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# American Indian Interests and Supreme Court Agenda Setting: 1969-1992 October Terms

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**AMERICAN INDIAN INTERESTS  
AND SUPREME COURT AGENDA SETTING  
1969-1992 October Terms**

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A recent development in the judicial behavior literature on Supreme Court agenda setting is the examination of case selection within particular areas of the law. To that end, this study examines the Supreme Court's agenda-building process regarding American Indian Interests as a petitioning litigant during the 1969-1992 October terms. Using a multivariate logistic regression model, the findings indicate that judicial attitudes as manifested by the attitudinal model, the direct and third party briefs filed by the Solicitor General's office for and against American Indian interests, and the presence of a sovereignty issue were influential explanatory variables in the Supreme Court's case selection process. Contrary to the expectations of this study, however, the petitioning party alleging lower court conflict, dissension, and the number of *amici curiae* briefs filed in support of, and in opposition to, American Indian interests were not important predictors.

**One of the growing developments** in the literature on agenda setting in the Supreme Court of the United States is the analysis of case selection within specific areas of the law. As McGuire and Caldeira (1993, 717) point out, "A great deal is known about how the Court, in general, selects cases . . . but next to nothing about how this winnowing takes place in particular areas of law." In this study, I seek to make a contribution to that end by examining how the Supreme Court has chosen cases for its plenary agenda within the field of federal Indian law.

More precisely, this study asks the question: How did American Indian interests fare before the U.S. Supreme Court as a petitioning litigant during the Burger and Rehnquist years (i.e., during the 1969-1992 October terms)? I also attempt to discern those factors that

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contributed to the success of American Indian interests before the Court as a petitioning litigant. To explain their success, the effects of seven explanatory variables are estimated: (a) the presence of the Solicitor General's office as a party for and against American Indian interests; (b) the presence of the Solicitor General's office as an *amicus curiae* on behalf of, and in opposition to, American Indian interests; (c) the presence of lower court dissension; (d) the presence of the petitioning party alleging intercourt conflict; (e) the presence of a sovereignty issue; (f) the number of *amici curiae* briefs filed by organized interests for and against American Indian interests; and (g) judicial attitudes as manifested by the attitudinal model.

There are several reasons that American Indian interests' treatment by the Burger and Rehnquist Courts merits attention at the agenda-setting stage. First, at least two justices from the Burger Court have placed great importance on cases involving American Indian interests. As one justice stated, "We now have three westerners on the Court and we are very concerned about . . . Indian cases. And you can tell by our votes for cert. that we are interested in them" (Perry 1991, 261). Another justice stated, "Actually, I think the Indian cases are kind of fascinating. It goes into history and you learn about it, and the way we abused some of the Indians, we that is the U.S. government" (Perry 1991, 262).

Second, cases involving American Indian interests are receiving more attention by the Court than ever before. The Supreme Court decided more cases involving American Indian interests—35—in the 1970s than in any other previous decade in the Court's history (Wilkinson 1987, 2). In the 1980s, the Supreme Court decided more than 40 cases involving issues critical to the interests of American Indians (Hermann 1994, 2). Indeed, the Court is more interested in cases involving American Indian interests than many other types of cases. Although less than 5% of all petitions for certiorari win review, over 20% of the 545 cases involving American Indian interests were granted plenary review by the Court during the 1969-1992 October terms.<sup>1</sup>

Third, given that American Indian activities are regulated primarily by the federal government (and not the states), the U.S. Supreme Court plays a particularly important role in the policy formation of Indian rights. Since the Marshall Court's decision in 1832, in *Worcester v. Georgia* (31 U.S. [6 Pet.] 515), the Court has usually held that "matters

affecting Indians in Indian country are thus as a general rule excepted from the usual application of state law" (Cohen 1982, 260).

Fourth, and perhaps most important, the concept of Supreme Court agenda setting has special significance for politically disadvantaged groups, including American Indian interests.<sup>2</sup> If politically disadvantaged groups have little clout in majoritarian institutions, the courts in general, and the Supreme Court in particular, may be the last avenue for these groups to redress their grievances.

### EXPLAINING SUPREME COURT AGENDA SETTING

Given that the Court does not offer any hard and fast guidelines for selecting cases for its plenary agenda,<sup>3</sup> judicial scholars have attempted to explain the Court's case selection process systematically. The literature on Supreme Court agenda setting can be classified under two broad categories: cue theory and judicial attitudes as manifested by the attitudinal model (but, see Perry 1991; Provine 1980).

