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TEACHING INDIAN LAW IN AN ANTI-TRIBAL ERA

ALEX TALLCHIEF SKIBINE*

One year, on the last day of my federal Indian law class, one student asked me whether in answering the exam, I wanted her to answer according to what the law was or what I thought the law should be. Her question reminded me of Robert Laurence's article criticizing some scholarship for being perhaps a little out of touch with reality.¹ Was this student criticizing my teaching the same way Laurence was criticizing some of our scholarship? The truth be told, for some years now, I have found that teaching Indian law can have a depressing effect. This effect, of course, is due to the Supreme Court decisions I teach in the class.

I graduated from law school in 1976. This was a period of activism and hope for Indian rights. I started teaching in 1989 and although there had been by then some negative Supreme Court cases, the overall record was still pretty good. It has now been thirty years since I began to practice Indian law and about seventeen years since I began teaching it and any feelings of hope have long dissipated. In fact, the general wisdom now is to advise Indian tribes to avoid the Supreme Court at all costs. The class that had the most effect on me, as far as installing a desire to practice Indian law, was a class given by Charles Wilkinson in 1973 at the Pre-law Summer Institute for Indian students at the University of New Mexico. Wilkinson was then a young attorney working for the Native American Rights Fund and the class was called something like "Indian Advocacy" and it was really a legal writing class focusing on writing memos and briefs for imaginary Indian tribal clients. This class resonated so much with me because it was empowering. It made students believe that by using the law, they could bring justice to their tribal clients.

About seven years ago, I was given the opportunity to teach summer classes at Lewis and Clark, and after teaching the increasingly more depressing basic Indian Law 101 class the first year, I decided that next year, I wanted to teach a new class, one that would reinvigorate me or, at

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1. See Robert Laurence, *Indian Law Scholarship and Tribal Survival: A Short Essay Prompted by a Long Footnote*, 27 AM. INDIAN L. REV. 503 (2002-2003).

least, give my students the same kind of feelings and hopes I had experienced, taking Wilkinson's class in that summer of 1973.²

In this essay, after first giving a brief description of the two new courses I devised to avoid focusing mostly on Supreme Court cases, I look at the reasons for my depressive outlook on the Supreme Court. Because I have identified 1988 as the turning point in the Court's attitude toward tribal rights, I contrast this last nineteen-year period, 1988-2005, with the previous nineteen years, 1968-1987. Some may point out that this kind of research has already been done by others, most notably by David Getches in his landmark article, *Beyond Indian Law*.³ In this article, I focus more on the Justices' individual records and conclude that previous theories, including Getches' and my own,⁴ were perhaps incomplete as far as explaining what the Court has been doing in its federal Indian law decisions.⁵ In this article, rather than attempting to go beyond *Beyond Indian Law*, I merge Getches' thesis with my previous efforts in order to come up with a new theory attempting to explain the Court's decisions in the field. Because the new courses I have devised focus on lower courts' decisions and federal Indian legislation, I conclude by contrasting the Court's record with the record of the lower courts and the record of Congress on Indian issues.

The first course, "Indian Legislation," was created for the Indian law summer program at Lewis and Clark University's Northwestern School of Law. This class focuses on the major acts of Congress enacted since the late 1960s, the era of Indian self-determination, and on the Courts' decisions which have interpreted such statutes. In the last part of the class, students are required to draft their own bills. The class then becomes an imaginary committee of Congress and students are asked to first testify on

2. Although I am sure that at least Wilkinson has remained somewhat optimistic. See generally CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* (2005).

3. See David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001) (arguing that the Court's agenda in Indian cases is driven by the Court's concerns about protecting state's rights, and mainstream values as well as an antagonism toward recognizing special rights for racial minorities).

4. See Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667 (2006).

5. The following sources provide some of the most perceptive articles in this area beyond the Getches' article. ROBERT WILLIAMS, *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (Univ. of Minn. Press 2005); Phillip Frickey, (*Native*) *American Exceptionalism in Federal Public Law* 119 HARV. L. REV. 431 (2005); Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 OR. L. REV. 75 (2003); and Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001).

bills drafted by fellow students, and then to propose amendments to those bills in mock mark-up sessions of the committee. In some of the classes, I asked students to write a legislative report at the conclusion of the course, in others I gave them a short answer, two-hour exam.⁶

The second course, “Current Issues in Federal Indian Law,” was created when I was given the opportunity to visit Harvard in the spring of 2004. In this class, I focus on issues that have not been conclusively resolved by the Supreme Court. Although I do include very recent Supreme Court cases, which were decided in the last year or two where some issues have not been conclusively resolved,⁷ the bulk of the cases studied are lower court cases decided in the last couple of years. In the last part of the class, I ask the students to take one of the cases we studied and conduct a moot court argument with the rest of the class acting as the Supreme Court.⁸

II. ASSESSING THE COURT’S INDIAN LAW RECORD

A. 1968-1987

I have determined that 1988 is perhaps the turning point in the Court’s Indian law jurisprudence. I could have chosen 1986, the year Rehnquist became Chief Justice and Scalia replaced Chief Justice Burger on the Court, but in my mind, the anti-Indian majority on Indian issues did not begin to gel until 1988, the year Justice Kennedy replaced Justice Powell. Besides, perhaps two of the last most meaningful pro-tribal decisions were issued in 1987. *Iowa Mutual v. Laplante*⁹ reaffirmed and extended the Court’s earlier decision in *National Farmers Union v. Crow Tribe*.¹⁰ Additionally, in that year, *California v. Cabazon Band of Mission Indians*¹¹ represents perhaps the most significant Tribal victory in using the Indian preemption test to prevent assertion of state jurisdiction in Indian Country.

6. Not surprisingly, I have found that the existence of an exam motivates the students to read and remember the cases and statutes covered in the first part of the class.

