LONG DECISION, WRONG DECISION: The Supreme Court's Refusal to Recognize Tribal Sovereignty

I. Introduction:

The Commerce Clause of the Constitution gives to Congress the exclusive responsibility of regulating our relationships with Indian tribes[1]. Yet on June 25, 2008, the Supreme Court handed down its decision in *Plains Commerce Bank v. Long* placing another obstacle in the road to tribal self-government and further deviating from Congress's intentions in passing the Indian Reorganization Act (IRA) of 1934.[2] The bank in the case, a Non-Indian entity that had sold land it owned on the Cheyenne River Sioux Indian Reservation, sought a declaratory judgment that the tribal court judgment against the bank for discriminatory lending practices asserted by the Indian lessees was void due to a lack of tribal jurisdiction. Writing for the majority, Chief Justice Roberts looked to the Court's earlier decisions in *Oliphant v. Suquamish* and in *U.S. v. Montana*[3] before concluding that the tribe lacked any civil adjudicatory authority over the Longs's discrimination claim.[4] By finding no consensual relationship between the bank and the tribe, which would subject the bank to tribal jurisdiction, the decision removes a significant aspect of Indian tribes' ability to self-govern and draws upon a chain of arbitrary decisions to almost narrow tribal jurisdiction over Non-Indians out of existence.

One of the primary purposes of the IRA was to correct the harm done by the General Allotment Act (Dawes Act) of 1885 by decreasing federal control and increasing tribal self government.[5] My position is that *Long* fails these objectives miserably, and I

[1] U.S. Const. Art. I § 8, cl. 3
[2] 25 U.S.C. §§461-479.
[3] *Oliphant v. Suquamish*, 435 U.S. 191 (1978); *U.S. v. Montana,* 450 U.S. 544 (1981)
[4] *Plains Commerce Bank v. Long Family Land & Catle Co., Inc.*, 128 S.Ct. 2709, 2714 (2008).
[5] 25 U.S.C. §§461-479

will summarize this into two arguments. First, if one follows the history of the decisions and congressional enactments leading up to *Montana* and then to *Long*, it seems clear that the Supreme Court's continued reliance on *Montana* and its subsequent reasoning in *Long* is misplaced. The decision reinforces the errors of the Dawes Act and departs substantially from Congress's intent in passing the IRA. Second, even if one assumes that *Montana* is good law and that its exceptions to the blanket rule prohibiting tribal jurisdiction over Non-Indians still apply, the facts of the case clearly fall within the ordinary language of those exceptions. Therefore, the Cheyenne River Sioux Tribe's adjudicatory jurisdiction should have been upheld rather than being further diminished.

A. Historical background

The decision in *Long* primarily was built on the Court's earlier decisions in *U.S. v. Montana* and *Oliphant*. The problem with this is that these cases were based on policies that Congress had already attempted to do away with by enacting the IRA in 1934 and the Indian Civil Rights Act in 1968. The Constitution lists among the legislative powers the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" thereby granting Congress the sole authority to make laws governing the United States relations with the Indian tribes.[6] In numerous cases, the Supreme Court has acknowledged the importance of Congressional intent in analyzing federal statutes.[7] And in *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, the Court held that when interpreting statutes relating to Indian law the statutes must be construed liberally in favor of the Indians with any

[6] U.S. Const. Art. 1, §8, Cl. 3.

ambiguity interpreted to their benefit.[8] The two Congressional enactments in question, the Dawes Act and the IRA, both exemplify two frames of thought at different periods of time. But by relying on the *Montana* line of cases the Court has continued to focus on the residual effects of the failed Dawes Act and ignored the purpose of the subsequent IRA.

1. The Dawes Act and the IRA

On February 8, 1887, Congress passed the Dawes Act. Named for Senator Henry Dawes of Massachusetts, the law provided for the breaking up of reservation land held in common by the members of a tribe into small "allotments" divided among the individuals.[9] Henry Dawes graduated from Yale College in 1839 and was admitted to the Massachusetts bar in 1842. In 1875, Dawes was elected to the United States Senate where he served on the Committee of Indian Affairs. A longtime advocate for the assimilation of the Indian tribes, Dawes believed that the only way to ensure the continued survival of the tribes was by bringing them into the folds of white society and making them "civilized." As he noted in an article published in 1899, twelve years after the Dawes Act was enacted:

> Emigration was yearly swelling in numbers…It was this condition which forced on the nation its present Indian policy. It was born of sheer necessity. Inasmuch as the Indian refused to fade out, but multiplied under the sheltering care of reservation life, and the reservation itself was slipping away from him, there was but one alternative: either he must be endured as a lawless savage, a constant menace to civilized life, or he must be fitted to become a part of that life and be absorbed into it. To

---

[7] See *Menominee Tribe v. United States*, 391 U.S. 404, 412-413, (1968); See also *United States v. Dion*, 476 U.S. 734, 738 (1986).
[8] 502 U.S. 251, 269 (1992); See also *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985);
[9] See The Indian General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§331-334, 339, 341-342, 348-349, 354, 38 (2000) (repealed 1934).

