



Winter 1998

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Recommended Citation

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).
Available at: <https://digitalrepository.unm.edu/nmlr/vol28/iss1/3>

FULL FAITH AND CREDIT IN TRIBAL COURTS: AN ESSAY ON TRIBAL SOVEREIGNTY, CROSS- BOUNDARY RECIPROCITY AND THE UNLIKELY CASE OF *EBERHARD V. EBERHARD*

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I. THE PROBLEM STATED

The case of *Eberhard v. Eberhard*¹ presents, in classic form, the questions of the enforcement of judgments across Indian reservation boundaries: What reception should a tribal court give to a state court order? What reception should a state court give to a tribal court order? Do these questions have the same answer? Should they have the same answer? In *Eberhard*, the Cheyenne River Sioux Court of Appeals held that it was bound, in general, by federal law to provide full faith and credit to a state court order, though it found a way to avoid recognizing the precise California order at issue in the case. This article presents the argument that a tribal court need not give full faith and credit to a state court order as was done in *Eberhard*.

These are the facts of *Eberhard*: In 1995, two U.S. Marines, Shawn Eberhard and Angela Coontz, were married in California.² Shawn was, and is, a member of the Cheyenne River Sioux Tribe; Angela is not. In November of 1995, a daughter was born of the marriage. The marriage was to be short-lived, and in February of 1996 Shawn sued for divorce in tribal court, petitioning for temporary custody of the child. Angela, now in Washington State, turned the child over to Shawn. Shawn left the child on the Cheyenne River Sioux reservation with her paternal grandmother while he left for an overseas assignment.

In March of 1996, Angela sued for divorce in California state court, seeking custody of the child. In April, the California Superior Court ordered the return of the child to California, after which Angela appeared in the tribal court to object to its jurisdiction over her and to seek enforcement of the California order. In May of 1996, the Cheyenne River Sioux Trial Court found that it did have jurisdiction over the parties to the divorce action, but nonetheless ordered the child returned to California pursuant to the California court order. Both parties appealed the decision to the Cheyenne River Sioux Court of Appeals.

The questions of enforcement of judgments have been much debated of late in the law reviews, on panels at symposia, in the hallways at conventions, in Indian Law classrooms, and around the conference table at the American Indian Law Center in Albuquerque. Less discussion has found its way into the Reporters.³ Basically, three approaches to the problem have been proffered. First, there are those scholars who

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1. 24 Indian L. Rep. (Am. Indian Lawyer Training Prog.) 6059 (Cheyenne River Sioux, Feb. 18, 1997).

2. I will refer to the parties by their names. The Tribal Court of Appeals followed the common practice of off-reservation appellate courts, calling the parties "Appellant" and "Appellee." This is an especially confusing practice when the case involves cross-appeals. *See id.*, n.1. I have criticized this practice as cryptic to readers less familiar with the case than the court that is deciding it. *See* Robert Laurence, *Straight Talk: To-the-Point Observations about Eight Recent Cases on the Occasion of the Fiftieth Anniversary of the Arkansas Law Review*, 50 ARK. L. REV. 29, 42 (1997).

3. The Cheyenne River Sioux Court of Appeals listed most of the cases and articles dealing with the question. *See Eberhard*, 24 Indian L. Rep. at 6065 n.3.

have advocated, and a few courts which have held, that full faith and credit must be given by tribes to state judgments and by states to tribal judgments.⁴ Full faith and credit exists among the states by constitutional command, and requires, with very few exceptions, that foreign judgments be enforced.⁵

A second approach, proposed, perhaps, by fewer scholars, but accepted by more courts, is the notion that comity should apply between and among tribes and states.⁶ Comity is a more flexible requirement than full faith and credit, in which the receiving court shows a generalized respect for the issuing regime, but is not commanded to enforce the judgment. As the United States Supreme Court has said:

Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.⁷

Professor Nell Jessup Newton lists four "preconditions" to enforcement of a foreign judgment under principles of comity: (1) subject matter and personal jurisdiction over the defendant in the court rendering the judgment; (2) no fraud against the foreign court by the plaintiff; (3) a fundamentally fair foreign proceeding; and (4) a broad consistency between the foreign judgment and local policy.⁸ As Professor Newton notes, the fourth requirement threatens to "swallow the whole rule,"⁹ unless moderated. Therefore, she suggests that the court receiving the foreign judgment ought to presume that the fourth requirement is met unless enforcement would "shock the conscience of the community in which enforcement is sought."¹⁰

The third approach is the so-called "asymmetric" solution. This doctrine holds that no rule should require tribes to treat state judgments identically to the way that states treat tribal judgments. This asymmetric solution rules out "full faith and credit," which is the prototypically symmetric solution to the problem of cross-boundary enforcement.¹¹ The asymmetric solution is consistent with comity as long as it is not required that all jurisdictions apply comity identically. Hence, there is a certain advantage to proposing the asymmetric solution. What others see as a split in the decisions can be explained as mere asymmetry, it being understandable under an asymmetric approach that different courts disagree about whether and how cross-boundary judgments are to be enforced.

4. See 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, 241-47 (1993) (remarks of Professor Robert N. Clinton).

5. The Full Faith and Credit Clause is found in U.S. CONST. art. IV, § 1. The clause is implemented by 28 U.S.C. § 1738 (1948). See ROBERT A. LEFLAR, ET AL., *AMERICAN CONFLICTS LAW* at 215-49 (4th ed. 1986), for a discussion of full faith and credit as it generally applies to the states.

6. See Ransom, *supra* note 4, at 250-55 (remarks of Professor Nell Jessup Newton).

7. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). See generally LEFLAR, *supra* note 5, at 249-53 (discussing the comity that is due by states to foreign-nation judgments).

8. See Ransom, *supra* note 4, at 250-55 (remarks of Professor Nell Jessup Newton).

9. *Id.* at 252.

10. *Id.*

11. See *id.* at 247-50 (remarks of Professor Robert Laurence).

The Cheyenne River Sioux Court of Appeals took the first approach in deciding the appeal from the trial court decision ordering the Eberhard child returned to her mother in California. The court of appeals found itself bound by a federal full faith and credit statute, making it one of the few tribal courts that has done so.¹² At first glance, there are two things surprising about this result. First, one would expect a tribal court to be rather reluctant to find itself bound by an ambiguous federal statute which restricts tribal courts' discretion in the treatment they give to off-reservation judgments, and which, by its own terms, applies only to states, territories and possessions of the United States. But the Cheyenne River Sioux Court of Appeals seemed almost eager to find its discretion limited by off-reservation law.

Second, one would expect that once the court found that federally imposed full faith and credit did apply to the tribal court, it would have enforced the California judgment. For indeed, exceptions to the commands of full faith and credit are narrow ones. But the Cheyenne River Sioux Court of Appeals found that it had comfortable latitude, even under full faith and credit, to decline to enforce the off-reservation order.

On one level, perhaps these two surprises are harmonious. Full faith and credit is not a very onerous burden for a court to bear if by "full faith and credit" Congress meant "comity." Furthermore, I, and other adherents to comity and asymmetry, might well react to *Eberhard* with enthusiasm, for in the end, it is an example of a tribal court refusing, for its own strongly held reasons, to enforce an off-reservation judgment. Thus, it is consistent with the kind of asymmetry I advocate, notwithstanding all of the court's "full faith and credit" language. On that level, yet another volley in the continuing debate between the principal advocate of symmetry and the principal advocate of asymmetry seems superfluous.¹³

On another level, however, *Eberhard* is rather troubling. It reveals a tribal court at war with its own tribe, with its own law, and even with itself. It reveals how easily manipulatable in the hands of a creative court are the rules of statutory interpretation at work in American Indian law. It reveals the costs of uniformity and reciprocity, characteristics too often thought to be cost-free for Indian tribes. It also reveals the price that must be paid when a tribal court incorporates dominant-society law into tribal books. For those reasons, the case deserves a careful analysis on these law review pages. The criticism will be sharp, though honest; I criticize the Cheyenne River Sioux Court of Appeals' decision-making in the instance of *Eberhard*, but remain respectful of the court itself, and its Tribe.

I begin with a rendition of the court's opinion.

12. Comprehensive reporting of tribal court opinions is not yet available, so it is difficult to tell if any other tribal court has addressed this issue. The court of appeals in *Eberhard* called the matter "apparently" one of first impression in tribal courts. See *Eberhard v. Eberhard*, 24 Indian L. Rep. (Am. Indian Lawyer Training Prog.) 6059, 6063 (Cheyenne River Sioux, Feb. 18, 1997).

13. This debate is largely between me and Professor Robert N. Clinton, the Wiley B. Rutledge Distinguished Professor of Law of the University of Iowa. See Ransom, *supra* note 4. Professor Clinton is also an Associate Justice of the Cheyenne River Sioux Court of Appeals and his off-bench writings clearly influenced the *Eberhard Per Curiam*. Chief Justice Frank Pommersheim, a Professor at the University of South Dakota School of Law, concurred specially. Both of these gentlemen are friends and colleagues of mine, relationships that I rather fervently hope will survive the various critical indiscretions of this essay.

II. THE OPINION RELATED

There are three sections of the *Eberhard* opinion.¹⁴

A. *Part I of Eberhard: The Subject Matter Jurisdiction of the Tribal Court over the Divorce and the Ancillary Custody Matter*

The first question that the court of appeals addressed was whether the tribal trial court had jurisdiction over the divorce and custody matters that had been brought to it. The court of appeals held that it did. Under Cheyenne River Sioux law, all that was necessary for the tribal court to take jurisdiction over both the divorce and all matters ancillary to the divorce was that the plaintiff be a resident of the Reservation. Shawn Eberhard almost stumbled over his own petition on this issue, by stating therein that he was "residing" in Okinawa at the time, but the court, noting that the petition was *pro se*, forgave his informality, and assumed that he meant to allege that his present abode, not residence, was in Okinawa.¹⁵

Under the law of most states, one gains a "domicile of origin" at birth, which persists until the person acquires a new one, called a "domicile of choice."¹⁶ As Dr. Leflar writes, "[t]he principal manner by which a new domicile can be acquired is by physical presence at a new place coinciding with the state of mind of regarding the new place as one's present home."¹⁷ Soldiers should have the same freedom to choose a domicile as anyone else, and the forced assignment to another locale should not result in a changed domicile unless the soldier so chooses.¹⁸

Cheyenne River Sioux tribal law appears to be the same as state law on this point:

Since the undisputed facts indicate that [Shawn] was a legal resident of the Reservation and a member of the tribe when this proceeding was filed, and

14. The court of appeals enumerated these divisions somewhat differently. The court divided the opinion into two main parts: 1) Jurisdiction and 2) Application and Effect of the Parental Kidnapping Prevention Act. The second part is subdivided into a) Application of the Parental Kidnapping Prevention Act to Tribal Courts and Their Orders and b) Application of the Parental Kidnapping Prevention Act. See *Eberhard*, 24 Indian L. Rep. at 6060, 6062, 6066.

15. See *id.* at 6060. The court of appeals actually called Okinawa Shawn's "domicile," distinguishing that from his reservation "residence." Throughout the opinion, the court used the terms "residence" and "domicile" rather interchangeably. See, e.g., *id.* at 6061.

With respect to the interchangeability of the words "domicile," "residence," and "abode," Dr. Leflar writes:

The word residence appears in statutes, as a connecting fact between a person and a state's law, more often than does the word domicile. It is a more popular term, and in general, better understood, though not one with an exact definition. It is commonly said that a person may have more than one residence, but only one domicile. That is the reason why lawyers prefer to use the word domicile, for some purposes. They can give it a more exact definition, and thus identify the single preeminent headquarters whose law can be applied for those purposes for which singleness of rule is desirable

LEFLAR, *supra* note 5, at 34. In *Eberhard*, it would appear that "singleness of rule is desirable," so perhaps the court of appeals should have used the word "domicile" throughout the opinion.

Dr. Leflar defines "abode" as follows: "The words 'usual place of abode' are used in some statutes, especially those dealing with service of process in civil actions. These words appear to refer to a place at which a person is actually living, which need not be his domicile . . ." *Id.* at 36. Thus, it would appear that Okinawa was Shawn Eberhard's "abode" at the time of the litigation.

16. See LEFLAR, *supra* note 5, at 19.

17. *Id.* at 20-21.

18. See *id.* at 23-24.

remains one to this date, both the Cheyenne River Sioux Tribal Trial Court and this court clearly have jurisdiction over the divorce.¹⁹

It would appear from this quotation that residents or domiciliaries of the Reservation remain residents when they leave, and the one arguing for a changed domicile has the burden to prove such, presumably by showing an abandonment of the reservation domicile or the intention to acquire a conflicting one off-reservation.

Having found that Shawn Eberhard, the petitioner, was a reservation resident, the court then found that it had jurisdiction over the marriage and hence jurisdiction over the divorce proceedings, notwithstanding its lack of jurisdiction over the wife. This would be the fairly standard state rule.²⁰

More difficult for the court was the question of whether the Eberhards' daughter was a resident of the reservation, as required by the Cheyenne River Sioux statute for the trial court to have jurisdiction over the matter of custody.²¹ The child had spent little of her young life on the reservation before the litigation began; there had been only a quick holiday visit when she was a few weeks old.²²

Angela Eberhard cited the United States Supreme Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*.²³ This case held that, in Indian Child Welfare Act (ICWA)²⁴ cases in which the child was born to unmarried parents, the child's domicile was the same as the mother's. The Cheyenne River Sioux Court of Appeals seemed to approve of this determination but found it inapplicable to custody matters in divorce cases, where the ICWA does not apply.²⁵ The court also declined to follow what it characterized as "the historically gendered and sexist rules of the western common law,"²⁶ which would have preferred the residence of the father over that of the mother when the parents are married but residents of different states.²⁷ Rather, the court held that in such situations, the residence of the child was the residence of the tribal member, whether mother or father.²⁸

In conclusion, then, the court found that the father retained his reservation residency notwithstanding his physical presence off-reservation in the military, the mother having failed to carry her burden to show otherwise. The child was found to have the same residency as her father, the tribal member. Both of these results are expansive of tribal court jurisdiction, but not remarkably so.

19. *Eberhard v. Eberhard*, 24 Indian L. Rep. (Am. Indian Lawyer Training Prog.) 6059, 6060 (Cheyenne River Sioux, Feb. 18, 1997). Along the way to this conclusion, the court quoted "the Defense Department's long-standing tradition" in place in 1964 that members of the armed services retain the residence they had when they entered the military. This tradition can be overcome by the intention of the service man or woman. See *Meeks v. Avery*, 251 F. Supp. 245, 255 (D. Kan. 1966), cited in *Eberhard*, 24 Indian L. Rep. at 6060. *Carrington v. Rush*, 380 U.S. 89 (1965), cited in *Eberhard*, 24 Indian L. Rep. at 6060, is a case in which the United States Supreme Court found unconstitutional Texas's irrebuttable presumption that the Pentagon's tradition held for all service personnel, irrespective of intent.

