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Analysis of a Bias-Based Exception to the Doctrine of Exhaustion in Wilson v. Bull

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NOTE

ANALYSIS OF A BIAS-BASED EXCEPTION TO THE DOCTRINE OF EXHAUSTION IN *WILSON V. BULL*

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I. Introduction

The jurisdictional reach of U.S. federal courts invokes a number of complicated questions and requires a delicate balancing act. Courts and legislators must weigh the guiding and limiting parameters of the Constitution as well as important policy considerations. The waters become even muddier when tribal concerns are involved. The courts are charged with the significant responsibility of maintaining the supremacy of the federal judiciary, but must be cautious not to hinder tribal sovereignty and self-determination. Indicative of this difficult balance is this question: When both the tribal courts and the federal courts can claim jurisdiction, can the parties choose which court to seek relief in? In an effort to protect the sovereignty of tribal courts and in the name of comity, the Supreme Court created the Doctrine of Exhaustion, requiring that tribal parties exhaust any available tribal court remedies before seeking redress in federal court.[1]

Because the Doctrine of Exhaustion is a device intended to maintain fairness in the application of federal and tribal court jurisdiction, it has exceptions in place—safeguards to prevent abuse.[2] In early 2014, a plaintiff seeking jurisdiction in federal district court sought to add another exception to the recognized list. Diane Wilson argued she was exempt from the

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1. *See* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856–57 (1985); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (1 Pet.) (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

2. *See Nat'l Farmers Union*, 471 U.S. at 856 n.21 ("We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith'. . . or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.") (quoting Juidice v. Vail, 430 U.S. 327, 338 (1977)); *see also* Strate v. A-1 Contractors, 520 U.S. 438, 459 n.14 (1997) ("When . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct.").

exhaustion requirement because the tribal court was incapable of rendering an unbiased opinion in her suit against a tribally chartered college.[3] Following a rejection of her proffered theory of bias, the federal district court for the Western District of South Dakota dismissed her claim.[4]

This case note examines the opinion given in *Wilson v. Bull*, and closely considers the merits of the new exception proposed by the plaintiff, compared against the policy behind the existing exceptions. On the facts of this particular case, the magistrate judge's recommendation that the claim be dismissed was the right way to dispose of this action, and the trial court was correct in adopting the recommendation. However, Wilson's proposed exception to the Doctrine of Exhaustion merits further inquiry, as it may serve another purpose in line with the policy of the existing exceptions.

Ultimately, an exception to the Doctrine of Exhaustion for potential tribal bias is not an altogether unwise proposal. However, as a tribal member, Wilson was not the proper plaintiff for this exception. Wilson's contention that she—a tribal member—would be deprived of a fair trial because of the tribal court's supposed bias cannot be supported because such a position would destroy any legitimacy that tribal courts have long struggled for. Even so, it is worth exploring whether this exception would be prudent in the narrow circumstances when a non-tribal member plaintiff seeks judicial relief from a tribally chartered entity, such as the Oglala Lakota College, for conduct occurring off the reservation. In such cases, there may be a reasonable concern that a tribal court could be incapable of adjudicating the matter without bias toward a defendant which draws revenue for the tribe. While this proposal still carries some troubling implications, it bears further exploration.

II. The Law Before the Case

A. Development of the Doctrine of Exhaustion

The Doctrine of Exhaustion requires a party to a tribal court case to exhaust all tribal court remedies before the party can challenge the tribal court's jurisdiction in federal court. It was introduced by the Supreme Court in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*.[5] In *National Farmers Union*, the Court examined the rule from *Oliphant v.*

3. Wilson v. Bull, No. CIV. 12-5078-JLV, 2014 WL 412328, at *1 (W.D.S.D. Feb. 3, 2014).

4. *Id.* at *2.

5. 471 U.S. 845, 856-57 (1985).

