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THE BANK BEGAN TREATING THEM BADLY: *PLAINS COMMERCE BANK*, THE SUPREME COURT, AND THE FUTURE OF TRIBAL SOVEREIGNTY

Cullen D. Sweeney*

I. Introduction

The sovereign status of Indian tribes in the United States is an endangered species in the menagerie of legal ideals: everywhere stalked, cornered, and assailed by arrows of law. Existing at the sufferance of the judiciary, the Indian sovereignty that was once a monument of inherent strength has become a hunted and harrowed thing. In *Plains Commerce Bank v. Long Family Land & Cattle Co.*,¹ the United States Supreme Court held that Indian tribes lack authority to regulate sales of non-Indian-owned fee land located within reservation boundaries and by that same token also lack power to adjudicate disputes arising from those transactions.²

This note argues that the Court's decision in *Plains Commerce Bank* represents another significant step in the steady erosion not only of Indian sovereignty but also of the Court's foundational principles of Indian law.³ This has not happened accidentally. By tightly circumscribing the ability of tribes to regulate the activities of nonmembers while upon reservations—activities bearing directly on tribal interests—the Court has deliberately subjugated the rights of tribes to the rights of outsiders on their own land. In stripping tribes of key sovereign powers of self-determination and autonomy through misguided fiat, the Court also substantially forecloses the possibility of genuine social, political, and economic progress on reservations. It creates a cycle of weakness and dependency: everything, in short, that a strong and meaningful sovereignty would never countenance.

This note's overarching arguments are threefold. First, despite the abundantly chronicled mistreatment of Indians during the settlement of the United States, the Supreme Court crafted a legal doctrine which, even if largely only in theory, acknowledged an inherent, substantial, and largely unbroken tribal sovereignty. Second, *Plains Commerce Bank* stands as the

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

2. *Id.* at 2714.

3. See WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* (4th ed. 2004).

current culmination of the modern Supreme Court's efforts, now thirty years in the making, to diminish and destabilize Indian sovereignty through a jurisprudence that respects neither *stare decisis* nor the rights of tribes to exist as self-defining (albeit fully accountable) polities within the boundaries of the United States. Third, the economic viability (and thus the continued existence) of Indian tribes can be guaranteed only through a legitimate, binding recognition of their sovereign and inalienable rights—a recognition the Court today obdurately refuses to afford.

With *Plains Commerce Bank* the Supreme Court has doubly erred. First, with a casuistry bordering on contempt, the Court unapologetically misreads its own modern standard for the valid exercise of tribal civil jurisdiction over nonmembers, as set forth in 1981's landmark case *Montana v. United States*.⁴ Secondly and equally damagingly, the Court manipulates the criteria for consent to tribal court jurisdiction, robbing tribes of the power to create and cultivate effective legal institutions on reservations. By yoking dubiously interpreted precedent in service of questionable policy, the Court has ushered into the annals of jurisprudence a decision that works to the undeniable detriment of tribes while lavishing ill-gained benefits on possibly exploitative outsiders.

First, the foundation: Part II of this note chronicles the history of the Supreme Court's major Indian law decisions from its first significant pronouncement on the subject, by Chief Justice John Marshall in 1823's *Johnson v. M'Intosh*,⁵ and thereby traces to the Marshall Era a broad judicial acknowledgment of the substantial panoply of rights retained by Indian tribes within their reserved territories over Indians and non-Indians alike. The second half of Part II summarizes the (quite literally) unprecedented sea change in the Court's conceptualization of Indian sovereignty over recent decades, a shift manifesting a less-than-subtle determination to relegate tribal sovereignty to the status of quaint historical relic—a begrudging nod to the benighted but harmless traditions of an alien enclave in the midst of a world that has long since passed it by.

Part III examines the most recent manifestation of this anti-autonomy tack in Supreme Court jurisprudence, *Plains Commerce Bank*, through that case's facts and procedural history, issues, and holding. Part IV discusses how unstable precedent and flawed policy coalesced in *Plains Commerce Bank* into a presumptive jettisoning of Indian sovereign powers both regulatory and adjudicatory over non-Indians on reservations, even when logic and experience

4. 450 U.S. 544 (1981).

5. 21 U.S. (8 Wheat.) 543 (1823).

dictate that such assertions of authority are of paramount importance to compelling tribal interests. By misapplying *Montana*⁶ and holding that tribes do not possess regulatory authority over non-Indian-owned fee land sales involving non-Indians within reservation boundaries—and that tribal courts thus lack authority to adjudicate claims arising from a non-Indian's sale of fee land⁷—the Court in *Plains Commerce Bank* has intentionally blinded itself to the insistent truth that a people's control over their own land is inextricably linked to their continued vitality as a functioning political unit. By weakening the traditional legal underpinnings of tribal sovereignty, the Supreme Court has created the ideal conditions for a devastating reduction in the ability of tribes to govern not only non-Indians, but even their own members.

Part V proposes that the only viable outlet for a tribe's meaningful confrontation with the social problems, political realities, and economic demands of the modern United States is through an ironclad judicial and legislative recognition of a robust, inviolable Indian autonomy. To deprive Indian tribes of the practical ability to manage their own interests, even though those interests may sometimes bear materially on the rights of non-Indians, is to force those tribes into stagnation, isolation, and irrelevance as viable political entities within the greater boundaries of the United States. Poverty and hopelessness must be the expected, if not the intended, result of such impotence. And with that result achieved, the ability of tribes ever to reassert their true sovereign powers would be rendered a cruel and farcical nullity. The ideals of American democracy, the ingenuity of American economics, and the integrity of American law would be enhanced, not enervated, by embracing a resurgent tribal sovereignty drawn within parameters of reason rather than outmoded racial rancor. This note concludes in Part VI.

II. The Supreme Court and Tribal Sovereignty, pre-Plains Commerce Bank

A. The Marshall Trilogy

The foundations of Supreme Court Indian law jurisprudence find their genesis in three landmark opinions written by Chief Justice John Marshall, generally known as the Marshall Trilogy: *Johnson v. M'Intosh*,⁸ *Cherokee Nation v. Georgia*,⁹ and *Worcester v. Georgia*.¹⁰ Collectively, these decisions

6. 450 U.S. 544.

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

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

9. 30 U.S. (5 Pet.) 1 (1831).

10. 31 U.S. (6 Pet.) 515 (1832).

“fashion[ed] legal doctrines that would influence Indian Law for the next century and a half.”¹¹ Despite profound encroachments on tribal interests by the actions of the executive and legislative branches, the Marshall formulation remained basically untouched in Supreme Court case law until a series of decisions radically reevaluating tribal sovereign powers began to issue forth in the late 1970s.¹²

Chief Justice Marshall’s 1823 *Johnson* opinion marked the first time “the Supreme Court attempted to formulate its views of Indian tribes and their legal and historical relation to the land.”¹³ Indeed, the *Johnson* decision has been called “without question, the most important Indian rights opinion ever issued by any court of law in the United States.”¹⁴ In *Johnson*, Marshall acknowledged that the insoluble historical fact of European conquest in the Americas unavoidably subtracted from the absolute sovereignty formerly exerted by Indian tribes: their sovereign rights were “necessarily, to a considerable extent, impaired.”¹⁵ Marshall, however, defines the scope of this “impairment” in language directly suggesting a diminishment far less substantial than the limitations perceived by today’s Court by narrowly framing the loss of sovereign rights in terms of the unfettered alienability of property. Though admitting Indian tribes to be the original “rightful occupants of the soil,” Marshall explained that those tribes’ “rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.”¹⁶

At the outset, the irony of Marshall’s statement about the “discovery” of America must be accepted as articulating a historical *fait accompli* that, no matter how bitter, exists beyond argument, irrevocably engrained in the grand narrative of the United States. For the purposes of this note, the pragmatic significance of Marshall’s opinions instead flows from his explicit enumeration of sovereign rights lost by Indian tribes. Moreover, an examination of the principal tenets of Indian policy at the time of the United

11. CANBY, *supra* note 3, at 14.

12. *Id.* at 76; see also COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 220 (Nell Jessup Newton et al. eds., Michie 2005) [hereinafter COHEN] (“[B]eginning in 1978, the Supreme Court has substantially limited tribal power over nonmembers.”).

13. CANBY, *supra* note 3, at 14.

14. ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 51 (2005).

15. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823).