20. See LEFLAR, *supra* note 5, at 615.

21. The lower court's jurisdiction over the divorce and custody was governed by § 8-3-10 of the Law and Order Code of the Cheyenne River Sioux Tribe. See *Eberhard*, 24 Indian L. Rep. at 6060.

22. See *Eberhard*, 24 Indian L. Rep. at 6059.

23. 490 U.S. 30 (1989).

24. 25 U.S.C. §§ 1911-1963 (1994).

25. See *Eberhard*, 24 Indian L. Rep. at 6061.

26. *Id.*

27. See LEFLAR, *supra* note 5, at 26-28.

28. See *Eberhard*, 24 Indian L. Rep. at 6061.

Angela Eberhard attacked before the court of appeals not only the ability of the tribal court to reach her person, but also the manner in which it did so, by complaining about the speed with which the trial court took, heard, and decided the case below. Indeed, justice was swift in the Cheyenne River Sioux court: Shawn petitioned for both divorce and custody on February 16, 1996. Angela was served the same day in California, and the trial court issued its *ex parte* temporary order granting custody to Shawn, likewise, the same day.

The court of appeals termed the rapidity of this process "efficiency,"²⁹ and found that Angela had abandoned any possible complaint by failing to argue it below.³⁰ Thus, the opinion does not set out the precise details of what appears to be Angela's attack under the civil-side due process provisions of the Indian Civil Rights Act (ICRA).³¹ The court only briefly turned its attention, in a footnote, to the suggestion that the trial court's efficiency was either a denial of due process under the ICRA, or of "traditional Lakota respect for the dignity of the individual and for fair play."³² Stressing that the *ex parte* order was temporary and that Angela had forgone a prompt motion in tribal court challenging the order, the court quickly found no due process or "fairness" violation.³³

B. Part II of Eberhard: The General Applicability of the Parental Kidnapping Prevention Act to Tribal Courts

The Cheyenne River Sioux Court of Appeals then turned its attention to the question of whether the Parental Kidnapping Prevention Act (PKPA) applies to tribal courts. The PKPA requires, as a matter of federal law, that states enforce the child custody determinations of other states. The PKPA is captioned "Full faith and credit given to child custody determinations," and is codified as 28 U.S.C. § 1738A, immediately following the more general federal full faith and credit statute, found in 28 U.S.C. § 1738. This more general statute only applies to final judgments, which most child custody decrees are not. Thus, Congress apparently thought that a particular full faith and credit statute was appropriate to require some uniformity in custody decrees and to stop parents from taking custody matters into their own hands.

Eberhard is a classic "parental kidnapping" case, in which the parents were using conflicting court orders to obtain custody of a child. Although the case never apparently reached the especially sad situation when one parent actually snatches the child while the other is not looking, it is one in which the parents attempted the "kidnapping" by litigating separately in different courts, with each parent prevailing in his or her "home" court.

That *Eberhard* involves the situation that Congress set out to manage in the PKPA does not settle the matter however, for the question becomes whether the Cheyenne River Sioux tribal courts were to be Congress's instrument to accomplish its national purpose. The PKPA itself requires full faith and credit to be given by and to "states," defined in the statute as "a State of the United States, the District of Columbia, the

29. *See id.*

30. *See id.*

31. 25 U.S.C. §§ 1301-1303 (1994).

32. *Eberhard*, 24 Indian L. Rep. at 6061 n.2.

33. *See id.*

Commonwealth of Puerto Rico, or a territory or possession of the United States.”³⁴ Indian tribes are not mentioned.

The Cheyenne River Sioux Tribe, invited by the court of appeals to participate in *Eberhard*, joined Shawn Eberhard in resisting application of the full faith and credit requirements of the PKPA to the Tribe, on the grounds that the Tribe was not a state of the Union, never had been a state, and, in fact, pre-existed the states in antiquity. The Tribe insisted that when Congress wants to legislate with respect to Indian tribes it needs to do so expressly and not by implication, and certainly not merely by expanding the definition of “state” to include territories and possessions of the United States.

The Cheyenne River Sioux Court of Appeals, however, rejected the Tribe’s argument and found that Congress used the word “state” intending to bind Indian tribes. Calling this a “very close and troubling question,”³⁵ the court devoted several pages of the opinion to its analysis, first by inspecting the legislative history of the PKPA. This legislative history does not mention tribes, but another section of the original bill did. That other section, the ill-fated “Domestic Violence Prevention and Services Act,”³⁶ was intended to offer federal grants to various governments working to prevent domestic violence, and both the statute and the legislative history made it clear that tribes were to be included in this federal largess, at least in the Senate version of the bill. The House version did not provide for tribes at all.³⁷

The “Parental Kidnapping Prevention Act” section of the original bill did not disperse federal money, but only required the “states” to give full faith and credit to child custody decrees of other “states.” The PKPA was detached from the “Domestic Violence Prevention and Services Act” and became law when President Carter signed it on December 28, 1980, now devoid of any mention of tribes in the statute or the legislative history.³⁸ The “Domestic Violence Prevention and Services Act,” with its specific application to tribes, was left behind until several Congresses later.³⁹

The Tribe argued that this was insufficient evidence to find the federal statute applicable to tribes. The PKPA does not mention Indian tribes on its face, nor does it mention tribes in its legislative history. The Tribe argued that the statute could not be said to apply to tribes especially because its companion section *did* mention tribes in both places. Rather, the tribe argued, this legislative history showed that “Congress knows exactly how to ensure that Indian tribes are specifically included within the purview of federal statutes.”⁴⁰

The court of appeals responded that it “would normally agree with the Tribe that any congressional curtailment of tribal sovereignty requires a clear and express showing of congressional intent.”⁴¹ However, with respect to the PKPA, the court

34. 28 U.S.C. § 1738A(b)(8)(1994).

35. *Eberhard*, 24 Indian L. Rep. at 6063.

36. Title I, H.R. 2977 96th Cong. (1979).

37. *See Eberhard*, 24 Indian L. Rep. at 6063.

38. *See id.*

39. The Domestic Violence Prevention Act became law in 1984 and is codified at 42 U.S.C. § 10401. *See Eberhard v. Eberhard*, 24 Indian L. Rep. (Am. Indian Lawyer Training Prog.) 6059, 6063-64 (Cheyenne River Sioux, Feb. 18, 1997).

40. *Id.* at 6064 (quoting the Tribe’s brief, submitted at invitation of the court).

41. *Id.*

found itself “convinced that Congress intended the [statute] to apply to tribal courts as a means of integrating them, and other courts, into the cooperative federalism framework of the national union.”⁴² Chief Justice Pommersheim went further in his short concurrence, finding that “it is most likely—if *not* a virtual certainty—that Congress intended to include tribes in the definition of ‘State.’”⁴³

It is hard to see anything approaching “virtual certainty” in the statute or in what lies behind it. The Tribe and Shawn had the better technical argument on this point. The key to understanding the court’s rejection of the otherwise sound technical argument is an appreciation of how differently the Cheyenne River Sioux Court of Appeals and the Cheyenne River Sioux Tribe saw the effect of the PKPA on tribal sovereignty. It was the Tribe’s view that for Congress to impose a full faith and credit requirement on tribal courts is a restriction of the Tribe’s sovereignty, which restriction should be resisted by the courts in the face of anything less than absolute clarity by Congress. It was the court of appeals’ contrary view that the PKPA does not restrict tribal sovereignty, but enhances it:

While the court agrees with the tribe that the federal canons of statutory construction require any curtailment of Indian immunities to be made expressly [citations omitted], the court does not find this case to be one to which this canon of construction can be properly applied. The PKPA is not intended to and does not diminish the sovereignty of the courts 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. While admittedly the court of a sovereign asked to enforce a prior child custody decree under the PKPA has less choice over the matter, and therefore, in some theoretical senses perhaps, less sovereignty, the Court does not perceive the imposition of such an obligation on a sovereign as a loss of sovereignty. Rather 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.⁴⁴

The court of appeals, therefore, saw the PKPA as one small step in the incorporation of itself, along with its sister tribal courts, into the federal union. This incorporation is non-consensual in this instance, but the court relegated the imposition to a “theoretical” diminishment of sovereignty; its tone seemed grateful that Congress had chosen this particular restriction on tribal latitude.

This odd thankfulness on the occasion of congressional diminishment of tribal latitude is explained by the court’s clear understanding that if the PKPA requires the Tribe to give full faith and credit to California’s child custody decrees, then it also requires California to give full faith and credit to tribal court decrees:

Furthermore, when the PKPA is read together with the Uniform Child Custody Jurisdiction Act, adopted by many states, including California, 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, separate maintenance or other like proceedings will not be adequately enforced or

42. *Id.*

43. *Id.* at 6068 (Pommersheim, C.J., concurring).

44. *Id.* at 6066.

recognized by the courts of other states, tribes, territories, and possessions without a ruling that the PKPA applies to tribal courts and their orders.⁴⁵

It is, of course, a legislative determination of the Cheyenne River Sioux Tribe not to enact its own version of the Uniform Act mentioned by the court. To do so would have made its own law match California's and would have regulated the recognition of foreign custody decrees under tribal, not federal, law. The court evidently saw this legislative choice as an unfortunate one, and found the needed reciprocity in the PKPA.

Such reciprocity will come only if the California courts also recognize the PKPA's application to tribal courts, a result the court expressly desired and thought that its *Eberhard* decision would make more likely:

If this court expects its non-ICWA child custody orders to be honored, respected, and enforced by other state and tribal courts, it must be prepared to reciprocally enforce the orders of other courts. Recognition and acknowledgment that the PKPA applies to tribal courts and their orders offers that assurance. Perhaps now that the California court understands that the courts of this tribe are bound by the PKPA, it will discharge its responsibility under 28 U.S.C. 1738A(g) to decline to exercise jurisdiction over the child custody proceeding pending before it in this matter.⁴⁶

So, the Cheyenne River Sioux Court of Appeals wished for the benefits of reciprocity from California and found that benefit most readily available through the PKPA. The court saw itself as taking the first step toward binding California by binding itself to the federal law. But, still and all, it was dealing with a congressional enactment that nowhere mentions Indian tribes, and, despite the Chief Justice's "virtual certainty" that the statute binds tribes, the court had to go to substantial intellectual lengths to make the statute apply.

It is here that the *Eberhard* opinion bears the clearest mark of Justice Clinton's off-bench writings.⁴⁷ Tracing the history of the full faith and credit question back to the earliest days of the Union, the court parsed section 1738, the original full faith and credit statute, with care, finding evidence in its structure that Congress in 1790 intended it to apply to all courts "geographically located within . . . states or territories."⁴⁸ This, according to the court, would necessarily include tribal courts.

This early history became, to the court, a "well-established interpretive backdrop,"⁴⁹ against which the Congress legislated in enacting the PKPA:

Consequently, it is quite understandable why Congress would specifically refer to Indian tribes in Title I of HR 2977 [the unenacted "Domestic Violence Prevention and Services Act"], but make no reference to them in Title III, which later became the PKPA. Title I dealt with domestic violence, a relatively new

45. *Id.* at 6064. The Uniform Child Custody Jurisdiction Act has been adopted by all fifty states and the District of Columbia, see LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 3:03, at 7 (1993).

46. *Eberhard*, 24 Indian L. Rep. at 6066. This quotation is limited to non-ICWA child custody decrees because the ICWA does not apply to child custody matters ancillary to divorces, like *Eberhard* was.

47. See, e.g., Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841 (1990), cited at *Eberhard*, 24 Indian L. Rep. at 6066.

48. See *Eberhard*, 24 Indian L. Rep. at 6064 (emphasis omitted).

49. *Id.* at 6065.

subject for the federal government to address and one which lacked the well developed interpretive regime evident in the area of full faith and credit. Consequently, Congress supplied careful definitions of its terms which expressly included Indian tribes By contrast, Title III, which later became the PKPA, dealt with full faith and credit In this context, Congress was not required to explicitly refer to Indian tribes since the judicial interpretive backdrop against which it legislated, . . . clearly reflected that tribes were included within the states, territories, or possessions of the United States.⁵⁰

Chief Justice Pommersheim, concurring, cautioned that, although the majority was careful to give in-depth justification for its conclusion, and although this conclusion was well thought-out and viable, it is likely that other courts deciding this issue could reach a contrary conclusion.⁵¹ Hence, to prevent a lack of uniformity in this area, the Chief Justice urged Congress to be clearer about its intent by explicitly including tribes in the statutory definition of "states."⁵² One wonders whether, were such a proposal made to Congress, the Cheyenne River Sioux Tribe would lobby against it as an imposition on tribal sovereignty.

C. *Part III of Eberhard: The Application of the Parental Kidnapping Prevention Act to this Particular Case*

Having found that the PKPA was intended by Congress to require tribes to give full faith and credit to state decrees, and, in *dicta*, to require states to give the same to tribal decrees, the court of appeals turned to the question of what the PKPA required in light of the facts of *Eberhard*. It found that the Cheyenne River Sioux courts were not required to recognize the California custody decree in this instance, as it was entered in violation of California law and hence not recognizable under the PKPA.

Unlike most "full faith and credit" statutes, the PKPA requires the court receiving the decree to satisfy itself that the court issuing the decree "[had] jurisdiction under the law of such State[.]"⁵³ The California court, in issuing the custody decree in favor of Angela Eberhard, had apparently, though without opinion, decided that it did have jurisdiction to do so. But the Cheyenne River Sioux Court of Appeals found itself not bound by that determination. The court made an independent examination of California's version of the Uniform Child Custody Jurisdiction Act (UCCJA).⁵⁴ Under that statute, California declines jurisdiction over cases in which another "state" is already exercising jurisdiction in conformity with the UCCJA.⁵⁵

The UCCJA, like the PKPA, does not mention Indian tribes, so the court found itself again analyzing the question of whether the UCCJA should be read to reach tribes where "states" is defined to include "state[s], territor[ies] or possession[s]." One would think that the focus this time would be on the intent of the California Legislature (or perhaps the Commissioners of Uniform State Laws) and not the intent

50. *Id.*

51. *See id.* at 6068.

52. *See id.*

53. 28 U.S.C. § 1738A(c)(1) (1994).