> permit him to be a roving savage was unendurable, and therefore the task of fitting him for civilized life was undertaken.[10]

The purpose of the Act was clear, to provide for the elimination of the reservations and end tribal dependence on the federal government while promoting the assimilation of tribal members into conventional society. Legislators hoped to complete the assimilation process by forcing the tribes to abandon their communal life-style and imposing Western values of economic independence and nuclear families. However, the small parcels were not large enough for economic viability and many were eventually sold to Non-Indians. In addition, any land deemed to be "surplus," that is beyond what was needed for allotment, was also opened to white settlers. By the time the Act was repealed in 1934 with the enactment of the IRA, around 90 million acres of land, or two-thirds of the 1887 tribal land base, were lost and roughly 90,000 Indians were left landless.[11] The Dawes Act also had a negative impact on the culture of Indian tribes and their ability to self-govern. The depletion of the land base effectively ended hunting as a means of obtaining food and forced men to work in the fields, typically considered to be a women's role in Indian societies. This shift caused many tribes to shift from matrilineal to patrilineal societies, and women who enjoyed status and political importance prior to allotment became dependent entirely on their husband.

Two decades later, in 1906, Congress enacted the Burke Act amending the Dawes Act to give the Secretary of the Interior the power to issue allotees a patent in fee simple to people classified 'competent and capable.' The land of any allottees deemed

[10] Dawes HL (1899). *Have We Failed with the Indian?* New York, NY: Atlantic Monthly, Volume 84. pp. 280-281.
[11] Case DS, Voluck DA (2002). *Alaska Natives and American Laws*, 2nd ed., Fairbanks, AK: University of Alaska Press, 104-5.

'competent' by the Secretary would lose their trust status and become subject to taxation, or could be sold by the allottee. The allotted lands of Indians determined to be incompetent were automatically leased out by the Federal Government, resulting in further loss of tribal land to Non-Indians.[12] This pro-assimilation policy continued for twenty more years until the Department of the Interior conducted a study of the living conditions of the Indian peoples. The product of this study was *The Problem of Indian Administration*, or the Meriam Report, after its author Lewis Meriam. The Meriam Report listed numerous failings of the Dawes Act, from the inadequate size of the allotments to the lack of properly qualified personnel administering the trusts in the Bureau of Indian Affairs (BIA).[13] The report also suggested that through gross mismanagement of the land trusts BIA personnel were cheating Indian allottees out of their land. It was these failings which helped to pave the way for the IRA of 1934.

Possibly the biggest proponent of the IRA was John Collier. Collier was an advocate for Indian rights, believing that the culture of the Indians must be protected from white encroachment. Collier believed that Indian survival was dependent on the retention of the tribal land base. As a result he rejected the assimilation and Americanization policies symbolized by the Dawes Act and demanded the acceptance of the cultural differences of the Native American tribes. In Collier's opinion, the Dawes Act was a complete failure leading to the increasing loss of Indian land and his arrival as a federal Indian policy reformer was a turning point in Indian affairs. Collier attacked the BIA's policies directly. Prior to Collier criticism of the BIA was primarily directed only

[12] Robertson P (2001).
[13] Meriam L (1928). *The Problem of Indian Administration: Report of a Survey Made at the Request of Honorable Hubert Work, Secretary of the Interior, and Submitted to Him, February 21, 1928*. Baltimore, MD. John Hopkins Press.

at the corruption and incompetence of the personnel rather than the policies being followed. Collier fought against legislation and policies which he believed to be detrimental to the well-being of Native Americans and his work led to the study which created the Meriam Report.

The election of President Roosevelt in 1932 was the first step towards fixing the mistakes of the Dawes Act. A reform president, Roosevelt named Collier as the Commissioner of Indian Affairs in 1933. With a mind towards alleviating the conditions brought on by the Great Depression, Collier introduced the IRA to Congress. Codified at 25 U.S.C. §§461-479, the IRA reversed fifty years of assimilation policies and emphasized tribal self-determination and a return of communal Indian land. Several state and federal district courts have found that the purpose of the IRA was to foster and encourage self-government by the tribes.[14] But the Supreme Court has failed to grant certiorari and directly address the issue. Instead, over forty years after the enactment of the IRA, and shortly after the District Court of South Dakota delivered its decision in *Kleppe*, the Supreme Court delivered an opinion in *Oliphant v. Suquamish* which struck a hammer blow against tribal jurisdiction and paved the way for more atrocious cases like *Montana*.[15]

2. *Oliphant* and *Montana*

The first decision to be handed down on the way to *Montana* was *Oliphant v. Suquamish*. Justice Rehnquist delivered the majority opinion in *Oliphant* which held that

[14] See *Cheyenne River Sioux Tribe v. Kleppe*, 424 F. Supp. 448, (SD 1977); See also *State of Fla., Dept. of Business Regulation v. U.S. Dept. of Interior*, 768 F.2d 1248 (CA11 1985); See also *Estate of Johnson*, 125 Cal.App.3d 1044 (Cal.App. 1 Dist. 1981).
[15] 435 U.S. 191 (1978)

Indian tribal courts lack any criminal jurisdiction over Non-Indians.[16] The opinion called efforts by the tribes to exercise criminal jurisdiction over Non-Indians a relatively 'new phenomena' and stated that where these efforts were attempted before they were found to be without jurisdiction.[17] Rehnquist gave as his reasoning that "Until the middle of this century, few Indian tribes maintained any semblance of a formal court system. Offenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes; emphasis was on restitution rather than on punishment."[18] Rehnquist ignored the fact that for the most part there were no tribal courts prior the middle of the century, until *after* the passage of the IRA in 1934. The IRA gave tribes the ability to form their own constitutions and court systems. Prior to 1934, the BIA had primary adjudicatory authority over disputes arising in Indian country. It was not until after the IRA that tribes even had the authority to create their courts, and rather than credit the tribes that bothered to create a court system, Rehnquist marginalizes their efforts. But *Oliphant's* flaws stretch even further than that.

