

May 2017

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Recommended Citation

Fletcher, Matthew L.M. (2017) "Toward a New Era of American Indian Scholarship: An Introductory Essay for the American Indian Law Journal," *American Indian Law Journal*: Vol. 1 : Iss. 1 , Article 1.
Available at: <https://digitalcommons.law.seattleu.edu/ailj/vol1/iss1/1>

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TOWARD A NEW ERA OF AMERICAN INDIAN LEGAL SCHOLARSHIP: AN INTRODUCTORY ESSAY FOR THE *AMERICAN INDIAN LAW JOURNAL*

Matthew L.M. Fletcher*

The field of American Indian law is both incredibly old *and* new. It is old because Indian law intruded on the deliberations of the Framers way back in 1787,¹ and it is new because there simply was no significant corpus of Indian law scholarship until the 1970s. American Indian law is a growing, dynamic field, subject to enormous complexity and creativity. The founding of a new law journal dedicated to Indian law – Seattle University School of Law's *American Indian Law Journal* – compels review of the scholarly field of American Indian law.

Modern Indian law scholarship has passed through two distinct phases – the first phase is one practicality dominated by the practitioners of the 1960s through the early 1980s;² the second phase, which began in earnest in the late 1970s and is ongoing, is dominated by scholars (many of whom continue to practice in the field on a limited basis) who are critics of the doctrines of federal Indian law.³ The temporal framework

* Professor of Law, Michigan State University College of Law. Director, Indigenous Law and Policy Center. Thanks to Wenona Singel, Kristen Carpenter, Kate Fort, and Angela Riley. Finally, thanks to Bree Blackhorse and the other editors of the *American Indian Law Journal* for the kind invitation to publish this essay. I am honored.

¹ See Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs*, 69 B.U. L. REV. 329 (1989)

² My informal surveys of the most-cited Indian law articles of all-time includes numerous articles written by practitioners from the first generation of Indian law specialists, many of whom (most?) became law professors. *E.g.*, Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice, and Mainstream Values*, 86 MINN. L. REV. 267 (2001); Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329 (1989); Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L. J. 35 (1992); Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: As Long as Water Flows, or Grass Grows Upon the Earth—How Long a Time is That?*, 63 CAL. L. REV. 601 (1975); Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977); Robert Yazzie, *"Life Comes from It": Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994). My studies are Matthew L.M. Fletcher, *Top 25 Indian Law/Tribal Law Articles (HeinOnline)*, Turtle Talk blog post, Aug. 9, 2011, available at <http://turtletalk.wordpress.com/2011/08/09/top-25-most-cited-indian-lawtribal-law-articles-heinonline/>; Matthew L.M. Fletcher, *Top 25 Most-Cited Federal Indian Law/Tribal Law Articles*, Turtle Talk blog post, Aug. 8, 2011, available at <http://turtletalk.wordpress.com/2011/08/08/top-25-most-cited-federal-indian-lawtribal-law-articles/>.

³ *E.g.*, ROBERT A. WILLIAMS, JR., *SAVAGE ANXIETIES: THE INVENTION OF WESTERN CIVILIZATION* (2012); ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005); ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800* (1997); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990); Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1; Russel Lawrence Barsh, *Is There Any Indian Law*

loosely corresponds to the changing fortunes of tribal interests⁴ in the United States Supreme Court, with tribal interests enjoying significant success before the Court through the 1960s and into the 1980s, and suffering considerable losses before the Court since the mid-1980s, with tribal interests having lost more than 75 percent of their cases since 1986.⁵ A few observers, most notably Sam Deloria⁶ and the late Phil Frickey,⁷ argue that the current phase of Indian law scholarship is a failed endeavor and

Left—A Review of the Supreme Court's 1982 Term, 59 WASH. L. REV. 863 (1984); Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979 (1981); Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999); Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31 (1996); 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); Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753 (1992); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995); Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991); Gerald Torres & Kathryn Milun, *Translating Yonondio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L. J. 625; Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660; Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

⁴ I use "tribal interests" throughout this article as a general term to mean Indian tribes, but also to mean those entities that may be aligned with Indian tribes. In any given case, that may mean the federal government, private entities, and individual Indians. I intend to exclude those non-tribal parties from this definition in cases where they are not aligned with tribes.

⁵ See generally David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of State' Rights, Color-Blind Justice, and Mainstream Values*, 86 MINN. L. REV. 267, 280 (2001) (recounting tribal failures at the Supreme Court).

⁶ See Sam Deloria, *Commentary on Nation-Building: The Future of Indian Nations*, 34 ARIZ. ST. L. J. 55, 55-56 (2002) ("The saddest thing of all is the number of Indian academics who basically yearn for a time which never existed, when Indian sovereignty was like Superman in a universe without kryptonite. That never even happened for Superman. Somebody always had a little rock of kryptonite to whip out and Superman was toast. But we have sad, misguided scholars dropping out of what's happening because, as one said to me, 'I can't participate in a project that tells the tribes what they can't do.' My God. That's our money that sent this guy to school. In the old days, when my people sent out some scouts, if they went over the hill and saw 500 Crow Indians standing there cleaning their weapons, were they supposed to come back to the camp and say, 'No problem, man, nothing happening?' They would get fired as scouts. Whatever our personnel system was in those days, they wouldn't be sent out. But we have scholars that want to look over the state of the law and come back and say, 'Hey, we've got unlimited sovereignty, it's just that we've got a screwed up country that won't recognize it.' Well, that's helpful."). I should add that Deloria's assessment differs from Frickey's, and goes to the heart of the subject matter of American Indian law.

⁷ See Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 660-61 (2006) ("[W]riting in the field needs to work toward a functional jurisprudence, in which objective, scholarly work interrogates the law and life on the ground, to make

is unpersuasive to the judiciary and policymakers. The main question Indian law scholars have been asking for 20 years or more is – what are we doing this for?

I suspect American Indian legal scholarship is heading toward a crossroads.⁸ In the coming years, I believe Indian law scholars must address these questions (and probably many more I have neglected to mention):

- Were Deloria and Frickey right – that most current Indian law scholarship is a failed enterprise in that it fails to persuade the judiciary, and really anyone outside the field? How do tribal advocates change that?
- Who is, and who should be, the audience for American Indian legal scholarship? State and federal judges? The Supreme Court? Tribal court judges? Tribal leaders and constituents? The practicing Indian law bar?
- Is there a link between the shift in American Indian legal scholarship from practical and descriptive work to theoretical and normative work, and the decline in the fortunes of tribal interests in the Supreme Court?
- Are Indian law scholars, who are most distant from the on-the-ground realities of Indian country, less capable of generating useful legal scholarship than current practitioners? Do courts cite practical articles (often written by practitioners) more than theoretical articles (usually written by law professors and law students)?
- What is the best, most useful kind of American Indian law scholarship? Theoretical and doctrinal papers that offer normative prescriptions? Descriptive papers that offer legal, political, economic, and historical context? Normative scholarship that offers realistic solutions for tribal attorneys and tribal leaders? Normative scholarship that offers thoughtful theoretical criticism of the Supreme Court's Indian law jurisprudence? Practical nuts-and-bolts scholarship for Indian country lawyers, tribal leaders, and tribal court judges? Practical nuts-and-bolts scholarship for federal judges?

transcendental nonsense more difficult to deploy for anyone on any side of a dispute, but especially by the Supreme Court in cases like *Duro*. Of course, such work might deflate some federal judicial stereotypes about tribes, but might support some others. So be it. Scholarship is not – or should not be – unidimensional in any ideological way. My sense, though, is that such work would tend to support the pragmatic legitimacy of tribes in many circumstances.”); see also *Conference Transcript – The New Realism: The Next Generation of Scholarship in Federal Indian Law*, 32 AM. INDIAN L. REV. 1, 3-4 (2007/2008) (quoting Phil Frickey: “People like Sam Deloria have said this before, and in some cases, like Sam, for many years.”).

⁸ Usually, Indian law scholars describe *Indian law* as heading toward a crossroads. *E.g.*, *Symposium: Indian Law at a Crossroads*, 38 CONN. L. REV. 593-832 (2006); Clinton, *Isolated in Their Own Country*, *supra* note 3, at 979 (“Federal Indian policy is again at a crossroads.”). I must respectfully disagree. Federal Indian law has been incredibly stable since 1970, despite some ugly losses in the Supreme Court. See *generally* CHARLES F. WILKINSON, *BLOOD STRUGGLE* (2005).

- Does the law review market distort Indian law scholarship and how it is used by the courts?

This essay will address just the tip of the iceberg of the effort to reexamine American Indian legal scholarship and its influence on the Supreme Court, state courts, lower federal courts, and tribal courts and on the legal academy.⁹ In 2011, I generated a dataset for Supreme Court citations dating back to the 1958 Term that cited to American Indian legal scholarship in the form of law review articles, books or monographs, and treatises and casebooks.¹⁰ I was curious about whether the early generation of Indian law scholars, most of whom were practitioners forcing huge jumps in the modernization of federal Indian law, were really all that influential. And if so, why?

My initial impressions were that the scholars writing in the 1970s were very influential on the Supreme Court, but that the American Indian legal scholarship citation rate is declining, with the starkest decline being in the Roberts Court. Overall, as we will see, about one-third of the Burger and Rehnquist Courts' decisions included citations to American Indian legal scholarship. Still, my conclusion is that the Court rarely engages with the normative and prescriptive analyses articulated in the literature, even when the Court does cite to it. What is fairly clear, however, is that there is a judicial ideological connection to Indian law scholarship citation practices, with left-leaning Justices citing to scholarship two-to-four times more often than moderate or right-leaning Justices.

As for the state and lower federal courts (here I only study the years of the early Roberts Court), my initial finding (really, more of an estimate) is that less than ten percent of Indian law decisions involve citations to Indian law scholarship. However, the citation rate goes up considerably when the court is deciding a hard case. In appellate cases, when at least one judge dissents or writes a separate concurrence, the citation rate climbs dramatically. Moreover, I presume, given what I have seen so far, that many more state and lower federal court judges are likely to engage Indian law scholarship on normative and prescriptive matters more than the Supreme Court Justices do.

I additionally engage Professor Frickey's recommendation that Indian law scholars embark on research designed to bring more "realism" to the field of Indian law. In my view, with deep respect for Professor Frickey, it was not always clear what he

⁹ Like other studies, I use citation counts as a proxy for influence, recognizing the limitations on that proxy. E.g., David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345 (2011); Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme Court's Use of Legal Scholarship*, 106 NW. U. L. REV. 995 (2012).

