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Amicus Briefs in Indian Law: The Case of Plains Commerce Bank v. Long Family Land and Cattle Co., Inc., (Part II of South Dakota Law Review Trilogy)

Frank Pommersheim, *University of South Dakota School of Law*



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AMICUS BRIEFS IN INDIAN LAW: THE CASE OF *PLAINS COMMERCE BANK V. LONG FAMILY LAND & CATTLE CO.**

FRANK POMMERSHEIM[†]

I. INTRODUCTION

The role of the amicus brief in litigation before the United States Supreme Court has changed significantly over time. This is true with regard to both its function and its increasing prevalence.¹ This is no less the case in the field of Indian law. And while there is a developing body of scholarship relative to amicus practice generally,² there is *not* a single article that deals with amicus briefs in the context of Indian law. This piece intends to open that door and take a look around.

The primary vehicle for this examination will be a review of the amicus briefs submitted in the case of *Plains Commerce Bank v. Long Family Land & Cattle Co.*³ The precise method will involve an investigation of the nature of the arguments made by the various amici parties on both sides, with a focus on both doctrinal and policy matters. There will also be a particularized look at the unique role of the United States as an amicus in Indian law cases, the practice of the states, especially South Dakota, various trade associations, and public interest advocacy groups, with regard to any patterns as to the nature of the arguments made. There will also be an examination of the role of amicus briefs within tribal appellate systems with particular consideration given to the role of the Cheyenne River Sioux Tribe as an amicus before both the Cheyenne River Sioux Tribal Court of Appeals and the United States Supreme Court. Lastly,

* This article is Part Two of Professor Pommersheim's South Dakota Law Review Trilogy. Part One is entitled "At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty" and published at 55 S.D. L. REV. 48 (2010). Part Three is entitled "The Crazy Horse Malt Liquor Case: From Modernity to Tradition and Halfway Back" and will be published in Issue 1, Vol. 57 (Fall 2011).

[†] Professor of Law, University of South Dakota School of Law. Professor Pommersheim is also the Chief Justice of the Cheyenne River Sioux Tribe Court of Appeals and author of the Court's (per curiam) opinion in the *Plains Commerce* case. A special thanks to my exceptional research assistants, Alex Hagen, University of South Dakota Law Class of 2010, and Meghan Woster, University of South Dakota Law Class of 2011, true amici in every sense.

1. See generally PAUL M. COLLINS, JR., *FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING* (Oxford University Press 2008).

2. See generally COLLINS, *supra* note 1; see, e.g., Matthew Laroche, *Is the New York State Court of Appeals Still "Friendless?" An Empirical Study of Amicus Curiae Participation*, 72 ALB. L. REV. 701 (2009); Daniel A. Farber, *When the Court Has a Party, How Many "Friends" Show Up? A Note on the Statistical Distribution of Amicus Brief Filings*, 24 CONST. COMMENT. 19 (2007); Sylvia H. Walbolt & Joseph H. Lang, Jr., *Amicus Briefs Revisited*, 33 STETSON L. REV. 171 (2003); Dan Schweitzer, *Fundamentals of Preparing a United States Supreme Court Amicus Brief*, 5 J. APP. PRAC. & PROCESS 523 (2003); Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243 (1992); Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603 (1984).

3. 128 S. Ct. 2709 (2008).

there will be a more speculative assessment concerning the legal effectiveness and political impact of amicus practice within the field of Indian law, as well as a review of the survey data involving a number of western states.

II. BACKGROUND

The origin of the *amicus curiae*⁴ can be traced to Roman law, where amicus participants provided the courts with information in areas of law beyond the expertise of the judges. This information was usually in the form of impromptu oral communication or non-binding written opinions.⁵ The amicus played the role of a neutral advisor educating the courts and helping the judges avoid erroneous decisions.⁶ The amicus was not a litigant in the case, “but served as an impartial assistant to the judiciary, providing advice and information to a mistaken or doubtful court.”⁷

This “neutral” tradition was carried over to England, but began to change in the eighteenth century with a shift from a “neutral” stance to positive advocacy. This practice soon made its way to America, where it would take root and proliferate.⁸ The first advocacy amicus participation in American jurisprudence was in the 1823 case of *Green v. Biddle*.⁹

In the *Green* case, the celebrated orator and former legislator Henry Clay appeared before the Supreme Court and argued for rehearing. The essential grounds were his claim that significant legal interests involving many (non-party) Kentucky landowners were likely to be affected, especially in light of the non-appearance before the Court of the non-prevailing party in the court below. The Court characterized it thusly:

that it involved the rights and claims of numerous occupants of the land in Kentucky, who had been allowed by the laws of that State, in consequence of the confusion of the land titles, arising out of the vicious system of location under the land law of Virginia, an indemnity for their expenses and labour bestowed upon lands of which they had been *bone fidei* possessors and improvers, and which were reclaimed by the true owners. He stated, that the rights and interests of those claimants would be irrevocably determined by the decision of the Court, the tenant in present case having permitted it to be brought to a hearing without appearing by his counsel, and without any argument on that side of the question.¹⁰

Clay’s role was twofold: advising the Court of the likely collusiveness of the lawsuit because Biddle failed to appear and advocating a substantive position

4. The phrase is Latin and means friend of the court.

5. COLLINS, *supra* note 1, at 38.

6. *Id.*

7. *Id.* (quoting Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1244 (1992)).

8. COLLINS, *supra* note 1, at 39-40.

9. 21 U.S. 1 (1823).

10. *Id.* at 17-18.

for certain non-party Kentucky landowners.¹¹

The advocacy role of amicus practice continued to expand in American jurisprudence and it soon became dominant. In this early development however, the amicus brief “was used most commonly to protect government interests.”¹² For example, in *Ball Engineering Co. v. J.G. White & Co.*:¹³ “The U.S. Solicitor General successfully argued that the contractual seizure of construction company’s building materials did not constitute a seizure under the meaning of the Fifth Amendment and therefore fell under tort law, leaving the government free from fiscal liability claims resulting from the seizure.”¹⁴

This practice soon attracted the attention of private organizations who began to use it in their own quest for policy adjustment or social change within the law.¹⁵ The first instance of this new practice was the case of *Ah How (alias Louie Ah How) v. United States*.¹⁶ In that case, the Chinese Charitable and Benevolent Association filed an amicus brief supporting the petitioner’s attempt to resist deportation by bringing to the Court’s attention the abuses of Chinese immigrants by the government.¹⁷

This practice has consistently grown and expanded. It has become a vehicle of both liberals and conservatives. Its apogee was likely reached in the University of Michigan admission cases involving the role of racial preference¹⁸ in which more than 100 amicus briefs were filed. Such widespread “activist” practice presumably risks the ire of both the Court and the public at large. However, no such ire has yet become manifest.

The Court itself controls amicus practice through its promulgation of rules relevant to such activity. Supreme Court Rule 37¹⁹ controls the practice and sets

11. COLLINS, *supra* note 1, at 40. Clay realized only partial success. Rehearing was granted, but the Court affirmed its original decision. *Id.* at 40 n.42.

12. *Id.*

13. 250 U.S. 46 (1919).

14. COLLINS, *supra* note 1, at 40.

15. *Id.*

16. 193 U.S. 65 (1904).

17. COLLINS, *supra* note 1, at 40-41. The arguments of the amicus were unsuccessful and the Supreme Court affirmed the judgment of the lower court.

18. *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

19. Supreme Court Rule 37 provides as follows:

1. An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored. An *amicus curiae* brief may be filed only by an attorney admitted to practice before this Court as provided in Rule 5.
2. (a) An *amicus curiae* brief submitted before the Court’s consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file under subparagraph 2(b) of this Rule. An *amicus curiae* brief in support of a petitioner or appellant shall be filed within 30 days after the case is placed on the docket or a response is called for by the Court, whichever is later, and that time will not be extended. An *amicus curiae* brief in support of a motion of a plaintiff for leave to file a bill of complaint in an original action shall be filed within 60 days after the case is placed on the

docket, and that time will not be extended. An *amicus curiae* brief in support of a respondent, an appellee, or a defendant shall be submitted within the time allowed for filing a brief in opposition or a motion to dismiss or affirm. An *amicus curiae* shall ensure that the counsel of record for all parties receive notice of its intention to file an *amicus curiae* brief at least 10 days prior to the due date for the *amicus curiae* brief, unless the *amicus curiae* brief is filed earlier than 10 days before the due date. Only one signatory to any *amicus curiae* brief filed jointly by more than one *amicus curiae* must timely notify the parties of its intent to file that brief. The *amicus curiae* brief shall indicate that counsel of record received timely notice of the intent to file the brief under this Rule and shall specify whether consent was granted, and its cover shall identify the party supported.

