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Of Tribal Courts and "Territories" Is Full Faith and Credit Required?

WILLIAM V. VETTER*

In the last fifteen to twenty years, Indian tribal governments have become increasingly active, expanding both the nature and amount of their concerns and efforts. The number and variety of cases being heard in tribal courts are also increasing. A number of those courts are hearing cases which involve persons who are not members of the reservation tribe. Unless tribal court judgments can be enforced outside of the reservation, judgments against non-members may be useless.

Article IV, section one of the United States Constitution requires that every state give "Full Faith and Credit" to the public acts, records and judicial proceedings of other states. Acts of Congress implementing that provision have extended its requirements and benefits to other governments associated with the United States. If Indian tribal governments and courts are not entities to which that full faith and credit provision applies, tribal court judgments will only be enforceable through application of the principles of comity, a theory which allows an examination of both the rendering court and the procedures it employs.

To date, very few state or tribal courts have taken a position concerning the applicability of the full faith and credit requirements to Indian tribal governments or courts. As tribal court activity increases and expands into new areas, it is probable that state courts throughout the nation will eventually need to decide that issue.

INTRODUCTION

The practice of keeping the prior inhabitants of North America separate from the immigrating Europeans was well-established before the American Revolution. Indians were treated, legally, politically and socially, as separate from the white settlers.¹ Despite

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1. That the non-Caucasian peoples who had immigrated to the American continents thousands of years before 1492 became known as "Indians" because of Christopher Columbus' understandable mistake is well known. While there have been suggestions to change that identification to "Amerindian" or "Native American" or some similar "less incorrect" term, "Indian" remains the accepted legal and general appellation and the term used in federal statutes. Similarly, the term "white" man is used to denote the later immigrants

that separation, the white man's law was applied to Indians through treaties, the then-contemporary "international law" with regard to governmental relations with them and the regulation of white men's activities. Perhaps both less substantial and more influential was that white men brought with them a set of traditions, concepts and beliefs containing a view of "reality" which had developed over centuries and under conditions totally alien to the New World's inhabitants. Post-fifteenth century discoveries and experience had a radically modifying impact, but the European world-view remained the base on which the new American civilization was built.

By the time Chief Justice John Marshall wrote his opinions laying the foundation of United States law regarding Indians,² it was accepted ideology that Indians and whites could not intermingle in harmony.³ Indians were viewed as having, and comprising, political "nations" separate from whites, but subject to the mandates of "natural," that is European, legal principles.

Through the more than one hundred fifty years since Marshall's pronouncements, United States Indian law⁴ has changed in a number of ways. However, the premise of separate Indian nations with the power, authority and right to make and be ruled by their own laws has not been abandoned.⁵ The past quarter-century has witnessed a renewed interest in, and insistence on, Indian tribal self-determination and self-government. Ironically, one result has been Indian establishment of European-style governments and governmental institutions. The informal social controls of communal tribal living are giving way to formal laws, written by legislative and executive bodies and enforced by judicial tribunals.⁶

The model for this development, of course, has been the governmental institutions of the now-dominant "western" society. Therefore, not surprisingly, an increasing percentage of Indian governments are asserting powers akin, if not identical, to those exercised by non-Indian state and local governments, claiming le-

and their descendants despite the fact that that term is often used pejoratively and that many of that group were and are black or brown. No offense is intended by the author in the use of any of these terms.

2. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

3. See, e.g., *McIntosh*, 22 U.S. (8 Wheat.) at 590-91.

4. "Indian law" has become the generally accepted label for the law of the United States which has particular application to Indian individuals and tribes. This is primarily a body of federal law. See F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 1 (1982 ed.) [hereinafter COHEN—1982].

5. See, e.g., *United States v. Wheeler*, 435 U.S. 313 (1978); *Williams v. Lee*, 358 U.S. 217 (1959).

6. See, e.g., *NAVAJO TRIB. CODE*.

gal control over all persons and events within the geographic boundaries established for them by the predominant polity. One aspect of that assertion is the exercise of, or the attempt to exercise, civil judicial power over non-Indians with respect to all acts and events that occur on the reservation.⁷ Such assertions will inevitably result in tribal courts' entry of judgments against persons who are not members of the reservation tribe, including persons who neither reside nor own property located on the reservation. Like courts of any other jurisdiction, tribal courts cannot enforce their judgments *per se* beyond the geographic boundaries of their jurisdiction.

One of the significant problems which would be created by a conclusion that tribal courts do have nonconsensual jurisdiction over nonmembers is the enforceability of tribal court judgments. In *National Farmers Union Insurance Co. v. Crow Tribe of Indians*,⁸ the nonconsenting, nonmember defendant owned personal property located on the reservation which was attached to satisfy the default judgment. That will not always be true. For example, if a nonmember merely driving through a reservation is responsible for an automobile accident with a member or other nonmember, if personal jurisdiction is obtained⁹ and a judgment is entered by the tribal court, there would be no leviable property on the reservation.¹⁰

7. Whether such exercise exceeds the rationale underlying Indian tribal authority is beyond the scope of this Article. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court held that the exercise of *criminal* jurisdiction over non-Indians is inconsistent with the tribes' "dependent" status and therefore such jurisdiction can be asserted only on the express permission of Congress.

A related question, also beyond the scope of this Article, is whether the invocation of tribal court jurisdiction prevents the exercise of jurisdiction over the same parties and subject matter by the state or federal courts. *See, e.g., In re Marriage of Limpy*, 195 Mont. 314, 636 P.2d 266 (1981); *County of Vilas v. Chapman*, 122 Wis. 2d 211, 361 N.W.2d 699 (1985).

8. 475 U.S. 845 (1985).

9. It would not be unreasonable to assume that tribal governments would enact long arm statutes similar to those of the states.

10. It would seem that the Indian Civil Rights Act, particularly title II, § 202 (25 U.S.C. § 1302(8) (1982)), would preclude prejudgment attachment to same extent it is precluded to states by fourteenth amendment due process requirements. Section 202 provides that "[n]o tribe exercising powers of self-government shall— . . . (8) . . . deprive any person of liberty or property without due process of law." *See Johnson v. Lower Elwha Tribal Community of Lower Elwha Indian Reservation*, 484 F.2d 200 (9th Cir. 1973) (hearing required before deprivation of reservation land assignment). *But see R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 509 F. Supp. 933 (D. Mont. 1981) (no federal court remedy for summary attachment by tribal court without jurisdiction or a meaningful prejudgment hearing).

If, however, tribal court judgments are not afforded full faith and credit, the special circumstances surrounding an action against a temporarily present, nonmember defendant arguably should allow prejudgment seizure of property, a bond posting requirement or some other measure to assure satisfaction of any judgment which may be later rendered.

If tribal court judgments are entitled to full faith and credit in the same manner as state court judgments, the absence of on-reservation property would pose no greater obstacle than does the absence of in-state property in the event of a state court judgment. However, it is doubtful that many courts—state, tribal or federal—will conclude that they are *required* to apply the full faith and credit implementing statute¹¹ to Indian tribes or tribal court judgments.

The full faith and credit clause of the United States Constitution,¹² which applies only to the states, authorizes Congress to adopt implementing legislation. Congress first did so in 1790¹³ but made references to no governments other than those of the states. By 1804, when Congress supplemented the 1790 Act, the geographic and political situation of the new nation had changed drastically. Non-Indian settlement had spread westward. A number of new political entities had been created, most labeled “territories” and intended to become states. The vast expanse of the Louisiana Purchase had just been added to the political domain. In response to the changing situation,¹⁴ the 1804 implementing legislation added “territories of the United States and countries subject to the jurisdiction of the United States” to the entities which must give, and whose acts must be given, full faith and credit.¹⁵

Any such provision should also require that the defendant be reimbursed for any associated costs in the event he prevails in the action. The result might be the necessity of purchasing temporary insurance, such as when driving one's own automobile into Mexico, whenever driving through a reservation.

11. 28 U.S.C. § 1738 (1982).

12. U.S. CONST. art. IV, § 1 states: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”

13. Act of May 26, 1790, ch. 11, 1 Stat. 122. That act states:

Be it enacted . . . That the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and judicial proceedings of the courts of any state, [sic] shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings authenticated as aforesaid, [sic] shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.

14. It was, no doubt, obvious to members of Congress by 1804 that the United States would continue to expand. Consequently, their enactments were probably intended to be flexible enough to accommodate that expansion.

15. Act of Mar. 27, 1804, ch. 56, 2 Stat. 298. Section 2 of that act states: [A]ll of the provisions of this act, and the act to which this is a supplement, shall apply as well to the public acts, records, office books, judicial proceedings, courts and offices of the respective territories of the United States, and countries subject

Between 1804 and 1948, the political domain of the United States changed significantly and on a number of occasions including the addition of Texas, the cession of the Southwest and California by Mexico, the negotiation of the northern boundary of the Oregon Country, the purchase of Alaska and the Virgin Islands and, for varying lengths of time, the cession of the Philippines, Cuba and Puerto Rico by Spain. The continental United States was transformed from sparsely inhabited "Indian country" into fifty states and a number of associated polities, resulting in the emergence of a preeminent world power. However, during that same period, the terminology of the full faith and credit implementing statute did not change.

With what have been called minor changes,¹⁶ the 1804 Act remains in effect today at sections 1738 and 1739 of title 28 of the United States Code. Section 1738, applicable to court judgments, states in part:

Such Acts, records and judicial proceedings [of any State, Territory, or Possession of the United States] . . . 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 the State, Territory or Possession from which they are taken.¹⁷

Since they are not otherwise mentioned, section 1738 applies to Indian tribes only if they are "territories or possessions" of the United States within the meaning of that statute. State and federal court decisions concerning that issue are conflicting. A dearth of legislative history exacerbates the problem.¹⁸

to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, courts and offices of the several states.

16. See *infra* notes 175-78 and accompanying text.

17. 28 U.S.C. § 1738 (1982).

18. With respect to the legislative history of the 1804 Act, see Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33, 61 (1957).

The amending of the implementing statute was suggested in the House of Representatives in November, 1803. 13 ANNALS OF CONG. 554 (1852). The matter came before the House on a number of occasions (*see id.* at 555, 625, 979, 1226-27), but only the title of the legislation was recorded and the debate was limited: On November 11, 1803, "[a]fter considerable discussion, developing much diversity of opinion . . . the bill was recommitted to a select committee of nine members." *Id.* at 625. "After some time spent thereon, the bill was reported [passed] without amendment . . ." *Id.* at 1227. In the Senate, the bill passed by the House was "read" three times over a four day period at the end of the session (March 24 through March 27, 1804, inclusive) and passed, apparently without discussion. *Id.* at 299-300, 304, 306.

With respect to the legislative history of the 1948 Judicial Code revisions, see Nadelmann, *supra*, at 81-82. "Neither [the Chairman on the Committee on Revision] nor any one else mentioned the changes in the provisions derived from the Acts of Congress in 1790 or 1804. Nor were these changes mentioned in the debates of Congress." *Id.* at 82.

The courts have been forced to determine which entities or areas associated with the United States are included in the 1804 or 1948 Acts' language. Those few decisions which deal with the issue provide very little support for a conclusion that Indian tribes are included in section 1738. Moreover, the actions of Congress, testimony before congressional committees and executive department pronouncements fail to support such a conclusion.

I. "TERRITORY" IN THE COURTS

A. Indian Tribes as "Territories"

1. Federal Decisions

An 1856 Supreme Court decision¹⁹ and a series of decisions by the Eighth Circuit Court of Appeals in the 1890's²⁰ have been interpreted as deciding that, at least at that time, decisions of the courts of the "Five Civilized Tribes"²¹ were binding on federal courts. In contrast, the majority of the more recent state court decisions have not found that they are required to give full faith and credit to Indian tribal court judgments.²² With few exceptions, the decisions which find in favor of full faith and credit either are specifically required to do so by federal statute²³ or concern tribal court decisions on matters traditionally within exclusive tribal jurisdiction.²⁴

Modern cases provide only superficial support for the conclusion that full faith and credit must be accorded to tribal court judgments. The only contemporary Supreme Court mention of the subject is in *Santa Clara Pueblo v. Martinez*,²⁵ which is typical of the manner in which this issue has been handled by the courts. At the end of a footnote supplying data concerning the number of tribal courts and the cases they heard in 1973, the Court gratuitously added:

Judgments of tribal courts, as to matters properly within their

19. *United States ex rel. Mackey v. Coxe*, 59 U.S. (18 How.) 100 (1856).

20. *Raymond v. Raymond*, 83 F. 721 (8th Cir. 1897); *Cornells v. Shannon*, 63 F. 305 (8th Cir. 1894); *Standley v. Roberts*, 59 F. 836 (8th Cir. 1894); *Exendine v. Pore*, 56 F. 777 (8th Cir. 1893); *Mehlin v. Ice*, 56 F. 12 (8th Cir. 1893).

21. The Cherokee, Chickasaw, Choctaw, Creek and Seminole tribes were often collectively labeled the "Five Civilized Tribes" or "Nations" even in federal legislation, possibly to distinguish them from other tribes, such as the Sioux, Navajo, Apache and others which were still, at that time, actively engaged in preserving their traditional way of life.

22. See *infra* Part I. A. 2.

23. See, e.g., the Indian Child Welfare Act, 25 U.S.C. § 1911(d) (1982).

24. See *Sheppard v. Sheppard*, 104 Idaho 1, 7-8, 655 P.2d 895, 901-02 (1982) (adoption of Indian child; tribal adoption order before Indian Child Welfare Act adopted, state court decision after); *In re Buehl*, 87 Wash. 2d 649, 555 P.2d 1334 (1976).

25. 436 U.S. 49 (1978).

jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts. *See, e.g., United States ex rel. Mackey v. Coxe*, [59 U.S.] 18 How. 100 (1856); *Standley v. Roberts*, 59 F. 836, 845 (CA8 1894), appeal dismissed, 17 S. Ct. 999, 41 L. Ed. 1177 (1896).²⁶

The mention of full faith and credit in the *Martinez* footnote is obviously dicta.

All of the cases, including *Martinez*, stating that Indian tribes or their courts are entitled to full faith and credit rely, directly or indirectly—and without critical examination—on *United States ex rel. Mackey v. Coxe*.²⁷ The Supreme Court's statements concerning full faith and credit in *Mackey* both are dicta and do not relate to, nor consider, the full faith and credit clause of the Constitution or its implementing statutes.

Mackey originated in the District of Columbia court as a proceeding to collect on a performance bond which had been posted to allow the commencement of an ancillary probate proceeding in that court. The plaintiffs were heirs of a Cherokee citizen and had been appointed administrators of the estate by the Cherokee Tribal Court. The ancillary proceeding had been commenced by a Mr. Raines, the attorney-in-fact for the heirs. The Court's discussion of the faith and credit to be given to the Cherokee court appointment related to an 1812 act²⁸ which authorized an executor qualified in any "state or territory" to bring certain actions in the District of Columbia courts without first qualifying as executor, that is, without commencing an ancillary probate.²⁹ Despite the Court's statements concerning the lack of any necessity therefor, Raines had commenced ancillary proceedings in the District of Columbia because the United States Treasury Department had refused to pay him money owed to the decedent until he had done so.³⁰ Raines had eventually received the money as ancillary administrator and transferred it to himself as attorney-in-fact for the

26. *Id.* at 66 n.21. Neither the footnote as a whole, nor the part quoted, have any significant relationship to the issue in the case: whether a federal cause of action other than habeas corpus is available to enforce the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1982). If tribal courts were, by statute, entitled to full faith and credit, the "in some circumstances" language in *Martinez* would be inappropriate.

27. 59 U.S. (18 How.) 100 (1856).

28. Act of June 24, 1812, ch. 106, § 11, 2 Stat. 755.

29. *Mackey*, 59 U.S. (18 How.) at 102-03.

30. *Id.* at 101. The Court stated:

Under this law [section 11 of the 1812 Act] the money due to Mackey might have been paid, and, indeed, should have been paid, to Raines, the attorney in fact of the administrators of Mackey. But, through abundant caution, letters of administration were required to be taken out in this District, as a prerequisite to the payment of the money by the treasury department.

Id. at 103.

heirs. If those ancillary proceedings had not been commenced, there would have been no performance bond and the matter actually before the Court could never have been brought.

The actual dispositive of the case, to which the discussion of full faith and credit to be given tribal courts was irrelevant, was:

Under the circumstances, it would be a hardship fraught with injustice, to hold the defendant liable as surety on the administration bond. Raines was the confidential agent of the administrators of Mackey—the money was placed in his hands, under full authority to receive it. It has never been paid over, it is said, by reason of the bursting of a boiler, by which Raines lost his life and the money which he had received. But whether this be true or not, the money went into the hands of Raines, who was the agent of the administrators, duly authorized to receive it; and we think, under the peculiar circumstances of the case, the defendant [surety] was thereby discharged. . . . The parties are estopped from denying the agency of Raines.³¹

Even if the full faith and credit discussion in *Mackey* were not dicta, it would not support a conclusion that tribal court judgments are entitled to recognition under section 1738. The statute to which the Court made reference was the eleventh of sixteen sections of an act dealing with the authority and procedures of the courts of the District of Columbia.³² That section had the limited purpose of allowing an executor, qualified in a decedent's domicile, to bring an action in the District of Columbia courts without the expense and trouble of commencing ancillary proceedings.³³ The very limited effect of that section, and the very localized nature of and purpose for the entire act, are substantially different from, and much less significant than, any act implementing the Constitution's full faith and credit clause. The District of Columbia court was the only government office or agency which was affected by the act. The statute had no effect whatsoever on the actions or proceedings of any court or other agency of any state, territory or other jurisdiction.

