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FEDERAL COURTS, TRIBAL COURTS, AND COMITY: DEVELOPING TRIBAL JUDICIARIES AND FORUM SELECTION

Raymond L. Niblock[*]

I. INTRODUCTION

The original legal systems of the American Indian tribes differed greatly from each other as well as from those of the European settlers. These systems differed in form as well as in substance.

Given the political nature of tribes having no established geographic boundaries, so, too, the jurisdiction of their legal systems had no established boundaries. As colonialism progressed, so did cession of territory which restricted the territorial jurisdiction of tribes to the reservations that exist today.[1]

Within tribal territory, a number of current federal limitations have added to the difficulty in maintaining many of the traditional legal systems previously in place. Yet other forces, in existence well before federal limitations, had already begun to weaken and overwhelm the traditional systems. For example, European contact and the work of missionaries had a paramount impact, disrupting the traditional economies and introducing new technology.[2]

As the presence and influence of whites increased, evidenced by federal efforts to induce tribes to adopt representative governments, so progressed the disappearance of the traditional tribal systems. As the United States developed, the economic and social pressures of the nation also brought influence upon the tribes to adopt representative governments.[3] This facet has been recognized by some tribal courts. For example, the Navajo Supreme Court has stated: "People living on [reservations] face [many] social and economic situations unlike those faced in Anglo-America. Therefore . . . court[s must] consider those unique situations when deciding controversies that are particular to that . . . Nation."[4]

The purpose of this article is to examine tribal judicial systems in an historical context, to argue for the development of tribal judiciaries, separate and distinct from the federal judicial system, and to present a general

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1. FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 332 (1982).
2. *Id.*
3. *Id.* at 333.
4. Begay v. Navajo Nation, 15 Indian L. Rep. 6032, 6034 (Navajo 1988).

guideline for determining in what court a civil action involving Indian tribe members or territory should be filed. But to do so, a number of issues and doctrines must be considered—two of these being comity and notions of tribal sovereignty. These principles, comity and sovereignty, are distinct, but involve overlapping aspects.

A. The Doctrine of Comity and Indian Law

The doctrine of comity, in the context of civil jurisdiction, between a federal court and a tribal court, is significant in any examination of tribal judiciaries. The issue is whether the tribal court ought to have first opportunity to determine its jurisdiction in cases where it has already asserted itself, or ought to have asserted itself, but the matter is properly before a federal court. The discussion is confined to federal-tribal relations in matters of civil jurisdiction. State-tribal relations are excluded from the discussion, as are issues of criminal jurisdiction. Criminal jurisdiction is entirely another matter, one that is considerably regulated by Congress; whereas, matters of tribal civil jurisdiction have not received definitive treatment by Congress or the federal courts. Where comity is concerned, the treatment by Congress is non-existent, and the treatment by the federal judiciary is limited, leaving the field open for development.

1. *Definition of Comity*

> Comity . . . Courtesy; complaisance; respect; *a willingness to grant a privilege, not as a matter of right, but out of deference and good will.* Recognition that one sovereignty allows within its territory to the legislative, executive, or judicial act of another sovereignty, having due regard to rights of its own citizens. . . . In general, the principle of 'comity' is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect.[5]

The doctrine of comity relates to the amount of respect federal courts ought to accord tribal courts in their assertions of tribal civil jurisdiction over matters in which concurrent jurisdiction between federal government and the tribe *might* exist. In other words, the question is whether a federal court should abstain from hearing a matter and allow, or force, a plaintiff to bring the matter before a tribal court, whether the action was originally brought in federal court or not, where Congress has not expressly limited the

5. BLACK'S LAW DICTIONARY 267 (6th ed. 1990) (emphasis added)(citations omitted).

tribe's jurisdiction. One concern that must be remembered, however, is that this doctrine is discretionary. A federal court confronted with comity concerns is not obligated to consider them. Some of the decisions discussed in this article appear to have elevated the doctrine of federal-tribal comity to that of a mandate.

2. *Comity is Not a Jurisdictional Determination*

Comity concerns and jurisdictional issues are two separate questions; however, the two topics are not mutually exclusive. Comity deals with how much respect a federal court should accord a tribal court in its initial determination of jurisdiction, even where the federal court may share jurisdiction. Jurisdiction, by contrast, refers to the power and authority of a court to adjudicate a claim.

The courts have given comity relatively little treatment beyond the two Supreme Court comity cases *seminalis*, *National Farmers Union Insurance v. Crow Tribe of Indians*[6] and *Iowa Mutual Insurance Co. v. LaPlante*.[7] These cases will be examined regarding their impact on federal and Indian relations—specifically upon the respective judiciaries.

