

# FACTBOUND AND SPLITLESS: THE CERTIORARI PROCESS AS BARRIER TO JUSTICE FOR INDIAN TRIBES

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*The Supreme Court's certiorari process does more than help the Court parse through thousands of "uncertworthy" claims—the Court's process creates an affirmative barrier to justice for parties like Indian tribes and individual Indians. The Court has long maintained that the certiorari process is a neutral and objective means of eliminating patently frivolous petitions from consideration. But this empirical study of 163 preliminary memoranda, recently made available when Justice Blackmun's papers were opened, demonstrates that the Court's certiorari process is neither objective nor neutral. The research, reflecting certiorari petitions filed during October Term 1986 through 1993, demonstrates that statistically, there is a near zero chance the Supreme Court will grant a certiorari petition filed by tribal interests. At the same time, the Court grants certiorari to far more petitions filed by opponents of tribal sovereignty.*

## INTRODUCTION

Professor Edward Hartnett once asserted that the certiorari process, which defines the Supreme Court's power to decide its own docket, "has had a profound

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role in shaping our substantive constitutional law.”<sup>1</sup> The power to choose a few select cases among several thousand petitions each year is an awesome power. Hartnett challenged future scholars to perform an empirical analysis of the impact of the certiorari process on substantive constitutional law. There are a growing number of empirical studies of the Supreme Court’s agenda-setting through the certiorari process,<sup>2</sup> but few scholars have examined the impact of the certiorari process on a substantive area of constitutional law. This Article takes up that challenge.<sup>3</sup>

To meet Hartnett’s challenge, this Article reviews 163 preliminary memoranda written by Supreme Court clerks in the certiorari decision-making process (the “cert pool memos”)<sup>4</sup> during the 1986 through the 1993 docket years, memoranda only recently made public in the Digital Archive of the Papers of Justice Harry A. Blackmun.<sup>5</sup> The Article only studies memos from federal Indian law cases.<sup>6</sup> A study of the cert pool memos in a single subject area offers unique possibilities. It is, after all, the Supreme Court clerks who serve as the first gatekeeper to the Supreme Court. Moreover, the influence of the cert pool memo in moving a case onto the Court’s “discuss list” and then to certiorari is critical, yet understudied.<sup>7</sup> In most instances, the cert pool memos are the only writing from the Court discussing the cases in which the Court denies certiorari. Studies show that when the author of a cert pool memo recommends denial, other Justices’ clerks generally spend little or no time arguing to grant certiorari.<sup>8</sup>

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

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

3. Cf. Hartnett, *supra* note 1, at 1732 (noting how the certiorari process has affected the development of incorporation theory).

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

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

6. This number excludes seven cert pool memos analyzing unpaid petitions.

7. Previous scholarship on the “discuss list” did not study the cert pool memoranda, perhaps because it largely was unavailable. E.g., Caldeira & Wright, *supra* note 4. Research on the Blackmun digital archive is nascent. See, e.g., Ryan Schoen & Paul J. Wahlbeck, *The Discuss List and Agenda-Setting on the Supreme Court* (Mar. 5, 2007), 1st Annual Conference on Empirical Legal Studies Paper, available at <http://ssrn.com/abstract=912783>.

8. See David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 974 (2007) (“[B]ecause recommendations to deny are the norm, law clerks pay far less attention to those recommendations than to recommendations to grant during the annotation process,

Federal Indian law was a natural choice of focus, not only because of this author's experience in the subject matter, but also because of the fortuitous timing of the memos' release. Something extraordinary has been happening in federal Indian law. From 1959, the generally recognized beginning of the modern era of federal Indian law,<sup>9</sup> to 1987, when the Supreme Court decided the major Indian gaming case *California v. Cabazon Band of Mission Indians*,<sup>10</sup> Indians and Indian tribes (to whom this Article will often call "tribal interests") won nearly 60% of federal Indian law cases decided by the Supreme Court.<sup>11</sup> But since *Cabazon*, tribal interests have lost more than 75% of their cases. The sample under study—from 1986 to 1993—covers the first years of this radical turnaround. Consistent with the overall pattern of the period, tribal interests lost about 75% of their cases during the period under study.

The research presented in this Article reveals powerful evidence that the Supreme Court's certiorari process harshly discriminates against the interests of Indian tribes and individual American Indians. During the period analyzed in this study—October Terms (OT) 1986 through 1993—the Supreme Court granted certiorari *once* out of ninety-two Indian tribe and tribal interest petitions (excluding three unpaid *in forma pauperis* prisoner petitions involving indigent Indians in which the Court granted certiorari).<sup>12</sup> During the same period of time, the Court granted cert *fourteen times* out of a mere thirty-seven petitions filed by states and local units of government against tribal interests—more than a third of the petitions. Other petitioners opposing tribal interests did not fare as well as state governments, but the Court still granted their petitions significantly more often than tribal parties (four grants out of twenty-eight petitions). This difference is statistically significant.<sup>13</sup> Because so few tribal petitions are granted, and relatively so many petitions filed by opposing parties are granted, the number of cases where a tribal party is the respondent—and at a clear disadvantage statistically—is overwhelming.

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increasing the likelihood that an issue of importance will be overlooked.") (citing PERRY, *supra* note 2, at 63).

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

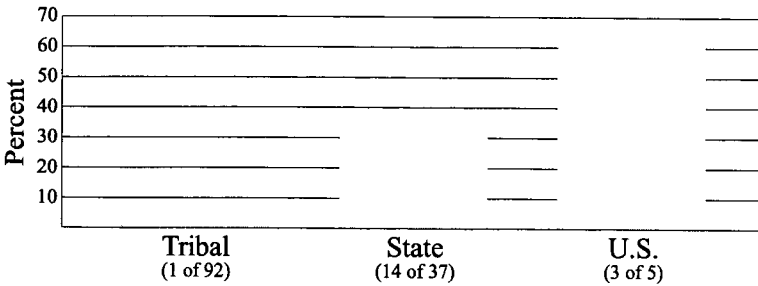
10. 480 U.S. 202 (1987) (holding that the State of California had no authority to regulate the high-stakes bingo operations of the Cabazon Band).

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

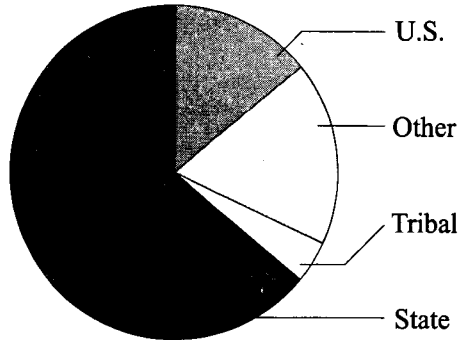
12. There are two major classes of cert petitions—paid and unpaid. "Paid petitions" are petitions filed by parties with the means to pay the filing fee, while "unpaid petitions" are filed by parties without the means to pay the filing fee, often referred to as *in forma pauperis* (IFP) petitions.

13. A chi-square analysis is used to evaluate the associations between categories by determining whether differences in the observed frequencies and the expected frequencies may be the result of chance. A chi-square analysis indicated that the difference between these two groups is statistically significant and thus unlikely to be due to chance,  $\chi^2(1, N = 129) = 34.68, p < .01$ . (Chi square analysis on file with author.)

**Table 1**  
**Cert Petition Success by Party: OT 1986–1993**



**Table 2**  
**Party as Petitioner: OT 1986–1993**



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.<sup>14</sup> Of the twenty-two petitions granted, the tribal interest was a respondent in twenty of the cases, was the petitioner once, and was not present once.

The bare statistics are incredible. The question remains—how does the Court’s certiorari process discriminate so wildly against tribal interests? The Supreme Court’s certiorari process, which includes the clerks that do much of the Court’s work, discriminates against Indians and Indian tribes in two ways. First, the Court undervalues the merits and importance of petitions filed by tribal interests. Second, the Court overvalues the merits and importance of petitions filed by the traditional opponents of tribal interests—state governments and, to a lesser extent, the federal government and private entities. In shorthand, if a tribe or an

14. See Harvard Law Review, *The Supreme Court—The Statistics*, 122 HARV. L. REV. 516, 524 (2008) (reporting that the Supreme Court reversed or vacated forty-five cases while affirming only twenty-two in the 2007 Term). Cf. generally S. Sidney Ulmer, *The Decision to Grant Certiorari as an Indicator to Decision “On the Merits,”* 4 POLITY 429 (1972).

Indian loses in the federal courts of appeal, the Court will almost never review the case, but if a state loses against a tribe or an Indian, the Court often grants certiorari. This imbalance skews the development of federal Indian law doctrine.

Emblematic of how the certiorari process undermines tribal interests is *Elliott v. Vermont*.<sup>15</sup> *Elliott* is a case about aboriginal hunting and fishing rights of the Abenaki people. The cert pool memowriter recommended that the Court deny the petition because it was both factbound and splitless, as are nearly all Indian treaty claims.<sup>16</sup> But the memowriter acknowledged that the petitioners had a valid claim. The Vermont Supreme Court applied the wrong standard—in fact, that court had created a new common-law standard out of whole cloth—and the court had refused to consider important evidence favoring the exercise of the aboriginal rights. Despite a strong showing that the lower court had committed reversible error, the Supreme Court denied the petition.

This Article argues that the certiorari *decisions* made by the Supreme Court tend to prejudice tribal interests because the entire certiorari *process*—especially the participation of the clerks—slants the Court's certiorari decisions against tribal interests in subtle but unmistakable ways. It would be tempting to argue that the Supreme Court's agenda has shifted from more of a balance of tribal and non-tribal interests since 1987 to an agenda that is opposed to tribal interests on most levels. This Article, backed with empirical support drawn from the cert pool memos, offers a theory different than mere agenda-setting: that *the certiorari process itself creates conditions that lead the Supreme Court to accept cases that are likely to be decided against tribal interests.*

*Elliott* is a good example of how the certiorari process and the cert pool create conditions that prejudice tribal interests. *Elliott* is typical of cases that arise between tribal interests and others; namely, that conflict arises out of attempted enforcement of Indian treaty rights and the subsequent exclusion of state law and regulation. Critically, memowriters recognize that tribal claims are usually based on a single treaty or statute grounded deep in American history.<sup>17</sup> The treaty's terms and history are bound to a particular territory,<sup>18</sup> so a law clerk would be hard-pressed to argue that the case has national implications. 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. 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

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15. 507 U.S. 911 (1993) (No. 92-877).

16. Cert Pool Memo at 13–14, *Elliott v. Vermont*, 507 U.S. 911 (1993) (No. 92-877), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/92-877.pdf> (“The case is sui generis . . .”).

17. E.g., Cert Pool Memo at 7, *W. Shoshone Nat'l Council v. Molini*, 506 U.S. 822 (1992) (No. 91-1916), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/91-1916.pdf>.

18. E.g., Cert Pool Memo at 7, *Lummi Indian Tribe v. Washington*, 507 U.S. 1051 (1993) (No. 92-1445), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/92-1445.pdf>.

Court. This, according to the Court's own rules, it will rarely do. Finally, as memowriters demonstrate time and again, the cert pool members assume tribal interests are not important to their audience.

The first part of this Article provides a short description of the certiorari process and, in particular, the cert pool. It describes the origins of the Court's discretionary docket and the modern certiorari process. Part I will also introduce Supreme Court Rule 10 (Rule 10), which lists the subjective and objective factors the Court uses to decide whether or not to grant a petition for certiorari. It continues by describing cert pool mechanics and how they relate to the "discuss list"<sup>19</sup> and the Conference, where the Justices privately meet to deliberate on whether or not to grant certiorari in a given case.

Part II offers a historical review of modern Indian law during the study time period. The beginning of the period under study reflects not only the early Rehnquist Court, but the start of a major yet subtle change in the Court's Indian law decisions. Specifically, from 1959's *Williams v. Lee*<sup>20</sup> to 1987's *California v. Cabazon Band of Mission Indians*,<sup>21</sup> the Court's rulings favored tribal interests a majority of the time. Since *Cabazon*, however, the Court has changed course, ruling against tribal interests most often. In fact, consistent with recent decades, during the eight years of this study, the Court ruled in favor of tribal interests only one-quarter of the time.

Part III is the heart of the study. Here, the Article offers an extensive, qualitative examination of the Court's certiorari decisions during the eight year period. The analysis begins with the text of Rule 10, which divides the Court's decision-making factors into four main categories: (1) splits in authority; (2) importance; (3) gross error by lower courts; and (4) the factual character of the dispute. The vast majority of Indian law certiorari petitions are denied because they are "splitless" and "factbound." It appears from cert pool memos that clerks recommend denial of tribal cert petitions because the decision-making factors almost always weigh against tribal interests. The study demonstrates that the certiorari process, often considered the linchpin to the Supreme Court's agenda-setting, does more than merely set the Court's docket. The certiorari process *drives* the Court toward accepting Indian law cases weighted against tribal interests.

Not only does Rule 10 prejudice tribal interest petitions, but the research indicates that the Supreme Court favors some substantive issues over others. The study demonstrates the Court's special dispensation *against* tribal interests.

Supreme Court clerks with little institutional memory, little knowledge of American Indian history, and working in a "culture" of certiorari denial, almost

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19. The "discuss list" is the list of cert petitions generated by the Chief Justice and circulated amongst the Justices prior to each Conference. Any Justice can add a petition to the discuss list. If a petition does not reach the discuss list, it is effectively "dead." For a history of the "discuss list" and how it derived from the "dead list," see Caldeira & Wright, *supra* note 4, at 809-15.

20. 358 U.S. 217 (1959) (holding that a state court has no jurisdiction over a civil claim arising in Indian Country brought by a non-Indian plaintiff against an Indian defendant).

21. 480 U.S. 202 (1987).

never recommend a grant to petitions filed by tribal interests. Moreover, the clerks rarely find that tribal interests are of national legal importance sufficient to attract the interest of the Court. Impressively, the comparative interests of the states opposing tribes are often deemed—without discussion—important.

