

## Contract and (Tribal) Jurisdiction

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Consider two commercial contracts. The first requires customers to waive their rights to bring class actions against large businesses in favor of private arbitration. The second requires a reservation leaseholder to adjudicate disputes in tribal court. Both contracts require dispute resolution in fora over which the Supreme Court does not exercise supervisory jurisdiction. Both arbitration and tribal courts are favored by acts of Congress.<sup>1</sup> Both contracts are hotly contested in the Supreme Court. But the arbitration clause contract has been affirmed in a series of recent decisions.<sup>2</sup> The tribal court contract, by contrast, is pending before the Court in *Dollar General Corp. v. Mississippi Band of Choctaw Indians*.<sup>3</sup> Ironically, while the more conservative Justices signed on to the arbitration clause decisions, these same Justices may be Dollar General's best bets for escaping tribal jurisdiction. This short Essay details the key arguments in *Dollar General* and argues that to undo the tribal contract would unnecessarily and unconstitutionally undo the right to contract for Indian nations.

### I. CONTRACT AND TRIBAL JURISDICTION

Indian nations and non-Indians conduct billions of dollars' worth of business on Indian lands. Indian energy revenue disbursements from the

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1. Compare The Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2012), with Indian Tribal Justice Act, 25 U.S.C. §§ 3601-3631 (2012), Indian Tribal Justice Technical and Legal Assistance Act of 2000, 25 U.S.C. §§ 3651-3682 (2012), and Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, 124 Stat. 2261 (2010).
  2. Cf., e.g., *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).
  3. *Dolgenercorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014) (affirming tribal court jurisdiction over tribal member tort claim against nonmember arising on tribal lands), *reh'g en banc denied*, 746 F.3d 588 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2833 (2015).

Interior Department topped \$1 billion for the first time in 2014,<sup>4</sup> and much of that business depends upon non-Indian companies. Indian gaming is a nearly \$30 billion revenue source for Indian nations,<sup>5</sup> and nearly all of that revenue is generated from non-Indians. Gaming tribes employ many thousands of non-Indians and do billions of dollars' worth of business with non-Indian vendors.<sup>6</sup> Tribal governments handling billions of dollars in federal government contracting funds likely employ hundreds of thousands of non-Indians nationwide. Virtually all of this business activity is conducted through contractual relationships, with business activities occurring on Indian lands. Gaming, resource exploitation, and federal contracting have revolutionized the political economy of Indian nations in the past four decades.

Commercial relations between Indian nations and those who are not members of the tribes have been normalized for the most part, with one critical exception. The Supreme Court has left tribal civil jurisdiction over nonmember business activities unsettled. There is one key open question staring tribal business operations in the face: "the question of tribal-court jurisdiction over nonmember defendants in general."<sup>7</sup>

Oral argument in *Dollar General* suggests that the Court is not certain even about the proper rules to use in deciding tribal civil jurisdiction matters. The Court's working theory, memorialized in the *Montana* test, is that Indian nations do not have jurisdiction over nonmembers, except in two circumstances.<sup>8</sup> One is where nonmember activity is potentially "catastrophic" to tribal government operations and reservation life.<sup>9</sup> The other is where a nonmember consents, usually through a commercial transaction, to tribal jurisdiction.<sup>10</sup> Several cases in the 1980s determined that Indian nations enjoyed civil jurisdiction over nonmembers in a variety of disputes arising on

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4. *Interior Disburses \$13.4 Billion in FY14 Energy Revenues to Benefit Federal, State, Local and Tribal Governments*, U.S. DEP'T INTERIOR (Dec. 2, 2014), <http://www.doi.gov/news/pressreleases/interior-disburses-13-4-billion-in-fy14-energy-revenues-to-benefit-federal-state-local-and-tribal-governments> [<http://perma.cc/U4L6-D9DU>].

5. Press Release, National Indian Gaming Commission, 2013 Indian Gaming Revenues Increased 0.5% (July 21, 2014), <http://www.nigc.gov/news/detail/2013-indian-gaming-revenues-increased-0.5> [<http://perma.cc/ST64-5CVD>].

