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Full Faith and Credit in Cross-Jurisdictional Recognition of Tribal Court Decisions Revisited

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Federally recognized Indian tribes are America's third sovereigns; at this level of generality the law is clear. However, exactly what demands the existence of tribal sovereignty places on our constitutional system is a seemingly inexorable question. One way to pin the question down, and begin to trace the deep legal and moral tensions it discloses, is to examine the relationship among America's three sovereign court systems: tribal, state, and federal. All three occupy an important space in our social, political, and legal universe; and all three claim legitimacy for their autonomy from particularized fonts of sovereignty. But how much credit and deference state and federal courts must extend to the decisions of tribal courts, and vice versa, presents an ongoing and difficult legal question that has received sporadic attention from

1. See Cherokee Nation v. Georgia, 30 U.S. (1 Pet.) 1, 17 (1831) (describing tribes as "domestic dependant nations" rather than foreign nations); see also Worcester v. Georgia, 31 U.S. 515, 557 (1832) (holding that the laws of the states have no force in Indian country on their own accord); United States v. Wheeler, 435 U.S. 313 (1978) (reaffirming the holding that tribes retain their inherent, precolonization sovereignty except as to the extent it is supplanted by congressional fiat and holding that tribes are separate sovereigns for the purposes of the U.S. Constitution's double jeopardy clause); Talton v. Mayes, 163 U.S. 376 (1896) (holding that the Fifth Amendment does not apply to tribal prosecutions because the powers of local self-government enjoyed by tribes existed prior to the federal government and have not since been extinguished).

2. Federal and state sovereignty springs from the Constitution, which created them, while tribal sovereignty is traced back to the retained precolonization sovereignty of tribes. See supra, note 1.
courts and commentators.\textsuperscript{3}

Currently, tribal, federal, and state courts generally recognize the judgments and other public acts of one another in one of two ways: on the basis of a judicial determination of comity, or pursuant to a legislative or constitutional full faith and credit command.\textsuperscript{4} Language in the federal Full Faith and Credit Act, along with a nineteenth-century U.S. Supreme Court case interpreting a similar statute, has led some courts and commentators to argue that tribal courts are owed full faith and credit as a matter of federal law.\textsuperscript{5} Advocates of this interpretation further argue that the application of full faith and credit would advance tribal sovereignty and engender good relations among all three court systems.\textsuperscript{6}

The alternative approach adopted by many courts and commentators, most notably the Ninth Circuit, urges that state and federal courts are not required to extend full faith and credit to tribal courts.\textsuperscript{7} Advocates of this approach argue that because a tribal court’s power is tethered to a lineage of sovereignty foreign to the Constitution, and Congress has not explicitly exercised its power to mandate general full faith and credit for tribes, neither the Full Faith and Credit Act nor any other federal mandate requires the application of full faith and credit to tribal judgments.\textsuperscript{8} But, because tribes are sovereign political units, their judgments are entitled to a degree of comity, a doctrine that the Supreme Court described as “neither a matter of absolute obligation . . . nor of mere courtesy and good will.”\textsuperscript{9}

\textsuperscript{3} See infra notes 5–7. The same can be said about the question of how tribal courts should recognize the judgments of other tribal courts. Though an interesting question, it will not be the focus of this Comment.

\textsuperscript{4} See U.S. Const. art. IV (commanding states to extend full faith and credit to the judgments and public acts of one another); 28 U.S.C § 1738 (2006) (extending full faith and credit to the territories and possessions of the United States). The traditional formulation of comity is found in Hilton v. Guyot, 159 U.S. 113, 163–64 (1895), however Hilton is not binding on state courts. There is, of course, a third path some courts may follow in the absence of a full faith and credit command: simply ignore the judgments of other courts.


\textsuperscript{7} See Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997); see also 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). Although I disagree with Vetter’s ultimate conclusion that § 1738 cannot apply to tribes for reasons that will be discussed in Part III, his essay is a thorough piece of scholarship that provides an excellent history of the construction of the term “territory” as well as a history of the argument that tribes should be treated like territories for the purposes of § 1738.

\textsuperscript{8} See Marchington, 127 F.3d at 809–10.

\textsuperscript{9} See Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).
While many courts and commentators have posed the question of full faith and credit for tribes pursuant to the Full Faith and Credit Act, a relatively smaller number have devoted extensive analysis to it. The two scholars who have devoted the most attention to the question, Robert Laurence and Robert Clinton, have sparred over it for the better part of two decades, producing insightful and creative scholarship along the way. However, they have also often talked past one another and in the process have raised difficult questions.

In this Comment, I attempt to answer some of those lingering questions by revisiting the claim that tribes should be afforded full faith and credit under the Full Faith and Credit Act. By looking to the Indian Law canons, the unique precedent of Puerto Rico, and the present reality of federal-tribal relations, I conclude that the Act does mandate full faith and credit for tribes. Rather than looking to whether Congress intended to include tribes at the moment it amended the Full Faith and Credit Act to include territories and countries under the jurisdiction of the United States, I arrive at my conclusion by following the approach of the First Circuit in the context of Puerto Rico and asking: Would Congress have intended to include tribes in § 1738 if it were aware of the current status of federally recognized Indian tribes today?

Part I of this Comment briefly explores the background of full faith and credit and some of the benefits tribes can hope to capture from an interpretation of the term “territories” in the Full Faith and Credit Act that includes tribal courts. Part II begins with an analysis of Mackey v. Coxe, the nineteenth-century U.S. Supreme Court case deciding that the Cherokee Nation should be considered a territory of the United States for the purposes of a federal probate

11. See, e.g., Robert Laurence, Tremors: Justice Scalia and Professor Clinton Re-Shape the Debate over the Cross-Boundary Enforcement of Tribal and State Judgments, 34 N.M. L. Rev. 239, 242 (2004) (providing a quick synopsis of the decades-old indirect debate Clinton and Laurence are having).
12. See, e.g., Laurence, supra note 7, at 652–53.
13. See Cordova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank N.A., 649 F.2d 36, 41–42 (1st Cir. 1981). I am not the first person to argue that tribes should be included within § 1738 based on their current relationship with the federal government. Shortly following Brown v. Babbitt Ford, Inc., 571 P.2d 689 (Ariz. Ct. App. 1977), and Jim, 87 N.M. at 363, two student notes criticized the Brown court’s reliance on Ex parte Morgan, 20 F. 298, 307 (W.D. Ark. 1883), an 1883 federal district court opinion which held that tribes were not territories for the purposes of an extradition statute because the term “territory” only refers to inchoate states. See Note, The Application of Full Faith and Credit to Indian Nations, 20 Ariz. L. Rev. 1064 (1978); Moshier, supra note 5, at 812. As mentioned before, Robert Clinton has also made a similar argument in his excellent and far-ranging article. Clinton, supra note 5. Like my Comment, both of these student notes and Robert Clinton urge the application of § 1738 to tribes based on the current status of tribes in our American polity. In addition to my discussion of Laurence and Clinton’s analysis of the application of full faith and credit, as well as my discussion of the Indian Law canons, my Comment adds to these early efforts by looking to federal jurisprudence concerning the application of federal laws to Puerto Rico when those laws do not explicitly include Puerto Rico. I argue that this same statutory gap-filling technique, explained in Part III below, should be applied to tribes in the context of § 1738.
statute. Part II then proceeds to trace the legacy of *Mackey* as it relates to the question of full faith and credit for tribes pursuant to 28 U.S.C. § 1738. Part III takes on two difficult problems posed by Robert Laurence: first, does the Court's decision in *University of Tennessee v. Elliott* require that only those courts that existed when Congress passed § 1738 be included within its scope, thus excluding tribal courts;14 and second, how can tribes be considered territories of the United States after *United States v. Wheeler*, which reaffirmed that tribes enjoy inherent sovereignty in contrast to territories that derive their power to govern from the federal government?15 To answer these questions, I look to the example of Puerto Rico and the plastic definition of "territory" supplied by the Supreme Court, concluding that *Wheeler* does not preclude a finding that tribes can be treated like territories for the limited purposes of § 1738. Part III also explains why tribes should be treated like territories under § 1738, focusing on the underlying goals of § 1738 and the evolving relationship between both tribes and the federal government and tribes and the greater American polity. Part IV surveys the current landscape of American Indian law as it relates to cross-jurisdictional recognition more generally and discusses some strategic considerations for tribal sovereignty of a finding that § 1738 applies to tribes.

Before beginning this analysis, it is helpful to raise some difficult and potentially deep descriptive and normative questions for American Indian law that are implicated by our inquiry into the relationship between territories, as that term is used in § 1738, and tribes. By describing tribes as similar to territories, which do not enjoy any inherent sovereignty, are we obliquely eroding the already teetering conceptual scheme of an inherent tribal sovereignty? Should we attempt to bolster the validity of tribal competence and the acceptance of tribal adjudicatory practices by extending to tribes the same faith the Constitution requires the fifty sovereign states to extend to one another? Should our answer change if full faith and credit would require tribes to recognize the decisions of state courts and might leave tribal decisions vulnerable to attack from state courts? Or, should we deploy the doctrine of comity which, while its rhetoric may reinforce the theoretical independence and sovereignty of tribes, requires federal courts to examine tribal court decisions from predominately Anglo-American notions of justice, potentially continuing the construction of tribal courts as something outside of American legal norms? It is far from clear which approach better advances the interests of tribal sovereignty and tribal members, and it is even less clear which approach best serves the interests of the American polity as a whole, including tribes and tribal members. Such uncertainty suggests that we must approach these questions with care and circumspection, and it is important that these questions

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15. Id.
ground our analysis, even if we cannot provide immediate answers to them.

I

FULL FAITH AND CREDIT

Before turning to a textual analysis of the Full Faith and Credit Act and its implications for tribal, state, and federal relations, it is helpful to examine the development and present relevance of general full faith and credit jurisprudence in nontribal contexts, which have received far more judicial attention. Not only will this help to orientate those unfamiliar with the background principles of full faith and credit, it will also lay an important foundation for determining congressional intent in placing the word “territories” in the Full Faith and Credit Act, the significance of which is explored in Part III.

A. The Full Faith and Credit Clause

The Full Faith and Credit Clause of the U.S. Constitution is a critical linchpin in the coordination of the fifty states that comprise our federal system. As former Chief Justice Vinson observed, its purpose was no less than “transforming an aggregation of independent, sovereign States into a nation.” It promotes national unity by curbing the powers of each individual state, vis-à-vis every other state, by mandating that the public records, acts, and decisions of each state be given full faith and credit in every other state. While the Full Faith and Credit Clause appears to reduce the absolute sovereignty of the states, it simultaneously increases it by allowing states to project the products of their sovereignty, such as the decisions of their courts, into other states. The Clause itself applies only to the states, thus excluding not only the federal government, but also the territories and possessions of the United States. In 1804, Congress amended the Full Faith and Credit Act, which originally prescribed how documents were to be proved eligible for full faith and credit, to extend the mandate of full faith and credit to the territories and possessions of the United States.

There is only meager historical background on the Full Faith and Credit Clause to guide or supplement judicial interpretations of its meaning. Just

19. Id.
20. 28 U.S.C. § 1738 (2006). It is interesting to note that, prior to 1948, the full faith and credit statute had the phrase “of any country subject to the jurisdiction of the United States” substituted for the current wording of “Possession of the United States.” This earlier wording is much more amenable to an interpretation of the statute as applying to tribes, and sheds light on exactly how inclusive Congress intended this statute to be. 28 U.S.C § 687 (1940).
before the Continental Congress began its first sessions, the Province of Massachusetts passed an early forerunner to the Full Faith and Credit Clause in order to deal with “judgment debtors” who sought to escape their burden by fleeing the local jurisdiction.\textsuperscript{22} The Articles of Confederation subsequently adopted a similar full faith and credit command, though with little record of what its drafters thought to be its scope and purpose.\textsuperscript{23} Finally, the Full Faith and Credit Clause appeared in the Constitution, again with very little recorded debate.\textsuperscript{24}

Since its incorporation into the Constitution, the issue of what obligations the Full Faith and Credit Clause places on courts has received substantial attention from the Supreme Court, and is thus correspondingly opaque. So long as the analysis is kept sufficiently broad, it is relatively clear that the adjudicatory decisions of courts demand a far more absolute species of full faith and credit than the actual laws of the states.\textsuperscript{25} For example, courts must give credit to the judgments of other states where the suit arises out of the forum state and is barred by the forum’s statute of limitations.\textsuperscript{26} The Court even mandated full faith and credit for a judgment where the original suit arose out of a gambling contract that was invalid in its state of creation and the foreign judgment was based on a misapprehension of that state’s law.\textsuperscript{27} Generally, once a dispute has been fairly and fully litigated, it may not be litigated again in another state’s court.\textsuperscript{28} Further, a successful litigant may demand satisfaction of the judgment in any state that may acquire jurisdiction over the losing litigant.\textsuperscript{29}

By contrast, the Supreme Court has carved out a broad escape hatch from the Full Faith and Credit Clause in the form of the public policy exception for the legislative and common laws of other states.\textsuperscript{30} As described in Pacific Employers Insurance Co., the public policy exception establishes that the full faith and credit command does not compel “a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.”\textsuperscript{31}

A pair of relatively recent Supreme Court cases, Nevada v. Hall and Franchise Tax Board of California v. Hyatt, help illustrate precisely the issue that full faith and credit is intended to resolve and the difficulty of delineating the effect of full faith and credit in a federal system.\textsuperscript{32} In Hall, a California

\begin{itemize}
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id.
\item \textsuperscript{26} Roche v. McDonald, 275 U.S. 449 (1928).
\item \textsuperscript{27} Fauntleroy v. Lum, 210 U.S. 230 (1908).
\item \textsuperscript{28} Baker, 522 U.S. at 233.
\item \textsuperscript{29} Id. at 237–38.
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Hall, 440 U.S. 410, 411 (1979); Hyatt, 538 U.S. 488 (2003).
\end{itemize}
resident sued the State of Nevada and a Nevada government employee over a car accident that occurred in California. At trial, the State of Nevada sought to cap the available damages by asserting that the Full Faith and Credit Clause required the California court to recognize a Nevada statute that capped damages against Nevada at $25,000. The California court refused, citing the public policy exception; and although the U.S. Supreme Court upheld the California decision, it admonished California for stirring the pot of our “great political family.”

