

Beyond The Indian Commerce Clause: Robert Natelson's Problematic "Cite Check"

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Introduction

Academic disagreements risk becoming reality shows. Conflict and drama are entertaining; they draw attention. Historical research, by contrast, is much less entertaining: careful parsing of complicated eighteenth-century documents makes bad television. And so the temptation is to just fast-forward through these boring, detail-oriented bits. The drama, not the facts, become the story. But this isn't a show; it's a dispute with real-world consequences. Facts and scholarship should matter.

The stakes here are much more significant than the potentially wounded egos of two non-Native scholars. The argument between Mr. Natelson and me takes place in the shadow of *Brackeen v. Haaland*, [one](#) of the most important constitutional disputes over Indian affairs to reach the Supreme Court in decades. The outcome in this case will profoundly affect the lives of countless Native children and the rights of Native and non-Native families who seek to care for them. The decision could also call into question many other federal laws that similarly seek to support Native autonomy, profoundly affecting Native communities.

For this reason, I have taken the time to carefully go through Mr. Natelson's critiques and respond thoroughly to each of his concerns with my 2015 *Yale Law Journal* article [Beyond the Indian Commerce Clause](#). The result is necessarily lengthy—over half as long as the original article. I do this even though, given the context of this dispute, no one could mistake Mr. Natelson for a good faith critic of my work. (I will address Mr. Natelson's additional arguments in his recent *Federalist Society Review* article in a subsequent publication).

Here's that context: In 2007, Mr. Natelson wrote a law review [article](#) on the original understanding of the Indian Commerce Clause. Justice Thomas later [cited](#) Mr. Natelson's article in a 2013 concurrence questioning Congress's authority to enact the Indian Child Welfare Act (ICWA). In 2015, while a graduate student finishing my J.D./Ph.D. in American Legal History at Penn, I published [Beyond the Indian Commerce Clause in the YLJ](#), which revisited original understandings of the sources of federal power over Indian affairs. In the article, I argued that the Founders thought that the federal government's authority rested not just on the Indian Commerce Clause but on the interplay between *multiple* constitutional provisions, including the Treaty Clause, the Territory Clause, the war powers, the law of nations, and the Constitution's limits on state authority. The article also challenged Justice Thomas's and Mr. Natelson's conclusions in what Mr. Natelson later [conceded](#) was a "generally respectful" tone. Since the article, a [number](#) of subsequent [articles](#) by other scholars, some [right-of-center](#) and others [disagreeing](#) with my conclusions, have similarly challenged Mr. Natelson's views.

Thomas's concurrence predictably spawned a number of legal challenges to ICWA. In 2019, when the *Brackeen* case was before the Fifth Circuit, I submitted an amicus [brief](#) reiterating the conclusions of my 2015 article and repeating, in condensed form, my earlier critiques of Mr. Natelson's conclusions. Earlier this year, Mr. Natelson discovered this brief. He

published an explosive [response](#) accusing me of being a “shyster.” Now, deciding the best defense is a good offense, he has taken it upon himself to [“cite check,”](#) eight years on, my 2015 Yale article.

Mr. Natelson’s accusations are dramatic. He claims that the article had a “disturbing number of inaccurate, non-existent, and misleading citations, as well as deceptively-edited quotations.” He even suggests that the *Yale Law Journal* failed so egregiously in its cite-checking that the article could only have been published either to placate a faculty member or for “political reasons” due to left-wing bias.

Beyond the Indian Commerce Clause did, in fact, go through an extensive cite-checking process. I’m deeply appreciative to the Yale Law Journal’s student editors who went through the Article’s 416 footnotes and over 140 primary sources to make sure that each citation was fair and accurate. Mr. Natelson’s “cite check,” by contrast, clearly did not undergo the same rigorous scrutiny, since many of its allegations can be disproven with a simple Google search.

Nor did the Article simply confirm “left-of-center” ideological and normative priors. As anyone who has spent time in Indian country knows, the federal government has long played an at-best ambiguous role in Indian affairs, often using its authority to cause great harm to Native communities. Thus, the most vehement [critiques](#) of federal Indian law from the left, derived from critical race [theory](#), have been *attacks* on federal authority. Although I do not think my historical findings support the doctrine of federal “plenary power” *over* tribes, the article nonetheless examined how “the first federal leaders’ narrow claims of sovereignty over Native nations became the doctrinal tools for ever more aggressive assertions of federal authority to regulate Indians.” I personally would strongly favor a constitutional interpretation that gave more space to Native independence and less to federal power, but the underlying Founding-era history that the article uncovered is complex and multivocal.¹

If, as the Supreme Court has increasingly insisted, history will be the primary basis for determining constitutional meaning, then we need to ensure that that history rests on the best, fullest evidence. Originalists insist that originalism is not just an effort to confirm preordained conclusions that conform to ideological preferences. In this regard, the seeming imperviousness of Mr. Natelson’s views and his ceaseless attempts to find reasons to ignore substantial contrary evidence—as well as his repeated claims that I am unscholarly and my work published only because of left-wing bias—are worrying. This, unfortunately, is not a conversation between two scholars committed to reading all the evidence and arriving at the best interpretation. It has become, I fear, about Mr. Natelson insisting that he is right. I believe that, at the very least, the history before the Court should be based on more than that. I recognize that I am hardly an

¹ The “left of center” charge is also off-base because my article *challenges* efforts by left-leaning scholars like Akhil Amar and Jack Balkin to use the history of Indian affairs to claim a broad reading for “commerce” more generally. Indeed, Robert Pushaw, a right-leaning scholar on the Commerce Clause, recently [cited](#) my article as the “definitive work” on the Indian Commerce Clause to *reject* Akhil Amar’s interpretation of “commerce.”

Prof. Amar was, in fact, quite displeased with my article: before publication, he called me up to harangue me for an hour and a half about why the article was wrong. Mr. Natelson thus gets it backward: I was actually worried that a powerful YLS faculty member would encourage YLJ to *rescind* my publication offer. Fortunately, that didn’t happen.

impartial observer either, but I think I have the receipts for my interpretations. I invite readers to look beyond the flashy controversy, examine the sources, and decide for themselves.

I address Mr. Natelson's critiques individually and at much more length below. I've done so by sorting his critiques into three broad categories. Here, I'll briefly explain these categories as well as provide a general critique of the argumentative moves they make.

- 1) *Plain Error*: In these critiques, Mr. Natelson accuses me of relying on non-existent sources. Mr. Natelson's mistakes are not subjective: sources either exist or they don't. **Every instance of a source that Mr. Natelson and his assistant were unable to locate is readily available online, and confirms my original citation.** Without any instruction from me, my Research Assistants were able to locate most of them in minutes—sometimes in seconds. Readers can do the same: I've provided screenshots and also linked to the sources.
- 2) *Claiming that Context Confirms His Conclusions in the Absence of Any Actual Evidence*: Allegations of “misleading citations,” “deceptively edited quotations,” and “manipulation” reflect a more complicated disagreement, which I will discuss in more detail below. But Mr. Natelson's basic move is consistent. When confronted with contrary evidence whose plain textual meaning seems contravene his preferred interpretation, he retrieves additional context from the original source—a useful exercise. But he then claims to discover in that context a limiting principle that he claims “proves” some alternate explanation—one that conveniently leaves his original hypothesis untroubled.

Yet the actual sources contain nothing that directly substantiates or supports Mr. Natelson's proposed limiting principle. His conclusion rests instead on his own often-tenuous inferences about what the author *must have meant*.

This is best understood through concrete examples. Take President Washington's statement that “the Executive of the United States possess[es] the only authority of regulating an intercourse with them [the Seneca Indians].” In the original article, I cited this provision only to show that Washington asserted federal supremacy over Indian affairs; I relied on other documents to discuss the *source* of federal authority. Nonetheless, Mr. Natelson insists that the President here “was alluding to his duties under a specific treaty between the United States and the Six Nations (one of which was the Senecas)—not to any general power over all Indians.”

How does Mr. Natelson know? You might think, based on Natelson's confident conclusion, that Washington's letter explicitly *said* that he was relying on the treaty. If so, you'd be wrong: though he was writing about the Senecas, Washington's letter said absolutely nothing about the treaty. Thanks, however, to Mr. Natelson's apparent mind meld with Washington, the treaty's mere existence “proves” that Natelson's conclusion is *definitively* correct.

I think Mr. Natelson's interpretation here is unlikely; it cuts against significant other historical evidence, which I discuss below. But, though I think my interpretation more plausible, I cannot "prove" Mr. Natelson's view wrong any more than Mr. Natelson can "prove" my view wrong: no responsible historian would assert such certainty in the face of a silent source. The only claim here that I think can be fairly deemed objectively wrong is Mr. Natelson's claim to definitive authority and knowledge.

This example is representative of other similar examples, which I will discuss below.

- 3) *Asserting Interpretive Disagreements are Factual Errors*: Though similar to the prior move, in these instances Mr. Natelson just reiterates diverging interpretations and then accuses me of error for not agreeing with his conclusions. Did Mr. Natelson or I more faithfully interpret what an author said in her book or article? Is a treaty provision an "assertion" of federal authority or an acknowledgement that it would otherwise be absent? How best to read the appearances of the word "exclusive" in the Constitution? These are all classic interpretive questions. Mr. Natelson is free to dispute my views, which he clearly does. But the idea that I committed scholarly misconduct by offering my interpretations in *my* article is laughable. This standard of "cite-checking" decrees as sound scholarship only the interpretations that Mr. Natelson deems correct—a standard ultimately subversive of scholarship itself.

