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SPECIAL FEATURES

RECOGNIZING AND ENFORCING STATE AND TRIBAL JUDGMENTS: A ROUNDTABLE DISCUSSION OF LAW, POLICY, AND PRACTICE

*Hon. Richard E. Ransom, Hon. Christine Zuni, P.S. Deloria, Robert N. Clinton, Robert Laurence, Nell Jessup Newton, M.E. Occhialino, Jr.**

P. S. (Sam) Deloria: My name is Sam Deloria, and I'm director of the American Indian Law Center. Today we are going to discuss issues regarding full faith and credit between state and tribal court systems. I would first like to introduce our distinguished panel. Ted Occhialino teaches at the University of New Mexico School of Law. Nell Newton teaches at American University Law School in Washington, D.C. The Honorable Christine Zuni is an appellate court judge with the Southwestern Intertribal Court of Appeals. The Honorable Richard E. Ransom is the chief justice of the New Mexico Supreme Court. Bob Clinton teaches at the University of Iowa Law School and is associate justice of the Cheyenne River Sioux Tribal Appellate Court. And Robert Laurence teaches at the University of Arkansas Law School.

Let me begin with a word of introduction. For a long time, we at the American Indian Law Center have been interested in and concerned about the growth and strengthening of tribal governmental institutions. Tribal sovereignty is often talked about in the abstract, but people are somewhat reluctant to deal with the practical issues that are involved when sovereignty is actually exercised: the give and take that governments do all the time in their relationships with each other. We tried to take the leadership a number of years ago in looking at some of the practical issues involved in the inter-governmental relationship, particularly in the executive and legislative branches of state and tribal governments. What we're hoping to do in this discussion is to look at some of the practical and political concerns in the governmental relationship between the *judicial* branches. This is, in many respects, an area that touches the lives of Indian people the most directly and immediately, in the sense that it involves the day-to-day conduct of business on- and off-reservation. Unless there are some pretty good rules or pretty good guidelines, the ability of Indian people to do

* This feature is adapted from a roundtable convened to discuss issues regarding full faith and credit between state and tribal court systems. It was held at the University of New Mexico School of Law, Albuquerque, N.M., on July 22, 1992. The discussion was sponsored by the American Indian Law Center and was moderated by P.S. Deloria, director of the center. — *Ed.*

business — *personal* business, and *business* business — is affected by how these issues are viewed. So it is of enormous practical importance to tribal and state governments and to the future of these governments that people understand these issues better. So with that, we'll ask Professor Occhialino to begin.

M.E. (Ted) Occhialino, Jr.: The thirteen separate colonies needed a cement to bring them together into a single nation. The Constitution provides that cement in many forms. One is in Article IV, Section 1 of the Constitution.¹ That provision commands that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other State."²

Two things are fundamental to an understanding of the Full Faith and Credit Clause and our discussion. First, the constitutional command of full faith and credit only applies between states. The Constitution requires that every state shall give deference to the proceedings and acts "of every other State." One of the issues we confront today is the question of how tribal governments and tribal courts fit within the context of the constitutional provision, which addresses only deference to and from states.

The second noteworthy point is that the Constitution commands "full faith and credit" but it does not define what full faith and credit is. Instead, the constitutional provision delegates responsibility to Congress to define the meaning of "full faith and credit." Congress has done so over a period of time in a series of statutes. The statute in effect today provides that the judicial proceedings "of any State, Territory or Possession of the United States" shall receive as much deference "in every court within the United States and its territories and possessions" as those proceedings are given in the jurisdiction that rendered them.³ Our discussion today is going to consider whether tribal courts are courts of a "State, Territory or Possession." If they are, their judgments are going to be given full faith and credit deference by states and, in return, tribal courts are going to have to give deference to state court judgments.

At one level the debate today may be about technicalities flowing from hundred-year-old cases. But ultimately, after the dry historical debate concludes, we surely will face a fundamental question of policy: whether tribal governments are better off if they are treated as if they were states, territories or possessions so that they get full faith and credit for their courts' judgments. Stated differently, are tribal governments worse off because, if their courts get full faith and credit,

1. U.S. CONST. art. 4, § 1.

2. *Id.*

3. 28 U.S.C. § 1738 (1988).

they have to give it as well, and they might thereby lose some sovereignty.

The panel members will likely present several different views. There will certainly be some support for the proposition that tribal governments should be treated as territories or possessions and, therefore, their courts must give full faith and credit to state judgments and get full faith and credit for their judgments in return. Other panelists might assert that tribal court judgments are not entitled to full faith and credit — that the words “territories and possessions” don’t apply to tribal governments and courts and that instead, tribal judgments get and tribal courts give only the common law principle of comity. To give comity is to give deference, but it is a doctrine of discretion, not compulsion, and thus not as compelling as the deference required by full faith and credit. At least one member of this panel will try to have his cake and eat it too. He is likely to take the position that tribal governments and their courts do get full faith and credit, but maybe they don’t have to give quite as much full faith and credit as they get. That position he will call “asymmetric” full faith and credit.

As we debate these propositions today, I think the fundamental question is not what is a territory or a possession for purposes of our federal full faith and credit statute, but what is the appropriate role of Indian governments and courts in the give and take of showing and receiving deference for judgments.

Deloria: Let me offer a suggestion and a little refocusing, if I may. Because of the preoccupation with the term “sovereignty” in Indian Law, I would rather that we talk about whether people are trading off *flexibility*, if they are accepting *constraints* in trying to arrive at a particular accommodation. It is misleading to say that tribal governments, and state governments trade off sovereignty, because *anything* tribes and states do is an act of sovereignty. If a sovereign enters into an agreement with another government, in which the sovereign promises to do something in return for something done by the other government, each side is promising to exercise its sovereignty in a certain way. But the agreement itself is still an exercise of sovereignty. There is an undue fear on the part of many people that if sovereignty is not an absolute — like Superman without kryptonite in the universe — then all is lost and something terrible will inevitably happen. This fear constrains a lot of tribal people from sitting down and even considering some of these things.

So with that, we have several people here who have very definite opinions on this. First, I will ask Bob Clinton to remove his tribal judge’s hat and put his University of Iowa endowed chair hat on.

Robert N. Clinton: Sam, your point is well-taken. It cuts to the core of what full faith and credit really is about. Full faith and credit

defines how separate sovereign states, possessions or territories within the Federal Union exercise the sovereignty which they have, in order to accommodate other members of the Federal Union in enforcing their judgments. In the Constitution, as Ted suggested, full faith and credit is limited by the terms of Article IV only to states. Congress, however, was given constitutional authority to implement full faith and credit obligations by statute.

Pursuant to this constitutional authority, Congress has enacted something called the Full Faith and Credit Act, found at 28 U.S.C. § 1738.⁴

4. The Full Faith and Credit Act provides:

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

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

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

28 U.S.C. § 1738 (1988).

For a fuller elaboration of Professor Clinton's views on the application of the Full Faith and Credit Act to tribal courts and judgments, see Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 897-921 (1990). For competing views, see Robert Laurence, *The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity, and the Indian Civil Rights Act*, 69 OR. L. REV. 589 (1990); William V. Vetter, *Of Tribal Courts and "Territories": Is Full Faith and Credit Required?*, 23 CAL. W. L. REV. 219 (1987); Fred Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M. L. REV. 133 (1977); John T. Moshier, Comment, *Conflicts Between State and Tribal Law: The Application of Full Faith and Credit Legislation to Indian Tribes*, 1981 ARIZ. ST. L.J. 801 (1981); Gorden K. Wright, Note, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397 (1985). See also Robert Laurence, *Service of Process and Execution of Judgment on Indian Reservations*, 10 AMER. INDIAN L. REV. 257 (1983) (discussing the related problem of reach of state power to serve process and execute judgments).

In addition to the Full Faith and Credit Act, there are other specialized statutes that specifically obligate the states to give full faith and credit to tribal actions or judgments in certain specified situations. For example, the Indian Child Welfare Act contains a provision found in 25 U.S.C. § 1911(d) (1988) which obligates state courts to give full faith and credit to tribal court judgments in certain child custody matters. See, e.g., *Roman Nose v. New Mexico Dep't of Human Servs.*, 1992 U.S. App. Lexis 14141 (10th Cir. 1992); *In re Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988). Indeed, in every instance in which Congress directly has addressed the question of recognition of tribal decrees and laws, it has expressly adopted the full faith and credit model. See also 28 U.S.C. § 1360(c) (1988) (stating that state courts exercising jurisdiction under Public

Based on my reading of it, that act applies to Indian tribal judgments and requires tribal courts both to get and to give full faith and credit.

Let me explain that point in a little more technical detail than we have so far. The Act actually uses two phrases to describe the coverage of the statute. The phrases are different depending upon whether we are talking about the court that renders the judgment, the "rendering court," or the court to which the judgment is taken for enforcement, which I call the "enforcing court." The phrase used in section 1738 for the rendering court is this: the courts of "any state, territory or possession."⁵ The phrase used in the act for the enforcing court is this: "every court within the United States."⁶

In light of the language of that act, it seems to me that the question for tribal courts is not whether they *want* to give full faith and credit to state court judgments. To say that they do not have to give full faith and credit as the enforcing court, the tribal court must conclude under the language of the act that it is not a "court within the United States" as that phrase is used in section 1738.⁷ To my way of thinking that is not a tenable argument. It is just not plausible because at the time the act was adopted, Indian tribes were sovereign governments. They may not then have had Western-style courts, but they were sovereign governments. They later developed Western-style courts, and these tribunals were *courts*; they were not administrative tribunals or something else, as Bob Laurence seems to argue in his article. The tribal courts conducted judicial proceedings of the type described in the Act. Once tribes had Western-style courts conducting judicial proceedings, they became "courts within the United States" within the meaning of the Act. They were, therefore, obligated under the plain language of the statute to extend full faith and credit to state court judgments and, I might add, the judgments of other tribal courts.

The only remaining question, it seems to me, is not whether tribal courts have to give full faith and credit — they *do*. The harder interpretive question is whether tribal judgments *get* full faith and credit in state and federal courts.

The question of whether tribal judgments are entitled to full faith and credit is dependent on the other language in section 1738: whether the tribal court is a court of "any state, territory or possession." The

Law 280 must give "full force and effect" to "tribal ordinance or custom"); 25 U.S.C. § 1725 (1988) ("The Passamaquoddy Tribe, the Penobscot Nation, and the State of Maine shall give full faith and credit to the judicial proceedings of each other.").

5. 28 U.S.C. § 1738 (1988).

6. *Id.*

7. *Id.*

tribal courts clearly are not courts of any "state." In 1855, however, the Supreme Court ruled in a case called *United States ex rel. Mackey v. Cox*,⁸ involving the courts of the Cherokee Nation, that for purposes of another similar but not identical statute involving recognition of the judicial acts of states, territories, or possessions (in this case the appointment of fiduciaries) that the courts of the Cherokee Nation were, in fact, courts of a "territory" and should be treated that way under federal recognition statutes. A number of state courts have followed *Mackey*, both in the full faith and credit context⁹ and in

8. 59 U.S. (18 How.) 100 (1855). The statute in question in *Mackey* was Act of June 24, 1812, ch. 106, § 11, 2 Stat. 755, 758, which provided for recognition by the courts of the District of Columbia of fiduciary appointments by courts of other states or territories. The language of the Act provided:

[I]t shall be lawful for any person or persons to whom letters testamentary or of administration hath been or may hereafter be granted, by the proper authority in any of the United States or the territories thereof, to maintain any suit or action, and to prosecute and recover any claim in the [D]istrict of Columbia, in the same manner as if the letters testamentary or administration had been granted . . . in the . . . [D]istrict.

Id. In his opinion for the Court in *Mackey*, Justice McLean ruled that the courts of the Cherokee Nation were courts of a territory for purposes of this statute. His opinion focused not on the origin of the sovereign power of the tribal court, but on its geographic location as a territory within the United States. He said: "The Cherokee country, we think, may be considered a territory of the United States within the [A]ct of 1812. In no respect can it be considered a foreign [s]tate or territory, as it is within our jurisdiction and subject to our laws." *Mackey*, 59 U.S. (18 How.) at 104.

