The Supreme Court's last 30 years of Federal Indian Law: Looking for Equilibrium or Supremacy?

Alex Tallchief Skibine[*]

Since 1831, Indian tribes have been viewed as *Domestic Dependent Nation*s located within the geographical boundaries of the United States.[1] Although Chief Justice John Marshall acknowledged that Indian nations had a certain amount of sovereignty,[2] the exact extent of such sovereignty as well as the place of tribes within the federal system, has remained ill-defined. This Article examines what has been the role of the Supreme Court in integrating Indian nations as the third Sovereign within our federalist system. Although I have written on similar topics in the past,[3] this Article looks at this issue by surveying and examining the Court's Indian law record in the last 30 years.[4]

The Court initially deferred such questions to Congress,[5] whose policy towards Tribes changed with the times.[6] Initially, Indian nations were viewed as political entities existing outside of our political system and most of the relations between the United States and the tribes were governed through treaties.[7] Things started changing after 1871, the year a law was enacted prohibiting any more treaties with Indian nations.[8] Soon after, the United States embarked on a policy aimed at assimilating individual Indians into the mainstream of American

[*] S.J. Quinney Professor of Law, University of Utah S.J. Quinney College of Law. I would like to thank George Skibine for his editorial review of this Article and Professor Kirsten Carlson for providing critical comments and suggestions on a previous draft of this Article.

[1] Cherokee Nation v. Georgia 30 U.S. 1 (1831). Although this Article will use the terms "Indian nations" and "Indian tribes" interchangeably, the United States Constitution refers only to Indian "tribes." The use of the term "tribes" in the Constitution played a key role in Cherokee Nation v. Georgia where the Court held that Indian tribes were neither States of the Union or foreign nations for the purpose of invoking the original jurisdiction of the Supreme Court under the Constitution.

[2] Worcester v. Georgia, 31 U.S. 515 (1832).

[3] See Alex T. Skibine, *Redefining the Status of Indian Tribes within "Our Federalism": Beyond the Dependency Paradigm*, 38 Conn. L. Rev. 667 (2006), and Alex T. Skibine, *United States v. Lara, Indian Tribes, and the Dialectic of Incorporation*, 40 Tulsa L. Rev. 47 (2004).

[4] Describing Indian nations as "the third sovereign" may have originated initially with Justice O'Connor. See Justice Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1 (1997).

[5] See for instance United States v. Kagama, 118 U.S. 375 (1886), Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

[6] See Cohen's Handbook of Federal Indian Law, 2012 Ed., pp. 23-108.

[7] See Vine Deloria Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 Ariz. L. Rev. 963 (1996).

[8] Act of March 3, 1871, 16 Stat. 466 (1871) (codified as amended at 25 U.S.C. 71 (2000) (stating "No Indian nation of tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.")

society.[9] There was no idea at that time to integrate Indian nations into our political system as sovereign governments. The expectations were that Indian tribes, as political entities would soon disappear.[10] The current policy, however, is to promote tribal self-determination and recognize tribes as self-governing entities with enough sovereignty to have a government-to-government relationship with the United States.[11]

The Supreme Court's record of decided cases in the last thirty years indicates that the Court has had difficulties upholding the federal policy of respecting tribal sovereignty and encouraging tribal self-government. For instance, in an influential article, David Getches documented that during the first 15 terms of the Rehnquist Court, Indian tribal interests only won about 23% of Federal Indian law cases at the Supreme Court from 1986 until 2001.[12] As the title of his article indicated, Getches believed that the dismal tribal record was influenced by the Court's agenda to promote states' rights, a color-blind agenda, and mainstream values. Getches' findings were later supplemented by Professor Matthew Fletcher who analyzed the *Cert* process at the Supreme Court and found that while very few tribal petitions were granted, a disproportionately large number of petitions filed by non-tribal interests aimed at overturning decisions favorable to these tribal interests were granted.[13] In a more recent article, Professor Bethany Berger updated the numbers found by Getches by looking at cases decided between 1990 and 2016.[14] While confirming that the percentage of tribal wins from 1990 until 2015 had not improved since Getches's 2001 article, she saw an improvement in the 2015-16 term that perhaps indicated that tribal interests could find some light at the end of this anti-tribal tunnel.

In this article, I start with an in-depth examination of the last 30 years of Indian law decisions.[15] Starting where Professor Berger left off, after first categorizing the cases between victories and losses during this time, Part II divides the cases into four categories: Federal common law, statutory interpretation, constitutional law, and procedural law. The cases are then further divided into four general areas within the field of Federal Indian law: 1. Political/sovereign rights, 2. Economic Rights (treaty/property rights), 3. Rights derived from the

[9] See Felix Cohen's Handbook of Federal Indian Law (2012 Edition) at pp. 71-79.

[10] See Kathryn E Fort*, The Vanishing Indian Returns: Tribes, Popular Originalism, and the Supreme Court*, 57 St. Louis U. L. J. 297 (2013).

[11] See Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Polic*y, 85 Neb. L. Rev. 121, 135-136 (2006).

[12] 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, 280-281 (2001).

[13] Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes,* 51 Ariz. L. Rev. 933 (2009).

[14] Bethany Berger *Hope for Indian Tribes in the U.S. Supreme Court, Menominee, Nebraska v. Parker, Bryant, Dollar General, and Beyond,* (forthcoming in the University of Illinois Law Review.) (Hereinafter *Hope for Indian Tribes*)

[15] My survey starts with the 1987-1988 term and ends with the 2016-2017 term. For another survey, see Lawrence R. Baca, *40 Years of U.S. Supreme Court Indian Law Cases*, 62 –APR Fed. Law 18 (2015)(listing all the cases from 1976 until 2014, classifying them as tribal victories or not, and commenting on the Justices who wrote some of the cases).

Indian trust doctrine, and 4. Cultural/Religious rights. Part II ends by assessing the trends in the evolution of the cases and concludes by formulating general principles that can be derived from the tribal win/loss record in these different classifications.

In Part III, I focus on the interaction between the Court and Congress concerning the incorporation of tribes as third sovereigns within the federalist system. This Part first evaluates Congress's response to Supreme Court cases. It then looks at the Court's response to congressional legislation. In a noted article, Professors Frickey and Eskridge put forth the thesis that in deciding cases, the Court is evaluating what Congress and the Executive branch think about the broader issues involved in such cases and responds accordingly, in effect trying to reach a legal "equilibrium" among the three branches of government. As stated by the authors:

> Positive political theory claims that lawmaking institutions are rational, self-interested, interdependent, and affected by the sequence of institutional interaction. When viewed through this lens, law is... an equilibrium, a state of balance among competing forces or institutions. Congress, the executive, and the courts engage in purposive behavior. Each branch seeks to promote its vision of the public interest, but only as that vision can be achieved within a complex, interactive setting in which each organ of government is both cooperating with and competing with the other organs. To achieve its goals, each branch also acts strategically, calibrating its actions in anticipation of how other institutions would respond.[16]

Yet when it comes to Federal Indian Law, one has to wonder if the Supreme Court does not have another agenda on the table. One that does not try to reach an equilibrium about incorporating tribes as the third sovereign within our federalism but instead aims to impose the Court's own terms on how Indian tribes should be integrated into our Federalist system.[17] For instance, in two other articles, Professor Frickey noted that one of the reason Tribal sovereignty was under attack at the Court was that the Court was abandoning the *exceptionalism* of John Marshall's foundational Indian law cases,[18] and was instead adopting a new "federal common law" for what he called, "our age of colonialism."[19]

In the 1930's Congress made the decision to integrate tribes into our political system as quasi-sovereign entities.[20] However, most tribes were isolated geographically and lacked the financial resources to have much of an impact on non-Indians or outside Indian Country. In the last thirty years, things have changed. Tribes are now more meaningful actors, economically and politically. This could explain the Court's new aggressiveness in taking on Indian cases and, some may argue, judicial activism in modifying foundational principles established when tribes

---

[16] See William N. Eskridge & Philip P. Frickey, *Law as Equilibrium*, 108 Harv. L. Rev. 26, 28-29 (1994).

[17] …….

[18] Philip P. Frickey, (*Native) American Exceptionalism in Federal Public Law*, 119 Harv. L. Rev. 433 (2005)

[19] Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Non-Members,* 109 Yale L.J. 1 (1999).

[20] See Felix Cohen's Handbook of Federal Indian Law, 2012 Edition, at pp. 79-84.

were not much of a factor in the economic and political life of the United States.[21] As once noted by Professor Judith Resnick, when issues become important enough to the government, it will remind "the dominated group of its dependence upon the larger collective and works to bring the smaller group into compliance with federal norms."[22] Federal Courts will then impose federal rules of decisions on either state or tribal courts.[23] Perhaps this is the reason why Philip Frickey was right when he observed that the Court was in the process of "flattening" federal Indian law into the broader American public law by importing general constitutional and sub-constitutional value into the field."[24]

Some scholars have argued that Congress has given up its leading role in formulating federal Indian policy.[25] Others have noted that Congress is in fact much more active in enacting laws affecting or concerning Indian nations than previously thought.[26] Part III ends with evaluating the role of the Court's use of Federal Common law. I argue here that perhaps the Court is not trying to reach an equilibrium with Congress but is looking for a different kind of *equilibrium.* In other words*,* the Court is not attempting to achieve a balance between Congress and itself, but is aiming to establish what the Court perceives should be the proper equilibrium between tribal interests on one hand and the non-Indian/state interests on the other.

PART II: DISSECTING THE RECORD: WHAT THE NUMBERS TELL US:

As reflected in Appendix A, the survey takes into account 66 cases.[27] The survey shows that of these 66 cases, tribal interests lost 47.5 cases and won 18.5.[28] This represent a tribal win

[21] On foundational principles of federal Indian law and how the Court is changing them, see David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Cal L. Rev. 1573 (1996).

[22] Judith Resnick, *Dependent Sovereigns: Indian Tribes and the Federal Courts*, 56 U. Chi. L. Rev. 671, 756 (1989).

[23] Id., at 754 (Stating that federal courts have allowed Tribes unrestricted authority on certain intra tribal issues such as tribal membership dispute because these "are not decisions of national importance." Id., at 754.

[24] Philip P. Frickey, *Our Age of Colonialism*, supra at note 18, at pp.73-77.

[25] See Fletcher, *Federal Indian Policy*, supra at note 11.

[26] See Kirsten Matoy Carlson*, Congress and Indians,* 86 U. Of Col. L. Rev. 77 (2015).

[27] Not included in the total number is South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004). The case involved an Indian tribe and a number of environmental organizations bringing a case against a Florida water management district for violation of the Clean Water Act. The case was remanded for more factual findings. I do not regard this case as a Federal Indian Law case. It is an environmental law case where one of the plaintiffs happened to be an Indian tribe. I have also not included Department of the Interior v. South Dakota, 117 S. Ct. 286 (1996). The case involved a challenge to the Interior Secretary's decision to take land in trust for a Tribe. Over a strong dissent by Justices Scalia, O'Connor, and Thomas, the Court granted *cert*, vacated the decision below, and order the case remanded to the Secretary (GVR) so that a new decision could made using newly issued regulations

ratio of only 28% . However, that percentage is still higher than the numbers found by David Getches in his 2001 study (23%) summarizing the first 17 years of the Rehnquist Court,[29] and just a bit higher than that found by Professor Berger in her more recent study.[30]

A. THE RECORD BASED ON THE TYPE OF LAW USED TO DECIDE THE CASES.

This part divides the cases into four categories: Federal common law, statutory/treaty interpretation, constitutional law, and procedural law**.**[31] The cases are divided into those four categories because when it comes to Federal Indian law, all the relevant cases can be fitted into these categories. In spite of strong arguments from various scholars that international law should provide the rules of decisions in many Indian law cases, the Court has unfortunately not yet followed that recommendation.[32] Whether a case is decided using federal common law or constitutional law is normally easy to tell although that issue was the subject of at least one Supreme Court decision in Federal Indian law.[33]

1. Federal Common law decisions: 28.5 cases.

The survey indicates that there was a total of 28.5 cases decided on Federal common law grounds. The half point is the result of considering *California v. Cabazon Band* as half a statutory interpretation case and half a federal common law case.[34] Of these federal common law cases**, tribal interests won 9 and lost 19.5 cases. This represent a tribal win ratio of 31.5%.**

The tribal percentage of wins may look better than it might have been because three of the tribal wins were against the Oklahoma Tax Commission and were perhaps the result of an overly aggressive anti–tribal agenda on behalf of that Commission.[35] Also, after much debate, I

---

[28] The half point comes from the fact that in *Brendale v. Confederated Tribes*, 492 U.S. 408 (1990), the Tribe won half the case (Tribal jurisdiction over non-member property in the "closed" part of the reservation), but lost the other half of the case (no tribal jurisdiction over non-member property in the "open" section.)

