Nos. 21-376, 21-377, 21-378, 21-380

In the Supreme Court of the United States

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.,
v.
CHAD EVERET BRACKEEN, ET AL.

CHEROKEE NATION, ET AL.,
v.
CHAD EVERET BRACKEEN, ET AL.

TEXAS,
v.
DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

CHAD EVERET BRACKEEN, ET AL.,
v.
DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* PROFESSOR GREGORY ABLAVSKY IN SUPPORT OF FEDERAL PARTIES AND TRIBAL DEFENDANTS

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INTEREST OF *AMICUS CURIAE*[1]

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and neither counsel for a party nor a party made a monetary contribution intended to fund the preparation and submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made such monetary contribution. Written consent of all parties has been provided in support of this brief through blanket consent to the Clerk in accordance with Supreme Court Rule 37.3(a).

SUMMARY OF THE ARGUMENT

History plays a central role in constitutional interpretation. The understanding of constitutional text at the time of its adoption is critical, and often dispositive, in resolving disputes over its meaning. *See, e.g.*, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2127-31 (2022). Moreover, the Court has repeatedly stressed the principle—"neither new nor controversial"—that "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *N.L.R.B. v. Noel Canning,* 573 U.S. 513, 524-25 (2014).

Here, constitutional text, history, and early practice all support broad congressional authority over Indian affairs, including regulating the status and placement of Indian children. The Constitution's drafters deliberately sought to remedy the failure of the Articles of Confederation, which had ambiguously divided authority over Indian affairs between states and the federal government. Like the foreign affairs power, the power over Indian affairs was understood as an "indivisible" set of related authorities to govern relationships with other sovereigns through treaties, war and peace, trade regulation, land sales, and borders.

The new Constitution centralized all these powers in the new federal government. The Indian Commerce Clause was only one among these interrelated powers, but, as James Madison observed, it explicitly shed the qualifying language preserving state authority from the Articles of Confederation.

Moreover, it relied on a term, "commerce," that Plaintiffs themselves acknowledge was universally defined as "intercourse," a term of art of the time to describe relations between Natives and U.S. citizens.

Ratification and post-ratification history confirms this conclusion. One of the few commentaries on Indian affairs during ratification acknowledged that ratification would "totally surrender" authority from states to Congress. Similarly, federal and state officials alike concluded that, under the new Constitution, the federal government had preeminent authority to govern intercourse between the United States and Indian tribes.

From the beginning, this authority encompassed federal regulation of the status of Indian children. This centrality reflects both the widespread frontier commerce in captive Indian children and the significance of education to the federal project to "civilize" Indians. Similarly, after ratification, Congress and federal officials, including President Washington, invoked federal power over Indian affairs to mandate that state courts and officials comply with federal aims and policies.

The Plaintiffs here seek to challenge this text, precedent, and practice by advancing a revisionist argument that asserts a highly circumscribed vision of federal authority over Indian affairs. Their claim that this approach reflects original constitutional understandings, however, rests not on concrete Founding-era evidence but on a handful of contested

law review articles that rely on inaccurate evidence. Their claims are nonetheless not new: they echo purposive Removal-era efforts by state advocates to challenge federal authority. Yet such arguments have met two centuries of repeated failure in this Court beginning in the 1830s, and warrant continued rejection today.

ARGUMENT

I. The Drafters of the Constitution Sought to Remedy the Problem of State Interference in Indian Affairs.

A. The Articles of Confederation Disastrously Attempted to Divide What the Framers Described as the "Indivisible" Set of Powers over Indian Affairs.

Prior to the Revolution, the British regarded Indian tribes as quasi-foreign nations outside the empire's legislative control. Relationships with tribes, like relationships with other sovereigns, were governed through negotiation and treaties. Colin G. Calloway, *Pen and Ink Witchcraft: Treaties and Treaty Making in American Indian History* 12-97 (2013).

Under the Articles of Confederation, the United States attempted to split the authority to govern what was known, analogously to foreign affairs, as "Indian affairs." After contentious debates, the Articles granted the new Continental Congress the power "regulating the trade and managing all affairs with

the Indians, not members of any of the states; provided that the legislative right of any state, within its own limits, be not infringed or violated." Articles of Confederation of 1781, art. IX, para. 4. The limitations preserving state authority, James Madison later observed, were "obscure and contradictory." *The Federalist No. 42*, at 217 (James Madison).

The results of this confusion were predictable. Seizing on these ambiguities, states routinely challenged federal authority, even purporting to nullify federal Indian treaties. Gregory Ablavsky, *The Savage Constitution*, 63 Duke L.J. 999, 1018-38 (2014) [hereinafter, Ablavsky, *Savage Constitution*]. James Monroe, present at one such negotiation, fretted to James Madison about the dangerous harms of such failures to speak with one voice in Indian affairs. Letter from James Monroe to James Madison (Nov. 15, 1784), *in* 8 *Papers of James Madison: Congressional Series* 140, 140-43 (Robert A. Rutland & William M.E. Rachel eds., 1973).

In response to this chaos, the Continental Congress's Committee on Southern Indians in August 1787, crafted a report that offered the clearest statement of Founding-era understandings of the Indian affairs power. 33 *Journals of the Continental Congress*, *1774-1789*, 457 (Roscoe R. Hill ed., 1936). The Committee stressed that the legal framework for "managing Affairs with the Indians" was "long understood and pretty well ascertained" as a set of interrelated powers analogous to the power to regulate foreign affairs: "making war and peace, purchasing

certain tracts of [Indians'] lands, fixing the boundaries between them and our people, and preventing the latter settling on lands left in possession of the former." *Id.* at 458. These objects were interconnected: indeed, the Committee wrote, "The powers necessary to these objects appear to the committee to be indivisible." *Id.* The Committee urged that the states must "accede to Congress's managing, exclusively, all affairs with the Cherokees, Creeks, and other independent tribes." *Id.* at 460.

The Committee's call found many supporters. Advocates argued for a new constitution that would, among other aims, remedy state interference in Indian affairs. *See, e.g.*, James Madison, Vices of the Political System of the United States (Apr. 1787), *in* 9 *The Papers of James Madison* 345, 348 (Robert A. Rutland & William M.E. Rachal eds., 1975) (enumerating "Encroachments by the States on the federal authority"—the very first of which was "the wars and Treaties of Georgia with the Indians."); *see also* Henry Knox, Report of the Secretary of War on the Southern Indians (July 18, 1787), *in* 18 *Early American Indian Documents: Treaties and Laws, 1607-1789: Revolution and Confederation* 449, 450 (Alden T. Vaughan gen. ed., Colin G. Calloway ed., 1994) (informing Congress that "unless the United States do in reality possess the power 'to manage all affairs with the independent tribes of Indians,' . . . a general Indian war may be expected.")

B. The Constitution Gave the Federal Government Primary Authority to Regulate Indian Affairs and Preempt State Interference.

The Constitutional Convention sought to undo the damage from the Articles' failure by granting the federal government each of the "indivisible" powers related to Indian affairs—and, equally importantly, by *limiting* state authority in the area. The new Constitution gave Congress the power to declare war, U.S. Const. art. I, § 8, cl. 11, and it specifically denied this power to the states, *id.* art. I, § 10, cl. 3. It gave the President and Senate the power to make treaties, *id.* art. II, § 2, cl. 2, which would be the "Supreme Law of the Land," binding on state as well as federal courts, *id.* art. VI, cl. 2. It specifically prohibited states from making treaties. *Id.* art. I, § 10, cl. 1. The Property Clause affirmed the federal government's power to make "all needful rules and regulations" for federal property and the territories, where most Indians lived. *Id.* art. IV, § 3, cl. 2. And the Constitution granted Congress all authority "necessary and proper" to implement these enumerated powers. *Id.* art. I, § 8, cl. 18.

