

Preconstitutional Federal Power

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In two fields of constitutional law, the United States Supreme Court has acknowledged that the federal government may possess preconstitutional power, or national authority derived, not from the United States Constitution, but from the very fact of sovereignty. This Article analyzes the two areas of law—the Foreign Affairs Power and the Indian Affairs Power—and assesses their viability in future cases. The case recognizing a preconstitutional Foreign Affairs Power resting with the executive branch, United States v. Curtiss-Wright Export Corp., suffers from poor historical reasoning and has little precedential weight in modern foreign affairs cases, but has never been overruled. The Indian Affairs Power case, United States v. Lara, decided in 2004, included no historical reasoning and only offered the theory as dicta. However, the Court raised the theory, perhaps, as a means of placating the textualists on the Court who do not view the Indian Commerce Clause as a viable source of congressional power in Indian Affairs. This Article offers a defense for the proposition that congressional plenary power in Indian Affairs might derive from a preconstitutional source, a defense that includes the original understanding of the Indian Affairs Power, and that unlike the Foreign Affairs Power, did survive the ratification of the Constitution.

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I. INTRODUCTION

In two areas of federal law, the United States Supreme Court has recognized that the federal government may have *preconstitutional* authority—authority not derived from the enumerated powers of the Constitution, but inherent authority derived from the very fact of national sovereignty.¹ First, in *United States v. Curtiss-Wright Export Corp.*, the Court recognized that presidential authority to act in a foreign affairs context may be a “necessary concomitant[] of nationality” originating in a national source of authority that existed prior to the ratification of the Articles of Confederation and the Constitution.² This Article will refer to this authority as the “Foreign Affairs Power.” More recently, in *United States v. Lara*, the Supreme Court proposed a theory (although it did not rely exclusively upon the theory for its holding) that the federal government may have preconstitutional authority to deal in Indian affairs beyond the strictures of the Indian Commerce Clause or the structure of the Constitution.³ This Article will refer to this authority as the “Indian

1. Of course, there are serious difficulties using the term *inherent authority* in this context. See Louis Fisher, *Invoking Inherent Powers: A Primer*, 37 PRES. STUD. Q. 1, 2 (2007).

2. 299 U.S. 304, 318 (1936). *Curtiss-Wright* identified other examples as well, all from the foreign affairs field such as “[t]he power to acquire territory by discovery and occupation, the power to expel undesirable aliens, [and] the power to make such international agreements as do not constitute treaties in the constitutional sense.” *Id.* (citations omitted).

3. 541 U.S. 193, 201 (2004). The existence of the possibility of the theory had been recognized before. See *Oneida Indian Nation of N.Y. v. New York*, 860 F.2d 1145, 1150-55 (2d Cir. 1988); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 65-66 (1996); cf. *United States v. Kagama*, 118 U.S. 375, 384-85 (1886) (stating that the power must vest in the federal government because “it has never existed anywhere else”). Even Justice Sutherland, as a Senator in 1910, asserted that the Indian Affairs Power derived from a preconstitutional source of authority. See George Sutherland, *The Internal and External*

Affairs Power.”⁴ In *Lara*, the Court stressed that preconstitutional federal authority may be analogous to the Foreign Affairs Power, as described in *Curtiss-Wright*, in that it derives from a national power that predates the Constitution.⁵

The recognition of extraconstitutional authority is an extraordinary circumstance, available perhaps only in extraordinary situations.⁶ There have been occasions when an exercise of federal authority that goes beyond the text of the Constitution is nevertheless constitutional.⁷ President Lincoln’s actions in the early period of the Civil War “suspended the writ of habeas corpus, withdrew funds from the Treasury, called forth the state militia, and placed a blockade on the rebellious states without legislative authority,” but Congress, of course, ratified these actions.⁸ What sets *Curtiss-Wright* and *Lara* apart from other cases of extraconstitutional authority is the preconstitutional character of the authority.⁹ In these two cases, the authority exercised by the national government exists, in theory, despite the fact that the Constitution is not a plenary powers constitution but is instead an enumerated powers constitution.¹⁰ What this Article will show is that the United States, acting through the Continental Congress during the Revolutionary War and prior to the Articles of Confederation, exercised a “national authority” independent and separate from the

Powers of the National Government, 191 N. AM. REV. 373, 385 (1910) (quoting *Kagama*, 118 U.S. at 380).

4. In discussing an “Indian Affairs Power,” this Article will not attempt to define the extent and scope of the power, other than assuming that the power is plenary, or, something less than total, absolute authority over the affairs *with* and *of* Indians and Indian tribes, but enough to accomplish many of the statutes enacted by Congress in accordance with this Power. See generally Sam Deloria, *New Paradigm: Indian Tribes in the Land of Unintended Consequences*, 46 NAT. RESOURCES J. 301, 307 (2006) (“On balance, and especially in the last 80 years, the Plenary Indian Power of Congress has created a zone within which tribal governmental status can be recognized by the federal government, and within which tribes enjoy protection from state power. The concept of federal recognition of an Indian tribe is a key element of the continued effective political existence of tribal governments, and the scope of that recognition—that is, the measure of the powers of tribes that will be given effect in the American system—is the key to the tribal future.”).

5. *Lara*, 541 U.S. at 201-02.

6. See *Curtiss-Wright*, 299 U.S. at 318.

7. Fisher, *supra* note 1, at 2-3 (citing Lincoln’s actions in the early period of the Civil War).

8. *Id.*

9. See Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1104-05 (2004).

10. But cf. Randy E. Barnett, *Who’s Afraid of Unenumerated Rights?*, 9 U. PA. J. CONST. L. 1, 1 (2006) (highlighting the Ninth Amendment and the Fourteenth Amendment’s Privileges or Immunities Clause as two instances where the Constitution recognizes unenumerated powers).

state sovereigns.¹¹ It is this national authority that predates the Constitution and can be characterized as “preconstitutional.” Once the states ratified the Articles of Confederation (and perhaps earlier), and later the Constitution, some, *but not all*, of these national powers receded and became subsumed into the governing, organic documents.¹² The authority exercised by the United States through its disparate branches (legislative, executive, and judicial) can be characterized as “confederal” or “federal” authority, depending upon the period. For purposes of this Article, I intend to maintain a distinction between “national,” “confederal,” and “federal” authority.

Part II of this Article describes the two areas of constitutional authority at issue—the Foreign Affairs Power and the Indian Affairs Power. The Foreign Affairs Power described by Justice Sutherland’s majority opinion in *Curtiss-Wright* is a robust, plenary presidential power that originated during the very early days of the Revolutionary War.¹³ This authority existed, it appears, as a national sovereign power that predated the Articles *and* the Constitution and, according to the Court, implicitly survived the ratification of both documents.¹⁴ Part II also introduces the Indian Affairs Power described in dicta by Justice Breyer’s majority opinion in *Lara*.¹⁵ According to the theory of the *Lara* dictum, the Indian Affairs Power exercised by Congress (and perhaps the President) might also predate the Articles and the Constitution.¹⁶ Justice Breyer cited to the *Curtiss-Wright* opinion as authority for this theory.¹⁷

Part III examines the viability of the *Curtiss-Wright* holding that the Foreign Affairs Power, in relation to the original understanding of the pre-Articles Continental Congress, as well as the Founders of the Articles of Confederation and the Constitution, is an unenumerated power. Part III concludes that this theory has historical support in terms of the understanding of the Continental Congress during the

11. Cf. Merrill Jensen, *The Idea of a National Government During the American Revolution*, 58 POL. SCI. Q. 356, 357 (1943) (“[There is a] clear distinction made by eighteenth century political leaders between the terms ‘federal’ and ‘national’ as applied to central governments.”).

12. See Prakash, *supra* note 9, at 1086-1102 (describing the various textual sources in the Constitution granting the federal government powers over Indian affairs).

13. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315-22 (1936).

14. *Id.* at 315-18.

15. 541 U.S. 193, 201-02 (2004).

16. See *id.* (explaining that because Indian affairs have been seen as an aspect of military or foreign policy, the federal government’s power in that area would be derived from its status as a sovereign entity).

17. *Id.* at 201.

Revolutionary War until the ratification of the Articles, but then doubts (without concluding) that much, if any, of the national authority that existed prior to the Articles survived the ratification of either the Articles or the Constitution. Nevertheless, Part III proposes a theory that the origins of the national Foreign Affairs Power rested in the *necessity* of the Continental Congress and the states. Assuming that a necessity arises once again in a manner not contemplated by the Constitution, in theory, the national Foreign Affairs Power might once again come into play.

Part IV attempts to examine the national Indian Affairs Power theorized in the *Lara* dictum. The Indian Affairs Power, like the Foreign Affairs Power, originated during the Revolutionary War in a time of great necessity. The history and original understanding of the Indian Affairs Power deviates substantially from that of the Foreign Affairs Power after the ratification of the Articles and later, the Constitution. While a plausible argument could be made that a national necessity that existed from the time of the Revolution through the modern era authorized the exercise of the Indian Affairs Power to this day, a better argument couched in the history and original (mis)understanding of the Indian Affairs Power exists. In this theory, the original understanding of the Founders was that the Indian tribes located within the exterior boundaries of the United States would eventually assimilate and disappear, an understanding that never came to pass (for at least 560 tribes).¹⁸ Because of this original (mis)understanding, the Constitution is not adequate to deal with Indian affairs, creating the necessity that justifies delving into the preconstitutional national authority—the Indian Affairs Power—as a means of authorizing federal plenary power in Indian affairs.

II. A TALE OF TWO AREAS OF PRECONSTITUTIONAL AUTHORITY

Twice now, the Supreme Court has announced theories of constitutional law that would appear to shake the foundations of constitutional law's precept that the Constitution is exclusively an enumerated powers constitution.¹⁹ One case, *United States v. Curtiss-*

18. See Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 200 (1984); see also David Wilkins, *Seasons of Change: Of Reforms, Melees, and Revolutions in Indian Country*, in *AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS* 35, 46 (Eric D. Lamont ed., 2006) (noting that there are "more than 560 federally recognized tribes").

19. See *Lara*, 541 U.S. at 201-02 (reintroducing the theory that the Indian Affairs Power is plenary); see also *Curtiss-Wright*, 299 U.S. at 318 (stating that the presidential Foreign Affairs Power is plenary). In the context of state sovereignty, of course, the Supreme

Wright, drew significant attention at the time it was decided²⁰ and continues to draw hostility and venom from academics.²¹ Justice Sutherland's theory that the President's foreign affairs powers are plenary, as opposed to the federal government's internal affairs powers that he acknowledged are enumerated and limited, came at a time when world affairs were unstable and dangerous.²² The opinion also came down at a time when the legitimacy of the Supreme Court was in its own danger zone, with wounds from the conflicts between the Court and the President over the extent of federal and state authority still bleeding.²³

In comparison, the Court's recent decision in *Lara*, which reintroduced the theory that federal Indian affairs authority could be characterized as preconstitutional,²⁴ drew almost no attention from mainstream constitutional law scholars.²⁵ Of course, for American

Court recognized a preconstitutional sovereign immunity that survived the ratification of the Constitution. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996).

20. 299 U.S. 304 (1936); see Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 571-73 (1938); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946); C. Perry Patterson, *In re the United States v. The Curtiss-Wright Corporation*, 22 TEX. L. REV. 286 (1944).

21. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 94-95 (1990) (pointing out that *Curtiss-Wright* has been the subject of "withering" criticism); Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 26 (1972) (noting that some parts of *Curtiss-Wright* are "ill considered"); Louis Fisher, *The Law: Presidential Inherent Power: The "Sole Organ" Doctrine*, 37 PRES. STUD. Q. 139, 139-40 (2007) (noting that support for the proposition cited in *Curtiss-Wright* purportedly granting the President broad powers is misleading); Walter LaFeber, *The Constitution and United States Foreign Policy: An Interpretation*, 74 J. AM. HIST. 695, 710-11 (1987) (describing Justice Sutherland's analysis as "highly questionable"); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 14 (1973) (highlighting a "flaw" in the opinion).

22. See generally ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 4.6.1, at 367 (3d ed. 2006) (noting that the case came down at a time when U.S. arms manufacturers were purportedly involved in other nations' wars); G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 62 (2000) (describing the emergence of totalitarian states and political dislocations after World War I).

23. See ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 148-49 (1987) (discussing the Court's challenge of New Deal measures and legislation that was met with criticism).

24. 541 U.S. 193, 201-02 (2004).

25. But see Prakash, *supra* note 9, at 1103 (asserting that the *Lara* dictum will not "win over those who steadfastly believe that the federal government is a government of enumerated powers"). Although one journalist did report on *Lara*, see Linda Greenhouse, *Court Upholds Tribal Power It Once Denied*, N.Y. TIMES, Apr. 20, 2004, at A12, *Lara* was not a *salient* case, defined by some to be a case that appears on the front page of the *Times*. See LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 156 (2006).

Indian law observers, *Lara* could be the most important Indian law decision in decades,²⁶ but even in that context, the notion that federal Indian affairs authority could be described as preconstitutional has not generated much discussion.²⁷

This Part reintroduces the *Curtiss-Wright* theory that presidential authority in foreign affairs could be construed as plenary,²⁸ with careful attention given to the leading criticisms of Justice Sutherland's "essay."²⁹ The first Subpart explains that given the intense criticisms and hostility toward the opinion, it is not much of a surprise that during the early years of the Roberts Court and in the dregs of the War on Terror, Justice Sutherland's opinion carries little or no weight in the Court. The second Subpart explains Justice Breyer's dictum in *Lara* that relied upon, among other authorities, *Curtiss-Wright* (of all authorities) for a description of the source of federal authority in Indian affairs. This Subpart will also explain the emerging rift on the Court (a rift that has been played out over decades in the American Indian law literature) over the source and extent of federal authority in Indian affairs.

A. *The Foreign Affairs Power*

The Foreign Affairs Power is shared by the President and Congress.³⁰ The President may negotiate and sign treaties, as well as

26. The discussion of *Lara* in Indian law scholarship is extensive. *E.g.*, Bethany R. Berger, *United States v. Lara as a Story of Native Agency*, 40 TULSA L. REV. 5, 19-24 (2004); Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 463-72 (2005); Robert Laurence, *Don't Think of a Hippopotamus: An Essay on First-Year Contracts, Earthquake Prediction, Gun Control in Baghdad, the Indian Civil Rights Act, the Clean Water Act, and Justice Thomas's Separate Opinion in United States v. Lara*, 40 TULSA L. REV. 137, 146-53 (2004); Frank Pommersheim, *Lara: A Constitutional Crisis in Indian Law?*, 28 AM. INDIAN L. REV. 299, 299-305 (2004); Alex Tallchief Skibine, *United States v. Lara, Indian Tribes, and the Dialectic of Incorporation*, 40 TULSA L. REV. 47, 51-56 (2004); Kevin K. Washburn, *Lara, Lawrence, Supreme Court Litigation, and Lessons from Social Movements*, 40 TULSA L. REV. 25, 26-32 (2004).

27. *But see* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.01[4], at 397-98 & nn.53-54 (Lexis Nexis 2005) (1941).

28. On occasion, the *Curtiss-Wright* holding is referred to as dicta. *E.g.*, *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635-36 n.2 (1952) (Jackson, J., concurring); Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2288 (2006).

29. *See infra* Part II.A.2.

30. *See generally* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 83-130 (2d ed. 1996) (noting that each branch's role in foreign affairs is unclear); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 243 (2001).

appoint ambassadors, with the advice and consent of the Senate.³¹ Congress is authorized to regulate commerce with foreign nations and to define and punish piracy and offenses against the law of nations.³² The War Powers portion of the Foreign Affairs Power is also shared.³³ Congress has the power to declare war and the President acts as the Commander in Chief of the armed forces of the United States.³⁴ Congress is authorized to maintain armies and navies, to regulate these armed forces, and to provide for the common defense of the Union.³⁵ Congress also may suspend the writ of habeas corpus in cases of rebellion or invasion and has the power to declare the punishment of treason.³⁶ Since the Revolutionary War, the Foreign Affairs Power has been all national and federal, to the exclusion of the states.³⁷

While much of the authority exercised by the President and Congress in their foreign affairs capacities is not controversial,³⁸ one aspect of the Foreign Affairs Power remains controversial—the existence of extraconstitutional (or preconstitutional) authority.³⁹ One specific example is the ongoing dispute over whether the President has inherent authority as the head of the Executive branch to take action not authorized (or, in other instances, even prohibited) by Congress.⁴⁰ This Article will discuss a small but significant aspect of this debate—whether there is a foreign affairs power that the President may exercise outside the scope of Article II or a congressional delegation.

31. U.S. CONST. art. II, § 2, cl. 2.

32. *Id.* art. I, § 8, cls. 3, 10.

33. *See id.* art. 1, § 8, cl. 11; *id.* art. II, § 2, cl. 1.

34. *Id.* art. I, § 8, cl. 11; *id.* art. II, § 2, cl. 1.

35. *Id.* art. I, § 8, cls. 1, 12-14.

36. *Id.* art. I, § 9, cl. 2; *id.* art. III, § 3, cl. 2.

37. HENKIN, *supra* note 30, at 13, 149-67. Henkin went on to acknowledge that states have influence over foreign affairs through representatives elected to Congress. *See id.* at 167-69.

