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Abstract: Scholars of the Supreme Court often use a justice’s political ideology to predict their ultimate vote on Constitutional questions. While this approach may serve scholars well when questions involve hot button civil liberties issues that are the focus of confirmation hearings, ideology is in actuality a poor predictor of judicial behavior in other areas of law. This paper looks at one of the more complex – Federal Indian Law – and uses both descriptive statistics and more advanced quantitative analysis to go beyond the pure ideology and explain why individual Justices vote the way they do. Using the Fisher Exact Test, and a comprehensive new database of Indian Law decisions, I demonstrate that contrary to common expectations, factors like the Solicitor General’s participation are not significant in swaying an individual Justice’s vote, while factors like being the appellant party and certified questions of conflicting jurisdiction do statistically significantly alter an individual Justice’s vote on the merits. These factors provide better insight into the ultimate outcome – at a Justice level – of Indian law decisions before the Court, and can be used by parties to predict future Supreme Court outcomes on Indian law questions.

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I. Introduction

Both political scientists and lawyers are avid scholars of the Supreme Court. However, while the interest of these two scholarly factions may be motivated by the same fascination with jurisprudence and the Court as an institution, they approach the study of the Court with different methods, aims, and objectives. Lawyers give effect to the legal tests and specific words articulated by the Court in its majority, concurring, and dissenting opinions for their precedential value (stare decisis). We learned in our first year of law school that it is the application of these legal “tests” which are determinative of the ultimate outcome, and so as lawyers we are apt to follow the evolving standards employed by the Court as it clarifies these tests by adjudicating the difficult cases with facts whose outcome is not determined by a plain reading of court precedent.

In contrast to the lawyer, social scientist who studies the Supreme Court is seldom bothered by the words of any opinion. They appreciate the difference between a unanimous decision and a 5-4 vote not for the degree of difference proffered between the majority and the dissent, but for their ability to test, model, and predict that very result. Social scientists focus on the ideologies of the individual Justices to predict the outcome of cases. While there are several iterations of this scholarship the most popular, and a good approximation of the direction judicial politics scholarship is moving in, is found in the Median-Justice theory.¹ These pundits view

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¹ Andrew D. Martin, Kevin M. Quinn, and Lee Epstein Locating the Constitutional Center Centrist: Judges and Mainstream Values: A Multidisciplinary Exploration: The Median Justice on the United States Supreme Court 83 N.C.L. Rev. 1275 (2005). The Median Justice Theory assumes that the “median” Justice is the one that controls the outcome of cases on the Supreme Court: “the Justice in the middle of a distribution of Justices, such that (in an ideological distribution, for example) half the Justices are to the right of (more “conservative” than) the median and half are to the left of (more “liberal” than) the median.” Martin and his colleagues continue; “On virtually all conceptual and empirical definitions, O’Connor is the court’s center -- the median, the key, the critical and the swing justice”). See also Lee Epstein and Tonja Jacobi Super Medians 61 Stanford L. Rev. 37 (2008), Chris Bonneau, Thomas H. Hammond, Forrest Maltzman, and Paul J. Wahlbeck Agenda Control, the Median Justice, and the Majority Opinion on the Supreme Court American Journal of Political Science, Vol. 51, No. 4, (2007) (“it is argued that decision-making is driven simply by the median justice’s policy preferences”), Thomas H. Hammond, Chris W. Bonneau, and Reginald S. Sheehan, Strategic Behavior and Policy Choice on the U.S. Supreme Court. Stanford, CA: Stanford University Press (2005), Patrick D. Schmidt and David A. Yalof, The ‘Swing Voter’ Revisited: Justice
Supreme Court decisions as ideological battles, where conservative justices are pitted against liberal justices, and the ideological middle justice controlling the direction of the Court in closely fought cases. They maintain that a case is not determined by the application of facts to a legal test or the precedent of prior cases, but instead by selecting a desired outcome which comports with their ideological perspective of the law, and then trying to write an opinion in that direction which can command a majority. According to this model, these same pundits view the replacement of Chief Justice William Rehnquist with Chief Justice John Roberts, and more recently the confirmations of Justices Sonia Sotomayor and Elena Kagan to replace retiring Justices David Souter and John Paul Stevens as having no discernible impact on the outcome of

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2 Pablo T. Spiller The Choices Justices Make American Political Science Review Vol. 94, No. 4, (2000) (“Once the median is proposed, no other proposal will beat it, and it becomes the outcome”), Cliff Carrubba, Barry Friedman, Andrew D. Martin, and Georg Vanberg. "Does the Median Justice Control the Content of Supreme Court Opinions?" Presented Second Annual Conference on Empirical Legal Studies, November 2007 available at http://adm.wustl.edu/media/working/mjt1-5.pdf (“The reasoning behind “median justice theory” (MJT) is powerful, so much so that it remains the dominant model of judicial decision making on collegial courts such as the Supreme Court”) (Last accessed December 6, 2010).

3 Id.


5 Adam Liptak, The Roberts Court, The Most Conservative Court in Decades New York Times, July 25, 2010 (“[F]or all the public debate about the confirmation of Elena Kagan or the addition last year of Justice Sonia Sotomayor, there is no reason to think they will make a difference in the court's ideological balance. Indeed, the data show that only one recent replacement altered its direction, that of Justice Samuel A. Alito Jr. for Justice Sandra Day O'Connor in 2006, pulling the court to the right”), Elisabeth Semel The Honorable John Paul Stevens: Liberty: Reflections on Justice John Paul Stevens's Concurring Opinion in Baze v. Rees: A Fifth Gregg Justice Renounces Capital Punishment 43 U.C. Davis L. Rev. 783 (2010) (“Sotomayor, however, has not altered the balance of power on the Court”) citing Adam Liptak. Justices Allow Execution, with Sotomayor Opposed, New York Times, Aug. 19, 2009 (observing that Sotomayor's appointment did not alter "the ideological fault line at the court").

6 Id. See Also, Richard Brust The 'Super Median': On an ideological court, it's all about keeping Justice Kennedy 96 A.B.A.J. 20 (2010) (Suggesting that Justice Kagan will play the same role as Justice Stevens without changing the ideological balance of the Court), Rupert Cornwell Dirt Fails to Stick as Kagan Pledges an ‘Open Mind’ on Supreme Court; Second woman to be Nominated by Barack Obama Faces Grilling by Senators on Abortion, Gay Rights and Gun Control The London Independent, June 29, 2010 (“Ms. Kagan can expect to serve for a quarter of a century but her arrival will not change the balance of the court, where conservatives among the nine justices have a 5-4 majority”), On the Confirmation of Elena Kagan to the Supreme Court. 111th Congress, 2nd Session. Senate Judiciary Committee (2010) (Testimony of Chairman Sen. Patrick Leahy D-VT) (“I don’t expect your nomination to change the balance of power”).
the Court’s decisions because each replacement had an ideological midpoint on the same side of
the Court as the Justice they replaced, effectively maintaining the stasis of the Court’s prior
equilibrium. For those that accept the Median-Justice theory, only Justice Samuel Alito’s
confirmation\(^7\) to replace Justice Sandra Day O’Connor had a discernible impact on the
ideological balance of the bench.

Even if the Median-Justice theory has a place in explaining the ultimate outcome of cases
before the Court in some areas of law, as is often the case decisions involving tribes, their
members, and their interests (collectively “Federal Indian Law”) are notable exceptions.\(^8\)
Because few Justices arrive at the bench with any significant exposure\(^9\) to Indian law,\(^10\) their
jurisprudence in the area naturally changes as they are continually exposed to questions

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\(^7\) Adam Liptak, *The Roberts Court, The Most Conservative Court in Decades* New York Times, July 25, 2010 (With Justice Alito joining the court’s more conservative wing, Justice Kennedy has now unambiguously taken on the role of the justice at the center of the court, and the ideological daylight between him and Justice O’Connor is a measure of the Roberts court’s shift to the right.”), See also Adam Liptak, *Alito Vote May Be Decisive In Marquee Cases This Term* New York Times, February 1, 2006.

\(^8\) The majority of closely decided Supreme Court cases do follow strict ideological lines. In the 2009-2010 term for example, 69% of 5-4 decisions were split perfectly along the ideological line of the Court – with Justice Kennedy serving as the swing Justice, the Chief Justice and Justices Scalia, Thomas, and Alito forming the conservative end of the court, and Justices Stevens, Ginsburg, Breyer, and Sotomayor forming the liberal end of the Court. However, as is often the case, Indian law decisions are considerably less likely to fall under strict ideological lines.

\(^9\) Melissa Tatum *Native American Law: Foreword* 37 Tulsa L. Rev. 481 (2001) (Describing how Indian Law was not an important part of the law school curriculum when any of the sitting Justices attended law school), Kevin Washburn *The Next Great Generation of American Indian Law Judges* 81 U. Colo. L. Rev. 959 (2010) (Describing many Justice’s first impressions of Indian law and how little exposure to Indian law most of the individual Justices had prior to their appointed to the bench), Carole Goldberg, *Finding the Way to Indian Country: Justice Ruth Bader Ginsburg’s Decisions in Indian Law Cases*, 70 Ohio St. L.J. 1003 (2009) (Describing Justice Ginsburg’s first impressions of Indian law in particular through her work with the ACLU, and how that experience has shaped her Indian law jurisprudence).

\(^10\) Indian Country is a legal term of art defined at 18 USC 1151. It sets the metes and bounds of Indian regulatory and adjudicatory authority by broadly defining on which lands federal and tribal governments, as opposed to states, are presumptively assumed to jurisdiction. It has three parts: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.
regarding the third sovereign, the unique cannons of construction that apply to statutory and treaty interpretations when Indians and their governments are involved, and legal issues found only in Indian Country. Complicating matters, the determination of Indian law cases is often bound up in specific facts that can span not decades but centuries and focus on the singular relationship between one single tribe and one state, thus requiring each Justice to read and understand a poorly documented area of American history. The sympathies of individual Justices to the brutal history of federal-state-tribal relations, and the fact based nature of many cases, results in splits among the Justices that would never be predicted by the Median Justice model or the ideology of specific Justices.

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11 Since Cherokee Nation v. Georgia 30 U.S. 1 (1831) tribes have been considered “domestic dependent nations” and given roughly equal sovereign status as states. Accordingly, while Courts repeatedly recognize Congressional plenary powers over Indian affairs stemming from the Supremacy Clause, states are often prohibited or preempted from acting in Indian Country. This creates questions that can functionally only arise in tribal proceedings because the law as applied to states is too well settled to raise the controversy.


13 See Washburn, Supra n.9 (Dean Washburn provides an excellent analysis of the movement of Supreme Court Justices on Indian law over the course of their tenure; “federal judges tend to be more even-handed to Indian tribes once they become seasoned in their positions.” His discussion of Chief Justice Marshall and the Indian Law trilogy is particularly insightful.)

14 This precise problem has recently resulted in fewer certiorari grants when tribes are the petitioning party to the Supreme Court because the appellate decisions below are not determined to present questions of national importance, even when they are arguably wrongly decided, if they affect only one tribe and the situation is unlikely to recur. See Matthew Fletcher Factbound and Splitless: The Certiorari Process as a Barrier to Indian Tribes 51 Ariz. L. Rev. 933 (2009).
For example, the longest Natural Court\(^15\) in more than a century\(^16\) issued twenty-eight Indian Law opinions.\(^17\) Contrary to the expectations created by the Median Justice model, which would expect conservative justices to vote with other conservatives, and liberal justices to vote with other liberals, many of the Indian law opinions issued by the last natural Rehnquist Court demonstrated very non-ideological coalitions and inexplicable joining behavior.\(^18\) In *United

\(^{15}\) Chief Justice Rehnquist and Justices Stevens, O'Connor, Scalia, Kennedy, Thomas, Souter, Ginsburg and Breyer. The “natural court” includes an aggregate of the Supreme Court terms where the same nine Justices sat together without any changes to the Court’s composition. The last Rehnquist natural Court lasted from Justice Breyer’s confirmation in 1994 through the death of Chief Justice Rehnquist and the subsequent confirmation of Chief Justice Roberts in 2005. This is a useful way to think about the Court because the same Justices are deciding which cases to give certiorari and casting the votes on the merits. Therefore, changes over the period of the Court, or differences that emerge within it, are particularly interesting to study as the cause of any change that occurs over the duration of a natural court cannot be due to the introduction of a new Justice or the loss of a more senior one. For a more thorough discussion of the benefits of a “natural court” see Laurie Ringhand *The Rehnquist Court in Empirical and Statistical Retrospective: Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court* 24 Const. Commentary 43 (2007) (“Because these same nine justices sat together throughout this period, this time frame provides a wealth of data while avoiding the difficulties associated with comparing decisions rendered by different justices in different cases”).

\(^{16}\) The only natural court of longer duration was the sixth natural court under Chief Justice Marshall when the Court had only seven justices, with associate Justices Bushrod Washington, William Johnson, Henry Brockholst Livingston, Thomas Todd, Gabriel Duvall, and Joseph Story. It was this Court that decided the first of three significant Indian law cases, now often known colloquially as the Indian Law Trilogy; *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (holding that only the federal government, and not the states, could negotiate with Indian tribes for the rightful title to Indian land.)


\(^{18}\) Joining behavior is a term popularized by social science to reflect the reality that some Justices are more likely to sign on to opinions written by Justices with similar ideological positions on the law, appointed by Presidents from the same party, or are more persuasive in moderating opinions so as to build coalitions. For a thorough legal discussion of joining behavior see Leigh Anne Williams *Measuring Internal Influence on the Rehnquist Court: An Analysis of Non-Majority Opinion Joining Behavior* 68 Ohio St. L.J. 679 (2007).
States. v. Lara. Justice Souter’s lone dissent was joined only by Justice Scalia, representing a coalition of a sole liberal and a sole conservative. Even more unusually, Lara was one of just seven cases heard all term by the Court where Justices Thomas and Scalia did not vote together, representing the ability of Indian law to confound the expectations of social scientists. 