31. *Id.* at 104-05.

32. Act of June 24, 1812, ch. 106, 2 Stat. 755-59. That act coordinated the laws applicable in the "County of Alexandria" (previously ceded by Virginia) and the "County of Washington" (previously ceded by Maryland). Under the provisions of the act accepting the cessions from the two states (Act of Feb. 27, 1801, ch. 15, 2 Stat. 103), the laws in the two "counties" were previously those of the ceding state. The Act is properly characterized as "state" or "local" law for Washington, D.C., rather than federal law of general application. For example, § nine made it possible for a resident of Alexandria to move his slaves to Washington without surrendering any property rights. *Lee v. Lee*, 33 U.S. (8 Pet.) 44, 49 (1834).

33. Since, by treaty, the Cherokee Nation had exclusive jurisdiction over tribal and tribal members' property matters, no other court, whether state or territorial, had original probate jurisdiction and therefore no other probate proceedings could have been brought. See Treaty of March 14, 1835, art. 5 (quoted in *Mackey*, 59 U.S. (18 How.) at 102).

In *Standley v. Roberts*,³⁴ the other case cited in the *Martinez* footnote, the Eighth Circuit Court of Appeals discussed whether the federal district court should have enjoined the execution of a Choctaw tribal court judgment involving the same parties and subject matter as before the district court. All parties to the tribal court action were citizens of the Choctaw nation. A then recent federal statute³⁵ provided that the Choctaw courts had exclusive jurisdiction over matters between its citizens and arising within the reservation.³⁶ The substance of *Standley* was that no cause of action had been alleged against the relevant parties and therefore the federal district court should have dismissed the action without regard to the Choctaw action or the status of Choctaw courts.³⁷ Therefore, it was pure dicta when the Eighth Circuit stated: "[T]his court has held that judgments of the courts of these 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."³⁸

Mehlin v. Ice,³⁹ the case relied on in the *Standley* dicta and in subsequent similar decisions, was an ejectment action initiated in the United States District Court for the Indian Territory by Ice against Mehlin and others (all defendants were members of the Cherokee Nation) to recover possession of a one hundred thirty acre parcel of land within the boundaries of the Cherokee Reservation. Mehlin had come into possession of the parcel through a preceding, similar action he had brought in a Cherokee district court. Ice had been given adequate notice of the tribal court action and had made a general appearance; a two day hearing was then held during which Ice defended on the merits.⁴⁰ The tribal court entered a judgment and issued a writ of ejectment in Mehlin's favor.⁴¹ That writ was executed by a Cherokee Nation district sheriff, assisted by Mehlin and the other defendants in the federal court action. The Eighth Circuit Court of Appeals held that by generally appearing and actively defending, Ice had

34. 59 F. 836 (8th Cir. 1894), *appeal dismissed*, 17 S. Ct. 999.

35. Act of May 2, 1890, ch. 182, 26 Stat. 81 (*quoted in part in Standley*, 59 F. at 845).

36. *Standley*, 59 F. at 845.

37. *Id.*

38. *Id.* (citing *Mehlin v. Ice*, 56 F. 12 (8th Cir. 1893)). Two other Eighth Circuit cases decided by the same three judges also rely on *Mehlin*: *Cornells v. Shannon*, 63 F. 305 (8th Cir. 1894); *Exendine v. Pore*, 56 F. 777 (8th Cir. 1893). Neither of those cases discussed the basis for their statements further than citing *Mehlin*. See also *Raymond v. Raymond*, 83 F. 721 (8th Cir. 1897).

39. 56 F. 12 (8th Cir. 1893).

40. *Id.* at 13-14.

41. *Id.* Ice brought the action in federal court fifteen months after the tribal court issued its writ of ejectment.

waived any objection to tribal court jurisdiction over his person⁴² and that the tribal court unquestionably had subject matter jurisdiction pursuant to a treaty between the Cherokee Nation and the United States.⁴³ The court's quotation from *Mackey*,⁴⁴ and its discussion of full faith and credit⁴⁵ in general, was unnecessary to the decision.⁴⁶ Modern Eighth Circuit Court of Appeals decisions have not followed the *Mehlin* line of cases. Decided in 1977, *Conroy v. Frizzell*⁴⁷ was a racial and sexual discrimination action brought under 42 U.S.C. section 1985(3). In its decision, the district court

42. *Id.* at 19-20.

43. *Id.* at 17 (citing Treaty of July 19, 1866, 14 Stat. 799). That treaty had reestablished the relationship between the United States and the Cherokee Nation following the latter's joining with the Confederate States during the Civil War. One result of that treaty was that the lands placed under tribal control were reduced by about one half.

44. The court's actual consideration of *Mackey* was superficial. It stated that in *Mackey*, "it became necessary to determine the validity of these letters [of administration issued by the Cherokee court], and the faith and credit due to them." *Mehlin*, 56 F. at 18. The court then proceeded with a long quote from *Mackey* which included the sentence: "No question could arise as to the validity of the Cherokee law under which letters of administration were granted . . ." *Id.* at 19 (quoting *Mackey*, 59 U.S. (18 How.) at 104).

The court apparently did not notice the contradiction between its own statements and those quoted. The *Mehlin* decision did not discuss the differences between the 1812 Act involved in *Mackey* and general full faith and credit considerations. Nor did *Mehlin* consider the fact that the *Mackey* discussion was limited to the status of the Cherokee Nation for the narrow, local purposes of the 1812 Act.

45. The court stated in *Mehlin*: "The proceedings and judgments of the courts of the Cherokee Nation in cases within their jurisdiction are on the same footing with proceedings and judgments of the courts of the territories of the Union, and are entitled to the same faith and credit." *Mehlin*, 56 F. at 19. The circuit court did *not* say that (1) Indian tribes were "territories" for the purpose of the full faith and credit implementing statute; or (2) that conclusion was required by any provision of United States constitutional or statutory law.

46. The "faith and credit" discussion arguably was necessary for application of the doctrine of *res judicata* to the tribal court decision. However, as expressly noted in *Mehlin*, a series of treaties between the United States and the Cherokee Nation conferred on the Cherokee judicial tribunals "'exclusive jurisdiction in all civil and criminal cases arising within their country'" to which only tribal members are parties. *Id.* at 17 (quoting Treaty of July 19, 1866, art. 13, 14 Stat. 799) (emphasis added). The United States was bound by that treaty, not by the full faith and credit statute, to recognize judgments of the Cherokee courts.

Exendine v. Pore, 56 F. 777 (8th Cir. 1893), decided three weeks after *Mehlin*, presented an identical factual and procedural situation, only the names and the dates were changed, and was perfunctorily disposed of by a citation to *Mehlin*. *Id.* at 778.

Cornells v. Shannon, 63 F. 305 (8th Cir. 1894), was the last of the line of cases (*Mehlin*, *Exendine*, *Standley* and *Cornells*) decided by the same panel of judges, Circuit Judges Caldwell and Sanborn and District Judge Thayer. All of the opinions except *Standley*, which was written by Judge Sanborn, were written by Judge Caldwell. Two of those three judges participated in *Raymond v. Raymond*, 83 F. 721 (8th Cir. 1897).

In two other cases sometimes cited as being a continuation of that series, *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), and *Hayes v. Barringer*, 168 F. 221 (8th Cir. 1908), the offhand mention of full faith and credit and citation to *Mehlin* were equally irrelevant to the issues before the court.

47. 429 F. Supp. 918 (D.S.D. 1977), *aff'd sub nom.* *Conroy v. Conroy*, 575 F.2d 175 (8th Cir. 1978).

quoted from the 1897 *Raymond v. Raymond* decision,⁴⁸ including its statement concerning the faith and credit accorded to tribal divorce decrees.⁴⁹ However, the issue in *Conroy* was whether the Oglala Tribal Court had the authority, in a divorce action between tribal members, to order a transfer of an interest in trust lands from one member to another.⁵⁰ Whether such an order is required to be given faith and credit was *not* an issue. In affirming the district court's judgment, the Eighth Circuit Court of Appeals was very careful to limit the scope of its decision, stating:

We do not here paint with a broad brush. The question of property settlement, if any, upon divorce granted in Tribal Court, is one of first impression and no authority thereon is cited to us, pro or con. We rule narrowly upon the property division made, having in mind the various interests to be considered. . . .

The result sought by the defendant is grossly at variance with the modern aim, so far as feasible within constitutional and statutory limitations, of giving the Indians "[t]he control of their own affairs and of their own property.[]"⁵¹

In *Conroy*, the court properly said nothing about the faith and credit to be given to the tribal decree.⁵²

2. State Decisions

The more recent state court decisions which hold that Indian tribes are "territories" within section 1738 continue the uncritical reliance on *Mackey* and *Mehlin*, sometimes adding a superficial analogy to Puerto Rico. The most cited recent case is *Jim v. CIT Financial Services Corp.*,⁵³ an action in the New Mexico courts attempting to collect a penalty imposed by Navajo statute for failure to comply with Navajo-prescribed repossession procedures. In a terse opinion, the New Mexico Supreme Court reversed the ap-

48. 83 F. 721 (8th Cir. 1897).

49. The district court stated: "[A]n Indian tribe 'may maintain its own judicial tribunals, and their judgments and decrees upon the rights of the persons and property of members of the [tribe] as against each other are entitled to all the faith and credit accorded to the judgments of territorial courts.'"

Conroy, 429 F. Supp. at 927 (quoting *Raymond*, 83 F. at 722).

50. *Conroy*, 429 F. Supp. at 924-28.

51. *Id.* at 183 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting Sen. Wheeler speaking of the Indian Reorganization Act, 78 CONG. REC. 11,125 (1934))) (footnotes omitted).

52. Again in 1981, the Eighth Circuit Court of Appeals did not take the opportunity to resurrect the *Mehlin* line of cases. In a footnote in *Davis v. Mueller*, 643 F.2d 521, 526 n.9 (8th Cir. 1981), *cert. denied*, 454 U.S. 892 (1981), the court stated: "While it is clear that tribal reservation sovereignty is not congruent with state sovereignty, such sovereignty as the tribes do possess is entitled to recognition and respect by both state and federal governments."

53. 87 N.M. 362, 533 P.2d 751 (1975), *rev'g* 86 N.M. 784, 527 P.2d 1222 (Ct. App. 1974) (Herandez, J., dissenting).

pellate court's divided opinion, expressly agreed with that part of Appellate Court Judge Hernandez' dissent concerning the status of the Navajo Tribe as a "territory" under section 1738,⁵⁴ but disagreed with Judge Hernandez' result.⁵⁵ Judge Hernandez' opinion rests on three points: (1) a long quotation of the dicta in *Mackey* comparing the Cherokee Nation to "other territories of the Union"; (2) citing *Americana of Puerto Rico, Inc. v. Kaplus*,⁵⁶ the legal conclusion that the term "territories" does not have a fixed and technical meaning; and (3) citing no similar decision as authority, the assertion that "the status and legal character of the Navajo Tribe is analogous to that of the Commonwealth of Puerto Rico."⁵⁷ While the second of those propositions is almost unanimously conceded, the first and third do not provide adequate support for the result reached.⁵⁸

Other state court decisions granting full faith and credit to Indian tribes rely solely on *Jim*, on the cases relied on in *Jim* or on some combination of *Jim* and the authorities it cites.⁵⁹ The analysis in those other decisions is, for the most part, superficial or non-existent.⁶⁰ To date, the cases do not provide solid support for the conclusion that Indian tribes are entitled to full faith and credit under section 1738 or its predecessors. The majority of the state court decisions considering the issue conclude that there is no full faith and credit requirement.

54. 86 N.M. at 789-91, 527 P.2d at 1227-30 (Hernandez, J., dissenting).

55. The ultimate decision by the New Mexico Supreme Court was to remand the case to the trial court for a determination of whether the parties had made a choice of law agreement as a part of the conditional sales contract which lay at the bottom of the entire proceedings but which was not a part of the record on appeal. 87 N.M. at 363, 533 P.2d at 753.

56. 368 F.2d 431 (3d Cir. 1966). See *infra* notes 128-36 and accompanying text for a discussion of *Americana of Puerto Rico, Inc. v. Kaplus*.

57. *Jim*, 86 N.M., at 789-90, 527 P.2d at 1228.

58. For a discussion of *Mackey*, see *supra* notes 27-33 and accompanying text. For a comparison of Puerto Rico and other acknowledged "territories," see *infra* Part I. C.

59. See *Sheppard v. Sheppard*, 104 Idaho 1, 655 P.2d 895, (1982); *Chischilly v. G.M.A.C.*, 96 N.M. 264, 629 P.2d 340 (Ct. App. 1980), *rev'd on other grounds*, 96 N.M. 113, 628 P.2d 683 (1981); *In re Buehl*, 87 Wash. 2d 649, 555 P.2d 1334 (1976). *But cf.* *Queets Band of Indians v. State*, 102 Wash. 2d 1, 682 P.2d 909 (1984) (Indian tribes are *not* a "state or territory" for purposes of reciprocity under Washington's automobile licensing statute). Compare that case with *Red Lake Band of Chippewa v. State*, 311 Minn. 241, 248 N.W.2d 722 (1976) (Indian tribe, entitled to reciprocity under Minnesota's automobile licensing statutes to prevent dilution of governmental power, is not specifically a "territory").

60. For example, in *Sheppard v. Sheppard*, 104 Idaho 1, 8 n.2, 655 P.2d 895, 902 n.2 (1982), one significant consideration seems to have been the court's desire to convince the Shoshone-Bannock Appellate Court to revise its earlier holding concerning § 1738 and foster a "good working relationship between state and tribal courts." *But cf.* *Fisher v. Fisher*, 104 Idaho 68, 656 P.2d 129 (1982) (state court has jurisdiction, in a divorce action, to require the tribal-member party to pay the nonmember party the value of community interest in lands and rights which could be possessed or used only by a tribal member).

The Arizona courts have decided a series of cases relating to the issue, culminating with *Brown v. Babbitt Ford, Inc.*⁶¹ In 1950, *Begay v. Miller*⁶² considered whether the divorce of two tribal members granted by the Court of Indian Offenses for the Navajo Indians was valid in Arizona. The court concluded that the Navajo divorce should be recognized "because of the general rule, call it by whatever name you will, that a divorce valid by the law where it is granted is recognized as valid everywhere."⁶³ The court also held that (1) the Navajo decree was *not* entitled to full faith and credit under the United States Constitution because the Navajo tribe was not a state; and (2) recognition was also not available under comity principles, which apply only between independent sovereign nations, because the Navajo tribe was not recognized as such a nation.⁶⁴

The enforceability of Navajo court orders came before the Arizona court again in 1962. *In re Estate of Lynch*⁶⁵ considered whether a will admitted to probate in the Navajo Tribal Court must be admitted in Arizona courts without inquiry into its execution. Based on an Arizona statute requiring a will be so admitted if it had previously been admitted in "another state or country",⁶⁶ the court found in favor of admission of the Navajo-probated will.⁶⁷ *Lynch* has been characterized as a "retreat" and as "backpedaling" from *Begay* "toward comity".⁶⁸ However, the difference between the two decisions is more apparent than real and is based on an intervening Supreme Court decision⁶⁹ establishing the Navajo tribe as a "separate jurisdiction from Arizona courts"⁷⁰ and a state statute (similar to that discussed in the *Mackey dicta*) directly related to the issue.⁷¹

61. 117 Ariz. 192, 571 P.2d 689 (Ct. App. 1977). A petition for review by the Arizona Supreme Court was denied. *Id.*

62. 70 Ariz. 380, 222 P.2d 624 (1950).

63. *Id.* at 386, 222 P.2d at 628.

64. *Id.* So far as it goes, the *Begay* decision was correct based on prior decisions concerning the dependent status of Indian tribes, including *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). *Begay* did not consider whether the Navajo Tribe was a "territory" under § 1738.

65. 92 Ariz. 354, 377 P.2d 199 (1962).

66. ARIZ. REV. STAT. ANN. § 14-343 (now codified at ARIZ. REV. STAT. ANN. § 14-3303 (Supp. 1986)).

67. *Lynch*, 92 Ariz. at 357, 377 P.2d at 201.

68. See Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M.L. REV. 133, 138-39 (1977).

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

70. *Lynch*, 92 Ariz. at 357, 377 P.2d at 201.

71. The Arizona statute is very similar to, and has the same purpose as, the 1812 statute involved in *Mackey*. *Lynch* reached the result *Mackey* proposed as correct. Such statutes appear to be fairly common provisions in state probate codes. See, e.g., N.M. STAT. ANN. §§ 45-4-204 & 45-4-205 (1978 & Supp. 1986); UNIF. PROBATE CODE §§ 4-204 & 4-

With that background, *Brown v. Babbitt Ford, Inc.*⁷² came before the Arizona Court of Appeals in 1977. *Brown* was an action to recover the civil penalties provided by Navajo Tribal law for violation of the Navajo Tribal repossession laws, the same provisions that were considered by the New Mexico courts in *Jim v. CIT Financial Services Corp.*⁷³ The Arizona Court of Appeals held that the Navajo Tribe is not a "territory" or "possession" of the United States within the meaning of section 1738 and therefore the courts of Arizona are not required to give full faith and credit to enactments of the Navajo Tribal Council.⁷⁴ In reaching that decision, the court considered and rejected the reasoning of *Mackey* and *Jim*. *Mackey* was distinguished on the basis that it was not concerned with the predecessor of section 1738, but with the 1812 statute.⁷⁵ The Arizona court concluded that *Jim* ignored the historical development of, and legal concepts associated with, both territories of the United States and the relationship between the United States and the Indian tribes.⁷⁶

Based on early legislation, including Continental Congress resolutions, the Constitution and early court decisions, the Arizona court concluded that "the concept 'territory' embraced land belonging to the United States which had not yet achieved the status of independent sovereign states."⁷⁷ In contrast, according to the court, Indian country did not "belong to" the United States, but was the "home of the Indians."⁷⁸

The arguments supporting the *Brown* decision have weaknesses. These arguments are articulated in terms of the "ownership" of the land occupied by the Indians, that is, that since title did not "belong to" the United States, those lands were not territories. The court said: "In essence, Indian country did not 'belong to' the United States and thus by definition could not fall within the U.S.

