

Factbound and Splitless: Certiorari and Indian Law

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Abstract

The Supreme Court's certiorari process is a barrier to justice for parties like Indian tribes and individual Indians. Statistically, there is a near zero chance the Supreme Court will grant a certiorari petition filed by tribal interests. At the same time, the Court grants certiorari in more than a quarter of petitions filed by the traditional opponents to tribal sovereignty, states. Why?

The Supreme Court has long maintained that the certiorari process is a neutral and objective means of eliminating patently frivolous petitions from consideration. This empirical study of preliminary memoranda drafted by the Supreme Court law clerk pool demonstrates the likelihood that the Court's certiorari process is neither objective nor neutral. Cert pool clerks overstate the relative merits and importance of petitions filed by states against tribal interests, while understating the merits and importance of tribal petitions.

In this study of more than 162 certiorari petitions filed between 1986 and 1994, a majority of petitions brought by state and local governments received favorable treatment from the cert pool while recommending denial in all but a single tribal petition, often labeling them "factbound" and "splitless." The impact of this weighted review of cert petitions is that a disproportionate number of state government petitions are granted while very few tribal petitions are granted.

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Introduction

The Supreme Court's system of deciding which cases merit review, and the clerks that do much of the Court's work, discriminate against Indian tribes and individual Indians in two ways. First, the Court undervalues the merits and importance of petitions filed by tribal interests. Second, the Court overvalues the merits and importance of petitions filed by the traditional opponents of tribal interests, state governments. In shorthand, if a tribe or an Indian loses in the federal courts of appeal, the Court will almost never review the case, but if a state loses against a tribe or an Indian, the Court often grants certiorari. This choice of cases skews federal Indian law overall.

Consider the following two cases.

In *Western Shoshone National Defense Council v. Molini*, a case involving the abrogation of tribal treaty rights by Nevada state officials, the Ninth Circuit applied the wrong legal standard in rejecting the tribal claims. After the tribe petitioned for certiorari, a Supreme Court law clerk drafted a private memorandum to the Justices recommending summary reversal of the Ninth Circuit's decision because of the clear error.¹ Instead, the Supreme Court denied certiorari.

In *South Dakota v. Bourland*, a case involving the Cheyenne River Sioux Tribe's authority to control hunting and fishing in its reservation, the Eighth Circuit applied well-settled federal common law to the narrow question presented and found in favor of the Tribe. After the State petitioned the Court, a law clerk's internal memoranda found none of the criteria present that would justify review, and recommended a denial of the petition.² Instead, the Supreme Court granted review.

In federal Indian law, these cases are unremarkable. Many, many times an Indian tribe or individual Indian asserts tribal sovereign rights against a state government. In the lower courts, where review is not discretionary, tribal interests likely do not win more than half of the cases, but they do win some. And yet, once the losing party chooses to petition the Supreme Court, the scales of justice tip mightily against tribal

¹ See Cert Pool Memo at 9, *Western Shoshone National Defense Council v. Molini*, 506 U.S. 822 (1992) (No. 91-1916), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/91-1916.pdf>.

² See Cert Pool Memo at 10, *South Dakota v. Bourland*, 508 U.S. 679 (1993) (No. 91-2051), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Granted-pdf/91-2051.pdf>

interests. It is well known that the Court's Members select cases for review based in large part on the outcome below. It is striking that the Court selects so few cases in which tribal interests lost below, and so many cases in which tribal interests won below.

Professor Edward Hartnett asserted that the certiorari process – cabining the Supreme Court's power to decide its own docket – “has had a profound impact on shaping our constitutional law.”³ The power to choose among several thousand cases a year for a select few, usually less than one hundred cases, is an awesome power. This Article takes up Hartnett's challenge to analyze the impact of the certiorari process on substantive constitutional law through an empirical study of a particular topic of constitutional law. There have been numerous empirical studies of the Supreme Court's agenda-setting through the certiorari process,⁴ but few scholars have examined the impact of the certiorari process on a substantive area of constitutional law.

My study reveals strong circumstantial evidence that the structure and mechanics of the Court's certiorari process operates to discriminate against tribal interests. In this study, I review preliminary memoranda written by Supreme Court clerks in the certiorari decisionmaking process (the “cert pool memos”⁵) during the 1986 through the 1994 docket years, memoranda available in the Digital Archive of the Papers of Harry A. Blackmun.⁶

I study over 162 cert pool memos relating to cases involving federal Indian law. A study of the cert pool memos in a single subject area offers unique possibilities. It is, after all, the Supreme Court clerks who serve as the first gatekeeper to the Supreme Court. Moreover, the

³ Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill*, 100 COLUM. L. REV. 1643, 1731 (2000).

⁴ E.g., VANESSA BAIRD, *ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA* (2007); H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991); Lee Epstein, Jeffrey Segal & Jennifer Nicoll Victor, *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395 (2002); Joseph Tanenhaus et al., *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, in JUDICIAL DECISION-MAKING 111 (Glendon Schubert ed., 1963).

⁵ See Gregory A. Caldeira & John R. Wright, *The Discuss List: Agenda Building in the Supreme Court*, 24 LAW & SOCIETY REV. 807, 811 (1990) (describing the “cert pool” and the memoranda that originate there).

⁶ Lee Epstein, Jeffrey A. Segal, & Harold J. Spaeth, *The Digital Archive of the Papers of Justice Harry A. Blackmun* (2007), <http://epstein.law.northwestern.edu/research/BlackmunArchive.html>.

influence of the cert pool memo in moving a case onto the Court's "discuss list" and then to certiorari is critical, and yet understudied.⁷ In most instances, the cert pool memos are the only writing from the Court discussing the cases in which the Court does not grant certiorari. And, studies show, where a cert pool memowriter recommends that the Court deny certiorari, the other Justices' clerks generally spend little or no time to convince his or her Justice to vote to grant certiorari.⁸

I chose federal Indian law because of my experience in the subject matter, but also because of the fortuitous character of the timing of this sample of cert pool memos. Something extraordinary has been happening in federal Indian law. From 1959, the generally recognized beginning of the modern era of federal Indian law,⁹ to 1987, when the Supreme Court decided the major Indian gaming case *California v. Cabazon Band of Mission Indians*,¹⁰ Indians and Indian tribes (whom I will often refer to as "tribal interests") won nearly 60 percent of federal Indian law cases decided by the Supreme Court.¹¹ But since *Cabazon*, tribal interests have lost more than 75 percent of their cases. The sample under study – from about 1986 to 1994 – covers the first years of this radical turnaround. Consistent with the overall pattern of the latter period, tribal interests lost about 75 percent of their cases during the period under study.

This Article argues that, not only do the certiorari decisions made by the Supreme Court tend to prejudice tribal interests, but entire certiorari process – especially the participation of the clerks – slants the Court's

⁷ Previous scholarship on the "discuss list" did not study the cert pool memoranda, perhaps because it largely was unavailable. *E.g.*, Caldeira & Wright, *supra* note 5. Research on the Blackmun digital archive is nascent. *See, e.g.*, Ryan Schoen & Paul J. Wahlbeck, *The Discuss List and Agenda-Setting on the Supreme Court* (March 5, 2007), 1st Annual Conference on Empirical Legal Studies Paper, <http://ssrn.com/abstract=912783>.

⁸ *See* David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 974 (2007) ("[B]ecause recommendations to deny are the norm, law clerks pay far less attention to those recommendations than to recommendations to grant during the annotation process, increasing the likelihood that an issue of importance will be overlooked.") (citing PERRY, *supra* note 4, at 63).

⁹ According to Charles Wilkinson, the "modern era" of federal Indian law began in 1959 with the Court's decision in *Williams v. Lee*, 358 U.S. 217 (1959). *See* CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN MODERN CONSTITUTIONAL DEMOCRACY* 1 (1987).

¹⁰ 480 U.S. 202 (1987).

¹¹ *See* Turtle Talk Blog, *Supreme Court*, <http://turtletalk.wordpress.com/supreme-court-indian-law-cases/> (listing all the federal Indian law Supreme Court cases and their outcomes since 1959).

certiorari decisions against tribal interests in subtle, yet unmistakable, ways. The field of federal Indian law often involves interesting and important questions of federalism, states rights, and Indian treaty rights. In the period of time analyzed in this study, where the petitioner was an Indian tribe or a tribal interest, the Supreme Court granted certiorari *once* out of more than eighty petitions (excluding three unpaid *in forma pauperis* prisoner petitions involving indigent Indians in which the Court granted certiorari¹²). During the same period of time, the Court granted cert *eleven times* out of a mere twenty-eight petitions filed by states or state agencies against tribal interests, more than a third of the petitions. Other petitioners opposing tribal interests did not fare as well as state governments, but the Court still granted their petitions far more often than tribes. The import, of course, of a grant of certiorari is that the Court has agreed to review a lower court decision adverse to the petitioner. And the Court historically grants certiorari and reverses the lower court decision far more than it affirms.¹³

It would be tempting to argue that the Supreme Court's agenda has shifted from more of a balance of tribal and non-tribal interests since 1987 to an agenda that is opposed to tribal interests on most levels. Or, alternatively, the Court is choosing merely to rein in Indian tribes that have overstepped their bounds, restoring a balance of state and tribal interests. This Article does not dispute the possibility that the Court is simply fed up with Indian tribes or is interested in strengthening states' rights to the detriment of tribes' rights,¹⁴ but instead offers a theory separate from mere agenda-setting – backed with some empirical support drawn from the cert pool memos – that *the certiorari process itself creates conditions that lead the Supreme Court to accepting cases that it will likely decide against tribal interests.*

The two cases at the outset of this paper provide good examples of the certiorari process, drawn from the cert pool memos, and how it creates

¹² There are two major classes of cert petitions – paid and unpaid. “Paid petitions” are petitions filed by parties with the means to pay the filing fee, while “unpaid petitions” are filed by parties without the means to pay the filing fee, often referred to as *in forma pauperis* petitions.

¹³ See Harvard Law Review, *The Supreme Court – The Statistics*, 121 HARV. L. REV. 436, 445 (2007) (reporting that the Supreme Court reversed or vacated 54 cases while affirming only 19 in the 2006 Term). Cf. generally S. Sidney Ulmer, *The Decision to Grant Certiorari as an Indicator to Decision “On the Merits”*, 4 POLITY 429 (1972).

¹⁴ See WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 265(1997). Cf. Ulmer, *supra* note 13, at 430 (“For through exclusive control of its dockets, the Supreme Court creates inequalities in access to its process.”).

conditions that prejudice tribal interests. They highlight critical elements of the Court's certiorari process and how that process creates substantive barriers to the certiorari petitions of tribal interests. These cases represent the typical cases that arise between tribal interests and others; namely, that they arise out of the attempted enforcement of Indian treaty rights and the subsequent exclusion of state law and regulations. What is critical here is the recognition by the memowriters that tribal claims usually are based on a single treaty or statute grounded deep in American history. The terms of the treaty and its history are bound to a particular territory, so a law clerk would be hard-pressed to argue that the case has national implications. Moreover, the limited territorial reach of Indian law cases means that splits in lower court authority, the most important objective factor that the Court looks for in the certiorari process, will rarely occur. Moreover, these cases are complex and "factbound" applications of settled law, meaning that the Court has previously devised rules of law that will govern a particular kind of dispute and that the certiorari petitioner is seeking merely for the Court to correct a lower court error. This, according to the Court's own rules, it will rarely do. Finally, as the cert pool memowriters demonstrate time and again, they assume tribal interests are not important to their audience.

The first part of this Article will provide a short description of the certiorari process and, in particular, the cert pool. I describe the origins of the Court's discretionary docket and the modern certiorari process. This part will also introduce Supreme Court Rule 10, which lists the subjective and objective factors the Court uses in determining whether or not to grant a petition for certiorari. I describe the mechanics of the cert pool in particular, and how it relates to the "discuss list"¹⁵ and the Conference, where the Justices meet in private to deliberate on whether or not to grant certiorari in a given case.

The second Part offers a review of the time period of this study in the context of the history of modern federal Indian law. The beginning of the period under study reflects not only the beginning of the Rehnquist Court, but the beginning of a major yet subtle change in the outcomes the Court reached in decided its Indian cases. Specifically, from 1959's

¹⁵ The "discuss list" is the list of cert petitions generated by the Chief Justice and circulated amongst the Justices prior to each Conference. Any Justice can add a petition to the discuss list. If a petition does not reach the discuss list, it is effectively "dead." For a history of the "discuss list" and how it derived from the "dead list," see Caldiera & Wright, *supra* note 5, at 809-15.

*Williams v. Lee*¹⁶ to 1987's *California v. Cabazon Band of Mission Indians*,¹⁷ the Court ruled in favor of tribal interests just under 60 percent of the time. However, since *Cabazon Band*, the Court has changed course, ruling against tribal interests seventy-five percent of the time. In fact, consistent with recent decades, during the eight years of this study, the Court ruled in favor of tribal interests only one-quarter of the time.

Part III is the heart of this study. Here, I offer an extensive qualitative study of the Court's certiorari decisions during these eight years. I begin with the text of Rule 10, which divides the Court's factors into four main categories: (1) splits in authority; (2) importance, (3) gross error by lower courts; and (4) the factual character of the dispute. I begin by demonstrating, as in the title of this Article, that the vast majority of Indian law certiorari petitions are usually denied because they are "splitless" and "factbound." It appears from the cert pool memos that the clerks may recommend denial of tribal cert petitions because these factors almost always weigh against tribal interests.

I assert first that the research demonstrates that the Supreme Court certiorari process is weighted against tribal interests in two ways: both in terms of "agenda-setting" and also in the structural process of certiorari decisionmaking. First, although the empirical research on certiorari decisions has not been strong in the context of proving that the Supreme Court favors some substantive issues over others, I demonstrate that the Court has a special dispensation *against* tribal interests. I leave open the question of whether the Supreme Court is likely to grant certiorari in a higher or lower number of cases to advance its agenda.

Second, and I attempt to keep these lines of analyses distinct, the structure of the Court's Rule 10 and the mechanics of the certiorari process work against certiorari petitions filed by tribal interests, and concurrently in favor of certiorari petitions filed against tribal interests. For example, the historical character of the treaty claims raised by tribal interests – as well as the limited geographic scope of many of the underlying disputes – generates certiorari petitions that are far more often than not factbound and splitless. As a result, Supreme Court clerks with little institutional memory, little knowledge of American Indian history, and working in a "culture" of certiorari denial, almost never recommend a grant to petitions filed by tribal interests. Moreover, the clerks rarely find that tribal interests are of national legal importance sufficient to attract the

¹⁶ 358 U.S. 217 (1959).

¹⁷ 480 U.S. 202 (1987).

interest of the Court absent a split in authority. Perhaps most impressively, the comparative interests of the states opposing tribes are often deemed – without discussion – important, seemingly by definition. Here I demonstrate the certiorari process, often considered the linchpin to the Supreme Court’s agenda-setting, does more than merely set the Court’s agenda in federal Indian law. The certiorari *process* drives the Court toward accepting Indian law cases weighted against tribal interests. The outcome of the certiorari process is that historical claims raised by tribal interests are quickly and easily labeled “factbound” and “splitless,” with questions of insignificant national interest. As such, tribal petitions are not given the same weight as petitions from non-tribal interests.

I. The Certiorari Process

A. The Origins of the Modern Certiorari Process

The modern certiorari process originated in the 1925 Judges’ Bill,¹⁸ in which Chief Justice Taft argued in favor of creating a discretionary docket for the Supreme Court for more than a decade before he succeeded.¹⁹ The main stated purpose of this new form of discretion was to lighten the Court’s workload, which had become overwhelming, slowing down the business of the Court to a snail’s pace, with the Court taking “eighteen to twenty-four months for the Court to reach a case on its docket.”²⁰ The critical representation made by the Justices was that the large majority of certiorari petitions were patently uncertworthy. In 1934, Chief Justice Hughes called upon the Supreme Court bar to assist the Court by not filing cases “which are devoid of merit.”²¹ Chief Justice Vinson famously castigated the Supreme Court bar: “Lawyers might be well-advised, in preparing petitions for certiorari, to spend a little less time discussing the merits of their cases and a little more time demonstrating

¹⁸ Judiciary Act, Act of Feb. 13, 1925, 43 Stat. 936.

¹⁹ See Hartnett, *supra* note 3, at 1660-1704.

²⁰ Chief Justice Vinson, *Work of the Federal Courts*, Address to the American Bar Association (Sept. 7, 1949), *reprinted in* HENRY M. HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1403, 1403 (1953); *see also* Letter of Chief Justice Hughes to Sen. Burton Wheeler (March 21, 1937), *reprinted in* HART & WECHSLER, *supra*, at 1399, 1401 (“No single court of last resort, whatever the number of judges, could dispose of all the cases which arise in this vast country and which litigants would seek to bring up if the right of appeal were unrestricted.”); Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L. Q. 389, 392 (2004).

²¹ Chief Justice Hughes, *Address to American Law Institute* (May 10, 1934), *reprinted in* HART & WECHSLER, *supra* note 20, at 1395, 1396.

why it is important that the Court should hear them.”²² Decades later, however, Chief Justice Rehnquist estimated that one to two thousand “of the petitions for certiorari are patently without merit.”²³

Chief Justice Vinson in 1949 recalled the Constitutional Convention when he asserted the ultimate purpose of the Supreme Court was, quoting John Rutledge, “to secure the national rights & uniformity of [Judgments].”²⁴ The establishment of discretionary case selection in the Supreme Court in 1925 brought down the Court’s workload to a more manageable level; however, some constitutional questions remained mandatory for the Court to review: “notably in those cases thought to create the strongest frictions in our system of federalism, such as where a state court rejected a claim of right asserted under federal law or where a federal court invalidated state legislation.”²⁵ In addition, the Judges’ Bill kept open the possibility that lower courts could certify a case to the Supreme Court.²⁶ But the Court circumvented these avenues of mandatory review by “deciding many cases on appeal in a summary fashion that was largely indistinguishable from the Court’s disposition of petitions for certiorari.”²⁷ By 1988, Congress eliminated even these avenues of mandatory appeal.²⁸

B. The Mechanics of Modern Certiorari Decisionmaking

The process by which the United States Supreme Court decides to accept a petition for certiorari has long been a virtual mystery,²⁹ except

²² Vinson, *supra* note 20, at 1404-05.

²³ REHNQUIST, *supra* note 14, at 264.

²⁴ Vinson, *supra* note 20, at 1404.

²⁵ Cordray & Cordray, *supra* note 20, at 393 (citing FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 277-78 (1927)).

²⁶ See Cordray & Cordray, *supra* note 20, at 393 (citing James M. Moore & Allan D. Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 3 (1949)).

