REVIEWS


Robert N. Clinton†

Until the late nineteenth century, the United States generally treated Indian tribes as self-governing political entities. Chief Justice Marshall, for example, characterized the tribes as “domestic dependent nations”1; to him, they were autonomous, but dependent, states that retained powers of self-government2 while assuming the protection of the United States. Even after the rapid westward movement of the frontier made the policy of physically separating tribes from the states impossible, the federal government sought to protect the Indians’ autonomy by denying newly admitted states jurisdiction over the tribes within state boundaries.3

Beginning in the 1880s, the political relationship between the tribes, the states, and the federal government began to change; this was the first of many fluctuations of federal policy between the extremes of forced assimilation of Indians and the protection of their legal, political, and cultural autonomy. In 1885, Congress established federal and state jurisdiction over some crimes committed between Indians on tribal lands,4 and in 1887 it asserted fed-

† Professor of Law, The University of Iowa College of Law. The ideas offered in this review originate in research the reviewer has undertaken for a forthcoming book on federal authority over Indian affairs under the Indian commerce clause. Further elaboration of some of these ideas may be found in Brief of Appellee Indian Tribes at 65-90, Washington v. Confederated Tribes, 100 S. Ct. 2069 (1980), to which the reviewer contributed.
1 Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).
2 Id. at 16.
   As late as 1883, the Supreme Court held that jurisdiction over an intratribal murder lay solely with tribal authorities, and denied federal jurisdiction. The court found the federal policy of protecting tribal sovereignty dispositive. Ex parte Crow Dog, 109 U.S. 556 (1883).
eral power to allot tribal lands without regard to tribal wishes. The ultimate goal of the allotment program was to put the Indians under state control.\(^5\)

The forced-assimilation policy of the federal government continued until 1934, when the Indian Reorganization Act\(^6\) sought to strengthen tribal government and to halt the policy of dismantling Indian tribes. The 1950s, however, brought fresh efforts to disband tribes and to force the assimilation of their members into American society. Congress “terminated” many tribes,\(^7\) and encouraged states to exercise jurisdiction over tribal reservations.\(^8\)

In recent years, the policy of forced assimilation of Indians again has been abandoned, with a renewed effort being made to strengthen tribal self-government and to require tribal consent for jurisdictional changes affecting Indian reservations.\(^9\) History provides no guarantee, however, that the federal government will continue to protect the political autonomy with which the nation’s Indian tribes began their relationship with the United States. Furthermore, the existence of tribal governments within the territorial boundaries of states continues to pose important political, jurisdictional, and constitutional questions involving the integration of tribal governments into a federal system.

The Road\(^10\) properly identifies the political liberty of the Indian tribes as the most important legal issue confronting Indian societies today. The book offers a long and sometimes disorganized

---


\(^6\) Ch. 576, 48 Stat. 984 (1934) (current version at 25 U.S.C. §§ 462-479 (1976)).


survey of the historical vagaries of the legal relationships between the Indian tribes and the federal and state governments since the colonial era. This march through history has two purposes. The first is to show that the courts never have established a consistent and sensible constitutional theory that accommodates and protects Indian tribal sovereignty within a system of federal and state governments. Like congressional Indian policy,11 the Supreme Court’s approach to the question of the Indian tribes’ role in American legal theory has vacillated between theories of subjugation of the tribes to the states,12 and protection of tribal autonomy from state encroachments.13 Regrettably, the authors fail to highlight the interesting point that the Supreme Court’s views on Indian tribal sovereignty often have conflicted with the policies Congress simultaneously was attempting to implement. One of the most dramatic disparities occurred when the Court in Worcester v. Georgia14 reaffirmed the sovereign and autonomous status of the Cherokee Nation as a domestic dependent nation at the very time the federal government and the states were seeking to remove eastern tribes to land west of the Mississippi.15

The second purpose of the historical and legal survey presented in The Road is to provide the basis for the authors’ suggestion that the tribal governments return to a concept of “treaty