Suquamish Indian Tribe[6] stating tribal courts do not have criminal jurisdiction to punish non-Indians for offenses committed on an Indian reservation. However, the Court declined to apply this rule to civil actions.[7] The Court endorsed a requirement of tribal court exhaustion, stating that such a rule supports tribal self-determination, allows the full development of a record for federal appellate courts, and "encourage[s] tribal courts to explain to the parties the precise basis for accepting jurisdiction."[8] Congress, as the Court said, is "committed to a policy of supporting tribal self-government and self-determination."[9] Justice Stevens continued, arguing that Congress' policy regarding tribal self-government "favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge."[10] The Court held that if the tribal courts have jurisdiction over an action pursuant to 28 U.S.C. § 1331,[11] "exhaustion [of tribal remedies] is required" before such claims might be entertained by federal courts.[12]

The Doctrine of Exhaustion was developed further in 1987, in *Iowa Mutual Insurance Co. v. La Plante*.[13] *Iowa Mutual* asked whether the holding in *National Farmers Union* could be applied in a diversity case over a non-Indian defendant.[14] When members of the Blackfeet Indian Tribe in Iowa brought suit in Blackfeet tribal court against an Iowa insurance company, the defendants challenged the court's subject matter jurisdiction and asserted the plaintiff failed to properly allege tribal court jurisdiction.[15] The tribal court ruled against the defendant on both challenges and the defendant filed in federal district court for its interlocutory appeal.[16] The district court then granted the Indian plaintiffs' motion to dismiss for lack of subject matter jurisdiction, applying precedent

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6. 35 U.S. 191 (1978).
7. *Nat'l Farmers Union*, 471 U.S. at 853-54.
8. *Id.* at 856-57.
9. *Id*. at 856.
10. *Id.*
11. 28 U.S.C. § 1331 (2012) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). The Court in *National Farmers Union* noted that the district court was correct in "conclud[ing] that a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction." *Nat'l Farmers Union*, 471 U.S. at 853.
12. *Nat'l Farmers Union*, 471 U.S. at 857.
13. 480 U.S. 9 (1987).
14. *Id.* at 13-14.
15. *Id.* at 11-12.
16. *Id.* at 12-13.

that the tribal court must be given an opportunity to determine its own jurisdiction,[17] and the Ninth Circuit affirmed.[18] The Supreme Court determined that the *National Farmers Union* rule applied. Even in diversity cases, parties must exhaust tribal court remedies before seeking adjudication in federal court.[19] The lasting rule from *Iowa Mutual* is that the exhaustion of tribal court remedies is required "regardless of the basis for jurisdiction."[20] The Court described the Doctrine of Exhaustion as necessary as a matter of comity,[21] or "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."[22]

B. Exceptions to the Doctrine of Exhaustion

The Supreme Court has recognized four exceptions to the Doctrine of Exhaustion. The first three arise from *National Farmers Union*. Exhaustion is not required if "assertion of tribal court jurisdiction" meets one of three exceptions: first, when it "is motivated by a desire to harass or is conducted in bad faith"; second, "where the action is patently violative of express jurisdictional prohibitions"; and lastly, "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."[23] The Court later created a fourth exception, which applies specifically to the *Montana* rule that "Indian tribes lack civil authority over the conduct of nonmembers on non-Indian fee land within a reservation"[24] unless one of two narrow exceptions is met. This fourth exception exempts parties from the exhaustion requirement when "'it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land

17. *Id*. at 13.
18. *Id*.
19. *Id.* at 19-20.
20. *Id.* at 16.
21. *Id.* at 15.
22. Carey Austin Holliday, Note, *Denying Sovereignty: The Louisiana Supreme Court's Rejection of the Tribal Exhaustion Doctrine*, 71 LA. L. REV. 1339, 1341 (2011) (quoting Hilton v. Guyot, 159 U.S. 113, 163-64 (1895)).
23. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 n.21 (1985).
24. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 647 (2001).

covered by *Montana*'s main rule'[25] so the exhaustion requirement would 'serve no purpose other than delay.'"[26]

C. Application of the Exhaustion Doctrine

Since *National Farmers Union* and *Iowa Mutual*, the Supreme Court has reexamined the Doctrine of Exhaustion several times, and continually supports it. For example, the Court has considered whether petitioners were required to exhaust their tribal court claims in *Nevada v. Hicks*.[27] In *Hicks*, the respondent claimed that a state game warden's search of his home exceeded the bounds of the warrant and he sued in tribal court.[28] After the tribal court held that its jurisdiction was proper, the petitioner sought declaratory judgment in federal district court that the tribal court lacked jurisdiction.[29] Not only did the district court rule against the petitioner, it also held that the state officials would have to exhaust any claims of qualified immunity in tribal court. On appeal, however, the Supreme Court held that because tribal courts lack jurisdiction over state officials for causes of action relating to their performance of official duties, exhaustion was not required because there it would serve only to delay the proceedings.

