Spring 2004

Enforcement of Tribal Court Tax Judgments outside of Indian Country: The Ways and Means

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Recommended Citation
ENFORCEMENT OF TRIBAL COURT TAX JUDGMENTS OUTSIDE OF INDIAN COUNTRY: THE WAYS AND MEANS

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Full faith and credit for tribal court judgments in state courts and the reverse situation, state court judgments enforced through tribal courts, have received substantial scholarly attention, much of which I discuss in part I of this article. No commentators, however, have looked at the full faith and credit question from the point of view of enforcing tax liabilities. A substantial number of tribes have tax systems and collection of unpaid tribal taxes may force tribal tax officials to seek taxpayer assets located off the reservation. Likewise, states have a history of aggressively asserting their taxes against tribes and their members. Especially in the case of gaming tribes, states may look to per capita payments as a source to satisfy unpaid state taxes. Given these realities, state courts will have to consider the enforceability of tribal tax liabilities, and tribal courts will certainly have to decide whether they will assist state tax authorities in their efforts to collect unpaid state taxes owed by tribal members having substantial on-reservation assets. Federal courts may also be involved because tribes are likely to have better luck on jurisdictional questions in the federal forum.

In this article, we (you, the reader, and I, the author) retrace some of the territory explored by others. We do so, however, from a tax collection perspective. In part II, we look generally at the history of comity and full faith and credit in the United States. In part III, we review the law as applied to Indian tribes with some new interpretations of the existing statutory framework, leading me to agree with what Fred L. Ragsdale concluded almost four decades ago: the federal full faith and credit statute does not apply to tribes. Since then, Congress has enacted several

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1. See, e.g., Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905) (validating a tribal permit tax imposed for the privilege of doing business on the Creek Nation and finding that the power to tax was one of “the inherent and essential attributes of...sovereignty”); Washington v. Confederated Tribes, 447 U.S. 134, 152 (1980) (finding that a tribe’s cigarette tax was proper because the “power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status”); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982) (confirming the tribe’s severance tax on oil and natural gas and concluding that the tribe’s “authority to tax non-Indians who conduct business on the reservation does not simply derive from the Tribe’s power to exclude such persons, but is an inherent power necessary to tribal self-government and territorial management”); Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985) (validating the Navajo Nation’s business activity tax and possessory interest tax).

2. See, e.g., The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867) (holding that Kansas wrongfully attempted to impose its property tax on tribal lands); The New York Indians, 72 U.S. (5 Wall.) 761 (1867) (holding that New York wrongfully seized and sold tribal lands for non-payment of property taxes); McClanahan v. Ariz. State Tax Comm’n, 411 U.S. 164 (1975) (holding that Arizona wrongfully attempted to impose its income tax on earnings of a Navajo Nation member who lived and worked on the reservation); Bryan v. Itasca County, 426 U.S. 373 (1976) (holding that a county within Minnesota wrongfully attempted to impose its property tax on a mobile home located on the Leech Lake Reservation in Minnesota).

3. See Jefferson v. Comm’r of Revenue, 631 N.W.2d 391 (Minn. 2001) (Minnesota income tax imposed on the per capita income earned by members of the Prairie Island Indian Community; collection of tax was not at issue, but source of income came from the tribe and would provide source for collection of the tax).

4. Fred L. Ragsdale, Jr., Problems in the Application of Full Faith and Credit for Indian Tribes, 7 N.M. L. REV. 133, 141 (1977) (“[T]he legal arguments available for urging the extension of full faith and credit to Indian tribes are inadequate.”).
new full faith and credit provisions for states and tribes. None of these statutes applies to state or federal tax liabilities. We also learn that some states have their own full faith and credit statutes and that these rules could enable tribal tax authorities to receive off-reservation enforcement of tax liabilities.

In part IV, we look at off-reservation enforcement of tribal court tax judgments. Without a federal rule mandating full faith and credit and with most states not extending general full faith and credit to tribes as a matter of state law, one possibility is that the Uniform Foreign Money Recognition of Judgments Act might provide a state law basis for enforcing tribal court tax judgments. This turns out to be unlikely. Another possibility is comity—a common law rule that permits, but does not require, a state court to recognize a foreign court judgment. The bad news continues, unfortunately. A common law doctrine known as the "revenue rule" provides that comity does not extend to tax liabilities. Does this mean that tribal tax officials should just give up? Maybe yes, maybe no.

Federal courts have begun to develop what they call a federal common law of comity. This developing area of law might provide a basis for actually getting off-reservation enforcement of tribal court tax judgments. And finally, tribes and states, because they may have a common interest in promoting cross-border enforcement of tax liabilities, could enter into inter-governmental agreements. So, let us begin.

I. OVERVIEW OF SCHOLARLY COMMENTARY

Fred L. Ragsdale, Jr., was one of the early academics to give the issue sustained consideration, and he concluded that no federal law compelled reciprocal full faith and credit for tribal and state court judgments. Nonetheless, Ragsdale thought that full faith and credit in this context was a good idea that would validate tribal sovereignty and promote improvement in tribal-state relations.


6. See, e.g., Wis. Stat. § 806.245 (2003) (requiring Wisconsin courts to give full faith and credit to tribal court proceedings if certain requirements are met, including reciprocity).

7. For a codified comity rule, see S.D. CODIFIED LAWS § 1-1-25 (Michie 2003) (permitting comity of tribal court proceedings only if certain conditions are met including, in some instances, reciprocity from the tribe for South Dakota judicial proceedings).

8. See Ragsdale, supra note 4. My initial exposure to federal Indian law came when Professor Ragsdale, my torts professor in law school, asked me to be his research assistant and do research on an article he was then writing that was later published as the piece I have just cited. I express my thanks to him for providing me with this rich and fruitful exposure to federal Indian law.

9. Id. at 141 (concluding that "the legal arguments available for urging the extension of full faith and credit to Indian tribes are inadequate").

10. See id. at 141–45.
Two other academics, Robert Laurence and Robert Clinton, have since added ample scholarly commentary and conducted something of a one-sided debate, with Laurence as the dominant voice on the issue. Clinton asserts that the federal full faith and credit statute compels tribal courts to give full faith and credit to state court judgments. He contends that this is a good idea because, as Ragsdale earlier pointed out, it would validate tribal sovereignty and improve tribal-state relations. Laurence, on the other hand, disagrees with Clinton’s reading of the federal full faith and credit statute, which means under the Laurence view that no federal statute requires full faith and credit. In the absence of a federal mandate, Laurence recommends that tribal court judgments receive something close to full faith and credit in state courts and that tribes should develop their own appropriate legal mechanisms for enforcing state court judgments when such enforcement is consistent with tribal interests. This asymmetrical approach is justified, Laurence claims, because individual tribes find themselves in circumstances that are very different from the states. Tribal sovereignty, he observes, is much more fragile than state sovereignty. Laurence fears that the imposition of full faith and credit on tribes could do more harm than good for tribes.

The academic commentary of others has offered additional perspectives. For example, Stacy Leeds has pointed out that state courts, when required to give tribal court determinations full faith and credit by operation of special federal statutes, have developed a very poor track record. The non-compliance of state courts with federal law shows that the limited applications of full faith and credit in the
tribal/state context have not been successes in validating tribal sovereignty or improving tribal state relations. B.J. Jones explains that justice requires some mechanism by which tribal court judgments receive recognition in state courts and suggests that tribes and states should get together to develop some workable models.\textsuperscript{23}

Daina B. Garonzik, like B.J. Jones, sees a need for reciprocal enforcement.\textsuperscript{24} Garonzik’s proposal, however, is a federal solution in which she recommends an amendment to the federal full faith and credit statute.\textsuperscript{25} To insure uniformity, her proposed rule would give state recognition to tribal court judgments only if the particular tribe’s court system had been certified by the Bureau of Indian Affairs as meeting minimum constitutional standards.\textsuperscript{26} Carl H. Johnson\textsuperscript{27} and David S. Clark\textsuperscript{28} agree with Garonzik and contend that reciprocal full faith and credit is a necessary ingredient in the tribal/state/federal legal system that we have. Barbara Ann Atwood, in the limited context of child custody matters, explores the harms that may result from an unthinking imposition of standard full faith and credit.\textsuperscript{29} She sees a substantial risk that a full faith and credit rule will force tribal courts to compromise the quality of justice they achieve by applying their traditional methods of finding and doing justice.\textsuperscript{30}

Overall, this body of scholarly commentary on recognition of tribal court judgments and orders is impressive. It also shows that we have not yet achieved a system that provides legal certainty. This article shows that legal certainty is far from clear in the context of tribal court tax judgments. Accordingly, it is a good idea to start at the beginning and review the history of comity and full faith and credit in the United States.

\section*{II. BRIEF HISTORY OF COMITY AND FULL FAITH AND CREDIT IN THE UNITED STATES}

During the colonial period, the English law on the recognition of foreign judgments provided that a foreign judgment was prima facie evidence of that which it purported to determine.\textsuperscript{31} This was the rule of comity. There was no full faith and

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\item\textsuperscript{24} See Daina B. Garonzik, Full Reciprocity for Tribal Courts from a Federal Courts Perspective: A Proposed Amendment to the Full Faith and Credit Act, 45 EMORY L.J. 723 (1996).
\item\textsuperscript{25} See id.
\item\textsuperscript{26} See id. at 763–69.
\item\textsuperscript{27} See Carl H. Johnson, A Comity of Errors: Why John v. Baker Is Only a Tentative First Step in the Right Direction, 18 ALASKA L. REV. 1, 57 (2001) (“As tribes become increasingly recognized as a third sovereign in our federalist system, states and Congress are concluding that the most consistent, fair, and respectful mechanism for recognition of tribal court decisions is through full faith and credit recognition.”).
\item\textsuperscript{28} See David S. Clark, Part Three: “Traditional” Legal Perspective: State Court Recognition of Tribal Court Judgments: Securing the Blessings of Civilization, 23 OKLA. CITY U. L. REV. 353, 368 (1998) (stating that amendment of 28 U.S.C. § 1738 to include tribes “would improve the status of Indian tribes as governmental units within the legal system of the United States and overall increase their autonomy”).
\item\textsuperscript{29} See Barbara Ann Atwood, Fighting over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity, 36 UCLA L. REV. 1051, 1108 (1989).
\item\textsuperscript{30} See id. at 1100.
\item\textsuperscript{31} See Ralph U. Whitten, The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act, 32 CREIGHTON L. REV. 255, 272–80 (1998) (summarizing the colonial practices prior to adoption of the Articles of Confederation).
\end{itemize}
credit rule. So, for example, a debt determined by a French court and reflected in a written judgment would be sufficient, absent other evidence, to establish the liability of one party to another in an English court.\textsuperscript{32} The British colonies followed the English common law on comity.\textsuperscript{33} More significantly, the colonies accorded comity to the judgments from other colonies and treated them the same as judgments from other countries even though the colonies were under the common dominion of the British monarch.\textsuperscript{34} Because each of the colonies retained substantial legislative authority over internal affairs\textsuperscript{35} reflected in laws passed by colonial legislative bodies, treating a judgment from another colony the same as a foreign judgment was logical.

At least one group of colonies identified common interests and established what we can view as the precursor of the full faith and credit clause now embodied in our Constitution. The commissioners of the United Colonies of New England met in 1644 and recommended that the judicial proceedings of the courts of each colony be given "due respect."\textsuperscript{36} Connecticut, in response to the commissioners' recommendation, enacted a statute providing a procedure for validating sister-colony judicial proceedings.\textsuperscript{37}

The full faith and credit clause contained in the Articles of Confederation is remarkably similar to the text contained in the Constitution and states that "[f]ull faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state."\textsuperscript{38} A search of the legislation enacted by the Continental Congress finds no enabling legislation for this clause.\textsuperscript{39} The absence of enabling legislation is not surprising, however, because the clause, by its terms, is self-executing. The clause is a command to the states, and the states, having agreed to the Articles of Confederation, are bound by its provisions. The Articles of Confederation did not create a national court system. As a result, the courts of each state were responsible for providing "full faith and credit" to the judgments of sister states.

Without enabling legislation, the procedural details of how a full faith and credit system would work are unclear. The sketchy history of the framing of the clause suggests that some members of the Continental Congress wanted a more specific clause that would unquestionably establish a procedure by which creditors could enforce their debts determined in one state in the courts of other states where the debtor or the debtor's property might be found.\textsuperscript{40} Having opted for a more general

\textsuperscript{32} See id. at 269.
\textsuperscript{33} See id. at 272–80.
\textsuperscript{34} The primary source of law in the colonies was the legislative body of the colony, not the British Crown or the British Parliament. See, e.g., William Waller Hening, Statutes at Large of Virginia (Vols. 1–9, 1823) (containing the legislation passed by the various legislative bodies of Virginia from 1617–1778).
\textsuperscript{36} See Whitten, supra note 31, at 274 (quoting 2 Ebenezer Hazard, Historical Collections; Consisting of State Papers, and Other Authentic Documents; Intended as Materials for an History of the United States of America 13, 21 (T. Dobson 1794)).
\textsuperscript{37} See id.
\textsuperscript{38} Articles of Confederation and Perpetual Union § 3 (1781).
\textsuperscript{39} See generally Journals of the Continental Congress 1774–1789 (1904–37).
\textsuperscript{40} This is implied by the adoption of a full faith and credit clause to replace notions of comity.
clause that did not establish precise effect or the procedure to require enforcement, the Continental Congress was leaving the details to the legislatures and courts of the individual states.

