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Factbound and Splitless: The Certiorari Process as a Barrier to Justice for Indian Tribes

Matthew L.M. Fletcher

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Abstract

The Supreme Court’s certiorari process does more than help the Court parse through thousands of uncertworthy claims – the Court’s application of the process creates an affirmative barrier to justice for parties like Indian tribes and individual Indians. The negative impact of the certiorari process is all but invisible unless one studies a specific area of constitutional law. This study takes up that challenge. Statistically, there is a near zero chance the Supreme Court will grant a certiorari petition filed by tribal interests. At the same time, the Court grants certiorari in far more petitions filed by the opponents to tribal sovereignty.

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

I study 163 certiorari petitions filed during OT 1986 through 1994, and the accompanying “cert pool” memos that only recently became available through the opening of Justice Blackmun’s papers. The results show that a large percentage of petitions brought by tribal opponents received favorable treatment by Supreme Court clerks who simultaneously recommended denial in nearly all tribal petitions. The impact of this weighted review of cert petitions is that a disproportionate number of petitions filed by opponents to tribal interests are granted while very few tribal petitions are granted.

The research presented here suggests that the Court’s ostensibly neutral and objective measures are neither, and in the hands of the clerks – and the Justices who are their audience – measurably prejudice tribal interests before the Court.
Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes

Matthew L.M. Fletcher®

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Introduction

The research presented in this Article reveals powerful evidence that the Supreme Court decisions whether or not to hear a case – the certiorari process – harshly discriminates against the interests of Indian tribes and individual American Indians. I review preliminary memoranda written by Supreme Court clerks in the certiorari decisionmaking process (the “cert pool memos”\(^1\)) during the 1986 through the 1994 docket years, memoranda only recently made public in the Digital Archive of the Papers of Harry A. Blackmun.\(^2\)

In the period of time analyzed in this study – October Terms 1986 through 1994 – where the petitioner was an Indian tribe or a tribal interest, the Supreme Court granted certiorari once out of 92 petitions (excluding three unpaid \textit{in forma pauperis} prisoner petitions involving indigent Indians in which the Court granted certiorari\(^3\)). During the same period of time, the Court granted cert \textit{fourteen times} out of a mere 37 petitions filed by states and local units of government against tribal interests, more than a third of the petitions. Other petitioners opposing tribal interests did not fare as well as state governments, but the Court still granted their petitions significantly more often than tribal parties.

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\(^1\) See Gregory A. Caldeira & John R. Wright, \textit{The Discuss List: Agenda Building in the Supreme Court}, 24 \textit{LAW \\& SOCIETY REV.} 807, 811 (1990) (describing the “cert pool” and the memoranda that originate there).

\(^2\) Lee Epstein, Jeffrey A. Segal, & Harold J. Spaeth, The Digital Archive of the Papers of Justice Harry A. Blackmun (2007), \url{http://epstein.law.northwestern.edu/research/BlackmunArchive.html}.

\(^3\) There are two major classes of cert petitions – paid and unpaid. “Paid petitions” are petitions filed by parties with the means to pay the filing fee, while “unpaid petitions” are filed by parties without the means to pay the filing fee, often referred to as \textit{in forma pauperis} petitions.
This difference is statistically significant. A chi-square analysis is used to evaluate the associations between categories by determining whether observed differences in the observed frequencies and the expected frequencies may be the result of chance:
### Table 2
**Statistical Significance**

**granted * tribal Crosstabulation**

<table>
<thead>
<tr>
<th></th>
<th>tribal</th>
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<th></th>
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</thead>
<tbody>
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<td></td>
<td>.00</td>
<td>23</td>
<td>91</td>
</tr>
<tr>
<td>granted</td>
<td>1.00</td>
<td>14</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>37</td>
<td>92</td>
</tr>
</tbody>
</table>

**Chi-Square Tests**

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<tr>
<th></th>
<th>Value</th>
<th>df</th>
<th>Asymp. Sig. (2-sided)</th>
<th>Exact Sig. (2-sided)</th>
<th>Exact Sig. (1-sided)</th>
</tr>
</thead>
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<tr>
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<td>.000</td>
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<td>Linear-by-Linear</td>
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<td>.000</td>
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<td></td>
</tr>
<tr>
<td>Association</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N of Valid Cases</td>
<td>129</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

a. 1 cells (25.0%) have expected count less than 5. The minimum expected count is 4.30.

b. Computed only for a 2x2 table

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4 A chi-square analysis indicated that the difference between these two groups is statistically significant and thus unlikely to be due to chance, $\chi^2(1, N = 129) = 34.68, p < .01$. 

6
Because so few tribal petitions are granted, and relatively so many petitions filed by parties opposing are granted, the number of cases where a tribal party is the respondent – and at a clear disadvantage statistically – is overwhelming.

Table 3
Party as Petitioner: OT 1986-1994

The import, of course, of a grant of certiorari is that the Court has agreed to review a lower court decision adverse to the petitioner. It is well-established that the Court grants certiorari and reverses the lower court decision far more than it affirms. Of the 22 petitions granted, the tribal interest was a respondent in 20 of the cases, was the petitioner once, and was not present once.

The bare statistics are incredible. The question remains – how does the Court’s certiorari process discriminate so wildly against tribal interests?

Professor Edward Hartnett once asserted that the certiorari process – cabining the Supreme Court’s power to decide its own docket – “has had a profound impact on shaping our constitutional law.” The power to choose among several thousand cases a year for a select few, usually less than one hundred cases, is an awesome power. This Article takes up

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Hartnett’s challenge to analyze the impact of the certiorari process on substantive constitutional law through an empirical study of a particular topic of constitutional law. There are a growing number of empirical studies of the Supreme Court’s agenda-setting through the certiorari process, but few scholars have examined the impact of the certiorari process on a substantive area of constitutional law.

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

A classic example of how the certiorari process works to undermine the claims of tribal interests is *Elliott v. Vermont*, a case involving the aboriginal hunting and fishing rights of the Abenaki people. The cert pool memowriter recommended that the Court deny the petition on grounds that it was both factbound and splitless, as are nearly all Indian treaty claims. But the memowriter acknowledged that the petitioners had a decent claim the Vermont Supreme Court applied the wrong standard – in fact, that court had created a new common law standard out of whole cloth – and that the court had refused to consider important evidence favoring the exercise of the aboriginal rights. And yet, despite a strong showing that the lower court had gotten it all wrong, the Supreme Court denied the petition.

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I study 163 cert pool memos in federal Indian law cases. A study of the cert pool memos in a single subject area offers unique possibilities. It is, after all, the Supreme Court clerks who serve as the first gatekeeper to the Supreme Court. Moreover, the influence of the cert pool memo in moving a case onto the Court’s “discuss list” and then to certiorari is critical, and yet understudied. In most instances, the cert pool memos are the only writing from the Court discussing the cases in which the Court does not grant certiorari. And, studies show, where a cert pool memowriter recommends that the Court deny certiorari, the other Justices’ clerks generally spend little or no time to convince his or her Justice to vote to grant certiorari.

I chose federal Indian law because of my experience in the subject matter, but also because of the fortuitous character of the timing of this sample of cert pool memos. Something extraordinary has been happening in federal Indian law. From 1959, the generally recognized beginning of the modern era of federal Indian law, to 1987, when the Supreme Court decided the major Indian gaming case California v. Cabazon Band of Mission Indians, Indians and Indian tribes (whom I will often refer to as “tribal interests”) won nearly 60 percent of federal Indian law cases decided by the Supreme Court. But since Cabazon, tribal interests have lost more than 75 percent of their cases. The sample under study – from

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10 This number excludes seven cert pool memos analyzing unpaid petitions.
11 Previous scholarship on the “discuss list” did not study the cert pool memoranda, perhaps because it largely was unavailable. E.g., Caldeira & Wright, supra note 1. Research on the Blackmun digital archive is nascent. See, e.g., Ryan Schoen & Paul J. Wahlbeck, The Discuss List and Agenda-Setting on the Supreme Court (March 5, 2007), 1st Annual Conference on Empirical Legal Studies Paper, http://ssrn.com/abstract=912783.
12 See David R. Stras, The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process, 85 Tex. L. Rev. 947, 974 (2007) (“[B]ecause recommendations to deny are the norm, law clerks pay far less attention to those recommendations than to recommendations to grant during the annotation process, increasing the likelihood that an issue of importance will be overlooked.”) (citing PERRY, supra note 7, at 63).
14 480 U.S. 202 (1987) (holding that the State of California had no authority to regulate the high stakes bingo operations of the Cabazon Band).
15 See Turtle Talk Blog, Supreme Court, http://turtletalk.wordpress.com/supreme-court-indian-law-cases/ (listing all the federal Indian law Supreme Court cases and their outcomes since 1959).
about 1986 to 1994 – covers the first years of this radical turnaround. Consistent with the overall pattern of the latter period, tribal interests lost about 75 percent of their cases during the period under study.

This Article argues that, not only do the certiorari decisions made by the Supreme Court tend to prejudice tribal interests, but entire certiorari process – especially the participation of the clerks – slants the Court’s certiorari decisions against tribal interests in subtle, yet unmistakable, ways. It would be tempting to argue that the Supreme Court’s agenda has shifted from more of a balance of tribal and non-tribal interests since 1987 to an agenda that is opposed to tribal interests on most levels. Or, alternatively, the Court is choosing merely to rein in Indian tribes that have overstepped their bounds, restoring a balance of state and tribal interests. This Article does not dispute the possibility that the Court is simply fed up with Indian tribes or is interested in strengthening states’ rights to the detriment of tribes’ rights, but instead offers a theory different than mere agenda-setting – backed with some empirical support drawn from the cert pool memos – that the certiorari process itself creates conditions that lead the Supreme Court to accepting cases that it will likely decide against tribal interests.

Elliott is a good example of how the certiorari process works, how it is affected by the cert pool, and how it creates conditions that prejudice tribal interests. Elliott represents the typical case that arises between tribal interests and others; namely, that they arise out of the attempted enforcement of Indian treaty rights and the subsequent exclusion of state law and regulations. What is critical here is the recognition by the memowriters that tribal claims usually are based on a single treaty or statute grounded deep in American history. The terms of the treaty and its history are bound to a particular territory, so a law clerk would be hard-pressed to argue that the case has national implications. Moreover, the limited territorial reach of Indian law cases means that splits in lower court authority, the most important objective factor that the Court looks for in the certiorari process, will rarely occur. Moreover, these cases are complex and “factbound” applications of settled law, meaning that the Court has previously devised rules of law that will govern a particular kind of dispute and that the certiorari petitioner is seeking merely for the Court to correct a lower court error. This, according to the Court’s own rules, it

16 See William H. Rehnquist, The Supreme Court: How It Was, How It Is 265 (1997). Cf. Ulmer, supra note Error! Bookmark not defined., at 430 (“For through exclusive control of its dockets, the Supreme Court creates inequalities in access to its process.”).
will rarely do. Finally, as the cert pool memowriters demonstrate time and again, they assume tribal interests are not important to their audience.