Federal circuit courts of appeals inform well on the application of the Exhaustion Doctrine. In analyzing the Doctrine of Exhaustion further, the First Circuit found in *Ninigret Development Corp. v. Narrangansett Indian Wetuomuck Housing Authority* that "the tribal exhaustion doctrine holds that when a colorable claim of tribal court jurisdiction has been asserted, a federal court may (and ordinarily should) give the tribal court precedence . . . ."[30] The First Circuit found the Exhaustion Doctrine rests upon three "pillars."[31] The first pillar is Congress' "policy of supporting tribal self-government and self-determination."[32] The second is that exhaustion fosters administrative efficiency,[33] and the third pillar is that

25. *See* Montana v. United States, 450 U.S. 544 (1981).

26. Nevada v. Hicks, 533 U.S. 353, 369 (2001) (quoting Strate v. A-1 Contractors, 520 U.S. 438, 459 n.14 (1997)).

27. 533 U.S. 353 (2001).

28. *Id*. at 356.

29. *Id.* at 357.

30. Ninigret Dev. Corp. v. Narrangansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 31 (1st Cir. 2000).

31. *Id.*

32. *Id.* (quoting Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985)).

33. *Id.*

exhaustion "provides other decision makers with the benefit of tribal courts' expertise, thus facilitating further judicial review."[34] These three cases serve to represent that since its inception, the Doctrine has been supported and praised as the best way to reconcile federal and tribal jurisdictional concerns.

III. Statement of the Case: Wilson v. Bull

A. Facts

Diane Wilson is a member of the Oglala Sioux Tribe. In November 2008, she was hired as a teaching assistant for Oglala Lakota College's "Wanblee Head Start" children's program and was subsequently employed through year-to-year contracts.[35] The Oglala Lakota College (OLC) is a tribally chartered organization.[36] In April 2009, OLC reprimanded Wilson based on an allegation that she mistreated a child in the program. The specific allegations of her conduct are not listed in the opinion. It warned her that another incident could result in her termination.[37] After another child-mistreatment allegation surfaced in November 2009, Wilson's employment with OLC was terminated.[38] Wilson claimed this second allegation was false and asked OLC to reinstate her job or buy out the remainder of her contract.[39] However, OLC upheld her termination after an informal grievance meeting.[40] Wilson then requested a "formal full board hearing" in front of the OLC's Board of Trustees, but this was denied because the request was untimely.[41] OLC's policy required Wilson to submit a written request within five business days of the informal grievance meeting, and she missed this deadline.[42] Wilson, acting pro se, filed a wrongful termination suit in federal court in October 2012, demanding compensatory and punitive damages.[43] She asserted federal question jurisdiction, pleading claims based on the Fort Laramie Treaty, the

34. *Id.*
35. Wilson v. Bull, No. CIV. 12-5078-JLV, 2014 WL 412328, at *2 (W.D.S.D. Feb 3, 2014).
36. *Id.* at *3.
37. *Id.* at *2.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at *2-3.
42. *Id.* at *3.
43. *Id.*

Administrative Procedures Act, and the Fourteenth Amendment.[44] The two named defendants in the suit were Thomas Short Bull, the President of OLC, and Michelle Yankton, the Director of OLC's Head Start program.[45]

B. Holding

The defendants moved to dismiss the case without prejudice in part[46] because Wilson failed to exhaust her tribal remedies, instead initiating her complaint in federal court.[47] The court sought the recommendation of U.S. Magistrate Judge Veronica L. Duffy, who advised the court to grant the defendants' motion and dismiss the case for Wilson's failure to exhaust her tribal remedies.[48] Judge Duffy noted Wilson's concerns about tribal court bias "because of their connections to OLC," but explained this allegation does not fit within any existing exceptions to the Exhaustion Doctrine.[49] The district court adopted Judge Duffy's recommendation in full, and dismissed Wilson's complaint without prejudice.[50]

The district court was not swayed by Wilson's other argument that she should be exempt from the Doctrine of Exhaustion because "the tribal court will not be impartial to [her] case due to [its] loyalty to OLC College."[51] The district court rejected this because the alleged impartiality of the tribal courts is not one of the recognized exceptions to the Doctrine of Exhaustion.[52] Judge Duffy noted that requiring Wilson to exhaust tribal remedies was particularly just in this case—even more just than in *National Farmers Union* or *Iowa Mutual* because those cases involved suits against a non-member party, whereas Wilson's case was a dispute between a tribal member and a tribally chartered organization.[53]