Any case law during this period is especially valuable in determining what was the likely understanding of the clause. This understanding is instructive because it reflects the context in which the Full Faith and Credit Clause of the Constitution was drafted. This context can help us understand the original meaning of the clause. State courts decided five reported cases under the Articles of Confederation involving the application of the Full Faith and Credit Clause.\(^4\) Three of the five decisions come from Pennsylvania\(^4\) and present a confusing picture about the scope of the clause.\(^4\) The other two decisions, one from South Carolina\(^4\) and the other from Connecticut,\(^4\) provide straightforward application of full faith and credit principles. These cases reflect the understanding that the clause was mandatory but not absolute, suggesting that local courts had leeway in determining standards for enforcement. The Connecticut case, for example, foretells the modern requirement that a foreign state judgment is unenforceable if the original court lacked jurisdiction.\(^4\)

At this stage, Indian tribes were not necessarily out of the Full Faith and Credit picture. The 1778 treaty with the Delaware Tribe\(^4\) contemplated an Indian state in which the Delaware Tribe would be at the head.\(^4\) If the Delaware Tribe, along with other tribes, had become a state, then the full faith and credit clause in the Articles of Confederation would have applied and required reciprocal enforcement of judgments. The states did not finally ratify the Articles until 1781, but they were complete in 1778 and were undergoing state-by-state approval.\(^4\) Congress and the

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41. See Whitten, supra note 31, at 282-87 (discussing these five cases).
42. James v. Allen, 1 U.S. (Dall.) 188 (Pa. 1786); Millar v. Hall, 1 U.S. (Dall.) 229 (Pa. 1788); Phelps v. Holker, 1 U.S. (Dall.) 261 (Pa. 1788).
43. One source of the confusion is Jones v. Allen, 1 U.S. (Dall.) 188 (Pa. 1786), because it involved a creditor who tried to enforce a New Jersey judgment in Pennsylvania after the New Jersey legislature had discharged the debtor as bankrupt. The court extended full faith and credit to the judgment but, under a choice of law approach, declined to honor the effect of the New Jersey bankruptcy, which was then solely a matter of state law. Id. In Millar v. Hall, 1 U.S. (Dall.) 229 (Pa. 1788), the Pennsylvania Supreme Court gave effect to the insolvency of a debtor under Maryland insolvency law. This result is consistent with an obligation to provide full faith and credit to the judicial proceedings of a sister state. Another source of confusion is found in Phelps v. Holker, 1 U.S. (Dall.) 261 (Pa. 1788). In Phelps, the Pennsylvania Supreme Court found that a Massachusetts judgment rendered in rem through an attachment proceeding was not conclusive and not entitled to full faith and credit notwithstanding the full faith and credit clause contained in the Articles of Confederation. Id. The court reasoned that an in rem proceeding ought not be extended beyond the jurisdictional boundaries of the court rendering the judgment. Id.
44. Jenkins v. Putnam, 1 S.C.L. (1 Bay) 8 (1784) (enforcing a North Carolina admiralty court decision condemning slaves as property of an enemy of the United States and rejecting the original owner’s claim of rightful ownership against the rights of a subsequent purchaser).
45. Kibbe v. Kibbe, 1 Kirby 119 (Conn. 1786) (refusing to enforce a Massachusetts judgment where personal jurisdiction in the original action was not established).
46. Id. at 126 (finding no personal jurisdiction in the original action but acknowledging the obligation to provide full faith and credit when jurisdiction is proper in the original action).
47. Articles of Confederation and Perpetual Union art. IX, § 13 (1781).
48. Id. art. IV, § 14.
49. See 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 79–137 (Merrill Jenson ed., 1976). The Articles of Confederation were drafted in 1776 and 1777 and the states completed ratification in 1781.
states were aware of the treaty with the Delaware Tribe\textsuperscript{50} and, presumably, understood that full faith and credit would be a feature of the relationship. The Delaware treaty also highlights the point that the tribes were not part of the confederation and that they lay outside its legal framework unless affirmatively brought into it.\textsuperscript{51} Therefore, we can safely conclude that the full faith and credit clause in the Articles of Confederation had no application to Indian tribes.

The text of the Full Faith and Credit Clause contained in the U.S. Constitution contains no language that changes its meaning from that found in the Articles of Confederation. The language from the Constitution is “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”\textsuperscript{52} In the Articles of Confederation, the rule applied to “acts,”\textsuperscript{53} and in the Constitution it applies to “public [a]cts.”\textsuperscript{54} Presumably, this part of the Clause deals with legislation and imposes an obligation in choice of law situations. The adjective “public” suggests that private acts are not included within the operative effect of the clause.\textsuperscript{55} For our purposes, this is unimportant because we are concerned primarily with judgments. Our concern is the phrase “judicial proceedings,” which extends to judgments. In the Articles of Confederation, the reference is to the “judicial proceedings of the courts and magistrates.”\textsuperscript{56} The Constitution’s omission of the phrase “of the courts and magistrates” does not appear to affect the meaning in any way. Instead, the drafters appear to merely tighten up the language and seem to have thought that “judicial proceedings” did not require further elaboration.

Of greater significance is the addition of a second sentence in the Constitution, which states that “the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.”\textsuperscript{57} Under this sentence, Congress has the power to prescribe procedures and determine the effect of “full faith and credit.” This congressional power to prescribe the effects of judgments applies only to interstate judgment recognition because the text of the Constitution’s Full Faith and Credit Clause applies only to states; the clause does not apply to judgments from tribal courts or to judgments from courts of foreign nations. Any federal power to determine tribal/state enforcement of judgments does not derive from this sentence and must be found elsewhere in the Constitution.

In the context of inter-state recognition of tax judgments of state courts, a question arose whether these judgments came within the Constitution’s clause and the statute that implemented it. The U.S. Supreme Court answered this question

\textsuperscript{50} See 12 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 984–86 (1908) (noting the reading of the treaty to the members of the Continental Congress on October 6, 1778).
\textsuperscript{51} Articles of Confederation and Perpetual Union art. IX, ¶ 13, 14 (1781) (specifically permitting the Delaware Nation “to join the present [American] confederation, and to form a state...and have representation in Congress; Provided nothing contained in this article to be considered as conclusive until it meets with the approbation of Congress”).
\textsuperscript{52} U.S. CONST. art. IV, § 1.
\textsuperscript{53} Articles of Confederation and Perpetual Union art. IX, ¶ 3 (1781).
\textsuperscript{54} U.S. CONST. art. IV, § 1.  
\textsuperscript{55} See Whitten, supra note 31, at 389.
\textsuperscript{56} Articles of Confederation and Perpetual Union art. IX, ¶ 3 (1781).
\textsuperscript{57} U.S. CONST. art IV, § 1.
affirmatively in *Milwaukee County v. M.E. White Co.* So, if tribes are states within the meaning of the Full Faith and Credit Clause of the Constitution or territories within the meaning of the enabling legislation found in 28 U.S.C. § 1738, then states would be required to give full faith and credit to a tax judgment of a tribal court. The next part of this article discusses these definitional questions and concludes that tribes are not states or territories and that, accordingly, no federal mandate applies to states in the enforcement of tribal court judgments generally or to tribal court tax judgments specifically.

III. FULL FAITH AND CREDIT AND TRIBES

There is no evidence that the full faith and credit clause found in the Articles of Confederation or the Constitution had any application to Native American governments. The clause's text in both documents applies only to states, and Native American governments were not states that were members of the confederation or the federal union. This does not mean that debt collection was not an issue.

Trade in Indian Country was a critical part of the overall British interests in North America. Control of Indian trade was a factor in colonial dissatisfaction with British rule. Indian trade was an important part of the American economy well into the nineteenth century. With ample trade occurring between Europeans and the indigenous peoples of North America, determination and collection of debts were no doubt recurring problems. It was a common practice for traders to extend credit to Indians who often purchased European goods in advance of trading furs and pelts for the goods.

On the Indian side of the bilateral trade equation, cheating and sharp practices among traders was common and a substantial source of conflict. The better part of federal legislation dealing with Native Americans addressed questions of trade. This legislation was a continuation, at least in theme, of the regulatory approach adopted by the British in the middle of the eighteenth century and continued by

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58. Milwaukee County v. M.E. White Co., 296 U.S. 268 (1935) (holding that a county in Wisconsin could sue to collect on a property tax judgment in Illinois and that such a judgment was entitled to full faith and credit as a matter of federal law).


61. John Jacob Astor, the owner of the American Fur Company founded in 1808 and built around the Indian fur trade, was the wealthiest man of his day. See Ed Boland, Jr., *F.Y.I.,* N.Y. TIMES, Jan. 19, 2003, § 14, at 2.


63. Unauthorized and illegal white intrusion on Indian lands was a constant problem for tribes; the federal government attempted to remedy these intrusions without success. See, e.g., Proclamation of the Continental Congress (Sept. 22, 1783), at 25 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 597-602 (1922) (prohibiting "all persons from making settlements on lands inhabited or claimed by Indians, without the limits or jurisdiction of any particular State").

64. See, e.g., Ordinance for the Regulation of Indian Affairs (Aug. 7, 1786), in 31 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 488-93 (1934) (creating Indian districts with federal superintendents, requiring a federal license to trade with Indians, and imposing substantial fines for persons not complying with the ordinance); Act of July 22, 1790, ch. xxxiii, 1 Stat. 137–38 (similar to 1786 ordinance and also extending federal criminal jurisdiction over whites committing crimes in Indian Country).

the American Congress under the Articles of Confederation and the Constitution.\textsuperscript{66} Tellingly absent from these rather detailed federal provisions was any kind of mutual judgment recognition mechanism.\textsuperscript{67}

Superimposition of English judicial institutions was not the systemic solution to debt collection problems or to the fraudulent practices of traders in Indian Country. Instead, existing legal institutions provided a variety of dispute resolution methods for individual, intra-tribal, and inter-tribal disputes. For disputes with the British or colonials, treaties provided some mechanisms for resolving disputes by providing systemic changes.\textsuperscript{68} In the late colonial period\textsuperscript{69} and also in the early American period,\textsuperscript{70} Indian agents provided an important dispute resolution function. Indian agents were agents of the federal government\textsuperscript{71} and included prominent people who were supposed to resolve disputes.\textsuperscript{72} Given this context, it is accurate to view these agents as quasi-judicial officials. Their correspondence to the Secretary of War demonstrates that an important part of their job was to help the trade and treaty system run smoothly.\textsuperscript{73}

This rather complicated set of legal systems did not translate into judgments from tribal courts that could be enforced in state courts. And a state court judgment was not going to do its holder any good if he took it into the jurisdiction of the Cherokee, Creeks, or the Iroquois Confederation. If anything, cross border dispute resolution was primarily a function of officials from the colonial, state, confederate, federal, or British government interacting with relevant leaders of the particular Native American government.\textsuperscript{74} In fact, this government-to-government method of

\textsuperscript{66} See Ordinance for the Regulation of Indian Affairs (Aug. 7, 1786), in 31 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 488–93 (1934) (creating Indian districts with federal superintendents, requiring a federal license to trade with Indians, and imposing substantial fines for persons not complying with the ordinance).

\textsuperscript{67} See, e.g., Act of Mar. 30, 1802, 2 Stat. 139-46 (which contained detailed rules about licensing and criminal jurisdiction but no provisions relating to the recognition of tribal judicial proceedings).

\textsuperscript{68} See, e.g., Oglethorpe's First Treaty with the Lower Creeks at Savannah, May 21, 1733, in 11 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES & LAWS 1607–1789: GEORGIA TREATIES 1733–1763, at 15–17 (dealing with various issues such as returning escaped slaves) (Alden T. Vaughan et al. eds., 1989).

\textsuperscript{69} See, e.g., Letter from Superintendent Stuart to the Earl of Egremont (Dec. 5, 1763), in 11 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES & LAWS, 1607–1789: GEORGIA TREATIES 1733–1763, at 359-61 (describing attempts to lessen ill will amongst several tribes in the southeast).

\textsuperscript{70} See Report of Committee on Indian Affairs (Oct. 15, 1783), in 25 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 680–93 (1922) (detailing the need for negotiations and establishing trade regulations).

\textsuperscript{71} See Ordinance for the Regulation of Indian Affairs (Aug. 7, 1786), in 31 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 488–93 (1934) (establishing two districts with superintendents and deputies).

\textsuperscript{72} Benjamin Hawkins (1754–1818) was a good example. He was a long-time Indian agent with the Creeks (1796–1818), a position he took after having served in the Continental Congress and after having been a U.S. Senator. See WIKIPEDIA: THE FREE ENCYCLOPEDIA, Benjamin Hawkins, available at http://en.wikipedia.org/wiki/Benjamin_Hawkins (last visited July 7, 2004).

\textsuperscript{73} See, e.g., A sketch of the present state of the objects under the charge of the principal agent for Indian affairs, South of the Ohio (1801), 1 AMERICAN STATE PAPERS, INDIAN AFFAIRS 647–48 (1823) (submitted by Benjamin Hawkins and mentioning the problem of licensing traders). This particular sketch actually described judicial proceedings dealing mostly with criminal prosecution of thefts and involving the means for dealing with white and Indian defendants. Id. at 648.

\textsuperscript{74} See, e.g., Letter of Sept. 9, 1815, from General William Henry Harrison to W.H. Crawford, Secretary of War, 2 AMERICAN STATE PAPERS, INDIAN AFFAIRS 16–17 (1823) (detailing, among other things, actions he took to settle claims brought by individual tribal members against the United States for homes burned and horses wrongfully stolen by the U.S. militia).
resolving unpaid debts was a tool that the United States used aggressively to induce treaty concessions from tribal leaders. For example, Thomas Jefferson saw the federal control of Indian trade as a tool for acquiring tribal lands by facilitating debt creation among tribal leaders. Payment of these debts could and did occur through the treaty process.

Until the latter part of the nineteenth century, tribal taxation was quite rare. As a result, tribal taxation of non-members and associated collection problems were virtually unknown. But in the midst of the allotment period, the Creek Nation created a permit tax that applied to non-members who traded within the boundaries of the Nation. In a case involving this tribal tax, *Buster v. Wright*, the taxpayer objected to payment on the grounds that federal legislation allowing him to purchase land within the Creek Nation divested the Nation of its power to tax him. The court, after a close reading of the treaties and federal statutes, concluded that the Creek Nation’s inherent power to tax had not been diminished by the conversion of tribal land to fee land owned by a non-member. Of greater importance to this article, the federal court discussed the role of federal court enforcement of the tax liability and found that federal enforcement through federal officials was appropriate. The facts in *Buster*, however, did not involve off-reservation enforcement of the tax liability. Instead, the court validated the federal Indian agent’s removal of the non-complying taxpayer from the Creek Nation as an appropriate remedy and one imposed by the law of the Creek Nation. Nonetheless, if federal enforcement is appropriate, then full faith and credit, as a tool to enforce tribal court tax judgments, may be unnecessary. Under the *Buster* approach, federal enforcement transcends state boundaries. We will take up the *Buster* case later in part IV when I discuss a federal common law approach to the enforcement of tribal court tax judgments.

