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A Legacy of Public Law 280: Comparing and Contrasting Minnesota's New Rule for the Recognition of Tribal Court Judgments with the Recent Arizona Rule

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**A LEGACY OF PUBLIC LAW 280: COMPARING AND
CONTRASTING MINNESOTA'S NEW RULE FOR THE
RECOGNITION OF TRIBAL COURT JUDGMENTS WITH
THE RECENT ARIZONA RULE**

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Chloe Thompson^{††}

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I. INTRODUCTION

Tribal court dockets across the country have been growing steadily, and tribal courts are becoming an important part of the judicial fabric of the United States.¹ To acknowledge this reality, state courts and legislatures across the United States have begun to address the important issues of how and whether to recognize tribal court judgments in state courts.² The Minnesota Supreme Court adopted a rule that took effect in January of 2004 that

1. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 2 (1997).

2. See, e.g., N.C. GEN. STAT. § 1E-1(a) (2003) ("The courts of this State shall give full faith and credit to a judgment, decree, or order signed by a judicial officer of the Eastern Band of Cherokee Indians and filed in the Cherokee Tribal Court to the same extent as is given a judgment, decree, or order of another state . . . provided that the judgments, decrees, and orders of the courts of this State are given full faith and credit by the Tribal Court of the Eastern Band of Cherokee Indians."); S.D. CODIFIED LAWS § 1-1-25 (Michie 2003) (stating "[n]o order or judgment of a tribal court in the state of South Dakota may be recognized as a matter of comity in the state courts of South Dakota, except under [certain] terms and conditions" established by clear and convincing evidence); 17B ARIZ. REV. STAT. TRIBAL CT. CIV. J. R. 1-7 (establishing full faith and credit for tribal courts, unless objection filed); MICH. CT. R. 2.615 (establishing that judgments and orders of tribal courts granting reciprocity to Michigan courts were presumed valid and given full faith and credit unless objecting party proves one of enumerated factors); OKLA. DIST. CT. R. 30(b) (adopted 1994) (granting full faith and credit where tribal courts reciprocate); WASH. SUPER. CT. CIV. R. 82.5(c) (granting full faith and credit to tribal court orders, judgments, and decrees as long as there is reciprocity, due process, and jurisdiction); WIS. STAT. § 806.245 (2003) (proclaiming full faith and credit for tribal courts, but setting forth a list of requirements that look more like comity); WYO. STAT. ANN. § 5-1-111 (Michie 2002) (granting full faith and credit to the judicial records, orders, and judgments of the courts of the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Reservation, unless one of the four enumerated requirements is not met); *John v. Baker*, 982 P.2d 738, 763 (Alaska 1999) (holding that Alaska courts should, as a general rule, "respect tribal court decisions under the comity doctrine"); *Wippert v. Blackfeet Tribe of the Blackfeet Indian Reservation*, 859 P.2d 420, 429 (Mont. 1993) (upholding comity for tribal court judgments).

provides guidelines for the recognition and enforcement of tribal court orders and judgments.³ The Minnesota Supreme Court Rule on the Recognition and Enforcement of Tribal Court Orders and Judgments ("Minnesota Rule") followed closely on the heels of a similar rule by the Arizona Supreme Court.⁴ Though the Minnesota and Arizona rules are close in time, they staked out quite different approaches.⁵ The Arizona Supreme Court Rules of Procedure for the Recognition of Tribal Court Civil Judgments ("Arizona Rules") reflect tremendous respect for tribal courts and provide clear guidance to lower state court judges as to how to handle tribal court judgments.⁶ The Minnesota Rule, in contrast, adopts a much more tentative stance toward tribal court orders and judgments and provides little or no guidance to state court judges as to whether to recognize a tribal judgment.⁷

All of the recent activity in state courts and legislatures, together with the important policy issues underlying these questions, has fueled voluminous academic commentary.⁸ The

3. MINN. R. GEN. PRACT. 10.

4. See 17B ARIZ. REV. STAT. TRIBAL CT. CIV. J. R. 1-7.

5. Compare 17B ARIZ. REV. STAT. TRIBAL CT. CIV. J. R. 1-7 with MINN. R. GEN. PRACT. 10.

6. See 17B ARIZ. REV. STAT. TRIBAL CT. CIV. J. R. 1-7.

7. See MINN. R. GEN. PRACT. 10.

8. Robert N. Clinton et al., *Dispute Resolution in Indian Country: Does Abstention Make the Heart Grow Fonder?*, 71 N.D. L. REV. 541, 554-55 (1995); Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77 (1993); Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841 (1990); 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); Karla Engle, *Red Fox v. Hettich: Does South Dakota's Comity Statute Foster Unwarranted State Court Intrusion into Tribal Jurisdictional Authority Over Civil Disputes?*, 38 S.D. L. REV. 706 (1993); Daina B. Garonzik, *Full Reciprocity for Tribal Courts from a Federal Courts Perspective: A Proposed Amendment to the Full Faith and Credit Act*, 45 EMORY L.J. 723 (1996); Robert Laurence, *Symmetry and Asymmetry in Federal Indian Law*, 42 ARIZ. L. REV. 861 (2000); Richard E. Ransom et al., *Recognizing and Enforcing State and Tribal Judgments: A Roundtable Discussion of Law, Policy, and Practice*, 18 AM. INDIAN L. REV. 239 (1993); see Robert Laurence, *The Role, if Any, for the Federal Courts in the Cross-Boundary Enforcement of Federal, State and Tribal Money Judgments*, 35 TULSA L.J. 1 (1999); Robert Laurence, *The Off-Reservation Garnishment of an On-Reservation Debt and Related Issues in the Cross-Boundary Enforcement of Money Judgments*, 22 AM. INDIAN L. REV. 355 (1998); Robert Laurence, *The Convergence of Cross-Boundary Enforcement Theories in American Indian Law: An Attempt to Reconcile Full Faith and Credit, Comity and Asymmetry*, 18 QUINNIPIAC L. REV. 115 (1998); 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); Robert Laurence, *Dominant-Society Law and Tribal Court Adjudication*, 25 N.M. L.

academic literature includes several articles that fill a useful niche in describing the development of the law in the specific context of rules for the recognition of tribal court judgments.⁹ This article seeks to add to the existing scholarship within that niche by describing the development of the Arizona and Minnesota rules. In addition, it seeks to offer a substantive critique of the Minnesota Rule and some suggestions as to the broader lessons that can be learned from the process.

This article will critically evaluate the Minnesota Rule by comparing and contrasting its development, as well as its substantive content, with the new Arizona Rules. Part II of this article will describe the Minnesota Rule and compare it to the Arizona Rules that shortly preceded it.¹⁰ Part III will describe the rulemaking processes that produced the Minnesota and Arizona Rules and seek to provide insight into how Minnesota reached such a markedly different result than Arizona.¹¹ Part III will also mine the insights from these processes and from other sources to offer some explanation as to why the Arizona Supreme Court embraced tribal courts respectfully while the Minnesota Supreme Court addressed tribal courts cautiously.¹² Part IV will conclude by encouraging the Minnesota Supreme Court to view its new rule as a cautious first step and urging the court to consider a re-

REV. 1 (1995); Robert Laurence, *The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity, and the Indian Civil Rights Act*, 69 OR. L. REV. 589 (1990); Stacy L. Leeds, *Cross Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311 (2000); Fred L. Ragsdale, Jr., *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M. L. REV. 133 (1977); Melissa L. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 KY. L.J. 123, 138-39, 183-84 (2002); William V. Vetter, *Of Tribal Courts and "Territories": Is Full Faith and Credit Required?*, 23 CAL. W. L. REV. 219 (1987).

9. See Michael F. Cavanaugh, *Michigan's Story: State and Tribal Court Try to Do the Right Thing*, 76 U. DET. MERCY L. REV. 709 (1999) (discussing Michigan's adoption of rule for the recognition of tribal court judgments); Ralph J. Erickstad & James Ganje, *Tribal and State Courts – A New Beginning*, 71 N.D. L. REV. 569, 579-80 (1995) (describing adoption of North Dakota rule for recognition of tribal judgments); Darby L. Hoggatt, Comment, *The Wyoming Tribal Full Faith and Credit Act: Enforcing Tribal Judgments and Protecting Tribal Sovereignty*, 30 LAND & WATER L. REV. 531 (1995); see also James A. Bransky & Hon. Garfield W. Hood, *The State/Tribal Court Forum: Moving Tribal and State Courts from Conflict to Cooperation*, 72 MICH. B.J. 420, 420 (1993).

10. See *infra* Part II.

11. See *infra* Part III.

12. See *infra* Part III.

examination of the question after appropriate experience has developed from which to evaluate the current rule.¹³

II. THE NEW RULES FOR RECOGNITION OF TRIBAL COURT JUDGMENTS

The differing approaches to the question of the recognition of tribal court judgments reflect a wide spectrum.¹⁴ On one end of the spectrum are those states that are highly respectful of tribal court civil judgments. Courts in Idaho and New Mexico,¹⁵ for example, accord tribal courts “full faith and credit” under federal law, the same level of respect that they accord to other state courts.¹⁶ Courts in several other states, such as Oklahoma,¹⁷ assert “full faith and credit” for tribal courts, but go on to define that phrase in a particular manner that affords slightly less respect to judgments of tribal courts than judgments of state courts.¹⁸ Some states eschew the “full faith and credit” language, but direct lower courts to exercise “comity” in determining whether to recognize tribal court judgments.¹⁹

Most states fall within one of these three bands along the

13. See *infra* Part III.

14. See Leeds, *supra* note 8, at 331-46 (outlining a thorough survey of how state courts have addressed these questions).

15. See *id.* at 332 (stating that Idaho and New Mexico are the only states to include tribes in the federal Full Faith and Credit Act's definition of “territory,” thus giving full faith and credit recognition to tribal courts, just as they would to other states' courts); see also Sheppard v. Sheppard, 655 P.2d 895, 902 (Idaho 1982); Jim v. CIT Fin. Servs. Corp., 527 P.2d 1222, 1228 (N.M. Ct. App. 1974).

16. The Minnesota Court of Appeals rejected such an approach, at least as an interpretation of the federal Constitution's Full Faith and Credit clause. See Desjarlait v. Desjarlait, 379 N.W.2d 139, 144 (Minn. Ct. App. 1985).

17. Oklahoma accorded full faith and credit through legislative authorization and judicial rule. See OKLA. STAT. tit. 12, § 728 (2000); OKLA. DIST. CT. R. 30(b); see also Dennis W. Arrow, *Oklahoma's Tribal Courts: A Prologue, the First Fifteen Years of the Modern Era, and a Glimpse at the Road Ahead*, 19 OKLA. CITY U. L. REV. 5, 63-70 (1994) (describing the process through which Oklahoma's tribal recognition rule developed); Shelly Grunsted, *Full Faith and Credit: Are Oklahoma's Tribal Courts Finally Getting the Respect They Deserve?*, 36 TULSA L.J. 381 (2000) (addressing the effect the Full Faith and Credit clause has on Indian Nations).

18. For example, Michigan extends full faith and credit only to those tribal courts that offer reciprocity to judgments from Michigan courts. MICH. CT. R. 2.615.

19. See, e.g., John v. Baker, 982 P.2d 738, 763 (Alaska 1999) (holding that Alaska courts should, as a general rule, “respect tribal court decisions under the comity doctrine”).

spectrum: actual full faith and credit, purported full faith and credit, and comity. Each of these positions is somewhat respectful toward tribal courts because in most run-of-the-mill cases, tribal court judgments will be recognized and enforced. However, one other approach is worth mentioning. The South Dakota statute on recognition of tribal court judgments creates a presumption *against* recognition²⁰ and requires a party seeking recognition of a tribal judgment to prove numerous facts related to the validity of the tribal judgment *by clear and convincing evidence*.²¹ If these facts are proven, then a state court judge *may* recognize the tribal judgment, but even so, only in a narrow range of circumstances.²² To be sure, South Dakota occupies a lonely and extreme point at the end of the spectrum. The majority of states have adopted the notion of full faith and credit for tribal court rulings or a very respectful expression of comity. Many states, however, have not yet addressed the question. Because Minnesota and Arizona have recently adopted rules for the recognition of tribal court judgments and orders, they may be guides for other states.

A. *The Minnesota Rule*

After nearly a decade of discussion by several tribal and state court judges as well as other interested individuals and organizations, the Minnesota Supreme Court, in an order dated December 11, 2003, adopted a rule for the recognition of tribal court orders and judgments.²³ The rule is primarily hortatory in nature²⁴ and is agnostic as to whether to respect tribal court judgments. As such, it is a disappointment to many of its original proponents.²⁵ The Minnesota Rule requires recognition of tribal court orders and judgments only where already mandated by state

20. S.D. CODIFIED LAWS § 1-1-25 (Michie 2003); *see also* Red Fox v. Hettich, 494 N.W.2d 638, 647 (S.D. 1993) (holding that tribal member did not satisfy burden of proof necessary to show that tribal court had jurisdiction so that its judgment should be recognized under principle of comity).

21. S.D. CODIFIED LAWS § 1-1-25(1)(a)-(e) (emphasis added).

22. *Id.* § 1-1-25(2)(a)-(d).

23. MINN. R. GEN. PRACT. 10 (effective Jan. 1, 2004).

24. MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON GENERAL RULES OF PRACTICE, FINAL REPORT at 4 (2002).

25. Interview with Hon. Andrew M. Small, Associate Judge, Prairie Island Mdewakanton Dakota & Lower Sioux Communities, Bloomington, Minnesota (June 3, 2004) (on file with author).

or federal statute.²⁶ Where not mandated by statute, the rule merely provides a list of discretionary factors for a court to consider in determining whether to recognize and enforce a tribal court order or judgment.²⁷ The rule requires no hearing and establishes no presumption for or against recognition.²⁸ It addresses two general areas: recognition where mandated by other law (Rule 10.01) and discretionary recognition (Rule 10.02). A critical description follows.

