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Conflicts and Dependant Sovereigns: Incorporating Indian Tribes into a Conflicts Course

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CONFLICTS AND DEPENDENT SOVEREIGNS INCORPORATING INDIAN TRIBES INTO A CONFLICTS COURSE

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SEVERAL years ago, the AALS Section on Conflict of Laws did a program on conflicts involving Native American tribal law. That program highlighted that in addition to the federal and state governments, there is a third category of governmental entity in this county, i.e., Indian Tribes, and these entities provide a fascinating arena in which to explore conflicts issues.

I use materials on Indian Tribes at the end of my course as a vehicle for examining the interrelations among choice of law, jurisdiction, and recognition of judgments. I give students about thirty pages of cases and notes that explore the contours of state, tribal, and federal authority [1] My goal is not to make students experts in Indian law Instead, I use the material as a vehicle to get students to reexamine assumptions about the nature of sovereignty and the role of choice of law, jurisdiction, and recognition of judgments as devices for recognizing and allocating governmental authority

The materials begin with a section on jurisdictional limits on states and Tribes.[2] This material highlights that with respect to conflicts involving Indian Tribes, the primary device for allocating authority is jurisdiction rather than choice of law The first case, *Williams v. Lee*,[3] is a simple contract action brought in state court by a non-Indian plaintiff against an Indian husband and wife alleging failure to pay for goods purchased on the Reservation at plaintiff's store.[4] The Supreme Court held that the state courts had no jurisdiction to hear this dispute.[5] The case provides a brief history of the relationship among Tribes, states, and the federal government and notes that "Congress has acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation."[6] The opinion ends with the conclusion that "[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."[7]

In the class discussion, I start with the Court's concern about preserving tribal self-governance and ask students to articulate why state court jurisdiction would

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1. The materials described are included in a casebook manuscript written by this author, Symeon Symeonides, and Arthur von Mehren.

2. A helpful article is Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV 329 (1989).

3. 358 U.S. 217 (1959).

4. *Id.* at 217-18.

5. *Id.* at 222-23.

6. *Id.* at 220.

7 *Id.* at 223.

infringe on self-governance.[8] In the interstate context, respect for another state's self-governance is addressed primarily through choice of law, not jurisdiction.[9] Indeed attempts by states to use jurisdiction as the device for allocating authority are at least sometimes unconstitutional.[10] Would choice of law would be an adequate way to preserve tribal self-governance? If jurisdictional dismissals are necessary to preserve tribal self-governance, are they also necessary in the interstate context? These question provide an opportunity to reconsider cases such as *Tennessee Coal, Iron & Railroad Co. v. George*[11] and *Crider v. Zurich Insurance Co.*[12]

The relationship between jurisdiction and self-governance is explored further in *Iowa Mutual Insurance Co. v. LaPlante*.[13] This case grew out of an automobile accident on a reservation involving an Indian employee of a Montana corporation doing business on the reservation.[14] The Indian plaintiff sued the corporation and its insurer in tribal court.[15] The insurance company moved unsuccessfully to dismiss for lack of jurisdiction.[16] It then filed a declaratory judgment action in federal court, seeking a declaration that it had no duty to defend the suit in tribal court because the accident was outside the scope of the policy [17] The Supreme Court held that although the federal suit should not have been dismissed for lack of subject matter jurisdiction, the district court could properly consider whether to stay the federal action or dismiss on grounds analogous to abstention.[18] The Court reiterated the importance of tribal judicial jurisdiction and stressed that "[p]romotion of tribal self-government and self-determination require[] that the Tribal Court have 'the first opportunity to evaluate the factual and legal bases for the challenge' to its jurisdiction."[19]

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8. The basic pattern in *Williams* should be a familiar one to conflicts students—a plaintiff from one state, conduct in and a defendant from another state. *Cipolla v. Shaposka* is a well-known tort case that fits this pattern. Cipolla v. Shaposka, 267 A.2d 854, 856-57 (Pa. 1970) (applying Delaware law rather than Pennsylvania law where Pennsylvania plaintiff brought suit for damages as a result of automobile accident that occurred in Delaware involving a Delaware resident).

9 State courts must, of course, have personal jurisdiction. However, the Supreme Court currently views personal jurisdiction as protecting the liberty of defendants rather than protecting the sovereignty of sister states. *See* Insurance Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 & n.10 (1982). In earlier cases, the Court had suggested a different approach and implied that the purpose of personal jurisdiction was to prevent intrusions into the sovereignty of other states. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980) (finding personal jurisdiction is "an instrument of interstate federalism"); Pennoyer v. Neff, 95 U.S. 714, 720 (1877) ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."). One can use the Indian materials as an occasion to reconsider the Court's current approach.

10. *See* Crider v. Zurich Ins. Co., 380 U.S. 39, 41-43 (1965); Tennessee Coal, Iron & R.R. Co. v George, 233 U.S. 354, 359-61 (1914).

11. 233 U.S. 354 (1914).

12. 380 U.S. 39 (1965).

13. 480 U.S. 9 (1987).

14. *Id.* at 11.

15. *Id.*

16. *Id.* at 12.

17 *Id.* at 13.

18. *Id.* at 16 n.8, 20 n.14.

19. *Id.* at 15-16 (quoting National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 856

Justice Stevens dissented and his argument provides a good starting point for the discussion. Justice Stevens noted that "[i]t is not unusual for a state court and a federal court to have concurrent jurisdiction over the same dispute."[20] He concluded, "I see no reason why tribal courts should receive more deference on the merits than state courts."[21] I ask students to consider the extent to which tribal courts do receive "more deference" and whether there are reasons to treat states and tribes differently in this regard.

