

THE ORIGINAL UNDERSTANDING OF THE INDIAN COMMERCE CLAUSE: AN UPDATE*

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*The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes*¹

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¹ U.S. CONST. art. I, § 8, cl. 3 (italics added).

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² Bibliographic Footnote: This footnote lists secondary sources referenced multiple times in this article.

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----, *The Enumerated Powers of States*, 3 NEV. L.J. 469 (2003) [hereinafter Natelson, *Enumerated*];

Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformi-*

I. RECENT AND PENDING LITIGATION

Since 2019, the Supreme Court has issued four major decisions on Indian tribal sovereignty law issues. Perhaps this is a belated response to Justice Clarence Thomas's call for clarifying a body of jurisprudence long plagued by doctrinal confusion.³ That confusion may be the reason for the fractured votes in all four recent cases: Three were decided by 5-4 margins, and one on a vote of 3-2-4.⁴

The Court has agreed to consider four more cases, now consolidated, in the October 2022 term.⁵ They test the constitutionality of the federal Indian Child Welfare Act of 1978 (ICWA).⁶ This statute purports to govern the removal and out-of-home placement of American Indian children, to override state jurisdiction, and to dictate procedures to state courts.⁷

There is fierce controversy among child advocates over the merits of the ICWA.⁸ The pending cases, however, all focus on constitutional issues

ty, 55 ARK. L. REV. 1149 (2003) [hereinafter Prakash];

THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed. 1911) [hereinafter FARRAND];

Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 ARK. L. REV. 1175 (2003) [hereinafter Vermeule].

³ *United States v. Lara*, 541 U.S. 193, 214-22 (2004) (Thomas, J., concurring).

⁴ *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022) (5-4) (recognizing state jurisdiction over crimes committed by non-Indians in Indian country); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (5-4) (holding that Congress never dissolved a particular Indian reservation); *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019) (5-4) (holding that admission of a state to the union did not abrogate an Indian treaty unless Congress clearly so stated, and construing the terms of the treaty); *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019) (decided 3-2-4) (holding that the terms of a federal treaty with an Indian tribe preempt state law).

⁵ *Brackeen v. Haaland*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/brackeen-v-haaland/>.

⁶ 25 U.S.C. §§ 1901 - 1963.

⁷ *E.g.*, 25 U.S.C. § 1911(a) ("An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law."); *id.* § 1911(c) ("In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.").

⁸ For a generally positive view, see, e.g., Gabby Deutch, *A Court Battle Over a Dallas Toddler Could Decide the Future of Native American Law*, THE ATLANTIC, Feb. 21, 2019, <https://www.theatlantic.com/family/archive/2019/02/indian-child-welfare-acts-uncertain-future/582628/>; for a negative view, see, e.g., Lisa Morris, *The Indian Child Welfare Act: An Unconstitutional Attack on Freedom*, Christian Alliance for Indian Child Welfare, <https://caicw.org/2022/03/08/the-indian-child-welfare-act-an-unconstitutional-attack-on-freedom/>.

alone. They raise questions of Fifth Amendment equal protection and due process, delegation of legislative power, and federal commandeering of state officials. However, their most fundamental question is whether Congress's enumerated powers include authority to intervene in child placement decisions at all—even though family law is “an area that has long been regarded as a virtually exclusive province of the States.”⁹

In one of the ICWA's recitals, Congress identifies the Indian Commerce Clause¹⁰ as its principal constitutional justification.¹¹ The ICWA further recites that the Indian Commerce Clause and unspecified “other constitutional authority grants Congress plenary power over all Indian affairs.”¹²

For reasons explained in this article, this recital is erroneous: The Constitution did not give Congress authority to enact the Indian Child Welfare Act.

II. PREVIOUS SCHOLARSHIP

Struck by the incoherence of the law in this area, in early 2007 I decided that the first step toward clearing the tangle might be to ascertain what the Indian Commerce Clause really means. Accordingly, I researched and wrote *The Original Understanding of the Indian Commerce Clause*.¹³ I learned that one reason the law of governmental-tribal relations was so chaotic was that there had been little worthwhile scholarship on the original meaning of the Indian Commerce Clause. The relatively few publications that addressed the issue usually (1) displayed little awareness of originalist sources or methodology, or of the wider context of the Constitution's adoption, and (2) were strongly agenda-driven.¹⁴

Felix S. Cohen's *Handbook of Federal Indian Law* may serve as an example. This work often is treated as the ultimate authority on Indian law. Yet Cohen was not a seasoned constitutional scholar, nor was he objective or independent. He was a political appointee in the administration of Presi-

⁹ *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). During the debates over the Constitution's ratification, advocates for the Constitution specifically represented that family law would remain a state concern. Natelson, *Enumerated*, *supra* note 2, at 483.

¹⁰ U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . to regulate Commerce . . . with the Indian Tribes.”).

¹¹ 25 U.S.C. § 1901.

¹² *Id.*

¹³ Natelson, *ICC*, *supra* note 2. Like my other investigations into constitutional meaning, I tried to keep this one as objective as possible.

¹⁴ *Id.* at 212-13 (providing examples of agenda-driven writings).

dent Franklin D. Roosevelt. At the time he published (1942), the administration was promoting the position that the Commerce Clause granted the federal government vast power over areas previously seen as reserved to the states. So it is no surprise that Cohen contended that the Indian Commerce Clause, alone or in conjunction with the treaty power, granted Congress plenary authority over Indian affairs—even though this position dissolves under examination.¹⁵

Concluding that I could not rely on existing literature, I turned directly to Founding-era sources. Those sources compelled the conclusion that Congress's powers under the Indian Commerce Clause were not plenary. Rather, like Congress's powers under the Foreign and Interstate Commerce Clauses, they were limited to regulating certain economic activities. My resulting article created a stir. Justice Thomas cited it several times,¹⁶ it prompted at least one academic response, and it may have provoked several challenges to the constitutionality of the ICWA.

III. GOALS OF THIS ARTICLE

Parts I-IV of this article are introductory in nature. Part V explains—I think more clearly than my previous study—the Constitution's "separation of powers" approach to Indian affairs. Part VI provides additional evidence of the Founding-era meaning of the phrase "Commerce . . . with the Indian Tribes." Part VII addresses some commentators' contention that the word "Commerce" has a more inclusive meaning in the Indian Commerce Clause than in the Foreign and Interstate Commerce Clauses, even though that word is used only once with respect to all three forms of commerce. Part VIII is a response to Professor Gregory Ablavsky and his admittedly "heterodox"¹⁷ approach to interpreting the federal government's Indian affairs powers. Part IX concludes that the child placement provisions of the ICWA are indeed outside the scope of Congress's authority.

¹⁵ *Id.* at 203-12 (collecting and analyzing rationalizations for plenary authority).

¹⁶ *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 658-59, & *passim* (2013) (Thomas, J., concurring); *Upstate Citizens for Equality v. United States*, 140 S. Ct. 2587, 2588 (2017) (Thomas, J., dissenting from denial of certiorari).

¹⁷ Ablavsky, *supra* note 2, at 1017 ("To determine the original constitutional Indian affairs power, this Article employs an alternate approach to reconstruct constitutional meaning. This approach uses heterodox methodologies and inclusive conceptions of constitutional actors and sources . . .").

IV. SOME PRINCIPLES OF ORIGINALIST ANALYSIS

As noted earlier, much writing on the federal Indian powers appears to be agenda-driven,¹⁸ and the flames of advocacy often consume appropriate methodology. Before examining the original meaning of constitutional terms, therefore, it may be helpful to review some aspects of originalist analysis.

First, the Constitution is a *legal* document—“the supreme Law of the Land.”¹⁹ Its framers drafted it, and its advocates explained it, with standard Anglo-American methods of documentary interpretation in mind. By way of illustration, both Alexander Hamilton’s and James Madison’s writings in *The Federalist* refer repeatedly to standard rules of documentary construction.²⁰ Adhering to those rules is necessary to preserve the integrity of the document. If judges and public officials can craft and apply unanticipated interpretive methods to the Constitution—thereby effectively changing its meaning—then they, and not the Constitution, are the “supreme Law of the Land.”

