

Research Report on the 1876 Removal of Article X, Section 5 from Printed Copies of the Maine Constitution

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I. Introduction and Synopsis

The purpose of this Report is to explain from a legal perspective, and to the extent possible in light of the century and a half that has since passed, how and why the Maine Constitution was amended in 1876 to remove from printed copies of that Constitution, but not from the Constitution itself, the original language directing Maine to assume “the duties and obligations of this Commonwealth, towards the Indians within said District of Maine.”¹

Maine separated from Massachusetts in 1820 and became a state as part of the Missouri Compromise. The process of becoming a state first required legislation by Massachusetts, called the Articles of Separation,² followed by a vote of the people of Maine to approve separation, and finally approval by the federal government. For Maine’s purposes, once the people had voted in favor of separation, Maine required a constitution, which in turn also had to be approved by vote of the people.

Article X of the 1820 Constitution had 6 sections. A portion of Article X, Section 5 reads as follows:

The new State shall, as soon as the necessary arrangements can be made for that purpose, assume and perform all the duties and obligations of this Commonwealth, towards the Indians within said District of Maine, whether the same arise from treaties, or otherwise; and for this purpose shall obtain the assent of said Indians, and their release to this Commonwealth of claims and stipulations arising under the treaty at present existing between the said Commonwealth and said Indians . . .³

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¹ ME. CONST. art. X, § 5 (1820), *available at* https://digitalmaine.com/senate_docs/1; ME. CONST. art X, § 4 (1875), *available at* http://digitalmaine.com/senate_docs/11.

² Referred to alternatively as the “Articles” and as the “Act” of Separation, this report will refer to the “Articles” to avoid confusion. *See* RONALD F. BANKS, MAINE BECOMES A STATE 270, App. XIV (1970).

³ ME. CONST. *supra* note 1.

More than fifty years later, after a constitutional commission in 1875, Maine made several amendments to its constitution including the addition of Section 4 to Article X, as follows:

Sections one, two and five, of article ten of the existing Constitution, shall hereafter be omitted in any printed copies thereof prefixed to the laws of the State; but this shall not impair the validity of acts under those sections; and section five shall remain in full force, as part of the constitution, according to the stipulations of said section, with the same effect as if contained in said printed copies.⁴

It is important to note that the removal of Sections 1, 2, and 5 from printed copies was accomplished by amending the Maine Constitution and not by a statutory change. As a result, full reversal of that action would also require an amendment to the Constitution and not just a statute, which is the primary reason why efforts to restore the language to printed copies have not been successful.

The questions addressed in this report are: (1) what was the process by which Article X, Section 5 was removed from printed copies of the Maine Constitution, (2) what was its legal effect, and (3) why was it done.

The process of removal was straightforward, but it is helpful to understand that process for discussion of the other two questions. The legal effect is also fairly easy to evaluate; removal of the language did not affect either the way the treaties were viewed or discussed in court decisions or the formal legal relationship between Maine and the Tribes in the period following removal, at least as far as the State saw that relationship. The question as to why the language was removed cannot be definitively answered, although in context it seems most likely that it was clerical in nature rather than directed at the Indians. This is not because there was no official animus against Maine's Indians in 1876; rather, this change in the Constitution was not a significant factor in how that animus was expressed from either a legal or a practical standpoint. The removal of the language from printed copies of the Constitution may have actually assumed more importance in the present day, following the federal court litigation in the 1970s that clarified the actual legal relationship between Maine and the Tribes (subsequently modified by the Settlement Act in 1980), as the language removed from view in 1876 was the legal cornerstone from which the relationship between Maine and the Tribes began.

II. Historical Background

In 1820 when Maine became a state and assumed Massachusetts' duties and obligations to the Indians in Maine, the basic framework of the relationship between Massachusetts (later Maine) and the Indians had been laid out in treaties with the Passamaquoddy and the Penobscot tribes; specifically Massachusetts' treaty with the Passamaquoddy in 1794 and treaties with the Penobscots from 1796 and 1818.⁵ In brief summary, in 1794 the Passamaquoddy Tribe ceded much of its ancestral land to Massachusetts, but reserved the land at Indian Township and Pleasant Point as well as "the privilege of fishing on both branches of the river Schoodic without hinderance or molestation and the privilege of

⁴ ME. CONST. art. X, § 4 (1875), available at http://digitalmaine.com/senate_docs/11.

⁵ Passamaquoddy Tribe and Commonwealth of Massachusetts, *1795 Resolve Regarding A Treaty Between the Passamaquoddy and Massachusetts* (2017), available at https://digitalmaine.com/native_tribal_docs/12 Treaty; Commonwealth of Massachusetts; Robbins, Edward H.; Hill, Mark Langdon; and Davis, Daniel, *1818-06-29 Treaty Between Massachusetts and the Penobscot Nation* (1818), available at https://digitalmaine.com/native_tribal_docs/10.

passing the said river over the different carrying places thereon.”⁶ The Penobscots similarly ceded much of their ancestral land to Massachusetts in their treaties, allowing most of the shoreland along the Penobscot River to be opened for settlement and development in exchange for certain annual payments.⁷

On June 19, 1819, the Massachusetts legislature passed the Articles of Separation that allowed Maine to vote on independence, which it promptly did, favorably, in July 1819.⁸ Maine held a Constitutional Convention in October 1819. That Convention approved a draft constitution on October 29, 1819, which was then put to another vote of the people on December 6, 1819 and also passed.⁹ After approval by the federal government, the Maine Constitution took effect in 1820 upon Maine's admission to the Union as the 23rd state on March 15, 1820.¹⁰

A. Article X of the Maine Constitution

Article X of the 1820 Maine Constitution had 6 Sections. It is important not only to know what was in Section 5, the specific section herein under discussion, but also to have a basic understanding of the other Sections in Article X, all of which came under the heading “Schedule”. Sections 1, 2, and 5, in bold below, were the sections removed from printed copies in 1876.

- **Section 1 set out when the first Maine legislature would meet, when initial elections would be held, and how Senate and House seats would be apportioned as between counties and towns.**
- **Section 2 set out the initial term of Maine’s elected and appointed officers as being from the last Wednesday in May, 1820, to the first Wednesday in January, 1822.**
- Section 3 explained that the then existing laws of Massachusetts would remain in force, as long as they weren’t in conflict with the new Constitution, until altered or repealed by the Maine legislature.
- Section 4 set out the process for amending the Maine Constitution.
- **Section 5 contained the verbatim text of the Articles of Separation, which, in turn, had nine sections. The fifth of those sections contained the language about “the duties and obligations . . . towards the Indians within said District of Maine.”¹¹**
- Section 6 said that the Constitution was to be written on parchment, kept in the Secretary’s office, be “prefixed to the books containing the laws of this state,” and be the supreme law of Maine.¹²

⁶ Transcription, *Treaty between the Passamaquoddy Tribe & The Commonwealth of Massachusetts 1794*, App. A, Abbe Museum, available at <https://static1.squarespace.com/static/56a8c7b05a5668f743c485b2/t/5a67a309ec212dd424162e5f/1516741388247/Wabanaki+Timeline-+Resistance+Making+War+and+Negotiating+Peace.pdf>.

