

## THE UTILITY OF AMICUS BRIEFS IN THE SUPREME COURT'S INDIAN CASES

Matthew L.M. Fletcher\*

In the last days of the 2012 Term, the Supreme Court decided *Adoptive Couple v. Baby Girl*,<sup>1</sup> possibly the highest profile Indian law case in decades.<sup>2</sup> Given the stakes, it is not surprising that groups and individuals filed 32 *amicus briefs* in support of the parties.<sup>3</sup> And yet the Supreme Court's 5-4 decision, which included Justice Alito's majority opinion, concurrences from Justices Thomas and Breyer, and dissents from Justices Scalia and Sotomayor, cited to exactly one *amicus* brief—

---

\* Professor of Law, Michigan State University College of Law. Director, Indigenous Law and Policy Center. Reporter, RESTATEMENT, THIRD, THE LAW OF AMERICAN INDIANS. I owe significant inspiration for the article to Frank Pommersheim, *Amicus Briefs in Indian Law: The Case of Plains Commerce Bank v. Long Family Land and Cattle Co.*, 56 S.D. L. REV. 86 (2011), and Douglas Laycock, *Persuasion in Hot-Button Cases*, in PERSUASION AND IDEOLOGY: POLITICALLY DIVISIVE CASES IN APPELLATE COURTS, 7TH ANNUAL MSU INDIGENOUS LAW CONFERENCE MATERIALS (2010). Miigwetch to the Stanford Native American Law Students Association—especially to the ever-patient Tom Pack—for allowing me to present this paper. And thanks to Dan Rey-Bear, Wenona Singel, and Kaighn Smith for comments.

<sup>1</sup> 133 S. Ct. 2552 (2013).

<sup>2</sup> National news commentators wrote repeatedly about the case, before and after the decision. *E.g.*, Emily Bazelon, *Send Veronica Back: A truly terrible ruling in the Baby Girl custody case*, SLATE (July 18, 2013), [http://www.slate.com/articles/double\\_x/doublex/2013/07/baby\\_veronica\\_case\\_the\\_south\\_carolina\\_court\\_got\\_it\\_wrong.html](http://www.slate.com/articles/double_x/doublex/2013/07/baby_veronica_case_the_south_carolina_court_got_it_wrong.html) (last visited Nov. 24, 2013); *Happy Ruling for Adoptive Couple, Uncertainty for Baby Girl*, NATIONAL PUBLIC RADIO (June 26, 2013), <http://www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&islist=false&id=195787510&m=195787473> (last visited Nov. 10, 2013); Adam Liptak, *Justices Hear Case of Indian Child Caught in Custody Fight*, N.Y. TIMES (April 16, 2013), <http://www.nytimes.com/2013/04/17/us/justices-hear-case-of-adopted-indian-child.html?ref=us&r=0> (last visited Nov. 24, 2013).

<sup>3</sup> The Native American Rights Fund complied each of the 32 *amicus* briefs filed in support of the respondents and the petitioners. See Native American Rights Fund, Tribal Supreme Court Project, *Adoptive Couple v. Baby Girl* (No. 12-399), *Amici in Support of the Petitioners*, available at [http://sct.narf.org/caseindexes/adoptivecouplevbabygirl-amici\\_briefs\\_in\\_support.html](http://sct.narf.org/caseindexes/adoptivecouplevbabygirl-amici_briefs_in_support.html) (last visited Nov. 10, 2013); and *id.*, *Amici in Support of Respondents*, available at [http://sct.narf.org/caseindexes/adoptivecouplevbabygirl-amici\\_briefs\\_in\\_support\\_respondents.html](http://sct.narf.org/caseindexes/adoptivecouplevbabygirl-amici_briefs_in_support_respondents.html) (last visited Nov. 24, 2013).

that of the United States.<sup>4</sup> Did the other 31 amicus briefs make no impression on any of the Justices? What's the point of filing an amicus brief in a hot-button Supreme Court case if there's no evidence that the briefs have any impact?

Still, four times in the past 16 years, arguments or information raised by amici in Indian law cases before the Supreme Court have had dramatic impacts on the Court's decision-making process in cases involving federal Indian law. In two cases involving government contracting, amicus briefs filed by the United States Chamber of Commerce supporting tribal interests played important roles in pointing out the impact the Court's decision would have on defense and other government contractors.<sup>5</sup> In another case, an amicus railroad company alleged that the procedures in one tribal court were stacked against nonmembers; apparently causing the Court to reconsider its views on tribal civil jurisdiction.<sup>6</sup> In a fourth case, an amicus resuscitated a line of argument long thought to be retired from the field (in fact, none of the parties briefed the argument) and persuaded the Court to decide a case on that basis.<sup>7</sup>

What about these briefs, as opposed to the dozens upon dozens of other Supreme Court amicus briefs filed in the Court's Indian cases, served to influence the Court so heavily? This short paper hopes to sort out a few general guidelines for amicus brief writers in federal Indian law cases by reviewing a series of amicus briefs and what we know about how the Court deals with them. In general, amicus briefs that provide the Court with factual and legal information not provided by the parties tend to be the most important amicus briefs, but there is no hard and fast rule.

The paper begins with a description of the subject area of federal Indian law; most particularly, the types of Indian law cases that reach the Court. Indian law is an unusual area, and has several non-legal

---

<sup>4</sup> See *Adoptive Couple v. Baby Girl*, 133 S. Ct. at 2564 n. 9; *and id.* at 2577 n. 5 (Sotomayor, J., dissenting).

<sup>5</sup> See *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012); *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005).

<sup>6</sup> See *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

<sup>7</sup> See *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005).

characteristics that affect how the Court decides these cases. Part I offers several reasons why an amicus strategy is usually important in the Indian cases. Part II parses through the array of amicus briefs in selected Indian law cases from the last few decades. Part III reviews more generally the goals of amicus brief strategies in Supreme Court litigation. Part IV analyzes the impact the amicus briefs actually had on the outcome of selected cases by reviewing citations to and quotations of, amicus briefs within the selected cases. Part V offers conclusions.

### I. THE IMPORTANCE OF AMICUS IN THE SUPREME COURT'S INDIAN CASES

There are several non-legal ways to describe American Indian law cases before the Supreme Court. First, the cases are very unpopular, unsexy cases for the Court. Jeffrey Toobin's book notes that the clerks consider these cases "dogs."<sup>8</sup> Justice Brennan supposedly once referred to an assignment to write the opinion in an Indian law case as a "chickenshit" assignment.<sup>9</sup> Senior Justices often assign the Indian law opinions to junior Justices.<sup>10</sup> It is probably unlikely that a Supreme Court Justice will ascend to the High Court with an expertise in Indian law, although one sitting Justice (Sotomayor) has demonstrated that Indian law is a special area of her concern.<sup>11</sup> Similarly, it seems unlikely that a sitting Justice would hire a clerk for their expertise in Indian law. And since few, if any, clerks come from law schools where Indian law is emphasized (mostly non-elite law schools in the west), it cannot be expected that Supreme Court clerks will have any experience with Indian law questions. That said, Supreme Court clerks are better than anyone in the world at getting up to speed in short order.

---

<sup>8</sup> JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* 54 (2012).

<sup>9</sup> BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 359 (1979).

<sup>10</sup> Junior Justices authored the last three Indian law decisions. See *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 132 S. Ct. 2199 (2012) (Kagan); *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012) (Sotomayor); *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011) (Alito).

<sup>11</sup> See *U.S. Supreme Court Justice Sonia Sotomayor Visits Law School*, UNIV. NEW MEXICO, <http://lawschool.unm.edu/news/archives/2011/september/sotomayor.php> (last visited Nov. 24, 2013).

Second, tribal interests<sup>12</sup> are similarly disfavored by the Supreme Court. The outcomes in the Indian cases since the 1986 Term, when Chief Justice Rehnquist ascended, are stark—tribal interests have lost more than 75 percent of their cases before the Court, a figure the late Dean David Getches noted was worse than the failure rate of convicted criminals before the Court.<sup>13</sup> It is also apparent from the Court's certiorari decisions that the only Indian law cases that attract the Court's attention are cases where the tribal interest has won below, or in the limited cases where the United States acquiesces to Supreme Court review.<sup>14</sup> This is not to accuse the Justices or the Court as an institution of overt discrimination against tribal interests, but to note the extreme disadvantage tribal interests face before the Supreme Court. After all, tribal interests differ in fundamental ways than federal, state, business, foreign, and even individual interests in that tribal governance activities often are not sanctioned or constrained by the Constitution. Further, these fundamentally different tribal interests enter into a Court that gives weight based on the units of government most likely to represent consensus en masse, rather than the divergent views of a particular locality. Consider, for example, that the Supreme Court's clerks decide the importance of a particular amicus brief by employing a hierarchy of sovereignties. Briefs of the United States government are highest on the list, followed by the state briefs (regardless of the quality of the brief), local units of government, and everyone else.<sup>15</sup>

Third, tribal interests are incredibly diffuse. More often in recent decades, tribal interests are on opposite sides, although this is rarely the

---

<sup>12</sup> I use "tribal interests" to define the parties to which I am focusing. I include Indian tribes, individual Indians backed by or siding with a tribe, governmental and economic entities siding with a tribe, and individuals siding with a tribe. Occasionally, individual Indians are in opposition to this notion of "tribal interests," most notably in criminal cases. *E.g.*, *United States v. Lara*, 541 U.S. 193 (2004) (nonmember Indian challenge to "Duro fix").

<sup>13</sup> See David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Main-stream Values*, 86 MINN. L. REV. 267, 280-81 (2001).

<sup>14</sup> See Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as a Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 937 (2009).

<sup>15</sup> See Kelly J. Lynch, *Best Friends?: Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J. L. & POL. 33, 46-49 (2004).

case in Supreme Court litigation, largely because the Court rarely finds inter-tribal disputes important enough to be worthy of the Court's attention.<sup>16</sup> This is important because of the reality that the Supreme Court's decisions, absent some sort of check, apply universally to all of Indian country. The most obvious example is *Oliphant v. Suquamish Indian Tribe*,<sup>17</sup> a decision barring tribal criminal jurisdiction over non-Indians involving an Indian tribe that had a tiny population, a nascent tribal judicial system, and limited resources. That decision applies to all Indian tribes, even those tribes with centuries-old criminal justice systems, control over massive territorial bases, and sufficient economic and legal resources to exercise prosecutorial authority, such as the Navajo Nation.<sup>18</sup> While it makes sense for some decisions to apply universally, it makes less sense in other cases.

Fourth, information about Indian country is relatively scarce.<sup>19</sup> There are few methodologically sound social science studies on tribal judicial systems, tribal economies, tribal legal infrastructure, and federal and state relations with Indian tribes; although, that is beginning to change.<sup>20</sup> Legal scholarship on American Indian law is nascent and often skewed by political (and perhaps racial) biases. Representations made by

---

<sup>16</sup> The last such case appears to be *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976).

<sup>17</sup> 435 U.S. 191 (1978).

