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ISSUES

THE ROLE, IF ANY, FOR THE FEDERAL COURTS
IN THE CROSS-BOUNDARY ENFORCEMENT OF
FEDERAL, STATE AND TRIBAL MONEY JUDGMENTS

Robert Laurence*

I. INTRODUCTION

A. The Problem Stated

Suppose that a tribal court issues a money judgment and the defendant does not pay voluntarily. Suppose also, that the defendant is judgment-proof on the

* Robert A. Leflar Professor of Law, University of Arkansas. Thanks go to my colleague John J. Watkins, whose field is conflicts law and who, over the years, has shown a commendable interest in jurisdictional questions raised by the presence of tribes among us. He read an early outline version of this paper, as I prepared for the 1998 Federal Bar Association Indian Law Conference in Albuquerque, and read the penultimate version of the paper, just prior to submission to the Tulsa Law Journal. On both occasions, he provided valuable insight and saved me several of the indignities that await the non-proceduralist in the forbidding realm of federal jurisdiction. Remaining errors and infelicities, of course, are my responsibility alone.
reservation; he, she or it owns no non-exempt property over which the tribe exercises any formal jurisdiction. For this reason, the victorious plaintiff must present the tribal court judgment to some off-reservation court in order to make the victory complete.

Ordinarily, the court in which enforcement is sought will be the state court that has jurisdiction over the defendant's property. Most coercive enforcement actions in the country are brought in state, not federal court. In fact, there is no general federal enforcement-of-judgment law; Rule 69 of the Federal Rules of Civil Procedure merely incorporates state enforcement law into the federal rules.

There are, however, three ways in which a federal court might find itself involved in the enforcement of the tribal court judgment. First, and contrary to expectations, the plaintiff might present the judgment to the federal court sitting in the state where the defendant's property lies. Second, the plaintiff might present the judgment to the state court, and the defendant might sue in federal court to prevent enforcement there. Third, having presented the tribal court judgment to the state court, and having received an unwelcome reception there, the plaintiff might sue in federal court to force the state court to recognize the judgment.

Conversely, the initial suit may be brought in state court, with judgment for the plaintiff. Suppose the defendant again does not pay voluntarily and is judgment-proof off-reservation. This judgment ought to be presented to tribal court for enforcement. However, a plaintiff suspicious of tribal court process might try to enforce the judgment in the federal court for the district in which the reservation -- and hence the property -- lies. Alternatively, the plaintiff might proceed in tribal court and the defendant might sue in federal court to block tribal court enforcement. The third possibility is that, the tribal court having refused to enforce the state court judgment, the plaintiff might sue in federal court to force the tribe to enforce the off-reservation judgment.

1. By "formal jurisdiction" I mean tribal civil judicial process. I acknowledge that, given the proper circumstances, a tribe may be able to exercise "informal jurisdiction" by flexing its economic muscle to persuade the defendant to pay. An example these days might be where a member of a gaming tribe, employed by the tribe's advertising agency, recovers judgment in tribal court over an employment dispute. Technically speaking, the tribal court may have no "formal jurisdiction" over any on-reservation property of the agency, there being none. However, one could speculate that for the defendant to turn its back on the tribal court order would put its contract with the tribe at risk. There is also the question of the tribe's ability to reach intangible property of the defendant by declaring its location to be on-reservation with the defendant or another, under the so-called debt-follows-the-debtor rule. See generally Robert Laurence, The Off-Reservation Garnishment of an On-Reservation Debt and Related Issues in the Cross-Boundary Enforcement of Money Judgments, 22 AM. INDIAN L. REV. 355 (1998). Despite the economic realities revealed by the example, and the important complexities involved with intangible property, this article deals only with the "formal jurisdiction" of the tribe over tangible personal property, and the enforcement of money judgments against same.

2. Fed. R. Civ. P. 69(a) states:

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.
Many scholarly articles have touched on the issues of cross boundary enforcement of judgments when the enforcing courts are state or tribal courts. Rather, the question addressed here is what, if any, role the federal courts should play in this process, either as the court being asked directly to enforce the judgment, or as the court in which a collateral attack is made on some other court's willingness or unwillingness to enforce a judgment from across a reservation boundary. In conclusion, without some substantial change in the laws governing their jurisdiction, federal courts will have only a minor role to play. As a major role for the federal courts makes sense, these changes should be made.

B. A Preliminary Note on Terminology

I begin by defining some terms:

1. Direct Collateral Review

This strangely contradictory term describes those situations when a federal court...
is asked by the plaintiff to make a direct appraisal of the proceedings in a tribal court before judgment. The review is "collateral" in the sense that it is not being done on appeal from the tribal court proceeding, through the tribal appellate court system, but collaterally in the federal court system. The review is "direct" in the sense that the challenge is directly to the power of the tribal court to issue the judgment, or to the way that power was exercised.

There are traditionally three kinds of direct collateral review:

a. Habeas Corpus

The Indian Civil Rights Act (ICRA) permits those detained by tribal criminal justice systems to seek review of the detention in federal court. Habeas Corpus is beyond the scope of this article, as it deals only with criminal or quasi-criminal detentions.

b. Martinez-style ICRA Review

The Indian Civil Rights Act imposes certain Constitution-like restrictions on tribal governments, including tribal courts. For ten years following the passage of the act in 1968, tribes were regularly sued under the ICRA, often by their own members and often over what might be called "political questions," such as electoral redistricting. In Santa Clara Pueblo v. Martinez, the United States Supreme Court held that the ICRA, even while imposing these restrictions, did not create a federal civil cause of action for violations of them. Hence Martinez-style direct collateral attacks on tribal court proceedings are not permitted under the present state of the law.

c. Strate-style Common Law Review

Almost simultaneously with finding that the Indian Civil Rights Act (the congressional enactment meant to restrict the operation of tribal governments) to be unenforceable, on the civil side in federal court, the Supreme Court also determined that the federal common law imposed restrictions and was enforceable by civil actions in federal court. The earliest of these common law cases, Oliphant v. Suquamish Indian Tribe, decided only a few months before Martinez, was a direct collateral

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5. See id. § 1303.
7. See, e.g., White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973).
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attack on the criminal jurisdiction of a tribal court over non-Indians. The Court held that the ICRA's habeas corpus provision could be used to enforce the Court's common law restrictions. 10 Montana v. United States 11 extended Oliphant to the civil side of tribal jurisdiction, though without the blanket prohibition of the exercise of jurisdiction over non-Indians, and not in the case of tribal court adjudication. Strate v. A-I Contractors, Inc., 12 a case involving a white-on-white tort, applied Montana to a direct collateral attack in federal court on a tribal court civil judgment for money damages. The Court permitted the collateral attack, and found the tribal court judgment to be void. 13

Thus, Strate was a successful direct collateral review in federal court of the power of the Three Affiliated Tribes of the Fort Berthold Reservation, while Martinez was an unsuccessful direct collateral review in federal court of the power of the Santa Clara Pueblo. Audrey Martinez attempted a statutory attack and was denied, while A-1 Contractors tried a common law attack and won, an irony that has not gone without notice. 14 National Farmers Union v. Crow Tribe 15 involved direct collateral review, where the federal court plaintiff, who had been the tribal court defendant, was seeking a federal stay of the on-reservation enforcement by tribal officers of the tribal court plaintiff's tribal court judgment.

Hence, of the three types of "direct collateral review" mentioned above, only the Strate-type applies on the civil side of the tribal court's jurisdiction; habeas corpus is criminal and Martinez denied the collateral attack. Furthermore, the Court in National Farmer's Union required that Strate-style collateral review in federal court await the exhaustion of all tribal court remedies. 16

Academic commentators tend to dislike Oliphant and its progeny, including Montana and Strate, which limit or destroy tribal jurisdiction under a very nebulous federal common law. These same commentators tend to admire Martinez and National Farmers Union, which cautioned the federal courts to tread carefully on tribal court jurisdiction. It has always been unclear whether those academic views are shared by persons who live under tribal jurisdiction. One suspects that the Supreme Court has fulfilled those persons' practical wishes more than the theoretical needs of the academics. This article will not explore directly this well-trodden ground, though other aspects of these cases will be discussed below.

2. Indirect Collateral Review

Whenever a judgment is presented for enforcement in a court other than the one

10. See id. at 195.
13. Id. at 439.
14. See William C. Canby, Jr., The Status of Indian Tribes in American Law Today, 62 WASH. L. REV. 1 (1987). Judge Canby wrote not in terms of Martinez and Strate, but Martinez and Oliphant, but the point is the same.
16. See id. at 845.
that rendered the judgment, a form of collateral review takes place. Even when both the rendering court and the receiving court are state courts, bound by the strict mandates of full faith and credit,\textsuperscript{17} there is a narrow form of collateral review. Not all state court judgments are entitled to full faith and credit and the receiving court is permitted a review of certain aspects of the judgment rendered. When full faith and credit does not apply, prototypically when a state court is asked to enforce a judgment from a foreign nation, the collateral review is more expansive, touching on many aspects of the judgment, as well as the law and procedure that gave rise to it.

The review involved in these kinds of cases is "indirect collateral review," where the challenge to tribal power is done in, or is related to, an off-reservation civil enforcement action. The two most commonly discussed and litigated types of indirect collateral review are the most straightforward cross-boundary enforcement cases. One of these is where off-reservation enforcement of a tribal court judgment is sought in state court, and the other where on-reservation enforcement of a state judgment is sought in tribal court. The law with respect to these common hypotheticals is mentioned below in Part II(C), but, as they are the ones most often discussed in the literature, and since they do not involve federal court review, the discussion here will be mercifully short.

Strate and National Farmers Union would have involved indirect collateral review in federal court if the challenge to tribal power had come in an off-reservation enforcement action. The issues involved had these tribal court plaintiffs sought federal court enforcement of the tribal court judgment are discussed in Part III, below.

There is also the opposite kind of indirect collateral review, where a state court plaintiff attempts to use the federal court to enforce a state court judgment on-reservation. Here, the first question involves the collateral review, as the federal court inspects the state court judgment to see if it passes muster and is enforceable. The second question is one of the federal court's power to enforce any judgment on reservation. These issues will be discussed in Part IV, below.

