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EXAMINING COMITY AND THE EXHAUSTION DOCTRINE IN TRIBAL COURT CIVIL JURISDICTION: THE CHEROKEE NATION'S OPIOID LITIGATION

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Abstract: The opioid epidemic has devastated communities throughout the United States over the last two decades. Native American and Alaska Native tribes faced disproportionate impacts and suffered the long-lasting consequences that opioid addiction causes families and communities. In response, states and municipalities across the United States sued the distributors and pharmacies responsible for illegally diverting opioids. In April of 2017, the Attorney General for the Cherokee Nation, Todd Hembree, initiated a civil suit against opioid pharmaceutical distributors and retailers: CVS, Walgreens, Wal-Mart (pharmacies), and McKesson, Cardinal Health, and AmerisourceBergen (distributors). Although other tribes in the United States also brought claims against the distributors and pharmacies, the Cherokee Nation took a unique approach: it brought a civil suit in tribal, rather than federal, court. In response, the distributors and pharmacies sought to enjoin the suit, asking the Federal District Court for the Northern District of Oklahoma to assert its jurisdiction over the pending case and halt proceedings. The court granted the distributors and pharmacies injunctive relief and stopped the case from proceeding in tribal court.

As Felix Cohen,[1] the author of the Handbook of Federal Indian Law, remarked, one of "the most basic principle[s] of all Indian law"[2] is that a tribe's powers are "inherent powers of a limited sovereignty which [have] never been extinguished,"[3] and "what is not expressly limited [by Congress] remains within the domain of tribal sovereignty."[4] Congress has not expressly

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1. Felix Cohen was an attorney and civil servant in the Department of Justice and Department of Interior in the 1930s and was tasked with compiling a handbook on federal Indian law. He is considered the architect of the modern framing of federal Indian law. *See* Adrian Habermacher, *"Felix Cohen was the Blackstone of Federal Indian Law:" Taking the Comparison Seriously*, 8 BR. J. AM. LEGAL STUD. 371, 371–98 (2019).

2. 1 FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01(1)(a) (Nell J. Newton ed., 2017) [hereinafter COHEN'S HANDBOOK].

3. *Id.* (quoting United States v. Wheeler, 435 U.S. 313, 322 (1978)).

4. U.S. Dep't of the Interior, Opinion on Powers of Indian Tribes (Oct. 25, 1934), *as reprinted in* DECISIONS OF THE SOLICITOR GENERAL OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS 1917–1974 447 (2013), https://archive.org/details/opinionsofsolici01unit/page/446/mode/2up [https://perma.cc/R85Z-ZUTW].

authorized the removal of cases from tribal court to federal court. Instead, the policy and decisional law of the United States requires federal courts to wait to assert jurisdiction over civil cases pending in tribal court until plaintiffs have exhausted tribal remedies. Known as the exhaustion doctrine, this requirement is based on the principle of comity, which has its roots in international law. Comity is a principle of restraint that encourages nations to acknowledge and enforce the fair and equitable decisions of foreign sovereigns in their jurisdiction.

This Comment argues that by failing to apply the exhaustion doctrine, the Federal District Court for the Northern District of Oklahoma violated the principles of comity. The court erred in its decision to grant the distributors' and pharmacies' preliminary injunction against the Cherokee Nation's opioid litigation. In doing so, the court ignored well-established federal decisional law and policy developed to support tribal self-determination. Ultimately, to promote the federal interest in supporting the self-determination of tribes, federal courts must follow the exhaustion doctrine and principles of comity in matters regarding tribal court civil jurisdiction over non-members.

INTRODUCTION

The opioid epidemic disproportionally impacts Alaska Native and Native American communities.[5] Alaska Natives and Native Americans account for only 2% of the United States population, yet account for the largest percentage increase in number of deaths in the United States from 1995 to 2015.[6] During that time, opioid overdose deaths rose from 2.9 per 100,000 deaths in 1999 to 13.9 per 100,000 deaths in 2016.[7] Opioid addiction impacts the health of individuals and families, and the illegal distribution or diversion[8] of opioids removes the ability of local governments to act, significantly impacting tribal governments.[9] Illegal diversion functionally limits the provision of services to communities, including health care, public safety and tribal justice, housing, economic

5. *See* Stacy L. Leeds, *Beyond an Emergency Declaration: Tribal Governments and the Opioid Crisis*, 67 KAN. L. REV. 1013, 1013–15 (2019) (summarizing CDC data on overdose and mortality rates during the opioid epidemic and contextualizing the data as applied to American Indian and Native Alaskan communities); *see also* Petition at 18, Cherokee Nation v. McKesson Corp., No. CV-2017-203 (Cherokee Nation D. Ct. Apr. 20, 2017) [hereinafter Cherokee Petition] ("Annual deaths from opioid-related overdoses more than doubled within the Cherokee Nation between 2003 and 2014. For adults within the Cherokee Nation, overdose deaths now outnumber deaths due to car accidents.").

6. Brief for 448 Federally Recognized Tribes et al. as Amici Curiae in Opposition to Defendants' Motions to Dismiss Tribal Claims at 10 & 40 n.54, *In re* Nat'l Prescription Opiate Litig., Nos. 17MD02804, 1:18-op-45459, 1:18-op-45749 (N.D. Ohio Oct. 5, 2018), 2018 WL 11016730 [hereinafter Brief Amici Curiae].

7. *Id.*

8. Here, diversion refers to the removal of prescription opioids from the legal market and distribution of prescription pills into the black market.

9. Cherokee Petition, *supra* note 5, at 20–21 ("Adverse social outcomes include child abuse and neglect, family dysfunction, criminal behavior, poverty, property damage, unemployment, and social despair. As a result, more and more Cherokee Nation resources are devoted to addiction-related problems . . . .").

development and government revenue, social services, child welfare and elder care.[10] These services are vital to maintaining the social and political fabric weaving together the tribes' inherent sovereignty; undermining them threatens the continued and future survival of the tribes' cultural and political identity.[11]

The opioid epidemic significantly impacted the Cherokee Nation, and as the largest federally recognized tribe in the United States, the Nation is well-positioned to bring a civil suit against the epidemic's driving forces. The District Court of the Cherokee Nation serves fourteen counties in Oklahoma and hears civil, criminal, and juvenile cases.[12] The Oklahoma Bureau of Narcotics determined that over ninety-seven million opioid pills were distributed within the Cherokee Nation's fourteen county territory in 2015, amounting to 107 opioid pills per adult.[13] As a result of the staggering rates of opiate addiction and the prevalence of the illegal diversion of opioids within the Cherokee Nation, the Attorney General for the Cherokee Nation, Todd Hembree, sued prescription opioid pharmacies and distributors in tribal court in the District Court of the Cherokee Nation.[14]

Attorney General Hembree, acting in his *parens patriae*[15] capacity, sought to hold pharmacies and distributors accountable for the illegal diversion of thousands of opioid pills within the Cherokee Nation's reservation boundaries.[16] In response, the distributors and pharmacies sought injunctive relief[17] from the Federal District Court for the Northern District of Oklahoma.[18] The distributors and pharmacies asked the federal court to enjoin the Cherokee tribal court from hearing the suit on the

10. *See* Brief Amici Curiae, *supra* note 6, at 10–19.

11. *See* Leeds, *supra* note 5, at 1013–15; Matt Irby, *The Opioid Crisis in Indian Country: The Impact of Tribal Jurisdiction and the Role of the Exhaustion Doctrine*, 43 AM. INDIAN L. REV. 353, 371 (2019).

12. *District Court*, CHEROKEE NATION JUD. BRANCH, https://www.cherokeecourts.org/District-Court [https://perma.cc/3J76-DT62].

13. Brief Amici Curiae, *supra* note 6, at 11

14. Cherokee Petition, *supra* note 5, at 3.

15. *Parens patriae* is a doctrine that represents a government's ability to bring a suit on behalf of its citizenry. *Parens patriae*, BLACK'S LAW DICTIONARY (11th ed. 2019).

16. Cherokee Petition*, supra* note 5, at 3.

17. An injunction, or asking for injunctive relief, is when a party asks the court to stop or halt an action. In this case, the action the distributors and pharmacies sought to halt were the Cherokee Nation's litigation proceedings in tribal court. *See* McKesson Corp. v. Hembree, No. 17-CV-323-TCK-FHM, 2018 WL 340042, at *2 (N.D. Okla. Jan. 9, 2018) ("Plaintiffs' Motion seeks a preliminary injunction pursuant to Federal Rule of Civil Procedure 65 enjoining Defendants from taking any action in the Tribal Court Action.").