205 (1974).

72. 117 Ariz. 192, 571 P.2d 689 (Ct. App. 1977).

73. See discussion of *Jim*, *supra* notes 53-58 and accompanying text. *Jim* (New Mexico) and *Brown* (Arizona) reached opposing results concerning the status of the Navajo tribe under § 1738. A part of the Navajo Reservation lies in each state. See also Note, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397 (1985); Comment, *Conflicts Between State and Tribal Law: The Application of Full Faith and Credit Legislation to Indian Tribes*, 1981 ARIZ. ST. L.J. 801; Note, *Arizona Appellate Decisions—Indian Law: The Application of Full Faith and Credit to Indian Nations*, 20 ARIZ. L. REV. 1064 (1978); Ragsdale, *supra* note 68.

74. *Brown*, 117 Ariz. at 197, 571 P.2d at 694.

75. *Id.* at 195-96, 571 P.2d at 692-93. See discussion of *Mackey*, *supra* notes 27-33 and accompanying text.

76. *Brown*, 117 Ariz. at 196, 571 P.2d at 693.

77. *Id.*

78. *Id.* at 196-97, 571 P.2d at 693. The court placed significant reliance on *Ex parte Morgan*, 20 F. 298 (W.D. Ark. 1883). See *infra* notes 91-98 and accompanying text for a discussion of *Ex parte Morgan*.

Const. art. IV, § 3, authorizing Congress to deal with territories, and thus could not be historically so considered."⁷⁹ The emphasis on land ownership, as the court itself admitted,⁸⁰ is not a currently viable distinction, if it ever was. The court even recognized, citing an 1823 case,⁸¹ that Indians had always been considered as having only the right to occupy and use their lands and did not hold legal title to them.⁸²

If *Brown* intended to refer to United States' "ownership" as fee title interest, its reasoning lacks support. Significant portions of the early territories, such as Ohio and Indiana, remained occupied by Indians long after territorial (and even state) governments were formed. If, on the other hand, *Brown* used "ownership" in the sense of governmental exercise of sovereign rights (which is how a government usually "owns" its territory), it is correct only if the self-imposed limitation on the United States' exercise of sovereignty over the lands occupied by Indians is construed as merely an acknowledgement that the United States had no sovereignty over those lands. Such a construction is at odds with the entire course of political history following the European advent on the American scene. The problem with the historical rationale of *Brown* is its use of semantics and its mixing of concepts. The court's discussion of "territory" concentrates on the geographic meaning of that term, a territory being a fixed geographic area with specified boundaries, pieces of which can be transferred by deed. The term, as used in section 1738, is not a term of geography, but one of political institutions. It refers to, and acts on, governments which have a particular relationship to the Union. The creation of the government, not the survey of borders, establishes a section 1738 "territory." If *Brown* reached the appropriate conclusion, its articulation of reasons leaves the decision open to criticism. Although not acknowledged by the Arizona court, most of the authorities it cited recognize that the political relationship between the Indian tribes and the United States is not one which

79. *Brown*, 117 Ariz. at 196, 571 P.2d at 693-94.

80. As acknowledged by the Arizona court, *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), held that the Indians' right to land within those claimed by the United States was, based on European international and United States law, only a right of use and occupancy. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), held that the state of Georgia could transfer fee title to lands rightfully occupied by Indians, subject to that occupation. Therefore, legal fee title, per se, has never been particularly relevant to the political relationship between Indians and the United States.

81. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

82. *Brown*, 117 Ariz. at 197, 571 P.2d at 694. The history relied on in *Brown* does, however, show that lands occupied by Indians were obtained from them (at least ostensibly) by purchase or conquest and white men were prohibited from settling on those lands until such "clear" title was acquired.

would support a conclusion that the tribes were political "territories."⁸³

Other state courts have come to essentially the same conclusion, that is, that Indian tribes are not "territories" and therefore full faith and credit is not *required*.⁸⁴ However, applying principles of comity, state courts have recognized tribal court decisions concerning such matters as divorces between tribal members,⁸⁵ probate of members' estates,⁸⁶ custody and adoption of Indian children and disposition of deceased members' bodies.⁸⁷ Thus, while state courts have not been amenable to finding that they were required to do so, they have been willing, in a number of cases, to recognize and enforce tribal court judgments in traditionally tribal matters.

Overall, court decisions mentioning full faith and credit for Indian court judgments, or other tribal actions, do not provide a solid foundation for concluding that Indian tribes are "territories" within the meaning of section 1738. Similarly, judicial decisions concerning the meaning of "territories" in other contexts as well as statutes do not support such a conclusion.

B. Extradition, "Territory" and Indian Tribes

Apparently, courts have never held that Indian tribes were territories of the United States for purposes of federal extradition statutes. As with full faith and credit, provisions concerning extradition from one state to another are included in article IV of the

83. *Id.* at 198-99, 571 P.2d 695-96.

Other decisions of Arizona courts have also declined to find that Indian tribal actions must be granted full faith and credit. Some of those decisions, while declining to state that tribal court decisions were entitled to recognition under comity principles, gave such an effect to them. *See In re Estate of Lynch*, 92 Ariz. 354, 377 P.2d 199 (1962); *Begay v. Miller*, 70 Ariz. 380, 222 P.2d 624 (1950); *Leon v. Numkena*, 142 Ariz. 307, 689 P.2d 566 (Ct. App. 1984).

While *Brown* discussed the possibility of recognizing Navajo tribal laws on the basis of comity, it concluded that the parties had made a choice of law decision when executing the subject conditional sales contract to apply Arizona law.

84. Most courts do little more than state that Indian tribes are not territories. Those that go further generally support that conclusion with some reference to the "independent sovereignty" of Indian tribes with little or no discussion concerning whether they are "territories" under § 1738. *See, e.g., Red Fox v. Red Fox*, 23 Or. App. 393, 542 P.2d 918 (1975); *Mexican v. Circle Bear*, 370 N.W.2d 737 (S.D. 1985). *Cf. Malaterre v. Malaterre*, 293 N.W.2d 139 (N.D. 1980).

85. *Leon v. Numkena*, 142 Ariz. 307, 689 P.2d 566 (Ct. App. 1984); *Red Fox v. Red Fox*, 23 Or. App. 393, 542 P.2d 918 (1975). *Cf. In re Marriage of Limpy*, 195 Mont. 314, 636 P.2d 266 (1981).

The Oregon decision in *Red Fox* was reviewed and approved by the federal courts. *See Red Fox v. Red Fox*, 564 F.2d 361 (9th Cir. 1977).

86. *Cf. In re Estate of Lynch*, 92 Ariz. 354, 377 P.2d 199 (1962).

87. *Mexican v. Circle Bear*, 370 N.W.2d 737 (S.D. 1985).

Constitution.⁸⁸ Similarly, Congress acted early to implement the extradition provisions.⁸⁹ Again similarly, while the Constitution includes only states, Congress added "territories" to those polities which are entitled and subject to extradition provisions.⁹⁰

In 1883, the legendary Judge Parker of the Western District Court of Arkansas was required to decide if the Cherokee Nation was a "territory" within the meaning of the extradition statute.⁹¹ In *Ex parte Morgan*, he held that Congress had the power, at least under the authority granted to it over territories, to include territories in the extradition statute.⁹² He further held that "when used to designate a political organization, [territory] has a distinctive, fixed, and legal meaning under our political institutions."⁹³ After reviewing legislation enacted under both the Articles of Confederation and the Constitution, he concluded that

[a] territory, under the constitution and laws of the United States, is an inchoate state,—a portion of the country not included within the limits of any state, and not yet admitted as a state into the Union, but organized under the laws of congress, with a separate legislature, under a territorial governor and other officers appointed by the president and senate of the United States.⁹⁴

The judge went on to note that, by treaty, the geographic area occupied by the Cherokee Nation could not be included within the jurisdiction of any state or territory of the United States and that throughout the history of the relationship between the Indians and the United States, "Indian country" had always been treated differently from, and was considered distinct from, "states" or "territories."⁹⁵

Some of the statements in *Morgan* can be, and have been, la-

88. U.S. CONST. art. IV, § 2, cl. 2, provides:

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

89. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302 (codified as 2 Rev. Stat. § 5278 (1874), Rev. Stat. § 5278 (2d ed. 1878)) (currently codified as amended at 18 U.S.C. § 3182 (1982)).

90. As originally enacted in 1793, the extradition statute included "any state of the union, or . . . either of the territories northwest or south of the river Ohio . . ." Act of Feb. 12, 1793, ch. 7, § 1, 1 Stat. 302. As codified in 1874, the comparable language was "any State or Territory . . ." 2 Rev. Stat. § 5278 (1874).

91. *Ex parte Morgan*, 20 F. 298 (W.D. Ark. 1883).

92. *Id.* at 302-03.

93. *Id.* at 304.

94. *Id.* at 305.

95. *Id.* at 305-07. *Morgan* was cited with approval in *O'Donoghue v. United States*, 289 U.S. 516 (1933), which also held that territories were transitory, intended to eventually become states. *Id.* at 537-38.

beled as incorrect or no longer valid. *Morgan* unequivocally took the position that "territory" can have but one narrow, precise meaning, that is, an inchoate state. Subsequent cases⁹⁶ have concluded that the term is somewhat more flexible.⁹⁷ Similarly, *Morgan* included the statement that tribal governments could not be "territories" because Indians were not citizens of the United States. That situation is no longer true. Even though that statement could be used as a basis for attempting to distinguish *Morgan* from any modern situation, it was only an example based on the underlying legal theory that Indian tribes and Indian peoples were a separate (albeit dependent) political community recognized as different from the states or territories of the Union in the Constitution, treaties and legislation enacted throughout the first hundred years of the nation's existence.⁹⁸ That Indians were not then United States citizens was only one minor part of their separateness. While that part may have disappeared, the separateness remains.

Ex parte Morgan seems to have so firmly established the proposition that Indian tribal lands were not "territories" for purposes of extradition that the issue has not been subsequently raised.⁹⁹ From a much more recent case, it can be concluded, by implication, that the *Morgan* rationale remains valid. In *Arizona ex rel. Merrill v. Turtle*,¹⁰⁰ the Navajo Tribal Court had refused to order extradition of Wayne Turtle, a Cheyenne Indian residing on the Navajo Reservation, to Oklahoma because the Navajo ordinance only provided for extradition to Arizona, New Mexico and Utah. After that refusal, Oklahoma requested Arizona state

96. See, e.g., *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253 (1937).

97. However, it should be remembered that in 1883, areas such as Puerto Rico and the Virgin Islands had not yet come into the United States' polity. The political definition of "territory" enunciated in *Morgan* has been approved and applied by the Supreme Court in deciding that Puerto Rico was different from Indian tribes and was a "territory." See *People ex rel. Kopel v. Bingham*, 211 U.S. 468 (1909). Cf. *O'Donoghue v. United States*, 289 U.S. 516, 537-38 (1933).

98. *Morgan*, 20 F. at 305-07.

99. Part of the explanation may also lie in the fact that (a) most Indian treaties require that the Indian tribe turn over to United States authorities any white man who commits a crime on the reservation or any Indian who commits a crime against a white man (see, e.g., 1846 Treaty with the Cherokee Nation noted in *Morgan*, 20 F. at 306); and (b) since the enactment of the Major Crimes Act (Act of Mar. 3, 1885, ch. 385, § 9, 23 Stat. 385 (codified as amended at 18 U.S.C. § 1153 (Supp. III 1985))), most serious crimes committed on reservations are federal crimes. See also Indian Civil Rights Act of 1968, Act of Apr. 11, 1968, Pub. L. No. 90-284, tit. II, § 201(7), 82 Stat. 73, 77 (codified at 25 U.S.C. § 1302(7) (1982)) (limiting tribal courts to maximum sentences of no greater than six months or a fine of \$500, or both).

The argument could also be made that Indians tried for state offenses are less frequently released on bail or granted probation and therefore the occasion for a state request for extradition from reservation areas arises less frequently.

100. 413 F.2d 683, 683-84 (9th Cir. 1969), cert. denied, 396 U.S. 1003 (1970).

officials to extradite Turtle. The Sheriff of Apache County went onto the Navajo Reservation and took Turtle into state custody.¹⁰¹ On petition for writ of habeas corpus, the United States District Court for the District of Arizona and the Ninth Circuit Court of Appeals held that Arizona's actions improperly infringed on the power of the Navajo Tribe to make its own laws and be ruled by them.¹⁰² In reaching its conclusion, the Ninth Circuit Court stated: "We have been referred to no specific Congressional action limiting the power of the Navajo tribal government to deal with the extradition of Indians resident within the Reservation or granting to the State of Arizona the authority to exercise extradition jurisdiction over such residents."¹⁰³ Necessarily implied in that decision is the conclusion that the Navajo Tribe is not a "territory" within the meaning of federal extradition statutes. If it were such a territory, the tribal law limiting extradition to the three neighboring states would be invalid.

Given the similarity of the language of, and the reasons for, the constitutional provisions concerning full faith and credit and those concerning extradition, together with the similarity of the congressional action implementing those respective provisions, a conclusion that Indian tribes were "territories" for one statute but not the other would require the sacrifice of substance for some rather minute splitting of very fine, and very peripheral, hairs.

C. "Territory" in Other Contexts

The meaning of the word "territory" in a statute can and does vary.¹⁰⁴ Where the purpose of Congress was to proscribe certain activity throughout the full geographic scope of its authority (for example in section three of the Sherman Antitrust Act¹⁰⁵ and section one of the Civil Rights Act of 1866¹⁰⁶), "territory" has been construed to include such areas as Puerto Rico,¹⁰⁷ the District of

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

102. *Id.* at 685-86.

103. *Id.* at 685. *Davis v. Mueller*, 643 F.2d 521 (8th Cir. 1980), held that no federal law or court decision required that a state lose jurisdiction over a criminal defendant solely because he was arrested in violation of a tribal extradition ordinance.

104. See *District of Columbia v. Carter*, 409 U.S. 418 (1973) *reh'g denied*, 410 U.S. 959 (1973); *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253 (1937).

105. Act of July 20, 1890, ch. 647, § 3, 26 Stat. 209 (codified at 15 U.S.C. § 3 (1982)).

106. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (codified at 42 U.S.C. § 1983 (1982)).

107. *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253 (1937) (applying § 3 of the Sherman Act); *Moreno Rios v. United States*, 256 F.2d 68 (1st Cir. 1958) (applying the Narcotic Drug Import and Export Act). *But cf. Garcia v. Friesecke*, 597 F.2d 284 (1st Cir. 1979), *cert. denied*, 444 U.S. 940 (1979) (applying Longshoremen's Act coverage provision, as amended in 1972, 33 U.S.C. § 902(a)).

Columbia¹⁰⁸ and American Samoa.¹⁰⁹ However, when Congress' purpose was to prohibit or control certain types of *governmental* activity (such as in section one of the Ku Klux Klan Act of 1871¹¹⁰), or to deal with purely governmental activities, entities, agencies or functions, "territory" has been construed to mean *only* those non-state political entities which are constituent parts of the Union.¹¹¹ Thus, a distinction can be made between the use of "territory" in a geographic sense and its use in a political sense.¹¹²

In those instances in which it was Congress' intention to proscribe private actions, for example in situations involving restraint of trade or racial discrimination, the term "territories" has been interpreted geographically to give the statute the broadest possible coverage based on the assumption that Congress intended to exercise all of the power it had.¹¹³ In those instances in which it was Congress' intention to affect local governmental actions, for example with regard to failure to enforce civil rights laws, "territories" has been interpreted politically to include those political units organized by Congress.¹¹⁴ Determining whether Congress intended to exercise its authority over individuals throughout the geographic area of the United States or only with respect to other governments within the federal system is not always simple.

One factor in making that determination is the constitutional provision authorizing the legislation in which the term is used. In *District of Columbia v. Carter*,¹¹⁵ the Court distinguished between the meaning of "territory" as used in 42 U.S.C. section 1982, which prohibits racial discrimination, and the meaning of "territory" as used in 42 U.S.C. section 1983, which authorizes a

108. *Hurd v. Hodge*, 334 U.S. 24 (1948) (applying § 1 of the Civil Rights Act of 1866).

109. *United States v. Standard Oil of Cal.*, 404 U.S. 558 (1972), *reh'g denied*, 405 U.S. 969 (1972) (applying § 3 of the Sherman Act); *Tien Lop Lee v. United States*, 549 F.2d 154 (9th Cir. 1977) (employee of American Samoa government equivalent to an employee of the federal government for the purposes of Naturalization Act preferences).

110. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1982)).

111. *District of Columbia v. Carter*, 409 U.S. 418 (1973) (construing Ku Klux Klan Act of 1871, Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1982 (1982))). *Cf. In re Lane*, 135 U.S. 443 (1890) (holding that the exception of "the territories" in a federal carnal knowledge act (Act of Feb. 9, 1889, ch. 120, 25 Stat. 658) did not include the Oklahoma Territory because it was not a territory organized pursuant to an organic act).

