Smith v. Salish Kootenai College: Self-Determination as Governing Principle or Afterthought in Tribal Civil Jurisdiction Jurisprudence

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NOTE

SMITH V. SALISH KOOTENAI COLLEGE: SELF-DETERMINATION AS GOVERNING PRINCIPLE OR AFTERTHOUGHT IN TRIBAL CIVIL JURISDICTION JURISPRUDENCE?

Nicole E. Ducheneaux*

The Ninth Circuit's en banc decision in Smith v. Salish Kootenai College,1 while unquestionably a narrow victory for the Confederated Salish and Kootenai Tribes of the Flathead Reservation, is, when viewed more broadly, just another in a long line of cases that misguidedly defines the boundary between state and tribal civil adjudicatory power over civil actions arising on the reservation. In its 1959 decision Williams v. Lee,2 the U.S. Supreme Court held that constitutional principles, case precedents and statutory law dictate a presumption in favor of inherent tribal adjudicatory power over activities occurring on the reservation.3 The Court has never reversed its holding in Williams, and continues to nominally uphold it.4 Yet since its decision in Montana v.
United States,⁵ the Court has consistently supported a proposition opposite what it held in Williams—that there is instead a presumption in favor of state civil jurisdiction on the reservation, relying on the theory of implicit divestiture of tribal sovereign authority.⁶

This Comment will show that while the Williams rule—that tribal courts possess inherent adjudicatory jurisdiction over reservation-based causes of action regardless of land status or the status of the parties—may have been rendered judicially obsolete, it is still the presumption that best serves the basic principles of federal Indian law. It is a presumption that serves both Indian and non-Indian interests by moving toward the current federal goal of tribal self-determination. This presumption also enhances overall judicial economy and provides for uniformity in judicial interpretation of federal treaties, statutes, and executive orders.

This Comment will discuss the history of the Court's treatment of the scope of inherent tribal authority over reservation-based causes of action. Section I will address the foundations of inherent tribal adjudicatory jurisdiction, highlighting the authorities that support the Williams interpretation of the scope of tribal jurisdiction. Section II will focus on Montana and its successors, and how they, paradoxically, both moved away from the Williams holding and solidified the principles that underlie the Williams presumption. Section III will explore how the recent decision in Smith v. Salish Kootenai College fits in this line of cases. Finally, in Section IV, this Comment will assert the reasons why we should return to the original Williams presumption, and how this can be accomplished by either the Court or the U.S. Congress.

1. Basic Principles of Federal Indian Law, Williams, and the Presumption in Favor of Tribal Civil Adjudicatory Power for Actions Arising on the Reservation

In 1959, the U.S. Supreme Court decided Williams v. Lee,⁷ which stands for the proposition that, except for limited circumstances, tribes retain the inherent sovereign power to adjudicate civil matters arising on the reservation regardless of the status of the parties.⁸ In Williams, a non-Indian owner of a general store
on the Navajo Indian Reservation brought an action in Arizona state court to collect a debt owed him by a Navajo tribal member and his wife.\(^9\) The Indian defendants moved to dismiss the state court action, arguing that the Navajo tribal court had jurisdiction over the action.\(^10\) Both the Arizona trial court and the Arizona Supreme Court held in favor of the store owner, on the grounds that the state of Arizona had presumptive jurisdiction over civil actions arising on the reservation absent an express act of Congress to the contrary.\(^11\) The U.S. Supreme Court granted certiorari to decide under what circumstances states have civil adjudicatory authority over actions arising on the reservation.\(^12\)

The Court addressed this question by examining the most basic principles of federal Indian law.\(^13\) Principally, the Court relied on \textit{Worcester v. Georgia},\(^14\) Chief Justice John Marshall's seminal Indian law decision, which first articulated the foundational tenet of Indian law that, by virtue of their interaction with the United States, tribes have a limited kind of sovereignty through which they retain powers of self-government.\(^15\) These inherent tribal powers of self-government generally preclude states from exerting adjudicatory authority in Indian Country.\(^16\) Reviewing over one hundred years of Indian law jurisprudence, the \textit{Williams} Court stated that this bedrock principle of Indian law shields tribes from state jurisdiction, a principle that has remained substantially intact since 1832, except for limited circumstances in which "essential tribal relations were not involved and where the rights of Indians would not be jeopardized."\(^17\) Within that framework, the Court articulated the clear rule that unless the U.S. Congress has expressly stated otherwise, tribes exercise civil adjudicatory power over reservation-based causes of action except when state jurisdiction does not "infringe[] on the right of reservation Indians to make their own laws and be ruled by them."\(^18\) The Court stated that such a rule was in agreement with Congress's "as-

\(^{9}\) Id. at 217–18.  
\(^{10}\) Id. at 218.  
\(^{11}\) Id.  
\(^{12}\) Id.  
\(^{13}\) See \textit{Williams}, 358 U.S. at 218–19.  
\(^{15}\) Id. at 520.  
\(^{16}\) \textit{Williams}, 358 U.S. at 219.  
\(^{17}\) Id.  
\(^{18}\) Id. at 220.
sumption that the States have no power to regulate the affairs of Indians on a reservation.”

After examining the scope of federal statutes and the Navajo Tribe's treaties with the U.S. government, the Court held that this reservation-based cause of action, involving a non-Indian plaintiff and Indian defendants, could not fall under state jurisdiction because it would “undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.” The Court did not qualify its holding based on party status or the nature of the cause of action. It called the plaintiff's non-Indian status “immaterial”; the dispositive factors were that the plaintiff was located “on the Reservation and the transaction with an Indian took place there.”

