PROCEDURAL FAIRNESS: ENSURING TRIBAL CIVIL JURISDICTION AFTER *PLAINS COMMERCE BANK*

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I. INTRODUCTION: INDIAN COUNTRY'S JURISDICTIONAL ANOMALY

In mid-North America, Indian country[1] is undergoing a renaissance, as sovereign American Indian tribes are "asserting their ambitions, their power, and their values with greater and greater effectiveness."[2] As a result, many tribes are "on paths toward economic self-sufficiency, political self-determination, and cultural rejuvenation."[3] Nevertheless, the United States Supreme Court has curiously continued to restrict these paths.[4] In particular, Indian tribes face great adversity in asserting civil jurisdiction over nonmembers[5] due to a guiding doctrine and precedent that only confounds what is already a "jurisdictional crazy quilt."[6] In June 2008, the Supreme Court reaffirmed that adversity when it

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1. The term "Indian country" means

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C.A. § 1151 (West 2009). Though § 1151 is a criminal statute, it generally applies to questions of civil jurisdiction. Decoteau v. Dist. County Court, 420 U.S. 425, 427 n.2 (1975).

2. Joseph P. Kalt, *The Role of Constitutions in Native Nation Building, in* REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 78 (Miriam Jorgenson ed., 2007).

3. *Id.*

4. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978) (ruling that tribes lack criminal jurisdiction over non-Indians unless specifically authorized by Congress); Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct 2709, 2714 (2008) (ruling that tribes lack jurisdiction over a sale of fee land between a non-Indian to another non-Indian).

5. To clarify, a nonmember is one not enrolled in a tribe, and may include non-Indians, non-enrolled Indians, and even Indians that are enrolled in a different tribe. For purposes of this Note, nonmembers and non-Indians will be used interchangeably unless otherwise specified.

6. Nevada v. Hicks, 533 U.S. 353, 383 (2001) (Souter, J., concurring).

decided *Plains Commerce Bank v. Long Family Land and Cattle Co.*[7] Like other sovereign entities, tribes would like to regulate and exercise their adjudicatory authority over all individuals within their territories to further ensure the effectiveness of their governments. However, in stark contrast to the growth of civil personal jurisdiction among states, tribes have faced an onslaught of setbacks—imposed by the Supreme Court—that have restricted their governing capabilities. This Note will show that the Court has utilized a doctrine that stresses the importance of fee land in order to restrict tribal authority over nonmembers. Since the doctrine's founding, the Court has expanded its basic logic and alluded to otherwise clear instances where tribal jurisdiction should be proper.[8] The reason, which has become clearer as of late, is that the Court is not as concerned about land status as it is about "fairness" to nonmembers, especially to non-Indians.[9]

After *Plains Commerce Bank*, one has to wonder how much further the Court will go to insulate nonmembers from tribal authority. The recent resurgence of tribal authority demonstrates that one thing is certain: tribes are here to stay and they will continue their efforts toward greater economic, political, and legal control over their territories. This Note argues that such efforts must be well-calculated, as the Supreme Court is able—and probably willing— to issue a bright-line rule against tribal civil jurisdiction over nonmembers.

Overall, this Note will show that tribal jurisdiction is indeed unfair, but for tribes, not for nonmembers. First, Part I will briefly introduce the sovereign status of tribes and then highlight how the Supreme Court has created legal disparities between state and tribal civil jurisdiction. In effect, tribal civil jurisdiction is an anomaly within the United States legal structure. Next, Part II will introduce *Montana v. United States*,[10] which has become the guiding legal doctrine. There, this Note will illustrate how the Supreme Court has fueled the doctrine's growth, over the course of various decisions, from a proposition into a robust general rule that tribes lack civil jurisdiction over nonmembers on nonmember fee land. Part III will provide an in-depth discussion of *Plains Commerce Bank* from the Cheyenne River Sioux Tribal Court to the United States Supreme Court. Part IV will argue that *Montana*'s progeny of cases is less about fee land than it is about the procedural rights of nonmembers. Such an argument

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7. 128 S. Ct. 2709.

8. *See, e.g.*, Lisa M. Slepnikoff, Article, *More Questions than Answers:* Plains Commerce Bank v. Long Family Land & Cattle Company, Inc. *and the U.S. Supreme Court's Failure to Define the Extent of Tribal Civil Authority Over Nonmembers on Non-Indian Land*, 54 S.D. L. REV. 460, 462 (2009) (arguing that the *Plains Commerce Bank* Court "misrepresented the facts of the case and employed an unduly narrow interpretation" of the guiding legal doctrine).

9. *See* Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUS. L. REV. 701, 713 (2006) (suggesting that the Supreme Court seems to assume that tribal law is unfair to nonmembers).

10. 450 U.S. 544 (1981).

helps explain why the Court has yet to rule in favor of tribal civil jurisdiction under the *Montana* doctrine. In addition, Part IV will refute the misleading idea, advocated heavily by the Court, that tribal courts are unreliable and unfair for non-Indians. To the contrary, tribal courts are competent justice tribunals that afford all parties due process and, therefore, deserve full faith and credit. Finally, Part IV will recommend measures that tribes, tribal judges, and tribal lawyers can take to ensure that future cases do not hinder tribal judicial capabilities as sovereigns "outside the basic structure of the Constitution."[11]

A. A Primer on the Political and Sovereign Status of American Indian Tribes

Indian tribes may exercise jurisdiction because they are recognized sovereigns. In fact, tribes have always inherently governed themselves as distinct sovereign entities.[12] Beginning in 1831, however, the United States Supreme Court began to address and define the parameters of tribal sovereignty.[13] For example, in *Cherokee Nation v. Georgia*, Chief Justice John Marshall expressly declined to recognize tribes as "foreign nations" and instead famously defined them as "domestic dependent nations."[14] He reasoned that tribes merely occupy the lands to which the United States holds title by virtue of colonial conquest.[15] Marshall also famously defined the government-to-government relationship between tribes and the Federal Government, which still exists, as a "guardian-ward" or trust relationship, meaning that the United States has a fiduciary duty to tribes.[16] Shortly thereafter, in *Worcester v. Georgia*, Marshall clarified that, despite their somewhat "dependent" status, tribes still exist as sovereign entities whose principal relationship is with the Federal Government.[17] As a result, he ruled that state laws have no effect within tribal boundaries.[18] From this early Supreme Court jurisprudence, tribes have come to be understood as "quasi-

11. *Plains Commerce Bank*, 128 U.S. at 2724 (quoting United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring)).

12. United States Supreme Court Chief Justice John Marshall even recognized this fact almost two centuries ago in the landmark case Worcester v. Georgia, 31 U.S. 515, 519 (1832) ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial.").

13. *See generally* Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

14. *Id.* at 2.

15. *Id.*

16. *See id.* (stating that tribes' relations to the United States "resemble that of a ward to his guardian").

17. *See Worcester*, 31 U.S. at 561 ("The whole intercourse between the United States and this nation, is by our constitution and laws, vested in the government of the United States.").

18. *Id.*

sovereign" entities, whereby they can exercise jurisdiction and governmental powers within their boundaries to the extent the Federal Government, particularly Congress, allows.[19]

B. State Personal Jurisdiction

To fully understand the shortcomings of tribal jurisdiction discussed in this Note, one needs to look first at the progress of state jurisdiction over the past century. In *Pennoyer v. Neff*, the Supreme Court incorporated into United States law two so-called "well-established [international] principles of public law respecting the jurisdiction of an independent State over persons and property."[20] Under the first principle, according to Justice Field, "every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory."[21] Under the second, "no state can exercise direct jurisdiction and authority over persons or property without its territory."[22] Further, Justice Field opined that the validity of a personal jurisdiction judgment could be questioned as to whether it afforded due process to the individual "according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."[23] He added that the proceedings are only valid if issued by a "competent" tribunal.[24] In effect, *Pennoyer* issued a strict sense of territorial jurisdiction among the states for reasons of state sovereignty and individual due process rights.

The precedent set forth in *Pennoyer* has mostly fallen by the wayside. In its place has stepped *International Shoe Co. v. Washington*, which adopted the "minimum contacts" test.[25] Under this test,

> due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain *minimum contacts* with it such that the maintenance of the suit does not offend "traditional notions of *fair play and substantial justice*."[26]

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19. *See* Angelique A. EagleWoman & Wambdi A. Wastewin, *Tribal Values of Taxation Within the Tribalist Economic Theory*, 18 KAN. J.L. & PUB. POL'Y 1, 2 (2008) (discussing how federal Indian law, U.S. Supreme Court decisions, federal jurisprudence, and congressional legislation have qualified the notion of "quasi-sovereignty").
20. 95 U.S. 714, 722 (1878).
21. *Id.*
22. *Id.*
23. *Id.* at 733.
24. *Id.*
25. 326 U.S. 310, 316 (1945).
26. *Id.* (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)) (emphasis added).

International Shoe's ideas of minimum contacts, fair play and substantial justice have since evolved and narrowed, leaving behind very little of Justice Field's legacy. For example, *Hanson v. Denckla* narrowed the minimum contacts test, requiring that "there be some act by which the defendant *purposefully avails itself* of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[27] Down the road, *World-Wide Volkswagen Corp. v. Woodson* held that "[a] forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[28] Five years later, in *Burger King Corp. v. Rudzewicz*, the Court explained that a defendant's action must be purposefully directed toward the forum State in order to establish minimum contacts between the defendant and the forum State.[29] Without more than the mere placement of a product into the stream of commerce, a forum State's exercise of jurisdiction over a non-resident would offend the traditional notions of fair play and substantial justice.[30]

In effect, in the century that passed since *Pennoyer*, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States, became the central concern of the inquiry into personal jurisdiction.[31] Though territorial jurisdiction is still alive and well, the prior emphasis on federalism and exclusive sovereignty has clearly given way to more liberal notions, such as minimum contacts, and to what is fair and just.

C. The Anomaly of Tribal Jurisdiction

Unlike their neighboring states, tribes have not enjoyed a growing degree of jurisdictional capabilities. As discussed above, state civil jurisdiction, aided by the minimum contacts test, has expanded beyond strict territoriality requirements.[32] Simultaneously, the United States Supreme Court has restricted the exercise of territorial tribal sovereignty.[33] In effect, tribal jurisdiction often does not even reach the full extent of tribal land boundaries, leaving tribal courts,

27. 357 U.S. 235, 253 (1958) (emphasis added); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-73 (1985) (noting how purposeful availment affords individuals a "fair warning" and therefore protects an individual's liberty interest).

28. 444 U.S. 286, 297-98 (1980).

29. *Burger King*, 471 U.S. at 476.

30. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112-16 (1987).

31. Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

32. *See supra* Part I.B and accompanying text.

33. *See* Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond the Reservation Borders*, 12 LEWIS & CLARK L. REV. 1003, 1005 (2008).

and the application of tribal law, strictly confined.[34] The following discussion will provide a general overview of tribal jurisdiction, highlighting how certain inherent powers have been confined by unique legal doctrines.

Just before the onset of the 1970s, tribal sovereignty managed to withstand many legal attacks by state interests as tribes increasingly exercised their self-governing powers within their territories.[35] For example, one of the preeminent cases of the time, *Williams v. Lee*, which was decided in 1959, recognized the exclusive authority of tribal courts to adjudicate matters arising out of Indian country.[36] The *Williams* Court opined that "the exercise of state jurisdiction in [that] case would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."[37] The Court further noted that Supreme Court cases have consistently guarded the inherent authority of tribal governments over their territories.[38] In a sense, the Court was correct[39] because it was Congress that began to whittle away tribal sovereignty between the time of *Worcester* and *Williams*, or roughly the 1830s to the 1950s.[40] Finally, the *Williams* Court noted that tribal governmental power over their territories remains until Congress takes it away.[41] Certainly, *Williams* has helped to vitalize the development of tribal courts and tribal governments.[42] However, even though Congress has since been very supportive of the so-called tribal renaissance, particularly since 1975,[43] the Supreme Court has stepped into its most defining role over tribal interests since

34. *See, e.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2726 (2008) ("The sovereign authority of Indian tribes is limited in ways state and federal authority is not.").

