Predicting Supreme Court Behavior in Indian Law Cases

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Abstract: This piece builds upon Matthew Fletcher's call for additional empirical work in Indian law by creating a new dataset of Indian law opinions. The piece takes every Indian law case decided by the Supreme Court from the beginning of the Warren Court until the end of the 2019-2020 term. The scholarship first produces an Indian law scorecard that measures how often each Justice voted for the "pro-Indian" outcome. It then compares those results to the Justice's political ideology to suggest that while there is a general trend that a more "liberal" Justice is more likely to favor the pro-Indian interest, that trend is generally weak with considerable variance from Justice to Justice. Finally, the article then creates a logistic regression model in order to try to predict whether a pro-Indian outcome is likely to prevail at the Court. It finds six potential variables to be statistically significant. It uses quantitative analysis to prove that the Indian interest is more likely to prevail when the Tribe is the appellant, when the issue is framed as a jurisdictional contest, and when the case arises from certain regions of the country. It suggests that Indian law advocates may use these insights to help influence litigation strategies in the future.

> It is almost always a mistake to seek answers to Indian legal is-
> sues by making analogies to seemingly similar fields. General
> notions of civil rights law and public land law, for example,
> simply fail to resolve many questions relating to American In-
> dian tribes and individuals. The extraordinary body of law and
> policy holds its own answers, which are often wholly unex-
> pected to those unfamiliar with it.[1]

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Shortly after the turn of the last century, while still sitting as a dis-
trict court judge, Learned Hand queried: "[h]ow long we shall continue
to blunder along without the aid of unpartisan and authoritative scientific
assistance in the administration of justice"?[2] Writing in 1911, Judge Hand
could not have contemplated the development of empirical research
techniques that are now permeating legal discourse. (He was in fact re-
solving a question of patent infringement.)[3] Today, the development of
empirical analysis to apply unbiased "scientific assistance" to understand

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1. Davis v. Muellar, 643 F.2d 521, 530 (8th Cir. 1981) (McMillian, C.J., dissenting).

2. Parke-Davis & Co. v. H.K. Mulford Co., 189 F. 95, 115 (C.C.S.D.N.Y. 1911).
For a discussion of the benefits of empirical analysis or scientific assistance in the legal
context, see Gregory Parks, *Toward a Critical Race Realism*, 17 Cᴏʀɴᴇʟʟ J. L. & Pᴜʙ.
Pᴏʟ'ʏ 683, 741-42 (2008) ("an empirical analysis of race and law issues has some general
yet substantive benefits. . . . First, empiricism bolsters claims made by theory or personal
narrative. Second, . . . [e]mpiricism allows one to test the degree to which theory or a
personal account of reality is true for others. Where it is generalizable, especially for a vast
number of similarly situated individuals, public policy may be implicated. Thus, the third
benefit of synthesizing empirical legal scholarship and Critical Race Theory should be
concerned with . . . pragmatic instrumentalism—a means-end relationship to law. Legal
scholarship, more readily than any other type of research, has the potential to shape public
policy. In this vein, the benefit of Critical Race Theory's employment of social science is
that social science may help shape courts', legislatures', and administrative agencies' policy
decisions.")

3. *Parke-Davis & Co.*, 189 F. at 97. For the curious reader, the patent at issue involved
a process to isolate and purify a chemical substance from an animal's suprarenal gland to
be sold as medicine.

the behavior of courts—and, by extension, justice—is fast becoming a critically important piece of legal scholarship.[4]

This paper applies some of these new empirical tools to understand the Supreme Court's behavior in cases involving federal Indian law.[5] Indian law is unusual. It is a body of law that has developed essentially sui generis from common law principles articulated by the courts,[6] and for that reason it is incredibly difficult to predict. No other area of law has so sharply divided the Court's recent conservative textualists[7] and few other areas result in such lengthy litigation.[8] Indian law is also critically im-

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4. In 2009, the Georgetown Journal of Legal Ethics dedicated a symposium to addressing and understanding this new trend in legal research. *See* Robert L. Nelson, *Are We There Yet? Empirical Research and the Predicted Demise of Large Law Firms: An Introductory Essay*, 22 GEO. J. LEGAL ETHICS 1249 (2009); Susan Saab Fortney, *Taking Empirical Research Seriously*, 22 GEO. J. LEGAL ETHICS 1473 (2009).

5. Any empirical analysis is only as good as the data it is built upon. This piece looks at the behavior of the Supreme Court and accordingly has found all of the Court's Indian law opinions. The entire population of cases is known, but the analysis may be affected by the fact that the Court selects which cases it decides; *see* Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933 (2009). For a discussion of how biased data can make bad policy, see Rashida Richardson, Jason M. Schultz & Kate Crawford, *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. Rev. 192 (2019).

6. Consider United States v. Kagama, 118 U.S. 375, 384-85 (1886), where the Supreme Court upheld Congress' power to enact criminal laws that apply in Indian country. When asked where in the Constitution that power came from, the Court determined that it did not emanate from the Commerce Clause but rather exists in the federal government "because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because [the federal government] alone can enforce its laws on all the tribes." *See also* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1 (1999).

7. For a discussion of how Indian law has divided the Court's textualists, see Grant Christensen, *Judging Indian Law: What Factors Influence Individual Justice's Votes on Indian Law in the Modern Era*, 43 U. TOL. L. REV. 267, 272-73 (2012) (discussing the unusual joining behavior of liberal and conservative Justices in Indian law cases, including how Indian law cases often divide conservative Justices who regularly vote together like Justices Thomas and Scalia).

8. It is not uncommon for Indian law issues to appear before the Court multiple times. For example, questions about the regulation of salmon in Oregon recurred three times over a ten year period. *See, e.g.*, Puyallup Tribe, Inc. v. Dep't of Game of Wash., 433 U.S. 165 (1977); Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44 (1973); Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392 (1968). In a particularly interesting development, Justice Kennedy recused himself from hearing Washington v. United States in 2018 because he participated in an earlier version of the case as a Ninth Circuit judge in 1985. Miriam Seifter, *Argument Preview: Justices to Consider the Scope of Tribal Fishing Rights*, SCOTUSBLOG (Apr. 11, 2018, 1:25 PM), http://www.scotusblog.com

portant.[9] Indian law cases raise important constitutional questions about the separation of powers[10] and, because the extent of a tribe's authority raises a federal question,[11] a disproportionate number of Indian law cases end up in the federal courts. Accordingly, although the total number of cases decided by the Supreme Court has fallen to less than eighty in recent years, the Court continues to hear between two and three Indian law cases each term.[12]

The empirical analysis presented here is divided into two parts. First, a new dataset was created by identifying every Indian law case decided by the Supreme Court from the beginning of the Warren Court in 1953 through July 2020. Each case was coded for whether the interest preferred by Indian tribes was successful on the merits. Indian tribes themselves are not always parties to this litigation and so rather than determine whether the "tribe" won or lost, it is more accurate to look to the pro-tribal or pro-Indian interest. Sometimes this interest is represented by an individual member of the tribe, a tribal business, employee, or governmental subdivision, or even the United States federal government representing the tribe pursuant to its trust responsibility.[13] Each Justice's vote was recorded for whether they ultimately supported or opposed the tribal interest. This dataset thus permitted a ranking of Justices in the order of their support for Indian interests and is a new contribution to the Indian law literature. While this analysis is in the realm of descriptive statistics, it is more immediately visual to most readers and challenges the notion that "liberal" Justices are more "pro-Indian" while "conservative" Justices are more likely to oppose Indian interests. Justice Gorsuch, a noted conservative, has the third highest level of support for tribal interests

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/2018/04/argument-preview-justices-to-consider-the-scope-of-tribal-fishing-rights/ [https://perma.cc/W7MJ-Y62W].

9. *See* Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579 (2008) (discussing how, in addition to being important in their own right, the Supreme Court uses Indian law cases to say important things about other areas of the law from civil rights to land title and from water rights to trust law).

10. *Id*. at 580 ("the Court identifies an important constitutional concern embedded in a run-of-the-mill Indian law certiorari petition, grants certiorari, and then applies its decision making discretion to decide the 'important' constitutional concern").

11. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 852-53 (1985).

12. As illustrated in the dataset generated and discussed below, since 1959 the Court has heard an average of 2.6 Indian law cases each term. *See infra* Part II.A.

13. Indian tribes themselves are not always parties to this litigation, thus it is more accurate to look at the pro-tribal or pro-Indian interest rather than to determine whether the "tribe" won or lost. Sometimes this interest is represented by an individual member of the tribe, a tribal business, employee, or governmental subdivision, or even the United States federal government representing the tribe pursuant to its trust responsibility. *See infra* notes 78-80 and accompanying text.

while Justice Stevens, a noted liberal, barely supported the tribal interest a third of the time.

The second part of the analysis then coded each of the 158 Indian law cases for eighteen different independent variables. A logistic regression model was created to try to explain the behavior of the Court and identify what factors might statistically significantly influence the outcome of Indian law cases. The regression model identified six variables that were statistically significant and so substantially advances the understanding of judicial behavior. Insights from this second analysis statistically confirm the more recent bias in the Court against tribal interests, the importance for tribes to frame their legal issues as conflicts between tribal and state jurisdiction, the advantage of being the Appellant in Supreme Court litigation, and potential sympathies the Court displays for cases coming from certain parts of the country.

This paper is broken down into four parts in addition to this introduction. Part 1 introduces Indian law cases as a category. Part II looks at the role of individual Justices. It employs descriptive statistics to determine proportionally how often each Justice voted in favor of the tribal interest and ranks the Justices on the basis of these votes. It makes some preliminary observations about the role of these rankings and examines the application of the Median Justice Theory to Indian law, ultimately suggesting that the median Justice in the Indian law context may not be the middle Justice from the purely ideological perspective used in other models.

Part III provides an extensive discussion of the methodologies employed in the more rigorous logistic regression analysis that follows. The methodology part is roughly broken down into three subparts consisting of documentation for how the population of Indian law cases was culled from the broader list of all Supreme Court opinions, how each of those cases was coded for the dependent variable (whether the tribal interest prevailed on the merits), and a discussion of the eighteen independent variables along with their accompanying null hypotheses.

Part IV interprets the results from the logistic regression. It provides an analysis of both the strength of the regression model as well as tests of each independent variable. It also recognizes the difficulty in interpreting coefficients from a logistic regression and so presents a contrast score to quantify the effect each statistically significant variable has on the success of the tribal interest at the Court. The model itself is able to explain about a quarter of the variance in the success of the tribal interest, which is a robust result and an independent verification of the importance of this paper to the contribution of the study of Indian law and judicial behavior. Finally, Part V provides some brief concluding remarks.

I. INDIAN LAW CASES ARE DIFFERENT

Political scientists have devoted considerable effort attempting to explain the behavior of the United States Supreme Court.[14] They have constructed various theories and models in order to predict each Justice's voting behavior and the overall outcomes of Supreme Court opinions before they are formally handed down.[15] By studying the joining behavior of Justices over time, this scholarship suggests that the most potent explanation for how a Justice votes is that Justice's political ideology; i.e., conservative Justices tend to cast ideologically "conservative" votes, while liberal Justices tend to cast ideologically "liberal" ones. While such theories can explain a large portion of Supreme Court outcomes,[16] Indian law opinions are particularly difficult to classify. Rather than falling into traditionally liberal or conservative positions, the sui generis nature of Indian law encourages the development of common law principles, presents complex federalism concerns, and employs a legal interpretation of history that does not perfectly mirror political ideology.

In these traditional models, decisions in favor of a tribe are often grouped in a civil rights category, where the model assumes that liberal Justices are more likely to side with the pro-tribal interest and conservative Justices are more likely to oppose it.[17] Because these models attempt

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14. For example, see Jeffrey A. Segal & Albert Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989); Jeffrey A. Segal, Lee Epstein, Charles M. Cameron & Harold J. Spaeth, *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995); Kevin T. McGuire, Georg Vanberg, Charles E. Smith Jr. & Gregory A. Caldeira, *Measuring Policy Content on the U.S. Supreme Court*, 71 J. POL. 1305 (2009).

15. *See, e.g.*, Miriam Cherry & Robert Rogers, *Tiresias and the Justices: Using Information Markets to Predict Supreme Court Decisions*, 100 NW. U. L. REV. 1141 (2006); Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004); Charles M. Cameron & Jee-Kwang Park, *How Will They Vote? Predicting the Future Behavior of Supreme Court Nominees, 1937-2006*, 6 J. EMPIRICAL LEGAL STUD. 485 (2009). For an excellent discussion of how judges use persuasion, see Anne E. Mullins, *Subtly Selling the System: Where Psychological Influence Tactics Lurk in Judicial Writing*, 48 U. RICH. L. REV. 1111 (2014).

16. *See* Leigh Anne Williams, *Measuring Internal Influence on the Rehnquist Court: An Analysis of Non-Majority Opinion Joining Behavior*, 68 OHIO STATE L.J. 679, 686-88 (2007); Harold J. Spaeth & Michael F. Altfeld, *Influence Relationships Within the Supreme Court: A Comparison of the Warren and Burger Courts*, 38 W. POL. Q. 70, 80 (1985).

17. The Supreme Court Judicial Database is the most highly regarded collection of data on the Court and has been the basis of hundreds of papers cited in the legal and judicial politics literature. The code book to the database places Indian law opinions in the civil rights category. HAROLD SPAETH, LEE EPSTEIN, TED RUGER, SARAH C. BENESH, JEFFREY SEGAL & ANDREW D. MARTIN, SUPREME COURT DATABASE CODE BOOK 46 (2017), http://scdb.wustl.edu/_brickFiles/2017_01/SCDB_2017_01_codebook.pdf

to account for all of the cases over a period of several terms, a natural court,[18] or even a Chief Justice's tenure,[19] they apparently fail to question their assumption about the political alignment of Justices' votes for Indian law cases. Professor John Hermann has raised this issue in several scholarly pieces, convincingly arguing that explanations of judicial behavior in Indian law cases require a more nuanced approach than most models use in order to account for the variance in individual voting patterns.[20]

It is often impossible to use traditional models to predict Indian law cases. Consider a pair of 6-3 decisions where the dissents each consisted of one liberal, one moderate, and one conservative aligned against a majority that was able to unify otherwise ideologically disparate members of the bench. In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, the Court held that a tribe could raise sovereign immunity as a defense to a breach of contract claim, with Justices Stevens, Souter, and Thomas dissenting.[21] In *Mississippi Band of Choctaw Indians v. Holyfield*, the Court held that a tribe had exclusive jurisdiction over the child custody place-

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[https://perma.cc/SYB2-ZTC2] ("Civil rights includes non-First Amendment freedom cases which pertain to classifications based on race (including American Indians), age, indigency, voting, residency, military or handicapped status, gender, and alienage."). To access the database, see Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger & Sara C. Benesh, *2019 Supreme Court Database*, WASH. UNIV. L., Version 2019 Release 01, http://supremecourtdatabase.org.

