

HOPE FOR INDIAN TRIBES IN THE U.S. SUPREME COURT?: MENOMINEE, NEBRASKA V. PARKER, BRYANT, DOLLAR GENERAL . . . AND BEYOND

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There has long been concern that the U.S. Supreme Court is hostile to Indian tribes. Between 1990 and 2015, tribal interests lost in 76.5% of Supreme Court cases distinctly affecting them; the loss rate rose to 82% in the first decade of the Roberts Court. With four Indian law cases on the docket last year, Native communities were poised for disaster. Newspapers speculated on why tribes could not win in the Supreme Court. By the end of June 2016, however, tribal interests had lost just one case, won two, and the Court split four-four in a fourth, affirming a lower court decision upholding tribal jurisdiction without opinion.

One Term does not reverse a pattern of decades, and the Court remains a very dangerous place for Indian tribes. But, together with other recent majority and dissenting opinions, the Term suggests a resurrection on the modern Court of an old idea: that tribes are a third sovereign in the federal system and that this sovereignty has significant implications for statutory construction, federal common law, and even constitutional review. This shift is a product of a coordinated effort to familiarize justices with the modern reality of Native governments and to highlight the connections between tribal status and the law affecting other sovereigns. It reflects, as well, that the newer members of the progressive wing come to the Court with more knowledge of federal Indian law than the last.

Work remains to build a coherent theory of third sovereign status on the Court. Given the voting records of the current justices, moreover, Justice Neil Gorsuch may often be a deciding vote. Voting in federal Indian law cases does not always accord with traditional progressive-conservative divides, however, and Justice Gorsuch's record suggests that he will be more open to tribal concerns than the

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late Justice Antonin Scalia. The President himself has a dark history of levying false accusations and racial attacks against Indian tribes to protect his own casino interests, and the early actions by his administration suggest hostility to tribal interests. But while the Supreme Court is influenced by political tides, it is not the creature of them, and Chief Justice Roberts appears committed to maintaining this. The decisions of 2016, therefore, remain evidence that the decades-long thumb on the scale against the third sovereign in the Supreme Court may, occasionally, be lifted.

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I. INTRODUCTION

In the fall of 2015, supporters of the rights of tribes and Native peoples were poised for catastrophe. The Roberts Court had been devastating for tribal nations. The Court had decided eleven Indian law cases, and tribal interests had lost all but two, undermining longstanding principles of state¹ and tribal jurisdiction,² federal authority to take land into trust,³ and child custody.⁴ The October 2015 Term⁵ opened with three Indian law cases on the Court's docket, and the Court soon granted certiorari in one more.⁶ One of the cases, *Menominee Indian Tribe v. United*

1. *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005).

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

3. *Carcieri v. Salazar*, 555 U.S. 379 (2009).

4. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

5. That Term, beginning October 5, 2015 and ending October 2, 2016, will be abbreviated as "the 2015 Term."

6. This Article does not discuss a fifth case that potentially impacts Indian tribes because it was not framed as an Indian law case and did not reach the question that would most impact the rights of tribal nations and Native peoples. *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016), held that nonfederally

States,⁷ involved a statute of limitations question with generally little impact on federal Indian law. But three others would have threatened the governance powers of many tribes. *Nebraska v. Parker* concerned the borders of tribal territory;⁸ *United States v. Bryant* concerned the constitutional status of tribal convictions;⁹ and *Dollar General v. Mississippi Band of Choctaw Indians* concerned tribal court jurisdiction over non-tribal citizens.¹⁰ The Supreme Court had ruled consistently against tribes in cases regarding jurisdiction over non-Indians since 1997,¹¹ and consistently against tribes in questions of tribal territory since 1993.¹² The Tribal Supreme Court Project coordinated feverish activity across the country to present effective arguments in each case,¹³ but privately, those involved awaited the results with a sense of doom.

But at the end of June 2016, tribes and their supporters could breathe a sigh of relief. Tribes lost in *Menominee*, but won in *Nebraska v. Parker* and *United States v. Bryant*. In *Dollar General*, the Court split four-four, affirming the Fifth Circuit's opinion in favor of jurisdiction

owned lands within federal conservation boundaries, under the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101–3103 (2012) (“ANILCA”), are not subject to federal park service regulations. Although the specific challenge concerned state-owned waters, ANILCA was written against the backdrop of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 et seq. (2012), and much of the land reserved to Alaska Native groups under that act is within federal conservation boundaries. See Brief on the Merits of Amici Curiae Doyon, Ltd. et al., Seeking Reversal at 1–2, *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016) (No. 14-1209). A number of Alaska Native corporations filed as amici seeking reversal, arguing for more freedom to regulate land within those borders. *Id.* But federal regulation of state-owned navigable waters within conservation boundaries permits federal protection of Alaska Native subsistence fishing, and Alaska Natives have long fought to preserve that protection. See *John v. United States*, 720 F.3d 1214, 1224 (9th Cir. 2013). Native subsistence users and two Alaska Native villages filed in support of affirming federal jurisdiction. Brief for Alaska Native Subsistence Users, as Amici Curiae Supporting Respondents, *Sturgeon*, 136 S. Ct. 1061 (No. 14-1209). In the end, the Supreme Court held that ANILCA did not permit federal regulation of the non-federal lands but remanded for determination of whether some other ground might permit federal regulation of navigable waters within those lands. *Sturgeon*, 136 S. Ct. at 1072. Neither side, therefore, can claim a complete victory.

7. 136 S. Ct. 750 (2016).

8. 136 S. Ct. 1072, 1076 (2016).

9. 792 F.3d 1042, 1042 (9th Cir. 2015), cert. granted *United States v. Bryant*, 136 S. Ct. 690 (2016).

10. 136 S. Ct. 2159 (2016), affg sub nom *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014).

11. See generally *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473 (1999); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *South Dakota v. Bourland*, 508 U.S. 679 (1993).

12. See generally *City of Sherrill, N.Y. v. Oneida Indian Nation*, 544 U.S. 197 (2005); *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1993). An additional two cases make it harder for tribes to expand their Indian country by giving their land to the United States to take into trust. *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 567 U.S. 209 (2012); *Carcieri v. Salazar*, 555 U.S. 379 (2009).

13. I, for example, am not a frequent brief writer, but by the end of the year I had cowritten my first Supreme Court amicus brief, Brief of Historical and Legal Scholars, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406), and provided assistance on another. Brief for Historians and Legal Scholars Gregory Ablavsky et al., as Amici Curiae Supporting Respondents, *Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496).

without opinion.¹⁴ A 66% win rate may not seem significant to those outside federal Indian law, but compared to the 76.5% loss rate over the previous twenty-five years, it was a stunning reversal.

It is both too easy and unfair to blame this switch in time on the death of Justice Scalia. From his remarks at oral argument¹⁵ and his previous opinions,¹⁶ one can predict that his vote would have led to a ruling against tribal jurisdiction in *Dollar General*. But his comments at oral argument in *Nebraska v. Parker* suggested contempt for the state's argument in that case,¹⁷ and respect for his memory may even have convinced some Justices to join in the unanimous opinion for the tribe.¹⁸ The other decisions, one for and one against tribal interests, were also unanimous, and little about Justice Scalia's history suggests that he would have ruled differently.

This Article argues that the cases, when read together with various dissents, concurrences, and rare majority opinions in recent years, suggest a growing acceptance on the modern Court of an old idea: that tribes remain a third sovereign under federal law¹⁹ and that this sovereignty has significant implications for statutory construction, the judicial role, and even constitutional review. This shift is influenced by recent decisions regarding states and foreign nations, but also by federal Indian law decisions that anteceded, and may even have contributed to, those decisions regarding other sovereigns. Equally important, it reflects that the new generation of the progressive wing comes to the Court with more knowledge of tribal nations, and that concerted advocacy from Indian country may be succeeding in familiarizing the Justices with the foundational precedents and modern reality affecting Native people. This effort is far from complete, and the Supreme Court remains a very dangerous place for Native interests.²⁰ But the current Term provides some reasons

14. 136 S. Ct. at 2160.

15. See Transcript of Oral Argument at 30:20–21, 50:6, 50:23–24, 53:4–14, *Dollar Gen. Corp.*, 136 S. Ct. 2159 (2016) (No. 13-1496).

16. The only opinion he authored in this field is *Hicks*, 533 U.S. at 370, which fabricated new rules limiting tribal jurisdiction, but he also sought to limit tribal jurisdiction over non-Indians in all the cases listed *supra* note 11, as well as in two additional cases involving tribal jurisdiction over non-member Indians. See *United States v. Lara*, 541 U.S. 193, 199 (2004); *Duro v. Reina*, 495 U.S. 676, 688 (1990).

17. Transcript of Oral Argument at 5:9–13, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406) (Scalia, J.). Other Justices were also skeptical. See, e.g., *id.* at 10:2–10 (Kagan, J.) (“You know, because usually, at least now, we don’t think much of subsequent history of any kind. Now, maybe they thought a little bit more highly of it in the days when *Solem* was written, but now it would—it’s — it’s pretty much of a stretch to use subsequent legislative history or subsequent history generally when we’re dealing with a interpreting a statute.”).

18. See *infra* Section III.B.

19. Interestingly, the term “third sovereign,” I believe, came into currency due to an article by Justice Sandra Day O’Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1 (1997).

20. For example, *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), the only federal Indian law opinion of the 2016 Term, was a loss for tribal interests, holding that tribal employees did not share a tribe’s sovereign immunity. Even that decision, however, continued the trend I identify by considering tribal common law immunity in the same framework as the common law immunity of other sovereigns.

for hope that the decades-long thumb on the scales against Indian tribes in the Supreme Court may, occasionally, be lifted.

Part II of this Article lays out the dismal recent history of federal Indian law in the Supreme Court, complimented by an Appendix charting that history by subject matter, Chief Justice, and votes of individual Justices, and discusses the reasons for this history and the efforts to address it. Part III discusses the litigation and results in the four cases the Supreme Court decided in 2016 and the ways they did and did not reflect tribal status as third sovereigns. Part IV discusses the promise and limitations of the 2015 Term, proposes a more cogent understanding of tribes as third sovereigns in the federal system, and highlights the importance of the next appointments to the Supreme Court in developing that understanding.

II. A DISMAL QUARTER CENTURY: FEDERAL INDIAN LAW IN THE UNITED STATES SUPREME COURT

Over the quarter century beginning in 1990, tribal interests lost more than three-quarters of the cases decided by the United States Supreme Court. This disparate win-loss rate begins with the certiorari process, continued (and even worsened) in the Roberts Court, and affects almost every subject distinctly impacting tribes. A Tribal Supreme Court Project, founded in 2002, has ensured that Indian law cases receive coordinated and high-quality advocacy in the Court, but the project has not obviously improved success rates. This Part lays out the dismal history of the last twenty-five years, discusses the causes of this history, and asserts the importance of understanding the theory and reality of tribal sovereignty in changing this history.

A. *The Losses*

In 2001, the late Dean David Getches published a study charting the success of tribal interests in the Supreme Court.²¹ Professor Getches found that tribal interests won only 23% of Supreme Court decisions between 1986 (when William Rehnquist became Chief Justice) and 2000, down from a 58% win rate between 1969 and 1986 (when Warren Burger was Chief Justice).²² This record was worse than that of any other group: even convicted criminals, he found, had their sentences reversed 36% of the time.²³ The decisions, moreover, were not applications of existing precedent, but rather often ignored precedent, creating new rules that undermined tribal interests.²⁴

21. David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 267 (2001).

22. *Id.* at 280.

23. *Id.* at 281.

24. *Id.* at 273–74.

A subsequent study by Professor Matthew Fletcher showed that this disparity begins with the certiorari process.²⁵ The Supreme Court has almost complete control over its docket, granting only about 4% of “paid” petitions (those in which the petitioner is not *in forma pauperis*) a year.²⁶ But Professor Fletcher’s comprehensive analysis of certiorari petitions between 1987 and 1993 showed that the Supreme Court granted only one out of ninety-three paid petitions filed by tribes or tribal interests,²⁷ almost four times less than the average rate of success. In contrast, the Court granted a whopping fourteen out of thirty-seven petitions filed by states or local governments against tribal interests,²⁸ almost ten times the rate of success enjoyed by petitions generally. Nongovernmental petitioners against tribal interests also did well, albeit by not quite as much. Their petitions were granted four out of twenty-eight times,²⁹ enjoying roughly three times the success rate of all paid petitioners.

Professor Fletcher’s examination of the memoranda and votes produced in the certiorari process illuminates the reasons for this disparity. Decisions against tribal interests were seen as “factbound and splitless,” meaning that they were fact dependent and did not create a split in lower courts,³⁰ and they were deemed unimportant outside the immediate dispute.³¹ Petitions seeking review of decisions favoring tribal interests, in contrast, were seen as having high “national importance,” even when they were similarly dependent on facts and consistent with other rulings.³² In short, non-Indian appeals of decisions that hurt them were important to everyone, while tribal appeals of decisions that hurt them were not.

I have updated Professor Getches’s research to reflect cases decided in the twenty-five years between 1990 and 2015. The full list of cases is printed as Appendix A at the end of this Article, but here are the highlights. Out of forty-nine federal Indian law cases³³ resulting in a full opin-

25. Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 938–39 (2009).

26. David O. Stewart, *Quiet Times: The Supreme Court is Reducing its Workload—But Why?*, 80 A.B.A. J. 40, 40 (1994) (noting 3.7% success rate in 1993 term and that willingness to grant petitions had declined); Kedar S. Bhatia, *Likelihood of a Petition Being Granted*, DAILYWRIT (Jan. 10, 2013), <http://dailywrit.com/2013/01/likelihood-of-a-petition-being-granted/> (calculating 4.29% rate of success between 2001 and 2011). The rate of success for *in forma pauperis* petitions, which are largely filed by prisoners, is far worse. *Id.*

27. Fletcher, *supra* note 25, at 935.

28. *Id.*

29. *Id.*

30. *Id.* at 937.

31. *Id.* at 973–75.

32. *Id.* at 968. In a particularly glaring discrepancy, in one long-running set of disputes between the Oklahoma Tax Commission and Oklahoma tribes, the clerks described petitions by the Commission as raising “important concerns of federalism,” while petitions filed by Indian tribes were “of no general significance.” *Id.* at 973. At times, moreover, the Justices voted to grant certiorari even when the clerk’s certiorari memo recommended against it. *Id.* at 972.

33. To construct this list, I first searched all cases using the West keyword topic “Indian,” and excluded cases like *United States v. Bormes*, 133 S. Ct. 12 (2012), which discusses the Indian Tucker Act but not in the context of a dispute involving Indians. I then did a broader search for cases using the words “Indians” and “tribes” and added a handful of additional cases that distinctively affected

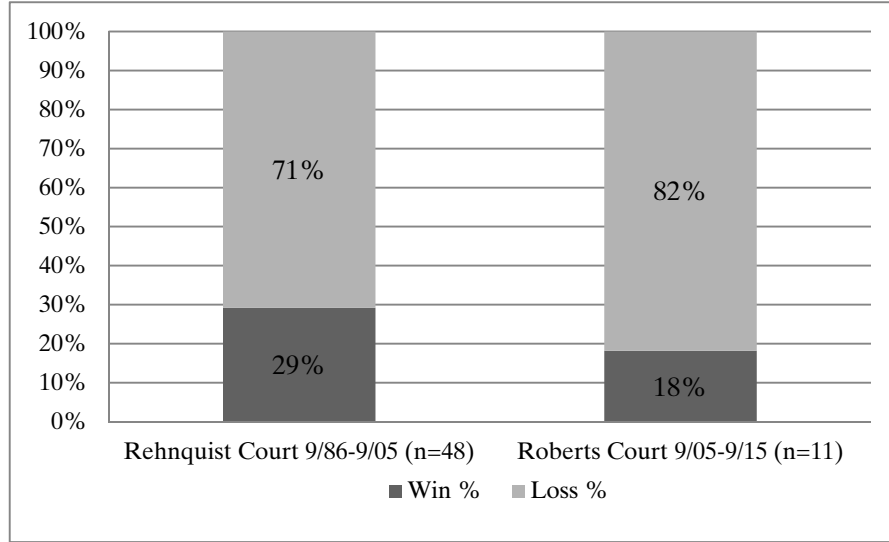
ion, tribal interests won only 11.5 and lost 37.5.³⁴ In other words, they won 23.5% and lost 76.5% of these cases, almost exactly what Professor Getches found fifteen years ago. What is more, the disparity across the first decade of the Roberts Court, with an 18% win rate, was even worse than the 29% win rate over the nineteen years of the Rehnquist Court.³⁵

tribes or Native peoples as members of indigenous political communities. *See* Inyo County, Ca. v. Paiute-Shoshone Indians of the Bishop Cmty., 538 U.S. 701 (2003) (holding that tribes are not “persons” who can sue under 42 U.S.C. § 1983); *Rice v. Cayetano*, 528 U.S. 495 (2000) (discussing constitutionality of a voting rights scheme affecting Native Hawaiians, an indigenous group whose status is related but different from federal Indian tribes, under the rubric of measures affecting recognized Indian tribes); *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1 (2001) (holding that there was no Indian trust exception to FOIA); *Arizona v. California*, 530 U.S. 392 (2000) (holding that tribal claims for additional water based on resolution of reservation boundary dispute were not precluded by previous settlement of water rights claims involving states and tribes); *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865 (1999) (holding surface estate holders, and not tribes holding equitable title to coal on reservation, owned gas from coal); *Montana v. Crow Tribe of Indians*, 523 U.S. 696 (1998) (holding tribe was not entitled to disgorgement of state severance taxes collected from tribe in violation of Indian Mineral Leasing Act); *Idaho v. Coueur D’Alene Tribe of Idaho*, 521 U.S. 261 (1997) (holding that the Coueur D’Alene could not maintain an action claiming that it, and not the state, owned the submerged lands on its reservation because the suit was the functional equivalent of a quiet title suit and barred by tribal sovereign immunity); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775 (1991) (holding that that, unlike other states, tribes are barred from suing states by sovereign immunity). The figures do not include cases that turned up in that broader search but do not distinctively affect tribal claims, such as *South Florida Water Management District v. Mikosukee Tribe of Indians*, 541 U.S. 95 (2004), which reversed a judgment in favor of the tribe challenging alleged Clean Water Act violations, or cases in which the Court simply vacated and remanded the judgment below, such as *Oklahoma v. Ponca Tribe of Oklahoma*, 517 U.S. 1129 (1996).

