THE EXTRADITION CLAUSE AND INDIAN COUNTRY

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I. INTRODUCTION

The Constitution primarily concerns itself with the creation of a federal government and the concomitant allocation of powers between the states and the United States. As a condition of its ratification, a Bill of Rights was added, which focused on protections for the people from the exigencies of the federal government. The entire document is a grant of powers from the sovereign states – each state giving up some of its sovereignty in exchange for the protections offered by the creation of a federal entity.[1]

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1. *See generally* Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 512 (2012) ("Constitutional rights are thus limits on government powers. The Constitution initially sketches out the extent and limits of federal power with the broad brushstrokes of powers, and it then pencils in more detailed limits with rights . . . . The Constitution's limits on

The Constitution, therefore, has very little to say about the relations between states, except to cement an understanding that they must mutually abide by the decisions of the federal sovereign when it exercises the powers they delegated to it.[2] Article IV Section 1 requires that each state accept and enforce the decisions and judgments of her fellow sister states,[3] while Section 2 Clause 1 guarantees to the citizens of each state the Privileges and Immunities of citizens in the several states.[4]

In only one place does the Constitution assign a role to the governor of a state by speaking to the "executive authority". Article IV Section 2 Clause 2, the Extradition Clause, provides that:

> 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.[5]

Just what exactly does the Constitution require from state governors? Must the governor of one state comply with a request from the governor of another even if it is against the public policy of the state? What if the crime the individual is accused of is not a crime in the jurisdiction where they are currently located – must a governor turn over a citizen to another state for criminal prosecution of activity that is admittedly lawful in the state where the governor sits? What if the person sought is on territory outside the jurisdiction of the governor – like an Indian[6] reservation?

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government, including constitutional rights, are not contractual terms, but rather are legal constraints legislated by the people. They therefore are legally binding on the government, regardless of any contrary private or state consent.").

2. *See generally* 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.").

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

4. 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.").

5. U.S. CONST. art. IV, § 2, cl. 2.

6. The author recognizes that the word "Indian" is not without problematic connotations; however, the word is used in the Constitution itself. For example, in the Commerce Clause, Congress is given the power to regulate commerce with "Indian tribes". U.S. CONST. art. I, § 8, cl. 3. The term is used throughout American law. Federally Recognized Indian Tribe List Act of 1994, Pub. L. NO. 103–454, 108 Stat. 4791 (1994) (explaining that the word "Indian" is a legal term of art and is regularly used in the law and by lawyers to describe many of America's Indigenous people. 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). *But see* H. PATRICK

This article explores the Extradition Clause and, more specifically, how it applies to Indian country. This article takes the position that as sovereign governments – state governors lack authority to enter the Reservation to comply with requests made pursuant to Article IV even if the Indian reservation appears to be incorporated within the state borders. Part II begins the discussion by looking at the enforceability of the Extradition Clause. The Supreme Court has vacillated on the authority of federal courts to enforce an obligation assigned by the Constitution to the executive power of a State. This part explores the Supreme Court precedent and takes from it some important foundational ideas about the role of federal courts in policing state executive authority. Part III looks at the application of the Extradition Clause to persons located in Indian country. This section recognizes that, while the Supreme Court has never decided this question, federal appellate courts have suggested that state governors lack authority in Indian country. Part IV reconciles this authority to argue that, while the Supreme Court has given federal courts some power to enforce the Extradition Clause, governors are still without the ability to extradite a person located in Indian country. It argues that states wishing to extradite a person found in Indian country must avail themselves of tribal extradition ordinances or tribal customary rules because Article IV is limited to circumstances where a state has both territorial and jurisdictional authority over the person sought. Finally, Part V provides a few brief concluding remarks.

II. THE ENFORCEABILITY OF THE EXTRADITION CLAUSE

The Extradition Clause is unique because it assigns a constitutional role to a state officer. This raises some other, more complicated constitutional questions. Article III of the Constitution creates a Supreme Court and leaves it up to Congress to provide for other federal courts.[7] Because the Constitution is understood as creating a federal government, with those powers not explicitly surrendered to the federal sovereign in the document reserved to the states,[8] can the federal courts enforce a constitutional provision that gives obligations to state officers? Essentially, federal courts

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GLENN, LEGAL TRADITIONS OF THE WORLD 60-94 (Oxford U. Press, 5th ed. 2014) (discussing how the term 'Indian' is more problematic in an international context).

7. Patti Alleva, *Prerogative Lost: The Trouble with Statutory Federal Question Doctrine After* Merrell Dow, 52 OHIO ST. L.J. 1477, 1487 (1991) ("[A]rticle III itself established the Supreme Court, but gave Congress the power to constitute the lower federal courts should Congress see fit to do so.").

8. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 147 n.1012 (2002) ("It has been repeated so often as to become axiomatic, that this government is one of enumerated and delegated powers, with the powers not delegated reserved to the states and the people." (quoting Fong Yue Ting v. United States, 149 U.S. 698, 758 (1893) (Field, J., dissenting)).

are asked whether the enforcement of Article IV in a federal forum is an exercise of the judicial power given to the Courts in Article III. Although the Extradition Clause assigns a constitutional role to state officers, is it consistent with the limited powers of the federal courts to force state governors to comply?

A. *DENNISON* AND THE INABILITY OF FEDERAL COURTS TO ENFORCE THE EXTRADITION CLAUSE

In 1861, during the middle of the Civil War, the Supreme Court said the enforcement of the Extradition Clause was beyond the judicial powers the federal courts were given by Article III.[9] Willis Lago assisted Charlotte, a slave, to escape from her captivity and flee north from Kentucky into Ohio.[10] Helping a slave escape was a violation of Kentucky law at the time – the Thirteenth Amendment banning slavery would not be enacted until 1865.[11] Kentucky's Governor Magoffin made a formal request under Article IV Section 2, the Extradition Clause, to Ohio's Governor Dennison, seeking the extradition of Mr. Lago so he could stand trial for the crime in a Kentucky court.[12] On the advice of Ohio's Attorney General, Governor Dennison refused.[13] The State of Kentucky sued the State of Ohio and Governor Dennison directly in the Supreme Court under its original jurisdiction[14] alleging that Ohio's Governor violated his constitutional obligation under the Extradition Clause.

