Note

The Last Judicial Frontier: The Fight for Recognition and Legitimacy of Tribal Courts

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On July 2, 2018, the Minnesota Supreme Court adopted a new rule governing the recognition and enforcement of tribal court orders and judgments in Minnesota district courts.[1] Through clearer language and diminished judicial discretion, the new rule is a significant step toward respecting tribal sovereignty and ensuring tribal and state courts work together to promote justice. This Note pushes the new Minnesota rule further and proposes a solution that is designed to address issues that exist in Minnesota under the old rule and other states who have similar rules. The new rule in Minnesota is untested, but the old rule led to delays in recognition and to the refusal to enforce tribal court orders where recognition was mandated by state or federal law. One such example of these issues is illustrated by the story of Steven and his son, Walter.[2]

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1. Order Promulgating Amendments to the General Rules of Practice for the District Courts (Rule 10 – Tribal Court Judgments and Orders), No. ADM09-8009 (Minn. Sept. 1, 2018) [hereinafter Rule 10 Order].

2. The facts of this story are based on a case the author of this Note helped litigate. To protect the identity of the client, the names of the parties have been altered and the location of the dispute has been omitted.

Steven was born and raised on a Native American Indian Reservation in Northern Minnesota and, but for the four years he served in the U. S. Navy, he spent his entire life on the reservation.[3] For over ten years, Steven was embroiled in a fierce and contentious child custody battle in his tribe's tribal court regarding his son, Walter, with Walter's biological mother, Carol. Over those ten years, Steven gained and lost custody and visitation rights to Walter. At what seemed to be the end of the custody dispute, Steven finally received a court order issuing him and Carol equal custody and visitation rights. However, the heartache and legal battle was far from over.

Instead of complying with the court order for custody and visitation, Carol chose to move off the reservation so that the Tribe no longer had jurisdiction over her and Walter. This effectively allowed Carol to disregard the tribal court order and escape any repercussions. Steven contacted state police, but upon asking the police to enforce the tribal court order, the police refused because the tribal court order was not from a state court. Steven was left devastated. He felt like his child had been kidnapped.

Not giving up hope, Steven contacted different law offices and legal organizations, but they were either unwilling to help or told him that there was nothing he could do. Two years went by without seeing Walter, but Steven continued to search for a solution. After doing some research on his own, Steven filed a petition in Minnesota state court to have the tribal court custody order enforced in Minnesota. The state court judge wrongly[4] denied Steven's petition, citing Rule 10.02 of the Minnesota General Rules of Practice, which, prior to the implementation of the new rule, gave judges broad discretion in deciding to recognize tribal court orders.[5] The state court judge was required to grant

3. DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 19 (1997) (noting that tribes have traits, practices, and a culture that is different from predominant Euro-American cultural characteristics). Many tribal members residing on reservations face abject poverty, alcoholism, and substance abuse problems. *Id.* ("[M]ost tribal nations are severely disadvantaged economically and have astounding levels of unemployment and poverty.").

4. *See* MINN. GEN. R. PRAC. 10.01(a) (2003) (mandating child custody determinations, including those of tribal courts, be recognized and enforced pursuant to the Uniform Custody Jurisdiction and Enforcement Act, MINN. STAT. § 518D.104 (2018)).

5. MINN. GEN. R. PRAC. 10.02 (2003). The previous version of Rule 10.02 gave judges unlimited discretion in deciding if they wish to recognize a tribal

Steven's petition pursuant to Rule 10.01 of the Minnesota General Rules of Practice because child custody orders from a tribal court were required to be recognized by statute.[6]

With yet another setback, Steven was left feeling like the country he served to protect was preventing him from seeing his son. Finally, after two years of searching, Steven found a legal organization who drafted a petition on his behalf and represented him in Minnesota state court. The Minnesota court subsequently granted Steven's petition and after thirteen years, his fight to have custody and visitation rights to Walter was finally over.

This story has a happy outcome, but it illustrates why it was imperative to amend the old rule that gave judges broad discretion when deciding to enforce a tribal court order. The story further illustrates why states with similar rules should also consider enacting change. Minnesota's recognition scheme was not fully responsible for the thirteen-year legal battle Steven faced,[7] but it certainly delayed justice and, as the adage goes, justice delayed is justice denied.

This Note explores the level of deference and process in which tribal court orders[8] are recognized and enforced in state courts.[9] This Note focuses on the tribal-state relationship in-

court order, whereas Rule 10.01 afforded judges zero discretion. *See infra* Part II.A.2.b (discussing the previous Minnesota rules).

6. *See* MINN. GEN. R. PRAC. 10.01 (2003) (requiring tribal court orders be recognized and enforced as mandated by statute); *see also* MINN. STAT. § 518D.104.

7. The amount of time Steven's family law issues were litigated for is similar to the amount of time some family law cases are litigated in state family courts. The long time that the case was litigated in the tribal court should not be looked at as a poor reflection of the tribal court.

8. This Note uses "tribal court order" and "tribal court judgment" interchangeably.

9. The use of "deference" in this Note refers to how much respect tribal courts are shown as competent legal bodies. This Note will use the terms "recognized" and "enforced" interchangeably at times to refer to tribal court orders being given effect in state courts. As one author points out,

> [a]lthough often used interchangeably, the terms "enforcement" and "recognition" of foreign judgments refer to two distinct concepts. Enforcement occurs when a court compels a defendant to satisfy a judgment that has been rendered against him or her in the court of a foreign nation. While a court must recognize a judgment in order to enforce it, recognition may also occur independently of enforcement. Recognition occurs when a court precludes litigation of a claim or issue because that claim or issue was previously litigated in the court of a foreign nation.

stead of tribal-federal because there is greater interaction between tribes and states. Particular emphasis will be given to Minnesota, given it is the most recent state to consider and promulgate significant changes to the way tribal court orders are recognized in the state. The recent amendment and historical development of the rule in Minnesota will be used to show the direction this area of the law is heading.

Part I introduces the basics of tribal courts and briefly discusses their sovereignty and jurisdiction as related to state and federal courts. It also discusses the unique features of tribal courts. Part II addresses the question of how much deference should be given to tribal court orders and describes differing viewpoints on that question. The historical development of the rule in Minnesota and the recent changes made by the Minnesota Supreme Court will be discussed and will serve as an example of a recent approach to address these issues. Finally, Part III argues that state legislatures should amend their state constitutions to give full faith and credit to tribal court orders to best increase tribal sovereignty and clarify the status of tribal courts in the American legal system.

I. TRIBAL COURTS: STARTED AT THE BOTTOM AND THEY ARE STILL THERE

Although tribal courts have been a part of the American legal landscape since the nineteenth century, their judicial authority is not considered equal to that of state and federal courts.[10] Section A discusses the historical evolution and unique features of tribal courts. This Section also covers the current jurisdictional framework many tribal courts operate under and explains how this jurisdictional framework fits into the overall framework for tribal sovereignty. Section B concludes with a discussion of the amount of deference that different state courts currently give to tribal court judgments.

Cedric C. Chao & Christine S. Neuhoff, *Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective*, 29 PEPP. L. REV. 147, 147 (2001).

10. *See* United States *ex rel.* Mackey v. Coxe, 59 U.S. (100 How.) 104 (1855) (noting the existence of the Cherokee judicial system).

A. TRIBAL COURTS: THE JUDICIAL SYSTEM OF THE FORGOTTEN THIRD SOVEREIGN

There are three distinct sovereign entities in the United States: the federal government, state governments, and Indian tribes.[11] Each sovereign has its own distinct judicial system.[12] Just like state and federal courts, tribal courts have jurisdiction over certain disputes,[13] but "[t]ribal courts are not United States courts."[14] Many people, including those with a legal education, know little about tribal courts.[15] Despite this, tribal courts have been developing steadily and have increasingly "becom[e] an important part of the judicial fabric of the United States."[16] To understand the current status of tribal courts and the problems they face, a discussion of their historical development is necessary.[17]

1. The Historical Development of Tribal Courts is Marked by a Confusing Array of Statutes and Changing Policies.

The relationship between tribal courts and the United States is characterized by paternalism. Through myriad statutes enacted since the 19th century, the growth of tribal judicial systems have been constrained by dense and confusing statutory frameworks. Given that the United States federal government

11. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 U. TULSA L.J. 1, 1 (1997) (asserting that there are three separate sovereign governments in the United States).

12. *Id.* This Note will refer to the judicial systems and individual courts operated by any tribal governments as tribal courts.

13. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1986) (holding tribal courts have jurisdiction over disputes in their territory); *infra* Part I.A.3.

14. Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 WASHBURN L.J. 733, 733 (2008).

15. 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, 467 (1998) (explaining that some attorneys avoid litigation in tribal courts because they perceive the applicable law to be inaccessible).

16. Kevin K. Washburn & Chloe Thompson, *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*, 31 WM. MITCHELL L. REV. 479, 480 (2004).

17. *See* Jones, *supra* note 15, at 467–68 (asserting that it is important for someone who does not know much about tribal courts to understand the historical evolution of the courts to begin to understand and appreciate them).

possesses plenary power[18] over tribes,[19] Congress is free to control the development of tribal courts as it sees fit.[20] In the federal Indian policy context, there is considerable disagreement surrounding the nature of plenary power.[21] Some argue that this power is exclusive to Congress and Congress may exercise it over Native Americans without regard for constitutional restraints.[22] Others view Congress's exercise of plenary power over Native Americans as nothing more than an arbitrary means by which it is able "to oppress or even eradicate tribal or individual political, civil, or property rights."[23] For now, tribes have the power and ability to govern themselves by creating and enforcing their own policies and laws, but that power could be taken away by Congress at any time, spelling the end of tribal judicial systems.[24] The policy of the United States, today, is to respect the independence of tribal courts and help them develop into competent legal bodies.[25] However, these goals have not always been advanced, which leaves tribal courts no choice but to operate in a state of uncertainty, not knowing if Congress will take away their authority unexpectedly. A brief historical overview of the development of tribal courts illustrates this uncertainty.

18. *Plenary Power*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Power that is broadly construed; esp., a court's power to dispose of any matter properly before it."). The Supreme Court first cited "plenary power" in 1824 to describe the powers of Congress. *See* Gibbons v. Ogden, 22 U.S. (1 Wheat.) 17 (1824).

19. Nat'l Farmers Union Ins. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985) ("[T]he power of the Federal Government over the Indian tribes is plenary."); Charles J. Hyland, *The Tribal Court: Where Does It Fit?*, 65 J. KAN. B. ASS'N 14, 15 (1996) ("[T]he power of the federal government over Indian Tribes is plenary.").

20. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.").

21. WILKINS, *supra* note 3, at 25.

22. *Id.*

23. *Id.*

24. *See* 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, 744 (1996) ("[T]he federal government has the ability to extinguish tribes, tribal courts, and tribal procedures."); Wahwassuck, *supra* note 14, at 734.

25. ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: CASES AND MATERIALS 398 (3d ed. 1991).

a. First Glimpse: From Ex parte Crow Dog *to the Major Crimes Act*

Most tribal courts were brought into being because of the Indian Reorganization Act of 1934.[26] Prior to the passage of the Indian Reorganization Act of 1934, the first signs that tribes may be able to have their own judicial systems came in 1883 when the United States Supreme Court held in *Ex parte Crow Dog* that territorial courts did not have jurisdiction over criminal offenses committed by one Indian against another within Indian country.[27] This decision allowed Native Americans to determine the appropriate punishment for crimes that one band member commits against another band member.[28] While *Ex parte Crow Dog* illustrated the need for a reservation-based dispute system, it also served as the catalyst for the creation of law and policies aimed at taking away tribal sovereignty.[29]

In an attempt to address the need for a reservation-based dispute system, the Bureau of Indian Affairs (BIA) started establishing "Courts of Indian Offenses" in the late 1880s.[30] These courts were nothing like the tribal courts of today.[31] The Courts of Indian Offenses furthered the values and customs of the BIA, not tribes.[32] The BIA used "these courts [as] the agents of assimilation, and followed laws and regulations designed to assimilate the Indian people into both the religious and jurisprudential mainstream of American society."[33] Instead of being used as a mechanism designed to enhance tribal sovereignty and legitimacy, the Courts of Indian Offenses were used as a mechanism to perpetuate racism and oppression; strip Native Americans of

26. Indian Reorganization Act of 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–79 (2012)).

27. *See Ex parte* Crow Dog, 109 U.S. 556, 571–72 (1883).