Wilson made no claim that she did, in fact, exhaust her tribal remedies,[54] nor did she argue that the facts of this case fit within one of the previously existing exceptions. The function of Wilson's argument was to suggest that a new exception to the exhaustion requirement be adopted: a party need not exhaust her tribal remedies when the tribal court is unable to render an

44. *Id.*
45. *Id.* at *2-3.
46. The defendants also requested dismissal on the merits of the case. *Id.* at *5.
47. *Id.* at *3.
48. *Id.* at *1.
49. *Id.* at *5.
50. *Id.* at *2.
51. *Id.* at *1.
52. *Id.*
53. *Id.* at *3.
54. *Id.* at *1.

impartial opinion because of bias toward a party.[55] Because trial courts are typically bound to operate within existing statutory and common law, leaving the creation of new law to appellate courts and legislators, the trial court refused to create a new exception.

As a procedural matter, it is important to note that Wilson's claim was dismissed on jurisdictional grounds without prejudice.[56] If Wilson seeks redress through tribal sources and is truly subject to the kind of bias she claims exists, then she will have the opportunity to bring her action in federal court again. In this circumstance, her claim would likely survive a jurisdictional challenge because she has exhausted her tribal court remedies. Furthermore, she will have satisfied the first exception to the Exhaustion Doctrine, which states a claimant need not exhaust tribal remedies if the assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith."[57]

IV. Analysis

A. Why Diane Wilson Was Not the Proper Plaintiff to Propose a Bias-Based Exception

Because the Doctrine of Exhaustion is based on a "policy of supporting tribal self-government and self-determination, and because it is prudential rather than jurisdictional,"[58] any exceptions also serve to impose limitations upon tribal self-government and self-determination. Considering those implications, suggestions to expand the list of exceptions should be viewed closely and with utmost skepticism, as should any attempt to limit tribal autonomy. Even assuming that the exhaustion requirement can be bypassed with a showing the tribal court is unable to render an impartial opinion, Judge Duffy and the district court correctly decided this case.

Requiring exhaustion of tribal court remedies was particularly proper in this case because it involved a dispute between two tribal parties: a tribal member and a tribally chartered organization. "The facts in this case support requiring exhaustion of tribal remedies even more compellingly than did the facts in *National Farmers Union* and *LaPlante*" because "here, the issue is whether a tribe has jurisdiction over a dispute between a

55. *Id.*

56. *Id.* at *2.

57. Nat'l Farmers Union v. Crow Tribe of Indians, 471 U.S. 845, 857 n.21 (1985).

58. Gaming World Int'l v. White Earth Band of Chippewa Indians, 317 F. 3d 840, 849 (8th Cir. 2003) (quoting *Nat'l Farmers Union*, 471 U.S. at 856).

member and a tribally chartered organization."[59] The Supreme Court cases giving rise to the Doctrine of Exhaustion and its exceptions involved suits against non-members, and even then the Court upheld the exhaustion requirement.[60] If Wilson had been successful in avoiding tribal court on the grounds that the court's loyalty to OLC would deprive her of impartial adjudication, the damage to the doctrines of tribal legitimacy would be substantial. The question then becomes quite harrowing: If tribal courts cannot try cases between two tribal parties, then who falls under their jurisdiction? Instead, any discussion of whether the alleged impartiality of a tribal court constitutes a just exception to the Exhaustion Doctrine must be based on jurisdiction over non-members. There is no viable way to grant tribal members this exception without severely injuring the independence of tribal courts to deal with disputes between their members and tribally chartered organizations. The adoption of this exception for tribal members would allow for the circumvention of tribal courts whenever convenient, rendering their jurisdiction toothless.

However, Wilson's failed argument raises an interesting question about the merits of attaching a new exception to the Exhaustion Doctrine. Why not adopt a new exception for a narrow factual situation when the tribal courts could not even be expected to operate impartially? What if the plaintiff was a non-Indian and the defendant, similarly to Oglala Lakota College, was a tribally chartered organization that brought in revenue for the tribe?

B. The Policy Behind the Existing Exceptions

As previously noted, there are currently four recognized exceptions to the Doctrine of Exhaustion: exhaustion of tribal remedies

> is not required (1) where "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 judicial prohibitions"; (3) "where exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction"; and (4) "[w]hen . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land

59. *Wilson*, 2014 WL 412328, at *5.