All of these issues frame a larger disagreement between Mr. Natelson and me. He finds great certainty in his interpretations of the past and of other scholars—so much so that, when I earlier pointed out much of his argument rested on an inaccurate version of a quotation that, when corrected, directly contradicted his original interpretation, he [insisted](#) that the corrected quotation still did not trouble his original conclusion. You will find a similar attitude throughout his "cite check": deep confidence that not only is his interpretation right and mine wrong, but that my view is so egregiously incorrect as to not warrant publication.

I don't feel such complete certainty about the unerring correctness of my conclusions, though I sometimes wish I did. But I also think such certainty is antithetical to the virtues of a good historian and scholar: openness to the ambiguity and complexity of the past; commitment to understanding historical sources on their own terms rather than in light of predetermined conclusions; acknowledgment when incomplete evidence makes definitive answers impossible. The only reason I felt justified in reaching the conclusions that I did in my original article was that I had looked at lots of sources, from different perspectives, that coalesced around similar points. I have not repaid Mr. Natelson's work with the attention he has lavished on mine, though my brief digging suggests that it might not meet his own standards: my RAs, for instance, reexamined his text search on the use of the "commerce" and concluded that it does not support his claims about its invariable equivalence with "trade" (more on this below). Nonetheless, the reason I was comfortable asserting that he and Justice Thomas were sometimes wrong in their accounts of the past was because I had uncovered multiple historical sources that explicitly and directly contradicted their claims. There is, however, always the possibility of new evidence or that I missed something. In *Castro-Huerta*, for instance, Justice Gorsuch cited a letter from Thomas Jefferson to Henry Knox about treaties that I had read long ago but completely forgotten about.

And so my initial thought on discovering Mr. Natelson's cite check was that maybe I *had* gotten something wrong. After all, I wrote *Beyond the Indian Commerce Clause* nearly a decade ago, when I was very junior, and mistakes inevitably happen. And, in fact, I did discover a factual inaccuracy, although not one "corrected" by Mr. Natelson. In footnote 265, I said that the U.S. first asserted criminal jurisdiction over Natives in Indian country in 1834. Actually, that happened in federal statute enacted in 1817. Though nothing in my article turned on this precise date, I regret the error. (I discuss this more below).

Otherwise, I was pleasantly surprised at how well my article stood up against Mr. Natelson's rather naked attempt to scour it for any and all flaws, no matter how minor, with which to discredit it. In the end, Mr. Natelson presented no evidence that I had not already read and considered when I wrote the original article. And I found his attempts to debunk my work and explain away unhelpful evidence either unambiguously wrong or highly unpersuasive. He did helpfully catch some stray volume numbers and dates in a couple citations. Nearly eight years after publication, though, it's probably too late to go back and correct them.

I. Plain Errors

Mr. Natelson and his research assistant claimed that they could not locate or identify various sources from my article. I asked my research assistants to locate them without providing them any additional assistance. They did. I have included in parentheses the amount of time they said it took them to identify the sources.

I'm a little baffled as to why Mr. Natelson and his assistant struggled to locate these sources. In one case, I can replicate what went wrong, since it troubled my RAs, too: my article used the HeinOnline version of the *Annals of Congress*, while the online version from the Library of Congress uses a different printing of the same source with slightly different pagination. But in the other instances, I can't find any plausible explanation as to why Mr. Natelson failed find these readily available, public sources located at the exact spot my citations said they were.

I have outlined Mr. Natelson's original text in red (he indented the text from my article) and kept it in Century SchoolBook; my response in black and in Times New Roman.

Pages 1041-42, text & fn. 159:

Frustrated by state interference under the Articles, [Knox] read the Constitution as a grant of expansive authority. "[T]he United States have, under the constitution, the sole regulation of Indian affairs, in all matters whatsoever," he instructed a federal Indian agent.¹⁵⁹

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

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

Ablavsky Comment: <https://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=007/llsp007.db&recNum=233>

232

INDIAN AFFAIRS.

[1792]

You will clearly understand, that the United States have, under the constitution, the sole regulation of Indian affairs, in all matters whatsoever. You will, therefore, receive no orders but from me, in the name of the President, and from the superintendent.

In all your transactions, your conduct must be marked with economy, and a due regard to the public interests. Your permanent appointment and your reputation, will materially depend on your attention to this order.

It will, therefore, be your duty, not only to guard the public property from waste or embezzlement, but to prevent any other person from doing the same. Your accounts will be rigidly examined, and any deviations from this order will be in your own wrong.

You are to understand, that any improper assembling of the Indians, will be considered as a violation of your orders, and will be severely censured, besides the expenses disallowed.

It will be proper, that you establish some certain mode of communicating with me, by confiding your letters to some persons of reputation, on the route from Canandaigua to Philadelphia.

Colonel Pickering is of opinion that Matthias Hollenback, of Wilkesbarre, Guy Maxwell, Esquire, at Tioga Point, and Mr. John Morris, at Newtown Point, would be proper persons for this purpose; I shall, accordingly, direct my letters to you through them, until I receive your further communications on the subject.

Given, &c.

H. KNOX,
Secretary for the Department of War.

(7 minutes)

The source that Mr. Natelson identifies is an entirely separate document from the manuscript Samuel Kirkland Papers (rather than the published American State Papers, which drew from governmental archives). As a cursory glance at the two documents demonstrates, they are two different documents, not different versions of the same source.

Page 1042, fn. 161:

Letter from Henry Knox, Sec'y of War, to the Governor of Ga. (Aug. 31, 1792), in 1 AMERICAN STATE PAPERS: INDIAN

AFFAIRS, *supra* note 81, at 258, 259 (“[Y]our Excellency will easily discover what is the duty of the federal and your own Government. The constitution has been freely adopted; the regulation of our Indian connexion is submitted to Congress; and the treaties are parts of the supreme law of the land.”).

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

Ablavsky Comment: <https://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=007/llsp007.db&recNum=260>

1792.]

GENERAL VIEW.

259

Under these circumstances, your Excellency will easily discover what is the duty of the federal and your own Government. The constitution has been freely adopted; the regulation of our Indian connexion is submitted to Congress; and the treaties are parts of the supreme law of the land. It would be a criminal negligence in the federal administration to pass over the gross infraction of public tranquillity, and the insult to the public honor, which are said to be in contemplation. I am authorized to declare to you, sir, in order to testify the determination to uphold you in the most vigorous exertions under the laws of your State, that those of the United States will be strictly enforced and executed upon the offenders, without distinction.

To invite your Excellency to the strenuous exercise of the power which your office confers upon you, no arguments can be necessary. It cannot be believed that any State would assume upon itself a responsibility for the waste of blood and treasure, which the want of a timely interposition, on this occasion, must produce. It cannot be believed that any State would countenance, even by indifference, those individuals, who shall presume to set the constitution and the law at defiance. While every usurpation of power will be avoided, no legal power ought to be abandoned. Permit me, then, to exhort you, as you regard the Union, and love order, to suppress those violent and unwarrantable proceedings, of which you have been apprised. The affections of the enlightened citizens must be with you in such a contest: for those who may be compelled to step forward with energy in this exigency, can have no interest, distinct from theirs, nor any wish to gratify, but that of preventing the public authority from being trampled under foot.

I have the honor to be, &c.

(30 seconds)

Page 1046, text & fn. 182:

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

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

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

Ablavsky Comment:

1793

HISTORY OF CONGRESS.

1794

H. OF R.]

Address to the President.

[DECEMBER, 1790.]

war, and of extending the protection of Government to our defenceless frontiers, as any man whatever; and had no doubt of the necessity of the measures taken to chastise the banditti on the Ohio; but as a Representative from the State of Georgia, he should think himself inexcusable were he not to express his astonishment that no notice is taken in the President's Speech of the Treaty with the Creek Nation; a treaty which has spread alarm among the people of that State—a treaty by which more than three millions of acres of land, the property of the State of Georgia, guarantied to that State by the Constitution of the United States, are ceded away without any compensation. Mr. J. then adverted to several articles of the treaty, which he said controverted the plainest principles of the Constitution, particularly those parts which secured to every citizen the rights of property. He contrasted the present situation of the inhabitants of Georgia, with what it was under the British Government, and said this treaty placed them in a less eligible situation in respect to the Indians.

It had been said, exclaimed he, that there are secret articles in the treaty. Good God! at this early period, are there to be secret articles existing between the United States and any other nation under heaven! Treaties by the Constitution are to be considered the supreme law of the land; but will Congress permit the laws of the United States, like those of *Caligula*, to be placed where they cannot be read, and then punish the people for not obeying them? The people will never submit to be bound by secret articles.

This selection comes from the version of the *Annals of Congress* available on HeinOnline. A different printing of the *Annals*, with different pagination, appears on the *Library of Congress* website. That version reprints the identical [material](#) but at different location: Vol. 2, p. 1839. (Confusingly, there were *two* distinct printings of the *Annals* in 1834: see document page 1463/pdf page 1495 of [this document](#) for more. I will reach out to the editors of the BlueBook to suggest a revision to avoid similar confusion in the future.). The same language can also be found in Volume 14, p. 34, of the *Documentary History of the First Federal Congress*, which can be found through the online Rotunda database at UVa.

