CONGRESS AND INDIANS

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Contrary to popular narratives about courts protecting certain minority rights from majoritarian influences, Indian nations lose in the United States Supreme Court over 75 percent of the time. As a result, scholars, tribal leaders, and advocates have suggested that Congress, as opposed to the courts, may be more responsive to Indian interests and have turned to legislative strategies for pursuing and protecting tribal interests. Yet very little is known about the kinds of legislation Congress enacts relating to American Indians. This Article charts new territory in this understudied area and responds to recent calls for more empirical legal studies in the field of federal Indian law by enhancing understandings of the amount and kinds of Indian-related legislation enacted by Congress. Based on an analysis of 7799 Indian-related bills, the Article expounds a basic typology of the kinds of Indian-related legislation introduced and enacted by Congress from 1975 to 2013. The Article reports a higher enactment rate for Indian-related legislation as compared to the enactment rate of all bills introduced in Congress. This finding problematizes traditional narratives about the success of minority groups in the political process and has serious implications for how scholars and advocates understand congressional policymaking. Further, the Article shows that much of this legislation does not affect Indians alone. Rather, Congress generates a substantial amount of legislation for the general welfare of its citizens, including Indians and Indian nations. It suggests that federal Indian law

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scholarship, which has focused on legislation specific to Indian nations, has overlooked an important part of the development of federal Indian law and policy. Finally, the Article considers some possible explanations for the higher enactment rate of Indian-related legislation and the implications of this study for congressional policymaking, especially federal Indian law and policy. It confirms the need for further investigation into the different kinds of Indian-related legislation and the complex relationships between Congress and Indians.

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A popular narrative in American politics is that discrete and insular minorities’ law reform efforts do not fare well in the political process, but that these groups can turn to federal courts for the recognition of their rights. This simple narrative has tremendous appeal, but it greatly oversimplifies the relationships among groups, courts, and the political process. It assumes that courts create effective policies that benefit minority groups while legislatures do not. In reality, understanding the complexity of these relationships often requires unpacking such assumptions and moving into a contested and messy realm. Although scholars have investigated the relationships among various groups and

1. See, e.g., John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 135–79 (1980) (noting that discrete and insular minorities are politically disadvantaged and suggesting that this justifies judicial review in certain kinds of cases); The Federalist No. 78 (Alexander Hamilton) (describing the courts as “bulwarks of a limited Constitution against legislative encroachments”).

2. Several different literatures question aspects of this popular narrative and suggest its limited utility as a general proposition. Robert Dahl investigated the assertion that the Supreme Court’s primary role is to protect the rights of the minority against the tyranny of the majority and found that “policy views dominant on the Court are never far out of line with the policy views dominant among the lawmaking majorities of the United States.” Robert A. Dahl, Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker, 6 J. Pub. L. 279, 285 (1957). While political scientists have contested Dahl’s findings, see, e.g., Jonathan D. Casper, The Supreme Court and National Policy Making, 70 Am. Pol. Sci. Rev. 50 (1976), scholars have grown increasingly skeptical about the usefulness of litigation as a tool for successful law reform or policy change. See, e.g., Stuart A. Scheingold, The Politics of Rights: Lawyers, Public Policy, and Political Change 4–10, 97–116 (1974) (evaluating whether litigation can be useful for redistributing power and influence in the political arena); Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 336–343 (1991) (arguing that courts are constrained in their ability to change social policy and depend on political support to produce such reform); Michael J. Klarmann, From Jim Crow to Civil Rights 4–7 (2004) (suggesting that policy reform through litigation depends on prevailing public opinion). Political scientists have also argued that some minority groups actually fare better in the political process. Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups 35 (1971) (concluding that small groups have advantages over larger groups in the political system).
political and legal processes, one important group remains understudied—American Indians.

Despite scant information about the success of law reform efforts by Indians, federal Indian law scholars and tribal advocates have largely bought into the allure of litigation as the focus of law and policy reform efforts. For the past fifty years, federal Indian law scholars and advocates have devoted more resources and attention to litigation than legislation as a tool for facilitating law and policy reform in Indian affairs.


4. See Jeff J. Corntassel & Richard C. Witmer, II, American Indian Tribal Government Support of Office-Seekers: Findings from the 1994 Election, 34 Soc. Sci. J. 511, 511–12 (1997) (discussing the limited literature on American Indian political behavior and its omission from mainstream political science studies); Richard Witmer & Frederick J. Boehnke, American Indian Political Incorporation in the Post-Indian Gaming Regulatory Act Era, 44 Soc. Sci. J. 127, 127 (2007) (noting that "the study of contemporary political relations between Indian nations and federal and state governments remains underdeveloped in the political science literature."); accord David E. Wilkins & Heidi K. Stark, American Indian Politics and the American Political System 170 (3d ed. 2011). The exclusion of American Indians from many of these studies may relate to their unique political status, which distinguishes them from other minority groups. American Indians have a distinct political status as members of tribal governments and thus, are not exclusively members of racial or ethnic minorities. See generally Morton v. Mancari, 417 U.S. 535 (1974).

5. American Indians engage in law reform efforts individually, as collections of individuals, tribally, and pan-tribally. Individual Indians may pursue law reforms independent of and not supported by Indian nations. Similarly, individual Indians may not support the law reform efforts of their Indian nations. In this Article, I use "Indians" inclusively to refer to the various kinds of law reform efforts in which Indians—individually, collectively, and tribally—may be involved and to indicate the multiple relationships that may exist between Indians, in these differing capacities, and Congress. I try to specify in places where I discuss particular subsets of this larger group, such as Indian nations.


7. See, e.g., Tracy Labin, We Stand United Before the Court: The Tribal Supreme Court Project, 37 New Eng. L. Rev. 695 (2003); Getches, supra note 6; Matthew L.M. Fletcher, Factbound and Splitless: The Certiorari Process as a Barrier to Justice for Indian Tribes, 51 Ariz. L. Rev. 933 (2009); Philip P. Frickey, Adjudication and Its Discontents: Coherence and Concession in Federal Indian
Yet Indian nations, the most impoverished group in the United States, lose in the Supreme Court over 75 percent of the time—more frequently than convicted felons. As a result, many scholars, tribal leaders, and advocates have recently suggested that Congress may be more responsive than the courts to Indian interests and have turned to legislative strategies for pursuing and protecting tribal interests, especially tribal self-determination and jurisdiction. Others have voiced a similar opinion, arguing that Congress is the most appropriate institution within the United States government to make federal Indian law and policy and that the courts should defer heavily to Congress. These scholars and advocates assume that Congress can and will create more effective and beneficial policies for Indian nations than the Supreme Court.

This Article questions the assumptions underlying the various narratives about courts, legislatures, and groups. It starts from the premise that more information is needed about Congress and its relationships with Indians in order to determine whether courts or legislatures make more effective or more beneficial policies for Indian nations. It represents an initial attempt to increase the empirical information available about Congress and Indians so that scholars and advocates may better understand the relationships between them.

Scholars, advocates, and tribal leaders currently know very
little about Congress and its relationships with Indians.\textsuperscript{13} Federal Indian law scholars have devoted more attention to the role of the Supreme Court in Indian affairs than to the role of Congress.\textsuperscript{14} Their discussions of Congress often occur in the shadow of the Court and emphasize the serious confrontations between the two branches of government on federal Indian law issues.\textsuperscript{15} Scholars in other fields shed scarcely more light on the topic. Political scientists routinely omit American Indians from studies of congressional politics,\textsuperscript{16} and Native American Studies scholars have focused more on the rise of individual Indian activism and the Red Power movement than tribal strategies for law reform.\textsuperscript{17}

This Article charts new territory in this understudied area as an initial step toward developing a more comprehensive understanding of the amount and kinds of Indian-related legislation enacted by Congress. It presents a comprehensive study of federal, Indian-related legislation introduced and enacted by Congress from 1975 to 2013 (the 94th through 112th Congresses). The study defines Indian-related legislation as congressional bills with provisions involving American Indians, Native Americans, Native Hawaiians, Alaska Natives, and their respective governments or organizations. It responds to calls for more empirical research in the field of Indian law and extends the recent trend toward such research into the congressional realm.\textsuperscript{18} The study combines the content-focused

\textsuperscript{13} See Wilkins & Stark, supra note 4, at 170.
\textsuperscript{14} See, e.g., Getches, supra note 6, at 267; Fletcher, supra note 7, at 933; Labin, supra note 7, at 695.
\textsuperscript{15} Frickey, supra note 11, at 436 (noting that the Supreme Court’s recent revision of Indian law has led to “serious confrontation between congressional and judicial functions in federal Indian law.”). For other examples of legal scholarship focused on the interplay between the Court and Congress, see Robert Laurence, A Memorandum to the Class, 46 Ark. L. Rev. 1 (1993–1994); Steele, supra note 11; Alex Tallchief Skibine, Duro v. Reina and the Legislation that Overturned It: A Power Play of Constitutional Dimensions, 66 S. Cal. L. Rev. 767 (1993).
\textsuperscript{16} See Wilkins & Stark, supra note 4, at 170; Witmer & Boehmke, supra note 4, at 127.
\textsuperscript{17} See, e.g., Daniel M. Cobb, Native Activism in Cold War America: The Struggle for Sovereignty (2008); Beyond Red Power: American Indian Politics and Activism since 1900 (Daniel M. Cobb & Loretta Fowler eds., 2007); Joane Nagel, American Indian Ethnic Renewal: Red Power and the Resurgence of Identity and Culture (1996).
\textsuperscript{18} For examples of empirical studies in federal Indian law, see Fletcher, supra note 7; Getches, supra note 6; Carole Goldberg & Duane Champagne, Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last, 38 Conn. L. Rev. 697 (2006); Mark D. Rosen, Evaluating Tribal Courts’ Interpretations of the
analysis of public policy analysts and law scholars with the empiricism that political scientists use in studying Congress to present a first look at how Congress exercises its legislative authority over Indians.

The purpose of this study is to create systematic knowledge about Congress and Indians so that scholars and advocates can understand better the complicated relationships among courts, legislatures, and groups. While the data presented here provides limited information about the role and success of Indians in the political process, the study uses empirical methods to gain a more detailed and informed understanding of the relationships between Congress and Indians. It reports the amount and kinds of Indian-related legislation that Congress generates in the modern era of self-determination and compares that data to how Congress legislates more generally. 19

The study covers the forty-year period of the modern era of tribal self-determination. Congress adopted its latest official federal Indian policy, the Self-Determination Policy, around the 94th Congress and continued to adhere to this policy through the 112th Congress. 20 The Indian Self-Determination and Education Assistance Act of 1975 declared the policy, stating, “[T]he United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective


19. Congress’s oversight authority or its exercise of that authority is beyond the scope of this Article except to the extent that Congress legislates in relation to that authority.

communities.”21 Scholars have widely described Congress’s Self-Determination Policy as supportive of Indian nations as governments, and many describe it as the most successful Indian affairs policy ever established by Congress.22 Some scholars have argued that the Supreme Court is often unwilling to follow the dictates of Congress’s Self-Determination Policy.23 Despite this, Congress’s Self-Determination Policy has provided some Indian nations with the opportunity to develop economically and to devise effective governing structures.24

This Article does not attempt to explain why Congress enacts particular bills related to Indians. Nor does it take a normative position on Congress’s power over Indians or its role in interpreting the Constitution.25 My purpose is not to take a stance on what Congress should do in legislating, but rather to


25. Important normative issues exist on these topics. For example, an extensive and ongoing debate exists in the legal literature on the plenary power over Indian affairs, how it developed, and how Congress should exercise it. See, e.g., Robert A. Laurence, Learning to Live With the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams’ Algebra, 30 ARIZ. L. REV. 413, 418–28 (1988); Robert A. Williams, Jr., Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence’s Learning to Live with the Plenary Power of Congress over the Indian Nations, 30 ARIZ. L. REV. 439, 441 (1988); Mark Savage, Native Americans and the Constitution: The Original Understanding, 16 AM. INDIAN L. REV. 57, 79 (1991); Robert N. Clinton, The Dormant Indian Commerce Clause, 27 CONN. L. REV. 1055, 1156–58 (1995).
increase our understanding of what it actually does by broadly
describing the contours of the Indian-related legislation
introduced and enacted by Congress during a specific time
period. My intent here is to describe and contextualize “the
actual state of things”\textsuperscript{26} in the broadest sense possible, to use
this description to generate theories for better understanding
the relationships between Congress and Indians, and to
consider some of the implications of my analysis on
policymaking in general and federal Indian law and policy
more specifically.

Recent assertions that Indians may fare better in Congress
than in the courts contradict popular narratives about the
political success of minority groups. A healthy skepticism about
these assertions prompted this study. While I did not formulate
and test clear hypotheses, I expected Indian-related bills to
constitute a small proportion of the congressional agenda and
to face a low enactment rate similar to the general enactment
rate of all bills.

Several factors informed my expectation that Indian law
scholars’ and tribal advocates’ optimism in Congress might be
misplaced. First, Indians do not have the resources needed to
influence a majority in Congress. Numerically, the 566 Indian
nations in the United States are diffuse geographically and do
do not constitute a majority in any state.\textsuperscript{27} Indians comprise a
majority in only one or two congressional districts and rarely
affect electoral outcomes.\textsuperscript{28} Financially, most Indian nations
and individuals are impoverished and are not major
contributors to electoral campaigns.\textsuperscript{29} Accordingly, Indians

\textsuperscript{26} Laurence, supra note 25, at 435.
\textsuperscript{27} TINA NORRIS, PAULA L. VINES, & ELIZABETH M. HOEFFEL, U.S. CENSUS
BUREAU, 2010 CENSUS BRIEFS, THE AMERICAN INDIAN AND ALASKA NATIVE
POPULATION: 2010, 6–7 (Jan. 2012) (noting that California has the highest
percentage of Indians living in any state at 14 percent).
\textsuperscript{28} DANIEL MCCOOL, SUSAN M. OLSON & JENNIFER L. ROBINSON, NATIVE
VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE
176–91 (2007) (noting the few instances in which Native voters may have made a
difference in elections in Western swing states); TOVA WANG, DÉMOS, ENSURING
ACCESS TO THE BALLOT FOR AMERICAN INDIANS & ALASKA NATIVES: NEW
SOLUTIONS TO STRENGTHEN AMERICAN DEMOCRACY 3 (2012), available at
http://www.demos.org/sites/default/files/publications/IHS%20Report-Demos.pdf,
archived at http://perma.cc/57LE-75JZ (reporting low voter turnout rates among
American Indians).
\textsuperscript{29} Fredrick J. Boehmke & Richard Witmer, Indian Nations as Interest
Groups: Tribal Motivations for Contributions to U.S. Senators, 65 POL. RES. Q.
179, 179, 181 (2012) (stating that prior to gaming, tribes previously did not have
appear to be a paradigmatic diffuse and insular minority that faces extreme obstacles in influencing the political process.

Second, federal Indian law issues generally concern Indians, are not highly salient to the general public, and are not among the issues upon which most non-Indian constituents base their voting decisions. Indian issues rarely, if ever, decide congressional elections. To the extent that non-Indians care about Indian issues, it may jeopardize a member of Congress’s reelection due to an increased backlash movement against Indians in recent decades. Thus, as a collection of election-minded politicians (rather than conscientious lawmakers), members of Congress have few incentives to pay attention to Indian issues and more often than not, politicians may gain political support from non-Indians by disfavoring Indian interests.

Finally, Indians historically have not done well in Congress. Congress has promulgated some of the federal Indian policies most detrimental and destructive to Indian nations. For example, the allotment policy undermined Indian nations by allotting tribally held land into alienable fee simple properties held by individual Indians and assimilating Indians into mainstream American culture as farmers. Similarly, the termination policy ended the political and legal relationship between the United States and over 110 tribal governments, liquidated tribal assets, and converted tribally held lands into fee simple properties. Congress has also ignored Indian nations’ opposition to particular bills and overlooked tribal requests for legislation benefiting their financial resources to participate politically).

32. Wilkins & Stark, supra note 4, at xxx–xxxi, 169.
33. For a full discussion of these policies, see generally Getches et al., supra note 8 (describing the different Indian policies enacted by the federal government).
interests. These factors suggest that Indians wield little political influence. The discrepancy between this apparent lack of Indian political influence and the belief in Congress as an avenue for Indian law reform motivated my inquiry into the amount and kinds of Indian-related legislation introduced and enacted by Congress. Because Indians appear to have little influence on Congress, I did not expect Congress to enact much legislation related to them.

My study produced two major, and somewhat unexpected, findings. First, Congress’s enactment rate for Indian-related legislation was higher than its enactment rate for legislation more generally during the time period studied. This higher enactment rate has important implications for how we understand Congress as a policymaker, its relationship with Indians, and the formulation of federal Indian law and policy. It raises the question of why the enactment rate for Indian-related legislation was higher than the general enactment rate. How can we understand Congress’s behavior towards Indians? How does that behavior compare with congressional behavior towards other groups? The answers to these questions may affect current advocacy strategies and understandings of Congress’s policymaking role because the higher enactment rate for Indian-related legislation contradicts traditional narratives about discrete and insular groups’ inability to participate successfully in the political process.

Second, the study revealed the volume and importance of the different kinds of Indian-related legislation generated by Congress. While recent scholarship has focused on the passage of pan-tribal legislation that substantially alters federal Indian law and policy, Congress also enacts legislation on behalf of specific tribes and regularly includes

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37. See infra Part II.

38. See Ely, supra note 1, at 135–79.

39. See infra Part II.

Indians in general legislation. Most Indian law scholarship overlooks these kinds of laws. My findings indicate a need for further research into these areas and their possible impacts on federal Indian law and policy and congressional policymaking more generally.

This Article proceeds as follows. Part I situates the study in the various literatures pertaining to Congress and Indians and explains the study’s methodology. Then, Part II reports the major findings of the study. Part II.A describes the amount of Indian-related bills introduced and enacted in Congress from 1975 to 2013 (the 94th through the 112th Congresses). Part II.B creates a typology of the kinds of Indian-related bills and investigates whether a particular kind of bill disproportionately affects the overall enactment rate for Indian-related legislation. Part III provides some preliminary thoughts on possible explanations of the relationships between Congress and Indians. It uses the study’s data to generate several possible hypotheses that could assist in understanding those relationships. It suggests the need for more research to test these hypotheses and to develop a fuller understanding of the relationships between Congress and Indians. Part IV discusses the implications of the study’s findings on congressional policymaking. It considers how the study informs understandings of legislative success and its relationship to bill content, interest group interaction in the legislative process, and federal Indian law and policymaking. Finally, it suggests that more research is needed to understand the complexity of Indian-related legislation and the relationships between Congress and Indians.

I. THE STUDY: BUILDING EMPIRICAL KNOWLEDGE ON CONGRESS AND INDIANS

Federal Indian law has benefited recently from a renewed interest in empirical legal studies. Recent studies have provided insights into criminal law and procedure in

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42. Empirical legal studies of federal Indian law date from the early twentieth century when legal realists conducted some qualitative studies of tribal law. See, e.g., K. N. Llewellyn & E. Adamson Hoebel, The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence (1941).
Indian country, tribal court practices and procedures, and the success of Indian interests both in the certiorari process and on the merits in the Supreme Court. Largely absent from this growing body of scholarship are empirical studies devoted to understanding the relationships between Indians and the legislative process. Yet Congress was historically the predominant maker of federal Indian policy and continues to play a major role in Indian affairs. The study presented in this Article is an initial attempt to fill part of this gap in the literature. Part I.A briefly summarizes the existing literature on Congress and Indians and shows how that literature suggests the need for more empirical data on the subject. Part I.B then explains the study's methodology and limitations.

A. Congress and Indian Affairs

Congress plays a preeminent role in the formation of federal Indian law and policy because Article I, Section 8, clause 3 of the United States Constitution enumerates exclusive legislative power over Indian affairs as one of Congress's governing responsibilities. Scholars have conducted only a few studies purporting to review legislation over Indian affairs passed by Congress since the 1970s. These studies either list major legislation relating to Indian affairs or.

43. See, e.g., Goldberg & Champagne, supra note 18.
44. See, e.g., Rosen, supra note 18; Berger, supra note 18; Newton, supra note 18.
45. See, e.g., Fletcher, supra note 7; Getches, supra note 6.
47. U.S. CONST. art. I, § 8, cl. 3.
49. See, e.g., CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 192–93 n.151 (1987); WILKINS & STARK, supra note 4, at 265–69. Professor Wilkinson lists major legislation passed since 1968 in his analysis of the Supreme Court's Indian law jurisprudence in the mid-twentieth century. He asserts that his list demonstrates that Congress cannot pass legislation that Indian nations oppose. He does not, however, explain how he determined whether Indian nations supported or opposed the bill, especially given the lack of unity among Indian nations. It seems that some of his classifications may be questionable or overly simplistic. For example, he designates the Alaska Native Claims Settlement Act
or compare United States and Canadian legislation relating to indigenous self-determination.\textsuperscript{50} None of these studies, however, claims to be comprehensive, and all of them focus on major congressional legislation that addresses Indian affairs while giving little, if any, consideration to general legislation that includes Indians.

Despite their limitations, these studies provide some valuable insights into how to think about Congress and Indians. First, they note the rise of legislative advocacy by Indian nations in recent decades and suggest that this advocacy may affect the relationships between Congress and Indians.\textsuperscript{51} Second, they emphasize the role and influence of the Senate Committee on Indian Affairs (SCIA) in ensuring the passage of legislation in recent decades, but they do not try to confirm the SCIA’s role empirically.\textsuperscript{52} Finally, they note that Congress has haphazardly dealt with Indian affairs issues, leaving many important questions open and therefore subject to judicial interpretation.\textsuperscript{53}

Most of the other existing studies that address legislation over Indian affairs focus on the passage or implementation of specific legislation,\textsuperscript{54} policy proposals within specific legislation,\textsuperscript{55} the role of political parties in supporting certain kinds of legislation,\textsuperscript{56} or statutory interpretation by courts and

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\textsuperscript{50} See, e.g., BORROWS, supra note 22.

\textsuperscript{51} See, e.g., WILKINSON, supra note 49, at 53, 82–83; WILKINS & STARK, supra note 4, at 165–70.

\textsuperscript{52} See, e.g., WILKINS & STARK, supra note 4, at 94–99.

\textsuperscript{53} See, e.g., WILKINSON, supra note 49, at 11. Professor Frickey also laments Congress’s less than consistent approach to Indian affairs. Frickey, supra note 11, at 482.

\textsuperscript{54} See, e.g., THE INDIAN CIVIL RIGHTS ACT AT FORTY (Kristen A. Carpenter et al. eds., 2012); Skibine, supra note 4, at 767; Berger, supra note 40.


the appropriate application of the Indian canons of construction. The most systematic of these studies reports that Democratic members of Congress have been more supportive of extending the Self-Determination Policy through legislation than have Republican members of Congress. The study’s authors, however, do not explain their methodology, so it is not clear how they identified self-determination bills. The study does not discuss any other kind of Indian-related legislation.