Second, although some have claimed that originalism is a new creed, in fact it antedates the Constitution itself.²¹ Well before the 18th century, the lodestar of most documentary interpretation had become the “intent of the makers.”²² When applied to the Constitution, the “intent of the makers” was the understanding of the ratifiers.²³ In default of a clear and consistent

¹⁸ *Supra* note 14 and accompanying text.

¹⁹ U.S. CONST. art. VI, cl. 2.

²⁰ *E.g.*, THE FEDERALIST NO. 32 (Hamilton) (using the interpretative technique of the negative pregnant); THE FEDERALIST NO. 41 (Madison) (using the presumption against superfluities). *See generally* Natelson, *Hermeneutic*, *supra* note 2 (explaining techniques of 18th-century documentary interpretation).

²¹ Natelson, *Hermeneutic*, *supra* note 2 (tracing originalist methods of interpretation in English law to well before the Founding). Actually, originalist methods can be traced back even further. *E.g.*, Polybius, *Histories* 12.16.9 (reporting a defense that an interpretation was faulty because it was not the intent of the lawgiver).

²² Natelson, *Hermeneutic*, *supra* note 2, at 1249-55.

²³ *Id.* For a defense of this approach, see Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575 (2011).

Chief Justice John Marshall’s frequently misunderstood comment that “We must never forget that this is a constitution we are expounding” does not contradict originalist method. Marshall made the statement only to explain why the *Designatio unius* (today we would say *Expressio unius*) maxim had diminished force for determining the makers’ intent. *McCulloch v. Maryland*, 17 U.S. 316, 406-07 (1819) (referring to “The men who drew and adopted” the Tenth Amendment). Marshall certainly didn’t reject the maxim, even in the constitutional context. *See Marbury v. Madison*, 5 U.S. 137 (1803) (holding that Congress’s grant to the Supreme Court of certain orig-

understanding, the original public meaning would suffice.²⁴

Finally, a caveat about evidence of original understanding: The American people adopted the Constitution when it was ratified by state conventions elected for the purpose. The understanding of the ratifiers and of the wider public was informed by statements, events, and conditions previous to and contemporaneous with those conventions. It could not have been influenced by statements, events, or conditions that had not yet arisen. For this reason, post-ratification statements, events, or conditions generally are very weak—if any—evidence of the original understanding. Admittedly, there are rare exceptions to this rule.²⁵ But those exceptions certainly do *not* include statements and actions by self-interested politicians made after the ratification was complete. In nearly all cases, the originalist’s best response to such so-called evidence is to ignore it.²⁶

V. THE CONSTITUTIONAL SCHEME: SEPARATION OF POWERS

In 1789, the United States transitioned from the Articles of Confederation to the new federal Constitution. Like the Articles, the Constitution granted only enumerated powers to the central government and reserved the remainder in the states.²⁷ In general, the extent of powers granted by the Constitution was greater than under the Articles. Unlike the Articles, however, the Constitution did not bestow those powers on a single entity, such as Congress. Rather, the Constitution divided them among different federal actors, thereby creating countervailing checks and balances.²⁸

The treatment of relationships with the Indians followed this pattern. The Articles bestowed on the Confederation Congress the power of “regu-

inal jurisdiction exceeded its enumerated powers).

²⁴ Natelson, *Hermeneutic*, *supra* note 2, at 1286.

²⁵ Subsequent evidence is best admitted only to “liquidate” the meaning of truly unclear provisions. *Cf.* THE FEDERALIST NO. 37 (Madison) (referring to subsequent practice to liquidate “obscure and equivocal” laws).

²⁶ The Supreme Court recently disclaimed the misuse of post-ratification “evidence.” *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2162-63 (2022) (Barrett, J., concurring):

[T]oday’s decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights. On the contrary, the Court is careful to caution “against giving postenactment history more weight than it can rightly bear.”

²⁷ ARTS. CONFED., art. II; U.S. CONST. amend. X.

²⁸ *E.g.*, U.S. CONST. art. I, § 8, cl. 11 (granting Congress power to declare war), *but id.* art. II, § 2, cl. 2 (granting the President and Senate power to make treaties, including treaties of peace).

lating the trade and managing all *affairs* with the Indians.”²⁹ “Indian affairs” was understood to include relations of all kinds³⁰—economic, diplomatic, religious, and military—and the word “all” implied congressional authority over Indian affairs was exclusive. But the grant was cut down severely by two exceptions in favor of the states: The authority of the Confederation Congress extended only to “Indians[] not members of any of the States,” and it was subject to the proviso “that the legislative right of any State within its own limits be not infringed or violated.”³¹ These exceptions preserved state supremacy over those Indians who had accepted state citizenship or were living within state boundaries.³²

At the Constitutional Convention, James Madison suggested granting to the new federal Congress an unlimited “power to regulate affairs with the Indians.”³³ However, the Convention rejected this suggestion. The finished Constitution did give federal officers and entities more authority over Indian relations than the Confederation Congress had enjoyed, but unlike the Articles, the Constitution divided that authority:

- The President would conduct diplomacy and military operations.³⁴
- The President, with the approval of two-thirds of the Senate, could enter treaties with the tribes.³⁵ This may have been the most important Indian affairs power, because treaties were the usual way of resolving disputes between European Americans and Native Americans. Treaties could cover almost any subject,³⁶ including subjects other than those normally within the purview of the federal government.³⁷

²⁹ ARTS. CONFED., art. IX.

³⁰ Natelson, *ICC*, *supra* note 2, at 217-18 (providing examples of the meaning of Indian “affairs” See also “Federal Farmer.” Letter No. 1, Oct. 8, 1787, in 19 DOCUMENTARY HISTORY, *supra* note 2, at 207, 213 (listing “commerce” and “affairs” separately).

³¹ ARTS. CONFED., art. IX.

³² Natelson, *ICC*, *supra* note 2, at 227-30.

³³ 2 FARRAND, *supra* note 2, at 324 (Aug. 18, 1787) (Madison).

³⁴ NATELSON, TOC, *supra* note 2, at 151, 159, & 166 (explaining that the President’s diplomatic and warmaking powers derive partly from their explicit enumeration and partly from the then-recognized incidents of the explicitly enumerated powers).

³⁵ U.S. CONST. art. II, § 2, cl. 2.

³⁶ Including the highly significant subject of land. Paine Wingate to Samuel Lane, Jun. 2, 1788, in 28 DOCUMENTARY HISTORY, *supra* note 2, at 317, 318 (discussing potential land allocations by Indian treaties).

³⁷ See generally, KAPPLER, *supra* note 2, at 3-54 (reproducing treaties between Indian tribes and the United States from 1778 through 1798).

- Congress would (1) govern federal territories³⁸ (then inhabited by many tribes), (2) declare war,³⁹ (3) “define and punish . . . Offenses against the Law of Nations,”⁴⁰ (4) adopt legislation to execute treaties⁴¹ under the Necessary and Proper Clause,⁴² and (5) regulate “Commerce . . . with the Indian Tribes.”⁴³
- The states reserved police power over Indians within their boundaries on matters not duly preempted. The Constitution made this clear by dropping the Articles’ word “all” from its grants of federal power over Indian affairs,⁴⁴ and it confirmed the reservation by the Ninth and Tenth Amendments. State exercise of police power over Natives was and remains controversial, but the states had exercised it before the Constitution and, despite occasional complaints from federal officials, continued to do so afterward.⁴⁵

The passage of time has eroded the constitutional grounds for the federal government’s powers over Indian affairs. Warfare between the United States and tribes has ended. Relatively few Natives now live in federal territories.⁴⁶ The fact that nearly all Indians are now U.S. and state citizens, with the privileges pertaining thereto, has rendered the law of nations irrelevant. And as a matter of choice—the product of a congressional declaration and presidential acquiescence—the government has entered into no Indian treaty

³⁸ U.S. CONST. art. IV, § 3, cl. 2.

³⁹ *Id.* art. I, § 8, cl. 11.

⁴⁰ *Id.* art. I, § 8, cl. 10. During the Founding era, “the law of nations” was the usual term for international law.

