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PROBLEMS IN THE APPLICATION OF FULL FAITH AND CREDIT FOR INDIAN TRIBES

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INTRODUCTION: JIM v. CIT FINANCIAL SERVICE CORP.

Recently, the New Mexico Supreme Court, in *Jim v. CIT Financial Services Corp.*,[1] held that the Navajo Nation was a territory for the purposes of 28 U.S.C. 1738 (1970)[2] which is the enabling statute for the Full Faith & Credit Clause of the United States Constitution.[3] Although the court's holding dealt with a choice of law problem involving Navajo Tribal law[4] and New Mexico commercial law,[5] the court's decision has important implications for the problem of recognition of judgments between states and Indian tribes.

In *Jim*, the petitioner, Allan Jim, an enrolled member of the Navajo Nation, purchased a pickup truck in Farmington, New Mexico. Respondent, CIT Financial Services Corp., financed the purchase of the truck. Petitioner, living on the reservation and keeping his truck there, failed to make the payments on the truck as they came due. Respondent, without taking any action in the Navajo Tribal Court, sent two agents onto the Navajo Reservation and had them repossess the truck.

Petitioner then filed an action in New Mexico District Court for

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1. 87 N.M. 362, 553 P.2d 751 (1975).
2. The text of the statute is as follows:

   [T]he Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof shall be authenticated by affixing the seal of such State, Territory, or Possession thereto.

   The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the Court that the said attestation is in proper form.

   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.
3. U.S. Const. art. IV, § 1.
4. 7 Navajo Tribal Code § § 307, 309 (1969).
5. N.M. Stat. Ann. § 50A-9-503 (Repl. 1962).

damages based on sections 307[6] and 309[7] of the Navajo Tribal Code. The provisions required either written consent from the party affected or a tribal court order before personal property of Navajo Indians could be repossessed. These sections, by allowing recovery of a percentage of the purchase price, also provided a remedy to the party affected by the wrongful repossession.

The district court dismissed the action, apparently finding that the New Mexico law authorizing self-help repossession applied to the action and not the provisions of the Navajo Tribal Code.[8] On appeal, a 2-1 majority of the court of appeals affirmed the dismissal of the district court.[9] The New Mexico Supreme Court reversed the court of appeals by holding that 28 U.S.C. 1738 (1970) was applicable and that the Navajo Nation was a territory for purposes of full faith and credit.[10] On remand, the district court, by looking at the terms of the contract between the parties, was to determine which law should apply.

The New Mexico Supreme Court's decision, one rendered in a state with numerous Indian reservations, is particularly important because it recognizes tribal law as a legitimate alternative in choice of law situations and because it institutionalizes the relationship between state and tribe. And even though *Jim* addresses only the issue of choice of law, it is equally important in the area of recognition of

6. 7 Navajo Tribal Code § 307 (1969) states:
Repossession of personal property.
The personal property of Navajo Indians shall not be taken from land subject to the jurisdiction of the Navajo Tribe under the procedures of repossession except in strict compliance with the following:
(a) Written consent to remove the property from land subject to the jurisdiction of the Navajo Tribe shall be secured from the purchaser as the time repossession is sought. The written consent shall be retained by the creditor and exhibited to the Navajo Tribe upon proper demand.
(b) Where the Navajo refuses to sign said written consent to permit removal of the property from land subject to the jurisdiction of the Navajo Tribe the property shall be removed only by order of a Tribal Court of the Navajo Tribe in an appropriate legal proceeding.

7. 7 Navajo Tribal Code § 309 (1969) states in part:
Civil Liability. Any person who violates section 307 of this title and any business whose employee violates such section is deemed to have breached the peace of the lands under the jurisdiction of the Navajo Tribe, and shall be civilly liable to the purchaser for any loss caused by the failure to comply with sections 307-09 of this title.
If the personal property repossessed is consumer goods (to wit: goods used or bought for use primarily for personal, family or household purposes), the purchaser has the right to recover in any event an amount not less than the credit service charge plus ten percent (10%) of the principal amount of the debt or the time price differential plus ten percent (10%) of the cash price.

8. 7 Navajo Tribal Code § § 307, 309 (1969).

9. 86 N.M. 784, 527 P.2d 1222 (Ct. App. 1974).

10. 87 N.M. 362, 363, 533 P.2d 751, 752 (1975).

judgments because of its interpretation of the Navajo Nation as a territory for purposes of 28 U.S.C. 1738 (1970). If the New Mexico Supreme Court is correct in its finding that the Navajo Nation, like all other Indian tribes, is a territory for purposes of 28 U.S.C. 1738 (1970), then suddenly Indian tribes are constitutionally compelled to recognize state court judgments. The case law[11] prior to *Jim* indicated that Indian tribes were not affected by the Full Faith and Credit Clause and its enabling legislation.

This article will discuss the history of the Full Faith and Credit Clause and its enabling legislation, the case law dealing with full faith and credit for Indian tribes, the policy reasons supporting extension of full faith and credit to Indian tribes, and the problems that could arise were full faith and credit statutorily extended to Indian tribes.

