

ARTICLES

Black Men, Red Men, and the Constitution of 1787: A Bicentennial Apology From a Middle Templar*

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Introduction

Amid all the excitement surrounding the bicentennial of the United States Constitution, it is not inappropriate to remember two of the Framers' most serious oversights: the exclusions of the Black and Native American populations from the body politic.¹ The two races then accounted for more than one quarter of the total population existing 200 years ago.²

* In large part, this Article is an edited version of a lecture delivered at the University of Essex, Wivenhoe, England, in November 1981.

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1. Justice Thurgood Marshall eloquently discussed the constitutional exclusion of the black man last year. See Justice T. Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Ass'n, Maui, Hawaii (May 6, 1987), published as *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

2. According to the Census of 1790, the total population of the United States (then bounded on the west by the Mississippi and excluding Florida) was just under four million, including 700,000 black slaves. See, e.g., 1 S. MORISON, H. COMMAGER, & W. LEUCHTENBURG, *THE GROWTH OF THE AMERICAN REPUBLIC* 262 & n.1 (7th ed. 1980) [hereinafter S. MORISON]. These figures do not take into account the tribal Indians living within the borders of the New Republic; their number is only estimated here. It has been surmised that there were some one or two million Indians in North America in the sixteenth century, most of them presumably east of the Mississippi. *THE AMERICAN HERITAGE BOOK OF INDIANS* 110 (A. Josephy ed. 1961). In 1900, the Indian population of the United States was only 250,000, but this represented a radical reduction of the total from a century earlier, attributable to intervening "disease, conquest, mass executions, oppression, decay and assimilation." *Id.* at 403. Today, the Indian population is about one million. D. GETCHES, D. ROSENFELT & C. WILKINSON, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 7 (1979). The total population of the so-called Civilized Tribes in the lower South (Creeks, Choctaws, Chickasaws, and Cherokees, but not the Seminoles in Florida) is fairly accurately fixed at just over 60,000 in 1800. J. SWANTON, *EARLY HISTORY OF THE CREEK INDIANS AND THEIR NEIGHBORS* 438, 442-43, 449, 451, 456 (1922); G. FOREMAN, *THE FIVE CIVILIZED TRIBES* 7, 211 (1934). Given these widely separated landmarks, it seems not unreasonable to guess at an

The Framers promulgated these exclusions behind the backs of the Blacks and Native Americans, whom they did not invite to the Philadelphia Convention. Nor were there any women—which may have affected the outcome of the issues discussed below.³ But there were lots of lawyers. Out of the fifty-five delegates who attended,⁴ almost two-thirds had been trained in the law—even if they were not all practicing lawyers.⁵ And five of these had been called to the bar by the Honourable Society of the Middle Temple in London.⁶

When I say Blacks and Native Americans were “excluded from the body politic,” I do not mean merely that they were denied the franchise. At that time, the right to vote was universally restricted to propertied adult *males*⁷ and was left to the states to regulate.⁸ Rather, the Constitution of 1787 excluded black and red people in a much more fundamental sense: they were not deemed citizens of the United States. They had no civil rights except as conceded to them by the states, and thus enjoyed no constitutional protection from ill treatment at the hands of federal or state authorities. The drafters of the Constitution affirmed the status of Blacks as chattel and Native Americans as aliens in their own land. These were serious scars on the fundamental charter of the new nation, which loudly proclaimed the liberty and equality of man.

Most students of American history have apologized for the Framers by arguing that they were prisoners of their time. On the slave trade, Professor Brogan has written: “It might have been better for the United

Indian population of some 500,000 in 1790, within the then-existing boundaries of the United States.

3. It is worth speculating whether the presence of Abigail Adams, the wife of John Adams, whose intellect was much respected by Jefferson and others, would have made a difference. As early as 1774, she had stressed the inconsistency between the fight for freedom and the continuance of black slavery. P. BERGMAN, *THE CHRONOLOGICAL HISTORY OF THE NEGRO IN AMERICA* 48 (M. Bergman comp. ed. 1969). She might have shamed the male delegates into bolder action.

4. See A. PRESCOTT, *DRAFTING THE FEDERAL CONSTITUTION* 20-22 (1941).

5. W. MURPHY, *THE TRIUMPH OF NATIONALISM* 56 (1967); C. ROSSITER, *1787: THE GRAND CONVENTION* 147 (1966).

6. These were the following: Jared Ingersoll of Pennsylvania, C. ROSSITER, *supra* note 5, at 107, John Dickinson of Delaware, *id.* at 110, John Blair of Virginia, *id.* at 122, John Rutledge, *id.* at 130-31, and General Charles Cotesworth Pinckney, *id.* at 131, both of South Carolina. The Inner Temple contributed William Houston of Georgia, *id.* at 135-36. Then, as now, the Middle Temple and the Inner Temple were two of the four English Inns of Court, responsible for training would-be barristers and ultimately admitting them to practice.

7. See P. STOREY, *OUR UNALIENABLE RIGHTS* 47-49 (1965).

8. The only federal officers to be chosen by direct popular election under the original Constitution were Representatives. But the relevant provision specified that “the Electors in each State”, for this purpose, were to have “the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” U.S. CONST. art. I, § 2, cl. 1.

States if it had been taken up and disposed of in 1787, once and for all; but it was not possible.”⁹ Others might conclude, pointing to the evasion of the post-Civil War amendments in the case of Blacks and the hundred broken treaties in the case of the Indians, that subsequent history would have been no different if the Constitution had treated Blacks and Native Americans more generously.

I am not convinced on either point. I think the Founding Fathers could have used their skills to avoid or at least substantially attenuate two cruel and degrading aspects of our history. Law cannot overcome all social pressures and prejudices, but, if stated with unequivocal clarity, it can withstand a great many—especially in a country where the federal courts are usually willing to take on unpopular causes. I will consider whether it is realistic to suppose that the Framers might have dealt with Blacks and Native Americans in a significantly different way.

I distinguish between the two cases. The Framers’ treatment of the Blacks and Indians demonstrated the common prejudice of the time against non-white people, and the common idea that the black and red men were “children of nature” or “savages.” But beyond excluding the two races from the body politic, the Constitution deals very differently with Blacks and Indians. The operative causes are not the same. Furthermore, the resulting treatment of each race was quite distinct. I shall accordingly look separately at the two racial situations.

I. The Constitution and the Black Man

The Constitution does not explicitly draw any racial line excluding the Blacks. The relevant provisions of the original charter¹⁰ deal with slaves of any color. Indian slavery had, however, been abandoned in the North American colonies for years, and white slavery was unknown. The Constitution thus can only mean Blacks when it refers to “other Persons” who are neither “free” nor merely “bound to Service for a

9. H. BROGAN, *LONGMAN HISTORY OF THE UNITED STATES OF AMERICA* 205 (1985).

10. U.S. CONST. art. I, § 2, cl. 3 provides, in part, that apportionment of representatives to Congress and for direct taxes “shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.” U.S. CONST. art. I, § 9, cl. 1 provides:

The Migration or Importation of Such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year [1808], but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

U.S. CONST. art. IV, § 2, cl. 3 provides:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Term of Years.”¹¹ The Constitution also does not expressly discriminate against Blacks who are *not* slaves. However, this did not deter Chief Justice Taney, writing for the majority some seventy years later in the infamous *Dred Scott* case.¹² He found that free Blacks, just like slaves, were not intended by the Framers to be included as “a portion of [the] people,”¹³ “constituent members of [the] sovereignty,”¹⁴ or “citizens of the United States”,¹⁵ but were regarded as “so far inferior, that they had no rights which the white man was bound to respect”¹⁶ Regardless of the correctness of Justice Taney’s assertions, it is obvious that the status of free Blacks—then numbering only some 60,000¹⁷—was substantially affected and overshadowed by the sanction given to the slavery of approximately three quarters of a million black brothers.¹⁸

A. The Apportionment Clause

The Constitution first defines black slaves at the beginning of the document. They are delicately referred to as “other Persons” other than “free Persons,” persons “bound to Service for a Term of Years,” and “Indians not taxed.”¹⁹ Slaves were counted to the extent of “three-fifths” of a person in computing the number of Representatives each state could send to Congress and the proportion of “direct taxes” it could be asked to contribute to the national government.²⁰

Six months later, in *The Federalist*,²¹ James Madison bravely sought to justify this odd formula by noting that a slave was, under law, regarded as both property and person but not wholly either. He claimed it was reasonable to treat “the *slave* as divested of two-fifth of the *man*,” and therefore, as three-fifths of a person.²² More modern commentators view the apportionment as a simple compromise, combining the advan-

11. U.S. CONST. art. I, § 2, cl. 3. Indians were also excluded from the category of “other Persons.” See *supra* note 10.

12. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). In *Dred Scott*, the Court extended constitutional protection to slaveholders’ property rights, under a substantive due process theory. The Court held that neither Congress nor the states had power to grant citizenship to slaves or their descendants.

13. *Id.* at 404.

14. *Id.*

15. *Id.*

16. *Id.* at 407.

17. Franklin, *A Brief History of the Negro in the United States*, in 1 THE AMERICAN NEGRO REFERENCE BOOK 48 (J. Davis ed. 1966); P. BERGMAN, *supra* note 3, at 68.

18. See *supra* note 2.

19. U.S. CONST. art. I, § 2, cl. 3. See *supra* note 10.

20. U.S. CONST. art. I, § 2, cl. 3. See *supra* note 10.

21. THE FEDERALIST NO. 54 (J. Madison) (J. Cooke ed. 1961).

22. *Id.* at 367-69.

tage to the South of increasing their representation with the penalty of similarly increasing their monetary contribution.²³ But the matter was not so straightforward.

The "three-fifths" question was only a subissue in the main debate about how "national" the new government should be²⁴—a question finally resolved by treating the states as equal in one branch of the Legislature (the Senate) and unequal in the other (the House of Representatives).²⁵ Although the subissue itself occupied many days of discussion,²⁶ its resolution was more an accident than intended. There was much floundering, considerable posturing, a few moments of true eloquence, some apparently contradictory votes,²⁷ and every opportunity for a determined and far-sighted schemer to sell an innocuous solution. Several alternatives were possible, and many of them were mentioned,²⁸ but no one really took the lead. The obvious resolution, agreeable to the southern states, was to make both taxes and representation depend on the total population, without separate reference to the slaves.²⁹ This solution made no appreciable difference in the voting power of the slave states at that time and avoided the express constitutional recognition of slavery.

Although there was plainly no chance of achieving a constitutional abolition of slavery if the southern states were to be part of a Union, the delegates from the North, especially those who spoke out against condoning black slavery, most likely saw some virtue in counting the slaves as whole "inhabitants." Counting the slaves as whole, and not fractional, inhabitants would have added only six members to the southern bloc over the next dozen years. This addition would not have created a major-

23. See H. BROGAN, *supra* note 9, at 205-06.

24. For a discussion of the three-fifths question as a subissue of the debate over representation of the States in the national government, see E. DUMBAULD, *THE CONSTITUTION OF THE UNITED STATES* 70-71 (1964).

25. For a discussion of the debate and the resolution, called the Great Compromise, see C. ROSSITER, *supra* note 5, at 186-95, 196-97. See also E. DUMBAULD, *supra* note 24, at 68-73.

26. See E. DUMBAULD, *supra* note 24, at 68-73.

27. W. MURPHY, *supra* note 5, at 184-87; E. DUMBAULD, *supra* note 24, at 68-73.

28. See E. DUMBAULD, *supra* note 24, at 70-71; see also W. MURPHY, *supra* note 5, at 185.

29. Even after taxation and representation had been tied together, South Carolina, joined by Georgia, urged counting the whole number of slaves for apportionment purposes. See 1 M. FARRAND, *THE RECORDS OF THE FEDERAL CONSTITUTIONAL CONVENTION OF 1787*, at 596 (rev. ed. 1966). Perhaps these states rightly foresaw that, at least for the next century, there would be no "direct taxes" imposed by Congress, federal revenue being raised instead by excise taxes and duties.

ity vote for the southern states.³⁰ Moreover, the northern states had the immediate prospect of increasing the imbalance in their favor when new states were carved out of the Northwest Territory, where slavery was banned by the Northwest Ordinance of 1787.³¹ Finally, conceding on the southern representation claim might have gained the northern states a few credit points in the subsequent argument on the slave trade.

Why was this solution, or some other scheme that avoided constitutional recognition of slavery, not embraced?³² In part, the answer lies with precedent. The three-fifths formula, although never ratified by the state legislatures, had been put forward six years earlier by an almost unanimous Continental Congress. It was first proposed as an amendment to the Articles of Confederation in an effort to substitute population for landed wealth as the basis for taxing the states.³³ The Framers easily utilized an already familiar formula³⁴ to apply to representation as well as taxation.³⁵

30. The apportionment of Representatives, on the basis of the 1790 Census and the three-fifths rule, was made by the Act of Apr. 14, 1792, ch. 23, 1 Stat. 253, to take effect for the Third Congress, starting March 3, 1793. Using the formula specified in this Act—one Representative for every 33,000 inhabitants—the result of counting slaves as whole persons would have been to accord one additional Representative each to Maryland, North Carolina, and South Carolina, and three to Virginia, with no change for Georgia or Delaware. Thus, the “Southern bloc”, including an arbitrary two Representatives for Kentucky, *see* Act of Feb. 25, 1791, ch. 9, 1 Stat. 191, would have had a total of 54 votes, as against 57 for the other States, including those of an arbitrary two Representatives for Vermont. *Id.* The admission of Tennessee in 1796, with only one Representative through 1803, did not measurably alter the Northern advantage. *See* BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS 1774-1927, at 39, 57, 62, 71 (1928) [hereinafter BIOGRAPHICAL DIRECTORY].

31. A complete reprint of the original Northwest Ordinance appears in 23 JOURNALS OF THE CONTINENTAL CONGRESS 334-43 (1936). The full text of the ordinance is also reprinted as a note in the Statutes at Large on the occasion of its reenactment by Congress after the ratification of the Constitution. *See* 1 Stat. 51(a) (1789). In 1787, it was probably assumed that the regime of the Northwest Ordinance would also be applied to any ceded territory south of the Ohio River. But the North would have retained a comfortable majority under a rule counting the full number of slaves, at least through 1820, despite the admission of Kentucky, Tennessee, Mississippi, and Alabama as slave States. *See* BIOGRAPHICAL DIRECTORY, *supra* note 30, at 39.

32. It could have been possible to avoid a constitutional recognition of slavery by basing representation on citizenship or the right of suffrage as determined by each state.

33. Act of Apr. 18, 1783, to Amend Art. VIII, 24 JOURNALS OF THE CONTINENTAL CONGRESS 260-61 (1922). *See* E. DUMBAULD, *supra* note 24, at 47 n.51, 70, 190 n.25; 3 M. FARRAND, *supra* note 29, at 160.

34. *See, e.g.*, 3 M. FARRAND, *supra* note 29, at 160.

35. *See* B. MITCHELL & L. MITCHELL, A BIOGRAPHY OF THE CONSTITUTION OF THE UNITED STATES 11-12 (2d ed. 1975). In the context of monetary contributions, of course, the interests of North and South were reversed. Since representation in the Continental Congress was to remain equal under the Articles of Confederation art. V (1781, repealed 1787), the slave states initially opposed counting slaves at all while the North wanted them fully counted. The fractional counting compromise resulted. For an earlier debate respecting the propriety of

The decisive factor against treating slaves as full inhabitants was the short-sightedness of the outspoken enemies of slavery, lawyers from Massachusetts and Pennsylvania. Thus, Gouverneur Morris, in the midst of an impassioned speech against the constitutional sanctioning of slavery, objected to Southerners counting the slaves as inhabitants, fractionally or otherwise. He insisted that "the people of Pennsylvania would revolt at the idea of being put on a footing with slaves."³⁶ While demonstrating a lawyer's versatility in fashioning arguments, Morris hardly dealt a telling blow for abolition. Indeed, he effectively invited the compromise ultimately accepted. The truth is that certain Framers did not try very hard to avoid giving slavery the imprimatur of the Constitution. At the very least, they could easily have improved the Apportionment Clause.

B. The Fugitive Slave Clause

Article IV of the Constitution stipulates that, notwithstanding the law of the asylum state, any fugitive "person held to service or labor" shall be delivered up to his master.³⁷ While this clause was undoubtedly aimed at fugitive slaves, it is equally applicable to indentured servants and therefore does not constitute an express constitutional recognition of black slavery.

