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## Reading Indian Law: Evaluating Thirty Years of Indian Law Scholarship

Grant Christensen

Melissa L. Tatum

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## READING INDIAN LAW: EVALUATING THIRTY YEARS OF INDIAN LAW SCHOLARSHIP

Grant Christensen\* & Melissa L. Tatum\*\*

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\*Associate Professor of Law at the University of North Dakota and Director of the Indian Law Certificate program. J.D., Ohio State University 2006, LL.M. Indigenous Peoples Law & Policy, University of Arizona 2010. Special thanks to Anne Mostad-Jensen for her assistance in collecting and recording material upon which this research is based.

\*\*Research Professor of Law at the University of Arizona. J.D., University of Michigan, 1992. Thanks to Maureen Garmon, and a special debt of gratitude to Cynthia Condit, for their assistance in collecting and recording material upon which this research is based.

## I. INTRODUCTION

There are many motivations for creating a ranking of legal scholarship.<sup>1</sup> The idea behind this particular version arose, appropriately enough, out of a conversation at the Federal Bar Association's annual Indian Law Conference in April 2014. That conference, which celebrated its 40th anniversary in 2015, has witnessed the vast changes that have occurred in the field of Indian law over the last few decades. Those changes have included a tremendous increase in the number of academics teaching and course offerings,<sup>2</sup> and a veritable explosion of scholarly articles exploring virtually every conceivable aspect of the field, from abstract theoretical concepts<sup>3</sup> to practical strategies for navigating federal courts.<sup>4</sup>

Thirty years ago the Indian law community was small enough that it was possible for even a new scholar to the field to keep up with most of the Indian law scholarship published annually, from thought provoking student notes<sup>5</sup> to the latest work by noted Indian law scholars.<sup>6</sup> However, as our field has proliferated, it has also fragmented.<sup>7</sup> How, then, does one keep track of what is being written? From a promotion and tenure perspective, how does one evaluate the quality of a placement for an article in such a specialized field, particularly when Indian law is not even offered at most U.S. law schools? Answering these questions requires knowing what articles are being published in what journals and who is citing them. From there emerged the idea of creating a comprehensive database containing all scholarly Indian law articles and tracking their

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1. For a discussion of the reasons to rank law reviews, many of which are equally applicable to ranking scholarship within a particular legal field, see Gregory Scott Crespi, *Ranking Specialized Law Reviews: A Methodological Critique*, 26 FLA. ST. U. L. REV. 837, 839 (1999) (“[O]ne might be an author interested in the comparative merits of specialized law reviews as a way of quickly and widely communicating her research findings to a target group of people in her field of expertise, as compared to more general law reviews. Another author might be primarily interested in the comparative prestige of the members in a group of specialized law reviews, or in their prestige compared to particular flagship law reviews. One might even be a law school faculty member or dean seeking to make a hiring, promotion, or tenure decision, who might covertly seek a means for making a rough assessment of the merits of a candidate’s scholarship based on its publication in a relatively prestigious specialized law review, rather than on the merits of the writing itself.”).

2. For example, in 1980 there were thirty faculty listed as teaching Indian law in the AALS Directory of Law Teachers. By 2010 that number had more than quadrupled to one-hundred twenty seven.

3. See, e.g., Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299 (2002); Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799 (2007); Richard Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617 (1994).

4. See, e.g., Tracy Labin, *We Stand United Before the Court: The Tribal Supreme Court Project*, 37 NEW ENG. L. REV. 695 (2003); Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753 (1992); Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973 (2010).

5. See Erica Rosenberg, Note, *Native Americans’ Access to Religious Sites: Underprotected Under the Free Exercise Clause?*, 26 B.C. L. REV. 463 (1985).

6. See Richard B. Collins, *The Future Course of the Winters Doctrine*, 56 COLO. L. REV. 481 (1985).

7. This fragmentation is evident not only in the growth of Indian law faculty, but in the variety of courses offered. Law schools have not developed specialized Indian law programs that teach courses in niche fields within the discipline like the Indian Child Welfare Act, Taxation in Indian Country, and Tribal Natural Resources. See Gloria Valencia-Weber, *When the State Bar Exam Embraces Indian Law: Teaching Experiences and Observations*, 82 N.D. L. REV. 741 (2006); see also James M. Grijalva, *Compared When? Teaching Indian Law in the Standard Curriculum*, 82 N.D. L. REV. 697 (2006); see also G. William Rice, *There and Back Again – An Indian Hobbit’s Holiday “Indians Teaching Indian Law,”* 26 N.M. L. REV. 169 (1996).

citations.

