

**THE *PLAINS COMMERCE BANK* DECISION AND ITS
FURTHER NARROWING OF THE *MONTANA*
EXCEPTIONS AS APPLIED TO TRIBAL COURT
JURISDICTION OVER NON-MEMBER DEFENDANTS**

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I. INTRODUCTION

On June 25, 2008, the U.S. Supreme Court issued its opinion in *Plains Commerce Bank v. Long Family Land & Cattle Co.*¹ It reversed the decisions of four lower courts, all of which had concluded that an Indian tribal court had jurisdiction over a non-member defendant.² In doing so, the Supreme Court further modified the federal common law of tribal court jurisdiction and provided further clarification regarding the general tribal jurisdiction rule and its two exceptions first established in *Montana v. United States*.³

The legal evolution of Indian tribal sovereignty has moved in contradictory directions at different points in U.S. history. The result is that predicting whether, and when, tribal courts have authority can be difficult, particularly when it comes to people or entities that are not tribal members. This can be particularly problematic when non-members and members do business together. The lack of certainty regarding the applicable law or applicable forum can add transaction costs to already expensive economic disputes.

This article will discuss the facts that gave rise to the *Plains Commerce Bank* case, the development of the *Montana* rule and its exceptions, and the Supreme Court's holding in *Plains Commerce Bank* as well as its implications for tribal jurisdiction.

II. FACTS

Plains Commerce Bank essentially involved a lending relationship that went awry.⁴ While the dispute ended up being litigated in tribal court, the nagging question throughout the case, which required a decision from the Supreme Court to resolve, was whether the tribal court had jurisdiction to litigate the dispute.⁵ The intricacies of the facts foreshadow the difficulty in answering this question.

A. *The Cheyenne River Sioux Reservation*

At one time, the Sioux Tribes claimed a large part of the Dakotas as their own.⁶ But treaties, Congressional divestiture, land allotments,

1. 128 S. Ct. 2709 (2008).

2. *Id.* at 2716.

3. 450 U.S. 544 (1981).

4. *Plains Commerce Bank*, 128 S. Ct. at 2714.

5. *Id.*

6. *See* *South Dakota v. Bourland*, 508 U.S. 679, 682 (1993); *Solem v. Bartlett*, 465 U.S. 463, 468–69 (1984).

and sales significantly diminished the Sioux Tribe's land.⁷ The Fort Laramie Treaty of 1868 established the now defunct Great Sioux Reservation, consisting of more than sixty-million acres, principally in western South Dakota and southwestern North Dakota.⁸ The Indian General Allotment Act of 1887, however, provided for diminishment of this reservation by enabling non-Indians to acquire fee title to "surplus" land on the reservation.⁹ In 1889, Congress replaced the Great Sioux Reservation with a number of smaller reservations, which included the Cheyenne River Sioux Reservation (the Reservation).¹⁰

The boundaries of the Reservation encompass large areas of Dewey and Ziebach counties in north-central South Dakota.¹¹ Further sales and transfers of individually- and tribally-owned lands within the Reservation occurred when Congress later opened up 1.6 million acres of land within Reservation boundaries for homesteading by non-Indians.¹² Today, non-Indians own substantial land within Reservation boundaries, including the land at issue in this case.

B. *The Parties*

Plains Commerce Bank (the Bank) is a South Dakota banking corporation.¹³ It has a branch in Hoven, South Dakota, which is located near but not on the Reservation.¹⁴ The Long Family Land and Cattle Company (the Long Company), on the other hand, is a South Dakota ranching and farming corporation located on the Reservation.¹⁵ The Long Company was incorporated on March 24, 1987.¹⁶ Shortly thereafter, the Indian-owned Long Company, which was eligible for Bureau of Indian Affairs (BIA) guaranteed loans pursuant to 25 C.F.R. § 103.25, began lending relations with the Bank.¹⁷ Cheyenne River Sioux tribal members Ronnie Long and his wife, Lila

7. See *Bourland*, 508 U.S. at 682; *Solem*, 465 U.S. at 468–69.

8. Fort Laramie Treaty of 1868 art. 2, 15 Stat. 635.

9. Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887).

10. *Bourland*, 508 U.S. at 682.

11. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2715 (2008).

12. Act of May 29, 1908, ch. 218, 35 Stat. 460 (1908).

13. *Plains Commerce Bank*, 128 S. Ct. at 2715.

14. *Id.*

15. *Id.* at 2714.

16. South Dakota Secretary of State, Business Services, <http://apps.sd.gov/applications/st32cprs/AllDocuments.aspx? &BID=DF026227> (last visited Nov. 2, 2009).

17. *Plains Commerce Bank*, 128 S. Ct. at 2728 (citing 25 C.F.R. § 103.25) (Ginsburg, J., concurring in part, dissenting in part).

Long, (the Longs) have a majority shareholder interest in the Long Company.

C. The Land

The primary collateral underlying the loan arrangements between the Bank and the Long Company consisted of approximately 2230 acres of pasture and farm land on the Reservation in Dewey County, South Dakota, and a home in Timber Lake, South Dakota.¹⁸ Kenneth Long, Ronnie Long's father, and a non-tribal member, owned this property in fee status before his death.¹⁹ In 1992, Kenneth Long mortgaged this property to the Bank as security for the Long Company's debt.²⁰

Kenneth Long died on July 17, 1995.²¹ On September 26, 1995, the Bank filed a creditor's claim against the estate for the Long Company's debts; demanding \$750,000.²² In lieu of foreclosure, Kenneth Long's second wife, Paulette Long, provided a personal representative's deed for the real estate and home in Timber Lake to the Bank.²³

D. The Contracts

The Bank and the Long Company then entered into two contracts: a loan agreement and a lease with option to purchase.²⁴ The parties entered into the loan agreement on December 5, 1996.²⁵ Under the terms of the loan agreement, the Bank credited the Long Company debt for the farm real estate, and the home in Timber Lake deeded to the Bank.²⁶ The loan agreement required the Bank to request that the BIA increase the guarantee on one outstanding Long Company loan from 84% to 90%, and to reschedule payment of the delinquent note over twenty years.²⁷ The Bank also was to request that the BIA provide a 90% guarantee for a new operating loan.²⁸ If the

18. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 440 F. Supp. 2d 1070, 1073 (D.S.D. 2006).