²⁷ Cordray & Cordray, *supra* note 20, at 393-94 (citing FEDERAL JUDICIAL CENTER, *REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT*, 57 F.R.D. 573, 595-96 (1972), and Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court’s Plenary Docket*, 58 WASH. & LEE L. REV. 737 751-58 (2001)).

²⁸ See *Review of Cases by the Supreme Court*, Pub. L. 100-352, 102 Stat. 662 (1988).

²⁹ Cf. Stras, *supra* note 8, at 947 (referencing “the shroud of secrecy surrounding the Court”); Ulmer, *supra* note 13, at 432-33 (critiquing the Court’s “[s]ecret decision making”).

perhaps to those who have participated in the process.³⁰ What is known is that the Court grants cert in only a handful of cases – often less than 100 a year – out of over several thousand petitions filed each Term.³¹ When a party to litigation receives an adverse judgment from a federal Court of Appeal or the highest court of a state judiciary, if the party wishes to seek Supreme Court review, it must file a petition for certiorari with the Court – a “cert petition.” Opposing parties may file an opposition – a “cert opposition” or “cert opp.” Even amici may file briefs at this time.³² Each of the Supreme Court Justices hires clerks – usually recent law graduates with some experience in lower federal courts – who review all the cert petitions, cert oppositions, and amicus briefs first. The clerks prepare short memoranda, formally known as a “preliminary memorandum,” in which they summarize the facts, procedural history, and the claims of the parties. Then they offer a short discussion section in which they offer candid commentary on the relative merits of the petitions and make a recommendation either to grant or deny the petition. In some instances, especially in cases in which the federal government might have an interest or special expertise (federal Indian law being a prime example), they recommend that the Court call for the views of United States, represented by the Solicitor General – or a CVSG.³³ Each of these decisions is preceded by a preliminary memorandum from a law clerk.

³⁰ Cf. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L. J. __, __ (2008) (arguing that the Supreme Court bar, often former clerks, dominates advocacy before the Court).

³¹ E.g., Harvard Law Review, *supra* note 13, at 444 (reporting that the Court considered over 8900 certiorari petitions and granted 77 during the 2006 Term).

³² See Caldeira & Wright, *supra* note 5, at 816 (asserting that amicus briefs at the certiorari stage are critical to providing hints to the Court about the importance of a case).

³³ Professor Stras helpfully listed the various miscellaneous actions that a cert pool memo could recommend: “The most common variations ... included CVSG (call for the views of the Solicitor General), Summary Reverse, Summary Affirm, CFR (call for a response), CFRecord (call for the record), Hold, and GVR (grant, vacate, and remand).” Stras, *supra* note 8, at 978 n. 188.

In Indian law cases, a CVSG is a common cert pool recommendation because of the special experience – and the special relationship – that the federal government has with Indians and Indian tribes. A CFR is also common because the Court does not require a party opposing a cert petition to file a cert opposition brief. Both a CVSG and a CFR are strategically useful to a clerk as a means of garnering more information about a complex Indian law case. Holds and GVRs are often related to the likelihood that the Court will decide another case that may decide the outcome of a later case. Then, the clerk will recommend a Hold if a cert petition should wait for the Court to decide a case already on the Court’s calendar. Once the Court decides that case, the clerk will then recommend a GVR, asking the lower court to reconsider the same case given the new

Eight of the nine current Justices (Justice Stevens excluded) participate in what is known as the “cert pool,” whereby the law clerks of the eight Justices are assigned a docket number and asked to write a preliminary memorandum about the petition.³⁴ During the period in question in this study – the 1986 through the 1993 Terms – however, only Chief Justice Rehnquist and Justices White, Blackmun, O’Connor, Scalia, Kennedy, Souter, and Thomas participated in the pool. Justices Brennan, Marshall, and, as noted above, Stevens, did not participate, although they each received copies of each cert pool memo.³⁵

The cert pool memos are the Court’s first take on whether a case is “certworthy,” an internal term of art that can be best defined by referring to Supreme Court Rule 10, which governs the exercise of judicial discretion the Court is allowed when making decisions on cert petitions. Rule 10 indicates that the Court will review petitions for numerous factors, including: (1) whether “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;”³⁶ (2) whether “a United States court of appeals ... has decided an important federal question in a way that conflicts with a decision by a state court of last resort;”³⁷ (3) whether “a United States court of appeals ... has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power;”³⁸ (4) whether “a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;”³⁹ (5) whether “a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court;”⁴⁰ or (6) whether “a state court or a United States court of appeals ... has decided an important federal question in a way that conflicts with relevant decisions of this Court.”⁴¹ Running throughout the rule is the requirement that the question presented must be “important.” Rule 10 also

precedent. Summary reversals, summary affirmances, and CFRecords are very rare in the sample studied here.

³⁴ See Stras, *supra* note 8, at 953.

³⁵ See *id.* at 953.

³⁶ SUP. CT. RULE 10(a).

³⁷ *Id.*

³⁸ *Id.*

³⁹ SUP. CT. RULE 10(b).

⁴⁰ SUP. CT. RULE 10(c).

⁴¹ *Id.*

states that “[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”⁴²

Primarily, the Court looks for cases in which the lower courts are split or lower court decisions that conflict with the Court’s own precedents.⁴³ In the rare circumstance where a lower court has made a decision that appears to be an exceptional departure from normal “proceedings,” the Court may be inclined to exercise its supervisory power. But the Court avoids petitions asking it to review the lower court’s findings of fact, which are entitled to deference, or application of a settled legal standard to specific facts. In the parlance of the cert pool memo, cases in which there is no split in authority are “splitless.” Cases in which a party is seeking cert asking the Court to review a lower court’s application of specific facts to a settled legal principle are “factbound.” It is clear from reading the cert pool memos contained in Justice Blackmun’s archives that the vast majority of Indian law-related cert petitions are “factbound” or “splitless” – and often both.

The cert pool memos feature recommendations from the clerks on whether to grant or deny a petition, or in other cases to seek the views of the Solicitor General or hold a case. These recommendations often are hedged, however, by a note that a case is a “close call.” Moreover, not even the clerks know for certain when the Court will find a case “important” enough to justify the granting of a cert petition. There may be clear splits between circuits that the Court might find to be not important enough to resolve. In other instances, the clerks note that a split is weak or illusory, which could mean that there may appear to be a split in authority, but one of the lower court cases forming the split might have been resolved by alternative means. Or the language in one of the lower court cases forming the split is dicta or the kind of dispute creating the split is unlikely to recur. In short, however, most cases that are important enough are placed on the so-called “discuss list.”

On the relatively rare occasion when a cert pool memo recommends anything other than a straight denial, the Court often will discuss the case to some extent. Justice Blackmun appears to have taken the time to annotate his docket sheet when the Court voted in conference on whether to grant or deny a cert petition.

⁴² SUP. CT. RULE 10.

⁴³ See REHNQUIST, *supra* note 14, at 265.

II. The Rise and Fall of Federal Indian Law

A. The Court's Indian Law Docket (1959-Present)

Using the United States Law Week classifications of “Indians” or “Native Americans,” supplemented by Westlaw’s “Indians” headnote category, the Court decided 130 federal Indian law cases.⁴⁴ On the merits, tribal interests (Indians, Indian tribes, and parties directly or indirectly representing tribal interests) won 60 cases, lost 66 cases, with four cases considered a tie.

From the 1959 through the 1985 Terms, the Court issued 82 opinions on the merits during this period, with tribal interests (Indians, Indian tribes, and parties directly or indirectly representing tribal interests) winning 49 cases and losing 33 cases.

From the 1986 through the 2006 Terms, the Court issued 48 opinions on the merits during this period, with tribal interests (Indians, Indian tribes, and parties directly or indirectly representing tribal interests) winning 11 cases, losing 33 cases, and with three cases considered a tie.

During the period of this study (the 1986 Term through the 1993 Term), there were 162 paid certiorari petitions involving federal Indian law. The Court granted certiorari in 24 of these petitions,⁴⁵ and in another

⁴⁴ See Turtle Talk Blog, *Supreme Court*, <http://turtletalk.wordpress.com/supreme-court-indian-law-cases/> (listing all the federal Indian law Supreme Court cases and their outcomes since 1959).

⁴⁵ See *Dept. of Taxation and Finance of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994) (No. 93-377); *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993) (No. 92-259); *South Dakota v. Bourland*, 508 U.S. 679 (1993) (No. 91-2051); *Lincoln v. Vigil*, 508 U.S. 182 (1993) (No. 91-1833); *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 502 U.S. 1053 (1992) (No. 91-907) (GVR); *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992) (Nos. 90-408 & 90-577); *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) (No. 89-1782); *Puckett v. Native Village of Tyonek*, 499 U.S. 901 (1991) (No. 89-609) (GVR); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991) (No. 89-1322); *Employment Division v. Smith*, 494 U.S. 872 (1990) (No. 88-1213) (Smith II); *Wyoming v. United States*, 492 U.S. 406 (1989) (No. 88-309) (affirmed by an equally divided Court); *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989) (No. 88-266); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (Nos. 87-1622, 87-1697 & 87-1711); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (No. 87-1327); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (No. 87-980); *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988) (No. 86-1013); *Employment Division v. Smith*, 485 U.S. 660 (1988) (Nos. 86-946 & 86-947) (Smith I); *Oklahoma Tax Commission v. Graham*, 484 U.S. 973 (1987) (No. 87-635) (GVR); *Hodel v. Tribal Village of Akutan*, 480 U.S. 943 (1987) (Nos. 86-303 & 86-304) (GVR).

three unpaid petitions.⁴⁶ Of the 24 grants of paid petitions, the Court issued a GVR in five of these petitions. After the consolidation and remand of some petitions (and with one affirmed by an equally divided Court), the Court issued 17 opinions on the merits, with tribal interests winning three and losing fourteen, an 18 percent win rate.

Also during the period of this study, states, state subdivisions, and state officials filed 29 certiorari petitions against tribal interests.⁴⁷ The Court granted certiorari in 13 cases, with two cases remanded. The states won eight of these cases on the merits, losing three. Indians and Indian tribes filed 28 petitions against state interests, with the Court granting certiorari in only one of these cases, resulting in a loss.⁴⁸ The success rate

⁴⁶ See *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281); *Negonsott v. Samuels*, 507 U.S. 99 (1993) (No. 91-5397); *Duro v. Reina*, 495 U.S. 676 (1990) (No. 88-6546).

⁴⁷ The Court denied certiorari in *City of Timber Lake v. Cheyenne River Sioux Tribe* (No. 93-1753); *New Mexico v. Navajo Nation* (No. 92-1238); *County of Inyo v. Gutierrez* (No. 92-686); *Wisconsin v. Lac du Flambeau Band of Chippewa Indians* (No. 91-2037); *Ponca City v. Housing Authority of the Kaw Tribe of Indians* (No. 91-1480); *Washington v. Colville Confederated Tribes* (No. 91-569); *South Dakota v. Spotted Horse* (No. 90-1003); *Connecticut v. Mashantucket Pequot Tribe* (No. 90-871); *South Dakota v. Rosebud Sioux Tribe* (No. 90-749); *Nevins v. Hoopa Valley Tribe* (No. 89-686); *South Carolina v. Catawba Indian Tribe* (No. 88-1752); *Alaska v. Kanaitze Indian Tribe* (No. 88-1642); *Iowa v. United States* (No. 88-1636); *Oklahoma Tax Commission v. Muscogee (Creek) Nation* (No. 87-1068); *Montana v. Crow Tribe* (No. 87-343); *Jackson County v. Swayney* (No. 86-1978); *McKenzie County Social Services Board v. V.G.* (No. 86-996); *New Mexico Taxation Dept. v. Ramah Navajo School Board* (No. 86-367).

⁴⁸ The Court denied certiorari in *Lummi Indian Tribe v. Whatcom County* (No. 93-1742); *United Keetoowah Band v. Oklahoma Tax Commission* (No. 93-616); *Lummi Indian Tribe v. Washington* (No. 92-1445); *Catawba Indian Tribe v. South Carolina* (No. 92-1088); *Elliott v. Vermont* (No. 92-877); *Sac & Fox Nation v. Oklahoma Tax Commission* (No. 92-499); *Wyandotte Indian Tribe v. Oklahoma ex rel. Oklahoma Tax Commission* (No. 90-1756); *Oyler v. Kansas* (No. 90-1704); *Indian Child Welfare Act Coordinator of the Juvenile Court of the Cheyenne River Sioux Tribe v. Chester County Dept. of Social Services* (No. 90-1493); *King Island Native Community v. Montana Dept. of Social Services* (No. 90-1306); *Cross v. Washington* (No. 90-1162); *Osceola v. Florida Dept. of Revenue* (No. 90-653); *Oyler v. Jones* (No. 90-223); *Ahtna, Inc. v. Alaska* (No. 89-1446); *Hoopa Valley Tribe v. Nevins* (No. 89-890); *Oneida Indian Nation of Wisconsin & Oneida Indian Nation of N.Y. v. New York* (Nos. 88-1758 & 88-1915); *Omaha Indian Tribe v. Jackson* (No. 88-1426); *Shoshone Tribe v. Wyoming* (No. 88-492); *John v. City of Salamanca* (No. 88-84); *Winnebago Tribe v. Dept. of Revenue of Iowa* (No. 87-1480); *Makah Tribe v. Washington* (No. 87-1390); *Coeur d'Alene Tribe v. Idaho* (No. 87-199); *Chemehuevi Indian Tribe v. Cal. State Board of Equalization* (No. 86-1574); *Yankton Sioux Tribe v. South Dakota* (No. 86-1436); *White Mountain Apache Tribe v. Williams* (No. 86-814); *Chunie v. Ringrose* (No. 86-748); *Native Village of Nanana v. Alaska* (No. 86-662).

of states in the certiorari process was 45 percent (13 out of 29 petitions), while the success rate for tribal interests was, in contrast to the state success rate, a paltry four percent (one out of 28 petitions). Private parties (non-Indian and non-states) filed 37 certiorari petitions and the Court granted the five of the petitions, a 14 percent grant rate. The Court granted certiorari in 60 percent of the petitions filed by the United States (three out of five).

B. The Court’s Indian Cases during the Period of Study (OT 1986-1993).

This period of time includes the first years in Professor Alex Skibine’s survey arguing the Court’s shift against tribal interests began in 1987 after the Court decided *California v. Cabazon Band of Mission Indians*.⁴⁹ He found that since that case, the Court has ruled against tribal interests 75 percent of the time (excluding four neutral cases).⁵⁰ In contrast, Professor Skibine found that Indian tribes won between 55 and 60 percent of their cases from the beginning of the “modern era” of federal Indian law⁵¹ in 1959 to 1987.⁵²

During this period, the Court decided several cases that contributed fundamental, yet subtle, alterations to the foundational principles of federal Indian law. The first significant subject area addressed by the Court during this period involved Indian religious freedom. In *Lyng v.*

The Court technically granted one cross-petition filed by a tribe against a state subdivision, *Yakima Indian Nation v. County of Yakima* (No. 90-577), but never reached the merits of the Nation’s claim (that the County lacked the power to tax any Indian lands). *Cf.* Cert Pool Memo at 6, *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992),

[http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/1991%20GRANTE D-pdf/90-408.pdf](http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/1991%20GRANTE%20D-pdf/90-408.pdf) (“The Yakima Nation’s arguments on [cross-petition], where they are the [Ninth Circuit] incorrectly decided that [25 U.S.C. § 349] continues to permit state taxation of fee-patented [Indian] lands are largely in error. As the County points out in its [response to the cross-petition], the Yakima Nation cites to cases that are inapposite.”).

⁴⁹ 480 U.S. 202 (1987).

⁵⁰ See Alex Tallchief Skibine, *Teaching Indian Law in an Anti-Tribal Era*, 82 N.D. L. REV. 777, 781 (2006); see also David H. Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Colorblind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280-81 (2001) (“Tribal interests have lost about 77% of all the Indian cases decided by the Rehnquist Court in its fifteen terms, and 82% of the cases decided by the Supreme Court in the last ten terms. This dismal track record stands in contrast to the record tribal interests chalked up in the Burger years, when they won 58% of their Supreme Court cases.”) (footnotes omitted).

⁵¹ See WILKINSON, *supra* note 9, at 1 (citing *Williams v. Lee*, 358 U.S. 217 (1959)).

⁵² See Skibine, *supra* note 50, at 781.

*Northwest Indian Cemetery*⁵³ and *Employment Division v. Smith II*,⁵⁴ the Court denigrated the claims of Indian religious freedom, favoring federal land agencies and state employment agencies. The second significant subject area was the Indian Child Welfare Act. In *Mississippi Band of Choctaw Indians v. Holyfield*, the Court held that states and private parties could not undermine the purposes of the Indian Child Welfare Act⁵⁵ by moving Indian children out of Indian Country as a means of avoiding the Act's application.⁵⁶

The third significant subject area involved the federal preemption of state laws under federal Indian law. *Cotton Petroleum v. New Mexico*, in which the Court declined to strike down a state law that taxed the business activities of nonmembers doing business in Indian Country,⁵⁷ in the words of one clerk, "substantially alter[ed] Indian implied preemption analysis in general."⁵⁸ The fourth significant subject area involved the scope and contours of *Montana v. United States*.⁵⁹ In *Brendale v. Yakima Indian Nation*,⁶⁰ followed by *South Dakota v. Bourland*,⁶¹ the Court made clear that the rule stated in *Montana* – that tribes presumptively do not have civil jurisdiction over nonmembers – applied not just to the very narrow fact pattern of *Montana*, but to all cases involving tribes and nonmembers.

The Court decided two important Indian law cases after granting the certiorari petitions filed *in forma pauperis* – *Duro v. Reina*⁶² and *Hagen v. Utah*.⁶³ *Duro*'s importance declined after Congress overruled it by statute a year after its announcement,⁶⁴ but *Hagen*'s importance in the law of reservation diminishment and treaty rights cannot be understated.⁶⁵

⁵³ 485 U.S. 439 (1988).

⁵⁴ 494 U.S. 872 (1990).

⁵⁵ 25 U.S.C. § 1901 et seq.

⁵⁶ 490 U.S. 30 (1989).

⁵⁷ 490 U.S. 163 (1989).

⁵⁸ Cert Pool Memo at 11, Rodney, Dickason, Sloan, Akin & Robb, P.A. v. Revenue Div. of the Dept. of Taxation of the State of New Mexico, 490 U.S. 1043 (1989) (No. 88-773),

<http://epstein.law.northwestern.edu/research/BlackmunMemos/1988/DM1988-pdf/88-773.pdf>.

⁵⁹ 450 U.S. 544 (1981).

⁶⁰ 492 U.S. 408 (1989).

⁶¹ 508 U.S. 679 (1993).