[29] See Getches, *Beyond Indian Law*, supra at note 12.

[30] See Berger, *Hope for Indian Tribes,* supra at note 14. Professor Berger's percentage of tribal wins from 1990 until 2016 is 27.3%. The minor difference can be explained by the slightly different scope of the years covered in the two surveys, 1990-2016 for hers instead of 1987-2017 for mine. The difference in years considered resulted in a difference in the number of cases included: 53 in her study, 66 for mine.

[31] This last category is in effect is a residual one containing all cases not fitting in the first three categories.

[32] See Robert A. Williams Jr., Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America (2005), Philip P. Frickey, *Domesticating Federal Indian Law*, 81 Minn. L. Rev. 31 (1996).

[33] United States v. Lara, 541 U.S. 193 (2004).

[34] 480 U.S. 202 (1987).

[35] See Oklahoma Tax Commission v. Citizen Band of Potawatomi, 498 U.S. 505 (1991), Oklahoma Tax Commission v. Sac and Fox nation, 508 U.S. 114 (1993), Oklahoma Tax Commission, v. Chickasaw Nation, 515 U.S. 450 (1995). It is noteworthy that these are the only three cases Indian nations won fighting the states' attempts to tax activities in Indian Country using the Indian preemption doctrine after the Court issued its 1989 decision in Cotton Petroleum v. New Mexico, 490 U.S. 163 (1989).

did include *Dollar General v. Mississippi Choctaw*,[36] in this survey as a tribal win although, perhaps, the case is better described as not a loss rather than an outright win. In that case, the Supreme Court split 4-4 thereby affirming the decision below that was in favor of tribal civil jurisdiction over a non-member. Experts seem to agree, however, that if Justice Scalia had still been alive, his previous record and questioning during the oral argument indicate that, in all likelihood, he would have voted against the tribal interests.[37]

Of the other wins, two upheld tribal sovereign immunity,[38] one allowed a tribe to sue the United States for breach of trust in the management of trust assets,[39] and half of *Brendale v. Confederated Tribes*[40] allowed tribal jurisdiction over non-members in the "closed" parts of the reservation. Two of the more meaningful wins came early on. In *California v. Cabazon Band of Mission Indians*, the tribe was allowed to conduct certain gaming activities free of state regulation,[41] and in *Iowa Mutual v. Laplante*,[42] the Court reaffirmed and extended the requirement that non-members being sued in tribal court should first have to exhaust their tribal court remedies before challenging tribal jurisdiction in federal court.

The tribal loss category can be divided into four subcategories: 1. Tribal Jurisdiction over non-members, 2. State taxation inside Indian reservations, 3. Cases interpreting the trust doctrine, and 4. Cases involving both tribal and state sovereign immunity.

Tribal interests lost 6.5 cases out of 7.5 cases involving tribal jurisdiction over non-members.[43] Tribal interests also lost six cases involving the states' attempts to tax activities on Indian land or Indian reservations.[44] Judicial Interpretation of the Trust doctrine also proved detrimental to tribes as tribal interests lost 4 cases. Two cases involved the Navajo Nation attempts to sue the United States for breach of trust.[45] Another one involved a tribal attempt

---

[36] 136 S. Ct. 2159 (2016).

[37] See Berger, *Hope for Indian Tribes,* supra at note14.

[38] Michigan v. Bay Mills Indian Community, 124 U.S. 2024 (2014) and Kiowa Tribe v. Manufacturing technologies, 523 U.S. 751 (1998).

[39] United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003).

[40] 492 U.S. 408 (1990).

[41] 480 U.S. 202 (1987).

[42] 480 U.S. 9 (1987).

[43] The six cases are: Duro v. Reina, 495 U.S. 676 (1990), South Dakota v. Bourland, 508 U.S. 679 (1993), Strate v. A-1 Contractors, 520 U.S. 438 (1997), Atkinson Trading v. Shirley, 532 U.S. 645 (2001). Nevada v. Hicks, 533 U.S. 353 (2001), and Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008). The tribes also lost half of Brendale v. Confederated tribes, 492 U.S. 408 (1990).

[44] Cotton Petroleum v. New Mexico, 490 U.S. 163 (1989), Department of Taxation v. Milhelm, 512 U.S. 679 (1994), Montana v. Crow Tribe, 523 U.S. 696 (1998), Arizona Department of Revenue v. Blaze Construction, 526 U.S. 32 (1999), City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005), and Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005).

[45] United States v. Navajo Nation I, 537 U.S. 488 (2003). and United States v. Navajo Nation II, 556 U.S. 287 (2009)(both cases finding that no statutes allowed the Navajo Nation the right to sue the United states for breach of trust). While both cases could be classified as involving statutory construction in that the issue was whether statutes could fairly be interpreted as allowing a breach of trust action

to apply the trust doctrine to the Freedom of Information Act.[46] Perhaps the most important one, in a jurisprudential sense, *United States v. Jicarilla Apache Nation*,[47] held that the trust doctrine could not allow the Tribe access to documents in possession of the United States that was both the trustee for the plaintiff Tribe but also the defendant in the case. The importance of the case stems from language throughout the Opinion indicating that, absent specific statutory language, the general law of trust could not be imported to define the duties of the United States as trustee for the tribes because its role as trustee was so different than that of a regular trustee.

Tribal interests also lost three cases dealing with sovereign immunity. Two cases involved tribal sovereign Immunity,[48] and one the sovereign immunity of the states.[49]

2. Statutory Interpretation cases: 21.5 cases.

Among the 66 cases, 21.5 involved statutory/treaty interpretation. Among those, **the tribal interests lost 15 and won 6.5 cases or 30.2% of all the cases in this category.** It is interesting to note that beside *Cabazon* (counting for half a case),[50] all other six tribal wins involved interpretations of Indian specific legislation. Two involved interpretation of the Indian Self Determination Act.[51] Two more involved treaty and quasi treaty interpretations.[52] The oldest case decided in this category involved interpretation of the Indian Child Welfare Act,[53] and the last decided case, *Nebraska v. Parker*, involved federal legislation which was alleged to have disestablished an Indian reservation.[54]

---

against the United States for mismanagement of trust assets, I view them as being more about applying the Indian trust doctrine to the interpretation of statutes than just cases about statutory interpretation.

[46] Department of Interior v. Klamath River Water Users, 530 U.S. 495 (2000)(Trust doctrine does not create a tribal exception to FOIA.

[47] 564 U.S. 162 (2011).

[48] C.L. Enterprise v. Citizens Band of Potawatomi Indian Tribe, 532 U.S. 422 (2001)(Holding that the Tribe had waived its immunity) and Lewis v. Clark, 137 S. Ct. 1285 (2017)(Refusing to extend the sovereign immunity of the Tribe to tribal employees committing torts off the reservation while on tribal assignment.)

[49] Idaho v. Coeur d'Alene, 521 U.S. 261 (1997)(Refusing to extend the Ex parte Young Doctrine to allow the tribe to sue the State.)

[50] 480 U.S. 202 (1987)(interpreting P.L. 280 as not allowing state civil regulatory jurisdiction over Indian gaming).

[51] Salazar v. Ramah Navajo Chapter, 132 S. Ct. 2181 (2012), Cherokee Nation v. Leavitt, 543 U.S. 631 (2005). Interestingly, in the seven years separating these two cases, tribal interests did not win once at the Supreme Court.

[52] Minnesota v. Mille Lacs Band of Chippewa, 526 U.S. 172 (1999), and Idaho v. United States, 533 U.S. 262 (2001). I called this last one a quasi-treaty case because the Court had to interpret an 1891 Act that ratified two previous tribal agreements made with the Coeur D'Alene Tribe. The Court held that Congress intended to reserve all submerged land under lakes and rivers when it legislatively ratified these two previous tribal agreements.

[53] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

[54] 136 S. Ct. 1072 (2016).

Among the tribal losses, ten cases involved Indian specific legislation, and five involved general type of legislation**.** The Indian specific legislation included an interpretation of the Indian Child Welfare Act,[55] a tax provision of the Indian Gaming Regulatory Act,[56] an interpretation of the Indian Reorganization Act,[57] and an interpretation of the Alaska Native Claims Settlement Act (ANCSA).[58] In addition, two cases interpreted the General Allotment Act and the Burke Act, to allow state taxation of Indian owned fee patented lands.[59] Two other cases interpreted Acts opening up reservations for non-Indian settlers as terminating reservation status.[60] Another case interpreted a Kansas act as conferring criminal jurisdiction on the State.[61] Finally, in *Hawaii v. Office of Hawaiian Affairs*,[62] the Court held that when Congress enacted the Native Hawaiian Apology Resolution, it did not intend to strip the State of Hawaii of its sovereign power to alienate lands which had previously been ceded by the Kingdom of Hawaii the United States and then transferred to the State.

Among the five losses involving general and not Indian specific legislation, one case dealt with interpretation of the Administrative Procedure Act and the Quiet Title Act.[63] Another one held that Indian tribes were not "persons" for the purposes of being allowed to sue under Section 1983.[64] One case held that claims brought under the Price-Anderson Act required federal court jurisdiction so that tribal exhaustion of remedies could not be mandated.[65] Another one held that the Coal Lands Acts of 1909 and 1910 conveyed everything to the non-Indian surface patentees except the coal which had been reserved to the United States. Therefore, it was these patentees and not the Tribe who owned the coal bed methane gas under the land.[66] Finally one case dealt with the rights of Alaska Natives under the Alaska National Interest Lands Conservation Act, (ANILCA).[67]

3. Constitutional Law: 11 cases.

[55] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013).
[56] Chickasaw Nation v. United States, 534 U.S. 84 (2001).
[57] Carcieri v. Salazar, 555 U.S. 379 (2009)(holding that only tribes under federal jurisdiction as of 1934 could benefit from section 5 of the IRA, 25 U.S.C. 465, allowing the Secretary of Interior to take land into trust for the benefit of Indians.
[58] Alaska v. Native Village of Venetie, 522 U.S. 520 (1998)(Holding that sections of the law reserving lands for Indians in fee simple did not create "Indian Country" as that term is defined in 18 U.S.C. 1151).
[59] County of Yakima v. Confederated Tribes, 502 U.S. 251 (1992) Cass County v. Leech Lake Band, 524 U.S. 103 (1998) (Holding that when Congress makes Indian or tribal land freely alienable, it clearly signifies an intent to allow state taxation of such lands.)
[60] South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) and Hagen v. Utah, 510 U.S. 399 (1994).
[61] Negonsott v. Samuels, 507 U.S. 99 (1993).
[62] 556 U.S. 163 (2009)
[63] Mach-E-B-Nash-She-Wish Band v. Patchak, 132 S. Ct. 219 (2012)
[64] Inyo County v. Paiute Shoshone Indians, 538 U.S. 701 (2003).
[65] El Paso Natural Gas v. Neztsosie, 526 U.S. 473 (1999).
[66] Amoco Production v. Southern Ute Tribe, 526 U.S. 865 (1999).
[67] Amoco Production v. Gambell, 480 U.S. 531 (1987).