3. Doubly Indirect Collateral Review

"Doubly indirect collateral review" involves that unwieldy situation where all three court systems are implicated by the enforcement action. Here, the judgment arises in one jurisdiction, for instance, a tribal court. The defendant does not pay voluntarily and the plaintiff seeks enforcement in the state court system. The defendant then seeks the protection of the federal court against the state enforcement of the tribal judgment. National Farmers Union would have involved a doubly indirect collateral review of this type if the insurance company had sued in federal court to halt Sage's suit in state court to enforce the tribal court judgment. Or, if the state court refused to enforce Sage's tribal court judgment, and Sage sued in federal

court to compel state enforcement. These issues are discussed in Parts V(A) and (B), below.

Another kind of doubly indirect collateral review in federal court is the other side of the National Farmers Union coin, where the plaintiff recovers an off-reservation judgment and seeks on-reservation enforcement, which is either refused or granted by the tribal court. Now, the original plaintiff sues in federal court seeking to compel, or the original defendant sues to block, the tribal court's enforcement of the state court judgment. These issues are discussed in Parts VI(A) and (B), below. This article will conclude in Part VII with some recommendations of where the law ought to go and some predictions of where it will go.

II. SOME BACKGROUND, DISCUSSING THE CASES NOT DIRECTLY BEFORE US

Even though the topic of this article is the enforcement of judgments across Indian reservation boundaries, we begin with some non-Indian law, excessive non-Indian law, possibly, for some. While it is true that tribes are neither states nor foreign countries,\(^\text{18}\) the American law with respect to the enforcement of judgments across state and foreign borders provides necessary background for the present discussion. Furthermore, any discussion of cross-boundary enforcement in the United States must begin with the prototype hypothetical, where a judgment is being enforced across state lines.

A. The Non-Indian Cross-Boundary Cases, In Which Federal Courts are Usually Not Involved

1. Pure Full Faith and Credit between States

The hypothetical is this:

\(AB\ vs. \ CD\) in Texas state court, judgment for \(AB\).

Texas appeal; affirmed.

\(AB\ vs. \ CD\) in Arkansas state court to enforce the Texas state court judgment.

Here is full faith and credit in its most pristine form. The Arkansas court must, under 28 U.S.C. § 1738 and the United States Constitution, recognize the Texas judgment. As the Supreme Court recently stated in \textit{Baker v. General Motors}

Regarding judgments... the full faith and credit obligation is exacting. A final judgment in one state, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.20

The exceptions are few: (1) Arkansas must only give the judgment the force that Texas would, so if it is unenforceable in Texas, it is unenforceable in Arkansas;21 (2) Texas must have had personal and subject matter jurisdiction over CD under federal constitutional principles;22 (3) the Texas judgment must not have been satisfied;23 and (4) penal judgments are not entitled to full faith and credit, though judgments for punitive damages are.24

Most importantly, perhaps, under the full faith and credit doctrine, Arkansas may not refuse to recognize the Texas judgment because of its own strong public policy.25 In Baker, the Supreme Court described the relationship between the Full Faith and Credit Clause and the public policy of the receiving jurisdiction (called the "forum state" in the quotation below) this way:

A court may be guided by the forum State's "public policy" in determining the law applicable to a controversy. But our decisions support no roving "public policy exception" to the full faith and credit due judgments. In assuming the existence of a ubiquitous "public policy exception" permitting one State to resist recognition of another State's judgment, the District Court in the Bakers' wrongful death action . . . misread our precedent. "The full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation." We are "aware of [no] considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to [a money] judgment outside the state of rendition."26


21. See Baker, 522 U.S. at 233. In particular, Justice Kennedy referred to "the undisputed principle that courts need give a prior judgment no more force or effect that the issuing State gives it . . . ." Id. at 247 (Kennedy, J., concurring). This statement should not be read to suggest that a receiving court must give exactly the same force or effect to a judgment as the issuing state would. As mentioned below, the receiving state will use its own execution process for the enforcement of judgment, after applying its own statutes of limitations and exemption laws. See infra text accompanying note 27.


24. Id.

25. See Baker, 522 U.S. at 232-37; LEFLAR, supra note 23 at § 75.

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In the actual enforcement of the Texas judgment, however, Arkansas will use its own execution process, not Texas', and will apply its own exemption laws and statutes of limitations. The Baker court stated:

Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the even-handed control of forum law. Orders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority. 27

2. Pure Comity, In the Cross-National-Borders Situation

The hypothetical is this one:

AB vs. CD in Hungarian court, judgment for AB.
Hungarian appeal, affirmed.
AB vs. CD in Arkansas state court to enforce the Hungarian judgment.

Full faith and credit, of course, does not apply to judgments from foreign nations. 28 Instead, comity, a more flexible rule, obtains permitting the receiving court greater discretion in determining whether to recognize the judgment. 29 Instead of the very limited circumstances of non-recognition of full faith and credit mentioned above, the standard principles of comity allow for a denial of recognition in four major classes of cases. First, where the judgment seriously offends local public policy; second, where the judgment is not in conformity with fundamental procedural fairness; third, where the judgment was procured by fraud; or finally, where the judgment was issued by a court without proper subject matter and personal jurisdiction. 30

The usual case cited in an explanation of comity is Hilton v. Guyot, 31 but that case does not apply directly to the current hypothetical. In Hilton, the Supreme Court set the rule of comity for federal courts when a foreign nation judgment is presented

27. Id. at 235-36 (citations omitted) (footnote omitted).
28. See LEFLAR, supra note 23 at 251.
29. See id. at 250.
30. See Ransom et al., supra note 3 at 250-52 (remarks of Professor Newton).
31. 159 U.S. 113 (1895).
for enforcement, but did not require that the same rule be used in state courts. 32 Hence, Arkansas's version of comity will govern the recognition of the case.

Roughly one half of the states have adopted the statutory Uniform Foreign Money-Judgment Recognition Act (UFM-JRA). 33 The UFM-JRA, in turn, embodies much of the law of Hilton. For instance, section 4 provides for three mandatory reasons for non-recognition, and six discretionary reasons:

(a) A foreign judgment is not conclusive if

(1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) the foreign court did not have personal jurisdiction over the defendant; or

(3) the foreign court did not have jurisdiction over the subject matter.

(b) A foreign judgment need not be recognized if

(1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;

(2) the judgment was obtained by fraud;

(3) the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state;

(4) the judgment conflicts with another final and conclusive judgment;

(5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

32. See Success Motivation Inst. of Japan, Ltd. v. Success Motivation Institute, Inc., 966 F.2d 1007, 1009-10 (5th Cir. 1992); Sompotex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971); McCord v. Jet Spray International Corp., 874 F.Supp. 436 (D.Mass. 1994). As the citations indicate, these cases dealt with the related question of whether Hilton's federal rule of comity should apply in a federal diversity case, under Erie, holding that it does not. See supra text accompanying notes 53-56. See also Bruce J. Downey III, Note, Enforcement of Foreign Judgments in Federal Courts, 49 N.C. L. Rev. 747 (1971). Dr. Leflar stated the proposition in the text directly, but without citation of authority, other than his estimable own: "The doctrine [of retaliation found in Hilton] has received scant approval from commentators and is not binding on state courts." LEFLAR, supra note 23 at 251.

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(6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of that action.\(^{34}\)

In states like Arkansas that have not adopted the UFM-JRA, state common law will apply.\(^{35}\) While the common law of comity is in large part captured by the UFM-JRA, one of the principal differences between the two in some states is that the former may require enacting states to retaliate against foreign countries that do not enforce the enacting state's judgments.\(^{36}\) Actually, the uniform version of the UFM-JRA does not require retaliation, nor does it even seem to permit it, as retaliation is not listed under section 4's discretionary reasons for non-recognition. However, some enacting jurisdictions have added a non-uniform variation that permits retaliation. For example, North Carolina's version of section 4(b) adds to the six discretionary reasons for non-recognition quoted above, a seventh, which reads:

(b) A foreign judgment need not be recognized if:

\[\ldots\]

(7) The foreign court rendering the judgment would not recognize a comparable judgment of this State.\(^{37}\)

State common law might, or might not, have such a requirement.

Thus, in states that use retaliatory comity by statute or common law, a court may refuse to enforce a foreign nation judgment even though the judgment otherwise meets the requirements of comity, as above. For example, a judgment that does not offend local sensibilities, was granted in conformity with fundamental procedural fairness, was not procured by fraud, and was issued by a court with proper subject matter and personal jurisdiction might still be unenforceable in a state that retaliates. The refusal by the receiving court to enforce the judgment, in other words, will not be based on any particular shortcoming of the judgment presented for enforcement, but rather on the refusal of the rendering jurisdiction to enforce prior judgments presented to it by the receiving jurisdiction.

Dr. Leflar thought that there should be no retaliation doctrine: "It has no appreciable tendency to induce a change in the foreign nation's law."\(^{38}\) Judge Learned Hand, commenting on *Hilton* and retaliation, wrote:

[The Supreme Court] certainly did not mean to hold that an American

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37. N.C. GEN. STAT. § 1C-1804. Massachusetts and Texas have similar non-uniform variations, see MASS GEN. LAWS ANN. ch. 235 § 23A (West 1986) and TEX. CIV. CODE ANN. § 36.005 (West 1997).
38. See LEFLAR, supra note 23 at 250 (citing Kurt H. Nadelmann, Reprisals against American Judgments?, 65 HARV. L. REV. 1184 (1952)). Professor Nadelmann was the Reporter of the UFM-JRA. Dr. Leflar may have influenced the drafters of the UFM-JRA to avoid retaliation; the Official Comment to § 3 states that "[t]he method of enforcement will be that of the Uniform Enforcement of Foreign Judgments Act of 1948 . . . ." Dr. Leflar was the reporter of that uniform act. See generally Robert A. Leflar, Act 34: The New Uniform Foreign Judgments Act, 3 ARK. L. REV. 402 (1949).
court was to recognize no obligations or duties arising elsewhere until it appeared that the sovereign of the locus reciprocally recognized similar obligations existing here. That doctrine, I am happy to say, is not part of American jurisprudence.\(^3\)

Furthermore, it can be seen that retaliation penalizes a plaintiff who owns a judgment unobjectionable on its merits for aspects of the rendering jurisdiction's law unrelated to the issuance of the plaintiff's judgment.