The ideological extremes left out the center in Chickasaw Nation v. United States where Justice Breyer’s majority opinion could gain the support of conservative Justices Rehnquist, Thomas, Scalia, moderate Justice Kennedy, and liberal Justices Ginsberg and Stevens, but was unable to obtain the support of moderate Justices O’Connor and Souter who jointly dissented. Even more unusual was the 6-3 decision in Kiowa Tribe of Oklahoma v. Manufacturing Technologist Inc. where the dissents from an opinion favoring tribal sovereign immunity in contract disputes drew from the most liberal (Stevens and Ginsberg), and most conservative (Thomas) corners of the Court.

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20 Justice Souter’s dissent, cloaked in brazenly hostile language to tribes, is a particularly good example that Justices assumed to be on the ideological left are not always allies of tribal interests; “tribes have lost their inherent criminal jurisdiction over nonmember Indians, any subsequent exercise of such jurisdiction "could only have come to the Tribe" (if at all) "by delegation from Congress...." [T]ribal sovereignty over nonmembers cannot survive without express congressional delegation, and is therefore not inherent." (emphasis added) Id. at 226-227.
22 In sharp contrast to Justice Souter’s dissent, which Justice Scalia joined, Justice Thomas’s concurrence questions the apparent conflict between tribal sovereignty and Congressional plenary power. While ultimately voting in favor of ratifying Congressional action to expand tribal court jurisdiction over non-member Indians Justice Thomas opined; “I do not see how this is consistent with the apparently 'undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government.' The sovereign is, by definition, the entity 'in which independent and supreme authority is vested.' It is quite arguably the essence of sovereignty not to exist merely at the whim of an external government.” (Internal citations omitted). Certainly Justice Thomas’s concurrence expresses a willingness to rethink the very nature of sovereignty in ways that could both benefit and greatly harm tribes, but his ideological position on Indian law is fundamentally different than his fellow conservatives. For an excellent discussion of how Justice Thomas’s conservatism and tribal interests could be merged after Lara see Matthew L.M. Fletcher The Supreme Court and Federal Indian Policy 86 Neb. L. Rev. 121 (2006).
It is not just the unusual joining behavior displayed in Federal Indian Law cases that demonstrates that a Justice’s ideology is a poor indicator of their voting on the merits, it is also the unexpected ideological outcomes of lone dissents. While liberal justices are commonly perceived to be friends of tribes, neither of the most liberal justices in the last twenty years (Justice Stevens and Ginsberg)\(^\text{25}\) have supported the tribal position even 50% of the time. In some extreme cases, like *Babbitt v. Youpee*\(^\text{26}\) and *Iowa Mutual Insurance Company v. LaPlante*\(^\text{27}\) the lone dissents, by the liberal anchor of the Court, Stevens,\(^\text{28}\) were decided against the tribal interest.

Given that ideology is a much poorer predictor of a Justice’s voting record on Indian law cases than cases in general, it is important for scholars of Indian Law and the Court to break down and further analyze what is really going on to separate the outcome of cases from the predicted pattern of ideological joining behavior among the Justices. To understand broadly the influences on the Court and how its members decide to vote in Indian law cases quantitative methodologies,\(^\text{29}\) used elsewhere in social science, are of particular value.

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\(^{25}\) William M. Landes and Richard A. Posner *Judicial Behavior, A Statistical Study* Journal of Legal Analysis, Vol. 1, No. 2, pp. 775-831 (2009) (Landes and Posner use the voting records of all Justices from 1937 forward in non-unanimous cases to determine the relative conservativeness of each Justice’s voting record. They break justice ideology down three ways, for all cases, for cases dealing with economic issues, and for civil liberties cases. In each instance Justices Stevens and Ginsburg are the most liberal). Landes and Posner go on to compare their results with other studies done to rank the relative ideologies of the Justices. Martin and Quinn scores determine justice ideology for each term of the Court and then aggregate them to create scores for the Justices. They also conclude that Justices Ginsburg and Stevens are the most liberal members of the last Rehnquist natural court, although their data ends in 1999. Andrew D. Martin and Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 Political Analysis 134 (2002). The data are available at http://mqscores.wustel.edu/measures.php. Additionally Segal-Cover scores are used as a comparison of the relative ideology of the Justices at their time of appointment. These scores also conclude that Justice Stevens and Ginsburg are the most ideologically liberal of the final Rehnquist Court. Jeffrey Segal and Albert Cover, *Ideological Values and the Votes of Supreme Court Justices*, Amer. Political Science Rev. 83: 557-565 (1989) and updated in Lee Epstein & Jeffrey Segal. *Advice and Consent: The Politics of Judicial Appointments*, Oxford University Press (2005).


\(^{27}\) *Iowa Mutual v. LaPlante* 480 U.S. 9 (1980).

\(^{28}\) For a discussion of Justice Steven’s liberal merits see Part III of this article.

\(^{29}\) For a justification of the use of quantitative methods as valid legal scholarship see Part II of this article.
While rigorous quantitative methodology is becoming a requirement in most social sciences including political science and its study of judicial politics, legal scholars have lagged behind in use and application of quantitative methods when studying the Court. This reluctance to use quantitative research methods among the legal community is unfortunate, for while many traditional political science models ignore the nuisances we as lawyers find critically important – such as the justification and semiotics of a holding – there are some useful applications of the ability to model Court behavior and quantitatively identify statistically significant relevant and irrelevant factors bearing on the outcome of a given case.

Part II of this paper explains the two kinds of quantitative methodology used to provide greater insight to Indian law cases at the Supreme Court. The first – pure counting – is nothing more than descriptive statistics. Although this method is neither new nor novel, I offer the most complete accounting of Indian law cases compiled in the literature and break them down not only against whether the Indian interest won or lost on the merits, but by the voting record of each individual Justice on every Federal Indian Law case from the beginning of the Warren

30 Because quantitative experiments and conclusions can be verified, replicated, and analyzed by other scholars, there is a decided move in all of the social science disciplines to embrace increasingly advanced methodologies as a significant portion of their top scholarship. See Jeremy Freese Replication Standards for Quantitative Social Science Sociological Methods Research Vol. 36, No. 2 (2007) (“The credibility of quantitative social science benefits from policies that increase confidence that results reported by one researcher can be verified by others. Concerns about replicability have increased as the scale and sophistication of analyses increase the possible dependence of results on subtle analytic decisions and decrease the extent to which published articles contain full descriptions of methods”). However, there are also scholars who argue for the use of mixed-methods, that is qualitative data, case studies, and real world observations that can confirm or direct social science research. This article takes that approach, applying simple quantitative measures to explain qualitative results and patterns observed through a comprehensive reading of cases. Such mixed methods also find strong support in the social science literature, Abbas Tashakkori and Charles Teddlie, Handbook of Mixed Methods in Social & Behavioral Research Sage Publications, 2002. See also, Todd Jick, Mixing Quantitative and Qualitative Methods: Triangulation in Action Administrative Science Quarterly, Vol. 34 (1979), Joanna E.M. Sale, Lynne H. Lohfeld, and Kevin Brazil Revisiting the Quantitative-Qualitative Debate: Implications for Mixed-Methods Research Quality & Quantity Vol. 36, No. 1, (2002).

31 There are merits to a quantitative understanding of judicial decision making. While some legal scholars may shy away from empirics, quantitative analysis “has a great deal to offer to the understanding of judicial behavior—a subject of both theoretical interest and practical significance” Landes and Posner Supra n.25 citing James L. Gibson, From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior, 5 Political Behavior 7 (1983).
Court (1953) through the end of the 2009 term. By looking at the success rates of tribal interests not just by era, but also by Justice, it becomes apparent that many commonly accepted ideas about judicial behavior and Indian law require a second look, while others, notably the significantly lower success rate of tribal interests over the last several decades are confirmed.

The second method is much more quantitative – the Fisher Exact Test. While being used widely in social science, it is not widely used by legal scholars. By coding each case first by justice, (for each case and each Justice did they vote for or against the tribal interest) and then by a variety of factors that may impact a particular justice’s conception of the case, it becomes possible to compare the aggregate data in such a way as to test each individual Justice’s voting record against each factor to determine which have a statistically significant likelihood of influencing a Justice’s vote on the merits of an Indian law case.

Part III of this paper reports the results of the descriptive statistic analysis and provides a ranking of Supreme Court Justices who have served since the beginning of the Warren Court based upon their votes on the merits in the identified cases. The section then goes on to use two case studies, the jurisprudence of “liberal” Justice Stevens and “conservative” Justice Stewart to provide some context to the findings that ideology is a poor predictor of how a Justice will vote on the merits in cases of Indian law. A comparative analysis of their history with Indian law is

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32 This era is chosen for several reasons. First, it roughly coincides with the Civil Rights Movement, which had the effect of moving the goals of Indian policy from “termination” which aimed to define tribes out of existence to “self-determination” effectuating tribal rights. Additionally, because a Chief Justice can exert tremendous influence over a Court and its direction, starting the study with the beginning of the tenure of a new Chief Justice improves the cohesion of the results achieved, the most recent cases are the most relevant to advocates of Indian law looking for trends that will help them make informed decisions about the behavior of the Court, and finally they are covered in the Supreme Court Judicial Database. This makes coding some of the variables easier to standardize and the results easier to duplicate by scholars attempting to recreate and confirm the findings presented here. The database collects basic information about all recent Supreme Court decisions, and is freely and publically available to all scholars of the Court. It can be accessed here: http://scdb.wustl.edu/

33 The Fisher Exact Test is a test of statistical significance used on contingency tables when the expected observations are generally small making a chi-square test inaccurate given a models assumptions. A more detailed explanation of the Fisher Exact Test and its application to the Court’s Indian Law jurisprudence is found in part II of this article.
helpful to understand why a Justice’s political ideology is a poor indicator of their ultimate voting behavior on the merits.

Part IV reports the results of the Fisher Exact Test. The results from this test statistic provide new insights into Indian law at the Supreme Court. While never having been modeled before, the results of the Fisher Exact Test provide support for two extremely relevant factors when predicting a favorable outcome by an individual Justice, and disprove one commonly held assumption taken from the public law literature.

Quantitatively confirming a trend that other scholars have observed, a majority of Justices are statistically significantly more likely to vote for the pro-Indian interest when the tribe is the appellant party than in the average Indian law case. The important contribution here is not that the appellant party succeeds more often, as this trend has been observed across the spectrum of Supreme Court jurisprudence, but that conservative Justices in particular are more likely to vote for a pro-tribal position when the tribe is the appellant than they would in a typical Indian law case, functionally disrupting the proposition that ideology is the most likely indicator of a Justice’s vote on the merits.

34 Both the presence of the tribe as the appellant party and the existence of a state v. tribal jurisdictional conflict are significant factors that can influence the outcome of individual judges.

35 Contrary to both the general rule and commonly held perception, the participation by the United States Solicitor as a party on behalf of tribal interests in front of the Supreme Court does not statistically significantly improve the chances that an individual Justice will vote for a pro-Indian outcome. The rest of the article provides a thorough discussion of the assumption and the implications of that conclusion.

36 Matthew L.M. Fletcher Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes 51 Ariz. L. Rev. 933 (2009) (Discussing how a sharp reduction in the proportion of cert petitions granted to tribal interests compared to non-tribal interests has resulted in a sharp reduction of the success of Indian interests at the Supreme Court from a success rate of approximately 60% between 1959 and 1987 (when Cabazon was decided broadly expanding tribal powers to operate casino gaming) and in the post 1987 period).

37 In the 2009-2010 term the Court reversed or vacated 71% of cases it decided (59 of 83). Scotusblog.com End of Term Statistical Analysis – October 2009 July 7, 2010. Available at http://www.scotusblog.com/wp-content/uploads/2010/07/Summary-Memo-070710.pdf. For authority demonstrating that the Court regularly reverses a majority of cases on its discretionary docket See Factbound and Splitless Supra n.36 at 936 (“It is well-established that the Court grants certiorari and reverses the lower court decision far more than it affirms”), Harvard Law Review, The Supreme Court - The Statistics, 122 Harvard L. Rev. 516, 524 (2008) (reporting that the Supreme Court reversed or vacated forty-five cases while affirming only twenty-two in the 2007 Term.) See also Kevin T. McGuire and Barbara Palmer Issue Fluidity on the U.S. Supreme Court American Political Science Review Vol. 89 No. 3 (1995) (“Predictably, the high court reverses far more often than it affirms”).
A second, and considerably less expected result, is that roughly half of the Justices are statistically significantly more likely to vote for a pro-tribal opinion when questions of tribal jurisdiction conflict with state jurisdiction. While several recent and important cases dealing with conflicts between state and tribal jurisdiction have been decidedly anti-Indian, \(^{38}\) over the entire period of the study it is clear that individual Justice’s are supportive of tribal claims that states should not interfere with the regulatory and adjudicatory jurisdiction of the tribal sovereign. A closer examination of this subgroup of cases could provide new strategies for tribal litigants to recapture this support in future cases where questions of jurisdictional conflicts have been certified by the Court.

Finally, while the Solicitor General is the most successful litigant before the Supreme Court, both in obtaining favorable votes for certification \(^{39}\) and succeeding on the merits, \(^{40}\) whether the Solicitor participates directly on behalf of the tribe impacts virtually no Justice’s decision compared to their average support for Indian law cases. It is highly unusual to find such a thorough null result for Solicitor success in Indian law cases when the existing scholarship and general consensus is overwhelmingly in contravention of the described behavior. \(^{41}\) This should

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\(^{38}\) Plains Commerce Bank v. Long Family Land & Cattle Co. 554 U.S. 316 (2008) (A sharply divided court (5-4) held that the Cheyenne River Sioux tribal court lacked jurisdiction over the sale of formerly Indian fee land by a non-Indian bank to a non-Indian on more favorable terms than was offered the former Indian, a tribal member), Wagnon v. Prairie Band Potawatomi Nation 546 U.S. 95 (2005) (The Kansas motor fuel tax could be applied to fuel delivered to a non-Indian off-reservation distributor who supplied a tribal gas stations).

\(^{39}\) Gregory Caldeira and John R. Wright, Organized Interests and Agenda Setting in the U.S. Supreme Court, 82 American Political Science Review 1109 (1988) (Finding that repeat players are more successful because they have more experience at the Court, also finding that Supreme Court Justices and their clerks are not always in a position to judge the reliability of information and rely upon the government via the Solicitor to provide guidance.), Karen O’Connor, The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation, 66 Judicature 256, 261 (1983) (“The solicitor general’s success rate as amicus curiae surpasses the high win-loss ratio that the government enjoys as a party to a suit”). See generally, Jeffrey A. Segal, Amicus Curiae Briefs by the Solicitor General During the Warren and Burger Courts: A Research Note, 41 W. Pol. Quarterly 135 (1988).