Cases decided on constitutional grounds were even more detrimental to tribal interests than the two previously discussed areas. There was a total of 11 cases. **The tribes only won two cases and lost nine. This amounts only to an 18.1% rate of success.**

The major tribal win, and some may say, the most significant win of all during this period, was *United States v. Lara*.[68] The Court in *Lara* held that decisions like *Duro v. Reina* where the Court held that Tribes had been implicitly divested of criminal jurisdiction over non-members, were decisions based on Federal Common law and not constitutional law. As such, these decisions could be reversed or modified by Congress.[69]

The other tribal win was *United States v. Bryant*,[70] holding that convictions obtained in tribal courts could be counted for the purpose of enhancing sentences in federal courts even if the defendants in tribal courts did not benefit from the assistance of counsel. Although the case is a win as far as recognizing the legitimacy of tribal courts within the federal system, some may argue that it is a loss for those who think the assistance of counsel is crucial to ensure a fair conviction.[71]

Among the nine losses, three cases involved Indian/tribal interests but were not, strictly speaking, Indian cases. *Matal v. Tam* is a non-Indian case with ramifications for cases challenging the use of Indian mascots.[72] *Employment Division v. Smith* involved the use of Peyote as a sacrament in Native American religious practices but the constitutional principle devised by the Court to decide the case affected all religions.[73] The third case, *Rice v. Cayetano*, dealt with the special status of Native Hawaiians under federal law.[74]

Six tribal losses were truly Indian cases. *Hodel v. Irving*,[75] and *Babbitt v. Youpe*e, [76] struck as unconstitutional certain sections of the Indian Land Consolidation Act. *Lyng v. Northwest Cemetery* held that just about all federal actions negatively impacting Native American Sacred

---

[68] 541 U.S. 193 (2004).

[69] For a general discussion of the case, see Alex T. Skibine, *United States v. Lara, Indian Tribes, and the Dialectic of Incorporation*, 40 Tulsa L. Rev. 47 (2004).

[70] 136 S. Ct. 1954 (2016).

[71] For a discussion of the issue, see Barbara L. Creel, *The Right to Counsel for Indians Accused of a Crime: A Tribal and Congressional Imperative, 18 Mich. J. Race & L. 317, 358 (2013).*

[72]137 S. Ct. 1744 (2017)(holding that the use of arguably racially offensive words in Trademarks is protected by the Free Speech clause of the First Amendment.) The Holding in Matal v. Tan doomed the efforts of Indians to force the National Football League to abandon the "Redskins" trademark, see Pro-Football v, Blackhorse, 112 F.Supp.3d 439 (2015).

[73] 494 U.S. 872 (1990)(holding that criminal laws of general applicability that only incidentally impose burdens on the exercise of religion cannot be challenged under the Free Exercise Clause of the First Amendment.)

[74] 528 U.S. 495 (2000)(holding that a law restricting voting in a State election to "Native Hawaiians" was a racial classification and therefore unconstitutional under the 15th Amendment.

[75] 481 U.S. 704 (1987).

[76] 519 U.S. 234 (1997).

sites located on Federal land could not be challenged under the Free Exercise Clause because such actions did not substantially burden the religious practices of Native American practitioners.[77] *United States v. Cherokee Nation*,[78] involved the extent of the United States' navigational servitude under the Commerce Clause. The last two cases, *Blatchford v. Native Village of Noatak*,[79] and *Seminole Tribe v. Florida*,[80] prevented Indian nations from suing states in federal courts because of the states' sovereign immunity under the Eleventh Amendment of the United States Constitution.[81]

4. Administrative/Civil Procedure Law: 5 cases.

There are only five cases in this category. Although tribal interests only won one of these cases, representing only a 20% win rate, this is by far the least important category since the cases here, while very important to the particular parties involved in each case, do not represent important precedents concerning the status of Indian Nations within the federal system.

The one win was in *Arizona v. California*.[82] The case was also the most meaningful among the five cases in this category. The decision held that the claim of the tribes and the United States to more water from the Colorado River was not precluded by previous decrees, nor was it barred under Res Judicata principles.

Among the four losses, one case involved a tribe losing the right to sue in the Federal Court of Claims because the Tribe had already filed a substantially similar case in a federal district court.[83] Another one held that the Administrative Procedure Act did not prevent the right of an Executive Agency to reprogram monies from one Indian program to another.[84] In *Oklahoma Tax Comm. v. Graham,*[85] the Court remanded a case which had been decided in the tribe's favor but only because the case had been improperly removed to federal court. Finally, in *Menominee v. United States,*[86] the Court held that the statute of limitation contained in the Contract Dispute Act was applicable to a contract dispute between a tribe and the United States involving the Indian Self Determination Act.

---

[77] 485 U.S. 439 (1988). For a more in-depth analysis of the case, see Alex Tallchief Skibine, *Towards a Balanced Approached for the Protection of Native American Sacred Sites,* 17 Mich. J. of Race &Law 269, 279-288 (2012).

[78] 480 U.S. 700 (1987).

[79] 501 U.S. 775 (1991).

[80] 517 U.S. 44 (1996).

[81] The Eleventh Amendment provides as follows: **"**The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[82] 530 U.S. 392 (2000).

[83] United States v. Tohono O'Odham, 563 U.S. 307 (2011).

[84] Lincoln v. Vigil, 508 U.S. 182 (1993).

[85] 489 U.S. 838 (1989).

[86] 136 S. Ct. 750 (2016).

5. **Assessing the record based on the type of law used to decide the cases.**

Since 1988, tribes are most likely to lose cases based on constitutional or Procedural law although as stated earlier, the cases based on procedural law are not that meaningful. Of the six losses in strictly Indian cases involving constitutional law, *Seminole Tribe v. Florida*,[87] while undoubtedly very important to Indian interests, involved much more of a Federal versus State conflict than a Tribal versus State one. *United States v. Cherokee Nation* involved tribal interests but was not strictly speaking, decided on constitutional law dealing specifically with Indians.[88] It is debatable whether *Irving* and *Youpee* are, strictly speaking, losses for tribal interests as the Court held that Congress could not without adequate compensation make individual Indians' minimal interest in land escheat to the tribes.[89] This leaves *Lyng*,[90] the sacred site decision, and *Village of Noatak* holding that even though states can sue each other, Indian tribes cannot sue states because the tribes were not part of the "Plan of the Convention,"[91] as the two most meaningful constitutional losses involving the rights of Indian nations within the federal system. As stated earlier, *United States v. Lara* is the most meaningful tribal win in this category.[92]

Refusing to use constitutional law to integrate Indian tribes as the third sovereign within our federalist system is not a dereliction of judicial duties. While Indian tribes are acknowledged in the Constitution as political entities sovereign enough to have their own commerce with the United States,[93] the extent of the Indian nations' sovereignty is not defined.

The tribes' chance of winning cases decided under federal common law which stands at 28% is not as good as winning cases based on statutory construction which have a 31.7% winning rate. Within the statutory construction category, tribal interests have the best chance of winning cases dealing with interpretation of Indian specific legislation as tribes won six of the sixteen cases in this area, or 37.5% of the cases. However, arguably the two most important statutory interpretation cases in this thirty-year period were losses in cases involving Indian specific legislation: The interpretation of the Indian Reorganization Act of 1934 in *Carcieri*,[94] and the case interpreting the Alaska Native Claims Settlement Act of 1971 in *Village of Venetie*.[95]

The Court has historically left the role of governing the relations with the Indian nations to Congress, confirming that position relatively recently in *United States v. Lara*,[96] a pivotal case

[87] 517 U.S. 44 (1996). See discussion at notes 74-80.
[88] 480 U.S. 700 (1987) (determining the extent of the United States navigational servitude in the "waters of the United States."
[89] Hodel v. Irving, 481 U.S. 704 (1987), Babbitt v. Youpee, 519 U.S. 234 (1997). See note 201, infra.
[90] 485 U.S. 439 (1988).
[91] 501 U.S. 775 (1991).
[92] 541 U.S. 193 (2004). See discussion, supra, at notes 66-673-64.
[93] The Commerce Clause, Article II, Section 8, Clause 3, of the U.S. Constitution provides that "Congress shall have the power ….to regulate Commerce…. with the Indian Tribes;"
[94] Carcieri v. Salazar, 555 U.S. 379 (2009).
[95] Alaska v. Native Village of Venetie, 522 U.S. 520 (1998).
[96] 541 U.S. 193 (2004).

decided in 2004. So one would think that most of the cases would be about statutes defining the relationships between the tribes, the states and the federal government. Perhaps surprisingly, the Court uses Federal Common Law more than any other type of law when deciding cases involving tribal interests. Among the cases decided on Federal Common law grounds, tribes only won in the area of tribal sovereign immunity, and fought successfully against assertion of tax jurisdiction by Oklahoma in the three cases involving the Oklahoma Tax Commission. Otherwise, tribal interests lost all six cases involving assertion of tribal jurisdiction over non-members. The tribes also lost six cases involving state taxation of activities in Indian Country. Clearly, the Court used federal common law mostly to protect non-members against tribal sovereignty and to promote state sovereignty (through taxation) inside Indian Country. "Indian Country" is a term of art defined in 18 U.S.C. 1151. It includes all lands within Indian reservations as well as land held in trust or restricted fee by the United States for the benefit of Indians, and land set aside by the United States for Dependent Indian Communities.[97]

B. THE RECORD WHEN CASES ARE DIVIDED ACCORDING TO SUBJECT MATTER.

In this section, instead of classifying the cases according to the type of law used to make the decision, the cases are classified according to four subject matter areas affecting tribal rights: Sovereign/Political Rights, Economic/Property Rights, Rights derived from the trust Relationship, and Cultural/Religious Rights. For the purposes of this section, I have not included *Lincoln v. Vigil*,[98] or *Oklahoma v. Graham*.[99] Although both are tribal losses, albeit relatively unimportant ones in the procedural category, they did not easily fit in any of the four categories named above.

1. Sovereign/Political rights: 38.5 cases.

This category concerns cases involving the sovereign rights of Indians tribes, either to assume jurisdiction over non-members, or claim sovereign immunity when being sued in state or federal court. The section also concerns the sovereign rights of states to assume jurisdiction in Indian Country, or claim sovereign immunity when being sued by tribes. Also included are cases involving the application of the Indian Child Welfare Act.

Most of the cases decided by the Court concerning tribal interests involve, in some fashion or another, the political or sovereign rights of the tribes, 38.5 out of 66 cases. *Cabazon* is being counted as half a political rights case and half an economic rights case since it denied the states the jurisdiction to regulate gaming in Indian Country . *Brendale* is being considered as half a loss and half a win for the tribes.[100] The record, therefore, indicates that tribal interests suffered 26.5 losses while winning 12 cases (30.2%).

[97] 18 U.S.C. 1151.
[98] 508 U.S. 192 (2011)
[99] 489 U.S. 838 (1989).
[100] Brendale v. Confederated Tribes, 492 U.S. 408 (1990).

The 26.5 losses can be divided among cases extending or recognizing state power over Indian Country or Indian Affairs and cases that reduced tribal power.

13 cases can be described as allowing State jurisdiction. While eight of these cases dealt with the authority of states to tax,[101] one extended state criminal jurisdiction in Kansas,[102] and three others diminished the extent of Indian country, thereby extending state general authority over these areas.[103] Finally one case narrowed the application of the Indian Child Welfare Act (ICWA), implicitly extending state authority over such cases.[104]

13.5 cases can be described as negatively impacting tribal sovereignty: 7.5 cases denied tribal civil or criminal jurisdiction over non-members.[105]Five cases either prevented tribes from suing states,[106] or refused to extend tribal sovereign immunity.[107] Finally one case refused to limit election to the State Commission on Native Hawaiian affairs to Native Hawaiians.[108]

Tribal interests won 12 cases; 9 reinforced the sovereign rights of Indian tribes,[109] while 3 negatively impacted state power by denying state taxing authority inside Indian Country.[110]

---

[101] Cotton Petroleum v. New Mexico, 490 U.S. 163 (1989), Department of Taxation v. Milhelm, 512 U.S. 679 (1994), Montana v. Crow Tribe, 523 U.S. 696 (1998), Arizona Department of Revenue v. Blaze Construction, 526 U.S. 32 (1999), City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005), Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005), County of Yakima v, Confederated Tribes, 502 U.S. 251 (1992), and Cass County v. Leech Lake Band, 524 U.S. 103 (1998).