18. *Id.*

grounds that the tribal court lacked subject matter jurisdiction.[19] The District Court for the Northern District of Oklahoma ruled in favor of the distributors and pharmacies.[20] In doing so, the federal court failed to require the distributors and pharmacies to exhaust their remedies in tribal court.[21] The court did so notwithstanding the well-established precedents of the United States Supreme Court and the Eighth, Ninth, and Tenth Circuit Courts of Appeals. Those precedents require federal district courts to extend comity to the tribal courts so that they can make the primary decision on the extent of their jurisdiction.[22]

This Comment examines the role of comity in the exhaustion doctrine and its application in the Cherokee Nation's opioid litigation. Part I summarizes the international origins of comity in United States common law. Part II discusses the application of comity in federal Indian law through the exhaustion doctrine. Part III analyzes the Cherokee Nation's opioid litigation and the federal court's decision to enjoin the Cherokee Nation's suit in tribal court. Ultimately, to promote the federal interest in supporting the self-determination of tribes, federal courts must follow the exhaustion doctrine and principles of comity on matters regarding tribal court civil jurisdiction over non-members.

I. INTERNATIONAL ROOTS OF COMITY IN FEDERAL COMMON LAW

Decisional law in the United States integrates the principle of international comity. Article IV, Section 1 of the United States Constitution provides that "Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other state."[23] The Full Faith and Credit Clause requires states to recognize and give credit to the laws and judgments of other states in the union. The full faith and credit obligations that domestic states are bound to under this

19. *Id.*

20. *Id.* at *11.

21. *Id.*

22. *See, e.g.*, Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985) (finding that exhaustion of tribal remedies was required before the court could decide on a claim for injunctive relief); Grand Canyon Skywalk Dev., LLC v. 'SA' Nyu Wa Inc., 715 F.3d 1196, 1200 (9th Cir. 2013) (requiring a corporation to exhaust tribal remedies before proceeding in federal court); Colombe v. Rosebud Sioux Tribe, 747 F.3d 1020 (8th Cir. 2014) (holding that corporation failed to exhaust tribal remedies before seeking a federal injunction); Kerr-McGee Corp. v. Farley, 115 F.3d 1498, 1507 (10th Cir. 1997) (finding that federal legislation did not preclude the rule to exhaust tribal remedies); United States v. Tsosie, 92 F.3d 1037 (10th Cir. 1996) (holding that the United States needed to exhaust tribal remedies before initiating claims in federal court).

23. U.S. CONST. art. IV, § 1, cl. 1.

clause do not extend to foreign nations.[24] Instead, the principle of international comity prevails as the standard for enforcing foreign judgments in the courts of the United States.[25] The principle of international comity is fundamentally a principle of recognition.[26] It recognizes the authority of foreign law, foreign judgments, and foreign sovereigns as litigants.[27] It is also inherently a principle of restraint. International comity limits the ability of a sovereign to regulate and adjudicate outside of its own jurisdictions and over foreign, sovereign defendants.[28] Judicial doctrines, executive actions, and statutes weave the principle of international comity into domestic law in the United States.[29]

For the purposes of this Comment, the principle of comity is reviewed predominately within the context of decisional law in the United States. However, it is important to note that comity, in the context of international law, can also be separated into discrete categories, such as prescriptive comity (conflict of laws, presumption against extraterritoriality, presumption against unreasonable interference, etc.); adjudicative comity (recognition of foreign judgments, forum non conveniens, international comity abstention doctrine, and prudential exhaustion, among other categories); and sovereign party comity (foreign state/official immunity, privilege of bringing suit).[30]

Hilton v. Guyot[31] remains the foundational case expressing international comity in federal decisional law.[32] In *Hilton v. Guyot*, French creditors sued debtor residents from New York in a French court.[33] After obtaining a judgment in their favor, the French creditors sought to enforce the judgment against the defendants. The judgment was ultimately appealed to the United States Supreme Court.[34] In making its decision, the Court first turned to treaty and statutory law, "[t]he most certain guide, no doubt, for the decision of such questions."[35] However, finding no statute

24. DONALD EARL CHILDRESS III & MICHAEL D. RAMSEY, TRANSNATIONAL LAW AND PRACTICE 600 (2d ed. 2021).

25. *Id.*

26. William Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2099–102 (2015).

27. *Id.*

28. *Id.*

29. *Id.* at 2078, 2089.

30. *See id.* at 2099–119.

31. 159 U.S. 113 (1895).

32. *See* Dodge, *supra* note 26, at 2074–76.

33. *Hilton*, 159 U.S. at 114–15.

34. *Id.*

35. *Id.* at 163.

or treaty on point, the Court considered judicial decisions and comity:

> 'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[36]

The Court's definition of comity did not include a duty or obligation to uphold the judgments of foreign nations. Instead, the Court suggested a two-tiered approach to recognizing and enforcing foreign judgments: first, to the extent treaties or domestic law required such recognition and enforcement; and second, under the broader principles of comity.[37] In reaching its decision, the Court also weighed due process to ensure that parties had a full and fair opportunity to be heard.[38] The Court determined that where a foreign sovereign provides an "impartial administration of justice" and where its courts and laws evidence no prejudice, fraud, or concern for due process, comity applies and prevents the re-hearing or appeal of a case and its merits in the United States.[39] Ultimately, the Court held that the French judgment was enforceable in the United States.[40] Therefore, although the Court's holding in *Hilton* dismissed an international obligation for comity, it established in decisional law the requirement to consider comity in the enforcement of foreign judgments.[41] In later decisions, courts in the United States determined that comity should apply to foreign judgments except when due process and impartiality concerns exist, or the court does not have personal jurisdiction.[42]

Hilton also established a reciprocity requirement that is no longer

36. *Id.* at 163–64.

37. *Id.*

38. *Id.*

39. *Id.* at 202–03.

40. *Id.* at 168.

41. *See* Dodge, *supra* note 26, at 2077–80 (explaining that international comity is deference to foreign government actors that is not required by international law but is incorporated in domestic law).

42. *See* Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276, 286 (S.D.N.Y. 1999) ("A foreign country judgment is 'not conclusive,' however, if either of the following two circumstances exists: (1) 'the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law'; or (2) 'the foreign court did not have personal jurisdiction over the defendant.'" (quoting N.Y. C.P.L.R. § 5304(a) (McKinney 2012))).

enforced.[43] Despite the lack of enforcement, the reciprocity requirement still serves as a foundation for how courts frame comity in decisions regarding the exhaustion doctrine.[44] The Restatement (Third) of Foreign Relations Law of the United States and the Uniform Foreign-Country Money Judgements Recognition Act (Uniform Act)[45] provide that a foreign judgment may be recognized and enforced in the United States and reiterate factors similar to those described in the decisional law on nonrecognition of judgments from foreign courts.[46] Such factors reject recognition of decisions that are not from impartial courts, that present due process concerns, or that lack personal jurisdiction over the defendant.[47] The Uniform Act also provides discretion to judges, who need not recognize judgments where: (1) lack of subject matter jurisdiction exists; (2) the defendant did not receive notice; (3) the judgment was obtained by fraud; (4) the cause of action or judgment is based in public policy that is repugnant to the United States or the state in question; (5) the judgment conflicts with another final judgment and is entitled to recognition; or (6) it was agreed to proceed with the controversy elsewhere.[48]

While *Hilton v. Guyot* provided the decisional foundation for international comity in U.S. courts, the Constitution remains the ultimate authority for domestic law-making. Article III, Section 2 of the U.S. Constitution governs the jurisdictional authority of courts in the United States, establishing the fundamental boundaries between state and federal court authority.[49] Federal court decisions determining how and whether to extend comity to tribal courts in the United States stem primarily from the United States Supreme Court and the Eighth, Ninth, and Tenth Circuits.[50] The District Court for the Northern District of Oklahoma's decision in

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43. Dodge, *supra* note 26, at 2081 n.49; *id.* at 2090 (citing UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (UNIF. L. COMM'N 2005)).