⁴¹ It has been argued that the Necessary and Proper Clause recognizes only congressional power to facilitate the making of treaties and not their execution, but this is an error. Treaties are the “supreme Law of the Land,” the President must “take Care” to enforce them, and the Necessary and Proper Clause empowers Congress to enact legislation to assist him in that function. NATELSON, TOC, *supra* note 2, at 164-65.

⁴² U.S. CONST. art. I, § 8, cl. 18.

⁴³ *Id.* art. I, § 8, cl. 2.

⁴⁴ Professor Ablavsky writes that the Constitution avoided the terms “sole” and “exclusive” for all its enumerated powers, “opting instead for broad federal authority through the Supremacy Clause.” Ablavsky, *supra* note 2, at 1035. *But see* 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”); *see also id.* art. I, § 9, cl. 1 (assuring exclusive congressional or federal jurisdiction by denying states certain concurrent powers).

⁴⁵ Natelson, *ICC*, *supra* note 2, at 222-23. *Cf.* Matthew L. M. Fletcher, *Indian Tribes and Statehood: A Symposium in Recognition of Oklahoma’s Centennial*, 43 TULSA L. REV. 73 (2007) (arguing for a retreat from the position that states’ powers have no role in Indian affairs); *Castro-Huerta*, 142 S. Ct. 2486 (recognizing state jurisdiction over crimes committed by non-Indians in Indian country).

⁴⁶ Natelson, *ICC*, *supra* note 2, at 209.

since 1868.⁴⁷ As a result, the Indian Commerce Clause is the only federal Indian affairs power in active and significant use.

Yet advocates for congressional power over Indian affairs press their case as if these changes had not occurred. They commonly assert that the Indian Commerce Clause, although constitutionally but one component of the federal Indian affairs power, now grants all of it: that Congress, acting alone, may exercise all the authority the Constitution vests explicitly in other entities.⁴⁸ This claim is explored below.⁴⁹

VI. THE MEANING OF THE INDIAN COMMERCE CLAUSE

A. Americans' Focus on the Regulation of Commerce

Regulation of commerce was a topic with which Americans of the Founding generation were very familiar. Until 1776, they had been subjects of the greatest commercial polity in the history of the world. The British government supervised commerce with foreign nations and among all of the (mostly self-governing) units of the Empire. For several years, the British government tried to regulate trade with Indians as well, before resigning that function to the individual colonies.⁵⁰

From 1763 to 1775, pamphleteers expounding the colonial cause publicized the distinction between centrally-imposed commercial regulations (which the pamphleteers found acceptable) and centrally-imposed taxes and internal governance (which they did not).⁵¹ The First Continental Congress adopted the same distinction.⁵² After Independence, Americans deliberated about whether to amend the Articles of Confederation to grant Congress

⁴⁷ 25 U.S.C.A. § 71:

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.

⁴⁸ *E.g.*, Vermeule, *supra* note 2, at 1177 (reporting the claim that the Treaty Power expands the scope of, or works in tandem with, the Indian Commerce Clause); COHEN, *supra* note 2, at 91 (also coupling them).

⁴⁹ *Infra* Part VII.

⁵⁰ Natelson, *ICC*, *supra* note 2, at 219.

⁵¹ Natelson, *Commerce*, *supra* note 2, at 836-38.

⁵² *E.g.*, 1 J. CONT. CONG. 82-90 (Oct. 21, 1774) (stating, in a letter “To the People of Great-Britain,” that the colonists accepted British regulation of trade/commerce while rejecting parliamentary taxation).

the power to regulate commerce.⁵³ They further deliberated on the topic during the constitutional debates of 1787-1790.⁵⁴ For Americans of the Founding generation, regulation of commerce was a central, rather than a peripheral, concern.

B. “Regulate Commerce” = “Regulate Trade”

In the 18th century, the word “commerce” could have different meanings. But as comprehensive usage surveys demonstrate, it usually was interchangeable with the word “trade.”⁵⁵ This was particularly so when the context was government regulation of commerce.⁵⁶ The phrase “regulate commerce” was almost always interchangeable with the phrase “regulate trade.”

The following extract from Madison’s *Federalist* No. 42 illustrates this interchangeability:⁵⁷

The defect of power in the existing Confederacy to *regulate the commerce* between its several members, is in the number of those which have been clearly pointed out by experience [W]ithout this supplemental provision, the great and essential power of *regulating foreign commerce* would have been incomplete [*sic*] and ineffectual Were [the states] at liberty to *regulate the trade* between State and State, it must be foreseen that ways would be found out, to load the articles of import and export, during the passage through their jurisdiction, with duties. . . [I]t would stimulate the injured party, by resentment as well as interest, to resort to less convenient channels for their foreign *trade* The necessity of a *superintending authority over the reciprocal trade* of confederated States has been illustrated by other examples as well as our own The *regulation of commerce* with the Indian tribes is very properly unfettered from two limitations in the articles of confederation And how the *trade* with

⁵³ *E.g.*, 31 *id.* 494-95 (Aug. 7, 1786) (committee proposal for an amendment permitting Congress to “regulat[e] the trade of the States as well with foreign Nations as with each other”). Of course, Congress already had authority to regulate trade with the Natives under its Indian affairs power.

⁵⁴ *E.g.*, A Native of Virginia, *Observations Upon the Proposed Plan of Federal Government*, Apr. 2, 1788, in 9 DOCUMENTARY HISTORY, *supra* note 2, at 655, 670 (discussing details of the commerce power).

⁵⁵ See generally Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 CHI. L. REV. 101 (2001); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003).

⁵⁶ Natelson, *Commerce*, *supra* note 2.

⁵⁷ Another illustration appears in the Constitution itself: the Port Preference Clause, U.S. CONST. art. I, § 9, cl. 6. *Infra* note 97 and accompanying text.

Indians, though not members of a State, yet residing within its legislative jurisdiction, can be *regulated* by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.⁵⁸

C. “Regulate Commerce/Trade” = *Lex Mercatoria*

Like many of the Constitution’s expressions,⁵⁹ the phrase “regulate Commerce” derives from contemporaneous Anglo-American law. The regulation of inter-jurisdictional trade/commerce was a recognized jurisprudential category—much as naturalization law and real estate law were recognized jurisprudential categories.

William Blackstone’s *Commentaries* treated inter-jurisdictional commerce as such. He distinguished it from the regulation of domestic commerce (i.e., commerce within England) and identified inter-jurisdictional commerce with the distinct body of law known as the *lex mercatoria* or *law merchant*.⁶⁰

With some modifications, the Constitution adopted the same distinction. To the state governments, it left supervision of domestic (intrastate) commerce. To Congress, it assigned governance of inter-jurisdictional commerce—that is, the *lex mercatoria*.

The Constitution made only two modifications on the traditional scheme. Both appear immediately after the Commerce Clause.⁶¹ The first was a grant to Congress of a distinct power to adopt uniform bankruptcy laws.⁶² Bankruptcy traditionally had been a component of the law merchant,⁶³ so this additional power would not have been necessary for Congress to regulate bankruptcy in inter-jurisdictional transactions. However,

⁵⁸ Publius, *The Federalist No. 42*, N.Y. PACKET, Jan. 22, 1788, in 15 DOCUMENTARY HISTORY, *supra* note 2, at 427, 429-31 (italics added).

⁵⁹ NATELSON, TOC, *supra* note 2, at xxii.

⁶⁰ 1 WILLIAM BLACKSTONE, COMMENTARIES *263-64 (“[T]he affairs of [that] commerce are regulated by a law of their own, called the law merchant or *lex mercatoria*, which all nations agree in and take notice of.”).

⁶¹ U.S. CONST. art. I, § 8, cl. 3.

⁶² *Id.* art. I, § 8, cl. 4.

⁶³ 1 CUNNINGHAM, *supra* note 2, at v-xxx (listing numerous subtopics of bankruptcy in the index); JACOB, *supra* note 2, at 385 (providing for bankruptcy commissioners). Jacob’s work, like Blackstone’s *Commentaries*, was deemed sufficiently important to be included on the list of books recommended for acquisition by the Confederation Congress. The recommendation was contained in a report by a committee consisting of James Madison, Thomas Mifflin, and Hugh Williamson—all later among the Constitution’s framers. 24 J. CONT. CONG. 84 & 89 (Jan. 24, 1783).

the additional grant ensured that any federal bankruptcy laws would have intrastate as well as interstate effect. The second modification was a grant to Congress of power over weights, measures, and money.⁶⁴ In England, regulation of weights, measures, and money were components of domestic (i.e., intrastate) commerce.⁶⁵ As in the case of bankruptcy, this additional power would enable Congress to regulate throughout the entire country and not merely in inter-jurisdictional transactions.

