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American Indians and the Burger Court

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Objective. Like many politically disadvantaged groups, American Indian interests have turned to the courts when they lack access or clout in the electoral process. Unlike many other disadvantaged groups, the litigation activities of American Indian interests have failed to garner much scholarly attention. The purpose of this research is to examine how American Indian interests fared before the Burger Court (1969–85 October terms). *Methods.* The 63 full opinion cases regarding issues critical to American Indian interests were identified by examining the *United States Reports.* Each case was coded as whether or not the Court decided in favor of the party advancing American Indian interests. *Results.* American Indian interests won over one-half of the cases decided by the Burger Court during the 1969–85 terms. Additionally, the appellant status of the party advancing American Indian interests and the issue area being litigated were important determinants in the direction of the Burger Court's decisions. *Conclusions.* While American Indian interests won more cases than they lost during the 1969–85 terms, the Burger Court's decisions did not result in a coherent body of law.

Researchers long have studied groups who try to achieve their policy preferences in the courts when they lack access or clout in the electoral process (Cortner, 1968; Edsall and Edsall, 1991; Lawrence, 1990; O'Connor, 1980; O'Connor and Epstein, 1982, 1983; Sorauf, 1976; Vose, 1959). Like many other groups, American Indians have also turned to the courts to lobby for their interests. Yet, their efforts failed to garner much scholarly attention (but see Deloria and Lytle [1983], Shattuck and Norgren [1979, 1991], Wilkins [1990], and Wunder [1994]).

Because so few political scientists have examined the interests of American Indians or American Indians as an interest group of any kind—let alone how they are treated in the American legal system—we offer this preliminary study of how American Indian interests fared in the Burger Court to find out if they were treated differently by the Supreme Court than other disadvantaged groups.

American Indian cases began to receive far more attention from the

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Court during the Burger Court years. Almost simultaneously with the development of the California Indian Legal Services (CILS) and the Native American Rights Fund (NARF), the Supreme Court decided more American Indian cases (35) in the 1970s than in any other previous decade in the Court's history (Wilkinson, 1987:2). Additionally, while more than 95 percent of certiorari petitions failed to win review during the 1969–85 terms, approximately 25 percent (n = 394) of American Indian cases, as defined as such by *U.S. Law Week*, were granted plenary review.

The explosion in federal Indian law occurred in the wake of litigation on behalf of other minority or disadvantaged groups, including African Americans, women, and Hispanics. Although American Indians 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 disadvantaged groups. Thus, the relationship between the United States government and the Indian tribes is also a political one, not a racial one, per se. Because American Indian activities are regulated primarily by the federal government (and not the states), the U.S. Supreme Court plays an especially important role in the Court's assessment of Indian rights. Although the federal government clearly does not exercise the degree of control over Indians and tribes that it did in earlier periods, it still plays an important role in the regulation of day-to-day Indian affairs.

In spite of this racial/political difference, we opt here to treat American Indians in the context of the body of literature that exists concerning politically disadvantaged groups' use of litigation to achieve their policy goals. To that end, we ask three questions: First, how often did the U.S. Supreme Court decide in favor of American Indian interests during the 1969–85 terms? Second, did the interests of American Indians fare better when their position was advanced by appellants in the litigation? Third, what type of American Indian issues dominated the Court's agenda and did the Court's support for American Indians vary based on the issue presented? But, before we address these questions, we offer an overview of the historical context in which to place the Burger Court decisions.

Historical Background

The Formative Years: 1776–1830. During the embryonic years of the United States, the national government's policies toward American Indians generally aimed at acquiring Indian lands through treaties and expanding Congress's authority over American Indian affairs through

a series of Trade and Intercourse Acts. By 1790, almost every American Indian tribe along the eastern seaboard had negotiated a treaty with the United States. Most of these treaties had the same theme. The settlers were prohibited from taking American Indian lands and the tribes were not allowed to enter into alliances or engage in land trades with foreign nations (Wunder, 1994:19).