44. Robert N. Clinton, *Comity & Colonialism: The Federal Court's Frustration of Tribal-Federal Cooperation*, 36 ARIZ. ST. L.J. 1, 28 & n.64 (2004).

45. UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (UNIF. L. COMM'N 2005).

46. RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 481 (AM. L. INST. 1987).

47. *See id.* cmts. a, f; Dodge, *supra* note 26, at 2129 n.346.

48. *See* Dodge, *supra* note 26, at 2129 n.346 (quoting UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (UNIF. L. COMM'N 2005) § 4(c)(2)–(8)).

49. U.S. CONST. art. III, § 2.

50. For examples of current precedent, see *DISH Network Serv. LLC v. Laducer*, 725 F.3d 877, 882 (8th Cir. 2013); *Elliott v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 846 (9th Cir. 2009); *Norton v. Ute Indian Tribe of the Uintah & Ouray Rsrv.*, 862 F.3d 1236, 1247 (10th Cir. 2017); and *Chegup v. Ute Indian Tribe of Uintah & Ouray Rsrv.*, No. 19-4178, 2022 WL 815681, at *1060–63 (10th Cir. Mar. 18, 2022), some of which are discussed *infra* Part IV.

McKesson v. Hembree[51] to enjoin the Cherokee Nation's opioid litigation from proceeding in tribal court[52] contradicted those precedents and violated principles of comity. Instead, the court should have relied on the exhaustion doctrine and returned the case to tribal court.

II. COMITY IN FEDERAL INDIAN LAW: THE EXHAUSTION DOCTRINE

Over time, federal courts interpreted the Full Faith and Credit Clause as inapplicable to tribal governments and nations, given their status as separate sovereigns exercising their inherent powers. Some scholars argue that initially, the courts extended full faith and credit to tribes but have since ceased to do so in an attempt to implement a form of federal removal jurisdiction over tribal court cases.[53] Removal jurisdiction refers to the right of a defendant to ask a federal court to assert its authority to hear a case that is proceeding in a state court, and assume jurisdiction either because the parties are diverse, or because there is a question of federal law implicated in the suit.[54] In the absence of statutory law governing the jurisdiction of federal courts over tribal court cases, federal courts developed the exhaustion doctrine to address the issue of enforcing, recognizing, or rejecting judgments that came out of tribal courts.[55]

A. The Evolution of United States Decisional Law on Tribal Sovereignty

Tribes have maintained their sovereignty as nations since well before the United States Constitution was adopted.[56] Generally, the powers of Indian tribes are "inherent powers of a limited sovereignty which [have] never been extinguished."[57] However, over the course of the last two centuries, the United States Supreme Court and Congress have limited the

51. No. 17-CV-323-TCK-FHM, 2018 WL 340042 (N.D. Okla. Jan. 9, 2018).

52. *Id.*

53. *See generally* Clinton, *supra* note 44.

54. 28 U.S.C. § 1441(a)–(b).

55. Blake A. Watson, *The Curious Case of Disappearing Federal Jurisdiction over Federal Enforcement of Federal Law: A Vehicle for Reassessment of the Tribal Exhaustion/Abstention Doctrine*, 80 MARQ. L. REV. 531, 554–63 (1997).

56. *See* McGirt v. Oklahoma, 140 U.S. 2452, 2460 (2020); Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014).

57. COHEN'S HANDBOOK, *supra* note 2, § 4.01(1)(a) (quoting United States v. Wheeler, 435 U.S. 313, 322 (1978)).

sovereign authority and civil and criminal jurisdiction of the tribes.[58] These judicial and congressional acts created a "jurisdictional maze."[59] Despite this, Felix Cohen[60] recognized in his Handbook on Federal Indian Law that:

> [T]he whole course of judicial decision on the nature of Indian tribal power is marked by adherence to three underlying fundamental principles: (1) an Indian tribe possesses, in the first instance, all the powers of any sovereign state; (2) a tribe's presence within the territorial boundaries of the United States subjects the tribe to federal legislative power and precludes the exercise of external powers of sovereignty of the tribe, such as its power to enter into treaties with foreign nations, that are inconsistent with the territorial sovereignty of the United States, but does not by itself affect the internal sovereignty of the tribe; (3) inherent tribal powers are subject to qualification by treaties and by express legislation of Congress, but except as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.[61]

As hopefully and positively as Felix Cohen's Handbook characterizes inherent tribal sovereignty in the law, decisional law diverged from this characterization and constrained tribal authority.[62]

1. The Marshall Trilogy

The core federal cases interpreting inherent tribal sovereignty and tribal

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58. For a recent example of the Supreme Court's foray into limiting tribal criminal jurisdiction, see *Oklahoma v. Castro-Huerta*, __ U.S. __, 142 S. Ct. 2486 (2022) (holding that the State of Oklahoma has concurrent criminal jurisdiction to prosecute certain crimes in Indian country). The holding ran amok in interpreting 200 years of existing precedent criminal jurisdiction in Indian country. Justice Gorsuch dissented, stating that "[the majority's] declaration comes as if by oracle, without any sense of the history recounted above and unattached to any colorable legal authority. Truly, a more ahistorical and mistaken statement of Indian law would be hard to fathom." *Id.* at 2511 (Gorsuch, J. dissenting).

59. *See* Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976). For examples of cases analyzing the complexities of jurisdiction, see *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 195 (1978) and *Montana v. United States*, 450 U.S. 544, 547 (1981).

60. Felix Cohen was an attorney and civil servant in the Department of Justice and Department of Interior in the 1930s and was tasked with compiling a handbook on federal Indian law. He is considered the architect of the modern framing of federal Indian law. *See* Habermacher, *supra* note 1, at 371–98.

61. COHEN'S HANDBOOK, *supra* note 2, § 4.02 (footnotes omitted).

62. Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 669–73 (2006).

nations as "domestic dependent nations"[63] are *Johnson v. M'Intosh*,[64] *Cherokee Nation v. Georgia*,[65] and *Worcester v. Georgia*,[66] colloquially known as the Marshall Trilogy.[67] Beginning with *Johnson v. M'Intosh*, the Supreme Court formally adopted the federal doctrine of discovery, or the right of the "discoverer" to the property of the "discovered."[68] The dispute revolved around the ownership of land purchased by speculators from the Piankeshaw Indian tribe.[69] In 1763, prior to the speculator's acquisition of land, and prior to the signing of the United States Constitution, the King of Great Britain proclaimed that Indian tribes in North America retained title and rights to their land from time immemorial.[70] However, the Supreme Court held that Indian tribes maintained only a possessory right to the land, and that the federal government held a preemptive right to extinguish Indian title.[71] The status of Indian tribes' "complete sovereignty, as independent nations, [was] necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."[72] In other words, when Europeans "discovered" lands with indigenous inhabitants, those tribes' unqualified right to land was superseded by and vested in their discoverers.[73]

Justice Marshall's decision in *Johnson v. M'Intosh* relied on principles of international law and comity to determine that the doctrine of discovery and principles of war, conquest, and land acquisition should apply in the United States as they had to European powers.[74] Marshall referred to "the foundation of title[] in European nations" as a guiding principle for determining "proprietary rights in the natives."[75] Here, Justice Marshall applied the principles and laws governing European nations to Indians and determined that, under these laws, Indians do have "original" title to the

63. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 2, 13 (1831).

64. 21 U.S. (8 Wheat.) 543 (1823).

65. 30 U.S. (5 Pet.) 1 (1831).

66. 31 U.S. (6 Pet.) 515 (1832).

67. Fletcher, *supra* note 62, at 669–73.

68. *See Johnson*, 21 U.S. at 572–95.

69. *Id.* at 571–72.

70. *Id.* at 549.

71. *Id.* at 567–74.

72. *Id.* at 574.

73. Please note that tribes continue to retain aboriginal title to the land, and their absolute rights were not terminated upon European settlement. *See id.* at 567.

74. *Id.* at 573–74.

