NOTE

A DOLLAR FOR YOUR THOUGHTS: *DOLLAR GENERAL* AND THE SUPREME COURT'S STRUGGLE WITH TRIBAL CIVIL JURISDICTION

I. INTRODUCTION

Tribes have been deemed "quasi-sovereign nations"[1] with a unique amalgam of attributes, at once having a "dependent status"[2] and being "distinct, independent political communities" that retain some of their original sovereignty.[3] There are 567 federally recognized Indian tribes in the United States, with approximately 56.2 million acres of land held in trust by the federal government on behalf of the Indian tribes, and 326 land areas administered as Indian reservations.[4] It is inevitable that non-Indian, non-member businesses, and individuals will travel through, live on, establish businesses on, fish or hunt on, and even commit crimes or torts on these lands.[5]

For as long as the United States has existed, the federal government and the Indian tribes have had a complicated relationship.[6] The policies toward these tribes have fluctuated from one extreme to another, from elimination to self-determination.[7] Justice Marshall once noted that the legislature's authority over tribal matters is extremely broad, and as such, the role of courts in interfering in tribal affairs ought to be restrained.[8] Yet when it comes to non-members, interference in tribal legislative and adjudicatory jurisdiction has become quite common in

1. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 (1978).
2. United States v. Wheeler, 435 U.S. 313, 323 (1978).
3. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).
4. *Frequently Asked Questions: Why Tribes Exist Today in the United States*, U.S. DEP'T INTERIOR INDIAN AFF., http://www.bia.gov/FAQs (last visited Nov. 15, 2017).
5. *See, e.g.*, State v. A–1 Contractors, 520 U.S. 438, 442, 457-59 (1997); Montana v. United States, 450 U.S. 544, 563-67 (1981); Transcript of Oral Argument at 40-63, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016) (No. 13-1496).
6. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 48-50 (1982).
7. M. Gatsby Miller, Note, *The Shrinking Sovereign: Tribal Adjudicatory Jurisdiction over Nonmembers in Civil Cases*, 114 COLUM. L. REV. 1825, 1829-31 (2014).
8. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).

the past few decades.[9] In the past twenty-nine years, the Supreme Court has ruled against tribal interests in seventy-two percent of the fifty-five cases heard.[10] The Roberts Court has considered four cases in the past year alone.[11]

Dollar General Corp. v. Mississippi Band of Choctaw Indians[12] was shaping up to be the most far-reaching of these cases.[13] Dollar General signed a multi-year lease and opened up a store in a shopping plaza managed by a tribal-run company on the Mississippi Choctaw reservation in 2000.[14] Pursuant to a business license issued under the Choctaw Code, Dollar General consented to tribal court jurisdiction for matters arising out of the lease.[15] The tribe operated a youth job-training program, placing young tribe members in positions with local businesses and paying them for the work done under the supervision of the business.[16] In 2003, a teenager employed by Dollar General through this program claimed that the store manager, a non-tribal employee, sexually assaulted him while working in the store.[17] Since the manager never faced any criminal repercussions, the teenager and his family ultimately sued Dollar General in tribal court.[18] Despite a consensual business relationship with the tribe, Dollar General contested the tribal court's ability to exercise jurisdiction on four separate occasions.[19] Each time, its argument was rejected, until Dollar General appealed to the Supreme Court.[20]

This Note argues that the Supreme Court's line of precedent since the 1970s both contains and relies upon flawed reasoning and assumptions regarding the historical position of the tribes in relation to the federal government and tribal courts' ability to adjudicate matters

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9. Miller, *supra* note 7, at 1831-37.

10. Stephen Wermiel, *SCOTUS for Law Students: Indian Cases at the Court*, SCOTUSBLOG (Jan. 4, 2016, 9:48 AM), http://www.scotusblog.com/2016/01/scotus-for-law-students-indian-cases-at-the-court.

11. *Id.*

12. 136 S. Ct. 2159 (2016).

13. Wermiel, *supra* note 10.

14. Ed Gehres, *Argument Preview: The Future of Tribal Courts — The Power to Adjudicate Civil Torts Involving Non-Indians*, SCOTUSBLOG (Nov. 30, 2015, 9:45 PM), http://www.scotusblog.com/2015/11/argument-preview-the-future-of-tribal-courts-the-power-to-adjudicate-civil-torts-involving-non-indian.

15. *Id.*

16. *Id.*

17. Lisa Nagele-Piazza, *High Court Upholds Tribal Jurisdiction in* Dollar General *Case*, SOC'Y FOR HUMAN RESOURCE MGMT. (June 24, 2016), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/tribal-jurisdiction-dollar-general.aspx.

18. Gehres, *supra* note 14.

19. *Id.*

20. *Id.*

concerning non-members without violating due process.[21] These fundamentally flawed conclusions are not only a means for the Supreme Court to interfere with tribal matters and in effect diminish tribal sovereignty, they also ultimately conflict with principles of international law.[22]

Part II of this Note elaborates generally on the historical relationship between the tribes and the federal government from early American history through the era of self-determination, which began in the 1960s and continues today.[23] It addresses the major decisions coming out of the Supreme Court that have drastically limited the ability of the tribal courts to assert jurisdiction over non-members within their territory, and summarizes the general circumstances of tribal civil jurisdiction as they existed at the time the Supreme Court agreed to hear *Dollar General*.[24] Part III of this Note explains the unique outcome of *Dollar General*, the underlying unresolved issues that both contributed to the case coming before the Court and some of the issues that remain afterward, and the impact of such concerns on tribal courts and tribal sovereignty, as well as non-members who interact with the tribes.[25] Finally, Part IV of this Note explains how *Dollar General* ought to have been decided if the Supreme Court had a full bench, and how the Court should approach civil divestiture cases in the future to resolve the uncertainty in its own precedent, comport more with fundamental principles of international law, and restore some of the sovereignty the tribes historically possessed.[26]

II. THE RELATIONS BETWEEN CONGRESS, FEDERAL COURTS, AND THE TRIBES

The relationship between the federal government and the tribes is complex.[27] From the early colonial era, to the adoption of the Constitution and beyond, the policies of the European "discoverers" and, later, the federal government, have fluctuated.[28] The recent *Dollar General* case is a culmination of all that has come before it; the next logical step from the path that Indian law has taken over the years.[29] This

21. *See infra* Part IV.

22. Stephen Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. REV. L. & SOC. CHANGE 217, 275-80, 287-94 (1994); *see infra* Part II.

23. *See infra* Part II.

24. *See infra* Part II.

25. *See infra* Part III.

26. *See infra* Part IV.

27. *See infra* Part II.

28. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 6 (noting six different eras in Indian law).

29. *See infra* Part II.B–C.

Part first discusses the policies surrounding European-Native and early American-Native relations and the dramatic shift in how the tribes were perceived by the United States.[30] Next, this Part discusses the significant case law that has been developed by the Supreme Court as a result of this perception of the Indian Nations.[31] This Part also explains the state of tribal court authority to exercise civil jurisdiction and, by extension, tribal sovereignty before the *Dollar General* case.[32]

A. Early Federal Policies

Relations between the tribes and the European powers and colonies leading up to the American Revolution were those as between two sovereign nations.[33] From the time of first contact between the tribes and the Europeans, relations were conducted formally through the creation of treaties.[34] The view was that the Indian tribes had exclusive jurisdiction over their lands, with the corresponding legal rights to property and self-government; and as such, relations should be conducted in this manner.[35] When the colonies became more established, however, England was concerned that the colonists would become overeager to take over Indian lands without negotiation or compensation, contrary to the settled policy of the European powers.[36] The Crown thus issued a Royal Proclamation in 1763, voiding any treaties or land purchases made by any individuals

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30. *See infra* Part II.A.

31. *See infra* Part II.B.

32. *See infra* Part II.C.

33. McSloy, *supra* note 22, at 228.

34. *Id.*

35. *See* Amy Conners, Note, *The Scalpel and the Ax: Federal Review of Tribal Decisions in the Interest of Tribal Sovereignty*, 44 COLUM. HUM. RTS. L. REV. 199, 210 (2012); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 6, at 50-52 (discussing Francisco de Vitoria, a Roman Catholic philosopher and one of the fundamental contributors to theories of human rights and self-determination, which formed the foundation of the relationship between Native Americans and European nations). de Vitoria's analysis established the principle that before Europeans could legally acquire lands or dominion over Indian tribes, the tribes must first give their consent. *Id.* at 50. Pope Paul III incorporated de Vitoria's principle in the *Sublimis Deus* in 1537, which stated:

> [T]he said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and of no effect.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 6, at 52 n.15 (quoting FRANCIS AUGUSTUS MACNUTT, BARTHOLOMEW DE LAS CASAS 429 (Arthur H. Clark Co. 1909)). Substantially similar language may be found in the Northwest Ordinance enacted by the Continental Congress and reenacted by the U.S. Congress. *See id.* at 108 n.383.

36. McSloy, *supra* note 22, at 234. For a thorough discussion of the doctrine of discovery as it was applied toward the Indian tribes, see *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 545, 572-73, 591-92 (1823).

or the colonies unless they were approved by the Crown, and effectively centralized the power to conduct relations with the tribes.[37]

A similarly centralized policy was adopted by the framers of the Constitution.[38] Among the federal government's enumerated powers are the ability to establish treaties[39] and regulate commerce with the tribes.[40] Treatymaking, a power belonging solely to the federal government, continued to be the main means of interacting with the tribes.[41] The aim of the two provisions regarding tribal affairs was to ensure that the federal government had the enumerated power to conduct relations between the government and the tribes, not the states.[42]

Perhaps the most significant early contribution to case law regarding the tribal nations' status can be found in Chief Justice Marshall's trio of cases, *Johnson v. M'Intosh*,[43] *Cherokee Nation v. Georgia*,[44] and *Worcester v. Georgia*.[45] First, per the Supreme Court, the doctrine of discovery could be applied to the lands occupied by the tribes, justified in part on the basis of race, because of the "character and habits of the [Indians]."[46] Second, the Court nevertheless held that the only limitation on the tribes' sovereignty was that the tribes could not sell or give away land at will to whomever they pleased.[47] Less than a decade later, the Court went further: although the Cherokee Nation was recognized by the federal government as a state, the Indian tribes could not be deemed foreign nations; rather, the tribes were "domestic dependent nations"—a legal fiction newly invented by the Court.[48] The

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37. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 548 (1832). A similar policy was adopted by the federal government. *See* An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790) (codified at 25 U.S.C. § 177 (2012)).

38. *See* U.S. CONST. art. I, § 8, cl. 3; art. II, § 2, cl. 2.