38. *But cf.* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, at 521 (1969) (“The supreme magistrate was truly awesome. Standing alone, as commander-in-chief of the armed forces unencumbered by an executive council, with power over appointments that few state executives possessed and with a term of office longer than any, the president was a magistrate who could ‘easily become king.’”).

39. *See, e.g.,* Levitan, *supra* note 20, at 472-80 (tracing the development of Justice Sutherland’s interpretation of the Foreign Affairs Power as expressed in *Curtiss-Wright* and noting its controversial nature).

40. *See, e.g.,* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315 (1936).

1. *United States v. Curtiss-Wright Export Corp.*

In 1934, Congress passed a joint resolution authorizing the President to prohibit the exportation of arms to Bolivia, then engaged in a military conflict with Paraguay in the region of Chaco, at his discretion.⁴¹ Congress criminalized violations of the resolution in the event the President invoked the authority to prohibit the arms transfers.⁴² That day, the President issued a proclamation invoking the authority to ban the sale of arms to Bolivia and Paraguay in accordance with the Joint Resolution.⁴³ The federal government indicted Curtiss-Wright Export Corporation for violation of the Joint Resolution and Presidential Proclamation on May 29, 1934.⁴⁴ The alleged arms exporters claimed that the Joint Resolution effectuated “an invalid declaration of legislative power to the executive.”⁴⁵ While it appears that Justice Sutherland’s majority opinion could have focused on alternate reasoning in reaching the conclusion that Congress’s delegation of authority contained in the Joint Resolution was valid,⁴⁶ it instead chose to elucidate an unprecedented articulation of the executive foreign affairs power.⁴⁷

Justice Sutherland asserted that “[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.”⁴⁸ Justice Sutherland then explained this audacious statement with a recitation of

41. Joint Resolution To Prohibit the Sale of Arms or Munitions of War in the United States Under Certain Conditions § 1, 48 Stat. 811 (1934).

42. *Id.* § 2.

43. Proclamation, Sale of Arms and Munitions of War to Bolivia and Paraguay, 48 Stat. 1744 (1934).

44. *Curtiss-Wright*, 299 U.S. at 311.

45. *Id.* at 314.

46. See generally *id.* at 322-29 (discussing a host of prior similar congressional delegations of authority); see also *id.* at 322 (“[I]t is evident that this court should not be in haste to apply a general rule which will have the effect of condemning legislation like that under review as constituting an unlawful delegation of legislative power. The principles which justify such legislation find overwhelming support in the unbroken legislative practice which has prevailed almost from the inception of the national government to the present day.”); Lofgren, *supra* note 21, at 8 (“To establish and sanction such a category Sutherland might have followed the lead of the government on brief and cited long-standing legislative and judicial precedent, but he rejected this simple course.” (citing Brief for the United States at 7-9, 15, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) (No. 98))).

47. See *Curtiss-Wright*, 299 U.S. at 311-22. But, as Charles Lofgren pointed out, Justice Sutherland had articulated this view in 1910 from his position in the Senate. See also Sutherland, *supra* note 3, at 373-82.

48. *Curtiss-Wright*, 299 U.S. at 315-16.

debatable constitutional history: “[T]he primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states.”⁴⁹ Justice Sutherland then asserted that the states had “never possessed international powers.”⁵⁰ According to this theory, the sovereign entity that would become the United States during the time of the Revolution, engaged in a war with Britain and otherwise exercising the Foreign Affairs Power, was the Continental Congress.⁵¹ Justice Sutherland theorized that when “the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union.”⁵² Justice Sutherland concluded:

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. . . . As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign.⁵³

But, of course, the Constitution provides extensive foreign affairs and war powers to the United States,⁵⁴ which would seem to reduce the expansive *Curtiss-Wright* language to a state of mere dicta.⁵⁵ Moreover, Justice Jackson’s opinion in *Youngstown Sheet & Tube Co. v. Sawyer* would have limited the *Curtiss-Wright* theory to a statement

49. *Id.* at 316 (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 294 (1936)).

50. *Id.*

51. *Id.* (“Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence.”).

52. *Id.* at 317 (citing *Penhallow v. Doane*, 3 U.S. (3 Dall.) 54, 80-81 (1795)); *see also* Samuel H. Beer, *Federalism, Nationalism, and Democracy in America*, 72 AM. POL. SCI. REV. 9, 12 (1978) (arguing that the “national theory . . . is a superior [theory]”).

53. *Curtiss-Wright*, 299 U.S. at 318. Justice Sutherland also noted that “[i]n *Burnet v. Brooks*, 288 U.S. 378, 396 (1933), we said, ‘As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations.’” *Id.*

54. *See generally* HENKIN, *supra* note 30, at 13-22 (describing the source and scope of the federal government’s Foreign Affairs Power under the Constitution).

55. *But see id.* at 20 (referring to *Curtiss-Wright* as “authoritative doctrine”); Lofgren, *supra* note 21, at 1 n.1, 32 (arguing that perhaps Justice Sutherland’s theory is not to be dismissed as dicta).

that “the strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs.”⁵⁶

2. Representative Criticisms

Charles Lofgren’s attack on Justice Sutherland’s reasoning and, in particular, the historical basis for his theory remains the clearest statement on the subject.⁵⁷ Professor Lofgren reaches the conclusion, as have others, that Justice Sutherland’s history was “‘shockingly inaccurate’” and that “*Curtiss-Wright* ought to be relegated to history.”⁵⁸ Lofgren showed how Justice Sutherland’s history suffered from obvious mistakes.⁵⁹ For example, Lofgren pointed out that while Justice Sutherland had relied upon the 1783 Treaty between Great Britain and the United States as “a ‘practical application of [the] fact’ that external sovereignty passed immediately from Britain to the American Union,”⁶⁰ the Articles of Confederation already had, in 1781, “expressly granted to Congress the treaty-making power.”⁶¹ Lofgren also proved that several pieces of evidence that Justice Sutherland used to support his theory were quoted out of context.⁶² Take, for example, a speech given by Rufus King during the Constitutional Convention, quoted by Justice Sutherland for the proposition that, in the arena of foreign affairs, the states had no sovereign authority.⁶³ Professor Lofgren pointed out that “in the same speech, however, King clearly implied the [foreign affairs] power was delegated by the states.”⁶⁴ In another example, Lofgren noted that Justice Sutherland’s citation to Justice Patterson’s opinion in *Penhallow v. Doane*⁶⁵ “was but one of four seriatim opinions in the case, and it does not support Sutherland’s

56. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 n.2 (1952) (Jackson, J., concurring).

57. See Lofgren, *supra* note 21, at 6-12.

58. *Id.* at 32 (quoting Paul L. Murphy, *Time To Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64, 76 (1963)).

59. *Id.* at 12-28.

60. *Id.* at 17 (quoting *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 317 (1936)).

61. *Id.* (citing ARTICLES OF CONFEDERATION art. IX (U.S. 1781)).

62. *Id.* at 12-28.

63. *Curtiss-Wright*, 299 U.S. at 317 (quoting JAMES MADISON, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 212 (Jonathan Elliott ed., J.B. Lippincott Co. 1901) (1845)).

64. Lofgren, *supra* note 21, at 19.

65. 3 U.S. (3 Dall.) 54, 80-81 (1795).

argument.”⁶⁶ As a historical matter, Justice Sutherland’s opinion remains in shambles.⁶⁷

3. The Burial of the Theory

Regardless of the academic conclusions made about Justice Sutherland’s theory of preconstitutional inherent foreign affairs authority, *Curtiss-Wright* remains “authoritative doctrine.”⁶⁸ But, perhaps ironically, *Curtiss-Wright* does not enjoy canonical status.⁶⁹ The Court rarely cites to the foundational principles that Justice Sutherland attempted to bring to its foreign affairs jurisprudence. As Louis Henkin wrote, “In no case has the Supreme Court deemed it necessary to revisit Sutherland’s theory; the theory has been recognized in appellate courts, perhaps grudgingly. The principle uses of *Curtiss-Wright* are for some of its famous dicta [in relation to the President’s exclusive authority to speak for the United States] or its rhetorical flourishes.”⁷⁰

Perhaps most damning for *Curtiss-Wright* is Justice Thomas’s dissenting opinion in *Hamdi v. Rumsfeld*.⁷¹ There, Justice Thomas proposed the theory of the “unitary Executive” to the Court and garnered only one vote for his proposition—his own.⁷² One would imagine that Justice Thomas would find a friend in Justice Sutherland’s opinion, but Justice Thomas singled out only a small portion of *Curtiss-Wright* for mention—citing the case for the proposition that the President, in exercising his foreign affairs authority “[should] be free from interference [from Congress and the Court].”⁷³ No Justice from the Roberts Court appears willing to acknowledge and analyze a theory of federal authority not derived from the enumerated powers of the Constitution.⁷⁴ Perhaps this demonstrates the burial of the *Curtiss-Wright* theory—a burial without an explicit reversal.

66. Lofgren, *supra* note 21, at 20.

67. *Id.* at 12-32.

68. HENKIN, *supra* note 30, at 20.

69. *See id.* at 332 n.16.

70. *Id.* (citations omitted).

71. 542 U.S. 507, 579-99 (2004) (Thomas, J., dissenting).

72. *See id.* at 580.

73. *Id.* at 582 (citing *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936)).

74. *See, e.g., Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2799 (2006) (Kennedy, J., concurring) (providing a summary of the rationale of the case without reference to unenumerated powers)

B. The Indian Affairs Power

Congress asserts—and the Supreme Court recognizes—a plenary power in Indian affairs.⁷⁵ The Executive branch enjoys this plenary power as well, because Congress long ago delegated vast amounts of its authority to the President and to the Department of the Interior.⁷⁶ This power has been used for great good and for great harm to Indian people and to Indian tribes.⁷⁷ Its plenary character could once have been described as all but “absolute,” with the Supreme Court refusing for about a century to hear any challenges to Indian affairs legislation or exercises of regulatory discretion under the political question doctrine.⁷⁸ However, that characterization is likely no longer accurate, with the Court, on rare occasions, striking down Indian affairs regulation in the modern era.⁷⁹

The Indian Affairs Power is far more difficult to locate in the Constitution than the War Power. Three main theories have served to provide sources for this plenary Indian Affairs Power.⁸⁰ *First*, the only grant of authority with respect to Indian affairs in Article I is the Indian Commerce Clause, granting Congress the sole and exclusive authority

75. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 27, § 5.02[1], at 398 (citing *United States v. Lara*, 541 U.S. 193, 200 (2004); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470 (1979)); see also *United States v. Kagama*, 118 U.S. 375, 380 (1886) (describing Congress’s power to enact laws affecting Indians as deriving from its “exclusive sovereignty”).

76. See 25 U.S.C. §§ 2, 9 (2000).

77. Compare Indian Child Welfare Act, 25 U.S.C. §§ 1901-1903 (respecting the unique relationship between the United States and Indian Tribes and seeking to preserve tribal identity), and COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 27, § 11.01[1]-[2], at 820-25 (describing the purpose of the Indian Child Welfare Act), with General Allotment Act, 24 Stat. 388 (1887) (providing a method of U.S. government control of Indian land and citizenship), and COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 27, § 1.04, at 75-84 (describing the devastation of the allotment era in Indian country).

78. See, e.g., *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 281 (1955); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946); *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 339 (1945); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-68 (1903); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 306-08 (1902); *United States v. Kagama*, 118 U.S. 375, 383-84 (1886); *Beecher v. Wetherby*, 95 U.S. 517, 525-26 (1877); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 197 (1876); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870); *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 228-29 (1850); *United States v. Rogers*, 45 U.S. (4 How.) 567, 572 (1845); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 740 (1835).

79. E.g., *Hodel v. Irving*, 481 U.S. 704, 718 (1987).

80. See U.S. CONST. art. I, § 8, cl. 3 (granting Congress the authority to regulate commerce with the Indian tribes); *Missouri v. Holland*, 252 U.S. 416 (1920) (granting authority for various treaties with Indians); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) (analogizing the preconstitutional foreign affairs power to the national government’s authority over Indian tribes).

to regulate commerce with the “Indian tribes.”⁸¹ The Supreme Court has long accepted the Indian Commerce Clause as the source of congressional plenary power, despite some reservations.⁸² The text of the Indian Commerce Clause suggests (perhaps) that congressional authority in the field of Indian affairs is less than plenary, if one accepts the argument that “commerce” does not include the entire field (although whatever authority remained would be exclusive as to the states).⁸³ The Supreme Court has identified the Treaty Clause, the War Power, and the Property Clause, for example, as other sources of the Indian Affairs Power.⁸⁴ The Supreme Court has assumed that collectively these clauses serve as the source of the Indian Affairs Power.⁸⁵ *Second*, the federal government has acquired authority in Indian affairs, à la *Missouri v. Holland*,⁸⁶ in various treaties with Indian tribes.⁸⁷ For example, the Cherokee Nation agreed to the divestiture of its external sovereignty in exchange for the right to remain in the southeastern United States free from the interference of the states and their citizens⁸⁸ (a right, it turned out, with no remedy⁸⁹). Again in incremental bits and pieces, the United States acquired vast (although perhaps not plenary) authority in Indian affairs through these treaties.⁹⁰ The Marshall Court famously fudged the history of these early treaties

81. U.S. CONST. art. I, § 8, cl. 3.

82. *Compare* *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (“[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.”), *and* *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U.S. 463, 470 (1979) (referencing Congress’s plenary and exclusive power over Indian affairs), *with* *United States v. Lara*, 541 U.S. 193, 215 (2004) (Thomas, J., concurring) (noting that despite broad authority to regulate “every aspect of the tribes” it is nonetheless true that there are differences with respect to the scope of that power), *and* *United States v. Kagama*, 118 U.S. 375, 378-79 (1886) (hesitating to accept the Indian Commerce Clause as an expansive grant of regulatory power over Indian affairs).

83. *See* U.S. CONST. art. II, § 8, cl. 3; *see also* *Lara*, 541 U.S. at 200-01 (finding that other aspects of federal authority are derived from other sources).

84. *See* *Lara*, 541 U.S. at 200-01.

85. *See* Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 ARK. L. REV. 1175, 1176-78 (2003).

86. 252 U.S. 416 (1920) (recognizing Congress’s power to make laws in order to enforce and execute treaties).

87. *See, e.g.*, Treaty of Hopewell with the Cherokee Nation, Nov. 28, 1785, 7 Stat. 18; Treaty of Fort Pitt with the Delaware Nation, Sept. 17, 1778, 7 Stat. 13.

88. *See* Treaty of Hopewell with the Cherokee Nation, *supra* note 87, at 19.

89. *See generally* TIM ALAN GARRISON, *THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS* 234-45 (2002) (examining the significant costs inflicted on the Cherokee tribes as a result of the government’s forced removal policy); RENNARD STRICKLAND, *THE INDIANS IN OKLAHOMA* 4 (1980) (describing the human costs of the removal policies).

90. *See, e.g.*, Treaty of Hopewell with the Cherokee Nation, *supra* note 87, at 19.

to mean that when one or more tribes agreed to the divestiture of their external sovereignty, *all tribes consented to the divestiture of their external sovereignty*, an action I have referred to as a “least favored nations” doctrine.⁹¹ Given these complimentary theories, the Court has long recognized that the federal government has plenary authority over Indian affairs—and plenary authority over Indians and Indian tribes as well.⁹² The *third* theory can be described as the importation of preconstitutional federal authority as described in *Curtiss-Wright*.⁹³ The Court had once implied that such a power could exist in *United States v. Kagama*,⁹⁴ and then over a century later in *Lara*, Justice Breyer’s majority opinion asserted it explicitly, albeit in dicta.⁹⁵ In *Kagama*, the Court recognized that Congress had authority to enact criminal laws in Indian Country (the Major Crimes Act⁹⁶) under an amalgamation of implied authorities that appeared to be a combination of the *Missouri v. Holland*-style acquisition of authority from Indian treaties and Indian “dependence.”⁹⁷ The Court suggested that this power somehow had to exist in the federal government as a matter of constitutional pragmatism (necessity?) and held that it did.⁹⁸ One important portion of the Court’s opinion in *Kagama* was a rejection that the Indian Commerce Clause, or any other constitutional provision, authorized Congress to enact the Major Crimes Act.⁹⁹ Justice Breyer’s *Lara* dictum may be a response to this question, reopened to some extent by Justice Thomas’s skeptical *Lara* concurrence.¹⁰⁰

What was a certainty, however—at least at the time of the ratification of the Constitution—was that federal authority in Indian affairs (whatever its scope) was exclusive of state authority.¹⁰¹ History

91. Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 658 (2006).

92. *United States v. Lara*, 541 U.S. 193, 200-01 (2004) (identifying both enumerated powers and treaties as sources of federal control over Indians and their affairs).

93. 299 U.S. 304, 318 (1936).

94. 118 U.S. 375, 380 (1886).

95. 541 U.S. at 200-02.

96. Act of Mar. 3, 1885, ch. 341, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (2000)).

97. *See Kagama*, 118 U.S. at 384-85.

98. *See id.*

99. *See id.* at 378-79.

100. *Lara*, 541 U.S. at 214-26.

101. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996) (“If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been

shows with certainty that one of the greater weakness of the national government under the Articles of Confederation was the nonexclusive character of the Indian Affairs Power.¹⁰² The Court has long interpreted the Indian Commerce Clause as excluding the authority of states to enter the field of Indian affairs, unless Congress consents.¹⁰³ And yet, for decades, Indian activists and scholars decried federal plenary power in Indian affairs because it was a source of deeply destructive federal Indian law and policy.¹⁰⁴ Beginning especially in the mid-1980s, Indian law specialists and scholars divided over the scope and legitimacy of federal plenary power in Indian affairs.¹⁰⁵ While plenary power once created untold hardships for Indian people, Congress had lately begun using its plenary power, in most instances, to enact statutes for the benefit of Indian tribes and Indian people.¹⁰⁶ Undermining the theoretical foundations of federal plenary power might serve to limit federal authority over Indian affairs, but it might also destroy much of what Indian people and tribes relied upon as their best hopes for a remedy. Statutes such as the Indian Child Welfare

divested of virtually all authority over Indian commerce and Indian tribes.”); *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234 (1985); *Cayuga Indian Nation v. Cuomo*, 565 F. Supp. 1297, 1307-08 (W.D.N.Y. 1983); *Mohegan Tribe v. Connecticut*, 528 F. Supp. 1359, 1368-69 (D. Conn. 1982) (quoting *Nat’l League of Cities v. Usery*, 426 U.S. 833, 852 (1976)); AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 107-08 (2005).

102. See *Oneida*, 470 U.S. at 234 n.4; Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 49 (2005).

103. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 27, § 6.03[1][a]-[b], at 520-25.

104. *E.g.*, RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* 112-34 (1980) (describing various federal policies that were ignorant of or hostile to the Indians and the difficulties administering a department charged with oversight of Indian affairs); VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 40-45 (1983) (exploring the growth of federal laws that have placed Indians at the mercy of Congress and the federal government).

105. Compare Robert Laurence, *Learning To Live with the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. 413, 437 (1988) (embracing the plenary power as a comparison to tribal sovereignty), and Robert Laurence, *On Eurocentric Myopia, the Designated Hitter Rule, and “The Actual State of Things,”* 30 ARIZ. L. REV. 459, 460 (1988) (confirming the view that Native Americans should “liv[e] with the plenary power of Congress”); with Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RESEARCH J. 1 (arguing that Congress does not have plenary power to legislate in the field of Indian affairs), and Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2003) (same).

106. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 27, § 1.07, at 97-113; see also CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* 249 (2005) (describing the progress made by Indians with respect to federal recognition of tribal rights); Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 140-54 (2006) (providing an overview of congressional legislation that promotes tribal self-determination).

Act,¹⁰⁷ the Indian Civil Rights Act,¹⁰⁸ or even the various Indian self-determination acts¹⁰⁹—statutes that did not obviously implicate Indian commerce—appeared to be at risk if Indian law scholars were successful in persuading the Court to limit federal plenary power.¹¹⁰ This was the paradox for Indian law advocates prior to *Lara*.

1. *United States v. Lara*

The scholarly and political debate over federal plenary power did not reach the halls of federal courts in any significant manner until Congress enacted an amendment to the Indian Civil Rights Act that attempted to reaffirm the inherent tribal authority to prosecute nonmember Indians.¹¹¹ In *Duro v. Reina*, the Supreme Court, per Justice Kennedy, held that Indian tribes had been implicitly divested of authority to prosecute all nonmembers, including members of Indian tribes who resided on the reservations of other tribes and who participated socially and economically in the foreign reservation.¹¹² In 1991, Congress acted quickly to reverse the decision in an enactment popularly known as the “*Duro Fix*.”¹¹³ Within the decade, nonmember Indians began bringing challenges to their tribal criminal prosecutions in federal court, arguing that Congress’s plenary power did not extend to the authority to reverse the Supreme Court’s common law decision in *Duro*, or to the authority needed to force nonmember Indians to face tribal prosecutions.¹¹⁴ By the late 1990s, federal circuit courts were

107. 25 U.S.C. §§ 1901-1963 (2000).

108. *Id.* §§ 1301-1303.

109. *E.g.*, Indian Self-Determination and Educational Assistance Act, 25 U.S.C. § 450a; Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. §§ 4101-4243.

110. *See* *United States v. Lara*, 541 U.S. 193, 200-02 (2004) (describing the locus of federal power over Indian affairs as originating in the Indian Commerce Clause).

111. 25 U.S.C. § 1301(2) (“[P]owers of self-government’ means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and *means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians . . .*” (emphasis added)); Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 AM. INDIAN L. REV. 109, 109-13 (1992); Alex Tallchief Skibine, *Duro v. Reina and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767, 767 (1993).

112. 495 U.S. 676, 679-85 (1990).

113. *See, e.g.*, Will Trachman, Comment, *Tribal Criminal Jurisdiction after U.S. v. Lara: Answering Constitutional Challenges to the Duro Fix*, 93 CAL. L. REV. 847, 848 (2005).

114. *E.g.*, *United States v. Long*, 324 F.3d 475, 476-77 (7th Cir. 2003) (appealing a tribal court conviction to federal court); *United States v. Enas*, 255 F.3d 662, 664-65 (9th Cir. 2001) (en banc) (same); *Means v. N. Cheyenne Tribal Court*, 154 F.3d 941, 943-47 (9th Cir.

grasping with the very question that Indian academics and activists had been squabbling about for well over a decade—the extent of federal plenary power.¹¹⁵ And, with the exception of Indian activists facing tribal prosecutions, Indian law specialists argued vehemently that Congress possessed at least enough authority to enact the *Duro* Fix.¹¹⁶

After a split between the United States Courts of Appeals for the Eighth and Ninth Circuits, the Court granted certiorari in *Lara*.¹¹⁷ Despite the complexity of the analysis in the lower courts over the extent of federal plenary power, Justice Breyer's majority opinion (writing for a total of five Justices) made short shrift of the argument that the Indian Affairs Power was anything but plenary.¹¹⁸ However, Justice Thomas's opinion concurring in the result blasted the notion of federal plenary power.¹¹⁹ He was unable to locate any provision in the Constitution that granted Congress or the Executive branch much authority at all or otherwise protected tribal sovereignty.¹²⁰ He noted that the Court had more recently revisited the Interstate Commerce Clause, holding that there were limitations on congressional authority in that field, implying that there must also be limitations on congressional authority under the Indian Commerce Clause.¹²¹ He added that he was not persuaded by the notion that a structural reading of the Constitution would support the exercise of federal plenary power.¹²²

Because Justice Thomas garnered only one vote (his own), Justice Breyer's majority opinion relying upon the numerous instances where the Court had recognized federal plenary power in Indian affairs controlled the outcome.¹²³ However, Justice Breyer's opinion, apparently in response to Justice Thomas's arguments, asserted that

1998) (arguing that the tribal court lacked jurisdiction), *overruled by* United States v. Enas, 255 F.3d 662 (2001); United States v. Weaselhead, 36 F. Supp. 2d 908, 911-15 (D. Neb. 1997), *order aff'd en banc*, 165 F.3d 1209 (8th Cir. 1999).

115. See, e.g., *Weaselhead*, 36 F. Supp. 2d 908; *Means*, 154 F.3d 941.

116. See, e.g., Trachman, *supra* note 113, at 868-76.

117. 541 U.S. 193, 198-99 (2004) (outlining, in part, ways in which the *Duro* Fix can stand constitutional muster).

118. *Id.* at 200.

119. *Id.* at 218 (Thomas, J., concurring).

120. *Id.* at 215.

121. *Id.* at 224 (citing United States v. Morrison, 529 U.S. 598, 617 (2000); United States v. Lopez, 514 U.S. 549, 553 (1995)).

122. See *id.* at 215.

123. *Id.* at 196-210 (majority opinion).

there may be a different source for the Indian Affairs Power, one he labeled “preconstitutional.”¹²⁴

2. The *Lara* Dictum

Justice Breyer’s majority opinion stated that “the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ‘plenary and exclusive.’”¹²⁵ Justice Breyer identified the Indian Commerce Clause and the Treaty Clause as the “traditional” sources of federal plenary power.¹²⁶ The Court noted that some authorities cited the Property Clause as an additional source.¹²⁷ Justice Breyer added that, while it is silent as to Indian affairs, the Treaty Power adds to Congress’s authority through “treaties . . . [that] authorize Congress to deal with ‘matters’ with which otherwise ‘Congress could not deal.’”¹²⁸ In his concurrence, Justice Thomas raised the specter of the 1871 Act of Congress that “purported to prohibit entering into treaties with the ‘Indian nation[s] or tribe[s],’” and asserted that the Act “reflects the view of the political branches that the tribes had become a purely domestic matter.”¹²⁹ Justice Breyer’s opinion responded that the same 1871 Act also “saved existing treaties from being invalidated or impaired and this Court has explicitly stated that the statute in no way affected Congress’ plenary powers to legislate on the problems of Indians.”¹³⁰

Justice Breyer then added the critical paragraph for purposes of this Article:

Moreover, at least during the first century of America’s national existence . . . Indian affairs were more an aspect of military and foreign policy than a subject of domestic or municipal law. Insofar as that is so, Congress’ legislative authority would rest in part, not upon affirmative

124. *Id.* at 201.

125. *Id.* at 200 (citing *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979)); *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993); *United States v. Wheeler*, 435 U.S. 313, 323 (1978); WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 2 (3d ed. 1998)).

126. *See Lara*, 541 U.S. at 200 (citing *Morton v. Mancari*, 417 U.S. 535, 552 (1974); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 n.7 (1973)); CANBY, *supra* note 125, at 11-12).

127. *See Lara*, 541 U.S. at 200 (citing COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 27, § 3[a], at 209-10).

128. *Id.* at 201 (quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920)).

129. *Id.* at 218 (Thomas, J., concurring in judgment) (quoting 16 Stat. 566 (1871) (codified at 25 U.S.C. § 71 (2000))).

130. *Id.* at 201 (majority opinion) (citation and internal quotation marks omitted).

grants of the Constitution, but upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as necessary concomitants of nationality.¹³¹

It is not entirely clear if Justice Breyer intended this paragraph to be a continuation of the response to Justice Thomas's argument about the 1871 Act or whether Justice Breyer intended it to be yet another theory as to the source of federal plenary power. Moreover, it is not clear if Justice Breyer meant that the War Powers discussed in *Curtiss-Wright* are to be added to the other sources of authority that make up the Indian Affairs Power (that is, the Indian Commerce Clause, the Treaty Clause, and perhaps the Property Clause), *or* if Justice Breyer meant that the Indian Affairs Power is analogous to the War Power discussed in *Curtiss-Wright* in that they both maintain the characteristic of being preconstitutional, *or*, as is possible, a combination of both. This Article, for purposes of analytical clarity, will treat the citation to *Curtiss-Wright* as the second possibility only—wherein Justice Breyer argues that both the Indian Affairs Power and the War Power share the characteristic of being preconstitutional.¹³²

The *Lara* dictum, then, appears to be the second time in America's constitutional history that the Supreme Court has asserted that the federal government—in this case Congress—has authority that existed prior to the ratification of the Articles of Confederation and the Constitution and, it would appear, survived the ratification of both. Given this somewhat monumental concept, it is surprising that there has been so little discussion from either the mainstream constitutional law academy,¹³³ or even more surprisingly, from the Indian law

131. *Id.* (citation and internal quotation marks omitted)

132. If, however, Justice Breyer intended for the first inference—that the War Power somehow contributes to the amalgamation of textual provisions that make up the Indian Affairs Power—it does no harm to this Article's thesis. If Justice Breyer did intend that meaning, however, it is no response to a textualist like Justice Thomas, who firmly disagrees that such a structural reading of the Constitution is possible. *See id.* at 215 (Thomas, J., concurring in judgment) (“Unlike the Court I cannot locate such congressional authority in the Treaty Clause or the Indian Commerce Clause.” (citations omitted)); Prakash, *supra* note 9, at 1103 (asserting that the *Lara* dictum will not “win over those who steadfastly believe that the federal government is a government of enumerated powers”).

133. *E.g.*, Prakash, *supra* note 9, at 1103 (discussing the *Lara* suggestion and quickly dismissing it as incapable of “winning over” believers in a government of enumerated powers). There has been much more analysis of the *Lara* Court's reference to *Missouri v. Holland* and the possible expansion of congressional authority via the exercise of the Treaty Power. *See, e.g.*, Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 15-16 (2006) (citing *Lara*'s reference to *Missouri v. Holland*, 252 U.S. 416 (1920)); Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79

academy.¹³⁴ This Article intends to bring light to the opaque reference made by Justice Breyer in the *Lara* dictum by offering a theory based on the preconstitutional history of the American republic that a preconstitutional Indian Affairs Power may be viable.

Before we can assess the viability of the *Lara* dictum, we must first revisit the case upon which Justice Breyer relied, *Curtiss-Wright*, and its explication of the Foreign Affairs Power.¹³⁵

III. THE ORIGINAL UNDERSTANDING OF THE NATIONAL FOREIGN AFFAIRS POWER

Justice Sutherland's *Curtiss-Wright* holding may have some basis in the original understanding of national authority as it existed prior to the ratification of the Articles of Confederation in 1781.¹³⁶ Historians and constitutional law scholars have never reached consensus on the origins of national authority exercised by the Continental Congress from the time they began to wage general war against the British Empire prior to the Declaration of Independence until the ratification

S. CAL. L. REV. 1327, 1353 (2006) (discussing how *Lara* shows that four Justices believe *Missouri v. Holland* remains good law); Prakash, *supra* note 9, at 1095-96 (discussing *Lara* as an example of how the Treaty Power can expand Congress's legislative authority); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1875 (2005) (citing *Lara* as an example of the continuing reliance upon *Missouri v. Holland* by the Court); Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1895 n.66 (2005) (citing *Lara* as an example of how the scope of the Treaty Power can expand Congress's legislative authority).

134. E.g., Steven J. Gunn, *Compacts, Confederacies, and Comity: Intertribal Enforcement of Tribal Court Orders*, 34 N.M. L. REV. 297, 324 & n.179 (2004) (citing *Lara* dictum for the proposition that the Indian Affairs Power is "unmoored from the Constitution"); Peter Manus, *Indigenous Peoples' Environmental Rights: Evolving Common Law Perspectives in Canada, Australia, and the United States*, 33 B.C. ENVTL. AFF. L. REV. 1, 74 n.385 (2006) (quoting the *Lara* dictum without discussion); Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667, 690 (2006) (discussing the *Lara* dictum in the context of a proposed constitutional amendment incorporating Indian tribes into "Our Federalism") (citing Frank Pommersheim, *Is There a (Little or Not So Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271, 285-87 (2003)); Clay R. Smith, *American Indian Tribes and the Constitution*, ADVOCATE (Idaho), Jan. 2005, at 19, 19 (assuming, incorrectly, that Justice Breyer did not intend to assert the *Lara* dictum as a viable constitutional theory). See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 27, § 5.01[4], at 397-98 & nn.53-54 (referencing and dismissing the *Lara* dictum).

135. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 315-22 (1936).

136. See Jack Rakove, *The Legacy of the Articles of Confederation*, 12 PUBLIUS: J. FEDERALISM 45, 45 (1982) ("By the time the Articles were ratified in 1781, almost three and a half years after the Continental Congress had conveyed a final text to the states, many delegates were convinced that this long-awaited constitution was already obsolete.").

of the Articles.¹³⁷ For purposes of clarity in this Article only and to be consistent with the terminology of the day, I will refer to this pre-Articles, pre-Constitution authority as “national” authority or power; I will refer to the authority exercised during the period of the Articles of Confederation as “confederal” authority or power; and I will refer to the authority exercised under the Constitution as “federal” authority or power.¹³⁸

A. *The National Period: 1776 to 1781*

The theoretical underpinnings of the argument here arise in the period of time around the Declaration of Independence where the Continental Congress became the executive head of the Union to the ratification of the Articles of Confederation. It is perhaps the majority opinion of scholars that the people of the several states delegated aspects of their sovereignty to the national government when the states ratified the Articles.¹³⁹ And later when the states ratified the Constitution, again the people delegated sovereignty to the new national government.¹⁴⁰ But no governing document, neither the Articles of Confederation nor the Constitution, controlled the Continental Congress at this time.¹⁴¹ From where did sovereignty derive in that instance? From the people, as suggested by Justice Story?¹⁴² Then how did the people of the new nation delegate their

137. Compare WOOD, *supra* note 38, at 354-55 (arguing that the Continental Congress was created and exercised powers only because of the exigent circumstances of war), with Sutherland, *supra* note 3, at 376 (locating national sovereignty that could be exercised by the Continental Congress using plenary power).

138. Cf. Jensen, *supra* note 11, at 357 (noting that the Founders recognized a difference between “national” and “federal” authority).

139. See, e.g., Rakove, *supra* note 136, at 50-53 (discussing the division of federal and state power under the Articles of Confederation).

140. *Id.* at 55-60 (describing the substantive differences between the allocation of power and sovereignty between the Articles and the Constitution).