The Commerce Clause, which gave Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," *id.* art. I, § 8, cl. 3, was only one source of authority in this set of interrelated powers. Yet even in isolation, its text suggests broad federal authority over relations with Indians. As James Madison observed, the earlier language protecting each state's

"legislative right" had attempted "to accomplish impossibilities: to reconcile a partial sovereignty in the Union, with complete sovereignty in the States." *The Federalist No. 42*, at 217 (James Madison). The revised Clause was "very properly unfettered" from this restriction, *id.*, Madison praised, affirming federal preeminence.

Nor did "commerce with the Indian tribes" have the same meaning as commerce with foreign nations or, especially, among the several states. Insisting that the term means the same thing overlooks clear textual differences. "Commerce . . . *with* the Indian tribes" suggested a bilateral relationship with an entity *outside* the political order, which is why the Foreign Commerce Clause had a similar locution. The constitutional authority to regulate commerce "among" the several states, by contrast, reflected their position *within* the body politic. Similarly, "tribes" and "nations" were political entities defined by membership, while "states" were primarily defined by geography. *See* Christopher R. Green, *Tribes, Nations, States: Our Three Commerce Powers* (Aug. 22, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3679265 (emphasizing this distinction). Moreover, commerce with the Indian tribes had a complicated regulatory and political history sharply distinct from the regulation of other kinds of commerce. *See* Francis Paul Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1780-1834*, 6-20 (1962) (examining the extensive colonial governance of Indian commerce). Indeed, the Indian Commerce Clause was

the only one of the three commerce clauses with a clear antecedent in the Articles of Confederation.

Historical evidence confirms this textual conclusion. The Founders themselves distinguished among the three commerce clauses. *See, e.g.*, Letter from Edmund Randolph to George Washington (Feb. 12, 1791), *in* 7 *Papers of George Washington*: *Presidential Series* 330, 330-31 (Jack D. Warren, Jr., ed., 1998) (analyzing the scope of each commerce power distinctly). Scholars examining the history have reached the same conclusion. Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment,* 25 Minn. L. Rev. 432, 467-68 (1941); Gregory Ablavsky, *Beyond the Indian Commerce Clause,* 124 Yale L.J. 1012, 1025-28 (2015) [hereinafter Ablavsky, *Beyond*]; Green, *supra*; Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 Ark. L. Rev. 1175 (2003).

Founding-era evidence also shows that the meaning of commerce with the Indian tribes was not limited to trade. Plaintiffs emphasize the terminological shift from "affairs" in the Articles to "commerce" in the Constitution, Br. Individual Pls. at 48-49; Br. Pl. Tex. at 23, but they ignore another shift: instead of granting the power of "regulating the trade" with Indians, as the Articles had, the Constitution gave Congress authority over "commerce." In other words, under Plaintiffs' own logic, if the Constitution's drafters had wanted to grant Congress "only authority to regulate trade with tribes," Br. Individual Pls. at 49, they knew exactly how to do so.

Instead, the Constitution's drafters chose "commerce," a much more expansive term than trade. Commerce with Indians could even include the exchange of religious ideas or even sexual relationships. *See, e.g.*, 2 *Memoirs of the Right Honorable Lord Viscount Cherington* 238 (1782) (recounting his illness after a voyage to Brazil: "I firmly believe my disorder was contracted by too free a commerce with Indian women"); Ablavsky, *Beyond*, *supra*, at 1029. But one eighteenth-century meaning of "commerce" had particular historical significance in Indian affairs: "intercourse." *See Adoptive Couple v. Baby Girl*, 570 U.S. 637, 659 (2013) (Thomas, J., concurring) (quoting 1 Samuel Johnson, *Dictionary of the English Language* 354 (4th ed. 1773), which listed "intercourse" as the first definition of "commerce"); Br. Individual Pls. at 47 (citing the same definition); Br. Pl. Tex. at 23 (citing the same definition).

Intercourse was a late eighteenth-century term of art for relations with Indian tribes. *See* App. (reprinting numerous instances of the term "intercourse" in Indian affairs); Ablavsky, *Beyond*, *supra*, at 1028-31. The term encompassed, but was not limited to, trade—otherwise eighteenth-century writers would not have needed to specify "intercourse by trade," nor would they have used "trade *and* intercourse" as a standard synonym for commerce with Indians. *See* App. Instead, "intercourse" described broader social, cultural, political, and diplomatic ties between Indians and Anglo-Americans—hence its frequent preceding adjective, "friendly." *Id.* Its closest synonyms were "exchange" or "communication." *See* 1 Thomas Sheridan, *A*

Complete Dictionary of the English Language (2d ed. 1789) (defining intercourse as "commerce, exchange; communication."); 1 Samuel Johnson, *Dictionary of the English Language* 354 (4th ed. 1773) (defining intercourse as "commerce; exchange; communication"); *see also id.* (quoting Milton to illustrate intercourse's meaning: "This sweet *intercourse* / Of looks, and smiles.")

Founding-era evidence confirms that "commerce" and "intercourse" were used synonymously in Indian affairs. Congress captioned the first statute regulating relations with Indian tribes the Trade and Intercourse Act. Act of July 22, 1790, 1 Cong. ch. 33, 1 Stat. 137. Early Congresses routinely used intercourse as a synonym for congressional power under the Indian Commerce Clause. *See, e.g.*, 5 Annals of Cong. 637 (1796) (analogizing congressional powers over "commerce with foreign nations" and "intercourse with the Indian tribes"); *id.* (emphasizing the congressional "right to regulate trade and intercourse with the Indian tribes"); *id.* at 1186 (complaining that the Jay Treaty required the admission of British subjects "to continue their commerce with Indians living in our territory, uncontrolled by those regulations, which we had thought necessary, in order to restrain our own citizens in their intercourse with these tribes.").

C. Ratification and Immediate Post-Ratification History Confirm That the Founders Understood that the Federal Government, not the States, Would Govern Indian Affairs.

Ratification confirms that the new Constitution was understood to confer primary authority to regulate relations with Indian tribes on the federal government, not the states. The strongest opposition to the Constitution's Indian affairs provisions came from Anti-Federalist Abraham Yates, Jr., who cited the Supremacy Clause, federal tariffs, the Indian Commerce Clause, and expanded "legislative, executive and judicial powers" as sources of federal power. Abraham Yates, Jr. (Sydney), To the Citizens of the State of New York (June 13-14, 1788), *reprinted in* 20 *The Documentary History of the Ratification of the Constitution* 1153, 1156-67 (John P. Kaminski et al. eds., 2004). Because of these provisions, Yates concluded, "[i]t is therefore evident that this state, by adopting the new government, will enervate their legislative rights, and totally surrender into the hands of Congress the management and regulation of the Indian affairs." *Id.*

Americans heard Yates's argument that ratification would "totally surrender" all power over Indian affairs to Congress—and ratified anyway. In fact, other Anti-Federalists *embraced* federal supremacy over Indian affairs. *See, e.g.*, Federal Farmer, Letters to the Republican, Letter I (Oct. 8, 1787), *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* . . . leaving the internal police of the community, in other respects, exclusively to the state governments . . . ." (emphasis added).

This emphasis on federal supremacy became the dominant understanding of the newly ratified Constitution. The Washington Administration reiterated that federal power over Indian affairs was akin to its authority over foreign affairs: "The independent nations and tribes of Indians ought to be considered as foreign nations, not as the subjects of any particular state," Secretary of War Henry Knox wrote President Washington. Letter from Henry Knox to George Washington (July 7, 1789), *in* 3 *Papers of George Washington: Presidential Series* 134, 138 (Dorothy Twohig ed., 1989). Knox argued for federal supremacy over the states: "[T]he United States have, under the constitution, the sole regulation of Indian affairs, in all matters whatsoever." Letter from Henry Knox to Israel Chapin (Apr. 28, 1792), *in* 1 *American State Papers: Indian Affairs* 231-32 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832).