HISTORY OF FULL FAITH AND CREDIT CLAUSE AND ITS EXTENSION TO INDIAN TRIBES

The general history of the Full Faith and Credit Clause, its enabling legislation, and the case law interpreting its application to Indian tribes illustrate the ambiguity of constitutionally requiring extension of full faith and credit to Indian tribes. The history of the Full Faith and Credit Clause and its enabling legislation indicate that Indian tribes were not consciously included in the full faith and credit schemata. Neither the Clause itself nor the enabling legislation expressly provides for the extension of full faith and credit to Indian tribes. The case law defining "territory" is not helpful either. One can only conclude that sometimes an Indian tribe is considered a territory and sometimes it is not. Likewise, the case law defining the extension of full faith and credit to Indian tribes is ambiguous. As a result there is no adequate legal theory sufficient to compel extension of full faith and credit to Indian tribes.

The History of the Full Faith and Credit and Its Enabling Legislation

The Full Faith and Credit Clause was incorporated by the framers of the Constitution out of a vaguely articulated need to control relationships between the states.[12] Full faith and credit was a substitute for the older notion of comity. Under the concept of comity, foreign

11. *See* Annis v. Dewey County Bank, 335 F. Supp. 133 (D.S.D. 1971), In re Lynch's Estate, 92 Ariz. 354, 377 P.2d 199 (1962) and Begay v. Miller, 70 Ariz. 380, 222 P.2d 624 (1950).

12. *See generally,* Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical Analytical Reappraisal,* 56 Mich. L. Rev. 33, 53-59 (1957) and A. McLaughlin, A Constitutional History of the United States 127 (1936).

states were not compelled to recognize either foreign laws or foreign state judgments. Under the Full Faith and Credit Clause application of foreign laws and recognition of foreign state judgments, in theory at least, become constitutionally compelled.

The history of the Clause, however, makes no mention of either territories or Indian tribes.[13] Since the Constitution mentions Indian tribes elsewhere[14] one might conclude that the drafters consciously excluded tribes from the scheme of full faith and credit. In any case the history of the Clause, because there is no express mention of Indian tribes in either the Clause itself or its history, offers no convincing evidence that it was meant to extend to Indian tribes.

The history of the enabling legislation is similarly silent on the inclusion of Indian tribes into the full faith and credit framework. In 1790 Congress passed an act[15] to prescribe the procedure for recognition of foreign state judgments. Commentators on the history of the enabling legislation have referred to subsequent changes prior to 1948 as technical only.[16] One of those technical changes raises the issue of the meaning and scope of the word "territory."[17]

In 1804 Congress amended[18] the 1790 Act.[19] The 1804 Act prescribed the manner of proof necessary, described the effect of records on various courts, and extended the scope of the enabling legislation to the territories. The extension of the Full Faith and Credit Clause to the territories was necessary for accomplishing integration of the newly conquered lands of the west into the federal system. Unfortunately, however, the legislative history on the territorial amendment does not mention Indian tribes.[20] Subsequent changes in the statute have been technical only.[21] The legislative history of these changes nowhere mentions Indian tribes.

Case Law Defining "Territory"

The only interpretation of the meaning of "territory" for the purposes of the 1804 statute[22] and its successors[23] involves the

13. *See* Nadelmann, *supra* note 11, at 53-59.
14. U.S. Const. art. I, § 8, cl. 3.
15. Act of May 26, 1790, ch. 11, 1 Stat. 122.
16. Nadelmann, *supra* note 12, at 81-82 and A. Von Mehren & D. Trautman, The Law of Multistate Problems 1228 (1965).
17. *See* Act of March 27, 1804, ch. 56, 2 Stat. 298.
18. *Id.*
19. Act of May 26, 1790, ch. 11, 1 Stat. 122.
20. *See* Nadelmann, *supra* note 12, at 61-62.
21. Nadelmann, *supra* note 12, at 81-82 and A. Von Mehren & D. Trautman, *supra* note 16, at 1228.
22. Act of March 27, 1804, ch. 56, 2 Stat. 298.
23. *See* 28 U.S.C. § 687 (1940) and 28 U.S.C. § 1738 (1970).

status of the District of Columbia.[24] In *Embry v. Palmer*[25] the Supreme Court addressed the issue of whether the District of Columbia was a territory for the purposes of the 1804 statute and found that it was a territory. But before reaching this issue, the Court addressed whether Congress had the power to extend the operation of the Full Faith and Credit Clause to territories since the Clause made only express mention of full faith and credit between states. The Court found that the general judicial powers embodied in Article III[26] were broad enough to empower Congress to legislate beyond interstate relationships. *Embry* is important for two reasons. First, it could serve as a precedent authorizing congressional legislation extending the operation of the Full Faith and Credit Clause between tribe and state. Second, *Embry* clearly illustrates that "territory" is not a fixed concept and that one must interpret the meaning of "territory" in the light of the context.

In *District of Columbia v. Carter,*[27] a case involving a question similar to *Embry,* the Supreme Court determined that the District of Columbia was not a territory for purposes of 42 U.S.C. 1983 (1970), the statute authorizing civil actions against any state or territory for deprivation of rights guaranteed by the Constitution and laws of the United States. Although *Embry* and *Carter* might seem contradictory at first, when read together they demonstrate that determining the territorial status of a political entity depends on the purpose and intent of the statute.

Another analogue to 28 U.S.C. 1738 (1970) is the legislation implementing interstate extradition.[28] In *Arizona ex rel. Merrill v. Turtle,*[29] the Ninth Circuit Court of Appeals held that Arizona had no power to extradite an Indian from the Navajo Reservation pursuant to constitutional extradition demands made by Oklahoma. The court based its reasoning on provisions found in the Navajo Treaty of 1868 and on the general principal of Indian law that those rights not specifically taken from the tribe still remain with the

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24. Although it is true that in Mackey v. Coxe, 59 U.S. (18 How.) 100 (1855), the Supreme Court found that the Cherokee Nation was a Territory for purposes of the enabling legislation requiring recognition of administrators appointed from the Territories (*see* Act of June 29, 1812, ch. 106, 11, 2 Stat. 758), the Court did not specifically mention the Full Faith and Credit Clause or other enabling legislation.