35. *See, e.g.*, Williams v. Lee, 358 U.S. 217, 223 (1959) (refusing to allow a state to exercise jurisdiction within the Navajo Nation over a contract dispute because state jurisdiction "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves").

36. *Id.*; *see also* Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 598 (2008).

37. *Williams*, 358 U.S. at 223.

38. *Id.*

39. *See* Fletcher, *supra* note 36, at 598 (noting there is a "reasonable argument that the Court's decisions in the field from 1832's *Worcester v. Georgia* until 1959's *Williams v. Lee* amounted to little more than an interregnum where the Court announced very little federal Indian law").

40. *See id.* (arguing that the Supreme Court just stood by and watched).

41. 358 U.S. at 223.

42. Fletcher, *supra* note 36, at 598.

43. Congressional support "officially" began with the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n (1975). *See* EagleWoman, *supra* note 19, at 11-12 (noting that the Act "signaled an end to the domination of termination and assimilation proponents and a return to recognition of tribal governmental authority").

the Marshall Court and, at times, sharply confined tribal sovereignty in the process.[44]

Over the past thirty years, the Supreme Court has whittled away long recognized inherent tribal authority in both criminal and civil matters. This Note will not discuss all cases where the Court has done so, but a short overview here of the Court's approach to tribal jurisdiction, in general, is useful before turning specifically to *Plains Commerce Bank* and its progeny. In *United States v. Wheeler*, the Court upheld the power of a tribe to punish members who violate tribal criminal laws.[45] The *Wheeler* Court noted that, through tribes' original incorporation into the United States as well as through specific treaties and statutes, tribes have lost many of their sovereign attributes.[46] The Court further noted: "[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."[47] If not for *Oliphant v. Suquamish Indian Tribe*,[48] decided two weeks earlier, such a statement would have been an unprecedented affront on cases like *Williams v. Lee*.[49]

In *Oliphant*, Justice Rehnquist successfully subverted centuries of tribal authority to regulate conduct within tribal territorial boundaries.[50] The Court ruled that tribes cannot exercise criminal jurisdiction over non-Indians.[51] Importantly, the non-Indian criminal at issue committed the crime *within* the tribe's territory. Until *Oliphant*, tribes arguably controlled all internal relations. After *Oliphant*, tribal relations with nonmembers became essentially external relations.[52] Both *Oliphant* and *Wheeler* were limited in scope to tribal authority over criminal matters. Still, this Note will illustrate that *Oliphant*'s rule has substantially transcended into the field of tribal civil jurisdiction.

Since *Oliphant*, the Supreme Court has seemingly inched its way closer to a comparable rule in the tribal civil jurisdiction context. *Oliphant*'s transcendence began with *Montana v. United States*,[53] which represented a similar reversal in precedent. Unlike the justices in *Oliphant*, the *Montana* Court could not craft a bright-line rule because *stare decisis* dictated that certain exceptions

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44. *See* Skibine, *supra* note 33, at 1005 (arguing that the Supreme Court has "driven huge holes" through tribal sovereignty).

45. 435 U.S. 313, 331-32 (1978).

46. *Id.* at 325-26.

47. *Id.* at 326.

48. 435 U.S. 191 (1978).

49. 358 U.S. 217, 223 (1959) (pronouncing the "infringement" doctrine against state encroachments on tribal sovereignty).

50. Judith V. Royster, Montana *at the Crossroads*, 38 CONN. L. REV. 631, 632 (2006).

51. *Oliphant*, 435 U.S. at 210.

52. Royster, *supra* note 50, at 633.

53. 450 U.S. 544 (1981).

must exist.[54] Nevertheless, since *Montana*, the Supreme Court has consistently ruled against tribal civil jurisdiction over disputes involving nonmembers on nonmember fee land.

Plains Commerce Bank is the latest example where the Supreme Court has rebuked tribal civil jurisdiction. There were two common themes in that case: the sacrosanct freedom of non-Indians to alienate their real property and the unfairness of subjecting non-Indians to tribal law.[55] Thus, the Court's ruling is notably limited: tribes may not have civil adjudicatory jurisdiction over the sale of nonmember fee land by one nonmember to another nonmember.[56] Even so, how the Court arrived at its decision is troubling and worthy of discussion. Essentially, the Court has likely paved the way for a case to confine *Montana* to a bright-line rule like *Oliphant*, based on an individual's status. Before a full discussion of *Plains Commerce Bank*, however, we need to first understand how *Montana*'s legal precedent evolved into its present state as an anomaly in the United States' civil jurisdiction framework.

II. LOOKING AT CIVIL JURISDICITON IN INDIAN COUNTRY THROUGH A *MONTANA* LENS

Today, any discussion of civil jurisdiction in Indian country often begins with *Montana v. United States*,[57] as it provides the legal framework for all subsequent cases that address tribal civil jurisdiction over nonmembers.[58] Each case decided since the 1981 *Montana* decision is important in its own right, becoming a piece of the *Montana* doctrine's puzzle. In other words, one cannot fully grasp the present legal framework, as defined in *Plains Commerce Bank*, without understanding its precedent. From *Montana* and the cases that follow, one can better understand the clockwork of Justice Roberts's opinion in *Plains*

54. *Id.* at 555-56.

55. *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2719, 2724 (2008) (discussing how allotment policies created alienable fee simple lands for non-Indians without expressly allowing tribes to retain civil jurisdiction over non-Indian use of the land).

56. Though the issue was arguably whether the tribal court could exercise jurisdiction over a discrimination claim by an Indian party against a non-Indian bank, Chief Justice Roberts clearly framed it differently. *See Plains Commerce Bank*, 128 S. Ct. at 2714 ("This case concerns the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals.").

57. 450 U.S. 544 (1981).

58. *See, e.g.*, Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (relying on *Montana*); South Dakota v. Bourland, 508 U.S. 679 (1993) (using *Montana* to rule against tribal authority over non-Indian hunting within a tribe's reservation); *Plains Commerce Bank*, 128 S. Ct. at 2719-20 (using *Montana* to rule against tribal adjudicatory jurisdiction over a non-Indian bank).

Commerce Bank, the effects of the Federal Government's allotment policies, and ways tribes may navigate the framework and maintain civil jurisdiction over nonmembers.

A. Planting the Seed in Fee Land: *Montana v. United States*

In *Montana*, the Supreme Court established the "proposition" that, subject to certain exceptions, tribes lack jurisdiction over nonmember activities, even within their own territories.[59] Specifically, the *Montana* Court held that a tribe could not regulate hunting and fishing activities by nonmembers on lands owned in fee by nonmembers within its own reservation. There, the Crow Tribal Council had enacted a law prohibiting "hunting and fishing within the reservation by anyone who is not a member of the Tribe."[60] Nevertheless, the State of Montana continued to regulate hunting and fishing by non-Indians within the Crow reservation,[61] thereby creating a typical tribe-versus-state jurisdictional showdown. The Court's holding in favor of the State, along with its analysis, is vital to understanding how the status of land and individuals influences tribal civil jurisdiction cases.

The Court's holding and analysis emphasized that tribes have been divested of their inherent tribal authority over non-Indians.[62] It acknowledged that an 1868 treaty with the Crow obligated the United States to prohibit most non-Indians from residing on, or passing through, reservation lands used and occupied by the Tribe. The treaty thereby conferred upon the Tribe the authority to control fishing and hunting on those lands.[63] However, the Court noted that the Tribe's treaty authority could only extend to land on which the Tribe exercised "absolute and undisturbed use and occupation."[64] Further, the General Indian Allotment Act of 1887[65] and the Crow Allotment Act of 1887[66] substantially reduced the quantity of such land by dividing the reservation into individual fee simple tracts to members and selling the remaining tracts to nonmembers.[67] As a result, the Court reasoned, even if the treaty recognized certain inherent tribal power, that power could not apply to lands held in fee by non-Indians.[68] In a very important footnote, the Court elaborated:

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59. 450 U.S. at 565.
60. *Id.* at 549.
61. *Id.*
62. *See id.* at 559, n.9 (discussing how the creation of fee land within tribal territories divested tribal regulatory authority over nonmembers on that land).
63. *Id.* at 558-59.
64. *Id.* at 559 (quoting Treaty with the Crows art. 3, May 7, 1868, 15 Stat. 649).
65. 24 Stat. 388, *amended by* 25 U.S.C. § 331 (repealed 2000).
66. Pub. L. No. 66-239, 41 Stat. 751 (1920).
67. *Montana*, 450 U.S. at 559.
68. *Id.*

> There is simply no suggestion in the legislative history [of the allotment acts] that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction . . . . It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government . . . . [W]hat is relevant in this case is *the effect of the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land*.[69]

The footnote highlights how the Court understands the effects of allotment policies: it created alienable fee simple land upon which tribes were congressionally divested of certain inherent powers over non-Indians.[70]

The Court further noted how tribal "dependency" has divested tribes of many of their sovereign attributes.[71] Given tribes' "dependent" status,[72] the Court said their powers were said to involve "only the relations among members of a tribe," while powers involving nonmembers were curtailed.[73] According to the Court, tribes can discipline tribal offenders, control tribal membership, regulate members' domestic relations, and impose inheritance rules for members.[74] However, the Court deemed that any "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," unless authorized by Congress.[75]

The Court also attempted to reconcile these general principles with the *Oliphant* Court's ruling that tribes lack criminal jurisdiction over non-Indians.[76] Its analysis introduced what has become the *Montana* doctrine, which consists of

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69. *Id.* at 559 n.9 (internal citations omitted) (emphasis added).

70. *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2719 (2008) (discussing how the "history of the General Allotment Act and its successor statutes has been well rehearsed in [the Court's] precedents").

71. *Montana*, 450 U.S. at 563 (citing United States v. Wheeler, 435 U.S. 313, 326 (1978)).

72. This idea of dependency was born in *Cherokee Nation v. Georgia*, where Chief Justice Marshall termed tribes to be "domestic dependent nations." 30 U.S. 1, 16-17 (1831).

73. *Montana*, 450 U.S. at 564 (quoting *Wheeler*, 435 U.S. at 326).

74. *Id.* (citing *Wheeler*, 450 U.S. at 322 n.18).

75. *Id.* (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973)).

76. *See supra* notes 50-52 and accompanying text.

a guiding rule, termed a "proposition," limited by two exceptions. First, similar to *Oliphant*, the *Montana* Court announced a "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[77] However, while *Oliphant* proposed that inherent tribal sovereign powers do not extend to the activities of nonmembers in criminal matters, the *Montana* Court conceded that tribes surely "retain inherent sovereign power to exercise some forms of *civil* jurisdiction over non-Indians on their reservations, *even on non-Indian fee lands*."[78] In effect, the Court declined to apply *Oliphant*'s clear-cut prohibition against tribal criminal jurisdiction over non-Indians to tribal powers of civil jurisdiction. Instead, based on precedential cases like *Williams*,[79] the Court conceded that certain circumstances may allow a tribe to exercise civil jurisdiction over non-Indians, regardless of the land status.[80]

As the Court described these circumstances, it thereby established what are now referred to as the two *Montana* exceptions.[81] First, "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 dealings, contracts, leases, or other arrangements."[82] Second, a tribe "[retains] 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."[83] Therefore, the Court carved out two clear circumstances where a tribe may exercise civil jurisdiction over nonmembers on non-Indian fee land.

The *Montana* doctrine, along with its two exceptions, applies only to situations where tribes assert jurisdiction over nonmembers on nonmember-owned fee lands.[84] While the case certainly seems to allow tribes some leeway, unlike *Oliphant*, subsequent cases illustrate that the fate of tribal civil authority over nonmembers on nonmember fee land still rests upon the subjective leeway of judicial interpretation.[85]

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77. *Montana*, 450 U.S. at 565.

78. *Id.* (emphasis added).

79. Williams v. Lee, 358 U.S. 217, 223 (1959).

80. *Montana*, 450 U.S. at 565.

81. *See, e.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2720-21 (2008) (addressing the two recognized "exceptions").

82. *Montana*, 450 U.S. at 565 (citing *Williams*, 358 U.S. at 223) (emphasis added).

83. *Id.* at 566 (citing *Williams*, 358 U.S. at 220) (emphasis added).

84. *See* Royster, *supra* note 50, at 634.