B. Fundamental Premise: Tribal Sovereignty

Sovereignty has many facets, and few authorities agree on a single definition. However, it is recognized that sovereignty is "supreme political authority; . . . [t]he power to do everything in a state without accountability."[8]

One hundred and fifty years ago, Chief Justice Marshall held in *Worcester v. Georgia*[9] that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive . . . ."[10] Today, the generally accepted view is that the various Indian tribes, within the borders of the United States, retain certain incidents of sovereignty that are inherent in them. This "right of tribes to govern their members and territories flows from a pre-existing sovereignty which is limited, but not abolished, by their inclusion within the territorial bounds of

6. 471 U.S. 845 (1985).
7. 480 U.S. 9 (1987).
8. BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).
9. 31 U.S. (6 Pet.) 515 (1832).
10. *Id.* at 557.

the United States."[11] Assuming the tribe is recognized, the "tribe retains its sovereignty until Congress acts to divest that sovereignty."[12]

The critical concept here, and truly a most basic principle of all Indian law, is that those powers which are vested in an Indian tribe are not delegated or granted to them by express acts of Congress; rather, those powers are "inherent powers of a limited sovereignty which has never been extinguished."[13] This fundamental principle of recognizing the tribes' inherent sovereignty where not limited or withdrawn by treaty or statutes, "or by implication as a necessary result of their dependent status,"[14] is well recognized by the United States Supreme Court.[15]

As fundamental precepts, then, we have established that the tribes are sovereign over their own members and over events within their territory, unless that sovereignty has been expressly limited by treaty, express Congressional act, or by the Supreme Court. This concept, combined with the principle of comity, provides the essential context within which the discussion of developing Indian judiciaries must occur.

II. FEDERAL INDIAN POLICY AND TRIBAL SELF-DETERMINATION

A. Historical Perspective

In *Cherokee Nation v. Georgia*[16] and *Worcester v. Georgia*,[17] Chief Justice Marshall espoused that the "American Indian peoples comprised nations domestic to and dependent upon the United States. They occupied a status of 'quasi-sovereignty' . . ., being sovereign enough to engage in treaty-making with the U.S. . . ., but not sovereign enough to manage their other affairs as fully independent entities."[18] This had the effect of laying the groundwork for the "plenary power doctrine," which means that the federal government would assume full and inherent power over Indian affairs and a concomitant "trust responsibility" over all Indian assets.[19]

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11. COHEN, *supra* note 1, at 231.

12. COHEN, *supra* note 1, at 231 (citing Harjo v. Kleppe, 420 F. Supp. 1110 (D.D.C. 1976), *aff'd sub nom.* Harjo v. Andrus, 581 F.2d 949 (D.C. Cir. 1978)).

13. COHEN, *supra* note 1, at 231 (quoting United States v. Wheeler, 435 U.S. 313, 322-23 (1978)).

14. COHEN, *supra* note 1, at 231 (quoting *Wheeler*, 435 U.S. at 323).

15. *See generally*, *Wheeler*, 435 U.S. at 313; Oliphant v. Suquamish Indian Tribes, 435 U.S. 191 (1978).

16. 30 U.S. (5 Pet.) 1 (1831).

17. 31 U.S. (6 Pet.) 515 (1832).

18. Ward Churchill & Glenn T. Morris, *Indian Laws and Cases*, *in* The State of Native America 19 (M. Annette Jaimes ed., 1992).

19. *Id.*

In 1896, Justice White's opinion in *Talton v. Mayes*[20] recognized Congress' plenary power, opining that "[t]rue it is that in many adjudications of this court the fact has been fully recognized, that although possessed of these attributes of local self government, when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States."[21] The Plenary Power Doctrine was the primary basis by which Congress and the Supreme Court unilaterally divested the several tribes of many aspects of their inherent sovereignty. The consequences of those unilateral acts embodied in various federal policies can be summed up as "assimilationist"—Allotment, Assimilation, Relocation, and Termination.

B. Shifting Policy

In 1977, the American Indian Policy Review Commission "called for a firm rejection of assimilationist policies and reaffirmation of the status of tribes as permanent, self-governing institutions . . . ."[22] By then, the federal government had shifted to a policy of advancing tribal self-determination after the previous policies of termination and assimilation were regarded as failures and began to fade.

The chief result of this change in federal Indian policy was the passage of the Indian Civil Rights Act of 1968.[23] This Act imposed upon the tribes most of the requirements of the Bill of Rights, whereas, traditionally, the tribes had not been subject to Constitutional restraints in their governmental actions.[24] Although the Act worked a further reduction of tribal sovereignty by thrusting portions of the Bill of Rights upon the tribes, it also amended Public Law 280[25] which cut in favor of advancing tribal sovereignty.

The amendment of Public Law 280 prohibited states from assuming civil and criminal jurisdiction over Indian country.[26] Public Law 280 originally allowed states to unilaterally assume jurisdiction over matters in Indian country, but its amendment added the requirement of tribal consent. The effect of the law was to put an end to further incursions by states into areas of tribal, or federal, domain. The amendment removed the states as interested parties, as a matter of competence, in the determination of

20. 163 U.S. 376 (1896).
21. *Id.* at 384.
22. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 31 (2d ed. 1988).
23. 82 Stat. 77 (codified as amended in scattered sections of Title 25 of the United States Code).
24. *See* CANBY, *supra* note 22, at 29 (citing Talton v. Mayes, 163 U.S. 376 (1896)).
25. 67 Stat. 588 (1968).
26. *See* CANBY, *supra* note 22, at 29 (citing 25 U.S.C. §§ 1321-22, 1326).

jurisdiction over Indian country, leaving the federal government and the tribes as the sole contenders for authority.

In matters of civil jurisdiction, the division of authority between the tribes and the federal government has not yet been fully determined. Since civil jurisdictional concepts have yet to be developed *in toto*, comity becomes important because it operates to allow tribes first opportunity to determine their jurisdiction over matters which otherwise remain untouched by Congress. Through the process of encouraging the tribes to assert themselves the law in this murky area will become developed. The decisions of the Supreme Court, up to this point, appear to have emplaced a framework which will guide the development of tribal judiciaries, assuming that the current federal policy of self-determination for Indian tribes remains in effect.