19. *Id.*

20. *Plains Commerce Bank*, 128 S. Ct. at 2715.

21. *Plains Commerce Bank*, 440 F. Supp. 2d at 1073.

22. *Id.*

23. *Id.*

24. *Id.* at 1073–74.

25. *Id.* at 1074.

26. *Id.*

27. *Id.*

28. *Id.*

BIA guarantee requests were approved, the Bank was to make an additional loan of \$53,500 to the Long Company.²⁹ The parties also entered into a two-year lease with the option to purchase the pasture farm real estate on December 5, 1996. The option price was \$468,000.³⁰

E. The Relationship

By letter dated December 12, 1996, the Bank claimed that it fulfilled its obligation to request the agreed BIA guarantees.³¹ During the winter, while the BIA request was pending, the Bank issued loans to the Long Company totaling approximately \$24,000.³² The BIA provided no response until February 14, 1997, when it rejected the Bank's application as incomplete.³³ By that time, most of the cattle the Long Company had proposed to use as collateral for the loans had perished in harsh winter conditions.³⁴ Because the BIA rejected the application, and the contemplated loan could no longer be sufficiently collateralized, the Bank did not make the loan. It did, however, provide subsequent additional financing.³⁵

The Long Company failed to exercise its option to purchase the farm real estate in December 1998.³⁶ On March 17, 1999, with the Long Company still in possession of approximately 960 acres, the Bank sold 320 acres of pasture land to Ralph and Norma Pesicka, who are not members of the tribe.³⁷ The Pesickas paid \$49,600 in cash for the land, or \$155 per acre.³⁸ Edward and Mary Maciejewski, who are not members of the tribe, purchased the remaining 1905 acres from the Bank for \$401,100 under a contract for deed on June 29, 1999.³⁹ The Maciejewskis paid approximately \$210 per acre for the remaining pasture and farm land. The Long Company remained in possession of 960 acres.⁴⁰

29. *Id.*

30. *Id.* at 1073–74.

31. *Id.* at 1074.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Joint App. at 141–43, *Plains Commerce Bank*, 128 S. Ct. 2709 (2006) (No. 07-411), 2008 WL 467351.

39. *Id.* at 148–57.

40. Aff. of Charles Simon, *Plains Commerce Bank*, 440 F. Supp. 2d (D.S.D. 2006) (No. CIV 05-3002) (on file with District of South Dakota)

Together, the Maciejewskis and the Pesickas paid approximately \$450,700 for the part of the property they acquired. According to the terms of the option to purchase, if the Long Company had exercised the option for \$468,000, it would have been reduced to a net cost of \$443,600.⁴¹

F. The Tribal Courts

The Long Company continued in possession of 960 acres of the property following the expiration of the lease. Therefore, the Bank sought to serve a Notice to Quit on the Long Company as a prerequisite to the action for forcible entry and detainer it filed in South Dakota state court.⁴² Because off-reservation process servers cannot effectuate valid service on the Reservation, the Bank sent the notice to the Cheyenne River Sioux Tribal Court (Tribal Court) on June 15, 1999, asking that the Tribal Court authorize service.⁴³ The notice was then served by a tribal process server.⁴⁴

In response to the Bank's Notice to Quit, Ronnie and Lila Long commenced the underlying Tribal Court action, seeking a temporary restraining order against the Bank.⁴⁵ The Bank responded, denying Tribal Court jurisdiction and opposing entry of injunctive relief.⁴⁶ The Tribal Court upheld jurisdiction and issued a preliminary injunction.⁴⁷

Ronnie and Lila Long then amended their complaint, adding the Long Company as a plaintiff. They asserted several causes of action, including breach of contract and discrimination. The Bank answered, again denying Tribal Court jurisdiction.⁴⁸ The Bank also filed a counterclaim seeking eviction of the Long Company from the 960 acres of the farm real estate it continued to hold and damages for holding over under the lease.⁴⁹

A trial was held before a Tribal Court jury in Eagle Butte, South Dakota, on December 6 and December 11, 2002.⁵⁰ In addition to the

41. Joint App., *supra* note 38, at 98.

42. Plains Commerce Bank v. Long Family Land & Cattle Co., 440 F. Supp. 2d 1070, 1074 (D.S.D. 2006).

43. *Id.*

44. *Id.*

45. *Id.* at 1075.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

contract claim, the Longs asserted that the Bank discriminated against them by preventing the Long Company from exercising the option to purchase the leased property and for charging a higher per-acre value than the subsequent non-member purchasers.⁵¹ The discrimination claim was submitted to the jury as a claim by Ronnie and Lila Long, not the Long Company.⁵² The jury returned a general verdict encompassing all claims of the Longs and the Long Company against the Bank for \$750,000 and indicated that interest should also be awarded. The jury found that the Bank had discriminated against Ronnie Long and Lila Long.⁵³

On post-trial motions, the Tribal Court upheld jurisdiction over the Bank; ruled that federal law supported the discrimination claim; added pre-judgment interest to the judgment; and gave the Long Company an option to purchase the 960 acres it possessed by offset against the judgment.⁵⁴

The Bank appealed the judgment to the Cheyenne River Sioux Tribal Court of Appeals (“Tribal Court of Appeals”). In an opinion dated November 22, 2004, the Tribal Court of Appeals affirmed the Tribal Court ruling, agreeing with the Tribe that the discrimination claim was based on tribal common law arising out of tribal tradition and custom.⁵⁵ Neither party had previously argued that the discrimination claim was based upon tribal tort law. The Tribe does not have a codified discrimination statute.⁵⁶

G. *The Federal Courts*

The Bank then commenced a declaratory-judgment action in the U.S. District Court, District of South Dakota, Central Division.⁵⁷ The Bank moved for judgment based upon the Tribal Court’s lack of jurisdiction, as well as the violation of its due-process rights. The Longs made a cross-motion for declaratory judgment.⁵⁸ The District Court ruled in favor of the Longs, finding that the Tribal Court had jurisdiction over the discrimination claim pursuant to the “consensual relationship” element of the first exception articulated in *Montana v.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 1082.

56. *Id.* at 1081.