- (b) When a party to the case has withheld consent, a motion for leave to file an *amicus curiae* brief before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ may be presented to the Court. The motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an *amicus curiae* brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest. Such a motion is not favored.
3. (a) An *amicus curiae* brief in a case before the Court for oral argument may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file under subparagraph 3(b) of this Rule. The brief shall be submitted within 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the time allowed for filing the petitioner's or appellant's brief. Motions to extend the time for filing an *amicus curiae* brief will not be entertained. The 10-day notice requirement of subparagraph 2(a) of this Rule does not apply to an *amicus curiae* brief in a case before the Court for oral argument. An electronic version of every *amicus curiae* brief in a case before the Court for oral argument shall be transmitted to the Clerk of the Court and to counsel for the parties at the time the brief is filed in accordance with the guidelines established by the Clerk. The electronic transmission requirement is in addition to the requirement that booklet-format briefs be timely filed. The *amicus curiae* brief shall specify whether consent was granted, and its cover shall identify the party supported or indicate whether it suggests affirmance or reversal. The Clerk will not file a reply brief for an *amicus curiae*, or a brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing.
 - (b) When a party to a case before the Court for oral argument has withheld consent, a motion for leave to file an *amicus curiae* brief may be presented to the Court. The motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an *amicus curiae* brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest.
4. No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.
5. A brief or motion filed under this Rule shall be accompanied by proof of service as required by Rule 29, and shall comply with the applicable provisions of Rules 21, 24, and 33.1 (except that it suffices to set out in the brief the interest of the *amicus curiae*, the summary of the argument, the argument, and the conclusion). A motion for leave to file may not exceed 1,500 words. A party served with the motion may file an objection thereto, stating concisely the reasons for withholding consent; the objection shall be prepared as required by Rule 33.2.
6. Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person, or entity, other than the *amicus curiae*, its members, or its counsel, who made such a monetary contribution to the preparation or submission of the brief. The disclosure shall be made in the first footnote on the first page of the text.

State practices vary significantly. South Dakota, for example, provides at S.D.C.L. § 15-26A-

the requirements. Rule 37 requires private amici to obtain the permission of both the parties. Should such permission be denied, application can be made directly to the Court and is routinely granted. Representatives of federal and state governments do not require permission of the parties.²⁰ Given the nature of the deeply entwined historical and contemporary relationship between the federal government and Indian tribes, the United States Justice Department – as

74 (2010):

A brief of an amicus curiae may be filed only at the request of the court or by leave of the court granted upon motion and notice to the parties. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. An amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. An amicus curiae brief shall not exceed the page limitation set in § 15-26A-66.

Amici curiae counsel will not be entitled to participate in oral argument unless counsel for either party agrees to share his time and the court allows the appearance of amici curiae counsel.

Tribes may or may not have rules for filing amicus briefs. *See, e.g.*, Rule 7 of the Appellate Rules of the Rosebud Sioux Supreme Court, which provides: “Amicus Curiae briefs, which may be filed with leave of court, shall be served and filed after leave is granted. Amicus Curiae shall conform to the requirements of the Appellant’s brief.” *Id.*

20. COLLINS, *supra* note 1, at 42. Note that this part of Rule 37(4) does *not* mention Indian tribes:

4. No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency’s authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.

See supra note 19.

However, when the Supreme Court Deputy Clerk, Chris Vasil and the Clerk of the Court, William K. Suter, were recently asked about Indian tribes’ participation as amici in front of the Court neither could remember “any discussion in the past 20 years about the question whether Indian tribes or foreign nations might or should be included in Rule 37.4.” Stephen R. McAllister, *The Supreme Court’s Treatment of Sovereigns as Amici Curiae*, 13 GREEN BAG 2D 289, 298 (2010). Neither remembered any requests from tribes or other foreign nations to be included under the rule. *Id.* The Clerk’s Office of the Supreme Court “did not recall any instances in which such sovereign amici were denied permission to file a brief so long as their requests were timely.” *Id.* at 298-99. Many times the parties consented to allow all amicus filings, which would make it unnecessary for any tribe or foreign nation to ask the Court for permission to file. *Id.* at 299.

The same rule holds true at the Federal Court of Appeals level, where Rule 29(a) states:

The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

FED. R. APP. P. 29(a). The Eighth Circuit has considered adopting a standing order so that Indian tribes would be put on equal footing with states and other governments for amicus practice. E-mail from Karen Schreier, Chief Judge, District of South Dakota (Sept. 19, 2010, 01:25 CST) (on file with author). This standing order has yet to be adopted, and the result partially hinges upon whether Rule 29(a) is amended for all of the Courts of Appeal. *Id.*

A change of Rule 37.4 as well as Federal Appellate Rule 29(a) to include Indian tribes would be welcome in order to recognize the importance of all sovereigns that want to appear before the court as amicus curiae. Stephen R. McAllister, *The Supreme Court’s Treatment of Sovereigns as Amici Curiae*, 13 GREEN BAG 2D 289, 302 (2010). Even if such a change is “largely intangible or dignitary in nature” such interests are important, and tribes deserve the same recognition as the thousands of other local governments that receive respect and acknowledgment under the current rules. *Id.*

in the *Plains Commerce Bank* case – often appears as amicus on the side of the tribes, except, of course, when the federal government itself is suing or being sued by the tribe.

This modern liberality has not always been the case. The Court was extremely cautious about the overtly social and political aspects of amicus practice during the 1940s and 1950s. For example, in 1954 the Court denied all motions for leave to file an amicus brief, but by 1961 it granted 93% of the applications.²¹

Several justices in the modern era have expressly endorsed amicus practice. Justice Breyer notes that: “[amicus] briefs play an important role in educating the Judges on potentially relevant technical matters, helping make us not experts, but moderately educated lay persons, and that education helps to improve the quality of our decisions.”²² Justice O’Connor concurs with this view by noting that: “The ‘friends’ who appear today usually file briefs calling our attention to points of law, policy considerations, or other points of view that the parties themselves have not discussed. These amicus briefs invaluable aid our decision-making process and often influence the result or the reasoning of our opinions.”²³ No Supreme Court Justice is on record as criticizing amicus practice.

III. AMICUS PARTICIPATION: GOALS, METHODS, CONTEXT

Amicus briefs are filed in the Supreme Court in increasing numbers in a range of subject matter areas with a broad band of varying emphases. In 1946, amicus briefs were filed in only 25% of the cases heard by the Court, but increased to 95% by 1998.²⁴ Amicus briefs cover a wide array of subject matter, but have been most prevalent in the areas of civil rights, economic interests, and federalism.²⁵ Amicus briefs have been filed in all Indian law cases of the past 25 years.²⁶

Amicus briefs may also be reviewed in the context of the “ideological” positions taken by amici. These positions are most conventionally defined as liberal or conservative. For example, in the context of federalism, liberal amici are pro-federal government and anti-state, while the conservative position is pro-state rights and anti-federal government.²⁷ It is worthwhile to note in this regard that liberal/conservative participation is roughly 50-50, striking an effective balance.²⁸ Yet these otherwise reliable categories do not work so well in the

21. COLLINS, *supra* note 1, at 45.

22. *Id.* at 4 (quoting Justice Stephen Breyer).

23. *Id.* (quoting retired Justice Sandra O’Connor).

24. COLLINS, *supra* note 1, at 47.

25. *Id.*

26. A Westlaw review of all Indian Law Supreme Court cases from 1985-2010 indicated that at least one amicus party filed a brief in every Indian Law case during that time period.

27. COLLINS, *supra* note 1, at 53.

28. *Id.* at 55.

field of Indian law, where the line-up tends to be the states and (non-Indian) business organizations on one side and the federal government (where it is not a party in the litigation) and tribal advocacy groups on the other side.²⁹

The policy focus typically urges the Court to take a certain position because of the possible ramifications for society at large, especially in regard to political and economic consequences.³⁰ The policy focus is especially prevalent in Indian law in matters of economic development and jurisdiction over non-Indians.

The *who* of amicus participation is also significant in determining whether amicus practice is widespread and democratic or narrow and biased in some direction. The groupings most common in Indian law cases are the federal government and tribes on the Indian side (unless it is suing or being sued by the tribe) and the state on the non-Indian side with trade associations also on the non-Indian side and various advocacy or public interest groups on both sides. Again, *Plains Commerce Bank* is instructive:

Long Family (Indian side)

1. Federal Government
2. Tribal Governments
3. Indian Advocacy Groups

Plains Commerce Bank (non-Indian side)

1. State and local governments
2. Non-Indian Advocacy Groups
3. Non-Indian Trade Associations

In looking at these groups, there is a disturbing pattern: “Indians” on the Indian side and “non-Indians” on the non-Indian side. This symmetry, however inadvertent, tends to reproduce a “racial” division that reinforces the notion of separation. If it is almost always “Indians” on one side and “non-Indians” on the other side, there is often the appearance of continuing historical animosity and strife between Indians and non-Indians suggesting, at least subliminally, the need to keep these contending parties jurisdictionally at arm’s length. If there was more crossover or overlap of perceived interests, the likelihood of thwarting the enmity of history past might have greater force and possibility.

It is also worthwhile to parse the nature of the information and argument that is usually supplied in the amicus context. In the most significant empirical study (which did not include any Indian law cases), the most prevalent categories were found to be legal, policy, and separation of powers.³¹ The category of legal argument did not simply repeat the legal argument made by the parties, but rather “[f]requently, these briefs provide the justices with treatment of precedents not addressed by the parties, point to alternative constitutional and statutory interpretations, and/or discuss a case’s policy ramifications for society at large.”³²

29. See *infra* note 111 and accompanying text.

30. See COLLINS, *supra* note 1, at 53.

31. *Id.* at 64.

32. *Id.* at 66.

In *Plains Commerce Bank*, the focus of amici on both sides was a review of the pertinent precedents as discussed by the parties, as well as wide-ranging discussion of likely policy ramifications. Since the domain of relevant Supreme Court precedent in context of tribal court jurisdiction over non-Indians is exceptionally small,³³ there is basically no precedent to discuss outside the basic canon. In fact, none of the amicus briefs, on either side, cite and discuss any cases outside the basic canon. This narrow universe is further isolated and confined because there are no constitutional principles or pertinent statutes to consider. There are just the vague contours of federal Indian common law at work.

