

Cite Checking Professor Ablavsky's *Beyond the Indian Commerce Clause*

By Robert G. Natelson

Beyond the Indian Commerce Clause (Beyond), by Professor Gregory Ablavsky, appeared in *Yale Law Journal* in 2015. The article relied on various sorts of evidence for inferring the meaning of the federal Indian affairs powers, particularly (but not exclusively) putative events and views arising during the presidential administrations of George Washington (1789-1797) and John Adams (1797-1801). Two leading federal judges already have relied on portions of the article.¹

When researching *The Original Understanding of the Indian Commerce Clause: An Update*, my assistant, Jeremy Sallee, and I examined a portion of the citations in *Beyond*. We found that, in many instances, the sources simply did not support the conclusions for which they were cited.

The examples below are organized by the page number of *Beyond* on which they appear. This list is based on a review of just a portion of the footnotes. It also omits arguable situations and citations with only inadvertent mistakes, such as a wrong page number.

Page 1017, fn. 23:

²³ Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575 (2011) (arguing against originalist methodologies for constructing historical textual meaning).

Comment: The parenthetical material implies that Professor Rakove argued against all originalist methodologies. In fact, Rakove argued for an “original understanding” rather than “original meaning” version of originalism.

¹Brackeen v. Haaland, 994 F.3d 249, 277-79, 300-01 *et passim* (5th Cir. 2021), cert. granted, 142 S. Ct. 1205 (2022) (Dennis, J.); Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2506-07 (2022) (Gorsuch, J., dissenting).

Page 1027, text & fn. 70:

One ratification discussion even seemed to exclude Indian trade from the concept of “commerce.”⁷⁰

⁷⁰ At the Pennsylvania ratifying convention, James Wilson noted that inhabitants of the “western extremity of this state” would “care not what restraints are laid upon our commerce,” without mentioning the region's extensive involvement in the Indian trade. Pennsylvania Convention Debates, 11 Dec. 1787, in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 550, 558

Comment: The author omitted the following material appearing after the word “commerce”: “. . . for what is the commerce of Philadelphia to the inhabitants on the other side the Allegheny Mountains?” As the omitted material makes clear, Wilson was focusing only on the revenue-raising potential of *foreign* commerce. He was not speaking of commerce in general.

Page 1028, text & fn. 80:

“Commerce” was a term only occasionally applied to Indian affairs. The phrases “commerce with the Indians” or “commerce with Indians” appeared in only a handful of eighteenth-century American publications.⁸⁰

⁸⁰ *Early American Imprints*—the database Natelson employed—reports only fourteen instances of “commerce with the Indians,” one instance of “commerce with Indians,” and seven instances of “commerce with the Indian tribes” in all works printed between 1639 and 1800 in what became the United States.

Comment: Reliance only on *Early American Imprints* is misleading because the overwhelming majority of books then available to Americans were published in Britain. Recovering the full scope of works available to 18th century Americans also requires use of the Thomson Gale database *Eighteenth Century Collections Online*.

The words “Natelson employed” refers to my article, *The Original Understanding of the Indian Commerce Clause*, 85 DENVER U. L. REV. 201 (2007). As

that article makes clear, I used both databases, not merely *Early American Imprints*, *id.* at 215, as the author suggests in this passage.

Eighteenth Century Collections Online added 92 monographs with the phrase “commerce with the Indians,” five containing “commerce with Indians” and thirteen containing “commerce with the Indian tribes.” From a review of both databases, I concluded, “[T]hose expressions almost invariably meant ‘trade with the Indians’ and nothing more.” *Id.*

Page 1029, text & fn. 83:

Several of the (few) discussions of “commerce” with Indians in the eighteenth century reflect a similar meaning. They speak, for instance, of “commerce” as the exchange of religious ideas among tribes.⁸³

⁸³ See, e.g., Thomas Hutchinson, 2 THE HISTORY OF THE COLONY OF MASSACHUSETTS-BAY, FROM THE FIRST SETTLEMENT THEREOF IN 1628, at 474 n. (1765) (quoting seventeenth century sources discussing how Indian nations, through “commerce” with other Indian nations, disseminated ideas about “idols *and* idolatry” (emphasis added)).