The opinion next cited a statement made in 1834 by the then-Commissioner of Indian Affairs, John H. Eaton. Eaton stated: "With the exception of two or three tribes, who have within a few years past attempted to establish some few laws and regulations among themselves, the Indian tribes are without laws, and the chiefs without much authority to exercise any restraint."[19] Aside from being an observation made by a white man in the early nineteenth century, an age of little cross-cultural understanding, the statement was made 100 years prior to the passage of the IRA and over 140 years prior to

[16] *Id.* at 195.
[17] *Id.* at 197.
[18] *Id.*
[19] H.R.Rep. No. 474, 23d Cong., 1st Sess., 91 (1834).

the date *Oliphant* was decided. Ideas and perspectives on many topics changed drastically over this period of time which spanned five great American wars, as well as the Sioux Wars of the late nineteenth century. Also, the tribes had been given reservations on which to live and many formed their own functional governments and, with the passage of the IRA, their very own court systems based on the Anglo-American model. Take the Navajo Nation for example. Today the Navajo Nation boasts the largest enrolled membership and largest reservation of any of the recognized Indian tribes. The current Navajo government was founded in 1923 to facilitate access to tribal land by American oil companies. The Navajos soon expanded their government to replicate our federal three-branch system by creating both an executive and a judicial branch alongside the Navajo Council. The Navajo Judicial Branch was adopted in 1959 and resembled many state court systems in that it included trial-level district courts, an appellate court and its own police force. I grant that the Navajo Nation is certainly an outlier in that it is likely the most sophisticated of the tribes and its large population gives it access to more resources than others, but it serves as an excellent example of what the tribes can achieve if given the means. For these reasons it was error for the Court to place any reliance on the words of an executive agency officer spoken over 140 years earlier.

The other sources of the Court's reasoning, a treaty from 1830, a single case from 1878 and a 1970 opinion from the Solicitor of the Dept. of the Interior, also do not in my opinion provide adequate support for the Court's decision. The 1830 Treaty with the Choctaw Indian Tribe guaranteed to the Choctaws "the jurisdiction and government of all the persons and property that may be within their limits." But the Treaty concluded with the provision that the Choctaws "express a wish that Congress may grant to the Choctaws

the right of punishing by their own laws any white man who shall come into their nation, and infringe any of their national regulations."[20] Rehnquist found a request for affirmative congressional authority inconsistent with the belief that criminal jurisdiction over non-Indians is inherent in tribal sovereignty.[21] But this request was for punishing Non-Indians by the laws of the tribe, not the laws of the State of Mississippi. At the time of the decision, the Navajo court had already adopted its own version of the Model Penal Code as well as the Arizona Rules of Procedure for use in its courtrooms. The authorities cited by the Court express a concern for the constitutional liberties so fundamental to every American's well-being not being protected. But it was for this very reason that in 1968, just a decade prior, Congress passed into law the Indian Civil Rights Act.

The Indian Civil Rights Act (ICRA) of 1968 required the Indian tribes to recognize and protect nearly all of the rights enumerated in the U.S. Bill of Rights to any person within their jurisdiction. The few exceptions include the lack of an Establishment Clause prohibiting an official religion, the lack of a right to bear arms, and the lack of a right to counsel.[22] The Court recognized that by extending the same basic rights to anyone tried in an Indian court that "many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared."[23] Also considered were the increasing sophistaction of the Indian courts and their resemblance to state systems. In the end, however, the Court stated that without an express Congressional grant of authority the Indian tribes lack the jurisdiction to try and punish non-Indians.

---

[20] *Treaty with the Choctaws*, Art. IV, 7 Stat. 333 (1830)
[21] *Oliphant*, 435 U.S. at 198
[22] 25 U.S.C. §§1301-03.
[23] *Oliphant*, 435 U.S. at 212.

Only four years after *Oliphant*, the Supreme Court handed down a decision in *United States v. Montana*. The primary issue in *Montana* was whether the Crow tribe, relying on the language in a treaty, had the authority to regulate hunting and fishing activities by non-Indians on non-Indian owned fee land within the external limits of the reservation. The author of the majority opinion, Justice Stewart, took things a step further with his rationale that the principles upon which *Oliphant* was based "support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[24] Stewart did acknowledge that the inherent sovereign power of Indian tribes grants the authority to exercise some forms of civil jurisdiction over non-Indians on their reservation, including on non-Indian fee lands. These authorized forms of civil jurisdiction have become known as the 'Montana Exceptions.' The first of these exceptions provides that "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."[25] The second exception allows tribes to exercise civil jurisdiction over "the conduct of non-Indians on fee lands within the 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. [26] The Montana Exceptions have a significant impact in the realm of Indian law because they define the scope of tribal jurisdiction over non-Indians. Unfortunately, in the last 26 years the Supreme Court has found few cases where tribal courts were allowed to retain civil jurisdiction over non-

[24] *Montana*, 450 U.S. at 565.
[25] *Id.*; See also *Williams v. Lee*, 79 S.Ct., at 272; *Morris v. Hitchcock*, 194 U.S. 384; *Buster v. Wright*, 135 F. 947, 950 (CA8).