Twenty-five years later in Hyatt, the State of California became a defendant in a Nevada court. The plaintiff, a former California resident who had moved to Nevada, brought an intentional tortious conduct suit against the State of California over the manner in which it had pursued taxes owed to it by the plaintiff. At trial, California asserted its own state law to protect the tax board from liability and demanded that this law be applied under the Full Faith and Credit Clause. Nevada refused, citing the public policy exception, and the U.S. Supreme Court affirmed the Nevada court over California’s pleas that a failure to apply full faith and credit where its ability to collect taxes is concerned seriously undermines state sovereignty.

Two important full faith and credit principles can be derived from these cases. First, full faith and credit is overwhelmingly concerned with judicial decisions rather than legislative enactments. While Nevada and California may disregard the laws of one another, they are nonetheless bound to recognize the judgments issued against them by the courts of the other. It can be further inferred that the full faith and credit doctrine is fairly toothless as a choice-of-law mechanism, as states may often simply ignore the laws of other states by invoking the public policy exception, and that it operates primarily as a means for establishing the finality and uniformity of judgments throughout the nation.

The second principle is that individual sovereign states can and do act in their own best interests at the cost of undermining their sister states’ ability to determine both their own liability and the liabilities of their citizens. It is not hard to see why such near absolute discretion, hemmed in by comity alone, to discard the judicial and legislative determinations of fellow sovereigns might have been considered by the framers to be inconsistent with the notion of a unified nation—particularly one whose citizens enjoy multilayered citizenships

33. Hall, 440 U.S. at 411.
34. Id. at 412–13.
35. Id. at 425–26.
36. Hyatt, 538 U.S. at 488.
37. Id. at 496.
38. Id. at 498–99.
39. See generally Brainerd Currie, Full Faith and Credit, Chiefly to Judgments: A Role for Congress, 1964 SUP. CT. REV. 89 (1964) (describing the Full Faith and Credit Clause as being meaningfully implemented with respect to judgments but not laws and suggesting how Congress could effectively implement the Full Faith and Credit Clause).
and the freedom to travel from sovereign state to sovereign state with minimal limitations. The public policy exception deployed in both Hall and Hyatt, however, is also a good example of the balance the Court has sought to strike between advancing the project of a unified nation of laws and allowing individual states the flexibility to make and enforce their own policy preferences within their jurisdiction.

B. Background on the Full Faith and Credit Act

The Full Faith and Credit Act, as it reads today, states in full:

State and Territorial statutes and judicial proceedings; full faith and credit:

The Acts of 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.

The Full Faith and Credit Act has existed in this form with very few changes since 1804. The only arguably significant change was the substitution of the phrase “possession of the United States” for the phrase “of any country subject to the jurisdiction of the United States” which was included in the statute until 1940. However, the significance of this change, if any, remains unclear.

As noted in the preceding section, the Full Faith and Credit Clause only applies to the states and reserves to Congress the power to prescribe how the decisions and acts of states shall be proved and what effect they shall have. The Full Faith and Credit Act is the congressional implementation of the Full Faith and Credit Clause, and for the purposes of this Comment supplies two significant pieces of content to the Clause. First, it greatly expands the reach of the Full Faith and Credit Clause by applying the principles of full faith and

40. See U.S. CONST. art. IV, § 2; United States v. Guest, 383 U.S. 745 (1966) (reaffirming the right of citizens to move across state lines and holding that the federal government may protect that right).


43. U.S. CONST. art. IV, § 1.

credit to "territories" and "possessions of the United States" in addition to the states. Second, it establishes that the judgments and acts of the states, territories, and possessions of the United States are to be given the same effect in forum courts as they would be given in the jurisdiction from which they are taken.\footnote{28 U.S.C § 1738; Kurt H. Nadelmann, \textit{Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal}, 56 Mich. L. Rev. 33, 61 (1957).}

Unfortunately, very little legislative history exists to illuminate what Congress's intended goals were in enacting § 1738 and what it sought to accomplish by including the terms "territories" and "possessions" of the United States, which are undefined in the statute itself.\footnote{28 U.S.C. § 1738; Nadelmann, \textit{supra} note 45, at 60–61.} The original text of the 1804 bill, which amended the Full Faith and Credit Act to include territories and countries under the jurisdiction of the United States, is lost along with any of the bill's debate details.\footnote{Nadelmann, \textit{supra} note 45, at 61–62.}

We are left, then, with primarily judicial interpretations and applications of the Act, as well as the jurisprudence surrounding the Full Faith and Credit Clause, as our primary guiding lights as to the Act's scope, purpose, and effect. From the terms of both the Clause and its implementing Act, it can be inferred that at least one of the main purposes of the Clause is to stamp national sanction on state policies with respect to a court judgment, particularly polices regarding res judicata.\footnote{David P. Currie \textit{et al.}, \textit{Conflict of Law: Cases, Comments, Questions} 481 (7th ed. 2006).} In turn, the underlying policies of res judicata, though they vary from jurisdiction to jurisdiction, can be roughly described as: (1) to conserve judicial economy; (2) to establish certainty and respect for the judgments of courts; and (3) to protect the interests of the party relying on the judgment.\footnote{Currie \textit{et al.}, \textit{supra} note 48, at 477–79.} As for the purpose of the expansion of full faith and credit to the territories and possessions of the United States, the First Circuit has provided an eloquent formulation:

The basic goal of full faith and credit is to coordinate the administration of justice throughout the nation. In order to achieve this goal Congress enacted \textit{Section 1738} and by use of the words "State, Territory or Possession" Congress intended to unify all of the courts in our system of government.\footnote{Americana of P.R., Inc. v. Kaplus, 368 F.2d 431, 438 (3rd Cir. 1966).}

\textbf{C. A Second Statutory Argument for Full Faith and Credit for Tribes}

In addition to the ambiguity of the terms "territories" and "possessions," which will be the focus of this Comment, the lack of parallelism in describing which courts shall receive full faith and credit and which are required to extend
it presents another ambiguity relevant to our analysis. The second paragraph of the Act describes the process by which "the records and judicial proceedings of any court of any state, territory, or possession" are to be proved in order to qualify for full faith and credit. The last paragraph describes the effect that properly proved records and judicial proceedings are to have, mandating that they receive full faith and credit "in every court within the United States and its territories and possessions."

What does the juxtaposition of the word "of" in the first paragraph and the word "within" in the second paragraph tell us about the intent of the drafters of this Act? One interpretation is that the word "of" refers to the political authority that created the records and judicial proceedings, while the word "within" refers to the geographical borders of the United States and its territories and possessions. If this was the intent of the drafters, then it seems to establish an asymmetrical rule whereby the judicial proceedings of the state courts, territories, and possessions are entitled to have their judgments recognized anywhere in the United States, but are not required to extend full faith and credit to courts other than states, territories, and possessions.

Robert Clinton, however, advances a second interpretation that construes the word "of" in the second paragraph to function as the equivalent of the word "within," so that both refer to geographical boundaries rather than sources of political authority. By interpreting "of" and "within" to both refer to geographical boundaries, we can give the statute symmetry in accordance with the principle of reciprocity that is so important to the rhetoric of nation-building employed in constructing the Full Faith and Credit Clause in federal courts. If the goal of the Full Faith and Credit Clause is to "transform[] an aggregation of independent, sovereign States into a nation" and to provide assurance that "... a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin[,]" then it seems logical to assume that Congress intended to further, or at least protect, those principles in implementing the Full Faith and Credit Act. As Clinton points out, at the time of the drafting of this Act, there were no tribal courts of record, so the Act could not have been written asymmetrically to exclude them. As such, the most obvious court system that Congress could have intended to exclude would be the federal system, but this seems to be an unusual goal. It would

51. For a broader discussion of this point as originally developed by Robert Clinton, see Clinton, supra note 6, at 26–30.
53. Id. (emphasis added).
54. See Clinton, supra note 6, at 29.
55. Id. at 27–29.
57. Id. at 232 (quoting Milwaukee County v. M. E. White Co., 296 U.S. 268 (1935)).
58. Clinton, supra note 6 at 29.
59. Id.
undermine the goals of the Full Faith and Credit Clause if the losing litigant in a federal court were allowed to relitigate her identical claim in state court in hopes of a better outcome.

Despite some of the conceptual merits of a symmetrical interpretation, it lacks the judicial support necessary to sustain itself. Indeed, recent murmurings from the Supreme Court suggest that such an interpretation might not be well received. In *Semtek International Inc. v. Lockheed Martin Corp.*, the Court decided that the claim preclusive effect of federal court decisions is a matter of federal common law to be decided by the Court itself.\(^\text{60}\) In arriving at this conclusion, the Court noted that the Full Faith and Credit Act on its face applies only to the adjudications of state and territorial courts, and therefore is little help in deciding what effect must be given to federal court adjudications.\(^\text{61}\)

Because there is such scant case law either to support or contradict the geographic interpretation of § 1738, this Comment focuses on the argument that tribes should be considered “territories” within the meaning of the statute.\(^\text{62}\) This interpretation does have judicial support and only requires a shift or clarification in judicial analysis of the single word “territory.” However, the ambiguity identified by Clinton above could play a significant role in how courts interpret the word “territory” within § 1738. If the asymmetrical interpretation is correct, then this could require that tribes must give full faith and credit to the decisions of state courts, but that their own decisions are not entitled to full faith and credit in state courts. Such an interpretation, in turn, might make a court more likely to construe “territory” to include tribes in order to avoid this asymmetrical burden under the Indian Law canons of interpretation, which generally require courts to construe liberally federal statutes in favor of tribes.\(^\text{63}\) The Indian Law canons and their potential application to § 1738 are discussed more fully in Part III.

**D. The Promises of Full Faith and Credit: The Tribal Interests at Stake**

Before attempting to construct an argument advancing a full faith and credit model for regulating relations among America’s three sovereigns, it is necessary to ask how such a model will advance tribal sovereignty and the


\(^\text{61}\) Id. Though there is little doubt that federal court judgments are entitled to full faith and credit in state courts, it is something of an open question as to why. Historically, the Court did look to § 1738 to secure the benefits of full faith and credit for federal court judgments by interpreting the language “courts in any country subject to the United States” in the pre-1948 version of § 1738 to include federal courts. *See Dupasseur v. Rochereau*, 88 U.S. 130, 134 (1874); CURRIE ET AL., supra note 48, at 481. As that language was left out of the current version of § 1738, it is certainly possible that the Court might use the symmetrical interpretation offered by Clinton as a way to once again work federal courts into § 1738.

\(^\text{62}\) For an additional argument made by Robert Clinton, see Clinton, *supra* note 5, at 906-07.

interests of both tribal members and the greater American polity. Such an inquiry is important for two reasons. First, it is important that legal arguments, even academic ones, are developed with a clear understanding of their real-world consequences. While mere legal correctness may be sufficient to sustain a law, it does not offer a blanket justification for advocacy attempts. Second, policy arguments occupy a unique space in American Indian Law. For example, as acknowledged by the Supreme Court, the ordinary rules of statutory construction do not always apply in the context of American Indian Law. Instead the “Indian Law canons of construction” require that treaties, agreements, executive orders, and statutes be “liberally construed in favor of the Indians [and that] all ambiguities are to be resolved in favor of the Indians.” Therefore, to properly interpret § 1738, we must first understand the deference given to tribal courts under the current comity model and the benefits and risks of extending full faith and credit to tribal courts as a matter of federal law.