As some tribes developed legal institutions resembling Anglo-American ones, a full faith and credit mechanism was conceptually possible. The critical feature is a system that produces written records from a tribunal having some independence. By the mid-nineteenth century, legal institutions among the tribes within the Indian Territory were using written documents and tribunals resembling state courts. An early example of off-reservation recognition of tribal legal proceedings is *Mackey v. Coxe*. The U.S. Supreme Court construed a federal statute allowing claims against the government based on letters of probate administration issued in a state or territory. The Court determined that the Cherokee Nation was a territory for

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67. Letter from President Thomas Jefferson to Governor William H. Harrison (Feb. 27, 1803), in 10 THE WRITINGS OF THOMAS JEFFERSON 368, 369–71 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903) (specifically stating that pushing tribal leaders into debts they could not repay would make them “willing to lop them off by a cession of lands”).
77. PRUCHA, supra note 75, at 219–23.
78. 135 F. 947 (8th Cir. 1905).
79. Id. at 952.
80. Id. at 953.
81. Id. at 954–55.
82. United States ex rel. Mackey v. Coxe, 59 U.S. 100 (1856).
83. Id. at 103.
purposes of that statute and concluded that the tribal proceeding appointing the administrators was valid. A string of old Eighth Circuit cases, although not relying on Mackey, essentially took the same approach regarding the effect of a variety of tribal legal proceedings. One of the cases summarized the approach by stating that "the judgments of the courts of these [Indian] nations, in cases within their jurisdiction, stand on the same footing with those of the courts of the territories of the Union and are entitled to the same faith and credit." These decisions did not rely on any specific federal statute even though the predecessor to 28 U.S.C. § 1738 was in force in substantially the same form as today.

But by the end of the nineteenth century, federal Indian policy had become aggressively assimilatory and made the destruction of tribal institutions a national priority. To give tribal court judgments full faith and credit during this period would have been inconsistent with a policy that desired to solve the "Indian problem" by destroying tribal governments. A full faith and credit mechanism would have validated the existence and credibility of tribal governments. This may explain why the group of old Eighth Circuit cases seemed to disappear into oblivion during this time.

But do these old Eighth Circuit cases have any enduring value? They certainly hold that full faith and credit should apply to tribal court proceedings. These cases could actually validate Professor Clinton’s view that the language of section 1738 includes tribes. Accordingly, I ask the reader’s pardon for a digression in which we consider how these cases and the full faith and credit rules in the Defense of Marriage Act might affect Professor Clinton’s argument.

The language in section 1738 that he refers to is as follows:

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Clinton takes the phrase "every court within the United States" and asserts that a tribal court is a court and that it is within the United States. He adds further, however, that the term "court," as used in section 1738, means a "western-style" court. And by "western-style" we assume he means a court that is in the Anglo-American legal tradition. Under Clinton’s reading of section 1738, then, tribal courts are required to give full faith and credit to state court judgments. Under the Supreme Court’s holding in Milwaukee County v. M.E. White Co., the full faith

84. *Id.* at 104 (stating that the Cherokee Nation was "a territory of the United States, within the act of 1812").
85. *See* Mehlir v. Ice, 56 F. 12 (8th Cir. 1893) (ejectment action); Exendine v. Pore, 56 F. 777 (8th Cir. 1893) (wrongful detainer action); Standley v. Roberts, 59 F. 836 (8th Cir. 1894) (dismissal of an injunction); Cornells v. Shannon, 63 F. 305 (8th Cir. 1894) (quarantine regulation); Raymond v. Raymond, 83 F. 721 (8th Cir. 1897) (divorce proceeding); Buster v. Wright, 135 F. 947 (8th Cir. 1905) (tribal tax).
86. Standley v. Roberts, 59 F. 836, 845 (8th Cir. 1897).
89. Clinton, *supra* note 14, at 901.
91. 296 U.S. 268 (1935).
and credit obligation extends to tax judgments of state courts. A more logical reading of "every court of the United States" is that the reference is limited to those courts enumerated earlier in the statute, courts of a state, territory, or possession of the United States. Otherwise, Clinton’s reading makes little sense.

Why enforce a provision that diminishes tribal sovereignty based on language from 1804? In 1804 the federal view was clear: Native American governments were outside the political framework of the United States and were governed by their own laws.92 The 1804 change to the 179093 version of section 1738 came about to accommodate the expansion of the United States after the addition of the Louisiana Purchase.94 The legislation setting up the territorial government had provisions relating to Native American governments,95 and none of these related to the full faith and credit statute.

In general, then, the early legislative history of section 1738 provides no support for Professor Clinton’s position. Some recent federal legislation, however, does help his argument. The enactment in 1996 by Congress of the full faith and credit provision in the Defense of Marriage Act96 actually provides Professor Clinton with a far better argument. This provision states:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.97

The purpose of this provision was to eliminate the federal mandate of granting full faith and credit to same-sex marriages under the rule that a marriage celebrated under the law of one state is valid in all other states.98 We notice that foreign marriages are not mentioned. Congress omits these because comity, not full faith and credit, applies to them. And comity means no federal mandate. Why, in 1996, would Congress remove from tribes a federal mandate that does not exist? Congress would have extended the reach of section 1738C to tribes only if it believed that the Full Faith and Credit Clause in the Constitution or its enabling legislation applied to tribes. The explanation in the Report of the House Committee on the Judiciary

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92. See Robert N. Clinton, There Is No Federal Supremacy Clause for Indian Tribes, 34 ARIZ. ST. L.J. 113, 137 (2002) (explaining the American view in the early nineteenth century that tribes were self-governing and lay outside the constitutional framework of the United States).


94. For the 1804 version of section 1738, see Act of Mar. 27, 1804, ch. LVI, 2 Stat. 298–99. For the statute establishing the territorial governments for the Louisiana Purchase, see Act of Mar. 26, 1804, ch. XXXVIII, 2 Stat. 283–89.

95. Within the statute establishing the territory of Louisiana, several provisions make it quite clear that Congress viewed tribes as something other than a territory. See Act of Mar. 26, 1804, ch. XXXVIII, 2 Stat. 283–89. For example, section 7 of the statute specifically incorporated the federal law regulating Indian trade, id. at 285, section 9 limited juries to “free white males,” which indicated exclusion of Native Americans from the judicial institutions established in the statute, id. at 286, and section 15 dealt directly with questions of tribal territory and authorized the President to cede lands to tribes willing to move west of the Mississippi. Id. at 289.


makes no mention of tribes and why the legislation includes them. We can guess that Congress mentioned tribes "just-in-case" it turned out that the Full Faith and Credit Clause or its enabling legislation was interpreted as applying to tribes. Is this a sufficient basis for looking again at the meaning of the Full Faith and Credit Clause and its enabling legislation? I do not think so. But I digress. We here end our digression and return to a consideration of the historical development of federal Indian policy and its implications for full faith and credit.

In 1934, with the passage of the Indian Reorganization Act, federal Indian policy officially changed and encouraged the growth of Native American governments and the development of the necessary institutions of government. These encouraged institutions included tribal courts. Except for the termination period in the 1950s and 1960s, federal policy has continued to encourage tribal courts. With the development of tribal court systems, we would expect to see the question of full faith and credit reflected in the reported decisions.

The application of the Full Faith and Credit Clause (to tribal court judgments in state courts or state court judgments in tribal courts) is not mandated by the language of the clause itself. The clause applies only to states. No federal courts have found that a tribe is a state for purposes of the Full Faith and Credit Clause. And, if anything, the 1778 treaty with the Delaware shows that statehood would have been a formal and obvious process and not a slow evolution in which we wake up one morning to find that a tribe has become a state.

Some tribal, state, and federal cases, however, have addressed full faith and credit issues outside the constitutional context. Congress enacted 28 U.S.C. § 1738 to govern the interstate recognition of judgments. As just discussed, the statute goes beyond the mandate contained in the Full Faith and Credit Clause in the Constitution and requires that full faith and credit be accorded to judicial proceedings of states, territories, and possessions of the United States. Tribes are not states, as we know, but could a tribe be a territory or a possession for purposes


100. And now I digress even further on another side, but relevant, point. In the latter part of the nineteenth century, a federal/tribal court system developed during a period when federal policy was aggressively promoting assimilation of Native Americans. These tribunals were known as Courts of Indian Offenses. See generally Annual Report of the Secretary of Interior, House Executive Document No. 1, 48th Con., 1st sess., serial 2190, at xxiii. As the name implies, the courts were primarily criminal. The judges were Native Americans and members of the tribe in which the court operated. These courts, however, were instruments of the federal assimilationist policy and were designed to eradicate "heathenish" practices that the Secretary of the Interior believed to be detrimental to the progress and improvement of Native Americans. Because these courts exercised only criminal jurisdiction, they could not serve a function of recognizing state court judgments nor produce judgments that required recognition off the reservation. By any measure, the Courts of Indian Offenses were overtly racist, denied freedom of religion, and furthered the cultural genocide that occurred during the allotment period. See Nell Jessup Newton, Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts, 22 AM. INDIAN L. REV. 285 (1998) (describing these courts as "tools of colonialism").


102. See id. § 16, at 987 (enabling tribes to adopt constitutions and establish governmental institutions).

103. Although tribal courts are not specifically mentioned in the Wheeler-Howard Act, many tribal constitutions adopted under the statute included tribal court systems.

of section 1738? A number of cases have looked at this question and have come up with different answers.

A. Cases Rejecting Full Faith and Credit

The leading federal case on the question is *Wilson v. Marchington*.105 The Ninth Circuit held that neither the Full Faith and Credit Clause of the Constitution nor 28 U.S.C. § 1738 applies to tribal court judgments.106 The court declined to apply section 1738 because the use of the words “territory” and “possession” did not seem to include an Indian tribe.107 The court noted that some other more specific federal full faith and credit rules specifically used the phrase “Indian tribe” to denote application of the rule to tribal court judgments.108 The court reasoned that Congress would have mentioned Indian tribes if it had intended to include them within the sweep of the full faith and credit rule contained in section 1738.109 In passing, the court noted that the “territory” and “possession” language in the predecessor to section 1738 was added in 1804.110 The court did not infer anything from the vintage of the section 1738 language, but it should have been obvious to the court that this was the year after Thomas Jefferson had completed the Louisiana Purchase.111 The better part of this territory was in possession of Indian tribes and would require extinguishment of Indian title.112 It is obvious that in 1804 Congress was not prepared to accept tribal court judgments in state or territorial courts.

In fact, the 1804 version of section 1738 was passed one day after the act that created the government of the Louisiana Territory.113 The statute, which, among other things, created the Territory and established a court system, specifically referenced the full faith and credit provision.114 So, it is clear that Congress was thinking of the Louisiana Territory and its newly minted judicial system. Because the territory had within it numerous Native American governments, these were treated in other related legislation with no hint that full faith and credit for tribal court judgments would be a feature of the legal system.115 Taken as a whole, this group of related legislation makes it clear that Congress did not want to extend full faith and credit to tribal court judgments. Instead, the legislative picture is one in

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105. 127 F.3d 805 (9th Cir. 1997).
106. Id. at 808–09.
107. Id.
108. Id. at 809.
109. Id.
110. Id. at 808.
111. For the 1804 version of section 1738, see Act of Mar. 27, 1804, ch. LVI, 2 Stat. 298–99. For the statute establishing the territorial governments for the Louisiana Purchase, see Act of Mar. 26, 1804, ch. XXXVIII, 2 Stat. 283–89.
112. The legislation creating the territorial government for the Louisiana Purchase acknowledged that the presence of tribes required extinguishment of Indian title through treaties and purchase. See Act of Mar. 26, 1804, ch. XXXVIII, § 15, 2 Stat. 283, 289 (authorizing the President to enter into treaties with tribes and negotiate their consent to remove to areas west of the Mississippi).
113. Congress passed the full faith and credit enabling legislation on March 27, 1804, and the legislation setting up the territorial government of the Louisiana Purchase on March 26, 1804.
115. See, e.g., id. § 15, at 289.
which Congress is keeping a clear political and physical boundary between the white Americans and the Indian tribes.  

Under the Wilson case, then, states, as a matter of federal law, are not required to afford full faith and credit to tribal court judgments. Instead, the doctrine of comity applies to tribal court judgments. Comity is, as we know, the judgment recognition rule that allows, but does not require, one court to recognize and enforce the judgments of another court. It is important to contrast this with full faith and credit where, as a matter of federal law, one state must recognize the judgment of a sister state. In applying comity, states are free to develop their own judgment-recognition rules.

The comity rules come from the federal common law, according to the Wilson court, when enforcement of a tribal court judgment is sought in a federal court. The court specifically refused to apply the comity standards of the state of Montana, the state in which the plaintiff was seeking enforcement. The court reasoned that enforcement of a tribal court judgment by a federal court had primarily a federal character and, therefore, justified application of the federal common law instead of any state decisional or statutory law that might apply. This part of the opinion seems to suggest that federal recognition of a tribal court judgment actually preempts state law. This could mean that other aspects of state law in the collection process may be preempted. State law provides exemptions from the execution of judgments. Would the federal common law preempt these? For example, federal tax collection laws preempt state exemption laws and thereby make the Internal Revenue Service (IRS) a super creditor. Thus far, we do not know if enforceable tribal court judgments will be subject to state exemption laws when a federal court is the collection court. We must await further development of this area of tribal/federal/state law.