[102] Negonsott v. Samuels, 507 U.S. 99 (1993).

[103] Alaska v. Village of Venetie, 522 U.S. 520 (1998), South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1988), and Hagen v. Utah, 510 U.S. 399 (1994).

[104] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013) (Holding that a biological father who never had "custody" of his child is not eligible to take advantage of the Act to challenge an adoption proceeding.)

[105] Duro v. Reina, 495 U.S. 676 (1990), South Dakota v. Bourland, 508 U.S. 679 (1993), Strate v. A-1 Contractors, 520 U.S. 438 (1997), Atkinson Trading v. Shirley, 532 U.S. 645 (2001). Nevada v. Hicks, 533 U.S. 353 (2001), Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008), Brendale v. Confederated Tribes, 492 U.S. 408 (1980) El Paso Natural gas v. Neztsosie, 526 U.S. 473 (1999).

[106] Seminole Tribe v. Florida, 517 U.S. 44 (1996), , Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991), and Inyo County v. Paiute Shoshone Indians, 538 U.S. 701 (2003).

[107] Lewis v. Clark, 137 S. Ct. 1285 (2017) (refusing to extend tribal sovereign immunity to employee committing tort off the reservation by within the scope of his employment), C& L Enterprise v. Citizens Band of Potawatomi, 532 U.S. 422 (2001) (finding an explicit waiver of tribal sovereign immunity).

[108] Rice v. Cayetano, 528 U.S. 495 (1990).

[109] The tribal wins in this area include California v. Cabazon Band, 480 U.S. 202 (1987), Iowa Mutual v. Laplante, 480 U.S. 202 (1987), United States v. Bryant, 136 S. Ct. 1954 (2016), Nebraska v. Parker, 136 S. Ct. 1072 (2016), Dollar General v. Mississippi Choctaw, 136 S. Ct. 2159 (2016), Mississippi Band of Choctaw v. Holyfield, 490 U.S. 30 (1989), Michigan v. Bay Mills Indian Community, 124 U.S. 2024 (2014), Kiowa Tribe v. Manufacturing technologies, 523 U.S. 751 (1998), United States v. Lara, 541 U.S. 193 (2004), and half of Brendale v. Confederated Tribes, 492 U.S. 408 (1990).

Among the 26.5 cases lost by the tribes, 15.5 were based on federal common law, 8 on statutory interpretation, and 3 on constitutional law. Among the 11.5 tribal wins, 7.5 were based on federal common law, 2 on statutory construction, and 2 on constitutional law.

Of the 8 statutory construction cases involving political rights that the tribes lost, 3 involved the disestablishment of Indian country,[111] one case interpreted a statute as conferring criminal jurisdiction on a state,[112] one was an ICWA case,[113] one case dealt with Native Hawaiians,[114] and two cases allowed state taxation of fee patented land owned by Indians.[115] The two cases won by tribal interests include one of the earlier case in the covered period, *Holyfield*,[116] interpreting ICWA, and one of the very latest, *Nebraska v. Parker*,[117] holding that an Indian reservation had not been disestablished.

Although the numbers indicate that there was a disproportionate use of Federal Common law in this area, 24 cases, and that the Tribes won 31.2% of cases based on Federal common law, the odds of tribal interests winning cases based on statutory interpretation in this area was even less: 2 out of 9 or 22%. In a somewhat curious twist, the tribes won 2 out of 5 or 40% of the cases based on constitutional law affecting tribal political rights.[118]

2. Economic/property rights: 14.5 cases.

This section concerns tribal rights that can be more easily described as property rights or economic rights. Not included in this category are cases where the Court was deciding the continued existence of Indian Country. While such cases, such as the ones involving the disestablishment of Indian reservations have certainly some economic or property aspect to them, they are mostly about who, as between the tribes, the States or the federal government, can assume jurisdiction over certain issues.

---

[110] Oklahoma Tax Commission v. Citizen Band of Potawatomi, 498 U.S. 505 (1991), Oklahoma Tax Commission v. Sac and Fox nation, 508 U.S. 114 (1993), Oklahoma Tax Commission, v. Chickasaw Nation, 515 U.S. 450 (1995).

[111] Alaska v. Village of Venetie, 522 U.S. 520 (1998), Hagen v. Utah, 510 U.S. 399 (1994), South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).

[112] Negonsott v. Samuels, 507 U.S. 99 (1993).

[113] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013).

[114] Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009).

[115] Cass County v. Leech Lake, 524 U.S. 103 (1998), County of Yakima v. Confederated Tribes, 502 U.S. 251 (1992).

[116] Mississippi Choctaw v. Holyfield, 490 U.S. 20 (1989).

[117] 136 S. Ct. 1072 (2016).

[118] The tribes won in United States v. Lara, 541 U.S. 193 (2004) and United States v. Brant, 136 S. Ct. 1954 (2016). Tribes lost in Seminole Tribe v. Florida, 517 U.S. 44 (1996), Rice v. Cayetano, 528 U.S. 495 (1990), and Btalchford v. Native Village of Noatak, 501 U.S. 775 (1991). The winning percentage here is curious because overall, the tribes lost 9 of the 11 cases involving constitutional law. See discussion supra at notes 63-76.

For these 14.5 cases, tribal interests won 5.5 cases and lost 9 which amounts to a 40% tribal win rate. This indicates that Tribal interest are much more likely to win cases involving Tribal economic rights (40%) than any other category of cases.

The tribal losses consist of an eclectic bunch not easily categorized. They range from an early case dealing with the subsistence rights of Native Alaskans,[119] to a case allowing federal taxation of Indian gaming.[120] Another three cases dealt with tribal attempts to confirm property rights in minerals,[121] or submerged land.[122] Two other cases did not allow minimal individual interests in land to escheat to tribes,[123] while another applied the statute of limitations to a contract dispute between a tribe and the United States.[124] Finally, another case allowed the state of Hawaii to continue the sale of lands that had been originally ceded by the Kingdom of Hawaii.[125]

The most meaningful tribal victory here was *California v. Cabazon Band of Mission Indians*,[126] which is included in this section as counting for half a case since it is also included for half a case in the sovereign/political rights case in that it prevented state jurisdiction over Indian gaming. Besides *Cabazon*, the tribal wins include two tribal contract disputes under the Indian Self-Determination Act,[127] two cases interpreting treaties or agreements with Indian Nations,[128] and one Indian water rights case, *Arizona v. California*.[129]

3. Rights derived from the Federal-trust relationship: **8 cases.**

There were 8 cases that, in some form or another, interpreted the trust relationship with the United States.[130] Tribal interests only won one case, a breach of trust claim against the United States,[131] and lost seven which amounts to only a 12.5% winning rate.

---

[119] Amoco Production v. Gambell, 480 U.S. 531 (1987).
[120] Chickasaw Nation v. United States, 534 U.S. 84 (2001)
[121] Amoco Production v. Southern Ute tribe, 526 U.S. 865 (1999).
[122] Idaho v. Coeur d'Alene 521 U.S. 261 (1997), United States v. Cherokee Nation, 480 U.S. 700 (1987).
[123] Hodel v. Irving, 481 U.S. 704 (1987), Babbitt v. Youpee, 519 U.S. 234 (1997).
[124] Menominee v. United States, 136 S. Ct. 750 (2016).
[125] Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009).
[126] 480 U.S. 202 (1987).
[127] Salazar v. Ramah Navajo, 132 S. Ct. 2181 (2012), Cherokee Nation v. Leavitt, 543 U.S. 631 (2005).
[128] Minnesota v. Mille Lacs Band of Chippewa, 526 U.S. 172 (1999), Idaho v. United States, 533 U.S. 262 (2001).
[129] 530 U.S. 392 (2000).
[130] Since 1831, when Chief Justice Marshall in *Cherokee Nation v. Georgia*, described the Indian tribes as domestic dependent nations whose relationship with the United States resembled that of a ward to its guardian, 30 U.S. 1 at 17, the political relationship between the United States and the tribes has been described as a trust relationship. Under that relationship, tribes are the beneficiary of the trust and the United States is the trustee. For a comprehensive treatment of the trust doctrine see Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty, The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471 (1994).
[131] United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003).

The tribal losses included three breach of trust claims.[132] In two other cases, tribes attempted, without success, to apply the Indian trust doctrine to non-Indian statutes and doctrines.[133] Finally, in *Patchak*, the Court allowed non-Indian individuals to challenge the United States' decision to take land into trust for Indian tribes,[134] while in *Carcieri v. Salazar*[135] it restricted the application of section 5 of the Indian Reorganization Act to tribes under federal jurisdiction as of 1934.[136] The low rate of tribal wins in this area clearly indicates that the Court is construing trust obligations narrowly,[137] and does not want to extend general principles of trust law to the Indian trust doctrine unless specifically mandated to do so by Congress.[138]

4. Cultural/Religious Rights: 3 cases.

There are only three cases in this category and, unfortunately, tribal interests lost every one of them. Two of the cases were not concerned with any doctrines of federal Indian law, *Matal v. Tam*,[139] and *Employment Division v. Smith*.[140] The third one did not allow Indian practitioners to invoke the protection of the Free Exercise of Religion Clause to protect Sacred Sites located on Federal land.[141]

C. THE RECORD WHEN THE CASES ARE CONSIDERED BASED ON RELATIVE IMPORTANCE AND ALONG TIME LINES.

Although this is a subjective count, among the cases that are the most important in Federal Indian Law from a precedential perspective, the survey indicates that there were 8 tribal victories and 16 defeats. In other words, in the last thirty years, for every meaningful tribal victory, there were two important tribal defeats. On the other hand, this means that tribal interests won 33.33% of these important cases which is a higher percentage of wins that the tribal average for all cases (28%).

---

[132] United States v. Navajo Nation, I and II, 537 U.S. 488 (2003), and 556 U.S. 287 (2009) (both cases finding that no statutes allowed the Navajo Nation the right to sue the United states for breach of trust). United States v. Tohono O'Odham, 563 U.S. 307 (2011), is included here although the Tribe lost the right to sue the United States in the Federal Court of Claims only because it had already filed a similar case in Federal District Court.

[133] United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011) (refusing to apply the trust doctrine to the attorney-client privilege), and Dept. of Interior v. Klamath River Water Users, 530 U.S. 495 (2000) (refusing to apply the trust doctrine to exceptions contained in the Freedom of Information Act (FOIA).

[134] Match-E-B-Nash-She-Wish Band v. Patchak, 132 S. Ct. 219 (2012).

[135] 555 U.S. 379 (2009).

[136] Section 5, codified at 25 U.S.C 465, authorizes the Secretary of the Interior to take land into trust for the benefit of Indians.

[137] United States v. Navajo Nation, 537 U.S. 488 (2003).

[138] United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011).

[139] 137 S. Ct. 1744 (2017).

[140] 494 U.S. 872 (1990).

[141] See Lyng v. Northwest Cemetery, 485 U.S. 439 (1988).