39. *See id.* art. II, § 2, cl. 2.

40. *Id.* art. I, § 8, cl. 3.

41. *See id.* art. II, § 2, cl. 2; STEPHEN CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE 45-47 (1988) (indicating that treaties between the federal government and the tribes were concluded in the same manner as treaties between the federal government and a foreign sovereign).

42. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18-19 (1831).

43. 21 U.S. (8 Wheat.) 543 (1823).

44. 30 U.S. (5 Pet.) 1.

45. 31 U.S. (6 Pet.) 515 (1832).

46. *Johnson*, 21 U.S. (8 Wheat.) at 589. The doctrine of discovery, a "principle of universal law" according to the Court, had traditionally meant that legal title in vacant land vested in the discovering country. *Id.* at 595.

47. *Id.* at 574. This limitation would later be relied upon by the Court as a means of justifying its theory of implicit divestiture. *See* John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the* Cohen's Handbook *Cutting-Room Floor*, 38 CONN. L. REV. 731, 736-40 (2006).

48. *Cherokee Nation*, 30 U.S. (5 Pet.) at 16-17. The Court, at the time, failed to further elaborate on exactly what the term "domestic dependent nations" meant, but in a later case, the Court determined that the ability of the federal government to exert power over the tribes was "necessary [for] their protection" and described the tribes as "wards" and "communities *dependent*

Court then backtracked a year later in *Worcester*.[49] As in the earlier cases, the Court was required to resolve whether the State of Georgia could impose its laws upon the Cherokee Nation.[50] Marshall, relying on principles of international law, determined that the tribes were "independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial."[51] The tribes, therefore, have an inherent and complete sovereignty over those lands, including the ability to self-govern, such that the government has no authority to interfere with the tribal affairs.[52] Although the *Worcester* decision was ultimately unenforced,[53] Chief Justice Marshall's description of the Indian tribes' position in relation to both the states and the federal government to this day remains some of the strongest language in support of tribal sovereignty.[54]

A major shift in federal-tribal relations developed in tandem with westward expansion under the notion of manifest destiny.[55] The expansion was gradual at first, but when the Gold Rush hit in 1848, the movement west became explosive.[56] At the same time, dominion over relations between the federal government and the Native Americans was

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on the United States." United States v. Kagama, 118 U.S. 375, 383-85 (1886).

49. *See Worcester*, 31 U.S. (6 Pet.) 515.

50. *Id.* at 542.

51. *Id.* at 559-60. Chief Justice Marshall further stated:

> The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, *as we have applied them to the other nations of the earth*. They are applied to all in the same sense.

Id. (emphasis added).

52. *See id.* at 547-48. Chief Justice Marshall has explained:

> [O]ur history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians . . . . The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He . . . never intruded into the interior of their affairs, or interfered with their self-government.

Id. at 547. Note that Chief Justice Marshall's analysis of the colonial powers' interactions with the tribes is consistent with the re-vamped doctrine of discovery in which certain exclusive rights, but *not* possessory rights, were vested in the first European power to "discover" the particular area of occupied land, including the ability to enter into treaties with and purchase lands from the tribes. *See Johnson*, 21 U.S. at 572-74 (1823).

53. McSloy, *supra* note 22, at 239. The decision in *Worcester* was politically unpopular and in the aftermath, the Cherokee people were forcefully removed from their lands and traveled west along the infamous "Trail of Tears." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 6 at 83-84, 91-92.

54. *See* McSloy, *supra* note 22, at 244-50.

55. *See* ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 101-35 (1970).

56. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 6, at 97.

transferred from the War Department to the Department of the Interior.[57] During this period, the House of Representatives successfully inserted itself into Indian affairs, a province that once belonged solely to the Senate and the Executive.[58] In 1871, a rider was attached to an appropriations bill which declared that the tribes would no longer be recognized as independent nations, with whom the federal government could engage with in treaty-making.[59] The inevitable implication of these actions, of course, was to diminish the view of federal-tribal relations as an international issue; rather, the tribes became a unique political entity, less than sovereign, located within the territory of the United States.[60]

B. Implicit Divestiture and Significant Supreme Court Decisions Affecting Tribal Civil Jurisdiction

Once Congress seized the authority over tribal affairs as a domestic issue, it proceeded to use this power to interfere with the internal affairs of the tribes, with the Supreme Court's support.[61] The Court has held that the acts of Congress were not authorized under any provision of the

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57. Act of Mar. 3, 1849, ch. 108, § 5, 9 Stat. 395 (codified at 25 U.S.C. § 1 (2012)). The fact that the responsibility over Indian affairs had been in the hands of the War Department since 1789 only reaffirms the recognition that such affairs were of an international nature. *See* RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 34-35 (1980).

58. Antoine v. Washington, 420 U.S. 194, 202 (1975).

59. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71); *see also* BARSH & HENDERSON, *supra* note 57, at 68 n.36 (explaining that existing treaties with the tribes were not affected); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 6, at 127-28 (same). This law was arguably unconstitutional because it interferes with the Executive's capacity to enter into treaties, though the Supreme Court has never ruled so, leading to the sudden shift in policy in 1886. *See* United States v. Kagama, 118 U.S. 375, 382, 384-85 (1886) ("[A]fter an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern [Indians] by acts of Congress."); BARSH & HENDERSON, *supra* note 57, at 68-69 (discussing the difference between the two policies and its impact on the role of the Supreme Court). For instance, "[t]reaties, like contracts, are unenforceable except against those agreeing specifically and expressly to be bound by them. Legislation, however, is presumed to be legitimate when enacted, and enforceable against all persons within the power of the legislature." BARSH & HENDERSON, *supra* note 57, at 69.

60. *See* 25 U.S.C. § 71; *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 6, at 106-07; Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CALIF. L. REV. 1499, 1518-19 (2013) (discussing how interference by Congress through the allotment program in the 1880s and the termination movement of the 1950s served to diminish tribal sovereignty by taking tribal lands out of the hands of the tribal governments).

61. *Kagama*, 118 U.S. at 79-83. Even with the Trail of Tears and the Dawes Act, both of which seriously diminished the amount of land that was considered to be in the tribes' possession, the notion expressed by the Court in *Worcester* remained good law—the tribes may exert complete sovereignty over their land. *See* Indian General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (repealed 2000).

Constitution.[62] Searching for a legitimate basis of Congress's power to legislate, the Court instead turned to judicially constructed limitations on the tribes' sovereign powers.[63]

Although the Supreme Court has stated repeatedly that Congress has "plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess,"[64] beginning in the 1970s, federal courts adopted the role of determining when the tribes' status as "dependent nations" limited their sovereignty and by extension their ability to exercise authority over non-members on their land.[65] According to the Court, when the tribes were incorporated into the territory of the United States, they accepted its protection.[66] This incorporation correspondingly implicitly divested them of some of the original sovereignty which they had once exercised.[67] As for the powers that still belonged to the tribes, the Court determined that any "aspects of sovereignty" that had not been taken away by treaty or by statute, or even by implication due to their "dependent status" belonged to the tribes.[68] The ability to exercise jurisdiction over relations between tribal members and non-members was one of these powers that was implicitly divested.[69] This was a decisive turn from the Court that declared that tribal governments have inherent sovereignty over activities that happen on their lands, regardless of whether non-members were involved or not.[70]

In conjunction with the *Wheeler* decision in 1978,[71] the Supreme Court declared that same year that private individuals had no cause of

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62. *See Kagama*, 118 U.S. at 378-80. The legislative power of Congress over the tribes was nevertheless upheld, despite there being no constitutional basis for that power. *See id.* at 384-85.

63. LaVelle, *supra* note 47, at 732-34.

64. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); *see* Talton v. Mayes, 163 U.S. 376, 384 (1896). For a discussion on why this assumption by the Court contradicts history, principles of international law, and even the Court's own precedent see McSloy, *supra* note 22, at 278-79.

65. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194-95 (1978). Beginning with *Oliphant*, for the first time in more than 150 years, the Supreme Court began adding powers to the list of those that were implicitly divested when the tribes were deemed domestic dependent nations within the United States. *See* Conners, *supra* note 35, at 215-16.

66. United States v. Wheeler, 435 U.S. 313, 323 (1978).

67. *Id.* To get a sense of the implicit divestiture theory in its early stages of development, see *Kagama*, 118 U.S. at 379-84.

68. *Wheeler*, 435 U.S. at 323. The view that certain aspects of sovereignty were "taken" by treaty or statute directly contradicts the principle of international law that any rights or powers that are not granted by one sovereign nation to a treaty to the other are retained by the granting party. *See* United States v. Winans, 198 U.S. 371, 380-82 (1905); McSloy, *supra* note 22, at 264.

69. *Wheeler*, 435 U.S. at 326.

70. Williams v. Lee, 358 U.S. 217, 219-20, 223 (1959); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 553-55 (1832).

71. *Wheeler*, 435 U.S. 313.

action against tribal courts under the Indian Civil Rights Act ("ICRA").[72] Before this decision, non-members were free to bring an action against the tribes and their courts in federal court and argue that in that particular case, extending the exercise of tribal civil jurisdiction would result in a violation of due process under the ICRA.[73] But, thanks to the ruling in *Martinez*, non-members who faced subjection to tribal courts for incidents that arose on tribal lands instead pleaded to the federal courts that the tribal courts' civil jurisdiction simply does not exist in the first place.[74] Hence, the development of *Montana*[75] and its progeny.[76]

In 1981, tribal civil jurisdiction, and therefore tribal sovereignty, was dealt a major blow.[77] The Supreme Court held that there was no suggestion in the history of legislative policies that Congress intended that non-Indians settled on allotted lands be subject to tribal regulatory or adjudicative authority.[78] In fact, without express congressional delegation, there was a presumption that the tribes' inherent sovereign powers do not extend to the activities of non-members.[79] However, the Court also identified two exceptions to this presumption where civil jurisdiction is concerned: (1) the tribes may regulate the activities of non-members who have entered into deliberate relationships with the tribes or its members through contracts, leases, or other commercial dealing; and (2) the tribes retain the power to exercise jurisdiction over non-members' conduct when that conduct endangers or has some direct impact on the tribes' political integrity, economic security, or health and welfare. [80] Since this decision was handed down, however, the Court has narrowed, redefined, and even completely ignored the implicit divestiture doctrine.[81]

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72. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51-52 (1978); *see* Pub. L. 90-284, § 202, 82 Stat. 77, 78 (1968) (codified as amended at 25 U.S.C. § 1302(a)(8) (2012)).

73. *See* § 202, 82 Stat. at 77-78.

