



STATE OF MAINE
HOUSE OF REPRESENTATIVES
SPEAKER'S OFFICE
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RACHEL TALBOT ROSS
SPEAKER OF THE HOUSE

Tuesday, March 7th, 2023

Testimony of Speaker Rachel Talbot Ross presenting
LD 78 RESOLUTION, Proposing an Amendment to Article X of the
Constitution of Maine Regarding the Publication of Maine Indian
Treaty Obligations
Before the Joint Standing Committee on the Judiciary

Good afternoon Senator Carney, Representative Moonen, and other distinguished members of the Judiciary Committee. I am Rachel Talbot Ross and I represent House District 118 which is the Portland neighborhoods of Parkside, Bayside, East Bayside, Oakdale and the University of Southern Maine Campus and I also have the distinct honor of serving as Maine Speaker of the House. I am here today to present **LD 78, Proposing an Amendment to Article X of the Constitution of Maine Regarding the Publication of Maine Indian Treaty Obligations.**

Amending the Constitution of Maine is not and should not be a simple task. Each and every section of the document as it is currently printed has been incorporated because of an extreme necessity. That necessity which is at least 2/3's of the Maine Legislature and a majority vote of referendum that gave approval of making a change to how we as the State of Maine decide to govern ourselves. For instance:

Article III, Section 1: Powers Distributed. The powers of this government shall be divided into 3 distinct departments, the legislative, executive and judicial.

Section 2. To be kept separate. No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted.

District 118: Portland neighborhoods of Parkside, Bayside, East Bayside, Oakdale and the University of Southern Maine Campus

Article I, Section 22: Taxes. No tax or duty shall be imposed without the consent of the people or of their representatives in the Legislature.

Those are some of the issues and the wording that are precisely realized were set in place because of a need. The need for a separation of government because no one branch of government should have more power over another branch of government. The need for no unruly and unapproved taking of money without legislative representative decision. That is why I am asking for us to amend the Constitution to reveal Article X, Section 5 and be printed in future editions of the State of Maine Constitution.

Article X of the Constitution is the original founding document that led to the creation of our home, the State of Maine. This part of the Maine Constitution encompasses the original Articles of Separation from the Commonwealth of Massachusetts. To this day, the Articles of Separations shall not be amended unless with approval of the Massachusetts government. The Articles are written instructions from the Massachusetts government about how Maine government should be organized. Emphasis has to be given that this is a legally binding agreement. It is not a recommendation. For instance:

Section 1 instructs when the first Legislature shall meet and the number of Senators and Representatives shall be distributed according to population.

Section 2 details how long a term may last.

Section 4 creates the ability for the Constitution to be amended if the Legislature and citizens find the need to do so.

In 1875, then Maine Governor Nelson Dingley Jr. called a Constitutional Convention during his state of the State address because he believed that 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”. You can bet there was more behind this.

As a result, a Constitutional Convention met and in less than 1 month reported back their recommendations of making amendments and to which also included that Article X, Sec’s 1, 2, & 5 were to be no longer printed.

In 2021, Maine legal historian Judson Esty-Kendall and scholar Rachel Hampson researched how and why the Maine Constitution was amended in their “Research Report on the 1876 Removal of Article X, Section 5 from Printed Copies of the Maine Constitution”. Their findings of why these sections are excluded:

“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”

As an aside after 7 years in the Legislature, I believe this is just a phenomenally quick amount of time to decide how to change the founding document of the State. Additionally, for there to be no debate is outstanding.

This bill will correct what the 1875 Constitutional Convention failed to consider when they decided that it was not necessary to no longer print those three specific sections of the Constitution of Maine. By responding to Governor Dingley to make the Constitution more streamlined for the “casual reader”, how would not printing sections of the Constitution make it less “difficult to understand”?

It has to be said that that our culture is a written culture – where we pride ourselves on the knowledge passed from one generation to the next through text, through books, through poetry, through history. Our laws should be no different. If the casual reader of the Maine Constitution who does not have a strong civics education would like to understand the building blocks of law in the State of Maine – they would need to first find a Constitution, then after making their way through Articles I through IX, at Article X section 1 find a reference to section 7 which states that:

Section 7. Original sections 1, 2, 5, of Article X not to be printed; section 5 in full force. Sections 1, 2 and 5, of Article X of the 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 said 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.

