5-2024

The Original Meaning of Commerce in the Indian Commerce Clause

GREGORY ABLAVSKY

CONNECTICUT
LAW REVIEW

VOLUME 56 MAY 2024 NUMBER 4

Essay

The Original Meaning of Commerce in the Indian Commerce Clause

GREGORY ABLAVSKY

In Haaland v. Brackeen*, the Supreme Court returned to the foundational question of federal authority over relations between the United States and Native nations, long known as "Indian affairs." The decision reaffirmed well-established precedent affirming broad federal authority in the area, but it also underscored ongoing disagreement, as Justices Gorsuch and Thomas offered lengthy and dueling investigations of the original understanding.*

This Essay explores one aspect of that history: the original meaning of "commerce" in the Indian Commerce Clause. Nearly a decade ago, I wrote an article that sought, as its title indicated, to move "beyond the Indian Commerce Clause." The Clause, I argued, was only one small component in how the early American political elite understood federal authority in this area. Consequently, that article addressed the Clause itself only briefly. In this Essay, in the wake of the contention in Brackeen*, I draw on both the Corpus of Founding Era American English and early American documents of law and governance to investigate the original meaning of "Commerce . . . with the Indian tribes."*

Ultimately, this Essay concludes that "commerce" was a widely and commonly used synonym for both "trade" with Indians and "intercourse" with Indians, a broader term that conveyed quotidian interactions between Native peoples and Anglo-Americans. The use of intercourse as a synonym for commerce was particularly frequent in documents dealing with governance in the early republic, with George Washington, Thomas Jefferson, members of the First Congress, and early caselaw all deploying the term that way. The historical evidence does not support either the claim that "commerce" was routinely used as a synonym for "Indian affairs," or that the term exclusively referred to trade and purportedly "economic" interactions.

ESSAY CONTENTS

INTRODUCTION 1015

I. CORPUS LINGUISTICS AND ORIGINAL PUBLIC MEANING 1020

A. POTENTIAL MEANINGS OF "COMMERCE" IN THE INDIAN COMMERCE CLAUSE 1020

B. METHODOLOGY 1024

C. RESULTS AND INTERPRETATION 1025

II. ADDITIONAL EVIDENCE 1027

A. THE CONVENTION DEBATES AND THE TROUBLE WITH NEGATIVE INFERENCES 1027

B. COLONIAL REGULATIONS 1029

C. THE FEDERALIST 1031

D. THE TRADE AND INTERCOURSE ACTS 1033

E. OTHER SIGNIFICANT FOUNDING ERA USES OF THE TERM "COMMERCE" IN INDIAN AFFAIRS 1035

CONCLUSION 1043

APPENDIX: RELEVANT APPEARANCES OF THE TERM "COMMERCE" IN THE CORPUS OF FOUNDING ERA AMERICAN ENGLISH 1045

The Original Meaning of Commerce in the Indian Commerce Clause

GREGORY ABLAVSKY*

INTRODUCTION

In *Haaland v. Brackeen*, the Supreme Court returned to the question of federal authority over relations with Native nations[1]—long known as "Indian affairs"[2]—that the Court last seriously addressed two decades ago in *United States v. Lara*.[3] In some ways, *Brackeen* largely echoed that earlier decision. The *Brackeen* majority, written by Justice Barrett, rejected the challenge to Congress's authority to enact the Indian Child Welfare Act (ICWA) by citing the Court's long-standing precedent establishing "muscular" congressional power over Indian affairs, the near-identical justification made by the majority in *Lara*.[4] Justice Thomas—whose concurrence in *Lara* expressed deep skepticism about the breadth of federal authority in the field[5]—dissented in *Brackeen*, arguing for a narrower scope of federal power than current precedent recognizes.[6]

What *was* different between the two cases—and a reflection of the changed jurisprudential landscape in the last twenty years—was the ascendence of originalism. The five distinct opinions in *Lara* contained a single citation to a Founding Era source.[7] In *Brackeen*, by contrast, while Justice Barrett largely confined her originalist investigations to the anti-

* Marion Rice Kirkwood Professor of Law, Stanford Law School; Professor of History (by courtesy), Stanford University. Thanks to Ella Bohn and Truman Chen for outstanding research assistance and for finding discussing the textual meaning of commerce in eighteenth-century documents "fun"; to Tanner Allread, Jud Campbell, Elizabeth Reese, the UCLA Legal History Workshop, the ASU Legal History Workshop, and the Cardozo faculty workshop for feedback on the work in progress; and to Bethany Berger and the *Connecticut Law Review* for organizing this Symposium.

[1] Haaland v. Brackeen, 143 S. Ct. 1609, 1627–31 (2023) (rejecting petitioners' contention that the Indian Child Welfare Act exceeds congressional authority).

[2] *Id.* at 1627–28.

[3] United States v. Lara, 541 U.S. 193, 196, 199 (2004).

[4] *Brackeen*, 143 S. Ct. at 1627–29; *Lara*, 541 U.S. at 200–06 (justifying Congress's "constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians").

[5] *Lara*, 541 U.S. at 214–18 (Thomas, J., concurring).

[6] *Brackeen*, 143 S. Ct. at 1662 (Thomas, J., dissenting).

[7] *Lara*, 541 U.S. at 201–02 (citing the *Journals of the Continental Congress* to support the proposition that Congress's legislative authority over Tribal affairs was partially derived from "preconstitutional powers necessarily inherent in any Federal Government").

commandeering challenge to ICWA,[8] Justices Gorsuch and Thomas offered voluminous, dueling treatises on the original understanding of federal power over Indian affairs.[9]

I watched this development with both interest and disappointment. On the one hand, back when I was a teaching fellow, I had written an article on the role of Indian affairs in the creation and drafting of the United States Constitution[10] and another specifically on Founding Era understandings of federal power over Indian affairs.[11] At the time, this was a seemingly obscure and little studied topic.[12] Now, my digging was legally relevant, and I wrote an amicus brief in the case.[13] Both Justices Gorsuch and Thomas ended up citing my work, albeit with different assessments.[14]

On the other hand, though I recognize history's relevance to current law and grasp the jurisprudential argument for originalism, I nonetheless share most historians' skepticism that originalism can offer definitive, value-neutral answers to disputed legal questions in the present. As I have noted elsewhere, there are especially good reasons to interrogate such reliance on history in federal Indian law, where the federal government often embraced laws and policies for Native peoples grounded in a belief in Native inferiority.[15]

---

[8] *Brackeen*, 143 S. Ct. at 1636–38 (investigating "early congressional enactments" to show that Congress imposed recordkeeping requirements on state courts).

[9] *See id.* at 1647–60 (Gorsuch, J., concurring) (taking "a full view of the Indian-law bargain struck in our Constitution" through a lengthy historical analysis that spans several pages); *id.* at 1664–75 (Thomas, J., dissenting) (engaging in an extended historical discussion regarding our country's "Founding-era dealings with Indian tribes").

[10] Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1002 (2014).

[11] Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1021 (2015).

[12] Nell Newton's significant and influential article on federal power over Indian affairs discussed the early constitutional history only briefly. Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 200–01 (1984). Perhaps the most substantial investigation was Robert Clinton's voluminous article in this law review, though it relied almost exclusively on the *Journals of the Continental Congress* as its source. Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1098–1102, 1106–15, 1119–30, 1132–34, 1137, 1140–41 (1995). Robert Natelson's article on the topic was, in my view, substantially marred by its reliance on inaccurate evidence, as I traced in my original article and in subsequent publications. Ablavsky, *supra* note 11, at 1032 n.105, 1035 n.122, 1036 n.124–25, 1043 n.170 (citing Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 237–41, 247–48, 250–56, 259 (2007)); Brief of Amicus Curiae Professor Gregory Ablavsky in Support of Federal Parties & Tribal Defendants at 30–33, *Brackeen*, 143 S. Ct. 1609 (Nos. 21-376, 21-377, 21-378, 21-380) [hereinafter Brief of Amicus Curiae Professor Gregory Ablavsky]. For other significant articles on the topic at the time, see generally Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN'S L. REV. 153 (2008); Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897 (2010); Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57 (1991).

[13] Brief of Amicus Curiae Professor Gregory Ablavsky, *supra* note 12, at 1.

[14] *Brackeen*, 143 S. Ct. at 1648–49, 1651–52, 1654, 1658 (Gorsuch, J., concurring); *id.* at 1665 (Thomas, J., dissenting).

[15] Gregory Ablavsky, *Too Much History:* Castro-Huerta *and the Problem of Change in Indian Law*, 2022 SUP. CT. REV. 293, 306–07 (2023).

The *Brackeen* opinions also suggested how current jurisprudence does not always align with past law. One of the things I tried to articulate in my article, *Beyond the Indian Commerce Clause*, was that the Indian Commerce Clause—which grants Congress the power "[t]o regulate Commerce . . . with the Indian Tribes"[16]—was a comparatively minor part of early constitutional thought about Indian affairs.[17] Instead, many of the "Founders"—that is, the people who drafted, interpreted, and initially implemented the Constitution—understood the document's provisions concerning Indian affairs in a "holistic" way. By this I mean that they interpreted federal power in this field as more than the sum of its parts, and in light of then-current ideas about nationhood, territory, and sovereignty.[18]

Subsequent commentators misread this argument as an embrace of a preconstitutional or "extraconstitutional" perspective[19]—or even, in rather loaded language, cast my claim as relying on the Constitution's "penumbras," a word that appeared nowhere in my article.[20] But, as I stated in that article, describing this original understanding of federal authority as outside the Constitution might be true within a narrowly textualist approach, but this view does not reflect Founding Era understandings of constitutionalism.[21] I wish that, at the time, I had the benefit of my now-colleague Jonathan Gienapp's important work on this topic that carefully reconstructs this legal worldview, which regarded multiple sources of law as "constitutional."[22]

In this sense, for all the gratifying attention that my article received, it still failed in its aim, as the title indicated, to move the legal and scholarly conversation *beyond* the Indian Commerce Clause. The litigation over ICWA's constitutionality helped prompt a number of articles investigating the Clause's history—though, in my perhaps jaundiced view as a historian, many of these suffer the same flaw as much historically-oriented legal scholarship in containing more (re)interpretation of familiar sources than

---

[16] U.S. CONST. art. I, § 8.

[17] Ablavsky, *supra* note 11, at 1044 ("Both during and after ratification, then, much of the nation's political elite shared an interpretation of Indian relations in which the Indian Commerce Clause played a minor role.").

[18] *Id.* at 1040–45.

[19] Lorianne Updike Toler, *The Missing Indian Affairs Clause*, 88 U. CHI. L. REV. 413, 438 (2021).

[20] Taylor Ledford, *Foundations of Sand: Justice Thomas's Critique of the Indian Plenary Power Doctrine*, 43 AM. INDIAN L. REV. 167, 170 (2018).

[21] Ablavsky, *supra* note 11, at 1066–67 (rejecting the claim that Founding Era federal assertions of authority rested on "extra-constitutional" authority, as that would have relied on a "cramped meaning of constitutionalism" that did not reflect Founding Era understandings).

[22] *See, e.g.*, Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW & HIST. REV. 321, 342 (2021) ("The constitutional text was presumed to be embedded within a broader web of fundamental law that was not, by definition, exclusively textual in nature."); JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 1–14 (2018) (elucidating this broader, pluralist understanding of constitutionalism at the time of the Constitution's adoption and its relationship to the constitutional text).

meaningful new evidence.[23] And predictably, in *Brackeen* itself, the gravitational pull of the sole constitutional clause to mention "Indian tribes" was too powerful to escape, with both Justices Thomas and Gorsuch arguing over its original meaning.[24]

In this symposium piece, then, I seek to pick up where my earlier article left off. That article, in trying to move *beyond* the Clause, was necessarily briefer on the Clause's original meaning. This Essay returns to that question, exploring the meaning of the term "commerce" with "Indians" through both corpus linguistics and specific, additional pieces of Founding Era historical evidence. This evidence shows that "commerce" was routinely used as a synonym for *both* trade *and* broader interactions—what was known as "intercourse"—with Indians, including in governance.[25] It rejects Justice Thomas's contention that the original public meaning of "commerce" with Indians was limited solely to the "buying and selling goods and transportation for that purpose."[26] Because of this conclusion, the Essay necessarily spends more time addressing Justice Thomas's contrary arguments than Justice Gorsuch's broader interpretation.

This Essay also focuses specifically on the meaning of "commerce" in the context of Indian affairs. There is, of course, a huge literature debating

---

[23] For recent articles exploring the original meaning of the Indian Commerce Clause, see Christopher R. Green, *Tribes, Nations, States: Our Three Commerce Powers*, 127 PA. ST. L. REV. 643 (2023) (comparing the interstate commerce power with the foreign and tribal commerce powers); M. Alexander Pearl, *Originalism and Indians*, 93 TUL. L. REV. 269 (2018) (contrasting Justice Thomas's and Justice Gorsuch's jurisprudence on Indian law and advancing a new originalist view of Indian Law and tribal sovereignty); Stephen Andrews, *In Defense of the Indian Commerce Clause*, 9 AM. INDIAN L.J. 182 (2021) (analyzing the competing interpretations of the Indian Commerce Clause and advocating for a broad interpretation); Ledford, *supra* note 20 (discussing the plenary power doctrine as found in the Indian Commerce Clause); Jeremy Rabkin, *Commerce with the Indian Tribes: Original Meanings, Current Implications*, 56 IND. L. REV. 279 (2023) (reviewing the federal power to regulate commerce with Indian tribes and advocating for a return to the Constitution's original view on Indian tribes); Updike Toler, *supra* note 19 (exploring the history of the omission of an "Indian Affairs Clause" and considering its implications on Commerce Clause jurisprudence).