25. 107 U.S. 3 (1882).

26. U.S. Const. art. III.

27. 409 U.S. 418 (1972).

28. This statute is the enabling legislation for a constitutional provision, U.S. Const. art. IV, § 2, cl. 2.

29. 413 F.2d 683 (9th Cir. 1969).

tribe.[30] In so doing, the court effectively excluded the Navajo Tribe from status as a territory for purposes of the extradition statute.[31]

The case law defining territory as it might relate to Indian tribes and the full faith and credit enabling legislation supplies no ready answer. The case law indicates that the classification of a political entity as a territory depends largely on the purpose and intent of the statute in question. And in *Turtle* the status of the Navajo tribe depended on such external considerations as terms of a treaty and general principles of Indian law.

Case Law Defining Full Faith and Credit for Indian Tribes

The leading case holding that public records from tribal courts are entitled to a limited form of full faith and credit is *Mackey v. Coxe.*[32] Although *Mackey* involved the provision of the enabling legislation of 1812[33] requiring recognition of administrators appointed from the territories and not the Acts of 1790 or 1804,[34] the Supreme Court held that Cherokee Nation's letters of appointment for testamentary purposes were entitled to full faith and credit. The Court found that, at least for the purposes of the 1812 Act, Indian nations were territories. The Court reasoned that:

> In some respects they (tribes) bear the same relation to the federal government as a territory did in its second grade of government, under the Ordinance of 1787. Such territory passed its own laws, subject to the approval of Congress. The principal difference consists in the fact that the Cherokees enact their own laws, under the restriction stated, appoint their own officers, and pay their own expenses. This, however, is no reason why the laws and proceedings of the Cherokee territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the Union. It is not a foreign, but a domestic territory—a territory which originated under our constitution and laws.[35]

It is interesting to note, however, that the Court does not expressly discuss the application of the Full Faith and Credit Clause or its other enabling legislation to Indian tribes.

The Eighth Circuit Court of Appeals, in the late nineteenth cen-

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30. *See* Treaty of June 1, 1968, 15 Stat. 667 and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
31. 18 U.S.C. § 3182 (1970).
32. 59 U.S. (18 How.) 100 (1855).
33. Act of June 29, 1812, ch. 106, 11, 2 Stat. 758.
34. Act of May 26, 1790, ch. 11, 1 Stat. 122 and Act of March 27, 1804, ch. 56, 2 Stat. 298.
35. 59 U.S. (10 How.) 100, 103 (1855).

tury,[36] adopted the same position in a number of cases involving ejectment,[37] wrongful detainer,[38] the dismissal of an injunction,[39] quarantine regulation,[40] divorce,[41] use tax,[42] and probate proceedings.[43] The importance of these cases is that they extend full faith and credit to the proceedings of tribal courts just as if they were proceedings of territorial courts. None of these cases, with the exception of *Mackey,* discusses any relevant full faith and credit legislation. Consequently, the relationship between the cases and full faith and credit legislation, particularly 28 U.S.C. 1738 (1970), is tenuous at best.

In contrast to these cases supporting the proposition that tribes are entitled to full faith and credit is *Begay v. Miller,*[44] an Arizona Supreme Court case. In addressing the validity of a divorce decree entered by a Navajo Tribal Court to two members of the Navajo tribe, the court, although rejecting recognition based on the Full Faith and Credit Clause or on the principles of comity,[45] found that the tribal divorce must be recognized "because of the general rule, call it by whatever name you will, that a divorce valid by the law where it was granted is valid anywhere."[46] The court ignored both 28 U.S.C. 1738 (1970) and the line of cases holding that tribes are entitled to full faith and credit.

Since then Arizona has partially retreated from the holding in *Begay.* In *In re Lynch's Estate,*[47] the Arizona Supreme Court held that a Navajo will, already having been admitted to probate in a tribal court, should be given the same force and effect as a will originally probated in an Arizona state court. The court found that "the proceedings held in the Navajo Tribal Court must be treated the same as proceedings in a court of another state or foreign coun-

36. The creation of the 10th Circuit in 1929 made most of these cases 10th Circuit precedents rather than 8th Circuit ones, since the cases arose in states presently within the 10th Circuit jurisdiction. *See* Act of Feb. 28, 1929, ch. 363, 116, 45 Stat. 1346.

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

38. Exendine v. Pore, 56 F. 777 (8th Cir. 1893).

39. Standley v. Roberts, 59 F. 836 (8th Cir. 1894), *appeal dismissed,* 166 U.S. 1177 (1896).

40. Cornells v. Shannon, 63 F. 305 (8th Cir. 1894).

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

42. Buster v. Wright, 135 F. 947 (8th Cir. 1905).

43. Hayes v. Barringer, 168 F. 221 (8th Cir. 1909).

44. 70 Ariz. 380, 222 P.2d 624 (1950).

45. *Id.* at 384, 222 P.2d at 628. Since a court can recognize other courts' judgments only through comity or full faith and credit, it is difficult to understand exactly what the court thought it was doing in recognizing the divorce while explicitly denying both comity and full faith and credit.