The Supreme Court took the case, but it ultimately decided that the federal courts lacked the power to force Governor Dennison to comply.[15] The Court began by recognizing that the Extradition Clause did not provide any exception based on the public policy of the rendering state; it included and intended to include:

> [E]very offence made punishable by the law of the State in which it was committed, and that it gives the right to the Executive authority

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9. Kentucky v. Dennison, 65 U.S. 66 (1861).

10. *Id.* at 67.

11. For an excellent discussion of the Ratification of the Thirteenth Amendment, *see* Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment*, 112 COLUM. L. REV. 1697 (2012). Professor Zietlow is perhaps today's foremost scholar of the Thirteenth Amendment. For additional discussion of the Thirteenth Amendment and the abolition of slavery, *see* Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment,* 49 HOUS. L. REV. 393 (2012); Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255 (2010); Rebecca Zietlow, *A Third Reconstruction*, 81 MD. L. REV. 351 (2021).

12. *Dennison*, 65 U.S. at 67.

13. *Id.*

14. The Supreme Court's original jurisdiction hears cases brought by one state against another state. For a discussion of the Court's original jurisdiction, *see* James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555 (1994).

15. *Dennison*, 65 U.S. at 109-10.

> of the State to demand the fugitive from the Executive authority of the State in which he is found; . . . without any reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled.[16]

Kentucky had the right to request the return of Mr. Lago even though the crime he was accused of committing, aiding a slave in the escape of her forced indenture, was not a crime in the State of Ohio, and in fact, was contrary to the public policy of the State.

Having established that the right existed, the Court then proceeded to consider whether the courts of the United States could enforce the right. The Court recognized the founders did not seem to contemplate that a State would refuse a request, because a refusing State would want the mutual assistance of its sister states when it would make a reciprocal request:

> when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the Executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union.[17]

As the *Dennison* case suggested, this assumption was proven false. When pressing social issues or matters of public policy, like slavery, divided states – a governor of one state was willing to refuse a request from a governor of a neighboring state knowing full well that the consequence of the refusal would strain state-to-state relations and would jeopardize future reciprocal extradition requests by the refusing state.

Given this reality, the Supreme Court had to determine how the Constitution would treat a governor's refusal to comply with a constitutional obligation. What if a governor refused to comply with an Article IV request from a fellow state governor? The Court reasoned that the federal government could not force the governor to comply.[18] While the Constitution places a duty upon the governor to comply, "[t]he performance of this duty, however, is left to depend on the fidelity of the State Executive to the compact

16. *Dennison*, 65 U.S. at 103.

17. *Id.* at 109.

18. *Id.* at 107-8 ("[T]he 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.").

entered into with the other States when it adopted the Constitution of the United States, and became a member of the Union."[19]

The *Dennison* case established the principle that while state governors may have a constitutional duty to comply with a fellow governor's extradition request – the federal courts of the United States, being limited in power, lack the authority to compel compliance with that duty. Accordingly, the State of Kentucky had the right to require Governor Dennison to assist them in the extradition of Willis Lago, but if the governor refused, the federal courts could not provide a legal remedy in order to protect or enforce that constitutional right.

B. *BRANSTAD* AND A NEW ROLE FOR FEDERAL COURTS ENFORCING THE EXTRADITION CLAUSE

More than a century later, the Supreme Court agreed to revisit the *Dennison* opinion.[20] During this post-*Dennison* period, states continued to make extradition requests of one another, with most requests routinely granted as a regular, even mundane, part of criminal procedure. As the Supreme Court had explained in *Dennison,* it continued to be in each state's interest to generally comply with requests from fellow states because each state benefitted from compliance when it in turn would make a request.

The constitutionality of *Dennison* was finally reexamined by the Court in 1987 following Iowa's outright refusal to comply with an extradition request from the Governor of Puerto Rico. In *Puerto Rico v. Branstad*, the Governor of Puerto Rico submitted a formal extradition request to the Governor of Iowa seeking the extradition of Ronald Calder who was criminally charged with homicide after using his vehicle to strike, and then repeatedly back over, a pregnant woman.[21] When Iowa's governor refused the extradition request, Puerto Rico sought an order from the federal court to compel compliance. The District Court denied the request, and the Eighth Circuit "reluctantly" affirmed based upon the precedent set in *Dennison*.[22]

The Supreme Court reversed both the Eighth Circuit opinion and its prior holding in *Dennison*. "The fundamental premise of the holding in *Dennison* – 'that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns—is not representative of the law today.'"[23] The Court rejected *Dennison*'s reasoning that federal courts could not compel state officers to act because doing so risked subjecting them to inconsistent

19. *Id.* at 109.

20. Puerto Rico v. Branstad, 483 U.S. 219, 220 (1987).

21. *Id.* at 221 ("According to two sworn statements taken by police, . . . after striking the couple Calder backed his car two or three times over the prostrate body. . . .").

22. *Id*. at 223.

23. *Id.* at 228 (citing FERC v. Mississippi, 456 U.S. 742, 761 (1982)).

direction or might overly occupy their time.[24] Instead, the Court explained that because "the duty 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[,]"[25] and it therefore held that a federal court could issue a writ of mandamus to compel the Governor of Iowa to extradite Ronald Calder to Puerto Rico.

Following the *Branstad* decision, a state whose governor had an extradition request refused by the governor of another state can now avail itself of the federal courts to seek a court order requiring the recalcitrant governor to comply with a validly issued request under Article IV. The Supreme Court, however, has not opined on what makes a request valid. In *Branstad*, Ronald Calder was not only located within the State of Iowa, he was clearly also located within the jurisdictional reach of Iowa's governor. Unlike *Branstad,* Indian reservations may be sited within the territorial boundaries of a state, but they are mostly outside the jurisdiction of the state.[26] How does the Extradition Clause work when Indian reservations are involved?

III. THE EXTRADITION CLAUSE IN INDIAN COUNTRY

The enforceability of the Extradition Clause becomes even more contentious when applied to American Indian reservations. Article IV requires the governor of a state to comply with a properly issued extradition request from the governor of a fellow state – but what if the governor lacks jurisdiction over the portion of their state where the named individual is located? When the Supreme Court used *Branstad* to overturn *Dennison*, permitting federal courts to enforce Article IV for the first time in more than one-hundred and twenty years, the case involved the extradition request of a man over whom Iowa clearly had jurisdiction. The Court in *Branstad* had no reason or occasion to consider how the enforcement of Article IV might change when Indian reservations are involved.