Aside from those modifications, the content of congressional jurisdiction over commerce was defined by the accepted scope of the *lex mercatoria*.⁶⁶

D. *The Scope of the Lex Mercatoria*

The fact that the expressions “regulate commerce” and “regulate trade” were virtually synonymous has led some commentators to assume that the scope of commercial regulation was very narrow—in foreign trade, perhaps limited to custom-house regulations,⁶⁷ and in interstate trade, to eliminating barriers so as “to make commerce regular.”⁶⁸

These assumptions do not comport with the broad scope of the *lex mercatoria*, as revealed by 18th-century statutes and treatises devoted to the subject.⁶⁹ Although these sources give no comfort to those who contend that Congress’s Commerce Power extends to all forms of intercourse or to all economic matters, they make clear that the *lex mercatoria* was far more extensive than custom-house regulations or removing trade obstructions. It encompassed:

- the law of bankruptcy,⁷⁰

⁶⁴ U.S. CONST. art. I, § 8, cl. 5.

⁶⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES *264.

⁶⁶ Natelson, *Commerce*, *supra* note 2, at 813-15, 818-19, & 846.

⁶⁷ *E.g.*, Ablavsky, *supra* note 2, at 1027 (referring to “the customs-focused understandings of the Interstate and Foreign Commerce Clauses”).

⁶⁸ John McGinnis, in *Colloquium, Resolved: The Constitution is Designed for a Moral and Religious People and It is Wholly Unsuitable for the Government of Any Other*, 49 CONN. L. REV. 995, 1005 (2017); Randy E. Barnett & Andrew Koppelman, *The Commerce Clause*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/752>.

⁶⁹ Available treatises include MALYNES, *supra* note 2; JACOB, *supra* note 2; WYNDHAM BEAWES, *LEX MERCATORIA REDIVIVA: OR, THE MERCHANT’S DIRECTORY* (3d ed. 1771); CUNNINGHAM, *supra* note 2; & FORSTER, *supra* note 2. Other works also included aspects of the *lex mercatoria* in their discussions. *E.g.*, JOHN REEVES, *A HISTORY OF THE LAW OF SHIPPING AND NAVIGATION* (1792).

⁷⁰ 1 CUNNINGHAM, *supra* note 2, at v-xxx (listing subtopics of bankruptcy); JACOB, *supra* note 2, at 385-86 (providing for bankruptcy commissioners).

- regulation and licensing of merchants,⁷¹ brokers (factors),⁷² and others involved in trade,⁷³ including requirements of oaths,⁷⁴ bonds,⁷⁵ and recordkeeping;⁷⁶
- the regulation of commercial paper—notes, drafts, and the like;⁷⁷
- price controls;⁷⁸
- all aspects of ships and navigation,⁷⁹
- prohibitions on certain forms of trade and of activities associated with trade,⁸⁰ including territorial restrictions, both outside⁸¹ and within⁸² the legislature’s jurisdiction;
- regulations of inventory, such as packing and shipping,⁸³ marking and

⁷¹ JACOB, *supra* note 2, at 157 (no alien may be an overseas merchant).

⁷² *Id.* at 152-157 (general regulation of factors, including restrictions in overseas possessions) & 387 (licensing of brokers and penalty for practice without a license).

⁷³ *Id.* at 134-35 (licensing of “carmen”), 218 (referring to licenses of captains and capers), & 65-66 (regulation of pilots); 13 Geo. iii, c. 63 (1773) (extensive regulation of the East India Company).

⁷⁴ JACOB, *supra* note 2, at 387 (oaths of brokers) & 286 (oaths of traders); FORSTER, *supra* note 2, at 171 (oaths of regulatory employees).

⁷⁵ JACOB, *supra* note 2, at 218 (captains and capers required to post bonds), 387 (brokers required to post bonds), & 160 (bond required to take on board certain inventory).

⁷⁶ *Id.* at 286 (entering license on certain books); 13 Geo. iii, c. 63, § XX (1773) (transferring and maintaining records).

⁷⁷ JACOB, *supra* note 2, at 101 (regulations of promissory notes) & 94-100 (regulations of bills of exchange); 2 CUNNINGHAM, *supra* note 2, at i-v (index listing bills of exchange topics); *id.* at v-vi (index listing promissory note topics), vii (index listing other notes), & vii-viii (index listing marine insurance)

⁷⁸ JACOB, *supra* note 2, at 134-35 (controls on prices of porters and carmen).

⁷⁹ *Id.* at 57-58 (general navigation rules), 131 (times of unloading), 132 (license required to unlade), & 185 (prizes); FORSTER, *supra* note 2, at 173 (extra fee for non-conforming ships).

⁸⁰ JACOB, *supra* note 2, at 32-33 (restrictions on wine imports), 37 (protection against fraud), & 163 (altering mark for purposes of fraud); 20 Geo. iii, c. 42 (1780) (comprehensive regulation and duties on trade with the Isle of Man, which was located within the empire).

⁸¹ *E.g.*, FORSTER, *supra* note 2, at 265-66 (“And ’tis made a high Crime and misdemeanor to go to the *East-Indies*, the Party not being qualify’d by Law so to do; and the Offender shall be liable to corporal Punishment, or a Fine, as the Court shall think fit.”); JACOB, *supra* note 2, at 261 (barring subjects from trading in or traveling to Asia, Africa, or America without license) & 160 (restrictions on alien landownership abroad).

⁸² 15 Geo. iii, c. 10 & c. 18 (1775) (restricting trade within the British Empire); 20 Geo. iii, c. 6 (1780) (lifting prior restraints pertaining to Ireland, then part of the British Empire); 20 Geo. iii, c. 18 (1780) (repealing earlier restraints on flow of money and traffic in hops with Ireland); *id.* c. 42 (1780) (comprehensive regulation and duties on trade with the Isle of Man, located within the empire).

⁸³ 10 Geo. iii, c. 17 (regulating the packing and shipping of China earthenware for export from

labeling⁸⁴—and flat prohibitions on inter-jurisdictional trading of certain goods (contraband);⁸⁵

- financial charges, including but not limited to customs and duties;⁸⁶
- administration of commercial treaties;⁸⁷
- marine insurance;⁸⁸
- incorporation of trading entities;⁸⁹
- certain criminal measures, such as penalties for piracy⁹⁰ and unauthorized mercantile activities;⁹¹ and
- the appointment of commissioners (agents) to administer the system.⁹²

As explained below, these categories are sufficient to comprehend the Founding-era understanding of “Commerce . . . with the Indian tribes.”⁹³

VII. THE PROTEAN COMMERCE CLAUSE HYPOTHESIS

In any scheme of commercial regulation, the precise mix of rules and their respective prominence differ according to the items traded and with whom they are traded. The rules of the Jamaican trade are never precisely the same as those of the French trade. Such variations are normal, and we do not understand them as affecting the scope of regulatory power granted.

However, some writers contend that the single constitutional phrase

Britain to America).

⁸⁴ MALYNES, *supra* note 2, at 142 (requirement of marking or labeling).

⁸⁵ JACOB, *supra* note 2, at 27 (adulterating wine prohibited) & 229-30 (permitted and contraband goods); FORSTER, *supra* note 2, at 109-10 (bans on export of some goods outside British Empire); 25 Geo iii, c. 67 (barring export of tools from Britain, even to other units of the empire, Ireland excepted).

⁸⁶ FORSTER, *supra* note 2, at 193-354 (listing duties on goods); JACOB, *supra* note 2, at 117-24 (schedule of duties), 265 (percentage duties), & 282 (license fees). For the scope of terms such as “custom” and “duty,” see Robert G. Natelson, *What the Constitution Means by “Duties, Imposts, and Excises”—and Taxes (Direct or Otherwise)*, 66 CASE WESTERN RES. L. REV. 297 (2015).