Comments: The cited passage does not, in fact, present a clear use of “commerce” to refer to the exchange of religious ideas. It may well mean that Indians obtained their religious ideas in the course of commerce rather than that the exchange of ideas was itself commerce. The mercantile meaning is supported Hutchinson’s other uses “commerce,” generally in a mercantile sense. *Id.* at 3 (referring to commerce with the colonies as paying for their expenses); 85 (“they had mutual trade and commerce”); 85n (“they have never been remarkable for foreign commerce”); 403 (referring to paper bills as “the sole instrument of commerce”); 458n (“it is not probable that the New-England Indians had any instrument of commerce”).

Two less important errors: (1) Hutchinson cites only one source containing the word “commerce” at that location, not multiple “sources”; and it arose over a century before the Founding Era, *id.* at 472n, and (2) the citation is inaccurate: It refers to a non-existent second volume of Hutchison’s history; actually, it is the second edition of a single volume.

Page 1029, text & fn. 85:

Several of the (few) discussions of “commerce” with Indians in the eighteenth century reflect a similar meaning. They speak, for instance, of “commerce” . . . using the term to encompass interaction broadly defined with and among Native nations.⁸⁵

⁸⁵ See REV. C. BROWN, *ITINERARIUM NOVI TESTAMENTI* app. at 20 (1784) (recounting a traveler’s story that Natives informed him that “your Brethren will have no Commerce with *Indians*, and if any of ours enter into their Country, they instantly kill them; neither do any of your brethren pass into our Country” . . .

Comments: The notation “app. at 20” apparently means the portion of the book entitled “Supplement.” The citation is offered to support the proposition that when the founding generation employed the word “Commerce” in the Indian context, it referred to all kinds of intercourse, not merely to mercantile trade.

It is not clear that the cited passage refers to general intercourse rather than to trade. There are three other uses of the “commerce” in the same source: on page 24 (“where he met with white Men bearded, well clothed, and abounding with Gold, Silver, and many precious Stones, having no Commerce with the *Spainards*”), page 127 (“suffers not to buy and sell, *i.e.*, civil Commerce”) and Supp. page 150 (The *Saracens* passing from *Afric* into *Spain*, and having Commerce with the western *European* nations”). The second of these three clearly refers to mercantile commerce, and the two, although not referring to Indian commerce, still suffer from the same ambiguity that affects the passage involving Indian commerce.

When the omitted usages are restored, the source does not support the thesis that English speakers thought of Indian commerce as fundamentally different from commerce with other peoples.

Page 1030, text & fn. 86:

[T]rade was a form of diplomacy and politics, “the defining feature of Native-colonial relations.”⁸⁶

⁸⁶ JOSEPH M. HALL, JR., *ZAMUMO’S GIFTS: INDIAN-EUROPEAN EXCHANGE IN THE COLONIAL SOUTHEAST* 5 (2009)

Comment: The defect here is subtle but constitutionally important. The author says that “trade” was the defining feature of Native-colonial relations, which suggests an all-encompassing role for the Indian Commerce Clause. But the author’s cited source does not say “trade” but “exchange”—and that source explains that exchange consisted largely of gift-giving rather than trade. HALL, at 1-5. Gift-giving was the preserve of presidential diplomacy. Once corrected, the passage actually illustrates how the Constitution divided federal power over Indian relations.

Pages 1031-32, fn. 101:

¹⁰¹ Adoption of Native children was widespread in the early Republic; Andrew Jackson famously adopted a Creek child. *See generally* Dawn Peterson, Unusual Sympathies: Settler Imperialism, Slavery, and the Politics of Adoption in the Early U. S. Republic (2011) (unpublished Ph.D. dissertation, New York University).

Comments: The cited dissertation is not available to the public. It does not appear on the internet, and the ProQuest Global Theses and Dissertations website, which reproduces the abstract, announces that, “At the request of the author, this graduate work is not available to view or purchase.” *See* <https://www.proquest.com/pgdtglobal/docview/912748798/Record/5FB7ACC94E7A4101PQ/1?accountid=14593>. This suggests that the paper was withdrawn.