The most immediate benefit to tribes will be the ability of tribal governments and tribal members to enforce the judgments of their courts outside of the tribe’s jurisdiction. This is an important right because it would allow tribes to enforce judgments not only against non-Indians whose property is located outside of the tribe’s jurisdiction, but also against tribal members who abscond from the tribe’s jurisdiction in an effort to avoid their legal burdens. However, it might fairly be asked if the benefit of having tribal court decisions guaranteed of recognition outside of the tribe’s institutions outweighs the cost of having to recognize the decisions of state courts against tribal members and the tribe itself. After all, it is certainly possible that the current model of comity reaches the optimal balance between the tribal interest in having its judgments recognized and its interest in not enforcing the judgments of other courts. While a satisfactory answer to this question would require the

65. See COHEN, supra note 63, at 119–20. These canons appear to have evolved out of treaty interpretations and the contract principle of adhesion, where the party with superior bargaining power draws up the contract. See ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 168 (2008).
67. Id.
68. Robert Laurence points out that because tribes are generally much smaller and poorer than states, the burdens of a symmetrical system such as full faith and credit might fall heavier on tribal sovereignty than on state sovereignty. See Robert Laurence, The Bothersome Need for Symmetry in Any Federally Dictated Rule of Recognition for the Enforcement of Money Judgments across Indian Reservation Boundaries, 27 CONN. L. REV. 979, 999 (1995). However, it is not entirely clear how imbalanced this would be, considering that both tribes and states enjoy sovereign immunity from suit. See Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751 (1998). To the extent that the confiscation of private property held by tribal members could impact tribal sovereignty, there are several escape hatches and jurisdictional issues to be found in both full faith and credit jurisprudence and federal Indian law, which tribal courts could use to mitigate the impacts of having to recognize state judgments and off-reservation creditors on tribal sovereignty. For a fuller discussion see Clinton, supra note 5, at 912–21.
collection and verification of empirical data beyond the ken of this Comment, there is some persuasive evidence suggesting that the de facto comity model has failed to achieve this optimal balance, and that there is a growing recognition within tribal courts that a different approach to cross-jurisdictional enforcement actions is needed. Moreover, even if comity is a sufficient and even optimal model to address the needs of tribal courts and governments, there is reason to argue that tribes are entitled to full faith and credit pursuant to § 1738 because, while the language of § 1738 is open to the interpretation that tribes should be included within its gamut, it is practically explicit that tribal courts already owe full faith and credit to the decisions of state courts regardless of whether state courts owe full faith and credit to tribal courts.

Unsurprisingly, tribal courts have been far from uniform in their approach to recognizing the decisions of state and federal courts where they are not bound to do so by federal law. Some tribal jurists argue that a reciprocal full faith and credit model is the supreme law of the land under § 1738. Certainly other tribal courts have refused to find any mandate to extend full faith and credit to state courts and have instead embraced a comity model of recognition. For many tribal courts, the support for a comity model is likely due to the belief that they should not extend full faith and credit to states which do not extend full faith and credit to them, a concern which the application of the national full faith and credit regime would directly address.

However, there are far fewer fissures among tribal courts concerning the need for a legal mechanism to recognize tribal court decisions outside of tribal jurisdiction. Stacy Leeds, current Chief Judge of the Prairie Band of Potawatomi Nation’s District Court, has compiled specific data gleamed

69. See Clinton, supra note 6; see also Eberhard v. Eberhard, 24 INDIAN L. REP. 6059 (Cheyenne River Sioux Ct. App. 1997) (construing § 1738 to apply to tribes); B.J. Jones, Chief Judge of Sisseton-Wahpeton Sioux Tribal Court and Turtle Mountain Chippewa Tribal Court, A Primer on Tribal Court Civil Practice, http://www.ndcourts.com/court/resource/tribal.htm#N_1_ (last visited Apr. 10, 2010); Prairie Island Indian Community: Tribal Court, History of Tribal Court Development, http://www.prairieisland.org/Court%20Rev.%204-5-05/TRIBAL%20COURTS%20LINK/Intro%20page.htm (last visited Apr. 10, 2010) (discussing need for full faith and credit for tribal court decisions).

70. 28 U.S.C. § 1738; see Clinton, supra note 5, at 910–11 (making the same argument that § 1738 requires tribes to extend full faith and credit to state courts regardless of whether tribal judgments are given full faith and credit).

71. See, e.g., Durango Credit & Collection v. Weaver, No. 97-CV-13 (S. Ute Tribal Ct. Oct. 17, 1997) (holding that the Full Faith and Credit Clause of the Federal Constitution is not applicable to tribes). Though this opinion refers to the Full Faith and Credit Clause, which only applies to states, it must be assumed that the court was also referring to the full faith and credit statute. Cf. supra note 69.

72. See supra note 69.

73. See, e.g., supra note 71.

74. Sheppard v. Sheppard, 655 P.2d 895, 902 n.2 (Idaho 1982) (noting that the Shoshone-Bannock appellate court held that it was not required to give full faith and credit to the decrees of Idaho state courts partly because of the belief that state courts do not accord tribal courts full faith and credit).
directly from a survey of tribal courts about the rate of recognition of tribal court decisions outside of the tribal jurisdiction in which the judgment originated. From a tribal advocate perspective, the results are disappointing but perhaps not all that surprising. Primarily, the survey revealed that 56 percent of respondent tribal judges reported at least one occurrence of another jurisdiction refusing to enforce their tribal court’s orders, with no distinction made between how the various jurisdictions officially approach tribal court orders. Of those reported refusals, 80 percent occurred in a state forum, while the remainder occurred in a tribal forum. Given the very low threshold to be included within the 56 percent—only a single refusal is necessary to be included—it is unclear exactly what to think of this information. What is clearly indicative of a problem, however, is that of those reporting a state court failure to enforce a tribal court order, 40 percent involved subject matters which were specifically covered by an explicit federal full faith and credit command statute, such as the Violence Against Women Act. If state forums are failing to respect tribal judgments even when explicitly required by federal law, this bodes ill for any notion that a majority of state courts are willing to treat tribal courts with substantial deference in the absence of a full faith and credit command. While it cannot be taken for granted that a more general command of full faith and credit for tribal court decisions would generate more consistent recognition in state forums, such a command would clearly communicate to state courts, in a manner that would be difficult for them to circumvent, that the federal government takes seriously the issue of respect for tribal court adjudications.

The second and ultimately more decisive answer to the question of whether a federal mandate for full faith and credit is desirable from a tribal perspective is that regardless of whether tribes are owed full faith and credit under § 1738, there is a very strong argument that § 1738 commands tribes to give full faith and credit to state court decisions. While Part III offers a more

75. Stacy L. Leeds, Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective, 76 N.D. L. Rev. 311, 349 (2000). While valuable, this is far from a scientific survey. Among other shortcomings, those who responded to the survey were entirely self-selected, the response rate was only approximately 34 percent, and the survey provides no information regarding the reasons forums refused to enforce a tribal court’s orders. The results should be approached with skepticism and any generalizations drawn from this data should be asserted with caution. Nonetheless, it is some of the only empirical data readily available and it is strong enough to at least support some limited suggestions about the state of cross-jurisdictional enforcements.

76. Id.
77. Id.
78. Id.
79. Many of the federal statutes which explicitly command full faith and credit for tribal judgments concern highly emotive subject matters, such as violence against women and child custody cases. See, e.g., Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963 (2006). As such, this data might exaggerate the reluctance of state courts to enforce tribal judgments.
80. See Clinton, supra note 5, at 911 for the same argument.
RECOGNIZING TRIBAL COURT JUDGMENTS

thorough analysis of § 1738, for now it is only necessary to point out that § 1738 reads in pertinent part: "[State] Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States." 81 The most literal interpretation of this language is that every court within the geographical boundary of the United States must extend full faith and credit to the judgments of state courts. Because, as far as present case law is concerned, it is practically beyond dispute that tribes exist within the geographical boundary of the United States, 82 this language seems to indicate that tribal courts owe full faith and credit to state court judgments. Indeed, at least one state supreme court has taken note of this language and interpreted it as a federal command for tribal courts to extend full faith and credit to its decisions. 83 As such, it is important to consider arguments that might mitigate the impact of such a finding. 84 If tribes owe full faith and credit, then they should be prepared to argue that they in turn are also owed full faith and credit. 85

One final consideration to explore is that beyond the immediate practical benefits of full faith and credit for tribes, there are more intangible, but nonetheless important, conceptual and symbolic gains resulting from extending full faith and credit to tribes. Courts often dress up the doctrines of full faith and credit and comity in the broad language of sovereignty. 86 While the judicially-stated goals of these doctrines may or may not help decide the merits of a particular case, I believe they do influence how judges and politicians think about tribal sovereignty in relation to the nation.

The purpose of comity is often described as regulating relations between foreign sovereigns in an international context. 87 Though comity also applies between domestic sovereigns, such as states, the presumption of comity between states is much more deferential than what many federal courts have been willing to extend to tribes. In the Ninth Circuit, a unique Indian law standard for comity has developed, one that resembles the model for international comity, but with an arguably more searching demand for federal due process norms. 88 The history and language of comity, because of the

84. See discussion, infra, Part III; see also Clinton, supra note 6, at 27 n.63.
85. On this point, it is likely that an interpretation holding that tribes owe full faith and credit to states would strengthen a claim that tribes should be treated like territories for the purposes of § 1738. In this scenario, a court applying the Indian canons should find the term "territories" ambiguous. It should then construct the term liberally in favor of Indian tribes, which in this case should result in tribes being owed full faith and credit, since to hold otherwise would be to deny them the benefit of full faith and credit while imposing the burden on them.
86. See Sherrer v. Sherrer, 334 U.S. 343, 355 (1948) (referring to the Full Faith and Credit Clause as "transforming an aggregate of sovereign, independent states into a nation"); Hilton v. Guyot, 159 U.S. 113, 163–64 ("'Comity' . . . is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation").
87. See Hilton, 159 U.S. at 163–64.
88. See Clinton, supra note 6, at 49–58 (discussing the "aberrational" manner in which the
conservative nature and paramount importance of precedent, often revolve around dated rhetoric of "civilization." In the tribal context in particular, the comity inquiry often requires a searching analysis of tribal court processes for consistency with particular notions of civilization, usually embodied in constitutional due process norms.90 While the rhetoric of international relations reinforces notions of deep tribal sovereignty, it also requires the practice of searching out tribal norms that a reviewing court might perceive as being different from American normative values and measuring them for fairness against a federal or state normative baseline.91 This decreases a reviewing court’s ability to appreciate the possibilities of a deep diversity model of tribal-national relations, whereby tribal norms can diverge from federal and state norms and yet still be recognized as valid expressions of American identity deserving respect and legal recognition.

In contrast, the purpose of full faith and credit is often described as forging a nation out of an aggregate of sovereigns, or in terms of mandating respect for the political and judicial processes of other sovereigns.92 This notion of respect for diversity, but with the goal of forging a nation, seems particularly suited for national-tribal relations. Whatever the validity of the current state of affairs, tribes are a part of the American political, cultural, and social landscape. The rhetoric of full faith and credit, urging the "transform[ation] [of] an aggregation of independent, sovereign States into a nation,"93 provides a better way to recapture the idea of deep diversity in a national context, whereby the deconstruction of American colonialism over American Indians can proceed in a manner that acknowledges both the diversity of tribes and the reality of the consequences of colonialism on tribal life:94 namely, that tribes and tribal members are American citizens whose lives are now irrevocably grounded in the same soil and attached to the same fate as every other American.

Of course, full faith and credit does not offer a conceptual scheme of tribes within the American polity that is without difficult problems. Foremost among these is the difficult challenge of bringing tribes into a constitutional order that did not anticipate them and of which they had no say in the original

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89. British Midland Airways Ltd. v. Int’l Travel, Inc., 497 F.2d 869, 871 (9th Cir. 1974) ("It has long been the law that unless a foreign country’s judgments are the result of outrageous departures from our own motions of ‘civilized jurisprudence,’ comity should not be refused.” (quoting Hilton, 159 U.S. at 122)).
90. See Bird, 255 F.3d at 1142-44.
91. Id. at 1144; see also Clinton, supra note 6, at 56-58.
93. Id. (quoting Sherrer v. Sherrer, 334 U.S. 343, 355 (1948)).
94. See generally Clinton, supra note 6 (discussing recent federal court decisions in the context of European colonization of Native Americans).
Balancing the need for national civil rights and due process norms against the need for tribal exceptionalism presents troubling challenges for scholars and advocates alike. In the final analysis, however, these problems must be confronted regardless of which model is adopted. Tribal sovereignty is best served by a conceptual and rhetorical scheme that acknowledges the inclusion of tribes within the American polity while respecting the right of independent sovereigns to determine their own policy preferences without being second-guessed by the other members of our, to borrow a phrase from the Court, "great political family." Having considered what tribes stand to lose and gain from a successful argument in favor of interpreting § 1738 to apply to tribes, I turn to the construction of the argument itself.