C. Limits on Tribal Sovereignty

Felix Cohen states:

> In matters of internal self-government within tribal territory, tribal powers are exclusive, and federal and state powers are inapplicable, unless such tribal powers have been limited by federal treaties, agreements, or statutes. Absent a limiting treaty or federal law, tribal powers may be exercised unfettered by assertions of federal or state authority.[27]

The limitations enacted by statutes and treaties are too many to enumerate, but "obvious examples are provided by the vast land cessions made by treaty which ended tribal power over the ceded areas. Some treaties also contain clauses requiring tribes to permit federal supervision within their territories."[28]

Another area of limitations exists among those "external powers of sovereignty [which] were implicitly lost to the tribes by virtue of their incorporation within the United States."[29] Chief Justice Marshall revealed these propositions in *Johnson v. M'Intosh*[30] and in the Cherokee Cases. Then, in 1978, the Supreme Court decided the case of *Oliphant v. Suquamish Indian Tribe*.[31] Justice William Rehnquist wrote the opinion,

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27. COHEN, *supra* note 1, at 236.
28. COHEN, *supra* note 1, at 242.
29. COHEN, *supra* note 1, at 244.
30. 21 U.S. (8 Wheat) 543 (1823). Discovery by the European nations did not extinguish the natives' sovereignty but did necessarily diminish it. COHEN, *supra* note 1, at 244.
31. 435 U.S. 191 (1978).

which held that the tribe did not have criminal jurisdiction over non-members in tribal courts.[32]

For this article's purposes, *Oliphant* serves well in the forthcoming discussion of the doctrine of comity, because *Oliphant* placed significant additional limitations on tribal sovereignty.[33] *Oliphant* raised the issue of the "tribe's power to exercise criminal jurisdiction over non-Indians on the reservation."[34] The opinion, silent towards civil jurisdiction over non-Indians, left unclear what limits may exist with respect to tribal civil jurisdiction toward non-Indians or non-member Indians living on the reservation. According to Cohen:

> [u]nder these decisions, the powers implicitly lost by tribes are the power to transfer tribal land without federal approval, the power to carry on relations with nations other than the United States, the power to regulate non-Indians when no tribal interest justifies such regulations, and the power to impose criminal punishment on non-Indians.[35]

D. The Extent of Civil Jurisdiction

The limits of tribal powers are not readily identifiable since their sovereignty, at least in civil matters, does not in any way rely on what the federal government has delegated to it. As stated above, the "powers of tribes extend 'over both their members and their territory.'"[36] Although tribal powers have been limited in a myriad of areas, particularly the area of criminal jurisdiction, tribal civil authority over its territory and transactions within that territory is extensive. The extent of tribal powers has not been limited to civil disputes between non-Indians and Indians arising from transactions on the reservation. However, authority over these transactions is "exclusively committed to tribal judicial jurisdiction."[37]

The evolution of rules governing civil jurisdiction to Indian country has been different from the development of rules dealing with criminal jurisdiction. "Contrary to the rule in criminal matters, Indian tribes retain

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32. *Id.* at 212.
33. *See* CANBY, *supra* note 22, at 69.
34. *See* CANBY, *supra* note 22, at 69.
35. COHEN, *supra* note 1, at 245-46.
36. COHEN, *supra* note 1, at 246 (citing United States v. Mazurie, 419 U.S. 544, 557 (1975)).
37. COHEN, *supra* note 1, at 246 (citing Williams v. Lee, 358 U.S. 217 (1959)).

civil regulatory and judicial jurisdiction over non-Indians."[38] As Cohen states, an

> analysis of the actions of each of the three federal branches demonstrates that civil jurisdiction over non-Indians has not been withdrawn and that the exercise of such jurisdiction is consistent with the tribes' dependent status under federal law. . . . In the civil field, however, Congress has never enacted general legislation to supply a federal or state forum for disputes between Indians and non-Indians in Indian country.[39]

Essentially, the field remains open to development. The case law is limited, and there are no federal enactments to guide federal courts, or tribal courts for that matter, in determining civil jurisdiction where the jurisdiction of both might be in question. However, this appears to assume that the tribal courts have no say in the question of their own jurisdiction. Nothing could be further from the truth.

The Navajo Nation's Supreme Court has taken positive steps to enforce their civil authority, at least from the influence of the authority of the states. In *Billie v. Abbot*,[40] the Navajo Supreme Court prevented the State of Utah from intercepting the federal tax refunds of Navajo Indians responsible for child support payments through the state-funded Aid to Families with Dependent Children. The Navajo Supreme Court relied heavily upon the idea of self-determination in its decision.

In support of its decision, the Navajo Supreme Court cited two United States Supreme Court decisions. The first was *Williams v. Lee*, where the United States Supreme Court stated that "[i]mplicit in the Treaty of 1868 is the understanding that the internal affairs of the Navajo people are within the exclusive jurisdiction of the Navajo Nation government."[41] In the second case, *United States v. Kagama*, the United States Supreme Court stated: "[t]he sovereignty retained by an Indian tribe includes 'the power of regulating [its] internal and social relations.'"[42]

Thus, the question of the development of tribal judiciaries does not rely solely upon the concept of comity and the discretion of the federal courts. Not only does comity play a role, but, as recognized by the *Kagama* decision, inherent sovereignty is an important and determining factor. Indian

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38. COHEN, *supra* note 1, at 253 (citing Washington v. Confederated Tribes, 447 U.S. 134 (1980) and *Williams*, 358 U.S. at 223).