7. *United States v. Lara*, 541 U.S. 193 (2004), and *Nevada v. Hicks*, 533 U.S. 353 (2001), are good examples of such cases. In *Lara*, the Court did not rule on whether non-member Indians being prosecuted by the tribes were being denied due process of law. In *Hicks*, the Justices could not agree, for the purpose of determining whether the tribe had jurisdiction, on how important it was that the land where the non-member activities took place was owned in trust by a tribal member.

8. I have at times, modified this approach and asked students to draft legislation that represents how they think Congress should resolve the questions currently being addressed by the lower courts.

9. 480 U.S. 9 (1987).

10. 471 U.S. 845 (1985).

11. 480 U.S. 202 (1987).

From 1968 to 1987, there were a total of seventy-five Indian cases decided by the Court. By my subjective count, tribal interests won forty-two of those cases, while losing twenty-eight. I classified the remaining five as neutral. The first meaningful tribal defeat did not come until 1975, in *Decoteau v. District Court*,¹² which was a reservation disestablishment case. This case was quickly followed by *Moe v. Confederated Salish & Kootenai Tribes*¹³ in 1976, *Rosebud Sioux Tribe v. Kneip*¹⁴ in 1977, *Oliphant v. Suquamish Indian Tribe*¹⁵ in 1978, *Washington v. Confederated Tribes of the Colville Reservation*¹⁶ in 1980, and *Montana v. United States*¹⁷ in 1981. Another significant tribal defeat during this period includes *Rice v. Rehner*¹⁸ in 1983.

Yet, this period contained a substantial amount of significant tribal victories as well. Thus, tribal land claims and treaty claims were upheld in *Oneida II*,¹⁹ and the Washington treaty fishing case.²⁰ Breach of trust claims were validated in *Mitchell II*.²¹ The tribes also fought successfully against reservation disestablishment attempts in *Mattz v. Arnett*,²² and *Solem v. Bartlett*.²³ Although it suffered a couple of meaningful defeats in *Oliphant* and *Montana*, the concept of tribal sovereignty was upheld in a majority of cases.²⁴ Perhaps, even more significantly, tribal interests won a majority of cases involving the states' attempt to assert jurisdiction in Indian Country.²⁵ Even the Plenary Power of Congress was qualified in

12. 420 U.S. 425 (1975).

13. 425 U.S. 463 (1976) (deciding state taxation of Indian cigarette sales to non-members).

14. 430 U.S. 584 (1977) (deciding reservation disestablishment).

15. 435 U.S. 191 (1978) (holding no inherent tribal criminal jurisdiction over non-Indians).

16. 447 U.S. 134 (1980) (deciding state taxation of tribal cigarette sales to non-members).

17. 450 U.S. 544 (1981) (holding no tribal civil jurisdiction over non-members on non-member fee land within Indian reservation except in narrow circumstances).

18. 463 U.S. 713 (1983) (finding state concurrent jurisdiction over liquor regulations).

19. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

20. *Washington v. Wash. State Commercial Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

21. *United States v. Mitchell*, 463 U.S. 206 (1983).

22. 412 U.S. 481 (1973).

23. 465 U.S. 463 (1984).

24. The following cases represent some of the most notable cases. *Iowa Mutual Ins. v. LaPlante*, 480 U.S. 9 (1987); *Nat'l Farmers Union Ins. v. Crow Tribe*, 471 U.S. 845 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Fisher v. District Court*, 424 U.S. 382 (1976); *United States v. Mazurie*, 419 U.S. 544 (1975).

25. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Cent. Mach. v. Ariz. State Tax Comm'n*, 448 U.S. 160 (1980); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *McClanahan v. State Tax Comm'n*, 411 U.S. 164 (1973).

Morton v. Mancari,²⁶ *Delaware Tribal Business Committee v. Weeks*,²⁷ and *United States v. Sioux Nation of Indians*.²⁸ All in all, tribes lost some significant cases, but they won substantially more than they lost.

B. 1988-2006

Only forty-eight Indian cases were decided in the next nineteen years, which is a substantial reduction from the seventy-five decided during the previous period. Of these most recent cases, tribal interests lost thirty-three while only winning eleven. I classified four as neutral.²⁹ The numbers may be a little different depending on who is doing the counting because in some cases, whether the case is an Indian victory or defeat is a little subjective.³⁰ Generally speaking, however, the tribes can be said to have lost by a three-to-one margin.

1. *Tribal Defeats*

Of the thirty-three cases decided against the tribal position, it is significant that, except for the three cases decided against the Oklahoma State Tax Commission, the tribes lost all the cases involving assertion of state jurisdiction inside Indian Country.³¹ The tribes also lost all their attempts to sue states or counties, either because of state sovereign immunity,³² or because they were not a person under federal statutes waiving such immunity.³³ Perhaps, more meaningfully, except for the mixed result

26. 417 U.S. 535 (1974) (stating that Congress's actions have to be rationally tied to its trust responsibilities when treating tribal members differently than non-members).

27. 430 U.S. 73 (1977) (providing that the political question doctrine was no longer applicable to shield acts of Congress from judicial review).

28. 448 U.S. 371 (1980) (explaining that Congress can no longer be presumed to have acted in good faith for the benefit of Indian tribes when it took property from Indian tribes).

29. Classified as neutral were: *Lincoln v. Vigil*, 508 U.S. 182 (1993), and two water rights cases, *Wyoming v. United States*, 492 U.S. 406 (1993) and *California v. United States*, 490 U.S. 920 (1989). In these two water rights cases, the lower courts were upheld by a 4-4 tie vote without a decision being issued. Also classified as neutral was the first *Oregon v. Smith*, 485 U.S. 660 (1988), which remanded the case to the Oregon Supreme Court.