112. This should be contrasted with some rather vague "remedial" versus "narrow cause of action" distinction, such as that suggested in Comment, *supra* note 73, at 806.

113. *See, e.g., District of Columbia v. Carter*, 409 U.S. 418 (1973); *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253 (1937).

114. *See, e.g., Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976); *District of Columbia v. Carter*, 409 U.S. 418 (1973).

115. 409 U.S. 418 (1973).

federal cause of action for deprivations of federal rights. The basis for this distinction was that section 1982 was intended to implement the thirteenth amendment prohibition of slavery while section 1983 was enacted to enforce the provisions of the fourteenth amendment applicable only to states and persons acting under state authority.¹¹⁶

As with the fourteenth amendment, the full faith and credit clause addresses only official state *governmental* actions.¹¹⁷ In the implementing acts, the term "territories" is employed to describe (1) *governments* whose legislative, administrative and judicial acts are to be accorded faith and credit; and (2) *governments* which are required to accord such faith and credit. Based on the political/geographic dichotomy, "territories" in section 1738 can only be construed as identifying political entities, not geographic locales.

In determining which entities are political territories of the United States, those which have been traditionally so designated and for which Congress has established a "territorial government," have presented no difficulty.¹¹⁸ Identifying other geographic areas with organized governments, but which are not labeled "territory," has presented greater difficulty.

In most instances, political territories have been "inchoate states," that is, self-governing political communities destined to become sovereign states and join, on an equal basis, with the other states of the Union.¹¹⁹ The power of Congress to create governments for such geographic areas and prescribe the limits of the authority of those governments has been long recognized.¹²⁰ The characteristics of political territories of the United States can be generally described as (1) having local self-government, subject to the provisions of the legislation authorizing local political organi-

116. *Id.* at 421-23. "Territory" in the Sherman Act, enacted pursuant to Congress' authority over interstate commerce, is construed geographically. *See, e.g.*, *United States v. Standard Oil Co. of Cal.*, 404 U.S. 558 (1972) (Sherman Act applicable in American Samoa); *Puerto Rico v. Shell Co (P.R.)*, 302 U.S. 253 (1937) (Sherman Act applicable in Puerto Rico).

117. *See supra* note 12 for the text of U.S. CONST. art. IV, § 1.

118. *See, e.g.*, *Suesenbach v. Wagner*, 41 Minn. 108, 42 N.W. 925 (1889). Similarly, foreign political entities (such as Canada and Mexico) are not included within § 1738.

119. *See, e.g.*, *District of Columbia v. Carter*, 409 U.S. 418 (1973); *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955); *O'Donoghue v. United States*, 289 U.S. 516 (1933); *Ex parte Morgan*, 20 F. 298 (W.D. Ark. 1883); *Brown v. Babbitt Ford, Inc.*, 117 Ariz. 192, 571 P.2d 689 (Ct. App. 1977).

The District of Columbia government has also been distinguished from the territorial governments on the basis of the statutory autonomy of, and the inability to oversee the day-to-day operations of, the latter. *See* *District of Columbia v. Carter*, 409 U.S. 418, 429-32 (1973).

120. *See, e.g.*, *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 4-5 (1955).

zation; (2) being politically and legally subject to the United States Constitution; (3) not being within the geographic boundaries of any other state or political entity; and (4) intended to eventually become a state of the Union. There are, however, polities which have been held to be "territories" for the purposes of section 1738 or other statutes which do not have all of those characteristics.

The District of Columbia purposefully has a unique status. It is a federal area, not designated for ultimate statehood, but also not existing (in contrast to military bases) within the geographic boundaries of any state. It has, however, been held that the judgments of its courts are to be given the same effect as that given to state court judgments. In *Embry v. Palmer*,¹²¹ the Court held that Congress has the power to prescribe the effect of federal court judgments and that courts of the District of Columbia were federal courts entitled to the status accorded to federal courts generally.¹²² In so ruling, the Court relied on the provisions of the Constitution declaring the judicial power of the United States and the supremacy of the national government.¹²³ Based on those provisions, the Court found that federal court judgments "have invariably been recognized as upon the same footing . . . with domestic judgments of the states, wherever rendered and wherever sought to be enforced."¹²⁴ However, the Court did not state that the District of Columbia was a "territory" or a "country subject to the jurisdiction" of the United States within the meaning of section 1738's predecessor.

The decisions of the federal courts generally are not among the types of judgments included within section 1738, but are recognized under the supremacy clause.¹²⁵ In contrast, congressional power to include territories within the ambit of section 1738 has been attributed to its authority under article four, section three.¹²⁶

121. 107 U.S. 3 (1882).

122. *Id.* at 9-10.

123. *Id.* (relying on U.S. CONST. art. III).

124. *Embry*, 107 U.S. at 10 (citations omitted). *But see* Synanon Church v. United States, 579 F. Supp. 967 (D.D.C. 1984); Washington Gas Light Co. v. Hsu, 478 F. Supp. 1262 (D. Md. 1979) (District of Columbia a "territory" under § 1738, relying on *Embry*).

The distinction between courts of the District of Columbia and those of territorial governments is enunciated in *O'Donoghue v. United States*, 289 U.S. 516 (1933), in which the Court held that the courts of the District of Columbia were created pursuant to article III and article I, section 8, clause 17, of the U.S. Constitution while those of the territories (and territorial governments in general) were established pursuant to article IV, section 3, clause 2, relating to the power to make rules concerning the territory or property of the United States.

125. U.S. CONST. art. VI, cl. 2. *See, e.g.*, *Embry v. Palmer*, 107 U.S. 3 (1882); *Hall v. Hall*, 238 Md. 191, 208 A.2d 593 (1965).

126. *See, e.g.*, *Suesenbach v. Wagner*, 41 Minn. 108, 42 N.W. 925 (1889).

The Virgin Islands and the Commonwealth of Puerto Rico have, for purposes of section 1738, been held to be "territories" of the United States¹²⁷ even though having all of the other characteristics identified previously, they were not intended, at the time of the adoption of their respective organic acts, to eventually become states.

The decision of the Third Circuit Court of Appeals in *Americana of Puerto Rico, Inc. v. Kaplus*¹²⁸ provides perhaps the most complete analysis of why Puerto Rico is, nevertheless, a "territory" within section 1738. *Americana* presented two issues: first, whether Congress had the power to include the citizens of the Commonwealth of Puerto Rico within the group authorized to bring diversity actions under 28 U.S.C. section 1332(d) which in turn depended on whether the Commonwealth was a "territory" within the meaning of article IV, section 3, of the Constitution; and second, whether a judgment rendered by the Supreme Court of the Commonwealth of Puerto Rico was entitled to full faith and credit under section 1738. The court decided both of those issues in the affirmative. Following an extensive examination of the history of the relationship between the geographic area of Puerto Rico and the United States, including the period from the cession of Puerto Rico by Spain in 1898 to the proclamation of the Commonwealth of Puerto Rico in 1952, the court concluded that Puerto Rico had previously been recognized as a "territory of the United States" and the creation of the commonwealth did not change its essential political relationship to the United States.¹²⁹

127. *Bergen v. Bergen*, 439 F.2d 1008, 1013 (3d Cir. 1971) (Virgin Islands); *Americana of Puerto Rico, Inc. v. Kaplus*, 368 F.2d 431 (3d Cir. 1966), *cert. denied*, 386 U.S. 943 (1967) (Puerto Rico).

See also with respect to Puerto Rico: *Torres v. Gardner*, 270 F. Supp. 1 (D.P.R. 1967); *Hilton Int'l Co. v. Arace*, 35 Conn. Supp. 522, 394 A.2d 739 (Super. Ct. 1977); *Heritage Corp. of South Florida v. Rivas*, 289 So. 2d 432 (Fla. Dist. Ct. App. 1974); *Conquistador Hotel Corp. v. Fortino*, 99 Wis. 2d 16, 298 N.W.2d 236 (Ct. App. 1980). *See also* regarding the Virgin Islands: *Chittick v. Chittick*, 332 Mass. 554, 126 N.E.2d 495 (1955); *Garvin v. Garvin*, 302 N.Y. 96, 96 N.E.2d 721 (1951).

The converse is also true. *See Brau-Guasp v. Rolscreen Co.*, 299 F. Supp. 459 (D.P.R. 1969) (Iowa judgment entitled to full faith and credit in Puerto Rican courts); *Bredin v. Bredin*, 140 F. Supp. 132 (D.V.I. 1956) (Florida divorce action entitled to full faith and credit in Virgin Islands' courts).

The decisions concerning the full faith and credit to be given to judgments of the courts of the Virgin Islands generally deal with divorces granted by those courts. The Virgin Islands divorce statute was invalidated as *ultra vires* in *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955).

128. 368 F.2d 431 (3d Cir. 1966), *cert. denied*, 386 U.S. 943 (1967).

129. *Americana*, 368 F.2d. at 436. The Third Circuit Court noted:

[T]he status of the Island conform[s] to one of the common definitions of a territory as a "portion of the country not included within the limits of any state, and not yet admitted as a state into the Union, but organized under the laws of Congress with a separate legislature, under a territorial governor and other officers

Therefore, the court concluded that Congress retained the authority to include Puerto Rico within 28 U.S.C. section 1332(d).¹³⁰

With respect to the inclusion of Puerto Rico within section 1738, *Americana* points to slightly different considerations. The first is that section 1738, in contrast to 28 U.S.C. section 1332(d), does not expressly include Puerto Rico.¹³¹ However, the Third Circuit Court noted that the Puerto Rican Federal Relations Act¹³² specifically provided that all laws of the United States "not locally inapplicable" have the same force and effect in Puerto Rico as in the United States.¹³³ The court further noted that "[t]he defendants admit that there is a government of the United States in Puerto Rico"¹³⁴ Based on the further conclusion that the creation of the commonwealth was not intended to change its fundamental political, social and economic relationship with the United States, the court held that Puerto Rico continued to be a territory of the United States for purposes of section 1738.¹³⁵ One key to that decision was the conclusion that:

The basic goal of full faith and credit is to coordinate the administration of justice throughout the nation. In order to achieve this goal Congress enacted Section 1738 and by the use of the words "State, Territory or Possession" Congress intended to unify all of the courts *in our system of government*.¹³⁶

appointed by the President and Senate of the United States." *Id.* at 434 (quoting *People ex rel. Kopel v. Bingham*, 211 U.S. 468, 475 (1909)). The court further stated that "[i]t is important that the nature and general scope of S. 3336 [now 64 Stat. 319] be made absolutely clear. The bill under consideration would not change Puerto Rico's fundamental political, social, and economic relationship to the United States." *Americana*, 368 F.2d at 435 (quoting H.R. REP. NO. 2275, 81st Cong., 2d Sess. (1950), reprinted at 1950 U.S. CODE CONG. & ADMIN. NEWS 2681-82).

130. *Americana*, 368 F.2d at 436.

131. *Id.* at 438.

132. 48 U.S.C. § 734 (1982).

133. *Americana*, 368 F.2d at 438 (quoting 48 U.S.C. § 734 (1982)).

134. *Americana*, 368 F.2d at 438 (emphasis added). In *Talbott v. Silver Bow County*, 139 U.S. 438, 446 (1891), the Court said:

[A territory] is not a distinct sovereignty. It has no independent powers. It is a political community organized by Congress, all whose powers are created by Congress, and all whose acts are subject to Congressional supervision. Its attitude to the general government is no more independent than that of a city to the State in which it is situated, and which has given to it its municipal organization.

As the court had previously explained, "[d]uring the term of their pupilage as Territories, they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the General Government." *Snow v. United States*, 85 U.S. (18 Wall.) 317, 320 (1873). See also *National Bank v. County of Yankton (Dakota Territory)*, 101 U.S. 129 (1880); *Territory v. Daniels*, 6 Utah 288, 22 P. 159 (1889).

135. *Americana*, 368 F.2d at 438-39. In *Puerto Rico v. Rosaly y Castillo*, 227 U.S. 270, 276-77 (1913), concerning the status of Puerto Rico for sovereign immunity purposes, the Court equated that government with that of the Territory of Hawaii in significant part because of the conclusion that both were *created* by the United States.

136. *Americana*, 368 F.2d at 438 (emphasis added).

The status of the Trust Territories of the Pacific Islands ("TTPI") is different from that of Puerto Rico, the Virgin Islands and American Samoa. The TTPI has been administered by the United States as a United Nations' "strategic trust."¹³⁷ Under the Trusteeship Agreement, the United States has plenary governmental (legislative, executive and judicial) control over the TTPI. While there are no cases considering whether the TTPI is a territory or possession of the United States under section 1738,¹³⁸ there are a number of decisions considering its status vis-à-vis the United States, under other statutes. The Fifth and Ninth Circuit Courts of Appeals have considered whether the TTPI government was an "agency" of the United States government for purposes of former section 911 of the Internal Revenue Code. The Fifth Circuit Court held that the TTPI was such an agency,¹³⁹ while the Ninth Circuit Court held that it was not.¹⁴⁰ More significantly for current purposes, however, those courts agreed that, for the purposes of I.R.C. section 911, the TTPI was not within the United States, that is, it was not a territory or possession "of the United States."¹⁴¹ Further, both decisions stressed the conclusion that sovereignty over the TTPI did not rest with the United States and that the actions of the United States, despite the broad, all-inclusive grant of authority, remained subject to United Nations' supervision.¹⁴²

137. Trusteeship Agreement for the Former Japanese Mandated Islands, *approved by the U.N. Security Council* Apr. 2, 1947, *entered into force* July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189 [hereinafter Trusteeship Agreement].

138. Under the Secretarial Orders establishing the TTPI government, the decisions of the local TTPI courts were ultimately appealable to the Ninth Circuit Court of Appeals and therefore would appear to have had, for full faith and credit purposes, a status similar to that of the District of Columbia.

139. *Groves v. United States*, 533 F.2d 1376, 1386 (5th Cir. 1976), *cert. denied*, 429 U.S. 1000 (1976).

140. *McComish v. Commissioner*, 580 F.2d 1323 (9th Cir. 1978).

141. *Groves*, 533 F.2d at 1380 (earnings from within the TTPI were "from sources without the United States"); *McComish*, 580 F.2d at 1326.

Under I.R.C. § 911 (1982 & Supp. III 1985), income earned in a "foreign country" was excludable if not paid "by the U.S. government or any U.S. government agency or instrumentality". Treas. Reg. § 1.911-2(a)(2) (1986). At the time that *Groves* and *McComish* were decided, for § 911 purposes, "foreign country" was defined as "any territory under the sovereignty of a government other than that of the United States. . . . It ["foreign country"] does not include a possession or territory of the United States." Treas. Reg. § 1.913-3(d). Treas. Reg. § 1.913-3(d) was repealed in the Tax Reform Act of 1986.

142. *Groves*, 533 F.2d at 1384-85; *McComish*, 580 F.2d at 1328-30. The TTPI government has also been held to be distinct from the United States government for other purposes. *See, e.g.,* *People of Saipan v. United States Dep't of Interior*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975) (TTPI government is not an "agency" of the U.S. government for the purposes of the Administrative Procedures Act or the National Environmental Policy Act); *Porter v. United States*, 496 F.2d 583 (Ct. Cl. 1974), *cert. denied*, 420 U.S. 1004 (1975) (TTPI is not an agent of the U.S. for purposes of the Torts Claims Act).

On the other hand, the Ninth Circuit Court and the District of Columbia Circuit Court have held that the TTPI government is "like" a territory or possession of the United States for purposes of exemption from the federal Administrative Procedures Act¹⁴³ and the federal Freedom of Information Act.¹⁴⁴ Those conclusions were based on a finding that Congress intended to identify, in those acts, *types* of agencies or entities rather than naming specific agencies.¹⁴⁵ The District of Columbia Circuit's decision in *Gale v. Andrus* typifies the difficulty in analogizing between various categories of intergovernmental relationships:

The similarities of the Trust Territories to the typical territories and possessions of the United States are self-evident. Appellee explains that the Trust Territory was established in the same manner as American Samoa, it has a structure like most territorial governments and has a similar kind of control and supervision from the United States. For example, Guam is supervised by the Department of Interior, and Congress may annul its [Guam's] laws. It would be highly inconsistent to [sic] for this Court to hold that territories and possessions are exempt [from the Freedom of Information Act], but the Trust Territory is not, when the latter is more removed from substantial control by the United States than most territories and possessions, and is on the road to self-government.¹⁴⁶

D. "Possessions" and Other Polities

Thus far, no court has construed the phrase "country subject to the jurisdiction of the United States" as used in the 1804 full faith and credit implementing act. Only a handful have dealt with the term "possession" with respect to full faith and credit or otherwise. *Dare v. Secretary of the Air Force*¹⁴⁷ reviews a majority of

There has been some debate concerning the locus of the sovereignty of areas subject to U.N. trusteeship. With respect to the TTPI, it is generally agreed that sovereignty does not lie with the United States. See generally Sayre, *Legal Problems Arising from the United Nations Trusteeship System*, 42 AM. J. INT'L L. 263 (1948).

143. See *Gale v. Andrus*, 643 F.2d 826, 832 (D.C. Cir. 1980); *People of Saipan v. Dep't of Interior*, 502 F.2d 90, 96 (9th Cir. 1974), cert. denied, 420 U.S. 1003 (1975).

144. *Gale*, 643 F.2d at 833.

145. *Id.* at 832.