16. *Id.*

States' founding reveals the official recognition that "the Indian territory was entirely the province of the tribes, and they had jurisdiction in fact and theory over all persons and subjects present there."¹⁷

After narrowing the bounds of Indian sovereignty by curtailing tribes' ability freely to alienate their land, Marshall later went on, in *Worcester v. Georgia*,¹⁸ to introduce a closely linked corollary to the *Johnson* limitation. Having earlier characterized Indian tribes as "domestic dependent nations,"¹⁹ Marshall asserted Indian tribes had "retain[ed] their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer."²⁰ Additionally, Marshall affirmed that a "nation" meant "a people distinct from others,"²¹ a category as readily applicable to Indian tribes as "to the other nations of the earth."²²

Through the trilogy of *Johnson*, *Cherokee Nation*, and *Worcester*, the Supreme Court established under the aegis of Chief Justice Marshall "a view of the tribes as nations whose independence had been limited in only two essentials—the conveyance of land and the ability to deal with foreign powers."²³ Rather than regarding Indian sovereignty as a feeble fiction vainly clutched by a broken people, the Supreme Court instead recognized tribes as retaining an inherent nationhood imbued with rights that had definitely not been wholly bent to the conqueror's will. Though the reality of conquest and "discovery" remained unavoidable for the tribes and the Court, Chief Justice Marshall displays an emphatic willingness to consider Indian tribes as distinct and self-contained polities within the greater corpus of the United States. To the extent tribal interests did not directly offend the federal government's own sovereign interests by signing treaties with foreign nations or selling land "to whomsoever they pleased,"²⁴ Indian autonomy within the boundaries of their own territory remained, in the established view of the Supreme Court, intact.

17. CANBY, *supra* note 3, at 133.

18. 31 U.S. (6 Pet.) 515 (1832).

19. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

20. *Worcester*, 31 U.S. (6 Pet.) at 559.

21. *Id.*

22. *Id.* at 560.

23. CANBY, *supra* note 3, at 74.

24. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823).

B. The Modern Supreme Court's Erosion of Indian Sovereignty

The limitations on inherent tribal sovereignty established in the Marshall Trilogy guided judicial principle during the entire course of America's westward expansion and development: "For nearly 150 years following the Cherokee cases, no additional limitations on tribal sovereignty were found to inhere in domestic dependent status."²⁵ In 1978, however, the Court suddenly struck a profound and unexpected blow against established understandings of Indian sovereign authority by holding that "Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress."²⁶ Though acknowledging that "Indian tribes do retain elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the federal government,"²⁷ then-Justice Rehnquist found a tribe's assertion of criminal jurisdiction over criminal acts committed by non-Indians within reservations to be impermissible given that the tribes are "fully subordinated to the sovereignty of the United States."²⁸

The logic of *Oliphant* hinged upon the Court's newfound obeisance, trumpeted with a proselyte's zeal, to the "implicit conclusion"²⁹ and "commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians."³⁰ In so peremptorily stripping tribes of criminal jurisdiction over non-Indians, *Oliphant* necessarily relied on the nebulous "authority" of implication and presumption, for no such deprivation of sovereign rights had ever been sounded explicitly, neither through statute nor through the foundational edicts of the Marshall Trilogy.³¹ Absent any direct grounding in statute or case law, *Oliphant*'s pronouncements on Indian sovereignty exist as a sort of judicial virgin birth, unable to claim precedent as patrimony, supported only by the Court's unblinking certitude in proclaiming a tribe's criminal jurisdiction over non-Indians as "*inconsistent with their status*."³² Through an act of judicial

25. CANBY, *supra* note 3, at 76.

26. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

27. *Id.*

28. *Id.* at 211.

29. *Id.* at 204.

30. *Id.* at 206.

31. See CANBY, *supra* note 3, at 76-77.

32. *Oliphant*, 435 U.S. at 208 (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976), *rev'd*, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)). Curiously, the Court in *Oliphant* enthusiastically adopted the letter but not the logic of the Ninth Circuit's opinion.

prestidigitation unburdened by the constraining niceties of stare decisis, the *Oliphant* Court blazed a trail for “discovering” new limitations on inherent tribal sovereignty, guided neither by the lessons of history nor the precepts of law, but rather by a barely concealed hostility to a tribe’s right to realize its own vision of its own future. From its inception, “*Oliphant* represented a significant potential threat to tribal governmental power. The threat was not long in being realized.”³³

Three years after *Oliphant* unceremoniously limited the scope of tribal criminal jurisdiction, the Court applied the same rationale to circumscribe tribal civil jurisdiction over non-Indians in *Montana v. United States*.³⁴ *Montana* employed “the principles on which [*Oliphant*] relied”³⁵ to deny tribes the civil authority to regulate hunting and fishing by non-Indians on non-Indian-owned fee land within a reservation.³⁶ *Montana*, like *Oliphant* before it, rooted its reasoning in “the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”³⁷ Writing for the majority, Justice Stewart elaborated on this novel rethinking of tribal sovereign status that originated in *Oliphant*, asserting that the “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.”³⁸

In light of this newly minted “general proposition”³⁹ limiting inherent Indian sovereignty, *Montana* then sets forth two situations—exceptions—where tribes may still permissibly “exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands”⁴⁰:

A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also

The Court did not just borrow but actually added emphasis to the phrase “*inconsistent with their status*”—and then turned the Ninth Circuit’s words against it, reversing that court’s judgment affirming tribal criminal jurisdiction over non-Indian violators of tribal law on reservations.

33. CANBY, *supra* note 3, at 77.

34. 450 U.S. 544 (1981).

35. *Id.* at 565.

36. *Id.* at 566.

37. *Id.* at 565.

38. *Id.* at 564.

39. *Id.* at 565.

40. *Id.*

retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.⁴¹

Holding that hunting and fishing by non-Indians on the reservation fee lands in question neither established a commercial relationship nor created a situation that would “so threaten the Tribe’s political or economic security as to justify tribal regulation,”⁴² *Montana* laid the groundwork and provided the analytical apparatus to justify the modern Court’s antipathy toward a meaningful assertion of tribal civil jurisdiction on reservation lands.

As interpreted by today’s Court, the *Montana* decision casts a long and stifling shadow over the reasonable boundaries of Indian sovereignty. Though *Montana* could stand only on the dwarfish shoulders of *Oliphant* for precedential legitimacy, and though on its specific facts the case only “announced an exception to the general rule that a tribe has governmental power over its territory unless some statute or treaty takes it away, subsequent Supreme Court opinions have tended to refer to the ‘*Montana* rule,’ not the ‘*Montana* exception.’”⁴³ Not only does *Montana* “continu[e] to gain strength,” but it actually “appears to have become the foundation case for contemporary Indian law in the Supreme Court.”⁴⁴ As such, *Montana* has become a formidable barrier to tribal authority, its “exceptions” molded and manipulated by a Court today thoroughly disinclined to acknowledge the genuine extent of tribal interests.

The Court’s aggressive reluctance to recognize substantial tribal sovereign rights, besides standing contrary to established precedent, also clashes with current executive and legislative trends in fostering Indian sovereignty:

In the modern era, Congress and the executive branch have reaffirmed the core principle of federal Indian law, that apart from alienating tribal land and treating with foreign nations, Indian tribes retain their original inherent sovereign authority over all persons, property, and events within Indian country unless Congress clearly and unambiguously acts to limit the exercise of that power.⁴⁵

41. *Id.* at 565-66 (citations omitted).

42. *Id.* at 566.

43. CANBY, *supra* note 3, at 78.

44. *Id.*

45. COHEN, *supra* note 12, at 224-25. In one particularly noteworthy instance, Congress acted promptly to supersede the Court after it held, contrary to historical tradition and legal

With the support of neither established precedent nor legislative intent nor official public policy to bulwark its aversion to meaningful Indian sovereignty, today's Court instead must rely upon "a judicially crafted theory" of "implicit divestiture"⁴⁶ to "creat[e] policy-driven limitations on inherent tribal powers."⁴⁷ Conveniently for today's Court, this theory's murky origins permit it considerable malleability.

The 1978 decision of *United States v. Wheeler* refers to a "sovereign power . . . which the Indians implicitly lost by virtue of their dependent status" and also notes that "[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."⁴⁸ Based on *Wheeler*'s facts, however, the context of these pronouncements suggests something far less promethean than the judicial advocates of implicit divestiture would care to admit.⁴⁹ Despite grave concerns that the continued application of *Montana*'s reasoning to set the boundaries of tribal authority "is inconsistent with this Court's past decisions and undermines the Federal Government's longstanding commitment to the promotion of tribal autonomy,"⁵⁰ a generation of Justices have now used *Montana*'s "general proposition"⁵¹ to cudgel and curb tribal sovereign rights.

precedent, that tribes lacked sovereign authority even over other *Indians* on reservations. *Duro v. Reina*, 495 U.S. 676 (1990), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in* *United States v. Lara*, 541 U.S. 193 (2004).

46. COHEN, *supra* note 12, at 225.

47. *Id.* at 228.

48. *United States v. Wheeler*, 435 U.S. 313, 326 (1978) (holding the criminal prosecution of a tribal member in federal court not barred by Double Jeopardy Clause of Fifth Amendment when tribal defendant previously had been convicted of lesser-included offense in tribal court).

