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Identity and Assimilation: Changing Definitions of Tribal Power Over Children

Barbara Ann Atwood[†]

The Elders spoke, "You, yes, you young, listen today for one day we will be gone! You will take care of the foods, for they are out there! The fish in the water, they return today for each of us." . . . The Elders spoke in words, and used body language and different types of objects—wood, rocks, and animals. Each of the words were heard by the children, for the words were in a voice and tone that cared. For the unwritten law is caring for the food and the children, and the children yet unborn.

Those days of long ago are still here. . . . [T]he Elders still tell stories of the unwritten laws. Children need unwritten laws that will speak the messages the Elders would have spoken long ago. The Elders used traditional courts that operated long before the Europeans came.¹

INTRODUCTION

In 1997, the National Conference of Commissioners on Uniform State Laws promulgated a revised child custody jurisdictional law, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).² In this new Act, the Commissioners for the first time have included an optional section extending

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1. Julian D. Pinkham, *Speaking to Tribal Judges on Improving Children's Court Practice in Child Abuse and Neglect Cases in our Country: A Proposal for a Uniform Children's Code*, 31 U. MICH. J.L. REFORM 159, 161-62 (1997).

2. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT §§101-405, 9 U.L.A. 242 (Supp. 1998).

the recognition and enforcement principles of the Act to Indian tribes.³ The optional section treats Indian tribes as states and ensures recognition of tribal child custody decrees so long as the tribal decrees are in substantial conformity with the jurisdictional premises of the Act.⁴ This provision of the revised law, while provoking little commentary,⁵ raises an important policy choice for state legislatures and for tribal councils as well. A state's decision whether to extend the uniform law to Indian tribes and a tribe's decision whether to incorporate the uniform law into its tribal code implicate fundamental questions about tribal identity and the legitimacy of tribes as sovereigns. Interestingly, of the two states that have adopted the UCCJEA to date, one has opted to extend the Act to Indian tribes pursuant to the whole of section 104, and the other has not.⁶ Legislation to enact the new law is now pending in at least eleven additional states and one U.S. territory.⁷

This Article explores the concept of tribal sovereignty through the lens of tribal jurisdiction in child custody disputes. Tribal jurisdiction over children no longer exists in isolation. With increases in migration across reservation boundaries and intermarriage between Indians and non-Indians,⁸ tribal-state

3. See *id.* § 104, discussed *infra* at notes 110-22 and accompanying text.

4. Section 104 of the UCCJEA provides in relevant part:

(b) A court of this State shall treat a tribe as if it were a State of the United States for the purpose of applying [the jurisdiction and recognition provisions of the Act].

(c) A child-custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this [Act] must be recognized and enforced under [the Act].

5. Media coverage of the release of the UCCJEA has disregarded the question of extending the Act to Indian tribes. See, e.g., Mike McCurley et al., *Jurisdiction Act Seeks Consistency*, NAT'L L.J., May 11, 1998, at B7.

6. Compare S.B. 1237, 46th Leg., 2d Sess. (Okla. 1998) (codified at 43 OKLA. STAT. § 551-104 (Supp. 1998)) (adopting UCCJEA, including optional section that extends Act to tribes) with H.B. 335, 20th Leg., 2d Sess. (Alaska 1998) (adopting UCCJEA but not extending Act to Indian tribes).

7. See *Oklahoma, Alaska Take Lead in Adopting Uniform Child Custody Act Amendments*, 67 U.S.L.W. 2008 (July 7, 1998) (noting that the UCCJEA has been introduced in the legislatures of California, Hawaii, Kansas, Maine, Maryland, Michigan, Missouri, Nebraska, Virginia, Washington, West Virginia, and the U.S. Virgin Islands).

8. According to a study based on 1990 Census data, American Indians intermarry with whites at a rate that is higher than that recorded for Asians, African-Americans, or Hispanics. See V. Dion Haynes & Vincent J. Schodolski, *Interracial Marriages Increase: But Black-White Unions Still Face Most Resistance*, CHI. TRIB., Sept. 8, 1998, at 1 (reporting that 52.9 percent of American Indian men and 53.9 percent of American Indian women between

conflicts in child custody disputes are increasing as well. As a result, an Indian tribe today may face a dilemma created by two potentially competing goals: first, the tribe's desire for recognition as a co-equal sovereign within this nation's federal system—an objective that often depends on the tribe's willingness to conform to majoritarian standards, and, second, the tribe's desire to protect and develop its unique cultural identity.

The goal of achieving respect as a sovereign necessarily encompasses the aspiration that tribal acts, including judicial decrees, be accorded recognition throughout the United States. The recognition of tribal decrees beyond the borders of the reservation is a telling measure of sovereignty since the extent to which Anglo-American governmental entities enforce official tribal acts reveals the tribe's status in the eyes of the outsiders. Anglo-American courts have often viewed tribal justice as different, marked, or "the other," and therefore inferior to the unmarked justice system of the dominant society.⁹ A tribal decree relating to the custody of a child, where the contestants include a non-Indian, may implicate with particular intensity the diverse world views of state and tribe. In such circumstances, the tribal judge and the state court judge may each claim a superior legal and cultural authority to determine the best interests of the child. Predictably, a tribe's willingness to mold its laws to conform to Anglo-American standards enhances the likelihood that tribal acts will be respected beyond the boundaries of the reservation.

the ages of 25 and 34 were married to whites, compared to significantly lower percentages for other minority groups).

9. For a discussion of the impact of "marking" to reinforce the dominant, privileged, and unmarked norm, see John A. Powell, *The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity*, 81 MINN. L. REV. 1481, 1511-13 (1997); Mary Coombs, *Interrogating Identity*, 11 BERKELEY WOMEN'S L.J. 222, 229 (1996); Mary Louise Fellows & Sherene Razack, *The Race to Innocence: Confronting Hierarchical Relations Among Women*, 1 J. GENDER RACE & JUST. 335, 341 (1998). As observed by Professor Pommersheim:

In the context of colonialism or other oppressive forces, the majoritarian society often defines differences as negative. For example, the history of Indian-non-Indian relations is replete with labels such as primitive, uncivilized, and inferior assigned to Indians. . . . Such a label of difference is often the product of the unilateral exercise of dominant power.

Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 423.

Alongside the quest for respect as a sovereign within the national system is the desire of most tribes to sustain and enhance the laws, practices, and traditions that make them culturally unique. Tribes frequently equate their own survival with the protection of traditional ways of life.¹⁰ Although federal policy towards Indian tribes historically aimed at elimination of tribal existence, since the advent of the modern era of "self-determination"¹¹ Congress has moved towards the goal of

10. Chief Justice Tso of the Navajo Nation Supreme Court stated that "[w]e, the people, are a natural resource. Our culture and our history are natural resources. We are so related to the earth and the sky that we cannot be separated without harm. The protection and defense of both must be preserved." Chief Justice Tom Tso, *The Process of Decision Making in Tribal Court*, 31 ARIZ. L. REV. 225, 234 (1989). The sheer tenacity of the American Indian tribes' will to survive is worthy of admiration. See FRANK POMMERSHEIM, *BRAID OF FEATHERS* 13 (1995) (stating that "whatever the conditions, tribal members have been committed to remaining indelibly Indian, proudly defining themselves as a people apart and resisting full incorporation into the dominant society around them"). The popular news frequently reports on efforts by tribes to teach their traditions to tribal children. See, e.g., Monica Mendoza, *Garden Unites Cultures*, *AGES*, ARIZ. DAILY STAR, June 15, 1998, at B-1, available in 1998 WL 6202828 (describing efforts by Pascua Yaqui elders to pass on traditional gardening techniques to Yaqui children); Angelica Pence, *Modern Methods Help Students Learn Ancient Tribal Language*, ARIZ. DAILY STAR, June 1, 1998, at B-1, available in 1998 WL 6202046 (describing course in which Tohono O'odham students learn native language through computer technology); Enric Volante, *Reviving Pride Through Storytelling*, ARIZ. DAILY STAR, May 18, 1998, at A-1, available in 1998 WL 6201347 (describing program in Tohono O'odham school through which tribal elders tell traditional stories). The Native American Preparatory School in New Mexico, founded in 1995, provides Indian students from tribes throughout the United States with a college preparatory education through a special curriculum that "support[s] their native identities, to give a fuller understanding of the native world in the United States." See Jane Salodof, *A New School Bridges Two Worlds*, N.Y. TIMES, Nov. 29, 1998, at 32A.

11. For a chronology of federal policy towards Indians and Indian tribes, see generally FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 47 (1982) (dividing federal policy into discrete phases, including the "Formative Years (1789-1871)," the era of "Allotments and Assimilation (1871-1928)," the period of "Indian Reorganization (1928-1942)," the era of "Termination (1943-1961)," and, finally, the era of "Self-Determination (1961 to present)."/> Vine Deloria, Jr., has a somewhat different historical perspective. According to his account, federal Indian law began with a "treaty-making period" when the United States tried to obtain as much land as possible from tribes, followed by a "prolonged experiment in social engineering" during which the federal government hoped to extinguish tribes by vesting private property in the hands of individual tribal members, followed by a period of self-government for tribes, and culminating today in a period of "negotiated settlements." See Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 204-05 (1989); see also ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW* 137-64 (3d

protecting tribal culture from forced assimilation into the dominant society. This new Congressional direction is reflected in statutes as disparate as the Indian Self-Determination and Education Assistance Act of 1975,¹² the Indian Child Welfare Act of 1978,¹³ the Native American Graves Protection and Repatriation Act of 1990,¹⁴ and the Religious Freedom Restoration Act of 1993.¹⁵ In addition, many tribes today are searching for ways of adapting to the demands of an industrialized economy while maintaining their core cultural attributes.¹⁶

This Article highlights the potential collision of these two dimensions of tribal sovereignty—legitimacy vis-à-vis other sovereigns in the national system and the maintenance of a unique cultural identity—in the context of child custody litigation. As Part III explains, a few Indian tribes have recognized the practical benefits of shaping their laws to fit the models of Anglo-American law and have adopted jurisdictional rules that parallel those of state law. In light of the provisions of the new Uniform Act, more tribes may be expected to follow suit. By conforming their jurisdictional rules to Anglo-American standards, the tribes will gain legitimacy in the Anglo-American world and will increase the likelihood that their custody decrees will be respected beyond the borders of the tribe, at least so long as the decrees satisfy the Uniform Act's requirements.

ed. 1991) (summarizing the evolution of federal Indian policy).

12. Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. §§ 450-50n (1994)).

13. Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901-63 (1994)).

14. Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001-13 (1994)).

15. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb-bb-4 (1994)).

16. Paula Mitchell Marks has observed that "[a] new emphasis on 'culturally appropriate' economic programs" is having an effect among Indian tribes, including, for example, the horse-breeding operation of the Nez Perces of Idaho, the expanded management of natural resources among southwestern tribes, and the land-restoration program of the Intertribal Sinkyone Wilderness project. PAULA MITCHELL MARKS, IN A BARREN LAND: AMERICAN INDIAN DISPOSSESSION AND SURVIVAL 371-74 (1998). Other efforts to combine cultural practices with economic development include the unique tourism attractions on the Blackfoot Indian Reservation in Montana, see Timothy Egan, *Indian Reservations Bank on Authenticity to Draw Tourists*, N.Y. TIMES, Sept. 21, 1998, at A1, and the negotiation of private home loans on Indian reservations as a result of trust developed between tribes and lenders, see *Tribes Seek Lending Partnerships*, ARIZ. DAILY STAR, Aug. 6, 1998, at 2B, available in 1998 WL 6204810.

That benefit, however, may be at the cost of a measure of tribal cultural identity. A tribe's unique identity depends in part on the tribe's ability to adhere to principles of traditional or customary law in resolving disputes that come before its courts.

My concern about the impact of assimilation on tribal identity is not novel. Others have offered compelling accounts of the human costs of reforming tribal courts to more closely parallel Anglo-American legal systems.¹⁷ Here I apply this shared concern to the often formalistic world of jurisdiction and enforcement in child custody litigation in order to heighten awareness of the impact of seemingly neutral principles. In disputes involving family structure and responsibility for children, a tribe's traditional bases for asserting jurisdiction may reflect values at the core of tribal identity.

But tribal identity is not the only value that hangs in the balance. Another concern is the quality of adjudication in child custody contests in both state and tribal courts. Tribal judges imbue their decisions with a contextual perspective, one that generally reflects a legal tradition that is diverse from that of the dominant society.¹⁸ As Frank Pommersheim has put it, tribal court jurisprudence is "an act of culture."¹⁹ Anglo-

17. See Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 239 (1997) (arguing that when Indian tribes deviate from "organic notions of tribal justice" they may lose their distinct identities, and urging tribes to reestablish a tradition of peacemaking and other dispute resolution methods that were utilized prior to the dominion of the U.S.); Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL'Y 17 (1997) (urging tribal courts to strengthen native concepts of justice and traditional methods of dispute resolution). As one scholar observed with reference to the Navajo Nation's court system, "[t]o the extent that the courts follow Anglo-American procedures and laws, they may undermine Navajo traditions; to the extent that they reject Anglo-American procedures and laws, they may exacerbate the already difficult economic conditions." Michael D. Lieder, *Navajo Dispute Resolution and Promissory Obligations: Continuity and Change in the Largest Native American Nation*, 18 AM. INDIAN. L. REV. 1, 6 (1993) (explaining the dilemma faced by the Navajo Nation in wanting to inspire confidence of outside investors while retaining traditional means of resolving disputes); see also Naomi Mezey, *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*, 48 STAN. L. REV. 711, 713 (1996) (describing ironic effect of Indian Gaming Regulatory Act that forces tribes to surrender a measure of sovereignty in order to exercise the federal gaming right).

18. See Robert B. Porter, *Introduction to The Tribal Law and Governance Conference: A Step Towards the Development of Tribal Law Scholarship*, 7 KAN. J.L. & PUB. POL'Y 1, 2-4 (1997).

19. Frank Pommersheim, *What Must Be Done to Achieve The Vision of the*

American judges likewise bring their world views to the task of judging, often effectuating cultural norms through the process of resolving custody disputes.²⁰ As compared to the Anglo-American approach, which typically has viewed struggles over children as a zero-sum game, a particular tribe may have a more fluid model of responsibility for children within a family, a clan, or a village.²¹ The method of dispute resolution may be different in tribal court and state court, with less adversarial and more mediative proceedings often characterizing tribal court.²² Ideally, if tribes retain their legitimate role in the resolution of contests over tribal children, custody rulings from tribal courts will inform and enrich the work of judges within the state courthouses.²³

Twenty-First Century Tribal Judiciary, 7 KAN. J.L. & PUB. POL'Y 8, 13 (1997) (urging tribal judges to remain cognizant of how their decisions reflect the culture in which they are embedded).

20. Numerous critics have maintained that the ubiquitous "best interests" standard in child custody law allows judges to discriminate on the basis of gender, race, and sexual orientation in choosing between two fit parents and to implement their hostility toward unconventional life styles. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY* (1995) (describing how mothers have been disadvantaged generally in family law); MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* (1994) (recounting the racist and sexist nature of historical child custody adjudications); Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615 (1992) (urging greater tolerance for diversity in childrearing arrangements by creating a preference for past parental roles); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 16 (1987) (contending that the best interest standard is indeterminate and highly unpredictable once each parent satisfies minimal fitness).

21. See *infra* notes 152-59 and accompanying text.

22. See Zuni, *supra* note 17, at 28 (contrasting various features of Anglo-American and indigenous justice). Professor Zuni identifies indigenous justice as a non-adversarial, fluid process which places paramount emphasis on community rather than individual rights. See *id.* In her perception of indigenous justice, spiritual matters are not separated from the secular, and restoration of peace—rather than vindication of society—is the ultimate goal. See *id.*

23. That the cultural world view of the decisionmaker will inevitably shape child custody adjudication has been noted by New Zealand scholar Graeme Austin, discussing the role of the New Zealand Family Court in resolving custody disputes over indigenous Maori children:

Decision-making involves a power to sift information, to break down complex stories into simpler ones, to redefine lived realities of the legal system's consumers, to make choices about custodial alternatives seem objective and natural. All of this depends on the power of those who tell law's stories.

....

If a tribe revises its jurisdictional standards to achieve greater acceptance among Anglo-American judges, a cluster of cases may slip from the tribal court's purview. To the extent that a tribe discards or compromises a traditional jurisdictional approach in order to maintain its role as a co-equal sovereign vis-à-vis state courts, the tribe's complex and nuanced identity will change.²⁴ Further, if disputes over the custody of Indian children are resolved by reference to exclusively Anglo-American jurisdictional and substantive standards, the quality of the decisionmaking will be impoverished.

I. A PRELIMINARY COMMENT ON TRIBAL SOVEREIGNTY

Indian tribes²⁵ are an anomaly in our federal system—they are neither domestic states nor foreign nations; they have in-

Whether or not New Zealand law accommodates challenges [from the Maori] based on recognition of the connection between discourse and power, a legal system that at least faces them honestly is surely healthier than one that persists in deflecting them against a smooth surface of supposed political and legal neutrality.

GRAEME AUSTIN, CHILDREN: STORIES THE LAW TELLS 115, 119 (1994).

24. To be sure, the survival of Indian tribes within a dominant society that was often bent on destroying them has required unending compromise and adaptation. To some observers, that history can be a rich source of bicultural jurisprudence. See Robert A. Williams, Jr., *"The People of the States Where They Are Found Are Often Their Deadliest Enemies": The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981, 990 (1996).

25. For simplicity, I use the term "Indian tribe" in this paper to refer to groupings of indigenous peoples in the United States who have received federal recognition as a tribe. Recognition by the Department of the Interior depends on the satisfaction of several requirements, including historical identification as an American Indian or aboriginal group, geographic cohesion, political authority over members, defined membership criteria, records of current and past membership, and existing rules of governance. See 25 C.F.R. § 83.7 (1998). For an insightful discussion of the oppressive and paternalistic nature of federal tribal recognition, see Jo Carrillo, *Identity As Idiom: Mashpee Reconsidered*, 28 IND. L. REV. 511 (1995). Tribes, of course, are not synonymous with reservations, since more than one tribe may share reservation lands, and sub-tribal groups such as villages, clans, and families may also figure prominently in the governance of an Indian community. The tribe, however, has typically been the formal actor in inter-governmental relations in modern history and thus seems to be the most appropriate concept for discussions of sovereignty. The enormous differences among Indian tribes are often overlooked in Indian law scholarship and in Anglo-American jurisprudence. Over 500 tribal governmental entities (including Alaskan Native villages) have received federal recognition, and another 200 are functioning without the federal imprimatur. See 62 Fed. Reg. 55270 (1997). The tribes range from the Navajo Nation, extending into three states and encompassing over 25,000 square miles, to tribes that are a single village with only a few hundred mem-

herent powers of self-government but they are subject to the absolute authority of the federal government.²⁶ The concept of tribal sovereignty has created conceptual problems throughout the history of federal Indian law²⁷ and remains a topic of active debate today, both outside and inside Indian communities. It is under attack by non-Indians who fear the perceived increase in political and economic power of Indian tribes. Although poverty, crime, and alcoholism are still endemic on reservation lands,²⁸ the "new buffalo" of the gaming industry has given some Indian tribes a stronger national presence than ever before.²⁹ Many outsiders fear that tribes with this increased strength will claim more than their fair share of land, water,

bers. See, e.g., BUREAU OF CENSUS, U.S. DEPT OF COMMERCE, *WE THE FIRST AMERICANS* 7 (1993) (summary report on American Indians and Alaskan Natives); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994). Each tribe's history, its relationship with the federal government, and its adaptation to the dominant society inform its identity. Although I speak of "tribes" in this paper, I have tried not to essentialize the construct of tribe as a monolithic entity. Indeed, the very diversity among tribes weighs against the adoption of a uniform national policy on judgment recognition.

26. In 1831, in the first of the two Cherokee cases, Indian tribes were famously described by Chief Justice Marshall as "domestic dependent nations. . . Their relation to the United States resembles that of a ward to his guardian." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Marshall expanded on the principle of dependent sovereigns the next year in holding that state laws could have no force within the boundaries of the Cherokee nation. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

27. A growing body of literature explores the evolution of federal Indian law from diverse perspectives. See, e.g., CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* (1987); Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989).

28. Unemployment rates among Indians living on reservations have been reported as high as 49%, and the Bureau of Indian Affairs (BIA) estimates that at least half the Indian population lives in poverty. See *Tribal Garden Helps to Ease Pain of Cutbacks in Welfare*, N.Y. TIMES, Aug. 23, 1998, at 24A. The incidence of violent crime on Indian reservations has increased in the 1990s, as has gang activity and substance abuse. See *On Indian Reservations in the West, Violent Crime Soars*, N.Y. TIMES, Aug. 16, 1998, at 28A.