⁷ See Transcription, *Treaty Between Massachusetts and the Penobscot Tribe, June 29, 1818*, DigitalMaine Transcription Project, https://digitalmaine.com/native_tribal_docs/10.

⁸ The Articles of Separation required approval by more than a majority of Maine voters; in order to pass, the votes in favor of separation had to outnumber the votes against by at least 1,500.

⁹ ME. CONST. art. I, (1820), available at https://digitalmaine.com/senate_docs/1; See generally Maine State Legislature’s Legislative History Collection for a collection of amendments to the Maine Constitution from 1820-present available at <https://www.maine.gov/legis/lawlib/ldl/constitutionalamendments/>.

¹⁰ The federal vote allowing the creation of Maine was part of the “Missouri Compromise.” See e.g., *Missouri Compromise*, HISTORY.COM, <https://www.history.com/topics/abolitionist-movement/missouri-compromise> (last visited Jan. 9, 2021).

¹¹ ME. CONST. art. X, (1820), available at https://digitalmaine.com/senate_docs/1.

¹² *Id.*

B. The Articles of Separation

The Articles of Separation, as incorporated into Article X, Section 5 of the 1820 Constitution, had nine sections, with the section about Indians being the fifth.¹³ The Articles read more like a divorce judgment than a constitutional document.¹⁴ While they lay out the process for Maine's separation from Massachusetts, they were primarily concerned with the practical details of that separation; specifically the division of property and obligations as between the two states. The general content of the nine sections is as follows:

- First – divided the public land in Maine as between Maine and Massachusetts;
- Second – divided in proportion to “the returns of the militia” the arms given to Massachusetts by the federal government in 1808;
- Third – divided the money due Massachusetts by the federal government from the War of 1812 (2/3 to Massachusetts, 1/3 to Maine);
- Fourth – provided for all other property in Maine owned by Massachusetts to be set aside for two years for payment of “all debts, annuities, and Indian subsidies, or claims due by said Commonwealth” with provision for resolving any surplus or shortfall existing after the two year period;
- Fifth – required Maine to “assume and perform all the duties and obligations of this Commonwealth, towards the Indians within said District of Maine, whether the same arise from treaties, or otherwise; and for this purpose shall obtain the assent of said Indians; and their release to this Commonwealth of claims and stipulations arising under the treaty at present existing between the said Commonwealth and said Indians” and in addition indemnify Maine \$30,000, either in cash or in land, for taking on these obligations;¹⁵
- Sixth – created a 6-person Commission to survey and divide the public lands in Maine;
- Seventh – made provision for the continuation of funding and exemption from taxation of “any religious, literary, or eleemosynary corporation, or society” with particular focus on Bowdoin College and its grant that came from a tax on banks;

¹³ ME. CONST. art. X, (1820), *available at* https://digitalmaine.com/senate_docs/1.

¹⁴ Court judgments granting divorces are typically more concerned with the mechanics of how property is to be divided, or how children are to be cared for, than the momentous nature of the separation itself. In essence, the Articles of Separation “divorced” the close “family” relationship between Maine and Massachusetts, but the document was primarily focused on dividing property.

¹⁵ The full text of the Fifth paragraph of the Act of Separation reads as follows:

Fifth. The new State shall, as soon as the necessary arrangements can be made for that purpose, assume and perform all the duties and obligations of this Commonwealth, towards the Indians within said District of Maine, whether the same arise from treaties, or otherwise; and for this purpose shall obtain the assent of said Indians, and their release to this Commonwealth of claims and stipulations arising under the treaty at present existing between the said Commonwealth and said Indians; and as an indemnification to such new State, therefor, this Commonwealth, when such arrangements shall be completed, and the said duties and obligations assumed, shall pay to said new State, the value of thirty thousand dollars, in manner following, viz.: The said Commissioners shall set off by metes and bounds, so much of any part of the land, within the said District, falling to this Commonwealth, in the division of the public lands, hereinafter provided for, as in their estimation shall be of the value of thirty thousand dollars; and this Commonwealth shall, thereupon, assign the same to the said new State, or in lieu thereof, may pay the sum of thirty thousand dollars at its election; which election of the said Commonwealth, shall be made within one year from the time that notice of the doings of the Commissioners, on this subject, shall be made known to the Governor and Council; and if not made within that time, the election shall be with the new State.

Supra note 13. In the end, Massachusetts paid the \$30,000 in cash.

- Eighth – provided equal rights for Maine and Massachusetts citizens for any existing litigation involving parties in the diverse states and for Massachusetts’ collection of taxes or debts assessed or due, but not yet collected, before the separation; and
- Ninth – provided that the terms and conditions of the Articles of Separation must become and remain part of Maine’s Constitution unless both the Maine and Massachusetts legislatures agree to amend or annul any provision.

Other than a provision in Article II prohibiting “Indians not taxed” from voting, the Articles of Separation contain the only reference to Indians in the original Maine Constitution. Nevertheless, it was no secret at the time that Maine had obligations to the Indians under the Articles of Separation and the Constitution. This was covered in the national and New England press¹⁶ and was mentioned favorably by Maine’s first Governor in his initial address to Maine’s very first legislature in 1821.¹⁷ In that same year, and consistent with the Fifth Section of the Articles, the Maine legislature ratified a new treaty with the Penobscots and appointed “Agents” for the Passamaquoddy and Penobscot tribes specifying their authority and duties.¹⁸

As a legal matter, from the outset of statehood the Maine government’s understanding of what its “duties and obligations” were towards the Indians appears to have been no more than the duties a guardian might have to a ward, without any independent rights for the ward.¹⁹ This was the import of Maine’s first Governor’s remarks about Indians in his address to the legislature in 1821, and the Commission created to implement the Articles of Separation, which completed its work in 1822, only

¹⁶ See, *Separation of Maine*, NILES WEEKLY REGISTER, Vol XVI, (June 26, 1819) at 294, <https://babel.hathitrust.org/cgi/pt?id=nyp.33433081664462&view=1up&seq=310> (quoting the Boston Daily Advertiser; “The new state to assume all obligations to the Indians resident within the district, and in compensation for it, to have set off by metes and bounds from the share of lands assigned to Massachusetts so much as shall be valued by the Commissioners to be appointed, at the sum of \$30,000, or \$30,000 in money...”). In 1820, Niles Weekly Register was an influential national magazine based in Baltimore.

¹⁷ Resolves of the Legislature of Maine (Address of Governor William King, January 11, 1821) *available at* http://ldc.mainelegislature.org/Open/Laws/1821/Laws1821res_s0045-0049_GovMessage_1821-01-11.pdf:

In compliance with the provisions of the Act relating to the separation, and in conformity to the Resolve of this State, Col. Lewis was designated to negotiate with the Penobscot Indians. He has accordingly effected with them a new treaty or agreement, by virtue of which this State assumes all the duties and obligations of the Commonwealth of Massachusetts in relation to that tribe; the payment of the annuities to commence as soon as the stipulated sum to be received from Massachusetts for that purpose, shall have been paid over to this State. On their part the Indians have released to Massachusetts all claims and stipulations arising under any treaty between them and that Commonwealth. The ready compliance of these Indians with the wishes of this government, the unhesitating manner, in which they acceded to the existing arrangements, should constitute on our part, additional inducements not only to respect their rights, but to aid' them in obtaining, at least, the ordinary and common comforts, of which it is but too evident, they are destitute. Should the Friends or Quakers of our State be inclined to become the friends of a friendless people, they would here find a field for the exercise of those qualities for which they have long been distinguished, and, at the same time, might do much toward producing a union of sentiment hereafter in relation to their exemption from services, which they may be conscientiously scrupulous of performing.