34. The .5s reflect the results in three cases, *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), and *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), in which tribal interests won and lost important issues in the same case.

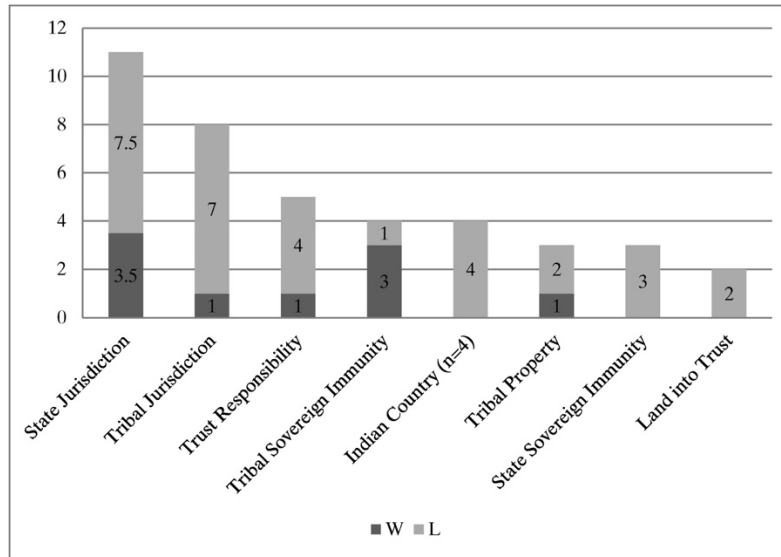
35. As Congress and the executive branch have actually increased support for tribal self-determination over this period, this trend supports Erwin Chemerinsky’s thesis that the conservative activists of the Roberts Court have discarded the deference that previous conservatives showed to elective branches. *See* Erwin Chemerinsky, *Supreme Court—October Term 2009 Foreword: Conservative Judicial Activism*, 44 LOY. L.A. L. REV. 863 (2011).

FIGURE 1: COMPARING REHNQUIST AND ROBERTS COURTS



Finally, although the numbers are too small to permit emphasis on the results in any one subject area, the disparate win-loss rates persist across all major subject areas other than tribal sovereign immunity.

FIGURE 2: WINS/LOSSES BY SUBJECT MATTER (1990–2015)



In short, over the last quarter century, tribes have been far more likely to lose in the Supreme Court than they have been to win. This disparity begins at the certiorari process and persists across Chief Justice and subject matter. As seen in the next Section, it has, until recently, also

resisted tremendous coordinated advocacy from lawyers and tribal leaders from across the country.

B. *The Tribal Supreme Court Project*

In 2002, in response to the dismal record on the Court, the Native American Rights Fund and the National Congress of American Indians ("NCAI") joined forces to create the Tribal Supreme Court Project ("Project").³⁶ The Project built a Supreme Court project working group of hundreds of attorneys and academics to share legal information and experience,³⁷ as well as an advisory board of tribal leaders to ensure that representation reflected the tribal perspective.³⁸ When certiorari is granted, the Project works to ensure litigants are advised or represented by expert Supreme Court counsel.³⁹ The Project also tries to coordinate amicus briefs "to submit to the Court the fewest number and the highest quality briefs in support of the Indian argument."⁴⁰

The Project had initial success in preventing further incursions into existing precedent.⁴¹ In 2004, it also contributed to a significant victory in *United States v. Lara*.⁴² In 1990, in *Duro v. Reina*, the Supreme Court held that tribes lacked criminal jurisdiction over Indians who were not members of the governing tribe.⁴³ Congress reacted with the "*Duro* Fix," which "affirmed the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians."⁴⁴ *Lara* held Congress could constitutionally enact the statute.⁴⁵

Lara turned, in part, on the scope of congressional "plenary power" in Indian affairs, which the Court had previously described as the result of tribal "weakness and helplessness,"⁴⁶ as an "uneducated, helpless and dependent people."⁴⁷ The amicus briefs, however, presented congressional power through the lens of tribal sovereignty. Just as Congress could adjust the powers of states or colonized territories, the NCAI brief declared, "[i]t is precisely because a Tribe is a sovereign governmental authority that Congress may authorize the Tribe qua sovereign to exer-

36. See Tracy Labin, *We Stand United Before the Court: The Tribal Supreme Court Project*, 37 *NEW ENG. L. REV.* 695, 696 (2003).

37. *Id.* at 697.

38. *Id.* at 698.

39. *Id.* at 698–99.

40. *Id.*

41. See Bethany R. Berger, *United States v. Lara as a Story of Native Agency*, 40 *TULSA L. REV.* 5, 18–20 (2004) (discussing decisions between 2002 and 2004).

42. 541 U.S. 193 (2004) (upholding the "*Duro* Fix," which affirmed inherent criminal jurisdiction over Indians who were not citizens of the tribe asserting jurisdiction).

43. *Duro v. Reina*, 495 U.S. 676 (1990).

44. 25 U.S.C. § 1301(2) (2012).

45. *Lara*, 541 U.S. at 196.

46. See *United States v. Kagama*, 118 U.S. 375, 384 (1886) ("From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.").

47. *Morton v. Mancari*, 417 U.S. 535, 552 (1974) (quoting *Bd. of Comm'rs v. Seber*, 318 U.S. 705, 715 (1943)).

cise sovereign powers, rather than to act as a federal agency.”⁴⁸ A brief on behalf of eighteen tribes, meanwhile, highlighted the need for the *Duro* Fix by presenting the lived reality of tribal nations trying to police and ensure public safety in their communities.⁴⁹

These briefs appeared to influence not just the narrow 5-4 win but also the language of the majority opinion.⁵⁰ Justice Breyer’s opinion recalled that, for decades after the Founding, federal Indian policy was “more an aspect of military and foreign policy than a subject of domestic or municipal law,”⁵¹ and described the statute as, like statutes ending the colonization of the Philippines or increasing the self-governance powers of Puerto Rico, modifying “the degree of autonomy enjoyed by a dependent sovereign that is not a State”⁵² Moreover, by expanding the “tribe’s authority to control events that occur upon the tribe’s own land,” the statute was not a radical change but was “consistent with our traditional understanding of the tribes’ status as ‘domestic dependent nations.’”⁵³

Once Chief Justice John Roberts came to the Court, however, hopes for rebalancing the scales ended. With just two wins out of eleven decided cases between the 2005 and 2014 Terms (and none before the 2011 Term), the 18% win rate was even lower than that on the Rehnquist Court. The 2012 win in *Salazar v. Ramah Navajo Chapter*,⁵⁴ moreover, had little to do with tribal sovereignty, but instead it concerned whether the United States had to actually pay the amounts promised tribal contractors⁵⁵ and largely reaffirmed a 2005 decision on the same contracts.⁵⁶

The 2014 win in *Michigan v. Bay Mills Indian Community*⁵⁷ was more significant. The case should have been an easy one for the Court. The question was whether tribal sovereign immunity applied to a tribe’s commercial activities outside its reservation. In 1998, the Court squarely held that it did in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*⁵⁸ Although the *Kiowa* majority declared “there are reasons to doubt the wisdom of perpetuating the doctrine” of sovereign immunity, it held that this was a question for Congress.⁵⁹ Congress had not acted; instead, it had considered and not passed several bills that would have

48. Brief for National Congress of American Indians as Amicus Curiae Supporting Respondents at 3, *Lara*, 541 U.S. 193 (No. 03-107). For further discussion of the briefs and work of the project in *Lara*, see Berger, *supra* note 40, at 20–22.

49. Brief Amici Curiae on Behalf of Eighteen American Indian Tribes at 22-29, *Lara*, 541 U.S. 193 (2004) (No. 03-107).

50. See Berger, *supra* note 41, at 22.

51. *United States v. Lara*, 541 U.S. 193, 201 (2004).

52. *Id.* at 204.

53. *Id.*

54. 567 U.S. 182 (2012).

55. *Id.*

56. *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005).

57. 134 S. Ct. 2024 (2014).

58. 523 U.S. 751, 760 (1998).

59. *Id.* at 758.

modified tribal immunity.⁶⁰ But the facts were terrible for the tribal perspective: the case involved a state's challenge to a tribe's action in building a casino outside its established reservation. Nevertheless, armed with congressional history and six modern cases affirming tribal sovereign immunity,⁶¹ the Bay Mills Indian Community managed to eke out a 5-4 victory.

More important than the holding was the language of Justice Kagan's opinion for the majority. The opinion began by emphasizing that "Indian tribes are 'domestic dependent nations'" with "inherent sovereign authority," . . . "separate sovereigns pre-existing the Constitution," and "unless and 'until Congress acts, the tribes retain' their historic sovereign authority."⁶² Tribal sovereign immunity was a necessary corollary to this sovereignty, and "unequivocal" language of Congress was needed to abrogate it.⁶³ "That rule of construction," the *Bay Mills's* Court declared, "reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government."⁶⁴ Although these principles were established by much older cases, the opinion was the Court's most full-throated endorsement of tribal sovereignty in a generation.

Again, *Bay Mills* rested on recent precedent that was squarely on point. If it could garner only a bare majority on the Court, the decision confirmed that the Court remained a dangerous place for Indians.

C. *The Reasons*

Why is the tribal record on the Supreme Court so abysmal? Some of it is related to the conservative shift of the Court generally over this period. Some of it may be due to disparities in the extent to which the Justices understand and care about tribal and Native concerns. But neither factor fully covers the depth of the disparity or explains why the more liberal members of the Court, including Justices Ginsburg, Stevens, and Souter, or Justice Kennedy, the famous swing voter, not only joined, but at times led, the charge against tribal interests. In this Section, I argue that these losses reflect an inability to see tribal interests as sovereign interests or to understand what tribal sovereignty means to Native people and others. Without this understanding of theory and the modern reality of tribes as third sovereigns, both past precedent and existing claims are incoherent and potentially unjust.

60. *Bay Mills*, 134 S. Ct. at 2038–39.

61. *C & L Enters., Inc. v. Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001); *Kiowa*, 523 U.S. at 760; *Okl. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890–91 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 172–73 (1977).

62. *Bay Mills*, 134 S. Ct. at 2030 (internal citations omitted).

63. *Id.* at 2031.

64. *Id.* at 2031–32.

The record streak of tribal losses is related to the Court's shift to the right. Chief Justice William Rehnquist, for example, was tremendously influential in both the Court's conservative⁶⁵ and anti-tribal shift. He practiced and was active in politics in Arizona during that state's Supreme Court battles with Indian tribes,⁶⁶ and, in the 1970s, he wrote the decisions that laid the groundwork for decades of tribal losses.⁶⁷ Justice Thurgood Marshall, meanwhile, was both one of the most liberal members of the Court and one of its strongest advocates for tribal sovereignty, while his replacement, Justice Clarence Thomas, is one of the most conservative Justices and, until 2016, had a near-perfect record of voting and writing opinions against tribal interests. Similarly, in 2006, Justice O'Connor, a moderate who had become a relatively sympathetic voice for tribal interests, was replaced with Justice Alito, both an ultra-conservative and a frequent writer against tribal interests. There is, therefore, some support for Dean David H. Getches's thesis that tribal issues lose in the Supreme Court because they bring together three bugbears of the conservative wing: intruding on state rights, protecting "special rights" of minorities and other groups, and undermining majoritarian values and expectations.⁶⁸

But his thesis does not explain why, until recently, the more liberal justices on the current Court have frequently voted to undermine tribal interests as well. Justice Ginsburg is more liberal than her predecessor Justice White, but until recently, her record in Indian law cases was far worse than his.⁶⁹ Justice Kennedy is a swing voter in many areas but in federal Indian law has a record of voting and writing against tribal interests that rivals that of Justice Thomas.⁷⁰ Justice Souter, while often voting in favor of respecting contracts and treaties with Indian tribes, also re-

65. Jeffrey Rosen, *Rehnquist the Great?*, ATLANTIC (April 2005), <https://www.theatlantic.com/magazine/archive/2005/04/rehnquist-the-great/303820/>.

66. See *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685 (1965); *Williams v. Lee*, 358 U.S. 217 (1959); Rosen, *supra* note 65 (noting that Chief Justice Rehnquist was "active in local Republican circles" following his move to Phoenix in 1953).

67. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that tribes lacked criminal jurisdiction over nonmember Indians committing crimes on their reservations); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976) (holding the state could tax cigarettes sold by tribal members to non-Indians on their reservations).

68. Getches, *supra* note 21, at 268–69.

69. Justice White wrote some very bad opinions for tribal interests but also some very good ones. Compare *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (holding Washington could tax cigarettes purchased on reservations by nontribe members and that Washington assumed civil and criminal jurisdiction over the Reservations), with *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (holding that California did not have jurisdiction to regulate the reservation's bingo enterprise), and *Oneida Indian Nation of N. Y. State v. Oneida Cty.*, New York, 414 U.S. 661 (1974) (holding that Indian title is a matter of federal law and can only be extinguished with federal consent). On Justice Ginsburg's record, see Carole Goldberg, *Finding the Way to Indian Country: Justice Ruth Bader Ginsburg's Decisions in Indian Law Cases*, 70 OHIO ST. L.J. 1003, 1013–18 (2009).

70. See *infra* Appendix A.

peatedly pushed the Court to go even further in stripping tribes of jurisdiction.⁷¹ Something beyond a liberal-conservative bias is going on here.

Part of the issue is lack of familiarity. Justice Powell's belief that he did not know any homosexuals (although one of his own law clerks was gay) is cited in explaining his vote upholding criminalizing sodomy, and the far greater presence of out-gay individuals in elite law circles today may be part of the story behind the Court's recent reversal on LGBT rights.⁷² Native people affiliated with their tribes, in contrast, make up less than 1% of the population, and most justices and their clerks come to the Court with little experience of them or of federal Indian law. For them, the concept of tribes as living communities acting in the modern world is not just foreign but bizarre. Richard Guest, who directs the Tribal Supreme Court Project for the NARF, aptly describes the oral argument in a 2008 tribal jurisdiction case as a "preview of the struggle by many justices . . . to get their minds around the concept that Indian tribes as governments could have authority over non-Indians"⁷³ Professor Fletcher's study of the certiorari process also supports the importance of familiarity, suggesting that both the Justices and their clerks found it easier to generalize from and empathize with the experience of non-Indians and their governments than Native people and their governments.⁷⁴ But Supreme Court Justices frequently rule in favor of groups they do not know, so this cannot be the whole story either.

More important is that, for a group of progressive-to-moderate Justices, tribal claims looked not just unfamiliar, but unfair. In particular, tribal governments are not bound by the Constitution,⁷⁵ many of their actions are not reviewable in federal court,⁷⁶ and they generally accord citizenship by descent rather than residence.⁷⁷ While antipathy to intrusions on state interests and protection of group rights might explain the anti-tribal opinions of those like Justices Rehnquist, Scalia, Thomas, and Alito, concern for preventing potential unfairness does more to explain those of Justices Souter, Ginsburg, Kennedy, and Stevens.⁷⁸

71. See *United States v. Lara*, 541 U.S. 193, 231 (2004) (Souter, J., dissenting); *Nevada v. Hicks*, 533 U.S. 353, 375 (2001) (Souter, J., concurring); *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 659–60 (2001) (Souter, J., concurring).