85. *See infra* Part II.B (illustrating how the Supreme Court has used subjective interpretation to consistently reject any argument that a *Montana* exception exists).

B. *Montana*'s Unconditional Growth

Since *Montana*, the Supreme Court has decided a number of cases that affect tribal civil jurisdiction over nonmembers. During that time, *Montana*'s "proposition" against tribal jurisdiction over nonmembers has practically evolved into a no-exceptions rule. This Note will walk through some of the key cases and highlight how the Court has relentlessly refused to recognize, and consequently narrowed, the exceptions to *Montana*'s "proposition." Through its consistent refusal, the Court has drastically enlarged *Montana*'s precedential force and left *Williams* a relic of the past.

The Supreme Court continued its exploration of tribal authority over nonmembers on nonmember fee lands in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,[86] where it narrowed *Montana*'s second exception.[87] There, a Yakima Nation[88] zoning ordinance conflicted with a Yakima County zoning ordinance. The issue was whether the Yakima Nation had exclusive authority to zone either of two tracts: (1) an "open area" that was a mixture of nonmember fee lands and tribal allotments held in trust, and (2) a "closed area" that was surrounded by tribal lands held in trust.[89] The case resulted in a plurality decision that ultimately held that the tribe lacked jurisdiction over the "open area," but retained inherent jurisdiction over the "closed area."[90]

Justice White's opinion, which guided the Court as to the "open area," is probably the most important because it narrowed *Montana*'s second exception, and consequently narrowed the application of *Williams*.[91] He opined that the second *Montana* exception, also known as the "direct effect" exception, did not apply because the nonmember activity in the "open area" did not "imperil" any tribal interests.[92] Recall from *Montana* that a tribe may "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 and welfare of the tribe."[93] According to Justice White, however, "[t]he impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health or welfare of the tribe."[94] By adding that there must be a "demonstrably serious" impact that must "imperil"

86. 492 U.S. 408 (1989).

87. *See id.* at 432-33 (White, J.) (requiring tribal interests to be "imperiled" in order to meet the "direct effects" exception).

88. Since *Brendale*, the tribe has legally corrected the spelling of its name through Congress, and it is now the Yakama Nation.

89. *Brendale*, 492 U.S. at 421-22.

90. *Id.* at 433-48 (Stevens, J., concurring).

91. *Id.* at 429-32.

92. *Id.* at 432.

93. Montana v. United States, 450 U.S. 544, 566 (1981) (emphasis added).

94. *Brendale*, 492 U.S. at 431.

the health and welfare of the tribe,[95] Justice White effectively narrowed the second exception and the application of *Williams*, which had guarded against the undermining effects of state jurisdiction on tribal sovereignty.[96]

Four years later, the Court decided *South Dakota v. Bourland*,[97] which extended the *Montana* approach to tribal authority over nonmembers on *all* fee lands within tribal territories.[98] There, the issue was whether the Cheyenne River Sioux Tribe could regulate hunting and fishing by non-Indians on lands located within the Tribe's reservation, but acquired by the United States for the operation of a dam and reservoir.[99] The Tribe claimed that a treaty reserved its inherent regulatory authority, and various Congressional flood control statutes did not divest that authority.[100] Before *Bourland*, the *Montana* approach relied on the idea that, when enacting the allotment acts, Congress intended to divest tribes of their jurisdiction over non-Indians who purchased new fee lands within tribal territories.[101] The *Bourland* Court extended *Montana*'s general rule to all fee lands within tribal territories, regardless of whether the fee lands were created by allotment policies.[102]

According to the *Bourland* Court, fee status is sufficient to trump tribal jurisdiction over nonmembers.[103] Importantly, Justice Thomas deemed the distinction between the purpose of allotment policy and the flood control statutes unimportant. "To focus on purpose," said Justice Thomas, "is to misread *Montana*."[104] In other words, the purpose of the act does not matter. Instead, more important to the Court's analysis is that "the *effect* of the transfer [of land] is the destruction of pre-existing Indian rights to regulatory control," because those lands had come to be held in fee by nonmembers.[105] Therefore, after *Bourland*, it does not matter whether an act *intended* to turn lands into alienable fee lands, but whether the lands have *become* alienable fee lands. If lands have passed to

95. *Id.*

96. *See* Williams v. Lee, 358 U.S. 217, 223 (1959) (refusing to recognize state jurisdiction within tribal territory because it "would infringe on the right of the Indians to govern themselves").

97. 508 U.S. 679 (1993).

98. Royster, *supra* note 50, at 636.

99. *Bourland*, 508 U.S. 679, 681-82 (1993). The United States acquired these lands by virtue of the Flood Control Act of 1944, ch. 665, 58 Stat. 887, and several subsequent acts that authorized various takings of Indian lands after severe floods had devastated the lower Missouri River basin in 1943 and 1944. *Id.* at 683.

100. *Id.* at 685.

101. Montana v. United States, 450 U.S. 544, 559 n.9 (1981).

102. *See Bourland*, 508 U.S. at 692 (focusing on the "effect" of fee simple land, regardless of the purpose of its creation).

103. *Id.*

104. *Id.* at 691.

105. *Id.* at 692 (emphasis added).

nonmembers in fee, then tribes must meet the burden of proving either exception under the *Montana* analysis to exercise jurisdiction over them.

In *Strate v. A-1 Contractors*, the Court extended *Montana*'s application (1) beyond fee lands to the "equivalent" of fee lands and (2) beyond tribal "governmental" jurisdiction questions to tribal "adjudicatory" jurisdiction questions.[106] There, the question was whether a tribal court had adjudicatory jurisdiction over a nonmember who was involved in a traffic accident with another nonmember on a state-maintained highway, but which ran through the tribe's reservation and was held in trust by the Federal Government.[107] In other words, the nonmember activity did *not* occur on nonmember fee land, but the Court did not think such a fact mattered.[108]

Instead, the *Strate* Court ruled that the highway was the jurisdictional "equivalent" of "alienated, non-Indian land" for nonmember governance purposes.[109] Justice Ginsburg reasoned that the right-of-way was open to the public, traffic was subject to the state's control, and the tribe had retained "no gatekeeping right," so the tribe could not assert a "landowner's right to occupy and exclude."[110] In essence, although the tribe still held the land in trust, the highway had essentially been divested, thereby making the land's status equivalent to nonmember fee land. Yet another blow to tribal jurisdiction, *Strate* expanded *Montana*'s application to cases involving nonmember fee land *or its equivalent*, and it expanded the *Montana* analysis to questions of tribal *adjudicatory* jurisdiction.[111]

Eight years later, the Supreme Court returned to tribal civil jurisdiction in *Atkinson Trading Co. v. Shirley*,[112] which solidified *Montana*'s "general rule" and offered a preview of where some justices would like to take *Montana*.[113] There, the Court opined that *Montana*'s "general rule" constituted a *presumption* "that Indian tribes lack civil authority over nonmembers on non-Indian fee land."[114] It then applied that presumption and held that neither *Montana* exception was met.[115] The Court's holding illustrates how difficult it is to meet the exceptions. For

106. 520 U.S. 438, 454-55 (1997).

107. *Id.* at 442.

108. *Id.*

109. *Id.* at 454.

110. *Id.* at 456-57.

111. Until *Strate*, the Court's *Montana* line of cases involving "regulatory" authority had only addressed questions of a tribe's civil *governmental* jurisdiction. After *Strate*, all cases addressing a tribe's civil adjudicatory jurisdiction, such as *Plains Commerce Bank*, involve what is now known as a *Montana-Strate* analysis. *See, e.g.*, Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 (2001) (referring to the "*Montana-Strate* line of authority").

112. 532 U.S. 645 (2001).

113. *Id.* at 654-57.

114. *Id.*; *see also* Royster, *supra* note 50, at 637-38 (discussing the case in more detail).

115. *Atkinson Trading Co.*, 532 U.S. at 655, 657.

example, the Court emphasized that a "consensual relationship" under the first exception "must stem from 'commercial dealing, contracts, leases, or other arrangements,'" and receipt of tribal services does not create the requisite nexus between a tribe and a nonmember to support an exception to *Montana*'s general rule.[116] In effect, the Court clarified that the first exception is extremely limited.

Beyond the actual holding, Justice Souter's one-paragraph concurrence argued, importantly, that land status should *not* be the first principle that the Court should consider in a tribal jurisdiction case.[117] Instead, Justice Souter argued, the first principle should be "*Montana*'s 'general proposition' that 'the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe' . . . regardless of whether the land at issue is fee land, or land owned by or held in trust for an Indian tribe."[118] Souter's argument, though brief in *Atkinson*, has developed into an important factor for the Supreme Court.[119]

That same year, the Supreme Court decided *Nevada v. Hicks*, which ruled that tribal ownership of land, on its own, is not enough to establish tribal authority under the *Montana* analysis.[120] The issue was whether a tribal court could assert its jurisdiction in a civil case against a state official who entered tribal trust land to execute a search warrant against a tribe member suspected of violating state laws.[121] In short, the Court held that the tribal court did not have the authority to hear the case, as neither *Montana* exception applied.[122] The Court explicitly rejected the argument that the tribe had civil authority because the activities occurred on tribal trust land.[123] Though land status was "central to the analysis in both *Montana* and *Strate*," Justice Scalia opined that the language of *Montana*[124] implied that "the general rule of *Montana* applies to both Indian and non-Indian land."[125] The ownership factor, or the status of the land, is just "*one* factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal

116. *Id.* at 655 (quoting Montana v. United States, 450 U.S. 544, 565 (1981)).

117. *Id.* at 659-60 (Souter, J., concurring).

118. *Id.* (quoting *Montana*, 450 U.S. at 565).

119. *See* Nevada v. Hicks, 533 U.S. 353, 375-76 (2001) (Souter, J., concurring). *See also* Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2724 (2008) (quoting *Hicks*, 533 U.S. at 383 (Souter, J., concurring)).

120. *Hicks*, 533 U.S. at 360.

121. *Id.* at 355.

122. *Id.* at 364-65, 371-72.

123. *See id.* at 359 (Scalia bluntly responds to the argument: "Not necessarily.").

124. The language Justice Scalia referred to was where *Montana* reads: "[t]o be sure, 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*." 450 U.S. 544, 565 (1981) (emphasis added).

125. *Hicks*, 533 U.S. at 359-60.

relations.'"[126] In other words, the existence of tribal ownership, on its own, is not enough to establish tribal authority.[127]

In *Hicks*, Justice Souter wrote another concurring opinion that sought to further constrict any importance placed on land status and that highlighted the Court's developing logic regarding tribal jurisdiction.[128] Therefore, an in-depth discussion of his concurrence is warranted here. Overall, Souter mostly agreed with the Court, but felt it had not gone far enough and should have been more explicit.[129] Taking a more solid stance than he did in *Atkinson*, Justice Souter vigorously argued that "land status within a reservation is *not* a primary jurisdictional fact, but is relevant only insofar as it bears on the application of one of *Montana*'s exceptions to a particular case."[130] Justice Souter's desired approach would first look at "the character of the individual over whom jurisdiction is claimed."[131] He claimed:

> The principle on which *Montana* and *Strate* were decided (like *Oliphant* before them) looks first to human relationships, not land records, and it should make no difference *per se* whether acts committed on a reservation occurred on tribal land or on land owned by a nonmember individual in fee. It is the membership status of the unconsenting party, not the status of real property, that counts as the primary jurisdictional fact.[132]

Justice Souter offered three reasons why his approach is more "sound" and "practical" than the land status approach.[133] First, he argued that tying tribal authority to land status would produce an "unstable jurisdictional crazy quilt."[134] He reasoned that land on Indian reservations "constantly changes hands," so a jurisdictional rule based on land status would "prove extraordinarily difficult to administer and would provide little notice to nonmembers, whose susceptibility to tribal-court jurisdiction would turn on the most recent property conveyances."[135]

Second, a presumption against tribal court civil jurisdiction "squares" with the principal policy concern underlying *Oliphant*: nonmembers must receive adequate notice and be protected from unwarranted intrusions on their personal

126. *Id.* at 360 (internal citation omitted) (emphasis added).
127. *Id.*
128. *Id.* at 375-86 (Souter, J., concurring).
129. *Id.* at 375-76 (Souter, J., concurring); *see also* Royster, *supra* note 50, at 639-40 (discussing Souter's concurrence in more detail).
130. *Hicks*, 533 U.S. at 375-76 (Souter, J., concurring) (emphasis added).
131. *Id.* at 381.
132. *Id.* at 381-82.
133. *Id.* at 382-85.
134. *Id.* at 383.
135. *Id.* (citing Hodel v. Irving, 481 U.S. 704, 718 (1987)).

liberty.[136] Justice Souter reasoned that tribal courts differ from traditional American courts, particularly with respect to the Bill of Rights and the Fourteenth Amendment, which "do not of their own force apply to Indian tribes."[137] He conceded, however, that the Indian Civil Rights Act of 1968 ("ICRA")[138] "makes a handful of analogous safeguards enforceable in tribal courts,"[139] but claims that "the guarantees are not identical."[140] Further, Justice Souter argued, the tribal law frequently followed by tribal courts "would be unusually difficult for an outsider to sort out."[141] He noted that tribal law, unlike the traditional American court system, is frequently unwritten, being based instead "'on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,' and is often 'handed down orally or by example from one generation to another.'"[142] As a result, tribal courts usually apply a mix of tribal, federal, state, and traditional law.[143] Essentially, Justice Souter argued that nonmembers should be ensured the normal rights of due process that can come only from an American court system. According to his logic, subjecting nonmembers to tribal court is unfair, because they cannot possibly understand such foreign law and procedures.