¹⁰ See Matthew L.M. Fletcher, *Supreme Court Citations to Indian Law Scholarship*, Turtle Talk blog post (Aug. 15, 2011), available at <http://turtletalk.wordpress.com/2011/08/15/supreme-court-citations-to-indian-law-scholarship/>; Matthew L.M. Fletcher, *First Addendum to Supreme Court Citations to Indian Law Scholarship: Treatises and Casebooks*, Turtle Talk blog post (Aug. 17, 2011), available at <http://turtletalk.wordpress.com/2011/08/17/first-addendum-to-supreme-court-citations-to-indian-law-scholarship-treatises-and-casebooks/>; Matthew L.M. Fletcher, *Second Addendum—All the Supreme Court Citations to Indian Law Articles*, Turtle Talk blog post (Aug. 17, 2011), available at <http://turtletalk.wordpress.com/2011/08/17/19730/>.

meant by “realism.” In his powerful *Connecticut Law Review* article on the subject, he wrote as an introduction that “realism”:

in federal Indian law should be simultaneously more grounded and more theoretical. If doctrine is at least as subject to evolution here as in other fields of law, scholarship should aspire to explain and prescribe Indian law where ... it counts—on the ground. What actually happens on Indian reservations concerning the creation, evolution, and implementation of law is a subject about which the broader legal community has few conceptions, and most of those are probably inaccurate. If, as legal realism suggests, the law that counts is the law in action, and the law in action should be measured by a bottom-up consequential calculus rather than some top-down consistency with abstract doctrine, the legal community cannot hope to understand, much less appreciate, federal Indian law without a much better sense of grounded reality.¹¹

I find this description of realism very compelling, most especially the prescription to focus on “a bottom-up consequential calculus.”¹² I take this description to mean that research into tribal law and tribal governance structures, then, would be at a premium. Empirical research, both qualitative and quantitative, about reservation legal relationships – between tribes and members, between tribes and nonmembers, on tribal court procedural and substantive practices, and “on-the-ground” reservation facts – would be a premium in this calculus.¹³ Of course, it may be especially difficult to parse out articles offering “realism” – some articles truly will derive from Indian country experiences, while others will only partially (and yet importantly) derive from Indian country experiences, while still others may only obliquely derive from Indian country experiences. Others may be “realistic” but derive nothing from Indian country.

Somewhat in contrast I note Sam Deloria’s continuing opposition and criticism of Indian legal scholarship. He, I would think, shares Frickey’s overall criticism of Indian law scholarship – that it is substandard as a general matter. I risk misinterpreting his criticism, but I take from his many unpublished talks and from our many conversations that at least a part of the fundamental problem with Indian law scholarship is the refusal by pro-tribal scholars to satisfactorily acknowledge the very real problems and limitations of tribal governance. Consider the following examples: tribal advocate and tribal leader demands for the recognition of tribal sovereignty beyond what any Indian tribe is capable of exercising at this time; lack of political accountability and general competence of many tribal government leaders; and misdirected focus on sovereignty issues instead of terrible real-world problems like reservation youth suicide. I cannot refute these criticisms by pointing to my scholarship and giving my own examples of how I have avoided this trap we are all in – few (and probably none) of us in the field

¹¹ Frickey, *supra* note 7, at 650-51.

¹² *Id.* at 651.

¹³ It’s hard to resist a joke about the development of Indian law scholarship from arithmetic, see Peter C. Maxfield, *Oliphant v. Suquamish Tribe: The Whole is Greater than the Sum of Its Parts*, 19 J. CONTEMP. L. 391 (1993), to algebra, see Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and the Americanizing the White Man’s Indian Jurisprudence*, 1986 Wis. L. Rev. 219, to calculus, see Frickey, *supra* note 7, at 691.

legitimately can – and I am not going to attempt to address them here completely. Here, I can make the effort to discuss how the scholarship in the field is received by the courts. Even that, of course, is limited.

Overall, I suspect that critics like Deloria and Frickey were both right and a little bit wrong. While much of the Supreme Court appears not to be persuaded by Indian law scholars, the state and lower federal courts sometimes are persuaded and, what's more, occasionally engage scholars on the normative and prescriptive arguments advanced by Indian law scholars. That said, courts still rarely engage and even less often adopt scholarly normative arguments.

Part I introduces the notion that the legal academy can somehow influence developments in the law. In Part II, I look at the data relating to Supreme Court citations to Indian law scholarship dating back to 1959. While the Burger and Rehnquist Courts (1968-2005) cited fairly extensively to Indian law scholarship, the early years of the Roberts Court (2005-2012) have seen a dearth of citations. Part III presents data on lower federal and state court citations to Indian law scholarship from the same time frame as the Roberts Court (2005-2012), and suggests that many lower courts continue to take Indian law scholarship seriously. In Part IV, I draw a few conclusions about the future of American Indian legal scholarship. I believe that a legal periodical like the *American Indian Law Journal* is helpful, and I will explain why.

I. A Note on Scholarship and Judging

The pinnacle for authors of legal scholarship is to write a paper that influences the development of the law, most strikingly in the Supreme Court. Probably only Felix Cohen can stake a claim to writing scholarship that had a dramatic and long-lasting impact on the Supreme Court's Indian law jurisprudence.¹⁴ Cohen's *Handbook of Federal Indian Law*, championed by his friend Supreme Court Justice Felix Frankfurter,¹⁵ is probably one of the most influential treatises in any field. It continues to be cited by the Court long after Cohen's involvement in the field ended with his early death in 1953.¹⁶

Cohen's original *Handbook* was a hybrid of the kind of scholarship that both restated the law for the ease and convenience of practitioners and courts, and promoted

¹⁴ The Supreme Court appears to have cited Cohen's law review articles alone more than any other scholar, with the exception of Robert Clinton. See *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) (citing Felix S. Cohen, *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 145 (1940)); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (citing Felix S. Cohen, *Spanish Origin of Indian Rights*, 31 GEO. L.J. 1 (1942)); *United States v. Dann*, 470 U.S. 39 (1985) (citing Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947), and Cohen, *Spanish Origin of Indian Rights*, *supra*); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (citing Cohen, *Original Indian Title*, *supra*); *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986) (Blackmun, J., dissenting) (citing Cohen, *Original Indian Title*, *supra*).

¹⁵ E.g., Felix Frankfurter, *Foreword to A Jurisprudential Symposium in Memory of Felix S. Cohen*, 9 RUTGERS L. REV. 355 (1954).

¹⁶ See Kevin K. Washburn, *Felix Cohen, Anti-Semitism and American Indian Law*, 33 AM. INDIAN L. REV. 583, 584 (2008-2009) (reviewing DALIA TSUK MITCHELL, *ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM* (2007)).

law reform.¹⁷ The *Handbook*, several editions later, has largely embraced its role as a treatise.¹⁸ The *Handbook's* efforts at promoting law reform in recent years have not been terribly successful.¹⁹ A treatise must often choose between competing lines of cases in order to present the doctrinal position best suited to the field, but best preserves its position of authority by picking and choosing its fights carefully. In a field like Indian law (perhaps there are no others like Indian law), where so much of the law is arrayed against tribal interests, treatise authors and editors might be compelled to argue for a position no court has adopted because it is the right position to take. A treatise arguing often enough for the impossible (or improbable) may become suspect in the eyes of the judiciary. Cohen's *Handbook*, despite being authored and edited exclusively by supporters of tribal interests, retains its authority after all these years.²⁰ The Supreme Court continues to trust the *Handbook*, and even cites it for propositions that might make tribal advocates cringe.²¹ But that's the *Handbook's* job.

Traditional law review articles (like the ones to be published by the *American Indian Law Journal*) tend to be better suited to filling the role of advocacy anyway. Law review articles can take the time to develop a comprehensive theory, delve into the legal history, the legislative history, the jurisprudential history, and make a complete argument on relatively narrow topics. Good law review articles identify the best arguments, address all sides of a dispute, and make fair conclusions from those arguments. No comprehensive treatise can do that as effectively as law review articles.

But writing law review articles is often a thankless task. Treatise authors and editors can take solace in being part of a project that is more likely to be cited in the cases. Law review articles are not as likely to be cited by the courts. A majority of articles are not cited by anyone, anywhere. There are so many articles, and few judges treat the business of judging as a scholarly endeavor. Some judges openly disdain scholarship.²² Moreover, law reform advocacy is difficult. It is far easier for judges to

¹⁷ Cf. Harold L. Ickes, *Foreword*, in FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW v (1941 ed.) ("Ignorance of one's legal rights is always the handmaid of despotism. This Handbook of Federal Indian Law should give to Indians useful weapons in the continual struggle that every minority must wage to maintain its liberties, and at the same time it should give to those who deal with Indians, whether on behalf of the federal or state governments or as private individuals, the understanding which may prevent oppression.").

¹⁸ See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2005 ed.).

¹⁹ *E.g.*, *Hydro Resources, Inc. v. EPA*, 608 F.3d 1131, 1157 (10th Cir. 2010) (rejecting arguments advanced in the 2005 and 1982 editions of the *Handbook*).

²⁰ A quick Westlaw search indicates that the courts have cited to various editions of the *Handbook* in about 900 cases, nearly 300 of them since 2000. The Supreme Court has cited the *Handbook* in 65 of its cases overall, and in ten since 2000.

²¹ *E.g.*, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 341 (2008) ("One commentator has noted that 'th[e] elevated threshold for application of the second Montana exception suggests that tribal power must be necessary to avert catastrophic consequences.' Cohen § 4.02[3][c], at 232, n. 220.").

²² See Petherbridge & Schwartz, *supra* note 9, manuscript at 2-3 (collecting anecdotes). See also Conference Transcript, *supra* note 7, at 13 (quoting Riyaz Kanji, who mentioned a friend who clerked on the Supreme Court; when the clerk presented law review research to the Justice, "The Justice had taken a look at the stack and had unceremoniously dumped them in the garbage can."). *Contra id.* at 14 ("When I went to the Court to clerk, I wondered whether Justice Souter would have the same approach to

follow the great weight of authority than to decide difficult questions in accordance with a law professor's recommendation. A judge might be reversed for that, and no judge wants to do anything out of the ordinary that might encourage reversal.

That said, courts do cite scholarship, and they typically are more likely to do so in close cases and in cases where there is little or no precedent. Indian law often fits that bill. UCLA Vice-Chancellor Carole Goldberg by far has influenced courts more than any other Indian law scholar in the modern era. Her research on Public Law 280's legislative history, and her conclusions from that research, formed the theoretical basis for two of the most important Supreme Court decisions in the last 50 years, *Bryan v. Itasca County*,²³ the most important Public Law 280 case,²⁴ and *California v. Cabazon Band of Mission Indians*,²⁵ the case that institutionalized Indian gaming.²⁶ While the Supreme Court and lower courts have cited other scholars for their research, no modern scholar has so directly influenced the Supreme Court in the same manner as Vice-Chancellor Goldberg.

In the next sections, we will review some hard data about the Supreme Court's and lower courts' citation patterns in Indian law. We will also take a look as to why a court might cite to a piece of scholarship.

II. Supreme Court Citations to Indian Law Scholarship, 1959-2012²⁷

A. The Survey

Here, we look to the United States Supreme Court, going back to the 1958 Term, which is generally recognized by American Indian law scholars and commentators as the beginning of the "modern era" of Indian law.²⁸ As we will see, the Supreme Court's use of American Indian law scholarship appears to have shifted considerably over the last five decades. The use of Indian law scholarship is highly ideological, with more liberal Justices citing to Indian law scholarship far, far more than conservative or

academic articles. Happily for I think everyone in this room, the answer is, no. He was a Justice, and I think more akin to other Justices, who definitely did want to know what was out there in legal writing that was relevant to the cases we were working on.").

²³ 426 U.S. 373 (1976).

²⁴ See generally Kevin K. Washburn, *The Legacy of Bryan v. Itasca County: How an Erroneous \$147 County Tax Notice Helped Bring Tribes \$200 Billion in Indian Gaming Revenue*, 92 MINN. L. REV. 919 (2008).

²⁵ 480 U.S. 202 (1987).