72. See Adam Liptak, *Exhibit A for a Major Shift: Justices' Gay Clerks*, N.Y. TIMES (June 8, 2013), <http://www.nytimes.com/2013/06/09/us/exhibit-a-for-a-major-shift-justices-gay-clerks.html>.

73. Richard A. Guest, *Motherhood and Apple Pie: Judicial Termination and the Roberts Court*, 56-APR FED. LAW. 52, 57 (2009).

74. See generally Fletcher, *supra* note 25 (arguing that the Supreme Court's certiorari decisions tend to prejudice tribal interests).

75. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

76. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18–19 (1987) (holding that diversity jurisdiction did not permit removal from tribal court and that, although a federal court could review a question of tribal court jurisdiction to hear a case involving non-Indians, unless jurisdiction was lacking, the case could not be relitigated there); *Santa Clara Pueblo*, 436 U.S. at 64–65 (holding that federal review for violations of the Indian Civil Rights Act was limited to habeas actions).

77. See Bethany R. Berger, *Race, Descent, and Tribal Citizenship*, 4 CALIF. L. REV. CIR. 23, 28 (2013) (discussing tribal citizenship requirements).

78. See Bethany R. Berger, *Liberalism and Republicanism in Federal Indian Law*, 38 CONN. L. REV. 813, 814–17 (2005–2006) (discussing Justices' opinions regarding tribal interests). These argu-

If that is true, why did more reliably progressive Justices—Justices Thurgood Marshall, Brennan, Blackmun, Black, and Warren—vote fairly consistently for tribal sovereign interests? The difference lies not in liberalism but in perspective. The previous generation of progressive Justices more consistently saw tribes as colonized governments working to govern themselves and their territory.⁷⁹ If tribal nations are seen as separate governments, then most of the apparent sources of unfairness seem unexceptional. For example, as “separate sovereigns pre-existing the Constitution,” it seems obvious why tribes are not constrained by constitutional provisions they neither framed nor agreed to.⁸⁰ Similarly, once reservations are understood as separate sovereign territories, it seems clear that state laws should not apply to tribal citizens or undermine tribal authority on reservations absent clear evidence of congressional intent.⁸¹ Moreover, if one combines this understanding of tribes as third sovereigns with a recognition of the injustice of their colonization, respecting tribal sovereign rights seems to be not just common sense but a progressive mandate.

Understanding tribes as colonized but still existing sovereigns is not just a matter of perspective but of precedent. The original federal Indian policy dealt with Indian tribes largely through the law of nations, rather than as a matter of domestic policy.⁸² The foundational Supreme Court opinions reflected this policy, turning to tribes’ original independent sovereign status to determine tribal, federal, and state authority.⁸³ It is true

ments are also touted by the more conservative Justices. *See id.*; Guest, *supra* note 73, at 57–58 (discussing questions asked by Justices Roberts and Scalia at oral argument in *Plains Commerce Bank v. Long Family Land & Cattle Co.*). But the fact that Justices who more consistently rule in favor of fairness in other contexts also rule in favor of tribes suggests that something beyond an abiding commitment to justice is at work.

79. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 59 (showing Justice Marshall holding that federal causes of action under the Indian Civil Rights Act (“ICRA”) were limited to habeas suits because creating “a federal forum . . . constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself”); *Williams v. Lee*, 358 U.S. 217, 223 (1959) (showing Justice Black rejecting state jurisdiction over a collection dispute between a Navajo couple and a non-Indian trader because it would “undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves”).

80. *Santa Clara Pueblo*, 436 U.S. at 56.

81. *See Bryan v. Itasca Cty., Minn.*, 426 U.S. 373, 381 (1976).

82. *United States v. Lara*, 541 U.S. 193, 201 (“[T]he first century of America’s national existence . . . Indian affairs were more an aspect of military and foreign policy than a subject of domestic or municipal law.”) (quoting F. Cohen, *Handbook of Federal Indian Law* 208 (1982 ed.); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 *YALE L.J.* 1012, 1059 (2014–2015) (stating that the founders “drew on the law of nations to determine Native status,” framing “nearly all issues of Indian affairs, including the question of land title, through the international law concept of sovereignty”); Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 *U. PA. L. REV.* 195, 200 (1983–1984) (“[T]he same powers that sufficed to give the federal government a free rein in the international arena were viewed as sufficient to enable the new government to deal adequately with the Indian tribes.”).

83. *See, e.g., Talton v. Mayes*, 163 U.S. 376, 383–84 (1896) (internal citations omitted) (relying on the original status of Indian tribes as “distinct, independent political communities” to find that “as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the Constitution, they are not operated upon by the fifth amendment”); *Worcester v. Georgia*, 31 U.S. 515, 542–43 (1832) (Declaring that “America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having

that these precedents recognized (and sometimes applauded) the reality of colonialism and bowed to the deliberate actions of Congress in forwarding the colonial project.⁸⁴ But where Congress had not acted clearly or where the United States had not yet plainly broken its promises, the Court generally ruled that those promises and tribal rights remained.⁸⁵

The Tribal Supreme Court Project has sought to familiarize the Justices with the third sovereign perspective on federal Indian law and its very real impact on Native communities. The Project has supported legal arguments that link recognition of tribal sovereignty to more familiar doctrines regarding other sovereigns. Briefs from tribal communities, meanwhile, present the lived reality of Indian communities struggling with poverty, violence, dislocation, and byzantine jurisdictional limitations, but nevertheless governing and developing functioning legal institutions. In addition, wherever possible, those working with the Project seek amicus briefs from parties that elicit more automatic sympathy from the Court—particularly states—in support of their claims.⁸⁶

While this advocacy did not appreciably change the success rate in the Roberts Court, it may have contributed to the fact that many of the post-2002 losses were split opinions,⁸⁷ a contrast with the 9-0 losses of the previous decade.⁸⁸ The Project also appears to have succeeded in its efforts to limit the number of cases for which certiorari is granted. The Rehnquist Court decided an average of 2.5 Indian law cases a year,⁸⁹ a whopping number for a body of law affecting relatively few people. This figure dropped by almost half to 1.1 during the Roberts Court.⁹⁰

The appointments of Justices Sonia Sotomayor and Elena Kagan in 2009 and 2010 also added Justices already familiar with alternative forms of sovereignty to the Court. Justice Sotomayor's knowledge of Puerto Rico's struggles with dependent sovereignty likely contributes to her

institutions of their own, and governing themselves by their own laws," before finding state could not operate against a non-Indian in Cherokee territory).

84. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (refusing to review whether a congressional acquisition of tribal land violated federal treaties with the tribes).

85. For the fullest discussion of this balance, see Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

86. See, e.g., Brief for the States of Mississippi et al., as Amici Curiae Supporting Respondents, *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496); Brief for the States of Arizona et al., as Amici Curiae Supporting Respondents at 16, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399); Brief for the States of Washington et al., as Amici Curiae Supporting Petitioner, *United States v. Lara*, 541 U.S. 193 (2004) (No. 03-107).

87. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 342 (2008) (Ginsburg, J., joined by Breyer, Souter, and Stevens, JJ., dissenting); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 115 (2005) (Ginsburg, J., joined by Kennedy, J., dissenting); *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 222 (2005) (Stevens, J., dissenting).

88. See, e.g., *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

89. In the nineteen years between September 1986 and September 2005, the Rehnquist Court decided forty-eight cases.

90. Richard Guest, *Tribal Supreme Court Project Ten Year Report: Oct. Term 2001–Oct. Term 2010*, 1 AM. INDIAN L.J. 28, 30 (2012).

sympathy for tribal claims.⁹¹ As Dean of Harvard Law School, Justice Kagan helped administer the Oneida Indian Nation Chair in Federal Indian Law, which has for many years brought federal Indian law scholars to Harvard Law School and would have given her a degree of familiarity with the subject.⁹² In addition, Justice Stephen Breyer's post-appointment work on the importance of the *Cherokee Cases* in the history of judicial review⁹³ gave him knowledge and admiration for the foundational precedents in federal Indian law.

Despite these changes, and over a decade of work by the Tribal Supreme Project, the reconfigured Court barely voted to uphold well-established precedent on tribal sovereign immunity in *Bay Mills*.⁹⁴ The Project succeeded in keeping federal Indian law cases out of the Supreme Court in the 2014 term. In 2015, however, tribes did not get so lucky.

III. THE CASES

The October 2015 Term began with three federal Indian law cases on the Supreme Court docket: *Menominee Indian Tribe of Wisconsin v. United States*,⁹⁵ *Dollar General Corp. v. Mississippi Band of Choctaw Indians*,⁹⁶ and *Nebraska v. Parker*.⁹⁷ The Court granted certiorari in a fourth, *United States v. Bryant*,⁹⁸ in December.⁹⁹ Unlike in *Bay Mills*, there was no controlling precedent in any of these cases. Three involved issues at the heart of tribal sovereignty: tribal territory, tribal jurisdiction, and the constitutionality of federal actions furthering tribal self-governance. Two arose from fact patterns that have consistently lost in the modern Court: tribal interference with the interests of non-Indian governments and businesses.

By the time the Term ended, the tribes had lost only the case with the least impact on federal Indian law, won the territorial and constitutional cases, and the Court split four-four on the tribal jurisdiction case, upholding the result below without opinion. This surprising result does

91. Although New York born and bred, Justice Sotomayor's parents were born in Puerto Rico, and her undergraduate thesis at Princeton and Yale Law Journal note both concerned Puerto Rican sovereignty. See generally Sonia Sotomayor de Noonan, Note, *Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights*, 88 YALE L.J. 825 (1979).

92. Rob Capriccioso, *Harvard Officials Defend Kagan on Indian Issues*, INDIAN COUNTRY MEDIA NETWORK (June 25, 2010), <https://indiancountrymedianetwork.com/news/harvard-officials-defend-kagan-on-indian-issues/>.

93. See STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 1–2 (2010) (comparing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)); Stephen Breyer, *For Their Own Good*, NEW REPUBLIC (Dec. 3, 2008), <https://newrepublic.com/article/63490/their-own-good>.

94. 134 S. Ct. 2024 (2014).

95. 136 S. Ct. 750 (2016).

96. 136 S. Ct. 2159 (2016).

97. 136 S. Ct. 1072 (2016). The Court granted certiorari in *Parker* just before the Term began, on October 1, 2015. 136 S. Ct. 27 (2015).

98. 136 S. Ct. 1954 (2016).

99. *United States v. Bryant*, 136 S. Ct. 690 (2015).

not reflect a general sympathy for alternative forms of sovereignty: a case asserting the inherent sovereignty of Puerto Rico lost seven-two because precedent went against the claim.¹⁰⁰ Rather, it reflects that the Court, at least in some cases, was both ready to accept existing precedent establishing tribal third sovereign status and willing to apply that precedent to acknowledge the modern existence of Indian tribes. This Part discusses the four cases in the order in which they were decided and examines what they mean for the third sovereign in the federal system.

A. Menominee Indian Tribe of Wisconsin v. United States

*Menominee*¹⁰¹ arose from an Indian law context and concerned a long-standing dispute between the United States and many tribes. It had little effect, however, on the distinct status of tribal nations or Native peoples and turned almost wholly on doctrines outside federal Indian law.

The case concerned funding under the Indian Self-Determination and Education Assistance Act (“ISDA”).¹⁰² The law, enacted in 1975, allows tribes to take over administration of federal programs providing health, education, police, and other services for Native people in Indian country.¹⁰³ Since its passage, tribes have taken over administration of governmental services for hundreds of thousands of Native people on reservations and tribal and Alaska Native territories throughout the country.¹⁰⁴

The ISDA directs that federal funding of tribal self-determination programs “shall not be less” than it would have been had the United States operated the program.¹⁰⁵ Initially, however, the United States refused to fund indirect costs such as auditing, accounting, legal services, and human resources.¹⁰⁶ In 1988, Congress amended the ISDA to require

100. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016). *Sanchez Valle* concerned whether the Double Jeopardy Clause prohibited Puerto Rico from prosecuting an illegal gun sale after the defendants had pled guilty in federal court to an offense arising from the same actions. If the prosecutions had involved the federal government and either a state or a tribal nation, the answer would clearly have been no because the prosecutions stemmed from different sources of sovereignty. See *United States v. Wheeler*, 435 U.S. 313, 320 (1978). The majority, in an opinion by Justice Kagan, held that because Puerto Rico’s sovereignty as a territory derived from Congress, the prosecution violated the double jeopardy prohibition. The Court has previously held as much in an earlier case. *Puerto Rico v. Shell Co.*, 302 U.S. 253, 261 (1937). A dissent by Justice Breyer, joined by Justice Sotomayor, argued that Congress’ actions in turning self-government over to Puerto Rico made it a separate sovereign for double jeopardy purposes. The dissent argued that the sovereignty of many entities deemed non-federal for Double Jeopardy purposes—including states other than the original thirteen, the Philippines, and tribal nations—was tainted by congressional action as well. Therefore, the dissenters asserted, for *Puerto Rico* “as with the Philippines, new States, and the Indian tribes—congressional activity and other historic circumstances can combine to establish a new source of power.” 136 S. Ct. at 1880 (Breyer, J., joined by Sotomayor, J., dissenting).

101. 136 S. Ct. 750 (2016).

102. 25 U.S.C. §§ 450–58 (2012).

103. *Id.*

104. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 22.02 (Nell Jessup Newton ed., 2012).

105. 25 U.S.C. § 450j-1(a)(1) (2012).

106. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 104, § 22.02[5].

funding of such “contract support costs” necessary to administer a self-determination contract.¹⁰⁷ Today, tribes and the federal government negotiate contract support costs in their annual self-determination contract funding agreements.¹⁰⁸

The United States has consistently failed to fully pay for the agreed contract support costs,¹⁰⁹ resulting in decades of tribal litigation.¹¹⁰ Although this litigation had mixed results in the lower courts, it resulted in two of the rare recent tribal victories in the Supreme Court. In 2005, in *Cherokee Nation v. Leavitt*,¹¹¹ the Supreme Court unanimously held that failure to earmark sufficient funds in annual appropriation acts did not relieve the government of its obligation to fulfill its contracts, so long as sufficient unrestricted funds were allocated to the agency.¹¹² *Cherokee Nation* did not decide on the effect of language that Congress had begun inserting in its appropriations acts stating that funding for contract support costs was “not to exceed” the amount appropriated.¹¹³ In 2012, *Salazar v. Ramah Navajo Chapter* held that the United States could not so easily avoid its contractual obligations.¹¹⁴

Shortly after the *Cherokee Nation* decision, a number of tribes, including Menominee, filed claims seeking compensation with the Indian Health Service (“IHS”).¹¹⁵ The IHS rejected Menominee’s 1996 to 1998 claims because it had not formally presented them to the IHS within six years,¹¹⁶ as required by the Contract Disputes Act.¹¹⁷ Menominee claimed that formally presenting the claims was excused both by its participation since the 1990s in two class action suits challenging underpayment of contract support costs, and by the trust responsibility of the United States to Indian tribes.¹¹⁸ In previewing the case for SCOTUSblog, Ronald Mann opined that:

107. 25 U.S.C. § 450j-1(a)(2).

108. *Id.* at § 450j-1(a)(3)(B).

109. Brief for Petitioner at 2, 18–27, *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750 (2016) (No. 14-510).

110. This litigation is summarized in COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 104, § 22.02[5].

111. 543 U.S. 631 (2005).

112. *Id.* at 637–38, 641.

113. *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1059 (10th Cir. 2011) (holding that the United States remained obligated to pay despite “not to exceed” language). *But see* *Arctic Slope Native Ass’n v. Sebelius*, 629 F.3d 1296, 1301–04 (Fed. Cir. 2010) (holding language relieved government of obligation to pay beyond the specific obligation).

114. *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 193–95 (2012).

115. *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 754 (2016); Brief for Petitioner at 4, *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750 (2016) (No. 14-510).

116. *Menominee*, 136 S. Ct. at 754.

117. 41 U.S.C. § 7103(a)(4)(a) (2012).