<sup>18</sup> See generally Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1185 (2004) ("In 1980, two years after *Oliphant*, an editorial in the Navajo Times complained: 'The New Mexico State government appears to be totally unconcerned about the problems it has created in the checkerboard area with its decision to prohibit Navajo police from citing non-Indians into tribal courts.'") (footnote omitted).

<sup>19</sup> See Philip P. Frickey, Address at University of Kansas Conference on Tribal Law and Institutions, Feb. 2, 2008, *Tribal Law, Tribal Context, and the Federal Courts*, 18 KAN. J.L. & PUB.POL'Y 24, 32 (2008) ("The larger, non-Indian community simply does not know very much about tribal institutions and law. And what they don't know tends not to hurt the larger community, but instead, to hurt tribes.").

<sup>20</sup> E.g., MARY E. GUSS, MIRIAM JORGENSEN, MELISSA L. TATUM, & SARAH DEER, *STRUCTURING SOVEREIGNTY: CONSTITUTIONS OF NATIVE NATIONS* (forthcoming 2014) (manuscript on file with author) (surveying tribal constitutional law).

tribal advocates and their adversaries often cannot be independently verified by the Court and the clerks.<sup>21</sup>

Finally, federal Indian law primarily is federal common law. Like admiralty law, federal Indian law is the province of the Supreme Court. While Congress can and does preempt many areas within federal Indian law, large swaths of the field remain common law. In such circumstances, the Court's uncomfortable role as policymaker and legislative judiciary arises. In one document—a private memorandum from Justice Scalia to Justice Brennan—discovered by the late Dean David Getches in Justice Marshall's papers,<sup>22</sup> Justice Scalia wrote that:

[O]pinions in this field have not posited an original state of affairs that can subsequently be altered only by explicit legislation, but have rather sought to discern what the current state of affairs ought to be by taking into account all legislation, and the congressional "expectations" that it reflects, down to the present day.<sup>23</sup>

---

<sup>21</sup> A paradigmatic example is the amicus brief in *Strate v A-1 Contractors*, Brief for the American Trucking Ass'ns., Inc. et al. as Amici Curiae in Support of Respondents, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (No. 95-1872), 1996 WL 711202, where the Court's amici alleged damning procedural facts about a tribal court case at the Crow Nation's reservation. See *id.* at 3. The amici alleged in the brief, which was filed while the tribal court case was pending, that a tribal judge addressed the all-Indian jury in the language of the Absalooke people and suggested the case was a chance for them to punish the railroad for historic transgressions. If true, the allegations are particularly troubling, but it is, and would be impossible, for the Court to verify the truth of these allegations.

<sup>22</sup> See David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1575 (1996).

<sup>23</sup> See *id.* (quoting Memorandum from Justice Antonin Scalia to Justice William J. Brennan, Jr. (Apr. 4, 1990) (*Duro v. Reina*, No. 88-6546) (hereinafter *Scalia Memorandum*), in PAPERS OF JUSTICE THURGOOD MARSHALL (reproduced from the Collections of the Manuscript Division, Library of Congress). Thanks to the David H. Getches Collection at the William A. Wise Law Library at the University of Colorado Law School, the memorandum is now available at Turtle Talk. See Matthew L.M. Fletcher, *Scalia Memorandum to Brennan in Duro v. Reina*, TURTLE TALK BLOG POST, <http://turtletalk.wordpress.com/2012/11/13/scalia-memorandum-to-brennan-in-duro-v-reina/> (last visited Nov. 24, 2013).

This unusually “frank admission”<sup>24</sup> by a sitting Supreme Court Justice may overstate the case, but the fact remains that public policy is very much in play in the Court’s decision-making in Indian cases.

All of these factors make the role of amicus briefs very important in the Supreme Court’s Indian cases. Information about Indian tribes and Indian country is at a premium, and amicus briefs are critical sources for information. As the next two sections show, however, to a large extent the provision of critical information about Indian country is either, often not the goal of the Indian law amici, or is simply unsuccessful.

## II. SELECTIVE SURVEY OF AMICUS BRIEFS IN INDIAN LAW CASES

Below, I outline four categories of amicus briefs for later review in the Court’s Indian cases.<sup>25</sup> First, I identify “policy briefs” that provide new information useful to helping the Court predict the outcomes of its decision. I believe these briefs are likely to be the most influential on the Court (“influential” being relative, of course). Second, I identify “alternative merits argument briefs” that simply provide an alternative theory upon which the Court could rely in its ruling. The United States as amicus curiae is probably the party most likely to file this kind of brief, although other amici do on occasion. These briefs may be influential if the amicus is the United States; less so if it is anyone else. Third, I identify “support briefs” that merely support or reiterate the parties’ merits arguments. It is likely that the vast majority of amicus briefs fit inside this third category. I do not believe these amicus briefs are influential, but they may be very useful to the Court in focusing the Court’s attention on relevant precedents in cases where the parties do not, for whatever reason. Finally, historical briefs are useful in underscoring the origins of modern Indian policy, although their influence is far from clear. I include history briefs as support briefs, and set them aside for later discussion.

---

<sup>24</sup> Frank Pommersheim, “New” *Directions in Indian Law Scholarship: An Afterword*, 32 AM. INDIAN L. REV. 157, 159 (2007-2008).

<sup>25</sup> My categories differ, but not much, from other commentators’. E.g., Paul M. Smith, *The Sometimes Troubled Relationship Between Courts and Their “Friends”*, excerpted in RICHARD SEAMON, ANDREW SIEGEL, JOSEPH THAI, & KATHRYN WATTS, THE SUPREME COURT SOURCEBOOK 362, 366 (2013).

An additional factor to consider is the organization and development of the Tribal Supreme Court Project, operated by the National Congress of American Indians and the Native American Rights Fund.<sup>26</sup> The Project started actively participating and organizing the tribal interest briefing in the Supreme Court in 2002.<sup>27</sup> The critical aspects of that Project for the purposes of this paper are the focusing of amicus briefs supporting tribal interests and the reduction in the number of repetitive amicus briefs. Four of the cases studied here are affected.

I will first highlight, in numbers, the amicus briefs filed in these 13 Indian law cases, and then categorize them. The first chart merely shows the number of briefs filed in these cases, and how many support tribal interests and how many oppose.<sup>28</sup>

About two-thirds of the amicus briefs filed before the Supreme Court in the 13 Indian cases I study are supportive of tribal interests, but the outcomes in those cases were almost exactly the opposite—tribal interests lost two-thirds of the cases. This fact alone lends support to the initial, but weak, hypothesis that amicus briefs are not all that influential. Certainly, other factors can account for this array. Weaker positions may require additional amici support, for example.

Another fact that will require some consideration is that tribal interests *are* now very well represented in the high stakes and expensive arena of Supreme Court litigation. This is a relatively new development, especially considering that tribal economies bolstered by Indian gaming

---

<sup>26</sup> See generally Tracy Labin, *We Stand United Before the Court: The Tribal Supreme Court Project*, 37 NEW ENG. L. REV. 695 (2003).

<sup>27</sup> *Id.*

<sup>28</sup> A few notes about the chart. I generally do not include certiorari stage briefs (those amicus briefs either supporting or opposing a petition for certiorari), but I included one such brief in the *City of Sherrill* case because it was the only brief before the Supreme Court in that case that argued in favor of the argument upon which the Court actually decided the matter. Also, there was a third amicus brief that purported to partially support the tribal interests, perhaps because of a missed filing deadline, but was strongly in opposition to tribal interests. I included that brief as an opposing brief.

floundered until the Supreme Court's *Cabazon Band* decision in 1987,<sup>29</sup> and the resulting enactment of the Indian Gaming Regulatory Act in 1988.<sup>30</sup> Moreover, it wasn't until 2000 that Congress finally removed the requirement under federal law that all contracts between attorneys and Indian tribes were invalid unless approved by the Secretary of Interior.<sup>31</sup> Tribal interests, more than ever before, have the resources and the legal capacity to represent themselves in high stakes Supreme Court litigation.

#### A. *Policy Briefs*

As noted above, I counted a brief as a policy brief where the brief dedicates a significant portion (usually a whole part or section) to making public policy arguments about the importance of the potential outcomes. For example, in the *California v. Cabazon Band*<sup>32</sup> and *Seminole Tribe v. Florida*<sup>33</sup> cases, both of which involved some aspect of Indian gaming, a policy brief might include information about the economic impact of a decision limiting tribal gaming opportunities.

---

<sup>29</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Indian gaming is now a \$27.9 Billion per year concern nationally. See *2012 Indian gaming revenues increase 2.7 percent*, NATIONAL INDIAN GAMING COMMISSION, July 23, 2013, <http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/pressreleases/2012Indiangamingrevenuesincreasegraphics.pdf> (last visited Nov. 24, 2013).

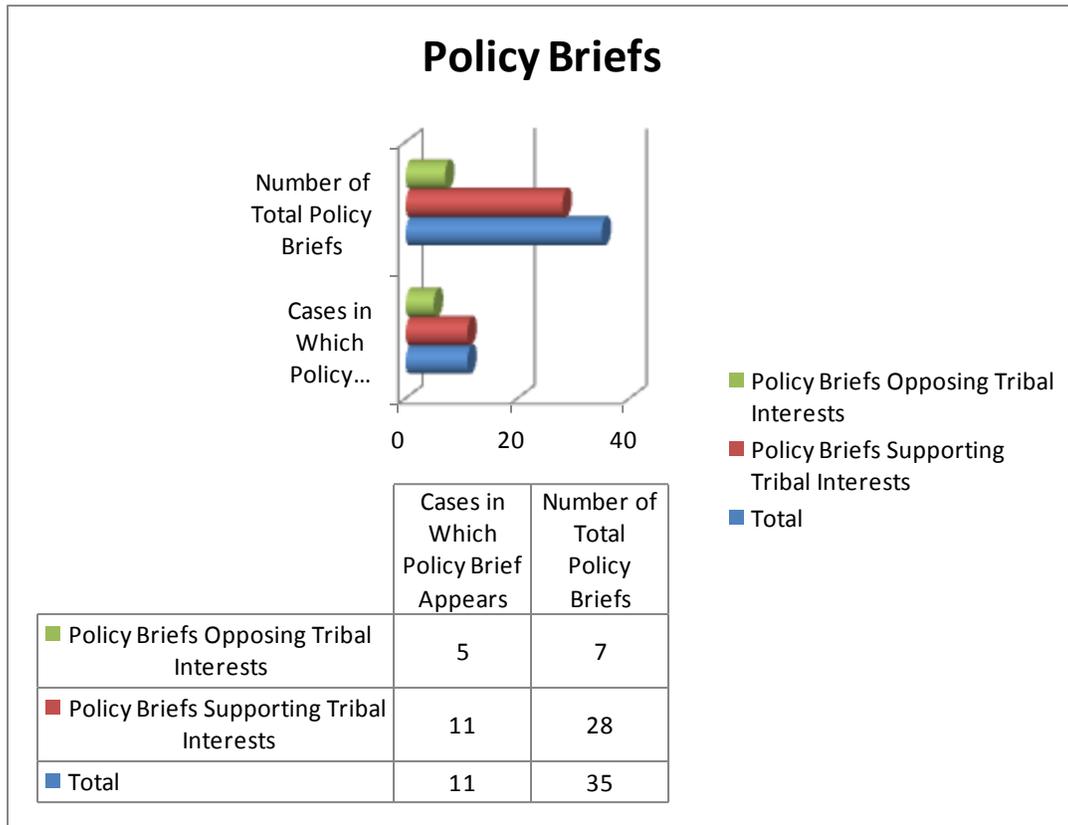
<sup>30</sup> 25 U.S.C. §§ 2701 (2012).