II. Efforts to Use Context to Blunt Textual Meaning

The critiques I address in this part share a common theme. Mr. Natelson presents spectacular accusations that my article manipulates or deceptively excerpts sources. He then claims that the broader context—almost invariably the existence of an Indian treaty with a specific Native nation—undercuts my conclusion and supports his interpretation.

The biggest problem here is that *none* of the sources says what Natelson claims for them. In my article, I cited remarks from President Washington, Governor Pinckney, the Virginia state legislature, and Henry Knox, all of which, in my view, supported the idea of broad federal authority, and limited state authority, to govern relations with Native nations. (I cited others in this section, too, that suggest very similar conclusions—letters from Edmund Randolph, Henry Knox, Thomas Jefferson, and a document from the Georgia state legislature—but Natelson apparently could not find nits to pick there). But despite seemingly broad language in all these sources, Natelson discovers a narrowing principle in each: President Washington, he asserts, was referring only to the Treaty of Fort Harmar, Governor Pinckney was limiting his remarks only to the western territory, Secretary of War Knox was invoking only the Treaties of Hopewell, and the Virginian legislature was only referring to the Chickasaws.

The problem is that none of these sources actually *articulated* any of the limiting principles that Mr. Natelson advances. But he is so convinced of his rightness that he will draw all necessary inferences, however broad and implausible, to show that not only that is his view correct but that my reading—again, based on what the language of the source *actually* said—is unscholarly and out of bounds.

Because it is impossible to prove a negative, I cannot “prove” that Washington *wasn’t* secretly alluding to the Treaty of Fort Harmar in his letter to Governor Mifflin—any more than Mr. Natelson can “prove” that the President *wasn’t* relying on the Indian Commerce Clause (which, to be clear, I did not argue). Nonetheless, as I discuss below, I think Mr. Natelson’s inferences are highly unlikely, conflicting both with contextual evidence and with the plain meaning of the sources themselves. (In the instance of Governor Pinckney’s letter, I can show that Mr. Natelson is objectively wrong, because he was mistaken about the location of the territory of the Muscogee Creek Nation).

Two further general points. First, no one disputes that the Treaty Power, and treaties with Native nations, were and are an important source of federal authority over Indian affairs. But none of the Founding-era Indian affairs statutes—most notably the Trade and Intercourse Act—limited their application solely to tribes that had entered treaties with the United States. Mr. Natelson’s insistence that the Act rested only on the Hopewell Treaties bizarrely envisions that three treaties with three tribes could be the constitutional basis for the federal government to claim authority over federal relations with *all* tribes. Also significantly, at least one piece of Founding-era evidence explicitly rejects Mr. Natelson’s view—though he has repeatedly failed to address this source and instead consistently changed the subject to focus on the fact, which I have never disputed, that this source also invokes the Territory Clause. (More on this below).

Second, Mr. Natelson repeatedly argues that the conclusion that the Founders reached applied only to the specific Native nation at issue in the source. Of course, axiomatically, *any* conflict in Indian affairs will involve a particular nation. Mr. Natelson’s argument here is a bit like claiming that the Nullification Crisis tells us nothing about the history of federalism because it involved South Carolina, not every state. More generally, the idea of legally recognizing tribes as distinct with distinctive histories—what Sai Prakash has [described](#) as rejecting “tribal fungability”—is a normatively appealing position that I support as a matter of present-day policy. But it was not the legal or constitutional position of the Founders. They spoke constantly about “Indian tribes”—most notably in the Constitution, but also in the sources that Mr. Natelson seeks to distinguish away. *They* were the ones who *created* this generic category of “Indian tribe” and imbued it with legal significance. In so doing, their approach here echoed other laws of the era governing sovereignty, whether the law of nations—which insisted on formal equality among nations—or the equal footing doctrine within federalism.

Mr. Natelson’s efforts here should be read for what they are: a rather obvious attempt to grasp at any facts, however tangential, to try to narrow the meaning of evidence that would otherwise trouble his conclusions.

Page 1041, text & fns. 157 & 158:

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

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

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

affairs”).

Comments: This citation presents multiple problems.

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

Ablavsky Comment: This is incorrect. The *Papers of George Washington* reprints the [letter](#) to Pickering in its main entry on this page. However, the language quoted comes directly from the letter from Washington to *Mifflin*, not Pickering. Contrary to Mr. Natelson’s claim, the language was not “quoted” in Pickering’s letter. Rather, the editors of the *Papers* (not Pickering) excerpted the Mifflin letter in a footnote printed below the letter from Pickering (as the material that Natelson quotes in the very next paragraph makes this clear).

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

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

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

(Some words omitted by the author italicized.)

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

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

Ablavsky Comment: There is a lot to say here. First, Mr. Natelson is strawmanning my argument. I did not say in my article that the authority invoked in this letter derived from the Indian Commerce Clause. In fact, only a paragraph before this citation, I wrote, "Indian affairs influenced the Constitution well beyond the Commerce or Treaty Clauses; they affected the Supremacy Clause, the Guarantee Clause, Article III jurisdiction, restrictions on the states, and military powers. Most observers understood federal authority over Indian affairs as emerging from the interplay of all of these clauses." Moreover, I cited the source primarily to show the proposition for which the statement unambiguously stands—which is that President Washington asserted federal supremacy over the nation's "intercourse" with Indian tribes (or, to placate Mr. Natelson, at least one Indian tribe).

We could argue endlessly about precisely *which* constitutional authority justified Washington's statement. Unfortunately for present-day historians, Washington didn't tell us, making impossible to authoritatively determine the answer.

But not, apparently, for Mr. Natelson, who asserts with great certitude that he knows the "actual source" of President Washington's authority here: the [1789 Treaty of Fort Harmar](#) with the Six Nations, and definitely *not* the Indian Commerce Clause. It is unclear why he is so certain given Washington's silence on this question. The treaty is at best a *possible* source of authority—though the text of the treaty provision at issue here provides little support for Washington's claim of *sole* federal authority. The treaty provided that any robbery or murder committed by a citizen or subject of the United States against an Indian "shall be tried, and if found guilty, be punished according to the *laws of the state*." Similarly, the provision requires that the Six Nations deliver perpetrators accused of a crime "to the civil authority of the state." This language seems a thin basis for Washington's assertion that the U.S. President had the "only authority of regulating an intercourse with them."

A more likely basis for Washington's conclusion, in my view, is the [Trade and Intercourse Act](#), ch. 33, 1 Stat. 137 (1790), enacted by the First Congress only two months before Washington's letter. Like Washington's letter, the Act used the term "intercourse"—seven times—to establish exclusive federal and in particular *executive* regulation over "any trade or intercourse with the Indian tribes." *Id.* §§ 1-2. The law, in short, broadly delegated authority over "intercourse" with tribes to the President. It also specifically established criminal jurisdiction over offenses committed with the Indian territory (though the provision was somewhat ambiguous about the balance of state/federal jurisdiction; subsequent versions would make clear that this crime fell under *federal* jurisdiction). *Id.* § 5.

Support from this proposition comes from Washington’s correspondence with the Seneca Nation three months later. The Senecas [presented](#) a long list of complaints, including the failure to punish murders committed against them. Letter from the Seneca Chiefs to George Washington (Dec. 1, 1790), *in* 7 Papers of George Washington: Presidential Series 7-16 (Jack D. Warren ed, 1998). Washington’s [reply](#) was a broad reaffirmation of federal supremacy. George Washington to the Seneca Chiefs (Dec. 29, 1790), *in* 7 Papers of George Washington: Presidential Series, *supra*, at 146-50. In response to Seneca complaints about state land sales, Washington noted that those “arose before the present government of the United States was established, when the separate States, and individuals under their authority, undertook to treat with the Indian tribes respecting their lands.” Washington continued: “But the case is now entirely altered—the general government only has the power to treat with the Indian nations, and any treaty formed and held without its authority will not be binding.” Washington proceeded to discuss the continued validity of the Treaty of Fort Stanwix (an earlier treaty predating the Treaty of Fort Harmar that Natelson invokes) providing protection for their lands. He then stated, “you will perceive by the law of Congress, for regulating trade and intercourse with the Indian tribes, the fatherly care the United States intend to take of the Indians.” This evidence—from the Seneca Nation specifically—reinforces the conclusion that Washington emphasized the Trade and Intercourse Act, alongside the treaties, as the source of his authority.

Natelson and I also disagree, of course, about the basis for federal authority to enact the Trade and Intercourse Act—he argues that it reflected only the Treaty Power, not the Indian Commerce Clause. I will discuss this claim in more detail in a moment.

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

Ablavsky Comment: Justice Gorsuch *did* cite Washington’s letter in his *Castro-Huerta* dissent. Here is the relevant quote:

In a letter to the Governor of Pennsylvania, President Washington stated curtly that “the United States ... posses[es] the only authority of regulating an intercourse with [the Indians], and redressing their grievances.” Letter to T. Mifflin (Sept. 4, 1790), *in* 6 Papers of George Washington: Presidential Series 396 (D. Twohig ed. 1996).