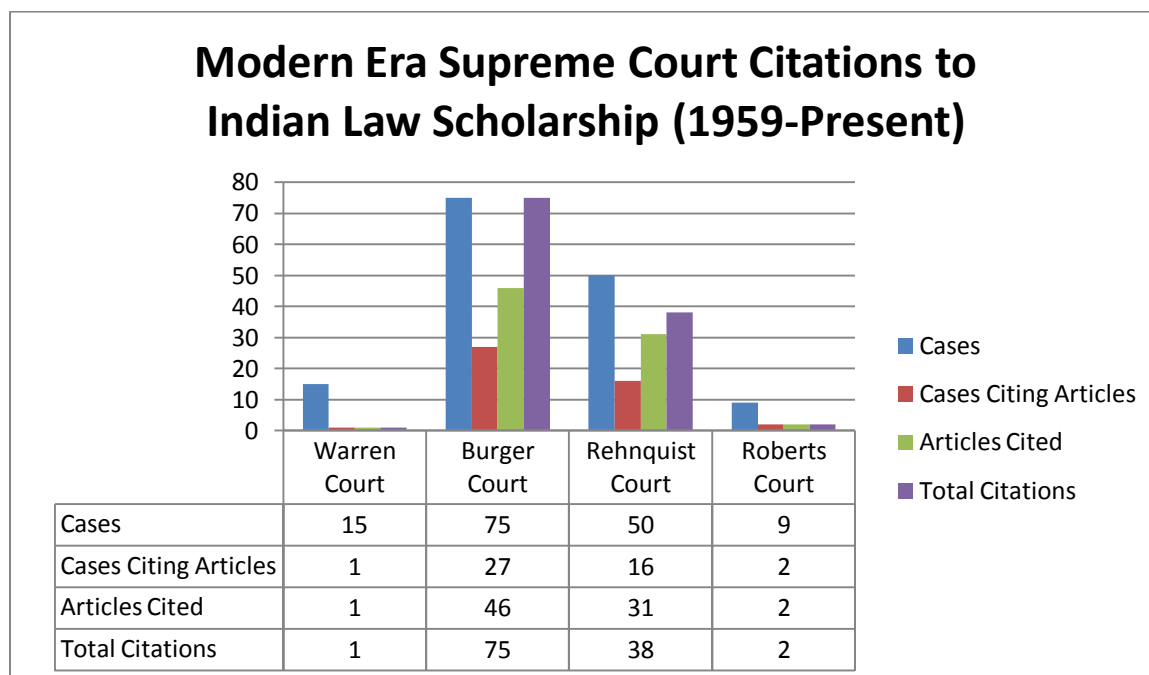
²⁶ See generally RALPH A. ROSSUM, *THE SUPREME COURT AND TRIBAL GAMING: CALIFORNIA V. CABAZON BAND OF MISSION INDIANS* (2011).

²⁷ The initial data for this study is collected at Matthew L.M. Fletcher, "Second Addendum – All the Supreme Court Citations to Indian Law Articles," Turtle Talk blog posting, Aug. 17, 2011, available at <http://turtletalk.wordpress.com/2011/08/17/19730/>. I have supplemented those results with data from the most recent Supreme Court Term, in which the Court decided two Indian law cases. See *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 132 S. Ct. 2199 (2012); *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012).

²⁸ 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 MODERN CONSTITUTIONAL DEMOCRACY* 1 (1987).

moderate/swing Justices. As the Supreme Court swung toward being more ideologically conservative in the Rehnquist Court era, citations to Indian law scholarship decreased. While it is far too early to tell, in the small number of Indian law cases decided by the Roberts Court so far, it appears that the current Court will rarely cite to Indian law scholarship. This contrasts remarkably with the Burger and Rehnquist Courts, which cited Indian law scholarship a great deal more, although those citations came mostly from the more “liberal” Justices.

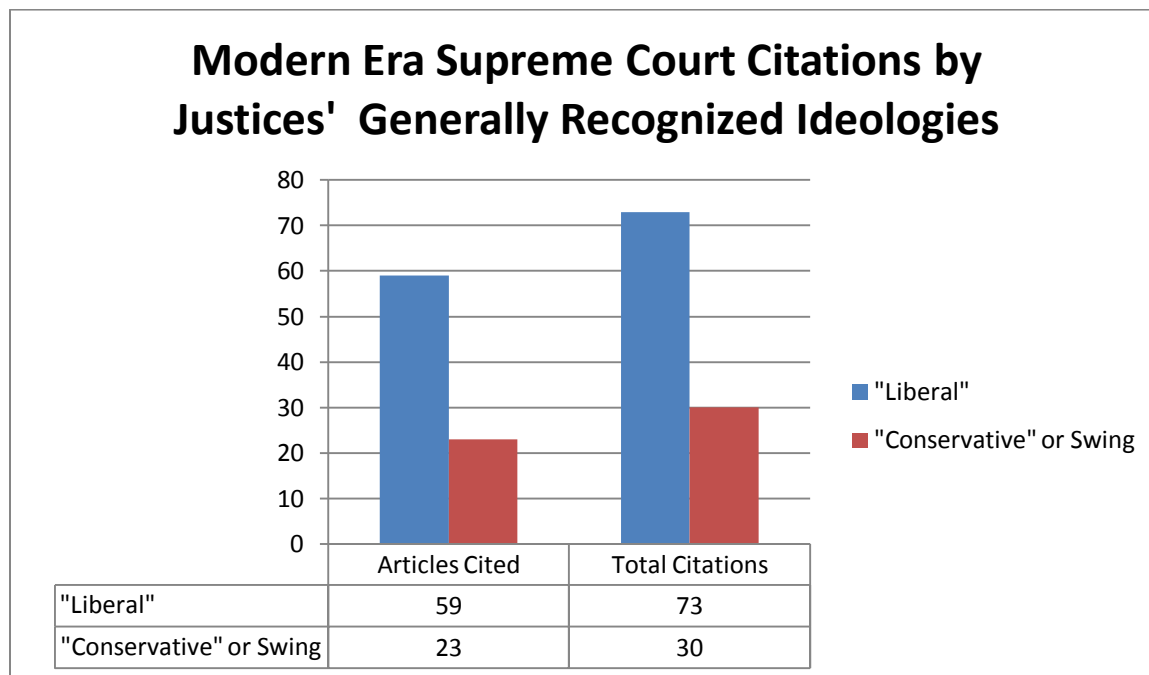
The first graph demonstrates the number of cases and the number of articles to which the Court cited,²⁹ organized in chronological order by the name of the Chief Justice:



The graph shows that the Burger Court was somewhat more likely than the Rehnquist Court to cite to American Indian legal scholarship – about 36 percent of Burger Court cases have at least one citation, while about 32 percent of Rehnquist Court cases cited to an Indian law scholarly work. And the intensity of the Burger Court’s citations was somewhat more significant than that of the Rehnquist Court – a Burger Court opinion citing to an Indian law article or other work averaged about 2.8 citations, while a Rehnquist Court opinion averaged about 2.4. Note that each Court is successively more conservative than the Court before it.

²⁹ The methodology, such as it is, for this portion of the study is that I simply read each Supreme Court opinion in Indian law located on Turtle Talk – Supreme Court, Turtle Talk blog page, *available at* <http://turtletalk.wordpress.com/resources/supreme-court-indian-law-cases/>. I included as a citation any Indian law article or monograph. I was probably more inclusive here than in my study of lower court decisions, especially in that I included a few works that were more history than law. I excluded from my count any secondary source that did not have as its focus Indian law.

Ideologies matter in citation patterns. The next graph takes into account generally recognized judicial ideologies, borrowing from Oyez³⁰ and the *Supreme Court Compendium*.³¹ I divided the Justices into two groups – the so-called “liberals”³² and the so-called “conservatives,” into which I added the moderate or “swing” Justices.³³ For the sake of convenience I included Justices Blackmun and Stevens in the “liberal” grouping, though in their early years on the Court they were not considered liberal Justices.³⁴



This chart demonstrates that there is a wide ideological divide between the Justices in the citation of American Indian legal scholarship. “Liberal” Justices are two-and-a-half to three times more likely to cite to Indian law scholarship than “conservative” or swing Justices throughout the entire study period (OT 1958 to OT 2011). This divide makes some sense, as the vast, vast majority of Indian law scholarship is pro-tribal. However, an alternate explanation may be that Indian law precedents tend to disfavor tribal interests, and so resort to scholarly criticism of those precedents is helpful to less conservative Justices.

³⁰ The Oyez Project, available at <http://www.oyez.org/>.

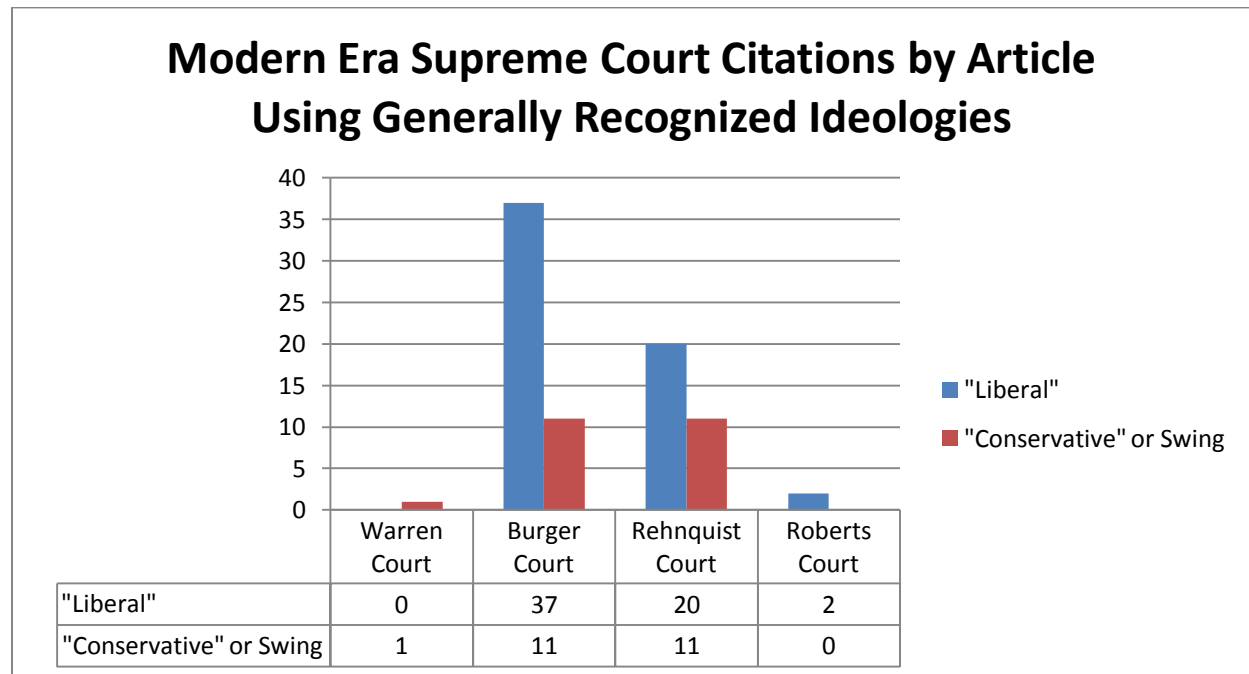
³¹ See LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM* 547-58 (5th ed. 2012).

³² In this group, I include Chief Justice Warren, and Associate Justices Blackmun, Brennan, Breyer, Clark, Douglas, Ginsburg, Marshall, Souter, and Stevens.

³³ In this group, I include Chief Justices Burger, Rehnquist, and Roberts, and Associate Justices Alito, Frankfurter, Harlan, Kennedy, O'Connor, Powell, Rehnquist, Roberts, Scalia, Stewart, Thomas, White, and Whittaker.