In Wilson, the court refused to extend comity to the tribal court judgment “because the tribal court lacked subject matter jurisdiction.” The underlying action arose out of a car accident on the Blackfeet reservation in Montana. The plaintiff was a member of the tribe and was injured by the defendant who was not a tribal member. The accident occurred on a state highway built on a right-of-way

116. See, e.g., id. § 9, at 286 (limiting jury pool to “free male white persons”).  
117. Wilson v. Marchington, 127 F.3d 805, 809 (9th Cir. 1997).  
118. Id. at 813 (“We apply federal common law...”).  
119. Id.  
120. Id.  
121. Id. (“[T]he quintessentially federal character of Native American law, coupled with the imperative of consistency in federal recognition of tribal court judgments, by necessity require that the ultimate decision governing the recognition and enforcement of a tribal judgment by the United States be founded on federal law.”).  
123. See, e.g., United States v. Heasley, 283 F.2d 422, 427 (8th Cir. 1960) (state right of redemption was preempted in federal foreclosure action brought to enforce a federal tax lien).  
124. See id.  
125. Wilson v. Marchington, 127 F.3d 805, 813 (9th Cir. 1997).  
126. Id. at 807.  
127. Id.
granted to Montana under a federal statute. The Ninth Circuit's finding of no subject matter jurisdiction is an extension of the Supreme Court's holding in *Strate v. A-I Contractors*, a case in which the Court held that the tribal court lacked subject matter jurisdiction over a lawsuit between two non-members who had a car accident on a state road on the Fort Berthold Reservation in North Dakota.

One would have thought that a Native American government's court would have jurisdiction over torts that occur within its political boundaries and that a right of way would not diminish its jurisdiction. *Strate*, however, extended the language of an earlier case, *Montana v. United States*, in which the Supreme Court said that a tribe did not have general civil jurisdiction over non-Indians on lands within the reservation if the lands are not owned by the tribe. This general rule of no civil jurisdiction over non-Indian lands within the reservation was subject to two exceptions, neither of which applied.

As a result, the Court in *Strate* found that the state highway built over a right-of-way was not owned by the tribe and that neither of the two exceptions applied. Therefore, the tribal court had no subject matter jurisdiction. An ancillary rationale of *Strate* was that the tribe had no interest in adjudicating the tort claim of two non-Indians who had a car accident on a state road that just happened to be on the Fort Berthold reservation. The accident, however, occurred within the reservation boundaries, so obviously the Court's acceptance of jurisdiction demonstrates that it has an interest. Accordingly, the court's rationale is spurious. The bottom line is that the Supreme Court does not trust tribal courts to dispense justice to non-Indians.

The real problem with *Strate* is its reliance on *Montana v. United States*. The *Montana* case involved the Crow Tribe's attempt to regulate fishing on the Big Horn River. The Big Horn River, according to the U.S. Supreme Court, belonged to the state of Montana. Montana, not the Crow Tribe, owned the river because it was a navigable river that was impliedly reserved for Montana when Congress

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128. *Id.* at 813–14.
130. *Id.* at 442–43, 456.
132. *Id.* at 566–67.
133. *Id.* at 565–66.
128. *Id.* at 813–14.
130. *Id.* at 442–43, 456.
132. *Id.* at 566–67.
133. *Id.* at 565–66.
134. 520 U.S. at 456–58.
135. *Strate* has been the subject of ample scholarly commentary, including those who have looked in detail at the strength of the tribal interest. See, e.g., Wambdi Awanwicake Wastewin, *Native Nations*, 74 N.D. L. REV. 711, 712 (1998) (detailing the connections of the parties to the tribe).
137. *Id.* at 547.
admitted it as a state to the union.\textsuperscript{138} Reserving title in the river for Montana was required under the equal footing doctrine, a doctrine that requires all new states to be admitted on an equal footing with the original thirteen states.\textsuperscript{139} The thirteen states were the owners of their navigable rivers. Unfortunately, the federal government had established the Crow reservation before Montana’s admission and never undertook any action to renegotiate the title to the river.\textsuperscript{140} Instead, well after the fact, Montana and the federal government essentially told the tribe, “Oh, we forgot to tell you that the river we said was yours isn’t really yours. You see there’s this obscure legal doctrine we should have explained to you, but it wasn’t really clear enough to us then to explain it to you, and you wouldn’t have understood it anyway. So, Montana gets to regulate your river. Well, we mean Montana owns the river and, therefore, has the power to regulate it.”

Instead of leaving \textit{Montana} as a case that deals with state jurisdiction over navigable rivers, the Court, thinking it was doing tribes a favor, gratuitously said:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.\textsuperscript{141}

Under the facts of the case, these words are dicta because the \textit{Montana} case involved the effect of the equal footing doctrine on navigable rivers within reservations. The dicta from \textit{Montana} spoke to all of those future and innumerable cases in which a tribe exercises civil jurisdiction over lands within its reservation when those lands are not owned by the tribe. As a matter of simple logic, a government ordinarily exercises civil jurisdiction over lands and people within its political boundaries. In the case of tribes, their civil jurisdiction is an inherent attribute of sovereignty that remains intact until given up by treaty, taken away by legislation enacted by Congress, or lost by “necessary implication of their dependent status.”\textsuperscript{142} The \textit{Montana} dicta and its two exceptions do not fall within any of these three ways in which a tribe can lose its sovereignty. Instead, the \textit{Montana} rule just precipitates out of the judicial ether without rhyme and without reason. Since its \textit{Montana} decision, the Supreme Court holds up the \textit{Montana} dicta

\begin{itemize}
  \item \textsuperscript{138} Id. at 551–57.
  \item \textsuperscript{139} Id. at 551.
  \item \textsuperscript{140} See id. at 550–51.
  \item \textsuperscript{141} Id. at 565–66 (citations omitted).
  \item \textsuperscript{142} Washington v. Confederated Tribes of the Colville Reservation of Washington, 447 U.S. 134, 152 (1980) (applying this rule in the context of tribal taxation). The “necessary implication of their dependent status” language is referred to as the implicit divestiture doctrine. Many commentators find the doctrine to have virtually no legal or logical support. See, e.g., Alex Tallchief Skibine, The Court’s Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country, 36 Tulsa L.J. 267 (2000). I count myself within the camp of these critics. It is the implicit divestiture doctrine that the U.S. Supreme Court has used incorrectly to contract the political sovereignty of tribes.
\end{itemize}
as if the words were a divine inspiration, describing the two "exceptions" as "pathmarking." Indeed, the Montana dicta mark a path of destruction that has reduced tribal sovereignty to the point where congressional intervention will be necessary.

In sum, then, the decision in Wilson that the Full Faith and Credit Clause and section 1738 do not apply to tribal court judgments off the reservation seems correct to me. In addition, the application of comity as the doctrine to determine enforceability also seems correct, although I think that the federal common law needs to customize the comity rule so that tribal court judgments receive more deference than judgments from foreign countries. After all, federally recognized tribes are subject to the legislative authority of Congress. Finally, the ruling in Wilson that the tribal court had no subject matter jurisdiction under Strate is wrong because both Strate and the Montana dicta reduce tribal civil jurisdiction without legal justification. Unfortunately, tribes have no near-term prospect of regaining the sovereignty lost in Montana and subsequent cases.

The Ninth Circuit continues to follow Wilson and its comity approach for the recognition of tribal court judgments. Some of the cases are like Wilson in that the tribal court's jurisdiction is disputed under an argument based on Montana and Strate. In these cases, the enforcement of the tribal court judgment is an issue only if the tribal court litigation has preceded the federal court litigation. This is not always the case. In some instances, the party objecting to tribal court jurisdiction goes to the federal court to stop the tribal court action, which then raises the question of whether this party must exhaust tribal remedies before seeking federal review. Exhaustion of tribal remedies is unnecessary if (1) an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," (2) the action patently violates express jurisdictional prohibitions, or (3) "exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." So, in the cases in which exhaustion is not required, a federal court's finding of no tribal court jurisdiction occurs before a tribal court proceeding ever gets rolling to the point of producing a judgment.

In other cases, the loser in tribal court seeks federal court review asserting that the tribal court has no jurisdiction. We should think of this as negative comity. If the losing party in tribal court does not convince the federal court that the tribal court lacked jurisdiction, then presumably the tribal court judgment, order, or determination remains valid and is enforceable in the federal court. 

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144. This is explicit in Wilson, in which the court concludes that "Indian law is uniquely federal in nature." 127 F.3d 805, 813 (9th Cir. 1997).
145. See, e.g., McDonald v. Means, 309 F.3d 530 (9th Cir. 2002) (tort case involving a tribal member and an Indian from another tribe on a Bureau of Indian Affairs road; appellate court reversed trial court's refusal to extend comity to tribal court's judgment).
146. See, e.g., AT&T Corp. v. Coeur D'Alene Tribe, 295 F.3d 899, 901, 903–04 (9th Cir. 2002) (finding no jurisdiction but stating that comity would have been appropriate had there been jurisdiction).
149. Id.
Means is a good example of this: another car accident, this time on a BIA road on the Northern Cheyenne reservation in Montana and involving a tribal member (Means) and a non-member (McDonald) who resided on the reservation and who was a member of another tribe (Ogalala Sioux). McDonald lost in tribal court and mounted a collateral challenge in federal court. He asserted that the tribal court lacked jurisdiction under Strate because the road was the equivalent of alienated fee land and that, as a result, the tribal court could acquire no jurisdiction over him unless the circumstances came within one of the two Montana exceptions. The federal trial court agreed with him, but the Ninth Circuit reversed, finding that a BIA road is different from a state road. The right of way did not terminate the tribe’s ownership interest in the road. Therefore, the tribal court had general adjudicatory authority over McDonald. Obviously, the Ninth Circuit’s decision recognizes the legal validity of the tribal court decision. No discussion of comity occurred because Means was not seeking actual enforcement of the judgment. Having ultimately lost in the Ninth Circuit, McDonald may have paid Means voluntarily.

Bird v. Glacier Electric Cooperative, Inc. is a good example of a case like Wilson, where comity was explicitly on the table. In Bird, the prevailing party from the tribal court action originating in the Blackfeet Tribal Court sought enforcement in the federal district court in Montana. The Bird court refused to extend comity to the underlying tribal court judgment because the tribal court adjudication failed to provide minimal due process for the defendants. The Bird case permits wider latitude of collateral attack on a tribal court judgment because the standard is comity, not full faith and credit.

Amongst these Ninth Circuit cases, we find a tax case in which a tribal tax is in dispute: Burlington Northern Santa Fe Railroad Co. v. Assiniboine and Sioux Tribes. The taxpayer railroad challenged the legislative authority of the Tribe to impose a property tax on Burlington Northern Santa Fe’s right-of-way through the reservation. Once again, Montana and Strate provide the basis for arguing that the tax should not apply. The taxpayer railroad asserted that the right-of-way is the equivalent of fee land. Under the Supreme Court’s decision in Atkinson Trading Co. v. Shirley, a tribe cannot impose a tax on a nonmember engaged in

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150. 309 F.3d 530 (9th Cir. 2002).
151. Id. at 535–36.
152. Id. at 536.
153. See id.
154. Id.
155. Id.
156. Id. at 537.
157. Id. at 538.
158. 255 F.3d 1136 (9th Cir. 2001).
159. Id. at 1138.
160. Id. at 1152 (concluding that the plaintiff’s “appeal to racial prejudice in closing argument in its civil case in tribal court offended fundamental fairness and violated due process owed” to the defendant).
161. 323 F.3d 767 (9th Cir. 2003).
162. Id. at 768–69.
163. Id. at 769.
164. See id.
activity on fee land unless one of the Montana exceptions applies. So, the taxpayer railroad in Burlington Northern Santa Fe Railroad Co. contended that the right-of-way was the equivalent to fee land, that it had not entered into a consensual relationship with the Tribe, and that the payment of the tax was not mandated by a critical governmental need of the tribe. As of the date of writing this article, the case is pending in tribal court for further discovery to give the tribal tax authority the opportunity to establish a critical governmental need. Comity is not the question in Burlington Northern Santa Fe Railroad Co. because it is the taxpayer that is attacking in federal court the validity of the tribal court determination. If the federal court ultimately holds for the Tribe and validates its taxing power, then comity would be an appropriate avenue to provide the Tribe with a method for collecting the tax it is owed.

Surprisingly, the state court cases that have refused to accord full faith and credit to tribal court judgments under a federal theory are relatively rare. The scarcity of state cases reflects, perhaps, the infrequency with which holders of tribal court judgments seek enforcement in state or federal courts. Or perhaps holders of such judgments, if they are Native Americans, are not very optimistic that they will receive full faith and credit for their judgments.

The earliest known state case is Begay v. Miller, which is quite instructive. The Arizona Supreme Court was required to decide whether a divorce granted by a Navajo Nation court to two members of the Nation was valid under Arizona law. The court found that full faith and credit did not apply, nor did comity. Instead, the court merely stated that it was prepared to recognize a divorce that was valid under the law of the jurisdiction where granted. The court considered one of the old Eighth Circuit cases, Raymond v. Raymond, but concluded it was not controlling because that case involved a treaty provision in which the Tribe was given sole jurisdiction of domestic affairs. The Arizona court found no such provision in the Begay case. Since Begay, the Arizona courts once again rejected full faith and credit but affirmatively endorsed comity. Under its comity approach, Arizona treats a tribal court judgment as though it comes from a foreign court.