The first part of this Article will provide a short description of the certiorari process and, in particular, the cert pool. I describe the origins of the Court’s discretionary docket and the modern certiorari process. This part will also introduce Supreme Court Rule 10, which lists the subjective and objective factors the Court uses in determining whether or not to grant a petition for certiorari. I describe the mechanics of the cert pool in particular, and how it relates to the “discuss list”\footnote{The “discuss list” is the list of cert petitions generated by the Chief Justice and circulated amongst the Justices prior to each Conference. Any Justice can add a petition to the discuss list. If a petition does not reach the discuss list, it is effectively “dead.” For a history of the “discuss list” and how it derived from the “dead list,” see Caldiera & Wright, supra note 1, at 809-15.} and the Conference, where the Justices meet in private to deliberate on whether or not to grant certiorari in a given case.

The second Part offers a review of the time period of this study in the context of the history of modern federal Indian law. The beginning of the period under study reflects not only the beginning of the Rehnquist Court, but the beginning of a major yet subtle change in the outcomes the Court reached in decided its Indian cases. Specifically, from 1959’s Williams v. Lee \footnote{358 U.S. 217 (1959) (holding that a state court has no jurisdiction over a civil claim arising in Indian Country brought by a non-Indian plaintiff against an Indian defendant).} to 1987’s California v. Cabazon Band of Mission Indians,\footnote{480 U.S. 202 (1987).} the Court ruled in favor of tribal interests just under 60 percent of the time. However, since Cabazon Band, the Court has changed course, ruling against tribal interests seventy-five percent of the time. In fact, consistent with recent decades, during the eight years of this study, the Court ruled in favor of tribal interests only one-quarter of the time.

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

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

Second, and I attempt to keep these lines of analyses distinct, the structure of the Court’s Rule 10 and the mechanics of the certiorari process work against certiorari petitions filed by tribal interests, and concurrently in favor of certiorari petitions filed against tribal interests. For example, the historical character of the treaty claims raised by tribal interests – as well as the limited geographic scope of many of the underlying disputes – generates certiorari petitions that are far more often than not factbound and splitless. As a result, Supreme Court clerks with little institutional memory, little knowledge of American Indian history, and working in a “culture” of certiorari denial, almost never recommend a grant to petitions filed by tribal interests. Moreover, the clerks rarely find that tribal interests are of national legal importance sufficient to attract the interest of the Court absent a split in authority. Perhaps most impressively, the comparative interests of the states opposing tribes are often deemed – without discussion – important, seemingly by definition. Here I demonstrate the certiorari process, often considered the linchpin to the Supreme Court’s agenda-setting, does more than merely set the Court’s agenda in federal Indian law. The certiorari process drives the Court toward accepting Indian law cases weighted against tribal interests. The outcome of the certiorari process is that historical claims raised by tribal interests are quickly and easily labeled “factbound” and “splitless,” with questions of insignificant national interest. As such, tribal petitions are not given the same weight as petitions from non-tribal interests.
I. The Certiorari Process

A. The Origins of the Modern Certiorari Process

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

Decades later, however, Chief Justice Rehnquist estimated that one to two thousand “of the petitions for certiorari are patently without merit.”

Chief Justice Vinson in 1949 recalled the Constitutional Convention when he asserted the ultimate purpose of the Supreme Court was, quoting John Rutledge, “to secure the national rights & uniformity of

21 See Hartnett, supra note 6, at 1660-1704.
22 Chief Justice Vinson, Work of the Federal Courts, Address to the American Bar Association (Sept. 7, 1949), reprinted in HENRY M. HART & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1403, 1403 (1953); see also Letter of Chief Justice Hughes to Sen. Burton Wheeler (March 21, 1937), reprinted in HART & WECHSLER, supra, at 1399, 1401 (“No single court of last resort, whatever the number of judges, could dispose of all the cases which arise in this vast country and which litigants would seek to bring up if the right of appeal were unrestricted.”); Margaret Meriwether Cordray & Richard Cordray, The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection, 82 WASH. U. L. Q. 389, 392 (2004).
23 Chief Justice Hughes, Address to American Law Institute (May 10, 1934), reprinted in HART & WECHSLER, supra note 22, at 1395, 1396.
24 Vinson, supra note 22, at 1404-05.
The establishment of discretionary case selection in the Supreme Court in 1925 brought down the Court’s workload to a more manageable level; however, some constitutional questions remained mandatory for the Court to review: “notably in those cases thought to create the strongest frictions in our system of federalism, such as where a state court rejected a claim of right asserted under federal law or where a federal court invalidated state legislation.”

In addition, the Judges’ Bill kept open the possibility that lower courts could certify a case to the Supreme Court. But the Court circumvented these avenues of mandatory review by “deciding many cases on appeal in a summary fashion that was largely indistinguishable from the Court’s disposition of petitions for certiorari.” By 1988, Congress eliminated even these avenues of mandatory appeal.

B. The Mechanics of Modern Certiorari Decisionmaking

The process by which the United States Supreme Court decides to accept a petition for certiorari has long been a virtual mystery, except perhaps to those who have participated in the process. What is known is that the Court grants cert in only a handful of cases – often less than 100 a year – out of over several thousand petitions filed each Term. When a

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26 Vinson, supra note 22, at 1404.
27 Cordray & Cordray, supra note 22, at 393 (citing Felix Frankfurter & James M. Landis, The Business of the Supreme Court 277-78 (1927)).
28 See Cordray & Cordray, supra note 22, at 393 (citing James M. Moore & Allan D. Vestal, Present and Potential Role of Certification in Federal Appellate Procedure, 35 Va. L. Rev. 1, 3 (1949)).
31 Cf. Stras, supra note 12, at 947 (referencing “the shroud of secrecy surrounding the Court”); Ulmer, supra note 5, at 432-33 (critiquing the Court’s “[s]ecret decision making”).
32 Cf. Richard J. Lazarus, Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar, 96 Geo. L. J. __, __ (2008) (arguing that the Supreme Court bar, often former clerks, dominates advocacy before the Court).
33 E.g., Harvard Law Review, supra note 5, at 523 (reporting that the Court considered over 8374 certiorari petitions and granted 95 during the 2006 Term).
party to litigation receives an adverse judgment from a federal Court of
Appeal or the highest court of a state judiciary, if the party wishes to seek
Supreme Court review, it must file a petition for certiorari with the Court –
a “cert petition.” Opposing parties may file an opposition – a “cert
opposition” or “cert opp.” Even amici may file briefs at this time. Each
of the Supreme Court Justices hires clerks – usually recent law graduates
with some experience in lower federal courts – who review all the cert
petitions, cert oppositions, and amicus briefs first. The clerks prepare short
memoranda, formally known as a “preliminary memorandum,” in which
they summarize the facts, procedural history, and the claims of the parties.
Then they offer a short discussion section in which they offer candid
commentary on the relative merits of the petitions and make a
recommendation either to grant or deny the petition. In some instances,
especially in cases in which the federal government might have an interest
or special expertise (federal Indian law being a prime example), they
recommend that the Court call for the views of United States, represented
by the Solicitor General – or a CVSG. Each of these decisions is
preceded by a preliminary memorandum from a law clerk.

Eight of the nine current Justices (Justice Stevens excluded)
participate in what is known as the “cert pool,” whereby the law clerks of
the eight Justices are assigned a docket number and asked to write a
preliminary memorandum about the petition. During the period in

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34 See Caldeira & Wright, supra note 1, at 816 (asserting that amicus briefs at the
certiorari stage are critical to providing hints to the Court about the importance of a case).
35 Professor Stras helpfully listed the various miscellaneous actions that a cert pool
memo could recommend: “The most common variations … included CVSG (call for the
views of the Solicitor General), Summary Reverse, Summary Affirm, CFR (call for a
response), CFRecord (call for the record), Hold, and GVR (grant, vacate, and remand).”
Stras, supra note 12, at 978 n. 188.

In Indian law cases, a CVSG is a common cert pool recommendation because of
the special experience – and the special relationship – that the federal government has
with Indians and Indian tribes. A CFR is also common because the Court does not require
a party opposing a cert petition to file a cert opposition brief. Both a CVSG and a CFR
are strategically useful to a clerk as a means of garnering more information about a
complex Indian law case. Holds and GVRs are often related to the likelihood that the
Court will decide another case that may decide the outcome of a later case. Then, the
clerk will recommend a Hold if a cert petition should wait for the Court to decide a case
already on the Court’s calendar. Once the Court decides that case, the clerk will then
recommend a GVR, asking the lower court to reconsider the same case given the new
precedent. Summary reversals, summary affirmances, and CFRecords are very rare in the
sample studied here.
36 See Stras, supra note 12, at 953.
question in this study – the 1986 through the 1993 Terms – however, only Chief Justice Rehnquist and Justices White, Blackmun, O’Connor, Scalia, Kennedy, Souter, and Thomas participated in the pool. Justices Brennan, Marshall, and, as noted above, Stevens, did not participate, although they each received copies of each cert pool memo.\(^37\)

The cert pool memos are the Court’s first take on whether a case is “certworthy,” an internal term of art that can be best defined by referring to Supreme Court Rule 10, which governs the exercise of judicial discretion the Court is allowed when making decisions on cert petitions. Rule 10 indicates that the Court will review petitions for numerous factors, including: (1) whether “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;”\(^38\) (2) whether “a United States court of appeals … has decided an important federal question in a way that conflicts with a decision by a state court of last resort;”\(^39\) (3) whether “a United States court of appeals … has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power;”\(^40\) (4) whether “a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;”\(^41\) (5) whether “a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court;”\(^42\) or (6) whether “a state court or a United States court of appeals … has decided an important federal question in a way that conflicts with relevant decisions of this Court.”\(^43\) Running throughout the rule is the requirement that the question presented must be “important.” Rule 10 also states that “[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”\(^44\)

Primarily, the Court looks for cases in which the lower courts are split or lower court decisions that conflict with the Court’s own

\(^{37}\) See id. at 953.

\(^{38}\) SUP. CT. RULE 10(a).

\(^{39}\) Id.