Standard academic practice is not to cite withdrawn and unverifiable material. When a source has not been withdrawn and is verifiable but not publicly available, standard academic practice is to deposit it at a specific location where the reader can view it. This was not done.

The only portion of the paper that is publicly available—the abstract—provides no statistics. It says that “quite a number of elite white men” adopted Indian children but includes no definition of “quite a number.” Eighty might be “quite a number” but would not make Indian adoption “common.” The abstract adds that “A number of influential American Indian parents sent their sons—and a few of their daughters—to live as the temporary “adoptees” of prominent white men . . .” This addition suggests the relationship was not a true adoption and the statement of frequency is even vaguer.

Page 1033, fn. 105:

¹⁰⁵ . . . Second, Natelson argues that references to tribes as nations do not signify acknowledgment of their separate sovereign status because “the word ‘nation’ did not necessarily evoke the association with political sovereignty it evokes today.” Natelson, *supra* note 14, at 259. In fact, period documents suggest that those opposed to tribal sovereignty understood the term “nations” to connote independent status, and so advocated abandoning it. (Citing a person who said, “I woud [sic] never suffer [to use] the word nations, or Six Nations. . . or any other Form which woud revive or seem to confirm [the Natives’] former Ideas of Independence.”)

Comments: The author failed to mention that my conclusion was based on the meaning of “nation” in 18th-century dictionaries. If he had, it would have been evident that a single usage in a single private document is not sufficient to establish a general usage to the contrary. This passage parallels the author’s statement in his Fifth Circuit brief (pp. 14-15), falsely claiming that I based my conclusion only on my “knowledge of Latin.”

Page 1035, text:

Moreover, although the Indian Commerce Clause no longer provided that federal authority was “sole” or “exclusive,” as Article IX had, the Constitution eschewed these labels for *all* of the federal government's enumerated powers, opting instead for broad federal authority through the Supremacy Clause.

Comment: The author is in error. Both “exclusive” and “sole” appear in the Constitution’s enumerated powers. U.S. CONST., art. I, § 8, cl. 17 (“To exercise exclusive Legislation in all Cases whatsoever”); *id.*, art. I, § 2, cl. 5 (“sole power of impeachment”); *id.*, art. I, §3, cl. 6 (“sole Power to try all Impeachments”). Moreover, *id.*, art I. § 9, cl. 1 assures exclusive congressional or federal jurisdiction by denying states certain concurrent powers. Thus, the drafters did not merely “opt[] instead for broad federal authority through the Supremacy Clause.”

Page 1036, text & fn. 128:

Unlike Yates, other Anti-Federalists accepted paramount federal authority over Indian affairs.¹²⁸

¹²⁸ Justice Thomas’s evidence supports this point. *Id.* at 2570 (citing Brutus, (Letter) X, N.Y. J., Jan. 24, 1788, in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 462, 465. . . .

Comment: The passage is entirely erroneous. The cited portion of the essay by “Brutus” does not “accept[] paramount federal authority over Indian affairs.” It acknowledges only a federal duty to “facilitate trade with the Indians.” The context focuses on the danger of standing armies. Here is a more complete quotation:

As standing armies in time of peace are dangerous to liberty, and have often been the means of overturning the best constitutions of government, no standing army, or troops of any description whatsoever, shall be raised or kept up by the legislature, except so many as shall be necessary for guards to the arsenals of the United States, or to garrisons to such posts on the frontiers, as it shall be deemed absolutely necessary to hold, to secure the inhabitants, and *facilitate the trade with the Indians.*

(Italics added.)

Page 1038, text & fn. 138 (first part):

There is a compelling case, though, that the [Indian Commerce] Clause was open-ended when drafted. Nearly all the enumerated powers were late additions and occasioned little of the heated discussion that surrounded issues of representation or the structure of the national government.¹³⁸

¹³⁸ See RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 288-89 (2009) (“[T]he delegates seemed disinclined even to raise questions about most of the specifically enumerated powers [S]urprisingly—given subsequent contention over the extent and limits of congressional

power—with just a few exceptions the discussion provoked little controversy.”)