18. A "natural court" is an aggregate of the Supreme Court terms where the same nine Justices sat together without any changes to the Court's composition. For example, the last Rehnquist natural court lasted from Justice Breyer's confirmation in 1994 through the death of Chief Justice Rehnquist and the subsequent confirmation of Chief Justice Roberts in 2005. This is a useful way to think about the Court because, for these periods, the same Justices decide which cases to hear and cast the votes on the merits. Changes over the duration of a natural court, or differences that emerge within it, are particularly interesting to study, as the cause cannot be due to the introduction of a new Justice or the loss of a more senior one. For a more thorough discussion of the benefits of studying a natural court, see Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43, 47 (2007) ("Because these same nine justices sat together throughout this period, this time frame provides a wealth of data while avoiding the difficulties associated with comparing decisions rendered by different justices in different cases.").

19. Because Chief Justices are leaders, some scholars discuss the development of the Court in terms of each one's tenure (e.g., the Warren Court, the Burger Court, the Rehnquist Court, the Roberts Court, etc.). *See* Frank B. Cross, Thomas A. Smith & Antonio Tomarchio, *The Rehnquist Court in Empirical and Statistical Retrospective: Warren Court Precedents in the Rehnquist Court*, 24 CONST. COMMENT. 3 (2007); Phillip E. Hammond, *American Church/State Jurisprudence from the Warren Court to the Rehnquist Court*, 40 J. FOR SCI. STUDY RELIGION 455 (2001).

20. John R. Hermann, *American Indians in Court: The Burger and Rehnquist Years*, 37 SOC. SCI. J. 245, 254-55 (2000); John R. Hermann & Karen O'Connor, *American Indians and the Burger Court*, 77 SOC. SCI. Q. 127, 136-44 (1996).

21. Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 759-60 (1998).

ment of the children of tribal members domiciled on the reservation but born in the state of Mississippi.[22] Justices Stevens and Kennedy were joined by Chief Justice Rehnquist in dissent.[23] Such unusual joining behavior requires an Indian-law-specific examination into the behavior of the Justices.

A. *Indian Law and Judicial Ideology*

In order to explore the relationship between a Justice's political ideology and a Justice's voting behavior in Indian law cases, this study began by counting the number of pro-Indian votes cast by individual Justices and comparing that behavior to their respective political ideological score based on their voting record across their entire tenure on the Court. The results illustrate the imperfect relationship between ideology and voting in Indian law cases.

The tribal interest prevailed in 73 of the 158 Indian law cases (46.2%) decided since the beginning of the Warren Court. If political ideology were a perfect predictor of Indian law cases, then the most liberal Justices would vote for the tribal interest the largest proportion of the time, while the most conservative Justices would vote for the tribal interest the least often.

To test this observation, it is first necessary to determine how liberal or conservative each Justice's jurisprudence is. While it might be obvious to people who study the Court that Justice Stevens was "liberal" and Justice Scalia was "conservative," an empirical study demands a more rigorous approach. Andrew Martin and Kevin Quinn have created an ideological score for each Justice for each term that Justice has served on the bench through the 2018-2019 term.[24] Negative scores are associated with a liberal voting pattern while positive scores indicate a conservative one. The absolute value of the score measures how liberal or conservative the voting pattern is, with the larger scores indicating a more extreme ideology. The scores reported below are aggregated for all years a Justice served on the bench from 1953 through the 2019-2020 term to give each Justice a single ideological score.

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22. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 53-54 (1989).

23. *Id*. at 54.

24. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134, 146 (2002). The data are updated each year based on information collected as part of the Supreme Court Judicial Database and can be downloaded in many forms at *Martin-Quinn Scores*, http://mqscores.lsa.umich.edu/measures.php [https://perma.cc/6NB2-F97V] (last visited Nov. 13, 2020).

The data show a number of outliers. Justices Stevens, Breyer, Souter, and Ginsburg all have liberal ideological scores but support the Indian interest less frequently than expected, while Justices like Burger, Harlan, Whittaker, Clark, and White have conservative ideological scores but support the Indian interest considerably more often than expected. Justice Gorsuch is particularly notable for having a markedly conservative ideological score but voting for the Indian interest in four of the five Indian law cases that have reached the Court during his short tenure.[25] His written opinions show a particularly acute sense of the injustices often faced by American Indians. For example, he has just opined that "[o]n the far end of the Trail of Tears was a promise. . . . Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word."[26] Justice Gorsuch's jurisprudence is just the latest example of how the liberal-conservative understanding of the Court breaks down in Indian law cases.

The following table shows how each Justice's voting patterns in Indian law cases compare with their average ideological score:

Justice Votes in Indian Law Cases				
Justice	Pro Tribe	Total Vote	Percent	Ave. Martin/ Quinn Score
C.J. Warren	13	15	86.7%	-1.26
Douglas	30	35	85.7%	-4.68
Sotomayor	12	15	80.0%	-2.68
Gorsuch	4	5	80.0%	0.98
Kagan	10	13	76.9%	-1.58
Fortas	3	4	75.0%	-1.43
Marshall	63	86	73.3%	-2.81
Brennan	65	94	69.1%	-1.93
Black	13	20	65.0%	-0.39
Blackmun	55	90	61.1%	-0.03
Frankfurter	6	10	60.0%	0.50
Harlan	10	17	58.8%	1.62
Clark	7	12	58.3%	0.29
Stewart	32	59	54.2%	0.44
C.J. Burger	37	70	52.9%	1.86
Whittaker	3	6	50.0%	1.24
Burton	2	4	50.0%	1.04
Minton	2	4	50.0%	0.86
Powell	33	67	49.3%	0.94

25. Voting in favor of the tribal interest in McGirt v. Oklahoma, 140 S. Ct. 2452 (2020); Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000 (2019); Herrera v. Wyoming, 139 S. Ct. 1686 (2019); and Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649 (2018). Only voting against the tribal interest in a 6-3 opinion, Patchak v. Zinke, 138 S. Ct. 897 (2018).

26. *McGirt*, 140 S. Ct. at 2452.

Ginsburg	25	51	49.0%	-1.73
White	45	97	46.4%	0.42
Souter	18	43	41.9%	-0.78
Breyer	19	48	39.6%	-1.23
Stevens	39	107	36.4%	-1.82
O'Connor	27	76	35.5%	0.98
C.J. Rehnquist	31	116	26.7%	2.95
Reed	1	4	25.0%	1.15
Kennedy	14	61	23.0%	0.68
Scalia	12	63	19.0%	2.48
C.J. Roberts	3	16	18.8%	0.93
Thomas	9	56	16.1%	3.6
Alito	3	19	15.8%	1.82
Kavanaugh	0	3	0.0%	0.54
** Justice Goldberg is omitted here because he participated in just two Indian law cases while on the bench. He voted in favor of the tribal interest in both cases. While Justice Kavanaugh has only been involved in three Indian law cases, he is included as he is a current justice.				

Graphing the pro-Indian vote and the Martin-Quinn scores for each Justice into a scatterplot provides a pictorial representation of the data above and shows a weak negative relationship. Essentially the graph suggests that, despite some outliers, generally as the Justice's voting rec–ord becomes more conservative they are less likely to support the tribal interest. While this is the same trend predicted by general models that suggest that conservative Justices are less likely to support Indian interests because they are related to questions of civil rights, there is a lot of vari-ance among the data points.
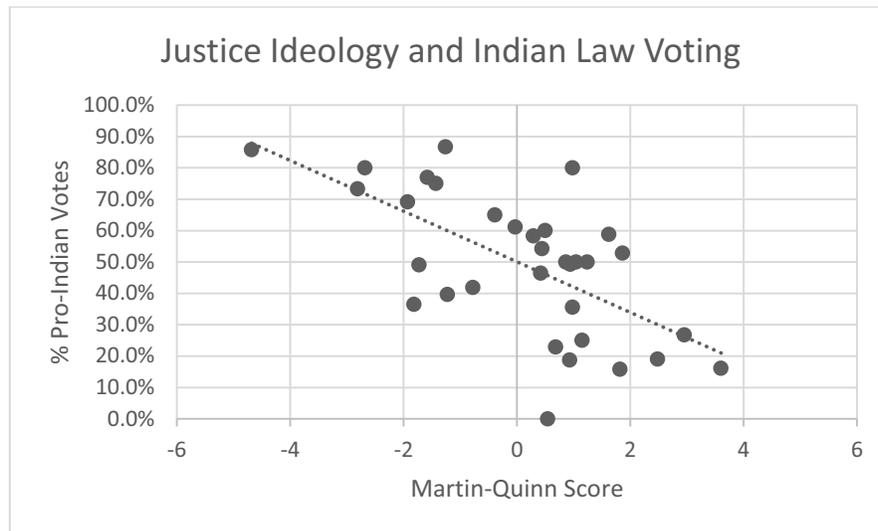
In order to determine whether an observed relationship between two variables is significant, a Pearson Product Moment Correlation Coefficient, or 'r', can be calculated.[27] The correlation coefficient is a statistical measurement of the relationship between two variables expressed between –1 and +1. The larger the absolute value of the coefficient, the more likely the observed relationship is significant. In this case the Pearson coefficient was calculated to test how strongly correlated judicial ideology was with voting in Indian law cases. The Pearson coefficient for the 34 Justice data points presented above is –0.6344. If the seven Justices who decided fewer than ten Indian law opinions are excluded on the basis that the small number of cases might skew the results, the Pearson coefficient is –0.7214.

Each of these results is statistically significant even at the p ≤ 0.01 level.[28] The Pearson test begins with a null hypothesis that the two variables (ideological score and percent vote in favor of the tribal interest) are not correlated. Even for a dataset with just 26 variables the p ≤ 0.01 is significant when the coefficient's absolute value 'r' is greater than 0.496.[29] Both 0.6344 and 0.7214 meet this test.

The Pearson coefficient suggests that the null hypothesis should be rejected, indicating that a Justice's political ideology as measured by the Martin-Quinn score and their voting behavior in Indian law are correlat-

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27. *See* R.F. Bartlett, *Linear Modelling of Pearson's Product Moment Correlation Coefficient: An Application of Fisher's \$z\$-Transformation*, 42 J. ROYAL STAT. SOC'Y 45, 45-53 (1993); *see also* Ursula A. Haug & D. H. Irvine, *The Use of Correlation Coefficients in Test Validation*, 16 HIGHER EDUC. 33, 33-36 (1987).

28. For a discussion of the role of a p-value in statistics, see *infra* Part III.A. For an interpretation of the significance of the r value obtained from a Pearson coefficient, see Del Siegle, *Critical Values of the Pearson Product-Moment Correlation Coefficient*, UNIV. OF. CONN., https://researchbasics.education.uconn.edu/r_critical_value_table/ [https://perma.cc/MG55-V4ZY] (last accessed Nov. 12, 2020). The measure of the coefficient is determined by taking the covariance and dividing by the product of the standard deviations of both terms.

$$\rho_{X,Y} = \frac{\mathrm{E}[(X - \mu_X)(Y - \mu_Y)]}{\sigma_X \sigma_Y}$$

29. *See id*. The statistical significance of the coefficient is dependent in part on the degrees of freedom, which is determined by taking the number of observations "n" and subtracting two. (df = n − 2). Removing the seven Justices who decided fewer than ten Indian law cases in the sample provides 26 observations, and so there are 24 degrees of freedom. Using the Critical Values table cited above the relationship between the values is significant at the highest p-value in the table when the absolute value of 'r' is greater than 0.496. If instead the analysis used all 33 observations, there would be 31 degrees of freedom. While the p-value of 31 degrees of freedom is not provided in the chart, using the value for df=30, which would be more conservative, would find the relationship statistically significant when the absolute value of 'r' is greater than 0.449. Statistical significance is clearly met here (0.7214 > 0.505 and 0.6344 > 0.449).

ed. The p ≤ 0.01 level of significance means that this result is true with a 99% level of confidence or, put another way, there is less than a 1% chance that the observed relationship is random (i.e. not correlated). The net result provides support to the proposition that a Justice's political ideology is associated with their voting behavior despite the outliers identified above. The next task is providing some context for what this association might mean when it comes to the behavior of the entire Court and not just an individual Justice. How does the observed voting correlation relate to whether the pro-Indian party ultimately prevails at the merits stage by securing at least five votes?

B. *Median Justice Theory*

Having demonstrated a statistically significant correlation between a Justice's political ideology and their voting behavior in Indian law cases, it is important to place that conclusion into context. The Median Justice Theory suggests that when the political ideology of the individual Justices is used to predict the outcome of a case, the 'middle' or 'median' Justice will control the outcome.[30] This is really just a matter of judicial math. Assuming that all of the Justices can be arranged along a single political spectrum (from left to right), then the Justice in the middle can control the outcome of the case because they are in the position to provide the fifth vote to either the more conservative four Justices to their right or the four more liberal Justices to their left.[31]

For much of her time on the Court, Justice Sandra Day O'Connor was presumed to be the median Justice and was therefore in an often pri-

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30. Jonathan N. Katz & Matthew L. Spitzer, *What's Age Got to Do With It? Supreme Court Appointees and the Long Run Location of the Supreme Court Median Justice*, 46 ARIZ. ST. L.J. 41, 55 (2014) ("Most of the literature presumes that outcomes and opinions follow the preferences of the Court's median Justice. . . . The further an outcome is from a Justice's ideal location, the less the Justice likes it. Under these circumstances, the Justice who has exactly four Justices to her right and four Justices to her left is the median Justice, and she should be able to get exactly what she wants out of the court. Since the court is assumed to operate under rules that are quite 'open'—any Justice can offer an alternative opinion to the one that is circulating prior to a vote—the median Justice should' be able to whipsaw those on her left against those on her right. At the end of the day the median Justice should get exactly what she wants.").

31. Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *Locating the Constitutional Center Centrist: Judges and Mainstream Values: A Multidisciplinary Exploration: The Median Justice on the United States Supreme Court*, 83 N.C. L. Rev. 1275, 1277 (2005). The Median-Justice Theory assumes that the 'median' Justice is the one that controls the outcome of cases on the Supreme Court: "the Justice in the middle of a distribution of Justices, such that (in an ideological distribution, for example) half the Justices are to the right of (more 'conservative' than) the median and half are to the left of (more 'liberal' than) the median."

oritized position to control the direction of the Court's jurisprudence.[32] However the Median Justice Theory only works if a Justice's preferred position can be identified clearly on the traditional left-right spectrum. While Justice O'Connor may have held the "median" position on many of the issues facing the Court during her tenure, she was not always the median.[33] For example, Justice Kennedy was often perceived to hold the swing vote on freedom of speech questions even if he was otherwise more conservative than Justice O'Connor on other issues before the Court.[34] Who is the median Indian law Justice?