The doctrine of comity, as applicable in a state court asked to enforce a foreign-nation money judgment, is a flexible one that may allow non-recognition for reasons having nothing to do with the judgment itself. It has none of the compulsory nature of full faith and credit. Nevertheless, as Dr. Leflar noted, modern conflicts jurisprudence has turned the receiving state's inquiry away from substance and toward procedure:

Ordinarily American courts do give effect to foreign judgments, and refuse to do so only in extraordinary situations. . . . [M]ere differences in local law do not necessarily give rise to the strong policy objections which justify refusal to recognize foreign judgments. Difference in strong public policy among civilized states today should not readily be found when judgments have been rendered under circumstances which satisfy our own basic concepts of due process of law.\(^4\)

We may now turn to the application of these principles of full faith and credit and comity in federal courts.

**B. Federal Courts in Non-Tribal Enforcement Actions**

1. Federal Courts and Full Faith and Credit for State Court Judgments

The hypothetical is this:

\(AB\) vs. \(CD\) in Texas state court, judgment for \(AB\).

Texas appeal; affirmed.

\(AB\) vs. \(CD\) in Arkansas federal district court to enforce the Texas state court judgment.

When this hypothetical is presented to those who practice and teach conflicts law, the common response is "Why federal court?" Concededly, most cross-state-boundary enforcement issues arise in state courts, not federal courts. In fact, as there is no general federal enforcement-of-judgment law, but rather only a referral in Rule 69 of the Federal Rules of Civil Procedure to state law, one has to work hard to explain the hypothetical. First that explanation; then the solution to the hypothetical.


\(^4\) LEFLAR, supra note 23 at 251-52.
Under full faith and credit, the enforceability of the Texas judgment in Arkansas depends on whether there was proper jurisdiction in Texas. If CD appeared in the Texas proceedings, then any objections to Texas's jurisdiction were either litigated or waived. In either case, they cannot be raised collaterally in the enforcement proceeding. Suppose instead that the original Texas judgment was by default, and CD now wishes to raise the jurisdictional issue in the enforcement action in Arkansas. This will be an *International Shoe*, "minimum contacts," "fair play and substantial justice" inquiry. Suppose further that AB, the Texas plaintiff, had been reaching long to establish jurisdiction in the Texas court over the Arkansas defendant; perhaps CD's contacts with Texas were barely "minimum," and arguably non-existent. It is understandable that, in the collateral review that will exist in the enforcement action, AB would want to reduce as much as possible the "homecourt advantage" that he fears CD will have in Arkansas. AB chooses the federal district court for that purpose, even though he knows that once the court holds the Texas judgment entitled to recognition in Arkansas, the rest of the process will go on under Arkansas law. That will include the application of Arkansas exemption law, where one can get pretty seriously "homecourted." Nonetheless, it is understandable that AB might wish to proceed in federal district court.

Now, does the Arkansas federal district court have jurisdiction? Yes, if the parties are of diverse citizenship and the Texas judgment is for more than $75,000, otherwise, no. The fact that the plaintiff's Texas judgment is entitled to full faith and credit in Arkansas under 28 U.S.C. § 1738 does not, by itself, mean that the federal court has jurisdiction under 28 U.S.C. § 1331. The Supreme Court has said: [T]he [full faith and credit] clause has nothing to do with the conduct

41. *See* Baldwin v. Iowa State Traveling Men's Assoc., 283 U.S. 522 (1931). *See also* Hazen Research Inc. v. Omega Minerals, Inc., 497 F.2d 151 (5th Cir. 1974), which explains the law quite clearly: Where the defendant has appeared in the original action, the judgment in that cause is res judicata on the issue of personal jurisdiction, whether the defendant actually litigated the question or merely permitted it to pass without objection. Defense to an adverse judgment on the basis of the failure of the rendering court to obtain jurisdiction of the person is therefore foreclosed, unless the peculiar law of the state in which the judgment was rendered would honor such a collateral attack. In those cases, however, in which the defendant makes no appearance and the judgment goes by default, the defendant may defeat subsequent enforcement in another forum by demonstrating that the judgment issued from a court lacking personal jurisdiction.

42. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945); *Hazen Research*, 497 F.2d at 155 (5th Cir. 1974).

43. Arkansas has a generous homestead exemption, *see* ARK. CONST. art. 9, §§ 3-5, though less generous for the owners of spacious homesteads than Florida's, South Dakota's, and Texas', among others. *See* FLA. CONST. art. X, § 4, S.D. CODIFIED LAWS § 43-31-1, TEX. PROP. CODE ANN. § 41.001, all of which provide for unlimited homestead exemptions. So, in the hypothetical given, AB is unlikely to be unfairly surprised, nor "homecourted" by Arkansas's homestead exemption. Nevertheless, the point is more general than this: exemption laws in particular may be read by courts to protect debtors in ways that seem outlandish to creditors from out of town. *See* Lawrence Ponoroff, *Exemption Limitations: A Tale of Two Solutions*, 71 AM. BANKR. L.J. 221, 235, nn. 67-69 (1997)(discussing the use of generous homestead laws by corporate raider Paul Bilzerian, baseball commissioner Bowie Kuhn, and Texas Governor John Connally).

44. 28 U.S.C. § 1332. *See, e.g., Hazen Research*, 497 F.2d at 151. The court in *Hazen* observed: In this case plaintiff has founded jurisdiction on diversity of citizenship, and we have the rather anomalous situation of a federal diversity court deciding a controversy in which Congress has, by the exercise of its express and implied powers, federalized all relevant legal questions - a diversity case in which there are no issues of forum state law.

*Id.* at 154 n.1.
of individuals or corporations; and to invoke the rule which it prescribes does not make a case arising under the Constitution or laws of the United States. 45

Suppose diversity jurisdiction exists. The cause of action in the federal court will then be the Texas judgment because the underlying cause of action was merged with the judgment in the Texas proceeding and can no longer be sued upon. 46 Federal full faith and credit principles apply, notwithstanding Erie. 47 Alternatively, some would suggest that even if the federal court should use Arkansas law under Erie, a part of Arkansas law is the federal requirement of full faith and credit, found in 28 U.S.C. § 1738. 48 Either way, the Arkansas federal district court will apply the requirements of full faith and credit to determine if the judgment should be recognized. If full faith and credit compels recognition, Rule 69 of the Federal Rules of Civil Procedure instructs that Arkansas process (including Arkansas exemptions and Arkansas statutes of limitations) should be used to enforce the judgment. 49 These Arkansas procedures will be executed by the federal marshal, not the county sheriff, but otherwise enforcement is under state law.

2. Federal Courts and Comity for Foreign-Nation Judgments
The hypothetical is:
AB vs. CD in Hungarian state court, judgment for AB.
Hungarian appeal; affirmed.
AB vs. CD in Arkansas federal district court to enforce the Hungarian judgment.

Here, federal alienage diversity jurisdiction under 28 U.S.C. § 1332(a)(2) is likely to exist, unless the judgment is small. 50 If the parties are not diverse, federal question jurisdiction under 28 U.S.C. § 1331 will exist only if there is some underlying federal issue, for example, where the suit is related to a subject of federal arbitration rules. 51

First, assume that only diversity jurisdiction exists in federal court. The cause of action will be the Hungarian judgment, and Arkansas law will apply under Erie. Suggestions have been made in the cases that federal enforcement of judgment law

46. See LEFLAR, supra note 23 at 222-23.
47. See Hazen Research, 497 F.2d at 155 n.1. See also LEFLAR, supra note 23 at 222.
48. See LEFLAR, supra note 23 at 222.
49. The Statute of Limitations question is made rather complex because of the Supreme Court's holding in Watkins v. Conway, 385 U.S. 188 (1966). This case permitted the states to have statutes of limitations that discriminated against out-of-state judgments so long as the states also permitted the plaintiff to return to the original forum state to "freshen up" the judgment so as to satisfy the receiving state's short statute of limitations See id. at 189-190. See, e.g., Durham v. Arkansas Department of Human Services, Child Support Enforcement Unit, 912 S.W.2d 412, 414 (1995).
should apply in diversity cases. In fact, Hilton v. Guyot, the case establishing the federal rule of comity, was a diversity case, but that case predates Erie Railroad Co. v. Tompkins and Klaxon Co. v. Stentor Electric Manufacturing Co., which together serve to apply state conflicts law in federal diversity cases.

If the federal court's jurisdiction is based on federal question jurisdiction under U.S.C. § 1331, then the federal rule of comity applies, regardless of the local state rule. This is the precise holding of Hilton v. Guyot. As mentioned above, in Hilton, the Supreme Court appeared to make retaliation a part of the federal common law, but lower federal courts have been able to avoid that requirement when it has been deemed desirable to do so.

C. The Cases in State or Tribal Courts Involving Judgments Crossing Reservation Boundaries

We now move finally to American Indian law, though not yet to our final destination. Before tackling the question of the role of the federal courts in the cross-reservation-boundary enforcement of judgments, it is required, for reasons that will become clear, to relate the law when enforcement is sought in state or tribal courts, beginning with the former.

52. In Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson, 597 F.2d 1161 (9th Cir. 1979), the Province sued in Oregon federal district court, seeking to enforce a tax claim against the defendants. The district court dismissed under the so-called "revenue rule," that is to say that one jurisdiction does not enforce the tax laws of another jurisdiction, 433 F.Supp. 410 (D. Ore. 1977). The Ninth Circuit affirmed, noting initially that:

In a diversity action, a federal district court applies the law of the forum state. Not only the substantive law, but also the conflicts of law rules of the forum are applied in diversity actions. Normally, this would automatically limit our analysis to the law of Oregon since it is the forum state in the present case. However, the question presented here carries foreign relations overtones which may create an inference that this should not be decided merely by reference to Oregon law.