54. UNIF. CHILD CUSTODY JURISDICTION ACT § 9, 9 U.L.A. 266 (1988).

55. CAL. FAM. CODE § 3406(a) (West 1997).

of Congress.⁵⁶ However, the court of appeals in one sentence took what had earlier been a "very close and troubling question,"⁵⁷ and applied its "state"-means-"tribe" reasoning to the UCCJA:

By the same reasoning offered above, [the] court finds that the word "State" as used in the UCCJA, and in particular in the California Family Code provisions adopting that legislation, includes Indian tribes, as is true of the virtually identical language of the PKPA.⁵⁸

Under the UCCJA, California only declines jurisdiction when that other "state" is acting in substantial conformity with the UCCJA.⁵⁹ That Uniform Law is not the law of the Cheyenne River Sioux Tribe. However, the court of appeals found that the PKPA imposes on the Tribe jurisdictional requirements substantially identical to the UCCJA.⁶⁰ Hence, the court held, if the California trial judge had properly construed California's own version of the UCCJA, the judge would have declined to exercise jurisdiction over the custody of the Eberhards' child, the "state" of Cheyenne River having already taken jurisdiction over the case. The California court having exercised jurisdiction where it should not have, the PKPA did not require the Cheyenne River Sioux courts to recognize its decree.

III. EBERHARD APPRAISED

Read as a whole, *Eberhard* extended tribal court jurisdiction broadly to reach a child who had hardly ever been on the reservation, attempted to honor tribal sovereignty with a creative construction of a federal statute, and declined to enforce an intrusive California custody decree. What's for a tribal advocate not to like?

A. The Puzzling Absence of Tribal Law in the *Eberhard* Opinion

Having found that the court below had jurisdiction over Shawn Eberhard, and therefore over his divorce, and over Shawn's daughter, and therefore over her custody, the court turned its attention to the reception that the tribal trial court should give to the California custody decree. The court wrote:

The preliminary question[] for this court, therefore, is whether Indian tribes and their reservations are within the phrase "State" or "a territory or possession of the United States," as used in the statutory definition of State found in the PKPA.⁶¹

56. One legislature has specifically applied its version of the UCCJA to tribal decrees. See NEV. REV. STAT. § 125A.050(e) (1995).

57. *Eberhard v. Eberhard*, 24 Indian L. Rep. (Am. Indian Lawyer Training Prog.) 6059, 6063 (Cheyenne River Sioux, Feb. 18, 1997).

58. *Id.* at 6067. The court of appeals did not cite any authority for this conclusion, but it might have. See *Martinez v. Superior Court*, 731 P.2d 1244 (Ariz. Ct. App. 1987), in which the court found it to have been the intention of the Arizona legislature to include tribes within the definition of "states" in the statute. There is authority to the contrary. See *Harris v. Young*, 473 N.W.2d 141 (S.D. 1991).

The court of appeals might also have cited, perhaps as "see also," *People v. Superior Court of Kern County (Jans, Real Party in Interest)*, 274 Cal. Rptr. 586 (Cal. Ct. App. 1990), which held that the California legislature intended to include tribes within the definition of "states" in a different statute. *Jans* is discussed more completely *infra*, at notes 194-96.

59. CAL. FAM. CODE § 3406(a) (West 1997).

60. *Eberhard*, 24 Indian L. Rep. at 6067-68.

61. *Id.* at 6063.

I would have thought that the *preliminary* question for the court would have been whether the California decree was entitled to respect and enforcement under Cheyenne River Sioux tribal law. However, and surprisingly, the Cheyenne River Sioux Court of Appeals saw the issues before it as almost entirely involving federal and state, not tribal law.

There is, in fact, relatively little tribal law in *Eberhard*.⁶² The court closed its opinion with a few words in the Lakota language,⁶³ and early on announced a Cheyenne River Sioux rule regarding the residency of children whose parents are married but have different residences,⁶⁴ but the great bulk of the case concerned federal and state law, to wit, the Parental Kidnapping Prevention Act, the more general full faith and credit statute found in 28 U.S.C. § 1738, and California's version of the Uniform Child Custody Jurisdiction Act. The court constructed its opinion around these off-reservation rules, notwithstanding the fact that the application of the first to tribes is problematic at best, the second is not directly relevant to the case at hand, and the third is definitely not the law of the Cheyenne River Sioux tribe.

Why is there so little tribal law in *Eberhard*?⁶⁵ In particular, why did the court of appeals not decide as a preliminary matter whether the California decree was entitled to recognition under Cheyenne River Sioux law? One could speculate that the court, having reached in conference the conclusion that the PKPA applied to the tribe, also

62. I must be careful not to attack too broadly here. As the discussion below will show, I believe that the court of appeals left local law much more tangential to the case than it should have been. However, that is not to say that the court is generally insensitive to the demands of tribal law. For example, in *Clement v. LeCompte*, 22 Indian L. Rep. (Am. Indian Lawyer Training Prog.) 6111 (Cheyenne River Sioux, Jan. 12, 1994), where one issue was the tribe's waiver of sovereign immunity, the court of appeals was emphatic that tribal law not be put aside from the inquiry.

63. "Ho Hecetu Ye Lo." *Eberhard v. Eberhard*, 24 Indian L. Rep. (Am. Indian Lawyer Training Prog.) 6059, 6068 (Cheyenne River Sioux, Feb. 18, 1997). This phrase is not translated, but I believe it means something along the lines of "It is so ordered."

64. *Id.* at 6061.

65. In addition to the principal absence of tribal law addressed in the text, there are two other places where one yearns for a dash of Lakota tradition. These are places where the court of appeals chose to foreclose arguments that were not made below, applying fastidious dominant-society rules of appellate procedure. First, the court would not allow Angela Eberhard to complain about the speediness of the procedure that she suffered before the tribal court, including the service upon her the same day as the *ex parte* hearing: "Accordingly, insofar as she may have any objection to the manner or reach of process in this case, she has waived any such objections by failing to properly assert them before this Court." *Id.* at 6061.

Second, the court responded to Angela's complaint about the *ex parte* nature of the proceedings below, as follows: "While this argument has some seeming appeal, the fact that she could have moved to dissolve or modify the emergency court order at any time after it was issued and thereby secured a prompt judicial hearing, eliminates any force to the argument, which will not be further addressed." *Id.*, n.2

I know nothing of Lakota tradition, but I, for one, would not look askance at the appellate procedure of this, or any tribe, should it be found to be less meticulous about such matters than the formalistic, persnickety rules that obtain in the dominant society's appellate courts. It is not at all clear to me why an appellate court for a community of ten thousand people, plus guests, must structure itself so carefully along the lines of federal or state courts, and I sincerely doubt that Lakota tradition demands, or even allows, it.

True enough, my asymmetric theory of cross-boundary enforcement requires that the tribal procedure be broadly consistent with the dominant society norms found in the ICRA, with challenges to be available collaterally in the off-reservation enforcement action. See Ransom, *supra* note 4, at 248. But I certainly see no need for tribal courts to abide by the details of off-reservation appellate procedure, as here, by refusing to address an argument that was not raised below.

reached the conclusion that that application preempted any tribal law, rendering the tribal-law question moot. Some state courts, indeed, have held that the PKPA preempts conflicting state law.⁶⁶ However, and even putting aside for the moment the question of whether an applicable PKPA necessarily preempts tribal law, that explanation will not work in *Eberhard*, for in the end, the court of appeals determined *not* to enforce the California decree under the PKPA. Even with preemption, such a result would lead back to the question of whether the California decree was enforceable under tribal law.

The tribal-law question went unaddressed in *Eberhard*, but I will discuss it briefly, analyzing in the alternative, so as to defer on the merits to the court of appeals' eventual resolution of the issue. If the court had thought that the California decree was recognizable under tribal law, then it could have been enforced in either of two ways. First, the court could have found that the off-reservation decree's on-reservation enforceability under tribal law mooted the question of the PKPA's application. Surely the PKPA, even if applicable, would not keep the Tribe from recognizing any decree it wanted to. Thus, by using this approach to the enforcement question, the court would have forsaken, at least for the moment, the imposition of federal law onto the tribal jurisdictional regime. This approach would have resulted in a much shorter and less legally technical *Eberhard* opinion.

Alternatively, if the court was inclined to think that the decree was enforceable under Cheyenne River Sioux law, but was also intent upon analyzing the case under federal law first, then it could have initially recounted its theory that the PKPA applies to tribes as states. It could then have addressed the question of whether the PKPA required enforcement of this particular California decree, finding, as in the actual case, that it did not. Once freed of the strictures of federal law, the court could have turned its attention to the decree's enforceability under Cheyenne River Sioux law. This approach would have been *Eberhard* as written, with the addition of a section analyzing the case under tribal law.

Either of these approaches would have been preferable to the *Eberhard* opinion as actually written. I prefer the former, although the latter is readily acceptable and, in fact, is the approach used by the Supreme Court of Arkansas. For example, in *Garrett v. Garrett*,⁶⁷ the Arkansas Supreme Court was faced with a question not unlike *Eberhard*, with no Indians involved. Our court said that the PKPA and our state law, the UCCJA, "must be read in conjunction"⁶⁸ with the federal law controlling any conflicts. In deciding to decline Arkansas jurisdiction over the suit, and to recognize an Oklahoma decree, the *Garrett* court wrote:

The scenario in this case, and the instability created for the family, is precisely what *both* of these acts were designed to prevent. *Their stated purposes* are to avoid jurisdictional conflict with courts of different states, to promote cooperation between courts so that the custody decree is rendered by the state

66. See, e.g., *Garrett v. Garrett*, 732 S.W.2d 127 (Ark. 1987).

67. 732 S.W.2d 127 (Ark. 1987).

68. *Id.* at 128.

which can best decide the case, to discourage continuing controversies over child custody, to deter abductions, and to avoid re-litigation of custody decisions.⁶⁹

Note how *Garrett* leaves local law very much in play, unless over-ridden by federal law, and this in the face of a federal statute that unambiguously binds Arkansas as a "state." *Eberhard* is to the contrary, with no mention of either the law or the policy of the tribe.

There is, I suppose, one additional approach that might been taken by a very careful and very submissive tribal court, inclined to enforce the decree under tribal law but keenly sensitive to the supremacy of federal law. Such a court might find it necessary to study whether the PKPA "preempts the field." That is to say, perhaps such a court might think that, if the PKPA applies in general to tribes as "states," though not in particular to this case, then the federal law keeps *any* tribal law from intruding into the area. But, such a result will not stand inspection, for it would require that the PKPA be read to require that a "state" *not* recognize any out-of-"state" decree that it is not required to recognize as a matter of federal law. There is absolutely no authority for such a peculiar result, and, had I been on the court, I would not even have raised the possibility.

Now suppose that the court of appeals was inclined to think that the California decree was *not* enforceable under tribal law, for reasons, one supposes, of strong tribal policy relating to real or perceived differences between Cheyenne River Sioux and California attitudes toward court-ordered child custody. One would think that such a court would begin by recounting that tribal-law result and those tribal policy reasons, as a prelude to addressing the question of whether tribal law was to be preempted by federal law. Even if the court would leave those things unsaid, it would still have to return to them, once having found that federal law does not, in this instance, require tribal enforcement of the California decree.

So, irrespective of the court's determination of the result under tribal law, the *Eberhard* opinion should have addressed the question or risk rendering tribal law entirely irrelevant to the controversy. A tribal court wishing to render tribal law irrelevant to any controversy had best explain why, so one is forced to conclude, instead, that the *Eberhard* court thought that tribal law did not require the lower court to recognize the California decree and that that result was so clear and strong under tribal law that it went entirely without saying. But if that is the case, the court's construction of the PKPA makes no sense, as discussed below.

B. The PKPA as an Infringement, or not, on Tribal Sovereignty

The only sensible way to explain the absence of any discussion of tribal cross-boundary enforcement law from the *Eberhard* opinion is to conclude that the court thought that local law did not mandate enforcement of the California decree, a result so clear as to go without saying. But, in the face of such a supposedly clear result under tribal law, one must now confront what can only be described as the court's eagerness to find itself bound by federal law to the contrary, requiring it to enforce, as a general matter, off-reservation judgments and decrees.

69. *Id.* (citations to both state and federal law omitted) (emphasis added).

There are about a dozen ways in which the Cheyenne River Sioux Court of Appeals could have avoided the conclusion that the PKPA applies to Indian tribes. These avoidance devices, discussed in more detail below, range from the straightforward ("The statute does not mention Indian tribes") to the subtle ("The legislative history shows that Congress intended one part of the original bill to apply to Indians and another part not to") to the majestic ("Congress does not have the power to require an Indian tribe to recognize the judgments of states").

The court's rejection of all of these federal-law avoidance devices was shaped by one consideration: the court's insistence, in the face of the Tribe's opposition, that the PKPA, in particular, and federal "full faith and credit" legislation in general, are not infringements on tribal sovereignty. The court made this point twice:

[T]he court is convinced 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. Furthermore, this 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.⁷⁰

and again:

The PKPA is not intended to and does not diminish the sovereignty of the courts to which it applies. . . . [The obligation to enforce foreign judgments] 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.⁷¹

Chief Justice Pommersheim made the same point in his concurrence:

[T]he inclusion of "tribes" within the meaning of "State" in the PKPA in no way demeans tribal sovereignty but rather takes it to another and quite appropriate level. This is the level where tribal courts are treated with the same dignity and respect accorded state and federal courts within the national system of law and jurisprudence. Indeed, such a doctrinal regime bespeaks a true sovereign equality under enduring principles of law.⁷²

The point that both the per curiam and the concurrence avoided confronting is that this imposition by the federal government on tribal latitude is entirely without the tribe's assent. "Full faith and credit," by its nature, is imposed from above. Among the states, it is comity that one state gives of its own law to another; full faith and credit is a federal requirement. The states, of course, having ratified the Constitution, and with representation in the Congress, are seen to have consented to the broad parameters of full faith and credit. The tribes have not. True enough, Congress does not need the tribes' consent when it legislates with respect to them.⁷³ But one ought not pretend that when Congress does so, it is not diminishing the precious remnant of tribal sovereignty. The Cheyenne River Sioux Tribe may (or may not) accept the

70. *Eberhard v. Eberhard*, 24 Indian L. Rep. (Am. Indian Lawyer Training Prog.) 6059, 6064 (Cheyenne River Sioux, Feb. 18, 1997).

71. *Id.* at 6066 (emphasis in the original).

72. *Id.* at 6068 (Pommersheim, C.J., concurring).

73. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-66 (1903).

reality that its sovereignty is recognized, or denied, at the sufferance of Congress,⁷⁴ but it at least desires a chance to lobby before the remnant is reduced. The tribes apparently did not have a chance to lobby in the passage of the PKPA, or the legislative history would have mentioned the word "tribe" somewhere. The task of lobbying Congress on behalf of such a very small minority as American Indians is difficult enough, without the tribes and their allies having to guess when and if Congress is legislating with respect to them.

The argument that the PKPA, or the more general requirements of 28 U.S.C. § 1738, does not restrict tribal sovereignty because Congress is imposing on tribes that which can only be imposed on *governments* will not withstand even a quick inspection. Suppose Congress were to waive tribal sovereign immunity where a tribe is a creditor in a bankruptcy case.⁷⁵ Because only *governments* have, and can have waived, sovereign immunity, is it a diminishment of tribal sovereignty for Congress to waive it unilaterally? Of course it is. Suppose Congress were to require tribes to permit the garnishment of the wages of a father not paying his child support.⁷⁶ Because only *governments* can have garnishment procedures, is it a diminishment of tribal sovereignty for Congress to impose the requirement? Of course it is. Suppose Congress were to impose on tribal court proceedings Constitution-like due process requirements.⁷⁷ Only *governments* have court proceedings, so is this a diminishment of tribal sovereignty? Of course it is.

The Tribe and Shawn's argument that the PKPA and section 1738 diminish tribal sovereignty seems strongest to me in a case not directly before the court. Nevertheless, it is fair to read in the court's *Eberhard* opinion its belief that both of those federal laws require one tribe to give full faith and credit to another tribe's decrees and judgments. Both tribes are older governments than Congress itself and neither has consented to the federal requirement. Furthermore, both, we are assuming, would resist enforcement under their own tribal laws. Even I, often characterized as the primary apologist for Congress's plenary power over Indians,⁷⁸

74. One ought not to contemplate the diminishment of tribal sovereignty by Congress without acknowledging P.S. Deloria's elegant theory of congressional diminishment, based on *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968). That case showed that, in the Supreme Court's view, Congress's termination of a tribe is only the termination of Congress's relationship with the tribe, not the termination of the tribe's very existence. *See id.* at 411-12. Hence, in *Menominee*, the tribe's treaty rights survived the congressional termination of federal relations with the tribe. More broadly then, a tribe may take the view that its *sovereignty* is inherent and cannot be reduced by Congress; all that body can do is to reformulate the relationship between the two governments.

75. *See* 11 U.S.C. § 106 (1994). Following the clear import of *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), the cases are holding that this statute is ineffective to waive *state* sovereign immunity. *See* *Light v. State Bar of California (In re Light)*, Nos. 94-16995 & 94-16997, 1996 U.S. App. LEXIS 16575 (9th Cir. Apr. 9, 1996) (per curiam); *Sacred Heart Hospital v. Pennsylvania Dept. of Public Welfare (In re Sacred Heart Hospital)*, Nos. 96-6172 & 96-6286, 1997 U.S. Dist. LEXIS 514 (E.D. Pa. Jan. 17, 1997); *Koehler v. Iowa College Student Aid Comm. (In re Koehler)*, No. BKY 4-94-6040, 1997 Bankr. LEXIS 9 (Bankr. D. Minn. Jan. 3, 1997), and cases cited *id.* at n.8.

The holding of *Seminole Tribe*, however, is based on the Eleventh Amendment, and would have no application to the question of the validity of a waiver of sovereign immunity when the *tribe* is a creditor in bankruptcy.

76. *See* 42 U.S.C. 654 (1994). This statute does not precisely fit the description in the text, as it was Congress's attempt to modernize state child support enforcement remedies via the unsubtle threat to withhold Social Security entitlements otherwise due the states.

77. *See* 25 U.S.C. § 1302 (1994).

78. *See, e.g.,* Judith V. Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 588 n.15 (1989).

have some difficulty finding congressional power to require such intertribal full faith and credit. The court of appeals' citation of *Embry v. Palmer*,⁷⁹ a non-Indian case, for an expansive reading of the Full Faith and Credit clause of the Constitution, certainly does not support the proposition that the PKPA full faith and credit provisions should be read so expansively. A congressionally mandated full faith and credit requirement between and among tribes may make sense to the Cheyenne River Sioux Court of Appeals, but let us not imagine that it elevates the sovereignty of the tribes, which would, in each case, prefer their own rules.

In the abstract, the argument that congressional impositions of full faith and credit requirements on tribes is an elevation, not a diminishment of tribal sovereignty, strikes me as almost insincere, especially were it to be made by an off-reservation court. What saves *Eberhard* from that charge is the *dicta* that lies behind the argument, *dicta* which demonstrates the sincerity of the court's belief that it is elevating tribal sovereignty, the Tribe's arguments to the contrary notwithstanding. Read again from the *Eberhard* opinion: "[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."⁸⁰

"In many instances." Not *this* instance; not *Eberhard*. In *this* instance, it is clear that if the PKPA applies, it will override tribal law, tribal objections and tribal latitude and would be, candidly, a diminution of tribal sovereignty. But, the Court was suggesting that in *other* instances, applying the PKPA (or, by extension, section 1738) to tribes will enhance tribal sovereignty. The court went on:

[W]hen the PKPA is read together with the [UCCJA], adopted by many states, including California, 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, separate maintenance or other like proceedings 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.⁸¹

Thus, we see the non-disingenuous part of the court of appeals' argument: It *does* enhance tribal sovereignty for California and the other states to recognize Cheyenne River Sioux decrees and, even if done non-consensually, for Congress to require states to do so could be viewed as an enhancement of tribal sovereignty. Of course, by the nature of the judicial process, the Cheyenne River Sioux Court of Appeals can never technically "hold" that California has a federal obligation to enforce its tribal judgments, but it can say so strongly in *dicta*, as it did in *Eberhard*.

Eberhard, then, is the court's attempt at a *quid pro quo* "bargain" with the state of California, and by implication with the rest of the states. The court states the "bargain" clearly: "Perhaps now that the California court understands that the courts of this tribe are bound by the PKPA, it will discharge its responsibility under 28

79. 107 U.S. 3 (1883).

80. See *Eberhard v. Eberhard*, 24 Indian L. Rep. (Am. Indian Lawyer Training Prog.) 6059, 6064 (Cheyenne River Sioux, Feb. 18, 1997)(emphasis added).

81. *Id.*

U.S.C. § 1738A(g) to decline to exercise jurisdiction over the child custody proceeding pending before it in this matter.”⁸²

There are three problems with this “bargain,” to which I now turn.

C. *The Road to Reciprocity*

In the first place, such “bargaining” is better done outside the litigation process. *Eberhard* deprives the Cheyenne River Sioux Tribe of a bargaining chip or two, should that sovereign-to-sovereign negotiation ever take place, now that its own court has ruled that it *must* follow a federal law that does not mention tribes. The highest courts of only a few states have found tribes to be “states” under relevant federal law. Thus, whereas for most states comity is still an option at the bargaining table, it is not for the Cheyenne River Sioux Tribe. Nevertheless, in my view, it is still the best course for the Cheyenne River Sioux Tribe to sit down with the State of California—or, more likely, the state of South Dakota⁸³—and, unrestrained by federal statutory law, hammer out the details of cross-boundary enforcement of judgments and decrees. True, tribe-state relations can be difficult at times in South Dakota,⁸⁴ but this is all the more reason that hard bargaining is the best approach to cross-boundary enforcement issues.⁸⁵

In the second place, I think the court needs to give careful consideration to the question of whether full faith and credit is the *quid pro quo* deal for which the Tribe should aim. The upside of reciprocity, as related by both the per curiam and the Chief Justice, is that tribal judgments and decrees will be recognized off-reservation. The downside is that off-reservation judgments and decrees must be recognized on-reservation.

Observe these two demographic facts of life: California is much, much bigger than the Cheyenne River Sioux Tribe, and many more Indians do business off-reservation than whites do business on-reservation. Both of these facts have impact on the question of whether full faith and credit is the *quid pro quo* the Tribe wants. The unnamed *Eberhard* daughter represents about one-thirty-millionth of the population of California; in contrast, the child represents about one-ten-thousandth of the enrollment of the tribe.⁸⁶ As much as a custody decree affects her own young life, it affects the State of California hardly at all. Her Tribe is affected much more substantially by any off-reservation determination of her custody. It is entirely understandable why the Tribe would wish to have more latitude than a state in the reception it must give foreign judgments and decrees: Individual court decisions

82. See *id.* at 6066.

83. Under what has come to be known as Chief Justice Ransom’s “transformer” theory, if South Dakota—or any other state—were to recognize Cheyenne River Sioux judgments as its own, then, under the standard mandates of full faith and credit, that tribal judgment, now as a *state* judgment, is entitled to recognition in all other states. See Ransom, *supra* note 4 at 272-73 (Remarks of Chief Justice Richard E. Ransom). Professor Clinton dislikes the “transformer” theory, see *id.* at 277.

84. See, e.g., Kay Humphrey, *Janklow: There’s no Yankton Reservation*, INDIAN COUNTRY TODAY, March 24-31, 1997, at 1.

85. Details are set out elsewhere, and I will not repeat those details here. 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).

86. The difference is a ratio of 3000:1. The similar ratio between the largest and smallest states is about 60:1. And, in general, the difference is even starker than that, for Cheyenne River Sioux is a fairly large tribe, as tribes go.

matter more to small tribes than they do to large states.

Furthermore, the impact of *Eberhard* is not limited to foreign custody decrees: The structure of the opinion is such that it could not be clearer that the court of appeals thinks it is bound to give full faith and credit under section 1738 to off-reservation money judgments and other final orders as well.⁸⁷ Unlike the PKPA, full faith and credit under section 1738 does not allow an inspection of the state law supporting the off-reservation judgment.⁸⁸ Every automobile that every tribal member buys is subject to an off-reservation contract, the interpretation and enforcement of which will go on in off-reservation courts. The resulting off-reservation judgments, under *Eberhard*'s clear direction, have to be given full faith and credit, and enforced without question, by the Cheyenne River Sioux courts under binding federal law.

In those much rarer instances in which whites come on the reservation to do business, or where the Indian contractors have the leverage to force the execution of the contract onto the reservation, the tribal court will interpret the contract and issue the judgment. Sure enough, tribal courts are increasingly becoming venues for litigation involving non-Indians, but the practical impact of *Eberhard* would seem to be in the wrong direction from the Tribe's perspective.

If one were to conclude that such reciprocity is no "bargain," and that the straightforward application of section 1738 to tribes will be to turn tribal courts into collection agencies for off-reservation car dealers, one's cynicism would be understandable. Less cynically, the proposition might be stated like this: It would be nice if the economic development of the Cheyenne River Sioux reservation advanced to the point where members could buy an automobile or a bedroom suite or a lap-top computer on-reservation. But the advent of that day may have been delayed by *Eberhard*; off-reservation businesses have one more reason not to move on-reservation if their off-reservation contracts can be enforced in convenient and familiar off-reservation courts, and rubber-stamped by a tribal court required to follow section 1738's full faith and credit rules.

The third difficulty with *Eberhard*'s reciprocity bargain relates to the final outcome of the case, for recall that, in the end, the court refused to honor the California decree. Before reaching that conclusion, the court found that a federal statute, without mentioning Indians, requires Indian tribes to recognize off-reservation decrees, and along the way indicated that other statutes of the same ilk that do not mention Indians also apply to tribes. We have seen that the only real way to explain this surprising result is to see the court as very much solicitous of reciprocity from California. But, in the end, the Cheyenne River Sioux Tribe refused to recognize the California decree, on the theory that the California judge was mistaken in his interpretation of California law.⁸⁹

This essay must now address a point of some sensitivity: Two of the three Justices on the Cheyenne River Sioux Court of Appeals are also full-time law professors. To some observers, this might be seen as a unqualified gain for the Cheyenne River Sioux Tribe, or for any tribe that is able to entice a professor or two temporarily out

87. See *Eberhard v. Eberhard*, 24 Indian L. Rep. (Am. Indian Lawyer Training Prog.) 6059, 6064 (Cheyenne River Sioux, Feb. 18, 1997).

88. See LEFLAR, *supra* note 5, at 223-24.

89. See *Eberhard*, 24 Indian L. Rep. at 6067-68.

of the academy and onto the tribal bench. The prestige and learning that professors bring to a court would seem to inure to both the court and the tribe's benefit. On the other hand, *Eberhard* gives some support to those who think that law professors may not make the best tribal court judges, at least not when, at the very same time, they are also teaching and writing Indian law on a full-time basis. The advanced level of learning, good will and erudition certainly possessed by Chief Justice and Professor Pommersheim, and by Associate Justice and Distinguished Professor Clinton, are beyond question, let alone reproach. Their qualifications as tribal advocates are similarly beyond question. The same can be said for other law professors *qua* tribal judges around the country. Still and all, *Eberhard* reads more like a law review essay than a court opinion, and I, for one, am not sure that such a change is necessarily an improvement in tribal jurisprudence.⁹⁰ P.S. Deloria once invited Justice Clinton "to remove his tribal judge's hat and put his University of Iowa endowed-chair hat on."⁹¹ *Eberhard* shows just how difficult the opposite switch might be, for any of us.

We law professors have our usefulness, to be sure, but we tend to be, shall we say, a bit unrestrained in our appraisals of judicial decisions. We are paid to be unrestrained, and I am no less so than the others. Telling a California court that it got California law wrong is so commonplace as to be entirely unremarkable in the law-professor business. To run slack-reined and rough-shod over judicial decisions is in the nature of law-review writing, as the present essay shows.

But judges need to be, well, more judicious than professors. The great advantage of judging, compared to law-review writing, is that, while a scholar only critiques and proposes the law, a judge gets to *make* the law. We scholars can risk being presumptuous because of the very weakness of our position; we are unable to accomplish anything directly, except criticism. We have no tools except our advocacy; our license to be brazen comes with our inability to rule. With the gavel, bench and robe comes the ability to make rules, but also the necessary judicial moderation.

Of course, judges declining to follow the reasoning of non-binding decisions from other jurisdictions in establishing a local rule are acting properly, even where the foreign rule and the local rule are uniform. Even declining to recognize a foreign judgment because of strong local policy is easily understandable, if usually impossible under section 1738's standard full faith and credit dogma.⁹² But declining such recognition because the local judge thinks that the foreign judge misinterpreted his or her own law can be contentious judging, and will be off-putting to the foreign judge unless done diplomatically. Such diplomacy may grate on the scholar, but judges who are soliciting reciprocity from their off-reservation colleagues must be diplomatic; they can not afford the law professor's luxury of being off-putting. Furthermore, as unfair as it might be in the platonic sense, tribal judges probably

90. I acknowledge the observation that these comments sound as if made by a professor who has never been invited to be a tribal judge. Indeed. Furthermore, I suspect that had I been asked, before *Eberhard*, I would have accepted the post, and I moreover suspect that my opinions would have sounded a lot like my law review essays. *Eberhard*, then, served for me a valuable cautionary function, and my criticisms here are decidedly *not* of the nature that I would have known better or done differently.