No existing scholarship has applied the Median Justice Theory to the Court's Indian law decisions. Understanding the development of Indian law through the Median Justice Theory brings new insights to the development of Indian law principles by the modern Court. For example, during the natural court that existed from Justice Breyer's confirmation in 1994 to Chief Justice Rehnquist's death in 2005, Justice O'Connor was the median Justice using the Martin-Quinn ideological scores for those terms,[35] but Justice Breyer (the third most liberal Justice during the natural court period) was the median Justice for Indian law cases.[36]

This shift is indicative of the growing hostility by the Supreme Court to Indian interests in recent years.[37] From the beginning of the Warren Court in 1953 to the end of the century, Indian interests prevailed in 60 of 125 cases (48%). However, since 2000, the Indian interest

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32. *Id.* at 1291 ("[O]n virtually all conceptual and empirical definitions, O'Connor is the court's center—the median, the key, the critical, and the swing Justice.").

33. *See* Patrick D. Schmidt & David A. Yalof, *The "Swing Voter" Revisited: Justice Anthony Kennedy and the First Amendment Right of Free Speech*, 57 POL. RES. Q. 209, 209-17 (2004).

34. *See id.*

35. While she was not the median Indian law justice, Justice O'Connor voted with the majority in all five 5-4 decisions decided during the natural court. *See* United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003); Idaho v. United States, 533 U.S. 262 (2001); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997); Seminole Tribe v. Florida, 517 U.S. 44 (1996).

36. During the natural court from 1994 to 2005, Justice Breyer voted for the Indian law outcome more often than four of his colleagues (C.J. Rehnquist, and Justices Thomas, Scalia, and Kennedy) and less often than four other colleagues (Justices Stevens, Ginsberg, Souter, and O'Connor), making him the median Indian law justice. There were thirty Indian law cases decided during this natural court, and Justice Breyer participated in twenty-nine of the cases. He voted for the pro-Indian interest in ten of them (34.5%)—less often than Justice O'Connor (11 of 30 or 36.7%) and more often than Justice Kennedy (7 of 30 or 23.3%).

37. For an excellent discussion of how the Court's selection of cases may disadvantage tribal interests, see Fletcher, *supra* note 5, at 935.

has only been successful in 13 of 33 cases (39.4%). At the end of the October 2019 term the Court is among the most divided natural courts on Indian law cases since 1953 with three of the five strongest supporters (Justices Gorsuch, Sotomayor, and Kagan) and four of the five least supportive (Chief Justice Roberts and Justices Thomas, Alito, and Kavanaugh) all currently on the bench. The recent death of Justice Ginsburg and her replacement with Justice Amy Coney Barrett, who has an uncertain record in Indian law cases, will provide an opportunity to test the validity of the claims made in this Article.

What the Median Justice Theory does suggest is that it has become more difficult for the pro-Indian interest to succeed at the Court as the median Justice has become less supportive of Indian rights.[38] In 1971 Justice Harlan was the median Justice[39] and although he was fairly conservative (with a Martin-Quinn score of 1.62)[40] he voted in favor of the tribal interest in 10 of 17 cases (58.8%). In contrast, by this same measure Justice Breyer is the median Justice now.[41] While his ideological score is less conservative than Justice Harlan (compare -1.23 with 1.62), his support for Indian interests is markedly weaker, voting in favor of the tribal interest in 19 of 48 cases (39.6%).

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38. Justice Gorsuch's appointment in lieu of Justice Scalia may be changing this calculus as he has been part of a pro-Indian 5-4 majority in three of the five cases decided since he joined the bench: McGirt v. Oklahoma, 140 S. Ct. 2452 (2020); Wash. State Dep't of Licensing v. Cougar Den, 139 S. Ct. 1000 (2019); Herrera v. Wyoming, 139 S. Ct. 1686 (2019).

39. In 1971 the Court's nine members, in declining order of votes in favor of tribal interests were: Justices Douglas, Marshall, Brennan, Black, Harlan, Blackmun, Stewart, C.J. Burger, and White. *See supra* table, Part I.A.

40. To put the score in context, compare Justice Harlan at 1.62 with Justice Alito at 1.68. *See supra* table, Part I.A.

41. In 2020 the Justices in declining order of Indian law support are: Justices Sotomayor, Gorsuch, Kagan, Ginsburg, Breyer, C.J. Roberts, Thomas, Alito, and Kavanaugh. For some interesting discussion of how Justice Gorsuch's appointment is changing the Court's Indian law jurisprudence, see Bethany Berger, *Hope for Indian Tribes in the U.S. Supreme Court?:* Menominee*,* Nebraska v. Parker*,* Bryant*,* Dollar General . . . *and Beyond*, 2017 U. ILL. L. REV. 1901, 1941-42 (2017) ("Justice Neil Gorsuch, while not always sympathetic to tribal concerns, will almost certainly be better for tribes than Justice Scalia was, and possibly better than Judge Merrick Garland, President Obama's nominee, would have been. As a Colorado native and longtime judge on the Tenth Circuit, Justice Gorsuch is familiar with Native issues, and will not have as much difficulty wrapping his mind around the idea of tribes as living governments. His record in the Tenth Circuit is also relatively balanced. . . . Justice Gorsuch wrote or joined in twenty-eight opinions on federal Indian law issues while on the Tenth Circuit. Of these, tribal interests won sixteen, lost nine, and three were a draw.").

Interestingly, Justice Breyer is not ideologically the median Justice[42]—that distinction belongs to Justice Kavanaugh who has never voted in favor of an Indian interest.[43] Given that the correlation between ideological score and support for the pro-Indian party is statistically significant, the data suggest that advocates on Indian law cases should target Justice Breyer as the important swing member of their audience through their briefs, amici, and at oral argument. The appointment of Justice Amy Coney Barrett to replace Justice Ginsburg further shifts the ideological balance of the Court. Given the strong pro-Indian voting records of Justices Gorsuch, Sotomayor, and Kagan, Indian law advocates must now carry not only Justice Breyer but a crucial fifth vote to prevail in deeply contested cases.

II. Methodology

The remainder of this Article transitions from analyzing decisions made by individual Justices into an examination of the behavior of the entire Court. It develops and tests a model that explains the outcomes of Indian law cases using logistic regression. Documentation of the methodology is critically important to any empirical work on judicial behavior.[44] This Part therefore lays out the methodological decisions taken to construct the dataset that forms the basis of the regression model.

This section is divided into two subparts. The first subpart discusses how cases were selected to ensure that the dataset collected the entire population of Indian law cases decided by the Supreme Court. The second subpart includes a discussion of how each case was coded for the dependent variable (whether the tribal interest won) and for the values of

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42. Justice Breyer has an average Martin-Quinn Score of -1.23. The current Court in order of liberal to conservative scores is: Sotomayor (-2.68), Ginsburg (-1.73), Kagan (-1.58), Breyer (-1.23), Kavanaugh (0.53), C.J. Roberts (0.93), Gorsuch (0.98), Alito (1.82), and Thomas (3.60).

43. Justice Kavanaugh has voted against the tribal interest in all three Indian law cases he has decided since joining the Supreme Court: McGirt v. Oklahoma, 140 S. Ct. 2452 (2020); Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000 (2019); Herrera v. Wyoming, 139 S. Ct. 1686 (2019).

44. M. Lynne Markus, *Toward a Theory of Knowledge Reuse: Types of Knowledge Reuse Situations and Factors in Reuse Success*, 18 J. MGMT. INFO. SYS., 57, 75-76 (Discussing the importance of documenting process and methodology for use by others. "When people knowingly document knowledge for others who are very dissimilar to themselves—such as people in other departments, novices in an area where the documenters are experts, and external customers—two issues come into play. The first is awareness that the reusers lack not only general or technical knowledge but also the ability to understand the relevance (and irrelevance) of specific or contextual knowledge. The second is awareness that reusers may misuse explicit knowledge.").

each of the eighteen independent variables which are hypothesized to help explain the Supreme Court's behavior on Indian law cases. The end result is that the study has identified 158 Indian law cases, determined whether the prevailing party represents the pro-Indian interest, and coded each case for the presence of each of the eighteen independent variables.

A. *Determination of All Relevant Cases*

Before anything can be said empirically about the Supreme Court's behavior involving Indian law, a complete dataset needed to be built that includes the population of cases, a determination of whether the Indian interest prevailed in each case (the dependent variable), and codes each of those cases for potentially explanatory binary independent variables. This study has selected the beginning of the Warren Court (October 5, 1953) as its starting point and includes all Indian law cases decided by July 9, 2020.[45]

The modern era of Indian law can be roughly traced to the beginning of the Warren Court.[46] In 1959 the Court in *Williams v. Lee* held that Indian tribes have the right "to make their own laws and be governed by them."[47] While not necessarily clear at the time it was decided, *Williams v. Lee* would eventually mark the beginning of what many Indian law scholars now term the era of self-determination,[48] where federal Indian policy shifted from a concerted attempt to terminate tribal relationships to federal assistance with the promotion of tribal self-governance and self-determination.

A complete list of Indian law cases decided on the merits by the Supreme Court is a necessary precursor to a thorough examination of the

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45. July 9, 2020 was the last day decisions were issued by the U.S. Supreme Court for the 2019-2020 term.

46. Rebecca Zietlow, *The Judicial Restraint of the Warren Court (and Why it Matters)*, 69 OHIO ST. L. REV. 255, 270-71 (2008) ("Throughout the Warren Court Era, the Court often ruled in favor of civil rights and civil liberties, interpreting those civil rights and liberties expansively at the expense of legislatures . . . . This activism subjected the Warren Court to virulent criticism from academics and politicians alike. It also made the Warren Court a heroic icon for an entire generation of lawyers and academics, and many of their subsequent students.").

47. Williams v. Lee, 358 U.S. 217, 220 (1959) ("Essentially, absent governing Acts of Congress, the question is whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.").

48. Bethany Berger, Williams v. Lee *and the Debate Over Indian Equality*, 109 MICH. L. REV. 1463, 1519-20 (2011) ("The result was the Self-Determination Era, which continues to guide congressional and executive Indian decision making today. *Williams v. Lee* helped provide the legal foundation for this policy, in both Congress and the Court.").

Court's voting behavior.[49] This task is more complicated because while 'Indian law' is itself an explicit discipline, by necessity the substantive cases involve questions pulled from fundamentally divergent areas of law: criminal[50] and civil jurisdiction,[51] family law,[52] taxation,[53] water rights,[54] equal protection,[55] double jeopardy,[56] sovereign immunity,[57] contract enforcement,[58] casino gaming,[59] trusts,[60] title to real property,[61] and more.[62]

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49. Christensen, *supra* note 7.

50. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that Indian tribes lack criminal jurisdiction over non-Indians because that inherent power has been divested from them by virtue of it being inconsistent with their status as dependent nations); United States v. Lara, 541 U.S. 193 (2004) (holding that Indian tribes do have inherent criminal jurisdiction over Indian persons who are not members of the tribe asserting the jurisdictional authority).

51. *See, e.g.*, Montana v. United States, 450 U.S. 544 (1981) (holding that Indian tribes lack civil jurisdiction over non-Indians when the conduct occurs on land owned in fee by non-Indians and does stem from a consensual relationship with the tribe or have a direct effect on the tribe's political integrity, economic security, health, or welfare); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (holding that Indian tribes have civil jurisdiction over even the conduct of non-Indians when the conduct occurs on tribal land).

52. *See, e.g.*, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2003) (holding that the Indian Child Welfare Act does not apply when there is no pre-existing relationship between a biological father and his Indian daughter); Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (holding that under the Indian Child Welfare Act the tribe has exclusive jurisdiction to determine the child custody placement of an Indian child domiciled on the reservation).

53. *See, e.g.*, Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985) (holding that the Department of Interior does not need to approve tribal taxes imposed on mineral extraction even if the legal incidence of the tax falls on non-Indians); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973) (holding that a state may not impose its income tax on income earned by a tribal member in Indian country).

54. Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984) (holding that tribal consent is required for the renewal of a water permit).

55. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (holding that a tribal member has no enforceable remedy in a federal court when the tribe determines it will enroll the children of male members born to women who are not members of the tribe, but denies membership to the children of female members whose father is not a member).

56. United States v. Wheeler, 435 U.S. 313 (1978) (holding that prosecution by a tribal court and subsequently by the United States does not violate double jeopardy because the defendant's liberty is being placed in jeopardy by different sovereigns).

57. Lewis v. Clarke, 137 S. Ct. 1285 (2017) (holding that a tribal employee cannot raise the tribe's immunity as a defense to litigation when the employee is being sued in a personal capacity and the employee is the real party in interest); Michigan v. Bay Mills Indian Community, 572 U.S. 782 (2014) (holding that a tribe can assert sovereign immunity because the Indian Gaming Regulatory Act did not waive tribal immunity and the tribe has never issued a clear and explicit waiver).

58. C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411 (2001) (holding that an arbitration clause in a contract between an Indian tribe and a non-Indian corporation is enforceable).

The task is made easier in that several, albeit slightly incomplete, lists already exist.[63] In order to ensure that this study identified all relevant Indian law cases a Lexis search was performed to identify all Supreme Court cases containing the word "Indian" or "Tribe" from October 5, 1953 (the start of the Warren Court) to July 9, 2020. These results were then culled to eliminate all entries that did not result in a relevant opinion.[64] Cases were eliminated if they did not squarely address core Indian law issues. For example, *United States v. R.L.C.* involved a 16-year-old member of the Red Lake Band of Chippewa Indians stealing a car and causing a car accident that resulted in a fatality on the Indian reservation.[65] However, the issue before the Supreme Court was whether a juvenile could be detained for a period longer than an adult who committed the same offense.[66] While an Indian was involved, and the conduct occurred in Indian country,[67] the question was not an Indian law question and accordingly the case was not included in this dataset.

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59. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (holding that tribes can operate gambling operations free from regulation from state laws as long as the state has not prohibited the activity).

60. United States v. Mitchell, 463 U.S. 206 (1983) (holding that the federal government has a trust obligation to manage timber resources for the tribe); United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003) (holding that the federal government has a trust obligation to not allow Fort Apache to fall into disrepair).

61. Idaho v. United States, 533 U.S. 262 (2001) (holding that the Coeur d'Alene tribe and not the State of Idaho has title to land under a navigable waterway running through a reservation).

62. *See* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996) (considering the unique position of Native Hawaiians, who are indigenous but not 'Indian'); Martha Hirschfield, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate*, 101 YALE L.J. 1331 (1992) (considering Native Alaskans, whose rights are often governed by the Alaska Native Claims Settlement, as general Indian law principles).