Studies of federal Indian policy tend to include some discussion of federal legislation relating to Indians. Most of these are limited to major pieces of legislation and often discuss such legislation as an aspect of presidential policymaking. These policy studies provide crucial and insightful descriptions of presidential agendas and key legislation affecting federal Indian policy, but they are extremely limited in scope. One notable study attempts to more systematically categorize modern congressional statements of federal Indian policy into three kinds: self-governance; economic development, tax authority, and immunities; and tribal court development. These studies, however, do not present a big-picture view of the kinds of Indian-related legislation introduced or enacted by Congress, and thus, limit our knowledge about what Congress actually does with respect to Indians.

Similarly, federal Indian law scholars regularly engage in

http://perma.cc/62DY-VUYW.


58. Cornell & Kalt, supra note 56, at 23.

59. See Cornell & Kalt, supra note 56.

60. See, e.g., Fletcher, supra note 20; Deloria, supra note 46; Newton, supra note 55.


62. Fletcher, supra note 20, at 139–46. The main emphasis of this study demonstrates how the Supreme Court’s “federal common law cases often contravene express federal Indian policy.” Id. at 129. Professor Fletcher argues, “the Court should follow congressional and Executive Branch federal Indian policy when confronted with cases where no treaty, statute, or regulation controls.” Id. at 128–29.
doctrinal debates on the subject of Congress and Indian affairs.\textsuperscript{63} They frequently discuss the sources,\textsuperscript{64} constitutionality,\textsuperscript{65} and scope\textsuperscript{66} of Congress's legislative authority over Indian affairs. Their analyses focus on the contours and limits of Congress's legislative authority over Indian affairs, which are often established by the Supreme Court.\textsuperscript{67} This literature tends to emphasize major pieces of legislation that establish or transform federal Indian law and policy,\textsuperscript{68} and confrontations between Congress and the

\textsuperscript{63} See infra notes 64–69.

\textsuperscript{64} For example, disagreement exists over whether Article I, Sec. 8, clause 3 of the United States Constitution, commonly referred to as the Indian Commerce Clause, serves as the basis for expanding congressional authority over the internal affairs of Indian nations. See, e.g., United States v. Kagama, 118 U.S. 375, 378–79 (1886) (explicitly rejecting the Indian Commerce Clause of the U.S. Constitution as the source for congressional authority over Indian affairs); McClanahan v. State Tax Comm’n of Ariz., 411 U.S. 164, 172 n.7 (1973) (“The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making.”). For a full discussion of the legal foundations of the legislative authority over Indians, see INDIAN LAW RES. CENT., NATIVE LAND LAW GENERAL PRINCIPLES OF LAW RELATING TO NATIVE LANDS AND NATURAL RESOURCES 2012 LAWYERS EDITION 154–55 (2012); VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS 79 (1999); Matthew L.M. Fletcher, Tribal Consent, 8 STAN. J. C.R. & C.L. 45, 75–93 (2012) (detailing the history of legislative authority over Indian affairs and the relationship between the trust doctrine, treaty relationships, and the plenary power doctrine).

\textsuperscript{65} Scholars have argued that Congress's exercise of its legislative authority over Indian affairs is unconstitutional for a multitude of reasons: it extends Congress's powers beyond those enumerated in the Constitution (see, for example, WILKINS, supra note 7; INDIAN LAW RES. CENT., supra note 64, at 147–51); it ignores the intent of the framers of the Constitution (see, for example, INDIAN LAW RES. CENT., supra note 64, at 149; Savage, supra note 25, at 74–79; Clinton, supra note 25, at 1156–58); and it is inconsistent with interpretation of the interstate and international commerce clauses (see, for example, INDIAN LAW RES. CENT., supra note 64, at 160; Saikrishna Prakash, Against Tribal Fungibility, 89 CORNELL L. REV. 1069, 1079, 1087–88 (2004)). Other criticisms also exist of the plenary power doctrine. See, e.g., Williams, supra note 25, at 441; WILKINS, supra note 7, at 80; Nell Jessup Newton, Federal Power Over Indians: Its Sources, Scope, and Limitations, 132 U. PENN. L. REV. 195, 209 (1984); INDIAN LAW RES. CENT., supra note 64, at 151–54.

\textsuperscript{66} Central to this debate has been the question of whether Congress has the authority to regulate the internal affairs of Indian tribes. See, e.g., Williams, supra note 25, at 445–49; Laurence, supra note 15, at 422–28.

\textsuperscript{67} See, e.g., Newton, supra note 65, at 195; WILKINS, supra note 7; INDIAN LAW RES. CENT., supra note 64, at 143–45, 151–61; Milner S. Ball, Constitution, Court, Indian Tribes, 1987 AM. B. FOUND. RES. J. 1, 12 (1987).

\textsuperscript{68} See, e.g., Laurence, supra note 25, at 421 (discussing the relationship between plenary power and the Indian Civil Rights Act); Williams, supra note 25, at 452 (same).
Supreme Court. The narrow focus of this literature fails to account for the full array of Indian-related legislation.

This inattention to legislative activity and trends stands in stark contrast to the vast political science literature on Congress and its role as a policymaker. While political scientists have studied policy formation and legislative trends in Congress extensively, political scientists “devote little attention” to how the subject matter of legislation may affect its enactment. Rather, political scientists tie party politics, individual legislator influence, presidential support, and interest group behavior to legislative success. So, by the nature of their inquiries, many political science studies omit any discussion of Indians or Indian issues. The political science studies that do consider bill subject matter have not looked at Indian-related legislation. As a result of this

69. For example, several law review articles debate the constitutional powers and proper function of Congress and the Supreme Court in relation to Indian affairs, especially in light of the recent disagreement between the two branches over the inherent authority of Indian nations to exercise criminal jurisdiction over non-member Indians. See, e.g., Laurence, supra note 15, at 12–13; Frickey, supra note 11, at 460–71.


72. See infra Part Error! Reference source not found. (discussing political science explanations for legislative success).

73. For a full discussion of the omission of Indians from political science studies, see supra note 4.

74. ADLER & WILKERSON, supra note 71, at 8–11. Most studies on lobbying and interest group behavior leave out Indian nations and Indian issues. See, e.g., BAUMGARTNER ET AL., LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSSES, AND WHY 9, 17 (2009) (listing interest group participants and lobbying issues included with no mention of Indians). The few political science studies that focus on Indians have not looked at legislative success. See, e.g., Boehmke & Witmer, supra note 29, at 179 (studying tribal contributions to United States Senators); Corniassel & Witmer, supra note 4, at 511 (studying political contributions by
oversight by legal scholars and political scientists, very little comprehensive data exists about how, how often, and under what circumstances Congress enacts Indian-related legislation.

The lack of knowledge about Congress’s role in formulating federal Indian law and policy is all the more disconcerting because as the Supreme Court has become less receptive to tribal litigants,75 tribal lawyers and advocates have increasingly turned to Congress to protect tribal interests, especially tribal self-determination and jurisdiction.76 Moreover, recent court decisions adverse to tribal interests have placed the burden on Indian nations to convince Congress to clarify its position on Indian affairs in legislation.77 As a result, some advocates have sought to reverse Supreme Court decisions through legislation aimed at protecting or reaffirming tribal sovereignty.78

Yet most bills introduced in Congress never get enacted.79 Congress is notoriously polarized, dysfunctional, and slow to enact even the most urgent legislation.80 If the formulation of Indian nations).

75. See Getches, supra note 6, at 280 (finding that tribes lost 82 percent of the cases decided by the Supreme Court from 1991 to 2000); Fletcher, supra note 7, at 943 (showing that the success rate of tribal litigants in the Supreme Court has not improved since 2001).

76. See Getches, supra note 6, at 276 (suggesting that the legislative process has advantages over adjudication); Berger, supra note 40, at 11–18 (detailing advocacy in the Duro Fix legislation).

77. See Frickey, supra note 11, at 483 (noting how, in the past, tribal success in the courts placed the legislative burden on tribal opponents, so that tribes were in the easier position of trying to kill reactive legislation rather than seeking legislation on their own behalf).


80. See, e.g., E. SCOTT ADLER & JOHN D. WILKERSON, CONGRESS AND THE POLITICS OF PROBLEM SOLVING 3 (2012) (describing congressional politics as “so polarized and dysfunctional that lawmakers are incapable of cooperating on even
federal law and policy beneficial to Indian nations depends on Congress, then tribal scholars, advocates, and lawyers need to better understand how Congress legislates. Studying legislative activity and trends will give us a more nuanced and comprehensive understanding of how Congress legislates in relation to Indians. Information on legislative trends may allow scholars to confirm or enhance their understandings of the formation of federal Indian policy and may help tribal lawyers and advocates develop better legislative strategies. The next Section makes a first attempt to increase knowledge about the relationships between Congress and Indians through an empirical study describing the amount and kinds of Indian-related legislation.

B. The Study

This Section describes a study of the amount and kinds of Indian-related bills proposed and enacted by Congress. It explains the study’s methodology and some of the limits of using that methodology.

1. Data Collection

The purpose of this study is to describe broadly the volume and kinds of Indian-related legislation introduced and enacted by Congress from 1975 to 2013. It creates a starting point for more detailed studies of congressional activity related to Indians and the relationships between Congress and Indians.

I created a database of identifiable Indian-related legislation in Congress from 1975 to 2013. I chose this time period because Congress adopted its latest official federal Indian policy, the Self-Determination Policy, around the 94th Congress and continued to adhere to this policy through the 112th Congress. A focus on this time period allows for consistency in terms of Congress’s stated federal Indian policy and an evaluation of how Congress acts in the modern era of the most mundane issues”). For a brief description of the literature on Congress’s dysfunction, see id. at 4–5.

81. For a full description of the database’s creation, see Appendix 1: Methodology [hereinafter Methodological App.].

82. Steele, supra note 11, at 778. See also LEVY, supra note 20; Fletcher, supra note 20, at 142–43.
self-determination.\footnote{The selection of this time period does not provide any information on how Congress exercised its legislative authority over Indian affairs in any other time period. In terms of federal Indian law, a field which spans several centuries and multiple, different policy eras, this may seem like a very limited time period. Accord Getches Et Al., supra note 8, at 43–216 (reviewing the different eras in federal Indian policy). But in terms of congressional studies, most of which analyze data from one or two Congresses only, this is a very comprehensive look at legislation over a long period of time.}{83}

I collected the data from THOMAS.GOV, a website created and run by the Library of Congress, which electronically compiles legislative information.\footnote{THOMAS, Library of Congress, http://thomas.loc.gov/home/thomas.php, archived at http://perma.cc/W4DV-7JF8 (last visited July 14, 2014). THOMAS includes the text and other information on legislation introduced and enacted in Congress. Political scientists have also created publically available legislative datasets. For a list of publicly and privately available legislative databases, see Resources, Congressional Bills Project, http://congressionalbills.org/research.html, archived at http://perma.cc/-EXK9 (last visited July 14, 2014). For example, the Congressional Bills Project [hereinafter CBP] has recently created a database of over 400,000 bills introduced in Congress from 1947 to 2011 and coded them based on 19 major and 225 minor subject matter or topic codes. Id. A related project, the Policy Agendas Project [hereinafter PAP], applies the same topic codes to legislative hearings, roll call votes, executive orders, state of the union speeches, Supreme Court decisions, the federal budget, and the New York Times Index. Datasets & Codebooks, Policy Agendas Project, http://www.policyagendas.org/page/datasets-codebooks, archived at http://perma.cc/QXQ6-3KM7 (last visited July 14, 2014). While the data collection and coding methodologies used by CBP and PAP informed this project, I do not rely primarily on their datasets. Except where otherwise noted, my figures are based on my extensive analysis compiling and manipulating the raw data. The creation and content of this dataset are discussed infra Methodological App.}{84}

I used the Congressional Research Service (CRS) subject codes in the “Bill Search and Summary” feature of THOMAS.GOV to identify public bills with provisions involving Indians, Alaska Natives, Native Hawaiians, and their respective governments introduced in either the House or the Senate in the 94th through 112th Congresses.\footnote{The CRS assigns at least one subject term to all legislation as a way to group legislation. Prior to the 111th Congress, the CRS used the Legislative Indexing Vocabulary to assign subject terms to proposed legislation. Starting with the 111th Congress, the CRS has used a new list of subject terms. For a complete list of the new subject terms, see generally CRS Legislative Subject Terms Used in THOMAS, Library of Congress, http://thomas.loc.gov/help/terms-subjects.html, archived at http://perma.cc/TEP4-X3MN (last visited Aug. 12, 2014).}{85} I initially searched THOMAS.GOV for public bills with a CRS subject matter code including the term “Indian.”\footnote{For a description of how CRS assigns subject matter terms, see Standard Subject Term, Library of Congress, http://thomas.loc.gov/bss/bss_help.html#index, archived at http://perma.cc/F37B-BNUQ (last visited July 14, 2014).}{86} The search generated 6,907 bills introduced in the
94th through the 112th Congresses. I downloaded these bills into a database.

I triangulated this data with other sources to ensure that I had identified as many Indian-related bills as possible. First, I downloaded all the bills coded into the Native American Affairs subtopic in the Congressional Bills Project (“CBP”) database. I compared the bills in my original THOMAS.GOV download with those in the CBP database to determine whether the CBP database included any additional bills. Second, I downloaded the bills in THOMAS.GOV categorized by CRS as “Native American” for comparison with the bills in my original download. Third, I compared the “Native American” bills in THOMAS.GOV with the Native American Affairs bills in the CBP database. The comparisons among these three datasets identified 951 Indian-related bills that were not in my original download from THOMAS.GOV. The comparisons revealed 108 bills in the CBP database that were not categorized as either “Indian” or “Native American” in THOMAS.GOV. I reviewed each of these bills to determine whether they belonged in my database. I excluded 59 bills in the CBP dataset from my database for one of the following reasons: (1) the bill text did not actually mention Indians, tribes, Native Americans, Alaska Natives, or Native Hawaiians, (2) the bill used the term “Indian” or a tribal

87. For a full description of these processes, see infra Methodological App.
88. This dataset is available at Download Congressional Bill Project Data, CONGRESSIONAL BILLS PROJECT, http://congressionalbills.org/download.html, archived at http://perma.cc/ZM6W-ZQNX (last visited July 14, 2014). I used the most recently posted CBP dataset, which covers the 93rd through 112th Congresses. I excluded bills in the 93rd Congress from the comparisons and subsequent database.
89. I made all comparisons among the bills in each of the downloads based on the unique bill identifiers. The unique bill identifier is the Congress-house-bill number sequence unique to each bill, e.g., 94 H.R. 606.
90. I reviewed these bills before adding them to the database because they had to be added to the database individually. The addition of these bills was a time consuming and laborious process so I wanted to ensure that they belonged in the database before adding them. For a full list of these bills, see infra Methodological App. The few CPB bills excluded from my database confirm the consistency and reliability of the coding in the CBP.
91. See, e.g., A Bill to Amend the Native American Programs Act of 1974 to Authorize the Provision of Financial Assistance to Agencies Serving Native American Pacific Islanders (Including American Samoan Natives), S. 157, 99th Cong. (1985) (legislating for Native Samoans, not American Indians); A Bill to Establish in the Department of State a Bureau of North American Affairs, and for Other Purposes, S. 606, 97th Cong. (1981) (no mention of Indians in bill); A Bill to
name, but only in reference to a place name or an organization not related to Indians, or (3) the bill was a private bill. Finally, I added the 892 bills identified as Indian-related in the other downloads to the database. Based on the addition of these bills, the final database included 7,799 bills.

Despite the efforts to triangulate the data, Indian-related bills may be missing from the database. In particular, the database may not include Indian-related bills that do not have a preeminent focus on Indians because the Native American Affairs subtopic in CBP data covers only bills with a predominant focus on Indians. While the CRS coding includes bills without a predominant focus on Indians, the subject matter codes and coders have changed over time, which increases the likelihood of inconsistent coding and the possible exclusion of relevant bills. As a result, a small proportion of Indian-related bills may likely be missing from the database.

2. Methodology

Studies on Congress abound, but quantitative, empirical studies that have looked at how the substantive content in the provisions of legislation relates to enactment rates are rare. A Permit the Department of Transportation to Proceed with a Highway Project in Lee County, Florida, without Regard to Section 106 of Public Law 89-665 or Procedures Developed under Section 1(3) of Executive Order Numbered 11593, H.R. 3667, 96th Cong. (1979) (same).

92. See, e.g., A Bill to Designate the Indian Health Facility in Ada, Oklahoma the "Carl Albert Indian Health Facility," H.R. 7150, 96th Cong. (1980) (renaming the Ada Indian Health Facility the Carl Albert Indian Health Facility); A Bill to Establish Chickasaw National Recreation Area in the State of Oklahoma, and for Other Purposes, S. 1725, 94th Cong. (1975) (establishing a national recreation area in Oklahoma).

93. See, e.g., A Bill to Provide for the Amendment of Public Survey Records to Eliminate a Conflict Between the Official Cadastral Survey and a Private Survey of the So-Called Wold Tract within the Medicine Bow National Forest, Wyo., H.R. 2501, 95th Cong. (1977).

94. Qualitative studies of Congress often do consider the substantive content of legislation. For a review of these studies, see generally FRANK R. BAUMGARTNER & BETH L. LEECH, BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND IN POLITICAL SCIENCE (1998). Further, some scholars have conducted qualitative case studies that look at the relationship between a particular bill’s content, usually its main issue focus, and the bill’s success or failure. See, e.g., WILLIAM N. ESKRIDGE JR., ET AL., CASES AND MATERIALS ON LEGISLATION STATUTES AND THE CREATION OF PUBLIC POLICY 1–25 (4th ed. 2007) (discussing the enactment of the Civil Rights Act of 1965). These studies, however, do not present a big picture view on how a bill’s main issue, such as health care or national security, may influence enactment rates.
few studies, however, have started to investigate this and thus demonstrate a renewed interest in how the substantive content of legislation may effect legislative enactment.\textsuperscript{95} These studies do not uniformly define substantive content, but look at different aspects of a bill’s provisions. They suggest that substantive content can refer to several aspects of a bill, including, but not limited to, the general subject matter or the topic that the bill addresses (e.g., health, education, or national security),\textsuperscript{96} or some other facet of the bill’s provisions (e.g., whether the bill seeks to reauthorize an existing policy\textsuperscript{97} or overturn a court decision).\textsuperscript{98} This study focuses on substantive content in terms of a single topic or subject matter of legislation, exclusively Indian-related legislation, and makes limited inroads into subdividing this topic into broad subtopics. It builds on the methodologies and insights developed in earlier studies that use measures of bill content: empirical legal studies on legislative overrides, political science studies of legislative success and legislative productivity, and recent studies that discuss the specific provisions or subject matter of legislation.

Empirical legal studies on legislative overrides of Supreme Court decisions have long emphasized the substantive content of legislation in terms of the provisions that overturn a specific court decision.\textsuperscript{99} These studies answer questions about how

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The big quantitative studies on legislative success and congressional productivity look at the influence of legislator behavior, party politics, committees, and the presidential agenda on enactment rates. See, e.g., Binder, supra note 70, at 84–104 (building model to predict congressional productivity using intragovernmental conflict, partisan polarization, and presidential priority); J. Tobin Grant & Nathan J. Kelly, Legislative Productivity of the U.S. Congress, 1789-2004, 16 POL’Y ANALYSIS 303, 318 (2008) (same); Adler & Wilkerson, supra note 80, at 7, 153–57 (describing literature on legislative success as focusing on lawmaker preferences, committees, and interbranch influences).


97. Adler & Wilkerson, supra note 80, at 17 (finding that expiring provisions of law and indicators of public issue salience are robust predictors of policy change).

98. See, e.g., Eskridge, supra note 95, at 331 (studying the legislative success of legislative overrides).

99. Eskridge, supra note 95, at 336–37 (explaining his focus on overrides);

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Congress responds to court decisions rather than look at how Congress enacts legislation in a single, substantive policy area.\textsuperscript{100} They often include breakdowns of legislative overrides by subject matter.\textsuperscript{101} This study builds on their methodologies and insights by looking at the related question of how Congress enacts legislation on a specific, substantive subject matter.\textsuperscript{102}

Political scientists have conducted numerous studies focusing on congressional productivity and explaining why one Congress enacts more legislation than another.\textsuperscript{103} These studies focus on “major” legislation, but they disagree on how to define major legislation.\textsuperscript{104} Aside from their various definitions of “major” legislation, these studies do not consider the substantive content (either the subject matter or specific provisions) of legislation. As a result, the majority of these studies say very little about the actual legislation passed by Congress and how it may relate to a substantive subject matter. This study expands our understandings of congressional productivity by exploring whether the subject matter of legislation affects legislative enactment and congressional productivity.

A few recent quantitative studies of Congress have looked at specific provisions or topics of legislation and whether they are related to legislative enactment.\textsuperscript{105} These studies, along

\begin{itemize}
  \item Blackstone, supra note 95, at 204–05 (defining decision reversal legislation).
  \item Eskridge, supra note 95, at 333; Blackstone, supra note 95, at 199.
  \item Christiansen & Eskridge, supra note 78, at 1358.
  \item My data collection methods reflect common practices used by political scientists studying Congress generally and legislative responses to Supreme Court decisions in particular. See, e.g., Blackstone, supra note 95, at 204–07.
  \item See, e.g., BINDER, supra note 70; MAYHEW, DIVIDED WE GOVERN, supra note 70.
  \item BINDER, supra note 70, at 34–40; MAYHEW, DIVIDED WE GOVERN, supra note 70, at 40–41.
  \item ADLER & WILKERSON, supra note 80. Political scientists have categorized bills along other lines, including studies of “major” legislation, private bills, and omnibus legislation. BINDER, supra note 70, at 34–40; MAYHEW, DIVIDED WE GOVERN, supra note 70, at 40–41. While these categories do not line up exactly with the substantive focus of the bill (and arguably omnibus legislation transcends one substantive focus), these studies do provide some insights into how enactment rates vary by classifications of legislation. For example, omnibus legislation has a substantially higher enactment rate than normal legislation. Glen S. Krutz, Tactical Maneuvering on Omnibus Bills in Congress, 45 AM. J. POLI. SCI. 210, 210 (2001).
  \item Recently, political scientists have built publically available legislative datasets to address two of the main challenges to the systematic study of legislative content, namely the availability and manageability of creating large legislative databases. For a description of these databases, see supra note 84. The
with an increased interest in the substantive issues placed on the legislative agenda, indicate a growing interest in and need for empirical analyses of the substantive content of legislation and how bill content may affect the legislative process.\textsuperscript{106} Political scientists Adler and Wilkerson argue that bill content influences the prospects of legislative enactment.\textsuperscript{107} They considered whether the existence of an expiring provision within a bill made it more likely for Congress to introduce and enact the bill as compared with bills without expiring provisions.\textsuperscript{108} In identifying these expiring provisions, Adler and Wilkerson provided limited data on the subject matter of the bills with sunset provisions (e.g., education), but they analyzed only whether the expiring provision predicted bill enactment.\textsuperscript{109} They did not look at whether the bill’s subject matter also affected its chances of enactment. This study furthers their research by defining a broad policy topic, identifying legislation on that topic, and evaluating whether the topic (rather than a specific kind of provision) affects legislative enactment.