142 S. Ct. at 2506. (Gorsuch, J., dissenting). Though J. Gorsuch cited my article in the two prior sentences, he did not cite me here; he cited Washington’s letter independently. Mr. Natelson is thus accusing Justice Gorsuch of one of two things: either the Justice 1) plagiarized my work or 2) engaged in the exact same “manipulation” that Mr. Natelson claims to find in my article.

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

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

The omission was a sentence appearing immediately before:

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

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

Ablavsky Comment: I have already dealt with this objection from Natelson [elsewhere](#), but he did not engage with my reply. I'll repeat the short version. In the brief, I was seeking to rebut Natelson's claim in his article that the Trade and Intercourse Act rested solely on the Treaty Power. In this rare instance, a historical actor specifically and explicitly discussed and *rejected* the basis for authority that Natelson claims undergirded the statute.

That was the sole purpose of the citation: to show that historical evidence contradicted Natelson's claim about the relationship between the Treaty Clause and the Trade and Intercourse Act. I did not need to discuss the prior discussion of the Territory and Property Clause to make that argument, and so I didn't. (Briefs are called that for a reason). But I was and am well aware of the invocation of the Territory and Property Clause in the prior sentence. Indeed, I specifically *discussed that exact sentence at length* in both an article and an amicus brief in *Castro-Huerta* itself unpacking the historical role of the Territory Clause in Indian affairs.

Moreover, Natelson once again strawmans my argument: in none of my work, including that brief, have I ever claimed that the Trade and Intercourse Act was *solely* enacted under the Indian Commerce Clause. Others have made that argument, and I think the title and subject of the statute, as well as historical evidence, make it inescapably clear the statute rested at least *partly* on the Indian Commerce Clause. I also think the evidence that the Treaty Clause and the Territory and Property Clause were also thought to support the statute is quite compelling—including through the quotation at issue.

The only argument I think the historical evidence clearly forecloses is the argument that Natelson makes—that the statute rested *solely* on the Treaty Clause.

Page 1043, text:

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

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

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

Ablavsky Comment: Mr. Natelson gets the context here incorrect. Elsewhere in the [letter](#), Pinckney does discuss the western territory (what today is Tennessee, and was then the federally governed Southwest Territory; I have recently published a book recounting its history). However, the Native nation that Pinckney was discussing immediately prior to the quotation at issue was the Muscogee (Creek) Nation: only sentences earlier he discussed "Mr. McGillivray"—the Muscogee leader Alexander McGillivray. At the time, Muscogee Creek territory lay almost entirely within the borders of Georgia (which included present-day Alabama and Mississippi until 1802)—which became a source of frequent, and intense, confrontation between the state of Georgia and the federal government. Indeed, immediately after the quotation at issue, Pinckney discusses how the governor of *Georgia* "made a formal requisition on me for the aid of this State." So Pinckney *was* in fact discussing federal authority over Indian affairs within state borders.

More significantly, Mr. Natelson once again attempts to write limiting principles into historical documents where the authors did not include them. Pinckney did not write, "the general Government, to whom with great propriety the sole management of India[n] affairs *outside the states* is now committed." He did not say "the general Government, to whom with great propriety the sole management *of the national territories* is now committed." The best interpretation, in my view, is that Pinckney meant what he wrote. As one of my RAs observed, "I don't see how Pinckney's characterization of 'the general Government' could have been more unequivocal."

Natelson's constitutional interpretation here is also odd, because it would reduce the federal government's authority over Indian affairs to so much surplassage. After all, the federal government already had broad authority over the federal territories under the Territory Clause. And, as I have traced at much greater length elsewhere, most of the contention around the federal authority over Indian affairs under the Articles concerned intense state-federal battles *within* state borders. So, in Natelson's view, the Constitution did nothing to resolve the long-standing battles over state-federal authority over Indian affairs—notwithstanding the contrary conclusions of many interpreters of the time.

As for Justice Gorsuch, he cited this source in *Castro-Huerta* without any reference to my work. His use of the source thus must stand on its own merits. Presumably Justice Gorsuch is capable of looking up the source (again, readily available [online](#)) and drawing his own conclusions about its meaning and the context.

Page 1043, text & fn. 167:

The Washington Administration's adoption of a position aggrandizing its authority is, perhaps, unsurprising. More unexpected is the agreement of state officials. . . . When the Virginia legislature supplied Indians with ammunition, it made sure President Washington knew it had acted from exigency alone, "le[]st in case of silence it might be interpreted into a design of passing the limits of state authority."¹⁶⁷

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

Several comments are in order here:

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

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

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

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

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

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

(Emphasis added.)

(3) The author omitted the word “Chickasaw” and substituted the word “Indian.” This substitution concealed the fact that the passage is not about Indians in general but about the Chickasaws in particular. The Chickasaw Nation, unlike most tribes, was a signatory to a treaty with the Confederation Congress (1786)—

made binding on the new federal government by Article VI of the Constitution. Article VIII of the treaty stated:

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

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

Ablavsky Comment: I went back to my original submission to law reviews and found that the footnote then contained the relevant date:

¹⁴¹ JOURNAL OF THE HOUSE OF DELEGATES, OF THE COMMONWEALTH OF VIRGINIA 7, 17 (John Dixon, Richmond, Va., 1789). The Virginian House observed that they were obligated to supply the ammunition because it was late in the year and the Chickasaws were unable to travel to New York, but they felt obligated to write to Washington, “incumbent on us to make this communication, least in case of silence it might be interpreted into a design of passing the limits of state authority.” *Id.* at 17.

Somehow the date got lost in the editing process with YLJ (as did the original discussion of the Chickasaw Nation, I vaguely recall for space concerns). Nonetheless, it is my article, and I take responsibility for the omission of the publication date. My RAs nonetheless reported being able to locate the original source even without the date by spending 30 seconds on Google Books.

Once again, Mr. Natelson invokes a treaty as a complete and self-evident explanation for the legal conclusion despite the lack of any discussion of that treaty in the historical record. And once again, the source tells a more complicated story. For all his critique of omissions, Natelson leaves out the beginning of the legislature’s statement, which reads: “It has been a great relief to our apprehensions, for the safety of our brethren of the frontiers, to learn from the communications of the Secretary at War, that their protection against the incursions of the Indians has occupied your attention.” The letter continues to discuss the danger of “Indian barbarity” and anxiety over the “Indian enemy.”

As this context shows, the Virginia Assembly *was* clearly thinking about the context of Indian affairs generally, and not just the Chickasaws. Once again, of course, any particular exercise of governmental authority necessarily involved *specific* Native nations. But Mr. Natelson’s claim that the legislature’s hesitation reflected the Treaty of Hopewell alone would be more persuasive if anyone at the time had said as much, rather than Natelson invoking this explanation *post hoc* to distinguish evidence that he finds unhelpful.

Page 1044, fn. 170:

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

13 | Page

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

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

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

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

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

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

Ablavsky Comments: Again, Mr. Natelson conflates context with proof of causation. Knox’s [report](#) is a long and detailed one, and deals with numerous tribes and treaties. Knox opened the report by noting that it built on prior reports addressing the broad circumstances of Indian affairs both in the present-day Midwest as well as in the South. Indeed, the very 149-word quotation that Natelson demands that I had added in my footnote reinforces this conclusion: note how Knox explicitly spoke of a “general view of the Indian Department” and a “general system for the government of Indian affairs.” Natelson then ignores what Knox actually proceeded to say, which was the basis my conclusion in my original article. “It would reflect honor on the new government and be attended with happy effects were a declarative Law to be passed that *the Indian tribes* possess the right of the soil of all lands within their limits respectively.” Note that Knox did not say “the Cherokee, Choctaw, and Chickasaw Nations” that signed the Treaty of Hopewell—he spoke of Indian tribes more generally.

There is no question that Knox’s concerns included ensuring the sanctity of the treaties, including the Treaties of Hopewell. But it does not follow that the Treaty and Intercourse Act that resulted from Knox’s proposal was therefore an *exercise* of the Treaty Power alone. Indeed,

the whole point of my article—what the title tried to capture but Mr. Natelson seems to continually miss—was that federal power over Indian affairs was thought to rest on the interplay of *multiple* constitutional provisions, including, but not limited to, the Indian Commerce Clause.

Mr. Natelson entirely ignores what followed this citation in my article: “Moreover, Natelson’s reading oddly suggests that Congress believed it could convert a provision in treaties with three tribes into a universal grant of authority. Were this true, of course, the limits Natelson urges on federal power over Indian affairs would be entirely meaningless. A far better reading is that Congress read those treaty provisions to reflect its power over Indian affairs rather than vice versa—an unsurprising position when many Indian treaties contained very similar provisions and followed a standard template.” This critique still stands. Indeed, Mr. Natelson’s comment about “future treaties” only bolsters it. In this view, Congress had the authority to pass a law that took immediate effect and applied to *all* tribes and Indian country, regardless of whether they had signed a treaty with the United States, on the basis that the federal government might one day sign a *future treaty* with that tribe.

