

“Motherhood and Apple Pie” ~ Judicial Termination and the Roberts’ Court

By

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On June 25, 2008, a sharply divided U.S. Supreme Court took another significant step in diminishing the authority of Indian tribes over nonmembers. In a 5-4 decision in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S.Ct. 2709 (2008), the Court held that the Cheyenne River Sioux Tribal Court does not have jurisdiction over a discrimination claim by tribal members Ronnie and Lila Long against Plains Commerce Bank involving the bank’s sale of fee lands on the reservation to non-Indians on terms more favorable than those offered to the tribal members. As a matter of record, the less than favorable terms offered by the bank to the Longs were based solely on their status as Indians.

Plains Commerce Bank was the first Indian law case since the addition of Chief Justice Roberts and Justice Alito to the Supreme Court. Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas and Alito, distinguished *sales* of fee land by non-Indians on the Reservation, over which the majority opined that Tribes have no legislative authority, and *activities* by non-Indians on fee lands which may implicate a Tribe's sovereign interests and, thus, be subject to tribal regulation. Although it is only one case, the opinion is disturbing because a majority of the Court was willing to ignore the Bank's extensive dealings with tribal members on the Reservation, including its successful use of the Tribal Court in numerous other cases against tribal members. Instead, the majority chose to rely on a hyper-technical distinction to further chip away at tribal sovereignty.² It is unclear what the long-term effects of the decision will be, but it is not a promising beginning to the Roberts’ era.³

Chief Justice Roberts’ decision to author (*i.e.* assign himself the task of writing) the majority opinion in *Plains Commerce Bank*, his style and word choice in discussing tribal lands, and the manner in which he frames the sovereignty of Indian tribes, require additional reflection on the question: “What type of Justice is John Roberts going to be on Indian law cases?” Back in July 2005, after President George W. Bush nominated him to replace Justice Sandra Day O’Connor on the Supreme Court of the United States, the Native American Rights Fund, as part of the Judicial Selection Project of the Tribal Sovereignty Protection Initiative, conducted research, gathered documents and prepared an August 2005 memorandum to Tribal Leaders entitled “The Nomination of John G. Roberts to the U.S. Supreme Court – An Indian Law Perspective.” The research uncovered several documents authored by John Roberts during his tenure at the White House as Associate Counsel to the President (1982-86) wherein he provided legal advice to his superiors in relation to various legislative bills affecting Indian country.

A handful of these documents raised a few eyebrows. In particular, in a January 18, 1983 memorandum entitled “Draft Indian Policy Statement,” Roberts addressed the proposed renunciation by Congress of House Concurrent Resolution 108—the official federal policy known throughout Indian country as the “Termination Policy.” Roberts wrote: “H. Con. Res.

108, in my view, reads like *motherhood and apple pie*” (emphasis added). This statement and statements in other memoranda were troubling for tribal leaders and tribal advocates regarding his confirmation to the Court.⁴ However, the concerns were tempered by the fact that over twenty years had elapsed since he had penned these memoranda. Surely his personal policy views as a young attorney in the Reagan White House should not be given too much weight given his maturation into a “lawyer’s lawyer,” with flawless credentials, whose legal experience included representing the State of Hawaii and Native Hawaiian interests before the Supreme Court in *Rice v. Cayetano*.

Today, in light of the *Plains Commerce Bank* decision, a review of these memoranda may provide much needed insight into the future direction of Indian law before the Roberts’ Court. Part I of this article provides an overview of the August 2005 memorandum to Tribal Leaders. Part II provides quotes from the memoranda authored by John Roberts as a young White House attorney. Part III reviews the oral argument transcript in the *Plains Commerce Bank* case, as well as portions of the majority opinion written by Chief Justice Roberts. This material is offered to continue the dialogue and to pose the question of whether a more concrete profile of Chief Justice Roberts is emerging—especially in relation to his Indian law jurisprudence.

The title of this article—“*Motherhood and Apple Pie*”: *Judicial Termination and the Roberts’ Court*—found its origin, in part, from Roberts’ 1983 characterization of the Termination Policy. However, the title further coalesced following a review of Professor Jacob Levy’s recent law review article *Three Perversities of Indian Law*⁵ in which he observes:

Like the threat of termination, *self-determination as judicially construed* has put tribes in a position of facing a kind of punishment for success. Under Nixon’s interpretation of termination, those “step[s] that might result in greater social, economic, or political autonomy” brought with them the risk that tribes’ formal political and legal standing might be eliminated altogether. In the modern era, those steps instead carry the risk of a kind of *whittling away* of jurisdiction, rendering tribes slowly but consistently *less able to act as effective governing entities*. Tribes that wish to ensure their continuing viability as polities have very strong reason *not* to pursue policies that might lead to broad private-sector-led economic development, or indeed to much economic development at all (emphasis added).

