



Legal Studies Research Paper Series

Research Paper No. 10 - 26

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

Matthew L.M. Fletcher*

Four times in the past 15 years, arguments or information raised by amici before the Supreme Court have had dramatic impacts on the Court's decision making process in cases involving federal Indian law. In two cases involving government contracting, amicus briefs filed by the United States Chamber of Commerce supporting tribal interests played important roles in pointing out the impact the Court's decision would have on defense and other government contractors.¹ In another case, an amicus railroad company alleged that the procedures in one tribal court were stacked against nonmembers, apparently causing the Court to reconsider its views on tribal civil jurisdiction.² In a fourth case, an amicus resuscitated a line of argument long thought to be retired from the field (in fact, none of the parties briefed the argument) and persuaded the Court to decide a case on that basis.³

What about these briefs, as opposed to the hundreds of other Supreme Court amicus briefs filed in the Court's Indian cases, served to influence the Court so heavily? This short paper hopes to sort out a few general guidelines for amicus brief writers in federal Indian law cases by reviewing a series of amicus briefs and how we know the Court deals with them.

I. The Supreme Court's Indian Cases

There are several ways to categorize litigation of American Indian law cases before the Supreme Court. First, the cases are very unpopular, non-sexy cases for the Court. Jeffrey Toobin's new book notes that the clerks consider these cases "dogs."⁴ Justice Brennan once referred to an assignment to write the opinion in an Indian law case as a "chickenshit"

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

¹ See *Salazar v. Ramah Navajo Chapter*, 132 S.Ct. 2181 (2012); *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005).

² See *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

³ See *City of Sherrill v. Oneida Indian Nation* 544 U.S. 197 (2005).

⁴ JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* 54 (2012).

assignment.⁵ Senior Justices often assign the Indian law opinions to junior Justices. It is extremely unlikely that a Supreme Court Justice will ascend to the High Court with an expertise in Indian law, although one sitting Justice (Sotomayor) has listed Indian law as a special area of her concern. Similarly, it is extremely unlikely that a sitting Justice would hire a clerk for their expertise in Indian law. And since few, if any, clerks come from law schools where Indian law is emphasized (mostly schools in the west), it cannot be expected that Supreme Court clerks will have any experience with Indian law questions. That said, Supreme Court clerks are better than anyone in the world at getting up to speed in short order.

Second, tribal interests⁶ are similarly disfavored by the Supreme Court. The outcomes in the Indian cases since the 1986 Term, when Chief Justice Rehnquist ascended, are stark – tribal interests have lost more than 75 percent of their cases before the Court, a figure the late Dean David Getches noted was worse than the failure rate of convicted criminals before the Court. It is also apparent from the Court’s certiorari decisions that the only Indian law cases that attract the Court’s attention are cases where the tribal interest has won below, or in the limited cases where the United States acquiesces to Supreme Court review.⁷ This is not to accuse the Justices or the Court as an institution of overt discrimination against tribal interests, but to note the extreme disadvantage tribal interests face before the Supreme Court. After all, tribal interests differ in fundamental ways than federal, state, business, foreign, and even individual interests in that tribal governance activities often are not sanctioned or constrained by the Constitution.⁸

Third, the tribal interests I use in shorthand to describe Indian tribes, individual Indians, and others siding with Indian tribes are incredibly diffuse. More often in recent decades, tribal interests are on opposite sides, although this is rarely the case in Supreme Court litigation, largely because the Court no longer finds inter-tribal disputes important to be worthy of the Court’s attention. Why this is important is the reality that the Supreme Court’s decisions, absent

⁵ BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 58 (1979).

⁶ I use “tribal interests” to define the parties to which I am focusing. I include Indian tribes, individual Indians backed by or siding with a tribe, governmental and economic entities siding with a tribe, and individuals siding with a tribe. Occasionally, individual Indians are in opposition to this notion of “tribal interests,” most notably in criminal cases. *E.g.*, *United States v. Lara*, 541 U.S. 193 (2004) (nonmember Indian challenge to “Duro fix”).

⁷ See Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as a Barrier to Justice for Indian Tribes*, 51 *ARIZ. L. REV.* 933, 937 (2009).

⁸ Consider for example the hierarchy of sovereignties in the views of the Supreme Court’s clerks in deciding the importance of a particular amicus brief. Briefs of the United States government are highest on the list, followed by the state briefs (regardless of the quality of the brief), local units of government, and everyone else. See Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 33 *J. L. & POL.* 33, 46-49 (2004).

some sort of check, apply universally to all of Indian country. The most obvious example is *Oliphant v. Suquamish Indian Tribe*,⁹ a decision barring tribal criminal jurisdiction over non-Indians involving an Indian tribe that had a tiny population, a new-ish tribal judicial system, and limited resources. That decision applies to all Indian tribes, even those with centuries-old criminal justice systems, control over massive territorial bases, and sufficient economic and legal resources to prosecute. While it makes sense for some decisions to apply universally, it makes less sense in other cases.

Fourth, information about Indian country is relatively scarce. There are few legitimate social science studies on tribal judicial systems, tribal economies, tribal legal infrastructure, and federal and state relations with Indian tribes. Legal scholarship on American Indian law is nascent and skewed by political (and perhaps racial) biases. Representations made by tribal advocates and their adversaries often cannot be independently verified by the Court and the clerks.

Finally, federal Indian law primarily is federal common law. Like admiralty law, federal Indian law is the province of the Supreme Court. While Congress can and does preempt many areas within federal Indian law, large swaths of the field remain common law. In such circumstances, the Court's uncomfortable role as policymaker and legislative judiciary arises. In one document – a private memorandum from Justice Scalia to Justice Brennan – discovered by the late Dean David Getches in Justice Marshall's papers,¹⁰ Justice Scalia wrote that

[O]pinions in this field have not posited an original state of affairs that can subsequently be altered only by explicit legislation, but have rather sought to discern what the current state of affairs ought to be by taking into account all legislation, and the congressional “expectations” that it reflects, down to the present day.¹¹

⁹ 435 U.S. 191 (1978).

¹⁰ See David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL L. REV. 1573, 1575 (1996).

¹¹ See *id.* (quoting Memorandum from Justice Antonin Scalia to Justice William J. Brennan, Jr. (Apr. 4, 1990) (*Duro v. Reina*, No. 88-6546) (hereinafter *Scalia Memorandum*), in *Papers of Justice Thurgood Marshall* (reproduced from the Collections of the Manuscript Division, Library of Congress)). Thanks to the David H. Getches Collection at the William A. Wise Law Library at the University of Colorado Law School, the memorandum is now available at Turtle Talk. See Matthew L.M. Fletcher, *Scalia Memorandum to Brennan in Duro v. Reina*, Turtle Talk blog post, <http://turtletalk.wordpress.com/2012/11/13/scalia-memorandum-to-brennan-in-duro-v-reina/>.

This unusually “frank admission”¹² by a sitting Supreme Court Justice may overstate the case, but the fact remains that public policy is very much in play in the Court’s decisionmaking in the Indian cases.

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

II. Goals of Supreme Court Amicus Briefs

The goals of a Supreme Court amicus brief vary widely. “At one extreme is the brief, filed for a particular outcome, that contains no legal analysis and a scanty, one-sided policy argument. At the other extreme is the brief, filed by an expert, that is far superior to anything filed by either of the parties.”¹³ Within this spectrum are amicus briefs that are more effective in persuading the Court than others. For example, an amicus can “demonstrate and emphasize areas of importance or conflict that are outside the expertise of the parties.”¹⁴ Stern and Gressman add: “For example, an international union or the ALF-CIO may be able to visualize and stress the importance of a particular labor law question to the national labor movement far better than the local union and the small company that are parties to the controversy.” As veteran Supreme Court litigator once wrote:

Occasionally, a case will be decided on a ground suggested only by an amicus, not by the parties. Frequently, judicial rulings, and thus their precedential value, will be narrower or broader than the parties had urged, because of a persuasive amicus brief. Courts often rely on factual information, cases or analytical approaches provided only by an amicus. A good idea is a good idea, whether it is contained in an amicus brief or in the brief of a party.¹⁵

¹² Frank Pommersheim, “New” Directions in Indian Law Scholarship: An Afterword, 32 AM. INDIAN L. REV. 157, 159 (2007-2008).