9. *See, e.g.*, *Sheppard v. Sheppard*, 655 P.2d 895 (Idaho 1982); *Jim v. CIT Fin. Servs. Corp.*, 533 P.2d 751 (N.M. 1975); *In re Adoption of Buehl*, 555 P.2d 1334 (Wash. 1976); *Raymond v. Raymond*, 83 F. 721 (8th Cir. 1897); *see also* *Native Village of Venetie v. Alaska*, 944 F.2d 548 (9th Cir. 1991) (holding that State of Alaska must give full faith and credit to Alaskan village child custody proceedings if the village is the successor in interest to the aboriginal sovereignty of traditional aboriginal community); *Navajo Nation v. District Court*, 624 F. Supp. 130 (D. Utah 1985) (holding that full faith and credit required for tribal order under the full faith and credit provisions of the Indian Child Welfare Act, 25 U.S.C. § 1911(d) (1988)); *In re Adoption of Jeremiah Holloway*, 732 P.2d 962 (Utah 1986) (same); *Chischilly v. General Motors Acceptance Corp.*, 629 P.2d 340 (N.M. Ct. App. 1980) (recognizing tribal law); *Lyons v. Lyons*, 268 N.Y.S. 84 (Sup. Ct. 1933) (according full faith and credit to the traditional Dead Feast of the Onondaga as a means of disposing of property alternatively to a will for which later probate was sought in state court). *But see* *Brown v. Babbitt Ford, Inc.*, 571 P.2d 689 (Ariz. 1977) (holding that tribal decrees entitled to comity but not full faith and credit); *In re Marriage of Red Fox*, 542 P.2d 918 (Or. Ct. App. 1975).

Perhaps the majority of cases considering the problem of recognition of tribal judgments opt for a comity approach, rather than full faith and credit. Most of those cases are, in fact, very ill considered. Those cases which opt for the doctrine of comity often suggest that full faith and credit does not apply to Indian tribal judgments, frequently only citing the constitutional full faith and credit clause and ignoring the scope of the Full Faith and Credit Act, which significantly expands the coverage of full faith and credit. *See, e.g.*, *In re Marriage of Red Fox*, 542 P.2d 918 (Or. Ct. App. 1976). Sometimes, however, the Full Faith and Credit Act is cited and the court hastily

other contexts,¹⁰ where state laws or other federal laws refer to territories. These cases treat Indian Tribes as territories for various purposes, mostly involving recognition of their sovereign actions by other elements of the Federal Union.

If the courts follow *Mackey*, as I think they should (and as I think the state courts are *compelled* to do as a matter of precedent), then the courts must come to the conclusion that the tribes must be treated as sovereign governments within the Federal Union; that is, they have become part of the Union. The same cement which bound the states together early on in the Constitution, through the Full Faith and Credit Clause of the Constitution, now by statute interweaves the tribal government into the fabric of the American government. It provides a way in which the exercises of sovereign tribal courts can be recognized as a matter of mandatory federal law by state courts. It leaves those decisions, not finally to the state courts but, because full faith and credit is a federal issue, to the federal courts. Additionally, it provides a vehicle by which states can be assured of reciprocity and will know

concludes that tribes are not territories without ever citing *Mackey*. *Sengstock v. San Carlos Apache Tribe*, 477 N.W.2d 310 (Wis. Ct. App. 1991) (also published at 19 Indian L. Rep. (Am. Indian Law. Training Program) 5026 (1991)). In other cases, full faith and credit is never mentioned as an alternative form of recognition. *See, e.g.,* *Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln, Inc.*, 462 N.W.2d 164 (N.D. 1990) (pointedly ignoring full faith and credit despite a separate concurring opinion that suggested that once tribes adopt procedural safeguards such as appellate courts there was no reason not to extend full faith and credit to their judgments to promote tribal sovereignty). Only the New Mexico case of *Jim v. CIT Fin. Servs. Corp.*, 527 P.2d 1222 (N.M. 1974) actually considers both the Full Faith and Credit Act and the implications of the Supreme Court's decision in *United States ex rel. Mackey v. Cox*, and concludes nonetheless that tribal court judgments are not entitled to full faith and credit under the Act. The court in *Jim* distinguished *Mackey*, simply suggesting "[t]hat case does not control; it interpreted an entirely different statute." *Jim*, 527 P.2d at 1225.

10. *See, e.g.,* *Tracy v. Superior Court*, 810 P.2d 1030 (Ariz. Ct. App. 1991) (holding that Navajo courts are courts of a territory for purposes of Arizona's version of the Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings); *In re Larch*, 872 F.2d 66 (4th Cir. 1989) (holding that Cherokee tribe is a state for purposes of the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1988)); *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510 (8th Cir. 1989) (suggesting in dicta that Indian tribal courts should be considered courts of a state for purposes of the Parental Kidnapping Act); *Martinez v. Superior Court*, 731 P.2d 1244 (Ariz. Ct. App. 1987) (holding that Indian reservations are territories or possessions of the United States within the meaning of Arizona's Uniform Child Custody Jurisdiction Act, ARIZ. REV. STAT. §§ 8-401 to -424 (1989 & Supp. 1992); *Red Lake Band of Chippewa v. State*, 248 N.W.2d 722 (Minn. 1976) (holding that Red Lake tribe was a state or territory for purposes of a Minnesota motor vehicle statute that was premised on policy to recognize the validity of automobile registration licenses issued by other jurisdictions); *Whitsett v. Forehand*, 79 N.C. 230, 232 (1878) (holding that Cherokee Nation is a territory for purposes of state statute governing admission of deed to probate and registration).

that if they accord tribal judgments full faith and credit, their valid state judgments will, in turn, be enforced in tribal court.

I should say with respect both to tribal and to state judgments, that they need not be enforced in two instances. First, under prevailing rules, a judgment rendered without subject matter jurisdiction need not be enforced by any enforcing court. Of course, if the issue of lack of subject matter jurisdiction was unsuccessfully litigated before the rendering court, then it should not be relitigated again before the enforcing court. Even for cases where the jurisdictional issue is first heard in state court, federal protections exist through appeal to the Supreme Court of the United States against state courts exceeding their jurisdiction over Indians or Indian country.

Second, no enforcement is required if there was a lack of personal jurisdiction and there was no appearance in the initial action. Therefore, tribal courts have reasons to decline enforcement of a state judgment if it turns out that the state was overextending its power to regulate reservation activities.¹¹ The proper procedure is to recognize the general obligation to accord state judgments full faith and credit but to decline to enforce a judgment in any particular case on the basis of the absence of subject matter or personal jurisdiction in the rendering court.

Deloria: Bob, you're not arguing that when Congress passed section 1738, it intended to include Indians.

Clinion: No, I'm not arguing that *directly*. What I am arguing instead is that Indian tribes certainly were known as sovereigns in the late eighteenth century when the Full Faith and Credit Act was debated and adopted. Indian tribes, at that time, did not have Western-style courts. But once they developed Western-style courts, they came within the plain language of "every court within the United States." If you think about it, California was not a state when the statute was first passed. Indeed, at the time, California was held by Spain. Of course, when California became a sovereign state within the Federal Union and developed courts, it became subject to the act in quite the same way. This is simply because the plain language of the act covered it,

11. Generally, a court is not required to accord full faith and credit to a judgment rendered by a court that lacked subject matter jurisdiction or jurisdiction over the person of the defendant, unless the defendant litigated these questions in the initial forum and lost. See, e.g., *Desjarlait v. Desjarlait*, 379 N.W.2d 139 (Minn. Ct. App. 1985). Since most principles of federal Indian law limiting the reach of state law in Indian country are framed as limitations on the subject matter or personal jurisdiction of state courts, Indian tribal autonomy generally is adequately protected by such jurisdictional limitations. Where a state does legitimately exercise subject matter and personal jurisdiction, often over off-reservation related causes of action, the tribes have little excuse under the Full Faith and Credit Act and very few sustainable reasons for declining to accord such state judgments full faith and credit.

even though Congress was not thinking about California when it enacted the statute. Indian tribes are in exactly the same situation. They were sovereign entities within the territory claimed by the United States when the Act was adopted. When they later developed Western-style courts they fell within the plain language of the statute which covers for enforcing courts "every court within the United States" and for rendering courts, the courts of "any state, territory or possession."

Robert Laurence: Well, the Sioux tribes and California were not in "exactly" the same situation. I think Congress when enacting section 1738 may well have been anticipating that the courts of *future* states would be covered by the statute, even without having California specifically in mind. But it's another matter whether it was anticipating future Westernized Indian tribal courts.

Deloria: It's easy enough to read the phrase "within the United States" to show that Congress wished to include tribes. It's less easy to read the phrase "state, territory and possession" language in that way. But is it possible to just say for these purposes a tribe is *like* a territory? Law professors and judges have to make certain assumptions based on the material that is in front of them that the rest of us do not have to make. Certainly, in terms of finding a way to read present law to include tribes, your reading is plausible. Nevertheless, we should look at whether that is the best way to achieve the result everybody seeks: a manageable system of dealing with judgments between governments. Professor Laurence of the state of Arkansas and its university has a similar view.

Laurence: My view, the one that Ted alluded to as the "asymmetric" one, is that full faith and credit as required between states by the Constitution and statutes is not well-designed for the problem that exists between states and tribes. Ted talked about the glue that holds the Union together. It seems to me that full faith and credit is more than just glue. In some ways, full faith and credit *creates* the Union as we know it. What we call the "sisterhood" of states, is created by the equality of states in full faith and credit, and — on the political side — in the Senate. It seems to me those two clauses in the Constitution in a very real way create the Union of fifty states that we live in.

I am not at all sure that sisterhood is appropriate between states and tribes. I guess if I had to state in just one sentence why I am not sure it's appropriate, I'd say that New York is ten thousand times as big as the San Juan Pueblo. And that's just in terms of population; if we measured beyond population, in terms of economic power, the disparity would, in fact, be quite much more than ten thousand times. I think that the sisterhood that we have works very well among states, even when the difference in size and clout is between, say, Florida

and New Mexico. But I'm not so sure it works when you're dealing with such disparity in the size and power of governmental units. Even between the largest tribe and the smallest state, there is a quantum difference in power.

I think, instead, we ought to take what we have in this country — a wide variety of tribes in terms of their own sizes and strengths — and we ought then to start from first principles. We ought to decide just exactly what the problems are, what the concerns of tribal court judges and state court judges are, and we ought to create a system that responds to those concerns.

I think those concerns — the concerns of tribal court judges and state court judges — are not the same. They're not identical. They're asymmetric, and so the system that I propose to deal with the recognition of judgments across reservation boundaries is asymmetric to take care of that difference in problems.

Very quickly, I would say the main question that I perceive to exist in the mind of a *state* court judge receiving a tribal court judgment is whether the tribal court judgment was issued fairly and consistently with the Indian Civil Rights Act of 1968.¹² As you know, there's no federal court review for what went on at the tribal court level, at least on the civil side where our primary concern lies.¹³ The Indian Civil Rights Act applies to tribal court proceedings, but there's no collateral review, and there is no appeal outside the tribal court system. I think the state court judge as the enforcing judge has a legitimate concern about whether the judgment was rendered consistently with the defendant's civil rights under the ICRA.

I think that's a concern that the state court judge doesn't have in giving full faith and credit to a sister state judgment. The federal courts *do* stand ready to review state court judgments, either on appeal or collaterally. So I think the state court judge, as the judge asked to enforce a tribal court judgment, has a concern that traditional, constitutional and statutory full faith and credit between states doesn't have to account for.

Similarly, but not identically, I think the *tribal* court judge has a legitimate concern as the enforcing judge. The tribal court judge's concern, I think, should *not* be whether the Constitution was followed at the state court level, because there are federal courts to provide that review. I think the *real* concern of the tribal court judge is whether the substance of the law that gave rise to the judgment is seriously inconsistent with local sensibilities and local tribal law. I would like the tribal court judge to be permitted a re-inspection of the suit on

12. Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301-1303 (1988 & Supp. II 1990)).

13. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

the merits, to look for that serious inconsistency with tribal ways before the judge is made to enforce the state court judgment against on-reservation property.

Notice that to re-inspect the merits is not to deny the validity of the state court judgment. It only allows the tribal judge to decline to enforce it against on-reservation property. Of course, we don't allow that between sister states, but states and tribes are not — and never have been — “sisters.”

So, there in a nutshell is why I propose an asymmetric approach to full faith and credit. I think the concerns of the two courts as enforcing courts are not the same, and the system we propose ought to recognize that. Now, I do not call my solution “full faith and credit,” because full faith and credit as found in the Constitution and statutory law does not allow the system I have just proposed. I propose that tribal court judges be allowed to do that which state court judges are not allowed to do when enforcing other state judgments. And I propose that state court judges receiving tribal court judgments should be allowed to do things that they cannot do when receiving another state court judgment. This is my asymmetric federal rule of recognition.

In order to have this system in place, I have to get section 1738 off the table and show why it doesn't govern the situation. I concede at the outset that I don't *want* it to cover the situation. I don't want Congress to pass a full faith and credit statute that applies to all issues and to all states and to all tribes. I hope they never do, for, as I've said, traditional full faith and credit solves a different problem from the one that obtains between states and tribes. And, I don't think Congress has done so yet. I don't think there's much indication that they intended to reach tribal courts with the language in section 1738 that Bob quotes. I don't think there's any indication that they were addressing the issue of the reception of tribal court judgments when they enacted section 1738.