Given this narrowness of legal focus, the amicus briefs – especially on the Bank’s side – center on the policy ramifications concerning the importance of certainty as necessary to enhance the likelihood of additional economic activity on the reservation.³⁴ These policy arguments are seldom supported by any empirical data or research to ground them in a verifiable reality. On the Long Family side, the focus is more on simply seeking to demonstrate that the legal reality on the reservation is much more ascertainable and ordinary than the Bank and its amici claim.³⁵

IV. AMICUS BRIEFS IN *PLAINS COMMERCE BANK V. LONG FAMILY LAND & CATTLE CO.*

In *Plains Commerce Bank*, the Court decided by a 5-4 vote that tribal courts do *not* have (subject matter) jurisdiction over the sale of fee land on the Reservation by a non-Indian bank to a tribal member or Indian-controlled corporation.³⁶ While the Court does not expressly cite or make reference to any specific amicus, the argument presented by the various amici is quite revealing as to matters of doctrine, ideology, and perceptions of difference.

Ten amicus briefs were submitted, five on each side. Briefs submitted for the petitioner Plains Commerce Bank came from the Association of American Railroads, the states of Idaho, Alaska, Florida, Oklahoma, North Dakota, South Dakota, Utah, Washington, and Wisconsin, several counties in Idaho and Minnesota, the Mountain States Legal Foundation, and the American Bankers Association. Briefs submitted for the respondent Long Family Land & Cattle Company, Inc. came from the United States, the National Network to End Domestic Violence, the National American Indian Court Judges Association, the

33. See, e.g., the following core gamut of cases running from *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001) to *Nevada v. Hicks*, 533 U.S. 353 (2001) to *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) and *Montana v. United States*, 450 U.S. 544 (1981).

34. See *infra* notes 37 - 44 and accompanying text.

35. See *infra* notes 45 - 56 and accompanying text.

36. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2722. The Court somewhat disingenuously (just look at the caption) characterizes the case as one involving the sale of fee land on the reservation by one non-Indian to another non-Indian. *Id.* at 2714. Perhaps the case is best described as involving the failure to consummate a sale of fee land by a non-Indian (bank) to an Indian.

Cheyenne River Sioux Tribe, and the National Congress of American Indians.

A. DOCTRINE

The amicus briefs submitted on behalf of the petitioner Plains Commerce Bank uniformly assert two propositions, namely the need for a clear rule to minimize (commercial) uncertainty and risk, and that such a rule of certainty means a uniform rule denying tribal court jurisdiction over non-Indian commercial entities. For example, the amicus brief submitted by the Association of American Railroads states that “this uncertainty discourages business investment and economic development in Indian country.”³⁷ The amicus states’ brief identifies “the fundamental state interest” as “the need to define with clarity the extent to which non-members of a tribe are nonetheless subject to the sovereign powers of that tribe.”³⁸ The American Bankers Association asserts that a “lack of reasonable predictability as to future events is detrimental to the economy in general and the credit market in particular.”³⁹ The amicus counties repeat the *uncertainty* refrain, but with a darker, more accusatory tone:

[T]he uncertainty regarding the scope of tribal jurisdiction over nonmembers that continues to undermine the quality of life and the economic development in all of these areas, despite the best efforts of this Court. The fact of the matter is that some, unfortunately, continue to ignore and abuse the general rules of this Court limiting the jurisdiction of Indian tribes over nonmembers, as this case attests.⁴⁰

The Mountain States Legal Foundation does not bother with the problems of uncertainty and predictability, but rather surprisingly declares that: “litigation of any legal dispute between a tribal member and a non-member in tribal court is *inherently unfair* and *prejudicial* to the non-member. Because tribal law is *unknowable* to non-members, non-members may not conform their conduct to that law.”⁴¹

These views – not surprisingly – propose a rather simple solution and that solution is to deny tribal court jurisdiction, which presumably will lead to economic boom across Indian country. This beneficial policy outcome is more asserted than demonstrated and is further accompanied by a subtext that

37. Brief for Association of American Railroads as Amicus Curiae Supporting Petitioner, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008), 2008 WL 503593, at *3 [hereinafter *American Railroads Amicus Brief*].

38. Brief for State of Idaho, et al. as Amici Curiae Supporting Petitioner, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008), 2008 WL 503594, at *2 [hereinafter *Idaho et al. Amici Brief*].

39. Brief for American Bankers Association as Amicus Curiae Supporting Petitioner, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008), 2008 WL 503597, at *2.

40. Brief for Idaho and Lewis County, Idaho, et al. as Amici Curiae Supporting Petitioner, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008), 2008 WL 503595, at *3-4. The ambiguous “some” is neither defined nor explained.

41. Brief for Mountain States Legal Foundation as Amicus Curiae Supporting Petitioner, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008), 2008 WL 503596, at *3 (emphasis added).

criticizes tribes as not being able to discern their own economic self-interest and placing themselves against the patriotic grain of American capitalism.

The second and more specific doctrinal argument of petitioner's various amici is that the "consensual" prong set out in *Montana v. United States*⁴² does not refer to consensual business and commercial *agreements* between Indians and non-Indians. Rather, the "consensual" prong refers to the necessity of express, non-Indian *consent* to tribal court jurisdiction. For example, the Association of American Railroads Brief states:

This Court's opinions support a simple and clear rule to define what constitutes a qualifying consensual relationship to establish tribal court jurisdiction: Tribal courts lack inherent jurisdiction over claims against a non-member absent the non-member's clear and unequivocal *consent to tribal court jurisdiction*. Such a rule would ensure that tribal court jurisdiction over non-members will be asserted only based on express agreement and would *provide certainty* to all concerned.⁴³

This doctrinal assertion is twisted beyond recognition by the amici states from a *potential* rule to its restatement as an actual rule, "whatever the precise reach of the *Montana* consent exception in the civil regulatory environment, it requires *actual* and *clear* consent to the exercise of tribal court authority."⁴⁴ Obviously, no such "consent to tribal court jurisdiction" rule exists because if it did, there would be absolutely no case worthy of Supreme Court attention. The Bank would have prevailed before the tribal court on a motion for summary judgment since there was no claim by either side that such express "consent to tribal court jurisdiction" existed.

The United States, the leading amicus for respondent Long Family Land & Cattle Co., appeared to carry out the "federal government's longstanding policy of encouraging tribal self-government," which includes the development of tribal courts.⁴⁵ The amicus brief of the United States focused on the particulars and actual details of the case at bar. The point of this focus on the particulars was to

42. 450 U.S. 544 (1981). The classic proviso states:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter *consensual relationships* with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe.

Id. at 565-66 (internal citations omitted) (emphasis added).

43. American Railroads Amicus Brief, *supra* note 37, at *5-6 (emphasis added).

44. Idaho et al., Amici Brief, *supra* note 38, at *3.

45. Brief for United States as Amicus Curiae Supporting Respondents, Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709 (2008), 2008 WL 742923, at *1 [hereinafter United States Amicus Brief] (quoting Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14-15 (1987)). The federal government also had a substantial interest in the case as a guarantor of loans that underlie the dispute pursuant to the Indian Financing Act of 1974, 25 U.S.C. § 455 et seq. *Id.* at *1-2. The United States as amicus also participated in the oral argument of the case. See Transcript of Oral Argument at *36, Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2790 (2008), 2008 WL 1710923.

refute matters of “uncertainty” and the alleged “unknowability” of tribal law.

The United States amicus brief forcefully notes that:

The only ‘uncertainty’ about the discrimination claim was the *source* of the obligation not to discriminate; its content so closely paralleled federal anti-discrimination law that petitioner repeatedly argued it was in fact a federal cause of action. Both federal courts rejected petitioner’s suggestion that it had somehow been prejudiced by the asserted indeterminacy of tribal law, and petitioner has abandoned any claim that the tribal court proceedings violated due process.⁴⁶

The United States amicus brief also notes that the Cheyenne River Sioux Tribal Court of Appeals had previously drawn on the seminal case of *Marbury v. Madison*⁴⁷ as well as Lakota tradition when it recognized the principal of judicial review.⁴⁸ It further quoted with approval the Tribal Court of Appeals assessment that there was a “direct and laudable convergence of federal, state, and tribal concern” with matters of discrimination.⁴⁹ Not antagonists then, but rather companions in arms engaged in a common effort to quell discrimination, wherever it might exist.

The theme of convergence is further emphasized in the amicus brief submitted by the National American Indian Tribal Court Judges Association, the Navajo Nation, and the Northwest Intertribal System. This amicus brief notes that “[t]he law applied by tribal courts is written, knowable and publicly available.”⁵⁰ It also cites the growing number of websites and online searchable catalogues that provide direct access to tribal codes and tribal court opinions.⁵¹

Not only is such law and jurisprudence increasingly available, it is often similar in substantive content and procedural format to what is found in federal and state judicial systems.⁵² In addition, consistency and impartiality of tribal courts has been the hallmark in dealing with both Indians and non-Indians.⁵³ Any dispute resolution that might look to more traditional tribal approaches, such as non-adversarial peacemaking adjudication, is always consent-based. It can never be employed without the mutual agreement of the parties.⁵⁴ These

46. United States Amicus Brief, *supra* note 45, at *28 (internal citations to the record omitted).

47. 5 U.S. 137 (1803).

48. United States Amicus Brief, *supra* note 45, at *28

49. *Id.* at *9. Note that the same quote was cited and quoted with approval in Justice Ginsburg’s dissent. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2732 n.3 (2008) (Ginsburg, J., dissenting). Justice Ginsburg’s quotation was a historical first. The Supreme Court has heretofore *never* quoted a tribal court opinion. See also *infra* note 100 and accompanying text.