75. *Id.* at 567.

land.[76] The authority of these principles remains vital to understanding the contemporary exercise of tribal sovereignty.[77]

In *Cherokee Nation v. Georgia*, the Cherokee Nation attempted to prevent the Georgia state legislature from extending its laws onto Cherokee lands by appealing to the United States Supreme Court.[78] The Nation argued that the Court had jurisdiction over the case based on Article III, Section 2 of the United States Constitution.[79] Article III, Section 2 of the Constitution delineates the extent of judicial power and jurisdiction of courts of law in the United States.[80] Specifically, it provides that the Supreme Court has original jurisdiction over cases "between a State . . . and foreign States, Citizens or Subjects."[81] The Court rejected the Nation's argument, however, holding that Indian tribes are neither states of the United States nor foreign states for the purposes of the original jurisdiction of the Court under Article III, Section 2.[82] Together, *Johnson v. M'Intosh* and *Cherokee Nation v. Georgia* underscored the status of Indian tribes under federal law as dependent nations, and that the extent of inherent tribal powers was subject to limitation by the United States government.

However, *Johnson v. M'Intosh* and *Cherokee Nation v. Georgia* were followed by *Worcester v. Georgia*, which established a strong precedent for federal recognition of the inherent sovereign powers of the tribes.[83] In *Worcester*, the dispute centered around whether Georgia's state laws could be imposed and enforced on Cherokee Nation lands.[84] The Court concluded that state law did not extend to Indian land, holding that "[t]he Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force."[85] On its own, this holding nearly recognized dual sovereignty, placing states and tribes on equal footing. Since the decision in *Worcester*, federal courts have continued to limit, contort, and

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76. *Id.*

77. *Id.*; *see also* Kristen A. Carpenter & Eli Wald, *Lawyering for Groups: The Case of American Indian Tribal Attorneys*, 81 FORDHAM L. REV. 3085, 3099 (2013) (discussing that the framework built by foundational cases on tribal sovereignty continues to prevail in the modern conception of tribal sovereignty).

78. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 1 (1831).

79. *Id.*

80. U.S. CONST. art. III, § 2.

81. *Id.*

82. *Cherokee Nation*, 30 U.S. at 20.

83. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832).

84. *Id.*

85. *Id.* at 561.

diminish federal interpretations of tribal sovereignty.[86] However, as will later be discussed, federal courts are reluctant to acknowledge their role in limiting or diminishing tribal sovereignty, or to employ mechanisms such as the exhaustion doctrine to mitigate limitations.

The foundations of the Marshall Trilogy decisions were rooted firmly in the history of the United States. Justice Joseph Story noted in 1858 that the Supreme Court's affirmation of the tribes' inherent sovereignty and right to self-governance was grounded in the United States' development under the Articles of Confederation and the Constitution:

> [T]he Indians, from the first settlement of the country, were always treated[] as distinct, though in some sort[] as dependent nations. Their territorial rights and sovereignty were respected. . . . The government of the United States, since the constitution, have always recognised the same attributes of dependent sovereignty, as belonging to them, and claimed the same right of exclusive regulation of trade and intercourse with them, and the same authority to protect and guarantee their territorial possessions, immunities, and jurisdiction.[87]

Ultimately, the birth of the United States federal government was entwined with the relationships it developed with other sovereigns at the time, including respect for the inherent sovereignty of tribes.[88]

2. Tribal Sovereignty and Self-Determination Post-Marshall Trilogy

Over time, the Supreme Court limited the scope of its interpretation of tribal authority, while continuing to recognize the special status of the tribes under federal law. In *Williams v. Lee*,[89] the Court recognized the Navajo Nation's inherent sovereign authority to enact its own laws and be governed by them on the reservation.[90] Furthermore, the Court concluded that the state could not exercise jurisdiction where doing so would infringe on the right of Indians to enact their own laws and be governed by them.[91]

Although the decision in *Williams* appears to recognize inherent tribal sovereignty at first blush, it reached a narrower conclusion in determining the scope of the tribe's jurisdiction. *Williams* held that state jurisdiction

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86. *See* Oliphant v. Suquamish Tribe, 435 U.S. 191, 195 (1978); Montana v. United States, 450 U.S. 544, 547 (1981).

87. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 541 (3d ed. 1858) (footnotes omitted).

88. *See id.*

89. 358 U.S. 217 (1959).

90. *Id.* at 223.

91. *Id.*

and law applied to the Navajo Nation unless it interfered with the tribe's right to enact and be governed by its own laws.[92] Although the Court previously determined that tribal Nations are "distinct, independent political communities, retaining their original natural rights,"[93] the Court in *Williams* limited the extent of inherent tribal sovereign authority.[94] The decision in *Williams* rests on the federal policy to protect the right of tribes to govern themselves rather than a recognition of the Navajo Nation's inherent sovereign authority to govern its territory.[95]

Despite *Williams's* limitation of tribal sovereignty, federal Indian policy shifted in the 1960s with the beginning of the self-determination era.[96] The Indian Civil Rights Act's enactment in 1968 was fundamental to this era, and acknowledged the authority of tribes over their own self-governance and cultural autonomy.[97] In addition, the enactment of the Indian Self-Determination and Education Assistance Act (ISDEAA)[98] in 1975 established a firm statutory basis for the federal government's policies of supporting self-determination.[99] The Act affirmed the Executive Branch's authority to enter into contracts with tribes.[100] The Act also provided federal funds for the tribes to directly administer federal services intended for the benefit of their people and communities, including the administration of tribal justice systems.[101] Enactment of the ISDEAA underscored the understanding that "Congress now prioritizes 'enhancing tribal court systems and improving access to those systems [to] serve[] the dual Federal goals of tribal political self-determination and economic self-sufficiency.'"[102] However, the authority of tribal

92. *Id.*

93. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

94. *Williams*, 358 U.S. at 220–23.

95. *Id.* at 223.

96. Carpenter & Wald, *supra* note 77, at 3104; Pete Heidepriem, *Tribal Remedies, Exhaustion, and State Courts*, 44 AM. INDIAN L. REV. 241, 245 (2020).

97. Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1356 (1969).

98. Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C.A. §§ 5301–5423 (West).

99. *See* Heidepriem, *supra* note 96, at 245.

100. *See id.*; *see also* Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 5321(a)(1) ("The Secretary is directed, upon request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs[.]").

101. *See* Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 5325–5327.

102. Heidepriem, *supra* note 96, at 245 (quoting 25 U.S.C. § 3651(7) (2018)); *see also* 25 U.S.C. § 5322(a) (providing the authority for the Secretary to contract or grant funding to improve tribal governance systems, including facilities and personnel encompassing courts and court systems).

governments over non-members continues to be limited by federal decisional law.[103] As soon as tribal governments exercise authority over non-Indians, federal law is less likely to recognize a tribe's inherent authority, absent the consent of the non-Indian party who is the subject of the exercise of tribal jurisdiction.

B. Tribal Court Civil Jurisdiction

Federal courts have also limited the ability of tribes to exercise their jurisdiction over civil cases. In *Montana v. United States*,[104] the United States Supreme Court limited the civil jurisdiction of tribes over non-Indians on non-Indian fee land within reservation boundaries.[105] The state of Montana challenged the Crow Tribe's authority to regulate fishing and hunting by non-members on non-Indian fee land within the reservation boundaries.[106] The central questions of the case revolved around the ownership of the riverbed and banks used for fishing, and whether the Tribe's inherent sovereignty included the authority to regulate and allow or prohibit non-Indian hunting and fishing on non-Indian land within the reservation boundaries.[107]

Despite treaty provisions between the Crow and United States that assured tribal authority over reservation lands, the Supreme Court held that such provisions must "be read in light of the subsequent alienation of those lands," and reversed the presumption of tribal jurisdiction where non-members are on the reservation on non-member fee land.[108] The Court concluded that the Crow Tribe did not have authority to regulate non-Indian fishing on non-Indian fee land on the reservation.[109] The Court nonetheless maintained that exceptions to the rule remain, noting that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."[110] The subsequent framework the Court imposed on the tribes included the general rule that stripped the tribes of civil jurisdiction

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103. This extends to both the assertion of criminal and civil jurisdiction of tribes. Limitations placed on a tribe's exercise of its civil jurisdiction are discussed in the next section. For examples of the limitations federal courts have placed on a tribe's exercise of its criminal jurisdiction on non-members, see *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 195 (1978) and *United States v. Lara*, 541 U.S. 193, 196 (2004).

104. 450 U.S. 544 (1981).

105. *Id.* at 547.

106. *Id.*

107. *Id.*

108. *Id.* at 561.