The U.S. Constitution offers little guidance concerning the relationship between American Indians and the United States.[1] American Indians are explicitly mentioned only three times in the Constitution. Article I, Section 2, and later, the Fourteenth Amendment, excluded American Indians from being taxed by Congress or the states.[2] Moreover, Article I, Section 8, stipulates that Congress has the authority to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

In addition to the enumerated legislative powers explicitly mentioned in Article I, there are many implicit powers given to the legislative and executive branches over American Indians. The "property clause" in Article IV allows Congress to dispose of and make all rules regarding the federal government's property, including American Indians' lands. The "necessary and proper clause" in Article I, Section 8, authorizes Congress to enforce its enumerated powers. The "war powers clauses" in the same article give the federal government power to wage wars against American Indians.[3] The "supremacy clause" in Article VI gives the federal government authority over the states in regulating Indian affairs. And, the "treaty clause" in Article II, Section 2, gives the president the power to negotiate treaties with American Indians with the advice and consent of the Senate.[4]

In essence, the Constitution offered a rough outline of the new government's authority over American Indian affairs. It is through the interpretation of the Constitution by Congress, the executive, and the courts, however, that the parameters of these powers are clarified. The Marshall Court took the leading role in defining the central tenets of federal Indian law through its interpretation of the Constitution and statutory law.

Through a trilogy of cases, Chief Justice John Marshall's Federalist allegiances were revealed, and the Court's belief that Indian nations

[1] For a more detailed discussion of American Indians and the U.S. Constitution, see Cohen (1982:207–28) and Wunder (1994:19–21).

[2] Article I, Section 2, states that "Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective Numbers . . . excluding Indians not taxed."

[3] See clauses 1, 11, and 12 of Article I, Section 8.

[4] From the outset, the Bill of Rights did not apply to American Indians, as they "were considered both pre–Bill of Rights and extra–Bill of Rights" (Wunder, 1994:21).

were subservient to the national government was enunciated.[5] The model created by these cases "can be described broadly as calling for largely autonomous tribal governments subject to an overriding federal authority but free from state control" (Wilkinson, 1987:24).[6]

The Marshall trilogy continues as the dominant precedent and standard by which the Court interprets the relationship between American Indians and the United States. The model also defines the trust relationship between American Indians and the federal government. The federal government has virtually unfettered authority over American Indians, yet it has a special relationship or even an obligation to act in their best interests.

Indian Removal and Reservation Life: 1830–80. In the early nineteenth century, as the United States tried to accommodate the westward movement of the white settlers, it also attempted to avoid the potential conflicts between the whites and the American Indians.[7] The United States' solution was to pressure the American Indians to surrender their lands through treaties. Virtually every treaty entered into during this period involved removing American Indians from the eastern part of the United States to lands west of the Mississippi River. While many tribes were willing to relinquish their lands through treaties, many resisted, including the Choctaws and the Cherokees.

Voluntary migration was no longer a viable option for the American Indians when Andrew Jackson was elected president in 1828. He promised to move the Indians westward and persuaded Congress to pass the Indian Removal Act of 1830. The Act forced the American Indians to move west of the Mississippi River, and those who resisted were subject to state criminal and civil jurisdiction. While the Cherokees' "trail of tears" is the most well-known tribal indignity, many other Indian tribes endured similar horrifying experiences including the Chippewas, Choctaws, Creeks, and Chickasaws (Foreman, 1932:21–28).

Beginning in the 1850s, with the rise of industrialization coupled with westward expansion, the United States government isolated Indians on reservations, confiscated their lands, and denied them basic political rights. Indian reservations were administered by the federal government, and Indians usually lived in substandard conditions.

In 1871, moreover, Congress passed the Appropriations Act

[5] The trilogy consisted of *Johnson v. McIntosh* (1823), *Cherokee Nation v. Georgia* (1831), and *Worcester v. Georgia* (1832), often called the Marshall trilogy.

[6] By "overriding federal authority," we mean that Congress has broad powers over American Indian affairs or what courts often term the "plenary power" of Congress, but these powers are "not synonymous with 'absolute' or 'total' " (Cohen, 1982:219).