597 F.2d at 1163 (citations omitted) (emphasis added). At this point, the court subtended a footnote:

The United States has entered into two tax treaties with Canada. Cf. Banco Nacional de Cuba v. Sabbatino, [376 U.S. 398, 424-427 (1964)], where [the] Court found that the scope of the act of state doctrine was to be decided by reference to federal rather than state law. But cf. Toronto-Dominion Bank v. Hall, 367 F. Supp. 1009 (E.D. Ark. 1973), where the court noted that "suits of this kind necessarily involve to some extent the relations between the United States and foreign governments and for that reason perhaps should be governed by a single uniform rule," but then went on to apply Arkansas state law. 367 F.Supp. at 1011-1012.

Her Majesty the Queen, 597 F.2d at 1163, n.2. (citations omitted).

53. 159 U.S. 113 (1895).
54. 304 U.S. 64 (1938).
55. 313 U.S. 487 (1941).
57. 159 U.S. 113 (1895).
58. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). Here, the Supreme Court wrote:

"Although Hilton v. Guyot, 159 U.S. 113, contains some broad language about the relationship of reciprocity to comity, the case in fact imposed a requirement of reciprocity only in regard to conclusiveness of judgments, and even then only in limited circumstances."

Id. at 411. See also, Her Majesty the Queen, 597 F.2d at 1164 ("We recognize that the reciprocity requirement has fallen into some disfavor," citing RESTATEMENT SECOND OF CONFLICTS OF LAWS, § 98, Comment e.); Tahan v. Hodgson, 662 F.2d 862 (D.C. Cir. 1981); Direction der Disconto-Gesellschaft v. United States Steel Corp., 300 F. 741, 747 (S.D.N.Y. 1924), aff'd, 267 U.S. 22 (1925).
1. Enforcement of Tribal Judgments in State Courts

The hypothetical is this:

AB vs. CD in tribal court, judgment for AB.

Tribal appeal; affirmed.

AB vs. CD in Arkansas state court to enforce the tribal court judgment.

Most of the published Indian law cases involve this hypothetical, and, of course, these cases come out of the state court systems. No consistent rule is established by those cases and it is difficult to discern a trend. Other than establishing the rule for the particular state involved, these cases do little to advance the discussion. Sheppard, Buell, Jim, and Cowboy apply a form of full faith and credit, while the others apply some form of comity.

As a group, these cases leave many more questions unanswered than answered: Does 28 U.S.C. § 1738 require the state court to give full faith and credit to the tribal judgment? Some cases so hold, usually under the theory that tribes are "territories" of the United States under the language of 28 U.S.C. § 1738. Others reject the application of that ambiguous language to tribes without clear legislative history showing that was Congress's intent. Does full faith and credit apply under some federal law other than U.S.C. § 1738, or under some state law? There are such particular and carefully drafted federal laws that impose full faith and credit for specific subject areas. When those specific subject areas are not involved in a case, some courts find a "negative pregnant" and hold that full faith and credit does not apply, while others reject the "negative pregnant" theory. Is some federal principle other than full faith and credit applicable, or is recognition of tribal judgments purely


60. See Wilson v. Marchington, 934 F.Supp. 1187 (D. Mont. 1996), rev'd on other grounds, 127 F.3d 805 (9th Cir. 1997). The lower court in Wilson noted:

A review of the decisional law relative to the recognition of tribal court judgments outside the boundaries of the reservation reveals that the federal courts have not dealt with full faith and credit and comity issues between tribal courts and federal and state courts in an in-depth manner.


62. See, e.g., Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997).

ENFORCEMENT OF MONEY JUDGMENTS

2. Enforcement of State Judgments in Tribal Courts

If the law coming out of the state courts forms no unified whole, the law from tribal courts is obscure in a different way. While one suspects that there is more of a trend toward the use of comity in tribal courts, it is difficult to verify that assumption, as tribal common law is less accessible than is state common law.67 Interestingly enough, the most famous tribal court case, *Eberhard v. Eberhard*,68 from the Court of Appeals of the Cheyenne River Sioux Tribe, is one of the few tribal court cases that opts for a congressionally imposed full faith and credit regime.

3. Negotiation

The *Eberhard* case shows the difficulty of the choice that must be made by a tribal court presented with a state court judgment for recognition. At issue here was the future of a very young tribal member, whose father was litigating her custody in tribal court while her mother was litigating her custody in California state court.69 In the published opinion, the court of appeals first determined that it was bound by federal law generally to give full faith and credit to state judgments.70 While the narrow holding interpreted the Federal Parental Kidnapping Prevention Act71 (PKPA), the structure of the opinion made it clear that the court considered the broader requirements of 28 U.S.C. § 1738 to apply to the tribe.72 By the end of the opinion, however, and using a creative reading of the PKPA, the court declined to enforce the California decree.73

The attraction of full faith and credit to the Cheyenne River Sioux Court of Appeals was clearly that, under its view of the PKPA, the courts of California would have to give full faith and credit to the tribal court's custody decrees.74 This federally mandated respect was so attractive to the tribal court that it considered the PKPA's purported imposition on the unconsenting tribe to be an enhancement of tribal sovereignty, a conclusion I disputed in the article cited above.

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67. Dean Newton has taken an important step to remedy this situation with her article, Nell Jessup Newton, "Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts," 22 Am. Indian L. Rev. 285 (1998).
69. See id.
70. See id.
71. 28 U.S.C. § 1738A.
72. See 24 Indian L. Rep. at 6064.
73. See id. at 6067-68.
74. See id. at 6066.
I do not dispute, however, the desire for cross-boundary respect. The question boils down to this: How much is a tribe willing to give up in terms of the discretion its judges have when presented with state judgments, in order to ensure that the judgments of those tribal judges will be respected by state courts? In views expressed in more detail elsewhere, I concluded that that question is better answered, not in the litigation setting, but in negotiations between states and tribes, with the federal government as an onlooker, but not as a decision maker. That is to say that tribal judges, tribal councils or tribal chiefs, presidents, chairmen or governors should negotiate with their counterparts in state government to determine how best to manage the cross-boundary enforcement of judgments, choosing full faith and credit, comity or some entirely new formulation as best fits their own governmental needs.

4. Asymmetry

A tribal judge once informally suggested over lunch that what would be best from his point of view would be a regime where state courts would give his judgments full faith and credit, but where he only had to give comity to incoming state court judgments. I acknowledged the beauty of such a system from a tribal perspective and the conversation moved on.

The judge's offhand suggestion, with tongue at least partly in cheek, struck some at the lunch, and later, as so politically and theoretically insupportable as to be not worth discussing, but it got me to thinking about the asymmetry involved in such a solution. While I have come to agree that the lunchtime proposal is unworkable in its directness, I have, since that day, become the most vocal proponent of an asymmetric solution to the cross-boundary enforcement problem.

It is my view that fundamentally different concerns exist depending on whether the judgment is incoming, from a tribal perspective, or outgoing: the tribal court is most mindful of the public policy issues at work in the judgment presented for enforcement, while the state court is most mindful of the fairness of the procedures in the court that rendered the judgment. The reasons for this asymmetry are several. First, tribes are generally so small and states are generally so large that the public policies reflected in an incoming state judgment present greater threats to tribal sensibilities than when the situation is reversed. Next, there is a federal check on state court civil procedures, but none on tribal court procedures. Also, the United States Constitution applies to state court procedures but not to tribal court procedures, and finally, the economic realities are that more tribal members must do business off-reservation than non-members on-reservations.

My reaction to the asymmetry of these needs is an asymmetric solution: that full faith and credit not apply; that tribal courts have a comity-like discretion when

77. See Talton v. Mayes, 163 U.S. 376 (1896).
presented with a state court judgment; that comity be more sensitive to local public policy than is the case when a large and economically healthy state is presented with a judgment from abroad; that the state court be permitted a "fairness check" under the ICRA on the procedures used by the tribal court in granting the judgment. 78

5. Concluding Thoughts

There has been considerable debate, some of it intemperate, in recent years among various Indian law scholars concerning the issues just addressed. 79 Much of the disagreement among us relates to the very different role that public policy plays in full faith and credit and comity. Advocates of full faith and credit are willing to put on-reservation sensibilities aside for the sake of the off-reservation recognition of tribal court judgments. Advocates of comity see a greater threat to on-reservation sensibilities in the tension between the policies supporting incoming judgments and closely-held local norms, even while noting that most often, even under comity, the incoming judgment is enforced. 80 Advocates of asymmetry see more need for a public policy exception when on-reservation enforcement of a state judgment is sought than when off-reservation enforcement of a tribal judgment is sought, and furthermore, a more sensitive public policy inquiry than is appropriate when the receiving jurisdiction is large. 81 I have recently offered a "reconciliation" that attempts to show that both full faith and credit and comity are essentially asymmetric, 82 but advocates of the symmetric versions of both of those are apt to see the "reconciliation" as an attempt to get asymmetry into the room through the back door.

Without an experiment, it is difficult to predict what will actually happen. With full faith and credit, will tribal courts become mere collection agencies for offreservation car dealers? Without full faith and credit, will every state court find some reason not to enforce every tribal court judgment presented? Can the legal system tolerate an asymmetric approach?

The experiment is in the works. In the absence of a definitive rule from the United States Supreme Court, various states and tribes are reaching different conclusions on the questions. Congress occasionally legislates the rule for certain subject matter areas (for example, non-divorce child custody orders 83) but more often leaves the choices for the state, tribal and federal courts. Some states and some tribes have negotiated resolutions to the problem. These developments are mostly nascent, and it is too soon to know whether one system is best for all situations. Only time


80. See LE'FLAR, supra note 23.

81. Correspondingly, asymmetrics, some of us anyway, see a greater need for the ICRA "fairness" check on an outgoing tribal judgment than for a constitutional "fairness" check on an in-coming state judgment.


will tell.

With this lengthy background discussion, we may now turn to the precise topic of this article: What role, if any, do and should the federal courts play in the cross-reservation-boundary enforcement of judgments?

III. A FEDERAL COURT RECEIVING A TRIBAL COURT JUDGMENT FOR OFF-RESERVATION ENFORCEMENT: Wilson v. Marchington

The hypothetical is this:

AB vs. CD in tribal court; judgment for AB.