## I. THE CERTIORARI PROCESS

### A. *The Origins of the Modern Certiorari Process*

The modern certiorari process originated in the 1925 Judges' Bill,<sup>22</sup> in which Chief Justice Taft argued to create a discretionary docket for the Supreme Court.<sup>23</sup> This grant of discretion was to lighten the Court's workload, which had become overwhelming. As the Court's backlog of cases grew, its decisions slowed to a snail's pace, taking "eighteen to twenty-four months for the Court to reach a case on its docket."<sup>24</sup>

### B. *The Mechanics of Modern Certiorari Decision-Making*

The way the Supreme Court decides to accept a petition for certiorari has long been a virtual mystery,<sup>25</sup> except perhaps to those involved in the process.<sup>26</sup> What is known is that the Court grants cert in only a handful of cases—often less than 100 a year—out of over several thousand petitions filed each Term.<sup>27</sup> When a litigant receives an adverse judgment from a federal court of appeal or the highest court of a state judiciary, the party may seek Supreme Court review. To do so, it must file a petition for certiorari with the Court—a "cert petition." Opposing parties may file an opposition—a "cert opposition" or "cert opp." Even amici may file briefs at this time.<sup>28</sup> Each of the Supreme Court Justices hires clerks—usually recent law school graduates with some experience in lower

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

23. See Hartnett, *supra* note 1, at 1660–1704.

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

25. *Cf.* Stras, *supra* note 8, at 947 (referencing "the shroud of secrecy surrounding the Court"); Ulmer, *supra* note 14, at 432–33 (critiquing the Court's "[s]ecret decision making").

26. *Cf.* Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1501, 1526 (2008) (arguing that the Supreme Court bar, often former clerks, dominates advocacy before the Court).

27. *E.g.*, Harvard Law Review, *supra* note 14, at 523 (reporting that the Court considered over 8374 certiorari petitions and granted 95 during the 2006 Term).

28. *See* Caldeira & Wright, *supra* note 4, at 816 (asserting that amicus briefs at the certiorari stage are critical to providing hints to the Court about the importance of a case).

federal courts—who review all the cert petitions, cert oppositions, and amicus briefs. The clerks prepare a short memorandum, formally known as a “preliminary memorandum,” in which they summarize the facts, the procedural history, and the claims of the parties. They include a short discussion with candid commentary on the relative merits of the petitions and recommend the Court either grant or deny the petition. In some instances, especially when the federal government has an interest or special expertise in an area of law addressed by a cert petition (federal Indian law being a prime example), they recommend that the Court seek input from the United States, represented by the Solicitor General—Call for the Views of the Solicitor General (CVSG).<sup>29</sup>

Seven of the nine current Justices (Justices Alito and Stevens excluded) participate in what is known as the “cert pool,” whereby the law clerks are assigned a docket number and asked to write a preliminary memorandum (colloquially known as a cert pool memo) about the petition.<sup>30</sup> During the period addressed by this study—the 1986 through the 1993 Terms—fewer Justices participated in the pool. Justices Brennan, Marshall, and, as noted above, Stevens, did not participate, although they each received copies of every cert pool memo.<sup>31</sup>

The cert pool memos are the Court’s first take on whether a case is “certworthy,” an internal term of art that can be best defined by referring to Supreme Court Rule 10, which governs the exercise of judicial discretion the Court is allowed when making certiorari decisions. Rule 10 indicates that the Court will review petitions for numerous factors, including: (1) whether “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;”<sup>32</sup> (2) whether “a United States court of appeals . . . has decided an important federal question in a way that conflicts with a decision by a state court of last resort;”<sup>33</sup>

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

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

30. See Stras, *supra* note 8, at 953; Tony Mauro, *The Supreme Court Cert Pool: Sotomayor Joins It, Lawyers Attack It*, THE BLT: THE BLOG OF LEGALTIMES, Setp. 21, 2009, available at <http://legaltimes.typepad.com/blt/2009/09/sotomayor-joins-the-cert-pool.html>.

31. See Stras, *supra* note 8, at 953.

32. SUP. CT. R. 10(a).

33. *Id.*



(3) whether “a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power;”<sup>34</sup> (4) whether “a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;”<sup>35</sup> (5) whether “a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court;”<sup>36</sup> or (6) whether “a state court or a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court.”<sup>37</sup> Running throughout the rule is the requirement that the question presented must be “important.” Rule 10 also states that “[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”<sup>38</sup>

Primarily, the Court looks for cases in which lower courts are split or lower court decisions conflict with the Court’s own precedents.<sup>39</sup> In the rare circumstance where a lower court has made a decision that appears to be an exceptional departure from normal “proceedings,” the Court may be inclined to exercise its supervisory power. The Court avoids petitions asking it to review a lower court’s findings of fact or application of a settled legal standard to specific facts. In the parlance of the cert pool memo, cases in which there is no split in authority are “splitless.” Cases in which a party is asking the Court to review a lower court’s application of specific facts to a settled legal principle are “factbound.” It is clear from reading the cert pool memos contained in Justice Blackmun’s archives that the vast majority of Indian law-related cert petitions are “factbound” or “splitless”—and often both.

Cert pool memos feature the Supreme Court clerks’ recommendations on whether to grant or deny a petition, or in other cases to seek the views of the Solicitor General or hold a case, which means to not make a decision on the case until another, similar case, is pending. These recommendations often are hedged by a note that a case is a “close call.” Not even the clerks can predict when the Court will find a case “important” enough to justify granting the petition. The Court might find some clear circuit splits too insignificant to resolve. In other instances, the clerks note that a split is weak or illusory, which could mean that there appears to be a split in authority, but one of the lower court cases forming the split might have been resolved by alternative means. It could also mean that the split is only dicta, or that the kind of dispute creating the split is unlikely to recur. In short, most cases that are important enough are placed on the so-called “discuss list.”

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34. *Id.*

35. SUP. CT. R. 10(b).

36. SUP. CT. R. 10(c).

37. *Id.*

38. SUP. CT. R. 10.

39. See WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS*

Once the “discuss list” is compiled, the Justices confer, reviewing the merits of granting cert to each case. Ultimately, if four Justices vote to consider a case, cert is granted. If the requisite four votes are not obtained, cert is denied.

## II. THE RISE AND FALL OF FEDERAL INDIAN LAW

### A. *The Court’s Indian Law Docket (1959–Present)*

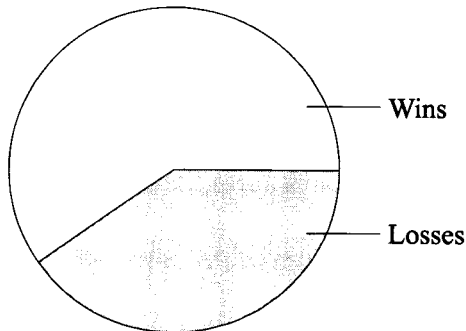
The modern era of federal Indian law began in 1959 with the Supreme Court’s decision in *Williams v. Lee*, recognizing for the first time inherent tribal sovereignty sufficient to defeat state interests.<sup>40</sup> While Indian law cases have been relatively few, few Supreme Court Terms since 1959 have not included at least one or two, and a typical Supreme Court Term includes about three Indian law cases.

The Court has decided 130 federal Indian law cases since 1959.<sup>41</sup> On the merits, tribal interests (Indians, Indian tribes, and parties directly or indirectly representing tribal interests) won sixty cases, lost sixty-six cases, and “tied” in four cases that cannot be classified as a clear victory or loss.

#### 1. *Tribal Interests Success Rate: OT 1959–1985*

From the 1959 through the 1985 terms, the Court issued eighty-two Indian law opinions on the merits. Tribal interests won forty-nine cases and lost thirty-three.

**Table 3**  
**Tribal Interests Success Rate before Supreme Court:**  
**OT 1959–1985**



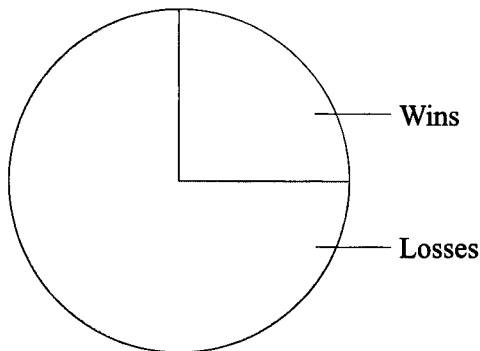
40. 358 U.S. 217 (1959). Charles Wilkinson is best known for identifying the case as the first in the “modern era.” CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 1 (1987).

41. See Turtle Talk Blog, *Supreme Court*, <http://turtletalk.wordpress.com/resources/supreme-court-indian-law-cases/> (listing all the federal Indian law Supreme Court cases and their outcomes since 1959). The *United States Law Week* classifications of “Indians” or “Native Americans,” supplemented by Westlaw’s “Indians” headnote category, were the basis for determining which cases were Indian law cases.

### 2. Tribal Interests Success Rate: OT 1986–2006

During the 1986 through the 2006 Terms, the Court issued forty-eight Indian law opinions on the merits. Tribal interests won eleven cases, lost thirty-three cases, and “tied” in three cases.

**Table 4**  
**Tribal Interests Success Rate before Supreme Court:**  
**OT 1986–2006**



### 3. Tribal Interests Success Rate: OT 1986–1993

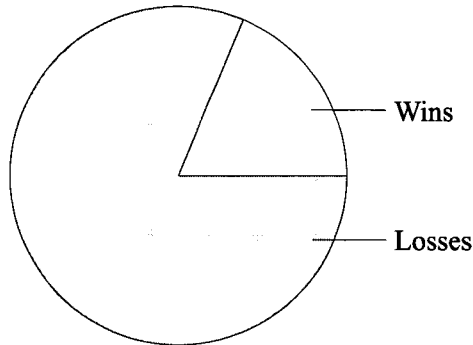
During the period of this study (the 1986 Term through the 1993 Term), there were 163 paid certiorari petitions involving federal Indian law. The Court granted certiorari in twenty-two of these cases<sup>42</sup> and in another three unpaid petitions.<sup>43</sup> Of the twenty-two grants of paid petitions, the Court issued five GVRs

42. See *Dep't of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994) (No. 93-377); *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993) (No. 92-259); *South Dakota v. Bourland*, 508 U.S. 679 (1993) (No. 91-2051); *Lincoln v. Vigil*, 508 U.S. 182 (1993) (No. 91-1833); *Dep't of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 502 U.S. 1053 (1992) (No. 91-907) (GVR); *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992) (Nos. 90-408 & 90-577); *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) (No. 89-1782); *Puckett v. Native Village of Tyonek*, 499 U.S. 901 (1991) (No. 89-609) (GVR); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991) (No. 89-1322); *Employment Div. v. Smith*, 494 U.S. 872 (1990) (No. 88-1213) (*Smith II*); *Wyoming v. United States*, 492 U.S. 406 (1989) (No. 88-309) (affirmed by an equally divided Court); *Okla. Tax Comm'n v. Graham*, 489 U.S. 838 (1989) (No. 88-266); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (Nos. 87-1622, 87-1697 & 87-1711); *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163 (1989) (No. 87-1327); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (No. 87-980); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (No. 86-1013); *Employment Div. v. Smith (Smith I)*, 485 U.S. 660 (1988) (Nos. 86-946 & 86-947); *Okla. Tax Comm'n v. Graham*, 484 U.S. 973 (1987) (No. 87-635) (GVR); *Hodel v. Tribal Village of Akutan*, 480 U.S. 943 (1987) (Nos. 86-303 & 86-304) (GVR).

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

(granting the petition, vacating the lower court decision without opinion, and remanding back to the lower court). After the consolidation and remand of some petitions (and with one affirmed by an equally divided Court), the Court issued seventeen opinions on the merits, with tribal interests winning three and losing fourteen—an 18% success rate.

**Table 5**  
**Tribal Interests Success Rate before Supreme Court on the Merits:**  
**OT 1986–1993**



#### 4. *Cert Petition Success Rate: OT 1986–1993*

Also during the period of this study, states, state subdivisions, and state officials filed thirty-seven certiorari petitions against tribal interests.<sup>44</sup> The Court granted certiorari in fourteen cases, with two cases GVR'd. The states won eight of these cases on the merits, losing three. Indians and Indian tribes filed twenty-eight petitions against state interests, with the Court granting certiorari in *none* of these cases.<sup>45</sup> The success rate of states in the certiorari process was 38% (fourteen out

44. The Court denied certiorari in *City of Timber Lake v. Cheyenne River Sioux Tribe*, 512 U.S. 1236 (1994) (No. 93-1753); *New Mexico v. Navajo Nation*, 507 U.S. 986 (1993) (No. 92-1238); *County of Inyo v. Gutierrez*, 506 U.S. 1028 (1992) (No. 92-686); *Wisconsin v. Lac du Flambeau Band of Chippewa Indians*, 506 U.S. 829 (1992) (No. 91-2037); *Ponca City v. Hous. Auth. of the Kaw Tribe of Indians*, 504 U.S. 997 (1992) (No. 91-1480); *Washington v. Colville Confederated Tribes*, 502 U.S. 997 (1992) (No. 91-569); *South Dakota v. Spotted Horse*, 500 U.S. 928 (1991) (No. 90-1003); *Connecticut v. Mashantucket Pequot Tribe*, 499 U.S. 975 (1991) (No. 90-871); *South Dakota v. Rosebud Sioux Tribe*, 500 U.S. 915 (1991) (No. 90-749); *Nevins v. Hoopa Valley Tribe*, 495 U.S. 1055 (1990) (No. 89-686); *South Carolina v. Catawba Indian Tribe*, 491 U.S. 906 (1989) (No. 88-1752); *Alaska v. Kanaitze Indian Tribe*, 491 U.S. 905 (1989) (No. 88-1642); *Iowa v. United States*, 490 U.S. 1090 (1989) (No. 88-1636); *Okla. Tax Comm'n v. Muscogee (Creek) Nation*, 487 U.S. 1218 (1988) (No. 87-1068); *Montana v. Crow Tribe of Indians*, 484 U.S. 1039 (1988) (No. 87-343); *Jackson County v. Swayney*, 484 U.S. 826 (1987) (No. 86-1978); *McKenzie County Soc. Servs. Bd. v. V.G.*, 480 U.S. 930 (1987) (No. 86-996); *N.M. Taxation Dep't v. Ramah Navajo Sch. Bd.*, 479 U.S. 140 (1986) (No. 86-367).