\(^{40}\) Id.

\(^{41}\) SUP. CT. RULE 10(b).

\(^{42}\) SUP. CT. RULE 10(c).

\(^{43}\) Id.

\(^{44}\) SUP. CT. RULE 10.
In the rare circumstance where a lower court has made a decision that appears to be an exceptional departure from normal “proceedings,” the Court may be inclined to exercise its supervisory power. But the Court avoids petitions asking it to review the lower court’s findings of fact, which are entitled to deference, or application of a settled legal standard to specific facts. In the parlance of the cert pool memo, cases in which there is no split in authority are “splitless.” Cases in which a party is seeking cert asking the Court to review a lower court’s application of specific facts to a settled legal principle are “factbound.” It is clear from reading the cert pool memos contained in Justice Blackmun’s archives that the vast majority of Indian law-related cert petitions are “factbound” or “splitless” – and often both.

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

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

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45 See REHNQUIST, supra note 16, at 265.
II. The Rise and Fall of Federal Indian Law

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

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

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

Table 4
Tribal Interests Success Rate before Supreme Court: OT 1959-1985

![Pie chart showing success rate]

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

Table 5
Tribal Interests Success Rate before Supreme Court on the Merits: OT 1986-2006

During the period of this study (the 1986 Term through the 1993 Term), there were 163 paid certiorari petitions involving federal Indian law. The Court granted certiorari in 22 of these petitions,\textsuperscript{47} and in another

three unpaid petitions. Of the 22 grants of paid petitions, the Court issued a GVR (granting the petition, vacating the lower court decision without opinion, and remanding back to the lower court) in five of these petitions. After the consolidation and remand of some petitions (and with one affirmed by an equally divided Court), the Court issued 17 opinions on the merits, with tribal interests winning three and losing fourteen, an 18 percent win rate.

Table 6
Tribal Interests Success Rate before Supreme Court on the Merits:
OT 1986-1994


Also during the period of this study, states, state subdivisions, and state officials filed 37 certiorari petitions against tribal interests. The Court granted certiorari in 14 cases, with two cases remanded. The states won eight of these cases on the merits, losing three. Indians and Indian tribes filed 28 petitions against state interests, with the Court granting certiorari in none of these cases. The success rate of states in the

49 The Court denied certiorari in City of Timber Lake v. Cheyenne River Sioux Tribe (No. 93-1753); New Mexico v. Navajo Nation (No. 92-1238); County of Inyo v. Gutierrez (No. 92-686); Wisconsin v. Lac du Flambeau Band of Chippewa Indians (No. 91-2037); Ponca City v. Housing Authority of the Kaw Tribe of Indians (No. 91-1480); Washington v. Colville Confederated Tribes (No. 91-569); South Dakota v. Spotted Horse (No. 90-1003); Connecticut v. Mashantucket Pequot Tribe (No. 90-871); South Dakota v. Rosebud Sioux Tribe (No. 90-749); Nevins v. Hoopa Valley Tribe (No. 89-686); South Carolina v. Catawba Indian Tribe (No. 88-1752); Alaska v. Kanaite Indian Tribe (No. 88-1642); Iowa v. United States (No. 88-1636); Oklahoma Tax Commission v. Muscogee (Creek) Nation (No. 87-1068); Montana v. Crow Tribe (No. 87-343); Jackson County v. Swayne (No. 86-978); McKenzie County Social Services Board v. V.G. (No. 86-997); Washington v. Colville Confederated Tribes (No. 86-1445); County of Yakima v. Yakima Indian Nation, 502 U.S. 251 (1992).

50 The Court denied certiorari in Lummi Indian Tribe v. Whatcom County (No. 93-1742); United Keetoowah Band v. Oklahoma Tax Commission (No. 93-616); Lummi Indian Tribe v. Washington (No. 92-1445); Catawba Indian Tribe v. South Carolina (No. 92-1088); Elliott v. Vermont (No. 92-877); Sac & Fox Nation v. Oklahoma Tax Commission (No. 92-499); Wyandotte Indian Tribe v. Oklahoma ex rel. Oklahoma Tax Commission (No. 90-1342); Oyler v. Kansas (No. 90-1704); Indian Child Welfare Act Coordinator of the Juvenile Court of the Cheyenne River Sioux Tribe v. Chester County Dept. of Social Services (No. 90-1493); King Island Native Community v. Montana Dept. of Social Services (No. 90-1306); Cross v. Washington (No. 90-1162); Osceola v. Florida Dept. of Revenue (No. 90-653); Oyler v. Jones (No. 90-223); Attna, Inc. v. Alaska (No. 89-1446); Hoopa Valley Tribe v. Nevins (No. 89-890); Oneida Indian Nation of Wisconsin & Oneida Indian Nation of N.Y. v. New York (Nos. 88-1758 & 88-1915); Omaha Indian Tribe v. Jackson (No. 88-1426); Shoshone Tribe v. Wyoming (No. 88-492); John v. City of Salamanca (No. 88-84); Winnebago Tribe v. Dept. of Revenue of Iowa (No. 87-1480); Makah Tribe v. Washington (No. 87-1390); Coeur d’Alene Tribe v. Idaho (No. 87-199); Chemehuevi Indian Tribe v. Cal. Dept. Board of Equalization (No. 86-1574); Yankton Sioux Tribe v. South Dakota (No. 86-1436); White Mountain Apache Tribe v. Williams (No. 86-814); Chunie v. Ringrose (No. 86-748); Native Village of Nanana v. Alaska (No. 86-662).

The Court arguably granted one cross-petition filed by a tribe against a state subdivision, Yakima Indian Nation v. County of Yakima (No. 90-577), but never reached the merits of the Nation’s claim (that the County lacked the power to tax any Indian lands). C.f. Cert Pool Memo at 6, County of Yakima v. Yakima Indian Nation, 502 U.S. 251 (1992).
The certiorari process was 38 percent (14 out of 37 petitions), while the success rate for tribal interests against states was zero percent (out of 28 petitions). Private parties (non-Indian and non-states) filed 39 certiorari petitions and the Court granted the four of the petitions, a 10 percent grant rate. The Court granted certiorari in 60 percent of the petitions filed by the United States (three out of five).

**Table 7**

Cert Petition Success Rate: OT 1986-1994

<table>
<thead>
<tr>
<th></th>
<th>Overall</th>
<th>Tribe (1 out of 92)</th>
<th>Tribal v. State (0/28)</th>
<th>States (14/37)</th>
<th>US (3/5)</th>
</tr>
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<tbody>
<tr>
<td>Percentage</td>
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http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/1991%20GRANTE D-pdf/90-408.pdf (“The Yakima Nation’s arguments on [cross-petition], where they are the [Ninth Circuit] incorrectly decided that [25 U.S.C. § 349] continues to permit state taxation of fee-patented [Indian] lands are largely in error. As the County points out in its [response to the cross-petition], the Yakima Nation cites to cases that are inapposite.”).
B. The Court’s Indian Cases during the Period of Study (OT 1986-1993).

This period of time includes the first years in Professor Alex Skibine’s survey arguing the Court’s shift against tribal interests began in 1987 after the Court decided California v. Cabazon Band of Mission Indians.\(^{51}\) He found that since that case, the Court has ruled against tribal interests 75 percent of the time (excluding four neutral cases).\(^{52}\) In contrast, Professor Skibine found that Indian tribes won between 55 and 60 percent of their cases from the beginning of the “modern era” of federal Indian law\(^{53}\) in 1959 to 1987.\(^{54}\)

During this period, the Court decided several cases that contributed fundamental, yet subtle, alterations to the foundational principles of federal Indian law. The first significant subject area addressed by the Court during this period involved Indian religious freedom. In Lyng v. Northwest Indian Cemetery \(^{55}\) and Employment Division v. Smith II,\(^{56}\) the Court denigrated the claims of Indian religious freedom, favoring federal land agencies and state employment agencies. The second significant subject area was the Indian Child Welfare Act. In Mississippi Band of Choctaw Indians v. Holyfield, the Court held that states and private parties could not undermine the purposes of the Indian Child Welfare Act\(^{57}\) by moving Indian children out of Indian Country as a means of avoiding the Act’s application.\(^{58}\)

The third significant subject area involved the federal preemption of state laws under federal Indian law. Cotton Petroleum v. New Mexico, \(^{51}\)
in which the Court declined to strike down a state law that taxed the business activities of nonmembers doing business in Indian Country, in the words of one clerk, “substantially alter[ed] Indian implied preemption analysis in general.” The fourth significant subject area involved the scope and contours of Montana v. United States. In Brendale v. Yakima Indian Nation, followed by South Dakota v. Bourland, the Court made clear that the rule stated in Montana – that tribes presumptively do not have civil jurisdiction over nonmembers – applied not just to the very narrow fact pattern of Montana, but to all cases involving tribes and nonmembers.

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

But what the Court did not do is almost as significant. The Court declined to hear a multitude of cases in which a state government or agency successfully opposed the exercise of Indian treaty rights, in which a state or the federal government arguably dispossessed Indian

68 E.g., Elliott v. State (No. 92-877); Makah Tribe v. Washington (No. 87-1390); Western Shoshone National Council v. Molini (No. 91-1916); Lummi Indian Tribe v. Washington (No. 92-1445); Lummi Indian Tribe v. Whatcom County (No. 93-1742).
peoples of land and property, and in which lower courts arguably circumscribed the authority of Indian tribes without reference to Congressional authority to do so. All of these cases had national import in Indian Country and some of them involved questions that remain open and ambiguous to this day. Each of these cases fit within the broad categories created by the Judges’ Bill in 1925 – many of them were not “patently uncertworthy” and many of them implicated an important federalism interest.

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

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

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

recommending dramatic law reform.\textsuperscript{73} Dean David Getches performed an empirical study of the Court’s decisionmaking process in the context of federal Indian law, arguing that the Court appears to be altering Indian law doctrines to remove their traces of exceptionalism or other unique characteristics – in other words, moving the Indian law field into the “mainstream.”\textsuperscript{74} Like Dean Getches, Professor Philip Frickey argues that the Court is uncomfortable with the “exceptionalism” of federal Indian law and seeks to force the field into conformance with the rest of constitutional public law.\textsuperscript{75} The outcomes in the Supreme Court’s recent Indian law decisions offer strong circumstantial evidence that the Court’s agenda includes reeling back the advances that tribal interests made during the Warren and Burger Courts. But there is much more to the story.