49. See *Brendale v. Yakima Indian Nation*, 492 U.S. 408, 452 n.3 (1989) (plurality opinion) (Blackmun, J., dissenting) ("*Wheeler* simply stands for the uncontroversial proposition that those specific aspects of inherent sovereignty that necessarily have been divested (criminal jurisdiction over non-Indians, alienation of land, and foreign relations) involve tribal relations with non-Indians."). In other words, *Wheeler*'s invocation of implicit divestiture does nothing more remarkable than restate the Court's traditional understanding of Indian sovereignty as set forth in the Marshall Trilogy, each case of which the *Wheeler* majority directly cites for support. *Wheeler*, 435 U.S. at 326. The Court's acolytes of implicit divestiture have probably built their house upon sand.

50. *Brendale*, 492 U.S. at 448 (plurality opinion) (Blackmun, J., dissenting).

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

In recent years, the rationale born of *Oliphant*⁵² and *Montana*⁵³ has led to a string of holdings that Indian tribes lack the civil authority to: zone nonmember-owned fee land embraced within reservation boundaries,⁵⁴ regulate non-Indian hunting and fishing on reservation lands appropriated by the federal government for public works projects,⁵⁵ adjudicate civil actions arising from accidents on state highways running through a tribal reservation,⁵⁶ and hear civil claims stemming from a state official's tortious conduct against a tribal member on the tribe's own land.⁵⁷ Additionally, the Court has held that, though a county may impose an ad valorem property tax on Indian-owned fee land within reservations,⁵⁸ a tribe may not impose an occupancy tax on non-Indian guests of a hotel located on nonmember-owned reservation fee land.⁵⁹ With *Plains Commerce Bank*⁶⁰ the Court again beats its insistent *basso ostinato* against Indian sovereignty—a drumbeat of conquest continued by other means.

III. Plains Commerce Bank v. Long Family Land & Cattle Co.

A. Facts and Procedural Posture of the Case

Ronnie and Lila Long owned and operated the Long Family Land and Cattle Company (the Long Company), a ranching and farming operation, on the Cheyenne River Sioux Indian Reservation in north-central South Dakota.⁶¹ The Longs, a married couple, are members of the Cheyenne River Sioux Indian Tribe and longstanding customers of Plains Commerce Bank (the Bank), a non-tribal South Dakota bank “located some 25 miles off the reservation as the crow flies.”⁶² In the late 1980s, Ronnie Long’s father, a non-Indian, arranged for a commercial loan to the Long Company from the

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

53. *Montana*, 450 U.S. 544.

54. *Brendale*, 492 U.S. at 428 (plurality opinion).

55. *South Dakota v. Bourland*, 508 U.S. 679, 697 (1993).

56. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997).

57. *Nevada v. Hicks*, 533 U.S. 353, 364 (2001).

58. *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 267-68 (1992).

59. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001).

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

61. *Id.* at 2714-15.

62. *Id.* at 2715.

Bank.⁶³ Under the loan agreement, the elder Long mortgaged 2230 acres of Long Company fee land located within the reservation's boundaries.⁶⁴

By the time of the elder Long's death in 1995, he and the Long Company were heavily indebted to the Bank.⁶⁵ The next year, Ronnie and Lila Long obtained a "fresh" loan from the Bank whereby the Longs avoided foreclosure on their ranching operation by deeding to the Bank the elder Long's previously mortgaged land.⁶⁶ Upon deeding the 2230 acres to the Bank, the Longs received from the Bank a two-year lease on the deeded land, with an option to purchase the land at the end of two years for \$468,000.⁶⁷

It was "at this point, the Longs claim, that the Bank began treating them badly."⁶⁸ After a "punishing winter" resulted in heavy loss of livestock, the Longs could not afford to exercise their option to purchase the land deeded to the Bank two years earlier.⁶⁹ Consequently, the Bank commenced an eviction proceeding against the Longs in state court and additionally petitioned the Cheyenne River Sioux Tribal Court to serve the Longs their eviction notice.⁷⁰ The Longs steadfastly refused to leave their ranch.⁷¹

As the Bank continued to pursue eviction proceedings against the Longs, it also initiated the sale of a piece of the Long Company land to a non-Indian couple.⁷² Finally, despite the Longs' continued occupancy, the Bank in 1999 sold the remaining acreage to two non-Indians.⁷³ A month after this final sale to the non-Indians by the Bank, the Longs and the Long Company sued the Bank in the Cheyenne River Sioux Tribal Court.⁷⁴ The Longs asserted claims against the Bank for, among other things, breach of contract and discrimination.⁷⁵ Most salient among these was the Longs' discrimination claim, alleging the Bank had offered its nonmember customers much more favorable terms of sale than those imposed on the Longs.⁷⁶ The Bank

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 2715-16.

76. *Id.*

answered, counterclaimed, and sought summary judgment, while simultaneously asserting the tribal court did not possess jurisdiction to hear the case.⁷⁷ The tribal court found it had jurisdiction and the case proceeded to jury trial.⁷⁸

The jury awarded the Longs \$750,000 on the discrimination claim, plus two of the additional claims. The tribal court affirmed the jury decision and awarded interest.⁷⁹ In a subsequent supplemental judgment, the tribal court also granted the Longs an option to purchase the acreage they still occupied on the same terms originally offered by the Bank, thereby negating the Bank's sale of that parcel to nonmembers.⁸⁰ On appeal the Cheyenne River Sioux Tribal Court of Appeals affirmed.⁸¹

Having exhausted its remedies in tribal court, the Bank next commenced an action in the United States District Court for the District of South Dakota, attempting to void the tribal court judgment on the basis of improper jurisdiction.⁸² The district court upheld the tribal court's jurisdiction, finding the Bank's repeated dealings with the Longs brought the Bank within the scope of the *Montana* "consensual relationship" exception permitting assertion of tribal authority over nonmembers.⁸³

The Court of Appeals for the Eighth Circuit subsequently affirmed the district court's judgment.⁸⁴ Under the Eighth Circuit's reasoning, "the Bank effectively consented to substantive regulation by the tribe," rendering the "antidiscrimination tort claim . . . just another way of regulating the commercial transactions between the parties."⁸⁵ Thus, the Eighth Circuit found that *Montana* permitted tribal civil jurisdiction in a consensual commercial context.⁸⁶ The United States Supreme Court granted certiorari.⁸⁷

B. Issue

In *Plains Commerce Bank*, the Supreme Court considered "whether [a] tribal court had jurisdiction to adjudicate a discrimination claim concerning [a]

77. *Id.* at 2716.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

non-Indian bank's sale of fee land it owned."⁸⁸ In determining whether to uphold tribal court jurisdiction, the Court employed the rubric of the two "*Montana* exceptions . . . that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land."⁸⁹ In addition to the principal issue at bar, the Court addressed as a threshold issue whether the Bank had standing to challenge the jurisdiction of the Cheyenne River Sioux Tribal Court.⁹⁰ Relatedly, the Court also assessed whether "the Bank consented to tribal court jurisdiction over the discrimination claim by seeking the assistance of tribal courts in serving a notice to quit" upon the Longs.⁹¹

C. Decision of the Court

1. Holding

Chief Justice Roberts, writing for a five-Justice majority, held that "the Tribal Court lacks jurisdiction to hear the Longs' discrimination claim because the Tribe lacks the civil authority to regulate the Bank's sale of its fee land."⁹² Before reaching its principal holding, the Court dispensed with the preliminary objection that the Bank had no standing to challenge tribal court jurisdiction, finding "the Bank was injured by the Tribal Court's exercise of jurisdiction over the discrimination claim."⁹³ All the Justices, including the four dissenters, joined in holding the Bank had standing to challenge the jurisdiction of the tribal court. The majority also hastily disposed of the Longs' contention that the Bank consented to the tribal court's jurisdiction by availing itself of that court's assistance in service of process.⁹⁴

Reaching the crux of the case, the majority refused to uphold tribal court jurisdiction over the Bank. The Court found the *Montana* exceptions—the judicially hewn exceptions acknowledging that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians"⁹⁵—to be "inapplicable."⁹⁶ Distinguishing "between sale of the land and conduct on it,"⁹⁷ the Court held the first *Montana* exception (involving

88. *Id.* at 2714.

89. *Id.* at 2720.

90. *Id.* at 2716.

91. *Id.* at 2727.

92. *Id.* at 2720.

93. *Id.* at 2718.

94. *Id.* at 2727.

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

96. *Plains Commerce Bank*, 128 S. Ct. at 2727.

97. *Id.* at 2723.

consensual commercial relationships between Indian tribal members and nonmembers)⁹⁸ unavailing.⁹⁹ The Court likewise rejected application of the second *Montana* exception (applicable to nonmember conduct that “threatens or has some direct effect” on the tribe),¹⁰⁰ asserting that a “sale of formerly Indian-owned fee land to a third party . . . cannot fairly be called ‘catastrophic’ for tribal self-government.”¹⁰¹ In sum, *Plains Commerce Bank* holds that no Indian tribe retains the sovereign power to regulate nonmember fee land sales despite such land’s location within the borders of the tribe’s own reservation.