166. Id. at 654.
167. 323 P.3d at 769.
169. Id. at 625-26. The case arose through a habeas corpus petition challenging Mr. Begay's incarceration for failure to pay spousal support under an Arizona divorce decree. Id. Mr. Begay asserted that the Arizona court had no jurisdiction to enter the order of support because he had already been divorced by a Navajo court. Id.
170. Id. at 628 (mentioning and rejecting full faith and credit and the application of comity).
171. Id.
172. 83 F. 721 (8th Cir. 1897).
173. Begay, 222 P.2d at 626.
174. Id.
176. Id. at 695 (stating a willingness to apply comity in a choice of law context if it did not violate the public policy of Arizona).
177. Id. (citing Lynch v. Olsen (In re Estate of Lynch), 377 P.2d 199 (Ariz. 1962) (giving comity to judicial proceedings of the Navajo Nation as if they were from a "foreign country").
Another early case comes from the Oregon Court of Appeals.\(^7\) The court refused to extend full faith and credit to a tribal divorce decree on the grounds that a federally recognized Indian tribe is not a sister state for purposes of the Full Faith and Credit Clause of the U.S. Constitution.\(^7\) The court did not consider application of 28 U.S.C. § 1738 and, consequently, did not consider or decide whether a tribe was a territory or a possession within the meaning of the statute.\(^8\) Instead, the court treated the tribal court divorce decree the same as a judgment from a foreign country and extended comity to it.\(^9\) After applying comity standards, the court ruled that Oregon courts were required to recognize the tribal court decree.\(^10\)

Minnesota,\(^11\) Montana,\(^12\) North Dakota,\(^13\) and South Dakota\(^14\) also have cases in which a state appellate court refused to grant full faith and credit.

B. Cases Finding Full Faith and Credit as a Matter of Federal Law

The earliest federal court to extend full faith and credit to a tribal court determination was the old Eighth Circuit in *Mehlin v. Ice*.\(^15\) Ice, the occupier of land within the Cherokee Nation, was ejected by a writ issued by the clerk of the Cherokee court.\(^16\) Ice challenged the validity of the writ in the federal territorial court.\(^17\) On appeal, the Eighth Circuit held that a valid writ issued by the Cherokee court was entitled to full faith and credit.\(^18\) The federal court did not refer to the full faith and credit enabling legislation but instead reasoned that federal recognition was appropriate given the important federal role in preserving the sovereignty of the Cherokee Nation.\(^19\)

*Raymond v. Raymond*\(^20\) comes from the same court and involved the validity of a Cherokee divorce. The court, as in the *Ice* case, did not rely on the Full Faith and


\(^{179}\) *Id.* at 920.

\(^{180}\) *See id.*

\(^{181}\) *Id.* at 921.

\(^{182}\) *Id.* at 922–23. The Oregon Court of Appeals faced the full faith and credit issue in *Moses v. Kalama-Scott*, 84 P.3d 1097, 1100 (Or. Ct. App. 2004), and implied that it would have applied to a tribal court adjudication except that the prevailing party had not established proper notice to the losing party.

\(^{183}\) *See Desjarlait v. Desjarlait*, 379 N.W.2d 139, 144 (Minn. Ct. App. 1985) (denying full faith and credit because a tribe is not a state).

\(^{184}\) *See Wippert v. Blackfeet Tribe*, 654 P.2d 512 (Mont. 1982) (rejecting full faith and credit and applying comity to a tribal court judgment).

\(^{185}\) *See Malaterre v. Malaterre*, 293 N.W.2d 139, 144 (N.D. 1980) (denying full faith and credit because tribe was not a state).

\(^{186}\) *See Mexican v. Circle Bear*, 370 N.W.2d 737, 741 (S.D. 1985) (applying comity, not full faith and credit).

\(^{187}\) *56 F. 12 (8th Cir. 1893).* Arguably, the U.S. Supreme Court case of *United States ex rel Mackey v. Coxe*, 59 U.S. (18 How.) 100 (1856), is the first reported federal case considering full faith and credit. But *Mackey* involved the application of an 1812 federal statute allowing someone who was granted probate letters of administration by a territorial authority to bring a suit in the federal court against the United States. *Id.* The statute did not provide full faith and credit and the court did not use that language. *Id.* Instead, the court applied the federal statute to letters of administration issued by the Cherokee Nation because the court viewed the tribe as a territory. *See id.* at 103–04.

\(^{188}\) *See Mehlin*, 56 F. at 1, 12–13.

\(^{189}\) *Id.* at 13–14.

\(^{190}\) *Id.* at 19.

\(^{191}\) *Id.*

\(^{192}\) 83 F. 721 (8th Cir. 1897).
Credit Clause contained in the Constitution or in the applicable federal statute. Instead, the court looked to the treaties and federal legislation and found by implication, with little reasoning, that full faith and credit should apply. Those two sources of law made it quite clear that the United States and the Cherokee Nation agreed that Cherokee courts would determine issues involving marital status between tribal members. In Raymond, a non-member of the tribe who was a U.S. citizen married a tribal member and was adopted by the tribe. The two later divorced, and the U.S. citizen went through a naturalization process to re-establish her U.S. citizenship. She then sued for divorce in the territorial court and sought alimony, which the court granted. On appeal, the court found that she had never lost her U.S. citizenship. Instead, she had merely gained membership in the Cherokee Nation. It was her Cherokee membership that gave the Cherokee court jurisdiction over the marriage by operation of the treaties and federal statutes. Essentially, the Eighth Circuit concluded that the political arrangement between the Cherokee Nation and the United States required the federal courts to recognize the tribal court decree. The Eighth Circuit did not use the precise phrase “full faith and credit,” did not rely on the Full Faith and Credit Clause in the Constitution, and did not base its decision on the full faith and credit enabling statute, 28 U.S.C. § 1738. Instead, the court found that the Cherokee divorce was “entitled to all the faith and credit accorded to the judgments and decrees of territorial courts.” The Eighth Circuit decided three additional cases worthy of note because they involved instances in which the court gave deference to tribal court actions. Because of age, these old Eighth Circuit cases may have lost their persuasive value and do not contain the succinct reasoning found in the Ninth Circuit’s Wilson decision. Nonetheless, this line of cases appears to remain good law in the Eighth Circuit. And because the Eighth Circuit split into the Tenth Circuit, these cases are precedent in both circuits. The Tenth and Eight Circuits contain about 100 federally recognized Indian tribes. As a result, these cases provide a basis for asserting that federal law mandates extension of full faith and credit to tribal court tax judgments and could be used to call into question the contrary state case law in Minnesota, North Dakota, and South Dakota. The strength of these cases is

193. Id. at 722-23.
194. Id. at 722.
195. Id. at 721, 723.
196. Id.
197. Id. at 721-22.
198. Id. at 723-24.
199. Id.
200. Id. at 724.
201. Id. at 722 (citing, inter alia, Mehlin v. Ice, 56 F. 12 (8th Cir. 1893)).
202. See Exendine v. Pore, 59 F. 836 (8th Cir. 1893) (wrongful detainer); Standley v. Roberts, 59 F. 836 (8th Cir. 1894) (dismissal of an injunction); Cornells v. Shannon, 63 F. 305 (8th Cir. 1894) (quarantine regulation).
203. 127 F.3d 805 (9th Cir. 1997).
204. See McMorris v. Comm’r of Internal Revenue (Estate of McMorris), 243 F.3d 1254, 1259 (10th Cir. 2001) (suggesting that old Eighth Circuit cases decided within the geographic area that became the Tenth Circuit would be precedent in the newly created Tenth Circuit); Act of Feb. 28, 1929, ch. 363, § 5, 45 Stat. 1346, 1348.
undermined, however, because the Eighth Circuit never really developed the idea that the full faith and credit requirement it recognized and applied originated in the constitutional clause or came from its enabling legislation.

The earliest state case to find that the full faith and credit rules of 28 U.S.C. § 1738 apply to tribes is *Jim v. CIT Financial Services Corp.*, a New Mexico Supreme Court case. The *Jim* case was actually a choice of law question that arose when Allen Jim, a member of the Navajo Nation, attempted to sue for damages in a New Mexico court for wrongful repossession of his motor vehicle. Mr. Jim had purchased the vehicle outside the reservation and within New Mexico. He financed the purchase and later defaulted on the payments. The lender's agents then entered the Navajo Nation and repossessed the vehicle. The repossession was legal under the law of New Mexico but violated a Navajo Nation law that required either consent of the owner or a court order prior to repossession. Violation of the Navajo law entitled Mr. Jim to damages against the lender. The trial court dismissed Mr. Jim's complaint on the grounds that New Mexico, and not Navajo, law applied and rendered the repossession perfectly legal. The New Mexico Court of Appeals agreed and affirmed the dismissal. The New Mexico Supreme Court, however, disagreed and found that section 1738 applied to Indian tribes and required the New Mexico trial court to apply Navajo law because the repossession occurred on the Navajo Nation.

*Jim v. CIT Financial Services Corp.* received immediate negative commentary from Fred Ragsdale, then a professor at the University of New Mexico. Ragsdale viewed the legislative history of section 1738 as conclusive. He was unable to see any suggestion that Congress intended to extend full faith and credit to tribes by implying that tribes were territories. Ragsdale concluded that "the legal arguments available for urging the extension of full faith and credit to Indian tribes are inadequate." Nonetheless, Ragsdale concluded that full faith and credit should be extended to Indian tribes on public policy grounds because recognition of each other's judgments would promote beneficial tribal-state relations. He was concerned that tribes, because they generally lacked appellate court systems then, could not provide a sufficiently neutral forum to make decisions on enforceability. To cure this systemic problem, he recommended that federal

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206. 87 N.M. 362, 533 P.2d 751 (1975).
207. *See id.* at 363, 533 P.2d at 752.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.* at 363, 533 P.2d at 752-53.
216. Ragsdale, *supra* note 4, at 141.
217. *Id.* at 136.
218. *Id.* at 141.
219. *Id.* at 141-45.
220. *Id.* at 149-51.
courts be permitted to review tribal court determinations on the enforceability of state court judgments.\footnote{221}

The *Jim* case, although it was a choice-of-law case, has led courts in Washington\footnote{222} and Idaho\footnote{223} to hold that tribal court judgments must be given full faith and credit under 28 U.S.C. § 1738 because a tribe is a territory. The case of *In re Adoption of Buehl* comes from the Washington Supreme Court and holds, among other things, that the child custody order of the Blackfeet tribal court (located within the state of Montana) was entitled to full faith and credit in Washington.\footnote{224} The conclusive effect of the tribal court order prevented a Washington trial court from considering an adoption petition filed by foster parents who were then living in Washington and who had temporary custody of the child.\footnote{225} The child was a member of the Blackfeet tribe and had been ordered into the temporary custody of the foster parents by the Blackfeet tribal court.\footnote{226} The Washington Supreme Court relied on *Jim* and did not even cite the Full Faith and Credit Clause of the U.S. Constitution or the enabling legislation of the Clause.\footnote{227} Because *In re Adoption of Buehl* involved a tribal court foster child placement, the Indian Child Welfare Act (ICWA), passed in 1978,\footnote{228} would now govern and provide an explicit full faith and credit rule.\footnote{229} For cases not governed by ICWA, the Washington Supreme Court probably now would defer to the Ninth Circuit's later decision in *Wilson* (and those cases following *Wilson*), which, as we recall, held that neither the Full Faith and Credit Clause of the U.S. Constitution nor its implementing legislation, 28 U.S.C. § 1738, applies to tribal court judgments.\footnote{230}

In *Sheppard v. Sheppard*,\footnote{231} the Idaho Supreme Court held that a tribal court adoption proceeding was entitled to full faith and credit in Idaho courts.\footnote{232} In reaching this conclusion, the court read section 1738 as bringing tribal courts within its sweep.\footnote{233} The court read "territory" to include Indian tribes and relied on the 1855 Supreme Court case of *Mackey v. Cox*.\footnote{234} The court also relied on the dicta in *Santa Clara Pueblo v. Martinez* and the holding in *Jim v. CIT Financial Service Corp.*\footnote{235} The Idaho Supreme Court apparently did not use the full faith and credit rule contained in ICWA because the adoption took place prior to the enactment of ICWA.\footnote{236} Recognition of the tribal court adoption by the Idaho Supreme occurred

\begin{footnotes}
\footnote{221}{Id. at 151.}
\footnote{222}{Duckhead v. Anderson (*In re Adoption of Buehl*), 555 P.2d 1334 (Wash. 1976).}
\footnote{223}{Sheppard v. Sheppard, 655 P.2d 895 (Idaho 1982).}
\footnote{224}{555 P.2d at 1342 ("Tribal court decrees are entitled to full faith and credit to the same extent as decrees of sister states.") (citing *Jim v. CIT Fin. Servs. Corp.*, 533 P.2d 751 (N.M. 1975)).}
\footnote{225}{See id. at 1343.}
\footnote{226}{Id. at 1335–36.}
\footnote{227}{See id. at 1342.}
\footnote{228}{See Pub. L. No. 95-608, 92 Stat. 3071 (1978).}
\footnote{229}{See 25 U.S.C. § 1911(d) (2000) (providing a full faith and credit rule for tribal court determinations of child custody under the act).}
\footnote{230}{See *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997).}
\footnote{231}{655 P.2d 895 (Idaho 1982).}
\footnote{232}{Id. at 902–03.}
\footnote{233}{Id. at 901–02.}
\footnote{234}{Id. at 902.}
\footnote{235}{Id.}
\footnote{236}{See id. at 898 (stating that the adoption occurred in 1971); *supra* note 227 (stating that adoption occurred in 1971, and Congress passed ICWA in 1978).}
\end{footnotes}
well after Congress had passed ICWA, but, because the tribal court adoption occurred well before enactment of ICWA, its effective date rules meant that its full faith and credit provision did not apply. Now, ICWA’s full faith and credit rule would govern tribal court adoptions of Indian children occurring after its passage. Regarding the broader question of general full faith and credit, Idaho is within the Ninth Circuit and, presumably, would follow the decision in *Wilson*.

Taken together, *Wilson*, *Beuhl*, and *Sheppard* raise an interesting question of how state courts should respond to federal precedent on a federal question squarely decided by the federal circuit court in which the states are located. *Wilson*, as a technical matter, is not binding precedent for the supreme courts of Washington or Idaho. This is true because federal review of their decisions can occur only by the U.S. Supreme Court. Therefore, the Ninth Circuit has no direct authority over these courts. *Wilson* cited *Buehl* and indicated its disagreement with its holding but did not purport to overrule it. Presumably, both state courts would reconsider their decisions and view *Wilson* as very persuasive authority.