II
THE LEGACY OF MACKEY: TRACING THE JUDICIAL HISTORY OF THE ARGUMENT THAT TRIBES ARE TERRITORIES OR POSSESSIONS OF THE UNITED STATES WITHIN THE MEANING OF § 1738

A. United States ex rel. Mackey v. Coxe

In 1856, thirty years before the Supreme Court would decide United States v. Kagama and begin to peddle the notion of congressional plenary power over Indian tribes, the Court issued a relatively brief opinion in the case of Mackey v. Coxe. The novel question presented was whether the judgments of the probate courts of the Cherokee Nation were entitled to full faith and credit by the courts of the District of Columbia. The equally novel answer was that the Cherokee Nation was entitled to full faith and credit because the Cherokee Nation was a "territory" of the United States. The Court's decision in Mackey marks the first attempt by any federal court of significant national stature to reconcile the existence of tribal governments inside American territory with the need for national uniformity and efficiency in the recognition of judgments. Although the Court was not directly considering the language of § 1738, the similarity in purpose and language between § 1738 and the statute considered in Mackey has led many courts and
commentators to conclude that its construction of the word "territory" is equally applicable to § 1738.102

The Mackey Court begins its analysis of the question of full faith and credit for tribes with an assessment of the Cherokee's relative level of civilization, as evidenced by their orderly and familiar system of government, whereby laws are created by a "national council," approved by an executive, and carried into effect by an "organized judiciary."103 The Court further notes that the Cherokee probate courts discharge their duties with as much regularity and responsibility as the "state courts of the Union."104

Having established that the Cherokees "exchanged their erratic habits for the blessing of civilization," the Court proceeded to consider directly the statutory question presented—whether the Cherokee Nation should be considered a "territory" within the meaning of the relevant federal probate statute—and answered it in the affirmative.105 The Court arrived at its conclusion by way of an examination of the Cherokee Nation's actual, as opposed to doctrinal or theoretical, relationship with the United States. It then analogized the relationship of the Cherokee Nation to that of the relationship between the United States and federally organized territories, which were undoubtedly included within the statute.106 As the Cherokees were subject by treaty to the U.S. Constitution and to the acts of Congress regulating trade and intercourse, the Court reasoned that the Cherokee Nation is not only within the jurisdiction of the United States, "but the faith of the nation is pledged for their protection."107

Though the Court found the above observation "sufficient" to answer the question, it bolstered its reasoning with an analogy to federal territories

102. See sources cited supra note 5.

103. Id. at 102.

104. Id. at 103. Though the exact relevance of this inquiry into "civilization" is unclear, the implicit reasoning may be that it is relevant to a general judicial belief that it would not offend constitutional or national principles to treat the Cherokee Nation in a manner similar to recognized territories of the United States, so long as the Nation had reached a sufficient point of civilization. This is presumably because the Court believed a "civilized" structure of government provided at least a limited guaranty of fairness in the creation and application of law, either as a matter of structural mechanics or because it is evidence of the tribe's assimilation into the American paradigm. Because of this familiar governmental structure, the Court may have further reasoned that it would be safe to assume that the intent of Congress might best be effectuated by treating the Cherokee Nation as a territory for the limited purpose of the federal probate statute at issue. Of course, such language could also be mere dicta, an effusive and deeply troubling aside by Justice McLean expressing how "refreshing [it is] to see the surviving remnants of the races which once inhabited and roamed over this vast country . . . exchanging their erratic habits for the blessings of civilization." Id.

105. Id.

106. Article IV, Section 3 of the U.S. Constitution grants Congress the power to regulate territories. Territorial governments that originate out of this congressional power are referred to as federally organized territories in this Comment, in contradistinction to tribal governments, which do not originate in the Constitution. See United States v. Wheeler, 435 U.S. 313, 320 (1978).

107. Mackey, 59 U.S. at 103.
organized under Article IV, noting that those territories also passed their own laws, subject to the approval of Congress and consistency with the Constitution, and that their individual inhabitants were bound by the laws of Congress. Though it noted several differences between the Cherokee Nation and Article IV federal territories, namely that the Cherokee had enacted their own laws, appointed their own officers, and paid their own expenses, the Court found these differences irrelevant to the question of full faith and credit. The opinion ends with the declaration that the Cherokee Nation “is not a foreign, but a domestic territory.”

Precisely what the Court means by a “domestic territory” is not immediately obvious. The most reasonable construction may be that the Court was referring to “territory” in the geographical and jurisdictional sense, asserting the uncontroversial proposition that tribes exist within the jurisdiction of the United States. This construction is suggested by the extreme way the Court framed the initial question, which was not whether tribes are territories per se, but whether the Cherokee Nation should be treated as a foreign nation or state. The ultimate holding of Mackey, then, appears to be that the Cherokee Nation is not to be treated as a foreign state, and that it is similar enough to territorial governments to conclude reasonably that the will of Congress would be best effectuated by treating them as a territory for the purposes of the statute.

To those unfamiliar with American Indian law, this logic likely seems intuitive. If the Cherokee Nation is subject to the laws of Congress and the mandates of the Constitution, then they certainly cannot be described as a foreign state or territory. If they are neither a foreign state or territory, nor a domestic state, then they must be a domestic territory. As they appear to be functionally the same as federally organized territories that are clearly included within the statute, and they appear to have attained a sufficient level of "civilization" to participate in the dominant political universe, it would seem an absurd result to deprive them of the benefit of full faith and credit simply because they were not created and organized in precisely the same legal manner as federally organized territories.

However, for Indian law initiates, this reasoning likely seems wanting. The Court neglects to consider some fundamental and immensely important differences between tribes and federally organized territories, namely that since Worcester the law has been clear that the tribes are distinct, political communities with a singular history of legal, political, and cultural relations

108. Id.
109. Id.
110. Id. The opinion also ends with a declaration that the Cherokee Nation is a domestic territory that originated under the U.S. Constitution. Id. However, this language is arguably dicta and should not be treated as talismanic given the difficulty of reconciling it with the Court's earlier analysis and language.
111. Id.
with the United States. It is fairly apparent from the opinion that the Court is not making sweeping generalizations about Indian law, but rather looking specifically at the Cherokee Nation. However, even when the Court’s line of reasoning is limited to the Cherokee Nation, the apparent tension between this opinion and earlier and later American Indian law jurisprudence is impossible to avoid. This is particularly true given the Court’s opinions in *Talton* and *Wheeler*, deciding that Indian tribes are not inherently subject to or organized under the U.S. Constitution. In Part III this Comment discusses how *Mackey* may be read consistently with current Indian law jurisprudence, and that plenary congressional power, coupled with its extensive application, is enough to sustain the Court’s reasoning in *Mackey* after the *Wheeler* decision.

**B. Tracing the Legacy of Mackey**

Following *Mackey*, the Eighth Circuit decided a series of cases from 1893 to 1894 in which it similarly extended full faith and credit to the Creek and Choctaw Nations on the theory that the courts of Indian nations stand on the same footing as the courts of United States territories and are therefore entitled to full faith and credit. This held true so long as the courts of Indian nations had proper jurisdiction to hear the case, and full faith and credit was extended even where non-Indians were before the power of an Indian court. After these cases, however, there is very little discussion of the issue in the Eighth Circuit or elsewhere in the federal courts.

Then, 119 years after *Mackey*, the Supreme Court of New Mexico decided *Jim v. Citi Financial Services Corp.* in 1975, holding, in unequivocal language, that for the purposes of § 1738 Indian tribes are territories of the United States, and the decisions of their courts are entitled to full faith and credit in the courts of New Mexico. Seven years later, the Idaho Supreme Court similarly

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112. See *Worcester v. Georgia*, 31 U.S. 515 (1832) (describing Indian nations as domestic dependant sovereigns and recounting the history of tribal-western relations since the colonization of North America by Europeans).

113. See *Mackey*, 59 U.S. at 102–03 (discussing the Cherokee Nation’s treaty with the United States and their particular system of government relative to other Indian nations).


115. Though the territories that the *Mackey* Court discusses are subject to the Constitution, not all territories are. At the turn of the 20th century, the Court decided a series of cases now known as the “Insular Cases,” holding that the Constitution does not necessarily follow the flag abroad. These cases provide an interesting parallel to the conceptual development of tribal sovereignty and congressional plenary power, and establish that a political unit, such as a tribe, does not need to be governed by the entire Constitution in order to be considered a territory. However, the citizens of these territories were guaranteed certain constitutional liberties. *DeLima v. Bidwell*, 182 U.S. 1 (1901); see also *Torres v. Puerto Rico*, 442 U.S. 465 (1979); *Downes v. Bidwell*, 182 U.S. 244 (1901).

116. *Mehlin v. Ice*, 56 F. 12 (8th Cir. 1893); *Exendine v. Pore*, 56 F. 777 (8th Cir. 1893).


recognized that § 1738 applied to Indian tribes.\textsuperscript{119} Several other state courts have since interpreted § 1738 to extend full faith and credit to Indian tribes.\textsuperscript{120} Other state courts, such as the Arizona Supreme Court, have decided that tribal courts are not entitled to full faith and credit pursuant to § 1738.\textsuperscript{121}

Several federal courts have mentioned Mackey in support of the proposition that tribal courts are entitled to full faith and credit. The Supreme Court in Santa Clara Pueblo v. Martinez cited Mackey for the proposition that tribal courts have been found to be appropriate forums for the adjudication of important interests, of both Indians and non-Indians, and are entitled to full faith and credit in “certain circumstances.”\textsuperscript{122} The Eighth Circuit has held that tribal courts are entitled to full faith and credit, and, citing Mackey, that the term “territories” in the Parental Kidnapping Prevention Act might be construed to include tribes.\textsuperscript{123} The Ninth Circuit is the only recent federal court to deploy a sustained analysis of Mackey in the context of §1738, and it found that while there might be strong policy reasons in favor of extending full faith and credit, § 1738 does not prescribe it.\textsuperscript{124}

\textsuperscript{119} Sheppard v. Sheppard, 655 P.2d 895 (Idaho 1982). The leap from Mackey’s limited decision concerning the Cherokee Nation and a federal probate statute to an interpretation of § 1738, which establishes a national full faith and credit regime, is major. Surprisingly, the depth of analysis employed by those courts that have interpreted § 1738 to include Indian tribes is at times shockingly brief, sometimes no longer than a few sentences and a citation to Mackey. \textit{See}, e.g., \textit{Jim}, 87 N.M. at 363. A conspicuous footnote included by the Idaho Supreme Court in Sheppard v. Sheppard suggests that one possible reason for such underdeveloped analysis is that some state courts may be eager to establish a reciprocal process for recognizing tribal court decisions in an effort to engender good working relationships with tribal courts. 655 P.2d at 902 n.2. After deciding that § 1738 mandated full faith and credit, the Sheppard court observed that a recent Shoshone-Bannock appellate court decision had ruled that tribal courts were not required to extend full faith and credit to state court decisions because state courts were not required to extend full faith to tribal courts. \textit{Id}. The Sheppard court responded to this ruling by expressing their hope that the Shoshone-Bannock tribe would take note of their decision to extend full faith, and that the decision would engender a better working relation between the two courts. \textit{Id}. This should not suggest that courts’ legal analysis is either faulty or entirely outcome driven, but rather that the path forward is not well marked, and that the principle of reciprocity is a powerful sign post for courts in interpreting the Full Faith and Credit Act.

\textsuperscript{120} \textit{See}, e.g., \textit{In re Adoption of Buehl}, 555 P.2d 1334, 1342 (Wash. 1976); People v. Superior Court, 274 Cal. Rptr. 586 (Cal. Ct. App. 1990).


\textsuperscript{122} Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65–66 n.21 (1978). Unfortunately, the Court did not address what those certain circumstances were other than to cite Mackey.

\textsuperscript{123} \textit{See} Standley v. Roberts, 59 F. 836, 845 (8th Cir. 1894); Mehlin v. Ice, 56 F. 12 (8th Cir. 1893); Exendine v. Pore, 56 F. 777 (8th Cir. 1893).

\textsuperscript{124} \textit{See} DeMent v. Oglala Sioux Tribal Court, 874 F.2d 510, 514 n.4 (8th Cir. 1989). The Eighth Circuit did not, however, decide the question because it was not properly brought before the court. \textit{Id}.

\textsuperscript{125} Wilson v. Marchington, 127 F.3d 805, 808–09 (9th Cir. 1997).
C. The Precedential Value of Mackey Today as it Relates to the Application of § 1738 to Tribes

Mackey has never been overruled and today remains a relevant authority on the question of whether tribes should be included in the term “territories.” Though old and relatively isolated, the Court has remembered Mackey in recent years, implying that it still has some precedential vitality left. After all, an old Supreme Court case is still a Supreme Court case. The Mackey opinion, however, even if still good law, is not dispositive on the application of § 1738 to tribes because the Court was specifically considering a limited federal probate statute, not the general Full Faith and Credit Act.

The highest authority directly on point, then, is the Ninth Circuit’s opinion in Wilson v. Marchington, which held that tribes are not entitled to full faith and credit under § 1738. The Ninth Circuit reasoned in Marchington that if Congress had intended § 1738 to extend full faith and credit to tribes, “enactment of the Indian Land Consolidation Act, the Maine Indian Claims Settlement Act, and the Indian Child Welfare Act would not have been necessary,” all of which specifically extended full faith and credit to tribal court decisions in certain circumstances. This analysis prompted Robert Clinton to comment that “the speciousness of the reasoning [in this opinion] would be hard to duplicate.” While the Ninth Circuit’s analysis is most likely not as deplorable as Mr. Clinton asserts, because it relies on fairly standard canons of construction, he is right to point out that the statutes the court depends on for its construction of § 1738 actually cover unique situations that might not be covered by general full faith and credit principles. The Indian Child Welfare Act, for example, concerns child custody matters, an area of law that often involves temporary orders and ongoing judicial involvement, which prevent the court’s orders from being considered final. So, while Marchington may have precedential value in the Ninth Circuit, it lacks persuasive power outside of its domain.