2. The Majority Opinion

Chief Justice Roberts’s majority opinion proceeds in three parts: Part I recites the facts and procedural posture of the case,¹⁰² Part II addresses the issue of the Bank’s standing,¹⁰³ and Part III offers a *précis* of tribal sovereignty before delving into an analysis of the applicability of the *Montana* exceptions, followed by an assessment of the jurisdictional-consent issue.¹⁰⁴

After giving the statement of the case in the first part of his opinion, Chief Justice Roberts next discussed the question of the Bank’s standing, pointing to the Justices’ “independent obligation to assure ourselves that jurisdiction is proper before proceeding to the merits” and to the fact “that whether a tribal court has adjudicative authority over nonmembers is a federal question.”¹⁰⁵ In essence, the Longs had claimed the Bank did not suffer the requisite injury-in-fact that would permit federal question standing because the damages awarded by the tribal jury were based upon the Longs’ breach-of-contract claim, not the discrimination claim presently before the Court.¹⁰⁶ Additionally, the Longs argued the tribal court had not afforded them the full extent of their requested relief when the tribal court voided the sale of only one of the fee land tracts, rather than the entire parcel.¹⁰⁷ Finally, the Longs argued the Bank would be financially compensated (regardless of the voided sale) by re-selling land to the Longs, thus suffering no actual loss.¹⁰⁸ Finding these arguments

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

99. *Plains Commerce Bank*, 128 S. Ct. at 2725.

100. *Montana*, 450 U.S. at 566.

101. *Plains Commerce Bank*, 128 S. Ct. at 2726.

102. *Id.* at 2714-16.

103. *Id.* at 2716-18.

104. *Id.* at 2718-27.

105. *Id.* at 2716.

106. *Id.* at 2717.

107. *Id.*

108. *Id.*

unpersuasive, Chief Justice Roberts noted that, based on the interrogatories on the tribal court jury's verdict form, "the jury could have based its damages award, in whole or in part, on the finding of discrimination."¹⁰⁹ Additionally, the tribal court's nullification of the Bank's sale constituted a "judicially imposed burden [that] certainly qualifies as an injury for standing purposes."¹¹⁰

The Bank's standing duly affirmed, the majority next arrived at the heart of the matter. Chief Justice Roberts commenced Part III—the core of his opinion—by spinning a narrative of judicially construed Indian sovereignty narrowly tailored to justify the continued erosion of those sovereign rights. Part III of the majority opinion begins by invoking the Marshall Trilogy through *Worcester v. Georgia*'s description of "Indian tribes as 'distinct, independent political communities.'"¹¹¹ Having briefly acknowledged the ideal of sovereign tribal rights, the rest of Chief Justice Roberts's synthesis reveals how emphatically (and recently) those rights have been diminished. In doing so, Chief Justice Roberts treated as settled principle the *Oliphant-Montana* "general rule" that proclaims "tribes do not, as a general matter, possess authority over non-Indians who come within their borders," a presumption viewed as "particularly strong when the nonmember activity occurs on land owned in fee simple by non-Indians."¹¹²

The majority opinion also looked to the historical fact of Indian allotment, which "convert[ed] millions of acres of formerly tribal land into fee simple parcels," noting also the paramount concept of fee simple property as a thing fully and freely alienable.¹¹³ Stating that "[o]ur cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it,"¹¹⁴ Chief Justice Roberts introduced the two *Montana* exceptions, which enumerate "circumstances in which tribes may exercise 'civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.'"¹¹⁵ Despite the availability of the *Montana* exceptions to uphold the exercise of tribal sovereignty over nonmembers, the Court does not readily bestow the benefit of those exceptions: tribal attempts to regulate nonmember conduct on non-Indian fee land will be "presumptively invalid"¹¹⁶ and the road towards demonstrating such validity will be treacherous and difficult.

109. *Id.*

110. *Id.* at 2718.

111. *Id.* (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)).

112. *Id.* at 2719.

113. *Id.*

114. *Id.*

115. *Id.* at 2720 (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)).

116. *Id.* (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001)).

Though holding that “neither exception authorizes tribal courts to exercise jurisdiction over the Longs’ discrimination claim,”¹¹⁷ the lion’s share of the majority opinion deals with the inapplicability of the first *Montana* exception alone. Here the Court hewed a fine distinction between the (permissible) “tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe’s sovereign interests”¹¹⁸ and the impermissible tribal regulation of *sales* of non-Indian-owned fee land. For the majority, the distinction is crucial because a sale is apparently neither “conduct” nor “activity” under *Montana*: “*Montana* provides that, in certain circumstances, tribes may exercise authority over the conduct of nonmembers, even if that conduct takes place on non-Indian fee land. But conduct taking place on the land and the sale of the land are two very different things.”¹¹⁹ In effect, *Montana*’s references to “the activities of nonmembers” and “the conduct of non-Indians on fee lands”¹²⁰ do not contemplate the Bank’s sale of fee land within the reservation because “sales” and “activities” are supposedly distinct categories. The Court expends much ink in trying to force that difference.

Though conceding “certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight,”¹²¹ the Court explained that because the Bank’s sale is neither conduct nor activity nor use nor behavior in any colorable legal sense, the Cheyenne River Sioux Tribal Court wielded jurisdiction improperly. Since the non-Indian-owned fee land “has already been removed from the tribe’s immediate control,”¹²² the sale of that land cannot implicate sovereign tribal interests “because non-Indian fee parcels have ceased to *be* tribal land.”¹²³ By the majority’s unforgiving logic, the sale of non-Indian-owned fee land cannot directly affect a tribe for the sole reason that the “direct harm to its political integrity . . . is sustained at the point the land passes from Indian to non-Indian hands.”¹²⁴ Later sales of the same parcel will thus cause no further harm. While some “*uses* to which the land is put . . . may well affect the tribe and its members,” the act described by the Court as the “mere resale of . . . land” or the “mere fact of resale” will, standing alone, work “no additional damage.”¹²⁵

117. *Id.*

118. *Id.* at 2721.

119. *Id.* at 2726.

120. *Montana*, 450 U.S. at 565-66.

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

122. *Id.*

123. *Id.*

124. *Id.* at 2723-24.

125. *Id.* at 2724.

The Court followed by analyzing the issue of nonmember consent to tribal authority in light of the first *Montana* exception. Nonmembers by definition play no role in tribal governance. For this reason, a tribe's "laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions."¹²⁶ As tribal assertions of sovereignty over nonmembers are "presumptively invalid,"¹²⁷ the first *Montana* exception will be very narrowly applied in creating any justification for tribal regulation.¹²⁸ Returning to the conduct/sale distinction, the Court observed that, even though the Bank "had 'lengthy on-reservation commercial relationships with the Long Company,'"¹²⁹ the Bank's sale of its nonmember-owned fee land in and of itself falls beyond the pale of the first *Montana* exception.¹³⁰

Next, the Court turned to the applicability of the second *Montana* exception. The majority rejected this basis for tribal sovereignty as well, finding the "mere fact of resale"¹³¹ does not "imperil the subsistence"¹³² of the tribe, the apparent threshold for triggering the second *Montana* exception. Characterizing the loss of the tribe's land as "quite possibly disappointing" but not "catastrophic,"¹³³ Chief Justice Roberts foreclosed the availability of the second *Montana* exception. Lastly, the Court quickly disposed of the Longs' argument "that the Bank consented to tribal court jurisdiction . . . by seeking the assistance of tribal courts in serving a notice to quit."¹³⁴ Observing "the Bank promptly contended in its answer that the court lacked jurisdiction" upon being sued by the Longs, Chief Justice Roberts found the earlier request for tribal court assistance did not rise to the level of consent to tribal court jurisdiction.¹³⁵ Accordingly, the Court reversed the judgment of the Court of Appeals for the Eighth Circuit.¹³⁶

126. *Id.*

127. *Id.* at 2720 (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001)).

128. *Id.* at 2724.

129. *Id.* (citation omitted).

130. *Id.* at 2725.

131. *Id.* at 2724.

132. *Id.* at 2726 (quoting *Montana v. United States*, 450 U.S. 544, 566) (1981)).

133. *Id.* (citation omitted).

134. *Id.* at 2727.