50. Brief for the National American Indian Tribal Court Judges Association et al. as Amici Curiae Supporting Respondents, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008), 2008 WL 782552, at *10 [hereinafter Tribal Court Judges et al. Amici Brief].

51. *Id.* at *10-11.

52. *Id.* at *11-12. See also Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUS. L. REV. 701, 720 (2006).

53. Tribal Court Judges et al. Amici Brief, *supra* note 50, at *13. See also Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L. J. 1047, 1094-97 (2005).

54. Tribal Court Judges et al. Amici Brief, *supra* note 50, at *28-29.

orderly developments are further in line with the overriding federal policy of supporting the advances of tribal self-governance and self-determination. In this view, one of the goals of such an approach is to enhance dignity and respect for emerging tribal institutions.

This view of convergence and common practice is further advanced by the amicus brief of the Cheyenne River Sioux Tribe, whose very law and judicial system was being challenged as being too uncertain and too different to hold a non-Indian, off-reservation bank accountable for its on-reservation conduct. The Tribe's amicus brief makes two quite basic empirical points, which tend to puncture the rather abstract and formalistic assertions of the Bank and its amici.

The first point is to note that the Petitioner Bank appeared often, mostly as a plaintiff, in the Cheyenne River Sioux Courts and that the Bank consistently prevailed against both Indians and non-Indians.⁵⁵ In the real world of law and facts, it would seem that the Bank had little to complain of, but it nevertheless created its own boogeyman of a tribal court gone awry.

The second point is to bring to light the rather threatening claim made by the Bank at oral argument before the Tribal Court of Appeals. The Bank's counsel stated:

That's why I'm concerned, not just for the Bank, the Bank has got the money to pay the judgment, your Honor. What I'm concerned with, is that this Bank is not acting on its own. There are a number of banks around that are looking at this case, not just the Tribe *and let me tell you, if they want to discriminate against tribal members, they can do it and get away with it. They can. They don't have to make everybody loans. They can find a reason for rejecting the loans.*⁵⁶

B. IDEOLOGY AND DIFFERENCE: THE SHADOW OF *JOHNSON V. MCINTOSH*⁵⁷

While the infamous "doctrine of discovery" that characterized Native peoples as the inferior "other" due to their lack of Christianity and "civilization"⁵⁸ has been thoroughly repudiated morally and anthropologically,⁵⁹

55. Brief for Cheyenne River Sioux Tribe as Amicus Curiae Supporting Respondents, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008), 2008 WL 782553, at *29-31 [hereinafter Cheyenne River Sioux Tribe Amicus Brief].

56. *Id.* at *19 (emphasis in original). The Tribe's amicus brief also quotes the response of the Tribal Court of Appeals:

Unfortunately, a final concern must be addressed. In his concluding summation to this Court, counsel for the Bank stated that a lot of banks and lenders were watching this case. While it seemed jarring and inappropriate at the time, it is even more so upon reflection. It is difficult to see the statement as merely some form of artless advocacy, but rather more as some kind of threat impugning the integrity of the Cheyenne River Sioux Tribe's judicial system, which this Court finds most offensive and unprofessional. Such statements must not be made again. Though it hardly needs repeating, the Court restates its commitment to fair play, the rule of law, and cultural respect for *all* parties who appear in the courts of the Cheyenne River Sioux Tribe.

Id. at *19-20.

57. 21 U.S. 543 (1823).

58. *Id.* Chief Justice Marshall stated: "The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing

it still casts a pall over modern Indian law. It does so – as the Plains Commerce Bank amici briefs amply demonstrate – by iterating the mantra of uncertainty and unknowability of the “other.” Yet this is almost always asserted rather than demonstrated, just as it was in *Johnson v. McIntosh*. Implicit in this move is not only the unsupported assertion, but also a subtext of negativity. That is, that whatever “unknowable” tribal law is, it naturally lacks the pedigree of mainstream commercial law.

Plains Commerce Bank is a sharp rejoinder to this ploy. Prior to this 2008 decision, every single tort or commercial case involving non-Indians in the modern era of Indian law reached the Supreme Court on motion to dismiss for lack of subject matter jurisdiction.⁶⁰ In this procedural posture, the exhaustion of tribal court remedies requirement preceded without any ruling on, or even the identification of, the *substantive* tort or commercial law to be applied.⁶¹ Thus the Supreme Court was free to fill this apparent void of (tribal) substantive law with conventional and negative stereotypes.

Plains Commerce Bank is the only case in the modern era to reach the Supreme Court in which there was a full (jury) trial on the *merits* in tribal court and thus the tribal court’s substantive law was front and center for all to see. All

on them civilization and Christianity” *Id.* at 573.

59. See generally CHARLES MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS (Knopf 2005); FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION (Oxford University Press 2009).

60. See *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Montana v. United States*, 450 U.S. 544 (1981).

61. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). Exhaustion in most tribal courts follows the trajectory (a pre-trial) motion to dismiss for lack of subject matter jurisdiction pursuant to *Montana v. United States*, 450 U.S. 544 (1981), and its progeny. If such a motion is denied, the non-Indian defendant will immediately file for an interlocutory appeal on the jurisdiction issue. Many tribal courts permit such appeals in a manner similar to 28 U.S.C. § 1292, which provides:

- (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals
- (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of this order: *Provided, however*, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Id.

Most literal interpretations of 28 U.S.C. § 1292(b) are likely to be satisfied in the “exhaustion” context. While such a result is in accord with the policy issues of efficiency and promptness, it is extraordinarily pernicious for tribes when such cases reach the Supreme Court without any identification or application of the *substantive* content of relevant tribal law. In such a vacuum, stereotypes of “unknowability” flourish. See, e.g., Justice Ginsburg’s decision for a unanimous court in *Strate v. A-1 Contractors* to the effect that it is not necessary for non-Indian defendants “to defend against this commonplace state highway accident in an *unfamiliar court*” 520 U.S. 438, 459 (1997) (emphasis added).

the causes of action were rather conventional mainstream common law-like claims; namely that the Bank breached the loan agreement, acted in bad faith, discriminated against the Longs based on their status as Indians, and improperly used self-help remedies in seeking to remove the Longs from the land.⁶² The result of the jury trial was a final verdict of \$750,000 (including pre-judgment interest) in favor of the plaintiffs based on the jury's favorable finding for plaintiff in favor of three of their causes of action. The jury found in favor of the defendant Bank on one cause of action. All of the causes of action were based on theories of contract and tort law.⁶³

In its appeal to the Cheyenne River Sioux Tribal Court of Appeals, the Bank raised seven issues relevant to the previous claims of the Long Family, namely:

1. Whether the Cheyenne River Sioux Tribal Court lacked subject matter jurisdiction for a claim of discrimination against an off-reservation bank.
2. Whether the trial court erred in failing to grant Defendant's motion for a directed verdict and judgment N.O.V. on the Plaintiff's breach of contract claim.
3. Whether the trial court erred in failing to grant Defendant's motion for a directed verdict and judgment N.O.V. on Plaintiff's separate cause of action based on bad faith.
4. Whether the trial court erred in failing to grant Defendant's motion for a judgment N.O.V. in that the damages awarded by the jury were excessive and controlled by passion.
5. Whether the trial court erred in not granting Defendant's cause of action for eviction against the Plaintiffs.
6. Whether the trial court erred in granting Plaintiff's motion to exercise its option to purchase some of the real estate sold to Edward and Mary Jo Mackjewski under a contract for deed.
7. Whether the trial court erred in allowing pre-judgment interest on certain damages absent specific instructions to the jury.⁶⁴

The Long Family itself raised two contract issues on appeal:

1. Whether the trial court erred in its calculation of prejudgment interest.
2. Whether the trial court erred in permitting the Plaintiffs to exercise their option to purchase with regard to only part, rather than all, of the land described in the option to purchase.⁶⁵

These issues were all matters of first impression for the Tribal Court of Appeals.

62. *Bank of Hoven v. Long Family Land & Cattle Co.*, 32 IND. L. REP. 6001, 6002 (2009). Note that the Bank of Hoven subsequently became Plains Commerce Bank and hence the change in the caption of the case.

63. *Id.* at 6001-02.

64. *Id.* at 6002.

65. *Id.*

All of the issues were resolved against the appellants and cross-appellants, and the primary authority relied on each instance was not some esoteric “unknowable” Tribal law, but rather the mainstream conventional rule as reflected in the basic restatement of contracts and the jurisprudence of the South Dakota Supreme Court.⁶⁶ It is noteworthy to observe that *none* of the contract issues were challenged by the Bank in its federal appeal.⁶⁷ This fact alone would seem to controvert the essential, core contention of Bank’s amici about uncertainty and unknowability.

Such thinking also appears to ignore basic principles of federalism and evolution of the common law tradition. A basic principle of federalism included within the structure of the Constitution is the notion that each state – within a national republic – is an individual lab of democratic and commercial variation, which ultimately contributes to a vibrant governmental and legal pluralism.⁶⁸ If the doctrine of federalism is such a key constitutional underpinning to mainstream themes of governance and commerce, it seems rather contradictory to prohibit tribes access to this venerated tradition.

To be sure, there are also boundaries to such parameters of federalism, and they are largely controlled by both the United States Constitution⁶⁹ and the state constitution of any particular state.⁷⁰ Such boundaries clearly exist within the federal-tribal context as well, and may be found in treaties, federal statutes, and the trust relationship.⁷¹

The common law tradition is also hallowed within American jurisprudence. This continually evolving body of judge made law – especially in the area of

66. The Cheyenne River Sioux Tribal Court of Appeals cited several South Dakota Supreme Court decisions, as well as the RESTATEMENT (SECOND) OF CONTRACTS § 204 (1990) and resolved these issues within a conventional state common law framework. *Id.* at 6004.