45. The Court denied certiorari in *Lummi Indian Tribe v. Whatcom County*, 512 U.S. 1228 (1994) (No. 93-1742); *United Keetoowah Band v. Okla. Tax Comm'n*, 510 U.S. 994 (1993) (No. 93-616); *Lummi Indian Tribe v. Washington*, 507 U.S. 1051 (1993) (No.

of thirty-seven petitions), while the success rate for tribal interests against states was 0% (zero out of twenty-eight petitions). Private parties (non-Indian and non-states) filed thirty-nine certiorari petitions and the Court granted four of the petitions, a 10% grant rate. The Court granted certiorari in three out of five of the petitions filed by the United States, consistent with the 70% success rate the United States generally has as a petitioner.<sup>46</sup> The only cert petition filed by an Indian tribe granted by the Court was against an Indian couple trying to avoid the application of the Indian Child Welfare Act.<sup>47</sup>

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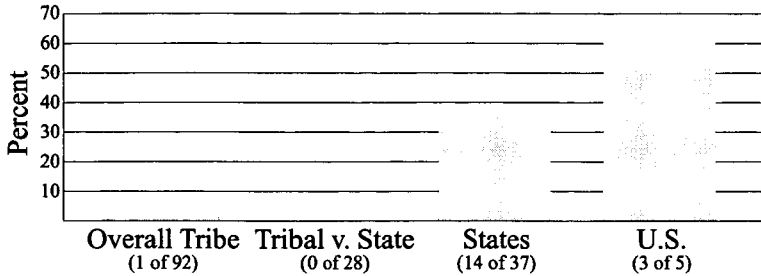
92-1445); *Catawba Indian Tribe v. South Carolina*, 507 U.S. 972 (1993) (No. 92-1088); *Elliott v. Vermont*, 507 U.S. 911 (1993) (No. 92-877); *Sac & Fox Nation v. Okla. Tax Comm'n*, 506 U.S. 975 (1992) (No. 92-499); *Wyandotte Indian Tribe v. Oklahoma ex rel. Okla. Tax Comm'n*, 501 U.S. 1219 (1991) (No. 90-1756); *Oyler v. Kansas*, 502 U.S. 810 (1991) (No. 90-1704); *Indian Child Welfare Act Coordinator of the Juvenile Court of the Cheyenne River Sioux Tribe v. Chester County Dep't of Soc. Servs.*, 500 U.S. 918 (1991) (No. 90-1493); *King Island Native Cmty. v. Mo. Dep't of Soc. Servs.*, 500 U.S. 917 (1991) (No. 90-1306); *Cross v. Washington*, 499 U.S. 922 (1991) (No. 90-1162); *Osceola v. Fla. Dep't of Revenue*, 498 U.S. 1025 (1991) (No. 90-653); *Oyler v. Jones*, 498 U.S. 896 (1990) (No. 90-223); *Ahtna, Inc. v. Alaska*, 495 U.S. 919 (1990) (No. 89-1446); *Hoopa Valley Tribe v. Nevins*, 494 U.S. 1055 (1990) (No. 89-890); *Oneida Indian Nation of Wis. v. New York*, 474 U.S. 823 (1985) (Nos. 88-1758 & 88-1915); *Omaha Indian Tribe v. Jackson*, 490 U.S. 1090 (1989) (No. 88-1426); *Shoshone Tribe v. Wyoming*, 492 U.S. 926 (1989) (No. 88-492); *John v. City of Salamanca*, 488 U.S. 850 (1988) (No. 88-84); *Winnebago Tribe v. Dep't of Revenue of Iowa*, 485 U.S. 1021 (1988) (No. 87-1480); *Makah Tribe v. Washington*, 485 U.S. 1034 (1988) (No. 87-1390); *Coeur d'Alene Tribe v. Idaho*, 516 U.S. 916 (1995) (No. 87-199); *Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization*, 481 U.S. 1051 (1987) (No. 86-1574); *Yankton Sioux Tribe v. South Dakota* (No. 86-1436); *White Mountain Apache Tribe v. Ariz. State Transp. Bd.*, 480 U.S. 941 (1987) (No. 86-814); *Chunie v. Ringrose*, 479 U.S. 1009 (1986) (No. 86-748); *Native Village of Nanana v. Alaska Dep't of Health & Soc. Servs.*, 479 U.S. 1008 (1986) (No. 86-662).

The Court arguably granted one cross-petition filed by a tribe against a state subdivision, *Yakima Indian Nation v. County of Yakima* (No. 90-577), but never reached the merits of the Nation's claim (that the County lacked the power to tax any Indian lands). *Cf.* Cert Pool Memo at 6, *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/1991%20GRANTED-pdf/90-408.pdf> ("The Yakima Nation's arguments on [cross-petition], where they are the [Ninth Circuit] incorrectly decided that [25 U.S.C. § 349] continues to permit state taxation of fee-patented [Indian] lands are largely in error. As the County points out in its [response to the cross-petition], the Yakima Nation cites to cases that are inapposite.").

46. Rebecca Mae Salokar, *The Solicitor General: The Politics of Law*, in SUSAN LOW BLOCH ET AL., *INSIDE THE SUPREME COURT: THE INSTITUTION AND ITS PROCEDURES* 835, 836 (2d ed. 2008) ("The solicitor general sought certiorari in 1,294 cases between 1959 and 1989, and was successful in obtaining the Court's review 69.78 percent of the time.").

47. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

**Table 6**  
**Cert Petition Success Rate: OT 1986–1993**



### ***B. The Court's Indian Cases During the Study Period (OT 1986–1993)***

During the study period, the Court decided several cases that contributed to fundamental changes to the foundational principles of federal Indian law over the past two or three decades.

#### *1. Religious Freedom*

During this period, the Court considered and rejected Indian religious freedom in two significant cases. In *Lyng v. Northwest Indian Cemetery*<sup>48</sup> and *Employment Division v. Smith II*,<sup>49</sup> the Court denigrated the claims of Indian religious freedom, favoring federal land agencies and state employment agencies. In *Lyng*, the Court held that the First Amendment did not bar a federal road project on federal lands that would destroy the sacred sites of Indian communities, sufficient to annihilate the entire religion.<sup>50</sup> In *Smith*, the Court rejected claims that a state unemployment compensation system discriminating against Native American Church worshippers was protected by the First Amendment,<sup>51</sup> and even went so far as to fundamentally rewrite Free Exercise Clause jurisprudence.<sup>52</sup>

#### *2. The Indian Child Welfare Act*

The Court also ruled on the Indian Child Welfare Act,<sup>53</sup> a controversial statute enacted by Congress to force the transfer of most state court cases involving Indian children to the courts of Indian tribes.<sup>54</sup> In *Mississippi Band of Choctaw Indians v. Holyfield*,<sup>55</sup> the Court held that states and private parties could

48. 485 U.S. 439 (1988).

49. 494 U.S. 872 (1990).

50. See *Lyng*, 485 U.S. at 450–51 (“virtually destroy”); Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313, 324–28 (2008).

51. See *Smith II*, 494 U.S. at 890.

52. See generally FRANK S. RAVITCH, *MASTERS OF ILLUSION: THE SUPREME COURT AND THE RELIGION CLAUSES* 32–36 (2007).

53. 25 U.S.C. §§ 1901–03, 1911–23, 1931–34, 1951–52, 1961–63 (2006).

54. See generally FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT at 30 (Matthew L.M. Fletcher, Kathryn E. Fort & Wenona T. Singel eds., forthcoming Dec. 2009).

55. 490 U.S. 30 (1989).

not undermine the purposes of the Indian Child Welfare Act by moving Indian children out of Indian Country to avoid the Act's application.<sup>56</sup>

### 3. Federal Preemption, State Law, and Indian Law

During this period, the Court considered the interplay of federal preemption, state law, and federal Indian law. In *Cotton Petroleum v. New Mexico*, the Court upheld a state law that taxed the business activities of non-tribal members doing business in Indian Country,<sup>57</sup> effectively precluding the Jicarilla Apache Tribe from taxing businesses on their own reservation lands. Federal Indian law preemption doctrine had "emphasize[d] the primacy of federal law in the field of Indian policy."<sup>58</sup> Prior to *Cotton Petroleum*, "[s]tate jurisdiction [wa]s preempted by the operation of federal law if it interfere[d] with . . . federal and tribal interests . . ."<sup>59</sup> In the words of one clerk, the decision "substantially alter[ed] Indian implied preemption analysis,"<sup>60</sup> recognizing that state interests can co-exist with federal interests.

### 4. Tribal Jurisdiction over Non-Tribal Members

During the study period, the Court limited tribal jurisdiction over non-tribal members in civil actions. In 1989<sup>61</sup> and again in 1993,<sup>62</sup> the Court expanded its holding in *Montana v. United States*.<sup>63</sup> In *Brendale v. Yakima Indian Nation*,<sup>64</sup> and *South Dakota v. Bourland*,<sup>65</sup> the Court made clear that the *Montana* rule—that tribes presumptively do not have civil jurisdiction over non-tribal members—applied not just to the very narrow fact pattern of *Montana*, but to all cases involving tribes and non-members. The decision meant that a member could not seek justice (through the tribal system) for a wrong committed against them on tribal land if the wrongdoer was not a tribal member.

### 5. Tribal Treaty Rights

Two important Indian law cases came before the Court *in forma pauperis*—*Duro v. Reina*<sup>66</sup> and *Hagen v. Utah*.<sup>67</sup> In *Duro*, the Court held that Indian tribes do not have authority to prosecute Indians who are not members of

56. *Id.*

57. 490 U.S. 163 (1989).

58. DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 562 (5th ed. 2005).

59. *Id.* at 565.

60. Cert Pool Memo at 11, Rodney, Dickason, Sloan, Akin & Robb, P.A. v. Revenue Div. of the Dep't of Taxation of N.M., 490 U.S. 1043 (1989) (No. 88-773), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1988/DM1988-pdf/88-773.pdf>.

61. *See Brendale v. Yakima Indian Nation*, 492 U.S. 408 (1989).

62. *See South Dakota v. Bourland*, 508 U.S. 679 (1993).

63. 450 U.S. 544 (1981).

64. 492 U.S. 408 (1989).

65. 508 U.S. 679 (1993).

66. 495 U.S. 676 (1990).

67. 510 U.S. 399 (1994).

the prosecuting tribe for criminal offenses,<sup>68</sup> applying the implicit divestiture doctrine, where the Court recognizes an implicit limitation in the sovereign authority of Indian tribes in federal statutes and legislative history.<sup>69</sup> In *Hagen*, the Court held that the Uintah Indian Reservation had been implicitly diminished by Congress.<sup>70</sup> *Duro*'s importance declined after Congress overruled it by statute a year after its announcement,<sup>71</sup> but *Hagen*'s importance in the law of reservation diminishment and treaty rights cannot be understated.<sup>72</sup>

### 6. Unanswered Questions

What the Court did not do is almost as significant as what it did. The Court did not review a multitude of decisions in which a state government or agency successfully opposed the exercise of Indian treaty rights,<sup>73</sup> in which a state or the federal government dispossessed Indian peoples of land and property,<sup>74</sup> and

68. *Duro*, 495 U.S. at 688.

69. For more on "implicit divestiture," see John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the Cohen's Handbook Cutting Room Floor*, 38 CONN. L. REV. 731 (2006).

70. *Hagen*, 510 U.S. at 412.

71. See *United States v. Lara*, 541 U.S. 193, 197-98 (2004); Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 AM. INDIAN L. REV. 109 (1992); Alex Tallchief Skibine, *Duro v. Reina and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767 (1993).

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

73. E.g., *Elliott v. Vermont*, 507 U.S. 911 (1993) (No. 92-877) (state court rejection of Abenaki treaty rights by adopting unprecedented common law standard); *Makah Tribe v. Washington*, 485 U.S. 1034 (1988) (No. 87-1390) (federal court rejection of attorney fees after Tribe won treaty rights issue against State); *W. Shoshone Nat'l Council v. Molini*, 506 U.S. 822 (1992) (No. 91-1916) (federal court rejection of treaty rights after application of wrong legal standard); *Lummi Indian Tribe v. Washington*, 507 U.S. 1051 (1993) (No. 92-1445) (federal court rejection of treaty rights based on alleged misinterpretation of treaty); *Lummi Indian Tribe v. Whatcom County*, 512 U.S. 1228 (1994) (No. 93-1742) (federal court rejection of tribal claim to tax immunities).