¹³ SUSAN LOW BLOCH, VICKI C. JACKSON & THOMAS G. KRATTENMAKER, INSIDE THE SUPREME COURT: THE INSTITUTION AND ITS PROCEDURES 931-32 (2d ed. 2008).

¹⁴ ROBERT L. STERN & EUGENE GRESSMAN, SUPREME COURT PRACTICE 497 (5th ed. 1978) (footnote omitted).

¹⁵ Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 603 (1984).

One could easily analogize this purpose to how modern tribal organizations and their sometimes-adversaries (state and local governments) utilize amicus briefs in Supreme Court litigation.

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

Alternatively amicus briefs can be a waste of time; they can even do affirmative harm to the cause they are trying to support. If there are too many amicus briefs, the important ones that the party needs the Court to read may get lost in the clutter. Worse, unrestrained amicus briefs may aggressively argue for applications and extensions of the party's argument that the party is trying to avoid or disclaim. Occasionally, an amicus brief may disclose bad facts that are not in the record.¹⁶

In my view, the best amicus briefs in Indian law cases offer some specialized and useful bits of information to the Supreme Court, information not otherwise available. Some social science researchers agree that non-parties file amicus briefs as a means of providing the Supreme Court with important information key to the Court's decision making process: "Since litigants are more likely to be narrowly focused on the case outcome, the broader policy implications of the decision may not be discussed in their briefs. In contrast, amicus briefs may provide this information and help the Court's members understand the policy implications of their rulings."¹⁷ In Indian law, an area of federal common law, where the Supreme Court's policymaking and legislative functions are in play, policy-oriented amicus briefs are very relevant. One survey of former Supreme Court clerks strongly suggests that amicus briefs offering information expanding upon the positions of the parties is very helpful.¹⁸

I outline three categories of amicus brief for later review in the Court's Indian cases. First, I identify "policy briefs" that provide new information useful to helping Court predict

¹⁶ Douglas Laycock, *Persuasion in Hot-Button Cases*, in PERSUASION AND IDEOLOGY: POLITICALLY DIVISIVE CASES IN APPELLATE COURTS, 7TH ANNUAL MSU INDIGENOUS LAW CONFERENCE MATERIALS, 19, 42 (2010).

¹⁷ James F. Spriggs & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RES. Q. 365, 367 (1997) (citations omitted).

¹⁸ See Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 33 J. L. & POL. 33, 41 (2004) ("The majority of clerks (56%) explained that amicus briefs were most helpful in cases involving highly technical and specialized areas of law, as well as complex statutory and regulatory cases ... [N]oteworthy areas of law included: railroad preemption, water rights, marine labor, immigration and *Native American law*." (emphasis added)).

outcomes of its decision. I believe these briefs likely to be the most influential on the Court (“influential” being relative, of course). Second, I identify “alternative merits argument briefs” that simply provide an alternative theory upon which the Court could rely in its ruling. The United States as amicus curiae is probably the party most likely to file this kind of brief, although other amici do on occasion. These briefs may be influential as well, most especially if the amicus is the United States. Third, I identify “support briefs” that merely support or reiterate the parties’ merits arguments. It is likely that the vast majority of amicus briefs fit inside this category. I do not believe these amicus briefs are influential, but they may be very useful to the Court in focusing the Court’s attention on relevant precedents in cases where the parties do not, for whatever reason.

III. Selective Survey of Amicus Briefs in Indian Law Cases

Here, I selectively review several amicus briefs in several cases, providing prototypical examples of each of the three categories of amicus briefs I have identified. I will focus on a small sampling of cases that whose issues tended to be based in federal common law and therefore had policy questions for the Court to decide; or had broader policy implications beyond Indian law; or otherwise were more likely to have included amicus briefs that likely had some influence on the Court’s decision. Those cases are (in reverse chronological order): *United States v. Jicarilla Apache Nation* (2012),¹⁹ *Carcieri v. Salazar* (2009),²⁰ *Sherrill v. Oneida Indian Nation* (2005),²¹ *Cherokee Nation v. Leavitt* (2005),²² *United States v. Lara* (2004),²³ *Kiowa Tribe v. Manufacturing Technologies* (1998),²⁴ *South Dakota v. Yankton Sioux Tribe* (1998),²⁵ *Strate v. A-1 Contractors* (1997),²⁶ *Seminole Tribe v. Florida* (1996),²⁷ *Duro v. Reina* (1990),²⁸ *Cotton Petroleum v. New Mexico* (1989),²⁹ and *California v. Cabazon Band of Mission Indians* (1987).³⁰

¹⁹ 131 S. Ct. 2313 (2011)

²⁰ 555 U.S. 379 (2009).

²¹ 544 U.S. 197 (2005).

²² 543 U.S. 631 (2005).

²³ 541 U.S. 193 (2004).

²⁴ 523 U.S. 751 (1998).

²⁵ 522 U.S. 329 (1998).

²⁶ 520 U.S. 438 (1997).

²⁷ 517 U.S. 44 (1996).

²⁸ 495 U.S. 676 (1990).

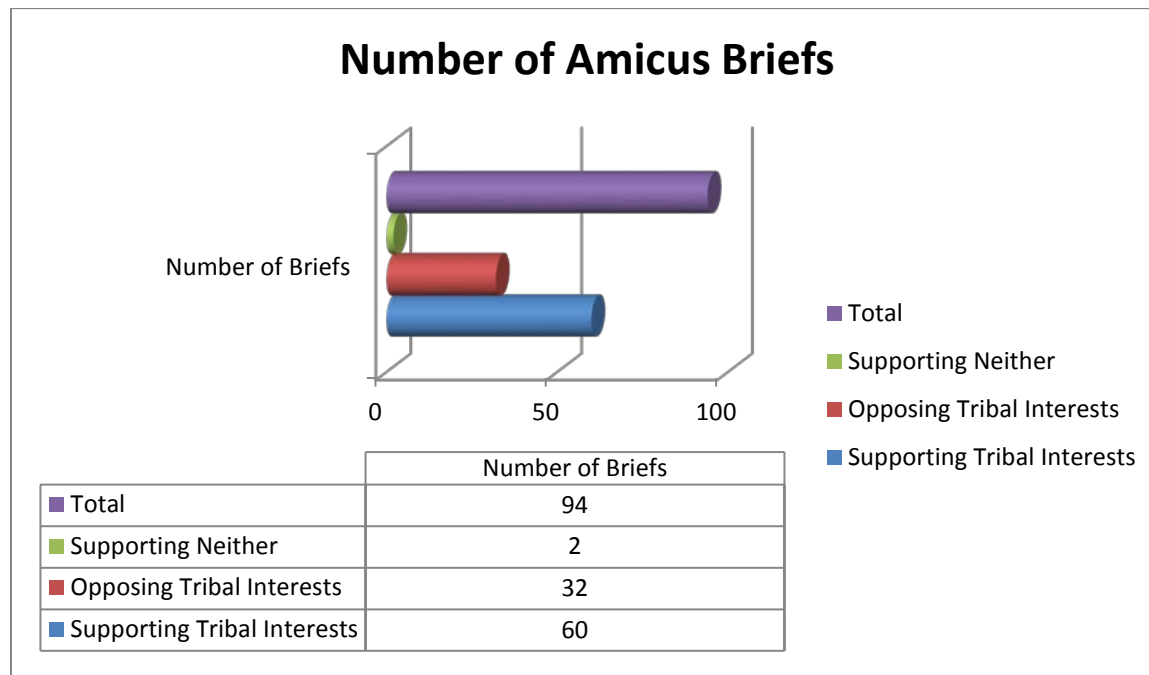
²⁹ 490 U.S. 163 (1989).