\(^{40}\) Id. See Also, Ryan Juliano Policy Coordination: The Solicitor General As Amicus Curiae in the First Two Years of the Roberts Court 18 Cornell J. L. & Pub. Pol’y 541 (2009) (“Between 2005 and 2007, the Court ruled in favor of the party supported by the Solicitor General in 89.06 percent of the cases decided on the merits. This success-rate exceeds both the historical average - about 75 percent - and the success rate of any prior Solicitor General”).

\(^{41}\) For a discussion of the nearly unanimous scholarship finding that Solicitor participation does influence a Justice’s ultimate vote on the merits see Part IV of this article.
lead to renewed skepticism about the role of the United States generally, and the Solicitor in particular, regarding the ability of the United States to successfully defend the federal government’s trust responsibility toward tribes.

II. Methodology

The methodology used to provide the analysis that follows is roughly two-fold. In the first set of results, I create a new data set, collecting every Federal Indian Law case that reached a decision on the merits at the United States Supreme Court for the period of the study, from the beginning of the Warren Court through the October 2009 term of the Roberts Court (1953-2010). This first set of data is thus merely descriptive, the results are represented in a series of tables that reflect the pure counts of relevant data obtained by breaking the cases in the dataset down by how each Justice voted on the merits. Although no two cases present identical facts and questions to be decided by the court, the aggregate count of how Justices vote in Indian law cases (for or against the tribal interest) provides both some interesting observations and lays the groundwork for the more complex analysis that follows.

The second section is considerably more complicated. Starting with the descriptive statistics identified above, I then code each case for additional factors which might influence the behavior of a justice when casting a vote on the merits. Looking over the entire dataset, I employ the Fisher Exact Test at the individual justice level to determine which factors influence a particular justice’s voting behavior in a statistically significant manner. This application of quantitative analysis to the individual justice level is completely new in legal scholarship generally and Indian law in particular. It provides a starting point for additional and significant expansion of scholarship regarding how scholars study specific areas of law before the Supreme Court.
A. Identifying Relevant Cases

A complete list of Indian law cases decided on the merits by the Supreme Court is a necessary precursor to a thorough examination of the individual justices voting behavior. Unfortunately, a complete and definitive list was not readily available, and accordingly had to be created from available materials. It can be found in appendix I of this article.

Locating a complete list of “Indian Law” cases is considerably more difficult that it might appear at first blush. Unlike other areas of law that are neatly governed by a uniform code, the substantive issues that present the background against which Indian law is applied run the gambit of basic law school subjects and scholarly discipline. Indian Law includes cases that are both criminal and civil in nature, cases from the Court’s original jurisdiction, cases dealing with a tribes civil regulatory and adjudicatory jurisdiction, cases dealing with specific statutes like

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43 A majority of Indian law cases ask questions that are civil or jurisdictional in nature. A breakdown of cases in these areas of law follows below. See Generally Max Mizner *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country* 6 Nev. L.J. 89 (2005).

44 *Arizona v. California* 530 U.S. 392 (2000) (Dispute over water rights between California and Arizona, in which the United States was also a party representing various tribal claims to water rights from the Colorado River and other sources through its trust responsibility), *State of Idaho ex. Rel. Evans v. Oregon & Washington* 444 U.S. 380 (1980) (Idaho had the burden to prove that tribes and fishermen not subject to the Sohappy Treaty were taking a disproportionate number of trout and chinook and thereby depleting the stocks in Idaho).

45 *Montana v. U. S.* 450 U.S. 544 (1981) (Tribe has civil regulatory and adjudicatory jurisdiction over non-Indian fee land when not having jurisdiction threatens the political integrity or economic security of the tribe, or when necessary for the health or welfare of the tribe), *Wagnon v. Prairie Band Potawatomi Nation* 546 U.S. 95 (2005) (State could apply its motor fuel tax when gasoline is delivered to an off reservation supplier but destined for on reservation sale).

46 *Plains Commerce Bank v. Long Family Land & Cattle Co.* 555 U.S. 316 (2008) (Tribal court lacked the ability to regulate the actions of a non-member bank operating outside the reservation on a claim pertaining to the violation of a tribal law prohibition against discrimination based on being a member of an Indian tribe), *Nevada v. Hicks* 533 U.S. 353 (2001) (Tribal court had no adjudicatory authority over a civil rights claim by a member Indian against a non-member state police officer), *Strate v. A-1 Contractors* 520 U.S. 438 (1997) (Tribal Court lacked adjudicatory authority over an incident that took place on a state highway running through the reservation).
the Indian Child Welfare Act\(^{47}\) or the Indian Civil Rights Act,\(^{48}\) cases involving treaties,\(^{49}\) cases involving both individual member Indians\(^{50}\) and tribal governments,\(^{51}\) cases without a named tribe or individual member Indian but where the federal government – acting in accordance with its trust responsibility\(^{52}\) – represents a tribal interest, cases involving indigenous Hawaiians\(^{53}\) and Alaskans,\(^{54}\) and cases on topics from water rights\(^{55}\) to contracts,\(^{56}\) from taxation\(^{57}\) to freedom of religion.\(^{58}\)

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\(^{47}\) Mississippi Band of Choctaw Indians v. Holyfield 490 U.S. 30 (1989) (Tribal courts have exclusive jurisdiction over issues of Indian adoption).


\(^{49}\) Minnesota v. Mille Lacs Band of Chippewa Indians 526 U.S. 172 (1999) (Tribe has a treaty guaranteed right to hunting and fishing), Menominee Tribe of Indians v. U.S., 391 U.S. 404 (1968) (The right to hunt and fish survived the tribes termination because they were rights guaranteed by the Wolf River Treaty).

\(^{50}\) U.S. v. Dion 476 U.S. 734 (1986) (Individual Indian did not have a treaty guaranteed right to hunt bald eagles), Keeble v. U.S., 412 U.S. 205 (1973) (Individual Indian was entitled to jury instructions that permitted the jury to find him guilty of simple assault instead of assault with the intent to commit serious bodily injury).


\(^{52}\) U.S. v. White Mountain Apache Tribe 537 U.S. 465 (2003) (United States breached its trust responsibility when it failed to maintain land it held in trust for the benefit of the tribe), U.S. v. Mitchell 463 U.S. 206 (1983) (Tribe was entitled to money damages when the United States breached its trust responsibility to protect tribal timber resources)

\(^{53}\) Hawaii v. Office of Hawaiian Affairs 129 S.Ct. 1436 (2009) (State of Hawaii was not prohibited from alienating certain of its lands prior to the conclusion of all claims indigenous Hawaiians may have upon them), Rice v. Cayetano 528 U.S. 495 (2000) (Hawaii cannot limit voting in elections for the trustees of the Office of Hawaiian Affairs only to indigenous Hawaiians).


I employed a number of strategies to ensure I found all relevant Indian Law cases from the Warren Court through the 2009-2010 term. These included making use the “Federal Native American Law – Supreme Court Cases” database maintained by West, using the list of Indian law cases provided by Matthew Fletcher professor of Indian Law at Michigan state, screening the Supreme Court Judicial Database, and using the list of cases collected by John Hermann and reported in his scholarship on Indians at the Court. The West database turned up 126 cases over the period of the study. Matthew Fletcher’s collection contains 135 cases. The Supreme Court Judicial Database found 112 cases. Professor Hermann used a shorter period of study and found 82 cases, all of which were also listed in at least one of the other three datasets. After merging all three databases, I have developed a complete list of 143 cases where the Supreme Court reached the merits of an Indian law question.

57 Chickasaw Nation v. U.S. 534 U.S. 84 (2001) (Tribal gaming revenues were not exempt from federal taxation), Cass County, Minn. v. Leech Lake Band of Chippewa Indians 524 U.S. 103 (1998) (Land repurchased by the tribe under the Nelson Act but not taken into trust by the Department of Interior was subject to state and local taxation), County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation 502 U.S. 251 (1992) (Non-Indian fee land arising due to the General Allotment Act is land subject to state taxation), Montana v. Blackfeet Tribe of Indians 471 U.S. 759 (1985) (States cannot tax royalty payments on oil and gas interests paid to Indian tribes), Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico 458 U.S. 832 (1982) (Federal preemption prevented the state from collecting a tax on gross receipts of a construction company that built a school on the reservation).

58 Employment Division., Dept. of Human Resources of Oregon v. Smith 494 U.S. 872 (1990) (Can a tribal member who uses peyote in accordance with his religious tradition be fired for its use?), Lyng v. Northwest Indian Cemetery Protective Ass’n 485 U.S. 439 (1988) (Can the government build a highway through an national park used regularly by the tribe for religious ceremonies?), Bowen v. Roy 476 U.S. 693 (1986) (Does an Indian have to use a social security number to apply for things like Welfare and Food Stamp benefits if it violates their religious convictions?).


60 The Supreme Court Judicial Database. Supra n. 32. Political scientists who study judicial politics often rely definitively on an existing database to divide cases into their composite areas of law. The Supreme Court Judicial Database’s “issue” variable, although meticulously maintained, is inappropriate to determine the relevant Indian law cases because it fails to include “Indian Law” as an area of law the Court decides, preferring instead of classify Indian law cases in terms of the substantive component – for example civil rights or taxation. It does include a list of cases in which one or more of the parties before the court are a tribe or tribal member, and it was these variables I used to ensure I found all relevant Indian Law cases.

61 John R. Hermann American Indians in Court: The Burger and Rehnquist Years. The Social Science Journal, Volume 37, No. 2, pgs. 245-259 (2000) (Collecting 82 Indian Law cases during the Burger and Rehnquist Courts 1969-1992). A full list of all Indian Law cases I’ve found by aggregating the databases can be found in the appendix at the end of this article.

62 Per Curiam decisions were included and coded as if the decision were unanimous.
To increase the confidence that I found all applicable cases during this time period I randomly selected two terms in every complete decade and scanned all cases provided in U.S. Reports for those terms. No opinion directly involving a tribe, tribal member, or issue of Indian Law was identified during this additional screening that was not already included in the collected dataset, significantly improving the likelihood that all relevant merits decisions are included in the collected dataset.

When multiple cases dealing with the same issue of Indian law were certified but combined in a single hearing\(^{63}\) and resulted in a single opinion\(^{64}\) they were included only once. This makes sense, since the analysis would otherwise be skewed significantly by double, or even triple, counting individual justice votes when similar questions and fact patterns were combined and heard by Court functionally as a single case with single set of oral arguments and written opinions.

Having created a complete list of cases, I recorded whether the Indian/Tribal interest prevailed at the Court. For most cases, it was comparatively easy to identify the tribal interest.\(^{65}\) For cases involving both an individual Indian and a federal Indian tribe, the tribe’s interest was used to determine if the Court’s outcome was favorable to Indian Country.\(^{66}\) This makes intuitive

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\(^{63}\) This happens more often than may be commonly assumed. For example, *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation* 492 U.S. 408 (1989) was actually three separately docketed cases consolidated into the named case because they presented identical arguments and thus could be heard and decided together. The combined cases were No. 87-1697, *Wilkinson v. Confederated Tribes and Bands of the Yakima Indian Nation*, and No. 87-1711, *County of Yakima et al. v. Confederated Tribes and Bands of the Yakima Indian Nation*. Altogether 23 of the 143 Indian law cases were combined from two or more docketed cases.

\(^{64}\) *Id.*

\(^{65}\) A majority of Indian Law cases during this period involved challenges between a tribe or tribal member and either a state, a corporation, a non-Indian individual, or the federal government. In these cases, a decision on behalf of the tribe or tribal member was considered a “pro-Indian” opinion and a decision in favor of the state, corporate, non-Indian individual or federal interest was an “anti-Indian” opinion.

\(^{66}\) For example in *Santa Clara Pueblo v. Martinez* 436 U.S. 49 (1977) a tribal member, Julia Martinez, brought suit against her tribe, asking it to recognize the membership rights of her children. The “tribal interest” here was coded as the interest of the Santa Clara Pueblo because a tribe’s right to define its own membership rules is obviously a greater interest to Indian Country (upholding a tribe’s right to maintain practices grounded in tribal culture that may
sense because the tribe has the more strongly vested interest in protecting tribal sovereign
immunity.\textsuperscript{67} Individual Indians often ask for state law or non-tribal principles to be imposed
against the tribe which endangers its independence.\textsuperscript{68} and its status as a nation within a nation.\textsuperscript{69}
If the vote by Court was ultimately tied due to an even number of justices voting on a case,\textsuperscript{70} the
lower court’s ruling is effectively upheld.\textsuperscript{71} Accordingly those cases are coded as resulting in a
favorable Indian outcome if the decision below was favorable to the tribe’s interest.

Having determined whether the outcome from the Court was favorable for the Indian
interest, I evaluated each Justice’s vote on each case and recorded them as favorable or
unfavorable to tribal interests. Next, those votes were aggregated for each justice serving on the
Court from the beginning of the Warren Court (1953) through the last completed Supreme Court
term (October term 2009). By looking at the number of votes each justice cast in favor of the
tribe’s interest compared to the total number of votes on Indian law cases it was easy to create a
table that ranked all justices that served during the studied period in order from most to least
amenable to tribal interests. The complete results are reported in Table I in Section IV below.

\textbf{B. The Fisher Exact Test}

\textsuperscript{67} For a discussion of this scoring rule, see Hermann supra n. 61.
\textsuperscript{68} Mississippi Band of Choctaw Indians v. Holyfield 490 U.S. 30 (1989) (Member Indians contesting the authority of
the tribe to intervene in an adoption proceeding under the Indian Child Welfare act), Santa Clara Pueblo v. Martinez
436 U.S. 49 (1977) (Member Indian asking the Court to apply Western principles of gender equality to invalidate a
membership rule that uses paternity to determine membership).
\textsuperscript{69} For an excellent discussion of a tribe’s sovereign status see Sarah Krakoff A Narrative of Sovereignty:
Illuminating the Paradox of the Domestic Dependent Nation 83 Or. L. Rev. 1109 (2004).
\textsuperscript{70} Even numbers occur most often when there is a vacancy on the Court, or when a newly appointed Justice recuses
themselves for having been involved in the case at a prior stage. For a summary of the Court’s rules of recusal see
\textsuperscript{71} For example see Wyoming v. U.S. 492 U.S. 406 (1989). Justice O’Connor did not take part in the decision. The
result was a 4-4 split by the Supreme Court resulting by rule in the affirmation of the lower Court opinion giving
tribes a greater share of the water rights from the Little Big Horn River. The lower Court opinion that was affirmed
by the split is In re General Adjudication of All Rights to Use Water in Big Horn 753 P.2d 76 (1988).
Having identified the relevant cases and the individual justice’s votes on each case, I took the results a step further to inquire what factors may explain why an individual justice cast their vote either for or against the tribal interest. Borrowing from the statistical methodology of social science, I coded each case for a number of factors that scholars hypothesize could explain a justice’s decision on the merits.