This leaves New Mexico as the only state squarely and unequivocally in the full faith and credit camp—the camp that believes that 28 U.S.C. § 1738 compels, as a matter of federal law, a state to recognize tribal court judgments. Interestingly, *Jim* was a choice-of-law case and did not even involve enforcement of a tribal court judgment in a New Mexico court. Nonetheless, the New Mexico Court of Appeals has extended *Jim* to tribal court judgments. In *Halwood v. Cowboy Auto Sales, Inc.*,* 239 similar repossession facts played out as in the *Jim* case. Nonetheless, Mr. Halwood, a member of the Navajo Nation, brought suit in tribal court and secured a money judgment that included punitive damages. The defendant asserted that the tribal court lacked subject matter jurisdiction because punitive damages were criminal in nature and that under the U.S. Supreme Court’s decision in *Oliphant v. Suquamish Indian Tribe* the tribal court had no criminal jurisdiction over a non-member of the tribe. The court, however, found that the punitive damages were civil, and not criminal, in nature. Accordingly, the tribal court had jurisdiction and its judgment was entitled to full faith and credit under the New Mexico Supreme Court’s decision in *Jim v. CIT Financial Service Corp.* As a result, the court found that enforcement was proper.

The enduring value of *Jim* and *Halwood* is questionable because both came out before the Ninth Circuit’s decision in *Wilson*. In fact, the *Halwood* opinion was released shortly before *Wilson*, and the New Mexico Supreme Court’s denial of the certiorari petition in *Halwood* occurred the day after the *Wilson* opinion was released. We can assume that neither the Court of Appeals nor the New Mexico

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238. See 127 F.3d 805, 808 n.2 (9th Cir. 1997).
240. See id. at 1089–90.
241. See id. at 1089.
242. See id. at 1090.
243. Id. at 1090–91.
244. The Court of Appeals issued its opinion on May 20, 1997. Id. at 1088. The Ninth Circuit issued its opinion in *Wilson* on September 23, 1997. 127 F.3d at 805. The certiorari petition in *Halwood* was denied on September 24, 1997. 946 P.2d at 1088.
Supreme Court was aware of the Ninth Circuit's opinion in *Wilson*. Interestingly, the New Mexico Supreme Court has quite recently cited *Halwood* with approval on the tribal jurisdiction issue but not on the full faith and credit question of whether a tribe is a territory within the meaning of 28 U.S.C. § 1738.

If *Jim* and *Halwood* are correct, however, then a tribal court tax judgment is entitled to full faith and credit to the same extent as a state court judgment finding a tax liability. This would make enforcement much easier for tribes. Unfortunately, New Mexico is the only state still squarely in the full faith and credit camp (as a matter of federal law). Given the gathering momentum of the *Wilson* line of cases, New Mexico may reverse itself some day soon.

C. State Provisions for Recognition of Tribal Court Judgments

If *Wilson* is correct, as I think it is, then, as a matter of federal law, states are not required to give full faith and credit to tribal court judgments. With no federal law mandating enforcement, states can enforce tribal court judgments as state law dictates. *Wilson* holds that full faith and credit is not required under federal law. *Wilson* also holds that federal courts are required to extend comity to tribal court determinations. The legal standards for applying comity come from federal common law.

The comity holding in *Wilson* does not require states to extend comity to tribal court judgments. This reminds us that state recognition of tribal court judgments is still a matter of state, not federal, law.

State treatment, then, can vary from state to state, and we find a fair amount of variance. On one end, we have New Mexico's case law, which extends full faith and credit, but only because the New Mexico Supreme Court thinks that federal law requires it to do so. Maine, Oklahoma, Nebraska, South Dakota, Washington, Wisconsin, and Wyoming have their own full faith and credit or comity statutes that they have adopted and that grant some form of recognition of tribal court proceedings. Oklahoma, Wisconsin, and Wyoming have broad full

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246. See 127 F.3d 805, 808–09 (9th Cir. 1997).
247. Id. at 809.
248. Id. at 813.
249. See ME. REV. STAT. ANN. tit. 15, §§ 702, 706 (West 2003) (providing full faith and credit for arrest warrants issued by the tribal courts of the Passamaquoddy Tribe or the Penobscot Nation, both tribes located within Maine).
250. OKLA. STAT. tit. 12, § 728 (2004) (authorizing the state’s supreme court to extend full faith and credit to tribal court judgments).
253. S.D. CODIFIED LAWS § 1-1-25 (Michie 2003) (providing a rule that prohibits the extension of comity to tribal court proceedings unless one of several conditions are met, including that the tribe in question grants reciprocal recognition to the judicial proceedings of South Dakota).
254. WIS. STAT. § 806.245 (2003) (granting full faith and credit to tribal court proceedings, including tribes from outside Wisconsin in some matters).
255. WYO. STAT. ANN. § 5-1-111 (Michie 2003) (granting full faith and credit to decisions of the tribes of the Wind River Reservation unless one of several conditions is not met).
faith and credit provisions, and each requires reciprocal recognition on the part of tribes.\footnote{256}

So, in those three states, a tribe could obtain full faith and credit for its judicial proceedings, including tribal court tax judgments, by providing tribal court recognition of state court proceedings. Because the tribal court proceeding will not receive full faith and credit unless the tribal court, as a matter of tribal law, offers full faith and credit to the state court proceedings, the effect of this reciprocity requirement is unclear on three fronts. First, does it mean that a tribe’s refusal to extend reciprocity forecloses the application of comity, which, as a broad common law doctrine, does not necessarily require reciprocity? Second, will a federal court

\footnote{256. See OKLA. STAT. tit. 12, § 728(B) (2004); WIS. STAT. 806.245(1)(c) (2003); WYO. STAT. ANN. § 5-1-111(a)(iv) (Michie 2003). The Wisconsin statute provides:

806.245. Indian tribal documents: full faith and credit.

(1) The judicial records, orders and judgments of an Indian tribal court in Wisconsin and acts of an Indian tribal legislative body shall have the same full faith and credit in the courts of this state as do the acts, records, orders and judgments of any other governmental entity, if all of the following conditions are met:

(a) The tribe which creates the tribal court and tribal legislative body is organized under 25 USC 461 to 479.
(b) The tribal documents are authenticated under sub. (2)
(c) The tribal court is a court of record.
(d) The tribal court judgment offered in evidence is a valid judgment.
(e) The tribal court certifies that it grants full faith and credit to the judicial records, orders and judgments of the courts of this state and to the acts of other governmental entities in this state.

(2) To qualify for admission as evidence in the courts of this state:

(a) Copies of acts of a tribal legislative body shall be authenticated by the certificate of the tribal chairperson and tribal secretary.
(b) Copies of records, orders and judgments of a tribal court shall be authenticated by the attestation of the clerk of the court. The seal, if any, of the court shall be affixed to the attestation.

(3) In determining whether a tribal court is a court of record, the circuit court shall determine that:

(a) The court keeps a permanent record of its proceedings.
(b) Either a transcript or an electronic recording of the proceeding at issue in the tribal court is available.
(c) Final judgments of the court are reviewable by a superior court.
(d) The court has authority to enforce its own orders through contempt proceedings.

(4) In determining whether a tribal court judgment is a valid judgment, the circuit court on its own motion, or on the motion of a party, may examine the tribal court record to assure that:

(a) The tribal court had jurisdiction of the subject matter and over the person named in the judgment.
(b) The judgment is final under the laws of the rendering court.
(c) The judgment is on the merits.
(d) The judgment was procured without fraud, duress or coercion.
(e) The judgment was procured in compliance with procedures required by the rendering court.
(f) The proceedings of the tribal court comply with the Indian civil rights act of 1968 under 25 USC 1301 to 1341.

(5) No lien or attachment based on a tribal court judgment may be filed, entered in the judgment and lien docket or recorded in this state against the real or personal property of any person unless the judgment has been given full faith and credit by a circuit court under this section.

(6) A foreign protection order, as defined in s. 806.247 (1) (b), issued by an Indian tribal court in this state shall be accorded full faith and credit under s. 806.247.
in South Dakota (Eighth Circuit), Montana (Ninth Circuit), or Oklahoma (Tenth Circuit) extend its own federal common law brand of comity if the tribe does not extend reciprocity? And third, if a tribe does extend reciprocity to state court judgments, would a federal court apply the state’s full faith and credit standard or its own federal common law standard for comity?

My general criticism of the unilateral state approach is that it adopts a “take-it-or-leave-it” approach in which the tribes either take the regime as dictated or they receive none of its benefits. It would be far better for states and tribes to identify common ground and decide on recognition of each other’s judicial proceedings in a way that accommodates their mutual needs. It might be that tax enforcement is not an issue for either side, in which case there is no need to craft a rule for a hypothetical situation. Child protective orders might be the area of maximum concern, and much might be accomplished by addressing that concern first, seeing how it works, and then building on an existing relationship to solve future problems as they arise. Such an approach would definitely further and improve government-to-government relations. Current federal Indian policy promotes such relationships between states and tribes as a positive way of solving problems. Too often, litigation is seen as the way of solving problems. Litigation, however, seldom provides an overall solution and usually weakens ongoing relations between a tribe and state.

Even with all of the interest and scholarly commentary, many states have no case law, no statutes, and no procedural rules that directly address tribal court proceedings. In these states, it is likely that their courts will approach a tribal court proceeding in the same way that they approach a proceeding from a foreign court. That approach would be comity. Minnesota, whose supreme court recently adopted a procedural rule for the enforcement of tribal court judgments, has endorsed a comity approach. A specific rule, like Minnesota’s rule, is beneficial because it gives parties a specific set of criteria to determine whether comity should apply.  

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257. For a detailed discussion of this type of approach, see Deloria & Laurence, supra note 13.
259. See id. Rule 10.02, which provides as follows:

(a) Factors. In cases other than those governed by Rule 10.01(a), enforcement of a tribal court order or judgment is discretionary with the court. In exercising this discretion, the court may consider the following factors:
(1) whether the party against whom the order or judgment will be used has been given notice and an opportunity to be heard or, in the case of matters properly considered ex parte, whether the respondent will be given notice and an opportunity to be heard within a reasonable time;
(2) whether the order or judgment appears valid on its face and, if possible to determine, whether it remains in effect;
(3) whether the tribal court possessed subject-matter jurisdiction and jurisdiction over the person of the parties;
(4) whether the issuing tribal court was a court of record;
(5) whether the order or judgment was obtained by fraud, duress, or coercion;
(6) whether the order or judgment was obtained through a process that afforded fair notice, the right to appear and compel attendance of witnesses, and a fair hearing.
A standard is helpful because comity is a common law doctrine that can vary from state to state in its details. The rule may also help the tribal courts develop a sense of the judicial standards that the Minnesota courts are expecting the tribal courts to follow.

D. Special Federal Statutes Requiring Recognition of Tribal Court Judgments

The discussion thus far has looked at whether the Full Faith and Credit Clause of the Constitution or its implementing legislation, 28 U.S.C. § 1738, requires recognition of tribal court judgments. So far as the Ninth Circuit260 is concerned, comity, not full faith and credit, is the operative judgment recognition methodology for tribal court judgments. Congress, however, has passed specific legislation requiring state and federal courts to give full faith and credit to certain tribal court proceedings.

The most important of these provisions is found in the Indian Child Welfare Act (ICWA), which requires federal, state, territorial, and tribal recognition of specific child custody proceedings of a tribe.261 As a result, a tribal court’s determination that a mother loses custody of her child must be recognized by federal courts, state courts, territorial courts, courts within U.S. possessions, and other tribal courts if the tribal court proceeding is covered by ICWA.262 Other congressionally mandated and targeted full faith and credit arrangements can be found in the Violence Against Women Act,263 the Child Support Orders Act,264 the Indian Land Consolidation Act,265 the National Indian Forest Resources Management Act,266 the American Indian Agricultural Resources Management Act,267 and the Maine Indian Claims Settlement Act.268

As already noted, Congress specifically included tribes in part of the Defense of Marriage Act. The specific provision, 28 U.S.C. § 1738C, just down the statutory road from section 1738 (the full faith and credit enabling statute), affirmatively rescinds the federal mandate contained in section 1738 that would otherwise require one state to recognize the same-sex marriage of another state. Congress passed this

before an independent magistrate;
(7) whether the order or judgment contravenes the public policy of this state;
(8) whether the order or judgment is final under the laws and procedures of the rendering court, unless the order is a non-criminal order for the protection or apprehension of an adult, juvenile or child, or another type of temporary, emergency order;
(9) whether the tribal court reciprocally provides for recognition and implementation of orders, judgments and decrees of the courts of this state; and
(10) any other factors the court deems appropriate in the interests of justice.

(b) Procedure. The court shall hold such hearing, if any, as it deems necessary under the circumstances.

260. See Wilson v. Marchington, 127 F.3d 805, 809 (9th Cir. 1997).
262. See id.
statute in anticipation of one or more states legalizing same-sex marriage. As things now stand, it looks as though same-sex marriage is legal in Massachusetts until that state passes a state constitutional amendment forbidding such marriages. In application, for example, section 1738C relieves Utah from having to recognize a same-sex marriage from Massachusetts. The point of section 1738C is that Utah remains free to recognize such a marriage but is not compelled to do so as a matter of federal law. Section 1738C explicitly applies to Indian tribes, and this means that tribes are relieved of any federal full faith and credit obligation they have to recognize a same-sex marriage from a state or from another tribe. Contrariwise, a state under section 1738C is relieved of its federal obligation to recognize a same-sex marriage that might be legal under tribal law. Section 1738C certainly implies that full faith and credit otherwise applies to states and tribes and on a reciprocal basis. Can congressional intent reflected in a 1996 statute be lifted and transferred to a related provision whose operative words Congress passed in 1804? One would not think so, but some courts have done exactly that. For present purposes, we will ignore section 1738C and leave further elaboration to Professor Clinton.