Finally, I think that *Mackey v. Coxe* is wrong. I can't reverse it myself, but I wouldn't extend it a millimeter without the present Supreme Court telling me that it has to be extended to a broader situation. (Actually, I wonder what the present Court would do with section 1738. Bob's statutory construction strikes me as pretty Scalian, actually, at least to the extent of saying that legislative history (which is silent about Indians) is irrelevant if the statute (which says “courts within the United States”) is unambiguous. On the other hand, I don't think for a second that the present Court thinks that tribal court judgments ought to be entitled to full faith and credit.)

So that's the way I get section 1738 off the table in order to give me the freedom to propose the law that I think we need.

Deloria: Both Bob Clinton and Bob Laurence are making semantic arguments. In order to get around the problem that tribes are not

states, Bob Clinton argues that Congress's use of the term "courts" in section 1738 should be interpreted as including tribal courts and the term "territories" should be interpreted as including tribes. He believes that accepting this semantic argument is necessary before the nation will issue membership cards to tribal courts as *real courts*. Bob Laurence seeks to avoid the term "full faith and credit," because he believes the term is freighted with connotations that are inappropriate for every tribal court setting. So, he proposes an asymmetric rule of federal recognition, a semantic mouthful that looks a whole lot like full faith and credit except for the asymmetry.

Laurence: Wow. That's like saying that an airplane looks a whole lot like a hotel, except it flies.

Deloria: Hold on. Perhaps there is another way to solve the problem by analogy to a well-established, though not well-articulated, theory that has developed under the Indian Civil Rights Act of 1968. The ICRA listed rights using the same phrases as the Bill of Rights in the United States Constitution. These rights serve as constraints on tribal government. Almost immediately the theory arose that due process in a tribal court situation might not mean the same thing as due process in a federal court situation or a state court situation. Consequently, the constitutional standards that apply to those governments may not apply in the same way to tribes. With this analogy in mind, I ask Bob Laurence whether there is a possibility that full faith and credit can be extended either by argument or by another statute to tribal courts to achieve the balanced asymmetry that you advocate. In other words, full faith and credit need not mean the same thing in a tribal situation as it means in an interstate situation. I think one of the fears you have is the either-or problem with full faith and credit — either that everything must be dealt with the same as in the interstate setting or that any other solution will be lumped as "comity," which is not binding on the states. Right? Isn't that what you're saying?

Laurence: Kind of, though I'd rather not use either term. They bring along too much baggage from other areas of the law; it becomes too easy for a judge to pull out the old non-Indian cases and use them without thinking of how the rules should be different here. If the rule is called "asymmetric full faith and credit" or "asymmetric comity," I'm afraid the judge will say, "I know what that means" and the *asymmetric* part will get lost.

Deloria: Let's get comity on the table. Nell, do the comity/full faith and credit number.

Nell Jessup Newton: Comity is the name given to an approach to enforcing foreign *country* judgments that the Supreme Court first articulated in 1894 in *Hilton v. Guyot*.¹⁴ And every state, to my

14. 159 U.S. 113 (1894).

knowledge, has adopted this same basic position: that a state of the Union is not *required* to enforce a judgment rendered by a foreign court. But, for the purposes of encouraging good relations between the countries in the international sphere, states may choose to — and in fact, *should* choose to — enforce these judgments as a matter of comity. Comity is thus not mandatory, but it is regarded as more than discretionary. In *Hilton*, the Court explained this in-between status of comity as follows:

Comity in the legal sense, is neither a matter of absolute obligation on the one hand nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.¹⁵

In *Hilton v. Guyot*, a business sought to enforce in the United States a judgment rendered in France. The defendant argued that the French judgment should not be enforced because he did not receive a fair trial in France. In particular, he argued that hearsay evidence was improperly accepted by the French tribunal. If the doctrine of comity required absolute similarity of legal rules and procedures, no court would *ever* enforce any judgment of a foreign country.

In rejecting this argument, the Supreme Court adopted a presumption in favor of enforcement of foreign country judgments. At the same time, the Court noted situations in which enforcement would not be proper. Courts applying comity as the basis for enforcement have adopted several requirements as preconditions to enforcement. These requirements are, first, the foreign court must have had subject matter and personal jurisdiction. Did the court rendering the judgment have the power to render the judgment against the defendant? The second requirement is the foreign country judgment not have been obtained by fraud. The third requirement is what I call the fundamental fairness or fundamental due process requirement. Instead of requiring absolute equivalence between the policies of the two states, the enforcing court should ask whether the judgment was issued by a system administered in a fundamentally fair way and in which basic due

15. *Hilton*, 159 U.S. at 164. *Hilton* was initially binding on the federal courts only as a matter of federal common law; it did not bind the state courts. Given the broad interpretation given the *Erie* doctrine, it is doubtful whether *Hilton* even binds the federal courts in diversity cases. See Eugene F. Scoles & Peter Hay, *Conflict of Laws* § 24.35, at 999-1001 (2d ed. 1992) (discussing the impact of *Hilton*). Nevertheless, many state courts have adopted the principle of the case.

process was observed: an impartial judge, notice and an opportunity to be heard. Once again, the doctrine of comity does not require the enforcing court to inquire whether the rendering state has the same court system. This requirement of basic fairness balances the respect owed to a foreign state's judicial processes with the fairness to which all persons coming before courts in the United States are entitled. Moreover, this requirement acknowledges cultural differences, without abandoning the basic principles espoused — although not always followed — by all states in the world.

The fourth exception is one that could swallow the whole rule. That is whether enforcing the foreign country judgment would offend the public policy of the enforcing state. Even in those jurisdictions in which the public policy argument is accepted, the courts usually require a situation in which the foreign judgment is based on a rule that would just shock the conscience of the community in which enforcement is sought. In other words, if the foreign country judgment was based on a rule of law that is somewhat different from the rule of law that would be applied in the receiving state, this dissimilarity should never be sufficient.¹⁶

The *Hilton* court also applied a principle of reciprocity as an alternative requirement for enforcement of foreign country judgments and, in fact, refused to enforce the French judgment because France did not enforce the judgments of United States courts automatically, but instead permitted relitigation of the issues. This aspect of *Hilton* has met with uniform disapproval from the international conflicts community and rightly so, for it punishes the individual for something she has no control over — whether her own country will honor United States judgments. Most states have rejected adding a reciprocity requirement to comity. In fact, reciprocity is not included as a basis for rejecting a foreign country judgment in either the major uniform act on recognition of foreign country judgments or the *Restatement (Second) of Conflict of Laws*. The Uniform Foreign Money-Judgments Recognition Act of 1962¹⁷ has been adopted by about twenty states. In effect, the Act is patterned on the basic principle of *Hilton*; that is, that enforcing states should recognize foreign country judgments as long as the rendering court was an impartial tribunal with jurisdiction over the subject matter that accorded the litigants due process in proceedings free from fraud. To these basic *Hilton* requirements, the

16. See, e.g., *Watts v. Swiss Bank Corp.*, 265 N.E.2d 739, 744-45 (N.Y. 1970) ("Recognition will not be withheld merely because the choice of law process in the rendering jurisdiction applies a law at variance with that which would be applied under New York choice of law principles.").

17. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 263 (1961 & Supp. 1991).

UFMJRA permits the party opposing enforcement to argue that the rendering court was a seriously inconvenient forum. The drafters of the *Restatement (Second) of Conflict of Laws* have adopted similar, although somewhat more restrictive, rules.¹⁸ Like the UFMJRA, however, the *Restatement* contains no requirement of reciprocity.

Turning to comity as it applies to tribal court judgments, perhaps a bare majority of the states that have dealt with the situation of enforcing judgments of Indian tribes in state courts have adopted the comity approach.¹⁹ Some argue — and I ultimately perhaps come down on this side of the argument — that if fairly applied, this approach does give the enforcing state a chance to give great deference to tribal court judgments. Comity also takes into account the many differences among Indian tribes, especially in size and in the types of courts they have.

A recent North Dakota case illustrates the way I would like to see state courts apply the comity doctrine. *Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln, Inc.*²⁰ began in the Fort Berthold tribal court as a suit by the car dealer against a tribal member who had defaulted on the first installment of his contract to purchase a pickup truck. While the suit was pending, and in violation of a tribal repossession law, the dealer repossessed the truck. The tribal court ruled the repossession illegal, and ordered both sides to file post-trial briefs regarding damages. The dealer argued he had not violated the law and that, in any event, the tribe member had suffered no damages. The tribal court disagreed, ordered the vehicle returned and assessed damages against the dealer. The dealer filed an appeal in the Intertribal Court of Appeals, but sold the pickup truck before the brief was due. At that point, the dealer simply failed to file the brief. The Intertribal Court of Appeals upheld the order to return the vehicle and remanded to the trial court. Upon remand, the trial court assessed punitive damages in the amount of \$15,000 in addition to the actual damages suffered by the tribal member. The tribal member then sought enforcement in state court.

While noting there are differences between Indian tribes and foreign nations, the North Dakota Supreme Court adopted the comity principle as articulated in *Hilton v. Guyot*, stating, “We consider an ‘Indian nation’ as equivalent to a ‘foreign nation’ to encourage reciprocal

18. The *Restatement* requires the foreign judgment be “valid” and that the immediate parties and underlying cause of action be the same. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 93 (1971). The definition of “valid” in the *Restatement* invokes the principles of *Hilton*, however. *Id.* § 92.

19. See *Mexican v. Circle Bear*, 370 N.W.2d 737, 741 (S.D. 1985) (collecting cases).

20. 462 N.W.2d 164 (N.D. 1990).

action by the Indian tribes in this state and, ultimately, to better relations between the tribes and the State of North Dakota."²¹ Significantly, the North Dakota court rejected several grounds offered by the dealer for refusing enforcement, including the difference between the tribe's and the state's repossession statutes. In refusing to apply the state's repossession statute, the tribal court judge had stated, "The Tribal Code is not predicated on Anglo-Saxon concepts and Common Law traditions."²² The dealer argued this statement indicated a lack of respect for North Dakota law that should be reflected by a refusal to enforce the tribal court judgment. The North Dakota Supreme Court disagreed, stating: "This Court has held, however, that 'comity does not rest upon mutuality or reciprocity.'"²³ The court accordingly refused to permit relitigation of such issues as whether the punitive damages were appropriate. The supreme court acknowledged that it would accept a public policy objection in an appropriate case, but only if the tribal custom shocked the conscience of the court.²⁴ Noting the tribal court had jurisdiction under its own laws over the subject matter and the parties, and that there had been no allegation of fraud, the supreme court overturned the lower court's decision denying summary judgment for the tribal member. In short, the opinion represents not discretion run wild, but an appropriate deference to tribal courts.

In contrast, the criticism of the comity approach is that it seems totally discretionary. In theory, a state court judge could just refuse to enforce a tribal court judgment, by saying nothing more than, "We don't have to, it's up to our discretion." Therefore, the comity approach might give overly broad license, arguably, to state court judges to refuse to enforce tribal court judgments, especially if they began using a broad public policy exception. My reading of the cases has illustrated to me that the state court judges applying comity have usually accorded deference to the tribal court judgment. In fact, they have applied comity in a way very similar to the way they would apply it if a judgment of France came before a state court. I have seen no examples of arbitrariness or otherwise showing any lack of respect for the tribal court systems.

That is the comity approach. In some ways I think that Bob Laurence's position is a version of the comity position.

21. *Id.* at 167.

22. *Id.* at 169.

23. *Id.* (quoting *Medical Arts Bldg. Ltd. v. Eralp*, 290 N.W.2d 241, 246 (N.D. 1980)).

24. *Id.* at 170. The tribal custom or law would have to be "so abhorrent to the policy expressed in state law that it may not be given effect." *Id.* (quoting *Mexican v. Circle Bear*, 370 N.W.2d 737, 742 (S.D. 1985)).

Laurence: I think so, too, with two additions. First, I'd still insist on asymmetric comity. For example, I think that the state court judge has much less reason to use your fourth exception than the tribal court judge; very small tribal communities are more susceptible to being unsettled by foreign judgments than are larger state communities. Second, I'd make it a federal rule. I wouldn't leave it to the discretion of the individual state or tribal judge. And, since it's a federal rule, I would make a denial of recognition appealable from the state court to the U.S. Supreme Court.