That certainly leaves ambiguity about the words behind those specific sections of the Constitution.

But really, why are we making Maine citizens have to jump through hoops to find these words? They are in effect. Article X, Section 7 says so. Isn't it disturbing that we lack transparency in our own Constitution? I think so.

To give Governor Dingley and the members of the 28th Maine State Legislature some credit, if they were worried about the labors of the printing process, it was a little more complicated than it is nowadays.

In every way that we operate, transparency is critical to truly have an elected government that decides on how we live, what the norms of our society are, and ultimately who gets to participate. Our constitution is the document that not only instructs us how we should live, but what our rights are and the history that has led us to the point that we are at today.

Simply enough, our constitution should not contain hidden sections, especially those that are **fully in effect**. With LD 78, I am asking for you to decide whether we ask the voters of Maine if they would like a constitution that has every section currently in effect printed, or if we would like to continue to proceed to need to research about what actually are the rules that govern each and every Mainer.

I leave you with the question of why would we not want our constitution to be fully transparent if there are sections that are in full effect?

For specific questions relation to the history of how we got here, I've asked Professor Dr. Darren Ranco Associate Professor of Anthropology and Coordinator of Native American Research at the University of Maine to speak to this. Secretary of State Shenna Bellows and Attorney General Aaron Frey will also be speaking behind me. I would ask for you to direct questions relating to the Archives and the applicability of the law to them.

In addition to my testimony, I am including the original unprinted language from Article X, Sections 1, 2 & 5, as well as the "Research report on the 1876 Removal of Article X, Section 5 from Printed Copies of the Maine Constitution" by Judson Esty-Kendall and Rachel T. Hampson.

Thank you for your time and attention as you in the Judiciary Committee and us in members of the 131st Maine State Legislature consider making an amendment to the founding document of the State of Maine.

Disapproved by
Speaker TALBOT ROSS
LD 78

xxiv CONSTITUTION OF MAINE.

Elections on the first Wednesday of January may be adjourned from day to day. SECT. 4. And in case the elections, required by this Constitution on the first Wednesday of January annually, by the two Houses of the Legislature, shall not be completed on that day, the same may be adjourned from day to day, until completed, in the following order : the vacancies in the Senate shall first be filled ; the Governor shall then be elected, if there be no choice by the people ; and afterwards the two Houses shall elect the Council.

Every civil officer may be removed by impeachment or address. SECT. 5. Every person holding any civil office under this State, may be removed by impeachment, for misdemeanor in office ; and every person holding any office, may be removed by the Governor with the advice of the Council, on the address of both branches of the Legislature. But before such address shall pass either House, the causes of removal shall be stated and entered on the journal of the House in which it originated, and a copy thereof served on the person in office, that he may be admitted to a hearing in his defence.

Tenure of office. SECT. 6. The tenure of all offices, which are not or shall not be otherwise provided for, shall be during the pleasure of the Governor and Council.

Valuation. SECT. 7. While the public expences shall be assessed on polls and estates, a general valuation shall be taken at least once in ten years.

Real Estate to be taxed according to its value. SECT. 8. All taxes upon real estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just value thereof.

ARTICLE X.

SCHEDULE.

Meeting of first Legislature. SECT. 1. The first Legislature shall meet on the last Wednesday in May next. The elections on the second Monday in September annually shall not commence until the year one thousand eight hundred and twenty one, and in the mean time the election for Governor, Senators and Representatives shall be on the first Monday in April, in the year of our Lord one thousand eight hundred and twenty, and at this election, the same proceedings shall be had as are required at the elections, provided for in this Constitution on the second Monday in September annually, and the lists of the votes for the Governor and Senators shall be transmitted, by the town and plantation clerks respectively, to the Secretary of State *pro tempore*, seventeen days at least before the last Wednesday in May next, and the President of the Convention shall, in presence of the Secretary of State, *pro tempore* open and examine the attested copies of said lists, so returned for Senators, and shall have all

Elections for 1820.

the powers, and be subject to all the duties, in ascertaining, notifying, and summoning the Senators, who appear to be elected, as the Governor and council have, and are subject to, by this Constitution: *Provided*, He shall notify said Senators fourteen days at least before the last Wednesday in May, and vacancies shall be ascertained and filled in the manner herein provided; and the Senators to be elected on the said first Monday of April, shall be apportioned as follows: Senators apportioned,

The County of York shall elect three.