109. *Id.*

110. *Id.* at 565.

over non-Indians on the reservations, with two exceptions:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements . . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[111]

Despite these exceptions, the Supreme Court and circuit courts of appeals subsequently applied the general rule from *Montana* most often to deny tribal jurisdiction.[112] In addition, the second *Montana* exception is narrowly defined, and has been further limited to circumstances "where the conduct of the nonmember poses a direct threat to tribal sovereignty" and "[t]he nonmember's conduct [is] 'catastrophic for tribal self-government.'"[113]

Most recently, in *United States v. Cooley*,[114] the Supreme Court applied the *Montana* exceptions to a criminal case involving the authority of tribal police officers to search and detain non-Indians under a reasonable belief they had committed a crime.[115] Writing for the majority, Justice Breyer argued that the second *Montana* exception applied, given that the potential criminal conduct investigated in the case had a direct effect on the political integrity, economic security, or the health and welfare of the tribe.[116]

While *Cooley* may open the door to more favorable applications of the second *Montana* exception in the future, courts remain reluctant to recognize the exercise of tribal jurisdiction over non-members, both in civil and criminal cases. In addition, the *Montana* exceptions remain in tension with the doctrine of inherent sovereignty originally affirmed in *Williams v. Lee*, given that the exceptions purport to uphold inherent tribal sovereignty, yet simultaneously hold that tribal decisions on the power to exercise jurisdiction can still face review by the federal courts.[117]

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111. *Id.* at 565–66.

112. COHEN'S HANDBOOK, *supra* note 2, § 7.02(1)(a).

113. McKesson Corp. v. Hembree, No. 17-CV-323-TCK-FHM, 2018 WL 340042, at *8 (N.D. Okla. Jan. 9, 2018) (quoting Phillip Morris USA, Inc. v. King Mountain Tobacco Co., 569 F.3d 932, 943 (9th Cir. 2009)).

114. __U.S. __, 141 S. Ct. 1638 (2021).

115. *Id.* at 1643.

116. *Id.*

117. Irby, *supra* note 11, at 372–73.

It is important to note that under *Wisconsin v. EPA*,[118] the Seventh Circuit held that "no case expressly rejects an application of *Montana* to off-reservation activities that have significant effects within the reservation," and that the Nation's "inherent authority over activities having a serious effect on the health of the tribe[] . . . is not defeated even if it exerts some regulatory force on off-reservation activities."[119] To this degree, off-reservation activities and their impact on reservation are not expressly barred from consideration under the tribal court's jurisdiction.[120] Therefore, when a court is considering whether conduct impacting a tribe reaches the *Montana* exceptions threshold, it cannot absolutely exclude a case in which the conduct occurs off-reservation but the impact still occurs on reservation.[121]

The *Montana* exceptions were created and applied by the federal courts. However, before a federal court can apply the *Montana* exceptions or engage in an analysis of their relevance, the federal court must first determine whether it has subject matter jurisdiction over the case. Federal courts have subject matter jurisdiction over cases that raise a question arising under federal laws or the Constitution, otherwise known as federal question jurisdiction, which is codified in 28 U.S.C. § 1331.[122] As previously noted, claims involving tribes or Indians generally implicate a federal question.[123] However, where the subject of litigation is the tribal court's subject matter jurisdiction and the claim arises in Indian country, a federal court must stay its hand before tribal remedies have been exhausted.[124]

C. The Exhaustion Doctrine

The exhaustion doctrine is the existing mechanism for federal courts to determine whether they have jurisdiction to hear a case that is currently being heard in a tribal court.[125] Under 28 U.S.C. § 1331, federal courts can decide whether a tribal court has adjudicative jurisdiction over a case that raises federal questions, which generally include claims involving Indians.[126] However, under the exhaustion doctrine, a federal court is

118. 266 F.3d 741 (7th Cir. 2017).

119. *Id.* at 749.

120. *Id.*

121. *Id.*

122. 28 U.S.C. § 1331.

123. *See* COHEN'S HANDBOOK, *supra* note 2, § 7.04(3).

124. *See id.*

125. *See id.*

126. 28 U.S.C. § 1331.

generally required to abstain from any jurisdictional analysis until after tribal court remedies have been exhausted, and the tribal court determines the extent of its jurisdiction.[127] Exhausting tribal court remedies means allowing the tribal court to pursue every available tribal procedure, including appellate review.[128]

1. Foundational Cases of the Exhaustion Doctrine

In *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*,[129] the United States Supreme Court demonstrated an interest in recognizing tribal court jurisdiction over non-Indians.[130] In *National Farmers*, a member of the Crow Tribe brought suit in the tribal court against a state-owned school located on the Crow reservation.[131] The school sought to stop the tribal court from hearing the case, seeking an injunction in federal court and review of the tribal court's subject matter jurisdiction.[132] The school's jurisdictional argument was based on the federal question statute, 28 U.S.C. § 1331.[133] The Supreme Court ultimately held that although the federal courts maintained jurisdiction to assess questions relating to the extent of a tribal court's authority, parties must exhaust tribal court remedies before invoking federal question jurisdiction.[134] The Court reasoned that "given the Congress' policy of 'supporting tribal self-government and self-determination,' tribal courts should have 'the first opportunity to evaluate the factual and legal bases' for challenges to their jurisdiction, and federal courts will benefit from their expertise."[135]

The Court's decision in *National Farmers* established the exhaustion doctrine and was extended to federal courts sitting in diversity jurisdiction under 28 U.S.C. § 1332 by *Iowa Mutual Insurance Co. v. LaPlante.*[136]

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127. *See id.*; *see also* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856–57 (1985) (requiring the exhaustion of tribal remedies before invoking the jurisdiction of a federal court).

128. *See* COHEN'S HANDBOOK, *supra* note 2, § 7.04(3); *see also Nat'l Farmers*, 471 U.S. at 856–57 (finding that "the orderly administration of justice in the federal court will be served by allowing *a full record* to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed," and that procedural challenges will be "minimized if the federal court stays its hand until after the Tribal Court has had a *full opportunity* to determine its own jurisdiction" (emphasis added)).

129. 471 U.S. 845 (1985).

130. *Id.* at 856.

131. *Id.* at 847.

132. *Id.* at 848.

133. *Id.*

134. *Id.* at 857.

135. COHEN'S HANDBOOK, *supra* note 2, § 7.04(1) (quoting *Nat'l Farmers*, 471 U.S. at 856).

136. 480 U.S. 9 (1987).

While 28 U.S.C. § 1331 codifies the federal courts' authority to hear cases concerning questions of federal law arising under statute or the Constitution, 28 U.S.C. § 1332 codifies federal courts' authority to hear cases concerning diverse parties.[137] In *Iowa v. LaPlante*, a member of the Blackfeet Indian Tribe sued his employer's insurance company.[138] The employer was a company owned by the tribe, so the tribal court claimed jurisdiction over the insurance company as a non-Indian company engaged in commercial relationships with the tribe.[139] The insurance company sought an injunction in federal court, failing to exhaust tribal remedies because the tribe lacked jurisdiction over non-members and that the case involved federal court claims based in diversity.[140] The Supreme Court held that unconditional access to federal court would "impair[] the [authority of tribal courts] over reservation affairs" and "infringe[] upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law."[141]

The Court based its decision in *Iowa Mutual* on the principle of comity, and the necessity of extending comity in order to support the existing federal policy of supporting tribal self-determination and governance.[142] While there is no mandate for the federal courts to apply full faith and credit in Indian country, in *Wilson v. Marchington*,[143] the Ninth Circuit Court of Appeals held that "the enforcement of tribal court judgments in federal court must inevitably rest on the principles of comity."[144] Comity is generally considered to be "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[145] It is not a jurisdictional requirement, but still requires due regard and balancing of the interests of both nations in question.[146] Although *National Farmers* established the domestic application of comity in federal Indian law, the decision also provided the

137. 28 U.S.C. § 1332. Generally, diverse parties are considered citizens of different states, or citizens of a state and a foreign state, or a mix of the two.

138. *Iowa Mutual*, 480 U.S. at 12–13.

139. *Id.* at 11–12.

140. *Id.* at 12–13.

141. *Id.* at 16; *see* COHEN'S HANDBOOK, *supra* note 2, § 7.04(1).

142. *Iowa Mutual*, 480 U.S. at 15.