57. *Id.* at 1075.

58. *Id.*

United States,⁵⁹ and ruled that due process was not violated.⁶⁰

The Bank appealed to United States Court of Appeals for the Eighth Circuit, arguing that the District Court erred in ruling that the Tribal Court had jurisdiction and that the Bank was afforded due process.⁶¹ Specifically, the Bank challenged the District Court's determination of jurisdiction based on consent and a voluntary consensual relationship with tribal members.⁶² It argued that the Tribal Court did not have jurisdiction over the federal claim, and that the after-the-fact assertion of tribal discrimination law resulted in a violation of the Bank's due-process rights.⁶³

The Circuit Court affirmed the ruling of the District Court.⁶⁴ It found that the Bank's due-process rights had not been violated, and that the Tribal Court's exercise of jurisdiction over the Bank fell within the inherent authority of the Tribe under the first *Montana* exception.⁶⁵ According to the Circuit Court, the Bank formed a consensual relationship with tribal members. Thus, the tribal tort law the Longs invoked was an "other means" by which a tribe may regulate non-member conduct.⁶⁶

The Bank petitioned the Supreme Court for a writ of certiorari, which it granted on January 4, 2008.⁶⁷ In its petition, the Bank explicitly declined to seek review of two arguments made below: 1) whether tribal courts generally lack jurisdiction to adjudicate claims based on federal law; and 2) whether the Tribal Court's judgment below should be denied comity because the Bank was denied due process.⁶⁸

59. *Montana v. United States*, 450 U.S. 544, 565 (1980) ("A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.").

60. *Plains Commerce Bank*, 440 F. Supp. 2d at 1074.

61. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 491 F.3d 878, 881 (8th Cir. 2007) (holding that the claim arose under tribal authority to regulate, and the Bank was not denied due process).

62. *Id.* at 884.

63. *Id.*

64. *See id.* at 892.

65. *Id.* at 888.

66. *Id.*

67. *Plains Commerce Bank v. Long Family Land & Cattle Co.* 128 S. Ct. 2709 (2008).

68. *Id.* at 2712.

III. DEVELOPMENT OF THE MONTANA RULE AND ITS EXCEPTIONS

Considerable legal debate has been devoted to resolving federal and state sovereignty issues arising out of the U.S. Constitution. But on the matter of tribal sovereignty in the federal system, the Constitution does not provide much guidance. It merely establishes that Congress has the power “to regulate Commerce . . . with the Indian Tribes.”⁶⁹

It therefore fell to the courts to define the status of Indian tribes with respect to state and federal authority. Three cases decided between 1810 and 1832, known as the Marshall trilogy, established a number of guiding principles that have influenced the resolution of tribal sovereignty questions ever since.⁷⁰

A. Pre-Montana

In *Fletcher v. Peck*, the concurring opinion of Justice Johnson discussed how tribal sovereignty had been diminished by treaties.⁷¹ Justice Johnson observed that some tribes’ sovereignty had been limited so that all that remained was the authority to govern people within the limits of their territory: “All the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves.”⁷² This foreshadowed the idea that tribes inherently lacked authority over non-members.

The development of federal common law regarding tribal sovereignty continued in *Cherokee Nation v. Georgia*.⁷³ *Cherokee* involved a challenge by the Cherokee Tribe against the State of Georgia.⁷⁴ The tribe challenged the state’s right to pass legislation affecting the existence of the tribe within the state.⁷⁵ Although the Court did not ultimately decide that issue, the opinion noted that a tribe’s relationship with the United States is “marked by peculiar and cardinal distinctions which exist no where else.”⁷⁶ The opinion coined the

69. U.S. CONST. art. I, § 8, cl. 3.

70. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

71. *Fletcher*, 10 U.S. at 143 (Johnson, J., concurring).

72. *Id.* at 147.

73. 30 U.S. (5 Pet.) 1 (1831).

74. *Id.*

75. *Id.* at 15.

76. *Id.* at 16.

phrasing that tribes were perhaps more properly thought of as “domestic dependent nations.”⁷⁷ This idea was developed further by the Court in *Worcester v. Georgia*.⁷⁸ *Worcester* involved another dispute between the Cherokee Tribe and the State of Georgia.⁷⁹ The question presented in the case involved whether states had jurisdiction to pass laws that would infringe on tribal sovereignty.⁸⁰

Worcester noted that by virtue of aboriginal political and territorial status, tribes possessed certain incidents of preexisting sovereignty.⁸¹ These vestiges of sovereignty were subject to diminution or elimination by the United States, but not by the states.⁸² It is this limited inherent sovereignty and corresponding dependency upon United States for protection that imposed a trust relationship between the tribes and the United States that has been a fundamental part of their relationship ever since.

As time went by, these federal common law concepts were shaped by subsequent treaty developments in the nineteenth-century wars between the United States and Indian tribes. In particular, with respect to the Sioux Tribe, the Fort Laramie Treaty of 1851⁸³ is an important starting point. The treaty sought to end hostilities between various tribes and the United States.⁸⁴ But following additional hostilities, the United States entered into the Fort Laramie Treaty of 1868.⁸⁵ The treaty established The Great Sioux Reservation.⁸⁶ The reservation comprised virtually all of what is now South Dakota west of the Missouri River, as well as part of what is now North Dakota.⁸⁷ The Treaty explicitly recognized a number of tribal powers, including the exclusive right to use reservation lands.⁸⁸

The rights under this treaty were later further modified by Congress. In the Indian General Allotment Act of 1887, Congress

77. *Id.* at 17.

78. 31 U.S. (6 Pet.) 515 (1832).

79. *Id.* at 537–40.

80. *See id.* at 521.

81. *Id.* at 557

82. *See id.*

83. Treaty of Fort Laramie with Sioux, etc., Sept. 17, 1851, 11 Stat. 749 [hereinafter Treaty of Fort Laramie].

84. *Id.* art. 1.

85. Treaty with the Sioux—Brule, Oglala, Minicinjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee—and Arapaho, Apr. 29, 1869, 15 Stat. 635 [hereinafter Treaty with the Sioux].

86. *Id.* art. 2.

87. *See id.* (setting out the boundaries of the reservation).