#### CUE THEORY

Cue theorists posit that the justices of the Supreme Court use cues as a means "for separating those petitions worthy of scrutiny from those that may be discarded without further study" (Tanenhaus et al. 1963, 158). The general idea behind cue theory is that the justices need a "quick and dirty way" of determining the certiorari-worthy cases.

One of the most important cues in explaining the Court's decision to grant petitions for certiorari has been the presence of the Solicitor General's office as a petitioning litigant (Armstrong and Johnson 1982; Salokar 1992; Tanenhaus et al. 1963; Ulmer, Hintze, and Kirklosky 1972). During the 1959-1989 October terms, for example, the Solicitor General's office was successful in seeking certiorari in approximately 70% of the 1,294 cases where it was a petitioning litigant (Salokar 1992, 25). As Tanenhaus et al. (1963, 160) point out, the attorneys in the Solicitor General's office "have the talent, the resources, and the experience to fully exploit the strong aspects of their cases, and in reply briefs to expose the most glaring weaknesses of their opponents."

In cases involving American Indian interests, the Solicitor General's petitioning briefs should play an especially important role in the decision-making calculus of the Court at the agenda-setting stage. The United States and American Indians have what is commonly called a fiduciary relationship, which "arises out of the constitutional plan to delegate plenary authority over American Indian affairs to the federal government and the duties undertaken by treaty and federal statute" (Cohen 1982, 651). Thus, in many cases involving American Indian interests, the Solicitor General's office acts as a trustee, as a direct and third party to protect American Indian rights. Given the special trust relationship between American Indians and the federal government, coupled with the fact that the Solicitor General's office as a petitioning party has been an important cue for the Court in determining its certiorari-worthy cases, one might anticipate that the Solicitor General's direct party briefs will significantly increase the chances that the Court will grant a case involving American Indian interests certiorari. In stark contrast, one might anticipate that the Court would be less inclined to grant the petition for certiorari in cases where the Solicitor General's office was a party in opposition to American Indian interests.

The Solicitor General's office as petitioning third party is also examined in this study. Salokar (1992, 27), for example, found that the Court granted review in 88% of the cases where the Solicitor General's office filed an *amicus curiae* brief on behalf of the petitioning litigant. (In addition, see Tanenhaus et al. 1963; Caldeira and Wright 1990b; McGuire and Caldeira 1993.) On the basis of the salient role of the Solicitor General's office at the agenda-setting stage and the most impressive success rates of the office as an *amicus curiae* at the decision on the merits stage (i.e., Scigliano 1971; Salokar 1992), a reasonable expectation is that the Court will be more inclined to grant certiorari in cases involving American Indian interests where the Solicitor General's office filed an *amicus curiae* brief in comparison to when no such cue is present. Conversely, one might expect that the Court would be less likely to grant certiorari in cases where the Solicitor General filed an *amicus curiae* brief in opposition to granting certiorari.

The presence of dissension and alleged intercourt conflict in the lower courts also have shown to increase the chances that the Court will accept a case for full review (Tanenhaus et al. 1963; Ulmer 1984).<sup>4</sup>

Chief Justice Fred Vinson, for example, considered dissension and conflict important criteria in determining the Court's decision to grant certiorari: "Our discretionary jurisdiction encompasses, for the most part, only the borderline cases—those in which there is a conflict among the lower courts or widespread uncertainty regarding problems of national importance" (Tanenhaus et al. 1963, 161). Tanenhaus et al. (1963, 161) found that the Court granted approximately 13% of the petitions for certiorari in cases where a dissension cue was present during the 1947-1958 October terms; in comparison, the Court granted certiorari in only 6% of the cases where no cue was present. The literature strongly suggests that the presence of dissension in the lower courts would increase the likelihood that the Court would grant certiorari in cases involving American Indian interests. In this study, dissension is defined in the tradition of the original cue theorists, Tanenhaus et al. (1963); that is, a petition where there is a disagreement by the judges in the court directly below or where there is disagreement between two lower courts in the same case. In the former type of dissension, at least one judge on the court below had to dissent or concur. In the latter type, the court of appeals had to reverse the lower court decision.