67. Plains Commerce Bank v. Long Family Land & Cattle Co., 491 F.3d 878 (8th Cir. 2007).

68. See, e.g., ERWIN CHEMERINSKY, FEDERAL JURISDICTION 33-40 (Aspen Publishers 5th ed., 2007). As Justice Brandeis has noted: “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 263, 311 (1932) (Brandeis, J., dissenting).

69. See LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 132-33 (Foundation Press 3rd ed., 2005).

70. See THIRTY YEARS OF STATE CONSTITUTION-MAKING: 1938-1968, 4-5 (National Municipal League 1970). When referring to the structure of early state constitutions:

These early documents reflected a basic belief, that, at best, government is evil and should be restrained. In philosophy they expressed eighteenth-century revolutionary ideals Their leading characteristics were popular sovereignty, limited government which is implemented through the familiar tripartite separation of powers, a system of checks and balances, a bill of rights and legislative dominance. In addition they generally set forth the organization, powers and procedures of the three governmental departments in varying detail, defined state boundaries, described the relationship of the state to the national government, specified suffrage qualifications and the manner of conducting elections, and provided the method of amendment and revision.

Id. (emphasis added).

71. See generally FELIX COHEN’S HANDBOOK OF FEDERAL INDIAN LAW (Nell Newton ed., LexisNexis 2005); FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION (Oxford University Press 2009).

contract and tort – identifies the doctrinal core of these two important aspects of law. This very point was noted by the Eighth Circuit Court of Appeals’ decision in this case: “If the encouragement of tribal self-governance through the development of legal institutions is to remain a federal priority then tribal appellate courts must be given latitude to shape their own common law to respond to the cases before them, as our own courts have done over the centuries.”⁷²

This basic principle led the Circuit Court to uphold the Tribe’s traditional Lakota notion of non-discrimination as clearly within a permissible perspective of law evolving to meet the needs of the community. Again, the Eighth Circuit Court of Appeals noted the Tribe’s traditional understanding of discrimination was well within the canon of discrimination as understood at both the federal and state levels.⁷³

This precise point was persuasively developed in the amicus brief of the *United States*, which noted the essential convergence, as noted by the Tribal Court of Appeals itself, of federal, state, and tribal concern with impermissible discrimination. A development that ought to have been lauded, rather than rejected, by the Supreme Court.

Despite glib generalities – even distortions – there is no evidence to suggest that the Cheyenne River Sioux Tribe’s (and tribes more broadly) law of contract or the tort of discrimination stray in the slightest from the dominant canon. Any legitimate uncertainty about the existence or content of pertinent tribal substantive rules may be dealt with through negotiated choice of law provisions.⁷⁴ Contracts are routinely negotiated in all jurisdictions on all sorts of issues and it ought not be any different in the tribal context. Just put your shoulder to the wheel.

There is no doubt that tribes themselves can improve this situation. Too often tribes (and scholars) likely over-emphasize the right of tribes to be “different” and exacerbate perceived differences with non-Indians, especially in the commercial context. Isn’t the call to full-blown self-determination and difference most often made in the areas of language, culture, spirituality, kinship, and land use rather than matters of “commerce” with non-Indians? Non-Indians need to stop blaming the victim, and tribes need to be less attached to the rhetoric of self-determination and difference and more attached to the necessity of getting the deal done;⁷⁵ across the table not across some racial divide.

72. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 491 F.3d 878, 892 (8th Cir. 2007) (internal citations omitted).

73. *Id.* at 891-92.

74. *Plains Commerce Bank*, 128 S. Ct. at 2729 (Ginsburg, J., dissenting). Justice Ginsburg also pointed out: “Had the Bank wanted to avoid responding in tribal court or the application of tribal law, the means were readily at hand: The Bank could have included forum selection, choice-of-law, or arbitration clauses in its agreements with the Longs, which the Bank drafted.” *Id.*

75. This presumes tribal interest in fostering economic activity on the reservation including economic activity with non-Indians. If tribal law is different (rather than merely unclear), non-Indians can simply decide whether they are in or out.

This latter point is aptly demonstrated in the amicus briefs in this case. If one looks at the amicus briefs submitted on each side (excluding the United States – in its familiar role – as amicus on the Indian side), the briefs have an unfortunate “racial” symmetry. Essentially there are Native groups and other tribes on the “Indian” side and non-Native groups and states and counties on the non-Indian side. Whether this “racial symmetry” was noticed by the Court itself is, of course, hard to say, but for those who do look, this racial symmetry will be all too apparent and will be quite disturbing in that it (however unintentionally) reproduces the very stereotyping that bedevils this area of law.

This persistent problem of what is the nature of the “other” is also linked to the ongoing issue of what might be called Indian law illiteracy.⁷⁶ By this, it is meant that non-Indians often challenge tribal jurisdiction because they know little about it and assume somehow that it will result in unfair treatment of them. If non-Indian litigants did not fear tribal court jurisdiction, why else would they routinely challenge it? Yet both in a comprehensive empirical study involving the Navajo Nation, the largest tribe in the United States, such “unfairness” was found not to be the case⁷⁷ and in *Plains Commerce Bank*⁷⁸ itself, such “unfairness” was also found not to be the case.

These findings suggest that much combativeness by non-Indians in the jurisdictional arena is premised on a false assumption about tribal court “favouritism” that is counterproductive both to self-interest and respect for tribal self-determination. In the absence of Indian law literacy, old stereotypes and cultural distortions rooted in *Johnson v. McIntosh* all too easily reappear.

C. UNIQUE AMICUS PARTICIPATION BY THE CHEYENNE RIVER SIOUX TRIBE

The *Plains Commerce Bank* case is likely unique in that the Tribe itself filed an amicus brief in both the proceedings before the Cheyenne River Sioux Tribal Court of Appeals and the subsequent proceedings before the United States Supreme Court. A review of these *two* amicus briefs is quite instructive.

While the focus of this essay is on amicus briefs submitted to the United States Supreme Court, it is also significant to note that there is potential opportunity to submit amicus briefs before tribal appellate tribunals as well. Such practice may be directly authorized by tribal appellate rules or by a court’s inherent authority in the context of administering its appellate docket. Within the Cheyenne River Sioux tribal legal system, such practice is authorized by appellate rules. Cheyenne River Sioux Appellate Rule 7 expressly provides: “Amicus Curiae briefs, which may be filed with leave of court, shall be served and filed after leave is granted with green covers. Amicus Curiae shall conform

76. See generally FRANK POMMERSHEIM, *BRAID OF FEATHERS* (University of California Press 1995).

77. See Berger, *supra* note 53, at 1075-76.

78. See Cheyenne River Sioux Tribe Amicus Brief, *supra* note 55, at *29-30. See also Fletcher, *supra* note 52, at 734-36.

to the requirements of Appellant's brief."⁷⁹

Such rules are often conceptually linked to tribal notice provisions,⁸⁰ which, where they exist, require tribal courts to provide notice to the tribe itself, when issues of tribal sovereignty and jurisdiction are litigated in private lawsuits in tribal court to which the tribe is not a named party. The function of such notice provisions is to ensure that the tribe has the opportunity, if it so desires, to make the court aware of its sovereignty and jurisdiction concerns, which may be insufficiently argued or appreciated by private party litigants.

This was essentially the role of Cheyenne River Sioux Tribe in its amicus capacity before the Cheyenne River Sioux Tribal Court of Appeals. In its brief, the Tribe provided very crucial information and legal argument for the Court's consideration. Specifically, the Tribe argued that prior decisions of the Court of Appeals had effectively identified Lakota tradition and custom as rooted in fairness and respect and provided the cornerstone for recognition of a tribal common law tort of discrimination.⁸¹

A significant portion of this argument found its way into the decision of the Tribal Court of Appeals, especially elements related to the traditional Lakota understanding of the concept of discrimination. The Tribe's amicus brief artfully wove together earlier Tribal appellate decisions that discussed Lakota tradition and custom and how they might be reasonably understood to apply in the context of alleged discrimination.

The use of amicus briefs at the Tribal appellate court level is likely more helpful and beneficial than in either federal or state contexts because most tribal appellate courts do not have the use of law clerks, who might otherwise locate

79. Rule 7 of the Cheyenne River Sioux Tribal Rules of Appellate Procedure.

80. The Native American Rights Fund promulgated a sample notice provision, which states:

Option A: Court to Give Notice

In any action or proceeding in which the Tribe or any agency, officer or employee thereof is not a party but which questions tribal sovereignty or jurisdiction or the validity of any tribal law, the Tribal Court will give notice in writing of the action or proceeding to [the Tribal Chairperson, or the Tribal Council, or the Tribal Attorney, or the head of the Tribal Legal Department, or the head of the appropriate Tribal Agency or Office]. The Tribal Court will also serve all parties with a copy of the notice given.

Option B: Court to Inform Parties of Notice Requirement; Party to give Notice

Upon the filing of any action or proceeding in which the Tribe or any agency, officer or employee thereof is not a party, the Tribal Court will promptly inform all parties in writing of this law. Any party to such a proceeding that questions tribal sovereignty or jurisdiction or the validity of any tribal law will give notice thereof to [the Tribal Chairperson, or the Tribal Council, or the Tribal Attorney, or the head of the Tribal Legal Department, or the head of the appropriate Tribal Agency or Office]. Such notice will identify the action or proceeding and will include a brief written explanation of the grounds upon which tribal sovereignty or jurisdiction or the validity of tribal law is being questioned. Any party giving notice under this law will simultaneously file proof with the Tribal Court that notice has been given as required by law.