Although we realized that an increasingly large number of Indian law articles were published each year, we were surprised at the actual number. That surprise led us to alter our plans slightly and to give more thought to defining parameters for what articles should be included in our ranking system – resulting in a final list of 3,334 pieces of scholarship. We explain those parameters and our methodology in Part III below. Before doing so, however, we first provide a brief overview of the evolution of Indian law scholarship; that is, how the “thinking” in Indian law has changed. Once Part II has provided that context, and Part III has set forth our methodology, Part IV presents the list of the top 100 articles that emerged from our rankings. Part V offers some additional observations, and Part VI presents a few words in conclusion.

## II. EVOLUTION OF THINKING IN INDIAN LAW

Indian law truly emerged as a separate academic discipline in the 1970's.<sup>8</sup> Professor Monroe Price published the first casebook in 1973,<sup>9</sup> which was followed later that decade by the first edition of Getches, et al.'s landmark *Federal Indian Law: Cases and Materials*.<sup>10</sup> That, probably not coincidentally, was the same decade that President Nixon announced the official start of the self-determination, or government-to-government relationship, era.<sup>11</sup> The United States Supreme Court's 1978 decision in *Oliphant v. Suquamish Indian Tribe*<sup>12</sup> and its 1981 decision in *Montana v. United States*,<sup>13</sup> both of which resulted in significant restrictions to tribal jurisdiction,<sup>14</sup> also contributed to the emergence of Indian law as a discrete academic discipline. The publication of the initial volumes of the Navajo Reporter<sup>15</sup> and the start of the Navajo Common Law Project, explicit milestones in the development and recognition of tribal courts, also contributed to the growth in demand for lawyers with an expertise in tribal law.<sup>16</sup>

A close connection has always existed between those who teach and those who

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8. Jennifer Hendry & Melissa L. Tatum, *Justice for Native Nations: Insights from Legal Pluralism*, 60 ARIZ. L. REV. 91, 95 (2018). Indeed, in compiling our database, we discovered that in 1980, the Current Index to Legal Periodicals listed Indian law articles under the topic heading “Ethnic Problems.”

9. MONROE E. PRICE, *LAW AND THE AMERICAN INDIAN* (1973).

10. See DAVID GETCHES ET AL., *FEDERAL INDIAN LAW: CASES AND MATERIALS* (1st ed. 1979).

11. President Richard M. Nixon, Special Message to the Congress on Indian Affairs, 1970 Pub. Papers 564 (July 8, 1970).

12. 435 U.S. 191 (1978).

13. 450 U.S. 544 (1981).

14. Perhaps unsurprising, some of the most cited Indian law articles addressed these restrictions. See Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005); see also Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657 (2013); Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 UCLA L. REV. 553 (2009); Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973 (2010).

15. Volume 1 of the Navajo Reporter encompassed decisions issued from 1969-1978, and Volume 2 contained opinions issued in 1979.

16. See Tom Tso, *The Process of Decision-Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 232 (1989). The U.S. Supreme Court had, of course, addressed the authority of tribal courts in *Williams v. Lee*, 358 U.S. 217 (1959), but it was not until the 1970's and the new era of federal Indian policy that the existence and authority of tribal courts reached the awareness of the general bench and bar.

practice in the field of Indian law.<sup>17</sup> Indeed, the first wave of academics specializing in the field were public interest lawyers who left full-time practice for academia.<sup>18</sup> As one might predict, these lawyers-turned-scholars wrestled with questions involving where tribal governments fit in the federal system,<sup>19</sup> the source of federal authority over tribes,<sup>20</sup> and separation of powers questions about the appropriate roles of the legislative, executive, and judicial branches.<sup>21</sup> While these questions remain at the core of federal Indian law, the field quickly spread beyond federal-state-tribal relations to encompass tribal law,<sup>22</sup> the newly emerged field of international laws relating to Indigenous people,<sup>23</sup> and, eventually, to comparative Indigenous peoples' law.<sup>24</sup>

