American students "must know and love the laws, this knowledge should be diffused by means of schools and newspapers, and an attachment to the laws may be formed by early impressions on the mind."

Exploring the (Dormant) Indian Commerce Clause

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Article I, Section 8, Clause 3 of the Constitution confers upon Congress the power "[t]o regulate Commerce "among the several States, and with the Indian Tribes."[1] The positive component of this Clause receives the most public debate and attention, as it grants broad affirmative power for federal regulations of all manner. [2] Disputes over what exactly this Clause authorizes have divided courts at all levels throughout American history, but so have issues regarding its "dormant" application, specifically in the context of interstate commerce.

General Dormant Commerce Clause Doctrine:

Analyzing the case law broadly, the Dormant or Negative Commerce Clause doctrine argues that the Clause implies states are prohibited from passing legislation which discriminates against or excessively burdens interstate commerce.[3] Since Congress was granted the power to regulate interstate commerce, the doctrine posits that individual states were divested of that authority during the Constitutional Convention, even in the absence of federal regulatory preemption.

Application of the Dormant Commerce Clause to residency requirements for commercial licenses and state taxation issues has recently been a point of contention for legal scholars and judges. Such debate manifested in *Comptroller of the Treasury of Maryland v. Wynne*, decided by the Supreme Court in 2015.[4] While evaluating the constitutionality of Maryland's taxation scheme, which did not provide full credit for income taxes paid in other states, the chasm between justices reflected opposing views on the Dormant Commerce Clause.

Citing the Court's earlier precedent in *Hughes v. Oklahoma* (1979), Justice Alito's narrow majority opinion, joined by the Chief Justice and Justices Breyer, Kennedy, and Sotomayor,

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[1]U.S. CONST. art. 1, § 3, cl. 3.

[2]*See generally, Gonzales v. Raich*, 545 U.S. 1 (2005) and *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

[3]"Commerce Clause," Cornell Law School, accessed at Commerce Clause | Wex | US Law | LII / Legal Information Institute.

[4]*Comptroller of Treasury of Md. v. Wynne*, 575 U.S. ___ (2015).

justified the Dormant Commerce Clause based on the purpose of avoiding economic disunity.[5] As the Court determined, "the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."[6] The Dormant Commerce Clause would thus serve to address these issues.

Justice Scalia, joined by Justice Thomas, quipped in his dissenting opinion that "the Constitution does not contain a negative Commerce Clause" because "[t]he [Commerce] Clause says nothing about prohibiting state laws that burden commerce."[7] In his separate dissent joined in part by Justice Scalia, Justice Thomas further argued that even assuming the existence of a Dormant Commerce Clause, Founding Era history demonstrates that those who ratified the Clause would have thought it to be consistent with Maryland's species of taxation policy.[8]

Against this backdrop, this article examines how different scholars have analyzed the Indian Commerce Clause and how the historical evidence cited bears on the theory of the "dormant" Clause.

Examining *Cotton Petroleum*:

In *Cotton Petroleum Corp. v. New Mexico* (1989), a non-Indian lessee of a Jicarilla Apache oil and gas sought to enjoin New Mexico's severance taxes as the tribe had already collected the same tax.[9] The lessee argued that no federal authorization existed for New Mexico's tax, and the existence of both the state and tribal taxes resulted in a discriminatory impact on commerce which violated the "dormant" Clause principles discussed previously. While recognizing that it was "true that the total taxes paid by Cotton are higher than those paid by off-reservation producers," the Court held, in a majority opinion authored by Justice Stevens, that "neither the State nor the Tribe imposes a discriminatory tax."[10] Rather, the Court determined that "[t]he burdensome consequence is entirely attributable to the fact that the leases are located in an area where two governmental entities share jurisdiction."[11]

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[5] *Id.*
[6] *Id,* 5, quoting *Hughes v. Oklahoma*, 441 U.S. 322 (1979).
[7] Scalia, J., dissenting, 2.
[8] Thomas, J., dissenting, 2.
[9] *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), 189.
[10] *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), 189.
[11] *Id.*

The *Cotton Petroleum* opinion ends by contrasting both the Interstate and Indian Commerce Clauses, expressing that while "the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation," the Indian Commerce Clause's primary function is "to provide Congress with plenary power."[12] In contrast, Justice Blackmun, dissenting, expressed a differing view and expounded "[t]he fact that the Jicarilla Apache have seen fit to impose their own taxes renders the threat to tribal interests which is always inherent in state taxation all the more apparent."[13] The dissent continued, "[t]he market can bear only so much taxation, and it is inevitable that a point will be reached at which the State's taxes will impose a ceiling on tribal tax revenues."[14]