The tribal wins are an eclectic mix. They include *Iowa Mutual v. Laplante* (exhaustion of tribal court remedies doctrine),[142] *California v. Cabazon Band* (state jurisdiction over gaming preempted,)[143] *Mississippi Choctaw v. Holyfield* (ICWA),[144] *Kiowa Tribe* and *Bay Mills* (tribal sovereign immunity),[145] *Minnesota v. Mille Lacs Band* (Treaty interpretation,)[146] and *Nebraska v. Parker* (existence of Indian Country).[147]

The tribal losses include seven against state interests.[148] Five of the cases that reduced tribal sovereignty over non-members.[149] Three that involved the trust relationship.[150] One that involved protection of an Indian sacred site.[151]

It is important to note that the overall percentage of tribal wins in the last thirty years, while not great (28%), has increased since Professor Getches published his 2001 survey (23%).[152] However, if one looks at the percentages of tribal wins when the cases are divided into ten year increments, the future looks brighter for tribal interests than it did previously. From the 1986-87 term to the 1996-97 term, the Court adjudicated 25 cases. Of these, 18.5 were tribal losses, and 6.5 wins,[153] amounting to a **26% tribal win rate**. From the 1997-98 term to the 2006/07 term, the Court also heard 25 cases. The tribal interests lost 18 cases, while

[142] 480 U.S. 9 (1987).
[143] 480 U.S. 202 (1987).
[144] 490 U.S. 30 (1989).
[145] Kiowa Tribe v. Manufacturing Technologies, 523 U.S. 751 (1998), Michigan v. Bay Mills, 134 S. Ct. 2024 (2014).
[146] 526 U.S. 172 (1999).
[147] Lyng v. Northwest Cemetery, 485 U.S. 660 (1988).
[148] Cotton Petroleum v. New Mexico, 490 U.S. 163 (1989), Alaska v. Native Village of Venetie, 622 U.S. 520 (1998), Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991), Seminole Tribe v. Florida, 517 U.S. 44 (1996), Adoptive Couple V. Baby Girl, 133 S. Ct. 2552 (2013), City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005), Cass County v. Leech Lake Band, 524 U.S. 172 (1999).
[149] Duro v. Reina, 495 U.S. 676 (1990), Strate v. A-1 Contractors, 520 U.S. 438 (1997) , Nevada v. Hicks, 533 U.S. 353 (2001), Atkinson Trading v. Shirley, 532 U.S. 645 (2001), Plains Commerce Bank v. Long Family Land, 554 U.S. 316 (2008).
[150] U.S. v. Navajo Nation, 537 U.S. 488 (2003) U.S. v. Jicarilla Apache Nation, 564 U.S. 162 (2011), and Carcieri v. Salazar, 555 U.S. 379 (2009).
[151] Lyng v. Northwest Indian Cemetery, 485 U.S. 439 (1988).
[152] See Getches, *Beyond Indian Law*, supra at note 12.
[153] The two most important wins for the tribes during that decade were California v. Cabazon Band, 480 U.S. 202 (1987) (No state jurisdiction over Tribal gaming) and Mississippi Choctaw v. Holyfield, 490 U.S. 30 (1989) (ICWA). Meaningful losses include Cotton Petroleum v. New Mexico, 490 U.S. 163 (1989) (State taxation), Strate v. A-1 Contractors, (No tribal civil jurisdiction over non-members) 520 U.S. 438 (1997), Duro v. Reina, 495 U.S. 676 (1990) (No tribal criminal jurisdiction over non-member Indians), Seminole Tribe v. Florida, 517 U.S. 44 (1996) (State retained sovereign immunity in spite of IGRA,) and Lyng v. Northwest Indian Cemetery, 485 U.S. 439 (1988) (No constitutional protection for Indian sacred site located on federal land).

winning 7.[154] This amounts to **a 28% Tribal win rate.** From the 2007/08 until the 2016/17 term, there was only 16 cases. 11 cases were tribal losses, and 5 tribal wins.[155] This represents **a 31.2 tribal win rate.**

Although the tribal win rate increased in each successive decade, the positive or pro-tribal trend is even more striking when one compares the first 15 years (1987-88 term until the 2000-01 term) with the last fifteen years (2001-02 term until the 2016-17 term.) The tabulation shows that there were 43 cases decided in the first 15 years with the tribal interests losing 32.5 cases while only winning 10.5 cases, representing a 24.4% rate of tribal wins. However, in the last fifteen years, there were only 23 cases. However, of these 23 cases, Tribal interests won 8 cases while losing 15. This represents a 34.7% rate of tribal wins and may indicate that, for the tribes, the worst is behind them and there might indeed be a light at the end of this anti tribal sovereignty tunnel. Besides the Court being more receptive to Indian tribes as the third sovereign within our federalism, other factors may have contributed to this rather abrupt drop in the number of cases decided as well as the increase in the percentage of tribal wins. One of these factors could be the creation of the Tribal Supreme Court Project, a joint effort by the Native American Rights Fund and the National Congress of American Indians, to more closely monitor and control the kind of cases appealed to the Supreme Court by tribal interests.[156]

PART III: LOOKING FOR EQUILIBRIUM OR JUDICIAL SUPREMACY?

A. Evaluating Congressional response to the Court's decisions, and the Court's reaction to federal legislation.

1. Congressional response.

[154] Among the more meaningful tribal wins in this decade are Kiowa Tribe v. Manufacturing Technologies, 523 U.S. 751 (1998) (Tribal Sovereign Immunity), Minnesota v. Mille Lacs Band, 526 U.S. 172 (1999) (Treaty Rights), and United States v. Lara, 541 U.S. 193 (2004) (Congressional power to overturn implicit divestiture cases). Important losses include Nevada v. Hicks, 533 U.S. 353 (2001) (No tribal civil jurisdiction over non-members), Alaska v. Village of Venetie, 522 U.S. 520 (1998) (Land owned in Fee by Indians pursuant to ANCSA not Indian Country), U.S. v. Navajo Nation, 537 U.S. 488 (2003) (No U.S. liability for breach of trust in management of tribal natural resources), Atkinson Trading v. Shirley, 532 U.S. 645 (2001)(No tribal civil jurisdiction over non-members), and Rice v. Cayetano, 528 U.S. 495 (2000) (Classification of Native Hawaiians for the purpose of voting in state elections are racial classifications reviewed under strict scrutiny).

[155] Meaningful tribal wins in this decade include Michigan v. Bay Mills, 134 S. Ct. 2024 (2014)(Tribal sovereign Immunity) and Nebraska v. Parker, 136 S. Ct. 1072 (2017)which is included as an important case because it may represent a turning point on how the Court determines whether Indian reservations have been disestablished. Important tribal losses include Pains Commerce Bank v. Long Family Land & Cattle, 554 U.S. 316 (2008)(no tribal civil jurisdiction over non-members), United States v. Jicarilla Apache Tribe, 564 U.S. 162 (2011)(Trust doctrine not applicable to interpret FOIA, Adoptive Couple v. Baby Girl, 133 S.Ct. 2552 (2013) (Applicability of ICWA) and Carcieri v. Salazar, 555 U.S. 379 (section 5 of IRA only applicable to tribes under federal jurisdiction as of 1934).

[156] See Berger, *Hope for Indian Tribes*, supra at note 14, at p.....

Congress is said to have "plenary power" over Indian Affairs,[157] and it is the Institution the Constitution, mostly through the Indian Commerce Clause, vested with primacy over Indian affairs.[158] Recently, one scholar has argued that it is normatively right for Congress to take the leading role in Indian Affairs because it has the better institutional capacity to formulate sound policies governing federal relations with Indian Nations,[159] while another one showed that Congress is still very active in formulating federal Indian policy.[160] Others have argued, however, that Congress has ceded its leading role to the Court.[161] Consistent with the views expressed in *Law and Equilibrium*,[162] it is true that Congress and the Court, and at times the Executive Branch, are involved in a kind of dialogue with each other. As once stated by Justice Ginsburg:" judges… participate in a dialogue with other organs of government."[163] In this section, I analyze the interrelationship between the Court and Congress in the field of Federal Indian Law to understand the nature of the dialogue and determine if the Court has taken control over such dialogue.[164]

Professor Matthew Fletcher has persuasively shown that, generally speaking, "modern congressional statements" in Federal Indian policy support tribal self-government, tribal tax authority and economic development, as well as tribal sovereign immunity and the development of tribal courts.[165] *This section focuses only on legislation enacted specifically as a response to a Supreme Court decision in order to evaluate Congressional willingness to retain primacy over Indian affairs.* This section is not a comprehensive survey. It is not pretending to be all inclusive of all Indian legislation that may have been partially motivated or influenced by former Supreme Court decisions. Although many tribe-specific legislation, whether it be land claims or water rights settlements, are somewhat related to former Supreme Court decisions,

---

[157] For instance, in Cotton Petroleum v. New Mexico, 490 U.S. 163, 192 (1989), the Court stated "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."

[158] The Commerce Clause, Article II, Section 8, Clause 3, of the U.S. Constitution provides that "Congress shall have the power ….to regulate Commerce…. with the Indian Tribes." For a thorough look at the various sources of congressional power over Indian Affairs, see Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012 (2015).

[159] See Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs,* 85 U. Colo. L. Rev 759 (2014).

[160] Kirsten Carlson, *Congress and Indians,* supra at note 25 at p. at 148-149.

[161] See Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 95 Neb. L. Rev. 121 (2006).

[162] See Eskridge & Frickey *Law as Equilibrium*, supra at note 16.

[163] Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1198 (1992). See also Lawrence Friedman *The Constitutional Value of Dialogue and the New Judicial Federalism,* 28 Hasting Const. L. Q. 93 (2000), Maimon Schwarzchild, *Pluralism, Conversation, and Judicial Restraint,* 95 Nw. U. L. Rev. 961 (2001) (discussing when court decisions encourage democratic conversations with the other branches.)

[164] For a comprehensive study of the dynamic relationship between the Court's decision and Congress on all issues see, William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331 (1991).

[165] See Fletcher *Federal Indian Policy*, supra at note 11, at pp. 140-150.

this section does not analyze all congressional legislation remotely related to Supreme Court decisions.

a. Indian Gaming.

Perhaps the most interesting case study involving the interaction between the legislative, judicial, and Executive branches in the field of Indian Affairs is in the area of Indian gaming. As is well documented, although Congress had been working on legislation to regulate Indian gaming, it is only after the Court issued its 1987 decision in *California v. Cabazon*,[166] that Congress was able to muster the political will to enact the Indian Gaming Regulatory Act of 1988 (IGRA).[167] Eight years after IGRA was enacted into law, the Court reacted and declared the part of IGRA allowing Tribes to sue States for failing to negotiate a tribal state compact in good faith unconstitutional.[168] While that decision did not generate a congressional reaction in the Indian gaming area, the Executive Branch took up the challenge and enacted new regulations allowing tribes to by-pass an assertion of state sovereign immunity by allowing them to ask the Secretary of the Interior to issue Class III gaming procedures.[169] So far, the power of the Secretary to issue such procedures has been struck down by two circuits,[170] but the Court has not yet decided to take a case challenging the validity of the regulations.

b. Tribal Criminal Jurisdiction over non-Indians and non-member Indians.

Congress also reacted to the Court's decisions to divest tribes of criminal jurisdiction over non-member Indians and non-Indians. Congress enacted the so-called *Duro Fix*,[171] overturning the Court's 1990 decision in *Duro v. Reina.*[172] Congress eventually also partially overturned or modified *Oliphant v. Suquamish Indian tribe*,[173] by enacting the 2013 VAWA Amendments.[174]

---

[166] 480 U.S. 202 (1987).

[167] For comprehensive analysis, see Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 Ariz. St. L. J. 99 (2010), Robert N. Clinton, *Enactment of the Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty*, 42 Ariz. St. L. J. 17 (2010).

[168] Seminole Tribe v. Florida, 517 U.S. 44 (1996)(holding that Congress could not use its Commerce Clause powers to abrogate the States' 11th Amendment sovereign immunity.)

[169] The final regulations were issued in 1999. See 64 Fed. Reg. 17,535 -36, codified at 25 C.F. R. 291.

[170] See Texas v. United States, 497 F.3d 491 (5th Cir. 2007), cert. denied. 129 C. Ct. 32 (2008), New Mexico v. Department of the Interior, 854 F.3d 1207 (10th Cir. 2017). For an argument supporting the Secretary's authority to issue such regulations, see Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 Ariz. St. L. J. 253, 293-296 (criticizing the Fifth Circuit opinion).

[171] P.L. No. 102-137, 105 Stat 646 (codified as amended at 25 U.S.C. 1301).

[172] 495 U.S. 676 (1990).

[173] 435 U.S. 191 (1978).

[174] 25 U.S.C., 1304. For background and implementation of the 2013 VAWA Amendments, See Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. Rev. 1564 (2016).