---

11 See text and notes at notes 4-9 supra.

There are other instances in which the Court and Congress have been at odds over Indian policy. For example, when Congress was trying to strengthen tribal governments, see note 9 supra, the Court held, in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), that tribes have no criminal jurisdiction over non-Indians because of “the inherent limitations of tribal powers that stem from their incorporation into the United States,” id. at 209. See also Washington v. Confederated Tribes, 100 S. Ct. 2069 (1980); Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463 (1979). Similarly, when Congress was trying to implement Public Law 280 and its termination legislation during the 1950s, the Court decided Williams v. Lee, 358 U.S. 217 (1959), the most forceful (if not the clearest) reaffirmation of Indian tribal sovereignty since Worcester.
federalism" in order to establish and protect the political liberty of the tribes. The concept of treaty federalism seems intended to assure Indian tribes the right to political autonomy and self-govern­ment similar to that enjoyed by the states. In the authors' view, making clear the legal and political status of the tribes would provide the courts with the basis they have hitherto lacked for adopting general principles with which to approach federal, state, and tribal relations. One specific purpose seems to be to remove the courts' "opportunities to act capriciously." 

The authors' suggestion for realizing the "treaty federalism" idea is surprising: they propose a constitutional amendment to protect the political liberty of Indian tribes. This amendment, whose language The Road offers, would treat all tribes as states, protect their powers to fix the criteria for their own membership, prevent jurisdictional encroachment by the states except pursuant to compacts approved by Congress, and provide for limited voting representation of the tribes in Congress through House and Senate tribal caucuses. In deference to their concept of treaty federalism, however, the authors make their amendment applicable only to those tribes that consent to it by a vote of two-thirds of their voting members.

While The Road correctly diagnoses the central legal issue confronting federal Indian law today—the lack of a coherent legal and political approach to Indian affairs—the path it takes to arrive at its destination misdirects the reader toward a fairly revolutionary solution to the problem. The authors attempt to arrive at an answer that fits within their view of the political theory of the American Revolution—especially the thought of Madison and Hamilton—and that of political theorists such as Locke and Filmer: "Treaty federalism is not an entirely novel idea. It simply reinterprets the sources of federal Indian law to be more consistent with our general political and ideological heritage, and in a way reconcilable with the realities of tribal survival today."

The flaw in attempting to make the treaty federalism idea consistent with the thoughts of Enlightenment theorists—

---

16 "Treaty federalism" is defined and discussed in BARSH & HENDERSON at 59, 270-82. The idea is that all dealings between the tribes and the federal government must be by mutual agreement, much as foreign sovereigns deal with each other through treaties.

17 Id. at xii.

18 Id. at 279-82.

19 Id. at 12-19.

20 Id. at 275.
references to which are intertwined with the book's description of federal Indian law—is that the necessity for doing so is never ade-
quately established. The recurring references to the political the-
ory of the Revolution seem to imply that the Founders intended to
impose their own ideas of political liberty on the Indian tribes. Yet
nowhere do the authors adduce any historical evidence to show
that such an intent actually existed. Without such a showing, there
seems no reason to believe it especially important to reconcile fed-
eral Indian policy with eighteenth century political notions.

The authors' reliance on Revolutionary theorists is objection-
able for another reason as well. Relying on these thinkers does a
disservice to the very tribal sovereignty the authors seek to pro-
tect: it assures federal superiority, allowing for the imposition of
alien political theories and organizations on the Indian tribes. It
seems strange that The Road, so concerned with Indian rights,
looks solely to Anglo-American theory for a proposal to protect
those rights, with no discussion of what would accord with Indian
thinking.

More careful attention to the early history of the evolution of
the constitutional grant of federal power over Indian affairs would
have suggested a less tortuous path toward the salutary objectives
sought by the authors. Such an approach would have made possi-
ble a less radical and less politically unfeasible solution than the
constitutional amendment suggested in The Road.

The body of the Constitution mentions the Indians twice.
First, the document expressly excludes "Indians not taxed" from
the enumeration of state citizens for purposes of congressional ap-
portionment. Of far greater importance than this reference, how-
ever, is the grant of authority to Congress "[t]o regulate Commerce
... with the Indian Tribes." These clauses were an attempt to
deal with two important problems in the regulation of Indian af-
fairs by colonial authorities and, later, by the Continental Congress
under the Articles of Confederation. The first issue was whether
Indian affairs should be regulated by a strong central authority
(the Crown or the subsequent national government) or only by the
individual colonies or states. The second issue was the legal status
of the Indian tribes: were they autonomous, self-governing states,
or were they wholly subject to the authority of colonial or state
governments? The failure to adopt a coherent legal philosophy rel-

21 U.S. Const. art. 1, § 2.
22 Id. art. 1, § 8, cl. 3.
ative to the tribes during the colonial and Articles of Confederation periods led to problems with the Indians that culminated in wars on the eve of the framing of the Constitution. The clauses in the Constitution referring to the Indians were intended to resolve these conflicts by placing the management of Indian affairs exclusively in the hands of the federal government, and by guaranteeing the Indian tribes legal and political autonomy as sovereigns exempt from federal and state control over their internal affairs. The intent was, further, that the tribes would be within the sway of federal power only for matters affecting "commerce" between the tribes and non-Indians.