My study, unlike doctrinal or theoretical studies, uses empirical evidence about the Supreme Court’s certiorari process. In large part, I focus on the cert pool memos filed by the Court’s clerks. I find that the structure and mechanics of the certiorari process – especially the cert pool


\textsuperscript{74}See Getches, \textit{Beyond Indian Law}, supra note 52; see also Getches, \textit{Conquering the Cultural Frontier}, supra note 71, at 1595-1617.

– discriminates against tribal interests before any of the cert pool Justices ever reviews a single Indian law petition. Thus, the Court tends to take seriously the petitions filed by those opposing tribal interests, especially those of state governments.

III. Federal Indian Law in the Supreme Court Cert Pool

The bare statistics of the Supreme Court’s certiorari decisions in federal Indian law tell a powerful story. In the period under study (1986-1994), the Court granted eleven certiorari petitions filed by state governments seeking review of a lower court decision favoring tribal interests, 76 out of 29 petitions, 77 or about one-third of the time. But when a tribal interest brought a certiorari petition against a state government, a state agency, or a local governmental subdivision, the Court granted one petition out of a possible 28. 78 The only certiorari petitions filed by a tribal interest the Court granted involved individual Indian respondents in one case and three unpaid in forma pauperis prisoner petitions brought by Indian convicts. 79

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


77 See note 49, supra.

78 See note 50, supra.

offering a more nuanced argument – that the certiorari process prejudices tribal interests.

A. Agenda-Setting and Federal Indian Law

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

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

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


82 See Hermann & O’Connor, supra note 81, at 136.

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

84 See Hermann, American Indians in Court, supra note 81, at 254.

85 See id.

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

1. Agenda Preferences of Individual Justices

Justice Blackmun’s clerks recognized that he was the leading scholar of federal Indian law on the Court and perhaps the leading advocate for tribal interests during the period studied.\(^{87}\) The notion of a “defensive denial,” where a Justice votes to deny certiorari even though he or she wants the legal question answered for strategic purposes,\(^ {88}\) appears explicitly in the cert pool memos in annotations by Justice Blackmun’s clerks.\(^ {89}\) One example is the annotation of one clerk who wrote in *Cherokee Nation v. United States*: \(^ {90}\) “I would not want to see the [Court] take this case. Because it is not one the [Court] would handle well, it


would likely declare the provision to be unenforceable. (Imagine the [opinion] of Scalia, J.) I think in the long run your friends are best served by denying cert." 91 Another example is the annotation in Woods Petroleum Corp. v. Cheyenne-Arapaho Tribes. 92 “I agree with poolwriter and the [Solicitor General] that this [petition] should be denied. Moreover, a grant would only harm these Indians.” 93

Likely because the data sample originates with Justice Blackmun’s papers, there is far less material about the other Justices. However, it is worth discussing. Most notably, and perhaps confirming what Dean David Getches and others had written about Justice O’Connor’s personal interests in western water law, 94 one Blackmun clerk took the unusual step of annotating the cert pool memo in California v. United States, 95 a part of the decades-long dispute over the Colorado River, to ask, “I wonder what [Justice O’Connor] will think of this?” 96

Blackmun’s clerks also recognized Chief Justice Rehnquist and Justice Scalia as two of the major opponents to claims made by tribal interests. In addition to the example above regarding the Cherokee Nation petition, a supplemental memorandum drafted by a Blackmun clerk in the case Puckett v. Native Village of Tyonek 97 demonstrated the Blackmun

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95 490 U.S. 920 (1989) (per curiam).
97 Justice Blackmun’s clerk also noted that Justice O’Connor appeared to be unusually interested in cases that implicated the State of Arizona. See Cert Pool Memo at 1, Connecticut v. Mashantucket Pequot Tribe, 499 U.S. 975 (1991) (No. 90-871), http://epstein.law.northwestern.edu/research/BlackmunMemos/1990/Denied-pdf/90-871.pdf (“I don’t see why [Justice O’Connor] is so worked up over this case (the poolwriter who suggested denial clerks for her) unless it’s [because Arizona] urged a grant.”) (annotation).
clerks’ suspicion of the Chief Justice, asserting that Chief Justice Rehnquist “may intend to use the GVR as a means of reflecting his disagreement with [the Ninth Circuit]’s decision – an inappropriate use of the GVR mechanism.” This material demonstrates little more than there appeared to be some procedural and ideological disputes between the various chambers.

2. The “Discuss List” and Certiorari Votes

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

Thirty-nine Indian law cases reached the discuss list during the period of study. Justice White voted to grant certiorari in 24 out of the 31 Indian law cases (74 percent) on the discuss list during his tenure; Chief Justice Rehnquist in 64 percent (25 out of 39); Justice O’Connor in 55 percent (21 out of 38); Justice Stevens in 42 percent (16 out of 38); Justice Thomas in 42 percent (five out of 12); Justice Souter in 39 percent (seven out of 18); Justice Kennedy in 39 percent (13 out of 34); Justice Brennan in 37 percent (seven out of 19); and Justice Blackmun in 34 percent (13 out of 38). On the other end, Justice Marshall voted to grant in only 15 percent of cases (four out of 27), while Justice Scalia voted to grant in 29 percent (11 out of 38). Justices Powell and Ginsburg voted in fewer than five cases.

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99 See Schoen & Walhbeck, supra note 11, at __ (hypothesis no. 6 – “Justice Byron R. White will be more apt to place cases on the discuss list than other associate justices.”).
Table 8
Votes for Certiorari from the Discuss List (OT 1986-1994),
By Justice

- White (24/31)
- Rehnquist (25/39)
- O’Connor (21/38)
- Stevens (16/38)
- Thomas (5/12)
- Souter (7/18)
- Kennedy (13/34)
- Brennan (7/19)
- Blackmun (13/38)
- Scalia (11/38)
- Marshall (4/29)
States, state agencies, and state subdivisions filed 21 of the 39 cases on the discuss list. Out of 29 overall petitions filed by a state, 72 percent reached the discuss list. Chief Justice Rehnquist and Justice White again led the charge, with the Chief Justice voting to grant certiorari in 80 percent (16 out of 20) of cases and Justice White in 79 percent (15 out of 19 cases). Justice O’Connor was next with 62 percent of her votes in favor (13 out of 21). Justice Scalia was next with fifty percent (seven out of 14 cases), a bit of a departure from his overall negative rate. Justice Brennan voted to grant in 40 percent of the cases (four out of ten). Justice Stevens followed with 37 percent (seven out of 19). Justice Kennedy voted to grant only five out of 17 state petitions (29 percent). Justice Blackmun voted to grant certiorari five times out of 19 cases (26 percent), Justice Souter in 22 percent of cases (two out of nine), and Justice Marshall voted only twice out of 15 petitions to grant certiorari (13 percent).
Table 9
Votes for Certiorari from the Discuss List (State Petitions, OT 1986-1994), By Justice

<table>
<thead>
<tr>
<th>Justice</th>
<th>Votes</th>
<th>Total</th>
</tr>
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<tbody>
<tr>
<td>Rehnquist</td>
<td>16/20</td>
<td></td>
</tr>
<tr>
<td>White</td>
<td>15/19</td>
<td></td>
</tr>
<tr>
<td>O'Connor</td>
<td>13/21</td>
<td></td>
</tr>
<tr>
<td>Scalia</td>
<td>7/14</td>
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<tr>
<td>Brennan</td>
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<tr>
<td>Stevens</td>
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<tr>
<td>Kennedy</td>
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<tr>
<td>Blackmun</td>
<td>5/19</td>
<td></td>
</tr>
<tr>
<td>Souter</td>
<td>2/9</td>
<td></td>
</tr>
<tr>
<td>Marshall</td>
<td>2/15</td>
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<table>
<thead>
<tr>
<th>Percentage</th>
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Only three paid tribal certiorari petitions reached the discuss list out of 28 (11 percent), while five unpaid petitions did. This percentage is far less than the rule of thumb that only 70 percent of the petitions filed are “patently uncertworthy.”

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

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

B. Applying the Rule 10 Criteria to Indian Law Cert Petitions

1. Circuit Splits and Splits in Authority (“Splitless”)

As Rule 10 suggests, the best way to convince the Court to grant cert in a particular case is to identify a circuit split or a conflict with Supreme Court precedent. A significant portion of the cert pool memos discuss the relative merits of the petitioners’ claims of a circuit split or conflict with the Court’s cases. However, in general there are few splits in authority when it comes to federal Indian law, perhaps because the vast majority of the cert petitions in the sample originated in the federal or state courts located within just three Circuits – the Eighth, Ninth, and Tenth Circuits. Cert petitions labeled “splitless” usually are relegated to the dust bin.


101 See PERRY, supra note 7, at 277; Cordray & Cordray, The Philosophy of Certiorari, supra note 22, at 407 (collecting studies).

The Court granted cert in several cases where a split existed. *Hoffman v. Native Village of Noatak* (later *Blatchford v. Native Village of Noatak*) involved a split between the Eighth and Ninth Circuits,\(^{103}\) as did *Duro v. Reina*.\(^ {104}\) *Negonsott v. Samuels* involved a circuit split between the Eighth and Tenth Circuits.\(^ {105}\) *Hagen v. Utah* involved a split in authority between the Tenth Circuit and the Utah Supreme Court.\(^ {106}\) *County of Yakima v. Confederated Tribes and Bands of the Yakima Nation* involved a conflict between the Ninth Circuit’s decision and Supreme Court precedents.\(^ {107}\) Department of Taxation and Finance of New York v.
Milhelm Attea & Bros., Inc. (twice) involved a conflict between the New York Court of Appeals and Supreme Court precedent (various Indian preemption cases).\(^{108}\) Rhodes v. Vigil (later Lincoln v. Vigil) involved a conflict between the Tenth Circuit’s lower court decision, a D.C. Circuit opinion (authored by then-Judge Scalia), and Supreme Court precedent.\(^{109}\) The Eighth Circuit opinion in South Dakota v. Bourland conflicted with Supreme Court precedent.\(^{110}\)

In one instance, however, the Court granted cert in an Indian law case because of an erroneously diagnosed lower court split – Oklahoma Tax Commission v. Sac and Fox Nation.\(^{111}\) The question the clerks thought


the Court should decide was whether an Indian working in Indian Country, but living outside of Indian Country, was exempt from state taxation.

The cert pool memos demonstrated how federal Indian law can confuse even the most diligent attorneys. The cert pool memo, authored by a Justice White clerk, noted at first that the petitioner (the Oklahoma Tax Commission) had not alleged a circuit split. Additionally, the memowriter noted that Sac and Fox was an inappropriate vehicle because the lower court did not develop the record on the distinction between reservation land and trust land. The open question, at that point, was whether Indian “trust land,” land held in trust by the federal government for the benefit of Indians or Indian tribes, was “Indian Country,” and therefore the Indians living on the land could qualify for the common law immunity from state income taxes. Because the lower court had not developed the record as to this question, the cert pool memo recommended a denial of the petition.