III. Interpretive Disagreements

In this section, I discuss a variety of instances where Mr. Natelson argues that I interpreted other scholars’ work incorrectly or read historical texts inaccurately. But these are interpretive disagreements that have no clear right answer (although I contacted a few of those scholars and they repudiated Mr. Natelson’s reading). I still believe that my interpretations were plausible—more plausible, in my view, than Mr. Natelson’s, because they more faithfully reflect the original evidence—but readers will have to make their own determinations. But presenting Mr. Natelson’s conflicting interpretations as a “cite check” strikes me as deeply disingenuous.

Page 1017, fn. 23:

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

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

Ablavsky Comments: My RAs deemed this critique “extremely nitpicky,” and I tend to agree. This parenthetical comes at the end of a long footnote citing sources that describes works that, in the words of the article, urge moving “beyond conventional histories in exploring constitutional meanings.” Here, the most relevant part of Rakove’s [article](#) is pp. 581-82. There, Rakove calls for examining not only the records of the debates over drafting and ratification but also

“contextual” sources, including “the traditions and texts that historians sometimes describe as political languages” as well as “one other set of sources [that] appeared highly relevant to a historically grounded inquiry. That would involve the real political world the Revolutionary generation inhabited—a world filled with a dazzling array of public policy issues and disputes shaped by the hard course of events.” It was this argument that I was trying to align myself with—the argument that “it might be the case that the construction of the foreign policy powers of the presidency owed as much to the Mississippi controversy of 1786 as it did to reading Locke or Blackstone on the prerogative of the Crown.” Substitute in the term “Indian affairs powers of the federal government,” and you basically capture what I was trying to accomplish methodologically in my article.

But let’s pick some nits. Prof. Rakove has published extensively on originalism, and his work makes it clear that he is no fan of originalism as conventionally practiced and defined. Perhaps his article can be read as a defense of “original understanding” originalism, but hardly in a way that echoes how most originalists would define that term. Rather, he endorses an originalism that relies very heavily on historians’ methodologies but notes that such an approach could “provid[e] an authoritative account of the original intentions of the Framers and the understandings of the ratifiers of the Constitution. There are too many gaps in the evidence, too many silences, and usually too few voices to provide an adequate account of the original meaning of the text.” I don’t think that’s how most commentators have used the term.

But you don’t have to take my word for it. I read Mr. Natelson’s critique right after running into Prof. Rakove, and so I emailed him about it. This was his characterization of Mr. Natelson’s interpretation: “balderdash.”

Page 1027, text & fn. 70:

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

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

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

Ablavsky Comments: In my view, this critique actually bolsters the point I was attempting to make. This footnote appears in a section that sought to show that Anglo-Americans rarely discussed Indian trade when they spoke about “commerce.” The previous sentence even reads, “The vast majority [of discussions of commerce] concerned overseas commerce with foreign nations.” The quotation then bolsters that conclusion. Natelson is correct: the quotation comes in the context of a discussion of excise taxes (which the Anti-Federalist Yates, at least, discussed in the context of Indian affairs) and impliedly discussed foreign commerce. But that’s not what they said: they spoke of “our commerce.” In other words, the whole point is that, when speaking generically of “our commerce,” they implicitly assumed they were discussing foreign commerce, not Indian commerce.

Page 1028, text & fn. 80:

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

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

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

The words “Natelson employed” refers to my article, *The Original Understanding of the Indian Commerce Clause*, 85 DENVER U. L. REV. 201 (2007). As that article makes clear, I used both databases, not merely *Early American Imprints*, *id.* at 215, as the author suggests in this passage.

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

Ablavsky Comments: There is no factual disagreement here, just an argument over relevance. *Early American Imprints* only contains works published in what became the United States, and there are only a few instances of the precise phrase appearing. Of course, many of the books in early America *were* printed in the British Isles. However, there is good reason to be skeptical that those books are particularly representative of how people in the early American colonies thought about Indian affairs. After all, until the 1760s, each colony governed Indian affairs and trade itself with minimal imperial intervention or oversight, and only a handful of Native peoples actually traveled to England. For this reason, the standard Corpus of Founding Era American English (COFEA) includes only sources from what became the United States. Nonetheless, although I consider the North American usages more probative, I asked my RAs to examine all the instances from *Eighteenth-Century Collection Online* that Mr. Natelson reports relying on. Here's what they reported:

We began with 110 hits: 92 “commerce with the Indians,” 5 “commerce with Indians,” and 13 “commerce with the Indian tribes.” Many of those hits (53) were duplicates - identical language appearing in different editions or collections. Once duplicates are discounted, there are 57 unique hits. Of those 57 hits, 14 do not refer to American Indians, but rather to East/West Indies, India, etc. That leaves us with 43 unique hits.

We categorized those 43 sources as follows:

- 25 synonym for trade
- 6 synonym for intercourse
- 12 too ambiguous to tell

In short, my RAs concluded that only 25 of the 43 sources—or 58%—clearly referred to trade. (Even, at points, they noted that several of the ones that they coded as “trade” could be considered ambiguous—but I deferred to their judgment and followed their coding). This result is hardly “invariable.” Moreover, it is worth noting—given that Mr. Natelson earlier [insisted](#) that all sources *after* 1789 were anachronistic—that eight of the quotations that Mr. Natelson relied on postdated 1789. Indeed, several of them were actually reprints of American documents like *The Federalist* examining the constitution—which of course begs the very question at issue here. My RAs coded those eight post-1789 documents as seven synonyms for trade and one ambiguous. So if we remove those from the sample, as Mr. Natelson demands, we are left with eighteen instances where commerce was a clear synonym for trade out of 35 total instances—or 51%.

A full reprint of my RAs' results can be found in the appendix.

Page 1029, text & fn. 83:

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

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

Comments: The cited passage does not, in fact, present a clear use of “commerce” to refer to the exchange of religious ideas. It may well mean that Indians obtained their religious ideas in the course of commerce rather than that the exchange of ideas was itself commerce.

Ablavsky Comments:

Let’s begin by what I was trying to show in this section: that, to quote my article, “commerce with Indians did not exclusively mean trade.” By contrast, Mr. Natelson insisted in his 2007 article that the phrase commerce with Indians “almost invariably meant trade and nothing more.” Characteristically, then, Mr. Natelson was much more definitive than I was. The burden of proof was on him to show that there were no or few instances where commerce with Indians *didn’t* mean trade. By contrast, I readily acknowledged and conceded that commerce was widely used as a synonym for trade—but that sometimes it wasn’t.

Now, however, Mr. Natelson retreats to arguing that the linguistic uses in the evidence I cited aren’t “clear.” In my view, this concession merely vindicates my original point in favor of complexity and undercuts his much more uncompromising position.

Here’s the passage in question: “That being the most northerly place that I resort to, some of those Indians have commerce with the Indians that are yet more northerly, who have commerce with those whom the French teach to pray to such idols, therefore they think the idols and idolatry come from them.” “Commerce” here *could* be read to suggest that it referred only to mercantile trade, though I think this interpretation is strained. The question I asked myself in assessing this was, is trade or intercourse the better synonym for “commerce” here? Which has a better fit if we substitute it in? I maintain my view that the better synonym here is “intercourse,” which captured the idea of noncommercial ties and relationships.

The mercantile meaning is supported Hutchinson’s other uses “commerce,” generally in a mercantile sense. *Id.* at 3 (referring to commerce with the colonies as paying for their expenses); 85 (“they had mutual trade and commerce”); 403 (referring to paper bills as “the sole instrument of commerce”); 458n (“it is not probable that the New-England Indians had any instrument of commerce”).

Ablavsky Comments: Only the last of these examples involved Native peoples, and I’m happy to concede that “instrument of commerce” likely had a clearer term of meaning as a term of art historically than the unmodified word “commerce.” Indeed, I suspect that “instrument of commerce” was often employed as a synonym for “money” or “specie” alone, the way it is used in Adam Smith’s [*Wealth of Nations*](#) or the [writings](#) of John Locke, and not for, say, a ship involved

in mercantile trade (which was “commerce” even under Mr. Natelson’s narrow definition). Indeed, as Natelson shows, this reading is consistent with Hutchinson’s usage of this phrase elsewhere in the volume.

However, Natelson omits some other, more ambiguous uses of commerce in Hutchinson’s volume:

- “Gosnold landed first on the eastern coast [of Nova Scotia], which he calls Mavoshen. After some commerce with the natives he sailed southward and landed upon one of the islands called Elizabeth islands.” (p. 1).
- “The Dutch at the Manhados had some knowledge of this place and had given intimations of it to the people of New-Plimouth with whom they had commerce, but Plimouth government kept their intelligence secret.” (p. 43).
- “Proposals had been made in the year 1648 to Monsieur D’Aillebout the governor of Canada for a free commerce between the Massachusets and that colony. . . a correspondence was kept up upon the subject until the year 1650, when the French governor sent an agent to Boston in order to settle, not meerly trade, but a league or alliance defensive and offensive between the government of Canada and the colonies of Massachusets and Plimouth . . . If the English would not join in the war it was then desired that the French might have leave to inlist volunteers, and they might be victualled for the service, and if that could not be obtained then at least the French might be allowed to pass through the colonies by water and land as occasion should require. Until these points were settled they could not proceed upon the treaty of commerce.” (pp. 166-70)
- “In the Dutch wars in the time of the Parliament and Cromwell, and in the former war after the restoration, until forces came to reduce the Mandhadoes, correspondence and commerce continued between the colonies, notwithstanding the war in Europe” (p. 284)

None of these uses unambiguously meant either intercourse or trade. They could be interpreted to plausibly mean either—which is rather the point. Even the appearance of “mutual trade and commerce” (p. 85) is not dispositive, since the appearance of words next to each does not mean that they had the same meaning. It might actually indicate the opposite—that they had different meanings. After all, if this rule invariably held, then the ubiquity of phrase “trade and intercourse” in Indian affairs would make the entire disagreement between Mr. Natelson and me irrelevant, since, under Mr. Natelson’s logic, trade would therefore mean intercourse.