One might also reasonably anticipate that the alleged inter-circuit court conflict cue might apply to cases involving American Indian interests. Petitioning attorneys perceive that discussing inter-circuit court conflict in their briefs increases the chances that their petitions will be given plenary review by the Court (Ulmer 1984). This observation is also supported by comments from several staff attorneys at the Native American Rights Fund (NARF). When asked what elements make up a particularly good certiorari petition, one staff attorney replied, "I get the Supreme Court rules out and the Supreme Court litigation book, Stern and Gressman . . . I look for the usual things, conflicts in the circuits" (Author interview; May 20, 1994). A former staff attorney at NARF remarked, "If there is conflict on an issue between the circuits, then I play that up as much as possible. Similarly, if the lower court is out of line with existing Supreme Court principles of law, I stress that fact" (Author interview; May 19, 1994). Caldeira and Wright (1988, 1120) confirm these attorneys' observations with quantitative data, concluding that "[E]vidently, the best advice for petitioning attorneys is to allege as many conflicts as possible." For

purposes here, alleged intercircuit court conflict is defined as any case where the petitioning party claims that there is conflict among or between the state supreme, federal circuit, or U.S. Supreme courts.

The presence of certain issues, moreover, appears to increase the probability that the Court will give favorable treatment to a petition for certiorari. In particular, the presence of a civil liberties issue has been an important cue for the Court in determining its plenary agenda (i.e., Tanenhaus et al. 1963). Although civil liberties issues are germane to American Indian interests, they are not as critical as other issues. One basic and important issue confronting American Indian interests is sovereignty, the power of Indian tribes to regulate their own affairs without state and federal governmental interference (Cohen 1982; Swagerty 1979; Wilkinson 1987).

For purposes of this study, I expect that in cases where there is a sovereignty issue present, the Court is more inclined to grant petitions for certiorari in relation to when no such cue is present. Given that sovereignty issues define the role of American Indians and tribes in the American political universe, the Court might give these issues greater attention than many other ones. For greater conceptual specificity, sovereignty is defined here as an issue raised in a case involving governmental regulation of tribal affairs. This definition possesses two crucial characteristics. First, sovereignty issues only involve disputes in Indian country, not actions involving American Indians outside of Indian country. Second, the states or federal government would have to attempt to infringe on the rights of a citizen of a tribe or attempt to limit tribal autonomy; or, the tribal governments may try to extend their own jurisdiction over Indians or non-Indians in Indian country.

Curiously, until recently the role of organized interests before the Court has been examined only at the decision-on-the-merits stage. Realizing the apparent void in the literature, judicial scholars have begun to examine the litigation activities of organized interests before the Court at the agenda-setting stage (Caldeira and Wright 1988, 1990a, 1990b; McGuire and Caldeira 1993). In one study, Caldeira and Wright (1988, 1119) conclude that for the 1982 term the "more briefs filed [by organized interests] in favor of certiorari in any given case, the better chances for plenary review." In addition, McGuire and Caldeira (1993) find that the number of amici curiae briefs filed by organized interests in support of a libertarian petition increased the

likelihood of the Court granting the case plenary review during the 1957-1987 October terms. On the basis of these recent findings, one would expect that the more briefs filed by organized interests in favor of an American Indian petition, the more inclined the Court is to give the case its full attention. In this study, one might also anticipate that the more briefs filed against American Indian interests, the more inclined the Court is to deny the petition for certiorari.

### JUDICIAL ATTITUDES

One of the unsettled controversies in the literature on Supreme Court agenda setting is whether judicial attitudes (as manifested by the attitudinal model) play an important role in Court decision making. Many political scientists (i.e., Palmer 1982; Schubert 1964; Ulmer 1978) argue that the Court uses what judicial scholars commonly call the "error correcting" strategy.<sup>5</sup> More precisely, the Court takes cases when it seeks "to 'correct errors' in the lower courts by voting to grant a hearing whenever a lower-court decision departed significantly from [its] most preferred doctrinal position" (Baum 1977, 14). Examining the 1933-1987 October terms, Pacelle (1991, 192) concludes that "members of the Court are also important entrepreneurs with policy goals derived from their values and attitudes. Justices use case selection and the agenda-building process to pursue these goals."