⁸⁷ JACOB, *supra* note 2, at 203-255 (reproducing commercial treaties).

⁸⁸ *Id.* at 84-92 (regulation of marine insurance).

⁸⁹ *Id.* at 256-98 (listing trading companies incorporated by Crown).

⁹⁰ *Id.* at 186-93 (piracy).

⁹¹ FORSTER, *supra* note 2, at 121-90 (listing penalties for violations).

⁹² JACOB, *supra* note 2, at 85 (commissioners of insurance), 285 (commissioners of the customs), & 385 (bankruptcy commissioners).

⁹³ *Infra* Part VII(B)(3).

“regulate Commerce” changes scope according to the persons or entities with whom the commerce is carried out. More specifically, they argue that “to regulate Commerce” takes on a far broader definition when modified by the phrase “with the Indian Tribes” than when modified by “with foreign Nations” or “among the several States.” Thus, although they might concede that the Interstate Commerce Clause does not authorize Congress to prescribe family law for non-Natives, they maintain that the Indian Commerce Clause empowers Congress to prescribe family law for Natives.

This argument is popular,⁹⁴ but weak. It has two kinds of flaws: (1) it is textually improbable and (2) the evidence advanced to support it is defective.

A. Textual Difficulties

When the same term appears in different parts of the same legal document, we presume that the term means the same thing in all its appearances. This was the presumption during the Founding era,⁹⁵ just as it is today.⁹⁶ It reflects the observation that drafters of legal documents generally do not alter the meaning of terms within the same instrument. This is especially true of drafters as competent as the Constitution’s framers.

Promoters of the protean Commerce Clause hypothesis almost universally overlook the fact that the Commerce Clause is not the Constitution’s only reference to regulating commerce. The Port Preference Clause states:

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to,

⁹⁴ E.g. Abel, *supra* note 2, at 437; Ablavsky, *supra* note 2, at 1026. The theory seems to have been adopted in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989), although *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996) avoided specifically endorsing it. Compare Vermeule, *supra* note 2:

“Commerce,” when used next to the words “with foreign Nations” or “with the Indian Tribes,” might have had a different meaning in the founding era than “commerce” when used next to the phrase “among the several States.” . . . I have no idea whether any of these possibilities are true.

Id. at 1181-82.

One must distinguish this contention from the (more plausible) position that the three different prepositional phrases following the word “Commerce” designate different people or entities with whom it is carried out. Christopher R. Green, *Tribes, Nations, States: Our Three Commerce Powers* (Aug. 22, 2020, rev’d Aug. 1, 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3679265.

⁹⁵ Natelson, *ICC*, *supra* note 2, at 215.

⁹⁶ See Prakash, *supra* note 2 (discussing the rule and some applications).

or from, one State, be obliged to enter, clear, or pay Duties in another.⁹⁷

The references to “Ports,” “Vessels,” and “Duties” communicate a mercantile sense for the word “Commerce.” This, in turn, triggers the presumption that the word’s appearance in the Commerce Clause also is mercantile and does not encompass non-mercantile subjects such as family law.

When a clause contains a single appearance of a word or phrase (as the Commerce Clause does with the word “Commerce”), the presumption that the meaning remains constant should be even stronger. The framers could have written, “The Congress shall have Power to regulate Commerce with foreign Nations and among the several States *and also to regulate Affairs* with the Indian Tribes.” But they did not. And if “Commerce” really did have a different meaning in the Indian setting, they could have written, “The Congress shall have Power to regulate Commerce with foreign Nations and among the several States *and to regulate Commerce* with the Indian Tribes.” But they didn’t do that either. Instead, they employed exactly the same appearance of the same phrase (“regulate Commerce”) to refer to all three groups.

B. Evidentiary Weaknesses

Five kinds of evidence are proffered to rebut the presumption that the meaning of “regulate Commerce” remains constant with respect to all three listed commercial partners:

- evidence that the framers inserted the phrase “with the Indian Tribes” in the Commerce Clause later in the drafting process than “with foreign Nations and among the several States;”
- an essay written by a New York Antifederalist stating that, under the Constitution, Congress would enjoy plenary power over Indian affairs;
- evidence supposedly showing that the regulation of Indian commerce was understood to be more comprehensive than the regulation of other forms of commerce;
- a passage in Attorney General Edmund Randolph’s 1791 opinion on the constitutionality of a national bank; and
- several post-ratification congressional statutes.

⁹⁷ U.S. CONST. art. I, § 9, cl. 6.

I proceed to address each of these.

1. The Order of Drafting

One piece of evidence advanced to support the conclusion that the Indian Commerce Clause is broader than the Foreign and Interstate Commerce Clauses is that the Constitution's framers added the words "with the Indian Tribes" after the foreign and interstate portions of the clause had been drafted.⁹⁸

Proponents of this evidence do not explain how the succession of events at a closed convention could affect the ratifiers' understanding of the completed document. They also overlook how the language came to be added: Madison moved to empower Congress to "regulate *affairs* with the Indians,"⁹⁹ but the Convention trimmed "affairs" to "Commerce"—the same word employed for other trade relationships.

Moreover, if the ratifiers had known about the temporal drafting order, the implications would have been exactly the opposite of what proponents claim. If an object is added to an existing category, the addition implies that persons adding it believe the new object is in the *same* category—not in a different one. Suppose I show Rita two animals and she says, "Those are both dogs." Then I present a third animal and she says, "That also is a dog." She is telling me she believes the third animal is in the same class as the first and second. If she thought the third animal was, say, a cat, then she would not have called it a dog.

In sum, to the extent that the framers' late addition of "with the Indian Tribes" has any probative power at all, it strengthens the conclusion that the framers thought commerce with the Natives was in the same general class as the two other forms of commerce.

2. An Antifederalist Screed

The second bit of evidence proffered to support the claim that the Indian Commerce Clause is broader than the scope of the Foreign and Interstate

⁹⁸ Abel, *supra* note 2, at 437-38. Ablavsky and his sources contend that in the Constitutional Convention, late additions of enumerated powers—including the Indian Commerce Clause—were mostly uncontroversial and accepted, and that this suggests the clause was "open-ended." Ablavsky, *supra* note 2, at 1038-39. Quite the contrary: On August 16, 1787, both Madison and Charles Pinckney proposed additional powers, a substantial number of which the delegates rejected. 2 FARRAND, *supra* note 2, at 324-26 (Aug. 16, 1787) (Madison). And as the text states, Madison's proposed Indian affairs power was reduced in scope.

⁹⁹ 2 FARRAND, *supra* note 2, at 324 (Aug. 18, 1787) (Madison).

Commerce Clauses is an essay written in opposition to the Constitution. It appeared in the June 14, 1788, *New York Journal* over the name “Sydney.” The piece has been ascribed both to Abraham Yates and Robert Yates.¹⁰⁰

The author complained that the Confederation Congress had interfered with the Indian affairs prerogatives of the states. He feared the Constitution would make federal intrusion worse. Here is the relevant passage:

If this was the conduct of [the Confederation] Congress and their officers, when possessed of powers which were declared by them to be insufficient for the purposes of government, what have we reasonably to expect will be their conduct when possessed of the powers “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes,” when they are armed with legislative, executive and judicial powers

It is therefore evident that this state, by adopting the new government, will enervate their legislative rights, and totally surrender into the hands of Congress the management and regulation of the Indian affairs, and expose the Indian trade to an improper government¹⁰¹

The words emphasized by advocates of the protean Commerce Clause hypothesis are “totally surrender into the hands of Congress the management and regulation of the Indian affairs.”

However, “Sydney” did not say the Indian Commerce Clause would be the sole source of congressional authority. He may well have drawn his conclusion from the entire collection of Congress’s Indian affairs powers, including the Define and Punish Clause,¹⁰² the Necessary and Proper Clause,¹⁰³ and the Territories and Property Clause.¹⁰⁴ Indeed, one early congressional Indian-intercourse law apparently was based on the Territories and Property Clause, not on the Indian Commerce Clause.¹⁰⁵

More likely, though, “Sydney” was not thinking about the new Congress

¹⁰⁰ “Sydney,” N.Y. J., June 13-14, 1788, in 20 DOCUMENTARY HISTORY, *supra* note 2, at 1153. The editor attributes it to Abraham Yates; *but see* 6 THE COMPLETE ANTI-FEDERALIST 107 (Herbert J. Storing ed., 1981) (noting a conflict between one scholar who attributed it to Robert Yates and another who attributed it to Abraham Yates).