91. See Ransom, *supra* note 4, at 241.

92. "The local public policy of the second state, however strong it may be, is not a ground for denying full faith and credit to a valid sister state judgment." LEFLAR, *supra* note 5 at 224.

need to be even more judicious in their review of foreign law, given their tribes' size and their courts' recent arrival on the national stage. Turnabout is fair play, and the ability of state courts to second-guess tribal courts on matters of tribal law is a dangerous one to contemplate.

Eberhard itself shows how vulnerable even the professor-laden Cheyenne River Sioux Court of Appeals is to that kind of off-reservation re-inspection of tribal law. The linchpin of the *Eberhard* opinion is the early determination by the court that there was jurisdiction over the child in the tribal trial court, under Cheyenne River Sioux law, which, in turn, required a finding that the child was a resident of the reservation, notwithstanding that she had hardly ever been there before the litigation began. Recall that the court did so by establishing that the local rule was gender-neutral, but tied instead to the residency of the parent who was the tribal member.

I am not prepared to tell the Cheyenne River Sioux Court of Appeals that Lakota tradition is not gender-neutral, nor even to ask for citations of authority in the usual dominant-society sense. The introduction of traditional and customary law into the common law of Indian tribes is an encouraging, but still nascent, development, and tribal courts should be given the time to work out their own rules of discovery, proof and substantiation.⁹³ But, when the issue is one of cross-boundary enforcement of judgments, and if that issue turns on a local analysis of foreign law, then the ability to trust a local determination of local law takes on a different importance. One can easily imagine finding a Berkeley anthropologist, say, willing to testify in California court that traditional Lakota ways were sufficiently matrilineal so that the "real" Lakota rule would place the child's residency in California with her mother.⁹⁴ Thus, a California court, encouraged by *Eberhard* to second-guess with nonchalance local determinations of local law, might well find that "real" tribal law would hold that there was no proper tribal jurisdiction at all over the divorce and ancillary custody matter.

In what we are assuming is an earnest attempt, even at the sacrifice of sovereign latitude, to solicit respect and reciprocity from California, the *Eberhard* court declined to enforce the California decree based on its own independent reading of California law. I will turn, below, to the merits of the question whether a tribe is a "state" under California law, and will side with the California trial judge. But put aside for the moment the details of California law, for a more fundamental point, having to do with judicial decision-making along the road to sovereign-to-sovereign reciprocity.

Sure enough, *Eberhard's* approach is technically correct under the PKPA: Congress, for whatever reason, in a statute that it called a "full faith and credit" statute, required that the receiving court satisfy itself that the rendering court had jurisdiction under its own law. Consistently with this requirement, the Cheyenne River Sioux Court of Appeals held that the California Superior Court did not have

93. See generally, Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994).

94. Cf. PAULA GUNN ALLEN, *THE SACRED HOOP* 209-10 (2d. Ed. 1992). Dr. Allen argues in this thoughtful book that Keres, or western, Pueblo tradition was matrilineal. In *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5, 16 (D.N.M. 1975), rev'd 540 F.2d 1039 (10th Cir. 1976), rev'd 436 U.S. 49 (1978), the federal district court found that that Santa Clara, which is a northern, not western, Pueblo, was from a patrilineal tradition.

jurisdiction. But there is a right way and a wrong way to so hold, at least if one is a judge in search of reciprocal treatment by the California courts. The right way is to acknowledge that the question is one of the intent of the California legislature in enacting the UCCJA, and then to cite some California authority strong enough to be convincing that the California trial judge misinterpreted the very law he is paid to get right. There is a usable case,⁹⁵ but the tribal Court of Appeals forwent its citation, thereby giving the impression that it was so certain that it knew what California law *should* be that it did not particularly care what California law *was*.

This is professor-like, not judge-like, composition, and seems an unlikely way to woo California's judicial reciprocity. How much more effective, it would seem, for a court which thinks that reciprocity is worth the cost, to recognize the judgment under its own law, instead of first binding itself to a non-consensual federal rule and then tossing the decree back to California as wrongly decided under California law.

At the heart of all of this is the essential *non sequitur* of *Eberhard*: The Cheyenne River Sioux Court of Appeals went to tortuous lengths to find itself bound by a federal statute that never mentions Indians. It did so under the false assumption that it was not sacrificing tribal sovereignty, in the face of its own Tribe's argument to the contrary. It did so entirely in the name of respect for California process, hopeful that the California courts will reciprocate. It then, and without citing any California authority, scored the California decree as if the California trial judge were a struggling C student:

[I]t is clear that the California court lacked jurisdiction over the child custody proceeding under California law. It is also clear under the PKPA that the California court is required to cease its exercise of jurisdiction and defer to the jurisdiction and orders of the courts of the Cheyenne River Sioux Tribe in this matter.⁹⁶

All of this "clarity" revolves around the question whether, and in which circumstances, the word "state" means "tribe." I will now turn my attention to that question.

D. Of "States" and "Tribes"

The conclusion that is so "clear" to the Cheyenne River Sioux Court of Appeals at the end of the opinion is that a statute which refers to "states" may reach Indian tribes, and that the PKPA does so. This conclusion is hardly "clear." In fact, it takes the court the bulk of the lengthy and detailed discussion of the PKPA in *Eberhard* to establish it. To call this conclusion "clear" after the discussion that one finds in the case reminds one of the math professor who required three blackboards and 45 minutes of class time to explain why he had called a certain step in a proof

95. In *People v. Superior Court of Kern County (Jans, Real Party in Interest)*, 274 Cal. Rptr. 586, 590 (Cal. App. 1990), a panel of the California Court of Appeals held that the word "state" in the Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings, expanded there, as in the UCCJA to include "territories," was intended to reach Indian tribes. *Jans* used analysis quite like that used in *Eberhard*. The California Supreme Court denied review, one Justice dissenting. See *Jans*, No. F014737, 1990 Cal. App. LEXIS 1144, at *1 (Ct. App. Nov. 28, 1990). *Jans* is discussed in more detail, *infra* at notes 194-96.

96. *Eberhard v. Eberhard*, 24 Indian L. Rep. (Am. Indian Lawyer Training Prog.) 6059, 6067 (Cheyenne River Sioux, Feb. 18, 1997).

“obvious.”

The court of appeals’ long discussion of what the word “state” means is premised on two assumptions already addressed, assumptions with which I disagree, as set out above: (1) That tribal law is irrelevant to the inquiry and (2) that imposition of a full faith and credit regime on unconsenting tribes by Congress enhances, rather than diminishes, tribal sovereignty. Even assuming these problematic assumptions to be true, *Eberhard*’s conclusion that “state” means “tribe” is flawed. Even if we accept the notion that Congress has not diminished a tribe’s sovereignty by diminishing its judges’ latitude, and even if we ignore the necessary assumption that the California decree is not enforceable under tribal law, neither the PKPA nor 28 U.S.C. section 1738 should apply to tribes without explicit mention of them by Congress.

The Supreme Court of the United States has held that congressional intent controls the question of which courts are reached by full faith and credit legislation.⁹⁷ The Cheyenne River Sioux Court of Appeals found itself “convinced” that Congress intended the PKPA to apply to tribes,⁹⁸ and Chief Justice Pommersheim thought that result was “most likely — if not a virtual certainty.”⁹⁹ But what evidence is there of such a congressional intent? The statute itself mentions neither Indians nor tribes. The legislative history of the statute as passed is likewise silent regarding either Indians or tribes.¹⁰⁰ And, as demonstrated by the Tribe, the “indirect” legislative history is counterindicative. That is to say, the legislative record with respect to companion, unpassed, legislation and with respect to other similar laws shows a Congress careful to use the word “tribe” when it wants to reach tribes.

The court of appeals rejected this evidence of congressional intent because it found that “Congress was not writing on a clean slate in the area of full faith and credit” when it enacted the PKPA.¹⁰¹ It is this “written-upon slate” which allowed the court to find that Congress intended to reach Indian tribes without mentioning them. However, the writing on this slate is cryptic at best:

1. There is the more general full faith and credit statute found in 28 U.S.C. § 1738. Neither this statute nor its legislative history mentions Indian tribes.¹⁰² Furthermore, there is no good evidence that judgment-granting tribal courts even existed in 1790 when the statute was passed, or that that early Congress would have ever conceived of granting those tribal courts, if they existed, co-equal status with the state courts.¹⁰³

There is in section 1738 this phrase: “[E]very court *within* the United States and its territories and possessions.”¹⁰⁴ The Court of Appeals reasoned that (a) this phrase must include tribal courts because they are geographically located within the United States, therefore (b) the phrase “courts *of* the States, territories and possessions,”

97. See *University of Tennessee v. Elliot*, 478 U.S. 788, 796-97 (1986).

98. See *Eberhard*, 24 Indian L. Rep. at 6064.

99. *Id.* at 6068 (emphasis in original).

100. See William V. Vetter, *Of Tribal Courts and “Territories”: Is Full Faith and Credit Required?*, 23 CAL. W. L. REV. 219, 255 n.206 (1987).

101. *Eberhard*, 24 Indian L. Rep. at 6063-64.

102. See Vetter, *supra* note 100, at 249-54.

103. This argument is set out more completely in Robert Laurence, *The Enforcement of Judgments across Indian Reservation Boundaries: Full Faith and Credit, Comity and the Indian Civil Rights Act*, 69 OR. L. REV. 651-62 (1990).

104. 28 U.S.C. § 1738 (1994) (emphasis added).

found in the same statute, must have the same meaning as this, therefore, the phrase "courts of the states, territories and possessions" found in other, later statutes must include tribal courts.¹⁰⁵

2. There is an old case called *United States ex rel. Mackey v. Coxe*,¹⁰⁶ which interpreted a now-repealed and very narrow statute to reach Indian tribes without mentioning them, thereby requiring the Orphan's Court of the District of Columbia to recognize letters of administration issued by the Cherokee Nation. The court of appeals quoted the United States Supreme Court in *Mackey* to the effect that tribes are "territories" of the United States within the meaning of that statute.¹⁰⁷ The court of appeals did not quote the part of *Mackey* where the Supreme Court described the Cherokee Nation as "not a foreign, but a domestic territory,—a territory which originated under our constitution and laws."¹⁰⁸ Such reasoning is factually wrong, inconsistent with more carefully reasoned Supreme Court precedent, and long out of date.¹⁰⁹

3. There is this bit of *dictum* in the more recent *Santa Clara Pueblo v. Martinez*:¹¹⁰ "Judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts."¹¹¹ *Mackey* and one lower court case¹¹² are cited as authority.

Of course this is only *dictum*. And, note how the tribal court of appeals altered the Supreme Court's words, thereby altering the sense of the *dictum*. The *Martinez* footnote actually says that tribal judgments get full faith and credit "*in some circumstances*."¹¹³ In *Eberhard*, the sentence before the *Martinez* quote says, "[t]he Supreme Court of the United States has *generally* recognized, as it did in the *Mackey* decision, that full faith and credit statutes applicable to courts of the states, territories or possessions apply to Indian tribes."¹¹⁴ In common parlance, "*in some circumstances*" is the direct opposite of "*generally*." The *general* Supreme Court recognition that the court of appeals found comes from exactly two sources: One out-

105. See *Eberhard v. Eberhard*, 24 Indian L. Rep. (Am. Indian Lawyer Training Prog.) 6059, 6064-66 (Cheyenne River Sioux, Feb. 18, 1997).

This argument was first set out, to my knowledge, by Professor Clinton as follows:

Does the language "in every court within the United States" in the last paragraph of 28 U.S.C. § 1738, require tribal courts to give full faith and credit to the acts, records and judicial proceedings of any state, territory, or possession of the United States? If so construed, could section 1738 be constitutionally sustained if it did not also require federal, state, and territorial courts to give full faith and credit to the acts, records, and judgments of tribal authorities?

MONROE PRICE & ROBERT N. CLINTON, *LAW AND THE AMERICAN INDIAN* (2d ed. 1982) at 357.

106. 59 U.S. (18 How.) 100 (1855).

107. See *Eberhard*, 24 Indian L. Rep. at 6064-65 (citing *Mackey*, 59 U.S. at 104).

108. *Mackey*, 59 U.S. at 103. A panel of the Court of Appeal of California, without a hint of either irony or embarrassment, included this quotation in its opinion in *People v. Superior Court (Jans Real Party in Interest)*, 274 Cal. Rptr. 586, 589 (Cal. Ct. App. 1990).

109. See, e.g., *United States v. Wheeler*, 435 U.S. 313, 326-28 (1978) (stating that the source of the power of tribal self-governance was "primeval sovereignty" rather than through federal delegation of power); *Talton v. Mayes*, 163 U.S. 376, 381-82 (1896) (stating that the Fifth Amendment of the United States Constitution does not bind the actions of the Cherokee Tribe).

110. 436 U.S. 49 (1978).

111. *Id.* at 65-66 n.21.

112. See *Standley v. Roberts*, 59 F. 836 (8th Cir. 1894).

113. 436 U.S. at 66 n.21 (emphasis added).

114. *Eberhard v. Eberhard*, 24 Indian L. Rep. (Am. Indian Lawyer Training Prog.) 6059, 6064-65 (Cheyenne River Sioux, Feb. 18, 1997) (emphasis added).

dated and poorly reasoned case interpreting a now-repealed statute, and one footnote in dicta, citing that old case, and limited to "some circumstances." This is hardly a *general* recognition that full faith and credit applies to tribes; this is hardly any recognition of that at all.

4. There is some lower court authority for the granting of full faith and credit to tribal judgments: Three state court cases in the 1970s and 1980s, and a brief flurry of activity from the Eighth Circuit in the 1890s.¹¹⁵ The court of appeals admitted, in a footnote, "that perhaps a majority of the state courts" that have addressed the question have ruled against the application of full faith and credit principles to tribal judgments.¹¹⁶

5. There is also a body of scholarship, which the court calls an "emerging debate,"¹¹⁷ in the law reviews; some of it is mine. Well, it is always nice to be cited by a court, but let's be honest: There is no evidence that any member of Congress has read one word of this debate, nor even knows of its existence. More to the point, there is no mention of it anywhere in the legislative history of the PKPA or of any other statute that I know of. The use of this rather exotic debate in a few obscure law reviews to explain, as the court of appeals attempted to explain, why Congress used the word "tribes" in section 1738B—the Full Faith and Credit for Child Support Orders Act—but not in the PKPA pushes the envelope of credulity.