Indians. As each new decision is handed down, tribal jurisdiction over non-Indians comes closer to being narrowed out of existence, and the most recent example of this is *Plains Commerce Bank v. Long*.

B. Long is Wrong because the cases on which it relies, *Oliphant* and *Montana,* are erroneously interpreted in light of old policies and are substantial deviations from modern Congressional intent.

The dispute in *Long* arose after a non-Indian bank sold fee land on the Cheyenne River Sioux reservation to non-Indian buyers. After the sale, the Longs, an Indian couple who were customers of the bank and had defaulted on their loans, claimed the bank discriminated against them by offering the land to the buyers on more favorable terms than were offered to them. The Longs sued in tribal court, which ruled against the bank and awarded the Longs damages and the right to purchase a portion of the land. The bank appealed to the Cheyenne River Sioux Tribal Court of Appeals on the grounds that the tribe lacked jurisdiction to hear the case. The tribal court's decision was affirmed and the bank appealed again to the U.S. District Court for the District of South Dakota. The District Court granted summary judgment to the Longs after finding that the bank had entered into a consensual relationship with the Longs, thereby subjecting the bank to tribal jurisdiction under the first *Montana* exception.[27] The Court of Appeals for the Eighth Circuit affirmed the decision on the grounds that the Longs' discrimination claim "arose directly from their preexisting commercial relationship with the bank."[28] In the

[26] *Montana*, 450 U.S. at 566.; See also See *Fisher v. District Court*, 424 U.S. 382, 386; *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128-129; *Thomas v. Gay*, 169 U.S. 264, 273,

[27] 440 F. Supp. 2d 1070, 1077-1078, 1080-1081 (SD 2006).
[28] 491 F. 3d 878, 887 (CA8)

Eighth Circuit's view, the tribe had authority to regulate the business conduct of persons who "voluntarily deal with tribal members," including a nonmember's sale of fee land.[29]

The Supreme Court, after considering its decisions in *Oliphant*, *Montana* and in *Strate v. A-1 Contractors*[30], reversed the decision because the tribe lacked the jurisdiction to hear the Long's discrimination claim. Chief Justice Roberts, writing for the majority, stated that tribes generally do not "possess authority over non-Indians who come within their borders."[31] Citing *Strate* that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction,"[32] the Court held that the Tribal Court lacked jurisdiction to hear the Longs' discrimination claim because the tribe lacks the civil authority to regulate the Bank's sale of its fee land. Specifically, the Court determined that the tribal tort law that the Longs were attempting to enforce operated as a restraint on alienation, in this case limiting a nonmember's sale of fee lands they own.[33] The Court explained that the tribal court lacked jurisdiction because the first *Montana* exception expressly applies only to the *activities* of nonmembers, and that the sale of land is not an activity on land but something altogether different. The Court reasons that fee land owned by nonmembers have already been removed from the tribe's control, therefore its subsequent sale to a different nonmember makes no difference because any harm to the tribe's political integrity or ability to self-govern occurred at the point the land transferred out of tribal control.[34]

---

[29] *Id*.
[30] *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997); *Strate* arose from a dispute between two non-Indians after an auto accident that occurred on a state highway within the reservation.
[31] 128 S.Ct. at 2709.
[32] See *Strate*, 520 U.S. at 453.
[33] 128 S.Ct. at 2721.

[34] 128 S.Ct. at 2723.

There are several reasons why the Court's reasoning is flawed. First, the Court relies on the principles set out in *Montana* and *Oliphant* as if they were clear and incontrovertible truths, when they actually mark a significant departure from the foundational case-law as of the Marshall Trilogy and run contrary to the intent congressional enactments like the IRA and the ICRA. Finally, as Justice Ginsburg points out in her dissent the majority in *Long* ignores the old canons of construction for interpreting Indian law by reading the unambiguous language of the *Montana* exceptions in such a way as to make them ambiguous.

1. The Divestiture of Territorial Sovereignty

The Rehnquist-era decisions marked a turning point in the way the Supreme Court looked at Indian-law cases. Prior to that, cases were typically determined based on the foundations laid down by the Marshall Trilogy of cases.[35] These cases spawned the 'implicit divestiture' docrine, based on the notion that the tribes are "domestic dependent nations" and as such enjoyed diminished sovereignty. But one of the most important principles emanating from those decisions was that the Indian tribes retained those aspects of sovereignty which were not expressly divested by Congress.[36] As recently as 1959, the Supreme Court confirmed these principles in *Williams v. Lee*.[37] In *Williams*, the Court held that where crimes occur on the reservation by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive. This decision was announced not even twenty years before *Oliphant*, where

[35] *Johnson v. M'Intosh,* 21 U.S. 543 (1823)*; Cherokee Nation v. Georgia,* 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).
[36] CANBY WC, AMERICAN INDIAN LAW IN A NUTSHELL 88 (1988)
[37] 358 U.S. 217, 222.

the Court applied a blanket rule prohibiting a tribe's assertion of criminal jurisdiction over non-Indians.

Oliphant was the first case to raise the implicit divestiture doctrine since the Trilogy cases, and it laid the foundation for *Montana* and *Strate*. The *Long* opinion cites all three as the primary sources of their reasoning. The Court leads off by citing part of the holding of *Oliphant* that "the tribes have, by virtue of their incorporation into the American republic, lost "the right of governing persons within their limits except themselves.[38] *Montana* then limit this authority solely to civil matters in instances where nonmembers enter consensual relationships with the tribe through commercial dealing, or where nonmember conduct threatens or directly effects the sovereign interests of the tribe. But Congress could not have intended for this level of divestment, and the current federal policy of tribal self-determination support this proposition.