It is important to recognize that which cases get to the Court – through the gate keeping function of the certiorari process – may also be influenced by the factors described below. While there is exceptional emerging scholarship on the certiorari process in Indian law cases this paper takes no position regarding the relevant factors involved in achieving cert, rather it is focused exclusively on explaining the voting behavior of individual judges on Indian law cases after certiorari has been granted.

After coding for the variables described below I employed the Fisher Exact Test to determine which factors are statistically relevant in explaining the individual judge’s behavior. This is done for each justice by creating a 2x2 table with the number of cases the justice voted for the Indian interest and the number against on one side and the number of times each tested variable existed and did not exist in those same cases on the other. Using this data an expectation and variance can be calculated to provide an example of what the data should look like if the tested variable and the pro-Indian outcome are not related. The Fisher Exact Test statistic is then

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72 See Fletcher Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes Supra n. 36. See also Matthew L.M. Fletcher The Supreme Court’s Indian Problem 59 Hastings L.J. 579 (2008) (An excellent discussion of the use of certiorari by the Supreme Court in Indian law cases to discuss other areas of Constitutional jurisprudence by using Indian law fact patterns and the inadvertent effect this strategy has on Indian law), Tracy Labin The Role of Jurisdiction in the Quest for Sovereignty: We Stand United Before the Court: The Tribal Supreme Court Project 37 New Eng. L. Rev. 695 (2003) (A brief discussion of the strategy of some Indian law scholars and practitioners to exert greater control over which Indian law cases are appealed to the Supreme Court).

created by taking the square of the cumulated discrepancies and divided by the sum of the conditional variances to provide a test statistic and a confidence measure. If the test statistic is sufficiently great and the confidence measure sufficiently high – the data supports a rejection of the null hypothesis that the two measures are unrelated. The Fisher Exact Test is used in place of the more common Pearson’s chi-square statistic because a number of Justices decided fewer than twenty Indian law cases during their tenure on the Court. The Pearson’s chi-square assumes at least five outcomes in each sector. Since that assumption is patently impossible with fewer than twenty data points, the Fisher Exact Test is used instead to model the relevant data.

This study tests three variables as being potentially relevant in explaining the voting outcome of individual judges in Indian law cases. The variables, how they were coded, and the expected outcome are discussed here in the methodology section. Section IV of this paper reports the results of the Fisher Exact Test for each variable and for each Justice who decided at least five Indian law opinions from the beginning of the Warren Court through the end of the October 2009 term.

1. Participation by the Solicitor General

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74 Any collegiate calculus based statistics textbook will provide an overview of hypothesis testing, the calculation of test statistics and the determination of levels of significance indicated by a p-value. For specific discussion relating to the interpretation of data resulting from the Fisher Exact Test see Cyrus R. Mehta and Nitin R. Patel A Network Algorithm for Performing Fisher’s Exact Test in r x c Contingency Tables Journal of the American Statistical Association Vol. 73, No. 382 pp. 427 (1983).

75 While the Pearson’s Chi Square test may provide more exact results for the justices that have decided a sufficiently large number of cases in the data set, it would significantly limit the breadth of the results if used accurately. I ultimately decided that the Fisher Exact Test, which doesn’t make assumptions which would be counter intuitive given the dataset would be the superior measure to determine the existence of a statistically significant relationship between individual Justice votes on Indian law decisions and the factors identified by this article.

76 Justice’s with fewer than 20 votes could not be modeled by the Pearson’s Chi Square, since it assumes at least 5 data points in each box. This means that the Pearson’s Chi Square would be valid only for Justice’s who cast at least ten votes for and against the tribal interest, at least five of those votes in cases where the tested variable was present and five where the tested variable was absent. This was actually the case in fewer than half the Justices sampled for each tested variable.
The Solicitor General of the United States is the legal advocate for the interests of the federal government. Because the solicitor can recruit and retain some of the brightest legal minds, including many former Supreme Court clerks, pick and choose which cases it appeals to the Court, and has the most experience litigating in front of the Supreme Court, it is the most successful litigant at both the certification and merits stages of Supreme Court litigation. The Solicitor is also charged with effectuating the United States’ trust responsibility between the federal government and federally recognized tribes. Given its rate of success and the unique

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77 The Solicitor General works in coordination with the Attorney General under the auspices of the Department of Justice. See 28 USC 505. It is the Solicitor General’s Office that is the ultimate appellate advocate for the United States before the Supreme Court. For a discussion of the role of the Solicitor in representing both the interests of the Presidential administration s/he serves under and the greater commitment to representing the “rule of law” in the United States see Kristen A. Norman-Major The Solicitor General: Executive Policy Agenda’s and the Court 54 Albany L. Rev. 1081 (1994).

78 Because of its active participation in front of the Supreme Court, former clerks who want to practice before the court are more likely to take a position with the Solicitor’s Office. The active participation of the Solicitor before the Court also makes clerks acutely aware of the high quality of representation provided by the Solicitor which induces them to join the office. See Karen O’Connor and John R. Hermann The Clerk Connection: Appearances before the Supreme Court by Former Law Clerks 78 Judicature 247 (1994) (“The clerks’ experiences as clerks gives them immediate stature within an elite segment of the bar. This is well illustrated by the high percentage of former clerks who are later hired by the U.S. Solicitor’s office, the most frequent and prominent player before the Court”).

79 James L. Cooper, The Solicitor General and the Evolution of Activism 65 Ind. L.J. 675 (1990) (“[T]he decision to seek certiorari or appeal, is almost entirely at the discretion of the Solicitor General”).


81 See Joseph D. Kearney & Thomas W. Merrill, The Influence of Amicus Curiae Briefs on the Supreme Court, 148 U. PA. L. REV. 743 (2000) (noting that the Solicitor General was the most successful amicus at the Supreme Court), Margaret Meriweather Cordray and Richard Cordray The Supreme Court's Plenary Docket Wash & Lee L. Rev. 737 (2001) (commenting on the success of the United States as a part before the Supreme Court), Michael A. Bailey, Brian Kamoie, and Forrest Maltzman Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making American Journal of Political Science Vol. 49, No. 1, pp. 72 (2005) (“[the Solicitor General] was successful at the certiorari stage because ‘the solicitor general also knows all the catchwords, and they just know how to write them in a brief’”), Salokar, R. M. The Solicitor General: The Politics of Law. Philadelphia: Temple University Press 1992 (Finding that during the Burger and Warren Courts the Solicitor General’s success rate as a direct participant was approximately 70%).

82 For a discussion of recent cases in which the Solicitor General has reaffirmed its role to uphold the trust responsibility owed by the United States to federal Indian tribes see Le'a Malia Kanehe The Akaka Bill: The Native Hawaiians' Race For Federal Recognition 23 Hawaii L. Rev. 857 (2001) (Discussing the role of the Solicitor in upholding the trust responsibility to native peoples, including native Hawaiians) and Shannon Taylor Waldron Trust in the Balance: The Interplay of FOIA’s Exemption 5, Agency-Tribal Consultative Mandates and the Trust Responsibility 26 Vt. L. Rev. 149 (2001) (Discussing the recognition by the Solicitor General of a duty to help uphold the federal trust responsibility the United States owes to tribes).
role it plays as an advocate on issues often deemed exclusively federal, it is probable that the participation by the Solicitor General on behalf of an Indian tribe at the Supreme Court would be taken by the individual justices as an indication of an important Indian law issue, and accordingly influence a more favorable vote from the Justice than cases where the Solicitor did not participate directly as a party before the Court. Testing the outcome of a justice’s vote to determine if it is statistically significantly different when the Solicitor directly participates on behalf of the tribal interest will determine whether a justice is more likely to join or write a decision that favors tribal interests when the Solicitor is a named party, and conversely less likely to join or write a decision favorable to tribal interests when the Solicitor’s participation is adverse or absent from supporting a pro-tribal outcome.

Coding the Solicitor General’s participation was very straightforward. If the Solicitor was the named party advancing the tribal interest, or a co-plaintiff/co-defendant and accordingly also submitted a brief on the merits then the case was coded “1” – indicating Solicitor participated on behalf of the tribe. If the solicitor did not submit a brief on the merits to the Court, or submitted a brief adverse to the pro-tribal outcome, then the case was coded “0” – indicating no solicitor participation on behalf of the tribe. This coding is slightly different than other studies which include solicitor participation as an amicus where they were not a direct

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83 See Norman-Major Supra n. 77.
84 Supra n. 80
85 In upholding the trust responsibility of the United States, the Solicitor has often brought suit in the name of the United States against a state or private company. For example in Idaho v. U.S. 533 U.S. 262 (2001) the United States served as the named party bringing suit on behalf of the Coeur D’Alene Indian Tribe to obtain title from the state of Idaho to submerged lands.
86 In accordance with the obligation to protect sovereign tribal interests, the United States may intervene on behalf of the tribe and thus be joined as a co-plaintiff or co-defendant. For example, see Seminole Tribe of Florida v. Florida 517 U.S. 44 (1996) (The United States enters as amicus and argues before the Court urging affirmation of Congress’s power to abrogate the ability of a state of claim sovereign immunity under the Eleventh Amendment).
87 This is also a common occurrence. Whenever a tribe sues the federal government for violation of its trust responsibility or in certain criminal proceedings where the individual contests criminal charges filed in federal court against him, the United States is a named party adverse to the tribal interest. For example U.S. v. White Mountain Apache Tribe 537 U.S. 465 (2003) (The United States defends a suit brought by a tribe against it for breach of its trust responsibility).
party and did not share time at oral argument.\textsuperscript{88} By limiting qualifying cases to only those where the solicitor directly participated, it is possible to get a better sense of the influence the Solicitor has on the individual voting behavior of the Justices.\textsuperscript{89}

2. Tribe as Appellant

The Supreme Court has considerable discretion over its docket.\textsuperscript{90} While the rule of four\textsuperscript{91} during the certiorari process encourages strategic behavior including aggressive grants and defensive denials\textsuperscript{92} the Court overrules a majority of the cases it hears every year.\textsuperscript{93} Testing the outcome of a justice’s vote when the tribal interest is the appellant in the litigation will determine


\textsuperscript{89} While the United States may provide varying levels of support to tribal interests in a variety of cases, this paper tests only those instances where the Solicitor filed a brief and appeared at oral argument to defend the tribe’s interests. This occurred sufficiently often to maintain the integrity of results and ensures that only the strongest message of Solicitor support – when the solicitor is actively participating in the litigation – is used to measure whether Solicitor participation influence the Court. If a null result is found in these cases there is no reason to suppose that expanding the test more broadly to all cases subject to a Solicitor amicus brief or where the Solicitor makes public statements in favor of the tribal interest would influence a justice of the Supreme Court in any appreciable degree.

\textsuperscript{90} The Supreme Court has mandatory jurisdiction in a very small number of cases comprising less than 10% of its docket – mostly disputes between states that fall under the Court’s original jurisdiction and certain voting rights appeals which it is required to hear by statute. The vast majority of its time is spent on cases it decides to hear through the certiorari process.

\textsuperscript{91} A case appealed for review by the Supreme Court that falls under its discretionary docket must be granted a writ of certiorari in order to proceed to the merits stage and be ruled upon by the Supreme Court. The nine Justices vote to grant “cert” in private conferences. Four votes are required for a grant to be issued and the case to proceed to the merits stage. Most of the time, but not always, this means a case is scheduled for oral argument. In a fraction of these cases, cert is granted and the case is dealt with summarily without additional briefs. For a general discussion of the certiorari process see Lawrence Baum THE SUPREME COURT 10th Edition, CQ Press (2009) and Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, and Kenneth S. Geller SUPREME COURT PRACTICE 9th Edition, BNA Books (2007).

\textsuperscript{92} Aggressive grants and defensive denials refer to the strategic voting by individual Supreme Court Justices at the certiorari stage of a Supreme Court case. An aggressive grant occurs when a Justice thinks the decision by the appellate court was properly decided but wants to decide the case anyway because s/he believes the Court will uphold the lower court and set national precedent. A defensive denial occurs when a Justice would vote to reverse the decision below, but does not think s/he has enough support on the Supreme Court to reverse the decision. This Justice votes against certiorari even though s/he believes the decision below was wrongly decided in order to prevent the Court from taking the case and upholding the opinion, thus making it binding precedent on all federal courts. For a discussion of this strategic behavior by the Court see Lee Epstein, Jeffrey A. Segal, and Jennifer Nicoll Victor Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment 39 Harv. J. on Legis. 395 (2002), Margaret Meriwether Cordray and Richard Cordray Setting the Social Agenda: Deciding to Review High-Profile Cases at the Supreme Court 57 Kan. L. Rev. 313 (2009).

\textsuperscript{93} Supra note 37.
whether a justice is more likely to join or write an opinion in favor of the tribal interest who appears as the appellant, and conversely less likely to join or write a decision favorable to tribal interests when the tribal interest is the respondent.