Tribal appeal; affirmed.

AB vs. CD in federal court to enforce the tribal court judgment off-reservation.

Diversity jurisdiction under 28 U.S.C. § 1332 requires that AB and CD be citizens of different states and that at least $75,000 be in controversy. AB's tribal membership will not be enough to invoke federal diversity jurisdiction; there is no specific federal diversity jurisdiction for lawsuits brought by non-Indians against Indians, or vice versa, as there is when the parties are of diverse state or national citizenship.

84. The Montana federal district court wrote two opinions in the case of Wilson v. Marchington. The first, found at 934 F. Supp 1176 (D. Mont. 1995) addressed only the merits of the question of whether the tribal court had jurisdiction over the underlying cause of action and the non-Indian defendant. After expressing considerable doubt that the answer to that question either was, or should be, "yes," see Wilson, 934 F.Supp. 1181-86, the court determined that it was required to follow the Ninth Circuit precedent found in Hinshaw v. Mahler, 42 F.3d 1178 (9th Cir. 1994), see Wilson, 934 F. Supp. at 1187. Thus, the plaintiff's motion for summary judgment was granted. Id.

In the second opinion, found at 934 F.Supp. 1187 (D. Mont. 1996), the district court addressed the question of whether it should recognize and enforce, off-reservation, the tribal court's judgment, finding that it should, id. This determination was appealed by the defendant.

The Ninth Circuit, then, reversed the second district court opinion on the grounds initially stated by the first district court opinion, holding that Hinshaw was effectively overruled by an extension of Strate v. A-I Contractors, 520 U.S. 438 (1997), and was no longer binding precedent, 127 F.3d 805, 815 (9th Cir. 1997).

85. Sound policy might well support the creation of such jurisdiction, tribal members falling, as they do, nicely between American citizens of different states and foreign nationals in terms of the general reception that they might expect to receive when entering the courts away from their homelands.

Would it be constitutional for Congress to make such a change? In Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), the Court held that the Cherokee Nation was not a "foreign nation" as that term is used in U.S. CONST. art. III, § 2, cl. 1. It likely follows that the Cherokees individually are not the "foreign... Citizens" mentioned in the same clause. While it is true enough that occasions are rare where the Supreme Court has stricken a congressional enactment as beyond the power granted by the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), the Court did just that in a case involving the jurisdiction of the federal courts. Seminole Tribe implicates the Eleventh Amendment, and the reform suggested above does not; nevertheless, it is reasonably certain that the present Supreme Court would balk at the expansion of federal court jurisdiction to reach cases brought by or against Indians. Cf. National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582
Does federal question jurisdiction exist under 28 U.S.C. § 1331? Applying usual state-to-state enforcement of judgment law, AB's federal complaint would not seem to give rise to a federal question, as she is only seeking federal court recognition. In the state-to-state situation, such recognition is considered to be only indirectly related to, not "arising under" federal law. 86

The second lower court opinion in Wilson v. Marchington, 87 is to the contrary when the judgment whose recognition is sought is from a tribal court. Wilson sued Marchington in tribal court and won. The tribal appellate court affirmed. 88 Wilson then sued in Montana federal district court to enforce the judgment off-reservation, presenting exactly the situation contemplated by the present hypothetical. Wilson alleged both diversity and federal question jurisdiction. 89 The district court held that both types of federal jurisdiction existed. 90

Why does it matter? In other words, why did the district court find it necessary to hold that both kinds of jurisdiction exist when just one would do? In the first place, diversity jurisdiction has a $75,000 amount-in-controversy requirement, 91 so small tribal judgments would not be enforceable in federal court if only diversity jurisdiction existed, though that was not a problem in Wilson.

The District Court in Wilson thought it also mattered what the basis of jurisdiction was in order to determine whether the court would follow a federal rule regarding the recognition of tribal judgments, or had to follow Montana's rule of recognition. The court thought that if diversity were the only grounds for federal jurisdiction, then state, not federal, enforcement of judgment law would have to apply under Erie 92

This is at least partly correct. It is correct to note that generally, there is no federal enforcement of judgment law. Rule 69 of the Federal Rules of Civil Procedure requires the federal court to use "the practice and procedure of the state in which the district court is held." 93 Because of this, as mentioned above, most cross-boundary enforcement actions are brought in state, not federal court, and federal marshals do not execute civil judgments as a general matter. Even when they do, they use state execution process. 94

It is also correct, again as mentioned in the background discussion above, that in the cross-national-boundaries situation, the usual rule is that in diversity cases, under Erie, state, not federal, rules of comity control. 95 There is an argument, however, that when federal interests dominate, federal law should control, even in

86. See CHARLES ALAN WRIGHT et al., supra note 45 at 50.
88. See Wilson, 934 F. Supp. at 1178, n.2.
89. See Wilson, 934 F. Supp. at 1189.
90. See Id. at 1189.
94. See discussion supra note 49.
diversity cases.\textsuperscript{96} Of course, it is Indian law dogma that, in this field of all fields, federal interests dominate over state interests.\textsuperscript{97}

It is also correct that, in the cross-state-boundaries situation, diversity jurisdiction must exist in order to use the federal courts to enforce out-of-state judgments, unless there is some federal question involved other than full faith and credit. As noted above, pleading the Full Faith and Credit Clause in a complaint does not establish 28 U.S.C. § 1331 federal question jurisdiction.\textsuperscript{98} Additionally, in diversity cases, \textit{Erie} generally requires the use of state law.\textsuperscript{99}

The result in \textit{Klaxon v. Stentor Electric Manufacturing Co.},\textsuperscript{100} does not mean that in diversity cases full faith and credit does not apply in the across-state-lines situation. Just as the states themselves must apply the federal requirements of 28 U.S.C. § 1738, federal full faith and credit is the rule in 28 U.S.C. § 1332 diversity cases.\textsuperscript{101} True enough, that does not make full faith and credit a 28 U.S.C. § 1331 "federal question." That is to say, it remains a federal question in diversity cases whether the particular judgment is entitled to full faith and credit, even though the same case does not present a federal question in the 28 U.S.C. § 1331 sense.

Thus the \textit{Wilson} lower court's precise concern was misplaced. It could have held the recognition question to be a federal one even if its jurisdiction were only based on diversity of citizenship, and even if 28 U.S.C. § 1738 did not apply. Notwithstanding \textit{Klaxon}'s holding that \textit{Erie} requires federal courts to use state conflicts law in diversity cases, the federal requirement of full faith and credit still applies in those cases as a federal imposition on state law. Similarly, if the court had held that federal interests dominate when a tribal judgment was involved, as the court clearly believed, and following the suggestion of those non-Indian cases that have made a parallel holding,\textsuperscript{102} the court could have applied the federal rule in a diversity case.

The \textit{Wilson} district court wrote:

\begin{quote}
In view of the unique status occupied by Indian Tribes under our law, . . . , it is, in the opinion of this court, imperative, not only that a uniform body of law develop in relation to the recognition and enforcement of civil judgments rendered in the various tribal courts, but that issues relating to the recognition and enforcement of the judgments be resolved in accordance with federal law. In this fashion, disruption
\end{quote}

\textsuperscript{96} See 18 CHARLES ALAN WRIGHT et al, supra note 45, § 4473 (1981 & Supp. 1997) and cases cited therein. \textit{See also} Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson, 597 F.2d 1161 (9th Cir. 1979).


\textsuperscript{100} See id.

\textsuperscript{101} Cf Leflar, supra note 23, at 222 (while it is true that the full faith and credit mandates of 28 U.S.C. § 1738 apply both to the state courts and to the federal courts in diversity cases, that does not necessarily mean that all aspects of res judicata and preclusion have been federalized). \textit{See also} Heiser v. Woodruff, 327 U.S. 726 (1946); Follette v. Wal-Mart Stores, Inc., 41 F.3d 1234 (8th Cir. 1994).

\textsuperscript{102} See Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson, 597 F.2d 1161 (9th Cir. 1979).
of the relationship between the various Indian Tribes and the United States will be avoided. 103

All of this is entirely sensible in my view, and good policy, required by most of what we know as American Indian law. However, the lower court's next sentence is more problematic based on the precedent:

Recognition of the existence of federal question jurisdiction over an action prosecuted for the purpose of seeking recognition and enforcement of a tribal court judgment is compelled by the relationship extant between the United States and the various Indian Tribes. 104

The question is whether this sentence follows from the court's prior discussion. As the state-to-state situation shows, the fact that federal law dominates the question does not always mean that 28 U.S.C. § 1331 jurisdiction exists. It does not in the across-state-borders situation when the only federal law implicated is the Full Faith and Credit Clause and 28 U.S.C. § 1738. It requires some stretching of the non-Indian cross-boundary enforcement precedent to find that these questions are "federal questions" in the 28 U.S.C. § 1331 jurisdictional sense. It would have been enough in Wilson for the district court to have found that in diversity cases the dominance of federal Indian law concerns requires the application of a federal rule of recognition. This, too, would have stretched current 28 U.S.C. § 1332 law, though less so than 28 U.S.C. § 1331 requires.

On appeal, the Ninth Circuit in Wilson avoided the issue and seemed indifferent about how the district court had obtained jurisdiction. 105 The court did not mention whether Wilson was proceeding under diversity or federal question jurisdiction, but applied a federal rule of recognition. 106

As we will see by the end of this article, without the Wilson lower court's holding that a suit to enforce a tribal court judgment in federal court raises a 28 U.S.C. § 1331 federal question, there will be only a small role for the federal courts to play at all in cross-reservation-boundary enforcement issues. Otherwise, the Wilson solution applies only in diversity cases, with the parties of diverse citizenship and a sizeable amount of money in controversy. Without substantial reform of various federal jurisdiction rules, the federal role will be a small one in this important area of American Indian law, where the federal courts have traditionally been the protectors of important privileges and prerogative. Of course, it must be pointed out that the federal courts play only a small role in the cross-state-boundary enforcement of judgments. The role is larger for federal courts in the enforcement of foreign nation judgments, due to alienage diversity jurisdiction, but the federal courts still apply state substantive law, including state rules of comity.