135. *Id.*

136. *Id.*

3. *The Dissenting Opinion*

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, dissented from the judgment of the Court, though all concurred as to Part II (upholding the Bank's standing to challenge tribal court jurisdiction) and to the Court's ruling that the tribal court invalidly nullified the Bank's sale of fee land as opposed to awarding damages as a remedy.¹³⁷ Justice Ginsburg, though accepting the "general rule" of *Montana*, believed the Longs' claim presented "a clear case for application of *Montana*'s first or 'consensual relationships' exception," thus obviating the need for further analysis under the second *Montana* exception.¹³⁸

The dissent emphasized the duration and depth of the Bank's business relationship with the Longs and the Long Company, noting the Bank was "no unwitting outsider forced to litigate under unfamiliar rules and procedures in tribal court."¹³⁹ The extent of the Bank's dealings with the Longs, coupled with the fact that "the Bank regularly filed suit" in the tribal court, led Justice Ginsburg to label the Court's holding, buttressed by its rigid distinction between the sale of fee land and nonmember conduct on that land, as "perplexing."¹⁴⁰ Ultimately, the dissent insisted the case is a discrimination claim, rooted in a long course of commercial dealing between the Bank and the Longs, over which the tribal court rightfully possessed jurisdiction because of a tribe's right under the first *Montana* exception "to shield its members against discrimination by those engaging in on-reservation commercial relationships—including land-secured lending—with them."¹⁴¹

IV. *Analysis*

By declaring an Indian tribe lacks authority to adjudicate a claim arising from the sale of non-Indian-owned fee land contained within the borders of that tribe's reservation,¹⁴² the Supreme Court manipulates its own precedent in the service of a deeply flawed policy that will prove gravely detrimental not only to the sovereignty but also to the very continued existence of Indian tribes. Indeed, genuine sovereignty and meaningful existence are inseparable. The Supreme Court erred, legally and morally, in two significant regards.

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

138. *Id.* at 2728 (Ginsburg, J., dissenting).

139. *Id.* at 2729 (Ginsburg, J., dissenting).

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

141. *Id.* at 2731 (Ginsburg, J., dissenting).

142. *Id.* at 2714.

First, the Court deliberately, even perversely, misreads *Montana v. United States*.¹⁴³ Second, the majority distorts the standard for consent to tribal court jurisdiction, thereby allowing nonmembers, especially sophisticated business entities like the Bank, to exploit tribes most in need of sustainable economic development. Neither precedent nor public policy can support the Supreme Court's calculated dismantlement of Indian sovereignty.

A. How (Not) to Read Montana

In reaching its holding the Court in *Plains Commerce Bank* relies heavily, perhaps even exclusively, on its understanding of the two *Montana* exceptions. The Court accepts as settled law that *Montana* generally precludes tribal assertion of authority over nonmembers.¹⁴⁴ At this juncture such an interpretation is most likely inescapable. Yet the Court goes one step further by reading *Montana*'s exceptions in a way that erects a nearly insurmountable bar to their application, leaving the actual utility of the "exceptions" for tribes in serious doubt. By drawing a labored and unconvincing distinction between nonmember "conduct" on reservations and land sales and by imposing a rigorous standard for demonstrating tribal harm that borders on open hostility, today's Court denies Indian tribes a most exalted American ideal: free and rational self-determination. Sophistry has trumped sovereignty. In the end, it is perhaps not only the Indians who have lost.

1. Montana as "General Rule"

The *Plains Commerce Bank* majority readily adopts the position that *Montana* established a "general rule" that "tribes do not . . . possess authority over non-Indians who come within their borders,"¹⁴⁵ this general rule being "particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians."¹⁴⁶ Indeed, even the *Plains Commerce Bank* dissent calls *Montana* a "pathmarking case" and unblinkingly accepts the majority's formulation of its "general rule."¹⁴⁷ For all the authority invested in its words, however, the precise principle of Indian sovereignty articulated by *Montana* remains legitimately open to varying interpretation.

First, to read *Montana* as rendering "presumptively invalid"¹⁴⁸ all assertions

143. 450 U.S. 544 (1981).

144. *Plains Commerce Bank*, 128 S. Ct. at 2718-19.

145. *Id.* at 2718.

146. *Id.* at 2719.

147. *Id.* at 2728 (Ginsburg, J., dissenting).

148. *Id.* at 2720 (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001))

of tribal authority over nonmembers, regardless of the fact that such conduct occurs within the prescribed political boundaries of that tribe as a functioning governmental unit, appears sharply to contradict the Marshall Trilogy's long-enconced view of Indian tribes as discrete political entities—as nations.¹⁴⁹ Inarguably, the Cheyenne River Sioux qualify, in the words of Chief Justice Marshall, as “a distinct community occupying its own territory, with boundaries accurately described.”¹⁵⁰ As such, the Tribe deserves all the sovereign rights of the specially situated “domestic dependent nation,”¹⁵¹ endowed with autonomy to the extent that its power of self-determination does not directly threaten or offend the rights of the larger, conquering, “discovering” sovereign, the United States of America.

Should the Cheyenne River Sioux decide to alienate the bulk of their tribal lands to Canada or to sign a treaty with Cuba lifting embargoes on trade, the Tribe would have surpassed the limits of its unique sovereign authority. Yet an ocean of difference lies between these scenarios and a tribe's regulation of fee land sales. The Marshall Trilogy contemplates this difference and provides for it. Sadly both for tribes and the legal doctrine of *stare decisis*, the Marshall Trilogy of foundational Indian law cases today exists chiefly to be undermined: an ancestor venerated in memory but thwarted in legacy by its forgetful progeny, for whom *Montana* has become a sacred text imbued with an import out of all proportion to the actual content and context of its words.

What *Montana* does say—on its face and on its facts—is that a tribe cannot

(holding a tribe may not impose an occupancy tax on non-Indian guests of hotel located on nonmember-owned reservation fee land)). Guided by *Montana*, the Court in *Atkinson* found the tribal tax in question an impermissible assertion of tribal authority over nonmembers, and thus “presumptively invalid,” *Atkinson*, 532 U.S. at 659, because the non-Indian hotel guests and the Navajo Nation had not entered a “consensual relationship [that] must stem from ‘commercial dealing, contracts, leases, or other arrangements,’” *id.* at 655 (quoting *Montana*, 450 U.S. at 565). The facts of *Plains Commerce Bank*, however, resist easy comparison with those of *Atkinson*. Hotel guests are rootless: travelers and transients, passing through on their way to elsewhere. A bank is something else entirely, a fixed institution that is (or should be) a pillar of constancy and stability, its fortunes insolubly intertwined with those of the communities in which it operates. Even given the current jurisprudential reality of “presumptively invalid” tribal civil authority over nonmembers, it is for entities such as the Bank (with its complex, continuous, and *consensual* connections to the Longs, their ranch, and their tribe) that *Montana*'s exceptions to this “general rule” exist.

149. See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (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 . . .”).

150. *Id.* at 561.

151. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

assert authority over nonmembers “beyond what is necessary to protect tribal self-government or to control internal relations,”¹⁵² a statement qualified by two exceptions through which tribes can “exercise some forms of civil jurisdiction over non-Indians on their reservations, *even on non-Indian fee lands*.”¹⁵³ Thus, while *Montana* certainly limits the previous scope of tribal sovereignty, the most convincing reading of its limitation in view of the Court’s earlier precedent indicates simply that a tribal regulation of nonmember conduct will be found invalid only when that conduct fails to bear on tribal interests in a direct and obvious way.¹⁵⁴ This interpretation most closely comports with *Montana*’s actual (and narrow) holding that the Crow Tribe of Montana could not regulate hunting and fishing by non-Indians on non-Indian-owned reservation fee land because the non-Indian sportsmen “[did] not enter any agreement or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction,” nor did their “hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe.”¹⁵⁵

The modern Court’s interpretation of *Montana*’s “general rule” misreads *Montana* by radically narrowing the extent of “what is necessary to protect tribal self-government,”¹⁵⁶ a result likely unintended by the Court in *Montana*. The Court’s cramped misreading of *Montana* imposes a hard reality on Indian tribes: the ungenerous “general rule,” accepted without question by the *Plains Commerce Bank* majority and dissenters alike, is here to stay. Yet through *Montana*’s exceptions, tribes may still hope to recover the meaningful measure of sovereignty expressed by the Marshall Trilogy. The Court’s error is in its

152. *Montana v. United States*, 450 U.S. 544, 564 (1981).

153. *Id.* at 565 (emphasis added).

154. See *Brendale v. Yakima Indian Nation*, 492 U.S. 408, 449-50 (1989) (plurality opinion) (Blackmun, J., dissenting) (“When considered in the full context of the Court’s other relevant decisions, it is evident that *Montana* must be read to recognize the inherent authority of tribes to exercise civil jurisdiction over non-Indian activities on tribal reservations where those activities . . . implicate a significant tribal interest.”). The modern Court’s canonization of the *Montana* “general rule” has been by no means unanimously accepted either within or outside the Court. Perhaps none has voiced objection more eloquently or authoritatively than Justice Blackmun in his incisive *Brendale* dissent.