Many state officials acknowledged the federal government's expansive new authority over Indian affairs. After ratification, South Carolina Governor Charles Pinckney spoke of "the general Government, to whom with great propriety the sole management of India[n] affairs is now committed." Letter from Charles Pinckney to George Washington (Dec. 14,

1789), *in* 4 *Papers of George Washington: Presidential Series* 401, 404 (Dorothy Twohig ed., 1993); *see also* Ablavsky, *Beyond*, *supra*, at 1043 (citing similar examples from Georgia and Virginia).

Early congressional actions confirm this understanding of federal predominance over Indian affairs. The First Congress enacted the Trade and Intercourse Act, the foundational statute that governed Indian affairs for the next fifty years. Act of July 22, 1790, 1 Cong. ch. 33, 1 Stat. 137. The statute created a licensure system for "any trade or intercourse with the Indian tribes," *id.* §§ 1-3, but it also made killing or theft from Indians by U.S. citizens in Indian country, even within state borders, a federal crime, *id.* § 5. Subsequent versions enacted over the 1790s criminalized crossing into Indian country without permission, Act of May 19, 1796, 4 Cong. ch. 30, § 3, 1 Stat. 469, 470, and authorized the federal military to arrest violators found within Indian country anywhere in the United States, *id.* §§ 5, 16. Taken together, the Acts provided the "foundational charter for asserting federal supremacy over Indian affairs." Gregory Ablavsky, *Federal Ground: Governing Property and Violence in the First U.S. Territories* 115 (2021) [hereinafter, Ablavsky, *Federal Ground*].

Founding-era Americans interpreted these statutes as implementing multiple sources of congressional authority, including the Territory Clause, 2 Annals of Cong. 751 (1792), and the Treaty Clause, Ablavsky, *Beyond, supra*, at 1043-44. But most commentators, including President Washington,

described the Acts as regulations of commerce. *See* Letter from George Washington to Edmund Randolph (Aug. 12, 1790), *in* 6 *Papers of George Washington: Presidential Series* 242 (Mark A. Mastromarino ed., 1996) (describing the first Trade and Intercourse Act as "the law to regulate trade & commerce with the Indian Tribes"); Indian Grants to the Inhabitants of Post Vincennes (Apr. 15, 1794), *in* 1 *American State Papers: Public Lands* 32 (Walter Lowrie ed., 1834) (describing the Acts as "the laws of Congress, made for the regulation of commerce with the Indians"); Green, *supra*, at 14-15.

II. The Early Federal Indian Affairs Power Encompassed the Authority to Determine the Status of Indian Children.

Though "domestic relations . . . has long been regarded as a virtually exclusive province of the States," *Sosna v. Iowa*, 419 U.S. 393, 404 (1975), this generalization is untrue for Indian affairs. From the beginning, federal authority over the nation's intercourse with Indian tribes routinely involved regulating the status of Indian children. *See, e.g.*, Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 Neb. L. Rev. 885 (2016).

Federal interventions in Native children's lives began "during the post-Revolutionary period." Dawn Peterson, *Indians in the Family: Adoption and the Politics of Antebellum Expansion* 6 (2017). Indian children's status implicated early federal Indian policy in two ways. First, children were a key issue of

diplomacy between Native nations and the United States. Early federal officials drew on the law of nations to guide their relationships with Indian tribes and European nations alike. *See* Ablavsky, *Beyond*, *supra*, at 1059-67; Seth Davis et al., *Persisting Sovereignties*, 170 U. Pa. L. Rev. 549 (2022). And the era's law of nations repeatedly emphasized the diplomatic significance of children's status. *See, e.g.*, Emer de Vattel, *The Law of Nations*, bk. I, ch. XIX, §§ 215-20, at 219-22; bk. III, ch. V, § 72, at 510; bk. III, ch. VIII, § 145, at 549; bk. III, ch. XVII, § 271, at 635 (1758) (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund ed. 2008) (discussing the status of children in the context of naturalization, birth, and belonging). This context also explains the prevalence of Indian treaty provisions involving Indian children. *See* Br. Amici Curiae Org. of Am. Historians.

The existence of widespread frontier trade in captured children, both Indian and white, made these questions especially pressing for federal officials. As early as 1791, the superintendent of southern Indian affairs sent an officer to recover an "Indian boy" being held by a U.S. citizen. The United States of America in Account with William Blount (Dec. 31, 1791), *William Blount Papers, 1783-1823* (on file with Manuscript Division, Library of Congress at Folder 3: 1791). Soon, federal officials routinely sought to restore captive Indian children to their tribes. Christina Snyder, *Andrew Jackson's Indian Son: Native Captives and American Empire*, *in The Native South: New Histories and Enduring Legacies* 89-94 (Tim Alan Garrison & Greg O'Brien eds., 2017). As

the United States expanded westward, the federal government continued to suppress this ubiquitous commerce in captive Indian children. Andrés Reséndez, *The Other Slavery: The Uncovered Story of Indian Enslavement in America* 295-316 (2016).

Second, the federal government early adopted a "civilization" policy to transform Indians into "civilized" U.S. citizens. Consequently, beginning in the early republic, the federal government sought the "transfer of American Indian children into foreign homes and institutions," *See* Peterson, *supra*, at 6. In the 1780s, the Continental Congress arranged for the education of George White Eyes, a Delaware Indian boy, at Princeton, paying his expenses from the national treasury. 28 *Journals of the Continental Congress 1774-1781*, 411 (Roscoe R. Hill ed., 1936). Beginning in 1791, Philadelphia Quakers took in a dozen Native children to be raised in their homes, often at the request of tribes, who sought European educations for prospective tribal leaders. Peterson, *supra*, at 43-46. The Quakers ensured that this project received the approval of the Secretary of War; they also received federal funds to support the children. *Id.* Within a few years, such practices hardened into precedent and statute, as the federal government funded missionary schools for Indians. *See* Nathan Chapman, *Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause*, 96 Notre Dame L. Rev. 677, 684-701 (2020).

The early federal government, then, routinely regulated the status of Native children as part of its power over intercourse with Indian tribes. It did not

regulate state proceedings involving Indian children, however: such proceedings did not yet exist. States did not enact adoption laws until the mid-nineteenth century. *See* Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. Fam. L. 443, 456-70 (1971) (noting that Massachusetts enacted the nation's first adoption law in 1851). State child protection agencies arose even later, shortly before ICWA's enactment. John E. B. Myers, *Child Protection in America: Past, Present, Future* 58 (2006) (noting that government takeover of child welfare "was not complete until the middle of the twentieth century"). Moreover, as discussed more fully below, jurisdictional limits meant that few state proceedings involving Indians occurred until well into the nineteenth century.

History is not static. Like American governance generally, the *form* of the intercourse between the United States and Native nations has shifted dramatically as the nation has transformed. Violent frontier negotiations over captivity have given way to regulatory schemes governing bodies of law, including family law, that did not exist at the Founding. Yet amidst this change there is a clear throughline. The federal government's primary role in managing the nation's intercourse with the Indian tribes still includes regulating the placement and status of Indian children—just as it has since the Founding.

III. The Early Federal Government Routinely Directed States' Actions as Part of Its Supremacy Over Indian Affairs.

Early federal statutes routinely delineated the scope of federal and state jurisdiction in Indian affairs. Successive versions of the Trade and Intercourse Acts made clear where states *lacked* authority, *see, e.g.*, Act of July 22, 1790, 1 Cong. ch. 33, § 4, 1 Stat. 137, 138 (barring state treaties), but also sometimes delegated authority to the states, *see, e.g.*, Act of Mar. 3, 1799, 5 Cong. ch. 46, § 3, 1 Stat. 743, 744 (authorizing state governors to issue passports into Indian country).

