Article IV and Indian Tribes

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ABSTRACT: Unlike the first three articles of the Constitution which create the three branches of the federal government and articulate their limited powers, Article IV establishes a set of rules to police the actions of states and knit them together into a single union. Notably absent from Article IV is any mention of the tribal sovereign. Concomitantly, there has been no comprehensive academic discussion addressing how the tribal sovereign complicates the purposes of Article IV. This piece advances a completely new understanding of Article IV and its implications in federal Indian law. It argues that where Article IV advances rights to individual citizens (i.e., a citizen's right to enforce a court judgment or their claim to the protection of the Privileges and Immunities Clause) then states may not use an individual's connection to any tribal sovereign as an excuse to deny them the protections of those rights. In contrast, where Article IV speaks to rules designed to ensure states treat each other respectfully (i.e., requests for extradition, claims under the Equal Footing Doctrine, or any attempt to enforce the Guarantee Clause) then Article IV's rules do not permit states to abridge, abrogate, modify, or erode the inherent rights of tribal nations. As the Court has recently opined, tribal governments themselves were absent from the Constitutional Convention and so constitutional limitations on the inherent powers of state sovereigns do not extend to tribal governments.

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INTRODUCTION

Wayne Turtle, Sr., a Cheyenne Indian, was wanted by the State of Oklahoma on charges of second-degree forgery.[1] Because he was living with his Navajo wife on the Navajo Reservation, the State of Oklahoma asked the Navajo Nation to extradite Turtle to Oklahoma to stand trial.[2] The Navajo Nation refused. The tribal court explained "that Navajo tribal law provided for extradition only to the three neighboring states of Arizona, New Mexico and Utah."[3] Turtle was accordingly released by the tribal court.[4]

The Governor of Oklahoma then made a request to the Governor of Arizona pursuant to Article IV of the U.S. Constitution.[5] Article IV Section 2 provides that a governor may "Demand" the governor of another state "deliver[] up" a person charged with "Treason, Felony, or other Crime."[6] Arizona's Governor Williams issued a writ of extradition, and Edgar Merrill, sheriff of Apache County, entered the Navajo Reservation and executed the warrant by

1. Arizona *ex rel.* Merrill v. Turtle, 413 F.2d 683, 683 (9th Cir. 1969).
2. *Id.*
3. *Id.* at 683–84.
4. *Id.*
5. *Id.* at 684.
6. U.S. CONST. art. IV, § 2, cl. 2 ("A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime.").

arresting Turtle.[7] Before Oklahoma authorities arrived to take custody of him, Turtle filed a writ of habeas corpus with the federal court in Arizona.[8] The federal court granted the writ "on the ground that the Arizona authorities had exceeded their jurisdiction in arresting appellee on the Navajo Reservation."[9] The Ninth Circuit affirmed, holding that "Arizona has no authority, and hence no duty, to exercise extradition jurisdiction over Indian residents of the Navajo Reservation."[10] The U.S. Supreme Court denied certiorari.[11]

Turtle is an excellent example of how the U.S. Constitution was drafted without thinking about the tribal sovereign.[12] Article IV's Extradition Clause provides a constitutional duty for the "executive authority" (i.e., governor) of one state to remit, to a sister state, someone charged with a crime, located within its borders, and subject to its jurisdiction.[13] "Critical to the exercise of this power is the dual understanding that the individual sought must be both within the state territory and subject to the state's jurisdiction."[14] State jurisdiction over Indians ends at the reservation's border. "States may not enter Indian country and remove persons found there absent cooperation with or permission from the Tribe."[15] In effect, the existence of a tribal sovereign nullified a constitutionally mandated obligation.

While the first three articles of the U.S. Constitution delegated power from the separate state sovereigns to create the three branches of the federal government,[16] Article IV prohibits state discrimination and sets some basic controls on interstate relations,[17] essentially focusing on the "'horizontal' relationships between states within the federal Union."[18] As Professor Seth

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7. *Turtle*, 413 F.2d at 684.

8. *Id.*

9. *Id.*

10. *Id.* at 686.

11. Arizona *ex rel.* Merrill v. Turtle, 396 U.S. 1003, 1003 (1970).

12. This is not to be confused with the fact that Indians themselves had thoughts and opinions about the Constitution. *See generally* Gregory Ablavsky & W. Tanner Allread, *We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution*, 123 COLUM. L. REV. 243 (2023) (discussing how Indian tribes engaged in the constitutional debates).

13. U.S. CONST. art. IV, § 2, cl. 2.

14. Grant Christensen, *The Extradition Clause and Indian Country*, 97 N.D. L. REV. 355, 375 (2022) (emphasis omitted).

15. *Id.* at 373–74, 376 ("[T]he Court has repeatedly limited the authority of states to enforce state criminal law in Indian country. Most recently, Justice Gorsuch found that Oklahoma could not enforce its criminal laws against crimes committed by Indians on the Muscogee (Creek) Reservation. He reminded Oklahoma that . . . '[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history.'" (footnotes omitted) (quoting McGirt v. Oklahoma, 591 U.S. 894, 928 (2020))).

16. Timothy K. Kuhner, *The Separation of Business and State*, 95 CALIF. L. REV. 2353, 2369 (2007) ("The first three articles of the Constitution describe the different functions of the three branches of government, thus providing for a separation of powers. Beyond specifying the powers of the federal government, the first three articles of the Constitution specify which branch may exercise which powers.").

17. Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1475–76 (2007) (discussing the origins and purpose of Article IV).

18. Ryan C. Williams, *The "Guarantee" Clause*, 132 HARV. L. REV. 602, 626 (2018).

Kreimer explained, "[t]he Constitution was framed on the premise that each state's sovereignty over activities within its boundaries excluded the sovereignty of other states."[19] Absent from this consideration of sovereign relations was any discussion of Indian tribes.[20] As Professor Judith Resnik has observed, "[t]o the extent Indian tribes are discussed in the Constitution, they seem to be recognized as having a status outside its parameters."[21] The tension between the Navajo Nation and the State of Arizona in *Turtle* illustrates how the omission of tribes from Article IV has raised some difficult questions regarding the role of the tribal sovereign in modern American federalism.

This Article recognizes that Indian tribes "did not take part in the Constitutional Convention and did not join in the federation of powers"[22] but argues that precisely because of this absence, the interpretation of Article IV is more complicated when Indians are involved. Part I of this Article explores the origin and purposes of Article IV, looking at how the Framers intended to forestall interstate conflict by creating a basic set of rights that prevent state discrimination of other states' citizens. Part II introduces the tribal sovereign into this narrative of federalism. It articulates why Indian tribes are not bound by the U.S. Constitution and firmly establishes that tribal governments exercise sovereign rights that, at times, alter federal–state relations. It lays the foundation for the argument that follows, separating Article IV's treatment of individuals from its treatment of sovereigns.

Part III then examines each of the four sections of Article IV and discusses how the proper interpretation of each is affected by the existence of a tribal sovereign. It argues that states ought to treat tribal court opinions as entitled to full faith and credit even if tribal courts are not reciprocally bound; that Indian people are entitled to the protection of the Privileges and Immunities Clause like any other citizen; that governors may not avail themselves of the Extradition Clause when the suspected criminal is an Indian located in Indian country; that the Equal Footing Doctrine does not allow states to usurp the inherent powers of tribal government; and that tribes are exempt from the Guarantee Clause's obligation that the United States ensure a Republican form of government. The Article concludes by offering a unifying theory of Article IV's application to Indian tribes.

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19. Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 464 (1992).

20. The Author recognizes that the word "Indian" has a number of problematic and even overtly racist connotations. Its use in this Article is as a legal term of art. The term is regularly used in American law (for example, Chapter 25 of the U.S. Code is the Chapter dealing with "Indians") and in the U.S. Constitution contradistinguishing "Indian Tribes" from fellow sovereign "states" and "foreign nations." *See* U.S. CONST. art. I, § 8, cl. 3. The term is used to codify the definition of "Indian country" at 18 U.S.C. § 1151 and is used to determine which tribes share in a government-to-government relationship through the Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103–454, 108 Stat. 4791. For a discussion of how the term "Indian" is more problematic in other contexts, see H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 60 n.1 (2014).

21. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 691 (1989).

22. *Id.*

Taken together, this Article argues forcefully that tribal sovereigns and their exercise of inherent power must be considered when interpreting Article IV, specifically when it comes to the behavior of states which often wish to discriminate against them.[23] The Supreme Court has even recognized states as the "deadliest enemies" of tribal governments.[24] While Indian tribes remain absent from the text of Article IV, it is impossible to understand and interpret the Article without their consideration, particularly when the rights, powers, duties, and obligations of the tribal sovereign are at the forefront of the judicial inquiry.

Ultimately, this Article advances a more nuanced understanding of the "horizontal" versus "vertical" federalism inherent in Article IV. Where Article IV's provisions extend vertically down from sovereign states to individual citizens, they duly encompass rights which apply to all persons, and thus, Article IV may be used to force the recognition of individual rights like the right to enforce a judgment from a tribal court or the right to the same privileges and immunities enjoyed by citizens of the state. Where, however, Article IV's provisions extend "horizontally" and create obligations between sovereigns, Indian tribes are exempt. Not having given up any of their inherent powers at the Constitutional Convention, they are sovereigns which may not now be obligated under a document they have never ratified.

I. THE PURPOSE OF ARTICLE IV: UNIFYING A NEW NATION

The Constitution created the three branches of the federal government in its first three articles. Article I created Congress, and the states delegated to it a set of limited legislative powers.[25] Article II created the office of the President and assigned the executive powers.[26] Article III created the Supreme Court, authorized Congress to create other lower federal courts, and assigned to the judiciary a limited judicial power.[27] Then, as Professor Joseph Zimmerman has observed, "[a] national constitution establishing a federal system of government of necessity must include clauses addressing various types of

23. United States v. Kagama, 118 U.S. 375, 384 (1886) ("[Indian tribes] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies."). For an excellent academic discussion of the origin of this distrust, see generally Robert A. Williams, Jr., *"The People of the States Where They Are Found Are Often Their Deadliest Enemies": The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981 (1996).

24. *Kagama*, 118 U.S. at 384.

25. For a general discussion of Article I and its role in regulating the powers of the legislative branch, see Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 159–80 (2010).

26. For a general discussion of Article II powers creating the executive branch and assigning limited powers to the office of the President, see generally Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019).

27. For a general discussion of Article III and its assignment of the judicial power to the federal courts, see Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1011–20 (2000).

relations between sister states."[28] It was in Article IV that the framers of the Constitution assigned limitations on state power in order to ensure uniformity and integration among state sovereigns—ultimately turning thirteen colonies into a unified federal force.[29]

The Supreme Court has long recognized that Article IV limits state power in order to achieve a functioning federalism where states do not intrude upon the authority of their sovereign state sisters. In 1943, Chief Justice Harlan Stone described the Full Faith and Credit Clause, a part of Article IV, as:

> [A]lter[ing] the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application.[30]

In a 1945 article in the Columbia Law Review, Justice Robert Jackson described Article IV as "serv[ing] to coordinate the administration of justice among the several independent legal systems which exist in our Federation."[31] Professor Gillian Metzger observed that "[s]ome national umpire over interstate relations is essential to ensure union"[32] and suggested that Article IV plays that role.[33] Even a cursory examination of each section will demonstrate how, unlike Articles I through III, Article IV is designed to knit the states together into a union by requiring each to respect their sovereign sisters.[34]

Section 1 contains the Full Faith and Credit Clause which broadly requires each state to give "[f]ull [f]aith and [c]redit" to the "public [a]cts, [r]ecords, and judicial [p]roceedings of every other State."[35] As Justice Stevens explained,

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28. JOSEPH F. ZIMMERMAN, UNIFYING THE NATION: ARTICLE IV OF THE UNITED STATES CONSTITUTION 25 (2015).

29. *Id.*; *see also* Eric Biber, *The Property Clause, Article IV, and Constitutional Structure*, 71 EMORY L.J. 739, 762 (2022) ("Article IV thus stands out from the rest of the Constitution, particularly the first three articles, in its focus on state-to-state relations rather than on the powers and limits of the federal government. Courts and commentators have noted these unique features of Article IV, identifying Article IV as a 'states' Article of the Constitution focused on comity between the states.").

30. Magnolia Petrol. Co. v. Hunt, 320 U.S. 430, 439 (1943).

31. Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 2 (1945).