¹⁰¹ 20 DOCUMENTARY HISTORY, *supra* note 2, at 1158.

¹⁰² U.S. CONST. art. I, § 8, cl. 10 ([The Congress shall have Power . . .] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; . . .).

¹⁰³ *Id.* art. I, § 8, cl. 18.

¹⁰⁴ *Id.* art. IV, §3, cl. 2.

¹⁰⁵ 3 ANNALS OF CONG. 751 (Dec. 20, 1792) (justifying the 1792 Indian Intercourse Act by stating 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”).

alone, but about the federal government as a whole. Observe how he transitioned from a complaint about the Confederation Congress “and their officers” to the new federal establishment “armed with legislative, executive and judicial powers.” The perceived threat came from the aggregate of *all* federal powers.

If so, then “Sydney’s” statement that the Constitution would “totally surrender” the management of Indian affairs to “Congress” arose from habit: The Confederation was still in existence when he wrote, and people referred to the central authority as “Congress.” It was understandable if the usage continued when mentioning the new federal government.

One last point: In my experience, Antifederalist expositions of constitutional meaning are not very reliable evidence of the Constitution’s actual meaning. They often contradict each other, ignore conventions of legal construction, misrepresent the text, or reflect ignorance of the goals behind the text they critique. Antifederalist representations are particularly weak in comparison with those issued by the Constitution’s sponsors.¹⁰⁶

3. The Claim that the Regulation of Indian Commerce was Broader than the Regulation of other Forms of Commerce

The next category of evidence advanced in support of a protean Commerce Clause consists of material supposedly showing that the Founding generation understood the regulation of Indian commerce/trade to be more inclusive than the regulation of foreign or interstate commerce/trade.¹⁰⁷

Those advancing the claim seem to assume that regulation of foreign commerce consisted primarily of custom-house regulations; they do not consider the wide scope of the *lex mercatoria*.¹⁰⁸ Yet the *lex mercatoria* included the subjects of trade regulations established in early Indian treaties.¹⁰⁹ It also accommodated even the most ambitious regulations of Indian commerce then extant—those adopted by South Carolina. The South Carolina scheme included:

¹⁰⁶ Natelson, *Founders*, *supra* note 2, at 60 (explaining why the representations of meaning from a measure’s sponsors are considered authoritative).

¹⁰⁷ *E.g.*, Ablavsky, *supra* note 2, at 1028-32.

¹⁰⁸ *Supra* Part VI(D).

¹⁰⁹ *E.g.*, KAPPLER, *supra* note 2, at 10 (right of traders to enter into Indian territories), 16 (same), & 20 (traders must be licensed); 18 EARLY AMERICAN INDIAN DOCUMENTS 551 (Colin G. Calloway ed., 1994) (quoting Art. VI of a Sept. 23, 1789, proposed treaty with the Creeks as saying, “into which, or from which, the Creeks may import or export all the articles of goods and merchandise [*sic*] necessary to the Indian commerce”).

- definitions and licensing of those permitted to carry out trade;
- restrictions on their activities, including geographic restrictions on trading or navigating in foreign places;
- regulations on the conduct of trade;
- price controls and credit restrictions;
- regulations of inventory, including the designation of some goods as contraband;
- appointment of commissioners to supervise the system and adjudicate disputes;
- administrative details, such as oaths and record keeping; and
- fees to pay for administration of the system.¹¹⁰

Nothing on this list exceeds the understood scope of the *lex mercatoria* applied to foreign commerce.

One writer points out, as further evidence that Indian commerce was broader than other forms of commerce, that Indian commerce encompassed trade in slaves.¹¹¹ True, but so also did the *lex mercatoria*.¹¹² The same writer observes that Americans used the Indian trade as a diplomatic tool¹¹³ and that captured or traded children sometimes were adopted.¹¹⁴ True, but international commerce also was (and is) a diplomatic tool. And the fact that children sometimes were adopted *after* they were traded does not render adoption policy an element of commercial regulation.¹¹⁵

4. Edmund Randolph's National Bank Opinion

Advocates of the protean Commerce Clause hypothesis offer as evidence a passage in Attorney General Edmund Randolph's 1791 opinion on the

¹¹⁰ Natelson, *ICC*, *supra* note 2, at 220-22.

¹¹¹ Ablavsky, *supra* note 2, at 1031.

¹¹² *Cf.* JACOB, *supra* note 2, at 12 (referring to "Negroes" as cargo), 171-72 (same), & 265 (empting "Negroes" as "merchandise" from certain financial duties).

¹¹³ Ablavsky, *supra* note 2, at 1030.

¹¹⁴ *Id.* at 1031.

¹¹⁵ *Cf.* Natelson, *Commerce*, *supra* note 2, at 841-45 (explaining that the Founders understood the interrelationship between commerce and other activities, but still elected to divide the power to regulate commerce from the power to regulate other activities).

constitutionality of a national bank.¹¹⁶ It reads:

Congress have also power to regulate commerce with foreign Nations, among the several states, and with the Indian tribes. The heads of this power with respect to foreign nations, are;

1. to prohibit them or their commodities from our ports.
2. to impose duties on them, where none existed before, or to increase existing Duties on them.
3. to subject them to any species of Custom house regulations: or
4. to grant them any exemptions or privileges [sic] which policy may suggest.

The heads of this power with respect to the several States, are little more, than to establish the *forms* of commercial intercourse between them, & to keep the prohibitions, which the Constitution imposes on that intercourse, undiminished in their operation: that is, to prevent taxes on imports or Exports; preferences to one port over another by any regulation of commerce or revenue; and duties upon the entering or clearing of the vessels of one State in the ports of another.

The heads of this power with respect to the Indian Tribes are

1. to prohibit the Indians from coming into, or trading within, the United States.
2. to admit them with or without restrictions.
3. to prohibit citizens of the United States from trading with them; or
4. to permit with or without restrictions.¹¹⁷

This passage is cited to show that Randolph thought “regulate Commerce” created different powers for each of its three objects.

But Randolph’s opinion merely lists the “heads” of each branch of the commerce power. It does not tell us whether Randolph thought those “heads” were the *exclusive* exercises of each power, or their *most likely* exercises, or the *motivations* for inserting each into the Constitution. The relevant 18th-century definitions of “head” do not resolve this question, since

¹¹⁶ Ablavsky, *supra* note 2, at 1027-28.

¹¹⁷ See Notes on Edmund Randolph’s Opinion on the Constitutionality of an Act to Establish a Bank, Founders Online, <https://founders.archives.gov/documents/Hamilton/01-08-02-0045> (reproducing Randolph’s opinion in the editor’s notes).

the word could mean either a principal element or a defining one.¹¹⁸

I believe Randolph used “head” to mean a purpose or expected exercise, rather than a definition.¹¹⁹ Modern writers sometimes underestimate Randolph, but he was a lawyer of very high reputation. He certainly knew that his four listed “heads” of foreign commerce, for example, fell far short of defining the scope of the law merchant.

Randolph’s opinion would have been better evidence for the protean Commerce Clause hypothesis if (1) his opinion purported to state the full extent of each commerce power and (2) it had been presented before May 29, 1790, the date the 13th state (Rhode Island) ratified the Constitution. If both had been true, it might have contributed to the understanding of the ratifiers. In the real world, it could have had no such effect.

5. Early Indian Intercourse Laws

During the 1790s, Congress passed a series of laws regulating relations with the Indians. The later acts repeated and refined the earlier ones and added supplemental regulations. Advocates of a protean Commerce Clause assume that the only constitutional justification for these laws was the Indian Commerce Clause. They therefore argue that these measures evince an understanding that “regulating Commerce” had a broader meaning when modified by “with Indian tribes” than when modified by “with foreign Nations” or “among the several States.”¹²⁰

Initially, I should note that these statutes are not timely evidence of the ratifiers’ understanding. One was adopted several months after the ratifica-

¹¹⁸ *E.g.*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1756) (unpaginated) (offering, in addition to other meanings of “head,” the definition, “Principal topicks of discourse”); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1789) (unpaginated) (same definition).