74. E.g., *Nichols v. Rysavy*, 484 U.S. 848 (1987) (No. 87-73) (federal court rejection of Indian land claims based on federal sovereign immunity); *Pawnee v. United States*, 486 U.S. 1032 (1988) (No. 87-1312) (federal court rejection of claim that Department of Interior set gas extraction rates too low, disadvantaging Indian tribes); *Oneida Indian Nation of Wis. v. New York*, 493 U.S. 871 (1989) (Nos. 88-1758) (federal court rejection of Indian land claims); *Littlewolf v. Lujan*, 493 U.S. 1043 (1990) (No. 89-538) (federal court rejection of constitutional challenge to White Earth Reservation Land Settlement Act); *Pueblo of Santo Domingo v. Rael*, 498 U.S. 811 (1990) (No. 89-1716) (federal court application of Fed. R. Civ. P. 19 to undermine Indian land claims against the United States); *Havasupai Tribe v. United States*, 503 U.S. 959 (1992) (No. 91-1124) (federal court rejection of challenge to government approval of uranium mine operations); *Pueblo of Santo Domingo v. Thompson*, 503 U.S. 984 (1992) (No. 91-1179) (federal court rejection of claim that Pueblo Indian Land Board impermissibly extinguished Indian land titles); *Cherokee Nation v. United States*, 504 U.S. 910 (1992) (No. 91-1354) (federal court



in which lower courts limited the authority of Indian tribes without Congressional authority to do so.<sup>75</sup> All of these cases had national import in Indian country and some involved questions that remain unanswered to this day. For example, the Vermont Supreme Court held in *State v. Elliott* that so-called “aboriginal” rights, Indian rights to hunt and fish never abrogated by treaty or statute, have dissipated by passage of time rather than by law.<sup>76</sup> And the Tenth Circuit in *Cherokee Nation of Oklahoma v. United States* adopted a crabbed reading of the Indian Claims Commission Act’s requirement that the government engage in “fair and equitable dealings,”<sup>77</sup> the meaning to which the Supreme Court has never clarified. The Court also declined to hear a case decided by the Alaska Supreme Court that all but gutted the application of the Indian Child Welfare Act in Alaska.<sup>78</sup>

### C. Scholarly Reaction to the Supreme Court’s Recent Indian Law Decisions

Federal Indian law scholars have long theorized about the Supreme Court’s dramatic turn against tribal interests. Most harshly criticize the Supreme Court’s direction,<sup>79</sup> while an influential few offer explanations and justifications

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rejection of tribal damage claims against U.S. Army Corps of Engineers for damage to Cherokee assets on the Arkansas River).

75. *E.g.*, *Totus v. Holly*, 484 U.S. 823 (1987), *reh’g denied*, 484 U.S. 971 (No. 86-1912) (federal court vacature of tribal water protection code despite the code never having been enforced); *Navajo Tax Comm’n v. Pittsburgh & Midway Coal Mining Co.*, 498 U.S. 1012 (1990) (No. 90-635) (federal court rejection of efforts by tribe to regulate on-reservation mining operations); *Circle Native Cmty. v. Alaska Dep’t of Health & Soc. Servs.*, 508 U.S. 950 (1993) (No. 92-1536) (state court rejection of tribal court jurisdiction over adjudication of Indian children); *Anderson v. Wis. Dep’t of Revenue*, 508 U.S. 941 (1993) (No. 92-5988) (state court rejection of income tax immunity claim by Indian living off-reservation but working on-reservation for tribal government); *Cabazon Band of Mission Indians v. Nat’l Indian Gaming Comm’n*, 512 U.S. 1221 (1994) (No. 93-1724) (federal court interpretation of Indian Gaming Regulatory Act’s definition of electronic games).

76. *See State v. Elliott*, 616 A.2d 210, 221 (Vt. 1992), *cert. denied*, 507 U.S. 911 (1993).

77. 937 F.2d 1539, 1546 (10th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992).

78. *See In re Matter of F.P.*, 843 P.2d 1214 (Alaska 1992), *cert. denied sub nom.*, *Circle Native Cmty. v. Alaska Dep’t of Health & Human Servs.*, 508 U.S. 950 (1993).

79. *E.g.*, DAVID E. WILKINS & K. TSINANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* (2001); ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005); Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002); Philip P. Frickey, *A Common Law for Our Age of Colonialism: A Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1 (1999); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001); Joseph William Singer, *Canons of Conquest: The Supreme Court’s Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641 (2003); Alex Tallchief Skibine, *The Court’s Use of the Implicit*

for the change,<sup>80</sup> and still others recommend dramatic reform.<sup>81</sup> Dean David Getches performed an empirical study of the Court's decision-making process in the context of federal Indian law. Based on the study's results, he argued that the Court appears to be removing traces of the unique characteristics of federal Indian law doctrines like the federal Indian law preemption doctrine<sup>82</sup>—in other words, moving the Indian law field into the “mainstream.”<sup>83</sup> Like Dean Getches, Professor Philip Frickey argues that the Court is uncomfortable with what he calls the “exceptionalism” of federal Indian law and is forcing the field's conformance with the rest of constitutional public law.<sup>84</sup> The Supreme Court's recent Indian law decisions offer strong circumstantial evidence that the Court has been reeling back the tribal interest advances gained during the Warren and Burger Courts, such as deference to tribal court jurisdiction<sup>85</sup> and preemption of state laws in Indian

*Divestiture Doctrine to Implement its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267 (2000); Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. J. C.L. & C.R. 1 (2003); Rebecca Tsosie, *Tribalism, Constitutionalism, and Cultural Pluralism: Where Do Indigenous Peoples Fit within Civil Society?*, 5 U. PA. J. CONST. L. 357 (2003); Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405 (2003); Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L. REV. 1 (1995).

For critiques of particular cases or lines of cases, see Kristen A. Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 TULSA L.J. 73 (1999); Kathryn E. Fort, *The New Laches: Creating Title Where None Existed*, 16 GEO. MASON L. REV. 357 (2009); Robert Laurence, *Don't Think of a Hippopotamus: An Essay on First-Year Contracts, Earthquake Prediction, Gun Control in Baghdad, The Indian Civil Rights Act, The Clean Water Act, and Justice Thomas's Separate Opinion in United States v. Lara*, 40 TULSA L. REV. 137 (2004); John P. LaVelle, *Sanctioning a Tyranny: The Diminishment of Ex parte Young, Expansion of Hans Immunity, and Denial of Indian Rights in Coeur d'Alene Tribe*, 31 ARIZ. ST. L.J. 787 (1999); LaVelle, *supra* note 69; Judith V. Royster, *Montana at the Crossroads*, 38 CONN. L. REV. 631 (2006); Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605 (2005).

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

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

82. See generally GETCHES ET AL., *supra* note 58, at 561–65 (describing federal Indian law preemption).

83. See David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Colorblind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280–81 (2001); see also Getches, *Conquering the Cultural Frontier*, *supra* note 79, at 1595–1617.

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

85. See, e.g., *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (requiring non-Indians to exhaust tribal court remedies before challenging tribal jurisdiction in federal court); *Williams v. Lee*, 358 U.S. 217 (1959) (holding that state

Country.<sup>86</sup> This study of the cert pool process adds new depth to the view that the Supreme Court is actively limiting Indian sovereignty.

#### **D. Federal Indian Law in the Supreme Court Cert Pool**

As seen above, the bare statistics of the Supreme Court's certiorari decisions in federal Indian law are disproportionately favorable to state interests. The Court only granted four certiorari petitions filed by tribal interests: one that involved an individual Indian respondent and three unpaid *in forma pauperis* prisoner petitions brought by Indian convicts.<sup>87</sup>

This Article theorizes that the Supreme Court's "agenda" involves limiting the rights of tribal interests and that the certiorari process is a tool through which the Court prejudices tribal interests.

#### **E. Agenda-Setting and Federal Indian Law**

A whole body of scholarly literature is devoted to exposing the Court's political leanings in both its agenda-setting<sup>88</sup> and also its decision-making process. There has been limited academic literature on Supreme Court agenda-setting in the context of federal Indian law.<sup>89</sup> One study, covering the period of 1969 to 1985, concluded that tribal interests won more cases than they lost.<sup>90</sup> A second study found that federal Indian law outcomes could be predicted by judicial ideology, the Solicitor General's involvement, and whether questions of sovereignty were at issue.<sup>91</sup> A third study, covering the years 1969 to 1992, concluded that the Rehnquist Court decisions were substantively different than those of the Burger Court.<sup>92</sup> The study argued that the Court employed a strategy of only granting cert

courts have no jurisdiction over civil suits against Indians that arise in Indian Country).

86. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (finding preemption of state gaming control laws in Indian Country); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (finding preemption of certain state taxes in Indian Country).

87. See *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) (unpaid petition); *Negonsott v. Samuels*, 507 U.S. 99 (1993) (same); *Duro v. Reina*, 495 U.S. 676 (1990) (same); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1988) (individual non-Indian respondent).

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

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

90. See Hermann & O'Connor, *supra* note 89, at 136.

91. See Hermann, *American Indian Interests*, *supra* note 89, at 253-54.

92. See Hermann, *American Indians in Court*, *supra* note 89, at 254.

to correct judicial errors to shape its Indian law agenda, without identifying a cohesive agenda.<sup>93</sup>

What these studies did not (and could not) address is first, how the Court effects major changes to substantive constitutional law by deciding which cases to hear in the certiorari process, and second, the impact of the cert pool in the certiorari process. This study attempts to focus on those questions. Like recent studies of the Court's agenda-setting in general,<sup>94</sup> this Article concludes that the data in the cert pool is inconclusive as to a federal Indian law "agenda."

This Article highlights two areas of study. First, qualitative material in the cert pool memos, mostly authored by the clerks for Justice Blackmun, reveal the preferences of individual Justices. The overall value of that material is extremely limited. Second, Justice Blackmun's docket sheets indicate the votes of individual Justices during the certiorari process. These prove more interesting.

### *1. Agenda Preferences of Individual Justices*

Justice Blackmun's clerks recognized that he was the leading scholar of federal Indian law on the Court and perhaps the leading advocate for tribal interests during the study period.<sup>95</sup> To further his interests, the clerks occasionally recommended a "defensive denial"—a strategy by which a Justice votes to deny certiorari even though he or she wants the legal question answered.<sup>96</sup> For example, one clerk wrote about *Cherokee Nation v. United States*:<sup>97</sup>

I would not want to see the [Court] take this case. Because it is not one the [Court] would handle well, it would likely declare the

93. See *id.*

94. See Cordray & Cordray, *supra* note 24, at 409 (collecting studies).

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

96. See PERRY, *supra* note 2, at 198–212, cited in LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 80 (2003); Robert Boucher & Jeffrey Segal, *Supreme Court Justices as Strategic Decision Makers: Offensive Grants and Defensive Denials*, 54 J. POL. 824 (1995).

97. 504 U.S. 910 (1992).

provision to be unenforceable. (Imagine the [opinion] of Scalia, J.) I think in the long run your friends are best served by denying cert.<sup>98</sup>

Another example is the annotation in *Woods Petroleum Corp. v. Cheyenne-Arapaho Tribes*:<sup>99</sup> “I agree with poolwriter and the [Solicitor General] that this [petition] should be denied. Moreover, a grant would only harm these Indians.”<sup>100</sup>

Likely because Justice Blackmun’s papers provided the data sample, there is far less information about his colleagues on the bench. However, what is available is worth discussing. Most notably, and perhaps confirming what Dean David Getches and others have written about Justice O’Connor’s personal interests in western water law, deriving from her family’s financial stake as ranchers in the desert southwest,<sup>101</sup> one Blackmun clerk annotated the cert pool memo in *California v. United States*,<sup>102</sup> a part of the decades-long dispute over the Colorado River, to ask, “I wonder what [Justice O’Connor] will think about this?”<sup>103</sup>

Blackmun’s clerks also recognized Chief Justice Rehnquist and Justice Scalia as two major opponents to tribal interest claims. In addition to the example above regarding the Cherokee Nation petition, a supplemental memorandum drafted by a Blackmun clerk in the case *Puckett v. Native Village of Tyonek*<sup>104</sup> demonstrated suspicion of the Chief Justice, asserting that Chief Justice Rehnquist “may intend to use the GVR as a means of reflecting his disagreement with [the Ninth Circuit]’s decision—an inappropriate use of the GVR mechanism.”<sup>105</sup>

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

99. 507 U.S. 1003 (1993).

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

101. See Getches, *Beyond Indian Law*, *supra* note 83, at 277–78; Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. COLO. L. REV. 683, 744–45 (1997).

102. 490 U.S. 920 (1989) (per curiam).

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

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

104. 499 U.S. 901 (1991).

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

Although this material clearly exposes procedural and ideological disputes between chambers, it does little to explicitly explain the Court's agenda-setting during the study period.

## 2. The "Discuss List" and Certiorari Votes

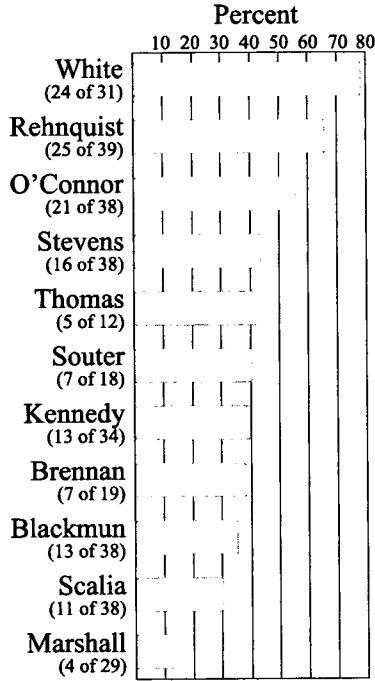
The "discuss list" and certiorari votes expose how the Justices' ideologies shape the Court's agenda, especially when the petitioner is a state, state agency, or state subdivision. According to historical data, once a petition filed by a state is put on the discuss list, it is much more likely than other petitions to be granted. This indicates the Justices' deference toward state interests. Importantly, the votes correspond to some extent with the generally recognized political tendencies of the Justices. Without a doubt, Chief Justice Rehnquist and Justice White voted for certiorari in Indian law cases brought by state interests, far more than any of the other Justices. Justice White's voting pattern can, perhaps, be traced to his tendency to vote for certiorari far more than the other Justices in all cases, as has been recognized elsewhere.<sup>106</sup> With some exceptions, the "conservative" or "federalism" Justices—White, O'Connor, Rehnquist, Thomas, Kennedy, and Scalia—voted to hear more Indian law cases than the "liberal" or "moderate" Justices—Stevens, Souter, Brennan, Blackmun, and Marshall. The key exceptions were Justices Stevens, who voted in favor of granting certiorari more than his liberal and moderate colleagues, and Scalia, who rarely voted to grant certiorari, apparently demonstrating a strong distaste for federal common law cases.