32. Metzger, *supra* note 17, at 1478.

33. *Id.* at 1477 (discussing how many Article I powers have delegated to Congress the authority to legislate concurrently in the same areas touched on by Article IV's restrictions on state power).

34. *See* Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 23–24 (2006) (talking about the Framers' goal of using Article IV "to ensure interstate cooperation"); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1398 (1992) (discussing the intent of Article IV as providing uniform protections for American citizens even if located away from their state of domicile); Gerard N. Magliocca, *Rediscovering* Corfield v. Coryell, 95 NOTRE DAME L. REV. 701, 710–12 (2019) (discussing Article IV's role in protecting citizens from out-of-state discrimination in the wake of the *Slaughter-House* decision in 1873).

35. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general

"The Full Faith and Credit Clause is one of several provisions in the Federal Constitution designed to transform the several States from independent sovereignties into a single, unified Nation."[36] It requires that each state respect the "legitimate interests" of their fellow states and avoid infringing upon the sovereignty of their peers[37] without requiring that states completely surrender their own interests.[38] By ensuring that each state respects the laws and judicial proceedings of their sister states, the Full Faith and Credit Clause contributes meaningfully to the development of a single national identity.

Section 2 contains both the Privileges and Immunities Clause[39] and the Extradition Clause.[40] The Privileges and Immunities Clause prevents a state from treating out-of-state citizens in a discriminatory manner when fundamental rights are involved.[41] The Supreme Court has repeatedly described the Privileges and Immunities Clause as instrumental to "fus[ing] into one Nation a collection of independent, sovereign States."[42] To accomplish that fusion, the Clause invalidates state laws that attempt to disrupt national unity by preferring state citizens or discriminating against citizens of other states.[43]

The Extradition Clause allows the governor of a state to request that another state deliver up "to be removed" a person charged with any crime.[44] The authors of the Constitution understood that if a state permitted itself to be a safe haven for criminals who committed crimes in other states, the lack of mutual cooperation when attempting to prosecute crime would severely

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Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

36. Allstate Ins. Co. v. Hague, 449 U.S. 302, 322 (1981) (Stevens, J., concurring).

37. *Id.* at 322–23.

38. Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional:* Lawrence*, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 937 (2006) ("It is not solely concerned with union, but with union of a certain kind: a union of meaningfully empowered subfederal polities."); *see also* Pac. Emps. Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 501 (1939) ("[T]he very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.").

39. U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

40. *Id.* cl. 2 ("A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime.").

41. Martin H. Redish & Brandon Johnson, *The Underused and Overused Privileges and Immunities Clause*, 99 B.U. L. REV. 1535, 1541 (2019).

42. United Bldg. & Constr. Trades Council v. Mayor & Council of Camden, 465 U.S. 208, 216 (1984) (quoting Toomer v. Witsell, 334 U.S. 385, 395 (1948)).

43. Keith R. Denny, *That Old Due Process Magic: Growth Control and the Federal Constitution*, 88 MICH. L. REV. 1245, 1268 (1990) ("Since the clause intends to bind together the national union it should invalidate laws that disrupt that unity.").

44. U.S. CONST. art. IV, § 2, cl. 2.

threaten national unity.[45] By requiring that states cooperate in the identification, arrest, and extradition of persons accused of criminal activity, the Extradition Clause knits the states closer together, creating mutual reliance to advance their respective law enforcement interests.[46]

Section 3 contains both the precursor to the Equal Footing Doctrine[47] and the Property Clause.[48] The Equal Footing Doctrine is a judicial interpretation of Article IV that requires that new states cannot be discriminated against when they join the Union, but must be placed on an "equal footing" with the other states which are already part of the United States.[49] The Supreme Court explained:

> [W]hen a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union . . . .[50]

By ensuring that the admission of new states is not conditioned on relinquishing rights secured by existing states, the Equal Footing Doctrine guarantees that no state gives up more inherent sovereignty than its predecessors.

The Property Clause assigns to Congress the power to regulate the public lands of the United States and makes clear that it is Congress which has the power to dispose of federal land.[51] The Supreme Court has explained that while states may attempt to govern federal lands, Congress may enact overriding

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45. Puerto Rico v. Branstad, 483 U.S. 219, 227 (1987) ("The Framers of the Constitution perceived that the frustration of these objectives would create a serious impediment to national unity, and the Extradition Clause responds to that perception.").

46. John J. Murphy, *Revising Domestic Extradition Law*, 131 U. PA. L. REV. 1063, 1108 (1983) ("This theory of the [E]xtradition [C]lause as mandating minimum cooperation among the states rather than a precise extradition process is also consistent with the location of the [E]xtradition [C]lause in the Constitution . . . . [I]t appears in the same article as the [F]ull [F]aith and [C]redit [C]lause and the [P]rivileges and [I]mmunities provision, thus suggesting the assurance of state cooperation rather than its confinement." (footnote omitted)).

47. U.S. CONST. art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.").

48. *Id.* cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.").

49. Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1125 n.177 (2016) ("Article IV's provision for admitting 'new States' into 'this Union' implicitly guarantees equal footing, because, in this country, the 'States' all have the same sovereign power, and to allow otherwise would create a different union from 'this Union.'").

50. Coyle v. Smith, 221 U.S. 559, 573 (1911). For an academic discussion, see Rosa Hayes, *Decolonizing Equal Sovereignty*, 29 WM. & MARY J. RACE GENDER & SOC. JUST. 355, 372 (2023) ("A core purpose of the equal footing doctrine is thus to guarantee the equal sovereignty of states.").

51. U.S. CONST. art. 3, § 3, cl. 2.

regulations which displace any state created rules.[52] The Property Clause ensures that, where necessary, the federal lands of the United States will be treated in a uniform manner without being subject to varying state goals and policies. As Professor John Leshy has observed, "[t]he Property Clause's main purpose was to provide an explicit foundation for the national government's authority over public lands" and thereby establish a uniform rule for the management of federal property.[53]

Section 4 has the United States "guarantee to every State in this Union a Republican Form of Government."[54] The Supreme Court has explained "that the guarantee of a government republican in form was the means provided by the Constitution to secure the people in their right to change their government,"[55] but, as scholars have noted, it did not prevent states from experimenting within the broad scope of republicanism.[56] The Guarantee Clause ensures a certain uniformity among state government, so even as American citizens move from state to state, they will recognize the general form of the government they participate in selecting.

Taken together, the four sections of Article IV create a loose set of rules and expectations that ensure that individual states respect their sovereign state sisters within a federal system. Juxtaposed against the first three articles, which create the three branches of the federal government, Article IV anticipated future inter-state conflict and varyingly established certain expectations for the uniform treatment of persons while also providing overriding federal power to ensure the equal treatment of persons and states within the newly created Union. Carefully examined, the rights contained in Article IV can be broadly divided into those rights claimed by citizens not to be discriminated against and those rights claimed by states—demanding that each state sovereign be treated equally among her respective sisters. While both sets of rights achieve the goals articulated for Article IV (national unity, uniformity, comity) when applied against the principles of federal Indian law, the nature of the protected party (individual versus sovereign) has dramatically different implications.

52. Kleppe v. New Mexico, 426 U.S. 529, 543 (1976) ("Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause . . . . And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause." (citations omitted)).

53. John D. Leshy, *Are U.S. Public Lands Unconstitutional?*, 69 HASTINGS L.J. 499, 505 (2018).

54. U.S. CONST. art. IV, § 4.

55. Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 145–46 (1912).

56. David A. Carrillo & Stephen M. Duvernay, *California Constitutional Law: The Guarantee Clause and California's Republican Form of Government*, 62 UCLA L. REV. DISCOURSE 104, 109 (2014) ("Thus, although the Guarantee Clause imposes constraints on the structure of state government—it necessarily implies a duty on the part of the States themselves to provide a republican form of government—it does not foreclose a state's ability to experiment within the broad sphere of republicanism." (footnote and internal quotation marks omitted)).

II. TRIBES AND THE CONSTITUTION

In Article IV, states surrendered powers—both explicitly to the federal government and to one another.[57] Unlike the first three articles, Article IV does not create any branch of the federal government but manages interstate relations by prohibiting states from discriminating against out-of-state citizens.[58] Indian tribes are not mentioned anywhere in the Article. In fact, Indian tribes are only explicitly mentioned twice in the Constitution: in the Apportionment Clause determining how many members of the House of Representatives each State is entitled to[59] and the Commerce Clause where Indian tribes are contradistinguished from both states and foreign nations.[60] Neither of these references address how tribes and states were supposed to interact within American federalism. This silence makes applying Article IV to controversies involving Indians considerably more difficult.

How do Indian tribes fit into the interpretation of Article IV? Tribes are notably outside of its restrictions and parameters. Tribal governments are sovereign, like states, but because they have never agreed to be bound by the Constitution their sovereignty is in no part limited by or subject to the Constitution.[61] As noted Indian law scholar Alex Tallchief Skibine explained, "the sovereignty of Indian tribes was first acknowledged and recognized by the United States neither by the Constitution nor by the Court. It was probably first recognized when the [U.S.] Senate ratified the first treaty with an Indian Nation."[62] The subsequent treatment of Indian treaties and tribal governments by Congress and the Supreme Court has confirmed both that Indian tribes are

57. Kreimer, *supra* note 19, at 488 ("[U]nlike the federal government in its relations with foreign nations, the states are constrained by the [C]ommerce [C]lause, [A]rticle IV, and the principles of federalism in their dealings with one another and in their ability to regulate their citizens extraterritorially."); James Y. Stern, *Choice of Law, the Constitution, and* Lochner, 94 VA. L. REV. 1509, 1542–43 (2008) (discussing how the Constitution implied state authority is largely territorial and using Article IV as an example, showing how states must extradite fugitives to one another, and that no new state could be made from an existing state's borders).

58. Mark P. Gergen, *The Selfish State and the Market*, 66 TEX. L. REV. 1097, 1098 n.5 (1988) ("[T]he privileges and immunities clause of article IV barred 'discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States.'" (quoting Toomer v. Witsell, 334 U.S. 385, 396 (1948))).

59. U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of Free persons, including those bound to Service for a Term of Years, and *excluding Indians not taxed*, three fifths of all other Persons." (emphasis added)). The Apportionment Clause was amended by the Fourteenth Amendment and the removal of the "three fifths of all other Persons" language; however, the exclusion for Indians remained. *Id.* amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, *excluding Indians not taxed*." (emphasis added)).

60. *Id.* art. 1, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

61. Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 483–84 (2000).

62. Alex Tallchief Skibine, *Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes*, 39 AM. INDIAN L. REV. 77, 100 (2014).

sovereign governments with a set of inherent powers[63] and that the Constitution has not limited those powers.[64]

A. *TRIBES ARE SOVEREIGN*

Indian tribes have always been sovereign. *Cohen's Handbook of Federal Indian Law*, the leading treatise in the field, observed, "[i]n precontact times, different worldviews and experiences molded Indian nations into an array of evolving governmental forms."[65] Since before the arrival of European colonists, tribal governments have organized themselves with rules to govern their society and implemented consequences for those who refuse to comply with them.[66]

Early treaties recognized the sovereign powers of tribal governments to make laws for their communities and to enforce those laws through their own justice structures. Consider the Treaty of Hopewell made between the United States and the Cherokee Nation;[67] it contained a provision forfeiting the protection of the United States for non-Indians who wrongfully settled on Cherokee lands and permitted the Cherokee to punish the non-Indians under their rules—"such person shall forfeit the protection of the United States, and the Indians may punish him or not as they please."[68] The power to create laws that govern the people of a territory is at the core of sovereignty, and the federal government's withdrawal of American protection for these trespassers on tribal lands is strong additional evidence that Congress understood tribal governments to be sovereign.[69]

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63. *See infra* Section II.A; *see also* Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. REV. 759, 799 (2014) (discussing how Congress has carefully assisted the expansion of tribal criminal jurisdiction by recognizing and reaffirming inherent tribal power instead of delegating federal power to tribal sovereigns).

64. *See infra* Section II.B; *see also* G. William Rice, *Teaching Decolonization: Reacquisition of Indian Lands Within and Without the Box—an Essay*, 82 N.D. L. REV. 811, 837 (2006) ("The United States Constitution does not limit the powers of government of the Indian Nations. The application of federal law to Indian Nations absent their continuing consent remains a naked imposition of power, and is violative of every American principal of legitimate government, and currently effective international principals of relations between States." (footnote omitted)).

65. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.04[1], at 254 (Nell Jessup Newton ed., 2012).

66. Grant Christensen, *Indigenous Perspectives on Corporate Governance*, 23 U. PA. J. BUS. L. 902, 919 (2021) ("The origins of Indigenous law and governance are thus not written down in any definitive or canonical text; '[b]ecause precontact tribal governments were not memorialized in written constitutions or statutes, information about these governments comes from the oral traditions of native peoples, anthropological studies of variable quality, and the sometimes unreliable written accounts of early non-Indian traders, missionaries, and military.'" (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 65, at 254 n.1)).

67. Treaty of Hopewell, Cherokees–U.S., Nov. 28, 1785, 7 Stat. 18.

68. *Id.* art. V ("If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands westward or southward of the said boundary which are hereby allotted to the Indians for their hunting grounds, or having already settled and will not remove from the same within six months after the ratification of this treaty, such person shall forfeit the protection of the United States, and the Indians may punish him or not as they please . . . .").

69. Matthew L.M. Fletcher, *Restatement as Aadizookaan*, 2022 WIS. L. REV. 197, 207 ("The text and structure of the Constitution reflect that Indian tribes are sovereign entities by including them in the Commerce Clause alongside foreign nations and states.").

The judicial recognition of tribal sovereignty dates back to the Marshall Trilogy.[70] In *Cherokee Nation v. Georgia*,[71] the Court determined that while Indian tribes are not "foreign states"[72] for the purposes of the Supreme Court's Article III original jurisdiction, they are nonetheless sovereign: "The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war; of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community."[73] They are contradistinguished within the Commerce Clause from states and foreign nations, an appellation redolent of sovereignty.[74]

While the Court has continuously reaffirmed the principle that tribal governments are sovereign governments,[75] with the right "to make their own laws and be ruled by them,"[76] its recent jurisprudence has placed ever greater emphasis on the autochthonous nature of tribal authority. In 2020, the Court recognized the inherent power of the Muscogee (Creek) Nation to exert criminal jurisdiction over its entire reservation territory.[77] In 2021, the Court expanded its recognition of the inherent powers of tribal police, recognizing for the first time their inherent authority to stop and detain non-Indians suspected of committing crimes in Indian country.[78] In 2022, the Court reaffirmed that the power to create criminal laws governing the conduct of

70. The Marshall Trilogy is generally understood in Indian law to refer to three cases whose controlling opinions were each written by Chief Justice Marshall, and which together established many foundational principles of the legal relationship between the United States, the states, and Indian tribes. For an academic discussion and critique of the Trilogy, see Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 630–48 (2006).

71. *See generally* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

72. *Id.* at 18.

73. *Id.* at 16.

74. *Id.* at 19 ("In one article in which a power is given to be exercised in regard to foreign nations generally, and to the Indian tribes particularly, they are mentioned as separate in terms clearly contradistinguishing them from each other.").

75. *See* Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 757, 760 (1998) (finding that tribal governments retain sovereign immunity and cannot be sued without their consent or a waiver of the immunity by Congress); Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 453 (1995) (holding that states may not impose taxes whose legal incidence is paid by an Indian tribe because they are sovereign and exempt from state regulation); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 138–39, 159 (1982) (concluding that an Indian tribe may impose a tax as a sovereign in addition to any royalties negotiated for under a contractual agreement as landowner); Antoine v. Washington, 420 U.S. 194, 206–08 (1975) (stating that citizens of a separate sovereign—tribal members—do not have to comply with state rules for hunting and fishing).

76. Williams v. Lee, 358 U.S. 217, 220 (1959).

77. *See* McGirt v. Oklahoma, 591 U.S. 894, 897–99 (2020). For an excellent discussion on the importance of the *McGirt* decision from the Tribe's ambassador, see generally Jonodev Chaudhuri, *Reflection on* McGirt v. Oklahoma, 134 HARV. L. REV. 82 (2020). For a discussion on its relevance to inherent tribal power, see Elizabeth A. Reese, *Welcome to the Maze: Race, Justice, and Jurisdiction in* McGirt v. Oklahoma, U. CHI. L. REV. ONLINE, Aug. 13, 2020, at *1, *1, and see generally Maggie Blackhawk, *On Power and the Law:* McGirt v. Oklahoma, 2020 SUP. CT. REV. 367.

78. United States v. Cooley, 593 U.S. 345, 347 (2021). For a discussion of the importance of the *Cooley* opinion to the expansion of inherent tribal power, see generally Grant Christensen, *Getting* Cooley *Right: The Inherent Criminal Powers of Tribal Law Enforcement*, 56 U.C. DAVIS L. REV. 467 (2022).

Indians on an Indian reservation was an inherent power exercised by tribal government, and not a power delegated to Indian tribes by the United States, even when the prosecution of both offenses was conducted in a court created and authorized under federal law.[79]

That tribes exercise an inherent sovereignty retained from time immemorial is no longer a contentious proposition. Justice Sandra Day O'Connor described Indian tribes as the "third sovereign" within the American federal system.[80] Tribes maintain "a government-to-government relationship [with] the United States,"[81] capable of negotiating treaties and signing contracts with the United States as a sovereign nation.[82] As Professor Matthew Fletcher explained:

> The relationship between the United States and Indian tribes is an ancient relationship and well-settled under American law. Prior to the formation of the United States, the relationship was one between foreign nations. That relationship shifted from a relationship between foreign nations to a relationship between domestic nations when Indian tribes entered into treaties with the United States in which they each agreed to come under the protection of the federal government.[83]

The nature of this sovereignty is sufficiently robust as to exempt Indian tribes from compliance with constitutional mandates and cannot force them to implement constitutional rights even when the federal or state governments are required to do so.

B. INDIAN TRIBES ARE NOT BOUND BY THE CONSTITUTION

Like states, tribes are sovereign governments with a set of inherent powers that were exercised long before the ratification of the Constitution.[84] Tribal

79. Denezpi v. United States, 596 U.S. 591, 604 (2022); *see also* Angela R. Riley & Sarah Glenn Thompson, *Mapping Dual Sovereignty and Double Jeopardy in Indian Country Crimes*, 122 COLUM. L. REV. 1899, 1928–37 (2022) (discussing how the dual-sovereignty doctrine operates).

80. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 5 (1997).

81. The term "government-to-government" has been used by the U.S. Supreme Court to describe the relationship between Indian tribal governments and the United States. *See* Yellen v. Confederated Tribes of the Chehalis Rsrv., 594 U.S. 338, 345 (2021) ("A federally recognized tribe is one that has entered into 'a government-to-government relationship [with] the United States.'" (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 65, at § 3.02[3])). The term is also used by the Bureau of Indian Affairs when it lists the tribes that "are recognized to have the immunities and privileges available to federally recognized Indian Tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations, and obligations of such Indian Tribes." Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 88 Fed. Reg. 2112, 2112 (Jan. 12, 2023).

82. Haaland v. Brackeen, 599 U.S. 255, 274 (2023) ("Until the late 19th century, relations between the Federal Government and the Indian tribes were governed largely by treaties.").

83. Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 505 (2020).

84. Puerto Rico v. Sánchez Valle, 579 U.S. 59, 75 (2016) ("That is why we have emphasized the 'inherent,' 'primeval,' and 'pre-existing' capacities of the tribes and States—the power they

power cannot therefore come from the Constitution, but antedates even the arrival of the first colonists.[85] Unlike states, tribes have never given up any part of their inherent sovereignty to the federal government in a Faustian bargain that trades surrendering parts of their inherent power for collective security. Justice Elena Kagan has offered one of the most trenchant commentaries on the absence of tribal ratification: "While each State at the Constitutional Convention surrendered its immunity from suit by sister States, 'it would be absurd to suggest that the tribes'—at a conference 'to which they were not even parties'—similarly ceded their immunity . . . ."[86]

Justice Kagan is not alone. The Supreme Court's recent jurisprudence is replete with categorical rejections of the proposition that the Constitution binds tribal governments. Chief Justice Roberts wrote for the majority in *Plains Commerce*, "[t]ribal sovereignty, it should be remembered, is 'a sovereignty outside the basic structure of the Constitution.' . . . The Bill of Rights does not apply to Indian tribes."[87] Justice Ginsburg wrote for a unanimous Court in *United States v. Bryant*, "'[a]s separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.' . . . The Bill of Rights . . . therefore, does not apply in tribal-court proceedings."[88]

The line of cases holding that Indian tribes are unconstrained by the rights and duties imposed by the Constitution goes back at least as far as *Talton v. Mayes*.[89] In *Talton*, the Supreme Court held that the Cherokee Nation could use a grand jury of five persons in its tribal court without violating a defendant's Fifth Amendment right to a grand jury because the Constitution did not bind the tribal sovereign.[90]

> By treaties and statutes of the United States . . . the Cherokee . . . [have been recognized] as an autonomous body . . . [a]nd from this fact there has consequently been conceded to exist in that nation power to

enjoyed prior to the Union's formation." (quoting United States v. Wheeler, 435 U.S. 313, 322–23, 328 (1978))); *see also* Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1566 n.1 (2016) ("The relation of Indian tribes as preexisting sovereigns situated within the borders of the United States has always been 'an anomalous one and of a complex character.'" (quoting United States v. Kagama, 118 U.S. 375, 381 (1886))).

85. *See* Michalyn Steele, *Congressional Power and Sovereignty in Indian Affairs*, 2018 UTAH L. REV. 307, 330 ("[T]ribes have domestic sovereignty and governing authority . . . ."); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 42 (1999) ("[*Duro v. Covert*] delt with inherent tribal power—which is beyond the reach of the Bill of Rights . . . .").

86. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 789–90 (2014) (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 782 (1991)).

87. Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 337 (2008) (citation omitted) (quoting United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring)).

88. United States v. Bryant, 579 U.S. 140, 149 (2016) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978)).

89. Talton v. Mayes, 163 U.S. 376, 379–80 (1896).

90. *Id.* at 383–85.

> make laws defining offences and providing for the trial and punishment of those who violate them . . . .[91]

Because the crime Talton was charged with was against the laws of the Cherokee Nation and not the laws of the United States, the Constitution did not govern the Cherokee's judicial process.[92] It was not required by the Constitution to use a grand jury at all, even for a capital offense, but if it did so, the composition and procedural rules for the grand jury were left entirely to the Cherokee to design.[93]

The Court has been consistent in this interpretation. Tribal governments are not bound by the Constitution's Equal Protection Clause,[94] may prosecute a criminal defendant for the same crime as the United States without violating the Double Jeopardy Clause,[95] and are not constitutionally required to provide legal counsel to criminal defendants.[96] Because the Constitution is not binding upon tribal governments, the interpretation of Constitutional provisions involving Indian tribes creates novel interpretative challenges.

III. ARTICLE IV AND INDIAN TRIBES

Article IV was written to preemptively resolve potential conflicts between states as domestic sovereigns.[97] By the 1830s the Supreme Court recognized Indian tribes as "domestic dependent nations,"[98] incorporating them into the family of sovereigns existing within the territorial boundary of the United States. While recognizing that tribes were contradistinguished from states, and foreign nations, they were nonetheless sovereigns situated within the greater nation.[99]

But *Cherokee Nation* came more than forty years after the Constitution's ratification. Professor Greg Ablavsky and Tanner Allread have powerfully demonstrated that in the eighteenth-century Indian tribes did not think of themselves as domestic sovereigns bound by the Constitution.[100] In their discussion of how Indigenous people debated the Constitution, Ablavsky and

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91. *Id.* at 379–80.

92. *Id.* at 384 ("It follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government.").

93. *Id.*

94. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55, 63 n.14 (1978).

95. United States v. Wheeler, 435 U.S. 313, 314, 332 (1978) (prosecuting a tribal member); United States v. Lara, 541 U.S. 193, 199, 210 (2004) (prosecuting a non-member Indian).

96. United States v. Bryant, 579 U.S. 140, 143 (2016).

97. *See supra* Part I.

98. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) ("They may, more correctly, perhaps, be denominated domestic dependent nations.").

99. *Id.* at 18 (stating that Indian tribes in the Commerce Clause "are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them.").