Similarly, as described in Part I.A, Professors Cornell and Kalt have considered the substantive focus in legislation by identifying bills related to Congress’s self-determination policy.\textsuperscript{110} Their limited focus on a subset of legislation relating to Indians does not provide much information on how Congress acts more generally towards Indians. My study builds on their work by considering all the Indian-related legislation introduced and enacted by Congress during the era of self-

\textsuperscript{106} See \textsc{Kingdon}, supra note 70.
\textsuperscript{107} \textsc{Adler & Wilkerson}, supra note 71, at 11–12.
\textsuperscript{108} \textsc{Adler & Wilkerson}, supra note 80, at 17.
\textsuperscript{109} Adler and Wilkerson include a simple chart showing the substantive focus of the legislation. \textit{Id.} at 150. In e-mail correspondence with me, they explained that they did not look more closely at the substantive focus of the legislation. Their focus was more on the sunset provisions and their effect on bill success or failure than on how the substantive focus on the bill could affect bill success or failure. Their e-mails also indicated the need for studies that do look at the substantive focus of introduced bills and how that affects bill enactment rates. E-mail from John Wilkerson, Professor of Political Sci., Univ. of Wash., to Kirsten Matoy Carlson, Assistant Professor of Law, Wayne State Univ. (June 26, 2013) (on file with author).
\textsuperscript{110} See supra Part I.A; Cornell & Kalt, supra note 56, at 21–26.
To gain an initial understanding of the amount and kinds of legislation Congress enacts within the topic of Indian-related legislation, I developed a typology of the kinds of bills in the database. The typology broadly considers how Congress regulates Indians (as a monolithic group, as individual tribes, or as part of the general public) and creates public policies affecting them. I broadly classified bills into four categories: tribe-specific bills, pan-tribal bills, general legislation affecting Indians, and appropriations bills. This typology allowed me to distinguish between bills that legislated over Indian affairs by developing federal Indian policy, bills that catered to the specific needs of a particular tribe or a few tribes, general legislation affecting Indians, and appropriations bills. It reflects how federal Indian law scholars have previously distinguished between kinds of Indian-related legislation and also considers information gathered from informal conversations with former legislative advocates for Indian nations. The few scholars who have looked at the inclusion of Indians in legislation have differentiated between two kinds: (1) federal legislation with the distinct purpose of developing federal Indian law or regulating Indian nations as Indian nations, and (2) legislation that treats Indians like other groups in American society. Other scholars have sought to refine our understandings of legislation that regulates Indians as Indians, and my typology reflects their work by dividing bills into pan-tribal and tribe-specific categories.

111. One of the limits of this coding scheme is that it obscures the fact that pan-tribal and tribal specific bills may get incorporated into general legislation during the legislative process. Both the Tribal Law and Order Act and the tribal provisions of the VAWA Reauthorization are examples of this, as they started as independent legislation and were later added to another bill. See Tribal Law and Order Act of 2010, Pub. L. No. 111–211, tit. 2, 124 Stat. 2258 (2010); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

112. See, e.g., Deloria, supra note 46, at 250–56; WILKINSON, supra note 49, at 10–11.


114. My categories mirror the tribe-specific and pan-tribal divisions suggested by Professor Wilkinson. WILKINSON, supra note 49, at 10–11. Wilkinson’s subdivisions of Indian legislation are as follows: (1) statutes that deal with the affairs of individual tribes; (2) legislation that sets a broad Indian policy but have left implementation to subsequent legislation or administrative action; and (3)
I coded legislation that affected a particular issue for one or a few, but not all, tribes as tribe-specific legislation. Tribe-specific bills do not seek to establish general federal Indian law and policy, but do in some way govern the relationship between specific tribes and the United States government. Tribe-specific bills often deal with enrollment issues, land acquisition, claims distributions, tribal recognition, natural resources (e.g., water or mineral rights), and access to religious or cultural sites on public lands.\textsuperscript{115} For example, the Maine Land Claims Settlement Act of 1980 resolves the outstanding land claims of, and extends federal recognition to, the Passamaquoddy Tribe, the Penobscot Nation, and the Malisleet Tribe, but it does not affect any other tribes (except as a possible model for other tribe-specific federal recognition bills).\textsuperscript{116} Other examples of tribe-specific bills include the Western Shoshone Claims Distribution Act, which provides for the distribution of funds awarded by the Indian Claims Commission to identifiable groups of the Western Shoshone for the extinguishment of their aboriginal title to lands in Nevada;\textsuperscript{117} the Mescalero Apache Tribe Leasing Authorization Act, which authorizes the tribe to lease or transfer some of its water rights under specific conditions;\textsuperscript{118} and the Native Hawaiian Education Reauthorization Act, which would have reauthorized appropriations for Native Hawaiian education.\textsuperscript{119}

\textsuperscript{115} substan tive, self-implementing legislation that deals with a specific subject area within Indian law and applies across the board to all tribes. \textit{Id.}

Recently, scholars have subdivided legislation even further. Professor Fletcher identifies three kinds of congressional statements of federal Indian policy: (1) self-governance; (2) economic development, tax authority, and immunities; and (3) tribal court development. Fletcher, supra note 20, at 141–50. In his comparative study of federal legislation relating to indigenous self-government in the United States and Canada, Professor Borrows subdivides self-government legislation into the following three areas of focus: (1) Indigenous control of federal services, (2) the protection of Indigenous cultures and communities, and (3) Indigenous control in relation to natural resources and economic development. BORROWS, supra note 22, at 5. Due to the broad nature of this study, these further subdivisions were not used.

\textsuperscript{116} My analysis of tribe-specific legislation confirms Wilkinson’s earlier work. WILKINSON, supra note 49, at 139 n.12 (reporting that tribe-specific legislation often dealt with enrollment issues, land acquisition, and claims distributions).


\textsuperscript{119} Native Hawaiian Education Reauthorization Act, S. 86, 107th Cong.
I defined pan-tribal legislation as bills impacting all tribes and designed specifically to develop federal Indian policy. The overriding purpose of these bills is to develop federal Indian policy by specifically addressing an issue faced by all Indian nations or members of Indian nations. Examples of pan-tribal bills include the Tribal Law and Order Act, which provided resources to Indian nations across the United States to enhance their tribal justice systems; the Indian Gaming Regulatory Act, which establishes a regulatory scheme for the operation of gaming establishments on Indian lands; and the Indian Mineral Development Act of 1982, which authorizes Indian nations to enter into negotiated agreements for mining activities with the approval of the Secretary of the Interior.

The most challenging part of the coding process was identifying general bills that have a substantial focus on Indian affairs. General legislation does not have the overriding purpose of formulating federal Indian policy, but some general bills do include specific provisions that focus substantially on Indian affairs or seek to change federal Indian policy. For this reason, general legislation was further divided into general legislation with a low focus on Indians and general legislation with a high focus on Indians.

General bills with a high focus on Indians (general high focus) include specific provisions that broadly affect Indian nations or substantially change federal Indian policy. The Violence Against Women Reauthorization Act of 2013 is a prime example of a general high-focus bill because it includes provisions that greatly alter current jurisdictional arrangements in Indian country by restoring inherent tribal criminal authority over perpetrators of specific domestic violence crimes. Another example is the Hazardous Materials Transportation Act, which was amended to treat Indian nations as governments, like states, without requiring

120 For a similar definition, see WILKINSON, supra note 49, at 10–11.
123 Id. §§ 2101–2108 (2012).
125 Id. § 904.
them to seek state status. This was a substantial change from previous environmental laws that either ignored the governmental status of tribes or required them to seek treatment as a state.

General legislation was determined to have a low focus on Indians (general low focus) if the bill did not appear to affect federal Indian law or policy, but merely included Indians or Indian nations within the scope of a more general policy. Common examples of this kind of legislation treat Indians as beneficiaries of federal government services, make tribes eligible for federal grants, or categorize tribal governments like state or local governments. Specific examples of general bills with a low focus on Indians include the Secure Border Act of 2012, which directs the Secretary of Homeland Security to (among other things) analyze cooperative agreements with international, state, local, tribal, and federal law enforcement agencies, and the Patient Protection and Affordable Care Act, which provides improvements and funding to the Indian Health Service and new benefits to American Indians.

My research assistant and I used the CRS bill summaries to code most of the bills. In particular, general bills were categorized into one of the two sub-categories (low and high focus) by searching THOMAS.gov’s summary of these bills to see how each bill addressed Indians. If the bill’s summary

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131. Coding the bills by summary may have increased the number of bills coded as low focus and decreased the number coded as high focus because the summaries did not always include sufficient information to determine that the bill
mentioned American Indians, Native Americans, Native Hawaiians, Alaska Natives, and their respective governments or organizations, but there were not any provisions specific to them that appeared to alter Indian policy—for example, Indian tribes were included in a list of groups that received preferential treatment in employment—then the bill was categorized as a low-focus bill. If the bill included particular provisions relating to Indians and these provisions developed federal Indian policy by addressing a specific issue faced by all Indian nations or people, then the bill was coded as a high-focus bill.

Finally, appropriations bills were coded as a separate category. I treated appropriations bills separately because, generally, appropriations bills appropriate money for existing programs rather than establish a policy or program.\footnote{\textsuperscript{132}} Bills were also coded by the Congress in which they were introduced (e.g., 112th) and by enactment (e.g., whether Congress enacted and the President signed the bill into law).\footnote{\textsuperscript{133}}

The coding process identified eighty-five bills included in the database that did not mention American Indians, Indian tribes, Native Americans, Alaska Natives, or Native Hawaiians in the bill text, or used the term “Indian” or a tribal name only in reference to a place name or an organization not related to Indians. These bills were excluded from the dataset and was high focus. As a result, the study may underreport high focus bills and overreport low focus bills.

\footnote{\textsuperscript{132}} My decision to separate out appropriations bills reflects my focus on Congress’s policymaking rather than its implementation or oversight of Indian affairs policies. It does not suggest that appropriations bills do not have an impact on federal Indian policy. Appropriations bills may have a huge impact on federal Indian policy. An authorized program may die or may not be fully or successfully implemented if it lacks sufficient funds. See \textit{ESKRIDGE ET AL.}, supra note 94, at 1146–48 (describing how Congress uses the power of the purse to control legislative implementation). Further, some members of Congress have used riders to appropriations bills in attempts to change federal Indian policy. For a full discussion of these riders, see \textit{WILKINS \& STARK}, supra note 4, at 96–97 (describing Senator Slade Gorton’s attempts to use appropriations riders to pass anti-Indian legislation in the 1990s); Deloria, \textit{supra} note 46, at 239–50 (explaining how an appropriations rider was used to end treaty-making with Indian Nations in 1871). Many of these riders did not pass. \textit{WILKINS \& STARK}, \textit{supra} note 4, at 96–97.

\footnote{\textsuperscript{133}} Bills were coded as enacted based on the action description in \textit{THOMAS.gov}. Sometimes multiple bills with the same title or similar content were introduced in the same congressional session. Only the bill that passed both chambers, was signed by the President, and became the public law was coded as enacted.
3. Limits of this Study

I chose a quantitative study of bills introduced and enacted in Congress during the modern era of tribal self-determination because my aim was to capture a broader picture of how Congress legislates in relation to Indians. The benefit of a large quantitative study is that it provides systematic data on legislation over time, which allows us to see the broader trends in what Congress does when legislating in relation to Indians. It allows us to analyze Congress as a whole, as a single unit of analysis, and also to identify possible differences among individual Congresses over time. This type of information may be used to generate hypotheses for additional studies of particular Congresses, time periods, or subtypes of legislation. This study also produces data to supplement existing studies.

One major disadvantage of a large quantitative study is that such studies do not produce detailed information about any particular bill. In fact, given the size of the dataset, it is hard to say much about the specific provisions or policies proposed in any of the individual bills. Nor does the data provide full explanations for the trends it shows. While it identifies trends in legislation, this exploratory study does not conclusively explain why those trends occur. Rather, the study provides us with another set of data that can be used either to generate new hypotheses or to verify the hypotheses made by others.

The study relies on the initial coding by CRS legislative analysts and CBP researchers to identify Indian-related legislation. I did not independently code every bill introduced during the time period studied. While I checked for erroneously included bills (e.g., bills not mentioning Indians), I could not identify bills that fit the definition of an Indian-related bill but were missing from the database. As a result, the database may not include the entire universe of Indian-related legislation.

The study uses a very basic measure for sorting bills. The high number of Indian-related bills in the dataset limited the feasibility of the coding scheme I could implement. I decided to take a multi-phase approach to coding the bills. In this first

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134. For a list of these bills, see infra Methodological App.
phase, I followed the broad categories suggested by previous scholars in an attempt to gain a preliminary sense of how the bills affected federal Indian policymaking. Accordingly, I coded the bills to see how much legislation seeks to change federal Indian law and policy and how much serves another purpose. Due to the time-consuming nature of coding 7,714 bills, I could not simultaneously code the bills into specific topics, such as health, education, land use, etc. Coding the bills into specific topics will occur in the next phase of the project.\textsuperscript{135} As a result, at this point, I cannot describe all the subtopics or policy proposals contained in the bills. I can make only limited observations about the different policy subtopics that arise in Indian-related legislation.

Further, and by design, the measure for sorting bills looks at the focus of a given bill. It does not consider whether or to what extent provisions in the bill, if implemented, could impact Indians or Indian nations. A bill could have a low focus on Indians, but because the general policy it formulates affects Indians disproportionately, it could have a high impact in Indian country. For example, a general bill seeking to reduce teen suicides or rural poverty may not focus on Indians (in fact, Indians may not be mentioned in the bill), but the bill could have a high impact on Indians and Indian nations because Indians suffer from high rates of teen suicide and rural poverty.\textsuperscript{136} Thus, instead of focusing on such potential impacts, the study considers only a given bill’s focus and whether American Indians, Native Americans, Native Hawaiians, Alaska Natives, and their respective governments or organizations are explicitly a part of that focus because they are mentioned in the bill.

Finally, the study does not consider whether Indian-related legislation is pro- or anti-Indian. While bills could have been coded as pro- or anti-Indian based on their provisions and a list of criteria, such coding would be subject to debate.\textsuperscript{137} Although some bills clearly seem pro- or anti-Indian, others are much harder to code because they include both pro- and anti-

\textsuperscript{135} I am currently in the process of coding the bills by subtopics and will report these results in a future article.

\textsuperscript{136} WILKINS & STARK, supra note 4, at 94 (noting several policy areas that greatly impact Indians and Indian Nations).

\textsuperscript{137} To some extent, Wilkinson tries to do this, except he does not explain his criteria for what is pro- and anti-Indian. He just asserts that tribes did not oppose certain legislation. WILKINSON, supra note 49, at 192–93 n.151.
Indian provisions. For example, the Bridgeport Indian Colony Land Trust, Health, and Economic Development Act of 2012 places land into trust for a tribe, which makes the bill seem pro-Indian.\(^\text{138}\) However, the bill also prohibits gaming on trust land, which could be considered anti-Indian.\(^\text{139}\)

Despite these limits, the study offers new knowledge about how Congress legislates in regard to Indians and Indian nations. The information generated by the analysis of the 7,714 bills in the study is detailed in the next Part.

II. LEGISLATING FOR INDIANS AND INDIAN NATIONS

This Part relays the major findings of the study. It paints a general picture of how Congress legislates Indians by looking at the amount and kinds of Indian-related bills introduced in and enacted by Congress over forty years during Congress’s Self-Determination Policy. Part II.A reports the finding that Congress enacted a disproportionally high number of Indian-related bills during the time period studied. Part II.B shows that Congress also enacted a variety of kinds of Indian-related legislation.

A. Amount of Indian-Related Bills

In trying to understand how Congress acts in relation to Indians, a key question is how the amount of Indian-related legislation introduced and enacted in Congress compares to Congress’s more general legislative enactment rate. My findings indicate that although Indian-related bills make up neither a substantial nor disproportionate percentage of the congressional agenda, Congress enacted more Indian-related legislation than it did legislation in general during the 94th through the 112th Congresses.


\(^{139}\) Id. § 2(d). A better approach than coding bills as pro- or anti-tribal is to use a measure of tribal opposition and support for legislative proposals. A latter phase of the research will measure tribal support and opposition. This will also provide a richer description of tribal legislative advocacy and how it affects the legislative process. For what it is worth, a cursory review of the bills suggests that only a few, if any, explicitly anti-Indian bills are introduced in each Congress. More commonly, bills include both pro- and anti-Indian provisions similar to the Bridgeport Indian Colony Land Trust, Health, and Economic Development Act of 2012, and are not easily categorized as either pro- or anti-Indian.
Proportionally speaking, legislators introduced a small number of Indian-related bills in each Congress. Chart 1 shows that Indian-related bills made up a relatively small proportion of the congressional agenda. Indian-related bills never exceeded 8.1 percent of the total number of bills introduced in Congress, and on average comprised about 4 percent of the total number of bills introduced.\(^\text{140}\) The low number of bills introduced does not seem unusual given the scarcity of resources in Congress,\(^\text{141}\) the small percentage of Indians in the general United States population (less than 2 percent),\(^\text{142}\) and the weak link between electoral politics and Indian issues.\(^\text{143}\)

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\(^{140}\) The author generated this number by dividing the total number of Indian-related bills in the dataset (7,714) by the total number of bills introduced during the time period studied (196,780). The total number of bills introduced during the time period studied comes from the congressional record daily digest Resume of Congressional Activity. Résumé of Congressional Activity, U.S. Senate, http://www.senate.gov/pagelayout/reference/two_column_table/Resumes.htm, archived at http://perma.cc/JY6U-7WA6 (last visited July 2, 2014).

\(^{141}\) See, e.g., ADLER & WILKERSON, supra note 71, at 9 (discussing scarcity of resources for policymaking in Congress).

\(^{142}\) GETCHES ET AL., supra note 8, at 13 (stating that 1.6 percent of the total population considered themselves American Indian in 2009).

\(^{143}\) See supra Introduction (discussing how Indian issues and Indian voters rarely affect congressional elections). Members of Congress regularly introduce legislation that they have no interest in seriously advocating for because the mere introduction of the legislation will pacify their electoral base. The weak link between electoral politics and Indian issues may mean that members of Congress are less likely to introduce Indian-related bills because they receive no electoral benefit for doing so. Recent scholarship actually finds that legislators pay attention to only a few constituents in their district on a given policy and most of the favored constituents either donate to the legislator or contact her office. See generally KRIS MILER, CONSTITUENCY REPRESENTATION IN CONGRESS: THE VIEW FROM CAPITOL HILL (2010).
Similarly, Table 1 shows that the number of Indian-related bills varied greatly by Congress and that this variation did not necessarily correspond with the variation in the total number of bills introduced. During this time period, on average, legislators introduced about 406 Indian-related bills during each congressional session. The data indicates a general trend of members of Congress introducing more Indian-related bills over time from the 99th until the 108th Congress (689 bills introduced). The number of Indian-related bills introduced has been decreasing since then. Comparison with the total number of bills introduced suggests that this trend does not match the trend for all bills. The number of all bills introduced has fluctuated more than the number of Indian-related bills over time. The data for all bills introduced displays a w-shaped pattern that starts with a high number in the 94th Congress, then decreases, albeit inconsistently for several Congresses, and rises again around the 109th Congress. In contrast, the data for Indian-related bills forms more of a bell-shaped curve with the number of bills, peaking in the 108th Congress.

144. The author generated this number by dividing the total number of bills (7,714) in the dataset by the number of Congresses (19) in the study.
Table 1: Indian-Related Bills Compared to All Bills Introduced by Congress

<table>
<thead>
<tr>
<th>Congress</th>
<th>Party in Control</th>
<th>All Bills(^{145})</th>
<th>Indian-Related Bills(^{146})</th>
</tr>
</thead>
<tbody>
<tr>
<td>94th (1975–77)</td>
<td>Dem.</td>
<td>19,762</td>
<td>251 (1.3%)</td>
</tr>
<tr>
<td>95th (1977–79)</td>
<td>Dem.</td>
<td>18,045</td>
<td>308 (1.7%)</td>
</tr>
<tr>
<td>96th (1979–81)</td>
<td>Dem.</td>
<td>11,722</td>
<td>242 (2.0%)</td>
</tr>
<tr>
<td>97th (1981–83)</td>
<td>Split</td>
<td>10,582</td>
<td>208 (2.0%)</td>
</tr>
<tr>
<td>98th (1983–85)</td>
<td>Split</td>
<td>9,537</td>
<td>264 (2.7%)</td>
</tr>
<tr>
<td>99th (1985–87)</td>
<td>Split</td>
<td>8,694</td>
<td>257 (2.9%)</td>
</tr>
</tbody>
</table>


\(^{146}\) The author generated the percentages by dividing the number of Indian-related bills by the number of public bills introduced in each congressional session. Private bills were not included in the analysis.
The amount of legislation enacted by Congress provides more probative information about how Congress legislates Indians. Chart 2 displays pictorially the data on introduced and enacted Indian-related bills for each of the 94th through the 112th Congresses. The rate of enactment does not correspond with the peak in the 108th Congress in the number of bills introduced. Instead, with some exceptions (e.g., the 100th Congress), the number of bills enacted decreases somewhat when the number of bills introduced increases. Further research should explore whether this suggests a “less is more” principle when it comes to Indian issues in Congress because more bills are enacted when fewer bills are introduced.
Table 2 reports the enactment rate of Indian-related bills for each Congress studied. It indicates the proportion of Indian-related bills enacted in each Congress as a percentage. The enactment rate is much lower than the number of bills introduced in each Congress. This unsurprising finding reflects the more general phenomenon that Congress does not enact the majority of bills introduced.