There are two conflicting policies at issue in this opinion, each emanating from a distinct era of federal Indian policy. First, the Court viewed Marshall-era tribal sovereignty principles as having modern justification in the New Deal's conception of Indian self-determination. As the Court noted, during the New Deal era, federal Indian policy shifted from centralizing federal control over Indian affairs to using federal resources to promote stronger, more organized tribal governments and tribal courts. To the Williams Court, this federal policy goal of supporting tribal self-government solidified the legal basis for its conclusion that the Court must presume tribal civil adjudicatory authority on the reservation.

Second, since the opinion was written in 1959, it was informed by termination-era theories that tribes as separate and distinct political entities must be functionally destroyed in order to integrate Indian people into mainstream society. But this policy consideration did not detract from the Court's finding of presumptive tribal civil jurisdiction. Rather, the Court used termination policy, which contemplated eliminating tribes completely by act of Congress and surrendering full civil and criminal jurisdiction to the states, to reason that tribes retain all those

19. Id.
20. Id. at 223.
21. Id. at 223.
22. Williams, 358 U.S. at 220.
23. Id.
24. Id.
26. Williams, 358 U.S. at 220.
powers not expressly divested by Congress. In this case, no act of Congress had terminated the Navajo Tribe, hence Arizona had no civil adjudicatory power on that reservation.27

The opinion, written by Justice Black, appears to be unambiguous. The scope of tribal civil adjudicatory authority had evolved little since Chief Justice Marshall's time. State authority over reservation-based causes of action comes into being only where there is no impact on, or overlap with, tribal self-government. Status of the parties is immaterial. It is whether the cause of action arose on the reservation that is dispositive of tribal jurisdiction. Reiterating a fundamental principle of federal Indian law, the Court stated that tribal sovereign power to adjudicate reservation-based civil actions remains vested in the tribes, and "[i]f this power is to be taken away from them, it is for the Congress to do it."28

Despite the seeming clarity of this short opinion, courts and scholars have interpreted Williams differently. Some authorities have interpreted Williams as supporting a presumption in favor of tribal civil adjudicatory authority, as it is interpreted above,29 especially when viewed through the originalist or the foundationalist lens.30 Gloria Valencia-Weber, law professor at the University of New Mexico, has examined colonial relations between the tribes and the crown, early American concepts of land and government, the Articles of Confederation, the origins of the Constitution and federal Indian law jurisprudence to conclude that the Founders, like Justice Black in Williams, saw little if any role for the state in Indian Country, leaving inherent adjudicatory authority with the tribes.31

Other authorities treat the Williams holding as more specific. Significantly, the Court in Montana v. United States32 cited Williams as a primary source for the Montana exceptions.33 In that case, the Court circumscribed inherent tribal adjudicatory authority, prohibiting tribal civil regulatory power over reservation-

27. Id. at 220–21.
28. Id. at 223 (citing Lone Wolf v. Hitchcock, 187 U.S. 553, 564–66 (1871)).
31. Id. at 418–20.
33. Id. at 565–66.
based causes of action arising on fee lands and involving nonmember defendants. The Court allowed for two exceptions to this rule, and for both of those the Court cited to Williams, among others, as examples of those exceptions. First, the Court noted that a tribe could have jurisdiction in a Montana scenario if the nonmember had "enter[ed] consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Despite the lack of qualifications to the Williams rule, the Court interpreted the nature of the nonmember's on-reservation conduct in Williams to be legally significant—conduct later described by the Court as actions "involv[ing] private commercial actors.")

Second, the Court noted that a tribe could have jurisdiction in a Montana scenario when the nonmember's "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Williams arose from a commercial debt and is cited as an example of the second Montana exception. It is to be inferred then that nonmember suits against tribal members for commercial debts are sufficiently related to a tribe's interests to invoke tribal jurisdiction, even though the Williams Court, again, did not qualify the rule it articulated. Rather, it stated simply that the state may not "infringe[] on the right of reservation Indians to make their own laws and be ruled by them."

II. Montana v. United States and Its Successors

In 1981, Montana v. United States kick-started the judicial trend away from the basic presumption in favor of tribal civil jurisdiction articulated by Williams. Williams has never been overturned, but, as in Montana, its meaning has been reshaped to limit tribal sovereignty. There are two kinds of post-Montana cases: (1) those that reject the basic Williams presumption and create precedent that further limits inherent tribal adjudicatory authority; and (2) those that reject the basic Williams presumption and create positive precedent that attempts to resolve the conflict between tribal and state adjudicatory authority.

34. Id. at 565–67.
35. Id. at 565–66.
36. Id. at 565.
38. Mont., 450 U.S. at 566.
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A. Montana v. United States

Montana v. United States was a federal action brought by the United States on behalf of the Crow Tribe.\textsuperscript{40} The United States petitioned for declaratory judgment that the Crow Tribe and the federal government, not the State of Montana, had the authority to regulate hunting and fishing within the exterior boundaries of the Crow Reservation.\textsuperscript{41} It is significant that Montana was decided just three short years after Oliphant v. Suquamish,\textsuperscript{42} a tribal criminal jurisdiction case in which the Court held that tribal jurisdiction over nonmembers committing crimes on the reservation had been implicitly limited, and hence no longer existed.\textsuperscript{43} Although Oliphant concerns criminal jurisdiction, and hence is not good precedent for a tribal civil jurisdiction issue, the Montana Court deliberately duplicated Oliphant’s reasoning:

\begin{quote}
[The Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members . . . . But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.\textsuperscript{44}
\end{quote}