Does Congress even have the power to impose a full faith and credit obligation on tribes and states regarding each other's judgments? Obviously, the source of congressional power to enact the full faith and credit provisions applicable to tribes does not come from text found in clause one of article IV of the U.S. Constitution. The second sentence of that clause provides Congress with the power to prescribe the procedure and extent to which full faith and credit must be afforded. But that power extends only to full faith and credit among states. Tribes are not mentioned. Because almost no one seems to think that tribes are states, the congressional power to require state courts to recognize tribal court judgments in specified contexts must be found elsewhere in the Constitution.

Over the years, the U.S. Supreme Court has issued a number of opinions finding that Congress has plenary power over tribes. The text of the Constitution contains


270. See Goodridge v. Dep't of Public Health, 798 N.E.2d 941 (Mass. 2003) (holding that the Massachusetts Constitution requires the state to allow same-sex marriages).

271. This is the text of section 1738C:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

272. See Wilson v. Marchington, 127 F.3d 805, 809 (9th Cir. 1997) (using this very logic to support the opposite conclusion given specific federal full faith and credit provisions applying to tribes and stating that a “later legislative act can be regarded as a legislative interpretation of an earlier act and ‘is therefore entitled to great weight in resolving any ambiguities and doubts’ ”) (quoting Erlenbaugh v. United States, 409 U.S. 239, 244 (1972) (quoting United States v. Stewart, 311 U.S. 60, 64–65 (1940))).

273. See generally Clinton, supra note 14, at 901–07. See also discussion supra text accompanying notes 87–100.

274. See, e.g., United States v. Kagama, 118 U.S. 375 (1886) (the power of Congress to enact the Major Crimes Act and extend its reach to Indian tribes emanates from the plenary power that Congress has over tribes); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (the plenary power of Congress over tribes enables it to unilaterally abrogate treaty obligations).
no explicit authorization to Congress granting it plenary power over Indian tribes. One case reasoned that plenary power over Indian tribes must exist within Congress "because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes." The cumulative weight of Supreme Court decisions makes it clear that Congress has plenary power over Indian tribes. We might just as well write it with an ink pen into our own copies of the Constitution. But does plenary power over Indian tribes give Congress the power to coerce states into recognizing tribal court judgments? The answer is very most probably "yes." In the aggregate, the interstate commerce clause, the necessary and proper clause, the Senate's treaty approval power, and the supremacy clause provide sufficient sources of federal power to require state recognition of tribal court determination in child custody proceedings.

One narrow exception may involve state sovereign immunity. The U.S. Supreme Court ruled that Congress could not waive a state's sovereign immunity from suit in the Indian Gaming Regulatory Act (IGRA), which permitted tribes to bring an action in federal court against a state that refused to negotiate a gaming compact. The court said that the Eleventh Amendment disabled Congress from statutorily waiving the state's sovereign immunity from suit. So, if a state official affirmatively refused to recognize a tribal court determination on a child custody matter and if an interested party other than the United States sued, then the official could claim sovereign immunity and assert that ICWA's full faith and credit mandate, applied in this way, went beyond the legislative power of Congress. Such a scenario is actually possible because state child welfare agencies are often involved in the foster care of Indian children who in turn might be the subject of a tribal court child custody determination.

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276. As an aside, my own view is that the U.S. Constitution does not give Congress plenary power over Indian tribes for two reasons. First, Congress has only those powers granted to it in the text of the Constitution and the text provides no such power either explicitly or by implication. Second, the governmental powers of the federal government and of the states come from the people. The "people" of the states, at the time of the Constitution, had no political power and no dominion over Native American governments and, therefore, had no power or dominion to transfer to their states or to the federal government. Britain asserted that it acquired political dominion over much of North America through John Cabot's 1497 discovery. The justification for this discovery giving political dominion to the British over Native American governments was the British claim to religious and racial superiority over Native Americans. By twenty-first century moral and legal standards, such a theory is unsupportable and patently unjust. The only legally and morally acceptable means for Congress to acquire political authority over Native American governments would be through their consent or through a just war. Henry Knox, the first Secretary of War in George Washington's administration, stated the legal norm this way:

> The Indians being the prior occupants, possess the right of the soil. It cannot be taken from them unless by their free consent, or by the right of conquest in case of a just war. To dispossess them on any other principle, would be a gross violation of the fundamental laws of nature, and of that distributive justice which is the glory of a nation.

Rpt. from Henry Knox, Sec. of War, to President George Washington (June 15, 1789) (reprinted in 1 *AMERICAN STATE PAPERS: INDIAN AFFAIRS* 13 (William S. Hein & Co., Inc. 1998)).
281. See *id.* at 73–76 (narrowly construing the *Ex parte Young* doctrine and making this a colorable argument).
IV. OFF-RESERVATION ENFORCEMENT OF TRIBAL COURT TAX JUDGMENTS

Federally recognized Indian tribes, as an inherent attribute of sovereignty, have the power to impose tribal taxes within their political territory. Although this power may be severely limited when the taxable activity involves a non-member on fee land within the political boundary of a tribe, some tribes still have a sufficient tax base to make tribal taxation a viable option for raising revenue. The Navajo Nation, for example, has a mature and well-developed tribal tax system that currently raises about $75,000,000 in tribal tax revenue each year. Not all tribal taxpayers will want to pay the taxes that they owe. When this happens, off-reservation enforcement is an option. Will a tribe be able to enforce its tribal court tax judgments in state or federal courts?

The question presupposes that the tax liability will take the form of a tribal court judgment. Collection of a tribal tax through on-reservation enforcement of a tribal court judgment would actually be quite rare. Most tax systems, including tribal tax systems, are set up so that an administrative agency can determine a taxpayer's tax liability and collect it without going through a judicial proceeding. For the Navajo Nation, for example, this is the Office of the Navajo Tax Commission. For the United States, it is the Department of the Treasury and the Internal Revenue Service (IRS), which is a subsidiary agency of the department.

The IRS, for example, can assess a federal tax and then, after demand of payment from the taxpayer and a failure to pay the demand, collect the tax without judicial intervention. To collect a delinquent tax liability, the IRS can simply send the taxpayer's bank a notice of levy and the bank will send the balance of funds to IRS. States have similar tax collection machinery. Courts are rarely involved

282. See, e.g., Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905) (validating a tribal permit tax imposed for the privilege of doing business on the Creek Nation and finding that the power to tax was "one of the inherent and essential attributes of sovereignty"); Washington v. Confederated Tribes, 447 U.S. 134, 152 (1980) (finding that a tribe's cigarette tax was proper because the "power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status"); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982) (confirming the tribe's severance tax on natural gas and concluding that the tribe's "authority to tax non-Indians who conduct business on the reservation does not simply derive from the Tribe's power to exclude such persons, but is an inherent power necessary to tribal self-government and territorial management"); Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985) (validating the Navajo Nation's business activity tax and possessor interest tax).


284. See, e.g., I.R.C. §§ 6331–6343 (2004) (levy provisions that enable IRS to seize a taxpayer's property for non-payment of delinquent taxes without a court judgment establishing the liability).


288. See I.R.C. § 6332 (2004) (requiring the person upon whom the levy is served to turn over the taxpayer's property to the IRS).

TRIBAL COURT TAX JUDGMENTS

The vast majority of coercive tax collections take place without judicial intervention. Non-government creditors do not have this array of collection tools. True, self-help repossession for enforcement of security interests in tangible personal property and repossession of real property following default on a conditional sales contract usually do not require judicial participation. Creditors have other collection tools as well, such as bad credit reports and aggressive debt collection personnel. Nonetheless, a garden-variety, unsecured debt usually requires a suit to prove the debt and liability of the debtor plus a judicial enforcement action, such as a writ of garnishment, to effect collection.

A tribe may very well find itself owed a large tax liability from a taxpayer who no longer has any connection with the reservation. If the taxpayer and the taxpayer’s assets are located beyond the reach of tribal tax authorities, what options are available? By comparison, consider a federal tax liability. The IRS has the entire United States, its possessions, and its territories as the theater of potential tax collection action. As a result, the IRS has an easier time with collection. Collection of federal tax liabilities from offshore sources, however, is another matter.

States are a different matter. As in the case of tribes, collection becomes more difficult for states when the taxpayer and the taxpayer’s assets are located out of state. A state’s police power, as part of its tax collection muscle, ends at its boundaries. As a result, administrative collection tools are generally ineffective beyond a state’s own boundaries. Moreover, an administrative tax assessment is not a judgment eligible for full faith and credit. Nonetheless, a state has the option of reducing its unpaid tax assessment to a judgment by suing the taxpayer in one of its own courts. The state can then seek full faith and credit in the state in which the taxpayer has assets. Although this is not a convenient tax collection method, states may find that it is their only choice when the tax liability is large enough to justify the time, effort, and expense. The U.S. Supreme Court, in Milwaukee County v. M.E. White Co., has indicated that full faith and credit for sister state tax judgments is required. Until the decision in Milwaukee County, it was not clear if tax judgments from sister states were eligible for full faith and credit.

To facilitate cross-border tax collection with sister states, some states have enacted legislation that gives reciprocal enforcement to sister state tax assessments that have not been reduced to a judgment. So far, this approach is rare. These

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293. For insights on garnishment, especially in a tribal/state context, see Laurence, Off-Reservation Garnishment, supra note 13.


296. See Will of Dow, 390 N.Y.S.2d 721, 731 (App. Ct. 4th Div. 1977) (stating that it “is a recognized general rule that tax assessments issued by the administrative authorities of other states which are not reduced to judgment will not be afforded full faith and credit or comity”).


298. See OR. REV. STAT. § 305.610 (2003) (providing enforcement of sister state tax assessments to the extent that the particular sister state provides reciprocity).
relatively rare reciprocal tax enforcement provisions do not apply to tribal court tax assessments.

We see, then, that the IRS has the easiest time because tribal and state borders have no meaning in the administrative tax collection process. For states, cross-border administrative tax collection is very limited. Reducing an assessment to a judgment in a home-state court and then seeking enforcement in a sister state court through full faith and credit is the only realistic option for most states. Although states face a difficult time, tribes have it much worse.

As the discussion above shows, full faith and credit for tribal court judgments in state courts is not a promising option. This author believes that the Ninth Circuit’s line of cases will become the norm before too long and that the issue may be so straightforward to the federal circuits that we will never get U.S. Supreme Court review. But perhaps I am wrong. Justice Ransom of the New Mexico Supreme Court, at the suggestion of P.S. Deloria, has asserted that full faith and credit for tribal court judgments is a realistic option because some state courts, in accordance with their own case law, afford full faith and credit to tribal court judgments. Under his theory, a person seeking enforcement can take a tribal court judgment to a friendly state, receive full faith and credit, and thereby transform the tribal court judgment into a state court judgment. This state court judgment, as a matter of federal law, is then eligible for full faith and credit under the U.S. Constitution.

Justice Ransom’s “transformer” theory has some basic problems. For example, the taxpayer may have no connections with the friendly state and may have no assets there. Let’s assume that the tribal tax judgment is from the Navajo District Court and determines a liability of $500,000 against T, the taxpayer. Let’s assume further that T, a non-member of the tribe, has moved away from the Navajo Nation’s reservation and now lives in California. Finally, let’s assume that T has $600,000 in an account in a California bank that has no branches in New Mexico. The Office of the Navajo Tax Commission (the Office) takes its Navajo Nation tax judgment to the state district court in Albuquerque, New Mexico. To record the judgment, the Office must give notice to T. The Office serves T with notice through a California process server. The Office then takes its New Mexico judgment to California seeking full faith and credit in a local court. Again, the Office must give T notice and then seek judicial collection measures. Here, the Office would likely seek a writ of garnishment on T’s California bank account. Will the California court recognize the New Mexico judgment? This scenario makes it difficult to establish that New Mexico has any real opportunity to actually give full faith and credit to the judgment. I doubt that the process of recordation would be viewed as sufficient to make the Navajo court tax judgment into a New Mexico money judgment to which California must give full faith and credit. What we have is a due process problem

299. See Ransom et al., supra note 16, at 267-73.
300. Presumably, the transformer theory would work under any of these circumstances: (1) a state like New Mexico, under its interpretation of federal law, extends full faith and credit to a tribal court tax judgment and thereby transforms it into a state judgment entitled to full faith and credit; (2) a state like Wisconsin, as a matter of its state law, gives full faith and credit to the judgment; or (3) a state like Minnesota or Oklahoma recognizes that judgment under its state law of comity. If a federal court recognizes the judgment, then no full faith and credit is needed because it then becomes a federally recognized judgment enforceable around the country through the federal court system.
in which the Navajo taxpayer, now living in California, has insufficient contacts with New Mexico to justify judicial intervention by a New Mexico court.301

Under the “transformer” theory, foreign judgments would have to be treated the same way—once recognized in a state jurisdiction with easy recognition rules, the “transformed” foreign judgment becomes a state judgment entitled to full faith and credit around the country. Given that some twenty-nine states have adopted the Uniform Foreign Money-Judgments Recognition Act (UFMJRA)302 and given that UFMJRA makes enforcement of foreign judgments easier than common law comity, one would expect to see some cases challenging the “transformation” into a state judgment entitled to full faith and credit under 28 U.S.C. § 1738. I will take the absence of such cases as an indicator that no lawyers have thought the “transformer” theory good enough to make the attempt worth the effort.

The “transformer” theory is not promising, but what about the UFMJRA? Is it possible that tribal court tax judgments would come within its enforcement provisions? UFMJRA appears to apply to tribes. It applies to judgments from foreign states.303 A “foreign state” is defined as “any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands.”304 A federally recognized Indian tribe seems to fit this definition because it does not come within any of the categories that would make it NOT a foreign government. But, once again, we are back to the possibility that “territory” includes an Indian tribe. If a tribe is a territory for purposes of UFMJRA, then tribes would fall outside of its application because a tribe would not be a foreign government. I have already expressed my opinion, which is that tribes are not U.S. territories. Nonetheless, it is important to consider the different context that UFMJRA provides. It is quite clear that the purpose of UFMJRA is to provide a method for enforcing money judgments from foreign countries.305 Given this purpose, it would seem strange to include tribes within its terms.