Id. at 47.

¹⁸ Although Maine “negotiated” a treaty with the Penobscot Tribe affirming the previous treaties with Massachusetts and absolving Massachusetts from further liability, there was no attempt to do so with the Passamaquoddy Tribe. However, this did not make any difference in any Court cases concerning Indian rights or Article X, Section 5 of the Constitution.

¹⁹ The Maine Supreme Court’s view in 1879 was that “[T]he wandering and improvident habits of the remnants of the Indian tribes within our borders led our legislature at an early period to make them, in a manner, the wards of the state, and especially to take the control and regulate the tenure of their lands.” John v. Sabattis, 69 Me. 473, 476–77 (1879); *see also* Jason M. Door, *Changing Their Guardians: The Penobscot Indians and Maine Statehood, 1820-1849* (1998). Electronic Theses and Dissertations, <http://digitalcommons.library.umaine.edu/etd/2746>.

mentioned the Penobscot Tribe in its report because they were entitled to a “subsidy or annuity”, while the Passamaquoddy were not due a subsidy and were not mentioned.²⁰

In the first several decades after Maine became a state, the smattering of court decisions that dealt with native rights and issues adopted the premise that the Indians in Maine were among the “small tribes or remnants of tribes yet denominated tribes, which had before that time and have ever since continued to be under the control and guardianship of a State, and were without power to carry on commerce or trade, except by permission and under the regulation of the State laws.”²¹ Government title to land reserved to the Indians by treaty was considered superior to Indian title, and Maine’s Supreme Judicial Court dispensed summarily with the concept of original Indian title in 1870 and 1874.²² The Court in *Moor* mentioned Article X, Section 5, but only by way of suggesting that Maine had become the guardian of the Indians in place of Massachusetts, and it belittled the agreements made between the states and the Tribes by referring to them as “contracts denominated as treaties”.²³

Unquestionably there was some public debate and awareness at the time about Indian issues. For example, in order to sue in *Penobscot Tribe v. Veazie*, in which the Penobscots were the plaintiff, the Tribe either required (or believed it required) authority to sue from the Maine Legislature, which authority it got by legislative resolve in 1868.²⁴ Within a month the Legislature acted again to amend that resolve to require the Penobscots to pay the defendants’ court costs if the Penobscots lost the case, with the costs to come out of the money held by Maine for the Tribe.²⁵ However, there is no indication

²⁰ Commonwealth of Massachusetts and State of Maine, *1822-05-25 Agreement Between Massachusetts and Maine Adjusting the Personal Concerns Between the Two States* (1822) available at https://digitalmaine.com/native_tribal_docs/17

²¹ *Moor v. Veazie*, 32 Me. 343, 366 (1850).

²² *Penobscot Tribe v. Veazie*, 58 Me. 402 (1870); *Granger v. Avery*, 64 Me. 292 (1874). As the Court explained in *Veazie*, The fact must not be overlooked, that the reservation referred to did not create in the Indians any new title, did not operate as a grant to them of the islands therein described. Its effect was simply to leave in them the title which they before had, and no more. It is clear, therefore, that if the plaintiffs prevail, it must be upon the ground that the title of the aborigines of this country to the wild lands over which they roamed is superior to that of the government. The executive and legislative departments of the government have generally treated with the Indians as if they were the owners of those vast territories. But when the title to any particular tract of land has been called in question, in the courts of justice, no such doctrine has been admitted. The courts have uniformly held that the title of the government is superior to that of the aborigines. (citations omitted).

Veazie at 407.

²³ *Moor*, *supra* note 21 at 367.

²⁴ Maine Legislature, *Acts and Resolves of the Forty-Seventh Legislature of the State of Maine 1868*, ch. 195, approved February 5, 1868, available at http://lldc.mainelegislature.org/Open/Laws/1868/1868_RES_c195.pdf.

Resolved, That the attorney general of this state is hereby authorized and directed to commence, in the supreme judicial court, in and for the county of Penobscot, a suit or bill in equity, in the name of the Penobscot tribe of Indians, in order to settle the title to the Grassy Islands, in Penobscot river, and the Fishways, at Oldtown Falls, in said river, and, to prosecute the same to final judgement, after notice has been given to all parties interested in said islands and said fishway. And for all purposes of said suit, said Penobscot tribe of Indians, shall be considered as properly parties in court, and the judgment or decree of said court, as affecting the title to said islands and fishway, and its construction of the treaties referring to the same, shall be final and conclusive.

Id. at 175.

²⁵ Maine Legislature, *Acts and Resolves of the Forty-Seventh Legislature of the State of Maine 1868*, ch. 235, approved Feb. 29, 1868, available at http://lldc.mainelegislature.org/Open/Laws/1868/1868_RES_c233.pdf.

Resolved, That any judgment or judgments for defendant's costs, arising from a suit or suits originated under the authority of the above named resolve, shall be paid to said defendant or defendants on demand, from the treasury of the state, upon warrant or warrants drawn therefor, in his or their favor by the governor and council, and the same be charged to the Indian fund, or general or special appropriations from the state in favor of said Indians.

Id. at 188.

that the level of controversy, public or legal, was sufficient to motivate Maine to remove the language in Article X, Section 5 from printed copies of the Constitution.

In sum, there are neither court decisions nor other evidence prior to 1876 suggesting that Maine recognized any inherent or retained Indian rights from Article X, Section 5 of the Maine Constitution beyond the strict boundaries of the land reserved by/for the Penobscot and Passamaquoddy tribes in their treaties with Massachusetts and Maine. Section 5's removal in 1876 from printed copies of the Constitution, as discussed below, was reflective of the official view largely held since statehood that the "duties and obligations" Maine assumed from Massachusetts were solely the duties and obligations of guardian to ward. It is understandable to suspect that Maine's motive in removing the Section 5 language was to hide its treaty obligations. However, to put it bluntly, the Maine government did not believe that it had any obligations to hide. By the 1870's, the only obligations Maine officially recognized it had towards the Indians were the statutes it had passed, beginning in 1821, for the regulation of the Penobscot and Passamaquoddy Tribes.

III. The removal in 1876 of Article X, Section 5, from printed copies of the Maine Constitution

In 1876, more than 50 years after the Maine Constitution was originally enacted, Maine amended the Constitution to add (amongst other amendments) a new section to Article X, as follows:

Sections one, two and five, of article ten of the existing constitution, shall hereafter be omitted in any printed copies thereof prefixed to the laws of the State; but this shall not impair the validity of acts under those sections; and section five shall remain in full force, as part of the Constitution, according to the stipulations of said section, with the same effect as if contained in said printed copies.²⁶

It is fairly easy to answer the question as to how this was done. It is harder to determine why it was done or what the effects of having done so have been over the ensuing 150 years.