1. Recognition Where Mandated by State or Federal Statute

The Minnesota Rule provides at the outset that the orders, judgments, and other judicial acts of tribal courts²⁹ shall be recognized and enforced where mandated by state or federal statute.³⁰ Currently, only three³¹ federal and four Minnesota

26. MINN. R. GEN. PRACT. 10.01(a).

27. *Id.* 10.02(a).

28. *Id.*

29. The Minnesota Rule includes the tribal courts of "any federally recognized Indian tribe." *Id.* 10.01(a). Some states limit recognition to the courts of tribes within the state. *See, e.g.*, N.Y. INDIAN LAW § 52 (McKinney 2003) (providing since 1909 that decisions of the peacemaker courts of the Seneca Nation are enforceable in state court); N.C. GEN. STAT. § 1E-1(a) (2003) (stating "[t]he courts of this State shall give full faith and credit to a judgment, decree, or order signed by a judicial officer of the Eastern Band of Cherokee Indians and filed in the Cherokee Tribal Court to the same extent as is given a judgment, decree, or order of another state . . . provided that the judgments, decrees, and orders of the courts of this State are given full faith and credit by the Tribal Court of the Eastern Band of Cherokee Indians"); N.D. CENT. CODE § 27-01-09 (1991) (stating "[t]he district courts shall recognize and cause to be enforced any judgment, decree, or order of the tribal court of the Three Affiliated Tribes of the Fort Berthold Reservation in any case" and subjecting the recognition to certain requirements, including "[reciprocity] involving the dissolution of marriage, the distribution of property upon divorce, child custody, adoption, an adult abuse protection order, or an adjudication of the delinquency, dependency, or neglect of Indian children if the tribal court had jurisdiction over the subject matter of the judgment, decree, or order"); WYO. STAT. ANN. § 5-1-111 (Michie 2002) (granting full faith and credit to the judicial records, orders and judgments of the courts of the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Reservation, unless one of enumerated requirements is not met).

30. MINN. R. GEN. PRACT. 10.01(a).

31. The Parental Kidnapping Prevention Act is arguably a fourth federal statute that creates such a mandate, but it is omitted in the Advisory Committee's comments to the Minnesota Rule. *See* Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (2000) (requiring states to enforce custody and visitation determinations of other states). Although the definition of "State" provided in the statute does not specifically include tribes, some courts have held that it requires full faith and credit for tribal court orders. Leeds, *supra* note 8, at 333 (examining

statutes address the recognition of tribal court orders and judgments. The federal statutes consist of the Violence Against Women Act (“VAWA”),³² the Indian Child Welfare Act (“ICWA”),³³ and the Full Faith and Credit for Child Support Orders Act.³⁴ The Minnesota statutes consist of the Uniform Child Custody Jurisdiction and Enforcement Act,³⁵ the Uniform Interstate Family Support Act,³⁶ the Minnesota Indian Family Preservation Act,³⁷ and the Uniform Foreign Country Money-Judgments Recognition Act.³⁸ Given that these federal and state statutes already mandate the recognition of tribal court orders, this portion of the new Minnesota Rule adds little to the law and simply insures that the rule is read in a manner consistent with existing law.

“political and legal relationships between tribal courts and their state and federal counterparts”).

32. Violence Against Women Act, 18 U.S.C. § 2265(a)-(b) (2000) (providing that a protection order issued by a tribal court “shall be accorded full faith and credit” by state courts, “and enforced as if it were the order of the enforcing State,” provided the tribal court had personal and subject matter jurisdiction, and the person against whom the order is sought was given “reasonable notice and opportunity to be heard”). The statute does not require prior registration for the order to be enforced. *Id.* § 2265(d)(2).

33. Indian Child Welfare Act, 25 U.S.C. § 1911(d) (2000) (requiring states to give “full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings”).

34. Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B(a), (b) (2000) (including “Indian country” in the definition of “State” and providing that states “shall enforce according to its terms a child support order made . . . by a court of another state” as long as the issuing court had personal and subject matter jurisdiction, and the contestants had reasonable notice and opportunity to be heard).

35. Uniform Child Custody Jurisdiction and Enforcement Act, MINN. STAT. § 518D.104 (2002) (requiring state to treat a tribe “as if it were a state of the United States” and to recognize and enforce child custody determinations made by tribes).

36. Uniform Interstate Family Support Act, MINN. STAT. § 518C.101(s)(1) (2002) (including “Indian tribe” in the definition of “State”).

37. Minnesota Indian Family Preservation Act, MINN. STAT. § 260.771, subd. 4 (2002) (providing that orders of a tribal court concerning placement of children “shall have the same force and effect as orders of a court of this state”).

38. Uniform Foreign Country Money-Judgments Recognition Act, MINN. STAT. § 548.35, subd. 3 (2002) (providing that a foreign money judgment is “enforceable in the same manner as the judgment of another state which is entitled to full faith and credit” unless the judgment is not conclusive because of a list of comity-type factors). While this statute does not expressly mention tribes, the Advisory Committee comment states that “[t]ribal court money judgments fall within the literal scope of this statute and the statutory procedures therefore may guide Minnesota courts considering money judgments.” MINN. R. GEN. PRACT. 10 advisory comm. cmt.

Rule 10.01 next purports to establish procedures for the enforcement of tribal court orders and judgments where required by federal or state statute.³⁹ Given the procedural ambiguity in some of the statutes mandating enforcement and recognition, such guidance would be helpful, particularly in light of the problems that frequently arise when recognition is federally mandated.⁴⁰ However, Rule 10.01 does not live up to its billing. Rule 10.01 states that “[w]here an applicable state or federal statute establishes a procedure for enforcement of any tribal court order or judgment, that procedure must be followed.”⁴¹

Unfortunately, only two of the state and two of the federal statutes contemplated in the Advisory Committee comment to the Minnesota Rule provide detailed procedures. Minnesota's Uniform Interstate Family Support Act provides instructions as to which court order should be controlling in the event that two or more separate courts have entered orders regarding the same child and obligor,⁴² and even provides some procedures for the enforcement of tribal support orders.⁴³ Minnesota's Uniform Foreign Country Money-Judgments Recognition Act specifically discusses the grounds for non-recognition of foreign judgments.⁴⁴ The federal Full Faith and Credit for Child Support Orders Act provides that a child support order issued by a court of another state (which includes tribes) shall be enforced if the other court had both personal and subject matter jurisdiction and provided

39. MINN. R. GEN. PRACT. 10.01(b).

40. See generally Leeds, *supra* note 8, at 349 (noting a high instance of non-recognition, “often in direct violation of state policy or federal law”). See also, e.g., PROCEDURES & FORMS COMM., PROCEDURES FOR REGISTRATION OF FOREIGN DOMESTIC ABUSE ORDERS (2004) (on file with author) (stating that although VAWA mandates full faith and credit, “in practical application, there are varying protocols throughout the United States on how this law is enforced”); Letter from Heidi A. Drobnick, Executive Director, Indian Child Welfare Law Center, to Frederick Grittner, Clerk, Minnesota Appellate Courts (Oct. 14, 2002) (Supreme Court Administrative Files CD-ROM, Disk 3 and 4, General Rules of Practice, No. CX-89-1863, 02-08-28 Order Tribal Ct 10-29-02 Hearing & Responses, current through January 1, 2004) [hereinafter CD-ROM] (on file with author) (noting that lack of a procedural rule is a recurring problem in the enforcement of tribal court orders involving Indian children and teenagers, and providing five examples recently encountered by her agency in which non-recognition of tribal court orders placed Indian children and teenagers in dangerous situations).

41. MINN. R. GEN. PRACT. 10.01(b)(1).

42. Uniform Interstate Family Support Act, MINN. STAT. § 518C.207 (2002).

43. *Id.* §§ 518C.508, 518C.601-04.

44. Uniform Foreign Country Money-Judgments Recognition Act, MINN. STAT. § 548.35, subd. 4 (2002).

reasonable notice and opportunity to be heard to contestants.⁴⁵ VAWA arguably goes the furthest of the federal statutes in providing a procedure for the recognition of tribal court orders. Under VAWA, a tribal order shall be “enforced as if it were the order of the enforcing State or tribe”⁴⁶ if the tribal court had personal and subject matter jurisdiction and provided reasonable notice and opportunity to be heard to the person against whom the order is sought.⁴⁷ VAWA does not require registration or filing of the order in the enforcing jurisdiction prior to enforcement. Nor does it require that the party against whom the order was issued be provided notice that the protection order has been registered or filed in the enforcing jurisdiction.⁴⁸

The other state and federal statutes, even though their wording is mandatory and unqualified, nevertheless provide little guidance as to procedures for the recognition and enforcement of tribal court orders and judgments.⁴⁹ The ICWA, for example, mandates that states grant full faith and credit to Indian child custody proceedings in tribal courts.⁵⁰ Though such clear and unqualified language ought to cause the routine enforcement of tribal court orders regarding Indian children, the result has been more complicated. More than a quarter century after ICWA was enacted, tribal court orders regarding Indian children are not always enforced.⁵¹

After mandating that specific procedures for enforcement established by state or federal statute must be followed, Rule 10.01 provides more detailed guidelines only for VAWA.⁵² VAWA already contains fairly detailed guidelines.⁵³ The lack of guidance in at least some of the other statutes has demonstrably been a barrier to the recognition and enforcement of tribal court orders and judgments.⁵⁴ The Minnesota Tribal Court/State Court Forum

45. Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B(c) (2000).

46. Violence Against Women Act, 18 U.S.C. § 2265(a) (2000).

47. *Id.* § 2265(b).

48. *Id.* § 2265(d).

49. *See, e.g.*, Indian Child Welfare Act, 25 U.S.C. § 1911(d) (2000).

50. *Id.*

51. *See* sources cited *supra* note 40 (discussing problems with the enforcement of tribal court orders regarding Indian children).

52. MINN. R. GEN. PRACT. 10.01(b)(2).

53. *See* sources cited *supra* notes 46-48 and accompanying text (discussing the VAWA).

54. *See* sources cited *supra* notes 49-51 and accompanying text.

("Minnesota Forum") specifically requested the insertion of additional language in Rule 10.01 regarding procedures for the enforcement of tribal court orders and judgments under the Full Faith and Credit for Child Support Orders Act, the Indian Child Welfare Act, the Uniform Interstate Family Support Act, and the Minnesota Indian Family Preservation Act.⁵⁵ Yet language that might provide such guidance was not included. As a result, Rule 10.01, which had the potential to make a useful contribution in clarifying these procedures for recognition of tribal court orders and judgments already mandated by statute, actually accomplished little in this regard and provides little specific guidance. While the procedures for VAWA are helpful, similar guidance would have been useful in insuring recognition of the orders contemplated in these other important statutes.

Thus, Rule 10.01, which addresses statutes mandating recognition, can be considered, at best, a modest first step. The provisions related to VAWA may serve as a useful model for future additions to the rule to address these other important statutes.⁵⁶

2. *Recognition Discretionary Where Not Mandated by Statute*

Rule 10.02 addresses recognition of tribal court orders and judgments where recognition is not mandated by statute. Given the absence of statutory direction, numerous approaches were available to the Minnesota Supreme Court. Of the numerous state courts that have already addressed the issue, most have taken an approach that would provide actual full faith and credit, purported full faith and credit, or comity.⁵⁷ Each of these approaches is respectful of tribal court judgments. The original proponents of such a Minnesota rule advocated a model that took shape in several other states: a rebuttable presumption in favor of recognition and a list of factors to aid courts in determining whether the presumption had been rebutted.⁵⁸ Such an approach has been widely adopted⁵⁹

55. Letter from Minnesota Tribal Court/State Court Forum to Frederick Grittner, Clerk, Minnesota Appellate Courts (Nov. 3, 2003) (CD-ROM, *supra* note 40).

56. The Advisory Committee's comments on the rule provide additional sound guidance.

57. See sources cited *supra* note 2. South Dakota is a notable exception.

58. This was the approach suggested by the Minnesota Tribal Court/State Court Forum. *Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments*, Minnesota Supreme Court, No. CX-89-1863, at A-1 (filed Apr. 11, 2002) (CD-ROM, *supra* note 40) (petitioning the Minnesota

because it demonstrates respect for tribal courts while preserving state court discretion to insure justice is done.

In Rule 10.02, the Minnesota Supreme Court took a different approach that can best be characterized as agnostic. It provides no presumption one way or the other with regard to the recognition and enforcement of tribal court orders and judgments not mandated by state or federal statute, stating simply that “enforcement of a tribal court order or judgment is discretionary with the court” and providing a list of factors that the court may consider in the exercise of their discretion.⁶⁰ The factors include:

- (1) whether the party against whom the order or judgment will be used has been given notice and an opportunity to be heard or, in the case of matters properly considered *ex parte*, whether the respondent will be given notice and an opportunity to be heard within a reasonable time;
- (2) whether the order or judgment appears valid on its

Supreme Court for a rule stating that tribal court orders and judgments are “presumed valid and enforceable and shall be given full faith and credit by the courts of the State of Minnesota” unless the objecting party can demonstrate lack of personal or subject matter jurisdiction; fraud, duress, or coercion; lack of fair notice or fair hearing; or, in some cases, a non-final order). [hereinafter *Minnesota Petition*]. While the *Petition* used the words “full faith and credit,” its approach more nearly resembled comity. Full faith and credit is a non-discretionary doctrine most often utilized on a state-to-state basis, whereas comity is a discretionary doctrine which allows a court to consider various factors in determining whether to recognize the judgment or order of a foreign court. *See, e.g.*, MINN. R. GEN. PRACT. 10 advisory comm. cmt.