Justice Blackmun’s clerk annotated the memo to agree with the recommendation for denial.

But the Oklahoma Tax Commission neglected to mention that the Wisconsin Supreme Court had reached a different conclusion in a superficially similar case, where the Indian lived off of the reservation and outside of Indian Country. The cert pool clerk assigned to Sac and Fox heard about this new petition – Anderson v. Wisconsin Department of Revenue – in which that petitioner there alleged a split in authority with Sac and Fox. The cert pool memo (same memowriter as in Sac and


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

114 See id. at 11.

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

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

Fox) in Anderson had a view toward granting the petition after hearing the views of the Solicitor General. The memowriter then turned to Sac and Fox, writing in a supplemental memo that “Anderson is a cleaner vehicle to address the issue whether [McClanahan v. Arizona State Tax Commission] applies to Indians who work on, but live off, the reservation.” The memowriter noted, lastly, that the Oklahoma Tax Commission might not be the best litigant to present the position of the state governments in this dispute because of its failure to note the possible split in authority. But of course, as became clear later, the memowriter got the law wrong.

Despite this memo, the Court wavered on granting certiorari in Anderson because the Court declined to allow John Anderson to file as an indigent petitioner. The Court granted certiorari in Sac and Fox, decided that case, and then denied certiorari in Anderson later (possibly because the petitioner never complied with Supreme Court Rules or because the Court preferred a case in which both parties were represented by retained counsel). However, the lower court split identified by the clerk never materialized because the Court held in Sac and Fox that trust lands were equivalent to reservation lands – they were both “Indian Country.” So the Indians in Sac and Fox really did live in Indian Country, while the Indians in Anderson did not. It is clear from the cert pool memo that the


118 See id. at 9.
120 See id. at 4-5.
124 See Sac and Fox Nation, 508 U.S. at 123.
Court would have voted to grant cert on the basis that there was a split of authority, but in the end the split was illusory.

Circuit splits tend not to arise in Indian law cases because often the only possible split would be between the state court and a federal circuit. For example, a cert pool memo authored by a Kennedy clerk disposed of a petition arising out of Alaska by noting, “Because of the local nature of this dispute, no conflict will arise in the circuits.”

In *South Dakota v. Spotted Horse*, Justice Blackmun’s clerk wrote a supplemental memo to the cert pool memo in which she wrote, “As the poolwriter noted, there will never be a split on the question of South Dakota’s jurisdiction over these tribal highways because both [Eighth Circuit] and the [South Dakota Supreme Court] agree that the State is without jurisdiction.”

In *Tarbell v. United States*, a criminal case involving the application of a federal statute that applied to New York Indians, the cert pool memowriter, an O’Connor clerk, noted, “Of course, [New York] state is probably the only other jurisdiction that would have an opportunity to rule on the issue.”

However, the Court granted certiorari in *Hagen v. Utah*, a case described by the cert pool memowriter, a shared Kennedy – Powell clerk, in an email as “admittedly not so sexy and is of little general

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importance..."132 because of the clear split between the Tenth Circuit and the Utah Supreme Court.133

Another possible explanation for the lack of circuit splits might be the subjective character of the federal Indian law preemption doctrine, in which different outcomes in different circuits can be explained by the differing facts. As will be discussed in greater detail in the next subpart, these cases are considered “factbound,” even where a split in authority can be identified. As one poolwriter (a Blackmun clerk) noted in the cert pool memo in White Mountain Apache Tribe v. Arizona State Transportation Board:134 “A final factor which may be considered either as supporting a grant or denying a grant is that the case involves pre-emption in the context of Indian law. [C]ases involving pre-emption claims by Indian tribes may merit a different analysis.”135 The cert pool memo in Rodey, Dickason, Sloan, Akin & Robb, P.A. v. Revenue Division of the Department of Taxation of the State of New Mexico 136 involving a law firm’s claim that federal Indian law preempted a state’s taxation of attorney fees demonstrated the difficulty in establishing a circuit split. The memowriter, a Blackmun clerk, identified three Supreme Court cases that had application to the question, but the disparate fact patterns in the cases created different applications of the federal Indian law preemption rule – “I think [appellant] has the better of the argument, though [appellant] overstates its case by suggesting a direct conflict with this Court’s prior decisions. Rather, I think the question is open.”137 The memowriter, a

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Blackmun clerk, in *Oklahoma Tax Commission v. Muscogee (Creek) Nation*, a case where the state wanted to tax a tribal bingo operation, noted that the preemption issue was "potentially certworthy" (perhaps) because the question involved Indian gaming. The Court denied cert in that case, however, probably because the Solicitor General recommended a denial on the basis that the case was factbound. Similarly, in *Central Machinery Co. v. Arizona*, the cert pool memo, authored by a Powell clerk, concluded, “In sum, I agree … that the lower courts are not in full agreement in this area [preemption of state taxes in Indian Country]. But the Court declined to grant in [earlier cases]. I see no reason to act differently here.” In one unusual case involving the application of the Indian Claims Commission Act test requiring the federal courts to interpret the meaning of the phrase “fair and honorable dealings,” the exasperated poolwriter, a Souter clerk, noted, “The decision below does not squarely conflict [with other lower cases], which can be distinguished on its facts (though, indeed, where legal principles are as squishy as those in this area, nothing squarely conflicts [with] anything else)."

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

Another cert pool memowriter, a Souter clerk, labeled an alleged circuit split in Washington v. Confederated Tribes of Colville Reservation – a case where the State “want[ed] to enforce petty traffic laws against Indians on reservations,”– “not clean.” The split was illusory because the character of the two state laws in question differed – one was explicitly criminal, the other a civil traffic statute. According to the memo, “Th[e other] case involved an explicitly criminal law…. [I]t

146 See Osceola v. Florida Dept. of Revenue, 893 F.2d 1231 (11th Cir. 1990).
   citing Omaha v. Peters, 516 F.2d 133 (8th Cir. 1975), Moe v. Confederated
   Salish & Kootenai Tribes, 425 U.S. 463 (1975), and Dillon v. Montana, 634 F.2d 463,
   468-469 (9th Cir. 1980):

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

148 503 U.S. 997 (1992) (No. 91-569) (Stevens and O’Connor, JJ. would grant certiorari).
149 Cert Pool Memo at 1, Washington v. Confederated Tribes of Colville
   Reservation, 503 U.S. 997 (1992) (No. 91-569),
   http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/Denied-pdf/91-569.pdf; see

150 Cert Pool Memo at 10, Washington v. Confederated Tribes of Colville
   Reservation, 503 U.S. 997 (1992) (No. 91-569),
remains possible that either [court], if someday faced with the facts of the other’s case, would come out just as the other did.”

In a case where the split of authority is based in state law, the Court also is less likely to grant certiorari. The cert pool memo, an O’Connor clerk, in Richardson v. Mt. Adams Furniture, in a case involving tribal sovereign immunity in the context of off-reservation business activities, recommended that the Court seek the views of the Solicitor General after the “[Petitioner] identifie[d] an existing division of authority among state supreme courts regarding the extent of tribal immunity from suit with respect to commercial activities undertaken by tribal entities off the reservation.” The memowriter further recommended that the Court seeks the views of the Solicitor General because “tribal immunity is a creature of federal law and can be adjusted only by Congress. To the extent immunity reflects federal policies regarding tribal autonomy and relations with outsiders, the Government may have an interest in ensuring that the Court selects an appropriate vehicle for addressing the immunity question.” But after the Solicitor General recommended the denial of the cert petition, the next cert pool

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


155 Id. at 11.
memo, written by an O’Connor clerk, noted, “Neither of the [conflicting] state cases, however, is sufficiently similar to the decision below to rise to the level of a split; both involved state rather than federal law, and [one state case] rested on the independent fact that the relevant activities were not ‘tribal’ for purposes of sovereign immunity. In short, any split is not clearly defined.”156 The fact that the cert petition involved the Bankruptcy Code seemed to kill the momentum to recommend a grant.157

It is often the case that the fact pattern will not recur anywhere outside of the context of a particular tribe or reservation, rendering the possibility of a split very unlikely. In cert petitions brought by the Oneida nations of New York and Wisconsin in the New York land claims,158 the cert pool memowriter, a Scalia clerk, wrote, “This is a case of some practical significance inasmuch as there is a great deal of land in the balance, but the questions are not of general legal significance meriting the plenary review of this Court. … There is no indication that these issues have arisen before or that they will arise again. … There is no split of authority on the relevant powers or limitations found in the Articles of Confederation or the Treaty of Fort Stanwix.”159 Another cert petition involved the interpretation of an 1887 Nevada statute that, as the cert pool memowriter, a Kennedy clerk, noted, “the interpretation of which can … affect [only] this case.”160 In one case involving the interpretation of a 1908 federal statute, the cert pool memowriter, a Souter clerk, noted, “All that would be left for us to do differently would be to reweigh the

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157 See id.


application of that settled law to the facts surrounding passage of the 1908 Act. Because the law is settled and the 1908 Act involved only the land in the Addition, our decision would have little significance beyond this case ([respondent] is correct that there is no lower court conflict to resolve with regard to the issues in this case).”

In one extraordinary instance demonstrating the enormous complexity of federal Indian law questions, however, the Court denied certiorari in an Alaska case, *Circle Native Community v. Alaska Dept. of Health and Social Services*, a case involving the remaining tribal authority to decide internal child custody matters after federal statutes purported to divest Alaskan Native villages of their tribal character, as well as whether the same villages retained sovereign immunity. The cert pool memowriter, a Scalia clerk, found that the splits in authority (there were *two* in this instance) were “square.” The memowriter concluded, “Although the issues are not very interesting and seem to have little national significance, they are quite important to Native-State relations in Alaska, and only this Court can resolve the conflict. I therefore unenthusiastically recommend [a Call for Response with] a view to GRANT.”