Justice Story later wrote that this clause "constituted a fundamental article, without the adoption of which the Union could not have been formed."³⁸ This statement was probably an effort to excuse the acquiescence of the Founding Fathers from his native Massachusetts. But the indications are that the so-called Fugitive Slave Clause was not inevitable. No comparable provision existed under the Articles of Confederation.³⁹ South Carolina's eleventh-hour proposal of the Clause was accepted with hardly a whimper presumably because the delegates were exhausted by other disputes.⁴⁰ In short, the opponents of slavery were simply caught napping. Again, this was an avoidable mistake.

counting slaves if population were to be the basis of financial contributions, see M. JENSEN, *THE ARTICLES OF CONFEDERATION* 145-50 (1963).

36. 1 M. FARRAND, *supra* note 29, at 583. See also *id.* at 593.

37. U.S. CONST. art. IV, § 2, cl. 3. See *supra* note 10.

38. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 611 (1842).

39. See 3 M. FARRAND, *supra* note 29, at 325. The Northwest Ordinance, adopted by the Continental Congress on July 13, 1787, however, *did* contain such a clause. Art. VI, 1 Stat. 51(a), 53 (1789). See *supra* note 31.

40. See 2 M. FARRAND, *supra* note 29, at 443, 446, 453-54, 628.

C. The Slave Trade Clause

Short of achieving the political impossibility of abolishing slavery within the Union, the most promising idea debated at the 1787 Convention was the immediate halt of the importation of new slaves. This constituted perhaps the largest missed opportunity if, as I believe, it was possible to end the slave trade straightaway.

The Constitutional provisions concerning the slave trade are quite startling and entirely one-sided. Article I contains the Constitution's main clause on the subject.⁴¹ In an unusual prohibition on Congressional action, it prohibited the legislature from stopping the importation of slaves until 1808. Article V is even more extraordinary. It states that the Constitution itself could not be amended to remove the prohibition in Article I prior to 1808,⁴² and thereby assured that the will of the majority of the people on this matter would not prevail.

As the provisions suggest, these clauses do not represent a consensus. As early as 1775 the Continental Congress had prohibited the importation of slaves,⁴³ and in 1787 ten states banned slave traffic.⁴⁴ It would have been easy for the majority to outvote the three dissenting states, North Carolina, South Carolina, and Georgia. Indeed, some sentiment existed for either writing an immediate prohibition of the slave trade into the Constitution or omitting any provision regarding slave trade and leaving the issue to Congress,⁴⁵ where the votes would be sufficient to impose the ban. Despite their overwhelming majority, the reformers conceded a twenty-year moratorium on any interference in response to the Carolinas' and Georgia's threat to refuse to join the new Union.⁴⁶ It seems that the reformers were "had" by clever lawyers, especially two Middle Templars from South Carolina, John Rutledge and General Charles Cotesworth Pinckney.⁴⁷

41. U.S. CONST. art. I, § 9, cl. 1. *See supra* note 10.

42. U.S. CONST. art. V.

43. Franklin, *supra* note 17, at 34; 1 S. MORISON, *supra* note 2, at 218-19. This ban was extended for the duration of the Revolutionary War by direction of the Congress in April 1776. H. BROGAN, *supra* note 9, at 185.

44. 1 S. MORISON, *supra* note 2, at 218-19, 245; W. JORDAN, *WHITE OVER BLACK* 373 (1969).

45. *See* B. MITCHELL & L. MITCHELL, *supra* note 35, at 106-07; *see also* W. MURPHY, *supra* note 5, at 185.

46. 2 M. FARRAND, *supra* note 29, at 364, 371-72. *See also* C. ROSSITER, *supra* note 5, at 268.

47. 2 M. FARRAND, *supra* note 29, at 364, 371-72. *See also* C. ROSSITER, *supra* note 5, at 268. For a discussion of Rutledge's and Pinkney's affiliation with the Middle Temple, *see supra* note 6 and accompanying text.

The Slave Trade Clause was quietly introduced by Rutledge, the chairman, as part of the report of the Committee of Detail on August 26.⁴⁸ Interestingly, the most vocal objection to thus vindicating slavery came from delegates of the Upper South: Luther Martin of Maryland,⁴⁹ John Dickinson, a Middle Templar from Delaware,⁵⁰ George Mason and Madison of Virginia.⁵¹ The New Englanders, such as Oliver Ellsworth⁵² and Roger Sherman,⁵³ seemed content to let the Clause lie. Perhaps they were influenced by the possibility of trading such a concession for the removal of the proposed impediments to the enactment of so-called "navigation acts."⁵⁴ Ultimately the most influential factor was the persistent threat of the most southern states to refuse to join the new Union if they did not get their way.⁵⁵

At the same time, some of the southern states suggested that, if they were left alone, their states might ban slave trade voluntarily.⁵⁶ James Wilson of Pennsylvania encouraged calling their bluff: "If South Carolina and Georgia were themselves disposed to get rid of the importation of slaves in a short time, they would never refuse to Unite because the importation might be prohibited."⁵⁷ Rufus King of Massachusetts added that the "Northern and middle States" could no more acquiesce in the clause than the Deep South claimed they could not live without it.⁵⁸ But no one was listening. Indeed, with practically no fuss, General Pinckney was later able to extend constitutional protection for the slave trade eight years beyond the original date to 1808.⁵⁹ John Rutledge, the other Middle Templar representing South Carolina, secured with equal ease the Article V provision against any amendment of the Constitution on this score.⁶⁰

I suggest that the result could have been otherwise. By 1787, every state, except the three most southern, had absolutely prohibited the im-

48. 2 M. FARRAND, *supra* note 29, at 177, 183. See also E. DUMBAULD, *supra* note 24, at 185.

49. 2 M. FARRAND, *supra* note 29, at 364.

50. *Id.* at 372.

51. *Id.* at 370, 415, 417.

52. *Id.* at 364, 370-71, 375.

53. *Id.* at 369-70.

54. Navigation acts, in the usage of the time, could take the form of tariffs, quotas, preferences for American merchant shipping, and the like. See, e.g., C. ROSSITER, *supra* note 5, at 209-10, 215-18; H. BROGAN, *supra* note 9, at 205-06.

55. 2 M. FARRAND, *supra* note 29, at 364, 371-73, 415-16.

56. *Id.* at 365, 372.

57. *Id.* at 372.

58. *Id.* at 373.

59. *Id.* at 415-16.

60. *Id.* at 559.

portation of slaves from overseas, and even North Carolina had imposed a substantial duty.⁶¹ South Carolina banned the trade later that year, and renewed the ban until 1803.⁶² Even Georgia followed suit in 1798.⁶³ Were these three states merely bluffing? One cannot suppose they would have stayed apart over this issue, especially considering the weakness of their isolation on the southern Atlantic coast, with a white population of less than half a million between them.⁶⁴ Had their bluff been called, subsequent history might have been very different.

D. The Missing Territorial Clause

I turn, finally, to what I call the "Missing Territorial Clause." The Northwest Ordinance of 1787,⁶⁵ enacted under the Articles of Confederation, banned slavery from the territory then belonging to the federal government and required any state formed out of that territory to forswear slavery forever.⁶⁶ The Ordinance had been adopted by the Continental Congress while the Convention was sitting and was doubtless known to the delegates. Yet no one at the Convention questioned the propriety or the continuing effectiveness of this stipulation. Accordingly, the question arises whether a like provision could have been introduced into the Constitution. Such a Territorial Clause could have governed not only the Northwest, but any further territory acquired by the United States as well, whether by cession from the original states or by treaty with foreign nations.

The idea was never broached out loud, although one would suppose it might have occurred when the Convention was considering the admission of new states⁶⁷ or the power of Congress over the territories.⁶⁸ Presumably some delegates thought they were empowering Congress to ban slavery in any territory, present or future, through the clause that conceded to the national legislature the authority to "make all needful Rules

61. 1 S. MORISON, *supra* note 2, at 245.

62. W. JORDAN, *supra* note 44, at 318, 373; 1 S. MORISON, *supra* note 2, at 245.

63. 1 S. MORISON, *supra* note 2, at 245.

64. According to the United States Census Bureau, the total population, black and white, of North Carolina, South Carolina, and Georgia in 1780 was 270,133, 180,000, and 56,071, respectively. The black population of those States at that time was 91,000, 97,000, and 20,831, respectively. 2 HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIME TO 1970, BICENTENNIAL EDITION 1168 (U.S. Bureau of Census 1975). Thus, the total white population in the region in 1780 was 297,313 people.

65. *See supra* note 31.

66. The territory consisted of the area between the Ohio River, the Mississippi, and the Great Lakes. Northwest Ordinance art. V, 1 Stat. 51(a), 53 (1789). *See supra* note 31.