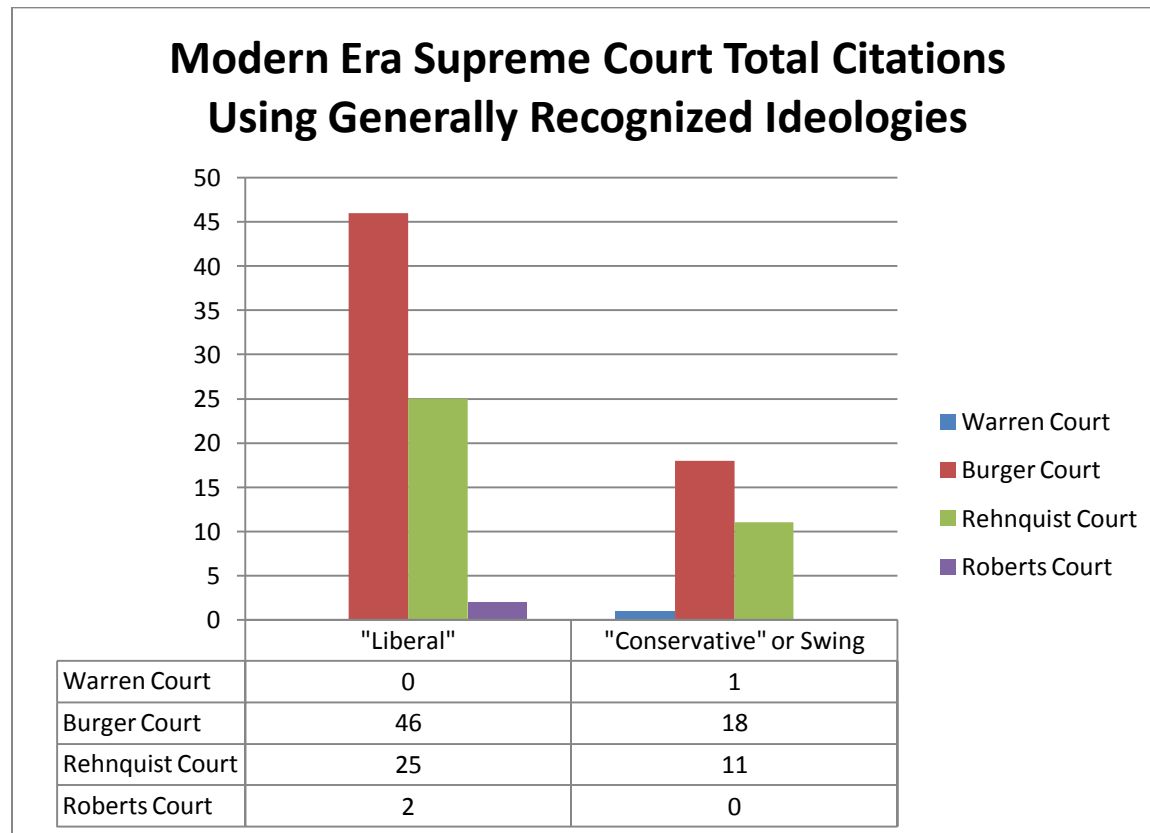
³⁴ For my review of Justice Stevens' Indian law “legacy,” see Matthew L.M. Fletcher, *The Indian Law Legacy of Justice Stevens*, Turtle Talk blog posting (Apr. 9, 2010), available at <http://turtletalk.wordpress.com/2010/04/09/the-indian-law-legacy-of-justice-stevens/>. On Justice Blackmun, see generally LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* 42-71 (2005).

The next chart breaks down the same data by the eras of the Chief Justices, only for actual articles cited:



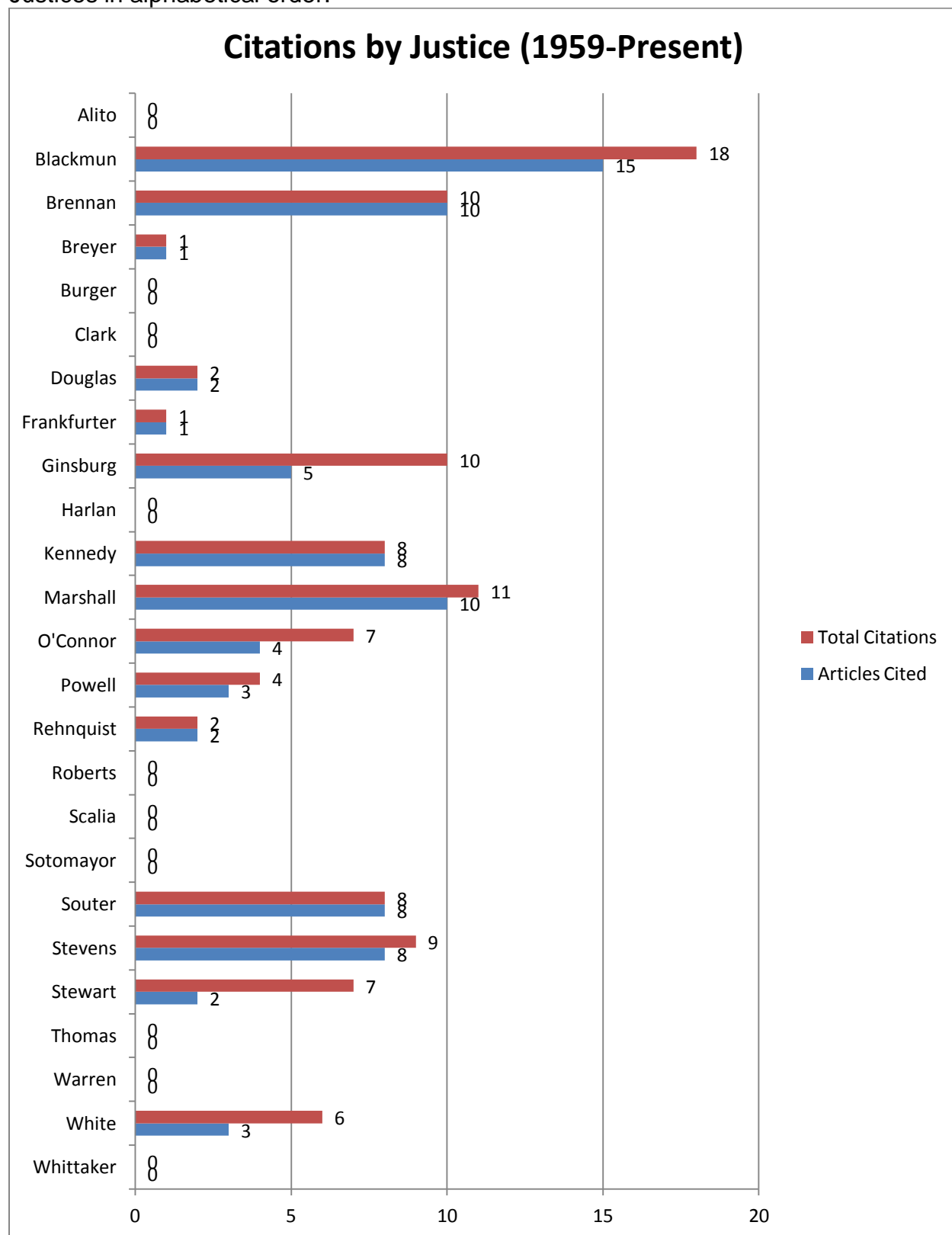
During the Burger Court era, conservative and swing Justices were less likely to cite to Indian law scholarship than their liberal colleagues – about four times less. Rehnquist Court-era conservative and moderate Justices were somewhat more likely to cite to Indian law scholarship than their Burger Court-era colleagues, and only trailed the liberals about two-to-one.

The next chart breaks down the same data by eras of Chief Justices in terms of the number of total citations:



Once again, we have similar results. Liberal Justices were far more likely in the Burger Court to cite to Indian law scholarship, more than 2.5 times likely, than their conservative or moderate colleagues. During the Rehnquist Court, the trend was similar, with liberals 2.3 times more likely to cite to scholarship.

The next chart shows the number of articles cited and total citations by the various Justices in alphabetical order:



This chart demonstrates again the liberal-conservative/moderate divide in citations to American Indian legal scholarship. The Justices with the highest citation counts are, in order, Blackmun (18), Marshall (11), Brennan (10), Ginsburg (10), and Stevens (9). Justice Kennedy is the first conservative/moderate to make this list, coming in tied for sixth place with Justice Souter, with eight citations. Notably, several conservative/moderate Justices with long tenures have zero citations, including Chief Justice Burger, and Justices Scalia and Thomas.³⁵

The analysis here has avoided discussing the Warren and Roberts Courts. The Warren Court, with its 15 cases but only one citation, was temporally located in an era when there was relatively minimal citation to legal scholarship and relatively few Indian law articles to cite.³⁶ The Roberts Court may be another matter altogether. That Court has only decided nine cases on the merits, but in only two of those cases are there citations to Indian law scholarship. The *n* is very low, but if there is the beginning of a trend, it may demonstrate a significant decline in the influence of American Indian legal scholarship on the Supreme Court.

Finally, we look at the characteristics of the scholarship cited by the Supreme Court. Out of curiosity, I wondered whether the source of the scholarship mattered. For example, does it matter if the author of the article was a law professor, a legal practitioner (including judges), or a law student (including recently-graduated judicial clerks)? One suspects that courts would cite to law professors and their propensity for deeply detailed articles more than the others. Students, as we all know, are inexperienced. Legal practitioners write far fewer articles than either of the above, and are less likely to have the time or resources to treat a subject with the same kind of depth. Practitioners, however, have the benefit of incorporating their real-world experience into their scholarship. In Indian law, perhaps more than in other fields, practice means a great deal. Some Indian law professors never practiced in Indian country, or did so only for a short time, and simply do not have the background that practitioners have. Occasionally in the literature, it shows. Finally, the earliest Indian law scholars in the modern era were practitioners, so I would expect that courts would cite to the practitioners more in the early years.

I also wanted to know, after sitting on a few panels with state and federal judges who claimed to not care who the author was or how prestigious the law review that published an article was,³⁷ whether the publication outlet mattered. Many law

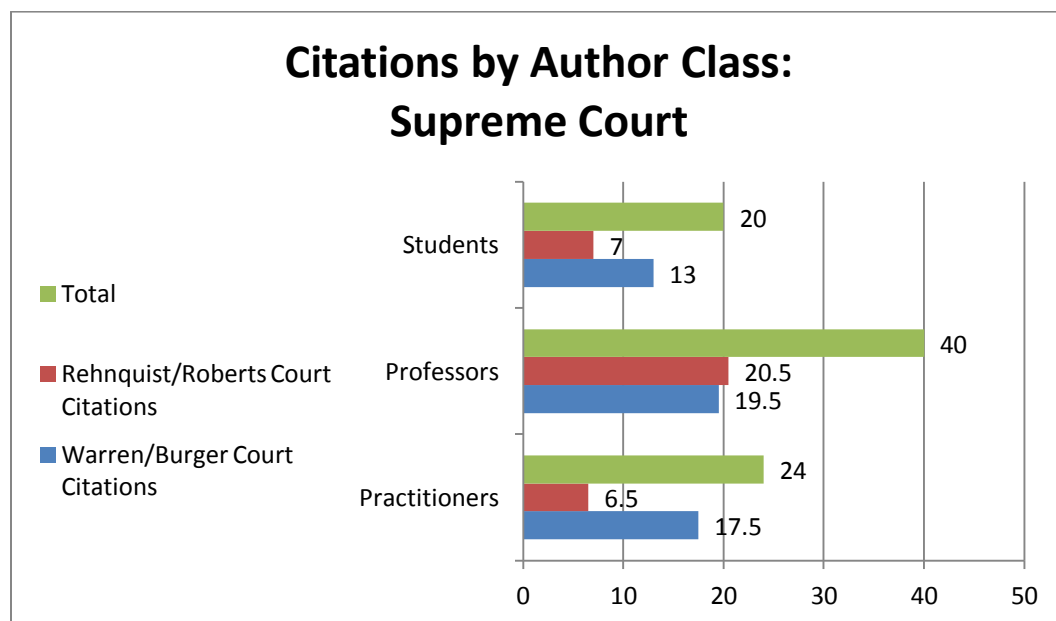
³⁵ Justice Scalia, it should be noted, did cite to one of the more radical historical monographs in the field, Wilcomb Washburn's *Red Man's Land/White Man's Law* (1971). See *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992).