Many of these articles are insightful and offer intriguing and persuasive theories, but, as noted, few provide much new historical evidence. The most historically oriented piece, by Lorianne Updike Toler, does offer a new and deeper dive into the Constitution's drafting history, but her key intervention—that the Constitution's drafters rejected an "Indian affairs" clause in favor of the Commerce Clause—was already well known in the literature. W. Tanner Allread, *On* Brackeen *and the Value of Careful History: A Response to Lorianne Updike Toler*, BALKINIZATION (June 28, 2023), https://balkin.blogspot.com/2023/06/on-brackeen-and-value-of-careful.html. She then draws a negative inference from this drafting history, which is risky for reasons discussed below. *Infra* Section II.A. Finally, she conflates federal power as against *states* and over *tribes*, lumping them together as "plenary power." *See* Allread, *supra* ("[T]he use of [plenary] to describe different legal principles has led to confusion . . . . [E]ven as Updike Toler argues that the omission of the Indian Affairs Clause means that the federal government lacks *complete* authority, she does not address the fact that the Constitution may still provide the federal government with *exclusive* authority vis-à-vis the states.").

[24] Haaland v. Brackeen, 143 S. Ct. 1609, 1654–56 (Gorsuch, J., concurring); *id.* at 1671–73 (Thomas, J., dissenting).

[25] *Infra* Section I.C.

[26] *Brackeen*, 143 S. Ct. at 1672 (Thomas, J., dissenting).

the original meaning of "commerce" focused primarily on the Interstate Commerce Clause.[27] Some advocates of a broader federal commerce power more generally have turned to the history of the Indian Commerce Clause for support,[28] while, conversely, proponents of a narrower federal power over Indian affairs have invoked the Interstate Commerce Clause.[29] Both sides presume that "commerce" has a consistent definition in the three commerce clauses—a position that the *Brackeen* majority rejected and that Justices Gorsuch and Thomas fought over.[30] My own view on this question remains what I originally wrote: although the three clauses might offer "suggestive parallels" to each other, "Indian affairs" was a sharply distinctive area of governance with its own history (including the fact that the Indian Commerce Clause alone had a clear antecedent in the Articles of Confederation), and the historical evidence suggests that the Founders interpreted the Indian Commerce Clause separately in light of this history.[31]

I also still think that fixating on the Indian Commerce Clause in isolation speaks more to our current jurisprudence than to the original constitutional understanding. In that context, two aspects of *Brackeen* are especially noteworthy. First, I find fruitful Justice Barrett's brief mention of the "Constitution's structure"[32] (a term that appeared nowhere in Justice Breyer's *Lara* opinion[33]), since this framing strikes me as the most accurate way to understand how and why federal authority over Indian affairs developed the way it did. Second, Justice Gorsuch's concurrence importantly underscores that, even if "commerce" is construed more broadly as a synonym for "intercourse," that interpretation does not suggest unbounded federal power.[34] The term encompassed only interactions *between* the United States (and its citizens) and Native

---

[27] For a sampling of some of this literature, see generally Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010); Randy E. Barnett, *The Original Meaning of the Commerce Clause,* 68 U. CHI. L. REV. 101 (2001); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1 (1999); Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U. L. REV. 695 (2002).

[28] *See, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107–08 (2005); Balkin, *supra* note 27, at 23–25.

[29] *See, e.g.*, Adoptive Couple v. Baby Girl, 570 U.S. 637, 659–60 (2013) (Thomas, J., concurring) (citing United States v. Lopez, 514 U.S. 549, 585–586 (1995) (Thomas, J., concurring)).

[30] *Brackeen*, 143 S. Ct. at 1627–28 ("[W]e have declined to treat the Indian Commerce Clause as interchangeable with the Interstate Commerce Clause."); *id.* at 1654–55 (Gorsuch, J., concurring) (arguing that the word "commerce" has different meanings in these two separate contexts); *id.* at 1671–72 (Thomas, J., dissenting) (arguing that this interpretation "makes little textual sense").

[31] Ablavsky, *supra* note 11, at 1025–28, 1028 n.78.

[32] *Brackeen*, 143 S. Ct. at 1628.

[33] United States v. Lara, 541 U.S. 193, 196–210 (2004) (neglecting to mention the phrase).

[34] *Brackeen*, 143 S. Ct. at 1654–56 (Gorsuch, J., concurring).

peoples, not the authority to dictate rules for Native nations directly[35]—a power that the United States subsequently asserted and that the Supreme Court described as "plenary."[36] Indian law scholars have been arguing this point for years,[37] and yet this fundamental distinction between federal authority with respect to *states* and with respect to *tribes* still confuses some commentators. I hope to say more about these questions in future writings.

I. CORPUS LINGUISTICS AND ORIGINAL PUBLIC MEANING

This Part explores the original public meaning of the term "commerce" in the context of Indian affairs using searches of two databases of Founding Era sources. It first explicates potential meanings of the term, explains the methodology, and then presents the results. Ultimately, it concludes, "commerce" did often mean trade, but it was also a frequently used synonym for the term "intercourse," a broader term that captured a general sense of interaction between Natives and non-Natives.

A. *Potential Meanings of "Commerce" in the Indian Commerce Clause*

This Section examines three possible meanings of the term "commerce" with Indians in the late eighteenth century alongside other widely used terms at the time that were potentially synonymous: "trade," "intercourse," and "Indian affairs."

1. *Trade*

Justice Thomas, as well as other commentators, have argued that the term "commerce" with Indians in the late eighteenth century solely referred to *trade*—that is, in Thomas's words, "buying and selling goods and transportation for that purpose."[38] Such exchanges were a significant part of the interactions between Native peoples east of the Mississippi and

---

[35] *Id.* at 1656–57.

[36] *See, e.g.*, United States v. Kagama, 118 U.S. 375, 383–85 (1886) (upholding broad congressional authority over Indian tribes); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning . . . .").

[37] *See* Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 128 (2002) (emphasizing that historically, the Indian affairs power allowed for regulation of affairs "with" tribes—not "of" tribes); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 44–46, 71–75 (1996) (criticizing the plenary power doctrine); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 263–65 (indicating that the plenary power doctrine has resulted in a series of wrongs).

[38] *Brackeen*, 143 S. Ct. at 1672 (Thomas, J., dissenting). *See also* Adoptive Couple v. Baby Girl, 570 U.S. 637, 659 (2013) (Thomas, J., concurring) ("[T]he term 'commerce with Indian tribes' was invariably used during the time of the founding to mean 'trade with Indians.'"); Natelson, *supra* note 12, at 215–16 (arguing that commerce "almost invariably meant 'trade with the Indians' and nothing more").

Anglo-Americans throughout the eighteenth century: in the "Indian trade," as it was often referred to at the time, these Native peoples exchanged furs, deerskins, and pelts for European manufactured goods.[39]

My original article pointed out that even "trade" with Indians was a capacious term that was not limited to activities we might now deem "economic" or "commercial."[40] Justice Thomas interpreted this as a claim that "trade had political significance."[41] This misreading was perhaps predictable, in part because my argument—sounding in what historians term "ethnohistory"[42]—was unfamiliar for lawyers, and in part because I did not express it as clearly as I hope to now. But the point was this: Justice Thomas's categories of "economic" and "noneconomic" activity would have been comprehensible for Anglo-Americans of the Founding Era, though they would have defined them differently than we would today.[43] But these categories would have made little sense to Native peoples, who considered buying, selling, and exchanging goods as a form of diplomacy rather than principally as a profit-seeking behavior as part of a "market."[44] In other words, for Native peoples, trade did not have "political significance"; it was itself a form of politics—or, to quote one eighteenth-century Haudenosaunee (Iroquois) leader, "The trade and the peace we take to be one thing."[45] Moreover, unlike Justice Thomas, Anglo-Americans at the time *understood* this aspect of Indigenous culture and so interpreted their trade with Native peoples in light of the perspective of their Indigenous trading partners.[46] Thus, defining trade with Indians as limited solely to what we would today categorize as "economic activity" is anachronistic.[47]

---

[39] The literature on this topic is enormous. For some key works, see KATHRYN E. HOLLAND BRAUND, DEERSKINS & DUFFELS: THE CREEK INDIAN TRADE WITH ANGLO-AMERICA, 1685–1815 xiii–xiv, 87–89 (1993); DANIEL H. USNER, JR., INDIANS, SETTLERS, & SLAVES IN A FRONTIER EXCHANGE ECONOMY: THE LOWER MISSISSIPPI VALLEY BEFORE 1783 8–9 (1992); DANIEL K. RICHTER, TRADE, LAND, POWER: THE STRUGGLE FOR EASTERN NORTH AMERICA 6 (2013).

[40] Ablavsky, *supra* note 11, at 1031–32.

[41] *Brackeen*, 143 S. Ct. at 1673 n.10 (Thomas, J., dissenting).

[42] *See* JAMES AXTELL, NATIVES AND NEWCOMERS: THE CULTURAL ORIGINS OF NORTH AMERICA 3–9 (2001) (describing the methodology of ethnohistory).

[43] *See, e.g.*, CATHY D. MATSON & PETER S. ONUF, A UNION OF INTERESTS: POLITICAL AND ECONOMIC THOUGHT IN REVOLUTIONARY AMERICA 32, 151–52 (1990) (writing that Federalists' and Antifederalists' economic interests at the time were in achieving economic freedom through trade).

[44] *See* RICHTER, *supra* note 39, at 3 ("[T]rade and power were nearly inextricable for Native people."); *id.* at 6 ("For eastern Native Americans, what Europeans called *trade* was nearly always embedded in efforts to strengthen human connections, socially as well as materially."); *id.* at 53–68 (tracing how "the political functions of the goods, rather than the goods themselves, were the key" for Native peoples throughout the seventeenth and eighteenth centuries).

[45] *Id.* at 68.

[46] *See* Ablavsky, *supra* note 11, at 1031–32 (collecting sources).

[47] *Cf.* ALISON L. LACROIX, THE INTERBELLUM CONSTITUTION: UNION, COMMERCE, AND SLAVERY IN THE AGE OF FEDERALISMS 87 (2024) ("In the Enlightenment sense in which the drafters of the Constitution used the term, 'commerce' entailed a rich web of connections, interactions, and even emotions that were civic and social as well as economic.").

Nonetheless, even this capacious understanding of trade maintained the idea of exchange at its core. In other words, if commerce only meant "trade," it encompassed only the exchange of goods, land, or people (including, as my original article noted of the era, children[48]), but arguably not interactions that fell outside that scope like, perhaps, criminal jurisdiction.

2. *Intercourse*

In contrast with "trade," "intercourse" had a broader meaning in the context of Indian affairs. As my brief traced in considerable detail, it was a frequent term of art in the Founding Era to describe *all* interactions between Native nations and non-Natives (as well as *between* different Native communities): political, social, cultural, legal, as well as "economic."[49] One of the most common adjectives that preceded the term is "friendly," capturing the broader idea of a relationship.[50]

That commerce *could* mean "intercourse" is demonstrated by the very definitions that Justice Thomas relies on, which defined commerce to include not only "the exchange of commodities" but also "intercourse of any kind."[51] Justice Thomas argues that this fact is not "instructive" because "dictionaries from the era also defined 'intercourse' as 'commerce.'"[52] I do not understand how this supports Thomas's claim that "commerce" only meant "trade"; to my mind, the much more natural interpretation of this evidence is that it further reinforces the conclusion that "commerce" and "intercourse" were synonymous. Perhaps the implication is some sort of transitive property: intercourse = commerce = trade. But this argument would only succeed if "intercourse" at the Founding referred solely to "trade." This claim appears in some of the *Brackeen* briefing,[53] but it is demonstrably false. Trade, of course, was one *form* of intercourse, but the historical examples overwhelmingly show that intercourse was a broader and more capacious term that usually had little to do with buying and selling.[54] Further confirmation is the appearance in early documents of the phrase "intercourse by trade," which would be nonsensical if the terms were synonymous.[55]

---

[48] *See* Ablavsky, *supra* note 11, at 1031–32.

[49] *Id.* at 1028–31; Brief Amicus Curiae Professor Gregory Ablavsky, *supra* note 12, at 10–11.

[50] Brief Amicus Curiae Professor Gregory Ablavsky, *supra* note 12, at 10–11.

[51] Haaland v. Brackeen, 143 S. Ct. 1609, 1673 n.9 (2023) (Thomas, J., dissenting) (quoting F. ALLEN, A COMPLETE ENGLISH DICTIONARY (1765)).

[52] *Id.* at 1673 n.10 (Thomas, J., dissenting).

[53] Reply Brief for Petitioner the State of Texas at 8, *Brackeen*, 143 S. Ct. 1609 (Nos. 21-376, 21-377, 21-378, 21–380) ("[T]he Act's reference to 'intercourse' is a somewhat dated synonym for 'trade.'"). *But see id.* (citing a contemporary definition of intercourse as "'commerce,' 'exchange,' or 'communication'").

[54] Brief Amicus Curiae Professor Gregory Ablavsky, *supra* note 12, app.

[55] Letter from Timothy Pickering, Secretary of War to the President (May 16, 1795), *in* 2 TERRITORIAL PAPERS OF THE UNITED STATES 519, 519 (Clarence Edward Carter ed., 1934).