After relating this "writing [up] on [the] . . . slate,"¹¹⁸ the court of appeals used the slate as an "well-established interpretive backdrop"¹¹⁹ and concluded that it was "apparent"¹²⁰ that the PKPA applied to tribes and "Congress was not required to explicitly refer to Indian tribes" to reach that result.¹²¹ Then, entirely without analysis, the court of appeals found that the same "well-established interpretive backdrop" applied to an enactment of the California legislature.¹²² As the *coup de grace*, the court said that the result under California law was so "clear" that it could hardly have been missed if the California trial judge had been paying attention.¹²³

Chief Justice Pommersheim, in his concurrence, called the *per curiam* "adroit[],"¹²⁴ and it is nowhere more adroit than it is in the construction and use of this "well-established interpretive backdrop."¹²⁵ Without this backdrop, as the court itself recognized, the usual canons of statutory construction would have applied and given the result for which Shawn Eberhard and the Tribe had argued.¹²⁶ With it, the statute applies, and so do other congressional full faith and credit pronouncements directed at "states." But adroitness has its own special entanglement: In the end, *anything* can be proved if one is clever enough. I now turn to a comparison of the *Eberhard*

115. See *id.* at 6065.

116. See *id.* at n.3.

117. See *id.*

118. *Id.* at 6064.

119. *Id.*

120. *Id.*

121. *Id.*

122. See *id.* at 6067.

123. See *id.*

124. *Id.* at 6068 (Pommersheim, C.J., concurring).

125. *Id.* at 6065.

126. See *id.* at 6064 (stating that "[i]f Congress had been writing upon a clean slate when it adopted the PKPA, the arguments offered by the tribe and the Appellant . . . would be compelling").

opinion to some adroit, if notorious, Indian law cases, comparisons that the court of appeals will not find entirely flattering.

IV. EBERHARD COMPARED

The blessings of adroitness in the field of American Indian law have been mixed indeed. On the positive side, in the venerable *Worcester v. Georgia*,¹²⁷ the court was required to interpret the fourth article of the Treaty of Hopewell, which refers to the "boundary allotted to the Cherokees for their hunting grounds."¹²⁸ Chief Justice Marshall held for the Court that the Cherokees had not abandoned their independence, autonomy or sovereignty by accepting under the treaty "allotted . . . hunting grounds."¹²⁹ In a discussion that Professor Philip P. Frickey calls "elaborate,"¹³⁰ and "stealth-like,"¹³¹ but that Chief Justice Pommersheim might call "adroit," Marshall departed from the plain meaning of Article Four, and, for reasons entirely justifiable to Professor Frickey and most of the rest of us, set the Court on the path of the friendly construction of Indian treaties.¹³²

Likewise, *McClanahan v. Arizona State Tax Commission*¹³³ was an adroit opinion by Justice Thurgood Marshall. The issue was whether Arizona could tax McClanahan's reservation income. The Court held that the state's ability to tax on the reservation was pre-empted by overriding federal policy.¹³⁴ Part III of *McClanahan* is a wonderful example of statutes and treaties being read for the most, not the least, that they might say regarding federal dominance over the states in the control of Indian-reservation taxation.¹³⁵

But, of late, such adroitness by the United States Supreme Court has more often than not been in derogation of tribal sovereignty and Indian rights. One thinks, for example, of Justice Thurgood Marshall's first opinion in *United States v. Mitchell*.¹³⁶ There, the Court was presented with the question of whether allottees under the General Allotment Act could sue the United States for money damages for the alleged mis-management of timber resources on the allotted land. The Act states that "the United States does and will hold the land thus allotted for a period of twenty-five

127. 31 U.S. (6 Pet.) 515 (1832).

128. Treaty of Hopewell, Nov. 28, 1785, U.S.-Cherokee, 7 Stat. 18, 19.

129. *Worcester*, 31 U.S. at 562.

130. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 400 (1993).

131. *Id.* at 402.

132. *See id.* at 400. In particular, Professor Frickey draws from *Worcester* two "central features of federal Indian law interpretation." *Id.* First, that since treaties were negotiated and written in English, fine—or even not-so-fine—distinctions between words should not be imposed on the Indians. Thus the fourth article's reference to "hunting grounds" became a reference to land over which the Cherokees had extensive rights of possession and control. Second, treaties should be interpreted in the light of their fundamental nature, which Professor Frickey calls their "constitutive" nature, that is, that Indian treaties are in the nature of a constitution between the United States and the tribes: "It was, if you will, the joinder of two sets of 'We the People,' and it therefore resonated with *Marbury*'s notion that constitutional authority flows from the people themselves. This treaty was a sovereign act of law rather than of sheer power—that is, of conquest." *Id.* at 409-410.

133. 411 U.S. 164 (1973).

134. *See id.* at 180-81.

135. The Court discussed the 1868 treaty with the Navajos, Treaty of July 25, 1868, U.S.-Navajo, 15 Stat. 667, the Arizona Enabling Act, ch. 310, 36 Stat. 557 (1910), the Buck Act, 4 U.S.C. §§ 105, 111 (1994), and Pub. L. 280, 25 U.S.C. § 1324 (1994).

136. 445 U.S. 535 (1980).

years, in trust for the sole use and benefit [of the allottee]."¹³⁷ However, Justice Marshall found that it takes more than the words "in trust" to impose on the United States the obligations of a trustee. Adroitly citing earlier drafts of the Act¹³⁸ and events surrounding passage of the Act,¹³⁹ as well as other acts dealing with timber management,¹⁴⁰ Justice Marshall wrote that "[t]he Act does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands."¹⁴¹

Consider then-Justice Rehnquist's opinion in *Rosebud Sioux Tribe v. Kneip*.¹⁴² There the question was whether the Rosebud Sioux reservation had been diminished from its original extent when Congress opened it for homesteading by three acts in 1904, 1907 and 1910.¹⁴³ Without overruling the three diminishment cases in place at the time,¹⁴⁴ the Court adroitly found the requirements from these precedents for diminishment were met. Justice Rehnquist's opinion found diminishment by crafting a complex combination of an unratified agreement and three congressional enactments with conflicting terms, all of this read against a background of a Supreme Court case not involving the diminishment of reservations.¹⁴⁵

Consider Justice Marshall's opinion for the unanimous Court in *United States v. Dion*, as another example of the Court's misplaced adroitness.¹⁴⁶ There the question was whether the Bald Eagle Protection Act,¹⁴⁷ abrogated the Yankton Sioux Tribe's treaty with the United States,¹⁴⁸ without ever precisely saying so. The court held that it did, applying its "actual consideration and choice" test for treaty abrogation.¹⁴⁹ The statute at issue mentions treaty rights neither on its face nor in its legislative history, which made finding the necessary consideration and choice difficult. However, Justice Marshall adroitly noted that the statute does mention Indian rights not represented by treaties, which the Court considered to be "clear"¹⁵⁰ circumstantial

137. 25 U.S.C. § 348 (1994). The twenty-five year period was extended indefinitely by 48 Stat. 984, 25 U.S.C. § 462 (1994).

138. See *Mitchell*, 445 U.S. at 544.

139. Justice Marshall discussed the interplay of *United States v. Cook*, 86 U.S. (19 Wall.) 591 (1873), 19 Op. Att'y Gen. 232 (1889) and the Act of Feb. 16, 1889, ch. 172, 25 Stat. 673. See *Mitchell*, 445 U.S. at 544-45.

140. See *Mitchell*, 445 U.S. at 545-46.

141. *Id.* at 542.

142. 430 U.S. 584 (1977).

143. See Act of April 23, 1904, ch. 1484, 33 Stat. 254; Act of March 2, 1907, ch. 2536, 34 Stat. 1230; Act of May 30, 1910, ch. 260, 36 Stat. 448.

144. *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962).

145. See *Rosebud*, 430 U.S. at 588-98. The case is *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

146. 476 U.S. 734 (1986).

147. 16 U.S.C. §§ 668-668d (1994).

148. Treaty with the Yankton [sic] Sioux, April 19, 1858, U.S.-Yankton Sioux, 11 Stat. 743.

149.

What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve the conflict by abrogating the treaty.

Dion, 476 U.S. at 739-40.

150. See *id.* at 740.

evidence that Congress must have contemplated treaty rights as well, though it never said so.¹⁵¹

Finally, consider the ill-famed *Oliphant v. Suquamish Indian Tribe*,¹⁵² perhaps the most consistently criticized Indian law case of the past half-century.¹⁵³ In *Oliphant*, the Supreme Court was faced with the question of whether an Indian tribe has criminal jurisdiction over a non-Indian defendant. Such jurisdiction could have been removed by Congress at any time, but never had been, at least not in any way relevant to the case at hand. The Supreme Court, then, had to resolve the question under federal common, not statutory, law.

The majority opinion in *Oliphant*, written by then-Justice Rehnquist, adroitly constructed what it called an "unspoken assumption," shared by the three branches of the federal government, that tribes had no criminal jurisdiction over non-Indians.¹⁵⁴ Creatively mixing together a witches' brew of unpassed legislation,¹⁵⁵ withdrawn Attorney General's opinions,¹⁵⁶ *dictum* from an obscure case,¹⁵⁷ and selective quotation from cases and treaties,¹⁵⁸ the Court was able to find that the Congress, the Executive and the Judiciary had all implicitly assumed that tribal criminal jurisdiction was so limited. Giving that unspoken assumption "considerable weight,"¹⁵⁹ the Court found Suquamish jurisdiction over Mark Oliphant to be lacking.

It is commonplace for tribal advocates to decry the Supreme Court's aggressive destruction of tribal sovereignty and treaty rights in *Oliphant*, *Rosebud*, *Dion*, *Mitchell* and the like, and to praise Chief Justice John Marshall, Justice Thurgood Marshall and others for their judicial craftsmanship in *Worcester*, *McClanahan* and the like. Ultimately, one's opinion probably rests on one's appraisal of the outcome. Tribal advocates tolerate, or even admire, adroitness in furtherance of the grand doctrine of tribal sovereignty; non-adroitness tends to be called a crabbed construction of relevant treaties and statutes when the result is the opposite.

Because the Cheyenne River Sioux Court of Appeals saw itself as advancing tribal sovereignty, it offered its dexterous *Eberhard* opinion confidently, optimistic, I am sure, of its reception by the relevant communities, on- and off-reservation, in the law schools and in the courts. Because I find the case to accomplish a reduction of

151. See *id.* at 743.

152. 435 U.S. 191 (1978).

153. See, e.g., Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055 (1995); Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall's Indian Law Jurisprudence*, 26 ARIZ. ST. L.J. 495 (1994); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995); Alex Tallchief Skibine, *Deference Owed Tribal Courts' Jurisdictional Determinations: Toward Co-existence, Understanding, and Respect between Different Cultural and Judicial Norms*, 24 N.M. L. REV. 191 (1994); Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

154. See *Oliphant*, 435 U.S. at 203.

155. The Western Territories Bill, H.R. REP. NO. 474, 23d Cong. 36 (1st Sess. 1834), discussed in *Oliphant*, 435 U.S. at 202.

156. Criminal Jurisdiction of Indian Tribes over Non-Indians, 77 Interior Dec. 113 (1970) (withdrawn), see *Oliphant*, 435 U.S. at 201 n.11.

157. *Ex parte Kenyon*, 14 F. Cas. 353, 353 (C.C.W.D. Ark. 1878), discussed in *Oliphant*, 435 U.S. at 199-200.

158. See, e.g., the *Oliphant* Court's selective quotation from *Ex parte Crow Dog*, 109 U.S. 556 (1883), found at *Oliphant*, 435 U.S. at 210.

159. See *Oliphant*, 435 U.S. at 206.

Cheyenne River Sioux tribal sovereignty, I find *Eberhard's* "written-upon slate" honestly to be too dexterous by half: The opinion is too dependent on very marginal *dicta* from *Martinez*.¹⁶⁰ It made too much of what Congress never said, or what it said in legislation that never passed, such as the Domestic Violence Prevention and Services Bill.¹⁶¹ It quoted selectively from *Mackey*.¹⁶² It assumed that Congress knew something that it never mentioned knowing, the scholarly full faith and credit debate.¹⁶³

Worst of all, the court of appeals' logic was faulty and unpersuasive. Consider the treatment of one of the arguments in *Eberhard*. Advancing the position that Congress's failure to mention Indian tribes in the PKPA was intentional, not haphazard, the Tribe and Shawn Eberhard pointed to three other full faith and credit statutes that do mention Indian tribes: 28 U.S.C. § 1738B (The Full Faith and Credit for Child Support Orders Act), 18 U.S.C. § 2265 (The Violence against Women Act), and 25 U.S.C. § 1911(d) (The Indian Child Welfare Act). The court of appeals gave three responses to this argument based on the express application to tribes of the full faith and credit provisions of other statutes. The first is rather obscure:

First, the judicial interpretative backdrop of phrases like state, territory or possession reflected in the *Mackey* decision undermines the point since this general phrase and the more explicit language of the [first] two cited statutes seem to be used interchangeably.¹⁶⁴

The court did not amplify this thought, but it apparently turned *Mackey* from a case interpreting language in one statute into a general rule of interchangeability of the phrases "state, territory or possession" and "state, Indian tribe, territory or possession." This is a dangerous equivalency, especially when built on the frail foundation of *Mackey*.

The court's second response was based on the problematic assumption that Congress was aware of the esoteric nature of the scholarly debate over full faith and credit in the law reviews, and chose to name Indian tribes specifically in statutes coming after the debate in order to satisfy the few of us who really care about the issue. I reiterate my opinion of that response as expressed above: It is dangerous, to Indian tribes more than to most, for a court to be overly creative in reading legislative history, concentrating on what is *not* there.

By way of example, consider the question of whether the Endangered Species Act¹⁶⁵ abrogated Indian treaty rights to hunt without ever precisely saying so. The 93d Congress passed that Act, and the legislative history of that Congress is entirely silent about Indian treaties. But, in the hands of creative readers of legislative history, intent upon expanding the reach of the Act, that silence, as in *Eberhard*, represents no real barrier. Note how Professors Coggins and Modrcin, writing before *Dion* in 1979, neatly turned the historical question to the deliberations of the *prior* Congress:

160. See *Eberhard v. Eberhard*, 24 Indian L. Rep. (Am. Indian Lawyer Training Prog.) 6059, 6065 (Cheyenne River Sioux, Feb. 18, 1997).