146. *Id.* at 833. Both the Freedom of Information Act and the Administrative Procedures Act were designed to impose obligations on agencies of the federal government. In both of these instances, the statute in question exempted territories and possessions of the United States from compliance with their requirements. The exemption of governments of territories and possessions recognizes that those are, in essence, local governments distinct from, and to a large extent practically independent from, the federal government. Thus, because the TTPI government is even *more* independent than territorial governments, the courts determined that its government should also be exempt and that the only way to achieve this result was by including it within the category of "territories and possessions."

147. 608 F. Supp. 1077 (D. Del. 1985), *aff'd without opinion*, 787 F.2d 581 (3d Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 166 (1986).

those few decisions.

In *Dare*, the plaintiff requested a writ of mandamus requiring the defendant to order plaintiff's estranged husband, who was stationed at Clark Air Force Base in the Philippines, to comply with a Delaware court's child custody order. The plaintiff's theory was that 28 U.S.C. section 1738A (the full faith and credit provision of the federal Parental Kidnaping Act of 1980¹⁴⁸) mandated that commanders of overseas military bases comply with state custody orders.¹⁴⁹ Key to that contention was the assertion that Clark Air Force Base was a "possession" of the United States within the meaning of section 1738A.

In reviewing the available authorities, the district court found that "possession," like "territory," was susceptible to different meanings based on the context and circumstances of its use.¹⁵⁰ *Dare* held that a military installation located on land which belongs to a foreign sovereign, and occupied at its pleasure, is not a "possession" "of the United States."¹⁵¹

The geographic/political dichotomy appears equally valid in the "possession" context. In *Vermilya-Brown Co. v. Connell*,¹⁵² the Supreme Court, in a five to four decision, held that a military base in the Crown Colony of Bermuda¹⁵³ was a "possession" of the United States for purposes of the Fair Labor Standards Act.¹⁵⁴ The majority opinion in *Vermilya-Brown* relied primarily on the terms of the lease which granted the United States authority with respect to the leased area, including the right to control the maximum hours and minimum wages for those employed there.¹⁵⁵ The Court said that, like "territory," "possession" is subject to differing meanings, depending on the context and pur-

148. See discussion *infra* notes 203-08 and accompanying text.

149. *Dare*, 608 F. Supp. at 1079.

150. *Id.* at 1079-80 (citing *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253, 258 (1937) (concerning "territory"); *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (concerning "income"); and *Americana of Puerto Rico v. Kaplus*, 368 F.2d 431, 436 (3d Cir. 1966), *cert. denied*, 386 U.S. 943 (1967) (concerning "territory")). See discussion of *Americana* and similar cases *supra* notes 128-36 and accompanying text.

The Virgin Islands progressed from an "insular possession" (Organic Act of the Virgin Islands of 1936, 49 Stat. 1807) to an "unincorporated territory" (Organic Act Revision of the Virgin Islands of 1956, 68 Stat. 497 (codified at 48 U.S.C. § 1541-1645 (1982 & Supp. III 1985))).

151. *Dare*, 608 F. Supp. at 1080.

152. 335 U.S. 377 (1948) (Jackson, J., dissenting), *reh'g denied*, 336 U.S. 928 (1949).

153. The base was occupied by the United States under a ninety-nine year lease from Great Britain, similar to the ninety-nine year leases on bases in the Philippines. *Vermilya-Brown*, 335 U.S. at 384 n.7.

154. *Id.* at 390 (citing Fair Labor Standards Act, §§ 3(b) & (c), 52 Stat. 1060 (codified at 29 U.S.C. § 203 (1982 & Supp. III 1985))).

155. *Vermilya-Brown*, 335 U.S. at 382-83 & n.4.

pose.¹⁵⁶ The Court held that

[w]hen one reads the comprehensive definition of the reach of the Fair Labor Standards Act, it is difficult to formalize a boundary to its coverage short of areas over which the power of Congress extends, by our sovereignty or by voluntary grant of the authority by the sovereign lessor to legislate upon maximum hours and minimum wages.¹⁵⁷

The dissent¹⁵⁸ pointed out that the majority's decisions could cause a multitude of problems with respect to numerous statutes. The dissent conceded that Congress may have had the power to regulate wages and hours within the leased area, but to reach that result through a finding that the area was a "possession" of the United States was not necessary, was contrary to the course of negotiation of the lease and could result in international political problems.¹⁵⁹ Of particular interest to the present discussion, the dissent pointed out that all of the areas cited as analogous by the majority (Puerto Rico, Guam, Virgin Islands, etc.) were distinguishable from the base in Bermuda in one significant respect: Those other areas "belong to us or they belong to no one. They are ceded territory over which the United States sovereignty is as complete and as unquestioned as over the District of Columbia and *they are subject to no dual control or divided allegiance.*"¹⁶⁰

Even if *Vermilya-Brown* is good law, it is clear that in using "possession" in the Fair Labor Standards Act, Congress was speaking in a geographic, rather than a political, sense. Given the purposes and circumstances of that act, Congress was clearly not intending to affect only the acts of the governments within the United States.¹⁶¹

Other cases dealing with "possession" are concerned primarily with distinguishing that term from "dependency."¹⁶² While those decisions shed little direct light on the question, they all at least

156. *Id.* at 386 (quoting *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253, 258 (1937)).

157. *Vermilya-Brown*, 335 U.S. at 389. The Court had noted at the outset that "the leased area is under the sovereignty of Great Britain and that *it is not a territory of the United States in a political sense*, that is, a part of its national domain." *Id.* at 380-81 (emphasis added).

158. 335 U.S. at 390-409 (Jackson, J., dissenting, joined by the Chief Justice and Justices Frankfurter and Burton).

159. *Id.* at 408.

160. *Id.* at 397 (emphasis added).

161. In a somewhat related situation, the Navajo Indian tribe has been held to be within the purview of the National Labor Relations Act. *See Navajo Tribe v. NLRB*, 288 F.2d 162 (D.C. Cir. 1961).

162. *See, e.g., Posadas v. National City Bank*, 296 U.S. 497, 502 (1936), where the Court stated: "[T]he Philippine Islands constituted a dependency, for they were not possessions merely, but possessions held by right of cession from Spain and over which the United States undoubtedly had supreme power of legislation and government." *See also United States v. The Nancy*, 27 F. Cas. 69 (C.C.D. Pa. 1814) (No. 15,854).

imply that the possessing nation has sovereignty, albeit possibly temporary, over the geographic area of the "possession."¹⁶³

As with "territory," the terms "country subject to the jurisdiction" and "possession" "of the United States" when used in the political sense denote political entities created under the sovereignty of the United States not subject to dual control or divided allegiance. Thus, the resolution of whether Indian tribes fall within those terms in the full faith and credit implementing statutes, as with whether they are "territories," depends on the resolution of the nature of Indian tribal "sovereignty."

E. A Synthesis—"Terroritories" As A Political or Geographic Term or as Both

The decisions concluding that tribal court judgments are entitled to full faith and credit, particularly those of the nineteenth century, mesh with current theories of Indian law if they are considered in terms of jurisdiction rather than full faith and credit. With rare exception, the parties to the related tribal court actions were members of the adjudicating tribe, the action arose within the tribe's geographic boundaries and the subject matter was tribal membership or rights to tribal property or benefits, or both. In those exceptions where one of the parties was not a tribal member, that nonmember had expressly or impliedly consented to tribal court jurisdiction.

Excluding *Jim* and the other rare, exceptional cases, all of the decisions remarking that Indian tribal decisions are given full faith and credit were cases which modern Indian law would place within the exclusive jurisdiction of tribal courts.¹⁶⁴ A fundamental premise of Indian law has been that, unless Congress has expressly provided otherwise, neither state nor federal courts have jurisdiction over disputes between Indians which arise on a reservation—whether or not there has been a prior tribal court adjudication of the matter, or even a tribal court capable of adjudicating the matter. Similarly, as in a proper understanding of *Mehlin v.*

163. The distinction made is that a "possession" is an area over which the possessor has practical physical and political control (such as following conquest and before a peace treaty is effective), while a "dependency" is an area over which the possessor has legitimized its sovereignty to the extent that it is recognized in international circles as being a political part of the dominant nation. However, those decisions are clearly based on international law conventions between recognized foreign, independent nation-states which were not applied to relationships with "uncivilized" native populations.

164. Almost universally, the decisions saying that tribal court judgments should be given full faith and credit qualify that statement with a phrase such as "as to matters properly within their jurisdiction." Most of these statements were made long before tribal courts claimed jurisdiction to adjudicate actions against nonconsenting, nonmember defendants.

Ice, a party voluntarily appearing and participating in a tribal court proceeding (or stipulating to tribal court jurisdiction) cannot later collaterally attack the result of those proceedings on the grounds of lack of personal jurisdiction.

The distinction is more than semantic. Decisions based on exclusive jurisdiction principles protect tribal self-determination interests in those areas which are most important to the tribes and their members. If the non-Indian court has no jurisdiction, any action it may take is void. In contrast, decisions based on full faith and credit principles assume that the applying court has jurisdiction to, and could, reach a differing result but for the full faith and credit requirement. Such a decision may be reversible, or possibly even voidable, but it would not be void *ab initio*. Merely erroneous judgments become enforceable if not challenged within a relatively short period, for example, appealed within thirty days. In contrast, void judgments can be safely ignored for years—or at least until the judgment creditor attempts enforcement.

If the rules of *stare decisis* are kept in mind, a synthesis of existing court decisions leads to the conclusion that, for purposes of section 1738, “territories and possessions of the United States” includes only those entities, regardless of their labels, which are part of the system of governments established by and under the Constitution. Such governments are *established* either in the Constitution or by an act of Congress as authorized by one or more of the powers granted to it by the Constitution.

That consideration distinguishes Indian tribes from Puerto Rico and other polities which are territories within the meaning of section 1738. Under commonly accepted international law principles, Puerto Rico, the Virgin Islands, American Samoa and other similarly acquired geographic territories are within and under the absolute sovereignty of the United States. In contrast, under the principles first enunciated by Chief Justice John Marshall in the 1830’s and reiterated in numerous decisions since that time, Indian tribes have retained at least some vestiges of their preexisting independence. In other words, the local governmental powers in Puerto Rico and other territories are acquired from the United States, while those powers exercised by Indian tribes have been retained by them and exist independently of the sovereignty of the United States.¹⁶⁵

165. The conclusion that Indian tribes are not within the U.S. system of government is reinforced by decisions holding that the United States Constitution does not constrain the freedom of Indian tribal governments in matters within their retained powers. *See, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 n.7 (1978); *Talton v. Mayes*, 163 U.S. 376, 382-83 (1896).

In one respect, Indian tribes may be more like the TTPI than the other "territories and possessions" of the United States. Assuming, as is the current legal and political notion, that Indian tribes possess a measure of sovereignty derived from some source other than the will or largess of the United States, the tribes are similar to the TTPI whose sovereignty is also derived from sources other than the United States. Even though the administrative powers of the United States with respect to both Indian tribes and the TTPI are, practically speaking, plenary, in both instances, unrestricted exercise of those powers is theoretically and politically limited by the nonderivative rights of the governed peoples.

There is, at the same time, a possibly significant distinction. The TTPI Trusteeship Agreement, as acknowledged by the United States at the time of its execution,¹⁶⁶ does not convey sovereignty¹⁶⁷ over the geographic area of the TTPI and provides that its political status can be altered only with the consent of the United Nations.¹⁶⁸ In contrast, the United States does claim and has exercised sovereignty and domain over the geographic areas within the Indian reservations and has legally and unilaterally terminated Indian tribes as political entities.

II. CONGRESSIONAL ACTIONS

Court opinions do not provide adequate support for a conclusion that section 1738 requires Indian tribal actions be accorded full faith and credit. Similarly, there is little contextual or contemporary support for the conclusion that Congress, in 1804, 1948 or currently, was or is of the opinion that the phrase "territories of the United States" in the full faith and credit implementation statutes encompasses Indian tribes.

A. Congressional History of Section 1738

Congress' first act implementing the full faith and credit clause, adopted in 1790, included only state official actions.¹⁶⁹ Similarly, in the 1804 supplementary act, the first section dealt only with "state" records.¹⁷⁰ However, section two of the 1804 Act added:

[A]ll the provisions of this act, and the act to which this is a supplement [the 1790 Act], shall apply as well to the public acts, records, office books, judicial proceedings, courts and offices of the respective territories of the United States, and coun-

166. See 16 DEP'T OF STATE BULL. 416 (1947).

167. See Sayre, *supra* note 142, at 271.

168. See Trusteeship Agreement, *supra* note 137, §§ 4 & 6.

169. See Act of May 26, 1790, ch. 11, 1 Stat. 122, *supra* note 13.

170. Act of Mar. 27, 1804, ch. 56, § 1, 2 Stat. 298.

tries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, courts and offices of the several states.¹⁷¹

Legislative materials relating to the 1804 Act are essentially nonexistent and those which do exist make no mention of the reason for, or purpose of, the addition of the second section.¹⁷²

When the revised statutes were adopted by the forty-third Congress, the 1790 and 1804 Acts were codified as sections 905 and 906 of chapter seventeen of title XII of the U.S. Code.¹⁷³ The code language followed that in section 2 of the 1804 Act, that is, "any State or Territory, or . . . any country subject to the jurisdiction of the United States . . ." ¹⁷⁴ That language remained until the 1948 revision of the Judicial Code.¹⁷⁵ As a part of that revision, the 1804 Act's words "of any country subject to the jurisdiction of the United States" were replaced with "Possession of the United States."¹⁷⁶ The 1948 revisors' intent was to make no "controversial" changes¹⁷⁷ and the revisors' comment on section 1738 was merely "changes were made in phraseology . . ." ¹⁷⁸

Even though the Supreme Court has stated in at least one Indian law case that subsequent legislation may be used to support interpretations of prior Congresses' intent,¹⁷⁹ it is doubtful that such consideration could reasonably extend from 1948 back to 1804. Thus, courts and lawyers are left with attempting to deduce the meaning of "territories" in section 1738 from the 1804 congressional intent based on the surrounding circumstances.

It is obvious that the 1790 Congress was aware of both the geographic extent of the nation's claimed dominion and the existence

171. *Id.* § 2, 2 Stat. at 299 (emphasis added).

172. See generally 13 ANNALS OF CONG., *supra* note 18. See also Nadelmann, *supra* note 18, at 61-62.

173. 1 Rev. Stat. §§ 905, 906, at 170-71 (1874). See also Rev. Stat. §§ 905, 906, at 171 (2d ed. 1878).

174. 1 Rev. Stat. § 905 (1874). Section 906 contained identical language. The capitalization of the word "Territory" but not "country" might be interpreted as intending to indicate that specific identifiable entities were intended by the former (similar to "States") but not the latter.

175. Act of June 25, 1948, 62 Stat. 947.

176. See Historical and Revision Notes to 28 U.S.C. § 1738 (1982); Historical and Revision Notes to 28 U.S.C. § 1739 (1982).

177. *Hearings Before Subcomm. No. 1 of House Judiciary Comm. on H.R. 1600 and H.R. 2055*, 80th Cong., 1st Sess. 24 (1947) (remarks of William W. Barron, chief revisor). See also Barron, *Judicial Code Revisions of 1948*, 8 F.R.D. 439 (1949).

178. Historical and Revision Notes to 28 U.S.C. § 1738 (1982); Historical and Revision Notes to 28 U.S.C. § 1739 (1982). See H.R. REP. NO. 308, 80th Cong., 1st Sess., A150 (1947). The revisors' notes do not state that the revisions were not significant nor substantial and it has been convincingly suggested that some of the changes were indeed significant. See Nadelmann, *supra* note 18, at 83-86.

179. *Bryan v. Itasca County*, 426 U.S. 373, 386-87 (1976). See also *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 472-75 (1976).

of local governments, authorized by the federal government, outside the geographic boundaries of the states. In 1787, the Continental Congress adopted an ordinance providing for the governance of the geographic area west of the Appalachian Mountains, east of the Mississippi River and north of the Ohio River, which became known as the "Northwest Ordinance of 1787."¹⁸⁰ One of the first enactments of Congress under the then-new Constitution reaffirmed the Northwest Ordinance.¹⁸¹ Those acts established the means of exercising non-Indian political authority throughout the designated geographic area.¹⁸²

On the same day as the 1790 full faith and credit implementing act was passed, an act was approved which established a "temporary government" for the "territory of the United States south of the river Ohio" which granted the same powers, duties, officials and privileges of local government as had been granted to the government of the "territory northwest of the Ohio River."¹⁸³

By 1804, the area included within the United States, and the parts for which territorial governments had been established, had increased dramatically. Under those altered conditions, the 1804 Congress added two jurisdictional categories to those whose official actions were to be recognized, that is, "the respective territories of the United States" and "countries subject to the jurisdiction of the United States."¹⁸⁴ Part of the 1804 language identifying the territories ("respective territories") semantically tracks part of the 1790 language identifying the states ("respective states"). The 1804 terminology assumes the existence of more than one territory of the United States. If the intent were to use the term "territories" in a merely geographic sense to identify the area not within a state, the word "respective" would be superfluous. Additionally, the 1804 Act necessarily refers to governments, not geography, again almost mandating the conclusion that "territories" was intended to identify the territorial governments established by Congress.

That "territories" in the 1804 Act was not intended to include Indian tribes is supported by language used by Congress in identi-

180. Ordinance of July 13, 1787, *reprinted at* 1 Stat. 51-53 n.(a) [hereinafter Northwest Ordinance].

181. An Act to provide for the Government of the Territory Northwest of the river Ohio, Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

182. Those acts made no mention of, nor attempt to directly deal with, the authority of the Indian tribes over their members or unceded areas. However, they authorized the governor to lay out counties and townships only in "the parts of the district in which Indian titles shall have been extinguished . . ." Northwest Ordinance, *supra* note 180, ¶ 8, *reprinted at* 1 Stat. 51 n.(a).