30. For instance, I counted *Brendale v. Confederated Tribes*, 492 U.S. 408 (1980), as an anti-Indian case, although part of the case went for the tribe. I also counted *Oklahoma Tax Commission v. Chickasaw*, 515 U.S. 450 (1995), as an Indian victory since the state was not allowed to tax transactions involving non-Indians on reservations. However, part of that case allowed state taxation of Indians working on the reservation but domiciled outside of it.

31. See *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005); *Wagon v. Prairie Band of Potawatomi Nation*, 546 U.S. 95 (2005); *Cass County v. Leech Lake Band*, 524 U.S. 103 (1998); *Dep't of Taxation v. Milhelm*, 512 U.S. 61 (1994); *County of Yakima v. Confederated Tribes*, 502 U.S. 251 (1992); *Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989).

32. See *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775 (1991).

33. See *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701 (2003).

in *Brendale*,³⁴ the tribes lost all cases involving tribal attempts to assert civil or criminal jurisdiction over non-members.³⁵ Tribal interests also lost all three disestablishment of Indian Country cases³⁶ and the two cases involving religious and cultural rights.³⁷

2. Tribal Victories

Among the eleven victories, three came at the expense of the Oklahoma Tax Commission, perhaps signifying a case of overreaching by an overly eager state agency.

In *Oklahoma Tax Commission v. Citizen Band of Potawatomi*,³⁸ the state was trying to collect taxes from the tribe and the tribe successfully argued that it had sovereign immunity. In *Sac & Fox Nation*,³⁹ Oklahoma was trying to tax Indians within Indian Country. The Court held state authority precluded under long standing precedents, most notably, *McClanahan v. Arizona Tax Commission*.⁴⁰ In *Chickasaw*,⁴¹ the Tax Commission lost because it was trying to tax transactions occurring on Indian lands when the legal incidence of the tax was clearly on the Indians.

Of the other eight decisions, *United States v. Lara*,⁴² upholding the power of Congress to confirm tribal inherent powers, is perhaps the most meaningful. Another important tribal victory was *Mississippi Band of Choctaw v. Holyfield*.⁴³ Finally, tribal sovereign immunity from suit was upheld in *Kiowa Tribe v. Manufacturing Technologies*,⁴⁴ although the Court appeared lukewarm at best towards the concept of tribal sovereign immunity.

34. The tribe won the right to zone non-member fee land located in the “closed” section of the reservation while losing the right to zone such non-member land in the “open” part of the reservation.

35. See *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 Co. v. Shirley*, 532 U.S. 645 (2001); *Nevada v. Hicks*, 533 U.S. 353 (2001).

36. See *Hagen v. Utah*, 510 U.S. 399 (1994); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Alaska v. Native Vill. of Venetie*, 523 U.S. 751 (1998).

37. See *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988); *Employment Div. of Oregon v. Smith*, 494 U.S. 872 (1990). Indian interests also lost the one other case the Court had decided in 1986, *Bowen v. Roy*, 476 U.S. 693 (1986).

38. 498 U.S. 505 (1991).

39. *Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114 (1993).

40. 411 U.S. 164 (1973).

41. *Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450 (1995).

42. 541 U.S. 193 (2004).

43. 490 U.S. 30 (1989) (defining the concept of “domicile” for the purposes the Indian Child Welfare Act so as to preserve tribal court jurisdiction in this case).

44. 523 U.S. 751 (1998).

While *United States v. White Mountain Apache Tribe*⁴⁵ is a meaningful decision in the breach of trust cases, the defeat of the Navajo Nation in its breach of trust cases on the same day somewhat negates this victory and is perhaps more meaningful in the long run.⁴⁶ The Cherokee Nation won an important contract dispute case against the United States,⁴⁷ but that case did not concern tribal rights as such and was decided on general contract law principles. The last two pro-tribal cases involve tribal treaty rights: *Idaho v. United States* concerned the ownership of the bed of a lake,⁴⁸ and *Minnesota v. Mille Lacs Band of Chippewa Indians* was an off-reservation treaty rights case.⁴⁹ Before drawing some more normative conclusions from the Court's overall record during this period, I will look more specifically at the individual record of the Justices from 1991-2005.

C. THE JUSTICES' INDIVIDUAL RECORDS SINCE 1991

The analysis below shows that from 1991 until 2005, four out of the nine Justices who were on the Court during that time hardly ever supported tribal interests. If, as mentioned earlier, an anti-Indian bias began to gel in 1988 with the arrival of Justice Kennedy, it did not solidify until Justice Thomas replaced Justice Marshall in 1991. In this section, I analyze the record of those I consider to be, the four most anti-tribal Justices: Rehnquist, Scalia, Thomas, and Kennedy.

1. *The Gang of Four*

During this time, although Justices Rehnquist, Kennedy, Thomas, and Scalia supported the Kiowa Tribe in its sovereign immunity case, the Cherokee Nation in its contract dispute with the Bureau of Indian Affairs, and ruled against the Oklahoma State Tax Commission in its three cases,⁵⁰

45. 537 U.S. 465 (2003).

46. *United States v. Navajo Nation*, 537 U.S. 488, 493 (2003).

47. *Cherokee Nation v. Leavitt*, 543 U.S. 631, 634 (2005).

48. 533 U.S. 262 (2001).

49. 526 U.S. 172 (1999).