100. Ablavsky & Allread, *supra* note 12, at 271–73.

Allread document repeatedly how Indian tribes viewed themselves as separate from the new federal government that had just emerged from the Second Constitutional Convention as well as the ratification of the Constitution by the several states. The Haudenosaunee sent a message to the new government to "Congratulate You upon Your New System of Government, by which You have one Head to Rule Who we can look to for redress in all disputes which have arose or which may arise between Your people and ours."[101] The Cherokee expressed their interest that the new government would prevent the states from interfering with the acts of the Cherokee Council: "We now hope that whatever is done hereafter by the great council will no more be destroyed and made small by any State."[102] This is language clearly distinguishing the tribal sovereign from the government newly re-formed, not a reconciliation that the tribes were to be bound by this document.

Similarly, when the drafters were writing the Constitution, they were not expecting to codify a relationship between states and tribes.[103] Professor Fred Ragsdale made this point unequivocally: "The history of the Full Faith and Credit Clause and its enabling legislation indicate that Indian tribes were not consciously included in the full faith and credit schemata."[104] Under the Articles of Confederation, responsibility for dealing with Indian tribes was divided between the weak central government and the various states.[105] This division of responsibility can only be described as an abject failure. The federal government would negotiate a treaty with an Indian tribe only to have the state refuse to recognize it and attempt to settle its citizens upon lands reserved by the treaty for the tribe.[106] As a result, conflict between colonists and Indian tribes rose under the Articles of Confederation,[107] and a need to deal with violence on the frontier between colonists and Indians was among the reasons for holding the 1787 Constitutional Convention which ultimately replaced the Articles with the Constitution.[108]

While the need for more consistent and predictable relations with Indian tribes was among the reasons representatives met in Philadelphia to draft a

101. *Id.* at 272–73.

102. *Id.* at 273.

103. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1026–27 (2015) ("Ratification debates continued this pattern. Of hundreds of discussions of commerce, only a handful considered trade with the Indians. The vast majority concerned overseas commerce with foreign nations, occasionally including interstate commerce.").

104. Fred L. Ragsdale, Jr., *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M. L. REV. 133, 135 (1977).

105. Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1103 (1995) ("While purporting to grant Indian affairs powers to the Congress as an *exclusive* power over which the states had no control, the Indian affairs clause of the Articles contained two provisos which some states relied upon throughout the history of the Articles to suggest greater state authority.").

106. *Id.* at 1114–28 (giving just one example of the Cherokee with whom the United States and the State of North Carolina attempted to negotiate separately).

107. *Id.* at 1108 ("The problem of regulating Indian land cessions within the states proved to be a thorny problem due to the two provisos in the Indian affairs clause.").

108. *Id.* at 1147–48.

new set of rules for the country, the Constitution itself gave little thought to tribal–state relations. The Constitution imaged that the new federal government would enact laws related to managing relations with the Indians by expressly enumerating the power in Article I.[109] The first Congress duly adopted the Trade and Intercourse Act of 1790[110] which regulated trade with Indian tribes.[111] It further imagined that relations with tribes would be largely governed by the Executive, with Article II giving the President the authority to declare war and to negotiate treaties with Indian tribes.[112]

Despite this structural arrangement, litigation for two hundred years has focused on the relationship between tribal and state sovereigns.[113] As a result, and although it was never intended to govern, Article IV has come to play a pivotal role in tribal–state relations within American federalism. The remainder of this Section highlights the role Article IV plays in tribal–state relations and argues for an interpretation of Article IV that both recognizes tribal sovereignty and strikes the proper balance between tribal and state power.

A. SECTION 1: FULL FAITH AND CREDIT

Article IV Section 1 requires that each state give full faith and credit "to the public Acts, Records, and judicial Proceedings of every other State" and gives to Congress the power to "prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[114] The first Congress in 1790 duly required that each state's judicial decisions be given the same effect in every court of the United States as if they had been issued by that court.[115]

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109. Ablavsky, *supra* note 103, at 1025–28 (arguing that Congress's use of the term "commerce" in the Indian Commerce Clause is broad and distinct from the definition of commerce related to states or foreign nations); Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TUL. L. REV. 509, 521–22 (2007) ("[T]he only grant of authority with respect to Indian affairs in Article I is the Indian Commerce Clause, granting Congress the sole and exclusive authority to regulate commerce with the 'Indian tribes.'" (quoting U.S. CONST. art. I, § 8, cl. 3)); *see also* Wilson v. Marchington, 127 F.3d 805, 808 (9th Cir. 1997) ("Nothing in debates of the Constitutional Convention concerning the clause indicates the framers thought the clause would apply to Indian tribes.").

110. Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137.

111. Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L.J. 2205, 2212 (2023) ("During the very first Congress, Congress passed the first of a series of Trade and Intercourse Acts that affirmed federal power over Indian Country and limited state power.").

112. Scott C. Hall, *The Indian Law Canons of Construction v. The* Chevron *Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 CONN. L. REV. 495, 499 (2004) (discussing the role of Article II in regulating federal relations with Indian tribes).

113. *Compare* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 2 (1831) (describing how the Cherokee sued the State of Georgia seeking enforcement of federal treaty obligations), *with* Oklahoma v. Castro-Huerta, 597 U.S. 629, 632 (2022) (describing how Oklahoma asserted its criminal jurisdiction over a non-Indian who committed a crime against a tribal member in Indian country).

114. U.S. CONST. art. IV, § 1.

115. Act of May 26, 1790, ch. 11, 1 Stat. 122 ("[T]he said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.").

The Supreme Court interpreted the Clause for the first time in 1813.[116] In *Mills v. Duryee*, a New York court had issued a judgment in favor of the plaintiff-creditor.[117] When the plaintiff attempted to enforce the judgment in the District of Columbia, the judgment-debtor denied the existence of the debt.[118] The Supreme Court held that the Full Faith and Credit Clause obviated the defense because the existence of the New York judgment was to be given full faith and credit as evidence of the debt and of the obligation.[119] Ever since *Mills*, the Full Faith and Credit Clause has been understood to mandate that the courts of one state recognize and enforce final judgments issued by their sister states.[120]

1. State Courts and Tribal Court Judgments

While state court judgments have been subject to Article IV's full faith and credit requirement since at least 1813,[121] the question of whether tribal court judgments are entitled to full faith and credit is considerably more controversial.[122]

Some states require tribal court judgments be given full faith and credit as a matter of state law, occasionally conditioning the recognition on tribal compliance with a short set of conditions which typically include that the tribal court reciprocally extend full faith and credit to state court judgments. For example, Wisconsin[123] and Wyoming[124] extend full faith and credit to tribal court judgments but require reciprocal treatment by the tribe; Oklahoma law permits its Supreme Court to create rules for the full faith and credit of

116. Mills v. Duryee, 11 U.S. (7 Cranch) 481, 483 (1813).

117. *Id.* at 484.

118. *Id.*

119. *Id.* ("If in such Court it has the faith and credit of evidence of the highest nature, viz. *record evidence*, it must have the same faith and credit in every other Court. Congress have therefore declared the *effect* of the record by declaring what faith and credit shall be given to it." (emphasis added)).

120. *See generally* Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485 (2013) (defending the Supreme Court's interpretation of the Full Faith and Credit Clause); Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986) (arguing that neither the Full Faith and Credit Clause nor its implementing statute appears to speak to the preclusive effects of the proceedings of federal courts); Craig Smith, Comment, *Full Faith and Credit in Cross-Jurisdictional Recognition of Tribal Court Decisions Revisited*, 98 CALIF. L. REV. 1393 (2010) (exploring what demands, if any, the existence of tribal sovereignty places on the American constitutional system); Thomas J. O'Neil, *The Full Faith and Credit Clause of the Federal Constitution*, 5 NOTRE DAME L. REV. 199 (1930) (explaining the history of the Full Faith and Credit Clause and how it has been interpreted).

121. *Duryee*, 11 U.S. at 484.

122. *See generally* Melissa L. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 KY. L.J. 123 (2002) (exploring the basic jurisdictional rules for state governments and how those rules differ from the jurisdictional rules binding tribal governments, and how this all interacts with the Violence Against Women Acts).

123. WIS. STAT. ANN. § 806.245 (West 2013).

124. WYO. STAT. ANN. § 5-1-111 (West 2023).

tribal court judgments provided the tribal courts recognize Oklahoma judgments;[125] and North Dakota does not require reciprocity but retains a public policy exception.[126]

Congress has further mandated, regardless of whether a state provides for the recognition of tribal court judgments, state courts to: enforce tribal court protection orders,[127] give full faith and credit to tribal actions limiting descent and distribution of trust lands,[128] and recognize tribal acts, records, and judicial proceedings regarding child custody.[129] Courts routinely require state compliance with these provisions,[130] although they do not require that states give tribal court proceedings greater weight than the state would otherwise accord a sister state judgment.[131]

Some courts have gone beyond the requirements enacted by state legislatures to impose their own full faith and credit requirement. In 1856 the U.S. Supreme Court held that state courts were required to respect the proceedings of the Cherokee, at least in the context of letters of administration in the probate of an estate:

> The principal difference consists in the fact that the Cherokees enact their own laws, under the restriction stated, appoint their own officers, and pay their own expenses. This, however, is no reason why the laws and proceedings of the Cherokee territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the Union.[132]

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125. OKLA. STAT. tit. 12, § 728 (2024).

126. N.D. SUP. CT. R. 7.2.

127. 18 U.S.C. § 2265(a) (2018) ("Full Faith and Credit. Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) shall be accorded full faith and credit by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory as if it were the order of the enforcing State or tribe." (footnote omitted)).

128. 25 U.S.C. § 2207 ("The Secretary in carrying out his responsibility to regulate the descent and distribution of trust lands under section 372 of this title, and other laws, shall give full faith and credit to any tribal actions taken pursuant to subsections (a) and (b) of section 2205 of this title, which provision shall apply only to estates of decedent's whose deaths occur on or after the effective date of tribal ordinances adopted pursuant to this chapter.").

129. 25 U.S.C. § 1911(d) ("The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.").

130. Simmonds v. Parks, 329 P.3d 995, 1009–10 (Alaska 2014); Native Vill. of Venetie IRA Council v. Alaska, 155 F.3d 1150, 1151 (9th Cir. 1998); Native Vill. of Stevens v. Smith, 770 F.2d 1486, 1488–89 (9th Cir. 1985).

131. Navajo Nation v. Dist. Ct. for Utah Cnty., 624 F. Supp. 130, 135–36 (D. Utah 1985) (explaining that a tribal court proceeding is not entitled to greater protection than the state would otherwise afford a sister state judgment regarding personal jurisdiction).

132. Mackey v. Coxe, 59 U.S. (18 How.) 100, 103 (1855).

In 1893 the Eighth Circuit extended the Supreme Court's conclusion that tribal court proceedings were entitled to recognition in state courts: "The proceedings and judgments of the courts of the Cherokee Nation in cases within their jurisdiction are on the same footing with proceedings and judgments of the courts of the territories of the Union, and are entitled to the same faith and credit."[133]

In a more recent footnote, the Supreme Court re-recognized that some courts treat tribal court judgments as entitled to full faith and credit without making the issue a constitutional question: "Judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts."[134] A number of these other courts have agreed. The New Mexico Supreme Court ordered its state courts to give Navajo laws related to the repossession of a vehicle garaged on its reservation full faith and credit;[135] the Eighth Circuit has ordered full faith and credit be given to an Indian tribe's decision to adopt a non-Indian;[136] and the Idaho Supreme Court ordered full faith and credit be given to a tribal adoption proceeding even if it would not have conformed with state law.[137]

In the alternative, some courts have concluded that without a legislative directive, tribal court decisions should be given comity.[138] Comity is a common law doctrine that respectfully extends recognition without an obligation to do so. The Supreme Court has helpfully categorized comity as:

> [N]either a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[139]

Many federal appellate courts remain divided as to whether a tribal court judgment should be entitled to full faith and credit or merely recognized as a matter of comity. For example, the Tenth Circuit has recently opined:

> This Court has not yet decided whether a tribal court's judgment is entitled to preclusive effect under the Full Faith and Credit Clause

133. Mehlin v. Ice, 56 F. 12, 19 (8th Cir. 1893).

134. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65–66 n.21 (1978).

135. Jim v. CIT Fin. Servs. Corp., 533 P.2d 751, 752–53 (N.M. 1975).

136. Raymond v. Raymond, 83 F. 721, 723 (8th Cir. 1897).

137. Sheppard v. Sheppard, 655 P.2d 895, 901 (Idaho 1982), *overruled in part by* Coeur d'Alene Tribe v. Johnson, 405 P.3d 13, 16–17 (Idaho 2017) (giving full faith and credit to tribal court decisions, but subsequently overturning its decision in favor of comity instead of full faith and credit).