Finally, Justice Souter argued that no effective review mechanism exists to police tribal courts' decisions on matters of state or federal law.[144] Though he correctly stated that "tribal-court judgments based on state or federal law can be neither removed nor appealed to state or federal courts," his claim that an effective review mechanism fails to exist is an overstatement.[145] This point becomes important in *Plains Commerce Bank*, because there is arguably an opportunity for federal courts to review tribal court decisions, or at least provide a second opportunity for parties who lose in tribal court.[146]

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136. Nevada v. Hicks, 533 U.S. 353, 383-84 (2001).

137. *Id.* at 383-84 (citing Talton v. Mayes, 163 U.S. 376, 382-85 (1896)).

138. 25 U.S.C.A. § 1302 (West 2009).

139. *Hicks*, 533 U.S. at 384 (Souter, J., concurring) (citing 25 U.S.C. § 1302).

140. *Id.* (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 (1978)).

141. *Id.* at 384-85.

142. *Id.* at 384 (quoting Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 130-31 (1995)).

143. *Id.*

144. Nevada v. Hicks, 533 U.S. 353, 385 (2001).

145. *Id.* To the contrary, various post-exhaustion review mechanisms are available. *See generally* Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. KAN. L. REV. 241 (1998) (discussing the standards, and extent, of post-exhaustion review of tribal court decisions).

146. *See* Royster, *supra* note 50, at 642 ("Nonmember parties to lawsuits in tribal court who do not consent to tribal jurisdiction may seek post-exhaustion review in federal court of the tribal court's jurisdiction to hear the lawsuit.").

C. A Shift From Land Status to "Justifiable Expectations"?

Following *Hicks*, many Indian law scholars believed that *Montana* was on the verge of a new direction, as directed by Justice Souter.[147] Since *Montana*, tribes witnessed an erosion of both governmental and adjudicatory civil jurisdiction. Increasingly, there was an emphasis on nonmember fee land. However, in the past ten years, as seen in Justice Souter's concurrences[148] (and to a small extent in Justice Scalia's opinion in *Hicks*[149]), the Supreme Court seemed to focus on the status of the individual, rather than the land. Essentially, *Oliphant* was beginning to rear its horns within the civil context. The underlying reason for change seemed to be couched in an idea that tribal adjudicatory jurisdiction would be unfair to nonmembers.[150]

After *Hicks*, but before *Plains Commerce Bank*, Professor Judith Royster suggested that Justice Souter might influence the Court into adopting an approach that would make nonmembers' "justifiable expectations" the cornerstone of the *Montana* analysis.[151] Under this theory, nonmembers would be held to have consented, or to have sufficient effects on tribal governmental interests, only if the court can find that they had justifiable expectations of being subject to tribal jurisdiction.[152] In other words, the *Montana* exceptions would be met, and therefore tribal jurisdiction would be valid over a nonmember on nonmember fee land, *only* if the nonmember justifiably expected to be subject to tribal jurisdiction. Royster noted that such an approach "may turn on the subjective intent of the nonmembers rather than on title or territory or any other basis on which governmental authority generally rests."[153]

The problem with the expectations approach is that any nonmember can make an argument in court that they never expected to be subject to tribal jurisdiction. Royster argued that holding tribal civil authority on tribal lands hostage to the expectations of nonmembers would repudiate the modern recognition of tribal self-government and the entire course of federal Indian law.[154] As seen from the line of cases outlined above, the Court has increasingly scaled back tribal civil jurisdiction over nonmember fee land. After *Hicks*, tribal sovereignty advocates feared the Court would extend the *Montana-Strate* analysis to nonmember activity on Indian trust land.[155] Such a move, as Royster

147. *See generally* Royster, *supra* note 50.

148. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659-60 (2001) (Souter, J., concurring); *Hicks*, 533 U.S. at 375-86 (Souter, J., concurring).

149. *See* 533 U.S. at 355-75.

150. *See* Fletcher, *supra* note 9, at 713-14 (analyzing the Supreme Court's rhetoric).

151. Royster, *supra* note 50, at 643.

152. *Id.*

153. *Id.*

154. *Id.* at 645.

155. *See id.* at 647.

suggested, would be "the most significant inroad on tribal governmental authority in a quarter century."[156]

Today, it remains unclear as to whether the Court is ready to go so far. The result in *Plains Commerce Bank* seems to suggest that the Roberts Court continues to concentrate on fee status.[157] However, Justice Roberts notably incorporated many of Justice Souter's points into the Court's majority opinion, but without adopting Justice Souter's argument.[158] As this Note will argue in Part IV, the Court seems to be inching toward an *Oliphant*-like rule based on fairness to nonmembers, regardless of whether the nonmember conducts an activity on tribal trust land or has a justifiable expectation of tribal jurisdiction.

III. *PLAINS COMMERCE BANK*: BACKGROUND, PROCEDURE, AND HOLDING

On its face, the holding in *Plains Commerce Bank* merely created more questions than answers about the *Montana* doctrine.[159] Critics of the decision are mostly troubled, and reasonably puzzled, because the Supreme Court "took an approach that neither party argued in the case and was not addressed by the lower courts."[160] Here, this Note will provide a factual and procedural background of the case, and then discuss Chief Justice Roberts' approach. Like so many cases before, fee status proved to thwart tribal civil jurisdiction, and the Court narrowed the "consensual relations" exception to *Montana*'s "general rule."[161]

A. Background

The respondents were Ronnie and Lila Long, enrolled members of the Cheyenne River Sioux Tribe, majority owners of Long Family Land and Cattle Co. and long-time customers of the petitioner, Plains Commerce Bank.[162] In the

156. *Id.*

157. Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2714 (2008).

158. *Id.* at 2724-26.

159. *See generally* Slepnikoff, *supra* note 8 (arguing that the holding raises significant questions without any helpful guidance).

160. *Id.* at 484.

161. *See id*. at 491 (noting that the Court established a "narrow rule that the first Montana exception completely precludes consensual relations between a non-Indian and Indian when such relations ultimately result in the non-Indian sale of fee land to another non-Indian"); *see also* Skibine, *supra* note 33, at 1011-12 ("[T]he Court not only restricted the first exception to non-member conduct, but also seemed to tie the consensual relation exception to instances where tribal jurisdiction is needed for tribal self-government.").

162. *Plains Commerce Bank*, 128 S. Ct. at 2714-15.

late 1980s and early 1990s, Kenneth Long—Ronnie Long's late father and a non-Indian—had negotiated a series of commercial loan agreements with the bank during his lifetime for the Long Company.[163] As part of those agreements, he mortgaged to the Bank 2,230 acres of fee land he owned inside the reservation.[164] When he died, Ronnie and Lila Long assumed $750,000 in debt owed to the Bank, but soon negotiated a new loan contract in which Kenneth Long's estate deeded over the previously mortgaged fee land to the Bank in lieu of foreclosure.[165] In return, the Bank agreed to cancel some of the company's debt, make additional loans to the Company, and allow the Company to lease the deeded property for two years with an option to purchase at the end of the term.[166]

With the contract settled, the relationship soon turned sour between the Longs and the Bank. First, there were arguments over the terms of the contract.[167] Then, a tough winter destroyed much of the Company's cattle and left the Longs unable to exercise their purchase option at the end of the lease.[168] However, they refused to vacate the land, so the Bank initiated eviction proceedings in a South Dakota state court, and petitioned the Cheyenne River Sioux Tribal Court to serve the Longs with a notice to quit.[169] With the lease expired, but the Longs still there, the Bank sold a portion of the land to a non-Indian couple, then the rest to two other nonmembers.[170]

B. The Tribal Trial Court

This case began in Cheyenne River Sioux Tribal Court, where the Longs filed suit against the Bank, seeking an injunction to prevent their eviction from the property and to reverse the sale of the land.[171] One of the Longs' claims was that the Bank discriminated against them when it sold the land to nonmembers on more favorable terms.[172] The tribal court, against the Bank's assertions, found it had jurisdiction, and the case went to trial on four causes of action.[173] The jury found for the Longs on three of the causes, including the discrimination claim, and

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163. *Id.* at 2715.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2715 (2008).
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 2715-16. This is the sole claim that reached the Supreme Court. *See id.* at 2714.
173. *Plains Commerce Bank*, 128 S. Ct. at 2716. The causes of action were discrimination, breach of contract, bad faith, and violation of self-help remedies. *Id.*

awarded a $750,000 verdict.[174] The Bank again challenged the jurisdiction issue, but the tribal court denied the challenge, and entered a judgment for $750,000 plus interest.[175] Further, the tribal court entered a supplemental judgment that awarded the Longs an option to purchase the portion of the deeded land that they still occupied on the terms offered in the original purchase option.[176] The restored option to purchase nullified the Bank's previous sale of the land to non-Indians.[177]

C. The Tribal Court of Appeals

The Bank appealed to the Cheyenne River Sioux Tribal Court of Appeals, which affirmed the judgment of the trial court.[178] The Bank primarily argued that the tribal court lacked jurisdiction over the discrimination claim.[179] The Bank relied on *Hicks* for the proposition that tribal courts do not have jurisdiction over federal causes of action, and claimed the Longs' discrimination claim arose under 42 U.S.C. § 1981(c).[180] The court conceded that its proposition was "likely true," but said it "misse[d] the point" because the "discrimination claim [was] based on a cause of action grounded in *tribal, not federal, law*."[181] The court reasoned, "[w]hile there is no express tribal ordinance creating a civil cause of action based on discrimination," there are two other sources of tribal law that do: "tribal common law and the Cheyenne River Sioux Law and Order Code § 1-4-3 . . . ."[182] The court first found that the action constituted "tortious conduct" under the Code.[183] It then found that the Bank's action constituted discrimination under tribal common law:

> Such a potential claim arises from the existence of Lakota customs and norms such as the "traditional Lakota sense of justice, fair play and decency to others," . . . and "the Lakota custom of fairness and respect for individual dignity."[184]

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174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. Plains Commerce Bank v. Long Family Land & Cattle Co., No. 03-002-A, mem. op. at 6 (Cheyenne River Sioux Ct. App. Nov. 24, 2004), *available at* http://turtletalk.files.wordpress.com/2007/12/tribal-coa-opinion-bank-of-hoven.pdf.
180. *Id.*
181. *Id.* (emphasis added).
182. *Id.* at 7-8.
183. *Id.* at 8.
184. *Id.* (internal citation omitted).