After exploring the scope of tribal judicial jurisdiction, the materials examine the scope of tribal legislative jurisdiction. In *Montana v United States*,[22] the Court held that the Crow Tribe could not regulate hunting and fishing by non-members of the Tribe on land owned by non-members but located inside the reservation.[23] The Court concluded that "the general principles of retained inherent sovereignty" did apply in this case because "regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations."[24] The case thus raises interesting questions about the centrality of land to sovereignty

The final issue included in the materials is recognition of tribal court judgments. Some commentators have argued that a tribal court is a court of a "Territory or Possession" within the meaning of 28 U.S.C. § 1738 and therefore its judgments are entitled to full faith and credit.[25] Others have disagreed[26] and the caselaw on this issue is limited.[27] Regardless of how the current section 1738 is interpreted, Congress could amend that statute to bring tribal courts within the statute's ambit. Would this be a good idea? Even for those who support increased tribal autonomy this question is not as easy as it might appear As Professor Vetter has explained:

> A conclusion that section 1738 includes Indian tribes must be based on the proposition that they are part of the United States' federal polity, while Indian self-determination

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(1985)). The Court's deference to tribal courts in civil litigation does not extend to criminal jurisdiction. In *Oliphant v. Suquamish Indian Tribe*, the Court held that the Suquamish Tribe did not have criminal jurisdiction over a non-Indian for conduct that occurred on the tribe's reservation. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

20. *Iowa Mutual Ins. Co.*, 480 U.S. at 21 (Stevens, J., concurring in part and dissenting in part).

21. *Id.*

22. 450 U.S. 544 (1981).

23. *Id.* at 566.

24. *Id.* at 564-65.

25. *See, e.g.*, Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV 841, 908 (1990). *See also* 28 U.S.C. § 1738 (1994).

26. *See* Robert Laurence, *The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity, and the Indian Civil Rights Act*, 69 OR. L. REV 589, 673 (1990); William V Vetter, *Of Tribal Courts and "Territories" Is Full Faith and Credit Required?* 23 CAL. W L. REV 219, 269 (1987).

27 *Compare* Sheppard v. Sheppard, 655 P.2d 895, 901 (Idaho 1982) (holding that section 1738 applies to judgments of tribal courts), *and* Jim v CIT Fin. Servs. Corp., 533 P.2d 751, 752 (N.M. 1975) (holding that section 1738 applies to tribal law), *with* Brown v. Babbitt Ford, Inc., 571 P.2d 689, 694 (Ariz. Ct. App. 1977) (holding that section 1738 does not apply to tribal courts). *See generally* Fred Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M. L. REV 133 (1977) (summarizing the history of the Full Faith and Credit Clause and the arguments for and against extending it to Indian Tribes).

is based on the proposition that they are *not* a part of that polity In addition, the reciprocity required by section 1738 would tend to limit tribal flexibility which is an important part of the concept of self-determination and which may be needed to adequatelv protect the tribes' interests or those of its members.[28]

In order to tie all of the issues together, I end the material with the following discussion problem:

> The native population of the Hawaiian Islands has not been recognized by the federal government as an Indian tribe. There is a growing "sovereignty movement" among this native population.
>
> Assume that some autonomy or self-governance is to be granted to this group. Consider what mechanisms might be used to recognize that autonomy Could they be granted some type of sovereign status without control over a delineated portion of land? If land is necessary would it matter whether any or all of the governed population lived on that land? Would it be sufficient that the group owned an office building in Honolulu?
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> If the native group is granted some form of autonomy short of complete international independence, it will be necessary to allocate authority among the native group, the state and the federal governments. Should the primary allocational mechanism be choice of law, jurisdictional restrictions, or a combination of both? Are there cultural or social factors that may influence your analysis of any of these issues?[29]

I start the discussion by asking whether the native population must have land in order to be recognized as a sovereign or governmental entity Is it inconceivable to recognize a separate government when there is no discrete territory that the government controls? I then turn the discussion to the relative merits of choice of law jurisdiction and recognition of judgments as allocative devices. Finally I ask students the following: to the extent they would use choice of law, what choice of law methodology would they recommend? As representatives of the indigenous population, is there a methodology that they would consider more respectful of tribal sovereignty? Would they want both the tribe and the State of Hawaii to use the same choice of law methodology?

Students' reaction to the Indian material and discussion problem has been very positive. They find it an interesting context in which to review and reexamine the basic elements of the course. The material can also provide an occasion to question basic assumptions about the allocation of power among governmental units within our federal system.[30] Finally for some students this is the only course in law school in which they consider the scope of tribal authority and the relationship between

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28. Vetter, *supra* note 26, at 269.

29. *See generally* Neil M. Levy *Native Hawaiian Land Rights*, 63 CAL. L. REV 848 (1975); Ellen Nakashima, *Native Hawaiians Consider Asking for Their Islands Back*, WASH. POST, Aug. 27 1996, at A1.

30. Professor Judith Resnik has argued on similar grounds for greater inclusion of Indian material in the standard Federal Courts course. *See* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV 671, 701-42 (1989).

tribes, states, and the federal government. Of course, many professors may conclude that as interesting as the subject may be, they just don't have the extra class to devote to it. There are no easy solutions to this dilemma. However, I have found that this rich material offers enough that it is worth including even at the cost of compressing slightly some of the more traditional conflicts topics.