Both Montana and Oliphant relied on the new theory of \textit{implicit divestiture}.\textsuperscript{45} Implicit divestiture diverges from the fundamental principle of Indian law that powers of inherent tribal sovereignty may only be divested by an express act of Congress:\textsuperscript{46} the principle relied upon by the Court in Williams v. Lee to support the presumption in favor of tribal civil adjudicatory authority for reservation-based causes of action.\textsuperscript{47} Instead, Montana and Oliphant reversed that presumption, holding that absent “express congressional delegation,”\textsuperscript{48} tribes lack power to exercise adjudicatory authority over nonmembers because that inherent sovereign power has been “implicit[ly] divest[ed]”\textsuperscript{49} by the nature of tribal status relative to the U.S. government.\textsuperscript{50} Thus, while the Wil-

\textsuperscript{40} Mont., 450 U.S. at 549.
\textsuperscript{41} Id.
\textsuperscript{43} Id. at 208.
\textsuperscript{44} Mont., 450 U.S. at 564 (citation omitted).
\textsuperscript{45} Newton, supra n. 25, at 224–25.
\textsuperscript{46} Lone Wolf v. Hitchcock, 187 U.S. 553, 564–66 (1871).
\textsuperscript{48} Mont., 450 U.S. at 564.
\textsuperscript{50} Mont., 450 U.S. at 564; Oliphant v. Suquamish, 435 U.S. 191, 212 (1978).
Williams rule was never explicitly overruled by succeeding cases, the theory of implicit divestiture altered its meaning after the fact. The result was an enormous restriction of inherent tribal adjudicatory authority over reservation-based causes of action. Where Williams stood for the proposition that the Court presumes tribal authority in civil cases unless there is essentially no impact on a tribe’s inherent right to govern within its own territory, since Montana there is a presumption in favor of state jurisdiction where the action takes place on fee land on the reservation and the defendant is a nonmember, unless one of the two Montana exceptions applies.

B. Strate v. A-1 Contracting and Nevada v. Hicks: Montana’s Successors Restricting Tribal Adjudicatory Authority

Two recent cases have extended Montana’s holding, further limiting the power of tribes to adjudicate reservation-based causes of action. Strate v. A-1 Contracting and Nevada v. Hicks deal respectively with the scope of the Montana exceptions and whether Montana applies to tribally-owned lands held in trust by the federal government. In these cases, the Court construed the scope of the basic premise of Montana broadly, while at the same time construing the scope of the Montana exceptions narrowly—a tendency that does little to promote tribal self-government.

In Strate, the Court held that neither Montana exception applied when a nonmember plaintiff sued a nonmember defendant for injuries arising from a car accident that occurred on a state-maintained right-of-way on the Fort Berthold Indian Reservation in North Dakota. The Court ruled that Montana controlled under the facts because no statute or treaty governed jurisdiction (meaning state jurisdiction was presumed) and also because the cause of action arose on alienated, non-Indian land rather than tribal land held in trust by the United States.
The petitioners argued that the first *Montana* exception applied in this case because A-1 Contractors was engaged in subcontract work for the Three Affiliated Tribes of the Fort Berthold Reservation at the time of the accident, which, they argued, was a "consensual relationship[ ] with the [T]ribe[s]." The Court reviewed the fact scenarios in the three cases the *Montana* court cited as examples of the first exception, and concluded that a tribal landscaping subcontract was not an activity contemplated as a consensual relationship. Other than citing the decision below for the fact that the plaintiff was not a party to the subcontract and referring uncritically to the three illustrative cases from the *Montana* decision, the Court did not analyze or explain why a tribe's interest in self-government was not affected by a lawsuit arising from activities relating to a business transaction between a tribe and a nonmember subcontractor, as under the *Strate* facts.

The *Montana* Court's examples illustrating when a "consensual relationship" existed are just as uncritical and unclear about when the exception can be applied. The cited examples reveal that a "consensual relationship" existed in two instances in which the action arose directly from interaction between an individual tribal member and a nonmember, and in the instances implicating a tribe's ability to directly tax nonmembers in a business transaction. Neither *Strate* nor *Montana* reveals why those particular scenarios infringe on the right of the tribe to govern itself under the retained *Williams* rule, while others do not.

The United States next argued that the second *Montana* exception applied because negligent behavior on reservation highways necessarily affected the "health or welfare of the tribe" and its members. Interestingly, the Court agreed with this assertion, stating that "[u]ndoubtedly, those who drive carelessly on a public highway running through a reservation... surely jeopardize the safety of tribal members." But the Court held that this was not enough, and instead cited *Williams* for the proposition that in order to satisfy this exception the tribe's adjudicatory authority must implicate "the right of reservation Indians to make their own laws and be ruled by them." The Court referred to

60. Id. at 456-57.
61. Id. at 457.
62. Id.
63. *Strate*, 520 U.S. at 457 (internal quotation marks omitted).
64. Id. at 457-58.
65. Id. at 458 (internal quotation marks omitted).
several examples from *Montana* showing when the second exception is applied. The cited examples included where all parties to an adoption were tribal member residents of the reservation, the *Williams* scenario of a lawsuit arising from an on-reservation commercial debt, and property tax cases involving non-Indian owned livestock. According to the Court, the cited cases involved situations that implicated internal tribal relations and, as the *Strate* fact scenario did not constitute such a case, the second exception was not applicable. Again, with little analysis, the Court concluded that authority over ensuring the safety of reservation highways does not implicate this right of Indians to make their own laws, while authority over commercial debts does.