Within this broad spectrum, some scholars focused on keeping the U.S. Supreme Court intellectually honest,<sup>25</sup> others tackled the task of “decolonizing” federal Indian “control” law,<sup>26</sup> and still others largely abandoned domestic Indian law to focus on the international arena.<sup>27</sup> Emerging scholars also began focusing on particular specialty areas such as family law,<sup>28</sup> gaming law,<sup>29</sup> and violence against Native women.<sup>30</sup> Indian law also

17. Hendry & Tatum, *supra* note 8, at 93–94.

18. The preface to the sixth edition of the leading textbook provides a brief overview of the history of the field, along with the stunning statement that “[i]n the thirty years since our first edition was published, Indian law has expanded at warp speed (at least relative to the typical pace for change in the law). . . . More than eighty percent of the cases in this volume did not exist when the first edition came out in 1978.” DAVID GETCHES ET AL., *FEDERAL INDIAN LAW: CASES AND MATERIALS*, pg. v (6th ed. 2011). As the authors explain:

During the mid–1970s, David Getches, Charles Wilkinson, and Daniel Rosenfelt prepared the first edition after several years of representing Indian tribes and groups through legal services programs, particularly the Native American Rights Fund (NARF). The content and organization was based on materials prepared at NARF to train Indian legal services attorneys. At that point the field seemed arcane, but the authors believed it had promise as an intellectually exciting subject, charged with potent implications for a largely forgotten minority group and great symbolic force for our system of law. Teachers in a few law schools, including Professors Wilkinson and Rosenfelt who had become full-time law teachers, were offering Indian law courses.

*Id.*

19. See Melissa L. Koehn, *Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts*, 29 ARIZ. ST. L.J. 705, 766 (1997).

20. See Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 210 (1984).

21. See David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001).

22. Robert Yazzie, *Life Comes From It: Navajo Justice Concepts*, 24 N.M. L. REV. 175, 176–181 (1994).

23. See Jo M. Pascualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 WIS. INT'L L.J. 51 (2009).

24. See Robert J. Miller & Jacinta Ruru, *An Indigenous Lens Into Comparative Law: The Doctrine of Discovery in the United States and New Zealand*, 111 W. VA. L. REV. 849 (2009).

25. See Phillip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

26. See Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 269 (1997).

27. See Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57 (1999).

28. See Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577 (2000).

29. See Steven Andrew Light and Kathryn R.L. Rand, *The Hand That's Been Dealt: The Indian Gaming Regulatory Act at 20*, 57 DRAKE L. REV. 413 (2009).

30. See Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal*

began attracting the attention of “non-specialists” or those who specialized in other areas but recognized the value of federal Indian law for exploring complex theoretical questions.<sup>31</sup>

In other words, Indian law “took off.” The 1984-1985 AALS directory of law teachers listed thirty-eight professors who identified themselves as teaching in the field of Indian law.<sup>32</sup> By 1993-94, that number had almost doubled to seventy-five, and in the very next year it exploded virtually overnight to 121. The number of teachers listed in the directory hit a high of 135 in 2006-2007 and again in 2011-2012, but has largely hovered in the 120s.<sup>33</sup> In 2014-2015, 117 faculty listed themselves as working in the field.

These increased numbers of faculty resulted in increased publications. In 1985, the first year in our database, thirty-five articles were published. By 1990, the annual total was fifty-nine articles. By 1995, that total had doubled to 119 articles. A decade later, the total was 151 articles. The year 2006 saw the publication of a whopping 207 articles, although the annual totals generally ranged between 120 and 150 articles for the years 2007-2015.