138. MacArthur v. San Juan County, 309 F.3d 1216, 1225 (10th Cir. 2002); Wilson v. Marchington, 127 F.3d 805, 808 (9th Cir. 1997); *Coeur d'Alene Tribe*, 405 P.3d at 16–17.

139. Hilton v. Guyot, 159 U.S. 113, 163–64 (1895). *But see* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2075 (2015) (critiquing the Supreme Court's definition as "incomplete and ambiguous").

> . . . or as a matter of comity. . . . [But] [e]ither way, it is appropriate for a federal court to consider whether the court that rendered the underlying judgment had jurisdiction to do so.[140]

The Idaho Supreme Court has reversed its interpretation. Originally concluding that tribal court judgments were entitled to full faith and credit,[141] it overturned that proposition and replaced mandatory recognition with comity.[142] The Court explained that if the full faith and credit statute[143] had intended to apply to tribal court judgments, then Congress's separate extension of full faith and credit to tribal acts in subsequent statutes would have been unnecessary.[144]

Given the widely divergent interpretations of state and federal courts above, the question of whether tribal law and tribal court judgments are entitled to full faith and credit is one ripe for future Supreme Court adjudication. In anticipation of that future case, this Article argues that tribal court judgments should be entitled to full faith and credit under Article IV.

2. Tribal Court Judgments Should Be Entitled to Full Faith and Credit

Although Indian tribes are not bound by the Constitution,[145] and therefore are not required to give full faith and credit to state court judgments,[146] the Full Faith and Credit Clause and its attenuated implementing statute,[147] nonetheless requires state recognition of tribal court judgments. The justification for that conclusion starts with the Supreme Court and its 1856 precedent.

In *United States Use of Mackey v. Coxe*, the Supreme Court created binding judicial precedent in favor of tribal court judgments being given full faith and credit.[148] The Court held that, under Cherokee law, persons granted letters of administration by the Cherokee Tribal Court were entitled to act as representatives of the estates of the deceased in U.S. courts.[149] The Court held that Indian tribes are domestic territories—capable of making treaties with the United States and self-governing but also domestic to the United States.[150]

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140. Burrell v. Armijo, 456 F.3d 1159, 1176 (10th Cir. 2006) (McConnell, J., concurring) (citations omitted).

141. *Sheppard*, 655 P.2d at 901, *overruled in part by Coeur d'Alene Tribe*, 405 P.3d at 16–17.

142. *Coeur d'Alene Tribe*, 405 P.3d at 16–17.

143. *See* 28 U.S.C. § 1738.

144. *Coeur d'Alene Tribe*, 405 P.3d at 17 ("If full faith and credit had already been extended to Indian tribes, enactment of the Indian Land Consolidation Act, the Maine Indian Claims Settlement Act, and the Indian Child Welfare Act would not have been necessary." (quoting Wilson v. Marchington, 127 F.3d 805, 809 (9th Cir. 1997))).

145. *See supra* Section III.B.

146. *See* Kevin K. Washburn & Chloe Thompson, *A Legacy of Public Law 280: Comparing and Contrasting Minnesota's New Rule for the Recognition of Tribal Court Judgments with the Recent Arizona Rule*, 31 WM. MITCHELL L. REV. 479, 508–09 & n.191 (2004) (giving the example of the Mille Lacs Tribal Court which has recently decided it will not give full faith and credit to state court judgments that would not reciprocally recognize its tribal court judgments).

147. 28 U.S.C. § 1738.

148. Mackey v. Coxe, 59 U.S. (18 How.) 100, 103–04 (1855).

149. *Id.* at 105.

150. *Id.* at 103.

Although "the Cherokees enact their own laws . . . appoint their own officers, and pay their own expenses," the Court explained that this "is no reason why the laws and proceedings of the Cherokee territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the Union."[151] The Court further reasoned that the judgments of the tribal court must be recognized because "[t]hey are not only within our jurisdiction, but the faith of the nation is pledged for their protection."[152]

Mackey provides two independent reasons for why tribal court judgments must be entitled to full faith and credit in the state and federal courts of the United States: precedent and geography.

i. Precedent

The simplest justification for reading the Full Faith and Credit Clause as requiring recognition of tribal court judgments is the precedent set by *Mackey*. *Stare decisis*, meaning to stand by things decided, suggests that courts should reach the same outcome when cases present the same set of facts.[153] Once the Supreme Court recognized that tribal court judicial opinions were entitled to recognition in the other courts of the United States, state and federal courts should have followed the precedent established; therefore, those tribal court opinions must be given the same interpretation of the Full Faith and Credit Clause provided by the Supreme Court.[154]

Mackey was not forgotten after it was decided. It has been the basis for many judicial decisions treating tribes as states or territories for the purpose of recognizing tribal court judgments. The Arizona Supreme Court in 1991 helpfully collected much of this authority in an opinion which recognized a Navajo Tribal Court order requiring a witness located in the State of Arizona to testify in a tribal court proceeding.[155] The Court surveyed authority treating

151. *Id.*

152. *Id.*

153. June Med. Servs. L.L.C. v. Russo, 591 U.S. 299, 345 (2020) (Roberts, C.J., concurring) ("*Stare decisis* ('to stand by things decided') is the legal term for fidelity to precedent. . . . It has long been 'an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion.'" (first quoting *Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019); and then quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *69)), *abrogated by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

154. *See id.* For an interesting critique of *stare decisis* in Indian law, see Adam Crepelle, *The Time Trap: Addressing the Stereotypes that Undermine Tribal Sovereignty*, 53 COLUM. HUM. RTS. L. REV. 189, 210 (2021) ("Federal Indian law jurisprudence is often even worse because stare decisis results in repetition of rotten, racist representations of Indians. Indians will remain trapped in time until the jurisprudential story changes.").

155. Tracy v. Superior Ct. of Maricopa Cnty., 810 P.2d 1030, 1035–46 (Ariz. 1991) (en banc).

tribes as states[156] or alternatively as territories,[157] and ultimately decided to recognize the tribal court order.[158] Perhaps most relevant is the Supreme Court's reliance on *Mackey* as requiring state courts to give tribal court judgments full faith and credit: "Judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts."[159]

Given that the Supreme Court has never suggested that tribal court opinions should be entitled to comity,[160] and has both held[161] and affirmatively referenced[162] case law establishing that tribal court decisions should be entitled to full faith and credit, precedent alone is a sufficient reason for state and federal courts to enforce tribal court orders. Lower courts should be bound by precedent and Article IV to recognize and enforce tribal court judgements.

156. *Id.* at 1039–40 ("[V]arious lower federal courts and state courts have deemed Indian tribes to be states or territories within the meaning of the statutes under consideration." (first citing *In re* Larch, 872 F.2d 66, 68 (4th Cir. 1989) ("Congress included United States territories in its definition of 'states' whose courts owe full faith and credit to custody decrees of other states and territories under the PKPA. . . . There is authority that Indian courts owe full faith and credit to state court judgments on the same basis as do territorial courts." (citation omitted)); then citing Martinez v. Super. Ct. in & for La Paz Cnty., 731 P.2d 1244, 1247 (Ariz. Ct. App. 1987) ("We hold that Indian reservations are territories or possessions of the United States within the meaning of Arizona's Uniform Child Custody Jurisdiction Act."); then citing Red Lake Band of Chippewa Indians v. State, 248 N.W.2d 722, 724 (Minn. 1976) ("Red Lake Band of Chippewa Indians, was a 'state' or 'territory and possession of the United States' as those terms are used in [MINN. STAT. § 168.012 (2024)]."); and then citing Whitsett v. Forehand, 79 N.C. 230, 232–33 (1878) ("And for the purposes now under consideration it must be considered a 'territory' 'within the United States.'")).

157. *Id.* at 1040 ("A majority of courts has [sic] deemed Indian tribes to be territories for purposes of the federal statute extending the application of the full faith and credit clause to the territories and possessions of the United States . . . ." (first citing Sheppard v. Sheppard, 655 P.2d 895 (Idaho 1982), *overruled in part by* Coeur d'Alene Tribe v. Johnson, 405 P.3d 13 (Idaho 2017); then citing Jim v. CIT Fin. Servs. Corp., 533 P.2d 751 (N.M. 1975); then citing Duckhead v. Anderson, 555 P.2d 1334 (Wash. 1976); then citing Cornells v. Shannon, 63 F. 305, 306 (8th Cir. 1894); then citing Standley v. Roberts, 59 F. 836, 845 (8th Cir. 1894); and then citing Mehlin v. Ice, 56 F. 12, 19 (8th Cir. 1893)).

158. *Id.* at 1051.

159. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65–66 n.21 (1978).

160. The Supreme Court's sole reference to tribal court opinions being recognized because of comity instead of full faith and credit comes from a c.f. citation in a 2016 opinion. In *United States v. Bryant*, 579 U.S. 140, 157 (2016) (holding that an uncounseled tribal court opinion can be recognized in a federal court as a predicate offense triggering consequences under federal law without violating the defendant's due process rights), the Court indicated that its conclusion should be compared with: "cf. *State v. Spotted Eagle*, [71 P.3d 1239, 1244–46] (2003) (principles of comity support recognizing uncounseled tribal-court convictions that complied with ICRA)." *Id.* Using a tribal court opinion as a predicate offense is not the same as recognition and enforcement of a tribal court opinion, but even if it were, the Court's actual holding in *Bryant* is that federal courts should recognize uncounseled tribal court convictions.

161. Mackey v. Coxe, 59 U.S. (18 How.) 100, 103 (1855).

162. *Santa Clara Pueblo*, 436 U.S. at 65–66 n.21.

ii. Geography

As the Court in *Mackay* reasoned, Indian tribes are domestic to the United States.[163] Chief Justice Marshall has described them as "domestic dependent nations."[164] Recently, in 2023, the Court held that Indian tribes fit within the continuum of an "other foreign or domestic government."[165] Indian tribes are separate sovereigns,[166] but they are located within the exterior boundaries of the United States.

Article IV was written to forge a union of separate states, with a purpose of making the states integral parts of a single union.[167] In implementing the Full Faith and Credit Clause, Congress decided that the judicial acts, records, and proceedings of "any such State, Territory, or Possession" should be entitled to enforcement in every "such State, Territory, or Possession."[168] Whether an Indian tribe constitutes a territory or possession is immaterial. Using the same reasoning as the Court in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, Indian tribes may not be either foreign or domestic governments, but Congress intended them to be within the continuum of "other foreign or domestic governments."[169] Thus, Indian tribes fit within the continuum of "any such State, Territory, or Possession."[170]

The purpose of codifying the full faith and credit statute, which implements Article IV's Full Faith and Credit Clause, was to unify the country together by making the courts of each concomitant sovereign respect the judgments of their sister sovereigns. The use of these broad geopolitical terms "can turn on a flexible, functional analysis of the context, purpose, and circumstances of the particular statute in question, rather than any categorical approach to defining those terms for all statutes."[171]

In keeping with the broad understanding of Article IV and the inescapable conclusion that Indian tribes are separate sovereigns but domestic to the United States, the orders of tribal courts must be given full faith and credit in the other courts of the United States. Admittedly the text of Article IV uses

163. *Mackey*, 59 U.S. at 103.

164. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1830) ("[Indian tribes] may, more correctly, perhaps, be denominated domestic dependent nations.").

165. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382, 390 (2023) ("Accordingly, we find that, by coupling foreign and domestic together, and placing the pair at the end of an extensive list, Congress unmistakably intended to cover all governments in § 101(27)'s definition, whatever their location, nature, or type.").

166. Riley & Thompson, *supra* note 79, at 1904–18 (discussing the role of Indian tribes as separate sovereigns such that a prosecution by a tribe and by the United States does not violate double jeopardy).

167. Metzger, *supra* note 17, at 1508 ("The Court has frequently emphasized the union-forging purpose of Article IV, describing it as animated by the purpose of making the states integral parts of a single nation and as constituting an essential part of the Framers' conception of national identity and Union." (footnotes and internal quotation marks omitted)).

168. 28 U.S.C. § 1738.

169. *Id.*; *see Lac du Flambeau Band of Lake Superior Chippewa Indians*, 599 U.S. at 388–90.

170. 28 U.S.C. § 1738.