28. *Id.* ("[O]ffences committed by Indians against . . . each other [are] left to be dealt with by each tribe for itself, according to its local customs.").

29. WILKINS, *supra* note 3, at 68 (describing the decision in *Ex parte Crow Dog* as enhancing tribal sovereignty and also taking it away).

30. Jones, *supra* note 15, at 469; *see also* O'Connor, *supra* note 11.

31. *Id.* at 470.

32. *Id.* The BIA decided what rules and policies would be enforced by the Courts of Indian Offenses, which left tribes with little control over their governance. *See id.* at 469–70 n.43 (explaining that the BIA was setting up the courts illegally, but challenges to their authority were unsuccessful, which left the BIA free to do as it pleased with the court system it created).

33. *Id.* at 470.

their customs, culture, and heritage; and erase any notion of tribal sovereignty and legitimacy.[34]

Congress, viewing the *Ex parte Crow Dog* decision as creating a void in the enforcement of criminal law, and wishing to claw back the sovereignty and jurisdiction tribes gained from the decision,[35] passed the Major Crimes Act in 1885.[36] The Major Crimes Act grants federal courts jurisdiction over certain crimes that are committed by a Native American against another Native American on tribal lands.[37] The passage of the Act erased any progress towards the creation of a tribal judicial system by restoring the legal landscape to what it was prior to *Ex parte Crow Dog*.[38]

b. Turbulent Times: Shifting Federal Indian Policy and Laying the Groundwork for the Tribal Courts of Today

It was not until the passage of the Indian Reorganization Act of 1934 "and the subsequent promulgation of a revised Code of Indian Offenses for Indian tribes," that Indian tribes were able to create and adopt their own codes and laws and were free to create a judicial system to enforce those laws.[39] This was the start of a new era of Indian policy whereby Congress sought to strengthen and protect tribal culture, and political and social organizations.[40] The dramatic shift in policy and the passage of the Indian Reorganization Act laid the foundation for modern tribal courts even though this era did not last long.[41]

34. *See* WILKINS, *supra* note 3, at 64 ("The congressional acts and policies responsible for most of these vast reductions of tribal sovereignty, property, and civil and political rights include[s] . . . the establishment of the Courts of Indian Offenses . . . ."); *cf.* United States v. Clapox, 35 F. 575, 577 (D. Or. 1888) ("These 'courts of Indian offenses' are . . . but mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.").

35. *See* WILKINS, *supra* note 3, at 68–69; *see also* Jones, *supra* note 15, at 469.

36. *See* 18 U.S.C. § 1153 (2013).

37. *Id.*

38. WILKINS, *supra* note 3, at 68–69.

39. Jones, *supra* note 15, at 470–71.

40. WILKINS, *supra* note 3, at 118.

41. *Id.* (noting the favorable policy shift towards Native Americans only lasted from 1934–45).

After the Indian Reorganization Act, the next important statute for tribal court development was Public Law 83-280 ("Public Law 280") in 1953, which enabled states to assume criminal, as well as civil, jurisdiction in matters involving Native Americans as litigants on reservation land.[42] Public Law 280 furthered "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 . . . to the general laws of the states."[43] Public Law 280 embodied this termination policy, and both the BIA and tribes ceased to invest money in tribal courts.[44]

After experiencing a growth stunt at the hands of Public Law 280, the passage of The Indian Civil Rights Act ("ICRA") of 1968 further controlled the development of tribal courts.[45] The ICRA is the last statute that has played a major role in the formation of modern tribal courts.[46] The ICRA mandates that tribes "base their judicial system on Anglo-American notions of due process by superimposing many of the fundamental rights of the United States Constitution upon tribal justice systems . . . ."[47] While this could be seen as a positive, some commentators have noted that this is an example of paternalism making its way into the development of tribal courts.[48] With a brief understanding of

42. Public Law 280, Pub. L. No. 83-280, 67 Stat. 588 (Aug. 15, 1953) (codified as amended at 18 U.S.C. § 1162 (1994), 25 U.S.C. §§ 1321–26 (1994), 28 U.S.C. § 1360 (1994)).

43. Washburn & Thompson, *supra* note 16, at 519; *see also* WILKINS, *supra* note 3, at 166–67 (explaining that the passage of Public Law 280 and the Federal government's policy of physically relocating Native Americans contributed to the goal of assimilating Native Americans into United States culture).

44. Jones, *supra* note 15, at 472.

45. 25 U.S.C. §§ 1301–03 (2012).

46. For other influential statutes that led up to the passage of the ICRA, see WILKINS, *supra* note 3, at 64 ("The congressional acts and policies responsible for most of these vast reductions of tribal sovereignty, property, and civil and political rights included the assignment of Indian agencies to religious societies; the establishment of the Courts of Indian Offenses; the Major Crimes Act of 1885; the General Allotment Act of 1887; the 1891 amendment to the General Allotment Act; the Curtis Act of 1898; and the Burke Act of 1906.").

47. Jones, *supra* note 15, at 474.

48. *Id.* at 474–75 ("This history of externally imposed justice is not an auspicious foundation for the development of indigenous justice systems, and may explain why the uninitiated may find tribal justice systems especially confounding."). Setting aside arguments for the merits of following the Bill of Rights, forcing legal concepts and laws upon another nation which has a distinct culture, different customs, and markedly different conceptions of justice is seen by some as a form of cultural imperialism. *See* WILKINS, *supra* note 3, at 19–20.

the confusing, and at times contradictory, policies and laws that have impacted the development of tribal courts, this Note's proposal serves as a way to clear up the confusion and uncertainty that surrounds tribal courts.

2. The Modern Tribal Court

Despite a history of ups and downs, tribal courts have survived years of laws and policies aimed at their termination.[49] Because Congress created the statutes that grant power to tribal courts, tribal judicial systems mirror state and federal courts.[50] Tribal courts typically operate the same divisions, such as criminal, juvenile, and civil divisions.[51] Judges and lawyers are "law trained," which means they have graduated from law schools in the United States and many of them are members of state bar associations.[52] Judges are often screened by a branch of government that is separate from the judiciary.[53] Tribal courts have their own rules of procedure.[54] Just like state and federal courts, tribal courts typically have both a trial court and appellate court.[55] Increasing use of alternative dispute resolution in state and federal courts is paralleled by tribal courts' use of less-formal and less-adversarial mechanisms for dispute resolution.[56]

49. *See supra* Part I.A.1.

50. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.04[3][C], at 267 (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK].

51. *Id.*

52. O'Connor, *supra* note 11, at 5.

53. COHEN'S HANDBOOK, *supra* note 50. For a more in-depth discussion of how tribal judges are vetted, see Shakopee Mdewakanton Sioux Community, the Lower Sioux Indian Community, the Upper Sioux Community, and the Prairie Island Indian Community, Supplemental Filings for Petition of Minnesota Tribal Court/State Court Forum to Amend Rule 10 at 5, No. ADM09-8009 (filed July 2, 2018), http://www.mncourts.gov/mncourtsgov/media/Tribal-Orders/Supplemental%20Hearing%20Submissions/SMSC-LSIC-USC-PIIC-Supplemental-Filing-to-Rule-10-Petition-final.pdf.

54. Washburn & Thompson, *supra* note 16, at 517; *see also* O'Connor, *supra* note 11, at 2.

55. COHEN'S HANDBOOK, *supra* note 50; *see also* O'Connor, *supra* note 11, at 5 ("[M]ore and more tribal judicial systems have established mechanisms to ensure the effective appealability of decisions to higher courts.").

56. O'Connor, *supra* note 11, at 4–5 (noting that tribal courts have been developing alternative ways to settle disputes that are less adversarial, more agreeable, faster, and less expensive).

Even though there are many similarities between state, federal, and tribal courts, there are also some unique characteristics and struggles that are unique to tribal courts.[57] The starkest difference between tribal courts and US courts is the incorporation of Native American values into the judicial process.[58] A nation's conception of justice is shaped by its cultural values and customs, which in turn dictates the way its judicial system operates.[59] It is difficult to describe how a foreign court adjudicates in the context of its nation's cultural values and customs.[60] It is even harder to discuss how those values and customs are implemented.[61] "Explaining how disputes are resolved extra-judicially among any group of people is a little akin to empirically describing how one puts his pants on in the morning: it is done subconsciously without attributing some method or technique to the experience."[62]

Characteristics that make tribal courts unique range from the physical presence of tribal courtrooms to the collaborative and inclusive judicial procedures many tribal courts employ.[63] Differences also present themselves in the context of punishment of offenders.[64] For example, the Leech Lake Band of Ojibwe Juvenile Justice Code allows the tribal court to impose punishment on juvenile offenders that is reflective of the traditions and customs of the tribe.[65] The Code also allows tribal judges to order a convicted child "to apologize . . . in a traditional manner or ceremony to any persons who have been victimized by the minor's

57. *See, e.g.*, Wahwassuck, *supra* note 14, at 734–35 (discussing the similarities and differences between state, federal, and tribal courts).

58. O'Connor, *supra* note 11, at 3; *see, e.g.*, *Tribal Court*, LEECH LAKE BAND OJIBWE, http://www.llojibwe.org/court/court.html (last visited Nov. 8 2018) (stating that the mission of the Leech Lake Tribal Court is "[t]o Establish [sic] a fair and effective justice system incorporating research-based practices and Ojibwe culture and values; to protect the rights of the Leech Lake Band of Ojibwe people; to preserve natural and Band resources; and to promote peace, health and public safety within the Leech Lake Reservation").

59. Jones, *supra* note 15, at 466.

60. *Id.*

61. *Id.*

62. *Id.*

63. O'Connor, *supra* note 11, at 2; *see also* Carl H. Johnson, *A Comity of Errors: Why* John v. Baker *Is Only a Tentative First Step in the Right Direction*, 18 ALASKA L. REV. 1, 39–40 (2001).

64. *See, e.g.*, LEECH LAKE BAND OF OJIBWE JUDICIAL CODE tit. 4, § 4-13(E) (establishing that a tribal court may impose punishment on juvenile offenders that is reflective of the traditions and customs of the tribe).

65. *Id.*

conduct; including family members, Band officials, and/or community at large."[66] One such example of this type of punishment is ordering a minor who violates the tribe's tobacco code to attend meetings with a tribal elder to learn about the historical role of tobacco in the tribe's culture and then give a presentation on what they learned to a panel of elders.

Although culture and custom may play a role in state and federal courts by, for instance, shaping conceptions of justice, they are much more significant in tribal courts.[67] The codification of tribal customs and traditions into the laws and procedures of tribal courts reflects a different set of priorities from state and federal courts. It may well be these differences in priority and conceptions of justice that lead to an unwillingness to enforce tribal court orders by American courts. Despite the differences, tribal and American courts are both competent judicial bodies capable of administering justice that comport with their nation's cultural values.

3. Tribal Sovereignty and Tribal Court Jurisdiction: Intertwined from the Start

The degree of a tribal court's sovereignty influences its jurisdictional reach.[68] The history of tribal sovereignty and the jurisdiction tribal courts can exercise has ebbed and flowed through the statutory framework that led to the creation of tribal courts.[69] To understand tribal courts, one needs to have a grasp on the development of tribal sovereignty and jurisdiction. In the following subsections, the status of tribal sovereignty will be discussed, followed by a discussion of tribal jurisdiction.