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

Ablavsky Comment: Hutchinson speaks of Eliot’s “manuscripts,” but yes, Hutchinson relies a single source. Looking back at the versions, *YLJ* added the volume label in the editing process, as well as shifting the citation from the 1764 American edition to the 1765 London edition. I don’t

know why they did either of those things; perhaps they were confused by the appearance of a subsequent different volume of Hutchinson's history later (though then the 1765 volume should've been volume 1). I did not catch this during the editing process.

Page 1029, text & fn. 85:

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

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

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

It is not clear that the cited passage refers to general intercourse rather than to trade. There are three other uses of the “commerce” in the same source: on page 24 (“where he met with white Men bearded, well cloathed, and abounding with Gold, Silver, and many precious Stones, having no Commerce with the *Spainards*”), page

127 (“suffers not to buy and sell, *i.e.*, civil Commerce”) and Supp. page 150 (The *Saracens* passing from *Afric* into *Spain*, and having Commerce with the western *European* nations”). The second of these three clearly refers to mercantile commerce, and the two, although not referring to Indian commerce, still suffer from the same ambiguity that affects the passage involving Indian commerce.

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

Ablavsky Commerce: Interpreting linguistic usage is ambiguous—which, of course, is what makes Mr. Natelson's insistence that commerce with Indians meant trade and only trade so fraught. This is a good example. Here's the full passage at issue:

Hereupon five of the chief *Indians*, whom they call *Cazici*, and who were my Ancestors, having understood the Prophecy of the Magicians, which they had learned of the Wisemen of the *Hebrews*, went thither, and after much Entreaty obtained their Desires, having first made known their Mind to that Woman, whom you saw was my Interpreter, for your Brethren will have no **Commerce** with us *Indians*, and if any of ours enter into their Country, they instantly kill them; neither do any of your Brethren pass into our Country. Now by the Help of this Woman we made this Agreement with them, 1st. That our Five *Cazics* should come to them without any other Company, at the End of every Seventy Months. 2^{dly}. That he to whom any Secrets should be revealed, should be above the Age of Three Hundred Moons, or Months, that is near Thirty Years old. 3^{dly}. That they would discover nothing in the Pre-

Nothing in this passage suggests “trade” in the sense that Mr. Natelson means it. Against, ask yourself which word, if substituted for the word “commerce” here, would make more linguistic sense: “trade” or “intercourse.” I read the overall context—especially the parts about “enter[ing] into their Country” and “pass[ing] into our Country”—as making “intercourse” the better synonym. Mr. Natelson also lopped off the rest of the citation in the same footnote, which was as follows: “DEBATES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES DURING THE FIRST SESSION OF THE FOURTH CONGRESS pt. 2, at 254 (Bioren & Madan 1796) (using the phrases “commerce with the Indians” and “intercourse with these tribes” as synonyms).”

The other uses of “commerce” in the source, of course, don’t address the original usage—but I also think they provide an interesting experiment. The first example of the term “commerce”—on page 24 (“where he met with white Men bearded, well clothed, and abounding with Gold, Silver, and many precious Stones, having no Commerce with the *Spainards*”)—I agree is ambiguous, though I tend to read “intercourse” here as a better substitute than “trade.” In the second instance, Natelson cuts off the quotation prematurely. It reads, in full, “The *Saracens* passing from *Afric* into *Spain*, and having Commerce with the western *European* Nations, imparted to them these particular sciences we are now treating of, viz. *Astronomy*, *Geometry*, and *Chronology*, which before were almost lost in *Europe*.” Again, this could be speaking simply of trade—but the context, and the emphasis on the exchange of *ideas*, once again make “intercourse” a better synonym in my view.

The final usage of commerce in this source, on p. 129, comes from a trippy description of revelation and the beasts of the apocalypse. I’ll readily concede that it refers to trade—though the appearance of the adjective “civil” before commerce implies the existence of *other* forms of commerce that might not encompass buying and selling.

Here, with an admittedly tiny n of four (though not that much smaller than Natelson’s overall n), we have one instance of with commerce with Indians that Mr. Natelson concedes is ambiguous (and I still think is better read as intercourse), two more instances of commerce that Mr. Natelson concedes are ambiguous and I also think are also better read as synonyms for intercourse, and one instance where commerce was a synonym for trade but was qualified with the adjective “civil,” which I read to suggest the existence of other forms of commerce.

In my view, this small sample reinforces rather than undercuts my original argument—not that commerce with Indians did not *sometimes* or even *often* mean trade, but, again, that it did not *exclusively*—“almost invariably”—mean trade.

Page 1030, text & fn. 86:

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

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

4 | Page

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

Ablavsky Comment: This critique underscores just how thoroughly Mr. Natelson failed to understand my article’s argument, Professor Hall’s book, or the world of Native-European relations in the eighteenth century. The point of this section was to stress how thoroughly trade and diplomacy were the conceptions of both Europeans and Native peoples during this time period.

Even a casual glance at Prof Hall’s [book](#) thoroughly demonstrates this point. A sentence right before the one I quoted reads as follows: “Indeed, as John Stuart, the British official in charge of southeastern Indian affairs, noted in 1764, trade was the ‘Original great tie between Indians and Europeans.’” Literally the next sentence after the one I quoted in the book reads, “The significance of these ties has led historians to explore the variety of ways that these peoples with one another through the things they traded.” Moreover, the footnote in the original article cited *three other books* to make the same point, which Mr. Natelson evidently ignored.

But once again, you don't have to take my word for it. I reached out to Prof. Hall, and here is what he said:

It seems that Robert Natelson misunderstood my argument. I do not say that exchange consisted largely of gift-giving rather than trade. I do say that "Indians continued to insist on practices that were both older than and distinct from European logics of the market" (p. 5), but I also say two sentences later that "Indians and Europeans blended commercial and diplomatic norms." (p. 5) One of the main points of my book was that historians had often exaggerated how much Native people abandoned the diplomatic elements of exchange because of the opportunities of new trade with Europeans. In insisting on the continuing importance of gifts and diplomacy, I do not say that gifts remained preeminent. I only say that they remained important. Without a doubt, as many other historians like Kathryn Braund and Claudio Saunt have shown, trade became an increasingly important element of Natives' relations with colonists. As I note in the conclusion, "In some respects, Creeks themselves were born from trade....But as much as Europeans and Indians all recognized the benefits of trade, no one depended on it entirely." (169)

I just want to make clear that my book presents trade and gifts with more nuance than Natelson recognizes in his analysis. He is looking for an absolute distinction that I do not make because it did not exist. Exchange was more than trade, but it still included trade as a central feature. That is what made the deerskin trade and even the slave trade in the Southeast so incredibly important for Europeans and Natives both.

As Prof. Hall stresses in his response, dichotomy that Mr. Natelson invoking between "gift-giving" (the preserve of "presidential diplomacy") and "trade" relies on categories that find no support in the eighteenth-century history of relations with Native nations. As I trace in my recent [book](#), Congress paid for and organized many "Indian presents," which were also thought of in terms of trade and exchange; the President and the Indian Department did, too. Mr. Natelson is once again crafting distinctions based on ahistorical categories to blunt evidence that would trouble his hypotheses.

Pages 1031-32, fn. 101:

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

Comments: The cited dissertation is not available to the public. It does not appear on the internet, and the ProQuest Global Theses and Dissertations website, which reproduces the abstract, announces that, "At the request of the author, this graduate work is not available to view or purchase."

See <https://www.proquest.com/pqdtglobal/docview/912748798/Record/5FB7ACC94E7A4101PQ/1?accountid=14593>. This suggests that the paper was withdrawn.

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

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

Ablavsky Comment: Mr. Natelson is apparently unfamiliar with the widespread academic practice of embargoing a dissertation. Many graduate students—including me—embargo their dissertations because they are writing a book and don’t want to preempt its arguments and sales. It does not mean that the dissertation was “withdrawn.”

I dug back through my correspondence, which indicated that Prof. Peterson provided YLJ a copy of her dissertation back in 2014. I no longer have a copy of her dissertation, but Mr. Natelson should contact them if he would like one.

More surprisingly, Mr. Natelson was apparently unable to discover what my RAs (again, unaided by me) figured out very quickly: Prof. Peterson’s dissertation has been subsequently published as a [book](#), *Indians in the Family: Adoption and the Politics of Antebellum Expansion*, that is readily available through some online databases. Indeed, I cited *this exact book* in the [brief](#) that Mr. Natelson has repeatedly criticized. Apparently Mr. Natelson only read the (very small) portions of the brief explicitly about his work.