67. U.S. CONST. art. IV, § 3, cl. 1.

68. U.S. CONST. art. IV, § 3, cl. 2.

and Regulations respecting the Territory . . . [of] the United States.”⁶⁹ Congress consistently acted on that premise through 1850.⁷⁰ But history would soon reveal two problems with this silent approach. First, judges bent on supporting slavery could read the Territorial Clause to be applicable only to the territory of the nation when the Constitution was adopted in 1789, the Northwest.⁷¹ Secondly, a divided and harassed Congress would be tempted to compromise by continually balancing the admission of “free” states with others where slavery was welcome.⁷² Indeed, in 1790 the very first Congress, after re-enacting the Northwest Ordinance of 1787,⁷³ capitulated to North Carolina’s insistence that the cession of its western lands, the future Tennessee, should *not* be subject to the anti-slavery provisions of the Northwest Ordinance.⁷⁴ Similarly, when Kentucky was carved out of Virginia a year later, the spirit of the compromise dictated that there be no prohibition of slavery⁷⁵ or mention of the question in debate.⁷⁶

The only hope at the Convention of 1787 was to seize the moment to end the spread of slavery. It could not have been done without a fight. However, that does not mean that it could not have been done. After all, in 1787, the only future territories in view were the Kentucky region of Virginia and the western lands of North Carolina, later Tennessee, and of Georgia, later Mississippi and Alabama.⁷⁷ Virginia probably would have *supported* a generalized Territorial Clause, and while the other two states would have complained, they might have conceded eventually and swallowed hard on the false pretense that they could refuse to make any cession to the federal government. A persuasive advocate, I submit, could

69. U.S. CONST. art. IV, § 3, cl. 2.

70. See, for example, H. FAULKNER, *AMERICAN AND POLITICAL SOCIAL HISTORY* 225, 375, 377, 382-86 (7th ed. 1957), for a discussion of the Missouri Compromise of 1820, ch. 22, 3 Stat. 545, the Joint Resolution of 1845, S.J. Res. 8, 28th Cong., 2d Sess., 5 Stat. 797 (admitting Texas into the Union), the Territorial Act of 1848, ch. 177, 9 Stat. 323 (creating the Oregon Territory), and the Compromise of 1850, chs. 49-51, 9 Stat. 446-58 (admitting California into the Union and creating the Utah and New Mexico Territories).

71. A majority of the Supreme Court, led by Chief Justice Taney in 1857, so read the Territorial Clause contrary to prior and later opinion. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 432 (1857).

72. See sources cited *supra* note 70.

73. 1 Stat. 50 (1789).

74. See 2 *ANNALS OF CONG.* 1477, 2203-2212 (1790); Act of Apr. 2, 1790, ch. 6, 1 Stat. 106. See also the Act of May 26, 1790, ch. 14, 1 Stat. 123, effectively making the Northwest Ordinance applicable to the territory of the United States south of the Ohio River “except so far as is otherwise provided” in the Act accepting the North Carolina cession.

75. Act of Feb. 4, 1791, ch. 4, 1 Stat. 189.

76. See 2 *ANNALS OF CONG.* 1731, 1742, 1745, 1862, 1885 (1790).

77. See 10 A. McLAUGHLIN, *THE AMERICAN NATION: A HISTORY* 123-37 (1905).

have pushed through a generalized version of the anti-slavery clause of the Northwest Ordinance.

Even if their brothers Rutledge and Pinckney had opposed them, there were three Middle Templars who might have carried the cause. One was John Dickinson of Delaware, a "man of Continental reputation"⁷⁸ who had spoken out against leaving the states free to continue the slave trade,⁷⁹ but had not taken up the idea of preventing *internal* slave traffic. Another was John Blair of Virginia, a very able and senior delegate who later served on the Supreme Court. Unfortunately, he never spoke a word on any subject during the Convention.⁸⁰ Finally, there was Jared Ingersoll of Pennsylvania, described by a fellow delegate as "a very able Attorney, with a clear legal understanding,"⁸¹ and, more recently, as "probably the ablest jury lawyer in Philadelphia."⁸² He also never spoke, however, until the very last day of the Convention and by then the damage had been done.⁸³ But one must not expect lawyers to innovate. While they *re-act* well and quickly and even fashion new arguments in support of their case, they first must be handed a brief. In this instance, there was no proposal put forward and an opportunity was lost.

E. What Might Have Been

It is wholly fanciful to imagine the Framers drafting a provision emancipating all slaves. However, if they had restricted slavery in the several ways I have suggested, instead of expressly condoning and protecting the institution, it might have withered much sooner and without a Civil War. Confining slavery to Maryland, Delaware, Virginia, the Carolinas and Georgia would have isolated these states, perhaps forcing them to abandon the practice long before 1865.

A much more limited slave population, restricted by the ban on the trade, successful escapes, and the absence of demand from new slave states, would have presented less of a problem for emancipation. We must remember that beyond an economic justification for the institution,⁸⁴ slavery was perpetuated by fear of the free black man.⁸⁵ A smaller

78. C. ROSSITER, *supra* note 5, at 109.

79. 2 M. FARRAND, *supra* note 29, at 372-73. *See also id.* at 416 (moving to amend the Slave Trade Clause to confine it to States which had not themselves prohibited the importation of slaves).

80. W. MURPHY, *supra* note 5, at 70.

81. Pierce, *Character Sketches of Delegates to the Federal Convention*, in 3 M. FARRAND, *supra* note 29, at 87, 91.

82. W. MURPHY, *supra* note 5, at 92.

83. *Id.* *See also* 2 M. FARRAND, *supra* note 29, at 647.

84. 1 S. MORISON, *supra* note 2, at 245-46.

85. *See, e.g.,* W. JORDAN, *supra* note 44, at 122-35, 406-11.

number of slaves to be freed, the prospect of black migration to work in neighboring free states with similar soil and climate,⁸⁶ and even the possibility of black emigration to Africa would have lessened the anticipated problem of the "freedman." But the greatest potential for shortening the shamefully long life of American slavery lay in the powers of the Constitution, which regretfully, were untapped.⁸⁷

II. The Constitution and the Red Man

Although prior history restricted the Framers' options for treatment of Native Americans, I submit that here, too, an opportunity was lost. In this instance, however, mistakes were made due to the Framers' lack of foresight.

For at least half a century before the Constitutional Convention of 1787, the British Crown and the American Colonies had treated as independent sovereigns the Indian tribes who were their neighbors, notably the powerful Iroquois Confederacy known as the Six Nations and the looser confederacies led by the Delaware, the Creeks, or the Cherokees. They engaged in wars, alliances, conferences, and treaties with all the formalities reserved for foreign powers.⁸⁸ This was not artificial etiquette or gratuitous generosity; it was realism. At first the tribes simply outnumbered the colonists.⁸⁹ Later, although numerically less important, the tribes learned to play the French against the English and vice-versa.⁹⁰ Thus, their military standing and, consequently, their grievances had to be taken seriously.

In 1754, the British government summoned delegates from most of the Colonies to Albany, New York to hear the complaints of the Six

86. Hypothetically, this would include Kentucky, Tennessee, Alabama, Mississippi, Louisiana, Florida, Arkansas, Texas, and Missouri.

87. Cf. J. POLE, *FOUNDATIONS OF AMERICAN INDEPENDENCE 1783-1815*, at 148-49 (1972), pointing to the "formative influences" of the Northwest Ordinance in the Ohio Valley.

88. See A. VAUGHAN, *NEW ENGLAND FRONTIER* 109-21 (1965); W. WASHBURN, *THE INDIAN IN AMERICA* 81 (1975); see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831):

[Indians] have been uniformly treated as a State, from the settlement of our country. The numerous treaties made with them by the United States, recognise [sic] 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.