In his 2001 article, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color Blind Justice and Mainstream Values*,⁶ David Getches concluded that an intellectual leader among the Justices must emerge, one who “can assume the hard work of understanding Indian law, its historical roots, and its importance as a distinct field.” Failing such an intellectual “rediscovery” of Indian law by the Court, “Indian policy will unravel further [and] Indian interests will suffer.” Do we think Chief Justice Roberts views himself as the emerging intellectual leader of the Court on Indian law? If so, does the decision in *Plains Commerce Bank* indicate that Indian country may be facing another era of *judicial* termination—courts poised to “whittle” away tribal sovereignty one case at a time in the name of ‘motherhood and apple pie.’”

Part I – The August 2005 Memorandum

Who is John G. Roberts? *His Childhood.* John Glover Roberts, Jr., was born on January 27, 1955, in Buffalo, New York. His father, John, Sr., was an executive in the steel industry; his mother, Rosemary, was a homemaker. When he was a boy, his family moved to Long Beach, Indiana, an all-white, predominantly Catholic community on Lake Michigan. He and his sisters attended Notre Dame Catholic School. He then attended La Lumiere, an all boys Catholic prep school in Indiana where he was co-captain of the football team, co-editor of the school newspaper and valedictorian of his class.

His Education. Roberts attended Harvard College where he majored in history and graduated in 1976 at the top of his class. He spent the next three years at Harvard Law School where he served as managing editor of the Harvard Law Review and graduated *magna cum laude* in 1979. During his first summer in law school, he clerked at the law firm of Ice, Miller Donadio, & Ryan (now Ice Miller) in Indianapolis, IN. During his second summer, he clerked at the law firm of Carlsmith, Carlsmith, Wichman & Case (now Carlsmith Ball LLP) in Honolulu, HI.⁷

His Early Career. Following law school, Roberts clerked for Judge Henry J. Friendly, an Eisenhower appointee to the U.S. Court of Appeals for the Second Circuit, a well-respected appellate judge and a proponent of judicial restraint.⁸ Next, Roberts clerked for then-Associate Justice (now former Chief Justice) William H. Rehnquist of the Supreme Court from July 1980 to August 1981. Following his clerkships, Roberts served as Special Assistant to United States Attorney General William French Smith, although his direct boss was Kenneth Starr. In November 1982, President Reagan appointed Roberts to the White House Staff as Associate Counsel to the President where he distinguished himself as an aggressive advocate for the administration's policies. His responsibilities as Associate Counsel to the President included advising the President regarding his constitutional powers and responsibilities, as well as other legal issues affecting the executive branch.

His Path to the Federal Bench. In May 1986, Roberts joined the law firm of Hogan & Hartson as an associate attorney and was elected as a general partner of the firm in October 1987. In 1989, he left Hogan & Hartson to serve as Principal Deputy Solicitor General of the United States under Kenneth Starr. In this capacity, he personally argued a number of cases before the Supreme Court and the federal courts of appeals on behalf of the United States. He had general substantive responsibility for cases arising from the Civil and Civil Rights Divisions of the Justice Department. In 1993, President George H.W. Bush nominated Roberts for a federal judgeship to the U.S. Court of Appeals for the D.C. Circuit, but the Senate did not vote on his nomination before the Clinton administration took office. According to various reports, Roberts was crestfallen, disappointed that his nomination languished in a standoff over judicial nominations at the end of Bush's term.

As a result, Roberts returned to private practice with his old firm in January 1993 where he established a successful appellate practice and developed a Washington insider reputation as a "lawyer's lawyer." In 2001, President George W. Bush nominated Roberts for a federal judgeship to the U.S. Court of Appeals for the D.C. Circuit and was confirmed by the full Senate on May 8, 2003 without a roll call vote. As noted above, on July 19, 2005, President George W.

Bush nominated John G. Roberts to become an Associate Justice on the Supreme Court of the United States, but with the death of Chief Justice Rehnquist on September 3, 2005, President Bush nominated Roberts to become the 17th Chief Justice of the United States. Roberts was confirmed by the U.S. Senate and sworn in as Chief Justice on September 29, 2005.

Prior to becoming Chief Justice, did Roberts have any experience with federal Indian law? There is nothing in the record to indicate that Roberts had direct responsibility for any case involving federal Indian law during his days as a judicial clerk or as an attorney with the federal government in the Reagan and Bush I administrations. However, it is important to note that during his clerkship for Justice Rehnquist, one very important Indian law case was decided by the U.S. Supreme Court: *Montana v. United States*, 450 U.S. 544 (1981) (Indian tribes do not have civil jurisdiction over non-Indians on non-Indian owned fee lands within the reservation, except when there is a consensual relationship or when the non-Indian conduct threatens the political integrity, economic security, health or welfare of the tribe).⁹ In addition, during the October 1980 Term, Justice Rehnquist issued a written dissent to a denial of certiorari in *Connecticut v. Mohegan Tribe*, 452 U.S. 968 (1981), a land claims case arising under the Non-Intercourse Act wherein he characterized the court of appeals decision as “unprecedented” making “millions of acres in the eastern United States vulnerable to Indian land title-claims.” Justice Rehnquist would have had the Court decide the territorial applicability of the Non-Intercourse Act (*i.e.* how the Act applies to Indian lands in the original 13 colonies versus Indian lands in the rest of the States).