A total of thirty-nine Indian law cases reached the discuss list during the study period. Justice White voted to grant certiorari in 74% (twenty-four out of the thirty-one) that arose during his tenure; Chief Justice Rehnquist in 64% (twenty-five out of thirty-nine); Justice O'Connor in 55% (twenty-one out of thirty-eight); Justice Stevens in 42% (sixteen out of thirty-eight); Justice Thomas in 42% (five out of twelve); Justice Souter in 39% (seven out of eighteen); Justice Kennedy in 39% (thirteen out of thirty-four); Justice Brennan in 37% (seven out of nineteen); and Justice Blackmun in 34% (thirteen out of thirty-eight). On the other end, Justice Marshall voted to grant in only 15% of cases (four out of twenty-seven), while Justice Scalia voted to grant in 29% (eleven out of thirty-eight). Justices Powell and Ginsburg voted in fewer than five cases.

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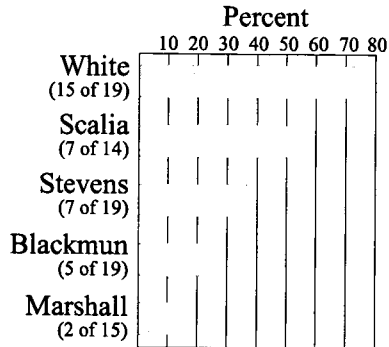
106. See Schoen & Walbeck, *supra* note 7, at 11 (Hypothesis 6—"Justice Byron R. White will be more apt to place cases on the discuss list than other associate justices.").

**Table 7**  
**Votes for Certiorari from the Discuss List, by Justice:**  
**OT 1986–1993**



States, state agencies, and state subdivisions filed twenty-one of the thirty-nine cases on the discuss list. Out of twenty-nine overall petitions filed by a state, 72% reached the discuss list. Chief Justice Rehnquist and Justice White again led the charge, with the Chief Justice voting to grant certiorari in 80% (sixteen out of twenty) of cases and Justice White in 79% (fifteen out of nineteen cases). Justice O'Connor was next with 62% of her votes in favor (thirteen out of twenty-one). Justice Scalia was next with 50% (seven out of fourteen cases), a bit of a departure from his overall negative rate. Justice Brennan voted to grant in 40% of the cases (four out of ten). Justice Stevens followed with 37% (seven out of nineteen). Justice Kennedy voted to grant only five out of seventeen state petitions (29%). Justice Blackmun voted to grant certiorari five times out of nineteen cases (26%), Justice Souter in 22% of cases (two out of nine), and Justice Marshall voted only twice out of fifteen petitions to grant certiorari (13%).

**Table 8**  
**Votes for Certiorari from the Discuss List, State Petitions, by Justice:**  
**OT 1986–1993**



Only three paid tribal certiorari petitions reached the discuss list out of twenty-eight (11%), while five unpaid petitions did. This percentage is far less than the rule of thumb that only 70% of the petitions filed are “patently uncertworthy.”<sup>107</sup>

There also appears to be a correlation between the conservative ideology of some Justices in voting for certiorari once the cases reach the discuss list, with Chief Justice Rehnquist and Justice Scalia betraying their hands by *always* voting for state petitions and *never* voting for tribal petitions. Justice O’Connor’s votes in favor of certiorari are also consistent with her generally conservative voting patterns, usually voting in favor of state petitions, as are Justice White’s (although his certiorari voting patterns are unusual).

### ***F. Applying the Rule 10 Criteria to Indian Law Cert Petitions***

#### *1. Circuit Splits and Splits in Authority*

As Rule 10 suggests, the best way to convince the Court to grant cert in a particular case is to identify a circuit split or a conflict with Supreme Court precedent.<sup>108</sup> In general, the study found few splits in authority regarding federal Indian law, perhaps because the vast majority of the cert petitions in the sample were from just three circuits—the Eighth, Ninth, and Tenth Circuits. Cert petitions labeled “splitless” are usually relegated to the dustbin.<sup>109</sup> In some criminal law and

107. See Byron R. White, *The Work of the Supreme Court: A Nuts and Bolts Description*, 74 N.Y. B.J., Oct. 1982, at 346, 349, cited in Schoen & Wallbeck, *supra* note 7, at 2.

108. See PERRY, *supra* note 2, at 277; Cordray & Cordray, *supra* note 24, at 407 (collecting studies).

109. E.g., Cert Pool Memo at 11, *Nichols v. Rysavy*, 484 U.S. 848 (1987) (No. 87-73), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1987/Denied-pdf/87-73.pdf>; Cert Pool Memo at 5, *Ducheneaux v. Sec’y of Interior*, 486 U.S. 1055 (1988) (No. 87-1732), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1987/Denied-pdf/87->



Eleventh Amendment cases where a split did exist, however, the Court granted cert.<sup>110</sup> Circuit splits tend not to arise in Indian law cases because often the only possible split is between a state court and a federal circuit. For example, a cert pool memo authored by a Kennedy clerk disposed of a petition arising out of Alaska by noting, "Because of the local nature of this dispute, no conflict will arise in the circuits."<sup>111</sup> In *South Dakota v. Spotted Horse*,<sup>112</sup> Justice Blackmun's clerk wrote a supplemental memo to the cert pool memo in which she noted, "As the poolwriter noted, there will never be a split on the question of South Dakota's jurisdiction over these tribal highways because both [Eighth Circuit] and the [South Dakota Supreme Court] agree that the State is without jurisdiction."<sup>113</sup> In *Tarbell v. United States*,<sup>114</sup> a criminal case involving the application of a federal statute that applied to New York Indians,<sup>115</sup> the cert pool memowriter, an O'Connor clerk, noted, "Of course, [New York] state is probably the only other jurisdiction that would have an opportunity to rule on the issue."<sup>116</sup>

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1732.pdf; Cert Pool Memo at 8, *Lummi Indian Tribe v. Whatcom County*, 512 U.S. 1228 (1994) (No. 93-1742), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Denied-pdf/93-1742.pdf>.

Non-tribal interests faced the same fate. *E.g.*, Cert Pool Memo at 8, *N.M. Taxation and Revenue Dep't v. Ramah Navajo Sch. Bd.*, 479 U.S. 941 (1986) (No. 86-367), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1986/MissedMemos-pdf/86-367.pdf>; Cert Pool Memo at 8, *Am. Mgmt. and Amusement, Inc. v. Barona Group of Capitan Grande Band of Mission Indians*, 487 U.S. 1247 (1988) (No. 87-1790), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1988/DM1988-pdf/87-1790.pdf>.

110. *Hoffman v. Native Village of Noatak* (later *Blatchford v. Native Village of Noatak*) involved a split between the Eighth and Ninth Circuits, as did *Duro v. Reina*. *Negonsott v. Samuels* involved a circuit split between the Eighth and Tenth Circuits. *Hagen v. Utah* involved a split in authority between the Tenth Circuit and the Utah Supreme Court. *Rhodes v. Vigil* (later *Lincoln v. Vigil*) involved a conflict between the Tenth Circuit's lower court decision, a D.C. Circuit opinion (authored by then-Judge Scalia), and Supreme Court precedent.

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

112. 500 U.S. 928 (1991) (No. 90-1003).

113. Supplemental Memo at 1, *South Dakota v. Spotted Horse*, 500 U.S. 928 (1991) (No. 90-1003), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1990/Denied-pdf/90-1004.pdf>; see also Cert Pool Memo at 4, *South Dakota v. Spotted Horse*, 500 U.S. 928 (1991) (No. 90-1003), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1990/Denied-pdf/90-1004.pdf> ("I note only that the fact that the [South Dakota Supreme Court] has adopted the reasoning relied upon by [the Eighth Circuit] in *Rosebud* may counsel against review since there is not now, and is unlikely ever to be, any split of authority on the somewhat unique questions presented in these two cases.").

114. 500 U.S. 941 (1991) (No. 90-1386).

115. 25 U.S.C. § 232.

116. Cert Pool Memo at 12, *Tarbell v. United States*, 500 U.S. 941 (1991) (No. 90-1386), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1990/MissedMemos/90-1386.pdf>.

Moreover, the lack of circuit splits also can be attributed to the subjective character of many federal Indian law doctrines, such as the federal Indian law preemption doctrine<sup>117</sup> or the reservation diminishment cases,<sup>118</sup> rendering “factbound” what might otherwise be an apparent split in authority. Because these doctrines are subjective, different outcomes between circuits may be attributable to different facts. If cases are considered “factbound,” Rule 10 weighs against granting cert, even where a split in authority can be identified. As one Blackmun clerk noted in the cert pool memo in *White Mountain Apache Tribe v. Arizona State Transportation Board*:<sup>119</sup> “A final factor which may be considered either as supporting a grant or denying a grant is that the case involves pre-emption in the context of Indian law. [C]ases involving pre-emption claims by Indian tribes may merit a different analysis.”<sup>120</sup>

One cert pool memo, involving a claim that federal Indian law preempted a state’s taxation of attorney fees, demonstrated the difficulty in establishing a circuit split.<sup>121</sup> The memowriter, a Blackmun clerk, identified three Supreme Court decisions that applied to the question, but the cases’ disparate fact patterns created different applications of the federal Indian law preemption rule—“I think [appellant] has the better of the argument, though [appellant] overstates its case by suggesting a direct conflict with this Court’s prior decisions. Rather, I think the question is open.”<sup>122</sup>

Similarly, in *Central Machinery Co. v. Arizona*,<sup>123</sup> a federal preemption case, the cert pool memo concluded, “In sum, I agree . . . that the lower courts are not in full agreement in this area [preemption of state taxes in Indian Country]. But the Court declined to grant in [earlier cases]. I see no reason to act differently here.”<sup>124</sup> In one unusual case involving the application of the Indian Claims

117. See generally *GETCHES ET AL.*, *supra* note 58, at 561–65 (describing federal Indian law preemption).

118. See generally *id.* at 461–75 (describing numerous reservation diminishment and disestablishment cases).

119. 480 U.S. 941 (1987) (No. 86-814).

120. Cert Pool Memo at 17, *White Mountain Apache Tribe v. Ariz. State Transp. Bd.*, 480 U.S. 941 (1987) (No. 86-814), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1986/MissedMemos-pdf/86-814.pdf>.

121. *Rodey, Dickason, Sloan, Akin & Robb, P.A. v. Revenue Div. of the Dep’t of Taxation of N.M.*, 490 U.S. 1043 (1989) (No. 88-773).

122. See Cert Pool Memo at 8, *Rodey, Dickason, Sloan, Akin & Robb, P.A. v. Revenue Div. of the Dep’t of Taxation of N.M.*, 490 U.S. 1043 (1989) (No. 88-773), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1988/DM1988-pdf/88-773.pdf> (discussing *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982), and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)); *id.* at 11 (noting possible application of *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989)).

123. 481 U.S. 1042 (1987) (No. 86-1546).

124. Cert Pool Memo at 8, *Central Machinery Co. v. Arizona*, 481 U.S. 1042 (1987) (No. 86-1546), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1986/Denied-pdf/86-1546.pdf> (discussing *White Mountain Apache Tribe v. Ariz. State Transp. Bd.*, 480 U.S. 941 (1987) (No. 86-814), and *N.M. Taxation & Revenue Dep’t v. Ramah Navajo School Bd.*, 479 U.S. 940 (1986) (No. 86-367)).

Commission Act test requiring the federal courts to interpret the meaning of the phrase “fair and honorable dealings,” the exasperated poolwriter, a Souther clerk, noted, “The decision below does not squarely conflict [with other lower cases], which can be distinguished on its facts (though, indeed, where legal principles are as squishy as those in this area, nothing squarely conflicts [with] anything else).”<sup>125</sup>

During the study period, the Court sometimes did not act on cases in which the petitioner alleged a viable split or conflict with prior precedents if the split was “weak” or “illusory.” In *Osceola v. Florida Department of Revenue*,<sup>126</sup> a case involving the application of the Tax Injunction Act to individual Indians seeking immunity from state taxes,<sup>127</sup> the memowriter noted that the older case in the split probably would have been decided differently if it were reconsidered in accordance with later Supreme Court precedent.<sup>128</sup>

Another cert pool memowriter described the apparent split in authority in *Washington v. Confederated Tribes of Colville Reservation*,<sup>129</sup> a case where the State “want[ed] to enforce petty traffic laws against Indians on reservations,”<sup>130</sup> as “not clean.”<sup>131</sup> There, what seemed to be a circuit split turned out to be illusory

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

126. 498 U.S. 1025 (1991) (No. 90-653).

127. See *Osceola v. Fla. Dep’t of Revenue*, 893 F.2d 1231 (11th Cir. 1990).

128. Cert Pool Memo at 7, *Osceola v. Fla. Dep’t of Revenue*, 498 U.S. 1025 (1991) (No. 90-653), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1990/Denied-pdf/90-654.pdf> (citing *Omaha v. Peters*, 516 F.2d 133 (8th Cir. 1975), *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1975), and *Dillon v. Montana*, 634 F.2d 463, 468–69 (9th Cir. 1980)):

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

129. 503 U.S. 997 (1992) (No. 91-569) (Stevens and O’Connor, JJ., would grant certiorari).

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

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

because the character of the two state laws involved differed—one was explicitly criminal, the other was a civil traffic statute. Explaining away the apparent split in authority with a kind of logical leap, the memowriter concluded, “It remains possible that either [court], if someday faced with the facts of the other’s case, would come out just as the other did.”<sup>132</sup>

The Court is also less likely to grant certiorari when a split of authority is based in state law. *Richardson v. Mt. Adams Furniture*,<sup>133</sup> involved tribal sovereign immunity in the context of off-reservation business activities.<sup>134</sup> The cert pool memo recommended seeking the Solicitor General’s input after the “[petitioner] identifie[d] an existing division of authority among state supreme courts regarding the extent of tribal immunity from suit with respect to commercial activities undertaken by tribal entities off the reservation.”<sup>135</sup> The memowriter explained:

[T]ribal immunity is a creature of federal law and can be adjusted only by Congress. To the extent immunity reflects federal policies regarding tribal autonomy and relations with outsiders, the Government may have an interest in ensuring that the Court selects an appropriate vehicle for addressing the immunity question.<sup>136</sup>

The Solicitor General recommended denial of the cert petition. The next cert pool memo in the case noted:

Neither of the [conflicting] state cases, however, is sufficiently similar to the decision below to rise to the level of a split; both involved state rather than federal law, and [one state case] rested on

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

133. 510 U.S. 1039 (1994) (No. 92-1398).