66. *Id.*

67. *See, e.g.*, *id.* § 4-1 ("[The goal of this code is] [t]o recognize and acknowledge the tribal customs and traditions of the Leech Lake Ojibwe and to utilize the same whenever applicable to promote the well-being of Indian children who come before the Juvenile Division . . . [and] [t]o provide culturally specific programming whenever possible.").

68. Richard W. Garnett, *Once More into the Maze:* United States v. Lopez*, Tribal Self-Determination, and Federal Conspiracy Jurisdiction in Indian Country*, 72 N.D. L. REV. 433, 438 (1996) (asserting that jurisdiction is essential to and defines sovereignty); Jones, *supra* note 15, at 485 ("Tribal courts tend to be very jealous about the exercise of their valid jurisdiction, simply because they see that jurisdiction as an extension of their sovereignty and erosions upon it as threats to their survival as distinct nations.").

69. *See supra* Part I.A.1. See WILKINS, *supra* note 3, for an exhaustive discussion of the legislation and landmark cases that have affected tribal sovereignty.

a. An Overview of Tribal Sovereignty

Tribal sovereignty is a difficult concept to grasp and is even more difficult to define given tribes have inherent sovereignty and sovereignty that is granted by the United States. The inherent sovereignty that tribes possess is unusual in that their sovereignty predates the United States Constitution,[70] yet the ability to operate as an autonomous nation is subject to the control of Congress.[71] Tribal sovereignty has long been recognized and is well established in the United States.[72] Tribes are not considered states;[73] rather, they are "denominated domestic dependent nations,"[74] which leaves them with less sovereignty than a foreign nation.[75] "[Indian tribes] are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States."[76] Indian tribes can set up their own governments and exercise authority over their lands and members.[77] Tribal sovereignty goes beyond the powers given to a tribe to embody a cultural/spiritual dimension.[78] Tribal sovereignty "'can be said to consist more of continued cultural integrity than of political powers and to the degree that a nation loses

70. CLINTON ET AL., *supra* note 25, at 312; *see also* Talton v. Mayes, 163 U.S. 376, 384 (1896) (asserting that the rights to self-govern were not delegated by Congress and thus not powers arising from or created by the federal Constitution).

71. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030 (2014) ("As dependents, the tribes are subject to the plenary control by Congress.").

72. Gordon K. Wright, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1401 (1985) (referencing Supreme Court cases from 1832 and 1975, both of which affirmed tribal sovereignty).

73. CLINTON ET AL., *supra* note 25, at 317–18.

74. Cherokee Nation v. Georgia, 30 U.S. (1 Pet.) 17 (1831).

75. *Id.* at 17–18 (evidencing this relationship, *inter alia*, by describing how an act of war against an Indian Tribe would be "considered by all" to be an invasion of the United States).

76. Native Am. Church v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959); *see also* CLINTON ET AL., *supra* note 25, at 320 ("[W]hat is not expressly limited [by the Federal government] remains within the domain of tribal sovereignty." (quoting COHEN'S HANDBOOK, *supra* note 50, at 122)).

77. *Cherokee Nation*, 30 U.S. at 16 (explaining how the treaties made between the United States and tribes evidences their sovereignty); *see also* WILKINS, *supra* note 3, at 20 (detailing the rights that tribal sovereignty affords tribal governments).

78. WILKINS, *supra* note 3, at 20.

its sense of cultural identity, to that degree it suffers a loss of sovereignty.'"[79]

The United States Supreme Court has concluded that tribal sovereignty extends as far as is necessary "to protect tribal self-government or to control internal relations."[80] Even though "tribes are pre-constitutional entities whose sovereignty does not spring from either the federal government or the Constitution,"[81] the status of their sovereignty is ultimately controlled by Congress, who can choose to broaden or narrow it.[82] Since 1980, the federal government has only added to the confusion regarding the status of tribal sovereignty by adopting laws and policies that enhance tribal sovereignty on one hand, while simultaneously taking it away and denying Native Americans Constitutional rights at the same time.[83] All of this has led to confusion and uncertainty as to how autonomous tribes can be.

b. Tribal Court Jurisdiction

Tribal courts have wide jurisdiction within their territory and even some outside of it.[84] Tribes retain the authority to prosecute members for crimes committed in Indian country, a power "justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent."[85] For tribes subject to Public Law 280, the federal government has jurisdiction over certain crimes committed on Indian lands.[86] And, under Public Law 280,

79. David E. Wilkins, *The U.S. Supreme Court's Explication of "Federal Plenary Power": An Analysis of Case Law Affecting Tribal Sovereignty, 1886–1914*, 18 AM. INDIAN Q. 349, 350 (quoting Vine Deloria Jr.).

80. Montana v. United States, 450 U.S. 544, 546 (1981).

81. Craig Smith, *Full Faith and Credit in Cross-Jurisdictional Recognition of Tribal Court Decisions Revisited*, 98 CALIF. L. REV. 1393, 1415 (2010).

82. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030 (2014) (stating that tribes retain their "historic sovereign authority" up to and until Congressional action).

83. WILKINS, *supra* note 3, at 235 (explaining that the federal Indian policy and statutes applicable to tribes have been in conflict, whereby policy dictates that tribal governments should be bolstered and promoted, while some statutes do the opposite).

84. *See* COHEN'S HANDBOOK, *supra* note 50, at 145–46.

85. Duro v. Reina, 495 U.S. 676, 694 (1990).

86. *See* Assimilative Crimes Act, 18 U.S.C. § 13 (2012) (extending "State, Territory, Possession, or District" jurisdiction over any crimes committed in places, such as including Indian country, within those areas); Indian Country Crimes Act, *id.* § 1152 (2012) ("[T]he general laws of the United States as to the

states have concurrent criminal jurisdiction over some crimes arising in Indian country.[87] Under federal common law, tribes generally do not possess inherent prosecutorial authority over non-Indians.[88] This is not, however, an absolute rule.[89] Moreover, Congress may delegate federal prosecutorial authority to tribes if it wants.[90]

With respect to civil jurisdiction, tribes retain inherent authority over their members and their territory.[91] This includes the "power of regulating their internal and social relations."[92] Thus, tribes may exercise civil adjudicatory jurisdiction over the conduct of their members and the conduct of nonmembers that enter onto tribally owned lands. Except under certain circumstances, tribes do not have the power to exercise civil jurisdiction over nonmember conduct on non-tribal land.[93] Congress, however, is free to clarify the confines of tribal inherent power to exercise civil jurisdiction, to limit that power, or to delegate additional federal power. Indeed, Congress has reaffirmed that tribes retain concurrent jurisdiction with the federal government over specified civil matters.[94] Even though tribes have the authority to adjudicate over certain matters, that does not mean that states respect tribal adjudicatory authority by recognizing, as legitimate, tribal court judgments.

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punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to the Indian country.").

87. *Id.* § 1162 ("[J]urisdiction over [Indian country] shall be concurrent among the Federal Government, State governments, and, where applicable, tribal governments.").

88. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

89. *See* Violence Against Women Reauthorization Act of 2013 (VAWA), 25 U.S.C. § 1304 (2016) (affirming tribal authority to exercise "special domestic violence criminal jurisdiction over all persons" under certain circumstances).

90. *See Oliphant*, 435 U.S. at 208 ("[E]ven ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.").

91. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) ("Indian tribes retain attributes of sovereignty over both their members and their territory." (citations omitted)).

92. United States v. Kagama, 118 U.S. 375, 382 (1886). However, this power is not absolute. *See id.* at 379–80 (finding that because the Indians are within the geographical boundary of the United States, Congress has the power to grant them the authority to make their own laws, but that power could be withdrawn, modified, or repealed at any time by Congress).

93. Montana v. United States, 450 U.S. 544, 563–66 (1981) (specifying circumstances when tribes have the power to adjudicate over non-member conduct on non-tribal land).

94. *See* COHEN'S HANDBOOK, *supra* note 50, at 145 (citing examples).

B. GIVING DEFERENCE TO TRIBAL COURT ORDERS IN STATE COURTS: FULL FAITH AND CREDIT VERSUS JUDICIAL COMITY

The extent to which tribal court orders should be recognized and enforced in state courts is fiercely debated.[95] "Currently, tribal, federal, and state courts generally recognize the judgments and other public acts of one another in one of two ways: on the basis of a judicial determination of comity, or pursuant to a legislative or constitutional full faith and credit command."[96] Some authors argue that tribes should be treated as a state or territory of the United States and therefore tribal court orders should be given full faith and credit.[97] Others argue that there should not be any rules or procedures governing the recognition and enforcement of tribal court orders because any rule is simply a perpetuation of colonialism and paternalism.[98] The way in which states choose to recognize tribal court orders, if at all, is inconsistent. There are many important distinctions between judicial comity and full faith and credit, and this section will introduce both concepts.[99]

1. Full Faith and Credit Represents the Highest Level of Deference Given to a Foreign Judicial Order

At its core, full faith and credit essentially mandates that courts recognize and enforce another court's judgment, even if they would rather leave the judgment unenforced.[100] Courts can still exercise a modicum of discretion, such as determining whether the issuing court had proper jurisdiction.[101] The concept

95. *See generally* Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311 (2000) (providing an overview of different arguments and concluding that non-tribal courts have several problematic reasons for not recognizing tribal court judgments).

96. Smith, *supra* note 81, at 1394. There is also a third category that is characterized by courts simply ignoring the judgements of other courts. *Id.* at 1394 n.4.

97. *Id.* at 1434–35, 1434 n.267.

98. Frank Bibeau, Public Comment to Petition to Amend Rule 10 of the Minnesota General Rules of Practice for the District Courts, File No. ADM09-8009 (2018).

99. B.J. Jones, *Tribal Considerations in Comity and Full Faith and Credit Issues*, 68 N.D. L. REV. 689, 689–91 (1992) (discussing differences between comity and full faith and credit).

100. Wright, *supra* note 72, at 1412.

101. *See* Pink v. A.A.A. Highway Express, 341 U.S. 201, 210 (1941) (positing that the Full Faith and Credit Clause is not an "inexorable and unqualified" command); *see also* Wright, *supra* note 72, at 1413 (noting that a reviewing court

of full faith and credit as a legal term and full faith and credit as a constitutional concept are distinct. The concept of full faith and credit is found in the Full Faith and Credit Clause of the United States Constitution.[102] Congress made the Full Faith and Credit Clause applicable to all states, territories, and possessions of the United States by enacting 28 U.S.C. § 1738.[103] There is some dispute as to whether the Full Faith and Credit Act extends to tribes.[104] However, individual states are able to extend full faith and credit to tribal court orders through state court decisions or by establishing it through the state legislature.[105]

The purpose of full faith and credit is to bring many different sovereigns together to promote unity by requiring the judicial and political processes of each sovereign to be respected.[106] When it comes to giving deference to tribal court orders because of a full faith and credit mandate, under a plain reading of the concept, state courts are required to recognize and enforce the tribal court order without question.[107] Full faith and credit represents the highest level of deference given to tribal court judgments.[108]

2. Judicial Comity Often Gives Judges Broad Discretion When Deciding to Enforce a Foreign Judicial Order

Judicial comity is a much less rigid concept; courts are able to exercise broad discretion in deciding whether to recognize and enforce another court's order.[109] Comity is best described as "the

may not alter judgment on the merits of the order, but the court can adjust the remedy).

102. U.S. CONST. art. IV, § 1 (requiring states to extend full faith and credit to the judgment and public acts of another state).

103. *See* 28 U.S.C. § 1738 (2018) (granting full faith and credit to all judicial proceedings from courts in the United States, and any U.S. territory or possession).

104. Smith, *supra* note 81, at 1427–32 (describing how some of the confusion is due, *inter alia*, to unfollowed Supreme Court dicta).