Clinton: That problem ultimately is one of the major disagreements I have with employing the comity approach to recognize tribal judgments. Generally, comity is thought to be a matter of state, not federal, law. The comity approach, therefore, when applied to tribal full faith and credit questions leaves the state courts as the final arbiter of whether to accord recognition to a tribal judgment. By contrast, full faith and credit is a matter of federal statutory obligation and failure of a state court to accord such recognition can be appealed to the United States Supreme Court. Now, Bob Laurence's suggestion that we create a federal common law rule might partially solve that problem, but at present we simply do not have such a federal common law rule. I might add that I doubt that one will ever be adopted. For example, just as enforcing Indian judgments raises questions of federal concern involving Indians, enforcing the judgments of foreign nations raises questions of international relations, also a matter of paramount federal concern. Yet, under our present comity law we permit states to have the final word as to whether they choose to enforce the judgment of a foreign court. If federal law is reluctant to interfere with the sovereign choices of states on the enforcement of judgments of another nation — a question involving delicate questions of international relations — I see little likelihood that the federal courts will adopt Bob Laurence's suggestion that they fashion a federal comity rule simply because the enforcement of tribal judgments involves a matter of significant federal and tribal concern.

Thus, under present law, adopting a classic comity approach leaves the matter of the enforcement of tribal judgments entirely to the state courts. That always has been the critical difference between comity and full faith and credit. The full faith and credit doctrine is a matter of federal statutory obligation. It, therefore, leaves in the hands of the federal courts, particularly the U.S. Supreme Court, the question of orchestrating tribal-state as well as state-state relationships. Leaving such matters to comity approaches in the present legal context is to leave the final resolution of such questions to the discretion of the state courts, where I assert they do *not* belong.

Newton: If a state court misused the comity approach, by interpreting it too broadly in some of the ways I have discussed, the tribe

could appeal the decision to the Supreme Court, arguing it is an appealable matter of federal common law governing the extent to which states must give deference to tribal court judgments. In that appeal, I would urge the Supreme Court to adopt comity, strictly interpreted, as the rule.

I understand Bob's argument that enforcement of judgments is regarded by most sages as a state law matter in the *Erie* sense and even agree with this point in the context of enforcing international judgments. But, I would distinguish the federal-state-tribal relationship from the state-tribal-foreign country relationship. While federal control of the field of foreign relations is broad, as it is in the field of Indian law, the purpose of federal control in the international context is not to protect foreign nations from the states, but to foster relations between the United States and other nations. In other words, a state's refusal to enforce a judgment from a tribunal in Paris can do little danger to the French government or its relations with the United States. In fact, if a state's consistent refusal to enforce French court judgments on a flaky comity theory (e.g., "Any country that speaks French and is rude to tourists doesn't deserve any respect in the great state of Fredonia") posed any threat to this nation's relationship with France, the executive and legislative branches would readily intervene.

In contrast, the federal government's supremacy in Indian affairs is predicated in part on the federal government's historic obligation to protect the tribes from the states. Because of the differentials in power and wealth and usually in numbers of citizens and size as well; because of their long history of enmity only recently reduced by efforts on both sides to form better working relationships, the states have been characterized as tribes' "greatest enemy."²⁵ While a state court judgment may not put the government of Paris into turmoil, a state court's consistent refusal to enforce tribal court judgments on similar flaky grounds undercuts the legitimacy of the tribal courts in a way directly contrary to the present United States policy of fostering and strengthening tribal court systems and tribal governments.²⁶ Moreover, the tribe's lack of political influence in the state legislatures and the fact that a local state-tribal conflict may not readily get the ear of Congress, should influence the Supreme Court to act more forcefully in this area to protect the tribes from the states.²⁷ In short, the Supreme Court

25. *United States v. Kagama*, 118 U.S. 375 (1886).

26. *See, e.g., National Farmers Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (relying on the importance of the federal policy of supporting tribal self-government in requiring federal courts to permit tribal courts the first opportunity to determine the extent of tribal court jurisdiction over civil matters).

27. The lack of representation of federal interests fostering interstate commerce in state legislatures is a rationale frequently invoked for the Supreme Court's interventionist stance in reviewing state regulations affecting interstate commerce. *See, e.g., South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 768 n.2 (1945).

need not decide that enforcement of foreign country judgments is a matter of federal common law in order to declare Indian country comity to be a rule of federal common law rule.

Furthermore, although many states have cited *Hilton* and used the term "comity," I am aware of no state judicial decisions that say: "that is a matter of internal state law only, not appealable." In short, whether states actually take the position that federal law cannot control in this area will not be resolved until a state refuses to recognize a tribal court judgment, citing comity, and does so in an arbitrary way by, for example, citing the differences between tribal and state law as alone justifying refusal. At that point, if the plaintiff filed a writ of certiorari, I would hope the Supreme Court would take the case and give guidance to state courts on the appropriate boundaries of the comity doctrine.

Clinton: I am a little concerned that, when all is said and done, we are left without anyone here at this roundtable articulating and defending what is the predominate methodology of state courts in this area: *straight comity*. I had thought that was Nell's position, but we see now that she agrees with Bob Laurence and me on the need for a *federal* rule. That position, of course, is not straight comity and is not the rule that the states are developing on their own, nor is it the one that the states would be expected to develop on their own. Thus, the roundtable is perhaps, in the end, a bit misleading, without an overt defender of classic comity holding a seat at the table.

Deloria: There's no way we're going to have an outcome that puts the tribes within *constitutional* full faith and credit. So we are discussing a statutory or common law inclusion of tribal courts or tribal governments in some other category. In both full faith and credit and in comity, there is an existing set of rules that was developed to guide courts in receiving foreign judgments. But these rules are based on the assumption that they apply to large governments, large systems that perceive themselves to be permanent. But tribes always perceived themselves to be threatened with extinction. So, it is in the interests of nobody — this is a hypothesis — to have the same set of rules uncritically applied to the tribal-state situation as those applied to the interstate situation, or even the state-foreign country situation.

So, we have also discussed a separate set of rules suited to state-tribal disparities, such as size. What is the state perspective? Why does it matter, or does it matter, whether the process or rule is called full faith and credit or whether it is called comity? Does it matter to you, Chief Justice Ransom? It matters in the sense that one set of rules — the full faith and credit rules — gives you less flexibility than the other. Right?

Richard E. Ransom: I don't like either full faith and credit or comity, quite frankly. I think we're attempting to walk in shoes that

were never really made for this trek. We need a fresh approach, probably legislative. But, in the absence of legislation and perhaps as a prelude to legislation, we should try various judicial experiments in new doctrine.

The United States Senate has legislation pending that has been under a great deal of scrutiny, with a number of hearings, regarding the support of tribal courts. One of the provisions in what was Senate Bill 1752 of the 102d Congress — which was never passed — provided for full faith and credit between states and tribes. I'm on a standing committee of the Conference of Chief Justices that deals with Indian sovereignty and Indian courts, and the relationship between those courts and the courts of the states. The Conference of Chief Justices has gone on record against using the term "full faith and credit" with respect to enforcing the final judgments (or otherwise enforceable orders) of tribal courts in the state domain.

I believe the reason most of the chief justices of the United States are against using that phrase is that it is simply not a phrase that was designed for this situation. We are talking about Indian tribes and tribal courts. Why, I've heard there are Indian tribes that don't have more than a single enrolled member. I know that there are a number of tribes that don't have more than a half dozen, or at least no more than a score, of enrolled members. I suppose that, in some of those situations, the executive and the judiciary and the legislative functions are all mixed up together in one person or a half a dozen.

This doesn't *necessarily* bother me with respect to whether we might enforce the judicial acts of that body, but it raises the question of what is an Indian tribe? What are we talking about? To what tribal judgments are we going to give full faith and credit for enforcement in the courts of the state?

And what is a tribal court? There are tribes that now have what we would call "traditional" Western courts, following the practices and procedures that we commonly see in courts within the states, with trial courts and intermediate and final high courts of appeal. But then there are other well-established Indian tribes still operating with the "traditional" Indian court system, a mediation system that brings together the leaders of the clans, the parties that are concerned, and perhaps the governor of the tribe, with none of the earmarks of a "traditional" Western court.

So we in the Conference of Chief Justices believe that it's inappropriate to talk about a constitutional doctrine or even a federal doctrine of full faith and credit. That doctrine deals with different types of entities than we're talking about here. There *are* some Indian tribes that could fit very well in a standard litigation system, but I'm talking now about trying to find a concept that covers *all* situations. It simply

is not appropriate to engraft all of the history and the application of the doctrine of full faith and credit into this situation.

Comity also bothers me, because comity, indeed, leaves to the discretion of the court the enforcement of a foreign judgment or interlocutory order — a great deal of discretion. While I prefer comity to full faith and credit, what I'm afraid of is that we're talking about *two* trials every time we want to domesticate an Indian tribal court judgment. We're going to have the parties contesting much more strongly the questions of due process or jurisdiction, or all those matters of public policy that Professor Newton brought up and which we have already stated are important to us in terms of comity and Indian jurisdiction. Those questions are going to be contested much more strongly than the underlying issue.

So I would like to have the legislature, or perhaps the supreme court of the state under its rulemaking power, develop criteria under which certain tribes within the state will be granted enforcement of judgments and other tribes will not. (We will be dealing mostly with the tribes within our own state; not that we couldn't treat tribes that cross state boundaries.) These criteria will not be established in each individual case. They will have been established on appropriate application to our supreme court by the Indian tribes. Once a tribe meets those criteria, there won't be any dispute as to whether we are going to enforce the warrants or decrees of the tribal court. Well, of course, there can always be some jurisdictional issues or issues of fraud in obtaining the judgment. Those issues come into play under traditional full faith and credit. But aside from those issues, I foresee no major problems.

I don't know what the criteria will be, and I hate to exclude any "traditional" tribal court simply because it does not meet "traditional" Western standards of practice and procedure. In fact, I am very much in favor of recognizing very "traditional" tribal courts that have no trappings of "traditional" Western courts. But I guess that will be decided by those who determine what the criteria are for declaring that the courts of a particular New Mexican tribe or pueblo are courts whose orders will be recognized in the courts of our state.

Deloria: Let me see if I understand you right. You want to discourage state trial judges in particular from developing separate criteria of what they're going to recognize under some comity theory. From the state point of view, at least, the state court system under the leadership of the supreme court, should decide the criteria that would then be good for that state court system, a set of criteria which would then be applied to tribal court systems for the recognition problem. Is that right?

Ransom: That's correct. I would do it either by a court rule, or perhaps in the legislature. I think the legislature could delve into this as well.

Deloria: That's a separation of powers question under state law.

Ransom: It certainly is.

Deloria: Is your suggestion not, then, a form of comity with separate rules that are suited to this particular situation?

Ransom: Is it a form of comity or is it a concept that must be developed to meet a special need? Is it full faith and credit, or is it something else? I just wish we didn't feel we had to use those terms.

Deloria: Is there a need for a new term?

Ransom: Well, if it's an act of the legislature, you can give the act a name such as "The Enforcement of Tribal Court Judgments and Orders Act" and then it would eventually have a short name.

Laurence: I agree with Chief Justice Ransom. I think that both terms — "full faith and credit" and "comity" — come with too much baggage from the state-to-state or state-to-foreign country problem attached to them. The term I use is a "rule of recognition" and I'm just trying to do exactly what you're saying. We have to establish this rule of recognition for the unique problems that exist between New Mexico and its Indian tribes, or, like you say, the tribes outside the state. I think the terms "full faith and credit" and "comity" imply too much and we can use . . .

Clinton: Let me say, that by suggesting that the problem is *unique*, a proponent of such a unique, adapted rule is making certain assumptions about the differences between tribal and state sovereignty, and possibly suggesting the lesser nature of tribal sovereignty than state sovereignty. That is *precisely* what concerns me, and moves me toward the full faith and credit model. Let me highlight the problems that I am talking about.

Chief Justice Ransom is concerned about small tribes. Tribes, in fact, might have just a few members. At least in my experience, those tribes generally do not have a tribal court, or at least not a Western-style tribal court.²⁸ By its terms, the Full Faith and Credit Act only requires deference to "judicial proceedings" and, consistent with my interpretation, what "judicial proceedings" meant was what Congress intended: a *Western-style court*. So, it is only to those tribes which have adopted Western-style courts to which full faith and credit is going to apply.

28. There are, of course, exceptions to the notion that smaller tribes have not tended to fully organize around Western-style governing structures, including tribal courts. For example, in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Suquamish, who were then described in the opinion as having 50 on-reservation members, had organized a Western-style court which unsuccessfully asserted criminal jurisdiction over non-Indians. While exceptions to any statement of general tendency can certainly be advanced, it nevertheless remains the case that it tends to be larger tribes, or those with considerable resources, that have organized Western-style courts.

Laurence: Would it be disruptive to note here that what we are all calling “Western-style” courts evolved in Europe, which is *east* of here?

Occhialino: Yes.

Laurence: Sorry. Bob?

Clinton: Now, that does not mean that there should not be some other special body of recognition rules with respect to those tribes that are continuing traditional systems. I do not have any problem with adopting Judge Ransom’s suggestion with respect to such nonjudicial determinations by tribes. But if a tribe has Westernized in quite the same way as the states, then it seems to me the tribe, just as much as any state, is entitled to get — and, I might add, must *give* — full faith and credit for their judgments.