74. *Martinez*, 436 U.S. at 72; Conners, *supra* note 35, at 226-27. This was in spite of the fact that the Court acknowledged that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Martinez*, 436 U.S. at 65.

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

76. *See, e.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008); Nevada v. Hicks, 533 U.S. 353 (2001); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987); Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985); Strate v. A-1 Contractors, 520 U.S. 438 (1977). These cases are sometimes referred to generally as the "civil divestiture" cases. *See* Conners, *supra* note 35, at 222, 227.

77. *See Montana*, 450 U.S. at 564-67.

78. *Id.* at 557-58. The Supreme Court had already determined a few years prior that the tribal courts did not have inherent criminal jurisdiction over non-Indians who had committed crimes on their lands. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).

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

80. *Id.* at 565-66.

81. *See, e.g.*, *Iowa Mut. Ins. Co.*, 480 U.S. at 18 (avoiding the implicit divestiture question);

Soon after *Montana*, the Court defined the cause of action that non-members could turn to as a means of escaping tribal civil jurisdiction.[82] Non-members, having a general right against a tribal court's unlawful exercise of power, do not need a statute to expressly create a right of action; instead, the Court must determine whether the tribes implicitly divested their power to assert jurisdiction over non-members.[83] Yet, just two years later, the Court ignored the implicit divestiture doctrine, instead stating that the tribes retain all sovereignty over their territory that has not been explicitly withdrawn by federal statute or treaty.[84] More importantly, the Court held that tribal courts' civil jurisdiction over non-members was precisely one such form of sovereignty that presumptively remained in the tribal courts.[85] Later, the Court reversed itself; now, instead of retaining civil jurisdiction over non-members unless explicitly withdrawn, the tribal courts could only assert jurisdiction over the activities of non-members in limited circumstances unless they were expressly granted that authority by treaty or federal statute.[86] In a magnificent acrobatic feat, the Court in *Strate* was careful to reiterate its precedent so as to not be misinterpreted by the lower courts in the future: the tribal courts only have presumptive jurisdiction where the tribes possess the power to *regulate* the activity of non-members.[87] The Court distinguished between the tribes' adjudicative authority and their legislative authority, and held that their adjudicative jurisdiction does not exceed their authority to regulate the conduct of

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Nat'l Farmers Union Ins. Cos., 471 U.S. at 856-57 (same); *Strate*, 520 U.S. at 442 (same). The decision in *Strate* in particular indicated a departure from the principles set forth in *Montana* while at the same time declaring that it was not stating anything new. 520 U.S. at 453. The Court held that subject to any controlling treaties or statutes, as well as the two exceptions identified in the *Montana* decision, the civil authority of the tribes, and the jurisdiction of its courts, "generally 'does not extend to the activities of non-members of the tribe.'" *Id.* at 453 (quoting *Montana*, 450 U.S. at 565); *see infra* notes 87-89 and accompanying text; *see also* Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65, 72 (1992). Professor Berkey explained: "The Supreme Court has struggled, with mixed results, to apply the implicit divestiture rule consistently. The Court appears to be confused about the meaning and scope of the rule." *Id.*; *see, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 146-47, 147 n.13 (1982) (following the implicit divestiture doctrine as defined in *Colville*, not as it was defined in *Montana*); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 153 (1980) (redefining divestiture to apply "where the exercise of tribal sovereignty would be inconsistent with the overriding interests" of the federal government).

82. *See Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 852-53, 855-57.

83. *See id.* at 850-53; *see also* David A. Castleman, Comment, *Personal Jurisdiction in Tribal Courts*, 154 U. PA. L. REV. 1253, 1278-79 (2006) (analyzing the cause of action whereby non-members could directly attack the adjudicatory power of the tribal courts).

84. *Iowa Mut. Ins. Co.*, 480 U.S. at 14.

85. *Id.* at 18. The Court further explained that in cases where federal statute or treaty is silent, the tribal courts' power remains intact. *Id.*

86. *See Strate*, 520 U.S. at 445.

87. *See id.* at 453.

non-members.[88] This, of course, left the question open whether the tribes' adjudicatory authority was *concurrent* with their regulatory authority, a question that remains unanswered today.[89]

C. Where Things Stood Before Dollar General

The more recent actions taken by Congress and the executive branch differ markedly from the federal courts' apparent eagerness to interfere with tribal courts.[90] For example, since the major cases limiting tribal civil jurisdiction were decided, Congress passed both the Tribal Law and Order Act[91] and the Indian Tribal Justice Technical and Legal Assistance Act ("Tribal Justice Act").[92] The purpose of the Tribal Law and Order Act was to strengthen tribal law enforcement by expanding the authority for tribal justice systems to prosecute and punish criminals and encourage intergovernmental collaboration between tribal, federal, state, and local governments.[93] The Tribal Justice Act was initially enacted in 2000, upon the finding that "enhancing tribal court systems and improving access to those systems serves the dual Federal goals of tribal political self-determination and economic self-sufficiency."[94] If anything, these statutes reaffirm the legislature's support for, and faith in, the tribal courts as the most appropriate forums for handling disputes affecting personal and property rights on tribal lands.[95] The very purpose of these laws contradicts the precedent set by the Court diminishing the tribal courts' adjudicatory power.[96]

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88. *See id.*

89. *See generally* Miller, *supra* note 7. Miller indicates that in two of the Supreme Court's most recent divestiture cases, *Hicks* and *Plains Commerce Bank*, the Court explicitly avoided deciding whether the tribes' two powers were coextensive, and even identifying the scope of tribal adjudicatory power in certain cases by determining that the tribes lacked the ability to regulate the underlying issue in the first place. *Id.* at 1835-37.

90. *See supra* Part II.B.

91. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258, 2261-301 (codified in scattered sections of 25 U.S.C. (2012)).

92. Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, 114 Stat. 2778 (codified in 25 U.S.C. § 3651).

93. *Tribal Law and Order Act*, U.S. DEP'T JUST., https://www.justice.gov/tribal/tribal-law-and-order-act (last updated Oct. 20, 2016).

94. 25 U.S.C. § 3651(7).

95. *Id.* § 3651(6).

96. *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 320 (2008); Nevada v. Hicks, 533 U.S. 353, 364 (2001); Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997). The Supreme Court itself has acknowledged that its own precedent once guarded the authority of tribes over their own land. *See* Williams v. Lee, 358 U.S. 217, 223 (1959) (attributing the source of the tribal governments' general sovereignty over their land and respect for that sovereignty to treaties entered into by the United States). The Court once expressed that the inherent power of the tribes could only be taken away by an explicit action from Congress. *Id.* Of course, even this view of Congress's general ability to legislate the tribes' powers away cannot find support in the

As of the time *Dollar General* came before the Supreme Court, the Court had never ruled in favor of the tribal courts where civil jurisdiction was involved.[97] Nor has the Court explained exactly what non-member activity would fall under one of the two *Montana* exceptions, or whether the tribes' regulatory authority over non-member activity and their corresponding adjudicatory authority are concurrent.[98] As the civil divestiture cases suggest, it is incredibly difficult to meet either of the *Montana* exceptions, and the Court has disagreed whether the main focus should be on the ownership of land or on the status of the parties involved.[99]

The most recent civil divestiture case, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, seemed to indicate a shift in the Court's analysis in divestiture cases.[100] Although Chief Justice Roberts's opinion on behalf of the Court did continue to use land ownership status as a significant factor, it incorporated aspects from Justice Souter's two major concurrences in *Atkinson*[101] and *Hicks*[102] into civil divestiture jurisprudence.[103] In analyzing *Montana*'s general rule, the Chief Justice indicated that due process concerns justified the limitations imposed on tribal regulatory and adjudicative jurisdiction: allowing tribal regulation of the sale of fee land in this case risked subjecting non-members to tribal authority "without commensurate consent" because non-members

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Constitution. United States v. Kagama, 118 U.S. 375, 378-79 (1886).

97. *See Plains Commerce Bank*, 554 U.S. at 320; *Hicks*, 533 U.S. at 369; *Strate*, 520 U.S. at 456-59; Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19-20 (1987); Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985).

98. *Plains Commerce Bank*, 554 U.S. 329-36 (finding that the sale of non-Indian fee land on a reservation by a non-Indian bank did not fall within the exceptions and avoiding the adjudicatory power question by holding that the tribal court lacked the underlying regulatory power regarding the plaintiffs' discrimination claim); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 654-59 (2001) (ruling that non-member receipt of tribal services did not justify the tribal tax imposed on a hotel owned by non-members on tribal land and therefore did not meet either *Montana* exception); *Hicks*, 533 U.S. at 355-56, 364 (holding that neither exception applied when the tribal court attempted to exercise jurisdiction over state officials who had allegedly executed a search warrant against a tribal member on tribal land illegally and explicitly avoiding the question of whether the tribes' two powers were coextensive); *Strate*, 520 U.S. at 454-59 (holding that a car accident involving non-members on a right of way through tribal land did not fall under either of the *Montana* exceptions).

99. *Hicks*, 533 U.S. at 359-60 (ownership of land is just one factor and the *Montana* rule applies to both tribal and non-tribal land). Justice Souter's concurring opinion in *Hicks* urged that the focus should instead be on the "character of the individual over whom jurisdiction is claimed." *Id.* at 381 (Souter, J., concurring).

100. *See* 554 U.S. 316.

101. *Atkinson*, 532 U.S. at 659-60 (Souter, J., concurring).

102. *Hicks*, 533 U.S. at 375-86 (Souter, J., concurring).

103. *See Plains Commerce Bank*, 554 U.S. at 337-38; *see also* Jesse Sixkiller, Note, *Procedural Fairness: Ensuring Tribal Civil Jurisdiction After* Plains Commerce Bank, 26 ARIZ. J. INT'L & COMP. L. 779, 792-97 (2009).

do not participate in tribal government.[104] As such, non-members should only be subject to tribal jurisdiction if the non-member has consented "either expressly or by his actions."[105] Chief Justice Roberts also appeared to conflate the two *Montana* exceptions, explaining that for the non-members who have consensual relationships with the tribes through leases or contracts, their activities could only be regulated to the extent necessary to protect tribal self-government and control the tribes' internal relations.[106] Although the statement was dictum, it is suggestive that the Court would be willing to narrow the *Montana* rule even further, virtually into oblivion.[107]

III. PROCEDURAL FAIRNESS, REGULATORY VERSUS ADJUDICATORY AUTHORITY, AND THE WEAKENING OF TRIBAL SOVEREIGNTY

The frequency with which the Roberts Court took up issues relating to tribal civil jurisdiction and the general inconsistency in the Court's decisions over the years meant that it was only a matter of time before another civil jurisdiction case came before the Court.[108] This Part first discusses the underlying facts and procedural history of the *Dollar General* case.[109] Next, this Part addresses the still lingering question whether the tribes' adjudicatory authority extends as far as their legislative authority in the context of *Dollar General*, and how in this regard the tribal nations are treated differently from every other

104. *Plains Commerce Bank*, 554 U.S. at 337. If the Court cannot find strong footing for denying tribal jurisdiction on the grounds of overriding state or federal interests, the Court frequently turns to due process considerations to justify implicit divestiture of the tribes' powers. *See Hicks*, 533 U.S. at 364-65; Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. at 153-54 (1980) (holding that divestiture may be found in instances when the tribes seek to subject non-members to "tribal courts which do not accord the full protections of the Bill of Rights," inconsistent with the overriding interests of the federal government).