It is unclear what legally concrete, precedential conclusions can be drawn from *Strate* because of the paucity of the Court's discussion and analysis. But if the "whys" of this case are uncertain, what is certain is that the Court read the *Montana* exceptions very narrowly. Instead of reading the exceptions as in keeping with the long-understood principles of tribal sovereignty and the modern policy of tribal self-determination, the Court held that the exceptions will apply only when they match the few examples provided by the *Montana* court.

The second significant recent case that limited the scope of tribal adjudicatory power over reservation-based causes of action is *Nevada v. Hicks*. In *Hicks*, a Fallon Paiute-Shoshone tribal member living on the Fallon Paiute-Shoshone Reservation in Nevada brought actions in tribal court against individual state game wardens for tortious conduct and civil rights violations in their search of his home on tribally-owned reservation land. Justice Scalia wrote the opinion in which the Court held "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations—to 'the right to make laws and be ruled by them.'" A significant development in *Hicks* is the Court's pronouncement that, although *Montana*'s rule arose from a specific fact scenario occurring on "lands . . . owned in fee simple by non-Indi-

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66. Id.
67. Id.
68. Id. at 459.
70. Id. at 355–57.
71. Id. at 364.
ans,"72 the status of the land was intended to be just one non-dispositive factor.73 The Court broadened the Montana holding beyond its fact scenario, and created a new rule in which state power over reservation causes of action involving nonmembers is always presumed, and the most significant factor is whether tribal "[s]elf-government and internal relations"74 are at issue.

Although the state of tribal adjudicatory power over reservation-based causes of action has changed since 1959, Hicks represents a total about-face from Williams's basic presumption in favor of tribal authority over those causes of action. Williams was premised on the joint congressional and judicial "assumption that the States have no power to regulate the affairs of Indians on a reservation."75 Absent an express act of Congress to the contrary, that power remains in the tribes unless the state action does not infringe on "the right of reservation Indians to make their own laws and be ruled by them."76 Throwing that fundamental Indian law tenet to the wind, Justice Scalia in Hicks instead announced that "[s]tates' inherent jurisdiction on reservations can of course be stripped by Congress. But with regard to the jurisdiction at issue here that has not occurred."77 Interestingly, the Court cited to an 1896 criminal jurisdiction case for this proposition,78 and ignored Williams completely.

Strate and Hicks reveal the existing Court's consistent bias against the presumption in favor of tribal civil adjudicatory authority. The Court viewed the Montana rule broadly, prohibiting tribal jurisdiction in fact scenarios not implicated in the original decision, and applied the exceptions in only the narrowest of cases. In these two cases, the Court demonstrated its commitment to limiting tribal civil adjudicatory authority wherever possible.

73. Hicks, 533 U.S. at 370.
74. Id. at 371.
76. Id.
77. Hicks, 533 U.S. at 365 (citing Draper v. U.S., 164 U.S. 240, 242–43 (1896)) (emphasis added) (citation omitted).
78. Draper, 164 U.S. at 241.
C. National Farmers Union Insurance Co. v. Crow Tribe and Iowa Mutual Insurance Co. v. LaPlante: Montana’s Successors Creating Positive Statements of Indian Law

Less than ten years after Montana, the Court decided two Indian law cases that further refined tribal civil adjudicatory authority, and reaffirmed the joint congressional and judicial commitment to enhancing tribal self-determination and self-government. Neither National Farmers Union nor Iowa Mutual retreated from Montana’s holding, but their proximity in time to Montana reveal the intended scope and purpose behind the rule and its exceptions better than the later cases.

In National Farmers Union Insurance v. Crow Tribe, a minor Crow tribal member was injured by a motorcyclist on elementary school grounds on the Crow Reservation. The plaintiff’s guardian brought an action against the school district in Crow Tribal Court, and served process on the school board chairman, who failed to notify anyone else of the suit. As a result, default judgment was eventually entered against the school district. The defendant insurance company and the school board subsequently sought redress in the federal district court, which granted a permanent injunction against the Crow Tribal Court, stating that the Tribe lacked subject matter jurisdiction over the action. The Ninth Circuit Court of Appeals reversed, and the U. S. Supreme Court granted certiorari to decide whether the federal district court could enjoin a tribal court on the basis of lack of subject matter jurisdiction.

The Court held that, on these facts, tribal civil adjudicatory authority over the non-Indian defendants was not precluded by law, and could be determined by examining the reach of tribal sovereignty—whether that sovereignty has been divested, and whether statutes, treaties, or federal precedent impacted the extent of tribal jurisdiction. The Court established that this deter-

82. Id. at 847.
83. Id.
84. Id.
85. Id.
86. Id. at 848–49.
88. Id. at 855–56.
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mination is one that must first be reached by the tribal court.89 Therefore, where tribal civil adjudicatory authority is at issue, a federal court may not act until tribal remedies are exhausted.90

The Court premised this holding on two governing judicial policies. First, and most importantly, exhaustion of tribal remedies best serves the modern federal policy of enhancing "tribal self-government and self-determination," to which the Court and the U. S. Congress have long demonstrated commitment.91 Not only does exhaustion allow the tribe to exercise its powers of self-government, it provides an opportunity for a tribal appellate court to examine its decision and "rectify any errors."92 In essence, the Court suggested that even where tribal jurisdiction is lacking, exhaustion serves tribal self-determination because it encourages tribal courts to learn from their mistakes by both deciding the law and explaining that law to the parties.