60. *See Nat'l Farmers Union*, 471 U.S. 845; Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

> covered by *Montana*'s main rule, so the exhaustion requirement would serve no purpose other than delay."[61]

Each of these exceptions arises out of policy concerns involving simple notions of fairness, equity, and good faith. None imply the federal courts are superior to, or more capable of impartial justice than tribal courts.

An exception allowing an Indian plaintiff to circumvent tribal court jurisdiction based on court bias toward tribally chartered organization defendants would be incongruous with the policies underlying the four recognized exceptions. Wilson's argument[62] suggests that federal courts are more capable of rendering impartial judgments than tribal courts. Whether this assertion is valid is irrelevant when considering a possible bias exception. A bias exception implies a point the other exceptions reject: tribal courts are incompetent.

C. The Supreme Court Weighs in on Alleged Incompetence of Tribal Courts

The Supreme Court has looked at the competence of tribal courts, and rejected an exemption from tribal court jurisdiction based on incompetence, protecting tribal courts' place as the "appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."[63] The petitioner in *Iowa Mutual* also sought to avoid tribal court jurisdiction, arguing that local bias and incompetence justified exemption.[64] The Court reiterated that alleged incompetence is not one of the recognized exceptions, and that it would be "contrary to the congressional policy promoting the development of tribal courts."[65] The Supreme Court will not suggest that tribal courts are incompetent, and it will not grant relief to parties that can only forward a fear of tribal court incompetence.

D. Conflicts of Interest or Incompetence?

There is a key difference between extending the proposed exception to Wilson and extending it to a non-Indian plaintiff: allowing Indian plaintiffs to bypass tribal court jurisdiction because of bias implies tribal courts are incapable of fairly adjudicating matters. The use of such an exception for non-Indian plaintiffs suing tribally chartered organizations carries a

61. *Wilson*, 2014 WL 412328, at *1 (quoting Nevada v. Hicks, 533 U.S. 353, 369 (2001)).

62. *Id.* at *5.

63. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978).

64. *Iowa Mut. Ins. Co.*, 480 U.S. at 18-19.

65. *Id.*

different implication, which although problematic, is less troubling than that of tribal court incompetence. An exception for non-Indian plaintiffs against tribally chartered organization defendants suggests not that tribal courts are *unable* to oversee matters fairly, but that they could be *unwilling* to do so when the defendant is a source of revenue for the tribe.

It is crucial to draw distinctions between this suggestion and other very common situations. In the context of state and federal government, suits are frequently brought involving governmental entities that draw revenue for the government, like a state tax commission. It might be said that the rationale behind a bias-based exception would extend to this arena, suggesting that a private entity could not have a fair trial in federal court against the Internal Revenue Service. However, just as the bias-based exception would not apply when a tribal member brings suit against a source of tribal revenue, such concerns would not need to be addressed here because the private citizen or entity has subjected himself to the jurisdiction of the United States courts by simply being a citizen or domestic entity. The bias-based exemption would apply in situations where a non-tribal member ends up in tribal court, due not to his or her citizenship, but by activity.

It can be argued that a bias-based exception already exists within the Doctrine of Exhaustion, as an example of harassment or bad faith. It is true that a party that can actually demonstrate an act or pattern of bias in the tribal courts could likely achieve this exception. The proposed new exception, however, would allow for parties to overcome the exhaustion requirement without an actual showing of such bias. In the specific posture this note suggests, when a non-tribal member brings a claim against a source of tribal revenue, there could be a presumption that exhaustion is unnecessary, allowing proceedings to move forward in federal court without the delay for a party to make a showing of harassment or bad faith.

To be clear, this is not intended to imply that tribal courts are corrupt. This would be a far more serious accusation. Instead, it means to illustrate a clear conflict of interest that arises when a non-Indian party must submit to tribal court jurisdiction when suing a tribally chartered organization. The non-Indian plaintiff is at the unique disadvantage of litigating in an unfamiliar court, and may incur substantial costs before they can question tribal court jurisdiction.[66] It seems unjust to require the plaintiff to argue in front of a court whose financial interests are tied to the defendant.

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66. James D. Griffith, *Understanding the Tribal Court Exhaustion Doctrine*, J.D. GRIFFITH LAW (Oct. 7, 2013), https://jdgriffithlaw.wordpress.com/2013/10/07/tribal-ct-exhaustion-doctrine/.