⁶² 495 U.S. 676 (1990).

⁶³ 510 U.S. 399 (1994).

⁶⁴ See *United States v. Lara*, 541 U.S. 193, 197-98 (2004); Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 AM. INDIAN L. REV. 109 (1992);

But what the Court did not do is almost as significant. The Court declined to hear a multitude of cases in which a state government or agency successfully opposed the exercise of Indian treaty rights,⁶⁶ in which a state or the federal government arguably dispossessed Indian peoples of land and property,⁶⁷ and in which lower courts arguably circumscribed the authority of Indian tribes without reference to Congressional authority to do so.⁶⁸ All of these cases had national import in Indian Country and some of them involved questions that remain open and ambiguous to this day. Each of these cases fit within the broad categories created by the Judges' Bill in 1925 – many of them were not “patently uncertworthy” and many of them implicated an important federalism interest.

Federal Indian law scholars have long theorized about the change in federal Indian law outcomes, with most criticizing the Court's direction,⁶⁹ others explaining or justifying it,⁷⁰ and still others

Alex Tallchief Skibine, *Duro v. Reina and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767 (1993).

⁶⁵ See, e.g., Cert Pool Memo at 11, *Sokaogon Chippewa Community v. Exxon Corp.*, 510 U.S. 1196 (1994) (No. 93-1223), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Denied-pdf/93-1223.pdf> (annotation) (“It’s hard to say whether the decision below is correct. Regardless, in view of *Hagen*, there seems to be little reason to take this case.”).

⁶⁶ E.g., *Elliott v. State* (No. 92-877); *Makah Tribe v. Washington* (No. 87-1390); *Western Shoshone National Council v. Molini* (No. 91-1916); *Lummi Indian Tribe v. Washington* (No. 92-1445); *Lummi Indian Tribe v. Whatcom County* (No. 93-1742).

⁶⁷ E.g., *Nichols v. Rysavy* (No. 87-73); *Pawnee v. United States* (No. 87-1312); *Oneida Indian Nation v. New York* (Nos. 88-1758 & 88-1915); *Littlewolf v. Lujan* (No. 89-538); *Pueblo of Santo Domingo v. Real* (No. 89-1716); *Havasupai Tribe v. United States* (No. 91-1124); *Pueblo of Santo Domingo v. Thompson* (No. 91-1179); *Cherokee Nation v. United States* (No. 91-1354).

⁶⁸ E.g., *Totus v. Holly* (No. 86-1912); *Navajo Tax Commission v. Pittsburgh & Midway Coal Mining Co.* (No. 90-635); *Circle Native Community v. Alaska Dept. of Health and Social Services* (No. 92-1536); *Anderson v. Wisconsin Dept. of Revenue* (No. 92-5988); *Cabazon Band of Mission Indians v. National Indian Gaming Commission* (No. 93-1724).

⁶⁹ E.g., DAVID E. WILKINS, & K. TSANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* (2001); ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005); Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L. J. 113 (2002); Philip P. Frickey, *A Common Law for Our Age of Colonialism: A Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L. J. 1 (1999); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993); Philip P. Frickey, *Congressional Intent, Practical*

recommending dramatic law reform.⁷¹ Dean David Getches performed an empirical study of the Court's decisionmaking process in the context of federal Indian law, arguing that the Court appears to be altering Indian law doctrines to remove their traces of exceptionalism or other unique characteristics – in other words, moving the Indian law field into the “mainstream.”⁷² Like Dean Getches, Professor Philip Frickey argues that

Reasoning, and the Dynamic Nature of Federal Indian Law, 78 CAL. L. REV. 1137 (1990); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001); Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641 (2003); Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267 (2000); Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1 (2003); Rebecca Tsosie, *Tribalism, Constitutionalism, and Cultural Pluralism: Where Do Indigenous Peoples Fit within Civil Society?*, 5 U. PA. J. CONST. L. 357 (2003); Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405 (2003); Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L. REV. 1 (1991).

For critiques of particular cases or lines of cases, see Kristen A. Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 TULSA L. J. 73 (1999); Kathryn E. Fort, *The (In)Equities of Federal Indian Law*, 54 FED. LAW., March/April 2007, at 32; Robert Laurence, *Don't Think of a Hippopotamus: An Essay on First-Year Contracts, Earthquake Prediction, Gun Control in Baghdad, The Indian Civil Rights Act, The Clean Water Act, and Justice Thomas's Separate Opinion in United States v. Lara*, 40 TULSA L. REV. 137 (2004); John P. LaVelle, *Sanctioning a Tyranny: The Diminishment of Ex parte Young, Expansion of Hans Immunity, and Denial of Indian Rights in Coeur d'Alene Tribe*, 31 ARIZ. ST. L. J. 787 (1997); John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the Cohen's Handbook Cutting Room Floor*, 38 CONN. L. REV. 731 (2006); Judith V. Royster, *Montana at the Crossroads*, 38 CONN. L. REV. 631 (2006); Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605 (2006).

⁷⁰ See L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702 (2001). Cf. Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L. J. 537 (1996).

⁷¹ See Hope M. Babcock, *A Civic-Republican Vision of “Domestic Dependent Nations” in the Twenty-First Century: Tribal Sovereignty Re-Envisioned, Reinvigorated, and Re-Empowered*, 2005 UTAH L. REV. 443; Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049 (2007); Alex Tallchief Skibine, *Redefining the Status of Indian Tribes within “Our Federalism”: Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667 (2006).

⁷² See Getches, *Beyond Indian Law*, *supra* note 50; see also Getches, *Conquering the Cultural Frontier*, *supra* note 69, at 1595-1617.

the Court is uncomfortable with the “exceptionalism” of federal Indian law and seeks to force the field into conformance with the rest of constitutional public law.⁷³ The outcomes in the Supreme Court’s recent Indian law decisions offer strong circumstantial evidence that the Court’s agenda includes reeling back the advances that tribal interests made during the Warren and Burger Courts. But there is much more to the story.

My study, unlike doctrinal or theoretical studies, uses empirical evidence about the Supreme Court’s certiorari process. In large part, I focus on the cert pool memos filed by the Court’s clerks. I find that the structure and mechanics of the certiorari process – especially the cert pool – discriminates against tribal interests before any of the cert pool Justices ever reviews a single Indian law petition. Thus, the Court tends to take seriously the petitions filed by those opposing tribal interests, especially those of state governments.

III. Federal Indian Law in the Supreme Court Cert Pool

The bare statistics of the Supreme Court’s certiorari decisions in federal Indian law tell a powerful story. In the period under study (1986-1994), the Court granted eleven certiorari petitions filed by state governments seeking review of a lower court decision favoring tribal interests,⁷⁴ out of 29 petitions,⁷⁵ or about one-third of the time. But when a tribal interest brought a certiorari petition against a state government, a state agency, or a local governmental subdivision, the Court granted one petition out of a possible 28.⁷⁶ The only certiorari petitions filed by a tribal interest the Court granted involved individual Indian respondents in one

⁷³ See Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431 (2005).

⁷⁴ The Court granted certiorari in *Dept. of Taxation and Finance of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994) (No. 93-377); *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993) (No. 92-259); *South Dakota v. Bourland*, 508 U.S. 679 (1993) (No. 91-2051); *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992) (Nos. 90-408 & 90-577); *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) (No. 89-1782); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991) (No. 89-1322); *Employment Division v. Smith*, 494 U.S. 872 (1990) (No. 88-1213) (Smith II); *Wyoming v. United States*, 492 U.S. 406 (1989) (Nos. 88-309, 88-494 & 88-553) (affirmed by an equally divided Court); *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989) (No. 88-266); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (Nos. 87-1622, 87-1697 & 87-1711); *Employment Division v. Smith*, 485 U.S. 660 (1988) (Nos. 86-946 & 86-947) (Smith I).

⁷⁵ See note 47, *supra*.

⁷⁶ See note 48, *supra*.

case and three unpaid *in forma pauperis* prisoner petitions brought by Indian convicts.⁷⁷

This Part attempts to theorize as to the back story to these bare statistics by first offering the easy argument – that the Supreme Court’s “agenda” involves rolling back the rights of tribal interests – and then offering a more nuanced argument – that the certiorari process prejudices tribal interests.

A. Agenda-Setting and Federal Indian Law

Scholars studying the certiorari process have long asserted that it has a significant impact on the cases the Court decides to hear. This is commonly referred to as “agenda-setting.”⁷⁸ A whole body of scholarly literature is devoted to exposing the Court’s political leanings in both its agenda setting, and also its decisionmaking process on the merits of its cases. There has been a limited amount of academic literature on agenda-setting and the Supreme Court in the context of federal Indian law.⁷⁹ The first study covered the periods of 1969 to 1985 and concluded that tribal interests won more than they lost.⁸⁰ A second study found that judicial ideology, the participation of the Solicitor General, and questions involving sovereignty would be valuable predictors of federal Indian law outcomes.⁸¹ The final study covered the years 1969 to 1992 noted that the Rehnquist Court had already reversed course on Indian law in comparison to the Burger Court.⁸² This study added that judicial ideology, taking the form of an error correction strategy, and the subject matter of the cases figured into the Court’s Indian law agenda.⁸³

⁷⁷ See *Hagen v. Utah*, 508 U.S. 399 (1994) (unpaid petition); *Negonsott v. Samuels*, 507 U.S. 99 (1993) (same); *Duro v. Reina*, 495 U.S. 676 (1990) (same); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1988) (individual non-Indian respondent).

⁷⁸ E.g., Gregory A. Caldera & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988); Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727 (2001).

⁷⁹ See John R. Hermann, *American Indians in Court: The Burger and Rehnquist Years*, 37 SOC. SCI. J. 245 (2000); John R. Hermann, *American Indian Interests and Supreme Court Agenda Setting: 1969-1992 October Terms*, 25 AM. POLITICS Q. 241 (1997); John R. Hermann & Karen O’Connor, *American Indians and Burger Court*, 77 SOC. SCI. Q. 127 (1996).

⁸⁰ See Hermann & O’Connor, *supra* note 79, at 136.

⁸¹ See Hermann, *American Indian Interests*, *supra* note 79, at 253-54.

⁸² See Hermann, *American Indians in Court*, *supra* note 79, at 254.

⁸³ See *id.*

What these studies did not (and could not) address is how the Court set its agenda in the certiorari process, as well as the impact of the cert pool. Like more recent studies of the Court's agenda setting in general,⁸⁴ I conclude that the data in the cert pool is inconclusive as to a federal Indian law "agenda."

I highlight two areas of study. First, there is some qualitative material in the cert pool memo, much of it authored by the clerks for Justice Blackmun, highlighting the agenda-setting preferences for individual Justices, but the overall value of the material is extremely limited. Second, I review the Justice Blackmun's docket sheets, which record the votes of individual Justices during the certiorari process.

1. Agenda Preferences of Individual Justices

Justice Blackmun's clerks recognized that he was the leading scholar of federal Indian law on the Court and perhaps the leading advocate for tribal interests during the period studied.⁸⁵ The notion of a "defensive denial," where a Justice votes to deny certiorari even though he or she wants the legal question answered for strategic purposes,⁸⁶ appears explicitly in the cert pool memos in annotations by Justice Blackmun's clerks.⁸⁷ One example is the annotation of one clerk who wrote in

⁸⁴ See Cordray & Cordray, *The Philosophy of Certiorari*, *supra* note 20, at 409 (collecting studies).

⁸⁵ See Cert Pool Memo at 14, *Burlington Northern R.R. Co. v. Blackfoot Tribe*, 505 U.S. 1212 (1992), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/Denied-pdf/91-545.pdf> ("You and [another clerk] are undoubtedly the Indian tax experts..., but [respondents] appear correct that there is a distinction [between] trust lands and fee lands.") (annotation by Blackmun clerk); Cert Pool Memo at 11, *South Carolina v. Catawba Indian Tribe*, 491 U.S. 906 (1989) (No. 88-1752), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1988/DM1988-pdf/88-1752.pdf> ("You dissented in [*South Carolina v. Catawba Indian tribe, Inc.*, 476 U.S. 498 (1986)], believing that Congress did not intend for state statute of limitations to apply. Even assuming that it does, I do not think you would disagree with CA4's consideration of Indian interests in applying state law.") (annotation of Blackmun clerk); Cert Pool Memo at 8, *Lummi Indian Tribe v. Whatcom County*, 512 U.S. 1228 (1994) (No. 93-1742), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Denied-pdf/93-1742.pdf> ("Questionable, particularly in light of your jurisprudence in this area, but not necessarily certworthy.") (annotation of Blackmun clerk).

⁸⁶ See PERRY, *supra* note 4, at 198-212, cited in LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 80 (2003); Robert Boucher & Jeffrey Segal, *Supreme Court Justices as Strategic Decision Makers: Offensive Grants and Defensive Denials*, 54 J. POL. 824 (1995).

⁸⁷ See Cert Pool Memo at 16, *Parisien v. Twin City Construction*, 490 U.S. 1085 (1989) (No. 88-1618),

Cherokee Nation v. United States:⁸⁸ “I would not want to see the [Court] take this case. Because it is not one the [Court] would handle well, it would likely declare the provision to be unenforceable. (Imagine the [opinion] of Scalia, J.) I think in the long run your friends are best served by denying cert.”⁸⁹ Another example is the annotation in *Woods Petroleum Corp. v. Cheyenne-Arapaho Tribes*:⁹⁰ “I agree with poolwriter and the [Solicitor General] that this [petition] should be denied. Moreover, a grant would only harm these Indians.”⁹¹

Likely because the data sample originates with Justice Blackmun’s papers, there is far less material about the other Justices. However, it is worth discussing. Most notably, and perhaps confirming what Dean David Getches and others had written about Justice O’Connor’s personal interests in western water law,⁹² one Blackmun clerk took the unusual step of annotating the cert pool memo in *California v. United States*,⁹³ a part of the decades-long dispute over the Colorado River, to ask, “I wonder what [Justice O’Connor] will think of this?”⁹⁴

<http://epstein.law.northwestern.edu/research/BlackmunMemos/1988/DM1988-pdf/88-1618.pdf> (annotation).

⁸⁸ 504 U.S. 910 (1992).

⁸⁹ Cert Pool Memo at 11, *Cherokee Nation of Oklahoma v. United States*, 504 U.S. 910 (1992) (No. 91-1354), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/Denied-pdf/91-1354.pdf> (annotation).

⁹⁰ 507 U.S. 1003 (1993).

⁹¹ Cert Pool Memo at 8, *Woods Petroleum Corp. v. Cheyenne Arapaho Tribes*, 507 U.S. 1003 (1993) (Nos. 92-970 & 92-1286), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/92-970.pdf> (annotation).

⁹² See Getches, *Beyond Indian Law*, *supra* note 50, at 277-78; Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. COLO. L. REV. 683, 744-45 (1997).

⁹³ 490 U.S. 920 (1989) (per curiam).

⁹⁴ Cert Pool Memo at 18, *California v. United States*, 490 U.S. 920 (1989) (No. 87-1165), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1988/GM-1988-pdf/87-1165.pdf> (annotation).

Justice Blackmun’s clerk also noted that Justice O’Connor appeared to be unusually interested in cases that implicated the State of Arizona. See Cert Pool Memo at 1, *Connecticut v. Mashantucket Pequot Tribe*, 499 U.S. 975 (1991) (No. 90-871), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1990/Denied-pdf/90-871.pdf> (“I don’t see why [Justice O’Connor] is so worked up over this case (the poolwriter who suggested denial clerks for her) unless it’s [because Arizona] urged a grant.”) (annotation).

Blackmun's clerks also recognized Chief Justice Rehnquist and Justice Scalia as two of the major opponents to claims made by tribal interests. In addition to the example above regarding the Cherokee Nation petition, a supplemental memorandum drafted by a Blackmun clerk in the case *Puckett v. Native Village of Tyonek*⁹⁵ demonstrated the Blackmun clerks' suspicion of the Chief Justice, asserting that Chief Justice Rehnquist "may intend to use the GVR as a means of reflecting his disagreement with [the Ninth Circuit]'s decision – an inappropriate use of the GVR mechanism."⁹⁶ This material demonstrates little more than there appeared to be some procedural and ideological disputes between the various chambers.

2. The "Discuss List" and Certiorari Votes

The agenda and ideology of the Court's members is apparent in key areas of this portion of the study – votes for certiorari – especially when the petitioner is a state, state agency, or state subdivision. First, enough Justices vote in favor of granting certiorari so that a significant majority of petitions filed by states that reach the discuss list are granted. Second, the votes correspond to some extent with the generally recognized political tendencies of the Justices. Without a doubt, Chief Justice Rehnquist and Justice White voted for certiorari far more than any of the other Justices. Justice White's voting patterns can, perhaps, be traced to his tendency to vote for certiorari far more than the other Justices, as has been recognized elsewhere.⁹⁷

Thirty-nine Indian law cases reached the discuss list during the period of study. Justice White voted to grant certiorari in 24 out of the 31 Indian law cases (74 percent) on the discuss list during his tenure; Chief Justice Rehnquist in 64 percent (25 out of 39); Justice O'Connor in 55 percent (21 out of 38); Justice Stevens in 42 percent (16 out of 38); Justice Thomas in 42 percent (five out of 12); Justice Souter in 39 percent (seven out of 18); Justice Kennedy in 39 percent (13 out of 34); Justice Brennan in 37 percent (seven out of 19); and Justice Blackmun in 34 percent (13

⁹⁵ 499 U.S. 901 (1991).

⁹⁶ Supplemental Memo, *Puckett v. Native Village of Tyonek*, 499 U.S. 901 (1991) (No. 89-609), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1990/DeniedMemos90-pdf/89-609.pdf> (discussing *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991)).

⁹⁷ See Schoen & Walhbeck, *supra* note 7, at ___ (hypothesis no. 6 – "Justice Byron R. White will be more apt to place cases on the discuss list than other associate justices.").

out of 38). On the other end, Justice Marshall voted to grant in only 15 percent of cases (four out of 27), while Justice Scalia voted to grant in 29 percent (11 out of 38). Justices Powell and Ginsburg voted in fewer than five cases.

States, state agencies, and state subdivisions filed 21 of the 39 cases on the discuss list. Out of 29 overall petitions filed by a state, 72 percent reached the discuss list. Chief Justice Rehnquist and Justice White again led the charge, with the Chief Justice voting to grant certiorari in 80 percent (16 out of 20) of cases and Justice White in 79 percent (15 out of 19 cases). Justice O'Connor was next with 62 percent of her votes in favor (13 out of 21). Justice Scalia was next with fifty percent (seven out of 14 cases), a bit of a departure from his overall negative rate. Justice Brennan voted to grant in 40 percent of the cases (four out of ten). Justice Stevens followed with 37 percent (seven out of 19). Justice Kennedy voted to grant only five out of 17 state petitions (29 percent). Justice Blackmun voted to grant certiorari five times out of 19 cases (26 percent), Justice Souter in 22 percent of cases (two out of nine), and Justice Marshall voted only twice out of 15 petitions to grant certiorari (13 percent).