63. *See* Christensen, *supra* note 7; Hermann, *supra* note 20 (collecting eighty-two Indian Law cases during the Burger and Rehnquist Courts, 1969-1992); Matthew L.M. Fletcher, *Supreme Court*, TURTLE TALK, https://turtletalk.wordpress.com/resources/supreme-court-indian-law-cases/ [https://perma.cc/Q7TL-YEUR] (last visited Oct. 26, 2020).

64. The search produced 1,415 entries. Most of these entries were one page orders where the Supreme Court either granted or denied cert. Others were cases citing noted legal commentator Laurence Tribe discussing the country of India or citing to cases outside the scope of Indian law but using one of the search terms. *See, e.g.*, Indian Towing Co. v. United States, 350 U.S. 61 (1955).

65. United States v. R.L.C., 503 U.S. 291, 294-95 (1992).

66. *Id.* at 306-07.

67. Indian Country is a legal term of art defining the places over which special jurisdictional rules apply and includes all reservations, dependent Indian communities, and allotments. It is codified at 18 U.S.C. § 1151 (2018). For additional discussion of Indian country, see Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority Over Indian*

After culling the cases from Lexis, the list of cases was compared with existing lists of Indian law cases maintained by Matthew Fletcher,[68] by John Hermann,[69] and collected in a comprehensive appendix by Grant Christensen.[70] This resulted in the addition of one case involving Native Hawaiians.[71] The databases also referenced several cases that, upon further evaluation, are not included here. For example, the Fletcher index includes cases that were pulled by the parties before a final decision was reached,[72] affirmed by an equally divided court,[73] and a case involving the hunting of moose by hovercraft in Alaska but not implicating Indian law.[74] None of these cases required votes on the merits of core Indian law issues and are therefore omitted from this dataset.

So what is an 'Indian law' case? Broadly speaking, the world of Indian law cases includes those cases that address the relationship between tribes and either states or the United States, cases that interpret an Indian treaty or a statute which singles out Indians or Indian tribes for special treatment, and cases with legal issues that affect Indian reservations. Additionally, cases dealing with the legacy of colonialism and the status of Native Alaskans and Hawaiians are also included, as are cases between a member Indian and their tribe that raise federal questions. Essentially, to be classified as an Indian law case the case needs to do more than simply have an Indian party; the legal question must raise issues unique to Indian tribes or Indigenous people.

The final dataset contains 158 Indian law cases. Just four of those cases were decided before *Williams v. Lee* and so the Supreme Court has decided on average 2.6 Indian law cases every year from 1959-2020.[75] Despite a reduction in the total number of cases decided by the Supreme Court in recent years, the Court's interest in Indian law has remained

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Country Granted by Public Law 280, 87 WASH. L. REV. 915 (2012); Carole Goldberg, *In Theory, in Practice: Judging State Jurisdiction in Indian Country*, 81 U. COLO. L. REV. 1027 (2010).

68. Matthew L.M. Fletcher, *Supreme Court*, TURTLE TALK, https://turtletalk.wordpress.com/resources/supreme-court-indian-law-cases/ [https://perma.cc/Q7TL-YEUR] (last visited Oct. 26, 2020).

69. Hermann, *supra* note 20 (collecting eighty-two Indian Law cases during the Burger and Rehnquist Courts, 1969-1992).

70. Christensen, *supra* note 7, at 313-17 app. 1.

71. Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009).

72. Madison County v. Oneida Indian Nation, 562 U.S. 42 (2011).

73. Dollar General v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016).

74. Sturgeon v. Frost, 136 S. Ct. 1061 (2016).

75. This average hides some wide variances. The Court decided eight Indian law cases in calendar years 1980 and 1985 but no Indian law cases at all in 1969 or 2015. *See, e.g.*, Christensen, supra note 7, at 313-17.

strong. For example, the Court scheduled three Indian law cases during the 2017–2018 term[76] even though it decided fewer than eighty cases to-tal.[77]

B. *Coding the Variables*

Having identified a complete list of cases, the next step was to code those cases for use in an empirical inquiry. While the data could arguably be coded to test many different kinds of judicial behavior, this study is trying to identify which factors are statistically significant predictors of the outcome in Indian law cases. Accordingly, each case was coded for the dependent variable: whether or not the pro-Indian interest prevailed on the merits.

Each case was also coded for eighteen independent variables. A null hypothesis is reported suggesting that each of the variables does not im-pact the outcome of Indian law cases at the Court and the logistic regres-sion model will test to see if we can confidently reject each null hypothe-sis. While the rejection of a null hypothesis does not prove causation between the independent and dependent variables, it is valuable to iden-tify which variables are statistically significant explanators of the Indian law outcome within the model.

1. The Dependent Variable: A Pro-Indian Outcome

The dependent variable is whether the Supreme Court ultimately reached the outcome urged by the tribe or was otherwise protective of the tribal interest. The dependent variable is coded as a binary "0" or "1" for each case, with a "0" being associated with a decision that went against the tribal interest and a "1" being an opinion that held in favor of the legal interpretation urged by the tribe.

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76. Patchak v. Zinke, 138 S. Ct. 897 (2018) and Lundgren v. Upper Skagit Indian Tribe, 138 S. Ct. 1649 (2018) were both decided by the Court on the merits but Wash-ington v. United States, 138 S. Ct. 1832—while briefed and argued —was ultimately af-firmed by an equally divided court. It turns out Justice Kennedy had worked on an earlier version of the case from the Ninth Circuit when he was still a federal appellate judge in the 1980s and so recused himself. *See* Hon. Marsha Berzon, *Judicial Archaeology: The Ninth Circuit Opinions of Justice Kennedy*, 70 HASTINGS L.J. 1175, 1177 (2019) ("Interestingly, just at the end of his tenure, Justice Kennedy recused in *Washington v. United States*, which was also about Indian fishing rights, because, digging back, he discovered that he had been on an earlier version of the case in the Ninth Circuit. So Indian fishing rights issues never went away during Justice Kennedy's 40-year tenure.").

77. For a list of cases decided during the 2017-2018 term, see *2017-2018 Term,* OYEZ, https://www.oyez.org/cases/2017 [https://perma.cc/56M8-SG6Y], (last visited Oct. 29, 2020).

In many cases the tribal interest is easy to identify. A majority of cases in the dataset include a tribe, or one of its members, participating directly as a named party.[78] Other cases have the United States, pursuant to its trust obligation,[79] arguing on behalf of the tribe. In these cases, decisions in favor of the tribe (or in favor of the United States representing the tribal interest) are obviously representative of a pro-Indian outcome and coded as "1." In the small number of cases where the dispute was between a tribe and one of its members, the tribal interest was coded as the outcome urged by the tribe itself.[80] In this manner each case was coded with a binary dependent variable, and it is this variable that the regression model attempts to explain.

2. The Independent Variables

So how might a model explain whether the tribal interest wins or loses? In order to evaluate and explain the dependent variable, each case was also coded for eighteen independent variables, each attached to a possible theory/explanation for why the factor may alter the outcome from the Court. Each independent variable was also binary, with each case having the variable coded "0" or "1" following the general rules described below.

Also associated with each independent variable is a null hypothesis. In each case the null hypothesis suggests that the independent variable will not have an effect on the outcome. Logistic regression analysis tests each of these independent variables in order to determine when that null

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78. *See, e.g.,* Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649 (2018); United States v. Tohono O'odham Nation, 563 U.S. 307 (2011).

79. For examples of the United States suing states on behalf of tribes pursuant to its trust obligations, see Idaho v. United States, 533 U.S. 262 (2001); United States v. Nevada, 412 U.S. 534 (1973). *See also* Montana v. United States, 450 U.S. 544 (1981) (United States standing in to defend a tribe from an assertion of power by a state pursuant to its trust obligation).

80. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51 (1978) (a tribal member, Julia Martinez, brought suit against her tribe, asking it to recognize her children as members. The "tribal interest" here was coded as the interest of the Santa Clara Pueblo because a tribe's right to define its own membership rules is obviously a greater interest to Indian law generally than the right of Julia Martinez to have her children's membership in the Santa Clara Pueblo mandated by a federal court over the objection of the tribe.) Another case, United States v. Jim, 409 U.S. 80, 86, (1972), proved particularly troublesome. That case involved a decision of Congress to change the beneficiary of oil and gas revenues from a specific band of Navajo to all Navajos living in San Juan County, Utah. The materials indicate that the Navajo Nation filed an amicus brief but I could not locate the brief itself nor is it clear which side the Navajo Nation officially supported. After carefully reading the opinion and Justice Douglas' dissent I have decided the "pro-Indian" outcome is the position articulated by Justice Douglas and coded the case accordingly.

hypothesis can be rejected.[81] Those independent variables where the null hypothesis is rejected at a level of statistical significance form the basis for the discussion of the results that follows in Part IV.

a. *The Tribe as the Appellant*

Tribal Appellant: (TribeAppellant). It has long been true that the appellant wins more often than the appellee at the Supreme Court.[82] This makes sense when one considers that Supreme Court decisions are really the product of two votes. The Supreme Court controls which cases it hears through the process of granting certiorari, where it takes four votes from the Justices in order to add the case to the Supreme Court's docket.[83] Professor Matthew Fletcher has written an exceptional piece on the behavior of Indian law cases at the certiorari stage, ultimately concluding that many Indian law cases which were arguably wrongly decided by the lower court are not granted cert because they are "factbound"[84] and/or "splitless."[85]

Moreover, much empirical work has established that Justices employ strategic voting at the certiorari stage.[86] Justices are most likely to

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81. A discussion of logistic regression and why it was selected is located infra Part IV.A, "Brief Discussion of Empirical Metrics."

82. Fletcher, *supra* note 5, at 936 ("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.").

83. *Id.* at 942. ("Ultimately, if four Justices vote to consider a case, cert is granted. If the requisite four votes are not obtained, cert is denied.").

84. *Id.* at 937-38. ("Moreover, these cases are complex and involve "factbound" applications of settled law. The petitioner is therefore praying the Court to correct a lower court error applying rules of law previously determined by the Supreme Court. This, according to the Court's own rules, it will rarely do.").

85. *Id.* at 937. ("Because Indian law cases have limited territorial reach, splits in lower court authority are unlikely. Jurisdictional splits are the most important objective factor favoring a grant of certiorari.")

86. Gregory A. Caldeira, John R. Wright & Christopher J. W. Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549, 550 (1999) ("[A]bove and beyond the usual forces in case selection, justices engage in sophisticated voting, defined as looking forward to the decision on the merits and acting with that potential outcome in mind, and do so in a wide range of circumstances. We present strong evidence for sophisticated behavior, ranging from votes to deny a case one prefers to reverse to votes to grant cases one prefers to affirm. Furthermore, sophisticated voting makes a substantial difference in the size and content of the Court's plenary agenda."); *See also* Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 414

vote to hear a case when they believe that the case below was wrongly decided and that their fellow Justices will agree to reverse.[87] This strategic behavior results in the appellant winning almost two-thirds of all Supreme Court cases that reach the merits[88] because judges are more likely to vote to hear a case when they believe that the lower court erred in its interpretation of the law *and* that there exists a majority for overturning the decision. Even when a Justice believes the lower court wrongly decided the case, the Justice may not vote to hear the case if he or she does not believe a majority of the Court would vote accordingly.[89]

H_o: Appearing as the appellant does not change the likelihood the tribal interest succeeds at the Supreme Court

Given the success of the appellant generally, and the existence of strategic voting at the gatekeeping stage of appeal, the model tests whether the outcome of the Supreme Court's Indian law cases might be explained by whether the tribe acts as the appellant when the case is petitioned to the Court. Cases are coded as "1" when the tribe is the appellant and "0" if any other party is the appellant. Cases where the appellant is representing the tribe's interest, but is not the tribe itself, are still coded "0".[90] All cases arising under the Court's original jurisdiction are also coded as "0" because even though no party 'appeals' from a lower court judgment, Indian tribes do not qualify for the Court's original jurisdiction and therefore could never be considered the petitioning or appealing party.[91]

(2004) ("The weight of the evidence, however, now favors the view that the Justices do act strategically in their decision making at the certiorari stage.").

87. John Krol & Saul Brenner, *Strategies in Certiorari Voting on the United States Supreme Court: A Reevaluation*, 43 W. POL. Q. 335, 335 (1990) ("[J]ustices vote to grant cert, in part, because they want to reverse the decision of the lower court. This kind of behavior is known in the literature as the error-correcting strategy. The discovery of this strategy is not surprising because the Supreme Court reverses approximately two-thirds of the cases it reviews.").

88. *Id*.

89. *Id*. at 336.

90. *See, e.g.*, United States v. Lara, 541 U.S. 193 (2004) (The United States represents the interest of the tribe, arguing that tribal courts have the inherent power to prosecute non-member Indians in criminal cases, and that the power is neither delegated by Congress to Indian tribes nor implicitly divested as inconsistent with the status of the tribal sovereign. While this position clearly favors tribal interests, the United States was the appellant and so this variable is coded as "0.").

91. Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (The Court explicitly considered a case filed by the Cherokee Nation with the Court under its original jurisdiction and the Court held that tribes are 'states' but not 'foreign states' and so they do not qualify for the Court's original Article III jurisdiction.).

b. *The Solicitor General in Support of the Tribe*

Solicitor General Supporting the Tribe's Position: (SCProTribe). The Solicitor General is responsible for representing the United States before the U.S. Supreme Court, and "has long exerted significant influence over both the Court's case selection decisions and its substantive decisions on the merits," supporting the winning party almost 90% of the time during the early years of the Roberts Court.[92] The power of the Solicitor is so great that he or she is sometimes referred to as the "Tenth Justice."[93] The Solicitor General is given "great leeway" to determine whether to participate when the United States is not itself a party,[94] and when it chooses to participate it sends a signal to the Court about the merits of the claim.[95]

H₀: Having the Solicitor General appear on behalf of the tribal interest does not change the likelihood the tribal interest succeeds at the Supreme Court

The model tests whether the Solicitor's participation in favor of the tribal interest may affect the outcome of Indian law cases. The model codes each case as "1" if the Solicitor General participated in the case and supported the tribal interest and "0" for all other cases. The Solicitor's participation was determined by examining whether the Solicitor appeared at oral argument. The case does not code for whether the Solicitor may have submitted a brief or responded to a call from the Court for the views of the Solicitor. The case is coded as "1" whenever the Solicitor General appeared to support the pro-Indian position regardless of whether the tribe was the appellant or the appellee.

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92. Cordray & Cordray, *supra* note 86, at 1324.