³⁰ 480 U.S. 202 (1987).

Tribal interests prevailed in four of these 12 cases,³¹ a figure slightly less than the 20-25 percent win rate for tribal interests during this period.

An additional factor to consider is the organization and development of the Tribal Supreme Court Project, operated by the National Congress of American Indians and the Native American Rights Fund.³² The Project started actively participating and organizing the tribal interest briefing in the Supreme Court in 2002. The critical aspects of that Project for the purposes of this paper are the focusing of amicus briefs supporting tribal interests and the reduction in the number of repetitive amicus briefs. Four of the cases studied here are affected.

I will first highlight in numbers the amicus briefs filed in these 12 Indian law cases, and then categorize them. The first chart merely shows the number of briefs filed in these cases, and how many support tribal interests and how many oppose.



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

³¹ See *Cherokee Nation*, 543 U.S. 631; *Lara*, 541 U.S. 193; *Kiowa Tribe*, 523 U.S. 751; and *Cabazon Band*, 480 U.S. 202.

³² See generally Tracy Labin, *We Stand United Before the Court: The Tribal Supreme Court Project*, 37 NEW ENG. L. REV. 695 (2003).

filing deadline, but was strongly in opposition to tribal interests. I included that brief as an opposing brief.

About two-thirds of the amicus briefs filed before the Supreme Court in the 12 Indian cases I study are supportive of tribal interests, but the outcomes in those cases were almost exactly the opposite – tribal interests lost two-thirds of the cases. This fact alone lends to the initial but weak hypothesis that amicus briefs are not all that influential. Certainly, other factors can account for this array. Weaker positions may require amici support, for example.

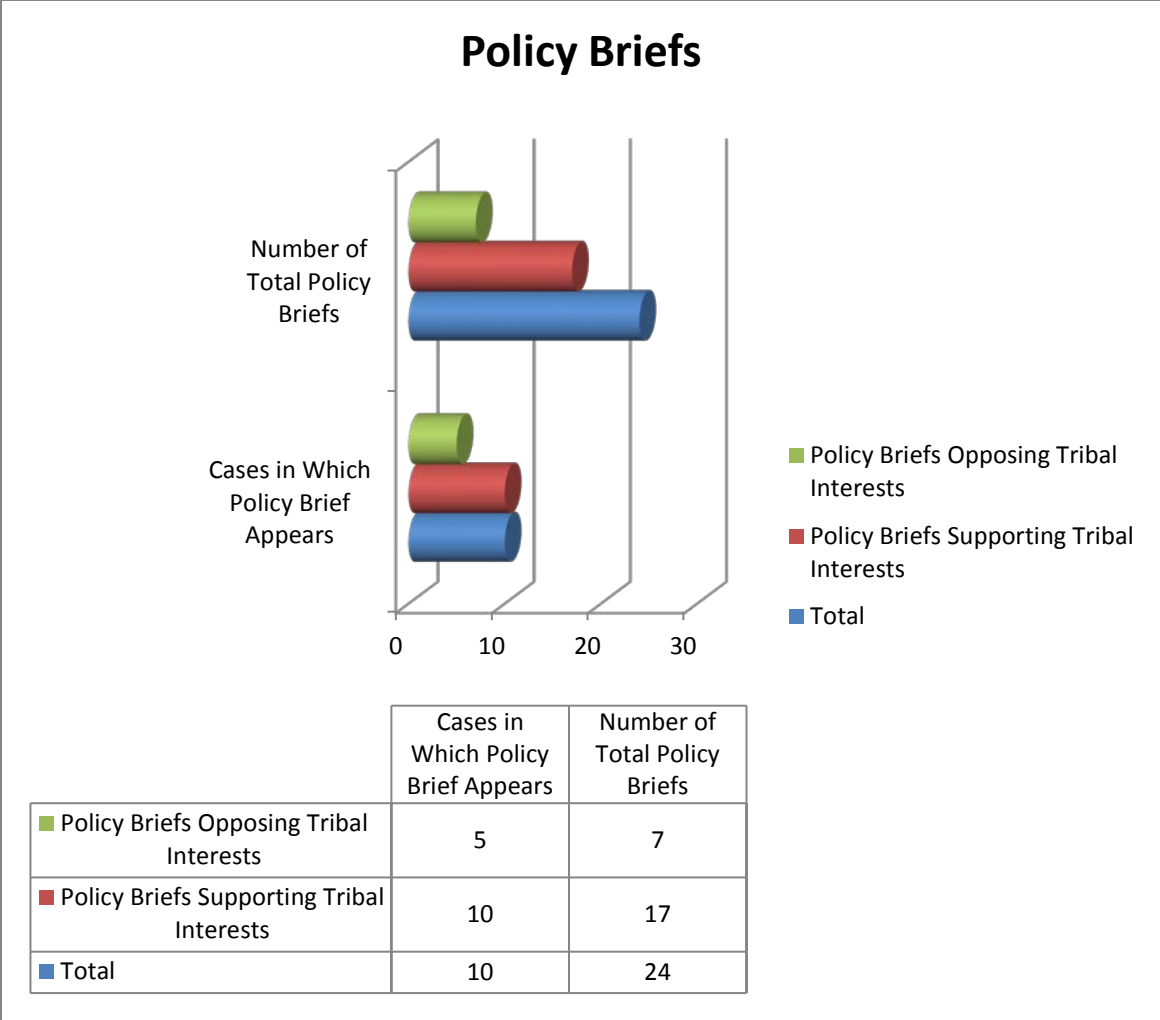
Another fact that will require some consideration is that tribal interests are very well represented in the high stakes and expensive arena of Supreme Court litigation. This is a relatively new development, especially considering that tribal economies bolstered by Indian gaming floundered until the Supreme Court's *Cabazon Band* decision in 1987 and the resulting enactment of the Indian Gaming Regulatory Act in 1988. Moreover, it wasn't until 2000 that Congress finally removed the requirement under federal law that all contracts between attorneys and Indian tribes were invalid unless approved by the Secretary of Interior.

Next I will categorize the briefs, some of which meet multiple categorizations.