59. *See, e.g.*, WIS. STAT. § 806.245 (2003) (proclaiming full faith and credit for tribal courts, but setting forth a list of requirements that look more like comity); WYO. STAT. ANN. § 5-1-111 (Michie 2002) (granting full faith and credit to the judicial records, orders, and judgments of the courts of the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Reservation, unless one of enumerated requirements is not met); 17B ARIZ. REV. STAT. TRIBAL CT. CIV. J. R. 1-7 (establishing full faith and credit for tribal courts unless an objection is filed); MICH. CT. R. 2.615 (judgments and orders of tribal courts granting reciprocity to Michigan courts presumed valid and given full faith and credit unless objecting party proves one of enumerated factors); OKLA. STAT. tit. 12, § 728 (2003); OKLA. DIST. CT. R. 30(b); WA. SUPER. CT. CIV. C.R. 82.5(c) (full faith and credit to tribal court orders, judgments, and decrees as long as there is reciprocity, due process, and jurisdiction); *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997) (concluding that “as a general principle, federal courts should recognize and enforce tribal judgments”); *John v. Baker*, 982 P.2d 738, 763 (Alaska 1999) (holding that Alaska courts should, as a general rule, “respect tribal court decisions under the comity doctrine”); *Wippert v. Blackfeet Tribe*, 859 P.2d 420 (Mont. 1993) (upholding comity for tribal court judgments).

60. MINN. R. GEN. PRACT. 10.02(a).

face and, if possible to determine, whether it remains in effect;

(3) whether the tribal court possessed subject-matter jurisdiction and jurisdiction over the person of the parties;

(4) whether the issuing tribal court was a court of record;

(5) whether the order or judgment was obtained by fraud, duress, or coercion;

(6) whether the order or judgment was obtained through a process that afforded fair notice, the right to appear and compel attendance of witnesses, and a fair hearing before an independent magistrate;

(7) whether the order or judgment contravenes the public policy of this state;

(8) whether the order or judgment is final under the laws and procedures of the rendering court, unless the order is a non-criminal order for the protection or apprehension of an adult, juvenile or child, or another type of temporary, emergency order;

(9) whether the tribal court reciprocally provides for recognition and implementation of orders, judgments and decrees of the courts of this state; and

(10) any other factors the court deems appropriate in the interests of justice.⁶¹

While several of the factors listed in Rule 10.02 mirror the factors considered under traditional principles of comity,⁶² both

61. *Id.*

62. *Hilton v. Guyot*, 159 U.S. 113, 158 (1895) (setting forth the following considerations for comity:

opportunity for a full and fair trial . . . before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice . . . [with] nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect);

see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 (1987) (stating

(1) A court in the United States may not recognize a judgment of the court of a foreign state if:

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

(b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state[.]

factor 9 (reciprocity)⁶³ and factor 10 (any other factor deemed appropriate) introduce considerations that lie outside traditional comity analysis. By recognizing discretion to consider any other “appropriate factor,” factor 10 potentially broadens the scope of the inquiry tremendously and opens a proceeding to many issues not heretofore thought to be relevant by other courts.

The rule also lacks any requirement for a hearing.⁶⁴ The Advisory Committee’s reasoning that “[i]n some instances, a hearing would serve no useful purpose or would be unnecessary”⁶⁵ is undoubtedly correct, particularly when recognition is strongly indicated. However, a hearing would be a useful procedural safeguard and an appropriate sign of respect if a decision not to recognize a tribal court judgment or order is imminent. The cumulative effect of the agnostic approach and the broad list of factors, concluding with the apparently open-ended grant of discretion in factor 10, is an extremely wide grant of discretion to state trial courts that gives comparatively little guidance on how that discretion should be exercised.

While some judges who are knowledgeable about Indian tribal courts will appreciate that discretion, others may be uncomfortable with the lack of guidance given by the Minnesota Rule. These features, along with the lack of a hearing requirement, present a risk that errors will occur. Because of this rule, some valid tribal judgments may not be enforced. Non-enforcement will constitute justice denied for some unlucky litigant.

(2) A court in the United States need not recognize a judgment of the court of a foreign state if:

- (a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action;
- (b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;
- (c) the judgment was obtained by fraud;
- (d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought;
- (e) the judgment conflicts with another final judgment that is entitled to recognition; or
- (f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.)

63. *See, e.g.,* Wilson v. Marchington, 127 F.3d 805, 811-12 (9th Cir. 1997) (suggesting that the question of a reciprocity requirement is better left to the executive and legislative branches).

64. MINN. R. GEN. PRACT. 10.02(b).

65. *Id.* 10 advisory comm. cmt.

While errors can occur under any rule, one approach is to draft a rule to insure that the risk of error is properly allocated. In light of the broad discretion in the rule and the lack of a hearing, it may be difficult for a losing party to create a record that demonstrates error. Indeed, this rule seems uniquely designed to make errors that demonstrate disrespect for tribal courts unreviewable.

Given the risk of widespread ignorance about tribal courts, one can make a strong argument that respect for tribal courts justifies at least a modest presumption in favor of the regularity and validity of tribal court proceedings. In light of the fact that federal notions of due process have been imposed on tribal courts in much the same way as they have been imposed on state courts, a presumption that tribal court judgments are valid is sound; in practice, tribal courts function much like state courts.⁶⁶

In sum, the Minnesota Rule's provisions related to federal or state statutory mandates are of limited assistance. In circumstances in which recognition is discretionary, Minnesota Rule provides broad discretion and little guidance. Naturally, judges who possess awareness and familiarity with tribal courts are likely to view judgments from tribal courts more favorably than judges who lack that knowledge. The rule may well lead to arbitrariness in the enforcement of tribal judgments, and such arbitrariness will be difficult to review. The lack of firm guidance in the Minnesota Rule may thus produce arbitrary outcomes and a lack of uniformity in the recognition of tribal court rulings in Minnesota courts.

B. The Arizona Rules

The Arizona Rules⁶⁷ took effect December 1, 2000; three years prior to the promulgation of the Minnesota Rule. Like the Minnesota Rule, the Arizona Rules were nearly a decade in development.

Unlike the Minnesota Rule, which is divided into two basic

66. The Fourteenth Amendment and the great "Incorporation Controversy" ultimately was resolved by several Supreme Court decisions imposing uniform standards of various kinds of due process and procedure on state courts. The Indian Civil Rights Act constituted Congress's effort to impose the same kinds of due process on tribal courts. For more on this, see Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403 (2004). The article discusses that tribal courts have clearly been required to provide many fundamental procedural rights for a longer time than state courts.

67. 17B ARIZ. REV. STAT. TRIBAL CT. CIV. J. R. 1-7.

sections (Rule 10.01: mandated recognition; and Rule 10.02: discretionary recognition), the Arizona Rules consist of seven different provisions, cast as Rules 1 through 7, that set forth considerably more detail than the Minnesota Rule. The following discussion will describe the Arizona Rules and highlight some of the key differences between the Arizona and Minnesota rules.

1. *Presumption of Recognition of Tribal Judgments*

The heart of the Arizona approach is Rule 5. It sets forth the standard for the recognition of tribal court orders and judgments in the Arizona courts.⁶⁸ Rule 5 provides that tribal judgments “shall be recognized and enforced by the courts of this state to the same extent and shall have the same effect as any judgment, order, or decree of a court of this state.”⁶⁹ Unless a timely objection is filed, the presumption of validity results in the recognition and enforcement of the tribal court judgment.⁷⁰

In the event a timely objection is filed, Rule 5 sets forth two mandatory⁷¹ and four discretionary considerations to guide courts.⁷² The considerations are set forth as follows, with comparable Minnesota Rule provisions footnoted:⁷³

Mandatory Considerations Following Objection. A tribal judgment shall not be recognized and enforced if the objecting party demonstrates to the court at least one of the following:

1. The tribal court did not have personal or subject matter jurisdiction.⁷⁴
2. The defendant was not afforded due process.⁷⁵

Discretionary Considerations Following Objection. The superior court may, in its discretion, recognize and enforce or decline to recognize and enforce a tribal judgment on equitable grounds, including:

1. The tribal judgment was obtained by extrinsic

68. *Id.* 5.

69. *Id.* 5(a).

70. *Id.* 5(a), (b).

71. *Id.* 5(c).

72. *Id.* 5(d).

73. *See* MINN. R. GEN. PRACT. 10.02(a); *see also supra* notes 61-62 and accompanying text (laying out the Minnesota Rule).

74. *Cf.* 10.02(a) (Factor 3).

75. *Cf. id.* (Factor 6).

fraud.⁷⁶

2. The tribal judgment conflicts with another final judgment that is entitled to recognition.⁷⁷

3. The tribal judgment is inconsistent with the parties' contractual choice of forum.⁷⁸

4. Recognition of the tribal judgment or the cause of action upon which it is based is against fundamental public policy⁷⁹ of the United States or the State of Arizona.⁸⁰

Both the Minnesota Rule and the Arizona Rules contain provisions to ensure that a defendant was afforded due process and that a tribal court had personal and subject matter jurisdiction before its judgments will be enforced. Of the four discretionary considerations in the Arizona Rules, two are comparable to provisions found in the Minnesota Rule. The Minnesota Rule, however, contains an additional five considerations, including whether the tribal court is a "court of record," whether the tribal court has reciprocal rules for the recognition of state court judgments, and an extremely broad general provision.⁸¹

The inspiration for the Arizona Rules is obvious; it tracks closely, in fact, nearly word-for-word, with the federal common law rule regarding the recognition of tribal court judgments.⁸² In contrast, the Minnesota Rule departs substantially from this widely used approach and charts a new course.

2. *Setting a Respectful Tone*

Despite certain similarities between the two rules, the Arizona Rules are decidedly more respectful toward tribal courts in other

76. *Cf. id.* (Factor 5).

77. No comparable provision exists in the Minnesota Rule, although the issue could be addressed in Minnesota's catchall Factor 10. *See id.* (Factor 10).

78. No comparable provision exists in the Minnesota Rule, although the issue could be addressed in Minnesota's catchall Factor 10. *See id.* (Factor 10).

79. *Cf. id.* (Factor 7).

80. 17B ARIZ. REV. STAT. TRIBAL CT. CIV. J. R. 5(c), (d).

81. *See supra* notes 60-61 and accompanying text (discussing the Minnesota Rule).

82. *See supra* note 62 and accompanying text (describing the *Hilton* and Restatement approaches to the recognition of foreign judgments); *see also* *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997) (setting forth a standard for the recognition and enforcement of tribal judgments in federal courts upon which the Arizona Rules are based almost word-for-word).

ways as well. The Arizona Rules offer two clarifications that are lacking in the Minnesota Rule. For example, Arizona's Rule 1 specifies that "[d]eterminations regarding recognition and enforcement of a tribal judgment pursuant to these rules shall have no effect upon the independent authority of that tribal judgment."⁸³ It also notes that "[n]othing in these rules shall be deemed or construed to expand or limit the jurisdiction either of the State of Arizona or any Indian tribe."⁸⁴

While these provisions are not strictly necessary, they serve two important functions. First, by defining the limits of the rules, these statements may be useful to judges and individuals who have little or no experience in the area of Indian law or limited understanding of the place of Indian tribal courts within the American system. Second, in elucidating the Arizona Supreme Court's own understanding as to the authority of tribal courts, the statements set a tone of respect for the courts of the "Third Sovereign."⁸⁵ Inclusion of these statements in the very first rule provision sets a respectful tone for the rest of the provisions. The absence of similar statements in the Minnesota Rule produces a different tone.

Just as Rule 1 starts out the Arizona recognition rules with a respectful approach toward tribal courts, the concluding rule provision implements respect in a practical manner. Rule 7,⁸⁶ which is unlike any provision to be found in the Minnesota Rule, provides that when issues arise as to the validity of a tribal court judgment, the district court "shall . . . attempt to resolve any issues raised . . . by contacting the tribal court judge who issued the judgment."⁸⁷ In other words, the Arizona Rules actually encourage inter-sovereign judicial cooperation.⁸⁸ While such a provision could potentially cause friction when state court judges question the judgments of the tribal court judges, it seems more likely to produce improved communication, understanding, and cooperation between state and tribal courts. The Minnesota Rule

83. 17B ARIZ. REV. STAT. TRIBAL CT. CIV. J. R. 1.

84. *Id.*

85. O'Connor, *supra* note 1, at 1.

86. 17B ARIZ. REV. STAT. TRIBAL CT. CIV. J. R. 7.

87. *Id.*

88. While communication may not be advisable or even appropriate in all cases, this rule constitutes recognition that many of the disputes in which such issues will arise are local in nature and informal communication between judges may be a good practical solution.

would undoubtedly be improved if it promoted such respect and cooperation.

3. *Detailed Filing Procedures*

In many ways, the Arizona Rules are also more helpful to litigants and judges than the Minnesota Rule.⁸⁹ While Rule 2 is not substantively different from provisions in the Minnesota Rule,⁹⁰ Rule 3 sets forth relatively detailed procedures for the recognition and enforcement of tribal court orders and judgments.⁹¹ Rule 3 states that a “copy of any tribal judgment may be filed in the office of the clerk of the superior court in any county of this state.”⁹² It further provides instructions to the enforcing party on how to file the tribal judgment, how to serve the responding party with notice of the filing, and how to file proof of service.⁹³

Arizona Rule 4 continues in this helpful vein by explaining the procedures for objections.⁹⁴ Under Rule 4, “[a]ny objection to the

89. Rule 1 contains a provision similar to that of the Minnesota Rule regarding recognition of tribal court orders and judgments where mandated by state or federal statute. *See supra* note 30 and accompanying text (discussing the similar Minnesota Rule provision). The Arizona Rules explicitly provide that “[t]hese rules do not apply to tribal judgments for which federal law requires that states grant full faith and credit recognition or for which state law mandates different treatment.” 17B ARIZ. REV. STAT. TRIBAL CT. CIV. J. R. 1. In addressing VAWA, the Minnesota Rule is somewhat more helpful than the Arizona Rules. Moreover, the Advisory Committee comment in the Minnesota Rule notes the relevant state and federal statutes. MINN. R. GEN. PRACT 10 advisory comm. cmt..