118. Brief for Petitioner at 18–27, *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750 (2016) (No. 14-510). Menominee first participated in a class action filed against the Bureau of Indian Affairs. *Menominee*, 136 S. Ct. at 755 (referencing Complaint, *Ramah Navajo Chapter v. Lujan*, No. 1:90-cv-0957 (D.N.M. Oct. 4, 1990)). That class was certified over objections by the United States that some plaintiffs had not formally filed their claims with the BIA. *Id.* at 754 (referencing Memorandum Opinion, *Ramah Navajo Chapter v. Lujan*, No. 1:90-cv-0957 (D.N.M. Oct 1, 1993)). It was also part of a putative class action filed against the Indian Health Service in *Id.* (referencing *Ramah Navajo Chapter v. Lujan*, No. 1:90-cv-0957 (D.N.M., Oct. 1, 1993)), but that class was denied certification on com-

If ever a case called for pure and unfiltered judgments about fairness, it is *Menominee Indian Tribe v. United States* From the tribe's perspective, the government promised to pay this money, but then thought better of it and interposed innumerable objections to the payments, requiring protracted litigation in multiple class and individual actions, with the government eventually losing pretty much all of the litigation.¹¹⁹

After hearing the Justices' "unremittingly dubious" questions for the tribe at oral arguments, however, Professor Mann called *Menominee* an instance "when my initial take on a case is most strikingly mistaken."¹²⁰ In an opinion by Justice Alito, the Supreme Court unanimously rejected the tribe's petition.¹²¹ The trust responsibility, the Court held, did not void the requirements of a specific statutory exhaustion obligation.¹²² Although the Supreme Court has long held that "commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action,"¹²³ the Court held that without having first filed a claim with the agency, *Menominee* could never have properly been a member of the class.¹²⁴ The tribe's reliance on the certification of one of these class actions, the Court held, was a simple mistake of law, not the kind of "extraordinary circumstance" necessary to trigger equitable tolling.¹²⁵

While a loss for the tribe, the case has little general impact on tribal interests. The argument that the trust responsibility gives rise to broader equitable tolling was accepted by the Federal Circuit in another ISDA case,¹²⁶ but otherwise has little support in the case law. Because the delay was not caused by the federal government, it seems unrelated to other contested trust claims.¹²⁷ The holding that a member of a putative class cannot be part of a class without having first asserted its administrative

monality and typicality grounds. *Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357, 363–66 (E.D. Okla. 2001). It was not until after the *Menominee* Tribe had filed its claims that a court held that tribes had to formally present their claims to the agency before being part of a class. *Pueblo of Zuni v. United States*, 243 F.R.D. 436, 452 (D. N.M. 2007).

119. Ronald Mann, *Argument Preview: Justices Return to Dispute About Government's Refusal to Comply with Contracts to Support Tribes*, SCOTUSBLOG (Nov. 24, 2015, 3:57 PM), <http://www.scotusblog.com/2015/11/argument-preview-justices-return-to-dispute-about-governments-refusal-to-comply-with-contracts-to-support-tribes/>.

120. Ronald Mann, *Argument Analysis: Justices Dubious of Tribe's Claim for Equitable Tolling in Government Contract Dispute*, SCOTUSBLOG (Dec. 2, 2015, 11:12 AM), <http://www.scotusblog.com/2015/12/argument-analysis-justices-dubious-of-tribes-claim-for-equitable-tolling-in-government-contract-dispute/>.

121. *Menominee*, 136 S. Ct. at 757.

122. *Id.*

123. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974).

124. *Menominee*, 136 S. Ct. at 756.

125. *Id.* at 755–57 (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

126. *Arctic Slope Native Ass'n v. Sebelius*, 699 F.3d 1289, 1298 (Fed. Cir. 2012).

127. It is unlike, for example, *United States v. Navajo Nation*, 537 U.S. 488 (2003), where the Supreme Court found no trust responsibility even though the United States refused to approve a more equitable royalty rate for the Navajo Nation's coal after the Department of Interior official held secret meetings with coal company representatives.

remedies is consistent with holdings in Social Security Act¹²⁸ and Federal Tort Claims Act contexts¹²⁹ but inconsistent with those in Title VII cases.¹³⁰ The impact of the case, therefore, may be greater for class action litigants and the doctrine of equitable tolling generally than for federal Indian law.

B. Nebraska v. Parker

Unlike *Menominee*, *Nebraska v. Parker* involved issues at the heart of tribal sovereignty. The boundaries of “Indian country” are key to tribal self-governance, marking the line at which state jurisdiction over tribal citizens generally stops and tribal and federal authority begins.¹³¹ All land within an Indian reservation constitutes Indian country, regardless of who owns the land.¹³² *Nebraska v. Parker* concerned whether an 1882 statute opening part of the Omaha Reservation to non-Indian purchase shrank the boundaries of the reservation.¹³³ The opened area had long been owned almost exclusively by non-Indians, but beginning in 2006, the tribe sought to regulate the sale of liquor at the seven liquor stores in Pender, the village that dominated the area.¹³⁴ The case thus triggered two subjects—tribal territory in non-Indian dominated areas and tribal jurisdiction over non-Indians—in which the Supreme Court had consistently ruled against Indian tribes for twenty-five years.¹³⁵

The 1882 Act was one of many “allotment acts” that Congress passed between the 1880s and the 1920s.¹³⁶ As part of the federal policy to assimilate and individualize the Indians, allotment opened some tribal land to non-Indian purchase immediately and allotted much of the remainder to individual Indians. As the Supreme Court has acknowledged, “[t]he policy of allotment of Indian lands quickly proved disastrous for

128. *Weinberger v. Salfi*, 422 U.S. 749, 763–64 (1975).

129. *Aguiar v. United States*, 818 F.2d 194, 198 (2d Cir. 1987).

130. See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975).

131. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998) (“Generally speaking, primary jurisdiction [in Indian country] rests with the Federal Government and the Indian tribe inhabiting it, and not with the States.”).

132. 18 U.S.C. § 1151(a) (2012). Indian country also includes all allotments outside reservation boundaries that are still under Indian ownership, *id.* § 1151(c), as well as “dependent Indian communities,” *id.* § 1151(b), and land the federal government has set aside for Indians under federal protection. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. at 530.

133. 136 S. Ct. 1072 (2016).

134. *Id.* at 1078.

135. The six cases concerning tribal jurisdiction over non-Indians are: *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473 (1999); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); and *South Dakota v. Bourland*, 508 U.S. 679 (1993). The four cases involving Indian country are: *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005); *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998); and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994). An additional two cases make it harder for tribes to expand their Indian country by giving their land to the United States to take into trust. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012); *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009).

136. See *Hodel v. Irving*, 481 U.S. 704, 706–07 (1987).

the Indians.”¹³⁷ Between 1887 and 1934, 86 million acres of land—almost two-thirds of the Indian land base—passed out of Indian hands,¹³⁸ leaving Indians landless and impoverished.¹³⁹ In 1934, Congress forever repudiated allotment,¹⁴⁰ and in 1948, declared that all land within reservation boundaries remained Indian country, regardless of who owned it.¹⁴¹

But these statutes did not resolve whether allotment changed reservation boundaries in the first place. The Court has been less than consistent on the issue. Although it has insisted that allotment does not diminish a reservation absent “clear and plain” evidence of congressional intent,¹⁴² it has repeatedly found diminishment even though Congress did not actually say the boundaries would change.¹⁴³ Even stranger, it has endorsed the use of current demographics—whether mostly Indians or non-Indians live in the area now, to determine if the area has lost its “Indian character”—as a factor in the analysis.¹⁴⁴ The Court has acknowledged that modern demographics are an “unorthodox” way to determine what Congress was thinking a century ago,¹⁴⁵ but relies on this factor to avoid “disrupt[ing] the justifiable expectations” of the non-Indians in the area.¹⁴⁶

In 2005, in *City of Sherrill v. Oneida Indian Nation of New York*, the Court extended the legal force of non-Indian expectations beyond the diminishment context.¹⁴⁷ In *Sherrill*, the Court held that the expectations of non-Indian communities prevented the Oneida Indian Nation from asserting its immunity from state tax on land the tribe owned within its historic reservation because the state had acquired the land and sold it to non-Indians long ago.¹⁴⁸ This was true even though the Court had earlier held that the acquisitions were illegal, that no statute of limitations

137. *Id.* at 707.

138. *Hagen*, 510 U.S. at 425 n.5 (quoting 2 FRANCIS PRUCHA, *THE GREAT FATHER* 896 (1984)).

139. *See id.* (quoting Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 15, 17 (1934)).

140. 25 U.S.C. § 461 (2012).

141. 18 U.S.C. § 1151(a) (2012).

142. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (quoting *United States v. Dion*, 476 U.S. 734, 736–39 (1986)) (internal quotations omitted); *see Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (“Congress [must] clearly evince an intent to change boundaries before diminishment will be found.”) (internal quotations omitted); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977); *DeCoteau v. Dist. Cty. Court*, 420 U.S. 425, 444 (1975) (“This Court does not lightly conclude that an Indian reservation has been terminated . . . The congressional intent must be clear, to overcome the general rule that [d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.”) (quoting *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 174 (2001)) (internal citations omitted); *Mattz v. Arnett*, 412 U.S. 481, 504 (1973) (“[C]lear termination language was not employed in the 1892 Act. This being so, we are not inclined to infer an intent to terminate the reservation.”).

143. *Yankton*, 522 U.S. at 358; *Hagen*, 510 U.S. at 421; *Rosebud*, 430 U.S. at 614; *DeCoteau*, 420 U.S. at 449.

144. *Yankton*, 522 U.S. at 356–57; *Solem*, 465 U.S. at 471–72.

145. *Solem*, 465 U.S. at 472 n.13.

146. *Hagen*, 510 U.S. at 421; *Rosebud*, 430 U.S. at 604–05.

147. 544 U.S. 197, 221 (2005).

148. *Id.* at 215–19.

barred the land claims, and that the tribes were prevented from earlier litigating on their own behalf.¹⁴⁹

Nebraska v. Parker pitted these inconsistent doctrines against each other. The 1882 Act did not contain any of the language previously found to indicate diminishment: it did not state that the Omaha Tribe relinquished all interests in the land, that the land was being restored to the public domain, or that the United States would pay the tribe a lump sum in exchange for the land.¹⁵⁰ Instead, the Act authorized the United States to declare the disputed area open for sale and settlement after tribal members had a chance to select allotments there and directed the government to pay the proceeds of any sales to the tribe.¹⁵¹ This was almost the same language found not to constitute diminishment in two earlier cases.¹⁵²

Unlike those earlier cases, the demographics were on Nebraska's side. Less than 2% of the population in the opened area was Indian; no allotments remained in Indian ownership; and the tribe had exerted little governmental presence there until recently.¹⁵³ But precedent seemed to favor the tribe, and both the district court and the Eighth Circuit found the reservation boundaries remained unchanged.¹⁵⁴ Nebraska sought certiorari, asking the Court to determine that diminishment might be found despite "ambiguous evidence" in the statute's language and history if there had been "de facto diminishment" of the area.¹⁵⁵ When the Supreme Court granted certiorari, it seemed clear that at least four members of the Court thought the answer should be yes.

Paul Clement, a conservative Supreme Court titan and past clerk to Justice Scalia, joined the attorneys for the Omaha Tribe to represent the Omaha Tribal Council,¹⁵⁶ and the U.S. Solicitor filed and argued against diminishment as well. The Tribal Supreme Project organized two amicus briefs. One, from the NCAI, focused on the disruption from changing the established diminishment test and on the cooperative relationship between tribes and the many non-Indian towns that existed within reserva-

149. For commentary on the case, see Kathryn Fort, *The New Laches: Creating Title Where None Existed*, 16 GEO. MASON L. REV. 357, 375–80 (2009) (criticizing misuse of laches in *Sherrill*); Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 611–12 (2006).

150. See *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998).

151. S.J. Res. 434, 47th Cong. (1882).

152. *Solem v. Bartlett*, 465 U.S. 463, 473 (1984) (finding 35 Stat. 460 authorizing the Secretary to "sell and dispose of all that portion of" the reservations and deposit proceeds for the tribe "suggests the Secretary of the Interior was simply being authorized to act as the Tribe's sales agent."); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 356 (1962) (finding that 34 Stat. 80 provided that certain lands would be open to "settlement and entry under the provisions of the homestead laws" and the proceeds would be "deposited in the Treasury of the United States to the credit of the" tribe "did no more than open the way for non-Indian settlers to own land on the reservation.");

153. *Nebraska v. Parker*, 136 S. Ct. 1072, 1077–78 (2016).

154. *Smith v. Parker*, 774 F.3d 1166, 1168–69 (8th Cir. 2014); *Smith v. Parker*, 996 F. Supp. 2d 815, 844 (D. Neb. 2014).

155. Brief for Petitioners at i, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406).

156. Brief for Respondents Omaha Tribal Council, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406).

tion borders.¹⁵⁷ The second, which I wrote with Professor Colette Routel, was on behalf of scholars of federal Indian law, politics, and history.¹⁵⁸

A key message of the briefs was that demand for clear evidence of congressional intent to change reservation boundaries was not some idiosyncratic aspect of federal Indian law. Rather, it was the same rule applied to interpreting other statutes alleged to adjust traditional boundaries and relationships with other governments.¹⁵⁹ In the same way that Congress “must clearly express its intent” to abrogate treaties with tribal nations,¹⁶⁰ treaties with foreign nations “will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.”¹⁶¹ Similarly, federal statutes will not be interpreted to operate in the territory of a foreign government unless “the affirmative intention of the Congress [is] clearly expressed.”¹⁶² In other interpretive rules with parallels to federal Indian law, clear evidence of congressional intent is required to interpret a statute to intrude on traditional state authority¹⁶³ or abrogate state sovereign immunity.¹⁶⁴ In each of these areas, respect for traditional sovereign rights demands clear evidence before the Court will breach the traditional boundary lines between governments.

The briefs also gave context to the Omaha Tribe’s slight presence in the opened area, which was dominated by the town of Pender. First, the U.S. Commissioner of Indian Affairs inappropriately sought to discourage Omahas from selecting allotments there, and, relying on discriminatory homesteading laws, forbade Indians from purchasing land there once it was open to sale.¹⁶⁵ Once the land had been allotted, real estate

157. Brief for the National Congress of American Indians, et al. as Amici Curiae in Support of Respondents at 15–16, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406).

158. Brief for Historical and Legal Scholars, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406).

159. Brief for Respondents Omaha Tribal Council, at 23–24, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406). Brief for Historical and Legal Scholars, at 11, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406); see Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 416–17 (1993) (discussing similarity between interpretive rules in federal Indian law and clear statement rules courts employ in questions of federalism and structure of sovereignty); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 458 (1989) (discussing the requirement of a “clear statement before courts will find congressional displacement of the usual allocation of institutional authority”).

160. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999).

161. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (quoting *Cook v. United States*, 288 U.S. 102, 120 (1933)) (internal quotations omitted).

162. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)) (internal quotations omitted).

163. *Bond v. United States*, 134 S. Ct. 2077, 2088–89 (2014); cf. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56–57 (1978) (statute would not be interpreted to intrude on tribal sovereignty absent clear indications of congressional intent).

164. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003) (stating that congressional intent to abrogate state sovereign immunity must be “unmistakably clear”); cf. *Michigan v. Bay Mills Indian Cmty.* 134 S. Ct. 2024, 2031 (2014) (stating that congressional intent to abrogate tribal sovereign immunity must be “clear” and “unequivocal[.]”).

165. Brief for Respondents Omaha Tribal Council, at 49, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406); Joint Appendix at 950–52, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406).

syndicates known as “the Pender Ring” worked to separate Indians from their land, often for “ridiculously low rates,”¹⁶⁶ and initially in violation of federal law.¹⁶⁷ When tribal police tried to evict non-Indians illegally on allotted land, the county sheriff actually arrested the tribal officers.¹⁶⁸ The sheriff, in turn, was arrested by the tribal police and tried in tribal court.¹⁶⁹ In response, William Peebles, a founder of Pender and a leader in one of the leasing syndicates, purchased 100 rifles to arm a resistance against enforcement of the law.¹⁷⁰ Although violence was averted, the syndicates later secured replacement of the federal agent who was enforcing the law with one who was friendlier to their interests.¹⁷¹ Non-Indians, in other words, worked hard—sometimes illegally and even violently—to suppress Omaha attempts to preserve their land or assert their authority.