Coding these cases was very simple. The appellant on each case was easy to identify, the party petitioning the Supreme Court for certiorari. If the appellant was a tribe, tribal member, or the federal government94 (including the Solicitor, the Department of Interior, Bureau of Indian Affairs, etc.) bringing suit on behalf of the tribal interest, the case was coded “1.” All other cases were coded “0.” Cases involving a tribe and an individual tribal member were coded “1” only if the tribal interest was the represented by the appellant, as it is presumed the outcome that is most favorable to Indian tribes writ large will be defended by the tribe instead over an individual member Indian.95

3. Questions of State Jurisdiction

Tribes are sovereign entities, co-equal to states96 in that they are largely subject only to the overriding jurisdiction of the federal government.97 There is a long tradition of state resistance to tribal sovereignty that has required the Supreme Court’s repeated intervention to

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94 For a discussion of the Federal Government’s appearance before the Court on behalf of tribal interests see Supra n. 85 and n. 86
95 Supra n. 66
96 This understanding of the unique sovereign nature of tribes was developed in what scholars now term the Marshall trilogy, a series of three cases decided by Chief Justice Marshall in the early 19th century. Together these cases have laid the foundation for modern Indian law and continue to provide the basic structure for how the Court understands tribal sovereignty today. Johnson v. M’Intosh 21 U.S. (8 Wheat) 543 (1823) (Held that only the United States could validly purchase or negotiate for land previously held by tribes under the doctrine of discovery), Cherokee Nation v. Georgia 30 U.S. (5 Pet.) 1 (1831) (Tribes are not states or foreign governments but “domestic dependent nations” subject only to the laws of the United States. They do not qualify as states for purposes of access to the Court’s original jurisdiction), Worchester v. Georgia 31 U.S. 515 (1832) (The state of Georgia had no jurisdiction within the Cherokee reservation).
97 U.S. Constitution Article IV sec. 2 “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.” See also Alexander Hamilton The Federalist Papers 33 “But it is said that the laws of the Union are to be the supreme law of the land. But what inference can be drawn from this, or what would they amount to, if they were not to be supreme?”
resolve jurisdictional disputes. The Supreme Court has repeatedly recognized a tribal nation’s right to make its own laws and be governed by them. However when the Supreme Court is asked to choose between competing sovereigns, often a state government that wants to tax or regulate activities occurring in Indian Country, the stakes at the Court substantially increase as the Court is adjudicating the balance of power between sovereigns. Testing the outcome of a justice’s vote when the issue that is certified by the Court is one of competing state and tribal jurisdictions will determine whether a justice is more likely to join or write a decision in favor of the state interest instead of the tribal interest when both are represented in the litigation and conversely less likely to join or write a decision favorable to tribal interests when no state or state entity is a party.

This variable was coded by looking at the questions certified by the Supreme Court. From these questions it was comparatively easy to identify cases where a conflict of jurisdiction was among the certified questions to be briefed, argued, and decided by the Court. These cases include questions of both regulatory authority like the right to tax non-members or tribal natural resources, and adjudicatory jurisdiction including the right to try individuals in tribal instead of state courts. Cases that included conflicts between state and tribal jurisdiction were

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98 Id. For a list of recent Supreme Court decisions dealing with conflicting tribal and state jurisdiction see Supra notes 42 and 43.
99 Williams v. Lee 358 U.S. 217, 220 (1959) (“absent governing Acts of Congress, the question is whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them”).
100 State entities are included here, because often the interest of a state is represented in litigation not by the governor or the attorney general but by an agency or municipality within state bureaucracy. For example a state tax commission in Oklahoma Tax Com’n v. Chickasaw Nation 515 U.S. 450 (1995), or a city or municipal government in City of Sherrill New York v. Oneida Indian Nation 544 U.S. 197 (2005).
101 For a partial list of recent cases dealing with a tribes regulatory jurisdiction vis-à-vis states see Supra note 45 and 57. (Cases dealing with state regulation of hunting and fishing on the reservation, and taxation of activity on the reservation)
102 For a partial list of recent cases dealing with a tribe’s adjudicatory authority see Supra note 46. These have most recently dealt with the ability of a tribe to assert its civil jurisdiction over non-members for activities committed on the reservation. For a discussion of the growing exercise by tribes of adjudicatory jurisdiction over non-member non-Indians see Grant Christensen Creating Brightline Rules for Tribal Court Jurisdiction Over Non-Indians: The Case of Trespass to Real Property 35 American Indian Law Review 1 (2011) (forthcoming).
coded “1” all others were coded “0.” Cases involving conflicts of tribal and federal jurisdiction, but where no state jurisdiction is implicated, were also coded “0.” 103

III. Individual Justice Voting Behavior

The data provides more insights into Indian law than may at first be presumed, and challenges many widely held presumptions about the ideological connection between votes on the merits in Indian law cases and justice ideology.

Some of the data speaks for itself. Of the twenty-six justices who have decided at least four Indian law cases in the last fifty years, the five justices least favorable to tribal interests are all currently sitting on the bench (Roberts, Alito, Scalia, Thomas, and Kennedy). Justices Kagan and Sotomayor have as of yet to decide an Indian law case and have only minimal exposure to Indian law prior to their appointment. 104 While observers hope that their jurisprudence will be more favorable to tribal interests given their generally accepted liberal attitudes, 105 the data presented here provides no strong support for such a proposition. While fourteen of the twenty-six Justices have voted for a pro-Indian outcome more than fifty percent of the time, no sitting Justice has. The sitting justice with the strongest voting record in favor of tribal interests is

103 For example see U.S. v. Wheeler 435 U.S. 313 (1978) (Both the Federal Government and Tribe have jurisdiction over an Indian for a crime criminalized under both the Major Crimes Act and the Tribal Code, double jeopardy does not preclude the prosecution by both governments for the same criminal offense.)

104 While the average Supreme Court term since Chief Justice Warren took over the Court in 1953 has decided 2.6 Indian law cases, the 2009-2010 term did not hear any, and thus both Justices Sotomayor and Kagan will hear their first Indian law cases at oral argument together during the October 2010 term. For a discussion of the Court’s behavior accepting cases for review see Matthew L.M. Fletcher’s Factbound and Splitless Supra n. 36.

105 The ideology of a Supreme Court Justice over the last two decades has tended to mirror that of the President that appointed them. Hence President Clinton’s appointees, Justices Ginsberg and Breyer, are considered liberals on the Court while President George W. Bush’s appointees, Chief Justice Roberts and Justice Alito, are considered conservatives. In keeping with these perceptions, Obama’s appointees would be expected to lean in a liberal direction. This general perception is ubiquitously reflected in the media when writing about the Court. See Ben Conery Kagan Takes Seat, Makes History on the Court The Washington Times October 5, 2010 (“Chief Justice Roberts and Justices Thomas and Alito are considered conservative, while Justices Kagan and Sotomayor are considered liberal”).
Justice Ginsberg, voting for the tribal interest in only fifteen of thirty-six cases – less than forty-two percent of the time.\textsuperscript{106}

While scholars widely associate liberal justices with the protection of marginalized groups – questions in Indian law are often about much more than civil rights or equal protection. They involve the status of tribes and tribal sovereignty which is not as ideologically pure as many Indian law scholars believe. For example, Justice Stevens, a “liberal lion”\textsuperscript{107} voted in favor of tribal interests in only thirty-six percent of his cases, considerably less than in other traditionally liberal areas like civil and women’s rights.\textsuperscript{108} Other Justices, renowned for their more conservative attitudes have actually been better supporters of tribal interests. For example, Chief Justice Burger\textsuperscript{109} regularly voted against abortion rights,\textsuperscript{110} gay rights,\textsuperscript{111} and capital punishment\textsuperscript{112} but supported tribal interests considerably more often than Justice Breyer or Justice Souter two recent liberal moderates, and substantially more often than Justice Stevens.

\textsuperscript{106} It is perhaps relevant that the Court has been markedly less likely to support tribal interests generally in the last decade, with the Robert’s Court yet to issue a pro-Indian opinion. There has been only one unanimous opinion in favor of the tribal interest since the October 1995 term - Cherokee Nation of Oklahoma v. Leavitt 543 U.S. 631 (2005).

\textsuperscript{107} Steven’s has often been referred to as a “liberal lion,” phraseology evoking his role as a pillar of the liberal end of the Supreme Court. For usage by major media outlets see Michael Isikoff \textit{Who is Obama’s Next Supreme Court Pick} Newsweek April 12, 2010 (“most court watchers expect John Paul Stevens, the 89-year-old longtime liberal lion, to announce his retirement soon, perhaps as early as next month”). Richard Adams \textit{John Paul Stevens to Retire from US Supreme Court} The London Guardian April 9, 2010 (“the Obama administration [must] replace the liberal lion, Stevens), Ben Feller and Charles Babington \textit{Obama Likely to Stick with Court Strategy that Worked} The Detroit Free Press April 11, 2010 (“Obama must replace the liberal lion of the court, John Paul Stevens”).

\textsuperscript{108} See Landes and Posner Supra n. 25 (noting that Justice Stevens voted for the more liberal interest calling for the expansion or protection of civil rights issues in 67.5% of cases with a decision on the merits).

\textsuperscript{109} Id. (noting that Justice Burger cast a conservative vote in 73.5% of all cases that reached the merits stage, and 77.1% of civil liberties cases).

\textsuperscript{110} While Justice Burger did vote with the majority in \textit{Roe} his position was substantially reversed later in his career. \textit{Thornburgh v. American College of Obstetricians and Gynecologists} 476 U.S. 747 (1986).

\textsuperscript{111} \textit{Bowers v. Hardwick}, 478 U.S. 186 (1986) (“Blackstone described “the infamous crime against nature” as an offense of ”deeper malignity” than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." (Chief Justice Burger Concurring)).

\textsuperscript{112} \textit{Gregg v. Georgia} 428 U.S. 153 (1976) (The Chief Justice voted with the majority to reinstate the death penalty), \textit{Furman v. Georgia} 408 U.S. 238 (1972) (Chief Justice Burger dissented from the majority’s decision to find the death penalty in contravention of the 8th Amendment’s prohibition of cruel and unusual punishment).
**Table 1:**  
*Supreme Court Indian Law Decisions by Justice: 1959 – Present*

<table>
<thead>
<tr>
<th>Justice</th>
<th>Votes in Favor of Indian Interests</th>
<th>Total Votes on Indian Cases</th>
<th>Percent of Pro-Indian Votes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Douglas</td>
<td>30</td>
<td>34</td>
<td>88.24%</td>
</tr>
<tr>
<td>Warren</td>
<td>12</td>
<td>14</td>
<td>85.71%</td>
</tr>
<tr>
<td>Fortas</td>
<td>3</td>
<td>4</td>
<td>75.00%</td>
</tr>
<tr>
<td>Marshall</td>
<td>65</td>
<td>87</td>
<td>74.71%</td>
</tr>
<tr>
<td>Brennan</td>
<td>69</td>
<td>96</td>
<td>71.88%</td>
</tr>
<tr>
<td>Frankfurter</td>
<td>6</td>
<td>9</td>
<td>66.67%</td>
</tr>
<tr>
<td>Clark</td>
<td>7</td>
<td>11</td>
<td>63.64%</td>
</tr>
<tr>
<td>Black</td>
<td>12</td>
<td>19</td>
<td>63.16%</td>
</tr>
<tr>
<td>Blackmun</td>
<td>57</td>
<td>91</td>
<td>62.64%</td>
</tr>
<tr>
<td>Harlan</td>
<td>10</td>
<td>16</td>
<td>62.50%</td>
</tr>
<tr>
<td>Whittaker</td>
<td>4</td>
<td>7</td>
<td>57.14%</td>
</tr>
<tr>
<td>Stewart</td>
<td>34</td>
<td>60</td>
<td>56.67%</td>
</tr>
<tr>
<td>Burger</td>
<td>38</td>
<td>70</td>
<td>54.29%</td>
</tr>
<tr>
<td>Powell</td>
<td>34</td>
<td>67</td>
<td>50.75%</td>
</tr>
<tr>
<td>White</td>
<td>46</td>
<td>98</td>
<td>46.94%</td>
</tr>
<tr>
<td>Souter</td>
<td>18</td>
<td>43</td>
<td>41.86%</td>
</tr>
<tr>
<td>Ginsberg</td>
<td>15</td>
<td>36</td>
<td>41.67%</td>
</tr>
<tr>
<td>Breyer</td>
<td>12</td>
<td>33</td>
<td>36.36%</td>
</tr>
<tr>
<td>Stevens</td>
<td>39</td>
<td>108</td>
<td>36.11%</td>
</tr>
<tr>
<td>O’Connor</td>
<td>27</td>
<td>76</td>
<td>35.53%</td>
</tr>
<tr>
<td>Rehnquist</td>
<td>32</td>
<td>117</td>
<td>27.35%</td>
</tr>
<tr>
<td>Kennedy</td>
<td>9</td>
<td>50</td>
<td>18.00%</td>
</tr>
<tr>
<td>Scalia</td>
<td>10</td>
<td>57</td>
<td>17.54%</td>
</tr>
<tr>
<td>Thomas</td>
<td>5</td>
<td>41</td>
<td>12.20%</td>
</tr>
<tr>
<td>Roberts</td>
<td>0</td>
<td>5</td>
<td>0.00%</td>
</tr>
<tr>
<td>Alito</td>
<td>0</td>
<td>4</td>
<td>0.00%</td>
</tr>
</tbody>
</table>

**Justices Kagan, Sotomayor, Goldberg, Burton, Reed, and Minton are not included here because they decided fewer than four Indian law cases during the period of the study.**
Time is a better explanation than ideology of individual justice voting on the merits in Indian law cases. It appears that as tribes have gotten more power from Congress – they have found the Court less sympathetic to their claims of sovereignty across the board. As of the 2009-2010 term, the Roberts court has yet to issue a pro-Indian opinion.113 Tracing the history of the regulatory and adjudicatory authority of tribal courts as determined by the Supreme Court demonstrate how dramatically the Court has changed its views on the proper application of tribal sovereignty. Far from the 1959 ruling in Williams v. Lee that Indians have the right to “make their own laws and be ruled by them,”114 the Court now questions the legitimacy of those very courts established to carry out the tribal sovereignty maxims that Williams v. Lee protects.115 Justice Souter’s concurrence in Nevada v. Hicks is indicative of this mood among the Court; “[t]ribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges…. Tribal law is still frequently unwritten, being based instead ‘on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,’ and is often ‘handed down orally or by example from one generation to another.’”116

To illustrate the fallacy that liberal justices are tribal allies on the bench, while judicial conservatives are harder to persuade – one need only compare the jurisprudence of two stalwarts on the Court – Justice John Paul Stevens and Justice Potter Stewart. Justice Stevens’ liberal reputation is generally well deserved. Although he professes to be a moderate who served a

113 Although there have been a number of closely decided cases, include a 5-4 decision in Plains Commerce Bank v. Long Family Land & Cattle Co. 554 U.S. 316 (2008) and a 6-3 decision in Carcieri v. Salazar 497 F.3d 15, ___ U.S. ____ (2008).
114 Williams v. Lee Supra n. 99
115 Nevada v. Hicks 533 U.S. 353 (2001)
116 Id. at 423-424 (Justice Souter Concurring)
distinguished career while his colleagues moved to the right, his voice has been a consistent advocate for civil rights and minority causes, a seemingly ideal advocate for tribal rights.