Native American Rights Fund, Model Tribal Notice Materials (Feb. 15, 2000) <http://www.narf.org/pubs/misc/modelnotice.html#draft>.

81. See Brief for Cheyenne River Sioux Tribe as Amicus Curiae Supporting Appellees, *The Bank of Hoven n/k/a Plains Commerce Bank v. Long Family Land & Cattle Co. Inc.*, Cheyenne River Sioux Tribal Court of Appeals, Appeal No. 03-002-A, at 15-16 (on file with author).

such information, and often lack the significant participation of seasoned counsel or other interested parties participating on a voluntary amicus basis. Such amicus practice, especially by the tribe itself, should be encouraged within tribal appellate practice. Increased amicus practice along those lines is likely to enhance the quality of tribal appellate decision-making, especially as it relates to matters of jurisdiction and tribal tradition and custom.

V. EFFECTIVENESS OF AMICUS PARTICIPATION

A lingering question about amicus practice is whether it is effective and if so, in what way. The consensus appears to be that it can be effective, but not always in the most predictable ways. While it is generally understood that legal decision-making comes in two main styles or paradigms, amicus briefs appear to have different effects depending on the model of decision-making employed by the Supreme Court. These two models are most often referred to as the attitudinal model and the legal model. The attitudinal model asserts that:

the justices' decision making is primarily a function of their policy preferences. Lacking ambition for higher office, political accountability, and constituting a court of last resort that controls its own jurisdiction, the justices are argued to operate within an institutional setting that frees them to vote in accordance with their attitudinal predilections.⁸²

Under the legal model, "The justices are viewed as neutral decision makers who set their personal preferences aside when rendering their decisions. That is, the justices are expected to rule consistently with their legal training by attempting to discover correct legal answers."⁸³

These two models are, of course, quite idealized and likely reflect two ends of a continuum rather than wholly discrete and independent entities. Yet, in the context of amicus practice, their differences appear to have empirical ramifications. The attitudinal approach is also referred to as the "top down" approach. The top down process: "Involves goal-oriented decision making in which a justice approaches a decision with the goal of reaching a conclusion that is in line with the justice's policy preferences. In so doing, the justice seeks out directional goals and downplays or disregards argumentation that challenges the justice's pre-existing biases."⁸⁴

The legal approach becomes a "bottom-up" process in which:

A justice carefully reviews all of the available evidence and argumentation for the purpose of reaching a sound legal decision. In this mode, a justice is motivated by an accuracy goal. Rather than deciding the case solely on the basis of the justice's preconceived attitudinal proclivities, the justice sometimes labors to suppress the influence of these preferences in an attempt to reach the most legally correct answer.⁸⁵

82. COLLINS, *supra* note 1, at 12 (citations omitted).

83. *Id.* (citations omitted).

84. *Id.* at 175 (citations omitted).

85. *Id.* (citations omitted).

Within this framework, it has been suggested that amicus briefs are likely to be more effective within the legal model because such justices are more open to potential amicus arguments that aid “in an attempt to reach the most legally correct answer.”⁸⁶ If we think of this as a commitment to accuracy that has the effect of suppressing preference, it suggests that the legal model ought to play a more prominent role in Indian law — a field generally understood to be mostly governed by preferences adverse to tribes and sovereignty and self-determination.⁸⁷

Yet in the absence of such a shift away from the attitudinal model and back to a more legal model in Indian law, research suggests a rather minimal positive effect of amicus briefs within Indian law. While there is much wiggle room for these competing theories within the amicus context as a general matter, the case of Justice Ginsburg in Indian law is particularly instructive.⁸⁸

VI. THE EXAMPLE OF JUSTICE GINSBURG IN INDIAN LAW

Justice Ginsburg has written several opinions in the field of Indian law that are particularly acerbic, if not actually dismissive, with regard to tribal sovereignty, especially in the context of tribal jurisdiction over non-Indians. These cases include *Strate v. A-1 Contractors*⁸⁹ and *City of Sherrill v. Oneida Indian Nation of New York*.⁹⁰ In *Strate*, the unanimous Court held that a tribal court did *not* have jurisdiction over a civil lawsuit brought by a non-Indian resident of the Reservation against a non-Indian non-resident of the Reservation for a car accident that took place on a state highway running through the Reservation.⁹² Justice Ginsburg noted that upholding tribal jurisdiction against a non-Indian “in an unfamiliar court” was not necessary to protect tribal self-government.⁹³ Everybody could just go to the presumably more familiar “state

86. *Id.*

87. See POMMERSHEIM, *BROKEN LANDSCAPE*, *supra* note 59, at 4-5.

88. See generally Carole Goldberg, *Finding the Way to Indian Country: Justice Ruth Bader Ginsburg's Decisions in Indian Law Cases*, 70 OHIO ST. L. J. 1003 (2009).

89. 520 U.S. 438 (1997). Justice Ginsburg has also commented on arbitration in an Indian law sovereign immunity case:

Instead of waiving suit immunity in any court, the Tribe argues, the arbitration clause waives simply and only the parties' right to a court trial of contractual disputes; under the clause, the Tribe recognizes, the parties must instead arbitrate The clause no doubt memorializes the Tribe's commitment to adhere to the contract's dispute resolution regime. That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration.

C & L Enterprises, Inc., v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 422 (2001) (internal citations omitted).

90. 544 U.S. 197 (2005).

92. The plaintiff, Gisela Fredericks, filed the original lawsuit in the Three Affiliated Tribes Tribal Court in North Dakota. She was a long time resident of the Reservation who was married to a (now deceased) tribal member and her five adult children were enrolled members of the Tribe. *Strate*, 520 U.S. at 442-43.

93. *Id.* at 459.

forum open to all who sustain injuries on North Dakota's highways."⁹⁴

In *City of Sherrill*, writing for an 8-1 majority, Justice Ginsburg was even more pointed in noting that recognizing the Oneida Indian Nation's ability to resist the City of Sherrill's imposition of real property tax on fee land purchased by the Oneida Indian Nation would be a "disruptive remedy" upsetting the "justifiable expectations" of non-Indians.⁹⁵ Justice Ginsburg went further to boldly proclaim that, "'standards of federal Indian law and federal equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold."⁹⁶

This sharpness of opposition to tribal self-governance and jurisdiction shifts dramatically in *Plains Commerce Bank*. In a case where there was neither an "unfamiliar court" nor a "disruptive remedy" but rather the *full record* of a tribal court applying ordinary principles of anti-discrimination law, Justice Ginsburg had no problem embracing tribal court jurisdiction. To demonstrate that the Bank was not an "unwitting outsider forced to litigate under unfamiliar rules and procedures in tribal court"⁹⁷ the dissent cited the amicus brief of the Cheyenne River Sioux Tribe for the proposition that "hardly a stranger to the tribal court system, the Bank regularly filed suit in that forum."⁹⁸

Justice Ginsburg was particularly puzzled by the majority's denial of the Tribal Court's jurisdiction over the discrimination claim, when it conceded the Tribal Court's jurisdiction over the breach-of-contract and bad faith claims:

But if the Tribal Court is a proper forum for the Longs' claim that the Bank has broken its promise or acted deceptively in the land-financing transactions at issue, one is hard put to understand why the Tribe could not likewise enforce in its courts a law that commands: Thou shall not discriminate against tribal members in the terms and conditions you offer them in those same transactions. The Federal Government and every state, county, and municipality can make nondiscrimination the law governing contracts generally, and real property transactions in particular. Why should the Tribe lack comparable authority to shield its members against discrimination by those engaging in on-reservation commercial relationships – including land-secured lending – with them?⁹⁹

Indeed, Justice Ginsburg went on to quote from the Cheyenne River Sioux Tribal Court of Appeals opinion: "With regard to checks against discrimination, as the Tribal Court of Appeals observed, 'there is a direct and laudable convergence of

94. *Id.*

95. 544 U.S. at 199.

96. *Id.* at 214. Justice Ginsburg's assertions are quite wrongheaded. The Tribe was not seeking to advance its sovereignty "offensively" against non-Indians, but rather to assert its sovereignty "defensively" to avoid paying a tax it regarded as illegal. *See id.* at 225 (Stevens, J., dissenting). *See also* Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55 S.D. L. REV. 48, 54 (2010).

97. *Plains Commerce Bank*, 128 S. Ct. at 2729 (Ginsburg, J., dissenting).

98. *Id.* *See supra* note 74 and accompanying text.

99. *Plains Commerce Bank*, 128 S. Ct. at 2730-31 (internal citation omitted).

federal, state, and tribal concern.”¹⁰⁰

The explanation of such a trajectory from dismissive “embers” to “laudable convergence” bears some reflection, especially within the amicus context of this essay. The change (however temporary it might be) in Justice Ginsburg’s Indian law jurisprudence owes much to the nature of the record in this case, which was a primer for reducing Indian law illiteracy, as well as the informative content of the amicus brief of the Cheyenne River Sioux Tribe, which served to make the “other” more comfortably recognizable.