D. The Lower Federal Courts

After exhausting its tribal court remedy, the Bank petitioned for relief in the federal courts.[185] It sought a declaration from the District Court for the District of South Dakota that the tribal judgment was null and void because the tribal court lacked jurisdiction.[186] The district court granted summary judgment to the Longs because, it reasoned, the Bank had previously sought relief in the tribal court and admitted that the court had subject matter jurisdiction—"a significant concession by the bank" that it "should be held to."[187] The Court of Appeals for the Eighth Circuit affirmed along similar lines, reasoning that the "Long's discrimination claim arose directly from their preexisting commercial relationship with the bank."[188]

E. The Supreme Court

The Supreme Court reversed and held that the tribal court did not have adjudicatory jurisdiction over the Bank.[189] Chief Justice Roberts, speaking for a slim five-to-four-majority, immediately framed the issue around the sale of nonmember fee land between two non-Indian parties.[190] He then held that the tribal court did not have jurisdiction over a discrimination claim concerning that sale.[191]

Roberts's opinion flows from *Montana* and the legacy of allotment.[192] While he briefly recognized the self-governing powers of tribal governments, he quickly noted tribal sovereignty's limitations.[193] In particular, he re-emphasized that tribes generally do not possess authority over non-Indians who come within their borders,[194] especially when the nonmember's activity occurs on non-Indian

185. Plains Commerce Bank v. Long Family Land & Cattle Co., 440 F. Supp. 2d 1070 (D.S.D. 2006), *aff'd*, 491 F.3d 878 (8th Cir. 2007), *rev'd*, 128 S. Ct. 2709 (2008).

186. *Id.* at 1075.

187. *Id.* at 1080-81.

188. Plains Commerce Bank v. Long Family Land & Cattle Co., 491 F.3d 878, 887 (8th Cir. 2007), *rev'd*, 128 S. Ct. 2709 (2008).

189. Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2716, 2720 (2008).

190. *See id.* at 2714 ("This case concerns the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals.").

191. *Id.*

192. *See id.* 2718-19 (setting forth the general rule that tribes lack authority over nonmembers within their borders).

193. *See id.* at 2718 (noting that "[tribal sovereignty] centers on the land held by the tribe and on tribal members within the reservation").

194. *Id.* at 2718-19 (citing Montana v. United States, 450 U.S. 544, 565 (1981)).

fee land.[195] He noted that, "[t]hanks to the Indian General Allotment Act of 1887," there are now "millions of acres of non-Indian fee land located within the contiguous borders of Indian tribes."[196] He then explained that allotment intended to convert formerly tribal lands into fee simple parcels that were fully alienable and free of any encumbrance.[197] He further noted that the conversion of tribal land into fee simple causes the tribe to lose plenary jurisdiction over it, and "among the powers lost [was] the authority to prevent the land's sale," because "'free alienability' by the holder is a core attribute of the fee simple."[198]

With the *Montana* rule and ideas of free alienability of fee lands in place, Roberts attacked the Longs' only hope, the first *Montana* exception, and held that it does not authorize tribal jurisdiction.[199] Like so many cases before, *Plains Commerce Bank* seemed like a sure fit within the first exception, which allows a tribe to "regulate" the activities of nonmembers who enter "consensual relationships with the tribe or its members."[200] The Longs appeared to have a very good argument that the Bank had entered into such a relationship. However, Roberts reaffirmed the principle that a tribe's adjudicative jurisdiction cannot exceed its legislative jurisdiction, and held that the tribal court lacked jurisdiction to hear the Longs' discrimination claim because the court lacked the civil authority to regulate the Bank's sale of its fee land.[201] He argued that the tribal tort law "operates as a restraint on alienation" because it sets limits on how nonmembers may engage in commercial transactions, and therefore it is a form of regulation.[202] Thus, Roberts centered the case on whether the tribe can regulate the sale of fee land, when it was arguably more about whether the tribe could adjudicate the discrimination claim. By doing so, he craftily justified a denial of the first *Montana* exception. Roberts then rebuked application of the second *Montana* exception along with the argument that the Bank had consented to tribal jurisdiction before giving his judgment for reversal.[203]

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195. *Plains Commerce Bank*, 128 S. Ct. at 2719 (citing Strate v. A-1 Contractors, 520 U.S. 438, 446 (1997)).

196. *Id.* (citing Atkinson Trading Co. v. Shirley, 532 U.S. 645, 648, 651 n.1 (2001)).

197. *Id.*

198. *Id.* (quoting CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 32 (2d ed. 1988)).

199. *Id.* at 2720-26.

200. Montana v. United States, 450 U.S. 544, 565 (1981).

201. *Plains Commerce Bank*, 128 S. Ct. at 2720 (citing Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997)).

202. *Id.* at 2721.

203. *Id.* at 2726-27.

IV. RECOGNIZING AND OVERCOMING DUE PROCESS CONCERNS

Since *Montana*, the Supreme Court has never upheld tribal jurisdiction under one of the exceptions.[204] Instead, the general rule, which says tribes cannot exercise civil jurisdiction over non-Indians, has continuously prevailed, even in cases where the facts seem to sensibly fit within one or both exceptions.[205] As the cases above have demonstrated, non-Indian fee land has proved to be the leading burden for tribal regulatory and adjudicatory jurisdiction over their territories.[206] The Supreme Court has continually used land status as a justification for why neither *Montana* exception applies. However, the longstanding use of such a justification, despite reasonably fitting examples of the *Montana* exceptions, forces one to question the validity of the Court's concern for land status and its free alienability. This Note posits that the Court is actually more concerned about the due process of nonmembers, particularly non-Indians.

In *Plains Commerce Bank*, buried at the end of Chief Justice Roberts' reasoning against application of the first *Montana* exception, sweeping dicta reveals an underlying preconception that has been shaping the Supreme Court's opinions: the Supreme Court distrusts tribal courts and sees them as incapable of protecting the fundamental rights of non-Indians.[207] In effect, the Supreme Court will never recognize either exception to *Montana*, at least so long as a majority of the Justices remains convinced that tribal courts are unfair.

A. Roberts v. Ginsburg: The Court's Divide

In *Plains Commerce Bank*, Chief Justice Roberts and Justice Ginsburg were notably divided over whether the tribal court proceedings were fair to the

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204. *See generally* Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and* United States v. Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 682 (2009) (noting how the Supreme Court "seems willing to work hard to construct rationales to avoid the reach of the *Montana* exceptions," and suggesting that the exceptions "may well . . . exist in theory but never actually apply"); *see also* Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY L. REV. 1, 8 (2004) ("The Supreme Court has never held that an Indian Tribe's taxation or regulation of a nonmember fits one of the two *Montana* exceptions.").

205. *See, e.g.*, *Strate*, 520 U.S. at 457-59 (holding that neither *Montana* exception applied); *Plains Commerce Bank*, 128 S. Ct. at 2720 (also holding that neither *Montana* exception applied).

206. *See* Nevada v. Hicks, 533 U.S. 353, 360 (2001) (noting that there has only been one narrow instance where the Supreme Court has allowed a tribe to exercise authority over a nonmember on nonmember fee land).

207. *See Plains Commerce Bank*, 128 S. Ct. at 2724-26.

nonmember bank.[208] Chief Justice Roberts espoused the view that tribal jurisdiction would be unfair for non-Indians.[209] He argued that, not only is such tribal "regulation" beyond the tribe's sovereign powers, "it runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent."[210] He informs readers that "it should be remembered" that tribal sovereignty exists "outside the basic structure of the Constitution"[211] where "the Bill of Rights does not apply."[212] He pointed out that "Indian courts 'differ from the traditional American courts in many respects.'"[213] He then reasoned that, because "nonmembers have no part in tribal government," tribal laws and regulations "may be fairly imposed on nonmembers *only if* the nonmember has consented, either expressly or by his actions."[214]

In this case, Roberts believed the Bank had no reason to anticipate that its general business dealings with the Longs would permit the Tribe to regulate the Bank's sale of fee simple land.[215] Roberts focused on the fact that "[e]ven the courts below recognized that the Longs' discrimination claim was a 'novel one'" that "arose 'directly from Lakota tradition as embedded in Cheyenne River Sioux tradition and custom,' including the Lakota 'sense of justice, fair play and decency to others.'"[216] Therefore, it would be unfair to subject the unsuspecting Bank to tribal adjudicatory jurisdiction because tribal courts not only differ in form, but also often apply "novel" laws.[217]

Justice Ginsburg, in her dissent, made an effort to refute the Chief Justice's understanding of the Cheyenne River Sioux Tribal Court.[218] She emphasized that the case "involve[d] no unwitting outsider forced to litigate under unfamiliar rules and procedures in tribal court."[219] She reasoned that the Bank was no stranger to the tribal court system, because it regularly filed suit there.[220] In her view, if the Bank wanted to avoid responding in Tribal Court or the application of tribal law, it had means readily available.[221] For example, "[t]he

208. *Id.* at 2729 (Ginsburg, J., dissenting) (emphasizing that the case did not involve an unwitting outsider forced to litigate under unfamiliar rules and procedures in tribal court).

209. *Id.* at 2724-25.

210. *Id.* at 2724.

211. *Id.* (quoting United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring)).

212. *Id.* (citing Talton v. Mayes, 163 U.S. 376, 382-85 (1896)).

213. *Plains Commerce Bank*, 128 S. Ct. at 2724 (quoting Nevada v. Hicks, 533 U.S. 353, 383 (2001) (Souter, J., concurring)).

214. *Id.* (emphasis added).

215. *Id.* at 2725.

216. *Id.* (internal citations omitted).

217. *Id.*

218. *Id.* at 2727-33 (Ginsburg, J., dissenting).

219. *Plains Commerce Bank*, 128 S. Ct. at 2729.

220. *Id.* (Ginsburg, J., dissenting).

221. *Id.*

Bank could have included forum selection, choice-of-law, or arbitration clauses in its agreement with the Longs, which the Bank drafted."[222] Today, outside entities commonly enlist such means when contracting with tribes. However, as Justice Ginsburg pointed out, the Bank bypassed those opportunities. She further disagreed with the Chief Justice that the discrimination claim was "novel."[223] She argued that the Tribal Court of Appeals "drew not only from 'Tribal tradition and custom,' [but] it also looked to federal and state law."[224] Justice Ginsburg recognized that many tribal courts borrow from the law of the federal and state governments, so the discrimination claim involved "a direct and laudable convergence of federal, state, and tribal concern."[225]

Justice Ginsburg's opinion, though not adopted by the Court, still offers a glimmer of hope for the fate of tribal adjudicatory jurisdiction. It revealed that the Court may have begun to see that tribal courts are really not so foreign nor "outside the United States Constitution" as the Court has always believed.[226] Therefore, from *Plains Commerce Bank*, tribal courts can be hopeful that the Court may eventually come to understand tribal courts to be fair judicial tribunals that offer non-Indians familiar due process principles. However, the Court still must be persuaded.

Interestingly, Justice Souter, who is primarily responsible for Chief Justice Roberts's analysis of tribal courts and its fairness to non-Indians, joined Justice Ginsburg's dissent.[227] Perhaps he was persuaded by Justice Ginsburg and the submitted briefs that the Cheyenne River Sioux Tribal Court would be a fair tribunal for non-Indians, especially the Bank, given their prior dealings there.[228] Perhaps he cared about the due process rights and fairness to the Longs, since Roberts's opinion essentially stripped away their discrimination remedy. Or, perhaps he was upset that Roberts refused to write an *Oliphant*-like rule that says tribes cannot exercise jurisdiction over non-Indians, regardless of land status. Whatever the case, his previous concurring opinion in *Hicks* still proved to be influential in Roberts's majority opinion, and will now be more difficult to overcome.