In contrast, some judicial scholars opt for what this study calls the "quasi-legal" model. Adherents of the quasi-legal model (i.e., Provine 1980; Perry 1991) argue that there are greater legal forces at work in the Court's case selection process that extra-legal models neglect to consider. This model takes its theoretical underpinnings from the words of Pritchett (1969). On commenting on the state of judicial politics, Pritchett (1969, 42) concluded that "again political scientists who have done so much to put the 'political' in political jurisprudence need to emphasize that it is still jurisprudence."

Provine (1980, 172), for example, finds that "a shared conception of the proper role of a judge prevents the justices from exploiting the possibilities for power-oriented voting in case selection." Similarly, Perry argues that if the justices are not driven by some ideological predisposition to hear a particular case, they focus on legal factors using what he terms the "jurisprudential mode" (Perry 1991, 277-79).



In this study, I begin to resolve this continuing debate by attempting to discern whether judicial attitudes are important in explaining Court decision making at the agenda-setting stage for cases involving American Indian interests. To answer this question, judicial attitudes at the agenda-setting stage were measured by (a) taking all cases involving American Indian interests (as defined as such by *U.S. Law Week*) that were granted plenary review by the Court during the 1969-1992 October terms, (b) determining the individual justices' support rates for these cases at the decision-on-the-merits stage,<sup>6</sup> (c) creating a composite index of these support rates for each natural Court during the 1969-1992 October terms, and (d) applying this ideological composite index to the Court's decisions at the agenda-setting stage. For the justices' support rates in cases involving American Indian interests at the decision-on-the-merits stage during the 1969-1992 October terms and the coding procedures used, see Appendix A.

The new measure of judicial attitudes used here appears to be justified because many scholars long have suspected that the Court's votes on petitions for certiorari are a tentative indicator of the Court's votes at the decision-on-the-merits stage (i.e., Schubert 1964; Ulmer 1972). As Boucher and Segal (1995, 824) point out, "Long before terms such as 'backward induction' became part of the parlance of political science, Schubert (1959, see IV) asked what strategies justices would take on certiorari voting if they wished to achieve their policy goals on the merits."

## DATA COLLECTION AND METHODOLOGY

The 303 certiorari petitions filed involving American Indian interests as the petitioning party during the 1969-1992 October terms were located in *U.S. Law Week*.<sup>7</sup> Each certiorari petition involving an issue critical to American Indian interests was then examined in *The United States Records and Briefs* on microfiche to determine whether (a) the Solicitor General's office filed a direct party brief in support of, or against, American Indian interests; (b) the Solicitor General's office filed a third party brief in favor of, or in opposition to, American Indian interests; (c) dissension was present within and between lower courts; (d) the petitioning party alleged a conflict; (e) a sovereignty issue was

present; and (f) the number of amici curiae briefs filed by organized interests in support of, and against, American Indian interests. For greater conceptual specificity of how this study operationalized the explanatory variables, see Appendix B.

The Court's support rates at the agenda-setting stage are computed by dividing the number of cases that the Court supported American Indian interests over the entire population of cases. In cases where the parties were *Indian* versus *Tribe*, the tribe is coded in favor of American Indian interests. This coding scheme advances the position that the community interest outweighs the individual interest. To explain the relative influences of the explanatory variables on the dependent variable (1 if certiorari were granted; 0 otherwise), a logistic regression model is used.

### EMPIRICAL FINDINGS

As evidenced by Table 1, the Court supported American Indian interests as the petitioning party in 17% of the cases at the agenda-setting stage during the 1969-1992 October terms. As Table 1 also indicates, the logistic regression model offers moderate explanatory power. The model correctly explains 88% of the cases. Five of the 11 variables included in the model are important determinants in explaining Court decision making in cases involving American Indian interests at the agenda-setting stage. (See Appendix C for the descriptive statistics of the explanatory variables.)