We are left, then, with little judicial guidance directly on point. Mackey, however, remains a powerful and persuasive precedent for the proposition that tribes should be treated as territories for the purposes of full faith and credit. The reasoning behind Mackey rightly still informs the decisions of courts and commentators today. For the purposes of this Comment, Mackey continues to stand for two important propositions: (1) that the Court has previously construed the term ‘territories’ to include tribes in the context of full faith and credit; and (2) that the determination of the applicability of a statute can turn on

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127. Marchington, 127 F.3d 805.
128. Id. at 809.
129. Clinton, supra note 6, at 43.
a functional analysis of the relation of tribes to the federal government rather than a purely categorical one.

III
TRIBES ARE TERRITORIES OR POSSESSIONS OF THE UNITED STATES WITHIN THE MEANING OF § 1738

Following the Mackey Court’s functional analysis of the relationship between tribal courts and full faith and credit principles, I argue that tribal courts today should be treated like territories under the Full Faith and Credit Act, and that their decisions should be guaranteed full faith and credit throughout the United States. Although there is little case law directly on point outside of Mackey, there is a wealth of insightful case law regarding the Commonwealth of Puerto Rico and the application of general federal statutes that do not specifically mention Puerto Rico.131 The most salient principle to be drawn from these cases is that questions of statutory construction regarding broad geopolitical terms such as states, territories, and possessions can turn on a flexible, functional analysis of the context, purpose, and circumstances of the particular statute in question, rather than any categorical approach to defining those terms for all statutes.132 Looking to the purposes of § 1738, I think it is clear that by using the amorphous term “territories” in § 1738, Congress would have intended to include entities such as tribes had they been aware of the current relationship between tribes and the federal government.133

But before any sustained statutory analysis of the applicability of § 1738 to tribes can begin, it is necessary to address two thorny questions posed by Robert Laurence. First, does the Court’s opinion in University of Tennessee v. Elliott demand that § 1738 be interpreted to include only those courts that existed at the time the Act was passed so that Congress could be said to be legislating full faith and credit for their judgments?134 Second, how can tribes be territories of the United States if, after Wheeler, tribes are pre-constitutional entities whose sovereignty does not spring from either the federal government or the Constitution?135

131. See, infra. Part III.C.
132. Id.
134. See Univ. of Tenn. v. Elliott, 478 U.S. 788 (1986); Laurence, supra note 7, at 655–56.
135. See Laurence, supra note 11, at 242 n.20; see also Fred L. Ragsdale, Jr., Problems in the Application of Full Faith and Credit for Indian Tribes, 7 N.M. L. Rev. 133 (1977); Vetter, supra note 7 (arguing that the historical use of the term “territories” by Congress does not suggest that it intended to include tribes); but see Moshier, supra note 5.
A. Limiting the Elliott Question: Section 1738 Does Not Apply Only to Those Courts that Existed when the Full Faith and Credit Act Was Passed

University of Tennessee v. Elliott grew out of a Title VII and § 1983 claim against the University of Tennessee by an employee who claimed that he was dismissed because of his race. In addition to his federal claims, plaintiff Elliott also sought a state administrative review of his dismissal. Before his federal claims reached a final judgment, the state administrative law judge ruled that the University did not act with racial motivation, but determined that dismissal was too harsh of a punishment and Elliott should be transferred to a different position instead. Rather than appealing the administrative decision, Elliott elected to pursue his federal claims, but the district court judge ruled that his federal claims were now precluded by the state proceedings. The Supreme Court reversed, holding that § 1738 "is not applicable to the unreviewed state administrative factfinding at issue [in this case]."

Robert Laurence argues that in the tribal court context, Elliott requires courts to ask whether Congress was thinking about tribal courts as judgment-granting courts when it enacted § 1738. According to Laurence, there is no historical evidence that Congress was thinking of or even aware of the existence of tribal courts in 1804, when the statute was amended to include territories and countries under the control of the United States. Thus, the Elliott doctrine precludes a finding that tribes are owed full faith and credit as territories under § 1738.

While there is a certain logic to Professor Laurence's interpretation of Elliott and § 1738, I believe Laurence overstates the Court's holding. Elliott holds that § 1738 does not apply to the unreviewed determinations of state administrative agencies, because those agencies are not courts per the terms of the statute. Elliott also holds that § 1738 does not prohibit the court from fashioning a federal common law rule of preclusion because state administrative agencies did not exist when Congress initially enacted § 1738, and therefore Congress did not make a finding as to the preclusive effect of

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137. Id. at 790–92.
138. Id. at 791–92.
139. Id. at 792.
140. Id. at 788.
141. Id. at 795.
142. See Laurence, supra note 7, at 655–57.
143. Id. at 657.
144. Elliott, 478 U.S. at 794–95.
state administrative agencies on federal courts one way or another. Laurence draws from the Court’s brief reasoning concerning its generally undisputed power to create federal common law rules of preclusion a vastly broader holding that essentially freezes the application of § 1738 to courts as Congress knew them in 1790 and 1804. Neither the Court’s language nor its reasoning support this conclusion.

The Court in Elliott was primarily concerned with creating federal rules of preclusion for the determinations of state administrative agencies in federal courts. The Court did not consider whether only those courts that Congress was aware of when it originally passed § 1738 are included within the reach of § 1738, other than to affirm that the decisions of unreviewed state administrative courts are not courts within the meaning of § 1738. Moreover, the Court’s observation that there could be no congressional determination that state administrative agencies are not entitled to any type of preclusion because they antedate § 1738 was not necessary to the adjudication of the claim before it. Just because Congress exercises its authority to prescribe rules of preclusion for certain entities does not mean, without more, that only those entities are entitled to preclusion. As such, there was no need for the Court to justify its exercise of its power to fashion federal rules of preclusion by reference to the non-existence of state administrative agencies at the time § 1738 was enacted.

Indeed, if Laurence’s contention is correct, then a host of state-created courts that did not exist when § 1738 was enacted, such as family courts, would be excluded from the preclusion principles established in § 1738. Instead, the Court’s language should be limited to the context presented in Elliott, namely whether determinations made by state administrative agencies are entitled to the preclusive effects prescribed in § 1738, and if not, then whether the federal courts may create federal rules of preclusion in the absence of a Congressional determination to the contrary.

Properly framed, the issue presented in Elliott is inapplicable to tribal courts, as tribal courts are not administrative agencies. Importantly, the question presented in this Comment is not whether tribal courts are “courts,” but whether if Congress were aware of the status of tribes today they would have intended to include tribes in § 1738. If Congress would, then there should be no real additional dispute that tribal courts are courts within the meaning of § 1738. While the Court may reason that Congress did not intend to prohibit

145. Id.
146. Laurence, supra note 7, at 657.
147. See Elliott, 477 U.S. at 793–94.
148. Id.
149. See Charles L. Chute, Divorce and the Family Court, 18 Law & Contemp. Probs. 49, 51 (1953) (discussing the creation of the first unified family court in 1917, and distinguishing this court from the earlier juvenile courts created in Chicago around 1899).
150. Elliott, 478 U.S. at 794–95.
151. There are as many different tribal courts as there are tribes, so it is impossible to speak
what it had no knowledge of, it does not follow that in using the unqualified term “courts” Congress intended to include only those courts that then existed, and exclude any courts that states, territories, and countries under U.S. jurisdiction may have later created. Such an interpretation would actually seem to contradict the very purpose of § 1738, as well as greatly frustrate our federal system by severely hampering a state’s ability to create new types of courts to respond to the challenges of a quickly changing world. Therefore, it seems highly doubtful that the Elliott Court intended to lay down such a far reaching and disruptive doctrine with only a short paragraph worth of limited analysis in an opinion primarily concerned with fashioning a federal rule of preclusion for federal courts.

B. Limiting the Wheeler Question: Tribes Can Be Treated as Territories Even Though Tribal Sovereignty Does Not Derive from Either the Federal Government or the Constitution

United States v. Wheeler is a seminal case in modern American Indian law, establishing that Indian tribes trace their sovereignty to a font outside of the Constitution and federal government, and that tribes represent a distinct and separate political community in the same way that the states are a separate sovereign from the federal government. The specific question presented in Wheeler was whether a person who had been prosecuted and sentenced in a tribal court could be prosecuted again for the same crime in a federal court. The Ninth Circuit held that the “dual sovereignty” doctrine, whereby a person may be prosecuted for the same crime in the courts of different sovereigns, was inapplicable to tribal courts because Indian Tribes derived their power to punish from the federal government and were not themselves sovereigns. It

to one categorical idea of what a tribal court is. However, the Navajo Nation court system offers an excellent example of modern tribal courts. According to Chief Justice Tom Tso, Navajo courts are structured very much like state and federal courts. Their district courts are courts of general civil jurisdiction and limited criminal jurisdiction. These district courts assert jurisdiction over all persons residing within the Navajo Nation and any person who causes an act to occur within the Nation. The Navajo Nation Supreme Court, composed of three justices, hears appeals from the district courts and certain final administrative orders. Navajo judges are selected from a pool of qualified applicants by a judiciary committee and then appointed by the Tribal Chairman to a two-year probationary period. If the judge completes his training and performs well, the Chief Judge and judiciary committee will recommend him for a permanent appointment, subject to approval by the Tribal Council. Like state and federal courts, once a tribal court makes a decision, that decision is subject to change only through judicial processes; no other branch may overrule that decision. In addition to the more formal and Anglo-influenced district courts, the Navajo also employ Peacemaker Courts, which attempt to solve problems through traditional Navajo values and beliefs. Tom Tso, The Process of Decision Making in Tribal Courts, 31 ARIZ. L. REV. 225, 227–35 (1989). For a more compressive study of tribal legal processes see generally Justin B. Richland, Introduction to Tribal Legal Studies (2004).

153. Id. at 314.
154. Id. at 319.
arrived at that conclusion because of the "undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government."\(^{155}\)

The Supreme Court disagreed, holding that the source of tribal sovereignty was not the federal government, but rather the inherent powers of a limited sovereignty that predated incorporation into the United States and that had never been extinguished.\(^{156}\) For the Court, what mattered was the source of the power to punish crimes, not the degree to which that power is regulated. As the source of tribal sovereignty is inherent in the tribe itself as a distinct political community, the dual sovereignty doctrine applied and the Double Jeopardy Clause of the Constitution was not implicated.\(^{157}\) Thus, the defendant in this case could be prosecuted for the same crime in a tribal court as well as a federal court.

The *Wheeler* Court was concerned with the source of a tribe’s power to punish, and to make clear that that power was located outside of the federal sovereign the Court analogized the political lineage of tribes to that of a federal territory. Unlike tribes, the Court observed, federal territories are organized under the power of the federal government and are therefore mere extensions of the sovereignty of the federal government.\(^{158}\) The Court had decided long before *Wheeler* that territories are not separate sovereigns for the purposes of the "dual sovereign" doctrine.\(^{159}\)

Robert Laurence argues that *Wheeler* is inconsistent with the Court’s reasoning in *Mackey* and precludes an argument that tribes can be considered territories of the United States.\(^{160}\) He contends that the notion of tribes as territories in *Mackey* contradicts the tenet that tribes are extra-constitutional entities that have reserved their pre-contact sovereignty.\(^{161}\) If tribes are distinct political communities that retain inherent sovereign powers, then they cannot be territories of the United States, whose governments draw their power from the federal government.\(^{162}\) Laurence’s observation initially appears grounded in the text of *Wheeler*, which draws a comparison between the federal government and territorial governments in contradistinction to the relationship between the federal government and tribal governments.\(^{163}\) Moreover, Laurence is correct that federally organized territories are considered to be manifestations of the federal sovereign and are therefore subject to the double jeopardy doctrine in criminal prosecutions by their courts, whereas tribes retain inherent sovereignty

\(^{155}\) Id.
\(^{156}\) Id. at 323.
\(^{157}\) Id.
\(^{158}\) Id. at 321–22.
\(^{160}\) Laurence, *supra* note 7, at 652.
\(^{161}\) Id.
\(^{162}\) Id.
\(^{163}\) *Wheeler*, 435 U.S. at 321.
and are not subject to the double jeopardy doctrine. However, these observations do not preclude an interpretation of § 1738 that includes tribes or imply that Mackey is inconsistent with modern Federal Indian law.

Mackey neither held that tribal governments derive their power from the federal government nor that they are federally organized territories. Instead, the Mackey Court held that tribes, because they are not a foreign territory and their form of government is similar to territorial governments, could and should be considered territories of the United States for the limited purpose of the probate statute in question. The Court's holding in Mackey did not concern the nature of tribal sovereignty, but rather the will of Congress. There is a difference between deciding that tribes are territories under the Constitution of the United States and deciding that tribes may be considered territories when effectuating the will of Congress in a specific statute.