6. Alan Meister, *Casino City's Indian Gaming Industry Report*, CASINO CITY PRESS 3 (2015), [http://www.nathaninc.com/sites/default/files/Pub%20PDFs/Indian\\_Gaming\\_Industry\\_Report\\_2015\\_Executive\\_Summary.pdf](http://www.nathaninc.com/sites/default/files/Pub%20PDFs/Indian_Gaming_Industry_Report_2015_Executive_Summary.pdf) [<http://perma.cc/T72E-6RAN>] (reporting 612,000 Indian gaming casino jobs and \$91.1 billion in output).

7. *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001).

8. *Montana v. United States*, 450 U.S. 544, 564-65 (1981).

9. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008).

10. *Id.* at 337.

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Indian lands: taxes on reservation sales to nonmembers;<sup>11</sup> taxes on nonmember interests on reservation leaseholds;<sup>12</sup> taxes on reservation resources removed by nonmembers;<sup>13</sup> regulation of nonmember hunting and fishing on reservation lands;<sup>14</sup> and even zoning regulation of nonmember-owned fee land in a predominantly tribal portion of an Indian reservation.<sup>15</sup> At this late date, it is well established that nonmembers who have consented to tribal jurisdiction will not be successful in challenging tribal jurisdiction in federal court, especially if the dispute arises on Indian lands. These challenges are almost uniformly unsuccessful.<sup>16</sup> The simple answer for any commercial entity doing business in Indian country is to resolve these uncertainties in contract with the tribal business partner. In fact, Indian country business entities successfully contract away jurisdictional problems in most instances.<sup>17</sup>

### **II. DOLLAR GENERAL V. MISSISSIPPI BAND OF CHOCTAW INDIANS**

Despite the long line of authority and practical lawyering acknowledging the power of tribes and their business partners to contract for jurisdiction, the Supreme Court is poised to possibly undo that law by excusing a tribal business partner from its contractual consent to tribal jurisdiction.

Dollar General rents land from the Choctaw tribal trust to operate one of its stores in accordance with a lease in which the store consented to tribal court jurisdiction and to the Choctaw Tribal Tort Claims Act. The tribe persuaded the Dollar General store manager to participate in the tribe's Youth Opportunity Program, which places tribal members in unpaid positions at reservation businesses for educational purposes. One of the tribal member youths employed at the store alleged that the store manager sexually molested him and sued both the manager and Dollar General in tribal court for \$2.5 million in damages.<sup>18</sup>

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11. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-53 (1980).
  12. *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 201 (1985).
  13. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982).
  14. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983).
  15. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 440 (1989) (Stevens, J. concurring).
  16. *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 820 (9th Cir. 2011); *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of the Miss. in Iowa*, 609 F.3d 927, 946 (8th Cir. 2010); *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1127 (9th Cir. 2006) (en banc).
  17. *E.g.*, *Fine Consulting, Inc. v. Rivera*, 915 F. Supp. 2d 1212, 1228 (D.N.M. 2013).
  18. *Petition for Writ of Certiorari at 2, Dollar General Corp. v. Miss. Band of Choctaw Indians*, No. 13-1496, (U.S. June 12, 2014).

In its petition for certiorari, Dollar General characterized the issue as a tort claim,<sup>19</sup> perhaps to deflect attention from the fact that the company likely had consented to the application of tribal law under the lease. The strategy is sound. The Court has long worried that nonmembers will be surprised in tribal court by unfair and unknowable tribal tort law.<sup>20</sup> Justice Souter once wrote that tribal courts “differ from traditional American courts in a number of significant respects.”<sup>21</sup>

The Mississippi Choctaw tribal court is a professional court consisting of attorneys; the chief appellate judge must possess several years of judicial experience before he or she may sit on the court.<sup>22</sup> Dollar General does not allege that Mississippi Choctaw tribal court engaged in any unfairness, or that tribal tort law is unknowable, but only argues in its cert petition that there is no guarantee that the tribal court is “endowed with the independence required for fair treatment of outsiders.”<sup>23</sup> Even that is a generalization: there is tribal law that could address the question of, for example, the tribal procedural rules and judicial conduct rules.<sup>24</sup> But Dollar General does not engage with that law.