In terms of long-term law reform, one must think about the basic questions of

104. Id. at 1192.
105. 127 F.3d 805 (9th Cir. 1997).
106. See supra notes 109-13 and accompanying text.
what role the federal courts should play in this area, to what extent federal interests control, and how much we should trust the state and tribal courts to serve those federal interests. These questions will be addressed in the Conclusion. For now it is enough to note that the lower Wilson holding that 28 U.S.C. § 1331 applies in the cross-boundary enforcement situation is rather novel, and litigants are sure to face resistance from the federal courts in advancing the theory, based on the non-Indian analogies.

In conclusion, if AB and CD are of diverse state citizenship and AB's tribal court judgment is for at least $75,000, AB may use the federal courts to enforce the judgment off-reservation. In such a diversity action, a straightforward application of Erie, backed up by the usual non-Indian rules, will result in the federal court using the state enforcement of judgment law. The better result will be Wilson's, holding that it will be a question of federal law whether the tribal judgment is entitled to recognition.

If AB and CD are citizens of the same state or AB's judgment is small, there is an argument based on the lower court opinion in Wilson, that AB may use the federal court system for off-reservation enforcement, using a federal rule of recognition. This argument is based upon sound policy, but the non-Indian precedent is less strong.

In order to invoke federal court jurisdiction under 28 U.S.C. § 1331, there must be a federal cause of action. In this case, that cause of action will be based on the tribal judgment itself, and the rule that applies when tribal court judgments are presented for enforcement in off-reservation courts. The prior discussion addressed the various forms those rules might take: full faith and credit, comity and some asymmetric version of either. The question for the federal court becomes whether that rule is governed by federal statute, most obviously 28 U.S.C. § 1738, by the federal common law, or by state statutory or common law.

The Ninth Circuit in Wilson made asymmetric, non-reciprocal comity the rule of recognition in the federal courts of that Circuit. The court rather quickly dismissed the argument that 28 U.S.C. § 1738 applies to tribal court judgments, noting that neither Indians, Indian tribes, nor Indian tribal courts are mentioned in the statute. The court also declined to be bound by the rule of Montana, where the federal law suit was brought. The Ninth Circuit, however, did not adopt the lower court's view that 28 U.S.C. § 1331 created federal court jurisdiction for all actions enforcing tribal judgments, nor did it require the states of the Ninth Circuit to follow the federal rule, which it said applied in federal courts within the circuit. It rejected full faith and credit as well as the analogy to comity as it applies to foreign-nation

108. See supra notes 59-83 and accompanying text.
110. Id. at 808-09.
111. Id. at 813.
judgments, which would have traditionally required more federal court deference to the Montana's state rule of comity.\textsuperscript{112} Here, Montana's rule is specifically retaliatory, but the Ninth Circuit rejected retaliation as part of the federal rule, thus allowing for the possibility that the federal courts would enforce a Blackfeet judgment, even though the Blackfeet courts are not enforcing federal judgments.\textsuperscript{113}

All of the academic participants at the "Roundtable" held some years ago at the American Indian Law Center agreed that the rule of recognition for these cases should be a federal one.\textsuperscript{114} Former Chief Justice Ransom of the Supreme Court of New Mexico understandably desired a state rule of recognition.\textsuperscript{115}

It is interesting to note that Professor Robert N. Clinton of the University of Iowa, one of the principal proponents of full faith and credit and the apparent author of the \textit{Eberhard} opinion,\textsuperscript{116} opposed the use of comity, at least partly because comity is conventionally treated as a feature of state common law. The federal doctrine of comity is applicable under \textit{Hilton} only when a foreign-nation judgment is presented to a federal court having 28 U.S.C. § 1331 federal question jurisdiction. While the opposite result has been urged, \textit{Hilton}-style federal comity, unlike federal full faith and credit, does not preempt a state's version of comity either in an \textit{Erie}-based federal diversity case, or in a state court case. Professor Clinton thought that if comity controlled the Indian law question, it would automatically follow that any federal rule governing the cross-boundary enforcement of tribal judgments would only apply, like \textit{Hilton}, in cases where there was 28 U.S.C. § 1331 jurisdiction.\textsuperscript{117}

This observation was prescient, as the Ninth Circuit's opinion in \textit{Wilson} shows. Having established for sound reasons that asymmetric, non-retaliatory comity should be the federal rule, the court gave no hint that it thought that federal rule would preempt Montana's state law regime of symmetric, retaliatory comity.\textsuperscript{118}

But why should that be? Indian law requires one to think "outside the box." The adoption of some form of comity regime should not carry along with it all of the jurisdictional baggage that encumbers comity in the foreign-nation situation. The questions are separate. First, should the federal rule be comity, full faith and credit, or something else? Second, should whatever rule that is chosen bind the state courts

\textsuperscript{112} See Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971).
\textsuperscript{113} See Wilson, 127 F.3d at 811-12.
\textsuperscript{115} Under the law of New Mexico in place at that time and reinforced since, federal full faith and credit applies to the recognition by New Mexico state courts of tribal judgments under 28 U.S.C. § 1738 and the holding that tribes are "territories" under that statute. See Jim v. C.I.T. Fin. Serv., 533 P.2d 751 (N.M. 1975)(illustrating the case in place at the time of the Roundtable); Halwood v. Cowboy Auto Sales, Inc., 946 P.2d 1088 (N.M. Ct. App. 1997)(marking the intermediate appellate court case that was decided after the Roundtable). No comment at the Roundtable indicated that Chief Justice Ransom was committing himself to a reconsideration of that case, nor that he had predetermined his vote on any such reconsideration.
\textsuperscript{116} "Apparent" because the \textit{Eberhard} opinion is \textit{per curiam}. Nevertheless, it is commonly understood in the academic world that Professor Clinton, an Associate Justice on the Cheyenne River Sioux Court of Appeals, wrote the opinion. The opinion is clearly based on an argument first presented in Monroe Price \& Robert N. Clinton, \textit{Law and the American Indian} 357 (2d ed. 1982).
\textsuperscript{117} See id. at 255.
\textsuperscript{118} It is difficult to cite authority for this silence in the Ninth Circuit's \textit{Wilson} opinion. The existence of this undiscussed conclusion supports Professor Clinton's fear of what will become of any rule except full faith and credit.
as well as the federal courts? To say that choosing comity as the answer to the first question predetermines the answer to the second question is a non sequitur in Indian law, a field in which straightforward analogies are traditionally subject to a harsh reception. Tribes are not "like" anything; not Puerto Rico or the Mariana Islands or Alaska before it became a state; not like some private voluntary organization such as the Anti-Defamation League or the Boy Scouts; not like Kosovo or Tibet or the Vatican or East Timor or Kuwait during the Gulf War or Hungary during the Turkish occupation. They are not even much like their pre-Columbian selves anymore, at least not under the domestic law of the United States.\textsuperscript{119}

In general, comity may well be a federal rule to which the Supremacy Clause does not attach when foreign-nation judgments are involved. Whatever the merits of that conclusion, it does not determine the answer when tribal judgments are involved. Professor Clinton may be right, as the Ninth Circuit's \textit{Wilson} opinion shows, that when one suggests "comity" as the Indian law rule, a non-careful listener may suppose that one is suggesting that the Supremacy Clause need not apply. The way to avoid this unhappy result is to avoid using the word "comity" when proposing the rule, even if the proposed rule is very much like traditional comity. Perhaps a better name would be "the federal rule of recognition," thereby at least leaving open the supremacy question rather than appearing to assume the answer in advance.

\textsuperscript{119} I am speaking here of what tribes are "like" under the present domestic law of the United States. The inaptness of analogies under that body of law is to be distinguished from what tribes might be "like" under their own domestic laws, or what they might be "like" under the domestic laws of any other nation, or what they might be "like" under developing international law. I have had the pleasure of listening recently to Professor Rice of the University of Tulsa College of Law speak broadly of the future course that Indian law might take, using a Kosovar analogy, G. William Rice, "Imagining the Cherokee People in the Year 3000" (remarks made at the Sixth Annual University of Arkansas Native American Symposium, November 8, 1999).
IV. A FEDERAL COURT RECEIVING A STATE COURT JUDGMENT FOR ON-
RESERVATION ENFORCEMENT: ANNIS V. DEWEY COUNTY BANK\textsuperscript{120}

The hypothetical is this one:

\textit{AB v. CD} in state court; judgment for \textit{AB}.

State court appeal; affirmed.

\textit{CD v. AB} in federal court to enjoin the on-reservation enforcement of the state court judgement.

In \textit{Annis v. Dewey County Bank},\textsuperscript{121} the bank recovered judgment in state court on a contract claim. The defendant, a member of the Cheyenne River Sioux Tribe, did not pay voluntarily, and pursuant to the plaintiff's writ of execution, the county sheriff attempted to execute judgment against the defendant's cattle, located on-reservation. Annis, the original defendant, then sued in federal court to enjoin execution of the judgment against his on-reservation cattle. The Bank counter-claimed in federal court on the state court judgment, seeking compensatory and punitive damages.\textsuperscript{122}

The court held that state process could not occur on-reservation and issued the injunction. On the counter-claim, however, the court gave full faith and credit to the state court judgment, and sent the federal marshal out to seize the cattle.\textsuperscript{123} No punitive damages were allowed.\textsuperscript{124}

I have written elsewhere at length on this problem, arguing that the \textit{Annis} decision was incorrect.\textsuperscript{125} True enough, replacing the county sheriff with the federal marshal solves some of the jurisdictional aspects of the problem; while state officers have no authority on-reservation without tribal agreement, federal officers are commonly there enforcing various federal criminal laws.\textsuperscript{126} But merely replacing one officer with another does not solve all of the problems presented by \textit{Williams v. Lee}\textsuperscript{127} and the tribe's right "to make its own laws and be ruled by them."\textsuperscript{128} The \textit{Annis} court ignored the crucial impact of Rule 69 of the Federal Rules of Civil Procedure, with

\begin{itemize}
  \item 120. 335 F. Supp. 133 (D.S.D. 1971).
  \item 121. Id.
  \item 122. See id. at 134.
  \item 123. See id. at 138.
  \item 124. See id.
  \item 126. See, e.g., 18 U.S.C. § 1152.
  \item 127. 358 U.S. 217 (1959).
  \item 128. Id. at 220.
\end{itemize}
its blanket incorporation of state enforcement process into federal law.\textsuperscript{129} Take the question of whether Annis's cattle are exempt. Suppose they are under the law of the tribe, but that they are not under the law of South Dakota. \textit{Williams} would surely include within its protection of the tribe's right to make its own law, its right to make its own exemption law. However, under Rule 69 of the Federal Rules of Civil Procedure and \textit{Annis}, South Dakota's exemption law will apply instead.