Table 2: Indian-Related Bills Introduced and Enacted by Congress

<table>
<thead>
<tr>
<th>Congress</th>
<th>Party in Control</th>
<th>Introduced Bills</th>
<th>Enacted Bills</th>
</tr>
</thead>
<tbody>
<tr>
<td>94th (1975–77)</td>
<td>Dem.</td>
<td>251</td>
<td>22 (8.8%)</td>
</tr>
<tr>
<td>95th (1977–79)</td>
<td>Dem.</td>
<td>308</td>
<td>51 (16.5%)</td>
</tr>
<tr>
<td>96th (1979–81)</td>
<td>Dem.</td>
<td>242</td>
<td>49 (20.2%)</td>
</tr>
<tr>
<td>97th (1981–83)</td>
<td>Split</td>
<td>208</td>
<td>41 (20.8%)</td>
</tr>
<tr>
<td>98th (1983–85)</td>
<td>Split</td>
<td>264</td>
<td>55 (20.8%)</td>
</tr>
</tbody>
</table>

147. The author generated these numbers by taking the number of bills introduced and dividing that number by the number of bills enacted in each Congress in the dataset.

148. LOWI ET AL., supra note 79, at 211.
Table 2 also shows that the enactment rate of Indian-related bills varied by Congress. The enactment rate rose to a high of 22.8 percent in the 100th Congress and hit a low of 6.6 percent in the 112th Congress. The enactment rate increased in the 95th Congress and remained around 20 percent through the 101st Congress. The enactment rate then dropped in the 102nd Congress to 15 percent and continued at that rate until it decreased again in the 105th Congress. A closer look at the data reveals that the lower enactment rates in the 107th, 108th, 111th, and 112th Congresses are due in part to the consolidation of bills. For example, several of the appropriations bills introduced in the 107th and 108th Congresses were enacted as a joint resolution in the 108th Congress. Similarly, Congress consolidated nine tribe-

<table>
<thead>
<tr>
<th>Congress</th>
<th>Party</th>
<th>Bills</th>
<th>Enacted</th>
<th>Enactment Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>99th (1985–87)</td>
<td>Split</td>
<td>257</td>
<td>48 (18.7%)</td>
<td></td>
</tr>
<tr>
<td>100th (1987–89)</td>
<td>Dem.</td>
<td>324</td>
<td>74 (22.8%)</td>
<td></td>
</tr>
<tr>
<td>101st (1989–91)</td>
<td>Dem.</td>
<td>323</td>
<td>57 (17.6%)</td>
<td></td>
</tr>
<tr>
<td>102nd (1991–93)</td>
<td>Dem.</td>
<td>370</td>
<td>56 (15.1%)</td>
<td></td>
</tr>
<tr>
<td>103rd (1993–95)</td>
<td>Dem.</td>
<td>455</td>
<td>68 (14.9%)</td>
<td></td>
</tr>
<tr>
<td>104th (1995–97)</td>
<td>Rep.</td>
<td>422</td>
<td>60 (14.2%)</td>
<td></td>
</tr>
<tr>
<td>105th (1997–99)</td>
<td>Rep.</td>
<td>494</td>
<td>59 (11.9%)</td>
<td></td>
</tr>
<tr>
<td>106th (1999–2001)</td>
<td>Rep.</td>
<td>613</td>
<td>75 (12.2%)</td>
<td></td>
</tr>
<tr>
<td>107th (2001–03)</td>
<td>Rep./Split</td>
<td>593</td>
<td>42 (7.1%)</td>
<td></td>
</tr>
<tr>
<td>108th (2003–05)</td>
<td>Rep.</td>
<td>689</td>
<td>58 (8.4%)</td>
<td></td>
</tr>
<tr>
<td>109th (2005–07)</td>
<td>Rep.</td>
<td>670</td>
<td>67 (10.0%)</td>
<td></td>
</tr>
<tr>
<td>110th (2007–09)</td>
<td>Dem.</td>
<td>554</td>
<td>41 (7.4%)</td>
<td></td>
</tr>
<tr>
<td>111th (2009–11)</td>
<td>Dem.</td>
<td>358</td>
<td>30 (8.4%)</td>
<td></td>
</tr>
<tr>
<td>112th (2011–13)</td>
<td>Split</td>
<td>319</td>
<td>21 (6.6%)</td>
<td></td>
</tr>
</tbody>
</table>

specific bills introduced in the 111th Congress into the Claims Resolution Act of 2010.\textsuperscript{150}

The data presented in Table 3 and Chart 3 suggests that Congress more frequently (often \textit{twice} as frequently) enacted Indian-related bills than it enacted bills generally.\textsuperscript{151} Chart 3 compares proportionally the enactment rate of Indian-related bills to the enactment rate of all bills. It shows that Congress consistently enacted more Indian-related bills than general bills in each Congress studied. With some notable exceptions (e.g., the 111th Congress), the trend of the enactment rate for Indian-related bills closely resembled that for general bills. In other words, if the enactment rate for general bills decreased during a congressional session, the enactment rate for Indian-related bills usually decreased as well. This suggests that while Congress enacts more Indian-related bills, similar political forces may influence Indian-related and other bills.

Table 3 provides a more detailed comparison of the enactment rates for Indian-related and all bills. It confirms that even though the difference between the two enactment rates varied over time, Congress consistently enacted Indian-related bills at a higher rate than its average rate of bill enactment during the time period studied. Over the time period studied, Congress enacted 12.6 percent (974/7,714) of Indian-related bills. Further, Congress enacted on average about 13.8 percent of Indian-related bills in each congressional session.\textsuperscript{152}

Table 3: Indian-Related and All Bills Enacted by Congress in Percentages

<table>
<thead>
<tr>
<th>Congress</th>
<th>Party in Control</th>
<th>Indian-Related Bills</th>
<th>All Bills</th>
</tr>
</thead>
<tbody>
<tr>
<td>94th (1975–77)</td>
<td>Dem.</td>
<td>8.8%</td>
<td>5.1%</td>
</tr>
<tr>
<td>95th (1977–79)</td>
<td>Dem.</td>
<td>16.5%</td>
<td>3.5%</td>
</tr>
<tr>
<td>96th (1979–81)</td>
<td>Dem.</td>
<td>20.2%</td>
<td>5.2%</td>
</tr>
<tr>
<td>97th (1981–83)</td>
<td>Split</td>
<td>20.8%</td>
<td>4.5%</td>
</tr>
</tbody>
</table>

\textsuperscript{152} The author generated this number by summing the percentages of enacted bills for each Congress (262.5) and dividing that sum by the total number of Congresses (19) in the study.
Two additional analyses were run to test the robustness of the finding that Congress more frequently enacted Indian-related bills than it enacted bills generally. First, I downloaded the CBP data and ran a similar analysis on the proportions of bills introduced and enacted for several of the subtopics, including the Native American Affairs subtopic. The analysis generated comparable results. The CBP coded 2,909 bills in the 93rd through 111th Congresses as Native American Affairs. Of these 2,909 bills, 375 (or 12.89 percent) were enacted.

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153. The results of similar analyses based on other subtopics from the CBP data are reported in Part III., infra. I ran these analyses using CBP data covering the 94th through the 111th Congresses, which may explain the slightly higher enactment rate for the Native American Affairs subtopic in the CBP data. See CBP, supra note 84.

154. The Topics Codebook describes this subtopic as follows: Budget proposals and appropriations for Indian programs, Indian health programs, Indian water claims, federal recognition of Indian tribes, assistance to Indian tribal courts, management of Indian irrigation projects, economic aid for Indian reservations, law enforcement on Indian reservations, Indian participation in government contracting, Indian health care programs, Native Hawaiian children education.
enacted.\textsuperscript{155} Similarly, the CBP database includes 208,252 bills for this time period, of which 8,316 (or 3.9 percent) were enacted.

Second, I excluded the appropriations bills included in the database to determine if the generally higher passage rate for appropriations bills was artificially inflating the enactment rate for Indian-related legislation.\textsuperscript{156} That analysis indicated that while the appropriations bills may have a slight impact on the enactment rate of Indian-related bills, they do not fully explain it. Even without the appropriations bills, the enactment rate for all Indian-related bills was 11.4 percent (838 out of 7,379 bills total). Table 4 shows that the enactment rate for Indian-related bills remained higher than the average legislative enactment rate even after excluding the appropriations bills.\textsuperscript{157}

\begin{table}
\caption{Enactment Rates of Indian-Related Bills With and Without Appropriations Bills by Congress}
\centering
\begin{tabular}{|c|c|c|}
\hline
Congress & All Bills & Indian-Related Bills & Indian-Related Bills without Approps. \\
\hline
94th (1975–77) & 5.1\% & 8.8\% & 8.8\% (22/251) \\
\hline
\end{tabular}
\end{table}

\textsuperscript{155} As discussed in supra Part II.B, the CBP dataset excludes general legislation relating to Indians. The fact that the enactment rate remains high when excluding the general legislation suggests that the presence of general legislation in the dataset is not the sole cause of the higher enactment rate. Based on the lower enactment rate of general legislation generally, one would expect that if anything the general legislation may be suppressing the enactment rate of Indian-related legislation. As Part II.B suggests, it is not clear that general legislation consistently has that effect on the Indian-related legislation enactment rate. For the full comparison analysis of the CBP data by Congress, see infra App. 3.

\textsuperscript{156} The author excluded all appropriations bills (335 total) from these Congresses, reducing the dataset from 7,714 to 7,379 bills.

\textsuperscript{157} The variation over time evident in Table 4 may indicate that appropriations bills affected the enactment rate more in some congressional sessions than in others. For example, appropriations bills may have more of an impact on enactment rates in the 109th Congress than the 98th Congress.
The finding of a higher enactment rate for Indian-related bills seems surprising, especially when contrasted with the evidence indicating that Indians have limited political power.\textsuperscript{158} It provides limited support for tribal advocates’ and Indian law scholars’ recent predictions that Indians may fare better in the legislative than the legal process.\textsuperscript{159} The higher enactment rate also suggests that the relationships between Congress and Indians diverge from the traditional narrative about discrete and insular minorities in the political process and may be more complicated than initially thought.

The next section expands our knowledge about the relationships between Congress and Indians. It develops a

\begin{tabular}{|c|c|c|c|}
\hline
Years & First & Final & Final \%
\hline
95th (1977–79) & 3.5\% & 16.5\% & 16.0\% (49/306) \\
96th (1979–81) & 5.2\% & 20.2\% & 19.6\% (47/239) \\
97th (1981–83) & 4.5\% & 20.8\% & 19.3\% (39/202) \\
98th (1983–85) & 6.5\% & 20.8\% & 19.8\% (50/253) \\
99th (1985–87) & 7.6\% & 18.7\% & 18.2\% (45/247) \\
100th (1987–89) & 8.4\% & 22.8\% & 21.4\% (67/313) \\
101st (1989–91) & 7.0\% & 17.6\% & 15.6\% (48/308) \\
102nd (1991–93) & 6.1\% & 15.1\% & 13.1\% (46/351) \\
103rd (1993–95) & 5.9\% & 14.9\% & 12.1\% (53/439) \\
104th (1995–97) & 4.3\% & 14.2\% & 12.5\% (50/399) \\
105th (1997–99) & 5.2\% & 11.9\% & 10.1\% (46/455) \\
106th (1999–2001) & 6.4\% & 12.2\% & 10.6\% (61/574) \\
107th (2001–03) & 4.2\% & 7.1\% & 5.3\% (30/561) \\
108th (2003–05) & 5.8\% & 8.4\% & 7.4\% (48/650) \\
109th (2005–07) & 4.5\% & 10.0\% & 8.7\% (57/653) \\
110th (2007–09) & 4.2\% & 7.4\% & 7.1\% (38/534) \\
111th (2009–11) & 3.6\% & 8.4\% & 7.0\% (24/342) \\
112th (2011–13) & 2.7\% & 6.6\% & 6.0\% (18/302) \\
\hline
\end{tabular}

\textsuperscript{158} See supra Introduction.
\textsuperscript{159} Without more data on whether Indian-related bills are pro- or anti-Indian, it is hard to interpret the data as fully supportive of these predictions.
typology of the kinds of Indian-related bills and considers how the kind of bill relates to enactment rates. The typology provides insights into the multiple possible relationships between Congress and Indians by illuminating how Congress regulates Indians as a monolithic group, as individual tribes, or as part of the general public.

B. Kinds of Indian-Related Bills

The data so far does not report much about the kinds of Indian-related bills introduced and enacted by Congress. This section uses a basic sorting mechanism to provide some initial insights into the kinds of Indian-related bills introduced and enacted during the period studied, and to develop a more nuanced understanding of how Congress legislates Indians.

To the author’s knowledge, the CRS subcategories create the only somewhat systematic attempt to categorize bills relating to Indians. The CRS subcategories are topical and seek to identify subtopics within the larger subject area of Indian-related legislation. The problem with the CRS subcategories is that they have changed over time and have not been applied consistently across all the Congresses included in this study. The CRS has used several different subcategories for Indian-related bills, including the following: children, claims, courts, economic development, education, gambling operations, housing, hunting and fishing rights, lands, law enforcement, medical care, social and development programs, water rights, women, and youth. Some of the subcategories, such as gambling operations and youth, are salient for only a few Congresses (the 103rd through the 107th), while subcategories such as Indian claims and Indian lands have been coded for every Congress. The variety of topics in bills increases over time because the CRS started adding new subcategories of Indian-related legislation in the 101st Congress. This trend of adding subcategories continued until

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160. The CBP data does not provide any coding based on content within its Native American Affairs subtopic. A few scholars have suggested ways to categorize Indian-related legislation. See supra Part 0.
161. See infra App. 4 for the number of introduced bills in each CRS subcategory for each Congress from the 94th through the 110th Congresses.
162. The increase in the number of CRS subtopics corresponds with the increase in Indian-related bills. Compare supra Chart 1 & Table 1, with infra App. 4.
the 107th Congress. The increase in CRS subcategories may suggest that the topics of Indian-related bills have changed over time, but this cannot be determined from the publicly available information on the CRS subcategories, which does not explain the changes in subcategories. This study’s preliminary review of the Indian-related bills in the database confirms that some of the bills fall within the topical CRS subcategories.

To develop a more consistent picture of the kinds of bills over time, this study created a basic typology of Indian-related bills. As detailed in Part I.B, the typology distinguishes among four main kinds of bills: tribe-specific bills, pan-tribal bills, general bills relating to Indians, and appropriations bills. The typology does not correspond with the subcategories used by the CRS. Rather, it broadly considers how Congress regulates Indians as a monolithic group, as individual tribes, or as part of the general public and creates different kinds of public policies affecting Indians along those lines. Part II.B.1 categorizes the 7,714 Indian-related bills into the four categories of the typology. Part II.B.2 discusses the enactment rates for each of the categories and whether they appear to influence the overall enactment rate of Indian-related bills.

1. Introduced Indian-Related Bills

Chart 5 shows the proportion of Indian-related bills by kind during the time period studied. General legislation constituted a majority (53 percent) of all Indian-related bills. Disaggregating the general bills into high and low focus categories reveals general low-focus bills as the most prevalent at 48 percent (3,681/7,714).163 A preliminary review of these general low-focus bills indicates that they include Indians in a wide variety of government programs, including health care, education, welfare, housing, and employment, as well as bills addressing federal tax policy, law enforcement (including border security and immigration), and military issues.164 This

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163. As defined by the typology, general bills with a low focus on Indians do not seek to affect federal Indian law or policy, but merely include Indians or Indian nations within the scope of a more general policy. See supra Part II.B.

164. I have not conducted a detailed analysis of the provisions of these bills. Some bills appear to create special programs or have special provisions for dealing with Indian nations within these larger policies. I have not attempted to fit these provisions into Lowi’s policy typology although such analysis may be useful for seeing how Indians fit within larger regulatory or distributional policies. See
category also includes amendments to general statutes, such as the tax code, that would include American Indians, Native Americans, Alaska Natives, or Native Hawaiians along with other groups in the original legislation.

The three other types of bills—tribe-specific, pan-tribal, and general high focus—emphasize Indians and Indian policy. As defined by the typology, these bills include provisions that seek to create or change a policy related to Indians either as a monolithic group or as specific tribes. When combined, these three categories of bills accounted for 47.9 percent (3,697/7,714) of all the Indian-related bills during the time period studied.

In contrast to the high percentage of general low-focus bills, legislators introduced very few general high-focus bills. General high-focus bills constituted just under 5 percent (362/7,714) of all Indian-related bills. Some general high-focus bills, such as the HEARTH Act of 2012, incorporated a pan-tribal bill into a general bill. Topically, general high-focus bills cover such subcategories as violence against women, environmental regulation, education, and public lands. The low number of general high-focus bills indicates that most attempts to change federal Indian law and policy are introduced either as pan-tribal or tribe-specific bills rather than as general bills.

Over a third—43.2 percent (3,335/7,714)—of all Indian-related bills were either tribe-specific or pan-tribal bills. Tribe-specific bills comprised a significant proportion—30.2 percent (2,333/7,714)—of all Indian-related bills. My cursory review of the tribe-specific bills confirmed that they often fall into the topical subcategories proposed by Professor Wilkinson two generally Theodore J. Lowi, Four Systems of Policy, Politics, and Choice, 32 PUB. ADMIN. REV. 298 (1972). Some of these bills may actually implement Congress’s self-determination policy by treating tribes as governments (for instance, through grants to or recognition of authority in tribal governments), but this has not been analyzed either.

165. See supra Part II.B.

166. The low number of general high focus bills may reflect coding based largely on the CRS summaries. Some of the general low focus bills may influence federal Indian policy more than the CRS summaries indicate.


168. Further research is needed to confirm this result as it is unclear from this analysis how many pan-tribal and tribe-specific bills were later incorporated into general bills.
decades ago. His subcategories included enrollment issues, land acquisition, and claims distributions. The data suggests additional subcategories, including federal recognition requests, water rights settlements, claims settlements, natural resource issues, Alaska Native issues, area-specific conservation, and Native Hawaiian issues. The high number of tribe-specific bills may reflect the government-to-government relationship that the United States has with the 566 diverse, federally-recognized tribes. It also indicates a perceived need for Congress to deal with Indian nations on an individual basis as governments rather than establish a one-size-fits-all policy for them.

Legislators introduced half as many pan-tribal bills as tribe-specific bills, with pan-tribal bills comprising 13 percent (1,002/7,714) of all the Indian-related bills. They deal with a similar range of subtopics as tribe-specific bills, including but not limited to tribal courts, health care, economic development, gaming, cultural preservation, child welfare, education, and self-governance.

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170. Id.
172. See Wilkinson, supra note 49, at 7, 10.
Chart 6 compares pictorially the actual numbers of Indian-related bills by kind by Congress.\textsuperscript{174} It indicates that the number of general low-focus bills increased steadily, if not consistently, for most of the time period studied but decreased dramatically after the 109th Congress.\textsuperscript{175} The data thus somewhat confirms some scholars’ predictions that Congress increasingly includes Indians in general legislation.\textsuperscript{176}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{chart5.png}
\caption{Chart 5: Introduced Indian-Related Bills by Kind, 94th through 112th Congresses}
\end{figure}

\begin{enumerate}
\item For a breakdown of the numbers and percentages of Indian-related bills by kind by Congress, see infra App. 2.
\item While not apparent from Chart 6, this trend diverges from the trend for legislation generally, which decreased during most of the time studied and then increased in the 109th Congress. See supra Chart 1. The increase in general low focus bills during the time period studied may explain the divergence in the trends in introduced bills generally and Indian-related bills.
\item See Deloria, supra note 46, at 254–55; cf. Wilkinson, supra note 49, at 46–47. Deloria and Wilkinson posit different interpretations of the value of incorporating Indians into general legislation. See id. While Deloria fears that it indicates the assimilation of Indians, Wilkinson sees it as resolving the problem of general legislation not expressly stating how it impacts Indian tribes. See id.
\end{enumerate}
In contrast, the introduction rates of tribe-specific, pan-tribal, and general high-focus bills have remained relatively more consistent over time. When combined, these three categories of bills accounted for a third to a half of the Indian-related bills introduced in each Congress. Chart 6 shows that legislators introduced a significant number of tribe-specific bills—almost twice as many as pan-tribal bills—in each Congress and more than general low-focus bills from the 94th through the 97th Congresses. Legislators introduced almost the same percentage of tribe-specific and general low-focus bills in the 98th through 103rd Congresses. The fairly consistent introduction rates of tribe-specific, pan-tribal, and general high-focus bills suggest that Indian law and policy are regularly on the congressional agenda—even if they constitute only a small part of that agenda.

2. Enacted Indian-Related Bills

This section analyzes the 974 Indian-related bills enacted by Congress during the time period studied. Chart 7 displays pictorially the percentages of bills enacted by kind. While general low-focus bills composed a much higher percent of the introduced bills (47.7 percent), Congress enacted almost the
same percentage of tribe-specific (36.2 percent or 353/974) and
general low-focus bills (36.8 percent or 359/974). Tribe-specific
bills constituted a larger proportion of the enacted bills (36
percent) than they did of the introduced bills (30 percent). Pan-
tribal bills composed 10 percent (99/974) of the enacted bills—
the same percent as introduced pan-tribal bills.