90. 17B ARIZ. REV. STAT. TRIBAL CT. CIV. J. R. 2. Rule 2 sets forth definitions for the terms “tribal court” and “tribal judgment.” While the definitions are a bit more specific than anything found in the Minnesota Rule, they are essentially parallel to provisions of the Minnesota Rule. For instance, the Arizona Rules definition of “tribal court,” while going into more detail, essentially includes the courts of any federally recognized Indian tribe. *Id.* The Minnesota Rule also contains the phrase “any federally recognized Indian tribe,” but it is not noted as being a definition, and is only emphasized in the Advisory Committee comment. MINN. R. GEN. PRACT. 10.01. The Arizona Rules define “tribal judgment” as “any final written judgment, decree or order of a tribal court duly authenticated in accordance with the laws and procedures of the tribe or tribal court.” 17B ARIZ. REV. STAT. TRIBAL CT. CIV. J. R. 2. The Minnesota Rule appears to contemplate a similar definition, yet it is obscured by being included as one of the factors courts may consider in determining whether to recognize a tribal court order or judgment. MINN. R. GEN. PRACT. 10.02(a)(8) (stating “whether the order or judgment is final under the laws and procedures of the rendering court . . .”).

91. 17B ARIZ. REV. STAT. TRIBAL CT. CIV. J. R. 3.

92. *Id.* 3(a).

93. *Id.* 3(b).

94. *Id.* 5; *see also supra* notes 68-80 and accompanying text (discussing the recognition of tribal judgments according to Rule 5).

enforcement of a tribal judgment shall be filed within twenty (20) days of service or of receipt of the notice . . . or within twenty-five (25) days of the date of mailing, whichever last occurs.”⁹⁵ The rule further indicates that “[i]f an objection is filed within this time period, the superior court may, in its discretion, set a time period for replies and/or set the matter for hearing.”⁹⁶ Like the Minnesota Rule,⁹⁷ the Arizona Rules leave the decision of whether to hold a hearing to the discretion of the court.⁹⁸ If no objections are timely filed, a tribal judgment is enforceable under the Arizona Rules.⁹⁹ In short, while the Minnesota Rule purports to set forth procedures, the Arizona Rules actually create procedures. While the Minnesota Rule provides procedures in the context of VAWA, it provides none for other circumstances.¹⁰⁰

One final procedural difference is worth noting. Under Arizona Rule 6, an Arizona court “shall stay enforcement of the tribal judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated.”¹⁰¹ This provision applies to circumstances in which an appeal of the tribal court judgment is pending or may be filed, or a stay of execution has been ordered by the tribal court.¹⁰² Although the Minnesota Rule raises the issue of finality as one of the factors that may be considered by the state court,¹⁰³ it provides no guidance as to how to proceed in circumstances in which the order is not final. Nevertheless, the order ought to be enforced if and when it becomes final. While a state court in Minnesota may have discretion to stay enforcement in appropriate circumstances,¹⁰⁴ the Minnesota provision has the effect of making finality a substantive and dispositive factor rather than a procedural hurdle.

95. 17B ARIZ. REV. STAT. TRIBAL CT. CIV. J. R. 4.

96. *Id.*

97. MINN. R. GEN. PRACT. 10.02(b); *see also supra* notes 64-65 and accompanying text (discussing the Minnesota Rule provision making a hearing optional).

98. 17B ARIZ. REV. STAT. TRIBAL CT. CIV. J. R. 4.

99. *Id.* 5.

100. MINN. R. GEN. PRACT. 10.01(b)(2). To be fair, the Arizona Rules eschew any claim to applicability if a federal or state mandate is involved, so parties are without guidance if the mandate statute fails to provide clear direction. *See* 17B ARIZ. REV. STAT. TRIBAL CT. CIV. J. R. 1.

101. 17B ARIZ. REV. STAT. TRIBAL CT. CIV. J. R. 6.

102. *Id.*

103. MINN. R. GEN. PRACT. 10.02(a)(8).

104. *Id.* 10.02.

Accordingly, a Minnesota court judge may simply refuse to recognize the tribal court order or judgment in such circumstances.

In summary, the Arizona Rules are not only more respectful to tribal courts, they are more detailed and, as a result, more helpful to both litigants and judges. Part III of this article will describe and compare the rulemaking processes in Arizona and Minnesota, in the hopes of drawing some conclusions about the very different results.¹⁰⁵

III. THE RULEMAKING PROCESS

During the latter half of the twentieth century, tribal courts began to flourish. In cases such as *Williams v. Lee*,¹⁰⁶ *National Farmers Union Insurance Co. v. Crow Tribe*,¹⁰⁷ and *Iowa Mutual Insurance Co. v. LaPlante*,¹⁰⁸ the U.S. Supreme Court repeatedly affirmed the legitimacy of tribal courts. And Congress, for its part, has not only required state courts to grant full faith and credit to certain kinds of tribal court judgments,¹⁰⁹ it has supported tribal courts with federal appropriations.¹¹⁰

As federal support for tribal courts has increased, tribal courts have developed, in the words of Justice O'Connor, by "leaps and bounds."¹¹¹ Increased reservation commerce and populations have

105. See *infra* Part III.

106. 358 U.S. 217, 223 (1959).

107. 471 U.S. 845, 856-57 (1985).

108. 480 U.S. 9, 14-15 (1987).

109. See *supra* notes 31-34 and accompanying text.

110. The U.S. Commission on Civil Rights urged Congress to increase the funding of tribal courts in amounts equal to the funding provided to state courts. See U.S. COMMISSION ON CIVIL RIGHTS: THE INDIAN CIVIL RIGHTS ACT 72-73 (1991). While this has never been achieved, Congress responded more modestly in 1993 by enacting the Indian Tribal Justice Act. Pub. L. No. 103-176, § 2, 107 Stat. 2004 (1993) (codified at 25 U.S.C. § 3601) (indicating that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments"). In that legislation, Congress also established an Office of Tribal Justice Support within the Bureau of Indian Affairs and authorized annual appropriations up to \$50 million for assistance to tribal courts. See Pub. L. No. 103-176, 107 Stat. 2004 (codified at 25 U.S.C. §§ 3611-14, 3621(b)). Seven years later, in 2000, Congress enacted the Indian Tribal Justice Technical and Legal Assistance Act of 2000. Pub. L. No. 106-559, 114 Stat. 2778 (codified at 25 U.S.C. § 3651) (finding that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring the health and safety and the political integrity of tribal governments").

111. O'Connor, *supra* note 1, at 1.

increased the number of civil disputes heard in tribal courts.¹¹² And increased mobility on and off the reservation has created a need for cross-border enforcement of judgments.¹¹³

Recognizing the increasing number of issues related to tribal courts, the Conference of Chief Justices of State Supreme Courts began to look into the problems between state and tribal courts in the late 1980s.¹¹⁴ Research by the National Center for State Courts revealed that “jurisdictional disputes had arisen most frequently in the areas of the Indian Child Welfare Act, domestic relations (family law), contract law as well as taxation, hunting and fishing, and certain other areas.”¹¹⁵ To develop approaches to address these issues, the Conference of Chief Justices selected Arizona, Oklahoma, and Washington as pilot states to develop “model approaches to consensus building” and report on them.¹¹⁶

A. *The Arizona Process*

Toward this end, the Arizona Court Forum was created in 1989,¹¹⁷ and held its first meeting in early 1990.¹¹⁸ The Arizona Court Forum was originally composed of four state court leaders, three tribal court officials, and a forum consultant.¹¹⁹ The Arizona Court Forum held four meetings in 1990, all of which were open to the public.¹²⁰ During that year, it also prepared a report on its efforts, to be presented to the Conference of Chief Justices.¹²¹

Because the original forum’s purpose was to identify issues, develop potential problem-solving approaches, and ultimately report their findings and recommendations to the Conference of

112. *Minnesota Petition*, *supra* note 58, at 7.

113. *Id.*

114. ARIZONA COURT FORUM, STATE AND TRIBAL COURT INTERACTION: BUILDING COOPERATION: AN ARIZONA PERSPECTIVE 4 (1991), *available at* <http://supreme.state.az.us/stfcf/handouts/StateTribal%20Court%20Interaction.pdf> (last visited Nov. 12, 2004) [hereinafter BUILDING COOPERATION].

115. *Id.*

116. *Id.* at 5.

117. *Arizona Court Forum Chairman Michael C. Nelson’s Petition for Adoption of Rules of Procedure for Recognition of Tribal Court Judgments*, In re: Rules of Procedure for the Recognition of Tribal Court Judgments, *available at* <http://supreme.state.az.us/stfcf/handouts/Recognition%20of%20Judgements%20Petition.pdf> (last visited Nov. 12, 2004) [hereinafter *Arizona Petition*].

118. BUILDING COOPERATION, *supra* note 114, at 34.

119. *Id.*

120. *Id.*

121. *Arizona Petition*, *supra* note 117.

Chief Justices, its initial scope was quite broad.¹²² The issue of recognition of tribal court judgments was only one of many issues that the Arizona Court Forum addressed in its early years.¹²³ In fact, the idea of a supreme court rule on recognition of tribal court judgments was not yet on the horizon when the Arizona Court Forum submitted its first report to the Conference of Chief Justices in 1991.¹²⁴ Instead, early suggestions for approaches to the recognition issue included intergovernmental agreements, legislative action, and even establishing recommended procedural guidelines for the *tribal courts* in order to ensure that their judgments would be enforced in state court.¹²⁵ While the idea of intergovernmental agreements remained a popular topic for discussion in other areas, it appears to have been discounted early on as an approach to the area of recognition of judgments simply because of the sheer number of agreements that would be required.¹²⁶ The idea of legislative action, while eventually discarded, remained viable for several years.¹²⁷ The Arizona Court Forum's report even contained a model Uniform Enforcement of State and Tribal Court Judgments Act.¹²⁸

Although the Arizona Court Forum later rejected some of its initial ideas, other priorities remained. For example, educating tribal and state court judges about the various jurisdictional issues was an early and lasting priority. Increasing the interaction between tribal and state court judges, making tribal ordinances and court decisions more readily available, and ensuring that tribes had access to Arizona law and various other resources were other key priorities for the Arizona Court Forum.¹²⁹

One characteristic of the Arizona Court Forum that should be noted was its openness to public comment. Since its earliest meetings, the forum was open to the public.¹³⁰ Beginning with the

122. See, e.g., BUILDING COOPERATION, *supra* note 114, at 34.

123. *Id.*

124. See *id.* at 13-33.

125. *Id.* at 34 (emphasis added). The last idea doesn't appear to have been discussed after the first meeting.

126. See Arizona State, Tribal & Federal Court Forum, Minutes from Meeting (Oct. 20, 1990), available at <http://supreme.state.az.us/stfcf> (last visited Nov. 12, 2004).

127. See *Arizona Petition*, *supra* note 117 (stating that in 1995, an expanded and newly organized forum decided not to pursue legislation).

128. BUILDING COOPERATION, *supra* note 114, app. E.

129. *Id.* app. A; see also *id.* at 34.

130. See *id.* app. A. While the presence of "guests" was not noted at the first

second meeting, public comments were sought at the end of each meeting.¹³¹ Written comments by the public were also sought as the Arizona Court Forum's report neared completion.¹³² Despite so much opportunity for public comment and the concomitant ease with which controversy could arise, it appears that the Arizona Court Forum received only one written comment (whose author also enclosed a disputed parking ticket).¹³³ Furthermore, there appears to have been only two instances of mild discord at forum meetings. In one of these instances, a tribal court "guest" is described as having taken "strong exception" to a discussion regarding the "sophistication of the Navajo tribal courts."¹³⁴ In the other instance, a law student "commented [that] there had been some concern expressed by Salt River tribal council members who were not asked to participate or provide input into Arizona Court Forum procedure," whereupon no less than three Arizona Court Forum members attempted to allay these concerns.¹³⁵ Thus, despite ample opportunity for public comment and the possibility of resulting controversy, the Arizona Court Forum's early meetings seem to have passed uneventfully.

At a national conference sponsored by the Conference of Chief Justices held in Seattle, Washington, from June 30 to July 1, 1991, Arizona, Oklahoma, and Washington presented their reports.¹³⁶ Arizona's report, entitled *Building Cooperation*, set forth the Arizona Court Forum's recommendations and rationale for action in the areas of education, jurisdiction, intergovernmental agreements, state legislation, and federal legislation.¹³⁷ The appendices to the report provided minutes of the forum's meetings, profiles of Arizona tribes, sample intergovernmental agreements, a list of Arizona cases involving jurisdiction which were decided by the U.S. Supreme Court, the model Uniform

Forum meeting, it was not unusual for up to 15 "guests" to be present at later meetings, although most of those named appear to be members of the legal community. *Id.*

131. *Id.*

132. *Id.* at 34 (establishing a period for comment regarding the report).

133. *Id.* app. F.

134. *Id.* at 34.

135. *Id.* (establishing a period for comment regarding the report).

136. See, e.g., Tribal Court Clearinghouse, *Building on Common Ground: A National Agenda to Reduce Jurisdictional Disputes Between Tribal, State, and Federal Courts*, available at <http://www.tribal-institute.org/articles/common.htm> (last visited Nov. 12, 2004).

137. BUILDING COOPERATION, *supra* note 114, at 9-33.

Enforcement of State and Tribal Court Judgments Act, and a lone public comment.¹³⁸ Among the more specific recommendations in the report was establishment of an Indian Law section of the Arizona State Bar.¹³⁹ In fact, the Indian Law section held its organizational meeting on November 8, 1990, even before the recommendation was presented in Seattle.¹⁴⁰

In response to one of the report's recommendations, the Arizona legislature passed a groundbreaking statute in 1992 that made tribal court involuntary commitment orders recognizable and enforceable in state courts.¹⁴¹ In 1994, the Arizona Supreme Court adopted rules for the recognition of tribal court involuntary commitment orders.¹⁴² Thus, the Arizona Court Forum began seeing the results of its efforts almost immediately.