³⁶ Cf. Chester A. Newland, *Legal Periodicals and the United States Supreme Court*, 3 MIDWEST J. POL. SCI. 58, 58 (1959) (noting contemporaneous increase in Supreme Court citations to legal scholarship).

³⁷ E.g., Jeff Amestoy, Address, American Association of Law Schools Committee on Research Program, Uses of Legal Scholarship by Courts and Media (Jan. 7, 2012), *podcast available at* http://www.aals.org/am2012/podcasts/6_A10b_R2_RESEARCHPRGRM_Edited.mp3. See also Richard Brust, *The High Bench vs. the Ivory Tower*, ABA J., Feb. 1, 2012, *available at* http://www.abajournal.com/magazine/article/the_high_bench_vs_the_ivory_tower/ ("When it comes to law review articles, 'all I ask for is good analysis that instructs and sometimes persuades,' [Judge Thomas

professors believe that an elite placement for their law review article is the only goal, and literally will do anything to game the law review article selection system to meet that goal. Does the publication outlet matter in Indian law cases?

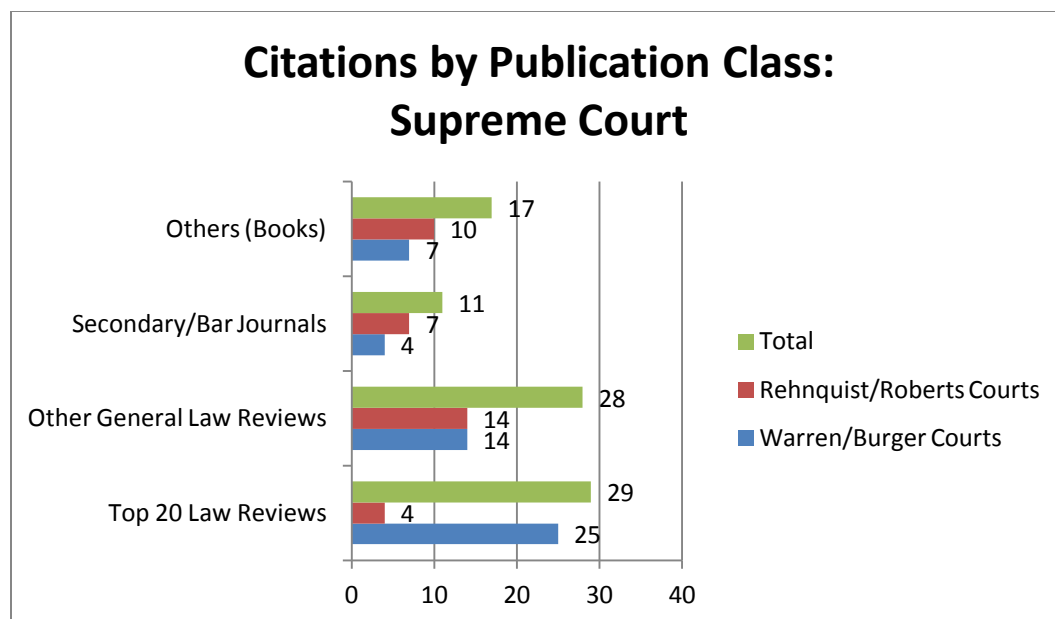
The following graph looks to classifications of the authors as professors, practitioners (including judges), and students (including law clerks).



In general, the Supreme Court cited to more law professor articles than any of the others – 40 of the 84 citations (48 percent)³⁸ are to law professor-authored papers. Twenty (24 percent) are to student-authored papers. And 24 (29 percent) are to practitioner-authored papers. The percentages are consistent with my understanding of how many articles are published that are written by professors, students, and practitioners – in other words, about half or more of articles in law reviews are professor-authored, and the remaining articles are split between students and practitioners. The break-down in Supreme Court citations is consistent with authorship patterns. However, as I predicted given the percentage of early Indian law articles authored by practitioners, practitioner citations were neck and neck to law professor citations in the Warren/Burger Courts.

L.] Ambro wrote in 2006 in *The American Bankruptcy Law Journal*. ‘Who it comes from and where it appears adds not a whit to its content.’”).

³⁸ Here, one “citation” means any citation to any article or other scholarly work. A work might be cited multiple times in a particular opinion, but it counts only as one here. If the Court cites it in another case, it will count again.



As could be expected, the Supreme Court cites Indian law articles published in the top 20 law reviews more than other outlets, such as the rest of the general law reviews, secondary and bar journals, and books, book chapters, and other publications. The Court cited to 29 articles published in the top 20, accounting for 34 percent of the citations. Top 20 articles accounted for far, far more citations in the Warren and Burger Courts, accounting for 25 of the 50 citations, or 50 percent. The top 20 article share has dropped considerably since then.

Overall, lower tier general law reviews accounted for 33 percent of citations, and secondary and bar journals accounted for 13 percent. They combined for 46 percent of overall citations. However, their share has increased at the expense of the elite reviews. In the Warren/Burger Courts, these articles combined for only 36 percent. In the Rehnquist/Roberts Courts, these articles combined for 60 percent. What gives? Well, for one, there are many, many more secondary journals now than there were in the 1970s.

In short, publication outlet and author characteristics do not seem to matter all that much to the Supreme Court. There probably is a real bias in favor of the elite law reviews, but it is blunted by the sheer number of lower tier and secondary journal articles available. Lower tier and secondary journal articles are at least as influential. But very little of this scholarship has apparently been persuasive to the Roberts Court Justices.³⁹

³⁹ Numerous briefs by the parties and their amici in Supreme Court cases have cited to Indian legal scholarship, and American Indian law professors have authored or co-authored amicus briefs in their capacities as scholars. The Supreme Court rarely engages those scholarly arguments. But that is a study for another day.

B. Looking Beyond the Bare Stats

When the Supreme Court cites to Indian legal scholarship, what kind of scholarship attracts its attention? Is the Court interested in normative legal theories? Is the Court interested in historical background, in terms of tribal histories, Indian affairs history, and Indian legal jurisprudential history? Does the Court look for public policy arguments or, as Frickey suggested, evidence of “realism”?

It appears that, even given the very small sample, the Rehnquist and Roberts Courts’ citations are almost exclusively toward the historical background. These articles tend to be descriptive, often lacking much serious theoretical argument. Moreover, even where there is a serious argument, the Court seems to be citing only to the descriptive aspects of those articles. Normative articles, even those that meet Frickey’s “realism” test, so far have had no place in the Supreme Court’s opinions.

There are only two citations to Indian legal scholarship in the Roberts Court, so let’s begin there. The most recent citation is by Justice Breyer in *Carcieri v. Salazar*.⁴⁰ He cited to an article surveying the law and history of the federal acknowledgement practices, most especially as they related to eastern tribes that did not have a direct treaty relationship with the United States, like the Narragansett Tribe that was the subject of *Carcieri*. Justice Breyer cited this article’s descriptive portion for the proposition that “following the Indian Reorganization Act’s enactment, the Department [of Interior] compiled a list of 258 tribes covered by the Act; and we also know that it wrongly left certain tribes off the list.”⁴¹ The Quinn citation largely was descriptive, but supported Breyer’s normative view that the federal government’s federal recognition practices were historically “wrong.” This is a powerful citation, blunted by its placement in a concurrence.

Four years earlier, Justice Ginsburg cited to an article on tribal-state tax agreements in her dissent to *Wagnon v. Prairie Band Potawatomi Nation*.⁴² She cited to the article for the proposition that “[m]ore than 200 Tribes in eighteen states have resolved their taxation disputes by entering into intergovernmental agreements.”⁴³ This is largely descriptive, more so than the Quinn citation. And it is in a dissent.

The two Supreme Court majority opinions that have cited to the most Indian law scholarship during the most recent era are *City of Sherrill v. Oneida Indian Nation*⁴⁴ and *Duro v. Reina*.⁴⁵ Justice Ginsburg’s majority opinion in *Sherrill* cites to three pieces of

⁴⁰ *Carcieri v. Salazar*, 555 U.S. 379, 398 (2009) (Breyer, J., concurring).

⁴¹ *Id.* (citing William W. Quinn, *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331, 356–359 (1990)).

⁴² *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 130–31 (2005) (Ginsburg, J., dissenting).

⁴³ *Id.* (quoting Richard J. Ansson, *State Taxation of Non-Indians Who Do Business With Indian Tribes: Why Several Recent Ninth Circuit Holdings Reemphasize the Need for Indian Tribes to Enter Into Taxation Compacts With Their Respective States*, 78 OR. L. REV. 501, 546 (1999)).

⁴⁴ 544 U.S. 197 (2005).

⁴⁵ 495 U.S. 676 (1990).

scholarship – two law review articles and a book chapter.⁴⁶ Her citations to these articles – the Court cited two of the three in previous cases involving the Oneida Indian Nation⁴⁷ – were exclusively for historical background about the Oneida land claims and its treaty relationship with the State of New York.⁴⁸ In short, the Court's interest in this scholarship had little to do with the normative arguments presented in each paper,⁴⁹ but more with the excellent histories each presented.

Similarly, Justice Kennedy's opinion in *Duro* cited to six pieces of scholarship.⁵⁰ Four of the authorities are merely for background.⁵¹ The other two citations, to student-authored pieces, acknowledge that there is scholarly dispute over the question presented in *Duro*.⁵² There is no discussion of or engagement with the normative principles. Other Supreme Court citations to scholarship in the Rehnquist Court follow the same pattern.⁵³

⁴⁶ See Jack Campisi, *The Oneida Treaty Period, 1783–1838*, in *THE ONEIDA INDIAN EXPERIENCE: TWO PERSPECTIVES* 48, 59 (Jack Campisi & Lawrence Hauptman eds. 1988); Robert N. Clinton & Margaret Tobey Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17, 23–38 (1979); Gerald Gunther, *Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal–State Relations*, 8 BUFFALO L. REV. 1(1958–1959).

⁴⁷ See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (citing Clinton & Hotopp, *supra* note 46); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (citing Gunther, *supra* note 46).

⁴⁸ E.g., *Sherrill*, 544 U.S. at 204 n. 2 (citing Clinton & Hotopp for general background on the history of Indian affairs); *id.* at 205 (citing Campisi and Gunther for background on the New York–Oneida treaty relationship); *id.* at 214 (citing Gunther for the proposition that “the United States largely accepted, or was indifferent to, New York’s governance of the land in question and the validity *vel non* of the Oneidas’ sales to the State”).