The problem raised for me by the Chief Justice’s suggestion of individualized state recognition — and by the way, I am told that South Dakota has already begun to do that, in other words, they have already begun to implement Chief Justice Ransom’s suggestion for individualized implementation of recognition of tribal judgments under South Dakota statutory law — is that it puts the states in the position of deciding whether to recognize the sovereign governments and courts of Indian tribes.

I have always assumed that under our Constitution, the recognition of Indian tribes was lodged in the federal government, not in the states, and that the choice to recognize or not is not one that the states individually could make for separate and different tribes. Otherwise we get a system of federally recognized tribes and then a separate system of tribes that are recognized by the states for purposes of full faith and credit. And that’s a different list.

Newton: But, Bob, you can’t really have any trouble with states recognizing tribal sovereignty, can you? That’s what tribes have been striving for from the days of *Worcester v. Georgia*.²⁹ What you mean, I think, is that you don’t want states showing less respect for tribal sovereignty than the federal law allows. That’s what Bob Laurence and I mean about wanting this “rule of recognition” to be federal. Chief Justice Ransom, for all the obvious reasons, prefers that it be a matter of state law.

Clinton: Nell, I think that description of *Cherokee Nation* and *Worcester* turns those venerable cases on their heads. They were not about permitting states to separately recognize Indian tribes under state law, as Chief Justice Ransom’s proposal suggests. Rather, they were about the refusal of the State of Georgia to give appropriate recognition to the legal structure, sovereignty, laws, and lands of the Cherokee Nation recognized and protected by *federal* constitutional,

29. 31 U.S. (6 Pet.) 515 (1832).

statutory and treaty sources. These cases make my point. Federal law, not state law, recognizes tribal governments and their governing institutions, like tribal courts. Just as the state courts were bound in *Worcester* to respect the treaty and statutory protections accorded the Cherokee Nation, so the state courts are bound by the federal Full Faith and Credit Act and should not be at liberty, as Chief Justice Ransom suggests, to fashion their own independent recognition scheme for tribal courts. They are bound by federal recognition of the tribal governments, often under the Indian Reorganization Act.

The last problem I have relates to Bob Laurence's suggestion of what will go on before the state court which receives a tribal court judgment for enforcement purposes. Bob's suggestion is that the tribal court judgment can be reexamined in the state court when brought there because of some "fairness" concerns. But, he says, state judgments cannot be reexamined in tribal court on the same grounds. Now, it seems to me that suggestion makes certain *a priori* disparaging judgments about the sophistication, the nature of the exercise of sovereignty, the quality of the tribal judges and the tribal courts which I do not think are fair. We have good tribal judges and we have bad tribal judges. Likewise, we have good state judges and we have bad state judges. It seems to me when you take a judgment from a Western-style court — and I think that's all we're talking about here, when we're talking about full faith and credit — when you take a judgment from a Western-style court rendered by a judge, we do not inquire into whether they're good or bad judges or whether they correctly or incorrectly apply the law or whether they utilized procedures that seemed meticulously proper or fair to the enforcing court so long as they had proper jurisdiction. We take the judgment as we find it, so long as there was subject matter jurisdiction, and so long as there was either proper personal jurisdiction or waiver of that jurisdiction in the earlier court.

Now, I would agree with Bob that, in fact, in full faith and credit there ought to be an ability to inquire into whether the procedure was *fundamentally fair*. But if we can't do that with state judgments — and we cannot under present law — I do not think we ought to be able to do it with tribal judgments either. Perhaps the one area on which Bob Laurence and I would agree is that the rules of full faith and credit should be altered to permit collateral attack on a judgment, either offensively or defensively, where the judgment was rendered in violation of constitutional or quasi-constitutional norms, whether those norms are the Bill of Rights, the Fourteenth Amendment or the Indian Civil Rights Act. We simply do not presently have such opportunities under full faith and credit and Bob and I differ, not on the desirability of permitting such collateral attack, but, rather, on the conclusions one draws from this significant omission from present law. Bob would

asymmetrically create such opportunities to collaterally attack tribal judgments, but no other judgments,³⁰ while I would continue the symmetry and accord the judgments of tribal courts the same respect and enforcement that would be accorded to state courts. Perhaps Bob's approach suggests a greater distrust of the procedural fairness of tribal courts than of state courts. For myself, I am equally suspicious of both.

Laurence: Well, first let me respond to the previous footnote.³¹ There. Now I note here in the text that we *can* and *do* collaterally

30. Professor Laurence has argued for an asymmetrical rule requiring states to accord full faith and credit to tribal judgments, yet permitting tribal courts to ignore state judgments. Such an approach not only seems inconsistent with the plain language of the Full Faith and Credit Act, it also seems unsustainable in the long term. First, most sovereign governments will be quite reluctant to accord full faith and credit to judgments of another government which does not accord reciprocity. Thus, whatever the legal doctrine, an asymmetrical rule is likely to be practically productive of a disintegration of mutual sovereign deference. Second, an asymmetrical rule seems more likely to produce intergovernmental friction, rather than to perform the intended role of full faith and credit in cementing the Union together into an harmonious whole. Third, depending on how such an asymmetrical rule is conceptually implemented, there may only be federal oversight of compliance for one side of the equation, the state courts. The mandatory nature of the legal obligation and federal oversight of compliance with full faith and credit are perhaps the most important features that distinguish the legal concept of full faith and credit from the more flexible, less mandatory doctrine of intergovernmental comity. Fourth, as reflected by the recent decisions of the United States Supreme Court in the area of extradition, *see, e.g., Puerto Rico v. Branstad*, 483 U.S. 219 (1987), the Court has moved to a more appropriate and aggressive posture in overseeing intergovernmental relations within the Federal Union as a matter of enforceable federal legal imperative. Finally, the asymmetrical rule seems to attempt to preserve a vision of tribal courts as remaining somehow outside the Federal Union or, perhaps more accurately, with one foot in and one foot *outside* the Federal Union. Yet, the current legal problems of Indian tribes and their contemporary legal situation suggests that the long-term survival of tribal governments requires that tribes work out their legal positions as governments that are now wholly *within* and part of the Federal Union.

31. In the previous footnote, Bob Clinton paraphrases my position thusly: "Professor Laurence has argued for an asymmetrical rule requiring states to accord full faith and credit to tribal judgments, yet permitting tribal courts to ignore state judgments." Wrong. I have argued for an asymmetric federal rule of recognition that imposes on *both* courts the duty to comply with federal law. That federal law, though, allows the two courts to undertake an examination of the judgment sought to be enforced and for both courts to decline, in certain instances, to help the plaintiff collect its judgment. Neither of these examinations is allowed under classic full faith and credit analysis, so I don't use that term.

Now, those instances when the judgment is allowed, under my system, not to be recognized are asymmetric, the state court is allowed an inquiry that is forbidden to the tribal court, and vice versa. Neither court has to give "full faith and credit"; neither court is allowed to "ignore" the judgment whose enforcement is sought. The state court is allowed to undertake a "fairness" hearing, because it will be the first such hearing outside of the tribal court system. The tribal court is allowed to undertake a hearing

attack state judgments, but it's not done in the recognition process. We now inquire as to the fundamental fairness of state court proceedings based upon the Constitution either on certiorari to the U.S. Supreme Court or by collateral attack in U.S. district court, if you can get around the federal court abstention doctrines. I'll admit that those are very substantial barriers to *actual* review, but at least a *theoretical* review of the fairness of the state court proceeding exists outside of the state court system. But even theoretically, the possibility of federal court review of tribal court systems doesn't exist. There's no appeal from tribal court into the federal court system, and collateral attack is impossible after the *Martinez* case, at least on the civil side.

Clinton: But what you're suggesting is only true if you have a question that raises a federal issue. If the case only involves the far more common situation of a misapplication of state law, the state court is the final arbiter of that question. There is absolutely no possibility of review by the United States Supreme Court, just as tribal appellate courts serve as courts of last resort on most questions of tribal law.

Laurence: My system is the same. With the state as the enforcing court, I wouldn't allow it to reinspect issues of tribal law. And, of course, the Constitution does not bind the tribe.³² So, I would only allow a hearing with respect to compliance with the Indian Civil Rights Act. Chief Justice Ransom makes a good point: We don't want to have a major civil rights hearing for the enforcement of every tribal court judgment. I assume that, at the beginning of the process, there would be some rush to do that. But, as those hearings develop and some law begins to be laid down about what exactly the Indian Civil Rights Act means in this context, they should become rarer and more manageable. We could encourage only serious challenges by making the defendant — who is, after all, not paying voluntarily on a pre-

on the merits to see if the judgment represents a serious deviation from tribal law, because the tribal society is more threatened by such foreign law intrusions than is the state.

I propose this asymmetric solution because the *problem*, itself, is asymmetric. Partly this is inherent, due to the degradation that tribes have suffered under European rule. Partly the asymmetry is created by the *Martinez* case, which prohibits a federal ICRA inspection of the tribal proceeding. I grant that an asymmetric solution is cumbersome, for the reasons that Bob Clinton has listed in the previous footnote. But one cannot avoid this unwieldiness merely by pretending that the issues raised by tribal court enforcement of state court orders are the same as the issues raised by state court enforcement of tribal court orders. Sadly enough, for those who like their law straightforward, complicated and asymmetric problems require complicated and asymmetric solutions. Or, as Tom Robbins reminds us, "Don't confuse symmetry with balance." TOM ROBBINS, *EVEN COWGIRLS GET THE BLUES* 375 (1976).

32. *Talton v. Mayes*, 163 U.S. 376 (1896).

sumptively valid judgment — pay the costs of the ICRA hearing, if the defendant loses and the judgment is enforced.

I'm not sure that I am satisfied with the Chief Justice's solution, because it only has the state certifying on a tribe-by-tribe basis that a tribal court system is generally worthy of respect. I think a tribal court defendant who takes a judgment has a right to complain that the system, which looks okay on paper, did not work fairly *as to him*. Or her. Or it. In other words, I think each individual defendant trying to resist the enforcement of a tribal court judgment against off-reservation property has a right to raise non-trivial objections to the tribal court process under the ICRA.

Deloria: I think there is, in some respects, an unseen hand that works in this area. That is, if we try to adopt a broad rule that asks too much of one government or another, we'll have to pay the price some place else, either in people inventing messy rules to get around the broad rule, or in paying an enormous political price by the consequences. I think one of the things that's going to influence the outcome here is whether there's an identifiable difference between the kinds of judgments and orders and other paraphernalia that are brought from state court into tribal court seeking enforcement and the kinds of things that are brought from tribal court into state court.

Deloria: Judge Zuni, what's been your experience in both directions?

Christine Zuni: Well, before I answer that question, Sam, I want to respond to what I've heard so far today. This is a complex issue, one which requires further deliberation and consideration before I can take a firm position. The discussion today has been very interesting. I tend to agree with Chief Justice Ransom in his statement that there is a need here for a third rule or a third approach. Full faith and credit is a rule, as Professor Laurence was saying, to be applied to sister states because there is uniformity among all the states. Sisterhood and uniformity are not elements of the relationship between states and Indian tribes. Indian tribes don't fit into the judicial uniformity that exists between the sister states. Neither are tribes uniform among themselves. Uniformity or conformity with state judicial systems should not be a prerequisite to recognition of tribal court orders. Comity is appropriate when you have foreign judgments or foreign decrees outside of the system entirely. Tribal court orders in my opinion don't fit into either one of those categories. For the most part, when tribal courts want to have their orders enforced, they go with the principle of comity and that carries with it problems. It's difficult to accomplish.

I think it is best to devise a third approach to solve this problem so that state court litigants can have their court orders enforced in tribal jurisdictions and tribal court litigants can have their orders enforced in state court jurisdictions.

I question, however, whether solving the problem at the state level is going to work, because there are tribes nationwide and our people travel nationwide. You can have a need to enforce the decree of a particular tribe not only in the state where that tribe is from, but outside that state as well. And *vice versa*. So I see a need to try to accomplish this through some method, nationally. Of course, I think that working on it — at least looking at the problem on a state level — is certainly a good approach and that needs to occur. We need a thorough study of the problem of enforcement of judgments between state and tribal courts on a national level.

In response to the question that you asked, Sam, about the types of things I have seen: I have seen a judge, or some officer of the state court or the state police officers from a border town come into my court to request enforcement of an arrest warrant, or request that the court allow the police officers to serve documents inside the reservation. The process generally followed requires that they bring the papers to the court and then the court, upon looking the documents over, would decide whether to give authority for service of the documents.

In situations where we wanted some documents served in the border town, somewhat of the same process would occur in reverse. That's generally how we accomplished service of documents. It's very informal at this point.