The County of Cumberland shall elect three.

The County of Lincoln shall elect three.

The County of Hancock shall elect two.

The County of Washington shall elect one.

The County of Kennebec shall elect three.

The County of Oxford shall elect two.

The County of Somerset shall elect two.

The County of Penobscot shall elect one.

And the members of the House of Representatives shall be elected, ascertained, and returned in the same manner as herein provided at elections on the second Monday of September, and the first House of Representatives shall consist of the following number, to be elected as follows: And representatives.

COUNTY OF YORK.

York.

The towns of York and Wells may *each* elect two representatives; and each of the remaining towns may elect one.

COUNTY OF CUMBERLAND.

Cumberland.

The town of Portland may elect three representatives; North-Yarmouth, two; Brunswick, two; Gorham, two; Freeport and Pownal, two; Raymond and Otisfield, one; Bridgton, Baldwin and Harrison, one; Poland and Danville, one; and each remaining town one.

COUNTY OF LINCOLN.

Lincoln.

The towns of Georgetown and Phippsburg, may elect one representative; Lewiston and Wales, one; St. George, Cushing and Friendship, one; Hope and Appleton Ridge, one; Jefferson, Putnam and Patricktown plantation, one; Alna and Whitfield, one; Montville, Palermo, and Montville plantation, one; Woolwich and Dresden, one; and each remaining town one.

COUNTY OF HANCOCK.

Hancock.

The town of Bucksport may elect one representative; Deer Island, one; Castine and Brooksville, one; Orland and Penobscot, one; Mount Desert and Eden, one; Vinalhaven and Isleborough, one; Sedgwick and Bluehill, one; Goulds-

borough, Sullivan and plantations No. 8 and 9 north of Sullivan, one; Surry, Ellsworth, Trenton and plantation of Mariaville, one; Lincolnville, Searsmont and Belmont, one; Belfast and Northport, one; Prospect and Swanville, one; Frankfort and Monroe, one; Knox, Brooks, Jackson and Thorndike, one.

Washington.

COUNTY OF WASHINGTON.

The towns of Steuben, Cherryfield and Harrington, may elect one representative; Addison, Columbia and Jonesborough, one; Machias, one; Lubec, Dennysville, Plantations No. 9, No. 10, No. 11, No. 12, one; Eastport, one; Perry, Robinston, Calais, Plantations No. 3, No. 6, No. 7, No. 15, and No. 16, one.

Kennebec.

COUNTY OF KENNEBEC.

The towns of Belgrade and Dearborn may elect one representative; Chesterville, Vienna and Rome, one; Wayne and Fayette, one; Temple and Wilton, one; Winslow and China, one; Fairfax and Freedom, one; Unity, Jozand 25 mile pond plantation, one; Harlem and Malta, one; and each remaining town one.

Oxford.

COUNTY OF OXFORD.

The towns of Dixfield, Mexico, Weld and Plantations Nos. 1 and 4, may elect one representative; Jay and Hartford, one; Livermore, one; Rumford, East Andover and Plantations Nos. 7 and 8, one; Turner, one; Woodstock, Paris and Greenwood, one; Hebron and Norway, one; Gilead, Bethel, Newry, Albany and Howard's gore, one; Porter, Hiram and Brownfield, one; Waterford, Sweden and Lovell, one; Denmark, Fryeburg and Fryeburg addition, one; Buckfield and Sumner, one.

Somerset.

COUNTY OF SOMERSET.

The town of Fairfield may elect one representative; Norridgewock and Bloomfield, one; Starks and Mercer, one; Industry, Strong and New-Vineyard, one; Avon, Phillips, Freeman and Kingfield, one; Anson, New-Portland, Embden, and Plantation No. 1, one; Canaan, Warsaw, Palmyra, St. Albans and Corinna, one; Madison, Solon, Bingham, Moscow and Northhill, one; Cornville, Athens, Harmony, Ripley, and Warrenstown, one.