Did "intercourse" encompass *all* interactions between Natives and non-Natives, as Justice Thomas implies?[56] It is sometimes hard to say what a word does *not* mean—where, in other words, its meaning ends. But I am struck that Anglo-Americans of the time did not seem to use the term "intercourse" to describe the frequent warfare and violent conflicts between the United States and Native peoples. Indeed, when low-level warfare broke out in the Southwest Territory, one resident wrote that "all intercourse between us and the Indians has ceased."[57] Based on my reading of the sources, then, "intercourse" most frequently connoted the everyday interactions and connections that linked Native and non-Native communities.[58]

3. *Indian Affairs*

A final potential synonym for "commerce," and the one invoked by the *Brackeen* majority,[59] is Indian affairs. As an analogue to "foreign affairs," the term was most commonly used in governance to convey the broad set of issues implicated by the government's relationship with Native nations. One definition of the era that I cited in my prior article,[60] and that Justice Thomas similarly relies on,[61] comes from a 1786 report of the Committee on Southern Indian Affairs of the Continental Congress, which emphasized the authority over war and peace, purchasing Native lands, fixing borders, and preventing illegal settlement on Native territory, though this was arguably a non-exhaustive list.[62] Rather, the term seems to have covered every question of governance that might arise between Native nations and Anglo-American governments.

How did "Indian affairs" and "intercourse" differ? In part, they were used in different domains: "Indian affairs" was largely a term of *government*, whereas "intercourse"—though widely used in governance—emphasized the sort of quotidian interactions that everyday people, and not just government officials, engaged in. But by the same token, "intercourse" also had a seemingly narrower meaning than Indian affairs. It did not seem to encompass warfare, as discussed above, and was less commonly used than "affairs" to describe the era's formal treatymaking and diplomacy between Native nations and the United States.

---

[56] *Brackeen*, 143 S. Ct. at 1673 n.10 (Thomas, J., dissenting).

[57] Letter from Willie Blount to John Gray Blount (Feb. 25, 1794), *in* 2 THE JOHN GRAY BLOUNT PAPERS 368, 368–69 (Alice Barnwell Keith ed., 1959).

[58] For more on these connections between communities, described at the time as a "promiscuous intercourse," see GREGORY ABLAVSKY, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES 116–22 (2021).

[59] *Brackeen*, 143 S. Ct. at 1630.

[60] Ablavsky, *supra* note 11, at 1040.

[61] *Brackeen*, 143 S. Ct. at 1673 n.9 (Thomas, J., dissenting).

[62] 33 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 458 (Roscoe R. Hill ed., 1936).

B. *Methodology*

To assess the public meaning of "commerce" with Indians or Indian tribes, two research assistants and I ran searches in the Corpus of Founding Era American English (COFEA) housed at Brigham Young University. This corpus includes a broad range of printed material from the Founding, defined as 1765–1799, and purports to be the "best corpus in existence for representing written language" in the period.[63] We searched for the word "commerce" located within six words (the broadest possible search in COFEA) of the following terms: "Indian"; "Indians"; "Tribe"; "Tribal"; "Tribes"; "Native"; and "Natives." These searches yielded 131 instances. We excluded ninety-one results: forty-eight were duplicates, while forty-three were not about Native Americans—they used the term "Indian" in the context of the East or West Indies, for instance. We also considered each instance of the term "commerce" that appeared on separate pages within the same work as a separate instance, which yielded an additional eight results. This ultimately produced forty-eight distinct relevant instances of the term "commerce." We then each coded these instances based on which synonym we thought best captured the usage—trade, intercourse, or Indian affairs—or marked it as "ambiguous" if there was not enough information to decide. We then constituted ourselves a tribunal of sorts to review our determinations and resolve any disagreements. We

---

[63] *Corpus of Founding Era American English (COFEA)*, BYU L., LAW & CORPUS LINGUISTICS, https://lcl.byu.edu/projects/cofea/ (last visited Apr. 9, 2024). The Corpus draws from several key sources: Evans Early American Imprints, which has digitized every book printed in what became the United States in the eighteenth century; Founders Online, which has digitized the collected papers from various elite political figures of the time; and then political and legal texts like the records of the Federal Convention and early session laws. *Id*. *See also* Brett Hashimoto, *Corpus of Founding Era American English: Designing a Corpus for Interpreting the United States Constitution*, 18 CORPORA 1 (2023) (using the COFEA to provide evidence for the meaning of contested terms during the Founding Era). This construction of the corpus, nonetheless, has important shortcomings. It obviously privileges elite understandings, though this is likely a flaw with most works focusing on published material during this period. Moreover—as the inclusion of Founders Online underscores—much written material during this period appeared in correspondence and other manuscript documents that were not published until much later, if ever. It is notable, for instance, that several of the sources discussed in Part II of this Essay fail to appear in the Corpus.

The validity of corpus linguistics as a method for determining textual meaning is hotly contested. I am sympathetic to the critiques, but bracket this question for the purpose of this piece. For defenses of the method, see generally Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788 (2018) (responding to common criticisms of corpus linguistics); Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. CHI. L. REV. 275 (2021) (advocating for the use of corpus linguistics to take up the task of interpreting the language of law); Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261 (2019) (offering corpus linguistics as a useful tool for originalism); Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 BYU L. REV. 1311 (discussing instances in which corpus linguistics can be a helpful legal tool). For critiques, see Anya Bernstein, *Legal Corpus Linguistics and the Half-Empirical Attitude*, 106 CORNELL L. REV. 1397 (2021) (arguing that legal corpus linguistics is flawed because it ignores the contexts in which legal language is produced, interpreted, and deployed); Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726 (2020) (arguing that the use of corpus linguistics risks diverging from ordinary understanding).

were able to reach consensus in most instances, though in a couple instances one of us dissented. The results appear in the appendix.

We confronted some consistent textual ambiguities that we had to resolve. Often, commerce was joined with another word using the conjunction "or": e.g., trade *or* commerce. Other times, commerce was joined using the conjunction "and" (trade *and* commerce). In both instances, the words could be synonymous ("the FAA or Federal Aviation Administration," "arbitrary and capricious"), but it could also be that the author sought to cover more conceptual ground by using both terms ("this or that," "Monday and Tuesday"). We looked to the context to try to clarify the usage, but, absent additional information, we marked such usages as "ambiguous."

We also confronted the challenge of how to grapple with bare references to the Indian Commerce Clause or federal authority over commerce with Indians without additional context clues. Given that this was precisely the question at issue, we consistently labeled such uses as ambiguous.

C. *Results and Interpretation*

In the end, the results were mixed. In the Corpus selection, of the forty-eight relevant instances of the term "commerce," we determined that twenty-five (52%) used it as a synonym for "trade," eight (17%) used it as a synonym for "intercourse," one (2%) used it as a synonym for "Indian affairs," and fourteen (29%) were "ambiguous."[64]

These results undercut assertions by both the majority and the dissent in *Brackeen*. The majority described "commerce" and "Indian affairs" as synonyms, a conclusion that accurately reflects the Court's well-established precedent on the question.[65] Nonetheless, this was not a common usage of the term "commerce" at the time of ratification, and so, to the extent that one believes that the original public meaning is legally dispositive, the historical evidence challenges the majority's reasoning. But Justice Thomas's purportedly originalist conclusion—that "when the Founders did discuss 'commerce' specifically, they did so almost entirely in the context of trade"—also fails to hold up.[66] References to commerce as

[64] These results mirror the findings of an earlier survey that my research assistants did of the forty-three instances of the phrases "commerce with the Indians," "commerce with Indians," and "commerce with the Indian tribes" in *Eighteenth-Century Collections Online*, which covers the less probative material printed in Britain. Gregory Ablavsky, *Beyond the Indian Commerce Clause: Robert Natelson's Problematic "Cite Check,"* 23 (2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4244353. There, they found twenty-five of those instances (58%) used the term "commerce" as a synonym for trade, six (14%) used it as a synonym for intercourse, and twelve (28%) were ambiguous. *Id.* at 37 app.

[65] *Brackeen*, 143 S. Ct. at 1627–28.

[66] *Id.* at 1674 n.10 (Thomas, J., dissenting).

trade constituted only a bare majority of the usages in our search, after all, and Justice Thomas's textual evidence to support his "almost entirely" claim is thin and misleading.[67]

Nonetheless, some might claim the fact that "trade" appeared nearly three times more often than "intercourse" or "Indian affairs" in the results as proof that "commerce" only meant trade. But this is a misreading that ignores the complicated relationship between these terms. Originalists discussing original public meaning often present instances of homonyms where words have sharply distinct meanings: original public meaning shows that "arms" in the Second Amendment, for instance, refers to weapons, not limbs. But the relationship between trade, commerce, and intercourse was different, because trade was a *form* of both commerce and intercourse. Consequently, the fact that "commerce" often meant "trade" fails to show that it was the term's *exclusive* meaning. If sixty percent of the usages of the term "tree" in a newspaper in December refer to Christmas trees, that doesn't mean that oaks and maples aren't *also* trees. Moreover, the fact that many of the era's uses centered on Indian trade is hardly surprising, given its economic, political, and diplomatic importance in the eighteenth century. But, again, this fails to show that this was the term's *exclusive* meaning, rather than merely one "original expected application," in the terms of constitutional theorists.[68]

The best reading of the evidence, in my view, is that "commerce" was a complex, multivalent term that could take on different meanings depending on the context. It fell somewhere *between* the terms intercourse and trade—it was more likely to be associated with buying and selling than "intercourse," but it was not as specific and limited as "trade." I see suggestions in the sources, too, that the late eighteenth century was a moment of transition in the meaning of commerce: commerce-as-intercourse was an older but still current definition, while commerce-as-principally-economic-behavior was a newer, ascendent definition. But the

---

[67] After adducing three instances where he plausibly concludes that commerce was used as a synonym for trade while sidelining contrary evidence—for instance, dismissing a broader usage, *id.* at 1672, Justice Thomas then cites numerous examples (many of which date from the nineteenth century) using the term "commercial." *Id.* at 1672 n.7. But "commercial" was not a straightforward synonym for "commerce": my reading of the sources suggests that the term was much more likely to specifically connote an economic relationship.

Similarly, Justice Thomas argues that the fact that the term "trade" appeared more often than "intercourse" or "commerce" in Founding Era sources shows that commerce meant trade. *Brackeen*, 143 S. Ct. at 1673–74 n.10 (Thomas, J., dissenting). This logic does not hold, because the meaning of words is not defined by how frequently supposed synonyms are used in the language in general. "Vehicle" does not refer solely to "cars" just because the word "cars" is used more frequently in English than "vehicle" (or, say, "motorcycle"). *See* GOOGLE BOOKS NGRAM VIEWER, https://books.google.com/ngrams (search "Graph these comma-separated phrases" for "vehicle," "car," "motorcycle") (last visited Apr. 4, 2024).

[68] Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 80 (2016).

sources suggest that *both* meanings were widely used and perfectly intelligible to the literate, English-reading public of the late-eighteenth-century United States.

II. ADDITIONAL EVIDENCE

This Part examines some significant additional Founding Era evidence of the meaning of "commerce" with the Indians. It considers some conventional sources of constitutional meaning (the debates at the Constitutional Convention, colonial precedents, *The Federalist*, and the Trade and Intercourse Acts), and then examines some additional significant individual pieces of Founding Era evidence. Taken together, this evidence, in my view, further undercuts the claim that commerce with Indians invariably meant trade and bolsters the suggestion that commerce and intercourse were commonly used as synonyms in Indian affairs.

A. *The Convention Debates and the Trouble with Negative Inferences*

Advocates of a narrower federal power under the Indian Commerce Clause regard its drafting history as one of their most powerful pieces of evidence—particularly the shift from the term "Indian affairs" under the Articles to "commerce" in the Constitution. But this interpretation is not only methodologically questionable but also inconsistent: its proponents have willfully ignored the simultaneous and identical change in wording, from "trade" in the Articles to "commerce" in the Constitution, which undercuts their argument.

The Articles of Confederation contained a single provision, Article IX, that addressed relations with Native nations. It provided:

> The United States, in Congress assembled, shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States; provided that the legislative right of any State, within its own limits, be not infringed or violated . . . .[69]

In granting Congress power over "Commerce . . . with the Indian tribes" instead of replicating this provision, the Constitution chose different language. The negative inference, then, is that the drafters "rejected a facially broader 'Indian affairs' power in favor of a narrower power over 'Commerce.'"[70] As Justice Thomas's dissent emphasized, "the Articles of Confederation had contained that 'Indian affairs' language, and that

---

[69] ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 4.
[70] *Brackeen*, 143 S. Ct. at 1673 (Thomas, J., dissenting).

language was twice proposed (and rejected) at the Constitutional Convention."[71]

Justice Scalia once cautioned against this precise interpretive move: "It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process."[72] The reason for his hesitation is clear. As I argued in my earlier article, in the absence of additional evidence, the *reason* why the Constitution's drafters changed the language is unknowable.[73] Maybe, as Justice Thomas suggests, they made a conscious decision to adopt language they thought narrower. But perhaps, as one scholar has argued, they regarded "Indian affairs" and "commerce" as synonyms and thought that, by appending this authority to the already-extant commerce clause, they were embracing, not narrowing, the federal power over Indian affairs.[74] It is precisely this uncertainty over how to interpret legislative history that led many to embrace original public meaning as the surest guide to constitutional meaning.