88. *Id.*

provided non-Indians with fee title to some of the unallotted and surplus lands on the reservation.⁸⁹ Then in the Act of March 2, 1889, Congress greatly reduced the Great Sioux Reservation, replacing it with smaller reservations.⁹⁰ The Cheyenne River Sioux Reservation, located in north-central South Dakota, was the largest of these smaller reservations with boundaries established by the Act that encompassed 2.9 million acres.⁹¹ With the Act of May 29, 1908, Congress further authorized the Secretary of the Interior to open 1.6 million acres of the reservation to homesteading and settlement by non-Indians.⁹² As a result of these (and subsequent) actions by Congress, some of the land within the Reservation boundaries is owned by the Tribe and its members; some is owned by non-members.

The Indian Reorganization Act of 1934 allowed officially recognized tribes to form their own constitutions and governments.⁹³ The Cheyenne River Sioux Tribe, in turn, established tribal bylaws that provided for a tribal court with the power to preside over civil and petty offenses pertaining to all tribal members.⁹⁴ Similarly, the Constitution of the Cheyenne River Sioux provides tribal courts the authority to adjudicate claims or disputes arising among or affecting the Cheyenne River Sioux Tribe.⁹⁵ The Tribe's provisions for its courts, nevertheless, do not answer the question of whether those courts have any authority over non-members.

Two cases, *Oliphant v. Suquamish Indian Tribe*⁹⁶ and *United States v. Wheeler*,⁹⁷ foreshadowed the eventual development of the Montana rule in 1981. *Oliphant* involved a challenge by a non-Indian against a tribe attempting to subject him to criminal liability in tribal court.⁹⁸ The Court ultimately concluded in *Oliphant* that tribes lack the power to try non-Indians for crimes.⁹⁹ *Wheeler* held that tribes retain that

89. See Indian General Allotment Act, ch. 119, § 5, 24 Stat. 388, 389–90 (1887).

90. Act of Mar. 2, 1889, ch. 405, 25 Stat. 888, 888–89 (1889).

91. Dan Barry, *A Rising but Doubtful Dream on a Reservation*, N.Y. TIMES, July 13, 2009, at A10 (stating that reservation consists of 2.9 million acres).

92. Act of May 29, 1908, ch. 218, 35 Stat. 460, 460–462 (1908).

93. Indian Reorganization Act, ch. 576, 38 Stat. 984, 984 (codified as amended at 25 U.S.C. § 461 et seq. (1988)).

94. CONSTITUTION AND BY-LAWS OF THE CHEYENNE RIVER SIOUX TRIBE, art. IV, § 1, available at http://www.tribalresourcecenter.org/ccfolder/cheyennesioux_const.htm.

95. *Id.*

96. 435 U.S. 191 (1978).

97. 435 U.S. 313 (1978).

98. *Oliphant*, 435 U.S. at 194–95.

99. *Id.* at 211.

power to punish member offenders.¹⁰⁰ *Wheeler* states that tribal members are subject to “inherent powers of limited sovereignty that have never been extinguished.”¹⁰¹ Where not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status, tribes retain certain sovereign powers.¹⁰² The precise scope of those retained powers, though, remained undefined.

B. Montana

When discussion turns to the reach and confines of tribal jurisdiction over non-members, arguably, no single case has had more impact on this area of the law than *Montana v. United States*,¹⁰³ and for good reason. *Montana* was and remains the first and perhaps most general expression by the Supreme Court of the bounds of tribal jurisdiction over non-members. Building upon *Oliphant*,¹⁰⁴ a decision which foreclosed the possibility of tribal court jurisdiction over non-Indians in criminal cases, the *Montana* court articulated the now oft-quoted general rule that the “inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe” except under the circumstances of two very narrow exceptions.¹⁰⁵

In *Montana*, the Court was called upon to decide whether the Crow Tribe and the United States as Trustee for the Tribe had sole authority to regulate hunting and fishing within the reservation, particularly within the Big Horn River, or whether the State of Montana had the authority to do so.¹⁰⁶ By tribal regulation, the Crow Tribe of Montana had sought to prohibit hunting and fishing within its reservation by anyone who was not a member of the tribe.¹⁰⁷ After examining various treaties between the United States and the Tribe and other materials, the Court determined that title to the riverbed and corresponding banks passed to the State of Montana upon its admission into the Union.¹⁰⁸ Although the Tribe could prohibit or regulate hunting or fishing by non-members on land belonging to the

100. *Wheeler*, 435 U.S. at 322 (“It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members.”).

101. *Id.* (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945) (emphasis in original)).

102. *Id.* at 323.

103. 450 U.S. 544 (1980).

104. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

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

106. *Id.* at 547.

107. *Id.* at 549.

108. *Id.* at 551–57.

Tribe or held by the United States in trust for the Tribe, it had no power to regulate non-Indian fishing and hunting on reservation land owned in fee by non-members of the Tribe.¹⁰⁹

Importantly, in reaching this decision, the Court focused on the concept of “inherent sovereignty,” explaining that through their original incorporation into the United States as well as specific treaties and statutes, the Indian tribes had lost many of the attributes of sovereignty, particularly as to the relations between a tribe and non-members.¹¹⁰ The Court reasoned that exercise of tribal authority “beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.”¹¹¹ Indeed, as the Court of Appeals had previously noted, it would defy common sense to suppose Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when the very purpose of allotment was elimination of tribal government.¹¹²

Through this contextual lens then, it is clear that the rule set forth in *Montana* (that tribes generally lack jurisdiction over non-members) is inextricably intertwined with the effect of the allotment policies, land alienation, and treaty rights tied to the use and occupation of lands inside a reservation.¹¹³ Taken to its logical end, the theory of inherent sovereignty (or its corollary principle, implied divestiture) necessarily means that once a tribe divests ownership of a piece of land (either through allotment or otherwise), it no longer retains the power to regulate non-member conduct on the land. Accordingly, to determine tribal jurisdiction over a non-member, the analysis must first begin with a determination of land ownership. Thus, assuming the land at issue is owned by a non-member non-Indian, the general *Montana* rule would apply, and the non-member would not be subject to tribal jurisdiction except under two circumstances.