89. See Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 40-41 (1947).

90. See generally *THE AMERICAN HERITAGE BOOK OF INDIANS* 187-202 (A. Joseph ed. 1961).

Nations.⁹¹ The Albany Congress ultimately devised a plan of union, the main object of which was to avoid such problems for the future by confining all relations with the Indians to a central government.⁹² When this plan failed to win acceptance by the colonial legislatures, the Crown issued the famous Proclamation of 1763, which forbade settlement beyond a line drawn along the Appalachian Mountains and required Crown authority for any land purchase from the Indians.⁹³

The Revolution ended the regime of the Proclamation, which, in fact, had already been attenuated.⁹⁴ But the problem persisted and suggested the same solution. Both in the North and among the so-called Civilized Tribes of the South⁹⁵ there were Indian groups who sided with the British Crown, or who threatened to do so. It remained important for the revolutionaries to gain allies and prevent the increase of Indian adherents to the British side. To that end, the Articles of Confederation sought to centralize Indian affairs in the national government.⁹⁶ Arguably going beyond its authority under the Articles, the Congress repeatedly attempted to end dealings with the tribes by individual states, as well as private land cessions.⁹⁷

91. See R. NEWBOLD, *THE ALBANY CONGRESS AND PLAN OF UNION OF 1754*, at 22-24, 49-51, 57-67, 173-74 (1955). These complaints mainly concerned private land cessions, and white settlements without benefit of sale. *Id.* at 64-66.

92. *Id.* at 93-94, 127-30, 186, 191.

93. Well before the Proclamation, the British Government in London had taken steps in the same direction. *Id.* at 71, 173-76; F. PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 11-13* (1962); J. KINNEY, *A CONTINENT LOST—A CIVILIZATION WON 18-22* (1937). For a discussion of the Proclamation and its immediate implementation, see F. PRUCHA, *supra*, at 13-25; 1 S. MORISON, *supra* note 2, at 154-57; J. KINNEY, *supra*, at 22-25.

94. F. PRUCHA, *supra* note 93, at 23-25; J. KINNEY, *supra* note 93, at 24-26.

95. The "civilized" tribes of the South included the Creek, Cherokee, Chickasaw, and Choctaw.

96. Article XVIII in the first draft of the Articles, reported to Congress on July 12, 1776, by a committee headed by Dickinson, M. JENSEN, *supra* note 35, at 126, was apparently unqualified. It unreservedly conferred upon the national government "the sole and exclusive Right and Power of . . . Regulating the Trade, and managing all Affairs with the Indians." *Id.* at 133-34, 258. Even then, however, it was apparently deemed right to concede to the states jurisdiction over the land purchases from the Indians within State boundaries, as fixed by Congress, under articles XIV, XV, and XVIII. *Id.* at 257-58 & n.2. Congress later ambiguously tempered the first draft by confining it to Indians "not members of any States," and by adding the proviso that "the legislative right of any State, *within* its own limits be not infringed or violated." *Id.* at 139, 159, 268. See also F. PRUCHA, *supra* note 93, at 29-30.

97. These efforts began with the establishment, in 1778, of three Indian Departments and the appointment of several Commissioners for each. F. PRUCHA, *supra* note 93, at 27-28. At the end of the War, on September 22, 1783, the Congress issued a proclamation very like the Crown proclamation of twenty years earlier. *Id.* at 31-32; J. KINNEY, *supra* note 93, at 28. And, in August 1786, Congress promulgated a comprehensive Ordinance for the Regulation of Indian Affairs. F. PRUCHA, *supra* note 93, at 36-37. Indian Treaties at this time were written expressly to recognize the "sole and exclusive" power of the national government to manage

Most land transactions with the Indians, whether conducted by the national or state authorities, continued to follow the pattern of formal treaty negotiations, thereby recognizing the tribes as at least quasi-sovereign entities.⁹⁸ This was, no doubt, partly force of habit. But the formal treatment of the Tribes also reflected their importance as potential enemies, especially in the western territories⁹⁹ and in the far south where Spain held posts and made alliances with the Indians.¹⁰⁰ There was no question, at this time, of imposing the white man's law on the tribes in the "Indian country." The Native Americans were entirely self-ruled beyond the frontier and were commonly conceded the right to "punish . . . in such a manner as they [saw] fit" white intruders who presumed to settle upon the lands confirmed to the tribes by treaty.¹⁰¹

By 1787, a substantial proportion of the Indian population of the United States, then bounded on the west by the Mississippi, was within the Northwest Territory already ceded to the federal government by the states. There the tribes were expressly promised by the Ordinance of

Indian affairs. *See, e.g.*, Treaty of Hopewell of 1785 with the Cherokee, Art. IX, 7 Stat. 18 (1785), in 2 C. KAPPLER, *INDIAN AFFAIRS: LAW AND TREATIES* 10 (1904). In August 1787, before ratification of the new Constitution, a committee of Congress equivocally declared the exclusive authority of the federal government. F. PRUCHA, *supra* note 93, at 38-39. *See generally* G. HARMON, *SIXTY YEARS OF INDIAN AFFAIRS* 1-6, 8 (1941); W. WASHBURN, *supra* note 88, at 148-59. The documents here referred to, together with others, are conveniently collected in F. PRUCHA, *DOCUMENTS OF UNITED STATES INDIAN POLICY* 1-11 (1975).

98. For a short time, there was an inclination to treat the Tribes that sided with Britain in the Revolutionary War, including the four "disloyal" Nations within the Iroquois Confederacy, as defeated enemies, whose lands could be taken without consent. But, partly at the urging of General Washington and Henry Knox, the Secretary of War, this approach was promptly abandoned as unwise. *See* F. PRUCHA, *supra* note 93, at 34-40; W. WASHBURN, *supra* note 88, at 156-63; S. TYLER, *A HISTORY OF INDIAN POLICY* 35-36 (1973). For the views of Washington and Knox, see F. PRUCHA, *supra* note 97, at 1-2, 11-13, 15-16.

99. Britain had legally relinquished these territories at the 1783 Treaty of Paris, but continued to occupy them for more than a decade. Smith, *The Shaping of America*, in 3 A PEOPLE'S HISTORY OF THE YOUNG REPUBLIC 168, 184, 220 (1980).

100. 1 S. MORISON, *supra* note 2, at 267-68.

101. *See, e.g.*, Treaty of Fort McIntosh of Jan. 21, 1785, with the Wyandot, Delaware, Chippewa, and Ottawa, art. V, 7 Stat. 16, *reprinted in* 2 C. KAPPLER, *supra* note 97, at 7; Treaty of Hopewell of Nov. 28, 1785, with the Cherokee, art. V, 7 Stat. 18, *reprinted in* 2 C. KAPPLER, *supra* note 97, at 9; Treaty of Hopewell of Jan. 3, 1786, with the Choctaw, art. IV, 7 Stat. 21, *reprinted in* 2 C. KAPPLER, *supra* note 97, at 12; Treaty of Hopewell of Jan. 10, 1786, with the Chickasaw, art. IV, 7 Stat. 21, *reprinted in* 2 C. KAPPLER, *supra* note 97, at 17; Treaty of Jan. 31, 1786, with the Shawnee, art. VII, 7 Stat. 26, *reprinted in* 2 C. KAPPLER, *supra* note 97, at 17; Treaty of Fort Harmar of Jan. 9, 1789, with the Wyandot, Delaware, Ottawa, Chippewa, Pattawatima, and Sac, art. IX, 7 Stat. 28, *reprinted in* 2 C. KAPPLER, *supra* note 97, at 21; Treaty of Aug. 7, 1790, with the Creeks, art. VIII, 7 Stat. 35, *reprinted in* 2 C. KAPPLER, *supra* note 97, at 27; Treaty of Holston of July 2, 1791, with the Cherokee, art. VIII, 2 Stat. 39, *reprinted in* 2 C. KAPPLER, *supra* note 97, at 30; Treaty of Greenville of Aug. 3, 1795, with the Wyandot, Delaware, Shawanoes, Ottawa, Chippewa, Pattawatima, Miamis, Eel-River, art. VI, 27 Stat. 49, *reprinted in* 2 C. KAPPLER, *supra* note 97, at 42.

July 13, 1787, the most just and friendly treatment.¹⁰² But that commitment was not secure against repeal. And, besides, there was also very substantial "Indian country" within New York State, the Carolinas and Georgia, and smaller enclaves in New England, where the independent status of these Indians was not always fully conceded; however, in practice, they were mostly left alone.

Although the delegates at the 1787 Constitutional Convention expected the issue of authority in Indian relations to rise again,¹⁰³ almost nothing was said about it at the Convention. Indeed, the text of the Constitution only mentions Indians twice, seemingly in passing.