This negative inference is especially ironic coming from advocates who believe that "commerce" was synonymous with "trade," because an identical negative inference cuts against their conclusion. "If the Founders wished the Constitution to contain a power to 'manag[e] all affairs with the Indians,' the Articles of Confederation reflect they knew how to do so," Texas argued in its reply brief.[75] "Yet those are not the words the Framers chose."[76] But the exact same logic undercuts Texas's view: the Articles contained the word "trade," but the Constitution did not. In other words, to paraphrase Texas only very slightly: "If the Founders wished the Constitution to contain a power to '*regulat[e] the trade* . . . with the Indians,' the Articles of Confederation reflect they knew how to do so."

These advocates of preserving state authority also ignore another important negative inference from the drafting history. When the Committee of Detail originally proposed adding Indian commerce to the preexisting commerce clause, it had suggested empowering Congress to regulate commerce "with Indians, within the Limits of any State, not subject to the laws thereof"—thereby partially replicating the protection of state authority under Article IX.[77] But the Convention rejected this proposal.[78] Here, too, then a significant negative inference can be drawn *against* limiting federal authority to protect state authority.

---

[71] *Id.*

[72] D.C. v. Heller, 554 U.S. 570, 590 (2008).

[73] Ablavsky, *supra* note 11, at 1038–39.

[74] Clinton, *supra* note 12, at 1156 ("[T]he proposals by the Committee of Detail and the Committee of Eleven to authorize the Congress to regulate commerce with the Indians were obviously viewed as synonymous with regulating Indian affairs or 'affairs with the Indians.'").

[75] Reply Brief for Petitioner the State of Texas, *supra* note 53, at 6–7.

[76] *Id.* at 7.

[77] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 367 (Max Farrand ed., 1911).

[78] *Id.* at 493, 497, 503.

Ultimately, the phrase "commerce . . . with the Indian tribes" should be interpreted based on what this language meant, not what it might have been. "Commerce" was a different word from "Indian affairs," "trade," or "intercourse"—even if, as described above, it could be, and was, used as a synonym for all these words in varying contexts. We cannot know *why* the drafters chose "commerce" instead of these possible synonyms; we can only best interpret the language that they *did* choose.

B. *Colonial Regulations*

Another source relied on in *Brackeen* to construe the scope of the Indian Commerce Clause was the extensive colonial regulations "governing Indian trade."[79] Justice Thomas notes the long history of these regulations, pointing to his earlier concurrence in *Adoptive Couple* that argued for continuity between these colonial regulations and the federal power over Indian commerce.[80]

There is a danger in relying solely on colonial statutes to construe the historical scope of authority over Indian affairs. As my original article briefly suggested,[81] and many other scholars have examined much more thoroughly and thoughtfully,[82] Native laws and norms not recorded in session laws also heavily shaped the regulation of the Indian trade.

Nonetheless, even viewed in isolation, these statutes suggest a broader scope to colonial regulation than merely "buying and selling goods and transportation for that purpose."[83] Consider, for instance, South Carolina, a colony that regulated Indian trade extensively[84] and that Justice Thomas has cited as his primary example.[85] Prior to the American Revolution, South Carolina enacted dozens of statutes that it labeled as regulations of the Indian trade. Yet many of these statutes attempted to control South Carolinians' interactions with Native peoples more generally, not just relationships that we would now describe as "commercial." Probably most striking is that the colony's regulations routinely extended beyond traders to encompass "every *person* or tradesman . . . that shall *live*, trade or *deal*

---

[79] *Brackeen*, 143 S. Ct. at 1664 (Thomas, J., dissenting).

[80] *Id. See also* Adoptive Couple v. Baby Girl, 570 U.S. 637, 660–61 (2013) (Thomas, J., concurring) (construing the Indian Commerce Clause in light of "regulations governing Indian trade" adopted "[b]efore the Revolution").

[81] Ablavsky, *supra* note 11, at 1029–31.

[82] *See, e.g.*, RICHTER, *supra* note 39, at 178–79, 187–90 (discussing British official's failed plan for the future management of Indian affairs which imagined trade to flourish amongst Euro-Americans and Indians); JOHN PHILLIP REID, A BETTER KIND OF HATCHET: LAW, TRADE, AND DIPLOMACY IN THE CHEROKEE NATION DURING THE EARLY YEARS OF EUROPEAN CONTACT 188 (1976) ("Both British law and Cherokee law were moving forces on the southern frontier. . . ."). Reid's work is especially significant because it is arguably the best (and practically only) legal history of colonial regulation of the Indian trade.

[83] *Brackeen*, 143 S. Ct. at 1672 (Thomas, J., dissenting).

[84] RICHTER, *supra* note 39, at 187–88; REID, *supra* note 82, at 32–38.

[85] *Adoptive Couple*, 570 U.S. 637 at 661 n.1 (Thomas, J., concurring).

either directly or indirectly with any Indians whatsoever."[86] Here are some other notable provisions of laws that South Carolina labeled as regulations of the Indian trade:

- Geographic limitations on entry into Indian country that encompassed *all* South Carolina residents, not just traders.[87]
- Grants of broad civil and criminal authority to provincial Indian agents equivalent to "any Justice of the Peace."[88]
- Authorization that provincial Justices of the Peace may inflict corporal punishment on any Indian alleged to have harmed colonial residents "upon due complaint made to them by any of the inhabitants of" South Carolina.[89]
- Authorization that, upon complaint against "any person trading or *residing* amongst the Indians," the Governor could dispatch officers to "apprehend such disobedient trader or person residing amongst the Indians" and detain them.[90]
- The extension of colonial criminal jurisdiction over "all [trea]sons, murthers, felonies and other crimes, offences and misdeamnours done, perpetrated or committed, or hereafter to be done, perpetrated or committed by any person or persons . . . in any country possessed and inhabited by the Indians, on the main Continent of North America."[91]
- Prohibitions on bringing any Indians to the province.[92]

Imperial British regulations provide a similar picture. In 1764, in the aftermath of the Seven Years' War, the Board of Trade adopted a "Plan for Imperial Control of Indian Affairs."[93] This plan was never successfully implemented, defeated by Native and colonial resistance, and mired in the pre-revolutionary imperial crisis.[94] It nonetheless provided the clearest summary of the imperial legal vision for the "several Regulations [and] restrictions hereafter mentioned" over what it called, in its first provision, "the Trade & Commerce with the several Tribes of Indians in North

---

[86] 16 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607–1789; CAROLINA AND GEORGIA LAWS 136 (Alden T. Vaughan & Deborah A. Rosen eds., 1998) (emphasis added). *See also id.* at 133 (regulating "any person or persons tradeing or *inhabiting* amongst the Indians") (emphasis added).

[87] *Id.* at 113.

[88] *Id.* at 140.

[89] *Id.* at 233, 269.

[90] *Id.* at 258.

[91] *Id.* at 290. The Vaughn/Rosen volume says "sons," but its original source states "treasons." 3 STATUTES AT LARGE OF SOUTH CAROLINA 519 (Thomas Cooper & David McCord eds., 1838) (original spelling maintained).

[92] EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 86, at 345–46.

[93] Plan for Imperial Control of Indian Affairs, July 10, 1764, *in* 10 COLLECTIONS OF THE ILLINOIS STATE HISTORICAL LIBRARY 273 (Clarence Walworth Alvord ed., 1915).

[94] RICHTER, *supra* note 39, at 192–201.

America."[95] Some of these "regulations" did seek to control "buying [and] selling goods";[96] others sought to prohibit unauthorized purchase and settlement of Native lands.[97] But the Plan also broadly granted authority and jurisdiction on imperial agents, including to "hear any appeals [and] redress all complaints of the Indians," as well as to exercise broad criminal jurisdiction by being "impowered to act as Justices of the Peace . . . with all powers [and] privileges vested in such officers in any of the Colonies."[98] Moreover, unlike the Plan's vesting of *civil* jurisdiction, this criminal jurisdiction was not limited to disputes involving traders.[99] The Plan further provided that "all Laws now in Force in the Several Colonies for regulating *Indian affairs or Commerce* be repealed."[100]

If such pre-revolutionary regulations are precedent for federal authority over Indian commerce, as Justice Thomas has argued,[101] then they suggest a broad scope of federal power. Indeed, these colonial trade regulations bear a striking resemblance to the federal Trade and Intercourse Act, the first federal Indian affairs statute enacted under the Constitution.[102] These colonial precedents, especially the Plan of 1764 and its explicit provisions addressing "Commerce," might have well been what the Constitution's drafters and ratifiers envisioned when they empowered the federal government to regulate commerce with the Indian tribes.

C. *The Federalist*

The pro-ratification essays published as *The Federalist* contain only a single paragraph devoted to the Indian Commerce Clause. Here is the discussion in its entirety, from James Madison's *Federalist* 42:

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And *how*

---

[95] Plan for Imperial Control of Indian Affairs, *supra* note 93, at 273; RICHTER, *supra* note 39, at 192–201.

[96] Plan for Imperial Control of Indian Affairs, *supra* note 93, at 279. *See also id.* at 278–80 (governing licensing, weights and measures, tariffs, and other trade regulations).

[97] *Id.* at 280.

[98] *Id.* at 274–77.

[99] *Id.* at 276.

[100] *Id.* at 274 (emphasis added).

[101] Adoptive Couple v. Baby Girl, 570 U.S. 637, 660–65 (2013) (Thomas, J., concurring).

[102] Act of July 22, 1790, ch. 33, 1 Stat. 137.

> *the trade with 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. This is not the only case in which the articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain.[103]

Madison was contrasting the Indian Commerce Clause with its antecedent, Article IX of the Articles of Confederation. As discussed earlier, this Article granted Congress the exclusive power of "regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated."[104]

As Justice Thomas rightly observes in *Brackeen*, Madison's comments on the Indian Commerce Clause in this essay mostly emphasized the elimination of the two "obscure and contradictory" limitations of Article IX that sought to preserve state authority.[105] Indeed, in earlier correspondence with James Monroe, Madison had offered the fullest surviving investigation of this language as he fulminated against the confusions it created.[106] The clearest and most straightforward reading of Madison's language, then, stresses its obvious nationalist thrust by eliminating the language that protected state authority.

Yet litigants in *Brackeen* and scholars have argued that Madison's reference in the fourth sentence to "trade with Indians" underscores the equivalence between "commerce" and "trade."[107] Yet that sentence does not refer to the scope of federal power under the Indian Commerce Clause. Instead, Madison was referencing the language of Article IX, as his italics further suggest. After all, the preceding sentence addressed the question of which Indians counted as "members of the state"—language that appeared *only* in Article IX. Then the sentence in question addressed the *second* qualifier in the Articles, while repeating the language of "trade" from Article IX. There is little suggestion that Madison was *equating* the two provisions; on the contrary, he was contrasting them.

---

[103] THE FEDERALIST NO. 42 (James Madison) (emphasis added).

[104] ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 4.

[105] *Brackeen*, 143 S. Ct. at 1665 (Thomas, J., dissenting).

[106] Letter from James Monroe to James Madison (Nov. 15, 1784), *in* 8 THE PAPERS OF JAMES MADISON 140, 140 (Robert A. Rutland, William M.E. Rachal, Barbara D. Ripel & Fredrika J. Teute eds., 1973); Letter from James Madison to James Monroe (Nov. 27, 1784), *in* 8 THE PAPERS OF JAMES MADISON, *supra* at 156.

[107] Brief for Individual Petitioners at 48, *Brackeen*, 143 S. Ct. 1609 (Nos. 21-376, 21-377, 21-378, 21-380); Natelson, *supra* note 12, at 247.

Indeed, close textual reading of this essay suggests that Madison read "commerce with the Indian tribes" as a synonym for the *full* power that Congress had enjoyed under Article IX. In the very first sentence—where Madison does *analogize* the Indian Commerce Clause with Article IX—Madison equates "the regulation of commerce with the Indian tribes" in the Constitution to "*the* provision" and "*the* power" that was limited under Article IX. Not some or part of the authority, but *the* provision—that is, the power in Article IX over *both* trade *and* Indian affairs.

Personally, I find parsing specific articles in an essay drafted during a heated political campaign a questionable method for construing the original understanding. Instead, I think the best reading of Madison's remarks is that he was so singularly fixated on the nationalist implications of eliminating Article IX's vague qualifiers that he sidelined or ignored the question of what "commerce"—as opposed to *either* Indian affairs or trade, as in the Articles—meant.

D. *The Trade and Intercourse Acts*

In 1790, the First Congress enacted "An Act to regulate trade and intercourse with the Indian tribes."[108] For the next forty years, the Trade and Intercourse Act, frequently revised, became the principal federal statute governing Indian affairs.[109] Like the colonial precedents, that statute and its successors encompassed regulation of traders and a licensing scheme, but also included protections for Native lands *and* broad jurisdictional provisions that governed *all* Anglo-Americans within Indian country.[110]

Predictably, the Act has become a central site of argument over the original meaning and scope of the federal government's commerce power, since many of its provisions had little to do with trade.[111] My original article argued that the Act reflected the federal government's multiple sources of authority in Indian affairs, a position I still believe to be correct.[112] But historical evidence also underscores that law's provisions reflected federal power under the Indian Commerce Clause. After all, as one scholar noted, the statute's title itself invoked the two terms widely

---

[108] Act of July 22, 1790, ch. 33, 1 Stat. 137.