One provision in the statute's 1799 iteration is especially noteworthy. The law required that, if requested, federal officers must bring alleged offenders:

> to the nearest judge of the supreme or superior court of any state, who, if the offence is bailable, *shall take* proper bail if offered, returnable to the district court next to be holden in said district, which bail the said judge is hereby authorized to take, and which shall be liable to be estreated as any other recognizance for bail in any court of the United States.

Id. § 16 (emphasis added). This language—repeated in the 1802 act, Act of Mar. 30, 1802, 7 Cong. ch. 13, § 16, 2 Stat. 140, 145, which remained in force until 1834—explicitly "enact[ed] standards for state courts." Br. Individual Pls. at 51.

The new federal executive also routinely intervened in state administrative machinery to assert federal constitutional supremacy over Indian affairs. In 1792, for instance, when some Georgians plotted to violate an Indian treaty, Secretary of War Henry Knox wrote to Georgia's governor to demand that the governor, "as a public officer, bound by oath to support the constitution of the United States," employ state criminal law to suppress the planned invasion. Letter from Secretary of War to the Governor of Georgia (Aug. 31, 1792), *in* 1 *American State Papers*, *supra*, 258-59. "[Y]our Excellency will easily discover what is the duty of the federal and your own Government," Knox stated. *Id.* "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." *Id.* Knox concluded, "[T]he situation of the United States strongly demands that this co-operation be immediate, zealous, and firm." *Id.*

Knox's letter was unusually blunt, but it echoes similar examples. In 1790, for instance, President Washington wrote to Governor Mifflin of Pennsylvania after unknown U.S. citizens killed two Senecas. Letter from George Washington to Governor Mifflin (Sept. 4, 1790), *in* 6 *Papers of George Washington: Presidential Series* 396. President Washington reminded Mifflin that the federal government possessed "the only authority of regulating an intercourse with them [the Indians]" but assured him that the "Attorney General of the United States will see that the most effectual measures within the judiciary power of the federal government

shall be adopted for the punishment of the Offenders; and I doubt not if he should apply to you for the co-operation of the Officers of Pennsylvania it will be afforded." *Id.*

Federal officials also intervened in state judicial machinery. In 1801, for instance, the federal agent to the Cherokee Nation secured the release of a Cherokee man imprisoned pending state criminal charges in Tennessee. Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836*, 37 (2010). But such actions were unusual, because state judicial proceedings involving Indians in the early United States were very rare. Most Native peoples lived within the federal territories, not the states, and so early exercises of jurisdiction over Indians usually implicated *federal* authority. Ablavsky, *Federal Ground*, *supra*, at 122-28 (noting that most "Indian country" in the early United States was in the territories).

State proceedings were also rare because states themselves doubted their jurisdiction over Indians and Indian Country. *See Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2497 (2022) (noting the paradigm of "territorial separation" in the early republic in which "state authority did not extend to Indian country"); Ford, *supra*, at 30-42 (observing that "Georgia tried very few indigenous peoples before 1820" due to state-imposed jurisdictional limits as well as federal law); Deborah A. Rosen, *American Indians and State Law: Sovereignty, Race, and Citizenship, 1790-1880*, 19-48 (2007) (recounting states' uncertainty over their jurisdiction over Indians). Indeed, in the exceptional

instances that cases involving Indians ended up in state court, judges routinely dismissed them as exceeding state jurisdiction. *See, e.g.*, *Goddell v. Jackson, ex dem. Smith*, 20 Johns. 693 (N.Y. 1823) (Kent, J.) (holding that the Oneidas remained a "distinct people" outside state jurisdiction and that New York could alter their status only "with the entire approbation of the government of the United States"); *Holland v. Pack*, 7 Tenn. 151, 152-54 (1823) (concluding that Tennessee courts could not hear a tort claim arising in Cherokee territory because "[t]heir [Cherokee] laws must govern the transactions which happen within their own borders"). Not until the late 1820s would states begin to aggressively assert jurisdiction over Indians as part of so-called Indian Removal—only for this Court to reject their pretensions to authority.

IV. The Revisionist Argument for State Authority Has Repeatedly Failed and Lacks Evidence.

A. States Have Long Challenged Federal Authority over Indian Affairs—and Repeatedly Lost.

Although the revisionist argument advanced by the Plaintiffs—that the long-standing congressional authority to legislate in Indian affairs is primarily limited to "trade," narrowly defined—finds little support in Founding history, it is also not new. On the contrary, states' advocates concocted this argument in the mid-nineteenth century as they discovered that federal power posed a barrier to seizing Native lands.

Yet such state power grabs, justified by post hoc rationalizations, have repeatedly lost—including in this Court.

Immediately after ratification, there was widespread consensus that the Constitution conferred broad federal power to regulate relations with Indian tribes. *See* Ablavsky, *Beyond*, *supra*, at 1045-49. Even states like Georgia that had challenged federal authority under the Articles acquiesced in federal power, likely hoping that under the new regime they could use federal money and authority to gain more Native land. Ablavsky, *Savage Constitution*, *supra*, at 1067-71. State courts early acknowledged that the new constitutional order established federal supremacy in Indian affairs. *See, e.g.*, *Glasgow's Lessee v. Smith*, 1 Tenn. 144, 166-67 (1805) ("The Constitution of the United States gave the power to the General Government to regulate intercourse with the Indians and to make treaties. The States, having conceded these powers, no longer possess them.").

However, within a few years, states like Georgia became frustrated at the slow pace at which the federal government "extinguished" Indian title. And so they increasingly proclaimed that the federal government's Indian affairs power trampled on their sovereignty. Ablavsky, *Beyond*, *supra*, at 1048-50. Such cries peaked during the Removal Crisis of the 1830s, as federal authority impeded southern states' efforts to expel Native nations from their borders. Rosen, *supra*, at 51-78; Tim Alan Garrison, *The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations* (2002).

These states struggled, however, to articulate a constitutional basis for their claims. Initially, they rarely discussed the Indian Commerce Clause. Ablavsky, *Beyond*, *supra*, at 1048-50. Instead, these states insisted on an absolute right to state territorial integrity—even though the Constitutional Convention had expressly *rejected* a proposal to codify this principle. *Id.* They also harped on the equal footing doctrine, although federal authority over Indian affairs equally restricted *all* states. Ablavsky, *Federal Ground*, *supra*, at 204-05.

During Removal, state officials and judges hit on additional eclectic constitutional arguments to cabin federal authority. They claimed that federal Indian treaties were constitutionally invalid, that the existence of Native nations within state borders violated the Constitution's New State Clause, and that the Constitution could not override preexisting property and jurisdictional rights. *See, e.g.*, *Tennessee v. Foreman*, 16 Tenn. 256 (1835); *Caldwell v. Alabama*, 1 Stew. & P. 327 (1832); *Georgia v. Tassels*, 1 Dud. 229 (1830); Rosen, *supra*, at 51-75. Amidst these scattershot arguments, states in the 1820s and '30s crafted a new, narrower interpretation of the Indian Commerce Clause as a way to blunt federal efforts to restrict state jurisdiction. Rosen, *supra*, at 57 ("State challenges to federal authority over Indians frequently were founded on an assertion that the subject of regulation was not 'commerce.'").

These arguments fared poorly. Justice Story firmly rejected them in his canonical *Commentaries on the Constitution*. Before the Revolution, Story

observed, "the authority to regulate trade and intercourse with the Indian tribes . . . was understood to belong to the prerogative of the British crown." Joseph Story, 3 *Commentaries on the Constitution of the United States* 37-38 (1833). "The constitution," Story continued, then gave "to congress, as the only safe and proper depositary, the exclusive power, which belonged to the crown in the ante-revolutionary times." *Id.* at 39. In Story's view, this principle ensured that the nation would speak with one voice in Indian affairs: "The Indians, not distracted by the discordant regulations of different states, are taught to trust one great body, whose justice they respect, and whose power they fear." *Id.* at 40.