¹¹⁹ *See* Prakash, *supra* note 2, at 1163:

Yet the well-known differences in motivation and in the expected uses of the power to regulate commerce across the three subparts hardly prove the existence of two or three different meanings for “regulate commerce.” As is well understood even where intrasentence uniformity is not an issue, whatever the particular motivation for granting authority, the textual grant may go beyond the particular concern sought to be addressed.

¹²⁰ *E.g.*, COHEN, *supra* note 2, at 92 (citing these laws as evidence for the scope of the Indian Commerce Clause). *See also* AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 107-08 (2005) (arguing that “Commerce” includes “all forms of intercourse in the affairs of life” and that certain provisions of the Indian Intercourse Act of 1790 support this broad understanding).

tion was complete and the rest were enacted years later. The members of Congress who adopted them were not necessarily either framers or ratifiers, and their incentives—to interpret their own powers expansively—were quite different.

Moreover, the assumption that the Indian Commerce Clause was the only possible basis for these laws is simply false. They actually were supported by multiple constitutional clauses. The statutes included:

- Ordinary *lex mercatoria* regulations, including licensing requirements for traders, bonding requirements, rules imposed on the regulators, inventory control, and associated penalties for violation.¹²¹ These regulations would, of course, be supported by the Indian Commerce Clause.
- Criminal penalties on Indians who harmed whites and on whites who harmed Indians.¹²² Depending on the details of these laws, they were justified as exercises of the *lex mercatoria*, as “necessary and proper” to the execution of treaties, and by the Define and Punish Clause.¹²³
- Restrictions on land settlement and land purchase. The text of the statutes tells us that these provisions were “necessary and proper” to the making or execution of treaties.¹²⁴
- Authorization to “ascertain[]” and “mark[]” boundaries determined by treaty,¹²⁵ and penalties associated with violating treaty bounda-

¹²¹ *E.g.*, 1 Stat. 137-38, c. 34, §§ 1-3 (1790); 1 Stat. 329-30, c. 19, §§ 1-3 & 6 (1793); *id.* § 7; 1 Stat. 471-72, c. 30, §§ 8-11 (1796); 1 Stat. 745-46, c. 46, §§ 7-11 (1799).

¹²² *E.g.*, 1 Stat. 138, c. 34, § 5 (1790); 1 Stat. 329, c. 19, § 4 (1793); 1 Stat. 470-71, c. 30, §§ 4 & 6 (1796); 1 Stat. 472-73, c. 30, § 14 (1796); 1 Stat. 744-45, c. 46, §§ 4 & 6 (1799).

¹²³ Natelson, *ICC*, *supra* note 2, at 252-56 (stating that an extra-territorial criminal regulation in the 1790 act was justified both by the *lex mercatoria* and as “necessary and proper” to the execution of the Hopewell treaties). Actually, I understated my case. As to any persons within federal territories, such provisions also could be sustained under the Territories and Property Clause. Additionally, control of the movement of peoples across national lines—*e.g.*, in and out of Indian country—was a recognized element of “defin[ing] the Law of Nations.” See Robert G. Natelson, *Where Congress’s Power to Regulate Immigration Comes From*, <https://i2i.org/where-congress-power-to-regulate-immigration-comes-from/> (collecting Founding-era sources classifying cross-border movement as a subject for the law of nations).

¹²⁴ *E.g.*, 1 Stat. 138, c. 34, § 4 (1790) (limiting the sale of lands “unless the same shall be made and duly executed at some public treaty”). See also 1 Stat. 330-31, c. 19, §§ 5 & 8 (1793) (restricting land sales unauthorized by treaty); 1 Stat. 475, c. 30, § 5 (1796) (banning settlement in violation of treaty); 1 Stat. 472, c. 30, § 12 (1796) (banning land sales except under treaty); 1 Stat. 744-46, c. 46, §§ 3-8 (1799) (regulating traffic and activity on lands secured by treaty).

¹²⁵ 1 Stat. 469, c. 30, § 1 (1796).

ries.¹²⁶ These provisions also were “necessary and proper” to treaty enforcement.

- Authorization to the President to present gifts to Natives.¹²⁷ Gifts were part of normal diplomatic practice, both in European diplomacy¹²⁸ and in relations with non-Europeans.¹²⁹ The constitutional authorization was, again, the Necessary and Proper Clause—to enable the President to carry out his diplomatic responsibilities.¹³⁰
- Judicial enforcement procedures,¹³¹ as authorized by Congress’s power to constitute tribunals inferior to the Supreme Court.¹³²

As to Indians living in the federal territories, all these regulations could be supported by the Territories and Property Clause as well.¹³³

Because all the provisions in these statutes are readily justified under other constitutional provisions, there is no reason to assume they rested on an expansive reading of the Indian Commerce Clause and remain relevant to federal power over Indian affairs today.¹³⁴

Given the defects in all these forms of evidence, those advancing the implausible proposition that a single appearance of the word “Commerce” in a single clause changes meaning in response to its different objects have fallen

¹²⁶ *E.g.*, 1 Stat. 330, c. 19, § 5 (1793); 1 Stat. 470, c. 30, § 5 (1796); 1 Stat. 745, c. 46 § 5 (1799).

¹²⁷ *E.g.*, 1 Stat. 331, c. 19, § 9 (1793); 1 Stat. 472, c. 30, § 13 (1796); 1 Stat. 746-47, c. 46, § 13 (1799).

¹²⁸ *See generally* Robert G. Natelson, *The Original Meaning of “Emoluments” in the Constitution*, 52 GA. L. REV. 1 (2017).

¹²⁹ Henry Knox to George Washington, Jan. 4, 1790, *available at* <https://founders.archives.gov/documents/Washington/05-04-02-0353> (“It seems to have been the custom of barbarous nations in all ages to expect and receive presents from those more civilized—and the custom seems confirmed by modern Europe with respect to Morocco, Algiers, Tunis and Tripoli. The practise [sic] of the British Government and its colonies of giving presents to the indians [sic] of North America is well known . . .”).

¹³⁰ The President’s foreign affairs powers derive from the enumeration in Article II, supplemented by the normal incidents thereof, as understood during the Founding. *Supra* note 34 and accompanying text.

¹³¹ *E.g.*, 1 Stat. 138, c. 34, § 6 (1790); 1 Stat. 331, c. 19, §§ 10-11 (1793); 1 Stat. 473, c. 30, § 15 (1796).

¹³² U.S. CONST. art. I, § 8, cl. 9.

¹³³ *Cf.* 3 ANNALS OF CONG. 751 (Dec. 20, 1792) (justifying the 1792 Indian Intercourse Act by “the power of the General Government to legislate in all the territory belonging to the Union, not within the limits of any particular State”).

¹³⁴ One might point out that the 1790 statute’s commercial regulations applied not merely to trade but to “intercourse.” 1 Stat. 137, c. 34 (1790). *See also* 1 Stat. 329, c. 19 (1793). This was cured in the 1796 statute, which applied them only to “traders.” 1 Stat. 471, c. 30, § 7 (1796).

far short of proving their case.

VIII. COMMENTS ON PROFESSOR ABLAVSKY'S *BEYOND THE INDIAN COMMERCE CLAUSE*

In *Beyond the Indian Commerce Clause*, Professor Gregory Ablavsky relies heavily on usages and statements that he says are derived from the period during the administration of President George Washington, but at the expense of evidence (such as the content of the *lex mercatoria* and pre-existing regulatory statutes) that could have been within the contemplation of the Constitution's framers and ratifiers. He justifies the use of this evidence as part of his "heterodox"¹³⁵ and "holistic" method of interpretation, which he contrasts with methods he labels "clause bound."¹³⁶

Ablavsky's article is marred by a disturbing number of misleading or otherwise defective citations, which I have itemized elsewhere.¹³⁷ When those citations are corrected, the usages and views during the Washington administration sometimes turn out to be different, or the context different, from how describes them.¹³⁸ This Part VIII, however, focuses on his methodology alone.