105. *Id.* at 1434–35, 1434 n.267 (citing examples of states that have established that full faith and credit is to be given to tribal court orders). It is important to note that some of the examples cited do not technically give "full" full faith and credit to tribal court orders because a reviewing court is authorized to consider one or more factors in deciding to recognize the tribal court order. *See infra* Part II.A.2 (discussing states erroneously claiming to give tribal court judgments full faith and credit when in reality they only afford a moderate amount of deference via judicial comity).

106. Smith, *supra* note 81, at 1408.

107. *Id.*

108. *Id.*

109. Gil Seinfeld, *Reflections on Comity in the Law of American Federalism*, 90 NOTRE DAME L. REV. 1309, 1313 (2015) (describing the ambiguity of comity

recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation."[110] "Comity is a nebulous concept . . . [that] describes a set of reciprocal norms among nations that call for [states] to recognize, and sometimes defer to, the laws, judgments, or interests of another . . . [and is] . . . motivated by a desire to preserve and promote harmony among nations."[111] If a state decides to recognize and enforce tribal court judgments based on comity, the Supreme Court has held that states can choose to give deference, but they are under no obligation to do so,[112] and that if they decide to defer, how much they decide to is up the individual state.[113] Further, the burden of showing the judgment is not entitled to enforcement rests with the party whom the judgment is sought against, but this varies from state to state.[114] While comity allows a reviewing state court to apply its normative values and compare them to the tribal court in determining whether to give deference to the order at issue, full faith and credit does not allow such comparison and makes recognition and enforcement an absolute obligation.[115] The most important distinction is that judicial comity does not guarantee a tribal court order will be given effect, but, absent a determination of lack of jurisdiction, full faith and credit does.[116]

as appearing "to be a kind of shorthand deployed by judges in the hope that reliance on a concept that is familiar from one set of intergovernmental relations . . . will give us a better sense of how a different set of intergovernmental relations . . . operates").

110. Hilton v. Guyot, 159 U.S. 113, 164 (1895).

111. Seinfeld, *supra* note 109, at 1309.

112. *Hilton*, 159 U.S. at 163–64 (describing comity as "neither a matter of absolute obligation . . . nor of mere courtesy and good will").

113. Smith, *supra* note 81, at 1394 (describing how some courts believe that "because tribes are sovereign political units, their judgments are entitled to a degree of comity," but not total full faith and credit).

114. *See id*. *But see* Shen v. Daly, 222 F.3d 472, 476 (8th Cir. 2000) ("The burden of proof in establishing that the foreign judgment should be recognized and given preclusive effect is on the party asserting it should be recognized.").

115. *See* Seinfeld, *supra* note 109, at 1319–20 (describing the difference between the two as full faith and credit being an outgrowth of the notion of comity).

116. *See id*. at 1332 n.93 (describing comity usage between tribal and state courts).

II. HOW MUCH DEFERENCE SHOULD BE GIVEN TO TRIBAL COURT ORDERS: ARGUMENTS THAT COVER THE SPECTRUM

There is no agreement on the correct level of deference to give to tribal courts. The choice of judicial comity or full faith and credit to afford deference to tribal court orders varies by state, and the arguments in support of a state's decision are vast. Section A provides an overview of the level of deference shown to tribal court orders in various states—including the previous version of Minnesota's Rule 10. The arguments in support of each position will be discussed. Section B covers the new Rule 10 that was accepted by the Minnesota Supreme Court on July 2, 2018. The new Minnesota rule provides an example of the most recent attempt of a state to balance the interests of justice with tribal sovereignty.

A. OVERVIEW OF DEFERENCE GIVEN TO TRIBAL COURT ORDERS: THE SPECTRUM

Previous authors have pointed out that the level of deference state courts give to tribal court orders can be seen as a spectrum, ranging from a high, to a moderate, to a low amount of deference.[117] As discussed previously, when a state gives full faith and credit to tribal court judgments, this represents the highest amount of deference.[118] Comity is a lower level of deference, and the ultimate level of deference given varies from state to state within the states that use comity to decide whether to enforce a tribal court order. There are a variety of factors that may influence why a given state affords a high or low level of deference. Although that inquiry is outside the scope of this Note, it is worth noting that the population of Native Americans in a state and the amount of time a tribe's judicial system has been in place may play a part.[119] The discussion that follows gives specific ex-

117. Washburn & Thompson, *supra* note 16, at 483 ("The differing approaches to the question of the recognition of tribal court judgments reflects a wide spectrum."); *cf.* Seinfeld, *supra* note 109, at 1332 n.93 (portraying the spectrum in a similar way).

118. *See supra* note 108 and accompanying text.

119. As is illustrated below, states that afford a high or moderate amount of deference to tribal court judgments are primarily located in the Western United States. *See infra* Part II.A.1–2. The largest population levels of Native Americans are concentrated in the Western United States. *See* TINA NORRIS ET AL., THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, 7 tbl.2 (2012).

amples of where certain states fall on the spectrum and identifies the rationales for why a state may choose to give more or less deference.

1. Full Faith and Credit: The Highest Level of Deference on the Spectrum

a. State Examples of Full Faith and Credit

New Mexico is currently the only state that gives full faith and credit to tribal court judgments.[120] In *Jim v. CIT Financial Services Corp.,* the New Mexico Supreme Court held that the Navajo Nation's laws are afforded full faith and credit, as provided by the Full Faith and Credit Act,[121] because the Navajo Nation satisfied the "territory" requirement of the Act.[122] Consequently, judgments rendered by a tribal court are given the highest level of deference.

Seven years after *Jim*, in *Sheppard v. Sheppard*, the Idaho Supreme Court also ruled that tribal court judgments are entitled to full faith and credit per the Full Faith and Credit Act, 28 U.S.C. § 1738.[123] Even though the Idaho Supreme Court held that tribal court orders are not equivalent to orders from another state, tribal court orders were still entitled to full faith and credit because Indian tribes are considered territories under the Act.[124]

One of the oldest tribal judicial systems, as we conceive of a judicial system today, that still exists, belongs to the Cherokee Nation. *See* United States *ex rel.* Mackey v. Coxe, 59 U.S. (100 How.) 103 (1855) (noting the Cherokee judicial system predates the U.S. Constitution). The Cherokee Nation, not to be confused with other populations of Cherokee throughout the country, is located in Oklahoma, which is defined as being within the Western United States. NORRIS ET AL., *supra*, at 8. Therefore, it is possible that population and the number of years a tribal court has been around may influence how much deference a state chooses to afford tribal court judgments.

120. Washburn & Thompson, *supra* note 16, at 483.

121. 28 U.S.C. § 1738 (2018).

122. Jim v. CIT Fin. Servs. Corp., 533 P.2d 751, 753 (N.M. 1975). For a more in-depth discussion of the Full Faith and Credit Act and how it relates to tribal courts, see generally Smith, *supra* note 81. For a more in-depth discussion of the Full Faith and Credit Act, see *infra* Part II.A.1.b.ii.

123. Sheppard v. Sheppard, 655 P.2d 895, 902 (Idaho 1982) (finding that the term "Territories and Possessions" was "broad enough to include Indian tribes, at least as they are presently constituted under the laws of the United States").

124. *Id.* at 901 ("Tribal court decrees, while not precisely equivalent to decrees of the courts of sister states, are nevertheless entitled to full faith and credit.").

However, in 2017, the Idaho Supreme Court overruled *Sheppard* in *Coeur d'Alene Tribe v. Johnson*.[125] In overruling *Sheppard*, the Idaho Supreme Court followed Ninth Circuit case law that held tribes are not entitled to full faith and credit pursuant to the Full Faith and Credit Act because "[n]othing in debates of the Constitutional Convention concerning the [Full Faith and Credit] clause indicates the framers thought the clause would apply to Indian tribes."[126] Now tribal court orders are only afforded deference via judicial comity in Idaho.[127] Even though Idaho no longer provides full faith and credit to tribal court orders, it still serves as an example of a state being willing to extend full faith and credit to tribal court orders. Despite the lack of states giving full faith and credit to tribal court orders, there are many sound arguments in support of extending it to tribes.

b. Reasons to Give Tribal Court Orders Full Faith and Credit

i. The Reality of Tribes in America and the Will of Congress

As was seen in the *Jim* and *Sheppard* cases, courts have been willing to extend full faith and credit to tribal court orders by finding that the Full Faith and Credit Act applies to tribal nations.[128]

Most scholarship argues that the Full Faith and Credit Clause of the U.S. Constitution, via the Full Faith and Credit Act, requires states and the federal government to give full faith and credit to tribal court judgments.[129] The crux of this approach centers around the realities of how tribes function in the United States, the goals of the Full Faith and Credit Act, and the complex history of federal American Indian policy.[130]

125. Coeur d'Alene Tribe v. Johnson, 405 P.3d 13, 16–17 (Idaho 2017).

126. Wilson v. Marchington, 127 F.3d 805, 808 (9th Cir. 1997).

127. *Johnson*, 405 P.3d at 17. The Idaho Supreme Court also clarified that they were not overruling *Sheppard* in its entirety. *Id.* ("We will continue to apply [*Sheppard*'s] requirement that a party attacking the validity of a tribal court's judgment bears the burden of proving its invalidity." (citing *Sheppard*, 655 P.2d at 901)).

128. *See supra* Part II.A.1.a.

129. *See, e.g.*, Smith, *supra* note 81, at 1393–95, 1427–32 (providing an overview of scholarship in the former page range, while the second page range advances the position that the Full Faith and Credit Act requires the federal government and state governments to extend full faith and credit to tribal court orders).

130. *Id.* at 1427. See *supra* Part I.A.1 for an overview of the complex and convoluted history of Indian policy in the United States. See *supra* Part I.A.3 for a better look at the realities of how tribes function in the United States; how

Congress has enacted a multitude of laws that apply to tribes—many of which have shaped tribal courts into judicial entities that resemble American courts.[131] The goal of these enactments has been to increase the economic, social, and political interactions between tribes and the United States.[132] The increase in interactions between sovereigns makes tribal governments "a critical element of the American political reality and our system of government."[133] Given this, extending full faith and credit to tribes will further increase interaction between the sovereigns and embrace the reality that the sovereigns are more akin to sisters.[134]

ii. Breaking down the Full Faith and Credit Act

As some commentators have noted, applying the Indian canon[135] to the Full Faith and Credit Act, it is reasonable to interpret the statute as applying to tribes because the statute is ambiguous as to whether it applies to tribes.[136] The goal of the Full Faith and Credit Act is to provide "for the orderly administration of justice throughout the United States."[137] The argument is that extending full faith and credit to tribal court orders furthers the goal of the Act by providing finality to judicial decisions that have already been litigated, and eliminates the delay created by petitioning a state court to recognize and enforce an order.[138] Interpreting the Full Faith and Credit Act as applying

tribes function in the United States can be gleaned from understanding the status of tribal sovereignty and the jurisdiction tribal judicial systems have.

131. *See supra* Part I.A.1.

132. *See* Smith, *supra* note 81, at 1430 (arguing that increased Congressional oversight during the past century has resulted in greater control of the American society and, with it, Indian tribes).

133. *Id.* (asserting that it is beyond dispute that tribes are a key component to the American political reality).

134. *Id.*

135. The Indian canon is a tool of statutory construction employed by judges that instructs them to settle statutory ambiguity in favor of tribes. *See* Philip P. Frickey, *Indian Canon Originalism*, 126 HARV. L. REV. 1100, 1100–01 (2013) (explaining that because so many of the early American dealings with tribes were inherently one-sided and exploitive, this doctrine emerges from the idea that texts should be read in the way the tribes would have understood them to mean at the time of their ratification or enactment).

136. Smith, *supra* note 81, at 1427–28 (analyzing the arguments of both sides of the ambiguity debate under the Indian canon).

137. *Id.* at 1430.