This question, and the states' arguments, ultimately reached this Court in 1832 in *Worcester v. Georgia*. Chief Justice John Marshall affirmed the original understanding of the Indian affairs power as an indivisible set of related powers vested in the federal government alone—soundly rejecting Georgia's novel reinterpretation. 31 U.S. 515 (1832). The Constitution "confers on congress the powers of war and peace; of making treaties, and of regulating commerce . . . with the Indian tribes," he reasoned, ruling Georgia's efforts to assert jurisdiction over the Cherokee Nation unconstitutional. *Id.* at 558. "These powers comprehend all that is required for the regulation of our intercourse with the Indians." *Id.* at 558-59.

Since *Worcester*, this Court has consistently rejected challenges to federal Indian affairs statutes rooted in state sovereignty. *See, e.g.*, *In re Kansas*

Indians, 72 U.S. 737 (1866); *United States v. Kagama*, 118 U.S. 375, 384 (1886); *United States v. Sandoval*, 231 U.S. 28, 49 (1913). Indeed, amidst the many dramatic shifts in federal Indian policy, this Court has never held that a federal Indian affairs statute exceeded Congress's enumerated powers under the Constitution.[2] Thus, the original constitutional understanding of federal primacy over Indian affairs has remained good law despite some states' long-standing post hoc efforts to challenge it.

B. The Current Revisionist Challenge to Federal Authority Rests on Doctrinal Confusion and Incomplete Scholarship.

To overturn over two centuries of well-settled practice and precedent, Plaintiffs and their *amici* offer almost no Founding-era citations to support their purportedly originalist conclusions. For instance, in hundreds of pages of briefing, the only direct historical evidence of Founding-era interpretation of the Indian Commerce Clause that they cite is Federalist No. 42, Br. Individual Pls. at 48—in which, as discussed above, James Madison advanced an interpretation of the Indian Commerce Clause endorsing expanded federal authority "unfettered" by the protections of state authority in the Articles. Instead, to support

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[2] In *Seminole Tribe of Florida v. Florida,* this Court found that the Indian Gaming Regulatory Act, though a valid exercise of congressional authority under the Indian Commerce Clause, violated the Eleventh Amendment by attempting to abrogate state sovereign immunity. 517 U.S. 44 (1996).

their revisionist conclusions, Plaintiffs proffer a handful of law review articles.

Even then, this scholarship offers less than meets the eye. In particular, Plaintiffs conflate two distinct and long-standing issues of federal authority in Indian affairs. One issue was a matter of federalism: which sovereign, state or federal, would govern relations *between* U.S. citizens and Indian tribes. The other was the source and scope of federal power *over* tribes' internal affairs. *See Brackeen v. Haaland*, 994 F.3d 249, 23-24 (5th Cir. 2021) (Duncan, J.) (articulating this distinction). The Founders devoted almost all their attention to the federalism question, offering a clear answer in favor of federal preeminence. By contrast, they only cursorily considered the source of federal power *over* tribes' internal affairs—likely because, as noted above, the Founders routinely described tribes as akin to "foreign nations."

But, as the United States seized more Native land over the nineteenth century, the federal government began to claim authority not only to regulate relations *with* tribes but to govern tribes and their internal relations directly, through ordinary legislation. Yet it struggled to find a solid constitutional footing to justify federal authority to interfere in internal tribal affairs.

Consider, for instance, the congressional debate over the 1834 Western Territory Bill, an example that Texas seemingly plucked from a student note. Nathan Speed, Note, *Examining the Interstate Commerce*

Clause through the Lens of the Indian Commerce Clause, 87 B.U. L. Rev. 467, 478-79 (2007). The bill proposed creating a federal territory, to be admitted as a state, from the Native nations west of the Mississippi. The bill shed no light on the balance of *state-federal* authority over Indian affairs, since it exclusively concerned federal territory outside any state's jurisdiction. The principal constitutional issue was whether such a proposal infringed on *Native*, not state, autonomy. 10 Reg. Deb. 4770 (1834); Speed, *supra*, at 479 ("The Western Territory bill was the first attempt to regulate *clearly internal tribal matters* via statute." (emphasis added)). As for John Quincy Adams, far from questioning congressional authority to regulate intercourse with Indians, he feared *limiting* congressional power over Indian affairs: the bill, he worried, "divest[ed] Congress of all power over the relations of the people of the United States to the Indian tribes, and placed it wholly in the hands of the President." 10 Reg. Deb. 4770. The bill's ultimate demise reflected this criticism as well as Native opposition. Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* 302-09 (1984).

By the end of the nineteenth century, though, earlier federal qualms about asserting federal power over tribes' internal affairs had largely vanished. Yet the *source* of this federal authority *over* tribes remained uncertain. In 1886, in *Kagama*, this Court acknowledged that federal authority to regulate internal tribal affairs found little support in a constitutional provision that regulated intercourse *with* the tribes. 118 U.S. at 378 (describing as a "very

strained construction" of the Indian Commerce Clause to justify "a system of criminal laws for Indians living peaceably in their reservations, which left out the *entire code of trade and intercourse laws justly enacted under that provision*" (emphasis added)). Instead, the Court discovered federal authority over tribes in principles of territorial sovereignty and Native dependence. *Id.* at 379-80. Many subsequent commentators have criticized this atextual basis for claiming federal plenary power *over* tribes. *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 214, 223-26 (2004) (Thomas, J., concurring); Ablavsky, *Beyond*, *supra*, at 1082-88; Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 2 (2002); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L.J. 113 (2002); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 Minn. L. Rev. 31 (1996); Saikrishna Prakash, *Against Tribal Fungibility*, 89 Cornell L. Rev. 1069, 1087-90 (2003); Lorianne Updike Toler, *The Missing Indian Affairs Clause*, 88 U. Chi. L. Rev. 413 (2021).

This litigation, however, does not present a question of the scope of federal power over tribes' internal affairs. Plaintiffs challenge ICWA on federalism grounds, presenting the question whether the state or federal government has the power to govern relations *between* the United States and Native nations, not the power *over* tribes. And on this issue, the scholarly commentary is nearly unanimous: numerous commentators, including self-identified conservative originalists, have surveyed Founding-era

evidence of the Constitution's original meaning and concluded that it supports broad federal authority to manage relations *with* tribes and to preempt state authority. *See, e.g.*, Stephen Andrews, *In Defense of the Indian Commerce Clause*, 9 Am. Ind. L.J. 182 (2021); Robert N. Clinton, *The Dormant Indian Commerce Clause,* 27 Conn. L. Rev. 1055 (1994); Green, *supra*; Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 Tax Law. 897 (2010); Toler, *supra*, at 481.[3]

Virtually the sole support for the contrary revisionist argument in favor of expansive *state* authority over Indian affairs is Justice Thomas's concurrence in *Adoptive Couple*, 570 U.S. at 656 (Thomas, J., concurring), where the issue was unbriefed. *See id.* at 690 n.16 (Sotomayor, J., dissenting). Justice Thomas's historical argument largely rests on a single law review article by former academic Robert Natelson. *See id.* at 656 (Thomas, J.,

[3] Contrary to the claims of some of the Plaintiffs' *amici*, my work does not support their position. I have indeed written that the historical meaning of the Indian Commerce Clause read *in isolation* does not alone support exclusive federal power over Indian affairs. But that same work also unambiguously concluded that the Indian Commerce Clause, in conjunction with the Constitution *as a whole*, gave the federal government primacy to govern relations with Indian tribes: "Rather than relying on the Clause in isolation, members of [the Founding-era political] elite class argued that the Constitution prohibited the exercise of state authority by granting the federal government the core Indian affairs powers in multiple provisions, and by barring the states from entering treaties or declaring war." Ablavsky, *Beyond*, *supra*, at 1044.