A. "Indians Not Taxed"

The Constitution first refers to the Indians in Article I, where the apportionment of Representatives and direct taxes is based on population "excluding Indians not taxed."¹⁰⁴ This formulation can be traced to a 1776 draft of the Articles of Confederation by John Dickinson, of the Middle Temple, which allocated contributions to the national government on the basis of the total population of each "Colony," including slaves but excepting "Indians not paying taxes."¹⁰⁵ The same exclusion was carried forward in the 1783 proposal to amend the Articles of Confederation.¹⁰⁶ The formula, now applicable to both representation and

102. The Ordinance provides the following:

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

Northwest Ordinance art. 3, 1 Stat. 51(a), 52 (1789); 32 JOURNALS OF THE CONTINENTAL CONGRESS 340-41 (1936); F. PRUCHA, *supra* note 97, 9-10.

103. It was expected that the Northwest Territory would soon be divided into States, thereby presenting the same potential issue of State versus federal authority over Indian relations.

104. U.S. CONST. art. I, § 2, cl. 3. Even today, "Indians not taxed" are constitutionally excluded from the population for the purpose of apportionment. *See* U.S. CONST. amend. XIV, § 2. Since 1940, the Bureau of the Census has counted all Indians within each state, on the ground that they are subject to federal taxation. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 389 & n.11 (1942). This approach is questionable since the taxes alluded to in the Constitution were presumably those imposed by the States on tribal Indians. Therefore, Native Americans should remain immune from taxation, except if Congress has expressly provided otherwise. *See, e.g.,* Bryan v. Itasca County, 426 U.S. 373 (1976); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).

105. Draft of ARTICLES OF CONFEDERATION art. XI, in M. JENSEN, *supra* note 35, at 256.

106. 24 JOURNALS OF THE CONTINENTAL CONGRESS 260 (1922). This same proposal was the source of the three-fifths rule for counting Indian inhabitants. *See supra* notes 20-23 and accompanying text.

contributions, was fixed as early as June 11, 1787,¹⁰⁷ and was accepted without a word of debate.¹⁰⁸

At the simplest level, the Convention did no more than apply one of the fundamental principles of the American revolution: that taxation and representation were inseparable. The Framers also endorsed the then-accepted notion that Indians were *aliens*, even within the borders of the United States.¹⁰⁹ Indians were deemed *beyond* the power of taxation¹¹⁰ because they belonged to a separate sovereignty, unless they had voluntarily abandoned their tribal relations and assimilated into the white man's world, as very few had done.

The Indian was apparently left free to choose between continuing his tribal existence, immune from the white man's law so long as he did not harm the whites or their property, or joining the white world and being treated as a full citizen. But the clause merely assumed such a choice, it did not guarantee it. Thus, the Constitution suggests Indians are aliens, yet does not protect their separate status against either federal or state interference. Nor does it direct the Nation or its several states to accept the Indian as a citizen if he wants to assimilate.

B. The Indian Commerce Clause

The Constitution next refers to Indians in the so-called "Indian Commerce Clause" of Article I. On its face, the Clause appears a very weak thing, merely providing that "Congress shall have the power . . . to regulate commerce . . . with the Indian tribes."¹¹¹ It seems to grant Congress little more than the power to control the Indian fur trade and ban the sale of guns and whiskey to Indians. Beyond this, the provision only tells us that Indian Tribes are something other than "foreign nations", yet are communities distinct from the ordinary inhabitants of the United States. In short, they were as the Supreme Court was later to conclude, "domestic dependent nations," whose members were in a "state of pupil-

107. 1 M. FARRAND, *supra* note 29, at 193.

108. *Id.* at 227, 229, 236, 444; 2 M. FARRAND, *supra* note 29, at 183, 571, 590, 651. There is equally no discussion of the exclusion of Indians in THE FEDERALIST. Indeed, except for mentioning them as a past or present threat, the only reference to Indians in those papers is Madison's brief elucidation of the Indian Commerce Clause. *See infra* note 113. Nor does it appear that the Indian question was agitated during the State ratification process. *See F. PRUCHA, supra* note 93, at 42 n.2.

109. That notion was expressly stated by the Supreme Court in 1884. *Elk v. Wilkins*, 112 U.S. 94 (1884).

110. U.S. CONST. art. I, § 2, cl. 3.

111. U.S. CONST. art. I, § 8, cl. 3. The same clause gives Congress the power to regulate foreign and interstate commerce.

lage" as "wards" of the Government.¹¹²

On closer examination, it is arguable that the Indian Commerce Clause has more bite. John Madison proposed the Clause in general terms as giving the power "to regulate affairs with the Indians, as well within as without the limits of the United States."¹¹³ Madison was a member of the Committee of Eleven¹¹⁴ which deleted a qualification limiting the scope of the Clause to Indians within a state "*not subject to the laws thereof*."¹¹⁵ In *The Federalist*,¹¹⁶ Madison described the federal government's authority as "unfettered" because it was now rid of the two limitations that had caused confusion under the Confederacy.¹¹⁷ Thus, we seem to have the best authority for reading the Indian Commerce Clause as placing the Indian Tribes under a constitutionally secure federal umbrella.

For almost a century, the Supreme Court agreed, ruling that the effect of the Indian Commerce Clause was to abrogate state jurisdiction completely.¹¹⁸ But, alas, this is not the unambiguous meaning of the words. And so, more recently, the Supreme Court was able to dismiss the Clause as affording little or no protection to the Indian tribes from hostile state legislation.¹¹⁹

112. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). *See also* *United States v. Kagama*, 118 U.S. 375, 383-84 (1886).

113. 2 M. FARRAND, *supra* note 29, at 321, 324.

114. On several occasions, the Convention designated a committee composed of one member from each of the eleven states attending and referred to it unresolved questions. In the Records and in Madison's notes such a committee is usually denominated the "Committee of Eleven." *See, e.g.*, 2 M. FARRAND, *supra* note 29, at 483. In this instance, Madison was appointed as the Virginia representative. *Id.* at 473, 481.

115. 2 M. FARRAND, *supra* note 29, at 367. *See id.* at 473, 481, 493, 495, 497, 499, 503, 569, 595.

116. THE FEDERALIST NO. 42, at 284-85 (J. Madison) (J. Cooke ed. 1961).

117. *Id.* In the Articles of Confederation, the power of Congress over Indian affairs was expressly restricted to Indians who were "not members of any of the states" and was also embarrassed by a proviso guarding against infringement of the legislative right of any state within its own limits ARTICLES OF CONFEDERATION art. IX (1781, repealed 1787).

118. *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876). In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558-60, 561, 590-92, 594 (1832), Chief Justice Marshall used the Indian Commerce Clause to reach his holding that Georgia's laws had no force within the territory confirmed to the Cherokee Nation by federal treaties. President Andrew Jackson disputed the Chief Justice's interpretation of the Indian Commerce Clause and ignored the decision, making it clear that unless the Cherokees were "removed" to lands west of the Mississippi, all the Indian Tribes would be subjected to hostile State jurisdiction. *See The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1866); *see also* F. COHEN, *supra* note 104, at 81-92.

119. In recent years, the Supreme Court has generously used the Supremacy Clause to protect Indian tribes from state taxation and regulation. *See Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 845-46 (1982).

At all events, even if the Indian Commerce Clause affords ambiguous protection against *state* action, it does not restrain the federal government. On the contrary, the Supreme Court has construed the provision as supporting laws dealing with the property and liberty of Indians, which would be politically unthinkable and plainly unconstitutional if white citizens were involved. The familiar tale of oppressive federal acts—quite aside from state abuses—is too voluminous to discuss in this Article.¹²⁰ All this was justified by the federal government's view of the Indians as alien "captives", constitutionally subject to the "plenary power" of Congress, usually attributed to the Commerce Clause.¹²¹

C. The Supremacy of Treaties Clause

Although it does not mention Indian Tribes in terms, some have invoked as relevant to the status of Indians the provision of the Supremacy Clause of the Constitution that declares "Treaties [already] made . . . under the Authority of the United States" to override inconsistent state laws.¹²² Thus, in *Worcester v. Georgia*,¹²³ Chief Justice Marshall found here a sanction of earlier treaties with Indian Tribes and, consequently, constitutional recognition of their status as "nations" enjoying the "rank among these powers who are capable of making treaties."¹²⁴

There is, in fact, no evidence that the Framers had Indian treaties in mind when they wrote the Supremacy Clause. The Clause, as we know

120. We may mention broken treaties, various westward forced removals of tribes, land confiscations, mishandling of Indian "trust" funds, atrocities committed in the name of avenging "Indian massacres", involuntary relocations to reservations, prisoner treatment of many tribes, and the insultingly pervasive regulation of every aspect of Indian life. A good short legal history of federal Indian relations is considered in F. COHEN, *supra* note 104, at 47-206. Of special interest in examining particular aspects of the national oppression of the Indian are W. WASHBURN, *supra* note 88, at 170-96, 209-49; CITIZEN'S ADVOCACY CENTER, OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA 5-154 (1969); and D. BROWN, BURY MY HEART AT WOUNDED KNEE (Cahn ed. 1971).