Another general recommendation of the Arizona Court Forum was the establishment of an ongoing colloquium of state, federal, and tribal officials.¹⁴³ As the forum continued with its work, a permanent forum was established by Administrative Order of the Arizona Supreme Court in 1994.¹⁴⁴ Chief judges of the Ninth Circuit and the District Court of Arizona appointed judges to serve on the new forum.¹⁴⁵ The new forum was expanded to include federal members, and was renamed the State, Tribal & Federal Court Forum ("Arizona Forum").¹⁴⁶ In its new incarnation, the Arizona Forum consisted of four federal members, six state members, at least seven tribal members, one state bar member, and two public members.¹⁴⁷ The state, tribal, and public members serve for two-year terms.¹⁴⁸

The next landmark event in the Arizona Rules process was the Ninth Circuit's decision in *Wilson v. Marchington*¹⁴⁹ in September of

138. *Id.* apps. A-F.

139. *Id.* at 17.

140. *Id.*

141. ARIZ. REV. STAT. § 12-136 (1992).

142. 17B ARIZ. REV. STAT. TRIBAL CT. INVOL. COMMITMENT ORDERS R. 1-6.

143. Arizona State, Tribal & Federal Court Forum Website, at <http://supreme.state.az.us/stfcf> (last visited Nov. 12, 2004).

144. Arizona Supreme Court Admin. Order, *In re*: Appointment of Members to State, Tribal, and Federal Court Forum (No. 2001-70), available at <http://supreme.state.az.us/orders/admorder/orders01/2001-70.pdf> (last visited Nov. 12, 2004).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. 127 F.3d 805 (9th Cir. 1997).

1997. This case set forth a common law standard for the recognition and enforcement of tribal court judgments by the federal courts.¹⁵⁰ The Arizona Forum discussed the case during its June 1998 meeting and adopted a draft of proposed rules for the recognition of tribal court judgments that echoed the *Marchington* standard.¹⁵¹ The proposed rules adopted *Marchington*'s presumption in favor of recognition.¹⁵² While *Marchington* was a federal case, the forum noted that it "provides an indication of the current common law which is useful to frame rules that implement current Arizona common law."¹⁵³ Despite the fact that the Arizona Forum agreed that the proposed rules, when redrafted, would serve as the basis for the petition to the Supreme Court, no members of the public made any comments when given the opportunity.¹⁵⁴

By the Arizona Forum's next meeting, in December of 1998, the Arizona Rules petition had been filed with the Supreme Court. At this meeting, the forum discussed procedures for the enforcement of tribal domestic violence orders, noting that they were not covered by the rule.¹⁵⁵ In January of 1999, the Arizona Supreme Court sought public comment on the Arizona Rules petition.¹⁵⁶ Following the comment period, the Arizona Forum authorized its chairperson to file a reply to the comments.¹⁵⁷ The

150. *Id.* at 810.

151. Arizona State, Tribal & Federal Court Forum, Minutes from Meeting (June 9, 1998), available at <http://supreme.state.az.us/stfcf/98%20thru%2099/98-06-09%20minutes.pdf> (last visited Nov. 12, 2004). It should be noted that the Arizona Forum also discussed other issues during its meetings. *Id.* This article, however, focuses only on those issues which relate to the recognition of tribal court judgments.

152. *Id.*

153. *Id.*

154. *Id.* The Arizona Rules were not nearly as controversial as the Minnesota Rule. The only real opposition was the Civil Practice Committee of the State Bar Association, which was concerned that the effect of the rule went beyond current law. County Attorneys were also somewhat concerned until the proposed rule was amended to clarify that it only applied to civil cases. Other than that, the Arizona Rules were simply not an area of concern. Telephone Interview with David Withey, Chief Counsel, Administrative Office of Arizona Courts (Jul. 14, 2004).

155. Arizona State, Tribal & Federal Court Forum, Minutes from Meeting (Dec. 4, 1998), available at <http://supreme.state.az.us/stfcf/98%20thru%2099/99-08-04%20minutes.pdf> (last visited Nov. 12, 2004). The non-recognition of tribal judgments doesn't appear to have been as much of a problem in Arizona. Telephone Interview with David Withey, *supra* note 154.

156. Arizona State, Tribal & Federal Court Forum, Minutes from Meeting (Dec. 4, 1998), available at <http://supreme.state.az.us/stfcf/98%20thru%2099/99-08-04%20minutes.pdf> (last visited Nov. 12, 2004).

157. Arizona State, Tribal & Federal Court Forum, Minutes from Meeting

forum agreed to clarify that the rule applies to civil judgments only, and agreed to a few other minor amendments.¹⁵⁸ No additional changes were suggested.¹⁵⁹

At the Arizona Forum's meeting on October 26, 1999, it was reported that the Arizona Supreme Court would circulate the petition to twenty-two practitioners and academics to comment on the need for the rules and the court's authority to adopt them.¹⁶⁰ David Withey, the Chief Counsel for the Arizona Supreme Court Administrative Office of the Courts, and an active participant in the Arizona Forum since its inception, would also submit a comment.¹⁶¹ The forum discussed practical aspects of enforcing tribal court judgments.¹⁶² Members noted the availability of state court forms on the Arizona Supreme Court's website, as well as the availability of WordPerfect versions of these forms suitable for tribal modification.¹⁶³ An invitation to tribal courts to make their own forms available on the website was also extended.¹⁶⁴ Again, despite opportunity for public comment, apparently no comments were offered.¹⁶⁵

The petition was scheduled to be considered at the Arizona Supreme Court's Rules Agenda meeting in January of 2000.¹⁶⁶ However, the court postponed its consideration of the petition until its next Rules Agenda meeting due to lack of response of academics and experts from whom the Court had requested to submit comments.¹⁶⁷ In the meantime, the Arizona Forum discussed possible education efforts and the logistics of making tribal codes and regulations available in some sort of centralized

(Aug. 4, 1999), *available at* <http://supreme.state.az.us/stfcf> (last visited Nov. 12, 2004).

158. *Id.*

159. *Id.*

160. Arizona State, Tribal & Federal Court Forum, Minutes from Meeting (Oct. 26, 1999), *available at* <http://supreme.state.az.us/stfcf/00%20thru%2004/2000-02-25%20minutes.pdf> (last visited Nov. 12, 2004).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Arizona State, Tribal & Federal Court Forum, Minutes from Meeting (Feb. 25, 2000), *available at* <http://supreme.state.az.us/stfcf/00%20thru%2004/2000-02-25%20minutes.pdf> (last visited Nov. 12, 2004). Apparently, no one, including tribes, was very interested in the proposed rule. Telephone Interview with David Withey, *supra* note 154.

location.¹⁶⁸ It also heard reports from experts regarding the enforcement of tribal judgments where mandated by federal statute.¹⁶⁹ While the recognition and enforcement of child support orders was identified as not being a problem, the recognition and enforcement of VAWA orders was identified as a significant problem, despite the federal mandate.¹⁷⁰ Possible remedies identified were intergovernmental agreements and the standardization of forms and protocols.¹⁷¹

Finally, at the Arizona Supreme Court's May 2000 Rules Agenda meeting, the Arizona Forum's petition was approved with some modifications.¹⁷² More than a decade in the making, the Arizona Rules became effective on December 1, 2000.¹⁷³ The rules tracked the *Marchington* standard for the recognition and enforcement of tribal judgments closely, beginning with a presumption of enforcement, and listing limited circumstances under which enforcement may not occur.¹⁷⁴ They also set forth careful procedures for the enforcement and recognition of tribal court judgments.¹⁷⁵

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Arizona State, Tribal & Federal Court Forum, Minutes from Meeting (Jan. 19, 2001), available at <http://supreme.state.az.us/stfcf/00%20thru%2004/2001-01-19%20minutes.pdf> (last visited Nov. 12, 2004). Indeed, the only significant area of concern for the Arizona Supreme Court appears to have been whether the rule was a reflection of current law, or whether it took a step beyond current law. Telephone Interview with David Withey, *supra* note 154.

174. See *supra* Part II.B (discussing the Arizona Rules, as well as the *Marchington* standard).

175. *Id.* It seems that the Arizona Rules translated immediately into action. At the Arizona Forum's meeting on January 19, 2001, David Withey reported that he had already provided forms to state court clerks to use in processing tribal court cases under the rule. Arizona State Tribal & Federal Court Forum, Minutes from Meeting (Jan. 19, 2001), available at <http://supreme.state.az.us/stfcf> (last visited Nov. 12, 2004). The clerks had decided that a statutory filing fee would apply. *Id.*

B. *The Minnesota Process*¹⁷⁶

While the process for proposing the Minnesota Rule was modeled in some ways on the Arizona approach,¹⁷⁷ the process unfolded somewhat differently.¹⁷⁸

1. *Formation of a Working Group and Development of a Rule*

It was not until the summer of 1996 that informal meetings began.¹⁷⁹ Thereafter, a group of tribal judges and lawyers approached Justice Sandra Gardebring of the Minnesota Supreme Court about the possibility of establishing a committee to work on the issues.¹⁸⁰ Justice Gardebring assisted in recruiting state court judges from the various districts.¹⁸¹ The first meeting of the Tribal Court/State Court Forum ("Minnesota Forum") took place on July 18, 1997, at the Prairie Island Mdewakanton Dakota Community Tribal Court.¹⁸² Unfortunately, Justice Gardebring departed the Supreme Court in 1998, and the work of the forum was temporarily suspended.¹⁸³

The Minnesota Forum resumed in May of 1999,¹⁸⁴ but the loss

176. The Honorable Andrew M. Small kindly provided the authors with copies of many of the files he accumulated during the rulemaking process. The rule petition and many of the comments to the rule have been compiled on a CD-ROM and are on file at the Minnesota State Law Library in the Minnesota Judicial Center. CD-ROM, *supra* note 40. The Honorable Robert H. Schumacher and Michael Johnson of the State Court Administration and General Rules Advisory Committee also provided very helpful background information on the Minnesota Rule.

177. Interview with Hon. Andrew M. Small, *supra* note 25; Interview with Hon. Robert H. Schumacher, Judge, Minnesota Court of Appeals & Chair, Minnesota Tribal Court/State Court Forum, in St. Paul, Minnesota (June 29, 2004).

178. While the Minnesota Forum began its work in the early 1990s, members of the Minnesota legal community were not interested in working on the issue of the recognition and enforcement of tribal court judgments. Interview with Hon. Andrew M. Small, *supra* note 177.

179. *Minnesota Petition*, *supra* note 58.

180. Interview with Hon. Robert H. Schumacher, *supra* note 177.

181. *Id.* When asked about the qualifications of the state court judges who were asked to serve on the Minnesota Forum, Judge Schumacher stated that he himself had no experience with the issue of tribal court recognition prior to serving as Chair of the Minnesota Forum. However, he had long been interested in Indian Law, and in fact started a legal advice clinic for the Indian community in Minneapolis's Upper Midwest American Indian Center in the early 1970s.

182. *Minnesota Petition*, *supra* note 58, at 2.

183. State Court Committee on Tribal Court/State Court Forum, Minutes from Meeting (May 6, 1999) (on file with author).

184. *Id.*

of Justice Gardebring's leadership had a distinct impact. Members of the Minnesota Supreme Court decided that a rule regarding the recognition of tribal court judgments should be pursued through the legislature instead.¹⁸⁵ The supreme court also sought to separate the Minnesota Forum into a tribal court committee and a state court committee that would meet jointly only periodically.¹⁸⁶

Although it was technically split into two separate committees, the Minnesota Forum continued to meet jointly.¹⁸⁷ The forum identified several priorities: educating the public about tribal courts, ensuring the quality of tribal court judges and procedures, and pursuing "full faith and credit."¹⁸⁸ Though developing a rule for the recognition and enforcement of tribal court judgments was a high priority,¹⁸⁹ the process gathered momentum slowly until 2001. Between May and September of that year, the tribal councils of many of the Minnesota tribes passed resolutions in support of the state enforcement of tribal court orders.¹⁹⁰

In February of 2002, a Mille Lacs Tribal Court judge refused to recognize a Minnesota state court judgment on the ground that the Minnesota state courts do not grant reciprocity to Mille Lacs Tribal Court orders and judgments.¹⁹¹ This decision, like the *Wilson v.*

185. *Id.* Justice Stringer presented this approach to the Minnesota Forum. *Id.*

186. *Id.*

187. *Id.*; see also Interview with Hon. Robert H. Schumacher, *supra* note 177. It also continues to meet jointly. *Id.*

188. Interview with Hon. Robert H. Schumacher, *supra* note 177.

189. *Id.*

190. See, e.g., Bois Forte Reservation Tribal Council Resolution No. 142-2001 (May 10, 2001); Leech Lake Band of Ojibwe Resolution No. 01-130 (June 27, 2001); Upper Sioux Community Board of Trustees Resolution No. 33-2001 (Aug. 17, 2001); White Earth Tribal Council Resolution No. 001-01-023 (Aug. 20, 2001); Mille Lacs Band of Ojibwe Indians Resolution No. 09-04-116-01 (Sept. 25, 2001); see also RED WING REPUBLICAN EAGLE, *More Harmony Sought Between Courts* (Aug. 2, 2002), available at <http://www.republican-eagle.com/main.asp?Search=1&ArticleID=14492&SectionID=40&SubSectionID=114&S=1> (last visited Nov. 12, 2004) (reporting that the Prairie Island Tribal Council "'unequivocally' supports the petition"). The President of the Minnesota Chippewa Tribe (which includes six of the eleven Minnesota tribes) stated later that "there is support among all Tribal governments for the proposal." *Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgment: Hearing Before the Minnesota Supreme Court*, No. CX-89-1863 (Minn. Oct. 29, 2002) (testimony of Chairman Norman Deschampe).

191. *Household Fin. Serv. v. Weyaus*, No. 01-CV-546, slip op. at 6 (Mille Lacs Band Ct. of Cent. Jurisdiction, Feb. 4, 2002) (explaining that in order for the tribal court to recognize a judgment from another jurisdiction, tribal ordinance requires courts of other jurisdictions to "have enacted a full faith and credit provision in their Constitution or Statutes or on a case-by-case basis . . . granted

Marchington decision in Arizona, served as a trigger that drew attention to the recognition issue.