The briefs also showed why Nebraska’s own exercise of jurisdiction in the opened area should not be relevant to the diminishment inquiry.¹⁷² First, states have jurisdiction over non-Indian interactions regardless of reservation boundaries.¹⁷³ Second, until the 1970s, Nebraska illegally exercised jurisdiction over Indians throughout the reservation, not just the opened area.¹⁷⁴ In 1953, moreover, Public Law 280 gave Nebraska jurisdiction over Indians on all reservations.¹⁷⁵

At oral argument, Justice Scalia seemed particularly dubious about use of post-enactment events: “I mean, to say, you know, a later Congress did thus and so, and therefore the earlier Congress, when it enacted a particular statute, must have diminished. That doesn’t make any sense.”¹⁷⁶ The Justices also pressed the attorney for Nebraska on whether

166. JUDITH A. BOUGHTER, *BETRAYING THE OMAHA NATION, 1790–1916*, 110, at 142–43, 146–47 (1998).

167. *Id.*; see also *Beck v. Flournoy Live-Stock & Real-Estate Co.*, 65 F. 30, 36 (8th Cir. 1894) (holding leases illegal).

168. *Federal v. State—Government Wins Its Prosecution of Sheriff Mullin*, *The State* (Columbia, S.C.), Apr. 22, 1895.

169. *Id.*

170. *An Indian War Threatened—Settlers are Armed and Organized in Nebraska*, *DAILY INTER OCEAN*, July, 19, 1895.

171. BOUGHTER, *supra* note 166, at 163–64.

172. Brief for Petitioners at 32, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406).

173. *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28, 29 (1885) (taxing jurisdiction); *United States v. McBratney*, 104 U.S. 621, 624 (1881) (criminal jurisdiction).

174. *Omaha Tribe v. Vill. of Walthill*, 334 F. Supp. 823, 835–36 (D. Neb. 1971), *aff’d sub nom. Omaha Tribe of Neb. v. Vill. of Walthill*, Neb., 460 F.2d 1327 (8th Cir. 1972) (rejecting jurisdiction under 1882 Act); MARK R. SCHERER, *IMPERFECT VICTORIES: THE LEGAL TENACITY OF THE OMAHA TRIBE, 1945–1995*, 16–17 (1999).

175. See *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 177 (1973). Although Nebraska partially retroceded jurisdiction over the Omaha Reservation in 1970, it retained jurisdiction over Indians on highways. Its retrocession, moreover, described the reservation as including the Pender area. *Smith v. Parker*, 996 F. Supp. 2d 815, 830 (D. Neb. 2014).

176. Transcript of Oral Argument at 5:9–13, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406) (Scalia, J.). Other Justices were also skeptical. See, e.g., *id.* at 10:2–10 (Kagan, J.) (“You know, because usually, at least now, we don’t think much of subsequent history of any kind. Now, maybe they thought a little bit more highly of it in the days when *Solem* was written, but now it would – it’s – it’s pretty much of a stretch to use subsequent legislative history or subsequent history generally when we’re dealing with interpreting a statute.”).

reservation status would make much difference for non-Indians and the state, given that states retained broad jurisdiction and tribes lacked most jurisdiction over non-Indians.¹⁷⁷ More troubling for the tribe, Justice Scalia also suggested that *Sherrill* meant that tribal sovereignty could be lost by failure to exercise it,¹⁷⁸ but the Justices also seemed to believe that question was not raised by a case solely about reservation boundaries.¹⁷⁹ The mood after the argument was cautiously optimistic.

Justice Scalia's remarks at oral argument suggested that he would vote against diminishment, but the votes of Justices Roberts, Alito, and potentially Justices Breyer and Ginsburg, were less certain. Justice Thomas, meanwhile, had a near-perfect record of voting against tribal interests. Many were surprised when, six weeks after Justice Scalia's death on February 13, Justice Thomas authored a unanimous opinion holding the Omaha Reservation had not been diminished.¹⁸⁰ One might even speculate that the unanimity reflected a tribute to Justice Scalia and his long insistence that statutes should be judged by what they actually say.

The opinion reaffirmed that only Congress could diminish a reservation and that "its intent to do so must be clear."¹⁸¹ The primary place to look for this intent was the text of the statute itself; any other surrounding history must "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation."¹⁸² While the Court did not state that earlier decisions were wrong to consider demographic evidence, it seriously discounted the value of such evidence. It declared it "not our role to 'rewrite' the 1882 Act in light of this subsequent demographic history,"¹⁸³ which was "the least compelling" element in the diminishment inquiry.¹⁸⁴ The Court called the "justifiable expectations" of the non-Indians who lived in the area "compelling" but stated that only Congress, not expecta-

177. See, e.g., *id.* at 9:9–13 (Sotomayor, J.) ("What—what else—what else do you lose if this ruling is against you? We've already circumscribed the powers of the Tribes on their own reservations greatly, so what powers do you lose?"); *id.* at 12:5–14:12 (Alito, Scalia & Sotomayor, JJ.); *id.* at 36:17–22 (noting that the liquor regulation giving rise to the case was unusual, because it resulted from a specific federal authorization of tribal regulation pursuant to the broad federal power over sales of alcohol on reservations); see also 18 U.S.C. § 1161 (2012); *United States v. Mazurie*, 419 U.S. 544, 547 (1975). It is not settled whether this authorization applies in non-Indian communities on reservations, see *Pittsburgh & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1544 n.13 (10th Cir. 1995) (suggesting it does not), but see *City of Timber Lake v. Cheyenne River Sioux*, 10 F.3d 554, 557–58 (8th Cir. 1993) (holding that it does).

178. Transcript of Oral Argument at 18:21–19:3, 27:9–22, 45:12–46:5, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406) (Scalia, J.).

179. *Id.* at 7:5–19 (Roberts, C.J.); *Id.* at 20:20–21:10 (Kagan, J.).

180. *Nebraska v. Parker*, 136 S. Ct. 1072 (2016).

181. *Id.* at 1078–79.

182. *Id.* at 1080 (quoting *Solem v. Bartlett*, 465 U.S. 463, 471 (1984)).

183. *Id.* at 1082 (quoting *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 447 (1975)). *DeCoteau*, notably, held that a reservation had been diminished, and the history it was refusing to rewrite was the entire history of allotment. 420 U.S. at 447.

184. *Parker*, 136 S. Ct. at 1082 (quoting *South Dakota v. Yankton Sioux*, 522 U.S. 329, 356 (1998)).

tions, could diminish reservation boundaries.¹⁸⁵ Finally, because the petition raised only the diminishment question, the Court “express[ed] no view” about whether *Sherrill* supported curtailing the tribe’s governmental powers.¹⁸⁶

While the reference to *Sherrill* foretells battles for another day, the opinion as a whole represents a victory for Indian tribes. It affirms the clear intent standard and cabins attempts to expand reliance on present demographics. Its impact may be even more wide ranging. In several areas, the Court has striven to accommodate the alleged expectations of non-Indians within tribal borders, bending rules of statutory construction, equitable remedies, and allocation of power between Congress and Court to do so.¹⁸⁷ Perhaps this decision may help to establish that the wishes of this favored group are not enough to make the Court depart from its usual interpretive role.

C. United States v. Bryant

United States v. Bryant concerned the constitutional status of tribal governmental powers. In 2005, Congress enacted 18 U.S.C. § 117, which made it a felony to commit domestic assault in Indian country if the offender already has two or more convictions for domestic violence by a federal, state, or tribal court.¹⁸⁸ The law was a partial response to a criminal justice crisis. Native women face the highest rates of domestic violence of any group in the United States, with 46%—almost one in two—experiencing domestic violence in their lifetimes.¹⁸⁹ Yet, states generally lack jurisdiction over crimes committed between Indians on reservations and often do not enforce the jurisdiction they do have.¹⁹⁰ Tribes do have jurisdiction over intra-Indian crimes but can generally sentence defendants to no more than one year in prison.¹⁹¹ Section 117, therefore, could be seen as “the first true effort to remove these recidivists from the communities that they repeatedly terrorize.”¹⁹²

Sounds good, right? Under the statute, the federal government can prosecute habitual abusers as felons, and somewhat shrink the enforcement gap. Michael Bryant is precisely the kind of serial offender Con-

185. *Id.*

186. *Id.*

187. See, e.g., Fort, *supra* note 149 (criticizing misuse of laches in *Sherrill*); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture Of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 25–26 (1999) (criticizing this trend in both diminishment and tribal jurisdiction cases); Ann E. Tweedy, *Unjustifiable Expectations: Laying to Rest the Ghosts of Allotment-Era Settlers*, 36 SEATTLE U. L. REV. 129 (2012) (arguing that allotment era settlers could have no valid expectations against tribal jurisdiction).

188. 18 U.S.C. § 117 (2012).

189. *United States v. Bryant*, 136 S. Ct. 1954, 1959 (2016).

190. *Id.* at 1960–61.

191. *Id.* at 1960. The 2010 Tribal Law and Order Act permitted tribes to sentence offenders to up to three years in prison if they put a number of procedural protections in place, but few tribes have done so yet. *Id.*

192. *United States v. Bryant*, 792 F.3d 1042, 1045 (9th Cir. 2015) (Owens, J., dissenting).

gress intended to reach. As described by the dissent to the Ninth Circuit's refusal to review the case en banc,

Michael Bryant likes to beat women. Sometimes he kicks them. Sometimes he punches them. Sometimes he drags them by their hair. He punched and kicked one girlfriend repeatedly, threw her to the floor, and even bit her. When he could not find his keys, he choked another woman to the verge of passing out. Although his violence varies, his punishment never does. Despite Bryant's brutality—resulting in seven convictions for domestic violence—his worst sentence was a slap on the wrist: one year imprisonment, or what someone who “borrows” a neighbor's *People* magazine from the mailbox on two separate occasions could face.¹⁹³

In February 2011, after over 100 tribal court convictions for domestic abuse and other crimes, Bryant was arrested for “attacking his then girlfriend, dragging her off the bed, pulling her hair, and repeatedly punching and kicking her.”¹⁹⁴ He admitted to law enforcement that he had physically assaulted her five or six times before.¹⁹⁵ Three months later, he assaulted a new girlfriend, “choking her until she almost lost consciousness,” again admitting multiple assaults in just the two months they had dated.¹⁹⁶ Federal felony sentencing of Bryant could remove a predator who had victimized many women from the Northern Cheyenne community.

This is the problem: because tribal sovereignty does not derive from the Constitution and tribes have not consented to it, tribes are not bound to constitutional requirements.¹⁹⁷ The Indian Civil Rights Act (“ICRA”) does require tribes to abide by guarantees very similar to the Bill of Rights,¹⁹⁸ and criminal defendants may vindicate these rights via habeas actions in federal court.¹⁹⁹ But ICRA protections are not identical to their constitutional counterparts. In particular, tribes need not provide criminal defendants with counsel before imposing sentences of less than one year.²⁰⁰ Therefore, although Michael Bryant had not had counsel for any of his tribal court convictions, those convictions were valid under federal law.²⁰¹ But the federal government, of course, is subject to the Constitution. *Bryant* asked whether the federal government could constitutionally use uncounseled tribal court convictions to qualify a defendant for habitual offender status.

Earlier decisions narrowed the question but did not answer it. In *Burgett v. Texas*, the Court held that a conviction obtained in violation of the right to counsel could not be used to either “support guilt or enhance

193. *Id.* at 1044–45.

194. *Bryant*, 136 S. Ct. at 1963.

195. *Id.*

196. *Id.*

197. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

198. 25 U.S.C. § 1302 (2012).

199. *Id.* § 1303.

200. *Id.* § 1302(a)(6).

201. *Bryant*, 136 S. Ct. at 1963.

punishment for another offense” because the accused would thereby “suffer[] anew from the deprivation of that Sixth Amendment right.”²⁰² The Court subsequently held in *Scott v. Illinois* that the right to counsel did not apply to misdemeanor convictions not carrying a sentence of imprisonment.²⁰³ The following year, *Baldasar v. Illinois* held that an uncounseled misdemeanor conviction could not be used to enhance a defendant’s sentence for a later crime, but the five Justices joining the *per curiam* opinion did not agree on a rationale for the holding.²⁰⁴ In 1994, *Nichols v. United States* reversed *Baldasar*, finding that “an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.”²⁰⁵

What did *Nichols* and *Burgett* mean for an uncounseled, but valid, tribal court conviction for which a prison term had been imposed? More generally, did *Nichols* apply beyond its sentence enhancement context to habitual offender statutes where the previous conviction was an element of the crime itself? Some dicta in *Nichols* suggested it did. The *Nichols* Court referred in passing to “recidivist statutes,” noting that “[t]his Court consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant.”²⁰⁶ Other parts of *Nichols*, however, emphasized the sentencing versus element distinction, calling the sentencing process “less exacting than the process of establishing guilt” because contributing factors needed to be proved only by a preponderance of evidence rather than beyond a reasonable doubt.²⁰⁷ This language suggested that concern for the reliability of uncounseled convictions, one of the rationales for both the right to counsel and a *Baldasar* concurrence,²⁰⁸ might still prevent uncounseled convictions from being used in habitual offender statutes. Cases before and after *Nichols* provided ammunition for both sides but no clear answers in this debate.²⁰⁹

202. *Burgett v. Texas*, 389 U.S. 109, 115 (1967).

203. 440 U.S. 367, 373–74 (1979).

204. 446 U.S. 222, 224 (1980). In *Baldasar*, Justice Blackmun argued that *Scott* was incorrectly decided and that the Sixth Amendment always required counsel for criminal defendants. *Id.* at 229–30 (Blackmun, J., concurring). Three Justices joined an opinion arguing that an uncounseled conviction lacked sufficient reliability to be used for sentence enhancement. *Id.* at 227–28 (Marshall, J., concurring). Justice Stewart, however, referred simply to the logic of the Court’s prior cases without explanation. *Id.* at 224 (Stewart, J., concurring).

205. *Nichols v. United States*, 511 U.S. 738, 748–49 (1994).

206. *Id.* at 747 (quoting *Baldasar*, 446 U.S. at 232) (Powell, J., dissenting)).

207. *Id.* at 747–48.

208. *Baldasar*, 446 U.S. at 227–28 (Marshall, J., concurring).

209. *Alabama v. Shelton* recited the reliability concern in holding that the Sixth Amendment required counsel before a conviction resulting in a suspended sentence. 535 U.S. 654, 667 (2002). The Court stated that “the key Sixth Amendment inquiry” was “whether the adjudication of guilt corresponding to the prison sentence is sufficiently reliable to permit incarceration.” *Id.* A pre-*Nichols* case, *Lewis v. United States*, held that an uncounseled felony conviction could be used to support a conviction for possession of a firearm by a felon, stating that “[t]he federal gun laws, however, focus not on reliability but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons.” 445 U.S. 55, 67 (1980). A subsequent pre-*Nichols* case, however, *United States v. Mendoza-Lopez*, distinguished *Lewis* to hold that it was unconstitutional to convict someone of reentering the United States after deportation without permitting the defendant to

In 2011, both the Eighth and Tenth Circuits, in the euphoniously named *United States v. Cavanaugh* and *United States v. Shavanaux*, upheld use of uncounseled tribal court convictions to establish habitual offender status under 18 U.S.C. § 117.²¹⁰ In *United States v. Bryant*, the Ninth Circuit ruled the other way.²¹¹ The *Bryant* panel relied in part on the Ninth Circuit's 1994 decision in *United States v. Ant*, holding that an uncounseled tribal court guilty plea could not be used as evidence of guilt in a subsequent federal prosecution.²¹² The *Bryant* panel also found that *Nichols* should be read to only apply to cases of sentence enhancement and that considering an uncounseled conviction in a habitual offender statute case remained unconstitutional.²¹³

The majority opinion in *Bryant* paid little attention to the distinctive Indian law aspects of the issue. Judge Paul Watford, however, concurred to state that, as the convictions themselves were constitutional, presumably the majority was motivated by concerns about the reliability of the convictions.²¹⁴ Since uncounseled state and federal court convictions were sufficiently reliable to convict a defendant for gun possession after conviction of a felony,²¹⁵ however, he argued:

[A]ren't we really saying that the right to appointed counsel is necessary to ensure the reliability of all *tribal* court convictions? If that's true, we seem to be denigrating the integrity of tribal courts. The implication is that, if the defendant lacks counsel, tribal court convictions are inherently suspect and unworthy of the federal courts' respect. While in our adversarial system we've concluded that the lack of counsel detracts from the accuracy and fairness of a criminal proceeding, . . . respect for the integrity of an independent sovereign's courts should preclude such quick judgment.²¹⁶

The Ninth Circuit, over the dissents of eight judges, denied review en banc,²¹⁷ and the Supreme Court granted certiorari.

In the Supreme Court, Elizabeth Prelogar, a past clerk to Judge Merrick Garland and Justices Ginsburg and Kagan, represented the United States. The Tribal Supreme Court Project also helped to organize three amicus briefs. One, from the NCAI, emphasized the regularity of procedures in tribal courts and Northern Cheyenne courts, and the long

challenge due process infirmities in the previous deportation. 481 U.S. 828, 839 (1987). *Medoza-Lopez*, however, relied on the constitutionally bizarre status of deportation proceedings, where statutes forbid judicial review. *Id.* at 836–41.