50. I do not want to underplay these three Oklahoma state tax commission decisions, because they provide meaningful markers as to how far states can push the envelope before running into problems with the Court. *Potawatomi* was based on tribal sovereign immunity, and *Chickasaw* involved the taxation of tribal transactions with non-members when the "incident" of the tax was clearly on the tribe. In *Sac & Fox*, the Court found that the state could not tax the income of tribal members residing on the reservation or impose fees on member owned vehicles maintained on tribal lands. These traditional immunities from taxation had been recognized since the landmark decisions in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). The state thought that since the lands at stake were not part of a reservation, but instead consisted of isolated tracts of trust land, the state could tax them. The state was wrong. As such, this case is not about state jurisdiction as much as what constitutes Indian Country. The Court did reaffirm the principle that

they ruled against tribal interests in all the other Indian cases.⁵¹ Notably, unlike the other five Justices, these four all dissented in *United States v. White Mountain*,⁵² *Idaho v. United States*,⁵³ and *Minnesota v. Mille Lacs Band*.⁵⁴ Furthermore, the opinions of Justices Kennedy and Thomas in *Lara* cannot be considered as endorsing the reasoning of Justice Breyer's majority opinion. More indicative, it seems that since 1991, the year they were all together on the Court, with the exceptions of Justice Rehnquist joining the *Lara* decision,⁵⁵ and Justice Kennedy joining the *Wagnon* dissent,⁵⁶ these four Justices sided against tribal interests in thirty out of thirty-five cases—a ratio of six to one.

That these four Justices can be counted to almost always vote against tribal interests is meaningful in that only one Justice among the remaining five is needed to constitute an anti-tribal majority.

2. *The Not-So-Fab Five*

In this section, I look at the record of the remaining five Justices during these same years: Justices O'Connor, Souter, Ginsburg, Breyer, and Stevens. The only decisions that really set these five apart from the previous four is that they all voted for the tribes in the *White Mountain* breach of trust case, and the two treaty cases: *United States v. Idaho* and *Minnesota v. Mille Lacs Band*. Except for Justice Ginsburg, they also all voted for the tribe in the Navajo Nation breach of trust case. Their overall record, however, still reflects mostly antagonism toward tribal interests. As previously noted by Sarah Krakoff,⁵⁷ some of the decisions that went against tribal interests are striking because they were unanimous: *Cass County v. Leech Lake Band of Chippewa Indians*,⁵⁸ *Inyo County v. Paiute-Shoshone Indians of the Bishop Community*,⁵⁹ *Department of Taxation & Finance of New*

as long as the trust lands are within Indian Country, the state cannot impose a tax directly on the tribes or tribal members.

51. The lone exception here is the relatively early case of *Mississippi Band of Choctaw v. Holyfield*, 490 U.S. 30 (1989), where Justice Scalia did vote with the majority. Justices Thomas and Kennedy were not yet on the Court.

52. 537 U.S. 465 (2003).

53. 533 U.S. 262 (2001).

54. 526 U.S. 172 (1999).

55. Although Justice Rehnquist joined the Breyer majority opinion for the Court, it is difficult to figure out what motivated Justice Rehnquist to do so. Perhaps, he was able to somewhat influence the tone of Justice Breyer's opinion by joining.

56. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005).

57. See Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1178 (2001).

58. 524 U.S. 103 (1998).

59. 528 U.S. 701 (2003).

York v. Milhelm Attea & Bros., Inc.,⁶⁰ *South Dakota v. Yankton Sioux Tribe*,⁶¹ and *Alaska v. Native Village Of Venetie Tribal Government*⁶² are all unanimous decisions dealing with either assertion of state regulatory power in Indian Country or the existence of Indian Country.⁶³ It is also notable that in the area of inherent tribal sovereignty, *Duro v. Reina*,⁶⁴ *Strate v. A-1 Contractors*,⁶⁵ and *Atkinson Trading Co. v. Shirley*,⁶⁶ were all unanimous decisions.

Two other cases are worth mentioning. Although *Chickasaw Nation v. United States* is, on the surface, a case about federal taxation of Indian gaming enterprises,⁶⁷ it is mostly a case about the unwillingness of the Justices to apply the Indian canon of statutory construction to resolve statutory ambiguities in favor of the Indians. Only two Justices, O'Connor and Souter, supported the tribal position. Finally, *City of Sherrill* stands alone, perhaps because of its outrageousness.⁶⁸ It is both emblematic and ironic that Justice Stevens was the only dissenter. It is emblematic because he was the sole dissenter. It is ironic because he wrote the dissenting opinion in the 1985 decision in *Oneida II*.⁶⁹ This leads me to conclude that from one of the most anti-tribal Justices in 1985,⁷⁰ Justice Stevens had somehow become, twenty years later, the least anti-tribal Justice.⁷¹

To sum up, the Gang of Four is still willing to recognize the concept of tribal sovereign immunity, as well as an immunity from state taxation when the incidence of the tax falls directly on the tribes or their members. They are also not adverse to siding with the tribes in contractual disputes with the federal government. In addition to supporting the tribal position in such cases,⁷² the Not-So-Fab Five seemed mostly willing to support tribal

60. 512 U.S. 61 (1994).

61. 522 U.S. 329 (1998).

62. 522 U.S. 520 (1998).

63. The only exceptions in this area of the law seemed to have been Justice Souter joining Justice Blackmun's dissent in *Hagen* and Justice Ginsburg's dissent in *Wagnon*. Justice Souter also joined Justice Blackmun's dissent in *Bourland*, however, he seemed to have had a change of heart about Indian law after Justice Blackmun left the Court in 1994.

64. 495 U.S. 676 (1990).

65. 520 U.S. 438 (1997).

66. 532 U.S. 645 (2001).

67. 534 U.S. 84 (2001).

68. 544 U.S. 197 (2005). See Joseph W. Singer, *Ninth-Tenths of the Law: Title, Possession, and Sacred Obligations*, 38 CONN. L. REV. 605 (2006).

69. 470 U.S. 226 (1985).