With the repudiation of the Dawes Act, Congress realized that the assimilation of the tribes into our society would not work and instead promoted the reorganization of tribal governments so that they would be more like our own. Beginning with *Oliphant*, the Court has focused solely on the effects of the Dawes Act as the basis for perpetuating its goals. The Court's rationale is that Congress has never expressly acted to reverse those effects. But Congress' intent was clear that Indian country should be preserved as it was at the time the IRA was enacted. If it wasn't clear enough for the Court in 1934, then it should have been clear by 1948 when Congress passed legislation defining Indian country as including "all lands within the limits of any Indian reservation.[39]" Since then Congress has modified the ICRA to extend the rights guaranteed by the Act from"any

[38] *Oliphant*, 435 U.S. at 209.
[39] 18 U.S.C. § 1151(a).

Indian" appearing before tribal courts to "any person." These rights include most of the basic rights enjoyed by anyone in the United States court system with the additional right of habeas corpus to anyone who contests the legality of their detention by an Indian tribe.[40] From the plain meaning of the words in these statutes, it is clear that Congress manifested its belief that lands within the external boundaries of reservations are included within Indian country and that tribal courts are competent to try cases involving non-Indians. Therefore if the Court had decided to, it could have affirmed the adjudicatory jurisdiction of the tribes and finally stopped any further damage caused as a result of *Oliphant* and *Montana*. Instead, *Long* just builds on top of a case for which the only authority from the 20th century was a legal opinion, which the Court knew had been withdrawn for undisclosed reasons, and diminishes further tribal sovereignty.

2. *Long* fits the *Montana* Exceptions

The Court held that the *Montana* exceptions did not apply to the Longs' discrimination claim against the bank because it concerned the sale of fee land acquired from the estate of a non-Indian. The Court drew a distinction between non-member *conduct* and non-member *activities*, explaining that the first exception applies only to activities and that the bank's sale of land was conduct rendering the exception inapplicable.[41] The Court then said that the second exception did not apply because the bank's *conduct* had no effect on the tribe's sovereign interests. However, *Montana* was only a 5-4 decision. Justice Ginsburg wrote for the dissent,with whom Stevens, Souter and Breyer joined, arguing that the case was not about the sale of non-Indian fee land on

[40] 25 U.S.C. §§1302-1303.
[41] 128 S.Ct. at 2721.

a reservation, but "the power of the Tribe to hold nonmembers like the bank to a minimum standard of fairness when they voluntarily deal with tribal members.[42]" It was Justice Ginsburg's opinion that in this context it was within the tribe's authority to adjudicate the Long's claim.

After the bank appealed the tribe's judgment to the federal courts, the District Court found that the contract between the bank and the Longs both created the requisite consensual relationship *and* that it "clearly involved the economic security of the tribe.[43] The District Court based these findings on the facts that after Kenneth Long died and the land was deeded to the bank, the bank took part in discussions concerning the new loan agreement with the Longs and CRST Tribal officers at the CRST Tribal offices on the reservation.[44] The District Court cited the CRST Court of Appeals opinion that:

> This case is the prototype for a consensual agreement as it involves a signed contract between a tribal member and a non-Indian bank. The contract deals solely with fee land located wholly within the exterior boundaries of the reservation. Fee land that was originally owned by the Longs, but owned by the Bank during the controverted events in this lawsuit. All bank loans in this matter were provided solely for the ranching operation by the Longs taking place on the Bank's land within the reservation. Numerous meetings of the Bank with the Longs, with Cheyenne River Sioux Tribal Officials, and Bureau of Indian Affairs personnel took place on the reservation, both when the land was owned by the Longs and subsequently when it was owned by the Bank.[45]

The District Court also found that the economic security of the tribe was affected in that it (along with the BIA) was a direct participant "actively consulted by both the Longs *and* the Bank seeking economic data and support relevant to the cattle operation on the Longs' land.[46] The District Court reasoned that if the economic security of the tribe was not

---

[42] *Id.* at 2727.
[43] 440 F.Supp.2d 1070,1077 (SD 2006).
[44] *Id.* at 1073
[45] *Id.* at 1077
[46] *Id.*

involved, then it would not have had such a large role in these events in seeking to support and advance the opportunity for tribal members to succeed in their ranching operation.

Ginsburg's dissent focuses on many of these same facts. She writes that unlike *Strate*, this was a clear case of a consensual relationship. The dispute in *Strate,* the Court said was "distinctly non tribal in nature" Because it "arose between two non Indians involved in a run of the mill highway accident.[47]" Although the defendant in *Strate* was engaged in subcontract work on the reservation, and therefore had a "consensual relationship" with the tribe, the plaintiff there was not a party that contract, thus it was not a tribal matter.[48] Lending strength to Ginsburg's point is the fact that she also authored the opinion in *Strate*, so she is in the best position to explain the reasoning behind it. She points out that although the Long family operation (the Long Company) was incorporated in South Dakota, it was "overwhelmingly tribal in character, as were its interactions with the bank.[49]" The Long Company is a closely held corporation and CRST members have controlled at least 51% of its outstanding stock at all times. Such Native American control was necessary in order for the Long Company to qualify for BIA guarantees which allowed the bank to make loans to the Longs at greatly reduced risk. In fact, after the Longs' cattle died in the winter of 1996-1997 the bank submitted a claim on those guarantees and received $392,968.55 from the BIA. The District Court found, and Ginsburg agreed, that the loan agreements between the bank and the Long Company were