Most of Roberts’ experience with Supreme Court cases involving federal Indian law arose during his years in private practice, as an attorney representing the interests of the State of Alaska in *Alaska v. Native Village of Venetie*, and representing the State of Hawaii in *Rice v. Cayetano*.¹⁰ Each of these cases is summarized below.

1. *Alaska v. Native Village of Venetie Tribal Government* (Scope of Indian Country): In 1986, Alaska entered into a joint venture agreement with a private contractor to construct a public school in the Village of Venetie using state funds. The Native Village of Venetie Tribal Government (the “Tribe”) notified the contractor that it owed the Tribe approximately \$161,000 in taxes for conducting business activities on its land and sought to enforce the tax in tribal court. The State filed an action to enjoin the collection of the tax and the Federal District Court for the District of Alaska held that since the Tribe's lands were not “Indian country” under the Alaska Native Claims Settlement Act (ANCSA), the Tribe lacked the power to impose a tax upon nonmembers. On appeal, the U.S. Circuit Court of Appeals for the Ninth Circuit reversed, holding that the land meets the definition of “Indian country” under 18 U.S.C. § 1151(b) as a “dependent Indian community.”

The State hired Roberts to prepare and file a petition for certiorari to the U.S. Supreme Court. The Court granted review and on the merits, Roberts argued that Congress has plenary authority over Indian affairs, that Congress has spoken clearly through ANCSA and that the Court should abide by Congress’ intent. However, several legal scholars have noted and taken exception with Roberts’ re-statement of the Court’s language in *United States v. Kagama* in his introductory Statement of the Case:

By the time the United States had acquired “Russian-America,” as Alaska was then known, most Indians in the contiguous United States had been displaced from their aboriginal lands by war or treaty, and confined to federally established territories or reservations. Although these reservations were created expressly for the use and occupancy of Indians, Indians did not own or control the land. Rather, the land was held in “trust” for them by the federal government, and any action concerning the land was subject to exclusive federal control. At the same time, because their means of subsistence had fallen prey to westward expansion, reservations Indians were almost entirely dependent upon the federal government for food, clothing, and protection, and were often “dead[ly] enemies” of the States *United States v. Kagama*, 118 U.S. 375, 383-84.

In other words, Roberts re-characterized Indians as the “deadly enemies” of the States (*e.g.* the savage Indian). In fact, the Court in *U.S. v. Kagama* stated:

These Indian tribes are wards of the nation. They are communities dependent on the United States,-dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, *the people of the states where they are found are often their deadliest enemies*” (emphasis added).

Quoting the concurring opinion in the Ninth Circuit, Roberts argued that recognizing Indian country in Alaska would invite a “blizzard of litigation throughout the State as each and every tribe seeks to test the limits of its power over what it deems to be its Indian country,” asserting “claims to freedom from state taxation and regulation, claims to regulate and tax for tribal purposes, assertions of sovereignty over vast areas of Alaska, and even assertions that tribes can regulate and tax the various corporations created to hold ANCSA land.” In a unanimous opinion delivered by Justice Thomas, the Court held that the Tribe’s land is not Indian country.

2. *Rice v. Cayetano* (Status of Native Hawaiians): In 1978, the State of Hawaii amended its constitution to establish the Office of Hawaiian Affairs (“OHA”), a public trust entity which administers programs to benefit the people of Hawaiian ancestry. OHA is governed by a nine-member board of trustees which must be “Hawaiian” and elected by “Hawaiians.” By statute, the term “Hawaiian” means “any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778” and the term “native Hawaiian” means “any descendant of not less than one half-part [blood] of the races inhabiting the Islands before 1778.”

Harold Rice, a non-native citizen of Hawaii and a descendant of pre-annexation residents of the islands, brought suit in federal district court contesting his exclusion from voting in the elections for OHA trustees based on the equal protection clause of the 14th Amendment and the prohibition of the 15th Amendment (may not deny or abridge the right to vote on account of race) of the U.S. Constitution. The U.S. District Court for the District of Hawaii granted summary

judgment to the State, finding that the Congress and the State of Hawaii have a guardian-ward relationship with the native Hawaiians, analogous to the relationship between the United States and Indian tribes. The U.S. Court of Appeals for the Ninth Circuit affirmed, holding that the State “may rationally conclude that Hawaiians, being the group to whom trust obligation run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be.”