70. See, e.g., *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (Stevens, J., dissenting).

71. Of course, I do not deny that Justice Stevens may have become more sensitive to tribal interests since 1985.

72. *But see* *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 760-66 (1998) (Stevens, J., dissenting).

interests in cases involving treaty protected tribal property rights and breach of trust cases against the federal government.⁷³ Occasionally, some of these five Justices will also support tribal interests in other areas. Thus, Justice Ginsburg dissented in *Wagnon* (state tax), Justice Stevens dissented in *Sherrill*, and Justices O'Connor and Souter dissented in *Chickasaw* (federal taxation of tribal gaming revenues). However, a super majority of Justices seem to always support the assertion of state jurisdiction when non-members are at least partially involved. And of course, none of the Justices ever seem to support tribal inherent jurisdiction over non-members. Finally, none of the Justices have supported tribes facing arguments that their reservations had been disestablished.

D. NORMATIVE CONCLUSIONS

Recently, after teaching the *City of Sherrill* case on my last day of class, I jokingly told my students that the following paradigm could explain the Court's Indian law decisions: "Whenever the issue is truly important to non-Indians and Indians are on the other side of such issue, the Indians lose." I was surprised that more than a few students actually took me seriously. Although I realize that for some, this paradigm cannot be that easily discarded, I will resist for the time from drawing such conclusion.⁷⁴

Although I believe that Professor Getches is undoubtedly correct in asserting that the Court's predisposition in favor of state rights, mainstream values, and colorblind justice, has worked to the detriment of Indian tribes,⁷⁵ one has to wonder whether it can explain all these defeats. It seems that, at least for the Gang of Four, antagonism toward tribal rights goes beyond the reasons given by Getches. Furthermore, cases like *Chickasaw Nation v. United States*, involving federal taxation of Indian gaming revenues, and the *Navajo Nation* breach of trust case, as well as cases such as

73. *But see* *United States v. Navajo Nation*, 537 U.S. 488, 493 (2003). Justice Ginsburg delivered the opinion of the Court. *Id.* at 493.

74. Such paradigm may explain, for instance, the dichotomy in the two breach of trust cases: *Navajo Nation* and *White Mountain*. Not only did *Navajo Nation* involve hundreds of millions of dollars more than *White Mountain*, but the case could have been used as precedent by other tribes to successfully bring many more such cases. Chances are, the situation in *White Mountain* was close to unique. The issue there was the existence of trust duties in managing a specific property that had been transferred in trust for the benefit of the White Mountain Apache tribe. The issue in *Navajo Nation* was whether the Secretary of the Interior had specific enough trust duties when approving tribal coal leases under the Indian Mineral Leasing Act, so that the breach of such duties could be compensable. *See* Ezra Rosser, *The Trade-off Between Self-Determination and the Trust Doctrine: Tribal Government and the Possibility of Failure*, 58 ARK. L. REV. 291, 296-303 (2006). Even *United States v. Lara*, 541 U.S. 193 (2004), which I view as perhaps the most important recent decision for tribes, in fact did not affect non-Indians at all since the issue there was whether Congress could reaffirm tribal criminal jurisdiction over non-member Indians.

75. *See generally* Getches, *supra* note 3.

Negonsott v. Samuels,⁷⁶ *Department of Interior v. Klamath Waters Users*,⁷⁷ *Amoco Production v. Southern Ute Tribes*,⁷⁸ and *El Paso v. Neztosie*,⁷⁹ do not fall in any of these three categories. This survey seems to indicate that tribal interests are perhaps being subrogated to many other interests than just an interest in protecting state rights, mainstream values, and colorblind justice. Although, of course, this depends on how broad one construes Getches' three classifications. Set forth below is a thesis that complements Getches' theory, and may perhaps explain more accurately what the Court has been doing.

Under what I have previously termed the Rehnquist Court's Dependency Paradigm of tribal incorporation,⁸⁰ Indian tribes are "dependent" on the United States Congress for all their political rights. I believe that at least the Gang of Four and Justice Souter have adopted the view that Indian tribes have no political rights except to the extent that such rights are delineated in treaties and acts of Congress. Combining my previous theory with Getches' thesis, I come to the following principle: The more tribal interests affect states' rights, mainstream values, or colorblind justice, the more explicit such tribal interests or rights will have to be delineated in congressional legislation.

This principle would explain the state jurisdiction cases. Although vague, general congressional acts being considered against a backdrop of inherent sovereignty were enough to preempt state jurisdiction during the Marshall-Brennan era.⁸¹ The Rehnquist Court has demanded much more specific acts of Congress before finding state jurisdiction preempted, at least in cases where non-tribal members were, to some extent, involved.⁸² This principle is even truer when the tribes attempt to exercise civil jurisdiction over non-members. In such cases, after *Strate* and *Hicks*, it seems that the Court will not support tribal authority unless such authority has been somehow endorsed or at least acknowledged by Congress. Even the recognition of tribal sovereign immunity in *Kiowa Tribe v. Manufacturing*

76. 507 U.S. 99 (1993) (interpreting federal criminal laws).

77. 532 U.S. 1 (2001) (applying the Freedom of Information Act in Indian affairs).

78. 526 U.S. 865 (1999) (determining ownership of coal based on Coal Lands Act).

79. 526 U.S. 473 (1999) (interpreting the Price-Anderson Act as creating exclusive federal court jurisdiction).

80. See generally Skibine, *supra* note 4.

81. See, e.g., *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Ramah Navajo v. Bureau of Revenue*, 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Cent. Mach. v. Arizona*, 448 U.S. 160 (1980).

82. See *Dep't of Taxation v. Milhelm*, 512 U.S. 61 (1994); *Cotton Petroleum v. New Mexico*, 490 U.S. 920 (1989); *Rice v. Rehner*, 463 U.S. 713 (1983).

Technologies,⁸³ can be explained in this fashion. Thus, in this case, even though the Court stated that tribal sovereign immunity was first recognized by the federal common law by “accident,” it remarked that Congress had endorsed and relied on that concept and that, therefore, it was now for Congress, and not the Court, to modify or abrogate such concept.