Comment: It is not accurate to state that there was little dissension as to enumerated powers; the convention notes show that many proposed powers were rejected. Even if it were true, however, the conclusion that the Indian Commerce Clause was “open ended” would be a non-sequitur.

Moreover, convention records show that the delegates explicitly rejected open-endedness by trimming Madison’s Indian “affairs” proposal to an Indian commerce power.

Finally, the author omitted wording from his cited quotation tending to show that the convention was reacting *against* open-endedness:

On August 16 the delegates began to debate the specific enumeration of the powers of Congress. The Committee of Detail, in moving from a general and exceptionally broad grant of power to specifically enumerated powers, had gauged the mood of the Convention correctly. In spite of the nationalists’ strong support for a broad, *general* grant of power to the Congress, no one rose to question the wisdom of the committee's action. Indeed . . .

Page 1041, text & fns. 157 & 158:

Soon into his presidency, George Washington informed the Governor of Pennsylvania that “the United States . . . possess[es] the only authority of regulating an intercourse with [the Indians], and redressing their grievances.”¹⁵⁷ Washington entrusted that authority to Secretary of War Henry Knox, whose department administered Indian affairs.¹⁵⁸

¹⁵⁷ Letter from George Washington to Thomas Mifflin (Sept. 4, 1790), in 6 THE PAPERS OF GEORGE WASHINGTON, *supra* note 88, at 396.

¹⁵⁸ Act of Aug. 7, 1789, ch. 7, 1 Stat. 49, 50 (investing the Secretary of War with “such duties as shall . . . be enjoined on, or entrusted to him by the President of the United States . . . relative to Indian

affairs”).

Comments: This citation presents multiple problems.

First, as a matter of form, the immediate source should have been cited: a letter from Washington to Timothy Pickering, not to Thomas Mifflin. The Pickering letter purports to quote from a letter to Mifflin.

Second, the extract has been presented with misleading omissions. Following is the extract passage in fuller form:

After writing the above letter with its enclosed instructions to Pickering, GW wrote to Governor Mifflin the same day, 4 Sept. 1790: “In consequence of the papers which you yesterday communicated to me, I have taken what appear to be the necessary measures for preventing the retaliation threatened by the *Seneca Indians*.

“Colonel Timothy Pickering is instructed to meet them immediately; to express the fullest displeasure at the murders complained of; to give the strongest assurances of the friendship of the United States towards that Tribe; and to make pecuniary satisfaction—As they have been in the habit of negotiation with your State, and therefore may expect some reply to their talk from you, it might facilitate the object in view, if, by an act of your body, *they should be referred to the Executive of the United States*, as possessing the only authority of regulating an intercourse with *them*, and redressing their grievances—The effect of such an act might be greater, if it were carried by some messenger from the Supreme Executive of Pennsylvania.”

(Some words omitted by the author italicized.)

Thus, in the source, Washington told Mifflin that the *Executive* was the only authority for intercourse with the *Seneca Indians*. By contrast, the author’s version says that the *United States* has exclusive authority to negotiate with *the Indians*. The substitution of “United States” for “executive” could induce the reader to believe that the source of authority was the Indian Commerce Clause. The substitution of “[the Indians]” for “Seneca Indians” implies that Washington was referring to all Natives when in fact he was referring only to the Senecas.

The author's manipulation of this extract conceals the actual source and limits of Washington's authority: a Jan. 9, 1789, treaty with the Six Nations (of which the Senecas were one), but not with other Indian tribes. The treaty required the United States (and, therefore, specifically the President as chief executive) to take action against whites committing crimes against any member of a tribe in the Six Nations. "*Separate Article,*" *Treaty with the Six Nations, 1789*, reprinted in KAPPLER, *supra* note 3, at 23, 25. This authority did not derive from the Indian Commerce Clause, and it did not apply to all Indians.