[109] *See* FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834, 1–3 (1962) (describing the Trade and Intercourse Acts as the principal tool for federal Indian policy in the early United States).

[110] Act of July 22, 1790, ch. 33, 1 Stat. 137, 137–38.

[111] *Compare Brackeen*, 143 S. Ct. at 1656 (Gorsuch, J., concurring) (arguing that the Trade and Intercourse Act "liquidated" the Indian Commerce Clause) *with id.* at 1666–68 (Thomas, J., dissenting) (arguing that the Trade and Intercourse Act focused on diplomacy and maintaining peace). *See also* Ablavsky, *supra* note 11, at 1043–44 n.170 (summarizing the scholarly debate).

[112] Ablavsky, *supra* note 11, at 1043–44.

used as synonyms for commerce,[113] and the Act repeatedly spoke of federal regulation of "trade and intercourse with the Indian tribes."[114] For his part, President Washington seemed to regard the statute as an exercise of the government's commerce power: writing to Edmund Randolph shortly after its adoption, he spoke of "the law to regulate trade & commerce with the Indian Tribes."[115] This substitution of the term "commerce" for "intercourse" not only further suggests that the two terms were synonymous, but also makes the connection to the Indian Commerce Clause explicit. As the Appendix shows, others at the time made the same substitution in describing the law.[116]

Justice Thomas's contrary argument stems from a quotation in the 1792 congressional debates around the Act's reenactment that I uncovered several years back.[117] When Congress's authority to enact the law was discussed, one congressman reasoned 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."[118] Justice Thomas seems to interpret this as evidence that the Trade and Intercourse Act applied only in the federal territories, not within the states.[119] But this view makes little sense, since the Act contained no such limitation—under its own terms, its criminal provisions applied to "any town, settlement or territory belonging to any nation or tribe of Indians"[120]—and the federal government routinely prosecuted such crimes *within* state borders.[121] A better reading of the quotation is that it reflected an understanding of constitutional structure that was widespread at the time: that Native lands, even those within states' external borders, nonetheless lay outside states' ordinary jurisdiction[122]—the view that Chief Justice Marshall would later enshrine in *Worcester v. Georgia*.[123] But this conclusion fits, rather than

---

[113] Andrews, *supra* note 23, at 205 ("[T]he title of the Act . . . literally mirrors the two definitions of 'commerce.'").

[114] Act of July 22, 1790, ch. 33, §§ 1–2, 1 Stat. 137, 137.

[115] Letter from George Washington to Edmund Randolph (Aug. 12, 1790), *in* 6 PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 242, 242 (Mark A. Mastromarino ed., 1996).

[116] *See infra* app.

[117] *Brackeen*, 143 S. Ct. at 1666–68 (Thomas, J., dissenting). As best I can tell, no court decision or scholar had referenced this language before I cited it in an earlier symposium piece. Gregory Ablavsky, *Sovereign Metaphors in Indian Law*, 80 MONT. L. REV. 11, 29 (2019).

[118] 3 ANNALS OF CONG. 751 (1792). The "belonging to" language likely reflected the view advanced by some at the time that the federal government enjoyed an underlying ownership right to Native lands, Ablavsky, *supra* note 117, at 29, a claim that the Supreme Court later embraced in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

[119] *Brackeen*, 143 S.Ct. at 1669–70 (Thomas, J., dissenting).

[120] Act of July 22, 1790, ch. 33, § 5, 1 Stat. 137, 138.

[121] ABLAVSKY, *supra* note 58, at 220–21 (describing a 1798 prosecution under the Trade and Intercourse Act in Tennessee, the first case in the new state's federal court).

[122] *See* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2489–90 (2022) (emphasizing the embrace of "territorial separation" of Native lands in the early republic).

[123] 31 U.S. (6 Pet.) 515, 557 (1832).

conflicts with, the conclusion that the "whole power of regulating the intercourse with [Native peoples], was vested in the United States," as Chief Justice Marshall opined in *Worcester*—citing, among other constitutional provisions, the Indian Commerce Clause.[124]

E. *Other Significant Founding Era Uses of the Term "Commerce" in Indian Affairs*

This Section surveys four other significant sources that help construe the term "commerce" as used in Indian affairs from shortly before and after ratification: a letter from the Treaty of Fort Stanwix, the terms of the Jay Treaty, Thomas Jefferson's proposed constitutional amendment to legitimate the Louisiana Purchase, and early caselaw. All further suggest the use of "commerce" and "intercourse" as synonyms, including in construing the Indian Commerce Clause.

1. *Letter from Federal Commissioners at Fort Stanwix*

In 1784, federal commissioners met with Haudenosaunee leaders to negotiate what became the Treaty of Fort Stanwix. In a somewhat bizarre set of circumstances that I have traced more fully elsewhere, Governor Clinton of New York, fearful that the treaty would interfere with New York's efforts to obtain Native land, dispatched Peter Schuyler to secretly disrupt the proceedings.[125] When the commissioners discovered Schuyler's actions, they were outraged. "We have had information from time to time of your interfering with the Indians, . . . of your giving liquor to the Indians, as if you was a Commissioner, and by various direct and indirect means counteracting our negotiations with them," they wrote to Schuyler.[126] They then ordered him to cease: "[T]here is no authority now existing that can warrant you in being on the ground, which we have appointed for a public treaty, and *holding any commerce with the Indians* here without our permission."[127]

Here, the commissioners' use of the term "commerce" is a pretty clear synonym for "intercourse," not "trade." Schuyler was not a trader, and even his gift of liquor was part of a diplomatic, not a commercial, relationship (hence the statement "as if you was a Commissioner," a federal office). Given the context, it is hard to imagine a reasonable reader concluding that, if Schuyler confined his interference to *non-economic* activities—lying about the commissioners to the Haudenosaunee, say, or

---

[124] *Id.* at 559–60.

[125] Ablavsky, *supra* note 10, at 1019–27.

[126] Letter from Commissioners to Peter Schuyler (Oct. 6, 1784), *in* 18 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607–1789, 315, 315 (Alden T. Vaughan & Colin G. Calloway eds., 1979).

[127] *Id.* (emphasis added).

attempting to persuade them not to sign the treaty—then the commissioners would have accepted this behavior. Indeed, the commissioners said as much, warning Schuyler against "in any way meddling in this treaty."[128]

In one sense, this is merely an additional instance of the term "commerce" being used more broadly than "trade" in the lead-up to the Constitutional Convention—although, given the small numbers, each usage is significant. But I also read evidence from these treaty negotiations as particularly probative because the federalism battles during the Treaty of Fort Stanwix were especially influential in shaping the Framers' understanding of Indian affairs.[129] The congressional commissioners—Oliver Wolcott Senior, Arthur Lee, and Richard Butler—were themselves congressmen and prominent politicians. The fight between New York and the Continental Congress also had a particularly significant impact on James Madison, who attended the initial proceedings and continued to follow them closely. As described above, his correspondence with James Monroe on New York's actions produced the most sustained critique of state interference in Indian affairs of the era.[130] At the very least, this document underscores that the usage of the term "commerce" as synonymous with "intercourse" was well-known to the nation's political elite in the immediate leadup to the Constitution's drafting.

2. *Jay Treaty*

One of the most important discussions around commerce and Indians involved the Jay Treaty of 1794 between the United States and Great Britain. After the American Revolution, tensions persisted between the United States and the British Empire, particularly over the United States-Canadian border.[131] Attempting to placate Native demands, the British refused to cede several key posts, including Detroit and Niagara, that were located within United States territory. Federal officials regarded this territorial violation as an affront to United States sovereignty, as well as a British attempt to maintain their influence over—and lucrative fur trade with—the region's Indigenous peoples. When John Jay arrived in London as the United States' representative to negotiate a resolution, cross-border trade and access proved among the most contentious issues. "A continuance of trade with the Indians was a decided ultimatum," he

---

[128] *Id.*

[129] Ablavsky, *supra* note 10, at 1023–27.

[130] *See* Letter from James Monroe to James Madison, *supra* note 106, and accompanying text (discussing Madison's correspondence with Monroe critiquing state interference in Indian affairs).

[131] On the history around the Jay Treaty, see SAMUEL FLAGG BEMIS, JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY (1923); COLIN G. CALLOWAY, CROWN AND CALUMET: BRITISH-INDIAN RELATIONS, 1783–1815 (1987); LAWRENCE B.A. HATTER, CITIZENS OF CONVENIENCE: THE IMPERIAL ORIGINS OF AMERICAN NATIONHOOD ON THE U.S.-CANADIAN BORDER (2017).

reported of British demands.[132] "[M]uch time and paper, and many conferences were employed in producing this article."[133]

Jay was describing Article III of the treaty the two nations ultimately negotiated and ratified, which read:

> It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's bay Company only excepted) and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other.[134]

Additional documents provide more context. In the lead-up to the treaty, British minister to the United States George Hammond recorded a conversation with Secretary of the Treasury Alexander Hamilton, in which Hamilton expressed confidence that the United States would grant "a free intercourse of commerce with the Indians dwelling within the American territory, provided that a similar intercourse with the Indians residing in the territory of Canada should be allowed to the citizens of the United States."[135] Similarly, but more significantly, after the treaty's adoption, the British objected to a federal regulation that required trading licenses, and so sought the addition of an "explanatory article" that would avoid "all possible misconstruction or doubt on this point, on the part either of His Majesty's subjects, or of the citizens of the United States, and still more on the part of the Indians."[136] The Article, duly ratified by the Senate, stated that no treaty:

> [W]ith any other state or nation, or with any Indian tribe, can be understood to derogate in any manner from the rights of free intercourse and commerce, secured by the aforesaid third article of the [Jay Treaty] to the subjects of his Majesty and

---

[132] Letter from John Jay to Edmund Randolph (Nov. 19, 1794), *in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 503, 503 (Walter Lowrie & Matthew St. Clair Clarke eds., Gales & Seaton 1833).

[133] *Id.*

[134] Treaty of Amity, Commerce, and Navigation, Between His Britannic Majesty and the United States of America, by their President, with the Advice and Consent of their Senate, Gr. Brit-U.S., art. III, Nov. 19, 1794, 8 Stat. 116.

[135] Alexander Hamilton, Conversation with George Hammond (Apr. 30–July 3, 1792), *in* 11 PAPERS OF ALEXANDER HAMILTON 347, 347 (Harold C. Syrett ed., 1966).

[136] Letter from Phineas Bond to Timothy Pickering (Mar. 26, 1796), *in* 1 AMERICAN STATE PAPERS, *supra* note 132, at 551–52.

> to the citizens of the United States, and to the Indians dwelling on either side of the boundary line aforesaid.[137]

The Jay Treaty proved controversial. A protracted legislative debate ensued over whether the House of Representatives had a constitutional role in approving the treaty—a debate which only tangentially addressed the question of Indian trade.[138] Congressman Edward Livingston of New York, however, did argue that the "discretion of the House of Representatives as to commerce with foreign nations, stood precisely on the same footing with that which they ought to exercise in regulating intercourse with the Indian tribes," and then further spoke of Congress's "right to regulate trade and intercourse with the Indian tribes."[139]

What to make of all this evidence, in which "commerce," "intercourse," and "trade" were routinely employed and often conjoined with ambiguous "ands"? Only Livingston's remarks are strongly probative that at least some in Congress regarded its authority over commerce as a power over "intercourse with the Indian tribes." But the other instances, though ambiguous, nonetheless reinforce what the corpus linguistics evidence similarly suggests: that "commerce" with Indians was routinely used in conjunction with both "trade" and "intercourse" and was frequently used as a synonym for both. The evidence around the Jay Treaty suggests that this association also held true in the early nation's documents of high diplomacy.

3. *Jefferson's Proposed Constitutional Amendment*

A third significant source on the scope of the Indian Commerce Clause is Thomas Jefferson's proposed 1803 constitutional amendment to legitimize the Louisiana Purchase.[140] Jefferson had qualms about whether the United States could constitutionally annex the Louisiana Territory because it extended beyond the original boundaries of the United States. Jefferson accordingly drafted a constitutional amendment that would have explicitly legitimated the annexation.[141] But the proposal went further and contained a detailed description of federal power over Indian affairs:

> The Province of Louisiana is incorporated with the US. and made part thereof. [T]he rights of occupancy in the soil, & of self-government, are confirmed to the Indian inhabitants, as

---

[137] Explanatory Article to Article III of the Jay Treaty, Gr. Brit.-U.S., May 4, 1796, 8 Stat. 130.

[138] *See* GIENAPP, THE SECOND CREATION, *supra* note 22, at 250–324.

[139] 5 ANNALS OF CONG. 637 (1796).

[140] Thomas Jefferson, Revised Amendment (July 9, 1803), *in* 40 THE PAPERS OF THOMAS JEFFERSON 686, 686–88 (Barbara B. Oberg ed., 2013).

[141] *See generally* Thomas Jefferson, Constitutional Amendment on Louisiana: Editorial Note, *in* 40 THE PAPERS OF THOMAS JEFFERSON 681, 681–85 (discussing Jefferson's hesitations over Louisiana); Maggie Blackhawk, Foreword, *The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 33–43 (2023) (summarizing the constitutional debate).