There was a challenge to the Congress's power to overturn or modify cases such as *Duro* and *Oliphant*, but the Court in *United States v. Lara* ruled that these former decisions were based on Federal common law and not constitutional law.[175] Therefore, the results in such cases could be modified by Congress.[176] Whether non-members can be prosecuted in tribal courts without the full protection of the United State Constitution has not yet been decided.[177]

c. Indian land Consolidation Act:[178]

On an issue of much less interest to the non-Indian world, the Court twice struck as unconstitutional provisions of the Indian Land Consolidation Act allowing very small interests in land owned by tribal members to escheat to their tribe under certain conditions.[179] Each time, the Congress reacted by enacting a new version of the law. The first ILCA was enacted in 1983.[180] An amended version attempting to resolve the constitutional issues was enacted in 1984 but declared unconstitutional in *Babbitt v. Youpee*.[181] A third version was enacted in 2000, but was replaced before it could be implemented by the 2004 American Indian Probate Reform Act.[182]

d. Overturning Patchak:

Following the Court's decision in *Mach-E-B-Nash-She-Wish v. Patchak,*[183] which had allowed a non-tribal member to challenge a decision by the Secretary of the Interior to transfer some land to the tribe from fee to trust, Congress enacted the 1994 Gun Lake Trust Land Reaffirmation Act.[184] That Act attempts to overturn or, perhaps, moot the Court's decision in *Patchak* by reaffirming the Secretary's decision to take the land into trust and directing the dismissal of any action (future or pending) challenging such fee to trust transfer. The Court has recently, however, granted *cert* to review the constitutionality of this legislation.[185] The grant of *cert* may seem unusual as the case only concerns a tribe specific statute. However, the legal principles involved are important since they involve the power of Congress to affect the result

[175] 124 S. Ct. 1628 (2004).
[176] For in depth analysis of the decision and its background, see Bethany R. Berger, *United States v. Lara as a Story of Native Agency*, 40 Tulsa L. Rev. 5 (2004). See also, Alex Tallchief Skibine, *United states v. Lara, Indian Tribes, and the Dialectic of Incorporation*, 40 Tulsa L. Rev. 48 (2004).
[177] See Note, *Tribal Criminal Jurisdiction after United States v. Lara: Answering the Constitutional Challenge to the Duro Fix*, 93 Cal. L. Rev. 847 (2005). See also Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 UCLA L. Rev. 553 (2009).
[178] 25 U.S.C. 2201-2219
[179] Hodel v. Irving, 481 U.S. 704 (1987), and Babbitt v. Youpee, 519 U.S. 234 (1997).
[180] P.L. 97-459, 96 Stat. 2517.
[181] 519 U.S. 234 (1997).
[182] P.L. 106-462. 114 Stat. 1992.
[183] 132 S. Ct. 219 (2012).
[184] Pub. L. 113-179, 128 Stat. 1913.
[185] See Patchak v. Zinke, 137 S. Ct. 2091 (2017)(granting cert on May 1, 2017).

reached in previous court decisions. This case provides a good segue to the next section since it discusses the Court's reaction to other congressional legislation.

The Court's Reaction to Congressional legislation:

This section evaluates the Court's reaction to congressional legislation to determine if the Court is looking for a political equilibrium and cares about reaching results consistent with the positions of Congress on Indian issues.

a. Interpreting IGRA.

As stated earlier, the Court struck part of IGRA as unconstitutional in *Seminole Tribe v. Florida*.[186] The Court also interpreted IGRA as allowing federal taxation of tribal gaming revenues in *Chickasaw Nation v. United States*.[187] While *Seminole* Tribe obviously upset the carefully crafted balance reached by Congress between tribal and state interests in tribal gaming within Indian Country, the decision was part of a much larger debate among the Justices concerning the extent of Eleventh Amendment immunity. Because it affected much more than just Indian-specific statutes, the decision was part of a much larger controversy between Congress and the Court concerning the extent of Congressional power to abrogate the sovereign immunity of the States.

However, the refusal of the Court to allow Tribes to sue state official using the *Ex Parte Young* doctrine reflects a profound disagreement with the Congressional policies enunciated in IGRA.[188] As I argued elsewhere, that policy revealed a congressional desire to include tribes into a model of what some have termed cooperative federalism,

> [f]ederal statutes in the new Tribal Self-Governance Era… have progressively adopted what could be described as a compact model…. These statutes can be seen as incorporating or integrating Indian tribes as sovereign political entities within "Our Federalism" and creating what could be called a system of cooperative federalism between the tribes and the federal government.[189]

Although I also pointed that IGRA was different from the typical cooperative federalism statute in that it directly involved the states in the negotiation of compacts,[190] I also believed that IGRA

[186] 517 U.S. 44 (1996). See discussion at notes 165-169.
[187] 534 U.S. 84 (2001)
[188] For a critique of that aspect of the Court's opinion, see Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 Ariz. St. L.J. 253, 297-300.
[189] Id., at 285-287 (2010).
[190] Typical statutes embodying a cooperative federalism model include the Clean Air Act, Pub. L. 101-459, 104 Stat. 2399, the Safe drinking Water Act, Pub. L. 99-339, 100 Stat 642, and the Clean Water Act, Pub. L. 100-4, 101 Stat 7. Indian tribes are included in the statutes as being able to be treated as States and assume primacy over the reservations' air and water resources.

could fit "in the concept of cooperative federalism, a concept which should be based on tri-lateral agreements between the tribes, the federal government, and the states."[191]

b. Interpreting ANCSA.

In *Venetie*,[192] the Court reacted to enactment of the 1971 Alaska Native Claims Settlement Act (ANCSA) by holding that land set aside for Native Corporations under the Act was not Indian Country. Therefore, the State of Alaska could tax activities taking place on those lands. The Court achieved this remarkable result by insisting that lands set aside by Congress for dependent Indian Communities, such as Alaskan Native Villages, could only qualify as "Indian Country" for the purpose of section 1151 if such lands also remained in control of the federal government.[193] Because Native Alaskan villages held their lands in fee, the federal government did not have complete control over such lands. Therefore, such lands could not qualify as Indian Country.[194]

c. Interpreting ICWA:

Since its enactment in 1978, the Court has only interpreted the Indian Child Welfare Act twice. From a pro tribal interpretation in *Holyfield* in 1988,[195] the Court in 2013 came up with a very narrow interpretation of the law in *Adoptive Couple v. Baby Girl.*[196] This new interpretation severely limits the instances where biological Indian fathers could invoke the protection of ICWA when intervene in adoption proceedings.

d. Interpreting section 5 of the IRA.

Section 5 allows the Secretary to transfer land into trust for the benefit of Indian tribes.[197] For years, the Secretary had construed that section as applying to all Indian tribes as long as such tribes were under federal jurisdiction as of the date of each land transfer. At the urging of the states, the Court in *Carcieri* gave a very narrow interpretation to the Indian Reorganization Act restricting application of Section 5 to those tribes under federal jurisdiction as of 1934.[198] The Court was able to reach this result by surprisingly claiming that there was no

---

[191] Id., at 287.

[192] Alaska v. Village of Venetie, 522 U.S. 520 (1998).

[193] Although 18 U.S.C. 1151 defines what lands qualify as Indian Country for the purpose of criminal jurisdiction, the definition has been applied to civil jurisdictional issues.

[194] For a critical evaluation of the Court's reasoning in Venetie, see Kristen Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 Tulsa L.J. 73 (1999); see also David M. Burton, *Canons of Construction, Stare Decisis, and Dependent Indian Communities: A Test of Judicial Integrity,* 16 Alaska L. Rev. 37 (1998).

[195] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 20 (1989) (Coming up with a national definition of "domicile" preventing Indian mother from avoiding application of ICWA by giving birth off the reservation).

[196] 133 S. Ct. 2552 (2013).

[197] Codified at 25 U.S.C. 465.

[198] Carcieri v. Salazar, 555 U.S. 379 (2009).

ambiguity whatsoever in the statute and, therefore, *Chevron* deference was not applicable.[199] In doing so, the Court set aside a thirty year old formal regulation of the Interior Department which had interpreted the statute as only requiring that a tribe be under federal jurisdiction at the time the land was transferred into trust.[200]

e. Indian Land Consolidation Act.

As noted earlier, the Court struck down as unconstitutional parts of the Indian Land Consolidation Act twice.[201] It is interesting to note that in each of the five examples cited above, the Court ruled against the tribal interests. However, of the five statutes, only the Indian Land Consolidation Act generated a congressional response.[202] This shows that if tribal interests are not in direct conflict with the interests of states or important non-Indian interests, Congress is ready and willing to correct Supreme Court decisions.[203] The next sub-section makes this point even clearer.

f. Interpreting the Indian Self Determination Act.

In 1988 and 1994, Congress amended the Indian Self-Determination Act of 1975.[204] In *Cherokee Nation v. Leavitt*, [205] the Supreme Court unanimously interpreted the 1988 Amendments as mandating the funding of "Contract Support Costs" associated with Self-Determination contracts entered into between the United States and the tribes. Contract support costs

reasoned that Congress had still appropriated sufficient unrestricted funds to cover the full amount of those contract support costs.

Aware of this problem, Congress later enacted Appropriation Bills with language providing that contract support costs available to tribes should be capped at an amount "not to exceed" amounts appropriated by Congress for this activity. Yet, in *Salazar v. Ramah Navajo Chapter*,

the Justices are concerned that non-members are not fully protected by the United States Constitution when appearing in tribal courts. Finally, Indian nations are not seen by the Court as truly sovereign governments in charge of governing their territories.[209] The same concerns generated by unfamiliarity, lack of constitutional protection, and mixed feelings about tribal sovereignty, could be operating also at the congressional level to dim any chances of restoring tribal civil jurisdiction through legislation. However, it should be noted that although not enacted

Legislation is needed to resolve the ambiguities created by *Seminole Tribe v. Florida.*[218] In *Seminole Tribe,* the Court struck down as unconstitutional a section of IGRA allowing the tribes to sue states in federal court for failure to negotiate a tribal state gaming compact on good faith.[219] The unresolved question is whether the Secretary of the Interior can issue Class III gaming procedures upon being petitioned to do so by a tribe whose lawsuit against a state was dismissed on account of sovereign immunity. Two Circuits have ruled that the Secretary cannot issue such regulations.[220] No amendment to IGRA on this issue seems to be forthcoming.[221]

d. Recognizing Native Hawaiians.

Although so far, Native Hawaiians lost both Supreme Court cases affecting their interests,[222] Congress tried but was unable to enact any kind of legislation recognizing Native Hawaiians as a political group.[223] However, on September 29, 2015, the Obama Administration, through the Department of the Interior, announced that it was amending its regulations to allow Native Hawaiians to apply for federal recognition as an Indian tribe.[224]

e. Overturning *Ca c e*

So far, tribal efforts to enact a *Carcieri* Fix have been unsuccessful although Indian nations may not be unitied in the effort to overturn the decision.[225] Under *Carcieri*, in order to be eligible to receive land into trust under the IRA's section 5, a tribe had to be under federal jurisdiction in 1934.[226]

f. Repealing Section 5 of the IRA.

---

[218] 517 U.S. 44 (1996).

[219] The Court held that Congress could not use its Commerce Clause power to abrogate the States' sovereign immunity guaranteed by the Eleventh Amendment to the U.S. Constitution.

[220] See New Mexico v. Department of Interior, 854 F.3d 1207 (10th Cir. 2017), Texas v. United States, 497 F.3d 491 (5th Cir. 2007). For a critique of the decision, see Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 Ariz. St. L. J. 254, 293-296 (2010). See also Note, *A Pretty Smart Answer: Justifying the Secretary of Interior's Seminole Fix for the Indian Gaming Regulatory Act*, 40 Am. Ind. L. Rev. 325 (2015-16).

[221] See Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 Harv. J. on Leg. 39 (2007) (Recommending Amendments to IGRA).

[222] Rice v. Cayetano, 528 U.S. 495 (2000), Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009).

[223] For a description of such legislative efforts, see Note, *The Akaka Bill: The Native Hawaiians Race for Federal Recognition*, 23 U. Hawaii L. Rev. 857 (2001).

[224] See Department of the Interior Press Release, 9/29/2015, *Interior Proposes Re-establishing Government to Government Relationship with Native Hawaiian Community.*

[225] See e.g. Note, *Beyond the Carcieri Fix: The Need for Broader Reform of the Land into Trust Process of the Indian Reorganization Act of 1934*, 96 Iowa L. Rev. 1377 (2011).