29. See Mezey, *supra* note 17, at 713-14; Stephen Goode, *The Search for Sovereignty*, 14 INSIGHT MAG. 18, June 1, 1998, available in 1998 WL 9105505 (describing disparate economic fortunes of five Indian tribes and the tribes' efforts to preserve their cultures); Scott Canon, *Indian Nations: Tribes Reaffirm Their Right to Rule*, KAN. CITY STAR, June 21, 1998, at A1, available in 1998 WL 2558077 (explaining efforts by various tribes to strengthen self-rule and the resistance among non-Indians to such tribal ambitions); Amy L. Cox, Comment, *The New Buffalo: Tribal Gaming As a Means of Subsistence Under Attack*, 25 B.C. ENVTL. AFF. L. REV. 863 (1998).

mineral resources, consumer dollars, and, significantly, children.³⁰ Not coincidentally, challenges to different aspects of tribal sovereignty have emerged recently in Congress.³¹ The Supreme Court has entered the fray with opinions that delimit the legal implications of tribal sovereign status.³²

The meaning of tribal sovereignty is also the subject of internal debate among Indian leaders.³³ Certain tribes are di-

30. For a recent examination of the popular image of Indian tribes and their political battles, see Timothy Egan's two-part series, *New Prosperity Brings New Conflict to Indian Country*, N.Y. TIMES, Mar. 8, 1998, at A1, and *Backlash Growing As Indians Make a Stand for Sovereignty*, N.Y. TIMES, Mar. 9, 1998, at A1 [hereinafter *Backlash*].

31. Senator Slade Gorton of Washington, for example, has sponsored proposals to completely abrogate tribal sovereign immunity. See S. 1691, 105th Cong. (1998) (proposing to abolish tribal sovereign immunity in areas of state taxation, commercial law, tort, and constitutional litigation); H.R. 2107, 105th Cong. § 120 (1997) (Sen. Gorton's sponsored amendment to the House appropriations bill providing that a tribe's receipt of Bureau of Indian Affairs funding operates as a waiver of immunity). The Indian Child Welfare Act of 1978 (ICWA), codified at 25 U.S.C. §§ 1901-23 (1994), has also been the focus of proposed amendments over the years, most recently in the form of a bill that, *inter alia*, would place time limits on a tribe's right to intervene in a state court proceeding affecting an Indian child. See Indian Child Welfare Act Amendment of 1996, H.R. 3828, 104th Cong. (1996); see also H.R. 3275, 104th Cong. (1996) (adopting the "existing Indian family" exception to the ICWA); Voluntary Adoption Protection Act, H.R. 3156, 104th Cong. (1996) (exempting voluntary child custody proceedings from the ICWA).

32. See *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) (holding that tribe's suit against state was barred by eleventh amendment); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (holding that tribal court lacked jurisdiction over tort suit against nonmember arising out of accident on state highway running through reservation). In a significant recent decision, *Kiowa Tribe v. Manufacturing Techs., Inc.*, 118 S. Ct. 1700 (1998), the Court upheld the Kiowa Tribe's assertion of sovereign immunity in a commercial dispute arising on non-tribal lands. Although the Court handed the tribe a victory, it clearly invited Congress to abrogate the shield of immunity. In his majority opinion, Justice Kennedy described the doctrine of tribal sovereign immunity as having "developed almost by accident." *Id.* at 1703. Moreover, he observed, "[t]here are reasons to doubt the wisdom of perpetuating the doctrine," especially in situations where the immunity harms people who did not know they were dealing with an Indian tribe or who did not do so voluntarily. *Id.* at 1704. The Court chose, however, to defer to Congress, explaining that Congress was "in a position to weigh and accommodate the competing policy concerns and reliance interests." *Id.* at 1705. For a critique of the Justices' diverse and subjective approaches to tribal sovereignty, see David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996).

33. Crow tribal members currently disagree, for example, about the authority of the Montana-based tribe to impose taxes on businesses operated by non-Indians within reservation borders. See *Backlash*, *supra* note 30, at A16.

vided over which groups within the tribe possess the legitimate tribal voice—the right to speak for the tribe.³⁴ As the wealth of certain tribes has increased, different views about the distribution of that wealth have produced inevitable factions. Among the tribes that operate casinos, for example, disagreement has arisen over how (or whether) the tribal government should include their members in decisionmaking about gambling income.³⁵ Controversies have arisen over whether the prerogative of the tribal government should supersede the desires of individual members of the community with respect to a variety of matters.³⁶ These internal disagreements about the nature of sovereignty seem to reflect a profound unease among tribal members concerning contemporary tribal life.

Not surprisingly, debates about tribal sovereignty quickly become debates about Indian identity.³⁷ To tribal leaders, the

34. See Leesteffy Jenkins & Cara Romanzo, *Makah Whaling: Aboriginal Subsistence or a Stepping Stone to Undermining the Commercial Whaling Moratorium?*, 9 COLO. J. ENVTL. L. & POL'Y 71, 84 n.42 (1998) (describing disagreement between tribal elders and younger members regarding cultural need to resume whaling); Robert Sullivan, *Permission Granted to Kill a Whale. Now What?*, N.Y. TIMES, Aug. 9, 1998, § 6 (Magazine), at 30 (describing disagreement among Makah tribe members about the role of whaling in tribal history); Karen Alexander, *Tlingits Split on Ruling*, SEATTLE TIMES, Sept. 14, 1995, at B1 (describing rift between factions in Tlingit tribal court regarding nature of banishment as traditional Tlingit punishment); Jennifer A. Hamilton, *Alternative Sentencing in Native America: Justice, Gender, and Legal Pluralism* (1998) (unpublished manuscript, on file with author) (describing conflict among members of Tlingit tribe over characterization of banishment as a traditional punishment).

35. See MARKS, *supra* note 16, at 365-66; Doug George Kanentiio, *Oneidas Raise Serious Leadership Questions*, NEWS FROM INDIAN COUNTRY, Mid-June 1995, at 11 (describing controversy on the Oneida Nation Territory in which tribe members protested that the tribal government had excluded them from participating in the gambling agreement with the state).

36. Tribal court opinions sometimes reveal sharp disagreement among tribal judges about the nature and scope of the tribe's sovereign immunity. See, e.g., *Sulcer v. Barrett*, 2 Okla. Trib. 76, 81 (Citizen Band Potawatomi Tribe Sup. Ct. 1990), available in 1990 WL 655878 (divided court upholding defense of sovereign immunity in wrongful termination suit against tribal agency and officers). Disagreements between tribal councils and their members also extend to family matters. For example, Indian birth parents' voluntary placements of their children with non-Indian families for adoption have pitted tribes against their members. See, e.g., *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

37. The term "Indian," although an historical misnomer, see ROBERT F. BERKHOFFER, JR., *THE WHITE MAN'S INDIAN* 4-5 (1978) (attributing the derivation of the term "Indian" to the "erroneous geography of Christopher Columbus"), is widely used by Indian and non-Indian scholars alike and is used here to denote membership in an Indian tribe. See, e.g., MARKS, *supra* note 16, at

concept of tribal sovereignty means, among other things, the right to determine membership.³⁸ As Paula Mitchell Marks has written:

The problems of sovereignty focus attention on the very concept of Indianness. Who is an Indian and who is not? . . .

. . . .

These redefinitions [of tribal membership] will be increasingly necessary as Indians who are trying to build upon their political and economic gains confront anew the old vexing question of who can speak for a tribe, or for Indians in general . . .

. . . How do tests for Indianness fit into an American society that is attempting to move away from discrimination based on race and ethnicity?³⁹

Marks has identified the tensions inherent in the status of tribes existing as separate sovereigns within a larger pluralistic community. As she points out, there are deep-seated differences among Indian residents about the proper role of tribes

viii-ix (explaining that "Indian," despite its European origins and inaccuracy, is the preferred term used by native peoples to define themselves); *see also*, e.g., Porter, *supra* note 17, at 237 n.7 (noting that most native people refer to themselves as members of their particular nation, tribe, community, pueblo, or village, but invariably use "Indian" to refer to themselves as part of the greater population of indigenous people). I have not employed "Native American," a term often used to refer to a racial classification. As a matter of Supreme Court Indian jurisprudence, however formalistic, the category of "Indian" signifies political membership rather than racial identity—a point of particular importance when Indian-based classifications have been challenged under the Equal Protection Clause. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 552 (1974); Fisher v. District Court, 424 U.S. 382, 390-91 (1976). For a dismantling of the premise of *Mancari* and a critique of the characterization of a tribal member as an exclusively political rather than political-racial-ethnological classification, *see* Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1760-63 (1997).

38. As noted by the President of the National Congress of American Indians, "[a]n Indian tribe's right to freely determine its membership criteria goes to the heart of self-governance and tribal sovereignty." *Indian Child Welfare Joint Hearings of Senate Comm. on Indian Affairs and House Resources Comm.* (June 18, 1997), available in 1997 WL 11234052 (testimony of W. Ron Allen, President, National Congress of American Indians). Professor Jo Carrillo has observed that the categories of Indian and non-Indian often fall into a set of oppositions, such as primitive/modern, custom/law, oral/written, and she contends that "the law on tribal identity was one that created and enforced a system of biases." Carrillo, *supra* note 25, at 525; *see also* Richard Warren Perry, *The Logic of the Modern Nation-State and the Legal Construction of Native American Tribal Identity*, 28 IND. L. REV. 547, 573 (1995) (arguing that the process of federal tribal recognition requires Indian communities to fit a definition of identity constructed of European stereotypes).

39. MARKS, *supra* note 16, at 378-79.

vis-à-vis the states and the federal government.⁴⁰ Moreover, while most Indian tribes historically have resisted assimilation and struggled to retain a distinctive cultural and political identity, their growing power today has highlighted the anomaly of recognizing unique rights for tribal members in a larger society formally committed to equality.⁴¹

Scholars such as Rebecca Tsosie,⁴² Robert Williams,⁴³ and Vine Deloria, Jr.,⁴⁴ have illuminated the theoretical confusion surrounding tribal sovereignty. Tsosie envisions a theory of indigenous or tribal rights that will not be submerged by dominant norms of equality, neutrality, and individual rights. She pointedly challenges the models suggested by liberal scholars⁴⁵ and argues that "Indian nations represent a unique

40. See *id.* at 379 (noting the tension inherent in a tribe's desire to exploit the unique federal trust relationship while demanding self-determination).

41. See *id.* at 380. For recent theoretical contributions on the themes of self-categorization and group identity, see MARTHA MINOW, *NOT ONLY FOR MYSELF: IDENTITY, POLITICS & THE LAW* (1997) (using personal narratives to show influence of law on identity); see also Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—Latcrit Theory and the Sticky Mess of Race*, 10 LA RAZA L.J. 499 (1998) (exploring multi-race consciousness from Latina and African-American perspectives); Leslie G. Espinoza, *Multi-Identity: Community and Culture*, 2 VA. J. SOC. POL'Y & L. 23 (1994) (using personal narrative to reveal competing identities of Latina author).

42. Professor Tsosie has argued that true multiculturalism, if it is to tolerate tribal views of collective rights, cannot promote an absolutist view of individual rights associated with Western liberalism. In a thoughtful essay/review of Aviam Soifer's book, *Law and the Company We Keep*, Tsosie focuses on the unique claims of tribes to group rights and seeks to construct an alternative theory of group rights outside of the framework of liberal constitutional theory. See Rebecca Tsosie, *American Indians and the Politics of Recognition: Soifer on Law, Pluralism, and Group Identity*, 22 L. & SOC. INQUIRY 359 (1997) [hereinafter Tsosie, *Pluralism*]. She has also explored a pluralistic vision of tribal sovereign rights as revealed in the decisions of Justice Marshall. See Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice in Thurgood Marshall's Indian Law Jurisprudence*, 26 ARIZ. ST. L. J. 495 (1994) [hereinafter Tsosie, *Separate Sovereigns*].

43. See generally ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800* (1997); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990).

44. See generally VINE DELORIA, JR. & CLIFFORD M. LYTTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* (1983).

45. In particular, Tsosie examines the work of liberal theorists such as Will Kymlicka. See generally WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* (1989). See also *THE RIGHTS OF MINORITIES* (Will Kymlicka ed., 1995). Tsosie also focuses on the work of "interculturalist" theorists such as James Tully. See generally JAMES TULLY, *STRANGE MULTIPLICITY: CON-*

intersection of international and domestic multiculturalism."⁴⁶ In his work, Professor Williams has explored the ways in which the racist underpinnings of European conquest permeate contemporary legal constructs of tribal sovereignty.⁴⁷ In his view, the "White Man's Indian Law" has failed to include the Indian's role as an active agent in the survival of tribalism.⁴⁸ Professor Deloria's scholarship has consistently drawn on history to inform his interpretation of federal Indian law. He urges an extra-constitutional construct of tribal sovereignty based on early understandings of the treaty process.⁴⁹

I do not attempt in this Article a theoretical rethinking of the concept of Indian tribal sovereignty. I focus instead on a singular dimension of sovereign authority—tribal power over children—and use that as a vehicle to explore some implications of contemporary tribal sovereignty. Children, like land,⁵⁰ are an incommensurable resource for Indian tribes. Many tribal members see a tribe's exercise of power over children as a core manifestation of tribal sovereignty—an act that goes to

STITUTIONALISM IN AN AGE OF DIVERSITY (1995).

46. Tsosie, *Pluralism*, *supra* note 42, at 386.

47. Using a theme from the case of *United States v. Kagama*, 118 U.S. 375, 383-84 (1886), Williams explains how much of federal Indian law revolves around the perceived role of the federal government as a protector of Indians against "their deadliest enemies"—white racial power. See Williams, *supra* note 24, at 987.

48. Williams argues that scholars and courts are preoccupied with the Western legal tradition and that much could be gained by heeding the contributions of Indians themselves as to the meaning of treaties as documents of sacred trust and protection. See Williams, *supra* note 24, at 991-97. At least one scholar has expressed skepticism about the capacity of federal Indian law, rooted as it is in colonial assumptions, to incorporate tribal jurisprudence. See Frickey, *supra* note 37, at 1777-78.

49. Deloria has focused on the treaty process as a dynamic that preserved the political status of Indian nations—not as a "ward" of the federal government but as an equal contracting party. See Vine Deloria, Jr., *Reserving to Themselves: Treaties and The Powers of Indian Tribes*, 38 ARIZ. L. REV. 963, 971-72 (1996).

50. Jo Carrillo has observed that "what shapes Native American consciousness is the land." READINGS IN AMERICAN INDIAN LAW: RECALLING THE RHYTHM OF SURVIVAL 2 (Jo Carrillo ed., 1998). Land, a "constitutive incommensurable" for Indian people according to Carrillo, *id.* at 97-101, figures fundamentally in Indian history, culture, and contemporary life. The loss of land is an experience common to tribes throughout the United States, whether by means of European conquest, treaty abrogation, federal legislative prerogative, or otherwise. The role of land or place in tribal cultures and the claims of many tribes to sacred sites are aspects of Indianness that many non-Indians find difficult to understand. See *id.* at 98.

the heart of tribal legitimacy.⁵¹ The words of the Navajo Supreme Court are telling:

[Indian children] are not simply children in a general population, but have special status as members of Indian tribes, and they are eligible for the protection of those tribes and their traditional social structures. There is no resource more vital to the continued existence and integrity of the Navajo Nation than our children. Consequently, we have a special duty to ensure their protection and well-being.⁵²

Thus, from the perspective of Indian tribes, the power to resolve custody disputes involving Indian children is a core function of tribal sovereignty. The true test of that sovereign power, moreover, is whether a tribe's custody decrees receive respect outside the reservation.

II. RECOGNITION OF JUDGMENTS ACROSS STATE AND RESERVATION BOUNDARIES

A. FULL FAITH AND CREDIT AND THE DOCTRINE OF COMITY

The unique status of Indian tribes as domestic sovereigns—neither states nor foreign nations—has led to uncertainty regarding the recognition owed to tribal and state judicial decrees across reservation boundaries.⁵³ The uncertainty springs from ambiguities surrounding the reach of the federal full faith and credit mandate. By its terms, the constitutional

51. The unique importance of children to Indian tribes has been explicitly recognized by Congress. In the Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-63 (1994)), Congress described the relationship of children to tribal survival. "[T]here is no resource," Congress wrote, "that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3).

52. *In re Custody of S.R.T.*, 18 Indian L. Rptr. 6158, 6160 (Navajo Sup. Ct. 1991) (citations omitted).

53. The topic of tribal-state judgment recognition has attracted considerable scholarly attention in recent years, a fact suggesting that tribal courts are playing an increasingly visible role on the national scene. See P.S. Deloria & Robert Laurence, *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 GA. L. REV. 365 (1994); Fred L. Ragsdale, Jr., *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M. L. REV. 133 (1977); Hon. Richard E. Ransom et al., *Recognizing and Enforcing State and Tribal Judgments: A Roundtable Discussion of Law, Policy, and Practice*, 18 AM. INDIAN L. REV. 239 (1993) (discussion participants included the Hon. Christine Zuni, P.S. Deloria, Robert N. Clinton, Robert Laurence, Nell Jessup Newton, M.E. Ochialino, Jr.) [hereinafter *Roundtable*]; William V. Vetter, *Of Tribal Courts and "Territories": Is Full Faith and Credit Required?*, 23 CAL. W. L. REV. 219 (1987).

Full Faith and Credit Clause applies only to the states,⁵⁴ but the implementing statute is somewhat broader. In 28 U.S.C. § 1738, Congress provided in part that the judicial proceedings of any court of "*any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.*"⁵⁵ Thus, section 1738, unlike its originating clause in the Constitution, imposes the full faith and credit obligation on federal as well as state courts and extends the cloak of full faith and credit to decrees from federal territories and possessions.

Despite its breadth, neither the language nor the history of the statutory full faith and credit command reveals an intent to extend the full faith and credit obligation to tribal court judgments or to tribal courts.⁵⁶ It is improbable that the Framers of the Constitution or the first Congress had tribal courts in mind—either as the rendering court or the receiving court—when they required every court in the United States to give full faith and credit to the judicial proceedings of the

54. The constitutional mandate is simply that "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." U.S. CONST. art. IV, § 1. The Supreme Court has described the clause as a "nationally unifying force," one that altered "the status of the several states as independent foreign sovereignties . . . and [made] them integral parts of a single nation." *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276-77 (1935). By including the strongly worded guarantee in the Constitution, the Framers intended to assure "that the United States would have the unity of one nation instead of being thirteen (or fifty) separate little nations." ROBERT A. LEFLAR ET AL., *AMERICAN CONFLICTS LAW* Ch.9, § 73, at 215 (4th ed. 1986). For a recent reexamination of the purposes behind the clause, see Rex Glensy, Note, *The Extent of Congress' Power Under the Full Faith and Credit Clause*, 71 S. CAL. L. REV. 137, 151-56 (1997).

55. Act of May 26, 1790, Pub. L. No. 105-220, 1 Stat. 122 (codified at 28 U.S.C. § 1738) (emphasis added).

56. The Supreme Court has stated that the specific purpose of the statute was "to insure that federal courts, not included within the constitutional provision, would be bound by state judgments." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 484 n.24 (1982) (citing *Davis v. Davis*, 305 U.S. 32, 40 (1938)). The legislative history of the statute is sparse and reveals no reference to Indian tribal courts. See George P. Costigan, Jr., *The History of the Adoption of Section 1 of Article IV of the United States Constitution and a Consideration of the Effect on Judgments of That Section and of Federal Legislation*, 4 COLUM. L. REV. 470, 470-76 (1904); Willis L. M. Reese & Vincent A. Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 153-55 (1949).

courts of any "State, Territory, or Possession."⁵⁷ In the late eighteenth century, Indian tribes had mechanisms of dispute resolution that were unlikely to be viewed as judicial systems by the drafters of the federal judicial code. Traditional dispute resolution often fell within the authority of the tribal chief, a council of elders or warrior society leaders, or the religious leaders—not a judicial body in the modern sense—and the process typically was one of mediation rather than adjudication.⁵⁸ More importantly, Congress itself has indicated that it does not view territories and possessions as synonymous with tribes.⁵⁹ In numerous enactments in the modern era, Congress has explicitly extended full faith and credit to certain tribal court proceedings,⁶⁰ often by listing "Indian tribes" in addition to "territories and possessions" as covered categories.⁶¹ Such designations, unless meaningless, show that Congress views Indian tribes as falling into a unique category, outside the general command of full faith and credit.

The United States Supreme Court has never directly held that tribes are territories or possessions within the meaning of the full faith and credit statute, but it held in an early case that the Cherokee Nation was a "territory" within the meaning of a federal statute governing testamentary appointments,⁶²

57. See *Roundtable*, *supra* note 53, at 249 (statement of Robert Laurence).

58. See DELORIA & LYTLE, *supra* note 44, at 111-13.

59. *Accord* Wilson v. Marchington, 127 F.3d 805, 809 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1516 (1998).

60. See, e.g., Indian Child Welfare Act, codified in part at 25 U.S.C. § 1911(d) (1994) (requiring full faith and credit to tribal court child custody decrees); Violence Against Women Act, codified in part at 18 U.S.C. § 2265 (requiring full faith and credit to tribal court orders of protection for victims of domestic violence); Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B(b) (defining "State" to include "Indian country").

61. See 25 U.S.C. § 1911(d) (extending full faith and credit obligation to "every State, every territory or possession of the United States, and every Indian tribe").