46. *Id.*

47. 92 Ariz. 354, 377 P.2d 199 (1962).

try."[48] Arizona is backpedaling from its position in *Begay* to a position of at least comity.[49]

Both the Arizona cases and the federal line of cases on extending full faith and credit to Indian tribes offer no convincing answer to the question of whether such extension of the clause is constitutionally mandated. Furthermore, since neither line of cases specifically address the relevant full faith and credit enabling legislation,[50] it might be helpful to look at the statute itself[51] in order to determine if statutory interpretation in any way clarifies the problem.

Concerning this approach the 1884 Supreme Court case of *Elk v. Wilkins*[52] is instructive. The Court found that, because the citizenship clause of the 14th amendment[53] did not expressly mention Indians or Indian tribes, petitioner John Elk, an Indian, was not a citizen under the 14th amendment and therefore not entitled to vote as a citizen under the 15th amendment.[54] In finding that the 14th amendment citizenship clause did not apply to Indians, the Court followed the general principle that general acts of Congress do not apply to Indians unless so expressed as to manifest a clear intention to include them.[55]

By this reasoning 28 U.S.C. 1738 (1970) would not be applicable to Indians because they are not expressly covered by the statute. In *Navajo Tribe v. National Labor Relations Board*[56] the District of Columbia Circuit Court of Appeals held that the National Labor Relations Board had jurisdiction over a labor dispute on the Navajo Reservation. The court specifically stated that the congressionally announced policies of the National Labor Relations Board superceded the local policies of states and Indian tribes, even though the relevant legislation did not address the issues of jurisdiction on Indian Reservations. In so holding the court directly addressed the concept of exemption for Indians from general legislation.

The decision of *Elk v. Wilkins,* 112 U.S. 94 (1884), whatever its

48. *Id.* at 357, 377 P.2d at 201.

49. The Court's recognition of comity was based on Williams v. Lee, 358 U.S. 217 (1959).

50. Note that Mackey v. Coxe, 59 U.S. (18 How.) 100 (1855) dealt only with the 1812 statute (*see* Act of June 29, 1812, ch. 106, 11, 2 Stat. 758), which dealt only with the recognition of administrators appointed from the territories; it did not address the problems of choice of law or recognition of judgments.

51. 28 U.S.C. § 1738 (1970).

52. 112 U.S. 94 (1884).

53. U.S. Const. amend. XV.

54. U.S. Const. amend. XIV.

55. 112 U.S. 94, 100 (1884).

56. 288 F.2d 162 (D.C. Cir. 1961).

> present-day significance, certainly does not operate to remove "Indians and their property interests" from the coverage of a general statute. . . . The National Labor Relations Act is a general statute. Its jurisdictional provisions, and its definitions of "employer," "employee," and "commerce" are of broad and comprehensive scope.[57]

This same reasoning would seem to apply to 28 U.S.C. 1738 (1970), thus making it mandatory for tribes to adhere to 28 U.S.C. 1738 (1970) and to afford other states and territories full faith and credit. The statute is one of general application and seeks to promote judicial economy and to improve intergovernmental relations.[58] Using the *Navajo Tribe* case, it would appear that inclusion of tribes might be permissible, at least through statutory construction.

Interestingly enough, however, the Ninth Circuit Court of Appeals came to a different conclusion when considering the Navajo Tribe as a territory for purposes of the extradition statute.[59] *In Arizona ex rel. Merrill v. Turtle,*[60] discussed earlier, the court held that Arizona had no power to extradite an Indian from the Navajo Reservation pursuant to the extradition demand of Oklahoma. Under *Turtle,* one might argue by analogy that full faith and credit, like the extradition clause and its enabling legislation, will not apply to tribes unless extended by an act of Congress.

Generally, then, the legal arguments available for urging the extension of full faith and credit to Indian tribes are inadequate. Neither the Full Faith and Credit Clause nor its enabling legislation expressly provides for the extension of the Clause to Indian tribes. Furthermore, the history of the Clause and its enabling legislation also indicates that Indian tribes were not consciously included in the full faith and credit framework. The case law defining territory is not helpful either. Likewise, the case law on extending full faith and credit to Indian tribes is ambiguous. Consequently, because no legal theory is sufficiently convincing, only policy grounds remain for arguing that full faith and credit should be extended to Indian tribes.

REASONS FOR EXTENDING FULL FAITH AND CREDIT TO INDIAN TRIBES

The present relationship between states and Indian reservations is not unlike that which existed between the states in the Confederation in 1778. The mutual interests of both the states and tribes are

57. *Id.* at 165, footnote 4.
58. A. Von Mehren & D. Trautman, The Law of Multistate Problems 1228-30 (1965).
59. 18 U.S.C. § 3182 (1970).
60. 413 F.2d 683 (9th Cir. 1969).

better served when the processes of resolving conflicts are institutionalized. A change in any factor may affect the application of the jurisdiction's law. This confusing jurisdictional morass often turns relatively simple problems between states into complex cases when they involve an Indian tribe and a state.[61]

With the Supreme Court's unanimous decision in *McClanahan v. Arizona State Tax Commission*,[62] which held that Arizona was without power to impose or collect taxes against an Indian living on the reservation whose income was earned from reservation sources, it is apparent the problems of defining relationships resulting from overlapping degrees of self-government of the state and the tribe will continue. Such problems will continue because *McClanahan* supports at a minimum the continuance of limited tribal self-government.