[226] For an argument that most if not all Indian Tribes were under federal Jurisdiction as of 1934, see William Wood, *Indians, Tribes, and (Federal) Jurisdiction,* 65 U. Kansas L. Rev. 415 (2016).

On the other hand, in spite of concerted efforts by the States to challenge implementation of section 5 of the IRA,[227] or declare the section unconstitutional,[228] the Court never came close to holding the Section unconstitutional. The Court did grant cert in Department of the Interior v. South Dakota,[229] but proceeded on issuing a GVR, remanding the case for reconsideration to the Secretary of the Interior without writing a substantial opinion. [230] Congress on the other hand, did amend the Indian Reorganization Act in 1988 to allow tribes who had initially rejected the Act to be able to benefit from Section 5.[231]

g. Abrogating tribal Sovereign Immunity

In *Kiowa Tribe v. Manufacturing Technologies,* [232] the Court strongly implied that Congress should consider restricting the scope of tribal sovereign immunity.[233] Yet, after considering the issue in connection with enactment of the Indian Tribal Economic Development and Contracts Encouragement Act of 2000,[234] Congress opted against any major revisions to the doctrine.[235]

h. Amending ICWA.

---

[227] Section 5 allows the Secretary of the Interior to take land into trust for the benefit of Indians. For a critique of the implementation of Section 5, see Note, *Extreme Rubber Stamping: The Fee to Trust Process under the Indian Reorganization Act of 1934*, 40 Pepp. L. Rev. 251 (2014).

[228] See for instance, City of Roseville v. Norton, 348 F.3d 1020 (D.C. Cir. 2003). Section 5 has been attacked as being unconstitutional as an overbroad delegation of power to the Secretary of the Interior. Section 5 has also been attacked as being in violation of the Tenth Amendment to the U.S. Constitution. The Tenth Amendment provides that all powers not delegated to the Congress are reserved to the States.

[229] 117 S. Ct. 286 (1996).

[230] There is, as of this, writing, a Cert Petition pending in front of the Court in which one of the question presented is whether the land into trust provision of the IRA, 25 U.S.C. 5108, (formerly cited as 25 U.S.C. 465), exceeds Congress's authority under the Indian Commerce Clause. See Town of Vernon v. U.S., Docket No-17-8, petition filed on 6/23/2017.

[231] The amendments to Section 5 of the IRA, codified at 25 U.S.C. 2202, were contained in Title II of the Indian Land Consolidation Act, 96 Stat 2517.

[232] 523 U.S. 751, at 758 (1998).

[233] Id., at 758, (stating "There are reasons to doubt the wisdom of perpetuating the doctrine… In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims. These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule… Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment.)

[234] P.L. 106-179, 114 Stat. 46 (2000) (amending 25 U.S.C. 81.)

[235] See H.R. Rep. No. 106-501 (2000), S. Rep No. 106-150 (1999).

Anti-ICWA interest groups efforts to amend the Indian Child Welfare Act (ICWA),[236] have also gone nowhere, legislatively speaking. Although Bills to amend ICWA have been introduced, Congress has so far not enacted any new amendments to this legislation.[237] On the same subject, even though many have and continue to challenge some sections of ICWA as being unconstitutional,[238] the Supreme Court has never granted *cert* to any such cases.[239] It should be noted, however, that in *Adoptive Couple v. Baby Girl*, the Court stated that parts of ICWA would raise equal protection issues if the interpretation of the South Carolina Supreme Court was upheld.[240]

Conclusion to Part III A:

In a recent Article analyzing in depth the actions of Congress concerning Indians, Professor Kirsten Carlson found that Indian tribes were surprisingly adept at persuading Congress to enact legislation favorable to tribal interests.[241] As the *Patchak* legislation shows,[242] this is undoubtedly true when it comes to getting Congress to enact tribe specific bills or legislation not opposed by states or powerful non-Indian interests. Otherwise, the only major pan-tribal successes involving congressional reaction to Supreme Court decisions in the last thirty years have been the enactment of IGRA, the *Duro* Fix, and the 2013 VAWA Amendments. There have been, of course, many other tribal legislative successes. But such successes, like for instance, the Tribal Law & Order Act,[243] have not been the result of a direct congressional reaction to a Supreme Court case.

Tribal interests, however, have been more adept at *preventing* anti-tribal bills from being enacted into law. Thus, major pro-tribal legislation like the IRA, IGRA, and ICWA have not been amended in a way adverse to tribal interests. However, the same thing could be said of anti-tribal interests capabilities to stymie pro-tribal legislation. It is telling that Congress was able to revisit the ILCA twice and has made numerous amendments to the ISDA, yet tribal legislative efforts to fix IGRA in the wake of *Seminole Tribe,* reaffirm tribal *civil* jurisdiction over non-members, or preempt state taxation in Indian Country, have all been stalled.

---

[236] 25 U.S.C. sections 1901-1923 (2000)

[237] See Barbara Ann Atwood, *Flashpoints under the Indian Child Welfare Act*, *Toward a New Understanding of State Court Resistance,* 51 Emory. L. J. 587 (2002) (discussing the major controversies and disagreements involving ICWA.)

[238] For a summary of current cases, see Matthew Newman and Kathryn Fort, *Legal Challenges to ICWA: An Analysis of Current Case Law*, 36 NO.1 Child L. Prac. 13 (2017).

[239] However, one *cert* petition is still pending at the time of this writing, see S.S. v. Colorado River Indian Tribes, Docket No. 17-95, Petition for Cert filed on 7/17/17.

[240] 133 S. Ct. 2552, 2565 (2013).

[241] See Kirsten Matoy Carlson, *Tribes Lobbying Congress: Who Wins and Why*, Draft Report Presented at the Michigan State University's 13th Annual Indigenous Law Conference (2017) at pp. 9-12.

[242] See discussion, supra, at notes 180-182. Although the last chapter in this saga has still not been written as the Court recently granted *cert* to a petition challenging the constitutionality of that law.

[243] Pub. L. 11-211, 124 Stat 2261.

The record confirms that it is much easier to kill rather than enact legislation.[244] Many have written about congressional *gridlock* and the Court is, of course, aware of this phenomenon.[245] In the next section of this Article, I argue that this awareness has emboldened the Court to use judge-made law to promote its own agenda and policies in Indian Country without any fears of upsetting any equilibrium that may have been reached with Congress.

B. Looking for a different kind of equilibrium: The Court's use of Federal Common law:

As stated earlier, the Court uses Federal common law more than any other type of law in its Indian law jurisprudence. Moreover, the Court's most active use of federal common law is to protect non-members from tribal jurisdiction and promote state jurisdiction inside Indian reservations. In this section, I argue that rather than looking for an equilibrium with Congress, the Court is using federal common law to impose its own version of what the equilibrium between tribal and non-tribal interests should look like.

The Court's inordinate reliance on Federal common law for these purposes shows that the Court does not believe that Congress can be counted on to protect the interests of non-members or states in Indian Country.[246] In a non-Federal Indian law context, scholars have noted that the Court's new vigor to protect norms of Federalism is based on a belief that Congress does not always have the states' interest foremost in mind when enacting legislation.[247] Although there is no data supporting the ineptness of Congress to look after the interests of states and non-members in Indian Country, there is legislative gridlock generally speaking.[248] It would therefore not be surprising for the Court to think that this gridlock may extend to controversial issues in Indian Country.

This perceived inability or unwillingness of Congress to protect the interests of states and non-members has pushed the Court to reverse certain common law presumptions that used to govern the field of Indian Affairs. Thus, as I have argued elsewhere, the Court during the Rehnquist years adopted a "dependency" paradigm for the incorporation of tribes into our federalist system.[249] Under that paradigm, tribes were not being incorporated under a third sphere of sovereignty but were "dependent" on Congress for all their political rights. In other

[244] See William N. Eskridge, *Vetogates, Chevron, Preemption*, 83 Notre Dame L. Rev. 1441 (2008).

[245] See, Michael J. Teter, *Congressional Gridlock's Threat to Separation of Power*, 2013 Wisc. L. Rev. 1097 (2013), Michael, J. Gerhardt, *Why Gridlock Matters*, 88 Notre Dame L. Rev. 2107 (2013), Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 Notre Dame L. Rev. 2217 (2013).

[246] As Stated by the late Philip Frickey:"it seems plain that the trend has been motivated by a judicial sense that Congress has failed to step in and fix a myriad of festering local problems by eliminating tribal authority." *Native American Exceptionalism,* supra at note 17, at pp. 460-461.

[247] See Ruth Colker & James Brudney, *Dissing Congress*, 100 Mich. L. Rev. 80 (2001); Daniel Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 Notre Dame L. Rev. 1133 (2000).

[248] See note 244, supra.

[249] See Alex Tallchief Skibine, *Redefining the Status of Indian Tribes within "Our Federalism": Beyond the Dependency Paradigm*, 38 Conn. L. Rev. 667 (2006).

words, the Court's jurisprudence was evolving towards a position that would require the existence of tribal power to be somehow confirmed in treaties or legislation.[250] In addition, the Court was moving towards a position requiring Congressional intent to preempt state jurisdiction in Indian country to be clearly indicated.[251] Thus, instead of looking for Congress to act affirmatively to protect states and non-member interests, the Court was putting the burden on Congress to confirm tribal power and clearly establish its intent to pre-empt state jurisdiction in Indian Country.[252]

Although Congress has adopted broad policies favoring tribal self-government, the Court's effort to impose its own agenda through federal common law has been facilitated by the fact that Congress has rarely addressed general conflicts involving tribal and state claims to power on Indian reservations. As I have argued elsewhere, this lack of precise congressional direction on state taxation and tribal civil jurisdiction over non-members has enabled the Court through the use of *formalism* to formulate rigid rules from old cases in order to justify its decisions favoring States rights and disallowing tribal jurisdiction over non-members.[253] The typical formalist analysis uses a "rule" derived from authoritative text. Functionalism, on the other hand, applies "standards" to resolve a given conflict.[254] The use of formalism instead of functionalism has enabled the Court to hide its policy choices behind such rigid rules. Using a functional approach in federal Indian law would at least force the Court to explain why its holdings are congruent with current congressional policies.[255]

As the previous section demonstrated, the Court feels emboldened to use federal common law to divest tribes of jurisdiction over non-members and allow state tax jurisdiction in Indian Country because it thinks that the chances of Congress reacting to anti tribal decisions favoring States' rights or the right of powerful non-Indian interests, are extremely small. While I have no qualms with the right of the Court to use federal common law, the more difficult question is whether the Court's formulation of its common law rules is legitimate. Although there are very few limits, if any, on the power of federal courts to devise rules of federal common law,[256] the fashioning of rules of decision should be, in one way or another, tied either to congressional

[250] Id., at 668

[251] Id.

[252] However, I also argued that the Court's decision in United States v. Lara, 541 U.S. 193 (2004) might be announcing the Court's willingness to turn away from the Dependency Paradigm and return to what I described as Felix Cohen's Plenary Power-Sovereignty Paradigm. Under that paradigm, tribes were incorporated into the United States as sovereigns, having only lost the power to transfer their lands without federal approval and the power to sign treaties with foreign nations. However, Congress retained the plenary power to modify the terms of incorporation and divest tribes of their original sovereignty. Id.

[253] See Skibine, *Formalism and Judicial Supremacy,* supra at note 214.

[254] See e.g. William N. Eskridge Jr*., Relationship Between Formalism and Functionalism in Separation of Powers Cases*, 22 Harv. J. L & Pub. Pol'y 21 (1998).

[255] Skibine, *Formalism and Judicial Supremacy*, supra at note 214, at p. 395.