A. Amendment of the Maine Constitution in 1876

On January 7, 1875, as part of his "state of the State" address to the legislature,²⁷ Governor Norman Dingley proposed the establishment of a commission to make recommendations to clean up and re-codify the Constitution. He explained that after 55 years' worth of amendments, the Constitution "has become a piece of legal patch-work, in which the patches and out-of-date shreds cover half of the thirty-two pages which the Revised Statutes devote to the instrument, and the casual reader often finds it difficult to understand what is the fundamental law of the State."²⁸

The Governor gave no other reasons for recommending a constitutional commission, and he made no suggestions as to any specific sections of the Constitution that should be considered for

²⁶ ME. CONST. art X, § 4 (1875), *available at* http://digitalmaine.com/senate_docs/11.

²⁷ *See* ME. CONST. art V, § 9.

²⁸ Public Documents of Maine: Annual Reports of the various Public Officers and Institutions 1875 (Address of Governor Dingley to the Legislature of the State of Maine, Jan. 7, 1875), 37, *available at* http://lldc.mainelegislature.org/Open/Rpts/PubDocs/PubDocs1875v1/PD1875v1_04.pdf. The Governor noted that the people were already scheduled to vote the following September on a constitutional amendment abolishing the office of land agent and that a commission's recommendations could be put to a vote at the same time.

amendment. Most of his speech on this point was about the process for doing so; he advocated for the appointment of a select commission to make recommendations to the legislature, noting on the one hand that no existing legislative committees had the time for proper consideration of the issues, while on the other hand that a full-blown constitutional convention was expensive and unwieldy. He made no reference to Article X, Section 5 in his discussion, although he was not unaware of Maine's Indians, as he mentioned them in the sections of his address relating to disbursements ("rents of shores belonging to the Penobscot Indians") and expenditures ("\$12,553 for aid to the Penobscot and Passamaquoddy Indians").²⁹ Viewed objectively, his state of the State address was a comprehensive, detailed, and well-reasoned speech clearly intended to self-portray as a progressive thinker. For example, he recommended the abolishment of debtor's prison,³⁰ something that wasn't accomplished for another 100 years, advocated for legislation allowing women to hold certain offices such as Justice of the Peace³¹ (although women were not constitutionally allowed to vote), and challenged the legislature to decide once and for all whether capital punishment should be abolished.³²

Things then moved swiftly. Less than a week later, on January 12, 1875, the legislature responded to the Governor's challenge and gave him the authority to appoint a Constitutional Commission.³³ The Commission deliberated for less than a month and on February 10, 1875, finalized its recommendations and reported them to the legislature for its action.³⁴ Two weeks later, on February 24, 1875, following discussion and revision of each proposed amendment by the relevant legislative committees, the legislature approved a modified set of recommendations and sent them for a vote of the people.³⁵ The amendments were passed by statewide vote on September 13, 1875, and took effect on January 5, 1876.³⁶

B. What were the 1876 Amendments?

The Commission's proposal consisted of seventeen separate amendments on a diverse set of topics ranging from the Governor's power to pardon to abolishment of the office of land agent, appointment rather than the election of local judges, bribery at elections, and taxation of personal as well as real property. None of them affected the fundamental structure or lines of authority in the Constitution. The legislature did not just rubber-stamp the Commission's recommendations, which suggests that debate went on prior to the Legislature's vote on the final set of amendments. By way of example, the Commission recommended executive appointment rather than election for both probate and municipal judges, but in the end the Legislature retained the election of probate judges³⁷ and only amended the constitution to require the executive appointment of municipal judges.

²⁹ *Id.* at 4, 24.

³⁰ *Id.* at 35.

³¹ *Id.* at 35–36.

³² *Id.* at 31–33.

³³ Maine Legislature, *Acts and Resolves of the Fifty-Fourth Legislature of the State of Maine 1875*, ch. 1, approved Jan. 12, 1875, available at http://lldc.mainelegislature.org/Open/Laws/1875/1875_RES_c001.pdf.

³⁴ Const. Comm'n 1875, Proposed Amend. (Feb. 10, 1875), available at http://lldc.mainelegislature.org/Open/Rpts/PubDocs/PubDocs1875v2/PD1875v2_14.pdf.

³⁵ Maine Legislature, *Acts and Resolves of the Fifty-Fourth Legislature of the State of Maine 1875*, ch. 98, 36, approved Feb. 24, 1875, available at http://lldc.mainelegislature.org/Open/Laws/1875/1875_RES_c098.pdf.

³⁶ See Maine State Legislature's Legislative History Collection amendments to the Maine Constitution, available at <https://www.maine.gov/legis/lawlib/lldl/constitutionalamendments/>; *Debates and Journal of the Constitutional Convention of the State of Maine 1819-20*, available at http://lldc.mainelegislature.org/Open/Rpts/jk2825_1819_a1_1894.pdf.

³⁷ Which continues to this day.

The Commission's proposed amendment to Article X of the constitution, entitled "Codification of the Amended Constitution", required that Sections 1, 2, and 5 of Article X be omitted from printed copies of the Constitution, while confirming that Section 5 would remain in full force with the same effect as if still contained in printed copies.³⁸ The Senate Judiciary Committee considered this particular amendment, but made no changes, and the final set of amendments approved the original proposal verbatim.³⁹ When finally arranged and edited by the Chief Justice as per the amendment to Article X, Section 6, the seven sections of Article X were reduced to four in the printed Constitution, with Section 4 reading as follows:

SEC. 4. Sections one, two and five, of article ten of the existing Constitution, shall hereafter be omitted in any printed copies thereof prefixed to the laws of the State; but this shall not impair the validity of acts under those sections; and section five shall remain in full force, as part of the Constitution, according to the stipulations of said section, with the same effect as if contained in said printed copies.⁴⁰

C. What specific language was then omitted from printed copies of the Constitution?

Omitted Section 1 of Article X had set the schedule in 1820 for Maine's initial legislative assembly and initial elections for Governor and other executive offices, which would thereafter revert to the regular Constitutional schedule starting in 1821. Section 1 also apportioned the Senate and House seats by naming each county and town and the number of representatives each would initially elect. Section 1 covered almost three pages of text in the original Constitution.

Omitted Section 2 provided that the initial legislative and executive terms would begin in May 1820 and end in January 1822, at which point the regular Constitutional pattern of two, four, and six years terms – with elections every other September – would commence.

Omitted Section 5, which contained the language about "all the duties and obligations. . . towards the Indians", incorporated all nine sections of the Articles of Separation into the Maine Constitution. As noted above, the Articles contained much more than the language about Maine's Indians and were primarily concerned with dividing assets and obligations as between Massachusetts and Maine, with Massachusetts' obligations to the Indians considered as one of the latter. Section 5 covered more than three additional pages of text.