138. *Id.*

to tribes is consistent with current federal Indian policy of respecting tribal courts.[139] This interpretation would accomplish two things: (1) continue the growth and development of tribal courts by helping legitimize the courts in the eyes of Anglo-American litigants who may be more inclined to use tribal courts as a judicial forum; and (2) "increase the prestige of tribal courts by preventing state courts from ignoring tribal court judgments at their discretion."[140]

A final point to address regarding the Full Faith and Credit Act is the fact that the Act's language seems to indicate that tribes are required to give state court judgments full faith and credit regardless of whether tribal court judgments are extended full faith and credit. The relevant part of 28 U.S.C. § 1738 reads: "[State] Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States."[141] As the Supreme Court found in *U.S. v. Wheeler*, tribes are "physically within the territory of the United States . . . ."[142] Accordingly, a strict reading of § 1738 leads to the conclusion that tribes are to give full faith and credit to state court judgments because tribal courts are located within the United States. The Idaho Supreme Court in *Sheppard v. Shepard* focused on this language and ruled that tribes owe full faith and credit to Idaho court decisions.[143] This interpretation of the Full Faith and Credit Act can be used to support arguments that tribes should be treated as a territory under the Act. Here, "territories" is ambiguous because tribal lands are in the United States, therefore making them a territory, so a court should apply the Indian canon and interpret the term in favor of tribes.[144] This "should result in tribes being owed full faith and credit, since to hold otherwise would be to deny them the benefit of full faith and credit while imposing the burden on them."[145]

139. *See generally* CLINTON ET AL., *supra* note 25 (arguing that interpreting the Full Faith and Credit Act as applying to tribes is consistent with federal Indian policy).

140. Smith, *supra* note 81, at 1431.

141. 28 U.S.C. § 1738 (2018).

142. United States v. Wheeler, 435 U.S. 313, 322 (1978).

143. Sheppard v. Sheppard, 655 P.2d 895, 902 n.2 (1982). Because *Sheppard* was functionally (if not directly) overruled less than a year prior to this writing, it is unclear whether the Idaho Supreme Court still holds this position.

144. It should be noted that "territory" is not defined in the Full Faith and Credit Act.

145. Smith, *supra* note 81, at 1407 n.85.

iii. Increased Interaction

Moving beyond arguments in the context of the Full Faith and Credit Act, in *Sheppard v. Sheppard*, the Idaho Supreme Court was right to believe that extending full faith and credit to tribal court orders would facilitate better relations between the tribal courts in Idaho and the state courts of Idaho.[146] Fostering a positive relationship between state and tribal governments leads to more efficient administration of justice and increases tribal sovereignty and the legitimacy of tribal courts.[147]

An example of such a relationship is the execution of a Joint Powers Agreement between the Leech Lake Tribal Court and the Cass County District Court.[148] The Agreement was made in response to the severe alcohol and drug abuse issues plaguing both communities and ultimately led to the creation of the Leech Lake-Cass County Wellness Court.[149] The Wellness Court was the first problem-solving court of its kind in the nation.[150] The goal of the Wellness Court was to make sure that public safety is protected, that people get the help they need, and to improve the quality of life for all in the community.[151] The Leech Lake Tribal Court and the Cass County District Court worked together to accomplish these goals, and judges from both courts presided over hearings together.[152] The Wellness Court even alternated between holding hearings in tribal courtrooms and district court courtrooms.[153] "This ground-breaking agreement allows the Courts to more effectively and efficiently achieve their mutual goals of improving access to justice; administering justice for effective results; and fostering public trust, accountability, and impartiality."[154] Involvement of the Leech Lake Tribal Court in the Agreement "brought unprecedented recognition not only for the [tribal court], but also for tribal sovereignty in general."[155] The Wellness Court serves as an example of the positive

146. *Sheppard*, 655 P.2d at 902; *see also, e.g.*, Smith, *supra* note 81, at 1394 (asserting that the extension of full faith and credit to tribal court orders will lead to better relations between tribal, state, and federal courts).

147. Wahwassuck, *supra* note 14, at 755.

148. *Id.* at 747.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 748.

results that can occur when tribes and states work together. By extending full faith and credit to tribal court orders, litigants are more likely to choose tribal courts as their judicial forum and there will be more positive communication between the sovereigns due to the likely increase in orders being recognized. It is that increase in positive interaction that can lead to the best outcomes for both tribal and state governments.

iv. Extending Full Faith and Credit to Tribal Court Orders Will Help Clarify Tribal Sovereignty and Prevent the Wrongful Denial of Tribal Court Orders that are Required to be Enforced by Statute

Another strong argument for giving full faith and credit to tribal court orders is that doing so will help clarify the status of tribal sovereignty, which will in turn help clarify where tribal governments fit in the American federal system.[156] By establishing full faith and credit for tribal court orders, states can help ensure that justice under the law is maintained. If tribal court orders are enforced just as orders from another state are, it will prevent individuals who have a tribal judgment leveled against them from simply fleeing the jurisdiction or engaging in forum shopping by re-litigating the issue in a state district court.[157]

Lastly, one of the most significant problems that exists in states that use comity instead of full faith and credit is that many tribal court orders are wrongfully denied.[158] There is a startling lack of empirical data regarding the recognition and enforcement of tribal court orders, but one commentator conducted a survey that found fifty-six percent of tribal judges who responded to the survey had had at least one order that another

156. Smith, *supra* note 81, at 1435 (arguing that providing tribal courts full faith and credit "will advance the cause of tribal sovereignty while acknowledging and respecting the legitimacy of tribal practices and institutions in American life").

157. *Id.* at 1404; *see also* Tim Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 KAN. L. REV. 387, 406 (1974) (explaining that because tribes are a separate sovereign, collateral estoppel does not apply to situations like this).

158. *See, e.g.*, Leeds, *supra* note 95, at 349 (covering statistics regarding the recognition of tribal court orders in district courts). Even though this data is useful to illustrate that state courts refusing to recognize and enforce tribal court orders is a problem, the data would not pass as scientifically reliable. Respondents were self-selected, and the response rate was approximately thirty-four percent, and the results provide no information regarding why an order was refused. *Id.* at 348. Accordingly, the data should be approached with caution and any generalizations drawn should bear this in mind.

jurisdiction refused to enforce.[159] Of the reported refusals, eighty percent happened in a state court, while the other twenty percent happened in another tribal court.[160] The most significant finding from the survey was that forty percent of the refusals that happened in state courts were wrongfully denied.[161] These wrongful denials involved subject matters specifically covered by an explicit federal full faith and credit command statute, such as the Full Faith and Credit for Child Support Orders Act.[162] While it is not a guarantee that extending full faith and credit would lead to all tribal court orders being enforced, it is sure to mitigate instances of judges abusing their discretion under the auspice of judicial comity and would make it much harder for judges to circumvent the recognition and enforcement of tribal court orders.

2. Judicial Comity: The Middle and Low End of the Spectrum

The rationales for affording tribal court judgments a moderate or low level of deference are similar. The rationales for why one state chooses to give more or less deference under the doctrine of comity are not clear, but some factors may include the inherent (mis)trust the state has in tribal courts as a competent judicial forum and the working relationship that exists between the sovereigns. The arguments in support of recognizing and enforcing tribal court orders via comity will be covered simultaneously, given that they apply to both middle and low levels on the deference spectrum. The difference between moderate and low levels of deference is slight. In a moderate deference jurisdiction, there is a presumption of enforcement; in a low deference jurisdiction, there is no presumption. A low deference jurisdiction typically places the burden of proving enforceability on the person seeking enforcement and gives judges broad discretion in coming to their ruling.

a. Moderate Level of Deference

Oklahoma is a state that provides a moderate amount of deference to tribal court orders. In 1992, the Oklahoma legislature passed legislation that used the phrase "full faith and credit" to

159. *Id.* at 349 n.245 (fifteen out of twenty-seven respondents reported refusals).

160. *Id.* at 349 n.246 (twelve tribal courts reported state court refusals, and three tribes reported refusals by other tribal courts).

161. *Id.* at 349.

162. *Id.*; 28 U.S.C. § 1738B (2018).

describe the treatment of tribal court orders in the state, but the statute goes on to establish a level of deference that gives less respect to tribal court decisions compared to other states.[163] The statute states:

> A. This act affirms the power of the Supreme Court of the State of Oklahoma to issue standards for extending full faith and credit to the records and judicial proceedings of any court of any federally recognized Indian nation, tribe, band or political subdivision thereof, including courts of Indian offenses.
>
> B. In issuing any such standard the Supreme Court of the State of Oklahoma may extend such recognition in whole or in part to such type or types of judgments of the tribal courts as it deems appropriate where tribal courts agree to grant reciprocity of judgments of the courts of the State of Oklahoma in such tribal courts.[164]

By granting the Supreme Court of the State of Oklahoma the power to extend full faith and credit as they see fit, the Oklahoma statute is more in line with judicial comity than it is full faith and credit. When the Oklahoma Supreme Court exercises its power given by the statute, a state court must recognize and enforce a tribal court judgment if (1) "the tribal court that issued the judgment grants reciprocity to judgments of the courts of the State of Oklahoma,"[165] (2) "the court rendering the judgment [had] jurisdiction,"[166] and (3) extrinsic fraud was not used to obtain the tribal court judgment.[167] There is a presumption that the tribal court order will be enforced.[168] Multiple states legislatures and even some courts erroneously claim to afford tribal court orders full faith and credit, but in reality they are giving deference via judicial comity.[169] The result is that Oklahoma uses comity to determine the level of deference afforded tribal court orders, but still gives more deference than other states, given its presumption of enforcement and the limited number of factors a district court can consider when deciding whether to recognize the order.

163. Washburn & Thompson, *supra* note 16, at 483 n.17.

164. OKLA. STAT. tit. 12, § 728 (1992).

165. OKLA. ST. DIST. CTS. RULE 30(B) (2011).

166. Barrett v. Barrett, 878 P.2d 1051, 1054 (Okla. 1994) (citation omitted).

167. *Id.*

168. *Id.*

169. In addition to Oklahoma, Wisconsin, and Wyoming are examples of states erroneously using the label of full faith and credit to describe the mechanism and level of deference given to tribal court orders. *See, e.g.*, Smith, *supra* note 81, at 1434 n.267 (citing the relevant statutes in Oklahoma, Wisconsin, and Wyoming).

Alaska is another example of a moderate amount of deference afforded to tribal court judgments. In Alaska, a district court is required to recognize and enforce tribal court judgments unless "the tribal court lacked personal or subject matter jurisdiction" or "any litigant is denied due process."[170] Given that a district court in Alaska is "required" to recognize and enforce tribal court judgments, that sounds a lot like full faith and credit. However, because a district court can consider specific factors, Alaska does not grant full faith and credit; rather, it is a comity jurisdiction. The Supreme Court of Alaska confirmed this assertion when they stated that Alaska courts should "respect tribal court decisions under the comity doctrine."[171] Just as in Oklahoma, the presumption of enforcement and the limited factors a judge can deny enforcement of a tribal court order on result in a moderate level of deference for tribal court orders.

b. Low Level of Deference: Minnesota's Old Rule

Minnesota's previous rule governing the recognition and enforcement of tribal court orders was an example of the lowest level of deference given to tribal court orders. The Minnesota Supreme Court established Rule 10 of the Minnesota General Rules of Practice to control the level of deference afforded tribal court orders.[172] Rule 10 was divided into two sub rules: Rule 10.01 and Rule 10.02.[173]

Rule 10.01 controlled when a tribal court order had to be given effect because "recognition [was] mandated by law."[174] Rule 10.01(a) mandated that if a state or federal statute requires a tribal court order be given effect, courts must do so.[175] The Advisory Committee notes on the rule listed some state and federal statutes that had to be followed, but the specific statutes were not found in the text of the rule itself.[176] Rule 10.01(b) mandated that "[w]here an applicable state or federal statute establishes a procedure for enforcement of any tribal court order or judgment,

170. *See* John v. Baker, 982 P.2d 738, 763 (Alaska 1999).