The inclusion of tribes into full faith and credit procedures is one method of alleviating some of the tension that exists between tribes and states. A large part of the tension results from barriers that jurisdiction creates to impede the normal relationship between citizens of each political entity. Full faith and credit, if mutually afforded between those entities, should alleviate some problems if only on a personal level. Tribes presently are exercising more of their residual powers; these powers are very similar to the general powers of a state or municipality and are not dependent on race. This extension of tribal power and its acceptance by the judicial, legislative, and executive branches of government mark an historic change in the position of Indian tribes in America. This would constitute an official recognition of tribal autonomy and its political permanence. Almost without exception, past policy of the United States towards Indians viewed them as a transient phenomenon. Indians were considered a temporary problem that eventually would solve itself with the Indians being absorbed into the melting pot of America. The major policy issue in America as to Indians has been aptly characterized as a dispute as to whether to civilize and then Christianize them or to Christianize first and then civilize them.[63] This view of the Indian problem has become less important. The last decade has made it apparent that Indians and Indian tribes are not going to disappear.

Because Indian tribes are here to stay, it is necessary to begin to integrate tribal governments into the permanent fabric of America.

61. For an enlightening discussion of the complexities of civil jurisdiction on Indian reservations, *see* Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 Utah L. Rev. 206.

62. 411 U.S. 164 (1973).

63. A. Berkhofer, Salvation and the Savage 5 (1972).

Extending full faith and credit to Indian tribes is a starting point for institutionalizing this process. Each entity retains a degree of self-government protected from encroachment from the others. But because of the unique status of states and tribes that has evolved, the nature of intercourse between citizens of states and tribal members is more volatile than that existing between citizens of different states. Reservations are physically within the geographic boundaries of states. Tribal members are citizens of the United States and the state in which they live. They are entitled to all the privileges and immunities of a United States citizen.[64] But, they also are entitled to certain additional privileges and protections. For example, their properties on the reservation are exempt from state taxes,[65] and income earned on the reservation is exempt from state income tax[66] and state sales tax.[67] The reservation itself is also immune from certain state regulation such as zoning laws,[68] building codes,[69] eminent domain,[70] and most importantly, from exercise of certain criminal and civil jurisdiction.[71]

The need to institutionalize the relationship between state and tribe can best be understood in the context of two cases: *Annis v. Dewey County Bank,*[72] and *State Securities, Inc. v. Anderson.*[73] In *Annis* the plaintiffs sought a permanent injunction enjoining the defendant bank and South Dakota state officials from coming on the Cheyenne River Sioux Indian Reservation to enforce a judgment obtained in a South Dakota state court against plaintiff. Plaintiff successfully argued that, although the state court may have had power to adjudicate the merits of the notes, it lacked power to enforce, on the reservation, any judgment entered by the state court. The crucial issue in the case was not whether the state court had the power to adjudicate the initial cause of action, but whether the attachment, to be successful, had to be performed on the reservation.

64. *See* Felix v. Patrick, 145 U.S. 317 (1892); Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948); Citizenship Act of 1924, Act of June 2, 1924, ch. 233, 43 Stat. 253.

65. United States v. Rickert, 188 U.S. 432 (1903).

66. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).

67. Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685 (1965).

68. *See* Snohomish County v. Seattle Disposal Co., 70 Wash.2d 668, 425 P.2d 22 (1967); 25 C.F.R. § 1.4 (1975).

69. *See* Snohomish County v. Seattle Disposal Co., 70 Wash.2d 668, 425 P.2d 22 (1967); 25 C.F.R. § 1.4 (1975).

70. *See* 25 U.S.C. §§ 311-328 (1970).

71. *See* Vollman, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict,* 22 Univ. of Kan. L. Rev. 387 (1974); Canby, *supra* note 57, and for a more theoretical discussion of civil jurisdiction, *see* Comment, *The Indian Battle for Self-Determination,* 58 Cal. L. Rev. 445 (1970).

72. 335 F. Supp. 133 (D.S.D. 1971).

73. 84 N.M. 629, 506 P.2d 786 (1973).

The Federal District Court, citing *Williams v. Lee*[74] and *Kennerly v. District Court,*[75] upheld plaintiff's claim of no state power. However, the court allowed defendant bank's counterclaim sought under the theory of pendant jurisdiction. The court admitted that by granting defendant's counterclaim it was preventing the defendant bank from suffering an out-of-pocket loss and the plaintiff from becoming unjustly enriched by being able to keep property for which he had not paid. Significantly, the court noted that "The result of granting plaintiff an injunction without granting defendant relief on his counterclaim would be to cut off credit to enrolled Indians living within the closed portion of the reservation."[76]

In *State Securities, Inc.*[77] the New Mexico Supreme Court held that the New Mexico courts could obtain personal jurisdiction over Navajo defendants by serving process on them while on the Navajo Reservation when the dispute involved a contract entered into in New Mexico. The court reasoned that to serve process on the reservation would not interfere with the Tribe's right of self-government.[78] The court based its reasoning on *Organized Village of Kake v. Egan,*[79] a Supreme Court case that said a state's disclaimer of right and title to Indian lands was a disclaimer of proprietary rather than governmental interest. The New Mexico Supreme Court found, because the state's exercise of its power to serve process was not derived from a proprietary interest, that this exercise of jurisdiction did not infringe on the right of Indians to govern themselves. Justice Montoya's dissent points out the paradoxical nature of the court's holding:

> [W]e are left in the anomolous position of allowing service of state process upon an Indian within the reservation and obtaining a judgment which, under the decided cases, cannot be enforced on the reservation.[80]