As anticipated, American Indian interests have clearly benefited in cases where the Solicitor General's office represented them as a direct party. What is more helpful to the success of American Indian interests at the agenda-setting stage is the decision of the Solicitor General's office to file an amicus curiae brief in support of their position. Surprisingly, the Court is not less inclined to deny petitions for certiorari in cases where the Solicitor General's office filed amici curiae briefs in opposition to American Indian interests. As expected, however, the Court is less likely to grant petitions for certiorari in cases where the Solicitor General's office was a direct party against American Indian interests. Overall, the Solicitor General's position as a direct and (usually) as a third party had important influence on the

**TABLE 1**  
**Logistic Regression Model for Explaining the Success**  
**of American Interests Before the U.S. Supreme Court**  
**at the Agenda-Setting Stage: 1969-1992 October Terms**

<i>Variable</i>	<i>Estimated Coefficient</i>	SE	<i>Coefficient/ SE</i>
Solicitor General as a party on behalf of American Indian interests	1.63***	0.61	2.67
Solicitor General as an amicus curiae on behalf of American Indian interests	2.59***	0.59	4.39
Solicitor General as a party against American Indian interests	-1.01***	0.50	-2.02
Solicitor General as an amicus curiae against American Indian interests	-0.21	0.79	-0.27
Dissension within a lower court	0.71**	0.42	1.69
Dissension between lower courts	0.21	0.77	0.27
Alleged conflict	0.44	0.42	1.05
Sovereignty issue	0.80***	0.40	2.00
Number of amici curiae briefs filed on behalf of American Indian interests	0.28	0.24	1.16
Number of amici curiae briefs filed against American Indian interests	0.68*	0.52	1.31
Judicial attitudes	0.67***	0.33	2.03

*N* = 303

Constant: -6.54

-2 log likelihood: 203.836

Goodness of fit: 331.339

Model chi-square: 73.602; statistical significance: .00

Mean of dependent variable (Court's support rate): 17.2%

Percentage predicted correctly: 87.75%

NOTE: When coefficient/SE is 2 or more, the relationship has reached a significance level of .05 (Hosmer and Lemeshow 1989, 33).

\**p* < .10, one-tailed test. \*\**p* < .05, one-tailed test. \*\*\**p* < .01, one-tailed test.

Court's decision to grant or deny petitions for certiorari. As Salokar (1992, 25) notes,

As the attorney for the United States, the Solicitor General has available a large pool of possible certiorari requests and selects only a small number of cases that will most likely meet the standards of the Court in granting review and, subsequently result in a decision favoring the government.

Thus Ivers and Parker's (1993, 1) conclusion that the Solicitor General's office "is the E.F. Hutton of organizational interests—when it speaks, the Court's listens" appears to be correct. Given the prominent role of the Solicitor General's office in the Supreme Court's universe, it comes of little surprise that the success of American Indian interests as a petitioning litigant largely depended on the support of the office's direct and (usually) third party briefs.

The presence of a dissension cue does not appear to be an important determinant for the Court in selecting its cases for plenary review. It is clear that the Court is not more likely to grant petitions for certiorari in cases involving American Indian interests where there was at least one concurring or dissenting opinion in the decision directly below or where an appellate court reversed a lower court's decision.

Alleged conflict is also not an important cue for the Court in selecting its cases involving American Indian interests. Given that the Court considers conflict among and between lower courts as an important criterion for its case selection, most petitioning attorneys are naturally going to allege conflicts where they might not actually exist. As Caldeira and Wright (1994, 15) note, "Of the petitions for a writ of certiorari, about 6% in 1982 and 11% in 1968 contained real conflict, and about 60% in 1982 and 52% in 1968 set forth an alleged conflict." Thus, in many instances, the petitioning attorney may have alleged conflict where an actual conflict did not exist.

As hypothesized, the presence of a sovereignty issue is an important cue for the Court in determining its plenary agenda in cases involving American Indian interests. Sovereignty issues are an integral part of the field of federal Indian law because they define the relative roles that the federal government, states, municipalities, and tribes play in the regulation of American Indian affairs. Put simply, sovereignty issues define the status of tribal governments in the political and legal universe.

Contrary to the expectations of this study, the number of *amici curiae* briefs filed in support of, or in opposition to, American Indian interests does not significantly increase the likelihood that the Court would grant or deny the case plenary review, respectively. This finding contradicts the findings of others. Caldeira and Wright (1988, 1122), for example, find that "interested parties can have a significant and positive impact on the Court's agenda by participating as *amici curiae*

prior to the Court's decision on certiorari or jurisdiction." The findings here may indicate that using the number of amici curiae briefs may not always be an appropriate measure. Some groups' amici curiae briefs may hold greater weight with the Court than those of others. The Solicitor General's briefs, for example, are usually more respected by the Court. The same may hold true for certain groups' amici curiae briefs, as the attorneys' experiences and their reputation for filing quality briefs with the Court may influence Court decision making at the agenda setting. It is possible that the importance of filing amici curiae briefs with the Court may be dependent on who files the briefs, not how many briefs are filed in each case.