<sup>31</sup> See S. REP. 106-150, at 1 (1999) ("S. 613 also amends the Indian Reorganization Act of 1934 and § 81 to eliminate any statutory requirement for federal review of tribal contracts with attorneys.").

<sup>32</sup> 480 U.S. 202 (1987).

<sup>33</sup> 517 U.S. 44 (1996).

This chart details the number of cases in which a policy brief appeared, and how many policy briefs appeared overall.<sup>34</sup>



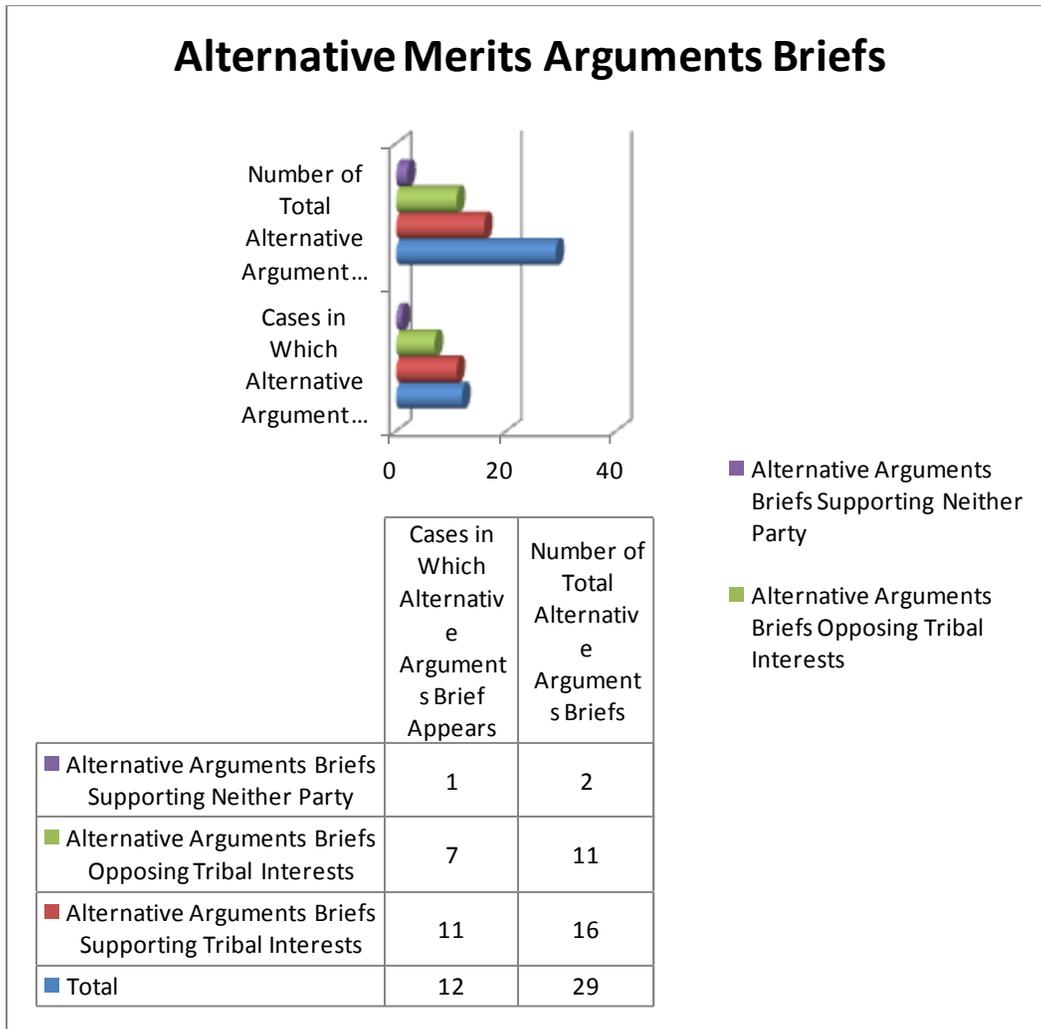
**B. Alternative Merits Arguments Briefs**

In relatively few instances, amici filed briefs making arguments on the merits not raised by the parties. Once again, I counted these briefs if the amici dedicated a substantial portion of the brief (a part or section) to an alternate argument not initially addressed by the parties (the argument might be addressed in reply briefs, of course). One example is the amicus brief filed (at the cert stage) by local units of government in the *City of Sherrill v. Oneida Indian Nation*.<sup>35</sup> A case arguing that the Oneida’s claim

<sup>34</sup> A few notes. In every case where an amicus filed a policy brief, amici supporting tribal interests filed a brief. In half of the cases where an amicus filed a policy brief, amici opposing tribal interests filed a brief.

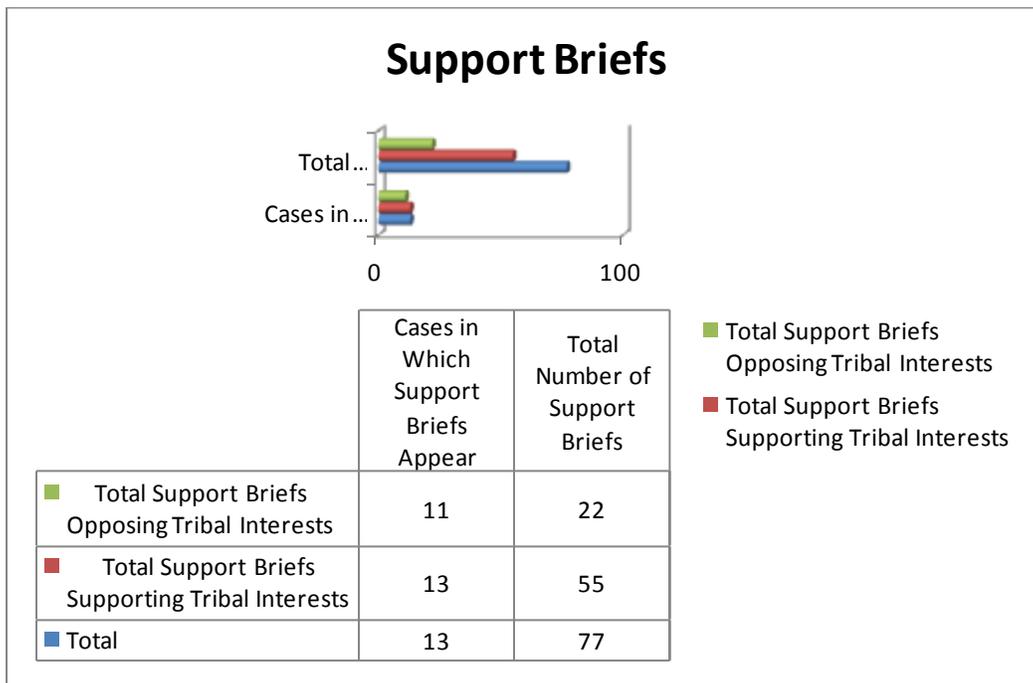
<sup>35</sup> 544 U.S. 197 (2005).

to tax immunity in their on-reservation fee lands was foreclosed by equitable defenses such as laches. This chart details the number of cases in which an alternative merits argument brief appeared, and how many of these briefs appeared overall.



**C. Support Briefs**

By far the largest category includes amicus briefs that supported, enhanced, or reiterated the merits arguments of the parties. Again, I counted amicus briefs that devoted a substantial portion of the brief, a part or section, to arguing the merits. Support briefs in Indian law cases that enhanced the parties’ merits arguments often included additional information about the history of a particular tribe or group of similar tribes, or information about a class of treaties or federal statutes dealing with similar questions. I include these history briefs as support briefs, but set them aside for further discussion as well. Examples of support briefs include the briefs filed by law professors or historians specializing in American Indian law in *Carcieri v. Salazar*.<sup>36</sup> These briefs delved into the history of the Indian Reorganization Act. Of note, there is a stark divide here, more so than in the other categories, of the sheer number of support briefs supporting tribal interests—there are two-and-a-half times more support briefs in favor of tribal interests than opposed.



<sup>36</sup> 555 U.S. 379 (2009).

### III. GOALS OF SUPREME COURT AMICUS BRIEFS

The goals of a Supreme Court amicus brief vary widely. “At one extreme is the brief, filed . . . for a particular outcome, that contains no legal analysis and a scanty, one-sided policy argument. At the other extreme is the brief, filed by an expert that is far superior to anything filed by either of the parties.”<sup>37</sup> Within this spectrum are amicus briefs that are more effective in persuading the Court than others. For example, an amicus can “demonstrate and emphasize areas of importance or conflict that are outside the expertise of the parties.”<sup>38</sup> Robert Stern and Eugene Gressman argue that important national organizations have a better view of the big picture: “For example, an international union or the AFL-CIO may be able to visualize and stress the importance of a particular labor law question to the national labor movement far better than the local union and the small company that are parties to the controversy.”<sup>39</sup> The best amicus briefs have critical impacts on the decisions reached by the Court, as veteran Supreme Court litigator Bruce Ennis once wrote:

Occasionally, a case will be decided on a ground suggested only by an amicus, not by the parties. Frequently, judicial rulings, and thus their precedential value, will be narrower or broader than the parties had urged, because of a persuasive amicus brief. Courts often rely on factual information, cases or analytical approaches provided only by an amicus. A good idea is a good idea, whether it is contained in an amicus brief or in the brief of a party.<sup>40</sup>

---

<sup>37</sup> SUSAN LOW BLOCH, VICKI C. JACKSON & THOMAS G. KRATTENMAKER, *INSIDE THE SUPREME COURT: THE INSTITUTION AND ITS PROCEDURES* 931-32 (2008).

<sup>38</sup> ROBERT L. STERN & EUGENE GRESSMAN, *SUPREME COURT PRACTICE* 497 (1978) (footnote omitted).

<sup>39</sup> *Id.* at 497 n. 103.

<sup>40</sup> Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 603 (1984).