B. A Lesson for Future Tribal Attorneys

Plains Commerce Bank was, among many things, a missed opportunity to educate the Supreme Court that tribal courts provide fair due process rights for

222. *Id.*
223. *Id.* at 2732 n.3. (Ginsburg, J., dissenting).
224. *Id.*
225. *Plains Commerce Bank*, 128 S. Ct. at 2732 n.3.
226. United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring).
227. *Plains Commerce Bank*, 128 S. Ct. at 2727.
228. *See infra* Part IV.B.1 and accompanying text.

nonmembers. As seen in the opinions, ensuring fairness to nonmembers, particularly non-Indians, is vital to making a case for tribal jurisdiction. Likewise, asserting unfairness serves as a powerful strategic tool for parties arguing against tribal jurisdiction. This subsection will show that the Bank capitalized on that strategy in its brief to the Supreme Court and during its ensuing oral argument. Consequently, the Bank exploited what has been on the minds of many of the justices, thereby helping it win the case.[229]

1. A Lopsided Battle in the Briefs

The Bank took full advantage of Justice Souter's concurrence in *Hicks* to argue that public policy mandates against forcing non-Indians to defend themselves in tribal court.[230] While the Bank recognized that tribes have taken steps over the past several decades to develop internal economies and systems of government, it nevertheless asserted that "at present, tribal courts remain very different from state and federal courts in the United States, and the concerns articulated by Justice Souter . . . still remain."[231] It then pointed to Justice Souter's specific allegations, particularly that tribal courts are the least developed branch of tribal government, largely because of a lack of federal funding.[232] Further, the Bank alleged that many tribal courts are unlike traditional American courts. It pointed to the fact that some tribal law is frequently unwritten and based on traditions and beliefs, which results in a complex mix of tribal, state, and federal law that would be "unusually difficult for an outsider to sort out."[233] Addressing the Cheyenne River Sioux Tribal Court, the Bank noted, "[t]he Tribe also acknowledged that, in the absence of any written tribal law, the tribal court is governed . . . by the traditional customs of the different Sioux bands residing on the reservation . . . ."[234] The Bank then argued that the tribal court of appeals applied such traditional customs when it determined that tribal tort law gave rise to the discrimination claim.[235] Overall, the Bank effectively used Souter's concurrence to argue that non-Indians should not be compelled to defend themselves in tribal court where the legal uncertainties make it unfair.[236]

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229. While this subsection refers to the party names (i.e. "the Bank" and "the Longs"), it is certainly an analysis of the strategies used by the parties' legal counsels.

230. *See* Petitioner Plains Commerce Bank's Brief at 40, Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709 (2008) (No. 07-411), 2008 WL 449965.

231. *Id.*

232. *Id.* at 40-41.

233. *Id.* at 41-42 (citing Nevada v. Hicks, 533 U.S. 353, 384-85 (2001) (Souter, J. concurring)).

234. *Id.* at 43 (internal citations omitted).

235. *Id.*

236. Petitioner Plains Commerce Bank's Brief at 41-42, Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709 (2008) (No. 07-411), 2008 WL 449965 (citing *Hicks*, 533 U.S. at 384-85 (Souter, J. concurring)).

The Longs did not address the Bank's public policy claims and, in effect, missed a tremendous opportunity to educate the Court about the state of tribal justice systems. Instead, their main arguments were that the Bank lacked standing, and that the two *Montana* exceptions supported tribal jurisdiction.[237] It should be noted that they did try to attack the Bank's claim of unfairness, but only by arguing that the Bank had consented to jurisdiction.[238] They relied heavily on *Montana*'s first exception, and, interestingly, tried to get the Court to look at that exception from a *Burger King* "purposeful availment" perspective.[239]

The Longs should have instead taken Souter's concurrence in *Hicks*[240] very seriously and addressed it head-on, rather than let the Bank utilize it to its advantage. Various Indian law experts, such as Royster, foresaw the importance in Souter's concurrence,[241] but the Longs failed to pay attention. Notably, an amicus curiae brief filed on behalf of the National American Indian Judges Association, the Navajo Nation, and the Northwest Intertribal Court System made various arguments that contradicted Justice Souter's previous misguided conceptions, and tried vigorously to educate the Court on the state of modern tribal courts and tribal law.[242] Those arguments may have helped persuade Justice Ginsburg. Had the Longs made similar arguments, they may have been able to persuade the Chief Justice. Instead, as indicated above in Chief Justice Roberts's dicta, the Bank's policy arguments certainly helped its case.[243]

2. Oral Argument

At oral argument, the Longs again failed to educate the Court, despite various instances where the justices repeatedly alluded to their concern for fairness to non-Indians in tribal courts.[244] While the Longs missed many opportunities to educate the Court, the Bank took full advantage of such oversight.[245] A close look at some of the dialogue is helpful for understanding not

237. *See* Brief for Respondents at 1-2, Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709 (2008) (No. 07-411), 2008 WL 727816.

238. *Id.* at 42-43.

239. *Id.* (citing Burger King v. Rudzewicz, 471 U.S. 462, 472 (1985)).

240. 533 U.S. at 375-86 (Souter, J., concurring).

241. *See supra* Part II.C.

242. *See generally* Brief of The National American Indian Court Judges Association et al. as Amici Curiae In Support Of Respondents, Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709 (2008) (No. 07-411), 2008 WL 782552.

243. *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2725 (2008) (recognizing the discrimination claim from an atypical regulation).

244. *See* Transcript of Oral Argument at 17-36, Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709 (2008) (No. 07-411), 2008 WL 1710923.

245. *Id.* at 48-49

only how the Longs failed, but also for learning how tribal lawyers can likely be more successful in the future.

Chief Justice Roberts was the first to hint at his concern for tribal legal uncertainties, particularly tribal procedural law.[246] While on the subject of tribal civil procedure law, he pointedly asked where he could look it up.[247] Clearly, he was alluding to the idea that tribal law is vastly unwritten and hard to find.[248] The Longs' lawyer took advantage of that opportunity to inform Roberts that the Cheyenne River Sioux Tribe has adopted the Federal Rules of Civil Procedure, and then explained the relevant federal rule.[249] Knowing that the Tribe did not apply its own "traditional" laws for procedural purposes probably eased some of the justices' concerns, but only initially.[250]

Later, the Longs' lawyer found it difficult to respond to the Court's lack of understanding and concern for tribal common law.[251] The lawyer admitted that they could not find any tribal precedent for the discrimination claim invoked by the Tribal Court of Appeals.[252] Chief Justice Roberts responded: "Well, neither could . . . anybody, right? I mean if anybody could find it, you could. It's because it's not published anywhere, right?"[253] The lawyer then pointed out that some opinions are in fact published, but that the case at hand was one of first impression.[254] From there, an important exchange between the lawyer and Justice Scalia took place:

> J. Scalia: Certainly, your reliance upon the Federal rules doesn't impress me as much as it did when you first told me about it, because apparently the Federal rules mean whatever the tribal courts say they mean; is that right?
>
> [Lawyer]: No, I think, Justice Scalia, the Court would look at the various sources of law . . .
>
> J. Scalia: And come to its own decision as to what they mean.

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246. *See id.* at 18-19.

247. *Id.*

248. Again, Justice Souter expressed this belief in *Nevada v. Hicks* to support his argument that tribal law would be unusually difficult for an outsider to sort out. 533 U.S. 353, 384-85 (2001) (Souter, J., concurring).

249. Transcript of Oral Argument at 18-19, *Plains Commerce Bank*, 128 S. Ct. 2709 (No. 07-411).

250. Justice Scalia soon inquired about the Tribal Court's adoption and reliance on the Federal Rules. *See id.* at 22-24.

251. *See id.* at 23-24 (responding to the Court's concerns).

252. *See id.* at 23 (arguing that the case presents due process concerns for nonmembers).

253. *Id.*

254. *Id.*

[Lawyer]: Yes.[255]

It appears that Justice Scalia was trying to explore an important matter on the minds of the Justices—whether tribal courts can even adequately apply state and federal laws.

Toward the end of the Longs' oral argument, Justice Ginsburg decided to attack the "lurking" concern over nonmember due process rights head-on.[256] Chief Justice Roberts had reminded the Longs of the Bank's concern that "[it] has no role to play in the nature or establishment of the court to which they are being subjected[.]"[257] The Longs' lawyer attempted to continue with his purposeful availment argument, but Justice Ginsburg interrupted:

> J. Ginsburg: . . . before you finish, I would like for [you to] give your best answer to a lurking, underlying concern, and that is the . . . Chief Justice brought up the outsider subjected to courts where the outsider has no vote. That happens when you['re] sued in a State that's not your own, but there is the right to remove and also at the end of the line is this Court. And I think in the case of the tribal courts, neither of those exists. There's no—you can't remove to a State or Federal court, and this Court has no review authority over a tribal court's judgment.
>
> [Lawyer]: I have two suggested responses to that . . . . One is that, when a tribal court judgment needs to be enforced, it can be brought in State court, and South Dakota follows the comity rule, which means that it has to satisfy certain requirements of fairness, adherence to basic principles, and the law before . . . the State court will enforce the tribal court judgment . . . .
>
> J. Ginsburg: Not the same faith and credit that it would give to a sister State judgment?
>
> [Lawyer]: That's correct. It's not full faith and credit; it's comity. And that comity provides for a substantive review while enforcing the judgment.
>
> C.J. Roberts: Well, what if the tribal law has certain cultural principles such as fairness and equity of a sort

255. Transcript of Oral Argument at 23-24, *Plains Commerce Bank*, 128 S. Ct. 2709 (No. 07-411).

256. *Id.* at 34.

257. *Id.* at 33.

> that aren't recognized under Federal or State law in this type of contractual relationship? Does that preclude the State court from giving comity or not?
>
> [Lawyer]: . . . unfortunately, I can't give you a direct answer to that . . . .[258]

The lawyer for the United States faced similar adversity.[259] Justice Scalia said that when a nonmember has to go to tribal court, "[i]t's sort of the analogue to being home fried in a foreign State."[260] The United States' lawyer did not defuse that distrustful sentiment.[261]

During rebuttal, the Bank's lawyer exploited the opportunities presented by the justices.[262] Its lawyer readdressed the procedural concerns and argued that the case presented questions of due process and equal protection for nonmembers, because "the constitutional protections of nonmembers do not apply down to tribal courts."[263] Given the outcome of the case, those points seemed to make a lasting impression for the majority of the Court that day.[264]

3. Lesson Learned (Again): What Tribal Lawyers Must Do in the Future

The events that unfolded in *Plains Commerce Bank* teach a valuable lesson for tribal lawyers that plan to argue for tribal jurisdiction before the United States Supreme Court. Most importantly, the parties witnessed that "Justice Souter's concurrence in *Hicks*, the first comprehensive attack on tribal law as applied to nonmembers,"[265] must be taken seriously. By the time the Court heard *Plains Commerce Bank*, Justice Souter's distrust of tribal courts had permeated through the Court as a "lurking, underlying concern."[266] Meanwhile, lawyers and academics frequently attacked Justice Souter's statements as misleading and

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258. *Id.* at 34-35.

259. The United States appeared as amicus curiae in support of the Longs. *Id.* at 36-47.

260. *Id.* at 37.

261. Instead, the lawyer tried to reconcile Justice Scalia's points with the suggestion that the *Montana* framework has recognized that tribes can have jurisdiction over nonmembers. Transcript of Oral Argument at 37, Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709 (2008) (No. 07-411), 2008 WL 1710923.

262. *See id.* at 48-49.

263. *Id.*

264. *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2727 (2008) (ruling in favor of the Bank by a five-to-four majority).

265. Fletcher, *supra* note 9, at 714.

266. *See* Transcript of Oral Argument at 34, *Plains Commerce Bank*, 128 S. Ct. 2709 (No. 07-411).

mostly false.[267] In other words, ample research and evidence was available to refute the lurking concern when the opportunity presented itself in *Plains Commerce Bank*. In future cases, it is imperative for tribal lawyers to utilize the research that is now available to educate the Court.

Professor Matthew L.M. Fletcher[268] argues that "tribal law is not monolithic in the manner that Justice Souter suggests."[269] Tribal law is hardly ever foreign or complex, at least as they apply it to non-Indians. Instead, according to Fletcher, tribal courts "decide their cases using Anglo-American common law more often than not," and traditional tribal law "applies only to members except where a nonmember expresses consent to the proceedings."[270] In fact, Fletcher even believes that "tribal courts would, if asked, adopt a choice of law doctrine similar to the one followed by federal courts where they would apply nontribal law to decide questions involving nonmember rights."[271] While tribal law remains the choice of law in on-reservation communities, it is not as difficult to find and learn as Justice Souter and Chief Justice Roberts state.[272] Instead, "tribal common law often is available online and in published reporters."[273] Even so, as Fletcher argues, the Court does not really have to fear tribal courts applying "traditional" tribal law to nonmembers, because they usually do not.[274]

Fletcher argues that two theories of law encompass tribal common law: (1) "intertribal common law" and (2) "intratribal common law."[275] Tribes have adapted their tribal courts to serve their own purposes and needs, as well as the purposes and needs of nonmembers.[276] While tribes strive to have their self-governing bodies reflect who they are, they also usually recognize that they exist

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267. *See generally* Fletcher, *supra* note 9 (arguing that tribal courts apply familiar legal principles to non-Indians); Alex Tallchief Skibine, *Making Sense Out of* Nevada v. Hicks*: A Reinterpretation*, 14 ST. THOMAS L. REV. 347 (2001) (criticizing the *Hicks* Court's analysis in great detail); Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641 (2003) (arguing that the *Hicks* decision was unprecedented).