I've also seen a case in which two parents disputing the custody of a child initially brought an action in tribal court. However, one of the parties fled the jurisdiction of the tribal court and went beyond the state court's jurisdiction to the east coast, and we faced the problem of our limited territorial jurisdiction. Nothing that we did in our court was sufficient to reach the person, who was clearly under the jurisdiction of the tribe. So we invoked the state court's jurisdiction in order to follow this person around.

The person didn't stop on the east coast, but went from there to Oklahoma. So we had a situation involving a tribal court, a New Mexico state court, a New York state court and an Oklahoma state court. We were seeking assistance from the state courts based on an underlying tribal court order. That is what really brought home to me the problem that we face, because there is no uniform way of recognizing tribal court decisions, nationally, other than comity. So, we faced an action to domesticate a foreign decree in New York and another action in Oklahoma before the case finally came back to New Mexico.

So, there are tremendous problems that can arise even if you've got one state which is working with the tribes within that state. You will still run into problems if your tribal court order has to go beyond the boundaries of the state that the tribe is in.

Deloria: Well, let's take the New Mexico and New Mexico tribe situation. Couldn't New Mexico serve as a sort of a "transformer" then? You take a tribal court order, get it domesticated in New Mexico, then have the *New Mexico* judgment enforced in New York or Oklahoma under constitutional and statutory full faith and credit.

But could it go the other way, then? Rather than saying a tribe has to have agreements with all fifty states, couldn't any other state come to New Mexico, and, using the New Mexico courts and statutory full faith and credit, transform in the other direction. The new New Mexico judgment then could be taken onto the reservation, if New Mexico and the tribe had an agreement.

Clinton: That would suggest just one thing that I would like to bring up. Justice Ransom has talked about how the Supreme Court of New Mexico might write some rules and determine whether or not it will give deference to the judgments of a particular pueblo, for example. He has not told us, however, whether or not he would demand reciprocity as a precondition to applying that rule to a particular tribe. Before we talk about creating a new, specialized, and presently nonexistent rule for recognition of tribal judgments in state courts, we should find out whether the state is prepared to enforce such judgments if they would not receive reciprocal enforcement of their judgments in tribal courts, as they might not under Bob Laurence's asymmetrical proposal.

Deloria: It also goes to Bob Clinton's point about the states recognizing tribes. As Felix Cohen is always so good at noting, the tribe can also say: We don't care whether you recognize us or not. So it does go both ways.

Occhialino: So, Justice Ransom, your notion is that the state supreme court or legislature might formulate these rules to recognize judgments on a tribe-by-tribe basis. Would you expect, or even demand, reciprocity so that the "transformer," as Sam calls it, works both ways?

Ransom: I would need to know what objection the tribes have before I could answer that. My experience has always been with enforcement going one way: with the tribes wishing to serve a warrant or writ (or any judicial act), to extend its jurisdiction outside of the reservation. I don't have the experience the other way to be able to answer that. I have read some literature regarding the fact that it is rather typical to see reciprocity requirements enforced by states attempting to negotiate with the tribes.

You see, I don't think I would say that it would be an absolute prerequisite, but it may become a prerequisite when I hear from district attorneys and others who are interested in enforcing various orders of the court on the reservations.

Clinton: It is interesting that the Wisconsin legislation adopted to implement full faith and credit and most of the other similar proposals

I have seen do demand reciprocity.³³ Reciprocal enforcement of state

33. WIS. STAT. ANN. § 806.245 (West. Supp. 1992) (as amended by 1991 Wis. Laws 990, act 43, §§ 1-3)). The Wisconsin legislation states:

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

(a) The tribe which creates the tribal court and tribal legislative body is organized under 25 USC §§ 461 to 479.

(b) The tribal documents are authenticated under sub. (2).

(c) The tribal court is a court of record.

(d) The tribal court judgment offered in evidence is a valid judgment.

(e) The tribal court certifies that it grants full faith and credit to the judicial records, orders and judgments of the courts of this state and to the acts of other governmental entities in this state.

(2)

(a) Copies of acts of a tribal legislative body shall be authenticated by the certificate of the tribal chairperson and tribal secretary.

(b) Copies of records, orders and judgments of a tribal court of record shall be authenticated by the attestation of the clerk of the court. The seal, if any, of the court shall be affixed to the attestation.

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

(a) The court keeps a permanent record of its proceedings.

(b) Either a transcript or an electronic recording of the proceeding at issue in the tribal courts is available.

(c) Final judgments of the court are reviewable by a superior court.

(d) The court has authority to enforce its own orders through contempt proceedings.

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

(a) The tribal court had jurisdiction of the subject matter and over the person named in the judgment.

(b) The judgment is final under the laws of the rendering court.

(c) The judgment is on the merits.

(d) The judgment was procured without fraud, duress or coercion.

(e) The judgment was procured in compliance with procedures required by the rendering court.

(f) The proceedings of the tribal court comply with the Indian civil rights act of 1968 under 25 USC § 1301 to 1341.

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

Id.

In 1992, the Oklahoma legislature also added a full faith and credit implementation provision:

A. This act affirms the power of the Supreme Court of the State of Oklahoma to issue standards for extending full faith and credit to the records and judicial proceedings of any court of any federally recognized

judgments by tribes, is regarded by most states as a necessary precondition to state enforcement of tribal judgments, although such reciprocity is lacking in Bob Laurence's proposal.

Laurence: My senior-most colleague at Arkansas, the great conflicts scholar Robert A. Leflar, believes, in the non-Indian context, that retaliation is not a concept that advances our inquiry very much: "The doctrine [of retaliation] has received scant approval from commentators. . . . It has no appreciable tendency to induce a change in the foreign nation's law."³⁴ And, of course, retaliation is just the other side of the reciprocity coin: "Recognize us or, by God, we'll withdraw recognition from you."³⁵

These disputes can become too bitter and divisive; there's also a bit of the schoolyard polemic to it: "If I can't come to your party, you can't come to mine!" Under my proposed federal rule of recognition, one government would not be relieved of its obligation to follow the federal law just because the other government is not following it. In a state-tribal negotiation, reciprocity might well be an *issue*, but I wouldn't say it's a "necessary precondition," as Bob put it. We should remember that the primary beneficiaries of the rules that we are discussing are not the governments themselves, but plaintiffs with judgments against defendants who are not paying voluntarily.

And finally, back to my boring insistence on asymmetry: if we *do* demand reciprocity, remember that, in my view, no one should be

Indian nation, tribe, band or political subdivision thereof, including courts of Indian offenses.

B. In issuing any such standard the Supreme Court of the State of Oklahoma may extend such recognition in whole or in part to such type or types of judgments of the tribal courts as it deems appropriate where tribal courts agree to grant reciprocity of judgments of the courts of the State of Oklahoma in such tribal courts.

12 OKLA. STAT. § 728 (Supp. 1992); *see also* N.D. CENT. CODE § 27-01-09 (1991); S.D. CODIFIED LAWS § 1-1-25 (1992).

34. ROBERT A. LEFLAR ET AL., *AMERICAN CONFLICTS LAW* 250 (4th ed. 1986).

35. A South Dakota comity statute *requires* retaliation:

(2) If a court is satisfied that all of the foregoing conditions exist, the court may recognize the tribal court order or judgment in any of the following circumstances:

. . . .

(b) In any case in which the jurisdiction issuing the order or judgment also grants comity to orders and judgments of the South Dakota courts

S.D. CODIFIED LAWS § 1-1-25(2)(b) (1992). This statute was recently at issue in *Red Fox v. Hettich*, 494 N.W.2d 638 (S.D. 1993). The Supreme Court of South Dakota upheld the trial court's dismissal of the enforcement action brought by Ms. Red Fox on the grounds that she did not carry her burden of proof that the tribal court judgment sought to be enforced was supported by proper tribal jurisdiction.

looking for "mirror image" reciprocity. One government may agree to do *something* in response to the other's agreement to do *something else*.

Clinton: I want to go back to Judge Zuni's child custody example for a moment, because the example makes the full faith and credit point very well. The reason why there were problems tracking down this individual and enforcing the judgment is that some of those states were not, under the Parental Kidnapping Act,³⁶ prepared to give the tribal court order full faith and credit. If state courts had been prepared to give the tribal court order full faith and credit, as they are required to do under the Parental Kidnapping Act,³⁷ the tribe and the parent would not have to go through the state. You simply take the tribal court order to wherever you find the child and say to that state's court: "Enforce this order as matter of federal law. This order is entitled to full faith and credit." There is, in fact, one case from the Fourth Circuit which holds that for purposes of the Parental Kidnapping Act — which is the very act addressed to the problem Judge Zuni is talking about — that an Indian tribe should be considered a court of a state for purposes of enforcing the act.³⁸ Now, if that's the case, full faith and credit provides that very direct contact glue that Ted was talking about, rather than the more circuitous route of the Chief Justice's "transformer," where a plaintiff has to work through the state in which the reservation lies.

Zuni: Let me just interject to say that in the case that I was mentioning, neither the Uniform Child Custody Enforcement Act nor the Parental Kidnapping Act was applicable for reasons that are not relevant here. So those statutes don't solve all the problems.

Laurence: I agree in theory that full-blown statutory full faith and credit may work for some issues and between some states and some tribes. I resist, though, the congressional statutes which, in a blanket way, apply it to everything. Hence my dislike for Bob's reading of section 1738. If Congress sits down and says that parental kidnapping

36. 28 U.S.C. § 1738A (1988). The Parental Kidnapping Act requires other states to enforce the child custody orders of the child's home state so long as that court had jurisdiction and certain other requirements specified in the Act. Under section 1738A(b)(8) (1988) the statutory term "State" is defined to include "a territory or possession of the United States." Thus, the approach of *United States ex rel. Mackey v. Coxe*, advanced here to support the application of the Full Faith and Credit Act to tribal courts would apply equally well to treating tribes as states for purposes of the Parental Kidnapping Act. At least one court already has so found. *In re Larch*, 872 F.2d 66 (4th Cir. 1989) (holding that Cherokee tribe is a state for purposes of the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1988)); see also *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510 (8th Cir. 1989) (suggesting in dicta that Indian tribal courts should be considered courts of a state for purposes of the Parental Kidnapping Act).

37. See *supra* note 33.

38. *Larch*, 872 F.2d at 68.

is the situation which, for these certain reasons, requires full faith and credit, that seems to me to be a sensible decision.

Newton: Just as Congress can provide that for purposes of this particular act a tribe will be considered the same as a state. The tribe will be treated as a state for those statutory purposes, but it does not make the tribe a state for all purposes.

Deloria: In our experience in dealing with state-tribal relations, we have found that very often in the early stages the two governments deal in the abstract, contending for power for the sake of power; jurisdiction for the sake of jurisdiction.

When they get down to talking about reasons, talking about standards and particular issues, they then realize that they have achieved an intergovernmental relationship that was more familiar. I think if you put to Chief Justice Ransom or anybody representing a tribal government, the abstract question of whether they would insist on reciprocity, they certainly would not want to say, "No, we don't care." Because clearly, you do not want to say I am going to give you whatever you want and I do not care whether you give anything in return. But it depends on the situation. I would guess that if you took the approach you have been discussing, *whatever* standards you developed, there can still be conflicts. For example, a tribe could take the position that: "we want our judgments recognized but under no circumstances will we ever recognize any piece of paper that comes out of the state of New Mexico." Such a stance would somewhat release the state from the recognition, I would guess. And I think, by the same token, we get to the question of does reciprocity mean uncritical, blind, dollar-for-dollar, penny-for-penny, chip-for-chip reciprocity. And I hear you saying, "No, not necessarily. It depends on the circumstances."

Ransom: It might even depend upon the nature of the writ involved. There may be some issues, or certain types of writs for which I would think the tribes would be very happy from past experience to lend the enforcement power of tribal government. And there may be others that have given rise to certain problems for which they would like to reserve judgment.

Professor Clinton was asserting that full faith and credit would be the answer to the problem that Judge Zuni raised, but yet how does the New York court know that this tribal court is a "traditional" Western court entitled to full faith and credit? Are they on some register somewhere?

Occhialino: I find that ironic — not the Chief Justice's last observation, but the point it addresses. I started out today thinking that Bob Clinton's full faith and credit approach at least had the benefit of simplicity. But then he said it depends on whether the tribal judgment *really* came from a Westernized judicial proceeding and of

course, that is a tribe-by-tribe determination. So all Professor Clinton has done is tell us that there is going to be full faith and credit, but there's a black hole exception for "non-Westernized" proceedings and that exception is as big as Laurence's "asymmetry."