[7] This discussion relies upon Cohen (1982:78–82), Prucha (1984:184–200), and Washburn (1975b:165–69).

(Prucha, 1975:136). The Act prevented any further formal treaty making between the United States and American Indians although, as Cohen (1982) noted, the United States continues to negotiate dozens of agreements with Indian tribes that have a similar effect. Most commentators agree that the central reason for the termination of treaty making was because the House of Representatives wanted to play a more instrumental role in the regulation of American Indian affairs (Fritz, 1976:85; Prucha, 1974:67–70).

During this period, the U.S. Supreme Court reasserted and expanded on the key principles pronounced in the Marshall trilogy. Congress's authority was expanded through two liquor cases: *U.S. v. Holliday* (1865) and *U.S. v. Forty-Three Gallons of Whiskey* (1876). In both, the Court gave Congress authority to regulate the sale and consumption of alcohol by American Indians. Congress's authority to regulate alcohol was justified, according to the Court, by the commerce clause and Congress's police powers to regulate for the health, safety, and morality of American Indians. On the other hand, states still possessed limited powers in regulating the tribes. In the *Kansas Indians* decision (1886), for example, the Court held that the Shawnees could not be taxed by the state of Kansas. Thus, Congress's authority over American Indians seemed to have few constraints, whereas the states continued to play a nominal role in regulating their affairs.

Assimilation: 1880–1928. In the 1880s, the federal government began to promote assimilation over separation. The assimilation movement's central goal was to destroy tribal culture and absorb American Indians into mainstream American culture. The assimilation movement was partially triggered in response to the Court's decision in *Ex parte Crow Dog* (1883). In this case, Crow Dog murdered Spotted Tail, the chief of the Sioux nation. In accordance with certain Sioux tribal customs, Crow Dog paid the relatives of Spotted Tail fifty dollars, eight horses, and a blanket as restitution for his crime. The District Attorney for the South Dakota Territory, however, tried Crow Dog in federal district court, where he was found guilty of first degree murder and ordered to be hanged. Crow Dog appealed to the U.S. Supreme Court, and Justice Stanley Matthews, writing for the Court, held that the federal courts had no jurisdiction over crimes committed between Indians in Indian country.

Outraged by the Court's decision, Congress passed the Major Crimes Act of 1885.[8] The Act made it a federal offense, rather than a tribal offense, for American Indians to commit one of any seven crimes on the reservation: murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.

[8] This discussion relies on Washburn (1975b:271).

In an even more significant step toward assimilation, Congress passed the General Allotment Act or Dawes Act (named after the sponsor of the bill) of 1887.[9] Its purpose was to end communal ownership of the tribes and encourage private ownership. Each American Indian family was given a certain acreage of land and the surplus land was sold to whites. It is estimated that Indian lands were reduced from about 140 million acres to less than 52 million (Wilkinson, 1987:20). In commenting on the ramifications of this Act to Congress in 1901, President Theodore Roosevelt characterized it is "a mighty pulverizing engine to break up the tribal mass" (Washburn, 1975:242). To foster "assimilation" further, American Indian children were sent to boarding schools away from the reservations, native languages and rituals were banned on reservations, and, in 1924, American Indians were made U.S. citizens and granted the right to vote. Like what happened to the earlier enfranchised African Americans, several states (i.e., Utah, Arizona, and New Mexico) continually attempted to prevent American Indians from voting through a variety of methods, including residency requirements, lack of state power over Indian conduct, language requirements, and guardianship (Deloria and Lytle, 1983:222–26; Price, 1973:229–37).

During the assimilation era, the Supreme Court legitimized Congress's "allotment" agenda by holding that Congress's authority over American Indians was plenary.[10] More precisely, the "Court recognized a seemingly unlimited federal power to alter tribal property and jurisdictional prerogatives contemplated by the treaties and treaty statutes" (Wilkinson, 1987:24).