62. In *United States ex rel. Mackey v. Cox*, 59 U.S. (18 How.) 100, 103-05 (1855), the Supreme Court construed an 1812 statute that required the District of Columbia to recognize testamentary appointments from states or territories of the United States. The Court concluded that the Cherokee Nation was a "territory" for purposes of the statute, emphasizing that the Cherokees were "more advanced in civilization than the other Indian tribes, with the exception, perhaps, of the Choctaws." *Id.* at 102, 104. In light of subsequent developments, the *Mackey* Court's desire to give respect to the testamentary appointments of an especially "civilized" tribe seems a very thin reed upon which to build the edifice of full faith and credit to tribal court judgments. In contrast, in *New York ex rel. Kopel v. Bingham*, 211 U.S. 468, 474-75 (1909), the Court cited with approval *Ex Parte Morgan*, 20 F. 298, 305 (W.D. Ark. 1883),

thus leading a few state courts to conclude that a similar construction is required in section 1738.⁶³ More recently, the Court stated ambiguously in dicta that "in some circumstances" tribal decrees have been entitled to full faith and credit.⁶⁴ On the other hand, the modern Court's prudential doctrine requiring exhaustion of tribal remedies before resort to federal court is flatly inconsistent with any notion of full faith and credit to tribal judgments.⁶⁵ If full faith and credit were applicable to tribal judgments, a tribal court's determination of its own jurisdiction would be binding on all other courts.⁶⁶ In contrast, the exhaustion doctrine envisions that a party dissatisfied with the tribe's jurisdictional ruling can argue the question anew in a federal forum.⁶⁷

The scholarly literature reveals a debate about the consequences of particular approaches for tribal sovereignty. Some commentators advance a full faith and credit approach to tribal-state recognition of judgments, while others prefer to rely on the doctrine of comity.⁶⁸ The proponents of a full faith

in which the district court held that the Cherokee Nation was not a "territory" within the meaning of the federal extradition statute.

63. See *Sheppard v. Sheppard*, 655 P.2d 895, 902 (Idaho 1982) (relying on *Mackey*, 59 U.S. at 104, to conclude that tribes are "territories" within the meaning of § 1738); *Jim v. CIT Fin. Servs. Corp.*, 533 P.2d 751 (N.M. 1975) (citing *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201, 210 (1941)) (same, but suggesting that full faith and credit to foreign law is not "an inexorable and unqualified command"); *In re Adoption of Buehl*, 555 P.2d 1334, 1342 (Wash. 1976) (relying without analysis on precedent of *Jim* decision).

64. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 & n.21 (1978) (citing *Mackey*).

65. See *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856-57 (1985) (requiring federal court to abstain from deciding extent of tribal court jurisdiction over non-Indian defendants until tribal courts have decided the issue); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) (extending *National Farmers Union* to diversity cases involving non-Indian defendants).

66. See, e.g., *Durfee v. Duke*, 375 U.S. 106, 115-16 (1963).

67. Professor Williams has strongly criticized the subordination inherent in federal court review of tribal court decisions, contending that such review reveals the "legacy of European 'racism and imperialism.'" Williams, *supra* note 27, at 276. For an analysis of the tribal exhaustion doctrine and a proposal for the creation of a procedure to remove suits from federal to tribal courts, see Melissa L. Koehn, *Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts*, 29 ARIZ. ST. L.J. 705, 713-67 (1997).

68. In this debate, advocates of a uniform neutral acceptance of tribes as sovereigns are pitted against those who emphasize the unique status of tribes, individually and generically. According to two proponents of the latter view, we do not believe that the national interests that drive uniform state-to-state full faith and credit apply to state-to-state or tribe-to-state enforcement concerns. The United States is made up of a relatively

and credit view seem motivated more by policy concerns than by solid historical evidence, with one respected Indian law scholar explicitly urging a categorical full faith and credit position as a means of bringing tribes into the American federal system as full sovereign participants.⁶⁹ Although most commentators embrace the goal of enhancing the inter-system recognition of tribal judgments, they find insufficient historical evidence to construe section 1738 as applying to Indian tribes.⁷⁰ Rather than rely on a uniform federal mandate, a few scholars have encouraged individual tribes and states to negotiate cooperative agreements for judgment recognition.⁷¹ Several state legislatures, moreover, have addressed the matter of tribal-state judgment recognition through codified law.⁷²

small number of rather similar states The United States is also made up of a relatively large number of rather dissimilar Indian tribes, dissimilar to the states and to each other For the Congress to legislate sisterhood among the tribes seems a rather presumptuous thing for a younger government to impose on its elders. And for the Congress to legislate sisterhood between tribes and states seems particularly unrealistic.

Deloria & Laurence, *supra* note 53, at 378-79 (citations omitted); see also *Roundtable*, *supra* note 53, at 241-46 (arguing for an extension of reciprocal full faith and credit obligations to tribes as a way of interweaving tribal governments into the fabric of the federal union as sovereigns). For an argument for asymmetric rule of judgment recognition as between state and tribal courts to accommodate unique concerns of each forum, see *id.* at 248-49. For an argument for a comity approach to judgment recognition to provide for individualized responses to different tribal settings, see *id.* at 250-54.

69. The primary proponent of an extension of the full faith and credit mandate to include tribal decrees is Professor Robert Clinton. See Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLIAMETTE L. REV. 841, 897-921 (1990). Clinton argues in part that tribal courts must give full faith and credit to state court judgments under section 1738 and that, to achieve symmetry and to bring tribal courts fully into the federal union, state courts should accord tribal decrees a similar recognition. *Id.* at 897-921. In support of his argument, he relies heavily on the *Mackey* case. See *id.* at 903-08. One of Clinton's apparent objectives is to ensure federal review. If the full faith and credit statute applied to tribal judgments, then a state's refusal to recognize a tribal judgment would present a federal question reviewable in theory in the United States Supreme Court. See *Roundtable*, *supra* note 53, at 245-46.

70. See, e.g., Deloria & Laurence, *supra* note 53, at 378-79.

71. See generally *id.* See also B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 482-84 (1998).

72. Several state legislatures have been sympathetic to such arguments and have addressed full faith and credit through codified law. See NEB. REV. STAT. § 43-1504 (1993) (extending full faith and credit to Indian child custody proceedings); OKLA. STAT. tit. 12, § 728 (1997 Supp.) (permitting Supreme Court of Oklahoma to issue standards for extending full faith and credit to

Because of the historical inapplicability to Indian tribes of the constitutional and federal statutory full faith and credit command,⁷³ and in the absence of legislative guidance, most state and tribal judges have turned to the doctrine of comity in deciding what effect to give to the other sovereign's decrees. Reasoning that tribes are not territories or possessions of the United States within the meaning of the full faith and credit statute, state courts have invoked comity to decide whether to recognize a tribal decree.⁷⁴ Likewise, tribal courts have preferred comity to full faith and credit in addressing state court orders, in part because the obligations inherent in section 1738 can result in a diminution of tribal sovereignty.⁷⁵

Comity, a doctrine historically invoked in the international context, allows the courts of one state or jurisdiction to give effect to the laws and judicial decisions of another state out of deference and mutual respect.⁷⁶ The traditional requirements

tribal court decrees, conditional on reciprocal recognition from tribal courts); WIS. STAT. § 806.245(1)(e) (1997 Supp.) (granting full faith and credit to judgments from Indian tribal courts in Wisconsin); WYO. STAT. ANN. § 5-1-111(a)(iv) (1997) (granting full faith and credit to identified tribal courts); see also S.D. CODIFIED LAWS § 1-1-25(2)(b) (1992) (setting standards for extension of "comity" to tribal court judgments); Pat Doyle, *Judges Ponder Writing State Rule to Enforce Tribal Court Orders*, STAR TRIB. (Minneapolis), May 4, 1998, at A1 (reporting on efforts by Indian tribes in Minnesota to persuade state judges to adopt a rule giving presumptive enforceability to tribal court orders in state court).

73. Professor Clinton, while conceding that Indian tribes were not in the minds of the drafters of section 1738, has argued that the plain meaning of the statute requires that tribal courts give full faith and credit to federal and state court judgments, and that symmetry and common sense should require that tribal judgments be extended full faith and credit. See *Roundtable*, *supra* note 53, at 243.

74. See, e.g., *Brown v. Babbitt Ford, Inc.*, 571 P.2d 689 (Ariz. Ct. App. 1977); *Wippert v. Blackfeet Tribe*, 654 P.2d 512 (Mont. 1982); *Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln, Inc.*, 462 N.W.2d 164 (N.D. 1990); *In re Marriage of Red Fox*, 542 P.2d 918 (Or. Ct. App. 1975). The federal courts likewise have typically employed comity in deciding what effect to give to a tribal decree. See, e.g., *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997) (explaining that federal courts should recognize and enforce tribal decrees so long as the decree rests on adequate personal and subject-matter jurisdiction, the litigants were afforded due process, and the decree does not violate the forum's public policy).

75. See *Jones*, *supra* note 71, at 481; B.J. Jones, *Tribal Considerations in Comity and Full Faith and Credit*, 68 N.D. L. REV. 689 (1992) (exploring the applicability of full faith and credit to tribal decrees from the perspective of tribal courts).

76. See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 165 (1895) (finding that comity is voluntary recognition of another nation's laws, "promot[ing] justice between individuals, and . . . produc[ing] a friendly intercourse between the sov-

of the doctrine are that the foreign court have had jurisdiction over the subject-matter and the parties, that the litigants were afforded fundamental due process, and that the judgment did not violate a fundamental public policy of the forum.⁷⁷ In applying comity to tribal judgments, state courts have tended to apply the requirements of the traditional doctrine⁷⁸ but some have adopted a decidedly deferential attitude towards tribal authority. As one state supreme court put it, "[w]e consider an 'Indian nation' as equivalent to a 'foreign nation' to encourage reciprocal action by the Indian tribes in this state and, ultimately, to better relations between the tribes and the State."⁷⁹

Numerous state courts have employed the doctrine of comity in the context of child custody litigation.⁸⁰ In so doing,

ereignities to which they belong").

77. See generally RESTATEMENT THIRD OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2) (1986); EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 996-99, 1014-17 (2d ed. 1992).

78. See, e.g., *Wells v. Wells*, 451 N.W.2d 402, 403 (S.D. 1990) (explaining that comity governs the question of recognition of tribal court orders, and that the burden of proof is on the party seeking to enforce the order).

79. *Fredericks v. Eide-Kirschmann Ford*, 462 N.W.2d 164, 168 (N.D. 1990). In *Fredericks*, the court held that comity governed the enforcement of a tribal money judgment and that the judgment carried a presumption of jurisdiction over the cause and the parties. See *id.* at 171. The court so held even though the North Dakota legislature had required its state courts to enforce other kinds of tribal judgments but had not required enforcement of the judgment in question. See *id.* at 169. The North Dakota Supreme Court reasoned that the statutory requirements did not limit its discretion "to voluntarily recognize and enforce tribal court judgments as a matter of comity." *Id.*; see also *In re Marriage of Skillen*, 956 P.2d 1 (Mont. 1998) (announcing a highly deferential doctrine of comity to respect a broad sphere of tribal court authority), discussed *infra* at notes 234-43 and accompanying text. Interestingly, in the Ninth Circuit's recent explication of the doctrine of comity toward tribal judgments, it stated that more deference was owed to tribal courts than to the courts of foreign nations, but its application of the doctrine revealed that even a "special comity" does not guarantee recognition of tribal decrees. See *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) (holding that tribal court lacked jurisdiction over an action arising from a collision occurring on a federal highway within reservation and that the resulting tribal judgment was not entitled to recognition).

80. See, e.g., *Leon v. Numkena*, 689 P.2d 566, 569 (Ariz. Ct. App. 1984) (holding that principle of comity required Hopi divorce and custody order to be recognized by state court); *In re Custody of K.K.S.*, 508 N.W.2d 813, 816 (Minn. Ct. App. 1993) (holding that state court should defer to tribal jurisdiction as a matter of respect for the tribal forum); *In re Marriage of Red Fox*, 542 P.2d 918, 920 (Or. Ct. App. 1975) (comparing tribal decree to foreign judgment in holding that tribal decree was conclusive on the merits); *In re Custody of Sengstock*, 477 N.W.2d 310, 314-15 (Wis. Ct. App. 1991) (holding that comity should be extended to temporary custody order of tribal court).

the courts analyze the competing jurisdictional standards for state courts and tribal courts. As a function of their status as dependent sovereigns, Indian tribes maintain broad powers of self-government over reservation activities, including adjudicatory power over the domestic relations of tribal members, unless Congress has legislated otherwise.⁸¹ In an earlier work, I explored jurisdictional conflicts between states and Indian tribes in child custody disputes primarily from the perspective of Anglo-American jurisdictional law.⁸² In that project I suggested guidelines for state and tribal courts to follow in resolving jurisdictional battles, guidelines that prioritized, albeit with great caution, the role of tribal courts where the child at the center of the custody dispute had significant connections with the tribe.⁸³ My recommendations were shaded by my perception that the biases of the Anglo-American judiciary can emerge most acutely in disputes involving children of an Indian parent and a non-Indian parent where the two cultures

81. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980). In the 1950s in the heyday of federal termination policy, Congress transferred civil and criminal jurisdiction over Indian reservations to six states and allowed other states to assume such jurisdiction by legislative action. See Act of Aug. 15, 1953, Pub. L. No. 280-505, 67 Stat. 588 (1953). With the advent of the era of self-determination, the 1968 Indian Civil Rights Act repealed that portion of Public Law 280 that permitted states to unilaterally assume jurisdiction over Indian lands, and it thereafter required the affected tribe to consent to the state assumption of jurisdiction. See 25 U.S.C. §§ 1321, 1322, 1326 (1994). Without a proper assumption of state authority, the Civil Rights Act provides for exclusive tribal jurisdiction over civil claims arising on a reservation to which Indians are parties. See *Kennerly v. Dist. Ct.*, 400 U.S. 423, 425-26 (1971). Because the ambiguities of civil jurisdiction under Public Law 280 are beyond the scope of this Article, see generally Carole Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1975), I focus on the legal relations between states and tribes where there has been no assumption of jurisdiction by a state over a reservation under Public Law 280.

82. See Barbara Ann Atwood, *Fighting over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. REV. 1051 (1989).

83. See *id.* at 1099-107. The recommendation for a preferred tribal role was for cases within the concurrent jurisdiction of state and tribal courts, i.e., where the child and a contestant had significant connections with both sovereigns. The recommendation rested, in part, on the "federal policy that tribal courts play a paramount role in resolving questions relating to the disposition of Indian children." *Id.* at 1106. Quite recently, such a policy was explicitly embraced by the Montana Supreme Court. See *Skillen*, 956 P.2d at 17 (announcing a rule of exclusive jurisdiction where Indian child and at least one Indian parent reside on reservation, and requiring discretion that is sensitive to the child's cultural identity where concurrent jurisdiction exists).

can each claim ownership of the child's future welfare.⁸⁴ Although my recommendations were aimed ostensibly at tribes and states, the primary thrust was towards building a respect for tribal authority among the state judiciaries.⁸⁵

In my analysis, I was heavily influenced by the federal policy of protecting the tribal role in proceedings involving Indian children—a policy derived from well-established tenets of federal Indian law jurisprudence.⁸⁶ In *Fisher v. District Court*,⁸⁷ for example, the Supreme Court established a rule of exclusive tribal court jurisdiction over the domestic relations of tribal members who are domiciled on the reservation. Conceding that many litigated disputes involving the custody of Indian

84. The bias of Anglo-American courts against tribal decisionmakers may have been at work in a recent controversial decision in California under the Indian Child Welfare Act. See *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Cal. Ct. App. 1996) (holding that ICWA does not allow belated attack on adoption of child where child lacks significant ties to tribe). The case pitted adoption advocates against Native American activists who wanted to protect the children's affiliation with their tribe. See James Rainey, *Declaring Truce in Adoption Fight*, L.A. TIMES, Dec. 4, 1997, at A1.

85. In contrast to my earlier study, this Article explores the tribes' own definitions of their jurisdiction in child custody cases and the implications of such jurisdictional rules for tribal identity. My particular concern here is the way in which Anglo-American jurisdictional standards may eclipse traditional sources of tribal power.

86. In *Williams v. Lee*, 358 U.S. 217 (1959), for example, the Court held that state courts had no jurisdiction over litigation brought against a Navajo couple based on a debt that arose on the Navajo Reservation. *Id.* at 222-23. According to *Williams*, the test of state court authority is "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220. The Court explained 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." *Id.* at 223.

87. 424 U.S. 382 (1976). The Supreme Court held that a tribe's jurisdiction to determine custody of an Indian child, in a dispute between the child's Indian mother and an Indian foster mother, was exclusive. See *id.* at 389. The Court reasoned that the state court's exercise of jurisdiction "plainly would interfere" with the tribe's powers of self-government. *Id.* at 387. Some tribes have codified this notion in their own domestic relations codes. See TRIBAL LAW & ORDER CODE OF THE LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS tit. X, § 10.002 (1982) (refusing to recognize a divorce obtained outside the reservation where both parties to the marriage were domiciled on the reservation at the time the proceeding for divorce was commenced). Significantly, *Fisher* was cited with approval in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), as an illustration of a necessary corollary of tribal sovereignty—that a tribe has the power to exercise jurisdiction over nonmembers when necessary to govern itself and control its internal relations.

children will not fall within *Fisher's* category of exclusive tribal jurisdiction, I advocated a comity-style deference to tribal courts where concurrent jurisdiction in a state and a tribe exists.⁸⁸ I relied additionally on the federal policy embodied in the Indian Child Welfare Act of 1978,⁸⁹ a policy that recognizes a paramount tribal role in determining the best interests of Indian children.⁹⁰ Although the ICWA by its own terms governs adoptive, pre-adoptive, and foster-care placements and has no applicability to custody disputes between parents,⁹¹ the Act evinces a federal policy that can inform judge-made doctrines of comity when non-ICWA custody disputes involving Indian children arise. Recent case law suggests that state courts are increasingly willing to endorse such a doctrine of comity that accommodates a preferred tribal role in adjudications affecting Indian children.⁹²

B. APPLYING FEDERAL OR UNIFORM STATE JURISDICTIONAL PRINCIPLES TO TRIBAL COURTS

The topic of tribal court power over children is particularly timely because of the efforts of the National Conference of Commissioners on Uniform State Laws to fashion a new and improved Uniform Act regarding child custody jurisdiction.

88. See Atwood, *supra* note 82, at 1099-107.

89. 25 U.S.C. §§ 1901-23 (1994).

90. Under the ICWA, tribal courts have exclusive jurisdiction over any child custody proceeding involving an Indian child who "resides or is domiciled within the reservation" or who has been declared a ward of the tribal court. *Id.* § 1911(a). A form of presumptive tribal jurisdiction exists for custody proceedings involving other Indian children "in the absence of good cause to the contrary," subject to veto by a parent or declination by a tribe. *Id.* § 1911(b). The interpretation of "good cause" in the state courts to defeat a transfer of jurisdiction to tribal court has been the subject of considerable controversy. See Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585 (1994).

91. Under the Act, "child custody proceeding" does not include "an award, in a divorce proceeding, of custody to one of the parents." 25 U.S.C. § 1903(1).

92. See *In re Marriage of Skillen*, 956 P.2d 1 (Mont. 1998), discussed *infra* at notes 234-43 and accompanying text; see also *In re Custody of K.K.S.*, 508 N.W.2d 813, 817 (Minn. Ct. App. 1993) (holding that state court should decline jurisdiction in favor of tribal court where state and tribe shared concurrent jurisdiction over custody dispute involving Indian child). At least one commentator has expressed optimism for the doctrine of comity as a way for state courts to give appropriate deference to tribal courts in areas of uniquely tribal concern and has seen "no examples of arbitrariness or otherwise showing any lack of respect for the tribal court systems." See *Roundtable*, *supra* note 53, at 254 (comments by Professor Nell Jessup Newton).

Three decades ago, the Uniform Child Custody Jurisdiction Act (UCCJA) was promulgated by the Conference as a means of introducing finality and consistency into the post-decree world of children of divorce.⁹³ One of the most innovative contributions of the UCCJA was the factual predicate for a state court's exercise of jurisdiction in child custody cases. The UCCJA announced in pragmatic terms the two major bases for the exercise of jurisdiction: home state jurisdiction, where the child and a contestant had lived for six consecutive months,⁹⁴ and significant connection jurisdiction, where the child and a contestant have a significant connection with the state and substantial evidence is available in the state concerning the child's welfare such that it is in the child's best interests for the state to exercise jurisdiction.⁹⁵

The concept of domicile is noticeably absent from the UCCJA model. According to the Commissioners, the six-month period for home state jurisdiction was selected "in order to have a definite and certain test which is at the same time based on a reasonable assumption of fact."⁹⁶ They went on to

93. The Uniform Child Custody Jurisdiction Act was approved by the National Conference of Commissioners on Uniform State Laws in 1968. See UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. 116 (1988) (Historical Note). The history of child custody jurisdiction has been recounted many times elsewhere and is beyond the scope of this paper. See generally Anne B. Goldstein, *The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act*, 25 U.C. DAVIS L. REV. 845 (1992).

94. According to the Act, jurisdiction exists if "this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within 6 months before commencement of the proceeding and . . . a parent or person acting as parent continues to live in this State." UNIF. CHILD CUSTODY JURISDICTION ACT § 3(a)(1), 9 U.L.A. at 143. The Act defines "home state" as the state where the child lived with his parents or a person acting as parent for at least six consecutive months. See *id.* § 2(5).

95. The Act provides that jurisdiction exists if:

[I]t is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and . . . at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

Id. § 3(a)(2). Although the Commissioners considered home state and significant connection to be the two major bases for jurisdiction, the Act also recognizes jurisdiction in a state where the child is present and state action is necessary on an emergency basis, or where no other state has jurisdiction or is willing to exercise it, and the child's best interests would be served by the exercise of jurisdiction. See *id.* § 3(a)(3)-(4).