If Mackey's holding does not depend upon a finding that tribes are federally organized territories, Laurence's argument must rely on an interpretation of Wheeler as holding that when construing the term "territory," a political unit can only be found to be a territory when it is organized pursuant to the federal government's Article IV power, and therefore that unit must be an extension of the federal sovereign. But the Wheeler Court did not rely on the distinction between a territorial government and a tribal government to reach its holding; rather it relied on its independent finding that tribal sovereignty is not a product of the federal government. To that end, the Court presented the distinction between tribes and territorial governments merely to repudiate the appellate court's erroneous description of tribal sovereignty as springing from the federal government in the same way as a territorial government.

Therefore, Mackey and Wheeler can be read consistently because Mackey does not assert that tribes are federally organized territories, and Wheeler does not create a rule of statutory construction commanding that only political territories organized under Article IV are territories as used in every statute.

C. The Statutory Construction of "Territory" and the Curious Case of Puerto Rico

Even if Mackey and Wheeler may be read consistently, we still must determine whether the will of Congress is best effectuated by construing the term territory in § 1738 to include tribes. The Supreme Court has avoided providing any fixed and universal definition for the word "territory" as it is used in various statutes, looking instead to "the context, the purposes of the law, and the circumstances under which the words were employed."
Importantly, a political entity can be a "territory" for the purposes of one statute but not another. This flexible approach makes sense given the diverse multitude of U.S. territories and possessions throughout the world, each with their own unique set of relations with the United States and their own governance needs.

Puerto Rico, whose political existence has shifted from Spanish Colony to U.S. territory to Commonwealth, provides an illuminating example of the statutory flexibility and pragmatism the federal courts have deployed when determining the scope of statutes that are limited by undefined geographic terms such as "territory." Puerto Rico's unique political status and history also present one of the closest analogies available to the relation of federally recognized Indian tribes with the United States. Puerto Rico is therefore particularly relevant to our discussion as a guiding light for how courts should approach the status of American Indian tribes when considering § 1738. Moreover, the approach federal courts have taken to situate Puerto Rico in the American legal landscape clarifies precisely why Mackey and Wheeler can and should be read consistently.

Prior to 1952, Puerto Rico was organized by the 1917 Organic Act, which prescribed its form of government and provided for many aspects of local autonomy, including the elections of many governmental members, though the President of the United States appointed certain officials, including the territorial governor. Under this arrangement, there was little doubt that Puerto Rico was a territory of the United States for the purposes of most laws, including § 1738. In 1950, Congress passed Public Law 600, offering a "compact" with the people of Puerto Rico whereby they would adopt a government and constitution of their choosing. In 1952, the people of Puerto Rico enacted a constitution, which was then approved by Congress with only minor changes. The effect of the "compact" on Puerto Rico's status as a political unit of the United States was, and in some ways remains, an open question. Some argue that Puerto Rico should now be considered a "state" for the purposes of many statutes, a contention that the Supreme Court has since partially affirmed in the context of the Three Judge Court Act, which provides that federal injunctions restraining the implementation of state statutes on constitutional grounds may not be granted unless the application for the injunction is heard and issued by a three judge district court. Others contend

170. Americana of P.R., Inc. v. Kaplus, 368 F.2d 431, 434 (3rd Cir. 1966).
171. Id.
172. Id.
173. Id.
174. 28 U.S.C. § 2281; see Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 675 (1974); see also Mora v. Mejias, 206 F.2d 377, 386 (1st Cir. 1953) ("The word 'State' may in the context of a particular act of Congress have a broader connotation than a state in the federal Union.").
that Puerto Rico can no longer be considered even a “territory” of the United States as that term is used in the Constitution.175 Either way, as the Third Circuit noted in *Americana of Puerto Rico, Inc. v. Kaplus*, “there can be no doubt” that Puerto Rico enjoys a different status than its former status as an organized but unincorporated territory.176 A key distinction for the court was that the government of the Commonwealth derives its powers from both the consent of Congress and the people of Puerto Rico.177

*Kaplus* provides an important guiding light in interpreting the term territories in § 1738 and is an excellent illustration of the difficulty federal courts have had in categorizing Puerto Rico after the “compact.”178 In *Kaplus*, the ambiguity of Puerto Rico’s status formed a critical part of the petitioners’ argument that federal courts in the United States were not bound by § 1738 to extend full faith and credit to the local courts of Puerto Rico.179 After the Superior Court of Puerto Rico issued a default judgment against them, the petitioners challenged a summary judgment order by a federal court in the United States finding that the Superior Court of Puerto Rico’s judgment was entitled to full faith and credit by its status as a territory of the United States.180

The petitioners argued that the establishment of Puerto Rico as a Commonwealth transformed the political essence of the relationship between Puerto Rico and the United States, so that the courts of Puerto Rico could no longer be considered part of the U.S. system of government, as they were before the “compact” when Puerto Rico was clearly a territory.181 The First Circuit, though agreeing that the compact was significant, decided that Puerto Rico should nonetheless be considered a “territory” for the purposes of § 1738.182 In reaching this holding, the court noted that the purpose of the Full Faith and Credit Act is to: “coordinate the administration of justice throughout the nation. In order to achieve this goal Congress enacted Section 1738 and by use of the words ‘State, Territory or Possession’ Congress intended to unify all of the courts in our system of government.”183

The court then took into consideration that, per the Federal Relations Act of Puerto Rico, the generally applicable laws of the United States were to have the same force and effect in Puerto Rico as before 1952, except where locally inapplicable. The court also took note of legislative history suggesting that the “compact” would not alter Puerto Rico’s fundamental political or legal

175. *Kaplus*, 368 F.2d at 435.
176. *Id.*
177. *Id.*
178. *Id.* at 431.
179. *Id.* at 432.
180. *Id.*
181. *Id.* at 438.
182. *Id.* at 436.
183. *Id.* at 438.
relationship with the United States. Putting all this together, the court concluded that Congress intended the Commonwealth of Puerto Rico to be included within the language of § 1738.

The basic fact left by the holding in Kaplus is that § 1738 has been construed to apply to Puerto Rico, even though Puerto Rico ceased to resemble a territory in a fundamental way after the “compact,” because Puerto Rico was still a part of our system of government despite no longer being purely a creation of Congress or the Constitution. But, though Kaplus provides a precedent for the proposition that a political unit may be considered a “territory” of the United States without being exclusively organized under Article IV, it does limited analytical work on the larger question of how broad a definition the word “territory” can sustain. The Kaplus court rested its holding in part on the legislative history of the Puerto Rico Federal Relations Act, which suggested that the “compact” was not intended to change Puerto Rico’s political or legal relationship with the United States. It was thus construing § 1738 in light of a later federal statute that dealt specifically with the relationship between Puerto Rico and the United States.

While Kaplus is the only post-“compact” federal appeals case to consider the applicability of § 1738 to Puerto Rico, by 1981 the notion of Puerto Rico as a state had gained ground. A series of federal cases had begun to construe the term “state” in federal statutes to include Puerto Rico when congressional intent appeared to be best effectuated by applying the statute to Puerto Rico. Although these cases do not directly interpret the term “territory,” the principles and approaches deployed by the courts provide a relevant and detailed guide to interpreting how and when a statute should be applied to a political unit that does not fit neatly into the geographic terms of a statute that was written before its drafters were aware that such a political unit existed.

In Cordova & Simonpietri Insurance Agency, Inc. v. Chase Manhattan Bank, the First Circuit held that Puerto Rico was to be treated like a state for purposes of the Sherman Act. The Cordova court began its analysis by discussing the continuing relevance of Puerto Rico v. Shell, which held in 1937 that Puerto Rico was a territory and therefore the Sherman Act was not applicable, in light of the enactment of the Puerto Rico Constitution. In the court’s view, the question presented in Shell was whether to apply the Sherman

184. Id. at 438–39.
185. Id.
186. Id.
187. Id. at 438.
188. Id.
189. See infra notes 189, 194.
191. Id. at 38–39.
Act to Puerto Rico as a territory or not at all.\textsuperscript{192} In contrast, \textit{Cordova} considered whether the Sherman Act's framers, if aware of Puerto Rico's post-"compact" status, would have intended it to be treated as a "state" or "territory" under the Act.\textsuperscript{193} The court held that the "compact" presented to the People of Puerto Rico was intended to work a major change in the relation between Puerto Rico and the rest of the United States, and that the legislative autonomy granted to Puerto Rico was of such an extent that for purposes of the Sherman Act it was to be treated as a state.\textsuperscript{194}

The statutory flexibility employed by the \textit{Cordova} court in 1981 has, if anything, become the standard approach for determining the applicability of federal statutes to Puerto Rico, as demonstrated in \textit{United States v. Laboy-Torres}.\textsuperscript{195} A 2009 Third Circuit case, authored by retired Supreme Court Justice Sandra Day O'Connor, \textit{Laboy-Torres} marshals an impressive array of precedent to support its decision to treat Puerto Rican convictions as state convictions for a federal statute making it a crime for individuals with convictions to transport firearms.\textsuperscript{196}

O'Connor opened her analysis of Puerto Rico's status with a quote from the Supreme Court affirming that "'Puerto Rico enjoys a measure of autonomy comparable to that possessed by the states'"\textsuperscript{197} and then proceeded to list the important similarities between Puerto Rico and the States of the Union.\textsuperscript{198} She noted that Puerto Rico enjoys a republican form of government that is organized by a constitution adopted by its people;\textsuperscript{199} it enjoys the same immunity from suit as the states;\textsuperscript{200} like the states it is a limited sovereign that cannot control its external relations with foreign governments;\textsuperscript{201} citizens of Puerto Rico are accorded United States citizenship;\textsuperscript{202} the rights, privileges, and immunities of U.S. citizenship are respected in Puerto Rico as though Puerto Rico were a state;\textsuperscript{203} and the judgments of Puerto Rican courts are entitled to full faith and credit in the United States.\textsuperscript{204}

O'Connor next turned her attention to the longstanding practice of federal courts to look to congressional intent when determining the applicability of

\begin{footnotes}
\item[192.] \textit{Id.}
\item[193.] \textit{Id.} at 39.
\item[194.] \textit{Id.} at 41–42.
\item[195.] 553 F.3d 715, 721 (3d Cir. 2009).
\item[196.] \textit{Id.}
\item[197.] \textit{Id.} at 721 (quoting Examining Bd. of Eng'rs v. Flores De Otero, 426 U.S. 572, 597 (1976)). She also cites to United States v. Acosta-Martinez, 252 F. 3d 13, 18 (1st Cir. 2001) for a similar proposition.
\item[198.] \textit{Laboy-Torres}, 553 F.3d at 721.
\item[199.] \textit{Id.} (citing to 48 U.S.C. §§ 731b–731e).
\item[200.] \textit{Id.} (citing to Ramirez v. Puerto Rico Fire Serv., 715 F. 2d 694, 697 (1st Cir. 1983)).
\item[201.] \textit{Id.} (citing to Americana of Puerto Rico, Inc. v. Kaplus, 368 F. 2d 431, 435 (3d Cir. 1966)).
\item[202.] \textit{Id.} (citing to Kaplus, 368 F. 2d at 434).
\item[203.] \textit{Id.} (citing to 48 U.S.C. § 737).
\item[204.] \textit{Id.}
\end{footnotes}
federal statutes to Puerto Rico that facially only apply to states. She borrowed the First Circuit's observation that "although Puerto Rico is not a state in the federal Union, 'it... seem[s] to have become a State within a common and accepted meaning of the word.' She then described the now standard approach of statutory gap filling that courts use when "Congress fails explicitly to refer to Puerto Rico" in a statute, noting that "courts routinely conclude that Congress intended to include Puerto Rico even when a statute is silent on that front." Having located herself firmly within this precedential edifice, O'Connor went on to conclude that "Puerto Rican convictions are not 'foreign' convictions for purposes of 18 U.S.C. §922(g)(1)... [and] are properly viewed as 'domestic' convictions that Congress intended to include among the predicates that trigger §922(g)(1)'s prohibitions.

It is important to observe that although the court in Kaplus took refuge in some obscure language of the Puerto Rico Federal Relations Act and its accompanying legislative history suggesting that the Puerto Rican "compact" was not meant to alter the political or legal relationship of Puerto Rico with the United States, as the above case law on Puerto Rico as a state demonstrates, it clearly has. Today, unlike prior to the 1952 "compact," Puerto Rico is often treated as a state, even enjoying a species of sovereign immunity despite being neither a creation of the federal government nor the Constitution. Perhaps nothing quite illustrates the depth of the legal transformation Puerto Rico underwent after the compact than the First Circuit's holding in United States v. Lopez Andino. Like the outcome in Wheeler, the Lopez Andino court decided that post-compact Puerto Rico was essentially a separate sovereign from the federal government, and that therefore the "dual sovereign" doctrine applied for double jeopardy purposes.