The Articles of Separation, by their own terms, had to "be incorporated into, and become and be a part of any Constitution, provisional or other, under which the Government of the said proposed State, shall, at any time hereafter, be administered; subject however, to be modified, or annulled by the

³⁸ *Supra* note 34. The proposal also recommended amending Section 6 of Article X, which had originally directed simply that the Constitution be "enrolled on parchment", placed in the Secretary of State's office, and "be prefixed to the books containing the laws of this State." Amended Section 6 added a process by which the Chief Justice of the Supreme Court would be responsible to "arrange" and edit the Constitution prior to being "enrolled on parchment".

³⁹ *Compare* Committee on the Judiciary, *Resolve concerning an amendment of the Constitution of Maine*, available at <https://www.maine.gov/legis/lawlib/lldl/constitutionalamendments/054-sd-0065-n22.pdf>, with Maine Legislature, *Acts and Resolves of the Fifty-Fourth Legislature of the State of Maine 1875*, ch. 98, 36, approved Feb. 24, 1875, available at http://lldc.mainelegislature.org/Open/Laws/1875/1875_RES_c098.pdf.

⁴⁰ ME. CONST. art X, § 4 (1875), available at http://digitalmaine.com/senate_docs/11.

agreement of the Legislature of both the said States; but by no other power or body whatsoever.”⁴¹ In other words, the Articles of Separation, which included Maine’s assumption of Massachusetts’ duties and obligations towards the Indians, could not be “modified or annulled” by Massachusetts or Maine alone, or by the federal government, but only by vote of the legislatures of Maine and Massachusetts.

If Maine really was primarily concerned with simplifying and shortening printed copies of its Constitution by removing the “patches and out-of-date shreds [that] cover half of the thirty-two pages”⁴², then the only way to remove the several pages of Article X, Section 5 – without legislative action by Massachusetts – was to remove the language from printed copies, yet affirm that the content remained part of the Constitution. This is precisely what Maine did in 1876.

A final legal question in this regard is worth mentioning: whether the Articles of Separation can be amended solely by mutual action of the Maine and Massachusetts legislatures or whether any change in the Articles would, by definition, be an amendment to the Maine Constitution and would therefore, as per current Article X, Section 4, also require a 2/3 vote of both legislative houses along with a vote of the people?

There is no clear answer. The Articles of Separation by its express terms says that it can be “modified, or annulled by the agreement of the Legislature of both the said States; but by no other power or body whatsoever”, suggesting that further process to amend the Constitution would not be required. However, it remains part of the Maine Constitution, which by its express terms, can only be amended as per Article X, Section 4. Potentially the answer might be “yes” to both questions if the Articles are first considered as a contract between the states and then viewed as part of the Constitution.

In 1973, the Maine Supreme Court was asked by the legislature to opine on the constitutionality of proposed legislation affecting reserved public lands.⁴³ Since Maine’s reserved public lands arose from the Articles of Separation, among the questions put to the justices were (1) whether the proposed legislation violated the Articles of Separation and (2), if so, “would such provisions be constitutional upon consent to such provisions by the Legislature of Massachusetts?”⁴⁴ Since the Justices found that the proposed legislation did not violate the Articles of Separation, they declined to answer the question as to whether the Articles could be amended with consent of the Massachusetts legislature without amending the Maine Constitution. However, they clearly recognized that the Articles of Separation remained part of the Maine Constitution even though since 1876 it had not been included in printed copies.⁴⁵ In their interpretation of the public lands provision of Article X, Section 5, the Justices put considerable stock in cases decided by the Maine Supreme Judicial Court shortly after Maine became a state, when the Articles of Separation were in recent memory, and the statement of facts in the legislature’s request for the opinion included a reference to a situation in 1831 when the Articles of

⁴¹ *Articles of Separation*, ME. CONST. art. X, §5, *Ninth*, available at https://digitalmaine.com/senate_docs/1.

⁴² *Gov. Dingley Address*, *supra* note 28 at 37.

⁴³ Opinion of the Justices, 308 A.2d 253 (Me. 1973).

⁴⁴ *Id.* at 257.

⁴⁵ *Id.* at 268–69. The Justices included the following enigmatic footnote on this issue:

By thus concentrating attention upon the Articles of Separation in this aspect as a part of the Constitution of Maine, we intend no suggestion that the "Articles" are without independent legal effectiveness as limitations upon the sovereignty of the State of Maine imposed by the Commonwealth of Massachusetts. Cf. *Green v. Biddle*, 8 Wheat. (21 U.S.) 1, 5 L.Ed. 547 (1823). As the ensuing discussion will disclose, our undertaking to answer the questions propounded need not involve an investigation of this facet of the Articles of Separation.

Id. at 269, n.1a.

Separation were amended by mutual action of the Maine and Massachusetts legislatures without amendment of the Maine Constitution.⁴⁶

IV. What was the legal and practical effect of removal of Sections 1, 2, and 5 of Article X?

Other than removing the words from printed copies of the Maine Constitution, the 1876 amendment had no legal effect on Article X, Section 5. The amendment itself confirmed that the Section 5 “shall remain in full force, as part of the Constitution, according to the stipulations of said section, with the same effect as if contained in said printed copies.” Subsequent to its removal from printed copies, in 1892 the Maine Law Court noted the continued viability of Article X, Section 5, specifically in reference to the State’s rights and responsibilities towards the Indians.⁴⁷ In *State v. Newell*, Peter Newell, a Passamaquoddy tribal member killed two deer on January 14, 1891, and was charged with violating State hunting laws. His defense was that the 18th century treaties with both colonial and post-colonial Massachusetts guaranteed his traditional rights to hunt and fish, because the Passamaquoddy had never ceded those rights.⁴⁸

The situation in *Newell* seems to have been instituted by the Passamaquoddy almost as a test case. Although we do not know for sure if they were one and the same person, a Peter J. Newell was the Passamaquoddy Tribal Representative to the Maine Legislature in 1889. His term would have ended in 1891, just before the arrest of Peter Newell for hunting deer out of season.⁴⁹ An article from an unnamed newspaper dated February 6, 1891, described the dispute as follows:

Game Warden French of Calais, has arrested 2 Indians, Peter Newell and Joseph Gabriel for the unlawful killing of deer. They were brought before Justice Dresser at Princeton, Feb. 3, found guilty and bound over to the Supreme Judicial Court to be held in Calais in April. There [*sic*] defense is truly an ingenious one and they base it on very solid foundations. They claim that they have the right to fish and hunt whenever and wherever they please, the fish and game law to the contrary notwithstanding. An interesting question thus arises. Are the Indians amenable to our game laws? The Indians [*sic*] confidently asserts that he is not, and it cannot be denied that he presents cogent reasons for his claim. It is none other than a right derived from treaties, in 1725, again in 1727, and finally in 1794 the Commonwealth of Massachusetts granted to this same Tribe of Passamaquoddy Indians by bounden and solemn treaty the right to fish and hunt forever. These treaties, the Indians say, neither the Legislature nor the courts have a right to vary,

⁴⁶ The Justices stated,

In 1831 the Legislature of Maine sought to modify the Articles of Separation to acquire the power to ‘direct the income of any fund arising from the proceeds of the sale of land required to be reserved for the benefit of the Ministry, to be applied for the benefit of primary schools, in the town in which such land is situate, where the fee has not already vested in some particular Parish in such town, or in some individual’.” Massachusetts responded with legislation which repeated, substantially verbatim, the Act of the Maine Legislature and which recited that the Articles of Separation were thereby “so far modified, as to permit an exercise of legislation by the Government of the State of Maine, over the subject of ministerial and school lands within its territorial jurisdiction, granted or reserved for those purposes before the separation of that State from the Commonwealth.