concurring) (citing ten times Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause,* 85 Denv. U. L. Rev. 201 (2007)); see also Br. Pl. Tex. at 23.[4]

In prior cases, Justice Thomas has admirably reevaluated earlier tentative conclusions based on additional evidence of original constitutional understanding. *See, e.g.*, *Peugh v. United States*, 569 U.S. 530, 559 (2013) (Thomas, J, dissenting); *Apprendi v. New Jersey*, 530 U.S. 466, 520-21 (2000) (Thomas, J., concurring). Such reexamination is warranted here. Every scholar to examine the issue since Natelson's article—including those cited extensively and approvingly by Plaintiffs and their *amici*—has explicitly rejected his conclusions. *See, e.g.*, Ablavsky, *Beyond*, *supra*, at 1026-29, 1036 nn.124-25, 1033 n.105; Andrews, *supra*, at 200, 207 ("Natelson's interpretation is untenable"); Green, *supra*, at 14 n.48 (critiquing Natelson's "creative[]" argument that the Trade and Intercourse Act rested solely on the Treaty Power as relying on "no direct evidence" and contradicting explicit contrary statements); Toler, *supra*, at 481-82 (noting that her "conclusion departs

[4] A much briefer account appears in Prakash, *supra*, at 1089-90. As noted above, Prakash mostly focuses on the distinct question of federal power *over* tribes. Prakash, *supra*, at 1087-90. He then examines the question of federalism in a single paragraph, relying solely on a negative inference from the change in language from "affairs" in the Articles to "commerce" in the Constitution. *Id.* at 1089-90. He examines no additional evidence, exploring neither the late eighteenth-century meaning of "commerce with the Indian tribes," nor any of the ratification-era evidence, discussed above, suggesting a broad understanding of federal authority as against the states. *Id.*

sharply from that of . . . Natelson in his scholarship" because the Constitution's provisions "preserve tribal sovereignty and limit state power"). None of the numerous opinions in the Fifth Circuit's 325-page *en banc* decision exhaustively examining the Founding-era history of Indian affairs cited Natelson's article, despite extensive citations to it in the briefing.

Natelson's conclusions rested on some key errors. In particular, Natelson relied on an erroneous transcription of Anti-Federalist Abraham Yates, Jr.'s objection to federal power over Indian affairs. Natelson's source omitted the language, quoted above, that ratification would "totally surrender into the hands of Congress the management and regulation of the Indian affairs." Natelson then proceeded to draw a negative inference from the inaccurate quotation, arguing, "if there had been any reasonable interpretation of that provision [the Indian Commerce Clause] that included plenary authority over Indian affairs, he [Yates] certainly would have pointed it out." Natelson, *supra*, at 248-49. But as the corrected quotation demonstrates, there was, and he did.[5]

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[5] Natelson subsequently explained his error by noting considerable library constraints. Robert G. Natelson, *A Preliminary Response to Prof. Ablavsky's "Indian Commerce Clause" Attack*, Indep. Inst. (Apr. 7, 2022), https://tinyurl.com/mtx3jy2u. But Natelson insisted that the corrected Yates quotation did not alter his earlier conclusions, asserting that, although Yates wrote "Congress," he "meant the entire central government, not the new federal Congress alone." *Id.* I find this atextual conclusion unpersuasive. Gregory Ablavsky, *A Reply to Mr. Natelson's "Preliminary Response to Prof. Ablavsky's 'Indian Commerce Clause Attack,'"* (May 6,

Justice Thomas also relied on Natelson's assertion that "commerce with the Indian tribes" was limited solely to trade. Natelson, *supra*, at 214-18. Yet Natelson's method for equating commerce and trade was flawed. He stated that he searched databases of early American printed materials for exact phrases. *Id.* But the precise phrases he used rarely appear in material published in America before 1787: the exact phrase "commerce with the Indians" appeared only six times; "commerce with Indian tribes" did not occur at all.[6] Contrast these results with the frequency of the terms "intercourse" and "commerce" (77 hits and 32 hits, respectively), in a single volume of collected federal Indian affairs documents from 1789-1814. Ablavsky, *Beyond*, *supra*, at 1028-29 n.81; *see also* App. When we expand our perspective beyond Natelson's miniscule sample size, his tidy equivalence between "commerce" and "trade" breaks down. Ablavsky, *Beyond*, *supra*, at 1028-31.

Ultimately, Plaintiffs' historical argument eschews concrete Founding-era evidence in favor of platitudes shorn of context. No one disputes that the states have long enjoyed primary authority over domestic relations, Br. Pl. Tex. at 21, Br. Individual Pls. at 54—yet this generalization has little application to the distinctive history of Native peoples in the United States. Similarly, invoking the truism

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2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4100597.

[6] In the less relevant material published in Britain, "commerce with the Indians" appeared in forty-four distinct works between 1700 and 1787; "commerce with Indian tribes" did not appear at all.

that the federal government enjoys limited and enumerated powers, Br. Pl. Tex. at 21, Br. Individual Pls. at 53, merely begs the question. Indian affairs, after all, is one of the few areas of law—equaled perhaps only by the related realms of foreign and military affairs—in which the Founding-era evidence overwhelmingly demonstrates that the Constitution's drafters and ratifiers believed that ratification would "totally surrender" state authority. Federal authority was not unbounded—it had to be tied to "our intercourse with the Indians," in Chief Justice Marshall's words, *Worcester*, 31 U.S. at 559—but it was substantial.

Yet it is also a truism that, where the Constitution clearly confers federal authority, as over Indian affairs, federal law is supreme. *See* U.S. Const. art. VI. This feature of the Constitution reflected the hard-won lessons of the Articles of Confederation, in which state interference with federal power had nearly destroyed the republic—including, as James Madison emphasized, in Indian affairs. As noted above, post hoc efforts by states disgruntled with federal policy to roll back the Constitution's transformation and return to the balance of the Indian affairs power under the Articles are also very old. But their arguments have met two centuries of failure before this Court, which has repeatedly endorsed the principle that the Constitution grants the federal government the primary authority to regulate the nation's intercourse with Indians.

CONCLUSION

The Court should rule in favor of Federal Parties and Tribal Defendants. ICWA should be upheld.

Respectfully submitted,

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APPENDIX

Instances of the Term "Intercourse" in Indian Affairs, 1784-1802

Quote	Source
"Many more authors might be quoted, declarative of the commendable qualities which have appeared in the Indians, whilst uncorrupted by an **intercourse** with the Europeans, and which is still the case in the disposition of those nations situated at a distance from us." "[I]f the peace and safety of the inhabitants of our wide extended frontiers; the lives and welfare of so many innocent and helpless people, depends on the maintenance of a friendly **intercourse** with our Indian neighbours, what greater instances of patriotism, of love to God and mankind, can be shewn, than to promote, to the utmost of our power, not only the civilization of these uncultivated people, whom Providence has, as it were, cast under our care; but also	Anthony Benezet, *Some Observations on the Situation, Disposition, and Character of the Indian Natives of This Continent* 19, 51-52 (1784).