These two cases illustrate the need for some type of recognition procedure. Although some loss of tribal autonomy is implicit in institutionalizing the relationship between tribe and state, such tribal autonomy is well worth sacrificing for the benefit of Indians living on the reservation. Reservation Indians who shop in border towns, especially when they purchase goods requiring credit, usually must

74. 358 U.S. 217 (1959).
75. 400 U.S. 423 (1971).
76. 335 F. Supp. at 138.
77. 84 N.M. 629, 506 P.2d 786 (1973).
78. Williams v. Lee, 358 U.S. 217 (1959).
79. 369 U.S. 60 (1962).
80. 84 N.M. at 636, 506 P.2d at 793.

pay a premium if they are going to use the goods on the reservation, simply because they are forced to subsidize the defaults that may occur with others. If a workable system of enforcement of judgments existed, perhaps sellers' losses would decrease by supplying a means of enforcement for judgments procured against defaulting creditors. As a result, the price of credit for Indians would dramatically decrease. The federal government, at little cost, could begin to solve this problem by extending the operation of the Full Faith and Credit Clause to tribe and state. Because such extension by means of the present case law would necessarily create contradictory decisions,[81] full faith and credit should be extended to Indian tribes through congressional legislation.

THE PROBLEMS AND IMPLICATIONS OF EXTENDING FULL FAITH AND CREDIT TO INDIAN TRIBES

Although extension of full faith and credit to Indian tribes is attractive for its philosophical and practical aspects, the unique status of Indian tribes suggests that such extension may be difficult to develop into a workable system. The major problems will arise in the area of recognition of judgments rather than in choice of law.

In the choice of law area, it is clear that there is no practical, constitutional, or statutory requirement of applying foreign state laws in the forum state court if the forum has the proper jurisdictional basis for hearing the case. In a series of workman's compensation cases,[82] the Supreme Court analyzed circumstances requiring such application and concluded that full faith and credit did not compel the application of a foreign state's laws. In *Alaska Packers Ass'n v. Industrial Accident Commission* the Supreme Court found that:

> *Prima Facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon

81. Of course, if a Supreme Court case unequivocally found that Indian tribes were territories for purposes of 28 U.S.C. § 1738 (1970), then congressional action would be unnecessary to avoid confusion. Because the present case law is unclear, different courts could reach different conclusions as to the application of full faith and credit to Indian tribes. *See, e.g.*, Jim v. CIT Financial Services Corp., 87 N.M. 362, 553 P.2d 751 (1975), (holding that the Navajo Reservation is a territory for purposes of 28 U.S.C. § 1738 (1970)) and Begay v. Miller, 70 Ariz. 380, 222 P.2d 624 (1950), (expressly indicating that a Navajo divorce was not entitled to full faith and credit in Arizona).

82. *See* Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939).

> some rational basis, that of the conflicting interest involved those of the foreign state are superior to those of the forum.[83]

This holding, further refined in *Pacific Employers Ins. Co. v. Industrial Accident Commission*[84] and *Carrol v. Lanza*,[85] has effectively eliminated the need for a state to apply foreign state laws under the command of the Full Faith and Credit Clause or 28 U.S.C. § 1738 (1970). Consequently, a statutory extension of full faith and credit to Indian tribes would create no major problems in the choice of law area.

Recognition of a foreign state judgment is another matter. The opportunity for states to lawfully avoid recognizing a foreign state judgment are extremely limited. To determine how tribal courts might resist the enforcement of state judgments,[86] it is necessary to look at the grounds that states currently employ for refusing recognition of certain state court judgments. Of the various grounds available for refusing recognition of foreign state judgments, the most important here is the lack of jurisdiction of the rendering court.

In normal recognition of judgment situations between two states, the issues raised are whether the first court had personal jurisdiction over the parties[87] or whether, in actions involving in rem or quasi in rem jurisdiction, the court had jurisdiction over the res.[88] Although fewer cases raise the problem of subject matter jurisdiction,[89] it is more important to Indian law and full faith and credit. Subject matter jurisdiction, used here in its broadest sense, encompasses such restrictions as the inability to hear local actions occurring outside the court's geographical jurisdiction, actions that the state legislature has restricted it from hearing, and actions prohibited by the United States Constitution or by federal law. The various federal prohibitions on state courts are of particular importance to Indian law and full faith and credit.

Federal Prohibitions and the Problems of Subject Matter Jurisdiction

If a federal prohibition runs against a state court, then the resulting lack of subject matter jurisdiction could be raised in a tribal

83. 294 U.S. 532, 547-548 (1935).
84. 306 U.S. 493 (1939).
85. 349 U.S. 408 (1955).
86. Although it is not altogether clear that Indian tribes would resist enforcement of foreign state judgments, the case of Annis v. Dewey County Bank, 335 F. Supp. 133 (D.S.D. 1971), illustrates how the situation might arise.
87. *See* Restatement (Second) of Conflicts § § 24-55, § 104 (Rev. 1971).
88. *Id.* at § § 56-68, § 104.
89. *Id.* at § 105.

court if the holder of such a state court judgment attempted to enforce it in a tribal court. In order to understand this potential problem, a delineation of the federal prohibitions that run against state courts in connection with Indian tribes is necessary.