Only three paid tribal certiorari petitions reached the discuss list out of 28 (11 percent), while five unpaid petitions did. This percentage is far less than the rule of thumb that only 70 percent of the petitions filed are "patently uncertworthy."⁹⁸

There also appears to be a correlation between the conservative ideology of some Justices in voting for certiorari once the cases reach the discuss list, with Chief Justice Rehnquist and Justice Scalia betraying their hands. Justice O'Connor's votes in favor of certiorari are also consistent with her generally conservative voting patterns, as are Justice White's (although his certiorari voting patterns are unusual).

But the much more important question appears, after these inconclusive statistics, why don't petitions filed by tribal interests reach the discuss list at all?

B. Applying the Criteria to Indian Law Cert Petitions

1. Circuit Splits and Splits in Authority

As Rule 10 suggests, the best way to convince the Court to grant cert in a particular case is to identify a circuit split or a conflict with

⁹⁸ See Byron R. White, *The Work of the Supreme Court: A Nuts and Bolts Description*, 74 N.Y. B.J., October 1982, at 346, 349, cited in Schoen & Wallbeck, *supra* note 7.

Supreme Court precedent.⁹⁹ A significant portion of the cert pool memos discuss the relative merits of the petitioners' claims of a circuit split or conflict with the Court's cases. However, in general there are few splits in authority when it comes to federal Indian law, perhaps because between 80 and 90 percent of the cert petitions in the sample originated in the federal or state courts located within just three Circuits – the Eighth, Ninth, and Tenth Circuits. Cert petitions labeled “splitless” usually are relegated to the dust bin.¹⁰⁰

The Court granted cert in several cases where a split existed. *Hoffman v. Native Village of Noatak* (later *Blatchford v. Native Village of Noatak*) involved a split between the Eighth and Ninth Circuits,¹⁰¹ as did *Duro v. Reina*.¹⁰² *Negonsott v. Samuels* involved a circuit split between the

⁹⁹ See PERRY, *supra* note 4, at 277; Cordray & Cordray, *The Philosophy of Certiorari*, *supra* note 20, at 407 (collecting studies).

¹⁰⁰ *E.g.*, Cert Pool Memo at 11, *Nichols v. Rysavy*, 484 U.S. 848 (1987) (No. 87-73), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1987/Denied-pdf/87-73.pdf>; Cert Pool Memo at 5, *Ducheneaux v. Secretary of Interior*, 486 U.S. 1055 (1988) (No. 87-1732), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1987/Denied-pdf/87-1732.pdf>; Cert Pool Memo at 8, *Lummi Indian Tribe v. Whatcom County, Wash.*, 512 U.S. 1228 (1994) (No. 93-1742), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Denied-pdf/93-1742.pdf>.

Non-tribal interests faced the same fate. *E.g.*, Cert Pool Memo at 8, *New Mexico Taxation and Revenue Dept. v. Ramah Navajo School Board*, 479 U.S. 941 (1986) (No. 86-367), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1986/MissedMemos-pdf/86-367.pdf>; Cert Pool Memo at 8, *American Management and Amusement, Inc. v. Barona Group of Capitan Grande Band of Mission Indians*, 487 U.S. 1247 (1988) (No. 87-1790), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1988/DM1988-pdf/87-1790.pdf>.

¹⁰¹ See Cert Pool Memo at 1-2, *Hoffman v. Native Village of Noatak*, 501 U.S. 775 (1991) (No. 89-1782) (comparing *Standing Rock Sioux Tribe v. Dorgan*, 505 F.2d 1135 (8th Cir. 1974), to *Native Village of Noatak v. Hoffman*, 896 F.2d 1157 (9th Cir. 1162-65 (9th Cir. 1990)), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1990/Granted-pdf/89-1782.pdf>.

¹⁰² See Cert Pool Memo at 1-2, *Duro v. Reina*, 495 U.S. 676 (1990) (No. 88-6546) (noting “direct conflict” between *Greywater v. Joshua*, 846 F.2d 486 (8th Cir. 1988), and *Duro v. Reina*, 851 F.2d 1136 (9th Cir. 1987), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1989/GM-1989-pdf/88-6546.pdf>.

Eighth and Tenth Circuits.¹⁰³ *Hagen v. Utah* involved a split in authority between the Tenth Circuit and the Utah Supreme Court.¹⁰⁴ *County of Yakima v. Confederated Tribes and Bands of the Yakima Nation* involved a conflict between the Ninth Circuit's lower court decision and Supreme Court precedents.¹⁰⁵ *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.* (twice) involved a conflict between the lower court (New York Court of Appeals) and Supreme Court precedent (various Indian preemption cases).¹⁰⁶ *Rhodes v. Vigil* (later *Lincoln v. Vigil*) involved a conflict between the Tenth Circuit's lower court decision, a D.C. Circuit opinion (authored by then-Judge Scalia), and Supreme Court

¹⁰³ See *Negonsott v. Samuels*, 507 U.S. 99, 101-02 & n. 1 (1993) (noting split between *Youngbear v. Brewer*, 415 F. Supp. 807 (N.D. Iowa 1976), *aff'd*, 549 F.2d 74 (8th Cir. 1977), and *Negonsott v. Samuels*, 933 F.2d 813 (10th Cir. 1991)).

¹⁰⁴ See Cert Pool Memo at 6-7, *Hagen v. Utah*, 510 U.S. 399 (1993) (No. 92-6281), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Granted-pdf/92-6281.pdf> (noting split between *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986), and *Utah v. Hagen*, 858 P.2d 925 (Utah 1992)).

¹⁰⁵ See Cert Pool Memo at 6, *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992) (Nos. 90-402 & 90-577), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/1991%20GRANTED-D-pdf/90-408.pdf> (arguing that the Ninth Circuit's remand of one issue is "less tenable" in light of *Brendale v. Yakima Indian Nation*, 492 U.S. 408 (1989)).

¹⁰⁶ See *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994) (No. 93-377), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Granted-pdf/93-377.pdf> (noting conflict between *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Nation*, 498 U.S. 505 (1991), and *Milhelm Attea & Bros., Inc. v. Dept. of Taxation and Finance of New York*, 615 N.E.2d 994 (1993)); Cert Pool Memo at 2, *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 502 U.S. 1053 (1992) (No. 91-907), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/Denied-pdf/91-907.pdf> (noting conflict between *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Nation*, 498 U.S. 505 (1991), and *Milhelm Attea & Bros., Inc. v. Dept. of Taxation and Finance of New York*, 564 N.Y.S.2d 491 (A.D. 1990), *appeal dismissed*, 575 N.E.2d 400 (N.Y. 1991)).

precedent.¹⁰⁷ The Eighth Circuit opinion in *South Dakota v. Bourland* conflicted with Supreme Court precedent.¹⁰⁸

In one instance, however, the Court granted cert in an Indian law case because of an erroneously diagnosed lower court split – *Oklahoma Tax Commission v. Sac and Fox Nation*.¹⁰⁹ The question the clerks thought the Court should decide was whether an Indian working in Indian Country, but living outside of Indian Country, was exempt from state taxation.

The cert pool memos demonstrated how federal Indian law can confuse even the most diligent attorneys. The cert pool memo, authored by a Justice White clerk, noted at first that the petitioner (the Oklahoma Tax Commission) had not alleged a circuit split.¹¹⁰ Additionally, the memowriter noted that *Sac and Fox* was an inappropriate vehicle because the lower court did not develop the record on the distinction between reservation land and trust land.¹¹¹ The open question, at that point, was whether Indian “trust land,” land held in trust by the federal government for the benefit of Indians or Indian tribes, was “Indian Country,” and

¹⁰⁷ See Cert Pool Memo at 16, *Rhodes v. Vigil*, 508 U.S. 182 (1993) (No. 91-1833), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Granted-pdf/91-1833.pdf> (“There is no clear split in authority, but the decisions below is certainly in tension with the Court’s decision in *American Hosp. Assn v. NLRB*, 111 S. Ct. 1539, 1545 (1991), and the D.C. Circuit’s approach [in] *International Union[, United Autoworkers v. Donovan]*, 746 F.2d 855 (CADDC 1984) (per Scalia, J.).”).

¹⁰⁸ See Cert Pool Memo at 1-2, *South Dakota v. Bourland*, 508 U.S. 679 (1993) (No. 91-2051), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Granted-pdf/91-2051.pdf> (noting the Eighth Circuit’s failure to apply *Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Yakima Indian Nation*, 492 U.S. 408 (1989), in *South Dakota v. Bourland*, 949 F.2d 984 (8th Cir. 8th Cir. 1991)).

¹⁰⁹ 508 U.S. 114 (1993) (No. 92-259). The Court denied cert in the *Sac and Fox Nation*’s cross-petition. See *Sac and Fox Nation v. Oklahoma Tax Commission*, 506 U.S. 975 (1992) (No. 92-499); Docket Sheet, *Sac and Fox Nation v. Oklahoma Tax Commission*, 506 U.S. 975 (1992) (No. 92-499), <http://epstein.law.northwestern.edu/research/BlackmunDockets/1992/Paid/docket-92-499.pdf> (Stevens, J., voting to CVSG). See generally Cert Pool Memo at 7-10, *Sac and Fox Nation v. Oklahoma Tax Commission*, 506 U.S. 975 (1992) (No. 92-499), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/92-499.pdf> (finding no split and, for other reasons, recommending denial).

¹¹⁰ See Cert Pool Memo at 10, *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993) (No. 92-259), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Granted-pdf/92-259.pdf>.

¹¹¹ *Id.* (“Nor does the decision below present this issue particularly well; as [petitioner] itself states, there was no evidence as to whether the members of the tribe actually lived on or off the tribal lands.”).

therefore the Indians living on the land could qualify for the common law immunity from state income taxes. Because the lower court had not developed the record as to this question, the cert pool memo recommended a denial of the petition.¹¹² Justice Blackmun’s clerk annotated the memo to agree with the recommendation for denial.¹¹³

But the Oklahoma Tax Commission neglected to mention that the Wisconsin Supreme Court had reached a different conclusion in a superficially similar case, where the Indian lived off of the reservation and outside of Indian Country.¹¹⁴ The cert pool clerk assigned to *Sac and Fox* heard about this new petition – *Anderson v. Wisconsin Department of Revenue* – in which that petitioner there alleged a split in authority with *Sac and Fox*.¹¹⁵ The cert pool memo (same memowriter as in *Sac and Fox*) in *Anderson* had a view toward granting the petition after hearing the views of the Solicitor General.¹¹⁶ The memowriter then turned to *Sac and Fox*, writing in a supplemental memo that “*Anderson* is a cleaner vehicle to address the issue whether [*McClanahan v. Arizona State Tax Commission*] applies to Indians who work on, but live off, the reservation.”¹¹⁷ The memowriter noted, lastly, that the Oklahoma Tax Commission might not be the best litigant to present the position of the state governments in this dispute because of its failure to note the possible split in authority.¹¹⁸ But of course, as became clear later, the memowriter got the law wrong.

Despite this memo, the Court wavered on granting certiorari in *Anderson* because the Court declined to allow John Anderson to file as an

¹¹² See *id.* at 11.

¹¹³ See *id.* at 11 (“I agree. There is no split, and the conflicts appear to be illusory.”).

¹¹⁴ Compare *Anderson v. Wisconsin Dept. of Revenue*, 474 N.W.2d 255 (Wis. 1992) (holding that a state may tax the on-reservation income of tribal members living off the reservation), with *Sac and Fox Nation v. Oklahoma Tax Commission*, 967 F.2d 1425 (10th Cir. 1992) (holding that a state may not tax the on-reservation income of tribal members residing on the reservation).

¹¹⁵ See Cert Pool Memo at 8-9, *Anderson v. Wisconsin Dept. of Revenue*, 508 U.S. 941 (1993) (No. 92-5988), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/92-5988.pdf>.

¹¹⁶ See *id.* at 9.

¹¹⁷ See Supplemental Memo at 4, *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993) (No. 92-259), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Granted-pdf/92-259.pdf> (citing *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973)).

¹¹⁸ See *id.* at 4-5.

indigent petitioner.¹¹⁹ The Court granted certiorari in *Sac and Fox*,¹²⁰ decided that case,¹²¹ and then denied certiorari in *Anderson* later (possibly because the petitioner never complied with Supreme Court Rules or because the Court preferred a case in which both parties were represented by retained counsel). However, the lower court split identified by the clerk never materialized because the Court held in *Sac and Fox* that trust lands were equivalent to reservation lands – they were both “Indian Country.”¹²² So the Indians in *Sac and Fox* really did live in Indian Country, while the Indians in *Anderson* did not. It is clear from the cert pool memo that the Court would have voted to grant cert on the basis that there was a split of authority, but in the end the split was illusory.

Circuit splits tend not to arise in Indian law cases because often the only possible split would be between the state court and a federal circuit. For example, a cert pool memo authored by a Kennedy clerk disposed of a petition arising out of Alaska by noting, “Because of the local nature of this dispute, no conflict will arise in the circuits.”¹²³ In *South Dakota v. Spotted Horse*,¹²⁴ Justice Blackmun’s clerk wrote a supplemental memo to the cert pool memo in which she wrote, “As the poolwriter noted, there will never be a split on the question of South Dakota’s jurisdiction over these tribal highways because both [Eighth Circuit] and the [South Dakota Supreme Court] agree that the State is without jurisdiction.”¹²⁵ In *Tarbell*

¹¹⁹ See *Anderson v. Wisconsin Dept. of Revenue*, 506 U.S. 971 (1992) (No. 92-5988); Docket Sheet, *Anderson v. Wisconsin Dept. of Revenue*, 506 U.S. 971 (1992) (No. 92-5988), <http://epstein.law.northwestern.edu/research/BlackmunDockets/1992/IFP/docket-92-5985---92-5988.pdf>.

¹²⁰ See *Oklahoma Tax Commission v. Sac and Fox Nation*, 506 U.S. 971 (1992) (No. 92-259); Docket Sheet, *Oklahoma Tax Commission v. Sac and Fox Nation*, 506 U.S. 971 (1992) (No. 92-259), <http://epstein.law.northwestern.edu/research/BlackmunDockets/1992/Paid/docket-92-259.pdf>.

¹²¹ See *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993) (No. 92-259).

¹²² See *Sac and Fox Nation*, 508 U.S. at 123.

¹²³ Cert Pool Memo at 5, *Ahtna, Inc. v. Alaska*, 495 U.S. 919 (1990) (No. 89-1446), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1989/DM-1989-pdf/89-1446.pdf>.

¹²⁴ 500 U.S. 928 (1991) (No. 90-1003).

¹²⁵ Supplemental Memo at 1, *South Dakota v. Spotted Horse*, 500 U.S. 928 (1991) (No. 90-1003), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1990/Denied-pdf/90-1004.pdf>; see also Cert Pool Memo at 4, *South Dakota v. Spotted Horse*, 500 U.S. 928 (1991) (No. 90-1003),

v. *United States*,¹²⁶ a criminal case involving the application of a federal statute that applied to New York Indians,¹²⁷ the cert pool memowriter, an O'Connor clerk, noted, "Of course, [New York] state is probably the only other jurisdiction that would have an opportunity to rule on the issue."¹²⁸ However, the Court granted certiorari in *Hagen v. Utah*,¹²⁹ a case described by the cert pool memowriter, a shared Kennedy – Powell clerk, in an email as "admittedly not so sexy and is of little general importance....,"¹³⁰ because of the clear split between the Tenth Circuit and the Utah Supreme Court.¹³¹

Another possible explanation for the lack of circuit splits might be the subjective character of the federal Indian law preemption doctrine, in which different outcomes in different circuits can be explained by the differing facts. As will be discussed in greater detail in the next subpart, these cases are considered "factbound," even where a split in authority can be identified. As one poolwriter (a Blackmun clerk) noted in the cert pool memo in *White Mountain Apache Tribe v. Arizona State Transportation Board*:¹³² "A final factor which may be considered either as supporting a grant or denying a grant is that the case involves pre-emption in the context of Indian law. [C]ases involving pre-emption claims by Indian tribes may merit a different analysis."¹³³ The cert pool memo in *Rodey*,

<http://epstein.law.northwestern.edu/research/BlackmunMemos/1990/Denied-pdf/90-1004.pdf> ("I note only that the fact that the [South Dakota Supreme Court] has adopted the reasoning relied upon by CA8 in *Rosebud* may counsel against review since there is not now, and is unlikely ever to be, any split of authority on the somewhat unique questions presented in these two cases.").

¹²⁶ 500 U.S. 941 (1991) (No. 90-1386).

¹²⁷ 25 U.S.C. § 232.

¹²⁸ Cert Pool Memo at 12, *Tarbell v. United States*, 500 U.S. 941 (1991) (No. 90-1386),

<http://epstein.law.northwestern.edu/research/BlackmunMemos/1990/MissedMemos/90-1386.pdf>.

¹²⁹ 510 U.S. 399 (1993) (No. 92-6281).

¹³⁰ Email, *Hagen v. Utah*, 510 U.S. 399 (1993) (No. 92-6281), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Granted-pdf/92-6281.pdf>.

¹³¹ See Cert Pool Memo at 6-7, *Hagen v. Utah*, 510 U.S. 399 (1993) (No. 92-6281), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Granted-pdf/92-6281.pdf> (noting split between *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986), and *Utah v. Hagen*, 858 P.2d 925 (Utah 1992)).

¹³² 480 U.S. 941 (1987) (No. 86-814).

¹³³ Cert Pool Memo at 17, *White Mountain Apache Tribe v. Arizona State Transp. Bd.*, 480 U.S. 941 (1987) (No. 86-814),

*Dickason, Sloan, Akin & Robb, P.A. v. Revenue Division of the Department of Taxation of the State of New Mexico*¹³⁴ involving a law firm’s claim that federal Indian law preempted a state’s taxation of attorney fees demonstrated the difficulty in establishing a circuit split. The memowriter, a Blackmun clerk, identified three Supreme Court cases that had application to the question, but the disparate fact patterns in the cases created different applications of the federal Indian law preemption rule – “I think [appellant] has the better of the argument, though [appellant] overstates its case by suggesting a direct conflict with this Court’s prior decisions. Rather, I think the question is open.”¹³⁵ The memowriter, a Blackmun clerk, in *Oklahoma Tax Commission v. Muscogee (Creek) Nation*,¹³⁶ a case where the state wanted to tax a tribal bingo operation,¹³⁷ noted that the preemption issue was “potentially certworthy” (perhaps) because the question involved Indian gaming.¹³⁸ The Court denied cert in that case, however, probably because the Solicitor General recommended a denial on the basis that the case was factbound.¹³⁹ Similarly, in *Central Machinery Co. v. Arizona*,¹⁴⁰ the cert pool memo, authored by a Powell clerk, concluded, “In sum, I agree ... that the lower courts are not in full agreement in this area [preemption of state taxes in Indian Country]. But the Court declined to grant in [earlier cases]. I see no reason to act

<http://epstein.law.northwestern.edu/research/BlackmunMemos/1986/MissedMemos-pdf/86-814.pdf>.