A. Policy Briefs

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

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

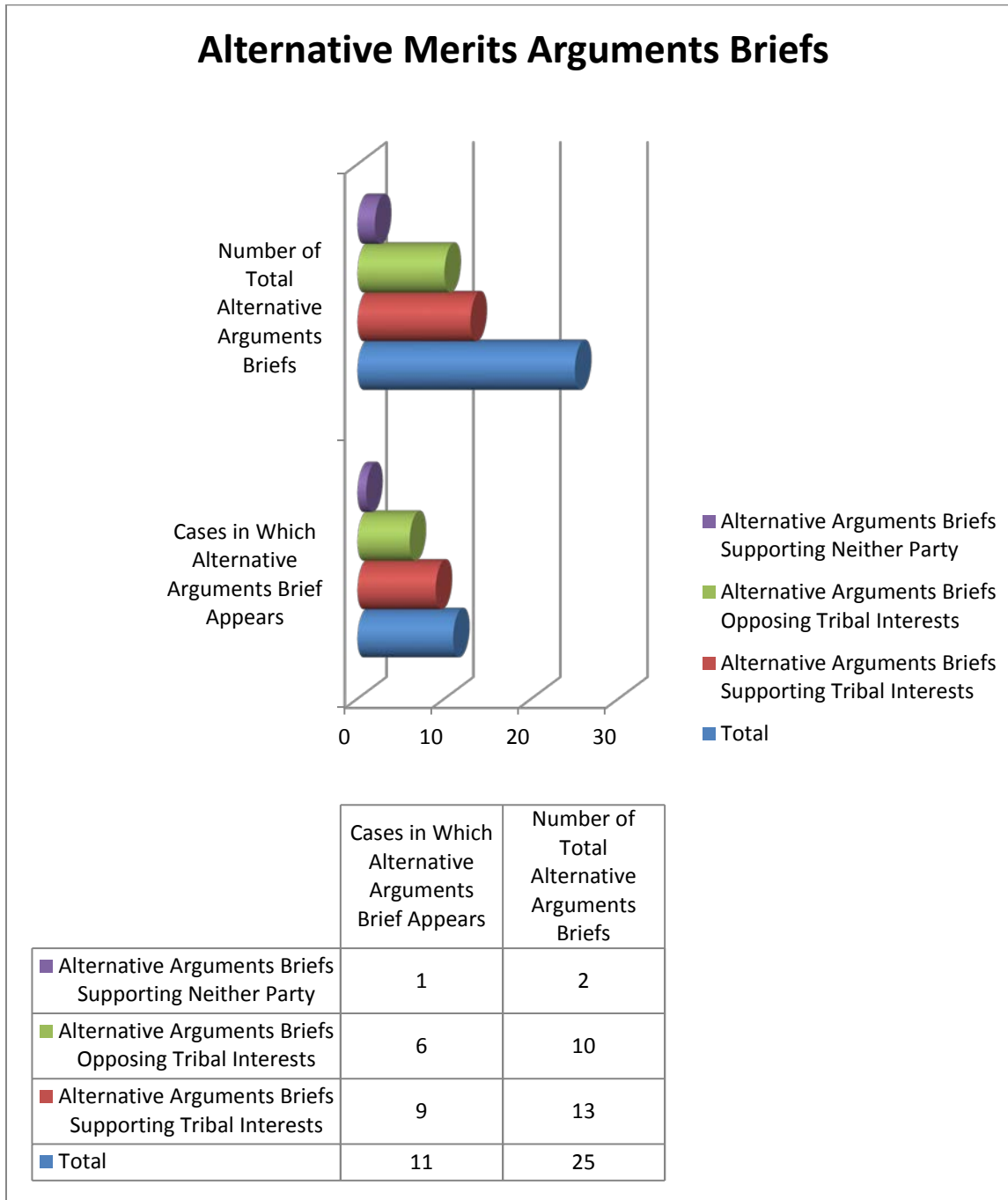


A few notes. In every case where an amicus filed a policy brief, amici supporting tribal interests filed a brief. In half of cases where an amicus filed a policy brief, amici opposing tribal interests filed a brief.

B. Alternative Merits Arguments Briefs

In relatively few instances, amici filed briefs making arguments on the merits not raised by the parties. Once again, I counted these briefs if the amici dedicated a substantial portion of the brief (a part or section) to an alternate argument not initially addressed by the parties (the argument might be addressed in reply briefs, of course). One example is the amicus brief filed by local units of government in the *Sherrill* case (at the cert stage) arguing that the Oneida’s claim to tax immunity in their on-reservation fee lands was foreclosed by equitable defenses such as laches.

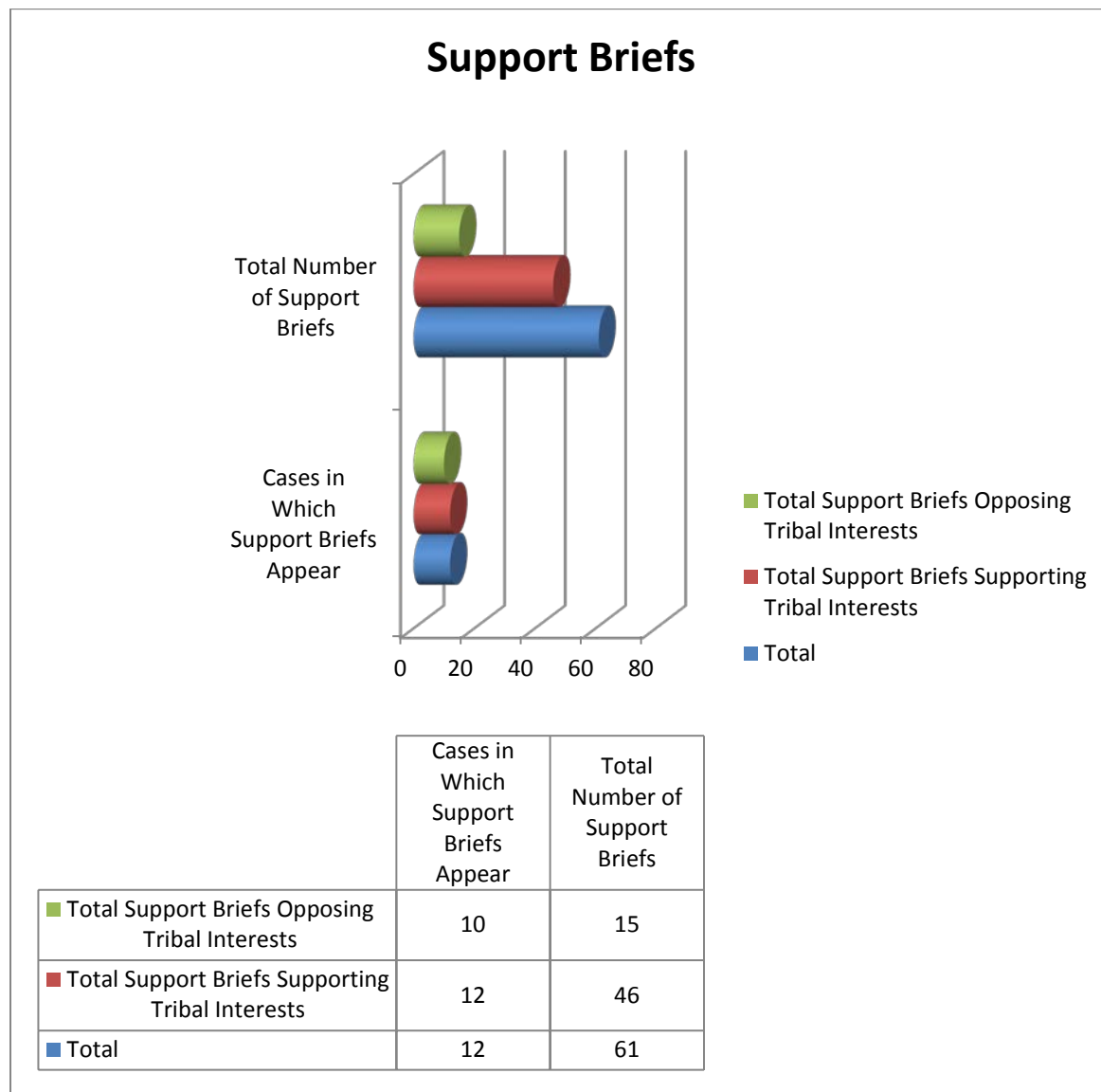
This chart details the number of cases in which an alternative merits argument brief appeared, and how many of these briefs appeared overall.



C. Support Briefs

By far the largest category includes amicus briefs that supported, enhanced, or reiterated the merits arguments of the parties. Again, I counted amicus briefs that included a substantial

portion of the brief, a part or section, to arguing the merits. Support briefs in Indian law cases that enhanced the parties’ merits arguments often included additional information about the history of a particular tribe or group of similar tribes, or information about a class of treaties or federal statutes dealing with similar questions. Examples of support briefs include the briefs filed by law professors or historians specializing in American Indian law in the *Carciari* case that delved into the history of the Indian Reorganization Act.



Of note, there is a stark divide here, more so than in the other categories, of the sheer number of support briefs supporting tribal interests – there are almost four times more support briefs in favor of tribal interests than opposed.

IV. Impact of Amicus Briefs in Indian Law Cases

It is not easy to measure in any meaningful way the impact or influence than an amicus brief might have on the Supreme Court's decision making. A Supreme Court decision relying heavily on an amicus brief might cite or quote from the amicus brief. An amicus brief might have influence by being part of the Court's decision, even where the Court rejects the thrust of the amici's argument. The Court simply might not even cite to an amicus brief, leaving amici to wonder if, or at all, their brief had any impact.