After the U.S. Supreme Court granted certiorari, the State of Hawaii retained Roberts who argued that the classification drawn by the statute was not drawn on the basis of race.¹¹ Instead, the statute simply restricted the right to vote to the beneficiaries of the trusts. Rice had not challenged the validity of the trusts and it was rational for the State to limit voting to those most directly affected by the administration of the trusts. In addition, he argued that similar to Native Americans in the lower 48 States and Alaskan Natives, Congress has established a special trust relationship with Native Hawaiians as an indigenous people:

Classifications based on Congress’ decision to assume a special relationship with an indigenous people are not based on race, but rather the unique legal and political status that such a relationship entails. Congress has expressly provided that classifications involving indigenous Hawaiians should be treated the same as those involving American Indians, Alaska Natives, and the other indigenous people over whose aboriginal lands the United States has extended its domain. This Court has repeatedly reaffirmed that such judgments are peculiarly within Congress’ prerogative to make. Centuries of jurisprudence, not to mention an entire title of the United States Code, are built on the understanding that such classifications are not race-based. This regime is fully applicable to indigenous Hawaiians.

As a strict constructionist, Roberts went on to argue that this “is true not only because Congress has said so, but because the Framers of the Constitution drew no distinctions among different groups of indigenous people in conferring power to deal with such groups on Congress, and the Framers of the Civil War Amendments never envisioned that those amendments would restrict the ability of Congress to exercise that power.” However, the Court rejected Roberts’ arguments and held that the state statute which limited voters to those persons whose ancestry qualified them as either a “Hawaiian” or “native Hawaiian,” violated Fifteenth Amendment, using ancestry as proxy for race.

What do we know of Roberts’ Judicial Philosophy, His Judicial Temperament? In August 2005, there were more questions than answers to the inquiry regarding what kind of Supreme Court Justice John Roberts would be if confirmed by the U.S. Senate. His two-years as a judge on U.S. Circuit Court of Appeals for the D.C. Circuit did not provide enough time to develop, or sufficient opportunity to evaluate, his judicial record. In Roberts’ own words, he does not have an “overarching, uniform” judicial philosophy.

By most accounts, Roberts’ role model was Judge Henry Friendly for whom he clerked on the U.S. Circuit Court of Appeals for the Second Circuit. Many legal scholars consider Judge

Friendly to be one of the great appeals court judges of the modern era. Judge Friendly was not result-oriented, rather he carefully weighed the facts and the law, was deferential to precedent and had a reputation of being intellectually honest. Based on his responses during his confirmation process, his reputation as a lawyer's lawyer, and the twenty-intervening-years since he was a White House attorney, the conclusion reached in August 2005 was that there was nothing recent in the Roberts' record, as a judge or as an attorney, to indicate that he is result-oriented or a political ideologue with a specific agenda. Were we wrong?

Part II -- The Five Memoranda

From 1982 to 1986, Roberts served as Associate Counsel to President Reagan providing legal advice in relation to various legislative bills, including bills affecting Indian country. In particular, he wrote five memoranda in which he discusses his policy views and values in relation to the history, treatment and legal status of Native Americans and of Indian tribes in the United States.¹² First, in a January 1982 memorandum, Roberts provided the following commentary on the Texas Band of Kickapoo Reservation Act:

The Kickapoos, originally from the Great Lakes area, *did not stop running from their encounter with Europeans until they reached Mexico*, where they now hold 17,000 acres of land. The Kickapoos provide migrant labor in the United States and a group of them made Newsweek *by choosing to live in squalid conditions* beneath the International Bridge in Eagle Pass, Texas, rather than their Mexican homeland.

* * *

While the approach of the bill – ad hoc exceptions to restrictions in general laws – strikes me as unfortunate, and while its provisions seem overly generous – particularly in light of the fact that these are, generally speaking, *Mexican Indians and not American Indians* – the bill is consistent with the Administration's recommendation (emphasis added).

Then, in a January 1983 memorandum entitled "Miscellaneous Amendments of the Internal Revenue Code and the ERISA," Roberts stated: "I view treating tribal governments as states as objectionable as a policy matter, but it is consistent with the equally objectionable (but well established) non-integrationist policy with respect to Indians." And as noted above, in a January 1983 memorandum addressing Congress's wish to adopt an Indian policy statement officially renouncing the 1950's Termination Policy—House Concurrent Resolution 108—he wrote:

[I]n my view, [House Concurrent Resolution 108] reads like motherhood and apple pie:

It is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, and to end their status as wards of the

United States, and to grant them all the rights and prerogatives pertaining to American citizenship.

I am advised ... that Indians oppose the notions of ‘equality’ embodied in H. Con. Res. 108 as departures from their “special” status, and that renunciation of H. Con. Res. 108 (itself having no legal effect) has great symbolic value. The decision to urge renunciation of H. Con. Res. 108 was made at a Cabinet Council meeting last fall, and has already been announced in the January 14 summary, so it appears in any event to be water under the bridge.

Next, in a November 1983 memorandum, Roberts wrote:

This bill would declare that 3,800 acres of public land in Nevada (valued at \$1.5 million) be held in trust for the Las Vegas Paiute Tribe. The tribe, consisting of 143 members, has no legal claim to the land, but simply wants to expand its economic base. Interior originally opposed the bill, contending that the land should not be transferred without compensation, but now has no objection. OMB recommends approval; Justice and EPA defer to Interior. This bill essentially *does nothing more than take money from you and me and give it to 143 people in Nevada (about \$10,000 each), simply because they want it* (emphasis added).