As an initial matter, it is problematic to apply "heterodox" interpretive methods to a document designed to be construed according to orthodox ones. If interpreters can craft and apply unanticipated interpretive methods to the Constitution, then they, and not the Constitution, become the "supreme Law of the Land."¹³⁹

Ablavsky does not define what he means by a "holistic" interpretive approach. The word "holistic" can have either of two meanings,¹⁴⁰ which,

¹³⁵ Ablavsky, *supra* note 2, at 1017.

¹³⁶ He repeats the epithet "clause bound" on five separate occasions. *Id.* at 1040, 1044, 1050, 1051, & 1052 n.210.

¹³⁷ See *Cite-Checking Professor Ablavsky's "Beyond the Indian Commerce Clause," available at <https://i2i.org/wp-content/uploads/ICC-addendum-final.pdf>.*

¹³⁸ *Id.*

¹³⁹ *Supra* notes 19-20 and accompanying text.

¹⁴⁰ The online version of Merriam-Webster's Dictionary defines "holistic" as "of or relating to holism." Holistic, Merriam-Webster, <https://www.merriam-webster.com/dictionary/holistic> (last accessed Jun. 10, 2022). It defines "holism" as follows:

- 1: a theory that the universe and especially living nature is correctly seen in terms of interacting wholes (as of living organisms) that are more than the mere sum of elementary particles
- 2 : a study or method of treatment that is concerned with wholes or with

when applied to constitutional interpretation, translate into a wider and a narrower version. In the wider version, the interpreter fills in the blanks between constitutional provisions, thereby making the whole greater than the sum of the parts. A famous example is the “emanations and penumbras” approach suggested by the Supreme Court in *Griswold v. Connecticut*,¹⁴¹ but never integrated into the Court’s jurisprudence. One problem with this procedure is that when we insert words that aren’t in the text, we upset the balance of values the framers adopted when composing that text.¹⁴² Another problem is that when applied to enumerated powers such as the Indian Commerce Clause, this method directly violates the mandates of the Ninth and Tenth Amendments, which leave power-gaps to be filled by the states and the people, not by creative constitutional interpretation.¹⁴³

When the narrower sense of “holistic” is applied to constitutional interpretation, it means only that in construing a provision, we consider all relevant evidence and view the provision within the context of the remainder of the document. “Holism” in this sense is uncontroversial.

It may be that Ablavsky’s reliance on putative practices and views of the Washington administration derive from the wider version of “holism.” One difficulty with including these practices and views is that they could not have been known to those who ratified the Constitution. Another is that the Washington administration’s understanding of the Constitution’s full range of Indian affairs powers cannot justify continued federal plenary power when, as Ablavsky acknowledges, all the “props that once supported exclusive federal power have been knocked out, [and] only a single slender pillar [the Indian Commerce Clause] survives to support the edifice.”¹⁴⁴ The classic legal response to this development would be to say, “The reason for the

complete systems : a holistic study or method of treatment

Holism, Merriam-Webster, <https://www.merriam-webster.com/dictionary/holism> (last accessed, Jun. 10, 2022).

¹⁴¹ 381 U.S. 479, 484 (1965). The approach has been widely ridiculed. See, e.g., Andrew P. Morriss & Richard L. Stroup, *Quartering Species: The “Living Constitution,” the Third Amendment, and the Endangered Species Act*, 30 J. ENVIR. L. 769 (2000) (satirically applying a similar “fill in the blanks” approach to conclude that the Endangered Species Act violates the Third Amendment”).

¹⁴² Cf. *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2131 (2022) (stating that the words of the Second Amendment are the product of balancing, and that courts should not replace that balance with their own).

¹⁴³ See NATELSON, TOC, *supra* note 2, at 239-49 (discussing the intended roles of the Ninth and Tenth Amendments).

¹⁴⁴ Ablavsky, *supra* note 2, at 1051.

law having ended, the law itself ends.”¹⁴⁵

Whichever holistic approach is applied, however, both require consideration of all significant evidence. It is not sufficient to conclude that the framers intended the Indian Commerce Clause to be “open-ended”¹⁴⁶—a conclusion that would require overlooking their rejection of Madison’s proposal to grant Congress authority over all Indian “affairs.”¹⁴⁷ Likewise, it is not sufficient to focus on statements and actions by self-interested parties *after* the ratification and neglect key evidence—such as the content of the *lex mercatoria*—arising *before* the ratification. An interpretive exercise that neglects important evidence is not holistic.

Finally, in arguing for his broad reading of Congress’s Indian affairs authority, Ablavsky draws an analogy to the federal government’s early interpretation of its foreign affairs authority, suggesting that this interpretation was broader than a strict reading of the Constitution’s enumerated powers would seem to authorize.¹⁴⁸ However, the Constitution’s enumerated foreign affairs powers—like all of its other enumerated powers—carry with them certain incidental powers. Those incidental powers, like all others, were the product of precedent and reasonable necessity,¹⁴⁹ not of mere creativity or usurpation. There seems to be nothing in the early interpretation that exceeded those incidents.¹⁵⁰

IX. CONCLUSION: THE INDIAN CHILD WELFARE ACT

The ICWA was not the product of a treaty nor does it implement a treaty. It is not a regulation of federal land. It is not an exercise of diplomatic or war powers or a feature of the law of nations. As this article has demonstrat-

¹⁴⁵ The maxim—in Latin, *Cessante ratione, cessat et ipsa lex*—was part of Founding-era jurisprudence. 2 WILLIAM BLACKSTONE, COMMENTARIES *391 & 4 *id.* at 330.

¹⁴⁶ Ablavsky, *supra* note 2, at 1033-39.

¹⁴⁷ James Madison proposed an Indian affairs power on the Convention floor, 2 FARRAND, *supra* note 2, at 324 (Aug. 18, 1787), and the committee of detail also considered one. *Id.* at 143, 159.

¹⁴⁸ Ablavsky, *supra* note 2, at 1052 n.210. Ablavsky relies on Andrew Kent, *The New Originalism and the Foreign Affairs Constitution*, 82 FORDHAM L. REV. 757 (2011), which fails to acknowledge the role of the Founding-era incidental powers doctrine and its application to the Constitution’s foreign affairs powers.

¹⁴⁹ Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause* in GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON, & GUY I. SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 60-68 (2010).

¹⁵⁰ Natelson, *TOC*, *supra* note 2, at 159-66 (discussing foreign affairs powers and their incidents).

This conclusion is buttressed by another form of evidence. During the ratification debates, leading advocates for the Constitution—mostly lawyers of high reputation—publicly represented the federal government’s limits by issuing lists of activities the government could *not* regulate.¹⁵¹ These lists were remarkably consistent with each other. They included criminal law, property law, governance of education and religion, contract law, regulation of infrastructure, welfare policy—and family law.

The sponsors’ representations of constitutional meaning to the ratifying public are reliable evidence of that meaning. The lists tell us that, in the absence of a treaty to the contrary, family law is not within the purview of the federal government, but of the states. Although the federal government could have negotiated treaties with the tribes embodying the terms of the ICWA, it never has. Congress has no power to impose those terms unilaterally.

Other Views:

- Brief of Amicus Curiae Professor Gregory Ablavsky in Support of Federal Parties and Tribal Defendants, *Brackeen v. Haaland*, No. 21-376 (Sup. Ct. Aug. 22, 2022), *available at* https://sct.narf.org/documents/haaland_v_brackeen/amicus_ablavsky.pdf.
- Stephen Andrews, *In Defense of the Indian Commerce Clause*, 9 AM. INDIAN L.J. 182 (2021), *available at* <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1229&context=ailj>.
- Christopher R. Green, *Tribes, Nations, States: Our Three Commerce Powers* (Aug. 1, 2022), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3679265.
- Lorianne Updike Toler, *The Missing Indian Affairs Clause*, 88 U. Chi. L. Rev. 413 (2021), *available at* <https://chicagounbound.uchicago.edu/ucirev/vol88/iss2/3/>.

¹⁵¹ They are collected in these three works: *More News on the Powers Reserved Exclusively to the States*, 20 FEDERALIST SOC’Y REV. 92 (2019); Natelson, *Founders*, *supra* note 2, at 60, & Natelson, *Enumerated*, *supra* note 2.