96. *Id.* § 3 cmt.

quote the work of an influential scholar regarding that factual assumption: "Most American children are integrated into an American community after living there six months; consequently this period of residence would seem to provide a reasonable criterion for identifying the established home."⁹⁷ The Commissioners thus favored the concrete and certain test of a child's actual residence over the intangible and less definite concept of domicile.

The UCCJA's effort to eliminate uncertainty and unpredictability in child custody jurisdiction was widely praised as an immense improvement over the ambiguity of the common law and was ultimately adopted in some form by every state.⁹⁸ The Act had its critics, however, many of whom focused on the continuing unpredictability of "significant connection" jurisdiction and the failure of the Commissioners to explicitly prioritize "home state" jurisdiction.⁹⁹ In 1980, Congress entered the interstate custody domain by enacting the Parental Kidnapping Prevention Act (PKPA)¹⁰⁰ pursuant to its powers under the Full Faith and Credit Clause. In the PKPA, Congress created a federal command for recognition and enforcement of child custody decrees from state to state by endorsing the jurisdictional model of the UCCJA and strengthening it in certain important respects. For present purposes, the most notable difference was that the PKPA prioritized "home state" jurisdiction and created the concept of exclusive continuing jurisdiction.¹⁰¹ Under the framework of the PKPA, a state qualifying as a child's "home state" has primary jurisdiction and only if there is no home state may a state with "significant connection" jurisdiction entertain a custody dispute.¹⁰² Additionally, in an attempt to avoid later disputes about modifica-

97. *Id.* (quoting Leonard Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 818 (1964)). Professor Ratner cited no studies in support of his assumption about a child's integration into a community.

98. See UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. at 115-16 (Table of Jurisdictions Wherein Act Has Been Adopted).

99. See, e.g., Goldstein, *supra* note 93; Brigitte M. Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CAL. L. REV. 978 (1977).

100. 28 U.S.C. § 1738A (1994).

101. See *id.* § 1738A(c)(2) (setting out categories of initial jurisdiction); *id.* § 1738A(d) (creating exclusive continuing jurisdiction).

102. See *id.* § 1738A(c)(2)(B)(i) (conditioning significant connection jurisdiction on there being no home state).

tion of custody decrees, Congress gave the issuing state continuing jurisdiction under certain circumstances.¹⁰³

Neither the UCCJA nor the federal statute refers to custody disputes arising in tribal courts. In each statute, the definition of "state" includes the familiar list: a state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.¹⁰⁴ In construing the UCCJA, most state courts have held that custody decrees from Indian tribal courts are not within the purview of the Act, but at least one has ruled that "state" includes Indian tribes under the Act.¹⁰⁵ Of course, a state judiciary can give whatever meaning it wants to words in a state statute, subject to legislative override. With respect to the PKPA, on the other hand, all courts must attempt to be faithful to the congressional intent underlying the federal enactment and in this case it does not appear that Congress's intent was to include the tribes. The legislative history of the PKPA does not suggest that Congress considered Indian tribes to fall within the statutory definition of "state."¹⁰⁶ Further, because contemporaneous federal legislation explicitly addressed Indian tribes,¹⁰⁷ Congress's failure to

103. See *id.* § 1738A(d) (granting continuing exclusive jurisdiction to issuing state so long as it continues to have jurisdiction under its own laws and remains the residence of the child or any contestant).

104. See UNIF. CHILD CUSTODY JURISDICTION ACT § 2(10), 9 U.L.A. at 142; 28 U.S.C. § 1738A(b)(8).

105. Compare *Harris v. Young*, 473 N.W.2d 141 (S.D. 1991) (finding that the UCCJA is not literally applicable to Indian tribes), *In re Custody of Sengstock*, 477 N.W.2d 310 (Wis. Ct. App. 1991) (same), and *Byzewski v. Byzewski*, 429 N.W.2d 394 (N.D. 1988) (same), with *Martinez v. Superior Court*, 731 P.2d 1244 (Ariz. Ct. App. 1987) (explaining that UCCJA requires recognition of tribal decree).

106. See generally *Parental Kidnapping Prevention Act of 1979, Joint Hearing Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 4-16 (1980) (statement of Sen. Wallop) (explaining the problem of interstate child custody enforcement and the need for a federal law requiring state court recognition of sister state decrees). Although Senator Wallop, who introduced the legislation in the Senate, alluded to the difficulties of enforcing custody decrees across international borders, he did not mention the question of tribal-state enforcement. See *id.* at 9-10, 16.

107. The PKPA was originally appended to the Domestic Violence Prevention and Services Act. While that Act explicitly included Indian tribes in its program of domestic violence prevention, see H.R. CONF. REP. NO. 96-1401, at 4, 30, 39 (1980), the PKPA ultimately became detached from the legislative proposal and was enacted separately. The domestic violence legislation did not become law until 1984 as Public Law 98-457. For a comprehensive discus-

do so in the PKPA cannot be deemed an oversight. Notwithstanding the vigorous advocacy of at least one prominent scholar,¹⁰⁸ very few courts have concluded that the Act applies literally to Indian tribes.¹⁰⁹

In 1997, the Commissioners promulgated a significantly revised custody act—the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The primary aim of the drafters was to incorporate the stricter jurisdictional standards of the PKPA into a model state law.¹¹⁰ Thus, the new Act prioritizes home state jurisdiction¹¹¹ and includes other provisions intended to clarify jurisdictional standards and to provide uniform procedures for interstate enforcement of custody decrees.¹¹² Most significantly for purposes of this Article, the new Act—unlike either the original UCCJA or the federal PKPA—also mentions Indian tribes.

In section 104, the Act addresses two potential conflicts between the jurisdiction of state and tribal courts.¹¹³ First, in section 104(a), the Act excludes proceedings governed by the Indian Child Welfare Act—a statement of principle that would be compelled in any event by the Supremacy Clause. Subparts (b) and (c) of section 104, enclosed in the Commissioners' brackets, provide for the potential applicability of the Act to Indian tribes. The subparts announce that the state shall treat

sion of the legislative history, see *Eberhard v. Eberhard*, 24 Indian. L. Rptr. 6059, 6063-65 (Cheyenne River Sioux Ct. App. 1997). With due respect to the conclusion reached in *Eberhard*, this author sees no support in the legislative history for the conclusion that Congress intended to reach Indian tribes in the PKPA.

108. See Clinton, *supra* note 69, at 854.

109. Compare *In re Larch*, 872 F.2d 66 (4th Cir. 1989) (finding that the Cherokee Nation is a "state" within meaning of PKPA), and *Eberhard*, 24 Indian L. Rptr. at 6067 (arguing that tribes are "states" within meaning of PKPA), with *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510 (8th Cir. 1989) (determining that the question of applicability of PKPA to Indian tribes remains unresolved), *In re Marriage of Skillen*, 956 P.2d at 10 (explaining that the policy underlying the PKPA, but not the literal language, extends to tribal decrees), and *Sengstock*, 477 N.W.2d at 310 (arguing that PKPA does not extend to tribal decrees).

110. See UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT, 9 U.L.A. 238 (Supp. 1998) (Prefatory Note).

111. See *id.* § 201.

112. The Act, for example, eliminates consideration of a child's best interests in determining whether significant connection jurisdiction exists, *id.*, defines exclusive continuing jurisdiction for modification purposes, *id.* § 202, and prescribes enforcement procedures, *id.* §§ 301-17.

113. See *id.* § 104.

a tribe as if it were a state of the United States for purposes of the Act,¹¹⁴ and that the state must recognize and enforce "a child-custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this [Act]."¹¹⁵ The comment cursorily explains that the section "allows states the discretion to extend the terms of this Act to Indian tribes by removing the brackets."¹¹⁶ The comment also makes clear that the Act does not purport to legislate custody jurisdiction for tribal courts. Rather, a tribe is free to decide whether to adopt the jurisdictional standards set forth in the Act. The advantage for the tribe of such an adoption is the recognition and enforcement of tribal judgments, at least by those states that have adopted the sections of the Act applicable to tribes.

The fact that the Commissioners chose to bracket subparts (b) and (c) and to use decidedly neutral language in the comment suggests that they were ambivalent about the inclusion of Indian tribes. Noticeably absent is any statement of substantive policy or any recognition that tribal-state custody conflicts pose a significant or unique problem. The Drafting Committee's original inclination was to define the term "state" to include Indian tribes. Debate on that proposal, however, revealed significant variations among the states on how to regard tribal judgments.¹¹⁷ Because of those variations, the Drafting Committee determined that the extension of the Act to Indian tribes should remain optional for each state.¹¹⁸

Even the Commissioners' equivocal invitation to extend the UCCJEA to Indian tribes will most likely be applauded by many family law scholars and some Indian law scholars.¹¹⁹ Surely, the argument goes, a provision for potentially including

114. See *id.* § 104(b); *supra* note 4 (quoting the full text of section 104(b)).

115. *Id.* § 104(c).

116. *Id.* § 104 cmt.

117. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1996 ANNUAL MEETING TRANSCRIPT 17-26 (statements of Comm'r Daykin of Nev. and Comm'r Peterson of Alaska).

118. See Robert G. Spector, *Uniform Child-Custody Jurisdiction and Enforcement Act (with Prefatory Note and Comments)*, 32 FAM L.Q. 303, 323 n.42 (1998). Professor Spector was the reporter for the Drafting Committee for the Act.

119. One can safely assume that Professor Robert Clinton will welcome the inclusion of Indian tribes in the new UCCJEA, since he achieved substantially the same result in his capacity as associate tribal justice in *Eberhard v. Eberhard*, 24 Indian L. Rptr. 6059 (Cheyenne River Sioux Ct. App. 1997). See *infra* notes 217-33 and accompanying text.

Indian tribes within the scope of the new Uniform Act is an improvement over the complete silence of the original UCCJA. If tribes are included as "states" within the meaning of the new Act, then Indian children will benefit at last from the predictability and consistency offered by uniform law because state court recognition and enforcement of tribal child custody decrees will be more likely. Moreover, the UCCJEA's mention of Indian tribes is a bow, even if bracketed, towards tribal sovereignty. Proponents of section 104 can maintain that including tribal judgments within the Uniform Act's cooperative model is a way of bringing Indian tribes into the federal system on a par with the states.

The applause, however, should be tempered. While a state's adoption of section 104 may extend a measure of sovereignty to tribes, it may also extract a measure of cultural integrity in return. Section 104 does not guarantee recognition of all tribal custody decrees. A state court's willingness to enforce a tribal decree under the UCCJEA depends on a finding by the state court that the tribal decree was issued in "substantial conformity" with the new Act's jurisdictional prerequisites. Accordingly, enforcement of another sovereign's decree is not required if the rendering court acted inconsistently with the jurisdictional principles of the Act.¹²⁰ In other words, the clear thrust of the new UCCJEA is that Indian tribes who adopt and adhere to the jurisdictional provisions of the Act—the prioritized "home state" and the secondary "significant connection" jurisdictional categories—will receive recognition of their decrees in Anglo-American courts. Conversely, Indian tribes who do not choose to so "Anglicize" their tribal codes run the risk that Anglo-American courts will view their custody decrees as lacking in legal force. The carrot of recognition is attained through the stick of assimilation.

120. State courts, for example, have refused to defer to the custody rulings of other states where the rendering state acted according to jurisdictional standards that departed from the terms of the UCCJA. *See, e.g.,* O'Neal v. O'Neal, 329 N.W.2d 666, 668 (Iowa 1983) (holding that an Arizona custody decree, issued on the basis of the child's domicile in Arizona, was not entitled to recognition under the UCCJA). The court noted that Arizona's inclusion of domicile as a jurisdictional base was a "substantial departure from the UCCJA." *Id.* at 668; *see also* Pasqualone v. Pasqualone, 406 N.E.2d 1121, 1127 (Ohio 1980) (Ohio not bound to honor Illinois decree because Illinois omitted "important" UCCJA sections); *cf. In re Marriage of Desjarlait*, 379 N.W.2d 139, 145 (Minn. Ct. App. 1986) (tribal court's exercise of jurisdiction in custody dispute was improper and did not strip state court of power to act).

Thus, in the arena of tribal-state custody disputes, there are significant differences between the comity-based approach to resolving jurisdictional competition and the statutory mandate contemplated by the UCCJEA. Each approach has its advantages and disadvantages. A comity-based approach allows for the exercise of discretion—a judicial freedom that can lead to the dangerous interplay of a judge's subjective biases. If a state court or tribal court is hostile to the other's exercise of authority, the malleability of the doctrine of comity can be misused.¹²¹ On the other hand, a comity-based approach permits judges to tailor their decisions to the unique context of tribal-state conflicts. In the child custody context, federal Indian law principles and federal policy recognizing the importance of Indian children to tribal integrity can combine to produce a special comity that is highly sensitive to the tribal role.

In contrast, a uniform statutory approach such as that suggested in section 104 of the UCCJEA would simply treat tribes as states. Neutral jurisdictional rules would be applied across the board to tribes and states, without regard to the unique nature of tribal sovereignty or the significance of a child's tribal membership. Concededly, in some cases the extension of the UCCJEA to tribes would result in enhancing the status of tribal decrees. Where a tribal decree rests on jurisdictional foundations that are consistent with the Act, then it would be statutorily entitled to recognition as a matter of state law, and a state court would have no discretion to rule otherwise. In other situations, however, the tribal decree might not fare as well outside the reservation as it would have under a sensitive application of comity. Nothing in the UCCJEA contemplates a role of deference towards tribal courts in custody disputes involving Indian children, and a tribal decree that was based solely on tribal membership, for example, would not qualify for enforcement under the Act.¹²² Thus, while a statutory mandate such as the UCCJEA removes the question of enforcement of custody decrees from the discretion of a judge, it

121. See, e.g., *Barbry v. Dauzat*, 576 So. 2d 1013, 1020 (La. Ct. App. 1991) (rejecting tribe's definition of tribal membership and refusing to recognize legitimacy of tribal custody decree). For a more extensive discussion of *Barbry v. Dauzat*, see *infra* notes 183-90 and accompanying text.

122. See Spector, *supra* note 118, at 323 n.42 (stating that "[a] tribal custody determination that was based solely on tribal membership (a form of nationality jurisdiction), without meeting the jurisdictional requirements of [the Act] would not qualify for enforcement under this Act").

also locks the judge into a set of jurisdictional standards that can be unforgiving.

III. THE VOICE OF THE TRIBES

A. THE ROLE OF TRIBAL CULTURE IN JUDICIAL DECISIONMAKING

The written laws of Indian tribes do not necessarily portray the only authentic tribal voice. For most Indian tribes, the customs and traditions that formed the legal framework of the society historically were unwritten, and were passed on by oral tradition and collective memory.¹²³ Tribal codes and constitutions are largely an innovation of the twentieth century with many appearing after the passage of the Indian Reorganization Act of 1934 (IRA).¹²⁴ Although numerous Indian tribes created governmental structures independent of federal policy, the majority heeded the call of the IRA.¹²⁵ The statute recognized the authority of tribes to organize their governments, draft their own constitutions, enact their own laws, and establish their own court systems. The Bureau of Indian Affairs, however, did most of the drafting and produced "standard boilerplate" constitutions . . . based on federal constitutional and common law notions rather than on tribal customs."¹²⁶ These documents, in turn, were subject to the approval of the Secretary of Interior, a signal of such subordinate status that some tribes refused to participate.¹²⁷ As federal policy gradually moved from a focus on the termination and assimilation of

123. See POMMERSHEIM, *supra* note 10, at 103-12 (describing the power of language, narrative, and myth in tribal culture); DELORIA & LYTTLE, *supra* note 44, at 82 (observing that written documents as governmental guidelines were not found among most tribes, with the notable exception of the pre-Columbian Iroquois Constitution).

124. 25 U.S.C. §§ 461-79 (1994).

125. See DELORIA & LYTTLE, *supra* note 44, at 99-105.

126. COHEN, *supra* note 11, at 149.

127. During the two-year period provided by the IRA during which tribes could indicate their acceptance of the federal reorganization, almost one-third of the total Indian tribes recognized at that time rejected the statutory plan. See DELORIA & LYTTLE, *supra* note 44, at 100. The Navajo nation, widely viewed as possessing the most sophisticated tribal court system in the country, did not establish its modern judicial system until 1959. See Tso, *supra* note 10, at 230. Furthermore, even those tribes who organized under the IRA have undergone a gradual "metamorphosis" such that their contemporary governmental structures and legal systems are uniquely powerful. See DELORIA & LYTTLE, *supra* note 44, at 105.

tribes to the current approach of tribal self-determination,¹²⁸ Indian tribes revised and expanded their written laws. Contemporary tribal law reflects the amalgamated influence of Anglo-American pressures toward conformity from the outside as well as the force of the tribes' own identity emerging from within.

While traditional methods of dispute resolution have prospered in a few tribes, most notably the Iroquois Peacemakers' Court and the religious courts of the Pueblos, most tribes have developed court systems that blend Anglo-American procedures with traditional cultural practices.¹²⁹ Most contemporary tribal courts trace their origins to the Courts of Indian Offenses, established in the late nineteenth century as a part of the Bureau of Indian Affairs' assimilationist program for reservations.¹³⁰ These courts, also known as "CFR courts" because they operated under guidelines set forth in the Code of Federal Regulations, have been characterized by critics as "instruments of cultural oppression"¹³¹ because of their use of criminal sanctions to impose dominant cultural norms on tribal peoples.¹³² At their zenith, they operated on about two-thirds of all reservations.¹³³ With the enactment of the IRA, tribes began to establish their own judicial systems to enforce the new tribal codes. These courts typically exercised civil as well as criminal

128. See *supra* note 11 and accompanying text (describing the chronology of federal policy toward Indian tribes).

129. See DELORIA & LYTTLE, *supra* note 44, at 113, 198-203 (noting the greater informality of tribal court procedures, less reliance on strict rules of evidence, and greater emphasis on mediation than adjudication); see also Sandra Day O'Connor, *Lessons From the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1 (1997) (noting that tribal legal systems incorporate traditional values and cooperative processes which can serve as models for Anglo-American courts).

130. See Nell Jessup Newton, *Tribal Court Praxis, One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 291 (1998); see also DELORIA & LYTTLE, *supra* note 44, at 113-16. The colonialist objective of these courts is made clear in their description by a nineteenth century federal judge as "mere educational and disciplinary instrumentalities by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian." *United States v. Clapox*, 35 F. 575, 577 (D. Or. 1888).

131. DELORIA & LYTTLE, *supra* note 44, at 115.

132. See Newton, *supra* note 130, at 291.

133. See James R. Kerr, *Constitutional Rights, Tribal Justice, and the American Indian*, 18 J. PUB. L. 311, 321 (1969); DELORIA & LYTTLE, *supra* note 44, at 115.

jurisdiction.¹³⁴ While there are wide variations among today's tribal courts, many tribes operate two-tiered judicial systems with procedural rules patterned after the rules of the state in which they are located.¹³⁵ Although tribal courts are generating a rich jurisprudence of their own,¹³⁶ the courts still face challenges to their legitimacy from tribal members who view them as "white man's tools."¹³⁷ At the same time, they face challenges to their legitimacy from outsiders (and some insiders) who view them as an inferior system of justice.¹³⁸

Some have praised the current state of tribal law as a manifestation of the tribes' abilities to adapt to their "dependent sovereign" status and to incorporate the contributions of Anglo-American law in a uniquely Indian meld.¹³⁹ According to one commentator:

The law produced in tribal codes and courts does not necessarily retain the discrete elements from Anglo-American legal culture with the same meaning and value as in the contributor culture or jurisprudence. In . . . tribal law . . . there is an innovative result that is consistent with a pervasive characteristic of the indigenous nations: the capacity to change as an evolving culture.¹⁴⁰

Recognizing a poverty of theory about the nature of tribal sovereignty, contemporary scholars of Indian law have urged

134. See DELORIA & LYTLE, *supra* note 44, at 116.

135. See Newton, *supra* note 130, at 291-94. In several of the tribes located in Arizona, for example, tribal codes have adopted procedures similar to those governing the Arizona courts. See *infra* notes 197, 199-201 and accompanying text.

136. For a fascinating description of case law generated by twenty Indian tribal courts over the course of a year, see Newton, *supra* note 130. The study reveals the complexity of the issues faced by tribal judges, the sophistication of their legal analysis, and the interplay of customary and traditional law in the decisionmaking.

137. See POMMERSHEIM, *supra* note 10, at 67 (observing that "many tribal courts are vilified as 'white men's' creations flowing from the IRA and an entire federal history directed to assimilation").

138. See Frank Pommersheim & Terry Pechota, *Tribal Immunity, Tribal Courts, and the Federal System: Emerging Contours and Frontiers*, 31 S.D. L. REV. 553, 566-67, 575-76 (1986).

139. According to Chief Justice Tso of the Navajo Supreme Court:

A close look at the Navajo Tribal Government would reveal many characteristics that appear to be Anglo in nature. Actually, many concepts have their roots in our ancient heritage. Others are foreign to our culture but have been accommodated in such a way that they have become acceptable and useful to us.

Tso, *supra* note 10, at 231; see also Valencia-Weber, *supra* note 25, at 256 (praising the creative capacity of tribal courts, shown through the work of "legal-warriors," who use the old to make new and distinctly Indian law).