Second, the Court noted that exhaustion of tribal remedies has the effect of enhancing judicial economy because, when the tribal court has been allowed to complete its inquiry into the basis for its jurisdiction over the action, the result is the development of a full record, which can be relied upon by any succeeding federal court.93 The federal court and the parties are not then required to visit the issues anew. Furthermore, where federal Indian law may be a murky, unfamiliar subject to mainstream law practitioners and judges, the tribal record gives the federal actors the "benefit of [the tribal court's] expertise in such matters in the event of further judicial review."94

The Court's articulation of its commitment to tribal self-determination is of paramount significance in National Farmers Union. When tribal civil adjudicatory powers are at issue, the Court seems to say that the U. S. Congress and the federal courts are governed by a commitment to enhancing and protecting tribes' ability to govern themselves. The few limitations to the exhaustion rule occur when the tribal action is brought in bad faith, where jurisdiction is expressly prohibited, or when the objecting party's opportunity to object to tribal court jurisdiction is inadequate.95 The National Farmers Union Court thus expressed its

89. Id. at 856.
90. Id.
91. Id.
92. Id. at 857.
94. Id. at 857.
95. Id. at 857 n. 21.
respect for tribal governments and institutions, committing itself to both protecting and strengthening tribal self-government.

Just two years later, the Court decided Iowa Mutual Insurance Co. v. LaPlante,96 another tort action, this time arising on the Blackfeet Reservation in Montana, in which a tribal member sued a nonmember insurance company in tribal court.97 Where the National Farmers Union defendants sought the federal forum on federal question jurisdiction, here the defendants sought the federal forum on diversity jurisdiction.98 They were denied at the circuit court level based on National Farmers Union's exhaustion rule.99 The U.S. Supreme Court granted certiorari to determine the extent of the exhaustion rule.100

The Court upheld, but refined, the Ninth Circuit's ruling that tribal remedies must be exhausted before federal jurisdiction is allowed: exhaustion of tribal remedies is not a jurisdictional requirement before the federal court may decide whether tribal civil jurisdiction exists; rather it is matter of comity between the federal and tribal jurisdictions.101

While perhaps weakening the tribal exhaustion rule, Iowa Mutual reaffirms the judicial policy of supporting and respecting tribal self-government. The Court noted the various ways that the Court and Congress have encouraged tribal self-government through the protection of tribal court jurisdiction, including federal statutes providing for the training of tribal judges, the legal difference between divested criminal powers and retained civil powers, and the long-held doctrine that state jurisdiction is precluded when it interferes with tribal self-government.102 Tribal remedies should be exhausted, not just respected at the trial court level, because a commitment to self-government means that tribal appellate courts must be allowed to review the determinations of their lower courts.103 The Court stated that "[t]he federal policy of promoting tribal self-government encompasses the development of the entire tribal court system."104 Moreover, the Court rejected

97. Id. at 11.
98. Id. at 12-14.
99. Id.
100. Id. at 14.
101. Id. at 15-16, 16 n. 8.
103. Id. at 16-17.
104. Id.
out-of-hand the insurance company's assertion that tribal court incompetence precluded tribal exhaustion, because such an exception to the exhaustion rule would be "contrary to the congressional policy promoting the development of tribal courts." The cases deciding tribal civil adjudicatory authority immediately succeeding the Montana decision create positive law which, while not expanding the scope of tribal civil jurisdiction beyond what Montana circumscribed, reiterated the long-held judicial understanding, affirmed in Williams, that tribal sovereignty meant tribal self-government—a worthy and compelling federal policy.

III. Smith v. Salish Kootenai College

Smith v. Salish Kootenai College (Smith II), an en banc decision of the Ninth Circuit Court of Appeals, reversing its own three-judge panel decision (Smith I), is the most recent in this discordant chorus of federal opinions on the scope of tribal civil adjudicatory authority. But despite being closer in time to Strate and Hicks, Smith II represents a philosophical return to the positive ideals embodied in Iowa Mutual and National Farmers Union. Like those decisions, it neither expands nor diminishes the scope of tribal civil jurisdiction from that prescribed in Montana, but reiterates the important policy foundations of tribes' adjudicatory authority.

The dispute in Smith arose from a single-car automobile accident occurring on the Flathead Reservation in Montana, home to the Confederated Salish and Kootenai Tribes, in which one passenger was killed and the driver and a second passenger were seriously injured. The vehicle, which rolled over because of a structural failure, was a dump truck owned by the tribal college, Salish Kootenai College (SKC), where all three persons involved in the accident were students. Smith, an Indian enrolled in another tribe, was driving as part of a college course. Smith and SKC were named as defendants in tort actions in tribal court, and

105. Id. at 18.
106. Id. at 19.
107. Smith v. Salish Kootenai College, 434 F.3d 1127 (9th Cir. 2006) [hereinafter Smith II].
108. Smith v. Salish Kootenai College, 378 F.3d 1048 (9th Cir. 2004) [hereinafter Smith I].
109. Smith II, 434 F.3d at 1129.
110. Id.
111. Id.
Smith cross-claimed against SKC. Eventually, all the claims except for Smith's action against the college were settled, so the tribal court realigned the parties with Smith named as plaintiff, and SKC as the defendant. After a tribal jury returned a verdict against Smith, he asserted for the first time that the tribal court lacked subject matter jurisdiction. Smith took this argument to both the tribal appeals court and to the federal district court, where he asserted an original action for negligent failure to maintain the vehicle and spoliation of evidence. When both courts affirmed tribal court subject matter jurisdiction, Smith appealed to the Ninth Circuit.