93. Adam Chandler, *The Solicitor General of the United States: Tenth Justice or Zealous Advocate?*, 121 YALE L.J. 725, 729 n.26 (2011) ("As a theory of the Solicitor General's role, the 'Tenth Justice' model is captured in its most potent form by David Strauss, who wrote that, under a 'Tenth Justice' approach, 'the Solicitor General should simply take the position that reflects his best judgment of what the law is, just as he would if he were literally a Justice.' David A. Strauss, *The Solicitor General and the Interests of the United States*, LAW & CONTEMP. PROBS., Winter/Spring 1998, at 165, 168.").

94. Cordray & Cordray, *supra* note 86, at 1331-32 ("At the merits stage, however, the Solicitor General exercises much greater discretion over whether to enter cases in which the government is not a party, and it is here that the office can 'play partisan hardball.' Although most cases the Solicitor General enters involve legal issues that directly affect federal interests, the office can, and periodically does, participate in cases raising issues of social policy independent of any direct federal interest.").

95. Cordray & Cordray, *supra* note 86, at 1328 n. 27 (*citing* "LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 6 (1987) (reporting that Justice Potter Stewart had said that the justices 'regarded the SG as a "traffic cop," acting to control the flow of cases to the Court')").

c. *The Solicitor General Opposing the Tribe*

Solicitor General Opposing the Tribe's Position: (SGNegTribe). For the same reasons described above it is possible that the Solicitor General's participation opposing the tribe's interest might be an important signal to the justices about the stakes of the case and the strength of the tribe's argument. The Solicitor is particularly likely to participate when the tribe or an individual Indian brings suit against the United States itself.[96] Even together these two variables do not cover all cases in the dataset. In 79 of the 158 cases (exactly half) the Solicitor did not participate at all.

H_o: Having the Solicitor General appear in opposition to the tribal interest does not change the likelihood the tribal interest succeeds at the Supreme Court

The model tests whether the Solicitor's participation against the tribal interest may affect the outcome of Indian law cases. The model codes each case as "1" if the Solicitor General participated in the case against the tribal interest and "0" for all other cases. The Solicitor's participation was determined by examining whether the Solicitor appeared at oral argument. The case does not code for whether the Solicitor may have submitted a brief or responded to a call from the Court for the views of the Solicitor.

d. *The Number of Justices Deciding the Case*

A Decision Made by Fewer Than Nine Justices: (ShortCourt). Supreme Court decisions may be impacted by a vacancy on the bench, whether created by a recusal or after the retirement or death of a sitting Justice and pending the confirmation of a replacement. Professor Jeffrey Stempel has explained that this problem is particularly acute at the Supreme Court level because further review of a decision by a panel unfamiliar with the issue is impossible.[97] The Court is not unaware of the problem, it has ordered cases to be reheard during a following term in an attempt to ensure

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96. *See, e.g.*, United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011) (tribe filing suit against the United States seeking the production of documents under the fiduciary exception to attorney-client privilege); Chickasaw Nation v. United States, 534 U.S. 84 (2001) (tribe filing suit arguing that it was exempt from paying certain gaming related taxes by the Indian Gaming Regulatory Act).

97. Jeffrey Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 646 (1987) ("At the Supreme Court level, this problem is particularly acute. There are only nine Justices, fewer during a vacancy. Once the Supreme Court has decided a case, it is impossible to have a second trial on the merits before an untainted Court unfamiliar with the controversy.").

a full complement of Justices can hear particularly contentious cases.[98] Professor Justin Pidot adds that vacancies create challenges to the institution of the Court, and raise the specter of tied votes which fail to provide definitive guidance on important legal questions.[99] This is no hypothetical matter for Indian law. Justice Scalia's unexpected death resulted in a 4-4 tie on an important question of tribal court jurisdiction in 2016;[100] Justice Kennedy worked on a case involving tribal treaty rights forty years ago when he sat on the Ninth Circuit and had to recuse himself when a version of the case reached the Supreme Court in 2018,[101] resulting in a 4-4 tie; and Justice Gorsuch's previous vote not to hear a case *en banc* when he was on the Tenth Circuit resulted in a 4-4 tie in a diminishment case in 2019.[102] That case was scheduled for reargument, and then the Court granted and decided a related case raising the same legal issue but where Justice Gorsuch was not recused, resulting in a 5-4 victory for the Muscogee Nation.[103]

H₀: Having the case decided by a panel of fewer than nine justices does not change the likelihood the tribal interest succeeds at the Supreme Court

The model tests whether a bench with less than a full complement of nine Justices may play a particular role in determining the outcome of Indian law cases by coding for whether the opinion was decided by fewer than nine Justices. Admittedly this will miss those cases that ended in 4-4

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98. Valerie Hoekstra & Timothy Johnson, *Delaying Justice: The Supreme Court's Decision to Hear Rearguments*, 56 POL RES. Q. 351-60 (2003) ("reargument is most likely to occur when multiple levels of uncertainty are present, even when we control for other factors that have been raised as explanations for this phenomenon").

99. Justin Pidot, *Tie Votes in the Supreme Court*, 101 MINN. L. REV. 245, 245-49 (2016) ("Yet due to death, retirement, or recusal, there have been 164 tie votes in the Supreme Court between 1925 and 2015. These ties have largely, but not entirely, gone unnoticed, in part because few of them involved particularly contentious cases in the eye of the public.").

100. Dollar General Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016). The Court had granted certiorari to determine whether the tribal court could assert jurisdiction over a non-Indian corporation doing business on the reservation for the tortious conduct of one of its employees. The resulting 4-4 decision essentially affirmed the decision of a divided panel of the Fifth Circuit that had held that the tribal court did have jurisdiction. *See* Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167 (5th Cir. 2014).

101. For a discussion of Justice Kennedy's recusal, see Berzon*, supra* note 76, at 1177.

102. Mike McBride, *Reservation Ruling Shows Gorsuch's Tribal Rights Support*, LAW360 (July 17, 2020, 5:48 PM), https://www.law360.com/articles/1292799/reservation-ruling-shows-gorsuch-s-tribal-rights-support [https://perma.cc/4W6J-E2ZH].

103. McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020).

ties since those cases were affirmed by an equally divided Court.[104] The data is coded "1" for each Indian law case where fewer than nine Justices voted and "0" if all nine Justice's had recorded votes. The coding of this variable was not impacted by whether the decision was unanimous or fractured. A 5-4 opinion and a 9-0 opinion are each coded as "0" because a full court of nine Justices voted while an 8-0 or a 4-3 opinion would each be coded "1." In no Indian law case during this period did fewer than seven justices cast a vote. 4-4 opinions were omitted from the dataset entirely as they provided no precedential value nor did they generate opinions.[105]

e. Indian Gaming and the Rise of the "Rich Indian" Stereotype

A Decision Made After Indian Gaming Was Implemented: (AfterGaming). The development of casino gaming on Indian reservations has fundamentally changed some tribal communities by injecting resources and new business opportunities.[106] The tribal casino gaming industry emerged after a Supreme Court decision in *California v. Cabazon Band of Mission Indians* held that states could not regulate tribal gaming activity occurring in Indian country.[107] Indian gaming has brought wealth to some Indian communities but has also encouraged the development of a new stereotype—the 'rich casino Indian.'[108] Could the development of this new stereotype change the Court's approach to Indian law cases?

Professor Matthew Fletcher suggests that an important inflection point occurred around the *Cabazon* decision.[109] "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 *Califor-*

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104. H. Ron Davidson, *The Mechanics of Judicial Vote Switching*, 38 SUFFOLK U. L. REV. 17, 32-33 (2004) ("When cases are tied, the decision below is affirmed by the inaction of the court above.").

105. See *supra* Part III.A for a more complete description of the selection of cases.

106. *See* Steven Andrew Light & Kathryn R.L. Rand, *The Hand That's Been Dealt: The Indian Gaming Regulatory Act at 20*, 57 DRAKE L. REV. 413 (2009).

107. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 221-22 (1987).

108. Robert Odawi Porter, *American Indians and the New Termination Era*, 16 CORNELL J.L. & PUB. POL'Y 473, 482-83 (2007) ("The fifth and last trend—which may be most significant— is the demise of the 'Noble Savage' stereotype in favor of the 'Rich Casino Indian' stereotype. This is a complicated trend to assess. . . . And that is the crux of the problem. As some Indian nations have quite prominently come into wealth, we all have taken on a new identity of 'Rich Casino Indians' in the American consciousness, including the poorest of us who remain in the majority of the Native population."). *See also* William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. KAN. L. REV. 415, 416 n.5 (2016).

109. Fletcher, *supra* note 5, at 935.

nia v. Cabazon Band of Mission Indians, Indians and Indian tribes. . . won nearly 60% of federal Indian law cases decided by the Supreme Court. But since *Cabazon*, tribal interests have lost more than 75% of their cases."[110] Indian success has improved a little since Fletcher's piece was first published, but he has clearly recognized a critically important change in the Court's behavior.[111]

H_o: Having the case decided after *Cabazon* does not change the likelihood the tribal interest succeeds at the Supreme Court

The model tests whether the development of Indian gaming, and new concomitant attitudes about Indians generally, may impact the outcome of Indian law cases by coding for whether the opinion was decided before or after the *Cabazon* decision was handed down.[112] The variable is coded "1" for each case decided after *Cabazon* and "0" for each case decided before it. This variable is coded binomially and does not attempt to represent how many years away from the 1987 opinion the case was decided. Instead it tests whether 1987 was an inflection point in Indian law at the Supreme Court. *Cabazon* itself is coded "0" because the effects of Indian gaming hypothesized here could not have occurred until after the decision was handed down. Admittedly, the reason for changing outcomes in Indian law cases after 1987 may have any number of factors (as discussed in more detail in the analysis part) but scholars point to 1987 as an inflection point because of the change in the economic circumstances of many tribes.

f. *The Origins of the Appeal*

An Appeal from the State Court System: (AppFromState). The appellate jurisdiction of the United States Supreme Court permits appeals from

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110. *Id.*

111. Since *Cabazon* and through July 2020, the Indian interest has prevailed in 21 of 66 cases or 31.8 percent.

112. The development of Indian gaming emerged almost immediately after *Cabazon* was decided. The Indian Gaming Regulatory Act was passed just a year after *Cabazon* in response to tribes scaling up their gaming operations. For a discussion of his history, *see generally* Kevin Washburn, *Agency Conflict and Culture: Federal Implementation of the Indian Gaming Regulatory Act by the National Indian Gaming Commission, the Bureau of Indian Affairs, and the Department of Justice*, 42 ARIZ. ST. L.J. 303 (2010). *See also* Robert Clinton, *Enactment of the Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty?*, 42 ARIZ. ST. L.J. 17 (2010).

both state and federal courts.[113] While the basis for judicial review of a lower court opinion finds its origins in Article III, Congress has codified different statutory provisions for appeals from the federal and state court systems.[114]   Professor David Schlueter suggests that the Supreme Court proceeds more cautiously when reviewing decisions from state courts, occasionally deferring to state supreme court judgments.[115] Most Indian law questions present federal questions which permit litigation in federal courts,[116] but questions of contract enforcement, state taxation, criminal jurisdiction, and family law involving Indians may originate in state court[117] and result in a direct appeal from the state court system to the United States Supreme Court.[118]

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113. *See* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 262 (1985) (discussing the differences between appeals to the Supreme Court from the federal court system and from state courts); *see also* Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919 (2003).

114. 28 U.S.C. § 1254 permits applications for certiorari from lower federal courts while 28 U.S.C. § 1257 allows applications for certiorari from state courts only when the legal question is federal or constitutional in nature. 28 U.S.C. § 1254(a) (2018) ("Cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . ."); 28 U.S.C. § 1257(a) (2018) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.").

115. David Schlueter, *Judicial Federalism and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges*, 59 NOTRE DAME L. REV. 1079, 1080 (1984) (discussing U.S. Supreme Court deference to state courts when there is an adequate and independent state grounds in accordance with Michigan v. Long, 463 U.S. 1032 (1983)).

116. *See* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) (holding that questions of a tribe's jurisdiction present federal questions which can be heard in federal courts); *see also* Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779, 803 (2014) (discussing *National Farmers* and the routes of federal court review in civil cases).

117. *McGirt*, 140 S. Ct. at 2452 (state court determining an Indian reservation was diminished permitting the state to assert criminal jurisdiction); *see also* Wash. State Dep't of Licensing v. Cougar Den, 139 S. Ct. 1000 (2019) (state court determining an Indian treaty provides immunity from state taxation); Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (state court determining the placement decision of an Indian child under the Indian Child Welfare Act); C & L Enters, Inc. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411 (2001) (state court determining if tribe has sovereign immunity when they agree to arbitration in a contract).

118. For a discussion of the confusing jurisdictional overlay in the context of family law, see Barbara Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional*

H₀: Appealing the case from a state court proceeding instead of from a federal proceeding does not change the likelihood the tribal interest succeeds at the Supreme Court

The model tests whether the Supreme Court treats appeals from state courts differently than appeals from federal courts when answering Indian law questions. The data is coded "1" if the case was decided by state courts and then appealed to the Supreme Court and "0" if the case arrived at the Supreme Court through other means. Cases arising under the Supreme Court's original jurisdiction were coded "0" because they were not decided by a state court.[119] Importantly, not all of the state court cases were resolved by a state's highest court.[120] In several cases, the state supreme court refused to hear the appeal from a state trial or appellate court and so the case that was actually appealed to the Supreme Court was a lower state court opinion.[121] These cases are all coded "1" because while they may not have been decided by a state's highest court they are appeals from the state system.

Was a State Sovereign Involved in the Litigation

A State Participating as a Party: (StateParty). A body of political science scholarship suggests that when a state government participates as a party in front of the Supreme Court it is disproportionately likely to be successful.[122] At least one scholar has attributed this success to the fact that

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Ambiguity, 36 UCLA L. Rev. 1051 (1989); for a discussion of the role state courts play in tax cases, see Larry EchoHawk, *Balancing State and Tribal Power to Tax in Indian Country*, 40 IDAHO L. Rev. 623 (2004).

119. *See* Idaho *ex. rel.* Evans v. Oregon, 444 U.S. 380 (1980) (an original jurisdiction case where Idaho contested the allocation of tribal hunting and fishing rights established in treaties involving tribes in the Pacific Northwest).

120. *See* McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164, 167 (1973) (appeal from the Arizona appellate court) ("The Arizona Supreme Court denied a petition for review of this decision, and the case came here on appeal."); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 173 (1989) ("The New Mexico Supreme Court granted, but then quashed, a writ of certiorari. We then noted probable jurisdiction and invited the parties to brief and argue the following additional question . . . ."); Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998) ("The Oklahoma Supreme Court declined to review the judgment, and we granted certiorari.").