D. Mackey, Wheeler and Federal Indian Law Revisited

The legal status of tribes is exceptional in many ways and without precedent in our legal system. They are sovereigns within a federal constitutional system that is much younger than they are and which barely mentions their existence. In that sense, then, they are like Puerto Rico, which

205. Id. at 721-22.
206. Id. at 721 (quoting United States v. Steele, 685 F. 2d 793, 805 n.7 (3d Cir. 1982) (quoting Mora v. Mejias, 206 F. 2d 377, 387 (1st Cir. 1953))). O'Connor also noted that the same quote was quoted with approval in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 672 (1974).
208. Laboy-Torres, 553 F.3d at 724.
210. See generally Frickey, supra note 95.
occupies a similarly unique space in American jurisprudence, sitting just outside the cognizance of many of the statutory regimes that govern the vast majority of transactions and interactions in the United States. Like Puerto Rico, tribal governments are established by tribal constitutions, they enjoy sovereign immunity, they are separate sovereigns for the purposes of double jeopardy, tribal members are citizens of the United States, and tribal power is circumscribed by a tribal version of the Bill of Rights, as established by the federal Indian Civil Rights Act. Tribes, however, are also very different from Puerto Rico. Not only because of the undisputed inherent and retained nature of their sovereignty, but also because of their unique history with the U.S. government and their "incorporation" within the borders of the United States.

Nonetheless, the statutory gap-filling approach taken by courts in dealing with Puerto Rico provides helpful precedent for the present consideration of the status of tribes under § 1738. First, it validates the Mackey Court's plastic approach to statutory interpretation for the modern era. In the same way the Mackey Court decided tribes should be treated like territories to effectuate best the intent of Congress in interpreting a federal probate statute, the Puerto Rico-as-state line of cases have sought to implement congressional intent based on an interpretation of the purposes of particular federal statutes, rather than trying to fix a rigid talismanic meaning to the use of geopolitical terms such as "state."

Second, although the question confronted in Cordova and later cases was whether Puerto Rico should be treated as a "state" for the purpose of various federal statutes, the reasoning behind these cases is crucial to understanding why Mackey and Wheeler can and should be read consistently. In the same way that the holding in Cordova was not that Puerto Rico is actually a state, but rather that it should be treated like a state for the purposes of the Sherman Act, the holding in Mackey is that tribes should be treated like territories for the purposes of the full faith and credit provisions of a federal probate statute. If the question were whether tribes, like most territories, are creatures of the federal government, then Wheeler's holding would have some relevance. But our question is whether the Act's drafters, if aware of the current status of tribes in the American political and legal landscape, would have intended them to be included within the Act. Therefore it makes no difference for our

216. See discussion of Mackey, supra Part II.
218. See Mackey, 59 U.S. 103–04.
purposes that tribes are sovereigns and territories are not, because to effectuate best the goals of the Full Faith and Credit Act tribes should at least be treated like territories.\textsuperscript{219}

\textit{E. Indian Tribes Should Be Treated like Territories Within the Meaning of the Full Faith and Credit Act}\textsuperscript{220}

As noted above, although Puerto Rico and tribes occupy strikingly similar tracts in the American legal landscape, the history of tribes within the United States is much older, more tragic, and more complicated. Therefore we cannot merely point to the example of Puerto Rico to decide the status of tribes in the United States. Instead, we must examine the bundle of particular legal rules and political realities that describe the relationship between tribes and the United States. Below, I argue that when we look at the way tribes function in the United States, it becomes clear that tribes should be considered “territories” within the meaning of § 1738 in order to effectuate best the purposes of that statute and federal American Indian law policy.

\textit{1. The Indian Law Canons}

As with most statutory questions in American Indian law, a good place to begin is with the Indian Law canons.\textsuperscript{221} The Indian law canons operate to liberally construe ambiguous statutory terms in favor of tribes and to avoid implicit cessations of tribal sovereignty.\textsuperscript{222} On this particular question of

\textsuperscript{219} In this respect also, Puerto Rico is relevant, as it is an important example of a political entity that is entitled to full faith and credit under § 1738 but is also treated like a separate sovereign from the federal government even though it is not a state. United States v. Lopez Andino, 831 F.2d 1164, 1167–68 (1st Cir. 1987).

\textsuperscript{220} Another question one might ask is why tribes should be treated like “states” or “possessions of the United States,” as either would be sufficient for the purposes of §1738. In the same way Puerto Rico is governed by its own Constitution, ratified by the people pursuant to federal legislation, so are Indian tribes that are recognized under the Indian Reorganization Act. This similarity would certainly lend weight to an argument that tribes should be treated like states for § 1738. However, the state categorization seems like it presents larger hurdles to overcome, and it is better to avoid reinforcing the idea that tribes should be treated like states rather than unique political units. As for “possessions of the United States,” this language does seem well suited to tribes, especially considering that this language replaced the more specific phrase “country under the jurisdiction of the United States.” However, this language does not have the benefit of Supreme Court precedent in the context of tribes. Moreover, if the argument can be made that tribes should be treated like territories, then it should be even easier to argue that they should be treated like “possessions,” if that categorization would prove more protective of tribal sovereignty.

\textsuperscript{221} See Frickey, \textit{supra} note 95, at 439–40, 445–46; see also Phillip P. Frickey, \textit{Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law}, 107 HARV. L. REV. 381 (1993). Although Professor Frickey expresses concern that the canons are losing their persuasive power, they have not been overruled, and some courts at least still pay lip service to them today. See, e.g., Cachil Dehe Band of Wintun Indians v. California, 629 F. Supp. 2d 1091, 1107 (E.D. Cal. 2009); Yankton Sioux Tribe v. Kempthorne, 442 F. Supp. 2d 774, 783 (D.S.D. 2006).

\textsuperscript{222} See \textit{COHEN, supra} note 63, at 119–20.
construction, however, it is not immediately clear which way the canons cut. Interpreting § 1738 to include tribes limits tribal sovereignty in some respects because it would require them to recognize the judgments of state courts. But it would also expand their sovereignty by allowing them to project the products of that sovereignty, namely tribal court judgments, outside of their jurisdiction. At the conceptual level, at least, tribes seem to gain as much as they lose.

However, as both the Sheppard court and Robert Clinton have noted, the clear language of § 1738, which demands that full faith and credit be given by every court within the United States, is such that regardless of whether tribes are owed full faith and credit, they owe full faith and credit to state courts.223 Though there is some room for interpretative maneuvering via the Indian law canons, because the Full Faith and Credit Act is a generally applicable statute, how precisely the Indian canons are to function is unclear in the shadow of Federal Power Commission v. Tuscarora Indian Nation, which stated in dicta that the general acts of Congress apply to Indian tribes in the absence of clear expression to the contrary.224 Lower courts, however, have not applied the Tuscarora dicta uniformly across the board, but have instead developed an exception for tribes where generally applicable statutes touch upon classically governmental functions that primarily concern intertribal relations.225

Ostensibly, § 1738 regulates relations among the various court systems, not the relationships of tribal members to one another, which militates in favor of applicability.226 But the statute also regulates what might be considered classically governmental functions, including the role of tribal courts to adjudicate disputes involving tribal members or tribal interests.227 If tribal courts are required to recognize simply state court judgments without the discretion to consider the merits of the case or the process by which the judgment was attained, then a tribal court may be unable to properly discharge its responsibility to tribal members and interests.228

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223. See Clinton, supra note 6, at 910–11; Sheppard v. Sheppard, 655 P.2d 895, 902 n.2 (Idaho 1982) (noting that the Shoshone-Bannock appellate court held that it was not required to give full faith and credit to the decrees of Idaho state courts partly because of the belief that state courts do not accord tribal courts full faith and credit).


225. See Donovan v. Coeur D’Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985).


227. Id.

228. See Karuk Tribe Hous. Auth., 260 F.3d at 1082; see also EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 251 (8th Cir. 1993) (holding that employment discrimination statutes do not apply to tribal employment of tribal members).
In the final analysis, it seems hard to escape the plain language of § 1738, especially after South Carolina v. Catawba, which held that the Indian canons are not so powerful as to escape the plain language of a federal statute. But assuming this statutory analysis is correct, it is equally likely that the Indian canons would work to strengthen the claim that tribes should be treated like territories for the purposes of § 1738 because a court considering this question would be required then to construe liberally the term “territories” in favor of tribes in light of § 1738’s mandate that tribes must give full faith and credit to state court decisions. To hold otherwise would deny tribes the benefit of full faith and credit while imposing on them the burden and would violate the Indian canons by reducing tribal sovereignty in the absence of a clear congressional command to do so. In this instance, tribes would have nothing to lose and everything to gain at the conceptual level by an extension of full faith and credit.

This interpretation, however, does not settle the question of whether arriving at full faith and credit by interpreting the term “territories” to apply to tribes might not infringe upon tribal sovereignty. There might be a lurking fear that, if courts place tribes within the term “territories,” it might begin to blur the line between tribes and territorial governments in other respects. This fear is by no means unreasonable, but it does seem to overlook both the plastic definition of “territory” supplied by the Supreme Court, and that the argument presented is not that tribes necessarily are territories, but rather that they should be treated like territories for the purposes of § 1738 in order to effectuate the purposes of the statute.

2. The Context, Purposes, and Circumstances of the Full Faith and Credit Act Indicate that Indian Tribes Should Be Considered “Territories” Under § 1738

Before the term “territory” in § 1738 can be construed regarding its applicability to tribes, “the context, the purposes of the law, and the circumstances under which the words were employed” must be considered. The goal of full faith and credit is to coordinate the administration of justice throughout the nation. To accomplish this goal Congress enacted § 1738 and, in using the language “State, Territory or Possession,” intended to unify all of the courts in our system of government. Full faith and credit serves this task

230. The reference to conceptual gains is in contradistinction to strategic gains, which will be discussed in the last Part of this Comment. For now, it should be noted that there is an earnest academic debate as to whether at the strategic litigation level, full faith and credit might actually undermine tribal sovereignty by touching off a backlash against tribes and tribal processes.
233. Id.
not only by transforming an aggregate of governments into a nation, but also by providing for the orderly administration of justice throughout the entire United States. It accomplishes this by engendering respect for the local political and judicial determinations of the various governments in our system, as well as by supplying finality to litigants in American courts. If litigants were required to relitigate their claims in a foreign forum to enforce judgments received in their local forum, the administration of justice would be potentially undermined by conflicting resolutions of adjudications, worthless remedies, and redundant uses of precious judicial resources.\textsuperscript{234}

The Supreme Court has described tribes as incorporated within the territory of the United States,\textsuperscript{235} and it is beyond dispute that tribal members are citizens of the United States.\textsuperscript{236} Even though tribal sovereignty does not originate in the Constitution, tribes are nonetheless bound by the will of Congress, which must approve tribal constitutions through the Bureau of Indian Affairs.\textsuperscript{237} Though tribes are not bound directly by the Constitution, neither are all territories.\textsuperscript{238} Congressional plenary power over tribes has been the law for many years, but today the regulation of tribes by the federal government is extensive.\textsuperscript{239} This is a result of both the accretion of legislative enactments concerning tribes and the more general process of increased social, political, and economic interaction across the United States throughout the past century, which in turn has resulted in the growth of a massive administrative state. Therefore, it seems beyond dispute that as a practical matter tribal governments represent a critical element of the American political reality and our system of government.\textsuperscript{240} Indeed, it is precisely because of the increased interaction and shrinking distances between American Indian tribes and the surrounding American jurisdictions that the will of Congress is best effectuated by extending full faith and credit to tribes. The fluidity of commerce and travel between jurisdictions, including Indian tribes, is far greater today than in 1856 when \textit{Mackey} was decided, let alone in 1804 when Congress amended § 1738 to include territories. It has likely never been easier for individuals to escape the administration of justice by leaving the personal jurisdiction of the

\textsuperscript{234} For a fuller discussion of the ostensible goals, context, and purpose of § 1738, see Part I, \textit{supra}.
\textsuperscript{236} \textit{See} 8 U.S.C. § 1401(b) (2006).
\textsuperscript{238} \textit{See supra} text accompanying note 88.
\textsuperscript{239} \textit{See} Frickey, \textit{supra} note 95, at 455.
\textsuperscript{240} For similar conclusions and arguments see Clinton, \textit{supra} note 5, at 912 ("Indian tribes and their courts are . . . within the United States today in both a physical and political sense") (emphasis original) and Note, \textit{supra} note 13; Moshier, \textit{supra} note 5, at 812. William Vetter, however, came to the exact opposite conclusion, i.e. that tribes should not be included under § 1738 because they are not a part of our system of government. \textit{See} Vetter, \textit{supra} note 7, at 266–67 (arguing that tribes cannot be included within our system of government because of their retained inherent sovereignty).
issuing court. While it is of great significance that Indian tribes are "distinct political communities" which retain inherent sovereignty, this is no reason to deny them full faith and credit.241

Moreover, including tribes within the reach of § 1738 not only advances the national goals of § 1738, it also advances the more ubiquitous federal goal of respecting the competency of tribal courts and fostering their development.242 National Farmers v. Crow Tribe of Indians and Iowa Mutual Insurance Co. v. LaPlante are seminal cases in modern American Indian law, both asserting that tribal jurisdiction is a federal question that may be brought in a federal court.243 However, and more importantly for our present purpose, these cases also require that any claims disputing tribal jurisdiction must first be brought in tribal court.244 A paramount reason for this tribal exhaustion requirement is a desire to implement what the Court views as a federal policy favoring the development of tribal government and self-determination, and tribal courts in particular.245 As the Iowa Mutual Court noted, "[t]ribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development."246

The federal policy of deferring to tribal courts and fostering their growth urges an interpretation of § 1738 that extends full faith and credit to tribal court decisions. Such an interpretation would further the federal policy of respect for and development of tribal courts in two ways. First, it would encourage litigants to use tribal courts because they could be assured that any judgment issued would be conclusive as to the merits in any other court in the United States. Second, full faith and credit for tribal court decisions would increase the prestige of tribal courts by preventing state courts from ignoring tribal court judgments at their discretion.