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24. *Id*. ("Considered *de novo*, there is no justification for distinguishing the duty to deliver fugitives from the many other species of constitutional duty enforceable in the federal courts. Indeed the nature of the obligation here is such as to avoid many of the problems with which federal courts must cope in other circumstances. That this is a ministerial duty precludes conflict with essentially discretionary elements of state governance, and eliminates the need for continuing federal supervision of state functions. The explicit and long-settled nature of the command, contained in a constitutional provision and a statute substantially unchanged for 200 years, eliminates the possibility that state officers will be subjected to inconsistent direction.").

25. *Id*.

26. *See* Bethany R. Berger, Williams v. Lee *and the Debate Over Indian Equality*, 109 MICH. L. REV. 1463 (2011) (discussing the limited power of states in Indian country); Judith Resnick, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989). *But see* Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627 (1998) (discussing the limited exception of tribes subject to Public Law 280 where Congress has permitted states to assert some authority in Indian country).

The history of relations between states and tribes is not an unblemished one.[27] The Supreme Court once remarked that 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."[28] As early as 1831, the Supreme Court had held that states lack criminal jurisdiction over individuals located on Indian reservations.[29] This section explores the added complication of processing extradition requests when the individual to be extradited resides in Indian country.

A. THE GEOGRAPHIC NATURE OF INDIAN COUNTRY

The modern definition of "Indian country" as a legal term of art dates back to 1948 when Congress formally codified the term as describing those places where the federal-tribal relationship is centered.[30] The definition of Indian country is currently codified at 18 U.S.C. §1151, and it includes all Indian reservations,[31] dependent Indian communities,[32] and allotments.[33] In

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27. For a general discussion of the long legacy of tribal-state relations and the role of the federal courts in policing that relationship, *see* Philip Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

28. United States v. Kagama, 118 U.S. 375, 384 (1886). For a larger academic discussion of these relationships, *see* Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 TULSA L. REV. 73 (2007).

29. Worcester v. Georgia, 31 U.S. 515 (1832) (holding that the state of Georgia could not enforce its criminal laws over non-Indian persons located on lands recognized as belonging to the Cherokee Nation). For a deeper discussion of *Worcester* and its progeny, *see* Rennard Strickland & William M. Strickland, *A Tale of Two Marshalls: Reflections on Indian Law and Policy, The Cherokee Cases, and the Cruel Irony of Supreme Court Victories*, 47 OKLA. L. REV. 111 (1994) and Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627 (2006).

30. An Act to revise, codify, and enact into positive law, Title 18 of the United States Code, entitled "Crimes and Criminal Procedure", Pub.L. No. 80-772, 62 Stat. 683 (June 25, 1948).

31. *See* Bethany R. Berger, McGirt v. Oklahoma *and the Past, Present, and Future of Reservation Boundaries*, 169 U. PA. L. REV. ONLINE 250, 269 (2021), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1262&context=penn_law_review_online ("[D]uring the allotment period, Indian country and reservation meant different things, and reservation was the broader category. While courts had limited Indian country to tribally owned lands, "reservation" included lands that tribes did not own. When Congress enacted the Indian Country Act in 1948, it codified this understanding; it did not create it.").

32. Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 425 (2008) (discussing the Supreme Court's opinion in Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998), which held that a dependent Indian community "refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements - first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence.").

33. G. William Rice, *Employment in Indian Country: Considerations Respecting Tribal Regulation of the Employer-Employee Relationship*, 72 N.D. L. REV. 267, 270 (1996) ("the Court held that land which had been carved from the tribal domain and held in trust by the United States for an individual Indian as an allotment was Indian Country even though the surrounding area of the reservation had then been extinguished, and that land allotted to an individual Indian from a tribal domain was Indian Country though it was held in fee simple by the individual Indian subject to federal restrictions upon alienation.") (citing United States v. Pelican, 232 U.S. 442, 447 (1914)). *See also* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995); 18 U.S.C. § 1151.

drafting the definition, Congress pulled from contemporary Supreme Court precedent involving the scope of judicial inquiry on Indian lands and accounted for the many exigencies of Indian law and policy which include the allotment of Indian reservations and the heightened land ownership of the Pueblos and other tribes in formerly Mexican/Spanish lands.[34]

The Constitution adopted in 1789 was comparatively silent regarding the role of Indian tribes.[35] It mentioned Indians in the Appropriation Clause only to note that state populations would not include "Indians not taxed"[36] when determining the population of each state for the purpose of deciding how many seats in the House of Representatives each state gets, and it contradistinguished Indian tribes from states and foreign nations in the Commerce Clause.[37] From these brief mentions, the Supreme Court has had to construct a set of federal principles that recognize the inherent sovereignty of tribal governments and govern the relationship between tribes, states, and the federal government.[38]

As far back as the 1830s, Chief Justice Marshall contemplated a territorial conception of jurisdiction whereby states could not enforce their laws on Indian reservations and Indian tribes could not enforce their laws in the state.[39] More recently, the Court has held that "Indian tribes within

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34. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.04, 2(c)(i) (2019) ("In the 1948 codification of the term 'Indian country,' Congress relied on the Supreme Court's decisions in *Donnelly*, *Sandoval*, *Pelican*, and *McGowan*, even to the point of codifying the Court's phrase 'dependent Indian communities.'") (citing Donnelly v. United States, 228 U.S. 243 (1913); United States v. Sandoval, 231 U.S. 28 (1913); United States v. Pelican, 232 U.S. 442 (1914); United States v. McGowan, 302 U.S. 535 (1938)). *See also* Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 155-56 (2006).

35. Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1168-69 (1990) ("The Constitution is silent concerning whether states have any authority to regulate in Indian country. As noted earlier, Chief Justice Marshall's opinion in Worcester attempted to lodge in the federal government the exclusive authority to deal with the Indians.").

36. Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 505-06 (2020) ("Similarly, the relationship between the United States and individual Indians shifted over time. For purposes of American citizenship, the Constitution leaves out 'Indians not taxed,' without defining that term. Congress enacted various statutes authorizing certain Indians to become citizens. But Indians remained tribal citizens, too.").

37. Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1170 (1995) ("In this clause the tribes 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. The objects, to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct.").

38. *See* Frickey, *supra* note 27. *See also* Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751 (2017) (discussing the impacts of colonialism on the Constitution and American democracy, and also arguing for a reimagination or rethinking of the founding stories).

39. Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 123 n.22 (2002) (discussing the Marshall Trilogy as "[a] clearer and more explicit

'Indian country' are a good deal more than 'private, voluntary organizations . . . .'"[40] They are distinct sovereigns that maintain a government-to-government relationship with the United States.[41] The Court's most recent jurisprudence has emphasized that state authority is severely restricted in Indian country. In just the last five years, the Court has held that states lack criminal jurisdiction over Indians committing crimes in Indian country,[42] that states cannot impose a state fuel tax on a tribal business when it contradicts a tribal treaty right,[43] and that states cannot prevent Indian tribes from asserting their hunting and fishing rights on public lands.[44]

Indian reservations are therefore *suis generis*;[45] they exist within or across state borders,[46] tribal citizens in Indian country are also citizens of the state in which they live,[47] tribal governments can assert parental rights in custody proceedings involving Indian children,[48] tribes can operate casinos

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statement of the assumption at the time of the drafting of the United States Constitution of the complete territorial jurisdiction of the Indian tribes over all persons, including non-Indians, within their territory . . . .").

40. United States v. Mazurie, 419 U.S. 544, 557 (1975).

41. The Supreme Court and Congress have often described the relationship between Indian tribes and the federal government as a government-to-government relationship. *E.g.*, Yellen v. Confederated Tribes of the Chehalis Reservation, 141 S. Ct. 2434, 2446 (2021) ("In 1979, 15 years before the List Act was passed, the Secretary began publishing a list of Indian tribes 'that have a government-to-government relationship with the United States.'"); *see also* Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 107 (1993) ("Notwithstanding the emergence of a body of Indian law rooted in protecting the government-to-government relations between the Indian tribes and the federal and state governments, important remnants of the colonialist roots of the relationship between the federal government and tribes remain imbedded in modern federal Indian law.").

42. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

43. Wash. State Dep't of Licensing v. Cougar Den Inc., 139 S. Ct. 1000 (2019).

44. Herrera v. Wyoming, 139 S. Ct. 1686 (2019).

45. David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 352-53 (2001) ("The Supreme Court's failure to appreciate that Indian law is sui generis denies deep traditions that preceded the nation's founding, were memorialized in the Constitution, and have been perpetuated by the judiciary until recently. The cornerstones of Indian law - that tribes have sovereignty over their territory, that state powers are severely limited in Indian country, and that these principles may be changed only by Congress - are essential to our political structure. Earlier Supreme Courts have characterized the relationship of tribes to the United States as unique.").

46. For a great discussion of the role of borders and Indian reservations *see* Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595 (2010).

47. David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 418 (1994) ("Today, American Indians are citizens with full voting rights.").

48. 25 U.S.C. § 1911(b) (allowing an Indian Child's Tribe to request the transfer of a child custody case to the tribal court even if neither parent requests the transfer). For a discussion of some cases where tribes have requested this transfer, *see* Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373, 1383 n.70 (2002) or Grant Christensen, *A View from American Courts: The Year in Indian Law 2017*, 41 SEATTLE U. L. REV. 805, 870-71 (2018).

and other gambling facilities exempt from most state regulation,[49] can set their own water quality standards,[50] and can sue the federal government for the mismanagement of resources held in trust.[51] As sovereign governments, Indian tribes retain the right to exclude[52] others from their lands – including the governor of the state in which the reservation sits.[53] This power to exclude stems from the inherent sovereignty of the tribal government.[54] The right to exclude is among the most basic attributes of sovereignty and has been repeatedly reaffirmed by the Supreme Court.[55]

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49. Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 286 (2003) ("Indian gaming is profitable only because states have created and preserved state legal regimes that maintain the Indian tribes' monopolistic power in the gaming market place. Because states have maintained strict restrictions or prohibitions on commercial gaming outside of Indian country, consumers flock to Indian casinos, which are, in effect, tribal islands of gaming permissiveness in state oceans of gaming intolerance. Put another way, by preventing gaming consumers from being able to find lawful gaming opportunities near their own neighborhoods, state governments force these consumers to seek out and visit Indian casinos, sometimes traveling several hours to play.").

50. James M. Grijalva, *Ending the Interminable Gap in Indian Country Water Quality Protection*, 45 HARV. ENV'T. L. REV. 1, 9 (2021) (discussing the ability of tribes to act as states and set their own water quality standards. "In 1986, Congress amended the Safe Drinking Water Act ("SDWA") authorizing EPA to "treat Indian Tribes as States" for groundwater and public drinking water protection programs. In 1987, Congress authorized EPA to "treat an Indian tribe as a State" for the CWA's surface water protection programs, and in 1990 to "treat Indian tribes as States" for the CAA's air quality management programs. While the language varied slightly among the statutes, all explicitly authorized EPA's treatment of tribes in the same manner as states for key environmental program roles and so became known generally as tribal "treatment as a state" or TAS provisions.").

51. Mary Christiana Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471 (1994) (discussing the ability of tribes to sue the United States for breach of trust); Ezra Rosser, *The Trade-Off Between Self-Determination and the Trust Doctrine: Tribal Government and the Possibility of Failure*, 58 ARK. L. REV. 291 (2005) (discussing the role of tribal governments and the trade off between tribal governance and accountability compared to the ability to seek damages from the United States for breach of trust).

52. Alex Tallchief Skibine, *The Tribal Right to Exclude Others from Indian-Owned Lands,* 45 AM. INDIAN L. REV. 261 (2021).

53. Adam Crepelle, *Our Best Shot: The Legality and Options Surrounding Vaccination: Tribes, Vaccines, and Covid-19: A Look at Tribal Responses to the Pandemic*, 49 FORDHAM URB. L.J. 31, 58 (2021) (discussing the right of Tribes in South Dakota to operate checkpoints that would exclude non-Indians). *See also* Jeremy Fugleberg, *Can Oglala Sioux Tribe Ban Gov. Kristi Noem from Reservation? Here's What the Law Says*, ARGUS LEADER (May 7, 2019), https://www.argusleader.com/story/news/business-journal/2019/05/07/oglala-sioux-tribe-ban-gov-noem-pine-ridge-reservation/3661748002/ ("The Oglala Sioux Tribe has the legal right to ban South Dakota's governor from stepping foot on the Pine Ridge Reservation . . . .").