Barely two months later, on April 11, 2002, a delegation of tribal court and state court members of the Minnesota Forum met with Chief Justice Kathleen Blatz and Justice Edward Stringer of the Minnesota Supreme Court to present their Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders.¹⁹² The proposed rule established a presumption of validity and enforcement which could be overcome by a showing that:

- 1) the tribal court lacked personal or subject matter jurisdiction; or
- 2) the order or judgment was obtained by fraud, duress, or coercion; or
- 3) the order or judgment was not obtained through a process that afforded fair notice and a fair hearing; or
- 4) the order or judgment is not final under the laws and procedures of the rendering court, unless the order is a non-criminal order for the protection or apprehension of an adult, juvenile or child, or another type of temporary, emergency order.¹⁹³

The proposed rule also contained procedural requirements for the enforcement of money judgments and emergency orders, as well as a specification that the rule would apply neither to orders where enforcement is mandated by statute, nor to criminal orders of tribal courts.¹⁹⁴

Justices Blatz and Stringer referred the Petition to the Minnesota Supreme Court's Advisory Committee on General Rules of Practice ("Advisory Committee"). The Advisory Committee would review the rule and make further recommendations to the court. At this point, opposition began to appear. On May 22, 2002, the Advisory Committee held a public hearing on the proposed rule. Several individuals complained that they learned of this hearing only by publication the day before the hearing and, as a result, were unable to attend the meeting. One of these individuals, a Minnesota Court of Appeals judge, expressed his

full faith and credit to judicial determinations" of the Mille Lacs tribal court).

192. Letter from Lenor A. Scheffler, Partner, Best & Flanagan L.L.P., to Philip Frickey, Richard W. Jennings Professor of Law, University of California School of Law (May 1, 2002) (on file with author); see also *Minnesota Petition*, *supra* note 58.

193. *Minnesota Petition*, *supra* note 58, at A-1.

194. *Id.* at A-2, A-3.

opposition to the rule by letter, and particularly questioned the Minnesota Forum's assertion that the proposed rule had unanimous support.¹⁹⁵ Another of these individuals, William J. Lawrence of the *Native American Press/Ojibwe News*, also voiced opposition to the rule, complaining that some of the Minnesota Forum meetings were closed to the public and that he and other rule opponents had been prohibited from voicing their concerns at public forum meetings.¹⁹⁶ While it is not clear how much effect these individuals had on the Advisory Committee's ultimate views, the committee noted concerns about the allegations regarding the lack of opportunity for public comment.¹⁹⁷

Following the Advisory Committee hearing, several developments occurred. Two significant changes were made to the rule. First, a reciprocity element, requiring tribes to recognize state court orders before their orders would be recognized in state court, was added.¹⁹⁸ Then, following a request from the Conference of Chief Judges, a due process reference was also added.¹⁹⁹ While the notice and fair hearing elements of due process were part of the rule as originally proposed, this amendment broadened consideration of due process issues. In addition, the Minnesota Forum responded in writing to some of the concerns raised by the Committee in its hearing on May 22, 2002,²⁰⁰ and filed an amended

195. Letter from Hon. R. A. Randall, Judge, Minnesota Court of Appeals to Hon. Robert Schumacher, Judge, Minnesota Court of Appeals (May 22, 2002). While it is true that the proposed rule may not have had the unanimous support of the citizens of the State of Minnesota, it did have the unanimous support of the Forum members, which was the assertion contained in the Petition. *Minnesota Petition*, *supra* note 58, at 2.

196. Affidavit of William J. Lawrence, Publisher, NATIVE AMERICAN PRESS/OJIBWE NEWS (May 22, 2002) (CD-ROM, *supra* note 40). While the Minnesota Forum meetings held on tribal land were closed to the public, those held on state land were open to the public. Indeed, opponents of the proposal attended the meetings. Interview with Hon. Robert H. Schumacher, *supra* note 177.

197. Interview with Michael B. Johnson, Senior Legal Counsel, State Court Administration & Staff of Advisory Committee, in St. Paul, Minnesota (July 1, 2004). The Committee also considered some of the points made by the rule's opponents. *Recommendations of Minnesota Supreme Court Advisory Committee on General Rules of Practice* (Aug. 19, 2002) [hereinafter *Advisory Comm. Report I*].

198. The reciprocity element was added on May 22, 2002. *Amended Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments* (June 26, 2002) [hereinafter *Amended Petition*].

199. The due process reference was added on June 26, 2002. *Amended Petition*, *supra* note 198.

200. Letter from Hon. Andrew M. Small, Associate Justice, Prairie Island Mdewakanton Dakota & Lower Sioux Communities to Hon. Edward C. Stringer,

petition.²⁰¹

Meanwhile, several influential groups registered their opposition to the rule. The first group to do so was the Minnesota Sheriff's Association Board of Directors, which recommended rejection of the proposed rule and referral of the issue to the legislature.²⁰² The second group to register its opposition was the Minnesota County Attorney's Association, which complained that the rule was overbroad, that the issues should be addressed by the legislature instead, that the rule did not address immunity for state and local officials, and that it would result in great financial costs to the State and counties.²⁰³ The Minnesota State Bar Association Court Rules and Administration Committee also weighed in with a recommendation that the recognition of tribal court orders and judgments should be pursued by some means, but that the most appropriate action would be to integrate the terms of the proposed rule into existing rules and statutes.²⁰⁴

On August 19, 2002, the Advisory Committee issued its report.²⁰⁵ The Committee described the proposed rule as mandating full faith and credit for tribal court judgments, with very limited exceptions.²⁰⁶ More specifically, the committee believed that the presumption of enforcement, combined with what it perceived as a narrow list of exceptions, made "aspects of comity either mandatory or, at least, presumptively mandatory, in contrast to the traditionally discretionary nature of comity."²⁰⁷

2. *Public Comments on the Proposed Rule*

After receiving the Advisory Committee's report, the Minnesota Supreme Court scheduled a hearing for October 29, 2002.²⁰⁸ It requested written comments on or before October 15,

Chair, General Rules of Practice Committee (July 5, 2002).

201. *Amended Petition*, *supra* note 198.

202. Letter from Larry Podany, Executive Director, Minnesota Sheriffs' Association to Advisory Comm. (Aug. 5, 2002) (CD-ROM, *supra* note 40).

203. Letter from Doug Johnson et al., Minnesota County Attorneys Association to Hon. Edward C. Stringer, Chair, Advisory Comm. (Aug. 6, 2002).

204. Letter from Mark H. Gardner, Co-Chair, Minnesota State Bar Association Court Rules and Administration Comm. to Advisory Comm. (Aug. 14, 2002).

205. Advisory Comm. Report I, *supra* note 197.

206. Interview with Michael B. Johnson, *supra* note 197.

207. Advisory Comm. Report I, *supra* note 197, at 4.

208. *Order for Hearing to Consider Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments*, No. CX-89-1863 (Minn. Aug. 2002).

2002,²⁰⁹ and received numerous public comments.²¹⁰ The comments fell generally into two groups: those in support and those opposed.

a. Rule Supporters

As might have been expected, many individuals and organizations from the Indian legal community supported the rule. Among those were the Minnesota American Indian Bar Association (“MAIBA”),²¹¹ the Indian Child Welfare Law Center,²¹² law professors from all four Minnesota law schools,²¹³ and the Northern Plains Tribal Judicial Institute.²¹⁴ Several of these groups emphasized the need for the rule. The Indian Child Welfare Law Center, for example, described five recent cases in which children and teenagers faced potentially dangerous situations because of non-recognition of a tribal court order.²¹⁵ MAIBA similarly noted that “state courts have not consistently or effectively enforced” tribal court orders, and asserted the need for some uniformity in this area, which the rule could provide.²¹⁶ MAIBA also argued, as did the Northern Plains Tribal Judicial Institute, that parties should not be able to re-litigate issues that had already been decided in a lawful forum.²¹⁷ The law professors pointed out that the scope of

209. *Id.*

210. The Court received nearly 500 pages of material, which is available on CD-ROM at the Minnesota State Law Library in the Minnesota Judicial Center. The comments are a monument to participatory government. Some comments were drafted by attorneys, others by laypeople. The comments cover a wide range of perspectives and subjects, some seemingly tangential to the issue.

211. Letter from Eileen J. Strejc, President, Minnesota American Indian Bar Association, to Frederick Grittner, Clerk, Minnesota Appellate Courts (Oct. 14, 2002) (CD-ROM, *supra* note 40).

212. Letter from Heidi A. Drobnick, Executive Director, Indian Child Welfare Center, to Fredrick Grittner, Clerk, Minnesota Appellate Courts (Oct. 14, 2002) (CD-ROM, *supra* note 40).

213. Author Kevin Washburn submitted comments jointly with Professor Eric Janus (William Mitchell College of Law), Professor Mary Jo Brooks-Hunter (Hamline University School of Law) and Professor Scott Taylor (University of St. Thomas). Written Statement by Law Professors Urging the Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments in State Courts (Oct. 15, 2002) (CD-ROM, *supra* note 40) [hereinafter Law Professor’s Statement].

214. Letter from B.J. Jones, Director, Northern Plains Tribal Judicial Institute, to Minnesota Supreme Court (filed Oct. 15, 2002) (CD-ROM, *supra* note 40).

215. Letter from Heidi A. Drobnick, *supra* note 212.

216. Letter from Eileen J. Strejc, *supra* note 211.

217. *Id.*; Letter from B.J. Jones, *supra* note 214.

such a rule was limited because of the limited nature of tribal jurisdiction, but that the need for the rule was great in the cases in which it would apply.²¹⁸ They also provided background on the development of tribal courts.²¹⁹

Other organizations expressing support for the rule were the Minnesota Department of Human Services and Mid-Minnesota Legal Assistance.²²⁰ Both of these organizations, working directly with impoverished tribal members, could be expected to encounter issues surrounding the recognition of tribal court orders on a fairly regular basis.²²¹ Mid-Minnesota Legal Assistance pointed out that the rule would improve efficiency and noted that tribal judges are well qualified.²²²

In addition to tribal judges, two individuals from the judicial community who provided comments were Dennis J. Murphy, Chair of the Administration Committee of the Conference of Chief Judges, and Robert D. Walker, a trial court judge for the District Court of Martin County in Minnesota.²²³ Particularly strong support came from the Minnesota Supreme Court's own Implementation Committee on Multicultural Diversity and Racial Fairness in the Courts.²²⁴ The Implementation Committee stated that the rule would help to combat "general ignorance in the legal community about issues of tribal court jurisdiction, sovereignty and

218. See Law Professor's Statement, *supra* note 213, at 1.

219. *Id.* at 2-3.

220. Letter from Wayland Campbell, Director, Child Support Enforcement Division, Minnesota Department of Human Services, to Hon. Kathleen Blatz, Chief Justice, Minnesota Supreme Court (Oct. 15, 2002) (CD-ROM, *supra* note 40); Letter from Jeremy Lane, Executive Director, Mid-Minnesota Legal Assistance, to Frederick Grittner, Clerk, Minnesota Appellate Courts (Oct. 26, 2002) (CD-ROM, *supra* note 40).

221. Letter from Jeremy Lane, *supra* note 220.

222. *Id.*

223. Letter from Hon. Dennis J. Murphy, Chief Judge, Ninth Judicial District, District Court of Minnesota, to Frederick Grittner, Clerk, Minnesota Appellate Courts (Oct. 15, 2002) (expressing a desire to appear before the supreme court to support the conference of the Full Faith and Credit Proposal) (CD-ROM, *supra* note 40); Letter from Robert D. Walker, Judge, Fifth Judicial District, District Court of Minnesota, to Hon. Kathleen Blatz, Chief Justice, Minnesota Supreme Court (Nov. 4, 2002) (supplementing the oral presentation made at the Minnesota Supreme Court hearing in support of the Full Faith and Credit Proposal) (CD-ROM, *supra* note 40).

224. Letter from Bridget Gernander, Project Specialist, Court Services Division, State Court Administrators Office, Minnesota Supreme Court, to Frederick Grittner, Clerk, Minnesota Appellate Courts (Oct. 11, 2002) (CD-ROM, *supra* note 40).

autonomy.”²²⁵ The committee asserted that the rule would help to educate the judiciary and the bar, would improve the relationship between state and tribal courts, and would make Native Americans safer overall, an important priority in light of the large Native American population in Minnesota.²²⁶

Finally, Brian Melendez, a member of the Advisory Committee, which had advised against the rule, submitted a comment in support of the rule.²²⁷ In particular, he criticized the recurring argument by many rule opponents that the legislature is the proper forum for the recognition issue.²²⁸ If the legislature did not approve of the Minnesota Rule, he pointed out, it was free to legislate.²²⁹

b. Rule Opponents

Opposition to the rule created unlikely bedfellows. Among the most vocal opponents were individual Native Americans who expressed the view that tribal courts were in some way incompetent. For example, a member of the Lower Sioux community opposed the rule because she felt the tribal courts were plagued by “favoritism, nepotism, and inefficiency.”²³⁰ A self-described documentary film producer raised similar concerns,²³¹ as did Indian journalists with the *Native American Press/Ojibwe News*.²³²

225. *Id.*

226. *Id.*

227. *Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgment: Hearing Before the Minnesota Supreme Court*, No. CX-89-1863 (Minn. Oct. 29, 2002) (statement of Brian Melendez, Member of the Advisory Committee on the General Rules of Practice dated Oct. 15, 2002) (CD-ROM, *supra* note 40) [hereinafter *Minnesota Petition Hearing*].

228. *See id.*

229. *Id.*

230. *Id.* (affidavit of Maxine V. Eidsvig dated Oct. 15, 2002).