In its merits brief and at oral argument, Dollar General dramatically shifted course and argued that since the Federal Constitution does not constrain tribal authority and the Supreme Court does not have supervisory authority over tribal courts, nonmembers cannot be sued in tribal court at all.<sup>25</sup> Dollar General

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19. Petition for Writ of Certiorari at 12, *Dollar General*, No. 13-1496 (“This case presents the Court a chance to complete the critically important, unfinished business of defining the scope of tribal authority to adjudicate tort claims against nonmembers.”).
  20. *E.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 338 (2008) (“But there is no reason the Bank should have anticipated that its general business dealings with respondents would permit the Tribe to regulate the Bank’s sale of land it owned in fee simple.”).
  21. *Nevada v. Hicks*, 533 U.S. 353, 383 (2001) (Souter, J., concurring).
  22. MISS. CHOCTAW TRIBAL CODE §§ 1-3-3(2), 1-3-4(1), [http://www.choctaw.org/government/tribal\\_code/Title%201-%20General%20Provisions.pdf](http://www.choctaw.org/government/tribal_code/Title%201-%20General%20Provisions.pdf) [<http://perma.cc/7U8T-R27Q>].
  23. Petition for Writ of Certiorari at 15, *Dollar General*, No. 13-1496 (U.S. June 12, 2014).
  24. *See* MISS. CHOCTAW TRIBAL CODE § 7-1-1, [http://www.choctaw.org/government/tribal\\_code/Title%207-%20Establishment%20of%20the%20Supreme%20Court.pdf](http://www.choctaw.org/government/tribal_code/Title%207-%20Establishment%20of%20the%20Supreme%20Court.pdf) [<http://perma.cc/MZ3E-J7L4>] (“The Supreme Court shall be the final authority within this jurisdiction for the interpretation of Tribal law.”); *Id.* § 1-6-2, [http://www.choctaw.org/government/tribal\\_code/Title%201-%20General%20Provisions.pdf](http://www.choctaw.org/government/tribal_code/Title%201-%20General%20Provisions.pdf) [<http://perma.cc/B9Z2-MZ2F>] (“Any judge of the Choctaw Tribal Court may be removed from office by a two-thirds vote of the membership of the Tribal Council for neglect of duty or gross misconduct after a hearing upon five days’ notice, at which the judge is given an opportunity to answer all charges and present evidence to the Tribal Council in his defense. The decision of the Tribal Council shall be final.”); Mississippi Band of Choctaw Indians, Rules of Civil Procedure, [http://www.choctaw.org/government/tribal\\_code/Title%206-%20-%20Rules%20of%20Civil%20Procedure.pdf](http://www.choctaw.org/government/tribal_code/Title%206-%20-%20Rules%20of%20Civil%20Procedure.pdf) [<http://perma.cc/83G9-DZF8>].
  25. Transcript of Oral Argument at 5, *Dollar General*, No. 13-1496 (“First, the Constitution contemplates the availability of a neutral forum for suits against noncitizens, and by

argued that it is irrelevant whether a tribal court guarantees fundamental fairness to all litigants, or even whether a nonmember has consented to tribal jurisdiction. The merits brief alleges that American law cannot hold that an American citizen can be divested of property without a neutral forum and that tribal courts are not neutral.<sup>26</sup> At oral argument, the company took that argument further and argued that no tribal court can exercise civil jurisdiction over nonmembers because the Supreme Court does not have jurisdiction to review tribal court decisions.<sup>27</sup>

Justice Kennedy vigorously latched onto the federal constitutional argument at oral argument. He suggested that even where a nonmember business enters into a contractual arrangement with a tribe or reservation entity that provides the forum and the governing law is that of the tribe, that entity did not “explicit[ly] consent” to tort claims, especially the possibility of punitive damages.<sup>28</sup> He also questioned whether Congress had the authority to “subject” American citizens to a “nonconstitutional forum.”<sup>29</sup> Later, Justice Kennedy tied the constitutional concerns to the contract term, which he seemingly argued did not constitute consent to a tribal forum, unfavorably comparing the Dollar General lease provisions to commercial arbitration provisions that the Court knows so well in other contexts.<sup>30</sup>