> they now exist. . . . The legislature of the union shall have authority to exchange the right of occupancy in portions where the US. have full right, for lands possessed by Indians, within the US. on the East side of the Missisipi . . . to regulate trade & intercourse between the Indian inhabitants, & all other persons . . . and to establish agencies & factories therein for the cultivation of Commerce, peace and good understanding with the Indians residing there.[142]

In the end, Jefferson was reluctantly persuaded to accept the view that the federal government already possessed the power to annex territory through treaty, and his proposed amendment was never adopted.[143] I nonetheless read Jefferson's amendment as the clearest and most straightforward summary of how much the Founding Era elite understood the legal and constitutional relationship between Native nations and the United States. This seeming paradox reflected Jefferson's constitutional conservatism. As multiple scholars have noted,[144] the evidence strongly suggests that Jefferson saw the amendment as merely extending authority that the federal government already enjoyed into the new Louisiana Territory. Compelling evidence for this view is that the federal government already exercised nearly all the powers that Jefferson enumerated. For instance, his call for establishing factories in Indian country constitutionalized the 1796 congressional statute that did just that.[145] Even the portions of Jefferson's amendment that seemed novel subsequently became federal law without the amendment: his proposal to exchange Native lands, for instance, was codified in the 1830 Indian Removal Act.[146]

As an effort to extend existing federal authority into the Louisiana Territory, Jefferson's amendment further clarifies federal power over Indian affairs. Jefferson's belief that Congress enjoyed the authority to "regulate trade & intercourse between the Indian inhabitants, & all other persons"[147]—even in absence of any treaty, none of which had yet been signed or adopted—seems to represent his view of existing federal power under the Indian Commerce Clause. Further evidence is Jefferson's subsequent use of "commerce" in the amendment to describe both the federal government's trading factories *and* its diplomatic agencies. But,

---

[142] Jefferson, *supra* note 140, at 686–87 (original spelling maintained).

[143] EVERETT SOMERVILLE BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE: 1803–1812, 28–29 (1920).

[144] ANTHONY F.C. WALLACE, JEFFERSON AND THE INDIANS: THE TRAGIC FATE OF THE FIRST AMERICANS 225 (1999) ("The legal authority and administrative mechanisms necessary to carry out [Jefferson's] plan were, by 1803, already in place."); *but cf.* Jack N. Rakove, *Thinking Like a Constitution*, 24 J. EARLY REPUBLIC 1, 25 n.37 (2004) (arguing that Jefferson's amendment was an attempt to cast his "policy preference" for removal in "constitutional stone").

[145] Act of Apr. 18, 1796, ch. 13, 1 Stat. 452.

[146] Act of May 28, 1830, ch. 148, 4 Stat. 411.

[147] Jefferson, *supra* note 140, at 687.

regardless of the meaning of commerce, Jefferson's amendment indicates that Jefferson believed that the federal government possessed the constitutional authority to regulate trade *and* intercourse between Natives and non-Natives.

4. *Early Caselaw*

Caselaw is a potentially tricky source for reconstructing Founding Era constitutional understandings. In the immediate aftermath of ratification, courts' role in adjudicating constitutional disputes was still uncertain and contested,[148] and the innovation of published court reporters was also nascent.[149] As a result, the first published court decisions addressing the scope of authority over Indian affairs did not appear until the early nineteenth century;[150] the United States Supreme Court did not address the question until 1810, when it ruled only obliquely on the issue in *Fletcher v. Peck*.[151]

Nonetheless, the sparse early caselaw reinforces the view that commerce was synonymous with intercourse. In 1805, for instance, Tennessee's highest court stated, "The 8th and 10th sections of the first article of the Constitution of the United States give to the General Government the exclusive right of regulating the intercourse of the citizens of the several States with the Indians, and of making treaties with them."[152] Twenty years later, the same court described the Indian Commerce Clause as "the clause which vests the power in Congress, to regulate trade and intercourse with the Indian tribes."[153]

As I noted in my original article, the widespread acceptance of this broad view of the Indian Commerce Clause did not mean that federal authority over Indian affairs was uncontroversial: it was, in fact, hotly contested.[154] But the opposition to federal power was largely structural; it stemmed from a claim that state territorial sovereignty and ownership were inviolate.[155] Not until the Indian Removal crisis of the late 1820s and

---

[148] *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 94–127 (2004).

[149] GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, 454 (2009).

[150] *See infra* notes 152–153 (citing two cases, decided in 1805 and 1826, that address the scope of authority over Indian affairs in the early nineteenth century, which are the only pre-Removal-era cases I have found construing the Indian Commerce Clause).

[151] 10 U.S. 87, 142–43 (1810).

[152] Glasgow's Lessee v. Smith, 1 Tenn. (1 Overt.) 144, 164 (1805). *See also id.* at 166–67 ("The Constitution of the United States gave the power to the General Government to regulate intercourse with the Indians and to make treaties. The States, having conceded these powers, no longer possess them.").

[153] Cornet v. Winton's Lessee, 10 Tenn. (2 Yer.) 143, 162 (1826).

[154] Ablavsky, *supra* note 11, at 1045–50.

[155] *Id.* at 1047. *See also* ABLAVSKY, *supra* note 58, at 201–30 (tracking Tennessee's opposition to federal authority over Indian affairs based on structural arguments).

1830s did the argument that the Indian Commerce Clause referred solely to trade gain considerable currency, primarily among southern jurists.[156]

Even then, there was significant debate over the precise meaning of "commerce." The Alabama Supreme Court, for instance, adopted the reasoning advocated by Justice Thomas: "*Commerce* relates to trade; *intercourse* may be carried on without trade."[157] At nearly the same time, Justice McLean, riding circuit, reached a similar, albeit broader, conclusion when he rejected federal criminal jurisdiction under the Trade and Intercourse Act.[158] "[T]he word 'commerce' does refer to trade," he reasoned, but noted that Congress "may provide by law in what manner this intercourse shall be carried on . . . ."[159] McLean's view was *dicta*, though, since the decision ultimately rested on McLean's conclusion that the crime alleged, a murder of a white man by another white man in Indian country, was "wholly disconnected from *any* intercourse with the Indians."[160]

Yet the Tennessee Supreme Court reached the opposite conclusion about the Indian Commerce Clause in an opinion written by future United States Supreme Court Justice Catron. "Commerce," Catron wrote, in construing the Indian Commerce Clause, "is traffic, but it is more, it is intercourse between nations."[161] (Despite this expansive reading, Catron nonetheless agreed with Justice McLean that the federal government lacked jurisdiction over the "general punishment of crime."[162]) The dissenting judge agreed with Catron's construction—"[T]here is much in the clause which vests Congress with power to regulate commerce with the Indian tribes, and that commerce and intercourse, in legal parlance, mean the same thing"—but rejected the majority's conclusion about federal authority.[163]

During Removal, then, the scope of the Indian Commerce Clause became hotly contested. Yet *why* disputed Removal Era arguments for a narrow scope of federal power should bear much weight in construing the Indian Commerce Clause today is unclear. Cases decided forty years after the Constitution's adoption, voicing an argument that seldom appeared at the Founding, are not compelling evidence of the document's original

---

[156] Ablavsky, *supra* note 11, at 1049 (noting that "Indian Commerce Clause-based interpretation coincided with the rise, beginning in the 1810s and culminating in the 1830s, of aggressive state assertions of sovereignty over Native nations") (citation omitted).

[157] Caldwell v. State, 1 Stew. & P. 327, 430 (Ala. 1832) (emphasis added).

[158] United States v. Bailey, 24 F. Cas. 937, 939 (C.C.D. Tenn. 1834).

[159] *Id.* at 940.

[160] *Id.* (emphasis added).

[161] State v. Foreman, 16 Tenn. 256, 316 (1835). It is unclear whether Justice Catron was deliberately echoing Chief Justice Marshall's language in Gibbons v. Ogden, 22 U.S. 1, 189 (1824) ("Commerce, undoubtedly, is traffic, but it is something more: it is intercourse.").

[162] *Foreman*, 16 Tenn. at 317.

[163] *Id.* at 362 (Peck, J., dissenting).

meaning. Taken to its full conclusion, Justice McLean's circuit opinion in *Bailey* would have deemed unconstitutional an act adopted by the First Congress,[164] and its reasoning seems at war with McLean's own concurrence two years earlier in *Worcester*, in which he repeatedly described federal authority as encompassing "intercourse with the Indians."[165] The cases also have no legal validity today. Even at the time, they conflicted with the United States Supreme Court's ruling in *Worcester*, as the state judges themselves acknowledged,[166] and subsequent Court decisions firmly and decisively rejected their reasoning.[167]

Nor are these decisions a normatively appealing source of law. As even a moment's glance at the history of Removal demonstrates, Southern states and their jurists were engaged in especially motivated reasoning, searching for any legal justification that would sweep away all impediments to their seizure of Native lands.[168] In the words of these state court decisions' leading historian, "southern judges fecklessly acceded to the will of a land-voracious and prejudiced public . . . ."[169] "[T]hey prejudged their cases," he continues, and justified the results through a "legal rationale as duplicitous and fallacious as any in American legal history."[170] And of course, lurking over all debates over federal authority in

---

[164] *See supra* Section II.D (discussing the First Congress's enacting of "An Act to Regulate Trade and Intercourse with the Indian Tribes").

[165] *See* Worcester v. Georgia, 31 U.S. 515, 590 (1832) (McLean, J., concurring) ("When Georgia sanctioned the constitution, and conferred on the national legislature the exclusive right to regulate commerce or intercourse with the Indians, did she reserve the right to regulate intercourse with the Indians within her limits? This will not be pretended."); *id.* at 591 ("Does not the constitution give to the United States as exclusive jurisdiction in regulating intercourse with the Indians, as has been given to them over any other subjects?"); *id.* at 592 ("Has not the power been as expressly conferred on the federal government, to regulate intercourse with the Indians; and is it not as exclusively given, as any of the powers above enumerated?").

[166] *See, e.g.*, *Foreman*, 16 Tenn. at 287 (rejecting *Worcester* and stating "with all due deference to the highest judicial tribunal in the Union, we think that the jurisdiction of North Carolina, as assumed by her state constitution, will not now be questioned").

[167] The *Brackeen* majority surveys the relevant caselaw rejecting these arguments. Haaland v. Brackeen, 143 S. Ct. 1609, 1627–28 (2023) ("We have interpreted the Indian Commerce Clause to reach not only trade, but certain 'Indian affairs' too.") (quoting Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989)).

[168] *See* CLAUDIO SAUNT, UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY 54–109 (2020) (tracing the history around Removal and arguing that, "[w]ith the exception of bayonets and rifles, the United States's most effective weapon in compelling people to move west was state law"); W. Tanner Allread, *The Specter of Indian Removal: The Persistence of State Supremacy Arguments in Federal Indian Law*, 123 COLUM. L. REV. 1533, 1539 (2023) ("In the 1820s and 1830s, a cadre of elite, southern, Euro-American politicians constructed the state supremacy theory to appease the voracious land hunger of their settler constituents.").

[169] TIM ALAN GARRISON, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS 11 (2002).

[170] *Id.* Though less vehemently, one scholar whom Justice Thomas himself cites makes a similar argument. *See* DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790–1880 78 (2007) (noting that southern courts "evaded honest discussion" and "vigorously avoided serious analysis of tribal sovereignty by loudly claiming rights of state sovereignty").

the antebellum South was the question of slavery.[171] Southern politicians sometimes made this connection expressly: "If Congress can invade the jurisdiction of a state, and in any way extend or abridge the rights of individuals, what is to prevent its interference with the slave population of the southern states?" the Alabama House of Representatives queried when discussing jurisdiction over Indian country.[172] "If it can say to the state of Alabama, that Indians cannot be citizens, it can by a similar exercise of municipal power within its limits, say that Negroes shall not be slaves."[173]

The limited early caselaw, then, suggests a reading of the Indian Commerce Clause as synonymous with "intercourse." By the Removal Era, this view had become contested: some decisions (including, most notably, the United States Supreme Court's decision in *Worcester*) embraced the broader view, but a few scattered state and lower court decisions offered a more limited interpretation. But this handful of 1830s decisions are not especially compelling evidence. These decisions came well after the Founding, and seemingly conflict with prior understandings and caselaw; they expressly disregarded the authority of the United States Supreme Court, which conclusively rejected these decisions' reasoning; and they were openly motivated by the defense of Native dispossession and chattel slavery. They thus deserve little weight when construing the original meaning of the Indian Commerce Clause.

CONCLUSION

The advocates for reading "commerce" in the Indian Commerce Clause as solely equivalent to trade have, in my view, the heavier evidentiary lift. They must demonstrate that the term "commerce" with Indians had almost exclusively a single meaning. By contrast, advocates for interpreting "commerce" more broadly—as synonymous with "intercourse"—can readily concede that commerce was often used to describe "trade," but that it also had other, wider meanings that encompassed a broader array of interactions between Native peoples and Anglo-Americans.

Weighed in this frame, the evidence from the late eighteenth century seems clear. Commerce was commonly used as a synonym for trade. But it was also routinely used as a synonym for "intercourse," as both the corpus linguistics and many specific pieces of Founding Era evidence demonstrate: Washington, Jefferson, the First Congress, and the negotiators of the Jay Treaty all seemed to have interpreted "commerce" that way.

---

[171] *Id.* at 78; Allread, *supra* note 168, at 1561.

[172] JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF ALABAMA, BEGUN AND HELD AT THE TOWN OF TUSCALOOSA, ON THE THIRD MONDAY IN NOVEMBER, 1828 220–21 (1829).

[173] *Id.* at 221.