Chart 7: Enacted Indian-Related Bills by Kind, 94th
through 112th Congresses

<table>
<thead>
<tr>
<th>Kind</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>General High Focus</td>
<td>3%</td>
</tr>
<tr>
<td>Approps.</td>
<td>14%</td>
</tr>
<tr>
<td>Tribe-Specific</td>
<td>36%</td>
</tr>
<tr>
<td>General Low Focus</td>
<td>37%</td>
</tr>
<tr>
<td>Pan-Tribal</td>
<td>10%</td>
</tr>
</tbody>
</table>

Chart 8 provides information on the kinds of Indian-
related bills enacted by each Congress. It shows the actual
numbers of Indian-related bills enacted by kind. Congress
enacted a total of 974 Indian-related bills, with an overall
enactment rate of 12.6 percent (974/7,714). Chart 8 suggests
some consistency in the sheer numbers of Indian-related bills
enacted by kind over time. General low-focus and tribe-specific
bills constituted the majority of enacted Indian-related bills
during this time period. In contrast, Congress enacted very few
general high-focus bills—only 3 percent overall (27/974). This
finding should be somewhat unsurprising since legislators
introduced more general low-focus and tribe-specific bills in
each Congress.
Table 5 reports more detailed information on the kinds of Indian-related bills enacted during the time period studied. Like Chart 8, it shows no consistent trends based on bill type over time, but does show variation in the enactment rates by kind of bill by Congress.
Table 5: Enactment Rates of Indian-Related Bills by Kind by Congress

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>94th</td>
<td>6.8% (4/59)</td>
<td>0</td>
<td>9.5% (11/116)</td>
<td>9.7% (7/72)</td>
<td>0</td>
<td>0</td>
<td>8.8% (22/251)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>95th</td>
<td>10.6% (7/66)</td>
<td>0</td>
<td>17.5% (27/154)</td>
<td>16.5% (13/79)</td>
<td>28.6% (2/7)</td>
<td>100% (2/2)</td>
<td>16.5% (51/308)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>96th</td>
<td>16.7% (4/24)</td>
<td>0</td>
<td>24.0% (31/129)</td>
<td>12.0% (9/75)</td>
<td>27.3% (3/11)</td>
<td>67.5% (2/3)</td>
<td>19.8% (49/249)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>97th</td>
<td>17.4% (4/23)</td>
<td>0</td>
<td>25.0% (23/92)</td>
<td>13.4% (11/82)</td>
<td>20.0% (1/5)</td>
<td>33.3% (2/6)</td>
<td>20.8% (41/208)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>98th</td>
<td>14.6% (6/41)</td>
<td>0</td>
<td>30.9% (30/97)</td>
<td>12.6% (13/103)</td>
<td>8.3% (1/12)</td>
<td>45.5% (5/11)</td>
<td>19.8% (55/264)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>99th</td>
<td>7.7% (3/39)</td>
<td>0</td>
<td>30.5% (29/95)</td>
<td>11.9% (12/101)</td>
<td>8.3% (1/12)</td>
<td>30.0% (3/10)</td>
<td>18.7% (48/257)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>100th</td>
<td>11.7% (6/51)</td>
<td>0</td>
<td>25.4% (31/122)</td>
<td>22.3% (29/130)</td>
<td>10.0% (1/10)</td>
<td>63.6% (7/11)</td>
<td>22.8% (74/324)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>101st</td>
<td>12.1% (8/66)</td>
<td>0</td>
<td>15.2% (16/105)</td>
<td>16.7% (20/120)</td>
<td>23.5% (4/17)</td>
<td>60.0% (9/15)</td>
<td>17.6% (57/323)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>102nd</td>
<td>9.5% (7/74)</td>
<td>0</td>
<td>15.1% (19/126)</td>
<td>13.4% (19/141)</td>
<td>10.0% (1/10)</td>
<td>52.6% (3/10)</td>
<td>15.1% (48/257)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>103rd</td>
<td>16.9% (10/59)</td>
<td>0</td>
<td>12.5% (14/112)</td>
<td>11.7% (29/248)</td>
<td>0</td>
<td>93.8% (1/12)</td>
<td>14.9% (74/324)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>104th</td>
<td>15.2% (7/46)</td>
<td>0</td>
<td>13.9% (14/101)</td>
<td>11.6% (27/232)</td>
<td>10.0% (2/20)</td>
<td>43.5% (10/23)</td>
<td>14.2% (60/422)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>105th</td>
<td>4.8% (3/62)</td>
<td>0</td>
<td>11.1% (14/101)</td>
<td>11.8% (27/232)</td>
<td>0</td>
<td>33.3% (3/139)</td>
<td>11.9% (59/494)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>106th</td>
<td>16.7% (10/60)</td>
<td>0</td>
<td>17.1% (26/152)</td>
<td>6.6% (22/331)</td>
<td>9.7% (3/31)</td>
<td>35.9% (16/39)</td>
<td>12.2% (75/613)</td>
<td></td>
<td></td>
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<tr>
<td>107th</td>
<td>6.0% (3/50)</td>
<td>0</td>
<td>6.1% (8/131)</td>
<td>4.9% (17/344)</td>
<td>5.6% (2/36)</td>
<td>37.5% (12/32)</td>
<td>7.1% (42/593)</td>
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<td></td>
</tr>
<tr>
<td>108th</td>
<td>6.6% (5/76)</td>
<td>0</td>
<td>13.3% (20/150)</td>
<td>5.9% (23/387)</td>
<td>0</td>
<td>25.6% (5/37)</td>
<td>8.4% (58/689)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>109th</td>
<td>8.2% (5/61)</td>
<td>0</td>
<td>9.9% (15/152)</td>
<td>8.6% (35/406)</td>
<td>5.9% (2/34)</td>
<td>58.8% (10/17)</td>
<td>10.0% (67/670)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>110th</td>
<td>5.4% (3/55)</td>
<td>0</td>
<td>7.5% (12/161)</td>
<td>7.4% (21/282)</td>
<td>5.6% (2/36)</td>
<td>15.0% (3/20)</td>
<td>7.4% (41/554)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>111th</td>
<td>6.7% (3/45)</td>
<td>0</td>
<td>5.5% (7/128)</td>
<td>8.2% (12/147)</td>
<td>9.1% (2/22)</td>
<td>37.5% (6/16)</td>
<td>8.4% (30/358)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>112th</td>
<td>2.2% (1/45)</td>
<td>0</td>
<td>7.8% (8/102)</td>
<td>6.5% (9/139)</td>
<td>0</td>
<td>17.6% (3/17)</td>
<td>6.6% (21/319)</td>
<td></td>
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</tr>
</tbody>
</table>

By far, general high-focus bills experienced the greatest variation in enactment rates. Congress enacted only 7.5
percent (27/362) of all general high-focus bills. The success of these bills, however, varied dramatically by Congress and more than any other kind of bill studied. The 95th Congress enacted 28.6 percent of all general high-focus bills while the 94th, 103rd, 105th, 108th, and 112th Congresses enacted no general high-focus bills.

The enactment rate for tribe-specific bills also fluctuated widely during the time period studied. Tribe-specific bills had the highest enactment rate for any kind of bill, with Congress enacting 15 percent (153/2,333) of all tribe-specific bills during the time period studied. While the overall enactment rate for tribe-specific bills for this time period was above the average for legislation generally, it depended on the Congress, ranging from 5.5 percent in the 111th Congress to 31 percent in the 98th Congress.

General low-focus bills showed less variation in enactment rates than either general high-focus or tribe-specific bills. While general low-focus bills constituted a high proportion of the Indian-related bills enacted during this time, Congress enacted only 9.7 percent (359/3,681) of all the general low-focus bills. The enactment rates for general low-focus bills ranged from a low of 4.9 percent in the 107th Congress to a high of 22 percent in the 100th Congress, but tended to hover around 9 percent.

Pan-tribal bills demonstrated the most consistency in enactment rates over time. Congress enacted almost 10 percent (9.8 percent or 99 out of 1,002 bills) of all pan-tribal bills during this time period with a low enactment rate of 2.2 percent in the 112th Congress and a high of 17.4 percent in the 97th Congress.
Chart 9 displays the enactment rate by bill kind in percentages and compares them to the enactment rate for all bills by each Congress. While Congress enacts more Indian-related legislation than it does legislation generally, the wide variation by Congress in enactment rates for each kind of bill suggests that no one type of bill determines the enactment rate over time. Rather, the varying enactment rates by kind of bill in each Congress seem to contribute to the higher than average enactment rate for Indian-related bills. This suggests that some Congresses may be more likely to enact certain kinds of Indian-related bills than others. For example, the high enactment rates for pan-tribal bills in some Congresses (e.g., the 103rd and 104th) and tribe-specific bills in others (e.g., the 98th, 100th, 106th, and 108th) may affect the overall enactment rate for Indian-related legislation in those Congresses. The data also indicates that some Congresses are more likely to enact Indian-related legislation than others. The data, for instance, shows increased rates of enactment for both tribe-specific and pan-tribal bills during the 97th, 98th, 103rd, 106th and 108th Congresses. This suggests that the

178. Interestingly, Republicans controlled both houses of Congress and the presidency during the 106th and 108th Congresses. These facts seem to support other studies, which suggest that enactment rates increase with unified
explanation for the higher enactment rate for Indian-related legislation may vary by each Congress. Part III builds on this suggestion and develops some theories for understanding better the relationships between Congress and Indians in light of the higher enactment rate for Indian-related legislation.

III. UNDERSTANDING CONGRESS AND INDIANS

The question looming in the data remains: how do we understand the relationships between Congress and Indians, especially given the higher enactment rate for Indian-related bills? The data presented in Part II suggests that these relationships may not adhere to this Article’s original expectation that Indians are not particularly successful in the legislative process. Rather, the data indicates a need for more nuanced descriptions of the relationships between Congress and Indians. This Part surveys the literature on federal Indian law and public policymaking for possible hypotheses to explain the relationships between Congress and Indians and to illuminate the possible causes of the higher enactment rate for Indian-related bills. It uses the insights presented by the study to evaluate whether any of these hypotheses, once tested, may further our understanding of the relationships between Congress and Indians.

A. Federal Indian Law: Indians as Exceptional

This section reviews the federal Indian law literature for possible hypotheses explaining the relationships between Congress and Indians, in light of the higher enactment rate of Indian-related bills. It focuses on the theory that Indians are exceptional within the American political system as a possible explanation for the higher enactment rate of Indian-related legislation and draws some initial conclusions about the usefulness of this theory.

Federal Indian law is a field frequently described as exceptional.\textsuperscript{179} Scholars offer different explanations for the government. See, e.g., Binder, \textit{supra} note 70, at 11. But the data does not seem to comport with Cornell and Kalt’s study, which implied that Indian interests fared better in Congress with Democrats than Republicans. Cornell & Kalt, \textit{supra} note 56, at 21–26.\textsuperscript{179} Frickey, \textit{supra} note 11, at 445; Wilkinson, \textit{supra} note 49, at 7–9.
exceptional nature of federal Indian law, but the idea of exceptionalism dates back to 1832 when Chief Justice John Marshall recognized Indian nations as domestic dependent nations over which states have no authority.\(^{180}\) The government-to-government relationship between Indian nations and the federal government predates the United States Constitution\(^{181}\) and differentiates Indians from other groups in the United States.\(^{182}\) The government-to-government relationship places moral and political obligations on the United States government, often referred to as the trust relationship.\(^{183}\) The sheer number (566) and diversity of Indian nations—each with their own governments, laws, and territories—complicates this area of law and separates it from other areas.\(^{184}\)

As a result of these differences, several features of federal Indian law distinguish it from other areas of law.\(^{185}\) The first and most obvious is the political status of Indian nations as separate, sovereign governments that retain some inherent governmental authority and a special relationship with the federal government.\(^{186}\) A second exceptional feature of Indian law relates to congressional authority, which is described as plenary, because Congress has the ability to limit tribal
powers.187

While exceptionalism usually refers to the Supreme Court and its creation of federal Indian law doctrines that depart from federal public law,188 the higher enactment rate of Indian-related bills could mean that this exceptionalism extends to the relationships between Congress and Indians. If the higher enactment rate is unique to Indians, that could indicate that something distinct about Indians or Indian law and policy could help to explain the relationships between Congress and Indians. To evaluate whether the higher enactment is unique to Indian-related bills, I used the CBP data to examine the enactment rates of other highly specialized areas of law over which Congress has extensive authority.189 I compared the Indian-related bills identified in the CBP data in the Native American Affairs subtopic with six other subtopics representing highly specialized areas of law and policy over which Congress has constitutional authority: (1) Taxation, Tax Policy, and Tax Reform,190 (2) Immigration and Refugee

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187. Newton, supra note 65, at 195; Frickey, supra note 11, at 440–43.
188. See, e.g., Frickey, supra note 11, at 434–60.
189. I chose these six categories based on: (1) common recognition of each as a highly specialized area of law, over which Congress has almost exclusive authority, and (2) their inclusion in the CBP dataset as a distinct subtopic (none of them, including the Native American subtopic, have been further subdivided). My review of the CBP subtopics suggested that these six subtopics were the most analogous to the Native American subtopic.
190. Taxation, Tax Policy, and Tax Reform are coded as 107 in the CBP data. PAP, supra note 84, at 5. This subtopic includes, but is not limited to:

[S]tate taxation of income, state and local income taxes, clarification of tax code, tax code reform, luxury and excise taxes, estate and gift taxes, corporate income taxes, administrative tax proposals, income tax reform, tax treatment of charities, federal tax code reform and simplification, revenue acts, impact of taxes on business, multiple tax changes (excise and capital gains), general tax changes, charitable contribution deduction bills, domestic tax breaks for foreign businesses, omnibus tax issues, general legislation that amends the Internal Revenue Code.

Id. It does not include specific tax changes, which were coded based upon the
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subject matter. Id.

191. Immigration and Refugee Issues are coded as 900 in the CBP data. PAP, supra note 84, at 22. This subtopic includes, but is not limited to:

Immigration of Cuban refugees to the U.S., refugee resettlement appropriations, HHS authority over immigration and public health, INS enforcement of immigration laws, legalization procedures for illegal immigrants, assessment of Haitian refugee detention by the U.S., immigration and education issues for aliens, adjusting visa allocations based on applicant job skills, DOL certification process for foreign engineers working in the U.S., denial of visas to political refugees, appropriations for the INS, citizenship issues, expedited citizenship for military service.

Id.

192. Copyrights and Patents are coded as 1522 in the CBP data. PAP, supra note 84, at 32. This subtopic includes, but is not limited to:

Patent and Trademark Office appropriations, copyrights and telecommunications, biotechnology patent protection, intellectual property rights, copyright infringement remedies, industrial design protection, patents for inventions made in space, copyright protection for computer software, music copyrights, piracy of intellectual property, patent application procedures, trademark use and clarification, home recording of copyrighted material, performance royalties, patent office fees.

Id.

193. Maritime Issues are coded as 1007 in the CBP data. PAP, supra note 84, at 23. This subtopic includes, but is not limited to:

U.S. Coast Guard, Merchant Marine, and Federal Maritime Commission budget requests and appropriations, cargo liability limits and the carriage of goods by sea, cargo preference laws, revitalization of the maritime industry, commercial fishing vessel safety, navigation safety issues, cruise ship safety, commercial shipbuilding industry, navy policies on transportation of military cargo by the Merchant Marine, financing construction of merchant ships, maritime freight industry regulation, intercoastal shipping act, regulation of ocean shipping rates, Great Lakes pilotage, small boat safety, Coast Guard operation of ocean weather stations, navigation rules on inland waterways, designation and naming of channels, designation and naming of vessels.

Id.

194. U.S. Dependencies and Territorial Issues are coded as 2105 in the CBP data. PAP, supra note 84, at 50. This subtopic includes, but is not limited to:

Future political status of Palau, Puerto Rico statehood issues, federal-territorial relationship between the U.S. and Guam, compact of free association between the U.S. and Pacific island nations, federal policies for economic development in Guam, termination of trusteeship of the Marshall Islands, proposed changes in the constitution of America Samoa, Alaska and Hawaii territorial issues, statehood for Hawaii and Alaska, Virgin Islands Corporation, various Organic Acts related to territories, former territories and U.S. protectorates.

Id. (noting that “[t]his covers many subject areas that would normally be coded in
of Columbia (D.C.) Affairs. While none of these areas of law compare perfectly to Indians or federal Indian law in terms of doctrine and other issues, they provide some basis for comparison and are similarly situated in terms of congressional authority.

Table 6 demonstrates that each of these subtopics, except D.C. Affairs, yielded a lower enactment rate than the Native American Affairs subtopic during the same time period. At 13.7 percent, the enactment rate for D.C. Affairs was less than one percentage point higher than the Native American Affairs subtopic (12.9 percent). Three other subtopics—Copyright and Patent, Maritime Issues, and U.S. Dependencies and Territorial Issues—have enactment rates higher than the general enactment rate but lower than the enactment rate for the Native American Affairs subtopic. Even the highest of these, Copyright and Patent, is four percentage points lower than the Native American Affairs subtopic. Two subtopics—Taxation, Tax Policy, and Tax Reform and Immigration and Refugee Issues—have enactment rates lower than both the general enactment rate and the enactment rate for the Native American Affairs subtopic. The various enactment rates by subtopic further indicate how bill content may influence enactment rates.

195. D.C. Affairs are coded as 2014 in the CBP data. PAP, supra note 84, at 48. This subtopic includes, but is not limited to:

- DC budget requests and appropriations, creation of the DC supreme court, DC public school system, health care reform in DC, water quality problems in DC, statehood for DC, transfer ownership of RFK to DC, revise the DC judicial system, overcrowding in DC correctional facilities, DC commuter tax, DC borrowing authority extension, Washington metropolitan area transit authority metrorail construction, DC fiscal problems, drug and crime crisis in DC.

Id. (noting that “[t]his covers many subject areas that would normally be coded in other subtopics (housing, medical programs, transportation systems, etc.).”).
Table 6: Comparative Enactment Rates by CBP Subtopic, 1975 to 2011

<table>
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<tr>
<th>Subtopic</th>
<th>Introduced</th>
<th>Enacted</th>
<th>Enacted Rate</th>
</tr>
</thead>
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<tr>
<td>Taxation, Tax Policy, and Tax Reform</td>
<td>5,758</td>
<td>56</td>
<td>0.9%</td>
</tr>
<tr>
<td>Immigration and Refugee Issues</td>
<td>2,870</td>
<td>74</td>
<td>2.6%</td>
</tr>
<tr>
<td>Copyright and Patent</td>
<td>858</td>
<td>72</td>
<td>8.4%</td>
</tr>
<tr>
<td>Maritime Issues</td>
<td>2,540</td>
<td>126</td>
<td>4.9%</td>
</tr>
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<td>U.S. Dependencies and Territorial Issues</td>
<td>625</td>
<td>47</td>
<td>7.5%</td>
</tr>
<tr>
<td>D.C. Affairs</td>
<td>1,202</td>
<td>165</td>
<td>13.7%</td>
</tr>
<tr>
<td>Native American Affairs</td>
<td>2,909</td>
<td>375</td>
<td>12.9%</td>
</tr>
</tbody>
</table>

A comparison of the different subtopics of the CBP data provides limited support for the theory that Indians are exceptional and therefore receive distinct treatment from the U.S. government. The Native American Affairs bills enjoyed a higher enactment rate than each of the other subtopics except D.C. Affairs. Because all of these subtopics represent highly specialized areas over which Congress has constitutional authority to legislate, Congress’s constitutional authority alone does not appear to explain the difference in enactment rates. If it did, all of the subtopics would have a higher enactment rate. The difference suggests that the Indian law exceptionalism theory could influence Congress and merits further attention.\footnote{One trend in the data undermines the Indian law exceptionalism theory. While Congress consistently enacted a higher rate of Indian-related bills in each Congress studied, the enactment rate for Indian-related bills generally followed the fluctuations in the enactment rate for legislation in general. See supra Chart 3 (suggesting that Indian-related legislation may be influenced by the same political forces as general legislation and may not be as exceptional as it appears).}

Federal Indian law exceptionalism could affect the relationships between Congress and Indians. First, the trust relationship places special obligations on the United States government as trustee for Indian nations and that special relationship may contribute to Congress enacting more Indian-related legislation.\footnote{While courts have not generally regarded the trust relationship as the source of specific, enforceable obligations on the part of the United States regarding the property of Indian nations, it does place moral and political obligations on the United States in its actions towards Indian nations. INDIAN LAW RES. CTR., supra note 64, at 99–108. For example, courts have held that the United States must meet the most exacting standards of loyalty and honesty in its dealings with Indian nations. Seminole Nation v. United States, 316 U.S. 286 (1942). For a discussion of the federal law on the trust relationship between...}
always a trust relationship) that the United States has with its dependencies and territories, one might expect to see a correspondingly high enactment rate for the U.S. Dependencies and Territorial Issues subtopic (like there is for D.C. Affairs subtopic in the CBP data). Indian nations, however, greatly outnumber United States dependencies and territories and could, as a result, require more legislation. The data on the number of tribe-specific bills introduced and enacted during the time period studied may support the idea that the government-to-government or trust relationship between Indian nations and the United States has an impact on the enactment rate of Indian-related legislation.

A second possibility is that Indian affairs prove more problematic for the United States government than other specialized areas of law. Indian affairs have long been referred to as the Indian problem and seen as conflicting with the goals of the general public. Indian nations garner more attention as Congress tries to figure out what to do with them because they do not fit well into the existing structure of United States federalism. Consequently, the enactment rate of Indian-related bills is higher than the general enactment rate. This theory would explain the need for the SCIA and a House Subcommittee on Indian and Alaska Native Affairs and why


198. See supra note 195. The District of Columbia, somewhat analogous to Indian nations, exercises a limited amount of governing authority within its geographic territory. D.C. Home Rule Act of 1973, Pub. L. No. 93–198, 87 Stat. 777 (providing for a local government with limited authority subject to congressional oversight for the District of Columbia). The existence of D.C. and Indian nations as limited governmental authorities within the United States that are subject to congressional oversight may contribute to the higher enactment rates of federal legislation relating to them.


200. See generally Deloria, supra note 46, at 241–46 (describing congressional policy as a response to various conflicts between the interests of Indians and the general public).

the relationships between Congress and Indians are different from the relationship between Congress and other groups.\footnote{In contrast, only one Senate subcommittee (Senate Subcommittee on Emergency Management, Intergovernmental Affairs, and the District of Columbia) and no House committee or subcommittee deals with the District of Columbia, and only one House subcommittee (House Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs), but no Senate committee or subcommittee addresses insular affairs. \textit{Congressional Committees and Subcommittees}, CONG. MERGE (2014), http://www.congressmerge.com/ onlinedb/cgi-bin/committee_list.cgi?site=congressmerge, archived at http://perma.cc/8SAG-7P4T.} To some extent, the data supports this theory, by demonstrating that Indians generate both their own constitutionally authorized, specialized legislation (tribe-specific and pan-tribal bills) and fall within general legislation.\footnote{It may be that with the implementation of Congress’s Self-Determination Policy, Indian nations have been included more as governments in general legislation over time until they have become institutionalized as a part of the standard drafting language for certain kinds of general legislation. This hypothesis is discussed further in Part IV.D, infra.}

The federal Indian law literature illuminates some of the possible reasons why Congress treats Indians differently than other groups. The exceptionalism theory and its related hypotheses, however, provide limited details about how the relationships between Congress and Indians function and about the actual interactions among members of Congress, congressional staffers, and Indians. The next section contributes to the depth of our understanding of the relationships between Congress and Indians. It turns to the literature on legislative outcomes and public policymaking, which suggests additional explanations for the distinct nature of the relationships between Congress and Indians and presents theories about the interactions among members of Congress, congressional staffers, the Executive Branch, and Indians.

\textbf{B. Legislative Outcomes and Public Policymaking}

This section considers possible hypotheses drawn from the literature on legislative outcomes and public policymaking for explaining the relationships between Congress and Indians, in light of the higher enactment rate of Indian-related legislation. While many of these hypotheses require further testing, some
initial conclusions about the usefulness of these theories may be drawn from the data presented in the study.