If this principle is descriptively accurate, however, it reflects a normatively warped understanding of how and why federal common law should be used to protect tribal interests. Although scholars have disagreed as to the extent of the federal courts’ power to create federal common law,⁸⁴ it is generally understood that before federal courts can “create” federal common law, there has to be at least a federal interest needing protection, and that this interest cannot be adequately protected by the courts using either the Constitution or acts of Congress.⁸⁵ Yet, requiring an increasing amount of explicitness from Congress indicates that the Court is adverse to using federal common law in order to protect tribal interests. This indicates that the Court may not be considering protection of tribal self-government as a fundamental federal interest worth protecting through the use of federal common law. This position ignores the rightful role of the Indian trust doctrine and Indian treaties in the formulation of the federal common law.

This position seems to assume that the trust doctrine was invented by the courts just because Indians were weak and defenseless, and can be conveniently ignored in the creation of federal common law. But that is not the case.⁸⁶ The trust doctrine originates not only in treaties signed between the tribes and the United States, but also in the decision to apply the

83. 523 U.S. 751 (1998).

84. See, e.g., Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585 (2006) (surveying the various positions, and arguing that the making of federal common law should be grounded “in the protection of interests unrepresented or systematically underrepresented in the creation of state law”). Disappointingly, the authors fail to acknowledge the field of federal Indian law as a special “enclave” of federal common law and do not even mention the field of Indian law except in footnote 331 where they seem to thank Joseph Singer for reminding them of the existence of the such field. I guess the omission of such an obvious area is due more to the marginalization of the field of federal Indian law rather than a lack of adequate research in this otherwise excellent article.

85. See Martha Field, *The Legitimacy of Federal Common Law*, 12 PACE L. REV. 303 (1992).

86. Philip Frickey has put forth elegant arguments describing the original Marshallian vision concerning the role treaties made with Indian tribes should play in the formulation of federal common law. Frickey viewed treaties as quasi-constitutional in nature because they determined the terms of incorporation of Indian tribes within our political system. See Philip Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993). My theory is slightly different inasmuch as it considers the trust doctrine as derived from the doctrine of discovery and therefore a key element in determining the terms of incorporation for all Indian tribes. My theory has also the benefit of being applicable to all Indian tribes and not only to the ones that signed treaties with the United States.

doctrine of discovery to Indian tribes in *Johnson v. M'Intosh*.⁸⁷ A doctrine under which, the United States, as successor to England, is said to have obtained not only a certain amount of political "dominion" over Indian tribes but also the "ultimate" title to all Indian lands. Under the discovery doctrine, the tribal nations were relegated to domestic dependent nations, and the complete right to their lands was transformed to a right of possession. As such, the Indian trust doctrine as well as the treaties, are an intrinsic part of the terms under which Indian tribes were incorporated within the United States territorial and political boundaries. The trust doctrine, therefore, cannot be ignored in the formulation of the federal common law.

Because the Indian trust doctrine, along with the various treaties signed with Indian nations, defines the terms of incorporation of Indian nations within our political system, and because the essential purpose of the trust doctrine is to protect the survival of Indian Nations as distinct self-governing political entities within our political system,⁸⁸ the tribes' rights to self-government should be enforced under federal common law, notwithstanding the existence of specific statutes conferring explicit rights to Indian tribes. In other words, the existence of an Indian trust doctrine signifies that there is an on-going federal interest to guarantee the continuing existence of Indian tribes as self-governing sovereign entities within our political system.⁸⁹ The Court's task should not be to look for additional source of support for tribal self-government. The opposite should be true. It should only be looking for treaties and acts of Congress that have taken

87. 21 U.S. 543 (1823). See ROBERT MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED* 165-66 (Praeger 2006). Some other scholars have taken the position that the trust doctrine is a product of treaties and acts of Congress. Mary Christina Wood theorized that the trust doctrine is the result of the huge amount of Indian land transferred to the United States in treaties and acts of Congress. Mary Christina Wood, *Indian Land and the Promise of Native American Sovereignty, The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471. While it is true that treaties and acts of Congress further defined the elements of the trust relationship, it ignores the fact that under *Johnson v. M'Intosh*, England acquired ultimate title to all Indian land upon discovery and the United States succeeded to such England claims. So, although treaties dispossessed the tribes of the actual right of possession, their ultimate legal title had already been transferred to the United States or England at the time of discovery.

88. Contrary to popular belief, Justice Marshall did not only imply the existence of a trust relationship in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), where he referred to a guardian-ward relationship. In *Worcester v. Georgia*, the second sentence of the opinion declares that the Cherokees are "a people. . . under the protection of the United States." 31 U.S. 515, 536 (1832). Later on, after describing all the Acts of Congress enacted up to that point, Marshall stated that such legislation "guaranteed" the tribes' rights to their lands and "contemplates the preservation of the Indian nations as an object sought by the United States." *Id.* at 557. The recognition of a trust relationship is implicit in the use of words such as "guaranteed" and "preservation."

89. For a thoughtful and comprehensive argument supporting this point, see Mary Christina Wood, *Protecting the Attributes of Native Sovereignty, A New Trust Paradigm for Federal Actions Affecting Tribal Land and Resources*, 1995 UTAH L. REV. 109.

such pre-existing tribal rights. Although an argument could be made that since the initial Indian Trade and Intercourse Acts, Congress has changed its mind about the status of Indian tribes within our political system, and the Court's methodology is only reflecting that fact, the last part of this article reveals this not to be the case.⁹⁰

Before looking at the congressional record in the final section of this essay, I first assess the Indian law record in the lower courts. I then compare these two records to the one compiled by the Supreme Court.

III. ASSESSING THE INDIAN LAW RECORD IN THE LOWER COURTS AND IN THE UNITED STATES CONGRESS

A. TRIBAL RECORD IN THE LOWER COURTS

Because this essay is focused on what the Supreme Court has done, analyzing all the lower courts' Indian law decisions is beyond the scope of this essay. I focus here only on these decisions where certiorari was granted by the Supreme Court. One argument which could be made is that the dismal tribal record in the United States Supreme Court is the product of tribal advocates, perhaps emboldened by their success in the previous era, getting overly optimistic and confident. My survey, however, reveals this not to be the case.