their establishment, in a pious and virtuous life."	
"I confess that the little benefit too many of the Indian nations have hitherto received from their **intercourse** with those who denominate themselves Christians, did not tend to encourage my charitable purposes; yet as many, though not the generality, might receive some benefit from the introduction among them of the polity and religion of the Europeans. . . ."	Jonathan Carver, *Three Years Travels, Through the Interior Parts of North-America, For More Than Five-Thousand Miles* 90 (1784).
"In this case I beg leave to offer it as my opinion that one great step to be pursued should be a distribution of a few presents among them [the Indians], and a constant **intercourse** with them by emissaries well acquainted with their language and manners."	Letter from Captain John Doughty to Henry Knox (Oct. 21, 1785), *in* 2 *St. Clair Papers: The Life and Public Services of Arthur St. Clair* 10 (William Henry Smith ed., 1881).
"Hence, it will be found that it would be out of our power to make the absolutely	Letter from Judges Parsons and Varnum to Arthur

necessary regulations for protecting the persons and securing the property of the natives, and for preventing those unwarrantable **intercourse**s, which might perpetuate their jealousies instead of conciliating their affections."	St. Clair (July 31, 1788), *in* 2 *St. Clair Papers: The Life and Public Services of Arthur St. Clair* 69 (William Henry Smith ed., 1881).
"How shall we distinguish between the original diseases of the **Indians** and those contracted from their **intercourse** with the Europeans?" "Since the **intercourse** of the white people with the **Indians**, we find some of them deformed in their limbs. This deformity, upon inquiry, appears to be produced by those accidents, quarrels, &c. which have been introduced among them by spirituous liquors."	Benjamin Rush, *Medical Inquiries and Observations* 10, 17 (1789).
"The chief communicated to me their wishes to be on friendly terms: signifying that it would be very much	Letter from John Cleves Symmes to Jonathan Dayton (May 18, 1789), *in*

to their advantage to have free **intercourse** with us, and exchange their peltrys for the articles which they much wanted. To this you will suppose I readily agreed."	*Correspondence of John Cleves Symmes: Founder of the Miami Purchase* 74 (Beverley Waugh Bond ed., 1926).
"By the expiration therefore of the above period, it is most probable that the indians will by the invariable operation of the causes which have hitherto existed in their **intercourse** with the whites, be reduced to a very small number."	Enclosure (June 15, 1789), *in* 2 *Papers of George Washington: Presidential Series* 494 (Dorothy Twohig ed., 1987).
"[A]s the organ therefore of a growing & important territory, whose future population & consequence depend upon the friendship & **intercourse** of their Indian neighbours, I intreat the early & earnest attention of the general Government, to whom with great propriety the sole management of India[n]	Letter from Governor Charles Pinckney to George Washington (Dec. 14, 1789), *in* 4 *Papers of George Washington: Presidential Series* 404 (Dorothy Twohig ed., 1993).

affairs is now committed . . . ".	
"[T]hey [the Cherokees] were glad to see me—I gave them some Corn & Tobacco—told them who I was, by whom I was sent, & what was my Object—in this apparent friendly **Intercourse** we spent at least an Hour together."	Letter from Major Doughty to Josiah Harmar (Apr. 17, 1790), Josiah Harmar Papers, Vol. 12, at 77 (on file at Clements Libr., Univ. of Mich., Ann Arbor, Mich.).
"By some former Communications I have observed that a Part of the Ouiatanons had been detached from the Views of the Nation—it is undoubtedly of some Consequence to keep them detached if possible; tho' in Case of a War I do not believe that they would range or take Part with the United States, and living as they do in the Neighbourhood of the Village, & having a free **Intercourse** with the Inhabitants it will be much in their Power to do them an unsuspected Injury—	Letter from Governor Arthur St. Clair to John Francis Hamtramck (June 11, 1790), *in* 3 *Territorial Papers of the United States* 311-12 (Clarence Edward Carter ed., 1934).

they should therefore be observed very carefully."	
"[A] further sum, not exceeding twenty thousand dollars, arising from the duties on imports and tonnage, shall be, and the same is hereby appropriated for defraying the expenses of negotiating, and holding a treaty or treaties, and for promoting a friendly **intercourse**, and preserving peace with the Indian tribes."	Act of July 22, 1790, 1 Cong. ch. 31, 1 Stat. 136.
"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. . . . "	Letter from George Washington to Timothy Pickering (Sept. 4, 1790), *in* 6 *Papers of George Washington: Presidential Series* 396 (Mark A. Mastromarino ed., 1996).

"As Americans they have been the peculiar Objects of Indian Depredation, while their Neighbours the french, from having had much **intercourse** with the Indians, and frequently intermarrying with them, until very lately were generally safe . . . ."	Report of Governor St. Clair to the Secretary of State (Feb. 10, 1791), 2 *Territorial Papers of the United States* 325 (Clarence Edward Carter ed., 1934).
"Of their former **intercourse** with the white people" [Heading from detailed War Department report on the Muscogee Creeks. Section recounts in detail Creek diplomatic and political connections to English and Spanish colonies.]	Report from Caleb Swan to Henry Knox (May 2, 1791), *in Caleb Swan Journal Extracts* 25-28 (on file at Am. Phil. Soc'y, Phila., Penn.).
"It is my wish & desire that you would examine the Laws of the General Government which have relation to Indian Affairs—that is—for the purpose of securing their lands to them—Restraining States—or Individuals from purchasing their lands—and	Letter from George Washington to Edmund Randolph (Oct. 10, 1791), *in* 9 *Papers of George Washington: Presidential Series* 68 (Mark A. Mastromarino and

forbidding unauthorized **intercourse** in their dealing with them."	Jack D. Warren eds., 2000).
"[I]t appeared to be a general opinion at the Look-out Mountain town, both of whites (traders) and Indians, that neither the Creeks, nor Lower town Cherokees would ever be at peace with Cumberland, because it was so immediately in the way of the **intercourse** between them and the Northern tribes, and that, if it was permitted to grow, it would be attended with bad consequences to them."	Report of David Craig to William Blount, Superintendent of Indian Affairs, for the Southern District, Made at Knoxville (Mar. 15, 1792), *in* 1 *American State Papers: Indian Affairs* 264 (Walter Lowrie and Matthew St. Clair Clarke eds., 1834).
"This alteration of sentiment and conduct in the five Lower towns, and which I have no reason even to suspect, has extended to any other part of the nation, is to be accounted for by their **intercourse** with the Creeks and Shawanese, since the defeat of General St. Clair."	Letter from William Blount to Henry Knox (Mar. 20, 1792), *in* 1 *American State Papers: Indian Affairs* 263 (Walter Lowrie and Matthew St. Clair Clarke eds., 1834).

"It is true that some of the Chickamagas, and others of the Cherokees, who have had considerable **intercourse** with the Shawanese, for some years past, have, at times manifested bad symptoms."	Letter from Secretary of War to Governor of Virginia (May 16, 1792), *in* 1 *American State Papers: Indian Affairs* 255 (Walter Lowrie and Matthew St. Clair Clarke eds., 1834).
"Good policy as well as my own feelings have induced me to recommend to the Frontier Inhabitants of this Territory to treat that part of the Cherokee Nation which have declared for peace in the same friendly manner as if no part had declared for War and permit me Gentlemen to extend that recommendation to you also and to request you to continue that friendly **intercourse** with that part of the Nation which is adjacent to you in the manner you have heretofore done so long as that part shall continue their	Message from Governor William Blount to the Frontier Inhabitants of North Carolina (Oct. 2, 1792), *in* 2 *John Gray Blount Papers* 640-41 (Alice Barnwell Keith ed., 1959).

friendship for the United States."	
"The good effect of the late Treaty are very sensibly felt in this country: the Indians have ever since continued their friendly **Intercourse** with the village where they have been supplied with goods on their own Terms by reason of a number of Traders having on the news of the Peace flocked hither with considerable Stores."	Letter from Henry Vanderburgh to Winthrop Sargent (Jan. 6, 1793), Winthrop Sargent Papers (on file at Reel 3, Microfilm, Mass Hist. Soc'y, Boston, Mass.).
"Agreeably to the promise I made when I last saw you I now write you the news of this place—all **intercourse** between us and the Indians has ceased for sometime past. . . . "	Letter from Willie Blount to John Gray Blount (Feb. 25, 1794), *in* 2 *John Gray Blount Papers* 368-69 (Alice Barnwell Keith ed., 1959).
"[D]aily and friendly **intercourse** is kept up at tellico blockhouse (on the North Bank of the Tennessee) between Mr McKee, the temporary Agent, Resident at that place, in the part of the	Letter from Governor Blount to Secretary of War (Nov. 3, 1794), *in* 4 *Territorial Papers of the United States* 362 (Clarence