171. Smith, *supra* note 120, at 1415.

only the term "State"—but it also expressly provides for Congress to implement the obligation.[172] Congress has chosen to do so using the much broader phrase "any state, Territory or Possession."[173] Even if Indian tribes are neither territories nor possessions, they are a sovereign contemplated by Congress within the broad encompassing context of the phrase.

B. SECTION 2: PRIVILEGES AND IMMUNITIES & THE EXTRADITION CLAUSE

Section 2 of Article IV contains both the Privileges and Immunities Clause and the Extradition Clause. Both are focused on the state sovereign: the Privileges and Immunities Clause preventing states from discriminating against out of state persons and the Extradition Clause permitting a state to request the extradition of a person located in a sister state to stand trial for violating the criminal laws of the requesting state.[174] Indian tribes are completely absent from the text of the Section.[175]

Despite their absence, there are some important constructs that can be distilled from the principles and purposes underlying both provisions. While the Privileges and Immunities Clause on its face only prevents a state from imposing discriminatory hurdles to the exercise of rights on the basis of an individual's citizenship in a fellow sister state,[176] the Clause's interpretation should be reasonably understood as similarly preventing a state from discriminating against a person on the basis of their tribal membership. This is a horizontal obligation.[177] Individual citizens, from any other state, must be given the same privileges and immunities as the citizens of the granting state, but cannot demand that the local rights they have in one state must be mirrored in any state they visit.[178]

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172. U.S. CONST. art. IV, § 1.

173. 28 U.S.C. § 1738.

174. U.S. CONST. art. IV, § 2.

175. M. Alexander Pearl, *Originalism and Indians*, 93 TUL. L. REV. 269, 329 (2018) (noting that the sovereign power or sovereignty entity of Indian tribes are not mentioned anywhere in the Constitution).

176. Redish & Johnson, *supra* note 41, at 1546 ("What the Clause does require is that whatever 'privilege' or 'immunity' each individual state chooses to grant to its citizens, the 'citizens of each state' cannot be denied that same 'privilege' or 'immunity' when they come within that state's jurisdiction. In other words, by its terms, the Clause prohibits a state from discriminating against noncitizens by denying them some right or benefit that it offers to its own citizens. And that is all that it does.").

177. Biber, *supra* note 29, at 744 ("Horizontal federalism may be advanced without any explicit mediating role by the federal government, as in the Article IV Privileges and Immunities Clause, which simply requires that citizens of one state 'shall be entitled to all Privileges and Immunities of the Citizens in the several States.'").

178. Jud Campbell, *General Citizenship Rights*, 132 YALE L.J. 611, 649 (2023) ("[V]irtually everyone understood that the only protection that the Privileges and Immunities Clause offered in this situation was a right to *equal* local citizenship rights—whatever they happened to be. Indeed, as a mere right of nondiscrimination, this rule underscored that states could define local citizenship rights however they wanted. Few jurists claimed that the Privileges and Immunities Clause set a substantive floor on *local* citizenship rights, like the franchise.").

In contrast to Indian persons claiming protections from discrimination by states in the Privileges and Immunities Clause, a right fundamentally understood to belong to all persons,[179] the Extradition Clause speaks of a relationship between sovereigns. Because the Extradition Clause does not articulate a right to which an individual might avail themselves, it should properly be read to limit the authority of a state sovereign to interfere with the right of a tribal sovereign: to make its own laws and be governed by them.[180] When a state makes an extradition request to a sister state, the state receiving the request may only comply if it has both territorial and jurisdictional authority over the person. Because states lack criminal jurisdiction over Indians in Indian country,[181] the Extradition Clause does not permit their removal.

1. Privileges and Immunities

The Privileges and Immunities Clause "has been interpreted to prevent a State from imposing unreasonable burdens on citizens of other States in their pursuit of common callings within the State."[182] Justice Bushrod Washington, writing as a circuit court judge in *Corfield v. Coryell* articulated what privileges and immunities are contemplated under Article IV: "We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states . . . ."[183] These rights include:

> [T]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state . . . .[184]

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179. David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RSRV. L. REV. 794, 852 (1987) ("Unlike the [F]ourteenth [A]mendment, [A]rticle IV is an individual right rather than a limit on state power."); Patrick Sullivan, Note, *In Defense of Resident Hiring Preferences: A Public Spending Exception to the Privileges and Immunities Clause*, 86 CALIF. L. REV. 1335, 1354 (1998) ("The Privileges and Immunities doctrine asks first whether a fundamental individual right has been violated, and then looks for a city's substantial reason for this violation.").

180. Williams v. Lee, 358 U.S. 217, 220 (1959).

181. McGirt v. Oklahoma, 591 U.S. 894, 898 (2020) ("State courts generally have no jurisdiction to try Indians for conduct committed in 'Indian country.'" (citing Negonsott v. Samuels, 507 U.S. 99, 102–03 (1993))); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1192 n.280 (1990) ("Absent a delegation of authority from Congress, the only instance in which a state court may assert criminal jurisdiction over an offense that occurred in Indian country is if both the perpetrator and the victim are non-Indian.").

182. Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 383 (1978).

183. Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230).

184. *Id.* at 552.

These are rights that have, surprisingly, continued to be at the heart of litigation involving Indians even in the modern era. For example, in 2019 the Supreme Court upheld a treaty provision guaranteeing to the Yakima "the right, in common with citizens of the United States, to travel upon all public highways" against a challenge by the State of Washington.[185]

Consistent with their obligations, states must recognize the rights of Indian persons, and the qualifications recognized by tribal governments, on an equal basis with those afforded by states. Law licensure is an interesting and evolving example. The Supreme Court has long held that a state may not discriminate against out-of-state persons in the context of bar admission because preferring state residents over out-of-state residents is a violation of the Privileges and Immunities Clause.[186] But what about persons licensed by an Indian tribe?

Florida permits persons employed solely by a business organization to practice law on behalf of their employer within the state without becoming a member of the Florida Bar, as long as they are "licensed to practice in jurisdictions other than Florida."[187] Florida has recently recognized that a person licensed to practice law by an Indian tribe is consistent with this definition, granting authorized house counsel status on the basis of the tribe's license to practice law.[188]

The Privileges and Immunities Clause should be understood to ensure, not only that states treat other state citizens in the same manner as their own citizens, but that they similarly afford citizens of, and qualifications obtained from, tribal sovereigns the same courtesy. States must neutrally apply the same standards by which they review recognition of professional qualifications conferred by other states to statuses conferred by Indian tribes. States may not restrict the free travel or engagement in professional pursuits by persons because of their Indian status. The Privileges and Immunities Clause protects those who claim rights from the tribal sovereign.

2. The Extradition Clause

The Extradition Clause is the only part of Article IV to assign a particular constitutional role to a state officer, the "executive Authority" of the State.[189] Its enforceability has an interesting constitutional history. In 1861, the Court

185. Wash. State Dep't of Licensing v. Cougar Den, Inc., 586 U.S. 347, 351–53 (2019).

186. Sup. Ct. of N.H. v. Piper, 470 U.S. 274, 288 (1985).

187. Fla. Bar re Amends. to Rules Regulating the Fla. Bar, 635 So. 2d 968, 973 (Fla. 1994) (noting that Rule 17-1.1 provides "[n]otwithstanding the provisions of article I, section 1, Rules of the Supreme Court of Florida Relating to Admissions to the Bar, this chapter shall authorize attorneys licensed to practice in jurisdictions other than Florida to be permitted to undertake said activities in Florida while exclusively employed by a business organization without the requirement of taking the bar examination").

188. *See* Matthew L.M. Fletcher, *Florida State Bar Authorizes Practices of Lawyer Admitted in St. Croix Tribal Court*, TURTLE TALK (Feb. 17, 2023), https://turtletalk.blog/2023/02/17/florida-state-bar-authorizes-practices-of-lawyer-admitted-in-st-croix-tribal-court [https://perma.cc/P7X8-DRTQ].

189. U.S. CONST. art. IV, § 2, cl. 2.

held that the Extradition Clause could not be enforced by the federal courts.[190] In *Kentucky v. Dennison*, Willis Lago assisted Charlotte, a slave, to escape from her involuntary indenture in Kentucky and seek freedom in the North.[191] Kentucky's governor, acting as the executive authority of his state, made a formal request to Ohio's Governor Dennison to extradite Mr. Lago so he could stand trial in Kentucky.[192] Governor Dennison refused, and Kentucky took the case to the Supreme Court.[193]

The Court held that Kentucky had the power to request Mr. Lago's extradition under Article IV Section 2, but that federal courts could not act to enforce the request if Ohio refused.[194] The Court reasoned that:

> The Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.[195]

The Court held that, while Article IV places a duty upon Ohio's governor to comply, "[t]he performance of this duty, however, is left to depend on the fidelity of the State Executive to the compact entered into with the other States when it adopted the Constitution of the United States, and became a member of the Union."[196]

More than a century later, the Supreme Court reversed *Dennison*.[197] In *Puerto Rico v. Branstad*, the Court held that because the duty to extradite the accused "is directly imposed upon the States by the Constitution itself, there can be no need to weigh the performance of the federal obligation against the powers reserved to the States."[198] Since *Dennison*, recalcitrant states may be sued in the federal courts to enforce compliance with their constitutional duty to deliver up the accused for criminal proceedings at the request of their state sisters.[199]

The question remains whether the executive authority of a state may request the extradition of a person located on an Indian reservation pursuant to Article IV. This Article opened with precisely this question, sharing the case

190. Kentucky v. Dennison, 65 U.S. (24 How.) 66, 109–10 (1861), *abandoned by* Puerto Rico v. Branstad, 483 U.S. 219 (1987).

191. *Id.* at 67.

192. *Id.*

193. *Id.*

194. *Id.* at 109–10.

195. *Id.* at 107–08.

196. *Id.* at 109.

197. Puerto Rico v. Branstad, 483 U.S. 219, 230 (1987).

198. *Id.* at 228.

199. Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 888 (1989) ("This Clause imposes a mandatory duty on the asylum state to extradite fugitives from justice in the requesting state.").

of Wayne Turtle Sr., a Cheyenne Indian wanted by the State of Oklahoma but residing with his wife on the Navajo Nation in Arizona.[200] While the Ninth Circuit in *Turtle* denied the extradition on the basis that "Arizona has no authority, and hence no duty, to exercise extradition jurisdiction over Indian residents of the Navajo Reservation,"[201] the case was decided before the Court's decision in *Branstad*.

The proper interpretation of Article IV is consistent with the *Merrill* opinion—the Extradition Clause only applies to persons who are within both the territorial and jurisdictional authority of a state's governor.[202] Although persons on an Indian reservation may be within the territorial authority of a state's executive authority, they are not within the jurisdictional authority of the state and therefore are not subject to the Extradition Clause.

i. Indian Country May Be Within the Territorial Limits of a State

Indian persons are citizens not only of their tribe and of the United States, but also of the state in which they reside.[203] Overcoming legal and structural hardships, Indigenous persons vote in state elections,[204] under some conditions pay state income taxes,[205] and may be required to comply with state regulations even while on the reservation when those regulations are for the purpose of conservation and not preempted by treaty.[206]

Early Supreme Court opinions denied the power of a state to incorporate tribal land within their borders:

> The Cherokee [N]ation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have

200. Arizona *ex rel.* Merrill v. Turtle, 413 F.2d 683, 683 (9th Cir. 1969).

201. *Id.* at 686.

202. Christensen, *supra* note 14, at 374 ("The obligation Article IV's Extradition Clause places on state governors, an obligation that is enforceable in federal courts after *Branstad*, is limited to those places both within the territorial control of the state and subject to its jurisdiction. Without the jurisdiction to enter the reservation, there can be no obligation for a state, even when requested by a fellow sister state, to extradite a person found in Indian country.").

203. Frickey, *supra* note 181, at 1187 ("[T]oday reservation Indians are citizens of the state in which they live.").

204. RESTATEMENT OF THE L., THE L. OF AM. INDIANS § 1 cmt. e (AM. L. INST. 2024) ("Indians are citizens of the United States and also citizens of the states in which they reside, even those that reside in Indian country where state jurisdiction is presumptively limited absent congressional consent. Indians have the right to vote in federal and state elections.").

205. Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 128 (1993) (holding that tribal members who either earn income outside of an Indian reservation or who live outside of the reservation may be responsible for the payment of state income taxes); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 179–80 (1973) (holding that Indians who live on and earn their income from the reservation are exempt from state income taxes).