39. COHEN, *supra* note 1, at 253-54.

40. 16 Indian L. Rep. 6021 (Navajo 1988).

41. Billie v. Abbot, 16 Indian L. Rep. 6021, 6022 (Navajo 1988) (citing Williams v. Lee, 358 U.S. 217, 221-22 (1959)).

42. *Id.* (citing United States v. Kagama, 118 U.S. 375, 381-82 (1886)).

nations must take active steps to enforce and enhance their own judicial authority and powers.

E. Current Federal Policy: Advancing Tribal Development

As expressed in the Introduction, the United States government, in the 1960s, adopted the policy of advancing tribal self-determination, regarding previous policies as failures. This belief in advancing tribal self-determination is probably more a result of the historical experience of federal interaction with the tribes rather than some academic theory that the tribes would be better off by retaining all, or even most of the incidents of their inherent sovereignty. After all, the recent history of Indian affairs from the reservation Period (1850 to 1887), through Allotment and Assimilation (1887 to 1934), Reorganization and Tribal Preservation (1934 to 1953), and Termination and Relocation (1953 to 1968) was dismal,[43] and President Nixon acknowledged the failures in 1970 in a statement that "declared termination to have been a failure."[44] President Nixon called on Congress to repudiate the policy.

The purpose here is not to argue on behalf of Indian sovereignty advocates, but, rather, to show that the federal government recognized in the 1960s that permitting Indians a degree of autonomy over their affairs, without abandoning federal trust responsibilities, would ultimately inure to their benefit. Strengthening tribal governments is the current model, and the federal courts have recognized this switch in federal policies by assiduous efforts to recognize tribal courts and their province over their internal affairs on the reservation, including the activities of non-Indians on the reservation.

F. Advancing the Tribal Judiciary

"The powers of an Indian tribe in the administration of justice derive from the substantive powers of self-government which are legally recognized to fall within the domain of tribal sovereignty."[45] To be able to adjudicate a claim involving applicable law is an essential element of sovereignty, self-government, and self-determination. Thus, a critical part of promoting tribal self-government is advancing a tribal judiciary.

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43. *See generally*, COHEN, *supra* note 1, for a more extensive explanation of these historical periods.

44. CANBY, *supra* note 22, at 30. See 116 CONG. REC. 23,258 (1970) for President Nixon's statement concerning Indian policy.

45. COHEN, *supra* note 1, at 145.

What good is a tribe's power to administer justice without well developed courts to interpret tribal laws and, in some instances, interpret federal and state laws as they might apply to tribal issues? This is a principle of law already recognized in the United States Court System; litigation of federal law is permitted to occur in state courts.[46] And, what good is the tribal court system without a cultivated tribal common-law responsive to its own needs? The Supreme Court has, if only implicitly, recognized that tribal courts have greater expertise in evaluating their own problems and interests.[47]

The tribe's power to administer justice through its own court system is an indispensable part of self-determination; therefore, encouraging the development of a tribal judiciary is an essential portion of the current federal Indian policy. Like all federal Indian law issues, comity, inextricably interwoven among jurisdictional matters, must be balanced on the high-wire against the plenary power of Congress over Indian affairs.

In the area of comity, the question is what amount of respect should federal courts give to tribal court determinations of their own jurisdiction before the federal courts allow litigation on the merits in the federal forum instead of the tribal forum? These related questions are not easily solved, however, because of a lack of any bright-line litmus tests for determining jurisdiction.

G. The Supreme Court, Tribal Sovereignty, and Comity

National Farmers Union Insurance Co. v. Crow Tribe of Indians[48] and *Iowa Mutual Insurance Co. v. LaPlante*[49] are the leading federal-tribal comity cases. Taken together, these cases form the judicial foundation for the advancement of a tribal judiciary.

In *National Farmers Union*, the respondent was a Crow Indian minor who was struck by a motorcycle in a school parking lot located within the Crow Indian Reservation on land owned by the State of Montana. The respondent brought an action in the Crow Tribal Court against the petitioner school district and obtained a default judgment.[50]

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46. For example, state courts can hear 42 U.S.C. § 1983 claims. The Tenth Circuit recognized this principle as applicable to tribal courts in Smith v. Moffett, 947 F.2d 442 (10th Cir. 1991).

47. See National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985) and Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987), which are discussed *infra* part II.G.

48. 471 U.S. 845 (1985).

49. 480 U.S. 9 (1987).

50. *National Farmers Union Ins. Co.*, 471 U.S. at 845.

In response, the school district and its insurer brought an action in federal court for injunctive relief on the ground that the tribal court had no civil jurisdiction over a non-Indian defendant, and invoking the jurisdiction of the federal court under the "federal question" statute.[51] Even though the district court's jurisdiction was properly invoked under § 1331, the Supreme Court held that the petitioners ought to have exhausted the available remedies in the tribal court first, because it would be premature for the district court to consider any relief until the tribal court had an opportunity to ascertain its jurisdiction. Hence, federal action should be held in abeyance pending the completion of the tribal court proceedings. The Supreme Court did not resolve the jurisdictional question, but deferred to the tribal court so that it could determine its own jurisdiction in the first instance.