This conclusion can be derived by the number of cases won by the tribes at the lower level and reversed by the Supreme Court. In other words, lower appellate level courts, which have to respect and follow Supreme Court precedents, thought they were applying existing law. Yet, when ruling in the tribes' favor, lower courts ended up being overturned at an extremely high rate by the United States Supreme Court. For instance, in the area of tribal inherent sovereign power, tribal interests won in the lower courts in four of the five cases.⁹¹ Only in *Strate*, where there was a badly fractured en banc decision, did the lower court end up ruling against the tribal position.⁹² In Indian Country disestablishment cases, the tribes won at the lower level in *Venetie* and *Yankton*.⁹³ While the Utah Supreme

90. See Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121 (2006) (arguing that the present congressional policy is still to support tribal self-government and that Supreme Court should look at such current congressional policy and legislation to formulate its federal common law jurisprudence on Indian issues).

91. See *Atkinson Trading Co. v. Shirley*, 210 F.3d 1247 (10th Cir. 2000); *State v. Hicks* 196 F.3d 1020, 1032 (9th Cir. 2000); *Duro v. Reina*, 851 F.2d 1136, 1138 (9th Cir. 1987). The tribal position also mostly prevailed in *South Dakota v. Bourland*, 949 F.2d 984, 996 (8th Cir. 1991).

92. See *A-1 Contractors v. Strate*, 76 F.3d 930, 941 (8th Cir. 1991).

93. See *Yankton Sioux Tribe v. S. Mo. Waste Mgmt.*, 99 F.3d 1439 (8th Cir. 1996); *Alaska ex. rel Yukon Flats Sch. Dist. v. Native Vill. of Venetie*, 101 F.3d 1286 (9th Cir. 1996).

Court ruled against the tribal position in *Hagen*,⁹⁴ that decision had disagreed with a Tenth Circuit decision which had gone in the tribe's favor ten years earlier.⁹⁵ In cases involving assertion of state regulatory jurisdiction in Indian Country, the tribal position prevailed in five of the six lower courts' decisions.⁹⁶ Only in *Cotton Petroleum*, did the lower court rule in favor of the state.⁹⁷ Other meaningful decisions that had gone in the tribes' favor at the lower court level only to be reversed by the Supreme Court include *Montana v. Crow Tribe*,⁹⁸ *Inyo County v. Paiute-Shoshone Indians of the Bishop Community*,⁹⁹ *United States v. Navajo Nation*,¹⁰⁰ *Amoco Production v. Southern Ute Tribe*,¹⁰¹ and *C&L Enterprises v. Citizen Band*.¹⁰²

This abbreviated survey confirms that tribal rights advocates were not being overly aggressive or optimistic in their litigation strategies. It is the Supreme Court that was being overly aggressive and activist in creating new doctrine or modifying applicable precedents in order to overturn lower courts decisions that had upheld tribal rights. It seems that in the important areas of inherent tribal sovereignty and state regulations within Indian Country, only in three cases did the tribal interest not prevail in the lower courts: *Seminole Tribe v. Florida*,¹⁰³ *New Mexico v. Cotton Petroleum*,¹⁰⁴ and *Strate v. A-1 Contractors*. Also meaningful is the fact that in these areas of the law, the Supreme Court never actually upheld a lower court decision which had been favorable to the tribes.

I mentioned earlier the *City of Sherrill* case as perhaps being in a special category because of the egregiousness of the opinion. What concerns me the most about this case is that it may be sending a message to the lower courts and this message is: "In important cases, if you do not want to be reversed, do not rule in favor of the tribes. And if you ruled against

94. *State v. Hagen*, 858 P.2d 925, 925-26 (1992).

95. *See Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985).

96. *See Prairie Band v. Richards* 379 F.3d 979 (10th Cir. 2004); *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 140 (2d Cir. 2003); *Milhelm Tea & Bros., Inc. v. Dep't of Taxation*, 615 N.E. 2d 994, 998 (1993). The tribes also prevailed, at least partly, in *Leech Lake v. Cass County*, 108 F.3d 820, 829-30 (8th Cir. 1997). *See also Confederated Tribes v. County of Yakima*, 903 F.2d 1207, 1219 (9th Cir. 1990) (providing that state allowed to impose *ad valorem* tax but not excise tax on fee patented Indian owned land).

97. *Cotton Petroleum v. State*, 745 P. 2d 1170 (1987).

98. *See Crow Tribe v. Montana*, 98 F.2d 1194, 1195 (9th Cir. 1996).

99. *See Bishop Paiute Tribe v. County of Inyo*, 291 F.2d 549, 554 (9th Cir. 2002).

100. *See Navajo Nation v. United States*, 263 F.3d 1325, 1333 (Fed. Cir. 2002).

101. *See S. Ute Tribe v. Amoco Prod. Co.*, 151 F.3d 1251 (10th Cir. 1998).

102. 532 U.S. 411 (2001).

103. 517 U.S. 44 (1996).