206. Tulee v. Washington, 315 U.S. 681, 684–85 (1942) (holding that states cannot require Indians to pay a fishing license fee, but they can impose on Indians nondiscriminatory regulatory fishing restrictions necessary for conservation); *see also* Robert J. Miller, *Indian Hunting and Fishing Rights*, 21 ENV'T L. 1291, 1292 (1991) ("Tribes with treaty rights can fish and hunt on their reservations without any state regulation except those necessary for conservation purposes.").

> no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.[207]

More recently, in 2022's *Oklahoma v. Castro-Huerta*, the Court has described the domestic status of Indian tribes as being sited within states, describing Indian reservations as "part of a State's territory."[208] If *Castro-Huerta* is upheld[209] then there can be little argument that Indian reservations are within state borders and therefore territorially subject to a state's executive authority. They are not, however, subject to the jurisdictional authority of the state.

ii. Indians in Indian Country Are Not Subject to the Jurisdictional Authority of the States

The Supreme Court first determined that states lack criminal jurisdiction over offenses committed on tribal lands in 1832.[210] In *Worcester v. Georgia*, the Supreme Court rejected Georgia's attempt to impose its criminal code, which prohibited non-Indians from residing on tribal lands without a license or permit,[211] to punish the conduct of a pair of Vermont missionaries working on lands reserved by the Cherokee in treaties with the United States.[212] It reasoned that states may not "interfere forcibly with the relations established between the United States" and Indian tribes,[213] and therefore Georgia's courts lacked jurisdiction over crimes occurring on tribal lands. *Worcester* thus established a baseline, but rebuttable, proposition that states lack the inherent criminal authority to impose their criminal laws on persons residing in Indian country even if Indian lands were nominally within the state's exterior borders.

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207. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

208. Oklahoma v. Castro-Huerta, 597 U.S. 629, 638 (2022) ("In short, the Court's precedents establish that Indian country is part of a State's territory.").

209. *See* Gregory Ablavsky, *Too Much History:* Castro-Huerta *and the Problem of Change in Indian Law*, 2022 SUP. CT. REV. 293, 295–98 (arguing that the narrow 5–4 majority in *Castro-Huerta* misread the Court's precedent in the area of Indian law perhaps because of the overlapping and confusing natures of trying to interpret two centuries of inconsistent law, policy, and precedent); John P. LaVelle, *Surviving* Castro-Huerta*: The Historical Perseverance of the Basic Policy of* Worcester v. Georgia *Protecting Tribal Autonomy, Notwithstanding One Supreme Court Opinion's Errant Narrative to the Contrary*, 74 MERCER L. REV. 845, 972–75 (2023) (arguing for the continuation of tribal autonomy from state interference and suggesting that *Castro-Huerta* be essentially limited to its facts).

210. *Worcester*, 31 U.S. at 561–62.

211. *Id.* at 542. The Supreme Court laid out the relevant Georgia code from 1930:

> It enacts that 'all white persons, residing within the limits of the Cherokee nation on the 1st day of March next, or at any time thereafter, without a license or permit from his excellency the governor, or from such agent as his excellency the governor shall authorise to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanour, and, upon conviction thereof, shall be punished by confinement to the penitentiary, at hard labour, for a term not less than four years.'

Id.

212. *Id.* at 538.

213. *Id.* at 561.

Subsequent acts of Congress[214] and judicial authority[215] carved out a small space for state criminal authority in Indian country: "Within Indian country, state jurisdiction is limited to crimes by non-Indians against non-Indians . . . and victimless crimes by non-Indians."[216] For a brief period in the 1950s, states were permitted by Congress to assume concurrent criminal authority in Indian country without tribal consent, but the Indian Civil Rights Act ended that expansion of state intrusion in 1968.[217] In 2022 a narrowly divided Supreme Court held, contrary to the *Worcester* precedent, that states have concurrent criminal jurisdiction over crimes committed by non-Indians against Indians in Indian country,[218] but did nothing to alter the presumption that states lack criminal jurisdiction in Indian country over Indian defendants.

In 2020 the Court reaffirmed that states lack criminal jurisdiction over even non-member Indians in Indian country: "State courts generally have no jurisdiction to try Indians for conduct committed in 'Indian country.'"[219] The 2022 opinion did not alter that proposition.[220] Not only is a lack of state jurisdiction based on judicial precedent going back to the Marshall trilogy,[221] but Congress has statutorily provided that the punishment of Indians who commit major crimes on tribal lands is "within the exclusive jurisdiction of the United States."[222] The Supreme Court has long held that the "exclusive" language

214. *See, e.g.*, 25 U.S.C. § 1321(a)(1) (permitting states to assume jurisdiction in Indian country with the consent of the Indian tribe); *see also* Alex Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 ALB. GOV'T L. REV. 49, 51–53 (2017) (discussing the federal–state–tribal statutory scheme); Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of* Marbury v. Madison *to Tribal Courts' Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77, 116–17 (2004) (analyzing the Supreme Court's interpretation of congressional power over tribal jurisdictions).

215. United States v. McBratney, 104 U.S. 621, 624 (1881) (holding that a state may prosecute non-Indian-on-non-Indian crime in Indian country); New York *ex rel.* Ray v. Martin, 326 U.S. 496, 497–99 (1946) (reaffirming *McBratney*).

216. Solem v. Bartlett, 465 U.S. 463, 465 n.2 (1984) (citation omitted).

217. Carole Goldberg, *Unraveling Public Law 280: Better Late than Never*, 43 HUM. RTS. 11, 11 (2017); *see also* Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1686 (1998) ("The [Indian Civil Rights] Act essentially made many, but not all of the provisions of the Bill of Rights, applicable to tribes. . . . [It] amended [prior law] to make tribal consent a prerequisite for future assumptions of jurisdiction [over tribal land]." (footnotes omitted)).

218. Oklahoma v. Castro-Huerta, 597 U.S. 629, 656 (2022) ("We conclude that the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.").

219. McGirt v. Oklahoma, 591 U.S. 894, 897 (2020) (quoting Negonsott v. Samuels, 507 U.S. 99, 102–03 (1993)).

220. *Castro-Huerta*, 597 U.S. at 647 (accepting *McGirt*'s conclusion that much of eastern Oklahoma is Indian country and limiting the question to whether states have concurrent criminal jurisdiction over crimes committed by non-Indians against Indians).

221. The Marshall Trilogy is a commonly used term to describe three early Supreme Court cases, all decided by Chief Justice Marshall, laying the framework for much of federal Indian law. Among the cases is 1832's *Worcester v. Georgia* which, as described in text, held that Georgia could not impose its criminal laws in Indian country. *See generally* Fletcher, *supra* note 70.

222. 18 U.S.C. § 1153(a).

in the Major Crimes Act was designed to prohibit state criminal jurisdiction over Indians in Indian country.[223]

iii. States May Not Extradite Indians in Indian Country Without Tribal Permission

Precisely because states lack jurisdictional authority in Indian country, the governor of a state may not enter an Indian reservation and arrest an Indigenous person for extradition to a sister state even when that state makes a request under Article IV, unless the removal of the Indigenous person is permissible under tribal law.[224] Admittedly, some tribes have extradition ordinances that provide a procedure for a state to seek removal of a person located within their borders.[225] It cannot be improper for a state to obtain jurisdiction over an Indian person located in Indian country by complying with the tribal process for extradition, but any attempt by any state to remove an Indian from Indian country without complying with tribal law is an unlawful—if not unconstitutional—act. The state lacks jurisdiction over the wrongfully seized person until the failure to comply with tribal law has been rectified.[226]

Finally, nothing here or in Article IV would prevent the federal government from entering an Indian reservation and arresting or removing any individual regardless of their Indian status.[227] Even when an Indian tribe has established an extradition ordinance of its own, because the federal government is the controlling sovereign, it does not need to comply with tribal extradition rules (just like it would not comply with state extradition rules in an analogous situation); although out of respect for tribal sovereignty compliance is certainly recommended.[228]

C. SECTION 3: THE TERRITORIAL INTEGRITY OF STATES

Article IV Section 3 creates a few basic rules for the admission of new states and preserves the underlying right of the federal government to make

223. Draper v. United States, 164 U.S. 240, 242–43 (1896).

224. Christensen, *supra* note 14, at 374.

225. For example, the Navajo Nation has an extradition ordinance that used to permit extradition only to those states with whom the Nation shares a border: Utah, Arizona, and New Mexico. Arizona *ex rel.* Merrill v. Turtle, 413 F.2d 683, 683–84 (9th Cir. 1969) ("Navajo tribal law provided for extradition only to the three neighboring states of Arizona, New Mexico and Utah."). Today, the extradition ordinance contains no such restriction. NAVAJO NATION CODE ANN. tit. 17, § 1951 (2010).

226. Benally v. Marcum, 553 P.2d 1270, 1274 (N.M. 1976) ("Accordingly we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."); *cf.* Davis v. Muellar, 643 F.2d 521, 525–26 (8th Cir. 1981) (holding that a criminal trial could proceed but the accused could raise the illegality of his arrest on appeal if he was convicted).

227. United States v. Kane, 537 F.2d 310, 311 (8th Cir. 1976) (rejecting the defendant's contention that the United States needed to request his "delivery" from the tribe in order to criminally charge him as being "clearly . . . inconsistent with congressional intent").

228. *Id.*

rules regarding the property of the United States.[229] In 1845, the Supreme Court used Article IV Section 3 as the basis for the development of the Equal Footing Doctrine.[230] In subsequent authority, the Court has explained that new states admitted to the union may not "be deprived of any of the power constitutionally possessed by other States, as States, by reason of the terms in which the acts admitting them to the Union have been framed."[231]

Professor Thomas Colby gave further context to the Equal Footing Doctrine. He explained that "the equal footing doctrine . . . enjoys a long historical pedigree in the sense that Congress (or the president) has always promised equality to the new states in their formal admission resolutions, and the Supreme Court has formally condoned the doctrine for well over a century."[232] Given its well established foundation in American constitutional jurisprudence, it is unsurprising that the Doctrine has been applied to conflicts between Indian tribes and states.[233]

Perhaps the most notable early application of the Equal Footing Doctrine used to resolve a conflict between states and tribes was *Ward v. Race Horse*.[234] In *Race Horse*, a Bannock man was attempting to exercise a treaty "right to hunt on the unoccupied lands of the United States."[235] Wyoming arrested him for hunting illegally.[236] Wyoming argued that when it entered the Union, it entered on an equal footing with all other states, and that gave it the right to regulate persons, even those like Race Horse, who were purportedly exercising a treaty right.[237] The Supreme Court agreed, reasoning that if Wyoming was admitted as a state without the power to regulate hunting on open lands, then it would not have been admitted on an equal footing with earlier admitted sister states.[238]

The challenging task of this paper—demonstrating that the Equal Footing Doctrine's conclusion that a state's admission to the Union does not interfere with any inherent tribal rights, nor abrogate any Indian treaty rights without

229. U.S. CONST. art. IV, § 3.

230. Pollard v. Hagan, 44 U.S. (3 How.) 212, 216, 222 (1845).

231. Coyle v. Smith, 221 U.S. 559, 570 (1911).

232. Colby, *supra* note 49, at 1100–01 (footnote omitted).

233. For a review of academic discussion on the use of the Equal Footing Doctrine, see generally Ablavsky, *supra* note 209; Katherine M. Cole, Note, *Native Treaties and Conditional Rights After* Herrera, 73 STAN. L. REV. 1047 (2021); and Frank W. DiCastri, Comment, *Are All States Really Equal? The "Equal Footing" Doctrine and Indian Claims to Submerged Lands*, 1997 WIS. L. REV. 179.

234. Ward v. Race Horse, 163 U.S. 504, 512–13 (1896).

235. *Id.* at 507.

236. *Id.* at 507–08.

237. *Id.* at 510.