Many scholars define the assimilation era as one of the darkest in the history of American Indians. Many progressives, however, took on the cause of Indian welfare and helped to form many American Indian groups, although these groups often reflected progressive movement goals.[11] The National Indian Association, Indian Citizenship Committee of Boston, Indian Rights Association, and the National Indian Defense Association all were created to lobby (in some form) to protect the general welfare of American Indians. These groups published letters, sponsored missions, conducted investigations, and lobbied Congress on behalf of American Indians.

Indian Reorganization: 1928–42. The 1920s and 1930s brought a new enthusiasm for American Indian autonomy and a disdain for the assimilationist policies of the allotment era (Cohen, 1982:144). The federal government began to reappraise the conditions of American

[9] For a more detailed discussion of the Dawes Act, see Washburn (1975a).

[10] See *United States v. Kagama* (1886), *United States v. McBratney* (1881), and *Lone Wolf v. Hitchcock* (1903).

[11] This discussion relies heavily upon Hagan (1993:135–36).

Indians.[12] The Merriam Report of 1928 found that the assimilation policies were a dismal failure and that most American Indians lived in abject poverty. American Indians lacked basic health care, illiteracy was rampant, annual incomes were below the poverty level, and the population of American Indians had reached a historical low.

To address these problems, President Franklin D. Roosevelt appointed John Collier, a champion of the Indian cause and an officer of the National Indian Defense Association, as Commissioner of Indian Affairs. Collier lobbied Congress and President Roosevelt for a resolution to end the assimilationist policies and to promote Indian sovereignty. Collier's dedication to the American Indian cause, when coupled with the Merriam Report, prompted Congress to pass the Indian Reorganization Act of 1934. The Act repealed the Allotment Act, encouraged community ownership and tribal culture, and gave American Indians preferential treatment for government positions in Indian service.

Termination: 1943–67. World War II brought an end to the short-lived trial of Indian revival. In an effort to support World War II, the United States cut the domestic budget—and the budget for American Indians was also trimmed.[13] The Eisenhower administration requested that the Hoover Commission recommend cost savings programs. The Commission suggested that the federal government transfer most of its Indian programs to the states. President Eisenhower also appointed Dillon S. Myer as Commissioner of Indian Affairs. Myer was a strong proponent of the termination movement, and his past government experience included supervising the relocation camps of Japanese Americans during World War II (Wunder, 1994:100).

The termination movement reached full stride when Congress passed Public Law 280, which allowed five states with exceptions, for the first time, to maintain both criminal and civil jurisdiction over American Indians. The trust relationship between the tribes and United States was also severed in these five states.

With a separate American Indian agenda, the Warren Court, however, limited the parameters of the termination policy by safeguarding Indian sovereignty. In *Williams v. Lee* (1959), Justice Hugo Black, writing for the majority, held that Arizona could not regulate contracts between Indians and non-Indians on reservation lands. Instead, the Court held that the Navajo tribe had exclusive judicial jurisdiction over such disputes. And, in *Menominee Tribe of Indians v. United States*

[12] This discussion relies upon Deloria and Lytle (1983:13–20), Philip (1977:113–34), and Wunder (1994:146).

[13] This discussion relies upon Cohen (1982:152–80) and Wunder (1994:100–108).

(1968), Justice Douglas found that termination did not mean the abrogation of existing treaty rights for tribes. Thus, the Warren Court took a leading role in hastening the end of the termination era.

Self-Determination: 1968–Present. It was not until the 1960s, at the same time when other groups including women were beginning to mobilize for greater civil rights, that Indians also began to mobilize (Shattuck and Norgren, 1979:5–15). Perhaps Indian groups' most important achievement during this period was their ability in helping to garner the necessary support for the codification of the Indian Civil Rights Act of 1968, which prohibited states from assuming jurisdiction in Indian country (amending Public Law 280) yet also allowed most amendments of the Bill of Rights to apply in Indian country.[14]