[256] See Louise Weinberg, *Federal Common Law*, 83 Nw. U. L. Rev. 805 (1989) (stating "I take it then that there are no fundamental constraints on the fashioning of federal rules of decision.")

policies,[257] or to values emanating from the Constitution.[258] As the Court noted, statutes establish policies that

> become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law…This appreciation of the broader role played by legislation in the development of the law reflects the practices of common law courts from the most ancient times. As Professor Landis has said "much of what is ordinarily regarded as 'common law' finds its sources in legislative enactment.[259]

Commenting on the Court's use of Federal Common Law, Professor Frickey once stated that the "unstated assumption" underlying these federal common law cases was that even though Congress has not spoken on the issues being decided, the Court is presuming that it is merely following the "wishes of Congress."[260] Professor Frickey concluded, however, that there was no evidence supporting such a judicial presumption.[261] Other scholars have noted that when it comes to federal Indian common law, the decisional law is divorced from current congressional policies.[262] As stated by Professor Frank Pommersheim "In a sense, the Court has become the ultimate organ for formulating Indian policy in contemporary law. This raises a quintessential separation of powers issue, with the Court usurping the constitutional role of Congress to make law and formulate policy."[263]

Native Americans have been described at various times as the "forgotten Americans," or the "vanishing Indians." There was a time when almost all Indian tribes were economically powerless and had very little or no impact on the political and economic life of the United States. These times are over: Whether it is because of the success of Indian casino gaming,[264] or other aspects of tribal economic development, [265] Indian issues are no longer on the

---

[257] See Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Poli*cy, 85 Neb. L. Rev. 121, 168-182 (2006)(Advocating a "consistent-with federal-policy" test for deciding some federal Common law Indian cases such as cases divesting tribes of sovereignty and cases enlarging state jurisdiction in Indian Country.)

[258] See for instance Bradford R. Clark, *Federal Common Law: A structural Reinterpretation*, 144 U. Pa. L. Rev. 124 (1996)(Arguing that courts should be able to make rules of federal common law only if they are directly implied from the constitutional structure or if they are necessary to further a basic structure of the constitutional scheme.)

[259] Moragne v. State Marine Lines, 398 U.S. 375, 390-01, 293 (1970) (quoting James Landis, *Statutes and the Sources of Law."* in Harvard Legal Essays 213-14 (1934).

[260] Frickey *Our Age of Colonialism*, supra at note 18, at p.7.

[261] Id.

[262] See Fletcher, *Federal Indian Policy*, supra at note 10.

[263] Frank Pommersheim, Broken Landscape: Indians Tribes, and the Constitution 229 (2009).

[264] See generally, Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 Ariz. St. L. J. 253 (2010).

[265] On tribal economic development, see Robert J. Miller, *American Indian Entrepreneurs: Unique Challenges. Unlimited Potential*, 40 Ariz. Sr. L. J. 1297 (2008), W Greg Guedel & J.D. Colbert, *Capital Inequality, and Self Determination: Creating a Sovereign Financial System for Native American Nations*. 41 Am. Ind. L. Rev. 1 (2016).

backburner.[266] How Indian tribes conduct their politics and handle their business affairs matters to the non-Indian world.[267] Because of this new reality, the Court may be in the process of adjusting the legal landscape.[268] In looking for an equilibrium between tribal and non-tribal interests, the Court may be adjusting the rules to ensure what it (subjectively) considers a level playing field between the tribes on one hand and the states and non-Indians on the other. Controversial decisions in cases such as *City of Sherrill*, and *Plains Commerce Bank,* may reflect a knee jerk reaction to the tribes' newfound political and economic power. A good example of the Court's desire to create a new level playing field is its recent decision in *Lewis v. Clark.* [269] In that case, the Court refused to extend the tribe's sovereign immunity to a tribal employee alleged to have committed a tort off the reservation but still within the scope of his employment. In coming to its decision, the Court took into account whether similar state employees would have enjoyed the State's sovereign immunity in such situations.[270]

CONCLUSION

The Court's continued reliance on federal common law doctrines to divest tribes of sovereignty or allow state jurisdiction in Indian Country, is unfortunate and undermining congressional policies favoring tribal self-government and economic self-sufficiency. However, there are reasons for tribes to be optimistic. Congressional response to the Supreme Court Indian law jurisprudence, while not overly active, has not been detrimental to tribal interests. Although enacting pro Indian pan-tribal legislation, such as the Indian Child Welfare Act, is definitely harder than it used to be,[271] individual tribes have continued to be successful in enacting tribal specific legislation.[272] Moreover, the overall percentage of tribal wins in the last thirty years while not great (28%), has increased with each decade.[273]

In conclusion, I concur with Professor Berger that there are reasons for Indian nations to be optimistic.[274] The overall trend in the cases does indicate that the Court is more willing now to support the integration of Indian nations as the third sovereigns within our federalist system. The Court, however, may be getting around to accepting the position of tribes as the third sovereigns within our federalism. A recent Supreme Court decision indicates a more positive

---

[266] See Matthew L.M. Fletcher, *Indian Tribal Business & the Off-Reservation Market,* 12 Lewis & Clark L. Rev. 1047 (2008).

[267] See Angela R. Riley, *Good (Native) Governance*, 107 Colum. L. Rev. 1049 (2007) (explaining why it is more important than ever for tribal governments to adopt good governmental practices.)

[268] See Judith Resnick, *Dependent Sovereigns*, supra at note 21.

[269] 137 S. Ct. 1285 (2017).

[270] Id., at 1290-91 (After summarizing the rules denying extension of state sovereign immunity in such circumstances, the Court stated "There is no reason to depart from these general rules in the context of tribal sovereign immunity.")

[271] On suggesting strategies to enact pan-tribal legislation supporting tribal self-determination, see Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 Conn. L. Rev. 777 (2006).

[272] See Carlson, *Congress and Indians*, supra at note 25.

[273] See discussion supra at notes 150-154.

[274] See Berger, *Hope for Indian Tribes*, supra at note 14.

attitude towards tribal sovereignty than the one prevailing during the Rehnquist years. Thus, in a non-Indian case discussing the inherent sovereignty of Puerto Rico, the Court declared *per* Justice Kagan

> Originally, this Court has noted "the tribes were self-governing sovereign political communities possessing (among other capacities) the "inherent power to prescribe laws for their members and to punish infractions of those laws." After the formation of the United States, the tribes became domestic dependent nations, subject to the plenary control of Congress… But unless and until Congress withdraws a tribal power—including the power to prosecute—the Indian community retains that authority in its earliest form. The ultimate source of a tribe's power to punish tribal offenders" thus lies in its "primeval" or, at any rate, "pre-existing" sovereignty: A tribal prosecution, like a State's is "attributable in no way to any delegation… of federal authority.[275]

[275] Puerto Rico v. Sanchez Valle,136 S. Ct. 1863, 1872 (2016)(holding that for the purposes of the double jeopardy clause, Puerto Rico did not have any inherent sovereignty separate from that of the United States.) Although there were two dissenters, only Justice Thomas objected to the quoted language. (Thomas concurring in part at p. 1877). See also Note, *Fifth Amendment-Double Jeopardy-Dual Sovereignty Doctrine-Puerto Rico v. Sanchez Valle* 130 Harv. L. Rev. 347 (2016).

Appendix A

Cases	Citation	Win/Loss	Type of Law Used	Substantive Rights Affected
Iowa Mutual v. LaPlante	480 U.S. 9 (1987)	Win	Federal common law	sovereign rights
Amoco Production v. Gambell	480 U.S. 531 (1987)	Loss	Statutory/treaty interpretation	Economic Right
Hodel v. Irving	481U.S. 704 (1987)	Loss	Constitutional law	Economic Right
United States v. Cherokee Nation	480 U.S. 700 (1987)	Loss	Constitutional law	Economic Right

Idaho v. Coeur D'Alene	521 U.S. 261 (1997)	Loss	Statutory Interpretation	Sovereign/Political
Alaska v. Village of Venetie	522 U.S. 520 (1998)	Loss	Statutory Interpretation	Sovereign/political
Cass County v. Leech Lake Band	524 U.S. 103 (1998)	Loss	Statutory Interpretation	Sovereign/political
South Dakota v. Yankton Sioux Tribe	522 U.S. 329 (1998)	Loss	Statutory Interpretation	Sovereign/political
Montana v. Crow Tribe	523 U.S. 696 (1998)	Loss	Common law	Sovereign/Political
Kiowa Tribe v. Manufacturing Technologies	523 U.S. 751 (1998)	Win	Common law	Sovereign/Political
Arizona Dept. of Revenue v. Blaz	526 U.S. 32 (1999)	Loss	Common Law	Sovereign/Political
Minnesota v. Mille Lacs Band of Chippewa	526 U.S. 172 (1999)	Win	Treaty Interpretation	Economic/Property
El Paso Natural Gas v. Neztsosie	526 U.S. 473 (1999)	Loss	Statutory	Sovereign/Political
Amoco Production v. Southern Ute Tribe	526 U.S. 865 (1999)	Loss	Statutory	Economic/Property
Dept. of Interior v. Klamath River Users	530 U.S. 495 (2000)	Loss	Common Law	Trust doctrine
Rice v. Cayetano	528 U.S. 495 (2000)	Loss	Constitutional law	Political right
Arizona v. California	530 U.S. 392 (2000)	Win	Procedural	Property right
Chickasaw Nation v United States	534 U.S. 84 (2001)	Loss	statutory	Economic Right
Nevada v. Hicks	533 U.S. 353 (2001)	Loss	Common law	sovereign rights
C&L Enterprise v. Citizens Band Potawatomi	532 U.S. 422 (2001)	Loss	common law	sovereign rights
Atkinson Trading v Shirley	532 U.S. 645 (2001)	Loss	Common law	Sovereign/political
Idaho v. United States	533 U.S 262 (2001)	win	statutory	Property right
Inyo County v. Paiute Shoshone Indians	538 U.S. 701 (2003)	Loss	Statutory	Sovereign
United States v. Navajo Nation I	537 U.S. 488 (2003)	Loss	Common Law	Trust doctrine
United States v. White Mountain Apache	537 U.S. 465 (2003)	win	Common Law	Trust doctrine
United States v. Lara	541 U.S. 193 (2004)	win	Constitutional law	Sovereign/political
City of Sherrill v. Oneida Indian Nation	544 U.S. 197 (2005)	Loss	Common law	Sovereign/political
Wagnon v. Prairie Band Potawatomi	546 U.S. 95 (2005)	Loss	Common law	Sovereign/political
Cherokee Nation v. Leavitt	543 U.S. 631 (2005)	Win	Statutory	Economic/property
Plains Commerce Bank v. Long Family Land	554 U.S. 316 (2008)	Loss	Common law	Sovereign/political
Hawaii v. Office of Hawaiian Affairs	556 U.S. 163 (2009)	Loss	Statutory	Property right

United States v. Navajo Nation II	556 U.S. 287 (2009)	Loss	Common law	Trust doctrine
Carcieri v. Salazar	555 U.S. 379 (2009)	Loss	Statutory	Sovereign
United States v. Jicarilla Apache Nation	564 U.S. 162 (2011)	Loss	Common law	Trust doctrine
United States v. Tohono O'Odham	563 U.S. 307 (2011)	Loss	procedural	trust doctrine
Salazar v. Ramah Navajo	132 S. Ct. 2181 (2012)	Win	Statutory	Economic Property
Match-E-Be-Nash-She-Wish v. Patchack	132 S. Ct. 219 (2012)	Loss	Statutory	Trust doctrine
Adoptive Couple v. Baby Girl	133 S. Ct. 2552 (2013)	Loss	Statutory	Sovereign/political
Michigan v. Bay Mills Indian Community	124 U.S. 2024 (2014)	Win	Common law	Sovereign/political
Nebraska v. Parker	136 S. Ct. 1072 (2016)	Win	Statutory	Sovereign/political
United States v. Bryant	136 S. Ct. 1954 (2016)	win	Common law	Sovereign/political
Menominee v. United States	136 S. Ct. 750 (2016)	loss	procedural	Economic/property
Dollar General v. Mississippi Band of Choctaw	136 S. Ct. 2159 (2016)	win	Common law	Sovereign/political
Lewis v. Clark	137 S. Ct. 1285 (2017)	Loss	Common law	Soevreign/political
Matal v. Tam	137 S. Ct. 1744 (2017)	Loss	Constitutional law	Cultural/religious