During the colonial period, differences over the management of Indian affairs and the legal status of the tribes plagued the English authorities in America. The Crown generally adhered to the view that, as separate peoples, the Indians were politically and legally autonomous within their territory until they voluntarily ceded their land to the Crown or were conquered in a just war, a view suggested by both international law and English common law.28

By contrast, the colonies were divided in their approach to the management of Indian affairs. In New England and Virginia, the colonists claimed the right to appropriate uncultivated land of the Indians as vacant waste, a claim that frequently led to armed Indian response.24 Although the Crown occasionally intervened to protect the Indians from such claims,25 the management of Indian affairs was left principally to colonial authorities until the mid-seventeenth century. Virginia, Connecticut, and the Massachusetts Bay Colony therefore were able to subjugate rapidly many eastern tribes. These colonies also claimed authority to govern and manage the affairs of the dependent tribes.26 The colonial authorities in

28 Cf. Campbell v. Hall, 1 Cowp. 204, 209, 98 Eng. Rep. 1045, 1047 (K.B. 1774) ("[T]he laws of a conquered country continue in force, until they are altered by the conqueror"); 1 W. Blackstone, Commentaries on the Laws of England *76-*78 (Oxford 1765) (discussing areas of England where local customs were allowed to continue); F. de Vitoria, De Indis et de Jure Belli Reflectiones 120-24, 155-61 (E. Nys trans. 1917) (commenting that while savages can be legal owners of property, a conqueror in a just war has plenary power over his enemy).

24 See F. Jennings, The Invasion of America 77-84, 133-45 (1975).


26 See, e.g., The Earliest Laws of the New Haven and Connecticut Colonies 106-07 (J. Cushing ed. 1977); Laws of the Colonial and State Governments Relating to Indians and Indian Affairs 12-14, 15-19 (1832) (Massachusetts); 3 Virginia Statutes at Large 464-
New York, however, more often dealt with the mighty Six Nation Confederacy of the Iroquois through diplomatic means befitting a separate sovereign people. Similarly, the Carolinas and, later, Virginia treated the Cherokees as a separate and autonomous state. The important case of *Mohegan Indians v. Governor of Connecticut*, heard through royal commissions and in the Privy Council between 1703 and 1733, attempted to resolve the legal status of Indian tribes. While the fundamental issue in the *Mohegan Indians* case involved a land dispute between the tribe and the colony, among the other issues presented was the legal status of the Indian tribes. Throughout the proceedings, the colonial authorities challenged the jurisdiction of the royal commissions and the Privy Council, claiming that the Indians were subject to colonial authority and law and that the dispute should be resolved by colonial courts. In each instance the colonial claim was rejected and jurisdiction sustained. In 1743 the Court of Commissioners explained its assertion of jurisdiction:

The Indians, though living amongst the king's subjects in these countries, are a separate and distinct people from them, they are treated with as such, they have a polity of their own, they make peace and war with any nation of Indians when they think fit, without controul from the English.

In affirming the autonomous and sovereign status of the Indian tribes, the *Mohegan Indians* case was the precursor by almost a century of the strong reaffirmation of Indian tribal sovereignty in *Worcester v. Georgia*.

While English law could proclaim the autonomous sovereign

69 (W. Hening ed. 1821).