Social scientists have developed several theories about legislative outcomes and public policymaking,204 Pluralist theory may be the most useful in understanding the relationships between Congress and Indians. Pluralist theory posits that bargaining among interest groups heavily influences political outcomes, and legislation in particular.205 Interest groups are often defined as “any group that, on the basis of one or more shared attitudes, makes certain claims upon other groups in the society for the establishment, maintenance or enhancement of forms of behavior that are implied by the shared attitudes.”206 Indian nations may not always act as interest groups, but this literature, which focuses on the relationship between groups and political outcomes may be helpful in understanding the relationships between Congress and Indians.207

Foremost among the relevant, descriptive pluralist theories are interest group theories.208 Public choice theories conceptualize the political process as driven by interest groups.209 They suggest that Congress is more likely to enact statutes that concentrate benefits on special interests while distributing the costs of those benefits to the general public and is less likely to enact statutes that distribute benefits broadly.210 Under public choice theory, Congress should enact more tribe-specific and pan-tribal bills, which would concentrate benefits either on a specific tribe or Indian nations more generally, rather than general bills related to Indians, which are more likely to have diffuse benefits and costs.211 Public choice theory may have some explanatory power for Congresses such as the 98th, 103rd and 108th, which

204. See ESKRIDGE ET AL., supra note 94, at 47–80 (discussing the political science theories about legislative outcomes).
205. Id. at 48–50.
208. See, e.g., ESKRIDGE ET AL., supra note 94, at 48–57 (discussing interest group and public choice theories of legislation).
209. Id. at 54–59 (explaining that interest groups demand legislation and legislators control the supply).
210. See, e.g., id. at 59.
211. See, e.g., id. at 54–63 (discussing public choice theories).
demonstrated high enactment rates of tribe-specific and pan-tribal bills and low enactment rates of general bills. In particular, public choice theory provides some useful insights into why pan-tribal and tribe-specific bills have a higher rate of enactment in certain Congresses. It may also suggest why the enactment rate for Indian-related bills decreases as the number of general bills increases, namely because it predicts that legislatures are less likely to enact statutes that distribute benefits broadly. But the variety in enactment rates by kind of bill by Congress suggests this hypothesis may not fully explain the higher enactment rate for Indian-related bills over all the Congresses in the study.

Scholars conducting empirical studies on the relationship between interest groups and legislative outcomes confirm some of the insights of public choice theory and provide descriptive findings that may also contribute to our understanding of the relationships between Congress and Indians. These studies have identified several factors, which may influence legislative success. These factors include, but are not limited to: (1) the role of individual, influential legislators; (2) the role of committees and subcommittees; (3) party in control of Congress; (4) the role of interest groups; (5) presidential support; (6) public salience; and (7) scope and urgency of the legislation. The data suggests that some of these factors are probably not playing a significant role in the higher enactment rate and may not contribute to our understanding of the relationships between Congress and Indians. These factors include: party control of Congress, public salience, and the role of individual legislators. The party in control of Congress does not seem to be a factor because the enactment rate is not consistently higher or lower based on the party in power. See supra Table 2. For example, the Republican controlled 104th Congress and the Democrat controlled 100th Congress both passed high rates of Indian-related bills. The low public salience of most Indian issues suggests that public salience does not affect the enactment rate. See supra note 30. While the data does not allow for full evaluation of the impact of public salience on the enactment of Indian-related bills, most Indian-related bills probably do not garner much media attention. Thus, the traditional way of measuring public salience by looking at the New York Times Index probably would not provide much information on why Indian-related bills pass at a higher than average rate.

While a few influential legislators have most likely played a key role in the enactment of specific legislation related to Indians (e.g., the role played by Senator Dorgan in the passage of the Tribal Law and Order Act), the existence of one or a few champions of Indian nations does not by itself seem to explain the higher rate of enactment of Indian-related legislation. Further, the multitude of studies on the effectiveness of individual legislators “offer very little consensus regarding the ‘keys to legislative success.’” ADLER & WILKERSON, supra note 71, at 2. For this reason, the studies that focus on the relationship between individual
find that interest group influence depends upon the context, with interest groups enjoying more success in opposing rather than enacting legislation.213 Interest groups succeed more frequently in enacting legislation on issues that are not salient to the larger public and that are perceived as narrow, technical, or nonpartisan.214 These findings, thus, suggest a higher enactment rate for tribe-specific bills and possibly some pan-tribal bills that do not affect or garner the attention of the larger public.215 More information on the content of specific bills and the context of their legislative progress is needed to determine whether Indian-related bills conform to these findings.

Another hypothesis, developed from these interest group studies, posits that tribes have limited resources and therefore pursue only the legislation most important to them.216 This emphasis on targeted advocacy would explain both why Indian-related bills do not make up a large proportion of the legislative agenda and their higher enactment rate. Because Indian advocates propose only legislation they are really interested in, they advocate harder for that legislation and as a result, Congress enacts more of it. This limited resource hypothesis would distinguish Indian-related legislation from the bulk of general legislation, which often includes bills with little

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213. ESKRIDGE ET AL., supra note 94, at 62 (“Groups defending the status quo need to prevail at only one stage in the convoluted legislative process.”); BAUMGARTNER ET AL., supra note 74, at 6–7 (“One of the single best predictors of success in the lobbying game is not how much money an organization has on its side, but simply whether it is attempting to protect the policy that is already in place.”).

214. ESKRIDGE ET AL., supra note 94, at 62 (explaining that “[c]lient politics is easier when it occurs outside the glare of publicity, and members are willing to trade support on minor issues in backroom deals”).

215. For example, tribe-specific bills that only affect the tribe, such as bills on historic preservation on tribal lands; and pan-tribal bills, such as legislation promoting Indian arts and crafts, would be expected to pass easily because they do not affect the general public. By contrast, bills like the Indian Gaming Regulatory Act or the VAWA Reauthorization would be harder to pass because of their possible impact on the general public.

216. This hypothesis stems from recent studies finding that different groups lobby differently and consequently, are viewed differently in the policymaking process. BAUMGARTNER ET AL., supra note 74, at 11 (“Citizen groups may spend less on lobbying and lobby on fewer issues than business organizations but when they do lobby, they are more likely to be considered an important actor in the policy dispute.”).
support or chance of enactment. It could also illuminate why Congress enacts fewer Indian-related bills when more are proposed: because the dilution of limited resources could undermine Indian advocacy strategies.

Finally, some interest group studies find that public officials regularly act as advocates and play a role in the policymaking process. Two groups of public officials in particular could influence the success of Indian advocacy and Indian-related bills. First, the powerful political role played by the SCIA suggests that it may influence policy success and that its sponsorship and support of Indian-related legislation may increase the likelihood of legislative success, especially if the rest of Congress largely defers to its policymaking expertise. This hypothesis, however, may only partially explain the higher enactment rate because general legislation may not be assigned to the SCIA. Second, if Indian-related legislation consistently receives support from the President or the executive branch, such support could explain the higher enactment rate. Previous studies have found presidential or executive branch support to be the greatest predictor of legislative success. Unlike earlier hypotheses which seem to explain high rates of pan-tribal or tribe-specific bills, the existence of presidential support could transcend the kind of legislation and explicate the higher enactment rate over time, but more information on presidential and executive branch support is needed to evaluate this hypothesis.

Interest group theories may generate some useful hypotheses for understanding the relationship between Congress and Indians. Interest group theories, however, often overlook factors that social scientists have found to influence legislative outcomes, including institutional influences and behaviors of individual legislators, and thus may not provide a complete picture.

Process-based theories of policy change provide an alternative to interest group theories and may shed some light on the relationships between Congress and Indians. Recent

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217. BAUMGARTNER ET AL., supra note 74, at 13 (estimating that 40 percent of the advocates in the study were in government).
218. WILKINS & STARK, supra note 4, at 92–93.
219. See, e.g., BAUMGARTNER ET AL., supra note 74, at 233.
221. See, e.g., KINGDON, supra note 70.
studies, particularly on omnibus legislation, have documented successful departures from the textbook version of the legislative process.\footnote{See, e.g., SINCLAIR, supra note 70, at 3–7.} Some scholars have more generally argued that policymaking occurs when “a problem becomes salient at the same time a solution becomes well-regarded and participants favoring the solution can seize the legislative process for that end.”\footnote{ESHKIDGE ET AL., supra note 94, at 64 (citing KINGDON, supra note 70).} These theories suggest that agreement between advocates and political elites about a solution to a problem leads to successful policymaking. They hypothesize a sequence of events, which could explain the higher enactment rate of Indian-related legislation. First, tribal advocates and leaders would agree with the relevant agencies and members of the SCIA on the content of a proposed bill before introducing it. Second, members of Congress would defer to the President and SCIA in voting for the proposed Indian-related bill and, as a result, Congress would enact it. This sequence of events might explain the higher enactment rate.\footnote{Another variation on this hypothesis is that since members of Congress rarely gain political points with constituents by introducing Indian-related bills, see supra Introduction (explaining the weak link between electoral politics and Indian issues), members of Congress may be more inclined to introduce fewer bills and only those that they ardently support. In turn, this would lead to a higher enactment rate.} This hypothesis suggests that increased advocacy by Indian nations could influence the legislative process and legislative outcomes when it aligns with the interests of other key players.\footnote{See, e.g., WILKINSON, supra note 49, at 53–54 (noting an increase in tribal legislative advocacy in the 1980s). In general, the problem with the hypothesis that increased Indian lobbying influences the higher enactment rate is that if that were true, we would expect the higher enactment rate to continue to increase over time. The data, however, shows that the enactment rate varies by each Congress and has generally decreased since the 102d Congress. See supra Table 3.} Tracing specific bills through the legislative process may confirm whether this sequence of events occurs, and may explain the higher enactment rate for Indian-related bills. However, the hypothesis may explain more powerfully the higher rate of enactment for pan-tribal and tribe-specific bills than for general legislation, which is less likely to go through the same process.\footnote{Most likely, general legislation is not referred to the SCIA, so the influence of the SCIA may not be as relevant.}

While it is hard to definitively conclude that any of these hypotheses explain the relationships between Congress and
Indians, they indicate important areas for future inquiry and the need for fuller empirical examination. They suggest understanding the relationships between Congress and Indians may require separate analyses by bill type and Congress, as well as further investigation into the provisions of Indian-related bills. Even if it does not provide a full understanding of how and why Congress enacts more Indian-related legislation, the data challenges traditional narratives about the relationships between Congress and underrepresented groups. The next Part considers the implications of the study on four important areas: legislative policymaking, federal Indian law and policy, federal power over Indians, and tribal sovereignty.

IV. IMPLICATIONS FOR CONGRESSIONAL POLICYMAKING AND FEDERAL INDIAN LAW

This Part discusses this study’s implications on the policymaking process. Part IV.A considers how the study reinforces calls for more analyses of the link between bill content and legislative success, problematizes traditional narratives about groups’ roles in the legislative process, and questions the ability of Indians to couple policy issues to improve legislative outcomes. Part IV.B explains how the study contributes to existing knowledge about federal Indian law and policymaking. Part IV.C emphasizes the study’s ramifications on understandings of federal power over Indians. Part IV.D highlights how the study suggests the need for further investigations into how Congress implements federal Indian policy, especially the Self-Determination Policy.

A. Congress and Policymaking

The most obvious implications of the study are about how Congress enacts laws and policies. The study has several implications for how scholars generally study and how advocates understand the legislative process. First, it confirms the intuition that the substantive content, or broad subject matter, of legislation influences the prospects of a bill’s enactment. Building on earlier studies, it demonstrates how Congress’s enactment rates vary by the substantive subject
matter of bills over time. This finding suggests that Congress does not treat all bills the same way and indicates a need for more quantitative empirical studies based on specific bill content.

Second, the study’s findings challenge traditional narratives about the role of minority groups in the political process. Some studies suggest that interest groups, like Indian nations, which often challenge the status quo, are not very successful in achieving legislative victories. Unexpectedly, though, the data did not confirm the expectation that the enactment rate for Indian-related legislation would mirror the low enactment rates for federal legislation generally. The finding of a higher enactment rate for Indian-related legislation questions the traditional narrative of discrete and insular minorities not faring well in the political process, but it does not provide definitive information about what is going on in the legislative process. Rather, it indicates a need for more studies on the role of Indians and other underrepresented groups in the legislative process. More specifically, the data suggests that a more complicated story needs to be told about the role of Indians and Indian nations in the legislative process. This story may affect our thinking about groups and politics more generally.

Third, the data undercuts theories about coupling policy issues to improve legislative outcomes. Scholars have argued that the best opportunities for policy change result from adding policy issues to issues that are already on the congressional agenda, and some Indian law scholars have tailored this theory by proposing that Indians will be more successful legislatively if they attach their issues to omnibus legislation, which passes at a higher rate generally. Both the low numbers of introduced and enacted general high-focus bills and their highly variable enactment rate provide little support for this theory. The data does not indicate that Indian issues, especially substantive changes to federal Indian law and policy,

227. See supra Part I.
228. BAUMGARTNER ET AL., supra note 74, at 31.
229. Earlier studies often underrepresent certain groups, including Indians and the economically disadvantaged. Id. at 255–56. This underrepresentation, along with my unexpected findings, suggests a need for more research in this area.
230. See, e.g., ADLER & WILKERSON, supra note 71, at 10.
231. Washburn, supra note 22, at 17.
fare better in the legislative process if they are included in general legislation. Rather the data suggests that the enactment rate of Indian-related bills has decreased as the number of general bills increased. If the coupling strategy worked, we would expect to see more general high-focus bills, and Congress enacting them more frequently and consistently. This data suggests that the coupling theory may not apply equally to all groups or issues and that this is an area in need of further study.

B. Federal Indian Law and Policy

The study has implications for the development of federal Indian law and policy. Contrary to the assertions of some scholars, the data presented suggests that Congress remains an active force in the creation of federal Indian policy. My systematic analysis of Indian-related legislation demonstrates that Congress is active in this area on multiple levels (tribe-specific, pan-tribal, general) across a variety of subtopics (e.g., health, tribal courts, law enforcement, etc.). While my data does not look at whether Indian-related bills propose policies for or against Indian interests, the higher enactment rate of Indian-related legislation provides limited support for increased legislative activity by Indian nations (either to combat negative, or to encourage positive, policy proposals). More research, however, needs to be done to determine whether the higher enactment rate for Indian-related bills translates into the enactment of legislation beneficial to, and supported by, Indian nations, and to investigate how subtopics may relate to legislative success. The data presented here provides very little information about whether Indian nations have been successful in pursuing law and policy reforms through the legislative process.

My findings may also have implications for how we understand interactions between the Supreme Court and Congress on federal Indian law and policy. Scholars have documented the Supreme Court’s increased activism in the area of federal Indian policymaking and its divergence from Congress’s Self-Determination Policy. As a result, scholars

232. Fletcher, supra note 20, at 123 (stating that Congress no longer drives federal Indian policy).

233. Frickey, supra note 11, at 445; Fletcher, supra note 20, at 127–28.
have made countless proposals for the Court to consider in developing—and improving—its Indian law jurisprudence and in aligning with Congress's Self-Determination Policy. Other scholars have simply given up on the Court and argued that Congress, rather than the Court, is the appropriate institution to make federal Indian law and policy.

My data contributes to these discussions in three ways. First, the data indicates that Congress continues to engage actively with federal Indian policy both by enacting higher rates of pan-tribal and tribe-specific bills and by including tribes in general legislation. Recently enacted statutes, such as the Tribal Law and Order Act and the Violence Against Women Reauthorization Act, indicate that Congress may have a very different view of Indian nations than the Supreme Court. In these statutes, Congress appears to reaffirm its commitment to strengthening tribal self-governance and extending tribal authority. This commitment stands in contrast to the current view of the Supreme Court, which recently questioned the competency of tribal governments and the constitutionality of tribal sovereignty. Thus, more confrontations between the Court and Congress over federal Indian law and policy may be on the horizon indefinitely.

Second, the data may encourage scholars to rethink their analyses of the institutional dynamics between the Supreme Court and Congress when it comes to federal Indian law and policy. Scholars have recently suggested that the Supreme Court is taking a more active role in,—and more frequently

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234. For a full list of these proposals, see Fletcher, supra note 20, at 36. See also Steele, supra note 11, at 764–65 (proposing that the Supreme Court should consider comparative institutional competency in determining whether the power to define inherent tribal authority should rest with the courts or Congress); Singel, supra note 201, at 8 (proposing that the Supreme Court consider federalism values in deciding Indian law cases).

235. Frickey, supra note 11, at 445; Steele, supra note 11, at 764–65.

236. Nothing in the data suggests that Congress has abandoned its Self-Determination Policy. A discussion exists in the literature questioning Congress's commitment to its Self-Determination Policy and suggesting that the underfunding of Indian nations may undermine the policy. See Washburn, supra note 22, at 10, 20.

237. Steele, supra note 11, at 778.

238. Id. ("Congress seems to have determined that it does not share the Supreme Court's concern with the competence of tribal justice systems to deal fairly with such offenders or view the Constitution as an impediment to congressional affirmation of such authority.").
clashing with—Congress on federal Indian law and policy. But the data may not support these propositions. In fact, the Court may have fewer opportunities to engage in federal Indian law and clash with Congress than scholars think. The Court accepts very few cases, and the variety of Indian-related legislation introduced and enacted in Congress suggests that the bulk of the policies enacted by Congress are never challenged in litigation and do not receive federal court review. The sheer amount of legislation suggests that the Court and Congress may not be engaging with the same, or even related, issues in Indian country. If this is true, the amount of legislation, as well as additional information on its content, may provide insight into the role of the Court in making federal Indian policy and suggest that scholars may have overemphasized the role that the Court actually plays. Further analysis of the cases reviewed by the Supreme Court will provide the information required to evaluate this hypothesis.

Third, my data may improve comparative institutional analyses of whether the Court or Congress is better positioned to make federal Indian law and policy by providing information on what Congress actually does. Scholars have suggested several important indicia for assessing comparative institutional competency, including: (1) the Constitution’s delegation of authority to the respective branches; (2) the susceptibility of the inquiry to judicially administrable standards; (3) the need for political accountability for policy choices; (4) the ability of the respective branches to appropriately tailor the necessary standards; (5) the need for flexibility to respond to changed circumstances; (6) the importance of resource allocation questions to the determination at issue; and (7) the potential subject matter expertise of the decisionmaker. My data informs the analysis of some of these factors. For example, it may support arguments for congressional supremacy in Indian affairs because it demonstrates Congress’s ability to appropriately

239. Frickey, supra note 11, at 445; Fletcher, supra note 20, at 127–28.
240. From 1975 to 2012, the Supreme Court heard 117 Indian law cases and not all of these cases involved federal legislation. See Supreme Court, TURTLE TALK, http://turtletalk.wordpress.com/resources/supreme-court-Indian-law-cases/, archived at http://perma.cc/SW96-LMTK (last visited July 21, 2014) (listing the 117 Indian law cases heard by the Supreme Court from 1975 to 2012).
241. Steele, supra note 11, at 784.
tailor solutions to balance competing interests through various kinds of Indian-related legislation. Congress has the ability to—and regularly does—enact legislation crafted to address tribe-specific problems.\footnote{For example, Congress has the ability to settle water rights or claims on behalf of specific tribes and to take lands into trust for specific tribes. See, e.g., Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1991, H.R. 3139, 102d Cong. (1991); Ute Water Settlement Act of 1989, S. 536, 101st Cong. (1989); To Settle the Black Hills Claim with the Sioux Nation of Indians, H.R. 5620, 101st Cong. (1990); A Bill to Declare that Certain Lands are Held in Trust for Potawatomi Indian Community, S. 1602, 100th Cong. (1987).} It can also establish broadly applicable policies to resolve problems throughout Indian country or treat tribes as governments in general legislation. This ability to tailor solutions to problems faced by tribes may indicate that Congress has a more realistic picture of Indian nations than the Supreme Court does because Congress considers policies broadly while the Court reviews only a very limited set of cases.\footnote{Indian law scholars have recently attributed the Supreme Court’s poor performance in federal Indian law as to the Court’s lack of “an appropriate and realistic vision of American Indian tribes as sovereigns in the modern context.” Sarah Krakoff, The Renaissance of Tribal Sovereignty, the Negative Doctrinal Feedback Loop, and the Rise of New Exceptionalism, 119 HARV. L. REV. F. 47, 47 (2005).} It may also suggest that Congress has more flexibility to respond to changed circumstances in Indian country because it has options in crafting legislative solutions. The data also contributes to comparative institutional analyses by hinting at the broad range of policy questions arising in Indian country and the need for political accountability in this area. Further research may confirm that Congress has more subject matter expertise on Indian issues and that there is a prominence of resource allocation issues in this area and thus, inform arguments about whether the Court or Congress should make federal Indian law and policy.

Additionally, my findings indicate a major gap in the literature on Congress and Indians. This literature has long marginalized general legislation relating to Indians, including how and when general legislation creates policies relating to Indians and Indian nations.\footnote{See supra Part 0.} The sheer amount of general legislation including Indians and Indian nations in broader national policies suggests a need for more studies on the content in the provisions of this general legislation, and its
application in Indian country.\(^{245}\)

In terms of the content of this legislation, future research should evaluate it to see if Congress is more likely to include Indians in certain kinds of general legislation and to see how Congress treats Indian nations in such legislation. The status of Indian nations as separate sovereigns suggests that Congress may treat Indians differently in general legislation than it does other groups. For example, some federal environmental statutes allow for Indian nations, like states, to establish their own air and water quality standards.\(^{246}\) Scholars, however, have studied this phenomenon only as it relates to specific policy areas (within Indian law) so the broader extent to which Congress does this is unknown.\(^{247}\) Congress may regularly treat Indian nations differently in general legislation as a way of implementing its Self-Determination Policy.\(^{248}\) If, over time, Congress enacts more general legislation treating tribes as governments, this may be evidence of Congress’s commitment to and implementation of its Self-Determination Policy. A cursory review of the data indicates that this hypothesis is worth exploring and that it could produce valuable information on federal implementation of the Self-Determination Policy.\(^{249}\)

The data, however, also suggests that legislation includes Indians in various, and sometimes, surprising, ways. Many bills address Indians in the ways scholars have previously described, by requiring consultation with Indian tribes.\(^{250}\)

\(^{245}\) A few scholars have noted the inclusion of Indian nations in laws of general applicability. See, e.g., Deloria, supra note 46, at 252.


\(^{247}\) See, e.g., BORROWS, supra note 22; Fletcher, supra note 20.

\(^{248}\) While scholars have studied tribal government efforts to implement aspects of Congress’s Self-Determination Policy, see, e.g., Kalt, supra note 24, at 184, the author has yet to identify a study that looks at how Congress implements the Self-Determination Policy through legislation.

\(^{249}\) Several bills treated tribal governments like state or local governments, and such treatment could be seen as a way of implementing the Self-Determination Policy and respecting the government-to-government relationship. The data suggests that treatment of tribal governments like state governments in general legislation extends back (at least) to the 100th Congress. See, e.g., Targeted Revenue Assistance to Fiscally Distressed Local Governments Act, H.R. 3748, 100th Cong. (1988).

creating special grant programs or set-asides for Indian tribes, or specifically extending general programs to Indians. Other bills, however, propose less common actions like directing federal agencies to explore foreign markets for American Indian arts and crafts, or declaring that any abandoned shipwreck on Indian lands is the property of the Indian tribe owning the land. The widespread nature and diversity of provisions relating to Indians in general legislation raises questions about the drafting process and how and why drafters place Indians and Indian issues in so many bills.