### III. DIVESTING THE POWER TO CONTRACT?

There are several avenues the Court could take in *Dollar General*. The Court could hold that the tribal court does not possess jurisdiction over the tort claim arising out of the contract. Or the Court could hold more narrowly that a tribal court cannot impose punitive damages upon nonmembers. Or the Court could accept Dollar General’s invitation to immunize nonmembers from tribal court jurisdiction altogether. Or the Court could make the easiest decision, to enforce the contract terms and acknowledge Dollar General’s consent to having tribal laws potentially enforced against it in a tribal forum.

If the Court holds that Indian nations may not assert civil jurisdiction over consenting nonmembers, which amounts to the denial of the power of Indian

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analogy, noncitizens as you say, Justice Ginsburg, have always been able to remove a case from State to Federal court. The United States at the time of incorporation could not have accepted that non-Indians would not be able to remove to a neutral forum. Second, the Constitution contemplates that this Court will be the one Supreme Court, and State court rulings on questions of Federal law have, of course, always been reviewable in this Court.”).

26. Brief of the Petitioner at 17, 43, *Dollar General*, No. 13-1496.

27. Transcript of Oral Argument at 5, *Dollar General*, No. 13-1496.

28. *Id.* at 34.

29. *Id.* at 35.

30. *Id.* at 45.

nations and their business partners to contract for jurisdiction, the decision could be deeply insulting to tribal interests. Ironically, it might not mean all that much in the end to tribes and their business partners, who will simply incorporate more specific provisions in commercial arrangements going forward. However, rejecting tribal jurisdiction would ignore the realities of the economy of the Mississippi Choctaws, an Indian country success story. The tribe employs thousands of nonmembers on its lands and has for decades.<sup>31</sup> The tribe, its employees, and its business partners established their commercial relationships in reliance upon federal Indian policy and Supreme Court precedents acknowledging tribal jurisdiction on trust lands over consenting nonmembers.

Justice Scalia's death may mean a 4-4 tie in the *Dollar General* case. Justice Scalia was in the majority in the most recent tribal civil jurisdiction dispute, *Plains Commerce Bank v. Long Family Land & Cattle Co.*,<sup>32</sup> decided by a 5-4 vote, split along the traditional conservative-liberal voting pattern. In *Plains Commerce*, Justice Scalia asked a nonmember company that had not specified jurisdiction in its commercial agreement with a tribal member-owned business: "[Y]our client could have obtained that certainly [sic] by inserting a choice of law provision providing that any disputes would be resolved somewhere else, couldn't it?"<sup>33</sup> The answer in that case from the nonmember? "I think that in the face of silence in the contract, the general rule [against tribal jurisdiction] controls rather than its exceptions."<sup>34</sup> There is a choice of law provision in *Dollar General*, negotiated at arm's length by sophisticated business entities, and it points to tribal court jurisdiction.<sup>35</sup>

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31. Stephen Cornell & Joseph P. Kalt, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, 22 AM. INDIAN CULTURE & RES. J. 187, 189 (1998).

32. 554 U.S. 316 (2008).

33. Transcript of Oral Argument at 8, *Plains Commerce*, 554 U.S. 316 (No. 07-411).

34. *Id.*

35. The governing law section of the lease provides:

This agreement and any related documents shall be construed according to the laws of the Mississippi Band of Choctaw Indians and the state of Mississippi (pursuant to Section 1-1-4, Choctaw Tribal Code). Exclusive venue and jurisdiction shall be in the Tribal Court of the Mississippi Band of Choctaw Indians. This agreement and any related documents [are] subject to the Choctaw Tribal Tort Claims Act.

Joint Appendix at 47-48, *Dollar General Corp. v. Miss. Band of Choctaw Indians*, No. 13-1496 (U.S. June 12, 2014).

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