30 Governor and Company of Connecticut, and Mohegan Indians, supra note 29, at 126 (Opinion of Comm'r Horsmanden, Aug. 1, 1743) (emphasis in original), quoted (inaccurately) in Barsh & Henderson at 32.

status of Indian tribes, the Crown was unable to protect Indian rights so long as the management of Indian affairs lay principally with colonial authorities. Land frauds, inattention to the protection of the Indians from encroachment by white settlers, and fear of English intentions and expansion led many Indian tribes, particularly the Six Nations, to remain neutral or even side with the French during King George's War. Efforts by colonial authorities to enlist Indian support for the English demonstrated the disunity and ineptitude of the colonial management of Indian affairs. Thus in 1751 a member of the Council of the Colony of New York, noting that "the preservation of the whole continent depends upon a proper regulation of the Six Nations," recommended that the management of Indian affairs be taken away from the colonial commissioners in Albany and placed under the direction of a single superintendent of Indian affairs.

The greatest impetus for a structural change in the management of Indian affairs occurred when a Mohawk leader threatened at a conference during the summer of 1753 to break the chain of friendship that allied the Six Nations to the Colony of New York, as a result of a list of complaints over land frauds and illegal encroachments by whites against the Indians. This development set the stage for the famous Albany Congress of 1754 which proposed a Union of the Colonies that would have the power to "hold or direct all Indian Treaties in which the general interest or welfare of the Colonys may be concerned," to "make peace or declare War with the Indian Nations," to "make such Laws as they judge necessary for the regulating all Indian Trade," and to regulate the purchase of land from the Indians, at least outside of colonial boundaries.

Almost simultaneously, the English government acted to centralize the management of Indian affairs in officials directly responsible to the Crown. This centralization lasted until 1768 and

---

34 6 N.Y. Col. Doc. at 781-88. See id. at 805-06 (memorandum of Oct. 30, 1753 concerning a meeting of Indians) ("Indian affairs at present are managed merely by expedients there being no established Method of conducting them").
35 Id. at 890.
36 The main impetus for doing so was security against the French. Id. at 893-97 (giving
included the appointment of superintendents for the management of Indian affairs in the northern and southern colonies, the Proclamation of 1763 which was designed to halt white encroachments on Indian territory and to introduce Crown control over Indian land cessions, and a plan formulated in 1764, but never fully approved or implemented, for

the regulation of Indian Affairs both commercial and political throughout all North America, upon one general system, under the direction of Officers appointed by the Crown, so as to sett [sic] aside all local interfering of particular Provinces, which has been one great cause of the distracted state of Indian Affairs in general.

Ironically, the very success of the earlier policies of central management of Indian affairs in allying the Indians (particularly the Six Nations) with the English side had helped eliminate the French as a potential ally of the Indians during the French and Indian War, and so had rendered the benefits of the 1764 plan unworthy of the costs involved. The plan therefore was abandoned in 1768 in favor of a partial and unsuccessful return to decentralized colonial management of Indian affairs.

The newly independent United States thus was presented with two important unresolved problems concerning Indian affairs: the need to establish a centralized management of Indian matters and the need to determine the legal status of the tribes. The immediate response of the nation was as ambivalent and unsatisfactory as the colonial attitude had been. While the early treaties between the Continental Congress and the Indian tribes guaranteed the tribes legal and political autonomy, the national government was unable to convince recalcitrant states both of the need for national man-

the English "the Command of the Indian Country [by control of trade] and consequently of the Indians . . . is the only way to preserve their Fidelity and alliance," id. at 895; id. at 901-04, 916-20.

37 F. Prucha, American Indian Policy in the Formative Years 11-13 (1962).


39 F. Prucha, supra note 37, at 13-21.

40 Reprinted in 7 N.Y. Col. Doc. at 637-41.

41 Id. at 634-35.

42 8 id. at 19-26, 55-58.

agement of Indian affairs and of the existence of the political autonomy of the Indian tribes from state or even national control. The language in article IX of the Articles of Confederation reflects the lack of resolution of these issues by granting to the Continental Congress "the sole and exclusive right and power of... regulating the trade and managing all affairs with Indians not members of any of the states; provided, that the legislative right of any state within its own limits be not infringed or violated." How this ambiguous and internally inconsistent grant of Indian-affairs power to the national government was supposed to work was, as Madison put it, "incomprehensible."

The impossibility of successful management by the national government during the Articles of Confederation period was evident in several areas. Perhaps the greatest failure involved Indian land rights. States often claimed both the right of preemption—the right to acquire Indian land upon its voluntary cession or abandonment or through conquest—and the power to enter into treaties with the tribes to extinguish the Indians' claims to land, thereby frustrating and sometimes actively interfering with efforts by the national government to negotiate treaties. For example, federal treaty negotiations with the Six Nations were physically disrupted by New York authorities who claimed the exclusive right to treat with those Indians. North Carolina and Georgia protested to Congress regarding the national government's interference with its domestic affairs when the Continental Congress approved the Treaty of Hopewell, guaranteeing the territorial integrity of the Cherokee Nation.