One could easily analogize this purpose to how modern tribal organizations and their sometimes-adversaries (such as, state and local governments) utilize amicus briefs in Supreme Court litigation.<sup>41</sup>

Occasionally, amicus briefs can be harmful by wasting the Court's time, by being duplicative, or by undermining the strategy of the party the amicus is trying to support; as veteran Supreme Court litigator Doug Laycock wrote:

Alternatively amicus briefs can be a waste of time; they can even do affirmative harm to the cause they are trying to support. If there are too many amicus briefs, the important ones that the party needs the Court to read may get lost in the clutter. Worse, unrestrained amicus briefs may aggressively argue for applications and extensions of the party's argument that the party is trying to avoid or disclaim. Occasionally, an amicus brief may disclose bad facts that are not in the record.<sup>42</sup>

In my view, the best amicus briefs in Indian law cases offer some specialized and useful bits of information to the Supreme Court, information not otherwise available. Some social science researchers agree that non-parties file amicus briefs as a means of providing the Supreme Court with information important to the Court's decision-making process: "Since litigants are more likely to be narrowly focused on the case outcome, the broader policy implications of the decision may not be discussed in their briefs. In contrast, amicus briefs may provide this information and help the Court's members understand the policy

---

<sup>41</sup> For example, in *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008), the Cheyenne River Sioux Tribe as amicus provided the Supreme Court with detailed descriptions and explanations of the inner workings of the Cheyenne River Sioux Tribal Court. See Brief for Amicus Curiae Cheyenne River Sioux Tribe in Support of Respondents, *Plains Commerce Bank*, 554 U.S. 316 (2008) (No. 07-411), 2008 WL 782553.

<sup>42</sup> Douglas Laycock, *Persuasion in Hot-Button Cases*, in *PERSUASION AND IDEOLOGY: POLITICALLY DIVISIVE CASES IN APPELLATE COURTS*, 7TH ANNUAL MSU INDIGENOUS LAW CONFERENCE MATERIALS 19, 42 (2010) (available through the author).

implications of their rulings.”<sup>43</sup> In Indian law, an area of federal common law, where the Supreme Court’s policymaking and legislative functions are in play, policy-oriented amicus briefs are very relevant. One survey of former Supreme Court clerks strongly suggests that amicus briefs offering information expanding upon the positions of the parties are very helpful.<sup>44</sup>

A note about historical information and Indian law—as Bruce Ennis wrote: “[T]he amicus can support points the party is making by providing a detailed legislative or constitutional history [or] a scholarly exposition of the common law. . . .”<sup>45</sup> There should be no question that the Supreme Court benefits from amicus briefs in this vein, given that federal Indian law is replete with nigh-ancient common law doctrines and labyrinthine statutory schemes. Several amici offered detailed expositions of historical information in these cases; and, unlike the other subcategories here, these briefs likely had influence on the Supreme Court by providing clear and cogent historical support, even if the Court did not cite these briefs directly.

#### IV. IMPACT OF AMICUS BRIEFS IN INDIAN LAW CASES

Here, I selectively review amicus briefs in several cases, providing prototypical examples of each of the categories of amicus briefs I have identified. I will focus on a small sampling of cases whose issues tended to be based in federal common law and therefore had policy questions for the Court to decide; or had broader policy implications beyond Indian law; or otherwise were more likely to have included amicus briefs that likely had some influence on the Court’s decision. Those cases are (in reverse chronological order): *Adoptive Couple v. Baby Girl* (2013),<sup>46</sup> *United States*

---

<sup>43</sup> James F. Spriggs & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RES. Q. 365, 367 (1997) (citations omitted).

<sup>44</sup> See Lynch, *supra* note 15, at 41; Kelly J. Lynch, *Best Friends?: Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J. L. & POL. 33, 41 (2004) (“The majority of clerks (56 percent) explained that amicus briefs were most helpful in cases involving highly technical and specialized areas of law, as well as complex statutory and regulatory cases . . . [N]oteworthy areas of law included: railroad preemption, water rights, marine labor, immigration and *Native American law*.”) (emphasis added).

<sup>45</sup> Ennis, *supra* note 40, at 606.

<sup>46</sup> 133 S. Ct. 2552 (2013).

*v. Jicarilla Apache Nation* (2012),<sup>47</sup> *Carcieri v. Salazar* (2009),<sup>48</sup> *City of Sherrill v. Oneida Indian Nation* (2005),<sup>49</sup> *Cherokee Nation v. Leavitt* (2005),<sup>50</sup> *United States v. Lara* (2004),<sup>51</sup> *Kiowa Tribe v. Manufacturing Technologies* (1998),<sup>52</sup> *South Dakota v. Yankton Sioux Tribe* (1998),<sup>53</sup> *Strate v. A-1 Contractors* (1997),<sup>54</sup> *Seminole Tribe v. Florida* (1996),<sup>55</sup> *Duro v. Reina* (1990),<sup>56</sup> *Cotton Petroleum v. New Mexico* (1989),<sup>57</sup> and *California v. Cabazon Band of Mission Indians* (1987).<sup>58</sup> Tribal interests prevailed in four of these 13 cases,<sup>59</sup> a figure consistent with the 20-25 percent win rate for tribal interests during this period.

It is not easy to measure in any meaningful way the impact or influence that an amicus brief might have on the Supreme Court's decision-making. A Supreme Court decision relying heavily on an amicus brief might cite or quote from the amicus brief. Or an amicus brief might have influence by being part of the Court's decision, even where the Court rejects the thrust of the amici's argument. The Court simply might not even cite to an amicus brief, leaving amici to wonder if, or at all, their brief had any impact. In this Part, the article addresses instances where the Court cites to amicus briefs, and categorizes the citations by significance.

---

<sup>47</sup> 131 S. Ct. 2313 (2011).

<sup>48</sup> 555 U.S. 379 (2009).

<sup>49</sup> 544 U.S. 197 (2005).

<sup>50</sup> 543 U.S. 631 (2005).

<sup>51</sup> 541 U.S. 193 (2004).

<sup>52</sup> 523 U.S. 751 (1998).

<sup>53</sup> 522 U.S. 329 (1998).

<sup>54</sup> 520 U.S. 438 (1997).

<sup>55</sup> 517 U.S. 44 (1996).

<sup>56</sup> 495 U.S. 676 (1990).

<sup>57</sup> 490 U.S. 163 (1989).

<sup>58</sup> 480 U.S. 202 (1987).

<sup>59</sup> See *Cherokee Nation v. Leavitt*, 543 U.S. 631(2005); *United States v. Lara*, 541 U.S. 193 (2004); *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751(1998); and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

### ***A. Significant Discussion of Arguments or Information Raised in Amicus Briefs***

I cherry-picked these 13 cases because in many of these opinions the Court has reviewed amicus briefs and made conclusions based on those briefs. I will start with opinions in which the Court actually discussed arguments or information raised in amicus briefs, as the Court did in eight of the 13 cases. I will categorize each discussion as (1) adoption or (2) rejection.

#### ***1. Adoption***

In a small number of cases (I count two), the Supreme Court cited amicus briefs favorably. I put these cases in the category of “adoption,” in that the Court may have adopted an argument presented by the amicus, or at least utilized the argument presented by the amicus to develop its holding or shape its reasoning.

##### ***a. Cherokee Nation v. Leavitt***

In *Cherokee Nation v. Leavitt*,<sup>60</sup> the Supreme Court agreed with the tribal interests and their amici, most notably the United States Chamber of Commerce, that the federal government owed contract support costs to government contracts even where Congress had not expressly appropriated funds for that purpose. The Court’s opinion cited tribal interest amici favorably here, although it referenced the parties’ merits arguments first.<sup>61</sup> Regardless, here the Supreme Court adopted the

---

<sup>60</sup> 543 U.S. 631 (2005).

<sup>61</sup> The Court wrote:

*The Tribes (and their amici) add, first, that this Court has said that “a fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency.”*

reasoning of the amici that federal statutes authorizing government contracting generally require government payment for services, even where Congress' appropriations are insufficient to pay all costs.

**b. United States v. Lara**

In *United States v. Lara*,<sup>62</sup> the Supreme Court held that Congress has authority to recognize tribal inherent authority to prosecute nonmember Indians. In two instances (one more important than the other), the Court cited to amici supporting tribal interests. First, the Court cited to an amici in relation to particular facts of the case.<sup>63</sup> In the second instance, Justice Thomas in his concurrence, cited to an amici supporting tribal interests that offered supporting authorities on a point he wished to raise in opposition to tribal interests.<sup>64</sup>

---

*The Tribes and their amici add, second, that as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on grounds of "insufficient appropriations," even if the contract uses language such as "subject to the availability of appropriations," and even if an agency's total lump-sum appropriation is insufficient to pay all the contracts the agency has made.*

As we have said, the Government denies none of this. Thus, if it is nonetheless to demonstrate that its promises were not legally binding, it must show something special about the promises here at issue. That is precisely what the Government here tries, but fails, to do.

*Id.* at 637-38 (emphasis added) [citations omitted].

<sup>62</sup> 541 U.S. 193 (2004).

<sup>63</sup> The Court wrote:

Respondent Billy Jo Lara is an enrolled member of the Turtle Mountain Band of Chippewa Indians in north-central North Dakota. *He married a member of a different tribe, the Spirit Lake Tribe, and lived with his wife and children on the Spirit Lake Reservation, also located in North Dakota. See Brief for Spirit Lake Sioux Tribe of North Dakota et al. as Amici Curiae 4-5.* After several incidents of serious misconduct, the Spirit Lake Tribe issued an order excluding him from the reservation. Lara ignored the order; federal officers stopped him; and he struck one of the arresting officers.

*Id.* at 196 (emphasis added) [citation omitted].

<sup>64</sup> Justice Thomas wrote:

*It does not appear that the President has any control over tribal officials, let alone a substantial measure of the appointment and removal power. Cf. Brief for National Congress of American Indians as Amicus Curiae*

These citations are less important than the citations in *Cherokee Nation*. The first citation is to the facts, otherwise not noteworthy, but it still shows that the Court digested the brief of the Spirit Lake Sioux Tribe to some extent. The second citation, coming as it does in a concurring opinion, is less important still, but the fact that Justice Thomas relied upon the amicus brief of the National Congress of American Indians to demonstrate his agreement with the amicus is very important, even if he would use the arguments in the brief to potentially undercut the amici's position.

## 2. Rejection

In another sampling of cases, which I place in a category called "rejection," the Supreme Court addresses but ultimately rejects the arguments raised by amici. Rejected amicus arguments remain influential, as some of the following discussions demonstrate, because the Court believed they were important enough to address. Moreover, these rejected arguments of amici can be helpful in limiting the damage to the amici's interests.

In *Adoptive Couple v. Baby Girl*,<sup>65</sup> the Supreme Court held that the Indian Child Welfare Act did not apply to the adoption of an Indian child where the Indian parent objecting to the adoption did not have custody. The majority opinion briefly touched upon—and disapproved of—a representation by the United States as amicus curiae,<sup>66</sup> and the dissent directly rejected an aspect of the United States' legal position.

---

27-29. Thus, at least until we are prepared to recognize absolutely independent agencies entirely outside of the Executive Branch with the power to bind the Executive Branch (for a tribal prosecution would then bar a subsequent federal prosecution), the tribes cannot be analogized to administrative agencies, as the dissent suggests. That is, reading the "Duro fix" as a delegation of federal power (without also divining some adequate method of Presidential control) would create grave constitutional difficulties. Accordingly, the Court has only two options:

Either the "Duro fix" changed the result in *Duro* or it did nothing at all.