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

Since I have cherry-picked the 12 cases under discussion, I am aware that in many of these opinions the Court has definitely reviewed amicus briefs and made conclusions based on those briefs, even where they have not cited to them directly. I will start with opinions in which the Court actually discussed arguments or information raised in amicus briefs, as the Court did in seven of the 12 cases. I will categorize each discussion as (1) adoption or (2) rejection.

1. Adoption

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

Cherokee Nation v. Leavitt (2005)

In *Cherokee Nation*,³³ the Supreme Court agreed with the tribal interests and their amici, most notably the United States Chamber of Commerce, that the federal government owed contract support costs to government contracts even where Congress has not expressly appropriated funds for that purpose. The Court's opinion cited tribal interest amici favorably here:

The Tribes (and their amici) add, first, that this Court has said that "a fundamental principle of appropriations law is that where Congress merely

³³ 543 U.S. 631 (2005).

appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency.” [citations]

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

As we have said, the Government denies none of this. Thus, if it is nonetheless to demonstrate that its promises were not legally binding, it must show something special about the promises here at issue. That is precisely what the Government here tries, but fails, to do.³⁴

The Supreme Court adopts the reasoning of the amici that federal statutes authorizing government contracting generally require government payment for services even where Congress’s appropriations are insufficient to pay all costs.

United States v. Lara (2004)

In *Lara*,³⁵ the Supreme Court held that Congress has authority to recognize tribal inherent authority to prosecute nonmember Indians. In two instances (one more important than the other), the Court cited to amici supporting tribal interests. First, the Court cited to an amici in relation to particular facts of the case:

Respondent Billy Jo Lara is an enrolled member of the Turtle Mountain Band of Chippewa Indians in north-central North Dakota. He married a member of a different tribe, the Spirit Lake Tribe, and lived with his wife and children on the Spirit Lake Reservation, also located in North Dakota. See

³⁴ *Id.* at 637-38 (emphasis added).

³⁵ 541 U.S. 193 (2004).

Brief for Spirit Lake Sioux Tribe of North Dakota et al. as Amici Curiae 4-5.

After several incidents of serious misconduct, the Spirit Lake Tribe issued an order excluding him from the reservation. Lara ignored the order; federal officers stopped him; and he struck one of the arresting officers. [citation].³⁶

In the second instance, Justice Thomas in his concurrence cited to an amici supporting tribal interests that offered supporting authorities on a point he wished to raise in opposition to tribal interests:

It does not appear that the President has any control over tribal officials, let alone a substantial measure of the appointment and removal power. Cf. Brief for National Congress of American Indians as Amicus Curiae 27-29. Thus, at least until we are prepared to recognize absolutely independent agencies entirely outside of the Executive Branch with the power to bind the Executive Branch (for a tribal prosecution would then bar a subsequent federal prosecution), the tribes cannot be analogized to administrative agencies, as the dissent suggests [citation]. That is, reading the “Duro fix” as a delegation of federal power (without also divining some adequate method of Presidential control) would create grave constitutional difficulties. [citation] Accordingly, the Court has only two options: Either the “Duro fix” changed the result in Duro or it did nothing at all.³⁷

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

2. Rejection

In another sampling of cases, I identify in the category of “rejection” the arguments raised by amici that the Supreme Court addresses but ultimately rejects. Rejected amici

³⁶ *Id.* at 196 (emphasis added).

³⁷ *Id.* at 216 (Thomas, J., concurring in judgment) (emphasis added).

arguments remain influential, as some of the following discussions demonstrate, because the Court believed they were important enough to address. Moreover, these rejected arguments of amici can be helpful in limiting the damage to the amici's interests.

United States v. Jicarilla Apache Nation (2012)

In *Jicarilla*,³⁸ the Supreme Court ruled that the federal government's trust obligations to Indians and Indian tribes differ from a standard common law trust on the question of whether the government as trustee must turn over attorney-client privileged material to the tribal beneficiary. The Court held the government's trust obligations do not require that action. The Court directly addressed and rejected the arguments made by the amici supporting the tribe:

We cannot agree with the Tribe and its amici that “[t]he government and its officials who obtained the advice have no stake in [the] substance of the advice, beyond their trustee role,” Brief for Respondent 9, or that “the United States’ interests in trust administration were identical to the interests of the tribal trust fund beneficiaries,” Brief for National Congress of American Indians et al. as Amici Curiae 5. The United States has a sovereign interest in the administration of Indian trusts distinct from the private interests of those who may benefit from its administration. Courts apply the fiduciary exception on the ground that “management does not manage for itself.” [citations] But the Government is never in that position. While one purpose of the Indian trust relationship is to benefit the tribes, the Government has its own independent interest in the implementation of federal Indian policy. For that reason, when the Government seeks legal advice related to the administration of tribal trusts, it establishes an attorney-client relationship related to its sovereign interest in the execution of federal law. In other words, the Government seeks legal advice in a “personal” rather than a fiduciary capacity. [citation]³⁹

Carcieri v. Salazar (2009)

³⁸ 131 S. Ct. 2313 (2011)

³⁹ *Id.* at 2327-28 (emphasis added).

In *Carcieri*, the Court held that the Secretary of Interior’s authority to acquire land in trust for Indian tribes did not extend to trust acquisitions for tribes not “under federal jurisdiction” in 1934, when Congress enacted the Indian Reorganization Act. The Court thus invalidated the Secretary’s trust acquisition of land for the benefit of the Narragansett Indian Tribe of Rhode Island, which the Court appeared to hold was under state jurisdiction in 1934.

The Court expressly rejected numerous arguments by the amici favoring tribal interests (also, here, the interests of the United States):

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

III

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

First, the Secretary and several amici argue that the definition of “Indian” in § 479 is rendered irrelevant by the broader definition of “tribe” in § 479 and by the fact that the statute authorizes the Secretary to take title to lands “in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired.” § 465 (emphasis added); Brief for Respondents 12–14. But the definition of “tribe” in § 479 itself refers to “any Indian tribe” (emphasis added), and therefore is limited by the temporal restrictions that apply to § 479’s definition of “Indian.” *See* § 479 (“The term

‘tribe’ wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation” (emphasis added)). And, although § 465 authorizes the United States to take land in trust for an Indian tribe, § 465 limits the Secretary’s exercise of that authority “for the purpose of providing land for Indians.” There simply is no legitimate way to circumvent the definition of “Indian” in delineating the Secretary’s authority under §§ 465 and 479.8

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

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

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

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

Rather, § 2202 provides additional protections to those who satisfied the definition of “Indian” in § 479 at the time of the statute’s enactment, but opted out of the IRA shortly thereafter.

NCAI’s reading of § 2202 also would nullify the plain meaning of the definition of “Indian” set forth in § 479 and incorporated into § 465. Consistent with our obligation to give effect to every provision of the statute, [citation], we will not assume that Congress repealed the plain and unambiguous restrictions on the Secretary’s exercise of trust authority in §§ 465 and 479 when it enacted § 2202. “We have repeatedly stated ... that absent ‘a clearly expressed congressional intention,’ ... [a]n implied repeal will only be found where provisions in two statutes are in ‘irreconcilable conflict,’ or where the latter Act covers the whole subject of the earlier one and ‘is clearly intended as a substitute.’” [citations]⁴⁰

The vote tally in *Carciere* was 8-1 against the interests of the amici, but the real action in the majority, concurring, and dissenting opinions involved the scope of the decision. Justice Thomas, it appears, was forced to address arguments advanced by amici in his majority opinion, demonstrating (if nothing else) that perhaps the case was closer than the 8-1 vote tally showed.