Unlike Justice Stevens, Justice Stewart was a strongly conservative justice who sat well to the right of most of his colleagues during his tenure on the bench. An ardent advocate of states’ rights against federal intervention, Justice Stewart would not appear to be an ally of tribal interests, especially against their repeated challenge to and by state authority. Together Justices Stevens and Stewart considered more than one-hundred and fifty Indian law cases, yet their divergent votes, which are contraindicative of their perceived ideologies, demonstrate that those scholars who use the Median Justice Theory and claim to be able to predict Supreme Court outcomes based on justice ideology will be confounded to explain the reality of these divergent Justice’s jurisprudence.

A. Defying Expectations: Justice Stevens

Justice Stevens is widely considered to be a liberal pillar on the Court. Political scientists that measure the ideology of the Justices based on their voting behavior have found his to be among the most liberal voices on the bench for decades. He has written that both public schools that provide a moment of silence that can be used for prayer or meditation and the

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117 When asked about being appointed as a moderate conservative, and retiring as the perceived liberal on the Court, Justice Stevens indicated that it was the Court that had changed, not himself; “Well, I think, primarily, the court has changed. There's some issues that I've learned more about over the years, and my views have certainly changed on some. But for the most part, I think that the change is a difference in the personnel of the court.” Justice John Paul Stevens. Interviewed by Nina Totenberg. Justice Stevens: An Open Mind on a Changing Court, Morning Edition by NPR. Originally broadcast October 4, 2010. A transcript is available at http://www.npr.org/templates/transcript/transcript.php?storyId=130198344

118 For a discussion of joining behavior among the Justices see Supra n. 18. For a discussion of the perceived Liberal bias in favor of tribes see Supra n. 105.

119 Supra n. 107

120 See Landes and Posner Supra n. 25 ranking all of the Justices based upon their voting behavior in cases decided on the merits, and determining that Justice Stevens and Justice Ginsburg are the two decidedly most liberal members of the Court after Justice Brennan retired in 1990. The position of the most liberal member is split depending on the measurement used, with Justice Stevens receiving a more liberal Martin/Quinn Score, but Justice Ginsburg slightly less likely to cast a “conservative” vote as determined by the authors.

mere presence of the Ten Commandments in a courtroom\textsuperscript{122} violates the First Amendment’s freedom of religion. He has the broadest possible interpretation of the interstate commerce clause, dissenting from decisions that Congress overreached its delegated authority when it passed the Gun Free School Zones Act\textsuperscript{123} and the Violence Against Women Act,\textsuperscript{124} and then authored the opinion upholding Congress’s right to preempt state drug laws.\textsuperscript{125} He has consistently sided with the accused over government, with a decidedly liberal record on police powers, authoring a majority opinion that during a police stop, officers may search only those parts of a vehicle within reach of a suspect prior to arrest,\textsuperscript{126} and has vehemently defended the rights of minors in schools.\textsuperscript{127} While he did join the 1976 majority to reinstate the use of the death penalty,\textsuperscript{128} Justice Stevens, reflecting on his thirty years on the bench, explicitly highlights his vote as the one vote on the bench he regrets.\textsuperscript{129} Since 1976 he has radically reversed position, finding that the death penalty constitutes cruel and unusual punishment and is therefore prohibited by the Constitution as applied to persons who were minors at the time of their offense,\textsuperscript{130} mentally incompetent,\textsuperscript{131} for crimes that did not take the life of another,\textsuperscript{132} when the

\begin{footnotes}
\item[125] Gonzalez v. Raich 545 U.S. 1 (2005).
\item[129] See Stevens Supra n. 117 (“I think there is one vote that I would change and that's one - was upholding the capital punishment statute. I think that we did not foresee how it would be interpreted. I think that was an incorrect decision”).
\item[130] Roper v. Simmons 543 U.S. 551 (2005) (Justice Stevens joined the majority to overturn Stanford, holding it is unconstitutional to sentence to death an individual who was a minor at the time the crime was committed), Stanford v. Kentucky, 492 U.S. 361 (1989) (Justice Stevens dissented from a decision permitting the application of the death penalty to an individual who was a minor at the time they committed the capital offense), Thompson v. Oklahoma 487 U.S. 815 (1988) (Justice Stevens voted with the majority to overturn a death sentence for an individual who was 15 when the capital offense was committed).
\item[132] Coker v. Georgia, 433 U.S. 584 (1977) (Holding that the death penalty was grossly disproportionate punishment for the crime of raping a minor).
\end{footnotes}
individual did not intend to kill, and finally, in 2008, concluding the death penalty itself to be unconstitutional.

Despite his broadly liberal jurisprudence, fellow Republican nominee Justice Souter, and considerably more moderate democratic nominee Justice Breyer, have both voted significantly more often for Indian interests than Justice Stevens. Justice Stevens’ preference for federal preemption over state action, and his sympathy for disadvantaged groups that appear before the Court apparently is not extended to tribal interests, contradicting the widely held belief that liberal justices are generally more friendly to tribal interests. A couple particularly egregious examples stand out.

In *Merrion v. Jicarilla Apache* Justice Stevens’ dissent was joined by Justice Rehnquist and Chief Justice Burger, estranging his traditionally liberal voice from even moderate conservatives like Justices Powell, White, and O’Connor. In his dissent, Justice Stevens first elucidated his notion of tribal sovereignty; “[i]n becoming part of the United States, however, the tribes yielded their status as independent nations; Indians and non-Indians alike answered to the authority of a new Nation, organized under a new Constitution based on democratic principles of representative government.” After concluding that the tribe’s claim to tax the extraction of

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134 *Baze v. Rees* 553 U.S. 35 (2008) (“I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents ‘the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.’”)
135 See Table 1. Justice Souter votes with the pro-Indian interest in approximately 42% of cases that reached the merits stage of the Court, a higher proportion than liberal Justice serving with him.
136 See Table 1 for the comparative voting records on Indian law cases of Justices Stevens and Breyer. See Landes and Posner Supra n. 25 for a comparison of the ideology of Justices Stevens and Breyer, concluding that Justice Stevens is considerably more liberal on civil liberties cases, economic cases, and overall.
138 Id. at 140 Justices Powell, White, and O’Connor all joined Justice Marshall’s majority opinion holding that “Indian tribes enjoy authority to finance their governmental services through taxation of non-Indians who benefit from those services. Indeed, the conception of Indian sovereignty that this Court has consistently reaffirmed permits no other conclusion.”
139 Id. at 160 (Justice Stevens dissenting).
natural resources within the outer bounds of the reservation is not explicitly provided for by federal statute or treaty, Justice Stevens finds that the tribe is making a claim on the basis of inherent sovereignty. 140 Yet he concludes “Tribal sovereignty is neither derived from nor protected by the Constitution.” 141 As a consequence of his refusal to recognize tribal sovereignty, the dissent ultimately would have held that “[a]t the time the leases contained in the record were executed, the Jicarilla Apache Constitution contained no taxing authorization whatever” 142 and thusly denied the Jicarilla Apache Tribe the right to collect taxes on the extraction of natural resources taken from their tribal lands. 143

In *California v. Cabazon Band of Mission Indians* 144 Justice Stevens again wrote the dissent against tribal interests, this time joined by moderate Justices O’Connor and Kennedy, while both extreme conservatives like Chief Justice Rehnquist and partisan liberals like Justice Marshall upheld the right of tribes to participate in gaming without being subject to state regulation. 145 Justice Stevens clearly holds that in his view, unless the federal government has pre-empted state jurisdiction, “I believe that a State may enforce its laws prohibiting high-stakes gambling on Indian reservations within its borders.” 146 Using gaming to extend his view that “commercial transactions between Indians and non-Indians – even when conducted on a reservation – do not enjoy any blanket immunity from state regulation,” 147 Justice Stevens concludes that “unless Congress authorizes and regulates these commercial gambling ventures catering to non-Indians, the State has a legitimate law enforcement interest in proscribing

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140 Id. at 168.
141 Id.
142 Id. at 188.
143 Id.
145 Id.
146 Id. at 222 (Justice Stevens dissenting).
147 Id. at 222.
them.” Justice Steven’s dissents against tribal sovereignty send dangerous precedents to lower Courts that want to further erode of the inherent powers of an Indian tribe vis-à-vis state or federal intervention.

_Merrion_ and _Cabazon_ are far from the only examples of a decidedly liberal Justice Stevens, occasionally joined by other liberal voices, in opposing tribal interests. Justice Stevens has repeatedly dissented in cases that uphold a tribal interest – often as the author of the dissent. In _Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico_ Justice Stevens dissented from a decision that concluded that federal law preempted a state tax on construction activities that occur solely within the outer boundary of a reservation. In _Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., (Wold I)_ and again in _Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., (Wold II)_ Justice Steven’s dissented from majority opinions concluding state jurisdiction was preempted by federal law. In _Montana v. Blackfeet Tribe of Indians_ he dissented from a majority that denied the state of Montana the right to tax royalty payments made from the extraction of oil and gas on the reservation. In _Iowa Mutual Insurance Company v. LaPlante_ Justice Stevens dissented, holding that a federal court need not wait for a tribal court to reach the merits of a decision and

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148 _Id._ at 226.
149 _Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico_ 458 U.S. 832 (1982) (Justice Stevens joined Justice Rehnquist’s dissent concluding that a construction company operating under a contract with a tribal government for work done on the reservation is not immune from being subject to state taxation).
150 _Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C._, 467 U.S. 138 (1984) (Justice Stevens joined Chief Justice Rehnquist’s dissent that the State of North Dakota may bar its’ state courts from hearing cases brought by Indian tribes. They conclude, contrary to the majority, that no federal law pre-empts the right of the state of North Dakota to close its courts to tribal litigants for lack of subject matter jurisdiction).
151 _Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C._, 476 U.S. 877 (1986) (Justice Stevens again joined Chief Justice Rehnquist’s dissent that Public Law 280 did not create a sufficiently comprehensive scheme to pre-empt North Dakota’s interest in acquiring state jurisdiction over the claim only if the tribe waives sovereign immunity and allows the state court to apply state instead of tribal law).
152 _Montana v. Blackfeet Tribe of Indians_ 471 U.S. 759 (1985) (Justice Stevens joined Justice White’s dissent that the majority was wrong when it asked whether the Mineral Leasing Act specifically consented to state taxation, instead the question should have been did the act bar state taxation. Finding nothing in the act to bar state taxation of minerals on Indian lands like the ones at issue in the case, the dissent would have permitted the state to tax the mineral extraction).
the appellate exhaust his tribal remedies before assuming jurisdiction.\textsuperscript{153} In \textit{Mississippi Band of Choctaw Indians v. Holyfield} his dissent found that the state ought to have been able to assert jurisdiction over an Indian child in contravention of the Indian Child Welfare Act’s preference for tribal court jurisdiction.\textsuperscript{154} In \textit{Babbitt v. Youpee} Justice Stevens provided the lone dissent, holding that if the interest is sufficiently small enough Indian title to real property on a reservation could be taken without any compensation.\textsuperscript{155} Finally, in \textit{Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.}, Justice Stevens voted to not recognize a tribe’s sovereign immunity claim in contract disputes.\textsuperscript{156}

Taken together, Justice Stevens’ record on Indian law – spanning parts of five decades – demonstrates how poor an indicator judicial ideology is to predict the voting behavior of individual justices on Indian law cases. Often voting against the tribal interest when many more moderate and even arch conservatives are amenable to the tribe’s claims, Justice Stevens is the clearest, but not the only, example of how the median justice theory in particular, and judicial ideology in general, fail to explain the outcome on the merits in Indian law cases.

\textbf{B. Defying Expectations: Justice Stewart}

In many ways, Justice Stewart’s jurisprudence is radically different from that of Justice Stevens. He authored the lone dissent against the application of “one person one vote” to state

\textsuperscript{153} \textit{Iowa Mutual Insurance Company v. LaPlante} 480 U.S. 9 (1987) (Justice Stevens dissented, writing that even if the tribal court had concurrent jurisdiction, that was insufficient reason for the state court to decline to exercise its jurisdiction while the case is exhausted in tribal court. He found the majority’s justification, a need to develop a record in the tribal court system where the court would be more familiar with the events of dispute and with tribal law to be insufficient justification for requiring exhaustion).

\textsuperscript{154} \textit{Mississippi Band of Choctaw Indians v. Holyfield} 490 U.S. 30 (1989) (Justice Stevens dissented, concluding that while the Indian Child Welfare Act could shield parents of Indian children from the exercise of state jurisdiction when they are temporarily off the reservation, it was not intended to allow a tribe to defeat the parents’ deliberate choice of state jurisdiction through an intentional abandonment of the children.)

\textsuperscript{155} \textit{Babbit v. Youpee} 519 U.S. 234 (1997) (Justice Stevens dissented, holding that the federal government’s interest in preventing fractionation of Indian lands was strong enough to justify the taking of Indian lands and permitting them to escheat without any compensation provided the land owner was given notice of the policy and afforded an opportunity to adjust their affairs).