54. Grant Christensen, *Creating Bright-Line Rules for Tribal Court Jurisdiction Over Non-Indians: The Case of Trespass to Real Property*, 35 AM. INDIAN L. REV. 527, 539 (2010) ("[T]ribe[s have] the right to exclude even nonmembers from the reservation by virtue of [their] inherent sovereignty . . . ."); *see also* Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 360-61 (2001) (discussing the original understanding of real property as including above all else the inherent right to exclude, and noting that "William Blackstone, for example, famously defined property as 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.'").

55. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) ("The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and

If Indian tribes' control of their territory is sufficiently absolute so as to exclude even the governor of a state – what happens when the governor of another state issues a request under the Extradition Clause? After *Branstad*, the federal courts can assist a state in the enforcement of an extradition request made pursuant to Article IV of the Constitution.[56] Can a state governor, or an agent acting under the governor's authority, enter Indian country for the purpose of executing the extradition request? The answer to that question requires an application of the status of Indian tribes and the purpose of Article IV.

B. STATE GOVERNORS, TRIBAL LAND, AND EXTRADITION

The U.S. Supreme Court has never interpreted the Extradition Clause in relation to an Indian tribe, but the Ninth Circuit was asked precisely how Article IV applies when an Indian tribe or Indian reservation is involved in an extradition request.[57] *Arizona ex rel. Merrill v. Turtle* was a unanimous opinion from the Ninth Circuit holding that the Extradition Clause did not give Arizona's governor the authority to enter an Indian reservation located within Arizona's borders for the purpose of complying with a request made by a fellow governor.[58]

In *Turtle*, the Governor of Oklahoma sought the extradition of the accused on a charge of second-degree forgery.[59] Turtle was a Cheyenne Indian who lived with his wife on the portion of the Navajo Reservation located in Arizona.[60] Oklahoma first applied to the Navajo Tribal Court for Turtle's extradition, but the Tribal Court denied the request because the Navajo Tribal Code included an extradition ordinance that only permitted extradition to the three states within which the Navajo Nation was incorporated.[61] Because Oklahoma was not Arizona, New Mexico, or Utah, the Tribal Code did not permit extradition, and the Tribal Court refused Oklahoma its desired remedy.[62]

After the Navajo Nation denied Oklahoma's request, Oklahoma's Governor made a demand upon the Governor of Arizona to secure Turtle's

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territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.").

56. Puerto Rico v. Branstad, 483 U.S. 219 (1987).
57. Arizona *ex rel.* Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969).
58. *Id.*
59. *Id*.
60. *Id.* at 683.
61. *Id.* at 683-84.
62. *Id*.

extradition pursuant to the Extradition Clause of the Constitution.[63] The Arizona Governor issued a writ of extradition, and the Sheriff of Apache County entered the Navajo Reservation, detained Turtle, and held him at the tribal jail while awaiting the arrival of Oklahoma authorities to complete the extradition.[64] Before agents from Oklahoma arrived to take custody, Turtle sought a writ of habeas corpus from the U.S. District Court for the District of Arizona on the basis that the State of Arizona had no authority to arrest him while he was on the Navajo Reservation.[65] The District Court agreed, and the State of Arizona appealed to the Ninth Circuit citing Article IV Section 2 as the Constitutional basis for the detention.[66] The Ninth Circuit affirmed.[67]

The Ninth Circuit based its affirmation on the unique nature of Indian tribes and their concomitant place in constitutional federalism; Indian tribes are "distinct political communities, protected by treaty from the laws of any state . . . ."[68] Building upon Supreme Court precedent that had routinely held that states could not infringe on the right of Indian tribes, the Ninth Circuit explained:

> [T]he basic principle that the Indian tribes retain exclusive jurisdiction over essential matters of reservation government, in the absence of specific Congressional limitation, has remained. Essentially, absent governing Act of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.[69]

The Ninth Circuit used this precedent to frame its discussion of the broader constitutional issue by asking whether Arizona's intrusion upon the Navajo Reservation unlawfully infringed on the right of the Nation to make its own laws and be governed by them under *Williams* or whether Article IV Section 2 provides an independent basis permitting Arizona's entry upon tribal lands.[70] In locating the basis of Arizona's authority, the court read Article IV Section 2 carefully. It noted that "[t]he constitutional mandate requires exercise of the state's lawful jurisdiction in responding to the extradition

63. *Id.* at 684.

64. *Id*.

65. *Id*.

66. *Id*. ("The District Court made no formal findings and wrote no opinion. The State of Arizona urges here, as it did in the District Court, that Article IV, Section 2 of the United States Constitution requires that the state retain extradition jurisdiction over Indian residents of the Navajo Reservation.").

67. *Id.*

68. *Id*.

69. *Id*. (citing Williams v. Lee, 358 U.S. 217, 220 (1959)).

70. *Id*. at 685 ("The initial question presented by this case, then, is whether Arizona's claim to extradition jurisdiction over Indian residents of the Navajo Reservation is subject to the tests of non-interference with the right of tribal self-government laid down in Williams, or is free from those limitations by reason of Article IV, Section 2 of the Constitution.").

demands of sister states, but it does not itself attempt to define the reach of that jurisdiction."[71] Using that framework, the Court asked whether the Navajo Reservation was within the jurisdiction of the State of Arizona. If the Navajo Reservation was, then Article IV mandates the Governor of Arizona to comply with the request from the Governor of Oklahoma, and Turtle's arrest by state officers on the reservation would have been proper. If, however, the State of Arizona lacked jurisdiction over the Navajo Reservation, then its arrest of Turtle while he was located there would have infringed upon the right to the Navajo to make their own laws and be governed by them, and not even Article IV of the Constitution would authorize Turtle's arrest.[72]

Ultimately, the Ninth Circuit concluded that Arizona lacked jurisdiction over the Navajo Reservation because doing so would infringe the right of the Navajo to make their own laws and be governed by them. The Navajo Tribal Council adopted the current extradition ordinance in 1956 and formally incorporated it into the Tribal Code.[73] Permitting an agent of the Governor of Arizona to enter the Reservation and remove an Indian located there would severely undermine the right of the Navajo to make their own laws (the extradition ordinance) and be governed by it.[74]

While the infringement analysis alone was sufficient to demonstrate that Article IV of the Constitution does not extend the state executive's authority into Indian country, the Ninth Circuit buttressed its reasoning by reflecting on the Treaty of 1868. Article I of the Treaty provides:

> If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo Tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they

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71. *Id*.