171. *Id.*

172. MINN. GEN. R. PRAC. 10 (2004) (repealed 2018).

173. *Id.*

174. *Id.*

175. MINN. GEN. R. P. 10.01(a) (2004) (repealed 2018) ("Where mandated by state or federal statute, orders, judgments, and other judicial acts of the tribal courts of any federally recognized Indian tribe shall be recognized and enforced.").

176. *Id.*

that procedure must be followed."[177] Rule 10.01 also established that a tribal court order pertaining to the Violence Against Women Act, 18 U.S.C. § 2265 (2003), was presumed to be enforceable.[178]

Rule 10.02 was more problematic. Rule 10.02(a) established that if a tribal court order was not enforceable under Rule 10.01, the enforcement of the tribal judgment was purely discretionary.[179] Rule 10.02 provided ten factors that a state court "may" consider when making their decision.[180] Some of these factors included whether there was adequate notice to the party against whom enforcement was sought, and whether the tribal court had subject-matter jurisdiction.[181] In the end, the factors did not mean much, if anything, in light of the final factor, which allowed a state court to consider "any other factors the court deems appropriate in the interest of justice."[182] Under the old Rule 10.02(b), the tribal court or the individual seeking enforcement of the tribal court judgment was not entitled to a hearing on the matter, which further reduced the level of deference afforded to tribal courts.[183] Above all else, the discretionary nature of the previous version of Rule 10 in Minnesota made it fall on the low side of the deference spectrum.

c. Why Many States Prefer Judicial Comity Over Full Faith and Credit

Proponents of restricting deference to tribal court orders include state and federal judges and, surprisingly, tribal courts themselves. The most common argument advanced in support of restricting the deference given to tribal court orders is that tribal courts are legal bodies that lack the competency, sophistication, and resources to be trusted.[184] Given the supposed lack of com-

177. MINN. GEN. R. P. 10.01(b) (2004) (repealed 2018).

178. *Id.*

179. MINN. GEN. R. P. 10.02(a) (2004) (repealed 2018).

180. *Id.*

181. For the complete list of factors, see *id.*

182. MINN. GEN. R. PRAC. 10.02(a)(10) (2004) (repealed 2018).

183. MINN. GEN. R. PRAC. 10.02(b) (2004) (repealed 2018) ("The court shall hold such hearing, if any, as it deems necessary under the circumstances.").

184. *Cf.* Minnesota Tribal Court/State Court Forum, Comment Letter on Proposed Amendments to the General Rules of Practice for the District Courts No. AD-M09-8009, at 1 (filed Jan. 19, 2018) (on file with author) (noting that the 2003 proposed Minnesota rule regarding the recognition and enforcement

petence, state courts should be cautious when deciding to recognize and enforce a tribal court order. The only way that caution can be exercised is by allowing judges to have discretion in deciding whether to enforce orders. Discretion in the context of enforcing a tribal court judgement can only be exercised under the doctrine of judicial comity—not under a full faith and credit mandate.[185]

When the previous version of Rule 10 of the Minnesota General Rules of Practice was promulgated in 2003, there was concern regarding the competency of tribal courts.[186] These same arguments were brought forth again in opposition to the recent amendment to Rule 10.[187] These concerns are difficult to pin down because they are only supported by anecdotal evidence.[188] To the contrary, tribal courts in Minnesota and around the country have invested significant resources into their judicial systems.[189] Tribal judges hold law degrees from some of the best law schools in the country and many have practiced outside of tribal courts.[190]

One of the strongest arguments for comity comes from the perspective of tribes themselves. Given tribal government sovereignty, comity is the only means by which tribal court orders can

of tribal court orders was met with public opposition that centered primarily on concerns about the efficacy of tribal courts).

185. *See supra* Part I.B (explaining that comity allows discretion, while full faith and credit does not).

186. Minnesota Tribal Court/State Court Forum, *supra* note 184.

187. *See, e.g.*, Joe Walsh, Mille Lacs County Attorney, Comment on to [sic] Petition to Amend Rule 10, at 1–2, http://www.mncourts.gov/mncourtsgov/media/Tribal-Orders/Mille-Lacs-County-Attorney-Comment.pdf (expressing opposition to the 2018 Amendment to Rule 10 on grounds that can be equated to tribal courts lacking competency).

188. *See, e.g.*, Oral Argument at 45:00, Proposed Amendments to the Gen. Rules of Practice for the Dist. Courts (Mar. 14, 2018) (No. AD-M09-8009), http://www.mncourts.gov/SupremeCourt/OralArgumentWebcasts/ArgumentDetail.aspx?vid=1193 (depicting Minnesota Supreme Court Justice Barry Anderson explaining that concerns regarding the efficacy of tribal courts are only supported by anecdotal evidence). Justice Anderson also pointed out the fact that there had been little to no opposition to the proposed changes and there had been overwhelming support for the Amendment. *Id.*

189. *See, e.g.*, Leech Lake Band of Ojibwe Tribal Court, Comment Letter on Proposed Amendments to the General Rules of Practice for the District Courts No. AD-M09-8009, at 1 (Mar. 16, 2017), http://www.mncourts.gov/mncourtsgov/media/Tribal-Orders/Leech-Lake-Band-of-Ojbwe-Tribal-Court-Comment.pdf (describing how the Leech Lake Band of Ojibwe invested seven million dollars into a new Judicial Center).

190. *Id.*; *see also* O'Connor, *supra* note 11, at 2.

be given effect in state courts without degrading their sovereign status.[191] The rationale behind this position is that full faith and credit presumes that when full faith and credit is extended to another sovereign, they are brought closer together as one nation.[192] Tribes may not want to be seen as one nation with the United States because their sovereignty pre-dates the United States.[193] Therefore, to maintain their unique sovereignty, comity should be the mechanism that states use to decide whether they want to enforce tribal court judgments.[194] The crux of this argument is that comity, not full faith and credit, bolsters tribal sovereignty.[195]

Lastly, tribal court orders are not easily accessible to practicing attorneys.[196] Access to published tribal court opinions is limited on research platforms such as Westlaw.[197] This poses some issues because practitioners are not able to readily conduct research to ensure that they best represent their clients' interests. The argument that follows is that if attorneys are not able to best represent their clients' interests in tribal courts, reviewing courts should have the discretion to evaluate whether the interest of the party was adequately represented. This is a fair argument of which tribal courts should take note. Publishing opinions, especially on an electronic database, will provide all persons with better access to the tribal courts. Given that each tribe has their own inherent sovereign authority, the publication of tribal court records will vary from tribe to tribe.[198]

191. Smith, *supra* note 81, at 1433–34.

192. *See supra* Part I.B.1.a (discussing full faith and credit).

193. Smith, *supra* note 81, at 1433–34.

194. *Id.*

195. *But see supra* Part II.A.1.b (arguing that full faith and credit enhances tribal sovereignty and judicial comity degrades it).

196. Randy V. Thompson, Response by Randy V. Thompson to Supplemental Information Request regarding Recognition of Tribal Court Orders and Judgments, at 8–9 (Apr. 24, 2017), http://www.mncourts.gov/mncourtsgov/media/Tribal-Orders/Supplemental%20Hearing%20Submissions/Thompson-04-24-2017-Supplemental-Response-FINAL.pdf.

197. *Cf. id.* (explaining that tribal court opinions are published by tribal courts).

198. Charles Vig et al., Response by the Shakopee Mdewakanton Sioux Community, the Lower Sioux Indian Community, the Upper Sioux Community, and the Prairie Island Indian Community to Supplemental Information Request regarding Recognition of Tribal Court Orders and Judgments, at 8 (Apr. 24, 2017), http://www.mncourts.gov/mncourtsgov/media/Tribal-Orders/Supplemental%20Hearing%20Submissions/SMSC-LSIC-USC-PIIC-Supplemental-Filing-to-Rule-10-Petition-final.pdf.

B. MINNESOTA'S RECENT CHANGE: THE PETITION TO AMEND RULE 10 AND ACCEPTANCE BY THE MINNESOTA SUPREME COURT

On November 30, 2016, the Minnesota Tribal Court/State Court Forum ("the Forum") submitted a petition to the Minnesota Supreme Court to amend Rule 10 of the Minnesota General Rules of Practice for the District Courts.[199] The Forum is comprised of tribal judges from each tribal court in Minnesota, judges from the Minnesota state courts, and attorneys.[200] The Amendment proposed a total overhaul of Rule 10 of the Minnesota General Rules of Practice.[201] The Forum's petition represented the culmination two decades of work.[202] On July 2, 2018, the Minnesota Supreme Court adopted a new rule that gives a moderate amount of deference to tribal court orders.[203] This Section covers the brief historical development of the rule in Minnesota and gives an overview of the recent changes promulgated by the Minnesota Supreme Court.

Prior to 2004, Minnesota did not have a rule in place that governed the recognition and enforcement of tribal court orders.[204] Around 2000, the Forum started working on a proposal for a rule focused on the recognition of tribal court orders.[205] After years of work and multiple drafts of the rule, the Minnesota Supreme Court finally adopted Rule 10 and it became effective on January 1, 2004.[206] Some commentators at the time criticized Rule 10 for not giving enough respect to tribal courts.[207] However, the rule was still an important first step to giving tribal courts the respect they deserve because it established procedures

199. *See generally* Petition of the Minnesota Tribal Court/State Court Forum, In Re Petition to Amend Rule 10 of the Minn. Gen. Rules of Practice for the District of Minn. No. AD-M09-8009 (Nov. 30, 2016) [hereinafter The Amendment], http://www.mncourts.gov/mncourtsgov/media/Tribal-Orders/Forum-Petition-filed-Nov-30-2016.pdf (explaining the Amendment and noting that it was filed on Nov. 3, 2018).

200. *Id.* ¶ 1.

201. *Id.* ¶¶ 41–71.

202. RITA COYLE DEMEULES, OVERVIEW: 2003 AND 2011 PETITIONS TO AMEND COURT RULES TO RECOGNIZE TRIBAL COURT JUDGMENTS 1 n.1 (Jan. 3, 2016), http://www.mncourts.gov/mncourtsgov/media/Tribal-Orders/Memo-to-MHC-re-tribal-court-judgments-170106.pdf [hereinafter *Rule 10 History*] (noting that the Forum was created in 1996).

203. *See* Rule 10 Order, *supra* note 1, at 1.

204. *See Rule 10 History*, *supra* note 202, at 1.

205. *Id.*

206. *Id.*

207. *See generally* Washburn & Thompson, *supra* note 16 (critiquing the previous version of Rule 10 of the Minnesota General Rules of Practice).

for how a tribal court order could be recognized in Minnesota state courts.

Even though Rule 10 was an important first step, over the years since its promulgation, its problems became evident.[208] The Amendment proposed by the Forum in 2016 sought to address these problems,[209] and the overhauled Rule 10 promulgated by the Minnesota Supreme Court in 2018, largely reflects the proposed changes. The changes to Rule 10 became effective on September 1, 2018.[210]

As the proposed changes were considered by the Minnesota Supreme Court, many people expressed their opinions regarding the changes.[211] The new rule remains a rule of comity, but it does establish a presumption of enforcement.[212] As explained below, the rule clarifies procedures for enforcement and provides more guidance to district court judges by eliminating the broad discretion judges had under the previous version of the rule.

1. Rule 10.01: Mandatory Recognition

The new Rule 10.01 remains largely the same as the previous version. However, the Rule has been reframed and further clarifies when a tribal court order is required to be recognized. Several statutory references from the Advisory Committee comments have now been moved into the body of the rule, such as the Indian Child Welfare Act, 25 U.S.C. § 1911.[213] In addition, two new statutory citations were added to the list of laws mandating recognition of tribal court orders and judgments.[214] The changes clarify the language of Rule 10.01 and help guide the district courts' decisions by identifying specific laws that mandate recognition of tribal court judgments and orders.