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

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

136. Cert Pool Memo at 11, *Richardson v. Mt. Adams Furniture*, 510 U.S. 1039 (1994) (No. 92-1398), *available at* <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Denied-pdf/92-1398.pdf>.

the independent fact that the relevant activities were not ‘tribal’ for purposes of sovereign immunity. In short, any split is not clearly defined.<sup>137</sup>

It is often the case that a fact pattern will be unique to a particular tribe or reservation, rendering the possibility of a split very unlikely. In cert petitions brought by the Oneida Nations of New York and Wisconsin in the New York land claims,<sup>138</sup> the cert pool memowriter wrote:

This is a case of some practical significance inasmuch as there is a great deal of land in the balance, but the questions are not of general legal significance meriting the plenary review of this Court.

.....

There is no indication that these issues have arisen before or that they will arise again.

.....

There is no split of authority on the relevant powers or limitations found in the Articles of Confederation or the Treaty of Fort Stanwix.<sup>139</sup>

Another cert petition involved the interpretation of an 1887 Nevada statute that, as the cert pool memowriter noted, “[T]he interpretation of which can . . . affect [only] this case.”<sup>140</sup> In one case involving the interpretation of a 1908 federal statute, the cert pool memowriter noted:

All that would be left for us to do differently would be to reweigh the application of that settled law to the facts surrounding passage of the 1908 Act. Because the law is settled and the 1908 Act involved only the land in the Addition, our decision would have little significance beyond this case ([respondent] is correct that there is no lower court conflict to resolve with regard to the issues in this case).<sup>141</sup>

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

138. *Oneida Indian Nation of Wis. v. New York*, 493 U.S. 871 (1989) (No. 88-1715); *Oneida Indian Nation of N.Y. v. New York*, 493 U.S. 871 (1989) (No. 88-1915).

139. Cert Pool Memo at 13, *Oneida Indian Nation of Wis. v. New York*, 493 U.S. 871 (1989) (No. 88-1785), *Oneida Indian Nation of N.Y. v. New York*, 493 U.S. 871 (1989) (No. 88-1915), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1989/DM-1989-pdf/88-1915.pdf>.

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

141. Cert Pool Memo at 6, *Navajo Tax Comm’n v. Pittsburgh & Midway Coal Mining Co.*, 498 U.S. 1012 (1990) (No. 90-635), available at

One certiorari denial, *Circle Native Community v. Alaska Dept. of Health and Social Services*, demonstrates the enormous complexity of federal Indian law questions.<sup>142</sup> It was an Alaskan case involving tribal authority to decide internal child custody matters after federal statutes purported to divest Alaskan Native villages of their tribal character. The case also posed the question of whether Alaskan Native villages retained sovereign immunity. The cert pool memowriter found that the splits in authority (there were *two* in this instance) were “square,”<sup>143</sup> meaning that the case squarely presented the splits for resolution. The memowriter concluded, “Although the issues are not very interesting and seem to have little national significance, they are quite important to Native-State relations in Alaska, and only this Court can resolve the conflict. I therefore unenthusiastically recommend [a Call for Response with] a view to GRANT.”<sup>144</sup>

But the state of Alaska threw a monkey wrench into the proceedings—they questioned the legal status of the petitioner, often a confusing question in Alaskan Native disputes.<sup>145</sup> Cert was subsequently denied.<sup>146</sup> The supplemental memo drafted by the clerk notes the clerk’s confusion:

In short, there may be good answers to the problems [respondent] raises, but I do not know what they are, and in any event the Court need not address the [jurisdiction] question presented in a case that would require preliminary resolution of other thorny and legally insignificant issues.<sup>147</sup>

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<http://epstein.law.northwestern.edu/research/BlackmunMemos/1990/Denied-pdf/90-634.pdf> (citing Act of May 19, 1908, § 25, 35 Stat. 444).

142. 508 U.S. 950 (1993) (No. 92-1536) (denying cert in *In re F.P.*, 843 P.2d 1214 (Alaska 1992)).

143. Cert Pool Memo at 8, *Circle Native Cmty. v. Alaska Dep’t of Health & Soc. Servs.*, 508 U.S. 950 (1993) (No. 92-1536), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/92-1536.pdf> (noting that *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991), conflicted with *In re F.P.*, 843 P.2d 214 (Alaska 1992), and *Native Village of Stevens v. Alaska Mgmt. & Planning*, 757 P.2d 32 (Alaska 1998)):

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

144. *Id.* at 2.

145. Supplemental Memo at 2–3, *Circle Native Cmty. v. Alaska Dep’t of Health & Soc. Servs.*, 508 U.S. 950 (1993) (No. 92-1536), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/92-1536.pdf>.

146. *Circle Native Cmty. v. Alaska Dep’t of Health & Soc. Servs.*, 508 U.S. 950 (1993).

147. *Id.* at 5–6.

As a result, the clerk recommended denial.<sup>148</sup> After the petitioner replied to these questions with copies of tribal council resolutions and a trial court order recognizing the Community's right to intervene, Justice Blackmun's clerk noted, "I recommend that the Court [call for the views of the Solicitor General]. The split is real and conceded. The [Solicitor General] may help to sort out the preliminary problems."<sup>149</sup> Regardless, only two Justices (Blackmun and Stevens) voted to seek the views of the Solicitor General, while the rest voted to deny certiorari.<sup>150</sup>

The emphasis on locating a split in authority affects federal Indian law, perhaps, more than in most other areas of law. Consider *Sokaogon Chippewa Community v. Exxon Corp.*<sup>151</sup> The case involved a highly contested land claim of immense importance to the tribal community and its neighbors, focusing on an 1854 treaty that was far from plain.<sup>152</sup> The cert pool memowriter dismissed the cert petition's claims with a curt blurb:

I think Judge Posner correctly interpreted the 1854 treaty as extinguishing the occupancy [rights] under the 1842 treaty in exchange for establishment of reservations and payments. [Petitioner], having lost on its interpretation argument in both the [district court and the Seventh Circuit], now seeks further appellate review. Absent a split, I see no reason for the [Court] to look further into this issue.<sup>153</sup>

Of course, there likely would never be a split in authority on the 1854 treaty because that case might be the only case ever turning on the treaty. Of all the cert pool memos in the sample, only one memowriter—an O'Connor clerk—recognized that "splits are rarer in Indian cases . . ." <sup>154</sup> And yet, he recommended denial of cert in *Lummi Indian Tribe v. Whatcom County* even though he was not "sure that [the Ninth Circuit] got this right—it's a close case—but there's no split, and the issue doesn't seem crucial enough to be independently certworthy."<sup>155</sup>

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

149. *Id.* at 6 (annotation of "AHS").

150. See Docket Sheet, *Circle Native Cmty. v. Alaska Dep't of Health & Soc. Servs.*, 508 U.S. 950 (1993) (No. 92-1536), available at <http://epstein.law.northwestern.edu/research/BlackmunDockets/1992/Paid/docket-92-1536.pdf>.

151. 510 U.S. 1196 (1994) (No. 93-1223).

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

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

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

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

## 2. Error Correction (“Factbound”)

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

This issue is endemic to Indian treaty claims brought by tribal interests. The number of cases where Indian tribes lost below and a Supreme Court clerk noted that their petition was at least colorable, if not compelling, but where the clerk recommended the denial of cert anyway, is surprisingly high. The standard in these cases usually is described as: (1) Did the lower court *correctly state* (as opposed to apply) the applicable rule?; (2) If yes, deny. As such, because few courts commit the gross error of stating the wrong standard, the Court will hear few Indian treaty petitions brought by tribal interests who lost below. Even in instances where the lower court did state the wrong standard, as noted in the Western Shoshone case in the introduction,<sup>156</sup> the Court may still deny cert.

The number of cases classified as “factbound” is the most significant subgroup of the sample. One example is *Little Earth of United Tribes, Inc. v. Kemp*.<sup>157</sup> The petitioner brought a race discrimination claim (amongst other claims) because the United States foreclosed the mortgage of the only public housing project for transient urban Indians.<sup>158</sup> On the cert petition, the pool memowriter noted that the case was based entirely on the factual findings of the district court and recommended denial.<sup>159</sup> Justice Blackmun’s clerk agreed with the recommendation but annotated the cert pool memo to state, “[s]ad case.”<sup>160</sup>

Another example is *Catawba Indian Tribe v. United States*,<sup>161</sup> a case involving a contract claim by the tribe against the federal government where the cert pool memowriter wrote that “[t]his involves nothing more than error correction.”<sup>162</sup> Later, the memowriter noted, “This question is extremely factbound, is not one of national importance, and involves application of settled law.”<sup>163</sup>

156. See Cert Pool Memo at 9, *W. Shoshone Nat’l Def. Council v. Molini*, 506 U.S. 822 (1992) (No. 91-1916), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/91-1916.pdf>.

157. 494 U.S. 1078 (1990) (No. 89-1094).

158. See *Little Earth of United Tribes, Inc. v. U.S. Dep’t of Hous. & Urban Dev.*, 878 F.2d 236, 236–37 (8th Cir. 1989).

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

160. *Id.*

161. 509 U.S. 904 (1993) (No. 92-1617).

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

163. *Id.* at 10.



Similarly, a cert pool memo in *Lummi Indian Tribe v. Washington*<sup>164</sup> denigrated the Lummi Tribe's claims by noting:

[Petitioner] is unhappy with [the Ninth Circuit]'s determination of the boundaries of the Lummi Reservation. Based on little more than the testimony of a 100-year-old man in the early 1900s, [petitioner] wants this Court to hold contrary to the plain language of the treaty, the facts found by the [district court], and the presumption against conveyance of land under navigable waters. The [petition] should be denied.<sup>165</sup>

Ultimately, the cert pool memo recommended denial on the basis of unimportance.<sup>166</sup>

Perhaps a more significant example of the fact-heavy character of Indian law cases was *Elliott v. Vermont*,<sup>167</sup> a case addressing whether the Abenaki people retained their aboriginal rights after the State of Vermont was incorporated into the Union in 1791.<sup>168</sup> The state prosecuted Missisquoi Indians attempting to exert their fishing rights on land they believed to be owned by the tribe in aboriginal title.<sup>169</sup> Under Rule 10, the Court is unlikely to grant cert in a case where the lower court allegedly misapplied a properly stated rule of law. As the cert pool memowriter noted:

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

164. 507 U.S. 1051 (1993) (No. 92-1445).

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

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

167. 507 U.S. 911 (1993) (No. 92-877).

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

169. See *Elliott*, 616 A.2d at 211.

The case is *sui generis* and probably does not warrant a grant of certiorari absent a more meaty legal issue . . . .<sup>170</sup>

This somewhat internally inconsistent cert pool memo (calling the Vermont Supreme Court's opinion "excellent and extensive" while noting that the court ignored the critical evidence raised by the Indians) places the claim in the "factbound" category. The Court did not discuss this case in conference, according to Justice Blackmun's docket sheet.<sup>171</sup>

The lesson from *Elliott* appears to be that, so long as the lower court states the proper test (a purely superficial exercise), the Supreme Court will not review the lower court's application of the test except in "rare" circumstances. Note that the cert pool memowriter must have had a short period of time to review the history of the State of Vermont (probably a well-documented history) and the history of the western Abenaki people; specifically, the Missisquoi people (probably not as well documented). It is unlikely that a cert pool clerk confronted with a case like *Elliott* could marshal the historical and legal knowledge in a short period of time to conclude that the Vermont Supreme Court was wrong.

Indian law scholars, however, have concluded that the Vermont Supreme Court in *Elliott* adopted a new test on aboriginal title extinguishment divorced from the Court's precedents—the "increasing weight of history" test.<sup>172</sup> The petitioners' reply brief in support of its cert petition argued, in the words of Justice Blackmun's clerk, "Vermont [Supreme Court]'s 'weight of history' approach conflicts [with] this [Court]'s requirement that extinguishment be 'clear and unambiguous.'"<sup>173</sup> To be fair to the memowriter, he did note that "an argument can be made that the Court has a special responsibility to ensure that Indian land claims are resolved properly, with due regard for the traditional federal policy of solicitude for Indian tribes."<sup>174</sup> Even Justice Blackmun's clerk concluded that the petition was factbound and not certworthy.<sup>175</sup>

Recent law graduates would have to have unusual knowledge about Indian history to conclude that a court was so wrong on most questions based in history and fact as to recommend that the Court grant cert. The chances of this happening, especially with Rule 10's admonition that it is "rare," in an Indian law

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

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

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

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

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

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

context where a tribal interest is the petitioner, are all but zero. This structural problem likely affects tribal claims, most of which are based in history, more than any other constitutional subject area.

### 3. Importance

Rule 10 factors in the relative “importance” of a case in the certiorari process. “Importance” is the greatest *subjective* factor that affects whether or not the Court will grant cert in a particular case. The importance factor also provides the Court great leeway to set a federal Indian law agenda, should it choose to do so. The cert pool memos reflect clerks’ predictions about what the Justices might find sufficiently important to grant cert. Many memos, too numerous to discuss in detail, evidence clerks hedging their bets by making recommendations to deny.

Many Indian law cases do not reach the discuss list because they are labeled too unimportant to consider. Yet in several cases, such as *Lyng v. Northwest Indian Cemetery Protective Association*<sup>176</sup> and *Employment Division v. Smith* (I and II),<sup>177</sup> the Court granted certiorari despite a clerk’s recommendation of a denial and noting the case to be factbound and splitless.<sup>178</sup>

As the following examples demonstrate, when a case is brought by a state government, a local government, or the federal government against a tribal interest, the cert pool memos either trumpet the importance of the case because of the governmental interest involved or take it as a given that the case is important because a state or the federal government filed the petition. Even if the memowriter does neither and recommends denial, the Court might disregard the recommendation, as was the case in *Lyng*,<sup>179</sup> *Smith I*,<sup>180</sup> and *Smith II*.<sup>181</sup> It may be

176. 485 U.S. 439 (1988) (No. 86-1013).