Clinton: But it is very clear whether the tribunal that renders a tribal judgment purports to be a court entertaining a judicial proceeding or a tribal council or other governing mechanism. Most tribes have written constitutions and tribal ordinances that can be consulted on such questions. If there are no positive, written governing documents establishing a Western-style court, in all likelihood the judgment was rendered through a more traditional nonjudicial governing process. There is no greater problem for a state court in determining whether a tribal decision was rendered in a Western-style "judicial proceeding" than determining whether a foreign judgment rendered, for example, by the courts of Saudi Arabia was rendered by a court of competent jurisdiction employing fundamentally fair procedures. State courts perform the latter function all the time (often without easy access to the laws of the foreign nation in question) under the guise of the comity doctrine. There is no reason why state and federal courts cannot determine with relative clarity and ease whether a tribal decision was rendered in a Western-style "judicial proceeding" as required for enforcement under the Full Faith and Credit Act. The limitation I am proposing is not a gaping, elastic hole in the Full Faith and Credit Act, but, rather, a simple factual determination that represents a statutorily necessary finding as a precondition to according full faith and credit.

Laurence: While Bob Clinton and I are on opposite sides in much of the discussion here, I have to agree with him that there's less trouble to his "court of record" determination than meets the eye. It's not going to be that difficult, and state courts are already doing it in the state-to-state situation. Note that the Uniform Enforcement of Foreign Judgments Act,³⁹ which allows for the simple registration of judgments when enforcement is sought in a foreign jurisdiction, only applies to judgments deserving of full faith and credit. So when a defendant challenges the registration of a judgment against him, the court may have to do a full-blown constitutional/statutory full faith and credit determination, figuring out, for example, whether an Alaska small-claims court judgment is entitled to recognition under the Act. And that doesn't seem to cause too many problems.

Ransom: It might be nice if, indeed, we were "transformers" and could determine for which tribal courts we were going to be transformers based upon various standards and criteria. It might be only in certain subject matters. The rule wouldn't have to be for every

39. UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT § 1, 13 U.L.A. 183 (1964).

possible judgment. Rather, we could develop standards and criteria for various tribes to meet, based upon their application in various subject matters. We could *domesticate* the tribal judgment in a very simple procedure in the state court. Then it would be entitled to full faith and credit because the New Mexico state court determined either by rule or legislative enactment that it was entitled to enforcement in the state of New Mexico.

Deloria: There is considerable irony here, beyond that which Ted has observed. The state of New Mexico makes billions taking tourists around explaining the Indians to them. Now, the suggestion is that the state courts will do the same in the legal system as well. In a way — and I'm not accusing the Chief Justice of having this idea — in a way what we are considering here is the possibility that the State of New Mexico will be explaining to the other courts in the country what tribal courts are all about in this “transformer” theory that we have developed.

Ransom: Yes. We — the courts of New Mexico — would just be deciding which courts we are going to recognize in terms of enforcement of judicial decrees about certain subject matters. And then we would domesticate those orders. Then it's treated like any other judgment or —

Deloria: But part of what is going on is that the New York judge will be saying, “Gee, I never heard of this tribe before, but New Mexico says it's okay so . . .”

Occhialino: Yes, we're surely talking about some difficult definitional problems any way we look at it. What we're doing is going through a possible system, deciding where we're going to put that definitional problem.

Laurence: And let me point out that there is nothing at all *voluntary* about the “transformer” theory, at least on the receiving end. If New Mexico decides to domesticate a tribal court judgment and make it one of its own, then the New York courts have no choice but to give full faith and credit to what is now a *New Mexico* judgment, don't we all agree on that? On the other hand, if New Mexico determines merely to *enforce* the tribal judgment within the state but without domesticating it into a state judgment, then there is nothing to which New York must give full faith and credit. I don't see any in-between ground.

Clinton: Let's go back to that practical definitional problem. In light of Chief Justice Ransom's comments about not wanting to have two trials, that first inquiry is simply asking what is the nature and structure of the government of a particular tribe. This inquiry allows us to figure out whether we are dealing with a Western court or not, which, as I suggested earlier, often is relatively simply discovered — you can look at their tribal constitution and ordinances. It is not an

inquiry that is any worse than asking whether the tribal court had subject matter jurisdiction, which we ask all the time. There is, to my way of thinking, a big difference between that sort of formal inquiry into the governing structure of the tribe, which I think is a fairly simple, formalistic inquiry, and asking whether the judgment that was rendered is in full procedural compliance within the Indian Civil Rights Act, which is Bob Laurence's suggestion. Resolving the question of procedural fairness and compliance with the Indian Civil Rights Act, I think, does result in exactly the kind of double trial problem to which Chief Justice Ransom referred in the first instance.

Indeed, one state, South Dakota, has adopted a statute⁴⁰ that seems to implement a hybrid arrangement permitting redetermination of tribal court structures and fairness much like that suggested by Chief Justice Ransom and Bob Laurence. That statute is incredibly hostile to the enforcement of tribal judgments, even as a matter of comity. It requires

40. S.D. CODIFIED LAWS § 1-1-25 (1992). The statute states:

No order or judgment of a tribal court in the state of South Dakota may be recognized as a matter of comity in the state courts of South Dakota, except under the following terms and conditions:

(1) Before a state court may consider recognizing a tribal court order or judgment the party seeking recognition shall establish by clear and convincing evidence that:

(a) The tribal court had jurisdiction over both the subject matter and the parties;

(b) The order or judgment was not fraudulently obtained;

(c) The order or judgment was obtained by a process that assures the requisites of an impartial administration of justice including but not limited to due notice and a hearing;

(d) The order or judgment complies with the laws, ordinances and regulations of the jurisdiction from which it was obtained; and

(e) The order or judgment does not contravene the public policy of the state of South Dakota.

(2) If a court is satisfied that all of the foregoing conditions exist, the court may recognize the tribal court order or judgment in any of the following circumstances:

(a) In any child custody or domestic relations case; or

(b) In any case in which the jurisdiction issuing the order or judgment also grants comity to orders and judgments of the South Dakota courts; or

(c) In other cases if exceptional circumstances warrant it; or

(d) Any order required or authorized to be recognized pursuant to 25 U.S.C., § 1911(d) (1988) or 25 U.S.C., § 1919 (1988).

Id. Insofar as this statute imposes special, higher burdens, such as proof by clear and convincing evidence, that conflict with federal statutory obligations imposed on states to accord full faith and credit to tribal judgments under with the Indian Child Welfare Act, 25 U.S.C. § 1911(d) (1988), the Full Faith and Credit Act, 28 U.S.C. § 1738 (1988), or the Parental Kidnapping Act, 28 U.S.C. § 1738A (1988), this state statute might be thought to be invalid under the Supremacy Clause of the United States Constitution, U.S. CONST. art. VI, para. 2, and to have been preempted by federal law.

that any party seeking to enforce a tribal judgment in state court prove by clear and convincing evidence a detailed list of prerequisites that include but go far beyond the traditional requirement that the tribal court had subject matter jurisdiction and personal jurisdiction. Included in the list is that the tribal order or judgment was not fraudulently obtained, that the tribal order or judgment was obtained by a process that assures the requisites of an impartial administration of justice including but not limited to due notice and a hearing, and, most remarkably, that the order or judgment complies with the laws, ordinances and regulations of the tribal jurisdiction from which it was obtained. This last requirement was no doubt imposed to assure that state courts could “second guess” tribal courts, even on tribal law, in order ostensibly to assure their fairness. Nevertheless, it results in precisely the type of second trial of the underlying dispute, in this case with a burden imposed on the party that prevailed in the tribal court to show compliance with tribal substantive and procedural law by clear and convincing evidence. The extraordinary hostility to the enforcement of tribal judgments demonstrated by this state statute dramatically highlights the reason why full faith and credit must be left to uniform federal law, rather, than case-by-case state initiative, as suggested by Chief Justice Ransom and as reflected in the South Dakota statute.

Laurence: Sure, I agree that my system threatens a second trial, though much narrower than the one contemplated by that South Dakota statute. But is the solution to tell the tribal court defendant who alleges that he was given only fifteen minutes to answer following service of the complaint — an example I admit to being entirely hypothetical — do we tell that defendant, “Oh, quit complaining and pay”? Do we really want to deny that defendant a place, outside of the tribal court, to complain about such a procedure? I can’t think of a surer way to get some federal judge to use the *Oliphant*⁴¹ ax and to deny the tribal court’s power to enter the judgment at all.

Now — pitching asymmetry again — suppose it is the *state* court defendant who took default judgment for failure to answer in fifteen minutes and who is now resisting enforcement of that judgment before the tribal court. That defendant forsook the federal court system, which stood ready — theoretically — to protect against such violations of due process; I wouldn’t give a second chance before a tribal court to challenge the state court procedure.

See? It’s not that I think that tribal courts are less fair than state courts, as Bob Clinton suspects. It’s that federal court review is *itself* asymmetric, caused partly by the *Martinez* case. We already have a system where there is federal review of state court proceedings but not

41. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

tribal court proceedings; my rule of recognition is based, partly, on this *Martinez*-induced asymmetry.

Deloria: But what we're buying all over again here is the *White Eagle v. One Feather*⁴² rule that if a tribe is going to have a Western-style election system, then it has to bring everything else from the west, including all of the requirements of the United States Constitution. What if the tribe said, "We want to have a bench, we want to have a gavel, we want to wear robes. But we also want to have our traditional mixed into this." Now, Bob, you have designed a system where somebody is going to sit off the reservation and decide and make some new determinations that are going to mean a whole lot economically and socially to people on both sides of the reservation boundary. Is there an enforcement-of-judgment template that the enforcing court has to put over the tribal procedure?

Clinton: I do not think that is correct. I think we are talking basically about whether you are dealing with some tribunal that classically would be described as a court of record. That description does not mean that a court of record cannot infuse tribal tradition into its substantive law if tribal law can stand it any more than Western courts use the commercial customs of England under the guise of the common law. The question is whether the tribunal that rendered the judgment is basically a Western-style court of record, irrespective of the substantive law which it applies. Now, certain tribes have chosen not to create courts of record. They have chosen to vest all of their power into their tribal council, or their governor, or some other governing institution. If they choose to do that, there may be contexts in which federal or state courts may want to afford deference to the adjudicative decisions of such tribunals. All I am suggesting is the Full Faith and Credit Act does not require it if the decision was not rendered by a Westernized tribal court of record.

Occhialino: What if a tribe says it doesn't want a Western style of court but it does want full faith and credit?

Clinton: It seems to me that the tribe should be aware that if it chooses to go without the Western-style court, the Full Faith and Credit Act, and possibly the Parental Kidnapping Act and other like statutes that accord full faith and credit may not apply directly to them. They may have to engage in the kind of government-to-government negotiation with Chief Justice Ransom's court or with the legislature of a particular state to get the kind of recognition that they want. What I want is that tribes which have chosen as an exercise of their tribal sovereignty to adopt the court of record route, which have chosen to have a Western-style court route, should get an assurance that they are entitled to precisely the same full faith and credit and

precisely the same recognition of their judgments that any state has.

Newton: I have changed my mind about four times in the past hour. If we recommend a tribal-state compact process, then some of these problems disappear. If a tribe and a state are trying to decide what to do, the tribal officials inform the state, and vice versa. Their officials meet together, they talk about the two systems, they then come to an agreement. They do not have to decide whether the tribe has a Western-style court or not. I would suspect the objection to this process would be (1) that the state-tribal compact route is too unwieldy and (2) that some tribes would not have very much clout in these compact negotiation sessions in some states. And then I guess a third objection might be that the "transformer" idea is for some reason a bad idea. But I rather like the notion that New Mexico and a New Mexico tribe have worked out a relationship regarding the recognition of judgments. Once New Mexico has enforced a tribal judgment, other states would have to follow New Mexico's lead because of section 1738.

Clinton: I think the downside to an individual, case-by-case, tribal-state agreement approach is simply that we are then abandoning federal legal control of exactly those situations that may need help the most. What do we do in those places where tribes and states are unable to come to an agreement?

Laurence: The professors, at least, are in agreement that in those cases *federal*, not state, law governs the question of recognition.

Clinton: Also, the logistics of the state-tribal compact route are difficult. A New Mexico tribe is easily going to be able to negotiate a compact with the state of New Mexico, we hope. But they may have to get their judgments enforced in Alaska as well. That is the "transformer" trick that Chief Justice Ransom has suggested. Once one domesticates the tribal court judgment in New Mexico, it becomes a New Mexico state judgment entitled to full faith and credit. The problem I have with Chief Justice Ransom's "transformer" solution is that it really winds up denigrating the sovereignty of the tribes. I mean, why isn't the tribal judgment entitled to enforcement simply *as a tribal judgment*? Why do you have to convert it into a state judgment to get it enforced? State courts that only enforce the judgments of other tribes because they have been magically "transformed" into state judgments quickly and improperly will adopt the view that tribal sovereignty exists only at the sufferance of and to the extent permitted by the state in which the reservation is located. The "transformer" view will transform not only judgments, but our law on inherent Indian sovereignty. That is a very serious perceptual danger posed by this electrifying and perhaps shocking "transformer" proposal.