210. See *United States v. Cavanaugh*, 643 F.3d 592, 594 (8th Cir. 2011); see also *United States v. Shavanaux*, 647 F.3d 993, 998 (10th Cir. 2011). For discussion of the two opinions and the differences in their approach, see Christiana Martenson, Note, *Uncounseled Tribal Court Guilty Pleas in State and Federal Courts: Individual Rights Versus Tribal Self-Governance*, 111 MICH. L. REV. 617, 628–32 (2013).

211. *United States v. Bryant*, 769 F.3d 671, 679 (9th Cir. 2014).

212. 882 F.2d 1389, 1395 (9th Cir. 1989). Judge Watford concurred in the opinion solely because he believed the decision was controlled by *Ant. Bryant*, 769 F.3d at 679 (Watford J., concurring).

213. *Bryant*, 769 F.3d at 679.

214. *Id.* at 680–81 (Watford, J., concurring).

215. *Lewis v. United States*, 445 U.S. 55, 67 (1980).

216. *Bryant*, 769 F.3d at 680 (Watford, J., concurring) (emphasis added) (citations omitted).

217. *United States v. Bryant*, 792 F.3d 1042, 1042 (9th Cir. 2015).

history—extending across many states and federal settings—of recognizing such proceedings as a matter of comity.²¹⁸ That brief countered one from the National Association of Criminal Defense Lawyers that relied on fifty-year-old quotes calling tribal courts “kangaroo courts,”²¹⁹ and mocking tribal court judges as “well-intentioned laypersons” unprepared “to effectively guarantee the complex, quasi-constitutional rights enshrined in ICRA”²²⁰

A second amicus, from the National Indigenous Women’s Resource Center and other domestic violence organizations, emphasized the domestic violence crisis in Indian country and the jurisdictional gaps necessitating 18 U.S.C. § 117.²²¹ A third amicus, from former attorneys general from seven states with substantial Indian territories, focused on recidivism among abusers and the importance of federal felony jurisdiction.²²² Justice Ginsburg spent much of her opinion for the Supreme Court discussing the facts in these two briefs: the crisis of domestic violence against Indian women, the failures of the existing jurisdictional scheme to address it, the high recidivism among abusers, and Michael Bryant’s own horrendous history of hurting woman after woman.²²³

Justice Ginsburg’s linking of tribal self-governance with protection of women is significant. Justice Ginsburg’s first known encounter with federal Indian law came in the 1970s when, as director of the ACLU’s Women’s Rights Project, she decided the project should file an amicus brief in *Santa Clara Pueblo v. Martinez*²²⁴ arguing for federal invalidation of a Santa Clara Pueblo ordinance that denied tribal membership to the children of female members with nonmembers.²²⁵ Some have speculated that this early experience, plus her lack of other exposure to Indian tribes, gave her a general concern about the fairness of tribal governments.²²⁶ Since joining the Court in 1993, Justice Ginsburg has written some of the opinions that have pushed precedent furthest against the interests of Indian tribes.²²⁷ A 2009 study found that she wrote a disproportionate share of Indian law opinions and that tribes lost in a disproportionate number of those cases.²²⁸ More recent Ginsburg opinions,

218. Brief for National Congress of American Indians as Amicus Curiae Supporting Petitioner at 20–21, *United States v. Bryant*, 136 S. Ct. 1954 (2016) (No. 15-420).

219. Brief for the National Association of Criminal Defense Lawyers and Experienced Tribal Court Criminal Litigators as Amici Curiae Supporting Respondent at 8, *Bryant*, 136 S. Ct. 1954 (No. 15-420).

220. *Id.* at 20–21.

221. See generally Brief for National Indigenous Women’s Resource Center et al., as Amici Curiae Supporting Petitioner, *Bryant*, 136 S. Ct. 1954 (No. 15-420).

222. Brief for Denis Burke et al., as Amici Curiae Supporting Petitioner at 8, *Bryant*, 136 S. Ct. 1954 (No. 15-420).

223. *Bryant*, 136 S. Ct. 1954, 1959–61, 1963–64 (2016).

224. See 436 U.S. 49, 51 (1978); see also Goldberg, *supra* note 69 at 1005.

225. Goldberg, *supra* note 69, at 1006.

226. *Id.*

227. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 (2005); *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997)

228. Goldberg, *supra* note 69, at 1013–14.

however, suggest a new appreciation of the role tribal institutions play in protecting vulnerable populations,²²⁹ and *Bryant* extends this trend.

But the legal rationale of the opinion did what criminal defense advocates had feared. It adopted the dicta of *Nichols* to hold that across the board, “convictions valid when entered—that is, those that, when rendered, did not violate the Constitution—retain that status when invoked in a subsequent proceeding.”²³⁰ The possibility that *Nichols* could be limited to sentencing enhancements was gone. Even more damaging, the opinion could be read to undermine the reliability concerns behind Sixth Amendment jurisprudence, which had been preserved to a degree in *Nichols*. “*Scott and Nichols*,” the *Bryant* Court declared, “counter the argument that uncounseled misdemeanor convictions are categorically unreliable, either in their own right or for use in a subsequent proceeding.”²³¹ The Court also reached a due process argument that the Respondent urged it to avoid,²³² declaring that since federal habeas review was available to challenge Bryant’s convictions at the time they were made, there were no due process problems with using the convictions in the current proceeding.²³³

Bryant, therefore, potentially does damage to the interests of criminal defendants generally. It did not have to be that way. Had the Court more heavily relied on the role of courts in recognizing the actions of separate sovereigns, it could have ruled for the United States without deciding larger issues.

The doctrine of comity, which is applied to judgments of foreign governments, permits recognition of foreign judgments even though those courts do not grant the protections the Constitution requires.²³⁴ Most federal and state courts apply this standard to tribal court judgments.²³⁵ Using the comity standard, states and lower federal courts have approved use of prior convictions from foreign nations that did not meet constitutional standards both as predicate offenses and for sentence enhancement.²³⁶ In 2005, the Supreme Court stated that Congress could

229. See generally *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008) (Ginsburg, J., dissenting); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (Ginsburg, J., dissenting). See also *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (joining opinion by Sotomayor, J., dissenting).

230. *United States v. Bryant*, 136 S. Ct. 1954, 1965 (2016).

231. *Id.* at 1966.

232. Brief for the Respondent at 38–44, *Bryant*, 136 S. Ct. 1954 (No. 15-420).

233. *Bryant*, 136 S. Ct. at 1966.

234. *United States v. Shavanoux*, 647 F.3d 993, 998–1000 (10th Cir. 2011); Martenson, *supra* note 210, at 635–39.

235. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 104, at § 7.07[2][a].

236. See, e.g., *United States v. Kole*, 164 F.3d 164 (3d Cir. 1998) (holding that Philippine conviction obtained without jury trial could be used to trigger mandatory felony sentence in United States); *Houle v. United States*, 493 F.2d 915, 916 n.2 (5th Cir. 1974); *United States v. Small*, 183 F. Supp. 2d 755 (W.D. Pa. 2002), *rev’d on other grounds*, *Small v. United States*, 544 U.S. 385 (2005) (holding that Japanese conviction that would have violated right to speedy trial, hearsay, and in which counsel was denied at key points, could be used as predicate offense for felony firearm possession); *State v. Schmidt*, 712 N.W.2d 530 (Minn. 2006) (holding that a Wisconsin DUI conviction that would have violated Minnesota constitutional right to counsel could be used to convert Minnesota offense to felony);

make a foreign conviction a predicate offense for federal prosecution, even though it recognized that foreign courts might grant defendants lesser protections.²³⁷ Had the Court explicitly applied the comity standard in *Bryant*, it could have avoided clothing its decision in the Sixth Amendment.

A comity standard would also have ensured protection for defendants whose prior convictions were used in subsequent prosecutions. While comity extends a presumption of validity to foreign judgments, the judgments are reviewed to determine if they violate “fundamental fairness.”²³⁸ Notably, this standard is not the same as that in the United States Constitution. Therefore, as the Fifth Circuit stated in upholding the use of uncounseled Canadian convictions, courts “decline to assume that . . . a foreign system, utilizing procedures with which we are unfamiliar, has failed to provide a fair trial if it does not conform with our right-to-counsel concepts.”²³⁹ In the tribal context, the Ninth Circuit itself has stated that “extending comity to tribal judgments is not an invitation for the federal courts to exercise unnecessary judicial paternalism in derogation of tribal self-governance.”²⁴⁰

In *Bryant*, the Supreme Court stated that the federal interest in due process was sufficiently protected by ICRA, which permits federal habeas challenges to tribal convictions.²⁴¹ But the Court did not say that de-

State v. Spotted Eagle, 71 P.3d 1239, 1245 (Mont. 2003) (“Comity requires that a court give full effect to the valid judgments of a foreign jurisdiction according to that sovereign’s laws, not the Sixth Amendment standard that applies to proceedings in Montana.”); State v. Meyer, 613 P.2d 132 (Wash.Ct. App. 1980) (holding that uncounseled Canadian convictions could be used for impeachment in state court); see also United States v. Fleishman, 684 F.2d 1329, 1346 (9th Cir. 1982) (rejecting challenge to sentence that considered uncounseled Mexican convictions). A number of states use foreign nation convictions in their implementation of habitual offender statutes. Martha Kimes, Note, *The Effect of Foreign Criminal Convictions Under American Repeat Offender Statutes: A Case Against the Use of Foreign Crimes in Determining Habitual Criminal Status*, 35 COLUM. J. TRANSNAT’L L. 503, 507–11 (1997) (noting that eight states did so in the text of the statute, and others interpret ambiguous statutes to include foreign convictions).

237. *Small*, 544 U.S. at 394. *Small* concerned whether a defendant previously convicted of felony arms trafficking in Japan could be convicted under a statute that forbid “any person . . . convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . [from] . . . possess[ing] . . . any firearm.” 18 U.S.C. § 922(g)(1) (2012). The Court concluded that without evidence that Congress intended to include foreign convictions in the phrase “convicted in any court,” the statute would be interpreted to reach domestic crimes only. *Small*, 544 U.S. at 390–91. The Court reached this conclusion in part because foreign convictions might be “inconsistent with an American understanding of fairness.” *Id.* at 401–02. Indeed, although the Supreme Court did not discuss it, *Small* alleged that he had been denied counsel at crucial stages of the proceedings. *Small*, 183 F. Supp. 2d at 766. Nevertheless, the Court stated that “Congress, of course, remains free to change this conclusion through statutory amendment.” *Small*, 544 U.S. at 394.

238. See also Kimes, *supra* note 236, at 515–18 (discussing courts’ use of fundamental fairness standard in evaluating foreign convictions).

239. *Houle*, 493 F.2d at 916.

240. *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997) (internal quotations omitted); see *United States v. Shavanaux*, 647 F.3d 993, 998 (10th Cir. 2011) (holding tribal convictions should be subject to same generous standard given to foreign judgments); *Spotted Eagle*, 71 P.3d at 1245–4 (describing risks to tribal sovereignty in evaluating tribal convictions according to United States constitutional standards); see also *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000) (declaring that a judgment could be recognized so long as it met an “international concept of due process,” a “less demanding” standard than “the complex concept that has emerged from American case law”).

241. *United States v. Bryant*, 136 S. Ct. 1954, 1966 (2016); see 25 U.S.C. § 1303 (2012).

pendants could also launch a collateral attack on ICRA grounds when the conviction was used in a habitual offender prosecution, and language in the opinion could be read to suggest that they could not.²⁴² Explicitly adopting a comity standard, in contrast, would make clear that tribal convictions could be challenged collaterally in federal court as well. In short, by failing to adequately account for tribal sovereign status, both the Ninth Circuit and Supreme Court missed an opportunity to at once protect United States and tribal interests in tribal self-governance while preserving fundamental fairness for all.

D. Dollar General Corp. v. Mississippi Band of Choctaw Indians

*Dollar General v. Mississippi Band of Choctaw Indians*²⁴³ was far and away the closest-watched federal Indian law case in the 2015 Term. It was the most important case for Indian communities, with the potential to limit the jurisdiction of every tribal court in the country. It was the subject of commentary in the *New York Times*,²⁴⁴ the *Atlantic*,²⁴⁵ and Samantha Bee's evening television show *Full Frontal*.²⁴⁶ The case generated eleven amicus briefs on the merits, including one group of six states for the Petitioner²⁴⁷ and another group of six states for the Respondent.²⁴⁸ In oral arguments, it pitted three leading Supreme Court advocates against each other, Thomas Goldstein for the Petitioner, and Neal Katyal and U.S. Solicitor General Edwin Kneedler for the Respondent.²⁴⁹ Out of the eighty cases heard in the 2015 Term, moreover, *Dollar General* took longest to decide, with more than seven months from oral argument until the Court finally split four-four.

If past is prologue, it was also the case that tribes were least likely to win. The case concerned the extent of tribal court jurisdiction over non-Indians. The Court has issued six opinions on this subject since 1990 and ruled against Indian tribes in every one.²⁵⁰ Although precedent tended to

242. *Bryant*, 136 S. Ct. at 1966 (stating that the habeas challenge is the “means” by which “a prisoner may challenge the fundamental fairness of the proceedings in tribal court,” but not stating that it is the only means of challenging that fairness.).

243. 136 S. Ct. 2159 (2016).

244. Ned Blackhawk, *The Struggle for Justice on Tribal Lands*, N.Y. TIMES (Nov. 25, 2015), https://www.nytimes.com/2015/11/25/opinion/the-struggle-for-justice-on-tribal-lands.html?_r=0.

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

246. Peter Weber, *Samantha Bee Looks at Tribal Sovereignty and its Strange Array of Powerful Enemies*, WEEK (June 21, 2016), <http://theweek.com/speedreads/631404/samantha-bee-looks-tribal-sovereignty-strange-array-powerful-enemies>.

247. Brief for the States of Oklahoma et al. as Amicus Curiae Supporting Petitioners, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496).

248. Brief for the States of Mississippi et al. as Amici Curiae Supporting Respondents, *Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496).

249. *No. 13-1496*, SUPREME CT. U.S., <https://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13-1496.htm> (last visited Aug. 8, 2017).

250. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *El Paso Nat. Gas Co. v. Neztzosisie*, 526 U.S. 473 (1999); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *South Dakota v. Bourland*, 508 U.S. 679 (1993).

support jurisdiction in *Dollar General*, no previous cases were squarely on point. Since 1997, moreover, each time past decisions seemed to support jurisdiction, the Court had reinterpreted its precedent or reframed the case to find that it did not. When the Court granted certiorari, it seemed, the writing was on the wall.

The trend against tribal court jurisdiction over non-Indians began in 1978, when, in an opinion by then-Associate Justice Rehnquist, the Supreme Court held that tribes lacked any criminal jurisdiction over non-Indians committing crimes in their territory.²⁵¹ Two years later, with little discussion, the Court upheld tribal taxes on non-Indians purchasing cigarettes on tribal land, stating that taxing jurisdiction did not follow the same rules as criminal jurisdiction.²⁵² The next year, however, *Montana v. United States* held that the Crow Tribe lacked jurisdiction to regulate hunting and fishing by non-Indians on non-Indian owned land on reservations.²⁵³ The *Montana* Court “readily agree[d]” that tribes could regulate activities by non-Indians on Indian-owned or trust land.²⁵⁴ Even on non-Indian land, the Court held that tribes could regulate activities of those who “enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements,” or whose activity “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”²⁵⁵

But between 1997 and 2008, the Court circumscribed the jurisdiction *Montana* left behind. With respect to land ownership, the Court first held that *Montana*’s limitation on jurisdiction applied to tribal trust land if the tribe had formally granted access to non-Indians without explicitly reserving jurisdiction,²⁵⁶ and then seemed to hold it applied even if the tribe had not granted access to the land.²⁵⁷ With respect to the consensual relationship exception, the Court first held that there must be a close nexus between the consensual relationship and the cause of action,²⁵⁸ and later found that a tribal court warrant given to state officers was not a qualifying consensual relationship.²⁵⁹ With respect to the “direct effects” basis for jurisdiction, the Court first suggested that it did not give tribes jurisdiction over actions endangering the economic security or health and welfare of tribal members unless they also undermined tribal self-

251. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194–95 (1978).

252. *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 153 (1980). While parts of the *Confederated Tribes* opinion could be read to suggest that it applied only to tribal trust land, others indicate that it applies to all doing business on the reservation generally.

253. 450 U.S. 544, 566 (1981).

254. *Id.* at 557.

255. *Id.* at 565–66 (citations omitted).