Far from becoming an anachronism, then, the reasoning of Mackey is more applicable today than it was in 1856. While it can no longer be maintained that tribes are bound by the Constitution, the extensive application of federal power over tribes coupled with the extension, or perhaps imposition, of U.S. citizenship to tribal members places them closer to the heart of the broad system of government designated by the Full Faith and Credit Act than when Mackey was decided. Tribes govern American citizens, exert their sovereignty over incorporated U.S. territories, and are subject to the plenary authority of Congress. Thus, the federal policy of fostering tribal courts and the goal of the Full Faith and Credit Act to unify all the courts of our nation are

241. See Worcester v. Georgia, 31 U.S. 515, 557 (1832) (holding that the laws of the states have no force in Indian country on their own accord).
242. For a similar argument from Robert Clinton, see supra note 5, at 907.
both best effectuated by liberally construing the already plastic term "territories" in favor of tribes and extending to them full faith and credit.

IV
THE COLONIAL IMPULSE PROBLEM\textsuperscript{247}: STRATEGIC CONSIDERATIONS FOR THE QUESTION OF FULL FAITH AND CREDIT

While the question of full faith and credit for tribes is interesting when posed in an academic vacuum, it becomes extremely importunate when injected into the current arc in American Indian law towards the undermining of tribal sovereignty. Since \textit{National Farmers Insurance Companies v. Crow Tribe}\textsuperscript{248} there has been a trend of ruling against tribal sovereignty in favor of greater federal oversight of tribal institutions and processes where non-Indians are involved or implicated.\textsuperscript{249}

The finding of a statutory and general mandate for full faith and credit under § 1738 represents one way to respond to this trend, as it might recapture a respect for local self-determination in the context of Indian tribes and perhaps begin to set a new path-mark for federal, state, and tribal relations. At the litigation level, it is possible that a finding of full faith and credit for tribal courts would greatly reduce, or altogether overrule, the available range of collateral attacks on tribal judgments established in \textit{National Farmers} and \textit{Iowa Mutual}\.\textsuperscript{250} In developing the full faith and credit doctrine as it applies to states, the Supreme Court has been explicit that "a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court’s inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."\textsuperscript{251} If applied to tribal courts, in cases where the question of jurisdiction is actually litigated, state and federal courts must extend full faith and credit to the tribal court’s judgment. Because \textit{National Farmers} and \textit{Iowa Mutual} require litigants, in

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247. See generally Clinton, supra note 6. The "colonial impulse problem" generally refers to the pattern of federal courts seeking to supervise tribal courts, particularly when they have jurisdiction over nonmembers, and to determine the content of tribal court processes. \textit{Id.}


[O]n the one hand there is increasing recognition of the stature of tribal courts, but on the other hand there is the companion development which seems to bring tribal courts more directly into the orbit of federal review. Or to say it another way, the more important tribal courts become, particularly in their authority over non-Indians, the more need there seems to be for increasing federal scrutiny.

\textit{Id.}

250. See \textit{Nat'l Farmers}, 471 U.S. 845, 852–53; Clinton, supra note 6, at 35–36, 46–48 (discussing the possible implications of the application of § 1738 to tribes for the types of collateral attack created by \textit{National Farmers}).

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most cases, to allow the tribal court to make a determination of its own jurisdiction before the tribal court’s jurisdiction can be attacked in federal court, the application of this species of full faith and credit would seem to require that the federal court simply defer to the tribal court’s determination.\textsuperscript{252} This question, though, becomes complicated at the state level, because it is not a settled question whether exhaustion applies whatever the source of jurisdiction.\textsuperscript{253} It would at least be clear under this doctrine that, where the question of jurisdiction has been litigated, full faith and credit is owed.\textsuperscript{254} While the Court could adopt this species of full faith and credit in the tribal context, it is by no means bound to do so. The doctrine as it applies to the states springs first and foremost from the Constitution, not from the Full Faith and Credit Act. While the same public policy favoring finality that inspired the Supreme Court in \textit{Duke} would apply in the context of the Full Faith and Credit Act, the Court could find that the extension of full faith and credit to territories, including tribes, demands a lesser full faith and credit command when applied to a tribal court’s determination of its own jurisdiction.\textsuperscript{255} Still, a finding of full faith and credit would at least require the court to revisit \textit{National Farmers} and likely would militate in favor of a more deferential standard towards the tribal court’s determination.\textsuperscript{256}

While full faith and credit may appear to offer nothing but promise for tribal sovereignty, Robert Laurence has persuasively argued that such “conventional wisdom” is misguided in American Indian law.\textsuperscript{257} Though full faith and credit may be the best solution in an ideal world,\textsuperscript{258} Laurence argues, it may also instigate a backlash from state courts wary of enforcing tribal decisions without considering the process by which the judgment was issued.\textsuperscript{259} Laurence believes there are two trends in modern American Indian law: the first marked by \textit{Santa Clara Pueblo v. Martinez}, upholding tribal power to legislate outside the bound of the U.S. Constitution,\textsuperscript{260} and the second marked by \textit{Oliphant}, restricting tribal power over nonmembers in criminal cases.\textsuperscript{261} Eventually, Laurence fears, tribes will have “unfettered power to do essentially nothing.”\textsuperscript{262} His cynicism is certainly well founded. The federal courts have not

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\item[252.] See Clinton, \textit{supra} note 6, at 46–48.
\item[253.] \textsc{Anderson et al.}, \textit{supra} note 65, at 524.
\item[254.] Another open question is whether the exhaustion requirement applies when no tribal proceeding is pending. \textit{Id.} at 525.
\item[255.] \textit{See Duke}, 375 U.S. at 111.
\item[257.] Laurence, \textit{supra} note 68, at 980–81.
\item[258.] \textit{Id.} at 985.
\item[259.] \textit{Id.} He is primarily concerned with state courts because most enforcement actions will be filed there rather than in federal court.
\item[262.] Laurence, \textit{supra} note 68, at 981.
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been shy about going through the door opened by *National Farmers*, cutting away more and more tribal jurisdiction over non-Indians. If full faith and credit, or even too strict a demand for comity, is extended to tribal court decisions, it is certainly possible that state courts will be apprehensive, or even outright hostile, to enforcing tribal judgments they believe to be lacking in fairness, and will attack these judgments through the only door open to them—a collateral attack on the tribal court’s jurisdiction per *National Farmers*.

As an alternative to full faith and credit, Laurence proposes an asymmetrical regime of cross-jurisdictional judgment recognition, whereby nontribal courts will be allowed to make an Indian Civil Rights Act (ICRA) “fairness check” on tribal court decisions, thus allowing them to ignore tribal judgments while leaving tribal jurisdiction unscathed. Conversely, tribal courts will not be able to make a fairness check on state court judgments, though they will be allowed to inquire into the jurisdictional footing of the issuing court. Tribes, however, will be allowed to adopt a comity-like review of the merits of a state court decision to determine whether it is “broadly consistent with tribal laws and ways.” The goal for Laurence, then, is to attain the benefits of an orderly system of cross-jurisdictional recognition without endangering the whole of tribal sovereignty. This is accomplished by strategically sacrificing a small portion of tribal sovereignty in order to stave off more drastic attacks on the limits of tribal jurisdiction.

One response to Laurence’s concerns was already discussed above, namely that a finding of full faith and credit might foreclose a collateral attack on tribal jurisdiction in many cases. Even if this is the case, the larger point remains that the more state courts must recognize tribal court decisions, arrived at through tribal processes they are unfamiliar with and potentially suspicious of, the greater the potential backlash against tribes. A second and potentially more satisfying response to Laurence’s concerns is that perhaps states are not as hostile to tribal sovereignty and interests as he supposes, and that full faith and credit will actually lead to better relations with state courts and more respect for tribal sovereignty. In large part, the call for full faith and credit for tribes has come from state courts and legislatures, ostensibly because states

263. See, e.g., *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1142 (9th Cir. 2001); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997).


265. *Id.* at 998. Laurence reasons that this asymmetry is justified in part because losing litigants in state courts will still have recourse to federal appellate review of any due process claims.

266. *Id.* at 1000. Likewise, this asymmetry is justified for Laurence by the fact that tribes are, with few exceptions, orders of magnitude smaller and poorer than the smallest and poorest states, and therefore tribal sovereignty is “threatened by too-easy access to reservation property by off-reservation judgment creditors” in ways that state sovereignty is not. *Id.* at 999.

267. In addition to several state court decisions, a handful of state legislatures have also established full faith and credit regimes for dealings with tribal court judgments, though they are usually contingent upon tribes reciprocating. See *Wyo. Stat. Ann.* § 5-1-111 (2009); Darby L.
are interested in having a strong, respectful, and mutually beneficial relationship with tribal courts.

It is impossible to predict the consequences of extending full faith and credit to tribes. And while it is important to be aware of the concerns of scholars like Laurence, it is not sustainable to continually cede sovereignty in order to preserve the greater whole. Prudent risks must be taken, and full faith and credit for tribes is desirable not only because it will bring greater certainty to litigants in tribal courts, but also because it will advance the cause of tribal sovereignty while acknowledging and respecting the legitimacy of tribal practices and institutions in American life. These are goals worth achieving, and there is a strong argument for achieving these goals through a judicial interpretation of § 1738 to include tribes. However, if the courts prove too much of a wildcard to adjudicate fairly tribal claims, many of the arguments presented in this Comment are applicable to an effort to persuade Congress that new full faith and credit legislation is needed to effect the orderly administration of justice within the United States and to extend the proper respect to tribal courts.268

CONCLUSION

By using the term “territories” in the Full Faith and Credit Act, Congress intended to unify all the courts in our system of government. Although tribal sovereignty exists outside of the Constitution and the federal government, and therefore tribes are not territories in the traditional sense, tribes should still be included within the scope of the Full Faith and Credit Act. The extensive functional similarities between the federal relationship with tribes and the federal relationship with federally organized territories, coupled with the plastic definition of “territories” supplied by the Supreme Court and the application of the Indian Law canons of interpretation, compels the conclusion that tribes should be treated like territories for the purposes of the Full Faith and Credit Act to effectuate best the intent of Congress. This conclusion is further supported by the use of statutory gap-filling techniques in federal courts to apply federal statutes to Puerto Rico when the purposes of a particular federal statute indicate that, although Congress did not specifically include Puerto Rico in the statute, it intended the statute to apply to Puerto Rico nonetheless.

Not only does an interpretation of § 1738 that includes tribes provide the

268. For an argument in favor of federal legislation to deal with the issue of cross-jurisdictional enforcement problems in the tribal context, see Daina B. Garonzik, Comment, Full Reciprocity for Tribal Courts from a Federal Courts Perspective: A Proposed Amendment to the Full Faith and Credit Act, 45 EMORY L.J. 723 (1996). While legislation may well be the best route to achieving full faith and credit, I do not agree with Garonzik that tribal courts should be transformed into federal courts to achieve that full faith.
most accurate application of congressional intent, it also advances both tribal and federal interests in the protection and development of tribal sovereignty. The Full Faith and Credit Act commands respect for the final judgments of courts sanctioned by the will of the people who are subject to those courts. By extending the same deference and respect to tribal courts, we can affirm the validity of tribal adjudicatory practices and competence, while also helping to locate tribes within our “great political family” of independent sovereigns. Whether the latter observation is in the best interests of tribes (i.e., whether it is better to treat tribes like international sovereigns or domestic sovereigns) is a difficult normative question that is beyond my ability to answer conclusively. However, an interpretation of § 1738 which includes tribes does advance the more limited goal of protecting tribal sovereignty, not least because there is a strong argument that § 1738 as it is currently read seems to require that tribes respect state court decisions regardless of whether states are required to respect tribal court decisions.

The question of what demands the existence of tribal sovereignty places on a democratic constitutional system in which tribes never had a say in the initial ordering is a seemingly inexorable one. It is a question that springs from the gap between the national norms our constitutional system engenders, and a national history that is as fraught with collective moral failures as it is anchored in the interdependent fate of the diverse peoples that must own, in their own ways, those failures. In this Comment I have attempted to pin down a piece of this question by looking at the relationship among state, federal, and tribal courts. While the analysis presented offers only limited insight into the larger question, I hope it has at least helped to shine some new light on where tribes fit and perhaps should fit in our shared local and national life.