Id. at 254–55.

⁴⁷ *State v. Newell*, 84 Me. 465, 24 A. 943 (1892).

⁴⁸ *Id.* at 943–44.

⁴⁹ Maine State Legislature, *Tribal Representatives to the Maine Legislature, 1823-*, available at <https://legislature.maine.gov/lawlibrary/tribal-representatives-to-the-maine-legislature-1823/9257> (last visited Jan. 9, 2020).

treaties which were made with them by commissioners of Massachusetts, before Maine became a State, which same treaties were not only ratified by the new State, but it was part of the agreement in the act of separation that the rights of the Indians by treaty and otherwise, should be protected. This treaty, the Indians Claim, is to be considered like any other treaty as the supreme law of the State and any act of the legislature that conflicts with it are null and void. At any rate they propose to test it and confidently appeal to the courts for redress of what they consider wrongs done them by the game laws. They have appealed to the Legislature again and again, but to no purpose. They now seek the domain of the law for vindication and propose to fight it out on that line. This much is sure: the Passamaquoddy Tribe is stirred up to its very foundations. This question has excited a lively interest in Calais. Many of the city's prominent citizens have volunteered their aid and counsel to the Indians and the case will be presented at the next session of the Supreme Judicial Court in April.⁵⁰

In deciding against Mr. Newell, the Supreme Judicial Court accepted the existence of the treaties presented in the record and noted the continuing validity of Article X, Section 5 of the Maine Constitution. However, they discounted those documents by deciding (1) that the Passamaquoddy Tribe in 1891 could not show that it was the successor to the Passamaquoddy Tribe with whom the treaties were made, (2) that over the intervening century they had essentially forfeited any independent legal or political existence, and (3) that in any event the treaty of 1794 only spoke of fishing rights in the Schoodic (St. Croix) River and did not grant any hunting rights.⁵¹

Though these Indians are still spoken of as the 'Passamaquoddy Tribe,' and perhaps consider themselves a tribe, they have for many years been without a tribal organization in any political sense. They cannot make war or peace; cannot make treaties; cannot make laws; cannot punish crime; cannot administer even civil justice among themselves. Their political and civil rights can be enforced only in the courts of the state; what tribal organization they may have is for tenure of property and the holding of privileges under the laws of the state. They are as completely subject to the state as any other inhabitants can be. They cannot now invoke treaties made centuries ago with Indians whose political organization was in full and acknowledged vigor.⁵²

For purposes of this report, the primary point is that in 1891 the Passamaquoddy Tribe, the State of Maine, the Supreme Judicial Court, and the public were all aware that the Articles of Separation remained a part of the Maine Constitution even though the language was no longer included in printed

⁵⁰ Email from Donald Soctomah to Donna Marie Loring (Nov. 6, 2000) *available at* <https://www.une.edu/sites/default/files/1-penobscotshistoricinfo1-treatyrights1891.pdf>.

⁵¹ *Newell*, *supra* note 47 at 943–44. Consistent with Maine's official position throughout the 19th century, the Court saw the treaties as, at most, a grant of land and/or rights from Massachusetts to the Passamaquoddy rather than a grant of certain land by the Indians with all other existing rights retained. The Court stated, "What the report calls the treaty of 1794 was simply a grant by the commonwealth to the Passamaquoddy Tribe of Indians of certain lands and the privilege of fishing in the Schoodic River, in consideration of their releasing all claims to other lands in the Commonwealth. Clearly the defendant gains no right to hunt under that grant." *Id.* at 944.

⁵² *Id.* This despite the revisions in Maine Statutes from 1821 on, specifically covering the Penobscot and Passamaquoddy tribes and state accountings; *see* State of Maine, *Revised Statutes of the State of Maine 1871*, *available at* http://lldc.mainelegislature.org/Open/RS/RS1871/RS1871_c009.pdf.

copies. A secondary point is that as far as the State of Maine was concerned it did not matter; the Passamaquoddy derived no rights from that part of the Constitution or the treaties it incorporated.⁵³

V. Why were Sections 1, 2, and 5 of Article X omitted from printed copies of the Constitution?

There is no recorded legislative debate, nor did the Maine legislature make findings as to why it amended the Constitution to omit Article X, Section 5 from printed copies.⁵⁴ In urging the legislature to review the Constitution and amend it where appropriate, Governor Dingley noted only that the Constitution with its amendments was poorly organized, had “out-of-date shreds”, and had become so long (32 pages) that “the casual reader often finds it difficult to understand what is the fundamental law of the State.”⁵⁵

A. Governor Dingley’s Reasoning

Taken at face value, Governor Dingley’s expressed reasons make sense. Omitted Sections 1 and 2 covered four pages of text, dealt only with the initial officeholders and legislative session when Maine became a state, and had no practical application after 1822. Omitted Section 5, as noted above, also occupied several pages of text and dealt with the way Massachusetts and Maine divided their property and obligations – from land to munitions to Indian subsidies – when they separated. Since those items had been apportioned and divided at the time of separation or soon thereafter, officials might well not have seen a reason to keep the Articles of Separation in printed copies of the Constitution even though the language itself, and the obligations is expressed, could not be altered or nullified without simultaneous action by the Massachusetts legislature.

Since the Supreme Judicial Court continued to recognize the existence and validity of Article X, Section 5 after the language was removed from printed copies, it does not appear that the amendment of 1876 was intended to take any rights away from Maine’s Indians. Rather, as far as the State of Maine was concerned at that time, Maine’s Indians did not have any treaty rights to take away. For both legal and practical purposes, the amendment and the hiding of the language about the State’s duties and obligations did not change the way the State conceived of or administered its relationship with the Passamaquoddy and Penobscot Tribes.

B. Redact: Obscuring the Maine Constitution

In September 2020, the Maine Historical Society presented an exhibit REDACT: Obscuring the Maine Constitution.⁵⁶ It suggested a possible motive for redaction in the connections between some of

⁵³ The language in the *Newell* decision suggests a deliberate attempt by the Justices to minimize any legal effect from the treaties, describing as one of the “treaties made centuries ago” a 1794 treaty that was actually less than 100 years old when the decision was rendered. *Newell*, *supra* note 47 at 944. The Court’s interpretation of the law was finally corrected in the 1970s in the federal litigation culminating in Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

⁵⁴ There is a “Journal of the Constitutional Commission of the State of Maine, 1875” located in the safe of the Secretary of State in Augusta, Maine which might shed some light on these issues, but has not been reviewable.

⁵⁵ *Gov. Dingley Address*, *supra* note 28 at 37.