The first important case in this area is *Worcester v. Georgia.*[90] In striking down Georgia statutes that restricted rights of the Cherokee Nation, the Supreme Court, per Chief Justice Marshall, held that the power of Congress over Indians was plenary—all powers not taken away from the tribes by the United States still resided in the tribe. In 1959, the Supreme Court modified *Worcester* by redefining the interests to be examined in a tribe/state controversy. In *Williams v. Lee,*[91] a case involving a non-Indian seller's attempt to recover in Arizona state court for goods sold to a Navajo on the reservation, the Court formulated a new test for determining state power on an Indian reservation:

> [A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the Rights of reservation Indians to make their own laws and be ruled by them.[92]

Thus, because of this federal prohibition against state interference with tribal autonomy, the Arizona state court did not have subject matter jurisdiction over the case. More recently, the Supreme Court, in *McClanahan v. Arizona State Tax Commission,*[93] held that Indians and Indian property on an Indian reservation are not subject to state taxation except by express congressional authorization. The Court found that since Arizona could not exercise either civil or criminal jurisdiction over the tribe the State likewise lacked power to tax the tribe, its lands, or its members living on the reservation.

When these three cases are read together, the status of state jurisdictions over Indian reservations for civil matters appears to be as follows:

(1) A state may acquire general jurisdiction over a reservation only as prescribed by Congress;

(2) Lacking general jurisdiction, a state has no power to adjudicate when the issue involves Indians engaged in reservation activity;

(3) If at least one party is not an Indian, the court must inquire if the state jurisdiction asserted infringes on a tribe's right of self-government, and if so, the tribe retains exclusive jurisdiction.

Given this jurisdictional quagmire, the defense of lack of juris-

90. 31 U.S. (6 Pet.) 515 (1832).
91. 358 U.S. 217 (1958).
92. *Id.* at 220.
93. 411 U.S. 164 (1973).

diction to adjudicate actions against Indians in recognition of state judgments becomes extremely important. A tribal court could refuse to recognize a state court judgment on the grounds that the state court lacked subject matter jurisdiction. Normally, the question of subject matter jurisdiction is not so complicated in judgment recognition proceedings between states. But in the case of Indian tribes, the *Williams* infringement test presents added confusion. Because the *Williams* infringement test is susceptible to wide interpretation, a tribal court could interpret the test in such a way as to avoid recognition of a state court judgment. If a state court judgment creditor seeks to enforce a judgment on the reservation, then probably the matter adjudicated was of some tribal interest. If the tribal interest was sufficient, then the tribal court likely would find that the state court action infringed the tribe's right of self-government. This conclusion would necessarily result in finding that the state court had no subject matter jurisdiction, thus rendering the judgment unenforceable.

This confusion can be illustrated by four hypotheticals.

(1) Plaintiff is injured in State *X* by defendant's negligent act. Defendant visits State *Y* on vacation. Plaintiff goes to State *Y* and sues defendant in State *Y* court. State *Y* has proper jurisdiction since the cause of action is transitory. Because the State *Y* court had proper jurisdiction over the cause of action, plaintiff would have no trouble having his judgment enforced in State *X*. Defendant would not be able to argue that the State *Y* court lacked subject matter jurisdiction.

(2) Plaintiff is injured on Reservation *X* by defendant's negligent act. Both plaintiff and defendant are Indian residents of the reservation. Defendant takes a vaction to State *Y* which is off the reservation. Plaintiff serves defendant in State *Y* to appear in a State *Y* court. State *Y* has no jurisdiction since the cause of action is one between Indians occurring on a reservation. If State *Y* renders a judgment and plaintiff attempts to enforce it on the reservation, then defendant will be able to successfully attack the judgment on the ground that State *Y* lacked subject matter jurisdiction.

(3) Plaintiff, a non-Indian living on Reservation *X*, is injured on the reservation by the negligent act of defendant, an Indian. Defendant visits State *Y* on vacation. Plaintiff goes to State *Y* and sues defendant in State *Y* court. State *Y* may or may not have subject matter jurisdiction depending upon whether the adjudication of the suit is an infringement of the tribe's right of self-government. If State *Y* renders a judgment its enforceability on the reservation will be

questionable. If the tribal court of the reservation is a hostile forum, then it probably will not recognize the judgment.

(4) Plaintiff is injured on Reservation *X* by defendant's negligence. Both are non-Indians. Proper service is obtained on defendant by plaintiff to appear in State *Y* court. State *Y* may or may not have jurisdiction depending on the application of the *Williams* infringement test.[94] The uncertainty of the application of the *Williams* test creates corresponding uncertainty of enforceability of such a judgment in a tribal court.

These hypotheticals illustrate how enforcement of state court judgments might be thwarted even if full faith and credit for Indian tribes becomes a statutory reality. In many cases the holder of a state court judgment who wishes to have that judgment enforced on a reservation will encounter the defense of lack of subject matter jurisdiction. Additionally, the matter litigated resulting in the judgment will probably have involved matters covered by the *Williams* infringement test. As a result, many state court judgments will not be recognized by tribal courts, especially when the tribal court is the forum deciding the presence or absence of subject matter jurisdiction in the first action.

Collateral Attack of Tribal Court's Refusal Through Indian Civil Rights Act

In 1968 Congress passed the Indian Civil Rights Act,[95] which required Indian tribes to adhere to certain enumerated constitutional restraints. The motive of the Act was to insure that no American citizen would be denied certain fundamental liberties by any government within the United States.[96] The crucial part of the Act, at least as it relates to a possible method of collaterally attacking the refusal of a tribal court to recognize a state court judgment, is 25 U.S.C. § 1302 (1970), which states that:

> No Indian tribe in exercising powers of self-government shall . . . (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law . . . .