*Id.* at 216 (Thomas, J., concurring in judgment) (emphasis added) [citations omitted].

<sup>65</sup> 133 S. Ct. 2552 (2013).

<sup>66</sup> The Court wrote:

**a. United States v. Jicarilla**

In *United States v. Jicarilla Apache Nation*,<sup>67</sup> the Supreme Court ruled that the federal government's trust obligations to Indians and Indian tribes differ from a standard common law trust on the question of whether the government as trustee must turn over attorney-client privileged material to the tribal beneficiary. The Court held the government's trust obligations do not require that action. The Court directly addressed and rejected the arguments made by the amici supporting the tribe.<sup>68</sup>

**b. Carcieri v. Salazar**

In *Carcieri v. Salazar*,<sup>69</sup> the Court held that the Secretary of Interior's authority to acquire land in trust for Indian tribes did not extend to trust acquisitions for tribes not "under federal jurisdiction" in 1934, when

---

Biological Father and the Solicitor General argue that a tribe or state agency could provide the requisite remedial services under § 1912(d). Brief for Respondent Birth Father 43; Brief for United States as Amicus Curiae 22. *But what if they don't? And if they don't, would the adoptive parents have to undertake the task?*

*Id.* at 2564 n. 9 (emphasis added).

<sup>67</sup> 131 S. Ct. 2313 (2011).

<sup>68</sup> The Court wrote:

*We cannot agree with the Tribe and its amici that "[t]he government and its officials who obtained the advice have no stake in [the] substance of the advice, beyond their trustee role," Brief for Respondent 9, or that "the United States' interests in trust administration were identical to the interests of the tribal trust fund beneficiaries," Brief for National Congress of American Indians et al. as Amici Curiae 5.* The United States has a sovereign interest in the administration of Indian trusts distinct from the private interests of those who may benefit from its administration. Courts apply the fiduciary exception on the ground that "management does not manage for itself." [citations omitted] But the Government is never in that position. While one purpose of the Indian trust relationship is to benefit the tribes, the Government has its own independent interest in the implementation of federal Indian policy. For that reason, when the Government seeks legal advice related to the administration of tribal trusts, it establishes an attorney-client relationship related to its sovereign interest in the execution of federal law. In other words, the Government seeks legal advice in a "personal" rather than a fiduciary capacity.

*Id.* at 2327-28 (emphasis added) [citations omitted].

<sup>69</sup> 555 U.S. 379 (2009).

Congress enacted the Indian Reorganization Act.<sup>70</sup> The Court thus invalidated the Secretary's trust acquisition of land for the benefit of the Narragansett Indian Tribe of Rhode Island, which the Court appeared to hold was under state jurisdiction in 1934.<sup>71</sup> The Court expressly rejected numerous arguments by the amici favoring tribal interests (also, here, the interests of the United States).<sup>72</sup>

---

<sup>70</sup> See *id.* at 395-96 (interpreting 25 U.S.C. § 479 (2012)).

<sup>71</sup> See *id.* at 395.

<sup>72</sup> The Court wrote:

*The Secretary and his amici also go beyond the statutory text to argue that Congress had no policy justification for limiting the Secretary's trust authority to those tribes under federal jurisdiction in 1934, because the IRA was intended to strengthen Indian communities as a whole, regardless of their status in 1934. Petitioners counter that the main purpose of § 465 was to reverse the loss of lands that Indians sustained under the General Allotment Act. . . so the statute was limited to tribes under federal jurisdiction at that time because they were the tribes who lost their lands. We need not consider these competing policy views, because Congress' use of the word "now" in § 479 speaks for itself and "courts must presume that a legislature says in a statute what it means and means in a statute what it says there."*

\*\*\*

*The Secretary and his supporting amici also offer two alternative arguments that rely on statutory provisions other than the definition of "Indian" in § 479 to support the Secretary's decision to take this parcel into trust for the Narragansett Tribe. We reject both arguments.*

*First, the Secretary and several amici argue that the definition of "Indian" in § 479 is rendered irrelevant by the broader definition of "tribe" in § 479 and by the fact that the statute authorizes the Secretary to take title to lands "in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." § 465 (emphasis added); Brief for Respondents 12-14. But the definition of "tribe" in § 479 itself refers to "any Indian tribe" (emphasis added), and therefore is limited by the temporal restrictions that apply to § 479's definition of "Indian." See § 479 ("The term 'tribe' wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation" (emphasis added)). And, although § 465 authorizes the United States to take land in trust for an Indian tribe, § 465 limits the Secretary's exercise of that authority "for the purpose of providing land for Indians." There simply is no legitimate way to circumvent the definition of "Indian" in delineating the Secretary's authority under §§ 465 and 479.*

The vote tally in *Carcieri* was 8-1 against the interests of the amici, but the real action in the majority, concurring, and dissenting opinions involved the scope of the decision. Justice Thomas, it appears, was forced to address arguments advanced by amici in his majority opinion, demonstrating (if

---

*Second, amicus National Congress of American Indians (NCAI) argues that 25 U.S.C. § 2202, which was enacted as part of the Indian Land Consolidation Act (ILCA), Title II, 96 Stat. 2517, overcomes the limitations set forth in § 479 and, in turn, authorizes the Secretary's action. Section 2202 provides:*

“The provisions of section 465 of this title shall apply to all tribes notwithstanding the provisions of section 478 of this title: Provided, That nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s).” (alteration in original.)

*NCAI argues that the “ILCA independently grants authority under Section 465 for the Secretary to execute the challenged trust acquisition.” NCAI Brief 8. We do not agree.*

The plain language of § 2202 does not expand the power set forth in § 465, which requires that the Secretary take land into trust only “for the purpose of providing land for Indians.” Nor does § 2202 alter the definition of “Indian” in § 479, which is limited to members of tribes that were under federal jurisdiction in 1934. [citations omitted] Rather, § 2202 by its terms simply ensures that tribes may benefit from § 465 even if they opted out of the IRA pursuant to § 478, which allowed tribal members to reject the application of the IRA to their tribe. § 478 (“This Act shall not apply to any reservation wherein a majority of the adult Indians. . . shall vote against its application”). As a result, there is no conflict between § 2202 and the limitation on the Secretary’s authority to take lands contained in § 465. Rather, § 2202 provides additional protections to those who satisfied the definition of “Indian” in § 479 at the time of the statute’s enactment, but opted out of the IRA shortly thereafter.

*NCAI’s reading of § 2202 also would nullify the plain meaning of the definition of “Indian” set forth in § 479 and incorporated into § 465. Consistent with our obligation to give effect to every provision of the statute. . . we will not assume that Congress repealed the plain and unambiguous restrictions on the Secretary’s exercise of trust authority in §§ 465 and 479 when it enacted § 2202. “We have repeatedly stated. . . that absent ‘a clearly expressed congressional intention,’ . . . [a]n implied repeal will only be found where provisions in two statutes are in ‘irreconcilable conflict,’ or where the latter Act covers the whole subject of the earlier one and ‘is clearly intended as a substitute.’”*

*Carcieri v. Salazar*, 555 U.S. at 392-95 (emphasis added) [citations omitted].

nothing else) that perhaps the case was closer than the 8-1 vote tally showed. Notably, Justice Breyer's concurrence and Justice Stevens' dissent both cited to amici as means of limiting the reach of the Court's opinion.<sup>73</sup> Similarly, but in dissent, Justice Stevens, relying on an amicus brief filed by one of the amici below, wrote to limit the breadth of the majority opinion.<sup>74</sup>

We now know that it is clear the opinions of Justices Breyer and Stevens portend the future of litigation in this area. There are numerous post-*Carcieri* cases pending, almost all of them involving heavy litigation

---

<sup>73</sup> Justice Breyer noted:

Third, an interpretation that reads "now" as meaning "in 1934" may prove somewhat less restrictive than it at first appears. That is because a tribe may have been "under Federal jurisdiction" in 1934 even though the Federal Government did not believe so at the time. *We know, for example, that following the Indian Reorganization Act's enactment, the Department compiled a list of 258 tribes covered by the Act; and we also know that it wrongly left certain tribes off the list. See Brief for Law Professors Specializing in Federal Indian Law as Amicus Curiae 22–24; Quinn, Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept, 34 Am. J. Legal Hist. 331, 356–359 (1990).* The Department later recognized some of those tribes on grounds that showed that it should have recognized them in 1934 even though it did not. And the Department has sometimes considered that circumstance sufficient to show that a tribe was "under Federal jurisdiction" in 1934—even though the Department did not know it at the time.

*Id.* at 397-98 (Breyer, J., concurring) (emphasis added).

<sup>74</sup> He wrote:

Although Congress has passed specific statutes granting the Secretary authority to take land into trust for certain tribes, it would be a mistake to conclude that the Secretary lacks residual authority to take land into trust under § 5 of the IRA, 25 U.S.C. § 465. Some of these statutes place explicit limits on the Secretary's trust authority and can be properly read as establishing the outer limit of the Secretary's trust authority with respect to the specified tribes. [citations omitted] Other statutes, while identifying certain parcels the Secretary will take into trust for a tribe, do not purport to diminish the Secretary's residual authority under § 465. *Indeed, the Secretary has invoked his § 465 authority to take additional land into trust for the Miccosukee Tribe despite the existence of a statute authorizing and directing him to acquire certain land for the Tribe. See Post-Argument En Banc Brief for National Congress of American Indians et al. as Amici Curiae 7 and App. 9 in No. 03–2647(CA1).*

*Id.* at 407 n. 7 (Stevens, J., dissenting) (emphasis added) [citations omitted].

over the extent of the *Carcieri* holding and focusing on these opinions.<sup>75</sup> The amici may have, if the post-*Carcieri* cases ultimately favor tribal interests, staved off disastrous outcomes for tribal interests by providing a guiding light to the concurring and dissenting Justices.

Although the *Carcieri* amicus briefs supporting tribal interests did not persuade a majority of the Court, in overall terms the briefs may have been as successful as any in that they offered sufficient support to the concurrence and dissent to limit the import of the decision. Ultimately, as a result of this effort, it may be that the only tribe foreclosed from eligibility to utilize Section 5 by *Carcieri* is the Narragansett Tribe.

### c. **Strate v. A-1 Contractors**

In *Strate v. A-1 Contractors*,<sup>76</sup> the Supreme Court held that tribal courts did not have civil adjudicatory jurisdiction over a tort claim brought by a nonmember against a nonmember involving an accident arising on a state-controlled highway on the reservation. The Court rejected an effort by amici to persuade it to read one of its precedents in a manner supportive of tribal interests.<sup>77</sup>

---

<sup>75</sup> *E.g.*, *Stand Up for California! v. Dept. of the Interior*, 919 F. Supp.2d 51 (D. D.C. 2013); *First Amended Complaint for Declaratory & Injunctive Relief, County of Amador v. Dept. of Interior*, No. 2:12-cv-01710-JAM, 2012 WL 4364462 (E.D. Cal., Sept. 20, 2012); *Defendants' Opposition to the Motion for Temporary Restraining Order by Citizens for a Better Way, United Auburn Indian Community of the Auburn Rancheria v. Dept. of Interior*, No. 2:13-CV-00064 JAM-AC, 2013 WL 373417 (E.D. Cal., Jan. 23, 2013); *Wilton Miwok Rancheria v. Salazar*, Nos. C 07-05706 JF (PVT) & C 07-2681 JF (PVT), 2010 WL 1397185 (N.D. Cal., Feb 2, 2010); *Complaint for Declaratory and Injunctive Relief, No Casino in Plymouth v. Salazar*, No. 2:12CV01748, 2012 WL 5127077 (E.D. Cal., June 29, 2012); *Cherokee Nation v. Salazar*, No. 12CV-493 GKF TLW, 2012 WL 3964965 (N.D. Okla., Aug. 29, 2012).