This manipulated extract apparently misled Justice Gorsuch in *Oklahoma v. Castro-Huerta*. 142 S. Ct. 2486, 2506 (2022) (Gorsuch, J., dissenting).

The author's Fifth Circuit brief arguing that the Indian Commerce Clause gave power to Congress to adopt the Indian Child Welfare Act contained a similarly deceptive omission:

Yet when some in Congress proposed removing the [1793 Indian Intercourse Act's] criminal provisions as duplicative of treaty provisions, the proposal failed: "[T]he power of Congress to legislate, independent of treaties, it was also said, must be admitted; for it is impossible that every case should be provided for by those treaties." 3 Annals of Cong. 751. (Brief, p. 14)

The omission was a sentence appearing immediately before:

In opposition to this motion, it was said that the power of the General Government to legislate in all the territory belonging to the Union, not within the limits of any particular State, cannot be doubted. *Id.*

The omitted material shows that the criminal provisions of the law were justified not under the Indian Commerce Clause but under the Territories and Property Clause.

Pages 1041-42, text & fn. 159:

Frustrated by state interference under the Articles, [Knox] read the Constitution as a grant of expansive authority. "[T]he United States have, under the constitution, the sole regulation of Indian

affairs, in all matters whatsoever,” he instructed a federal Indian agent.¹⁵⁹

¹⁵⁹Letter from Henry Knox to Israel Chapin, Apr. 28, 1792, *in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 81, at 231, 232.

Comment: Knox’s instructions to Chapin do not appear at the stated location nor, indeed, anywhere in the volume. We were able to locate a facsimile of the manuscript letter containing the instructions at <https://sparc.hamilton.edu/islandora/object/hamLibSparc%3A12353530#page/7/mode/1up>. However, the letter does not include the quoted language.

Page 1042, fn. 161:

Letter from Henry Knox, Sec’y of War, to the Governor of Ga. (Aug. 31, 1792), *in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 81, at 258, 259 (“[Y]our Excellency will easily discover what is the duty of the federal and your own Government. The constitution has been freely adopted; the regulation of our Indian connexion is submitted to Congress; and the treaties are parts of the supreme law of the land.”).

Comment: The cited letter does not appear at the stated location, nor anywhere in the volume.

Page 1043, text:

The Washington Administration’s adoption of a position aggrandizing its authority is, perhaps, unsurprising. More unexpected is the agreement of state officials. Shortly after ratification, South Carolina Governor Charles Pinckney appealed to Washington for assistance from “the general Government, to whom with great propriety the sole management of India[n] affairs is now committed.” (citing a December 14, 1789 letter from Pinckney to Washington).

Comment: This statement omits crucial context: Pinckney was appealing to the President for help, not against Indians within South Carolina’s own borders, but against “western territory” Indians whom the Spanish government was inciting against the United States for reasons of its own. Thus, this was not a case of conceding federal authority over Natives within state borders. Whether Pinckney would have agreed that the U.S. government had “sole management of Indian affairs” within the borders of South Carolina is open to question.

Possibly because of the absence of context, Justice Gorsuch relied on this passage in *Oklahoma v. Castro-Huerta*. 142 S. Ct. 2486, 2507 (2022) (Gorsuch, J., dissenting).

Page 1043, text & fn. 167:

The Washington Administration’s adoption of a position aggrandizing its authority is, perhaps, unsurprising. More unexpected is the agreement of state officials. . . . When the Virginia legislature supplied Indians with ammunition, it made sure President Washington knew it had acted from exigency alone, “le[is]t in case of silence it might be interpreted into a design of passing the limits of state authority.”¹⁶⁷

¹⁶⁷ VIRGINIA HOUSE OF DELEGATES, JOURNAL OF THE HOUSE OF DELEGATES, OF THE COMMONWEALTH OF VIRGINIA 7-8.

Several comments are in order here:

(1) This citation designates neither the volume nor the date of the source, so it cannot be found with the information provided.