Judicial attitudes as manifested by the attitudinal model were also a strong predictor of the Court's decisions in American Indian cases at the agenda-setting stage. The composite index of the justices' support rates at the decision-on-the-merits stage in cases involving American Indian interests was a useful measure for explaining Court decision making at the agenda-setting stage. This finding may offer support for those scholars (i.e., Ulmer 1972) who suspect that the Court's decision to grant or deny petitions for certiorari is inextricably linked to the Court's votes at the decision-on-the-merits stage.

What is perhaps more important, the method created here to measure judicial attitudes tentatively indicates that the attitudinal forces that govern decision making at the decision-on-the-merits stage may also apply to the agenda-setting stage, at least for the case of American Indian interests during the 1969-1992 October terms. Segal and Spaeth (1994, 11), however, suggest that

the institutional rules and incentives that allow Supreme Court justices to engage in attitudinal decision-making in votes on the merits simply do not apply in full to other courts or to other stages of the Supreme Court's processing of cases. . . . But nothing in the attitudinal model, which was developed explicitly to explain the decision on merits, requires these factors to be sole explanations of the justices's behavior at other stages.

Although attitudinal decision making is not the sole explanation in Court decision making at the agenda-setting stage, it may wield more influence than initially recognized. These findings may indicate that judicial scholars may have to rethink the influence of the role of the attitudinal model at the agenda-setting stage.

## CONCLUSION

Researchers long have examined groups that turn to the courts when they lack access or clout in the electoral process (Cortner 1968; Lawrence 1990; O'Connor 1980; Shattuck and Norgren 1979; Vose 1959). Curiously, unlike at the decision-on-the-merits stage, there is not much scholarly attention devoted to the litigation activities of politically disadvantaged groups before the U.S. Supreme Court at the agenda-setting stage (but see Lawrence 1990).

The concept of Supreme Court agenda setting is particularly important for politically disadvantaged groups, including American Indian interests. If politically disadvantaged groups have little clout in majoritarian institutions, the Supreme Court may be the last forum for these groups to redress their grievances. Before politically disadvantaged groups can redress their grievances before the Supreme Court, however, they first must gain access. Given that over 95% of all petitions for certiorari fail to win plenary review from the Court and that the Court has virtually full discretion over its docket, gaining a hearing before the Supreme Court is a difficult hurdle to clear.

In this study, I examine the litigation activities of a politically disadvantaged group at the agenda-setting stage that have not garnered much scholarly attention in judicial politics; that is, American Indian interests during the 1969-1992 October terms. As anticipated, most of the traditional cues variables also apply to the Court's case selection process for petitions filed involving American Indian interests. The direct and (usually) third party briefs filed by the Solicitor General's office in favor of or in opposition to are the among the most important cues in determining the Court's case selection process. The presence of a sovereignty issue also positively and significantly influenced the Court's agenda-building process.

Contrary to the expectations of this study, the petitioning party alleging lower court conflict, dissension, and the number of amici curiae briefs filed in support of, and in opposition to, American Indian interests are not important predictors of the Court's case selection process in cases involving American Indian interests. In the case of the alleged lower court conflict cue, many of the conflicts that existed may have been tolerable and, thus, may not have warranted the Court's immediate attention. In many instances, the petitioning attorney's

perception of an alleged conflict may not have been the same as the Court's. When controlling for all of the other explanatory factors, dissension was not an important predictor of the Court's agenda-building process.

The number of *amici curiae* briefs filed in support of, and in opposition to, American Indian interests may not have been an important determinant in the Court's case selection process because raw numbers alone may not be an appropriate measure for the influence of organized interests. The quality of the *amicus curiae* brief filed and the Court's respect for certain groups' briefs may be more valid measures in determining the influence of organized interests at the agenda-setting stage.

Judicial attitudes as manifested by the attitudinal model is an important predictor of the Court's agenda-building process in cases involving American Indian interests. The new measure takes the justices' support rates at the decision on the merits stage and applies them to the agenda-setting stage. This finding may indicate that the justice's vote at the agenda-setting stage may be a tentative vote for the decision-on-the-merits stage. What may be more important, the same attitudinal forces that govern Court decision making at the decision-on-the-merits stage may also apply at the agenda-setting stage, at least for the case of American Indian interests during the 1969-1992 October terms. This leaves the question: Can the Court's agenda-building process for other groups or interests be explained by the same attitudinal forces that explain American Indian interests? More scholarly attention is needed before political scientists will have an adequate answer to this question.