⁵⁶ The information contained herein regarding the Redact Exhibit was obtained through a visit to the Exhibit (https://www.mainehistory.org/museum_current.shtml#Redact) and a webinar/panel discussion entitled “REDACT: A panel discussion on the redaction of Maine’s 1820 Constitution” that aired on November 19, 2020.

the individuals involved in the case of *Granger v. Avery*⁵⁷ and the Constitutional Commission of 1875. One of the members of the 1875 Commission was Frederick Pike, a Calais politician and lawyer who began his practice of law in the office of Joseph Granger, Esq., the plaintiff in *Granger*.⁵⁸

The issue in *Granger* was whether Granger or the Passamaquoddy Tribe owned Grass Island in the St. Croix River. Granger claimed ownership of the Township of Baileyville, including Grass Island. He traced his chain of title from a 1793 deed from Massachusetts to a William Bingham. He sued Avery, Maine's agent for the Passamaquoddy Tribe, for Passamaquoddy "trespass" on Grass Island. Avery defended based on the Tribe's indigenous title and its 1794 Treaty with Massachusetts, which "expressly mentioned" Grass Island as Passamaquoddy land.⁵⁹ The Maine Supreme Court, noting Granger's chain of title, was unimpressed by either the claim of indigenous title or the 1794 Treaty, which post-dated Granger's claim:

It was determined in *Penobscot Tribe v. Veazie*, 58 Maine, 402, that the title of the government was superior to that of the aborigines. The Passamaquoddy Indians had no title originally to this island in controversy. They acquired none by the conveyance from Massachusetts, nor have they since acquired any by adverse possession.⁶⁰

The Redact Exhibit emphasized the personal/professional connections between Granger and Pike and suggested that, as a member of the 1875 Constitutional Commission, Pike proposed and advocated for redaction as a hedge against the pending *Granger* decision.⁶¹ The Exhibit posited that a decision favorable to Granger might have required Maine to reimburse the Passamaquoddys for the loss of Grass Island, based on the Constitutional obligation under Article X, Section 5.

Since records are limited, this theory cannot be fully proven or disproven. However, from a legal perspective, the State did not need a nefarious motive for redaction. The Maine Supreme Court had already dispensed with the concept of indigenous title in 1870 in *Penobscot Tribe v. Veazie*,⁶² the case upon which its decision in *Granger* was based. In 1892, seventeen years after redaction, the Court specifically mentioned the Articles of Separation as part of the Maine Constitution in *State v. Newell*.⁶³ As far as the Court was concerned, redaction had no legal effect on substantive law. In fact, after the *Granger* decision, the legislature voted both to compensate Granger for the trespass allegedly done to him *and* to ascertain the value of the land taken from the Passamaquoddys and reimburse their trust

⁵⁷ *Granger v. Avery*, 64 Me. 292 (1874).

⁵⁸ State of Maine, *Resolve providing for the payment of the members of the constitutional commission, 1875*, ch. 45, available at http://lldc.mainelegislature.org/Open/Laws/1875/1875_RES_c046.pdf.

⁵⁹ *Granger*, *supra* note 57 at 294.

⁶⁰ *Id.* at 296.

⁶¹ Pike and Granger were certainly acquainted, probably personally as well as professionally. Both Pike and Granger were Republicans who served terms as Mayor of Calais, as did C. R. Whidden, the lawyer who defended Avery, who served as Mayor directly after Granger did. See *The Political Graveyard: A Database of American History, Calais, Maine*, POLITICALGRAVEYARD.COM, <http://politicalgraveyard.com/geo/ME/ofc/calais.html> (last visited Jan. 9, 2021).

⁶² *Penobscot Tribe v. Veazie*, 58 Me. 402 (1870).

⁶³ 84 Me. 465, 24 A. 943 (1892). The Court described Mr. Newell's defense to the charge of illegal hunting as follows; "He claims that these treaties are made, by the fifth section of the act of separation, (incorporated into our constitution,) a constitutional restraint upon the power of the legislature to limit the freedom of the Passamaquoddy Indians in hunting and fishing." *Id.* at 944.

fund from the State treasury.⁶⁴ In sum, it is hard to see why the *Granger* case would have provided motivation sufficient for a Constitutional Commission to redact the entire Articles of Separation, of which Maine's obligations to the Indians was but a small part.⁶⁵

VI. Aftermath

As time went on, despite the continuing legal "duties and obligations" in Article X, Section 5, general awareness of those duties and obligations obviously declined and/or vanished. When the language in Article X, Section 5 has been "rediscovered" from time to time, there have been attempts to re-include the Articles of Separation in printed copies of the Constitution. However, this would of course require amendment of the Constitution. Edward Hinckley, briefly Maine's Commissioner for Indian Affairs in the 1960s, made an effort to do so, but was unsuccessful.⁶⁶ The "hidden language" was referenced in the context of the Maine Indian land claims,⁶⁷ and in 2015 and again in 2017 John Henry Bear, the Maliseet representative to the Maine legislature, sponsored bills to amend the Constitution to again include Article X, Section 5 in printed copies.⁶⁸ The first attempt ended with a different bill that did not amend the Constitution, but instead simply required the State Law Librarian to make Article X, Section 5, more easily available.⁶⁹ Representative Bear's second attempt in 2017 passed the Maine House, but died in the Senate.⁷⁰

Article X, Section 5 remains a part of Maine's Constitution, although not part of any printed copies. As such, it cannot be amended or removed from the Constitution without the consent of

⁶⁴ See Maine Legislature, *Acts and Resolves of the Fifty-Fifth Legislature of the State of Maine 1876*, Chap. 154, 116–17, approved Feb. 21, 1876, available at http://lldc.mainelegislature.org/Open/Laws/1876/1876_RES_c154.pdf; Maine Legislature, *Acts and Resolves of the Fifty-Seventh Legislature of the State of Maine 1878*, Chap. 83, 31, approved Feb. 21, 1878, available at http://lldc.mainelegislature.org/Open/Laws/1878/1878_RES_c083.pdf.

⁶⁵ The Redact Exhibit suggested that the decision in *Granger* was not issued until after the public vote for redaction in September 1875. The trial in *Granger* occurred in April 1874 in the Maine Supreme Court (Maine's basic trial court) with Justice Cutting presiding. The case then appears to have been submitted to the Law Court for a decision on the underlying legal issues. That decision was written by Chief Justice Appleton with five other Justices including Cutting concurring and issued in 1874 prior to redaction. The Law Court dealt solely with the legal issue and did not mention or decide the amount of damages. The case would then have gone back to the Supreme Judicial Court for determination of damages and costs. That judgement, presumably by Justice Cutting, was entered on October 20, 1875, after redaction.

⁶⁶ Colin Woodard, *Legislation would put hidden sections of Maine's constitution back into print*, PORTLAND PRESS HERALD, (June 1, 2015), <https://www.pressherald.com/2015/06/01/legislation-would-put-hidden-sections-of-maines-constitution-back-into-print/>.