143. 127 F.3d 805 (9th Cir. 1997).

144. *See* Steven J. Gunn, *Compacts, Confederacies, and Comity: Intertribal Enforcement of Tribal Court Orders*, 34 N.M. L. REV. 297, 303 (2004) (quoting *Wilson*, 127 F.3d at 809).

145. *Id.* (quoting Hilton v. Guyot, 159 U.S. 113, 163–64 (1895)).

146. *Id.* (quoting *Wilson*, 127 F.3d at 809–10).

foundation for several exceptions to arise.

2. Exceptions to the Exhaustion Doctrine

The exhaustion doctrine is subject to exceptions under certain circumstances. To temper *National Farmers'* and *Iowa Mutual's* requirements, a threshold was established requiring parties to meet a burden of proof prior to triggering an exception. For a party to avoid exhaustion, it must make a substantial showing of eligibility that one of the exceptions applies.[147] As established in *Thlopthlocco Tribal Town v. Stidham*,[148] these exceptions arise:

> (1) where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) where the action is patently violative of express jurisdictional prohibitions; . . . (3) where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction; [and] (4) where it is clear that the tribal court lacks jurisdiction and that judicial proceedings would serve no purpose other than delay.[149]

Nonetheless, even when a party can meet this threshold, under *Norton v. Ute Indian Tribe of Uintah & Ouray Reservation*,[150] exhaustion is still required where tribes can "make a colorable claim [they] have jurisdiction."[151] Recently, the Tenth Circuit Court of Appeals relied on this threshold requirement in establishing when exhaustion was appropriate.[152] The court explained that "when a federal court has subject-matter jurisdiction over a claim arising in Indian country . . . , principles of comity and the federal policy of promoting tribal self-government generally require that the plaintiff fully exhaust tribal remedies before proceeding in federal court."[153] Despite this, the federal court in *McKesson v. Hembree* failed to apply the exhaustion doctrine when the Cherokee Nation claimed jurisdiction over the non-member pharmacies and distributors for claims arising under Cherokee statutes, and for harms impacting and arising within the boundaries of the Cherokee Nation.[154]

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147. Kerr-McGee Corp. v. Farley, 115 F.3d 1498, 1502 (10th Cir. 1997).

148. 762 F.3d 1226 (10th Cir. 2014).

149. Irby, *supra* note 11, at 364 (quoting *Thlopthlocco*, 762 F.3d at 1238).

150. 862 F.3d 1236 (10th Cir. 2017).

151. *Id.* at 1246.

152. Chegup v. Ute Indian Tribe of Uintah & Ouray Rsrv., 28 F.4th 1051, 1060 (10th Cir. 2022) (quoting RESTATEMENT OF THE L. OF AM. INDIANS § 59 cmt. a (AM. L. INST., Proposed Official Draft 2021)).

153. *Id.*

154. Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

III. THE OPIOID EPIDEMIC AND THE CHEROKEE NATION'S OPIOID LITIGATION

The Cherokee Nation was one of the first governmental bodies to bring suit against major pharmacies and distributors for their role in furthering the opioid crisis.[155] The Cherokee Nation encompasses northeastern Oklahoma, and its reservation is spread across fourteen counties.[156] The Cherokee Nation Constitution and subsequent legislative acts provide for the general jurisdiction of the Cherokee Nation District Court.[157] Furthermore, the Cherokee Nation ratified its own constitution (which also provides for tribal court authority)[158] and is a party to three treaties with the United States: the 1785 Treaty of Hopewell, the 1835 Treaty of New Echota, and the Treaty of 1866.[159] As the largest tribe in the United States, the Cherokee Nation is also one of the largest employers in northeast Oklahoma and provides many services to its people and the community.[160] Additionally, the Cherokee Nation operates a comprehensive health care system, which includes eight health centers, a hospital, and a medical school.[161]

A. The Opioid Crisis in Indian Country

The opioid crisis is an existential threat for tribes, challenging their physical, cultural, and political survival.[162] In the context of colonial and historical violence, such harms are magnified by the opioid epidemic, which continues to cause Native individuals, families, and communities significant trauma and harm.[163] In fact, "American Indians and Alaska Natives make up only about 2 percent of the U.S. population, but have suffered a grossly disproportionate share of opioid-related impacts compared to the overall American public."[164] Several tribes joined other

155. Leeds, *supra* note 5, at 1022.

156. *Id.* at 1021.

157. *Id.*

158. *See* CHEROKEE NATION CONST. art. VIII, § 6 (establishing tribal court jurisdiction).

159. *Delegate to Congress*, CHEROKEE NATION, https://cherokee.org/our-government/delegate-to-congress/ [https://perma.cc/T4ZC-9VCR] (Sept. 21, 2022); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 574 (1832).

160. *About the Nation*, CHEROKEE NATION, https://cherokee.org/about-the-nation/ [https://perma.cc/7WCA-2H52] (Feb. 9, 2022); Leeds, *supra* note 5, at 1017.

161. Leeds, *supra* note 5, at 1017 (citing *Health Services*, CHEROKEE NATION, https://health.cherokee.org/ [https://perma.cc/LEV5-96Q5] (Nov. 4, 2021)).

162. *See* Brief Amici Curiae, *supra* note 6, at 11.

163. *Id.*

164. *Id.* at 10 (quoting *Facts for Features: American Indian and Alaska Native Heritage Month:*

States in bringing common law claims against opioid distributors and pharmacies.[165] States and tribes brought these claims in federal court, and their suits were eventually removed to become part of the muti-district litigation.[166] In response to a motion to dismiss filed by the distributors and pharmacies in the multi-district litigation, 448 federally recognized tribes argued for the urgency of their claims and provided shocking testimony of the impacts of the opioid epidemic on Indian country:

> American Indians and Alaska Natives had the highest drug overdose death rates in 2015 and the largest percentage increase in the number of deaths over time from 1999–2015 compared to other racial and ethnic groups—an increase greater than 500 percent. This steep rise can be attributed in large part to opioids: the CDC WONDER database on causes of death reveals that the age-adjusted annual mortality rate for opioid overdose deaths among American Indians and Alaska Natives rose from 2.9 per 100,000 in 1999 to 13.9 per 100,000 in 2016.[167]

In Oklahoma, the situation is similar. The Oklahoma Bureau of Narcotics reported that in 2015 over 97 million opioid pills were distributed in the fourteen Oklahoma counties comprising part of the Cherokee Nation's tribal jurisdiction.[168] This amounts to 107 opioid pills per adult in those counties.[169] Alongside an increase in opioid addiction and overdose deaths, the tribe also calculated that nearly 41% of its social welfare caseload could be attributed to opioids.[170] This includes family, youth, and dependency cases in which children are separated from their families if they are unable to provide care.[171]

B. The Cherokee Nation Sues Opioid Distributors and Pharmacies

In April of 2017, the Attorney General for the Cherokee Nation, Todd Hembree, acting in his *parens patriae*[172] capacity on behalf of the

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November 2016, U.S. CENSUS BUREAU (Nov. 2, 2016), https://www.census.gov/newsroom/facts-for-features/2016/cb16-ff22.html [https://perma.cc/A9H7-J4TV]).

165. Leeds, *supra* note 5, at 1022, 1024.

166. *Id.* at 1025.

167. Brief Amici Curiae, *supra* note 6, at 10 (internal quotations omitted).

168. *Id.* at 11.

169. *Id.*

170. Leeds, *supra* note 5, at 1022 (citing Kristi Eaton, *Opioid Epidemic Threatens the Children—and Future—of Cherokee Nation*, LILY (May 3, 2019), https://www.thelily.com/opioid-epidemic-threatens-the-children-and-future-of-cherokee-nation/ [https://perma.cc/A34T-K2J3]).