Notably, Justice Breyer’s concurrence and Justice Stevens’ dissent both cited to amici as means of limiting the reach of the Court’s opinion. Justice Breyer noted:

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

⁴⁰ *Id.* at 392-95 (emphasis added).

did not. And the Department has sometimes considered that circumstance sufficient to show that a tribe was “under Federal jurisdiction” in 1934—even though the Department did not know it at the time.⁴¹

Similarly, Justice Stevens, relying on an amicus brief filed by one of the amici below, argued:

Although Congress has passed specific statutes granting the Secretary authority to take land into trust for certain tribes, it would be a mistake to conclude that the Secretary lacks residual authority to take land into trust under § 5 of the IRA, 25 U.S.C. § 465. Some of these statutes place explicit limits on the Secretary’s trust authority and can be properly read as establishing the outer limit of the Secretary’s trust authority with respect to the specified tribes. [citation] Other statutes, while identifying certain parcels the Secretary will take into trust for a tribe, do not purport to diminish the Secretary’s residual authority under § 465. [citation] **Indeed, the Secretary has invoked his § 465 authority to take additional land into trust for the Miccosukee Tribe despite the existence of a statute authorizing and directing him to acquire certain land for the Tribe. See Post–Argument En Banc Brief for National Congress of American Indians et al. as Amici Curiae 7 and App. 9 in No. 03–2647(CA1).**⁴²

We now know that it is clear the opinions of Justices Breyer and Stevens portend the future of litigation in this area. There are more than a dozen post-*Carciere* cases pending, almost all of them involving heavy litigation over the extent of the *Carciere* holding and focusing on these opinions. The amici may have, if the post-*Carciere* cases ultimately favor tribal interests, staved off disastrous outcomes for tribal interests by providing a guiding light to the concurring and dissenting Justices.

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

⁴¹ *Id.* at 397-98 (Breyer, J., concurring) (emphasis added).

⁴² *Id.* at 407 n. 7 (Stevens, J., dissenting) (emphasis added).

A note about historical information and Indian law. As Bruce Ennis wrote, “[T]he amicus can support points the party is making by providing a detailed legislative or constitutional history [or] a scholarly exposition of the common law....”⁴³ There should be no question that the Supreme Court benefits from amicus briefs in this vein, given that Federal Indian law is replete with nigh-ancient common law doctrines and labyrinthine statutory schemes. Several amici offered detailed expositions of historical information in these cases, and unlike the other subcategories here, these briefs likely had influence on the Supreme Court by providing clear and cogent historical support, even if the Court did not cite these briefs directly.

Strate v. A-1 Contractors (1997)

In *Strate*,⁴⁴ the Supreme Court held that tribal courts did not have civil adjudicatory jurisdiction over a tort claim brought by a nonmember against a nonmember involving an accident arising on a state-controlled highway on the reservation. The Court rejected an effort by amici to persuade it to read one its precedents in a manner supportive of tribal interests:

Petitioners and the United States as amicus curiae urge that *Montana* does not control this case. They maintain that the guiding precedents are *National Farmers* and *Iowa Mutual*, and that those decisions establish a rule converse to *Montana*’s. Whatever *Montana* may instruct regarding regulatory authority, they insist, tribal courts retain adjudicatory authority in disputes over occurrences inside a reservation, even when the episode-in-suit involves nonmembers, unless a treaty or federal statute directs otherwise. Petitioners, further supported by the United States, argue, alternately, that *Montana* does not cover lands owned by, or held in trust for, a tribe or its members. *Montana* holds sway, petitioners say, only with respect to alienated reservation land owned in fee simple by non-Indians. We address these arguments in turn.

We consider next the argument that *Montana* does not govern this case because the land underlying the scene of the accident is held in trust for

⁴³ Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 606 (1984).

⁴⁴ 520 U.S. 438 (1997).

the Three Affiliated Tribes and their members. Petitioners and the United States point out that in *Montana*, as in later cases following *Montana*'s instruction—[citations]—the challenged tribal authority related to nonmember activity on alienated, non-Indian reservation land. We “can readily agree,” in accord with *Montana*, [citation] that tribes retain considerable control over nonmember conduct on tribal land. On the particular matter before us, however, we agree with respondents: The right-of-way North Dakota acquired for the State's highway renders the 6.59-mile stretch equivalent, for nonmember governance purposes, to alienated, non-Indian land.⁴⁵

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

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

Importantly, the amici favoring tribal interests had no opportunity to respond to the allegations made in the railroad brief, as the tribal party was the petitioner, meaning the merits and amici briefs supporting the tribal interests came first. In fact, responses to the due process concerns expressed in the railroad brief didn't appear until more than a decade later in the United

⁴⁵ *Id.* at 447-48, 454 (emphasis added).

States' and other tribal amici's briefs in *Plains Commerce Bank v. Long Family Land and Cattle Co.*⁴⁶

Duro v. Reina (1990)

In *Duro*,⁴⁷ the Supreme Court held that Indian tribes have no inherent criminal jurisdiction authority over nonmember Indians, an outcome later reversed by Congress in the "Duro fix" legislation affirmed by the Court in *Lara*. On the merits of extending prior precedents, the Court rejected efforts by amici to distinguish an earlier case:

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

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

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

⁴⁷ 495 U.S. 676 (1990).

that the “sovereignty that the Indian tribes retain is of a unique and limited character.” [citation]⁴⁸

In a second passage, the Court rejected a claim by amici that the history of tribal government compelled a different result:

Respondents and amici argue that a review of history requires the assertion of jurisdiction here. We disagree. The historical record in this case is somewhat less illuminating than in *Oliphant*, but tends to support the conclusion we reach. Early evidence concerning tribal jurisdiction over nonmembers is lacking because “[u]ntil the middle of this century, few Indian tribes maintained any semblance of a formal court system. Offenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes; emphasis was on restitution rather than punishment.” [citation] Cases challenging the jurisdiction of modern tribal courts are few, perhaps because “most parties acquiesce to tribal jurisdiction” where it is asserted. [citation] We have no occasion in this case to address the effect of a formal acquiescence to tribal jurisdiction that might be made, for example, in return for a tribe’s agreement not to exercise its power to exclude an offender from tribal lands, [citation].⁴⁹

In a third passage, the Court rejected a claim by amici that the nonmember Indian had consented to tribal jurisdiction in accordance with tribal cultural understandings:

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

⁴⁸ *Duro*, 495 U.S. at 685 (emphasis added).

⁴⁹ *Id.* at 688-89 (emphasis added).

been marked by both intertribal alliances and animosities. [citation] Petitioner's general status as an Indian says little about his consent to the exercise of authority over him by a particular tribe.⁵⁰

In final passage, the Court recognized a policy argument by amici supporting tribal interests who alleged that eliminating the tribal authority would create adverse policy implications on Indian country law enforcement. The Court declined to address this question, later suggesting Congress was the proper venue:

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

If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs. We cannot, however, accept these arguments of policy as a basis for finding tribal jurisdiction that is inconsistent with precedent, history, and the equal treatment of Native American citizens.⁵¹

⁵⁰ *Id.* at 695 (emphasis added).

⁵¹ *Id.* at 696, 698 (emphasis added).

The amicus briefs in *Duro* filed by amici supporting the tribal interests were heavily policy-oriented. One key argument from amici that Justice Kennedy largely declined to address, although he acknowledged it, involved the jurisdictional gray area that the outcome in *Duro* could create – if tribes didn’t have jurisdiction over the nonmember Indians within their territories, then it was unclear whether state or federal authorities would or could replace the tribal first responders. After the *Duro* Court told the tribal interests to take their policy concerns to Congress, they did, and a short while later Congress enacted what became known as the “Duro fix.”⁵²

Cotton Petroleum Corp. v. New Mexico (1989)

In *Cotton Petroleum*,⁵³ the Supreme Court revised its federal Indian law preemption doctrine and recognized an actionable state interest in taxing on-reservation business activities by nonmembers. Importantly, the parties to the case – a non-Indian-owned corporate resource extraction company and a state – were entirely non-Indian. The tribe in interest, the Jicarilla Apache Nation, did not participate as a party, but instead only as an amicus. The tribal interests prior to *Cotton Petroleum* were important to the preemption analysis (although not as important as the federal interest), but since the tribe was not a party, there was no evidence presented below of the impact on the tribal interests by the state taxation scheme.