256. *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997).

257. *Nevada v. Hicks*, 533 U.S. 353, 374 (2001) (applying *Montana* to dispute arising at tribal member’s home on trust land).

258. *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001); *Strate*, 520 U.S. at 457 (holding that the tribe could not exercise jurisdiction over a private citizen suit against a non-Indian contractor on the reservation to do work with the tribe because “the [T]ribes were strangers to the accident”).

259. *Hicks*, 533 U.S. at 359 n.3.

governance,²⁶⁰ and later dicta suggested that the impact must “imperil” the tribe.²⁶¹ Along the way, the Court essentially interpreted out of existence three post-*Montana* opinions stating that tribal taxing and judicial jurisdiction over non-Indians on reservations remained quite broad.²⁶²

Despite all this, *Dollar General* seemed to present a strong and sympathetic case for tribal jurisdiction. The case was a tort suit by a minor citizen of the Mississippi Band of Choctaw Indians claiming that the manager of a Dollar General store on the Mississippi Band reservation had sexually abused him when he was thirteen years old.²⁶³ Explicit consensual agreements brought Dollar General to the reservation and the Choctaw plaintiff into its store. The store was on tribal land, and in its lease with the tribe, Dollar General agreed that it would “comply with all codes and requirements of all tribal and federal laws and regulations . . . which . . . are applicable and pertain to [Dolgencorp’s] specific use of the demised premises,” and that “[e]xclusive venue and jurisdiction shall be in the Tribal Court.”²⁶⁴ The alleged abuse occurred while the plaintiff was interning at the store pursuant to a tribal Youth Opportunity Program, which placed young people for job training at reservation businesses.²⁶⁵ Dollar General had agreed to participate in the program.²⁶⁶

Both the district court and the Fifth Circuit found these consensual relationships gave the tribal court jurisdiction over the suit.²⁶⁷ Dollar General, however, argued that the consensual relationship exception could never support a tort suit²⁶⁸ and, more broadly, that tribes should

260. *Strate*, 520 U.S. at 458.

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

262. *Compare* *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (“Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.”) (citations omitted), and *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855 (1985) (holding that tribal court civil jurisdiction not foreclosed like civil jurisdiction and required a search for whether federal statutes and treaties have removed it, and this search must be conducted in first instance by tribal courts), with *Strate*, 520 U.S. at 453 (“[*Iowa Mutual’s* language] “stands for nothing more than the unremarkable proposition that, where tribes possess authority to regulate the activities of nonmembers, “[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.”); *compare* *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (“The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management [which] does not derive solely from the Indian tribe’s power to exclude non-Indians from tribal lands [but] from the tribe’s general authority, as sovereign, to control economic activity within its jurisdiction”), with *Atkinson Trading Co.*, 532 U.S. at 653 (2001) (stating that this language in *Merrion* was dicta and that *Montana’s* presumption against tribal jurisdiction fully applies to taxing jurisdiction).

263. *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014).

264. Brief for the United States as Amicus Curiae Supporting Respondents at 2–3, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496).

265. *Dolgencorp*, 746 F.3d at 169.

266. *Id.*

267. *Id.* at 173; *Dolgencorp Inc. v. Miss. Band of Choctaw Indians*, 846 F. Supp. 2d 646, 650 (S.D. Miss. 2011).

268. *Dolgencorp*, 746 F.3d at 174; Brief for Petitioners at 18, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496).

never have adjudicatory jurisdiction over non-member defendants.²⁶⁹ It supported these arguments less with precedent than with the alleged unfairness—and even unconstitutionality—of subjecting non-Indians to tribal courts.²⁷⁰

The reality of the tribal court here undermined this fairness argument. The Mississippi Band of Choctaw Indians is an economic success story, whose manufacturing, agricultural, and tourism businesses make it one of the largest employers in the state.²⁷¹ The tribe has a civil court, a criminal court, and a three-justice supreme court.²⁷² All judges must have graduated from an accredited law school and be members of the Mississippi Bar.²⁷³ The Mississippi Band courts follow an extensive written code (which includes several articles of the Uniform Commercial Code), their rules of procedure and evidence are modeled on the Mississippi rules, and they apply federal and state law where tribal written or common law does not resolve an issue.²⁷⁴ Thousands of non-Indians file cases in the tribal courts every year, largely in debt collection and garnishment suits, and win 85% of their cases.²⁷⁵ Dollar General's arguments that Mississippi Band courts could not fairly hear cases against non-Indians, therefore, seemed based on little more than the fact that they were tribal courts. Samantha Bee, alluding to Donald Trump's argument that a federal district court judge's Mexican heritage made him unable to be fair in his case, noted that "[t]he 'brown judges aren't being fair to me' argument is being made right now, in the Supreme Court, which will decide as early as tomorrow whether tribe members can sue Dollar General for an alleged sexual assault against a 13-year-old boy."²⁷⁶

The line-up of amicus briefs made the case look more like an effort to protect big business than to preserve fairness. In addition to the States of Oklahoma, Wyoming, Utah, Michigan, Arizona, and Alabama, the Retail Litigation Center, the Association of American Railroads, and the South Dakota Bankers Association filed on behalf of Dollar General.²⁷⁷

269. Brief for Petitioners at 17, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496) (“[T]ribal court jurisdiction over nonmembers is fundamentally incompatible with the United States’ ‘overriding sovereignty.’”).

270. See generally *id.*

271. Dennis Hevesi, *Phillip Martin, Who Led His Tribe to Wealth, Is Dead at 83*, N.Y. TIMES (Feb. 15, 2010), <http://www.nytimes.com/2010/02/15/us/15martin.html>; *Mississippi's Largest Private Sector Employers*, MISS. ST. U. C. BUS., <http://business.msstate.edu/programs/ib/resources/ms/index.php> (listing Mississippi Choctaw as fourth largest public sector employer in the state).

272. Brief for Petitioners at 4–5, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496).

273. *Id.* at 5.

274. *Id.* at 6.

275. *Id.* at 7.

276. Weber, *supra* note 246.

277. Brief for Retail Litigation Center, Inc., as Amicus Curiae Supporting Petitioners, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496); Brief for Ass’n of American Railroads as Amicus Curiae Supporting Petitioners, *Dollar Gen.*, 136 S. Ct. 2159 (No. 13-1496); Brief for the States of Oklahoma et al. as Amicus Curiae Supporting Petitioner; *Dollar Gen.*, 136 S. Ct. 2159 (No. 13-1496); Brief for the South Dakota Bankers Ass’n as Amicus Curiae Supporting Petitioners; *Dollar General*, 136 S. Ct. 2159 (No. 13-1496).

In contrast, the ACLU, along with the National Women's Indigenous Resource Center and other groups for sexual assault survivors, the NCAI, a group of fifteen tribes and tribal court groups, historical and legal scholars, and the States of Mississippi, Colorado, New Mexico, North Dakota, Oregon, and Washington filed briefs on behalf of the Mississippi Band.²⁷⁸

The argument on December 7, 2015, was as bad as tribal supporters had feared. Justices Ginsburg, Breyer, Sotomayor, and Kagan did have tough questions for Thomas Goldstein about the legal basis of Dollar General's arguments.²⁷⁹ But when Neal Katyal stepped up to argue on behalf of the Mississippi Band the argument became a blood bath. Chief Justice Roberts interrupted Katyal's opening statement by asking, "We have never before recognized tribal court jurisdiction over a non-member, have we?"²⁸⁰ This is technically true, although the Court has repeatedly said that jurisdiction did exist,²⁸¹ and has held that arguments against jurisdiction must first be exhausted in tribal courts.²⁸² When Katyal pointed this out, Justice Scalia stepped in to say, "That's dictum. Dictum is dictum."²⁸³ Soon the Justices were interrupting each other with hostile questions,²⁸⁴ leaving Katyal, one of the most successful Supreme Court advocates working today, left saying merely, "If—if there's—" and "Well—well, I—" before they jumped in again.²⁸⁵ Justice Kennedy also repeatedly pushed his pet theory that the Constitution somehow prohibits tribal jurisdiction over nontribal citizens.²⁸⁶ When Solicitor General Kneeder stood up, he at least got to state that Congress had repeatedly reviewed the operations of tribal courts in light of decisions supporting civil jurisdiction over nonmembers, and Congress concluded that tribal courts were essential instruments of self-government that should be sup-

278. Brief for Nat'l Congress of American Indians, et al. as Amici Curiae Supporting Respondents, *Dollar Gen.*, 136 S. Ct. 2159 (No. 13-1496); Brief for the Puyallup Tribe Of Indians, et al. as Amici Curiae Supporting Respondents, *Dollar Gen.*, 136 S. Ct. 2159 (No. 13-1496); Brief for Historians & Legal Scholars Gregory Ablavsky, et al. as Amici Curiae Supporting Respondents, *Dollar Gen.*, 136 S. Ct. 2159 (No. 13-1496); Brief for the Cherokee Nation, et al. as Amici Curiae Supporting Respondents, *Dollar Gen.*, 136 S. Ct. 2159 (No. 13-1496); Brief for the United States as Amicus Curiae Supporting Respondents, *Dollar Gen.*, 136 S. Ct. 2159 (No. 13-1496); Brief for Nat'l Indigenous Women's Res. Ctr. et al. as Amici Curiae Supporting Respondents, *Dollar Gen.*, 136 S. Ct. 2159 (No. 13-1496).

279. Transcript of Oral Argument at 6:15–21, 8:13–15, 13:5–7 (Ginsburg, J.), 10:21–24 (Sotomayor, J.), 11:24–12:11, 16:20–17:4, 18:3–10 (Breyer, J.), 19:13–20:3 (Kagan, J.), *Dollar Gen.*, 136 S. Ct. 2159 (No. 13-1496).

280. *Id.* at 29:8–10.

281. See, e.g., *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) ("[W]here tribes possess authority to regulate the activities of nonmembers, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts . . .'" (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987))).

282. *Iowa Mut. Ins. Co.*, 480 U.S. at 13–15; *Nat'l Farmers Ins. v. LaPlante*, 471 U.S. 845, 856 (1985).

283. Transcript of Oral Argument at 30:17–18 (Scalia, J.), *Dollar Gen.*, 136 S. Ct. 2159 (No. 13-1496).

284. *Id.* at 35:5–11 (Kennedy & Roberts, J.J.).

285. *Id.* at 34:11, 22.

286. See, e.g., *id.* at 35:9–11 ("I don't know what authority Congress has to subject citizens of the United States to that nonconstitutional forum.") (Kennedy, J.).

ported.²⁸⁷ Justice Scalia, however, jumped in to say they were only essential for disputes between tribal members, and to question the legal value of the congressional committee reports.²⁸⁸

At the end of the argument, it was pretty clear the vote would be at least five-four against tribal jurisdiction. Justice Scalia's death shifted the balance in this case. After struggling and failing to reach a majority, on June 23, 2016, the Court issued a four-four memorandum opinion affirming the Fifth Circuit.²⁸⁹

E. Conclusion

By June of most years, professors of federal Indian law are reeling, wondering how we can maintain our faith in the rule of law given the Court's latest assault on precedent. Last June was different. A pattern formed over twenty-five years does not change overnight, but 2016 was at least a break in that pattern. The next Part discusses whether it was anything more.

IV. THE 2015 TERM AND THE THIRD SOVEREIGN

One should not overstate the significance of the 2015 Term. There were no major changes to existing precedent, and the successes involved significant support from the United States. While Justice Scalia would have been a deciding vote only in *Dollar General*, future cases will likely involve more evenly divided deciding votes. The failure to robustly adopt a comity approach in *Bryant*, together with Justice Thomas's concurrence in that case, highlights the need for a coherent legal theory of tribal sovereignty. In short, while incremental progress was made, the clearest success of the 2016 Term is that tribal sovereignty did not receive the kinds of blows we have come to expect from the Court.

First, none of the cases fundamentally change past precedent or established practice. *Nebraska v. Parker*, with its emphasis on statutory language, might have changed the result in cases like *Osage Nation v. Irby*,²⁹⁰ in which the Tenth Circuit found that a statute simply providing for allotment to tribal members resulted in diminishment. It may also contribute to a broader effort to restrain the Court from eroding tribal sovereignty without congressional support. *United States v. Bryant* obviously reversed the Ninth Circuit's line of cases leading to the panel decision below,²⁹¹ and may contribute to a more coherent conceptualization of the constitutional status of tribal courts. The spirit and language of these cases, like the spirit and language of the *Bay Mills* and *Lara* cases discussed

287. *Id.* at 49:21–52:20.

288. *Id.* at 50:8–9.

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

290. 597 F.3d 1117 (10th Cir. 2010).

291. *United States v. Bryant*, 769 F.3d 671 (9th Cir. 2014); *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989).

in Section II.B, will add modern opinions in support of past affirmations of third sovereign status. Primarily, however, the decisions maintained the precedential status quo more than they changed it.

The success of tribes in these cases also completely correlates with the support of the United States. The United States was the primary litigant in *United States v. Bryant*, and contributed effective briefs and oral argument in support of tribal interests in *Dollar General* and *Nebraska v. Parker*.²⁹² In contrast, the United States was the opposing party in *Menominee Tribe*, the sole loss of the term. Support from the United States is not a necessary or sufficient condition for success of tribal interests. Fully half of tribal losses in the Roberts Court were in cases in which the United States filed on behalf of tribal interests,²⁹³ and one of the few wins was *Salazar v. Ramah Navajo Chapter*, in which the United States was the opposing party.²⁹⁴ But it is an important condition, and history proves that the United States is an inconsistent friend to tribal nations, and very often no friend at all.

President Trump's Indian affairs background bodes poorly for tribal interests. President Trump has a dark history of propagating lies and racial accusations to promote his casino interests. In 2000, he was behind a front organization that purchased newspaper advertisements and billboards falsely accusing the St. Regis Mohawk Tribe of drug dealing in order to defeat tribal efforts to build a casino in the Catskills.²⁹⁵ He paid a \$250,000 fine for violating state lobbying law in connection with the campaign.²⁹⁶ In 1993, before a congressional subcommittee on Indian gaming, he leveled charges of organized crime against Indian casinos, claimed tribal gaming was unfair because, unlike him, they did not pay hundreds of millions in taxes, and claimed Connecticut tribes should not be entitled to game at all because "they don't look like Indians to me."²⁹⁷ Nothing if not an opportunist, however, Trump later proclaimed a "love fest"

292. In *Dollar General* in particular, the brief of the United States was an extremely strong affirmation of tribal sovereignty. Brief for the United States as Amicus Curiae Supporting Respondents, *Dollar Gen.*, 136 S. Ct. 2159 (No. 13-1496). It was likely not a coincidence that the lead author of the brief is listed as Hilary Thompkins, Solicitor for the United States Department of the Interior, a citizen of the Navajo Nation with a long background in federal Indian affairs.

293. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012); *Carcieri v. Salazar*, 555 U.S. 379 (2009); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008); *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005).

294. *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012).

295. Joseph Tanfani, *Trump Was Once So Involved in Trying to Block an Indian Casino That He Secretly Approved Attack Ads*, L.A. TIMES (June 30, 2016), <http://www.latimes.com/politics/la-na-pol-trump-anti-indian-campaign-20160630-snap-story.html>.

296. *Id.*

297. "They Don't Look Like Indians to Me": Donald Trump on Native American Casinos in 1993, WASH. POST (July 1, 2016), https://www.washingtonpost.com/video/politics/they-dont-look-like-indians-to-me-donald-trump-on-native-american-casinos-in-1993/2016/07/01/20736038-3fd4-11e6-9e16-4cf01a41decb_video.html.

with other tribal casinos, drawing extortionate fees from them until they finally severed ties.²⁹⁸

The Trump Administration, moreover, immediately undermined important Obama-era victories for tribes, directing approval of easements for construction of the Dakota Access Pipeline²⁹⁹ and reconsideration of the designation of the sacred Bears Ears National Monument.³⁰⁰ Actions and statements by several members of the administration, moreover, suggest advocacy of something similar to the Termination Policy, in which the federal government sought to end its special relationship with Native tribes.³⁰¹ The Executive Branch will likely provide little support to tribes in the Supreme Court.

The 2015 Term also did not help build a cogent theory of third sovereign status. As discussed in Part III, the failure in *Bryant* to directly adopt the comity approach applied to foreign nation convictions resulted in unnecessary distortions of both constitutional law and justice for tribal litigants. Justice Clarence Thomas's concurrence in *Bryant* also highlights the need for a constitutional theory of tribal sovereignty. Although Justice Thomas concurred in light of past precedent, he claimed there was no "sound constitutional basis" for the three pillars of the decision: the Sixth Amendment exclusionary rule in *Burgett*, the tribal sovereignty to prosecute tribal members without constitutional restrictions, and the plenary power that grants Congress the ability to punish crimes between tribal members on tribal land.³⁰² Justice Thomas has bewailed the alleged conflict between tribal sovereignty and federal power before.³⁰³ Understanding the implications of third sovereign status would resolve this alleged conflict.