<sup>76</sup> 520 U.S. 438 (1997).

<sup>77</sup> The Court wrote:

*Petitioners and the United States as amicus curiae urge that Montana does not control this case. They maintain that the guiding precedents are National Farmers and Iowa Mutual, and that those decisions establish a rule converse to Montana's. Whatever Montana may instruct regarding regulatory authority, they insist, tribal courts retain adjudicatory authority in disputes over occurrences inside a reservation, even when the episode-in-suit involves nonmembers, unless a treaty or federal statute directs otherwise. Petitioners, further supported by the United States,*

The amici favoring tribal interests here provided an alternate argument on the question—that the precedent which the parties believed to be controlling was not the correct precedent, which at the time was at least partially an open question. The Court, it appears, used the arguments advanced by the amici as an opportunity to shut down that line of argument as an avenue for future litigation. In this respect, the amici's arguments backfired (although it can only be said to be true in hindsight, and amici could not possibly be criticized for raising the argument).

As noted in the introduction, *Strate* was the case in which a railroad asserted, in an amicus brief, that tribal courts in general were unfair to nonmember litigants, an assertion based on its experiences in litigating before the Crow Tribal Court. While the Court did not cite to this amicus, Justice O'Connor's questioning of the attorney for the United States strongly suggested that the Court took very seriously the allegations contained in the brief, and even may have believed that the structural basis for the allegation (the racial basis of tribal membership) may be endemic to tribal justice systems beyond the Crow Reservation.

The amici favoring tribal interests had no opportunity to respond to the allegations made in the railroad brief, as the tribal party was the petitioner, meaning the merits and amici briefs supporting the tribal interests came first. Amici do not file reply briefs and the parties usually do

---

argue, alternately, that *Montana* does not cover lands owned by, or held in trust for, a tribe or its members. *Montana* holds sway, petitioners say, only with respect to alienated reservation land owned in fee simple by non-Indians. We address these arguments in turn.

\*\*\*

*We consider next the argument that Montana does not govern this case because the land underlying the scene of the accident is held in trust for the Three Affiliated Tribes and their members. Petitioners and the United States point out that in Montana, as in later cases following Montana's instruction. . .the challenged tribal authority related to nonmember activity on alienated, non-Indian reservation land. We "can readily agree," in accord with Montana, [citation] that tribes retain considerable control over nonmember conduct on tribal land. On the particular matter before us, however, we agree with respondents: The right-of-way North Dakota acquired for the state's highway renders the 6.59-mile stretch equivalent, for nonmember governance purposes, to alienated, non-Indian land.*

*Id.* at 447-48, 454 (emphasis added) [citations omitted].

not want to highlight bad facts in opposing amicus briefs by responding to them. In fact, responses to the due process concerns expressed in the railroad brief didn't appear until more than a decade later in the United States' and other tribal amici's briefs in *Plains Commerce Bank v. Long Family Land and Cattle Co.*<sup>78</sup>

**d. Duro v. Reina**

In *Duro v. Reina*,<sup>79</sup> the Supreme Court held that Indian tribes have no inherent criminal jurisdiction authority over nonmember Indians, an outcome later reversed by Congress in the "Duro fix" legislation affirmed by the Court in *Lara*. In a passage concerning the merits of extending prior precedents, the Court rejected efforts by amici to distinguish an earlier case.<sup>80</sup> In a second passage, the Court rejected a claim by amici that the

---

<sup>78</sup> 554 U.S. 316 (2008). See generally Frank Pommersheim, *Amicus Briefs in Indian Law: The Case of Plains Commerce Bank v. Long Family Land and Cattle Co.*, 56 S.D. L. REV. 86 (2011).

<sup>79</sup> 495 U.S. 676 (1990).

<sup>80</sup> The Court wrote:

We think the rationale of our decisions in *Oliphant* and *Wheeler*, as well as subsequent cases, compels the conclusion that Indian tribes lack jurisdiction over persons who are not tribe members. Our discussion of tribal sovereignty in *Wheeler* bears most directly on this case. We were consistent in describing retained tribal sovereignty over the defendant in terms of a tribe's power over its members. Indeed, our opinion in *Wheeler* stated that the tribes 'cannot try nonmembers in tribal courts.' 435 U.S., at 326, 98 S. Ct., at 1087-88. Literal application of that statement to these facts would bring this case to an end. *Yet respondents and amici, including the United States, argue forcefully that this statement in Wheeler cannot be taken as a statement of the law, for the party before the Court in Wheeler was a member of the Tribe.*

It is true that *Wheeler* presented no occasion for a holding on the present facts. But the double jeopardy question in *Wheeler* demanded an examination of the nature of retained tribal power. We held that jurisdiction over a Navajo defendant by a Navajo court was part of retained tribal sovereignty, not a delegation of authority from the Federal Government. It followed that a federal prosecution of the same offense after a tribal conviction did not involve two prosecutions by the same sovereign, and therefore did not violate the Double Jeopardy Clause. Our analysis of tribal power was directed to the tribes' status as limited sovereigns, necessarily subject to the overriding authority of the United States, yet retaining necessary powers of internal self-governance. We

history of tribal government compelled a different result.<sup>81</sup> In a third passage, the Court rejected a claim by amici that the nonmember Indian had consented to tribal jurisdiction in accordance with tribal cultural understandings.<sup>82</sup> In a final passage, the Court recognized a policy argument by amici supporting tribal interests which alleged that eliminating the tribal authority would create adverse policy implications on Indian

---

recognized that the ‘sovereignty that the Indian tribes retain is of a unique and limited character.’

*Id.* at 685 (emphasis added) [citations omitted].

<sup>81</sup> The Court wrote:

*Respondents and amici argue that a review of history requires the assertion of jurisdiction here. We disagree. The historical record in this case is somewhat less illuminating than in Oliphant, but tends to support the conclusion we reach. Early evidence concerning tribal jurisdiction over nonmembers is lacking because ‘[u]ntil the middle of this century, few Indian tribes maintained any semblance of a formal court system. Offenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes; emphasis was on restitution rather than punishment.’ Cases challenging the jurisdiction of modern tribal courts are few, perhaps because ‘most parties acquiesce to tribal jurisdiction’ where it is asserted. We have no occasion in this case to address the effect of a formal acquiescence to tribal jurisdiction that might be made, for example, in return for a tribe’s agreement not to exercise its power to exclude an offender from tribal lands. . .*

*Id.* at 688-89 (emphasis added) [citations omitted].

<sup>82</sup> The Court wrote:

*The United States suggests that Pima-Maricopa tribal jurisdiction is appropriate because petitioner’s enrollment in the Torres-Martinez Band of Cahuilla Mission Indians “is a sufficient indication of his self-identification as an Indian, with traditional Indian cultural values, to make it reasonable to subject him to the tribal court system, which. . . implements traditional Indian values and customs.” Brief for United States as Amicus Curiae 27. But the tribes are not mere fungible groups of homogenous persons among whom any Indian would feel at home. On the contrary, wide variations in customs, art, language, and physical characteristics separate the tribes, and their history has been marked by both intertribal alliances and animosities. Petitioner’s general status as an Indian says little about his consent to the exercise of authority over him by a particular tribe.*

*Id.* at 695 (emphasis added) [citations omitted].

country law enforcement. The Court declined to address this question, later suggesting Congress was the proper venue.<sup>83</sup>

The amicus briefs in *Duro*, filed by amici supporting the tribal interests, were heavily policy-oriented. One key argument from amici that Justice Kennedy largely declined to address, although he acknowledged, involved the jurisdictional gray area that the outcome in *Duro* could create—if tribes didn't have jurisdiction over the nonmember Indians within their territories, then it was unclear whether state or federal authorities would or could replace the tribal first responders. After the *Duro* Court told the tribal interests to take their policy concerns to Congress, they did and a short while later Congress enacted what became known as the “Duro fix.”<sup>84</sup>

---

<sup>83</sup> The Court wrote:

*Respondents and amici contend that without tribal jurisdiction over minor offenses committed by nonmember Indians, no authority will have jurisdiction over such offenders. They assert that unless we affirm jurisdiction in this case, the tribes will lack important power to preserve order on the reservation, and nonmember Indians will be able to violate the law with impunity. Although the jurisdiction at stake here is over relatively minor crimes, we recognize that protection of the community from disturbances of the peace and other misdemeanors is a most serious matter. But this same interest in tribal law enforcement is applicable to non-Indian reservation residents, whose numbers are often greater. It was argued in *Oliphant* that the absence of tribal jurisdiction over non-Indians would leave a practical, if not legal, void in reservation law enforcement. The argument that only tribal jurisdiction could meet the need for effective law enforcement did not provide a basis for finding jurisdiction in *Oliphant*; neither is it sufficient here.*

\*\*\*

If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs. We cannot, however, accept these arguments of policy as a basis for finding tribal jurisdiction that is inconsistent with precedent, history, and the equal treatment of Native American citizens.

*Id.*, at 696, 698 (emphasis added) [citations omitted].

<sup>84</sup> See Means v. District Court of the Chinle Judicial District, 2 Am. Tribal L. 439, 442 (Navajo Nation Supreme Court 1999) (discussing and describing the “Duro fix,” codified at 25 U.S.C. § 1301(2)(2102)); United States v. Lara, 541 U.S. 193, 215-16 (2004) (same). See also Alex Tallchief Skibine, *United States v. Lara, Indian Tribes, and the Dialectic of Incorporation*, 40 TULSA L. REV. 47, 51-53 (2004) (discussing *Lara* and the Duro fix).

**e. United States v. New Mexico**

In *Cotton Petroleum v. New Mexico*,<sup>85</sup> the Supreme Court revised its federal Indian law preemption doctrine and recognized an actionable state interest in taxing on-reservation business activities by nonmembers. Importantly, the parties to the case—a non-Indian-owned corporate resource extraction company and a state—were entirely non-Indian. The tribe in interest, the Jicarilla Apache Nation, did not participate as a party, but instead as an amicus. The tribal interests prior to *Cotton Petroleum* were important to the preemption analysis (although not as important as the federal interest), but since the tribe was not a party, there was no evidence presented to show the impact on the tribal interests by the state taxation scheme.