155. *Montana*, 450 U.S. at 566. As Justice Blackmun explains in his *Brendale* dissent, “the critical difficulty in *Montana* was the Tribe’s failure even to allege that the non-Indians whose fishing and hunting it sought to regulate were in any measure affecting an identifiable tribal interest.” *Brendale*, 492 U.S. at 459 (plurality opinion) (Blackmun, J., dissenting) (citation omitted). Thus, tribal civil jurisdiction was improper in *Montana* because no significant tribal interest was convincingly implicated, a situation readily contrasted with the Bank’s discriminatory sale of fee land.

156. *Montana*, 450 U.S. at 564.

misunderstanding of *Montana*'s general rule, but the Court's sin is in its abuse of *Montana*'s exceptions.

2. *The First Montana Exception: Real Estate Transactions and Other Harmless Nonactivities*

The real, lasting importance of *Montana* for Indian tribes resides in the magnanimity or flintiness with which the Court will apply its exceptions. In light of the Marshall Trilogy's principles and the general currents of public policy, only an expansive application of the exceptions will preserve tribal integrity while fulfilling a legally supported ideal of self-determination: achieving, in short, everything the Court in *Plains Commerce Bank* has not done. The bulk of *Plains Commerce Bank*'s analysis centers upon the supposed inapplicability of the first *Montana* exception. The first *Montana* exception permits tribal civil jurisdiction over "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."¹⁵⁷ Logic, experience, and common sense—all tools to which judges resort from time to time, but any of which may be discarded to force a predetermined outcome—indicate that a commercial real estate transaction qualifies as a consensual business activity, one that a tribe may possess a reasonable interest in regulating. Not so, however, in *Plains Commerce Bank*.

As Chief Justice Roberts explains, "*Montana* provides that, in certain circumstances, tribes may exercise authority over the conduct of nonmembers, even if that conduct takes place on non-Indian fee land. But conduct taking place on the land and the sale of the land itself, are two very different things."¹⁵⁸ Though "*Montana* and its progeny permit tribal regulation of nonmember conduct inside the reservation that implicates the tribe's sovereign interests,"¹⁵⁹ Chief Justice Roberts claims a tribe cannot regulate land sales because the act of selling land is neither "conduct" nor "activity" within the contemplation of *Montana*. He is mistaken. *Montana* recognizes that "consensual relationships" between Indians and non-Indians on a reservation involving "commercial dealing, contracts, leases, or other arrangements" can and will affect tribal interests, "even on non-Indian fee lands,"¹⁶⁰ thus creating an *exception* to the

157. *Id.* at 565.

158. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2726 (2008).

159. *Id.* at 2721.

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

“general rule” stating tribes ordinarily would not have jurisdiction over nonmember activity.

The sale of land on a reservation, even of non-Indian fee land, carries with it issues of ownership, development, and identity that necessarily impact significant tribal interests. This situation did not arise between the Crow Tribe and the non-Indian hunters and fishermen in *Montana*. But it does arise here. A non-Indian bank with a “lengthy and complex”¹⁶¹ history of dealing with the Indian owners of an Indian corporation located on Indian land, that enters into a “commercial dealing” with non-Indians under circumstances allegedly involving discriminatory practices and breach of contract toward the prior Indian landowners, fits the very model of an entity subject to tribal civil jurisdiction under the first *Montana* exception, making jurisdiction presumptively *valid*.

Chief Justice Roberts, however, would require a showing that the “conduct” or “activity” sought to be regulated by tribes “had a discernable effect on the tribe or its members.”¹⁶² Again, Chief Justice Roberts pushes the Court’s logic through the looking-glass. As the Court finds the act of selling land is not an “activity,” the result of the sale cannot have a direct “effect” so far as the tribe is concerned. The majority acknowledges the existence of “certain forms of nonmember behavior . . . [that] may sufficiently affect the tribe as to justify tribal oversight,” as “may” arise with “certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development).”¹⁶³ These include “the sale of merchandise by a non-Indian to an Indian on the reservation,”¹⁶⁴ taxable “economic activity by nonmembers . . . ‘taking place or situated on Indian lands,’ ”¹⁶⁵ and apparently not much else.

The Court in *Plains Commerce Bank* thus fashions an elegant and impenetrable syllogism: only “activities” have a discernable effect on tribes; the sale of land is not an “activity;” therefore, the sale of land has no discernable effect on tribes. With no “discernable effect” on tribal interests, the tribe has no interests to regulate or protect. Vastly circumscribing the realm of nonmember “activities” over which a tribe may exercise its sovereign

161. *Plains Commerce Bank*, 128 S. Ct. at 2728 (Ginsburg, J., dissenting).

162. *Id.* at 2721.

163. *Id.* at 2723.

164. *Id.* at 2721 (citing *Williams v. Lee*, 358 U.S. 217 (1959)).

165. *Id.* (quoting *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980)) (holding Indian tribes have authority to impose taxes on cigarettes sold to non-Indian purchasers on tribal land).

powers, the Court effectively negates the genuine possibility of Indian self-determination by nakedly ignoring the existence of tribal interests worth protecting.

The Court justifies its exclusion of land sales from tribal regulation by claiming non-Indian-owned fee land in fact no longer exists as Indian land: "The tribe cannot justify regulation of such land's sale by reference to its power to superintend tribal land . . . because non-Indian fee parcels have ceased to *be* tribal land."¹⁶⁶ To an extent, the Court speaks accurately. Ownership of non-Indian fee land has quite obviously passed, by definition, "from Indian to non-Indian hands,"¹⁶⁷ while the (now thoroughly discredited) legacy of federal allotment policy has left "millions of acres of non-Indian fee land located within the contiguous borders of Indian tribes,"¹⁶⁸ including the land at issue in *Plains Commerce Bank*. But the equally obvious fact remains that the tribal reservation still wholly embraces the non-Indian fee acreage.¹⁶⁹ Consequently, occurrences on the non-Indian-owned land can—and most assuredly will—directly (sometimes detrimentally, sometimes destructively) affect the integrity of the tribe whose reservation encompasses the fee land. When this happens, the tribe must have the right to regulate events on those lands as a matter of nothing less than self-preservation. It is blindness, or active malice, to pretend otherwise.¹⁷⁰

A tribe has a very serious interest in ensuring the land remaining under its immediate control is not pocked and scarred by outsiders over whom they have little or no actual control. For this reason, *Montana*'s exceptions apply "even on non-Indian fee lands."¹⁷¹ By extending its exceptions to non-Indian fee lands, *Montana* affirms the need to preserve tribal interests that survive the transfer of ownership from Indians to non-Indians. *Plains Commerce Bank*'s

166. *Id.* at 2723.

167. *Id.* at 2724.

168. *Id.* at 2719.

169. *See, e.g., United States v. Mazurie*, 419 U.S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."); *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (describing Indian tribes as "distinct political communities, having territorial boundaries, within which their authority is exclusive . . .").

170. *See Brendale v. Yakima Indian Nation*, 492 U.S. 408, 457-58 (1989) (plurality opinion) (Blackmun, J., dissenting) ("[T]he nature of land ownership does not diminish the tribe's inherent power to regulate in the area. . . . [The] fundamental sovereign power of local governments to control land use is especially vital to Indians, who enjoy a unique historical and cultural connection to the land.").

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

majority insists that once land passes in fee from the tribe to non-Indians, “the mere resale of that land works no additional intrusion on tribal relations or self-government. Resale, by itself, causes no additional damage.”¹⁷² Do not believe it. If anything, the potential for harm only grows with each resale because, if the sale of land involves something bearing the potential to affect a tribe adversely, the tribe can only sit mutely until the harm materializes. And even then the tribe’s attempt at regulation will be viewed as presumptively invalid. With the power to oversee nonmember real estate transactions conducted within a reservation’s boundaries, a tribe can effectively preempt the possibility, perhaps even the likelihood, of alienated land becoming the locus of “noxious uses,”¹⁷³ activities, conduct, or behavior negatively impacting the right of the tribe to function as a cohesive territorial unit. Land is a people’s destiny, and to lose control over land is to lose control of the course of that destiny, to invite chaos and ruin, and to cede the future and slip into history a shade of greatness eternally renounced and of possibility forever lost.

3. *The Second Montana Exception: Possibly Disappointing to the Tribe*

The second *Montana* exception acknowledges a tribe’s civil authority to regulate nonmember conduct “when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”¹⁷⁴ In declining to apply the second *Montana* exception to the Longs’ situation, the Court sets an absurdly high standard for the exception’s application, essentially vitiating the possibility of its use. Under *Plains Commerce Bank*’s construction, “conduct must do more than injure the tribe, it must ‘imperil the subsistence’ of the tribal community.”¹⁷⁵ According to the majority, demonstrating a direct effect alone is insufficient to create a tenable tribal regulatory interest. Rather, the effect of the conduct must rise to the level of “menace” or catastrophe.¹⁷⁶

Chief Justice Roberts opines that “[t]he sale of formerly Indian-owned fee land to a third party is quite possibly disappointing to the tribe, but cannot

172. *Plains Commerce Bank*, 128 S. Ct. at 2724.