141. See Claude H. Van Tyne, *Sovereignty in the American Revolution: An Historical Study*, 12 AM. HIST. REV. 529, 539-43 (1907) (discussing the purposes for which the States came together in the Continental Congress and noting that it could not act under a governing document, but rather needed permission from the States).

142. See 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 216, at 159 (1891) (“From the crown of Great Britain, the sovereignty of their country passed to the *people* of it . . .” (quoting *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 470 (1793))). This claim from the *Commentaries* came under withering attack as the exact timing of the grasping of sovereignty by the Continental Congress. See Van Tyne, *supra* note 141, at 529-42 (challenging the view that the people consciously gave sovereignty to the Continental Congress at its formation). However, later historians concluded that “a single sovereign power, the people of the United States, created both the federal and state governments The national theory . . . is a superior interpretation of what actually happened” Beer, *supra* note 52, at 12.

sovereignty to the Continental Congress? Did they even care?¹⁴³ Justice Story's *Commentaries*, quoting from early Supreme Court decisions, argued that the Continental Congress did exercise significant national authority regardless of the subjective views of American leaders.¹⁴⁴ "The psychology of politics means . . . *real* obedience is a matter of degree, and *real* sovereignty is a complex of accommodation between conflicting groups."¹⁴⁵

It is my contention that this period of history has been glossed over by the Supreme Court in important respects because of the relative lack of importance to modern constitutional law.¹⁴⁶ Other than in *Curtiss-Wright*, the question of whether aspects of the Foreign Affairs Power of the federal government are national powers (as opposed to enumerated, federal or confederal powers) does not detail the Supreme Court.¹⁴⁷ But to be sure, as Merrill Jensen wrote over sixty years ago:

[There is] almost total ignorance in subsequent times of the clear distinction made by eighteenth-century political leaders between the terms "federal" and "national" as applied to central governments. Today we use the terms interchangeably, but the Found[ers] . . . of 1776,

143. See Jack P. Greene, *The Background of the Articles of Confederation*, 12 *PUBLIUS: J. FEDERALISM* 15, 43 (1982) ("[T]he location of sovereignty—which has received so much stress from modern historians, was . . . little emphasized by contemporaries. Much more interested in the practical problem of allocating power between the national and the state governments, members of Congress simply failed 'to give serious attention' to the question of sovereignty."); cf. WOOD, *supra* note 38, at 354–55 ("The principle of sovereignty was not probed and analyzed by Americans in 1776–77 the way it had been in the sixties, because whatever the limitations the Confederation may have placed in fact on the individual sovereignty of the states, few believed that their union in any theoretical sense contravened that sovereignty."); Peter Onuf, *Toward Federalism: Virginia, Congress, and the Western Lands*, 34 *WM. & MARY Q.* 353, 358 (1977) ("Depending on circumstances, a nationalist might feel compelled to advocate his state's rights. On the other hand, legislators were able to support measures enlarging and strengthening the national power, provided certain essential state rights were secured. Indeed, such ambivalence was typical.").

144. See 1 STORY, *supra* note 142, § 216, at 159 (quoting *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 470 (1793)); WOOD, *supra* note 38, at 355; cf. Greene, *supra* note 143, at 30 ("In the words of J.R. Pole, 'the American Colonies developed the characteristics of what would later be known as a republican form of government many years before they were to claim to be republican in principle.'" (quoting J.R. POLE, *THE SEVENTEENTH CENTURY: THE SOURCES OF LEGISLATIVE POWER* 69 (1969))).

145. W.Y. Elliott, *Sovereign State or Sovereign Group*, 19 *AM. POL. SCI. REV.* 475, 478 (1925).

146. But cf. Jensen, *supra* note 11, at 356–57 ("Historians and political scientists, equally with politicians and legal apologists, have interpreted the past in terms of present hopes and desires. As a result, many questionable generalizations concerning the nature of the American Revolution and its constitutional history have come to be accepted as fact.").

147. Cf. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316–18 (1936) (discussing the origin of national powers).

and the quite different set of Found[ers] . . . of 1787, suffered from no such confusion. If we are to believe what they said, they believed that a federal government was one created by equal and independent states who delegated to it sharply limited authority and who remained superior to it in every way. They believed that a national government was a central organization with coercive authority over both the states and their citizens. They expressed these beliefs as clearly in 1776 as they did in 1787, and they acted accordingly.¹⁴⁸

At least to the American leaders of the Revolution, national authority had a particular meaning and significance.¹⁴⁹ This national authority manifested itself in several ways, including the Foreign Affairs Power.

B. The Foreign Affairs Power

The Foreign Affairs Power exercised by the Continental Congress during the national period looks much different than the current power exercised by the President.¹⁵⁰ Despite arguments raised by the President in *Youngstown* (the *Steel Seizure* case)¹⁵¹ and again in *Hamdi v. Rumsfeld*¹⁵² that the President retains extensive, inherent authority limited only by the ballot box and the congressional power of impeachment,¹⁵³ the Court does not take much stock in these arguments.¹⁵⁴ For the most part, the Court can locate a constitutional provision or a congressional delegation or prohibition that controls in the foreign affairs cases,¹⁵⁵ meaning that the application of the national

148. Jensen, *supra* note 11, at 357; *see also* THE FEDERALIST NO. 39, at 243 (James Madison) ("The act, therefore, of establishing a constitution will not be a *national* act but a *federal* act.").

149. THE FEDERALIST NO. 39 (James Madison), *supra* note 148, at 243.

150. *See, e.g.,* *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 585 (1952); *Curtiss-Wright*, 541 U.S. at 318.

151. *See* Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?*, 19 CONST. COMMENT 63, 68-69 (2002) (quoting an exchange between Assistant Attorney General Homer Baldrige and Judge Pine); Richard M. Pious, *Inherent War and Executive Powers and Prerogative Politics*, 37 PRES. STUD. Q. 66, 73 (2007) (same).

152. *See* 542 U.S. 507, 540-41 (2004) (Souter, J., concurring in part, dissenting in part, concurring in judgment) (describing the representations made by the government's counsel during oral argument).

153. *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 174, 303-04 (1996).

154. *Steel Seizure*, 343 U.S. at 585-87 (holding in part that the President does not have the implied authority to seize private property due to the aggregation of enumerated executive powers).

155. *E.g., Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2825 n.2 (2006) (Thomas, J., dissenting) ("Although the President very well may have inherent authority to try unlawful combatants for violations of the law of war before military commissions, we need not decide that question because Congress has authorized the President to do so."); *Hamdi*, 542 U.S. at

authority discussed in *Curtiss-Wright* is unnecessary.¹⁵⁶ In short, there has been no reason to revisit the national period for a fresh analysis of the national Foreign Affairs Power.

Of course, if the Court were to adopt Justice Jackson's three-tiered approach to Executive power in foreign affairs,¹⁵⁷ as amended in part by Justice Souter's opinion in *Hamdi*—that “in a moment of genuine emergency, when the Government must act with no time for deliberation, the Executive may be able to detain a citizen if there is reason to fear he is an imminent threat to the safety of the Nation and its people.”¹⁵⁸ But, other than the immediate, credible threat of invasion or massive attack¹⁵⁹ or the emergency situation requiring the detention of an individual described by Justice Souter,¹⁶⁰ this question is academic. It simply has not come up since 1936.¹⁶¹ In Professor Lofgren's words, “By being available as authoritative precedent, [*Curtiss-Wright*] decreases the need to confront directly certain basic constitutional issues.”¹⁶² *Curtiss-Wright* serves its purposes for the time being.¹⁶³

This Subpart will revisit *Curtiss-Wright*'s tale of history with an eye to the period of time I refer to above as the national period and comparisons to the confederal and federal periods. As Louis Henkin put it, Justice Sutherland's “history, in particular, has been challenged, and surely it is not manifestly all his way. . . . But Sutherland's view of the locus of sovereignty between 1776 and 1789 has strong support; and—what Sutherland's critics have largely overlooked—challenging his history does not necessarily destroy his constitutional doctrine.”¹⁶⁴

518-24 (plurality opinion) (finding the authorization for use of military force as authorizing the detention of Hamdi).

156. *Hamdan*, 126 S. Ct. at 2825 n.2.

157. *Steel Seizure*, 343 U.S. at 635-38 (Jackson, J., concurring).

158. *Hamdi*, 542 U.S. at 552 (Souter, J., concurring in part, dissenting in part, concurring in judgment) (referencing Justice Jackson's opinion in the *Steel Seizure* Case).

159. *But cf.* Arthur S. Miller & H. Bart Cox, *Congress, the Constitution, and First Use of Nuclear Weapons*, 48 REV. POL. 211, 212 (1986) (arguing for Congress to regain the delegated authority to use nuclear weapons from the President).

160. *Hamdi*, 542 U.S. at 552.

161. *See* United States v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

162. Lofgren, *supra* note 21, at 29.

163. *See* KOH, *supra* note 21, at 94 (“Among government attorneys, Justice Sutherland's lavish description of the president's powers is so often quoted that it has come to be known as the “‘*Curtiss-Wright*, so I'm right” cite’—a statement of deference to the president so sweeping as to be worthy of frequent citation in any government foreign-affairs brief.”); Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2355 n.15 (2006) (same).

164. HENKIN, *supra* note 30, at 19 (footnote omitted). This Article will focus on the period prior to the ratification of the Articles in 1781, but it is interesting to note that

1. The Rise and Fall of National Sovereignty

Prior to the advent of general war with Great Britain, the Continental Congress's charge was to make peace with the King and Parliament.¹⁶⁵ Economic and political elites had no qualms about rousing the "mob" from its slumber to challenge the authority of the imperials on certain economic and political questions,¹⁶⁶ but once the fundamental relationship between Britain and the American colonies seemed on the brink of elemental change—from one of dependence to one of independence—many of America's elites wanted to back away.¹⁶⁷ Independence from Britain's military umbrella and protection, for example, was not the original intention of the colonial instigators.¹⁶⁸ Merrill Jensen noted that Gouverneur Morris was concerned that the people "could not be fooled forever" and "the aristocracy would lose all power and be ruled by a riotous mob."¹⁶⁹ Moreover, the American political elites that argued in favor of state sovereignty often tended to be more concerned with their own personal interests than in the interests of their state,¹⁷⁰ despite claims to the contrary that Americans identified with a state.¹⁷¹ It was the protection of private property that most concerned the elites.¹⁷²

Professor Henkin also questions the locus of sovereignty during the confederal period under the Articles.

165. Van Tyne, *supra* note 141, at 530.

166. *Cf.* Jensen, *supra* note 11, at 360 (noting Gouverneur Morris's opinion that "the mob now had leaders of its own").

167. *See, e.g.*, Onuf, *supra* note 143, at 359-61.

168. *See* Peter S. Onuf, *From Colony to Territory: Changing Concepts of Statehood in Revolutionary America*, 97 POL. SCI. Q. 447, 449 (1982) ("Patriots insisted that their claims were not incompatible [sic] with the imperial connection or with loyalty to the crown.").

169. Jensen, *supra* note 11, at 360 ("In the years just past, he wrote, the aristocracy had gulled the mob, but the mob now had leaders of its own and could not be fooled forever. If the disputes with Great Britain were to continue, the aristocracy would lose all power and be ruled by a riotous mob. Therefore Morris declared himself for peace at almost any price, for he said that the English constitution was the guarantee of the position of the wealthy people in the colonies.").

170. *See* Onuf, *supra* note 143, at 361 ("Because Americans juxtaposed sovereignty and actual governing authority, they were particularly sensitive to encroachments on their individual and collective rights. They were less interested in vesting their governments with powers than with protecting themselves—and their sovereignty—from their governments.").

171. *Cf.* John C. Ranney, *The Bases of American Federalism*, 3 WM. & MARY Q. 1, 2-3 (1946) ("Separated as they were by vast distances and abominable roads, unaccustomed to travel in other states or to communicate with their inhabitants, living in isolated communities which of necessity approximated to self-sufficiency, they had little interest in and little knowledge of their neighbors.").

172. Onuf, *supra* note 143, at 449-50.

Regardless, war came, and rather than face the gallows or worse,¹⁷³ it was clear that the Continental Congress would have to head up the American war effort.¹⁷⁴ Even prior to the Declaration of Independence, which for many observers is the date the colonies acquired “sovereignty,” the Continental Congress had already been exercising de facto sovereign authority to wage war against the Crown.¹⁷⁵

Justice Sutherland’s *Curtiss-Wright* opinion drew upon the national period, arguing that the sovereign authority of the Continental Congress during the national period was derived from the Union itself, as a “necessary concomitant[] of nationality.”¹⁷⁶ It was during this period of time that the Continental Congress exercised a *national authority* in foreign affairs and war.¹⁷⁷ In the more recent era of constitutional scholarship, which emphasizes the enumerated powers theory of the Constitution over all else,¹⁷⁸ this theory is unpopular. But, as this Article will show, there is significant historical proof that the Founders in 1776 and even in 1781 and 1789 had no such qualms.¹⁷⁹

Of course, there is an equally powerful response to the *Curtiss-Wright* claim, if proven; namely, that there was no national sovereignty, just a temporary borrowing of the power to wage war with the assent of the unified states as a collective.¹⁸⁰ There is evidence that at least some of the colonies (but only a minority) reserved sovereign authority to make war and to engage in foreign affairs during this

173. See Curtis Putnam Nettels, *The Origins of the Union and of the States*, in 72 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 68, 71 (1963) (describing the English penalty for treason, which was worse than mere death).

174. See Jensen, *supra* note 11, at 362; Van Tyne, *supra* note 141, at 535.

175. See Greene, *supra* note 143, at 15-16 (citing JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* 136-45 (1979)).

176. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316-18 (1936).

177. See Greene, *supra* note 143, at 15-16.

178. See, e.g., KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS* 170 (2006) (arguing that the federal government is one of enumerated powers); JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 49 (2005); Prakash, *supra* note 9, at 1103 (noting a belief that the federal government is one of enumerated powers).

179. In at least one case, *United States v. Maine*, 420 U.S. 515 (1975), the Supreme Court rejected claims from “some states . . . that they had had sovereignty before the U.S. Constitution, as a basis for claiming title to sea-bed off their coasts.” HENKIN, *supra* note 30, at 330 n.10; see also *id.* at 331 n.11 (citing *Maine* and Richard B. Murril Morris, *The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty over Seabeds*, 74 COLUM. L. REV. 1056 (1974), in support of the nationalist theory).

180. Van Tyne, *supra* note 141, at 535 (indicating that the Continental Congress was given powers necessary to wage war against Great Britain after reconciliation seemed impossible).

period.¹⁸¹ Some states also engaged other nations for “money and arms.”¹⁸² Moreover, there is evidence that the states did not form the Continental Congress with the intent of creating a nation.¹⁸³ Professor Van Tyne asserted, “It is manifestly wrong, therefore, to look at the First Continental Congress as coming together because of a national feeling, because of a desire to form a national state, and therefore to ascribe to it governmental powers.”¹⁸⁴ Only two colonies (Maryland and North Carolina) sent delegates to the First Continental Congress in 1774 with the apparent authority to make laws that might bind those colonies, but the remainder of the colonies treated the organization as “a joint appeal for relief” from the Crown.¹⁸⁵ According to Van Tyne, “[i]f the instructions to Congress meant anything, the delegates came together unauthorized by the people to act as a national government.”¹⁸⁶ Samuel Beer reported that James Wilson and John Adams asserted a theory that “the colonies and Britain were ‘distinct states’ within the empire connected . . . only by having the same king.”¹⁸⁷

But it seems clear that the Second Continental Congress, which began meeting in 1775, began to exercise the national authority of a sovereign state.¹⁸⁸ Justice Story wrote that the Continental Congress in 1775 assumed “the exercise of some of the highest functions of sovereignty” and in 1776 “took bolder steps and . . . authorized general hostilities against the persons and property of British subjects.”¹⁸⁹

181. See *id.* at 539-40 & n.2. South Carolina expressly reserved these powers; Pennsylvania, North Carolina, Maryland, Delaware, and Massachusetts impliedly reserved these powers. *Id.*

182. HENKIN, *supra* note 30, at 330 n.10 (citing Letter from Benjamin Franklin to Congressional Committee for Foreign Affairs (May 26, 1779), in 3 F. WHARTON, *THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES* 192 (1889)).

183. See Van Tyne, *supra* note 141, at 529-38; see also Beer, *supra* note 52, at 11 (“For months after Washington took command of the Continental Army in 1775 he and his officers daily drank [to] the king’s health.”).

184. Van Tyne, *supra* note 141, at 530.

185. *Id.* at 530-31.

186. *Id.* at 532.

187. Beer, *supra* note 52, at 12 (quoting James Wilson, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*, in 2 *THE WORKS OF JAMES WILSON* 745 n. (Robert Green McCloskey ed., 1967) (1774); John Adams, *Novanglus; or, a History of the Dispute with America, from Its Origin in 1754, to the Present Time*, in 4 *THE WORKS OF JOHN ADAMS* 37-38, 105, 170 (Charles Francis Adams ed., Boston, Charles C. Little & James Brown 1851)).

188. 1 STORY, *supra* note 142, § 213, at 156.