As a primer to overcome Indian law illiteracy, the record in *Plains Commerce Bank* is both complete and ordinary in its jurisprudence. The record in this “unfamiliar court” is rather familiar after all. It is governed by rules of civil procedure that closely parallel the federal rules of civil procedure,¹⁰¹ its substantive contract law often draws on the contract law of the state of South Dakota,¹⁰² its damage rules are conventional,¹⁰³ it provided for civil jury trials including the right of non-Indians to serve,¹⁰³ and even its traditional Lakota definition of discrimination is similar to state and federal statutory definitions.¹⁰⁴ Both decisions of the tribal trial court and court of appeals were written by law professors with a recognized expertise in the field of Indian law.¹⁰⁵ In fact, as stated above, Justice Ginsburg in her dissent *quoted* approvingly from the opinion of the Cheyenne River Sioux Tribal Court of Appeals – a historical first in Indian law jurisprudence before the bar of the United States Supreme Court.

The case as presented to the Supreme Court required no speculation or leap of faith about what the Tribal court *might do*. Instead, the Court was presented with a record about what the Tribal court *actually did*. And what it did was rather mundane, indeed so mundane, that but for its Indian law character, it would never have reached the Supreme Court.

This primer of conventionality was further advanced by the amicus brief of

100. *Id.* at 2732 n.3. This is the *first* time in the history of the Supreme Court that a Justice (albeit in a dissent) favorably quoted (not merely cited) language from a tribal court decision.

101. See Cheyenne River Sioux Tribe Amicus Brief, *supra* note 55, at *26-27.

102. See details discussed *supra* note 66 and accompanying text.

103. See United States Amicus Brief, *supra* note 45, at *28.

104. See, e.g., the Eighth Circuit opinion in *Plains Commerce Bank*, 491 F.3d at 887.

105. See, e.g., Cheyenne River Sioux Tribe Amicus Brief, *supra* note 55, at *28, stating that: the judges of the tribal courts are well-trained and well-recognized jurists and academics. For example, Chief Justice Frank Pommersheim of the [Cheyenne River Sioux Tribe] Court of Appeals, who wrote the tribal appellate decision in this case, is a member of the bar of South Dakota and a professor at the University of South Dakota School of Law; a graduate of Columbia University Law School, he serves on several tribal appellate courts, writes extensively in the area of Indian Law and is a contributor to the Handbook of Federal Indian Law by Felix S. Cohen, and has received awards for teaching at the University of South Dakota and its law school. Judge B.J. Jones, who presided as the trial judge in the tribal court in this case, is a member of a number of bars including those of North and South Dakota and is on the faculty of the University of North Dakota School of Law; Judge Jones graduated from the University of Virginia Law School, serves on several tribal appellate and trial courts, and is the Director of the Tribal Judicial Institute at the University of North Dakota Law School.

Id.

the Cheyenne River Sioux Tribe in which it provided empirical evidence that Plains Commerce Bank was no stranger to the Cheyenne River Sioux Tribal Courts. It often litigated there as plaintiff and it often prevailed.¹⁰⁶ The Bank routinely accepted Tribal Court jurisdiction, but this time it blustered and actually threatened the Tribal Court of Appeals.¹⁰⁷

The Tribe's amicus brief was particularly effective not so much because of its legal arguments, but because of its empirical content. It demonstrated what the Bank and Tribal Court actually did. In this way, it opted not for the abstract and formal, but for the concrete and real.¹⁰⁸ There is a lesson to be learned here.

Of course, it must be noted, lest one become too carried away, that this was one justice in a dissent. Yet if one believes that at least in some cases there might be four other justices interested in the accuracy, rather than ideology, of their pronouncements about the "other," perhaps, just perhaps, there may be a basis for hope.¹⁰⁹

Such hope is not disconnected from practice, but embedded in it. In sum, the amicus brief practice in the *Plains Commerce Bank* case suggests that the most beneficial element of an amicus from the tribal point of view is that it narrows the likelihood that the stereotype of the "unknown other" will carry the day. Such fruitful amicus work is empirical rather than theoretical; it focuses on what tribal courts *actually* do, rather than what they might do and on the likely convergence rather than divergence with federal and state practice.

In addition, while it played no discernible role in the *Plains Commerce Bank* case, there is the fearful symmetry that has all the "Indians" (including the United States Government) on one side and all the "non-Indians" (including the states) on the other side. For those so inclined, this looks like a racial divide that

106. *Id.* at *29.

107. *Bank of Hoven v. Long Family Land & Cattle Co.*, 32 IND. L. REP. 6001, 6006 (2005):

Unfortunately, a final concern must be addressed. In his concluding summation to this Court, counsel for the Bank stated that a lot of banks and lenders were watching this case. While it seemed jarring and inappropriate at the time, it is even more so upon reflection. It is difficult to see the statement as merely some form of artless advocacy, but rather more as some kind of threat impugning the integrity of the Cheyenne River Sioux Tribe's judicial system, which this Court finds most offensive and unprofessional. Such statements must not be made again. Though it hardly needs repeating, the Court restates its commitment to fair play, the rule of law, and cultural respect for *all* parties who appear in the courts of the Cheyenne River Sioux Tribe.

Id. See also *supra* note 56 and accompanying text.

108. Cheyenne River Sioux Tribe Amicus Brief, *supra* note 55, at *14-15.

109. See e.g., the same approach of Justice Blackmun in his dissent in *Employment Division Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), where he opted to measure the effect of peyote on members of the Native American Church in the concrete, rather than the abstract:

Not only does the church's doctrine forbid nonreligious use of peyote; it also generally advocates self-reliance, familial responsibility, and abstinence from alcohol. There is considerable evidence that the spiritual and social support provided by the church has been effective in combating the tragic effects of alcoholism on the Native American population Far from promoting the lawless and irresponsible use of drugs, Native American church members' spiritual code exemplifies values that Oregon's drug laws are presumably intended to foster.

Id. at 914-16 (Blackmun, J., dissenting) (internal citations omitted).

would only be exacerbated by allowing an assertion of tribal jurisdiction over non-Indians to prevail.¹¹¹ Such fearful symmetry would be greatly tempered, if not eradicated, if there was some “racial” crossover and you had, for example, the State of South Dakota or National Bankers Association weighing in on the side of the Tribe. Such an occurrence would greatly diminish “fear” and the assertions of uncertainty that often accompany it.

Tribal courts, at least in current Supreme Court jurisprudence, are seen but seldom heard and are thus objects of the woeful (dominant) imagination of the past. This must change. Tribal amicus briefs – rightly focused – can play a small, but not insignificant role in this process.

VII. EMPIRICAL SURVEY OF WESTERN STATE ATTORNEYS GENERAL

In accord with the dictum to practice what one preaches, this article includes its own empirical component in which the Attorneys General of nine¹¹² western states were surveyed as to their amicus practice in the field of Indian law. Specifically, they were asked to answer the following questions:

1. What kind of cases, such as jurisdiction over non-Indians, reservation boundaries, or matters concerned with natural resources are likely to be of most concern to you?
2. Is it a fair assumption that you routinely come in on the side that is opposing or challenging the tribal position?
3. What are the policy concerns that are foremost in your decision-making process?

The inquiry was sent to the Attorneys General of South Dakota, North Dakota, Arizona, California, New Mexico, Oregon, Washington, Montana, and Oklahoma. Responses were provided by the offices of six Attorneys General.

The responses to the first question were varied depending on the matters that were of the most importance to that individual state. For instance, South Dakota was concerned with public safety issues, which could “include jurisdiction over non-Indians and perhaps arrest and transport authority over Indians”¹¹³ A number of states said that the types of cases that interest them are those that affect the state and its citizens the most, while other states said it just depended on each case litigated. For instance, Oklahoma said that the importance of the issue being litigated and the effect any decision would have on

111. See earlier discussion *supra* at p. 92.

112. The Attorney General for the State of North Dakota chose not to respond to this inquiry on the rather odd grounds that the Attorney General’s Office did not provide “legal advice” or personal “legal research” for others. E-mail from Liz Brocker, Executive Assistant on behalf of Attorney General of North Dakota Wayne Stenehjem, to Frank Pommersheim, Professor of Law, University of South Dakota School of Law (Aug. 27, 2010; 07:36 CST) (on file with author).

113. Letter from Marty Jackley, Attorney General of South Dakota, to Frank Pommersheim, Professor of Law, University of South Dakota School of Law (September 2, 2010) (on file with author).

Oklahoma and its citizens is the most critical criteria for joining as an amicus.¹¹⁴ The State of Washington said its amicus interests are wide because the State interacts with its tribes on a broad array of issues.¹¹⁵ New Mexico joined cases that involved criminal jurisdiction, the definition of “Indian Country,” and the environment.¹¹⁶ Montana said that each case is reviewed on its own merits because Indian law issues of any kind could present issues of concern.¹¹⁷ Finally, Oregon said that it was hard to determine what sort of cases were of the most concern, but in the past, cases that dealt with public safety and the environment were most significant.¹¹⁸

Most of the Attorneys General responded to the second question with the same answer. Typically, the responses either said that it was not a fair assumption that states routinely came in on the side that opposed tribal interests or they simply answered “no” to the question. Montana and Oregon answered “no” and did not expand on their answers when the question was posed to them.¹¹⁹ Washington said while it has traditionally opposed the tribal position, state and tribal interests in Washington have increasingly become more aligned, and the historical position on tribal issues might not be an accurate indication of the future.¹²⁰ Oklahoma stated that the assumption that it would go against the tribal interest was unfair because its first priority is to determine whether it should get involved, then decide which interest is most beneficial to the State and its citizens.¹²¹ New Mexico said that it is unfair to assume it will oppose the

114. Letter from Tom Gruber, First Assistant Attorney General, State of Oklahoma, to Frank Pommersheim, University of South Dakota School of Law (July 8, 2010) (on file with author).