94. The Williams infringement test could possibly apply where the negligence action involved negligence per se. If defendant's negligence involved a violation of a Reservation statute, the tribe would arguably have an interest in having the action heard in tribal court. Otherwise, the ability of the tribe to govern activities on the Reservation might be thwarted.

95. 25 U.S.C. § § 1301-1341 (1970).

96. Before the passage of the Indian Civil Rights Act of 1968 the Supreme Court had found that neither the Bill of Rights nor the 14th Amendment applied to Indian tribes. *See, e.g.*, Talton v. Mayes, 163 U.S. 376 (1896).

The use of this section of the Indian Civil Rights Act as a means of collaterally attacking a tribe's refusal to enforce a judgment can best be illustrated by the following hypothetical. Plaintiff, a non-Indian, obtains a judgment against an Indian in a state court. The Indian has been properly served; consequently, there is no question as to personal jurisdiction. Also, the court is competent to hear the issues presented, or at least it would be if the dispute were between two non-Indians arising out of a transaction off the reservation. Plaintiff then takes his judgment to a tribal court and requests recognition and execution. The tribal court, because the issue in dispute under the *Williams* infringement test interferes with the tribe's right of self-government, refuses to accord the judgment full faith and credit on the grounds that the state court did not have subject matter jurisdiction. Plaintiff now has nowhere to turn; he cannot appeal because the tribe has no appellate court. And even if the tribe did have an appellate court, there would be no appeal from the tribal court of appeals to the outside. Plaintiff cannot challenge the tribe in federal court because of the tribe's general sovereign immunity.[97] Unless plaintiff can construct a civil rights argument based on a denial of due process, he is without a remedy save for the possibility of litigating the matter from the beginning in the tribal court. Therefore, the only way to challenge a tribe's refusal to enforce a state court judgment would be through filing a suit in federal court under the Indian Civil Rights Act of 1968, alleging that the tribe's failure to recognize the judgment is a violation of due process.[98]

Such a due process argument would be difficult to construct and would be completely ineffective if a federal district court were to refuse to hear such a suit against a tribe because of tribal sovereign immunity. Generally, waivers of sovereign immunity must be by Congress and must be express.[99] The courts will not imply a waiver from a jurisdictional statute[100] and will not allow circumvention of

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97. *See* notes 99-101.

98. The judgment creditor might argue two separate due process theories. First, the denial of full faith and credit deprives him of the right to have his judgment enforced under the Full Faith and Credit Clause. Second, the lack of an impartial tribunal in which to enforce his judgment deprives him of his due process right to a fair and impartial hearing. Unfortunately, there is little case law to support these theories. Only Jaster v. Currie, 198 U.S. 144 (1905), even remotely suggests that the Full Faith and Credit Clause confers a substantive constitutional right. And the right to a fair and impartial hearing is usually sustained only when there is blatant bias on the part of the judge. *See, e.g.,* In re Murchison, 349 U.S. 133 (1955).

99. Thebo v. Choctaw Tribe, 66 F. 372 (8th Cir. 1895).

100. *Id.* and Adams v. Murphy, 165 F. 304 (8th Cir. 1908).

the doctrine in suits brought against the United States as a trustee for or guardian of the Indian.[101]

More recent cases, however, have interpreted the Indian Civil Rights Act as a waiver of tribal sovereign immunity.[102] These recent cases are important because they could remove tribal sovereign immunity as a bar to suits challenging a tribal court's refusal to recognize a state court judgment. A waiver of sovereign immunity would be of no help, however, if the federal district judge hearing the action challenging a tribal court's refusal to recognize a state court judgment found that the right to have a foreign state judgment recognized under the Full Faith and Credit Clause was not a right protected by the Indian Civil Rights Act. If this were the judge's finding, which it easily could be since the question has never been litigated, then sovereign immunity would still be a bar to the suit. The possible bar of sovereign immunity illustrates the need for creating a statutory procedure for enforcing state judgments on Indian reservations.

CONCLUSION

Even if Congress were to extend the operation of the Full Faith and Credit Clause to Indian tribes through statutory enactments, as the New Mexico Supreme Court did in *Jim*, substantial problems would remain. In the recognition of judgment proceedings in a state or territory the judgment creditor has access to appellate courts if the court where he seeks enforcement refuses to enforce the foreign state judgment. Consequently, a judgment creditor usually can have a lower court's refusal reviewed by a neutral forum.

The lack of a neutral forum to review a tribal court's refusal to recognize a state court judgment is the heart of the problem. One possible means of making full faith and credit workable between tribe and state would be to provide appellate jurisdiction in a federal court for review of refusal to recognize the foreign state judgment. Such a statute might be in the following language:

> The federal district court shall have jurisdiction to review an Indian tribe's refusal to recognize a judgment of a state, territory, or tribe if that refusal is based upon a finding that the rendering court lacked jurisdiction. Such review shall be limited solely to the question of jurisdiction, and no inquiry into the merits shall be made. Upon a finding that the rendering court had proper jurisdiction, the federal court shall execute judgment.

101. Haile v. Saunooke, 246 F.2d 293 (4th Cir. 1957).

102. *See* Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967); Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85 (D. Mont. 1969); Dodge v. Nakai, 298 F. Supp. 17 (D. Ariz. 1968).

Such legislation would provide a workable and reliable recognition of judgment procedure. It would also benefit both tribes and states by institutionalizing relationships between them.