Penobscot.

COUNTY OF PENOBSCOT.

The towns of Hampden and Newburg may elect one representative; Orrington, Brewer, and Eddington and Plantations adjacent on the east side of Penobscot river, one; Bangor,

Orono and Sunkhaze Plantation, one; Dixmont, Newport, Carmel, Hermon, Stetson, and Plantation No. 4, in the 6th range, one; Levant, Corinth, Exeter, New-Charlestown, Blakesburg, Plantation No. 1 in 3d range, and Plantation No. 1 in 4th range, one; Dexter, Garland, Guilford, Sangerville, and Plantation No. 3, in 6th range, one; Atkinson, Sebec, Foxcroft, Brownville, Williamsburg, Plantation No. 1, in 7th range, and Plantation No. 3, in 7th range, one.

And the Secretary of State *pro tempore* shall have the same powers, and be subject to the same duties, in relation to the votes for Governor, as the Secretary of State has, and is subject to, by this Constitution: and the election of Governor shall, on the said last Wednesday in May, be determined and declared, in the same manner, as other elections of Governor are by this Constitution; and in case of vacancy in said office, the President of the Senate, and Speaker, of the House of Representatives, shall exercise the office as herein otherwise provided, and the Counsellors, Secretary and Treasurer, shall also be elected on said day, and have the same powers, and be subject to the same duties, as is provided in this Constitution; and in case of the death or other disqualification of the President of this Convention, or of the Secretary of State *pro tempore*, before the election and qualification of the Governor or Secretary of State under this Constitution, the persons to be designated by this Convention at their session in January next, shall have all the powers and perform all the duties, which the President of this Convention, or the Secretary *pro tempore*, to be by them appointed, shall have and perform.

Powers and duties of Secretary of State *pro tem.* in relation to the votes.

SECT. 2. The period for which the Governor, Senators and Representatives, Counsellors, Secretary and Treasurer, first elected or appointed, are to serve in their respective offices and places, shall commence on the last Wednesday in May, in the year of our Lord one thousand eight hundred and twenty, and continue until the first Wednesday of January, in the year of our Lord one thousand eight hundred and twenty two.

Duration of the first Legislature

SECT. 3. All laws now in force in this state, and not repugnant to this Constitution, shall remain, and be in force, until altered or repealed by the Legislature, or shall expire by their own limitation.

Laws now in force continue until repealed.

SECT. 4. The Legislature, whenever two thirds of both houses shall deem it necessary, may propose amendments to this Constitution; and when any amendment shall be so agreed upon, a resolution shall be passed and sent to the selectmen of the several towns, and the assessors of the several plantations, empowering and directing them to notify the inhabitants of their respective towns and plantations, in the manner prescribed by law, at their next annual meetings in the month of September, to give in their votes on the question, whether such

Constitution how it may be amended.

amendment shall be made; and if it shall appear that a majority of the inhabitants voting on the question are in favor of such amendment, it shall become a part of this Constitution.

Persons in office
to continue to
hold their offices.

SECT. 5. All officers provided for in the sixth section of an act of the Commonwealth of Massachusetts, passed on the nineteenth day of June, in the year of our Lord one thousand eight hundred and nineteen, entitled "An act relating to the Separation of the District of Maine from Massachusetts Proper, and forming the same into a separate and Independent State," shall continue in office as therein provided; and the following provisions of said act shall be a part of this Constitution, subject however to be modified or annulled as therein is prescribed, and not otherwise, to wit:

Part of a Law of
Massachusetts
made a part of
the constitution.

"SECT. 1. Whereas it has been represented to this Legislature, that a majority of the people of the District of Maine are desirous of establishing a separate and Independent Government within said District: Therefore,

"Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, That the consent of this Commonwealth be, and the same is hereby given, that the District of Maine may be formed and erected into a separate and Independent State, if the people of the said District shall in the manner, and by the majority hereinafter mentioned, express their consent and agreement thereto, upon the following terms and conditions: And, provided the Congress of the United States shall give its consent thereto, before the fourth day of March next: which terms and conditions are as follows, viz.