Should the federal rule-makers amend Rule 69 of the Federal Rules of Civil Procedure to incorporate tribal process for on-reservation enforcement (a good idea), or even amend the rule clearly so as to replace tribal enforcement law with state enforcement law (a bad one), then the federal court might take an \textit{Annis}-like case with no \textit{Williams} qualms. Until that time, a federal court should decline to use Rule 69 of the Federal Rules of Civil Procedure and state law to enforce a state judgment on-reservation, even in a diversity case, referring the plaintiff instead to the tribal court system.

Now to the "doubly indirect collateral review" category of cases where all three court systems come into play.

V. \textbf{COLLATERAL ATTACKS IN FEDERAL COURT ON A STATE COURT ENFORCEMENT ACTION CONCERNING A TRIBAL COURT JUDGMENT}

A. \textit{Where the State Court Refuses to Enforce the Tribal Court Judgment}

The hypothetical is this:

\textit{AB} vs. \textit{CD} in tribal court; judgment for \textit{AB}.

Tribal appeal; affirmed.

\textit{AB} vs. \textit{CD} in state court to enforce the judgment; denied.

\textit{AB} vs. \textit{CD} in federal court to mandate state court enforcement.

First, by necessity, consider the jurisdiction of the federal district court. Diversity jurisdiction under 28 U.S.C. § 1332 will lie if the parties are diverse and if the amount in controversy is over $75,000. Federal question jurisdiction under 28 U.S.C. § 1331 will lie if the question of when a state court must enforce a tribal court judgment is governed by federal law.

As discussed above, all of the law professors at the "Roundtable" thought that this must be a question of federal law.\textsuperscript{130} Professor Clinton, however, was clearly

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\item \textsuperscript{129} Once again, no citation is available to draw the reader's attention to the opinion's silence on this crucial issue.
\item \textsuperscript{130} See Ransom, \textit{supra} note 3, at 277.
\end{itemize}
\end{footnotesize}
concerned that, if the rule were not full faith and credit under 28 U.S.C. § 1738, then it would not be governed by federal law, except in the rare 28 U.S.C. § 1331 cases, where there was some federal question beyond the federal rule of recognition. In this way, Professor Clinton bolstered his argument that symmetric full faith and credit should be the law. Wilson supports his gloomy outlook, at least to the extent that the Ninth Circuit seemed to be adopting a federal rule for its own district courts while not suggesting that the same federal rule must apply in state courts within the Circuit.

Note the complexity of the jurisdictional question: Saying that there is a federal rule of recognition for the enforcement of tribal judgments in state courts, will not, by itself, mean that tribal judgments can be enforced in federal courts directly under 28 U.S.C. § 1331. It could mean, however, that the federal rule will apply in diversity cases under 28 U.S.C. § 1332, though most of the precedent is the other way. Both of these conclusions were discussed above. But under the present hypothetical, the result is more dramatic. It means that AB may use 28 U.S.C. § 1331 jurisdiction in federal court, not to sue on the judgment itself, but to challenge the state court's refusal to follow the federal rule.

AB's federal cause of action here would be under 42 U.S.C. § 1983, alleging a deprivation, under color of state law, of rights guaranteed under federal law. The state trial court is the state actor, and the federal law being violated to AB's detriment is the federal rule of recognition.

Federal court abstention under the doctrine of Younger v. Harris, however, will be a substantial barrier to AB. Ordinarily, the federal courts do not allow collateral federal attacks upon on-going state litigation. Younger was a federal case challenging an ongoing state criminal proceeding, but the theory has made some substantial incursions into the ability of the federal courts to restrain state civil process as well. I have discussed at length elsewhere the theory under which AB might persuade the federal court to ignore Younger in order to allow a collateral attack on state enforcement process alleged to be in violation of federal law, but I concede here that, as federal court respect for state prerogatives is on the rise, such theory is a little unlikely to prevail.

If Younger abstention applies, the federal district court will dismiss AB's collateral attack on the state proceeding to enforce the tribal judgment. That enforcement proceeding will then go to final judgment at the state level, after which its finality will have preclusive effect on any possible federal litigation other than application for certiorari to the U.S. Supreme Court.

131. See id. at 255.
132. See supra notes 88-104 and accompanying text.
137. Cf. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). These two cases establish the so-called "Rooker-Feldman" doctrine, which has become something of a in tout de jour of late among federal jurisdictionists. For example, the May 1999 issues of the Notre Dame Law Review is devoted entirely to the doctrine. See Thomas D. Rowe, Jr., Foreward: Rooker-Feldman: Worth Only the
Now one can see the true importance of the holding in the lower Wilson court that 28 U.S.C. § 1331 jurisdiction exists in a case seeking federal court enforcement of a tribal court judgment. If the applicable rule of recognition is a federal one (as most other commentators, including myself, as well as the federal district judge in Wilson think it must be), but if the only enforcement actions that can be brought in federal court are diversity cases, then many tribal court judgment creditors, especially those with small judgments, would have to proceed in state court. And if the state court is insistent upon applying its own state rule of recognition, rather than the federal rule, the only hope for the creditor, aside from the risky certiorari to the United States Supreme Court, would be this "doubly indirect collateral attack" in federal court, where Younger represents a substantial barrier to effective federal court supervision of the application of the federal rule.

In the Conclusion, I will set forth a preference for doubly indirect collateral attack, with a concomitant modification of Younger, over a system that makes the federal courts the primary forum for the enforcement of judgments.

B. Where the State Court Agrees to Enforce the Tribal Court Judgment

The hypothetical is this:

AB vs. CD in tribal court; judgment for AB.

Tribal appeal; affirmed.

AB vs. CD in state court to enforce the tribal court judgment; granted.

CD vs. AB in federal court to block state enforcement.

This issue essentially collapses into the issue presented by cases such as Montana v. United States138 and Strate v. A-I Contractors139 regarding federal common law limitations on the subject matter jurisdiction of tribal courts. The only possible objection that CD could have under federal law to the state's decision to enforce the tribal court judgment is that the judgment was rendered without jurisdiction under federal common law. Thus, CD would have to mount a Montana-based attack on tribal jurisdiction. Federal court jurisdiction would be based on 28 U.S.C. § 1331, and the federal cause of action would emanate from the federal common law. This combination was explicitly held to be proper jurisdictional

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grounds in National Farmer's Union v. Crow Tribe of Indians. 140

There are now two abstention issues. First, National Farmers Union would require that tribal process be exhausted, as it has been in the present hypothetical. Second, Younger abstention cautions the federal court not to take the case away from state court, where, presumably, the state judges will get the federal law right.

If Younger applies, the federal court will dismiss CD's case, and CD will have to appeal through the state system, and seek review in the United States Supreme Court. If Younger does not apply, the federal court will listen to the collateral attack and judge the case under the standards set out by Montana and Strate.

It should be clear that CD does not get "two bites at the apple." That is to say, CD should be able to mount either, but not both, a direct federal collateral attack on the underlying jurisdiction of the tribal court a la Strate, or a doubly indirect federal collateral attack in or on AB's off-reservation enforcement action, as discussed here. If CD chooses the former and loses, collateral estoppel should prevent relitigation of the issue a second time in or on the enforcement action. 141

A few words about the phrase "in or on." In some ways, that is the important question here: Whether a challenge under federal law to the underlying tribal court jurisdiction should come within, i.e., as a part of AB's state court enforcement action, or on, i.e., collaterally in federal court, attacking the state court enforcement action.

In the rubric of the present article, an attack in the enforcement action is "indirect collateral review," while an attack on the enforcement is a "doubly indirect collateral review." Younger places a substantial barrier to the latter; the place for the attack on tribal court jurisdiction is in the off-reservation enforcement action, if any. That would leave, as the only legitimate "direct collateral attack" on jurisdiction, the situation where CD, the tribal court defendant, has on-reservation property, as, did the defendant in National Farmers Union. That leads one to observe that property kept on-reservation might be considered consent to enforcement against that property by tribal authorities, pursuant to tribal judgments, an observation consistent with the dominant society's concept of quasi in rem jurisdiction. 142 This observation is appealing, but seems inconsistent with the tack the Supreme Court has taken in cases such as Oliphant, Montana, Bourland, and Strate. Of course, if CD's property is on-reservation due to contractual relationships with the tribe or its members, then under Montana, tribal jurisdiction over CD exists and a collateral attack on it, whether "direct" or in the enforcement action, should fail.
VI. COLLATERAL ATTACKS IN FEDERAL COURT ON A TRIBAL COURT ENFORCEMENT ACTION CONCERNING A STATE COURT JUDGMENT

A. Where the Tribal Court Refuses to Enforce the State Court Judgment

The situation is now reversed and the hypothetical is this:

AB vs. CD in state court; judgment for AB.

State appeal; affirmed.

AB vs. CD in tribal court to enforce the state court judgment; denied.

CD vs. AB in federal court to mandate tribal court enforcement.

If the parties are diverse and the state judgment is at least $75,000, the federal court's jurisdiction will be based on 28 U.S.C. § 1332. If the parties are not diverse, or the judgment is small, jurisdiction must be found under 28 U.S.C. § 1331, if at all. I have discussed above in another context the question of whether the federal rule of recognition can support 28 U.S.C. § 1331 jurisdiction, and found it to be possible, but a stretch.143

In any event, CD has no federal cause of action. Suits against tribes must be supported by specific statutory authority, and the only one that comes to mind in this instance is the due process requirement imposed by the ICRA on tribal court proceedings. But Santa Clara Pueblo v. Martinez144 held that the ICRA did not create a federal cause of action for suit in federal court.