The Court did address, and agree with, the arguments raised by tribal amici whether tribes should be treated as states under the Commerce Clause for tax apportionment purposes. The Court wrote:

In our order noting probable jurisdiction we invited the parties to address the question whether the Tribe should be treated as a State for the purpose of determining whether New Mexico’s taxes must be apportioned. All of the Indian tribes that have filed amicus curiae briefs addressing this question-including the Jicarilla Apache Tribe-have uniformly taken the position that Indian tribes are not States within the meaning of the Commerce Clause. This position is supported by the text of the Clause itself.

⁵² See *Means v. District Court of the Chinle Judicial District*, 2 Am. Tribal L. 439, 442 (Navajo Nation Supreme Court 1999) (discussing and describing the “Duro fix,” codified at 25 U.S.C. § 1301(2)); *United States v. Lara*, 541 U.S. 193, 215-16 (2004) (same). See also Alex Tallchief Skibine, *United States v. Lara, Indian Tribes, and the Dialectic of Incorporation*, 40 TULSA L. REV. 47, 51-53 (2004) (discussing *Lara* and the Duro fix).

⁵³ 490 U.S. 163 (1989).

Article I, § 8, cl. 3, provides that the “Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Thus, the Commerce Clause draws a clear distinction between “States” and “Indian Tribes.” As Chief Justice Marshall observed in *Cherokee Nation v. Georgia* ...: “The objects to which the power of regulating commerce might be directed, are divided into three distinct classes-foreign nations, the several states, and Indian Tribes. When forming this article, the convention considered them as entirely distinct.” In fact, the language of the Clause no more admits of treating Indian tribes as States than of treating foreign nations as States. [citation]⁵⁴

Many of the non-tribal amici (mostly the oil and gas companies) argued that the taxes should be apportioned. The tribal amici apparently pursued an all-or-nothing strategy, and therefore received nothing.

The Jicarilla Apache Nation, as the tribe in interest, did not brief the merits of the preemption claim, which would have allowed the Nation to articulate to the Court its sovereign interests in the state taxation scheme. But the Court ruled on them anyway, noting that the Nation had briefed the merits below:

Although Cotton did not press the pre-emption argument as an independent claim before the New Mexico Court of Appeals, we conclude that the issue is properly before us. **Cotton did rely on our pre-emption cases at least as a “backdrop” for its multiple taxation claim. In addition, the pre-emption claim was fully briefed before the Court of Appeals by the Tribe in its status as an amicus curiae.** And finally, the pre-emption claim was carefully considered and passed upon by the Court of Appeals.⁵⁵

The Court also noted that the sheer number of amicus briefs filed by the non-Indian-owned oil and gas companies was evidence, in its view, that the major impact of the state’s taxation scheme was on them, not the tribe. The Court wrote:

It is important to keep in mind that the primary burden of the state taxation falls on the non-Indian taxpayers. Amicus curiae briefs supporting

⁵⁴ *Id.* at 191-92 (emphasis added).

⁵⁵ *Id.* at 176 n. 11 (emphasis added).

the position of Cotton in this case have been filed by New Mexico Oil & Gas Association, Texaco Inc., Chevron U.S.A. Inc., Union Oil Company of California, Phillips Petroleum Company, Wilshire Oil Company of Texas, Exxon Corporation, Mobil Exploration and Producing North America Inc., Anadarko Petroleum Corporation, Southland Royalty Company, and Marathon Oil Company.⁵⁶

While the Court rejected the Jicarilla Apache Nation's claims that the State of New Mexico's taxation expenditures inside the Jicarilla reservation did not justify the state's taxation, Justice Blackmun in dissent relief heavily on the Nation's amicus brief on this point:

The distribution of responsibility is even clearly reflected in the relevant oil-and-gas-related expenditures during the 5-year period at issue in this case: federal expenditures were \$1,206,800; tribal expenditures were \$736,358; the State spent, at most, \$89,384. Brief for Jicarilla Apache Tribe as Amicus Curiae 10-11, n. 8. In any event, it is clear from this Court's rejection of the Montana severance tax at issue in *Montana v. Crow Tribe* [citation], that the mere fact that the State has made some expenditures that benefit the taxed activities is not sufficient to avoid a finding of pre-emption. [citation] Montana spent \$500,000 to pay 25% of the cost of a road used by employees and suppliers of a mine.⁵⁷

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

B. What the Court Did Not Discuss

While the discussion in the previous subpart suggests that the Supreme Court frequently takes into account the arguments of amici in Indian law cases (and they do, given that one study

⁵⁶ *Id.* at 187 n. 18 (emphasis added).

⁵⁷ *Id.* at 207, n. 11 (Blackmun, J., dissenting).

suggested that the Court cites to amicus briefs in fewer than one in five decisions⁵⁸), mostly the Court does not. This subpart reviews many of the examples I believe to be important.

1. Radical Reorientation of Federal Indian Law

Several amici on both sides filed briefs that likely would fit under the category of “one-sided policy argument,” to borrow a phrase from Susan Bloch et al.⁵⁹ Many of these briefs invited the Supreme Court to revisit foundational principles of federal Indian law, and perhaps even to reverse precedents unappealing to the amici. With one unusual exception, these briefs appeared to have fallen on deaf ears.

The one exception appears to be the amicus brief filed in the cert stage of *Sherrill v. Oneida Indian Nation* by the Towns of Lenox, Stockbridge, and Southampton, New York.⁶⁰ That brief presented the equitable defense of laches to the assertion of tribal sovereignty over newly-acquired lands by the Oneida Indian Nation.⁶¹ No other party, likely relying on the Court’s 1985 rejection of equitable defenses in dictum in a related case,⁶² briefed the issue.

2. Duplicative Argument

A survey of former Supreme Court clerks by Kelly Lynch found that the clerks emphatically refused to consider amicus briefs that offered “me too”-style substance, where the brief reiterates ground already covered by the parties’ merits briefs without offering anything “novel.”⁶³ Couple this with a large number of amicus briefs, and the likelihood that *any* of the briefs receive attention from the Court declines dramatically.⁶⁴

⁵⁸ See Karen O’Connor & John H. Wright, *Amici Curiae before the Supreme Court: Who Participates, When, and How Much?*, 52 J. POL. 782, 42-43 (1990).

⁵⁹ SUSAN LOW BLOCH, VICKI C. JACKSON & THOMAS G. KRATTENMAKER, *INSIDE THE SUPREME COURT: THE INSTITUTION AND ITS PROCEDURES* 931-32 (2d ed. 2008).

⁶⁰ See Brief of Amici Curiae Town of Lenox, New York; Town of Stockbridge, New York; and Town of Southampton, New York in Support of Petitioner City of Sherrill, New York, City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005) (No. 03-855), 2004 WL 1835370.

⁶¹ See *id.* at 6-12 (arguing that Congressional acquiescence to state purchases of tribal lands and the passage of time between tribal land sale and ownership should be addressed by the Supreme Court).

⁶² See *Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 244 n. 16 (1985).

⁶³ Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 33 J. L. & POL. 33, 45 (2004). See also *id.* (“Clerks repeatedly emphasized that most amicus briefs filed with the Court are not helpful and tend to be duplicative, poorly written, or merely lobbying documents not grounded in sound argument.”). See also Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 608 (1984) (“[T]he amicus should avoid duplicating the work of the parties. It is an improper use of the amicus role, and an imposition on the Court, to file a ‘me too’ amicus brief.”).

⁶⁴ See Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 33 J. L. & POL. 33, 45 (2004) (“A few clerks noted that, in cases where fewer amicus briefs are filed, there is a greater probability that each will be given more attention.”).