The Court did address, and agree with, the arguments raised by tribal amici that tribes should be treated as states under the Commerce Clause for tax apportionment purposes.<sup>86</sup> Many of the non-tribal amici (mostly the oil and gas companies) argued that the taxes should be apportioned. The tribal amici apparently pursued an all-or-nothing strategy when it came to whether or not the taxes should be apportioned, and therefore received nothing.

---

<sup>85</sup> 490 U.S. 163 (1989).

<sup>86</sup> The Court wrote:

*In our order noting probable jurisdiction we invited the parties to address the question whether the Tribe should be treated as a state for the purpose of determining whether New Mexico's taxes must be apportioned. All of the Indian tribes that have filed amicus curiae briefs addressing this question, including the Jicarilla Apache Tribe, have uniformly taken the position that Indian tribes are not states within the meaning of the Commerce Clause. This position is supported by the text of the Clause itself. Article I, § 8, cl. 3, provides that the 'Congress shall have Power. . . To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.' Thus, the Commerce Clause draws a clear distinction between "States" and "Indian Tribes." As Chief Justice Marshall observed in Cherokee Nation v. Georgia . . . : 'The objects to which the power of regulating commerce might be directed, are divided into three distinct classes-foreign nations, the several states, and Indian Tribes. When forming this article, the convention considered them as entirely distinct.' In fact, the language of the Clause no more admits of treating Indian tribes as states than of treating foreign nations as states.*

*Id.* at 191-92 (emphasis added) [citations omitted].

The Jicarilla Apache Nation, as the tribe in interest, did not brief the merits of the preemption claim, which would have allowed the Nation to articulate to the Court its sovereign interests in the state taxation scheme. But the Court ruled on the tribe's sovereign interests anyway, noting that the Nation had briefed the merits below.<sup>87</sup> The Court also noted that the sheer number of amicus briefs filed by the non-Indian-owned oil and gas companies was evidence, in its view, that the major impact of the state's taxation scheme was on them, not the tribe.<sup>88</sup>

While the Court rejected the Jicarilla Apache Nation's claims that the State of New Mexico's taxation expenditures inside the Jicarilla reservation did not justify the state's taxation, Justice Blackmun in dissent relied heavily on the Nation's amicus brief on this point.<sup>89</sup>

---

<sup>87</sup> The Court wrote:

Although Cotton did not press the pre-emption argument as an independent claim before the New Mexico Court of Appeals, we conclude that the issue is properly before us. *Cotton did rely on our pre-emption cases at least as a "backdrop" for its multiple taxation claim. In addition, the pre-emption claim was fully briefed before the Court of Appeals by the Tribe in its status as an amicus curiae.* And finally, the pre-emption claim was carefully considered and passed upon by the Court of Appeals.

*Id.* at 176 n. 11 (emphasis added).

<sup>88</sup> The Court wrote:

*It is important to keep in mind that the primary burden of the state taxation falls on the non-Indian taxpayers. Amicus curiae briefs supporting the position of Cotton in this case have been filed by New Mexico Oil & Gas Association, Texaco Inc., Chevron U.S.A. Inc., Union Oil Company of California, Phillips Petroleum Company, Wilshire Oil Company of Texas, Exxon Corporation, Mobil Exploration and Producing North America Inc., Anadarko Petroleum Corporation, Southland Royalty Company, and Marathon Oil Company.*

*Id.* at 187 n. 18 (emphasis added).

<sup>89</sup> Justice Blackmun wrote:

*The distribution of responsibility is even clearly reflected in the relevant oil-and-gas-related expenditures during the 5-year period at issue in this case: federal expenditures were \$1,206,800; tribal expenditures were \$736,358; the State spent, at most, \$89,384. Brief for Jicarilla Apache Tribe as Amicus Curiae 10-11, n. 8.* In any event, it is clear from this Court's rejection of the Montana severance tax at issue in *Montana v. Crow Tribe* [citation], that the mere fact that the State has made some expenditures that benefit the taxed activities is not sufficient to avoid a

The *Cotton Petroleum* Court used the amicus briefs filed by the Jicarilla Apache Nation and other tribal amici in the light least supportive of the tribal position. The Court made constitutional findings of fact on the preemption question without the benefit of hearing from the tribe affected, except in an amicus brief filed below.

### **B. What the Court Did Not Discuss**

While the discussion in the previous subpart suggests that the Supreme Court frequently takes into account the arguments of amici in Indian law cases (and they do, given that one study suggested that the Court cites to amicus briefs in fewer than one in five decisions<sup>90</sup>), overall the Court does not. This subpart reviews many of the important examples where the Court fails to take into account amici.

#### **1. “One-Sided Policy Arguments”**

Several amici on both sides filed briefs that likely would fit under the category of “one-sided policy argument,” to borrow a phrase from *Inside the Supreme Court*.<sup>91</sup> Many of these briefs invited the Supreme Court to revisit foundational principles of federal Indian law, and perhaps even to reverse precedents unappealing to the amici. With one unusual exception, these briefs appear to have fallen on deaf ears.

The one exception appears to be the amicus brief filed in the cert stage of *City of Sherrill v. Oneida Indian Nation* by the Towns of Lenox, Stockbridge, and Southampton, New York.<sup>92</sup> That brief presented the equitable defense of laches to the assertion of tribal sovereignty over

---

finding of pre-emption. Montana spent \$500,000 to pay 25 percent of the cost of a road used by employees and suppliers of a mine.

*Id.* at 207 n. 11 (Blackmun, J., dissenting) [citations omitted].

<sup>90</sup> See Gregory A. Caldeira & John H. Wright, *Amici Curiae before the Supreme Court: Who Participates, When, and How Much?*, 52 J. POL. 782, 788 (1990).

<sup>91</sup> BLOCH, JACKSON & KRATTENMAKER, *supra* note 37.

<sup>92</sup> See Brief of Amici Curiae Town of Lenox, New York; Town of Stockbridge, New York; and Town of Southampton, New York in Support of Petitioner City of Sherrill, New York, *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) (No. 03-855), 2004 WL 1835370.

newly-acquired lands by the Oneida Indian Nation.<sup>93</sup> No other party, likely relying on the Court's 1985 rejection of equitable defenses in dictum in a related case,<sup>94</sup> briefed the issue.<sup>95</sup>

## 2. *Duplicative Argument*

A survey of former Supreme Court clerks by Kelly Lynch found that the clerks emphatically refused to consider amicus briefs that offered “me too”-style substance, where the brief reiterates ground already covered by the parties' merits briefs without offering anything “novel.”<sup>96</sup> Couple this with a large number of amicus briefs, and the likelihood that *any* of the briefs receive attention from the Court declines dramatically.<sup>97</sup>

Tribal interest amici in the *Cabazon Band*, *Cotton Petroleum*, *Seminole Tribe*, *Kiowa Tribe* cases filed a total of 31 amicus briefs—about 7.8 briefs per case. Most of these briefs included very repetitive arguments -repetitive as to the parties' briefs and repetitive as to each other. Note that the Court decided these cases before 2002, when the Tribal Supreme Court Project began to effectively organize tribal amici.<sup>98</sup>

---

<sup>93</sup> See *id.* at 6-12 (arguing that Congressional acquiescence to state purchases of tribal lands and the passage of time between tribal land sale and ownership should be addressed by the Supreme Court).

<sup>94</sup> See *Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 244 n. 16 (1985).

<sup>95</sup> The *City of Sherrill* decision did work a radical reinterpretation of federal Indian law. See generally Kathryn E. Fort, *The New Laches: Creating Title Where None Existed*, 16 GEO. MASON L. REV. 357 (2009); Kathryn Fort, *Disruption and Impossibility: The New Laches and the Unfortunate Resolution of the Modern Iroquois Land Claims*, 11 WYO. L. REV. 375 (2011).

<sup>96</sup> Lynch, *supra* note 15, at 45. See also Fort, *supra* note 91. (“Clerks repeatedly emphasized that most amicus briefs filed with the Court are not helpful and tend to be duplicative, poorly written, or merely lobbying documents not grounded in sound argument.”). See also Ennis, *supra* note 40, at 608 (“[T]he amicus should avoid duplicating the work of the parties. It is an improper use of the amicus role, and an imposition on the Court, to file a ‘me too’ amicus brief.”).

<sup>97</sup> See Lynch, *supra* note 15, at 45 (“A few clerks noted that, in cases where fewer amicus briefs are filed, there is a greater probability that each will be given more attention.”).

<sup>98</sup> Amici supporting tribal interests filed 23 amicus briefs in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013), even with the guidance of the Tribal Supreme Court Project.

The opposite of duplication is collaboration, a tactic approved of by the Supreme Court clerks in Kelly Lynch's study.<sup>99</sup> In contrast to the tribal amici, the amici most often opposing tribal interests—state governments—collaborated extensively. Multiple states—and sometimes dozens of them—combined to sign on to a single amicus brief in several cases—*Adoptive Couple*, *City of Sherrill*, *Carcieri*, *Yankton Sioux*, *Kiowa Tribe*, *Strate*, *Seminole Tribe*, and *Cotton Petroleum*. The interests supported by the states won six of eight cases. Notably, in *United States v. Lara*,<sup>100</sup> the state amici split into two briefs, one supporting tribal interests and another marginally supporting tribal interests. Even more notably, the only other time the state amici split up, in *California v. Cabazon Band of Indians*,<sup>101</sup> the state interests lost. *Adoptive Couple v. Baby Girl*,<sup>102</sup> where 18 states signed on to an unsuccessful brief in support of tribal interests with no opposing state brief, is a true anomaly.

#### V. LOOKING FORWARD: THE SUPREME COURT AS LEGISLATIVE JUDICIARY IN THE INDIAN CASES

Federal Indian law, as federal common law uniquely subject to interpretation and modification by the Supreme Court, could be fertile ground for policy arguments on the merits of important Indian law questions. I have argued elsewhere that the Supreme Court's overarching theory of federal Indian law is "pragmatic utilitarianism."<sup>103</sup> I say pragmatic (borrowing from Judge Posner's assumption of "institutional and material constraints on decision-making by officials in a democracy")<sup>104</sup> because of the Court's temptation to rely upon on "what the current state of affairs ought to be."<sup>105</sup> And I say utilitarianism because of the Court's obligation to

---

<sup>99</sup> See Lynch, *supra* note 15, at 57 ("Almost 90 percent of clerks expressed a preference for collaboration, at least in certain circumstances. Most clerks explained that they would prefer to see more collaboration because there would be fewer total amicus briefs to read.").

<sup>100</sup> 541 U.S. 193 (2004).

<sup>101</sup> 480 U.S. 202 (1987).

<sup>102</sup> 133 S. Ct. 2552 (2013).

<sup>103</sup> Matthew L.M. Fletcher, "National Implications of *Sherrill*," Address, Syracuse University College of Law, Eighth Annual Haudenosaunee Conference, Syracuse, NY (November 19, 2011) (on file with author).

<sup>104</sup> RICHARD POSNER, LAW, PRAGMATISM, AND DEMOCRACY ix (2003).