105. *Plains Commerce Bank*, 554 U.S. at 337. It is worth noting here that, ironically, Justice Souter actually joined in Justice Ginsburg's dissent in this case, despite the fact that the majority opinion incorporated some of Justice Souter's earlier arguments. *Id.* at 342-52 (Ginsburg, J., concurring in part, dissenting in part). Justice Ginsburg argued that the bank had a lengthy relationship with the tribe and could not reasonably argue that it was unaware of tribal law or tribal court procedures. *Id.* at 346, 351 n.3. Furthermore, she suggested that the discrimination claim involved in the case was not based solely on unwritten tribal custom, as the majority suggested, but was based on both state and federal discrimination law, as many tribal courts actually borrow law from both the states and federal government. *Id.*; *see* Sixkiller, *supra* note 103, at 803-04.

106. *Plains Commerce Bank*, 554 U.S. at 332.

107. *See* Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 178-79, 179 n.5 (5th Cir. 2014) (Smith, J., dissenting), *cert. granted sub nom.*, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 125 S. Ct. 2833 (2015), *aff'd per curiam*, 136 S. Ct. 2159 (2016) (arguing that the federal courts were *required* to apply the Court's dicta in the *Plains Commerce Bank* case, and as such, the Choctaw tribal court could not be deemed to have authority over Dollar General).

108. *See supra* Part II.B–C.

109. *See infra* Part III.A.

sovereign nation.[110] This Part also examines how this question of legislative and adjudicatory power is more or less a mask for the Supreme Court's concern for non-members' due process rights.[111] In addition, this Part explains the circumstances leading up to and the rather unique outcome of the *Dollar General* case.[112] Finally, this Part discusses how some of the unresolved issues after the case can impact both the tribal courts and non-member parties going forward.[113]

A. The Dollar General *Case*

Dollar General owned and operated a store on Choctaw reservation land held by the United States in trust for the tribe, pursuant to a lease agreement with the tribe and a business license issued by the tribe.[114] In 2003, the store manager, Dale Townsend, agreed to participate in the Youth Opportunity Program, developed by the tribe to place young tribe members in summer employment positions.[115] John Doe ("Doe"), a thirteen-year-old tribe member who was placed at the store, sued both Townsend and Dollar General in tribal court, alleging that Townsend sexually assaulted him while he was working there.[116] Both Townsend and Dollar General filed motions to dismiss for lack of subject-matter jurisdiction, which the tribal court subsequently denied.[117] Their petitions for interlocutory review to the Choctaw Supreme Court were also denied.[118]

After exhausting their options, Townsend and Dollar General filed suit in federal court in 2008, seeking an injunction to prevent the suit from being carried out in tribal court.[119] Although the district court granted Townsend's motion, Dollar General's motion was rejected because Doe performed services of value to Dollar General, who in turn enjoyed a commercial benefit from its agreement to participate in the Youth Opportunity Program.[120] The conclusion might be drawn that a

110. *See infra* Part III.B.
111. *See infra* Part III.C.
112. *See infra* Part III.D.
113. *See infra* Part III.E.
114. Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 169 (5th Cir. 2014), *cert. granted sub nom.*, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 125 S. Ct. 2833 (2015), *aff'd per curiam*, 136 S. Ct. 2159 (2016).
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 169-70.
120. Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 846 F. Supp. 2d 646, 653-54 (S. Dist. Miss. 2011), *aff'd*, 746 F.3d 167, *cert. granted sub nom.*, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 125 S. Ct. 2833 (2015), *aff'd per curiam*, 136 S. Ct. 2159 (2016).

consensual relationship existed between the tribe and the store, and as such, *Montana*'s first exception applied.[121] Upon granting the tribe's motion for summary judgment, the court explained that as a consequence of the arrangement with the tribe, Dollar General had implicitly acquiesced to tribal jurisdiction over matters concerning this relationship.[122]

On appeal to the Fifth Circuit, Dollar General's arguments were yet again rejected.[123] The court determined that the relationship between the store, Doe, and the tribe, was unquestionably of a commercial nature, and even if it were noncommercial, the court did not find that the first *Montana* exception precluded noncommercial relationships from ever giving rise to tribal jurisdiction.[124] Although the Supreme Court had narrowed the *Montana* decision to require that the tribal regulation must have some connection to the consensual relationship itself, the Fifth Circuit determined that tribal jurisdiction over non-members was nevertheless an "important part of tribal sovereignty."[125] If the tribe retained the power to regulate specific conduct of non-members, it did not make a difference whether it was through "precisely tailored regulations or through tort claims."[126] The Fifth Circuit determined that the tribe was acting within its regulatory authority in insisting upon a child member's safety by placing him in a workplace on tribal land, and that there was an obvious nexus between the conduct for which Doe sought compensation and the store's participation in the youth employment program.[127] Dollar General's argument that the Supreme Court's decision in *Plains Commerce* required an additional showing by the tribes that the specific relationship at issue between the parties itself intrudes on the tribes' internal affairs or threatens the tribes' self-

121. *Id.*

122. *Id.* at 650. Perhaps, most importantly, the court interpreted *Montana* as reflecting "a legal presumption that it would materially undermine tribal rights of self-government to deprive tribal courts of jurisdiction in general as an exercise of tribal sovereignty to adjudicate such claims." *Id.* at 653-54.

123. *See Dolgencorp, Inc.*, 746 F.3d at 169.

124. *Id.* at 173.

125. *Id.* at 172-73 (quoting Atkinson Trading Co. v. Shirley, 532 U.S. 645, 656 (2001)).

126. Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe, 609 F.3d 927, 938 (8th Cir. 2010). If a court is examining tribal regulation through tort law, the court, in applying *Montana*, should focus its consideration on the specific alleged conduct of the non-member, and take a "functional view of the regulatory effect of the claim on the nonmember." *Id.*

127. *Dolgencorp*, *Inc.*, 746 F.3d at 173-74. Interestingly, the Fifth Circuit also discussed the element of foreseeability, a factor that is considered when weighing personal jurisdiction. *Id.* at 174. The Fifth Circuit held that because Dollar General "agreed to place a minor tribe member in a position of quasi-employment" on tribal land then it would be absurd for Dollar General to claim surprise if it was required to "answer in tribal court for harm caused to the child in the course of his employment." *Id.*

government was also rejected.[128] From the Fifth Circuit's perspective, not only was the Court's language in *Plains Commerce* dicta, it also indicated that, in a general sense, the tribe's ability to regulate the working conditions of its members employed on reservation land was central to its self-government.[129]

Dollar General's last hope laid with the Supreme Court, which granted certiorari in 2015.[130] Notably, the United States did step in as an amicus curiae on behalf of the respondents, and defended the tribes' authority to exercise civil jurisdiction over non-members,[131] as did a group of historians and legal scholars.[132] The United States asserted that the Court should refuse to accept Dollar General's plea for a rule that tribes lack jurisdiction over all civil claims against non-members because Congress has relied on the Court's jurisprudence "in supporting tribal courts as 'the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands.'"[133] The fact that at least four Justices were willing to consider the issue, given that it would involve applying somewhat settled law to the relatively narrow facts of the case, suggests that the Court was prepared to go even further in civil divestiture jurisprudence.[134]

B. Whether Tribal Regulatory Authority Is Concurrent with Its Adjudicatory Authority

The primary question to be considered in *Dollar General* was whether the presumption of the tribe's legislative authority to regulate the activity of non-members is concurrent with its ability to adjudicate matters that fall within their regulatory schemes.[135] Prior to hearing this case, the Court had skillfully skirted answering this precise

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128. *Id.* at 175.

129. *Id.* The Fifth Circuit emphasized the fact that the alleged conduct involved tort law, and in particular, the sexual molestation of a minor, and even hinted that *Montana*'s second exception—where the tribe's health and safety is at stake—was met. *Id.*

130. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 135 S. Ct. 2833 (2015), *aff'd per curiam*, 136 S. Ct. 2159 (2016). The Court agreed to hear the case despite the Solicitor General recommending otherwise. Noah Feldman, *Dollar General Tries to Shake Up Tribal Law*, BLOOMBERG (Dec. 7, 2015, 11:56 AM), https://www.bloomberg.com/view/articles/2015-12-07/dollar-general-tries-to-shake-up-tribal-law.

131. *See* Brief for United States as Amicus Curiae Supporting Respondents at 1, 7, *Dollar Gen. Corp.*, 136 S. Ct. 2159 (No. 13-1496).

132. *See* Brief for Amici Curiae Historians and Legal Scholars Gregory Ablavsky, Bethany R. Berger, Ned Blackhawk, Daniel Carpenter, Matthew L.M. Fletcher, Maggie McKinley, and Joseph William Singer in Support of Respondents at 1-2, 4-8, *Dollar Gen. Corp.*, 136 S. Ct. 2159 (No. 13-1496) [hereinafter Brief for Amici Curiae Historians and Legal Scholars].

133. *Id*. at 10-11 (quoting 25 U.S.C. § 3651(6) (2012)).

134. *See* Feldman, *supra* note 130.

135. Transcript of Oral Argument, *supra* note 5, at 3-4.

question, leaving tribal governments, scholars, and even other federal courts to wonder whether the tribes' adjudicatory power was coextensive with its ability to legislate and regulate.[136] It is worth noting that neither the states nor the federal government face this sort of division between their regulatory powers and their courts' corresponding adjudicatory powers.[137]

The principles of a sovereign's ability to assert its authority are governed by norms of international law.[138] These principles recognize that the sovereign's legislative jurisdiction and its adjudicatory jurisdiction are two different things, but that a nation's power to exercise the latter is normally broader.[139] *Montana* addressed a rather narrow question: the authority of the tribal government to pass ordinances—an exercise of legislative or regulatory jurisdiction—over non-members, but the holding of the Court used language that broadly encompassed tribal authority over non-members in general (including adjudicative jurisdiction).[140] The new problem was whether the ability to regulate a non-member's activity *necessitates* the ability to exercise judicial power over that individual subject to that regulation.[141] Essentially, by linking the tribal courts' adjudicatory jurisdiction to the tribe's regulatory (or legislative) jurisdiction, the Court treated the tribal courts' jurisdiction and by extension, its sovereignty, as something equivalent to a "federal agency with administrative courts," rather than as a "state sovereign with its own common law courts."[142]

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136. *See, e.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 320 (2008); Nevada v. Hicks, 533 U.S. 353, 364 (2001); Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997).