121. See, e.g., *Delaware Tribal Business Comm'n v. Weeks*, 430 U.S. 73, 83-84 (1977); *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1975); *Morrison v. Work*, 266 U.S. 481 (1925); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876); *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1865); see also *United States v. Kagama*, 118 U.S. 375, 383-84 (1886) (rejecting the Commerce Clause as the source of congressional power over the Indians themselves, but basing it, instead, on a "wardship" theory). The Indian Commerce Clause has been mentioned more recently as a source of federal *power* in Indian affairs, but not as a constitutional shield. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1972). See also *infra* note 142.

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

123. 31 U.S. (6 Pet.) 515 (1832).

124. *Id.* at 559.

it, was a substitute for a provision urged by Madison and others that would have expressly authorized Congress to “negative” State laws.¹²⁵ At no time were treaties alluded to—not even when Madison successfully proposed an amendment “to obviate all doubt concerning the force of Treaties pre-existing” the Constitution.¹²⁶ Indeed, there is some indication that the Framers, and Madison in particular, were only thinking of “Treaties with foreign nations”, since that is how Madison’s notes refer to the treaties on the basis of which Congress could “negative” inconsistent state laws under the earlier proposal.¹²⁷ It is sometimes forgotten that, besides half a dozen Indian treaties, the Continental Congress had executed an equal number of treaties with foreign powers before 1787, most notably the Treaty of Paris of 1783 with Britain, ending the Revolutionary War, and two treaties with France.¹²⁸

We must suspect that the great Chief Justice was an “activist” on the score of Indian rights. He used his position to “legislate” on behalf of the Indian tribes no less than more recent justices on other matters. But even if Marshall’s history was correct, his dictum in the second Cherokee case¹²⁹ did not confer lasting constitutional status as “sovereign” nations to the Indian tribes. In 1871, Congress determined to end the regime of dealing with the Indian tribes by formal treaties, expressing the view that “no Indian nation or tribe within the territory of the United States” ought, in future, to be “acknowledged or recognized as an in-

125. See E. DUMBAULD, *supra* note 24, at 443-44.

126. 2 M. FARRAND, *supra* note 29, at 417. See also *id.* at 431.

127. 2 M. FARRAND, *supra* note 29, at 164. This reference is perhaps most revealing of Madison’s thinking. It does *not* copy the more general words of the Resolution, as amended by Franklin, which spoke of “any Treaties subsisting under the authority of the union.” *Id.* at 47, 54. THE FEDERALIST contains no reference to treaties with Indian Tribes. Where the context reveals the meaning, the term invariably connotes an agreement with a foreign nation. See THE FEDERALIST NO. 22, at 136, 143-44 (A. Hamilton) (J. Cooke ed. 1961); *id.* NO. 42, at 279 (J. Madison); *id.* NO. 53, at 364 (J. Madison); *id.* NO. 64, at 432-38 (J. Jay); *id.* NO. 66, at 450-51 (A. Hamilton); *id.* NO. 69, at 467-70 (A. Hamilton); *id.* NO. 73, at 503-09 (A. Hamilton); *id.* NO. 78, at 520 (A. Hamilton); *id.* NO. 80, at 540 (A. Hamilton). So, also, it is significant that, although the practice of Senate ratification for Indian treaties soon developed, see 1 ANNALS OF CONG. 1034-36 (J. Gales ed. 1834), neither President Washington nor the Senate committee that first dealt with the question was immediately clear that this constitutional procedure was appropriate. *Id.* at 39-41, 72, 77, 80-81, 82. See also *id.* at 691.

128. See, e.g., J. POLE, *supra* note 87, at 73, 111-12, 143. According to John Jay, in THE FEDERALIST NO. 3, at 14 (J. Cooke ed. 1961), by November 3, 1787, “America ha[d] already formed treaties with no less than six foreign nations.” Assuming only one agreement with each country referred to by Jay, except for France, that would make a total of seven, the same number as for federal Indian treaties through 1787. See 2 C. KAPPLER, *supra* note 97, at 3-18.

129. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 576 (1832) (stating that the Cherokee Nation enjoyed national sovereignty).

dependent nation, tribe, or power.”¹³⁰ And, without demur from the High Court, Congress thereafter acted on this premise, enacting legislation abrogating treaties,¹³¹ imposing alien laws on the Indians,¹³² determining tribal membership and allotting tribal property,¹³³ unilaterally “terminating” federal supervision over tribes,¹³⁴ and then subjecting them to state jurisdiction.¹³⁵ Accordingly, we must conclude that the Supremacy of Treaties Clause does not shield the Indians in any special way.¹³⁶

D. Alternative Solutions

So far as they go, there is little basis to quarrel with either of the two clauses of the Constitution that expressly deal with Indians, or with the Supremacy Clause. Or at least, there would be little complaint if the Framers had accorded due protection to both the tribes and the individual Indian elsewhere in the Constitution. Considering the contemporaneous accord of the several states in the form of the Northwest Ordinance, there is some reason to suppose that a proposal which more expressly protected Native American rights would have won acquiescence if persuasively advanced.

The Native Americans could easily have been protected from state aggression. For instance, even if they were denied citizenship until they abandoned their tribal allegiance and submitted to taxation, the Indians could have been made the beneficiaries of a special “comity provision”

130. Indian Appropriation Act, ch. 120, 16 Stat. 544, 566 (1871), *reprinted in part in* F. PRUCHA, *supra* note 97, at 136.

131. *See* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (upholding legislation abrogating stipulations of the 1867 Treaty of Medicine Lodge, 15 Stat. 99, with the Kiowas, Comanche, and Apaches); *see also* The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870).

132. *See* United States v. Kagama, 118 U.S. 375 (1886) (upholding the Major Crimes Act, contained in the Indian Appropriation Act of Mar. 3, 1885, § 9, ch. 341, 23 Stat. 362, 385, and imposing federal criminal statutes on Indian Reservations).

133. *See, e.g.,* Stephens v. Cherokee Nation, 174 U.S. 445 (1899) (upholding a series of enactments conferring federal jurisdiction on administrative courts in Indian territories).

134. *See* Menominee Tribe v. United States, 391 U.S. 404 (1968) (limiting the effect of the Menominee Indian Termination Act, ch. 303, 68 Stat. 250 (1954) (repealed 1973), but assuming its constitutionality); *see also* Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972).

135. *See, e.g.,* Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) (applying Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588, to the Yakima Indian Nation).

136. Of course, so long as Congress is content to follow former Indian treaties, this Clause makes Indian treaties—as well as Acts of Congress—the “supreme law of the land,” binding on the states and on both federal and local officials. While Congress may abrogate such treaties, lands recognized by such agreements as belonging to a tribe cannot be taken by the United States without payment of just compensation. *Shoshone Tribe v. United States*, 299 U.S. 476 (1937). This case shows the replacement of the Supremacy Clause with an application of the Just Compensation Clause of the Fifth Amendment to Indian tribal property. U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation”).

akin to the Privileges and Immunities Clause in Article IV.¹³⁷ The latter Clause operates in favor of citizens of other states, assuring them, while in a state not their own, the benefit of “all Privileges and Immunities” enjoyed by the local citizens. Although it now reaches only citizens, the Article IV Privileges and Immunities Clause was borrowed from the Articles of Confederation, where it ran in favor of all “free inhabitants.”¹³⁸ It presumably would have embraced Indians had it not been altered, first, to “free citizens,”¹³⁹ then to just “citizens.”¹⁴⁰ While the change may have been intended to permit discrimination against free Blacks, no one suggested that Indians were a reason to restrict the coverage to citizens.

The delegates could easily have added to such a “comity” clause an express provision shielding the tribes and their members from oppressive *state* action. No doubt some states would have remonstrated, but it is not unthinkable that a monopoly of Indian affairs—including not only the regulation of commerce, but *all* dealings with the Tribes—could have been expressly and exclusively lodged in the federal government. John Madison’s claim that this was in fact accomplished is not entirely persuasive. Despite repeated efforts, I have never been able to persuade today’s Supreme Court that this is so.¹⁴¹ Unfortunately, the opportunity to insert a comprehensive and unambiguous provision excluding state jurisdiction within “Indian Country” was never pressed by the Framers.