E. Bias-Based Exception as a Method of Tribal Court Recusal

With respect to the conflict of interest concern, the proposed bias-based exception could operate as a method of tribal court recusal, just as justices and judges are expected to recuse themselves in matters where their impartiality "might reasonably be questioned."[67] Title 28 U.S.C. § 455 outlines specific situations where a judge's impartiality is so questionable that the judge must recuse himself, including personal bias or prejudices,[68] having served as a private practice or government lawyer in the matter at hand,[69] having a financial interest in the subject matter in controversy,[70] or having an otherwise close relationship to any party, lawyer, material witness, or person who would be substantially affected by the case's outcome.[71]

While tribal judges are not bound by § 455, the code serves as support for the proposition that it is wise for tribal courts to refrain from overseeing cases involving a tribally chartered organization that brings in money for the tribe. Such circumstances are analogous to § 455(b)(4), which requires recusal when the judge's financial interests are involved.

The American Bar Association requires lawyers similarly to avoid conflicts of interest.[72] Lawyers are expected to decline to represent certain clients if the representation would adversely affect another client.[73] They are also prohibited from acquiring any sort of financial interest adverse to their clients.[74] As judges and lawyers are expected to avoid any potential conflicts of interest, should we not similarly expect tribal courts to recuse themselves when the tribal government has a financial interest in the case's outcome?

F. The Need for Greater Federal Oversight

After examining tribal court decisions after the inception of the Exhaustion Doctrine, Judith V. Royster has suggested that as tribal courts are vested with increasing sovereignty, "the more need there seems to be

67. 28 U.S.C. § 455(a) (2012).
68. *Id.* § 455(b)(1).
69. *Id.* § 455(b)(2)-(3).
70. *Id.* § 455(b)(4).
71. *Id.* § 455(b)(5).
72. MODEL RULES OF PROF'L CONDUCT R. 1.7.
73. *Id.*
74. MODEL RULES OF PROF'L CONDUCT R. 1.8.

for increasing federal scrutiny."[75] Without such scrutiny, tribal exhaustion would mean little other than "delay and additional expense for the litigants."[76] While neither Royster nor this note mean to suggest that each tribal court decision ought to be presumed in error, Royster illustrates the point that the federal government can do more to ensure that tribal jurisdiction is not over-asserted to the detriment of non-Indian parties.

Royster's analysis supports the proposed exception in another way. In studying federal post-exhaustion review cases, Royster determined that although the federal courts review tribal determinations of federal law de novo, they accord "total deference" to tribal court determinations of tribal law.[77] This finding alone is not troubling, as one would expect federal courts to defer to tribal courts in interpreting tribal law. However, with little to no possibility of a federal court reversing a tribal court's determination on tribal law, it should not be easy to exercise tribal jurisdiction over a non-Indian plaintiff suing a tribally chartered organization. The primary concern here is that non-tribal members, with perhaps only the most incidental contact with a tribe, could be subjected to the jurisdiction of a foreign court with little actual recourse from the federal courts.

G. Williams v. Lee *Distinguished*

Opponents to this proposed exception may cite *Williams v. Lee*, where the Supreme Court reversed the Arizona Supreme Court's ruling that Arizona state courts had jurisdiction over suits by non-Indians against Indians, even if the action arose on an Indian reservation.[78] In *Williams*, the plaintiff was a non-Indian who ran a general store located on the Navajo Indian Reservation in Arizona. He sued a Navajo Indian married couple who lived on the reservation to collect on an outstanding debt. Drawing inspiration from John Marshall,[79] Justice Black held that to allow the exercise of state jurisdiction would "undermine the authority of the tribal courts over Reservation affairs and hence would infringe upon the right of Indians to govern themselves."[80] It was irrelevant to the Court that the

75. Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. KAN. L. REV. 241, 241 (1998).

76. *Id.* at 245.

77. *Id.* at 281.

78. Williams v. Lee, 358 U.S. 217, 218 (1959).

79. *Id.* at 218-19 (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)).

80. *Id.* at 223.

plaintiff was non-Indian because his business and the matter in controversy took place on an Indian reservation.[81]

Certainly Justice Black's powerful defense of tribal jurisdiction could serve as a strong argument against an exception for non-Indian plaintiffs suing tribally chartered organizations. However, the proposed exception is narrowly tailored so that none of the primary concerns the Court discusses in *Williams* are implicated. The suggested exception would differ from the *Williams* facts in two main ways. First, the exception would apply not to all Indian defendants such as those in *Williams*,[82] but only to tribally chartered organizations that serve as a revenue stream for the tribe. If the Indian defendant were not a source of tribal revenue, then the previously discussed conflicts of interest would not be at issue.