161. See *id.* at 6063-64.

162. See *id.* at 6064.

163. See *id.*

164. *Id.*

165. Pub. L. No. 93-205, 87 Stat. 884 (1973) (current version at 16 U.S.C. § 1531-1544(1994)).

No mention of other [than Alaska] Natives was made in the legislation enacted [by the 93d Congress], but earlier versions of it contained a blanket exemption for "American Indians, Aleuts, and Eskimos," expressly preserving Indian treaty rights [footnote omitted] or allowed Indian taking only for subsistence and ceremonial purposes [footnote omitted].¹⁶⁶

The first omitted footnote is a reference to the bill before the House in the 92d Congress; the second is to the bill in the Senate of the same Congress. Neither bill was enacted.¹⁶⁷

Sutherland on Statutory Construction calls the legislative history of a failed bill "meaningless" and forbids its use as an extrinsic aid in the construction of a later-enacted bill.¹⁶⁸ However, Professors Coggins and Modrcin, like the Cheyenne River Sioux Court of Appeals in *Eberhard*, believed that what was not said with respect to a bill that passed can be made clear by what was said with respect to a bill that did not:

That [the] provisions [in the bills before the 92d Congress, mentioned immediately above] were dropped in the legislative process very strongly implies that Congress considered an Indian exemption and consciously chose to override treaty rights in conflict with the ban on taking endangered species. The implication is somewhat undercut, however, by a memorandum before the Committee [of the 92d Congress] from the Interior Department suggesting that if Congress chose to "prohibit American Indians from exercising treaty-secured rights," it should do so "expressly." Even so, the combination of the specific Alaska Native exemption and the considered failure to enact an exemption for other Indians virtually requires the conclusion that Congress intended the Act to cover Indian activities.¹⁶⁹

"[V]irtually requires the conclusion that Congress intended the Act to cover Indian activities"—these words are very reminiscent of Chief Justice Pommersheim's "virtual certainty" that the PKPA was intended to bind Indian tribes without mentioning them. All of this "virtuality" increases Congress's ability to affect Indian tribes without saying so, an increase which is neither necessary nor prudent.

The *Eberhard* court's third response to the argument that the PKPA does not apply to the Cheyenne River Sioux Tribe is the one that most bothers me. Angela Eberhard had argued that it would be illogical for Congress to have a full faith and credit provision in the Indian Child Welfare Act and not in the PKPA, and the court of appeals bought the argument:

166. Coggins & Modrcin, *Native American Indians and Federal Wildlife Law*, 31 STAN. L. REV. 375, 404 (1979).

167. The House bill was H.R. 13081, 92d Cong. (1972). This bill was never passed. The bill in the Senate was S. 3199, 92d Cong. (1972), which also failed to pass.

168. See 2A NORMAN J. SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 48.01, at 301-303 (5th ed. 1992). Cf. *International Bd. of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977); *Cassidy v. Minihan*, 794 F.2d 340 (8th Cir. 1986) (intent of a subsequent Congress is no indication of the intent of the enacting Congress).

169. Coggins & Modrcin, *supra* note 166, at 404-05. These professors were writing in advance of *Dion*, but they nicely prefigured the Supreme Court's "actual consideration and choice" test.

[T]his Court, nevertheless, can discern absolutely no logical policy for requiring full faith and credit for tribal court custody orders in Indian Child Welfare Act proceedings under 28 U.S.C. § 1911(d) and not for child custody orders ancillary to divorce under the PKPA. Similarly, the Court can discern no logical Congressional policy that would distinguish child support orders governed by 28 U.S.C. § 1738B or protection orders governed by 18 U.S.C. § 2265, where the statutes expressly apply to tribal courts and their orders, from child custody orders governed by the PKPA. None of the parties or the commentators have offered any such logical or principled distinctions.¹⁷⁰

"Absolutely no logical policy," is strong and astonishing language, especially in the context of *Eberhard*'s problem of statutory construction. It suggests that the court may add the words "Indian tribes" to the language of a statute, when it can find no logical policy reason for Congress's having left them out. Such an approach to statutory construction, if used by an off-reservation court, could have serious on-reservation implications.

The logic that the court found missing is easy to supply: The ICWA applies only to non-divorce custody matters, a narrowness that has always been thought to be logical. It was in the context of non-divorce adoptions and foster home placements that Indian children were disappearing into the non-Indian world, incorporated into the non-Indian families of largely well-intentioned white adoptive parents and foster parents.¹⁷¹ Custody matters ancillary to a divorce between Indian and non-Indian parents raise different problems, which Congress chose to leave unaddressed in the ICWA.

Is that distinction "absolutely illogical"? Of course not, at least not for anyone with a trace of reluctance to second-guess a legislative determination. Furthermore, if the very narrowness of the ICWA is not "absolutely illogical," then is it not equally unobjectionable for Congress to choose different remedial schemes for different statutes aimed at different problems? If Congress thought that non-divorce custody matters involving Indian children were of great national concern, then the ICWA itself makes logical sense, and so, too, does the requirement of nationwide uniformity that is represented by the full faith and credit provision of section 1911(d).¹⁷² But if divorce-related custody matters involving Indian children are of less national concern, then steps less drastic than the ICWA's are needed, and Congress could logically have concluded that no full faith and credit regime needed to be imposed on the tribes and states.

Having offended the authors of *Eberhard* by comparing their analytic methods to *Mitchell*, *Rosebud*, *Dion*, and *Oliphant*, I can perhaps return to their good graces by noting, too, what they would probably find a more flattering comparison with the

170. *Eberhard v. Eberhard*, 24 Indian L. Rep. (Am. Indian Lawyer Training Prog.) 6059, 6066 (Cheyenne River Sioux, Feb. 18, 1997).

171. See Barbara A. Atwood, *Fighting over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. REV. 1051 (1989); Donna Goldsmith, *There is Only One Child and Her Name is Children*, 36 FED. BAR NEWS & J. 446 (1989).

172. Recall that I am not dead-set against full faith and credit in all circumstances. But it should be done, if it is done at all, carefully, subject-by-subject, with plenty of tribal input, and most unobjectionably not by congressional imposition at all, but by arms-length negotiation. See Deloria & Laurence, *supra* note 85.

venerable *Marbury v. Madison*,¹⁷³ another case with similarities. Both cases involved a fairly narrow question of judicial administration, but in both cases lying behind these disputes were more general disagreements between different branches of government over the structure of governing. Jefferson and Madison against Marshall over the roles of the judiciary and the legislature is a well-known conflict; in *Eberhard* we see the court taking on the Attorney General over the question of what is and what is not a threat to tribal sovereignty. The genius of Marshall in *Marbury* is also well-known; Marshall was able to establish his principle of judicial control of constitutional interpretation while at the same time letting Jefferson and Madison win the case, leaving them nothing to complain about, except of course the fundamental principle, on which they lost.¹⁷⁴

Similarly, in *Eberhard*, the court of appeals was able to establish its dominion over the question of what is and is not a threat to tribal sovereignty, while, at the same time, declining to enforce the California decree. The result was to give the Attorney General what he wanted in this particular case, but to give itself the essential victory by declaring that the PKPA, and presumably other congressional attempts to impose on the Tribe the duties of states, are elevations, not deprecations, of tribal sovereignty.

V. THE COSTS OF UNIFORMITY

Beyond this particular result, *Eberhard*, like *Marbury*, deals with the judiciary's view of the role of the legislature in the structure of the Cheyenne River Sioux government. In the end, the case represents the choice of the court of appeals to opt for reciprocity and uniformity with the states under federal law in the face of an absence of any such requirement under tribal law. The court of appeals noted that the Tribe had failed to enact the Uniform Child Custody Jurisdiction Act as its own local law, but it seemed to make nothing of this failure.¹⁷⁵ But how does one explain this choice by the tribe? The Court of Appeals reacted as if it were no "choice" at all, but merely inadvertence, the Tribal Council not having gotten around to adopting enlightened off-reservation law.

However, uniformity with the states is not a cost-free choice for a tribe, and it is just as sensible to see the Council's failure to adopt the UCCJA as a choice to remain a bit stand-offish with the states when it comes to matters of divorce-related child custody. Among the stated purposes of the UCCJA are these:

- (3) Assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training and personal relationships are most readily available, and the courts of this state decline the

173. 5 U.S. (1 Cranch.) 137 (1803). The Cheyenne River Sioux Tribal Court itself wrote admiringly of *Marbury v. Madison* in *Clement v. LeCompte*, 22 Indian L. Rep. (Am. Indian Lawyer Training Prog.) 6111, 6117 (Cheyenne River Sioux, Jan. 12, 1994).

174. Similar is Chief Justice Marshall's opinion in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), where he established the sovereignty of the Indian nations, over the strong objection of the Democrats—now led by Andrew Jackson—while letting the State of Georgia actually win the case on the merits. See generally, Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics and Morality*, 21 STAN. L. REV. 500 (1969).

175. See *Eberhard*, 24 Indian L. Rep. at 6060.

exercise of jurisdiction when the child and his family have a closer connection with another state;

...

(7) Facilitate the enforcement of custody decrees of other states;

...

(9) Make uniform the law of those states which enact it.¹⁷⁶

All of these are worthy goals, and one understands why all fifty states and the District of Columbia so readily ascribe to them. But they are goals in the name of *sameness*, of uniformity among the jurisdictions that adopt the UCCJA. Indian law, however, is ordinarily about *difference*. Tribal sovereignty is not simply a historically driven symbol of the antiquity of the tribes; it is "the right of the reservation Indians to make their own laws and be ruled by them,"¹⁷⁷ even when those laws conflict with closely held dominant-society norms.¹⁷⁸ It is certainly understandable that the goals of uniform laws such as the UCCJA take on a different cast when viewed from an Indian tribe's perspective. Tribes are old, but fragile, governments. For a tribe to ascribe to uniformity may threaten closely held local beliefs and long-standing local ways much more than for a state to do so.

The Cheyenne River Sioux tribal legislative body had refused, or at least failed, to opt for continent-wide uniformity, perhaps on the theory that it did not wish to defer to off-reservation custody decrees in exactly the same way that California defers to Florida decrees. In *Eberhard*, the court of appeals reached far to apply the PKPA in order to accomplish essentially the same purpose that the Council could have accomplished legislatively, but did not. While judicial dominion over legislative choice makes sense from the perspective of *Marbury*-influenced, dominant-society lawyers, courts in smaller, less compartmentalized tribal governments need to be more respectful of the legitimate decisions of the Council.¹⁷⁹

In many tribes, the Attorney General will be a lawyer hired by the Tribal Council, which is, in turn, chaired by the Tribal Chairman. In tribes with this common governmental structure, the application of *Marbury*-inspired separation of powers doctrines and judicial review is problematic, at best. A tribal court in such a tribe should not treat the Attorney General as if he or she were an independently elected official, as in many states, or an officer of an independent executive branch, as in the federal government. Given the small, informal and interconnected nature of tribal government, a tribal Attorney General may *know* what the Tribal Council was thinking, or can find out by walking across the hallway.

Arguments based on legislative prerogative sometimes prevail before the

176. UNIF. CHILD CUSTODY JURIS. ACT §1, 9 ULA 123 (1988). The New Mexico version of this statute is found at N.M. STAT. ANN. §§ 40-10-2 to -24 (1994 Repl. Pam.).

177. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

178. These thoughts are more thoroughly explored in Robert Laurence, *The Dominant Society's Judicial Reluctance to Allow Tribal Civil Law to Apply to Non-Indians: Reservation Diminishment, Modern Demography and the Indian Civil Rights Act*, 30 U. RICH. L. REV. 781 (1996).

179. See Margery H. Brown & Brenda C. Desmond, *Montana Tribal Courts: Influencing the Development of Contemporary Indian Law*, 52 MONT. L. REV. 211, 282-83 (1991):

A matter may be of great concern to a tribe, yet the tribe may have no written law in that area and the tribal court may not be adjudicating cases in that area. Tribal legislative authority certainly includes the decision not to legislate or, more significantly perhaps, the decision not to put unwritten customary law into writing.

Cheyenne River Sioux Court of Appeals, which can be far more deferential to the tribal council than it was in *Eberhard*. For example, in *Clement v. LeCompte*,¹⁸⁰ the court wrote:

The very essence of the sovereignty which the people of this reservation vested in the tribal council under the tribal constitution means that the tribal council, not this court, must decide whether, when, and how the tribe can be sued in its own forums. Until it does so, the plaintiff is without any effective remedy in tribal courts.¹⁸¹

One of the mysteries of *Eberhard* is why that opinion does not contain a similar passage, with the substitution of "must recognize foreign decrees" for "can be sued in its own forums." The answer surely relates to the court's fundamental view that, while waivers of tribal immunity may be damaging to the Tribe, cross-boundary reciprocity is benign, the Tribe's argument to the contrary notwithstanding. However, even if there is to be a strict separation between the judicial branch and the others in the dominant-society sense, the court must still observe that line carefully, probably more carefully than in off-reservation courts. It is one thing for the court to inform the Council that federal law requires that tribal sovereignty be reduced in this instance. It is another thing entirely for the court to say that it knows better *whether* sovereignty is being reduced, or for the court to second-guess the Council's judgment not to opt for cross-boundary reciprocity.

To see the disadvantages intrinsic to cross-boundary reciprocity and to understand the Tribe's reluctance to enter into a reciprocal relationship with the State of California, consider the case of *Tracy v. Superior Court of Maricopa County*¹⁸² from the Supreme Court of Arizona. Because Tracy's testimony was deemed relevant to the Tribe's prosecution of former Navajo Council Chairman Peter MacDonald, Sr., the Tribe sought to compel Tracy's attendance at MacDonald's trial. To accomplish this goal, the Tribal Council first enacted a version of the Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings (UASAWSCP).¹⁸³ The tribal court issued orders to compel Tracy and others to appear in the Window Rock Tribal District Court. The Arizona state judge received these tribal orders, found them valid under the state's version of the UASAWSCP,¹⁸⁴ and ordered Tracy to appear to testify. Tracy resisted by turning to the Arizona Court

180. 22 Indian L. Rep. (Am. Indian Lawyer Training Prog.) 6111 (Cheyenne River Sioux, Jan. 12, 1994).

181. *Id.* at 6118.

182. 810 P.2d 1030 (Ariz. 1991)(en banc). *People v. Superior Court of Kern County (Jans, Real Party in Interest)*, 274 Cal. Rptr. 586 (Cal. App. 1990), is a similar California case. *Jans* was mentioned *supra* at notes 58 and 95, and is discussed *infra* at notes 194-96.