"First. All the lands and buildings belonging to the Commonwealth, within Massachusetts Proper, shall continue to belong to said Commonwealth, and all the lands belonging to the Commonwealth, within the District of Maine, shall belong, the one half thereof to the said Commonwealth, and the other half thereof, to the State to be formed within the said District, to be divided as is hereinafter mentioned; and the lands within the said District, which shall belong to the said Commonwealth, shall be free from taxation, while the title to the said lands remains in the Commonwealth; and the rights of the Commonwealth to their lands, within said District, and the remedies for the recovery thereof, shall continue the same, within the proposed State, and in the Courts thereof, as they now are within the said Commonwealth, and in the Courts thereof; for which purposes, and for the maintenance of its rights, and recovery of its lands, the said Commonwealth shall be entitled to all other proper and legal remedies, and may appear in the Courts of the proposed State and in the Courts of the United States, holden therein; and all rights of action for, or entry into lands, and of actions upon bonds, for the breach of the performance of the condition of settling duties, so called, which have accrued, or may accrue, shall remain in this Commonwealth, to be enforced, commuted, released, or otherwise disposed of, in such manner as this Commonwealth may hereafter, determine: *Provided however,* That, whatever this Commonwealth may hereafter receive or obtain on account thereof if any thing, shall, after deducting all reasonable charges relating thereto, be divided, one third part thereof to the new State, and two third parts thereof to this Commonwealth.

"Second. All the arms which have been received by this Commonwealth from the United States, under the law of Congress, entitled, "An act making provision for arming and equipping the whole body of militia of the United States, passed April the twenty-third, one thousand eight hundred and eight, shall, as soon as the said District shall become a sep-

arate State, be divided between the two States, in proportion to the returns of the militia, according to which, the said arms have been received from the United States, as aforesaid.

"*Third.* All money, stock, or other proceeds, hereafter derived from the United States, on account of the claim of this Commonwealth, for disbursements made, and expenses incurred, for the defence of the State, during the late war with Great Britain, shall be received by this Commonwealth, and when received, shall be divided between the two States, in the proportion of two thirds to this Commonwealth, and one third to the new State.

"*Fourth.* All other property, of every description, belonging to the Commonwealth shall be holden and receivable by the same, as a fund and security, for all debts, annuities, and Indian subsidies, or claims due by said Commonwealth; and within two years after the said District shall have become a separate State, the Commissioners to be appointed, as hereinafter provided, if the said States cannot otherwise agree, shall assign a just portion of the productive property, so held by said Commonwealth as an equivalent and indemnification to said Commonwealth, for all such debts, annuities, or Indian subsidies or claims, which may then remain due, or unsatisfied: and all the surplus of the said property, so holden, as aforesaid, shall be divided between the said Commonwealth and the said District of Maine, in the proportion of two thirds to the said Commonwealth, and one third to the said District—and if, in the judgment of the said Commissioners, the whole of said property, so held, as a fund and security, shall not be sufficient indemnification for the purpose, the said District shall be liable for and shall pay to said Commonwealth, one third of the deficiency.

"*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.

"*Sixth.* Commissioners, with the powers and for the purposes mentioned in this act, shall be appointed in manner following: The Executive authority of each State shall appoint two; and the four so appointed, or the major part of them, shall appoint two more; but if they cannot agree in the appointment, the Executive of each State shall appoint one in addition; not however, in that case, to be a citizen of its own State. And any vacancy happening with respect to the Commissioners, shall be supplied in the manner provided for their original appointment; and, in addition to the powers herein before given to said Commissioners, they shall have full power and authority to divide all the public lands within the District, between the respective States, in equal shares, or moieties, in severalty, having regard to quantity, situation and quality; they shall

determine what lands shall be surveyed and divided, from time to time, the expense of which surveys, and of the Commissioners, shall be borne equally by the two States. They shall keep fair records of their doings, and of the surveys made by their direction, copies of which records, authenticated by them, shall be deposited from time to time, in the archives of the respective States; transcripts of which, properly certified, may be admitted in evidence, in all questions touching the subject to which they relate. The Executive authority of each State may revoke the power of either or both its commissioners; having, however, first appointed a substitute, or substitutes, and may fill any vacancy happening with respect to its own Commissioners; four of said Commissioners shall constitute a quorum, for the transaction of business; their decision shall be final, upon all subjects within their cognizance. In case said commission shall expire, the same not having been completed, and either State shall request the renewal or filling up of the same, it shall be renewed or filled up in the same manner, as is herein provided for filling the same, in the first instance, and with the like powers; and if either State shall, after six months' notice, neglect or refuse to appoint its Commissioners, the other may fill up the whole commission.