(2) We were able to locate it as a subsidiary document at the *Founders Online* website, <https://founders.archives.gov/documents/Washington/05-05-02-0228>. It is an October 30, 1789, address from the Virginia legislature to President Washington. It reads in relevant part:

The same causes which induced us thus to offer the treasure of Virginia, have occasioned another proceeding, which we think proper to communicate to you; it is indeed incumbent on us to make this communication, least in case of silence it might be

interpreted into a design of passing the limits of State authority.

Chiefs of the *Chickasaw* nation have solicited the General Assembly for a supply of ammunition; the advanced season of the year, and their anxiety to return home, owing to the perilous situation of their nation, who were in daily expectation that hostilities would be commenced against them by the Creeks, have determined them to stop here, and not to proceed to New York, the place of their original destination.

The resolution which we have now the honor of enclosing you, will therefore be executed in their favor; and we trust that our conduct, from the peculiar circumstances of the case, will be acceptable to yourself and the Congress of the United States; and being approved that we shall receive retribution for the expense we have thereby incurred.

(Emphasis added.)

(3) The author omitted the word “Chickasaw” and substituted the word “Indian.” This substitution concealed the fact that the passage is not about Indians in general but about the Chickasaws in particular. The Chickasaw Nation, unlike most tribes, was a signatory to a treaty with the Confederation Congress (1786)—made binding on the new federal government by Article VI of the Constitution. Article VIII of the treaty stated:

For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper.

The Confederation-Era treaty, not the Indian Commerce Clause or other constitutional provisions, is what required the Virginia legislature to recognize federal supremacy over relations with the Chickasaws.

Page 1044, fn. 170:

. . . . The [1790 Indian Intercourse Act] had its origins in the

executive department's commitment to protect the lands of *all* Natives, not just those who signed the Treaty of Hopewell. See Letter from Henry Knox to George Washington (July 7, 1789) . . . (“It would reflect honor on the new government and be attended with happy effects were a declarative Law to be passed that the Indian tribes possess the right of the soil of all lands within their limits respectively and that they are not to be divested thereof but in consequence of fair and bona fide purchasses [*sic*], made under the authority, or with the express approbation of the United States.”)

Comments: The author included the quotation from Knox’s letter to disprove my 2007 article’s conclusion that a constitutional basis for a portion of Indian Intercourse Act was enforcement of the Hopewell treaties and treaties generally. The quoted extract omits immediately-preceding text from the letter supporting my conclusion:

The disgraceful violation of the Treaty of Hopewell with the Cherokees, requires the serious consideration of Congress. If so direct and manifest contempt of the authority of the United States be suffered with impunity, it will be in vain to attempt to extend the arm of Government to the frontiers—The Indian tribes can have no faith in such imbecile promisses [*sic*], and the lawless whites will ridicule a Government which shall on paper only, make Indian treaties and regulate Indian boundaries.

The Policy of extending trade under certain regulations to the Choctaws and Chickasaws under the protection of military posts will also be a subject of Legislative deliberation.

The following observations, resulting from a general view of the Indian Department, are suggested with the hope that some of them might be considered as proper principles to be interwoven in a general system for the government of Indian affairs.

When this omitted text is restored, it becomes clear that the integrity of the Hopewell treaties and future treaties was foremost in Henry Knox’s mind.

Page 1046, text & fn. 182:

Throughout the 1790s, Georgia's leaders fashioned a constitutional argument from this populist rage. They did not challenge the federal right to enter Indian treaties, but they insisted that the Treaty of New York's guarantee of Creek title to lands within Georgia, as well as federal commissioners' authority within the state, was unconstitutional.¹⁸²

¹⁸² *E.g.*, 2 ANNALS OF CONG. 1793 (1790).

Comment: There is no reference to any such claim on that page, thereby leaving the text entirely unsupported.

Page 1062, fn. 265:

. . . Not until the final version of the Trade and Intercourse Act in 1834 did the United States assert criminal jurisdiction over Natives. . . .

Comment: This is a factual error. The United States consistently asserted criminal jurisdiction over the Natives in treaties entered into in and after 1785. *See, e.g.*, Article VIII, Treaty with the Creeks (1790), in KAPPLER, *supra* note 3, at 25, 27.