171. *Id.*

172. *See* definition and sources cited *supra* note 15. *See also* Robert C. Batson, *Addressing the*

Cherokee Nation, initiated litigation in the tribal court against opioid pharmaceutical distributors and retailers: CVS, Walgreens, Wal-Mart (pharmacies), and McKesson, Cardinal Health, and AmerisourceBergen (distributors).[173] The Cherokee Nation asserted common law claims of public nuisance, negligence, civil conspiracy, and unjust enrichment[174] alongside consumer protection claims under the Nation's Unfair and Deceptive Practices Act (CNUDPA).[175] The Nation alleged that the defendants "knowingly or negligently distributed and dispensed prescription opioid drugs within the Cherokee Nation in a manner that foreseeably injured . . . the Cherokee Nation and its citizens."[176] The Nation sought injunctive relief, imposition of civil penalties, compensatory and punitive damages, restitution, and disgorgement for the common law claims.[177]

Before the tribal court could commence proceedings, the distributors and pharmacies sought a preliminary injunction against Attorney General Hembree in the Federal District Court for the Northern District of Oklahoma, objecting to the jurisdiction of the tribal court.[178] Granting a preliminary injunction would halt the litigation proceedings in tribal court, and prevent Attorney General Hembree from pursuing the claims in tribal court. The federal district court agreed and granted the distributors and pharmacies' injunction, holding that the District Court of the Cherokee Nation did not have jurisdiction to hear the case. In its ruling, the federal court established the standard for a preliminary injunction,[179] and then analyzed the tribal court's civil jurisdiction under the *Montana* decision and its exceptions.[180]

Opioid Crisis in Indian Country with a Parens Patriae Action in Tribal Court, 11 ALB. GOV'T L. REV. 106, 116 (2017) (discussing the strategy behind *parens patriae* actions and their application in tribal courts).

173. Leeds, *supra* note 5, at 1020 n.41.

174. Common law claims are usually tort or negligence claims against a party for violating a statutory duty.

175. Brief of Petitioner at 41–42, Cherokee Nation v. McKesson Corp., No. CV-2017-203 (Cherokee Nation Dist. Ct. Apr. 20, 2017).

176. *Id.* at 3.

177. *Id.*

178. McKesson Corp. v. Hembree, No. 17-CV-323-TCK-FHM, 2018 WL 340042, at *2 (N.D. Okla. Jan. 9, 2018).

179. *Id.* ("To obtain a preliminary injunction, the movant has the burden to show that: (1) the movant is substantially likely to succeed on the merits; (2) the movant will suffer irreparable injury if the injunction is denied; (3) the movant's threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest." (citing N.M. Dep't of Game & Fish v. U.S. Dep't of the Interior, 854 F.3d 1236, 1246 (10th Cir. 2017))).

180. *Id.* at *6–9.

The federal district court's decision to enjoin the tribal court applied the standard of review for a preliminary injunction, and decided that the case was unlikely to succeed on the merits due to lack of subject matter jurisdiction.[181] The court subsequently dismissed application of the exhaustion doctrine, and found that the tribal court "plainly lacks" jurisdiction and therefore excepted the federal court from applying the exhaustion requirement.[182] In its decision, the court reasoned that because the Cherokee Nation's CNUDPA claims attempted to enforce a non-existent private cause of action under the Controlled Substances Act, those claims could not proceed.[183] Furthermore, the court reasoned that the tribal court was prevented from hearing the common law claims because the Cherokee Nation could not provide a colorable claim of jurisdiction that fit the two *Montana* exceptions.[184]

After dismissing the exhaustion doctrine and application of the *Montana* exceptions, the federal court reasoned that given the lack of subject matter jurisdiction, allowing the tribal court to continue hearing the case would cause irreparable harm to the distributors and pharmacies.[185] The court's reasoning rested on the lack of a guarantee that the distributors would be unable to recover on a bond, should they be subject to an award of damages, despite a written order from the Supreme Court of the Cherokee Nation agreeing to forgo such a bond to allow an appeal.[186] Additionally, the district court agreed with the distributors and pharmacies that they would suffer significant harm in economic losses during the time it would take to litigate in tribal court, which outweighed the potential harm to tribal sovereignty.[187] Finally, the court determined that granting an injunction was therefore in the public interest, and that in the absence of a threat to tribal sovereignty, allowing the tribal court to hear the case before review in the federal court was unwarranted.[188]

IV. THE FEDERAL DISTRICT COURT'S DECISION IN *MCKESSON V. HEMBREE* VIOLATED THE PRINCIPLES OF COMITY

The United States District Court for Northern Oklahoma should have

181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at *11.
186. *Id.*
187. *Id.*
188. *Id.*

applied the exhaustion doctrine in *McKesson v. Hembree*. The exhaustion doctrine is clear:

> Exhaustion requires exhaustion of all available tribal procedures, including appellate review. Once the tribal forum has had a full opportunity to review the issue, a claim can be brought in federal court to challenge the assertion of jurisdiction by the tribal court. Federal courts are required to defer to tribal court determinations of tribal law.[189]

The companies never filed a motion in the tribal court to dismiss the case for lack of subject matter jurisdiction, and the tribal court never had a chance to decide that question.

A. The District Court Should Have Applied the Exhaustion Doctrine

Under the exhaustion doctrine, the federal court's first course of action should have been to assess whether subject matter jurisdiction had been addressed by the tribal court. Instead, the court applied the preliminary injunction standard and determined that the exercise of jurisdiction by the tribal court would unduly burden the distributors and that it was in the public interest to grant the injunction.[190] The court's argument on these last two factors was questionable, given that the district court failed to offer any evidence that it had balanced these burdens. The district court did not weigh the economic harms to the Cherokee Nation due to the opioid epidemic and any resulting need to seek redress in the state court or in the subsequent multi-district litigation.[191]

Other federal district courts have upheld the exhaustion doctrine rather than applying a preliminary injunction standard. Most recently, in *City of Seattle v. Sauk-Suiattle Tribal Court*,[192] the Federal District Court for the Western District of Washington stayed court proceedings until the Sauk-Suiattle Tribal Court had an opportunity to determine its own jurisdiction over the case.[193] The Sauk-Suiattle initially brought suit in the Sauk-Suiattle Tribal Court for harms to the salmon population caused by dams operated by the City of Seattle.[194] The City of Seattle filed for injunctive relief to enjoin the tribal court from hearing the case, arguing that the court's jurisdiction was "plainly lacking" and therefore subject to being

189. COHEN'S HANDBOOK, *supra* note 2, § 7.04(3) (footnotes omitted).

190. *McKesson*, 2018 WL 340042, at *11.

191. Irby, *supra* note 11, at 368.

192. No. 2:22-CV-00142, 2022 WL 2440076 (W.D. Wash. July 5, 2022).

193. *Id.* at *1.

194. *Id.*

enjoined from proceeding in tribal court.[195] In its reasoning, the court emphasized the prudential requirements that *National Farmers* imposed in calling for tribal court exhaustion when factual questions remain "murky" or "undeveloped."[196] The court reasoned that "[j]urisdictional questions are notoriously fact-intensive, and the facts of this case may be distinguishable in a number of potentially material ways from the precedent on which the City relies and could at least arguably bring the tribal lawsuit within the ambit of the claimed *Montana* exception."[197]

Additionally, in *Minnesota Department of Natural Resources v. White Earth Band*,[198] the federal district court dismissed a suit for injunctive relief against the White Earth Band Ojibwe Chief Judge DeGroat.[199] In doing so, the court held that the Minnesota Department of Natural Resources's arguments regarding subject matter jurisdiction and sovereign immunity "'must give way' to the Band's 'vital interests.'"[200] This case involved the sovereign immunity of the tribal court and Chief Judge, distinguishing the facts from *McKesson v. Hembree*. Additionally, the plaintiffs filed a motion to dismiss for lack of subject matter jurisdiction in the tribal court that Judge DeGroat denied.[201] That denial prompted the attempt to enjoin further proceedings by the tribal court in the federal court.[202]

Although the facts are different, in the *White Earth* case, the district court centered the question of tribal sovereignty and sovereign immunity before weighing the factors for a preliminary injunction.[203] Furthermore, in a footnote, the court noted that "because this court lacks jurisdiction over [White Earth Band of Ojibwe] based on their sovereign immunity, the Court declines to address whether the Tribal Court has jurisdiction over Plaintiffs pursuant to *Montana v. United States*, as such an opinion would be an improper advisory opinion."[204] The district court in *McKesson v. Hembree* should have employed a similar analysis, declining to decide on the jurisdictional question until it had been heard in tribal court.

Alternatively, even if the federal court applied a preliminary junction

195. *Id.* at *2 (quoting DISH Network Serv. LLC v. Laducer, 725 F.3d 877, 883 (2013)).

196. *Id.*

197. *Id.* at *3.