“Seventh. All grants of land, franchises, immunities, corporate or other rights, and all contracts for, or grants of land not yet located which have been or may be made by the said Commonwealth, before the separation of said District shall take place, and having or to have effect within the said District, shall continue in full force, after the said District shall become a separate State. But the grant which has been made to the President and Trustees of Bowdoin College, out of the tax laid upon the Banks, within this Commonwealth, shall be charged upon the tax upon the Banks within the said District of Maine, and paid according to the terms of said grant; and the President and Trustees, and the Overseers of said College, shall have, hold and enjoy their powers and privileges in all respects; so that the same shall not be subject to be altered, limited, annulled or restrained, except by judicial process, according to the principles of law; and in all grants hereafter to be made, by either State, of unlocated land within the said District, the same reservations shall be made for the benefit of Schools, and of the Ministry, as have heretofore been usual, in grants made by this Commonwealth. And all lands heretofore granted by this Commonwealth, to any religious, literary, or eleemosynary corporation, or society, shall be free from taxation, while the same continues to be owned by such corporation, or society.

“Eighth. No laws shall be passed in the proposed State, with regard to taxes, actions, or remedies at law, or bars, or limitations thereof, or otherwise making any distinction between the lands and rights of property of proprietors not resident in, or not citizens of said proposed State, and the lands and rights of property of the citizens of the proposed State, resident therein; and the rights and liabilities of all persons, shall, after the said separation, continue the same as if the said District was still a part of this Commonwealth, in all suits pending, or judgments remaining unsatisfied on the fifteenth day of March next, where the suits have been commenced in Massachusetts Proper, and process has been served within the District of Maine; or commenced in the District of Maine, and process has been served in Massachusetts Proper, either by taking bail, making attachments, arresting and detaining persons, or otherwise, where execution remains to be done; and in such suits, the Courts within Massachusetts Proper, and within the proposed State, shall continue to have the same jurisdiction as if the said District had still remained a part of the Commonwealth. And this Commonwealth shall have the same remedies within the proposed State, as it now has, for the collection of all taxes, bonds, or debts, which may be assessed, due, made, or contracted, by, to, or with the Commonwealth, on or before the said fifteenth day of March, within the said District of Maine; and all officers within Massa

chusets Proper and the District of Maine shall conduct themselves accordingly.

"*Ninth.* These terms and conditions, as here set forth, when the said District shall become a separate and Independent State, shall, *ipso facto* 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 agreement of the Legislature of both the said States; but by no other power or body whatsoever."

SEC. 6. This Constitution shall be enrolled on parchment, ^{Constitution to be enrolled on parchment.} deposited in the Secretary's office, and be the supreme law of the State, and printed copies thereof shall be prefixed to the books containing the laws of this State.

Done in Convention, October 29, 1819.

WILLIAM KING, *President*

of the Convention and member from Bath.

COUNTY OF YORK.

YORK,	Elihu Bragdon,
	David Wilcox.
Kittery,	Alexander Rice.
Wells,	Joseph Thomas.
Berwick,	William Hobbs,
	Nathaniel Hobbs,
	Richard F. Cutts.
Biddeford,	George Thacher,
	Seth Spring.
Arundel,	Simon Nowell.
Saco,	William Moody,
	Ether. Shepley,
	George Thacher, junior.
Lebanon,	David Legrow.
Buxton,	Gideon Elden,
	Josiah Paine,
	Edmund Woodman.
Lyman,	John Low,
	John Burbank.
Shapleigh,	John Leighton.
Parsonsfield,	David Marston,
	Abner Keazer.
Waterborough,	Samuel Bradeen,
	Henry Hobbs.
Limington,	David Boyd.
Cornish,	Thomas A. Johnson.
ALFRED,	John Holmes.
Hollis,	Ellis B. Usher,
	Timothy Hodgdon.
South-Berwick,	Benjamin Green.
Limerick,	John Burnham.