137. Miller, *supra* note 7, at 1837.

138. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 401 (AM. LAW INST. 1987).

139. *See* Florey, *supra* note 60, at 1508; *see also* Catherine T. Struve, *How Bad Law Made a Hard Case Easy:* Nevada v. Hicks *and the Subject Matter Jurisdiction of Tribal Courts*, 5 U. PA. J. CONST. L. 288, 298 (2003) (indicating that a sovereign's adjudicatory power, or the ability to subject persons or things to its courts is "presumed to reach well beyond that government's regulatory power").

140. Florey, *supra* note 60, at 1523-24. It was not until *Strate* that the Court officially extended application of the *Montana* rule to tribal courts' adjudicative jurisdiction, thereby linking the two types of tribal jurisdiction: "tribal judicial jurisdiction was at any rate no broader than the legislative powers at issue in *Montana*." *Id.* at 1526 (citing *Strate*, 520 U.S. at 453).

141. Miller, *supra* note 7, at 1835-36. The *Strate* Court determined that the tribe must first have the power to pass regulations regarding the specific non-member conduct at issue before the tribal courts can exercise power over determining that individual's rights and obligations. *Id.*

142. Alfred R. Light, *Sovereignty Myths and Intergovernmental Realities: The Etiquette of Tribal Federalism*, 14 ST. THOMAS L. REV. 373, 392 (2001).

C. Procedural Due Process as a Guise for Diminishing Tribal Courts' Authority

Outside of determining the extent of tribal adjudicatory authority, Dollar General and at least four of the Justices adopted the stance that allowing non-members to be haled into tribal courts, referred to by Justice Kennedy as "nonconstitutional forums," would violate procedural due process.[143] Yet, as Justice Breyer highlights, if an American went to Tasmania, with a deliberate relationship with that forum, and ultimately litigated and received a reasonable judgment there, the United States courts would enforce that decision.[144] Whereas the traditional rule required federal courts, including the Supreme Court, to refrain from interfering with tribal authority over tribal territory to a significant degree in order to avoid encroaching upon tribal sovereignty, the Court has increasingly justified interference with tribal authority in order to protect non-member litigants' personal liberties.[145]

The primary concern for the Supreme Court appears to be that non-members do not participate in tribal government, and as such, have not necessarily consented to tribal jurisdiction, laws, and regulations, or adjudication in tribal courts.[146] This is an interesting concern considering that this same question does not arise in instances where an individual from out-of-state is subject to a particular state's courts and that state's criminal, contract, or tort law, for example.[147] Furthermore, the rules of procedure outside of the tribal court system may not be as consistent between forums as the Supreme Court would assume.[148] Research has indicated that procedures can vary widely between state courts, between state and federal courts, and even amongst federal courts.[149] Many of

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143. *See* Transcript of Oral Argument, *supra* note 5, at 35, 40-43; Brief for Petitioners at 39-40, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016) (No. 13-1496).

144. Transcript of Oral Argument, *supra* note 5, at 40.

145. *See* Nevada v. Hicks, 533 U.S. 353, 375-86 (2001) (Souter, J., concurring); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1595 (1996).

146. *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337 (2008).

147. *See, e.g.*, Walden v. Fiore, 134 S. Ct. 1115, 1119-21 (2014); Asahi Metal Indus. Co. v. Super. Court of Cal., 480 U.S. 102, 105-08, 112-16 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 463-64, 485-86 (1985).

148. *See, e.g.*, *Hicks*, 533 U.S. at 384-85 (Souter, J., concurring); Transcript of Oral Argument, *supra* note 5, at 11-12. In expressing concern over the tribal courts' apparent inconsistencies and abnormalities in procedures, the Supreme Court often holds the tribal courts up to a standard level of procedural fairness that can only be attained, in the view of the Court, in state or federal courts. Transcript of Oral Argument, *supra* note 5, at 11-12.

149. *See* Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1339 (2012); Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and As-Applied Challenges Under the Rules Enabling Act*, 86 NOTRE DAME L. REV. 1181, 1218-29 (2011). For an indication of how procedural rules may vary between federal courts,

these procedural differences may be outcome determinative.[150] Furthermore, the criticisms that tribal courts repeatedly face, that they are incompetent or unfair, are the very same criticisms that plague the state courts of Mississippi, Alabama, and West Virginia.[151] However, unlike those courts, the tribal courts are the only ones whose adjudicative jurisdiction is at risk.[152]

Another concern of the Court, in the words of Justice Souter and later, Justice Breyer,[153] is the lack of any effective review mechanism for the tribal courts' decisions.[154] But this is somewhat of an overstatement.[155] Although it is true that there is no removal mechanism from tribal court to federal court, nor are tribal judgments themselves directly appealable to state or federal court, once a non-member individual has exhausted proceedings in the tribal courts, there are a variety of means by which the tribal judgment may be reviewed.[156]

Yet, paradoxically, several Justices have expressed greater uncertainty about subjecting non-Indians to tribal laws and regulations, which drastically differ from the procedures of their own courts without their consent, than subjecting an individual to the procedures of a different state or even country.[157] According to Justice O'Connor, for instance, most of the tribal judicial systems' roots cannot be traced to tradition; rather, many of the courts may actually be attributed to the Indian Reorganization Act of 1934.[158] At the time the Act was passed, the tribes were already familiar with the procedures employed by the Bureau of Indian Affairs, and as such, those regulations and procedures

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or even within one single federal court, compare S.D. & E.D.N.Y. R. 11.1 (stating the requirements for pleadings, motions, and other papers), *and* N.D.N.Y. R. 10.1 (same), *with* Thomas McAvoy, Senior U.S. District Judge, Standing Order on Extensions of Time to File Opposition Papers and Reply Papers in All Motions Filed Pursuant to N.D.N.Y. L.R. 7.1 and 12.1 (Dec. 29, 2003), http://www.nynd.uscourts.gov/sites/nynd/files/DAgostino_03142016.pdf.

150. *See* S.I. Strong, *Limits of Procedural Choice of Law*, 39 BROOK. J. INT'L L. 1027, 1041-44 (2014).

151. Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* 32 (Harvard Univ. & John F. Kennedy Sch. of Gov't, Paper No. RWP04-016, 2004). The U.S. Chamber of Commerce has ranked those state courts as the worst state court systems in the United States, based on judges' competence, impartiality, and fairness. *Id.*

152. *Id.* at 32.

153. *Hicks*, 533 U.S. at 385 (Souter, J., concurring).

154. Transcript of Oral Argument, *supra* note 5, at 16-17.

155. *See infra* note 156 and accompanying text.

156. *See* Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. KAN. L. REV. 241, 254-80 (1998); Sixkiller, *supra* note 103, at 795.

157. *See, e.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 328-37 (2008); *Hicks*, 533 U.S. at 375-86 (Souter, J., concurring).

158. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 U. TULSA L.J. 1, 1-2 (1997); *see* Indian Reorganization Act, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461–749 (2012)).

laid the foundation for most of the tribal courts' structure.[159] It is well worth noting that the tribal governments are required to have not only their laws,[160] but also their procedures approved and regulated by the federal government.[161] What, then, is the real concern of the Supreme Court?

In the past, the Court had held that non-member parties cannot allege the general "incompetence" of tribal courts as a means of escaping their jurisdiction, as that would run directly contrary to the congressional policy of promoting tribal courts' development.[162] In fact, the Court indicated that the provisions of the ICRA specifically protected non-Indians against any unfair treatment in tribal courts.[163] During oral argument in *Dollar General*, Justice Breyer seemed to indicate just that.[164] Where the procedures appeared to be "normal," likely meaning the procedures were modeled after many of the procedures in state and federal court rather than the traditions of the tribes, the non-members ought to be subject to tribal jurisdiction; where the procedures appeared to be unfair to non-members, the non-member party could complain to the appellate court that there was a lack of due process rather than contest the very existence of jurisdiction.[165] Dollar General argued that in general, the Constitution does not apply in tribal courts, that there is no automatic appeal to non-tribal courts, that tribal law includes unwritten traditional tribal customs, and as such, non-members face disadvantages in tribal courts based solely on the fact that they are non-members.[166] It is worth noting that none of these arguments would fly if brought before any other recognized sovereign nation.[167]

D. In the Grand Scheme of Tribal Jurisdiction, Dollar General *Has Done Nothing to Resolve Confusion*

After a lengthy six-month and seventeen-day wait, the Supreme Court issued a per curiam ruling in *Dollar General*, affirming the Fifth

159. O'Connor, *supra* note 158, at 2.

160. 25 U.S.C. § 476 (requiring approval by the Secretary of the Interior of tribal constitutions).

161. *Id.* §§ 1301–41.

162. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987).

163. *Id.* Of course, the Court still maintained that the jurisdiction of the tribal courts was ultimately subject to review by the federal courts. *Id.*

164. *See* Transcript of Oral Argument, *supra* note 5, at 11-12.

165. *See id.* Justice Breyer also mentioned that were a party subject to the "terribly unfair" procedures of a particular state or a foreign country, the party could only complain that they did not receive proper due process; the party could not argue that the state or foreign country did not have the power to exercise jurisdiction in general. *Id.* at 12.