#### APPENDIX A

##### The Justices' Support Rates for American Indian Interests at the Decision-on-the-Merits Stage: 1969-1992 October Terms

<i>Justices</i>	<i>Support Rates (N)</i>
Douglas	0.94 (16)
Marshall	0.76 (70)
Brennan	0.74 (68)
Blackmun	0.63 (72)
Stewart	0.55 (38)

<i>Justices</i>	<i>Support Rates (N)</i>
Burger	0.50 (58)
Harlan	0.50 (2)
Powell	0.45 (56)
White	0.43 (75)
Souter	0.40 (5)
O'Connor	0.36 (36)
Stevens	0.33 (58)
Rehnquist	0.30 (71)
Scalia	0.25 (16)
Thomas	0.25 (4)
Kennedy	0.10 (10)
Black	0.00 (3)

SOURCE: Coding scheme: The 82 full opinion cases regarding American Indian interests decided by the U.S. Supreme Court were identified in *U.S. Law Week* and examined in the *U.S. Reports*. Each case was coded as decided by the justices as for or against American Indian interests. Seven cases were excluded from analysis because they were split decisions; that is, the Court and the justices affirmed and reversed on the central issues in the case, leaving a population of 75 cases. Success rates were computed by dividing the number of cases in which each individual justice supported American Indian claims over the total population of cases. For the coding of judicial attitudes in this study, see Appendix B.

## APPENDIX B

### Coding of the Variables

#### *Dependent variable*

If the Court grants the petition for certiorari, 1; otherwise, 0.

#### *Explanatory variables*

If the Solicitor General's office is a direct party on behalf of American Indian interests, 1; otherwise, 0.

If the Solicitor General's office is a direct party in opposition to American Indian interests, 1; otherwise, 0.

If the Solicitor General's office files an amicus curiae brief on behalf of American Indian interests, 1; otherwise, 0.

If the Solicitor General's office files an amicus curiae brief in opposition to American Indian interests, 1; otherwise, 0.

If lower court dissension is present, 1; otherwise, 0.

If the petitioning party alleges intercircuit court conflict, 1; otherwise, 0.

If a sovereignty issue is present, 1; otherwise, 0.

The number of amici curiae briefs filed by organized interests on behalf of American Indian interests (ordinal variable ranging theoretically from 0 to infinity).

The number of amici curiae briefs filed by organized interests in opposition to American Indian interests (ordinal variable ranging theoretically from 0 to infinity).

The ideological composite index for each natural Court could range theoretically from 0 (*completely conservative*) to 9 (*completely liberal*). Each justice's support rate could theoretically range from 0 (*no support*) to 1 (*complete support*). The support rates were



obtained by taking all cases that were granted plenary review by the Court during the 1969-1992 October terms (as defined as such by *U.S. Law Week*). Each full opinion case was examined in the *U.S. Reports* to determine if each individual justice supported the position advocated by American Indian interests at the decision-on-the-merits stage (1 if the justice sided with American Indian interests; 0 otherwise); per curiam cases and summary dispositions were excluded from the analysis. The justices' support rates for the 1969-1992 October terms were then added for all of the justices who served on each natural Court. The composite index for each natural Court was then applied to the agenda-setting stage.

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**APPENDIX C**  
**Descriptive Statistics of the Explanatory Variables**

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<i>Variable</i>	M	SD	<i>Minimum Score</i>	<i>Maximum Score</i>
Solicitor General's office as a party on behalf of American Indian interests	0.05	0.22	0	1
Solicitor General's office as an amicus curiae on behalf of American Indian interests	0.07	0.27	0	1
Solicitor General's office as a party against American Indian interests	0.44	0.50	0	1
Solicitor General's office as an amicus curiae against American Indian interests	0.04	0.19	0	1
Dissension within the lower court	0.18	0.38	0	1
Dissension between lower courts	0.19	0.39	0	1
Petitioning party alleging conflict	0.62	0.49	0	1
Sovereignty issue	0.34	0.47	0	1
The number of amici curiae briefs filed on behalf of American Indian interests	0.28	0.77	0	7
The number of amici curiae briefs filed against American Indian interests	0.06	0.29	0	3
Judicial attitudes	4.47	0.61	3.05	5.30
Number of cases ( <i>N</i> ): 303				

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**NOTES**

1. Cases involving American Indian interests are those defined as such by *U.S. Law Week*. These cases include American Indian interests as the petitioner as well as the respondent.