The Court stated that *Oliphant* did not control the question of the tribe's civil jurisdiction,[52] foreclosing any chance of an *Oliphant* argument in civil jurisdictional disputes where a petitioner argues that "resort to exhaustion as a matter of comity" would be "manifestly inappropriate."[53] In short, the Court explained that "if we were to apply the *Oliphant* rule here, it is plain that any exhaustion requirement would be completely foreclosed because federal courts would always be the only forums for civil actions against non-Indians."[54] In *National Farmers Union*, unlike *Oliphant*, there was "no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation."[55]

The driving force behind the *National Farmers Union* opinion was the Court's unequivocal statement that allowing the tribal court's initial examination of its jurisdiction is pursuant to current Congressional policy of supporting tribal self-government and self-determination. Furthermore, the Court reasoned that

> the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.[56]

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51. 28 U.S.C. § 1331 (1988).
52. *National Farmers Union Ins. Co.*, 471 U.S. at 854-55.
53. *Id.*
54. *Id.* at 854.
55. *Id.* (citing COHEN, HANDBOOK OF FEDERAL INDIAN LAW 253 (1982), which stated, "The development of principles governing civil jurisdiction in Indian Country has been markedly different from the development of rules dealing with criminal jurisdiction.").
56. *Id.* at 855-56.

It is this examination, wrote Justice Stevens, that "should be conducted in the first instance in the Tribal Court itself."[57]

The Court articulated five practical reasons in support of this notion, in addition to recognizing that "Congress is committed to a policy of supporting tribal self-government and self-determination."[58] Those reasons were: (1) giving the tribe whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal basis for the challenge; (2) allowing development of a full record in the tribal court prior to determination of the issues on the merits or before any question concerning appropriate relief is addressed; (3) minimizing the "procedural nightmare" by the federal court staying its hand until after the tribal court has had an opportunity to determine its own jurisdiction; (4) encouraging the tribal court to explain its precise basis for accepting jurisdiction; and (5) providing the federal court with the benefit of tribal court expertise in such matters in the event of further review.[59]

Almost a year and a half after the *National Farmers Union* decision came the case of *Iowa Mutual Insurance Co. v. LaPlante*.[60] The *Iowa Mutual* case dealt with tribal jurisdiction in the context of federal diversity jurisdiction, whereas *National Farmers Union* concerned the federal question statute. The subject matter in *Iowa Mutual* involved, *inter alia*, personal injuries in a tort claim. The plaintiff first brought his action before the tribal court, which ruled that it did have subject matter jurisdiction over the action. The insurance company-appellant then filed its petition in federal court without first seeking appellate review by the Tribal Court of Appeals.

The Supreme Court stayed its diversity jurisdiction to permit a tribal court to determine its own jurisdiction over parallel litigation. Here again, the Supreme Court did not actually decide whether the tribal court had power to entertain a case against a non-Indian defendant, but its language was encouraging.[61]

More important, however, is the emphasis Justice Marshall placed on the policy of promoting tribal self-government. The petitioner argued that the statutory grant of diversity jurisdiction overrides the federal policy of

57. *Id.* at 856.

58. *Id.* at 856-57 (citing New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 138 n.5 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980); Morton v. Mancari, 417 U.S. 535, 551 (1974); Williams v. Lee, 358 U.S. 217, 223 (1959)).

59. *Id.* at 856-57.

60. 480 U.S. 9 (1987).

61. CANBY, *supra* note 22, at 159.

deference to tribal courts.[62] Justice Marshall rejected the argument, opining that 28 U.S.C. § 1332 "makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government."[63] But Justice Marshall did not stop there. He went on, in dicta, to suggest that civil jurisdiction over the activities of non-Indians on reservation lands is not only an important part of tribal sovereignty, but such jurisdiction presumptively lies in the tribal courts unless affirmatively limited by specific treaty provisions or federal statute.[64]

As a last resort, the petitioner argued the "policies underlying the grant of diversity jurisdiction—protection against local bias and incompetence—justify the exercise of federal jurisdiction . . . ."[65] The Court replied that the "alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established in *National Farmers Union* . . . and would be contrary to the Congressional policy of promoting the development of tribal courts."[66] However, Justice Marshall attached a caveat, stating that even though the "petitioner must exhaust available tribal court remedies before instituting a suit in federal court," the tribal court's determination of its jurisdiction is "ultimately subject to review."[67]

Taken together, *National Farmers Union* and *Iowa Mutual* make clear that the Supreme Court supports the articulated federal policies of advancing tribal self-government through the doctrine of comity by requiring litigants to exhaust tribal court remedies. Thus, developing a tribal judiciary is a legal mandate. Further, in civil matters, there appears to be a strong presumption in favor of Indian jurisdiction.

III. COMMENTATORS

National Farmers Union and *Iowa Mutual* have drawn some attention by various commentators. For tribal advocates, it appears that both opinions are scored as partial victories for tribal sovereignty.