166. Feldman, *supra* note 130.

167. *Id.*

Circuit's decision by default after a four-to-four vote.[168] For now, the ability of the tribes' to exercise civil jurisdiction over non-members relates to some primitive notions about personal jurisdiction: that parties may generally be sued where they do business.[169] Yet, as Justice Thomas pointed out, unless the Court thoroughly re-examines the foundation of its logic in tribal sovereignty cases, the Court will continue to be haunted by confusion in future cases.[170]

A common theme that has developed in these civil divestiture cases is the Court's reluctance to declare finally, one way or another, whether the tribes may assert any manner of civil jurisdiction over non-members.[171] But, in every case that has come before the Court, the Court has never ruled in favor of tribal jurisdiction, even where the facts of the case seem to fit into one of the two exceptions identified to the general rule that the tribes cannot exercise adjudicatory authority over non-members.[172] The problem is that despite the presence of such facts, the Court has in each tribal civil jurisdiction case since then further elaborated on these exceptions and narrowed them in such a way that almost no activity of non-members could invoke tribal civil jurisdiction.[173] It seemed that Dollar General's activity clearly fell within the first exception identified in *Montana*, since the company had entered into a consensual commercial relationship with the tribe and its members through a lease.[174]

Ultimately, the Court's troubles with federal Indian law stems from the fact that the very foundation of its precedent cannot be traced to any part of the Constitution.[175] When Congress began to legislate over tribal affairs and the constitutionality of these acts were challenged, the Court was forced to examine how it was that federal law could be applied to the internal affairs of tribes.[176] Thus, the implicit divestiture doctrine was

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168. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159, 2160 (2016); Ed Gehres, *Opinion Analysis:* Dollar General*, the Court's Longest Pending Case of the 2015 Term Is a Four-Four Per Curiam Opinion*, SCOTUSBLOG (June 25, 2016, 9:28AM), http://www.scotusblog.com/2016/06/opinion-analysis-dollar-general-the-courts-longest-pending-case-of-the-2015-term-is-a-four-four-per-curiam-opinion.

169. Nagele-Piazza, *supra* note 17.

170. United States v. Lara, 541 U.S. 193, 214-15, 226 (2004) (Thomas, J., concurring).

171. *See, e.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 330 (2008); Nevada v. Hicks, 533 U.S. 353, 358-60 (2001); Strate v. A-1 Contractors, 520 U.S. 438, 457-59 (1997).

172. *See, e.g.*, *Plains Commerce Bank*, 554 U.S. at 320; *Hicks*, 533 U.S. at 374; *Strate*, 520 U.S. at 438, 457-59; Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18-20 (1987); Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 855-57 (1985).

173. *See, e.g.*, *Plains Commerce Bank*, 554 U.S. at 330 (holding that neither *Montana* exception applied); *Strate*, 520 U.S. at 457-59 (same).

174. *See* Gehres, *supra* note 168.

175. *See* United States v. Kagama, 118 U.S. 375, 378 (1886).

176. *See id.* at 379-80, 382.

created, where in some cases, the tribes retained the authority to exercise jurisdiction over non-members unless that authority was expressly taken away by Congress, and in others, the tribes could not exercise jurisdiction over non-members at all, except where the two *Montana* exceptions were involved.[177] When convenient, the Court could narrow even these instances.[178] For example, the Court conflated the two *Montana* exceptions in a later case when it held that tribal governments could only regulate non-member conduct inside the reservation when the tribe's sovereign interests were implicated, to the extent necessary to protect tribal self-government and control internal relations.[179] In addition, given how recent tribal cases have been decided, the Court's attempt to distinguish between the tribes' legislative jurisdiction and their adjudicatory jurisdiction is both puzzling and unworkable.[180]

E. Ramifications for the Tribes and Non-Member Individuals Engaged in Contractual Relationships with the Tribes

Unfortunately, after more than a decade, jurisdictional ambiguities between tribes and non-member businesses are little improved from where they were at the outset.[181] Of course, as a result of the four-to-four split, the Choctaw tribe could claim a victory: for now, the tribes could still exercise civil jurisdiction over tort claims brought by tribe members against non-member businesses operating on tribal land. Nevertheless, the uncertainty resulting from the still unanswered questions remains.[182] This Subpart first explains how the Court's floundering on tribal jurisdiction has helped to undermine the tribes' sovereignty and has left the tribal courts' uncertain of their own existence in the future.[183] This Subpart then discusses how, on the flipside, the Court's insistence upon protecting the personal liberties of non-members has actually created more uncertainty for non-member businesses seeking to do business on tribal lands.[184] In the long run, significant costs will be incurred for both parties.[185]

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177. *See Plains Commerce Bank*, 554 U.S. at 327-30.

178. *See infra* notes 179-80 and accompanying text.

179. *Plains Commerce Bank*, 554 U.S. at 332.

180. Florey, *supra* note 58, at 1543-49 (explaining how the tribes' two powers cannot really be coextensive in their application to non-members); *see supra* Part II.B–C.

181. *See* Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159, 2160 (2016) (per curiam).

182. *See supra* Part III.B–D.

183. *See infra* Part III.E.1.

184. *See infra* Part III.E.2.

185. *See infra* Part III.E.

1. Impact on Tribal Sovereignty

Tribal governments entering into contracts with commercial businesses will be wary that should any issues arise, whether it be a tort claim or otherwise, the business will still be able to take advantage of the argument used by Dollar General: that tribal adjudicatory jurisdiction does not extend to non-members.[186] As explained in *National Farmers*, the Supreme Court is still required to carefully examine the relevant statutes, policies of the executive branch as embodied in treaties, and administrative and judicial decisions when determining the existence and extent of the tribal courts' civil jurisdiction.[187] However, as legal scholars and historians have indicated, the Supreme Court often interprets these sources out of their proper historical context.[188] The uncertainty in the Court's civil divestiture jurisprudence has the tendency to produce unfortunate results, such as in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, which held that tribes' ability to zone tribal lands could not be extended to fee lands, resulting in an "impractical pattern of checkerboard jurisdiction."[189] These unworkable rules make it difficult for the tribes to act as a sovereign entity to any certain extent.[190]

There is a long line of precedent establishing that the tribes have inherent sovereignty.[191] But, according to Manley Begay, of the Harvard Project on American Indian Economic Development research group, there are three aspects of sovereignty: inherent, legal, and de facto; and the federal government has not for the most part, recognized any of these forms.[192] The United States government already took a step toward honoring the tribes' de facto sovereignty with the passage of the Indian Self-Determination Act of 1975.[193] Nevertheless, the line of precedent from the Supreme Court since *Montana* indicates that the tribal

186. *See* Transcript of Oral Argument, *supra* note 5, at 3.

187. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 855-56 (1977).

188. For perspectives on how the Court has misinterpreted some of the statutes and treaties throughout history, see *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 448-68 (1989) (Blackmun, J., dissenting in part); *Montana v. United States*, 450 U.S. 544, 569-81 (1981) (Blackmun, J., dissenting); and see also Brief for Amici Curiae Historians and Legal Scholars, *supra* note 132, at 8-20.

189. *See Brendale*, 492 U.S. at 457 (Blackmun, J., dissenting in part) (quoting Moe v. Confederated Salish & Kootenai Tribes, 435 U.S. 463, 478 (1976) (internal quotations omitted)).

190. *See supra* Part II.E.1.

191. *See supra* Part II.A.

192. *Gambling on Nation-Building*, ECONOMIST, Apr. 7–13, 2012, at 35; *see* Kalt & Singer, *supra* note 151, at 6 (defining the various aspects of sovereignty and the tribes' struggle to achieve de facto sovereignty).

193. Pub. L. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. § 5321 (2012)). This Act began the transfer of administration over the tribes' internal affairs from the Bureau of Indian Affairs to the tribal governments themselves. *See id.*

governments are still fighting for their sovereignty to be truly recognized in the legal sense.[194] Furthermore, according to Chief Justice Roberts in *Plains Commerce*, the tribe bears the burden of establishing that its regulatory and adjudicatory authority over non-members falls within one of the two exceptions laid out in *Montana*.[195] With every decision that removes the tribal courts' ability to adjudicate matters of tribal law, that power is shifted to non-tribal courts, which ultimately infringes upon the tribes' lawmaking authority because while they can create their own regulations, they cannot enforce them.[196]

2. Impact on Commercial Businesses and Other Non-Members

The amount of land designated as belonging to federally recognized tribes is quite extensive and it is naïve to think that commercial businesses, such as Dollar General, will not continue to seek out new opportunities on these lands and enter into consensual relationships with the tribes.[197] As stated above, in *Montana*, the Supreme Court identified two exceptions to the general presumption that tribal courts could not assert civil jurisdiction over non-members on tribal land.[198] With the outcome in *Dollar General*, non-member businesses and individuals alike may be uncertain as to which activities may subject them to tribal jurisdiction, including when they hire tribal members, enter into contracts with the tribe, or sign leases on tribal land.[199]

It took roughly thirteen years for Dollar General's $2.5 million civil suit to make it to the Supreme Court, and its resolution offered no opinion to guide Dollar General or any other company operating on tribal lands in any future interactions.[200] For now, companies will have to be wary, though the Fifth Circuit's decision upholding tribal courts' authority to adjudicate tribal member claims against non-member businesses is the first decision to ever rule in favor of such jurisdiction.[201] The amount of money at stake is considerable: non-members represent billions in business through contractual relationships and commercial leases with the tribes each year.[202] Non-member

194. As mentioned earlier, the Court has not upheld tribal civil jurisdiction in any of its civil divestiture cases. *See supra* Part II.B.

195. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 330 (2008).

196. Miller, *supra* note 5, at 1842-43.

197. *See supra* Part II.B–C.

198. *See* Montana v. United States, 450 U.S. 544, 563-67 (1981).

199. *See supra* Part III.

200. Vann R. Newkirk II, *The U.S. Supreme Court Leaves Tribal Authority Intact*, ATLANTIC (June 23, 2016), http://www.theatlantic.com/politics/archive/2016/06/supreme-court-choctaw-indian/488393.

201. *Id.*

202. Feldman, *supra* note 130.

businesses especially would be well advised to educate themselves as to tribal regulations relating to employment, especially where these regulations differ from those of the state and the federal government.[203] If businesses are not careful to adapt to these policy differences, like Dollar General, they might be exposed to significant litigation in the future.[204]

In a more abstract sense, there is indeed an intangible price to pay for non-Indian businesses and individuals alike when the Supreme Court and the lower federal courts interfere with tribal civil jurisdiction and the tribes' sovereignty despite the interference lacking a sufficient basis in both constitutional and international principles of law.[205] Professor Milner Ball stated as follows:

> Because we say we have a government of laws and not men, we hold our government to be limited and to have no unlimited power. If the federal government nevertheless exercises unrestrained power over Indian nations, then what we say is not true, and we have a different kind of government than we think we have. . . . The Court is regarded as the institution of restraint and a protector of rights.[206]

If the Court interferes with the sovereignty of the tribes, then the Court will continue to act in contradiction to its purported position in the federal government, something that negatively impacts the tribes and non-Indians alike.[207]

IV. RESOLVING THE SUPREME COURT'S NATIVE AMERICAN DILEMMA

For the hundreds of tribes in the United States, and the nearly 200 tribal courts currently operating, tribal sovereignty itself hangs in the balance of these Supreme Court decisions.[208] Even more importantly, it is necessary to find a solution that will help restore some of the tribes' authority over their land and those who choose to live or work on it.[209] Pushing power back into the hands of the tribes will require a solution that will convince a Supreme Court that has frequently been averse to recognizing tribal power that the tribes can exercise their regulatory and adjudicatory authority over non-members in their territory in a way that

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203. *See* Nagele-Piazza, *supra* note 17.