Had Mr. Natelson read the whole brief, he would have discovered I readily agreed with part of his “check” here, as did Prof. Peterson: these were not “adoptions” in the present-day sense, since modern adoption law did not yet exist in the early republic. (Though I question whether we should proclaim twenty-first-century legal definitions as “true” ones, which strikes me as anachronistic.). In the book, however, Prof. Peterson defends her use of the term “adoption” by observing, “[T]hose who housed and schooled Indian boys and girls understood their actions as a form of adoption.” Mr. Natelson is welcome to disagree with Prof. Peterson’s conclusion—though she did literally write the book on the subject.

Prof. Peterson concedes that the number of Indian children living in U.S. households was “relatively small.” But—while we’re being nitpicky—I didn’t say in this footnote that these adoptions were “common”; I said such adoptions were “widespread.” And Prof. Peterson points

to the practice among “number of established and would-be government officials” as well as multiple Native nations. I think this evidence supports that conclusion, but again, this is a semantic debate over the meaning of “widespread.”

Page 1033, fn. 105:

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

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

Ablavsky Comment: My article “failed to mention” lots of things, because articles cite sources rather than reprinting them in full. What’s really going on here is a dispute about the weight of evidence. There is, of course, a lively debate about the role of dictionaries in interpreting historical textual meaning, but they can clearly be a useful point of evidence in reconstructing how words were used in the past.

Here, however, the definitions Mr. Natelson cited were for the word “nation” in the abstract, not about Native peoples in particular, and so not very probative in my view. Even then, the evidence is ambiguous. Surprisingly—for someone who purports to be so concerned about misleading editing of quotations—his article cites [Johnson’s Dictionary](#) as defining a nation as a “people distinguished from another people.” He leaves off the rest of the definition: “generally by their language, original, or government,” which suggests a rather different conclusion about the implications about sovereignty and independence.

But this is largely beside the point, since none of these dictionaries directly addressed the semantic question at issue: when Founding-era American English speakers used the term “nation” to describe Native peoples, did the term convey ideas about sovereignty? The [source](#)

from “a person” that I cited specifically addressed that question. It suggested that the answer is yes, “nation” in the context of Indian tribes did convey connotations of sovereignty.

The “person” in question was James Duane: Mayor of New York, signer of the Articles of Confederation, federal district judge for the District of New York, and a delegate to the New York ratifying convention. Probably most significantly, while in the Continental Congress Duane was, in the [words](#) of the historian Colin Calloway, “chairman of a congressional committee charged with formulating Indian policy for the new nation.” Indeed, George Washington had [corresponded](#) with Duane in this role only the year before Duane wrote the source in question in an extensive and important exchange about Indian affairs that Calloway discusses for several pages. Moreover, Duane’s statement about the implications of calling tribes “nations” actually appeared in the [public papers](#) of the then-Governor of New York, George Clinton.

Given all this evidence, I, for one, take Duane’s explicit statement as representative, and probative, of the views of the early American political elite. Of course, like all sources, Duane’s statement should be weighed carefully and thoughtfully—but it should not be cast aside simply because Duane had the audacity to trouble Mr. Natelson’s conclusions.

But my disagreement with Mr. Natelson’s conclusion here actually rests on much more than this single citation. In another [article](#) published in the *Stanford Law Review*, I discussed how thoroughly Native status in this period was bound up with the law of nations, and the various ways that the term “nation,” as well as “tribe,” were constructed during this period. In particular, I focused on the well-known influence of Vattel’s *Law of Nations* on understandings of nationhood at the time and its association with sovereignty—which, given its well-documented role in shaping the Founders, would seem to warrant more weight than misleadingly edited dictionary definitions. But perhaps Mr. Natelson regards Vattel’s treatise as yet another “single private document.”

Page 1035, text:

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

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

Ablavsky Comment: “Sole and exclusive” in Article IX of the Articles of Confederation applied to federal authority as against the states, including the power over Indian affairs. By contrast, the examples that Natelson gives are either geographic (the exclusive federal power over the District of Columbia) or address the separation of powers within the federal government (the “sole Power” to try impeachments). Article I, § 9 does prohibit the exercise of certain kinds of state authority—including several limitations that Thomas Jefferson as Secretary of State concluded heavily restricted state authority in Indian affairs. Nonetheless, it is clear that the Supremacy Clause loomed especially large in the drafters’ vision of reconciling federal and state conflict by empowering the federal government to overcome countervailing state power. That conclusion seems self-evident, but it also rests on Prof. Alison LaCroix’s first [book](#), which heavily emphasized the Clause. “The Supremacy Clause was thus an explicit statement about the nature of the relationship between state and national levels of government,” she writes. “Rather than depending on formal legal structure (the Privy Council’s power to nullify colonial acts, Congress’s power to veto state laws), the federal union would be kept in balance by a constitutional provision that actually invoked a category of law—namely, the ‘supreme law of the land.’”

Furthermore, what Natelson describes as “error” was actually the subject of an enormous historical constitutional dispute. For years, lawyers in the early United States hotly contested whether the federal government’s enumerated powers were exclusive or concurrent, echoes of which persist in Dormant Commerce Clause doctrine. Prof. LaCroix’s forthcoming *new* book thoroughly, and in my view authoritatively, traces these arguments.

Regardless, the point here was not to resolve this long-standing interpretive dispute. The article’s point was simply that no negative inference can be drawn from the omission of the term “sole” or “exclusive” to describe the Indian Commerce Clause, since none of the enumerated powers included similar language, as they had in the Articles, limiting state authority. In my view, the point stands.

Page 1036, text & fn. 128:

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

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

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

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

(Italics added.)

Ablavsky Comment: Ironically, Mr. Natelson’s quotation from my article is misleading. Here’s my original footnote in full:

Justice Thomas’s evidence supports this point. *Id.* at 2570 (citing Brutus, (Letter) X, N.Y. J., Jan. 24, 1788, in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 462, 465 (J. Kaminski & G. Saladino eds., 2012)). Justice Thomas implies that Anti-Federalist concessions were limited to trade, but evidence suggests a broader scope. See, e.g., Federal Farmer, Letters to the Republican, Letter I (Oct. 8, 1787), reprinted in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 18, 24 (John P. Kaminski & Gaspare J. Saladino eds., 1983) (“Let the general government[’s] . . . powers extend exclusively to all foreign concerns, causes arising on the seas, to commerce, imports, armies, navies, *Indian affairs*, peace and war . . . leaving the internal police of the community, in other respects, exclusively to the state governments” (emphasis added)).

Two points worth making here. First, Brutus *is* conceding some paramount federal authority here over Indian affairs—most explicitly over trade, but also over the need to garrison frontier posts, an important role at the time. Second, I did not say that Brutus was conceding federal authority over *all* of Indian affairs, which I don’t think is an accurate interpretation. Instead, Mr. Natelson entirely omits the very next sentence of the citation and its citation from the Federal Farmer. As my language there made inescapably clear, that source *did*, in my view, support the proposition that the Federal Farmer embraced federal rather than state authority over *all* of Indian affairs, not just trade. (Federal Farmer did literally say “Indian affairs,” after all). Apparently Mr. Natelson could not find any basis to try to distinguish away this Federal Farmer citation, so he just omitted it.

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

There is a compelling case, though, that the [Indian Commerce] Clause was open-ended when drafted. Nearly all the enumerated powers were late additions and occasioned little of

the heated discussion that surrounded issues of representation or the structure of the national government.¹³⁸

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

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

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

Finally, the author omitted wording from his cited quotation tending to show that the convention was reacting *against* open-endedness: On August 16 the delegates began to debate the specific enumeration of the powers of Congress. The Committee of Detail, in moving from a general and exceptionally broad grant of power to specifically enumerated powers, had gauged the mood of the Convention correctly. In spite of the nationalists’ strong support for a broad, *general* grant of power to the Congress, no one rose to question the wisdom of the committee’s action. Indeed . . .

Ablavsky Comment: Another interpretive disagreement. Mr. Natelson seems to have misunderstood what I meant by “open-ended” here, though I would have thought that the section’s heading (“Silence as Ambiguity”)—and the surrounding context—made it inescapably clear: I meant that the provision was ambiguous and liable to interpretation. The point of relying on Prof. Beeman’s work here was to suggest *why* there was so little debate around the provision that might have clarified its meaning, and why the Indian Commerce Clause seemed such an afterthought. For that reason, the switch from “affairs”—and “trade,” it is worth stressing, since Mr. Natelson does not acknowledge this simultaneously linguistic shift—to “commerce” doesn’t resolve the question, since that presumes we know exactly what the drafters meant by that shift.

Indeed—ironically, given Mr. Natelson’s repeated moves here to argue from silence—the whole point of this section was to point out the *danger* of drawing negative inferences from silence. Silence at best *may* be evidence of consensus or agreement, but in the absence of other evidence, it seems to me a dangerous foundation for conclusively asserting constitutional meaning.

Page 1062, fn. 265:

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

. .

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

Ablavsky Comment: Here, there actually *is* a factual error on my part—but it’s not the one Mr. Natelson identifies. Though the 1834 version of the Trade and Intercourse Act was the first time that *that* statute asserted the criminal jurisdiction in question, the jurisdiction it codified actually came earlier, in a separate 1817 [statute](#). That was a mistake. I also should have specified *in Indian country*, as I did above the line.