173. *Id.*

174. *Montana*, 450 U.S. at 566.

175. *Plains Commerce Bank*, 128 S. Ct. at 2726 (quoting *Montana*, 450 U.S. at 566). Though *Montana* suggests that nonmember conduct must “threaten” or “imperil” a tribe to warrant tribal regulation, the “threat” standard is also used disjunctively with the presumably lesser requirement of “some direct effect.” *Montana*, 450 U.S. at 566.

176. *Plains Commerce Bank*, 128 S. Ct. at 2726.

fairly be called 'catastrophic' for tribal self-government."¹⁷⁷ With perhaps more than a whisper of condescension, Chief Justice Roberts refuses to engage with the reality of a fee land sale ever impacting an Indian tribe significantly, much less catastrophically. Though *Plains Commerce Bank*'s treatment of the second *Montana* exception is perfunctory at best, it speaks volumes about the Court's barely concealed distaste for upholding effective assertions of tribal sovereignty. By creating impossible standards for the application of the second *Montana* exception, the Court appears to manifest a belief that tribes are not capable—or worthy—of exercising actual jurisdiction over non-Indians.

B. Establishing Nonmember Consent to Tribal Court Jurisdiction

The Court's analysis of whether the Bank consented to the jurisdiction of the Cheyenne River Sioux Tribal Court flows primarily from its interpretation of the first *Montana* exception and bears all the flaws of that misreading. The Court performs impressive feats of legal acrobatics to allow the Bank to escape the tribal court's jurisdiction. Insisting the tribe has no power to regulate the Bank's land sale, Chief Justice Roberts writes that such regulation "runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent."¹⁷⁸ Fair enough, but the Court substantially downplays the ways in which the Bank could have reasonably consented to the jurisdiction of the tribal court.

The Court says tribal regulation "may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions."¹⁷⁹ By any rational measure, the Bank consented to tribal court jurisdiction, both expressly and by its actions. Unfortunately, the *Plains Commerce Bank* majority does not truly employ rational measures in determining the absence of jurisdiction. Instead, the Court simply sidesteps the indubitable fact of the Bank's consent by returning to its specious dichotomy between permissibly regulable "activities" and sales of fee land, finding "the tribe's inherent sovereign authority" implicated in no way that would make the *Montana* exceptions applicable.¹⁸⁰ By this familiar logic, sales of fee lands are not activities, do not have a discernable effect on the tribe, and so cannot be the object of tribal regulation. Thus, the Bank could not have consented to the

177. *Id.*

178. *Id.* at 2724.

179. *Id.*

180. *Id.*

tribal court's jurisdiction because the tribal court had no power to adjudicate in the first place.

This sweeping denial of tribal court jurisdiction allows the Court to engage with the consent issue in the most conclusory fashion with zero analysis. Only by reciting the artificial sale/activity distinction can the Court negate the fact of the Bank's consent, both explicit and implicit. In numerous ways the Bank manifested consent "by its actions," stemming from its extensive history of business dealings with the Longs. The majority nearly admits as much, conceding "[t]he Bank may reasonably have anticipated that its various commercial dealings with the Longs could trigger tribal authority to regulate those transactions"¹⁸¹ under the first *Montana* exception. Yet because the one commercial dealing directly at issue in *Plains Commerce Bank*, the sale of fee land, can admit of no tribal regulation whatsoever, "there is no reason the Bank should have anticipated that its general business dealings with [the Longs] would permit" tribal regulation of the Bank's sale of fee land.¹⁸² Through its emphatic refusal to include sales of fee land within the reach of *Montana*'s exceptions, the Court warps the generally understood meanings of both commerce and consent.

In its rush to render tribal courts powerless over nonmembers, the Court quite possibly distorts even the Bank's understanding of commercial dealings and consent to adjudication. The Bank had, after all, petitioned the tribal court to serve an eviction notice upon the Longs.¹⁸³ Though the Court without discussion finds that this action on the part of the Bank "does not . . . constitute consent for future litigation in the Tribal Court," it neglects to mention other compelling instances in which the Bank expressly acknowledged tribal court jurisdiction.¹⁸⁴ It is left to the dissenting opinion to note "the Bank regularly filed suit" in Cheyenne River Sioux Tribal Court and, more significantly, that in its motion for summary judgment on its counterclaim against the Longs "the Bank stated, without qualification, that the tribal court 'ha[d] jurisdiction over the subject matter of this action.'"¹⁸⁵ The Bank appears ready to acknowledge the jurisdiction of the tribal court whenever convenient. Under other circumstances the Bank's actions would almost certainly swell into valid consent and create an overwhelming presumption in favor of jurisdiction. But

181. *Id.* at 2725.

182. *Id.*

183. *Id.* at 2715.

184. *Id.* at 2727.

185. *Id.* at 2729 (Ginsburg, J., dissenting).

for the fact this case involves an Indian forum, the Court would have found jurisdiction proper and consent properly given.

V. Impact

In *Plains Commerce Bank* the Supreme Court takes from Indian tribes their voice in the disposition of land within their reservations when that land happens to be owned by non-Indians. In effect the Court says such land can be bought and sold with no thought given to the sale's ramifications on the surrounding community. The repercussions of *Plains Commerce Bank*, however, will echo far beyond its holding on fee land sales. The Court does not speak with enough bluntness to say Indian rights do not matter as much as non-Indian rights, but its holding and profoundly flawed underlying rationale unmistakably reinforce this conclusion. By mandating the atrophy of tribal courts—and thus consigning Indian tribes to the periphery of American jurisprudence—the Court simultaneously condemns those tribes to the margins of social, economic, and political development, with no immediate hope of improvement. Shorn of effective powers of governance over their territory, tribes will have no chance of becoming anything other than passive economic actors on a stage they possess but cannot hope to control.

A. Marginalization: The Impact on Tribal Economies

To speak of poverty and Indian reservations is usually to speak redundantly.¹⁸⁶ The Cheyenne River Sioux have felt this commonplace truth persistently and painfully. The lands of the Cheyenne River Sioux Indian Reservation extend over almost the entirety of two north-central South Dakota counties, Dewey and Ziebach.¹⁸⁷ Among the absolute poorest anywhere in the nation, 29.1 percent of Dewey County¹⁸⁸ and 55.9 percent of Ziebach County residents¹⁸⁹ lived below the national poverty line in 2004—more than double and quadruple the amount, respectively, of people living in poverty in South Dakota as a whole. Endemic poverty consumes the social and psychological

186. See STEPHEN CORNELL & JOSEPH P. KALT, *PATHWAYS FROM POVERTY: ECONOMIC DEVELOPMENT AND INSTITUTION-BUILDING ON AMERICAN INDIAN RESERVATIONS* 3 (1989) (“As is well known, by most indicators of economic well-being, American Indian reservations are extremely poor.”).

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

188. U.S. CENSUS BUREAU, *STATE AND COUNTY QUICKFACTS: DEWEY COUNTY, SOUTH DAKOTA* (2007), available at <http://quickfacts.census.gov/qfd/states/46/46041.html>.

189. U.S. CENSUS BUREAU, *STATE AND COUNTY QUICKFACTS: ZIEBACH COUNTY, SOUTH DAKOTA* (2007), available at <http://quickfacts.census.gov/qfd/states/46/46137.html>.

fabric of reservation life, leading to a plague of attendant social ills¹⁹⁰ probably well-rehearsed enough not to need enumeration here. And poverty is a total condition, neither beginning nor ending with the plain fact of not having money. A lack of material wealth reflects the present inability to share in the opportunities and resources capable of generating that wealth. This inability to access the means of achieving prosperity exists in tandem with a lack of significant participation in determining how that prosperity may be obtained, developed, and regulated: the real issue at the heart of *Plains Commerce Bank*.

For the Cheyenne River Sioux and other Indian tribes, economic development intertwines unavoidably with the ability to self-govern effectively. Put another way, “[e]conomy follows sovereignty.”¹⁹¹ A people without the right to manage their own land and natural resources will never achieve economic success in the true sense of the term, for any “success” will have been borrowed and bestowed by outsiders and therefore can never truly be their own. Passivity will never conquer poverty. Today’s Court implicitly acknowledges this fundamental economic and political truth, but in the wrong direction.

In doing so the Court staggers far behind the general tilt of modern public policy. The United States Congress, for example, has gradually come to appreciate the need for vigorous tribal self-determination on Indian reservations. Recognizing that “the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons,”¹⁹² Congress has finally affirmed not only “the strong expression of the Indian people for self-determination”¹⁹³ but also the crucial connection between self-determination

190. See, e.g., CORNELL & KALT, *supra* note 186, at 4 (“Hand-in-hand with economic distress go many of the social indicators commonly associated with poverty.”).