204. *See id.*

205. *See supra* Part III.E.

206. Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 61 (1987).

207. *See supra* Part III.B–E.

208. *See* Garrett Epps, *Who Can Tribal Courts Try?*, ATLANTIC (Dec. 7, 2015), http://www.theatlantic.com/politics/archive/2015/12/who-can-tribal-courts-try/419037.

209. *See supra* Part III.B–E.

will satisfy constitutional due process.[210] Subpart A first examines how a full Supreme Court bench ought to have decided *Dollar General*.[211] Next, Subpart B recommends the analysis that should be adopted in future cases dealing with tribal civil jurisdiction.[212]

A. How Dollar General *Should Have Been Decided*

If the Supreme Court had a full bench, the Court should have ruled against Dollar General by holding that tribal courts may indeed exercise jurisdiction in civil cases involving non-members.[213] Of course, this would have led to the same result (an affirmation of the Fifth Circuit's decision), but with an opinion that would hopefully offer some guidance to lower federal courts in future tribal jurisdiction cases.[214] Dollar General incorrectly assumed, and argued, that the tribes have no inherent adjudicatory authority; rather, any authority they do have is based upon consent.[215] Further, Dollar General appeared to argue that the tribes did not even have the regulatory authority over the type of dispute.[216] In other words, the tribes did not have the power to create regulations or legislation regarding tort law, nor enforce those regulations, on their own land.[217]

Assuming, arguendo, that the Supreme Court would not have abandoned any of its civil divestiture precedents, and instead would have decided the narrower question whether tribal courts may exercise civil adjudicative jurisdiction over non-member defendant businesses operating pursuant to commercial leases on tribal trust lands, the Court still ought to have ruled against Dollar General.[218] Although some Justices have argued against it, the Supreme Court's precedent in civil divestiture cases often focuses first on the nature of the land where the claims are based.[219] In the *Dollar General* case, the non-member

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210. L. Scott Gould, *Tough Love for Tribes: Rethinking Sovereignty After* Atkinson *and* Hicks, 37 NEW ENG. L. REV. 669, 675 (2003).

211. *See infra* Part IV.A.

212. *See infra* Part IV.B.

213. *See infra* Part IV.A.

214. *See* Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159, 2160 (2016) (per curiam).

215. *See* Transcript of Oral Argument, *supra* note 5, at 4-5; *supra* Part II.A.

216. Transcript of Oral Argument, *supra* note 5, at 6-7.

217. *Id.* at 4-7.

218. *Dollar Gen. Corp.*, 136 S. Ct. at 2160. Of course, the Court did ultimately affirm the Fifth Circuit's ruling against Dollar General by default via a four-to-four split, but for this portion of the Note, the full bench would have afforded a full opinion. *See id.*; Brendan I. Koerner, *What Happens in a SCOUTS Tie?*, SLATE (Feb. 13, 2016, 6:50 PM), http://www.slate.com/articles/news_and_politics/explainer/2004/11/what_happens_in_ascotus_tie.html.

219. *See* LaVelle, *supra* note 47, at 746-69 (providing an in-depth discussion of the Court's long line of civil divestiture cases and how land status in particular contributed to the nuances of

activities involved took place on tribal trust lands.[220] The Court has never extended its *Montana* "presumption" against tribal adjudicative authority over non-member activity taking place on actual tribal trust lands within the reservation.[221] The Court itself has indicated that a non-member business employing tribal members on tribal land is precisely the sort of activity that would fall within the first *Montana* exception.[222] Furthermore, the Court agreed that while the *Montana* rule applied both in situations involving land owned by non-members and tribal-owned land (as was the case in *Dollar General*),[223] the fact that land is owned by or held in trust for the tribes is a significant, sometimes dispositive factor.[224]

Although there was indeed a treaty signed with the Choctaw Nation removing the tribe's criminal jurisdiction over non-members on tribal land, in 1855, Attorney General Caleb Cushing stated that the United States did not reserve by treaty civil jurisdiction over non-members' activities on tribal land.[225] Furthermore, there were later treaties signed between the Choctaw Nation and the United States that reserved for the tribes the authority to exercise jurisdiction over "persons other than Indians and members of said tribes or nations."[226] Dollar General's argument that the tribal courts cannot have adjudicatory power over tort claims is also patently false.[227] In *Hicks*, the Court recognized that "there was little doubt that the tribal court had jurisdiction over [] tort claims," until that jurisdiction was affirmatively withdrawn by Congress.[228] Given these factors, the Court should have affirmed the Fifth Circuit's decision.[229]

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each decision). For instance, the Court's analysis has differed when the lands are non-Indian fee lands, fee lands owned by tribal members, or tribal lands held in trust by the United States, and whether the lands are open or closed-area reservations. *See, e.g.*, Strate v. A-1 Contractors, 520 U.S. 438, 454-57 (1997) (discussing the importance of land status and its impact on tribal authority over non-member activity under the *Montana* analysis); Sixkiller, *supra* note 103, at 790-95.

220. Gehres, *supra* note 168.

221. Sixkiller, *supra* note 103, at 796-97.

222. *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 334-35 (2008).

223. *See* Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 175 (5th Cir. 2014), *cert. granted sub nom.*, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 125 S. Ct. 2833 (2015), *aff'd per curiam*, 136 S. Ct. 2159 (2016); *supra* note 114 and accompanying text.

224. *See* Nevada v. Hicks, 533 U.S. 353, 370-71 (2001).

225. *See* Brief for Amici Curiae Historians and Legal Scholars, *supra* note 132, at 22-23.

226. *Id.* at 24-25 (quoting Treaty with the Choctaws and Chickasaws, 14 Stat. 772, art. 8, 14 Stat. 769, 772 (1866)).

227. *See* Brief for United States as Amicus Curiae Supporting Respondents, *supra* note 131, at 19-20.

228. *Hicks*, 533 U.S. at 368.

229. *See supra* Part IV.A.

B. Reconfiguring the Implicit Divestiture Doctrine to Comport with International Law Principles

As indicated above, the implicit divestiture doctrine has continued to prove a thorn in the Supreme Court's paw; a messy and inconsistently applied, judicially created doctrine with a flimsy constitutional foundation.[230] Not only has it been criticized by historians and legal scholars, it has also been questioned by members of the Court itself.[231] In 1989, Justice Blackmun delivered a lengthy dissent, and his reasoning in this dissent should be adopted by the Court when dealing with future tribal civil jurisdiction cases.[232] This would of course entail another reversal by the Court, but this reversal would help avoid any confusion in the future.[233]

In *Brendale*, Justice Blackmun declared that the Court's jurisprudence regarding tribal civil jurisdiction had lost its way.[234] Following Justice Blackmun's interpretation would not only comport with principles of international law as well as the historical relationship between the tribes and the federal government, it would also preserve the Court's jurisprudence in *Montana*.[235] In *Brendale*, the Court failed to muster a majority to determine whether the Yakima Nation possessed the inherent authority to pass zoning laws regulating non-members' use of lands within reservation territory.[236] Justice Blackmun argued not that *Montana* should, but must be read to recognize that whenever non-member conduct on reservation lands impacted or threatened a significant tribal interest, that non-member conduct may be regulated by the tribe (including enforcement of the regulation by tribal courts).[237]

Justice Blackmun relied in particular on Marshall's Cherokee Cases[238] and *Washington v. Confederated Tribes of Colville Indian*

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230. *See supra* Part II.B.

231. *See, e.g.*, Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 448-68 (1989) (Blackmun, J., dissenting in part); Florey, *supra* note 60, at 1542-49; LaVelle, *supra* note 47, at 746-76; McSloy, *supra* note 22, at 252-80.

232. *See Brendale*, 492 U.S. at 448-68 (Blackmun, J., dissenting in part).

233. *See supra* Part II.B–C.

234. *Brendale*, 492 U.S. at 449-51(Blackmun, J., dissenting in part) ("From this Court's earliest jurisprudence immediately after the American Revolution, it followed the settled understanding of international law that the sovereignty of the individual tribes . . . survived their incorporation within the United States, except as *necessarily* diminished.").

235. *See id.* at 449-57. Justice Blackmun pointed out that the 150 years of Indian law jurisprudence established the opposite "general principle" from what the majority was indicating, and that interpreting *Montana* without due consideration to the rich and extensive history of interaction between the United States and the tribes would lead the Court astray. *Id.* at 450-51.

236. *See id.* at 414 (majority opinion).

237. *Id.* at 449-50, 456-57 (Blackmun, J., dissenting in part).

238. *Cherokee Indian Cases*, PBS, https://www.pbs.org/wnet/supremecourt/antebellum/landmark_cherokee.html (last visited Nov. 15, 2017); *see* Worcester v. Georgia, 31 U.S. (6 Pet.)

Reservation.[239] The fundamental principle in Chief Justice Marshall's reasoning—a principle that has been a consistent aspect of the Court's Indian law jurisprudence—is that the tribes were divested of sovereignty only to the extent that that sovereignty was inconsistent with the United States' paramount authority.[240] *Colville* reflected this principle as well: the tribes' authority was implicitly divested only when the exercise of its authority would be inconsistent with the overriding interests of the national government, such as criminal jurisdiction over non-members.[241] In spite of the Court's holding in *Oliphant*, Justice Blackmun argues, *Colville* expressly established that nothing in the earlier case negated the Court's "historical understanding that the tribes retain substantial *civil* jurisdiction over non-Indians."[242]

Relying on Justice Blackmun's dissent as the foundation of future civil divestiture jurisprudence would require some backtracking, but not a complete overhaul of the jurisprudence as it exists today.[243] First, the opinion explicitly states that the *Montana* rule would not be abandoned because in general, it was consistent with the Court's Indian law jurisprudence despite containing some language "flatly inconsistent" with the Court's earlier decisions defining the scope of inherent tribal jurisdiction.[244] The *Hicks* ruling, for example, could be limited in its application to protecting state and federal government officials acting in their official capacity from being subjected to the tribes' civil jurisdiction.[245]

Second, the dissent's analysis goes further in comporting with principles of international law because it recognizes the tribes' inherent sovereignty and would do more to protect that sovereignty.[246]

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515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

239. 447 U.S. 134 (1980).