The first exception, commonly referred to as the “consensual relationship” exception, provides that “[a] tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its

109. *Id.* at 557–67.

110. *Id.* at 564.

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

112. *Id.* at 559 n.9.

113. *Id.* at 559–65.

members, through commercial dealing, contracts, leases, or other arrangements.”¹¹⁴ In creating this exception, the Court reasoned that tribes still retained some forms of civil jurisdiction over non-members, even on non-Indian land.¹¹⁵

Similarly, for the second exception, the Court concluded that tribes necessarily retained inherent powers to exercise civil authority over the conduct of non-Indians “when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”¹¹⁶

Viewed from any angle, the “general rule” precluding tribal jurisdiction over non-members is broad and the land ownership component is critical. Since deciding *Montana*, the absence of tribal ownership over non-member lands inside a reservation “has been virtually conclusive of the absence of tribal civil jurisdiction” over a non-member.¹¹⁷ With one minor exception (a zoning case),¹¹⁸ the Supreme Court has never upheld, under *Montana*, the extension of tribal civil authority over non-members on non-Indian fee land inside a reservation.¹¹⁹ Through examination of the principles outlined by the Supreme Court in *Montana*, it becomes readily apparent that the exceptions for cases involving non-member conduct on non-Indian-owned land inside a reservation are rather limited.

C. *Post-Montana*

Since deciding *Montana*, the Supreme Court has, from time to time, been called upon to analyze the scope of tribal jurisdiction over non-members. While some commentators believe the Court has continued to refine the *Montana* analysis since deciding the case nearly thirty years ago, others believe that subsequent decisions have led to further erosion of tribal autonomy which began over two-hundred years ago. We will not debate these principles here, but rather recognize that a dichotomy of opinions on the topic exists. A fair and perhaps neutral observation of this evolving area of the law would be that, at the very least, in decisions following *Montana*, the Supreme Court has put a finer point on the confines of tribal

114. *Id.* at 565 (citing *Williams v. Lee*, 358 U.S. 217, 223 (1959)).

115. *Id.*

116. *Id.* at 566.

117. *Nevada v. Hicks*, 533 U.S. 353, 360 (2001).

118. *See Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989).

119. *Id.*

jurisdiction over non-member activities on non-Indian land inside a reservation than first announced in *Montana*.

In *National Farmers Union Insurance v. Crow Tribe of Indians*,¹²⁰ a case involving a school district and its insurer seeking to prevent an injured schoolboy from executing a default judgment against the school district, the Court considered the potential for tribal civil adjudicatory authority over a non-consenting non-member. Ultimately, the case was resolved through application of the exhaustion-of-tribal-remedies doctrine. The Court characterized the civil adjudicatory question as supporting Congress's commitment to a policy of tribal self-government and self-determination.¹²¹ The Court held that, in order to determine a tribal court's jurisdiction, tribal sovereignty must be examined, including "the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions."¹²²

Later, in *South Dakota v. Bourland*,¹²³ the Court defined the scope of rights enjoyed by Indian tribes, which it first alluded to in *Montana*. Specifically, the Court determined that the Cheyenne River Sioux Tribe had given up, by operation of the General Allotment Act of 1887, the Act of 1889, and the Act of 1908, its right to regulate non-members on non-Indian-owned land inside the reservation.¹²⁴ The Court reasoned that when a tribe or Congress conveys ownership of tribal lands to non-Indians, the tribe loses the right of absolute and exclusive use and occupation of these lands.¹²⁵ According to the Court, "[t]he abrogation of this greater right . . . implies the loss of regulatory jurisdiction over the use of the land by others."¹²⁶ In other words, "the power to regulate is of diminished practical use if it does not include the power to exclude: Regulatory authority goes hand in hand with the power to exclude."¹²⁷

Following *Montana* and *Bourland*, the Court seemingly clarified the intended narrowness of both exceptions in *Strate v. A-1 Contractors*.¹²⁸ In *Strate*, a highway traffic accident occurred on the right-of-way

120. 471 U.S. 845 (1985).

121. *Id.* at 856.

122. *Id.* at 855–56.

123. 508 U.S. 679 (1993).

124. *Id.* at 688.

125. *Id.*

126. *Id.* at 689.

127. *Id.* at 691 n.11.

128. 520 U.S. 438 (1997).

owned by North Dakota, but inside the reservation.¹²⁹ A driver, his employer, the employer's insurer, and the tribal court sought a declaratory judgment that the tribal court lacked jurisdiction to adjudicate claims of a non-Indian driver (the widow of a tribal member and mother of tribal members) for injuries arising out of an automobile accident on a state highway that ran through reservation land.¹³⁰ The Court held that when the accident occurred on a portion of a public highway maintained by the state under a federally granted right-of-way over Indian reservation land, tribal courts could not entertain a civil action against the allegedly negligent driver or the driver's employer, neither of whom was a member of the tribe.¹³¹ It was held that absent a statute or treaty authorizing the tribe to govern the conduct of non-members on the highway in question, the court would not have jurisdiction.¹³² The Court determined this piece of land to be the equivalent of the alienated, non-Indian lands at issue in *Montana, Brendale, and Bourland*.¹³³ For that reason, the Court found that the case fit within the general rule announced in *Montana*, declaring that tribes lack authority to regulate or adjudicate the conduct of non-members on non-Indian land inside a reservation absent one of two exceptions.¹³⁴

The *Strate* decision is important for two reasons. First, with regard to the "consensual relationship" exception, the Court provided litigants with an outer boundary for determining whether a pre-existing relationship between a non-member and member falls within the "consensual relationship" exception.¹³⁵ *Strate* involved an automobile accident where the driver was on alienated land inside a reservation as a result of his company contracting with the tribe to perform various work inside the reservation.¹³⁶ The Court concluded this was not enough to satisfy the consensual relationship exception because the automobile accident was itself too attenuated from or beyond the scope of whatever consensual relationship existed between the driver, his employer, and the tribe.¹³⁷

Similarly, with respect to the second *Montana* exception concern-

129. *Id.* at 454–55.

130. *Id.* at 438.

131. *Id.*

132. *Id.*

133. *Id.* at 440.

134. *Montana v. United States*, 450 U.S. 544, 564–65 (1980).

135. *Strate*, 520 U.S. at 440.