104. 490 U.S. 163 (1989).

them, we will find a way to uphold your decision.” Certainly, the recent decision in *Cayuga Indian Nation v. Pataki*,¹⁰⁵ extending the *City of Sherrill* rationale to damage claims is indicative that at least some judges have heard the message.¹⁰⁶

B. ASSESSING THE CONGRESSIONAL RECORD IN THE ERA OF INDIAN SELF-DETERMINATION

Since the late 1960s, Congress is said to have adopted a policy of self-determination for Indian tribes.¹⁰⁷ This policy is still the official policy of Congress. Thus, the passage of the Indian Self Determination Act (ISDA)¹⁰⁸ in 1975, was followed by the Indian Child Welfare Act¹⁰⁹ in 1978. Furthermore, the ISDA was strengthened by pro-tribal amendments in 1988¹¹⁰ and 1994.¹¹¹ National environmental laws like the Clean Air, Clean Water, and Safe Drinking Water Acts were amended to allow tribes to be treated as states for the purposes of these laws.¹¹² Tribal political rights were also recognized and reinstated in the 1990 *Duro-Fix* legislation.¹¹³ Tribal cultural rights were recognized and given protection in many statutes, the most important of which was the 1990 Native American Grave Protection and Repatriation Act (NAGPRA).¹¹⁴

Congress also acted to promote tribal economic development by passing legislation such as the Indian Financing Act of 1974,¹¹⁵ the Indian Mineral Development Act of 1982,¹¹⁶ The National Indian Forest Resource

105. 413 F.3d 266 (2005).

106. *See id.* at 273. In *City of Sherrill*, the Court only held that an Indian tribe that had reacquired land in fee within their reservation could be taxed by the state, mostly because of the equitable doctrine of laches. *Id.* at 273-80.

107. *See* Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251 (1995).

108. Pub. L. 93-638, 88 Stat. 2003 (1975).

109. Indian Child Welfare Act of 1978, Pub. L. 95-608, 92 Stat. 3069 (1978).

110. Tribal Self-Governance Demonstration Project of 1988, Pub. L. 100-472, 102 Stat. 2296 (1988).

111. Tribal Self-Governance Act of 1994, Pub. L. 103-413, 108 Stat. 4272 (1994).

112. *See* Clean Air Act, 42 U.S.C. § 7601(d) (2000) (providing tribal amendments to the Act); Clean Water Act, 33 U.S.C. § 1251 (2000) (same); Safe Drinking Water Act, 42 U.S.C. §§ 300j-11(b)(1) (2000) (same).

113. Pub. L. 101-511, 104 Stat. 1892.

114. 8 U.S.C. § 1170 (2000), 25 U.S.C. §§ 3001-3013 (2001). In addition to NAGPRA, Congress also provided some protection for Indian archeological resources in the Archeological Resources Protection Act of 1979, 16 U.S.C. § 470 (1994). Congress also enacted the 1994 amendments to the Indian Religious Freedom Act, 42 U.S.C. § 1996 (1994), the Native American Language Act of 1990, 42 U.S.C. §§ 2991b-3, 2992d(e) (1990), and the Indian Arts and Crafts Act of 1990, 25 U.S.C. §§ 305-305e (1990), 18 U.S.C. § 1159 (1994).

115. 25 U.S.C. § 1451 (2000).

116. 25 U.S.C. §§ 2101-2108 (2000).

Management Act of 1990,¹¹⁷ and the Indian Tribal Government Tax Status Act¹¹⁸ also in 1982. Perhaps the most recent meaningful legislation promoting tribal economic development was the Indian Gaming Regulatory Act of 1988 (IGRA).¹¹⁹ Although not originally universally endorsed by all Indian tribes, IGRA has been mostly successful for Indian tribes in spite of the Court's effort to gut the Act in *Seminole Tribe v. Florida*.¹²⁰

It should also be noted that in the 1980s, Congress enacted numerous tribal-specific legislation which were supported by these tribes. Such legislation includes many tribal water and land claims settlement acts, tribal restoration, and recognition legislation, as well as statutes transferring additional lands to specific tribes. An unofficial count suggests that from 1981 to 1988 alone, Congress enacted over fifty such statutes.

On the other hand, some legislation is noteworthy because it was not enacted. Thus, while *Duro* was overturned legislatively, *Oliphant* was not. Furthermore, none of the cases such as *Hagen*, *Yankton*, or *Venetie*, finding Indian reservations or Indian Country diminished or disestablished, were legislatively reversed or at least somewhat corrected. The *Montana* line of cases, preventing tribal civil jurisdiction over non-members, have not been legislatively addressed. Finally although P.L. 280 was amended in 1968,¹²¹ it was never repealed nor further amended.

Finally, it should be noted that although the Congress has been less active in enacting pro-tribal legislation since 1994, the year the Republicans took control of both Houses of Congress, the policy of promoting tribal self-determination has not been abandoned.¹²² Moreover, there has not been any truly anti-Indian legislation enacted since 1994.

All in all, the record of Congress on Indian issues, while not the best that could be hoped for, is far fairer to Indian tribes than the one generated by the Supreme Court.

117. 25 U.S.C. §§ 3101-3120 (2000).

118. 26 U.S.C. § 7871 (2000).

119. 25 U.S.C. § 2701 (2000).

120. 517 U.S. § 44 (1996) (holding that Congress could not abrogate state sovereign immunity under its Commerce power.)

121. The amendments were part of the Indian Civil Right Act of 1968, 25 U.S.C. § 1301 (2000).

122. *See, e.g.*, Native American Housing Assistance and Self Determination Act, Pub. L. No. 104, 330, 110 Stat. 4017 (1996) (codified at 25 U.S.C. § 4101 (2000)). *See also* P.L. 106-464, 25 U.S.C. § 4301 (2000).

IV. CONCLUSION

As demonstrated in this article, the Court in the last twenty years or so has devised principles of federal common law that are based on a flawed understanding of how and to what extent the tribes came to be incorporated into our political system, not as just another disadvantaged minority group, but as self-governing and distinct political entities with pre-existing sovereign rights. In addition, the assumptions governing the development of the Court's federal common law on Indian issues are contrary to the policies Congress has adopted and maintained since the late 1960s. Finally, the Court's record in reversing lower court's pro-tribal decisions confirms that the Court is continuing its activist agenda by expanding the new principles devised for its age of colonialism.¹²³

123. See Philip Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 *YALE L.J.* 1 (1999).