183. Act of May 26, 1790, ch. 14, 1 Stat. 123.

184. Act of Mar. 27, 1804, ch. 56, § 2, 2 Stat. 298, 299.

fyng areas under Indian control. Beginning in 1796,¹⁸⁵ Congress adopted the practice¹⁸⁶ of specifying a boundary line between white and Indian lands and, at least by 1800, began the still-continuing practice of referring to the Indian lands so delineated as "Indian country."¹⁸⁷ In those instances when Congress did use the term "territory" with respect to Indians, it was as "Indian territory" or "the territory of Indians."¹⁸⁸ Thus, at the time of the adoption of the 1804 Act, Congress' convention was to use "territory" in conjunction with "the United States" or "Indian," thereby distinguishing between them. The 1804 Act uses the former terminology and can, therefore, be reasonably understood to not include the distinct category of "territories of the Indian tribes."

Given those linguistic habits, it would be more reasonable to conclude that *if* Congress had intended to include Indian governments within the ambit of the 1804 Act, it would have been as "countries subject to the jurisdiction of the United States" rather than as "territories." Such an interpretation does not, however, comport with the generally understood relationship between the United States and the Indian tribes. From the time of the discovery of the Americas through 1804, and for some time thereafter, Indian tribes were considered separate nations not subject, at least with respect to their internal governments, to control by the United States.¹⁸⁹ If the 1804 Congress had intended to identify Indian tribes as "countries within the jurisdiction of the United

185. An Act to regulate Trade and Intercourse with the Indian Tribes, and to preserve Peace on the Frontiers, Act of May 19, 1796, ch. 30, 1 Stat. 469. *See also* An Act to regulate trade and intercourse with the Indian tribes, Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137-38; Act of Apr. 22, 1800, ch. 30, 2 Stat. 139; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139.

186. This was first employed in King George's Proclamation of 1763 following the resolution of the French and Indian War, *reprinted at* 3 W. WASHBURN, THE AMERICAN INDIAN AND THE UNITED STATES: A DOCUMENTARY HISTORY 2135 (1973).

187. *See, e.g.*, Act of Apr. 22, 1800, ch. 30, 2 Stat. 39-40; Act of Mar. 30, 1802, ch. 13, §§ 3, 16, 2 Stat. 139, 141, 144. The current statute is codified at 18 U.S.C. § 1151 (1982).

188. *See, e.g.*, Act of Mar. 30, 1802, §§ 2, 4, 6, 10, 2 Stat. 139, 141-44.

That practice was continued after 1804. *See, e.g.*, An Act for establishing trading houses with the Indian tribes, Act of Apr. 21, 1806, ch. 48, 2 Stat. 402, *reenacted as amended*, Act of Mar. 2, 1811, ch. 30, 2 Stat. 652; An Act to provide for punishment of crimes and offenses committed within the Indian boundaries, Act of Mar. 3, 1817, ch. 92, § 1, 3 Stat. 383; An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, Act of June 30, 1834, ch. 161 § 1, 4 Stat. 729.

189. *See, e.g.*, *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 146-47 (1809) (Johnson, J., dissenting); *Spotted Eagle v. Blackfeet Indian Tribe of Blackfeet Indian Reservation*, 301 F. Supp. 85, 87-88 (D. Mont. 1969); *Gover & Laurence, Avoiding Santa Clara Pueblo v. Martinez: The Litigation in Federal Court of Civil Actions Under the Indian Civil Rights Act*, 8 HAMLINE L. REV. 497, 530-35 (1985).

States," it would have been contravening legal and political theory which had been established for nearly three hundred years. Such an intent would have been directly opposite to the assumptions underlying contemporaneous legislation expressly concerning Indians, both linguistically and by requiring that Indian governments recognize, and give "faith and credit" to, official acts of state and territorial governments. There is nothing to suggest that the 1804 Congress thought it had such a degree of power over the internal affairs of Indian tribes.

While the 1804 Congress did not have the benefit of the 1823 decision in *Johnson v. McIntosh*,¹⁹⁰ that decision clearly expresses the contemporary political theory of the relationship between the United States and the Indian tribes. The Court said that if a non-Indian purchased land from an Indian tribe, he gained whatever title may thereby be transferred under Indian law. If, thereafter, the same tribe transferred its property (including that previously transferred to the non-Indian purchaser) to the United States, whatever Indian law rights may have been obtained or lost were not enforceable in the United States courts.¹⁹¹

As the Court stated, "conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."¹⁹² If, as a result of the 1804 Act, the laws of the Indian tribes were required to be given the same faith and credit by all of the courts of the United States as they were given by the tribe, *McIntosh* would have been required to reach the opposite result.¹⁹³

A related problem with a conclusion that Indian tribes were included in the 1804 Act is the fact that the states and organized territories were not geographically separate from "Indian country." In 1804, the states of New York, Kentucky, Tennessee and Georgia all included significant areas of Indian country. The Territory of Ohio was mostly Indian country and all of the Territories of Indiana and Michigan were within Indian country.¹⁹⁴ If Indian tribes were governments within the 1804 Act, that act would have recognized at least two "legitimate" governments "of the United

190. 21 U.S. (8 Wheat.) 543 (1823).

191. *Id.* at 594-95.

192. *Id.* at 588.

193. There is nothing in the opinion to indicate that anyone contended that tribal acts were entitled to faith and credit under the 1804 Act.

194. See Act of Mar. 30, 1802, ch. 13, § 1, 2 Stat. 139, 139-41. See generally C. WALDMAN & M. BRAUN, *ATLAS OF THE NORTH AMERICAN INDIAN 172-97* (1985); *HARPER'S ATLAS OF AMERICAN HISTORY* 22 (Fox ed. 1920) (boundary of "Indian Country" as of 1800).

States" within the same geographic area. That, in turn, would have created the possibility that other states and territories have would been required to enforce contradictory governmental decisions emanating from the same geographic territory.

The two categories of "territories of" and "countries subject to" the United States may create an anomaly to today's reader. However, some illumination may be gained from other 1804 legislation. On the day prior to adopting the 1804 Act, Congress adopted an act providing for the government of the Louisiana Purchase.¹⁹⁵ That act divided the "country ceded by France" into the "territory of Orleans"¹⁹⁶ and the "district of Louisiana"¹⁹⁷ and provided for the organization of the government of *both* portions. Thus, at the time of the passage of the 1804 Act, there existed at least one local government, created by and under the jurisdiction of the United States, which was not a "territorial" government but still had the attributes which would make application of full faith and credit appropriate.

B. Recent Congressional Activities

Recent congressional action dealing with full faith and credit and Indian tribes, both separately and jointly, indicates that both Congress and the executive branch currently believe that section 1738 does not include Indian tribes.

1. General Studies

A portion of the two year study by the American Indian Policy Review Commission considered the application of full faith and credit to Indian tribal court judgments. Part of the *Task Force Two: Tribal Government* report to the Commission¹⁹⁸ addressed "mutuality" and "reciprocity" between state and tribal courts.¹⁹⁹

195. Act of Mar. 26, 1804, ch. 38, 2 Stat. 283. That acquisition had been the subject of extensive discussion during that session of Congress. See 13 Annals of Cong. *passim* (1852).

196. Act of Mar. 26, 1804, ch. 38, § 1, 2 Stat. at 283 (the described area "shall constitute a territory of the United States . . ."). Section 7 of that act, 2 Stat. at 285, extended, *inter alia*, the 1790 full faith and credit implementing act and the acts regulating trade with Indians to the territory thereby created.

197. *Id.* § 12, 2 Stat. at 287. The congressional debate concerning if and how the United States was empowered to add the Louisiana Purchase to its domain was vigorous and long. For a discussion of that debate, see *Downes v. Bidwell*, 182 U.S. 244, 252-57 (1901).

198. Task Force Two: Tribal Government, Report on Tribal Government, Final Report to the American Indian Policy Review Commission (Comm. Print 1976) [hereinafter Task Force Two Report].

199. American Indian Lawyer Training Program, *Issues in Mutuality—The Existing Relationship Between State and Tribal Courts*, in Task Force Two Report, *supra*

Unfortunately, this portion of that report is perhaps more confusing than enlightening, due partly to its approach.²⁰⁰ Despite its conclusion that Indian tribes are, or at least should be considered, "territories" under section 1738, Task Force Two recommended to the full commission that section 1738 be amended by adding "Tribal" and "Indian Tribe" at various points.²⁰¹ That recommendation was included in the full commission's Final Report to Congress.²⁰² That particular proposal has never been acted on by Congress.

2. Indian Child Welfare Act and Parental Kidnaping Act

One major purpose of the Parental Kidnaping Act of 1980²⁰³ is embodied in its full faith and credit provision which provides, in part, that "[t]he appropriate authorities of every State shall enforce . . . any child custody determination made . . . by a court of another State."²⁰⁴ For the purposes of that act, "state" is defined as "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States."²⁰⁵ The legislative history of that act does not reveal any consideration or testimony concerning whether Indian tribes or reservations would or should be included within the definition of "state."²⁰⁶ The American Bar Association, at the recom-

note 198, app. X, at 227-68; *Indian Tribes and Full Faith and Credit*, in Task Force Two Report, *supra* note 198, app. XIII, at 285-305.

200. The *Issues in Mutuality* section of the Task Force Two Report, *supra* note 198, was the product of an American Indian Lawyer Training Program, "Indian Law Seminar and Intern Project," and was prepared by law student interns. The "Forward" to the section shows that the project proceeded from a less than objective point of view. Appendix B to the *Issues in Mutuality* section appears to be a draft of a significant part of the following *Indian Tribes and Full Faith and Credit* article (appendix XII) for which no author is given. In addition to other problems with these articles, incomplete citations and typographical or printing errors frequently make understanding difficult or impossible.

201. Task Force Two Report, *supra* note 198, at 37. No similar recommendation was made with respect to 28 U.S.C. § 1739 (full faith and credit for nonjudicial records).

202. 1 American Indian Policy Review Commission, Final Report 214-15 (Comm. Print 1977). *But see Separate Dissenting Views of Congressman Lloyd Meeds, D-Wash., Vice Chairman of the American Indian Policy Review Commission, id.* at 458.

203. Pub. L. 96-611, 94 Stat. 3566 (1980).

204. *Id.* § 8 (a), 94 Stat. at 3569-70 (codified at 28 U.S.C. § 1738A(a) (1982)).

205. *Id.* § 8(b)(8), 94 Stat. at 3570 (codified at 28 U.S.C. § 1738A(b)(8) (1982)).

206. *See Parental Kidnaping, 1979: Hearing Before the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources on "Examination of the Problem of 'Child Snatching' "*, 96th Cong., 1st Sess. (1979); *Parental Kidnaping Prevention Act of 1979, S. 105: Joint Hearing Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess., S. Serial No. 96-54A and 96-54A Addendum (1980); *Parental Kidnaping: Hearing on H.R. 1290 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, H.R. Serial No. 73, 96th Cong., 2d Sess. (1980) [hereinafter *June 1980 Hrq.*]; 126 CONG. REC. 22,803-19, 22,842-43 (1980); *Conference Report*, H.R. REP. NO. 1401, 96th Cong., 2d

mentation of its Family Law Section, adopted a resolution supporting the Parental Kidnaping legislation.²⁰⁷ The statement of the American Bar Association representative, although noting that "the three American jurisdictions of the District of Columbia, Puerto Rico and the Virgin Islands" had not adopted the Uniform Child Custody Jurisdiction Act, made no mention of Indian tribes or reservations and no recommendation to amend the definition of "state" in the then proposed section 1738A.²⁰⁸

The Indian Child Welfare Act of 1978²⁰⁹ was expressly intended to affect Indian tribes and the recognition given to tribal interests with respect to Indian children. In contrast to the language used in the 1980 Parental Kidnaping Act, the full faith and credit clause included in the Indian Child Welfare Act *adds* Indian tribes to the language employed in both the general full faith and credit statute and the Parental Kidnaping Act provision. Section 101(d) of the Indian Child Welfare Act states:

The United States, every State, every territory or possession of the United States, *and every Indian tribe* shall give full faith and credit to the public acts, records, and judicial proceedings of *any Indian tribe* applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.²¹⁰

The Indian Child Welfare Act, in part, dealt with the same subject matter as the Parental Kidnaping Act²¹¹ and a juxtaposition of those acts shows that (1) when Congress clearly wants full faith and credit to be given to tribal decisions, it *adds* language to that found in section 1738;²¹² and (2) Congress does not consider

Sess. (1980), reprinted at 126 CONG. REC. 27,494 (1980).

"State" as used in the Uniform Child Custody Jurisdiction Act (the language of which is essentially identical to that of the Parental Kidnaping Act) has been expressly held to not include Indian tribes. *Desjarlait v. Desjarlait*, 379 N.W.2d 139, 143 (Minn. Ct. App. 1985) (construing MINN. STAT. § 518A.01, subd. 1 (1980) which defines "state" to include "any state, territory, or possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia . . ."). Cf. *Malaterre v. Malaterre*, 293 N.W.2d 139, 144 (N.D. 1980).

207. See *June 1980 Hrg.*, *supra* note 206, at 101-02.

208. *Id.* at 99-106 (testimony of Dr. Doris Jonas Freed, Esq., Chairperson, Commission on Custody, and Council Member, Section of Family Law, on behalf of the American Bar Association).

209. Pub. L. 95-608 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901-1963 (1982)).

210. *Id.* at tit. I, § 108(d), 92 Stat. at 3071 (codified at 25 U.S.C. § 1911(d) (1982)) (emphasis added).

211. Compare 25 U.S.C. § 1920 (1982) (Improper Removal of Child from Custody) with 18 U.S.C. § 1230 (1982) (Parental Kidnaping).

212. See also Indian Land Consolidation Act, Pub. L. 97-459, tit. II, § 208, 96 Stat. 2519 (1983) (codified at 25 U.S.C. § 2201-2206 (1982) (requiring *only* the Secretary of the Interior to "give full faith and credit to any tribal actions taken pursuant to [25

the general language of section 1738 or section 1738A as including Indian tribes.²¹³

3. Maine Indian Lands Claim Settlement

One section of the legislation proposed in 1980 (the same year the Parental Kidnaping Act was under consideration) to settle the Maine Indian land claims controversy was a full faith and credit provision, section 6(f), stating:

The United States, every State, every territory or possession of the United States, *and every Indian nation and tribe and band of Indians* shall give full faith and credit to the judicial proceedings of the Passamaquoddy Tribe and the Penobscot Nation. The Passamaquoddy Tribe and the Penobscot Nation shall give full faith and credit to the judicial proceedings of each other and to the judicial proceedings of the United States, every State, every territory or possession of the United States, *and every recognized Indian nation and tribe and band of Indians.*²¹⁴

The United States Department of the Interior objected to that proposal. In his written statement at the July 1, 1980, hearing before the Senate Select Committee on Indian Affairs, Secretary Andrus stated:

Under section 6(f) adjudications of the Passamaquoddy Tribe and the Penobscot Nation would be required to be given full faith and credit by the United States, the States, and all other Indian tribes. Although some courts have accorded full faith and credit to tribal judicial proceedings, statutory requirements for such full faith and credit presently exist only with respect to child custody proceedings. In addition, since tribal governmental actions are not reviewable except in habeas corpus proceedings in Federal court, a tribal court adjudication that violates the In-

U.S.C.] section 2205 . . . ").

213. If § 1738 included Indian tribes, 25 U.S.C. § 1911(d) (1982) would have been unnecessary. If § 1738A included Indian tribes, it would have been appropriate to repeal or amend § 1911(d) when § 1738A was adopted.

The considerations applicable to the interpretation of § 1738A are identical to the considerations applicable to the interpretation of § 1738. *See Dare v. Secretary of Air Force*, 608 F. Supp. 1077 (D. Del. 1985), *aff'd without opinion*, 787 F.2d 581 (3d Cir. 1986) (Clark Air Force Base in the Philippines not a U.S. "possession" under § 1738A).

214. S. 2829, 96th Cong., 2d Sess. § 6(f), 126 CONG. REC. 14,674, 14,677 (1980), *reprinted at 1 Proposed Settlement of Maine Indian Lands Claims: Hearings before the Senate Select Comm. on Indian Affairs on S. 2829*, 96th Cong., 2d Sess. 19-20 (1980) (emphasis added) [hereinafter *1980 Maine Hrgs (Senate)*]. The proposed language could be read to imply that all Indian tribes, regardless of federal status, would be required to give full faith and credit to the Maine Indians while the latter were only required to give full faith and credit to federally recognized tribes.

An identical measure was introduced in the House of Representatives as H.R. 7919. *See Settlement of Indian Land Claims in the State of Maine: Hearing Before the House Comm. on Interior and Insular Affairs*, H.R. Serial No. 96-41, 96th Cong., 2d Sess. 2, 18-19 (1980).

dian Bill of Rights might be required to be given full faith and credit. We therefore believe that this provision should be deleted from the bill.²¹⁵

Within six weeks after the Senate hearing, the Department of the Interior reported that the state of Maine and the Maine Indian tribes had proposed the much less encompassing substitute for the objectionable section and that proposal was included in the Department's proposed substitute bill.²¹⁶ The agreed substitute provided: "The Passamaquoddy Tribe, the Penobscot Nation, and the State of Maine shall give full faith and credit to the judicial proceedings of each other."²¹⁷ That proposal was adopted by Congress.²¹⁸

There does not appear to be any record or situational support for a conclusion that the 1790 or 1804 Congresses considered Indian tribes to be included within the meaning of the term "territories" as used in the full faith and credit legislation they enacted. To the contrary, there is every reason to conclude the opposite.²¹⁹

215. 1980 Maine Hrgs. (Senate), *supra* note 214, at 135 (written statement of Cecil D. Andrus, Secretary of the Interior).