62. *Iowa Mutual Ins. Co.*, 480 U.S. at 12.
63. *Id.*
64. *Id.*
65. *Id.* at 978.
66. *Id.* at 19.
67. *Id.*

A. Law Reviews

Frank Pommersheim, in *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*,[68] makes the accurate observation that both *National Farmers Union* and *Iowa Mutual* "have created significant 'breathing space' for tribal courts to articulate their own version of tribal sovereignty, while at the same time reserving significant federal judicial authority to review much of that decision making."[69] As a practical matter, Pommersheim points out that "[i]t is therefore incumbent upon tribal courts to insure that their decision making withstands the rigors of federal review."[70] Nonetheless, Pommersheim's discussion of tribal sovereignty is not the goal of this article. Rather, how the doctrine of comity and tribal sovereignty fit into the total scheme of tribal jurisprudence and an understanding of the need for the development of tribal courts, in the context of *National Farmers Union* and *Iowa Mutual*, is the goal.

Pommersheim accurately sums up the problem by his statement:

> Tribal courts and their jurisprudence are currently involved in a period of rapid growth and development. As part of this process of significant change, tribal courts need to build an indigenous jurisprudence of vision and cultural integrity. This endeavor includes the necessity to transcend . . . tribal sovereignty, and the 'dilemma of difference.'[71]

Given comity as an essential focus of the argument in this article, *National Farmers Union* and *Iowa Mutual* are definitely steps away from additional limits upon tribal sovereignty. As Pommersheim points out, the respect of comity as a doctrine will allow tribal courts to build their own jurisprudence. Indeed, Pommersheim implied that these decisions almost demand a tribal judiciary competent to hear such claims:

> In both the *National Farmers Union* and *Iowa Mutual* cases, the Court ringingly endorsed the importance of tribal courts as the primary forums in which to resolve civil disputes arising on the reservation. As Justice Marshall wrote in *Iowa Mutual*, '[t]ribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development.' It is the force of these most recent cases joined with the residual vitality of foundational cases such as *Cherokee*

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68. Frank Pommersheim, *Liberation, Dreams, and Hardwork: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411 (1992).

69. *Id.* at 412 n.4.

70. *Id.* at 412-13.

71. *Id.* at 411.

> *Nation* and *Worcester* that provide the necessary support, if not adequate legal and constitutional theory, for tribal courts to identify and explore the proper parameters of tribal sovereignty. These cases, of course, guarantee no affirmation of the *results*—practical or theoretical—of tribal court jurisprudence.[72]

Philip P. Frickey, in *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*,[73] also discussed these seminal comity cases but in a different context than Pommersheim. Frickey sought to paint federal Indian Law as a little understood facet of public law. He explained that one major reason for the confusion is that the Supreme Court has accorded Congress plenary power over Indian affairs and, because of this, the doctrine would require the Court to follow Congressional intent in deciding Indian law cases. Yet, Frickey illustrated that, in a variety of important cases, the Court has subordinated original Congressional intent in favor of more independent interpretations.[74]

Frickey noted that *National Farmers Union* and *Iowa Mutual* "are paradigms of practical reasoning and that may provide substantial methodological guidance."[75] Frickey pointed out that in *National Farmers Union*:

> the Court sensibly concluded that, consistent with federal policy encouraging tribal self-government, the tribal court should be the institution that, in the first instance, considered whether it may appropriately exercise jurisdiction in the circumstances. The Court acknowledged that the tribal court was the more competent institution to consider the traditional and contextual factors bearing on any such jurisdiction, and that the exhaustion requirement also promoted the efficient administration of justice.[76]

Iowa Mutual, wrote Frickey, is "particularly supportive of tribal courts," where the opinion concluded "that the federal district court must stay its hand until tribal appellate review is complete."[77]

> Taken together, [both cases] represent an effective exercise of practical reason. . . . The federal courts, including the Supreme Court, have very little experience with the structure, operation, and outcomes of tribal

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72. *Id.* at 420 (citations omitted).
73. Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990).
74. *Id.* at 1137.
75. *Id.* at 1232.
76. *Id.* at 1233.
77. *Id.* at 1234.

> court systems. Generalizing a formal theory of tribal court jurisdiction might ignore important contextual differences. Essentially, the Supreme Court has given tribal courts the chance to show that they can fairly and effectively litigate civil disputes involving non-Indian defendants. . . . In this context, at least, at some point formalism may follow function.[78]

B. Treatises

William C. Canby, Jr., who has been extensively cited in this Article, is the author of *American Indian Law*.[79] Canby's treatment of the issue of comity is clothed in a broad civil jurisdictional discussion, more broad than what we want to entertain here. As it may relate to comity, however, Canby does point out that many tribes are increasingly exercising jurisdiction over non-Indians for on-reservation claims. For many years this was not done unless the non-Indian stipulated to such jurisdiction.[80] Canby asserts that "it seems likely . . . that most tribal courts will be able to exercise jurisdiction over non-Indians for reservation-based claims."[81] The Doctrine of Comity is all the more necessary in encouraging the tribal courts to continue asserting themselves, albeit timidly, in furtherance of their judicial development. Honoring notions of comity allows that jurisdictional determination to be made in the first place by the court most qualified to determine its jurisdiction: the tribal court. After all, tribal interests may vary, and each tribe through its courts is the entity best suited to determine those interests.

C. The Minority View

As this article presents, current case law represents the majority view. Although there is apparently no true minority position, one can be inferred from several sources.