In his *Connecticut Law Review* article on *The Dormant Indian Commerce Clause* published in 1995, Professor Robert Clinton asserts that *Cotton Petroleum* "assume[s] that states possess inherent power over non-Indian activities in Indian country."[15] Accordingly, Clinton argues, *Cotton Petroleum* is the manifestation of "assumptions [that] turn the original understanding of the Indian Commerce Clause on its head" because "[i]nstead of assuming that states lacked authority to tax, regulate, or adjudicate matters involving Indian commerce…, *Cotton Petroleum*…assume[s] that states possess inherent power over non-Indian activities in Indian country," barring occurrences of federal preemption.[16]

The Originalist Argument Clinton Asserts:

To advance his argument that the new Constitution rejected states' claims of inherent sovereignty over Indian country, Professor Clinton examined Confederation Period political debates. He argues that the contribution of the Indian Commerce Clause to the Constitution was to "assure the exclusivity of congressional Indian affairs powers from the states."[17] This constitutional question and ensuing debate arose when Benjamin Franklin submitted his draft of the Articles of Confederation in July 1775. Article X of Franklin's draft detailed that no colony could engage in an offensive war with any Indian tribe without Congress's consent, and Article

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[12] *Cotton Petroleum Corp.,* 192.
[13] *Id,* 209-210.
[14] *Id,* 210.
[15] Robert N. Clinton, "The Dormant Indian Commerce Clause," 27 CONN. L. REV. 1055 (1995, 1218).
[16] *Id.*
[17] "The Dormant Indian Commerce Clause," 1222.

XI laid out a military alliance with the Six Nations (Iroquois Confederation).[18] According to Clinton, these Articles demonstrate a desire to "nationalize the control of Indian affairs, including the regulation of trade and land cessions."[19]

Thomas Jefferson's proposed Article XIV would have limited federal control over the purchase of land cessions to only affect those not within any existing state boundaries. However, Maryland's Samuel Chase argued against this provision based on the conviction that allowing each state to pursue its own independent interests and claims would be unsustainable for the nation at large.[20] After further drafts were submitted and debated, on November 15, 1777, the Continental Congress approved its final draft which granted itself "the sole and exclusive rights and power of … regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated."[21] This provision functioned as the "antecedent of the [Indian] Commerce Clause in the Articles of Confederation."[22]

In the following years, controversy continued as several states claimed dominion over territory within their exterior boundaries and asserted that Indians within their state's geographic boundaries were "members" of their states.[23] Clinton asserts that in the waning years of the Confederation, there was increased national control over Indian affairs. While he finds "the Continental Congress was never really able to assert the sole and exclusive power over all Indian affairs, … consensus emerged in favor of exclusive national authority over the portions of the western frontier ceded to the national government." Political disagreement, instead, festered over commercial issues. According to Clinton, by the time of the 1787 committee report, which was published to reflect the agreements made at the convention up to that point, leaders had recognized that "issues of peace and war with the Indian tribes were inseparable from land, trade, and other commercial disputes." By the time of the Constitutional Convention in 1787, "complete centralization of control of Indian affairs in the national government" became the majority position.[24]

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[18] *Id,* 1099.
[19] *Id*.
[20] *Id*, 1101.
[21] 9 J. CONT. CONG., supra note 146, at 844.
[22] *Id*, 1103.
[23] *Id*.
[24] Id, 1140, 1147.

Another Scholar's Perspective, *An Indian Affairs Clause?*:

To the extent that Professor Clinton's argument for a Dormant Indian Commerce Clause relies on historical evidence to suggest that the dominant view at the time of Constitutional ratification was "complete centralization of control of Indian affairs in the national government," Yale Law School Fellow Lorianne Updike Toler's 2020 *The Missing Indian Affairs Clause* in *The University of Chicago Law Review* adds to this discussion. Updike's archival describes that despite a unanimous vote by the Convention to include an Indian Affairs Clause, the Committee of Detail tasked with drafting the Constitution forgot the provision in their draft. This prompted Madison "to refer to the same Committee of Detail nine congressional powers, including [the power] '[t]o regulate affairs with the Indians as well within as without the limits of the U. States.'"[25]

Toler finds that "[t]he Committee of Detail rejected Madison's language and instead grafted 'Indians' into the Commerce Clause, adding in a clause that partially reflected the states' rights language of the Articles."[26] Accordingly, the Clause read that Congress shall have the power to regulate commerce "with Indians, within the Limits of any State, not subject to the laws thereof."[27] Before ratification, a committee changed the Clause's language to the phrasing that exists today, with minimal records of public debate and scholarship that could illuminate the change. Perhaps adoption of the phrase "not subject to the laws thereof," with its strengthened language around states' rights, suggests a rejection of a Dormant Indian Commerce Clause. However, it is challenging to conclusively determine the significance of the change in language to the eventually ratified Clause without further historical examination.

If This History Is Not Enough:

Insofar as this evidence reflects the pre-ratification history and the ratification process, a discussion of constitutional liquidation would only be necessary if one desired to confirm or

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[25]Updike Toler, Lorianne, "The Missing Indian Affairs Clause" (August 25, 2020). 88 University of Chicago Law Review (2020), 464.