I have reviewed the memorandum for the President . . . , and the bill itself, and have no legal objection (emphasis in original).

And, in a September 1984 memorandum advising the President about the Shoalwater Bay Indian Tribe Claims Settlement Act, Roberts characterizes the settlement as “another Indian giveaway”:

The bill would provide \$1,115,000 to an Indian tribe to settle the tribe’s claims to eight acres of land. The land was included in the tribe’s reservation by an 1866 executive order, but an 1872 General Land Office land patent granted the land to another party. Both the tribe and the successors-in-title to the other party now claim the land, and the tribe has filed suit against the other claimants. The other claimants have sued the United States and a third-party defendant.

In 1982 Interior offered \$120,000 to settle the tribe’s claims. Under typical Indian Claims Commission formula, the land would be worth only several hundred dollars. Nonetheless, Interior and OMB recommend approval, arguing that the United States could be exposed to greater liability if the lawsuit goes forward, and noting that the whole problem was caused by the Government in the first place. Justice defers to Interior.

This strikes me as *another Indian giveaway*, since the amount awarded greatly exceeds any reasonable valuation of the tribe’s claim. If Interior, Justice and OMB approve, however, I do not think we should interpose an objection (emphasis added).

Part III – The Plains Commerce Bank Case

When the Court granted review in the *Plains Commerce Bank v. Long Family Land & Cattle Co.* in January 2008, there was swift reaction from around Indian country. The U.S. Court of Appeals for the Eighth Circuit had clearly rejected all of the bank’s arguments and made a straight-forward application of the first “consensual relations” exception to the *Montana* exception to the general rule that Indian tribes retain civil jurisdiction over non-Indians on their reservation.¹³ Three principal concerns dominated the subsequent discussion in relation to the reason the Court granted review: (1) to create a broad *Oliphant*-style civil jurisdiction rule that Indian tribes do not have authority over non-Indians on the reservation;¹⁴ (2) to announce a rule that tribal courts have no jurisdiction over torts (*e.g.* personal injury suits) committed by non-Indians on the reservation per Justice Scalia’s opinion in *Hicks*; or (3) to revise the first *Montana* “consensual relations” exception to require clear, express consent to tribal court jurisdiction per Justice Souter’s opinion in *Hicks*.

Recognizing these concerns, a strategy was developed on behalf of Ronnie and Lila Long as the Respondents—a strategy designed to close every door the bank was attempting to open and prevent the Court from issuing a broad sweeping ruling. For Indian country, if ever there was a case of consensual relations between a non-Indian and tribal members arising on the reservation, this case was it! Second, in anticipation of the fact that the Court did not grant review to affirm tribal authority over non-Indians, the strategy included ways to limit the damage the Court may be prepared to cause to tribal sovereignty.

To achieve this objective, a full briefing presentation was developed which included the Respondents’ brief providing a detailed factual background giving rise to the consensual relations and to the bank’s discrimination; an amicus brief by the United States supporting tribal court authority over a bank doing business with tribal members on the reservation and taking advantage of a federal guaranteed loan program through the Bureau of Indian Affairs; an amicus brief by the Cheyenne River Sioux Tribe detailing their tribal laws, their tribal court system and the bank’s long history of doing business on the reservation and using the tribal court on many occasions in actions against tribal members; an amicus brief prepared by the National Congress of American Indians and individual Indian Tribes focusing on the fundamental principles of federal Indian law giving rise to the tribe’s inherent authority over non-Indians; an amicus brief by the National American Indian Court Judges Association, the Northwest Intertribal Court System and the Navajo Nation Tribal Courts providing an overview to the Court of capacity of tribal courts to fairly and efficiently adjudicate cases involving non-Indians; and an amicus brief by Sacred Circle and other domestic violence groups enlightening the Court regarding potential consequences for civil protection orders issued by tribal courts against non-Indian perpetrators of domestic violence against Indian women and children.

To help develop this comprehensive presentation, David Frederick, a seasoned Supreme Court practitioner and co-director of the University of Texas Law School Supreme Court Clinic, stepped forward and offered his legal expertise to the Long family *pro bono*. After the briefs were filed, three moot court oral arguments were held to prepare for the barrage of questions

expected from the justices. Each moot court included questions from practitioners familiar with Indian law, Supreme Court practice and the proclivities of individual justices.

On reflection, what emerged from the oral argument was a preview of the struggle by many of the justices, including the Chief Justice, to get their minds around the concept that Indian tribes as governments could have authority over non-Indians who come on to their reservations to do business. Early on, there was a glimmer of hope that Justice Scalia, in his own way, got it. During an exchange with the bank's attorney regarding the personal guarantees given by Ronnie and Lila Long on the loans by the bank to their corporation, Justice Scalia said:

And then you get guarantees from on reservation Indians. It *smells* like dealing with Indians on the reservation to me. . . . In the absence of [a choice of law/forum provision], why should we bend over backwards to give something that has the *smell* of dealing with Indians any other name?