B. Where the Tribal Court Agrees to Enforce the State Court Judgment

The hypothetical is this:

AB vs. CD in state court; judgment for AB.

State appeal; affirmed.

AB vs. CD in tribal court to enforce the state court judgment; granted.

143. See supra notes 87-104 and accompanying text.
CD vs. AB in federal court to block tribal court enforcement.

This case is the other side of National Farmers Union and would appear to be related to Williams v. Lee;\(^{145}\) CD's theory to block enforcement evidently is that the state judgment is invalid under federal law because it was beyond the power of the state court to hear the underlying law suit.

If the parties are diverse and the state court judgment is at least $75,000, then 28 U.S.C. § 1332 diversity jurisdiction exists. For jurisdiction to exist under 28 U.S.C. § 1331, CD's federal court complaint must arise under federal law. Presumably it does, as the complaint will have to allege the invalidity of the underlying judgment under Williams v. Lee.

But is the reliance on Williams v. Lee enough to win the case, even if it states a question arising under federal law? May not a tribal court, under tribal law, agree to enforce a judgment that is invalid under federal law? Perhaps CD could concoct an argument that would turn the tribal court's willingness to enforce a judgment invalid under Williams v. Lee into an ICRA due process violation. No other federal law would seem to prevent the tribe's determination to forgo its Williams v. Lee protection. In any event, Martinez would seem to be an insurmountable barrier to any federal ICRA suit to challenge the tribe's decision to recognize the judgment.

VII. CONCLUSION

In summation, under one view of what has gone before, there is not much of a role for the federal courts to play in the enforcement of tribal judgments off-reservation, or of state judgments on a reservation. For some, that will be nicely symmetric, for, as shown above, there is not much of a role for the federal courts in the cross-state-boundaries or cross-national-boundaries situations. In all three cases, diversity jurisdiction might exist, but many parties with presumptively valid judgments will not be able to meet the requirements of 28 U.S.C. § 1332.

Even if diversity jurisdiction exists in the foreign judgment situation, the state rule of comity applies. In the state judgment situation, federal full faith and credit will apply. At this time, the tribal judgment situation is suspended between these two analogies, with the Ninth Circuit's Wilson case holding that tribal judgments are more like foreign judgments, and the Cheyenne River Sioux Court of Appeals' Eberhard case holding that tribal judgments are more like state judgments.

If diversity jurisdiction does not exist, then the tribal court plaintiff must try to show 28 U.S.C. § 1331 jurisdiction, or trust its fate to the state courts. The Montana federal district court in Wilson held that 28 U.S.C. § 1331 jurisdiction exists when a tribal judgment is presented to a federal court for enforcement, a result that is in sharp contrast to the state judgment situation, and for which there is only scant authority in the foreign judgment situation. The Ninth Circuit did not directly address

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the issue, but would seem to disagree, not because of the reversal, which was on other
grounds, but because the Circuit was so reluctant to declare its rule of recognition to
be a federal rule binding on the states. If the Ninth Circuit's rule is not binding on the
states, then it is difficult to see how it could be grounds for 28 U.S.C. § 1331
jurisdiction. And, without 28 U.S.C. § 1331 jurisdiction, the federal courts will not
be enforcing most tribal court judgments.

Here is what ought to happen, beginning with a few fundamental principles.

First principle: The rule of recognition for the enforcement of tribal judgments
off-reservation or the enforcement of state judgments on-reservation must be a federal
rule, binding on state, federal and tribal courts.

Second principle: States and tribes should be able to opt out of this otherwise
uniform federal rule by negotiated agreement. My usual authority is by analogy to
11 U.S.C. § 522(b), a federal bankruptcy rule that allows states to opt out of an
otherwise uniform federal rule for exemptions in bankruptcy. The reason for 11
U.S.C. § 533(b)'s existence is the same as the reason here: Exemption law is a matter
of potent local concern, and Congress was reluctant to over-ride those concerns for
the sake of national uniformity, even in the face of a constitutional requirement that
it enact a "uniform" bankruptcy code. Similarly, states and tribes who put together
a cross-boundary enforcement regime that works for them should be able to opt out
of the federal version.

Third principle: There must be a role for the federal courts in the enforcement
of judgments across reservation lines. The Wilson lower court's solution is to make
all tribal judgments enforceable in the federal court. This is not a particularly
attractive option because: (1) the federal courts do not generally enforce judgments,
(2) when they do, they simply send the federal marshal to enforce state law, (3) the
solution doesn't work for the on-reservation enforcement of state judgments, (4) any
such large-scale expansion of federal court caseload is probably impractical to
contemplate, and (5) the lower Wilson holding is too much of a stretch of 28 U.S.C.
§ 1331 principles.

The more appropriate role for the federal courts is what I have called "doubly
indirect collateral review," where the federal courts are reviewing enforcement actions
in the state or tribal courts, rather than enforcing those judgments themselves. First,
take the case of the off-reservation enforcement of final tribal judgments. The primary forum for off-reservation enforcement should be the state courts, although
federal courts could still take diversity cases. To show due respect to the state court
system, federal courts should abstain from hearing any challenge to the state court
enforcement procedure until the party resisting enforcement has exhausted all state
appeals and has been denied certiorari by the Supreme Court. But, unlike Younger
abstention, the federal court should not dismiss a premature collateral attack on the
state process, nor should the federal court find itself precluded regarding the
application of the federal rule of recognition by the state court's determination of the

when given the chance, quickly opted out of the federal exemption scheme. See id.
issue in the enforcement action. Rather, the federal court should wait until the state court system has had its say about the enforceability of the tribal court judgment, then take the case for collateral review. The uniqueness of federal-state-tribal relations justifies this unusual kind of abstention. In the unlikely event that the United States Supreme Court granted certiorari, the collateral attack would be moot.

Furthermore, it seems that all of the issues that are available in the Strate class of cases could be raised in this federal challenge to the state enforcement action. As such, they should be raised only there, not independently. The Strate-style of attack on the jurisdiction of the tribal court is available in this collateral review of the state enforcement action, as the Ninth Circuit's Wilson opinion showed, because the existence, or lack of jurisdiction in the underlying action is an issue under both comity and full faith and credit. The only "direct collateral" attack that would remain would be where the tribal court plaintiff seeks to enforce the judgment on-reservation. Here I would allow an ICRA attack on the tribal process in preference to a Montana attack on the existence of jurisdiction itself, a result that would require an exception to Martinez, and a limitation of Strate.

Now take the case of a final state court judgment where enforcement is sought on-reservation. The only forum available for on-reservation enforcement should be the tribal court system. The federal courts should not even take diversity cases, as they would, under present Rule 69 of the Federal Rules of Civil Procedure, be sending the federal marshals to apply state enforcement law on the reservation, contrary to Williams v. Lee. Therefore, the only federal forum here would be a doubly indirect collateral one, challenging the tribal enforcement process as it applies to a state court judgment. Here the federal court should abstain, consistent with National Farmers Union, until the tribal court system has finished its inspection of the enforceability of the off-reservation judgment. Another exception to Martinez is needed to allow the federal court to inquire into the ICRA compliance in the tribal procedure. Part of the ICRA due process should be the requirement that the tribe follow the federal rule of recognition.

There is an interesting similarity between Younger, National Farmers Union and Martinez. They are all in the nature of federal comity toward state and tribal courts, and they all make sense, at least in our peculiar tri-partite federalist system. National Farmers Union is the dominant case, as it requires exhaustion of tribal (and, by implication, state) remedies before the federal courts step in. Younger and Martinez show a heady and admirable respect by the federal courts toward the ability of state and tribal judges, respectively, to get the federal law correct. However, they can be overdone, and, as proposed here, some narrow exceptions are needed to keep the federal courts in play with regard to the application of the federal rule of recognition in state and tribal courts.


Fourth principle: What should the federal rule of recognition be? More than enough has been written on that issue. Briefly, offered here is an asymmetric view: The federal rule of recognition should allow a tribal court receiving a state court judgment to inspect (1) the merits of the underlying lawsuit, and (2) the existence, or not, of state jurisdiction, but not (3) the state court’s conformity with the Constitution. The first of these is justified by the impact that the off-reservation judgment could have on closely held customs and traditions in the small tribal community. The second is an accepted aspect of both comity and full faith and credit. The third inquiry is better done using off-reservation federal courts whose specialty is the Constitution. The other branch of the federal rule of recognition should allow a state court receiving a tribal judgment to inspect (1) the existence, or lack, of tribal court jurisdiction, as well as (2), the ICRA compliance, but not (3), the underlying merits of the lawsuit which gave rise to the judgment. The first of these is, again, an aspect of both comity and full faith and credit. The second is required by Martinez’s holding that makes the collateral enforcement challenge the only ICRA check outside the tribal court system itself. The third inquiry is unnecessary, because the threat to very large states by the judgments from small tribes is minimal.149

That is what should happen; here is what probably will happen:

The cases, it would appear, are unlikely to evolve toward such a coherent common law system. These reforms must come, if at all, via congressional legislation and state-tribal negotiation. If left to their own devices, the cases are likely to create a result less agreeable than that just described:

1. There will likely be only a little role for the federal courts to play, as in the enforcement of judgments generally.

2. There will be a spotty adoption of full faith and credit, using either Eberhard’s hyper-technical reading of 28 U.S.C. § 1738, or Jim’s holding that tribes are "territories" of the United States. Neither does 28 U.S.C. § 1738 justice.

3. More commonly, courts will adopt a comity regime, with state comity rules differing from the federal comity rule. This is the Wilson result.

4. We will see much retaliation, similar to Montana’s rule, at issue in Wilson. There is a certain history of retaliation in Indian-European affairs dating back at least to Roanoke Island. Without calmer heads prevailing, we are in for more "retaliation," the word, one hopes, meaning something different in the twenty-first century from what it meant in the nineteenth.

Is that a livable system? Probably. But it is not to the advantage of either judgment creditors, judgment debtors, tribal courts, state courts or federal courts. The better course is one of state-tribal negotiation, with federal courts playing a substantial role in the enforcement process until those negotiations are complete.