[26]*Id,* 465.

[27]*Id*.

supplement a potential opinion on the Dormant Indian Commerce Clause debate with later historical practice.[28] As Justice Barrett acknowledged in her *Bruen* concurrence, "the Court d[id] not conclusively determine the manner and circumstances in which post-ratification practice may bear on the original meaning of the Constitution."

James Madison's statement in *The Federalist* No. 37 that "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications" has been utilized in some originalist scholarship related to the issue of liquidation even though this scholarship encompasses many nuanced tracks.[29] This paper solely takes note of the liquidation issue as merely supplementary to the primary, and antecedent, question this article addresses regarding how to view Ratification Era history.

Suggested Application:

One scholar, Professor Stephen Feldman, has asserted that "[t]he balancing test used to determine whether state laws violate the dormant interstate commerce clause is almost identical to the balancing test used to determine whether state laws infringe on tribal sovereignty."[30] While this article does not seek to analyze the latter test as a matter of first principles, according to Feldman, the application of the Dormant Indian Commerce Clause would include a judicial balancing act of "weigh[ing] the federal and tribal interests against the state interests in regulation" so long as the state law was "reasonably related to a legitimate state purpose."[31]

This test, Feldman claims, "would resolve the confusion created when the *McClanahan* Court stated that federal 'preemption' instead of federal power barred state law in Indian country."[32] With respect to *McClanahan v. Arizona State Tax Comm'n* (1997), Feldman writes

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[28]The doctrine of Constitutional liquidation describes the process by which indeterminate constitutional meaning can be clarified.

[29]THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961) and *see generally* William Baude, "Constitutional Liquidation," 71 Stanford Law Review 1 (2019) and Michael W. McConnell, *"*Time, Institutions, and Interpretation," 95 Boston University Law Review 1745 (2015).

[30]Feldman, Stephen Matthew, "Preemption and the Dormant Commerce Clause: Implications for Federal Indian Law" (2015), 691.

[31]*Id*, 692.

[32]*Id.*

that the Court "imprecisely suggested that both [the tribal sovereignty and federal law] barriers [to state regulation] were based on federal preemption instead of on federal power."[33]

This section does not fully explore whether this test would run into similar criticisms as the Court's Dormant Commerce Clause jurisprudence in the context of Interstate Commerce Clause interpretation. As Justice Scalia decried the balancing test the Court employed in *Wynne*, he wrote, "It…requires [the Court] to balance the needs of commerce against the needs of state governments. That is a task for legislators, not judges."[34] Insofar as potential Dormant Indian Commerce Clause weighing may require the consideration of even more factors–federal, state, and tribal interests, all at the intersection of different government's sovereignty–Justice Scalia's criticism may be amplified.

A Concluding Hypothetical:

During the petitioner's argument in *Brackeen v. Haaland,* petitioner argued against the constitutionality of the Indian Child Welfare Act (ICWA) as a permissible exercise of congressional power under the Indian Commerce Clause. During the course of the argument, Justice Gorsuch asked the petitioner's counselor the following hypotheticals: "What if Congress tomorrow adopted a treaty with the tribes that replicated ICWA…[a]nd how about if it did it under the Spending Clause?"[35] Counsel answered that Congress could replicate ICWA utilizing these other enumerated powers, explaining, "We're not saying that Congress is powerless in this area."[36]

The Treaty Clause hypothetical suggests lingering questions for the future, particularly to the extent *Missouri v. Holland* may relate to the issues at play. Much public and judicial debate has arisen from *Holland*'s statement that "[i]f [a] treaty is valid[,] there can be no dispute about the validity of the statute" that implements it as "a necessary and proper means to execute the powers of the Government." [37] Provided one disagrees with the constitutional basis for a Dormant Indian Commerce Clause, would *Holland*'s logic allow Congress to, in effect, enact this type of doctrine by treaty? And, if so, at what level of generality would Congress be obliged to

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[33]*Id,* 674.
[34]Scalia, J., dissenting, 6.
[35]*Oral Argument Transcript in the Supreme Court of the United States Brackeen v. Haaland,* 38.
[36]*Id.*
[37]*Missouri v. Holland*, 252 U. S. 416 (1920), 162.

act? Of course, while the majority opinion did not determine the answers, these are some of the same questions that the Supreme Court had to grapple with in *Bond v. United States*, albeit in a non-Indian context.[38]

Regardless of the path a majority of justices go down in the future, as the Supreme Court increasingly takes up cases involving federal Indian law, an understanding of the nuance of the opposing arguments about a Dormant Indian Commerce will play an interesting role in the Court's examination of tribal, federal, and state relationships.

[38] *See generally, Bond v. United States*, 572 U.S. 844 (2014).