A three-judge panel reversed the federal district court and tribal court's decisions. The panel held that Smith was a non-member to whom the Montana rule applied. Land status was immaterial to the decision. The court did not seriously consider that the allegedly negligent failure to maintain the vehicle would have occurred on tribal property, because according to Hicks, Montana applies regardless of land status. Moreover, neither Montana exception was implicated because: (1) Smith's enrollment at SKC was too attenuated from his negligence claim against the school to constitute a consensual relationship with a tribe or tribal member; and (2) a "simple tort suit against a community college" does not rise to the level of serious "imperil[ment of tribal] . . . political integrity . . . or the health and welfare of the Tribe." In May 2005, the Ninth Circuit vacated that decision and granted en banc review. The en banc court agreed that the Montana rule applied because Smith was a nonmember, and considered two threshold factors to determine how, if at all, to apply the Montana exceptions. First, the Court sought to determine

112. Id.
113. Id.
114. Id.
116. Id.
117. Smith I, 378 F.3d at 1051.
118. Id. at 1052–53.
119. Id.
120. Id.
121. Id. at 1056–57.
122. Id. at 1059.
124. Smith II, 434 F.3d at 1131.
the party status of the nonmember—plaintiff or defendant—because “membership status of the unconsenting party . . . [is] the primary jurisdictional fact.” 125 Next, the court considered whether the cause of action arose on tribal or non-tribal land. 126 Interestingly, where the three-judge panel dismissed this fact as irrelevant under Hicks,127 the en banc court cited Hicks for the proposition that, while it is not dispositive, land status is at least a factor—and in this case an important one to which the Hicks Court gave significant consideration.128

The en banc court examined these threshold factors at length. Regarding party status, it was accepted that Smith was not a member, and the court concluded that SKC was “a tribal entity, and, for purposes of civil tribal court jurisdiction, may be treated as though it were a tribal ‘member.’”129 Regarding land status, the court inquired whether Smith’s tort action had a “direct connection to tribal lands.”130 The court concluded that the causes of action (negligent failure to maintain the vehicle and spoliation of evidence) all necessarily occurred at the college—on tribal lands.131

With those threshold questions resolved, the court moved on to a discussion of whether either of the Montana exceptions applied, and, if so, based on party and land status, which exception would govern.132 The court’s analysis is interesting because it avoided the narrow interpretation of the exceptions found in Strate and Hicks, and yet neither flouted nor rejected the holdings in those cases; rather the court defined the Smith facts as more complex, and thus outside the scope of those holdings.

The court noted that Hicks did not apply under these facts because the nonmember party in Hicks did not “voluntarily submit[ ] . . . to tribal regulatory jurisdiction,” and here, Smith voluntarily brought his cross-claim in tribal court.133 And Strate did not apply to Smith because Strate referred to the issues of “the adjudicatory authority of tribal courts over personal injury actions against defendants who are not tribal members,’’ and here the

125. Id. (quoting Nev. v. Hicks, 533 U.S. 353, 382 (2001) (Souter, J., concurring)).
126. Id.
127. Smith I, 378 F.3d at 1052.
128. Smith II, 434 F.3d at 1131.
129. Id. at 1135.
130. Id.
131. Id.
132. Id.
133. Id. at 1136 (quoting Nev. v. Hicks, 533 U.S. 353, 372 (2001)).
nonmember party was the plaintiff. Since *Hicks* and *Strate* could not, therefore, be analogized to the facts, the court looked elsewhere for a tribal civil jurisdiction case that best matched the *Smith* facts, and from which it could determine the applicability of the *Montana* exceptions. That case was *Williams*.

*Williams* best analogized to the *Smith* facts first on very basic grounds: the plaintiff in both cases was the nonmember, and the defendant in both cases was the member. More specifically, however, the nonmember in both cases satisfied the first *Montana* exception under the same circumstances because both engaged in consensual relationships with a tribe or its members. It was immaterial that the consensual relationship in *Williams* was a commercial transaction and the consensual relationship in *Smith* was Smith's suit in tribal court. It was also immaterial to the court that *Williams* predated the formulation of the *Montana* exceptions, because it was cited as a model for both exceptions.

On first glance, this would seem out of line with *Strate*'s narrow holding on the first exception, and its rejection of the tribal subcontract as a consensual relationship. But since the *Strate* Court failed to elaborate on why the tribal subcontract did not fit the first exception, and because the *Smith* relationship was nothing like a tribal subcontract, there was no legal reason why the *Smith II* court couldn't conclude that Smith's suit created a consensual relationship. Indeed, the *Smith II* court justified its finding that a voluntary nonmember suit in tribal court is a consensual relationship under *Montana*, despite its lack of commercial character, because "civil tribal jurisdiction [should not] turn on finely-wrought distinctions between contract and tort."