140. See Valencia-Weber, *supra* note 25, at 256-57.

tribes to draw creatively on their traditions to enrich and distinguish their own systems of tribal justice.¹⁴¹

Tribal courts bring to a legal dispute a dimension of dispute resolution that is not available to the Anglo courts—the method by which the tribe historically has made sense of its place in the world.¹⁴² This dimension includes customs regarding the role of extended family members in child rearing, the respective roles of mothers and fathers, and the importance of preserving knowledge of the tribe's history, spiritual practices, myths, art forms, or traditional ways of life.¹⁴³ This dimension appears explicitly in many tribal codes and, even without a code's allusion to customary law, tribal courts often look to the traditions of their people in their decisionmaking. The Navajo Nation Supreme Court eloquently described the force of Navajo customary or "common law" in a recent opinion:

Navajo common law [or *K'e*] is the first law of our courts and we will abide by it whenever possible *K'e* recognizes "your relations to everything in the universe," in the sense that Navajos have respect for others and for a decision made by the group. It is a deep feeling for responsibilities to others and the duty to live in harmony with them It is a deeply-felt emotion which is learned from childhood. To maintain good relations and respect one another, Navajos must abide by this principle of *K'e*.¹⁴⁴

141. See, e.g., Porter, *supra* note 17 (recommending renewed emphasis on the Seneca tradition of Peacemaker in tribal dispute resolution); Pommerheim, *supra* note 9 (envisioning greater use of traditional narrative and story to "liberate" tribal court jurisprudence from its history of colonization). According to Deloria and Lytle, "[t]he greatest challenge faced by the modern tribal court system is in the harmonizing of past Indian customs and traditions with the dictates of contemporary jurisprudence." DELORIA & LYTLE, *supra* note 44, at 120.

142. Indian leaders have recognized that law reform within Indian communities must build on the unique strengths of the indigenous cultures. Judge Julian Pinkham of the Yakama Tribal Children's Court recently urged tribal judges across the nation to adopt a uniform children's code to address child welfare needs among Indian communities. See Pinkham, *supra* note 1. In his proposal for reform, Judge Pinkham deliberately drew on the traditional concern of the Yakima Tribe for the care of its children and for the preservation of tribal culture through education of the young. See *id.*; see also Robert Yazzie, *Life Comes from It: Navajo Justice Concepts*, 24 N.M. L. REV. 175, 180-87 (1994) (describing the unique concept of Navajo "horizontal" justice and its role in tribal adjudication); Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126 (1995) (describing the holistic philosophy that typifies indigenous justice systems in contrast to the "American" paradigm of justice).

143. See generally Newton, *supra* note 130, at 302-09.

144. Ben v. Burbank, 24 Indian L. Rptr. 6001, 6001 (Navajo Sup. Ct. 1996).

In a uniquely Navajo opinion, the court applied the principle of harmonious living to resolve a question of contract law.¹⁴⁵

B. TRIBAL CULTURE IN FAMILY LAW ADJUDICATION

Tribal judges frequently utilize the customary or unwritten law to assist them in deciding disputes in the family law arena.¹⁴⁶ In domestic relations involving tribal members, each tribe's culture can inform a court's approach to a case, ranging from the Navajo's matrilineal society in which a woman's role is revered,¹⁴⁷ to the Santa Clara Pueblo's patrilineal definition of tribal membership,¹⁴⁸ from the Comanche custom of giving a

145. In *Ben*, the Navajo Supreme Court determined that an oral contract between relatives was properly enforced by the tribe's small claims court, without regard to any statute of limitations. *Id.* at 6002.

146. Then-Judge Tom Tso has explained the essential role of family and clan in Navajo tradition:

It must also be understood that the Navajo clan system is very important, with a child being of the mother's clan and "born for" the father's clan. The clan is important, and the family as an economic unit is vital. The Navajo live together in family groups which can include parents, children, grandparents, brothers and sisters, and all the members of the family group have important duties to each other. These duties are based on the need to survive and upon very important religious values which command each to support each other and the group.

In *re* Estate of Apachee, 4 Navajo Rptr. 178, 182 (Window Rock Dist. Ct. 1983); see also *Ovah v. Coochyouma*, 21 Indian L. Rptr. 6085, 6086-87 (Hopi Tribal Ct. 1993) (describing the responsibility of villages within the Hopi Tribe for resolving family disputes according to tradition); *Davis v. Means*, 21 Indian L. Rptr. 6125, 6127 (Navajo Sup. Ct. 1994) (explaining the importance of paternity determinations for the functioning of Navajo Nation's clan system).

147. See *Navajo Nation v. Murphy*, 15 Indian L. Rptr. 6035, 6036 (Navajo Sup. Ct. 1988) (rejecting the Anglo concept of coverture as a basis for marital privilege, but sustaining the privilege on the basis of a need to preserve harmony). Other tribes, such as the Iroquois and many of the Pueblo tribes, are also matrilineal. See JANE B. KATZ, *I AM THE FIRE OF TIME 3* (1977); PAULA GUNN ALLEN, *THE SACRED HOOP* 209 (1986).

148. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). In *Martinez*, the Supreme Court upheld Pueblo tribal law against an equal protection challenge under the Indian Civil Rights Act that denied membership to a child born to an enrolled mother and a nonmember father. *Id.* The same law granted membership, however, to a child whose father was an enrolled member and whose mother was not. See *id.* at 52-53. *Martinez* has generated a rich scholarly debate about the clash of collective identity and individual rights. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 63-69 (1987); Tsosie, *Separate Sovereigns*, *supra* note 42, at 514-33; Robert C. Jeffrey, Jr., *The Indian Civil Rights Act and the Martinez Decision: A Reconsideration*, 35 S.D. L. REV. 355 (1990); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989). Other tribal code provisions contain similar gender-based distinctions that would most

special parenting role to a child's paternal aunt,¹⁴⁹ to the Delaware Tribe's recognition of "the unique relationship that exists between Indian grandparents and grandchildren."¹⁵⁰ As explained by the Navajo Supreme Court: "The family is the core of Navajo society. Thus, family cohesion is a fundamental tenet of the Navajo people. It is Navajo customary law—Dine Bi Beehaz'aanii—or Navajo common law. The Navajo Nation courts must apply that tenet to disputes involving children under the doctrine of *parens patriae*."¹⁵¹

Inevitably, a particular tribe's tradition on a family law matter may diverge from that of the state. In particular, a tribe's more fluid approach to responsibility for child-rearing may contrast sharply with the Anglo-American concern for the "legalistic parent and child relationship."¹⁵² The obligations of

likely fail under the United States Constitution's equal protection mandate. See, e.g., SALT RIVER COMMUNITY CODE § 10-16 (1981) (setting out as a ground for divorce a husband's failure to support his wife but omitting a wife's failure to support her husband); GILA RIVER INDIAN COMMUNITY CODE § 6.110 (1960) (same); LAW & ORDER CODE OF THE UTE INDIAN TRIBE OF THE UTAH & OURAY RESERVATION UTAH § 5-3-9 (1988) (requiring that tribal courts consider "the natural presumption that the mother is best suited to care for young children" in making custody awards).

149. See *In re K.A.W.*, 2 Okla. Trib. 338 (Child. Ct. for the Comanche Indian Tribe 1992).

150. *In re C.D.S.*, 1 Okla. Trib. 200, 204 (Ct. of Indian Offenses for the Del. Tribe of W. Okla. 1988).

151. *Davis v. Means*, 21 Indian L. Rptr. 6125, 6126 (Navajo Sup. Ct. 1994) (citations omitted).

152. *In re J.J.S.*, 4 Navajo Rptr. 192, 195 (Window Rock Dist. Ct. 1983) (distinguishing the Anglo view of parenthood from the Navajo common law that children belong to more than just the parents, and recognizing that extended families and clans have an obligation to care for children whose parents are unable to do so). In the area of adoptions, the willingness of tribal judges to endorse a concept of "open adoption" with ongoing contacts between the birth parents and the child has yielded a unique lesson in tribal justice. The tribal court of the Mississippi Band of Choctaws approved of such an arrangement after the Supreme Court remitted an adoption dispute to its exclusive jurisdiction in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). See Marcia Coyle, *After the Gavel Comes Down*, NAT'L L. J., Feb. 25, 1991, at 1; Rainey, *supra* note 84 (describing settlement in adoption feud in which Anglo adoptive parents agreed to maintain ties between adopted children and Pomo Indian tribe). Interestingly, Indian leaders have urged Congress to amend the ICWA to include a provision authorizing state courts to decree open adoptions in cases under the ICWA even where otherwise prohibited by state law. See H.R. 1082, 105th Cong. (1997); S. 569, 105th Cong. (1997); *Indian Child Welfare Joint Hearing Before the Senate Comm. of Indian Affairs and the House Resources Comm.* (June 18, 1997), available in 1997 WL 338648 (testimony of Deborah J. Doxtator, Chairwoman of the Oneida Nation of Wisconsin) (stating that "[t]his provision would . . . mak[e]

parenthood may be interpreted differently. For example, in a recent case before the Northern Plains Intertribal Court of Appeals, the court was faced with assessing a child support award against a Crow Creek father who had children from more than one relationship. In such a situation, state law would have given legal priority in terms of support to the offspring of the man's first relationship, but the court was unwilling to assume that the Crow Creek Sioux Tribe had a similar policy:

[T]he cultural differences between the non-Native American population of the state of South Dakota and the Native American population of the Crow Creek Sioux Tribe may be such that the proposition that the "first born child has priority in regard to support" does not fit within the acceptable cultural standards of the Crow Creek Sioux Tribe.¹⁵³

Significantly, the court believed that its responsibility as a tribal appellate court "require[d] it to consider the cultural differences and societal norms of Indian tribes in rendering its decision In particular, in regard to domestic relations and the support of children, Crow Creek Sioux may have considerably different standards."¹⁵⁴

In another dispute before a tribal court of one of the Paiute tribes, a court used a standard combining the practices of traditional Northern Paiute medicine men and "conventional white medical treatment" to determine whether a child had been deprived of adequate medical care under tribal law.¹⁵⁵ In such cases the tribal judges themselves are articulating their own obligation to discern and interpret the traditional law of the tribe.

Tribal culture may directly impact a court's resolution of disputes involving custody of children. A Cheyenne River Sioux court, for instance, explained that the tribal court must consider the cultural appropriateness of a proposed custody placement.¹⁵⁶ In particular, the tribal forum should take into

adoption to non-Indian families more attractive to Tribes, because of the possibility that the child may be more likely to keep ties with his or her culture").

153. *Attikai v. Thompson*, 21 Indian L. Rptr. 6001 (N. Plains Intertribal Ct. App. 1993) (remanding to trial court for determination of tribal policy).

154. *Id.* at 6002. The court directed the Crow Creek Tribal Court on remand to determine the applicable tribal cultural standard—either by the tribal judge's own personal knowledge or, if necessary, from testimony of tribal elders or other appropriate sources. *See id.*

155. *In re T.M.M.*, 24 Indian L. Rptr. 6039 (Walker River Paiute Juv. Ct. 1996).

156. *Miner v. Banley*, 22 Indian L. Rptr. 6044 (Cheyenne River Sioux Ct. App. 1995).

account "the appropriate familiarization of the child with Lakota customs, traditions and practices and the reported Lakota tradition of returning Lakota children placed with members of the extended family for child rearing to their biological parent upon request."¹⁵⁷ In a similar vein, a tribal appeals court on the Flathead Reservation recently considered a father's petition for the return of his son from the custody of the child's maternal grandparents.¹⁵⁸ Observing that Anglo-American law generally recognizes that parents have rights superior to those of the extended family, the court reasoned that such a principle reflects a culture that is different from that of the tribes:

In the culture of the Tribes, extended families play a much greater role in raising children. The rights of such extended family members will not necessarily be subordinate to natural parents when those extended family members have been rearing a child in their home or when they can offer more continuity of care than a parent who has not played a major role in parenting.¹⁵⁹

The tribal judges, although situated within and heavily influenced by the dominant society, are perpetuating the voice of the tribes as they self-consciously illuminate tribal culture.

The family codes of many tribes explicitly embrace the preservation of cultural heritage as a guiding principle in interpretation of the formal law. The Children's Code of the Cherokee Nation, for example, provides that it is to be construed "[t]o protect the interest of the Cherokee Nation in preserving and promoting the heritage, culture, tradition and values of the Cherokee Nation for its children."¹⁶⁰ The Domestic Relations Code of the Colorado River Tribes requires that it shall be construed to "give full consideration to religious and traditional preferences and practices of children during the disposition of a matter."¹⁶¹ In the formal law of many tribes, the substantive standards guiding a tribal court's resolution of a child custody dispute include factors relating to tribal cul-

157. *Id.* at 6045 (reversing trial court's award of permanent custody of child to non-parent).

158. See *In re Application of L.F.*, 24 Indian L. Rptr. 6015 (Confederated Salish and Kootenai Tribes of the Flathead Reservation Ct. App. 1996).

159. *Id.* at 6016 (holding that because father had actual physical custody of son before voluntarily placing him with grandparents, he was entitled to return of custody of child).

160. CHEROKEE NATION CHILDREN'S CODE § 1(E) (1993).

161. COLORADO RIVER TRIBES DOMESTIC RELATIONS CODE preamble (1995).

ture. One code provides that in determining custody the tribal court shall consider the "tribal affiliation of the parties and the child."¹⁶² Similarly, the Colville Tribal Code states that the tribal court "shall determine custody in accordance with the best interests of the child and, secondarily, the traditions and customs of the Colville Indian people."¹⁶³ The Code also lists the Indian heritage of the child as a relevant factor in a custody determination. The Lummi Indian Tribe requires its tribal court, in determining child custody, to consider the "tribal affiliation of the parties and the child" and the "extent of the participation of the parties in tribal cultural activities."¹⁶⁴ In yet another variation, the Yerington Paiute Tribe has codified a restriction on removing a child from the reservation "unless there is no suitable person on the reservation to act as custodian."¹⁶⁵

A tribal court's consideration of culture and tradition in its judicial decisionmaking may make state courts reluctant to respect the tribal court's ruling where non-Indian interests are at stake.¹⁶⁶ Anglo-American judges, who can often misunderstand the meaning of tribal identity, may fear that the foreign concept of tribalism will override the best interests of the child.¹⁶⁷ Especially where the parties feuding over child custody include non-Indians, Anglo courts and non-Indian participants often fear that pro-Indian bias will trump other factors and that tribal courts will disregard testimony of emotional bonding or other evidence favorable to the non-Indian party.¹⁶⁸ Thus, a

162. CHEHALIS MARRIAGE CODE § 11.4.02(g) (1985).

163. CONFEDERATED TRIBES OF THE COLVILLE RESERVATION LAW & ORDER CODE § 13.4.10 (1979).

164. LUMMI CODE OF LAWS § 11.4.02(g)-(h) (1974).

165. YERINGTON PAIUTE LAW & ORDER CODE § 9-70-050(h) (1977).

166. See POMMERSHEIM, *supra* note 10, at 79-98 (analyzing the scope of tribal judicial and legislative jurisdiction over non-Indians).

167. The history of the ICWA in the state courts is replete with examples of refusals by the courts to yield to presumptive tribal jurisdiction. See generally Carriere, *supra* note 90.

168. A non-Indian litigant in a custody battle with her Choctaw in-laws over her two young daughters recently objected to the tribe's jurisdiction, stating, "Just because the girls would be more exposed to Choctaw heritage in Oklahoma doesn't make the family there better guardians than their mother." Todd Bensman, *Tribal Court May Settle Custody Case*, DALLAS MORNING NEWS, Jan. 7, 1998, at 23A, available in 1998 WL 2503227. Such fears have been fueled by media coverage of several adoption cases under the ICWA. For a recent controversial California decision refusing to follow the literal terms of the ICWA, see *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Cal. Ct. App. 1996). The case generated widespread media attention. See, e.g., Rainey, *supra* note 84;

tribe's adherence to tribal cultural standards in its child custody determinations may pose a barrier to the recognition of these judgments in state courts. Perhaps in an effort to avoid this risk, a few tribes have adopted family codes that are devoid of references to the relevance of tribal cultural heritage.¹⁶⁹

C. TRIBAL DEFINITIONS OF CHILD CUSTODY JURISDICTION

The codes of many tribes were not drafted to resolve jurisdictional disputes with other sovereigns. Instead, they resemble charters or authorizing documents to be used by the tribal government to define the substantive and procedural rules to follow in resolving disputes between members or between a member and the tribe. In the domestic relations realm, the tribal codes may be silent as to the jurisdictional basis for child custody determinations, the unstated assumption being that power to determine custody exists whenever the tribal court has power to decree a divorce. Thus, the following overview of tribal rules for child custody jurisdiction is, in part, an extrapolation from the tribes' requirements for divorce jurisdiction.¹⁷⁰

1. Tribal Membership

In the child welfare context and the child custody context alike, a tribe's jurisdiction under its own law generally turns in part on the child's identity as "Indian."¹⁷¹ Today most tribes adhere to a relatively finite blood-quantum test to determine membership eligibility in order to protect the tribe as an entity.¹⁷² A few tribes, most markedly the Cherokee Nation of

Jane Gorman & Diane Michelsen, *Challenge to Native-American Adoptions*, SEATTLE TIMES, Dec. 23, 1997, at B5. See also *Mississippi Band of Choctaw v. Holyfield*, 490 U.S. 30 (1989) (nullifying state court ruling on the adoption of Choctaw children because of the ICWA's mandate of exclusive tribal jurisdiction over Indian children domiciled on reservation).

169. See *infra* notes 202-06 and accompanying text.

170. This "divorce equals custody" approach is found in the Cheyenne River Sioux Tribal Code and is explained in detail by the tribal court of appeals in *Eberhard v. Eberhard*, 24 Indian L. Rptr. 6059 (Cheyenne River Sioux Ct. App. 1997), discussed *infra* at notes 217-33 and accompanying text.

171. Federal law, through the ICWA, defines Indian child to mean any unmarried minor who is either a member of a federally recognized Indian tribe or who is eligible for membership and is the biological child of a member of a tribe. 25 U.S.C. § 1903(4) (1994). The ICWA, however, does not govern interparental custody disputes—the focus of this Article.

172. According to *Cohen's Handbook of Federal Indian Law*, two qualifications generally must be met in order for a person to be considered an Indian:

Oklahoma, have taken a more inclusive approach that broadens the tribal base.¹⁷³ Thus, a tribe's own definition of membership is of critical importance in determining the scope of its power over children.

The formal laws of many tribes give tribal courts the power to decide child custody on the simple basis of the tribal enrollment of at least one of the parents.¹⁷⁴ Such laws are premised on the traditional authority of an Indian tribe over the domestic relations of its members and generally are drafted without attention to the problem of jurisdictional conflict with other sovereigns.¹⁷⁵ The jurisdictional language varies from tribe to

some of the person's ancestors must have lived in pre-Columbian North America, and the person must be recognized as an Indian by his or her tribe or community. COHEN, *supra* note 11, at 19-20. Before the passage of the Indian Reorganization Act in 1934, most tribes did not keep formal membership rolls, but when the United States government conditioned federal recognition of Indian tribes on defined membership criteria, tribes developed such criteria, often with the BIA's assistance. Many tribal provisions call for a minimum of one-fourth degree of blood of the tribe in question but a few require as much as one-half degree of tribal blood. *See id.* at 22-23.

173. *See* MARKS, *supra* note 16, at 378 (stating that survival of tribes involves two opposing strategies—keeping blood-quantum high to protect tribal identity or widening tribal base by accepting minimal blood connections).

174. Under the Ak-Chin Indian Community Code, for example, in divorce actions "at least one of the parties must be a member of the Community and reside on the reservation at the time of instituting the action," with no separate jurisdictional rules for child custody. AK-CHIN INDIAN COMMUNITY CODE § 5.23 (1975). Adoption, on the other hand, requires that the child be a resident of the reservation. *See id.* § 5.24. In similar fashion, the Tribal Code of the Confederated Tribes, Chehalis Reservation, provides that jurisdiction in divorce cases exists if either party to the marriage is an enrolled member of the Chehalis Indian Tribe. CHEHALIS MARRIAGE CODE § 11.2.03 (1985). In custody matters, the same code provides that a custody proceeding can be commenced by a parent in a divorce action or, alternatively, by the filing of a petition for custody "where the child is permanently resident or on the reservation where [he] is found or enrolled." *Id.* § 11.4.01(a)(1)(ii). Thus, membership in the tribe or the child's residence on the reservation are two apparently alternative jurisdictional bases for custody determinations. The Tribal Code of the Lummi Indian Tribe is yet another example of jurisdiction resting on tribal membership, providing that jurisdiction for divorce exists where one of the parties to the marriage is either an enrolled member of the Tribe or a resident of the Lummi Indian Reservation. LUMMI CODE OF LAWS § 11.2.03 (1974). The Code does not set out specific jurisdictional rules for custody.

175. At least one code did acknowledge the potential assertion of conflicting jurisdiction by another tribe or a state. The laws of the Colorado River Tribes provide, in an explanatory note regarding tribal court jurisdiction, that anyone can file for divorce "regardless of whether any party is Indian or not. Usually the tribal court, however, will decline jurisdiction in cases in the interests of comity if no Indian or Indian-owned property is involved." COLORADO RIVER TRIBES, BROCHURE ON DOMESTIC RELATIONS CASES FOR

tribe, and several codes adhere to a jurisdictional framework imposed by the Bureau of Indian Affairs (BIA) that tribal civil jurisdiction extends only to disputes where the defending party is an Indian.¹⁷⁶ It is not clear whether Indian tribes may constitutionally assert civil jurisdiction over non-Indians for claims arising on tribal lands, but recent pronouncements by the Supreme Court clearly suggest that tribes possess such authority.¹⁷⁷ Thus, this BIA-imposed jurisdictional limitation may not be constitutionally mandated. Moreover, the ordinary requirement that a court possess personal jurisdiction over the defendant would not serve as a barrier to tribal jurisdiction in child custody cases since traditional notions of in personam ju-

DIVORCE OR LEGAL SEPARATION 57 (1995).