CUMBERLAND.

<i>Scarborough,</i>	Benjamin Larrabee, junior,
<i>North-Yarmouth,</i>	Joseph Fogg.
	William Buxton,
<i>Falmouth,</i>	Ephraim Sturdevant,
	Jeremiah Buxton.
<i>Brunswick,</i>	Peter M. Knight,
	Nathan Bucknam.
	Robert D. Dunning,
<i>Harpwell,</i>	Jonathan Page,
<i>Gorham,</i>	Benjamin Titcomb.
	Stephen Purrington.
	Lathrop Lewis,
	Joseph Adams,
	James Irish.
<i>Cape-Elizabeth,</i>	Ebenezer Thrasher.
<i>New-Gloucester,</i>	Joseph E. Foxcroft,
	Isaac Gross.
<i>Gray,</i>	Joseph McLellan.
<i>Standish,</i>	Theodore Mussey.
PORTLAND,	Albion K. Parris,
	William P. Preble.
<i>Freeport,</i>	Solomon Dennison.
<i>Durham,</i>	Secomb Jordan,
	Allen H. Cobb.
<i>Bridgton,</i>	Phineas Ingalls.
<i>Poland,</i>	Josiah Dunn, junior.
<i>Minot,</i>	Asaph Howard,
	Chandler Freeman.
<i>Danville,</i>	Joseph Roberts.
<i>Baldwin,</i>	Lot Davis.
<i>Raymond,</i>	Zachariah Leach.
<i>Pownal,</i>	Isaac Cushman.
<i>Westbrook,</i>	Silas Estes,
	Thomas Slemonds,
	John Jones.
<i>Harrison,</i>	Amos Thomes.

LINCOLN.

<i>Georgetown,</i>	Benjamin Riggs.
<i>New-Castle,</i>	Ebenezer Farley,
<i>Woolwich,</i>	Ebenezer Delano.
WISCASSET,	Abiel Wood,
	Warren Rice.
<i>Bowdoinham,</i>	Ebenezer Herrick,
	Elihu Hatch.
TOPSHAM,	Nathaniel Green.
<i>Boothbay,</i>	Daniel Rose,
	John McKown,

<i>Bristol</i>	Samuel Tucker,
	William M'Clintock,
	John Fosset.
<i>Waldoborough,</i>	Joshua Head,
	Isaac G. Reed,
	Jacob Ludwig, Junior.
<i>Edgcomb,</i>	Stephen Parsons.
<i>WARREN,</i>	John Miller,
	Cyrus Eaton.
<i>Thomaston,</i>	Isaac Barnard,
	John Spear.
<i>Bath,</i>	Joshua Wingate, junior,
	Benjamin Ames.
<i>Union,</i>	Robert Foster.
<i>Bowdoin,</i>	Joseph Carr.
<i>Nobleborough,</i>	Ephraim Rollins.
<i>Cushing,</i>	Edward Killeran.
<i>Camden,</i>	Nathaniel Martin.
<i>Dresden,</i>	Isaac Lillie.
<i>Lewiston,</i>	John Herrick.
<i>Litchfield,</i>	John Neal,
	David C. Burr.
<i>Lisbon,</i>	Nathaniel Eames,
	James Small.
<i>St. George,</i>	Joel Miller.
<i>Hope,</i>	Fergus M'Claine.
<i>Palermo,</i>	Thomas Eastman.
<i>Montville,</i>	Cyrus Davis.
<i>Jefferson,</i>	Jesse Rowell.
<i>Friendship,</i>	Melzer Thomas.
<i>Whitfield,</i>	Joseph Bailey.
<i>Putnam,</i>	Mark Hatch.
<i>Alna,</i>	John Dole.
<i>Wales,</i>	Joseph Small.

KENNEBEC.

<i>Hallowell,</i>	Samuel Moody,
	William H. Page,
	Benjamin Dearborn.
<i>Winthrop,</i>	Alexander Belcher,
	Daniel Campbell.
<i>Vassalborough,</i>	Samuel Redington,
	Abiel Getchel.
<i>Winslow,</i>	William Swan.
<i>Pittston,</i>	Eli Young.
<i>Green,</i>	Luther Robbins.
<i>Readfield,</i>	John Hubbard,
	Samuel Currier.