If, however, we decide that tribes are foreign governments for purposes of UFMJRA, then a potentially fatal problem arises. The definition of enforceable judgments excludes a “judgment for taxes.”306 This means that a tribal court tax judgment cannot be enforced under UFMJRA. This provision does not bar enforcement. It merely means the enforcement is not available under UFMJRA. Other tribal court judgments may very well come within UFMJRA, but tax judgments are explicitly not enforceable. And there is no suggestion that the “no-enforcement-of-tax-judgments” rule should be changed. So, for tribes seeking tax judgment enforcement in one of the twenty-nine states that have enacted UFMJRA, the effort will not be made easier by UFMJRA.

303. Id. § 1.
304. Id. § 1(1).
305. See Kathleen Patchel, Study Report on Possible Amendment of the Uniform Foreign Money-Judgments Recognition Act (memo to Study Committee on Recognition of Foreign Judgments) 7 (June 25, 2003) (on file with author).
306. UFMJRA, supra note 302, § 1(2).
Except for those states with statutory or procedural-rule-based full faith and credit provisions, tribes have comity as an option. Unfortunately, a common law rule known as the "revenue rule" states that comity will not be extended to foreign tax judgments. The exclusion of tax judgments from the application of UFMJRA no doubt reflects this rule. The "revenue rule" has an august vintage and originates from an eighteenth century English case by Lord Mansfield\textsuperscript{7} and continues as a recognized rule under American common law.\textsuperscript{3}\textsuperscript{0}\textsuperscript{8} The leading American case is \textit{Her Majesty the Queen v. Gilbertson},\textsuperscript{3}\textsuperscript{0}\textsuperscript{9} which involved an attempt by British Columbia to recovery on a judgment for taxes due by various Oregon residents who had income from logging operations in Canada.\textsuperscript{3}\textsuperscript{10} The Ninth Circuit ruled that it would follow the well known "revenue rule," which is an exception to the rule of comity that normally applies to foreign judgments.\textsuperscript{3}\textsuperscript{11} The Ninth Circuit reasoned that it is inappropriate for an American court to further the governmental interest of a foreign government.\textsuperscript{3}\textsuperscript{12} This is consistent with the general refusal to extend comity to the criminal laws of foreign jurisdictions.\textsuperscript{3}\textsuperscript{13}

In a more recent case, \textit{Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.},\textsuperscript{3}\textsuperscript{14} the Second Circuit considered the revenue rule in a more complicated context. In \textit{R.J. Reynolds}, Canada brought a Racketeer Influenced and Corrupt Organizations Act (RICO) action against an American tobacco company and alleged that the company conspired to smuggle cigarettes into Canada.\textsuperscript{3}\textsuperscript{15} The damages sought included lost tax revenues.\textsuperscript{3}\textsuperscript{16} It was the lost tax revenues that caused the federal court to evaluate whether it would entertain a cause of action in which a foreign country sought indirect enforcement of its tax laws. In the end, and after an extensive consideration of the issue, the Second Circuit found that the "revenue rule" did preclude the federal court from hearing the RICO claim.\textsuperscript{3}\textsuperscript{17} Of considerable importance to the court was the tax treaty scheme between the United States and Canada, which included procedures for reciprocal tax enforcement but not recognition of each other's tax judgments.\textsuperscript{3}\textsuperscript{18}

Taken together, \textit{Gilbertson} and \textit{R.J. Reynolds} provide ample authority for the continued application of the "revenue rule" in the context of comity and enforcement of foreign tax judgments. Nonetheless, \textit{Wilson}\textsuperscript{3}\textsuperscript{19} and \textit{Bird}\textsuperscript{3}\textsuperscript{20} two of the Ninth Circuit cases holding that tribal court judgments are entitled to comity but not full faith and credit, both mention \textit{Gilbertson} and the "revenue rule." \textit{Wilson} suggests that strict application of the comity rules for foreign judgments is

\textsuperscript{308} See id. at 268.
\textsuperscript{309} 597 F.2d 1161 (9th Cir. 1979).
\textsuperscript{310} Id. at 1161–63.
\textsuperscript{311} Id. at 1165.
\textsuperscript{312} Id.
\textsuperscript{313} See id. at 1165 n.10.
\textsuperscript{314} 268 F.3d 103 (2d Cir. 2001).
\textsuperscript{315} Id. at 105–06.
\textsuperscript{316} Id.
\textsuperscript{317} Id. at 126.
\textsuperscript{318} See id. at 119–22.
\textsuperscript{319} See Wilson v. Marchington, 127 F.3d 805, 810 (9th Cir. 1997).
\textsuperscript{320} See Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136, 1152 (9th Cir. 2001).
inappropriate in the case of tribal court judgments and expresses a desire to provide easier enforcement for them. The Ninth Circuit’s primary concern in Wilson is with jurisdiction and not with judicial quality. The court is willing to assume that the judicial quality will be sufficient in most cases. In the Bird decision, however, a greater concern over quality is evident and the court seems more inclined to extend the “revenue rule” to tribes. Admittedly, the Bird court is merely speculating and does not actually have the specific problem of tribal tax judgments in mind.

The Wilson line of thinking actually provides the little bit of light in this rather long and dark tunnel. The Wilson court is ready, willing, and able to develop a federal common law of comity for tribal court proceedings. If this is true, then the Ninth Circuit should be open to not applying the “revenue rule” to tribal court tax judgments. Not applying the “revenue rule” to tribal court judgments actually makes a great deal of sense. The United States has little or no interest in enforcing the tax laws of other countries. But the federal government has a very strong interest in helping tribes enforce their tax laws. First, there is some reciprocity here. Federal tax laws reach into Indian Country, and our affable federal tax collection people, those friends of ours who work for the IRS, expect tribal members to pay their federal income taxes and the tribes to assist in this where necessary. True, the IRS does not need a federal court judgment to take into Indian Country to collect an unpaid income tax, but it may need a tribal government to honor a levy on a tribal employee’s wages. The IRS expects tribal cooperation, so it seems only fair that the federal courts should be willing to help tribes whose arsenal of off-reservation tax collection weapons may be zero.

In addition, the federal government has an explicit policy of furthering tribal self-government. A government without sources of revenue cannot function very well. Governments need money to run their programs and perform their functions. Also, the federal government is a source of some financial support for many tribes. By helping tribes develop tax systems and collect taxes owed to them, the federal government is reducing tribal financial reliance on federal funding. This is quite different from being the collection agency for Revenue Canada. In the case of tribes, the federal government has a clear domestic reason for assisting tribes in collecting their tax revenues. In the case of a foreign government, the approach of the United States and other countries is “each country for itself.”

Another important reason why federal courts should assist tribes in the collection of tribal tax judgments is the current role these federal courts have in reviewing jurisdictional limits of tribal taxation. It seems rather strange that a federal court can validate or invalidate the assertion of a tribal tax but then play no role in its collection when its own determination affirms the taxpayer’s legal liability to the

321. See Wilson, 127 F.3d at 810–13.
322. See id. at 812–13 (but also mentioning due process as a concern relating to the quality of the justice).
323. See Bird, 255 F.3d at 1152.
324. See Wilson, 127 F.3d at 813.
tribe. It is the exertion of federal judicial power that often diminishes a tribe’s power to tax. Therefore, it is appropriate that federal courts determine the extent of that diminishment. Likewise, it is appropriate that federal courts should have a role in off-reservation enforcement because the current full faith and credit mechanism available to states is not available to tribes.

If the Ninth Circuit (and other circuits) is willing to follow the inclination of the Wilson court to develop a federal common law that extends more robust comity to tribal judicial proceedings, then existing federal statutes are available to go the final collection mile. These provisions enable the filing of liens and seizure of property for purposes of judicial sales. And, quite importantly, federal judgments can be executed anywhere within the political jurisdiction of the United States through a registration process.

Federal judicial participation in the collection of tribal court judgments is consistent with the early Eighth Circuit case of Buster v. Wright, which the Supreme Court cited with approval in Montana. Although the federal court in Buster did not actually provide the judicial process for the collection of the unpaid tax, it did uphold the use of the federal police powers to enforce the tribal court’s order to shut down the taxpayer’s business for the non-payment of the tribe’s tax. Federal court assistance in tribal tax collection in egregious cases would certainly help tribes with their tax compliance efforts. Taxpayers who knew that tribes could use federal judicial enforcement to collect tribal taxes would not evade them with the hope that tribes would view off-reservation collection as futile.

327. See, e.g., Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) (invalidating a tribal hotel occupancy tax imposed by the Navajo Nation, although the Navajo Nation argued that it was designed to fund essential governmental functions, including police, fire, and emergency medical services for the hotel owner and the hotel guests because the land, although within the Navajo Nation, was fee land owned, not by the tribe, but by the taxpayer).

328. See 127 F.3d at 813 (indicating that federal courts should develop their own common law of comity for the enforcement of tribal court judgments).


A judgment in an action for the recovery of money or property entered in any court of appeals, district court, bankruptcy court, or in the Court of International Trade may be registered by filing a certified copy of the judgment in any other district or, with respect to the Court of International Trade, in any judicial district, when the judgment has become final by appeal or when ordered by the court that entered the judgment for good cause shown. Such a judgment entered in favor of the United States may be so registered any time after judgment is entered. A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.

A certified copy of the satisfaction of any judgment in whole or in part may be registered in like manner in any district in which the judgment is a lien.

The procedure prescribed under this section is in addition to other procedures provided by law for the enforcement of judgments.

Assuming the above provision would apply to a tribal court tax judgment given comity by a federal district court, then the collection job for tribal tax officials would be much easier. This facilitation of collection is appropriate because “the purpose of the registration of judgments procedure [under 28 U.S.C. § 1963] is to simplify and facilitate collection on valid judgments.” Coleman v. Patterson, 57 F.R.D. 146 (S.D.N.Y. 1972).

331. 135 F. 947, 954–55 (8th Cir. 1905) (endorsing federal court participation in the enforcement of tribal taxes).

If states attempt to use federal courts to enforce their tax judgments against tribes under a comity theory, what would be the result? Ironically, a tribe enjoys sovereign immunity. In addition, a state attempting to enforce its own tax judgment can find no federal statute that confers jurisdiction on the federal court. In contrast, a tribe seeking enforcement can establish federal jurisdiction because the underlying claim is a claim brought by a tribe and arising out of federal law. A state seeking enforcement must then go to the tribal court, and the tribal court then recognizes the state court tax judgment to the extent required by tribal law. Some tribes have full faith and credit rules that require enforcement of the judgment if the state provides reciprocal enforcement. Other tribes, like most of the states, have no explicit foreign judgment enforcement rules. These tribes, then, can develop their own laws that are best suited to further the tribal interests as defined by the tribe in the exercise of its sovereignty. A tribe’s decision may mean comity, full faith and credit, no enforcement, or some other approach.

In many cases, negotiations between tribes and states will be beneficial to determine what tax enforcement arrangement might be mutually beneficial. The Navajo Tax Commission has developed a good relationship with the Arizona Department of Revenue. This has led to a fuel tax agreement designed to help both governments achieve maximum compliance with their fuel excise tax programs. The agreement contemplates information sharing and joint audits of taxpayers. The agreement does not provide for reciprocal tax collection, but joint audits are very close to such an arrangement. Because Arizona had an existing fuel excise tax program, its department of revenue provided training to staff of the Office of the Navajo Tax Commission. Although the relationship between the tax authorities of these two governments has not always been the most cooperative, the inter-
governmental agreement on the fuel tax shows that cooperation can help the revenue systems of both governments.

The tax agreement between the State of Michigan and the Hannahville Tribe is a good example of dealing with collection questions. The agreement provides detailed rules about how Michigan tax officials must approach tax collection activity within the Tribe’s jurisdiction. In general, the agreement requires prior tribal court approval of most audit and collection activity taking place within the reservation and involving the Tribe or its members.

These two examples show that inter-governmental agreements can take various forms and meet particularized needs of the tribe and the state. Negotiation of these agreements can be beneficial to both sides. Generally, such benefits are hard to achieve when a one-size-fits-all solution is imposed. Inter-governmental agreements allow for customization.

CONCLUSION

Full faith and credit involving tribal court proceedings is an issue that began well over 150 years ago and will likely continue for another 150 years. If the last 500 years is any kind of guide, tribes as communities of people exercising some degree of autonomy are very likely to be around in 2150. I, along with others, do not think that there is (or should be) a federal mandate forcing blanket reciprocal enforcement of tribal and state judicial proceedings.

If we use the federal comity approach for enforcement of tribal tax judgments (along with other judicial proceedings of tribes), then case law will take a good long while to develop, and where it will end up is anyone’s guess. Nonetheless, the case law will be able to respond to specific cases and develop a body of federal common law that one can hope will validate tribal sovereignty. At some point, the pendulum, lest it break, will have to swing in favor of tribal sovereignty. The last twenty years have seen a steady erosion of tribal sovereignty at the hands of the U.S. Supreme Court. Perhaps the case law will find a balance amongst competing tribal, federal, and state interests.

Meanwhile, it is in the mutual interest of tribes and states to negotiate their tax relationships. If tribes and states cannot negotiate the terms of enforceability of their tax judgments, then the Wilson line of cases provides tribes with a promising mechanism for securing enforcement. A substantial amount of litigation will be necessary to establish that federal courts should enforce tribal court tax judgments outside the reservation. Thus far, we have no federal cases extending Wilson into the area of enforcing tribal court tax judgments. Further litigation will be necessary to extend Wilson in circuits outside the Ninth Circuit. If a conflict in the circuits arises, then Supreme Court resolution would be necessary.

When tribal-state relations grow out of litigation, they do not work very well. Likewise, a tax system that requires a court case for the payment of every individual tax liability is a tax system that is broken. Accordingly, tribes and states must

344. See id. at 35.
cooperate. And if they develop good working relationships, those same relationships can serve as a basis for solving other problems. By promoting a working government-to-government relationship, tribes and states can promote the efficient operation of their tax systems. The tribal-state tax agreements mentioned in this article are good examples of how tax enforcement issues can be solved through negotiation.