183. Navajo Nation Code tit. 17 §§ 1970-1974 (Lamb 1995). The Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings itself appears at §§ 1-9, 11 U.L.A. 7 (1995). There are two versions of the Uniform Act, known as the 1931 Act and the 1936 Revision; all fifty states, plus the District of Columbia, the Virgin Islands and Puerto Rico have adopted one of the versions, most commonly the 1936 Revision. The Navajo Nation, as discussed below, has adopted the 1936 Revision. See Table of Jurisdictions Wherein 1936 Act Has Been Adopted, 11 U.L.A. at 1. No Indian tribes are listed in this table.

In some ways the UASAWSCP is "uniform" in name only, because many states have enacted their version with substantial deviations from the official text. For example, nine states omit any definition of the word "state," and four others use a non-uniform definition of the word, see Action in Adopting Jurisdictions, 11 U.L.A. at 7-8.

184. ARIZ. REV. STAT. ANN. §§ 13-4091 to -4096 (West 1989).

of Appeals seeking "special action"—essentially mandamus¹⁸⁵—against the state trial judge. This relief was denied in an unpublished opinion. Tracy renewed his request for "special action" in the Arizona Supreme Court and again lost.¹⁸⁶

The gravamen of Tracy's request for protection from tribal process was that he was potentially subject to federal criminal liability and that he wished not to incriminate himself before the tribal court, nor to raise the likelihood that he would become liable in civil damages to the Tribe.¹⁸⁷ Furthermore, Tracy thought that his freedom from self-incrimination in tribal court under the ICRA was not identical to that under the United States Constitution. In a long opinion from a court divided 3-2, these concerns did not carry the day.

First, the Arizona Supreme Court held that the Navajo Tribe is a "state" as that term is used in Arizona's version of the uniform act at issue.¹⁸⁸ In this sense, *Tracy* is very much like *Eberhard*, as the Arizona Supreme Court carefully set out the technical arguments for Navajo "statehood" in a lengthy part of the opinion.

Tracy's principal argument was "that the privilege against self-incrimination offered by the ICRA provides protection inferior to that of the United States and Arizona Constitutions."¹⁸⁹ This is a position with which I agree, though I think the phrase "different from" is better than "inferior to". The Arizona Supreme Court disagreed, stating that "when testifying in tribal court, Tracy will enjoy a federally imposed privilege against self-incrimination that is substantially coextensive with the fifth amendment privilege."¹⁹⁰

Thus, in *Tracy*, to an even greater extent than in *Eberhard*, the emphasis was on uniformity, sameness and reciprocity. The Navajo Tribal Council enacted the UASAWSCP, while the Cheyenne River Sioux Tribal Council did not enact the UCCJA. The Tribe itself, for its own sensible reasons in *Tracy*, advanced the theory that it was a "state," while in *Eberhard*, the Tribe resisted the designation. In the final analysis, however, the Arizona Supreme Court and the Cheyenne River Sioux Court of Appeals were in agreement in declaring the Navajo Tribe and the Cheyenne River Sioux Tribe to be "states" within the meaning of the appropriate statutes. But note in *Tracy* how quickly the other shoe fell, as the Arizona Supreme Court declared the protections of the ICRA to be identical to those of the United States Constitution, on scant authority and without analysis.

There is little support for this declaration, and it makes the ICRA more intrusive into the affairs of the Navajo Tribe than it was meant to be. This is exactly the point of this essay: Reciprocity tends toward uniformity. None of the cases cited by the

185. See *Tracy*, 810 P.2d at 1032 n.1.

186. See *id.* at 1030.

187. Tracy, who is white, was not subject to tribal prosecution under the doctrine of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (non-Indians are not subject to criminal prosecution in Tribal Courts).

188. See *Tracy*, 810 P.2d at 1039, citing Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841 (1990).

189. *Tracy*, 810 P.2d at 1047.

190. *Id.* at 1048. This holding was unnecessary for Tracy's protection. As the Arizona court correctly noted, the United States Supreme Court has said that a "state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." *Id.* The tribal analog to this statement is clear and Tracy should be shielded from federal prosecution from evidence obtained in violation of the Fifth Amendment, even if the ICRA was not violated. See, e.g., *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989).

Arizona Supreme Court has anything that even approaches analysis,¹⁹¹ and the court's result was conclusory, not analytical: "The [self-incrimination] language [of the ICRA] duplicates that of the federal constitution and clearly could not be interpreted to provide any lesser protection."¹⁹² Here, as in *Eberhard*, is that word "clearly" again, this time from a court that had just spent eleven pages of the Pacific Reporter holding that the word "state" includes within its meaning the Navajo Tribe. It ought not to be beyond the understanding of such a court that the ICRA's admonition that "no Indian tribe in exercising powers of self-government shall . . . compel any person in a criminal case to be a witness against himself,"¹⁹³ might mean something other than what similar words mean in the Constitution.

My objection to both *Tracy* and *Eberhard* is that reciprocity quickly tends to uniformity and sameness. For the sake of helping out the Navajo Tribe, the *Tracy* court interpreted the UASAWSCP and the ICRA to disallow all tribal deviations from dominant-society norms, just as the *Eberhard* court interpreted the UCCJA and the PKPA to require strict reciprocity between the Tribe and California. This was no great bargain for either tribe, even if the Navajos may go forward with the prosecution of their former Chairman in *Tracy*, and even if the Cheyenne River Sioux Court found a way of avoiding recognition of this particular California decree.

Tracy was less damaging because it was an off-reservation decision and because the Tribe itself had enacted the uniform act and sought reciprocity. Similarly, *People v. Superior Court of Kern County (Jans, Real Party in Interest)*¹⁹⁴ involved an attempt by the Navajo Tribe to compel the attendance of a California resident as a witness in Navajo tribal court. The California Court of Appeals especially emphasized the importance of the tribe's determination to seek reciprocity by enacting a uniform act:

The statute here requires reciprocal cooperation for the enforcement of witness attendance orders. The essence of the Uniform Act is to create a community of jurisdictions that will honor the request of fellow members for the appearance of witnesses at criminal proceedings under the conditions specified in the act. . . . It must be remembered that in order to be a part of [that] community a [tribal] legislative body must adopt the statute, and a judge of the [tribal] court system must certify the order.¹⁹⁵

Here again is an example of a court eager to suggest that the rules in Navajo court should replicate off-reservation rules. The sentences following this quotation read as

191. The court cited *United States v. Clifford*, 664 F.2d 1090, 1091-92 n.3 (8th Cir. 1981); *United States v. Lester*, 647 F.2d 869, 872 (8th Cir. 1981); *United States v. Strong*, 778 F.2d 1393, 1397 (9th Cir. 1985); and *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975).

192. *Tracy*, 810 P.2d at 1048.

193. 25 U.S.C. § 1302(4) (1994).

194. 274 Cal. Rptr. 586 (Cal. App. 1990).

195. *Id.* at 589. I mentioned *Jans* above as the case that the Cheyenne River Sioux Court of Appeals might have cited at the point in its opinion where it was correcting the California trial judge's interpretation of California law, *see supra* text at note 95. The passage just quoted from *Jans* makes me think that a California court might distinguish *Eberhard* from *Jans* based on the fact that, while the Navajo tribe had enacted the UASAWSCP in *Jans*, the Cheyenne River Sioux tribe had not enacted the UCCJA in *Eberhard*. In any case, and as this article shows, I think that *Eberhard*, *Tracy* and *Jans* are all incorrect in their holdings that legislatures should be able to reach tribes by using the word "states," defined to include "territories."

follows:

Where these tribal institutions exist, a state need not worry about the welfare of its citizens; the act itself has built-in protections for such witnesses. Recognition of the Navajo's order here does not imply approval of the tribal organization, merely recognition of their jurisdiction.¹⁹⁶

Between the lines of this quotation, one finds, again, the forces of uniformity at work in tandem with the forces of reciprocity. In *Eberhard*, the case for reciprocity and uniformity is far weaker than in *Tracy* and *Jans*, for the Tribe had not enacted the Uniform Child Custody Jurisdiction Act and had argued against reciprocity. At the end of the day, the *Eberhard* decision questions the legitimacy of those choices.

VI. CONCLUSION

Perhaps, the most troubling aspect of *Eberhard* is this question of legitimacy. The court of appeals spoke with admiration of Congress's attempt to integrate tribal courts "into a cooperative federalism framework of the national union."¹⁹⁷ But the tail comes with the hide, as shown by *Tracy*'s glib equivalence of the ICRA and the Constitution, which quickly followed the reciprocity that Arizona was willing to show the Navajo Tribe. It is perfectly understandable that an Indian tribe would want to inspect this "cooperative federalism framework" pretty carefully before deciding which part of it it wants. *Eberhard* preempted that choice for the court rather than the Tribal Council, and then surrendered its *own* choice to Congress, and did so with little regard for what tribal prerogatives were lost in the process.

Furthermore, the cross-boundary enforcement question can not be isolated from other questions of tribal jurisdiction. If states are required by federal legislation to give unquestioned full faith and credit to tribal court opinions, then there may well be ramifications affecting the ability of the tribes to hear cases involving non-members. Put the point this way: If one wanted to design a system in which federal courts would be most likely to deny the existence of tribal-court jurisdiction over non-members, thereby relegating tribes to the legal status of clubs or corporations, one would begin with a system that removes federal court review over perceived unfairness in the tribal process.¹⁹⁸ Follow that by establishing an abstention doctrine that requires all reservation controversies to be brought in tribal court in the first instance.¹⁹⁹ Then require that all tribal relief be exhausted.²⁰⁰ Finally, require states,

196. *Id.* at 590.

197. *Eberhard v. Eberhard*, 24 Indian L. Rep. (Am. Indian Lawyer Training Prog.) 6059, 6064 (Cheyenne River Sioux, Feb. 18, 1997).

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

199. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 1301 (1985).

200. Issues concerning the exhaustion of tribal court remedies and federal court abstention were discussed in fascinating detail at the *North Dakota Law Review's* 1995 Indian Law Symposium. *See* Lynn H. Slade, *Dispute Resolution in Indian Country: Harmonizing National Farmers Union, Iowa Mutual, and the Abstention Doctrine in the Federal Courts*, 71 N.D. L. REV. 519 (1995), and the panel discussion which followed the presentation of Mr. Slade's paper, a transcript of which is found *id.* at 541-68 (comments of Messrs. Lear and Slade, and Professors Alleva, Clinton, Pommersheim, Reynolds and Skibine). *See also* Blake A. Watson, *The Curious Case of Disappearing Federal Jurisdiction over Federal Enforcement of Federal Law: A Vehicle for Reassessment of the Tribal Exhaustion/Abstention Doctrine*, 80 MARQ. L. REV. 531 (1997).

under a rubric like "full faith and credit," to recognize any resulting tribal judgment, with almost all collateral attacks denied.²⁰¹ Such a system would, I believe, present some judges with an irresistible opportunity to cut back on tribal court jurisdiction as the only remaining way to protect non-member tribal court defendants.

All of these steps have been urged by some tribal advocates in the scholarly literature, with apparently no glance beyond theory to where this trail will lead in practice. Each step is debated in isolation, with little recognition of the fact that abstention affects full faith and credit, that full faith and credit affects tribal jurisdiction, and that tribal jurisdiction affects abstention. Even more damaging though is that these destructive arguments have been presented directly to the courts by the foes of tribal jurisdiction testing the reach of tribal adjudicatory power. For example, tribal civil adjudicatory jurisdiction over non-Indians was under attack in *Strate v. A-1 Contractors*.²⁰² The United States Supreme Court, taking a grudging, but not absolutist view of tribal court jurisdiction over non-Indians recently decided this case. The link to full faith and credit was made expressly by *Amici Curiae*:

Litigants may have an opportunity to challenge the fairness of tribal court judgments if and when the tribal court plaintiff seeks to enforce the judgment against assets located outside the reservation. *However, tribal court proponents once again take the position that the review available is extremely limited and that tribal court judgments are entitled to the same full faith and credit as state court judgments.*²⁰³

There seems to be a trend over the past several years in federal Indian law jurisprudence for off-reservation courts to permit tribes to have increasingly unfettered power to do less and less, culminating, one guesses, in tribes eventually having absolute power to do essentially nothing.²⁰⁴ The outcome of *Strate* is consistent with that trend.²⁰⁵ To consider a cross-boundary enforcement issue, without at the same time considering the issue's impact on ultimate questions of tribal jurisdiction, does not retard, but advances this trend.²⁰⁶

It is my opinion that full integration of tribal affairs into those of the dominant society, and full uniformity of tribal and state laws, and full reciprocity between tribal

201. See *Eberhard v. Eberhard*, 24 Ind. L. Rep. 6059 (Cheyenne River Sioux 1997).

202. 117 S. Ct. 1404 (1997).

203. *Strate v. A-1 Contractors, Brief for the American Trucking Associations, Inc. et al.*, at 21 n.21 (emphasis added).

204. This trend is related to the one that Professor Getches explores at length in David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996).

205. Mentioning both *Eberhard* and *Strate* makes one contemplate what they will mean together. The former required the Cheyenne River Sioux tribal courts to give full faith and credit to off-reservation judgments; the latter held that a tribal court does not have jurisdiction over a tort suit brought by one non-Indian against another non-Indian for a traffic accident which took place on a state highway on the reservation. Thus, as the U.S. Supreme Court cut back on tribal court jurisdiction, the tribal court bound itself to enforce off-reservation judgments.

Does the *Eberhard* result change as tribal jurisdiction over non-Indians gets narrower under federal law? There is little in the opinion, which is largely an exegesis on federal statutory construction, that would appear to change under *Strate*'s limitation of tribal court jurisdiction. On the other hand, would the Court of Appeals really want to bind tribal courts to section 1738 as there is less and less benefit running in the other direction to the tribe?

206. The argument that full faith and credit needs to be at the very least modified in order to preserve tribal court jurisdiction is found in more detail in Robert Laurence, *The Bothersome Need for Asymmetry in Any Federally Dictated Rule of Recognition for the Enforcement of Money Judgments across Indian Reservation Boundaries*, 27 CONN. L. REV. 979 (1995).

and state governments would leave us with a North America looking rather less Indian than today's. Any particular tribe may or may not agree with me. Should a tribe reach the same conclusion, and choose to be stand-offish from the states, then it should not be forced, without the most careful consideration by tribal and federal legislative bodies, into *Eberhard's* "cooperative federalism framework of the national union," least of all by its own highest court.