\textsuperscript{156} \textit{Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.}, 523 U.S. 751 (1998) (Justice Stevens dissented, writing that tribal sovereign immunity should not be expanded to include off reservation commercial activities).
legislative districts\(^{157}\) and later federal congressional districts.\(^{158}\) He voted against requiring police to inform arrested individuals of their rights, writing that *Miranda* warnings would hamper police investigations,\(^{159}\) and subsequently refused to extend them to minors.\(^{160}\) He found no Constitutional bar to state laws permitting prayer in public schools\(^ {161}\) or the sponsor by public schools of Bible reading in class,\(^ {162}\) and in refusing to strike down Connecticut’s ban on contraception concluded the Constitution did not protect a right to privacy.\(^ {163}\)

While Justice Stewart was admittedly not the advocate Justice Douglas or Justice Marshall were for tribal interests at the Supreme Court, his otherwise conservative voting record includes favorable outcomes for tribal interests in almost two-thirds of the sixty Indian law cases he participated in during the period of the study. Including, in his first Indian law case, joining Justice Black’s unanimous decision in *Williams v. Lee*\(^ {164}\) which established an exceptionally favorable framework to resolve conflicts between state and tribal jurisdiction; “absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”\(^ {165}\)

Far from a lone example, Justice Stewart’s tenure included a number of decisions favorable to tribes that are not explained by a merely ideological theory of Supreme Court jurisprudence. For example, in *Washington v. Confederated Tribes of the Colville Reservation et. al.* Justice Stewart’s separate opinion, dissenting in part/concurring in part, went far beyond the majority’s decision that tribes could also tax on reservation sales of cigarettes to non-members;


\(^ {160}\) *In re Gault*, 387 U.S. 1 (1967).


\(^ {165}\) *Id.* at 219-220.
“[i]t seems clear to me that the appellee Tribes enjoy a power at least equal to that of the State to tax the on-reservation.”\textsuperscript{166} The concurrence continues;

“when a State and an Indian tribe tax in a functionally identical manner the same on-reservation sales to nontribal members, it is my view that congressional policy conjoined with the Indian Commerce Clause requires the State to credit against its own tax the amount of the tribe’s tax. This solution fully effectuates the State’s goal of assuring that its citizens who are not tribal members do not cash in on the exemption from state taxation that the tribe and its members enjoy. On the other hand, it permits the tribe to share with the State in the tax revenues from cigarette sales, without at the same time placing the tribe’s federally encouraged enterprises at a competitive disadvantage compared to similarly situated off-reservation businesses.”\textsuperscript{167}

By requiring that the amount of tax levied by the tribe on the sale of cigarettes to non-members offset the state tax, Justice Stewart went further than his much more liberal fellow justices, Blackmun and Stevens, to give real teeth to tribal sovereignty. While not fully exempting the tribes from state taxation which would have permitted them to market a tax exemption, the tribe could functionally remove itself from the burden to collect the state excise tax on cigarettes simply by levying the same tax for tribal purposes on all purchasers.\textsuperscript{168}

In \textit{Colorado River Conservation District v. United States} Justice Stewart’s dissent over considerably more liberal members of the Court, including Justices Brennan and Marshall, further emphasizes how ideology is a poor measure of behavior on Indian law cases.\textsuperscript{169} In opposition to a majority that held that state courts had jurisdiction over the determination of water rights held by Indian tribes, Justice Stewart wrote; “the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation’s history.”\textsuperscript{170} Although unable to persuade his more liberal colleagues, he continues, “[i]t is not necessary to determine that there

\begin{flushleft}
\textsuperscript{167} \textit{Id.} at 175.
\textsuperscript{168} \textit{Id.}
\textsuperscript{169} \textit{Colorado River Conservation District v. United States} 424 U.S. 800 (1976).
\textsuperscript{170} \textit{Id.} at 826.
\end{flushleft}
is no state court jurisdiction of these claims to support the proposition that a federal court is a more appropriate forum than a state court for determination of questions of life-and-death importance to Indians.”

In addition to writing separately, Justice Stewart often emphasized his position on Indian law by joining the dissenting opinions of other justices when the majority decided against tribal interests. In *Rosebud Sioux Tribe v. Kneip* Justice Stewart joined Justices Marshall and Brennan in dissenting from the majority’s position that the Rosebud Sioux Reservation had been diminished. In *Mescalero Apache Tribe v. Jones* he joined Justice’s Douglas and Brennan in opposing the majority position that the state of New Mexico could tax a tribally operated skiing operation that took place on land that was not held in trust by the United States for the benefit of the tribe.

Justice Stewart’s record serves to emphasize that while conservative members of the Court today may be uniformly hostile to tribal interests, conservatives in general are not anti-Indian. In fact, a quick review of Table I demonstrates that many of the more conservative justices that served during the Warren and Burger Courts were significantly more pro-Indian in their voting records than modern liberals.

**IV: Explaining Justice Behavior: The Fisher Exact Test**

Having used descriptive statistics to demonstrate that Justice Ideology is an inconsistent indicator of an individual Justice’s pro-Indian voting behavior, new questions arise that this...
paper only begins to answer. If ideology is an incomplete proxy for whether a justice casts a vote for or against tribal interests, what factors are important for a favorable outcome on the merits? While there is much extant scholarship on the historical movement of the Court against tribal interests\(^{175}\) none of it does a satisfactory job of quantitatively examining the voting patterns of the Court. This section aims to address that common failing through a quantitative comparison in an attempt to isolate factors that may influence a Justice’s vote on Indian law cases.

As explained in the methodology section above, the Fisher Exact Test is used to compare two sets of variables to determine if the relationship between them is significant.\(^{176}\) The focus on the individual Justice instead of the Court as a whole is something not often explored in Federal Indian Law,\(^{177}\) but because the reasons for each individual’s vote could vary from Justice to Justice, the individual is the appropriate dimensional scale for the analysis. The results of the Fisher Exact Test are reported in Table 2, followed by a discussion of the results broken down by the factor tested.

| Table 2: Results of Fisher Exact Test to Determine Relevant Factors in Supreme Court Voting Behavior |
|---------------------------------------------------------------|---------------------------------------------------------------|---------------------------------------------------------------|---------------------------------------------------------------|
| Percent of Pro-Indian Votes | Fisher’s Exact: Solicitor’s Participation | Fisher’s Exact: Tribe As Appellant | Fisher’s Exact: State Jurisdiction |
| Douglas | 88.24% | 0.180 | 0.488 | 0.699 |
| Warren | 85.71% | 0.725 | 0.725 | 0.692 |
| Marshall | 74.71% | 0.292 | 0.060** | 0.001*** |

\(^{175}\) Matthew L.M. Fletcher *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes* 51 Ariz. L. Rev. 933 (2009) (discussing the increasing difficulty of Indians to get the Supreme Court to hear cases appealed by tribes, leading to more unfavorable opinions), Matthew L.M. Fletcher, *The Supreme Court’s Indian Law Problem* 59 Hastings L.J. 579 (2008) (Discussing how the Court’s use of Indian law cases to settle other areas of Constitutional law is promoting decisions that are injurious to tribal interests).

\(^{176}\) For a discussion of how the Fisher Exact Test is calculated see Supra n. 73 & 74.

\(^{177}\) Although Indian law scholars and others interested in Indian issues do discuss each prospective Justice’s interaction with Indian law upon their appointment and prior to their confirmation, there is very little scholarship that uses the individual as the unit of analysis across a series of cases in a single discipline, let alone from other Indian law scholars. Cf. Hermann Supra n. 61.
Fisher’s Exact Test Reported P-Values:
* = p < 0.15, ** = p < 0.10, *** = p < 0.05
Justices With Five or Fewer Indian Law Opinions Omitted

Each outcome-variable combination for each Justice has a p-value reported. The p-value is functionally a confidence interval. For example, the result of the Fisher Exact Test is a p-value of “0.180” for Justice Douglas when measuring the relationship between a pro-Indian outcome and whether the Solicitor General participated on behalf of the tribe. It indicates that there is an 18% chance that for Justice Douglas the presence of the Solicitor representing the pro-Indian interest will NOT increase the likelihood that he will cast a pro-Indian vote on the merits of the decision.

With this understanding of the data, it is clear that the lower the p-value, the more confident we are that the tested variable actually explains the behavior of the Justice, and is not simply a descriptive anomaly.
The p-values reported in Table 2 have further been coded to highlight values that are most statistically significant. All values where there is a 5% chance or less that the observed behavior is random are assigned three stars (***). For these data points it can be said that we are 95% confident that the existence of the tested variable increases the likelihood the Justice will vote for the pro-Indian interest. P-values greater than .050 but still less than .100 are assigned two stars (**), indicating that we can be at least 90% confident the existence of the tested variable will increase the likelihood the Justice will vote for the pro-Indian interest. P-values greater than .100 but less than .150 are assigned a single star (*), indicating that we are at least 85% confident the presence of the tested variable will increase the likelihood of a pro-Indian vote by the Justice.

Having understood how to read Table 2, some important implications to the study and practice of Federal Indian Law can now be drawn, and are accordingly discussed below.

A. Solicitor’s Participation

The United States Solicitor General is one of the most active litigants at the Supreme Court.\textsuperscript{178} The hypothesized expectation was that given its ability to pick and choose which cases it appeals, its long institutional memory, and its experience with the Court, the presence of the Solicitor General’s office as a party to the litigation on behalf of the tribe would result in more favorable voting by individual Justice’s for the tribal interest when compared to when the Solicitor General was not a direct party to the litigation.\textsuperscript{179} Additionally, the solicitor participates in a surprising number of Indian cases, participating directly as a named party in more than 1 in 5

\textsuperscript{178} See O’Connor and Hermann Supra n. 88 (The United States Solicitor is “the most frequent and prominent player before the Court”). For additional authority, see generally supra n. 39.

\textsuperscript{179} For a thorough justification for why the Solicitor is more likely to be a successful litigant, including discussion of its ability to attract the most qualified talent, its repeated exposure to argument before the Court, and its discretionary docket see Supra n. 78, 80, & 81.
Indian law cases since the beginning of the Warren Court and as an amicus in more than half of the Indian law cases that reach the merits stage.\textsuperscript{180}

Despite the widely reported success of the Solicitor at the Supreme Court,\textsuperscript{181} in Indian law cases it was successful in just over half (17 of 32) of the cases it participated in. (See Table 3 below).

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{Outcome} & \textbf{Did Participate} & \textbf{Did NOT Participate} \\
\hline
For Tribes & 17 (12\%) & 49 (34\%) & \quad 66 (46\%) \\
Against Tribes & 15 (10\%) & 62 (43\%) & \quad 77 (54\%) \\
\hline
32 (22\%) & 111 (77\%) & 143 \\
\hline
\end{tabular}
\caption{Solicitor's Participation}
\end{table}

Moreover, the participation of the Solicitor was a significant factor in explaining the votes of only two of the twenty-three Justices, Justices Ginsberg and Stevens, and an exceptional indicator of predicting only Justice Ginsberg’s voting behavior.\textsuperscript{182}

What might explain the result where the Solicitor is considerably less successful at litigating Indian law cases before the Supreme Court than defending the government’s interest in other areas? In the case of Indian law, a significant portion of cases where the Solicitor participates directly on behalf of tribal interests occur when the United States is defending treaties signed with tribes and rights reserved in those treaties – often against states. These

\footnote{See Hermann Supra n. 61 (Finding that in the period 1969-1992 the Solicitor General participated directly on behalf of tribes, either as a party to the litigation or an amicus, in more than 56\% (41 of 75 cases) of all Indian law cases. He also finds that the Solicitor’s direct participation of behalf of tribes has very little influence over a Justice’s final vote. This paper expands and updates his research, and confirms his surprising result.)}

\footnote{See Juliano Supra n. 40}

\footnote{While not significantly helpful at predicting individual Justice voting across the Court, it should be noted that the presence of the Solicitor was an exceptionally good indicator of Justice Ginsberg’s voting record on Indian law cases, statistically significant with a better than 95\% degree of confidence. Accordingly, when looking to predict the outcome of future cases while Justice Ginsberg is on the Court, the presence of the Solicitor General as a named party representing tribal interests ought to significantly increase the likelihood of her support for the Indian interest at contest in the litigation.}
include disputes over title to real property or the taxation of water, minerals and natural resources, and land, where the Court has been particularly reluctant to cede control from state governments to tribal governments.

For example, in *Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians* the Court held that in the permitting of rights-of-way for changing water flow to service a hydroelectric project the tribes have no “more power to stop such action than would a private landowner.” In *Arizona v. San Carlos Apache Tribe of Arizona* the Court held that State courts were disinterested enough to be a proper forum to adjudicate conflicting claims for water rights between tribes and states over the Solicitor’s objection that only a federal court could properly and impartially resolve a dispute between two sovereigns. Concluding that “the state proceedings have jurisdiction over the Indian water rights at issue here” the majority was unwilling to be persuaded by the Solicitor that the federal government’s trust responsibility to the tribe required federal administration of Indian water rights to the extent that state jurisdiction was ultimately precluded.

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185 *U.S. v. Clarke* 445 U.S. 253 (1980) (The Solicitor entered the litigation and appealed to the Supreme Court to prevent the state of Alaska from acquiring Indian lands through inverse condemnation).

186 *Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians* 466 U.S. 765 (1984) (Justice White, writing for a unanimous Court “it is highly questionable whether the Bands have inherent authority to prevent a federal agency from carrying out its statutory responsibility, since such authority would seem to be inconsistent with their status”).

187 *Arizona v. San Carlos Apache Tribe of Arizona* 463 U.S. 545 (1983) (Recognizing that “Indian rights have traditionally been left free of interference from the States” and that “State courts may be inhospitable to Indian rights” the Court nonetheless found that a final decision on the merits from qualifies state courts would be *res judicata* on federal courts, and therefore barred the tribes claims from proceeding in the federal forum to avoid “duplicative” work and a waste of judicial resources.

188 *Id.* at 567.

189 *Id.* at 576 (Justice Stevens in his dissenting opinion did remind the Court of “the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people,” however the
As a result of the Court’s well documented skepticism of the extent and nature of the federal trust responsibility⁹⁰ the Solicitor has been considerably less successful in Indian law cases when it appears as a party on behalf of Indian interests.⁹¹ The results from the Fisher Exact Test confirm that, unlike the general trend where the Solicitor prevails at roughly 70% of the cases it takes to the Court,⁹² the presence of the Solicitor as a named party is an unreliable indicator at an individual Justice level of the eventual vote cast either for or against the tribal interest in Indian law cases.