72. *Id*. ("[T]he historical development of this principle down to its contemporary formulation in Williams prohibits the State of Arizona, in the absence of specific Congressional authorization, from extending its laws or process to the Navajo Reservation if to do so would interfere with tribal self-government or impair a right granted by federal law. We have been referred to no specific Congressional action limiting the power of the Navajo tribal government to deal with the extradition of Indians resident within the Reservation or granting to the State of Arizona the authority to exercise extradition jurisdiction over such residents. In these circumstances, Arizona's right to exercise the jurisdiction claimed must be determined in light of whether such exercise would 'infringe on the right of reservation Indians to make their own laws and be ruled by them . . . .'") (citing *Williams*, 358 U.S. at 220).

73. *Id*. at 686.

74. *Id*. ("The Tribe has thus codified and does now exercise its extradition power. This power cannot now be assumed by or shared with the State of Arizona without 'infring(ing) [sic] on the right of reservation Indians to make their own laws and be ruled by them.'") (citing *Williams*, 358 U.S. at 220).

> wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States.[75]

The Court reasoned that the Treaty contemplated the situation where an Indian committed a crime outside of Indian country and provided only two possibilities to obtain jurisdiction over the accused. First, a request could be made to the Navajo for their extradition, and the Tribe could deliver up the wrongdoer to the United States to face prosecution and punishment in accordance with American law. Alternatively, if the Navajo refuse the extradition request, then compensation for the injury caused by the Indian will be reimbursed by funds kept by the United States for the benefit of the Tribe. The treaty made no provision for the State to enter the Reservation and recover the person sought. On the contrary, the Treaty expressly recognized that it was possible no mechanism existed to force the extradition, and it provided alternatively for compensation to be paid by the United States from funds held for the Tribe.

The Court could not escape the conclusion that, in addition to the infringement analysis, the Treaty of 1868 "recognized a jurisdiction in the Navajo Tribe over intersovereign rendition, at the time the relationship between the United States and the Tribe was originally defined. This jurisdiction was apparently intended to be exclusive, for only a damage remedy was provided for the wrongful refusal to extradite."[76] In the absence of any abrogation of this exclusive jurisdiction over intersovereign rendition, and in the face of the judicially imposed doctrine of deference to avoid infringing upon a Tribe's right to make its own laws and be governed by them, Arizona lacked the authority to enter the Navajo Reservation, so it could not be compelled to comply with the request from the Governor of Oklahoma.

IV: ARTICLE IV AND INDIAN COUNTRY TODAY

So, how can *Turtle* be reconciled with the decision in *Branstad* that suggests that federal courts are now appropriate forums to enforce Article IV requiring the assistance of a state's executive power in the extradition of wanted fugitives? Can states now enter Indian country under constitutional cover in order to remove persons in contravention of tribal law? The right answer begins with a nuanced understanding of the jurisdiction of the states. In *Branstad*, the accused was not only within the territory of the State of Iowa, but he was also contemporaneously subject to its jurisdiction. In

75. *Id*.
76. *Id*.

contrast, in *Turtle*, Oklahoma sought the extradition of a man who may have been within the territorial boundaries of the State of Arizona, but because he was located on the Navajo Reservation, he was not subject to the jurisdiction of Arizona.

While the cases have a territorial similarity, the jurisdictional difference accounts for their varied outcomes. Admittedly, *Turtle* was decided in 1969 which is almost two decades before the Supreme Court overturned *Dennison*.[77] At the time of the *Turtle* decision, the Ninth Circuit's task was aided considerably by *Dennison*'s prohibition which suggested federal courts could not enforce the Extradition Clause. The *Turtle* court did not have to reach the merits of the Article IV claim because *Dennison* was precedent at the time, and it held that a state could not use a federal judicial forum to enforce its constitutional request. That the Ninth Circuit moved beyond *Dennison* to establish the lack of Arizona's jurisdiction in Indian country is helpful dicta that crystalizes the issue in a post-*Branstad* world.

A. STATE JURISDICTION IN INDIAN COUNTRY

The *Turtle* court reasoned that states could not enter the Navajo Reservation because doing so infringes upon the right of Indians to make their own laws and be governed by them.[78] The Navajo Nation had enacted an extradition ordinance and so, reasoned the Ninth Circuit panel, any attempt by the Governor of Arizona to circumvent tribal proceedings on extradition was manifestly an infringement upon the Tribe's right to govern itself.[79] That conclusion is even easier to justify today, in 2022, than it was when *Turtle* was decided in 1969.

Since 1969, the Supreme Court has decided a number of cases involving the jurisdiction of states in Indian country. In 1973, the Court held that the State of California could not regulate the activity of tribal fisherman on the reservation,[80] and states could not tax Indians who both live and work on the reservation.[81] Later in the 1970s, the Supreme Court held that states did not have jurisdiction over the placement of an Indian child domiciled on the reservation,[82] that Congress did not allocate taxing authority to the states through Public Law 280,[83] that tribes have immunity to suits by states trying

77. *Branstad* was decided in 1987.
78. *Turtle*, 413 F.2d at 686.
79. *Id.*
80. Mattz v. Arnett, 412 U.S. 481 (1973).
81. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164 (1973).
82. Fisher v. District Court, 424 U.S. 382 (1976).
83. Bryan v. Itasca County, 426 U.S. 373 (1976).

to impose state limitations on fishing on the reservation,[84] and that states have no jurisdiction over an Indian who commits a crime in Indian country.[85]