2. Although American Indian interests are truly a disadvantaged minority in terms of a sense of powerlessness, numbers, racial or cultural characteristics, and a sense of group solidarity, their status as citizens in separate tribal nations gives them a unique political status that is different

from that of other politically disadvantaged groups. Thus the relationship between the United States and Indian tribes is also a political one.

3. Although the Court does not (usually) offer any reasons for granting or denying an individual petition for certiorari, Rule 10 of the U.S. Supreme Court Rules offers some guidance for petitioning attorneys, namely, in cases where there are intercircuit court conflicts between U.S. courts of appeals or state courts on a federal question, or in cases where a lower court has "so far departed from the accepted and usual course of judicial proceedings . . . to call for an exercise of this Court's power of supervision." Rule 10, however, is minimized by its introductory paragraph, which stipulates that "a review on writ of certiorari is not a matter of right, but of judicial discretion. . . . The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered."

4. Ulmer (1984) defines two types of intercircuit court conflict, alleged and real. Although there has been a general consensus among scholars on how to conceptualize alleged intercircuit court conflict, there is little agreement on an operational definition of real intercircuit court conflict. Feeney (1975, 305), for example, defined intercircuit court conflict as a "case in which the decision below deals with the same explicit point as some other case and reaches a contradictory result. Feeney's definition included conflicts involving federal district courts, state courts, or circuit courts (1975, 304). In a subsequent study, two former Supreme Court law clerks, Estreicher and Sexton, narrowed the operational definition of real intercircuit court conflict to contradictions in "decisions by state courts of last resort or federal courts of appeals" (1984, 1010-11). Still, Ulmer's definition includes only "cases involving conflict with Supreme Court precedents or conflicts in the [federal] circuits" (1984, 182). To magnify the problem further, many real intercircuit court conflicts need to percolate longer in the lower courts before the U.S. Supreme Court will decide the issues on their merits (O'Brien 1990, 215; Perry 1991, 230). In addition, whether it truly exists depends on one's interpretation of what "real conflict" is. Thus, given the several measurement problems associated with operationalizing real intercircuit court conflict, it was excluded from the analysis.

5. Although judicial scholars have applied the "error correcting" strategy most often to the agenda-setting stage, other theories have been examined. Among others, the "prediction" and the "majority" strategies have shown moderate explanatory power in predicting the Court's case selection process. Adherents of the prediction strategy posit that there is a positive nexus between a justice's decision to grant certiorari and being part of the winning coalition at the final vote. Advocates of the majority strategy hold that the justices will vote more often to grant certiorari when they part of the ideological majority on the Court. For extended discussions of these strategies, see Baum (1977), Brenner and Krol (1989), Boucher and Segal (1995), Krol and Brenner (1990), and Palmer (1982).

6. In this study, I specifically chose not to use the Spaeth database because in the Spaeth data American Indian cases are operationalized as those cases where American Indians are a party. In this study, in contrast, I examine all cases that had an impact on American Indian interests, including those cases where the federal government is a party on behalf of American Indian interests. In addition, in this study I purposely do not use the ideological values created by Segal and Cover (1989) because "some scholars of the Court have attempted to push the Segal/Cover scores beyond their intended limits, along the way stretching (and, perhaps, surpassing) the range of reliability and validity of the measures" (Epstein and Mershon 1996, 262). Segal and Cover are mindful to caution future use of their ideological measure, which was almost exclusively designed to examine cases involving civil rights and civil liberties issues. In contrast, American Indian cases involve issues regarding federalism, taxation, judicial power, federal and state preemption, natural resources, and so on (e.g., see Herrmann and O'Connor 1996). For a more detailed discussion of the validity and reliability problems associated with using the Segal and

Cover ideological scores in cases not exclusively using civil rights and civil liberties issues, see Epstein and Mershon (1996).

7. A list of these cases is available by contacting the author.

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