I anticipate that those advocating the narrower reading of the Indian Commerce Clause will nonetheless resist this conclusion and continue to insist that commerce with Indians referred only to trade and economic relationships, perhaps contesting the meaning of specific pieces of evidence presented here and dismissing others as outliers. But this debate simply underscores that language still involves complex questions of meaning and ambiguities that no number of full-text searches can eliminate.

It also raises questions about the supposed virtues of original public meaning originalism in resolving legal disputes. To its advocates, this interpretive method makes constitutional interpretation *less* subjective, *less* dependent on the ideological priors of judges. But it turns out that, just like law, "history [is] an argument without end," even if we try to focus the inquiry only on the question of semantic meaning.[174] The debate over the Indian Commerce Clause presents in microcosm the problem with turning to the past to find authoritative answers that it cannot offer. At least in this debate, the consequence of an originalist approach mostly seems to have shifted judges from arguing over law and precedent, which they are trained to do, to purportedly arguing about historical meaning—even though everyone involved recognizes that this argument is a charade, since the debate is still a proxy struggle over *law*. That observers can readily predict a judge's *historical* conclusions even before looking at the evidence suggests that history does not meaningfully constrain judges any more than precedent or any other source of law does; it may constrain them *less*, simply because there is so much historical evidence to pluck from.[175]

I am neither a judge nor a constitutional theorist, so fortunately I don't have to resolve this jurisprudential dilemma. Instead, I am someone who, like most historians, enjoys digging into the archives to address some of the seeming mysteries of the past. After years investigating this topic, I've offered here what I think is the best reconstruction of the Founding Era meaning of "commerce . . . with the Indian tribes" that the historical evidence supports.

---

[174] Herbert H. Rowen, *The Historical Work of Pieter Geyl*, 37 J. MOD. HIST. 35, 45 (1965).

[175] *See generally* Ablavsky, *supra* note 15 (highlighting the uncertainty surrounding which history to choose from).

APPENDIX: RELEVANT APPEARANCES OF THE TERM "COMMERCE" IN THE CORPUS OF FOUNDING ERA AMERICAN ENGLISH

Source	Meaning of "Commerce"	Context
1764		
THOMAS HUTCHINSON, THE HISTORY OF THE COLONY OF MASSACHUSETS-BAY 1 (1764).	Intercourse	"[T]he voyage made by Bartholomew Gosnold, an Englishman, in the year 1602, to that part of North America since called New-England. . . . After some commerce with the natives he sailed southward and landed upon one of the islands called Elizabeth islands."[176]
Letter from James Wright et al., Governor of Georgia to The Earl of Egremont (Nov. 10, 1763), *in* JOURNALS OF THE CONGRESS OF THE FOUR SOUTHERN GOVERNORS 43 (1764).	Trade	"[T]he general Promise of Goods which we have made[,] by the King's orders to the respective Indians requires such a performance as it is impossible circumstanced as we are to be answerable for we have no coercive Power over Traders. Your Lordship will pardon us for suggesting that there never was a time more seasonable for the establishing the Commerce with Indians upon a general safe equitable footing . . . ."

[176] Bartholomew Gosnold was a significant early English explorer of North America.

Source	Meaning of "Commerce"	Context
1765		
Letter from George Croghan to Benjamin Franklin (Dec. 12, 1765), *in* 2 THE NEW RÉGIME 1765-1767, 63–64 (Clarence Walworth Alvord & Clarence Edwin Carter eds., 1916).	Trade	"The principle objection, to the proper Regulation of the Indian department, is, I am told, the *Expence*. You will therefore, I am convinced Sir, pardon me, for a moment, whilst I mention to you—that a Duty of Five per Cent, upon the trade, would raise more, than wou'd defray the whole disbursements, incurr'd by maintaining peace with the Natives, and regulating their commerce—This Tax Indeed!—would be none to the Merchants, for they would necessarily, add it to the price of their Goods, and therefore, of consequence, the Indians themselves, wou'd pay the whole expence, of our negociations with them, and also of our superintending and regulating their Trade . . . ."
1766		
"A Lover of Britain": Preface to Three Letters to William Shirley (Feb. 8, 1766), *in* 13 THE PAPERS OF BENJAMIN FRANKLIN 118–20 (Leonard W. Labaree ed., 1969).	Intercourse	"In July 1754, when from the encroachments of the French in America on the lands of the crown, and the interruption they gave to the commerce of this country among the Indians, a war was apprehended . . . ."

Source	Meaning of "Commerce"	Context
1766		
Remarks on the Plan for Regulating the Indian Trade (Sept.–Oct. 1766), *in* 13 THE PAPERS OF BENJAMIN FRANKLIN 433–41 (Leonard W. Labaree ed., 1969).	Indian Affairs	"'That all Laws now in Force in the Several Colonies for regulating Indian affairs or Commerce be repealed.' [] Those Laws are the Result of long Experience, made by People on the Spot interested . . . ."
Examination before the Committee of the Whole of the House of Commons (Feb. 13, 1766), *in* 13 THE PAPERS OF BENJAMIN FRANKLIN 124–62 (Leonard W. Labaree, ed., 1969).	Trade	"The people of America are chiefly farmers and planters; scarce any thing that they raise or produce is an article of commerce with the Indians. The Indian trade is a British interest . . . ."

Source	Meaning of "Commerce"	Context
1767		
THOMAS HUTCHINSON, THE HISTORY OF THE PROVINCE OF MASSACHUSETS-BAY 472 (1767).	Trade	"They had no notion of cultivating any more ground than would afford their own necessary provisions, but proposed that their chief secular employment should be commerce with the natives, and they entered into contract with a company of 20 or more merchants and others, many of them belonging to Bristol, who were to furnish them with goods, and at the end of seven years the profits were to be divided equally between the merchants in England and the colonists, all the houses and improved land to be valued in the joint stock."
1768		
Letter from Samuel Wharton to Benjamin Franklin (Dec. 2, 1768), *in* 15 THE PAPERS OF BENJAMIN FRANKLIN 275–79 (William B. Willcox ed., 1972).	Ambiguous	"As This convention of the Natives, was to settle an affair, in which the future Peace and Commerce of these Colonies, were most intimately concerned, Sir William very prudently summoned Deputy's, as well from the Indian Tribes in Canada as from all those on the Susquehannah, and down the Ohio for many hundred Miles, That so, none of Those Nations might hereafter plead Ignorance or disapprobation of the Transaction."

Source	Meaning of "Commerce"	Context
1768		
Letter from Samuel Wharton to Benjamin Franklin (Dec. 2, 1768), *in* 15 THE PAPERS OF BENJAMIN FRANKLIN 275–79 (William B. Willcox ed., 1972).	Trade	"There is now the fairest prospect, that these Colonies have ever had since the Year 1749, to perpetuate the Blessings of an Indian Peace to their Posterity and of rendering our Commerce with the Natives much more beneficial to the Mother Country, than it Ever has been as every article used in that Trade, except Philada. *made Rum* is the Manufactory of Great Britain . . . ."
1770		
WILLIAM LIVINGSTON, A REVIEW OF THE MILITARY OPERATIONS IN NORTH-AMERICA: FROM THE COMMENCEMENT OF THE FRENCH HOSTILITIES ON THE FRONTIERS OF VIRGINIA, IN 1753, TO THE SURRENDER OF OSWEGO, ON THE 14TH OF AUGUST, 1756, 116 (1770).	Intercourse	"No other harbour had his Majesty upon that lake, capable of receiving vessels of force: that Oswego was situate in the country of the Onondagas, the centre canton of the Six Nations, and famous for the furr trade: no other mart could we boast, for commerce or correspondence with those numerous tribes of savages inhabiting the western country, on the banks of the great lakes Erie, Huron, Michigan, and the many rivers which roll into them . . . ."

Source	Meaning of "Commerce"	Context
1776		
JAMES CHALMERS, ADDITIONS TO PLAIN TRUTH 109 (1776).	Trade	"The natives of Florida, and New Zealand, who ravenously feed on human flesh, have no idea of commerce. I cannot indeed of my own knowledge say much of their patriotism, tho' they certainly possess the *true spirit of military defence* in its native *colours*. I believe our honest Indian neighbours are unskilled in commerce, tho' acquainted with the mode of broiling prisoners, and well versed in the *spirit of military defence*."
1778		
Letter from George Washington to Henry Laurens (Nov. 26, 1778), *in* 18 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES 300–01 (Edward G. Lengel ed., 2008).	Trade	"Mr John Dodge . . . he is a native of Connecticut—and about eight years ago, as he informs me settled in the Country between Detroit and Pitsburg as an Indian trader—That he carried on commerce till January 1776, when, for his attachment to our cause and the measures he had taken to promote it, he became obnoxious to the Enemy . . . ."

Source	Meaning of "Commerce"	Context
1778		
Letter from George Washington to Henry Laurens (Nov. 14, 1778), *in* 18 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES 149–52 (Edward G. Lengel, ed., 2008).	Trade	"Let us realize for a moment the striking advantages France would derive from the possession of Canada, the acquisition of an extensive territory abounding in supplies for the use of her Islands—the opening a vast source of the most beneficial commerce with the Indian Nations which she might then monopolise . . . ."
1781		
Letter from Thomas Jefferson to George Rogers Clark (Jan. 20, 1781), *in* 4 THE PAPERS OF THOMAS JEFFERSON 413–14 (Julian P. Boyd ed., 1951).	Intercourse	"Having cause to entertain doubts from several Letters transmitted me, whether Mr. Jno. Dodge who was appointed to conduct a commerce with the Indians on behalf of this state has not been guilty of gross misapplication or mismanagement of what has been confided to him . . . ."[177]

[177] Jonathan Dodge served as Virginia's Indian agent, charged with overseeing all aspects of the colony's relationship with Native peoples.

Source	Meaning of "Commerce"	Context
1783		
Letter from George Washington to United States Congress (Sept. 8, 1783) (on file at https://founders.archives.gov/documents/Washington/99-01-02-11803).	Trade	"And here I will take the liberty to suggest the expediency of restraining all Officers, stationed in the Indian Country, from carrying on, directly or indirectly, any Commerce or Traffic whatever with the Natives, it would be better to make a pecuniary compensation for any extra trouble of the Commanding Officer, in giving passes and regulating these things, than to suffer so pernicious a custom to take place."
1787		
Report of Committee on Indian Affairs, 32 J. CONT'L CONG. 66, 68 (Feb. 20, 1787).	Trade	"The commerce with the Indians will be an object of importance, and ought to be cultivated by all proper means. As no traders will be suffered, without a license from you, or your deputies, it will be necessary that you should be attentive to their characters and conduct, as the preservation of peace will depend in a considerable degree on the fairness of their transactions. Any complaints of the Indians against the traders, must be enquired into, and if just, redressed without delay."

Source	Meaning of "Commerce"	Context
1788		
THE FEDERALIST NO. 42 (James Madison).	Ambiguous	"I shall confine myself to a cursory review of the remaining powers comprehended under this third description, to wit: to regulate commerce among the several States and the Indian tribes . . . . The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation . . . ."
JAMES MONROE, OBSERVATIONS UPON THE PROPOSED PLAN OF FEDERAL GOVERNMENT. WITH AN ATTEMPT TO ANSWER SOME OF THE PRINCIPAL OBJECTIONS THAT HAVE BEEN MADE TO IT 24 (1788).	Ambiguous	"*To regulate commerce with foreign nations, and among the several States, and with the Indian tribes*; THE power of regulating commerce gives great alarm to the enemies of the Constitution. . . . The consequence of this power, say they, will be, that the eastern and northern States will combine together, and not only oblige the southern to export their produce in their bottoms . . . ."

Source	Meaning of "Commerce"	Context
1789		
Letter from George Washington to the Commissioners to the Southern Indians (Aug. 29, 1789), *in* 3 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 551–65 (Dorothy Twohig ed., 1989).	Trade	"A secure port to the Creeks or their head men on the Altamaha, St Marys or at any place between the said rivers into which or from which the Creeks may import or export the articles of merchandize necessary to the Indian commerce on the same terms as the Citizens of the united States . . . ."
George Washington's Memoranda on Indian Affairs (1789), *in* 4 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 468–94 (Dorothy Twohig ed., 1993).	Trade	"To preserve the attachment of the several Indian Nations bordering on the U. States, it appears expedient that some adequate means of supplying them with Goods & Ammunition at moderate prices should immediately be adopted and some uniform Plan of granting permits to those who may be employed in the Indian Commerce should be established by the Supreme Authority of the U. States . . . ."
George Washington, Fifth Annual Message to Congress (Dec. 3, 1793) (on file at https://www.presidency.ucsb.edu/documents/fifth-annual-address-congress).	Trade	"Next to a rigorous execution of justice on the violators of peace, the establishment of commerce with the Indian nations in behalf of the United States is most likely to conciliate their attachment."