208. As was previously discussed, the previous version of Rule 10 created delays in the recognition and enforcement of tribal court orders. *See, e.g.*, Leeds, *supra* note 95, at 349 (discussing statistics regarding the denial of tribal court orders where recognition and enforcement is mandated).

209. *See* The Amendment, *supra* note 199, ¶ 39.

210. *See* Rule 10 Order, *supra* note 1, at 2.

211. Memorandum in Support of Order Promulgating Amendments to the Gen. Rules of Practice for the Dist. Courts, No. ADM09-8009, at 2 (Minn. July 2, 2018), http://macsnc.courts.state.mn.us/ctrack/docket/docketEntry.do?action=edit&deID=978702&csNameID=66710&csInstanceID=72760&csIID=72760 (follow "Administrative - Order - Other (Corrected)" hyperlink).

212. *Id.* at 6.

213. *Id.* at 3.

214. *Id.* (adding 25 U.S.C. § 3106 and 25 U.S.C. § 3713).

a. Rule 10.02: Civil-Commitment Proceedings

Rule 10.02 was completely rewritten to focus specifically on the recognition of tribal court orders and judgments governing civil-commitment proceedings.[215] The Minnesota Supreme Court found persuasive the Advisory Committee's recommendation that a specific rule was needed to govern the recognition of tribal civil commitment orders.[216] The Court noted "the mental-health and financial issues that may . . . be of concern in [these] proceedings favor adopting a separate rule that provides specific guidance to the district courts."[217] The updated Rule identifies the circumstances that require enforcement of civil-commitment orders entered by certain tribal courts, or the circumstances in which the enforcement determination will be made under the new discretionary-recognition rule, Rule 10.03, discussed below.[218]

b. Rule 10.03: Discretionary-Recognition

Rule 10.03 is now the discretionary-recognition rule that was previously found in Rule 10.02. The new rule specifies that a party seeking enforcement of a tribal court order needs to proceed by petition or a motion within an existing action.[219] Going back to Steven and his custody dispute from the introduction to this Note, under this rule, Steven could have simply petitioned the court to recognize the tribal court order. Steven would not need an existing cause of action to be able to petition the court. Instead of the burden of proving that the order should be recognized being placed on the party seeking enforcement, the burden is now on the party whom enforcement is being sought against.[220] Additionally, a presumption of enforcement is established if the party is not able to carry its burden.[221]

The Minnesota Supreme Court recognized that the catchall factor found in the previous version of the rule "effectively swallowed the rule."[222] Accordingly, the catchall factor was deleted and the list of ten factors has now been reduced to five: (1) the

215. *See id.*
216. *Id.*
217. *See id.*
218. *See id.* at 3–4.
219. *Id.* at 4–5.
220. *Id.* at 5.
221. *Id.*
222. *Id.*

order or judgment is invalid on its face or no longer remains in effect; (2) the tribal court lacked personal or subject-matter jurisdiction; (3) the affected party was not afforded due process rights; (4) the order or judgment was obtained by fraud, duress, or coercion; or (5) the tribal court does not reciprocally recognize and enforce orders, judgments and decrees of the courts of Minnesota.[223] This effectively removes the unbridled discretion judges previously had, while maintaining the rule as one of comity.[224]

Of importance is the Supreme Court's justifications for reducing and clarifying the relevant factors to enforcement. First, the changes to the rule will help lead to more consistent outcomes.[225] Lastly, "the presumptive-recognition language is a more robust acknowledgement of the independent sovereignty of the Tribal Nations that have established tribal courts . . . ."[226]

Overall, the changes to Rule 10 are, yet again, another important step towards showing tribal courts the respect they deserve. However, the changes still fail to adequately address all the issue that existed under the previous Rule 10. The simple fact that the Rule 10.03 remains one of comity and there are specific factors that a judge can consider could continue to lead to delays in enforcement. It is also important to note that Rule 10.03 does not establish and outright presumption of enforcement. Rather, there is only a presumption of enforcement when the party against whom the order is sought fails to demonstrate that the order should not be enforced. This demonstrates that the Minnesota Supreme Court continues to approach tribal courts with caution instead of embracing them as an equally qualified judicial body. Accordingly, the rule does little to clarify tribal sovereignty or where tribal courts fit into the judicial framework of the United States.

Many states have made changes over the past decade that afford more deference to tribal courts.[227] This historical develop-

223. MINN. GEN. R. PRAC. 10.3(c) (2018).

224. Memorandum in Support of Order Promulgating Amendments to the Gen. Rules of Practice for the Dist. Courts, No. ADM09-8009, at 5 (Minn. July 2, 2018), http://macsnc.courts.state.mn.us/ctrack/docket/docketEntry.do?action=edit&deID=978702&csNameID=66710&csInstanceID=72760&csIID=72760 (follow "Administrative - Order - Other (Corrected)" hyperlink).

225. *Id.*

226. *Id.* at 6.

227. *See* The Amendment, *supra* note 199, ¶¶ 52–62 (discussing examples of

ment of Rule 10 in Minnesota is important to understand because it illustrates where this area of the law is heading: toward affording tribal court judgments more deference.[228] As Kevin Washburn stated in a letter written in support of the 2018 Amendment, "[The] proposed amendments represent progress. The proposed amendments offer a significant step in the right direction . . . ."[229] What this means is that even though the Minnesota Supreme Court adopted significant changes to Rule 10, there is still room for improvement. This Note's proposal represents where that progress is striving to get to—affording tribal court orders full faith and credit in state courts.

III. STATE LEGISLATURES SHOULD ADOPT AN AMENDMENT TO THEIR STATE CONSTITUTIONS EXTENDING FULL FAITH AND CREDIT TO TRIBAL COURT JUDGMENTS

Using judicial comity to determine whether a tribal court order should be recognized and enforced in state courts continues the oppression and colonialism Native Americans have faced for hundreds of years under the guise of being respectful and deferential. Accordingly, extension of full faith and credit is preferred over judicial comity. This Note argues that state legislatures should amend their state constitutions to give full faith and credit to tribal court orders.[230] This Part begins by explaining why a constitutional amendment is preferable over other judicial or legislative action and is followed by a discussion of the challenges this proposal may provoke. Lastly, counterarguments are considered.

A. WHY A CONSTITUTIONAL AMENDMENT IS THE BEST WAY TO EXTEND FULL FAITH AND CREDIT TO TRIBAL COURT ORDERS

As noted previously, there are two ways that full faith and credit can be extended to tribal court orders: (1) judicial action and (2) legislative action.[231] There have only been two examples

states giving more deference to tribal courts).

228. *See id.*

229. Kevin Washburn, Comment Letter on Amendment to Rule 10 of The Minnesota General Rules of Practice for the District Courts No. AD-M09-8009, at 3 (Mar. 13, 2017), http://www.mncourts.gov/mncourtsgov/media/Tribal-Orders/Professor-Kevin-Washburn-Comment.pdf.

230. The amendment should specify that it applies to all federally recognized Indian tribes.

231. Smith, *supra* note 81, at 1394.

of states extending full faith and credit to tribal court orders. Both were through judicial action, and only one is still in force today; the other was overturned by a subsequent court decision. There is yet to be a state that extends full faith and credit to tribal court orders through legislative action.[232]

Legislative action is preferable to judicial action because legislative action is inherently more stable. One need not look further than the Idaho Supreme Court's decision to overturn its previous decision to extend full faith and credit to tribal court orders. The stability of legislative action is particularly true in the context of a constitutional amendment. For example, in Minnesota, a constitutional amendment needs to be approved by a simple majority of both chambers of the legislature and then be ratified by a simple majority of voters at the next general election.[233] This same process would apply to overturning the amendment after it is passed. Once the constitution is amended, it will take much more than a panel of judges to decide the state no longer wishes to extend full faith and credit to tribal court orders.

A constitutional amendment is also preferable because it communicates the will of the people more than a judicial action. Minnesota's requirement that voters approve the amendment ensures that citizens are involved in the decision. Extending full faith and credit to tribal court orders in this way allows Minnesota voters to directly communicate to tribal governments and members: "We want to respect your rights as a sovereign nation." Even in states where citizens do not vote on constitutional amendments, the legislators communicate the same message, because they are elected by the people and speak on behalf of the electorate. This in turn leads to the positive impact of good relations between tribes and states. As discussed in Part II, increased relations and positive interactions leads to more efficient and effective administration of justice that is beneficial for all.

Next, a constitutional amendment extending full faith and credit to tribal court judgments is preferable over judicial action because it is unclear whether a state supreme court can extend full faith and credit to tribal court orders.[234] The two cases where

232. There have been states that claim to give full faith and credit to tribal court orders via statute, but, as was discussed *supra* Part II.A.2.a., these statutes use the label of full faith and credit incorrectly when in reality the statute extends deference through comity. *Supra* note 169 and accompanying text.

233. MINN. CONST. art. IX.

234. *See* Memorandum in Support of Order Promulgating Amendments to

a court extended full faith and credit to tribal court judgments did so by interpreting the Full Faith and Credit Act, a federal statute, as applying to tribes. This Note does not advance that position. A court is not able to simply rule that full faith and credit should be extended to tribal courts without finding a basis in the law that would allow them to rule in such a way.[235] The only "rulings" that a court may promulgate that are not predicated on a set of specific facts are procedural rules designed to control the litigation process.[236] Rule 10 of the Minnesota General Rules of Practice is an example of a procedural rule.[237] A court is not able to create substantive rights.[238] Only a legislative body has the authority to create substantive rights.[239] "[S]ubstantive rights [are] rights 'granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process.'"[240] A mandate of full faith and credit would certainly be regarded as creating a substantive right because it would creating, defining, and regulating the right to have tribal court orders enforced without question.[241] Therefore, by the state legislature adopting a constitutional amendment, it ensures that the proper authority is being exercised. The distinction between a substantive right and a procedural rule becomes irrelevant in this context if full faith and credit is extended to tribal court orders via a state constitutional amendment.

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the General Rules of Practice for the District Courts No. ADM09-8009, at D-1 to D-3 (Minn. July 2, 2018) [hereinafter Memorandum Gildea Dissent] (Gildea J., dissenting), http://macsnc.courts.state.mn.us/ctrack/docket/docketEntry.do?action=edit&deID=978702&csNameID=66710&csInstanceID=72760&csIID=72760 (follow "Administrative – Order – Other (Corrected)" hyperlink).

235. *See id*.

236. *See* Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 36 (2008).

237. Rule 10 is procedural because it simply provides for the process in which a tribal court order recognized in Minnesota District courts.

238. *Cf.* Redish & Murashko, *supra* note 236 (explaining that courts can only make procedural rules).

239. *Cf. id.* at 35–36 (explaining that courts can only make procedural rules).

240. *Id.* at 36 (quoting John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 723–24 (1974)). "Substantive rules are based on legislative and judicial assessments of the society's wants and needs, and they help to shape the world of primary activity outside the courtroom." *Id.* at 28 n.14 (quoting Michael Wells, *The Impact of Substantive Interests on the Law of Federal Courts,* 30 WM. & MARY L. REV. 499, 504 (1989)).

241. *Cf.* Memorandum Gildea Dissent, *supra* note 234 (arguing that the recent amendment to Rule 10 creates a substantive right).

Building off the distinction between a substantive and procedural right, the only way that judicial action could extend full faith and credit to tribal court orders is by interpreting the Full Faith and Credit Act as applying to tribes. Extending full faith and credit to tribal court orders via the Full Faith and Credit Act has the potential to create a slippery slope. The Full Faith and Credit Act is a generally applicable statute.[242] Interpreting the Act as applying to tribes would open the door for the argument to be made that other generally applicable statutes should apply to tribes. Based on the already muddled and confusing network of laws and policies that are applicable to tribes, applying more laws to tribes is likely to add confusion. Further, if tribes are considered a "territory" of the United States, that would rid them of the unique sovereignty they enjoy.[243] Overall, a state constitutional mandate of full faith and credit is preferable because the decision will be more stable, it communicates the will of the people more effectively, there are no separation of powers issues, and tribes will retain their unique sovereignty.