231. Letter from Sheldon Wolfchild, Producer and Spokesman for the “New Buffalo” Elders, to Frederick Grittner, Clerk, Minnesota Appellate Courts (Oct. 14, 2002) (requesting time to speak at the hearing and that the Minnesota Supreme Court deny the Petition) (CD-ROM, *supra* note 40). Sheldon Wolfchild is producer of a documentary “New Buffalo” that apparently dealt with enrollment issues of a small wealthy tribe, the Shakopee Mdewakanton Sioux Community. *See id.*

232. *Minnesota Petition Hearing*, *supra* note 227 (statement of Clara NiiSka dated May 22, 2002 and supplemental oral testimony filed Nov. 6, 2002). NiiSka’s comments apparently were based primarily on a personal experience with a Red Lake tribal court. *Id.* Ms. NiiSka’s publisher, William J. Lawrence, was also a vocal opponent of the rule. *Minnesota Petition Hearing*, *supra* note 227 (statement of William J. Lawrence dated May 22, 2002).

Many of the comments reflected the feelings of individual Indian litigants who were disgruntled following previous tribal court proceedings.

Aligned with these individual Indians were citizens groups that oppose tribal courts and other exercises of tribal sovereignty, such as Citizens for Lawful Government, a citizen's group located near the White Earth Chippewa Reservation, and Proper Economic Resource Management ("PERM"), an organization that has supported unsuccessful federal litigation with the Mille Lacs Band of Ojibwe over reservation boundaries.²³³ PERM noted the lack of separation of powers in tribal governments.²³⁴ Opposition was registered as well by state and local government officials, such as Frank Corteau, a Mille Lacs County Commissioner, and Sondra Erickson, State Representative of Minnesota District 17A.²³⁵ Representative Erickson cited a lack of information about tribal courts and questioned whether they are independent, whether they uphold civil rights, and the scope of tribal jurisdiction.²³⁶ Some of the mainstream organizations that had previously made their opposition to the rule known also filed comments.²³⁷

233. See Randy V. Thompson, *Supreme Court Adopts PERM's Argument on Tribal Court Judgments* [sic], at <http://www.perm.org/articles/a180.html> (last visited Nov. 12, 2004).

234. *Id.*

235. CD-ROM, *supra* note 40.

236. Letter from Sondra Erickson, Minnesota State Representative District 17A, Minnesota House of Representatives, to Hon. Kathleen Blatz, Chief Justice, Minnesota Supreme Court (Oct. 14, 2002) (CD-ROM, *supra* note 40).

237. The Minnesota State Bar Association Court Rules and Administration Committee reiterated its suggestion that the provisions of the rule be integrated into existing rules and statutes. Letter from Mark Gardner, Co-Chair, Minnesota State Bar Association Court Rules and Administration Committee, to Minnesota Supreme Court (Oct. 14, 2002) (CD-ROM, *supra* note 40). Minnesota State Bar Association Chairman John Duckstad, however, testified in favor of the rule. *Minnesota Petition Hearing*, *supra* note 227. The Minnesota County Attorneys Association reiterated its concern about financial burdens to the state and counties, and again asserted that the rule was overbroad, and should be addressed through the legislative process. Letter from John Kingrey, Executive Director, Minnesota County Attorneys Association, to Frederick Grittner, Clerk, Minnesota Appellate Courts (Oct. 15, 2002) (CD-ROM, *supra* note 40) (requesting to speak at the hearing against the proposal). The Minnesota Sheriffs' Association also repeated its position that the issue should be referred to the legislature. Letter from Larry Podany, Executive Director, Minnesota Sheriffs' Association, to Minnesota Supreme Court, Rules Advisory Committee (July 11, 2002) (CD-ROM, *supra* note 40).

3. *The Hearing*

The Minnesota Supreme Court public hearing took place on October 29, 2002. In addition to the written comments, the court considered the oral testimony of selected individuals.²³⁸ At the hearing, Chief Justice Blatz indicated that the court would accept additional written comments on the proposed rule.²³⁹ In the month of November, 2002, several individuals and organizations submitted further written materials.²⁴⁰ Rule supporters attempted to clarify some of the issues raised during the hearing.²⁴¹

Hennepin County Judge Robert A. Blaeser responded to several concerns regarding the rule.²⁴² Judge Blaeser first noted that many of the opponents of the rule had personal issues with their tribal courts, but that the rule was set up with safeguards so that if their complaints were legitimate, litigants would be protected.²⁴³ He also responded to concerns about the overbreadth of the rule by noting that tribal court jurisdiction is already

238. Those testifying were: Hon. Robert H. Schumacher, Minnesota Court of Appeals; Hon. Henry M. Buffalo, Jr., Tribal Court of the Shakopee Mdewakanton Sioux Community; Hon. Robert Blaeser, Fourth Judicial District; David Herr, Advisory Committee; Jon Duckstad, President of MSBA; Bill Lawrence, Native American Press/Ojibwe News; Randy V. Thompson, Nolan, MacGregor & Thompson; Laura Guthrie, Citizens for Lawful Government; Earl Mauss, Cass County Attorney; Kevin K. Washburn, University of Minnesota Law School; Sheldon Wolfchild, documentary producer; Jackie CrowShoe, Shakopee Child Welfare Officer; Clara NiiSka, Native American Press/Ojibwe News; Norman Deschampe, President of Minnesota Chippewa Tribe; and George Soule, Bowman and Brooke L.L.P.. *Minnesota Petition Hearing*, *supra* note 227. Apparently not everyone who wanted to was able to testify because of time constraints. Clara NiiSka, *Minnesota Supreme Court Rejects Proposed 'Full Faith and Credit' Rule*, NATIVE AMERICAN PRESS/OJIBWE NEWS (Mar. 7, 2003), available at http://www.press-on.net/articles/3-7court_rejects_rule.html (last visited June 21, 2004) (subscription required to view article online). Minnesota State Bar Association Chairman John Duckstad, however, testified in favor of the rule. *Minnesota Petition Hearing*, *supra* note 227.

239. *Minnesota Petition Hearing*, *supra* note 227.

240. Having learned that the Petition had not cited the new Arizona Rules, the author submitted additional materials, including a copy of the Arizona Rules, foreshadowing the subject of this article. See Letter from Kevin K. Washburn, Associate Professor, University of Minnesota Law School, to Frederick Grittner, Clerk, Minnesota Appellate Courts (Nov. 1, 2002) (CD-ROM, *supra* note 40).

241. *Minnesota Petition Hearing*, *supra* note 227.

242. Letter from Judge Robert A. Blaeser, Judge, Fourth Judicial District, to Frederick Grittner, Clerk, Minnesota Appellate Courts (Nov. 1, 2002) (CD-ROM, *supra* note 40).

243. *Id.*

limited.²⁴⁴ Finally, he stated that the legislature is not the proper forum for this issue because the recognition of tribal court judgments occurs entirely within the judicial system, and the legislature is subject to political pressures that would interfere with the process of reasoned analysis.²⁴⁵

Attorney Vanya Hogen of Faegre & Benson addressed several other concerns.²⁴⁶ In response to the idea that tribal courts are somehow incompetent, she noted that each of the tribal courts in Minnesota possesses “established rules of procedure, law-trained judges, and [renders] decisions that are available to the public.”²⁴⁷ Hogen also urged the court to “recognize much of the opposition for what it is: *allegations of disgruntled litigants and accusations by tribal political dissenters.*”²⁴⁸

Finally, the Minnesota Forum responded to several of the major issues.²⁴⁹ It noted that the proposed rule did not constitute substantive law, but simply recognized traditional principles of comity.²⁵⁰ The forum also listed the statutes, rules, and court decisions regarding the issue in the various states.²⁵¹

On March 5, 2003, the Supreme Court rejected the rule as proposed, and ordered the Advisory Committee “to consider rules to provide a general framework for the recognition and enforcement of tribal orders and judgments where there is an existing legislative basis for doing so.”²⁵² An attorney, Randy V. Thompson, claimed credit for the proposed rule's defeat on behalf of his clients, including Native American Press publisher William Lawrence and PERM.²⁵³

244. *Id.*

245. *Id.*

246. Letter from Vanya Hogen, Attorney, Faegre & Benson L.L.P., to Frederick Grittner, Clerk, Minnesota Appellate Courts (Nov. 4, 2002) (CD-ROM, *supra* note 40).

247. *Id.*

248. *Id.* (emphasis in original).

249. Letter from Judge Henry M. Buffalo, Jr., Chair, Minnesota Tribal Court Association, and Judge Robert H. Schumaker, Chair, State Court Committee, Tribal Court/State Court Forum, to Frederick Grittner, Clerk, Minnesota Appellate Courts (Nov. 5, 2002) (CD-ROM, *supra* note 40).

250. *Id.*

251. *Id.*

252. Mark A. Cohen, *Enforcement Proposal for Tribal Courts Rejected*, MINN. LAW., Mar. 10, 2003, at 1.

253. *See, e.g.*, Thompson, *supra* note 233.

4. *A New Rule*

In April, 2003, Judge Small reported to the Advisory Committee that in the month since the court's order regarding the rule, the Minnesota Forum had received reports of problems regarding both VAWA and ICWA.²⁵⁴ Judge Small encouraged the Advisory Committee to reconsider the rule.²⁵⁵ On September 17, 2003, the Advisory Committee issued its final report in which it included its recommended version of the rule.²⁵⁶ The new proposal was nearly identical to the Minnesota Rule as it would ultimately be approved by the Minnesota Supreme Court.²⁵⁷ In its report, the Advisory Committee admitted that its new proposed rule was largely hortatory in nature.²⁵⁸ Two days later, the Supreme Court solicited comments on the new proposed rule, to be filed no later than November 3, 2003.²⁵⁹ Responding to that invitation, the Minnesota Forum praised the Advisory Committee's efforts, and suggested amendments to the new proposed rule.²⁶⁰ The most important of these suggestions was to include in Rule 10.01(b)(1) a direct reference to other state and federal statutes mandating recognition of tribal court orders and judgments.²⁶¹

On December 11, 2003, the Minnesota Supreme Court adopted a rule which is virtually identical to that proposed by the Advisory Committee.²⁶² The rule became effective on January 1, 2004.²⁶³

254. Letter from Hon. Andrew M. Small, Judge, Lower Sioux Community in Minnesota Tribal Court Judgment, to Michael B. Johnson, Staff Attorney, Advisory Committee (Apr. 11, 2003).

255. *Id.*

256. Recommendations of Minnesota Supreme Court Advisory Committee on General Rules of Practice (Sept. 17, 2003).

257. *Id.* at 4-6.

258. *Id.* at 4.

259. *Order for Hearing to Consider Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments*, No. CX-89-1863 (Minn. Aug. 2002).

260. Letter from Hon. Andrew Small, Judge, Tribal Court/State Court Forum, to Frederick Grittner, Clerk, Minnesota Appellate Courts (Nov. 3, 2003) (CD-ROM, *supra* note 40).

261. *Id.*

262. The supreme court did not adopt any of the suggestions made by the Minnesota Tribal Court/State Court Forum.

263. *See* MINN. R. GEN. PRACT. 10.

IV. THE LEGACY OF PUBLIC LAW 280

Given that Minnesota state and tribal judges began with a proposal similar to Arizona's and used a similar process to evaluate the proposal, how did Arizona and Minnesota reach such different results? The answer could be explained by various factors, such as the different level of leadership on the issue at the state level in the two states, the existence of strong federal judicial leadership in the Arizona process (which was absent in the Minnesota process), or even the different characteristics of tribal courts in the two states. While each of these factors will be discussed briefly, the best answer likely involves a 1953 statute called Public Law 280, and its enduring legacy in Minnesota.

A. *Public Law 280*

In 1953, Congress enacted a law that shifted certain broad-ranging power over Indian reservations to certain states.²⁶⁴ Commonly referred to as Public Law 280, this law gave states the power to exercise criminal jurisdiction²⁶⁵ and civil adjudicatory authority over Indian reservations.²⁶⁶

Public Law 280 was an unprecedented extension of state power over Indians on Indian reservations and a reflection of the official federal Indian policy of the time, a period that has since become known as the "Termination Era."²⁶⁷ The termination policy that Public Law 280 embodied reflected Congress's long term design to terminate the special relationship that Indian tribes had with the United States, end tribal governance, and subject individual Indians, like other Americans, to the general laws of the states.²⁶⁸

After the enactment of Public Law 280, the courts of the designated states possessed the power to exercise criminal jurisdiction on Indian reservations as well as "jurisdiction over civil causes of action between Indians or to which Indians are parties

264. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-90 (codified in scattered sections of 18 and 28 U.S.C.).

265. *Id.* § 2.

266. *Id.* § 4.

267. See generally CAROLE GOLDBERG, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280* (1997). Professor Goldberg is the leading expert on Public Law 280; the book includes law review articles published over a span of twenty five years on the subject. *Id.*

268. See generally RENNARD STRICKLAND ET AL., *COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* 152-53, 170-77 (1982).

. . . .²⁶⁹ As a result, state courts were available to litigants even for disputes between Indians on a reservation.

Public Law 280 did not apply to reservations in Arizona and several other states, but it did apply to most of the reservations in Minnesota.²⁷⁰ The difference in the legal regime in Arizona and Minnesota accomplished by Public Law 280 is striking. In *Williams v. Lee*,²⁷¹ a case that arose in Arizona shortly after the enactment of Public Law 280, the Arizona courts served as the forum for a simple dispute over the sale of goods between a non-Indian seller and an Indian consumer arising on the Navajo Reservation in northern Arizona.²⁷² In adjudicating the dispute, the Arizona Superior Court ruled for the plaintiff and the Arizona Supreme Court affirmed.²⁷³ The Indian defendants then sought certiorari.²⁷⁴

In a terse and sharply worded opinion, the U.S. Supreme Court reversed the Arizona Supreme Court.²⁷⁵ Noting the fact that the tribe has “greatly improved its legal system through increased expenditures and better-trained personnel,”²⁷⁶ the Court held that “to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.”²⁷⁷

Thus, in the absence of Public Law 280 authority or other authority conferred on states by Congress, the Supreme Court was fiercely protective of the authority of tribal courts. In later cases, the Supreme Court continued to rebuff attempts by Arizona authorities to exercise state power on Indian reservations.²⁷⁸ In contrast to the independence of tribal courts and tribal governments in Arizona, Public Law 280 allowed broad intrusions of state power on Indian reservations in Minnesota and other states.