238. *Id.* at 514 ("The power of all the States to regulate the killing of game within their borders will not be gainsaid, yet, if the treaty applies to the unoccupied land of the United States in the State of Wyoming, that State would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the State. Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union, a power resulting from the fact of statehood and incident to its plenary existence.").

explicit language—has fortunately already been addressed by the Court itself. In *Minnesota v. Mille Lacs Band of Chippewa Indians*, the Court took the first step in eroding the *Race Horse* precedent. Justice O'Connor wrote for the majority that "*Race Horse* rested on a false premise. As this Court's subsequent cases have made clear, an Indian tribe's treaty rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over the natural resources in the State."[239] In *Mille Lacs*, the Court went on to hold that members of the Mille Lacs Tribe could exercise usufructuary rights on non-Indian lands to which the Tribe had never surrendered its previously recognized inherent powers to hunt, fish, and gather.[240]

Two decades later, the Court finally retired the *Race Horse* precedent unequivocally. Writing for the majority, Justice Sotomayor adopted the logic of *Mille Lacs* and disapproved of the application of the Equal Footing Doctrine to erode tribal power:

> We thus formalize what is evident in *Mille Lacs* itself. While *Race Horse* "was not expressly overruled" in *Mille Lacs*, "it must be regarded as retaining no vitality" after that decision. . . . To avoid any future confusion, we make clear today that *Race Horse* is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood.[241]

The *Herrera* case enshrined the Court's respect for the tribal sovereign, ensuring that states could not claim a power under Article IV to interfere with a tribal sovereign's exercise of its inherent authority, or powers expressed recognized by treaty.[242]

With the advent of *Herrera,* clear Supreme Court precedent now shuts down any interpretation that Article IV's Equal Footing Doctrine is a tool that states can use to invalidate tribal rights because their exercise may interfere with a right claimed by the state. *Herrera* is also further evidence of the strength of the thesis of this Article. When Article IV's provisions are designed to protect individual citizens of states, Indian persons can claim the same protections. But, when Article IV's provisions police the relationship between sovereigns, states may not avail themselves of a constitutional power to limit, modify, curtail, or abrogate any tribe's inherent sovereign rights.

D. SECTION 4: A REPUBLICAN FORM OF GOVERNMENT

Article IV contains a promise by the federal government to "guarantee to every state in this Union a Republican Form of Government."[243] Known as the Guarantee Clause, or sometimes as the Republican Form of Government

239. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999).

240. *Id.*

241. Herrera v. Wyoming, 587 U.S. 329, 342 (2019) (quoting Limbach v. Hooven & Allison Co., 466 U.S. 353, 361 (1984)).

242. *Id.*

243. U.S. CONST. art. IV, § 4.

Clause,[244] it has long provided the basis for challenges to state laws related to voting and representation,[245] although the Supreme Court has dismissed many of these as raising nonjusticiable political questions.[246]

Regardless of any plaintiff's ability to overcome the justiciability issue, Article IV's guarantee of a republican form of government does not extend to Indian tribes. This proposition is largely uncontroversial.[247] First, the textual argument forecloses its application. The "guarantee" in Article IV is "to every State in this Union."[248] Indian tribes are not states. This was made clear by the Supreme Court as early as 1831 when the Court contradistinguished tribal governments from states in a review of its interpretation of the original jurisdiction of federal courts in Article III: "[Indian tribes] are not a state of the union."[249] That Article IV does not guarantee Indian tribes a republican form of government becomes tautological. By its very explicit terms, the guarantee only applies to states of the union, a status not encompassing Indian tribal governments.

If the textual argument were insufficient, there is a powerful statutory argument that the United States is not obligated to guarantee Indian tribes a republican form of government. Because the Constitution does not ordinarily bind the tribal sovereign,[250] the Indian Civil Rights Act of 1968 ("ICRA")[251]

244. *See* Williams, *supra* note 18, at 607 n.31 ("This language has been so central to modern debates about the Clause's meaning that several prominent scholars have taken to referring to the provision as the 'Republican Government Clause' rather than the Guarantee Clause.").

245. For a string cite of these cases decided by the Supreme Court, see New York v. United States, 505 U.S. 144, 184–85 (1992).

246. *Id.* at 184 ("[B]ecause the Guarantee Clause has been an infrequent basis for litigation throughout our history. In most of the cases in which the Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine."); *see also* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1929 (2015) ("Throughout the nineteenth and much of the twentieth century, federal courts adjudicated constitutional questions on the merits, including issues that are today considered quintessential 'political questions,' such as the validity of constitutional amendments under Article V and the meaning of the Guarantee Clause of Article IV.").

247. An extensive search of the literature finds just one mention of a single scholar suggesting that Article IV should compel the government to interfere with the inherent powers of an Indian tribe to organize itself with any governmental structure it chooses. *See* Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1118 (2004) ("[I]f, contrary to current practices, Indian tribes were to adopt antidemocratic or even tyrannical policies vis-à-vis minority factions within tribes, the federal government always has the military power to intervene and restore order. The United States has intervened overseas on numerous occasions, and there is no reason to think that the United States would sit idly by while oppression occurs within the United States. Borrowing from the Constitution, the U.S. government might even guarantee each Indian tribe a 'Republican Form of Government.'").

248. U.S. CONST. art. IV, § 4.

249. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

250. *See supra* Section II.B.

251. Indian Civil Rights Act, 25 U.S.C. §§ 1301–1304.

statutorily incorporated some, but not all, constitutional protections upon tribal governments.[252]

As the Supreme Court has explained, Congress enacted ICRA to advance two competing policies: (1) to protect individual Indians from abuse by tribal governments, and (2) to provide continued support for furthering tribal self-government.[253] Professor Angela Riley gave context to this language, articulating some of the rights omitted by ICRA because they may be inconsistent with the policy of furthering tribal self-government: "Accordingly, Congress declined to extend to tribes the requirement of grand jury indictment, jury trials in civil cases, and the right to counsel for indigent defendants. Perhaps most importantly, Congress acceded to the desires of tribal elders and removed restrictions regarding tribal establishment of religion."[254]

Importantly for the purposes of this Article, Congress also refused to extend Article IV's guarantee of a republican form of government[255]: "[T]he Indian Civil Rights Act contains no requirement that the tribes have a republican form of government."[256] This is perhaps unsurprising given that contemporaneous sources report that the focus of Congress's inquiry was on procedural rights in criminal cases.[257] While originally ICRA was written to apply virtually all of the Bill of Rights against tribal governments, provisions requiring the right to vote and prohibitions on discrimination based on racial classifications were

252. Jordan Gross, *Through a Federal Habeas Corpus Glass, Darkly—Who Is Entitled to Effective Assistance of Counsel in Tribal Court Under ICRA and How Will We Know if They Got It?*, 42 AM. INDIAN L. REV. 1, 34 (2017) ("ICRA incorporates some, but not all, of the specific guarantees found in the Bill of Rights. Some are identical to the language in the Bill of Rights, while others are not.").

253. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978) ("In addition to its objective of strengthening the position of individual tribal members vis-à-vis the tribe, Congress also intended to promote the well-established federal 'policy of furthering Indian self-government.'").

254. Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 810 (2007) (footnote omitted); *see also* Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. COLO. L. REV. 59, 94 (2013) ("In other words, only nonmembers subject to tribal civil jurisdiction and Indians subject to tribal criminal jurisdiction have the right to seek outside review of tribal court jurisdiction (in civil cases) or review of a criminal conviction." (footnotes omitted)); Note, *ICRA Reconsidered: New Interpretations of Familiar Rights*, 129 HARV. L. REV. 1709, 1716–17 (2016) ("As a result of *Oliphant* and *Santa Clara Pueblo*, ICRA's enforceable effects were mostly limited to Indians imprisoned under tribal law for crimes committed on tribal lands."); Grant Christensen, *Civil Rights Notes: American Indians and Banishment, Jury Trials, and the Doctrine of Lenity*, 27 WM. & MARY BILL RTS. J. 363, 367, 371–98 (2018) (discussing the Supreme Court cases by "right to a jury trial, the availability of a writ of habeas corpus, and the effect of uncounseled convictions in tribal courts").

255. Jacobson v. Forest Cnty. Potawatomi Cmty., 389 F. Supp. 994, 995 (E.D. Wis. 1974) ("[T]he Indian Civil Rights Act contains no requirement that tribes have a republican form of government." (citing U.S. CONST. art. IV, § 4)); *see also* Frickey, *supra* note 181, at 1159 n.135 (citing *Jacobson* favorably for the proposition that Article IV does not apply to Indian tribes).

256. Stands Over Bull v. Bureau of Indian Affs., 442 F. Supp. 360, 374 (D. Mont. 1977) (citing *Jacobson*, 389 F. Supp. at 995).

257. Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1359 (1969) ("An overview of the legislative record shows that the Senate committee was concerned primarily with criminal trial procedures. Information concerning governmental structure and non-court practices received less attention." (footnote omitted)).

explicitly deleted because they may threaten the survival of "theocratic" tribes and be inconsistent with the "cultural autonomy" of tribal governments.[258]

The consequences are that tribal practices prevalent in 1968—but inconsistent with the notion of one-person one-vote or a "republican form of government"—survived ICRA's enactment. "An assumption in some of the legislative apportionment cases seems to be that the constitutional guarantee to the states of a republican form of government requires an election. Since the statute contains no such requirement for the tribes, it seems that the tribe could continue its nonelective system."[259] The Supreme Court has observed that Indian tribes organize their governments in a variety of forms; they do not all have Constitutions, nor are they required to adopt one in order to exercise their inherent sovereign powers.[260]

With the text of the Constitution limiting the Guarantee Clause to states of the union, and Congress's statutory expansion of quasi-constitutional rights[261] omitting the incorporation of any guarantee of a republican form of government, it is clear that the United States has not guaranteed that Indian tribes must organize themselves under a republican form of government. While the Guarantee Clause may exist to ensure the federal government monitors states and may guarantee their governmental structures do not meaningfully depart from the open democratic systems the Founders intended, there is neither textual nor statutory support for any federal requirement that tribes must organize themselves in a similar manner.

CONCLUDING REMARKS

Unlike the first three articles, Article IV was designed, not to create the branches of the federal government, but to knit the states together as a cohesive whole. The tribal sovereign was largely omitted from the Constitution and is completely absent from the text of Article IV. Indian tribes, however, live in the penumbra of the Article. If the goal of Article IV was to ameliorate conflict between the various domestic sovereigns of the United States, then tribes, as independent nations within her exterior borders, must be accounted for in its interpretation.

Shockingly, there has been virtually no scholarship about Indian tribes and Article IV despite the fact that courts routinely grapple with issues like

258. *Id.*

259. *Id.* at 1361 (footnote omitted).

260. Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 198 (1985) ("Section 16 of the IRA authorizes any tribe on a reservation to adopt a constitution and bylaws, subject to the approval of the Secretary of the Interior. . . . The Act, however, does not provide that a tribal constitution must condition the power to tax on Secretarial approval. Indeed, the terms of the IRA do not govern tribes, like the Navajo, which declined to accept its provisions." (citations omitted) (citing 25 U.S.C. §§ 476, 478)).

261. ICRA's rights are often described as quasi-constitutional because, while the Constitution does not apply to Indian tribes, Congress used the statute to expand many of the rights contained in the Bill of Rights to tribal governments. *See* Rosen, *supra* note 61, at 485–507; Robert N. Clinton, *Comity & Colonialism: The Federal Courts' Frustration of Tribal-Federal Cooperation*, 36 ARIZ. ST. L.J. 1, 31–32 (2004).

whether to recognize tribal court judgments and how to extradite Indians from Indian country. This Article is the first to comprehensively engage with tribal sovereigns and consider how the rights and obligations in Article IV may apply to the various structures of Indigenous government.

Tribes are not states. Tribal land is largely beyond the jurisdictional control of the state sovereign, and tribal governments were intended to be left to their own self-government. As such, Indian tribes are not subject to the obligations placed on states by the federal government. The Extradition Clause does not permit states to enter Indian territory to arrest and remove Native persons found there. The Equal Footing Doctrine does not permit states to reach into tribal lands and interrupt the exercise of treaty rights or the ability of the tribe to make rules governing its land and its members. The Guarantee Clause does not create an obligation for the federal government to dictate the form or function of tribal governments. Precisely because tribal governments are separate sovereigns, excluded from the continental congresses, Article IV does not articulate limitations on the inherent authority of Indian tribes.

Article IV was designed to unify the nation into one cohesive whole. While it does not permit states to interfere in tribal self-government and does not impose a constitutional basis for federal interference in tribal affairs—it is designed to ensure the uniform treatment of citizens. When a person, regardless of their Indian status, wins a judgment from tribal court, that person should be able to enforce that judgment in any state court of the United States. Similarly, states may not discriminate against Indian persons in the provision of fundamental services based upon their enrollment as a member of an Indian tribe. The goal of Article IV was to ensure a uniformity for American citizens when interacting with the structures of the state. A state attempting to deny any person those protections has violated its obligations under Article IV.