Second, such an exception would not apply if the matter in controversy took place on an Indian reservation. Justice Black recognizes in Williams that "the cases in this Court have consistently guarded the authority of Indian governments over their reservations."[83] The bias exception would thus only apply when the matter in controversy does not occur on an Indian reservation.

H. The Addition of New Exceptions to the Doctrine of Exhaustion May Be Appropriate

It is worth considering if there are any other grounds upon which another exception to the Doctrine of Exhaustion may be warranted. Any in-depth consideration of the particular merits or weaknesses of any other exceptions are beyond the scope of this note, but it is necessary to recognize that the existing list may be incomplete.

Consider, for example, an exception to the Doctrine of Exhaustion for Indian and non-Indian claimants seeking federal subject matter jurisdiction pursuant to 28 U.S.C. § 1331 in a claim against a tribal party.[84] Would an exception for parties seeking diversity jurisdiction under § 1332 be prudent,[85] an idea that was previously rejected by the Supreme Court?[86] These rules act to confer jurisdiction upon the federal courts for matters that are better suited the federal courts than the state courts. It is worth exploring

81. *Id.*

82. *Id.* at 218.

83. *Id.* at 223.

84. 28 U.S.C. § 1331 (2012) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

85. *Id.* § 1332.

86. Iowa Mut. Ins. Co. v. La Plante, 480 U.S. 9, 15 (1987).

whether the tribal courts are analogous to state courts in this regard. If so, then perhaps an exception to the Doctrine of Exhaustion for federal subject matter jurisdiction under §§ 1331 and 1332 is worth examining.

V. Conclusion

To protect important tribal interests in self-governance and self-determination, the Supreme Court has allowed the Indian tribes to adjudicate internally matters involving tribal members. This goal gave rise to the Doctrine of Exhaustion and its narrow exceptions. Even in cases like *National Farmers Union* and *Iowa Mutual*, where only one party was a tribal member or organization, the Court would not recognize potential bias against the non-Indian party as an excuse to duck the exhaustion requirement.[87] Likewise, Wilson could not have prevailed on her argument for a bias-based exception in her claim, especially because both parties to the case were affiliated with the same tribe.[88] If the Supreme Court rejected a bias exception when only one party was affiliated with a tribe, as Judge Duffy pointed out, it is extremely unlikely that bias would be a valid exception in claims involving two Indian parties.[89]

Wilson's proposed exception was rightfully rejected by the trial court and should be continually rejected on appeal. It operates under the inherent assumption that federal district courts are more competent than tribal courts. The recognized exceptions allow for original jurisdiction in federal court for reasons of good faith and fairness, not out of a presumption that the tribal courts are ill-equipped to rule on cases between their own tribal members. Wilson's case illustrates how even though the bias-based exception cannot be adopted as a bright line rule, there are existing case-by-case avenues through which a claimant can obtain a just ruling regardless of any in-practice biases.

However, it may be wise to adopt a new, narrow exception to the Doctrine of Exhaustion allowing non-Indian claimants to sue tribally chartered entities in federal court without first exhausting tribal court remedies. While this proposed exception does assume the possibility of tribal bias, it is not rooted in incompetence. Rather, it is based in genuine

87. *See* Nat'l Farmers Union v. Crow Tribe of Indians, 471 U.S. 845, 857 n.21 (1985); *Iowa Mut. Ins. Co.*, 480 U.S. at 9.

88. Wilson v. Bull, No. CIV. 12-5078-JLV, 2014 WL 412328, at *3 (W.D.S.D. Feb 3, 2014).

89. *Id.* at *5.

conflicts of interest issues that the American judiciary and legal profession have long sought to avoid.[90]

As the body of jurisprudence on the Doctrine of Exhaustion develops, courts should be open to considering new exceptions to the doctrine when justice so requires. However, such exceptions cannot be founded upon a lack of confidence in the tribal courts to adjudicate tribal matters. An exception for non-Indian plaintiffs suing tribally chartered organizations could serve to protect the interests of these plaintiffs to avoid impartial courts while not causing irrevocable damage to tribal sovereignty.

90. *See* 28 U.S.C. § 455(a) (2012); MODEL RULES OF PROF'L CONDUCT R. 1.7.