Plains Commerce Bank transcript at 15-16 (emphasis added). Then one wonders if Justice Scalia could have chosen a different sensory descriptor such as “it sounds like dealing with Indians” or “it looks like dealing with Indians.” Instead, he chose the term “smells,” as in “has a bad odor,” used it twice, giving one the sense that if you do business with Indians, then you deserve whatever bad deal you get, including being hauled into tribal court.

Later in the argument during an exchange with David Frederick about the nature and scope of tribal law, Chief Justice Roberts clearly demonstrates his disdain for tribal law: “Well, neither could—and neither could anybody [find tribal law as precedent], right? I mean if anybody could find it you could. It’s because its not published anywhere, right? Justice Scalia follows up with his own disdain: “Certainly your reliance upon the Federal rules doesn’t impress me as much as it did when you first told be about it, because apparently the Federal rules mean whatever the tribal courts say they mean, is that right?” *Plains Commerce Bank* transcript at 31-32.

Then in another exchange with David Frederick on the status of Indian-owned corporations, Chief Justice Roberts uses a curious comparison to challenge the special status of Indians:

One of the points you mentioned earlier is that this is an Indian corporation, and that’s a concept I don’t understand. If Justices Scalia and Alito form a corporation, is that an Italian corporation?

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[If] the point here is ... that the corporation is a member of the tribe ... I certainly do not think the State, when it incorporated this entity, said: You’re a different type of corporation than every other; you’re an Indian corporation.

Plains Commerce Bank transcript at 32-34. While David Frederick deftly avoided the racial undertones of the first question, he immediately clarified for the Court that, in fact, the South Dakota Supreme Court has recognized the special status of Indians and Indian-owned

corporations. But the Chief Justice was not finished trying to aggressively challenge the special status of Indians and Indian-owned corporations:

But if you are a bank and somebody comes in and says: I'm a corporation; I would like a loan, is the bank supposed to start asking questions about whether there are Indian shareholders, and how many, and all that?

* * *

So they should have a check box on their loan applications that says: Are you an Indian?

Plains Commerce Bank transcript at 34-36. Isn't a check box on a loan application based on race a violation of federal law? When David Frederick responded that in this case that Plains Commerce Bank clearly knew it was doing business with tribal members—with an Indian-owned corporation which had secured federal loans guarantees for the bank based on its status—all Roberts could say was: “Well I am sure the facts here matter.”

Towards the end of oral argument, the question of *Montana* as precedent finally came up. Justice Alito demonstrated his struggle to understand Indian law when he asks: “Well there are many facts here that are favorable to your position, but I would appreciate it if you could articulate the rule of law that you would like us to adopt in this case.” When David Frederick responded that the Court need not adopt any new law, merely apply the first *Montana* exception—the consensual relations exception—to the facts of this case, Alito replies: “Can that be the case: Any consensual relationship between a member of the tribe and a nonmember is subject to the jurisdiction of the tribal courts?” *Plains Commerce Bank* transcript at 37-38.

And finally, Chief Justice Roberts' revealed his predilection to never vote in support of tribal court jurisdiction over non-Indians, picking up this thread from the discussion with Justice Alito: “You said earlier that this is a straightforward application of *Montana*?” And once again David Fredericks says, yes—based on the facts of this case. To which the Chief Justice, in perhaps the most often quoted exchange says: “Yes given the facts. But isn't it true that this would be the first case in which we have asserted or allowed Indian tribal jurisdiction to be asserted over a nonmember?” *Plains Commerce Bank* transcript at 39-40.

When the Court issued its 5-4 decision in *Plains Commerce Bank*, any hopeful optimism that the Chief Justice Roberts would emerge as the intellectual leader of the Court who would “rediscover” the historical roots of Indian law was eviscerated. Although the holding is extremely narrow—no tribal authority over the *sale* of non-Indian fee land—some of the language used by the Chief Justice in the opinion deserves additional scrutiny as we consider the future direction of Indian law.

From the outset—in the very first sentence of the opinion—Chief Justice Roberts makes clear what the outcome is going to be: “This case concerns the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals.” Roberts characterized Ronnie and Lila Long as the “Indian couple” who defaulted on their bank loans and *then* claimed discrimination by the bank. The discrimination actually occurred when the bank changed the

terms of the loan to the Longs based on their being Indians, which in turn resulted in default by the Longs due to the breach of the loan agreement by the bank (*e.g.* breach of contract and bad faith claims not contested by the bank). In essence, Roberts characterized the Longs—not the bank—as the wrongdoers. But to reach this pre-determined outcome, the Chief Justice must trace and re-cast the history of the Cheyenne River Sioux Reservation: “Once a massive, 60-million acre *affair* ... appreciably diminished by Congress in the 1880’s and at present consists of roughly 11 million acres” 128 S.Ct. 2714 (emphasis added).