[47] 520 U.S. at 457.
[48] *Id.*
[49] 128 S.Ct. at 2728.

not only crafted with tribal membership in mind; they would not likely have been possible without it.[50]

Ginsburg observed that the Longs' discrimination claim was based on the allegedly unfair conditions resulting from the bank's failure to provide the loans necessary to sustain the operation of their ranch. She cites again to *Strate* where it was explained that *Montana's* consensual-relationships exception justifies tribal court adjudication of claims "arising out of on-reservation sales transactions between nonmember plaintiffs and member defendants.[51] How should it be different between member plaintiffs and non-member defendants?

The Majority in *Long* noted the absence of any case law specifically finding that *Montana* authorized a tribe to regulate the sale of non-Indian fee land.[52] But then why does *Montana's* list of examples of valid consensual relationships that tribes might have have authority over include "commercial dealing, contracts and leases.[53] If the Court had intended land sales to be excluded from this then it could have easily said so, but it did not. And why would a tribe's enforcement of an antidiscrimination claim be less important to tribal self-rule when it relates to the sale of land than in other contractual relationships?

C. C. Long is Wrong Because the Consensual Relationship Exception is an Inappropriate Restriction on the Tribes' Ability to Self-Govern.

In most peoples' minds, the notions of sovereignty and self-determination would include the power for a state to subject any outsiders who come within its borders to governmental authority. As I cited before however, in *Oliphant* the Supreme Court held

[50] 440 F.Supp.2d at 1078.
[51] 520 U.S. at 457.
[52] 128 S.Ct. at 2722.

that "the tribes have, by virtue of their incorporation into the American Republic, lost the right of governing persons within their limits except themselves."[54] But this does not reconcile itself with the position of the States when they entered our Republic. Surely we know that the States may exercise personal jurisdiction over non-residents in instances where the conduct or activities of those persons takes place within the state's borders. So why are the tribes treated differently?

Perhaps it is because the Anglo-American judicial system emerges from a culture so drastically different than that of the Indian tribes. This could cause some concern with the Court about potential litigants having fair notice that they will be subjected to the authority of the tribal courts. This seems a valid concern because average Americans, or other non-Indians, may lack any knowledge or information about the laws on Indian reservations so that to subject them to the jurisdiction of tribal courts would be a violation of their right to fair notice under the Due Process Clause.

Smith v. Salish Kootenai College[55], the Ninth circuit relied on *Williams* and *Hicks* to determine that the "consensual relationship" test for civil tribal jurisdiction resembled the Due Process Clause analysis for personal jurisdiction used in federal courts.[56] This begs the question, then, what are the federal standards? In the benchmark case of *World-Wide Volkswagen Corp. v. Woodson*[57], the Supreme Court gave us the "minimum contacts" rule. In *Woodson*, the Court reaffirmed that a state court may exercise personal jurisdiction over non-resident defendants only so long as the defendant maintains

---

[53] 450 U.S. at 565
[54] *Oliphant*, 435 U.S. at 209.
[55] No. 03-35306, slip op. at 126-127 (9th Cir. January 10, 2006)
[56] *Id.* Slip op. at 121.
[57] *World-Wide Volkswagen v. Woodson*,444 U.S. 286 (1980).

"minimum contacts" within the forum state.[58] The Court said that this rule protects defendants against litigating in distant or inconvenient forums and ensures that the States do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system.[59]

The Court made clear that this protection against inconvenient litigation means "reasonableness" and "fairness," such that defendant's contacts within the forum state must be such that maintenance of the suit "does not offend traditional notions of fair play and substantial justice."[60] In addition, courts considering this should consider other factors such as the form state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief[61], but the Due Process clause may sometimes divest a forum state from its power to render a valid judgment, notwithstanding these factors if the defendant has no contacts within that state.[62]

So what are these "minimum contacts?" According to *Woodson*, the threshold must be something more than mere foreseeability of being brought before the forum state's courts.[63] Rather, similar to the situation in *Long*, a corporation was brought before the forum state and challenged the state's jurisdiction to hear the case.[64] The Supreme Court stated that when a corporation purposefully avails itself of the privilege of conducting activities within the forum state, it has clear notice that it is subject to suit there.[65] Thus, the forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream

[58] *Id.* at 292; *See also*: *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)
[59] *Id.* at 293.
[60] *Id.*
[61] *Id.*
[62] *Hnason v. Denckla*, 357 U.S. 251, 254 (1958)
[63] 444 U.S. at 297.
[64] 444 U.S. 286

of commerce with the expectation that they will be purchased by consumers in the forum state.[66]

This is clearly analogous to the circumstances in *Long*, where the bank knowingly engaged in a transaction with an Indian-owned enterprise, the transaction took place on the reservation, the bank regularly dealt with other Indian customers, and the terms of the disputed agreement were negotiated with the Bureau of Indian Affairs at CRST tribal offices. This should be more than sufficient contact within the reservation to support the exercise of tribal jurisdiction if the standards laid down in *Woodson* applied to tribal courts in the same manner as they do for the states. Moreover, it would certainly have been enough for the Supreme Court to affirm tribal authority under *Williams v. Lee* where the Court held that it would undermine tribal courts' authority over reservation affairs and infringe upon the right of the tribes to govern themselves to allow the exercise of state jurisdiction where a non-Indian was on the reservation, and the transaction took place on the reservation.[67]