In the 1980s, the Court continued this trend. It held that states could not impose their motor vehicle taxes on vehicles garaged on the reservation,[86] or fuel taxes even on non-Indian owned vehicles operated in Indian country,[87] or tax tribal royalties on mineral earnings,[88] or impose state sales taxes on goods sold to Indian tribes to be used on the reservation,[89] or tax the activity of a non-Indian construction company operating on the reservation.[90] The Court also held that states cannot impose their hunting and fishing requirements on non-Indians who are hunting and fishing on the reservation,[91] that states lack criminal jurisdiction over Indians who commit crimes in Indian country,[92] that states that regulate gaming cannot prohibit Indian tribes from adopting their own regulations involving gaming,[93] and that state courts could not terminate parental rights or approve the adoption of an Indian child domiciled on the reservation.[94]

In the last thirty years, the Supreme Court has regularly and repeatedly limited the authority of states in Indian country. Absent Congressional authorization, states cannot tax activity in Indian country[95] or impose a tax where the legal incidence falls on the tribe,[96] they lack criminal jurisdiction over crimes committed by Indians in Indian country,[97] and they cannot sue tribes absent a waiver of sovereign immunity.[98] While tribes didn't win all of their legal challenges against the states,[99] Supreme Court jurisprudence since

84. Puyallup Tribe, Inc. v. Wash. Dep't of Game, 433 U.S. 165 (1977).
85. United States v. John, 437 U.S. 634 (1978).
86. Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134 (1980).
87. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).
88. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985).
89. Central Machinery Co. v. Ariz. State Tax Comm'n, 448 U.S. 160 (1980).
90. Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982).
91. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).
92. Solem v. Bartlett, 465 U.S. 463 (1984).
93. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).
94. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).
95. Okla. Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993).
96. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995).
97. McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).
98. Michigan v. Bay Mills Indian Cmty., 134 S.Ct. 2024 (2014).
99. States have won some cases at the Supreme Court when they have attempted to act on land outside of Indian country or on non-Indian persons who have connections outside of the reservation. For example, *see* Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 330 (2008) (tribal court lacked jurisdiction to hear a dispute involving the transfer of a piece of fee land on the Cheyenne River Reservation owned by a non-Indian bank and transferred to a non-Indian purchaser); Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 115 (2005) (state can tax the wholesale transfer of gasoline that ends up being sold at a tribal gas station when the legal incidence of the tax occurs outside of Indian country); Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645, 659 (2001) (an Indian tribe could not tax a non-Indian hotel located on non-Indian fee land located on the Navajo Reservation); Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103,

Turtle has consistently upheld the premise that states lack the inherent authority to act in Indian country.

B. *NEVADA V. HICKS* AND THE LIMITS OF STATE AUTHORITY

The closest the Supreme Court has come to recognizing state jurisdiction in Indian country is the 2001 decision in *Nevada v. Hicks*.[100] In *Hicks* a member of the Fallon Paiute-Shoshone Tribe was twice suspected of killing a California bighorn sheep off the reservation in the State of Nevada.[101] A Nevada state game warden obtained a state court search warrant to search Hicks' home.[102] The first warrant was issued "[subject to obtaining approval from the Fallon Tribal Court in and for the Fallon Paiute-Shoshone Tribes]" and the second warrant did not require the approval of the tribal court, but approval was obtained before execution.[103] Neither search obtained evidence of illegal hunting.

Upset that the searches damaged his sheep heads without discovering any evidence of illegal behavior, Hicks sued the game warden in the Fallon Paiute-Shoshone Tribal Court for civil offenses including trespass to land and chattel, abuse of process, and various offenses related to violations of his civil rights.[104] The game warden and the State of Nevada objected to being sued in the Tribal Court, and the issue of the Tribal Court's jurisdiction was appealed to the U.S. Supreme Court.[105]

In a unanimous but splintered opinion (five of the nine justices wrote separate opinions),[106] the Court held that the tribal court did not have civil jurisdiction over claims brought by a tribal member against the Nevada game warden. The question of the state's jurisdiction in Indian country was not before the Court – and the *Hicks* case did not conclude that Nevada had the right to enter the reservation in order to search Hicks' property. It merely

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115 (1998) (the state could tax fee land that had been repurchased by the tribe but not yet taken into trust by the United States federal government). For a discussion of the comparative success of tribal interests at the U.S. Supreme Court, *see* Grant Christensen, *Predicting Supreme Court Behavior in Indian Law Cases*, 26 MICH. J. RACE & L. 65 (2020).

100. 533 U.S. 353 (2001).

101. *Id.* at 355-56.

102. *Id.* at 356.

103. *Id.* at 356 (original text in all caps).

104. *Id.* at 356-57.

105. *Id.* at 357.

106. *Id*. at 355 (Scalia, J., writing for the Court); *Id.* at 375 (Souter, J., concurring) (Kennedy, J. and Thomas, J., joined the Souter concurrence); *Id.* at 386 (Ginsburg, J., concurring); *Id.* at 387 (O'Connor, J., concurring in part and concurring in the judgement) (Stevens, J. and Breyer, J., joined in O'Connor concurrence); *Id.* at 401 (Stevens, J., concurring) (Breyer, J., joined in Stevens concurrence).

concluded that any violation of tribal or federal law, including violations of Hicks civil rights, could not be decided by the tribal court.[107]

Even if, pursuant to *Hicks*, tribal courts lack civil jurisdiction over the actions of state law enforcement officers acting under color of state law with the approval of the tribal court, *Hicks* provides no support for the proposition that the state may generally enter the reservation for the purpose of removing an individual contrary to tribal law.[108] As Justice O'Connor noted in her concurrence, "At no point did the Tribes attempt to exclude the State from the reservation. At no point did the Tribes attempt to obstruct state officials' efforts to secure or execute the search warrants."[109] Instead, the Tribe and the State acted in "full cooperation" to investigate the crime.[110]

The facts in *Hicks* could not be more different than the facts in *Turtle* where Arizona state officers entered the reservation and removed a person residing there without complying with tribal law on extradition. *Hicks* makes clear that tribal sovereignty and tribal sovereign interests exist even when state officers enter the reservation on official business. *Hicks* only held that tribal courts are not the proper forum to hear these challenges. As Justice O'Connor recognized, "[t]his case involves state officials acting on tribal land. The Tribes' sovereign interests with respect to nonmember activities on its land are not extinguished simply because the nonmembers in this case are state officials enforcing state law."[111]

Consistent with Justice O'Connor's observation about the important role of tribal interests limiting the authority of the state, the 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)

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107. *Id.* at 376 (Souter, J., concurring) ("I rest my conclusion on the general jurisdictional presumption, it follows for me that, [ ] the holding in this case is 'limited to the question of tribal-court jurisdiction over state officers enforcing state law' . . . .").