¹³⁴ 490 U.S. 1043 (1989) (No. 88-773).

¹³⁵ See Cert Pool Memo at 8, Rodey, Dickason, Sloan, Akin & Robb, P.A. v. Revenue Division of the Department of Taxation of the State of New Mexico, 490 U.S. 1043 (1989) (No. 88-773), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1988/DM1988-pdf/88-773.pdf> (discussing *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982), and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)); *id.* at 11 (noting possible application of *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989)).

¹³⁶ 487 U.S. 1218 (1988) (No. 87-1068).

¹³⁷ See *Indian Country, U.S.A., Inc. v. State of Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.2d 967, 970 (10th Cir. 1987).

¹³⁸ See Cert Pool Memo at 11-12, *Oklahoma Tax Commission v. Muscogee (Creek) Nation*, 487 U.S. 1218 (1988) (No. 87-1068), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1987/Denied-pdf/87-1068.pdf>.

¹³⁹ See Supplemental Memo, *Oklahoma Tax Commission v. Muscogee (Creek) Nation*, 487 U.S. 1218 (1988) (No. 87-1068), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1987/Denied-pdf/87-1068.pdf> (“The peculiar facts of this case make it an unattractive candidate for review.”).

¹⁴⁰ 481 U.S. 1042 (1987) (No. 86-1546).

differently here.”¹⁴¹ In one unusual case involving the application of the Indian Claims Commission Act test requiring the federal courts to interpret the meaning of the phrase “fair and honorable dealings,” the exasperated poolwriter, a Souther clerk, noted, “The decision below does not squarely conflict [with other lower cases], which can be distinguished on its facts (though, indeed, where legal principles are as squishy as those in this area, nothing squarely conflicts [with] anything else).”¹⁴²

However, the Court sometimes did not act on cases in which the petitioner alleged a viable split or conflict with prior precedents. For example, some alleged circuit splits are labeled “weak” or “illusory.” In *Osceola v. Florida Dept. of Revenue*,¹⁴³ a case involving the application of the Tax Injunction Act to individual Indians seeking immunity from state taxes,¹⁴⁴ the cert pool memo, written by a Scalia clerk, noted that the older case forming half of the split probably would have been decided the other way if it were decided later.¹⁴⁵

¹⁴¹ Cert Pool Memo at 8, *Central Machinery Co. v. Arizona*, 481 U.S. 1042 (1987) (No. 86-1546), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1986/Denied-pdf/86-1546.pdf> (discussing *White Mountain Apache Tribe v. Arizona State Transp. Bd.*, 480 U.S. 941 (1987) (No. 86-814), and *New Mexico Taxation and Revenue Dept. v. Ramah Navajo School Bd.*, 479 U.S. 940 (1986) (No. 86-367)).

¹⁴² Cert Pool Memo at 9-10, *Cherokee Nation of Oklahoma v. United States*, 504 U.S. 910 (1992) (No. 91-1354), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/Denied-pdf/91-1354.pdf> (citing *Aleut Community of St. Paul Island v. United States*, 480 F.2d 831 (Ct. Cl. 1973)).

¹⁴³ 498 U.S. 1025 (1991) (No. 90-653).

¹⁴⁴ See *Osceola v. Florida Dept. of Revenue*, 893 F.2d 1231 (11th Cir. 1990).

¹⁴⁵ Cert Pool Memo at 7, *Osceola v. Florida Dept. of Revenue*, 498 U.S. 1025 (1991) (No. 90-653), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1990/Denied-pdf/90-654.pdf> (citing *Omaha v. Peters*, 516 F.2d 133 (8th Cir. 1975), *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1975), and *Dillon v. Montana*, 634 F.2d 463, 468-469 (9th Cir. 1980)):

[The Eighth Circuit] apparently stands alone in holding that it will support jurisdiction in a suit by individual Indians. This “split” does not merit review, however. As [the Eleventh Circuit] noted, *Omaha v. Peters* ... came down before this Court’s decision in *Moe* [*v. Confederated Salish & Kootenai Tribes*, which precluded these kinds of suits by individual Indians]. When [the Ninth Circuit] – which blazed the ... trail with respect to individual Indians – revisited the issue after *Moe*, it reversed itself, holding that *Moe* precluded the application of the plaintiff doctrine. ... My guess is that [the Eighth Circuit] will do the same if it faces the issue in the future.

Another cert pool memowriter, a Souter clerk, labeled an alleged circuit split in *Washington v. Confederated Tribes of Colville Reservation*¹⁴⁶ – a case where the State “want[ed] to enforce petty traffic laws against Indians on reservations,”¹⁴⁷ – “not clean.”¹⁴⁸ The split was illusory because the character of the two state laws in question differed – one was explicitly criminal, the other was a civil traffic statute. According to the memo, “Th[e other] case involved an explicitly criminal law.... [I]t remains possible that either [court], if someday faced with the facts of the other’s case, would come out just as the other did.”¹⁴⁹

In a case where the split of authority is based in state law, the Court also is less likely to grant certiorari. The cert pool memo, an O’Connor clerk, in *Richardson v. Mt. Adams Furniture*,¹⁵⁰ in a case involving tribal sovereign immunity in the context of off-reservation business activities,¹⁵¹ recommended that the Court seek the views of the Solicitor General after the “[Petitioner] identifie[d] an existing division of authority among state supreme courts regarding the extent of tribal immunity from suit with respect to commercial activities undertaken by

¹⁴⁶ 503 U.S. 997 (1992) (No. 91-569) (Stevens and O’Connor, JJ. would grant certiorari).

¹⁴⁷ Cert Pool Memo at 1, *Washington v. Confederated Tribes of Colville Reservation*, 503 U.S. 997 (1992) (No. 91-569), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/Denied-pdf/91-569.pdf>; see *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146, 147 (9th Cir. 1991).

¹⁴⁸ Cert Pool Memo at 10, *Washington v. Confederated Tribes of Colville Reservation*, 503 U.S. 997 (1992) (No. 91-569), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/Denied-pdf/91-569.pdf>

¹⁴⁹ *Id.* (citing *St. Germaine v. Circuit Court for Vilas County*, 938 F.2d 75 (7th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992) (No. 91-6385); see also Cert Pool Memo (2nd supplement) at 3, *St. Germaine v. Circuit Court for Vilas County*, 503 U.S. 997 (1992) (No. 91-6385), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/Denied-pdf/91-6385.pdf> (“Although the legal issue presented is important, these cases are inappropriate vehicles for addressing it. As the [the Solicitor General] points out, *St. Germaine* and *Colville Reservation* do not conflict that squarely. And though the [Supreme Court] may someday need to clarify *Cabazon*, it would do better to wait for cases involving state laws that, unlike the ones at issue here, are neither obviously criminal nor obviously civil.”) (discussing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)).

¹⁵⁰ 510 U.S. 1039 (1994) (No. 92-1398).

¹⁵¹ See *In re Greene*, 980 F.2d 590, 591-92 (9th Cir. 1992), *cert denied sub nom.*, *Richardson v. Mt. Adams Furniture*, 510 U.S. 1039 (1994) (No. 92-1398).

tribal entities off the reservation.”¹⁵² The memowriter further recommended that the Court seeks the views of the Solicitor General because “tribal immunity is a creature of federal law and can be adjusted only by Congress. To the extent immunity reflects federal policies regarding tribal autonomy and relations with outsiders, the Government may have an interest in ensuring that the Court selects an appropriate vehicle for addressing the immunity question.”¹⁵³ But after the Solicitor General recommended the denial of the cert petition, the next cert pool memo, written by an O’Connor clerk, noted, “Neither of the [conflicting] state cases, however, is sufficiently similar to the decision below to rise to the level of a split; both involved state rather than federal law, and [one state case] rested on the independent fact that the relevant activities were not ‘tribal’ for purposes of sovereign immunity. In short, any split is not clearly defined.”¹⁵⁴ The fact that the cert petition involved the Bankruptcy Code seemed to kill the momentum to recommend a grant.¹⁵⁵

It is often the case that the fact pattern will not recur anywhere outside of the context of a particular tribe or reservation, rendering the possibility of a split very unlikely. In cert petitions brought by the Oneida nations of New York and Wisconsin in the New York land claims,¹⁵⁶ the cert pool memowriter, a Scalia clerk, wrote, “This is a case of some practical significance inasmuch as there is a great deal of land in the

¹⁵² Cert Pool Memo at 1, *Richardson v. Mt. Adams Furniture*, 510 U.S. 1039 (1994) (No. 92-1398), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Denied-pdf/92-1398.pdf>. The split in authority involved Arizona and New Mexico courts. *Compare* *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968) (finding tribal immunity); *White Mountain Apache Tribe v. Shelley*, 480 P.2d 654 (Ariz. 1971) (same); *with* *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989) (No. 88-415) (finding no immunity); *Dixon v. Picopa Const. Co.*, 772 P.2d 1104, 1109 (Ariz. 1989) (same). Note the conflict in Arizona itself, not discussed in the cert pool memo.

¹⁵³ *Id.* at 11.

¹⁵⁴ Supplemental Memo at 2, *Richardson v. Mt. Adams Furniture*, 510 U.S. 1039 (1994) (No. 92-1398), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Denied-pdf/92-1398.pdf> (comparing *In re Greene*, 980 F.2d 590 (9th Cir. 1992); *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989) (No. 88-415); *Dixon v. Picopa Const. Co.*, 772 P.2d 1104, 1109 (Ariz. 1989)).

¹⁵⁵ *See id.*

¹⁵⁶ *Oneida Indian Nation of Wisconsin v. New York*, 493 U.S. 871 (1989) (No. 88-1715); *Oneida Indian Nation of New York v. New York*, 493 U.S. 871 (1989) (No. 88-1915).

balance, but the questions are not of general legal significance meriting the plenary review of this Court. ... There is no indication that these issues have arisen before or that they will arise again. ... There is no split of authority on the relevant powers or limitations found in the Articles of Confederation or the Treaty of Fort Stanwix.”¹⁵⁷ Another cert petition involved the interpretation of an 1887 Nevada statute that, as the cert pool memowriter, a Kennedy clerk, noted, “the interpretation of which can ... affect [only] this case.”¹⁵⁸ In one case involving the interpretation of a 1908 federal statute, the cert pool memowriter, a Souter clerk, noted, “All that would be left for us to do differently would be to reweigh the application of that settled law to the facts surrounding passage of the 1908 Act. Because the law is settled and the 1908 Act involved only the land in the Addition, our decision would have little significance beyond this case ([respondent] is correct that there is no lower court conflict to resolve with regard to the issues in this case).”¹⁵⁹

In one extraordinary instance demonstrating the enormous complexity of federal Indian law questions, however, the Court denied certiorari in an Alaska case, *Circle Native Community v. Alaska Dept. of Health and Social Services*,¹⁶⁰ a case involving the remaining tribal authority to decide internal child custody matters after federal statutes purported to divest Alaskan Native villages of their tribal character, as well as whether the same villages retained sovereign immunity. The cert pool memowriter, a Scalia clerk, found that the splits in authority (there were *two* in this instance) were “square.”¹⁶¹ The memowriter concluded,

¹⁵⁷ Cert Pool Memo at 13, *Oneida Indian Nation of Wisconsin v. New York*, 493 U.S. 871 (1989) (No. 88-1715), *Oneida Indian Nation of New York v. New York*, 493 U.S. 871 (1989) (No. 88-1915), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1989/DM-1989-pdf/88-1915.pdf>.

¹⁵⁸ Cert Pool Memo at 8, *Intertribal Council of Nevada, Inc. v. Lujan*, 493 U.S. 814 (1989) (No. 89-1947), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1989/DM-1989-pdf/88-1947.pdf>.

¹⁵⁹ Cert Pool Memo at 6, *Navajo Tax Commission v. Pittsburgh & Midway Coal Mining Co.*, 498 U.S. 1012 (1990) (No. 90-635), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1990/Denied-pdf/90-634.pdf> (citing Act of May 19, 1908, § 25, 35 Stat. 444).

¹⁶⁰ 508 U.S. 950 (1993) (No. 92-1536) (denying cert in *In re F.P.*, 843 P.2d 1214 (Alaska 1992)).

¹⁶¹ Cert Pool Memo at 8, *Circle Native Community v. Alaska Dept. of Health and Social Services*, 508 U.S. 950 (1993) (No. 92-1536), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/92->

“Although the issues are not very interesting and seem to have little national significance, they are quite important to Native-State relations in Alaska, and only this Court can resolve the conflict. I therefore unenthusiastically recommend [a Call for Response with] a view to GRANT.”¹⁶²

But Alaska threw a monkeywrench into the proceedings with a brilliant ploy that confused the clerk and the Court enough to convince the Court to deny certiorari – they questioned the legal status of the petitioner, often a confusing question in Alaskan Native legal disputes.¹⁶³ The supplemental memo drafted by the clerk after Alaska’s response notes the clerk’s confusion: “In short, there may be good answers to the problems [respondent] raises, but I do not know what they are, and in any event the Court need not address the [jurisdiction] question presented in a case that would require preliminary resolution of other thorny and legally insignificant issues.”¹⁶⁴ As a result, the clerk recommended denial.¹⁶⁵ After the petitioner replied to these questions with copies of tribal council resolutions and a trial court order recognizing the Community’s right to intervene, Justice Blackmun’s clerk noted, “I recommend that the Court [call for the views of the Solicitor General]. The split is real and conceded. The [Solicitor General] may help to sort out the preliminary problems.”¹⁶⁶

[1536.pdf](#) (noting that *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991), conflicted with *In re F.P.*, 843 P.2d 214 (Alaska 1992), and *Native Village of Stevens v. Alaska Mgmt. & Planning*, 757 P.2d 32 (Alaska 1998)):

There is a split both on the narrow question whether Indian tribes in [Alaska] have any [jurisdiction] over child custody matters, and on the preliminary (though probably more important for Alaskans) question whether Alaska Native villages have “inherent tribal sovereignty” [*i.e.*, sovereign immunity]. Both splits seem to be square, and the Alaska [Supreme Court]’s decision here demonstrates that it is unlikely to alter its position any time soon.

¹⁶² *Id.* at 2.

¹⁶³ Supplemental Memo at 2-3, *Circle Native Community v. Alaska Dept. of Health and Social Services*, 508 U.S. 950 (1993) (No. 92-1536), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/92-1536.pdf>.

¹⁶⁴ *Id.* at 5-6.

¹⁶⁵ *Id.* at 6 (“The conflict on the [jurisdiction] question is clear, but [petitioner] asserts that there are at least 8 relevant cases pending in its region alone; the Court should await a cleaner vehicle before stepping in.”).

¹⁶⁶ *Id.* at 6 (annotation of “AHS”).

Regardless, only two Justices (Blackmun and Stevens) voted to seek the views of the Solicitor General – the rest voted to deny certiorari.¹⁶⁷

The emphasis on locating a split in authority affects federal Indian law, perhaps, more than in most other areas of law. Consider *Sokaogon Chippewa Community v. Exxon Corp.*¹⁶⁸ The case involved a highly contested land claim of immense importance to the tribal community and its neighbors, focusing on an 1854 treaty that was far from plain.¹⁶⁹ The cert pool memowriter, a Scalia clerk, dismissed the cert petition’s claims with a curt blurb:

I think Judge Posner correctly interpreted the 1854 treaty as extinguishing the occupancy [rights] under the 1842 treaty in exchange for establishment of reservations and payments. [Petitioner], having lost on its interpretation argument in both the [district court and the Seventh Circuit], now seeks further appellate review. Absent a split, I see no reason for the [Court] to look further into this issue.¹⁷⁰

Of course, there likely would never be a split in authority on the 1854 treaty because that case might be the only case ever turning on the treaty.

Of all the cert pool memos in the sample, only one memowriter – an O’Connor clerk – recognized that “splits are rarer in Indian cases....”¹⁷¹ And yet, he recommended denial of cert in *Lummi Indian Tribe v. Whatcom County* even though he was not “sure that[the Ninth Circuit] got this right—it’s a close case—but there’s no split, and the issue doesn’t seem crucial enough to be independently certworthy.”¹⁷²

¹⁶⁷ See Docket Sheet, *Circle Native Community v. Alaska Dept. of Health and Social Services*, 508 U.S. 950 (1993) (No. 92-1536), <http://epstein.law.northwestern.edu/research/BlackmunDockets/1992/Paid/docket-92-1536.pdf>.

¹⁶⁸ 510 U.S. 1196 (1994) (No. 1223).

¹⁶⁹ See *Sokaogon Chippewa Community v. Exxon Corp.*, 805 F. Supp. 680 (E.D. Wis. 1992), *aff’d*, 2 F.3d 219 (7th Cir. 1993).

¹⁷⁰ Cert Pool Memo at 11, *Sokaogon Chippewa Community v. Exxon Corp.*, 510 U.S. 1196 (1994) (No. 1223), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Denied-pdf/93-1223.pdf>.

¹⁷¹ Cert Pool Memo at 8, *Lummi Indian Tribe v. Whatcom County*, Wash., 512 U.S. 1228 (1994) (No. 93-1742), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Denied-pdf/93-1742.pdf>.

¹⁷² *Id.* at 1 (discussing *Lummi Indian Tribe v. Whatcom County*, Wash., 5 F.3d 1355 (9th Cir. 1993)).

2. Error Correction (“Factbound”)

Many Indian law-related cert petitions are based in historical and treaty claims that arise in facts limited to a particular tribe or region. Rule 10 notes that “[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” These claims are often labeled “factbound” and denied.

This issue is endemic to Indian treaty claims brought by tribal interests. The number of cases where Indian tribes lost below and a Supreme Court clerk noted that their petition was at least colorable, if not compelling, but where the clerk recommended the denial of cert anyway is surprisingly high. The standard in these cases usually is described as: (1) Did the lower court *correctly state* (as opposed to apply) the applicable rule?; (2) If yes, deny. As such, because few courts commit the gross error of stating the wrong standard, the Court will hear few Indian treaty petitions brought by tribal interests who lost below. Even in instances where the lower court did state the wrong standard, as noted in the Western Shoshone case in the introduction,¹⁷³ the Court may still deny cert.