176. Under federal regulations setting forth the Bureau of Indian Affairs' Code for Courts of Indian Offenses, jurisdiction exists over actions against Indian defendants but not over actions against non-Indians except by stipulation of the parties. Civil Jurisdiction, Limitations of Actions, 25 C.F.R. § 11.103 (1998). Many tribal codes copied that model. See NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, INDIAN COURTS AND THE FUTURE 47-48 (1978). Professor Pommersheim has criticized this jurisdictional framework as "the handiwork of the Bureau of Indian Affairs and its commitment to act cautiously with regard to jurisdiction involving non-Indians," and has noted that such a policy is clearly at odds with the current trend toward meaningful self-determination. POMMERSHEIM, *supra* note 10, at 87.

177. In *Montana v. United States*, 450 U.S. 544, 565-66 (1981), the Court explained that the inherent sovereign powers of an Indian tribe, i.e., powers that exist apart from an explicit statute or treaty, do not extend to the activities of nonmembers. The Court noted, however, that even without congressional authorization, tribal civil jurisdiction extends to nonmembers who enter consensual relations with members or whose conduct on fee lands within the reservation directly affects tribal interests. See *id.* at 566. Later, the Supreme Court stated that "[t]ribal authority over the activities of non-Indians on reservations lands is an important part of tribal sovereignty," and that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). The position expressed in *Iowa Mutual* has led Judge Canby to observe that "[i]t seems likely . . . that most tribal courts will be able to exercise jurisdiction over non-Indians for reservation-based claims." WILLIAM C. CANBY, *AMERICAN INDIAN LAW IN A NUTSHELL* 159 (1988). Most recently, in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the Court applied *Montana* to hold that a tribe could not assert jurisdiction over a nonmember defendant in a tort suit arising on a state highway within the reservation's boundaries. For an analysis of this topic, see Frickey, *supra* note 37, at 1768-77 (arguing that the Supreme Court's treatment of the question shows shifting emphases on consent, geographic presence, and tribal interests); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 854 (1996) (arguing that the question of civil jurisdiction over nonmembers should be reconceived primarily as paradigm of consent).

risdiction do not apply in custody litigation.¹⁷⁸ In practice, many tribal courts have readily asserted jurisdiction in domestic relations actions brought by members against nonmembers,¹⁷⁹ but the older limitations do persist in some tribal codes despite the arguable lack of a constitutional justification for such a limit. In these tribal codes, if only one divorcing party is an enrolled member, that person must be the responding or defending party, not the petitioner.¹⁸⁰ The Jicarilla Apache Tribe, for example, has authorized its tribal courts to hear divorce petitions and resolve the custody of minor children when both parties are "Indians" or where the petitioner is a non-Indian and the respondent is an Indian. On the other hand, if the petitioner is an Indian and respondent a non-Indian, then according to the tribal code, jurisdiction exists only if the non-Indian respondent voluntarily submits to the tribal court's jurisdiction.¹⁸¹

These membership-based tribal codes are premised on the traditional assumption that the sovereign power of the tribe includes the resolution of family disputes involving tribal members. The prevailing Anglo-American model, as represented by the UCCJA, the new UCCJEA, and the federal PKPA, gives no weight to this pivotal jurisdictional fact. Instead, the Anglo-American model now focuses on the primary

178. In the "tri-polar" context of child custody, Anglo-American courts for the most part have been willing to dispense with traditional requirements of personal jurisdiction. I have explored the role of personal jurisdiction in child custody litigation elsewhere. See Barbara Ann Atwood, *Child Custody Jurisdiction and Territoriality*, 52 OHIO ST. L.J. 369 (1991).

179. The *Eberhard* case, discussed *infra* at notes 217-33 and accompanying text, is a very recent example of a tribe's exercise of jurisdiction in an action against a nonmember. See also *In re Marriage of Skillen*, 956 P.2d 1 (Mont. 1998), discussed *infra* at notes 234-43 and accompanying text (recognizing jurisdiction of Indian tribe to resolve child custody dispute between member and nonmember).

180. Two codes contained only a general limitation on the civil jurisdiction of the tribal courts, without a separate provision for jurisdiction in domestic relations cases. See HOPI TRIBAL CODE § 1.7.1 (1972) (recognizing civil jurisdiction of tribal courts in cases where defendants are members of the Tribe); CODE OF ORDINANCES OF THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY § 4.1(d) (1981) (recognizing civil jurisdiction of tribal courts in cases where defendant is a member of the community). But see HOPI TRIBAL CODE § 1.7.1.A (seeming to extend civil jurisdiction to cases where defendant enters upon the Hopi Reservation, by a theory of constructive consent).

181. JICARILLA APACHE TRIBAL CODE tit. 3, ch. 2 (1987). The Code contains no requirements specially applicable to the child that is the subject of any custody dispute.

concept of a child's "home state."¹⁸² Thus, a tribal child custody decree that was premised on the membership of one of the parents, without more, would not be recognized and enforced under the express terms of either the Uniform Acts or the federal act. Moreover, some state courts refuse even to accept a tribe's definition of its own membership.

A Louisiana court opinion is illustrative. In *Barbry v. Dauzat*,¹⁸³ the state court rejected an Indian father's arguments for the exclusive jurisdiction of the tribal court in a custody dispute between the father and the child's non-Indian mother.¹⁸⁴ Both the father and the child were enrolled members of the Tunica-Biloxi Indian Tribe and residing on the Reservation, and the Tunica-Biloxi tribal court had issued a custody decision favorable to the father.¹⁸⁵ A Louisiana state court, however, had also exercised jurisdiction over the dispute and had awarded custody to the mother.¹⁸⁶ In upholding the state court's authority, the court of appeals pointedly observed that in many cases of jurisdictional conflict between states and tribes, the tribal courts have evidenced "a tribal court concern for tribal sovereignty, cultural survival, and the welfare of the Indian child."¹⁸⁷ Such concerns were of no moment to the state tribunal. Indeed, the court refused to defer to the tribe even as to the child's status as an Indian. Observing that the child was "one-quarter Tunica-Biloxi Indian and three-quarter Caucasian by ancestry," the court went on to invoke a matrilineal definition of membership without any mention of the tribe's own membership criteria.¹⁸⁸ Instead, the court applied principles of the *civil* law (with citations to Justinian) to determine that the child was not an Indian: "[W]e find that a child born of a Caucasian woman by an Indian father would be considered a child of the Caucasian race as the condition of the mother, and not the quantum of the Indian ancestry of the child, determines the condition of the offspring."¹⁸⁹ In an ironic twist, the

182. See *supra* notes 94-111 and accompanying text (discussing UCCJA's recognition of home state jurisdiction and the later prioritization of the home state jurisdictional basis in the PKPA and the new UCCJEA).

183. 576 So. 2d 1013 (La. Ct. App. 1991).

184. The father in *Barbry* moved to dismiss or, alternatively, to transfer a pending custody action in state court to the tribe. *Id.* at 1014.

185. See *id.* at 1021.

186. See *id.* at 1013.

187. *Id.* at 1021.

188. *Id.*

189. *Id.* at 1021-22.

court emphasized that "[p]ersons of more white than Indian blood have been held to be white under the laws of other states."¹⁹⁰ The *Barbry* case reveals a disdain for the concept of tribal sovereignty, a disdain seemingly fueled by the court's discomfort with the prospect of tribal power over the welfare of the "Caucasian" child.

2. Geographic Ties to the Reservation

Several tribal codes include a geographic tie to the reservation by a parent or child as a prerequisite to the exercise of custody jurisdiction. The required territorial connection often takes the form of residence or domicile on reservation lands. The Chippewa-Cree Tribe, for example, provides that tribal courts shall have jurisdiction in child custody matters "if the child is domiciled or resides within the Court's jurisdiction or if it is in the best interest of the child that the Tribal Court assume jurisdiction."¹⁹¹ Other tribes have explicitly endorsed the jurisdictional standard of the federal ICWA. The Cherokee Code gives tribal courts jurisdiction in domestic relations "of Indians, as provided by the Federal Indian Child Welfare Act including child custody and adoption matters. Residence requirements shall be as provided in the Indian Child Welfare Act."¹⁹² Similarly, the Mille Lacs Band of Chippewa has incorporated the ICWA definition of child custody proceedings and gives exclusive jurisdiction to the tribal court "if the minor is domiciled or resides on lands under the jurisdiction of the Band."¹⁹³ Finally, several tribes have not established separate

190. *Id.* at 1022. The irony arises from the history in the South of overtly racist statutory categories of blood-quantum evidence to preserve the purity of the white race. See generally Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189 (1966).

191. LAW & ORDER CODE OF THE CHIPPEWA-CREE TRIBE OF THE ROCKY BOY'S RESERVATION tit. 5, § 3.8 (1987). For general divorce jurisdiction, the code requires that at least one of the parties "has lived within or has been domiciled within the Court's jurisdiction for the preceding ninety (90) days, or has significant connections with the Chippewa-Cree Tribe." *Id.* § 3.1.

192. CHEROKEE NATION CODE ANN. tit. 20, § 24(c) (West 1993). The Cherokee Children's Code, moreover, provides that it shall apply "to children subject to the jurisdiction of the Cherokee Nation who reside on 'Indian Country' as defined by federal and Cherokee Nation law." *Id.* tit. 10, § 1.2.

193. MILLE LACS BAND STAT. ANN. tit. 8, §§ 5(a), 4(b)(7) (substituting the word "territories" for "lands") (West 1996); see also LAW & ORDER CODE OF THE CHEYENNE RIVER SIOUX TRIBE § 8-3-2 (1980) (requiring in divorce action that plaintiff be a resident of the Cheyenne River Sioux Indian Reservation,

rules for jurisdiction in domestic relations matters and apparently rely on provisions for general civil jurisdiction over persons or events within the territory of the reservation.¹⁹⁴

As would be expected, the geographic connections that suffice for the exercise of jurisdiction differ among tribes, and most tribal codes do not conform to the formulaic approach to jurisdiction of the UCCJA and the UCCJEA. The concepts of "domicile" and "residence" frequently appear in the tribal codes but not in the Uniform Acts, in part because the Commissioners preferred to avoid terms of unclear meaning or application. Instead, the Commissioners created the more objective concept of "home state" jurisdiction—where a child and one contestant have lived for six consecutive months—to have a "definite and certain test,"¹⁹⁵ and in the newly-promulgated Act they have prioritized this basis of jurisdiction. Although a given fact pattern could satisfy both a tribe's standards and the standards of the Uniform Acts, a tribe complying with its own jurisdictional code could easily run afoul of the model of the new Uniform Act. The Chippewa-Cree Tribe, for example, could assert jurisdiction to determine the custody of a child it found to be domiciled within the reservation, even though the child might have been living off the reservation for more than six months. A state applying the new UCCJEA, even if it had adopted the section mandating respect for tribal court decisions, would not recognize initial tribal jurisdiction in such a case. Thus, under the acts, the goal of objectivity and certainty would trump the tribe's more subjective link to the dispute.

3. Tribal Adoption of the Uniform Acts

In a few tribes, the process of assimilation is evident in the formal laws governing child custody jurisdiction. In these

with no separate jurisdictional requirements for custody).

194. See, e.g., LAW & ORDER CODE OF THE COEUR D'ALENE TRIBE OF INDIANS § 1-3.01 (1985) (authorizing jurisdiction over all persons who voluntarily come onto or live within exterior boundaries of Coeur d'Alene Indian Reservation); HOH INDIAN TRIBE COURT PROCEDURES ORDINANCE § 5(c) (1986) (authorizing "civil jurisdiction over all persons who enter the exterior boundaries of the Hoh Reservation for whatever purpose, said act of entry being construed as consent of such jurisdiction"); CODE OF ORDINANCES OF THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY § 4.1(d) (1981) (authorizing civil jurisdiction if defendant "is domiciled or residing within the community; or has caused an event to occur within the community out of which the claim . . . arose").

195. UNIF. CHILD CUSTODY JURISDICTION ACT § 3 cmt., 9 U.L.A. 144 (1988).

tribes, the family codes have been drafted to reflect the prevailing jurisdictional model that is established by the UCCJA. The Northern Cheyenne Tribe, for example, has a detailed family code that provides jurisdictional categories substantially similar to the UCCJA's categories of home state, significant connection, and emergency jurisdiction.¹⁹⁶ Similarly, several Arizona tribes have incorporated Arizona's version of the UCCJA in their tribal codes.¹⁹⁷ In tribes such as these, the promise of inter-system legitimacy has led the tribal councils to model their child custody jurisdictional criteria after the Anglo-American norm. The goal of achieving recognition of custody decrees outside the boundaries of the reservation is clearly one of the forces driving the inclusion of such jurisdictional standards in the tribal codes. The Northern Cheyenne Tribal Code, for instance, reveals the Tribe's acute interest in having its own decrees respected: it mandates recognition of decrees of other courts that rest on similar jurisdictional bases except when the other tribal or state court has refused to recognize decrees of the Northern Cheyenne Court.¹⁹⁸

In Arizona, the unusual phenomenon of several tribes' willingness to adopt the UCCJA is perhaps a function of Arizona's peculiar version of the Uniform Act. Unlike all other states, Arizona has included "domicile of the child" as an alternative to "home state" jurisdiction,¹⁹⁹ and the tribes that have

196. See TRIBAL CODE OF NORTHERN CHEYENNE § 8-3-1 (1987).

197. See LAW & ORDER CODE OF THE FORT MOJAVE INDIAN TRIBE § 476 (1981) (adopting Arizona's version of UCCJA); HUALAPAI TRIBE CIVIL & CRIMINAL LAW & ORDER CODE § 3.21 (1975) (adopting Arizona's version of UCCJA); JUVENILE CODE OF PASCUA YAQUI TRIBE § 10.17 (1992) (same); YAVAPAI-PRESCOTT TRIBE LAW & ORDER CODE § 3.21 (1979) (same). One other Arizona-based tribe has followed the UCCJA model but provided somewhat greater flexibility. See LAW & ORDER CODE OF THE HAVASUPAI INDIAN TRIBE § 3.23 (1978) (providing for child custody jurisdiction in terms that are similar to, but more flexible than, provisions of the UCCJA: where child and contestant are living in community; where child lived in community in past six months but is absent and a parent or like contestant lives in community; where at least one contestant and child have a significant connection with community; where a child while present is abandoned or in emergency situation; where another court has deferred to Havasupai Tribal Court).

198. See TRIBAL CODE OF NORTHERN CHEYENNE § 8-4-11.

199. See ARIZ. REV. STAT. ANN. § 25-433(A)(1) (West Supp. 1997-98) (authorizing jurisdiction where "[t]his state is the domicile or the home state of the child"). The inclusion of domicile as the basis for child custody jurisdiction is contrary to the terms of the UCCJA and has prompted at least one court to disregard a custody decree from Arizona that was based on domicile. See *O'Neal v. O'Neal*, 329 N.W.2d 666, 668 (Iowa 1983).

incorporated the UCCJA into their codes have carried over that unusual feature.²⁰⁰ Thus, the tribes were able to adopt Arizona's version of the UCCJA without relinquishing the traditional jurisdictional basis of domicile in their tribal codes. Another factor that may continue to influence tribes in Arizona is the decision in *Martinez v. Superior Court*,²⁰¹ where the Arizona Court of Appeals held that the UCCJA should be construed to apply to Indian tribes—the only reported decision from a state court to so hold. Since *Martinez* places tribes on notice that the UCCJA will be applied to them in Arizona state courts, the tribes have an ongoing incentive to incorporate the jurisdictional standards of the Uniform Act in their tribal codes.

D. THE RELATIONSHIP BETWEEN JURISDICTIONAL RULES AND SUBSTANTIVE STANDARDS

My examination of tribal codes revealed an unexpected facet of a tribe's decision to adopt jurisdictional requirements that resemble those of the UCCJA. In those tribes that have enacted the UCCJA framework for custody actions, the *substantive* standards for resolving custody disputes likewise reveal the force of assimilation. Among the tribal codes that have incorporated the model of the Uniform Act, none has substantive provisions that contain any reference to the preservation of a child's cultural identity or tribal affiliation as factors to be taken into account by the tribal decisionmaker. In framing their jurisdictional laws to parallel the standards of the UCCJA, the tribes performed a clean sweep, eliminating references to a child's connection to the tribe. Thus, the tribal codes of the Northern Cheyenne,²⁰² Havasupai,²⁰³ and Hualapai²⁰⁴

200. The Yavapai Prescott Indian Tribe, for example, has authorized its tribal court to make an initial child custody determination where the "community is the domicile of the child at the time of commencement of the proceeding, or had been the child's domicile within six (6) months before commencement of the proceeding . . . and a parent or person acting as parent continues to live in this community." YAVAPAI PRESCOTT TRIBE LAW & ORDER CODE § 3.21 (1979).

201. 731 P.2d 1244, 1247 (Ariz. Ct. App. 1987).

202. TRIBAL CODE OF THE NORTHERN CHEYENNE § 8-3-2 (1987) (directing court to determine custody "in accordance with the best interest of the child" by reference to wishes of parents and child, relationship of child with parents and others, child's adjustment to home, school and community, mental and physical health of all individuals, and whether child has been incorporated into home of parent).

203. LAW & ORDER CODE OF THE HAVASUPAI INDIAN TRIBE § 3.24 (1978)

tribes employ culture-neutral language to guide tribal courts in resolving custody disputes, and phrases authorizing tribal courts to consider the preservation of the child's Indian heritage are noticeably absent. This cultural neutrality stands in sharp contrast to the substantive codes of tribes that have not adopted the UCCJA jurisdictional model.²⁰⁵ In these codes, whether based on geographic or membership standards, the substantive custody guidelines often give weight to a parent's tribal affiliation and to a parent's ability to maintain the child's cultural ties with his or her tribe.²⁰⁶ Although tribal courts may give weight to cultural facts even without express authority to do so, the silence of the codes that have adopted a UCCJA-style jurisdictional framework is telling. It suggests that, at least as a matter of formal codified law, the unique contributions of the tribal forum—its capacity to discern and perpetuate tribal culture—may be eclipsed by the tribe's desire to achieve legitimacy in the dominant society.

Several years ago I saw firsthand the benefits of a tribe's reliance on Anglo-American jurisdictional and substantive rules in the child custody arena. Only after the fact did I consider the costs associated with the tribe's conformity to Anglo-American standards. The experience arose out of my representation of Carol Redcherries, a member of the Northern Cheyenne Tribe and former tribal judge. Carol helped me understand a small part of Northern Cheyenne life, and I, in turn, helped her maintain custody of her granddaughter Lupe.

(directing court to award custody "in accordance with the best interests of the child" after considering parties' and children's wishes, child's interrelationship with family members and others, child's adjustment to home, school and community, physical and mental health of all individuals, and age of child).

204. HUALAPAI TRIBE CIVIL & CRIMINAL LAW & ORDER CODE § 3.22 (1975) (directing court to determine custody in accordance "with the best interests of the child," considering wishes of child and parents, interrelationship of child with parents, siblings and other persons who may significantly affect child's interest, child's adjustment to home, school and community, and mental and physical health of all individuals).

205. See *supra* notes 160-68 and accompanying text.

206. See, e.g., LUMMI CODE OF LAWS § 11.2.03 (1974) (imposing jurisdictional requirement in divorce that either petitioner or respondent be an enrolled member of Lummi Indian Tribe or a resident of Lummi Indian Reservation); *id.* § 11.4.01 (providing alternative jurisdictional basis for custody action where child is "permanently resident or on the Reservation where he is found or enrolled"); *id.* § 11.4.02 (providing that court shall consider, *inter alia*, "tribal affiliation of the parties and the child and the extent of the participation of the parties in tribal cultural activities").

Carol's own daughter, also a member of the Northern Cheyenne tribe, had died from cancer while still a young woman. After her death, a tug-of-war ensued between Carol and Lupe's biological father, Ruben Alegria, a Mexican-American man with no affiliation to Carol's tribe. Immediately following the death of Carol's daughter, the tribal court had awarded temporary custody of Lupe to Alegria but set a date for a hearing on permanent custody. To protect its jurisdiction, the court prohibited the father from removing Lupe from the Northern Cheyenne Reservation. Nevertheless, after attending his wife's funeral, Alegria left the reservation to return to his residence in Tucson, Arizona, taking little Lupe with him.²⁰⁷ Unknown to Alegria, the applicable family code of the Northern Cheyenne tribe created a presumption favoring biological parents over non-parents in custody disputes, without regard to the parent's Indian heritage.²⁰⁸ By disobeying the tribal court's edict, however, Alegria showed his contempt for tribal authority and lost the benefit of the presumption. Proceeding in the father's absence, the tribal court ruled that Carol should have permanent custody of the child.²⁰⁹

When I encountered Carol, she was armed with a copy of the tribal court decree and was trying to persuade local Arizona authorities to help her enforce her right to custody. We often spoke about the role of the extended family among the Northern Cheyenne people. "Lupe has many grandmothers," Carol once said. I smiled at her, thinking that she was referring to the spirits of ancestors. She explained her meaning. "In our tribe, all my sisters are viewed as 'grandmother' to Lupe. The word is the same. We are all responsible for the raising of the grandchildren." I began to understand that within the Northern Cheyenne community, Lupe would be at the center of a network of care and familial support.²¹⁰

207. The facts of the case are set out at *Alegria v. Redcherries*, 812 P.2d 1085, 1086 (Ariz. Ct. App. 1991).

208. Several provisions of the Northern Cheyenne family code favor biological parents. See, e.g., TRIBAL CODE OF THE NORTHERN CHEYENNE § 8-3-1(C) (1987) (providing that a nonparent may seek custody only if the child is not in the physical custody of a parent); *id.* § 8-3-2(A) (listing the wishes of the child's parents as a relevant factor in determining custody); *id.* § 8-3-7 (granting a non-custodial parent presumptive visitation rights).