189. *Id.* §§ 213-214, at 156-57 (“The Congress of 1775 accordingly assumed at once . . . the exercise of some of the highest functions of sovereignty. They took measures for national defence and resistance; they followed up the prohibitions upon trade and intercourse with Great Britain; they raised a national army and navy, and authorized limited national hostilities against Great Britain; they raised money, emitted bills of credit, and contracted

Gordon Wood concluded, “The authority of the Continental Congress and the Continental Army was in fact so great during the critical years of Independence and the war as to provoke a continuing if fruitless debate from the nineteenth century to the present over the priority of the union or the states.”¹⁹⁰ Professor Van Tyne had to acknowledge that while the delegates of the Second Continental Congress may have come together without the intent of forming a new nation, “open war developed, and the Congress gradually did assume all these powers which Story enumerates.”¹⁹¹ At some point, the war progressed to a point where “Americans changed the banner under which they were fighting, and in place of liberty merely they were aiming at liberty and independence.”¹⁹² National authority existed, from wherever derived, and the Continental Congress exercised it at least as early as 1775.¹⁹³

It was the necessity of a unified war effort that drove the states to accept the Continental Congress as the head of a national union that would exercise full national authority.¹⁹⁴ As Professor Van Tyne was forced to recognize:

To attempt united action by a clumsy system of correspondence was impracticable, and the Continental Congress, in which were assembled representatives of the sovereign states, was a convenient centre of intelligence and a source of advice which would keep their forces united. . . . To Congress was yielded a temporary and indefinite authority for war purposes¹⁹⁵

debts upon national account; they established a national post-office; and finally they authorized captures and condemnations of prizes in prize courts, with a reserve of appellate jurisdiction to themselves. The same body, in 1776, took bolder steps and . . . authorized general hostilities against the persons and property of British subjects; they opened an extensive commerce with foreign countries, regulating the whole subject of imports and exports; they authorized the formation of new governments in the colonies; and finally they exercised the sovereign prerogative of dissolving the allegiance of all colonies to the British crown.”); *see also* Nettels, *supra* note 173, at 69-70 (“Before July 2, 1776, the Continental Congress adopted a uniform commercial code, established and maintained a unified army, . . . issued continental currency, . . . sent a diplomatic agent to France, . . . and empowered the Continental Army . . . to inflict the death penalty . . .”).

190. WOOD, *supra* note 38, at 355.

191. Van Tyne, *supra* note 141, at 532-33.

192. *Id.* at 535.

193. *See* SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 57 (New York, Banks & Brothers, Law Publishers 1893) (“The simple truth is, that the United States, under the Articles of Confederation, like the United Colonies after the battle of Lexington, existed as a Sovereign Power from the necessities of the emergency.”); *id.* at 58 (“Before the Declaration of Independence it claimed and exercised the National Powers which until then had been wielded by the king of Great Britain.”).

194. *Id.* at 57.

195. Van Tyne, *supra* note 141, at 535.

According to Curtis Nettels, "So indispensable was the Union to the winning of independence and statehood that Lincoln scarcely exaggerated when he said the Union created the States, as States."¹⁹⁶ American leaders recognized that the states could not exercise the *necessary* authority in a time of general war.¹⁹⁷ However, at least one of the delegates to the Continental Congress resolved "to vest the Congress with no more Power than is absolutely necessary."¹⁹⁸ Only necessity limited the authority of the national union. And the powers created by the necessity tended to "increase[] in direct relation to the seriousness of the military danger."¹⁹⁹

The Declaration of Independence followed in July 1776, notifying the world that the United States would assert (as it had been) national sovereign authority.²⁰⁰ Van Tyne concluded that "[t]his I conceive to have been the condition in America until the trying experiences of the period of the Confederation taught a majority of Americans, what a few had long seen, that *the whole logic of the situation demanded the creation of a national state*."²⁰¹ All that remained of the argument that the Continental Congress did not exist as a nation among nations was semantics.²⁰² As he had with the

196. Nettels, *supra* note 173, at 71.

197. See Greene, *supra* note 143, at 39 (quoting ANDREW C. McLAUGHLIN, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 138 (1961)).

198. WOOD, *supra* note 38, at 359 (internal quotation marks omitted); see also John Gorham Palfrey, *The Growth of the Idea of Annexation, and Its Bearing upon Constitutional Law*, 13 HARV. L. REV. 371, 376 (1900) ("The necessities of the revolution gave new strength . . .").

199. Ranney, *supra* note 171, at 15.

200. 1 JOHN W. BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 100-01 (Boston, Ginn & Co. 1893) ("[A] people testified thereby the consciousness of the fact that they had become, in the progressive development of history, one whole, separate, and adult nation, and a national state, and that they were determined to defend this natural status against the now no longer natural supremacy of a foreign state. . . . The American state, organized in the Continental Congress, proclaimed to the world its sovereign existence, and proceeded . . . to authorize the people resident within the separate colonies to make temporary arrangement for their local government, upon the basis of the widest possible suffrage.").

201. Van Tyne, *supra* note 141, at 544 (emphasis added) (footnote omitted).

202. 1 STORY, *supra* note 142, §§ 214-215, at 157-58 ("[A]t the moment of their separation [the states] were under the dominion of a superior controlling national government whose powers were vested in and exercised by the general Congress with the consent of the people of all the States. From the moment of the Declaration of Independence, if not for most purposes at an antecedent period, the united colonies must be considered as being a nation *de facto* The powers of that government were not, and indeed could not be, well defined. But still its exclusive sovereignty . . . and its controlling power over the States was in most, if not in all, national measures universally admitted." (footnotes omitted)); see also Greene, *supra* note 143, at 15-16 ("From the beginning, American leaders were aware that they had no chance of success unless they could maintain a high degree of agreement on the

national powers exercised by the Continental Congress in 1775 and early 1776, Justice Story enumerated the national powers that body exercised from the time of the Declaration until the ratification of the Articles.²⁰³

Because the Supreme Court has not taken the opportunity in recent times to revisit *Curtiss-Wright* in any significant fashion,²⁰⁴ the question of whether preconstitutional national authority exists in the United States *after* the ratification of the Articles and the Constitution remains open, but not subject to closure any time soon, one would suspect. For purposes of this Article, I will assume that Justice Sutherland and Justice Story were correct in their conclusions, *at least during the national period* from 1776 to 1781, that the Continental Congress exercised a national power derived from the status of the united colonies as a nation.

It appears that the national authority exercised by the Continental Congress during the national period existed for only a brief time; in essence, the period of time a necessity existed (the war). Although the historical record is not conclusive, one possibility is that the war powers of the Continental Congress rose and fell with the necessity of engaging Great Britain in general war. Once the conflict developed into an all-out war with the King in 1776, it could be argued that the Continental Congress exercised the entire bundle of sovereign rights that any foreign nation with an undivided head exercises.²⁰⁵ But once the conflict receded, especially in the months following the Battle of Yorktown in 1781 and during the debates leading to the ratification of the Articles of Confederation,²⁰⁶ the war and foreign policy power of the Continental Congress—no longer as necessary—receded as well:

principles and tactics of opposition and avoid the types of jealousy that had troubled American resistance in the early 1770s. Inexorably, this awareness pushed delegates to the Continental Congress in the direction of a system in which Congress exerted extraordinarily extensive power, and thereby constituted a de facto national government.” (internal quotation marks omitted)).

203. 1 STORY, *supra* note 142, § 215, at 158-59 (“Among the exclusive powers exercised by Congress were the power to declare war and make peace; to authorize captures; to institute appellate prize courts; to direct and control all national, military, and naval operations; *to form alliances and make treaties*; to contract debts, and issue bills of credit upon national account. In respect to foreign governments, we were politically known as the United States only; and *it was in our national capacity, as such, that we sent and received ambassadors, [and] entered into treaties and alliances . . .*” (emphasis added)).

204. See HENKIN, *supra* note 30, at 332 n.16.

205. 1 STORY, *supra* note 142, § 213, at 157.

206. Cf. Jensen, *supra* note 11, at 373 (“The battle of Yorktown in the fall of 1781 and the peace negotiations under way gave no joy to the nationalists. Their arguments for centralization and the supposed efficiency and economy that would result depended heavily

Wood has shown that *the end of the war produced a reassertion of state authority and a corresponding diminution of central power*, a development marked by a revival of that traditional distrust of remote power that had been so evident in the controversy with Britain in the 1760s and early 1770s and would be such a conspicuous feature of the debate over the Constitution of 1787.²⁰⁷

By the time the states ratified the Articles, little or no *necessary* national power in foreign affairs (with the exception of the treaty power, perhaps) remained with the Continental Congress.²⁰⁸ The necessity that gave rise to the national authority receded and, with it, the power.²⁰⁹ By the time the 1781 Founders and the 1789 Founders ratified the Articles and the Constitution respectively, the people had made decisions on different means of allocating the Foreign Affairs Power by enumerating specific foreign affairs powers to the new government(s).²¹⁰ As the next Subpart shows, the new organic documents all but eliminated the national Foreign Affairs Power.

2. The Articles and the Constitution

The Articles of Confederation, much like the Constitution, granted broad and exclusive authority to the national government to deal in foreign affairs to the exclusion of the states.²¹¹ This authority, as noted above, is the confederal power exercised by the national government from 1781 to 1789.²¹² Jack Rakove noted:

The sphere allotted to Congress was primarily concerned with war and diplomacy, the great affairs of state. That given to the states involved matters of 'internal police' which . . . were understood in fairly broad terms.

. . . .

on the continuance of the war, and they knew it. . . . Robert Morris . . . declared that he would welcome peace so that he might be rid of his job but that, if he were to speak as a patriot, he would wish that the war would continue until the central government acquired more power.”).

207. Greene, *supra* note 143, at 44 (emphasis added) (citing WOOD, *supra* note 38, at 355, 464, 580); see MILLER, *supra* note 193, at 58 (“It is true that in the interim between the ratification of the Treaty of Peace, and the adoption of the Constitution, there was a time when the desire for union weakened.”).

208. Greene, *supra* note 143, at 44.

209. *See id.*

210. *See* Rakove, *supra* note 136, at 52, 63.

211. *See id.* at 52.

212. *See id.*

War, foreign relations, the regulation of interstate and foreign commerce, the organization of the national domain: these remained the essence of national affairs [under the Articles].²¹³

While there may be some debate on the subject, Professor Henkin concludes that “[o]n the whole there is perhaps no disagreement that, under the Articles, the states retained no external sovereignty.”²¹⁴

The Foreign Affairs Power under the Constitution, likewise, is shared between the President and Congress to the exclusion of the states.²¹⁵ There is the question—despite Justice Sutherland’s intent to answer it in *Curtiss-Wright*²¹⁶—whether the federal government retains a portion of that preconstitutional authority that the Continental Congress exercised during the Revolution. While the President has, on occasion, asserted an executive power to wage war in an emergency situation that would exceed the authority that has been delegated by Congress to the President²¹⁷—and has even asserted that Article II is a grant of plenary power in all things executive²¹⁸—the Court’s meager jurisprudence in this field has not required the final disposition of the question.²¹⁹

It would appear that the necessity that had existed from as early as 1775 through the end of major combat operations after the 1781 Battle of Yorktown did not compel the Framers of the Articles of Confederation or the Constitution to maintain a national plenary power over foreign affairs.²²⁰ These documents granted extensive and exclusive authority to handle all foreign relations, leaving no substantial (or extremely limited) preconstitutional foreign affairs authority.²²¹ Moreover, the original understanding of the 1789 Framers appears to strongly disfavor an executive with the capacity to exercise inherent, extraconstitutional authority.²²² Louis Fisher quoted John Jay’s *Federalist No. 4* as virtual proof: “[M]onarchs in other nations ‘will often make war when their nations are to get nothing by it, but for

213. *Id.* at 52, 63.

214. HENKIN, *supra* note 30, at 330 n.10.

215. *See* Rakove, *supra* note 136, at 52, 63.

216. 299 U.S. 304, 317-18 (1936).

217. *E.g., Ex parte Quirin*, 317 U.S. 1, 18-25 (1942); *The Prize Cases*, 67 U.S. (2 Black) 635, 690-95 (1863).

218. *See* Devins & Fisher, *supra* note 151, at 67-69; Pious, *supra* note 151, at 73.

219. HENKIN, *supra* note 30, at 332 n.16 (noting that the Supreme Court has not further visited Sutherland’s theory).

220. *See* Jensen, *supra* note 11, at 37.

221. *But cf.* HENKIN, *supra* note 30, at 14-16 (identifying the existence and acceptance of plenary authority).

222. *See* Fisher, *supra* note 1, at 7, 10; Prakash & Ramsey, *supra* note 30, at 236.

purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.”²²³

Where does that leave *Curtiss-Wright*? Justice Sutherland’s theory has some merit, but he probably was only partially correct. The balance of evidence tends to suggest that the Continental Congress did exercise a national power during the Revolutionary War, but that the national power faded and the requirements of the war effort faded as the combatants reached the end of hostilities.²²⁴ “The great contribution of [military necessity] was the earlier building of institutions and habits of co-operation and the stimulating of a national patriotism which endured longer than the military threat itself.”²²⁵ It appears that by the time of the ratification of the Constitution, military necessity no longer preoccupied the Founders.²²⁶ *The national power exercised by the Continental Congress during the national period of sovereignty existed only so long as the necessity for national power existed.*

The Articles and the Constitution both provided a complete measure of foreign affairs and war powers for the national government to exercise in accordance with the wishes of the people.²²⁷ It stands to reason that the national powers that existed prior to the ratification of these organic documents were subsumed into the authority delegated by the people to the United States. With the possible exception of an emergency along the lines of an invasion or an imminent devastating attack that would recreate the necessity that existed during the Revolution, the United States no longer retains national power in foreign affairs.

Where does that leave the Indian Affairs Power? What the following Part will demonstrate is that the history and original understanding of the Indian Affairs Power differs dramatically from that of the Foreign Affairs Power.

223. Fisher, *supra* note 1, at 7 (quoting THE FEDERALIST NO. 4, at 101 (John Jay)).

224. Jensen, *supra* note 11, at 373.

225. Ranney, *supra* note 171, at 33.

226. *Id.* (“Military necessity, far from being a decisive element in the final achievement of union, was of remarkably little consequence.”).

227. Fisher, *supra* note 1, at 7 (suggesting that because the Framers were conscious of abusive executive actions, they designed the Constitution so that an appeal to “inherent authority” would be unnecessary).

IV. THE ORIGINAL UNDERSTANDING OF THE NATIONAL INDIAN AFFAIRS POWER

The Indian Affairs Power may be another story. Justice Breyer's dictum in *Lara* that the United States (namely, Congress) retains a national Indian Affairs Power became the culmination of a debate that has simmered off and on from the time of the Supreme Court's decision in *United States v. Kagama*.²²⁸ One suspects that because, like *Curtiss-Wright*'s holding that the United States holds as much foreign affairs and war powers as necessary to defend the nation avoids ongoing constitutional debate, the Court's long-standing recognition of federal plenary power in Indian affairs does the same in the arena of the Indian Affairs Power.²²⁹ Because there have been no serious constitutional concerns that would require the Court to reexamine congressional authority in the field of Indian affairs, there has been no reason to seriously reexamine the source of that authority. Of course, at virtually any time, the Court might be confronted with the need to undertake that examination. This Article offers a launching point for a historical examination of the original understanding of the Indian Affairs Power in the context of the *Lara* dictum.²³⁰

The Indian Affairs Power serves as the foundation for a large portion of Indian affairs legislation and regulation.²³¹ Of course, a significant portion of the congressional enactments and Executive regulation in the field can be traced to the Indian Commerce Clause or to an Indian treaty provision that expressly authorizes the action, but this body of law only accounts for something less than the entire body of Indian affairs law.²³² As Justice Blackmun worried in an analogous context, should the Court hold that the federal government's Indian Affairs Power is constricted, much of Title 25 of the United States Code could lose its footing and come crashing down.²³³ In short, the

228. 118 U.S. 375 (1886).

229. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936).

230. See *United States v. Lara*, 541 U.S. 193, 200-01 (2004).

231. See *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

232. *Id.*

233. *Id.* at 552-53 ("Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the [Bureau of Indian Affairs], single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.") (citing *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808, 814 n.13 (E.D. Wash. 1965), *aff'd*, 384 U.S. 209 (1966)).

authority to enact these statutes *must exist somewhere* if the Indian Commerce Clause comes up short.²³⁴

An important question—perhaps the most important question for purposes of the argument contained in this Article—is whether the Articles of Confederation or the Constitution extinguished *forever* the national Indian Affairs Power exercised by the Continental Congress. No Supreme Court cases have addressed this question, but if Justice Breyer's *Lara* dictum will prevail, it must be answered in the negative.²³⁵ Only one federal court case has addressed even the drafting of the Indian affairs clause in the Articles, *Oneida Indian Nation of New York v. New York*.²³⁶ That analysis focused only on the Indian affairs authority intended by the Framers of the Articles to be reserved and/or granted to the states and is of limited utility in this Article.²³⁷ However, the United States Court of Appeals for the Second Circuit, in dicta, stated:

We recognize, however, that Indian affairs do not fall neatly into the category of either international or domestic matters, and it is surely arguable that on matters concerning war and peace with the Indians, the national government [from 1776 to 1781] did possess the inherent powers that *Curtiss-Wright* ascribed to the national government in the realm of traditionally “international” matters.²³⁸

Justice Breyer's *Lara* dictum, while resting in part on the fact that much of the United States' dealings with Indian tribes has been in the context of war or foreign affairs,²³⁹ does have a historical basis outside of the context of foreign affairs.²⁴⁰ The Indian Affairs Power may exist as a *national power* that predates *and survives* the Constitution and the Articles of Confederation. The Continental Congress possessed and exercised an Indian Affairs Power from 1776 to 1781.²⁴¹ Unlike the

234. Cf. Elliott, *supra* note 145, at 496 (“The legal sovereignty of government . . . must be capable of being determined constitutionally, *though its locus may be widened or narrowed*. Matters which transcend the purpose which government exists to realize under the constitutional mandate may be referred to an arbitrament outside the bounds of a narrowly conceived Austinian doctrine, and matters which are the special concern of local areas or specific interests will properly be left in their hands.” (emphasis added)).