For tribal jurisdiction though, the consensual relationship must stem from "commercial dealing, contracts, leases, or other arrangements,"[68] and it requires that the tribal authority imposed bear a nexus to the consensual relationship itself.[69] Relative to the authority granted to the states to try non-resident defendants, this is a much higher standard. Under *Long*, the two standards should make no difference because, to me, in this case the facts support an exercise of tribal jurisdiction either way. The consensual relationship exception in this case should have been no more than just an annoying

---

[65] *Id.* at 298.
[66] *Id.*
[67] 358 U.S. at 224.
[68] *Montana*, 450 U.S. at 565.

obstacle, but, in this case and in many other tribal jurisdiction cases, it has utterly precluded Indian tribes from exercising jurisdiction over nearly all non-Indian activities on reservations. How can this be an appropriate rule for the Supreme Court to follow?

The real question is what interests are we promoting by continuing to use this ridiculously stringent standard? The Supreme Court has waved the flag of fair notice as its primary justification in denying jurisdiction to the tribes in both civil and criminal matters. But this is a more recent development, starting with *Oliphant*. It is important to mention that the Court never expressed these concerns in civil cases prior to *Oliphant*. In fact, in *Williams v. Lee* the Supreme Court found it perfectly reasonable to hold a Non-Indian defendant liable in a tribal court for conduct occurring on the reservation.[70] For the early part of the twentieth century even it can be argued that there existed an attitude within federal courts that tribal civil jurisdictions over Non-Indians was perfectly acceptable.

A pragmatic approach is a far better solution to the problem of modern federal Indian law. I think if view things realistically or with a little more common sense and stay away from creating complicated or outdated legal fictions we would end up with something much more workable for both the United States and the individual Tribes. The case that feel is the best example of this view would be the Eighth Circuit decision in *Buster v. Wright*[71] all the way back in 1905. The case in *Buster* involved a dispute between the Creek Nation and a group of Non-Indian traders who were conducting their business on the Creek reservation.[72] There, the Creek Nation levied a permit tax on non-

---

[69] *Strate*, 520 U.S. at 457.
[70] *Williams v. Lee*, 358 U.S. 217 (1959)
[71] *Buster v. Wright*, 135 F. 947 (8th Cir. 1905)
[72] *Id.*

citizens (of the tribe) for trading within its borders, but the traders contested the tribe's authority to require the payment of the tax.[73] The case proceeded through the tribal courts up to the Eighth Circuit, which affirmed the tribe's ability to levy the tax on Non-Indians.

The traders in *Buster* contended that the authority of the tribe to levy such a tax was limited by the fact that they owned the land that their businesses were located on and that the tribe had lost title to it.[74] However, the Eighth Circuit held that the power to levy such a tax was "one of the inherent and essential attributes of their original sovereignty…a natural right of that people, indispensable to its autonomy as a distinct tribe or nation."[75] In making this decision the court noted that Congress of course had the power to take the Creek Nation's authority to tax non-Indians away, but until then it remained within the scope of the tribe's power.[76] The Court also emphasized that it found the tribe to be well qualified to levy such a tax based in part on the fact that the Creek Nation had modeled its Constitution after our own and adopted a three-branch system of government as well.[77]

The traders presented the arguments that because the properties in question were owned by non-Indians or because they were located within distinct non-Indian towns or settlements on the reservation that they were exempted from the tribal tax.[78] But the court rebuffed these assertions by stating that "Neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities…nor by the ownership, nor occupancy of

[73] *Id.* at 949.
[74] *Id.* at 950.
[75] *Id.*
[76] *Id.*

land within its territorial jurisdiction by citizens or foreigners."[79] Rather the Justice Sanborn determined that "the payment of [the] tax is a mere condition of the exercise of [the] privilege [of trading on the reservation]. No noncitizen is required to exercise the privilege or to pay the tax. He may refrain from the one and he remains free from liability for the other."[80] This represents a polar opposite view of that taken by the Rehnquist Court in *Montana* and *Oliphant*, and in my opinion, a view that actually makes sense. Though *Buster* was essentially a tax issue, the analysis and logic translate easily to a discussion over tribal jurisdiction.

It should also be noted that in *Buster* the Creek Nation's sole means of enforcing its tax against the traders was to have federal agents come onto the reservation and shut down the offending businesses.[81] The traders relied on a Congressional enactment for their initial cause of action. An appropriations act for the Indian Department, dated May 27, 1902, also included that "it shall hereafter be unlawful to remove or deport any person from the Indian Territory who is in lawful possession of any lots or parcels of land in any town or city in the Indian Territory which has been designated as a town site under existing laws and treaties."[82] The traders relied on this to argue that the closing of their businesses was a violation of their rights under the Fifth Amendment and deprived them of life, liberty, or propert without due process of law.[83] But, after determining that the tribe had lawful authority to levy their permit tax on the traders, the Eighth Circuit held that "Every noncitizen who continues to trade after his refusal upon reasonable demand