209. See Order of Jan. 11, 1990, *In re Lupe Moriah Alegria*, No. 89-233 (Northern Cheyenne Tribal Ct.).

210. Although my pro bono representation of Carol focused on the jurisdictional and judgment-recognition aspects of the case, I developed a firm conviction

After a loss in the state trial court,²¹¹ Carol's effort to enforce the tribal decree in Arizona ultimately succeeded. In taking her case to the state appellate courts, I advanced my client's interest in the best way I knew possible. I called the court's attention to the fact that the jurisdictional standards of the Northern Cheyenne Tribe were modeled after the familiar framework of the UCCJA.²¹² I made clear that the substantive standards of the Northern Cheyenne Code on child custody focused on the best interests of the child in neutral language. I argued that the tribal forum was competent to determine the custody of little Lupe because the grandmother's Indian identity would not automatically trump the father's presumptive rights under tribal law. In other words, I urged the court in sterile logic to enforce the tribal decree because the tribal forum had acted on the basis of well-known jurisdictional and substantive standards. In effect, I urged the state court to respect the tribal court for its sameness, not its difference. The strategy was successful. According to the court of appeals, the decree of the Northern Cheyenne tribal court was entitled to recognition under the doctrines of *res judicata* and comity and under the statutory commands of state and federal law.²¹³

With the benefit of reflection, I am now less comfortable with my advocacy in Carol's case. Arguments for recognition of tribal acts that are based on sameness inevitably promote assimilation as an ideal.²¹⁴ The decisionmaking of tribal courts,

tion that the best interests of Lupe would be served by her remaining with Carol. Through Carol, the girl would experience a childhood among a small and cohesive community where "Redcherries" is a respected tribal name. She would grow up in a rural setting without material luxuries but surrounded by the breathtaking grandeur of Montana. Her grandmother, an admired female figure in the tribe, would serve as a positive role model for the young child. In contrast, my impression was that Lupe's father would be unable to provide the child with a stable home. I had no confidence, however, that the state court would share my view of the merits of the custody dispute.

211. The state trial judge was clearly suspicious of the quality of justice available to Alegria in the tribe's judicial system, but his final order rested on a point of jurisdiction. According to the judge's minute entry, Alegria and the child had insufficient contact with the reservation to justify tribal court authority, and the tribal decree was therefore "void for lack of jurisdiction." Judgment, *Alegria v. Redcherries*, No. 268523 (Pima Co. Super. Ct. 1990).

212. See *supra* notes 196, 202 and accompanying text (describing provisions of the Northern Cheyenne code).

213. See *Alegria v. Redcherries*, 812 P.2d at 1087.

214. As forcefully stated by Professor Pommersheim, "[t]ribal courts do not exist solely to reproduce or replicate the dominant canon appearing in state and federal courts. If they did, the process of colonization would be complete

however, is worthy of respect at least in part because of the very difference that the tribal perspective offers. Although I would not alter my successful representation of Carol's interests, I am troubled by the fact that her legal position was made stronger because of the culture-neutral face of her tribe's code. The tribes that have chosen to omit culture-specific standards from their child custody laws have foregone an opportunity to instruct state judges as well as their own judges about the importance of cultural heritage in determining the placement of Indian children.²¹⁵ In contrast to the written code of the Northern Cheyenne Tribe, most tribal codes include cultural or spiritual facets of the child's well-being in addition to or in lieu of the factors considered by the Anglo-American courts.²¹⁶ For such tribes, the legitimacy of their custody decrees should not diminish in the eyes of state court judges merely because the codes identify tribal affiliation and tribal culture as relevant concerns.

IV. STATUTORY MANDATE VS. COMITY—TWO CASES AND SOME ILLUSTRATIONS

A. *EBERHARD V. EBERHARD*: AN INTRA-TRIBAL DEBATE ON THE PKPA

A provocative exploration of tribal sovereignty, full faith and credit, and child custody jurisdiction can be found in an opinion of the Cheyenne River Sioux Tribal Court of Appeals. In *Eberhard v. Eberhard*,²¹⁷ the court confronted a jurisdictional conflict between the tribal trial court and a California state court in a child custody battle. Although the tribal court was addressing the applicability of the federal PKPA to Indian tribes, the considerations involved in the PKPA analysis implicate the same concerns that arise under the Commissioners' new Uniform Act. The feuding parties in *Eberhard* were the father, a member of the Cheyenne River Sioux Tribe, and the

and the unique legal cultures of the tribes fully extirpated." POMMERSHEIM, *supra* note 10, at 99.

215. Christine Zuni has made this point forcefully: "To the extent that tribal justice systems pattern themselves, not only in structure but in the law applied in their systems, after federal and state court systems, they surrender their own unique concepts of native law and participate, at a certain level, in their own ethnocide." Zuni, *supra* note 17, at 24.

216. See *supra* notes 160-68 and accompanying text.

217. 24 Indian L. Rptr. 6059 (Cheyenne River Sioux Ct. App. 1997).

non-Indian mother, and at the center of their fight was their daughter, also an enrolled member of the tribe.²¹⁸ The dispute began when the father, alleging neglect against the mother, filed a divorce action and an "emergency" custody petition in tribal court in South Dakota at a time when his estranged wife and daughter were living in California. After the tribal trial court entered an emergency order transferring custody to the father, the mother reluctantly complied with the order, turning the child over to the father. One month after the tribal proceedings had begun, however, the mother filed her own divorce action in a California court, seeking custody of her daughter. Finding that it had jurisdiction in the matter, the California trial court ordered that the minor child be returned to the custody of the mother. Armed with the favorable state court ruling, the mother appeared specially in tribal court in South Dakota to enforce the California decree and to challenge the tribe's jurisdiction over her. The tribal trial court agreed with the mother's argument, concluding that the PKPA required deference to the California forum, and ordered the release of the child from the father's custody.

Much of the opinion of the tribal court of appeals focuses on whether an Indian tribe is a "state" within the meaning of the PKPA. Significantly, the tribe briefed the question at the court's request and took the position that the federal statute did not extend to Indian tribes.²¹⁹ The tribe argued, in part, that the application of the PKPA to Indian tribes was not clearly intended by Congress and would be a significant curtailment of tribal sovereignty.²²⁰ The tribal appeals court, however, disagreed. After reviewing the language of the Act and its ambiguous legislative history, the court concluded that "Congress intended the PKPA to apply to tribal courts as a means of integrating them, and other courts, into the cooperative federalism framework of the national union."²²¹ The court went on to address the tribe's sovereignty argument:

[T]his court believes that this conclusion does not diminish tribal sovereignty, as suggested by the tribe, but, rather, protects tribal sovereignty and the right of self-government of the Lakota people in many instances. Furthermore, when the PKPA is read together with the Uniform Child Custody Jurisdiction Act, adopted by many states . . .

218. See *id.* at 6059 (setting forth the facts of the case).

219. See *id.* at 6060.

220. See *id.*

221. *Id.* at 6064.

but not by the Cheyenne River Sioux Tribe or most other tribes, it is clear that most tribal judgments affecting the custody of tribal children in divorce . . . will not be adequately enforced or recognized by the courts of other states, tribes, territories, and possessions without a ruling that the PKPA applies to tribal courts and their orders.²²²

After concluding that the PKPA's reference to "state" includes Indian tribes, the court went on to apply the statute to the case before it. In so doing, the court reexamined the jurisdiction of the California court. Because the mother's California court petition was filed when the father's custody action was already pending in the tribal court, the Cheyenne River Sioux court of appeals held that California lacked power under California law to proceed with the case.²²³ The appeals court thus accomplished what it viewed as a victory for the role of tribes in the federal system while at the same time protecting the rights of the Indian father.

The *Eberhard* court's ruling that the PKPA applies to tribes rested more on policy than on a strict reading of congressional intent. Interestingly, the author of the opinion was Robert Clinton, a non-Indian law professor who has served as associate justice on the Cheyenne River Sioux Tribal Appellate Court since 1992.²²⁴ In an earlier scholarly work, Clinton argued that the PKPA should be construed to apply to Indian tribes,²²⁵ and he took the opportunity to advance that view for the court in *Eberhard*. Indeed, the debate between the tribal court of appeals and the tribe itself about the impact of the holding on tribal sovereignty parallels the debate in the scholarly literature about extending the national full faith and credit mandate to tribes.²²⁶ The court, per Clinton, took issue with the tribe's perspective on what would better serve its own sovereign interests. "The PKPA," Clinton insisted, "is not intended to and does not diminish the sovereignty of the court to which it applies. Rather, it protects their jurisdiction by assuring that other sovereigns will not 'second guess' child custody orders granted full faith and credit under the Act."²²⁷ He expanded on this point at some length, explaining that al-

222. *Id.*

223. *See id.* at 6067.

224. *See* ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS 1997-98, at 342-43 (1997).

225. *See Roundtable*, *supra* note 53, at 270.

226. *See, e.g.*, Deloria & Laurence, *supra* note 53, at 378-79; Clinton, *supra* note 69, at 897; *Roundtable*, *supra* note 53.

227. *Eberhard*, 24 Indian L. Rptr. at 6066.

though a tribe's obligation to enforce a foreign custody decree may in some theoretical sense lessen the tribe's sovereignty, "that obligation can only be imposed on a *government*. It is merely part of the glue that integrates the various sovereign components of the federal union into a coherent nation."²²⁸ In his sanguine reading of the PKPA's application to tribes, however, Clinton did not dwell on the jurisdictional requirements embodied in the statute. His dismissal of the tribe's objections as merely "theoretical" shows that he did not grapple with the concrete implications of the PKPA's jurisdictional rules for Indian tribes.

In my view, the fears of the Cheyenne River Sioux Tribe about the inroad on tribal sovereignty were well-founded.²²⁹ The PKPA's mandate of full faith and credit to other sovereigns' decrees applies only as to decrees that are consistent with the jurisdictional standards of the PKPA itself. Unless state courts blink at the jurisdictional standards of the Act—standards that differ significantly from the jurisdictional rules often appearing in tribal codes—the PKPA will not lead to widespread recognition of tribal custody decrees. Indian tribes would have to engage in wholesale revamping of their jurisdictional statutes in order for the PKPA to endow their custody decrees with extra-territorial recognition. Instead, it will provide state courts with a statutory basis for disregarding tribal judgments when the judgments rest on a jurisdictional foundation that is unfamiliar.

In *Eberhard* itself, Clinton's opinion sustained the tribal court's exercise of jurisdiction on a basis that is foreign to the jurisdictional framework of the PKPA. Candidly creating a definition of domicile designed to maximize tribal jurisdiction, Clinton's opinion found that the child was domiciled on the Cheyenne River Sioux reservation and therefore subject to the tribal court's authority.²³⁰ Both the reliance on the child's

228. *Id.*

229. Professor Robert Laurence has recently published an article criticizing the *Eberhard* case for somewhat different reasons than my own. See Robert Laurence, *Full Faith and Credit in Tribal Courts: An Essay on Tribal Sovereignty, Cross-Boundary Reciprocity and the Unlikely Case of Eberhard v. Eberhard*, 28 N.M. L. REV. 19 (1998) (disputing *Eberhard's* interpretation of the PKPA and objecting to the abstract ideal of uniformity).

230. The tribal court of appeals reached that conclusion by exploring the question of a child's domicile where the parents are separated. Instead of viewing the domicile as following that of the custodial parent, the court announced the rule that *the child should be deemed to have the domicile of any*

domicile—a concept not used in the PKPA or the UCCJA—and the pro-tribal nature of the definition of domicile make it unlikely that a state court would defer to the tribe's jurisdiction if it stayed true to the mandate of the UCCJA/PKPA.²³¹

Concededly, the principles of neutrality and equality inherent in liberalism are advanced by the *Eberhard* opinion and by the proposed extension of the new UCCJEA to tribes and states alike. Equal treatment, however, does not respect the unique status of Indian tribes.²³² If applied uniformly to Indian tribes, the PKPA and the UCCJEA would subordinate a tribe's concept of its own authority to the Anglo-American model of child custody jurisdiction. The extension to Indian tribes of the federal statute, as in *Eberhard*, and of the new uniform state law would have a significant impact on tribal law by encouraging tribes to alter their tribal codes and to abandon their traditional bases of jurisdiction. Under the framework of the PKPA as construed in *Eberhard* and under section 104 of the new UCCJEA, recognition of tribal custody decrees depends on their compatibility with uniform statutory standards that do not on their face give weight to an Indian child's intangible links to the tribe or the reservation.²³³

parent who is a member of the tribe. See Eberhard, 24 Indian L. Rptr. at 6061. The court frankly acknowledged that such a rule has the benefit of "asserting potential tribal court jurisdiction over any children who are enrolled in the tribe or may be eligible for tribal membership by virtue of their parentage." Id.

231. When a state diverges from the UCCJA in its jurisdictional provisions, it runs the risk that other states will refuse to recognize its custody decrees. See *supra* note 120 and accompanying text.

232. Cf. Tsosie, *Pluralism*, *supra* note 42, at 364 (stating that "Indian tribes' unique political status justifies federal legislation granting them special rights and forms an exception to prevailing liberal values favoring racial equality").

233. Among other changes, the new Act prioritizes "home state" jurisdiction. In other words, initial custody determinations based on the more flexible "significant connection[s]" of the child and one parent with the state are not entitled to full faith and credit unless there is no home state—a state where the child and one parent have lived for at least six consecutive months. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 201(a)(2)(A), 9 U.L.A. 250 (Supp. 1998). As applied to Indian tribes, the prioritization of home state jurisdiction would strip a tribal court of authority to render a custody decree if the child and one parent had lived off-reservation for six or more months, notwithstanding tribal membership and geographic ties. See *supra* notes 94-104 and accompanying text.

B. *IN RE MARRIAGE OF SKILLEN*: A BOLD COMITY TOWARDS TRIBAL CUSTODY DECREES

The Montana Supreme Court also recently addressed the jurisdictional ambiguities inherent in a child custody dispute between an Indian and non-Indian parent in *In re Marriage of Skillen*.²³⁴ The court relied on the policies, although not the letter, of the ICWA, the PKPA, and the UCCJA in fashioning a unique doctrine to resolve jurisdictional competition between state and tribal courts. In this case, both the mother and the child were enrolled members of the Fort Peck Tribes in Montana and had significant contacts on and off the Reservation; the father was a non-Indian and resided off the reservation. In the course of the custody litigation, the father had obtained a decree from the Montana state court awarding primary physical custody of the child to him, and the mother had secured a later order from the tribal court awarding her temporary custody.²³⁵

In the face of this imbroglio, the Montana Supreme Court took the opportunity to announce general guidelines for resolving such jurisdictional contests. Among its stated concerns was the risk that a state's exercise of power in custody disputes involving Indian children can bring about a corresponding decline in tribal authority.²³⁶ The court gave paramount importance to the federal Indian law principle that exclusive tribal jurisdiction exists where necessary to protect the tribe's political integrity and welfare, including the tribe's right to exercise authority over members within tribal boundaries.²³⁷ While the *Skillen* court acknowledged that the dispute before it involved the interests of a nonmember as well as members, it reasoned

234. 956 P.2d 1 (Mont. 1998).

235. See *id.* at 4-5.

236. As the court stated:

We decline here to undermine the tribe's position as a sovereign entity with the suggestion that merely because a resident Indian child also has significant off-reservation contacts through his non-Indian parent, its authority to exercise jurisdiction in domestic matters over its members who reside on Indian land is put in jeopardy.

Id. at 16.

237. *Id.* at 6-7. The court relied on the non-infringement test of *Williams v. Lee*, 358 U.S. 217, 220 (1959) (finding that absent governing acts of Congress, the question governing validity of state jurisdiction is "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them"), and its later interpretations in *Fisher v. District Court*, 424 U.S. 382 (1976); *Montana v. United States*, 450 U.S. 544 (1981); and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

that tribal sovereignty had to include a tribe's "right, within its own boundaries and membership, to provide for the care and upbringing of its young, a sine qua non to the preservation of its identity."²³⁸ In that regard, the *Skillen* court invoked the policy, although not the literal command, of the Indian Child Welfare Act—a policy recognizing the paramount role of tribal courts in determining questions affecting the welfare of Indian children.²³⁹

According to *Skillen*, the various jurisdictional and policy-based considerations combined to require a rule of exclusive tribal court jurisdiction whenever a dispute arises involving an Indian child and at least one Indian parent who reside on the Reservation.²⁴⁰ Thus, starting from a flexible and deferential notion of comity, the court fashioned a jurisdictional rule that gives an exclusive role to tribal courts where the essential facts of reservation-based residence and tribal membership exist. Significantly, the court's definition of residence, drawn from state statutory law, utilized a concept more akin to legal domicile than mere physical residence.²⁴¹ Such a definition would allow tribal courts to disregard a child's temporary but lengthy absence from a reservation. The court, moreover, announced a rule of considerable deference to tribal courts even in the absence of exclusive tribal jurisdiction. Where the child does not reside on the reservation, the court explained, a state court should be cautious in exercising its concurrent jurisdiction in any dispute involving an Indian child. The court strongly urged the lower courts to defer to the tribal forum if the tribe is

238. 956 P.2d at 16 (quoting *In re Bertelson*, 617 P.2d 121, 129 (Mont. 1980) (quoting *Wisconsin Potawatomes v. Houston*, 393 F. Supp. 719, 730 (W.D. Mich. 1973))).

239. 956 P.2d at 11, 16.

240. The court formulated its principle in clear terms:

We conclude that in a child custody dispute which involves an enrolled tribal member and that person's enrolled child, both of whom live within the exterior boundaries of the Reservation, state jurisdiction would threaten the tribe's political integrity and welfare, even though another party to the dispute is a non-Indian who resides off the Reservation.

Id. at 17.

241. The court quoted Montana's statutory definition of residence, including the provisions that one's residence is where one remains when not called elsewhere for a temporary purpose, that there may only be one residence, that a residence cannot be lost until another is gained, and that the residence of a minor whose parents live apart is the residence of the parent with whom the minor customarily resides. See *Skillen*, 956 P.2d at 19 (quoting MONT. CODE ANN. § 1-1-215 (1997)).

better equipped to determine the child's best interests, in light of the child's ethnic and cultural identity.²⁴²

The *Skillen* court's approach, while provoking a pointed dissent,²⁴³ reveals that state courts can be sensitive to unique tribal interests in adjudicating custody of Indian children even in the absence of explicit statutory commands. As a matter of common law, the court created a doctrine of emphatic deference to the tribal forum where tribal membership and reservation-based residence coincide. In addition, in situations falling outside exclusive tribal jurisdiction under the *Skillen* formulation, the court nevertheless suggested that state courts assume a posture of more flexible deference based on comity towards tribal courts. In essence, the Montana Supreme Court recognized that custody matters involving an Indian child implicate unique policy concerns and require the invocation of special jurisdictional principles.

C. ILLUSTRATIONS

Some hypothetical scenarios may illuminate the differences between a UCCJEA/PKPA approach and a comity-based approach to tribal-state conflicts in the child custody area. Although in many situations the doctrine of comity and the statutory mandate would yield the same ultimate result, these illustrations are designed to highlight the potential disparities in decree-recognition under the two approaches and the resulting dilemma created for tribes in forcing a choice between, on the one hand, conformity to the dominant jurisdictional model and, on the other hand, reliance on divergent standards that are more culturally compatible.

1. *Facts*: Mother and Father, both enrolled members of Tribe X, are disputing custody of their child, also an enrolled member of the Tribe. Mother has lived off the Reservation in State A with the child for one year, and Father lives on the Reservation. Father files a petition for custody of the child in tribal court and, after a proceeding in which Mother participates, Father is awarded permanent custody. Mother does not relinquish the child but, instead, files an action in a court of

242. 956 P.2d at 18 (requiring Montana trial court to consider whether "its exercise of jurisdiction would . . . undermine tribal authority in such a way as to infringe on the tribe's right to self-government").

243. See *Skillen*, 956 P.2d at 19-28 (Nelson, J., concurring in part and dissenting in part) (arguing that the majority was guilty of "judicial legislation" in creating a rule of exclusive jurisdiction without statutory authority).

State A for custody. Father appears in state court and contends that State A must recognize and enforce the tribal decree.