268. Professor Fletcher has written various articles on tribal courts. *See generally* Fletcher, *supra* note 9; Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57 (2007).

269. Fletcher, *supra* note 9, at 715.

270. *Id.*

271. *Id.* at 716.

272. *See id.* at 715-16 (arguing that tribal law is available and comprehensive).

273. *Id.* For example, many decisions and laws are published online at the Tribal Court Clearinghouse. *See* Tribal Court Clearinghouse, http://www.tribal-institute.org/ (last visited Mar. 28, 2009). In addition, many decisions are available in print by the American Indian Law Reporter.

274. Fletcher, *supra* note 9, at 715 (citing Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 290-91 (1998)).

275. Fletcher, *supra* note 9, at 718-20.

276. *Id.* at 718.

amidst large nonmember populations. Intertribal common law reflects the latter, as it "is the substantive common law applied by tribal courts in cases arising out of an Anglo-American legal construct."[277] It often includes other tribal courts' common law decisions and a tribal court's importation of federal and state court common law.[278] According to Fletcher, the "vast majority of tribal court cases arise out of an Anglo-American legal construct," especially those that nonmembers appeal all the way to the Supreme Court.[279] Almost all tribal cases that involve nonmembers employ an outside legal construct to respond to the issues.[280] That is because nonmembers generally fall into categories of common law that largely rely on Anglo-American concepts. For example, "[t]ribal housing leases, tribal employment contracts, tribal casino financing deals, tribal sovereign immunity, and common law tort, contract, and property law causes of action and defenses are all Anglo-American legal constructs."[281]

On the other hand, intratribal common law arises out of an Indigenous legal construct, as it relies on tribal custom and traditional laws and norms.[282] According to Fletcher, because many tribes have yet to recover their customs and traditions in a manner that is useful for application in a court setting, it may take time before many tribal courts utilize intratribal common law.[283] Instead, most tribal courts heavily rely on intertribal common law, at least for the time being.[284] Even so, intratribal common law cases tend to only involve tribal members, with the exception of nonmembers who consent to its application.[285] This is because nonmembers typically are not parties when a dispute arises that would utilize intratribal common law.[286] For example, a tribal court might apply intratribal common law "where a dispute arises between two members (or the tribe) involving tribal lands 'with a spiritual significance to the group.'"[287] Clearly, nonmember interests would not be at stake in such a case. Similarly, tribal courts often apply intratribal law when there is a dispute between members over rights to tribal lands.[288] Also, family law cases involving members are a very common area for applying intratribal common law.[289] Fletcher argues that tribal courts

277. *Id.* at 720.
278. *Id.*
279. *Id.*
280. *Id.* at 722.
281. Fletcher, *supra* note 9, at 720.
282. *Id.* at 728.
283. *Id.* at 728-29.
284. *See id.* at 728 (noting that "many tribes have not yet recovered their customs and traditions in a manner that is useful" in applying intratribal common law in the court room).
285. *Id.* at 728.
286. *See id.* at 730-33 (illustrating how, in practice, nonmembers are not usually subject to intratribal law when in court).
287. Fletcher, *supra* note 9, at 730 (quoting Newton, *supra* note 274, at 306 n.71).
288. *Id.* at 731.
289. *Id.* at 730-31.

should also apply intratribal common law when resolving tribal government disputes and tribal constitutional law questions.[290] In essence, the purpose of intratribal common law is to resolve disputes between tribal members (or between members and the tribe) in a way that is cognizant of tribal customs and culture.[291] Applying culture to resolve these types of disputes is a way for the tribe and the community to reclaim a sense of who they are, and it is also a healing process.[292] As Fletcher demonstrates, nonmembers are typically not parties in such disputes, and unless they consent and the community consents, there is really no desire to subject them to intratribal common law.[293]

Fletcher believes that "[t]he development and theorization of intertribal and intratribal common law may assist tribes and their advocates in educating the federal judiciary of the "on-the-ground" reality of tribal court civil jurisdiction over nonmembers."[294] Above all else, tribal lawyers must educate the Supreme Court of the distinctive characteristics of the two bodies of law. In future cases, they must point out that the Court's fears of unfairness are mistaken, because tribes almost always apply intertribal common law when resolving disputes that involve nonmembers. Fletcher predicted before *Plains Commerce Bank* that "a Supreme Court decision guided by the mistaken view of a monolithic tribal common law could be a disaster for Indian Country."[295] In hindsight, it was not in fact a disaster because the Court did not create a bright-line rule that tribal courts cannot have civil jurisdiction over nonmembers, as Fletcher and many other advocates of tribal sovereignty feared.[296] However, what was once just a concurring opinion is now embedded in majority dicta.[297] Therefore, tribal attorneys must recognize that tribes dodged what could have been a lethal bullet in *Plains Commerce Bank*. In the future, tribes may not be so fortunate, so tribal attorneys must diligently strive to educate the Court of the "on-the-ground" realities of tribal justice systems.[298]

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290. *Id.* at 732-33.

291. *See id.* at 730 (arguing that such disputes are a classic example of the application of intratribal common law).

292. *See id.* at 729-30 (arguing that intratribal common law allows tribal communities to reach back in their past and rediscover who they are).

293. Fletcher, *supra* note 9, at 733.

294. *Id.*

295. *Id.* at 717.

296. *Id.* at 741.

297. *Compare* Nevada v. Hicks, 533 U.S. 353, 375-86 (2001) (Souter, J., concurring) *with* Plains Commerce Bank v. Long Family Land & Cattle Co, 128 S. Ct. 2709, 2721-22 (2008).

298. Interestingly, the United States and the Mountain States Legal Foundation filed amicus curiae briefs that cited Fletcher's article to support contradictory propositions. The United States filed in support of the Long family and used Fletcher's article to argue that tribal courts usually apply American legal principles to non-Indians. *See* Brief for the United States as Amicus Curiae Supporting Respondents at 28 n.15, Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709 (2008) (No. 07-411), 2008 WL

C. Lesson for Tribal Courts: Applying Intertribal Law Versus Intratribal Law

Following the holding in *Plains Commerce Bank*, tribal courts must also take steps to help ensure that they can continue to exercise civil jurisdiction over nonmembers, particularly non-Indians. While distrust is one of the primary obstacles to adjudicatory jurisdiction over nonmembers, many tribes have made tremendous efforts to "legitimize" their courts and tribal laws.[299] At the same time, those tribes generally want to make sure their revamped courts and laws still reflect their communities' culture and identity.[300] Even so, most of the time, these new tribal codes can be best classified as intertribal, rather than intratribal, law.[301] However, not every tribe has a new set of codes.[302] Further, tribal judges, like all judges, still have to call upon common law when deciding cases. In effect, there remains a possibility for tribal courts to apply intratribal law when hearing a dispute that involves a nonmember. In order to ensure that tribal courts can continue to exercise civil jurisdiction over nonmembers, they must avoid applying intratribal law in such cases.[303]

Even if the lawyers for the Longs in *Plains Commerce Bank* had taken Fletcher's advice, the Bank would have likely still won because of the tribal court of appeals' use of intratribal legal concepts.[304] Fletcher's theory rests on the

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742923. The Mountain States Legal Foundation, on the other hand, filed in support of the Bank and disregarded Fletcher's argument that tribes apply familiar Anglo-American legal principles to non-Indians; instead, it highlighted the fact that many tribes are still recovering their traditions, which makes the tribal court process unfair to *tribal members*, and even more so to nonmembers, who do not know the traditions that will govern them in court. *See* Amicus Curiae Brief of Mountain States Legal Foundation in Support of Petitioner, Plains Commerce Bank at 20, Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709 (2008) (No. 07-411), 2008 WL 503596. Unfortunately, the United States amicus curiae attorney did not utilize Fletcher's points at oral argument, particularly when Justice Scalia analogized tribal court jurisdiction over nonmembers to being "home fried in a foreign State." Transcript of Oral Argument at 37, *Plains Commerce Bank*, 128 S. Ct. 2709 (No. 07-411).

299. *See generally* REBUILDING NATIVE NATIONS, *supra* note 2 (discussing why "legitimate" governance is important and providing various tribal examples).

300. *Id.* at 48 (noting that various tribes view legitimate authority differently).

301. For example, some tribes have adopted a Model Tribal Secured Transactions Act, which is not derived from intratribal principles. *Id.* at 222 n.19.

302. *See id.* at 122 (noting that many tribal courts still do not even have a tribal constitutional basis).

303. Otherwise, Fletcher's argument would be undermined. *See* Fletcher, *supra* note 9, at 741 (arguing that the Supreme Court's fears of subjecting nonmembers to unfair law should be allayed if the Court understands the distinction between intertribal common law and intratribal common law).

304. *See* Plains Commerce Bank v. Long Family Land & Cattle Co., No. 03-002-A, mem. op. at 8 (Cheyenne River Sioux Ct. App. Nov. 24, 2004), *available at*

presumption that "nonmembers will not be subject to 'unusually difficult,' confusing, unfair, or unfamiliar substantive law."[305] However, the Cheyenne River Sioux Tribal Court of Appeals disproved that theory when it allowed the Longs' discrimination claim. There, Chief Justice Pommersheim recognized that there was "no express tribal ordinance creating a civil cause of action based on discrimination . . . ."[306] Tribal law only provided that the Cheyenne River Sioux Tribal courts have jurisdiction over disputes arising on the reservation that involve "tortious conduct."[307] In order to find that "tortious conduct" included "discrimination," Chief Justice Pommersheim looked to common law:

> [T]here is a basis of a discrimination claim that arises directly from Lakota tradition as embedded in Cheyenne River Sioux tradition and custom. Such a potential claim arises from the existence of Lakota customs and norms such as the "traditional Lakota sense of justice, fair play, and decency to others" . . . and "the Lakota custom of fairness and respect for individual dignity."[308]

He then noted that "such notions of fair play are core ingredients in federal and state definitions of discrimination."[309]

While that may be true, the Chief Justice still clearly drew upon *intratribal* common law in direct contravention to Fletcher's theory. Under that theory, "tribal courts derive the substantive law that applies to nonmembers, intertribal law, from *Anglo-American common law*."[310] Arguably, many *intratribal* common law notions can relate to Anglo-American notions, despite the fact that they are based on an indigenous understanding. That does not necessarily mean that a nonmember will be familiar with the substantive law, because it is still *derived from* foreign traditions and customs.

When disputes arise that involve nonmembers and tribal courts must apply common law, tribal judges should be careful to stick to intertribal common law. Drawing upon intratribal common law dismantles perceptions of fairness to nonmembers.[311] Without fairness, tribes face legitimacy issues, particularly from

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http://turtletalk.files.wordpress.com/2007/12/tribal-coa-opinion-bank-of-hoven.pdf (noting that the discrimination claim, though similar in certain aspects to state and federal definitions of discrimination, *derived* from tribal traditions).

305. Fletcher, *supra* note 9, at 737.

306. *Plains Commerce Bank*, No. 03-002-A at 8.

307. *See id.*

308. *Id.* (internal citations omitted).

309. *Id.*

310. Fletcher, *supra* note 9, at 739 (emphasis added).

311. According to the Supreme Court, tribal customs and norms help make tribal common law unusually difficult for an outsider to figure out. Nevada v. Hicks, 533 U.S. 353, 384 (2001) (Souter, J., concurring).

the United States Supreme Court.[312] In order to ensure that the Court never invokes a bright-line rule against tribal adjudicatory jurisdiction over nonmembers, particularly non-Indians, tribal courts need to play an exemplary role by demonstrating that nonmembers will be treated fairly with familiar common law concepts.