The number of cases reduced to a state of being “factbound” is the most significant subgroup of the whole sample. One example is *Little Earth of United Tribes, Inc. v. Kemp*.¹⁷⁴ The petitioner had brought a race discrimination claim (amongst other claims) that the United States had chosen to foreclose the mortgage of the only public housing project for transient urban Indians.¹⁷⁵ On the cert petition, the pool memowriter, a Kennedy and Thomas clerk, noted that the case was based entirely on the factual findings of the district court and recommended denial.¹⁷⁶ Justice Blackmun’s clerk agreed with the recommendation but annotated the cert pool memo to state, “Sad case.”¹⁷⁷

¹⁷³ See Cert Pool Memo at 9, *Western Shoshone National Defense Council v. Molini*, 506 U.S. 822 (1992) (No. 91-1916), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/91-1916.pdf>.

¹⁷⁴ 494 U.S. 1078 (1990) (No. 89-1094).

¹⁷⁵ See *Little Earth of United Tribes, Inc. v. United States Department of Housing and Urban Development*, 878 F.2d 236, 236-37 (8th Cir. 1989).

¹⁷⁶ See Cert Pool Memo at 4, *Little Earth of United Tribes, Inc. v. Kemp*, 494 U.S. 1078 (1990) (No. 89-1094), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1989/DM-1989-pdf/89-1094.pdf>.

¹⁷⁷ *Id.*

Another example is *Catawba Indian Tribe v. United States*,¹⁷⁸ a case involving a contract claim by the tribe against the federal government where the cert pool memowriter, a Rehnquist clerk, wrote that “[t]his involves nothing more than error correction.”¹⁷⁹ Later, the memowriter noted, “This question is extremely factbound, is not one of national importance, and involves application of settled law.”¹⁸⁰

Similarly, in *Lummi Indian Tribe v. Washington*,¹⁸¹ discussed in the introduction, a caustic cert pool memo, written by an O’Connor clerk, denigrated the Lummi Tribe’s claims by noting:

[Petitioner] is unhappy with [the Ninth Circuit]’s determination of the boundaries of the Lummi Reservation. Based on little more than the testimony of a 100-year-old man in the early 1900s, [petitioner] wants this Court to hold contrary to the plain language of the treaty, the facts found by the [district court], and the presumption against conveyance of land under navigable waters. The [petition] should be denied.¹⁸²

Ultimately, the cert pool memo recommended denial largely because the case was unimportant.¹⁸³

Perhaps a more significant example of the fact-heavy character of Indian law cases was *Elliott v. Vermont*,¹⁸⁴ a case involving the question of whether the aboriginal rights of the Abenaki people remained after incorporation of the State of Vermont into the Union in 1791.¹⁸⁵ The question arose in the context of a state prosecution of Missisquoi Indians

¹⁷⁸ 509 U.S. 904 (1993) (No. 92-1617).

¹⁷⁹ See Cert Pool Memo at 1, *Catawba Indian Tribe v. United States*, 509 U.S. 904 (1993) (No. 92-1617), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/92-1617.pdf>.

¹⁸⁰ *Id.* at 10.

¹⁸¹ 507 U.S. 1051 (1993) (No. 92-1445).

¹⁸² Cert Pool Memo at 1, *Lummi Indian Tribe v. Washington*, 507 U.S. 1051 (1993) (No. 92-1445), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/92-1445.pdf>.

¹⁸³ *Id.* at 7 (“This case involves a very limited amount of land and affects a limited number of Indians.”).

¹⁸⁴ 507 U.S. 911 (1993) (No. 92-877).

¹⁸⁵ See *State v. Elliott*, 616 A.2d 210, 214 (Vt. 1992); Cert Pool Memo at 1, *Elliott v. Vermont*, 507 U.S. 911 (1993) (No. 92-877), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/92-877.pdf>.

attempting to exert their fishing rights – a “fish in” – on land they believed to be owned by the tribe in aboriginal title.¹⁸⁶ Under Rule 10, the Court is unlikely to grant cert in a case where the lower court allegedly misapplied a properly stated rule of law. As the cert pool memowriter, a Kennedy clerk, noted:

At bottom, [petitioners] complain that the Vermont Supreme Court[] misapplied the rule of extinguishment [of aboriginal title], not that the Court misstated it. Indeed, the Vermont Court did an excellent and extensive summary of the law of extinguishment, which appears to be correct in all its particulars. Nonetheless, [petitioners] appear to have a substantial argument that the admission of Vermont into the Union, and Congress’ concomitant de facto recognition of Vermonter’s land claims under the Wentworth grants, are not sufficient to establish the clear intent required to extinguish aboriginal title. Although the Vermont Court’s opinion is both exhaustive and scholarly, it does not take account of a fair bit of evidence introduced by [petitioners] that suggest that even after 1791, the Abenakis continued to exercise aboriginal fishing rights. The case is sui generis and probably does not warrant a grant of certiorari absent a more meaty legal issue....¹⁸⁷

This somewhat internally inconsistent cert pool memo (calling the Vermont Supreme Court’s opinion “excellent and extensive” while noting that the Court ignored the critical evidence raised by the Indians) places the claim here in the “factbound” category. Once again, the Court did not discuss this case in conference, according to Justice Blackmun’s docket sheet.¹⁸⁸

The lesson here appears to be that, so long as the lower court states the proper test (a purely superficial exercise), the Supreme Court will not review the lower court’s application of the test except in “rare” circumstances. Note that the cert pool memo writer must have had a short period of time to review the history of the State of Vermont (probably a

¹⁸⁶ See *Elliott*, 616 A.2d at 211.

¹⁸⁷ Cert Pool Memo at 13, *Elliott v. Vermont*, 507 U.S. 911 (1993) (No. 92-877), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/92-877.pdf>.

¹⁸⁸ See Docket Sheet, *Elliott v. Vermont*, 507 U.S. 911 (1993) (No. 92-877), <http://epstein.law.northwestern.edu/research/BlackmunDockets/1992/Paid/docket-92-877.pdf>.

well-documented history) and the history of the western Abenaki people; specifically, the Missisquoi people (probably not as well documented). It is unlikely that a cert pool clerk confronted with a case like *Elliott* could marshal the historical and legal materials in a short period of time that would be necessary to conclude that the Vermont Supreme Court was wrong. After much time to digest the decision, Indian law scholars concluded that the Vermont Supreme Court in *Elliott* adopted a new test on aboriginal title extinguishment divorced from the Court's precedents – the “increasing weight of history” test.¹⁸⁹ The petitioners' reply brief in support of its cert petition argued, in the words of Justice Blackmun's clerk, “Vermont [Supreme Court]'s ‘weight of history’ approach conflicts [with] this [Court]'s requirement that extinguishment be ‘clear and unambiguous.’”¹⁹⁰ To be fair to the memowriter, he did note that “an argument can be made that the Court has a special responsibility to ensure that Indian land claims are resolved properly, with due regard for the traditional federal policy of solicitude for Indian tribes.”¹⁹¹ Moreover, even Justice Blackmun's clerk concluded that the petition was factbound and not certworthy.¹⁹²

In many federal Indian law petitions, a recent law graduate would have to know something extraordinary about an area of law to ever conclude that a court was so wrong on a question based in history and fact as to recommend that the Court grant cert. *The chances of this happening, especially with Rule 10's admonition that it is “rare,” in an Indian law context where a tribal interest is the petitioner are all but zero.* This is a structural problem that affects tribal interests – and all historical claims, most of which are based in race relations – more than perhaps any other category of petitioner. Further, it ignores the important relationship between the United States and Indian tribes.

3. Gross Error

More rarely, the cert pool memos will assert that a lower court decision is clearly wrong, or in the Rule's language, “has so far departed

¹⁸⁹ E.g., Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481 (1994) (quoting *Elliott*, 616 A.2d at 218).

¹⁹⁰ Cert Pool Memo at 1, *Elliott v. Vermont*, 507 U.S. 911 (1993) (No. 92-877), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/92-877.pdf> (annotation).

¹⁹¹ *Id.* at 13-14 (citing *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942)).

¹⁹² *See id.* at 14 (“The pool memo appears correct that the issue is factbound, although [petitioners] have a good argument on the merits.”) (annotation).

from the accepted and usual course of judicial proceedings....”¹⁹³ As the language suggests, this happens less often than circuit splits. The complexity and ambiguity of federal Indian law, however, creates circumstances where lower courts do seem to deviate from Supreme Court precedents, perhaps more often than in other contexts. The classic example is *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*¹⁹⁴ The case reached the Supreme Court twice: the first time, the Court GVR’d the case in light of *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*;¹⁹⁵ the second time, the Court reversed the New York Court of Appeals on the merits.¹⁹⁶ The final case ostensibly turned on “the narrow[] question whether the New York scheme is inconsistent with the Indian Trader Statutes,”¹⁹⁷ but one additional reason found in the cert pool memos in the two cases was the problem of the New York Court of Appeals. The cert pool memowriter, a Rehnquist clerk, wrote that the Court’s holding that federal law “‘preempted the field of regulating trade with Indians...’ is difficult to reconcile [with] existing [Supreme Court] precedent...”¹⁹⁸ Even prior to the *Milhelm Attea* remand, the Court had GVR’d an earlier New York Court of Appeals decision on similar grounds.¹⁹⁹ The poolwriter noted, “[T]he [New York Court of Appeals] has not ‘moved’ on this issue since the [Supreme Court] vacated and remanded *Herzog* in 1988, the decision below is at least suspect, and if [New York]’s regulatory approach is the only effective way [petitioner]’s can police the retail sale of taxable cigarettes on Indian reservations, the [courts] below have put [petitioners] in a tough spot.”²⁰⁰ After another decision from the New York Court of

¹⁹³ SUP. CT. RULE 10(a).

¹⁹⁴ 502 U.S. 1053 (1992) (No. 91-907), *after remand*, 512 U.S. 61 (1994) (No. 93-377).

¹⁹⁵ 498 U.S. 505 (1991).

¹⁹⁶ *See Milhem Attea*, 512 U.S. at 78 (reversing *Milhelm Attea & Bros., Inc. v. Department of Taxation and Finance of State of N.Y.*, 615 N.E.2d 994 (N.Y. 1993)).

¹⁹⁷ *Milhelm Attea*, 512 U.S. at 70.

¹⁹⁸ Cert Pool Memo at 10-11, *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 502 U.S. 1053 (1992) (No. 91-907), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/Denied-pdf/91-907.pdf> (quoting *Herzog Bros. Trucking, Inc. v. State Tax Commission*, 508 N.E.2d 914, 920 (N.Y. 1987), *vacated and remanded*, 487 U.S. 1212 (1988)).

¹⁹⁹ *See Herzog Bros. Trucking, Inc. v. State Tax Commission*, 508 N.E.2d 914 (N.Y. 1987), *vacated and remanded*, 487 U.S. 1212 (1988).

²⁰⁰ Cert Pool Memo at 13-14, *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 502 U.S. 1053 (1992) (No. 91-907),

Appeals reaching the same outcome (*Herzog* apparently was not appealed to the Supreme Court after remand), the cert pool memowriter, a Rehnquist clerk, wrote, “The [New York Court of Appeals] stubbornly refuses to alter its questionable preemption analysis, despite two GVR’s from this [Court] (one in this case, and one in *Herzog*)....”²⁰¹ Moreover, according to the memo, “The issue, however, is important both legally and practically, and the [New York Court of Appeals] does not seem willing to heed anything but a reversal on the merits.”²⁰² Justice Blackmun’s clerk objected, annotating the cert pool memo in the first *Milhelm Attea* petition with this grumble: “Is this such an important case? What 20 [pages] of memos comes down to is this: the [New York Court of Appeals] misread one of this [Court]’s cases. What happened to the word ‘split’[?]”²⁰³

One of the key sticking points in federal Indian law is the doctrine surrounding the “special relationship” between the United States and Indian tribes.²⁰⁴ The most interesting example of this situation is the Arkansas River case, *Cherokee Nation of Oklahoma v. United States*.²⁰⁵ The Cherokee Nation brought a claim against the United States for damages related to the construction of the Arkansas River Navigation System, which implicated the Nation’s treaty rights.²⁰⁶ The cert pool memowriter, a Souter clerk, recommended the denial of the Cherokee Nation’s petition, noting “the strangeness of the entire inquiry.”²⁰⁷ The

<http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/Denied-pdf/91-907.pdf>.

²⁰¹ Cert Pool Memo at 2, Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994) (No. 93-377), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Granted-pdf/93-377.pdf>.

²⁰² *Id.* at 3.

²⁰³ Cert Pool Memo (supplement) at 6, Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., 502 U.S. 1053 (1992) (No. 91-907), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/Denied-pdf/91-907.pdf>.

²⁰⁴ See generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW: 2005 ED. §§ 5.01 et seq. (Nell Jessup Newton et al., eds.).

²⁰⁵ 504 U.S. 910 (1992) (No. 91-1354).

²⁰⁶ Cherokee Nation v. United States, 937 F.2d 1539 (10th Cir. 1991).

²⁰⁷ See Cert Pool Memo at 8-9, Cherokee Nation of Oklahoma v. United States, 504 U.S. 910 (1992) (No. 91-1354), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/Denied-pdf/91-1354.pdf> (citing 25 U.S.C. § 70a, and United States v. Oneida Indian Nation of New York, 576 F.2d 870, 883 (Ct. Cl. 1978) (Nichols, J.)) (“Given the strangeness of the entire inquiry, one cannot easily evaluate either the merits or the certworthiness of [petitioner’s] claim.”).

poolwriter could not find that a split existed or whether the lower court was clearly wrong because “given the inquiry, how could [the court] be [wrong]?”²⁰⁸

In other cases, the clerks focus on non-Indian law-related questions. One example is *Rhodes v. Vigil*.²⁰⁹ The Indian Health Service had lost at the lower court level on the question of its discretion to eliminate a program for handicapped Indian children.²¹⁰ The cert pool memowriter, an O’Connor clerk, noted, “There is no clear split in authority, but the decisions below is certainly in tension with the Court’s decision[s], and the D.C. Circuit’s approach...”²¹¹ But the cert pool memowriter acknowledged that the split was not clean.²¹² The memowriter recommended granting cert on the basis of “the egregiousness of the [Tenth Circuit]’s errors...”²¹³ Justice Blackmun’s clerk wrote a supplemental memo arguing against granting certiorari on the basis that the Indian law character of the claim made the split illusory.²¹⁴ The argument won over Justice Blackmun, but the Court still granted certiorari.²¹⁵

In this factor more than the others, the clerks might have the opportunity to equate “clearly wrong” with what appears to be an ideological position on tribal sovereignty, or perhaps a view toward protecting non-Indians from abuse by tribal governments, although there is

²⁰⁸ *Id.* at 9; *see also id.* at 10 “[W]here legal principles are as squishy as those in this area, nothing squarely conflicts w/ anything else.”).

²⁰⁹ *Lincoln v. Vigil*, 508 U.S. 182 (1993) (No. 91-1833).

²¹⁰ *See Vigil v. Rhodes*, 953 F.2d 1225 (9th Cir. 1992).

²¹¹ Cert Pool Memo at 16, *Rhodes v. Vigil*, 508 U.S. 182 (1993) (No. 91-1833), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Granted-pdf/91-1833.pdf> (citing *American Hosp. Assn v. NLRB*, 499 U.S. 606 (1991), and *International Union, United Autoworkers v. Donovan*, 746 F.2d 855 (D.C. Cir. 1984) (Scalia, J.)).

²¹² *See id.* at 17 (“Neither the “special relationship” nor the requirement that the money be spent on Indian health provide any meaningful standards against which to measure a decision to fund one Indian health project rather than another.”) (citing *International Union*, 746 F.2d 855).

²¹³ *Id.* at 18.

²¹⁴ *See* Supplemental Memo (Sept. 17, 1992), *Rhodes v. Vigil*, 508 U.S. 182 (1993) (No. 91-1833), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Granted-pdf/91-1833.pdf>.

²¹⁵ *See Rhodes v. Vigil*, 506 U.S. 813 (1992); Docket Sheet, *Rhodes v. Vigil*, 508 U.S. 182 (1993) (No. 91-1833), <http://epstein.law.northwestern.edu/research/BlackmunDockets/1992/Paid/docket-91-1833.pdf>.

no way to be certain. One example is in *FMC Corp. v. Shoshone-Bannock Tribes*,²¹⁶ a case in which the Ninth Circuit applied the federal common law in holding the tribe had civil jurisdiction over a non-Indian-owned business,²¹⁷ something the Supreme Court has not often held.²¹⁸ The cert pool memowriter, a Scalia clerk, appeared to be looking for a vehicle in which a tribe had acted “outrageous[ly]” in its dealings with non-Indians.²¹⁹

The cert pool memo found the lower court’s reasoning weak,²²⁰ but recommended denial because the case wasn’t a “good vehicle.... [Petitioner]’s argument appears to fail by its own terms: one of ‘consensual’ aspects of this particular relationship, the 1981 agreement, specifically related to the area that [respondents] are now trying to regulate ... Indian employment. This is not, then, a case where a non-Indian entered into a relationship [with a] tribe, only to have the tribe thereafter attempt to regulate something completely different.”²²¹ Perhaps this clerk was looking for something very specific (an outrageous tribal action) and this case did not have the right facts.

4. Importance

Rule 10 also factors in the relative “importance” of a case in the certiorari process. Here is the greatest *subjective* factor that affects whether or not the Court will grant cert in a particular *and* what cases the Court could use to set an agenda when it comes to federal Indian law. The cert pool memos are studies in clerks attempting to predict what the Justices might find important, a factor that goes to the heart of the certiorari process – and one that cannot be easily studied or predicted. In

²¹⁶ 499 U.S. 943 (1991) (No. 90-1146).

²¹⁷ 905 F.2d 1311, 1314-15 (9th Cir. 1990).

²¹⁸ *See Nevada v. Hicks*, 533 U.S. 353, 360 (2001) (“[W]ith one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land”).

²¹⁹ Cert Pool Memo at 7, *FMC Corp. v. Shoshone-Bannock Tribes*, 499 U.S. 943 (1991) (No. 90-1146), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1990/Denied-pdf/90-1146.pdf> (emphasis in original) (citing *Montana v. United States*, 450 U.S. 544, 565 (1981)):

There is certainly much loose language in the [the Ninth Circuit opinion] that would virtually always support Indian jurisdiction over non-Indians on fee land within a reservation..., but the exercise of Indian jurisdiction on the facts of *this* case does not appear so outrageous as to warrant a grant in the absence of a [circuit] split.

²²⁰ *See id.* at 6-7.