Although the Indian Civil Rights Act stands out as a prominent victory for many, some Indian groups did not perceive its passage as a victory and took measures to draw attention to what they perceived as continued legal inequalities. Like the civil rights and women's rights movements, American Indians had a more radical as well as a more traditional branch. The radical movement was led by young American Indian groups who came predominantly from urban areas (Wunder, 1994:157). In the late 1960s, for example, members of the American Indian Movement (AIM) seized Alcatraz Island claiming it as part of their aboriginal lands (Costello, 1980:58–59). In the summer of 1972, AIM planned the "trail of broken treaties." AIM caravanned from Minneapolis to Washington, D.C., and organized a "sit-in" at the Bureau of Indian Affairs (Wunder, 1994:158). And, in 1973, national attention was drawn to the plight of American Indians when AIM took over Wounded Knee, South Dakota, the site of the massacre of 150 Indians by the United States military in 1890 (Costello, 1980:59).

Several American Indians, however, took a more traditional avenue in redressing their grievances. Many Indians were attracted to the study of law at the American Indian Law Center at the University of New Mexico. Soon, the clinic there as well as graduates of its programs began to file hundreds of test cases in the federal courts. Around the same time, the Native American Rights Fund (NARF) was founded in 1970 in Boulder, Colorado. It quickly became the NAACP LDF of the Indian rights movement as the "courts became the forum of choice for Indian tribes and their members" (Strickland, 1992:579). Thus, the Burger Court became a central actor in the formation of American Indian policy.

[14] Title II of the Indian Civil Rights Act applies the First, Fourth, Fifth, Sixth, and Eighth Amendments and the Fourteenth Amendment's equal protection clause to Indian country. Additionally, no bill of attainder or ex post facto laws can be exercised on tribal lands. For a more detailed discussion of the Indian Civil Rights Act, see, for example, Wunder (1994:124–46).

American Indian cases heard by the Burger Court are diverse: they range from cases involving hunting, fishing, and land rights to those involving civil rights. Thus, when we analyze American Indian success rates in the Court, the kinds of issues present in each case are important factors to be considered.

Methods

The 63 full opinion cases regarding American Indians decided by the U.S. Supreme Court during the 1969–85 terms were identified by examining the *United States Reports*.[15] American Indian cases are defined here as ones that include American Indians as individuals as well as American Indian tribes, or those cases where the United States government is claiming to advance American Indian interests or to protect that trust relationship. The aim of this study is to examine collectively how the *interests* of American Indians and tribes are protected or advanced by Supreme Court litigation.[16]

Success and success rates are operationalized as whether or not the Court decided in favor of the party advancing American Indian interests. More specifically, our dependent variable is dichotomous (1 = in favor of American Indian interests; 0 = against American Indian interests).[17] Success rates were computed by dividing the number of cases in which the Court supported American Indian claims by the total population of cases. Theoretically, these scores can range from 0 to 1.

[15] A list of these cases is available by contacting the authors. Per curiam decisions were excluded from this analysis. We specifically chose not to use the Spaeth data base because the Spaeth data operationalize American Indian cases as those where American Indians are a party. We, in contrast, examine all cases that had an impact on American Indian interests, including those cases where the federal government is a party in a case on behalf of American Indian interests.

[16] The reader should be mindful that American Indians as individuals and Indian tribes as nations is a fundamental distinction that is critical to understanding federal Indian law. For purposes of this study, however, we have chosen to examine all cases involving issues that are crucial to American Indian interests without reference to this distinction because the purpose of this study is to determine how American Indian *interests* have fared in the Burger Court—irrespective of tribal or individual interests.

Moreover, to begin to analyze the data any differently would not allow us to make any meaningful comparisons. For example, in our data set of 59 cases, we found that the Court supported individual Indian litigants in 52 percent of the 21 cases and tribes in 52 percent of the 25 cases. And, in cases where the federal government represented an individual Indian litigant, the Court's support rates were 71 percent ($n = 7$); in cases where the federal government represented tribes, however, the Court's support rates were 0 percent ($n = 3$). Still, in cases where a non-Indian party advanced an Indian interest, the Court's support rates were 66 percent ($n = 3$). Thus, given the small number of cases under analysis, making these kinds of distinctions is not practical here.