Newton: Well, that was the point of Sam's allusion to the court going into the tourist guide business. Why is it that a *New Mexico* court has to legitimize a tribal court judgment to make it valid?

Occhialino: Bob and Nell are probably right, but the question is what do you want to pay? What will the tribes want to pay to get that last little bit of recognition? My guess is it's not worth the effort. To have to go —

Deloria: Look, there is a federal statute that requires in very clear terms "full faith and credit" under the Indian Child Welfare Act⁴³ and yet there are judges sitting in Connecticut, or wherever, saying "full" doesn't mean full, "faith" doesn't mean faith, "and" doesn't mean and, and "credit" doesn't mean credit. I think that certainly the Navajo tribe would feel much better and would be able to heal whatever wounds caused to their sovereignty if they could get a nice piece of paper signed by Chief Justice Ransom. Every one has heard of him and if he says — in his official capacity — that tribal judgments get full faith and credit, that ends the discussion. I think if I were a tribal chairman, it would be a small enough price to pay.

Newton: One response is to switch the question around and ask Judge Zuni about the kinds of problems she would perceive if there were state court judgments brought to a tribal court, and what kind of flexibility tribal court judges might prefer to have with reference to full faith and credit obligations.

Zuni: Well, actually, I have had judgments presented to the tribal court for enforcement from the New Mexico state court system and when I was presented with a judgment, the parties were informed to file a petition seeking enforcement of the state judgment in the tribal court. No one followed through. So you can see how this goes both ways.

We've talked a lot about tribal courts needing to get their orders recognized outside of the tribal court system. It works the other way around, too. Most of those judgments were judgments for money. I guess that the tribal court procedure was a sufficient deterrent to these people to keep them from pursuing the defendant, but it wasn't meant to be a deterrent at all. I informed the parties of the process to follow for the tribal court to recognize the state court judgment and I intended to go through a very simple procedure. But the parties involved in those cases just simply did not follow through.

Laurence: I think it's important to stress that when Judge Zuni is deciding whether to enforce a state court judgment and when she holds a hearing that is not exactly reciprocal or symmetric to those held by state judges, that's not her denial of, or disrespect for, New Mexico's sovereignty. It's a denial of sisterhood, that's all. It's her saying that it's not a symmetric situation. And *vice versa*. Under my approach to the problem, when a New York court undertakes an ICRA hearing to

43. Act of Nov. 8, 1978, Pub. L. No. 95-608, 92 Stat. 307 (codified at 25 U.S.C. § 1976 (1988)).

determine whether to enforce a judgment of Judge Zuni's court — even where it would not, and could not, undertake a similar constitutional hearing when the judgment comes from North Dakota — that's not *per se* a denial of Isleta sovereignty. Nor is it a presumption that hearings before her court are not fair ones. Rather, it's only a denial of Isleta-New York sisterhood. It's a search for a solution to an asymmetric problem, and it's a recognition of the fact that there has been — and can be — no ICRA check on her court outside of her court system.

I like Justice Ransom's idea of state-tribal compacts that set the rules on a tribe-by-tribe, state-by-state basis. And, while I appreciate the irony that Sam has observed, I also like the practicality of the transformer theory.

In spite of the respect that I have for state and tribal judges, I think the *background* rule should be a *federal* rule of recognition. But I think that states and tribes should be able to opt out by entering into Justice Ransom's compacts. It may bother some that a state and tribe together can opt out of a federal rule. It should bother them less when they discover that the Bankruptcy Code has a similar statutory procedure. There Congress has enacted a uniform rule — an exemption law, actually — and then allowed states to opt out from the otherwise uniform national rule.⁴⁴ And I think that the tribes and states acting together should be able to opt out of any uniform national enforcement-of-judgment system.

And it just occurs to me to mention — speaking of exemption laws and their widespread non-uniformity among the states — that we are speaking here of the recognition of judgments and their *general* enforceability. The actual property against which a judgment may be enforced will vary according to the enforcing jurisdiction; states are quite reluctant to use other states' exemption rules. So, both Florida and Navajo prohibit the garnishment of wages and that rule will obtain in those jurisdictions, irrespective of whether a foreign judgment is "recognized." Of course, the exemption laws themselves are subject to negotiated agreements between states and tribes.

Deloria: Bob Laurence's comment about exemption law has made me realize that we have not, I think, done a good job of distinguishing three related, yet clearly distinguishable issues:

(1) One government's recognition of another government's *sovereignty*;

(2) One government's recognition of that *particular exercise* of the other government's sovereignty that is called "entry of judgment";

(3) One government's agreement that a certain judgment will be *enforced with that government's help against certain property* lying within that government's jurisdiction.

44. 11 U.S.C. § 522 (1988 & Supp. III 1991).

I have always understood that difference — in my view, the crucial difference — between (1) and (2). Furthermore, I have always understood that (1) does not require (2). Nell's discourse on comity shows that: New Mexico recognizes France's sovereignty, even though it may decline in certain instances to enforce a French judgment. Likewise, Seminole recognition of Florida's sovereignty does not necessarily require it to recognize every state judgment brought to a Seminole court, putting aside for a moment Bob Clinton's argument that section 1738 is a *statutory* requirement that it do so.

Now, Bob Laurence, are you telling us that (2) does not require (3)?

Laurence: That's right, (2) does *not* necessarily lead to (3). Exemption laws are thought everywhere to be matters of intimate local concern. That's why Congress was persuaded to allow the states to "opt out" of a unified bankruptcy exemption scheme, as I mentioned above.⁴⁵ That's why most states *did* opt out.⁴⁶ That's why the Uniform Exemptions Act has suffered such an unfriendly reception.⁴⁷ And that's why, even in the state-to-state full faith and credit regime, states almost always use *their own* exemption laws, when they are required to recognize another state's judgment.⁴⁸ Arkansas may have to give "full faith and credit" to an Oklahoma judgment, but it doesn't have to allow it to be enforced against an Arkansas homestead, even if that homestead would not be protected if it were in Oklahoma.⁴⁹ Nor does

45. See 11 U.S.C. § 522 (1988).

46. See COLLIER ON BANKRUPTCY § 522.02 n.4a (15th ed. 1979).

47. See UNIF. EXEMPTIONS ACT, 13 U.L.A. 207 (1979). Only Alaska has enacted this uniform act, and that adoption was with substantial amendment.

48. See LEFLAR ET AL., *supra* note 31, § 122, at 335 & n. 12 (4th ed. 1986) (citing *Marine Midland Bank v. Surfbelt, Inc.*, 532 F. Supp. 728 (W.D. Pa. 1982); *Garrett v. Garrett*, 490 P.2d 313 (Colo. Ct. App. 1971); *Person v. Williams Echols Dry Goods Co.*, 169 S.W. 223 (1914); *Chicago, Rock Island & Pac. Ry. v. Sturm*, 174 U.S. 710 (1899)) ("The effect of these cases, as to exemptions, is that only the exemption laws of the forum are applicable, those of the place where the cause of action arose being irrelevant."). But see *id.* § 122, at 336 n.13 ("There is some authority for reference to the exemption laws of the state where the debt was incurred"); *id.* § 50, at 160 ("One of the most common types of cases in which injunctions are granted against maintenance of foreign suits is that in which an extra-state garnishment suit is brought to reach a claim that under the local law is exempt from garnishment.").

49. *Id.* at 335. The authors state:

The availability of attachment and garnishment, the mode of levying execution and rules establishing exemptions therefrom, are usually held to be procedural [and therefore the enforcing state will apply its own law], even though they obviously have a very significant effect upon the practical value of substantive rights that may be reduced to judgment. Apart from the considerations of convenience which normally support reliance upon local procedural rules, exemption rules are often backed also by local public policies which may be supported by an affirmative governmental interest of the forum state.

it have to follow Oklahoma exemption law.⁵⁰

Deloria: A variety of vehicles have been used in the state-tribal relations context, varying from fairly formally structured written agreements to simply one government announcing that it was going to conduct its business in a certain way and the other government announcing that it was going to conduct its business in a certain way and they happened to have talked about it before hand and these methods fit together. How much formality would be needed here?

Certainly if I were a tribal judge, I would want to have pretty good political grounding under me before I sat down and started making agreements with state officials. Chief Justice, you probably have more flexibility. Would you think it would have to be a formal agreement with each tribe or would you simply announce your criteria and then come what may, see how tribes responded?

Ransom: Well, based upon the idea that comity is a judicially created doctrine, it seems to me that the supreme court would have the power to make rules that would avoid the necessity of a mini-trial or a collateral trial on the question of recognition in every case. What I envisioned was a task force of representatives of the tribes and the trial courts, with perhaps some representatives from the legislature, to study the question of whether there are particular subject matters that are common to all the tribes that the state should recognize. And there are these questions of reciprocity. There are, perhaps, some tribal courts that are so Westernized, so to speak, that we would recognize everything that comes from those courts. But I would say that's an area of negotiation, and I would hope that no small tribe or small pueblo would get left in the lurch. But it would be a common effort to arrive at, as I called them, standards or criteria for recognition.

Deloria: Here is how it would work: You would have developed your standards — whatever they might be — and published them. Then you would not need to have a written agreement with tribal courts or tribal governments. You would simply have the standards, and then anyone presenting a tribal court order from a tribe that met those criteria, you would recognize the order. Right?

Ransom: Well yes, if by "you" you mean that the state trial court — not the supreme court — would recognize the order. Now, I wouldn't necessarily expect that for the trial judge to enter that order, each tribe would have to have its own rules that were complementary to ours, because if the system doesn't work from our perspective, we can revoke the rules.

You know, this idea about reciprocity doesn't bother me so much. I would rather see how it develops. My guess is that with a sense of

50. *Person v. Williams-Echols Dry Goods Co.*, 169 S.W. 223 (Ark. 1914).

cooperation, everybody would be happy. But if not, we may find that we're going to have to amend the rules somehow.

I wouldn't want to get involved in requiring the tribes to have complementary rules of court procedure or recognition. I would hope they would do so, but I would not like to have it as a *sine qua non* of recognition.

Deloria: Well, our time is about up. Do we have a summary?

Occhialino: We have found surprising agreement that there has to be flexibility. Even Bob Clinton, who started off by telling us that it was a simple matter of a federal statute mandating full faith and credit, has given us a few holes that we could drive a big truck through. Bob Laurence says that it should be asymmetric. Chief Justice Ransom says it could be even unilateral, perhaps, as an experiment to see how it will work. And I think that Judge Zuni and Professor Newton have both agreed that they don't see anything mandatory and compulsory and universal that has to be applied. There's a lot of flexibility, a lot of hope for good faith solutions that don't require a federal statute. What we *rejected* seems to be a simple equivalence of state and tribal governments as being exactly the same. The one area where there's disagreement, however, is whether the matter should be orchestrated at the state and tribal level or whether the matter should be handled by a more uniform federal approach. That's an important question.

Deloria: That *is* an important question. Something that I do have a half-way informed opinion about is that if the federal government gets into it, they will inevitably complicate it. Nobody is going to be happy with the solution and they will assign the job of coming up with a new solution to somebody who can't do anything else right, either. Whereas, if the states and the tribes can work this out, then they control what they are committing to. As Chief Justice Ransom says, they can pull back if something is not working and wait a little while and try it again.

Then, the question is still how do we get it going or are we only going to be working at the highest level — with the *greatest* common denominator, if you will. I think the answer is the same as we have seen in other areas of state-tribal relations. There is a normative impact of states seeing other states working this out. Tribes seeing other tribes benefitting from it are inclined to say, "Now that we understand the structure, we will try it, too." And then the later tribes will do a better job than the first ones did. There may be some places that will not try it. But, I think the normative impact of somebody priming the pump is going to solve a lot of that.

Zuni: I guess I would say a solution to this certainly would be to the benefit of both Indian tribes and Indian people, as well as those people who are seeking to enforce judgments within tribal jurisdictions.

Laurence: One last thought on the tribal-state negotiations. We should hope, I think, that these negotiations are able to continue outside of the kind of high profile case that hits the front page of the *Journal*. An emphatic refusal by one jurisdiction or another to come to the aid of a worthy plaintiff in a sympathetic case could take the discussion out of the quiet setting where composed leaders negotiate and put it into a forum where political posturing becomes important and level heads do not always prevail. It seems to me if we can get these negotiations under way in a calm atmosphere, under the boring title of "full faith and credit" and avoid the impact such a high-profile case could bring, we're very lucky. What we want to avoid here is a headline that says, "TRIBE TO WIDOW: DROP DEAD."

Deloria: Well, I want to thank everybody for appearing. I hope that it will be useful to someone, somewhere. Time to bring up the Brandenburg Concerto