Another area for future research is the application of general legislation in Indian country. To date, issues in this area have received substantial attention in certain high profile cases and policy areas, but few scholars have paid much attention to this area more generally. Given the proliferation of these bills and the limited nature of this study, research into the impacts of general legislation on Indian nations is necessary. Among other things, these studies should consider the potential implications of high rates of general legislation on the durability and application of the specialized Indian law

252. See, e.g., Emergency Agricultural Relief Act, S. 2603, 100th Cong. (1988) (specifically stating that the relief extends to Indian farmers).
254. Abandoned Shipwreck Act, H.R. 3748, 100th Cong. (1987). Interestingly, while the bill included provisions making abandoned shipwrecks on Indian lands the property of the tribe, no similar provision existed for states. Id.
255. The widespread inclusion of Indians and Indian issues in general legislation suggests that they may have become an institutionalized part of the drafting process or gained the sustained attention of professional drafters, lobbyists, or congressional staffers engaged in the drafting process. One hypothesis worth investigating further is whether treating Indian nations as governments like states and local governments in general legislation dealing with certain government programs has become formulaic and institutionalized.
256. Fed. Power Comm’n v. Tuscarora Indian Nation, 362 U.S. 99 (1960) (interpreting the Federal Power Act to permit condemnation of fee lands owned by the Tuscarora Indian Nation); San Manuel Indian Bingo & Casino v. N.L.R.B., 475 F.3d 1306 (D.C. Cir. 2007) (holding that the National Labor Relations Act applied to a tribal casino as generally applicable legislation, emphasizing that the casino did not affect tribal government but predominantly served and employed non-Indians).
257. See, e.g., Marren Sanders, Clean Water in Indian Country: The Risks (and Rewards) of Being Treated in the Same Manner as a State, 36 WM. MITCHELL L. REV. 533 (2010).
258. Skibine, supra note 113, at 85.
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canons for statutory construction.259

C. Federal Power over Indians

The study has tremendous implications for understanding federal power over Indians. The breadth of legislation relating to Indians in Congress suggests the need to think more broadly about the possible sources of congressional power over Indians. For generations, the plenary power doctrine has dominated federal Indian law debates over congressional power.260 In its strongest form, the plenary power doctrine holds that “Congress has plenary authority to limit, modify or eliminate the powers of self-government which the tribes otherwise possess.”261 Based on this doctrine, the Supreme Court has overwhelmingly upheld legislation over Indian affairs, suggesting that Congress has extensive powers over Indian affairs.262 Debates over this doctrine have centered on the contours of Congress’s authority to regulate Indians as Indians or Indian nations.263

My data, however, suggests that Congress may regulate Indians as part of the general welfare, as Indians, or as Indian

259. The Indian law canons of construction maintain that statutes are to be read liberally in favor of Indian nations with doubtful expression being resolved in favor of the Indians. For more information on the Indian law canons of construction, see Frickey, supra note 57; Williams, supra note 57.


263. See supra note 25.
nations. The plenary power doctrine (whatever its proper metes and bounds) does not appear to be the sole source for all congressional legislation over Indians. Only about one third to one half of all Indian-related legislation enacted by Congress focuses on issues specific to federal Indian policy. Since the focus of the rest of the legislation is more general, it is unlikely that plenary power is the only source of congressional authority in enacting this more general legislation. That, of course, leaves open the question about the source of Congress’s authority. Recent scholarship considering several constitutional and extra-constitutional bases for congressional authority over Indians, including the trust relationship and the treaty power, may provide some answers to this question. Indian law scholars, however, should also consider Congress’s broader obligations toward, and authority over, Indians outside the realm of Indian affairs, and how that may affect Congress’s ability to enact Indian-related legislation.

D. Tribal Sovereignty and Self-Government

Another important area affected by the study’s findings is tribal sovereignty and self-government. Tribal sovereignty is the basis of federal Indian law. Without it, Indian nations melt into the general polity and cease to exist as independent governments. For decades, Indian law scholars have expressed concerns about the incorporation, assimilation, and integration of Indian nations into the American polity. For example, Vine Deloria, Jr. lamented the inclusion of Indians in the War on Poverty as indicative of the disappearance of tribes, stating that “[s]ubsequent events have demonstrated that both Indian successes and failures have been connected to the Indian status as an identifiable racial minority within American society, not to the status of Indian tribes as domestic dependent

264. See supra Part II.B.
265. Frickey, supra note 11, at 474 (discussing the kinds of legislation that Congress could enact without the plenary power doctrine); Fletcher, supra note 64, at 75–93 (identifying several constitutional and preconstitutional sources for congressional authority over Indian affairs).
266. Laurence, supra note 15, at 4 (“The sine qua non of Indian law is the recognition of tribal sovereignty . . . .”).
nations.” Yet the existence and proliferation of pan-tribal and tribe-specific legislation over time suggests that Indians are not being incorporated or assimilated wholesale into mainstream America. Rather, it indicates that Congress continues to regulate Indians as Indians and Indian nations, and that Congress continues to create a distinct federal Indian policy that applies only to them.

While pan-tribal legislation indicates that Congress formulates federal Indian policy as a subset of federal policy more generally, two other kinds of bills may enhance our understanding of Congress’s commitment to tribal self-determination. First, as mentioned above, a more detailed analysis of the content of the specific provisions in general legislation relating to Indians may provide insights into how Congress implements the Self-Determination Policy. The data shows that Congress includes Indians in more general legislation over time. If Congress treats tribes as distinct governments in these general bills, it may indicate that Congress is implementing its Self-Determination Policy by clarifying the status of Indian nations as separate governments in legislation. This hypothesis deserves testing, and such analysis may provide valuable insights into how Congress views tribes and their self-governing powers.

Second, tribe-specific legislation, in particular, may provide insights into the government-to-government relationship between Indian nations and the United States. A unique feature of tribe-specific legislation is that it reaffirms the political relationship between the United States and individual Indian nations. Indian law scholars have decried a movement towards policy pan-tribalism—the treatment of all Indian nations as the same under a one-size-fits-all federal policy.

268. Deloria, supra note 46, at 255–66 (“The Indian ‘problem,’ which was derisively labeled a ‘problem’ because of racial and cultural differences a century ago, seems finally to have evolved into a social problem area and may finally be resolved as other such problems have been resolved.”).

269. This is not to say that some political and cultural assimilation is not taking place. It just suggests that Congress remains committed to recognizing the distinct status of Indian nations as separate sovereigns.

270. It may also confirm Alex Skibine’s description of “fears about tribal incorporation” as “exaggerated.” Skibine, supra note 180, at 30.

271. See, e.g., Newton, supra note 55, at 75 (“As messy and difficult as it is, Congress must deal with individual tribes, for it is with the tribes, and not a mythical large tribe called ‘Indian country’ with which Congress has a political relationship.”).
Indian policy—as not recognizing both the diversity of Indian nations and the individualized nature of the political relationship.\textsuperscript{272} The data may indicate that the federal government takes the government-to-government relationship with Indian nations more seriously than previously thought. More pointed research into tribe-specific bills and their success and failure may further develop understandings about how and when the federal government, or at least Congress, is willing to deal with Indian nations on an individual, government-to-government basis. For example, further study of tribe-specific legislation may provide illuminating insights into the politics and law of federal recognition, Indian claims, land-into-trust acquisitions, and water rights settlements.\textsuperscript{273}

CONCLUSION

Often perceived as guardians of minority rights, courts have not lived up to this reputation when it comes to Indian nations. As a result, Indian nations have optimistically turned to the political process, assuming that Congress can and will enact effective policies favorable to them. This Article is a first attempt to question the assumptions about courts and legislatures as effective policymakers for Indian nations inherent in various law reform strategies by providing more detailed and systematic information about Congress and Indians.

This Article builds on a renewed interest in empirical legal studies in federal Indian law by presenting the findings of the first comprehensive study of Indian-related legislation introduced and enacted in Congress during forty years of the Self-Determination Policy. The study’s findings suggest that complicated relationships exist among Indians, courts, and legislatures. First, the study finds that Congress enacted a


\textsuperscript{273} Further study of tribe-specific legislation may also provide illuminating insights into the politics and law of federal recognition. See Kirsten Matoy Carlson, Legislating Sovereignty: Empirically Understanding the Congressional Recognition of Indian Nations (working title) (forthcoming).
higher percentage of Indian-related legislation than its enactment rate of legislation more generally. This finding challenges traditional narratives about the success of minority groups in the political process and has serious implications for how scholars and advocates understand congressional policymaking. It also suggests that a bill's subject matter may influence legislative enactment rates and that scholars should pay more attention to the substantive content of bills in quantitative legislative studies.

Second, the study contextualizes the relationships between Congress and Indians by demonstrating that Congress generates several different kinds of Indian-related legislation. This suggests that Congress does not act monolithically towards Indians or Indian nations but has a more complicated relationship with them.

To understand the complex relationship between Congress and Indians, the study builds a typology for understanding the different ways in which Congress legislates over Indians. Using this typology, the data suggests that Indian law scholars have too narrowly assessed Indian-related legislation by focusing only on the passage of pan-tribal legislation that substantially alters federal Indian law and policy. By demonstrating that Congress enacts a significant amount of general legislation relating to Indians and tribe-specific legislation, this typology helps us to situate legislation over Indian affairs within the broader legislative agenda and better understand the different kinds of legislation that Congress enacts relating to Indians. The Article concludes by emphasizing the need for further research on Indian-related legislation, particularly general legislation and tribe-specific bills, and the various relationships between Congress and Indians.
APPENDIX 1: METHODOLOGY—DATABASE CREATION AND CODING

This Appendix elaborates on the discussion of the methodology provided in Part I of the Article.

A. Database Creation

The purpose of this study is to describe the legislation related to American Indians, Native Americans, Native Hawaiians, Alaska Natives, and their respective governments or organizations introduced and enacted by Congress. This required attempting to collect the entire universe of legislation relating to Indians introduced in Congress over a period of time.

Although the CBP dataset includes data for the time period of interest (and thus, can be used for comparison purposes), I did not use it because its coding scheme does not allow for identification of the entire universe of legislation relating to Indians. The CBP applied topic codes based on the title and summaries of legislation with each bill receiving only one topic code.274 The exclusivity of the coding by topic was meant to facilitate the tracing of changes in policy over time but limits that tracing to the major policy topic rather than considering how policy topics intersect.275 Because almost every major policy topic affects Indians and Indian nations, the CBP coding scheme does not include all legislation related to Indians within its Native American Affairs subtopic code. Thus, the CBP dataset proved underinclusive for the purposes of this study, which seeks to look at the entire universe of introduced and enacted legislation broadly related to Indians.

Instead, I attempted to create a dataset of all identifiable legislation relating to Indians introduced in Congress from
1975 to 2013. I collected the data from THOMAS.gov. I used the CRS subject codes in the Bill Search and Summary feature of THOMAS.GOV to identify legislation pertaining to Indians introduced in either the House or the Senate in the 94th through 112th Congresses. I initially searched THOMAS.gov for a full description of why I chose this time period, see Part II.B of the Article.

The CRS assigns at least one subject term to all legislation as a way to group legislation. CRS Legislative Subject Terms Used in THOMAS. LIBRARY OF CONGRESS, http://thomas.loc.gov/help/terms-subjects.html, archived at http://perma.cc/TEP4-X3MN (last visited Aug. 12, 2014). Prior to the 111th Congress, the CRS used the Legislative Indexing Vocabulary (LIV) to assign subject terms to proposed legislation. Id. Starting with the 111th Congress, the CRS has used a new list of subject terms. Id. For a complete list of the new subject terms, see id. Because the subject matter codes have changed over time (and the coders changed over time), most likely the dataset is still somewhat underinclusive and may not represent the entire universe of legislation relating to Indians. After extensively reviewing the bills in the database, I have concluded that the omission of any bills relating to Indians in the LIV and CRS codes was probably random and the dataset is probably as close to the complete universe as possible.

Despite the limitations of the CRS codes, I decided to use them instead of searching for bills by certain words, such as “Indian” or “Native.” I did run searches using the search engine in THOMAS.gov, using different possible search terms. These searches produced widely varying results, and running the same search using the same search term in the same Congress did not always yield the same result. This variance in results based on using the search engine led to me to consider and ultimately use the CRS codes instead. I also found that the searches using the THOMAS.gov search engine yielded results that were vastly overinclusive. If I used “Indian” as the search term, the search generated all bills relating to India and Indiana as well as Indians. The CRS codes allowed me to reduce the number of unrelated bills in the database and to ensure that it was not widely overinclusive. My later review of the bills validated this choice as I excluded very few bills from the database because they did not mention Indians or Native Americans.

I considered using other legislative databases, including ProQuest Congressional. PROQUEST CONG. (2014), http://congressional.proquest.com/congressional/search/basic/basicsearch, archived at http://perma.cc/8GRF-DAZV. ProQuest Congressional includes two subject terms relating to American Indians: Native Americans and Administration for Native Americans. Id. The search engine allows for searching bill texts by these search terms. Id. I searched bill texts from 01/01/1975 to 12/31/2012 using the “Native American” subject term. This search generated 8,943 results. A review of the results generated, however, showed that the search included multiple entries for the same bill; apparently every action on a bill generated the creation of a new entry. Ultimately, two factors informed my use of THOMAS.gov instead of ProQuest Congressional: first, the labor involved in sorting through these multiple entries on the same bill in ProQuest Congressional, and second, the number of social scientists using THOMAS.GOV to create similar datasets. See, e.g., Congressional Bills Project, UNIV. OF WASH. (2004), http://congressionalbills.org/acknowledgements.html, archived at http://perma.cc/6D9H-4R9H (identifying The Library of Congress Thomas website as a data resource).
for all bills with a CRS subject matter code including the term “Indian.” 278 The initial search generated 6,968 bills relating to Indians introduced in the 94th through 112th Congresses.

I downloaded all bills including a CRS subject matter code including the term “Indian.” 279 The bills were downloaded from THOMAS.gov into a Microsoft Excel spreadsheet using Visual Basic (VB). VB was used to reduce human error in the download; otherwise, the bills would have had to be downloaded by clicking on links to each file individually. The VB downloaded each html page from THOMAS.gov, using the standard search string, then parsed each variable into its respective column in the Excel spreadsheet, and categorized the data according to the corresponding variable header. The VB placed the content from one html page, which represented one introduced bill, into one row of the Excel spreadsheet. The download included the following information:

- the bill number;
- latest bill title;
- the date the bill was introduced;
- sponsor (of the bill);
- co-sponsors (of the bill);
- related bills;
- latest major action;
- latest action;
- titles;
- summary;
- committee reports;
- major actions;
- all actions;
- committees (referred to), and notes.

A database was then created in Microsoft Access and the downloaded information was transferred from the Excel spreadsheet into the database. The Microsoft Access database was used to code each of the bills using the codebook described in the next section. 280

278. During the time period studied, CRS used more than one subject matter code that included the term “Indian.” I wanted to pull all bills coded as “Indian.” For a list of all the CRS subject matter codes including the term “Indian,” see App. 4.

279. Dwayne Jarman assisted me in downloading the bills.

280. The original download included some congressional resolutions but these were identified based on legislative number (indicating a resolution, either H. Res., H. Con. Res., or S. Res. rather than H.R. or S.) and excluded from the
To ensure replicability of the dataset, the process was then repeated. The second download of the data produced 6,807 bills relating to Indians. In comparing the two downloads, 61 bills in the 95th Congress were identified that had been downloaded twice in the original download. These bills were included only once in the dataset.

I verified the data with other data sources to ensure that I had identified as many bills relating to Indians as possible. First, I downloaded all the bills coded into the Native American Affairs subtopic in the CBP database. I used the unique bill identifiers to compare the bills in my original THOMAS.gov download with those in the CBP database to determine how many bills were in both and whether any of the bills in the CBP database were not in mine. The two databases contained 2,494 bills in common. I found 317 bills that were included in CBP database but not my original download.

Second, I downloaded the bills in THOMAS.gov including “Native American” in their subject matter code so I could compare them with my database. The download generated 4,728 bills. I compared these 4,728 bills with the bills in my database to determine how many bills were in both and whether any of the bills coded as “Native American” were not in my database. I identified 3,885 bills categorized as both “Native American” and “Indian” and 843 bills categorized as “Native American” but not “Indian” in THOMAS.gov.

Third, I compared these 4,728 bills with the Native American Affairs bills in the CBP database to see how many bills were in both. This comparison generated 219 bills in common. The comparison analysis suggested that 951 Indian-related bills were not in my original download from the database.

281. I also tried to use ProQuest Congressional to verify the data but due to the search difficulties mentioned in note 277, I could not generate a list of Indian-related bills suitable for comparison to the database. I also considered using some of the subject matter codes in CONGRESS.gov, which is the successor of THOMAS.gov. I discovered that searching by the subject matter codes, now called subject-policy areas, in CONGRESS.gov generated widely differently results from searching by them in THOMAS.gov.

282. I downloaded these bills into an Excel file from the CBP website.

283. The unique bill identifier is the Congress-house-bill number sequence unique to each bill, for example, 94 H.R. 606. I made all comparisons among the bills in each of the downloads based on the unique bill identifiers.

284. The same process was used to download these bills as used to download the bills coded as “Indian” in THOMAS.gov.
THOMAS.gov. The comparisons revealed 108 bills in the CBP database that were not categorized as either “Indian” or “Native American” in THOMAS.gov. I reviewed each of these bills to determine whether they should be included in my dataset.\textsuperscript{285} I excluded fifty-nine bills in the CBP dataset from my dataset for one of the following reasons: (1) the bill summary or text did not actually mention Indians, tribes, or Native Americans currently living in the United States; or (2) the bill used the term “Indian” or a tribal name, but only in reference to a place name or an organization not related to Indians.\textsuperscript{286}

\textsuperscript{285} I reviewed these bills before adding them to the database because they had to be added to the database individually. The addition of these bills was a time consuming and laborious process so I wanted to ensure that they belonged in the database before adding them.

\textsuperscript{286} The following list details the fifty-nine bills identified in the CBP dataset and excluded from the analysis in the study:

7. A Bill to Permit the Department of Transportation to Proceed with a Highway Project in Lee County, Florida, Without Regard to Section 106 of Public Law 89-665 or Procedures Developed Under Section 1(3) of Executive Order Numbered 11593, H.R. 3667, 96th Cong. (1979) (no Indians).
9. A Bill to Provide for the Setting Aside in Special Trust Lands and Interests Within the Winema National Forest to Edison Chiloquin and for the Transfer of Monies Otherwise Available to Mr. Chiloquin from the Klamath Indian Settlement to the Secretary of Agriculture for the Acquisition of Replacement Lands or Interests, H.R. 7960, 96th Cong. (1980) (private bill).
11. A Bill to Provide for the Setting Aside in Special Trust Lands and Interests Within the Winema National Forest to Edison Chiloquin and for the Transfer of
Moneys Otherwise Available to Mr. Chiloquin from the Klamath Indian Settlement to the Secretary of Agriculture for the Acquisition of Replacement Lands or Interests, S. 3078, 96th Cong. (1980) (private bill).


34. A Bill to Provide for the Transfer of Operation and Maintenance of the Flathead Irrigation and Power Project; and for Other Purposes, S. 1186, 104th Cong. (1995) (no Indians).
54. To Authorize the Voluntary Purchase of Certain Properties in Treece, Kansas,
Finally, I added the 892 bills identified as Indian-related in the other downloads to the dataset. Based on the addition of these bills, the database included 7,799 bills.

B. Coding Procedures

Prior to the commencement of coding, I developed a codebook setting out the different codes to be applied to each bill. For the most part, these codes mirror the universal codes used by congressional scholars. Table 7 lists the codes, their definitions, and their application to the bills.

**Table 7: Coding Scheme**

<table>
<thead>
<tr>
<th>Code/Variable</th>
<th>Definition</th>
<th>How Applied</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bill Number</td>
<td>Number assigned to the bill by the House or Senate</td>
<td>Downloaded from the Bill Status and Summary in the THOMAS.gov database</td>
</tr>
<tr>
<td>Congress</td>
<td>Session of the House that the bill was introduced in</td>
<td>Downloaded from the Bill Status and Summary in the THOMAS.gov database; was noted for both Senate and House bills</td>
</tr>
<tr>
<td>Bill Title</td>
<td>Title or name of the legislation</td>
<td>Downloaded from the Bill Status and Summary in the THOMAS.gov database</td>
</tr>
<tr>
<td>Major Action</td>
<td>Connotes status of the bill, committees referred to, other action taken on the bill</td>
<td>Downloaded from the Bill Status and Summary in the THOMAS.gov database</td>
</tr>
</tbody>
</table>

Endangered by the Cherokee County National Priorities List Site, and for Other Purposes, H.R. 3058, 111th Cong. (2009) (place name).
58. A Bill to Prohibit Authorized Committees and Leadership PACs from Employing the Spouse or Immediate Family Members of Any Candidate or Federal Office Holder Connected to the Committee, S. 130, 112th Cong. (2011) (no Indians).
287. JOHN, supra note 275; ADLER & WILKINSON, supra note 80.
<table>
<thead>
<tr>
<th>Date</th>
<th>action taken (described in the Major Action code)</th>
<th>Status and Summary in the THOMAS.gov database</th>
</tr>
</thead>
<tbody>
<tr>
<td>Latest Action</td>
<td>Connotes latest action on bill</td>
<td>Downloaded from the Bill Status and Summary in the THOMAS.gov database</td>
</tr>
<tr>
<td>Latest Action Date</td>
<td>States date of the last action taken on the bill (described in the Latest Action code)</td>
<td>Downloaded from the Bill Status and Summary in the THOMAS.gov database</td>
</tr>
<tr>
<td>Public Law Number</td>
<td>Public law citation number assigned to the bill upon its enactment; identifies the bill that passed both chambers and presentment</td>
<td>Identified from the action section of the Bill Status and Summary downloaded from the THOMAS.gov database</td>
</tr>
<tr>
<td>Enumerated</td>
<td>Indicates whether a bill has been enumerated or enacted (passed by both houses and not vetoed by President) or not enumerated (not passed by both houses or vetoed by President)</td>
<td>Determined by looking at the action section of the Bill Status and Summary downloaded from the THOMAS.gov database. Sometimes multiple bills with the same title or similar content were introduced in the same congressional session. Only bills that passed both chambers and became the public law were coded as enumerated.</td>
</tr>
<tr>
<td>Notes</td>
<td>Any notes on the legislation included in</td>
<td>Downloaded from the Bill Status and Summary in the THOMAS.gov database</td>
</tr>
</tbody>
</table>

288 Some bills included a Public Law number or citation. The Public Law number was not used as definitive evidence that the bill had been enumerated since some bill records included Public Law numbers for a related bill. The bill was coded as enumerated only if the action section noted that the bill had passed both houses, been signed into law, and became a public law.