177. 485 U.S. 660 (1988) (Nos. 86-946 & 86-947); 494 U.S. 872 (1990) (No. 88-1213).

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

179. Cert Pool Memo at 8–9, *Lyng v. Nw. Indian Cemetery Protective Assoc.* 485 U.S. 439 (1988) (No. 86-1013), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1987/Granted-pdf/86-1013.pdf> (noting that the United States’ petition was a “fact-bound challenge” and that there was no circuit split).

180. Cert Pool Memo at 6, *Employment Div. v. Smith*, 485 U.S. 660 (1988) (Nos. 86-946 & 86-947), available at <http://epstein.law.northwestern.edu/research/>

that the Court reviews some cases recommended for denial because the Justices are concerned with leaving a lower court ruling in place that could apply to several states.<sup>182</sup>

*Brendale v. Confederated Tribes*,<sup>183</sup> a case involving the zoning authority of Indian tribes on reservation land, was sufficiently important to be granted cert. Amicus briefs filed by numerous states and counties noted that “the case is of national importance: of the 930,000 people who reside within Indian reservations nationwide, some 380,000 (41%) are non-Indians.”<sup>184</sup> The memowriter, a Rehnquist clerk, argued:

To me, the [*Montana*] question appears certworthy, as it is not clear from *Montana* just exactly how much civil regulatory authority a tribe possesses over *nonmembers* within a reservation.

....

And, as amici point out, the question of tribal zoning is potentially a very large issue, affecting many states and many private property owners, who would be divested of some say in local zoning laws if it were held that tribal zoning preempted state regulation.<sup>185</sup>

Justice Blackmun’s clerk argued that the lower court decision favoring the tribes was “basically correct—zoning jurisdiction over non-Indian parcels is important to proper, consistent regulation of land uses. I would wait for further development.”<sup>186</sup> But five Justices voted to grant certiorari,<sup>187</sup> perhaps on the basis that the number of non-Indians affected by the case was so large.<sup>188</sup>

BlackmunMemos/1987/Granted-pdf/86-946.pdf.

181. Cert Pool Memo at 12, *Employment Division v. Smith*, 494 U.S. 872 (1990) (No. 88-1213), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1989/GM-1989-pdf/88-1213.pdf>.

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

183. 492 U.S. 408 (1989) (Nos. 87-1622, 87-1697 & 87-1711).

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

185. *Id.* at 19.

186. *Id.* at 20 (annotation).

187. See Docket Sheet, *Brendale v. Confederated Tribes & Bands of the Yakima Reservation*, 492 U.S. 408 (1989) (Nos. 87-1622, 87-1697 & 87-1711),

Some cases are important because of practical problems that would arise if a particular dispute is not resolved. *Mississippi Band of Choctaw Indians v. Holyfield*,<sup>189</sup> the only Indian Child Welfare Act<sup>190</sup> case granted certiorari by the Supreme Court to date, was splitless.<sup>191</sup> Nonetheless, the memowriter argued that the Mississippi Supreme Court's decision "creates a jurisdictional 'black hole' because Indian Health Service had a practice of transporting expectant mothers off the reservation to give birth" in order to avoid the application of the Act.<sup>192</sup> The Act required the adoption of all Indian children domiciled on the reservation to be adjudicated in tribal court. The Court had granted cert in a similar case years earlier,<sup>193</sup> but that case had been settled and dismissed.<sup>194</sup> After *Holyfield*, the Court has denied cert in every Indian Child Welfare Act-related case.<sup>195</sup>

A clerk might assign greater importance to a case if it involves a significant number of citizens or a large amount of land. For example, the cert pool memo in *Navajo Tax Commission v. Pittsburgh & Midway Mining Co.* noted:

[The case had] arguable significance . . . . The significance lies in the fact that, as [petitioner] notes, the case involves jurisdiction over a large area with an overwhelmingly Navajo population. (The [petition] fails to state the population of the area, but asserts that the number of Indians affected by the decision is 'far greater' than the number affected by any of this Court's prior diminishment decisions.).<sup>196</sup>

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available at <http://epstein.law.northwestern.edu/research/BlackmunDockets/1988/Paid/docket-87-1622.pdf> (noting that Rehnquist, Brennan, White, Marshall, and O'Connor voted to grant cert).

188. Indian law scholars have observed a trend toward reviewing the demographics of a portion of Indian Country in analyzing the contours of tribal government authority. *E.g.*, Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 69 n. 162 (1996); LaVelle, *supra* note 69, at 739.

189. 490 U.S. 30 (1989) (No. 87-980).

190. 25 U.S.C. § 1901-63.

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

192. *Id.* at 4.

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

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

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

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

But the Court did not discuss this case at conference.<sup>197</sup>

Often, the initial cert pool memo recommends that the Court seek the views of the Solicitor General to help in determining the importance of a case. Sometimes, a petition headed for denial for lack of importance is resurrected by a recommendation from the government to grant certiorari. *Negonsott v. Samuels*,<sup>198</sup> one of the rare unpaid petitions in which the Court granted certiorari, is one such case. The cert pool memowriter noted a clear circuit split between the Eighth and Tenth Circuits,<sup>199</sup> but argued against a grant because of the lack of importance of the case.<sup>200</sup> After the cert pool memo recommended the Court call for a response from the State of Kansas, Kansas recommended that the Court grant certiorari.<sup>201</sup> The memowriter remained uncertain because of the limited impact of the older Eighth Circuit decision and the complexities of Indian law.<sup>202</sup> The Court then sought the views of the Solicitor General, which urged the Court to grant cert,<sup>203</sup> which it did.<sup>204</sup>

197. See Docket Sheet, *Navajo Tax Comm'n v. Pittsburgh & Midway Coal Mining Co.*, 498 U.S. 1012 (1990) (No. 90-635), available at <http://epstein.law.northwestern.edu/research/BlackmunDockets/1990/Paid/docket-90-635.pdf>.

198. 507 U.S. 99 (1993) (No. 91-5397).

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

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

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

202. *Id.* at 1–2:

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

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

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

For whatever reason, Supreme Court clerks rarely find cert petitions filed by tribal interests to be important.<sup>205</sup> For example, there are a good number of cert petitions brought by tribal interests the clerks found to be compelling, novel, or even interesting claims, but where the clerks also wrote that the underlying cases were unimportant for a variety of reasons, usually related to the narrow factual question. In short, claims brought by tribal interests are almost never important unless there is a non-Indian law-related question of importance attached to the petition. Often, the proxy for “importance” is whether a state government filed the cert petition.

One illustrative case is *Hoffman v. Native Village of Noatak*.<sup>206</sup> There, the Ninth Circuit held that the Eleventh Amendment did not bar suit by Indian tribes against states.<sup>207</sup> The cert pool memo begins, “Because these are complicated and far-reaching matters of federal jurisdiction, and because there is a split with the 8th Circuit on the 11th Amendment issue, I recommend that the petition be granted.”<sup>208</sup> Justice Blackmun’s clerk argued valiantly against a grant in a supplemental memo, noting:

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

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205. *E.g.*, E-mail from Rebecca Womeldorf to Law Clerk, *Hagen v. Utah*, 510 U.S. 399 (1993) (No. 92-6281), <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Granted-pdf/92-6281.pdf> (noting that case is “not so sexy and is of little general importance” but ultimately recommending a grant of the petition); Cert Pool Memo at 8, *United Keetowah Band v. Okla. Tax Comm’n*, 510 U.S. 994 (1993) (No. 93-616), *available at* <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Denied-pdf/93-616.pdf> (“The issue is not squarely presented in this case, and it is, like the princip[al] question in this case, apparently of no general significance.”). One commenter on an earlier draft of this paper, a former Supreme Court clerk, likened Indian law cases to habeas cases. According to the commenter, clerks carefully review a cert petition where a state government *loses* in a lower court to a convicted criminal, or an Indian tribe, but not the other way around.

206. 501 U.S. 775 (1991) (No. 89-1782).

207. *Hoffman v. Native Village of Noatak*, 896 F.2d 1157, 1162–63 (9th Cir. 1990).

208. Cert Pool Memo at 1–2, *Hoffman v. Native Village of Noatak*, 498 U.S. 807 (1990) (No. 89-1782) (referencing *Standing Rock Sioux Tribe v. Dorgan*, 505 F.2d 1135 (8th Cir. 1974)), *available at* <http://epstein.law.northwestern.edu/research/BlackmunMemos/1990/Granted-pdf/89-1782.pdf>; *see also id.* at 10 (“[The 11th Amendment issue] is an important issue of constitutional law, and there is a circuit split.”).

careful in its analysis. The Court might well wait for a better reasoned opinion.<sup>209</sup>

The argument did not dissuade the Court or even Justice Blackmun, who offered to serve as the fourth vote for certiorari if necessary.<sup>210</sup>

Another example is *South Dakota v. Bourland*,<sup>211</sup> where the Court narrowly granted cert despite a recommendation to deny. The cert pool memowriter noted that the lower court decision favoring the Cheyenne River Sioux Tribe might have been incorrect for failure to follow relevant Supreme Court precedent.<sup>212</sup> But the memo recommended denial because there was no split, nor could one be alleged.<sup>213</sup> And yet, despite the lack of a split and the recommendation of the cert pool memo, Chief Justice Rehnquist and Justices White, Stevens, and Thomas voted to grant certiorari.<sup>214</sup> Is this a case of four Justices voting reflexively in favor of a cert petition from a state?

Consider the Oklahoma Tax Commission, the entity involved in more certiorari petitions in this sample than any other except the United States—five as a petitioner and four as a respondent.<sup>215</sup> The Court granted certiorari in four of the five petitions filed by the Oklahoma Tax Commission, but in none of the petitions brought by tribes against the Commission. Ultimately, the Commission lost two of the three cases it litigated to a final result in the Supreme Court—*Sac and Fox* and *Citizen Band Potawatomi*—while winning in *Graham*, a relatively insignificant

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

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

211. 508 U.S. 679 (1993) (No. 91-2051).

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

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

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

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



case with only tangential Indian law issues.<sup>216</sup> But in the cert pool memos, the clerks described the interests of the Oklahoma Tax Commission as raising “important concerns of federalism,”<sup>217</sup> while similar tribal petitions were “of no general significance.”<sup>218</sup>

Other petitions brought by state governments or agencies implicated the power of states to enforce criminal laws against peyote,<sup>219</sup> the power of states to enforce its taxes on non-Indians in Indian Country,<sup>220</sup> and the water rights of states and their constituents.<sup>221</sup> The Court granted certiorari in all these cases.

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

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

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

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

220. *See* Cert Pool Memo at 1, *Dep’t of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 502 U.S. 1053 (1992) (No. 91-907), *available at* <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Granted-pdf/91-907.pdf> (describing the petitioner as a “financially strapped State [that] wants to tax cigarettes sold to non-Indians on Indian reservations”); Cert Pool Memo at 3, *Dep’t of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994) (No. 93-377), *available at* <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Granted-pdf/93-377.pdf> (“The issue, however, is important both legally and practically, and the NY Ct App does not seem willing to heed anything but a reversal on the merits.”).

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

Conversely, claims brought by tribal petitions often are labeled unimportant without much discussion. One exemplary case is *Pueblo of Santo Domingo v. Thompson*.<sup>222</sup> The United States and the Pueblo had brought claims that the Pueblo Lands Board had invalidly extinguished Pueblo title to certain lands in New Mexico.<sup>223</sup> The cert pool memowriter noted, "It seems clear that the Board erred 60 years ago when it extinguished Pueblo title in this overlap land; section 14 of the 1924 Act prohibited such a result."<sup>224</sup> But the poolwriter recommended denial because the outcome of the case would affect only a few tribes.<sup>225</sup> Even Justice Blackmun's clerk wrote in the margin, "While I think [the Tenth Circuit] may have erred, I see no issue of general importance."<sup>226</sup>

Another case of major importance to Indian Country, but one the Court did not discuss in conference, is *Western Shoshone National Council v. Molini*.<sup>227</sup> In that case, the Ninth Circuit had held that the Indian Claims Commission award in *United States v. Dann*<sup>228</sup> acted as a bar to the Western Shoshone claims that the State of Nevada had interfered with their aboriginal and treaty rights.<sup>229</sup> The cert pool memowriter noted that the claim was viable but unimportant.<sup>230</sup> Justice Blackmun's clerk disagreed, annotating the cert pool memo by arguing that the case "may merit summary reversal on application of the wrong standard."<sup>231</sup> In short, though the lower court may have gotten the case wrong by applying the incorrect standard, effectively eradicating the hunting and fishing rights of an entire tribe, the Court would not find the case to be important enough to discuss.<sup>232</sup>

Similarly, the cert pool memowriter in *Makah Tribe v. Washington*<sup>233</sup> noted that the lower court's decision may have been "a clearly unwarranted departure from precedent," but recommended denial of the petition because

222. 503 U.S. 984 (1992) (Nos. 91-1179 & 91-1346).

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

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

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

226. *Id.* at 14.

227. 506 U.S. 822 (1992) (No. 91-1916).

228. 873 F.2d 1189 (9th Cir.), cert. denied, 493 U.S. 890 (1989).

229. *W. Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 202-03 (9th Cir. 1991).

230. See Cert Pool Memo at 7, 9, *W. Shoshone Nat'l Council v. Molini*, 506 U.S. 822 (1992) (No. 91-1916), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Denied-pdf/91-1916.pdf> ("At bottom, any tension in the case law over the viability of claims involving hunting and fishing rights appears highly fact-based and falls short of a genuine legal conflict. . . . Although this case affects a sizable class, and involves national interests, the issues presented are largely factbound and seem unlikely to have broad implications for other litigants." (discussing Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985))).

231. *Id.* at 9.

232. See Docket Sheet, *W. Shoshone Nat'l Council v. Molini*, 506 U.S. 822 (1992) (No. 91-1916), available at <http://epstein.law.northwestern.edu/research/BlackmunDockets/1992/Paid/docket-91-1916.pdf>.