121. *Id.*

122. *See* Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187, 187 (1995) ("there is substantial evidence that parties which litigate frequently—the repeat players—accumulate disproportionate rates of success")(internal citation omitted); *see also* Colin Provost, *When to Befriend the Court? Examining State Amici Curiae Participation Before the U.S. Supreme Court*, 11 ST. POL. & POL'Y

states are repeat players before the Court and therefore have learned from experience how to improve their chances,[123] while others suggest that the higher rates of success are attributable to the development of particular divisions to handle appellate work which are capable of accumulating appellate expertise.[124] This paper makes no attempt to explain the relative success of a state as a party to litigation, it merely asks whether the Indian interest is less likely to prevail when it is being opposed by a state entity.

H_o: Having a state party participate in the litigation does not change the likelihood the tribal interest succeeds at the Supreme Court

The model tests whether the Supreme Court treats Indian law cases differently when a state is a party to the litigation by coding for state participation. The data is coded "1" if the state was a named party directly participating in the litigation and "0" if the state was not a party. For purposes of this variable the term 'state' includes state agencies or other state owned/governed entities which would benefit from having the state's attorney participate directly on their behalf. A common example of this in Indian law cases were state tax commissions,[125] but also included human resource offices,[126] state prisons,[127] and environmental officers.[128]

h. *Tribal-State Relations and the Question of Jurisdiction*

Question of State v. Tribal Jurisdiction: (StateJurQuest). Many Indian law cases directly confront jurisdictional questions centered around the

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Q. 4, 6 (2011) ("Between 1981 and 1989, the states won 61.6 percent of their cases. Between 1988 and 2000, they won more than 50 percent every year except 1991.") (internal citations omitted).

123. *See id.*

124. *See* Ryan J. Owens & Patrick C. Wohlfarth, *State Solicitors General, Appellate Expertise, and State Success Before the U.S. Supreme Court*, 48 L. & Soc'y Rev. 657, 657 (2014) ("[A]ttorneys from state solicitor general offices are significantly more likely to win their cases compared to other kinds of state attorneys.").

125. *See* Dep't of Taxation & Fin. v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1995); Okla. Tax Comm'n v. Graham, 489 U.S. 838 (1989); Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685 (1965).

126. Emp't Div., Dep't of Human Res. v. Smith, 485 U.S. 660 (1989) (state denying Indian plaintiffs unemployment benefits because they were fired for using peyote).

127. Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351 (1962) (Indian sued a prison warden to contest his unlawful state imprisonment).

128. Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392 (1968) (tribe appealing prior decisions in favor of state government to prevent it from enforcing state fishing conservation measures against tribal members).

interaction of competing tribal, state, and federal powers.[129] The Court has often used these interactions to opine on issues of federalism,[130] with important cases on the Eleventh Amendment[131] or interpretations of due process and equal protection[132] emerging from Indian law. Professor Matthew Fletcher suggests that in this way the Supreme Court may use Indian law cases in order to reach other important constitutional questions; "From the view of a national decision maker such as a Supreme Court Justice, there is much more to a simple Indian law case than a dispute between Indians, Indian tribes, and the non-Indian individuals, governments, and entities that oppose them. There are questions of equal protection, due process, federalism, jurisdiction, congressional and executive power, and more. Indian law disputes often are mere vessels for the Court to tackle larger questions."[133] Moreover, tribal resources (from casinos to water or natural resources) provide a large potential pool of revenue over which states regularly attempt to assert their authority.[134] At least

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129. For a discussion of these federalism concerns, see generally Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine of Implement Its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267 (2000); Robert Williams, *"The People of the States Where They Are Found Are Often Their Deadliest Enemies": The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981 (1996); Richard Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617 (1994).

130. For a discussion of these federalism concerns, see generally Skibine, *supra* note 129; Williams, *supra* note 129; Monette, *supra* note 129.

131. Seminole Tribe v. Florida, 517 U.S. 44 (1996); *see also* Vicki Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495 (1997); Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1 (2003); Martha Field, *The Seminole Case, Federalism, and the Indian Commerce Clause*, 29 ARIZ. ST. L.J. 3 (1997); Wenona Singel, *The First Federalists*, 62 DRAKE L. REV. 775 (2014).

132. United States v. Wheeler, 435 U.S. 313 (1978) (The double jeopardy clause of the Fifth Amendment does not apply to Indian tribes); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (The equal protection clauses of the Fifth or Fourteenth Amendment do not apply to Indian tribes). *See also* Rebecca Tsosie, *Reconceptualizing Tribal Rights: Can Self-Determination Be Actualized Within the U.S. Constitutional Structure?*, 15 LEWIS & CLARK L. REV. 923 (2011).

133. Fletcher, *supra* note 9, at 580 (2008).

134. Scott A. Taylor, *State Property Taxation of Tribal Fee Lands Located Within Reservation Boundaries: Reconsidering* County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation *and* Leech Lake Band of Chippewa Indians v. Cass County, 23 AM. INDIAN L. REV. 55, 94 (1998) (noting tribes are forced to spend their limited resources defending against state attempts to tax or regulate the land and resources of Indian reservations); Robert William Alexander, *The Collision of Tribal Natural Resource Development and State Taxation: An Economic Analysis,* 27 N.M. L. REV. 387, 390 (1997) ("State taxation can 'crowd out' and otherwise impede a tribe's ability to maximize its rights in resources it owns.").

one paper has suggested that individual Justice voting behavior could be influenced by the jurisdictional questions inherent in the conflict between tribes and states.[135]

H$_o$: Questions requiring the interpretation of state jurisdiction are no more likely to result in a decision favorable to the tribal interest than any other legal issue

The model tests whether cases involving a dispute between state and tribal jurisdiction might be sufficiently unique to help explain the Supreme Court's behavior when resolving Indian law cases. Each case was read carefully to determine whether the resolution of the certified question(s) required the determination of a jurisdictional question between states and tribes. Functionally this variable looks at those cases where a state and tribe are contesting their authority in Indian country. Cases where the state is attempting to tax, to impose its hunting and fishing regulations, to criminally prosecute, or to decide the custody of an Indian child are all examples of where a jurisdictional dispute is present. Recognizing that this is still an amorphous category, the coding of these cases was aided by additional verification from John Hermann and Karen O'Connor who recognized "procedure/jurisdiction" cases were one of the four most common categories of Indian law cases decided during the Burger and Rehnquist courts.[136] Cases that did raise this question were coded "1" and all other cases were coded "0".

i. *Geography: Where the Case Originated*

Tribes are not homogeneous. Differences in tribal culture, history, law, policy, religion, etc. may precipitate different kinds of legal claims. Tribes across the great plains were often subject to allotment,[137] while the Pueblos of New Mexico are notable for holding their lands communally

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135. Christensen, *supra* note 7, at 309 ("[T]he Justices are actually comparatively supportive of tribal claims that states are infringing on tribal rights and powers. . . . [T]ribes prevailed in a slight majority of cases where there existed a conflict in jurisdiction, but were unsuccessful in almost two-thirds of cases where no jurisdictional conflict presented itself.").

136. Hermann & O'Connor, *supra* note 20, at 138-39 ("[w]hat we term procedure/jurisdiction, which are cases that involve questions peculiar to tribal claims or the status of Indian reservations").

137. *See generally* Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

through land grants they can trace back to Spain.[138] I created several variables to test whether the geography of a claim effects the outcome.

Tribes of the Pacific Northwest: (PacNW). This variable is specific to claims from tribes in Washington State and Oregon. The Pacific Northwest has been singled out in Indian law because of its shared treaty history and interrelated legal issues connected to the Columbia River.[139] The Stevens Treaties from the 1850s were negotiated with many of these bands in attendance and share some common characteristics.[140] Tribes in this region also have a unique relationship to contested natural resources (particularly salmon) and so form a distinct interest group.[141]

Tribes from Oklahoma: (Okla). This variable asks whether cases from Oklahoma are treated differently than other cases. Oklahoma was originally the "Indian Territory" where tribes from across the country were moved during the mid–1800s.[142] Because of its status as the Indian Territory it was among the last regions of the country to be formally conferred statehood, and continues to have among the highest populations of American Indians.[143] The Five Tribes (Cherokee, Seminole, Choctaw, Chickasaw, and Muscogee (Creek)) are all located there among a total of 38 federally recognized tribes.[144] It is possible the Court might consider cases coming from Oklahoma differently given its unique American Indian history.

Tribes from the Northern Plains: (NPlains). Tribes across the Northern Plains speak different languages and share different cultures but this was the last region of the continental United States to have Indian claims set-

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138. United States v. Sandoval, 231 U.S. 28 (1913) (discussing the origin of the Pueblos land grants from Spain and differentiating their title from other tribes).

139. *See generally* Bradley I. Nye, *Where Do the Buffalo Roam? Determining the Scope of American Indian Off-Reservation Hunting Rights in the Pacific Northwest*, 67 WASH. L. REV. 175 (1992).

140. Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407 (1998); David A. Bell, *Columbia River Treaty Renewal and Sovereign Tribal Authority Under the Stevens Treaty "Right-to-Fish" Clause*, 36 PUB. LAND & RESOURCES L. REV. 269 (2015).

141. *Id.*

142. For an excellent discussion of the unique role Oklahoma has played in Indian law, see Judith Royster, *Indian Tribes and Statehood: A Symposium in Recognition of Oklahoma's Centennial: Symposium Foreword*, 43 TULSA L. REV. 1 (2007).

143. *Id.* at 1. (Until 1890 Indian Territory and Oklahoma Territory were separate entities. When they combined in 1890 there were already forty-four states admitted to the Union, including every state bordering Oklahoma).

144. *Id.*; *see also* Stacy L. Leeds, *Defeat or Mixed Blessing? Tribal Sovereignty and the State of Sequoyah*, 43 TULSA L. REV. 5 (2007) (discussing the role of the Five Tribes and their proposal for an Indigenous State of Sequoyah).

tled.[145] The last time the United States negotiated a treaty with an Indian tribe as the losing party was the Treaty of Fort Laramie in 1868—where the United States asked the Indians for peace.[146] Given its less hospitable climate, Indians were pushed to the fringes of this region. I have used a definition of Northern Plains that comes from the Indian Health Service.[147] This variable includes all claims that come from tribes located in Michigan, Wisconsin, Minnesota, Iowa, North Dakota, South Dakota, Nebraska, Wyoming, and Montana.[148]

Tribes from the Southwest: (Southwest). Although I recognize there is a great variation of tribal languages and cultures I have grouped tribes in Arizona and New Mexico together. This region includes some of the most populous reservations[149] as well as the Pueblos.[150] Both Arizona and New Mexico have comparatively large proportions of their population who identify as Indigenous and their shared desert climate often links these states together in the American mind.[151]

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145. The Northern Plains region is full of different Indigenous cultures and traditions. The Sioux (Oyate) and the Chippewa perhaps predominate, but among many other cultures—Assiniboine, Mandan, Hidatsa, Arikara, etc. For a well-written and interesting perspective on some of the diverse Indian cultures and related legal issues from this region, see Kristen Matoy Carlson, *In Memorium Diana E. Murphy (1934-2018): Judge Murphy's Indian Law Legacy*, 103 MINN. L. REV. 37 (2018).

146. United States v. Sioux Nation of Indians, 448 U.S. 371, 374 (1980) (discussing the Treaty of Fort Laramie of 1868, which was the culmination of the Powder River War wherein the Sioux, led by Red Cloud, defeated the United States military and won recognition of the Great Sioux Nation).

147. *See Northern Plains Region*, INDIAN HEALTH SERV., https://www.ihs.gov/dcps /regionaloffices/northern-plains-region/ [https://perma.cc/F8GB-LALL] (last visited Oct. 27, 2020).

148. *Id*.

149. Six of the ten most populous Indian reservations are located in Arizona and New Mexico, including the most populous (the Navajo Nation), which spans both Arizona and New Mexico as well as a small part of Utah. *Tribal Reservations*, CDC, https://www.cdc.gov/tribal/tribes-organizations-health/tribes/reservations.html [https://perma.cc/C2GM-89YZ] (last visited Oct. 27, 2020).

150. The early Supreme Court has distinguished the Pueblos from the Southwest from Indians located elsewhere in the country based on racially charged stereotypes. United States v. Joseph, 94 U.S. 614, 617 (1876) ("The pueblo Indians, if, indeed, they can be called Indians, had nothing in common with this class. The degree of civilization which they had attained centuries before, their willing submission to all the laws of the Mexican government, the full recognition by that government of all their civil rights, including that of voting and holding office, and their absorption into the general mass of the population (except that they held their lands in common), all forbid the idea that they should be classed with the Indian tribes for whom the intercourse acts were made . . . .").

151. Karen Tani, *States' Rights, Welfare Rights, and the "Indian Problem": Negotiating Citizenship and Sovereignty, 1935-1954*, 33 LAW & HIST. REV. 1, 4-6 (2015) (documenting the shared struggle of Indians in Arizona and New Mexico to secure the right to vote and

Tribes from California: (Calif). California has the largest number of federally recognized tribes in the continental United States at 109.[152] It also has a large population of urban Indians[153] and many tribes have bene-fitted from casino gaming.[154] It is worth examining whether appeals from these communities might be treated differently by the Court given the unique status of California as home to so many American Indian tribes.

Indigenous People of Alaska/Hawaii Noncontiguous States: (Noncontig). Alaska and Hawaii actually did not become states until after the begin-ning of the Warren Court.[155] Felix Cohen's[156] Handbook of Federal Indi-an Law[157] carves out Alaska and Hawaii as being treated uniquely given the complicated history of their acquisition. Alaska was purchased from Russia with little thought about the rights of the Native Alaskan people who have lives there since time immemorial,[158] while Hawaii was its own Indigenous nation-state until it was conquered by the United States at the end of the nineteenth century.[159] These noncontiguous states have incon-gruous histories which may change the legal basis under which their In-digenous citizens claim rights. There are no treaties with Native peoples

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the struggles tribal communities experienced in both states with their concomitant state governments).

152. *California Tribal Communities*, JUD. COUNCIL OF CAL., https://www.courts.ca.gov /3066.htm [https://perma.cc/B8Q8-ACYV] (last visited Oct. 31, 2020).

153. *Id.*

154. Joshua Sohn, *The Double-Edged Sword of Indian Gaming*, 42 TULSA L. REV. 139, 153-55 (2006) (discussing the unique profitability and public support Indian casino gam-ing has received in California).

155. Alaska and Hawaii entered the union in 1959, while the dataset begins with the start of the Warren Court in 1953.

156. Felix Cohen is widely considered the father of modern Indian law. Kristen A. Car-penter, *Real Property and Personhood*, 27 STAN. ENV'T L.J. 313, 357 (2008) ("Felix Cohen, the founding father of Federal Indian Law"); *see also* Philip Frickey, *Transcending Transcen-dental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649 (2006) (discussing the seminal importance of Felix Cohen and his Handbook to federal Indian law).

157. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton ed., 2012) (ebook) [hereinafter COHEN'S HANDBOOK].

158. COHEN'S HANDBOOK, supra note 157, § 4.07[3] ("From the acquisition of Alaska in 1867, until the 1960s, Alaska Natives had perhaps less visible involvement with the United States government as compared to Indian tribes in the 48 contiguous states. This lack of interaction left Native land claims, hunting and fishing rights, and governmental powers largely intact, although a paucity of court decisions left room for speculation as to the precise bounds of tribal authority and the extent of Native land and other claims.")

159. COHEN'S HANDBOOK, supra note 157, § 4.07[4] ("Although there is a substantial body of federal and state law relative to Hawai'i's Native people, a 2000 United States Supreme Court decision, *Rice v. Cayetano*, has raised concerns about the continued viabil-ity of those laws absent an organized Native Hawaiian government and formal recogni-tion by the United States.").

from either state and much of the common law developed by the courts and applicable to Indians on the mainland has been supplanted by stat–ute.[160]

> **H$_o$: Cases that involve Indians and Indian tribes from the Pacific Northwest are no more likely to prevail than Indian law cases in general**
> **H$_o$: Cases that involve Indians and Indian tribes from Oklahoma are no more likely to prevail than Indian law cases in general**
> **H$_o$: Cases that involve Indians and Indian tribes from the Northern Plains are no more likely to prevail than Indian law cases in general**
> **H$_o$: Cases that involve Indians and Indian tribes from the Southwest are no more likely to prevail than Indian law cases in general**
> **H$_o$: Cases that involve Indians and Indian tribes from California are no more likely to prevail than Indian law cases in general**
> **H$_o$: Cases that involve Indigenous people from Alaska or Hawaii are no more likely to prevail than Indian law cases in general**

The model tests whether the region of the country from which a case arises changes its outcome. Each of the 158 cases was coded for where the issues in front of the court originated. This is notably different than the procedural history of a case because many Indian law cases involved federal agencies and were therefore appealed from the D.C. Circuit Court of Appeals,[161] or involved claims against the United States and so originated in the Court of Claims,[162] or claims filed for breach of trust

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160. *See generally* Heather Kendall-Miller, *ANSCA and Sovereignty Litigation*, 24 J. Land Res. & Env'l L. 465 (2005).

161. Five of the 158 cases were filed by tribes in D.C. Circuit Court of Appeals mostly dealing with the power of federal agencies or Congress. *See, e.g.*, Patchak v. Zinke, 138 S. Ct. 897 (2018) (evaluating whether Congress can remove the jurisdiction of federal courts to hear challenges to decisions by Interior to take land into trust for Indians); Chemehuevi Tribe of Indians v. Fed. Power Comm'n, 420 U.S. 395 (1975) (assessing a challenge by an Indian tribe to the use of water in the Colorado river used to drive thermal power plants).

162. Eight of the 158 cases filed in the Court of Claims were mostly seeking monetary compensation from the federal government. *See, e.g.*, Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) (holding treaty rights survive a tribe's termination unless the treaty has been expressly abrogated); United States v. Mitchell, 463 U.S. 206 (1983) (holding the United States owes monetary damages for failing to manage timber resources under the Indian Forest Resources Management Act).

in the Federal Circuit,[163] or took advantage of the Supreme Court's original jurisdiction.[164] Each case was coded "1" if it originated in the target region and "0" if it arose elsewhere.

There was one case involving Native Alaskans that was decided after Chief Justice Warren was appointed but before Alaska became a state.[165] It was coded "1" for the 'noncontig' variable in recognition that it raised questions of land rights and aboriginal title to Indians in Alaska which were unrelated to the question of statehood. One additional case, *Morton v. Mancari*,[166] involved a Bureau of Indian Affairs (BIA) policy to provide preference to American Indians in the promotion process within the agency.[167] This case did not really arise from any one tribe, although the litigation was appealed to the Supreme Court from New Mexico. Because the policy originated with the Bureau of Indian Affairs and was not tribe specific I coded it as if the case emerged from Washington D.C.

j. *The Federal Appellate Courts*

Cases from the Eighth, Ninth, and Tenth Circuits: (Eighth) (Ninth) and (Tenth). Indian tribes are not evenly distributed across the United States. Almost all American Indian reservations are located in just three federal appellate circuits: the Eighth, Ninth, and Tenth.[168] Moreover, political

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163. Six of the 158 cases filed in the Federal Circuit were mostly claims against the United States for breach of trust. *See* United States v. Navajo Nation, 537 U.S. 488 (2003) (holding the United States is not liable to the Navajo for breach of trust under the Indian Mineral Leasing Act because IMLA did not give the federal government control and supervision over the coal resources).

164. Five of the 158 cases were filed between states pursuant to the Supreme Court's original jurisdiction all dealing with water rights or rights to marine resources like fish, and three of the five were disputes between California and Arizona over water in the Colorado river. Arizona v. California, 530 U.S. 392 (2000); Arizona v. California, 460 U.S. 605 (1983); Arizona v. California, 373 U.S. 546 (1963).

165. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

166. Morton v. Mancari, 417 U.S. 535 (1974).

167. *Id.*

168. Only nine of the 158 Indian law cases were decided by the First-Seventh, or Eleventh Circuits. The Third and Seventh Circuits did not decide a single Indian law case. Carcieri v. Salazar, 555 U.S. 379 (2009) (appeal from First Circuit); City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005) (appeal from Second Circuit); Oneida County v. Oneida Indian Nation, 470 U.S. 226 (1985) (Appeal from the Second Circuit); Oneida Indian Nation v. Oneida County, 414 U.S. 661 (1974) (appeal from the Second Circuit); South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498 (1986) (appeal from the Fourth Circuit); United States v. John, 437 U.S. 634 (1978) (appeal from the Fifth Circuit); Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024 (2014) (appeal from the Sixth Circuit); South Florida Water Management Dist. v. Miccosukee Tribe of Indi-

scientists have shown that the Supreme Court allocates its review of appellate decisions disproportionately—being more likely to review and to reverse some circuits more often than others.[169] Other scholars have noted that appellate courts may "shirk" from following Supreme Court precedent at the margins in order to advance their own ideological agendas.[170] The Supreme Court's review of appellate court behavior is thus an important check on the independence of those courts.[171] Given that different appellate courts are generally treated differently by the Supreme Court, the model tests whether that is true for Indian law cases.

H_o: Appeals from the Eighth, Ninth, and Tenth Circuits are no more likely than other Supreme Court cases to result in a victory for the pro-tribal interest

The coding of these variables is simple. When a case was appealed from the Eighth Circuit it was scored as "1" for the 'Eighth' variable and all other cases were scored as "0". This same process was followed for the variables 'Ninth' and 'Tenth'. There was one case which consolidated appeals from both the Federal Circuit and the Tenth Circuit.[172] It was scored as a "1" for the Tenth Circuit because one of the cases was decided by the Tenth Circuit, and a "0" for both the Eighth and Ninth Circuits. The model did not independently test cases from the Federal Circuit, but if it had I would have coded the case "1" for the Federal Circuit as well.

k. *En Banc Review*

En Banc Review: (En banc). Less than one half of one percent of all federal appellate court cases are decided *en banc* (i.e. by the entire set of active federal appellate judges).[173] In contrast, 14 of the 158 Indian law cases (8.9%) decided by the Supreme Court were appealed from *en banc*

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ans, 541 U.S. 95 (2004) (appeal from the Eleventh Circuit); and Seminole Tribe v. Florida 517 U.S. 44 (1996) (appeal from the Eleventh Circuit).

169. Stefanie A. Lindquist, Susan B. Haire & Donald R. Songer, *Supreme Court Auditing of the US Courts of Appeals: An Organizational Perspective*, 17 J. Pub. Admin. Rsch. & Theory 535, 608, 619 (2007).

170. Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 Am. J. Pol. Sci. 557, 693 (1994).

171. *Id*.

172. Cherokee Nation v. Leavitt, 543 U.S. 631 (2005).

173. Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 Sup. Ct. Econ. Rev. 171, 172 (2001) (providing an example from the Oct. 1999 term).

consideration. Discounting appeals from state courts and cases accepted under the Court's original jurisdiction and the proportion becomes even higher (14 of 112 or 12.5%). Political scientists have two theories about *en banc* opinions; some argue the Court is less likely to hear cases decided *en banc* because those cases have the benefit of review by a larger panel while others suggest that the acceptance of a case *en banc* might serve as a signal of the importance of the case and thus encourage Supreme Court review.[174]

H_o: Appeals to the Supreme Court from an *en banc* review are no more likely than any other case to result in a pro-tribal outcome

This variable was very easy to score. Cases that were decided by an *en banc* panel before being granted certiorari to the U.S. Supreme Court were scored "1" and all other cases were scored "0". Cases appealed from the state court system and cases decided in the first instance by the Supreme Court pursuant to its original jurisdiction were also scored "0" because they were not decided by an *en banc* panel, although admittedly it would have been impossible for them to be heard *en banc* given the nature of their procedural history.

III. Results

Having documented the choices made in the model and the hypothesized relationship between the variables, this part lays out the model's results. It begins by sharing the raw data resulting from the logistic regression model and then provides discussion divided into three parts.

The first part discusses how logistic regression works and how to interpret the values presented in the results. The second part evaluates the fitness of the model itself to determine whether the variables identified explain the Supreme Court's behavior in Indian law cases. The third part examines the independent variables tested in the model and suggests that the independent variables with the most statistically significant relationship to the dependent variable are; 1) whether the tribe is the appellant party, 2) whether the case was decided after the Supreme Court set the baseline for Indian casino gaming, 3) whether the case involved a question of state jurisdiction, and 4) whether the case originated from Oklahoma, the Northern Plains, or the Southwest.

The outcome of the logistic regression is reported here:

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174. *Id.* at 171.

Ind. Variable	Coef.	Std. Err.	Z	P > |z|
TribeAppellant	1.344	0.488	2.76	0.006
SCProTribe	0.569	0.506	1.12	0.261
SGNegTribe	0.680	0.604	1.13	0.260
ShortCourt	0.065	0.549	0.12	0.905
AfterGaming	–1.015	0.440	–2.31	0.021
AppFromState	–0.036	0.673	–0.05	0.957
StateParty	0.171	0.526	0.33	0.745
StateJurQuest	1.260	0.521	2.42	0.016
PacNW	0.655	0.682	0.96	0.337
Okla.	1.566	0.765	2.05	0.041
NPlains	2.024	0.695	2.91	0.004
Southwest	1.669	0.619	2.70	0.007
Calif.	0.152	0.838	0.18	0.856
NonContig.	–0.916	1.233	–0.74	0.458
Eighth	–1.056	0.863	–1.22	0.221
Ninth	0.341	0.606	0.56	0.573
Tenth	0.548	0.687	0.80	0.425
Enbanc	0.444	0.685	0.65	0.517
Constant	–2.468	0.829	–2.98	0.003

No. of Obs.	158
Prob. > Chi^2	0.0000
R^2	0.2452

A. *Brief Discussion of Empirical Metrics*

This model employs logistic regression in order to measure which variables help explain the Supreme Court's behavior in Indian law cases. Logistic regression was chosen because the dependent variable is binary (the Indian interest either won or lost at the Supreme Court on the merits). Because the variance between binary observations is homoscedastic,[175] Ordinary Least Squares (OLS) regression is inappropriate.[176] Unlike

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175. Homoscedastic is simply a term in statistics used to describe a situation in which the variance within each variable in the dataset is the same. In this case the binary data codes each variable "0" or "1" and so the variance for each data point is from 0 to 1. Because all variables are coded this way, the data is homoscedastic.

OLS, logistic regression is specifically designed to model binary data and so provides the best picture of how the independent variables described above explain (or fail to explain) the Supreme Court's Indian law juris-prudence.[177]

The results of the logistic regression test each null hypothesis identified in Part III. For each independent variable; a coefficient, standard error, z-score, and p-value ($P > |z|$) are calculated. The z-score is a test of statistical significance that determines whether or not the null hypothesis can be rejected. Z-scores measure standard deviation. The further the z-score is from zero, the more significant the independent variable. Whether the z-score is positive or negative is a reflection of the rela-relationship between the independent and dependent variables. In this model a negative z-score would imply that if the independent variable is present, it decreases the likelihood of the tribal interest succeeding on the merits while a positive z-score increases that likelihood.

The coefficient is an indicator of how much of an effect a one unit change in the independent variable has on the dependent variable. Because the dependent variable and each of the independent variables are binary these coefficients can be measured against each other to provide a gauge of relative or comparative importance. The coefficient's sign always matches the z-score, where a negative coefficient means the presence of the independent variable reduces the likelihood the tribal interest prevails at the Supreme Court and a positive coefficient increases that likelihood.

However the z-score and the coefficient alone are insufficient to interpret the data. The p-value takes the z-score and provides a probability that the null hypothesis was falsely rejected. In other words the p-value provides the degree of confidence that the reported result is actually the result of the independent variable operating on the dependent variable instead of an observation observed by chance. The smaller the p-value the greater likelihood that the reported relationship is meaningful and that the null hypothesis can be rejected. The results reported here will

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176. Logistic regression is the appropriate statistical regression test when the dependent variable is dichotomous. *See* John H. Matheson, *An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context*, 87 N.C. L. REV. 1091, 1135-36 (2009) ("Logistic regression is a variation of ordinary regression which is used when the dependent (response) variable is a dichotomous variable (i.e. it takes only two values, which usually represent the occurrence or non-occurrence of some outcome event, usually coded as 0 or 1), and the independent (input) variables are continuous, categorical, or both. For instance, in a medical study, the patient survives or dies. Unlike ordinary linear regression, logistic regression does not assume that the relationship between the independent variables and the dependent variable is a linear one. Nor does it assume that the dependent variable or the error terms are distributed normally.")

177. *Id.*

accept a 95% level of confidence and discuss in more detail those relations that are statistically significant at a p-value of 0.05 and below.

B. *Evaluating the Logistic Regression Model*

Before reviewing which variables are statistically significant in explaining the behavior of the Supreme Court in Indian law cases it is important to evaluate how robust the model ultimately is. First, the number of observations is 158. Logistic regression only works if each case has a value for every variable tested by the model. Any independent variable without a value would be omitted when reporting the results of the data. The dataset contains 158 cases and the number of observations used in the model is equal to 158. This indicates that every identified case has a value for each independent variable tested and so no cases were omitted when generating the model.

Taken together the model does a respectable first attempt of modeling the Supreme Court's outcome in Indian law cases. The data taken together is robust. This represents an important step forward in the understanding of Supreme Court behavior.