The Continental Congress could do little to control the states in this regard. In 1783, when it tried to protect Indian lands from encroachment by white settlers, it was able to secure approval only for a proclamation forbidding the cession or grant of Indian lands "without the limits or jurisdiction of any particular state," ab-

---

44 ARTICLES OF CONFEDERATION art. IX, para. 2. See generally 5 JOURNALS OF THE CONTINENTAL CONGRESS 674-89 (1776) [hereinafter cited without cross-reference as J. CONT. CONG.]; 6 id. at 1076-79; 9 id. at 844-45.
46 8 PAPERS OF JAMES MADISON 140-42 (1973).
48 28 id. at 297; 32 id. at 237, 367; 4 AMERICAN STATE PAPERS 38-39 (North Carolina's complaints about the Hopewell treaty). See id. at 17 ("[The treaty is] a manifest and direct attempt to violate the retained sovereignty and legislative right of this State, and repugnant to the principles and harmony of the Federal union").
49 25 J. CONT. CONG. 602.
sent the express consent of Congress. Tribes within a state thus were unprotected. When Georgia, whose unilateral treaty making spawned an Indian war on the eve of the convening of the Constitutional Convention,\(^5\) sought the national government's assistance, a committee of the Continental Congress summarized the national government's frustration:

> An avaricious disposition in some of our people to acquire large tracts of land and often by unfair means, appears to be the principal source of difficulties with the Indians. . . . The committee conceive that it has been long the opinion of the country, supported by Justice and humanity, that the Indians have just claims to all lands occupied by and not fairly purchased from them . . . . It cannot be supposed, the state has the powers [to make war with Indians or buy land from them] without making [the Indian affairs clause of article IX] useless . . . and no particular state can have an exclusive interest in the management of Affairs with any of the tribes, except in some uncommon cases.\(^6\)

The framers of the Constitution were aware of the failures of the Articles and of the need to deal with these two previously unresolved issues in the field of Indian affairs. On June 19, 1787 Madison requested the Constitutional Convention to consider whether a plan offered by the New Jersey delegation would remedy the deficiencies of the Articles:

> Will it prevent encroachments on the Federal authority? A tendency to such encroachments has been sufficiently exemplified among ourselves, as well as in every other confederate republic. . . . By the Federal Articles, transactions with the Indians appertain to Congress, yet in several instances the States have entered into treaties and wars with them.\(^7\)

---

\(^5\) See 32 id. at 365-69 (report of the Secretary of War, July 18, 1787); 33 id. at 407-08 (motion by Georgia delegates to warn the Indians against hostilities, July 26, 1787); id. at 454-63 (motion by William Blount to call for a conference between the Indians and Georgia, and a committee report on Indian affairs, Aug. 3, 1787); 34 id. at 13 (report of a letter from the governor of Georgia stating the reasons for going to war, Jan. 23, 1788); id. at 326 (motion by Georgia delegates to warn the Indians, July 15, 1788); id. at 362-66 (report of the Secretary of War on war preparations, July 23, 1788).

\(^6\) 33 id. at 457-59 (1787). For a more recent effort to illuminate the meaning of the Indian affairs clause of article IX, see United States v. Oneida Nation, 576 F.2d 870, 879-81 (Ct. Cl. 1978), aff'g 37 Ind. Cl. Comm. 522, 542 (1976). But see Six Nations v. United States, 173 Ct. Cl. 899, 906-07 (1965).

\(^7\) U.S. CONSTITUTIONAL CONVENTION, 1787, JOURNAL OF THE FEDERAL CONVENTION 190
In adopting the "Indians not taxed" language in the Constitution, the framers thus showed that they rejected the notion, partially recognized in article IX of the Articles of Confederation, that some Indian tribes were subject to both state and federal control. Their exclusion from the enumeration for apportionment purposes reflects their autonomous political status.