233. 485 U.S. 1034 (1988) (No. 87-1390).

“review would be merely for error correction.”<sup>234</sup> The Ninth Circuit held that prevailing tribes in the *United States v. Washington* litigation could not recover attorney fees under federal civil rights statutes.<sup>235</sup> Justice Blackmun’s clerk’s annotation, while sympathetic to the tribal petitioner, still doubted the importance of the question:

This is a hard call. It seems to me that [petitioners] are right in every respect: [the Ninth Circuit]’s decision is wrong as a matter of law and has no obvious limiting principle. On the other hand, my instinct is that the memowriter may be correct in viewing this case as an isolated blunder. Since I’m also sympathetic to [petitioners] on the merits, [I’d] be inclined to keep their claim alive. I’m really not sure what the [Solicitor General] would have to say. I appeal to your judgment.<sup>236</sup>

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

#### 4. Gross Error

More rarely, the cert pool memos will assert that a lower court decision is clearly wrong, or in the Rule’s language, “has so far departed from the accepted and usual course of judicial proceedings . . . .”<sup>237</sup> As the language suggests, this happens less often than circuit splits. The complexity and ambiguity of federal Indian law, however, creates circumstances where lower courts do seem to deviate from Supreme Court precedents, perhaps more often than in other contexts. The classic example is *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*<sup>238</sup> That case reached the Supreme Court twice: the first time, the Court GVR’d the case in light of *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*;<sup>239</sup> the second time, the Court reversed the New York Court of Appeals on the merits.<sup>240</sup> The Court’s opinion in *Milhelm Attea* noted that the outcome turned on “the narrow[] question of whether the New York scheme is inconsistent with the Indian Trader Statutes.”<sup>241</sup> The cert pool memos indicated another reason for the Court to decide the case. The memowriter indicated that a line of New York Court of Appeals’ decisions were not aligned

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

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

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

237. SUP. CT. R. 10(a).

238. 502 U.S. 1053 (1992) (No. 91-907), *after remand*, 512 U.S. 61 (1994) (No. 93-377).

239. 498 U.S. 505 (1991).

240. See *Milhem Attea*, 512 U.S. at 78 (reversing *Milhelm Attea & Bros., Inc. v. Dep’t of Taxation and Fin. of N.Y.*, 615 N.E.2d 994 (N.Y. 1993)).

241. *Id.* at 70.

with Supreme Court precedent.<sup>242</sup> Even prior to the *Milhelm Attea* remand, the Court had GVR'd an earlier New York Court of Appeals decision on similar grounds.<sup>243</sup> The poolwriter noted:

[T]he [New York Court of Appeals] has not 'moved' on this issue since the [Supreme Court] vacated and remanded *Herzog* in 1988, the decision below is at least suspect, and if [New York]'s regulatory approach is the only effective way [petitioner]s can police the retail sale of taxable cigarettes on Indian reservations, the [courts] below have put [petitioners] in a tough spot.<sup>244</sup>

After another decision from the New York Court of Appeals reaching the same outcome (*Herzog* apparently was not appealed to the Supreme Court after remand), the cert pool memowriter wrote, "The [New York Court of Appeals] stubbornly refuses to alter its questionable preemption analysis, despite two GVR's from this [Court] (one in this case, and one in *Herzog*) . . ."<sup>245</sup> Moreover, according to the memo, "the issue, however, is important both legally and practically, and the [New York Court of Appeals] does not seem willing to heed anything but a reversal on the merits."<sup>246</sup> Justice Blackmun's clerk objected, annotating the cert pool memo in the first *Milhem Attea* petition with this grumble: "Is this such an important case? What 20 [pages] of memos comes down to is this: the [New York Court of Appeals] misread one of this [Court]'s cases. What happened to the word 'split' [?]"<sup>247</sup>

One of the key sticking points in federal Indian law is the doctrine surrounding the "special relationship" between the United States and Indian tribes.<sup>248</sup> The most interesting example of this situation is the Arkansas River case, *Cherokee Nation of Oklahoma v. United States*.<sup>249</sup> The Cherokee Nation brought a

242. Cert Pool Memo at 10–11, *Dep't of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 502 U.S. 1053 (1992) (No. 91-907), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/Denied-pdf/91-907.pdf> (quoting *Herzog Bros. Trucking, Inc. v. State Tax Comm'n*, 508 N.E.2d 914, 920 (N.Y. 1987), vacated and remanded, 487 U.S. 1212 (1988)).

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

244. Cert Pool Memo at 13–14, *Dep't of Taxation and Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 502 U.S. 1053 (1992) (No. 91-907), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/Denied-pdf/91-907.pdf>.

245. Cert Pool Memo at 2, *Dep't of Taxation and Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994) (No. 93-377), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1993/Granted-pdf/93-377.pdf>.

246. *Id.* at 3.

247. Cert Pool Memo (supplement) at 6, *Dep't of Taxation and Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 502 U.S. 1053 (1992) (No. 91-907), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/Denied-pdf/91-907.pdf>.

248. See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW: 2005 ED. § 5.01[1]–[4] (Nell Jessup Newton et al. eds.).

249. 504 U.S. 910 (1992) (No. 91-1354).

claim against the United States for damages related to the construction of the Arkansas River Navigation System, which implicated the Nation's treaty rights.<sup>250</sup> The cert pool memowriter recommended the denial of the Cherokee Nation's petition, noting "the strangeness of the entire inquiry."<sup>251</sup> The poolwriter could not find that a split existed or whether the lower court was clearly wrong because "given the inquiry, how could [the court] be [wrong]?"<sup>252</sup>

In other cases, the clerks focus on non-Indian law-related questions. One example is *Rhodes v. Vigil*.<sup>253</sup> The Indian Health Service had lost at the lower court level on the question of its discretion to eliminate a program for handicapped Indian children.<sup>254</sup> The cert pool memowriter noted, "There is no clear split in authority, but the decisions below is certainly in tension with the Court's decision[s], and the D.C. Circuit's approach . . ."<sup>255</sup> But the cert pool memowriter acknowledged that the split was not clean.<sup>256</sup> The memowriter recommended granting cert on the basis of "the egregiousness of the [Tenth Circuit]'s errors . . ."<sup>257</sup> Justice Blackmun's clerk wrote a supplemental memo arguing against granting certiorari on the basis that the Indian law character of the claim made the split illusory.<sup>258</sup> The argument won over Justice Blackmun, but the Court still granted certiorari.<sup>259</sup>

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

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

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

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

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

255. Cert Pool Memo at 16, Rhodes v. Vigil, 508 U.S. 182 (1993) (No. 91-1833), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1992/Granted-pdf/91-1833.pdf> (citing Am. Hosp. Ass'n v. NLRB, 499 U.S. 606 (1991), and Int'l Union, United Autoworkers v. Donovan, 746 F.2d 855 (D.C. Cir. 1984)).

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

257. *Id.* at 18.

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

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

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

*1. The Mechanics of the Certiorari Process*

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

Professor David Stras has broken down the import of the clerks in the Supreme Court's cert pool, first noting that the creation of the cert pool has "led to a homogenization of the [certiorari] process . . .," largely because the clerk in the cert pool now writes for "anywhere from five to eight Justices."<sup>260</sup> Also, Stras points out, political science scholar H.W. Perry's interviews with former clerks "suggest that, because recommendations to deny a case are the norm, law clerks pay far less attention to those recommendations than to recommendations to grant during the annotation process, increasing the likelihood that an issue of importance will be overlooked."<sup>261</sup> The creation of the cert pool may have created, in former D.C. Circuit judge and Solicitor General Kenneth W. Starr's words, a "hydraulic pressure to say no."<sup>262</sup> Stras argues that three factors push cert pool clerks to recommend a denial in tough cases: (1) it is less risky because a recommendation to deny will receive less scrutiny from clerks in other chambers; (2) it avoids cases in which the Court might be forced to dismiss a grant of certiorari as improvidently granted (apparently a result that clerks "dread"); and (3) general signals from the Court that the fewer cases the better.<sup>263</sup>

Finally, the inexperience of the clerks hurts tribal petitions: "Incoming law clerks, often fresh off of a clerkship with a judge on the United States Courts of Appeals, have little training and even less experience screening petitions for certiorari."<sup>264</sup> As noted in Part III, there are several cert pool memos that evidence a clerk's lack of understanding of multiple aspects of federal Indian law. For example, some clerks seem surprised that Indian tribes have immunity from suit.<sup>265</sup>

260. Stras, *supra* note 8, at 973. Justice Alito's announcement that he will drop out of the cert pool in the 2008 Term is an interesting development. See Adam Liptak, *A Second Justice Opt's Out of a Longtime Custom: The 'Cert. Pool'*, N.Y. TIMES, Sept. 25, 2008, at A21. Justice Sotomayor may follow his lead . . . or not. See Tony Mauro, *The Supreme Court Cert Pool: Sotomayor Joins It, Lawyers Attack It*, THE BLT: THE BLOG OF LEGALTIMES, Setp. 21, 2009, available at <http://legaltimes.typepad.com/blt/2009/09/sotomayor-joins-the-cert-pool.html>.

261. Stras, *supra* note 8, at 974 (citing PERRY, *supra* note 2, at 63).

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

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

264. *Id.*

265. E.g., Cert Pool Memo at 3, *Aetna Casualty Co. v. Smith Plumbing Co.*, 479 U.S. 987 (1986) (No. 86-588); Supplemental Memo at 3, *Aetna Casualty Co. v. Smith Plumbing Co.*, 479 U.S. 987 (1986) (No. 86-588).

Other clerks complain about the vagueness of federal common law tests.<sup>266</sup> In many circumstances, the data indicates that a Supreme Court clerk will *always* recommend the denial of a petition filed by a tribal interest for the reasons Professor Stras suggests.

The cert pool Justices in the study period, except Justice Blackmun, constituted the core of the Court that would bring federalism jurisprudence to the forefront of American constitutional law in the 1990s<sup>267</sup>—mainly Chief Justice Rehnquist and Justices White, O'Connor, Scalia, Kennedy, and Thomas. Cert pool clerks knew that they were writing for an audience that consisted of Justices often interested in states' rights. There must be different tugs on a memowriter. The audience cannot be ignored, but the memowriter wants to be fair and candid about the petitions. Early in a law clerk's one-year stint, before a memowriter becomes confident and experienced in this unusual job, he or she is perhaps more likely to write to this audience of "federalism" Justices that constitute the core of this audience.<sup>268</sup> And so the cert pool memos, whether the clerks intend to or not, are less likely to trumpet the merits of a legal position put forward by a tribal interest than a state interest. A cert pool memo candidly noting that a state's position is weak in comparison to a tribe's position likely will not win points with the conservative Justices in the cert pool, while a memo understating the possible strength of a tribal position might undermine the cert pool memowriter's reputation. This suggests the possible creation of a cert pool culture, as suggested by David Stras, himself a former clerk.<sup>269</sup> However, the import of the cert pool can be overstated. It bears mention that the Court several times rejected the recommendation of the poolwriters.

In the cases decided since the end of this study, from 1994 to the present, the ratio of wins and losses remains the same.<sup>270</sup> Now, seven of the nine Justices participate in the cert pool, including three Democratic appointees. The "audience" for the cert pool clerks includes four "federalism" Justices (Roberts, Scalia, Thomas, and Kennedy), and three others (Breyer, Ginsburg, and Sotomayor). One would expect the cert pool memos in the last fifteen years or so to reflect the presence of the non-federalism Justices, but one could also expect that the focus of the cert pool memos would not reflect the minority. The cert pool memos appear to function as a means to crystallize the thinking of the Court on a particular case

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266. See Cert Pool Memo at 8–9, *Cherokee Nation of Okla. v. United States*, 504 U.S. 910 (1992) (No. 91-1354), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/Denied-pdf/91-1354.pdf> ("Given the strangeness of the entire inquiry, one cannot easily evaluate either the merits or the certworthiness of [petitioner's] claim.").

267. See generally MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 249–78 (2005); Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

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

269. See Stras, *supra* note 8, at 974–75.

270. Tribal interests have "won" eight out of thirty Supreme Court cases since the end of the study period, excluding "ties." See Turtle Talk Blog, *Supreme Court*, <http://turtletalk.wordpress.com/supreme-court-indian-law-cases/> (listing all the federal Indian law Supreme Court cases and their outcomes since 1959).

before any individual Justice reviews the materials. Anyone who negotiates contracts knows that the key to controlling the final product is to prepare the first draft, which then forms the basis for the entire negotiation. A Justice who supports a pro-tribal interest outcome in a matter might have to work from the first cert pool memo, which was written for an audience of a majority of Justices who disfavor tribal interests as opposed to state interests. Given that Indian law tends to not excite the “judicial libido,” in Justice Scalia’s pithy words,<sup>271</sup> a Justice who starts out in the minority might be less inclined to use his or her institutional capital to persuade the rest of the Court to change a presumptive vote against tribal interests, interests that do not appear to have *any* special supporters in the Roberts Court, a role that Justice Blackmun most recently played.

### CONCLUSION

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

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

The modern certiorari process, with its dependence on law clerks applying the Court’s Rule 10, virtually guarantees that the cert pool will denigrate petitions filed by tribal interests. Tribal petitions, often involving the interpretation of Indian treaties or complicated and narrow common law questions of federal Indian law, are readily deemed “factbound” and “splitless.” Conversely, the cert pool values and perhaps better understands the interests of state and state agency petitions. The pool’s audience (a majority of the Roberts Court, including Justice Alito) also highly understands and values the states’ interests. Thus, the pool’s recommendations favor states and state agencies. The result, frankly, is that tribal petitions on a question will almost never be favored, whereas state petitions on *the same question* will often be favored.

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

As the occasional clerk and the occasional Justice recognize, however, federal Indian law resists categorization into the mainstream. The certiorari process simply does not work for federal Indian law. The cert pool, and its

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271. Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep’t of Educ., 127 S. Ct. 1534, 1556 (2007) (Scalia, J., dissenting).



reflection of the political makeup of the Court, cements the prejudice that tribal interests face in the certiorari process.

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

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

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