289 This was done to ensure that the enactment rate was not artificially elevated. One of the problems with using bills as the unit of analysis is that duplicate or identical bills may be introduced during the same congressional session. While all these bills represent one policy proposal, only one of these bills will be enumerated. See Burstein et al., supra note 151 (distinguishing between bills and policy proposals). Duplicate, identical, and related bills were coded as non-enumerated; only the bill that passed both chambers and was signed into law was coded as enumerated. All bills coded as enumerated were double checked to ensure that duplicate bills were not accidently miscoded as enumerated.
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<table>
<thead>
<tr>
<th><strong>THOMAS.GOV Bill Status and Summary</strong></th>
<th><strong>THOMAS.govGOV database</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Related bills</strong></td>
<td><strong>Identifies related bills introduced across multiple Congresses; indicates that the bill may have been introduced in more than one Congress</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Downloaded from the Bill Status and Summary in the THOMAS.gov database; this information has not been used or verified</strong></td>
</tr>
<tr>
<td><strong>ENR/Public Law</strong></td>
<td><strong>Links to the Public Law Number and text of the final bill passed by the House and Senate</strong></td>
</tr>
<tr>
<td></td>
<td><strong>These links were identified in the major action and notes sections of the Bill Status and Summary</strong></td>
</tr>
<tr>
<td><strong>Reports</strong></td>
<td><strong>Identifies any House or Senate reports on the bill</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Downloaded from the Bill Status and Summary in the THOMAS.gov database</strong></td>
</tr>
<tr>
<td><strong>Tribe-Specific Bills</strong></td>
<td><strong>Legislation that affects a particular issue for one or more but not all tribes. These bills do not establish general federal Indian law and policy, but in some way govern the relationship between specific tribes and the United States government</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Usually identifiable by the title of the legislation or the summary from the THOMAS.gov database, which connotes the tribe(s) affected. This category includes bills dealing with: (1) lands or conservation in a specific area (e.g., the Rocky Mountains or certain counties in Arizona) because they only affect certain tribes; (2) Alaska Native Corporations (ANCSA entities); (3) Native Hawaiians even if the bill amended federal Indian law/policy to include Hawaiians (e.g., amendments to Indian Self-Determination and Education Act); (4) amendments to pan-tribal bills that only affect one or a few tribes, Alaska Natives, or Native Hawaiians; and (5) amendments to general bills that only affect one or a few tribes, Alaska Natives,</strong></td>
</tr>
</tbody>
</table>
Legislation impacting all tribes and designed specifically to develop federal Indian policy. The overriding purpose of these bills is to develop federal Indian policy by addressing specifically an issue faced by all Indian Nations or members of Indian Nations

Indians or Indian tribes were mentioned in the text, but nothing was specific to them, e.g., they are included in a list of groups that receive preferential treatment in employment. The purpose of the bill is not to address specifically an issue faced by all Indian Nations and the bill does not develop federal Indian policy but Indians are included in the larger policy focus of the legislation

Usually identifiable by the title of the legislation or the summary from the THOMAS.gov database. The category includes amendments to pan-tribal bills previously enacted

Usually identifiable by the title of the legislation or the summary from the THOMAS.gov database, but occasionally the text of the bill was searched to see how Indians were mentioned in the bill. Coding was based on the focus of the bill not its impact (e.g., how much attention is paid to Indians in the text). This category includes: (1) grant programs for Indian nations provided for under general legislation, especially if it is a general grant program that just includes Indian governments; (2) bills mandating studies of the affects/impacts of a policy on Indian nations; (3) amendments to general bills that include Indians along with other groups; and (4) general legislation that included provisions both for specific tribes and all tribes unless the pan-tribal provisions significantly changed federal Indian policy
Coding by the kind of bill allowed me to distinguish between bills that legislated over Indian affairs by developing federal Indian policy, bills that catered to the specific needs of a particular or few tribes, general legislation affecting Indians, and appropriations bills. My research assistant and I coded all the bills in the dataset into kinds.\textsuperscript{290} The data was coded in Microsoft Access. The majority of bills fit into one of the four categories. A smaller number, 10 to 15 percent, could fit into two of the four categories. The coder had to make a judgment call based on

\begin{table}
\centering
\begin{tabular}{|l|p{0.5\textwidth}|p{0.45\textwidth}|}
\hline
\textbf{General High-focus bills} & The bill includes specific provisions relating to Indians and these provisions develop federal Indian policy by addressing a specific issue faced by all Indian nations or people & Usually identifiable by the title of the legislation or the summary from the THOMAS.gov database, but occasionally the text of the bill was searched to see how Indians were mentioned in the bill. Coding was based on the focus of the bill not its impact. This category includes amendments to general bills that are specific to Indians \\
\hline
\textbf{Appropriations} & Bills appropriating spending by the federal government & Usually identifiable by the title of the legislation or the summary from the THOMAS.gov database. This does not include bills that authorize but do not make appropriations \\
\hline
\end{tabular}
\end{table}

\textsuperscript{290} I checked the coding using a random number generator. The random number generator was calculated by using the square root of the total number of bills in each Congress. A random number was assigned to each of the records. The records were then sorted by Congress and random number. The square root of each Congress was then used to identify the records to be double-checked. For example, if the square root was 17, the first 17 records were pulled and double-checked to make sure they were accurately coded as enumerated or not enumerated. The random number generator could not be reproduced, but the use of it eliminates selection bias in checking the coding. In addition to the random check, every bill designated “enumerated” was double-checked to ensure that it had passed both houses, survived presentment or veto, and became a public law.
prior coding practice, the codebook, and the content of the bill in coding these bills. Random spot checks were conducted both within Congresses and across Congresses to ensure that similar bills were coded the same way.\(^{291}\)

Several steps were taken to ensure intercoder reliability. First, my research assistant assisted in initial pilot testing of the coding scheme.\(^{292}\) Second, we ran a pilot test of intercoder reliability during coder training. I reviewed the codes applied by my research assistant to the 101st Congress and we discussed the differences in our application of the codes. We also discussed the application of codes for several Congresses, including the 110th, 109th, and 102nd. Finally, we conducted an independent test of intercoder reliability, using the data from the 104th Congress. My research assistant and I independently coded all 387 bills in the 104th Congress. We then ran several tests to check for intercoder reliability, including percent agreement (91.7 percent), Scott’s Pi (0.869), Cohen’s Kappa (0.869), and Krippendorff’s Alpha (nominal, 0.869).\(^{293}\) Based on these procedures and analyses, we feel confident that the differences in coding are minimal.

During the coding, 106 bills were identified that did not seem to have anything to do with Indians or Indian nations based on the bill summary. These bills were coded “not assigned.” All “not assigned” bills were compiled into a list in an Excel spreadsheet. The database was checked for bills with similar titles (to see if the bills were coded the same way and to identify all duplicate bills). The bills were then double-checked,

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291. I downloaded the unique ID number, bill number, congress, and kind code for each bill in the 100th to 112th Congresses into a Microsoft Excel spreadsheet. Then I searched the Excel file by the following categories (appropriations, native) to double-check the coding. The bills listed were all double-checked for consistency in coding based on terms in their titles and the codes applied to them. For example, I pulled all bills either with appropriations in their title or coded appropriations to make sure they were consistently and appropriately coded based on the bill title, summary, and coding scheme. I also ran a search by bill title to ensure that similar bills were coded the same way.

292. As a result of this pre-testing of the codes, we actually decided to eliminate “federal agency directive” from the codes used to classify kinds of Indian-related legislation.

293. The percent agreement was calculated by hand. All analyses (including the percent agreements) were run using ReCal 0.1 Alpha for 2 Coders. See Deen Freelon, ReCal: Intercooder Reliability Calculation as a Web Service, 5 INT’L J. OF INTERNET SCI. 20 (2010); Deen Freelon, ReCal2: Reliability for Coders, DFREEelon.ORG, http://dfreelon.org/utils/recallfront/recal2/, archived at http://perma.cc/9N4R-8NW8 (last visited Aug. 3, 2014).
often by looking at the bill text, to see if: (1) they should be included in the database; and (2) if so, how they should be coded. I excluded 85 bills from the dataset for any of the following reasons: (1) the bill summary or text did not actually mention Indians, tribes, Native Americans, Alaska Natives, or Native Hawaiians; (2) the bill used the term “Indian” or a tribal name, but only in reference to a place name or an organization not related to Indians; or (3) the bill was a private bill.294

294. The following list details the 85 excluded bills:
1. An Act to Establish the Chickasaw National Recreation Area, H.R. 4979, 94th Cong. (1976) (place name).
6. A Bill to Designate the Indian Health Facility in Ada, Oklahoma, the “Carl Albert Indian Health Care Facility,” S. 3184, 95th Cong. (1978) (no Indians; place name).
9. A Bill to Designate the Indian Health Facility in Ada, Oklahoma, the “Carl Albert Indian Health Care Facility,” H.R. 7150, 96th Cong. (1980) (no Indians; place name).
10. A Bill to Designate the Indian Health Facility in Ada, Oklahoma, the “Carl Albert Indian Health Care Facility,” S. 2801, 96th Cong. (1980) (no Indians; place name).


28. A Bill to Authorize the Acquisition of 25 Acres to be used for an Administrative Headquarters for Canaveral National Seashore, H.R. 3559, 100th Cong. (1987) (place name).


33. To Direct the Secretary of the Interior to Transfer All Right, Title, and Interest of the United States in Certain Property on San Juan Island, Washington, H.R. 2566, 101st Cong. (1989) (no Indians).


42. To Require the Secretary of the Interior to Determine the Suitability and Feasibility of Establishing the Mission San Antonio de Padua in California and Its Surrounding Historic and Prehistoric Archeological Sites as a Unit of the National Park System, and for Other Purposes, H.R. 295, 103d Cong. (1993) (no Indians).

43. To Amend the National Historic Preservation Act to Prohibit the Inclusion of Certain Sites on the National Register of Historic Places, and for Other Purposes, H.R. 5185, 103d Cong. (1994) (no Indians).

73. A Bill to Authorize Funding for the National Crime, S. 3601, 110th Cong.
C. Data

The dataset will be made available to the public upon completion of my own use of it.

75. To Amend the IRC to Provide Credit Rate Parity, S. 411, 110th Cong. (2007) (no Indians).
76. To Amend the IRC to Provide Credit Rate Parity, H.R. 1924, 110th Cong. (2007) (no Indians).
APPENDIX 2: DETAILS REGARDING INTRODUCED INDIAN-RELATED BILLS IN THE STUDY

The following table supplements Charts 5 and 6 of the Article by elaborating the counts and percentages of the kinds of Indian-related bills introduced in each Congress during the time period studied.
Table 8: Kinds of Introduced Indian-Related Bills by Congress

<table>
<thead>
<tr>
<th>Congress</th>
<th>Kind of Bill</th>
<th>Pan-Tribal</th>
<th>Tribe-Specific</th>
<th>General Low</th>
<th>General High</th>
<th>Approps.</th>
</tr>
</thead>
<tbody>
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<td></td>
<td>23.5%</td>
<td>46.2%</td>
<td>28.6%</td>
<td>1.6%</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(59/251)</td>
<td>(116/251)</td>
<td>(72/251)</td>
<td>(4/251)</td>
<td></td>
</tr>
<tr>
<td>95th</td>
<td></td>
<td>21.4%</td>
<td>50.0%</td>
<td>25.6%</td>
<td>2.3%</td>
<td>0.65%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(66/308)</td>
<td>(154/308)</td>
<td>(79/308)</td>
<td>(7/308)</td>
<td>(2/308)</td>
</tr>
<tr>
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<td>9.9%</td>
<td>53.3%</td>
<td>31.0%</td>
<td>4.5%</td>
<td>1.2%</td>
</tr>
<tr>
<td>97th</td>
<td></td>
<td>11.1%</td>
<td>44.2%</td>
<td>39.4%</td>
<td>2.4%</td>
<td>2.8%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(23/208)</td>
<td>(92/208)</td>
<td>(82/208)</td>
<td>(5/208)</td>
<td>(6/208)</td>
</tr>
<tr>
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<td></td>
<td>15.5%</td>
<td>36.7%</td>
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<td>4.5%</td>
<td>4.1%</td>
</tr>
<tr>
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<td>(97/264)</td>
<td>(103/264)</td>
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<td>(11/264)</td>
</tr>
<tr>
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<td>39.3%</td>
<td>4.7%</td>
<td>3.8%</td>
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<tr>
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<td>(95/257)</td>
<td>(101/257)</td>
<td>(12/257)</td>
<td>(10/257)</td>
</tr>
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</tr>
<tr>
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<td>(11/324)</td>
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<td>5.2%</td>
<td>4.6%</td>
</tr>
<tr>
<td></td>
<td></td>
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<td>5.1%</td>
</tr>
<tr>
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<td>(126/370)</td>
<td>(141/370)</td>
<td>(10/370)</td>
<td>(19/370)</td>
</tr>
<tr>
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<td>3.5%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(59/455)</td>
<td>(112/455)</td>
<td>(248/455)</td>
<td>(20/455)</td>
<td>(16/455)</td>
</tr>
<tr>
<td>104th</td>
<td></td>
<td>10.9%</td>
<td>23.9%</td>
<td>55.0%</td>
<td>4.7%</td>
<td>5.4%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(46/422)</td>
<td>(101/422)</td>
<td>(232/422)</td>
<td>(20/422)</td>
<td>(23/422)</td>
</tr>
<tr>
<td>105th</td>
<td></td>
<td>12.5%</td>
<td>21.8%</td>
<td>53.0%</td>
<td>4.6%</td>
<td>7.9%</td>
</tr>
<tr>
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<td>9.8%</td>
<td>24.7%</td>
<td>54.0%</td>
<td>5.1%</td>
<td>6.3%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(60/613)</td>
<td>(152/613)</td>
<td>(331/613)</td>
<td>(31/613)</td>
<td>(39/613)</td>
</tr>
<tr>
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<td></td>
<td>8.4%</td>
<td>22.1%</td>
<td>58.0%</td>
<td>6.1%</td>
<td>5.4%</td>
</tr>
<tr>
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<td>(131/593)</td>
<td>(344/593)</td>
<td>(36/593)</td>
<td>(32/593)</td>
</tr>
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<td>5.6%</td>
</tr>
<tr>
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<td></td>
<td>(76/689)</td>
<td>(150/689)</td>
<td>(387/689)</td>
<td>(37/689)</td>
<td>(39/689)</td>
</tr>
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<td>60.6%</td>
<td>5%</td>
<td>2.5%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(61/670)</td>
<td>(152/670)</td>
<td>(406/670)</td>
<td>(34/670)</td>
<td>(17/670)</td>
</tr>
<tr>
<td>110th</td>
<td></td>
<td>10%</td>
<td>29.1%</td>
<td>50.9%</td>
<td>6.5%</td>
<td>3.6%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(55/554)</td>
<td>(161/554)</td>
<td>(282/554)</td>
<td>(36/554)</td>
<td>(20/554)</td>
</tr>
<tr>
<td>111th</td>
<td></td>
<td>12.5%</td>
<td>35.7%</td>
<td>41.1%</td>
<td>6.1%</td>
<td>4.5%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(45/358)</td>
<td>(128/358)</td>
<td>(147/358)</td>
<td>(22/358)</td>
<td>(16/358)</td>
</tr>
<tr>
<td>112th</td>
<td></td>
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<td>32.0%</td>
<td>43.5%</td>
<td>5.0%</td>
<td>5.3%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(45/319)</td>
<td>(102/319)</td>
<td>(139/319)</td>
<td>(16/319)</td>
<td>(17/319)</td>
</tr>
</tbody>
</table>
APPENDIX 3: ADDITIONAL ANALYSIS OF THE CBP DATA

The following figures supplement Table 6 in the Article. Table 9 compares the enactment rate by Congress for the Native American Affairs subtopic in the CBP dataset with the Indian-related bills. It shows that the CBP data largely confirms the results from the dataset used in this study.

Table 9: Comparison of Enactment Rates of Indian-Related Bills and Native American Affairs Bills in CBP Database by Congress

<table>
<thead>
<tr>
<th>Congress</th>
<th>Native American Affairs Bills</th>
<th>Indian-Related Bills</th>
</tr>
</thead>
<tbody>
<tr>
<td>94th (1975-77)</td>
<td>8.5% (14/163)</td>
<td>8.8%</td>
</tr>
<tr>
<td>95th (1977-79)</td>
<td>16.9% (34/201)</td>
<td>16.5%</td>
</tr>
<tr>
<td>96th (1979-81)</td>
<td>20.8% (26/125)</td>
<td>20.2%</td>
</tr>
<tr>
<td>97th (1981-83)</td>
<td>22.0% (24/109)</td>
<td>20.8%</td>
</tr>
<tr>
<td>98th (1983-85)</td>
<td>25.6% (32/125)</td>
<td>20.8%</td>
</tr>
<tr>
<td>99th (1985-87)</td>
<td>19.8% (22/111)</td>
<td>18.7%</td>
</tr>
<tr>
<td>100th (1987-89)</td>
<td>19.4% (30/154)</td>
<td>22.8%</td>
</tr>
<tr>
<td>101st (1989-91)</td>
<td>12.1% (17/141)</td>
<td>17.6%</td>
</tr>
<tr>
<td>102nd (1991-93)</td>
<td>13.0% (20/154)</td>
<td>15.1%</td>
</tr>
<tr>
<td>103rd (1993-95)</td>
<td>16.1% (22/137)</td>
<td>14.9%</td>
</tr>
<tr>
<td>104th (1995-97)</td>
<td>15.5% (18/116)</td>
<td>14.2%</td>
</tr>
<tr>
<td>105th (1997-99)</td>
<td>8.4% (11/130)</td>
<td>11.9%</td>
</tr>
<tr>
<td>106th (1999-2001)</td>
<td>13.9% (23/165)</td>
<td>12.2%</td>
</tr>
<tr>
<td>107th (2001-03)</td>
<td>5.7% (10/174)</td>
<td>7.1%</td>
</tr>
<tr>
<td>108th (2003-05)</td>
<td>8.8% (17/192)</td>
<td>8.4%</td>
</tr>
<tr>
<td>109th (2005-07)</td>
<td>7.8% (13/166)</td>
<td>10.0%</td>
</tr>
<tr>
<td>110th (2007-09)</td>
<td>6.7% (12/179)</td>
<td>7.4%</td>
</tr>
<tr>
<td>111th (2009-11)</td>
<td>4.7% (7/147)</td>
<td>8.4%</td>
</tr>
</tbody>
</table>
Chart 10 supplements the data in Table 6 by displaying the enactment rates for some of the CBP subtopics. I analyzed the CBP subtopics in Table 6 for enactment rates by Congress. Legislators introduced bills on every subtopic in every Congress studied. Congress did not enact bills in every subtopic during every congressional session. Congress did not enact any bills in certain sessions in the Taxation, Tax Policy and Tax Reform (100th, 102nd, 104th), Immigration and Refugee Issues (97th), and U.S. Dependencies and Territories (102nd, 103rd, 104th, 107th, 109th) subtopics. Chart 10 shows the enactment rates in percentages for the Native American Affairs, D.C. Affairs, and U.S. Dependencies subtopics by Congress.\textsuperscript{295} It includes the Indian-related bills data, but no direct comparison can be made between the CBP subtopics and the Indian-related bills data.

\textsuperscript{295} I selected these three subtopics based on similarities with Indians, including higher than average enactment rates.
APPENDIX 4: BREAKDOWNS OF CRS SUBCATEGORIES OF INDIAN-RELATED LEGISLATION

The following table supplements Part III.B of the Article by showing the breakdown of the CRS subcategories of Indian-related legislation from 1975 to 2011.

*Table 10: CRS Subcategories of Indian-Related Bills by Congress, 94th to 102nd Congresses*

<table>
<thead>
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<th>Subcategory</th>
<th>94th</th>
<th>95th</th>
<th>96th</th>
<th>97th</th>
<th>98th</th>
<th>99th</th>
<th>100th</th>
<th>101st</th>
<th>102nd</th>
</tr>
</thead>
<tbody>
<tr>
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<td>–</td>
<td>–</td>
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<td>–</td>
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<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Claims</td>
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<td>67</td>
<td>84</td>
<td>53</td>
<td>43</td>
<td>39</td>
<td>50</td>
<td>53</td>
<td>43</td>
</tr>
<tr>
<td>Courts</td>
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<td>–</td>
<td>16</td>
<td>12</td>
<td>6</td>
<td>8</td>
<td>4</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
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<td>–</td>
<td>–</td>
<td>40</td>
</tr>
<tr>
<td>Education</td>
<td>–</td>
<td>37</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Gambling operations</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Housing</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>1</td>
<td>18</td>
</tr>
<tr>
<td>Hunting &amp; fishing rights</td>
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<td>7</td>
<td>20</td>
<td>3</td>
<td>5</td>
<td>10</td>
<td>13</td>
<td>15</td>
<td>3</td>
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<tr>
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<td>77</td>
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<td>103</td>
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<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
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<td>–</td>
</tr>
<tr>
<td>Medical care</td>
<td>–</td>
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<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>17</td>
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<td>–</td>
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<td>Youth</td>
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<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
</tbody>
</table>

*Table 11: CRS Subcategories of Indian-Related Bills by*  

\(^{296}\) Indicates that the subcategory was not used to classify bills introduced in that Congress. Total numbers of bills are not included because coding of these subcategories was not exclusive. The same bill could be included in one or more subcategories.
### Congress, 103rd to 110th Congresses

<table>
<thead>
<tr>
<th>Category</th>
<th>103rd</th>
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<th>105th</th>
<th>106th</th>
<th>107th</th>
<th>108th</th>
<th>109th</th>
<th>110th</th>
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<td>54</td>
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<tr>
<td>Claims</td>
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<td>–</td>
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<td>38</td>
<td>37</td>
</tr>
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<td>10</td>
<td>6</td>
<td>11</td>
<td>–</td>
<td>–</td>
<td>12</td>
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<td>204</td>
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<td>223</td>
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<td>Medical care</td>
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<td>81</td>
<td>92</td>
<td>101</td>
<td>101</td>
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<tr>
<td>Social &amp; development programs</td>
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<td>–</td>
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<tr>
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<tr>
<td>Women</td>
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<td>–</td>
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297 Data for the 111th and 112th Congresses are excluded because the Library of Congress introduced a new system for subcategorizing legislation starting in the 111th Congress. The only three codes used in the 111th and 112th Congresses are: Indian claims, Indian lands and resource rights, and Indian social and development programs.

298 These bills were labeled “Indian lands and resource rights” in the 110th Congress.