198. No. 21-CV-1869 (WMW/LIB), 2021 WL 4034582 (D. Minn. Sept. 3, 2021).

199. *Id.* at *3.

200. *Id.* at *1.

201. *Id.*

202. *Id.*

203. *See generally id.*

204. *Id.* at *2 n.4.

standard instead of an exhaustion analysis, the federal court's assertion that the *Montana* exceptions do not apply is questionable. Regarding the application of the first *Montana* exception, the court argued that there was not enough of a common nexus linking the relationship between the pharmacies and distributors to the Cherokee Nation.[205] In reaching this decision, the court relied only on evidence provided by the pharmacies and distributors indicating an ordinary business relationship.[206] In doing so, it failed to consider evidence produced by Attorney General Hembree showing the companies' involvement in the administration of the drug program for the Cherokee Nation Health Plan.[207]

Thus, the court failed to consider whether the distributors and pharmacies consented to the jurisdiction of the Cherokee Nation through their involvement in the administration of the largest tribally-operated health care plan in the United States.[208] In addition, the court failed to consider whether the distributors and pharmacies had engaged in any activity that directly targeted Cherokee Nation citizens.[209] Given that discovery proceedings were not yet underway in the tribal court, the federal district court should have allowed the Cherokee Nation an opportunity to develop and present evidence further examining the relationship between the parties before reaching a definitive conclusion on the extent and nature of those relationships.[210]

In a similar fashion, the court's decision on the second *Montana* exception favored evidence presented by the distributors and pharmacies and did not equitably weigh the evidence on the severity of the opioid epidemic in the Cherokee Nation.[211] The court determined that despite the severe impact of the opioid epidemic on the Cherokee Nation, the conduct alleged did not rise to the level of harm narrowly defined in the second *Montana* exception.[212] In other words, the conduct only "imperil[ed] the subsistence of the tribal community."[213] The court reasoned that the illegal diversion of opiates amounted only to a generalized threat, and "d[id] not threaten the Cherokee Nation's ability 'to make [its] own laws and be

205. Irby, *supra* note 11, at 366.

206. McKesson Corp. v. Hembree, No. 17-CV-323-TCK-FHM, 2018 WL 340042, at *6–7 (N.D. Okla. Jan. 9, 2018).

207. *Id.*; Irby, *supra* note 11, at 366.

208. Irby, *supra* note 11, at 366.

209. *Id.* at 365.

210. *Id.*

211. *Id.*

212. McKesson, 2018 WL 340042, at *6.

213. *Id.* at *7 (quoting Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d 1140, 1153 (10th Cir. 2011)).

ruled by them.'"[214] However, in reaching its conclusion, the court failed to consider that in the midst of a hazard such as a public health epidemic that threatened the entire fabric of a tribal society, it was entirely reasonable to consider whether it had a "catastrophic" impact on tribal sovereignty.[215]

The Cherokee Nation and other tribes have continuously stressed the interconnected relationship between their ability to govern and the epidemic, noting that "the opioid crisis has pushed health care, law enforcement, social services, and other systems in many tribal communities to the breaking point, and diverted scarce resources from other critical tribal priorities."[216] In response, the tribes have had to rely more heavily on federal programs rather than their own self-governance.[217] Widespread conduct that impacted the political integrity and governing authority of the tribes and increased their dependence on federal funding resources should be understood as a threat to the tribe's sovereignty.

The Federal District Court for the Northern District of Oklahoma should have applied the exhaustion doctrine before applying the standard for a preliminary injunction and engaging in the jurisdictional analysis in *McKesson v. Hembree*. The distributors and pharmacies never filed a motion to dismiss for lack of subject matter jurisdiction in the tribal court and failed to exhaust tribal remedies prior to seeking review in federal court. For an exception to apply, the tribal court must not be able to establish a colorable claim of jurisdiction.[218] Therefore a court's analysis of the exhaustion doctrine and *Montana* exceptions cannot stop once an exception has been marginally identified—if the tribal court has a colorable claim of jurisdiction, the exception to the exhaustion requirement cannot be applied. The federal government is not the authority on whether a tribal court has jurisdiction, it must defer first to the tribal court before it can hear jurisdictional claims. By foreclosing on the right of the Cherokee Nation's tribal courts to first determine their jurisdiction over the case under the exhaustion doctrine contrary to existing precedent, the federal court undermined the jurisdiction of the Cherokee Nation.

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214. *Id.* at *8 (quoting Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997)).

215. *See* FMC Corp. v. Shoshone-Bannock Tribes, 942 F.3d 916, 929 (9th Cir. 2019) (holding that operator's storage of hazardous waste on reservation threatened or had some direct effect on tribes' political integrity, economic security, or health and welfare), *cert. denied*, __ U.S. __, 141 S. Ct. 1046 (2021).

216. Brief Amici Curiae, *supra* note 6, at 11.

217. *Id.*

218. Thlopthlocco Tribal Town v. Stidham, 762 F.3d 1226, 1238 (10th Cir. 2014).

The federal court's failure to seriously consider evidence that supported the application of the *Montana* exceptions in its analysis minimized the severe harm an epidemic can have on a tribal sovereign's ability to govern, and the threat such a crisis posed to the Cherokee Nation's political and cultural survival. Finally, the authority to try cases on conduct and activity when it negatively impacts local communities in local courts is well understood in western legal traditions as a cornerstone of a democratic and equitable justice system. Denying tribal courts the opportunity to decide whether they have subject matter jurisdiction to hold wrongdoers accountable for the impact their conduct has on the tribal community infringes on the tribe's self-determination and governance and is contrary to the governing precedents the federal district court should have applied and followed.

B. Comity and the Exhaustion Doctrine: The Broad Implications of McKesson v. Hembree

The exhaustion doctrine can trace its lineage through the evolution of the principle of comity in the United States and was an alternative to extending full faith and credit to tribes.[219] Although *Hilton v. Guyot* and other decisional law is imperfect in its application of international comity, the principle's purposes are still established and foundational in the practice of the law.[220] No removal jurisdiction exists to allow cases to be removed from tribal courts to federal courts in the United States. The absence of removal jurisdiction strengthens the decisional law around exhaustion and comity as the primary consideration for federal court decision-making on enjoining tribal court proceedings.[221] Within this framework, the exhaustion doctrine embraces the principles of comity and recognizes that jurisdiction may not always be applicable, carving out exceptions for non-member suits in which tribal jurisdiction does not exist, due process rights are infringed or courts act in bad faith, the suit would be futile, or undue delay would result.[222]

In civil suits, the exceptions to the exhaustion doctrine protect due process and fair and equitable application of justice, and do not absolutely prohibit federal courts from finding that an exception applies or determining that the tribal court does not have jurisdiction.[223] However, the fundamental basis of the exhaustion doctrine requires the federal court

219. *See supra* Part I.

220. *See supra* Part I.

221. *See supra* section II.A.

222. *See supra* section II.A.

223. *See supra* section II.C.

to wait to make these findings until after the tribal court has had an opportunity to determine its own jurisdiction over a case.[224] After a tribal court has had the opportunity to determine its own jurisdiction, then the federal court may apply the exceptions to the exhaustion doctrine and assert jurisdiction over a case if warranted.[225] In this way, the federal court in *McKesson v. Hembree* should have allowed the tribal court first to determine whether it had subject matter jurisdiction over the case, before it asserted jurisdiction to grant the distributors' and pharmacies' injunction by invoking the *Montana* exceptions.

CONCLUSION

The Federal District Court for the Northern District of Oklahoma's decision not to apply the exhaustion doctrine in *McKesson v. Hembree* violated the principle of comity by failing to dismiss the preliminary injunction against the Cherokee Nation's opioid litigation. Through a long and convoluted history, the United States has carved out a winding and twisted path for tribes to maintain their tribal sovereignty and exercise self-determination and self-governance over their peoples and territories. Tribal sovereignty is inherent, and tribal governments and courts precede the adoption of the United States Constitution. Simultaneously, the principles of comity under international law precede the United States Constitution and have had an integral role in the decisional law that formed the United States' policies toward Native American and Alaska Native tribes. Although the United States has found ways to limit and sequester the authority of tribal governments, and to sideline or diminish the role of international law and comity, decisional law in the United States in support of both remains and must be followed.

224. *See supra* section II.C.

225. *See supra* section II.C.