235. See *United States v. Lara*, 541 U.S. 193, 200-02 (2004).

236. 860 F.2d 1145, 1155-61 (2d Cir. 1988).

237. *Id.* at 1155-61.

238. *Id.* at 1161.

239. *Lara*, 541 U.S. at 200.

240. See FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS: 1790-1834, at 27-30 (1962) (finding that the Continental Congress possessed and exercised an Indian Affairs Power from 1776 to 1781).

241. See *id.*

Foreign Affairs Power, which was all but subsumed into the Articles and then the Constitution, a strong argument can be made that the Indian Affairs Power has never been fully subsumed into these governing documents.

A. *Founders' Preoccupations*

National authority derived from the people's sovereignty during the time of the national period originated in the necessities of the Revolutionary War and, in some respects, the important questions that continued unanswered after the conclusion of major combat operations. The Founders believed that there could have been other necessities that created national power during the national period.²⁴² For example, Alexander Hamilton and others sought to create a national debt for which no individual state would take responsibility, but would have to be dealt with on a national level.²⁴³ Under this theory, which came to partial fruition through the Articles and the Constitution, the states would be bound together by the necessity of paying off a national debt.²⁴⁴ There were at least two other independent necessities that brought the colonies together as a nation prior to the ratification of the Articles that are relevant to this Article—the relationship of Indian tribes to the United States and the states and the related question of the Western lands.

1. Indian Tribes

An important necessity that occupied the Continental Congress during the Revolution was the potential for military intervention in the conflict by Indian tribes.²⁴⁵ The Continental Congress worried that the British would enter into a treaty with the Western tribes, especially the Six Nations of Haudenosaunee and the Indians of the Great Lakes and Ohio River Valley region, and those tribes would take up arms against the Americans.²⁴⁶ Given the relative military weakness of the Americans in the early years of the Revolutionary War and the fear of Indian-style guerrilla warfare, the Continental Congress treated the

242. See Jensen, *supra* note 11, at 366-68.

243. *Id.*

244. *Id.*

245. See Clinton, *supra* note 105, at 118.

246. See Andrew McFarland Davis, *The Employment of Indian Auxiliaries in the American War*, 2 ENG. HIST. REV. 709, 709-10, 713 (1887). See generally WALTER H. MOHR, *FEDERAL INDIAN RELATIONS 1774-1788*, at 37-39 (1933) (discussing the debates of the Continental Congress on "[w]hether the Indian was to participate in the impending war").

situation with grave concern.²⁴⁷ The Continental Congress had another reason to fear the Indian tribes—they had a much better relationship with the British than with the Americans, who the Indian tribes viewed as a vicious and hungry competitor to their lands.²⁴⁸ The British Indian agents lobbied Indian tribes all along the Western frontier to fight against the Americans.²⁴⁹ The Continental Congress had little choice but to deal with the Indian tribes, seeking either alliances or tribal neutrality,²⁵⁰ as the piecemeal efforts of the individual colonies failed.²⁵¹ The exercise of a national Indian Affairs Power derived from the necessities of the Revolution.²⁵² As Father Prucha explained:

In the end, *the over-all necessities* of Indian control prevailed, for, as James Wilson pointed out, the Indians refused to recognize any superior authority and only the United States in Congress assembled could have any hope of dealing with them in an adequate fashion. Above all else, rivalries between colonies in treating with the Indians had to be avoided.²⁵³

Many of the first treaties between the nascent nation and Indian tribes were treaties of military alliance or nonintervention and cooperation.²⁵⁴ In the Treaty of Fort Pitt with the Delaware Nation, for example, “it was agreed that all past offenses were to be mutually forgiven, peace

247. See Davis, *supra* note 246, at 709-26.

248. See PRUCHA, *supra* note 240, at 27; Davis, *supra* note 246, at 712 (describing the various methods, including massive fraud and violence, used by Americans to dispossess Indian lands).

249. See PRUCHA, *supra* note 240, at 27; Davis, *supra* note 246, at 716-17.

250. See MOHR, *supra* note 246, at 37-38; Davis, *supra* note 246, at 714, 719. See generally 1 VINE DELORIA, JR. & RAYMOND J. DEMALLIE, DOCUMENTS OF AMERICAN INDIAN DIPLOMACY: TREATIES, AGREEMENTS, AND CONVENTIONS, 1775-1799, at 12-13, 15-82 (1999) (listing and describing twelve treaties during the Revolutionary War period).

251. PRUCHA, *supra* note 240, at 27 (“The colonists . . . could not afford to let Indian matters drift, and individual colonies sent commissioners to the Indians. The Indian problem, however, could not be handled adequately by disparate provincial practices, and on July 12, 1775, the Continental Congress inaugurated a federal Indian policy with a report from a committee on Indian affairs.”); see 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 198 (1905) [hereinafter JOURNALS OF THE CONTINENTAL CONGRESS].

252. See PRUCHA, *supra* note 240, at 30.

253. *Id.* (emphasis added); see also Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1098 (1995) (“The threat that the Indian tribes of the northern, western, and southern frontiers might ally themselves with the English produced a rash of congressional action designed to assure the neutrality of the tribes.”); Clinton, *supra* note 105, at 118 (“During the American Revolution, the Continental Congress sought to out-position British military contingents. The British presence in Canada and the Crown’s forts and other outposts on the St. Lawrence and on the Great Lakes constituted one of the major threats to the Continental Army led by George Washington.”).

254. See generally MOHR, *supra* note 246, at 37-91 (describing the attempts made by Americans and British with regard to entering into treaties with Indians).

was established, and in case of war each party was to assist the other.”²⁵⁵ In general, however, the Continental Congress was mostly unsuccessful in treating with Indian nations during the Revolution to the extent that they could not reach alliances or guarantee neutrality.²⁵⁶ According to Walter Mohr, there were significant reasons why the Indians sided with the British, including the fact that “the Americans were desirous, mainly, of depriving the Indians of their lands.”²⁵⁷ Ultimately, the tribal assaults on American towns did little to influence the outcome of the war.²⁵⁸ In the South, especially, American military victories against the Indian tribes were substantial.²⁵⁹

This exercise of necessary national authority by the Continental Congress served as the leading focal point of what can now be referred to as the Indian Affairs Power, although, to be sure, the attempt to treat with, and then the fighting against, Indian tribes also are examples of the exercise of the Foreign Affairs Power. According to John Ranney, “Probably the most persistent of the active factors promoting co-operation in America was military necessity. . . . [E]ach of the early attempts at union was the direct consequence of some military threat [from, for example] the Indians”²⁶⁰ The exercise of this national authority by the Continental Congress is part of the origin of the Indian Affairs Power, a power that the national sovereign appeared to inherit from the King.²⁶¹ After the Revolution ended, the necessity of dealing with the Indian tribes remained.²⁶² Perhaps this is where the Indian Affairs Power made its clearest, independent debut. No one had forgotten the near-successful war waged by Pontiac in 1763²⁶³—and the possibility of another offensive. According to Walter Mohr, “The Indians are not mentioned in the treaty of 1783, yet they were a very influential factor in the negotiations.”²⁶⁴ John Marshall recalled decades later in a private letter to Justice Story how the American

255. *Id.* at 73; see Treaty of Fort Pitt with the Delaware Nation, *supra* note 87, at 13; DELORIA & DEMALLIE, *supra* note 250, at 11-12; Clinton, *supra* note 105, at 118-20.

256. See MOHR, *supra* note 246, at 87-88 (noting that Indians historically allied themselves with the British).

257. See *id.* at 40.

258. See *id.* at 87.

259. See *id.* at 60.

260. Ranney, *supra* note 171, at 14.

261. See Jack N. Rakove, *Taking the Prerogative Out of the Presidency: An Originalist Perspective*, 37 PRES. STUD. Q. 85, 92 (2007) (discussing authorities who made this claim).

262. See Clinton, *supra* note 253, at 1105.

263. See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 236-37 (1990).

264. MOHR, *supra* note 246, at 93.

leadership continued to fear an Indian offensive that could all but drive the nascent American nation into the sea.²⁶⁵ If anything, immediately after the hostilities with Britain ceased, perhaps the necessity increased, given that some powerful Indian tribes that had historically sided with the British were either concerned that the Americans would soon move against them or were continuing to agitate against the Continental Congress with British support.²⁶⁶ In addition, even the economic interests of New York and Pennsylvania in tapping into the Indian fur trade required union, as one antifederalist pointed out.²⁶⁷

A proposed amendment to Article IX, Clause Four, of the Articles of Confederation illustrates that the intent of the Framers—at one point—was to vest the entire Indian Affairs Power in the United States.²⁶⁸ However, the infamous proviso preserving the rights of state legislatures dampened—if not obliterated—that original intent.²⁶⁹ The debates of the Framers of the Articles of Confederation in the Indian affairs context were disjointed and inconclusive.²⁷⁰ It appears that the final provision ratified in 1781 consisted of the squeezing together a combination of the nationalists' proposed language and the antifederalists' proposed language—without serious consideration of the impact it would have on the meaning of the final provision. As

265. See RICHARD C. BROWN, *ILLUSTRIOUS AMERICANS: JOHN MARSHALL* 213 (1868) (“The Indians were a fierce and dangerous enemy whose love of war made them sometimes the aggressors, whose numbers and habits made them formidable, and whose cruel system of warfare seemed to justify every endeavor to remove them to a distance from civilized settlements.” (quoting 1828 letter from Chief Justice Marshall to Justice Story)); ROBERT KENNETH FAULKNER, *THE JURISPRUDENCE OF JOHN MARSHALL* 54-55 (1968) (“Instead [Marshall] excused the displacement which had occurred by the most narrow argument possible: *the Indians’ war-like savagery made their physical proximity a mortal danger to the conquering settlers*, and only to the extent of that danger might their lands be appropriated.” (emphasis added)). *Contra* Ranney, *supra* note 171, at 15 (“Only in Georgia, which was engaged in an Indian war, was defense an important motive for ratification [of the Constitution].”).

266. *Cf.* MOHR, *supra* note 246, at 93 (“The Indians clung tenaciously to that which the Americans desired most. Undoubtedly [sic] this resistance was strengthened by the hope of British resistance should matters come to a crisis”). See generally *id.* at 118-21.

267. See Ranney, *supra* note 171, at 15 (“New York and Pennsylvania anxiously look forward for [sic] the fur trade. How can they obtain it but by union?” (quoting William Grayson in the Virginia Convention, 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 278 (Jonathan Elliott ed., 2d ed. 1901))).

268. See *Oneida Indian Nation of N.Y. v. New York*, 860 F.2d 1145, 1155-57 (2d Cir. 1988).

269. See *id.* at 1145 (holding that New York had the power to purchase Indian land without the consent of Congress).

270. See *id.* at 1156-57; Clinton, *supra* note 253, at 1139-47.

famously noted by James Madison, Article IX, Clause Four was “obscure and contradictory.”²⁷¹

As to whether the national Indian Affairs Power that the Continental Congress exercised during the time of the national period survived the ratification of the Articles, the answer appears to be that the intent of the 1781 Founders was to vest the entire array of Indian Affairs Power(s) in the nation, with protection of the interests of the state legislatures. No national authority appears to have been left out or reserved.²⁷² The Framers, it appears, subsumed the entire national Foreign Affairs Power into the Articles. Of course, they did a very poor job of it.

By the time of the framing of the Constitution, the 1789 Founders moved away from vesting any reserved authority in the states.²⁷³ The 1789 Founders’ clear intent, as Professor Clinton showed in his comprehensive historical research, was to divest the states of any and all Indian Affairs Power.²⁷⁴ But where the Constitution reserves exclusive authority to the United States, it did not use the magic words that would vest the entire national Indian Affairs Power with Congress.²⁷⁵ Herein rests one of the biggest puzzles of federal Indian law—why did the 1789 Founders not keep language similar to the Articles of Confederation (leaving out the proviso); language that would have appeared to vest the entire Indian Affairs Power in Congress?

Instead, the 1789 Founders vested Congress with the power to regulate commerce with the Indian tribes.²⁷⁶ By negative implication, it would appear Congress does not have the authority to exercise the entire national Indian Affairs Power that it had under the Articles, subject to the proviso.²⁷⁷ While Congress has extensive authority in this vein,²⁷⁸ there is reasonable skepticism that Congress’s authority as

271. THE FEDERALIST No. 42, at 284-85 (James Madison).

272. Clinton, *supra* note 253, at 1155 (describing James Madison’s views of federal power).

273. *See id.* at 1164.

274. *See* Clinton, *supra* note 105, at 149 (noting that the history of the adoption of constitutional provisions suggests Congress wanted to ensure that no power over Indian Affairs was left to the states).

275. Prakash, *supra* note 9, at 1089.

276. U.S. CONST. art. 1, § 8, cl. 3.

277. *See* Prakash, *supra* note 9, at 1089.

278. *But cf.* United States v. Kagama, 118 U.S. 375, 378 (1886) (“The Constitution of the United States is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders.”).

derived from the Indian Commerce Clause alone is plenary.²⁷⁹ But the story of the Indian Affairs Power remains incomplete.

2. The Western Lands and Expansion

In 1763, in part as a response to the shocking success of the war waged by Indian military forces led by the Ottawa *ogema* Pontiac,²⁸⁰ the Crown issued a proclamation prohibiting anyone from purchasing Indian lands west of a boundary line set at the Allegheny Mountains—the infamous Norman Yoke.²⁸¹ The Proclamation of 1763, and its subsequent arbitrary enforcement and alteration, became one of the flashpoints of the American Revolution.²⁸² After the Battle of Yorktown diminished the necessary war powers of the Continental Congress, the interrelated questions of the Western boundaries, state Western land claims, and the expansion of the nation—all of which had its origins in British imperial policy and that also implicated the nation's Indian affairs—created an additional outlet for the exercise of national authority.²⁸³ Another related major concern relevant to this Article that drove the states together is the question of the Western lands and the expansion of the United States. Before the states could trust the national government in regard to their interests, they had to trust each other.²⁸⁴ And before they could trust each other, they had to rely upon a national government. The disputes that the states had with each

279. See Prakash, *supra* note 9, at 1089-90.

280. See WILLIAMS, *supra* note 263, at 232; Clinton, *supra* note 253, at 1092.

281. See generally WILLIAMS, *supra* note 263, at 232-86 (describing the execution of the proclamation's scope, enforcement and practical effects); Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs*, 69 B.U. L. REV. 329 (1989) (examining the history of the proclamation and its effect on the development of modern Indian law).

282. See WILLIAMS, *supra* note 263, at 232; cf. Onuf, *supra* note 143, at 363 ("British policy intensified the conflict of interests. White settlement was prohibited beyond the Atlantic watershed by the Proclamation of 1763; negotiations with Indians from 1768 to 1770 pushed the line considerably to the west. . . . But the Indian boundaries confined most speculators and promoters to Virginia's immediate hinterland.").

283. See generally Onuf, *supra* note 143, at 364, 369-74 (highlighting disputes between the states and federal government over "Western land" and through Virginia's release of land, the ability of the states and people to find a common ground); Onuf, *supra* note 168, at 451-55 (highlighting that the coming together of states to settle their land disputes resulted in the diminishment of that ability and a concomitant strengthening of the federal government).

284. "Maryland . . . held back [its ratification of the Articles of Confederation] to secure that settlement of the public lands which was eventually made. That State gave its assent [the final state to do so] in March, 1871." MILLER, *supra* note 193, at 42. See generally Merrill Jensen, *The Cession of the Old Northwest*, 23 MISS. VALLEY HIST. REV. 27, 32-48 (1936) (describing disputes between the landed and the landless states).

other—the landed states represented by Virginia and the landless states represented by Maryland—in addition to the claims of the United States, held up the ratification of the Articles for years.²⁸⁵

Only a national sovereign could solve the interstate disputes and maintain the solution over time: “[A]ll parties in the western lands controversy looked forward to congressional jurisdiction—whatever title claims Congress itself could advance—and accepted the notion that secure boundaries finally depended on mutual recognition through Congress.”²⁸⁶ According to Merrill Jensen, “[T]he conservatives, led by John Dickinson . . . insisted on the necessity of centralized authority to regulate trade and western lands”²⁸⁷ National (or confederal or federal) authority was necessary to ensure that states would not arbitrarily leave the union over a dispute.²⁸⁸ In Peter Onuf’s words, “Though recognition is by definition the basis of any state’s international standing, mutual recognition among the United States worked to diminish their independence. The price of recognition was a radical diminution of each state’s independence in relation to other states.”²⁸⁹

American political leaders considered the Western lands, in 1776, to be “the chief source of potential wealth in the eighteenth century.”²⁹⁰ A minority of conservatives in the Continental Congress who advocated a powerful national government, were supported in part by land speculators and land companies who stood to profit from these lands, sought central, national authority to handle the Western land claims.²⁹¹ In short, as these leaders asserted when Virginia denied national authority to handle the Western land claims, “[T]he ‘[q]uestion of the jurisdiction of Congress’ was the very essence of their claims, and that it was ‘of infinite consequence to the American Union as well as to your memorialists.’”²⁹² National interest in

285. See Jensen, *supra* note 284, at 32-48.

286. Onuf, *supra* note 168, at 452; see also *id.* at 453 (“Boundary controversies revealed the inadequacy of traditional definitions and coincidentally led to demands for the expansion of congressional power. If boundaries were not fixed, government itself was impossible.”).