136. *Id.*

137. *Id.*

ing conduct that threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe, the Court concluded that the seminal question is whether a State's or Territory's exercise of authority would trench unduly on tribal self-government.¹³⁸ The Court quickly concluded that this exception was not invoked in a pedestrian automobile accident.¹³⁹ Furthermore, the Court rejected the argument that *Montana's* general rule against tribal authority over non-members applied only to regulatory (as opposed to adjudicatory) authority, holding that a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.¹⁴⁰

Following *Strate*, the Court elaborated upon the "consensual relationship" exception in *Atkinson Trading Co. v. Shirley*.¹⁴¹ In *Atkinson*, the Court concluded that the Navajo Nation could not tax non-tribal member guests of a hotel located on non-Indian fee land within the reservation.¹⁴² In doing so, the Court reaffirmed the principles underlying the general rule precluding tribal jurisdiction over non-members, that "Indian tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory,' but their dependent status generally precludes extension of tribal civil-authority beyond these limits."¹⁴³ The Court rejected the Navajo Nation's contention that a consensual relationship existed between the guest and the Tribe based on the guest's acceptance of benefits from services potentially rendered by the Tribe.¹⁴⁴ Rather, the Court found that receipt of such services did not satisfy the requisite relationship prong of the first exception.¹⁴⁵ According to the Court, if that were the case, the exception would swallow the rule as all non-Indian fee lands within a reservation benefit, to some extent, from the advantages of a civilized society offered by the Indian tribe.¹⁴⁶

In contrast to the developed body of case law regarding the first *Montana* exception, there is no comparable line of cases for the second *Montana* or "adjudicatory" exception. Since articulating the second exception in 1981, the Court has never applied it to find that a tribe had civil adjudicatory authority jurisdiction over a non-member

138. *Id.*

139. *Id.*

140. *Id.*

141. 532 U.S. 645, 656–57 (2001).

142. *Id.* at 659.

143. *Id.*

144. *Id.* at 654.

145. *Id.* at 655.

146. *Id.*

defendant. At present, it merely remains an unrealized possibility.

IV. THE *PLAINS COMMERCE BANK* OPINION

For nearly eight years after deciding *Hicks* and *Atkinson*, the Supreme Court left open the question whether a commercial business relationship between a non-Indian owning fee land and a tribal member would allow the tribal court to exercise jurisdiction over the non-member as an “other means” of regulating its conduct under the *Montana* “consensual relationship” exception. In a 5–4 majority decision in *Plains Commerce Bank v. Long Family Land and Cattle Co.*, the Supreme Court answered this question in the negative, upholding thirty years of precedent.¹⁴⁷

To say the facts of *Plains Commerce Bank* presented the Court with a clear-cut answer under *Montana* and its progeny would be a gross overstatement. The lending relationship between the parties had become convoluted over time and the trial and appellate records facing the Court were anything but clear.¹⁴⁸ Moreover, from a policy perspective, implications of the Court’s decision would be far reaching regardless of the outcome.

The Court quickly disposed of arguments that the Bank lacked standing to bring the appeal,¹⁴⁹ or that a relatively pedestrian commercial lending relationship between the Bank and a South Dakota corporation somehow invoked tribal welfare or political and economic interests of the “catastrophic” magnitude sufficient to invoke the second *Montana* “civil adjudication” exception.¹⁵⁰ The Court focused its analysis on the *Montana* general rule and the first or “consensual relationship” exception, and this is where we will focus our analysis.¹⁵¹

The linchpin of the Court’s decision is remarkably simple: the first *Montana* exception contemplates regulation of conduct of a non-member, but said conduct does not include the non-Indian to non-Indian sale of already non-Indian-owned fee land.¹⁵² This distinction can only fully be understood by going back to the very roots of over two hundred years of American jurisprudence concerning relations between the United States and the Indian tribes.

In deciding *Montana* and subsequent “first exception cases,” the

147. 128 S. Ct. 2709, 2723–26 (2008).

148. *Id.* at 2715–16.

149. *Id.* at 2716–18.

150. *Id.* at 2726–27.

151. *Id.* at 2721–26.

152. *Id.* at 2723.

Court has adhered unwaveringly to the concept of implied divestiture, a concept grounded in the allotment acts enacted by Congress during the formative years of this country, as discussed above.¹⁵³ Tribes are, in essence, nations within a nation, a relationship unlike that of any other.¹⁵⁴ By virtue of this “reduced” status, they possess sovereignty only to the extent necessary to protect the political integrity, health, and welfare of their members.¹⁵⁵ This is where their sovereignty ends.¹⁵⁶ As a result, courts have allowed regulation of non-member conduct on fee land only in cases that “flow directly from these limited sovereign interests.”¹⁵⁷ In *Duro v. Reina*,¹⁵⁸ for example, the Court found that the tribes retained power to exclude persons from tribal land, and gave tribes the power to set conditions on entry to that land via licensing requirements and hunting regulation.¹⁵⁹ Similarly, the tribe’s power to tax certain items is retained “insofar as taxation enables a tribal government to raise revenues for its essential services.”¹⁶⁰

Regulation of the sale of non-Indian fee land is nothing of the kind. Unlike the aforementioned types of regulation, it cannot be justified by mere reference to the tribe’s remaining sovereign interests. As articulated by the Court, “[b]y definition, fee land owned by non-members has already been removed from the tribe’s immediate control.”¹⁶¹ Thus, tribes “cannot justify regulation of such land’s sale by reference to its power to superintend tribal land, then, because non-Indian fee parcels have ceased to *be* tribal land.”¹⁶² Tribal retained interests in protecting internal relations and self-government with respect to regulation of non-member owned fee land is necessarily unavailing for the same reason.

In *Plains Commerce Bank*, the Court put a fine point on what it considered to be regulation beyond the inherent retained powers of tribes.¹⁶³ However, it left open the possibility that certain uses by non-members of non-Indian-owned fee land may be regulated by the Tribe if said uses were noxious or otherwise threatened tribal welfare or

153. *Id.*

154. *Id.* at 2718.

155. *Id.*

156. *Id.* at 2718–19.

157. *Id.* at 2723.

158. 495 U.S. 676 (1990).