Resolution: If State A has adopted the UCCJEA and opted to extend the Act to Indian tribes, then the courts of State A would not enforce the tribal decree. As stated by the reporter for the Drafting Committee of the UCCJEA, a custody decree based solely on tribal membership "would not qualify for enforcement under [the] Act," if jurisdictional criteria are not otherwise met.²⁴⁴ In the given facts, State A would be the child's home state and, as such, would have priority over other sovereigns for initial child custody jurisdiction.²⁴⁵ At most, Tribe X's status under the UCCJEA would be that of a state with "significant connection" jurisdiction. Under the Act, the courts of Tribe X would not have authority to make a custody determination unless State A first declined to exercise jurisdiction.²⁴⁶ The fact that all parties involved are members of Tribe X would be irrelevant under the Act.

In a comity-based approach, on the other hand, a court in State A would be likely to enforce the tribal decree because of the paramount (if not exclusive) tribal role in adjudicating the domestic relations of tribal members. In deciding whether to enforce the tribal decree out of comity, the state court would need to determine whether the tribe had power over the subject matter and the parties as a matter of federal Indian law.²⁴⁷ Under accepted precedents, the tribe's authority is clear, since the parents and child are all enrolled members and Father is domiciled on the reservation.²⁴⁸ Tribe X would also have jurisdiction under its own laws if its tribal code resembled many of the codes described in Part III of this Article. Under a doctrine

244. See Spector, *supra* note 118, at 323 n.42.

245. See UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 201(a)(1), 9 U.L.A. 250 (Supp. 1998).

246. See *id.* § 201(a)(2).

247. See *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997).

248. State and tribal courts alike have long agreed that, absent a congressional act or treaty to the contrary, where all parties to a dispute are tribal members and the claim has some connection to the tribe's reservation, the tribal court has civil jurisdiction over the proceeding. See *Frejo v. Barney*, 3 Navajo Rptr. 233, 236 (Window Rock Dist. Ct. 1982); *Malaterre v. Malaterre*, 293 N.W.2d 139, 143 (N.D. 1980); cf. *Fisher v. District Court*, 424 U.S. 382, 389 (1976) (stating that tribe had exclusive jurisdiction over custody dispute between Indian mother and Indian foster mother, each of whom resided on reservation).

of comity, then, the courts of State A would most likely recognize and enforce the tribal decree through the local state judicial processes.

2. *Facts:* Child and Mother, both enrolled members of Tribe X, have lived on the Reservation for all of the child's life. Father, a non-Indian, lives off the Reservation in State A. With the consent of Mother, child moves off the Reservation for the school year to attend school in State A while residing with Father. After seven months have passed, Father files a custody petition in the court of State A. Mother immediately files her own action in tribal court, but State A proceeds to award custody to Father. Mother pursues her tribal court action seeking the return of the child. Father argues that Tribe X must enforce State A's decree.

Resolution: Under the terms of the UCCJEA, State A is the child's home state and has exclusive jurisdiction to make an initial custody determination regarding the child. If Tribe X has adopted the UCCJEA, it has no discretion to refuse enforcement since it lacks authority over the matter. The fact that the child's domicile would be deemed to be on the Reservation of Tribe X would be irrelevant.

Under the doctrine of comity as it was formulated in *In re Marriage of Skillen*, on the other hand, the child and Mother would be viewed as domiciled on the Reservation of Tribe X.²⁴⁹ The tribe would have exclusive jurisdiction of the custody dispute since it involved a parent and child who are enrolled members and "residents" of the Reservation. The courts of State A would be deemed to lack authority to decree the custody of the child.

3. *Facts:* Mother and child are enrolled members of Tribe X. Father is a non-Indian who lives off the Reservation. The child lived with Mother for several years on the Reservation, then resided with Father. The child and Father have lived peripatetically, residing temporarily in several states, including a three-month period in State A, a three-month period in State B, and a three-month period in State C. After the third month in State C, Father finally files a custody petition in the local courts, and Mother immediately files for custody in tribal court. Father argues in the court of State C that it should ex-

249. The child's temporary absence from the reservation would not defeat a finding of domicile. See *Skillen*, 956 P.2d at 19.

ercise jurisdiction in the case, while Mother argues that the state court should defer to the tribal court.

Resolution: Under the UCCJEA, both State C and Tribe X would have concurrent "significant connection" jurisdiction over the custody dispute. In such a situation, the UCCJEA, like its predecessor, gives priority to the action filed first in time.²⁵⁰ Thus, the court of State C would have priority to proceed with the case. Where two court systems have concurrent jurisdiction and simultaneous proceedings are pending, the UCCJEA gives no weight to the particular benefits that a tribal court might bring to a custody dispute involving an Indian child.

Under a comity-based approach, as explained in the case law, the tribal court might hold a position of preference in the custody dispute. Following the Montana Supreme Court's formulation in *Skillen*, the state would need to remain sensitive to "the tribe's interest in deciding the custody of one of its members," and would need to insure that it does not undermine tribal authority so as to infringe on the tribe's right to self-government.²⁵¹ The application of that doctrine arguably would lead to a relinquishment of jurisdiction by State C in favor of the tribe.

4. *Facts:* Mother and child are enrolled members of Tribe X and have resided on the Reservation of Tribe X throughout the child's life. Father is not an enrolled member of any tribe and lives in State A. Mother files a custody petition in tribal court and obtains an award of custody of the child. Father, who refused to participate in the tribal court proceeding, files a custody petition in the courts of State A. Mother argues that State A must recognize and enforce the tribal custody decree. Father argues that the tribal court was fundamentally biased and acted without jurisdiction.

Resolution: Under the UCCJEA and the PKPA, if the tribe were deemed a "state" within the meaning of those statutes, the tribal decree would be entitled to recognition and enforcement in the courts of State A. As the home state of the child, Tribe X had exclusive jurisdiction to make an initial custody

250. See UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 206, 9 U.L.A. at 256 (barring court from exercising jurisdiction if action concerning custody of child has been commenced in court of another state having jurisdiction substantially in conformity with the Act).

251. *Skillen*, 956 P.2d at 18 (quoting *In re Bertelson*, 617 P.2d 121, 130 (Mont. 1980)).

determination. The failure of Father to participate in the proceeding would not deprive the court of jurisdiction so long as Father was given adequate notice pursuant to the UCCJEA. The courts of State A would have no discretion to refuse to enforce the judgment. Moreover, according to both the UCCJEA and the PKPA, the tribe would retain exclusive jurisdiction to modify the decree affecting the custody of the child so long as Tribe X remained the home of the child or the Mother.²⁵²

If the courts of State A were not bound by the statutory mandate but instead relied on the doctrine of comity, the result most likely would be similar. The tribal membership and reservation-based domicile of the mother and child would satisfy the jurisdictional prerequisites of most tribal codes as well as the jurisdictional tenets of federal Indian law. Under the principles of comity as formulated by the *Skillen* court, for example, the decree would be entitled to recognition and enforcement because the tribe's power to determine the custody of Indian children who reside on the reservation is a necessary corollary of tribal sovereignty. The *Skillen* court, moreover, announced that the tribe would retain exclusive jurisdiction for as long as the child and mother remained residents of the reservation.

On the other hand, the discretionary nature of comity would leave room for a hostile state court judge to refuse recognition. As in *Barbry v. Dauzat*,²⁵³ a biased state court might refuse to accept the tribe's definition of membership. Without the critical underpinning of tribal membership, the tribal court might be viewed as lacking the authority to determine the custody of the child, and such a state court could proceed to determine custody without regard to the tribe's earlier award.

* * *

As these illustrations suggest, the extension of the UCCJEA to Indian tribes (or the construction of the PKPA to apply to tribes as held in *Eberhard*) may place certain categories of tribal decrees in jeopardy. Under the UCCJEA/PKPA framework, state courts can refuse to recognize a custodial order from a tribal forum that rests primarily on the tribal membership of the child and one of the parents. Even if a child

252. See UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 202, 9 U.L.A. at 252; 28 U.S.C. § 1738A(d) (1994).

253. 576 So. 2d 1013 (La. Ct. App. 1991), discussed *supra* at notes 183-90 and accompanying text.

were domiciled on a reservation but temporarily absent for more than six months, the UCCJEA/PKPA would subordinate the tribe's authority to that of the state where the child has most recently resided. Thus, the innocuous and technical terminology of the Uniform Act could make significant inroads on definitions of tribal power. In contrast, under a comity-based approach, state courts generally defer to a tribe's traditional bases of jurisdiction and give respect to such tribal decrees. Comity can take into account the federal policy favoring the tribal role in adjudications involving children who are members of the tribe and who claim the reservation as their permanent home.

On the other hand, the UCCJEA and the PKPA, if applied to tribes, will guarantee enforcement of tribal decrees when the decrees rest on jurisdictional foundations that are consistent with statutory requirements. And, while most interpretations of comity would likewise result in recognition of the tribal decree under such circumstances, the doctrine can become a tool for undermining the legitimacy of tribal courts in the hands of a hostile state judge. In certain situations, then, the statutory scheme promises more predictable recognition than does the more malleable doctrine of comity. It is this predictability that creates an incentive for Indian tribes to abandon their non-conforming bases of jurisdiction in favor of the uniform standards.

V. ACCOMMODATING THE COMPETING INTERESTS

Indian tribes wishing to enhance the enforceability of their child custody decrees face an uneasy choice today. Where the UCCJEA has been adopted and extended to tribes, a tribe has a clear incentive to conform its jurisdictional law to the Uniform Act's model. By so doing, the tribe effectively ensures that its child custody decrees will be accorded recognition in the state courts. Such a choice, however, carries with it the subordination of the tribe's traditional jurisdictional rules. Those rules, as well as the substantive custody standards applied by tribal courts, form a part of the tribe's cultural identity. As explained by Christine Zuni, "[l]aw is a significant part of all cultures and to the extent that Anglo-American concepts displace native concepts, native culture is changed."²⁵⁴ If, on the other hand, a tribal decree rests on such traditional ju-

254. Zuni, *supra* note 17, at 24.

risdictional bases as reservation domicile and tribal membership, the custody decree may not receive enforcement in states adhering to the new Uniform Act.

It is worth recalling the factual assumption underlying the original UCCJA and carried over into the new UCCJEA. The Commissioners have assumed that most "American children" adjust to new environments within six months such that the new location becomes their "home."²⁵⁵ That assumption may be entirely plausible when the change is from Pittsburgh to Detroit, or even from Sacramento to Atlanta. The lingering ties that the child might feel to her former neighborhood would soon fade. But what about the Navajo child who moves from Chinle, Arizona, to Houston, or the Zuni child who leaves her pueblo in northern New Mexico to join her non-Indian parent in New Orleans? Are the ties of such children to their reservations and their tribes as easily erased? I think not.²⁵⁶

The states, through a combination of judicial and legislative creativity, are in a position to accommodate the unique cir-

255. UNIF. CHILD CUSTODY JURISDICTION ACT § 3 cmt., 9 U.L.A. at 144 (quoting Ratner, *supra* note 97, at 818). See discussion *supra* at notes 81-82 and accompanying text.

256. Mother Earth in Navajo tradition reflects a particular understanding of place. As Chief Justice Tso has observed:

Just like our natural mother, our Mother Earth provides for us. It is not wrong to accept the things we need from the earth. It is wrong to treat the earth with disrespect . . . If people can understand that the Navajo regard nature and the things in nature as relatives, then they will easily see that nature and the Navajos depend upon each other. Understanding this relationship is essential to understanding traditional Navajo concepts which may be applied in cases concerning natural resources and the environment.

Tso, *supra* note 10, at 233-34. Similarly, Frank Pommersheim has tried to capture the meaning of land for Indian peoples:

The reservation is home. It is a place where the land lives and stalks people; a place where the land looks after people and makes them live right; a place where the earth provides solace and nurture. Yet, paradoxically, it is also a place where the land has been wounded; a place where the sacred hoop has been broken; a place stained with violence and suffering. And this painful truth also stalks the people and their Mother.

POMMERSHEIM, *supra* note 10, at 15. Pommersheim explains that land bears several levels of meaning for Indian tribes. It not only provides subsistence for tribal members, whether through natural resources or otherwise, but it also is "the source of spiritual origins and sustaining myth." *Id.* at 14. Moreover, a tribe's land is where generations of relatives have lived. See *id.* The voices of contemporary Indian authors also reveal the profound and lasting impact of growing up on the reservation. See, e.g., SHERMAN ALEXIE, *FIRST INDIAN ON THE MOON* (1993).

cumstances of Indian children. If a state legislature adopts the new UCCJEA and wishes to extend its provisions to Indian tribes, it could include special recognition principles for tribal decrees. The Act should not require tribes to demonstrate perfect conformity to majoritarian standards before according the tribal decrees recognition and enforcement. A modified act, for example, could provide that a tribal decree resting on the reservation-based domicile of a member child is presumptively enforceable (even if a child were temporarily absent from the reservation), and that the tribe would have exclusive jurisdiction in such a circumstance. This "modified uniform act approach" would acknowledge the tribe's traditional bases of power while still achieving predictability and certainty in custody disputes involving Indian children. Alternatively, state legislatures may exclude Indian tribes from the reach of the Uniform Act and leave the question of recognition of tribal custody decrees entirely up to the courts. In fashioning principles of recognition, the state judiciaries can ensure respect for the unique contributions of tribal judges in the resolution of family disputes involving tribal children. The comity approach utilized in *Skillen* exemplifies such a possibility.²⁵⁷ To the extent that state courts can articulate clear recognition rules, they can likewise lend predictability to the questions of enforcement of custody decrees across reservation boundaries.

Another path towards accommodating the unique traditions and values of Indian tribes concerning family and child-rearing while promoting cooperation between tribes and other sovereigns is through individualized negotiated agreements between tribal and state governments. Indeed, several contemporary Indian scholars have recommended greater use of tribal-state negotiation in addressing cross-boundary enforcement of judgments in commercial contexts,²⁵⁸ and such indi-

257. The Montana Supreme Court embraced such a rule of deference to the role of tribal courts in child custody disputes involving Indian children residing on reservation lands. See *In re Marriage of Skillen*, 956 P.2d 1 (Mont. 1998), discussed *supra* at notes 234-43 and accompanying text.

258. See, e.g., Deloria & Laurence, *supra* note 53. It should be noted that Deloria and Laurence explicitly exclude inter-system child custody enforcement from the scope of their discussion, stating:

The questions of whether the concerns of the [PKPA], and similar [statutes], should require standard solutions and uniform reach across the states, and whether leaving tribal decrees out would seriously impair any needed uniformity are issues that implicate policies well beyond Indian tribal sovereignty and whatever expertise the present writers have.

vidualized agreements may be suitable in the child custody arena as well.²⁵⁹ In such negotiations, tribes could articulate why particular assertions of jurisdiction are essential to tribal sovereignty and these policy considerations may encourage both the state legislature and the state judiciary to accord respect to the tribal decision. Similarly, tribes and states could work together to devise court rules addressing the question of child custody jurisdiction and enforcement.²⁶⁰ The option of focusing on court rules rather than legislation has the advantage of avoiding the political and divisive nature of legislative debates about Indian matters.²⁶¹ Further, a tribe in negotiation with a state could agree to reciprocal obligations of judgment recognition so long as the state agreed to respect the tribe's defined sphere of power in child custody disputes.²⁶²

In summary, the task of resolving questions of child custody jurisdiction and enforcement as between states and tribes should be approached with sensitivity to the competing interests of tribes, states, and children. A state's wooden insistence that tribes adhere to uniform jurisdictional rules without regard to more traditional bases of tribal power can erode the tribe's cultural identity. Native scholars have recognized that "[l]egitimization should not come at such a high price."²⁶³ Instead, creative solutions are possible that would recognize the sovereign status of tribes and states without requiring tribes to emulate the states in every jurisdictional and substantive rule.

Id. at 377; see also Frickey, *supra* note 37, at 1781-84 (suggesting that negotiation rather than adjudication holds more promise as a path towards reform in Indian law).

259. Tribal-state agreements are not unknown in the family law area. In the context of child support enforcement, for example, Congress has recognized the ability of states and tribes to enter cooperative agreements on such matters as wage withholding and the use of tax intercepts to collect support for Indian children. See 42 U.S.C. § 654(7) (1994).

260. Some states have adopted court rules as a result of state-tribal cooperation in the area of judgment recognition. See, e.g., N.D. CT. R. ANN. 7.2 (Michie 1998); S.D. CODIFIED LAWS § 1-1-25 (Michie 1992). See generally Jones, *supra* note 71, at 482-83. Chief Justice Jones of the Turtle Mountain Chippewa Tribal Court of Appeals is particularly optimistic about the use of tribal-state forums for addressing questions of jurisdiction and judgment recognition.

261. See Jones, *supra* note 71, at 484.

262. Reciprocity of judgment recognition is a matter of significant concern in some states. See *id.* at 483 n.114 (citing court rules in Michigan, Oklahoma, and Washington that require state courts to honor tribal court orders unless the tribe does not reciprocally recognize state court judgments).

263. Zuni, *supra* note 17, at 24.

CONCLUSION

The failure of the original UCCJA and the PKPA to mention Indian tribes is a familiar oversight in law. The "measured separatism"²⁶⁴ of Indian tribes under federal Indian jurisprudence has often resulted in measured invisibility. In one sense, then, the invitation in section 104 of the newly-promulgated UCCJEA is a welcome recognition of tribal sovereignty. Nevertheless, the carrot and stick approach—granting recognition of tribal decrees in state court in exchange for the tribe's incorporation of the jurisdictional standards of the Act—is troublesome. The jurisdictional framework of the Act would exclude several traditional bases of tribal jurisdiction. Moreover, my brief survey of tribal law suggests that jurisdictional homogenization can lead to the homogenization of substantive standards as well.

According to some observers, Indian tribes are experiencing a period of cultural renewal and rebirth.²⁶⁵ Others decry the imminent loss of tribal identity on the altar of assimilation.²⁶⁶ Without taking sides in this debate, I have tried to illuminate one way in which an Indian tribe's struggle for legitimacy in the eyes of the dominant society may undermine the tribe's cultural identity. In the culturally central area of child custody, tribes should think carefully before molding their jurisdictional laws to conform to the standards of Anglo-American uniform acts. Similarly, state courts should consider the tradeoffs involved before requiring absolute conformity from tribal courts. The controversial debate in *Eberhard* on the implications of child custody recognition for tribal sovereignty—a debate waged between the tribal court and represen-

264. The term "measured separatism" has been used to describe the status of tribes as a result of treaties and settlements with the federal government. See WILKINSON, *supra* note 27, at 120-21; Pommersheim, *supra* note 9, at 415.

265. See POMMERSHEIM, *supra* note 10, at 194 (tribal nations currently are in a period of intense cultural renewal and spiritual rebirth); MARKS, *supra* note 16, at xvii-xviii (despite history of oppression and dislocations, Indians have fought to hold on to homelands and to regain sacred places); CARRILLO, *supra* note 50, at 5, 7 (Indian groups are reclaiming tribal identity, and tribes' legal innovations in the face of injustice are "nothing short of inspirationally astounding"); Valencia-Weber, *supra* note 25, at 262 (use of custom increasingly the pattern in tribal courts).

266. See Porter, *supra* note 17, at 238 (Native Americans generally and Senecas specifically are taking actions that have practical effect of destroying Indian nations).

tatives of the tribal council—demonstrates the core importance of the question for Indian tribes today.

As a non-Indian who teaches future lawyers for a living, I value a multiplicity of voices, including those emanating from our indigenous cultures, when I explore family law with my students. We can learn much from these nations within a nation; their traditions can enrich our own understanding of culture, group identity, the definitions of family, and the role of law. In the embattled arena of child custody litigation, Anglo-American judges and legislatures have long debated ways to improve the substance and the process of dispute resolution.²⁶⁷ The unique experience and perspective of American Indian tribes, both historical and contemporary, should inform that debate. As we approach the millennium, Indian peoples and non-Indians alike need to understand that the forces of assimilation can operate in small, seemingly unimportant ways. In this Article, I have suggested that a tribe that conforms to Anglo-American jurisdictional laws in the child custody arena may be sacrificing some degree of cultural identity.²⁶⁸ To the extent that a tribe's identity is diminished, all of us lose a promise of human possibility.²⁶⁹

267. The American Law Institute is currently debating a set of proposed "Principles of the Law of Family Dissolution" regarding the resolution of child custody disputes. *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* pt. I (Tentative Draft No. 3, Mar. 20, 1998). The Draft, which offers predictable rules with more definite guidelines than the opaque and inherently subjective "best interests" standard, *see id.* at 2 (introductory discussion), is apparently generating heated controversy. *See ALI Members Clash over Child Custody While Child Support Draft Sails Smoothly*, 66 U.S.L.W. 2722-24 (May 26, 1998).

268. Just as current federal policy aims at preserving biological species faced with extinction, some have argued for a kind of cultural ecology—to preserve from extinction the indigenous peoples whom the Europeans encountered on these lands centuries ago. As Chief Justice Tso of the Navajo Nation pointedly observed, "[w]e are part of the total environment of America and at least as important as the snail darter or the California condor." Tso, *supra* note 10, at 232.

269. As Jamake Highwater observed, "[e]very view of the world that becomes extinct, every culture that disappears, diminishes a possibility." JAMAKE HIGHWATER, *THE PRIMAL MIND: VISION AND REALITY IN INDIAN AMERICA* 9 (1981) (commenting on OCTAVIO PAZ, *THE LABYRINTH OF SOLITUDE* (1967)), *quoted in* TULLY, *supra* note 45, at 186.