D. Comity or Full Faith and Credit for Tribal Court Decisions

Tribal courts and tribal lawyers should not have to convince the Supreme Court that tribal courts treat nonmembers fairly. Instead, procedural fairness should be presumed. Unfortunately, under the current legal structure, with some exceptions, federal and state courts generally give little or no deference to tribal court decisions by using principles of comity.[313] Comity leaves the enforcing court free to review the procedural fairness of the issuing court's process of rendering the judgment.[314] As seen as recently in both *Hicks* and *Plains Commerce Bank*, procedural fairness can be a determining factor for the Supreme Court when it considers whether a tribal court's jurisdiction over a particular case (or individual) was proper.[315] Therefore, it is necessary to remove the "fairness effect" as an obstacle to enforcing tribal judgments when appealed to other courts. One way to do that is to mandate that all reviewing courts apply full faith and credit principles to tribal court decisions. Under full faith and credit, a reviewing court presumes that the issuing court's judgment met procedural and substantive due process requirements.[316] Tribes certainly have a plausible argument that their courts afford nonmembers due process rights akin to American understandings. Further, as discussed above, tribal courts generally subject nonmembers to familiar American legal principles.[317] Therefore, a presumption of due process would not only help ensure enforcement of tribal judgments upon appeal, it would also realistically reflect the present state of tribal courts.

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312. Legitimacy issues were rampant in Justice Souter's concurring opinion in *Nevada v. Hicks*. 533 U.S. at 375-86 (Souter, J., concurring).

313. There are some congressionally created exceptions. *See* 18 U.S.C.A. § 2265(b) (West 2006) (mandating full faith and credit recognition to tribal domestic violence protection orders); 25 U.S.C.A. § 1911(d) (West 2009) (mandating full faith and credit to tribal proceedings applicable in Indian child custody); 28 U.S.C.A. § 1738B (West 1997) (mandating full faith and credit to tribal child support orders).

314. Stephanie Moser Goins, Comment, *Beware the Ides of Marchington: The* Erie *Doctrine's Effect on Recognition and Enforcement of Tribal Court Judgments in Federal and State Courts*, 32 AM. INDIAN L. REV. 189, 192 (2007).

315. *Hicks*, 533 U.S. at 383 (Souter, J., concurring); Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2724 (2008) (majority opinion).

316. Goins, *supra* note 314, at 192.

317. *See supra* notes 284-92 and accompanying text (illustrating why intratribal common law is not usually applied to nonmembers).

Currently, comity, rather than full faith and credit, is the most accepted common law principle to apply to tribal judgments at both the state and federal level.[318] Recall that during oral argument in *Plains Commerce Bank*, the Longs' lawyer explained that South Dakota courts follow the comity principle when they are asked to enforce a tribal court judgment.[319] While states differ in which approach they take, comity seems to be the norm.[320] This is also true at the federal level, where at least the Courts of Appeals for the Ninth and Tenth Circuits have adopted comity as the applicable rule.[321] Those courts equate tribes with foreign nations, rather than states, territories, or possessions as understood under the Full Faith and Credit Act.[322] Such a characterization is unfortunate for tribes because comity is highly discretionary in nature, and imposes no legal obligation on the enforcing court to recognize and enforce the "foreign" judgment.[323]

In United States' jurisprudence, the Supreme Court first established the doctrine of comity in 1895 in *Hilton v. Guyot*.[324] The Court not only commented on comity's discretionary nature, but also "articulated a road map for the enforcement of foreign judgments" that is pertinent to this discussion.[325] "First, the foreign court must have had both proper subject matter jurisdiction and personal jurisdiction; second, the defendant must have had *due process* of law."[326] Further,

> [a] federal court could exercise its discretion and decline to enforce or recognize a judgment if the judgment was (1) obtained by fraud; (2) conflicted with another final judgment entitled to recognition; (3) was inconsistent with the parties' contractual choice of forum; or (4) recognition of the judgment or the cause of action upon which it was based *conflicted with*

318. Goins, *supra* note 314, at 207.

319. Transcript of Oral Argument at 34-36, *Plains Commerce Bank*, 128 S. Ct. 2709 (No. 07-411).

320. *See* Stacey L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311, 335-46 (discussing the various state court approaches).

321. *See, e.g.*, Wilson v. Marchington, 127 F.3d 805, 809-10 (9th Cir. 1997); Burrell v. Armijo, 456 F.3d 1159, 1167 (10th Cir. 2006).

322. 28 U.S.C.A. § 1738 (West 2009) ("Such Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.").

323. Goins, *supra* note 314, at 201-04 (discussing the history and implications of comity).

324. 159 U.S. 113, 163-64.

325. Goins, *supra* note 314, at 203 (discussing the road map).

326. *Id.*

> *the public policy of the United States or the forum state* in which the federal court recognition of the judgment is sought.[327]

In effect, comity can provide appellants with a "de facto back door method of collateral attack" on a tribal court's judgment premised on an American understanding of procedural fairness.[328]

It should be noted that some courts do apply full faith and credit, rather than comity, when deciding whether to enforce a tribal court judgment.[329] In fact, full faith and credit was once the prevailing view of the federal courts during the nineteenth century.[330] It began with *United States ex rel. Mackey v. Coxe*, where the Supreme Court determined that the Cherokee Nation existed as a "domestic territory" under a similar full faith and credit statute.[331] The advantage of full faith and credit is that it "grants substantial deference to the issuing court and generally establishes a binding legal obligation to recognize" the "territory's" judgment.[332]

A tribe does not necessarily need to be considered a state, territory, or possession to reap the benefits of full faith and credit; it is enough to be *treated like* a state.[333] For example, the Oklahoma Supreme Court enacted a rule imposing a non-discretionary duty to grant full faith and credit and enforce *any tribal* judgment from a tribal court that grants reciprocity to Oklahoma state court judgments, on the condition that a tribal court judgment does not receive any greater effect of full faith and credit under the rule than would "a similar or comparable judgment of a sister state."[334]

However, in the last few decades, possibly due in part to the recent resurgence in tribal sovereignty and self-determination, many courts have turned from the view that tribes are "territories" of the United States.[335] Unfortunately for tribes, at the same time, they have sought ways to empower their justice

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327. *Id.* (citing Wilson v. Marchington, 127 F.3d 805, 810-11 (9th Cir. 1997)) (emphasis added).

328. *Id.* at 204.

329. The Oklahoma state-court system is one example. OKLA. STAT. ANN. tit. 12, § 728 (West 1992); Okla. Dist. Ct. R. 30(B) (1994); *see also* Goins, *supra* note 314, at 212-16 (discussing the Oklahoma statute and the Oklahoma Supreme Court rule).

330. *See* Goins, *supra* note 314, at 207 (noting that, only in the past few decades, courts have rejected the prevailing "[nineteenth] century view of tribes as entities under the ownership of the United States").

331. 59 U.S. 100, 103 (1856); *see also* Goins, *supra* note 314, at 206-07 (discussing the case and its progeny in further detail).

332. Goins, *supra* note 314, at 201.

333. *See* Okla. Dist. Ct. R. 30(B) (treating tribes akin to states for purposes of full faith and credit).

334. *Id.*

335. Goins, *supra* note 314, at 207.

systems.[336] In effect, while tribes have tried to assert their adjudicatory powers as quasi-sovereign nations, state and federal forums have increasingly reviewed tribal judgments under principles of comity, which has only diminished tribes' sovereign capabilities.[337] Thus, sovereignty has been a double-edged sword for tribal jurisdiction over nonmembers, who can shop for a forum that will view tribes as "foreign nations," and apply principles of comity rather than full faith and credit.

Looking forward, more courts need to recognize that tribal judgments have met procedural due process requirements. However, tribal courts should not have to enact the United States Bill of Rights to convince state and federal courts. Instead, tribal sovereignty should be continually respected as tribes find ways to enact laws and issue judgments that best fit within, and reflect, their communities. In order to better ensure that reviewing courts will apply full faith and credit to a rendering tribal court decision involving a nonmember, it would behoove a tribal judge to be explicit in his or her opinion that the court affords due process to nonmembers. Also, a tribal judge should explain how the tribe's understanding of due process is similar in many key respects to American due process. Finally, provided there is no clear tribal statute on point, a tribal judge should support the due process and fairness argument by highlighting that the court applies intertribal common law, rather than intratribal common law, to nonmembers. Hopefully, if reviewing courts then mandatorily apply full faith and credit, rather than comity, even the Supreme Court should have less ability to discard tribal court opinions for reasons of unfairness to nonmembers as due process will be presumably met.

V. CONCLUDING REMARKS

In 2001, the Navajo Nation Tribal Council enacted a long-arm statute, which provides the Nation with broad civil jurisdiction beyond its boundaries.[338] Specifically, it mandates that the Nation has civil jurisdiction over "[a]ll civil actions in which the defendant: (1) is a resident of Navajo Indian Country; or (2) has caused an action or injury to occur within the territorial jurisdiction of the Navajo Nation."[339] Clearly, the Navajo Nation wants its jurisdiction to be as expansive as the states, and to utilize "minimum contacts" jurisprudence.

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336. One particular method has been through "nation building." *See* REBUILDING NATIVE NATIONS, *supra* note 2 (discussing the nation-building, versus the standard, approach).

337. This was seen in *Plains Commerce Bank* where the Bank was able to petition—all the way to the Supreme Court—for federal review of the tribal court's jurisdiction over the discrimination claim. 440 F. Supp. 2d 1070 (D.S.D. 2006), *aff'd*, 491 F.3d 878 (8th Cir. 2007), *rev'd*, 128 S. Ct. 2709 (2008).

338. NAVAJO NATION CODE tit. 7, § 253(A)(2) (2001).

339. *Id.*

Though a long-arm statute akin to a state long-arm statue seems like a plausible way around the Supreme Court's *Montana-Strate* line of cases, it remains risky. A non-Indian can appeal an unfavorable Navajo court decision to a federal district court that might nevertheless apply a *Montana-Strate* analysis along with comity to find that the tribal court did not properly have jurisdiction and that jurisdiction over the non-Indian was unfair. In fact, even if the logic behind the long-arm statute works, and a reviewing court instead relies on cases like *World-Wide Volkswagen* and *International Shoe*, the court still must ensure that tribal jurisdiction was consistent with fair play and substantial justice.[340] While the Navajo Nation might be able to avoid the *Montana-Strate* line of cases, it can still be hooked for "fairness." In other words, a reviewing court can always just ignore the Navajo Nation statute. As this Note has demonstrated, such is the story of tribal jurisdiction from *Montana* to *Plains Commerce Bank*.

Today, as this Note has demonstrated, there remains a clear divide between state and tribal civil jurisdiction powers. While states have come to enjoy a form of civil jurisdiction that can reach beyond their boundaries regardless of state citizenship, tribes remain confined to specific lands within their territory when it comes to jurisdiction over nonmembers.[341] It has become more evident that the reasons are based on fairness to the nonmember parties, particularly to non-Indians.[342] That stigma of unfairness must be addressed in order to ensure that jurisdiction over nonmembers is not similarly compromised on tribal lands, and possibly to enlarge tribal jurisdiction on nonmember fee lands.

Looking forward, reviewing courts of non-tribal jurisdictions must be convinced that tribal judgments afford nonmembers basic due process rights. At the same time, tribal judges must be cognizant of the fact that a reviewing court, especially the Supreme Court, will look to whether the applicable tribal law was fairly applied to the nonmember. Thus, their judgments over nonmembers must be expressly limited to intertribal common law principles that are comparable to American common law. Similarly, as more tribes draft and amend their constitutions and statutes, they should ensure that their laws adequately provide due process to nonmembers. Without assurances of procedural fairness to nonmembers, there is the risk of a Supreme Court decision with a bright-line rule that uniformly strips tribal civil jurisdiction over nonmembers regardless of land

340. *See supra* notes 25-31 and accompanying text.

341. *Compare* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980) (holding that "[a] forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State") *with* Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2726 (2008) ("The sovereign authority of Indian tribes is limited in ways state and federal authority is not.").

342. *See* Transcript of Oral Argument at 37, *Plains Commerce Bank*, 128 S. Ct. 2709 (No. 07-411) (suggesting that tribal jurisdiction over nonmembers is "sort of the analogue to being home fried in a foreign State").

status. After *Hicks* and *Plains Commerce Bank*, the tools at least seem to be in place.