159. *Id.* at 687.

160. *Plains Commerce Bank*, 128 S. Ct. at 2723.

161. *Id.*

162. *Id.* (emphasis added).

163. *Id.* at 2724, 2728.

security.¹⁶⁴ Such regulation, though, was only allowed to the extent necessary to curb non-member activities relating to use of the land, not the mere act of its resale, which, in this case, respondents alleged gave rise to the tribal discrimination claim at issue.¹⁶⁵

Needless to say, the dissenting Justices saw things differently. Justice Ginsberg filed an opinion concurring in part, concurring in the judgment in part and dissenting in part, joined by Justices Stevens, Souter, and Breyer.¹⁶⁶ In its scintillating opinion, the dissent charged the majority with having failed to follow the principles espoused in *Montana* and subsequent decisions by creating an artificial distinction between the sale of non-Indian fee land and other types of regulation presumably allowed under the plain language of the first *Montana* exception—for example, regulation of “commercial dealing, contracts, [and] leases,” a result the dissent found “perplexing.”¹⁶⁷ Given inclusion of the word “lease” within the language of the first *Montana* exception, the dissent posed the question “why should a non-member’s lease of fee land to a member be differentiated, for *Montana* exception purposes, from a sale of the same land?”¹⁶⁸ The answer is “implied divestiture,” and the analysis, going back to *Montana*, begins with the ownership of the land.

To begin with, reservation land leased by a tribal member to a non-member is of a different character than that of non-Indian fee land, the latter type having already been alienated by the tribe. *Bourland* and *Strate* teach that under the notion of implied divestiture, the tribe no longer possesses (or possesses to a much lesser extent) the ability to regulate the non-Indian fee land.¹⁶⁹ Thus, as the argument goes, once the tribe (or Congress) permits the sale of the land to a non-Indian, the tribe necessarily divests itself of its inherent sovereign power to regulate the non-member’s sale of the land. Regulation of a non-Indian land sale is beyond the inherent powers retained by the tribe to provide for the political integrity, welfare, health, or governance of the internal relations of its members.¹⁷⁰

The analysis then proceeds to look at the “consensual relationship” at issue, which *Strate* and *Atkinson* have taught is not all encom-

164. *Id.* at 2724.

165. *Id.* at 2725.

166. *Id.* at 2727.

167. *Id.* at 2730 (Ginsburg, J., dissenting).

168. *Id.*

169. *Id.* at 2719–20 (majority opinion).

170. *Id.* at 2723–24.

passing.¹⁷¹ Stated succinctly, a relationship between a tribe and member giving rise to tribal regulation over the non-member's conduct in one area does not necessarily mean that the tribe can regulate all other areas of conduct. It is not "in for a penny, in for a pound."¹⁷² In *Plains Commerce Bank*, the Court noted that the commercial lending relationship and contractual claims between the Bank and petitioners were not at issue.¹⁷³

The key to the Court's analysis was recognizing that that Longs were attempting to "re-characterize their claim as turning on the bank's alleged failure to pay to respondents loans promised for cattle-raising on tribal trust land" when, in fact, "the Longs brought their discrimination claim seeking to have the land sales set aside on the ground that the sale to non-members 'on terms more favorable' than the bank had extended to the Longs" violated tribal tort law.¹⁷⁴ In essence, the Longs' discrimination claim "challenge[d] a non-Indian's sale of non-Indian fee land" and the tribal tort law the Longs attempted to enforce, according to the Court, "acted as a restraint on alienation."¹⁷⁵ This distinction is important, because, as the Court noted, "*Montana* does not permit Indian tribes to regulate the sale of non-Indian fee land. *Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests."¹⁷⁶

The reasoning underpinning this fine distinction can perhaps best be understood by keeping in mind the limited purpose of the two *Montana* exceptions, which is to allow tribes to regulate non-members *only* to the extent necessary to "protect tribal self-government [and] to control internal relations."¹⁷⁷ Looking at the case in this way, the Court necessarily concluded that regulation by the tribe of a non-Indian sale of non-Indian land was beyond the intended purpose of the first *Montana* exception.¹⁷⁸ Following this reasoning, the Court determined that the characteristics of the non-Indian, non-member owned land precluded its sale from being a non-member activity subject to tribal regulation.¹⁷⁹ Further, the Court's opinion suggests

171. *Id.* at 2725.

172. *Id.* at 2724 (citation omitted).

173. *Id.* at 2720.

174. *Id.*

175. *Id.* at 2720–21.

176. *Id.* at 2721.

177. *Id.* (citation omitted).

178. *Id.*

179. *Id.*

that the tribal discrimination claim was also too attenuated from even the commercial lending relationship between the Bank and the Long Family Land and Cattle Company to have allowed the tribal court to exercise jurisdiction over the Bank.¹⁸⁰

In the final analysis, there will surely be wildly varying views on the current state and future direction of tribal jurisdiction. While some will praise the Court's decision as keeping in line with *Montana* and its progeny, others will surely criticize it. One thing is for certain though, the *Plains Commerce Bank* decision provides members with a brighter line for determining the outer boundaries of tribal regulation over non-members than ever before. In a nutshell, tribes lack jurisdiction to regulate or adjudicate a non-Indian's sale of non-Indian fee land inside a reservation because this non-member activity is beyond the intended purpose and scope of the *Montana* exceptions, which only permit tribes to exercise jurisdiction over non-members on non-Indian lands inside a reservation to the extent necessary to protect tribal self-government or to control internal relations. As discussed below, this is something from which both tribes and non-members may one day benefit.

V. IMPLICATIONS FOR TRIBAL JURISDICTION

The road to understanding tribal jurisdiction over non-members arguably became a little smoother in light of the *Plains Commerce Bank* decision. Yet, there are still potholes left to be filled. Retired baseball pitcher Vernon Sanders Law is credited with saying that "experience is a hard teacher because she gives the test first, the lesson afterwards."¹⁸¹ If that is the case, and *Plains Commerce Bank* was the "test," what lessons have we learned?