B. POTENTIAL CHALLENGES AND COUNTERARGUMENTS

The most significant challenge to extending full faith and credit to tribal court orders via a constitutional amendment would be the difficulty of passing the amendment. In Minnesota, as of 2018, 213 constitutional amendments have been voted on with 120 of them adopted.[244] Because a little over half of proposed amendments pass, this bodes well for the success of getting the amendment adopted. However, proposing the amendment is only one step in the process. It could be challenging to get popular support in the legislature.

Considering the recent changes to Rule 10 of the Minnesota General Rules of Practice, there is at least some awareness and desire to give more respect to tribal court orders. The fact that the recent amendment had overwhelming support and no organized opposition makes it more likely a constitutional amendment could succeed.[245] There have also been other signs in the

242. Smith, *supra* note 81, at 1428.

243. *See supra* Part I.A.1.

244. *State Constitutional Amendments Considered*, MINN. ST. LEGISLATURE, https://www.leg.state.mn.us/lrl/mngov/constitutionalamendments (last visited Dec. 21, 2018).

245. *See generally Tribal Court Orders and Judgments: Hearings and Submissions*, MINN. JUD. BRANCH, http://www.mncourts.gov/SupremeCourt/Court-Rules/Tribal-Court-Orders-Hearing-Submissions.aspx (last visited Sept. 14,

political arena that indicate passage of a constitutional amendment would be possible. One such example is the 2013 Executive Order issued by Minnesota Governor Mark Dayton that called for increased interaction with Tribal nations and the strengthening of the bond between the two sovereigns.[246] Tribal courts have come a long way since the *Ex parte Crow Dog* decision.[247] Due to the work of dedicated individuals and groups, tribal courts have survived and thrived despite the ups and downs they have faced. Nonetheless, amending the Minnesota State Constitution is no easy task and will require a lot of advocating and educating to help legislators and voters arrive at an informed decision.

Individuals who oppose extending full faith and credit to tribal court orders are likely to employ the same paternalistic arguments that have always been made in this area of the law. Chief among these arguments is that tribal courts are simply not competent and cannot be trusted.[248] Perhaps critics simply cannot accept the fact tribal judicial systems further a different set of cultural customs and values as compared to American courts and are not fully adversarial. Advancing a different set of cultural customs and values is not an indication of how competent a judicial system is. There have been plenty of examples of non-adversarial courts having tremendous results, such as the Leech Lake-Cass County Wellness Court.[249] These arguments lack weight and should not gain any traction considering the realities of tribal judicial systems today.[250] There are, however, three opposition positions that have some merit, but are not sufficient to overcome the benefits of full faith and credit.

1. The Fairness and Error Concerns

The first counterargument that holds some water is that, if we extend full faith and credit to tribal court orders, there is no way to ensure that due process was required. The argument that follows is that we should be performing a "fairness check" on

2018) (demonstrating that only two submissions received by the Minnesota Supreme Court opposed the recent amendment).

246. Governor Mark Dayton, *Exec. Order No. 13-10*, MINN. EXECUTIVE DEP'T (Aug. 8, 2013), https://mn.gov/governor/assets/EO-13-10.pdf_tcm1055-92492.pdf.

247. *See supra* Part I.A.1.a.

248. *See supra* Part II.A.2.c.

249. Wahwassuck, *supra* note 14, at 755.

250. *See supra* Part I.A.2.

tribal court orders because a judgment from another foreign nation are normally subject to such a check. The Restatement (Third) of Foreign Relations Law § 482 (1987) lays out the grounds for recognition of foreign court judgements.[251] Some of the factors a court can consider are (1) whether the issuing court had jurisdiction, (2) whether the judgment was obtained by fraud, and (3) whether the judgment contravenes the public policy of the United States.[252] Accordingly, the same principle should apply to the recognition of tribal judgments because tribes are more similar to a foreign nation than they are to a state.

To the contrary, tribes are more similar to states than they are to a foreign nation.[253] Even if tribes were to be more like a foreign nation, tribal judgments should be given more deference than they are now because tribes receive less deference than a foreign nation. Comparing the level of deference given to an order under Minnesota's Rule 10 and the Restatement of Foreign Relations Law, the Restatement gives significantly more deference.[254] It simply does not make sense that a tribal court, presided over by a judge who graduated from an American law school, that is ten miles down the road from the recognizing court is given less deference than a court that is thousands of miles away. Further, this disparity is even more striking when you consider tribal courts are sure to mirror courts of the United States more than courts of a foreign nation because of the plethora of statutes that have sought to control the development of tribal courts to be reflective of Anglo-American values.[255] A state constitutional mandate of full faith and credit to tribal court orders would recognize the differences between tribal and foreign courts and help settle the disparity in deference that exists.

Another response to the fairness and error counterargument is that even if the tribal judgment lacked fairness, or an error was made, there are still ways that a judgment can be attacked

251. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 (AM. LAW INST. 1987).

252. For a complete list of factors, see *id.*

253. *See supra* Part I.A.3.A

254. *Compare* MINN. GEN. R. PRAC. 10.02 (2004) (repealed 2018) (granting judges unlimited discretion to decide to recognize a tribal court order because of the incorporation of a "catchall" provision), *with* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 (AM. LAW INST. 1987) (limiting judicial discretion to the factors listed).

255. *See supra* Part I.A.1.

under a full faith and credit mandate. The losing litigant could challenge the tribal judgment through those avenues of review that remain open within the tribal court where the original adjudication took place, such as filing an appeal in the tribal court.[256] If recognition of the tribal judgment is sought in state court, a litigant could oppose on three grounds: (1) collateral attack on jurisdiction; (2) public policy exception; and (3) state court equivalent of a Federal Rules of Civil Procedure Rule 60 attack.

Under a full faith and credit mandate, one can still attack the judgment on grounds that the issuing court did not have jurisdiction.[257] If the litigant is able to establish this, the order would not be recognized.[258] Supreme Court precedent seems to suggest that when a judgment is sought to be recognized via a full faith and credit mandate, the recognizing court can refuse to enforce the order if it does not comport with public policy.[259] This is an escape hatch for litigants to utilize if the tribal judgment does not seem fair or significant errors were made. Lastly, a Rule 60 attack allows a litigant to obtain relief from a judgment that is based on factors such as whether the judgment was obtained through fraud, whether the judgment is void, and whether the judgment was made under excusable neglect.[260] Takings these safeguards together, there are adequate protections against judgments being recognized that are not "fair" or were made via error.

Lastly, if the recognizing court is allowed to perform a "fairness check" to the extent that judicial comity allows, this would not be in keeping with principles of res judicata. The three main principles of res judicata are to: (1) conserve judicial economy; (2) establish certainty and respect for the judgments of courts; and (3) protect the interests of the party relying on the judgment.[261] If a "fairness check" was allowed, similar problems that

256. O'Connor, *supra* note 11, at 5.

257. *See* Nat'l Farmers Union Ins. v. Crow Tribe of Indians, 471 U.S. 845, 852–53 (1985).

258. *See, e.g.*, *id.* at 847 (noting that a federal district court entered an injunction against further proceedings in a tribal court after finding a lack of jurisdiction).

259. Pacific Emp'rs Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 501 (1939) ("[A] state [is not compelled] to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.").

260. FED. R. CIV. P. 60. For a full list of the factors, see *id.*

261. *See* DAVID P. CURRIE ET AL., CONFLICT OF LAW: CASES–COMMENTS–

are seen under judicial comity, such as delay and lack of recognition for orders that are required to be recognized pursuant to a state or federal mandate, would occur. In sum, this counterargument raises some fair points, but is not persuasive for the reasons stated above.

2. Disparity of Justice

The second counterargument tracks closely with the first. The argument is that the level of justice and competency of individual tribal courts will vary from court to court, so there needs to be a "check" on the tribal courts to ensure that justice is being administered evenly. The argument continues that judicial comity is the only way that this concern can be addressed.

This argument is correct to assert that the competency of each tribal court will vary. However, this is true in any judicial system, and is not cause to be less deferential to tribal courts. Further, this argument is paternalistic in that it posits that Anglo-American conceptions of justice should be strictly applied to tribal courts. The same concern about uneven administration of justice applies to state judicial systems.[262] Even though the same concerns exists with state courts, state court judgments receive full faith and credit while tribal judgments do not. There will always be a disparity in skill and competence among courts, but to categorically exclude tribal courts without concrete evidence of a lack of competence is itself uneven justice. Getting rid of the "checks" on tribal courts that exist under judicial comity and opting to extend deference via a full faith and credit mandate will increase "a reviewing court's ability to appreciate the possibilities of a deep diversity model of tribal-national relations, whereby tribal norms can diverge from federal and state norms and yet still be recognized as valid expressions of American identity deserving respect and legal recognition."[263]

QUESTIONS 477–79 (7th ed. 2006).

262. *Cf. Issues Overview: The Threat to Fair and Impartial Courts*, JUST. STAKE, http://www.justiceatstake.org/issues [https://web.archive.org/web/20170726010658/http://www.justiceatstake.org:80/issues] (last visited Dec. 21, 2018) (asserting that concerns over special interest money flooding state court elections and pressure on judicial candidates to promise specific rulings compromises the competency of state courts).

263. Smith, *supra* note 81, at 1408.

3. A Full Faith and Credit Mandate Could Lead to Forum Shopping

The last concern that some may raise is that granting full faith and credit to tribal court orders might lead to forum shopping. A litigant might choose to file their case in a state court because they know the law is more favorable to the facts of their case, which is a form of forum shopping. To the contrary, a grant of full faith and credit is likely to decrease forum shopping as compared to judicial comity.[264] Safeguards such as the Erie doctrine, which helps reduce forum shopping,[265] do not exist between tribal and state courts because they are separate sovereigns and have different laws. "[T]he full faith and credit doctrine is fairly toothless as a choice-of-law mechanism, as states may often simply ignore the laws of other states by invoking the public policy exception, and that it operates primarily as a means for establishing the finality and uniformity of judgments throughout the nation."[266] On its face, this may seem to be a less than desirable fact. However, what this means is that if a litigant brought a case in state court instead of tribal court because the law is more favorable, the state court judge could choose to apply tribal law. The discretion that judges have in the choice-of-law context under a mandate of full faith and credit would mean that judges can prevent forum shopping as they see fit.

CONCLUSION

Tribal courts are a unique entity that have a long and storied history. The law that creates the framework that tribal, state, and federal courts interact in is complex and muddled. The level of respect and deference shown to tribal courts as competent judicial forums is grossly out of line with reality. The low level of deference shown to tribal courts not only complicates the relationship between the three sovereigns, it also leads to unjust results that are a holdover of hundreds of years of oppression and colonialism. The delay and wrongful denial of tribal judgments in Minnesota led the Minnesota Supreme Court to promulgate significant changes to Rule 10 of the Minnesota General

264. *Cf. id.* at 1406 (discussing statistics on state courts' frequent refusal to enforce tribal orders).

265. *What Is "Forum Shopping"?*, ROTTENSTEIN L. GROUP LLP, http://www.rotlaw.com/legal-library/what-is-forum-shopping (last visited Dec. 21, 2018).

266. Smith, *supra* note 81, at 1399.

Rules of Practice. The recent changes are a step in the right direction, but they fail to adequately address the problems in this area of the law, given that the new rule is still one of judicial comity. This Note argues that state legislatures should amend their state constitutions to give full faith and credit to tribal court orders to best increase tribal sovereignty and clarify the status of tribal courts in the American legal system. The policy reasons and mutual benefits that tribes and states will see under such a mandate make now the optimum time for state legislatures to start considering a change.