[17] Four cases were excluded from the analysis because they were split decisions. In cases where the parties were Indian versus tribe, the tribe was coded in favor of American Indian interests. This coding scheme avoided any coding biases and reflects our belief that the community interest outweighs the individual interest.

The same calculations were made for each justice to calculate individual support rates.

Success Rates. As revealed in Table 1, American Indians won 53 percent of the 59 cases decided by the Burger Court. Considerable variation exists among the individual justices' support rates for American Indian claims. Justices Douglas, Marshall, Brennan, Blackmun, and Stewart supported American Indian claims in over 50 percent of the cases, whereas Justices White, Powell, O'Connor, Stevens, and Rehnquist all had support rates of less than 50 percent. Justice Douglas had the highest support rates, 94 percent (n = 16). In contrast, Justice Rehnquist's support rate for American Indians was less than 33 percent (n = 55).

In the case of Justice Douglas, his liberal tendencies have been well documented (Rohde and Spaeth, 1976:143; Segal and Spaeth, 1993:252–53). His love of the land and his support for American Indian interests are also well known (Johnson, 1990:191–97; Wilkinson, 1990:233–45). Johnson (1990), for example, noted that Justice Douglas was "an ardent supporter of tribal self-determination and a firm believer that agreements with Indian tribes should be construed in favor of the Indians, and should be upheld" (p. 206). More interesting is the uncharacteristic low support for American Indian interests by the usually more liberal Justice Stevens. O'Connor and Epstein (1983:328), for example, found Justice Stevens to support

TABLE 1

Court's and Justices' Support for American Indian Cases: 1969–85 Terms

Court and Justices	Support Rates		Support Rates as Appellant		Support Rates as Respondent	
	N	%	*N*	%	*N*	%
Court	59	52.5%	28	75%	31	32.2%
Douglas	16	93.8	13	100.0	3	66.7
Marshall	58	74 1	28	89.3	30	60 0
Brennan	57	71.9	26	88.5	31	58.1
Blackmun	56	60.7	25	68.0	31	54.8
Stewart	38	55.3	26	65.4	12	33.3
Burger	58	50.0	28	75.0	30	26.7
Harlan	2	50.0	1	100.0	1	0.0
White	59	45.8	28	60.7	31	32.3
Powell	51	43.1	24	66.7	27	22.2
O'Connor	21	42.9	2	100.0	19	36.8
Stevens	42	38.1	14	42.9	28	35.7
Rehnquist	55	30.9	25	52.0	30	13.0
Black	3	0.0	2	0.0	1	0 0

gender-based claims in 57 percent of the cases. Other studies have found him to be among the most liberal on the Court during the Burger Court era (Heck, 1981:197; Goldman, 1982:542).

One might hypothesize that justices from "western or southwestern states," such as Justices O'Connor and Rehnquist, might be better acquainted with the plight of American Indians and, thus, be more sympathetic to their claims. That was not the case. Justice O'Connor's support for gender-based claims, for example, was 67 percent, while it was only 43 percent for American Indians. Justice Rehnquist's low support for American Indian claims was consistent with his generally low support for disadvantaged groups. In fact, he was more supportive of American Indian claims (31 percent) than for gender-based claims (O'Connor and Epstein, 1983:328)—16 percent—at least before Justice O'Connor came on the Court. O'Connor and Segal (1990:100) found that Justice Rehnquist's support for gender-based claims increased to 50 percent after Justice O'Connor came on the Court.

Interestingly, Justice Burger's support rates were much higher for American Indian claimants than for African Americans or claims involving gender. Burger supported American Indian claims in 58 percent of the 19 cases during the 1972–76 terms, while he supported African American litigants in only 34 percent of the 65 cases examined by Ulmer and Thomson (1981:449) during the same time period. Similarly, Burger's support for American Indian claims were much higher (51 percent in 39 cases) than for gender-based claims (25 percent in 68 cases) (O'Connor and Epstein, 1983:328).