---

[77] *Id.* at 950-951.
[78] *Id.* at 952.
[79] *Id.*
[80] *Id.* at 949.
[81] *Id.* at 949-950.
[82] H.R. Rep., Ch. 888, 32 Stat. 259 (May 27, 1902.)
[83] *Id.* at 955

to pay his permit tax is a continuous violate of [the] law…and he has no personal or property right to violate that or any other valid law. Hence the mere stoppage of that violation, the mere closing of his unlawful business…impinges upon no right of life, liberty, or property which he possesses."[84]

Relying on an U.S. Attorney General's Opinion that the 1902 law did not, nor was intended to, limit the tribe's authority to enforce its tax upon non-Indians within the reservation, the *Buster* court reached the final conclusion that "purchasers of lots in town sites in towns or cities within the original limits of the Creek Nation…are still subject to the laws of that nation prescribing permit taxes for the exercise by noncitizens of the privilege of conducting business."[85] In my opinion this is a rational opinion that embodies an understanding of general facts of life and I believe it is especially relevant to both the *Long* decision and to the very state of Federal Indian law in general. Granted, *Buster* was a tax case rather than a jurisdictional, but then so was *Montana.* If the Supreme Court had only decided *Montana* on the basis of whether the Crow tribe had the authority to charge non-members for hunting permits, rather than whether the it had jurisdiction over non-Indians, we may have been in a vastly different state of affairs today.

In addition, the facts of *Buster* and *Long* can be easily analogized. Both involved commercial enterprises that conducted business transactions on the reservation knowingly and intentionally. The view presented was pragmatic and more necessary now than ever before given the complex nature of the animal that Indian law has become. And the decision in *Buster* came in 1905, before the IRA and well before the ICRA. This

[84] *Id.*
[85] *Id.* at 958.

shows us that there were judges who believed that the tribes were competent enough in their authority to regulate the conduct of Non-Indians within the boundaries of Indian reservations, and that it would probably not be a radical concept. The later repeal of the misguided Dawes act with the passage of the IRA makes it easy to infer that tribes exercising civil jurisdiction over disputes involving Non-Indians and arising in Indian country would also have been acceptable to these judges if they were sitting at the bench today. Surely this attitude was confirmed when *Williams* was handed down in 1959.[86] And it can be further argued that the passage of the ICRA only a decade after that was actually a Congressional affirmation of tribal authority in this regard.

Montana's consensual relationship exception arose from *Oliphant*, but it seems to me that the only foundation for the decision in *Oliphant* arose from the 1834 opinion I referred to earlier which read: "With the exception of two or three tribes, who have within a few years past attempted to establish some few laws and regulations among themselves, the Indian tribes are without laws, and the chiefs without much authority to exercise any restraint."[87] This is why the consensual relationship exception is an inappropriate restriction on tribal sovereignty. Tribal judicial systems have advanced dramatically in the last 80 years. In most cases they virtually mirror their Anglo-American counterparts in form and function. Many tribes have also adopted similar civil codes to the states in which their reservations lie.

The Navajo Nation, for example, possess the largest reservation in the country, occupying parts of Utah, New Mexico and a large portion of Arizona. The Navajo Judicial system consists of an appellate court, the Supreme Court of the Navajo Nation,

[86] *Williams*, 358 U.S. 217 (1959).
[87] H.R.Rep. No. 474, 23d Cong., 1st Sess., 91 (1834).

and numerous trial-level district courts. The Navajo Nation has also adopted its own version of the UCC and utilizes a unique Peacemaking Program much akin to court-appointed mediators in other states. While small cultural differences may exist, even between tribes, they cannot be said to be substantially different from the differences that exist between the states to the extent that it would be unfair or prejudicial to subject a Non-Indian who is conducting his affairs within the boundaries of their reservation to tribal jurisdiction. The Supreme Court has said that absent a Congressional Enactment, it cannot give the tribes these powers. But Congress has acted. The passage of the IRA was an expressed Congressional desire that the tribes, and their sovereignty should remain. The ICRA supplied them with the procedural tools and safeguards to try non-Indians. Their laws are familiar to Non-Indians and the courts are competent, and the continued reliance on the consensual relationship exception is gradually eroding what little remains of tribal sovereignty. But the Supreme Court turns a blind eye to these developments and continues to use and rely on the Trilogy cases, whose only seemingly rational authority is 175 year old statement made by a BIA official that reeks of racist overtones.

Further, the consensual relationship exception is inappropriate because it clearly complicates the judicial process with its apparently ambiguous language. The exception cases that have come since *Montana* have shown us that the Supreme Court apparently did not mean what it said with seemingly plain language. The decision in *Long* only affirms this conclusion. If a bank that regularly does business with Indian clients on reservation and who negotiates these transactions through the BIA can't be said to have a consensual relationship with the tribe that would subject it to the authority of tribal

courts, then what is the purpose for having such an exception is the first place? Rather, I think we need to start with a clean slate and start over by taking a hard look at the foundations of federal Indian law and the *Buster* decision. The *Buster* decision represents rational and sensible thinking, and it expressly affirms the inherent sovereignty of the tribes while at the same time giving them the means to enjoy and utilize that sovereignty.

In the spirit of the IRA and the basic principles that provide that the tribes possess attributes of inherent sovereignty not divested by Congress, *Long* was wrongly decided. The Court based its decision solely on the effects of policies and perspectives that have been expressly repealed by Congress. Rather than respecting and fostering tribal sovereignty, *Long* has done more to create an illusion. If there is ever any hope for tribal courts to possess real authority over non-Indians, it is up to Congress to express it in terms clear enough for the Court to understand.