In 1987, Judith Royster and Rory SnowArrow Fausett compiled a comprehensive listing of Indian law articles published in the sixty-five-year period between 1922 and 1986.<sup>34</sup> That list contains 1,280 articles.<sup>35</sup> In contrast, our database, which covers less than one-half the time period, contains more than two and one-half times the number of articles (3,334). The expansion, however, is even greater than those numbers initially suggest as Royster and Fausett’s compilation is truly comprehensive; encompassing all Indian law articles listed in volumes one to twenty-eight of the *Index to Legal Periodicals*, supplemented by several additional sources.<sup>36</sup> As we explain below in our methodology section, we imposed boundaries on our database which screened out articles which would have been included in the Royster and Fausett data set. Those boundaries focused our data set on scholars and articles relating to Indian law in the United States, while Royster and Fausett were more comprehensive, both in terms of audience (including, for example, articles published in bar journals)<sup>37</sup> and coverage (including, for example, articles

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*Indian Law*, 38 SUFFOLK U.L. REV. 455 (2005).

31. See Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989); Wendy Collins Perdue, *Conflicts and Dependent Sovereigns: Incorporating Indian Tribes into a Conflicts Course*, 27 U. TOL. L. REV. 675 (1996). Indian law specialists who work in other areas also sought to demonstrate the relevance of Indian law to other legal disciplines. See Frank Pommersheim, “Our Federalism” in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts’ Teaching and Scholarly Community, 71 U. COLO. L. REV. 123 (2000); John P. La Velle, *Sanctioning a Tyranny: The Diminishment of Ex Parte Young, Expansion of Hans Immunity, and Denial of Indian Rights in Coeur d’Alene Tribe*, 31 ARIZ. ST. L. J. 787 (1999).

32. While we recognize these numbers can be both over- and under-inclusive, as there can be a lag in adding new people and removing those who have left teaching and/or left Indian law as a specialty, the numbers are roughly reflective of the number of teachers identified as specializing in the field, and are sufficient for our purposes to indicate the quickly increasing popularity of the field.

33. Specifically, in 2002-2003, the count was 124; in 2003-2004, 125; in 2004-2005, 126; in 2005-2006, 129; 2006-2007, 135; 2007-2008, 134; 2008-2009, 122; 2009-2010, 131; 2010-2011, 130; 2011-2012, 135; 2012-2013, 129; 2013-2014, 123; and 2014-2015, 117.

34. Rory SnowArrow Fausett & Judith V. Royster, *Courts and Indians: Sixty-Five Years of Legal Analysis: Bibliography of Periodical Articles Relating to Native American Law, 1922-1986*, 7 Legal Reference Servs. Q. 107 (1987).

35. *Id.*

36. *Id.*

37. *Id.* at 112. For example the authors identify some articles appearing in bar journals going all the way back

published in Canadian law journals).<sup>38</sup>

### III. METHODOLOGY: THE SCORING AND SELECTION PROCESS

Any ranking system is necessarily dependent upon its methodology. A ranking system's output will vary dramatically depending upon the choices and assumptions made, the variety of variables selected, and how each factor is weighed when creating a final score.<sup>39</sup> It is common and best practice for quantitative work to include an open and honest discussion of the methodology used to achieve any reported results so as to help the reader understand and independently evaluate the rankings presented.<sup>40</sup> In accordance with that best practice, we detail our methodology here.

Our discussion of methodology is broken down into three related sections. The first two discuss the selection and scoring of law review articles. One of the inherent challenges with the scope of this endeavor is to ensure that we find all of the Indian law scholarship. If our ranking system failed to find a relevant article it would be omitted from further consideration and our results would be correspondingly incomplete. Section A documents how we compiled a complete list of Indian law scholarship. After finding all of the relevant articles we then had to measure their relative impact in order to rank them against each other. Section B discusses the process by which we created a score for each article that could then be used for objective comparison and ultimately to provide a definite rank of each article's impact. Finally, Section C focuses on the recognition of some inherent limitations in the methodology. This section includes a discussion of the potential critiques that may be raised to our methodology and documents our attempt to overcome these criticisms.

#### A. *How the Articles Were Selected*

We chose 1985 as our start date for three primary reasons. First, and perhaps most importantly, a comprehensive list of Indian law articles published from 1922-1986 already existed.<sup>41</sup> We saw no need to duplicate that excellent work, although starting in 1985 provided two years of overlap between the two data sets, allowing for some comparisons to be drawn between the articles collected using each methodology. Second, the noticeable increases in number of faculty and number of articles began in the late 1980s and early

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to the 1930s. "Some Interesting Cases on Bankruptcy as Regarding Osage Indian Headrights, 3 OKLA. ST. B.J. 146 (1932)."