Justice Stevens dissented from the exhaustion part of the *Iowa Mutual* holding. The gist of his grievance with Justice Marshall's opinion is that Justice Stevens felt that tribal courts receive more deference "on the merits" than state courts.[82] He argued that where the tribal court and federal district court have concurrent jurisdiction over the dispute, the question of whether the tribal court has jurisdiction is not sufficient reason for requiring the

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78. *Id.*

79. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW (West Publishing, Nutshell Series (1988)).

80. CANBY, *supra* note 22, at 158.

81. CANBY, *supra* note 22, at 159.

82. *Iowa Mutual Ins. Co.*, 480 U.S. at 20-21 (Stevens, J., dissenting).

federal court to decline exercising its own jurisdiction until the tribal court has decided the case on its merits.[83] Justice Stevens claims that *National Farmers Union* offers no controlling precedent where the issue is the deference given to the deliberations of tribal courts on the merits of a dispute.

Comparing the federal-state and the federal-tribal relationships, Justice Stevens stated that "the mere fact that a case involving the same issue . . . pending in another court has never been considered a sufficient reason to excuse a federal court from performing its duty 'to adjudicate a controversy properly before it.'"[84] In short, his dissent centered on his thought that it is an "anomalous suggestion that the sovereignty of an Indian tribe is in some respects greater than that of the State of Montana . . . ."[85]

It seems from the great weight of authority that Justice Stevens' dissent has fallen on deaf ears, because the controlling case law in this narrow field of federal Indian law is highly correlative, and strongly against his position.

IV. THE FIRST ISSUE

The first issue presented in the Introduction was to argue for the development of tribal judiciaries. Essential to this argument, was an understanding of sovereignty and comity.

Sovereignty for the Indian tribes within the United States is limited by law and by virtue of their status, both as dependents and conquerees of the United States. Although some authorities have argued that the sovereignty of Indian tribes should be treated like the sovereignty of the individual states, such a concept has met with little acceptance by the authorities which would grant such a status: i.e., Congress and the Supreme Court. Thus, by definition, the Indian tribes do not have sovereign rights equal to the individual states.

As defined earlier, sovereignty is akin to power; power to act within borders without being held accountable by a superior authority. As acknowledged previously in this discussion, the Indian tribes have little power or authority to adjudicate criminal matters. This limitation is established by statute.[86] By comparison, the states retain their criminal jurisdiction under the Constitution. Further, by comparison, state sovereignty

83. *Id.* (Stevens, J., dissenting).

84. *Id.* at 22 (Stevens, J., dissenting) (citing County of Allegheny v. Frank Mashuda Co., 361 U.S. 855 (1959)).

85. *Id.* (Stevens, J., dissenting).

86. Indian Major Crimes Act, 18 U.S.C. §§ 1153, 3242 (1988).

is derived from the United States, whereas Indian nation sovereignty is inherent.

However, by the decisions in *National Farmers Union* and *Iowa Mutual*, the Supreme Court appears to have elevated the civil jurisdiction of the Indian tribes to the same level as that enjoyed by the individual states, at least concerning the interplay with the federal judiciary.

It should be noted that not only are the mechanisms for determining jurisdiction different for tribes and states, but so is the scope of the power of the tribal and state courts. For example, where an action in a state court could be removed to the federal courts and vice versa,[87] the Indian courts seem to have first say in determining jurisdiction, subject, of course, to federal review. Thus, in one sense, the tribal courts have a greater scope of power than the state courts. However, in either case, the result is ultimately the same. The matter will eventually be adjudicated in the most appropriate forum.

Comity, as previously discussed, is the granting of deference to another authority, not by way of right, but as a matter of discretion. Up until the decisions in *National Farmers Union* and *Iowa Mutual*, comity was a viable way of viewing the relationship between the federal and tribal courts.

However, these decisions appear to have raised the process of deference to tribal determination of jurisdiction to a principle of law. It may appear that no longer is the granting of such deference a matter of discretion in the federal courts, but it may be a requirement for the courts. The Tenth Circuit Court was certainly not reticent about requiring the lower court to take such factors into consideration.[88]

In *Smith v. Moffet*, however, the Tenth Circuit noted that the consideration of comity is not a jurisdictional bar.[89] And, in *Iowa Mutual*, the Supreme Court stated:

> [t]he exhaustion rule enunciated in *National Farmers Union* did not deprive the federal courts of subject-matter jurisdiction. Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite. In this respect, the rule is analogous to principles of abstention articulated in *Colorado River Conservation Dist. v. United States*, 424 U.S. 800, 96 S. Ct. 1236 . . . : even where there is concurrent jurisdiction in both state and federal courts, deference to state proceedings renders it appropriate for the federal courts to decline jurisdiction in certain circumstances.[90]

87. *See* 28 U.S.C. § 1441 (1988).
88. Smith v. Moffet, 947 F.2d 442 (10th Cir. 1991).
89. *Id.* at 445.
90. *Iowa Mutual Ins. Co.*, 480 U.S. at 16 n.8.

Thus, once more, the relationship between the tribal courts and federal courts appears to mirror the relations between state and federal courts.

Sovereignty and comity, with respect to the relationship between tribal and federal courts, is very much like the relationship between state and federal courts. However, the primary differences are: (1) the tribal courts appear to have the first chance to determine jurisdiction and (2) the tribal courts will be accorded a greater degree of deference because of their status as semi-sovereign entities. Thus, it follows that as the Indian nations are semi-sovereign entities, comity in tribal-federal judicial relations will be given a greater degree of consideration and adherence than in state-federal judicial relations.