This leaves the more difficult question of shielding the Indian from *federal* oppression. No irrepressible pressure to remove the Indian tribes from their lands east of the Mississippi existed in 1787. At that time the federal government was still concerned with placating the large Indian

137. U.S. CONST. art. IV, § 2, cl. 1.

138. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states

ARTICLES OF CONFEDERATION art. 4 (1781, repealed 1787).

139. 2 M. FARRAND, *supra* note 29, at 173-74.

140. *Id.* at 187. Presumably, the deletion of “free” by the Committee of Detail simply reflected the recognition that all citizens were free—albeit all free persons were not citizens.

141. See *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 845-46 (1982); see also *Washington v. Confederated Tribes*, 447 U.S. 134, 157 (1980); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141-45 (1980); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 168 (1982) (Stevens, J., dissenting). Later cases apparently have eroded the statement in the majority opinion in *Merrion* to the effect that “this Court has relied on the Indian Commerce Clause as a shield to protect Indian Tribes from state and local interference” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 153-54. This statement was apparently no more than a recitation of ancient history, not a declaration of current constitutional doctrine. See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), and the discussion *supra* note 130 and accompanying text.

confederacies, with whom war would be unprofitable.¹⁴² And, witness, the Northwest Ordinance, the temper of the moment was more generously inclined toward the Indians than it would be a few years hence. This, then, was the perfect moment to *constitutionalize* a reasonably favorable regime for the Indian tribes.

Borrowing from the Ordinance, the Framers readily could have fashioned words to secure the tribal lands against involuntary cessions and the tribes against unwilling termination of their status as separate communities. The more awkward question was how far to forbid federal interference with tribal self-government, even where it did not directly impinge on the white world. The Framers were probably much less inclined to intrude than their successors today, not to mention the meddlesome reformers at the turn of the next century.¹⁴³ The failure to create such a clause was due mainly to innocence in regard to what was to follow. No doubt, some of the subsequent events were inevitable, Constitution or no Constitution. But they surely could have been tempered with a clear legal brake. Once again, the Middle Templars failed to do their best!

Conclusion

The Framers of the Constitution enjoyed a rare opportunity in 1787, which would not recur until the post-Civil War Reconstruction, when the Constitution was in some respects remade.¹⁴⁴ There existed at the Convention a general determination to succeed in fashioning a charter for the new nation. Strong differences and heated disagreements on equally fundamental issues were resolved because of the perceived importance of not failing. This, then, was the time of all times to insist on settling the two racial questions that faced America.

142. See, for example, the many statements of Henry Knox, Secretary of War both under the Confederacy and during Washington's administration under the Constitution, in G. HARMON, *supra* note 97, at 16-18, 54-57, and F. PRUCHA, *supra* note 93, at 39. See also F. PRUCHA, *supra* note 97, at 11-13.

143. In the early years of the Union, federal legislation dealt with white-Indian relations only. As late as 1883, in *Ex Parte Crow Dog*, 109 U.S. 556 (1883), the Supreme Court held that the white man's law did not reach a tribal Indian who had killed another Indian within "Indian country." This was, however, immediately followed by the enactment of the Major Crimes Act, contained in the Indian Appropriation Act of Mar. 3, 1885, § 9, ch. 341, 23 Stat. 362, 385, the General Allotment Act, ch. 119, 24 Stat. 389 (1887), and much more "paternalistic" legislation. See F. COHEN, *supra* note 104, at 117-23.

144. It should be noted that those who framed the Thirteenth, Fourteenth, and Fifteenth Amendments immediately after the Civil War did *not* take the opportunity to grant a "new deal" to the Indian. On the contrary, the exclusion of "Indians not taxed" is repeated in the Fourteenth Amendment. See *supra* note 104.

Moreover, it was a propitious moment for persuading any dissenters to indulge in generosity toward both black and red inhabitants. Before the invention of the cotton gin, the persistence of slavery was at best doubtful on economic grounds.¹⁴⁵ The resistance to ending the slave trade was more a matter of principle than of material self-interest, and we know that disinterested principles are not impossible to overcome. Many opponents of slavery no doubt were inclined to "let nature take its course." But it should have been appreciated that economics does not always determine history: there was a risk that the conservative instinct present in all societies would insist on preserving and spreading slavery, especially after the constitutional debate ultimately sanctioned the institution. I cannot fault the Founding Fathers for having failed to anticipate the future profitability of slavery.¹⁴⁶ I do blame them, however, for not seizing the moment to *ensure* the early demise of such an unconscionable regime.

For somewhat different reasons, 1787 was also a favorable time to deal with the "Indian question." Many years would elapse before it would be acceptable to assert that "the only good Indian is a dead Indian."¹⁴⁷ The Native American, if a "savage",¹⁴⁸ was still viewed as "noble." Indeed, the Indians were officially addressed as "Brothers",¹⁴⁹ not "children." The Delaware Tribe had been invited to join the new Union as a separate state,¹⁵⁰ and the federal government conceded the Cherokees a non-voting delegate in Congress.¹⁵¹ The prevailing policy was to avoid war by treating the Indian tribes fairly. George Washington firmly believed in this approach,¹⁵² and undoubtedly had the clout to secure constitutional endorsement of the principle had he chosen to intervene at

145. See, e.g., J. POLE, *supra* note 87, at 176-78. But see W. JORDAN, *supra* note 44, at 316-21.

146. See J. POLE, *supra* note 87, at 179; W. JORDAN, *supra* note 44, at 375-402. Nor can I fault them for not having foreseen the fears of emancipation that would be provoked by the slave revolutions on the island of Santo Domingo.

147. As with most popular aphorisms, this is an improvement on a remark attributed to General Sheridan at Fort Cobb in 1868. D. BROWN, *supra* note 120, at 170-72.

148. *Id.*

149. See, e.g., W. WASHBURN, *THE INDIAN AND THE WHITE MAN* 209-14, 325, 332-34 (1964).

150. Treaty with the Delaware of Sept. 17, 1778, art. VI, in 2 C. KAPPLER, *supra* note 97, at 4-5.

151. Treaty of Hopewell with the Cherokees of Nov. 28, 1785, art. XII, in 2 C. KAPPLER, *supra* note 97, at 10.

152. See, e.g., F. PRUCHA, *supra* note 97, at 1-2, 15-16. Washington's concern that the Indian question be dealt with in the right way is revealed by his personal appearance before the Senate in 1789 to secure the ratification of treaties and the approval of his policy—the only such appearance he ever made. 1 ANNALS OF CONG. 65-71 (1790). See also W. MACLAY, *JOURNAL OF WILLIAM MACLAY* 28-32 (1890).

the Convention.¹⁵³ The “manifest impossibility” of accomodating whites and Native Americans east of the Mississippi¹⁵⁴ was not yet obvious. Unfortunately, the Framers did not appreciate that they controlled the perfect moment to deflect the history of injustice that was to come.

The moral of the tale, which may have escaped you, is this: Never trust lawyers with the fate of any nation. Especially the best lawyers who, of course, are the barristers of the Middle Temple. The abler the lawyer, the better trained he is to urge his client’s cause, whether right or wrong. The best lawyer concentrates entirely on the moment: all effort is to win the particular case, by persuasion if possible, otherwise by compromise, and damn the consequences. Far-sightedness is not the mark of a good lawyer.

And so, it is not really surprising that too many lawyers spoiled the soup, at least on the question of racial equality. Nor that the most culpable were the five Middle Templars, whether by all-too-successful but short sighted advocacy or indifferent silence. As an American member of the Honourable Society of the Middle Temple, I now offer public apology for the errors of my brothers. Unfortunately, I am two hundred years too late.

153. According to John Madison, George Washington, who chaired the Convention, only intervened once in the discussions. When he did intervene on a question of apportionment, the delegates accepted his view without debate. 2 M. FARRAND, *supra* note 29, at 644. If need be, one would have expected the General to be seconded inside the Convention by the venerable Benjamin Franklin, and outside by John Adams and Thomas Jefferson. See W. WASHBURN, *supra* note 149, at 94-96, 422-25; F. PRUCHA, *supra* note 93, at 28-30, 50, 140-41.

154. For a discussion of the removal of the Indians to the West, see F. PRUCHA, *supra* note 93, at 224-49. For an example of the different attitude prevailing at least among some frontiersmen West of the Alleghanies, see W. WASHBURN, *supra* note 149, at 111-17.