United states, where James Cary the Interpreter also Resides, and the upper Cherokees, and the people generally on the frontiers, who have for upwards of two Years been miserably huddled together in Stations for their common defence."	Edward Carter ed., 1934).
"If the Indians are sincere and wish to have a now friendship they cannot object to these means of useful **intercourse** [military posts] which will cement that friendship, while they will afford a very necessary accommodation to the people of the United States, and in the way of trade to the Indians themselves."	Letter from Timothy Pickering to Anthony Wayne (Apr. 8, 1795), Northwest Territory Collection (on file with Ind. Hist. Soc'y, Indianapolis, Ind.).
"All the means of attaching those numerous Indian nations to the United States it would seem to me better to have suspended until we get possessed of the Western posts: for they would naturally increase the efforts of the British to	Letter from Secretary of War to the President (May 16, 1795), *in* 2 *Territorial Papers of the United States* 519 (Clarence

retain them in their interest, and perhaps prove a concealed motive for procrastinating the delivery of the posts. When that delivery takes place, they may be satisfied with a visit to the principal officer of the United States at Detroit or Michilimackanac; and then too the **intercourse** by trade may, advantageously commence."	Edward Carter ed., 1934).
"To put an end to a destructive war, to settle all controversies, and to restore harmony and a friendly **intercourse** between the said United States, and Indian tribes. . . ." "Henceforth all hostilities shall cease; peace is hereby established, and shall be perpetual; and a friendly **intercourse** shall take place, between the said United States and Indian tribes."	Treaty of Peace, U.S.-Wyandots et al., preamb. & art. 1, Aug. 3, 1795, 7 Stat. 49.
"And for giving one to the Creek Interpreter he	Letter from William Blount to David

alledges & I believe he is very usefull to the United States in that capacity, in the **Intercourse** between the Little Turkey . . . and the Creek Nation."	Henley (Oct. 24, 1795), William Blount Papers (on file with McClung Hist. Collection, Knoxville, Tenn.).
"It is a painful Truth that Frontier People and Indians have too little neighbourly affection for each other. . .the United States should take all practicable steps to cut off a too frequent promiscuous **Intercourse** with each other, which is impossible when only a line of marked Trees is the dividing line."	Letter from William Blount to James White (Dec. 14, 1795), *in* 4 *Territorial Papers of the United States* 411-14 (Clarence Edward Carter ed., 1934).
"[N]o stipulations in any treaty subsequently concluded by either of the contracting parties, with any other state or nation, or with any Indian tribe, can be understood to derogate in any manner from the rights of free **intercourse** and commerce secured by the aforesaid third article of the	Explanatory Article to Art. III of the Jay Treaty, U.S.-Great Britain, May 4, 1796, 8 Stat. 130-31.

treaty of amity, commerce and navigation."	
"[T]he traders of every description would conceive it their interest to divert the attention and **intercourse** of the indians from the United States to a quarter where they could recommence their trading as usual. . . ."	Letter from John Sevier to Andrew Jackson (Jan. 29, 1797), *in* 1 *Papers of Andrew Jackson* 120 (Sam B. Smith & Harriet Owsley eds., 1980).
"[I]t being our duty to draw in the Indians under our agency as much as possible to a friendly **intercourse** with our fellow citizens, and to cement it by an interchange of good offices, I think we should by every means encourage all their legal attempts to acquire a living. . . ."	Letter from Benjamin Hawkins to Silas Dinsmoor (Apr. 15, 1797), *in Letters, Journals, and Writings of Benjamin Hawkins* 102 (C.L. Grant ed., 1980).
"My first object is to commence a Trade and friendly **intercourse** with the Chickasaw nation of Indians on such principals as will be interesting to	Letter from Zachariah Cox to Andrew Jackson (Apr. 27, 1797), *in* 1 *Papers of Andrew Jackson* 131-32 (Sam B. Smith &

them as well as to the frontiers in General."	Harriet Owsley eds., 1980).
"The people know well, that all **intercourse** with foreign nations, and the Indian tribes, is conducted by the United States, in their national capacity. They know that whatever hardships this regulation may impose on particular states, yet it is a necessary consequence of the character we have assumed among the powers of the earth."	Campbell, "For the Knoxville Gazette," *Knoxville Gazette* (Knoxville, Tenn.), June 12, 1797.
"I confess with some degree of surprise, as it appears to me to be an attempt, and with the aid of the officers of government too, to trespass on the Indian rights under the pretext of a friendly **intercourse** with them, and which if in the least degree countenanced by the officers, must have the tendency to destroy that confidence which the	Letter from Benjamin Hawkins to Zachariah Cox (Aug. 6, 1797), *in Collected Works of Benjamin Hawkins, 1796-1810*, 189 (Thomas Foster ed., 2003).

Indians have in the justice of the United States."	
"As General Wilkinson must necessarily have some Agency in whatever concerns the **intercourse** with the Indians, and as this circumstance will render the responsibility for what is done more complex, than would be the case if one office only was concerned, I would recommend to you the utmost punctuality in your correspondence with the General."	Letter from Oliver Wolcott to Rufus Putnam (Sept. 16, 1797), Letters Sent by the GLO to Surveyors General, 1796-1816 (on file at Microfilm M027, U.S. National Archives, Wash., D.C.).
"[O]ccasions may occur in which the interests of the U. States may require an **intercourse** with the Indians residing in the Northwestern Territory, thro' a public agent."	Letter from Timothy Pickering to Arthur St. Clair (Sept. 18, 1797), Northwest Territory Collection (on file with Ind. Hist. Soc'y, Indianapolis, Ind.).
"It will be difficult to keep these Indians [the Chickasaws] at home owing to the long and friendly **intercourse** which has	Letter from Samuel Mitchell to David Henley (Oct. 30, 1797), David Henley Papers (on file with

subsisted between the Inhabitants of Cumberland and the nation."	Rubenstein Rare Book and Manuscript Library, Duke Univ., Durham, N.C.).
"At the same time, gentlemen, you will see the propriety of laws conformable to the public treaties of the nation for protecting them [the Indians] in their stipulated rights, for rendering redress in cases of injury and wrong easy and sure, and for securing to them, in their **intercourse** with us, a humane, a just, and generous treatment. By such means, animosities will be worn out on both sides, and many of the causes and incentives to war obviated."	Address of Governor St. Clair to the Council and House of Representatives (Sept. 25, 1799), *in* 2 *St. Clair Papers: The Life and Public Services of Arthur St. Clair* 446-57 (William Henry Smith ed., 1881).
"They [the Indians] had, they said, in all their **intercourse** with white people, been accustomed to do business with military Chiefs."	Letter from Major Thomas Cushing to General Wilkinson (Feb. 15, 1800), James McHenry Papers (on file at Box 5, Clements

	Library, Univ. of Mich., Ann Arbor, Mich.).
"[A]ll prudent means in our power should be unremittingly pursued for carrying into effect the benevolent views of Congress, relative to the Indian Nations within the jurisdiction of the United States. The provisions made by Congress, under the heads of **intercourse** with the Indian Nations, and for establishing trading houses among them &c. have for their object not only the cultivation and establishment of harmony and friendship between the United States and different nations of Indians."	Letter Henry Dearborn, Secretary of War to Arthur St. Clair (Feb. 23, 1802), Arthur St. Clair Papers (on file at Microfilm, Reel 5, Ohio Hist. Connection, Columbus, Ohio).