But Alaska threw a monkeywrench into the proceedings with a brilliant ploy that confused the clerk and the Court enough to convince the Court to deny certiorari – they questioned the legal status of the petitioner,

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There is a split both on the narrow question whether Indian tribes in [Alaska] have any [jurisdiction] over child custody matters, and on the preliminary (though probably more important for Alaskans) question whether Alaska Native villages have “inherent tribal sovereignty” [i.e., sovereign immunity]. Both splits seem to be square, and the Alaska [Supreme Court]’s decision here demonstrates that it is unlikely to alter its position any time soon.
164 *Id.* at 2.
often a confusing question in Alaskan Native legal disputes. The supplemental memo drafted by the clerk after Alaska’s response notes the clerk’s confusion: “In short, there may be good answers to the problems respondent raises, but I do not know what they are, and in any event the Court need not address the [jurisdiction] question presented in a case that would require preliminary resolution of other thorny and legally insignificant issues.” As a result, the clerk recommended denial. After the petitioner replied to these questions with copies of tribal council resolutions and a trial court order recognizing the Community’s right to intervene, Justice Blackmun’s clerk noted, “I recommend that the Court [call for the views of the Solicitor General]. The split is real and conceded. The [Solicitor General] may help to sort out the preliminary problems.” Regardless, only two Justices (Blackmun and Stevens) voted to seek the views of the Solicitor General – the rest voted to deny certiorari.

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

I think Judge Posner correctly interpreted the 1854 treaty as extinguishing the occupancy [rights] under the 1842 treaty in exchange for establishment of reservations and payments. [Petitioner], having lost on its interpretation argument in both the [district court and the Seventh

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166 Id. at 5-6.
167 Id. at 6 (“The conflict on the [jurisdiction] question is clear, but [petitioner] asserts that there are at least 8 relevant cases pending in its region alone; the Court should await a cleaner vehicle before stepping in.”).
168 Id. at 6 (annotation of “AHS”).
Circuit], now seeks further appellate review. Absent a split, I see no reason for the [Court] to look further into this issue.\textsuperscript{172}

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

Of all the cert pool memos in the sample, only one memowriter – an O’Connor clerk – recognized that “splits are rarer in Indian cases….”\textsuperscript{173} And yet, he recommended denial of cert in \textit{Lummi Indian Tribe v. Whatcom County} even though he was not “sure that[the Ninth Circuit] got this right—it’s a close case—but there’s no split, and the issue doesn’t seem crucial enough to be independently certworthy.”\textsuperscript{174}

2. Error Correction (“Factbound”)

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

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


\textsuperscript{174} \textit{Id.} at 1 (discussing Lummi Indian Tribe v. Whatcom County, Wash., 5 F.3d 1355 (9th Cir. 1993)).
Western Shoshone case in the introduction, the Court may still deny cert.

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

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

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

[Petitioner] is unhappy with [the Ninth Circuit]’s determination of the boundaries of the Lummi Reservation.

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


179 *Id.*


182 *Id.* at 10.

Based on little more than the testimony of a 100-year-old man in the early 1900s, [petitioner] wants this Court to hold contrary to the plain language of the treaty, the facts found by the [district court], and the presumption against conveyance of land under navigable waters. The [petition] should be denied.\footnote{Cert Pool Memo at 1, Lummi Indian Tribe v. Washington, 507 U.S. 1051 (1993) (No. 92-1445), http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/92-1445.pdf.} Ultimately, the cert pool memo recommended denial largely because the case was unimportant.\footnote{Id. at 7 (“This case involves a very limited amount of land and affects a limited number of Indians.”).}

Perhaps a more significant example of the fact-heavy character of Indian law cases was \textit{Elliott v. Vermont},\footnote{507 U.S. 911 (1993) (No. 92-877).} a case involving the question of whether the aboriginal rights of the Abenaki people remained after incorporation of the State of Vermont into the Union in 1791.\footnote{See State v. Elliott, 616 A.2d 210, 214 (Vt. 1992); Cert Pool Memo at 1, Elliott v. Vermont, 507 U.S. 911 (1993) (No. 92-877), http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/92-877.pdf.} The question arose in the context of a state prosecution of Missisquoi Indians attempting to exert their fishing rights – a “fish in” – on land they believed to be owned by the tribe in aboriginal title.\footnote{See \textit{Elliott}, 616 A.2d at 211.} Under Rule 10, the Court is unlikely to grant cert in a case where the lower court allegedly misapplied a properly stated rule of law. As the cert pool memowriter, a Kennedy clerk, noted:

At bottom, [petitioners] complain that the Vermont Supreme Court[,] misapplied the rule of extinguishment [of aboriginal title], not that the Court misstated it. Indeed, the Vermont Court did an excellent and extensive summary of the law of extinguishment, which appears to be correct in all its particulars. Nonetheless, [petitioners] appear to have a substantial argument that the admission of Vermont into the Union, and Congress’ concomitant de facto recognition of Vermont’s land claims under the Wentworth grants, are not sufficient to establish the clear intent required to extinguish aboriginal title. Although the Vermont Court’s

\footnotetext[185]{Id. at 7 (“This case involves a very limited amount of land and affects a limited number of Indians.”).}
\footnotetext[186]{507 U.S. 911 (1993) (No. 92-877).}
\footnotetext[188]{See \textit{Elliott}, 616 A.2d at 211.
opinion is both exhaustive and scholarly, it does not take account of a fair bit of evidence introduced by [petitioners] that suggest that even after 1791, the Abenakis continued to exercise aboriginal fishing rights. The case is sui generis and probably does not warrant a grant of certiorari absent a more meaty legal issue…. 189

This somewhat internally inconsistent cert pool memo (calling the Vermont Supreme Court’s opinion “excellent and extensive” while noting that the Court ignored the critical evidence raised by the Indians) places the claim here in the “factbound” category. Once again, the Court did not discuss this case in conference, according to Justice Blackmun’s docket sheet. 190

The lesson here appears to be that, so long as the lower court states the proper test (a purely superficial exercise), the Supreme Court will not review the lower court’s application of the test except in “rare” circumstances. Note that the cert pool memo writer must have had a short period of time to review the history of the State of Vermont (probably a well-documented history) and the history of the western Abenaki people; specifically, the Missisquoi people (probably not as well documented). It is unlikely that a cert pool clerk confronted with a case like Elliott could marshall the historical and legal materials in a short period of time that would be necessary to conclude that the Vermont Supreme Court was wrong. After much time to digest the decision, Indian law scholars concluded that the Vermont Supreme Court in Elliott adopted a new test on aboriginal title extinguishment divorced from the Court’s precedents – the “increasing weight of history” test. 191 The petitioners’ reply brief in support of its cert petition argued, in the words of Justice Blackmun’s clerk, “Vermont [Supreme Court]’s ‘weight of history’ approach conflicts [with] this [Court]’s requirement that extinguishment be ‘clear and


unambiguous.” To be fair to the memowriter, he did note that “an argument can be made that the Court has a special responsibility to ensure that Indian land claims are resolved properly, with due regard for the traditional federal policy of solicitude for Indian tribes.” Moreover, even Justice Blackmun’s clerk concluded that the petition was factbound and not certworthy.

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

3. Importance

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

Many Indian law cases do not reach the discuss list because they are labeled too unimportant to consider. And yet in several cases, such as Lyng v. Northwest Indian Cemetery Protective Association and


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

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

Employment Division v. Smith (twice), the Court granted certiorari over the recommendation of a cert pool memowriter that otherwise notes the case is factbound and splitless.

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

Brendale v. Confederated Tribes, a case involving the zoning authority of Indian tribes on reservation land, perhaps became important when amicus briefs filed by numerous states and counties noted that “the case is of national importance: of the 930,000 people who reside within

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198 But cf. Robert N. Clinton, Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law, 8 HAMLINE L. REV. 543 (1985) (worrying that Supreme Court cases creating rules for tribes with small land bases and populations will be applied to tribes such as the Navajo Nation, with a large land base and a large Indian population).
Indian reservations nationwide, some 380,000 (41%) are non-Indians.\textsuperscript{200}

The memowriter, a Rehnquist clerk, argued:

To me, the [Montana] question appears certworthy, as it is not clear from Montana just exactly how much civil regulatory authority a tribe possesses over nonmembers within a reservation. … And, as amici point out, the question of tribal zoning is potentially a very large issue, affecting many states and many private property owners, who would be divested of some say in local zoning laws if it were held that tribal zoning preempted state regulation.\textsuperscript{201}

Justice Blackmun’s clerk argued that the lower court decision favoring the tribes was “basically correct – zoning jurisdiction over non-Indian parcels is important to proper, consistent regulation of land uses. I would wait for further development.”\textsuperscript{202} But five Justices voted to grant certiorari, perhaps on the basis that the number of non-Indians affected by the case was so large.\textsuperscript{203}

Some cases acquire importance because of practical problems that would arise if a particular dispute is not resolved by the Court. Mississippi Band of Choctaw Indians v. Holyfield,\textsuperscript{204} the only Indian Child Welfare Act\textsuperscript{205} case granted certiorari by the Supreme Court to date, was splitless,\textsuperscript{206} but the memowriter (a Blackmun clerk) argued that the

\begin{itemize}
  \item \textsuperscript{201} Id. at 19.
  \item \textsuperscript{202} Id. at 20 (annotation).
  \item \textsuperscript{204} 490 U.S. 30 (1989) (No. 87-980).
  \item \textsuperscript{205} 25 U.S.C. § 1901 et seq.
  \item \textsuperscript{206} See Cert Pool Memo at 5-6, Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (No. 87-980),
\end{itemize}
Mississippi Supreme Court’s decision “creates a jurisdictional ‘black hole’ because of the practice of the Indian Health Service of transporting expectant mothers off the reservation to give birth.” This important question, according to the clerk, was highlighted by the fact that the Court had once granted cert in a similar case years earlier, but that case had been settled and dismissed. After Holyfield, the Court denied cert in every Indian Child Welfare Act-related case to this day.

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

In other circumstances, the initial cert pool memo often recommends that the Court seek the views of the Solicitor General to help in determining the importance of a given case. In some cases, a petition headed for denial for lack of importance might be resurrected by a recommendation from the government to grant certiorari. Negonsott v.


Id. at 5.