⁴⁹ E.g., Clinton & Hotopp, *supra* note 46, at 19 (“Because section 177 is a cornerstone of the modern federal trusteeship over all Indian land, the federal role is instrumental in enforcing the statutory restraint on alienation, as it was in creating the restraint. Section III pays close attention to the federal role in treating the problems of federal court jurisdiction over land claims, federal government status and tribal status as proper parties plaintiff, and allocation of the burden of proof in actions seeking judicial enforcement of the statutory restraint.”).

⁵⁰ See Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 505 (1976); Comment, *Jurisdiction Over Nonmember Indians on Reservations*, 1980 ARIZ. ST. L. J. 727; ANGIE DEBO, *A HISTORY OF THE INDIANS OF THE UNITED STATES* (1970); NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, *INDIAN COURTS AND THE FUTURE* 48 (1978); NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, *NATIVE AMERICAN TRIBAL COURT PROFILES* (1984); Note, *Who is an Indian?: Duro v. Reina’s Examination of Tribal Sovereignty and Criminal Jurisdiction over Nonmember Indians*, 1988 B.Y.U.L.Rev. 161.

⁵¹ See *Duro*, 495 U.S. at 680 n. 1 (citing Clinton, *supra* note 50, “[f]or a scholarly discussion of Indian country jurisdiction”); *id.* at 689 (citing *INDIAN COURTS AND THE FUTURE*, *supra* note 50, at 48, for the proposition that “[c]ases challenging the jurisdiction of modern tribal courts are few, perhaps because ‘most parties acquiesce to tribal jurisdiction’ where it is asserted”); *id.* at 681 n.2 (citing *NATIVE AMERICAN TRIBAL COURT PROFILES*, *supra* note 50, for background on tribal courts); *id.* at 691 (citing DEBO, *supra* note 50, for background on the Indian Reorganization Act).

⁵² See *id.* at 690 (comparing Note, *supra* note 50, and Comment, *supra* note 50).

⁵³ I leave out for now discussion of Justice Souter’s concurring opinion in *Nevada v. Hicks*, 533 U.S. 353 (2001). It has been covered too many times already, and he voted in favor of tribal court jurisdiction in *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008).

However, the Supreme Court doesn't really have the same need for legal scholarship.⁵⁴ The Court has the benefit of amicus briefs, many of them authored by law professors and other experts in the Indian law field, and so an article providing legal or historical background in the area might not be as acutely useful as it could be for lower court judges without the benefit of regular amici.

Let's turn to the lower courts.

III. Federal, State, and Tribal Court Citations to Indian Law Scholarship (2005-2012⁵⁵)

A. The Survey

This portion of the study addresses most directly whether Indian law scholarship influences the federal and state judiciaries in recent years. I look at the citation patterns of the lower courts dating back to the beginnings of the Roberts Court (and slightly earlier), back to 2005.⁵⁶ There are far more citations by lower courts than by the Supreme Court, a fact that can be explained in part by the sheer number of lower court cases. But it also appears that lower court judges are more likely to actively engage with Indian law scholarship.

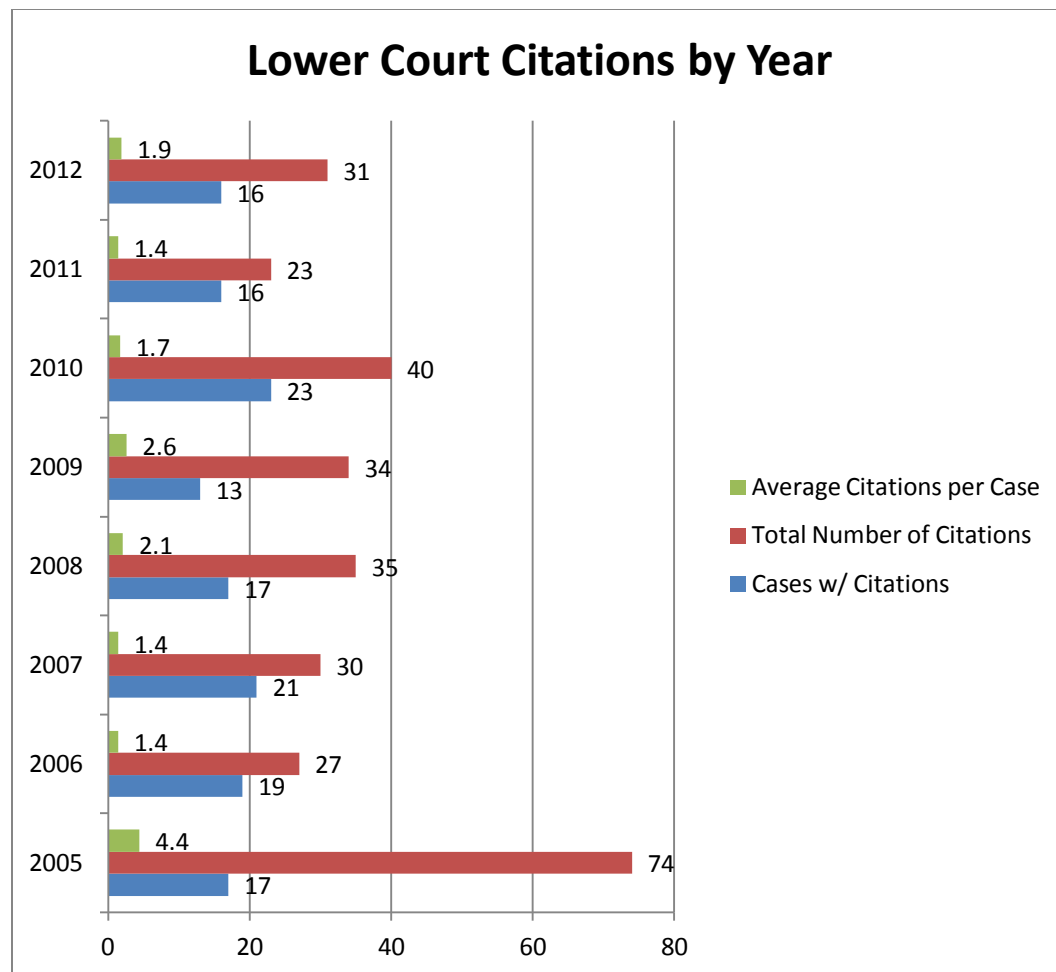
Lower court citations to Indian law scholarship are steady in number during 2005-2012. As the chart below shows, between 13 and 21 federal, state, and tribal court opinions cite to Indian law scholarship each year. There were a total of 294 citations during this period, an average of 36.8 per year. Each opinion citing Indian law scholarship cites about 2.1 articles.⁵⁷

⁵⁴ Adam Liptak thoughtfully pointed this out. See Adam Liptak, Address, American Association of Law Schools Committee on Research Program, Uses of Legal Scholarship by Courts and Media (Jan. 7, 2012), *podcast available at* http://www.aals.org/am2012/podcasts/6_A10b_R2_RESEARCHPRGRM_Edited.mp3.

⁵⁵ Naturally, this study does not encompass all of 2012; it ends on August 20, 2012.

⁵⁶ Here, the methodology is this. I searched Westlaw for federal, state, and tribal court cases with either a headnote that had the word "Indians" in it, or any opinion in which the phrase "Indian tribe" appeared between January 1, 2005 and August 20, 2012. I narrowed that down to include any case that had the following phrases: "l. rev.", "l.rev.", "l.j.", "l.j.", "pol'y", and "b.j." As with the Supreme Court study, I excluded non-Indian law articles from my count.

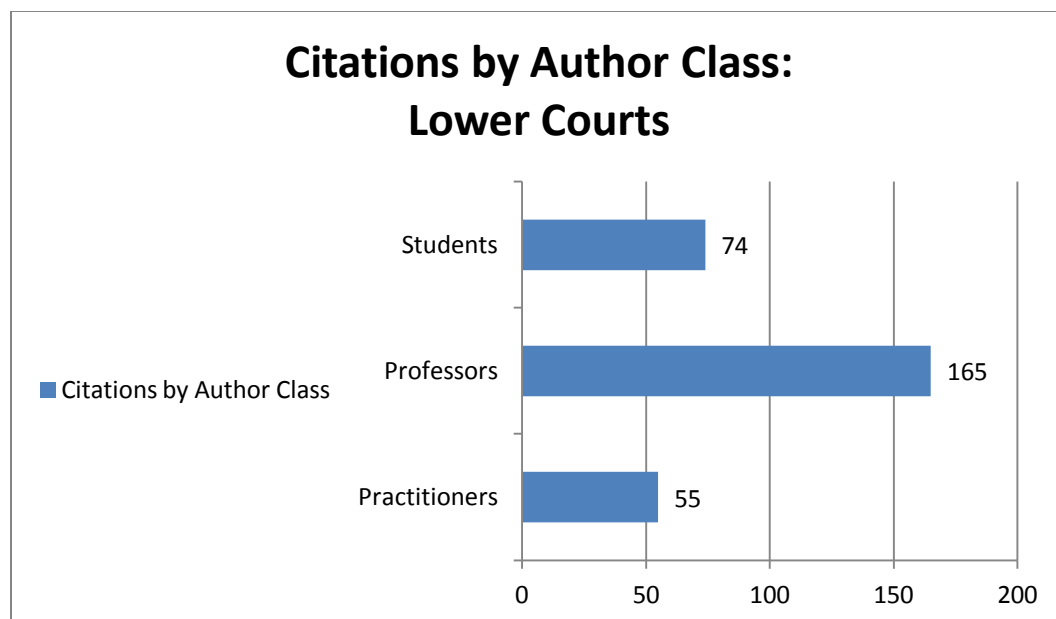
⁵⁷ These figures are skewed somewhat by two opinions authored by Judge Jenkins in *McArthur v. San Juan County*, 391 F. Supp. 2d 895 (D. Utah 2005); 566 F. Supp. 2d 1239 (D. Utah 2008). These two opinions cite to dozens of articles.



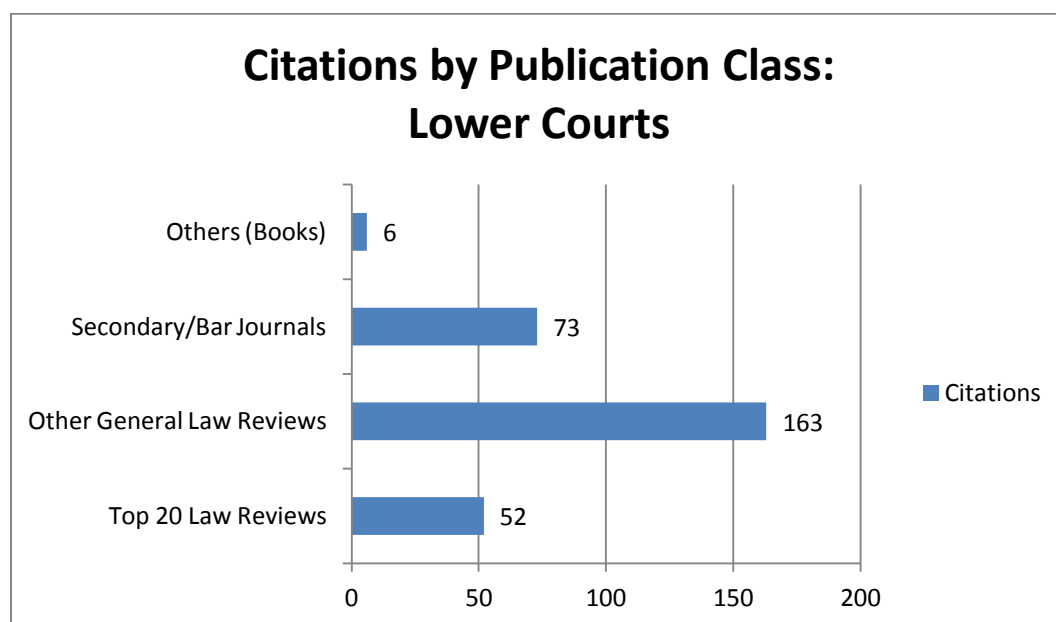
While I am estimating, it appears that lower court judges cite to Indian law articles in somewhere between five and 10 percent of their opinions.⁵⁸ This low percentage is attributable to the many easy, noncontroversial cases that judges hear, even in Indian law. The citation rate goes up considerably when there is a non-unanimous appellate court decision, with at least one judge writing a separate concurrence or dissent. In 26 appellate cases with at least one separate opinion, the court cited to Indian law scholarship.