115. Letter from Robert Costello, Deputy Attorney General, State of Washington, to Frank Pommersheim, Professor of Law, University of South Dakota School of Law (July 27, 2010) (on file with author). The 29 federally recognized tribes are active in building their communities and governments while diversifying their interests and economies, resulting in more interaction with the State. *Id.*

116. E-mail from Gary King, Attorney General, New Mexico, to Frank Pommersheim, Professor of Law, University of South Dakota School of Law (September 8, 2010) (on file with the author).

117. E-mail from Andrew Huff, Assistant Attorney General, Montana Department of Justice, to Frank Pommersheim, Professor of Law, University of South Dakota School of Law (October 4, 2010) (on file with the author).

118. E-mail from Stephanie Striffler, Native American Affairs Coordinator, Oregon Department of Justice, to Frank Pommersheim, Professor of Law, University of South Dakota School of Law (October 12, 2010) (on file with the author).

119. *See, e.g.*, Email from Andrew Huff, Assistant Attorney General, Montana Department of Justice, to Frank Pommersheim, Professor of Law, University of South Dakota School of Law (October 4, 2010) (on file with the author); Email from Stephanie Striffler, Native American Affairs Coordinator, Oregon Department of Justice, to Frank Pommersheim, Professor of Law, University of South Dakota School of Law (October 12, 2010) (on file with the author).

120. Letter from Robert Costello, Deputy Attorney General, State of Washington, to Frank Pommersheim, Professor of Law, University of South Dakota School of Law (July 27, 2010) (on file with author).

121. Letter from Tom Gruber, First Assistant Attorney General, State of Oklahoma, to Frank Pommersheim, Professor of Law, University of South Dakota School of Law (July 8, 2010) (on file with author). Oklahoma stated that there is no routine assumption that the tribal position will be opposed or joined. *Id.* For example, Oklahoma stated:

In a case involving water law, we conclude that the interest being championed by the tribe is more beneficial to the State and its citizens, we would join on the tribe's side of the case, if we

tribal position because it has supported the tribal positions in the past.¹²²

South Dakota Attorney General Marty Jackley said that it would not be a fair assumption that South Dakota would oppose the tribal position when it comes to issues of public safety.¹²³ Jackley said that historically when discussing state constitutional authority to govern that the state, tribes, and federal government may take “differing positions to protect their respective interests.”¹²⁴ Further, if South Dakota is concerned with cases affecting South Dakota’s Constitutional authority to govern, it may put the State at odds with federal or tribal authority.¹²⁵

The answer to the third question was again varied, but usually contained some reference to the state’s authority to govern or the individual interests involved in each case. South Dakota maintained that providing public safety and protection to Indians and non-Indians alike was important.¹²⁶ South Dakota stressed its most important policy concerns were its authority to govern and its place in the Constitutional order.¹²⁷ New Mexico’s primary policy concern was the impact the case had on its ability to exercise its sovereignty.¹²⁸ The State of Washington was most concerned with protection of legal rights and its state’s and citizens’ interests as well as fostering the government-to-government relationship between the state and the tribes.¹²⁹

Montana noted the importance of the cases impacting the government-to-government relationship between the state and tribes, as well as the individual interests at stake.¹³⁰ Oklahoma stressed the importance of the case-specific

concluded that the issue were of sufficient importance to join the case in the first instance.

Id.

122. Email from Gary King, Attorney General of New Mexico, to Frank Pommersheim, Professor of Law, University of South Dakota School of Law (September 8, 2010) (on file with the author). The New Mexico Office of the Attorney General supported the tribal position in the past including *Inyo County v. Paiute-Shoshone Indians of the Bishop Community*, U.S.S.C. No. 02-281, where New Mexico joined several other states in supporting the tribal position. *Id.* The Attorney General also joined an amicus brief in claims brought by the Navajo Nation against the United States. *Id.* New Mexico declines invitations to join an amicus brief more often than it accepts them. *Id.*

123. Letter from Marty Jackley, Attorney General of South Dakota, to Frank Pommersheim, Professor of Law, University of South Dakota School of Law (September 2, 2010) (on file with author).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. Email from Gary King, Attorney General of New Mexico, to Frank Pommersheim, Professor of Law, University of South Dakota School of Law (September 8, 2010) (on file with the author). The cases that normally involve New Mexico’s ability to exercise its sovereignty typically arise “when a criminal defendant or a tribe objects to the State’s exercise of its criminal or civil authority.” *Id.*

129. Letter from Robert Costello, Deputy Attorney General, State of Washington, to Frank Pommersheim, Professor of Law, University of South Dakota School of Law (July 27, 2010) (on file with author). Washington was also concerned with providing clarity and certainty in cases as well as fostering legal solutions to the common issues and challenges. *Id.*

130. Email from Andrew Huff, Assistant Attorney General, Montana Department of Justice, to Frank Pommersheim, Professor of Law, University of South Dakota School of Law (October 4, 2010) (on file with the author).

issue's effects on the state and its citizens.¹³¹ Oregon was equally concerned with the effect of participation on the state's relationship with tribal governments as well as the views of tribal attorneys, the cost of litigation, and availability of personnel.¹³²

In sum, while most of the responses given by the Attorneys General are rather broad, the potential for narrowing differences and finding more, rather than less, common ground is a recurring theme.

VIII. SOUTH DAKOTA'S AMICUS EXPERIENCE

The State of South Dakota has a long, uninterrupted record of filing (or joining) the amicus briefs in opposition to tribes in all cases involving jurisdiction over non-Indians,¹³³ all boundary and diminishment cases,¹³⁴ and many other tax and trust cases.¹³⁵ It has never filed an amicus brief in Indian law on the tribal side. Such amicus practice is largely outside the purview of the voting public within the state. The state, however, routinely issues press releases in regard to its state's rights ethos and participation in such non-Indian law cases as its opposition to the national health reform statute enacted by Congress in 2009 and its support for the immigration enforcement statute enacted by the State of Arizona.¹³⁶ Yet the state has never issued a press release relative to its amicus practice in Indian law.¹³⁷ One wonders why.

When such practice is coupled with the complete absence of state public

131. Letter from Tom Gruber, First Assistant Attorney General, State of Oklahoma, to Frank Pommersheim, Professor of Law, University of South Dakota School of Law (July 8, 2010) (on file with author).

132. Email from Stephanie Striffler, Native American Affairs Coordinator, Oregon Department of Justice, to Frank Pommersheim, Professor of Law, University of South Dakota School of Law (October 12, 2010) (on file with the author). Other concerns were off-reservation effects, effective law enforcement, and natural resources management. *Id.*

133. See, e.g., *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

134. See, e.g., *Idaho v. United States*, 533 U.S. 262 (2001); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); *Hagen v. Utah*, 510 U.S. 399 (1994).

135. See, e.g., *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Ariz. Dep't of Revenue v. Blaze Const. Co.*, 526 U.S. 32 (1999); *Montana v. Crow Tribe*, 523 U.S. 696 (1998); *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1997); *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995); *County of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251 (1992).

136. See, e.g., Press Release, South Dakota Attorney General, South Dakota Joins Other States in Support of State Joint Authority Over Immigration Enforcement; Press Release, South Dakota Attorney General, State of South Dakota Joins Multi-State Litigation Challenging Health Care Legislation; Press Release, South Dakota Attorney General, Healthcare Multi-State Litigation Amended Complaint Includes 20 States; Press Release, South Dakota Attorney General, Attorney General Jackley Announces Response to Federal Motion to Dismiss Filed in Health Care Suit (Aug. 6, 2010). All press releases are available at <http://atg.sd.gov/News/NewsReleases.aspx>.

137. A thorough review uncovered no press releases describing South Dakota's decision to write or join an amicus brief in an Indian law case.

policy in Indian affairs,¹³⁸ unbounded discretion abounds. Maybe the notion is that sovereigns clash and that is that, but perhaps some public consideration of state-tribal relations might identify more potential for respect and common ground.

IX. CONCLUSION

While it remains difficult to calibrate the exact effectiveness of amicus briefs in general and in Indian law in particular, the weight of authority is that they are effective to some degree, especially in the context of judicial concern for “legal accuracy” as opposed to “ideological preference.”¹³⁹ Unfortunately, the field of Indian law, at the Supreme Court level, is deeply embedded in a thrall of judicial preference.¹⁴⁰ Yet there are glimmers for potential change. As the example of Justice Ginsburg demonstrates, an amicus thrust that provides information on what tribal law is and what tribal courts actually do, can advance Indian law and improve “legal accuracy,” at least for those Justices willing to take a look at Indian law “reality.”

In addition, review of the survey data suggests that the states themselves need to continue to recalibrate and to rethink what exactly is their goal (except raw power politics) in weighing in so often against tribes. It gives the impression – whether intended or not – that the “Indian wars” continue with the predictable symmetry of “Indians” on one side and “non-Indians” on the other side. Unfortunately, this practice takes place completely without public discussion and citizen input. Yet there are glimmers of hope for new and incremental change.

The tribes themselves need to combat this one sidedness however steep the incline. They must continue, as they are, to advance their own amicus participation within both the tribal appellate system and the federal system albeit not with the undue rhetoric of sovereignty, but the tradition and custom of essential fairness and commitment to the ordinary rule of law.¹⁴¹

138. See POMMERSHEIM, BRAID OF FEATHERS, *supra* note 76, at 154-56, calling for, among other things, a comprehensive State-Tribal relations public policy study.

139. See discussion *supra* notes 82 - 87 and accompanying text.

140. See POMMERSHEIM, BROKEN LANDSCAPE, *supra* note 59, at 295-302.

141. See *supra* notes 79 – 81 and accompanying text. The tribes themselves also need to seek and to recruit amicus support across the “racial” divide.