In general, the use of the term “affair” connotes something temporary or transitional. It seems only the promises made by the United States during treaty negotiations were temporary. For the Cheyenne River Sioux Tribe, their treaty-negotiations set aside a permanent *homeland*, not an “affair” subject to the whims of the superior sovereign. And perhaps the oddest play on words by the Chief Justice in the opinion appears in the following statement regarding tribal lands: “*Thanks* to the General Allotment Act of 1887, there are millions of acres of non-Indian fee land located within the contiguous borders of Indian tribes.” *Id.* at 2719 (emphasis added). The use of the phrase “thanks to the General Allotment Act” and the subsequent discussion leading to the general rule that tribes have no authority to regulate the use of fee land, at best, reveals a complete denial of the poverty, misery, and suffering endured by Indians, not to mention the extraordinary loss of Indian lands, which occurred in the wake of the allotment and assimilation policies of the United States.

Chief Justice Roberts also reframed the Court’s discussion of tribal sovereignty, distinctly referring to it as a “residual sovereignty” centered “on the land owned by the tribe and on tribal members within the reservation.” *Id.* at 2718. In drawing the hyper-technical distinction between the *sale* of fee land and *activity* on fee land, Roberts relies on the fact that since the Court has only “permitted regulation of nonmember activity on non-Indian fee land,” but never authorized a tribe to regulate the sale of such land—no such tribal authority exists! *Id.* at 2722-23. This is a *non sequitur*, which Roberts attempts to support in his next paragraph:

“
[This is] entirely logical given the limited nature of tribal sovereignty and the liberty interests of nonmembers. By virtue of their incorporation in to the United States, the tribe’s sovereign interests are now confined to managing tribal land, protecting tribal self-government and controlling internal relations. The logic of *Montana* is that is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, a commercial development) may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent that they do, such activities may be regulated. To put it another way, certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight. While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmember behavior that implicates tribal governance and internal relations [citations and quotation marks omitted].

Is the determination of tribal authority over non-Indians now solely a balancing test between tribal sovereign interests versus the liberty interests of nonmembers? Is the doctrine of inherent tribal authority no longer a consideration?

And Chief Justice Roberts' references to certain occasions when an Indian tribe might be able to exercise authority over non-Indians on non-Indian fee land (*e.g.* employer of tribal members; commercial development) are illusory. In the opinion, Roberts makes clear that the tribal sovereign interests that give rise to the first *Montana* exception are identical to those of the second exception. Under the second *Montana* exception, Roberts states that the sovereign interests of Indian tribes are only implicated when "catastrophic consequences" befall a tribal government. *Id.* at 2726. Can we expect an equally heightened standard for the first exception?

More disturbing is the willingness of Roberts, similar to his brief in *Venetie* in which he cited *Kagama* as precedent for the proposition that Indians were the "dead[ly] enemies" of the States, to mis-use a footnote in the 2005 Cohen Handbook of Federal Indian Law for the proposition that Indian legal scholarship recognize this heightened "catastrophic consequences" standard for the second exception:

One commentator has noted that "th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences."

In fact, the footnote relied upon by Roberts, when considered in its entirety, actually refutes this notion of a heightened standard flowing from the Court's precedent:

In a footnote [in *Atkinson Trading*], the Court observed that "unless the drain of the nonmember's conduct on tribal services and resources is so severe that it actually 'imperil[s]' the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands." This elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences. In *Montana* itself, however, the Court reasoned that the existence of state rather than tribal authority on non-Indian fee lands had had practically *no* effect on tribal jurisdiction over hunting and fishing on Indian lands, and that the tribe had long accommodated itself to the exercise of state jurisdiction on fee lands [citations omitted].

Conclusion

In August 2005, a conclusion was reached that there were more questions than answers regarding what type of justice John G. Roberts would be in relation to Indian law cases before the Supreme Court. Perhaps the opinion in *Plains Commerce Bank*, and a reconsideration of the five memoranda he wrote as a young White House Attorney, provide a more concrete profile. To be sure, by the end of the October 2008 Term, there should be more definitive answers to this question as the Roberts' Court decides three more Indian law cases: *Carciere v. Kempthorne*, *U.S. v. Navajo Nation* and *State of Hawaii v. Office of Hawaiian Affairs*.

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² According to the majority, since the discrimination claim “is tied specifically to the sale of the fee land” – land alienated from tribal trust land and removed from tribal control – the Tribe has no authority to regulate the terms upon which the land can be sold, even if those terms are discriminatory and favor non-Indians over Indians. Lacking authority to regulate fee land sales, the Tribe has no adjudicatory authority over claims based on such sales since a Tribe's adjudicatory authority cannot exceed its legislative authority. Interestingly, however, because the majority expressly made clear that it was not addressing whether the Tribal Court had jurisdiction over the Longs' breach of contract and bad faith claims (the Bank had not appealed those claims), that leaves the Tribal Court jury award of \$750,000 to the Longs undisturbed and subject to further proceedings.