C. *Explaining Supreme Court Behavior in Indian Law Cases*

While the results of the logistic regression provide coefficients and contrast values for each of the eighteen independent variables, the relationship is not statistically significant for twelve of them and therefore we cannot reject the null hypothesis associated with those variables.[178] We therefore reject the hypothesis that *en banc* decisions, cases coming from the Pacific Northwest, California, or noncontiguous states, the Solicitor general's participation, a court with fewer than nine voting members, appeals from state courts, the existence of a state party, or the specific appellate court have a statistically significant impact on whether the court reaches a pro-Indian outcome. For these variables we cannot reject the null hypothesis.

The remaining six variables are statistically significant. The results for these six variables are discussed below in the order of the confidence with which the null hypothesis can be rejected. These results provide insight into the behavior of the Supreme Court that is useful for both the scholar and the practitioner. They suggest that when trying to obtain an outcome at the Court that favors a tribal interest, advocates should seek cases where the Court is willing to grant a case when the Tribe is the ap-

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178. The measure of statistical significance used here, as described *supra* Part IV.A, is P < 0.05, meaning that an independent variable is considered statistically significant.

pellant, try to frame the issue as one raising a jurisdictional question, target appeals that come from tribes located in Oklahoma, the Northern Plains, or the Southwest, and be generally cautious about taking cases to the Supreme Court in the post-*Cabazon* era.

Cases Where the Tribe is the Appellant: (P-Value of .006). The model provides support for Professor Matthew Fletcher's suggestion that because the appellant wins in a majority of cases in which the Court grants certiorari, Indian tribes should win more often when they are the appealing party.[179] An Indian tribe was the appellant in 66 of the 158 cases (41.77%). For the first time it is possible to quantify the benefit of having a tribal appellant.

Admittedly, these results provide no insight into how the Court decides to grant certiorari, which is a condition precedent to the resolution of the matter on the merits.[180] Moreover, when the tribe wins at the appellate level, it lacks the ability to appeal its case to the Court and therefore tribes often have little control over whether they are the appellant when they have not lost in the proceeding below.[181] However for Supreme Court observers, especially those tasked with identifying or predicting a winner before a case is finally resolved, knowing that the tribal interest is more likely to prevail when an Indian tribe is the appellant is certainly useful.

Cases Requiring the Resolution of a Question of State Jurisdiction: (P-Value of .016). The model suggests that when the Supreme Court is presented with questions of conflicting jurisdiction between tribes and states, all other things being equal the tribal interest is more likely to prevail. This conclusion is consistent with almost two centuries of Supreme Court precedent where the Court has considered its role to protect tribes from states.[182] Remarkably, questions of jurisdiction were present in 77 of the 158 cases collected in the dataset (48.73%).

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179. Fletcher, *supra* note 5, at 935-39 (2009).

180. *See generally* Kevin Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727 (2001); Cordray & Cordray, *supra* note 86; Aaron Tang, *The Ethics of Opposing Certiorari Before the Supreme Court*, 35 HARV. J. L. & PUB. POL'Y 933 (2012).

181. *See generally* Smith, supra note 181; Cordray & Cordray *supra* note 86; Tang *supra* note 181.

182. United States v. Kagama, 118 U.S. 375, 384 (1886) ("Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by congress, and by this court, whenever the question has arisen."); *see also* Robert Williams, *"The People of the States Where They Are Found Are Often Their Deadliest Ene-*

The high level of statistical significance is particularly noteworthy. The model cannot tell us why the Court seems more amenable to cases framed as jurisdictional struggles. Perhaps, as Professor Robert Williams suggests, the Court is playing its role in mediating conflicts of competing sovereigns in order to protect Indian tribes from the excesses of the state.[183] Certainly the Supreme Court has a legacy of being solicitous to tribal concerns when they are threatened by states. From Chief Justice Marshall writing in 1831, "If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined"[184] to Justice Gorsuch in 2020 "[o]n the far end of the Trail of Tears was a promise,"[185] the Court has long viewed its role as protecting tribes from states.

Tribal advocates are advised to consider framing their issues to the Court as questions of state encroachment on tribal jurisdiction. The framing of legal issues matters to the Court. The data suggests that if tribes can get the Supreme Court to frame the issues in Indian law cases as being jurisdictional in nature, the tribal interest is more likely to prevail, especially when that jurisdictional issue pits an Indian tribe against a state.

Cases originating from the Northern Plains (P-Value of .004), Southwest (P-Value of .007), or Oklahoma (P-Value of .042). These variables are interesting. Recall that the pro-Indian interest won 46% of the 158 cases decided since 1953. Thirty-eight of the 158 cases came from the Northern Plains and the tribal interest prevailed in 23 of them (60.5%). Thirty of the 158 cases from the Southwest and the tribal interest prevailed in 17 of them (56.6%). Sixteen of the 158 cases originated from tribes in Oklahoma and the tribal interest prevailed in 10 of them (62.5%). Tribes in these regions performed considerably better than cases arising from tribes in other states. This is valuable information from a purely descriptive level but becomes even more informative when applied to a logistic regression model.

The regression model asks whether the observed effect of greater success might be attributable to something other than the region of the country. For example, could the Solicitor General's participation, or the

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mies": *The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981 (1996).

183. United States v. Kagama, 118 U.S. 375, 384 (1886); *see also* Williams, *supra* note 183.

184. Cherokee Nation v. Georgia, 30 U.S. 1, 15 (1831) (a case brought by the Cherokee Nation seeking to enforce the treaties made with the United States that purported to give the Cherokee Nation and not the State of Georgia power over Cherokee lands).

185. McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020) (a case brought by an Indian to contest Oklahoma's assumption of jurisdiction over crimes committed by Indians on Indian lands and seeking a determination that Oklahoma must respect the original boundaries of the Muscogee Nation's reservation).

jurisdictional nature of the cases, or the fact that the cases were appealed from state or federal court explain the change in outcome. The model rejects with a greater than 95% level of confidence that any of the other independent variables provides an explanation for the more successful outcome in cases that arise from these states.

Admittedly the model captures only about a quarter of the variation in the Supreme Court's ultimate behavior in Indian law cases and so there may be other uncoded variables which are doing some of this work. However the high level of statistical significance even when controlling for the other independent variables does suggest that all things being equal a case has a greater chance of success at the Supreme Court if it arises from one of these three regions no matter how it gets to the Supreme Court (federal appellate courts, state court, or other federal courts, etc.).

Cases decided after 1987 and the legalization of large scale Indian gaming (P-Value of .021). This is the least surprising of the statistically significant variables. Since the *Cabazon* case affirmed the inherent sovereignty of tribes to regulate gaming as long as not prohibited by their surrounding state, Indian interests have prevailed in just 22 of 69 cases (31.9%), but before the *Cabazon* decision Indian tribes had prevailed in 51 of 89 cases (57.3%). The descriptive data alone clearly indicates that Indian tribes have been less successful recently at the Supreme Court.

What the model has added is a confirmation that this trend against tribal success holds true even after accounting for the other independent variables in the model like the participation of the Solicitor General, whether the appeal came from state or federal court, what region of the country the appeal originated in, whether jurisdictional issues were present, etc. The fact that the relationship remains true indicates that there is some element of bias in the Court since 1987 that did not exist in the same way before 1987. The rise of Indian gaming is commonly used as that inflection point.[186]

These results trigger closer scrutiny of the data surrounding 1987. While it is possible that Indian gaming is the reason (or part of the reason) for the lack of success of tribal interests at the Court in the years following 1987, the model merely instructs that the null hypothesis be rejected. It does not necessarily imply that Indian gaming or the *Cabazon* decision was exactly the reason for the change in the Court's behavior. Astute observers might note that a number of other things happened around 1987. Justice Rehnquist was elevated to Chief Justice in 1986, Justice Kennedy succeeded Justice Powell in 1988, and Justice Thomas

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186. *See* Fletcher, *supra* note 5, at 935.

succeeded Thurgood Marshall in 1991. The Court therefore got more conservative at the same time that it decided the *Cabazon* decision.

To place this variable in context it might be helpful to look at the element of time and the changing nature of the Court. The following table breaks down the descriptive statistics of the ultimate success of Indian tribes by decade and by Chief Justice.

	# Pro-Tribe Opinions	Total Cases	Indian % Win
Tribal Success by Chief Justice			
Warren Court (1953–1969)	10	16	62.5%
Burger Court (1969–1986)	39	71	54.9%
Rehnquist Court (1986–2005)	15	51	29.4%
Roberts Court (2005–Present)	9	20	45.0%
Tribal Success by Decade			
1953–1959	3	5	60.0%
1960–1969	7	11	63.6%
1970–1979	23	38	60.5%
1980–1989	20	44	45.5%
1990–1999	6	25	24.0%
2000–2009	5	20	25.0%
2010–2020	9	15	60.0%

The model's observation that 1987 was a relevant turning point in tribal success is accurate given the current data, but there is reason to believe that this may be changing. The appointment of Justice Gorsuch to replace Justice Scalia has altered the balance in Indian law cases, with the tribal interest prevailing in the five most recent Indian law cases[187] (although Justice Gorsuch voted against the tribal interest in one of them).[188] It is worth continuing to watch the Court's behavior in Indian law cases to see if the 1987 inflection point identified in the data loses some of its relevance with the composition of the current Court.

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187. The pro-Indian interest has prevailed in the Supreme Court's five most recent Indian law cases: McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (5-4); Wash. State Dep't of Licensing v. Cougar Den, 139 S. Ct. 1000 (2019) (5-4); Herrera v. Wyoming, 139 S. Ct. 1686 (2019) (5-4); Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649 (2018) (7-2); and Patchak v. Zinke, 138 S. Ct. 897 (2018) (6-3).

188. Justice Gorsuch voted against the tribal interest in Patchak v. Zinke, 138 S. Ct. 897 (2018), but on a question of Congressional power to decide judicial cases.

CONCLUSION

This paper marks the first attempt in the literature to explain the success (and failure) of tribal interests at the Supreme Court over the span of four Chief Justices. The logistic regression analysis has drawn upon a new dataset created specifically to examine the Court's behavior in cases presenting Indian law questions. The results are suggestive of patterns that are unique to Indian law and provide new insights for both practitioners and scholars.

The use of empirical data is designed to usher in a new and important era in the advocacy of Indian interests. Because Indian appellants are more likely to prevail, more effort and resources should be focused on getting the Supreme Court to accept Indian law cases when the Indian interest is the appellant party. Other scholarship suggests that additional amicus briefs[189] may help cases gain attention at the certiorari stage of litigation. Advocates for the advancement of Indian law should build on these strategies to help move more cases from filing to cert worthy when the tribal interest is the appellant party.

The data also provides other important insights for Indian law advocates, some of which may appear counterintuitive. Appellate advocates have the ability to frame legal issues in a variety of ways in an attempt to gain the attention and sympathy of the judiciary.[190] The model presented here suggests that the Court is particularly sympathetic to tribal interests when they are framed as struggles between tribes and states, especially when the fault lines coalesce around issues of jurisdiction. Lawyers should use this information to frame their arguments to the court in terms of jurisdictional disputes or as cases which pit tribes against states. Doing so suggests marginally improving the chances of securing a pro-Indian outcome.

Finally, when possible, advocates for reform in Indian country should try to cultivate cases from the Northern Plains, the Southwest, or Oklahoma. Cases originating in states with larger reservations and more rural populations appear to attract the Court's attention and sympathy differently than cases from the West coast—even after accounting for factors like the Solicitor General's participation, whether the tribal interest is the appellant, whether the case came from a state or federal court, etc. The model does not provide a concrete explanation for why this is true. It may be that the treaty relationship or Congressional treatment of these

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189. Stephen Shapiro, *Certiorari Practice: The Supreme Court's Shrinking Docket*, 24 LITIG. 25, 30 (1998), Greg Caldeira, Jack Wright & Christopher Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J. L. ECON. & ORG. 549, 563 (1999).

190. *See generally* Anne E. Mullins, *Subtly Selling the System: Where Psychological Influence Tactics Lurk in Judicial Writing*, 48 U. RICH. L. REV. 1111 (2014).

areas is somehow different, or that the Southwest, Oklahoma, and the Northern Plains play a particularly important role in the imagination of what Indian country is in the minds of the Court. Regardless of the reason, groups like the Native American Rights Fund who focus on promoting tribal interests should try to cultivate litigation from some places more than others to advance Indian interests.

In addition to explaining the Supreme Court's behavior in Indian law cases, this paper also provides an empirical evaluation of individual Justice's voting behavior in Indian law cases. By ranking the Justices based purely on the proportion of votes cast in support of Indian interests, the Indian law community can better evaluate the Court and its members during the era of tribal self-determination. The data provides general support for the proposition that more liberal Justices are more likely to support the outcome preferred by Indian tribes, but also highlights some noted outliers. For example Justice Stevens, long revered as a champion of civil rights and liberal values, has a decidedly mixed record on Indian law issues siding with the tribal interest in only 39 of 107 recorded votes. In contrast Justice Gorsuch, a recent Republican appointee with a generally conservative voting record, has sided with the tribal interest in 4 of his first 5 Indian law cases.

The rankings show that the current Court contains three of the most supportive Justices for outcomes which favor Indian country, President Obama appointees Justices Sotomayor and Kagan and President Trump's appointee Justice Gorsuch. Since Justice Sotomayor was named to the bench the tribal interest has prevailed in 9 of 15 cases (60%) reversing a trend of declining success in Indian law cases. However, the paper also shows that four of the five most hostile Justices to Indian law issues currently sit on Court. This bifurcation of judicial attitudes in Indian law cases will likely present few unanimous or 9-0 opinions in the coming terms. With such a currently hostile bench, this paper and its conclusions become even more important—attempting to identify the issues, parties, and conditions that are most likely to maximize success at the Court for Indian tribes.

Let me end with a call for more scholarship. The canon of empirical work on judicial behavior is deep, but almost none of it singles out Indian law for consideration. This paper provides the first robust dataset in twenty years that looks at Indian law cases as a distinct subset of the Court's jurisprudence, and has begun to explain only part of the variance of the Court's behavior in Indian law cases. Indian law needs to catch up.

Future scholars could do more to predict/explain individual Justice's votes in Indian law cases, explore the role of amicus briefs in Indian law cases at the certiorari stage and on the merits, evaluate the role of brief writers or oral advocates, mine the language of the Court's opinions for nuances about attitudes toward Indian law, further explore the con-

nection between political ideology and Indian law, examine dissenting or concurring opinions, etc. There is so much more to learn about the Supreme Court's behavior in Indian law cases that has the potential to transform how Indian law advocates go about presenting their claims. Further empirical analysis of these questions would be warmly welcomed by both scholars and practitioners.