Support Scores as an Appellant. The Court's tendency to decide in favor of appellants is well documented (Baum, 1976, 1977, 1979; Epstein and O'Connor, 1988; George and Epstein, 1992; Salokar, 1992; Sheehan, Songer, and Mischler, 1992). Many argue that the justices employ an "error correcting" strategy; that is, the justices take cases when they "seek to 'correct errors' in the lower courts by voting to grant a hearing whenever a lower-court decision departed significantly from their most preferred doctrinal position" (Baum, 1977:14).

American Indians clearly benefited when they were the appellant. As indicated in Table 1, the Court supported American Indian claimants in 75 percent of those cases. In sharp contrast, the Court's support fell to less than a third (32.2 percent) when American Indians were the respondent.

The individual justices were also more supportive of American Indians as the appellant. With the exceptions of Justices Black and Stevens, every justice supported American Indians as an appellant in over 50 percent of the cases. Further, when we controlled for when American Indians were the appellants, the low support rates by Justices Stevens and O'Connor may be explained. In the 21 cases in which

O'Connor participated, American Indians were the appellant in only about 10 percent. In the case of Justice Stevens, American Indians were the appellants in only a third of the 42 cases in which he participated. Stevens's and O'Connor's support rates may have been higher if American Indian claimants were the appellant in a greater number of cases.

Issue Areas and Support Rates. Table 2 reveals the kinds and distribution of issue areas in which American Indian cases fall. Four issues—land claims, natural resources, taxation, and what we term procedure/jurisdiction, which are cases that involve questions peculiar to tribal claims or the status of Indian reservations—make up just under 90 percent of the cases decided by the Burger Court. The kinds of cases heard by the Court involving American Indians are quite different than those involving African Americans and women. Unlike those of other politically disadvantaged groups, American Indians cases did not primarily involve traditional civil rights or liberties issues—at least during the Burger Court era. As a politically disadvantaged group, American Indian interests are unique and diverse in relation to their counterparts.

As Table 2 suggests, the success rates of American Indian claimants varied considerably based on the issue area being litigated. In land claims, American Indians enjoyed a 50 percent ($n = 16$) success rate. One of the most important victories for American Indians in this arena was in *County of Oneida v. Oneida Indian Nation* (1985). At issue was the validity of a 1795 agreement between the Oneida Nation and New York regarding the transfer of land to the state because the transfer did not have the required prior federal approval. In a 5 to 4 decision, the Court held that the 175-year-old agreement was invalid, which allowed the Oneida nation a federal common law right to sue for a breach of its possessory rights to aboriginal lands.

In the procedure/jurisdiction arena, American Indian claimants won

TABLE 2

Court's Support Rates for Different American Indian Issues: 1969–85

Issue	*N*	Distribution of Issues (%)	Support Rates (%)
Land claims	16	27.1%	50%
Natural resources	13	22.0	38.5
Procedure/jurisdiction	13	22.0	53.8
Tax	10	17.0	80 0
Civil rights/civil liberties	4	6.8	50.0
Other	2	3.4	0.0
Criminal	1	1.7	100 0
Total	59	100.0	

54 percent of the 13 cases. Their success may be credited in large part to their appellant status. American Indians were the appellants in 69 percent of the procedure/jurisdiction cases. An illustrative example of a procedure/jurisdiction case is *Kennerly v. District Court* (1971). The *Kennerly* Court struck down Montana's assertion that it possessed judicial jurisdiction regarding a civil contract between an Indian and non-Indian on a reservation.

In the area of natural resources, American Indians were not as successful as in land or procedure/jurisdiction claims. They won only 39 percent ($n = 13$) of their cases. The low success rates in natural resource cases may be attributed to the Court's preference to defer to the states' and Congress's police powers to preserve scarce resources although resources are also critical to the survival of some tribes, *as tribes*. For example, in *United States v. Dion* (1986) the Court held that, pursuant to the Eagle Protection Act, American Indians were prohibited from hunting eagles.