During the hearing, the following exchange occurred between Senator Cohen of Maine and Tim Vollmann, Assistant Solicitor for Indian Affairs, Department of the Interior:

Senator Cohen. Under section 6(f) of the [proposed] Federal act, judgments of the tribal courts in Maine would be accorded full faith and credit by the courts of the United States and any U.S. State or territory. How does this provision compare with current law?

Mr. Vollmann. Right now there is no statute of the United States that gives tribal court proceedings full faith and credit in State or federal courts. Some of those courts have honored judgments of tribal courts, nonetheless.

Senator Cohen. Is that on a basis of comity rather than full faith and credit?

Mr. Vollmann. Scholars view it as a comity issue, though one court has called it full faith and credit.

Id. at 49.

That position is consistent with the position taken by the Solicitor's Office of the Department of the Interior in a 1971 letter to the General Counsel of the Department of Agriculture concerning the inclusion of Indian reservations within the meaning of "territory" in the Wholesome Meat Act of 1967, 81 Stat. 584 (codified at 21 U.S.C. §§ 601-691 (1982 & Supp. III 1985)). *Applicability of the Wholesome Meat Act of 1967 on Indian Reservations*, 78 Interior Dec. 18 (1971). Perhaps significantly, that Solicitor's opinion expressly relies on *Ex parte Morgan*. See *id.* at 19.

216. Letter of Aug. 8, 1980, from Secretary of the Interior Andrus to Senator Melcher, reprinted in 1980 Maine Hrgs. (Senate), *supra* note 214, at 95-127.

217. 1980 Maine Hrgs. (Senate), *supra* note 214, at 121. According to Secretary Andrus, "[t]he parties could agree to this form of comity without the consent of Congress, but we have no objection to its inclusion in the settlement legislation. There is, of course, no reason why the Tribes may not establish similar comity with other jurisdictions." *Id.* at 102. See also *Settlement of Indian Land Claims in the State of Maine: Hearing on H.R. 7919 Before the House Comm. on Interior and Insular Affairs*, *supra* note 214, at 125-72, 132 (1980). See also S. REP. NO. 957, 96th Cong., 2d Sess. (1982), reprinted at 126 CONG. REC. 25,747 (1980).

218. Maine Indian Claims Settlement Act of 1980, Pub. L. 96-420, § 6(g), 94 Stat. 1785, 1793 (codified at 25 U.S.C. § 1725(g) (1982)).

219. *Cf. Gover & Laurence*, *supra* note 189, at 530-35 (arguing against the possibil-

It is a matter of record that the Department of the Interior which, since its creation has administered Indian affairs, is of the opinion that section 1738 does not apply to Indian tribes. Recent legislation, particularly section 101(d) of the Indian Child Welfare Act, strongly supports the conclusion that Congress agrees with the Department of the Interior and the majority of the courts which have addressed the issue.

III. SOME SECONDARY SOURCES

Secondary sources, both "leading authorities" and those of less universal renown, do not resolve the questions remaining after a careful review of primary authorities. Perhaps because of the character of the precolumbian political-judicial Indian society and the length of time before there was a significant number of European style Indian courts, the extensive opinion written in 1934 by the Department of the Interior's Solicitor's Office appears to be the first publication to address the issue. Other than a short reference in Cohen's *Handbook*, the subject lay essentially unnoticed until the New Mexico and Arizona courts issued their directly conflicting decisions.

A. *The 1934 Solicitor's Opinion*

In the frequently cited 1934 Solicitor's Opinion, *Powers of Indian Tribes*,²²⁰ Interior Department Solicitor Margold stated: "The decisions of Indian tribal courts, rendered in their jurisdiction and according to the forms of law or custom recognized by the tribe, are entitled to full faith and credit in the courts of the several States."²²¹ Cited in support of that statement were the familiar, and even then old, Eighth Circuit Court of Appeals decisions of *Raymond v. Raymond*, *Standley v. Roberts*, and *Mehlin v. Ice*.²²² In addition, Attorney General's Opinions from

ity that the 1870 Congress intended to include Indian tribes as governments against which civil rights actions might be brought).

220. 55 Interior Dec. 14 (1934). This opinion was drafted by the Solicitor of the Department of the Interior, with the assistance of John Collier, to "flesh out" the language of § 16 of the Indian Reorganization Act (the "Wheeler-Howard Act"). Section 16 merely recognized the "powers vested in any Indian tribe . . . by existing law" (48 Stat. 984, 987) as the powers which could be exercised by tribes organized under the Act, rather than the detailed exposition of powers included in the legislation originally proposed by Collier. *See generally* V. DELORIA & C. LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* 154-70 (1984). Deloria and Lytle characterize the 1934 Opinion as an "administrative revolution." *Id.* at 160. "Margold's opinion worked steadily in one direction: buttressing the political powers of the tribe that had not been acknowledged by any organ, agency, or branch of the federal government." *Id.* at 159.

221. *Powers of Indian Tribes*, 55 Interior Dec. at 56.

222. *See* discussion of these cases *supra* notes 34-46 and accompanying text.

1888²²³ and 1855,²²⁴ a then recent district court decision²²⁵ and the Supreme Court's 1897 *Nofire v. United States*²²⁶ decision were cited without discussion.²²⁷ In addition to the infirmities of the Eighth Circuit cases, the other cited sources dealt only with an Indian tribe's jurisdiction to decide matters of tribal membership, rights to tribal benefits and members' property matters. They did not discuss either full faith and credit in general or the meaning of the word "territory" in the implementing statute.

Later in that same opinion, the Solicitor, based on a reading of the cited 1855 Attorney General's Opinion, stated that Indian tribes "bear[] a relation to the Government of the United States similar to that which a territory bears to such Government"²²⁸ With respect to this statement, three points should be considered. First, it recognizes a distinction between Indian tribes and territories of the United States. Second, it espouses a relationship between the United States and the Indian tribes which is directly contrary to the Supreme Court's later decision in *United States v. Wheeler*.²²⁹ Third, if that theory of tribal federal relationship is the basis for the prior conclusion concerning full faith and credit, that prior conclusion is not well-founded.²³⁰ On the whole, at least this portion of the 1934 Solicitor's Opinion appears more advocacy than expository.

223. 19 Op. Att'y Gen. 109 (1888).

224. 7 Op. Att'y Gen. 174 (1855).

225. *Washburn v. Parker*, 7 F. Supp. 120 (W.D.N.Y. 1934).

226. 164 U.S. 657 (1897).

227. Since this appears to be a thoroughly researched opinion, the fact that *United States ex rel. Mackey v. Coxe*, 59 U.S. (18 How.) 100 (1856), is not mentioned at this point could be construed as an acknowledgment that it was not sufficiently analogous to support the quoted opinion. This is perhaps, even more remarkable when it is noted that *Mackey* was cited in support of the proposition that Indian tribes have the power to govern the descent and distribution of the property of their members. See *Powers of Indian Tribes*, 55 Interior Dec. at 43-44. Of course, this oversight could also imply that the Opinion was not so thorough as it might appear on the surface.

228. *Powers of Indian Tribes*, 55 Interior Dec. at 63, (discussing 7 Op. Att'y Gen. 174 (1855)). Again, *Mackey* was not cited.

229. 435 U.S. 313 (1978). *Wheeler* is, ironically, based on the theory of retained, inherent tribal powers which the 1934 Opinion so vigorously championed. See *id.* at 323-30.

230. Though not expressly stated in the discussion section of the 1934 Opinion, the full faith and credit portion may have been intended to be limited to tribal court decisions in matters between tribal members or was based on the assumption that such were the only types of actions tribal courts would or could decide. The related "summary conclusion" stated that tribes have the power "[t]o administer justice with respect to all disputes and offenses of or among the members of the tribe, other than the ten major crimes reserved to the Federal courts." *Powers of Indian Tribes*, 55 Interior Dec. at 66 (emphasis added).

B. Cohen—1942 and 1982

The "Bible" of Indian law, Felix Cohen's original *Handbook of Federal Indian Law*,²³¹ states:

That an Indian tribe has power to confer upon its own courts jurisdiction over controversies involving Indians is a proposition supported by authorities which have already been analyzed. That "full faith and credit" are due to decisions rendered by tribal courts in cases properly within their jurisdiction, is a second basic principle in the field of civil jurisdiction which is supported by authorities elsewhere analyzed.²³²

The "authorities elsewhere analyzed" are (1) a discussion which virtually repeats the 1934 Solicitor's Opinion,²³³ and (2) a statement, supported by quotations from *Mackey* and *Standley v. Roberts*, that "Indian tribes have been treated, for certain purposes as similar to states, territories, or dependencies of the United States."²³⁴ Interestingly, as examples of enactments conferring such jurisdiction, a provision from the Rosebud Sioux Tribal Code and one from the Department of the Interior's regulations covering Courts of Indian Offenses are quoted.²³⁵ Both confer outright jurisdiction over actions between members of the tribe, but limit jurisdiction over actions involving nonmembers to those which are brought before tribal court *by stipulation of all parties*.

Thus, both Cohen's 1942 conclusions and the 1934 Solicitor's Opinion concerning full faith and credit are based in significant part either on a subsequently disapproved position concerning the relationship between the tribes and the federal government or on the assumption that tribal court jurisdiction was exercised only over tribal members or persons voluntarily submitting themselves to that court's jurisdiction.

Cohen's (and perhaps Solicitor Margold's) conclusion concerning the state-tribal-federal relationship was probably influenced by the "federal instrumentality" doctrine which was not discredited until some years later. That doctrine held that, for purposes of executing the United States' trust and treaty obligations to the Indians, the tribes were instrumentalities, that is, agents, of the

231. F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (1942 & photo reprint 1972) [hereinafter COHEN—1942].

232. *Id.* at 382 (footnotes omitted).

233. *Id.* at 145.

234. *Id.* at 275. At the time Cohen was writing, the full faith and credit implementing statute had not been revised and still spoke in terms of "countries subject to the jurisdiction of the United States," not "dependencies". It is apparent that it was Cohen's at least casual opinion that those two terms were interchangeable. However, such an equivalence supports only the argument that the areas intended to be included within the statute were those which were part of the United States' political family, however temporarily.

235. *Id.* at 382.

federal government.²³⁶ Assuming that tribal courts exercise some responsibility in the United States (which would not have been an unreasonable assumption in 1940 when the majority of reservation courts were the administratively created Courts of Indian Offenses), those courts could be seen as federal instrumentalities and therefore entitled to respect because of that capacity.

Such an argument, however, proves too much and has been discredited by subsequent Supreme Court decisions.²³⁷ If tribal courts are acting on behalf of the federal government, then tribal juridical power would be an attribute delegated by the federal government. If Indian juridical authority is delegated, it would be difficult to conclude that Indian legislative and executive authorities had a different source. Such a conclusion is directly contrary to the inherent sovereignty theory.

The 1982 revision of Cohen's *Handbook*²³⁸ takes a much more ambiguous position. It first notes that application of section 1738 has resulted in conflicting state court decisions²³⁹ and then that the Supreme Court has construed the term "territory" in "an earlier statute" to include Indian tribes,²⁴⁰ a conclusion reached by other federal courts.²⁴¹ However, one gets the impression that the authors of the 1982 version prefer the application of comity principles over the inclusion of Indian tribes within section 1738.²⁴²

236. *Id.* at 275-77.

237. Application of the federal instrumentality doctrine to Indian tribes was repudiated in *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 366 (1949). That repudiation was reaffirmed in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 150 (1973).

238. COHEN—1982, *supra* note 4.

239. *Id.* at 385 (citing *Jim v. CIT Financial Services*, 87 N.M. 362, 533 P.2d 751 (1975), *rev'g* 86 N.M. 784, 527 P.2d 1222 (Ct. App. 1974) (Hernandez, J., dissenting); *In re Buehl*, 87 Wash. 2d. 649, 555 P.2d 1334 (1976); *Brown v. Babbitt Ford, Inc.*, 117 Ariz. 192, 571 P.2d 624 (Ct. App. 1977), discussed *supra* Part I. A. 2.

240. COHEN—1982, *supra* note 4, at 385 (citing *United States v. Mackey, ex rel. Cox*, 59 U.S. (18 How.) 100 (1856), discussed *supra* notes 27-33 and accompanying text).

241. COHEN—1982, *supra* note 4, at 385 (citing the old Eighth Circuit Court of Appeals cases discussed *supra* notes 34-46 and accompanying text).

Cohen—1982 also notes that the inclusion of Indian tribes within § 1738 would require tribes to give full faith and credit to states and other tribes. COHEN—1982, *supra* note 4, at 385 (citing *Red Fox v. Red Fox*, 564 F.2d 361, 365 n.3 (9th Cir. 1977); *Reiter v. Marion Corp.*, 299 F.2d 449, 452 (D.C. Cir. 1962)).

242.

Both reason and authority support the application of these doctrines to conflicts of laws arising between Indian tribes and other jurisdictions. Choice of law rules based on the comity principle are a flexible doctrine [sic] the reasons for which often apply to tribal jurisdictions as well as others, and courts have generally recognized tribal law in appropriate cases.

COHEN—1982, *supra* note 4, at 385 (footnote omitted).

The position taken with respect to the analogous extradition statute is similarly ambiguous. *Id.* at 382-84. The authors acknowledge the *Morgan* decision, criticize it using *Mackey* and *Embry v. Palmer*, 107 U.S. 3 (1882), but then flip back to the *Morgan* conclusion because interpretation of the term "territory" in the extradition statute to include

C. *Law Review Discussions*

In the late 1970's, the conflicting decisions in *Jim v. CIT Financial Services* and *Brown v. Babbitt Ford, Inc.*, sparked increased discussion of the issue. Professor Ragsdale's article²⁴³ did not have the benefit of the *Brown* decision, but did review the background of the application of full faith and credit to Indian tribes up through the *Jim* decision. The overall conclusion was that there was no legal theory adequate to compel the extension of section 1738 to Indian tribes²⁴⁴ and that the cases did not support a conclusion that Indian tribes were "territories" within the meaning of section 1738.²⁴⁵ The article goes on to discuss various "policy" considerations relating to the issue. While it is suggested that such an inclusion would have the favorable effect of integrating tribal courts into the "permanent fabric of America"²⁴⁶ and would institutionalize the somewhat chaotic relationships between the tribes and the states, it also notes that problems would result from the consequent limitations on state subject matter jurisdiction²⁴⁷ and the lack of an effective method of challenging a tribal court's failure to grant full faith and credit.²⁴⁸

Two subsequent discussions in Arizona law reviews did have the benefit of, and were critical of, the Arizona Court of Appeals' decision in *Brown*. Perhaps as a result, both overstate the strength of their position.

Indian tribes has "other problems." *Id.* at 383. The reason stated for that position is that the 1793 extradition statute (Act of Feb. 12, 1793, §§ 1, 3, 1 Stat. 302) specifically referred to the then existing "territories northwest and south of the River Ohio" and that language has been subsequently changed only as part of various codifications and therefore is less amenable to a broad construction than was the statute involved in *Mackey*. COHEN—1982, *supra* note 4, at 383 & n.26. Though not so contended in the 1982 version of Cohen's *Handbook*, the history and language of the 1804 full faith and credit statute supports only slightly less strongly the same argument with respect to that statute.

243. Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M.L. REV. (1977). Professor Ragsdale was acknowledged as a contributor or consultant to the Report of Task Force Two of the American Indian Policy Review Commission (see discussion *supra* notes 198-202 and accompanying text) and at least appendix XIII to that report appears to be a precursor of his *New Mexico Law Review* article.

244. Ragsdale, *supra* note 243, at 135.

245. *Id.* at 141. Among other things, the article notes the lack of mention of Indian tribes in the legislative history of the 1804 Act (*id.* at 136) and the fact that neither *Mackey* nor the old Eighth Circuit cases discussed the full faith and credit implementing legislation (*id.* at 138-39).

246. *Id.* at 142.

247. *Id.* at 146-69.

248. *Id.* at 150-51. The article concludes that: "[T]he 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." *Id.* at 150 (footnote omitted). Perhaps unfortunately, even that possibility was precluded by the Supreme Court's subsequent decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

The earlier of the two²⁴⁹ is very critical of the cases supporting a "narrow" construction of the term "territory" and champions the various dicta implying a "broad" construction.²⁵⁰ That Note does, however, recognize the political aspects involved in the issue. Perhaps taking a clue from *Mackey*, that author asserts that the creation of Indian tribal governments, the Navajo in particular, were authorized by the federal government and that the 1934 Indian Reorganization Act and the Navajo-Hopi Rehabilitation Act "may be properly considered as organic acts."²⁵¹ thus placing them on an equal footing with the governments of Puerto Rico and the Virgin Islands. While that argument is not without logic and clearly supports the desired conclusion, it ignores and is contrary to the fundamental theories supporting tribal self-government.

The later Arizona article²⁵² is perhaps even more advocatory. *Mackey* is declared "powerful authority" for extension of section 1738 to include Indian tribes.²⁵³ This article, too, takes the position that Indian tribes "exist as products of congressional legislation."²⁵⁴

Each of these sources,²⁵⁵ with varying degrees of openness, admit that the conclusion that Indian tribes are "territories" within section 1738 is not unequivocally supported by the court decisions or legislative history selected for discussion. Additionally, at least the Arizona articles impliedly acknowledge that reaching their desired conclusions requires the prior conclusion that the governmental authority exercised by Indian tribes is a product of congressional action. Even though that may, as a matter of practical reality, be the case, in legal theory it is akin to throwing out the proverbial baby with the bath.