As with the Supreme Court, I look toward the sources of Indian law scholarship as well. First, I look at the different classes of authors (professors, students, and practitioners).

⁵⁸ A quick Westlaw search showed that federal and state courts issued 176 published Indian law-related opinions in 2011, meaning that about eight percent of published opinions included at least one citation to an Indian law article.



As expected, the large majority of citations are to law professors, about 56 percent. Students and law clerks account for 25 percent and practitioner-authored works about 19 percent. The figures are similar to those of the Supreme Court citations during the Rehnquist and Roberts Court eras.



B. Looking Beyond the Bare Stats

Like the Supreme Court, most lower court citations are to articles useful for legal and historical background, rather than for any normative or other analytical purpose. For example, the Supreme Court of Alaska cited two articles for the proposition that a scholarly debate exists over the status of Indian country in Alaska after the *John v.*

Baker decision.⁵⁹ Judge Bybee, dissenting in an important Ninth Circuit gaming case, *Rincon Band of Luiseño Mission Indians of Rincon Reservation v. Schwarzenegger*,⁶⁰ cited to nine scholarly authorities, merely to suggest that the issue at hand was uncertain and important (and perhaps to mock the academy).⁶¹

However, there is far more discussion about and engagement with normative scholarly positions in the lower courts. Judges that cited to normative or prescriptive Indian law scholarship often do so in dissent, as in two cases out of the Washington and Minnesota Supreme Courts,⁶² but those arguments are at least present in the discussion. Similarly, one federal judge dealing with a tribal court jurisdiction case cited virtually every major Indian law professor in a pair of decisions, in one of which he held in favor of tribal jurisdiction and was reversed by the Tenth Circuit,⁶³ accounting for dozens of citations.

And yet Indian legal scholarship is making an impact. The Kansas Supreme Court recently overruled itself on an important Indian Child Welfare Act question, relying in part on nine law review articles in the field.⁶⁴ The Colorado Supreme Court held that

⁵⁹ See *Native Village of Tanana*, 249 P.3d at 750 n. 120 (“The debate continued among commentators after the decision.”) (citing *John v. Baker*, 982 P.2d 738 (Alaska 1999)).

⁶⁰ 602 F.3d 1019 (9th Cir. 2010) (Bybee, C.J., dissenting).

⁶¹ See *id.* at 1062-63 (Bybee, C.J., dissenting) (citing Katie Eidson, Note, *Will States Continue to Provide Exclusivity in Tribal Gaming Compacts or Will Tribes Bust on the Hand of the State in Order to Expand Indian Gaming?*, 29 AM. INDIAN L. REV. 319, 325–39 (2004); Courtney J.A. DaCosta, Note, *When “Turnabout” Is Not “Fair Play”: Tribal Immunity under the Indian Gaming Regulatory Act*, 97 GEO. L.J. 515, 542–546 (2009); Ezekiel J.N. Fletcher, *Negotiating Meaningful Concessions from States in Gaming Compacts to Further Tribal Economic Development: Satisfying the “Economic Benefits” Test*, 54 S.D. L. REV. 419, 431–39 (2009); Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. 39, 57–95 (2007); Eric S. Lent, Note, *Are States Beating the House?: The Validity of Tribal–State Revenue Sharing under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 453–74 (2003); Matthew Murphy, Note, *Betting the Rancheria: Environmental Protections as Bargaining Chips under the Indian Gaming Regulatory Act*, 36 B.C. ENVTL. AFF. L. REV. 171, 181–84 (2009); Kathryn R.L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming*, 90 MARQ. L. REV. 971, 985–87 (2007); Kathryn R.L. Rand and Steven Andrew Light, *How Congress Can and Should “Fix” the Indian Gaming Regulatory Act: Recommendations for Law and Policy Reform*, 13 VA. J. SOC. POL’Y & L. 396, 462–65 (2006); Joshua L. Sohn, *The Double-Edged Sword of Indian Gaming*, 42 TULSA L. REV. 139, 150–56 (2006), for the proposition that Congress’s failure to properly address the question has “generated public controversy, litigation, and a cottage industry in law review articles”).

⁶² See *In re R.S.*, 805 N.W.2d at 66 (Anderson, J., dissenting) (quoting Kunesh, *supra* note 64, at 78); *Eriksen*, 259 P.3d at 1087 (Alexander, J., dissenting) (quoting Pommersheim, *supra* note 2, at 50 (“[T]he [United States Supreme] Court changed direction sharply and became increasingly inimical to tribal sovereignty, especially in regard to tribal authority over non-Indians.”)).

⁶³ See *McArthur v. San Juan County*, 391 F. Supp. 2d 895 (D. Utah 2005), *rev’d*, 497 F.3d 1057 (10th Cir. 2007), *cert. denied*, 552 U.S. 1181 (2008); see also 566 F. Supp. 2d 1239 (D. Utah 2008).

⁶⁴ See *In re A.J.S.*, 204 P.3d 543 (Kan. 2009) (citing Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587 (2002); Samuel Prim, *The Indian Child Welfare Act and the Existing Indian Family Exception: Rerouting the Trail of Tears?*, 24 LAW & PSYCHOL. REV. 115 (2000); Patrice Kunesh, *Borders Beyond Borders—Protecting Essential Tribal Relations Off Reservation Under the Indian Child Welfare Act*, 42 NEW ENG. L. REV. 15 (2007); Cheyafina L. Jaffke, *The “Existing Indian Family” Exception to the Indian Child Welfare Act: The States’ Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 745–51 (2006); Lorie

tribal immunity prevented the state attorney general from investigating tribal payday lending practices, relying in part on two articles.⁶⁵ Perhaps most strikingly, two lower courts adopted Professor Kanassatega's argument rejecting tribal immunity from discovery in federal courts.⁶⁶ Even though a court might reject a theory proposed in an academic paper, it may still engage with those theories, as the court did in *Garcia v. Gutierrez*.⁶⁷

Perhaps lower courts are not frequently turning to Indian law scholarship to answer all the controversial open questions, but it does happen. Importantly, the courts are turning to Indian law scholarship in large numbers for background information. Unlike the Supreme Court, lower courts usually do not have the benefit of amicus briefs. Anecdotaly, former appellate court clerks and other practitioners have told me that appellate judges devour amicus briefs in Indian law cases because they have fewer resources available to them. Even if the court cites to an article for noncontroversial background, presumably the court read and internalized some other aspects of the article.

A few conclusions can be drawn with a grain of salt. First, the courts' citation to descriptive scholarship is consistent with the assumption that many judges are not familiar with the legal and historical underpinnings of American Indian law, and perhaps that judges rely upon descriptive historical scholarship for background in a case from a non-party scholar. Second, it is also consistent with the possibility that judges are turning to Indian law scholarship in difficult cases; although in the small 2005-2012

Graham, *"The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1 (1998); Charmel L. Cross, *The Existing Indian Family Exception: Is it Appropriate to Use a Judicially Created Exception to Render the Indian Child Welfare Act of 1978 Inapplicable?*, 26 CAP. U.L. REV. 847 (1998); Wendy Therese Parnell, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 SAN DIEGO L. REV. 381 (1997); Toni Hahn Davis, *The Existing Indian Family Exception to the Indian Child Welfare Act*, 69 N.D. L. REV. 465 (1993); Michelle L. Lehmann, *The Indian Child Welfare Act of 1978: Does it Apply to the Adoption of an Illegitimate Child?*, 38 CATH. U.L. REV. 511 (1989)).

⁶⁵ See *Cash Advance v. State of Colorado ex rel. Suthers*, 242 P.3d 1099 (Colo. 2010) (citing Robert A. Williams, Jr., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Government Tax Status Act of 1982*, 22 HARV. J. ON LEGIS. 335 (1985); Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759 (2004)).

⁶⁶ See *Alltel Communications, LLC v. DeJordy*, 2011 WL 673766 (D. S.D., Feb. 17, 2011) (citing Joshua Jay Kanassatega, *The Discovery Immunity Exception in Indian Country—Promoting American Indian Sovereignty by Fostering the Rule of Law*, 31 WHITTIER L. REV. 199 (2009)), *rev'd on other grounds*, 675 F.3d 1100 (8th Cir. 2012); *Bonnet v. Harvest (US) Holdings, Inc.*, 2012 WL 994403 (D. Utah, Mar. 23, 2012) (same).

⁶⁷ *Garcia v. Gutierrez*, 217 P.3d 591, 604-06 (N.M. 2009) (citing Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 902-04 (1990); Kelly Stoner & Richard A. Orona, *Full Faith and Credit, Comity, or Federal Mandate? A Path That Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders*, 34 N.M. L. REV. 381, 385 (2004); Fred L. Ragsdale, Jr., *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M. L. REV. 133, 139 (1977); and Stephanie Moser Goins, Comment: *Beware the Ides of Marchington: The Erie Doctrine's Effect on Recognition and Enforcement of Tribal Court Judgments in Federal and State Court*, 32 AM. INDIAN L. REV. 189, 207 (2007) in a discussion about the applicability of the Parental Kidnapping Prevent Act to Indian tribes).

sample, the judges citing to normative and prescriptive Indian law scholarship did so largely in separate concurring or dissenting opinions.

Third, there appears to be evidence that the courts continue to cite to descriptive historical articles, and at least acknowledge (if not adopt) the normative and prescriptive positions that scholars are taking in the field. However, the results often are consistent with these critics' views that American Indian legal scholarship is not terribly influential. Even so, despite the Supreme Court's apparent disinterest in American Indian legal scholarship, the lower courts are citing to more and more articles and other scholarly works. At least in the lower courts, where 2005-2012 data suggest that judges are more likely to cite to Indian law articles in close cases, American Indian legal scholarship may have some continuing utility, both in terms of providing legal and historic background.

What is plain is that the courts, even the lower courts, are not citing much to the normative or prescriptive analyses that often is the heart of legal scholarship. A cursory review of American Indian legal scholarship will inform even the least experienced observer that the vast, vast majority of Indian law articles favor tribal interests. Often, the only scholarly debates are how far the courts should go in supporting tribal interests. And so it makes perfect sense that the field of American Indian legal scholarship would be less useful to conservative Justices on the Supreme Court, and presumably to conservative judges in the lower courts.

IV. Conclusion: Where's the Realism?

The results of my survey suggest that lower courts are citing to Indian law scholarship to a substantial extent, even if the Supreme Court is not. Most of the citations are for historical background, but occasionally and dramatically, the lower courts have reformed American Indian law to the benefit of tribal interests, relying on doctrinal legal scholarship.⁶⁸ And yet there have been only a few successes for tribal interests.