Public Law 280 also insured that even in the absence of a tribal

269. 28 U.S.C. § 1360(a) (2000).

270. *Id.* The states where it applied immediately were California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon, and Wisconsin. *Id.* It was later extended to Alaska and other states. *Id.*

271. 358 U.S. 217 (1959).

272. *Id.*

273. *Williams v. Lee*, 319 P.2d 998 (1958).

274. *Williams*, 358 U.S. at 218.

275. *Id.*

276. *Id.* at 222.

277. *Id.* at 223.

278. *See, e.g.,* McClanahan v. Ariz. State Tax Comm’n, 411 U.S. 164 (1973); Warren Trading Post v. Ariz. State Tax Comm’n, 380 U.S. 685 (1965).

court, there was a forum in state courts to resolve disputes between Indians on tribal lands.²⁷⁹ Given the existence of the state court forum for most of the reservations in Minnesota, tribal courts were not needed to resolve disputes; from a purely legal standpoint, they could be considered “optional.”²⁸⁰ The history of tribal courts in Minnesota suggests that this may have been the view of tribal governments. Most of the active tribal courts in Minnesota were not founded until after 1978.²⁸¹

In creating state judicial authority on Indian reservations, Public Law 280 not only effectively stunted the development of tribal judicial systems; it also had other side effects, including preventing an environment of respect for tribal courts from developing. In Arizona, where state authorities repeatedly sought to exercise authority on Indian reservations, they were consistently rebuffed in a steady procession of U.S. Supreme Court cases that likely had the effect of embarrassing and, ultimately, educating Arizona officials. The protectiveness of the Supreme Court and the lower federal courts created a respectful environment in which tribal courts could operate side-by-side with state courts.

In contrast, in Minnesota, state courts have routinely been able to exercise substantial—and lawful—authority on Indian lands.²⁸² The pervasive influence and power of the state on Indian reservations has made the remaining power of Indian tribes comparatively less substantial and, to some people, less legitimate.

It would be anathema to a Navajo to prefer being hauled before a state court instead of a tribal court. Thus, the Arizona Rules had little or no opposition from Indian people.²⁸³ The

279. Act of Aug. 15, 1953, ch. 505, § 4, 67 Stat. 588-90 (codified in scattered sections of 18 and 28 U.S.C.).

280. From a tribal government and policy standpoint, culturally appropriate dispute resolution processes might not be considered “optional.”

281. According to literature describing the tribal courts in Minnesota that was provided to the Minnesota Supreme Court with the petition for the recognition rule, the tribal court of the Bois Forte Band of Chippewa was established in 1947, the White Earth Band in 1978, the Mille Lacs Band in 1983, the Shakopee Mdewakanton Sioux Community in 1988, the Lower Sioux Indian Community in 1993, and the Upper Sioux Indian Community in 1994. *Minnesota Petition*, *supra* note 58, at 3.

282. Even Minnesota authorities have been corrected by the U.S. Supreme Court when they have attempted to overstep their bounds. See *Bryan v. Itasca County*, Minn., 426 U.S. 373 (1976) (stating Public Law 280 does not include the power to tax Indian property on Indian reservations). This has been a rare event, however, because state authority is fairly broad.

283. Telephone Interview with David Withey, *supra* note 154.

Minnesota Rule, in contrast, faced opposition from members of Indian tribes, in some cases apparently because they were disgruntled litigants in tribal court disputes.²⁸⁴ While tribal courts have long been established and long been active in Arizona, they are generally newer in Minnesota and apparently even Indian people are not completely convinced of their legitimacy.

There are other differences between the tribal courts in Arizona and Minnesota. Arizona's tribal courts are perhaps more well-established than the tribal courts in Minnesota. The Navajo Nation alone, for example, has a population of over 180,000,²⁸⁵ and its courts handle well over 50,000 cases a year.²⁸⁶ The size of this judicial system creates different judicial dynamics. In Arizona, the tribal courts are a key component of the provision of justice within the state. Absent the tribal courts, the Arizona state courts might be forced to re-litigate thousands of cases. Minnesota does not have any tribes that large,²⁸⁷ nor any tribal courts with dockets that extensive.

Some of the opponents to the Minnesota Rule criticized tribal courts by noting alleged conflicts of interest because some of the tribal judges serve part-time as judges and part-time as attorneys in other tribal courts.²⁸⁸ The lack of a full-time tribal judicial class in Minnesota is both a blessing and a curse. Judicial independence and authority surely benefits from a class of judges who do not practice as attorneys in other contexts. Indeed, full-time judges attain a status of apparent impartiality that practicing lawyers can never fully obtain, at least while remaining in the fray as an advocate. On the other hand, few of the small tribes in Minnesota have caseloads that warrant a full-time judiciary. Like some state and even federal magistrate judges, some tribal judges serve only part-time. Having a judge who also moonlights as an attorney in other courts is not ideal, but it reflects one advantage of part-time judges: many of them have formal law degrees, reflecting substantial formal legal training. In contrast, many of the justices of the Navajo Nation Supreme Court have been lay persons.

While discomfort with part-time judges may not be completely

284. See *supra* notes 230-234 and accompanying text.

285. U.S. Census 2000, <http://www.census.gov/main/www/cen2000.html> (last visited Nov. 2, 2004).

286. BUILDING COOPERATION, *supra* note 114, app. B.

287. Leech Lake, for example, has approximately 10,000 members, while Red Lake has about 5,000. U.S. Census 2000, *supra* note 285.

288. *Minnesota Petition Hearing*, *supra* note 227.

devoid of merit, a tribe should not be forced to wait until it can develop a full-time case docket to begin a tribal judiciary. If a tribe, in its sovereign judgment, decides to swear in part-time judges, those judges are clothed in the tribe's sovereignty and their decisions should be respected as such.

Unfortunately, the environment in Minnesota is such that not all have accepted the fundamental concept of tribal sovereignty. Indeed, the Minnesota Rule faced opposition from groups that are not focused particularly on tribal courts, but that seek to raise a far broader point: they question the lawful basis of tribal sovereignty.²⁸⁹ In light of the long line of statutes, Supreme Court cases, and executive actions affirming tribal sovereignty, such claims are absurd. Public Law 280, however, may have helped to create an environment in which such claims can be made.

Public Law 280 should not be seen as an insurmountable barrier to good judicial policy on the recognition of tribal judgments. Indeed, Wisconsin, another Public Law 280 state, has adopted a recognition rule that is highly respectful of tribal courts.²⁹⁰ Thus, while Minnesota's approach to tribal courts has probably been strongly affected by Public Law 280, Minnesota's agnostic approach to tribal courts was not inevitable. Other factors must have been involved.

B. The Influence of Federal and State Leadership

In Arizona, the recognition proposal began at the state supreme court level and it seems to have had tremendous support there.²⁹¹ Yet, even though the question at issue was whether the

289. See *supra* notes 230-237 and accompanying text.

290. WIS. STAT. § 806.245 (2003) (proclaiming full faith and credit for tribal courts, but setting forth a list of requirements that look more like comity).

291. Arizona's process began at the request of the Conference of Chief Justices; the Arizona Supreme Court issued an administrative order for the establishment of Arizona's Tribal Court/State Court Forum. David Withey, the Chief Counsel for the Arizona Supreme Court, was an active participant on the Arizona Court Forum from the very first meeting. Some of the Arizona Supreme Court Justices themselves appear to have been more supportive of the Arizona Forum. The forum's report, for instance, contains a lengthy and glowing expression of gratitude to former Chief Justice Frank X. Gordon. BUILDING COOPERATION, *supra* note 114, at 3 (stating "[h]e has, among other things, opened the State Court Judges' Annual Conference and training to tribal court judges; he has established good working relationships with many tribal court judges; he has visited tribal courts; and he has actively and consistently supported the efforts of this Forum"). Former Chief Justice, Stanley G. Feldman co-authored an article

state courts should recognize tribal court judgments and orders, there was a significant federal component to the initiative. Not only were federal judges and officials involved in the process of developing the proposal within the Arizona Court Forum,²⁹² it was the Ninth Circuit's decision in *Wilson v. Marchington* that provided inspiration for the substance of the rule.²⁹³ The existence of federal common law and the pervasive effect of federal law in Indian country in Arizona undoubtedly produced a different environment than in Minnesota, where Public Law 280 has made state authority more pervasive.

In Minnesota, leadership at the state supreme court level was brief. In addition, Public Law 280 has also had the effect of defederalizing Indian country and removing federal officials and federal judges from important public policy questions related to tribal courts. With greater involvement by federal officials, who would have been influenced presumably by strong federal policies favoring tribal self-determination and the pervasive notion of the federal government's trust responsibility to look out for tribes in interactions with states, the result may have been different.

C. *The Road Ahead*

Public Law 280 remains the law of the land.²⁹⁴ As long as Public Law 280 remains in place, tribal courts will remain, to some

entitled "Resolving State-Tribal Jurisdictional Dilemmas" with David Withey in 1995. See Stanley G. Feldman & David L. Withey, *Resolving State-Tribal Jurisdictional Dilemmas*, 79 JUDICATURE 154 (1995). In contrast, Minnesota's proposal proceeded in almost a grassroots fashion with support coming primarily from tribal court and lower state court judges. While Justice Gardebring of the Minnesota Supreme Court helped to establish the Minnesota Forum, she soon left the bench and the forum no longer enjoyed the visible support of a state supreme court justice. From then on, the state leadership came from Judge Robert Schumacher at the Court of Appeals level and from district court judges.

292. Minnesota seems to have exported some of the talent to Arizona that was involved in the development of the Arizona Rules. Judge William C. Canby, Jr., born and raised in St. Paul and a graduate of the University of Minnesota Law School, now serves on the U.S. Court of Appeals for the Ninth Circuit in Arizona and occasionally appeared at Forum meetings. Judge Canby is an expert on federal Indian law. Other federal officials, including an assistant U.S. attorney, were members of the Forum. See *Minnesota Petition*, *supra* note 58, app. B.

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

294. The state has "retroceded" some of its Public Law 280 jurisdiction on the Bois Forte reservation to the Band and the federal government. B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 473 n.66 (1998).

degree, an optional forum for many disputes arising on Indian lands and will retain exclusive jurisdiction only for causes of action against the tribe. Public Law 280 need not, however, serve as an obstacle to tribal court development. As a matter of judicial economy, and the rational administration of justice, state courts should welcome the provision of justice by their brethren on tribal courts. Tribal courts seek to perform the same function that state courts perform, that is, to provide justice to litigants in a manner that is consistent with the laws and values of the public they serve.

As the volume of cases in tribal courts increase, state courts will have more occasions to address tribal court judgments and orders. Through such work, the courts may develop, through common law, what the Minnesota Supreme Court stopped short of accomplishing in the rule. Faced with the issue in a case in which it must decide, the Minnesota Supreme Court may well establish a common law rule of comity and respect toward tribal court judgments. While the issue is sure to percolate up to the state supreme court eventually, the exceedingly wide discretion contemplated by the existing rule and the unlikelihood of a hearing means that the record may not be developed for appellate review.

If the case reaches the appellate level, there is some reason to believe that the substantive rule adopted will be more respectful toward tribes than the Minnesota Rule. In the case of *Desjarlait v. Desjarlait* in 1985, the Minnesota Court of Appeals issued an opinion in which it rejected the strongest and most binding form of respect, full faith and credit, and seemed to suggest that it was inclined to approach questions of recognition of tribal court judgments as a matter of comity.²⁹⁵ As a matter of law, *Desjarlait's* rejection of federally-mandated full faith and credit seems correct.²⁹⁶ The exact contours of the rule of comity that it sought to apply, however, were not delineated.

295. See *Desjarlait v. Desjarlait*, 379 N.W.2d 139 (Minn. Ct. App. 1986).

296. For a short survey of the academic debate, compare Robert N. Clinton et al., *Dispute Resolution in Indian Country: Does Abstention Make the Heart Grow Fonder?*, 71 N.D. L. REV. 541, 554 (1995) (stating "I submit, and always have maintained, that tribal judgments are judgments of the territories within the meaning of the Full Faith and Credit Act, thereby indicating that they are entitled to the same full faith and credit as state judgments") with 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) (rejecting the view that tribes are included within the Full Faith and Credit Act).

If the issue is faced directly, it would seem difficult, however, to justify a refusal to give any respect to a tribal court ruling. After an appropriate amount of time and perhaps after district courts have had an opportunity to struggle with the virtually unlimited grant of discretion in the Minnesota Rule, the Minnesota Supreme Court should reconsider the issue. At that time, it would be well within the mainstream of state courts nationwide if it adopted a rule that was cautiously respectful of tribal court decisions; it would also be consistent with the nascent development of common law in this state as represented by *Desjarlail*.²⁹⁷ Comity is the approach taken in *Wilson v. Marchington* and such a rule constitutes a sensible approach to these questions.²⁹⁸

V. CONCLUSION

One of the legacies of Public Law 280 is an unwarranted disrespect for tribal governmental institutions. Because Indian tribal governments have a sovereign right to establish tribal courts, such disrespect is unfounded. If tribal courts exist, they are required by federal law to provide many of the same protections to litigants that state courts must provide. By providing these protections, they earn the right to be treated with respect by state courts.

The Minnesota Supreme Court Rule on the Recognition and Enforcement of Tribal Court Orders and Judgments is a step forward in state-tribal relations because it provides a clear avenue to the recognition of tribal court judgments. It is a very modest step, however. Minnesota should consider implementing a stronger rule that would clearly demonstrate respect for tribal courts, provide more direction to state district judgments to promote uniform treatment of tribal rulings, and encourage cooperation between tribal and state courts.

297. 379 N.W.2d 139.

298. 127 F.3d 805.