38. See, e.g., Howard E. Staats, *Some Aspects of the Legal Status of Canadian Indians*, 3 OSGOODE HALL L.J. 36 (1964).

39. See Joanna L. Grossman, *Feminist Law Journals and the Ranking Conundrum*, 12 COLUM. J. GENDER & L. 522 (2003) (Discussing how the metrics chosen effect both law journal ranking and law school ranking by U.S. News and World Report); Timothy P. Glynn & Sarah E. Waldeck, *Penalizing Diversity: How School Rankings Misled the Market*, 42 J.L. & EDUC. 417 (2013) (discussing how focusing on some factors and ignoring others changes a ranking system and can distort the ultimate outcome).

40. See Gregory Scott Crespi, *Ranking Specialized Law Reviews: A Methodological Critique*, 26 FLA. ST. U. L. REV. 837, 843 (1999). In reviewing a ranking methodology suggested for specialty law reviews, the author highlights that a weakness of ranking systems is when they fail to provide a justification for their assumptions and methodology deployed. *Id.* "This important threshold methodological choice merits at least some explicit discussion by the authors." *Id.*

41. Fausett & Royster, *supra* note 34.

1990s, so starting our collection in 1985 allowed us to capture these changes. Finally, starting in 1985 and ending in 2015<sup>42</sup> provided us with data spanning a thirty-year period, which seemed sufficiently long to allow us to capture trends and draw reasonable conclusions, but not so large as to be overwhelming.

Our goal was to capture all scholarly Indian law articles published from 1985-2015. We used the printed editions of the *Index to Legal Periodicals* as our primary source, searching under all relevant topic headings. The exact topic headings varied from year to year, but we started with “Indian” and “tribal” and followed all listed cross-references and “see also” references.<sup>43</sup>

Our focus on scholarly articles meant we excluded articles published in bar journals and trade journals. Our decision to exclude these publications is not intended to suggest that they are of less value. It is simply intended to signal that they are written for a different audience and that they serve a different, though not less important, purpose. We also excluded transcripts of panel discussions and of question and answer sessions. We did include student-written articles and notes, although we excluded case commentaries and “recent update” sections which served a mere reporting function (that is, which did not contain a substantial analytical component). We also excluded articles published in military law journals.

Since our focus is on U.S. academics and on the developments in federal Indian law, we excluded foreign journals and articles published in U.S. journals which focused exclusively on other countries with no comparative component.<sup>44</sup> Excluding foreign journals did exclude a few articles authored by academics working at schools in the United States, but the number was sufficiently small enough that it did not appear to impact the totals or the rankings. This conclusion was reinforced by the fact that many (if not most) of the articles written by U.S. academics and published in foreign journals had American analogs – that is, the author had written on the same or similar topic for a U.S. audience.

We did include all articles published in U.S. academic law reviews, except, as stated earlier, those with no comparative or U.S. component or which simply reported and summarized a case or statute. Our goal was to determine which articles were having the most impact in the United States, and we decided that U.S. academics, attorneys, and judges were more likely to publish in U.S. law reviews and to read articles published in those journals.

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42. Ending the database in 2015 allowed us to be reasonably certain we captured all articles listed with a publication date of 2015. While technology has decreased the lag time between an article appearing in print and that article appearing in an index, that lag time has not completely disappeared. In addition, as noted earlier, delays in the publication process can result in an article dated 2015 not actually appearing in print until 2016.

43. The number and variety of terms used in the Index was interesting. In some years the Journal would break out the list of relevant articles by specific tribe, other years included cross reference to agencies like the Bureau of Indian Affairs or the U.S. Department of Interior. Articles about Native Alaskans and Hawaiians were sometimes, but not always, broken out separately. The lack of consistency among index terms made the process of gathering the articles more time intensive but ultimately, by following all cross-listed terms, we feel that we have used the Index to help identify all relevant articles.