³ Although a disappointing outcome, attorneys from throughout Indian country worked extremely hard to limit the damage that the Court could do to tribal sovereignty if it issued a broad holding. When the Court granted review of the favorable ruling issued by the U.S. Court of Appeals for the Eighth Circuit in January 2008, many Indian law practitioners anticipated three possible worst-case scenarios: (1) The Court reversing *National Farmers and Montana*, establishing an *Oliphant* style rule prohibiting tribal civil jurisdiction over non-Indians; (2) The Court adopting a “clear and explicit consent” requirement by non-Indians to tribal court jurisdiction following Justice Souter's concurring opinion in *Hicks*; or (3) The Court holding that tribal courts have no jurisdiction over tort claims against non-Indian defendants following the lead of Justice Scalia's majority opinion in *Hicks*.

⁴ The Senate Judiciary Committee scheduled confirmation hearings to begin on September 6, 2005, but with the death of Chief Justice William Rehnquist on September 3, 2005, the hearings were postponed. On September 6, 2005, President Bush nominated John Roberts to become the 17th Chief Justice of the United States. Roberts was quickly confirmed by the U.S. Senate and sworn in as Chief Justice on September 29, 2005, four days before the start of the October 2005 Term.

⁵ 12 Texas Review of Law & Politics 329, 341-42 (Spring 2008)

⁶ 84 Cal L. Rev. 1573.

⁷ The firm was founded in 1857 and describes itself as Hawaii's oldest and largest law firm with offices in Honolulu, Hilo, Kona, Maui, Kapolei, Guam, Saipan and Los Angeles.

⁸ Judge Friendly frequently criticized the Warren Court for pushing rights that were not included in the Constitution. He was also known for his deference to the political branches of government.

⁹ As noted in the August 2005 memorandum, the nature and scope of tribal civil and regulatory authority over non-Indians on the reservation is an area of continuing controversy and litigation, as demonstrated by the Supreme Court's decisions in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); and *Nevada v. Hicks*, 533 U.S. 353 (2001).

¹⁰ *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998); and *Rice v. Cayetano*, 528 U.S. 495 (2000). Roberts also represented the State of Alaska on a petition for rehearing en banc in *Katie John v. United States*, 247 F.3d 1032

(2001), where he argued against federal protection of Native subsistence rights, contending that “the basis question presented by this case ‘is whether Alaska or the United States has control over ***Alaska’s navigable waters.’ Few matters are more central to a State’s sovereignty than the authority to manage the natural resources within its borders.” Although Roberts was successful in obtaining the rehearing en banc, the State of Alaska lost the case on the merits and did not seek review by the Supreme Court. The only Indian law case Roberts participated as a judge on the DC Circuit was *City of Roseville v. Norton*, 348 F.3d 1020 (2003), in which a group of cities challenged the authority of the Secretary to take land in trust for an Indian tribe to operate a casino under the restored lands provision of the Indian Gaming Regulatory Act. Roberts joined the unanimous opinion written by Judge Rogers which held in favor of the Secretary and Indian tribes.

¹¹ Roberts discussed this case in an October 6, 1999 NPR Interview, Profile: Racial Discrimination Case in Hawaii. In the interview Mr. Roberts characterized Mr. Rice’s claim that he was “as Hawaiian as anybody” as being “like the descendants of Myles Standish saying they’re Native Americans because they’ve been here for a long time.” In that interview he went on to say “The fact of the matter is, there was somebody else there when they arrived, and there was somebody else there when Mr. Rice’s ancestors arrived in Hawaii, the aboriginal inhabitants. We give special treatment to Alaskan natives. We don’t give special treatment to the Russian settlers who were there before that land was part of the United States Now if it is held to be racial discrimination to single out native Hawaiians, it’s hard for me to see why it wouldn’t also be racial discrimination to single out American Indians or Alaskan natives. And, of course, that takes place in countless laws in the US code.”

¹²January 4, 1982 Memorandum from John G. Roberts re Texas Band of Kickapoo Reservation Act; January 10, 1983 Memorandum from John G. Roberts re Amendments of the Internal Revenue Code and the ERISA; January 18, 1983 Memorandum from John G. Roberts re Draft Indian Policy Statement; November 30, 1983 Memorandum from John G. Roberts re Las Vegas Paiute Trust Lands; September 26, 1984 Memorandum from John G. Roberts re Shoalwater Bay Indian Tribe Claims Settlement Act.

¹³ *Montana v. United States*, 450 U.S. 544 (1981). Until the Court’s decision in *Montana*, the general rule had been that Indian tribes retain civil regulatory over non-Indians on their reservations. In this sense, the “rule” announced in *Montana* (no regulatory authority over fishing and hunting by non-Indians on non-Indian fee land) is an exception to the general rule that tribes retain their inherent authority not explicitly divested under their treaties.

¹⁴ *Oliphant v. Suquamish Indian Tribe*, 425 U.S. 191 (1978).