This is what third sovereign status means. First, tribes are not states or the federal government, but are analogous to foreign nations who must act within U.S. borders. Like foreign nations, tribes are not subject to the United States Constitution. Like foreign nations with their own territory (including diplomatic premises in the United States),³⁰⁴ tribes have territorial jurisdiction, extraterritorial jurisdiction on the same

298. Joseph Tanfani & Noah Bierman, *Trump's Art of the Deal with Native Americans: Racial Insults or Flattery, Whichever Was Good for Business*, L.A. TIMES (June 17, 2016), <http://www.latimes.com/politics/la-na-pol-trump-american-indians-20160617-snap-story.html>.

299. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 16-1534, 2017 WL 2573994, at *7 (D.D.C. June 14, 2017).

300. Darryl Fears & Juliet Eilperin, *Interior Secretary Recommends Trump Consider Scaling Back Bears Ears National Monument*, WASH. POST (June 12, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/06/12/interior-secretary-recommends-delaying-a-final-decision-on-changing-bears-ears-national-monument/?utm_term=.daa1c2a89c60.

301. See Indigenous Law and Policy Center, *Donald Trump and Indian Country's Termination Fears*, TURTLE TALKS: INDIGENOUS L. & POL'Y CTR. BLOG, MICH. ST. U.C. OF L. (May 8, 2017), <https://turtletalk.wordpress.com/2017/05/08/donald-trump-and-indian-countrys-termination-fears/>.

302. *United States v. Bryant*, 136 S. Ct. 1954, 1967 (2016) (Thomas, J., concurring).

303. *Adoptive Couple*, 133 S. Ct. at 2565; *United States v. Lara*, 541 U.S. 193, 214 (2004) (Thomas, J., concurring).

304. See Vienna Convention on Diplomatic Relations arts. 22–23, Apr. 18, 1961, 500 U.N.T.S. 95 (discussing special jurisdictional status of premises of diplomatic missions).

grounds as other sovereigns,³⁰⁵ and federal and state jurisdiction over their territories and citizens is limited. Nevertheless, just as it would for a foreign nation within the United States, the federal government has vast constitutional authority with respect to tribal nations and their citizens.³⁰⁶ Diplomatic concerns and respect for the sovereignty of foreign nations limit federal intrusion on foreign sovereignty and create interpretive rules against finding statutes to authorize such intrusion.³⁰⁷ Similarly, the federal relationship with tribal nations influences executive and congressional action and creates distinctive judicial interpretive canons. This analogy between tribes and foreign nations has substantial support in constitutional history,³⁰⁸ and elements of it can be found in the majority opinions in *Lara*³⁰⁹ and *Bay Mills Indian Community*,³¹⁰ but work remains to construct this understanding on the Court.

Whether this work is successful will depend, in part, on the composition of the Court. With the death of Justice Scalia, the Court has four members, Justices Breyer, Ginsburg, Kagan, and Sotomayor, who are occasionally sympathetic to tribal interests, and, at least sometimes, vote in favor of them. It has two members, Justices Alito and Thomas, who have almost always, until 2016, voted against tribal interests, and another two, Justice Kennedy and the Chief Justice, who broke this record only to uphold precedent squarely on point in *Michigan v. Bay Mills Indian Community*.³¹¹ Given this record, the eight-zero opinions in *Bryant* and *Parker* may reflect a desire to avoid unnecessary disagreement in light of the death of Justice Scalia more than true unanimity. A ninth Justice could often be the deciding vote in federal Indian law questions.

Justice Neil Gorsuch, while not always sympathetic to tribal concerns, will almost certainly be better for tribes than Justice Scalia was, and possibly better than Judge Merrick Garland, President Obama's nominee, would have been.³¹² As a Colorado native and longtime judge

305. *Kelsey v. Pope*, 809 F.3d 849 (6th Cir. 2016).

306. *See Lara*, 541 U.S. at 200–03.

307. *See, e.g., Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664–65 (2013) (discussing presumption against extraterritorial application of United States law).

308. In fact, the original and continuing description of tribes is as “domestic dependent nations.” *Lara*, 541 U.S. at 204–05; *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831); *see also Ablavsky, supra* note 82; *Newton, supra* note 82.

309. *Lara*, 541 U.S. 193 (upholding the “*Duro Fix*,” which affirmed inherent criminal jurisdiction over Indians who were not citizens of the tribe asserting jurisdiction).

310. 134 S. Ct. 2024 (2014).

311. *Id.*

312. Judge Garland had an extremely limited federal Indian law record, but some of it did give rise to concern by tribal advocates. *See* Matthew L.M. Fletcher, *Judge Garland's Indian Law Record*, TURTLE TALK (Mar. 16, 2016), <https://turtletalk.wordpress.com/2016/03/16/judge-garlands-indian-law-record/> (discussing Judge Garland's participation in the unsigned *per curiam* opinion in *San Manuel Indian Bingo & Casino v. N.L.R.B.*, 475 F.3d 1306 (D.C. Cir. 2007) (holding that tribal casinos were subject to the National Labor Relations Act). An opinion Judge Garland authored also might suggest ambivalence about Supreme Court precedent on the equal protection status of congressional measures regarding Indians. *U.S. Air Tour Ass'n v. F.A.A.*, 298 F.3d 997, 1012 n.8 (D.C. Cir. 2002). With little experience with Native peoples or federal Indian law, moreover, Judge Garland would have faced a larger learning curve in recognizing that tribes are living governments and familiarizing himself with

on the Tenth Circuit, Justice Gorsuch is familiar with Native issues, and will not have as much difficulty wrapping his mind around the idea of tribes as living governments. His record in the Tenth Circuit is also relatively balanced. As set forth in a memorandum by the Native American Rights Fund, Justice Gorsuch wrote or joined in twenty-eight opinions on federal Indian law issues while on the Tenth Circuit.³¹³ Of these, tribal interests won sixteen, lost nine, and three were a draw. Justice Gorsuch was both the author and the deciding vote in *Hydro Resources Inc. v. EPA*, a devastating decision making new law and limiting the scope of Indian country.³¹⁴ But he also wrote stinging rejections of Utah's attempts to limit the boundaries of the Utah Reservation despite Tenth Circuit precedent,³¹⁵ and wrote or joined a number of opinions deciding contested issues of tribal exhaustion and sovereign immunity in favor of tribes.³¹⁶ The National Congress of American Indians and the Native American Rights Fund even issued a joint letter of support for Justice Gorsuch, opining that he would be "open-minded to all perspectives" on Indian law issues.³¹⁷ It remains to be seen whether he will maintain this open-mindedness once he has the power to not only interpret, but overrule past precedent.

V. CONCLUSION

Was the 2016 Term a revolution, or a blip? I believe it was somewhere in between. The cases the Court decided in favor of tribal interests were ones in which precedent strongly supported its conclusions and the United States argued with the tribes. A ninth Justice could tip the balance on the Court in either direction, as could an administration less supportive of tribal self-governance. While Justice Gorsuch is not a disaster for tribes, neither is he an advocate, and the Trump Administration seems at times actively hostile to tribal sovereignty.

While the executive has significant influence, the Supreme Court is the institution that fluctuates least with political whims, and Chief Justice Roberts seems committed to keeping it so. Both the language of the opinions and tenor of arguments in the Court, as well as in the dissents

Indian law precedent. As suggested in Section II.B., such learning curves often work against tribal interests.

313. Memorandum from Richard Guest, Staff Attorney, Native Am. Rights Fund to Tribal Leaders & Tribal Attorneys Nat'l Cong. of Am. Indians – Project on the Judiciary 1 (Mar. 16, 2017), <http://sct.narf.org/articles/gorsuch-indian-law-cases.pdf>.

314. 608 F.3d 1131 (10th Cir. 2010).

315. *Ute Indian Tribe of the Uintah Ouray Reservation v. Myton*, 835 F.3d 1255 (10th Cir. 2016); *Ute Indian Tribe of the Uintah Ouray Reservation v. Utah*, 790 F.3d 1000 (10th Cir. 2015).

316. *See, e.g., United Planners Financial Services v. Sac and Fox Nation*, 654 F. Appx 376 (10th Cir. 2016) (holding that a non-Native corporation must exhaust tribal remedies); *Bonnet v. Harvest Holdings, Inc.* 741 F.3d 1155 (10th Cir. 2014) (holding that a subpoena *duces tecum* against a non-party tribal entity must be quashed because of tribal sovereign immunity).

317. *See*, Rob Capriccioso, *Neil Gorsuch Confirmed to US Supreme Court with Strong Tribal Support*, INDIAN COUNTRY TODAY (Apr. 7, 2017), <https://indiancountrymedianetwork.com/news/politics/neil-gorsuch-confirmed-us-supreme-court-strong-tribal-support/>.

and rare wins of recent years, do show that something is changing. More Justices are aware of the precedents establishing tribes as a third sovereign within the United States.³¹⁸ More are also aware of the crucial importance of furthering tribal self-government today, both for Native communities and non-Natives they impact. These are key developments with the potential to correct the imbalance of the past quarter century.

This change is due to many factors. The Tribal Supreme Court Project has done tremendous work in translating the law and reality of tribal sovereignty to an unfamiliar Court. Law school programs like the Oneida Indian Nation Professorship at Harvard begin the work of translation long before Justices, lawyers, and clerks reach the Court. Most important is the work of tribal nations themselves in building self-governing communities and ensuring that those communities protect justice and work effectively with their own citizens, others they impact, and local, state, and federal governments.

Clearly, more work remains to be done. Horror stories of dysfunction within a few tribal governments undermine willingness to protect the sovereignty of the majority.³¹⁹ Outrage by non-Indians at the thought of answering to Indian governments will continue to garner sympathy with substantial portions of the public and the Court. And despite the 200-year history of tribes as a third sovereign, the Court has not yet fully assimilated this history into a coherent legal theory. But 2016 shows that progress is being made. Given the dismal quarter century that preceded it, that is a very welcome thing.

318. Even the Supreme Court's recent decision against tribes in *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), for example, holding that tribal employees did not share tribe's common law sovereign immunity, firmly linked tribal common law immunity to that of federal and state common law immunity.

319. See Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 SAN DIEGO L. REV. 567, 569 (2012).

APPENDIX A: SUPREME COURT DECISIONS, 1990-2015

	Result	Subject	Majority	Dissent
Roberts Court				
Michigan v. Bay Mills Indian Cmty, 134 S.Ct. 2024 (2014)	Win	Tribal Sovereign Immunity	Kagan	Scalia; Thomas with Scalia, Ginsburg, and Alito
Adoptive Couple v. Baby Girl, 133 S.Ct. 2552 (2013)	Loss	ICWA	Alito	Scalia; Sotomayor with Ginsburg, and Kagan (Scalia joined in part)
Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S.Ct. 2199 (2012)	Loss	Land into Trust	Kagan	Sotomayor
Salazar v. Ramah Navajo Chapter, 132 S.Ct. 2181 (2012)	Win	ISDA	Sotomayor	Roberts with Ginsburg, Breyer, and Alito
United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011)	Loss	Trust Responsibility	Alito	Sotomayor
United States v. Tohono O'odham Nation, 563 U.S. 307 (2011)	Loss	Trust Responsibility	Kennedy	Ginsburg
United States v. Navajo Nation, 556 U.S. 287 (2009)	Loss	Trust Responsibility	Scalia	
Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009)	Loss	Native Hawaiian Land	Alito	
Carcieri v. Salazar, 555 U.S. 379 (2009)	Loss	Land into Trust	Thomas	Souter with Ginsburg (concurring in part and dissenting in part); Stevens
Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008)	Loss	Tribal Jurisdiction	Roberts	Ginsburg with Souter, Stevens, and Breyer
Wagon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005)	Loss	State Jurisdiction	Thomas	Ginsburg with Kennedy
Rehnquist Court				
Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005)	Loss	Indian Country	Ginsburg	Stevens
Cherokee Nation of Oklahoma v. Leavitt, 543 U.S. 631 (2005)	Win	ISDA	Breyer	
United States v. Lara, 541 U.S. 193 (2004)	Win	Tribal Jurisdiction	Breyer	Souter with Scalia
Inyo Cty, Ca. v. Paiute-Shoshone Indians of the Bishop Cmty, 538 U.S. 701 (2003)	Loss	42 U.S.C. 1983	Ginsburg	
United States v. Navajo Nation, 537 U.S. 488 (2003)	Loss	Trust Responsibility	Ginsburg	Souter with Stevens and O'Connor
United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003)	Win	Trust Responsibility	Souter	Thomas with Rehnquist, Scalia, and Kennedy
Chickasaw Nation v. United States, 534 U.S. 84 (2001)	Loss	Federal Taxation	Breyer	O'Connor with Souter

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Nevada v. Hicks, 533 U.S. 353 (2001)	Loss	Tribal Jurisdiction	Scalia	
Idaho v. United States, 533 U.S. 262 (2001)	Win	Tribal Property	Souter	Rehnquist with Scalia, Thomas, and Kennedy
Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001)	Loss	Tribal Jurisdiction	Rehnquist	
C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001)	Loss	Tribal Sovereign Immunity	Ginsburg	
Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001)	Loss	FOIA	Souter	
Arizona v. California, 530 U.S. 392 (2000)	Win	Water	Ginsburg	Rehnquist with O'Connor and Thomas
Rice v. Cayetano, 528 U.S. 495 (2000)	Loss	Voting Rights/Equal Protection	Kennedy	Ginsburg; Stevens with Ginsburg
Amoco Prod. Co. v. S. Ute Tribe, 526 U.S. 865 (1999)	Loss	Tribal Property	Kennedy	Ginsburg
El Paso Natural Gas Co. v. Neztosie, 526 U.S. 473 (1999)	Loss	Tribal Jurisdiction	Souter	
Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999)	Win	State Jurisdiction	O'Connor	Rehnquist with Scalia, Kennedy, and Thomas; Thomas
Arizona Dep't of Revenue v. Blaze Const. Co., Inc., 526 U.S. 32 (1999)	Loss	State Jurisdiction	Thomas	
Cass Cty, Minn. v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998)	Loss	State Jurisdiction	Thomas	
Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751 (1998)	Win	Tribal Sovereign Immunity	Kennedy	Stevens with Thomas and Ginsburg
Montana v. Crow Tribe of Indians, 523 U.S. 696 (1998)	Loss	State Jurisdiction	Ginsburg	Souter with O'Connor
Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998)	Loss	Indian Country	Thomas	
South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998)	Loss	Indian Country	O'Connor	
Idaho v. Coueur D'Alene Tribe of Idaho, 521 U.S. 261 (1997)	Loss	Tribal Property /State Sovereign Immunity	Kennedy	Souter with Stevens, Ginsburg, and Breyer
Strate v. A-1 Contractors, 520 U.S. 438 (1997)	Loss	Tribal Jurisdiction	Ginsburg	
Babbitt v. Youpee, 519 U.S. 234 (1997)	Loss	Takings	Ginsburg	Stevens
Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)	Loss	State Sovereign Immunity/IGRA	Rehnquist	Stevens; Souter with Ginsburg and Breyer
Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995)	Win/Loss	State Jurisdiction	Ginsburg	Breyer with O'Connor, Souter, and Stevens (concurring in win, dissenting in loss)
Dep't of Taxation and Fin. of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994)	Loss	State Jurisdiction	Stevens	
Hagen v. Utah, 510 U.S. 399 (1994)	Loss	Indian Country	O'Connor	Blackmun with Souter
South Dakota v. Bourland, 508 U.S. 679 (1993)	Loss	Tribal Jurisdiction	Thomas	Blackmun with Souter
Lincoln v. Vigil, 508 U.S. 182 (1993)	Loss	Government Services	Souter	
Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993)	Win	State Jurisdiction	O'Connor	
Negonsott v. Samuels, 507 U.S. 99 (1993)	Loss	State Jurisdiction	Rehnquist	
County of Yakima, Wash. v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251 (1992)	Loss	State Jurisdiction	Scalia	
Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991)	Loss	State Sovereign Immunity	Scalia	Blackmun with Marshall and Steven
Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991)	Win	State Jurisdiction/Tribal Sovereign Immunity	Rehnquist	
Duro v. Reina, 495 U.S. 676 (1990)	Loss	Tribal Jurisdiction	Kennedy	Brennan with Marshall
Total: 49, Wins: 11.5 (23.5%), Losses: 37.5 (76.5%)				