44. For an example; we included Summer Kupau, *Judicial Enforcement of “Official” Indigenous Languages: A Comparative Analysis of the Maori and Hawaiian Struggles for Cultural Language Rights*, 26 U. HAW. L. REV. 495 (2005), because of its comparative focus on an American indigenous group, but excluded Heidi Kai Guth, *Dividing the Catch: Natural Resource Reparations to Indigenous Peoples—Examining the Maori Fisheries Settlement Act*, 24 U. HAW. L. REV. 179 (2001), because it dealt exclusively with Maori rights.



We did face one very difficult decision in setting parameters for the database, and that was whether to include articles printed in journals published by an entity other than a law school. After surveying the publications on this list, we ultimately decided not to include them. Most of these journals were published by a trade association for a practitioner-focused audience or were otherwise targeted for non-law academics.<sup>45</sup> Since we were interested in scholarly articles impacting law audiences, we made the decision to exclude these journals. This did result in excluding some articles that would otherwise fit our criteria, such as Milner Ball's *Constitution, Court, Indian Tribes*, published in the American Bar Foundation's Research Journal.<sup>46</sup> Ultimately, however, for the sake of consistency, we opted to include only academic law journals published by U.S. law schools.

Our process did hit one obstacle. As mentioned earlier, we used the *Index to Legal Periodicals (ILP)* as our primary source. Although the topic headings sometimes morphed, it was easy to follow the changes and to stay consistent as to which articles we included in the database. When we reached 2011-2012 and 2012-2013, however, we noticed several changes in the *ILP*. These changes included fluctuations in the period of time covered by each volume (prior to this time, each volume had covered a twelve-month span from September through August), a reduction or elimination in cross-references and "See also" references, and most troubling, a substantial decrease in the number of articles indexed. Cynthia Condit, a reference librarian and Professor of Practice at the University of Arizona, investigated the changes.

Her investigation revealed that in June 2011, the H.W. Wilson Company, which published the *ILP*, was purchased by EBSCO. In 2013 EBSCO purchased Grey House Printing and turned over all print Wilson product publishing to Grey House, including the *ILP*. Condit contacted Grey House to inquire about the changes and about whether a list of index topics existed, so we could determine if we were overlooking possible relevant topic headings. Grey House informed Condit that no list of index topics existed and they had no information about the other changes.

We were thus left with a gap, and to remedy that gap, we turned to the bibliography of law review articles compiled by the National Indian Law Library.<sup>47</sup> That bibliography began in 2003, enabling us to compare the articles contained on that list to the articles listed in the *ILP* before the change in ownership. We discovered they were almost identical as to the articles meeting our parameters,<sup>48</sup> so for the years 2011- 2015, we supplemented the articles listed in the *ILP* with those listed in the NILL's bibliography. According to our

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45. These include, for example, the American Journal of Family Law (published by Professional Education Systems, Inc.); the Journal of Legal Pluralism and Unofficial Law (published by Taylor & Francis for the Commission on Legal Pluralism); the Administrative Law Review (published by the students of American University Washington College of Law in conjunction with the American Bar Association's Section of Administrative Law and Regulatory Practice); and Western Legal History (the Journal of the Ninth Judicial Circuit Historical Society).

46. Milner S. Ball, *Constitution, Court, Indian Tribes*, AM. B. FOUND. RES. J. (Winter 1987), [http://www.jstor.org/stable/828387?seq=1&cid=pdf-reference#references\\_tab\\_contents](http://www.jstor.org/stable/828387?seq=1&cid=pdf-reference#references_tab_contents).

47. The National Indian Law Library is part of the Native American Rights Fund. NILL's bibliography can be found at <https://www.narf.org/nill/bulletins/archive.html> (last visited Jan. 31, 2018).