<sup>105</sup> Scalia Memorandum, *supra* note 23.

all Americans and American governmental institutions requires it to consider the interests of all, and because the Court's easiest routes are to issue judgments favoring majorities absent clear constitutional rules to the opposite. In order to win, amici supporting tribes must persuade the Court that ruling in favor of tribal interests substantially benefits non-Indians.<sup>106</sup> It's a hard road for tribal interests to walk, to be sure.

How does one find the convergence of Indian and non-Indian interests?

I posit that finding those convergences and highlighting them is absolutely critical to effective advocacy by amici. Interest convergence in American Indian law tends to be economic or jurisdictional. These can be extremely helpful to tribal interests where there are direct convergences of interests that can involve traditional adversaries.

#### **A. *Economic Interest Convergence***

The tribal interests in the recent tribal government contracting cases, *Cherokee Nation v. Leavitt*<sup>107</sup> and *Salazar v. Ramah Navajo Chapter*,<sup>108</sup> found common cause with the United States Chamber of Commerce, an unusual ally, which expressed concerns to the Supreme Court about government contracting in general.<sup>109</sup>

As tribal business interests develop, more and more business partners (perhaps even state governments) may be helpful as amici in future cases. The recent convergence of the interests of the State of

---

<sup>106</sup> Cf. Derrick A Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); see also ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON xxxv (2005) (drawing upon Professor Bell's interest-convergence theory to articulate a "singularity thesis" for Indian affairs).

<sup>107</sup> 543 U.S. 631 (2005).

<sup>108</sup> 132 S. Ct. 2181 (2012).

<sup>109</sup> See Brief of the Chamber of Commerce of the United States of America and the National Defense Industrial Association as Amici Support of Respondents, *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012) (No. 11-551), 2012 WL 1132333; Brief of Amici Curiae the Chamber of Commerce of the United States of America, The National Defense Industrial Association, and The Aerospace Industries Association in Support of the Cherokee Nation and Shoshone-Paiute Tribes, *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005) (Nos. 02-1472, 03-853), 2004 WL 1386408.

Massachusetts and the Mashpee Wampanoag Tribe,<sup>110</sup> and the City of Lansing, Michigan and the Sault Ste. Marie Tribe of Chippewa Indians<sup>111</sup> over the tribes' gaming compact approvals and trust acquisitions are exemplary (even if they fail, as might occur).

### **B. Jurisdictional Interest Convergence**

The tribal interests in recent criminal jurisdiction cases have found common cause with some state governments in recent years, most notably in *United States v. Lara*.<sup>112</sup> The state amici split in this case, with one amicus brief led by Washington's Attorney General supporting the federal government and tribal positions in upholding the so-called "Duro fix," and another partially supporting the tribal position.<sup>113</sup>

These convergences of interests are helpful, but unless the substance of the amicus brief is valuable, the convergences might not mean anything. The short survey of cases and amicus briefs above suggests that briefs providing useful information to the Supreme Court are good (not great) bets for influencing the Court. This information includes historical and public policy information.<sup>114</sup> Conversely, briefs arguing for doctrinal changes in the law are the least helpful.

---

<sup>110</sup> See *KG Urban Enterprises, LLC v. Patrick*, 693 F.3d 1 (1st Cir. 2012).

<sup>111</sup> See *State of Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, No. 1:12-CV-962 (W.D. Mich., March 5, 2013), available at <http://turtletalk.files.wordpress.com/2013/03/dct-order-granting-injunction.pdf> (last visited Nov. 24, 2013), *appeal pending*, No. 13-1438 (6th Cir.).

<sup>112</sup> 541 U.S. 193 (2004).

<sup>113</sup> See Brief for the States of Washington, Arizona, California, Colorado, Michigan, Montana, New Mexico, and Oregon as Amici Curiae Supporting Petitioner, *United States v. Lara*, 541 U.S. 193 (2004) (No. 03-107), 2003 WL 22766742; Brief Amicus Curiae of the States of Idaho, Alabama, Louisiana, Nebraska, South Dakota, and Utah Supporting Petitioner in Part, *United States v. Lara*, 541 U.S. 193 (2004) (No. 03-107), 2003 WL 22766744.

<sup>114</sup> However, at least one social science study suggests that the Supreme Court barely pays attention to information offered by amici that is different from what the parties present. See James F. Spriggs & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RES. Q. 365 (1997). I suspect that the study might be partially inapplicable in cases involving federal common law subjects like Indian law, but these findings suggest temperance on the role of information regardless.

### C. *Historical Information*

The tribal amici in *Carcieri v. Salazar*,<sup>115</sup> for example, offered a wealth of historical information. The historians' brief developed the history of the Indian Reorganization Act (IRA).<sup>116</sup> The Indian law professors' brief included more information about the history of the IRA, but also developed the historical record on the Department of Interior's interpretation of the relevant provisions of the Act.<sup>117</sup> The *Carcieri* majority paid little heed to these briefs (and instead drew more from a separate amicus brief by the National Congress of American Indians that supported its view of the legislative history of the Act<sup>118</sup>). However, as noted above, Justice Breyer's concurrence and Justice Stevens' dissent drew heavily from the law professors' brief in a manner suggesting that the reach of the decision was limited to a small number of tribes (and perhaps only one).

Historical information, as the *Carcieri* decision shows, works for and against the parties. The state amici drew upon history to great effect in the reservation diminishment case *South Dakota v. Yankton Sioux Tribe*,<sup>119</sup> and also in *City of Sherrill v. Oneida Indian Nation*.<sup>120</sup>

### D. *Public Policy Information*

There is a dearth of useful public policy information in Supreme Court amicus briefs. While I would hope that policy information providing needed background on Indian country is useful, I have doubts about whether this information alone will be enough to change minds on the Court. One need only look at Justice Kennedy's outright rejection of the policy points in *Duro v. Reina*.<sup>121</sup> I suspect good policy details will appear

---

<sup>115</sup> 555 U.S. 379 (2009).

<sup>116</sup> See Brief of Historians Frederick E. Hoxie, Paul C. Rosier, and Christian W. McMillen As Amici Curiae Supporting Respondents, *Carcieri v. Salazar*, 555 U.S. 379 (2009) (No. 07-526), 2008 WL 3991410.

<sup>117</sup> See Brief of Law Professors Specializing in Federal Indian Law as Amicus Curiae Supporting Respondents, *Carcieri v. Salazar*, 555 U.S. 379 (2009) (No. 07-526), 2008 WL 3991411.

<sup>118</sup> See Brief of the National Congress of American Indians as Amicus Curiae Supporting Respondents, *Carcieri v. Salazar*, 555 U.S. 379 (2009) (No. 07-526), 2008 WL 3976868.

<sup>119</sup> 522 U.S. 329 (1998).

<sup>120</sup> 544 U.S. 197 (2005).

<sup>121</sup> 495 U.S. 676 (1990).

in opinions by the Justices already leaning toward a particular position. Policy information, somewhat like historical information, in amicus briefs is less important than economic and jurisdictional convergences with parties the Court considers important, such as state governments and big business.

In sum, tribal interests cannot go at it alone in the Supreme Court. This small case study demonstrates that a good amicus strategy can be helpful. It requires coordination (fewer briefs), persuasive policy arguments, and convergence of interests with actors the Supreme Court cares about (states and big business, for a start).<sup>122</sup> This is not easy, and in many cases it is virtually impossible.

A coda—in the recent decision, *Adoptive Couple v. Baby Girl*,<sup>123</sup> the tribal interests did all of these things right, with one possible exception.<sup>124</sup> The Cherokee Nation and Dusten Brown, the Birth Father seeking vindication of his rights under the Indian Child Welfare Act,<sup>125</sup> enlisted the assistance of the United States,<sup>126</sup> more than a dozen state attorney generals,<sup>127</sup> child welfare groups,<sup>128</sup> religious organizations,<sup>129</sup> and

---

<sup>122</sup> It also requires Supreme Court specialization from the counsel of record for the amicus. See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L. J. 1487 (2008). And help from the federal government. See Patricia A. Millett, “We’re Your Government and We’re Here to Help”: *Obtaining Amicus Support from the Federal Government in Supreme Court Cases*, 10 J. APP. PRACT. & PROC. 209 (2009).

<sup>123</sup> 133 S. Ct. 2552 (2013).

<sup>124</sup> There were 23 amicus briefs in support of the tribal interests, probably far too many. See Matthew L.M. Fletcher, *Turtle Talk Guide to the Amici Supporting Respondents in Baby Veronica Case (Adoptive Couple v. Baby Girl)*, TURTLE TALK BLOG POST (March 29, 2013), available at <http://turtletalk.wordpress.com/2013/03/29/turtle-talk-guide-to-the-amici-supporting-respondents-in-baby-veronica-case-adoptive-couple-v-baby-girl/> (last visited Nov. 24, 2013).

<sup>125</sup> 25 U.S.C. §§ 1901 (2006).

<sup>126</sup> Brief of the United States as Amicus Curiae, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399), 2013 WL 1099169.

<sup>127</sup> Brief of the States of Arizona, et al., *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399), 2013 WL 1308816.

<sup>128</sup> Brief of Casey Family Programs, et al., *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399), 2013 WL 1279468.

<sup>129</sup> Brief of Religious Organization *Amici Curiae* Friends Committee on National Legislation, et al., *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399), 2013 WL 1279465.

psychologists.<sup>130</sup> In one way, the amicus effort failed, both in persuading a majority of the Supreme Court and, less important, in terms of the amount of citations from the Court.

But in a more important way, the effort may have succeeded in helping to drive the Court into treating the Baby Veronica case as a dispute over statutory interpretation rather than a vehicle to address the ultimate constitutionality of the Indian Child Welfare Act, as Justice Thomas may have wanted to do.<sup>131</sup> In that way, at least, perhaps the strategy succeeded.

Amici focused on the multiple interpretations of the statute potentially drew attention away from the constitutional questions raised by counsel for the Guardian ad Litem.<sup>132</sup> The amici supporting the tribal interests largely did not respond to the constitutional objections, and focused on the statutory text, legislative history, and public policy.

*Adoptive Couple* may be an example of how a strong amicus strategy can shape the terms of the debate at the Supreme Court. The amici supporting tribal interests collectively carved a path (or lit a path) for the Court to avoid the constitutional questions. In the end, perhaps that is the best any amicus strategy can do.

---

<sup>130</sup> Brief of *Amici Curiae* National Latina/o Psychological Association, et al., *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399), 2013 WL 1279460.

<sup>131</sup> See *Adoptive Couple v. Baby Girl*, 133 S. Ct. at 2565 (Thomas, J., concurring) (“I join the Court’s opinion in full but write separately to explain why constitutional avoidance compels this outcome. Each party in this case has put forward a plausible interpretation of the relevant sections of the Indian Child Welfare Act (ICWA). However, the interpretations offered by respondent Birth Father and the United States raise significant constitutional problems as applied to this case. Because the Court’s decision avoids those problems, I concur in its interpretation.”).

<sup>132</sup> See Brief for Guardian ad Litem, as Representative of Respondent Baby Girl, Supporting Reversal at 48-58, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399), 2013 WL 633603.