108. The various concurrences in *Hicks* inform the Court's thinking about its limitations. Justice Souter cites the majority "the holding in this case is 'limited to the question of tribal-court jurisdiction over state officers enforcing state law'" *Id*. at 376. Justice Ginsburg cites the same sentence. *Id*. at 386. Justice O'Connor, joined by Justices Stevens and Breyer, would have gone even further and refrained from deciding anything beyond the scope of the doctrine of qualified immunity. They would not have held that the state had authority to enter the reservation, but instead would have held that state officers who enter Indian country on official business are immune from suit in tribal court for actions related to their official business on the reservation ("I would therefore reverse the Court of Appeals in this case on the ground that it erred in failing to address the state officials' immunity defenses. It is possible that Hicks' lawsuits would have been easily disposed of on the basis of official and qualified immunity."). *Id*. at 401.

109. *Id*. at 396 (O'Connor, J., concurring).

110. *Id.* ("Quite the contrary, the record demonstrates that judicial and law enforcement officials from the State and the Tribes acted in full cooperation to investigate an off-reservation crime.").

111. *Id*. at 395.

Reservation.[112] He reminded Oklahoma that "[u]nder our Constitution, States have no authority to reduce federal reservations lying within their borders[,]"[113] that "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history[,]"[114] and that "in many treaties . . . the federal government promised Indian Tribes the right to continue to govern themselves."[115] Set against this precedent, barely two years old, it is clear that the Ninth Circuit's decision in *Turtle* was well grounded in even our twenty-first century understanding of tribal sovereignty and the division of power between states and tribes. States lack jurisdiction over Indian country, and without that jurisdiction, Article IV cannot compel a state's executive to enter the reservation or remove a person found there contrary to tribal law.

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.

V. CONCLUSION

Since 1959,[116] the Supreme Court has repeatedly and consistently recognized that Indian tribes have the right to make their own laws and be governed by them.[117] That right imposes a critical barrier that, absent additional explicit congressional authorization, generally bars state

112. McGirt v. Oklahoma, 140 S. Ct. 2452, 2478 (2020).

113. *Id.* at 2463.

114. *Id.* at 2476 (citing Rice v. Olson, 324 U.S. 786, 789 (1945)).

115. *Id*.

116. The right was originally recognized in Williams v. Lee, 358 U.S. 217, 220 (1959).

117. The infringement language from *Williams* has been repeatedly cited with approval by the Supreme Court. *See* Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 335 (2008) ("'Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them.' Put another way, certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight." (quoting Nevada v. Hicks, 533 U.S. 353, 361 (2001))); Fisher v. Dist. Court, 424 U.S. 382, 386 (1976) ("In litigation between Indians and non-Indians arising out of conduct on an Indian reservation, resolution of conflicts between the jurisdiction of state and tribal courts has depended, absent a governing Act of Congress, on 'whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.'" (quoting Williams v. Lee, 358 U.S. 217, 220 (1959))); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) ("Congress has broad power to regulate tribal affairs under the Indian Commerce Clause. This congressional authority and the 'semi-independent position' of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members . . . . Second, it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.' The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members.") (citations omitted).

jurisdiction in Indian country. This interplay of state and tribal authority has many unexpected and unanticipated consequences. Among its important corollaries is a limitation on a state governor's ability to exercise power vested by Article IV's Extradition Clause.

Almost certainly, the founding fathers did not consider the role of tribal sovereigns when drafting the Extradition Clause. Indians were excluded from state populations for the apportionment of member of Congress,[118] and treaties made with tribes treated them as external agents beyond the scope or reach of state governors.[119]

Today, reservations sit both within and separate from states.[120] This separateness is what limits state authority even when exercising constitutionally delegated powers. While reservations are nominally within the territorial borders of states, they are not subject to the jurisdiction of the state. As the Supreme Court just recently held, "Indian Tribes [are] 'distinct political communities, having territorial boundaries, within which their authority is exclusive . . . which is not only acknowledged, but guarantied by the United States,' a power dependent on and subject to no state authority."[121] This difference was critical and dispositive in *Turtle* where Arizona's governor was barred from entering the Navajo Nation and removing Turtle pursuant to a request from the governor of Oklahoma. Despite changes to the enforceability of the Extradition Clause in the years since *Turtle* was decided, the Ninth Circuit's holding is as authoritative today as it was when it was issued in 1969.

Article IV's Extradition Clause provides a constitutional duty for the executive of one state to remit to the power of a sister state someone located within its borders and subject to its jurisdiction. 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. Indian country

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118. David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 832 (1991) ("[T]he legislative history indicates that the requirement that citizens be 'subject to the jurisdiction' of the United States was designed primarily to exclude tribal Indians.").

119. Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1634 (2000) ("The Indian treaties, on the other hand, contemplated the measured separatism of the Indian nations on discrete reservation land bases, where they would continue to exercise political sovereignty under the guardianship of the United States. The Indian nations would continue to possess beneficial ownership of their lands as distinct groups, and as such groups, they would be entitled to self-governance and a political relationship with the United States largely based on the treaties.").

120. Michael D. Oeser, *Tribal Citizen Participation in State and National Politics: Welcome Wagon or Trojan Horse?*, 36 WM. MITCHELL L. REV. 793, 843 (2010) ("Arguments could be made regarding whether reservations are 'within' a state, but the success of any such effort is doubtful without amending the Federal Constitution, which is improbable. A return to a measured separation based on negotiated treaties would be the simplest alternative to adopt . . . .").

121. McGirt v. Oklahoma, 140 S. Ct. 2452, 2477 (2020) (citing Worcester v. Georgia, 31 U.S. 515, 557 (1832)).

lies outside the general jurisdictional power of the states. States may not enter Indian country and remove persons found there absent cooperation with or permission from the Tribe. Doing so infringes upon the Tribe's right to make its own laws and be governed by them.