Other scholarship on the participation of the Solicitor General in Indian law cases has noted that the participation of the Solicitor does have a statistically significant and a pronounced negative effect when the Solicitor opposes the tribe.⁹³ This makes sense given both the success generally of the Solicitor and the alignment of the federal government against the tribe given the Court’s understanding of the government’s plenary power over Indian affairs. This paper did not study the effect of the Solicitor General as a party opposing tribal interests because of the comparatively small number of cases and the difficulty in separating the questions of criminal and civil participation which arguably send very different signals to the Justices.⁹⁴

While ultimately disappointing, this null result is still an important contribution to the field. Because of the success of the Solicitor General many tribal advocates doubtless believe

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⁹¹ The Solicitor wins just over 50% of the cases where it appeared as a party (17 of 32) well below its recent ordinary success rate of 89% and its historical success rate of 75%. See Juliano supra n. 40
⁹² See Salokar supra n. 81
⁹³ See Hermann Supra n. 61
⁹⁴ No case where the Solicitor participated directly on behalf of a tribal interest involved the criminal persecution or application of federal criminal laws over an individual. Oliphant v. Suquamish Indian Tribe 435 U.S. 191 (1978) did deal with a tribal court asserting criminal jurisdiction over a non-Indian, and the Solicitor participated in favor of tribal court criminal jurisdiction directly as a party to the litigation to demonstrate the United States’ commitment to tribal sovereignty, but the question in the case was ultimately jurisdictional and not criminal in nature.
that if they can get the support of the Solicitor General it may be more advantageous to appeal the case to the Supreme Court given its impressive success there. Differentiating Indian law cases, from cases generally, make it clear that the Solicitor’s Participation does not aid in the daunting task of persuading the members of the Court of the tribal interest, and therefore should not be used in the decision calculus by advocates when determining the appropriateness of appeal and the chances of success on the merits. Fortunately, the other two tested variables provided much better explanations of the behavior of the Court.

**B. Tribe as Appellant**

The most significant of the three variables tested was whether the tribe was the appellant party. The hypothesis was that since the Supreme Court has discretion over its docket, a majority of cases that reach the merits stage by receiving at least four votes in favor of certification are taken by the Court because the justices want to reverse.195 Applying the general trend to Indian law cases, I asked whether the tribe being the appellant is a statistically significant predictor of not the outcome of the case as a whole, but an individual justice’s vote on Indian law cases. For more than half of the Justices deciding at least five cases between the beginning of the Warren Court and the end of the 2009-2010 term (twelve of twenty-three – See Table 2 above), the presence of the tribe as the appellant party was statistically significant. For nine of the twelve, the data was emphatic, demonstrating with 95% confidence or better that the appellant status of the tribe impacted the decision of the Justice. Table 4 reports the basic cross-tab results of the data for purposes of creating an expected behavior score against which to measure each justice’s actual behavior.

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195 See Harvard Law Review Supra n. 37
Table 4: Tribe As Appellant

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<th>Outcome</th>
<th>Tribe As Appellant</th>
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<tr>
<td></td>
<td>Appellant</td>
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<tr>
<td>For Tribes</td>
<td>42 (29%)</td>
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<tr>
<td>Against Tribes</td>
<td>17 (12%)</td>
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<td>59 (41%)</td>
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The results are important for a number of reasons. As scholars like Matthew Fletcher have pointed out, the recent trend in defeats for tribal interests at the Supreme Court is likely largely the result of fewer cases being granted certification when the tribe appeals an unfavorable circuit court decision compared to when states petition the Court on a question of Federal Indian Law.\(^{196}\)

However the results are more instructive than merely commenting on the ultimate outcome or confirming a pattern found generally in the Court’s jurisprudence. The data is highly significant across the spectrum of justice ideology, from the more liberal Justices Brennan and Marshall to staunchly conservatives like Justices Rehnquist and Scalia. This confirmatory trend is identifying Justices for whom the presence of the Solicitor is particularly instructive (Justice Scalia) but also in identifying the Justices for whom the Solicitor carries less weight on Indian law decisions (Justice Thomas).

The implications strongly recommend that tribes not abandon the Supreme Court has a tool to advance Indian interests. While tribes have certainly been less successful at the Court in the last decade\(^{197}\) they have also been significantly less likely to be the appellant party.\(^{198}\)

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\(^{196}\) See *Factbound and Splitless* supra n. 36 (Professor Fletcher uses a collection of clerk memos from Justice Blackmun’s archive that have been recently released to provide an insightful discussion of how the rules of the Supreme Court are used by clerks with very little or no background in Indian law to determine that many cases with vital implications to a tribe or Indian Country as a whole are unlikely to be faced by other circuits and therefore recommend a denial of cert for lack of importance. Indian law cases appealed by a state or local government entity are more likely to be perceived as by Supreme Court clerks as having wider implications beyond the specific facts and accordingly more likely to be accepted.

\(^{197}\) Tribal Interests have failed to win a single majority decision in the Roberts Court. See also Hermann Supra n. 61 noting that the Rehnquist Court to 1992 was significantly less likely to provide a pro-Indian outcome (Almost 60%
this trend, the Native American Rights Fund (NARF)\textsuperscript{199} established the Tribal Supreme Court Project\textsuperscript{200} in 2000 in an attempt to improve the success rates of tribal interests before the Court. The data presented here indicates that one of the best ways to achieve favorable opinions at the Supreme Court is to appeal cases where the tribal interest lost in the federal appellate courts. While it is certainly appropriate for tribal advocates to attempt to prevent cases with fact patterns that would encourage an aggressive grant (cases the Court takes and affirms, making a precedent in one circuit into a national precedent),\textsuperscript{201} they should not be overly cautious and thereby prevent cases that present real issues that need to be resolved from reaching the Court.

C. State Jurisdiction

Finally, the last variable tested was whether individual Justices are more likely to vote for the tribal interest when at least one of the questions certified for a decision on the merits deals with a conflict between state and tribal jurisdiction. The hypothesis is that because the Court is the least majoritarian branch of government, it has the ability to protect minority interests from the abuse by the majority.\textsuperscript{202} In fact, it often views itself in this gatekeeper role, providing a check on what is popular by upholding what is “right.”\textsuperscript{203} This fits in with the general conception of Indian law as tribes often have large land reserves, and in some cases significant natural resources, but a comparatively small population. Unfortunately the substantial resources and land

\begin{footnotesize}
\begin{enumerate}
\item See Factbound and Splitless Supra n. 36.
\item NARF was founded in 1970 with the express purpose of advancing and defending the rights of Indian people. It is the largest and oldest organization of its kind in the United States. http://www.narf.org
\item NARF’s Tribal Supreme Court Project was founded in 2000 and provides a battery of legal resources for the promotion of tribal issues before the Supreme Court. They provide consulting services, assistance with counsel, and maintain a database of invaluable resources regarding Federal Indian Law in the federal courts of the United States. http://www.narf.org/sct/supctproject.html
\item For a general discussion of strategic voting behavior, including the aggressive grant strategy employed by the members on the Supreme Court see supra n. 92.
\item See Part II(3).
\item Michael J. Klarman FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY Oxford University Press (2004) (Discussing the institution of the Supreme Court and its role in making unpopular decisions and protecting minority rights).
\end{enumerate}
\end{footnotesize}
managed by tribes are often seen by states as a popular way to expand state power and revenue. Accordingly, states attempt to bully tribes into accepting state oversight, taxation, or direct management of assets, and use their own courts and laws in an attempt to erode tribal sovereignty and acquire jurisdiction for themselves in a zero-sum game.

Contrary to popular impressions of the Supreme Court’s jurisprudence, the Justices are actually comparatively supportive of tribal claims that states are infringing on their rights and powers. In the pool of all Indian law cases that reached a merits decision by the Supreme Court between the start of the Warren Court and the end of the 2009-2010 term, tribes prevailed in a slight majority of cases where there existed a conflict in jurisdiction, but were unsuccessful in almost two-thirds of cases where no jurisdictional conflict presented itself. (See Table 5 below).

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<th>Table 5: State Jurisdiction</th>
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<td><strong>Outcome</strong></td>
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<td>Against Tribes</td>
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The interesting result from the Fisher Exact Test when measuring state jurisdiction is the distribution of Justices over time. While jurisdictional questions were statistically significant factors for how ten of twenty-three Justices voted over the course of the study, it was significant for only one of the seven Justices serving on the bench in the 2009-2010 term. Justice Kennedy was the exception, and even that relationship is relatively weak – the Fisher Exact Test is about 89% confident that questions of state jurisdiction are statistically significant to Justice Kennedy’s voting on the merits.
This result is more important than it may first appear because Justice Kennedy is now considered the most likely swing Justice.\textsuperscript{204} Even if Indian law cases often confound traditional ideological rifts, other Justices pay particular attention to the swing Justice generally, since his vote will be cultivated along ideological lines in other cases, and accordingly his opinion will carry additional weight in lower federal courts as they attempt to faithfully apply the holdings from the Supreme Court. Accordingly, the precedential value of Justice Kennedy’s opinions will carry some additional weight. Knowing that Justice Kennedy’s vote can be statistically significantly explained when cases emphasis the independence of tribes from states is important for advocates who craft their briefs and oral arguments in order to win the support of certain judges. The data indicates that Justice Kennedy is more amenable to understanding Indian law cases in terms of conflicting jurisdictions and tribal sovereignty. Tribal advocates filing with the Court should use this data to their advantage.

Perhaps the best example of Justice Kennedy being persuaded that in conflicts of Jurisdiction, the Court has a responsibility to protect tribes from the excessive influence of the state is \textit{Wagnon v. Prairie Band Potawatomi Nation}.\textsuperscript{205} Justice Kennedy was the only other member of the Court to join Justice Ginsburg’s dissent finding that the state of Kansas had no right to level its fuel tax on gasoline was that ultimately going to be sold on the reservation at the Nation Station, a business located on the reservation and owned by member-Indians; “‘[t]he power to tax [as] an essential attribute of Indian sovereignty[,] . . . a necessary instrument of self-government and territorial management,’ which ‘enables a tribal government to raise revenues

\textsuperscript{204} Supra n. 37 – Justice Kennedy was in the majority 82\% of the time in the 2009-2010 term, more than any other Justice, indicating that his vote is the most important to command a majority. It also notes that he was the swing vote in 5-4 decisions that divided along purely ideological lines in 69\% of such cases.

for its essential services’’

While *Wagnon* may be the best example, it is not the only one. Justice Kennedy’s commitment to protect tribes when states attempt to assert excessive jurisdiction is an interesting conclusion that may have gone largely unnoticed without quantitative analysis of the voting records of individual justices.

The Fisher Exact Test results have important implications both for Indian law advocates before the Court today and for scholars of the Court. The results provide quantitative confirmatory analysis that during the early period of what scholars now term Indian Self Determination the Court was exercising its oversight role to protect a potentially vulnerable minority from excessive abuse of state power. The incredibly significant results (99% confident or greater) of Justices like Marshall, Brennan, Blackmun, and Powell voting for Indian interests specifically at a time when, and in instances where, jurisdictional disputes between tribes and states were most important to preserve tribal sovereignty.

The inverse implication is that the Court no longer finds that kind of analysis compelling. Advocates before the Court have two alternatives, to dial up the rhetoric or reconsider which cases it takes to the Court. On the one hand, the change in behavior away from protecting tribal interests may result from a lack of understanding by the modern Court of the situation on the ground in Indian Country. If this were the case, the solution would be to dial up the rhetoric, bringing as many cases to the Courts attention as possible that emphasize the ongoing challenge tribes face at the abuses perpetrated by states. Because Justices are more likely to vote for tribal

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206 Id. at 116 (Justice Ginsburg dissenting)
208 The era of Self-Determination marks the change in federal Indian policy, roughly corresponding to beginning of the Civil Rights Movement and often pegged to the Supreme Court’s decision in *Williams v. Lee* that resulted in government protection of tribal sovereignty. For a discussion of the various historical eras of Federal Indian Law see generally Felix Cohen COHEN’S HANDBOOK OF FEDERAL INDIAN LAW Lexis Publishing (2005).
interests when they are the appellant party, tribal advocates need to reconsider this strategy of educating the Court about the necessity of tribal sovereignty by appealing as often as possible sympathetic cases to tribal interests that the Indian litigant lost at the appellate level.

Unfortunately however, the Court has had a constant exposure to questions of Indian law during the past fifty years, and has become more ideologically aligned against promoting special rights for select groups. If this explains the change in behavior among the current Justices, advocates before the Court need to be aware that far from highlighting cases where state and tribal jurisdictions conflict, the best strategy might be to avoid litigating questions of jurisdiction before the Supreme Court at all.

V. Conclusion

Quantitative analysis is still relatively new in legal scholarship, but provides some interesting insights for both the scholar and the practitioner when making choices about Supreme Court litigation. By starting simply with descriptive statistics and then building the most complex quantitative Indian law database currently available, it becomes possible to look at the decision making of individual Justices at the Supreme Court in a new way.

When quantitative data is available it is much easier to divorce conceptions that the ideology of a Justice on a liberal-conservative spectrum is predictive of success by tribal interests at the Court. Instead of pure ideology, a more complex measure of how Justice’s view federalism and the ultimate powers of the federal government vis-à-vis the states is a much better indicator of their voting records on questions of Indian law.

\[209\] Compare *Morton v. Mancari* 417 U.S. 535(1974) (Upholding the use of Indian preference in hiring and promotion at the Bureau of Indian Affairs) with *Rice v. Cayetano* 528 U.S. 495 (2000) (Striking down a Constitutionally enacted provision of the Hawaiian Constitution limiting the ability to vote for trustees to manage the Office of Hawaiian Affairs to Hawaiians who can trace their ancestry to the indigenous peoples inhabiting the island before colonization in 1778).
Additionally, quantitative research methods help differentiate Indian law from other general trends at the court, confirming that the Solicitor is less helpful when appearing as a named party in cases involving Federal Indian Law than it is generally before the Court.

Tribes are in a markedly better position when they are the appellant before the Court. While they don’t have quite the success rate that appellants do generally, a majority of Justices are more likely to vote for tribal interests when they are the party who petitions for a reversal of the decision below.

Finally, while Justices during the early years of the study were significantly more likely to vote in favor of tribal interests to protect them from the excessive and undue influence of the states, the current Court appears to be less convinced. Because appeals to immunize tribes from the far reaching influence of states have not been an important factor for virtually any of the current Justices, advocates before the Court need to find other ways to convey the importance of the tribal interest or alternatively, need to engage in active prevention of questions of jurisdiction from reaching the merit stages at the Court.
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<td>Cass County, Minn. v. Leech Lake Band of Chippewa Indians</td>
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