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


Samuels,\textsuperscript{213} one of the rare unpaid petitions in which the Court granted certiorari, is one such case. The cert pool memowriter, a White clerk, noted a clear circuit split between the Eighth and Tenth Circuits,\textsuperscript{214} but argued against a grant because of the lack of importance of the case.\textsuperscript{215} After the cert pool memo came out calling for a response from the State of Kansas, Kansas recommended that the Court grant certiorari as well.\textsuperscript{216} But still the memowriter was unsure because of the limited impact of the older Eighth Circuit decision and because of the complexities and uncertainties of Indian law.\textsuperscript{217} The Court then sought the views of the Solicitor General, which urged the Court to grant cert,\textsuperscript{218} which it did.\textsuperscript{219}

\textsuperscript{213} 507 U.S. 99 (1993) (No. 91-5397).
\textsuperscript{215} Id. at 9-10 (“Accordingly, it is possible that [the previous case] today only prevents prosecution of major crimes occurring on reservations in North Dakota and on two reservations in Iowa.”).
\textsuperscript{217} Id. at 1-2:

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

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

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

I agree with [the cert pool memowriter] that the 11th Amend[ment] aspect of this case is certworthy. However, I think it would be appropriate for the Court to wait to see the actual consequences of [the Ninth Circuit]’s decision. [Petitioner’s] contention that this decision will open the floodgates to litigation by Native Americans is empirically verifiable. Further, if [petitioner’s] prediction is accurate,


222 896 F.2d 1156, 1162-63 (9th Cir. 1990).

the Court will have ample opportunity to revisit the issue. The results of litigation from circuits other than [the Ninth Circuit] and [the Eighth Circuit] would also be helpful. Finally, while I believe the [Ninth Circuit] may have reached the correct result given the unique status of Native American tribal governments in the United States, the [Ninth Circuit] opinion in this case is less than careful in its analysis. The Court might well wait for a better reasoned opinion.224

The argument did not dissuade the Court or even Justice Blackmun, who offered to serve as the fourth vote for certiorari (a “J3”), if necessary.225 Another example is South Dakota v. Bourland,226 where the Court narrowly granted cert despite a recommendation to deny. The cert pool memowriter, an O’Connor clerk, noted that the lower court decision favoring the Cheyenne River Sioux Tribe might have been incorrect for failure to follow relevant Supreme Court precedent.227 But the memo recommended denial because there was no split, nor could one be alleged.228 And yet, despite the lack of a split and over the recommendation of the cert pool memo, Chief Justice Rehnquist, and Justices White and Stevens voted to grant certiorari, with Justice Thomas adding the fourth vote as “J3.”229 Is this a case of four Justices voting reflexively in favor of a cert petition from a state?

228 Id. at 10 (“Assuming arguendo that such lands are rare, and thus that a circuit split is unlikely to arise, the issue is not sufficiently important for this Court.”).
Consider the Oklahoma Tax Commission, the entity involved in more certiorari petitions in this sample than any other except the United States – five as a petitioner and four as a respondent.\textsuperscript{230} The Court granted certiorari in four of the five petitions filed by the Oklahoma Tax Commission, but in none of the petitions brought by tribes against the Commission. Ultimately, the Commission lost two of the three cases it litigated to a final result in the Supreme Court – Sac and Fox and Citizen Potawatomi – while winning in Graham, a relatively insignificant case with only tangential Indian law issues.\textsuperscript{231} But in the cert pool memos, the clerks described the interests of the Oklahoma Tax Commission as raising “important concerns of federalism,”\textsuperscript{232} while similar tribal petitions were “of no general significance.”\textsuperscript{233}

Other petitions brought by state governments or agencies implicated the power of states to enforce criminal laws against peyote.\textsuperscript{234}


\textsuperscript{231} But see Kaighn Smith, Jr., Federal Courts, State Power, and Indian Tribes: Confronting the Well-Pleaded Complaint Rule, 35 N.M. L. REV. 1, 25-27 (2005) (noting that the question in Graham involving the well-pleaded complaint rule is a significant one for tribal interests).


\textsuperscript{234} See Cert Pool Memo at 5, Employment Division v. Smith, 485 U.S. 660 (1988) (Nos. 86-946 & 86-947), \url{http://epstein.law.northwestern.edu/research/BlackmunMemos/1987/Granted-pdf/86-946.pdf} (“I think it a close question whether this case is certworthy. There is some force to petr’s argument that Sherbert and Thomas are distinguishable because use of peyote—
the power of states to enforce its taxes on non-Indians in Indian Country,\textsuperscript{235} and the water rights of states and their constituents.\textsuperscript{236} The Court granted certiorari in all these cases.

Conversely, claims brought by tribal petitions often are labeled unimportant without much discussion. One exemplary case is \textit{Pueblo of Santo Domingo v. Thompson.}\textsuperscript{237} The United States and the Pueblo had brought claims that the Pueblo Lands Board had invalidly extinguished Pueblo title to certain lands in New Mexico.\textsuperscript{238} The cert pool memowriter, a Rehnquist clerk, noted, “It seems clear that the Board erred 60 years ago when it extinguished Pueblo title in this overlap land; section 14 of the 1924 Act prohibited such a result.”\textsuperscript{239} But the poolwriter recommended denial because because the outcome of the case would affect only a few tribes.\textsuperscript{240} Even Justice Blackmun’s clerk wrote in the margin, “While I


\textsuperscript{236} See Cert Pool Memo at 24, Wyoming v. United States, 492 U.S. 406 (1989) (No. 88-309), \url{http://epstein.law.northwestern.edu/research/BlackmunMemos/1988/GM-1988-pdf/88-309.pdf} (“This is an important case. It has apparently received national attention since it began in 1977, and the outcome, in a region where agriculture and industry need an assured water supply, will affect thousands of people.”).

\textsuperscript{237} 503 U.S. 984 (1992) (Nos. 91-1179 & 91-1346).

\textsuperscript{238} See United States v. Thompson, 708 F. Supp. 1206, 1208-10 (D. N.M. 1989).


\textsuperscript{240} See id. at 13 (citing United States v. Candelaria, 271 U.S. 432 (1926)).
think [the Tenth Circuit] may have erred, I see no issue of general importance."

In yet another case of major importance to Indian Country, but one the Court did not discuss in conference, is Western Shoshone National Council v. Molini.\textsuperscript{242} In that case, the Ninth Circuit had held that the Indian Claims Commission award in United States v. Dann\textsuperscript{243} acted a bar to the Western Shoshone claims that the State of Nevada had interfered with their aboriginal and treaty hunting and fishing rights.\textsuperscript{244} The cert pool memowriter, a White clerk, noted that the claim was viable but unimportant.\textsuperscript{245} Justice Blackmun’s clerk disagreed, annotating the cert pool memo by arguing that the case “may merit summary reversal on application of the wrong standard.”\textsuperscript{246} In short, though the lower court may have gotten the case wrong by applying the incorrect standard, effectively eradicating the hunting and fishing rights of an entire tribe, the Court would not find the case to be important enough to discuss.\textsuperscript{247}

In yet another case Makah Tribe v. Washington,\textsuperscript{248} the cert pool memowriter, an O’Connor clerk, noted that the lower court’s decision may have been “a clearly unwarranted departure from precedent,” but recommended denial of the petition because “review would merely be for error correction.”\textsuperscript{249} The Ninth Circuit had held that the prevailing tribes in

\textsuperscript{241} Id. at 14.
\textsuperscript{242} 506 U.S. 822 (1992) (No. 91-1916).
\textsuperscript{243} 873 F.2d 1189 (9th Cir.), cert. denied, 493 U.S. 890 (1989).
\textsuperscript{244} Western Shoshone National Council v. Molini, 951 F.2d 200, 202-03 (9th Cir. 1991).
\textsuperscript{245} See Cert Pool Memo at 7, 9, Western Shoshone National Council v. Molini, 506 U.S. 822 (1992) (No. 91-1916), \url{http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/91-1916.pdf} (“At bottom, any tension in the case law over the viability of claims involving hunting and fishing rights appears highly fact-based and falls short of a genuine legal conflict. … Although this case affects a sizable class, and involves national interests, the issues presented are largely factbound and seem unlikely to have broad implications for other litigants.”) (discussing Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985)).
\textsuperscript{246} Id. at 9.
\textsuperscript{248} 485 U.S. 1034 (1988) (No. 87-1390).
the *United States v. Washington* litigation could not recover attorney fees under federal civil rights statutes. Justice Blackmun’s clerk’s annotation, while sympathetic to the tribal petitioner, still doubted the importance of the question:

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

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

### 4. Gross Error

More rarely, the cert pool memos will assert that a lower court decision is clearly wrong, or in the Rule’s language, “has so far departed from the accepted and usual course of judicial proceedings…” As the language suggests, this happens less often than circuit splits. The complexity and ambiguity of federal Indian law, however, creates circumstances where lower courts do seem to deviate from Supreme Court precedents, perhaps more often than in other contexts. The classic example is *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.* The case reached the Supreme Court twice: the first time, the Court GVR’d the case in light of *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*; the second time,
the Court reversed the New York Court of Appeals on the merits. The final case ostensibly turned on “the narrow[] question whether the New York scheme is inconsistent with the Indian Trader Statutes,” but one additional reason found in the cert pool memos in the two cases was the problem of the New York Court of Appeals. The cert pool memowriter, a Rehnquist clerk, wrote that the Court’s holding that federal law “‘preempted the field of regulating trade with Indians…’ is difficult to reconcile [with] existing [Supreme Court] precedent….” Even prior to the Milhem Attea remand, the Court had GVR’d an earlier New York Court of Appeals decision on similar grounds. The poolwriter noted, “[T]he [New York Court of Appeals] has not ‘moved’ on this issue since the [Supreme Court] vacated and remanded Herzog in 1988, the decision below is at least suspect, and if [New York]’s regulatory approach is the only effective way [petitioner]’s can police the retail sale of taxable cigarettes on Indian reservations, the [courts] below have put [petitioners] in a tough spot.” After another decision from the New York Court of Appeals reaching the same outcome (Herzog apparently was not appealed to the Supreme Court after remand), the cert pool memowriter, a Rehnquist clerk, wrote, “The [New York Court of Appeals] stubbornly refuses to alter its questionable preemption analysis, despite two GVR’s from this [Court] (one in this case, and one in Herzog).” Moreover, according to the memo, “The issue, however, is important both legally and practically, and the [New York Court of Appeals] does not seem willing to

255 See Milhem Attea, 512 U.S. at 78 (reversing Milhelm Attea & Bros., Inc. v. Department of Taxation and Finance of State of N.Y., 615 N.E.2d 994 (N.Y. 1993)).
256 Milhem Attea, 512 U.S. at 70.
heed anything but a reversal on the merits.” Justice Blackmun’s clerk objected, annotating the cert pool memo in the first Milhem Attea petition with this grumble: “Is this such an important case? What 20 [pages] of memos comes down to is this: the [New York Court of Appeals] misread one of this [Court]’s cases. What happened to the word ‘split’[?]”