²²¹ *Id.* at 7.

many memos too numerous to discuss in detail, clerks hedge their bets by making recommendations qualified with a note that the case is too close to call.

Many Indian law cases do not reach the discuss list because they are labeled too unimportant to consider. And yet in several cases, such as *Lyng v. Northwest Indian Cemetery Protective Association*²²² and *Employment Division v. Smith* (twice),²²³ the Court granted certiorari over the recommendation of a cert pool memowriter that otherwise notes the case is factbound and splitless.²²⁴

When a case is brought by a state government, a local government, or the federal government against a tribal interest, the cert pool memos either trumpet the importance of the case because of the governmental interest involved or take it as a given that the case is important because a state or the federal government filed the petition – or the Court disregards the recommendation of the cert pool to deny the petition, as was the case in *Lyng*, *Smith I*, and *Smith II*. It may be that the Court reviews some cases recommended by the pool for denial because the Justices are concerned with leaving a lower court ruling in place that could apply to several states.²²⁵

²²² 485 U.S. 439 (1988) (No. 86-1013).

²²³ 485 U.S. 660 (1988) (Nos. 86-946 & 86-947) (*Smith I*); 494 U.S. 872 (1990) (No. 88-1213).

²²⁴ See Cert Pool Memo at 8-9, *Lyng v. Northwest Indian Cemetery Protective Assoc.* 485 U.S. 439 (1988) (No. 86-1013), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1987/Granted-pdf/86-1013.pdf> (noting that the United States' petition was a "fact-bound challenge" and that there was no circuit split); Cert Pool Memo at 6, *Employment Division v. Smith*, 485 U.S. 660 (1988) (Nos. 86-946 & 86-947), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1987/Granted-pdf/86-946.pdf> ("Since petr also alleges no conflict in the lower courts over the issue presented, on balance I do not think either petr is certworthy."); Cert Pool Memo at 12, *Employment Division v. Smith*, 494 U.S. 872 (1990) (No. 88-1213), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1989/GM-1989-pdf/88-1213.pdf> ("[W]hile there is some dispute among the lower courts over whether religious use of peyote by groups *other* than the Native American Church is protected, petr identifies no lower court opinion that squarely conflicts with this one by holding that the Free Exercise Clause of the First Amendment does *not* protect members of the Native American Church from prosecution for religious use of peyote.").

²²⁵ *But cf.* Robert N. Clinton, *Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law*, 8 *HAMLIN L. REV.* 543 (1985) (worrying that Supreme Court cases creating rules for tribes with small land bases and populations will be applied to tribes such as the Navajo Nation, with a large land base and a large Indian population).

Brendale v. Confederated Tribes,²²⁶ a case involving the zoning authority of Indian tribes on reservation land, perhaps became important when amicus briefs filed by numerous states and counties noted that “the case is of national importance: of the 930,000 people who reside within Indian reservations nationwide, some 380,000 (41%) are non-Indians.”²²⁷ The memowriter, a Rehnquist clerk, argued:

To me, the [*Montana*] question appears certworthy, as it is not clear from *Montana* just exactly how much civil regulatory authority a tribe possesses over *nonmembers* within a reservation. ... And, as amici point out, the question of tribal zoning is potentially a very large issue, affecting many states and many private property owners, who would be divested of some say in local zoning laws if it were held that tribal zoning preempted state regulation.²²⁸

Justice Blackmun’s clerk argued that the lower court decision favoring the tribes was “basically correct – zoning jurisdiction over non-Indian parcels is important to proper, consistent regulation of land uses. I would wait for further development.”²²⁹ But five Justices voted to grant certiorari, perhaps on the basis that the number of non-Indians affected by the case was so large.²³⁰

Some cases acquire importance because of practical problems that would arise if a particular dispute is not resolved by the Court. *Mississippi*

²²⁶ 492 U.S. 408 (1989) (Nos. 87-1622, 87-1697 & 87-1711).

²²⁷ Cert Pool Memo at 18, *Brendale v. Confederated Tribes and Bands of the Yakima Reservation*, 492 U.S. 408 (1989) (Nos. 87-1622, 87-1697 & 87-1711), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1988/GM-1988-pdf/87-1622.pdf> (referencing Brief of the States of Arizona, Nevada, New Mexico, South Dakota, Utah, Washington, and Wyoming in Support of Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, *Brendale v. Confederated Tribes and Bands of the Yakima Reservation*, 492 U.S. 408 (1989) (Nos. 87-1622, 87-1697 & 87-1711), 1987 WL 880161; and Brief of the National Association of Counties as Amicus Curiae in Support of the Petition for a Writ of Certiorari, *Brendale v. Confederated Tribes and Bands of the Yakima Reservation*, 492 U.S. 408 (1989) (Nos. 87-1622, 87-1697 & 87-1711), 1987 WL 880371).

²²⁸ *Id.* at 19.

²²⁹ *Id.* at 20 (annotation).

²³⁰ See Docket Sheet, *Brendale v. Confederated Tribes and Bands of the Yakima Reservation*, 492 U.S. 408 (1989) (Nos. 87-1622, 87-1697 & 87-1711), <http://epstein.law.northwestern.edu/research/BlackmunDockets/1988/Paid/docket-87-1622.pdf> (noting that Rehnquist, Brennan, White, Marshall and O’Connor voted to grant cert).

Band of Choctaw Indians v. Holyfield,²³¹ the only Indian Child Welfare Act²³² case granted certiorari by the Supreme Court to date, was splitless,²³³ but the memowriter (a Blackmun clerk) argued that the Mississippi Supreme Court’s decision “creates a jurisdictional ‘black hole’ because of the practice of the Indian Health Service of transporting expectant mothers off the reservation to give birth.”²³⁴ This important question, according to the clerk, was highlighted by the fact that the Court had once granted cert in a similar case years earlier,²³⁵ but that case had been settled and dismissed.²³⁶ After *Holyfield*, the Court denied cert in every Indian Child Welfare Act-related case to this day.²³⁷

A clerk might assign greater importance to a case if it involves a significant number of citizens or a large amount of land. For example, the cert pool memo in *Navajo Tax Commission v. Pittsburgh & Midway Mining Co.* noted that the case had “arguable significance.... The significance lies in the fact that, as [petitioner] notes, the case involves jurisdiction over a large area with an overwhelmingly Navajo population. (The [petition] fails to state the population of the area, but asserts that the number of Indians affected by the decision is ‘far greater’ than the number affected by any of this Court’s prior diminishment decisions.)”²³⁸ But the Court did not discuss this case at conference.²³⁹

²³¹ 490 U.S. 30 (1989) (No. 87-980).

²³² 25 U.S.C. § 1901 et seq.

²³³ See Cert Pool Memo at 5-6, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (No. 87-980), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1988/GM-1988-pdf/87-980.pdf>.

²³⁴ *Id.* at 5.

²³⁵ See *Pino v. District Court*, 471 U.S. 1014 (1985) (No. 84-248).

²³⁶ See *Pino v. District Court*, 472 U.S. 1001 (1985) (No. 84-248).

²³⁷ Cf. Cert Pool Memo at 7, *McKenzie County Social Services Board v. V.G.*, 480 U.S. 930 (1987) (No. 86-996), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1986/MissedMemos-pdf/86-996.pdf> (“It seems wise to leave this inherently family/tribal matter to tribal courts. In light of the fact that petr has now arranged to pursue such matters in tribal courts in future cases, review of this case would have little practical impact beyond this single case.”) (annotation of Blackmun clerk).

²³⁸ Cert Pool Memo at 5, *Navajo Tax Commission v. Pittsburgh & Midway Coal Mining Co.*, 498 U.S. 1012 (1990) (No. 90-635), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1990/Denied-pdf/90-634.pdf>.

²³⁹ See Docket Sheet, *Navajo Tax Commission v. Pittsburgh & Midway Coal Mining Co.*, 498 U.S. 1012 (1990) (No. 90-635),

In other circumstances, the initial cert pool memo often recommends that the Court seek the views of the Solicitor General to help in determining the importance of a given case. In some cases, a petition headed for denial for lack of importance might be resurrected by a recommendation from the government to grant certiorari. *Negonsott v. Samuels*,²⁴⁰ one of the rare unpaid petitions in which the Court granted certiorari, is one such case. The cert pool memowriter, a White clerk, noted a clear circuit split between the Eighth and Tenth Circuits,²⁴¹ but argued against a grant because of the lack of importance of the case.²⁴² After the cert pool memo came out calling for a response from the State of Kansas, Kansas recommended that the Court grant certiorari as well.²⁴³ But still the memowriter was unsure because of the limited impact of the older Eighth Circuit decision and because of the complexities and

<http://epstein.law.northwestern.edu/research/BlackmunDockets/1990/Paid/docket-90-635.pdf>.

²⁴⁰ 507 U.S. 99 (1993) (No. 91-5397).

²⁴¹ See Cert Pool Memo at 8, *Negonsott v. Samuels*, 507 U.S. 99 (1993) (No. 91-5397), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Granted-pdf/91-5397.pdf> (discussing *Youngbear v. Brewer*, 415 F. Supp. 807 (N.D. Iowa 1976), *aff'd*, 549 F.2d 74 (8th Cir. 1977) (per curiam), and *Negonsott v. Samuels*, 933 F.2d 818 (10th Cir. 1991)).

²⁴² *Id.* at 9-10 (“Accordingly, it is possible that [the previous case] today only prevents prosecution of major crimes occurring on reservations in North Dakota and on two reservations in Iowa.”).

²⁴³ See Supplemental Memo at 1, *Negonsott v. Samuels*, 507 U.S. 99 (1993) (No. 91-5397), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Granted-pdf/91-5397.pdf>.

uncertainties of Indian law.²⁴⁴ The Court then sought the views of the Solicitor General, which urged the Court to grant cert,²⁴⁵ which it did.²⁴⁶

Perhaps cert pool memowriters do not find Indian law questions to be important as a general matter.²⁴⁷ For example, there are a good number of cert petitions brought by tribal interests the clerks found to be compelling, novel, or even interesting claims, but the clerk wrote also that the case was unimportant for a variety of reasons, usually related to the narrow factual question. In short, claims brought by tribal interests are almost never important unless there is a non-Indian law-related question of importance attached to the petition. Often, the proxy for “importance” is whether a state government filed the cert petition. In fact, state governments brought the wide majority of Indian law cases heard by the Court during the period of study.

²⁴⁴ *Id.* at 1-2:

Ordinarily, with a clear split and both sides in agreement, I would recommend a GRANT outright. But, I am given pause, because (as I pointed out in the pool memo) [the Eighth Circuit] is pretty clearly wrong—having skipped over critical legislative history in the committee reports. Thus, the Court would simply be correcting a[n Eighth Circuit] oversight. Moreover, it is difficult to tell just what the significance of the split is. It is possible that the only prosecutions affected are on a single reservation in Iowa and on a single reservation in North Dakota [Spirit Lake]. Of course, the parties whose interests are most strongly [a]ffected, the States of Iowa and North Dakota, have not been heard from. I still feel very much in the dark about the general significance of this case. I have a hunch the parties may be missing something—which is easy to do in this complex network of old statutes.

²⁴⁵ See Second Supplemental Memo at 3, *Negonsott v. Samuels*, 507 U.S. 99 (1993) (No. 91-5397), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Granted-pdf/91-5397.pdf>.

²⁴⁶ See Docket Sheet, *Negonsott v. Samuels*, 507 U.S. 99 (1993) (No. 91-5397), <http://epstein.law.northwestern.edu/research/BlackmunDockets/1992/IFP/docket-91-5397.pdf>.

²⁴⁷ *E.g.*, *Email, Hagen v. Utah*, 510 U.S. 399 (1993) (No. 92-6281), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Granted-pdf/92-6281.pdf> (noting that case is “not so sexy and is of little general importance”); Cert Pool Memo at 8, *United Keetowah Band v. Oklahoma Tax Commission*, 510 U.S. 994 (1993) (No. 93-616) (“The issue is not squarely presented in this case, and it is, like the princip[al] question in this case, apparently of no general significance.”), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Denied-pdf/93-616.pdf>.

One prototypical case is *Hoffman v. Native Village of Noatak*.²⁴⁸ There, the Ninth Circuit had held that the Eleventh Amendment did not bar suit by Indian tribes against states.²⁴⁹ The cert pool memo begins, “Because these are complicated and far-reaching matters of federal jurisdiction, and because there is a split with the 8th Circuit on the 11th Amendment issue, I recommend that the petition be granted.”²⁵⁰ Justice Blackmun’s clerk argued valiantly against a grant in a supplemental memo, noting:

I agree with [the cert pool memowriter] that the 11th Amend[ment] aspect of this case is certworthy. However, I think it would be appropriate for the Court to wait to see the actual consequences of [the Ninth Circuit]’s decision. [Petitioner’s] contention that this decision will open the floodgates to litigation by Native Americans is empirically verifiable. Further, if [petitioner’s] prediction is accurate, the Court will have ample opportunity to revisit the issue. The results of litigation from circuits other than [the Ninth Circuit] and [the Eighth Circuit] would also be helpful. Finally, while I believe the [Ninth Circuit] may have reached the correct result given the unique status of Native American tribal governments in the United States, the [Ninth Circuit] opinion in this case is less than careful in its analysis. The Court might well wait for a better reasoned opinion.²⁵¹

The argument did not dissuade the Court or even Justice Blackmun, who offered to serve as the fourth vote for certiorari (a “J3”), if necessary.²⁵²

²⁴⁸ *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) (No. 89-1782).

²⁴⁹ 896 F.2d 1156, 1162-63 (9th Cir. 1990).

²⁵⁰ Cert Pool Memo at 1-2, *Hoffman v. Native Village of Noatak*, 501 U.S. 775 (1991) (No. 89-1782) (referencing *Standing Rock Sioux Tribe v. Dorgan*, 505 F.2d 1135 (8th Cir. 1974)), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1990/Granted-pdf/89-1782.pdf>; see also *id.* at 10 (“[The 11th Amendment issue] is an important issue of constitutional law, and there is a circuit split.”).

²⁵¹ Supplemental Memo, *Hoffman v. Native Village of Noatak*, 501 U.S. 775 (1991) (No. 89-1782), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1990/Granted-pdf/89-1782.pdf>.

²⁵² See Docket Sheet, *Hoffman v. Native Village of Noatak*, 501 U.S. 775 (1991) (No. 89-1782), <http://epstein.law.northwestern.edu/research/BlackmunDockets/1990/Paid/docket-89-1782.pdf>.

Another example is *South Dakota v. Bourland*,²⁵³ where the Court narrowly granted cert despite a recommendation to deny. The cert pool memowriter, an O'Connor clerk, noted that the lower court decision favoring the Cheyenne River Sioux Tribe might have been incorrect for failure to follow relevant Supreme Court precedent.²⁵⁴ But the memo recommended denial because there was no split, nor could one be alleged.²⁵⁵ And yet, despite the lack of a split and over the recommendation of the cert pool memo, Chief Justice Rehnquist, and Justices White and Stevens voted to grant certiorari, with Justice Thomas adding the fourth vote as “J3.”²⁵⁶ Is this a case of four Justices voting reflexively in favor of a cert petition from a state?

Consider the Oklahoma Tax Commission, the entity involved in more certiorari petitions in this sample than any other except the United States – five as a petitioner and four as a respondent.²⁵⁷ The Court granted certiorari in four of the five petitions filed by the Oklahoma Tax Commission, but in none of the petitions brought by tribes against the Commission. Ultimately, the Commission lost two of the three cases it litigated to a final result in the Supreme Court – *Sac and Fox* and *Citizen*

²⁵³ 508 U.S. 679 (1993) (No. 91-2051).

²⁵⁴ See Cert Pool Memo at 8, 9-10, *South Dakota v. Bourland*, 508 U.S. 679 (1993) (No. 91-2051), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Granted-pdf/91-2051.pdf> (discussing *Brendale v. Confederated Tribes and Bands of the Yakima Indian Reservation*, 492 U.S. 408 (1989), and *Montana v. United States*, 450 U.S. 544 (1981)) (emphasis in original).

²⁵⁵ *Id.* at 10 (“Assuming *arguendo* that such lands are rare, and thus that a circuit split is unlikely to arise, the issue is not sufficiently important for this Court.”).

²⁵⁶ See Docket Sheet, *South Dakota v. Bourland*, 508 U.S. 679 (1993) (No. 91-2051), <http://epstein.law.northwestern.edu/research/BlackmunDockets/1992/Paid/docket-91-2051.pdf>.

²⁵⁷ See *Oklahoma Tax Commission v. Graham*, 484 U.S. 973 (1987) (No. 87-635) (GVR); *Oklahoma Tax Commission v. Muscogee (Creek) Nation*, 487 U.S. 1218 (1988) (No. 87-1068) (certiorari denied); *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989) (No. 88-266) (decided with opinion); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991) (No. 89-1322) (decided with opinion); *City Vending of Muscogee, Inc. v. Oklahoma Tax Commission*, 498 U.S. 823 (1990) (No. 89-2011) (certiorari denied); *Wyandotte Tribe of Oklahoma v. State of Oklahoma ex rel. Oklahoma Tax Commission*, 501 U.S. 1219 (1991) (No. 90-1756) (certiorari denied); *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993) (No. 92-259) (decided with opinion); *Sac and Fox Nation v. Oklahoma Tax Commission*, 506 U.S. 975 (1992) (No. 92-499) (certiorari denied); *United Keetoowah Band of Cherokee Indians v. Oklahoma Tax Commission*, 510 U.S. 994 (1993) (No. 93-616) (certiorari denied).

Potawatomi – while winning in *Graham*, a relatively insignificant case with only tangential Indian law issues.²⁵⁸ But in the cert pool memos, the clerks described the interests of the Oklahoma Tax Commission as raising “important concerns of federalism,”²⁵⁹ while similar tribal petitions were “of no general significance.”²⁶⁰

Other petitions brought by state governments or agencies implicated the power of states to enforce criminal laws against peyote,²⁶¹ the power of states to enforce its taxes on non-Indians in Indian Country,²⁶² and the water rights of states and their constituents.²⁶³ The Court granted certiorari in all these cases.

²⁵⁸ *But see* Kaighn Smith, Jr., *Federal Courts, State Power, and Indian Tribes: Confronting the Well-Pleaded Complaint Rule*, 35 N.M. L. REV. 1, 25-27 (2005) (noting that the question in *Graham* involving the well-pleaded complaint rule is a significant one for tribal interests).

²⁵⁹ Cert Pool Memo at 15, *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991) (No. 89-1322), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1990/Granted-pdf/89-1322.pdf> (annotation of Blackmun clerk).