In most of these citations to Indian law scholarship, what is missing is the realism. Sure, some courts cited to papers that brought a practical, nuts-and-bolts version of realism, often written by practitioners.⁶⁹ But while there were many examples

⁶⁸ *E.g.*, *In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

⁶⁹ *See, e.g.*, Tim Connors, *Our Children Are Sacred*, 50 JUDGES' J. 33 (2011) (article by state court judge on the Indian Child Welfare Act), *cited in* *In re R.S.*, 805 N.W.2d 44, 59 (Minn. 2011) (Anderson, J., dissenting); Fletcher, *Negotiating Meaningful Concessions*, *supra* note 61 (article by Indian law practitioner with extensive experience in Indian gaming compact negotiation), *cited in* 602 F.3d 1019, 162-63 (9th Cir. 2010) (Bybee, C.J., dissenting); B.J. Jones, *In Their Native Lands: The Legal Status of American Indian Children in North Dakota*, 75 N.D. L. REV. 241 (1999) (article by tribal court judge on Indian Child Welfare Act), *cited in* *In re R.S.*, 805 N.W.2d at 59 (Anderson, J., dissenting); J. Matthew Martin, *Federal Malpractice in Indian Country and the "Law of the Place": a Re-examination of Williams v. United States under Existing Law of the Eastern Band of Cherokee Indians*, 29 CAMPBELL L. REV. 363 (2007) (article by tribal court judge), *cited in* *Welch v. Eastern Band of Cherokee Indians*, 6 Cher. Rep. 20, ___ (Eastern Band Cherokee 2007); William P. Zuger, *A Baedeker to the Tribal Court*, 83 N.D. L. REV. 55 (2007) (article by tribal court judge on tribal court practice), *cited in* *Richard v. United States*, 98 Fed. Cl. 278, 282 (2011).

of professor-authored realism,⁷⁰ the courts rarely delved into the realism aspects of these important papers.

In November 2006, when Phil Frickey brought many of the new generation of American Indian legal scholars to Berkeley,⁷¹ including myself, my spouse and colleague Wenona Singel, and many others, we talked about doing the kind of academic research that would bring a realistic, pragmatic story to federal and state judges. Frickey and representatives from the National Congress of American Indians stressed empirical research as a means of bringing much needed realism to the academy.

I confess to at first being considerably disappointed in the tenor of the meeting. There had been a great deal of realism in Indian legal scholarship prior to Frickey's meeting, although perhaps not so much empirical research. But the realism was published in secondary journals,⁷² lower tier general law reviews,⁷³ and in bar journals.⁷⁴ Apparently, it was invisible. Then as now, I suspect that elite law reviews do not reward papers highlighting realism in Indian country with publication. Maybe law professors are not rewarded by writing realism in American Indian law, and so they refuse to do it. Maybe it's too hard to research tribal law, and so there isn't much scholarship out there about tribal law.

In the years following Frickey's meeting, several of the young law professors published papers incorporating more realism (and by that, I mean tribal law and governance) into their work.⁷⁵ Some of them even published papers with a significant

⁷⁰ See, e.g., Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2006) (empirical research on fairness afforded nonmembers by Navajo courts), cited in *EXC, Inc. v. Kayenta District Court*, 9 Am. Tribal Law 176, 191 (Navajo Nation Supreme Court 2010); Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243 (2009) (article comprehensively surveying tribal membership criteria), cited in *Rosales v. United States*, 89 Fed. Cl. 565, 572 (2009), and *KG Urban Enterprises, LLC v. Patrick*, 839 F. Supp. 2d 388, 403 (D. Mass. 2012).

⁷¹ See Conference Transcript, *supra* note 7.

⁷² E.g., Robert B. Porter, *Decolonizing Indigenous Governance: Observations on Restoring Greater Faith and Legitimacy in the Government of the Seneca Nation*, 8 KAN. J.L. & PUB. POL'Y, Winter 1999, at 97 (describing impacts of introduction of American-style governance on Seneca leadership); Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9 KAN. J.L. & PUB. POL'Y, Summer 2000, at 761 (describing modernization of Hopi law); Wenona T. Singel, *Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule*, 15 KAN. J.L. & PUB. POL'Y, Winter 2006, at 357 (analyzing the impacts of tribal legislative adoption of model tribal secured transactions codes).

⁷³ E.g., Kristen A. Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 TULSA L.J. 73, 156-61 (1999) (describing on the ground impacts of the Supreme Court's *Venetie* decision from the point of view of Alaska Natives); Virginia H. Murray, *A Comparative Survey of the Historic Civil, Common, and American Indian Tribal Law Responses to Domestic Violence*, 23 OKLA. CITY U. L. REV. 433 (1998)..

⁷⁴ E.g., John F. Petoskey, *Doing Business with Indian Tribes*, 76 MICH. B.J. 440 (1997) (discussing tribal commercial law).

⁷⁵ E.g., Kristen A. Carpenter, *Interpretative Sovereignty: A Research Agenda*, 33 AM. INDIAN L. REV. 111 (2007) (describing research on tribal interpretations on Indian treaty rights); Wenona T. Singel, *Institutional Economics of Tribal Labor Relations*, 2008 MICH. ST. L. REV. 487 (reviewing tribal labor laws and why nonmembers may or may not choose to comply with them); Hannah Bobee, Allison Boisvenu,

empirical bent.⁷⁶ Aspects of realism have made their way into the Indian law papers published in the elite law reviews, but even those papers must wrap their tribal law prescriptions into broader theoretical and doctrinal subject areas in order to be considered for publication by elite law reviews looking to make a national imprint.⁷⁷ Papers that delve more directly into tribal law and practice, for example, are too narrow (and, impliedly, unimportant) to the elite law reviews. I assume that is the case *because there has never been a law review article authored by a law professor or practicing lawyer focusing on tribal law and practice published in an elite, top 20 law review.*⁷⁸

There may be another problem. It may be that federal and state judges will not know what to make of Indian country realism. One of the few times the Supreme Court ventured into the law reviews and learned about tribal court jurisprudence and court practice, it drew horrifically inaccurate conclusions.⁷⁹ And yet, I am happy to report that at least one Supreme Court Justice has integrated aspects of realism into her opinions.⁸⁰ Justice Sotomayor's dissent in *Match-E-Be-Nash-She-Wish Band of*

Anderson Duff, Kathryn E. Fort, & Wenona T. Singel, Criminal Jurisdiction in Indian Country: The Solution of Cross Deputization, Indigenous Law & Policy Center Working Paper 2008-01 (July 2008), *available at* <http://www.law.msu.edu/indigenous/papers/2008-01.pdf> (surveying Michigan tribal-state law enforcement cooperative agreements).

⁷⁶ E.g., Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as a Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933-81 (2009) (reporting findings of study of 162 Indian law-related cert petitions); Ezra Rosser, *Protecting Non-Indians from Harm? The Property Consequences of Indians*, 87 OR. L. REV. 175, 178 (2008) (reporting "empirical evidence from Madison County, New York, suggest[ing] that the [Supreme] Court's assumption that non-Indians are harmed by proximity to Indian land is not justified"). Other recent papers showcasing empirical research on Indian country topics include J. Anthony Cookson, *Institutions and Casinos on American Indian Reservations: An Empirical Analysis of the Location of Indian Casinos*, 54 J. L. & ECON. 651 (2010); Valentina P. Dimitrova-Grajzl, Pater Grajzl & A. Joseph Guse, *Jurisdiction, Crime, and Development: The Impact of Public Law 280 in Indian Country* (June 26, 2012), *available at* <http://ssrn.com/abstract=2093681>.

⁷⁷ E.g., Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061 (2005); Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022 (2009); Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049 (2007); *Tribal Sovereignty and Illiberalism*, 95 CAL. L. REV. 799 (2007); *Indians and Guns*, 100 GEORGETOWN L. J. 1675 (2012); Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709 (2006).

⁷⁸ One student-authored paper, Fredric Brandfon, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991 (1991), is the lone exception.

⁷⁹ See *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., concurring) ("Although the Indian Civil Rights Act of 1968 (ICRA) makes a handful of analogous safeguards enforceable in tribal courts, 25 U.S.C. § 1302, 'the guarantees are not identical,' ... and there is a 'definite trend by tribal courts' toward the view that they 'ha[ve] leeway in interpreting' the ICRA's due process and equal protection clauses and 'need not follow the U.S. Supreme Court precedents 'jot-for-jot,'" [Nell Jessup] Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 344, n. 238 (1998)."); see also *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 337 (2008) ("Indian courts 'differ from traditional American courts in a number of significant respects.'" (quoting *Hicks*, 533 U.S. at 383 (Souter, J., concurring))).

⁸⁰ See Matthew L.M. Fletcher, Quick and Dirty Commentary on Patchak, Turtle Talk blog post (June 8, 2012), *available at* <http://turtletalk.wordpress.com/2012/06/18/quick-and-dirty-commentary-on-patchak/> ("Justice Sotomayor proved today in her masterful and enlightening dissent that she is serious about knowing the practical realities of Indian country. With the only possible contender being Justice Blackmun, Justice Sotomayor may be the only Justice in American history that cares deeply enough about what happens in Indian country to learn about the impacts of the Court's decisions. This is a

*Pottawatomi Indians v. Patchak*⁸¹ demonstrated deep understanding and respect for the realistic and pragmatic impacts of the Supreme Court's decision.⁸² This is a Justice that will listen to the tribal perspective, a Justice interested in realism.

In conclusion, I offer my views on the charge of the *American Indian Law Journal*. If I am right and American Indian legal scholarship is at a crossroads, then the *Journal* will have an important role to play. I hope the *Journal* seeks articles by a mixture of academics and practitioners. I hope to see articles by tribal, state, and federal judges. I hope to see forward-thinking articles that challenge tribal governments and, most especially, tribal attorneys to work to earn sovereign authority. I hope to see articles expressing the views of the traditional adversaries of tribal interests – state and local governments, federal and business interests in competition or opposition to tribes, and tribal members and others under the jurisdiction of tribes. I hope to see a multitude of articles about the inner workings of tribal governments and the realities of Indian country governance.⁸³ I hope to see realism.

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common law area of law, and the Court has important policy making responsibilities that it is neglecting, and Justice Sotomayor is doing her homework.”).

Justice Ginsburg's dissent in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 131 (2005) (Ginsburg, J., dissenting) also demonstrated good understanding of the practical impacts of the Court's decisions. See *id.* (“By truncating the balancing-of-interests approach, the Court has diminished prospects for cooperative efforts to achieve resolution of taxation issues through constructive intergovernmental agreements.”) (citing *Ansson*, *supra* note 43).

⁸¹ 132 S. Ct. 2199 (2012).

⁸² See *id.* at 2212 (Sotomayor, J., dissenting) (“The Court's holding not only creates perverse incentives for private litigants, but also exposes the Government's ownership of land to costly and prolonged challenges.”); *id.* at 2218 (“[T]he majority's rule will impose a substantial burden on the Government and leave an array of uncertainties. Moreover, it will open to suit lands that Congress and the Executive Branch thought the ‘national public interest’ demanded should remain immune from challenge. Congress did not intend either result.”).

⁸³ See Frank Pommersheim, “New” *Directions in Indian Law Scholarship: An Afterword*, 32 AM. INDIAN L. REV. 157, 164 (2007-2008).