In contrast, American Indians enjoyed a very high success rate in taxation cases, 80 percent ($n = 10$). Most of these cases involved attempts by states to tax individuals who resided in Indian country. This high success rate may be due to a long line of precedent established by the Court as well as by codification of these principles in the Indian Civil Rights Act of 1968. The Indian Civil Rights Act of 1968 prohibits state jurisdiction on tribal lands, unless consent is attained by Congress or the affected tribe.[18] Further, since *Worcester v. Georgia* (1832), the Court has usually held that states would play a limited role in the regulation of Indian affairs in Indian country. As the Court held in *McClanahan v. Arizona State Tax Commission* (1973), this principle also applies to state taxation.

Discussion

While some justices appear to dislike American Indian cases (see Woodward and Armstrong [1979:359, 412]), at least two justices from the Burger Court placed great importance on American Indian cases. Said one justice: "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). Yet, that fascination has not necessarily resulted in a coherent body of law.

[18] For an extended discussion of the Indian Civil Rights Act (1968), see Cohen (1982:202–4).

As noted earlier, American Indian cases are different than those involving other minority groups. The issues of federal preemption and/or inherent tribal sovereignty permeate most cases irrespective of issue area. Thus, unlike the bodies of law that have developed as the Court has addressed issues of race and gender-based discrimination over the years, the range of issues presented by American Indian interests to the Court have resulted in little doctrinal coherence and, thus, mixed success rates. One author has noted that Justice Stewart was supposed to have remarked at a visit at Boalt Law School that "any case the Court decides in Indian law is stillborn and has no precedential value" (Pelcyger, 1983:31). More recently, one former attorney at the Native American Rights Fund remarked with some dismay,

> I have one pet peeve. Since *White Mountain Apache v. Bracker* [1980], the Court said they were going to decide each case on a case-by-case basis. As an attorney, try to tell a company to do business in Indian country and what the law is when the Court decides issues on a case-by-case basis. This is a terrible view, an ad hoc view, [which is] devised for state jurisdiction over tribes. [This] conflicts with our understanding of Indian law. They, [the justices,] should follow *Worcester*. Companies are now scared to go on reservations with no firm idea of how the Court will decide cases. The Indian commerce clause shields Indian tribes from state [jurisdiction]. (Author interview, 20 May 1994)

This case-by-case approach undoubtedly is reflected in the mixed success rates of American Indian interests in Court.

Just as important as their overall success rates, however, are the nature and impact of individual cases on the status of American Indians. American Indians, for example, were dealt a stunning blow in *Oliphant v. Suquamish Tribe* (1978) when the Court struck down tribal jurisdiction over crimes committed by non-Indians in Indian country thereby adversely affecting their efforts to preserve exclusive jurisdiction on reservations (especially in cases involving state jurisdiction). Similarly, in *Rice v. Rehner* (1983) the Court dealt tribal sovereignty another blow when it upheld concurrent tribal and state regulation of on-reservation sales of alcoholic beverages. And, in *Washington v. Confederated Tribes of the Colville Indian Reservation* (1980), the Court upheld a state cigarette tax on reservation sales by a tribe to non-Indians. All three cases symbolized a retreat from the Marshall trilogy.

In sharp comparison, in *Santa Clara Pueblo v. Martinez* (1978), the Court held that a tribe had authority to choose the criteria for its membership, even if it may have violated a competing gender-based equal protection claim. Later, in *White Mountain Apache v. Bracker* (1980), the Court struck down state motor license and fuel use taxes on a non-Indian corporation engaged in logging activities in Indian

country. Moreover, in *Ramah Navajo School Board v. Board of Revenue* (1982), the Court struck down a state tax on a non-Indian corporation building a school facility in Indian country.

These decisions highlight the Court's discomfort with American Indian cases and supports observations that the Court treats many American Indian cases on an ad hoc, case-by-case basis regardless of the issue area being litigated before the Court. Taken together, these cases also illustrate the uncertainty of the development of federal Indian law and the need to modify traditional methods of judicial behavior analysis to allow better comparisons of American Indian interests to other disadvantaged groups. SSQ

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