More importantly, the Constitution vested exclusive authority to regulate "Commerce . . . with the Indian Tribes" in the Congress, freeing the grant of federal power over Indian affairs from the ambiguous and counterproductive reservation of state authority that had plagued the Indian affairs clause of article IX. The Indian commerce clause also recognized the sovereign status of the tribes by including them in the same clause with "foreign Nations" and "the several States." In The Federalist, Madison wrote of the advantages of the Indian commerce clause over its counterpart in the Articles:

The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal Councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.83

Years later, in Worcester v. Georgia, Chief Justice Marshall explained the constitutional solution to the status of Indian tribes adopted by the framers, writing:

That instrument [the Constitution] confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indi-

---

83 The Federalist No. 42, supra note 45, at 284.
ans. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded.

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power . . . . The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land . . . consequently admits [the Indians] among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings . . . . We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense. 54

Chief Justice Marshall correctly reflected the decision of the framers of the Constitution to vest sole and exclusive power of managing the bilateral relations with the Indians—"Commerce . . . with the Indian Tribes"—in the federal government while constitutionalizing and protecting the sovereign and separate status of the tribes. This view thus represents the culmination and resolution of over a century of legal and constitutional debate over the status of the Indian tribes.

The concept of tribal sovereignty expressed by Chief Justice Marshall did not last long, however. 55 The Supreme Court, ignor-

54 31 U.S. (6 Pet.) 515, 559-60 (1831) (emphasis in original). Marshall also wrote: Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self government, so far as respected themselves only.


ing the Indian commerce clause and the history from which it emerged, quickly abandoned Marshall's approach. In its place, the Court adopted a theory of state control and subjugation of the tribes, similar to the claims asserted by Connecticut and rejected by the Privy Council over a century earlier in the *Mohegan Indians* case. Since then, the problem of integrating the sovereignty of Indian tribes into a coherent theory of constitutional law within the framework of our federal system has continued to pose problems for the courts and created the twisted path of legal decisions that constitutes federal Indian law.

Rather than looking to the historical implications of the Indian commerce clause for the solution to disputes between state and tribal authorities, the Court in recent years has looked principally to a theory of federal treaty and statutory preemption. As the Court has said, "[t]he Indian sovereignty doctrine [of *Worcester v. Georgia*] is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read." In further contravention of the intent of the framers and the *Worcester* doctrine, Congress has asserted and the Supreme Court has ratified the doctrine of "plenary" federal power over the Indians. It is a long, twisted path indeed from the framers' decision to give Congress the exclusive power to regulate commerce and other relations with the Indian tribes to the modern assertion of plenary federal power over them.

As *The Road* correctly points out, the approach taken by the Supreme Court and Congress is inappropriate and legally and morally inconsistent. *The Road* fails to give its historical survey proper focus, however. It devotes only four pages to the vital events of the colonial period, the Articles of Confederation, and the era culminating in the drafting of the Indian commerce clause. Yet it is

must say so expressly); Langford v. Montieth, 102 U.S. 145 (1880) (in absence of treaty to the contrary, Indian lands—though not necessarily the Indians—are under state control); United States v. Rogers, 45 U.S. (4 How.) 566 (1846) (dictum).

See text and notes at notes 29-30 supra.


60 BARSH & HENDERSON at 31-34.
there that an historically defensible constitutional theory of Indian tribal political liberty can be derived. By ignoring this crucial period, the authors of The Road have created an ill-conceived plan for Indian tribal liberty—it is a path that leads off a cliff. Their suggestion of a constitutional amendment to protect tribal liberty is unnecessary and, what is worse, inconsistent with their asserted theory of treaty federalism. Acceptance of their proposal is unlikely because it would demand a sharp break with the processes traditionally invoked for the resolution of Indian affairs. Furthermore, the authors seem to forget that the process for amending the Constitution requires the approval of three-fourths of the states, thereby giving the states a potential veto over their proposal. Such a plan would return to the states an important decision making role in Indian policy that the Indian commerce clause was intended to preclude.

Greater attention to the constitutional history surrounding the adoption of the Indian commerce clause would have contributed much more persuasive arguments in support of the authors’ position on Indian rights. Such a focus would have brought The Road back to the original intention of the framers of the Constitution, to Chief Justice Marshall’s recognition of exclusive federal power to manage bilateral relations with the Indian tribes and of the sole right of the tribes to govern their members and their internal affairs free from unwanted federal or state interference.

---

61 U.S. Const. art. V.