249. Note, *Arizona Appellate Decisions—Indian Law: The Application of Full Faith and Credit to Indian Nations*, 20 ARIZ. L. REV. 1064 (1978).

250. This stance was extended even to the point of stating that *Mackey* and the old Eighth Circuit cases were "approved" by the Supreme Court by its irrelevant footnote in *Martinez*.

251. Note, *supra* note 249, at 1071 n.65. The Note apparently does not recognize as important the fact that the Navajo Tribe did not accept, and is not organized under, the 1934 Indian Reorganization Act.

252. Comment, *Conflicts Between State and Tribal Law: The Application of Full Faith and Credit Legislation to Indian Tribes*, 1981 ARIZ. ST. L.J. 801.

253. *Id.* at 820.

254. *Id.* at 808.

255. *Cf. also* Note, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397 (1985).

IV. UNDERLYING POLITICAL CONCEPTS

On the surface, the full faith and credit clause of the Constitution is concerned only with proof of other states' records. However, in function, it is a keystone in the unique vision of the government underlying and pervading that document. The Constitution's first three articles provide the framework of the national government. The fourth article, entitled "States—Reciprocal Relationship Between States and With the United States", provides the basis for the "federal" character of the resulting nation. But for provisions such as those found in article IV, the United States would have been much less united. The full faith and credit clause is the first of those federalistic provisions. While retaining the fundamental sovereignty of the states, it establishes a tie among them—a special recognition of their legal and political interrelatedness. At the time of the adoption of the Constitution and at present, the principles of comity provide an adequate basis for interjurisdictional recognition of judgments. The full faith and credit requirements recognize and institutionalize a much closer political relationship between the jurisdictions subject to the Constitution.

There is nothing in congressional history or court decisions which proves an intent to bring within this federal relationship any political entities which are not a part of the nation established by and under the Constitution. The non-state political entities which are recognized as having been brought within the operation of the full faith and credit clause by the 1804 Act are constituent parts of the federal polity. The District of Columbia is expressly provided for in the Constitution.²⁵⁶ The political territories established by Congress through organic acts were not so clearly envisioned by the Constitution;²⁵⁷ but the legal process of creating territories as the first step in creating new states²⁵⁸ was established by the Confederacy before the drafting of the Constitution and was continued thereafter by a government operated by persons who participated in the Constitution's drafting. Persons involved in the drafting and ratification of the Constitution were still active in the federal government, as legislators, administrators and jurists, as the territorial governments were being authorized and when the 1804 Act was adopted.

256. U.S. CONST. art. I, § 8, cl. 17.

257. It is generally accepted that Congress' power to create territorial governments is within the powers granted in U.S. CONST. art. IV, § 3, but might have been also found under art. I, § 8, cl. 18, "Enactment of laws for execution of governmental powers".

258. U.S. CONST. art. IV, § 3, cl. 1.

That those persons did not understand Indian tribes to be members of the federal polity is rather obvious from the Constitution, as reflected in the provision for not counting Indians in the process of apportioning the members of the House of Representatives²⁵⁹ and the separate listing of "Indian tribes" among the entities with which Congress had the power to regulate commerce.²⁶⁰ That point of view is also rather obvious from the fact that, for nearly ninety years after ratification of the Constitution, dealings between the United States government and Indian tribes were by treaty rather than by legislation in the manner applicable to members of the federal polity. The Trade and Intercourse Acts, the primary vehicle for congressional regulation of commerce with the Indians, prohibited travel in the Indian country south of the Ohio River without a passport issued by state or federal authorities.²⁶¹ If Indian tribes were then considered "territories of the United States," requiring a passport to travel into Indian lands would be preposterous.

It is against that backdrop that the application of the full faith and credit implementing acts must be measured. Were, or are, Indian tribes so closely interwoven into the federal system to have become a political part of it? The key Supreme Court decision which supports a contention that Indian tribes are territories under section 1738 or its predecessors, *United States ex rel. Mackey v. Coxe*,²⁶² is based on the conclusion that the treaties between the United States and the Cherokee Nation (and possibly the Indian trade legislation passed by Congress) were sufficient to bring that tribe within the federal system. The Court stated: "[The Cherokee territory] is not a foreign, but a domestic territory,—a territory which originated under our constitution and laws."²⁶³ That language is not consistent with preceding opinions concerning the relationship between the Indians and the United States²⁶⁴ and is overshadowed by later decisions.²⁶⁵

Those political entities not labeled "territory" which neverthe-

259. U.S. CONST. art. 1, § 2. This provision was continued in the post Civil War fourteenth amendment.

260. U.S. CONST. art. I, § 8, cl. 3.

261. See Act of May 19, 1796, ch. 30, § 3, 1 Stat. 469, 470; Act of Mar. 3, 1799, ch. 46, § 3, 1 Stat. 743, 744; Act of Mar. 30, 1802, ch. 13, § 3, 2 Stat. 139, 141. The 1802 Trade and Intercourse Act was still in effect when the 1804 implementing act was adopted.

262. 59 U.S. (18 How.) 100 (1855).

263. *Id.* at 103 (emphasis added).

264. See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). Both cases involved the same Indian tribe as was involved in *Mackey*.

265. See, e.g., *United States v. Wheeler*, 435 U.S. 313 (1978); *United States v. Antelope*, 430 U.S. 641 (1977); *Talton v. Mayes*, 163 U.S. 376 (1896); *Elk v. Wilkins*, 112 U.S. 94 (1884).

less have been found to be included within that term in section 1738 have been, as an integral part of that conclusion, found to be a part of the United States "system of government."²⁶⁶ Local governments, such as those of Puerto Rico, the Virgin Islands, Guam and American Samoa, were *created by* act of the federal government and carved from a part of the geographic domain of the United States not already under a government existing under the Constitution. By act of the federal government, the inhabitants of those discrete geographic areas were given the authority to govern themselves, *subject to the Constitution* and applicable federal laws.

It can be argued that congressional acts such as the Indian Reorganization Act²⁶⁷ or section six of the Navajo-Hopi Rehabilitation Act²⁶⁸ created the tribal governments just as similar acts created the Virgin Islands' and Puerto Rican governments. That argument is both realistic and not without force.²⁶⁹ It is, however, inconsistent with the basis on which Indian tribes claim the right to self-determination. An alternative interpretation of such acts is that they do not purport to create the authority for Indian self-government but, instead, merely set forth the conditions under which the federal government will recognize and deal with representatives of the individual Indians.

Indian tribes, at least in current legal theory, are not constituent parts of the political, sovereign nation of the United States. The international law theory that was applied to Indians prior to the birth of the United States, continued by decisions of the Supreme Court and acts of Congress and given new meaning in the current theories of Indian self-determination, is based on the premise that the Indian tribes' right of selfgovernment antedates and is independent of the United States. Based on that theory, Indian tribes cannot be "territories" or "possessions" "*of the United States.*" The right to self-government, under that theory, is not a creation of the United States, but of some higher or different authority.²⁷⁰

266. See, e.g., *Americana of Puerto Rico, Inc. v. Kaplus*, 368 F.2d 431, 438 (3d Cir. 1966), *cert. denied*, 386 U.S. 943 (1967).

267. Act of June 18, 1934, ch. 576, 48 Stat. 984.

268. Act of Apr. 19, 1950, ch. 92, § 6, 64 Stat. 44, 45 (codified at 25 U.S.C. § 636 (1982)) (authorizing the Navajo tribe to adopt a constitution).

269. See Note, *supra* note 249; Comment, *supra* note 252.

270. The general theory that tribes govern through their inherent authority, not through authority delegated from the United States, is supported by Supreme Court decisions such as *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and the opinion of the Solicitor of the Department of the Interior at the time of the adoption of the I.R.A. *Powers of Indian Tribes*, 55 Interior Dec. 14 (1934).

A related problem is whether Congress even has the authority to include Indian tribes within a full faith and credit implementing statute. Article four, section one of the Constitution grants that authority only as to states. Power to include territories has been found in article four, section three—which mentions only “territory” “belonging to the United States.”²⁷¹ If that clause can be construed as granting power over Indian tribes, that interpretation has not been previously suggested by the courts. Perhaps the treaty power, which has been used with respect to Indians, could have been invoked to authorize treaties including full faith and credit provisions binding on the states through the Supremacy Clause; but that avenue was foreclosed over one hundred years ago.²⁷²

That leaves, as a basis for congressional authority, only the “Indian commerce clause” of article one, section eight, clause three of the Constitution. *Santa Clara Pueblo v. Martinez*²⁷³ implies that Congress has the authority under that section to require Indian tribes to give full faith and credit to other Indian tribes and states. Is it, however, sufficient to authorize Congress to require *states* to grant full faith and credit to Indian tribes? Given the breadth of the power allowed to Congress both under the interstate commerce clause and with respect to Indians, it is at least conceivable that Congress could properly amend section 1738 to include Indian tribes. There is no court decision which, after exploring congressional power under the Indian commerce clause, has found that Congress invoked that power in 1804 or 1948 when enacting or codifying the implementing legislation. However, the Court has held that Congress has the power to invalidate, through implied preemption, state legislation governing the jurisdiction of its own courts.²⁷⁴ Requiring the granting of full faith and credit to tribal court judgments is less intrusive on state autonomy and

271. *Brown v. Babbitt Ford, Inc.*, 117 Ariz. 192, 571 P.2d 689 (Ct. App. 1977), interprets that phrase to exclude lands possessed by Indian tribes. See discussion *supra* notes 61-83 and accompanying text.

272. Appropriations Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified as 25 U.S.C. § 71 (1982)):

[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided, further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

The language of that act implies that, theretofore, Indian tribes were considered “independent nations”.

273. 436 U.S. 49 (1978).

274. *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering*, — U.S. —, —, 106 S. Ct. 2305, 2311 (1986).

therefore probably within the scope of Congress' power.²⁷⁵ While Congress may have the authority to include Indian tribes within section 1738, whether that authority should be exercised remains an open question.

SUMMATION

A conclusion that tribal court judgments are entitled to full faith and credit under section 1738 may outwardly support the current theory of Indian self-determination. However, the court or commentator wishing to reach that result, for that reason, faces a dilemma. A conclusion that section 1738 includes Indian tribes must be based on the proposition that they are part of the United States' federal polity, while Indian self-determination is based on the proposition that they are *not* a part of that polity. In addition, the reciprocity required by section 1738 would tend to limit tribal flexibility which is an important part of the concept of self-determination and which may be needed to adequately protect the tribes' interests or those of its members.

Excluding Indian tribes from the operation of section 1738 does not mean that tribal court judgments will be unenforceable in state or federal courts. A number of non-Indian court decisions have, directly or indirectly, enforced tribal court decisions despite an unwillingness to find that section 1738 requires that result. Application of principles of comity have resulted in numerous favorable decisions. Employing comity, rather than full faith and credit, should not be seen as somehow derogatory. Except where controlled by treaty, judgments of all truly foreign nations are subject to comity considerations. It would not seem that tribes, which claim sovereignty antecedent to and independent of that of the United States, should object to being treated on an equal footing with European or Asian nations which antedate and are independent of the United States.

Perhaps unfortunately, some non-Indian courts applying comity considerations may decline to enforce judgments of some tribal courts because of perceived inadequacies in those courts.²⁷⁶ Those inadequacies may be of two types: (1) use of a traditional tribal remedy not available in an "Anglo" court; or (2) procedural or qualitative deficiencies. Since state and federal courts may not have the powers or facilities to enforce the more traditional tribal

275. The full faith and credit provision of the Indian Child Welfare Act (28 U.S.C. § 1738A (1982)) has not been held, by any court, to be beyond congressional authority.

276. See, e.g., Note, *supra* note 255; Brakel, *American Indian Tribal Court: Separate? "Yes," Equal? "Probably Not"*, 62 A.B.A. J. 1002 (1976); Collins, Johnson & Perkins, *American Indian Courts and Tribal Self-Government*, 63 A.B.A. J. 808 (1977).

remedies (which, in any event, may be ineffectual in non-Indian society), tribal judges and litigants will undoubtedly recognize the limited effect of such remedies and avoid them in situations which might require off-reservation enforcement. The perceived procedural and qualitative inadequacies of tribal courts can be overcome, but only by the tribes themselves and perhaps only with the surrender of some of the attributes which distinguish tribal courts from state courts.²⁷⁷

If tribal courts continue to exercise jurisdiction only over those subject matters over which tribal jurisdiction has been historically supported, that is, actions between tribal members or concerning tribal benefits or property rights, the lack of enforceable full faith and credit for tribal court judgments does not create a significant problem. It is only when tribes and tribal courts act like non-Indian governments and courts and attempt to involuntarily affect the rights of nonmembers that problems arise.

Thus, as is usual in Indian law matters, the problem comes full circle—back to the fundamental question of the proper political, social and ideological relationship between Indian tribes and the other peoples and governments of the United States. That, of course, is not a justiciable issue.

It may seem rather obvious that Indian tribes are, or are not, included within the meaning of “territory” or “possession” in section 1738. However, which of those conclusions appears “obvious” ultimately depends on an initial point of view. If practical reality is the benchmark, Indian tribes should be considered “territories.” If legal or political theory or ideology plays a significant part in the consideration, Indian tribes should not be considered “territories.”

Indian tribes exist as viable entities at the sufferance of Congress. Tribes have been terminated and reestablished by Congress. In that sense, they are akin to territories. The continued political existence of both depend on the will of Congress. Acts of Congress, such as the Indian Reorganization Act and administrative regulations, have an enormous impact on the characteristics of tribal governments and the manner in which their authority is exercised. That situation may change as tribal governments increase their revenues through local taxation or economic enterprises.²⁷⁸

277. These factors include having less formal court proceedings available, like the Navajo “Peacemaker Courts,” which allow the court to act more as a community arbitrator than as a formal, distant, adjudicator and making available tribal, communal remedies. These features also encompass such less favorable attributes as direct, or indirect, political and social control of the tribal court judges and use of judicial positions as “spoils” in tribal politics.

278. Even those activities are subject to significant control by federal authorities.

Their reliance on federal funding, with the concomitant subjugation to federal regulation, may decrease to a level no greater than that of "Anglo" local governments. Until that point is reached, the practical independence of tribal government is subject to serious question.

In addition, both Indian tribes and individuals exist and act within the economy of the United States. Depending on one's point of view, Indians may or may not be seen as being integrated into American society. However, regardless of that point of view, Indian society in the 1980's is more like the general American society than like the Indian societies existing before 1500 or even, in large part, a mere hundred years ago.²⁷⁹

Some of the previously logical reasons against concluding that Indian tribes are territories are no longer valid. *Morgan* noted that Indians were not citizens—not part of the United States' political family.²⁸⁰ In 1924, the bar to United States citizenship was removed²⁸¹ and, more recently, Indians have become citizens of the states in which they reside.

The notion that the land occupied by the Indians was not "owned" by the United States, mentioned in *Brown*, while not ever accurate in pure legal theory, is no longer accurate even from a practical standpoint. From the time Europeans began immigrating to what was to become the United States until the 1870's, Indians militarily and physically controlled an ever-decreasing portion of that geographic territory. From a practical point of view, the United States "conquered" the last portions held by Indians over one hundred years ago. Indian tribes are now in the process of regaining control of those areas allocated to them by the treaties.

While each tribe may be proceeding along its own path with varying degrees of success, tribal governments are taking on more and more of the appearance and function of non-Indian local governments—again in practical terms, coming to look and act like part of the American legal and political system. Indian tribes are, in practical legal and political respects, much like "territories" such as Puerto Rico. They can, within broad limitations, choose their own forms of government, political leaders and government

See, e.g., *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 839-45 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145-49 (1980).

279. Cf. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. 327 (1987).

280. *Ex parte Morgan*, 20 F. 298 (W.D. Ark. 1883). See also *Elk v. Wilkins*, 112 U.S. 94 (1884).

281. Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1041(b) (1982)).

officials in the manner they decide is best. In addition, they are in most practical respects subject to, and have the benefit of, the rights guaranteed by the Constitution and are subject to the plenary powers of Congress.

In fact, there appears to be only one factor which opposes a conclusion that Indian tribes are "territories" for purposes of the full faith and credit implementing statutes: the political distinction between the Indian and the remainder of the United States polity. That factor is also the theoretical basis for "Indian law." From a legal theory or ideological point of view, it is this single factor which counsels strongly against, and indeed prevents, a conclusion that Indian tribes are "territories" within section 1738.

In the final analysis, and regardless of the initial point of view, the Indian "right" of self-determination, whatever that might include, may simply be a matter of ideology and legal theory. It is ideology, however, which has provided the foundation for "Indian law." That foundation has, in turn, allowed Indians to retain at least some part of their cultural and political identity in the face of the overwhelming number and power of the non-Indians who "settled" the areas the Indians' ancestors once possessed unchallenged.

A determination, why or however made, that Indian tribes are "territories" for section 1738 purposes may be a slight chink in that theoretical foundation—but then, too, Achilles had only one small point of vulnerability. Whether it is "right" or "appropriate" for Indians to retain their separate political-legal status is beyond both this discussion and the proper scope of "the law." It should not, however, be inadvertently surrendered, or even weakened, for the expediency of strengthening the possibility of obtaining the assistance of non-Indian courts in enforcing tribal laws and tribal court judgments against nonmembers.