First and foremost, inclusion of choice of forum and law provisions in the lending agreement between the Bank and the Long Family Land & Cattle Co. might have negated the entire lawsuit altogether. Though the contract was not directly at issue in the appeal, one must wonder what would have happened had the loan agreement between the parties contained language similar to the following: "any and all disputes arising from or relating to this agreement shall be heard in South Dakota Court and be governed by South Dakota law." Indeed, the case may very well have never wound

180. *Id.*

181. JOSEPH TELUSHKIN, UNCOMMON SENSE: THE WORLD'S FULLEST COMPENDIUM OF WISDOM 118 (1987).

up before the Supreme Court as the parties' intent regarding jurisdiction over claims arising from or relating to the lending relationship would have been clear from the outset. Of course, there is no guarantee inclusion of this language would have avoided litigation altogether, or that it would have precluded the tribal courts from hearing the case in the first instance.

But supposing the parties' agreement did contain South Dakota choice of law and forum selection clauses, would the parties have needed to litigate the matter to finality in tribal court before the Bank could seek an injunction in federal court by raising jurisdictional arguments? The answer is probably "no." *National Farmers Union v. Crow Tribe of Indians*, an exhaustion case, teaches that as a general proposition, a tribal court should be afforded the opportunity in the first instance to carefully examine whether it has the power to exercise civil subject matter jurisdiction over non-Indians.¹⁸² The caveat to this proposition is that exhaustion is not required where assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."¹⁸³

An agreement between parties containing forum and choice of law provisions other than tribal court would seemingly negate the parties' need to litigate the matter in tribal court in the first instance. Under those circumstances, a credible argument could be made that the party seeking to have the matter heard in tribal court acted in bad faith by disregarding the plain language of the agreement. Moreover, it could be argued that the choice of law and forum selection clauses operate as a "jurisdictional prohibition" under the caveat to the exhaustion principle set forth in *National Farmers Union*.

The issue of consent to tribal court jurisdiction is arguably no clearer following the *Plains Commerce Bank* decision. The Court's analysis suggests that if a non-member were to explicitly consent to tribal court jurisdiction, as in the case of a contractual choice of forum clause, then perhaps the tribal court would have jurisdiction. Much less clear, however, is whether it would be possible for a non-member to implicitly consent to tribal court jurisdiction.

One potential route for such consent might be through conduct. There is a suggestion in the *Plains Commerce Bank* opinion that if

182. 471 U.S. 845, 856 (1985).

183. *Id.* at 857 n.21.

conduct showing implicit consent to tribal court jurisdiction was sufficiently connected to the consensual relationship contemplated by the first *Montana* exception, then perhaps there would be jurisdiction. But the Court has never held that. Indeed, the *Plains Commerce Bank* opinion addressed the absence of jurisdiction in the reverse situation: conduct where the tribe sought to attach jurisdiction that was unrelated to the contract between the parties. *Strate* and *Plains Commerce Bank* could be read together to support the conclusion that a non-member's consent to tribal court adjudication of a dispute should be actual and clear.

Problems remain, however, for a non-member defendant who finds himself defending a lawsuit in tribal court. For example, The Bill of Rights and the Fourteenth Amendment do not apply to Indian tribes.¹⁸⁴ And the handful of analogous safeguards enforceable in tribal court under the Indian Civil Rights Act of 1968¹⁸⁵ are not identical.¹⁸⁶ The presumption against tribal-court civil jurisdiction therefore squares with one of the principal policy considerations underlying *Oliphant*: an overriding concern that non-member citizens be "protected . . . from unwarranted intrusions on their personal liberty."¹⁸⁷

But it must not be forgotten that tribes do not possess sovereignty comparable to that of a foreign country; they are not an equal partner in the scheme of federalism. The Supreme Court can review federal court decisions. Courts in the state system are both potentially subject to review by the Supreme Court and operate subject to a qualified right of removal to federal courts. The tribal court system, however, is separate and unique. It is wholly distinct from traditional courts of general jurisdiction. Other than jurisdictional questions, federal courts provide no substantive review of tribal court proceedings. Thus, the tribal court system lacks adequate structural protections against abridging non-member defendants' constitutional rights. For this reason, tribal courts' power to adjudicate members' claims against non-members should be constrained. To this point, the Supreme Court has denied tribal courts broad jurisdiction over non-member defendants who stand outside members' political relationships to their tribes.

184. *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., concurring).

185. 25 U.S.C. § 1302.

186. *Hicks*, 533 U.S. at 384 (Souter, J., concurring) (quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 (1978)).

187. *Id.* (quoting *Oliphant*, 435 U.S. at 210).

At present, tribal courts still lack an important safeguard that exists in the federal system with respect to state court jurisdiction. Congress has explicitly provided for a statutory right of removal from state court based on either federal-question jurisdiction or diversity of citizenship jurisdiction.¹⁸⁸ To date, Congress has not provided for a right of removal from tribal court to federal court, though it could presumably do so. If a right to removal existed that allowed non-member defendants to remove cases from tribal court to federal court, there would at least be a procedural safeguard against the imposition of tribal court jurisdiction over a non-member defendant's objection.

As it stands now, however, a non-member defendant in tribal court who wishes to challenge that jurisdiction must first arguably exhaust tribal court remedies. Upon then bringing a jurisdictional challenge in federal court, the non-member defendant may only seek review of the jurisdictional question, not the underlying merits. Providing a right of removal or providing a means for review of the merits on proper appeal from tribal court would represent a step toward a fairer and more uniform system.

IV. CONCLUSION

The *Plains Commerce Bank* opinion represents the most recent development in a long line of U.S. Supreme Court jurisprudence defining the scope of tribal sovereignty. Although it does not definitively answer the question of whether a tribal court could have jurisdiction over a non-member defendant, it seemingly makes the barriers to that more formidable without outright prohibiting the possibility. The opinion appears to narrow the *Montana* exceptions by interpreting them with language that tends toward a more limited reading of the text of the exceptions. By doing so, the *Plains* opinion necessarily strengthens the general rule from *Montana* that tribes generally lack authority over non-members.

Though the Supreme Court left open, for now, the ultimate question as to whether tribes have jurisdiction over non-member defendants, continued economic interaction between tribes and non-members almost assures that the Court will find itself required to answer this question in the near future.

188. 28 U.S.C. §§ 1331–32 (2008); 28 U.S.C. § 1441 (2008).