48. The Index to Legal Periodicals also includes, for example, articles published in a number of foreign journals, which we are not including in our database and which are not listed in the NILL bibliography.

test comparisons, this should maintain consistency regarding which articles are included in the database.<sup>49</sup>

*B. How the Articles Were Scored*

A total of 3,334 Indian law articles were identified in the thirty-year period from 1985-2015.<sup>50</sup> To measure the impact of each article we turned to citation counts available in Lexis and Westlaw. While a pure citation count may be imperfect,<sup>51</sup> it is recognized as a “tractable methodology [that] provides an objective measure of quality.”<sup>52</sup> Despite its limitations, we have selected citation count as the proper measure of an article’s impact because, if nothing else, it is both objective and reasonably correlated to how useful others in the field find the scholarly work. Moreover, we include citation count by courts and in treatises as additional indicia of scholarly quality that overcomes some of the objections raised by scholars who worry about law review impact ranking systems based entirely upon citation count in law reviews.<sup>53</sup>

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49. We are aware of one article that otherwise meets all of our criteria but which was omitted from both the National Indian Law Library and the Journal of Legal Periodicals ‘Indian’ and ‘Tribal’ subheadings, and thus was not captured in the original dataset. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015). By the time the article was discovered the initial collection of citations and ranking was complete and had been for several months. For reasons explained in more detail in the methodology section it is not possible to merely add a 3,335th article to the rankings because the citation counts are pulled at a designated moment in time. However given the strong reception *Beyond the Indian Commerce Clause* has received, it is highly likely that it would have ranked in the top quarter, and potentially among the top 10 articles collected during the thirty year period of this empirical study.

50. While the methodology identified 3,334 articles we are aware of at least one Indian law article missed by our initial search which would indicate the actual number of articles published between 1985-2015 is slightly higher than 3,334. *See id.*

51. Russell Korobkin, *Ranking Journals: Some Thoughts on Theory and Methodology*, 26 FLA. ST. U. L. REV. 851, 867 (1999) Professor Korobkin recognizes that, in legal scholarship, not every citation adds value:

In journals in which citations are not a scarce commodity, the chance that any particular cite does not signify that the earlier article was particularly valuable to the creation of the later article increases markedly. The uselessness of many citations is illustrated by the finding of one study of citation practices that there is no correlation between the density of citations within a particular journal and how often that journal is cited. If every citation reflected scholarly value, publications with the most scholarly value would include the highest density of citations and would be cited by other scholars most frequently.

*Id.*

52. *Id.* at 865. Professor Korobkin adds other insight into ranking law review articles on the basis of citation count:

More importantly, it provides authors with a direct incentive to produce scholarly work with a particular characteristic—call it ‘citability’—that is associated rather closely with scholarly value. That is, all other things equal, work that is more valuable, in terms of insight and originality, will be cited by future scholars more than work that is lacking in these characteristics.

*Id.*

53. Professor Korobkin expressly worries that law review scholarship may include citations for purposes other than for the merit of the scholarly work. He suggests a number of instances in which the reason for including a citation may be beyond the scholarly impact of the work including: to cite to a friend or political ally, to curry favor with a specific scholar, or to cite someone prominent in the field merely for the sake of including a citation to their work. *Id.* at 565–67. It is of course impossible to weed out all such citations if for no other reason than it is impossible to know the subjective reasons each author has included every citation. However, by adding in court citations and citations in treatises which cite for the purposes of highlighting important scholarship we feel our ranking system has done as good a job as possible to guard against highlighting scholarship that does not actually add scholarly heft to the literature in our discipline.

### 1. Lexis

To measure each article's impact we began in Lexis.<sup>54</sup> Lexis has a Shepardization feature that reports where an article has been cited.<sup>55</sup> This feature shows both 'citing decisions,' which is a collection of cases that have cited to the article, and 'other citing sources,' which measures citation in other documents. Under each heading the number of citations is counted and reported numerically, broken down by further subcategories.

For each article we recorded how many cases cited the article by dividing those cases into three buckets: 1) United States Supreme Court, 2) federal appellate court, and 3) 'other,' which included a combined total of federal district courts and state courts at all levels.<sup>56</sup> We also recorded how many other citing sources cited to each case. The 'other citing sources' feature breaks down citation into several categories including 'law reviews,' 'court documents,' 'treatises,' 'statutes,' and 'other citations.' In order to be consistent, we recorded only the 'law review' and 'treatises' citation numbers.