Source	Meaning of "Commerce"	Context
1790		
Letter from Arthur St. Clair to George Washington (May 1, 1790), *in* 5 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 371–78 (Dorothy Twohig, Mark A. Mastromarino & Jack D. Warren eds., 1996).	Trade	"I have been trying to persuade some of them to quit their Villages, where as Farmers they can never thrive, . . . but they have so perfect a dread of the Savages, that, tho' they are satisfied of the truth of it, it is impossible to bring them to attempt it; tho the high Lands are both fertile and Healthy, and the Indian Commerce, which was the Resource of their Villages . . . ."
Letter from George Washington to Edmund Randolph (Aug. 12, 1790) (on file at https://loc.gov/resource/mgw2.022/?sp=357).	Intercourse	"I would, however, just mention, that as it may be necessary for me, in pursuance of the law to regulate trade and commerce with the Indian Tribes, to issue a Proclamation enjoining upon the People of the United States a strict observance of such treaties and regulations as are concluded with, and made respecting the Indian tribes . . . ."
3 ANNALS OF CONG. 377 (1792).	Ambiguous	"[T]here is, however, no clause in the Constitution that will authorize a measure of this kind: it is true, indeed, we have a power to regulate trade and commerce with the Indian tribes; but does that give us a power to render the United States tributary . . . ?"

Source	Meaning of "Commerce"	Context
1791		
WILLIAM BARTRAM, TRAVELS THROUGH NORTH & SOUTH CAROLINA, GEORGIA, EAST & WEST FLORIDA, THE CHEROKEE COUNTRY, THE EXTENSIVE TERRITORIES OF THE MUSCOGULGES, OR CREEK CONFEDERACY, AND THE COUNTRY OF THE CHACTAWS 194, 353 (1791).	Trade	"The Siminole girls are by no means destitute of charms to please the rougher sex: the white traders, are fully sensible how greatly it is for their advantage to gain their affections and friendship in matters of trade and commerce . . . . [A]s it is a fact, I am afraid too true, that the white traders in their commerce with the Indians, give great and frequent occasions of complaint of their dishonesty and violence . . . ."
Legal Opinion of Edmund Randolph (Aug. 1791), *in* 22 THE PAPERS OF THOMAS JEFFERSON 114–16 (Charles T. Cullen ed., 1986).	Ambiguous	"The constitution is the basis of fœderal power. This power, so far as the subject of Indians is concerned, relates 1. To the regulation of commerce with the Indian tribes. . . . But it undoubtedly is in the power of congress, to regulate commerce with the Indians in any manner to guard the right of making treaties, by forbidding the citizens to meddle under a penalty, and to provide a security to their preemption by passing adequate laws."

Source	Meaning of "Commerce"	Context
1791		
Letter from Thomas Jefferson to George Hammond (Dec. 15, 1791), *in* 22 THE PAPERS OF THOMAS JEFFERSON 409–12 (Charles T. Cullen ed., 1986).	Trade	"By these proceedings we have been intercepted entirely from the Commerce of furs with the Indian nations to the Northward . . . ."
1792		
WILLIAM SMITH, HISTORY OF THE PROVINCE OF NEW-YORK, FROM THE FIRST DISCOVERY TO THE YEAR 1732, 173 (1792).	Trade	"'The French and their Indians would not permit the English Indians to pass over by their forts.' The said act 'restrains them (the five nations) from a free commerce with the inhabitants of New York.' The five Indian nations are settled upon the banks of the river St. Lawrence, directly opposite to Quebec . . . ."[178]

[178] The original act referred to is "An act for encouragement of the Indian trade . . . ."

Source	Meaning of "Commerce"	Context
1792		
WILLIAM SMITH, HISTORY OF THE PROVINCE OF NEW-YORK, FROM THE FIRST DISCOVERY TO THE YEAR 1732, 177 (1792).	Ambiguous	"They conceive nothing can tend more to the withdrawing the affections of the five nations of Indians from the English interest, than the continuance of the said act, which in its effects restrains them from a free commerce with the inhabitants of New-York, and may too probably estrange them from the English interest; whereas, by a freedom of commerce, and an encouraged intercourse of trade with the French and their Indians, the English interest might, in time, be greatly improved and strengthened."
WILLIAM SMITH, HISTORY OF THE PROVINCE OF NEW-YORK, FROM THE FIRST DISCOVERY TO THE YEAR 1732, 178 (1792).	Ambiguous	"[T]hat the encouraging a freedom of commerce with our Indians and the Indians round them, who must pass through their country to Albany, would certainly increase both the English interest and theirs . . . ."
WILLIAM SMITH, HISTORY OF THE PROVINCE OF NEW-YORK, FROM THE FIRST DISCOVERY TO THE YEAR 1732, 179 (1792).	Ambiguous	"These Indians not only desired a free commerce, but likewise to enter into a strict league of friendship with us and our six nations . . . ."
WILLIAM SMITH, HISTORY OF THE PROVINCE OF NEW-YORK, FROM THE FIRST DISCOVERY TO THE YEAR 1732, 192 (1792).	Trade	"Nothing could more naturally tend to undermine the trade at Oswego, to advance the French commerce, at Niagara, to alienate the Indians from their fidelity to Great Britain . . . ."

Source	Meaning of "Commerce"	Context
1792		
Conversation with George Hamond (Apr. 30–July 3, 1792), *in* 11 THE PAPERS OF ALEXANDER HAMILTON 347–48 (Harold C. Syrett ed., 1966).	Intercourse	"[H]e said that this government would, he doubted not, consent to grant to the subjects of the crown a free intercourse of commerce with the Indians dwelling within the American territory, provided that a similar intercourse with the Indians residing in the territory of Canada should be allowed to the citizens of the United States. . . . [T]hose Gentlemen imagine that the evils, resulting from the surrender of the posts, would be considerably alleviated by the permission, to the subjects of the two countries, of his reciprocity of commerce with the Indians residing within their respective dominions."
1793		
Letter from Post Vincennes Citizens to George Washington (Nov. 20, 1793), *in* 14 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 410–12 (David R. Hoth ed., 2008).	Intercourse	"That your petitioners having lately heard of the publication of the Laws of Congress, made for the regulation of the Commerce with the Indians, and of your proclamation in congress forbidding any person whomsoever to establish himself upon lands belonging to them . . . ."[179]

[179] The law referred to is the Trade and Intercourse Act.

Source	Meaning of "Commerce"	Context
1794		
Indian Grants to the Inhabitants of Post Vincennes (Apr. 4, 1794), *in* 1 AMERICAN STATE PAPERS: PUBLIC LANDS 26 (Geo Taylor, Jr. trans.,1834).	Intercourse	"The petition of the inhabitants of Post Vincennes humbly showeth, that your petitioners, having lately heard of the publication of the laws of Congress, made for the regulation of the commerce with the Indians, and of your proclamation in consequence, forbidding any person whomsoever to establish himself upon lands belonging to them . . . ."[180]
1795		
Address from Caius to the President of the United States (Jul. 21, 1795), *in* 1 THE AMERICAN REMEMBRANCER; OR, AN IMPARTIAL COLLECTION OF ESSAYS, RESOLVES, SPEECHES, &C. RELATIVE, OR HAVING AFFINITY, TO THE TREATY WITH GREAT BRITAIN 112 (1795).	Ambiguous	"[T]o see all our present exclusive benefits of trade and commerce with the Indians, yielded to the British without equivalent, thereby confirming their present influence over the Indian nations . . . ."

[180] The law referred to is the Trade and Intercourse Act.

Source	Meaning of "Commerce"	Context
1795		
Atticus No. III, *in* 1 THE AMERICAN REMEMBRANCER; OR, AN IMPARTIAL COLLECTION OF ESSAYS, RESOLVES, SPEECHES, &C. RELATIVE, OR HAVING AFFINITY, TO THE TREATY WITH GREAT BRITAIN 149 (1795).	Ambiguous	"The power of congress to regulate commerce with the Indian tribes, is thus destroyed by a single coup of the presidential and senatorial hands."
Cato No. IV, *in* 1 THE AMERICAN REMEMBRANCER; OR, AN IMPARTIAL COLLECTION OF ESSAYS, RESOLVES, SPEECHES, &C. RELATIVE, OR HAVING AFFINITY, TO THE TREATY WITH GREAT BRITAIN 154 (1795).	Trade	"[I]f the British merchant can trade with equal advantage in our territory, and superior in the British territory—the last can employ a greater capital in his commerce; and as the Indian trade is liable to frequent interruptions by wars and bad seasons, which may prevail in our country . . . ."

Source	Meaning of "Commerce"	Context
1795		
ALEXANDER J. DALLAS, FEATURES OF MR. JAY'S TREATY. TO WHICH IS ANNEXED A VIEW OF THE COMMERCE OF THE UNITED STATES, AS IT STANDS AT PRESENT, AND AS IT IS FIXED BY MR. JAY'S TREATY 33–34 (1795).	Trade	"Her traders will boast of the favour and security, which she has compelled America to grant to the Indians; and so engage their confidence and attachment; while the privilege of free passage and the exemption from duties, will inevitably throw the whole fur-trade into the hands of the British. . . . It will not add a shilling to the profits of our Indian traffic; nor insure us a moment's suspension of Indian hostilities! But, to prosecute our *constitutional* enquiry—what right is there, by *treaty*, to regulate our commerce with the Indian tribes? Whenever a treaty of peace and amity has *heretofore* been concluded with the Indians, it has been the constitutional practice of the President, to call on Congress to regulate the commerce with them."
ALEXANDER J. DALLAS, FEATURES OF MR. JAY'S TREATY. TO WHICH IS ANNEXED A VIEW OF THE COMMERCE OF THE UNITED STATES, AS IT STANDS AT PRESENT, AND AS IT IS FIXED BY MR. JAY'S TREATY 34 (1795).	Ambiguous	"But let us imagine for a moment, that it is in the power of the President and Senate to regulate our commerce with the Indian tribes; *ought not the regulation to be made with the Indians themselves?*"

Source	Meaning of "Commerce"	Context
1795		
Robert G. Harper, An Address from Robert Goodloe Harper, of South-Carolina, to His Constituents, Containing His Reasons for Approving of the Treaty of Amity, Commerce, and Navigation, with Great Britain 30–31 (1795).	Ambiguous	"[T]he constitution says that congress, among the legislative powers that are vested in it, shall have that of 'regulating commerce with the Indian tribes.' The meaning, evidently is, and has always been so understood, that congress shall have power to make all the *legislative regulations* that may be necessary in our commerce with the Indians . . . . The old congress could regulate commerce with foreign nations and the Indian tribes . . . ."
Atticus No. VIII, *in* 3 THE AMERICAN REMEMBRANCER; OR, AN IMPARTIAL COLLECTION OF ESSAYS, RESOLVES, SPEECHES, &C. RELATIVE, OR HAVING AFFINITY, TO THE TREATY WITH GREAT BRITAIN 149 (1795).	Ambiguous	"By the 3d article of the treaty this power is affirmed by the president and senate; for it declares, that 'no duty of entry shall ever be levied by either party on peltries brought by land or inland navigation into the said territories respectively, *nor shall the Indians, passing or repassing with their own proper goods and effects, of whatever nature, pay for the same any import or duty whatever*. The power of *congress* to regulate commerce with the Indian tribes, is thus destroyed by a single coup of the presidential and senatorial hands."

Source	Meaning of "Commerce"	Context
1795		
Cato No. IV, *in* 1 THE AMERICAN REMEMBRANCER; OR, AN IMPARTIAL COLLECTION OF ESSAYS, RESOLVES, SPEECHES, &C. RELATIVE, OR HAVING AFFINITY, TO THE TREATY WITH GREAT BRITAIN 155 (1795).	Trade	"[A]nd we should certainly make a miserable exchange, if for this we sacrifice a branch of commerce of such immense importance, as the Indian trade."
1796		
5 ANNALS OF CONG. 1185 (1796).	Ambiguous	"British traders were all allowed, by the new Treaty . . . to carry on trade and commerce with the Indians living within our boundaries . . . ."

Source	Meaning of "Commerce"	Context
1796		
Letter from George Washington to James McHenry (July 18, 1796), *in* 20 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 445–47 (David R. Hoth & William M. Ferraro eds., 2019).	Trade	"The extract which you enclosed in your letter of the 10th, from the Secretary of the Treasury, declaring his inability to furnish money for carrying on Commerce with the Indian Tribes, renders the appointment of Agents for that purpose, *at present*, altogether improper—and whether the Act 'to regulate Trade and intercourse with the Indian Tribes, and to preserve Peace on the Frontiers' does, or does not go fully to the points which are enumerated in your letter of the 12th, there seems, under existing circumstances, no expedient so proper to execute the requisites of the above Act . . . ."

Source	Meaning of "Commerce"	Context
1796		
Letter from George Washington to Timothy Pickering (July 20, 1796), *in* 20 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 463–65 (David R. Hoth & William M. Ferraro eds., 2019).	Trade	"The want of funds to carry on Commerce with the Indian Tribes (agreeably to a late Act of Congress) is an unanswerable objection to the appointment of Agents, *at this time*, for that purpose."
6 ANNALS OF CONG. App'x 2889–90 (1796).	Trade	"[E]very such agent shall take an oath or affirmation faithfully to execute the trust committed to him; and that he will not, directly or indirectly, be concerned or interested in any trade, commerce or barter with any Indian or Indians whatever, but on the public account . . . ."
1798		
JAMES T. CALLENDER, SKETCHES OF THE HISTORY OF AMERICA 45 (1798).	Trade	"Their common eagerness to pursue it, may readily be traced to their strong desire of purchasing furs from the Indians, at a very cheap rate, in order to sell them at an exorbitant price in Europe. The spiritous liquors, which formed a staple commodity in this commerce, have utterly destroyed whole tribes of the primitive Americans . . . ."

Meaning of "Commerce"	Total Search Results	Percent of Total Results
Trade	25	52%
Ambiguous	14	29%
Intercourse	8	17%
Indian Affairs	1	2%
Total	*48*	*100%*