⁶⁷ See e.g., *Jt. Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F. Supp 649, 652 n.2 (1975) (Judge Gignoux discussing the treaty duties and obligations assumed and performed by the State of Maine, "The Articles of Separation were incorporated into the Maine Constitution as Article X, Section 5."); see also Francis J. O'Toole & Thomas N. Tureen, *State Power and the Passamaquoddy Tribe: A Gross National Hypocrisy*, 23 ME. L. REV. 1, 2, n. 5, 10 (1971) (discussing the omitted language of Article X, § 5, "Although this compact of separation remains a part of the Maine Constitution, it is no longer printed.").

⁶⁸ L.D. 893 (127th Legis. 2015) available at http://legislature.maine.gov/legis/bills/display_ps.asp?LD=893&snum=127; L.D. 428 (128th Legis. 2017) available at https://legislature.maine.gov/legis/bills/display_ps.asp?LD=428&snum=128.

⁶⁹ This bill finally passed over the Governor's veto. The language reads, "Sec. 1 Articles of Separation more prominently available. Resolved: That the Secretary of State, Maine State Library and Law and Legislative Reference Library, within existing resources, shall make the Articles of Separation of Maine from Massachusetts, including the fifth subsection, more prominently available to educators and to the inquiring public." Maine Legislature, Resolves 2015, ch. 40 available at <http://legislature.maine.gov/legis/bills/getPDF.asp?paper=HP0612&item=6&snum=127>. The Legislature has created a webpage titled "Sections of the Maine Constitution Omitted From Printing" available at <http://legislature.maine.gov/lawlibrary/sections-of-the-maine-constitution-omitted-from-printing/9296/>.

⁷⁰ L.D. 428 *supra* note 68.

Massachusetts and, possibly in addition, by amendment of the Constitution through Maine's constitutional process. Hence, as a constitutional matter, Maine still retains "all the duties and obligations" Massachusetts had to the Indians in Maine as contained in "treaties or otherwise". In the 19th century, the Maine Supreme Court recognized the existence of those treaties, although it downgraded them to mere contracts, but did not recognize the Indians of their day as the legal successors to the Tribes that negotiated those treaties. This view was clearly overruled in the land claims litigation in the 1970s.⁷¹

Hence, the question remains whether or not the Maine Constitution retains any Tribal rights beyond the Maine Implementing Act and the Settlement Act, a question that is outside the scope of this report. The State might argue, as the Attorney General did in 2015, that the Settlement Act gave Maine "a general discharge and release of all obligations ... arising from any treaty or agreement with, or on behalf of any Indian nation, or tribe or band of Indians or the United States as trustee" to the tribes.⁷² The State's current position, as expressed by Assistant Attorney General Chris Taub, remains that the relationship between the state and the tribes is governed by law and not treaties.⁷³ However, the Maine Constitution cannot be amended simply by legislative acts of the State of Maine or the Federal Government. We know that in 1831, even a relatively small change in the Articles of Separation involving the proceeds from the sale of public land required contemporaneous identical legislation in Massachusetts to succeed.⁷⁴

As an example, in the 1794 treaty between the Passamaquoddy and Massachusetts, the Passamaquoddy retained "the privilege of fishing on both branches of the river Schoodic without hinderance or molestation".⁷⁵ Maine assumed that obligation in 1821, and the state's duty to honor its obligations under that treaty remains in the Maine Constitution. In order to deny that treaty-based right, Maine would have to claim that federal legislation released them from a constitutional obligation.⁷⁶

VII. Conclusion

The duties and obligations Massachusetts had towards the Indians in the District of Maine were transferred to the new State of Maine as part of the Articles of Separation and, as such, were written into the Maine Constitution. However, as the Articles of Separation were concerned almost solely with dividing assets and obligations as between the two states, one reading/interpretation of what Massachusetts and Maine intended was that Massachusetts' "duties and obligations" to the Indians were financial in nature and that Maine would take on those obligations and hold Massachusetts harmless. Within the next generation, based on the decisions of Maine's Supreme Judicial Court, by

⁷¹ See *Jt. Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

⁷² *Woodard*, *supra* note 66; 25 U.S.C. 1731.

⁷³ Caitlin Andrews, *Maine lawmakers endorse sovereignty bid in historic win for tribes, but obstacles remain*, BANGOR DAILY NEWS (August 6, 2020), <https://bangordailynews.com/2020/08/06/politics/maine-lawmakers-endorse-sovereignty-bid-in-historic-win-for-tribes-but-obstacles-remain/>

⁷⁴ *Supra* note 35.

⁷⁵ *Supra* note 6.

⁷⁶ The Settlement Act purports to prevent any future lawsuits based on the laws of Maine respecting the transfer of any land or natural resources by the Indians prior to the Settlement Act. However, the Passamaquoddy's fishing rights were not transferred in 1794, but instead retained. See *State v. Newell*, 84 Me. 465, 24 A. 943 (1892) (Maine's Supreme Court expressly discussed that treaty; "What the report calls the treaty of 1794 was simply a grant by the commonwealth to the Passamaquoddy Tribe of Indians of certain lands and the privilege of fishing in the Schoodic River, in consideration of their releasing all claims to other lands in the commonwealth.").

law the Indians had no corresponding rights from those duties and obligations other than the land and the stipends specifically described in the treaties.⁷⁷

The constitutional amendment in 1876 that removed several sections of the constitution from printed copies does not appear to have been directed towards the duties and obligations the state had as regards the Indians. There is no clear evidence that these issues were even discussed at the time, and the amendment was focused on removing from print the sections of the constitution that appeared, at least to non-Indians, to be antiquated. Maine at that time had statutes regulating its relationship with the Tribes, and it is doubtful that the legislature in the 1870s would have recognized that it had any legally binding obligations not contained in those statutes. Finally, even after the Articles of Separation were hidden from view, the Maine Supreme Judicial Court continued to recognize the existence of Article X, Section 5 and the prior treaties with Massachusetts and Maine, yet did not consider those treaties to apply to the Indians then living in Maine beyond the subsidies granted and the lands retained in the treaties.⁷⁸

By removing Article X, Section 5 from printed copies of the Constitution, Maine does not appear to have intended to hide its obligations to the Indians from public view. As a practical matter, Maine already believed that through legislation and litigation it had reduced those obligations to a minimum.⁷⁹ It is more important that in the present day, with the ongoing evolution of the perception and recognition of the Maine/Wabanaki relationship and history, there is increased awareness of Article X, Section 5, perhaps including the question of its continuing legal viability, and a greater opportunity for positive change in that relationship.

⁷⁷ See *Murch v. Tomer*, 21 Me. 535 (1842); *Moor v. Veazie*, 32 Me. 343 (1850); *Penobscot Tribe v. Veazie*, 58 Me. 402 (1870); see also *Door*, *supra* note 19.

⁷⁸ See *State v. Newell*, 84 Me. 465, 24 A. 943 (1892); *Stevens v. Thatcher*, 39 A. 282, 283 (Me. 1897) (“Notwithstanding any treaties with Indians upon the territory of Maine, the political jurisdiction of the state includes every person and every acre of land within its boundaries.”).

⁷⁹ This remained Maine’s official view until the land claims litigation in the 1970s showed otherwise.