191. *Id.* at 40. Professors Cornell and Kalt, who have exhaustively and eloquently explored the subject of tribal economic development, go on to note that “[t]he most striking characteristic of the relatively successful tribes we have studied is that they have aggressively made the tribe itself the effective decision-maker in reservation affairs.” *Id.*; see also Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in WHAT CAN TRIBES DO?: STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT 1, 8 (Stephen Cornell & Joseph P. Kalt eds., 1995) (“[A]s sovereignty rises, so do the chances of successful development.”). Expressed yet more emphatically, “Sovereignty is one of the primary development resources tribes now have, and the reinforcement of tribal sovereignty under self-determination should be the central thrust of Indian policy.” *Id.* at 16.

192. 25 U.S.C. § 450(a)(2) (2006).

193. *Id.* § 450a(a).

and the tribes' "social and economic well-being."¹⁹⁴ Granted, the Supreme Court recognizes this connection in *Plains Commerce Bank*, but with unalloyed disdain. Rather than using the mighty force of law to foster further economic progress on Indian reservations, the Court instead manipulates policy and precedent to reverse the course of tribal self-determination, handing a resounding legal victory to opportunistic non-Indian bankers. Such an outcome inspires confidence in neither commerce, nor capitalism, nor the Court: each a pillar of American strength, each degraded in the eyes of Indians by *Plains Commerce Bank*. The Court has spoken, but justice sleeps.

The Cheyenne River Sioux, and by extension all Indian tribes, had a concrete chance for simultaneous economic, legal, and political advancement when the United States Supreme Court heard *Plains Commerce Bank*. Rather than fulfilling that long-overdue promise, the Court rendered a decision increasing the marginalization of Indian tribes under the imprimatur of the highest Court in the land, the one for whom "it is emphatically the province and duty . . . to say what the law is."¹⁹⁵ But this Court misspoke. This in itself is not so inconceivable. Many (including five or so Supreme Court Justices) would likely say that allowing Indian tribes to regulate—not to dominate or manipulate but simply to oversee prudently—real estate transactions *within the greater boundaries of tribal lands* between and among non-Indians is somehow "un-American." After all, it allows Indians to tell non-Indians how to manage their affairs. But such reasoning forgets, or callously rejects, that Indians tribal members *are* Americans, and the rights they seek are American rights. When a society, a nation, or a people cannot freely develop itself politically and economically, others will happily undertake such development for them for so long as profit can be obtained. This is the very definition of exploitation. It represents everything America should not and must not be, for Indians or for anyone else.

With *Plains Commerce Bank*, the Court increases the marginalization, political and economic, of Indian tribes. Life on the margins of a larger society breeds poverty and alienation, along with the self-obliterating desire to dull the blows of that poverty through escapes both temporary and permanent. As long as economic development for Indian tribes means little more than the chance to make some money from the hungry vices of non-

194. *Id.* § 450a(c); see also CORNELL & KALT, *supra* note 186, at 23 ("If external actors—governments, corporations, publics—effectively control events and decisions on reservations, then the chances of self-determined economic development are severely reduced.").

195. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Indians in the form of casinos and smokeshops or to wring some tax revenue from outsiders who extract and carry off the tribes' mineral wealth, then tribes will remain imprisoned by underdevelopment. Without the power to direct the creation of sustainable wealth in the present, Indian tribes will have no effective stake in their own future.

B. Powerlessness: The Impact on Tribal Courts

In *Plains Commerce Bank* the Supreme Court also forecloses upon the development of tribal court systems on reservations, dismissively branding tribal courts as purveyors of some lesser law. No sustainable good can grow in the absence of effective, enforceable laws. In spite of, or perhaps because of, the fact that "[f]air and effective tribal court systems are now recognized as important elements of economic development,"¹⁹⁶ *Plains Commerce Bank* greatly constricts the jurisdictional authority of the tribal judiciary. Economic marginalization demands political powerlessness on the part of the marginalized. Political powerlessness requires the constant undermining of the growth and development of effective governing institutions. By undercutting the ability of tribal courts to develop and implement a body of law that can respond to the unique needs of the tribe while integrating itself within the larger framework of American jurisprudence, the Supreme Court simultaneously disserves the interests of the tribe and the interests of justice, which here are inseparable.

Axiomatically, sustainable development requires the ability to attract, solidify, and maintain the investments of capital that will spur and perpetuate that development. For many Indian tribes, often isolated and always underdeveloped, the threshold step of attracting investment (as distinct from enduring opportunistic exploitation) remains achingly unrealized—and will remain unfulfilled under the draconian jurisdictional regime imposed by *Plains Commerce Bank*. No economically justifiable impetus for sustainable capital investment will exist so long as tribes stand precluded from providing a meaningful measure of governmental authority within their territory: an authority springing from sovereign rights, expressed in tribal law, and justly applied by tribal courts. For any people, "capable institutions of governance are necessary for any sustained, successful development."¹⁹⁷ In the specific context of tribal economic development on reservations, "capital access is first and foremost a problem of political development: the establishment of an

196. COHEN, *supra* note 12, at 1321.

197. Cornell & Kalt, *supra* note 191, at 45.

institutional environment in which investors feel secure.”¹⁹⁸ Potential investors in tribal economic development—at least those working in good faith toward a mutually beneficial relationship—thus obtain confidence from the *assertion*, rather than the absence, of effective tribal law.

Law gives voice to the values of a community, and courts give life to the law. This holds no less true for Indian tribes than for any other people or polity. The *Plains Commerce Bank* majority apparently believes tribal courts will treat nonmembers as inherently suspect interlopers rather than as parties entitled to an evenhanded and impartial administration of justice. This burdensome stigma, much more reflective of the Court’s disdain for tribal sovereignty than of any actual prejudice exhibited by tribal courts toward nonmembers, will necessarily—and nefariously—curb the creation of “a capable, independent tribal judicial system that can uphold contracts, enforce stable business codes, settle disputes, and, in effect, protect businesses from politics.”¹⁹⁹

In curtailing the authority of the Cheyenne River Sioux Tribal Court to hear cases arising within its own jurisdictional boundaries, the Supreme Court reinforces the pernicious lie that Indian tribes are a strange and alien race governed by crude and primitive rules to which no white man need submit. Yet the path of the law does not deviate or dissolve upon reaching the boundaries of an Indian reservation and neither do the fundamental responsibilities of those reservations’ courts, which at a very basic level must embody, for example, a system of justice “capable of enforcing workable business codes and the law of contract.”²⁰⁰ At root, law provides protection and predictability in the face of uncertainty, and the absence of such protection will inspire confidence in no one.²⁰¹ The bounty of sustainable, substantial, sovereign success will not fall on nations who have lost “the right . . . to make their own laws and be ruled by them.”²⁰²

With *Plains Commerce Bank* the Supreme Court evinces a hostility to Indian tribes far more corrosive than would ever realistically exist in tribal courts against non-Indian parties. A nation of laws can secure its vitality and legitimacy only through the strength of its legal institutions. If allowed to flourish, tribal courts will offer a promise of consistency and stability for the

198. *Id.* at 11.

199. *Id.* at 30.

200. *Id.* at 40-41.

201. *See id.* at 41 (“Without courts and judges . . . that can resolve disputes in ways that keep the rules of the game stable and free of politics, investors will refuse to launch enterprises.”).

202. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

tribe and those who seek to participate in the tribe's economic life. Far from being a threat to nonmembers, tribal courts will instead serve as the guardians and guarantors of sustainable economic prosperity on reservations. For the present, this must remain the hopeful ideal for tribal development and not the reality: for between the idea and the reality falls the shadow of *Plains Commerce Bank*, which in divesting tribal courts of legitimate adjudicatory powers within their rightful jurisdictional boundaries guards the rights of neither tribes nor investors and guarantees only the continued underdevelopment of Indian economies.

VI. Conclusion

In *Plains Commerce Bank* the United States Supreme Court held that Indian tribes lack authority to regulate the sale of non-Indian-owned fee land located within their own reservations. Relying upon unstable precedent and indefensible policy, the Court's decision robs Indian tribes not only of a significant portion of their inherent sovereignty but also of their ability to direct their own economic future. Deprived of effective political and legal institutions and thus lacking the power to generate sustainable economic development on reservations, tribes will continue to confront a future of dependency and destitution—a future bleak and blighted and so perhaps no future at all.

Plains Commerce Bank finds no foundation in law: neither the legacy of the Marshall Trilogy nor the policy of the *Montana* exceptions validly embraces the decision. *Plains Commerce Bank* bears no basis in logic: the belabored distinction between sales of land and activities upon such land suffocates in its own speciousness. Finally, *Plains Commerce Bank* secures no solace from the rightly exalted American ideal of self-determination: by denying tribes the rightful freedom to chart the course of their own reasoned yet free development, the Court commits an error that staggers somewhere between a blunder and a crime. And so justice slips away from the Sioux. The Bank began treating them badly, but the Supreme Court treated them far worse.