287. Jensen, *supra* note 11, at 362.

288. See Onuf, *supra* note 168, at 451.

289. *Id.* at 452.

290. Jensen, *supra* note 11, at 362; see also Onuf, *supra* note 143, at 358 (“The national domain was to be (or so it was thought) a source of virtually unlimited financial and political power for Congress.”).

291. Jensen, *supra* note 11, at 364-65 (citing Jensen, *supra* note 284, at 27-48).

292. *Id.* at 366 (quoting Papers of the Continental Congress, Oct. 13, 1780).

acquiring title to Western lands was preferable to landed states being forced to share or submit to landless states.

According to Peter Onuf, Virginia's refusal to back down from its claims to the Western lands described in its charter created a conflict between the national union and the states that helped to solidify (and perhaps even create) the federalism that distinguishes the American Republic.²⁹³ Virginia had established its boundaries in its Constitution of 1776 that extended well into the Old Northwest and joined the national union only upon reserving "her distinct rights of Sovereignty and Soil."²⁹⁴ The crisis involving Virginia's claims—unresolved until 1784—offered a unique opportunity for both the State to leverage its sovereignty by forcing the national union to recognize it, and for the United States to solidify its authority over national boundaries and Western land claims and, by extension, reserve the power to expand the nation by adding new states.²⁹⁵ The Western lands and the territorial claims of the landed colonies were a critical source of conflict with nonlanded states that only a sovereign national authority could resolve.²⁹⁶

The expansion of the nation, adding additional states to the original thirteen, also become an important reason for the states to accept a national government.²⁹⁷ As Peter Onuf wrote:

The new western states would only come into being, however, by assimilation to higher authority, through recognition by the existing states, and by admission to the union. New state claims were premised on a rejection of particular colony-state claims and the consequent elevation of a congressional title to unlocated lands. A union than included these new political communities, as territories or states, was necessarily a different kind of union than that which bound the original states.²⁹⁸

As with the recognition of Western land claims, the question of new states required a national authority to compel obedience to the whole and quell additional conflict: "Challenges to state jurisdiction,

293. See Onuf, *supra* note 143, at 368-74.

294. *Id.* at 368 (internal quotation marks omitted).

295. *Id.* ("If this territorial dispute could be resolved, Congress could have its national domain."); *id.* at 373 ("The Virginia cession exemplifies the kind of transactions, submerged from view by their very success, that secured the foundations of American federalism and helped Americans . . . discover a common ground.").

296. *Id.* at 371 ("[The] Marylanders were convinced that Virginians, with their vast open lands, resources, and population, were determined to impoverish their state and reduce it to satellite status.").

297. Onuf, *supra* note 168, at 458.

298. *Id.*

however, by other states and by separatists demonstrated the limitations of these ideas of statehood. Because state boundaries were in fact established through bilateral or multilateral agreements, mutual recognition became central to American statehood pretensions.”²⁹⁹

It was important for the states to agree that the federal government under the Constitution had the authority to acquire territory and expand the United States because this authority is not enumerated in the Constitution.³⁰⁰

Indian affairs were in the background of all these questions. Indians owned, occupied, and had competing claims to the Western lands.³⁰¹ This gave Indian tribes leverage as to the several, independent colonies and subsequent states.³⁰² According to George Washington, “[T]he [settlement] of the Western Country and making a Peace with the Indians [were] so analogous that there [could] be no definition of the one without involving considerations of the other.”³⁰³ Moreover, “[t]he danger of Indian war was growing ever greater as uncontrolled emigration pushed farther and farther into Indian country and came into violent contact with its inhabitants.”³⁰⁴ The dispute regarding massive amounts of land in Indiana and Illinois involving large land speculation companies³⁰⁵ would not be finally resolved until *Johnson v. M’Intosh* in 1823.³⁰⁶ But this was a sideline to the real question.

299. *Id.* at 459.

300. See Palfrey, *supra* note 198, at 384 (“A third view was that the express grant of power to admit new states included the power to admit a state not yet the property of the United States. Th[is view] . . . met with the widest acceptance.”); *cf. id.* at 372 (“The constitutional convention finally gave to the national government the power to make war, the power to make treaties, the power to admit new states, and the power to legislate for certain state objects. In all of these ways territory might conceivably be acquired; add to these acquisitions by discovery, and we have the sum of all possible manners of acquisition.”).

301. See, e.g., Newton, *supra* note 18, at 200 (noting that in the early period of the postconstitutional federal government, policies regarding Indians reflected a pragmatic realization that conflicts could arise between the nation and Indians).

302. *Cf. PRUCHA*, *supra* note 240, at 28-29 (finding the settlement of Western lands to be linked with peace with the Indians).

303. Letter from George Washington to James Duane (Sept. 7, 1783), *quoted in PRUCHA*, *supra* note 240, at 28.

304. Merrill Jensen, *The Creation of the National Domain, 1781-1784*, 26 MISS. VALLEY HIST. REV. 323, 339 (1939).

305. *Id.* at 330-32; Onuf, *supra* note 143, at 369.

306. 21 U.S. 543 (8 Wheat.) (1823). See generally LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 95-116 (2005) (analyzing Justice Marshall’s rationale in *Johnson v. M’Intosh*).

B. The Original Understanding of the Source of the Indian Affairs Power

There are two potential original understandings of the source of the Indian Affairs Power under the Constitution that scholars have not yet considered. The first understanding, based on the circumstances and politics of the 1789 Framers, suggests that the necessity that served as the source of national authority during the national period also served as the continuing source of authority for the United States even after the ratification of the Constitution. The second, somewhat related, theory is that there is a fundamental flaw in the Constitution—a constitutional necessity—that serves to resurrect the national Indian Affairs Power, even in the modern era.

1. A Generalized “Necessity”

This Part discusses a kind of necessity similar to the kind of necessity that created the national Foreign Affairs Power and that created the Indian Affairs Power. Unlike the necessity that created the Foreign Affairs Power, this necessity arguably remains extant today. Yet, one would be hard-pressed to demonstrate that this necessity is (or was) as acute as the foreign affairs necessity. It is likely that the Constitution squeezed the Indian affairs authority of Congress to something less than the national Indian Affairs Power.³⁰⁷ The national Indian Affairs Power, perhaps subsumed into nothingness by the Articles, returned in the aftermath of the Constitution, available for use in a time of necessity by the federal government.

Consider first that the national necessity of the Indian Affairs Power did not decline after the Revolution. If anything, the necessity of the United States increased throughout nearly all of the treaty period of federal Indian law and policy, which did not end formally until 1871.³⁰⁸ The necessity of the Indian Affairs Power has shifted and changed throughout the entire history of federal Indian law and policy. Often in the beginning, the necessity was military.³⁰⁹ In the last

307. This is similar to the argument made by Professor Saikrishna Prakash. See Prakash, *supra* note 9, at 1090 (discussing the Convention’s rejection of James Madison’s proposal to grant Congress the power to “regulate affairs with the Indians” in favor of the Indian Commerce Clause).

308. *Id.*

309. See generally 1 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 67-71 (1984) (describing Indian wars and threats and the expansion of settlement which required recognition of, and were a threat to, federal control).

decades of the eighteenth century and then intermittently through the nineteenth century, some Indian tribes retained a military capacity and salience that constituted a threat to the union and later the United States.³¹⁰ A second stage of necessity, related to, but different from the military necessity, involved the removal of the eastern tribes to the West, and later the establishment and maintenance of Indian reservation lands.³¹¹ The ongoing and continuing necessity of the Indian Affairs Power in the modern era is the regulation of the tribal-federal-state relationship—politically and economically, especially in the arenas of public safety and social services.³¹² This authority, as the *Kagama* Court noted, had to derive from somewhere.³¹³

Standing alone, this proposed answer may or may not be persuasive to the observer.³¹⁴ But consider the following new wrinkle about the original (mis)understanding of Indian affairs and whether it provides a much stronger possibility.

2. A Constitutional “Necessity”

There is yet another possibility—that the Constitution itself is deficient. The deficiency in the Constitution’s articulation of the United States’ authority in the field of Indian affairs could constitute a necessity that requires Congress, and perhaps the President, to reach back into the national period and tap into the national Indian Affairs Power. The reason for this constitutional necessity is that the Founders understood there were two categories of Indian tribes.³¹⁵ The first category included the tribes “within” the exterior boundaries of the thirteen states, tribes such as the Six Nations of Haudenosaunee and the Cherokee Nation.³¹⁶ The nontribal Indians residing within the thirteen states, such as those residing in the New England praying

310. See generally *id.* at 534-61 (describing the Great Plains Indian wars).

311. See generally *id.* at 214-26 (describing the removal of the Indians from the East and South and the opening of land west of the Mississippi River for Indian settlement); *id.* at 562-81 (describing the reservation period).

312. See Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (2000) (concerning tribal sovereignty with respect to criminal jurisdiction); Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (protecting the interests of Indian children through welfare programs); *cf.* Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 (recognizing that federal government programs for Indians have not achieved desired goals).

313. See *United States v. Kagama*, 118 U.S. 375, 380 (1886).

314. Prakash, *supra* note 9, at 1103 (“Necessity, however strongly felt, cannot enlarge the Constitution’s grants of federal power.”).

315. See Clinton, *supra* note 253, at 1101; see also 6 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 251, at 1078 (1906) (referring to two categories of Indian tribes, those “within [and] without” the colonial borders).

316. 6 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 251, at 1078 (1906).

towns, constituted a subcategory that the Founders understood to be the “Indians not taxed” or the “Indians taxed.”³¹⁷ The Founders would have understood that these internal tribes would, eventually, assimilate or disappear into the rubric of state jurisdiction and American citizenship. The second category of tribes included those “without” the thirteen states, such as the Three Fires Confederacy of Anishinaabeg in the Great Lakes region and all other tribes west of the American frontier.³¹⁸ The Founders, while arguably not recognizing these external tribes as foreign nations or states, dealt with their existence in the Constitution via the Indian Commerce Clause.³¹⁹ The problem, of course, is that the more than 560 Indian tribes now federally recognized by the United States are internal tribes; tribes that the Founders never expected to survive.³²⁰ Hence, no constitutional provision exists to govern relations with them properly. As such, perhaps the preconstitutional power theory in the *Lara* dictum is useful.

Consider the original understanding of the 1781 and 1789 Founders. There were Indian tribes located within the exterior boundaries of the thirteen united states and there were Indian tribes located outside of the exterior boundaries of the United States.³²¹ It is possible—and given the statements of the Framers and the jurisprudence of the Marshall Court—that the 1789 Founders intended for the Constitution to treat the Indian tribes within the United States differently from the Indian tribes outside the United States.³²²

First consider that the early drafts of the Articles of Confederation identified a distinction between tribes located within the boundaries of the states.³²³ Benjamin Franklin’s July 21, 1775, draft provided for a treaty alliance with the Six Nations of New York, later to be used as a model for all other tribes.³²⁴ That proposal morphed into Article XIV of the July 12, 1776, draft:

317. See Clinton, *supra* note 105, at 125 (discussing the exclusion of the “Indians not taxed” from the census).

318. See 6 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 251, at 1078 (1906).

319. See Clinton, *supra* note 253, at 1158.

320. See Newton, *supra* note 18, at 200.

321. Clinton, *supra* note 253, at 1150.

322. See 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 251, at 549 (1906) (reprinting a draft of article XIV); Clinton, *supra* note 253, at 1100.

323. 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 251, at 198 (1905) (reprinting Franklin’s draft of article XI); see Clinton, *supra* note 253, at 1099.

324. 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 251, at 198 (1905).

A perpetual Alliance, offensive and defensive, is to be entered into by the United States assembled as soon as may be, *with the Six Nations, and all other neighbouring Nations of Indians*; their Limits to be ascertained, their Lands to be secured to them, and not encroached on; no Purchases of Lands, hereafter to be made of the Indians by Colonies or private Persons before the Limits of the Colonies are ascertained, to be valid: All Purchases of Lands not included within those Limits, where ascertained, to be made by Contracts between the United States assembled, or by Persons for that Purpose authorized by them, and the great Councils of the Indians, for the general Benefit of all the United Colonies.³²⁵

Professor Bob Clinton reviewed the same history with an eye to the question of whether the states could “interfere” with Indian affairs,³²⁶ but I will take a different view. Once again, the 1776 draft identified the Six Nations of New York for special treatment, but added “other neighbouring Nations of Indians”—that is, similarly situated Indian tribes.³²⁷ A plausible reading here would be that the drafters viewed at least two different classes of Indian tribes—those like the Six Nations (a powerful and organized Indian confederacy located within the boundaries of New York State) and those unlike the Six Nations. Given that the remainder of the provision anticipates that the states will have jurisdiction over lands bought and sold by Indian tribes after the execution of a treaty conforming to the article—a situation that could only arise inside the boundaries of one of the states—the article does not apply to affairs with Indian tribes located outside the boundaries of the United States.³²⁸ Professor Clinton’s research shows that the 1776 debates anticipated and understood that there were two classes of Indian tribes—those ““within or without the real or pretended limits of any Colony.””³²⁹ Thomas Jefferson, at one point, moved “that all purchases of lands, *not within the boundaries of any Colony*, shall be made by Congress of the Indians in a great Council.”³³⁰ The next draft

325. 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 251, at 549 (1906) (reprinting a draft of article XIV) (emphasis added) (footnote omitted); *see* Clinton, *supra* note 253, at 1100.

326. Clinton, *supra* note 253, at 1100 (quoting John Dickinson’s marginal note, *reprinted in* 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 251, at 549 n.2 (1906)).

327. 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 251, at 549 (1906) (reprinting a draft of article XIV) (emphasis added); *see* Clinton, *supra* note 253, at 1100.

328. *See* Clinton, *supra* note 253, at 1101.

329. *Id.* (“We have no right over the Indians, *whether within or without the real or pretended limits of any Colony*. They will not allow themselves to be classed according to the bounds of Colonies.” (emphasis added) (internal quotation marks omitted)).

330. 6 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 251, at 1076 (1906) (emphasis added); Clinton, *supra* note 253, at 1100.

(August 20, 1776) included language that sounds similar to the text of the Indians Not Taxed Clause of the Constitution: Congress would possess the authority in “regulating the trade, and managing all affairs with the Indians, not members of any of the States.”³³¹ Importantly, the previous paragraph in the draft noted that new colonies could be created “in Lands . . . hereafter to be purchased or obtained” from Indian tribes.³³² In other words, in lands then owned by Indian tribes not within the boundaries of the united colonies. A year later, the Framers took up the Indian Affairs Clause in Article XIV in the context of classifying two types of tribes, internal and external.³³³ The distinction between tribes located within and without the united colonies was retained in Article VI of the Articles³³⁴ and it would remain implicit in Article IX, which provided:

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating . . . the trade and managing all affairs with *the Indians, not members of any of the States*, provided that the legislative right of any State within its own limits be not infringed or violated³³⁵

The proviso is explained, according to Professor Clinton, when the delegation reached a compromise off the record.³³⁶

331. 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 251, at 682 (1906) (reprinting a draft of article XIV of Aug. 20, 1776); *see* Clinton, *supra* note 253, at 1100; *see also* Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 403 (1857) (“[The Indian race], it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws.”).

332. 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 251, at 682 (1906) (reprinting a draft of article XIV of Aug. 20, 1776).

333. 9 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 251, at 844 (1907) (“It was moved to strike out in the 19 and 20 lines ‘not members of any of the states,’ and insert ‘not residing within the limits of any of the United States;’ to this an amendment was moved to strike out the whole paragraph and insert, ‘managing all affairs relative to war and peace with all Indians not members of any particular State, and regulating the trade with such nations and tribes as are not resident within such limits wherein a particular State claims, and actually exercises jurisdiction’”); Clinton, *supra* note 253, at 1102.

334. *See* ARTICLES OF CONFEDERATION art. VI (U.S. 1781) (anticipating that a state might “receive[] certain advice of a resolution being formed by some nation of Indians to invade such State”); *see also* Prakash, *supra* note 9, at 1084 (“Indeed, if the drafters of the Articles merely considered the Indians marauding scofflaws, there would be no need to specially authorize state action. Stopping Indian scofflaws would have been an ordinary matter of state law enforcement, not an occasion for making war, and hence not a concern for either the Articles or the Constitution.”).