One of the key sticking points in federal Indian law is the doctrine surrounding the “special relationship” between the United States and Indian tribes. The most interesting example of this situation is the Arkansas River case, Cherokee Nation of Oklahoma v. United States. The Cherokee Nation brought a claim against the United States for damages related to the construction of the Arkansas River Navigation System, which implicated the Nation’s treaty rights. The cert pool memowriter, a Souter clerk, recommended the denial of the Cherokee Nation’s petition, noting “the strangeness of the entire inquiry.” The poolwriter could not find that a split existed or whether the lower court was clearly wrong because “given the inquiry, how could [the court] be [wrong]?"

In other cases, the clerks focus on non-Indian law-related questions. One example is Rhodes v. Vigil. The Indian Health Service had lost at the lower court level on the question of its discretion to eliminate a program for handicapped Indian children. The cert pool memowriter, an O’Connor clerk, noted, “There is no clear split in

261 Id. at 3.
263 See generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW: 2005 Ed. §§ 5.01 et seq. (Nell Jessup Newton et al., eds.).
265 Cherokee Nation v. United States, 937 F.2d 1539 (10th Cir. 1991).
267 Id. at 9; see also id. at 10 “[W]here legal principles are as squishy as those in this area, nothing squarely conflicts w/ anything else.”).
269 See Vigil v. Rhodes, 953 F.2d 1225 (9th Cir. 1992).
authority, but the decisions below is certainly in tension with the Court’s decision[s], and the D.C. Circuit’s approach....

But the cert pool memowriter acknowledged that the split was not clean. The memowriter recommended granting cert on the basis of “the egregiousness of the [Tenth Circuit]’s errors....” Justice Blackmun’s clerk wrote a supplemental memo arguing against granting certiorari on the basis that the Indian law character of the claim made the split illusory. The argument won over Justice Blackmun, but the Court still granted certiorari.

In this factor more than the others, the clerks might have the opportunity to equate “clearly wrong” with what appears to be an ideological position on tribal sovereignty, or perhaps a view toward protecting non-Indians from abuse by tribal governments, although there is no way to be certain. One example is in FMC Corp. v. Shoshone-Bannock Tribes, a case in which the Ninth Circuit applied the federal common law in holding the tribe had civil jurisdiction over a non-Indian-owned business, something the Supreme Court has not often held. The cert pool memowriter, a Scalia clerk, appeared to be looking for a vehicle in

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271 See id. at 17 (“Neither the “special relationship” nor the requirement that the money be spent on Indian health provide any meaningful standards against which to measure a decision to fund one Indian health project rather than another.”) (citing International Union, 746 F.2d 855).
272 Id. at 18.
276 905 F.2d 1311, 1314-15 (9th Cir. 1990).
277 See Nevada v. Hicks, 533 U.S. 353, 360 (2001) (“[W]ith one minor exception, we have never upheld under Montana the extension of tribal civil authority over nonmembers on non-Indian land”).
which a tribe had acted “outrageous[ly]” in its dealings with non-

The cert pool memo found the lower court’s reasoning weak,\footnote{See id. at 6-7.} but recommended denial because the case wasn’t a “good vehicle…. [Petitioner]’s argument appears to fail by its own terms: one of ‘consensual’ aspects of this particular relationship, the 1981 agreement, specifically related to the area that [respondents] are now trying to regulate … Indian employment. This is not, then, a case where a non-Indian entered into a relationship [with a] tribe, only to have the tribe thereafter attempt to regulate something completely different.”\footnote{Id. at 7.} Perhaps this clerk was looking for something very specific (an outrageous tribal action) and this case did not have the right facts.

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

1. The Mechanics of the Certiorari Process

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

Professor David Stras has broken down the import of the clerks in the Supreme Court’s cert pool. He first notes that the creation of the cert pool has “led to a homogenization of the [certiorari] process…,” largely because the clerk in the cert pool now writes for “anywhere from five to
eight Justices.”

Also, Stras points out, H.W. Perry’s interviews with former clerks “suggest[s] that, because recommendations to deny a case are the norm, law clerks pay far less attention to those recommendations that to recommendations to grant during the annotation process, increasing the likelihood that an issue of importance will be overlooked.”

The creation of the cert pool may have created, in former D.C. Circuit judge and Solicitor General Kenneth W. Starr’s words, a “hydraulic pressure to say no.” Stras argues that three factors push cert pool clerks to recommend a denial in tough cases: (1) it is less risky because a recommendation to deny will receive less scrutiny from clerks in other chambers; (2) it avoids cases in which the Court might be forced to dismiss a grant of certiorari as improvidently granted (apparently a result that clerks “dread”); and (3) general signals from the Court that the fewer cases the better.

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

The cert pool Justices in this sample (1986-1993), save Justice Blackmun, constituted the core of the Court that would combine to bring federalism jurisprudence to the forefront of American constitutional law in

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281 Stras, supra note 12, at 973. Justice Alito’s announcement that he will drop out of the cert pool in the 2008 Term is an interesting development. See Adam Liptak, A Second Justice Opts Out of a Longtime Custom: The ‘Cert. Pool’, N.Y. TIMES, Sept. 25, 2008, at __. Justice Alito is a complete unknown in the context of federal Indian law. So far, we know only that he voted with the conservatives in the only case he has seen so far. See Plains Commerce Bank v. Long Family Land and Cattle Co., 128 S. Ct. 2709 (2008).

282 Id. at 975 (citing PERRY, supra note 7, at 63).

283 Stras, supra note 12, at 974 (citing PERRY, supra note 7, at 63).

284 See id. at 975 (citations omitted).

285 Id. at 975.
the 1990s — mainly Chief Justice Rehnquist, and Justices White, O’Connor, Scalia, Kennedy, and Thomas. Cert pool clerks knew that they were writing for an audience that consisted of Justices often interested in states rights. There must be different tugs on a memowriter. The audience cannot be ignored, but the memowriter wants to be fair and candid about the petitions. Early in a law clerk’s one-year stint, before a memowriter becomes confident and experienced in this unusual job – and develops a reputation as a good or poor memowriter – they perhaps are more likely to write to this audience of “federalism” Justices. And so the cert pool memos, whether the clerks intend to or not, are less likely to trumpet the merits of a legal position put forward by a tribal interest than a state interest. A cert pool memo candidly noting that a state’s position is weak in comparison to a tribe’s position likely will not win points with the conservative Justices in the cert pool, while a memo understating the possible strength of a tribal position might undermine the cert pool memowriter’s reputation. This suggests the possible creation of a culture within the cert pool of understating the merits of petitions filed by tribal interests, a culture generated by the structure of the cert pool itself. However, the import of the cert pool can be overstated. It bears mention that the Court several times rejected the recommendation of the poolwriters to deny a petition.

In the cases decided since the end of this study, from 1994 to the present, the ratio of wins and losses remains the same. Now, eight of the nine Justices participate in the cert pool, including two Democratic appointees. The “audience” for the cert pool clerks includes five “federalism” Justices, and three others, if one includes Justice Souter as a non-federalism Justice. One would expect the cert pool memos in the last fifteen years or so to reflect the presence of the non-federalism Justices, but one could also expect that the focus of the cert pool memos would not reflect the minority. The cert pool memos appear to function as a means to crystallize the thinking of the Court on a particular case before any individual Justice reviews the materials. Anyone who negotiates contracts knows that the key to controlling the final product is to prepare the first draft, which then forms the basis for the entire negotiation. A Justice who supports a pro-tribal interest outcome in a matter might have to work from the first cert pool memo, which was written for an audience of a majority

287 Thanks to Phil Frickey and David Stras for making this point.
of Justices who disfavor tribal interests as opposed to state interests. Given
that Indian law tends to not excite the “judicial libido,” in Justice Scalia’s
pithy words,288 a Justice who starts out in the minority might be less
inclined to use his or her institutional capital to persuade the rest of the
Court to change a presumptive vote against tribal interests.

2. The Structure of Rule 10

Of the four major factors expressed in Rule 10, three are more
subjective, while only one (whether a petition alleges a split) is more
objective. Since relatively few Indian law certiorari petitions allege a
viable split, the subjective factors become more important. And there is
where the inexperience of a Supreme Court law clerk is most
heightened,289 perhaps leading to far more recommendations to deny a
petition filed by tribal interests than those filed by states.

Consider the Rule 10 factors.

First, there are relatively few splits in authority that arise in Indian
law cases. Many Indian law cases arise when the meaning of a treaty or a
statute is in dispute, but that kind of dispute often is limited to a small
graphic region or to one or a very few number of tribes. For example,
if a federal circuit and a state supreme court agree on a particular
interpretation of a treaty or a statute (and even if both are dead wrong, a
possibility in a field dominated by ambiguity and complexity), there will
never be a split in authority. Absent a split in authority, Rule 10 informs
petitioners that the Court is not likely to hear the case unless there is some
national legal question at stake. And since this kind of dispute is limited in
graphic scope, the dispute is not important enough to be independently
certworthy absent a split.

Second, many Indian law cases are factbound, meaning that the
Court is unlikely to hear a petition where the petitioner seeks a review of
the lower court’s findings of fact. For example, in a treaty case, everything
involved is a question of fact, including the technical meaning of the treaty
language. In these kinds of cases, the Court will grant a petition only if the

288 Zuni Public School District No. 89 v. U.S. Dept. of Education, 127 S. Ct. 1534,

289 See Stras, supra note 12, at 975-76 (“In the absence of objective factors such as
a conflict among the lower courts, the decision about whether to recommend a grant or a
denial of certiorari is largely based on subjective factors that law clerks, at least early in
their clerkships, may be ill-equipped to evaluate.”) (citing DAVID O’BRIEN, STORM
CENTER 193 (7th ed. 2005)).
lower court made the gross error of applying the wrong law or the wrong standard to the case. If the lower court correctly stated the law or standard, the Supreme Court will let the lower court decision stand – no matter the relative merit of the lower court’s analysis. Rule 10 states that the role of the Court is not error correction, but in a field noted for ambiguity and complexity, error is endemic. The Court states in Rule 10 that it is not interested in reviewing this kind of error, no matter how troubling.

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

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

**Conclusion**

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

But in the field of federal Indian law, with questions often far removed from the mainstream of constitutional jurisprudence, the certiorari process appears to prejudice the interests of Indians and Indian

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tribes, who are often engaged in a multitude of complicated legal disputes with states and state agencies.

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

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

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

Finally, while the admonition that tribal interests should do their very best to avoid the Supreme Court is not new, the findings of this study also demonstrate with increased force and clarity that Supreme Court adjudication is an extraordinarily hazardous process for tribal interests. The only cases the Court is likely to accept are cases in which the party opposing tribal interests lost at the lower court level. In short, a tribal victory below appears to be viewed as an aberration that the Court is more willing to correct than not.

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