*Monmouth,**Mount-Vernon,
Sidney,**Farmington,**New-Sharon,**Clinton,
Fayette,
Belgrade,
Harlem,
AUGUSTA,**Wayne,
Leeds,
Chester ville,
Vienna,
Waterville,**Gardiner,**Temple,
Wilton,
Rome,
Fairfax,
Unity,
Malta,
Freedom,
Joy,
China,**Belfast,
Islesborough,
Deer-Isle,**Bluehill,
Trenton,
Sullivan,
Gouldsborough,
Vinalhaven,
Frankfort,**Bucksport,
Prospect,
CASTINE,
Northport,
Eden,**John Chandler,
Simon Dearborn, junior.
David McGaffey.
Ambrose Howard,
Reuel Howard.
Nathan Cutler,
Jabez Gay.
Christopher Dyer.
Herbert Moore.
Charles Smith.
Elias Taylor.
William Pullen.
Daniel Cony,
Joshua Gage,
James Bridge.
Joseph Lamson.
Thomas Francis.
Ward Locke.
Nathaniel Whittier.
Abijah Smith,
Ebenezer Bacon.
Jacob Davis,
Sanford Kingsbery.
Benjamin Abbot.
Ebenezer Eaton.
John S. Colbath.
Joel Wellington.
Rufus Burnham.
William Hilton.
Matthew Randall.
James Parker.
Daniel Stevens.*

HANCOCK.

*Alfred Johnson, junior.
Josiah Farrow.
Ignatius Haskell,
Asa Green.
Andrew Witham.
Peter Haynes.
George Henman.
Samuel Davis.
Benjamin Beverage.
Alexander Milliken,
Joshua Hall.
Samuel Little.
Abel W. Atherton.
William Abbot.
David Alden.
Nicholas Thomas, junior.*

Orland.
Ellsworth,
Lincolnville,
Belmont,
Brooks,
Jackson,
Searsmont,
Swanville,
Thorndike,
Monroe,
Knox,

MACHIAS,
Steuben,
Harrington,
Eastport,
Jonesborough,
Calais,
Lubec,
Robbinston,
Cherryfield,
Perry,

Fryeburg,
Turner,

Hebron,
Buckfield,
PARIS,

Jay,
Livermore,

Bethel,
Waterford,
Norway,
Hartford,
Sumner,
Rumford,
Lovell,
Brownfield,
Albany,
Dixfield,
East-Andover,
Gilead,
Newry,
Denmark,
Porter,
Hiram,
Woodstock,
Greenwood,
Sweden,
Weld,
Mexico,

Horatio Mason.
Mark Shepard.
Samuel A. Whitney.
James Weymouth.
Samuel Whitney.
Bordman Johnson.
Ansel Lathrop.
Eleazer Nickerson.
Joseph Bløthen.
Joseph Neally.
James Weed.

WASHINGTON.

John Dickinson.
Alexander Nichols.
James Campbell.
John Burgin.
Ephraim Whitney.
William Vance.
Lemuel Trescott.
Thomas Vose.
Joseph Adams.
Peter Golding.

OXFORD.

Judah Dana.
John Turner,
Philip Bradford.
Alexander Greenwood.
Enoch Hall.
James Hooper,
Benjamin Chandler.
Cornelius Holland.
Benjamin Bradford,
Thomas Chase, junior.
John Grover.
Josiah Shaw.
Aaron Wilkins.
Joseph Tobin.
Calvin Bisbee.
Peter C. Virgin.
Josiah Heald, 2d.
James Steele.
Asa Cummings.
Solomon Leland.
Sylvanus Poor.
Eliphaz Chapman.
Luke Reily.
Cyrus Ingalls.
William Towle.
Marshal Spring.
Cornelius Perkins.
Isaac Flint.
Samuel Nevers.
La Fayette Perkins.
Walter P. Carpenter.

January 11, 2021

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

By Judson Esty-Kendall and Rachel T. Hampson***

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/5a67a309ec21dd424162e5f/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/lidl/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.

¹⁵The 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://lldc.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-penobscot-historic-info1-treaty-rights1891.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 it 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.