335. ARTICLES OF CONFEDERATION art. IX (emphasis added).

336. *See* Clinton, *supra* note 253, at 1102-03.

Consider further the possibility that the 1789 Founders believed (or wished) that the Indian tribes located within the United States would eventually assimilate (or disappear) into the states in which they were located. Nell Jessup Newton demonstrated that “[t]he absence of a general power over Indian affairs in the Constitution is not surprising to students of history, for at the time the Constitution was drafted, the framers regarded Indian tribes as sovereign nations, albeit nations that would soon either move West, assimilate, or become extinct.”³³⁷ President Washington hoped that federal Indian policy would “attach” Indian tribes to the United States, “imparting to them the blessings of civilization,”³³⁸ that is, assimilation. President Jefferson advocated for the support of Indian trading houses in order “[t]o encourage them to abandon hunting, to apply to the raising [of] stock, to agriculture, and domestic manufacture.”³³⁹ Moreover, the “attachment” of Indian tribes to the United States was thought critical to the preservation of peace, as Professor Clinton speculated in connection with the Treaty of Fort Pitt provisions:

Perhaps . . . signatory parties [in early American-Indian treaty negotiations] concluded that a permanent arrangement in which Indian nations live within the exterior boundaries of another country in which they have no representation and to which they owe no allegiance might constitute a permanently unstable political situation, fraught with potential for conflict, misunderstanding and violence (a description that, with the benefit of hindsight, was not far from what ultimately happened).³⁴⁰

Most importantly, the 1789 Framers retained the understanding that there were two classes of Indian tribes—those within the United States

337. Newton, *supra* note 18, at 200 (citing ROBERT F. BERKHOFER, JR., *THE WHITE MAN’S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT* 134-45 (1978); PRUCHA, *supra* note 240, at 28-31, 213-27; S. LYMAN TYLER, *A HISTORY OF INDIAN POLICY* 32-43 (1973)).

338. George Washington, Third Annual Message (Oct. 25, 1791), in *DOCUMENTS OF UNITED STATES INDIAN POLICY* 15, 15 (Francis Paul Prucha ed., 3d ed. 2000).

339. President Jefferson on Indian Trading Houses (Jan. 18, 1803), in *DOCUMENTS OF UNITED STATES INDIAN POLICY*, *supra* note 338, at 21, 21; *see also* Robert W. McCluggage, *The Senate and Indian Land Titles, 1800-1825*, 1 W. HIST. Q. 415, 415-16 (1970) (“When once you have property, you will want laws and magistrates to protect your property and persons You will find that our laws are good for this purpose . . . you will unite yourselves with us . . . form one people with us, and we shall all be Americans” (quoting 16 THE WRITINGS OF THOMAS JEFFERSON 452 (1903))).

340. Clinton, *supra* note 105, at 126 (referencing the Treaty of Fort Pitt with the Delaware Nation, *supra* note 87, at 14-15); *cf.* Clinton, *supra* note 253, at 1104 (discussing the special cases of certain eastern tribes—the Pamunkey in Virginia, the Mohegan and Pequot tribes in Connecticut, and the Massachusetts Indian praying towns).

and those outside the United States—evidenced by James Madison’s proposal to authorize the federal government “[t]o regulate affairs with the Indians *as well within as without* the limits of the U[nited] States.”³⁴¹ Assuming assimilation, no special constitutional provision would be necessary to deal with Indian tribes. It would appear, then, that within the boundaries of the United States there would be two classes of individual Indians—tribal Indians and nontribal Indians. The Framers recognized the first category as “Indians not taxed”—once at the 1789 Founding and once again in the Fourteenth Amendment.³⁴² According to this logic, no constitutional provision was necessary to cover the second category.

The Marshall Court’s jurisprudence reflected this understanding as well.³⁴³ The split Court in *Cherokee Nation v. Georgia*, discussing these points decades after the Founding, appears to have supported this theory.³⁴⁴ Justice Johnson’s assertion that the Cherokee Nation could not be considered a foreign state—or even a nation at all³⁴⁵—perhaps presupposes that the Founders believed (or wished) that the internal Indian tribes would disappear. Chief Justice Marshall’s lead opinion, holding that Indian tribes *did* constitute states (domestic dependent nations),³⁴⁶ does not damage this theory. Chief Justice Marshall implied that perhaps the original understanding was that the Founders believed (or wished) the internal Indian tribes would assimilate, but that the *reality* of the postratification federal Indian policy was to engage these tribes in treaty negotiations and to deal with Indian

341. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 324 (Aug. 18, 1787) (Max Farrand ed., 1911) (emphasis added); *cf.* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) (“In the regulation of trade with the Indian tribes, the action of the law, especially when the constitution was made, was chiefly within a State.”).

342. See generally George Beck, *The Fourteenth Amendment as Related to Tribal Indians: Section I, “Subject to the Jurisdiction Thereof” and Section II, “Excluding Indians Not Taxed,”* 28 AM. INDIAN CULTURE & RESEARCH J. 37 (2004) (examining the phrases “excluding Indians not taxed” and “subject to the jurisdiction” in relation to Sections 1 and 2 of the Fourteenth Amendment).

343. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-20 (1831).

344. *Id.*

345. See *id.* at 25 (Johnson, J., concurring) (“Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a state?”); see also *id.* at 40 (Baldwin, J., concurring in judgment) (“[T]he Cherokees were then dependants, having given up all their affairs to the regulation and management of congress, and that all the regulations of congress, over Indian affairs were then in force over an immense territory, under a solemn pledge to the inhabitants, that whenever their population and circumstances would admit they should form constitutions and become free, sovereign and independent states on equal footing with the old component members of the confederation . . .”).

346. *Id.* at 16-17 (majority opinion).

affairs under the Indian Commerce Clause.³⁴⁷ As such, these internal, nonassimilated Indian tribes retained—and would forever retain—some form of national sovereignty of their own, dependent upon and subservient to the American national sovereignty expressed in the Indian Commerce Clause.³⁴⁸ We now know—absent a future catastrophic alteration of federal Indian law and policy—that the more than 560 federally recognized Indian tribes fit within this category,³⁴⁹ a category that perhaps the 1789 Founders never believed (or wished) would survive and a category that the Founders believed never required a comprehensive constitutional provision.³⁵⁰

Consider finally that the 1789 Founders believed (or wished) that the nonassimilated Indian tribes located in the Western lands would relocate (or be removed) even further west or would become subsumed and assimilate into the United States as the nation added states and territories. These “external” Indian tribes would be subservient to the sovereignty of the United States—as the Trade and Intercourse Acts³⁵¹ and the Doctrine of Discovery implied,³⁵² and *Johnson v. M’Intosh*

347. *Id.* at 16 (“They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.”).

One could argue that the relations between the Americans and Indian tribes *had* to be conducted through treaty negotiations. See Michael Asch, *Lévi-Strauss and the Political: The Elementary Structures of Kinship and the Resolution of Relations Between Indigenous Peoples and Settler States*, 11 J. ROYAL ANTHROPOLOGICAL INST. 425, 436 (2005) (“[T]he concept of ‘Treaty’ is intended to frame the political relationship between indigenous peoples and Canada in a manner that brings Self and Other together while maintaining each other’s autonomy . . .”).

348. Or as the Attorney General’s pithy words asserted, Indians are the “domestic subjects” of the United States. N.D. Houghton, *The Legal Status of Indian Suffrage in the United States*, 19 CAL. L. REV. 507, 510 (1931) (quoting 7 Op. Atty. Gen. 746 (1856)).

349. See generally Hope M. Babcock, *A Civic-Republican Vision of “Domestic Dependent Nations” in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 514 n.323 (2005) (“Indian societies did not disappear by assimilating to the dominate white culture, as predicted, but assimilated to themselves bits and pieces of the surrounding cultural environment. And they remained indubitably Indian, whether their constituents lived in a tight Indian community or commuted between the community and an urban job market.” (quoting D’ARCY McNICKLE, *THEY CAME HERE FIRST* 283 (rev. ed. 1975))).

350. See Newton, *supra* note 18, at 200.

351. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 27, § 1.03[2], at 37-41.

352. See WILLIAMS, *supra* note 263, at 218-21.

explicitly held³⁵³—and perhaps subject, in addition, to the Foreign Affairs Power shared by the President and Congress.

But there are no longer any external Indian tribes—and the provisions in the Constitution dealing with the internal Indian tribes are insufficient. What the 1789 Founders presumed in broad strokes would come to pass—the assimilation and disappearance of Indian tribes—*never happened*. As such, we are left with a Constitution that does not adequately reflect the reality of Indian affairs in modern America. The constitutional provisions that the Court tends to rely upon as the source of federal plenary power—the Indian Commerce Clause, the Treaty Clause, the Property Clause, and even the Foreign Affairs/War Power—might not be sufficient (nor were they intended to deal with the current circumstances). We are left with a *constitutional necessity*, an error in the constitutional drafting based on a false prediction from the 1789 Founders. Hence, a national Indian Affairs Power predating the Constitution as identified by Justice Breyer could be the answer.

However, the *Lara* dictum arouses opposition from those who espouse the original understanding of the Constitution as the only means of interpreting the Constitution. In Professor Saikrishna Prakash's phrasing, "Necessity, however strongly felt, cannot enlarge the Constitution's grants of federal power."³⁵⁴ He found the *Lara* dictum "the most puzzling" of all the theories of the sources for the Indian Affairs Power,³⁵⁵ distinguishing *Kagama's* wardship theory³⁵⁶ and Professor Phil Frickey's international law theory.³⁵⁷ Professor Prakash wrote:

It is hard to see why any government, let alone a government of enumerated powers, would have an "inherent" "preconstitutional power" to completely control another nation. At the extreme, the Supreme Court's claim bizarrely suggests not only that the United States might have an inherent plenary power over other nations (Mexico, Canada?) but also that other nations (Russia, Portugal?) might have the same power over the United States.³⁵⁸

353. 21 U.S. (8 Wheat.) 543, 573-74 (1823); WILLIAMS, *supra* note 263, at 308-17.

354. Prakash, *supra* note 9, at 1103.

355. *Id.* at 1104.

356. *Id.* at 1103-04.

357. *Id.* at 1104 (discussing Frickey, *supra* note 3, at 31, 37, 75-80, 85).

358. *Id.* at 1104-05 (footnote omitted); *see also id.* at 1116 ("[T]he federal government did not acquire a plenary power over Taiwan when it ended diplomatic recognition of the Nationalist government of the Republic of China.").

It appears Professor Prakash attempted to take the *Lara* dictum to a logical extreme as a rhetorical means of disputing the theory, but his argument suffers from the same fatal flaw that befalls all originalists. Like Justice Thomas before him, Professor Prakash is unwilling or unable to recognize the history of federal-tribal relations *because that history is not reflected in the Constitution*.³⁵⁹ The 1789 Framers of the Indian Commerce Clause presumed that American civilization would win out and quash Indian civilization, exterminating Indian tribes as political entities—it simply did not happen.³⁶⁰ Professor Prakash prefers to read the evolution of Article IX's grant of federal power to Congress to the Indian Commerce Clause as a devolution of power by assuming the original understanding of the Clause could be determined through a negative inference,³⁶¹ but such a reading elevates a *negative inference* to a position of authority higher than the *acts* of the 1789 Founders, who exercised a vigorous Indian Affairs Power in the First Congress.³⁶² Originalism renders the Indian Commerce

359. Newton, *supra* note 18, at 200.

360. *Id.*

361. Prakash, *supra* note 9, at 1090 (discussing the Convention's rejection of James Madison's proposal to grant Congress the power to "regulate affairs with the Indians" in favor of the Indian Commerce Clause (internal quotation marks omitted)).

362. See AMAR, *supra* note 101, at 108 n.* ("It also bears notice that the First Congress enacted a statute regulating noneconomic interactions and altercations—'intercourse'—with Indians. Section 5 of this act dealt with crimes—whether economic or not—committed by Americans on Indian lands." (citation omitted)); Akhil Reed Amar, *America's Constitution and the Yale School of Constitutional Interpretation*, 115 YALE L.J. 1997, 2004 n.25 (2006) ("It also bears note that none of the leading clausebound advocates of a narrow economic reading of 'commerce' has come to grips with the basic inadequacy of their reading as applied to Indian tribes, or has squarely confronted the originalist implications of the Indian Intercourse Act of 1790, in which the First Congress plainly regulated noneconomic intercourse with Indian tribes."); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1300 (2006) ("Congress's satisfaction with presidential administration with respect to Indian tribes may simply have mirrored its judgment concerning executive authority with respect to the War and State Departments. From the political perspective of the late eighteenth century, commerce with the Indian tribes may have seemed less like regulating interstate commerce than like some combination of the exercise of the war and foreign affairs powers. Essentially standardless regulatory authority may have been given to the President because Congress understood Indian affairs to be an executive—meaning political—function, but was not sure which executive department should take on the task."); Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 205 (2000) ("The United States Constitution, this country's primary political treatise, acknowledges Indian Nations' unique status through the "'Indian Commerce Clause.'" The Indian Commerce Clause extends a grant of singular authority to Congress to regulate intercourse and trade with Indian tribes, the only minority group explicitly mentioned in the Constitution. Just as the Foreign Nations Clause provides for federal control of commercial relations with foreign nations, the Indian Commerce Clause in effect

Clause all but an absurdity. Surely, the Founders could not have understood a provision of the Constitution in this manner.

Finally, the *Lara* dictum should not be such a difficult pill to swallow. Consider the most important objections to the theory of a preconstitutional Foreign Affairs Power (or any inherent power): “The assertion of inherent power in the president threatens the doctrine of separated powers and the system of checks and balances. Sovereignty moves from the constitutional principles of self-government, popular control, and republican government to the White House.”³⁶³ No threat of tyranny or other harm to the rights of the people exists in the exercise of the Indian Affairs Power, which has been exercised by Congress *aggressively* since 1790.³⁶⁴

V. CONCLUSION

The Supreme Court has always sidestepped the question of the extent and source of the authority of Congress and the Executive branch to deal with Indian affairs. But recent cases, such as *Lara*,³⁶⁵ suggest that some Justices are ready to make a sweeping decision about the Indian Affairs Power. Moreover, these Justices would attempt to bring Indian law into conformity with the rest of American public law and Commerce Clause jurisprudence.³⁶⁶ It would be a serious misreading of the original understanding and subsequent history of federal Indian law to make that determination.

Yet, the cases that could afford the Court this opportunity to turn Indian law on its head may already be in the pipeline. While *Lara* seemed to answer the question in the context of the congressional authority to affirm tribal criminal jurisdiction over nonmember Indians, the Court left open the question of whether Congress can authorize a domestic sovereign to prosecute American citizens without the full array of criminal procedural rights.³⁶⁷ The Court may be asked

recognizes the tribes’ unique position as quasi-sovereign nations-within-a-nation, and shields them from state and local interference.” (footnotes omitted)).

363. Fisher, *supra* note 1, at 2.

364. In fact, Congress has delegated massive authority to the Executive branch. See 25 U.S.C. § 2 (2000).

365. 541 U.S. 193, 200-02 (2004).

366. See generally Frickey, *supra* note 26, at 435 n.14 (exploring judicial frustration with the “complexities” and “insignificance” of federal Indian law).

367. Compare Troy A. Eid, *Beyond Oliphant: Strengthening Criminal Justice in Indian Country*, 54 FED. LAW., Mar./Apr. 2007, at 40, 44-46 (arguing for tribal authority to prosecute non-Indians who commit crimes on Indian lands while retaining defendants’ constitutional rights), with Elizabeth Ann Kronk, *Promoting Tribal Self-Determination in a*

to address the constitutionality of the Indian Child Welfare Act³⁶⁸ and federal statutes and regulations authorizing the Secretary of Interior to take land into trust for the benefit of Indians and Indian tribes.³⁶⁹ The constitutionality of these statutes, assuming they are declared unconstitutional at some point in the future, implicates the constitutionality of still other statutes—including the Major Crimes Act, the focal point of federal criminal jurisdiction in Indian Country.³⁷⁰ Regardless, perhaps the Court will continue to base its understanding of congressional plenary power over Indian affairs in the Indian Commerce Clause. But as some scholarship suggests, this is a weak source of authority.³⁷¹

If the Court were serious about locating a source of the Indian Affairs Power, then it should at the very least engage its “original understanding” search engines and find whether a source of authority exists outside of the Indian Commerce Clause or the structure of the Constitution. It has yet to do so and may be surprised at what it finds.

Post-Oliphant World: An Alternative Road Map, 54 FED. LAW., Mar./Apr. 2007, at 41, 41, 43 (arguing for the same right without Western notions of criminal justice).

368. See, e.g., *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 723-31 (Ct. App. 2001).

369. See, e.g., *Carcieri v. Kempthorne*, 497 F.3d 15, 39-43 (1st Cir. 2007) (en banc), *petition for cert. filed*, 76 U.S.L.W. 3226 (U.S. Oct. 18, 2007) (No. 07-526).

370. See generally Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 741-74 (2006) (exploring the constitutional implications of the Major Crimes Act in the context of jury composition, publicity, and venue).

371. See Prakash, *supra* note 9, at 1087-90.