Instead, the *Smith II* court examined the policy behind the first exception and found that the overriding rationale for allowing tribal jurisdiction where a nonmember is in a consensual relationship with the tribe or its members is the element of choice on the

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135. *Id*. at 1136–37.
136. *Id*. at 1136.
137. *Id*. at 1137.
138. *Id*.
139. *Id*.
141. *Id*.
142. *Smith II*, 434 F.3d at 1137.
part of the nonmember. According to the court, the first Montana exception is something like the due process analysis for personal jurisdiction in non-Indian civil law matters, hinging on the meaningful contacts established by the nonmember and whether they were purposeful. Smith established a meaningful contact with the tribe—he purposefully formed a relationship by bringing his cross-claim in tribal court—and thus he satisfied the first Montana exception and precluded assertion of state jurisdiction.

IV. SELF-DETERMINATION AND TRIBAL CIVIL ADJUDICATORY AUTHORITY

Federal jurisprudence from 1959, when the U.S. Supreme Court decided Williams, through 2006, when the Ninth Circuit rendered its opinion in Smith II, reveals some legal truths about tribal adjudicatory authority over reservation-based causes of action. The true scope of that inherent tribal power is reflected in the monumental rise of tribal self-determination in federal Indian law in the last quarter of the twentieth century, as well as in the language of the Montana exceptions. Tribal self-determination and tribal self-government have been the guiding, constant theme throughout these tribal civil jurisdiction cases. Even Williams v. Lee, informed by the Indian termination era, framed the boundary between tribal and state jurisdiction as one defined by "the right of the Indians to govern themselves." Williams was decided during an era when tribal sovereignty and tribal self-government were so little valued in federal Indian policy that Congress was willing to completely extinguish the tribal existence of such "assimilated" tribes as the Menominee of Wisconsin. Yet Williams articulated the rule that states have no civil adjudicatory power over Indian reservations unless the power does not "infringe[] on the right of reservation Indians to make their own laws and be ruled by them."

143. Id. at 1138.
144. Id.
145. Id. at 1140.
147. Id. at 220–21.
148. Id. at 223.
150. Williams, 358 U.S. at 220.
Even *Montana* reaffirmed the importance of tribal self-determination and self-government. Indeed, the Court’s reasoning for prohibiting tribal jurisdiction over nonmembers on fee land was premised on the idea that tribal jurisdiction exists to “protect tribal self-government [and] to control internal relations.”151 This is likely the reason the Court formulated the second *Montana* exception, allowing tribal jurisdiction over nonmembers on fee land where the nonmember’s “conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”152 Self-government cannot exist where the sovereign has no power to use its laws to protect its political integrity, its security, or the health and welfare of its citizens.

In addition, the exhaustion doctrine of *National Farmers Union* and *Iowa Mutual* follows the commitment to tribal self-government established by *Williams* and *Montana*.153 As discussed above, *Smith II* returned to the pro-self-determination stance first articulated in *Williams*. The only cases in this series of tribal civil jurisdiction that did not rely on the policy of Indian self-determination were *Strate* and *Hicks*, but perhaps they are anomalies.

Is it strange that *National Farmers Union* and *Iowa Mutual* were more in line with *Montana*’s commitment to self-determination than *Strate* and *Hicks*? Likely not. The former were much closer in time to *Montana*, at four and six years after respectively. *Strate* and *Hicks*, on the other hand, were decided sixteen and twenty years after *Montana*, respectively.

The two exhaustion cases perhaps had a better perspective on the original policy and meaning behind the *Montana* decision if only because of proximity in time. Moreover, Justices Thurgood Marshall and John Paul Stevens, who authored *Iowa Mutual* and *National Farmers Union* respectively, may have better understood Justice Stewart’s intent in *Montana* because both served on the bench with him.154 Perhaps they were echoing Stewart’s tribal self-determination philosophy. It is not clear how Justice Stewart’s understanding of the scope of tribal government was formed,

152. Id. at 566.
but it may be revealing that his first year on the bench was 1959—the year Williams was decided.\textsuperscript{155} Neither Justices Scalia nor Ginsburg, authors of Hicks and Strate, ever served with the author of the Montana decision.\textsuperscript{156}

Self-determination should be the overriding concern when Indian civil jurisdiction is at issue. Self-determination is not a concept that applies solely to American Indian tribes. As a legal principle, it is most recognizably found in discussions of emerging nation-states throughout the world.\textsuperscript{157} With origins in the French and American Revolutions, the concept requires that “government be responsible to the people.”\textsuperscript{158} And some scholars of Indian law have postulated that the confused mess of Indian dependence on the government and the intertwining of jurisdictions could be solved if the U.S. government further fostered Indian self-determination, as it did in post-World War II Europe.\textsuperscript{159} As such, the United States could establish “something of a Marshall Plan for American Indians, [which] would be offset by long-term savings in social costs.”\textsuperscript{160} Such a project could achieve what the United States attempted during the termination era, but instead of extinguishing Indian sovereignty, enhancing it to terminate Indian reliance on the federal government.

The Court used self-determination principles to justify exhaustion of tribal remedies, encouraging tribes’ exercise of power over reservation-based causes of action, avoiding needless burdens on state and federal governments.\textsuperscript{161} The Court was not saying two different things when it justified tribal exhaustion both on tribal self-determination grounds and judicial economy grounds. Tribal self-determination, when tribal civil adjudicatory powers are at issue, necessarily means judicial economy for state and fed-

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  \item \textsuperscript{155} The S. Ct. Historical Socy., History of the Court: Timeline of the Justices, http://www.supremecourthistory.org/02_history/subs_timeline/02_a.html (accessed Apr. 1, 2006); Williams, 358 U.S. 217.
  \item \textsuperscript{157} See Antonio Cassese, Self-Determination of Peoples: A Legal Reappraisal (Cambridge U. Press 1995).
  \item \textsuperscript{158} Id. at 11.
  \item \textsuperscript{159} Roxanne Dunbar Ortiz, Indians of the Americas: Human Rights and Self-Determination 178 (Praeger 1984).
  \item \textsuperscript{160} Id.
\end{itemize}
eral governments. Where tribes have the power and ability to adjudicate reservation-based causes of action, it logically follows that the burden on the non-Indian forum will be lessened, whether by keeping the dispute out of the non-Indian courts altogether, or producing a judicial record which, by comity, allows the non-Indian forum to rely on the tribal court’s findings of fact or its expertise in federal Indian law.