I am well aware of the earlier treaty provisions creating federal criminal jurisdiction, having written a detailed account in my book of a 1790s trial of a Muscogee Creek man under precisely the provision of the Treaty of New York that Natelson cites. However, I do not consider a treaty provision that *grants* the federal government jurisdiction as an *assertion* of criminal jurisdiction. On the contrary, such a treaty provision seems to concede that the federal government might otherwise *lack* such authority. In 1844, for instance, the United States entered a [treaty](#) with China to establish so-called extraterritorial jurisdiction over U.S. citizens within China. The United States even briefly created a U.S. Court for China to implement this jurisdiction. However, I for one would not describe exercising this treaty right as “asserting” U.S. jurisdiction over China; I would describe it as implementing a treaty right.

But if this is what Natelson means by “assert,” then he himself has committed “factual error,” since such jurisdiction arguably traces all the way back to the 1778 [Treaty](#) with the Delaware, rather than to 1785. That Treaty contained a quite fascinating provision for a trial by a mixed jury: “a fair and impartial trial . . . by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting parties and natural justice.”

Perhaps Mr. Natelson would argue that that provision is not actually an “assertion” of federal criminal jurisdiction because it is a mixed jury. But that argument would merely underscore my underlying point: what is really going on here is a semantic dispute over the meaning of “assert,” not any factual error.

Appendix

Appearances of the Phrases “Commerce with the Indians,” “Commerce with Indians,” and “Commerce with the Indian Tribes” in *Eighteenth-Century Collections Online* (duplicates and references to East Indies removed). Without any direction from me, my RAs coded each use of the term “commerce” as either a synonym for trade, intercourse, or ambiguous.

“Commerce with the Indians”

Author	Title	Date	Synonym
1. William Dampier	<i>A New Voyage Round The World</i>	1703	Intercourse
2. Robert Beverley	<i>The History and Present State of Virginia</i>	1722	Ambiguous
3. Ralph Sandiford	<i>The Mystery of Iniquity; In A Brief Examination of The Practice of The Times</i>	1730	Ambiguous
4. Fayer Hall	<i>A Short Account of The First Settlement of The Provinces of Virginia, Maryland, New-York, New-Jersey, and Pensylvania</i>	1735	Intercourse
5. Thomas Lediard	<i>The Naval History of England, In All Its Branches; From The Norman Conquest In The Year 1066. To The Conclusion of 1734</i>	1735	Intercourse
6. John Harris	<i>Navigantium Atque Itinerantium Bibliotheca [...]</i>	1744-48	Ambiguous
7. John Harris	<i>Navigantium Atque Itinerantium Bibliotheca [...]</i>	1744-48	Ambiguous
8. Daniel Neal	<i>The History of New-England: Containing An Impartial Account of The Civil and Ecclesiastical Affairs of The Country, To The Year of Our Lord, 1700 [...]</i>	1747	Trade
9. Jacques Savary des Brûlons, Malachy Postlethwayt, and Philémon Louis Savary	<i>The Universal Dictionary of Trade and Commerce, Translated From The French of The Celebrated Monsieur Savary</i>	1751-55	Trade
10. Jacques Savary des Brûlons and Malachy Postlethwayt	<i>The Universal Dictionary of Trade and Commerce, Translated From The French of The Celebrated Monsieur Savary, Inspector-General of The Manufactures For The King, At The Custom-House of Paris [...]</i>	1751-55	Trade
11. Joseph Robson	<i>An Account of Six Years Residence In Hudson's-Bay, From 1733 To 1736, and 1744 To 1747</i>	1752	Ambiguous
12. Thomas Salmon	<i>The Universal Traveller: Or, A Compleat Description of The Several Nations of The World</i>	1752	Ambiguous
13. N/A	<i>Some Account of The North-America Indians; [...]</i>	1754	Ambiguous
14. George Berkley and John Hill	<i>The Naval History of Britain, From The Earliest Periods of Which There Are</i>	1756	Trade

	<i>Accounts In History, To The Conclusion of The Year M.DCC.LVI. [...]</i>		
15. Richard Rolt	<i>A New Dictionary of Trade and Commerce, Compiled From The Information of The Most Eminent Merchants, and From The Works of The Best Writers On Commercial Subjects, In All Languages. [...]</i>	1756	Trade
16. Malachy Postlethwayt	<i>Britain's Commercial Interest Explained and Improved; In A Series of Dissertations On Several Important Branches of Her Trade and Police [...]</i>	1757	Trade
17. N/A	<i>The Modern Part of An Universal History, From The Earliest Account of Time [...]</i>	1759	Trade
18. N/A	<i>A New Universal History of Arts and Sciences [...]</i>	1759	Trade
19. Thomas Hutchinson	<i>The History of The Colony of Massachusetts-Bay, From The First Settlement Thereof In 1628, Until Its Incorporation With The Colony of Plimouth, Province of Main [...]</i>	1760	Intercourse
20. Tobias George Smollett	<i>Continuation of The Complete History of England</i>	1763	Trade
21. N/A	<i>Lives of Illustrious British Seamen [...]</i>	1764	Ambiguous
22. N/A	<i>The History of The Late War, From The Commencement of Hostilities In 1749, To The Definitive Treaty of Peace In 1763[...]</i>	1765	Trade
23. Merchant of London	<i>The True Interest of Great Britain, With Respect To Her American Colonies, Stated and Impartially Considered</i>	1766	Trade
24. N/A	<i>A Collection of the Most Interesting Tracts, Lately Published In England and America, On The Subjects of Taxing the American Colonies, and Regulating Their Trade</i>	1766	Trade
25. Jacques Savary des Brûlons	<i>The Universal Dictionary of Trade and Commerce [...]</i>	1766	Trade
26. Nova Scotia. House of Assembly	<i>The Perpetual Acts of the General Assemblies of His Majesty's Province of Nova Scotia</i>	1767	Trade
27. N/A	<i>The Town and Country Magazine; Or Universal Repository of Knowledge, Instruction, and Entertainment.[...]</i>	1769	Trade
28. N/A	<i>The World Displayed; Or, A Curious Collection of Voyages and Travels, Selected From The Writers of All Nations.[...]</i>	1769	Trade
29. N/A	<i>The History of The British Dominions In North America: From The First Discovery of That Vast Continent By Sebastian Cabot In 1497, To Its Present</i>	1773	Trade

	<i>Glorious Establishment As Confirmed By The Late Treaty of Peace In 1763.</i>		
30. Agricola Sylvan	<i>The Farmer's Magazine, and Useful Family Companion.[...]</i>	1776-1780	Ambiguous
31. William Dampier	<i>The Voyages and Adventures of Capt. William Dampier.[...]</i>	1776	Intercourse
32. John Murray	<i>Bath-Kol. A Voice From The Wilderness. [...]</i>	1783	Ambiguous
33. John Kent and John Campbell	<i>Biographia Nautica: Or, Memoirs of Those Illustrious Seamen, To Whose Intrepidity and Conduct The English Are Indebted, For The Victories of Their Fleets, The Increase of Their Dominions, The Extension of Their Commerce, and Their Pre-Eminence On The Ocean[...]</i>	1785	Trade
34. John Gough	<i>A History of The People Called Quakers[...]</i>	1789	Intercourse
35. John Meares	<i>Voyages Made In The Years 1788 and 1789, From China To The North West Coast of America[...]</i>	1790	Trade
36. John Long	<i>Voyages and Travels of An Indian Interpreter and Trader, Describing The Manners and Customs of The North American Indians[...]</i>	1791	Trade
37. Tobias George Smollett	<i>The History of England, From The Death of George The Second, To The Year 1765[...]</i>	1794	Trade
38. Charles Coote	<i>The History of England, From The Earliest Dawn of Record To The Peace of MDCCLXXXIII.[...]</i>	1796	Trade

“Commerce with Indians”

Author	Title	Date	Synonym for Commerce
1. Nathaniel Crouch	<i>Two journeys to Jerusalem, Containing first, a strange and true accout [sic] of the travels of two English pilgrims some years since, and what admirable accidents befel them in their journey to Jerusalem, Gr. Cairo, Alexandria, &c.[...]</i>	1709	Intercourse

“Commerce with the Indian Tribes”

Author	Title	Year	Synonym for Commerce
1. Matthias Mawson	<i>A Sermon Preached Before The Incorporated Society For The Propagation Of The Gospel In Foreign Parts; At Their Anniversary Meeting In</i>	1743	Ambiguous

	<i>The Parish-Church Of St. Mary-Le-Bow, On Friday, February 18, 1742-3</i>		
2. Alexander Hamilton, John Jay, and James Madison	<i>The Federalist: A Collection Of Essays, Written In Favour Of The New Constitution, As Agreed Upon By The Federal Convention, September 17, 1787.</i>	1788	Trade
3. William Belsham	<i>Memoirs Of The Kings Of Great Britain Of The House Of Brunswic-Lunenburg.</i>	1793	Trade
4. United States. Treaties, etc. Great Britain and Great Britain.	<i>Treaty Of Amity, Commerce, And Navigation, Between His Britannic Majesty, And The United States Of America, Conditionally Ratified By The Senate Of The United States, At Philadelphia, June 24, 1795.</i>	1795	Trade
5. Robert Goodloe Harper	<i>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.</i>	1796	Ambiguous