²⁶⁰ Cert Pool Memo at 8, *United Keetoowah Band of Cherokee Indians v. Oklahoma Tax Commission*, 510 U.S. 994 (1993) (No. 93-616), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Denied-pdf/93-616.pdf>.

²⁶¹ *See* Cert Pool Memo at 5, *Employment Division v. Smith*, 485 U.S. 660 (1988) (Nos. 86-946 & 86-947), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1987/Granted-pdf/86-946.pdf> (“I think it a close question whether this case is certworthy. There is some force to petr’s argument that *Sherbert* and *Thomas* are distinguishable because use of peyote—unlike refusal to work on Saturday or refusal to work in a munitions factor—is a crime in Oregon.”) (citing *Sherbert v. Werner*, 374 U.S. 398 (1963); *Thomas v. Review Board*, 450 U.S. 707 (1981)); Cert Pool Memo at 10, *Employment Division v. Smith*, 494 U.S. 872 (1990) (No. 88-1213), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1989/GM-1989-pdf/88-1213.pdf> (“On remand, the Oregon Sup Ct concluded that such conduct was not exempted from the reach of Oregon’s statute barring possession of controlled substances, but that ‘outright prohibition of good faith religious use of peyote by adult members of the Native American Church would violate the First Amendment.’”) (quoting *Smith v. Employment Division*, 763 P.2d 146, 148 (Or. 1988)).

²⁶² *See* Cert Pool Memo at 1, *Dept. of Taxation and Finance of N.Y. v. Milhelm Attea & Bros., Inc.*, 502 U.S. 1053 (1992) (No. 91-907), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Granted-pdf/91-907.pdf> (describing the petitioner as a “financially strapped State [that] wants to tax cigarettes sold to non-Indians on Indian reservations”); Cert Pool Memo at 3, *Dept. of Taxation and Finance of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994) (No. 93-377), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Granted->

Conversely, claims brought by tribal petitions often are labeled unimportant without much discussion. One exemplary case is *Pueblo of Santo Domingo v. Thompson*.²⁶⁴ The United States and the Pueblo had brought claims that the Pueblo Lands Board had invalidly extinguished Pueblo title to certain lands in New Mexico.²⁶⁵ The cert pool memowriter, a Rehnquist clerk, noted, “It seems clear that the Board erred 60 years ago when it extinguished Pueblo title in this overlap land; section 14 of the 1924 Act prohibited such a result.”²⁶⁶ But the poolwriter recommended denial because because the outcome of the case would affect only a few tribes.²⁶⁷ Even Justice Blackmun’s clerk wrote in the margin, “While I think [the Tenth Circuit] may have erred, I see no issue of general importance.”²⁶⁸

In yet another case of major importance to Indian Country, but one the Court did not discuss in conference, is *Western Shoshone National Council v. Molini*.²⁶⁹ In that case, the Ninth Circuit had held that the Indian Claims Commission award in *United States v. Dann*²⁷⁰ acted a bar to the Western Shoshone claims that the State of Nevada had interfered with their aboriginal and treaty hunting and fishing rights.²⁷¹ The cert pool memowriter, a White clerk, noted that the claim was viable but unimportant.²⁷² Justice Blackmun’s clerk disagreed, annotating the cert

[pdf/93-377.pdf](#) (“The issue, however, is important both legally and practically, and the NY Ct App does not seem willing to heed anything but a reversal on the merits.”).

²⁶³ See Cert Pool Memo at 24, *Wyoming v. United States*, 492 U.S. 406 (1989) (No. 88-309), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1988/GM-1988-pdf/88-309.pdf> (“This is an important case. It has apparently received national attention since it began in 1977, and the outcome, in a region where agriculture and industry need an assured water supply, will affect thousands of people.”).

²⁶⁴ 503 U.S. 984 (1992) (Nos. 91-1179 & 91-1346).

²⁶⁵ See *United States v. Thompson*, 708 F. Supp. 1206, 1208-10 (D. N.M. 1989).

²⁶⁶ Cert Pool Memo at 12-13, *Pueblo of Santo Domingo v. Thompson*, 503 U.S. 984 (1992) (Nos. 91-1179 & 91-1346), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/Denied-pdf/91-1179.pdf> (citing Act of June 7, 1924, 43 Stat. 636).

²⁶⁷ See *id.* at 13 (citing *United States v. Candelaria*, 271 U.S. 432 (1926)).

²⁶⁸ *Id.* at 14.

²⁶⁹ 506 U.S. 822 (1992) (No. 91-1916).

²⁷⁰ 873 F.2d 1189 (9th Cir.), *cert. denied*, 493 U.S. 890 (1989).

²⁷¹ *Western Shoshone National Council v. Molini*, 951 F.2d 200, 202-03 (9th Cir. 1991).

²⁷² See Cert Pool Memo at 7, 9, *Western Shoshone National Council v. Molini*, 506 U.S. 822 (1992) (No. 91-1916), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/91-1916.pdf> (“At bottom, any tension in the case law over the viability of claims involving

pool memo by arguing that the case “may merit summary reversal on application of the wrong standard.”²⁷³ In short, though the lower court may have gotten the case wrong by applying the incorrect standard, effectively eradicating the hunting and fishing rights of an entire tribe, the Court would not find the case to be important enough to discuss.²⁷⁴

In yet another case *Makah Tribe v. Washington*,²⁷⁵ the cert pool memowriter, an O’Connor clerk, noted that the lower court’s decision may have been “a clearly unwarranted departure from precedent,” but recommended denial of the petition because “review would merely be for error correction.”²⁷⁶ The Ninth Circuit had held that the prevailing tribes in the *United States v. Washington* litigation could not recover attorney fees under federal civil rights statutes.²⁷⁷ Justice Blackmun’s clerk’s annotation, while sympathetic to the tribal petitioner, still doubted the importance of the question:

This is a hard call. It seems to me that [petitioners] are right in every respect: [the Ninth Circuit]’s decision is wrong as a matter of law and has no obvious limiting principle. On the other hand, my instinct is that the memowriter may be correct in viewing this case as an isolated blunder. Since I’m also sympathetic to [petitioners] on the merits, [I’d] be inclined to keep their claim alive. I’m really not sure what the [Solicitor General] would have to say. I appeal to your judgment.²⁷⁸

hunting and fishing rights appears highly fact-based and falls short of a genuine legal conflict. ... Although this case affects a sizable class, and involves national interests, the issues presented are largely factbound and seem unlikely to have broad implications for other litigants.”) (discussing *Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985)).

²⁷³ *Id.* at 9.

²⁷⁴ See Docket Sheet, *Western Shoshone National Council v. Molini*, 506 U.S. 822 (1992) (No. 91-1916), <http://epstein.law.northwestern.edu/research/BlackmunDockets/1992/Paid/docket-91-1916.pdf>.

²⁷⁵ 485 U.S. 1034 (1988) (No. 87-1390).

²⁷⁶ Cert Pool Memo at 7, *Makah Tribe v. Washington*, 485 U.S. 1034 (1988) (No. 87-1390), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1987/Denied-pdf/87-1390.pdf>.

²⁷⁷ See *United States v. Washington*, 813 F.2d 1020, 1022-24 (9th Cir. 1987).

²⁷⁸ Supplemental Memo, *Makah Tribe v. Washington*, 485 U.S. 1034 (1988) (No. 87-1390), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1987/Denied-pdf/87-1390.pdf>.

As with determinations that a case is “factbound,” clerks often conclude that the limited geographic import of a particular claim renders the case less important – unless a state government brought the claim.

C. The Structure and Mechanics of the Certiorari Process Discriminates Against Tribal Interests

1. The Mechanics of the Certiorari Process

There is a great deal of circumstantial evidence that the factors articulated in Supreme Court Rule 10 create a sort of structural barrier to the fair disposition of cases brought by tribal interests. In short, the subjective and objective factors the Supreme Court’s clerks look to in the certiorari process encourage the dismissal of tribal arguments.

Professor David Stras has broken down the import of the clerks in the Supreme Court’s cert pool. He first notes that the creation of the cert pool has “led to a homogenization of the [certiorari] process...,” largely because the clerk in the cert pool now writes for “anywhere from five to eight Justices.”²⁷⁹ Also, Stras points out, H.W. Perry’s interviews with former clerks “suggest[s] that, because recommendations to deny a case are the norm, law clerks pay far less attention to those recommendations than to recommendations to grant during the annotation process, increasing the likelihood that an issue of importance will be overlooked.”²⁸⁰ The creation of the cert pool may have created, in former D.C. Circuit judge and Solicitor General Kenneth W. Starr’s words, a “hydraulic pressure to say no.”²⁸¹ Stras argues that three factors push cert pool clerks to recommend a denial in tough cases: (1) it is less risky because a recommendation to deny will receive less scrutiny from clerks in other chambers; (2) it avoids cases in which the Court might be forced to dismiss a grant of certiorari as improvidently granted (apparently a result that clerks “dread”); and (3) general signals from the Court that the fewer cases the better.²⁸²

Finally, the inexperience of the clerks hurts tribal petitions: “Incoming law clerks, often fresh off of a clerkship with a judge on the

²⁷⁹ Stras, *supra* note 8, at 973. Justice Alito’s announcement that he will drop out of the cert pool in the 2008 Term is an interesting development. See Adam Liptak, *A Second Justice Opts Out of a Longtime Custom: The ‘Cert. Pool’*, N.Y. TIMES, Sept. 25, 2008, at ___. Justice Alito is a complete unknown in the context of federal Indian law. So far, we know only that he voted with the conservatives in the only case he has seen so far. See *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709 (2008).

²⁸⁰ Stras, *supra* note 8, at 974 (citing PERRY, *supra* note 4, at 63).

²⁸¹ *Id.* at 975 (quoting Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1377 (2006)).

²⁸² See *id.* at 975 (citations omitted).

United States Courts of Appeals, have little training and even less experience screening petitions for certiorari.”²⁸³ As noted in Part III, there are several cert pool memos that evidence a clerk’s lack of understanding of multiple aspects of federal Indian law. Some clerks are surprised that Indian tribes have immunity from suit. Other clerks complain about the vagueness of federal common law tests, such as the federal Indian law preemption test, the tribal civil jurisdiction over nonmembers test, and the Indian Claims Commission Act test. In each of these circumstances, the data indicates that a Supreme Court clerk will *always* recommend the denial of a petition filed by a tribal interest for the reasons Professor Stras suggests.

The cert pool Justices in this sample (1986-1993), save Justice Blackmun, constituted the core of the Court that would combine to bring federalism jurisprudence to the forefront of American constitutional law in the 1990s²⁸⁴ – mainly Chief Justice Rehnquist, and Justices White, O’Connor, Scalia, Kennedy, and Thomas. Cert pool clerks knew that they were writing for an audience that consisted of Justices often interested in states rights. There must be different tugs on a memowriter. The audience cannot be ignored, but the memowriter wants to be fair and candid about the petitions. Early in a law clerk’s one-year stint, before a memowriter becomes confident and experienced in this unusual job – and develops a reputation as a good or poor memowriter – they perhaps are more likely to write to this audience of “federalism” Justices.²⁸⁵ And so the cert pool memos, whether the clerks intend to or not, are less likely to trumpet the merits of a legal position put forward by a tribal interest than a state interest. A cert pool memo candidly noting that a state’s position is weak in comparison to a tribe’s position likely will not win points with the conservative Justices in the cert pool, while a memo understating the possible strength of a tribal position might undermine the cert pool memowriter’s reputation. This suggests the possible creation of a culture within the cert pool of understating the merits of petitions filed by tribal interests, a culture generated by the structure of the cert pool itself. However, the import of the cert pool can be overstated. It bears mention that the Court several times rejected the recommendation of the poolwriters to deny a petition.

²⁸³ *Id.* at 975.

²⁸⁴ See generally MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 249-78 (2005); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

²⁸⁵ Thanks to Phil Frickey and David Stras for making this point.

In the cases decided since the end of this study, from 1994 to the present, the ratio of wins and losses remains the same. Now, eight of the nine Justices participate in the cert pool, including two Democratic appointees. The “audience” for the cert pool clerks includes five “federalism” Justices, and three others, if one includes Justice Souter as a non-federalism Justice. One would expect the cert pool memos in the last fifteen years or so to reflect the presence of the non-federalism Justices, but one could also expect that the focus of the cert pool memos would not reflect the minority. The cert pool memos appear to function as a means to crystallize the thinking of the Court on a particular case before any individual Justice reviews the materials. Anyone who negotiates contracts knows that the key to controlling the final product is to prepare the first draft, which then forms the basis for the entire negotiation. A Justice who supports a pro-tribal interest outcome in a matter might have to work from the first cert pool memo, which was written for an audience of a majority of Justices who disfavor tribal interests as opposed to state interests. Given that Indian law tends to not excite the “judicial libido,” in Justice Scalia’s pithy words,²⁸⁶ a Justice who starts out in the minority might be less inclined to use his or her institutional capital to persuade the rest of the Court to change a presumptive vote against tribal interests.

2. The Structure of Rule 10

Of the four major factors expressed in Rule 10, three are more subjective, while only one (whether a petition alleges a split) is more objective. Since relatively few Indian law certiorari petitions allege a viable split, the subjective factors become more important. And there is where the inexperience of a Supreme Court law clerk is most heightened,²⁸⁷ perhaps leading to far more recommendations to deny a petition filed by tribal interests than those filed by states.

Consider the Rule 10 factors.

First, there are relatively few splits in authority that arise in Indian law cases. Many Indian law cases arise when the meaning of a treaty or a statute is in dispute, but that kind of dispute often is limited to a small geographic region or to one or a very few number of tribes. For example,

²⁸⁶ *Zuni Public School District No. 89 v. U.S. Dept. of Education*, 127 S. Ct. 1534, 1556 (2007) (Scalia, J., dissenting).

²⁸⁷ *See Stras, supra* note 8, at 975-76 (“In the absence of objective factors such as a conflict among the lower courts, the decision about whether to recommend a grant or a denial of certiorari is largely based on subjective factors that law clerks, at least early in their clerkships, may be ill-equipped to evaluate.”) (citing DAVID O’BRIEN, *STORM CENTER* 193 (7th ed. 2005)).

if a federal circuit and a state supreme court agree on a particular interpretation of a treaty or a statute (and even if both are dead wrong, a possibility in a field dominated by ambiguity and complexity), there will never be a split in authority. Absent a split in authority, Rule 10 informs petitioners that the Court is not likely to hear the case unless there is some national legal question at stake. And since this kind of dispute is limited in geographic scope, the dispute is not important enough to be independently certworthy absent a split.

Second, many Indian law cases are factbound, meaning that the Court is unlikely to hear a petition where the petitioner seeks a review of the lower court's findings of fact. For example, in a treaty case, everything involved is a question of fact, including the technical meaning of the treaty language. In these kinds of cases, the Court will grant a petition only if the lower court made the gross error of applying the wrong law or the wrong standard to the case. If the lower court correctly stated the law or standard, the Supreme Court will let the lower court decision stand – no matter the relative merit of the lower court's analysis. Rule 10 states that the role of the Court is not error correction, but in a field noted for ambiguity and complexity, error is endemic. The Court states in Rule 10 that it is not interested in reviewing this kind of error, no matter how troubling.

Third, it is difficult for clerks to trumpet the interests of Indian tribes and individual Indians as being important. There are few Indian people, they tend to possess little or no land or resources, tribal interests tend to not impact or affect the interests of major metropolitan areas, and Indian law constitutional questions are unusual and abstract. Often the only factor clerks can feel comfortable arguing is important is the impact on a state government's ability to regulate, tax, or prosecute.

Moreover, the Court will grant certiorari when an important constitutional concern arises involving an Indian law question.²⁸⁸ Unfortunately for tribal interests, it is almost always the case that the constitutional concern that interests the Court is adverse to tribal interests. States rights or federalism, the Eleventh Amendment, and the authority and jurisdiction of state sovereigns to enforce criminal laws tend to be the major issues that attract the attention of the Court in this context. The protection or preservation of the sovereignty of Indian tribes is not of independent importance to the Court.

²⁸⁸ See generally Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L. J. 579 (2008).

Conclusion

The stated purpose of the Supreme Court's discretionary docket is to remove "patently uncertworthy" cases from consideration. In general, the certiorari process as currently constituted in Rule 10 appears to meet this goal. The Court will agree to decide few "splitless" or "factbound" unless there are extraordinary circumstances, such as an unusual importance to the question or if the lower court committed an atypical error.

But in the field of federal Indian law, with questions often far removed from the mainstream of constitutional jurisprudence, the certiorari process appears to prejudice the interests of Indians and Indian tribes, who are often engaged in a multitude of complicated legal disputes with states and state agencies.

The modern certiorari process, with its dependence on the so-called "cert pool" of clerks and the pool's gatekeeper status in applying the Court's Rule 10, virtually guarantees that petitions filed by tribal interests will be denigrated by the cert pool. Tribal petitions, often involving the interpretation of Indian treaties or complicated and narrow common law questions of federal Indian law, are readily deemed "factbound" and "splitless." Conversely, the cert pool values and perhaps better understands the interests of state and state agency petitions, as well as the way the pool's audience (the Court) understands and values the interests of states. Thus, the pool's recommendations favor states and state agencies far more. The result, frankly, is that tribal petitions on a question will almost never be favored, whereas state petitions on *the same question* will often be favored.

The solutions to this discrepancy are not simple to effectuate. The Court's commitment to the certiorari process and the cert pool is powerful and not subject to outside interference. This commitment likely is linked to the Court's interest in placing all cert petitions – with the notable exception of original jurisdiction petitions – into one category.

As the occasional clerk and the occasional Justice recognize, however, federal Indian law resists categorization into the mainstream. The certiorari process simply does not work for federal Indian law. The cert pool, and its reflection of the political makeup of the Court, cements the prejudice that tribal interests face in the certiorari process.

Finally, while the admonition that tribal interests should do their very best to avoid the Supreme Court is not new, the findings of this study also demonstrate with increased force and clarity that Supreme Court adjudication is an extraordinarily hazardous process for tribal interests.

The only cases the Court is likely to accept are cases in which the party opposing tribal interests lost at the lower court level. In short, a tribal victory below appears to be viewed as an aberration that the Court is more willing to correct than not.

One very important tactical benefit to this study for both tribal interests and those that oppose them is the light that the study sheds on the certiorari process. It is one thing to read and understand Rule 10, but it is another to see it in action as interpreted by the cert pool of clerks – and applied to very specific fact patterns. There is no doubt that the people writing these memoranda are some of the finest legal minds in American law and their assessment – colored as it is by Rule 10 – of the strengths and weaknesses of a particular petition is an invaluable tool for future litigators. If nothing else, the list of Indian law-related certiorari petitions filed during the study period will allow Indian law litigators to better assess their chances in the certiorari process.