240. *Brendale*, 492 U.S. at 451-52 (Blackmun, J., dissenting in part).

241. *See id.* at 452 (quoting *Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 153-54). The Court provided a few examples of when the tribes' sovereignty was necessarily divested, such as "when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts." *Id.* In fact, the only other power that the Court had deemed to be divested upon incorporation into the United States since the *Cherokee Cases* was the ability to exercise criminal jurisdiction over non-Indians. *Id.* at 453; Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).

242. *Brendale*, 492 U.S. at 453-54, 454 n.4 (Blackmun, J., dissenting in part) (referring to the Department of the Interior's administrative opinion regarding the extent of the tribes' powers over tribe members and non-members alike in their territory *regardless* of land ownership).

243. *See supra* Part II.B–C.

244. *Brendale*, 492 U.S. at 455-56 (Blackmun, J., dissenting in part).

245. *See generally* Nevada v. Hicks, 533 U.S. 353 (2001).

246. *Brendale*, 492 U.S. at 451 n.1 (Blackmun, J., dissenting in part) ("[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection." (quoting *Worcester*, 31 U.S. (6 Pet.) at 560-61)).

International law, ever-changing and developing, only falls more in favor of the tribes as time goes by.[247] Two of the fundamental principles of international law, self-determination and sovereignty, have been deemed the most important of all human rights by the tribes, and the two go hand in hand.[248] The Declaration on the of Rights of Indigenous Peoples,[249] while not legally binding, has generally been recognized as representing the "dynamic development of international legal norms" reflecting the commitment of the 145 endorsing states to move forward with recognizing the principles embodied within the declaration.[250] One of the fundamental principles embodied in the Declaration is the entitlement of the tribes to self-determination under international law.[251] Yet, the Court's current jurisprudence where the tribes' civil jurisdiction is concerned impedes, rather than promotes, the tribes' sovereignty.[252]

The Court has essentially defined a treaty as a "contract between two or more independent *nations*."[253] Over the years, corresponding methods of treaty interpretation with respect to treaties established with the Indian tribes have developed, often with respect for the tribes' sovereignty kept in mind.[254] Justice Blackmun incorporates these canons of construction into his dissents in order to examine the traditional relationship between the federal government and the tribes.[255] Under

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247. *See* Rachel San Kronowitz et al., Comment, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 588-621 (1987). For example, the United Nations created a permanent Working Group on Indigenous Populations, and after more than a decade of work, the Declaration on the Rights of Indigenous Peoples was adopted. *Historical Overview*, UNITED NATIONS, https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples/historical-overview.html (last visited Nov. 15, 2017).

248. G.A. Res. 61/295, annex, art. 7 ¶ 3 (Sept. 13, 2007).

249. S. James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, 75 IOWA L. REV. 837, 838-44 (1990).

250. *Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS, http://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf (last visited Nov. 15, 2017). The United States was at first one of four countries objecting to the Declaration, but it became the last major country to sign onto the Declaration when former President Obama announced his support of the Declaration in 2010. Krissah Thompson, *U.S. Will Sign U.N. Declaration on Rights of Native People, Obama Tells Tribes*, WASH. POST (Dec. 16, 2010, 12:10 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/16/AR2010121603136.html.

251. Stefania Errico, *The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview*, 7 HUM. RTS. L. REV. 741, 745-54 (2007).

252. *See supra* Parts II–III.

253. James J. Lenoir, Comment, *Treaties and the Supreme Court*, 1 U. CHI. L. REV. 602, 603 (1934) (emphasis added). In the case of the United States, a contract that was created by conforming to the Constitutional requirements concerning treaty-making. *Id.* at 604.

254. *See supra* Part II.

255. *See* Montana v. United States, 450 U.S. 544, 569-81 (1981) (Blackmun, J., dissenting in part). For example, Justice Blackmun reviewed evidence of the intention of the United States as a party to the treaty with the Crow Tribe with respect to possession of the Big Horn River. *Id.* at 570-

these canons, the courts should presume Congress's intent to protect the rights of the tribes and therefore, treaties are construed liberally in favor of the tribes, as the tribes would have understood them.[256] Thus, although the tribes would still bear the burden of showing that some right or interest was affected by the non-member conduct, given the favorable reading of any treaties and historical context, this would not be a particularly difficult burden to bear.[257]

As for the Court's underlying concern with fair treatment for non-members in tribal courts, this is the opportune area of jurisprudence in which the Court should show some judicial restraint.[258] According to Supreme Court precedent, Congress has the plenary power, however inconsistent with international law it may be, to remove the tribes' civil jurisdiction entirely.[259] Additionally, Congress could have created federal court review for tribal court decisions or a removal procedure for non-members to use, but has refrained from doing so.[260] The Court should hesitate to step in where Congress has not even identified a problem.[261] In any event, non-member parties still have recourse; the failure of a tribal court to provide appropriate due process would likely prevent the plaintiff from having the tribal court's judgment recognized and enforced in a state or federal court.[262]

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77. Considering how the aim of the treaty was to provide the tribe with a certain area of land to develop agriculturally with the recognition that much of their natural resources were being depleted, while at the same time obtaining the tribe's territory outside of the reservation, Justice Blackmun believed it both "inconceivable" and inconsistent with the purposes of the treaty that the United States intended to remove the tribe's possession of the riverbed. *See id.* (Blackmun, J., dissenting in part).

256. Allison M. Dussias, *Heeding the Demands of Justice: Justice Blackmun's Indian Law Opinions*, 71 N.D. L. REV. 41, 132 (1995). Justice Blackmun was not the first Justice to recommend extending use of the Court's canons of construction to treaties between the federal government and the tribes; Justice Douglas noted in his dissent in the *Affiliated Ute Citizens* case (the majority opinion was written by Justice Blackmun) that the canons of construction should be applied to both treaties and legislation where the tribes are concerned. *See* Affiliated Ute Citizens v. United States, 406 U.S. 128, 161 (1972) (Blackmun, J., dissenting in part). Justice Douglas stated: "We owe to the Indians a beneficent interpretation of remedial legislation designed to right past wrongs." *Id.* (citing United States v. Kagama, 118 U.S. 375, 384-85 (1886)). As such, "doubtful expressions . . . are to be resolved in favor of a weak and defenseless people." *Id.* (quoting Choate v. Trapp, 224 U.S. 665, 675 (1912)).

257. *See* Dussias, *supra* note 256, at 108.

258. Kalt & Singer, *supra* note 151, at 20.

259. *See id.* at 20; Part II.A–C.

260. *See* Kalt & Singer, *supra* note 151, at 20.

261. *See id.*

262. *See, e.g.*, Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136, 1138 (9th Cir. 2001) (holding that tribal court's judgment was not entitled to recognition because its proceedings violated due process).

V. CONCLUSION

As Justice Black once said, "Great nations, like great men, should keep their word."[263] The Court has recognized that the tribal courts' civil jurisdiction over non-members is a fundamental aspect of tribal sovereignty, yet the Court has not once shown its support for tribal authority, making the Court's own words seem hollow.[264] Even in cases where tribal jurisdiction seems to fit perfectly within one of the *Montana* exceptions, the Court has increasingly encroached on tribal authority over its own land.[265] In *Dollar General* the tribal courts narrowly avoided what seemed to be the pinnacle of civil divestiture: a holding that would prevent tribal courts from exercising jurisdiction over non-member businesses with both leases and contracts with the tribal government whose employees attack tribal youth on tribal trust lands.[266]

Neither history nor text of the Constitution work in the Court's favor.[267] The moment the federal government began treating the tribes as wards, a matter of internal affairs, rather than as independent sovereign entities, a matter of external or foreign affairs, was the moment the government was led astray.[268] As such, the Court was left with little choice other than to invent a new means of assessing the legitimacy of congressional action relating to Indian affairs: the implicit divestiture doctrine.[269] However, even with this doctrine, it was only within the past few decades that the Court began to use it as a means of significantly narrowing the tribes' civil jurisdiction.[270]

With the support of both the legislative and executive branches of government, states, lawyers, and academics for the competence of the tribal courts and the tribes' inherent sovereignty, the Court's (or, more accurately, four Justices') lone, bold stance against the tribes is odd.[271] Republicans and Democrats alike in the presidency and in either house of Congress have supported the broader policy of self-determination and

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263. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting). Justice Black delivered a scathing dissent when the Court upheld actions of the federal government that violated its treaty with the Tuscarora Tribe and led to the government's expropriating significant amounts of tribal land. *Id.*

264. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987); *supra* Parts II–III.

265. *See supra* Part III.A. *See generally* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008) (holding that neither *Montana* exception applied).

266. *See* Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159, 2160 (2016) (per curiam).

267. *See supra* Part II.A–B.

268. *See supra* Part II.A.

269. *See supra* Part II.A–B.

270. *See supra* Part II.B–C.

271. Kalt & Singer, *supra* note 149, at 19-21, 25-29; Sixkiller, *supra* note 103, at 809-11.

tribal sovereignty.[272] The Court's stance is especially concerning given the United States' recent change in position on the Declaration of the Rights of Indigenous Peoples.[273]

Turning toward Justice Blackmun's analysis of the *Montana* decision would, however, help to resolve some of the confusion in the Court's civil divestiture jurisprudence, and at the same time would help preserve the tribes' sovereignty.[274] Additionally, adopting his analysis would comport with principles of international law as it encourages the Court to engage in a more thorough analysis of the historical context of the treaties that the federal government has entered into with the tribes as sovereign entities.[275] If the federal government is really concerned with respecting its policy of self-determination and tribal sovereignty, it should be reflected in the actions of all three of its branches.[276] In another recent decision by the Court, Justice Thomas both railed against the Court's tribal law precedents and subtly hinted at the vestiges of something much darker in the past, stating that "until the Court rejects the fiction that Congress possesses plenary power over Indian affairs, our precedents will continue to be based on the paternalistic theory that Congress must assume all-encompassing control over the 'remnants of a race' for its own good."[277] His call for a change should be taken up by the rest of the Court, but until the Court is willing to diverge from its current path, the social and economic future of the tribes may depend on their continuing to assert their now internationally recognized rights to self-determination.[278]

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272. Kalt & Singer, *supra* note 149, at 25-29.

273. *See* Thompson, *supra* note 239.

274. *See supra* Part IV.B.

275. *See supra* Parts II.A, IV.B.

276. *See supra* Parts II.A, IV.B.

277. United States v. Bryant, 136 S. Ct. 1954, 1968-69 (2016) (Thomas, J., concurring) (citing United States v. Kagama, 118 U.S. 375, 384 (1886)).

278. *See supra* Part III.E.

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