Furthermore, the great body of Indian law, which has confounded and frustrated legal practitioners since Chief Justice Marshall’s time, could be greatly streamlined and simplified by reasserting inherent tribal adjudicatory authority over reservation-based causes of action. At present, there are three jurisdictional forces making law and interpreting treaties and statutes relating to Indian affairs. The decisions of state courts, federal courts, and tribal courts on the same issues of Indian law are, at best, slightly out of sync with each other.

Take for instance a recent decision of the Montana Supreme Court deciding whether a certified Indian-owned business may be considered a member of an Indian tribe in order to invoke one of the Montana exceptions. In Zempel v. Liberty, a tavern owned by a tribal member, located on the Flathead Indian reservation, and certified as an Indian-owned business by the Confederated Salish and Kootenai Tribes, was named as a defendant in an action arising from a drunken driving accident brought by a non-member plaintiff. The defendant tavern asserted that its Indian-owned business status made it a tribal member such that the Montana exceptions should be applied. The Montana Supreme Court arrived at its conclusion in a way that follows the Ninth Circuit’s decision in Smith II, interpreting the same federal precedent that would be relied upon in federal or tribal court. But it created new Montana state precedent on tribal membership of corporations for Montana exception purposes—an issue that has not yet been addressed by the Ninth Circuit. So Montana practitioners litigating a similar issue must take into consideration parallel precedent, which while not contradictory, is not in sync with the body of federal law on tribal civil adjudicatory authority. This, it should be noted, is probably a relatively benign example of what

163. Id. at 126–27.
164. Id. at 132.
165. Id. at 130–34.
166. Id. at 132.
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can happen when several jurisdictions decide the same issue of federal Indian law under different fact scenarios and without interacting. The reassertion of presumed, inherent tribal civil adjudicatory authority over reservation-based causes of action would likely limit such inconsistencies between federal and state law.

V. CONCLUSION: THE FUTURE OF TRIBAL CIVIL ADJUDICATORY AUTHORITY OVER RESERVATION-BASED CAUSES OF ACTION

Only by act of Congress or decision of the U.S. Supreme Court will the reinsertion of self-determination principles into the discussion of tribal civil adjudicatory authority, and the reassertion of inherent tribal civil adjudicatory authority over reservation-based causes be achieved. Both scenarios are possible.

Strate and Hicks were aberrations, out of line with the true meaning and scope of tribal civil jurisdiction jurisprudence in federal court. Those cases’ interpretations of Williams and Montana were anomalous errors, and their exclusion of self-determination and self-government as primary principles behind tribal civil jurisdiction were mistakes that ought to be corrected. Although the Ninth Circuit’s decision in Smith II is less persuasive than the Supreme Court’s decisions in Strate and Hicks, it reveals that Strate and Hicks may be so far afield from the true meaning of tribal civil jurisdiction that a court can reasonably and legally decide such an issue within Montana’s constraints without running afoul of either of those decisions.

While it does not reveal how the U.S. Supreme Court might evaluate future tribal civil jurisdiction cases, in June of 2006, the Court denied Smith’s petition for certiorari, and let stand the Ninth Circuit’s judgment. At the very least, this denial of certiorari demonstrates that the Ninth Circuit’s commitment to self-determination in a tribal civil jurisdiction analysis was not contradictory to current law.

However, it is not clear that the current Supreme Court is poised to move back toward Williams and greater respect for tribal self-determination. But even absent a willing Court, the U.S. Congress exercises plenary power over Indian affairs. In response to the U.S. Supreme Court’s decision in Duro v. Reina, in which the Court held that tribes have no criminal adjudicatory powers over nonmember Indians committing on-reservations

crimes,\textsuperscript{169} Congress, recognizing a jurisdictional void created by the \textit{Duro} decision,\textsuperscript{170} enacted the "\textit{Duro} fix." This amendment to the Indian Civil Rights Act relaxed \textit{Duro}'s judicial restriction of tribal sovereign powers, and reaffirmed tribal adjudicatory authority over nonmember Indians.\textsuperscript{171}

In \textit{U.S. v. Lara}, the U.S. Supreme Court affirmed the ability of Congress to redefine the metes and bounds of tribal sovereignty, essentially without limitation, upholding the \textit{Duro} fix.\textsuperscript{172} If a new Congress can be convinced, as the \textit{Williams, Montana, National Farmers Union,} and \textit{Iowa Mutual} Courts were, that self-determination is the most advantageous and consistent policy consideration behind defining the scope of tribal civil adjudicatory authority, then it is possible that tribes could regain a significant measure of their inherent power over on-reservation civil matters. Such a statute (a civil \textit{Duro} fix) could bring the United States and tribes closer to a realization of self-determination, which would enhance tribal sovereignty, lessen the tribal burden on the United States and create greater consistency in the interpretation of Indian law.

\textsuperscript{170} \textit{Id.} at 697–98.