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

The opposite of duplication is collaboration, a tactic approved of by the Supreme Court clerks in Kelly Lynch’s study.⁶⁵ In contrast to the tribal amici, the amici most often opposing tribal interests – state governments – collaborated extensively. Multiple states – and sometimes dozens of them – combined to sign on to a single amicus brief in several cases – *Sherrill*, *Carcieri*, *Yankton Sioux*, *Kiowa Tribe*, *Strate*, *Seminole Tribe*, and *Cotton Petroleum*. The interests supported by the states won six of seven cases. Notably, in *United States v. Lara*,⁶⁶ the state amici split into two briefs, one supporting tribal interests and another marginally supporting tribal interests. Even more notably, the only other time the state amici split up, in *Cabazon Band*,⁶⁷ the state interests lost.

V. Looking forward: The Supreme Court as Legislative Judiciary in the Indian Cases

As federal common law uniquely subject to interpretation and modification by the Supreme Court, federal Indian law could be fertile ground for policy arguments on the merits of important Indian law questions. I have argued elsewhere the Supreme Court’s overarching theory of federal Indian law is “pragmatic utilitarianism.”⁶⁸ I say pragmatism (borrowing from Judge Posner’s assumption of “institutional and material constraints on decisionmaking by officials in a democracy”⁶⁹) because of the Court’s reliance on “what the current state of affairs ought to be.”⁷⁰ And I say utilitarianism because of the Court’s obligation to all Americans and American governmental institutions requires it to consider the interests of all, and that the Court’s easiest routes are to issue judgments favoring majorities absent clear constitutional rules to the opposite.

⁶⁵ See Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 33 J. L. & POL. 33, 57 (2004) (“Almost 90% of clerks expressed a preference for collaboration, at least in certain circumstances. Most clerks explained that they would prefer to see more collaboration because there would be fewer total amicus briefs to read.”).

⁶⁶ 541 U.S. 193 (2004).

⁶⁷ 480 U.S. 202 (1987).

⁶⁸ Matthew L.M. Fletcher, “National Implications of *Sherrill*,” Address, Syracuse University College of Law, Eighth Annual Haudenosaunee Conference, Syracuse, NY (November 19, 2011).

⁶⁹ RICHARD POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* __ [preface] (2003).

⁷⁰ Scalia Memorandum, *supra* note 11.

It requires tribal interests to persuade the Court that ruling in favor of tribal interests substantially benefits non-Indians.⁷¹ It's a hard road for tribal interests to walk, to be sure.

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

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

Economic Interest Convergence. The tribal interests in the recent tribal government contracting cases *Cherokee Nation v. Leavitt*⁷² and *Salazar v. Ramah Navajo Chapter*⁷³ found common cause with the United States Chamber of Commerce, an unusual ally, which expressed concerns to the Supreme Court about government contracting in general.⁷⁴

As tribal business interests develop, more and more business partners (perhaps even state governments) may be helpful as amici in future cases. The recent convergence of the interests of the State of Massachusetts and the Mashpee Wampanoag Tribe, and the City of Lansing, Michigan and the Sault Ste. Marie Tribe of Chippewa Indians, over the tribes' gaming compact approvals and trust acquisitions are exemplary (even if they fail, as might occur).

Jurisdictional Interest Convergence. The tribal interests in recent criminal jurisdiction cases have found common cause with some state governments in recent years, most notably in *United States v. Lara*.⁷⁵ The state amici split in this case, with one amicus brief led by progressive state attorneys general supporting the federal government and tribal positions in upholding the so-called "Duro fix" and another partially supporting the tribal position.⁷⁶

⁷¹ Cf. Derrick A Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); see also ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON xxxv (2005) (drawing upon Professor Bell's interest-convergence theory to articulate a "singularity thesis" for Indian affairs).

⁷² 543 U.S. 631 (2005).

⁷³ 132 S. Ct. 2181 (2012).

⁷⁴ See Brief of the Chamber of Commerce of the United States of America and the National Defense Industrial Association as Amici Support of Respondents, *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012) (No. 11-551), 2012 WL 1132333; Brief of Amici Curiae the Chamber of Commerce of the United States of America, The National Defense Industrial Association, and The Aerospace Industries Association in Support of the Cherokee Nation and Shoshone-Paiute Tribes, *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005) (Nos. 02-1472, 03-853), 2004 WL 1386408.

⁷⁵ 541 U.S. 193 (2004).

⁷⁶ See Brief for the States of Washington, Arizona, California, Colorado, Michigan, Montana, New Mexico, and Oregon as Amici Curiae Supporting Petitioner, *United States v. Lara*, 541 U.S. 193 (2004) (No. 03-107), 2003 WL 22766742; Brief Amicus Curiae of the States of Idaho, Alabama, Louisiana, Nebraska, South Dakota, and Utah Supporting Petitioner in Part, *United States v. Lara*, 541 U.S. 193 (2004) (No. 03-107), 2003 WL 22766744.

These convergences of interests are helpful, but unless the substance of the amicus brief is valuable, the convergences might not mean anything. The short survey of cases and amicus briefs above suggests that briefs providing useful information to the Supreme Court are good (not great) bets for influencing the Court. This information includes historical and public policy information.⁷⁷ Conversely, briefs arguing for doctrinal changes in the law are the least helpful.

Historical Information. The tribal amici in *Carcieri v. Salazar*,⁷⁸ for example, offered a wealth of historical information. The historians' brief developed the history of the Indian Reorganization Act (IRA).⁷⁹ The Indian law professors' brief included more information about the history of the IRA, but also developed the historical record on the Department of Interior's interpretation of the relevant provisions of the Act.⁸⁰ The *Carcieri* majority paid little heed to these briefs (and instead drew more from a separate amicus brief by the National Congress of American Indians that supported its view of the legislative history of the Act⁸¹). However, as noted above, Justice Breyer's concurrence and Justice Stevens' dissent drew heavily from the law professors' brief in a manner suggesting that the reach of the decision was limited to a small number of tribes (and perhaps only one).

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

Public Policy Information. There is a dearth of useful public policy information in Supreme Court amicus briefs. While I would hope that policy information, the kind of information that will give the Court the needed background on Indian country, I have doubts about whether this information alone will be enough to change minds on the Court. One need only look at Justice Kennedy's outright rejection of the policy points in *Duro v. Reina*. I suspect good policy details will appear in opinions by the Justices already leaning toward a particular

⁷⁷ However, at least one social science study suggests that the Supreme Court barely pays attention to information offered by amici that is different from what the parties present. See James F. Spriggs & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RES. Q. 365 (1997). I suspect that the study might be partially inapplicable in cases involving federal common law subjects like Indian law, but these findings suggest temperance on the role of information regardless.

⁷⁸ 555 U.S. 379 (2009).

⁷⁹ See Brief of Historians Frederick E. Hoxie, Paul C. Rosier, and Christian W. McMillen As Amici Curiae Supporting Respondents, *Carcieri v. Salazar*, 555 U.S. 379 (2009) (No. 07-526), 2008 WL 3991410.

⁸⁰ See Brief of Law Professors Specializing in Federal Indian Law as Amicus Curiae Supporting Respondents, *Carcieri v. Salazar*, 555 U.S. 379 (2009) (No. 07-526), 2008 WL 3991411.

⁸¹ See Brief of the National Congress of American Indians as Amicus Curiae Supporting Respondents, *Carcieri v. Salazar*, 555 U.S. 379 (2009) (No. 07-526), 2008 WL 3976868.

position. Policy information, somewhat like historical information, in amicus briefs is less important than economic and jurisdictional convergences with parties the Court considers important, such as state governments and big business.

In sum, tribal interests cannot go it alone in the Supreme Court. This small case study demonstrates that a good amicus strategy can be helpful. It requires coordination (fewer briefs), persuasive policy arguments, and convergence of interests with actors the Supreme Court cares about (states and big business, for a start).⁸² This is not easy, and in many cases virtually impossible.

⁸² It also requires Supreme Court specialization from the counsel of record for the amicus. See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L. J. 1487 (2008). And help from the federal government. See Patricia A. Millett, “*We’re Your Government and We’re Here to Help*”: *Obtaining Amicus Support from the Federal Government in Supreme Court Cases*, 10 J. APP. PRACT. & PROC. 209 (2009).