Returning to the first issue, the argument for the development of tribal judiciaries can only be strengthened when the federal policy of Indian self-determination is considered. With the rejection of the assimilationist position by the federal government, it is clear that federal policy mandates that the tribes be considered as *different* from the states.

Thus, given the fact that the Indian tribes are semi-sovereign entities, to be considered differently from the states, it is logical that tribal courts be given a greater degree of deference in the determination of their jurisdiction. Therefore, when considering tribal-federal questions, the federal judiciary is subject to a standard which is higher than that of comity. Such a standard approaches the level of a legal mandate.

Given such a conclusion, not only should tribal judiciaries be developed, they must be developed. Without independent tribal judiciaries, the entire federal policy of self-determination becomes meaningless.

V. A GUIDE FOR DETERMINING THE FORUM

Since the federal courts do, as a matter of law, retain the discretion to hear a matter involving concurrent jurisdiction, where is the best forum to file a claim?

A. The Location of the Event

Almost all Supreme Court decisions recognize, if only implicitly, Chief Justice Marshall's decision in *Worcester v. Georgia*[91] that, generally, Indian nations have exclusive authority and jurisdiction within their boundaries.[92] If a civil wrong occurs on the reservation, then there will be a strong

91. 31 U.S. 515 (1832).
92. *Id.*

presumption in favor of the tribal court having the authority to adjudicate the matter.[93]

B. The Parties Involved

In both *National Farmers Union* and *Iowa Mutual*, some of the parties involved in the cases were non-Indians. Thus, there is implicit recognition in Supreme Court decisions that the jurisdiction of tribal courts extends to non-Indians. Further, in *United States v. Wheeler*, the Supreme Court stated that tribal jurisdiction extends "'over both their members and their territory.'"[94] And, the Tenth Circuit went so far as to state that the status of the parties was immaterial to the analysis.[95] Thus, if at least one party is an Indian or the matter occurred on the reservation, the tribal court will likely have jurisdiction.

C. Limitations on Sovereignty

As previously stated, criminal jurisdiction is prohibited to tribal courts and Congress has the power to limit the jurisdiction of the tribal courts.[96] Thus, an attorney considering filing a claim involving Indians and claims originating on reservations, must thoroughly research the statutes to ensure that there are no federal limitations upon the claim. However, even if there is a strong substantive federal claim, this does not mean that the tribal courts would not have jurisdiction.[97] Careful research on similar claims should be conducted prior to filing.

D. Tribal Interests

Of course, the specific interest that a tribe might have in a cause of action must be analyzed. Each case discussed in this article examined the interests of the tribe and considered those interests. The paramount tribal interest to all such claims would be any possible encroachment upon the sovereignty of that Indian nation. This interest arises from the stated federal policy of encouraging tribal self-determination. Any encroachment upon the

93. *Id.* at 521.
94. COHEN, *supra* note 1, at 246 (citing United States v. Wheeler, 435 U.S. 313, 322-23 (1978)).
95. Smith v. Moffett, 947 F.2d 442, 444 (10th Cir. 1991).
96. *See* Indian Major Crimes Act, *supra* note 86 and accompanying text.
97. *See* Smith v. Moffett, 947 F.2d 442 (10th Cir. 1991).

already limited sovereignty of an Indian nation would, by definition, limit that tribe's ability to develop as a semi-sovereign entity.

Further, tribal constitutions, statutes, and case law must be considered. These instruments are the formal legal expression of tribal interests upon which an opposing party would be able to object to a federal court exercising jurisdiction, alleging that the tribe has a much greater interest in adjudicating the matter.

E. Federal Interests

The attorney must determine if any federal interests are so strong as to preclude the tribal court from hearing the matter. These potential federal interests must be balanced against the tribal interests. The attorney must also ask if these tribal interests would be sufficient to allow the federal court to require the claimant to refile in tribal court.

F. An Objection on Principle

One objection that is likely to be raised by a party who is forced to go to a tribal court is the issue of federal question jurisdiction. Is it proper to require a United States citizen, who very well might not be a member of that tribe and would be properly before the federal court with a federal question, to go to a tribal court?

This objection is the essence of Justice Stevens's dissent in *Iowa Mutual*. Is a tribal court's jurisdiction so important that it becomes a reason for the federal court to decline to exercise its jurisdiction until the tribal court has decided the case?

The stated policy of Congress, currently adhered to by the courts, of enhancing tribal self-determination, is the root of this problem. The problem has not been addressed by the courts to this date and resolution of it may very well be determined according to the attitudes and politics of the circuit judges which first hear the issue when it is raised.

VI. CONCLUSION

If the current federal policy of self-determination by Indian nations is maintained, then the development of tribal judiciaries must be a primary step in realization of this goal. Essential to the development of tribal judiciaries as organs of inherently semi-sovereign entities, as opposed to the derivative sovereignty of the states, is the quasi-independence of the tribal judiciaries,

not subject to the discretion of the federal courts under the doctrine of comity.

After all, the discretion associated with comity is the antithesis of sovereignty when that discretion is used to suborn decisions within the sovereign authority of the primary adjudicator. Even though the principle of self-determination may not comfortably juxtapose with this notion of limited sovereignty and discretionary comity, elevating comity to the level of mandate might be a better compromise.