Lexis had indexed most of the articles in our survey. However, some of the articles, particularly from the 1980s, were in journal volumes that Lexis had not yet indexed online. To get comparative citation numbers for these journals we searched the exact citation format in quotation marks. This yielded all results (cases, law review articles, and treatises) that contained the exact citation and is thus a reasonable approximation of the Shepardization search. Helpfully Lexis uses the same sortation terms related to cases, law reviews, and treatises in its search results and we recorded the corresponding number of citations in each category.

It is certainly possible that, because different courts or journals might abbreviate a citation slightly differently, the search described above would not capture all relevant citations. To correct for this possibility, when an article's volume was not electronically indexed we also performed a search by putting the entire article title in quotations. This search would find any citation that reproduced the exact same title, but risks missing citations where the title might be misspelled or differently punctuated. When the article title and the citation searches yielded slightly different results, we erred by taking the larger citation count in each category. While not perfect, we are reasonably certain that these methods created roughly equivalent citation counts for those articles that were indexed by Lexis and those that were not.<sup>57</sup>

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54. The authors recognize that Lexis and Westlaw are roughly equally good research tools. The decision to start in Lexis was made because Lexis is the publisher of *Cohen's Handbook of Federal Indian Law* (Nell Jessup Newton ed., 2015). As anyone familiar with Indian law can attest, the Handbook is foundational in the field. See M. Christian Clark, *Analytical Research Guide to Federal Indian Tax Law*, 105 LAW LIBR. J. 505, 522 (2013) ("Cohen's Handbook is the leading treatise on American Indian law . . .").

55. Seema Shah, *Does Research with Children Violate the Best Interest Standard? An Empirical and Conceptual Analysis*, 8 NW. J.L. & SOC. POL'Y 121, 155, n.209 (2013) ("Shepardizing' is a method to locate decisions that are based on previously identified prior precedent from *Shepard's Citations*, which are books listing published reports of appeals court decisions that cite a particular prior case.").

56. For the purposes of determining a final score each citation was treated equally. It did not matter whether the citation came from the Supreme Court or a state trial court. We discussed employing a weighting mechanism but ultimately decided that any weighting of citation might unfairly distort the rankings by preferring older articles that would have had the opportunity to be cited in more published opinions. The authors intend to produce future scholarship that looks into court citation of Indian law scholarship in more detail.

57. As described later in this section, we also performed the same search in Westlaw for more than 250 of the Indian law articles identified in this survey. While the citation counts produced by the searches were not

A preliminary score was then created for each article by totaling the number of citations by courts, in law reviews, and in treatises. This preliminary score treated every citation identically and did not attempt to weight any one citation higher than any other. To correct for the element of time, articles decided 30 years ago will have more citations than those decided two years ago, we then divided the number of citations by the number of years the article has been in print. The denominator was determined by subtracting the year of publication from 2017. This created a citations-per-year metric for each article which allowed us to compare articles directly against each other.<sup>58</sup>

## 2. Westlaw

We are aware that it is possible that Lexis and Westlaw may record slightly different citation counts because they index slightly different lists of journals and treatises.<sup>59</sup> To correct for this we took all articles that had an average of 2.0 citations per year in the preliminary Lexis score and used Westlaw's KeyCite feature to verify their citations.<sup>60</sup> There were a total of 261 articles that had a Lexis citation score of 2.0 from our dataset. For each of these articles we recorded the number of court citations identified by KeyCite divided into the same three categories as used by Lexis. Encouragingly, these counts were virtually identical.<sup>61</sup> We also recorded the number of citations in 'Secondary Sources' in order to mirror the analysis used in Lexis. KeyCite uses two categories here: 'Law Reviews' and 'Other,' and we recorded the numerical count in both categories.<sup>62</sup>

The same process for identifying citation counts for unindexed articles that we used in the Lexis searches was followed for the Westlaw searches. We started out by putting the citation directly into Westlaw, and, if Westlaw indexed the article, it was easy to pull out citation counts using the KeyCite feature. If Westlaw did not index the article, we then

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identical in every instance they were close enough that, even in instances where an article was indexed in either Lexis or Westlaw but not both, we are reasonably confident that our alternative methodology for unindexed articles has achieved a reasonable reported result.

58. We recognize that an article reported as being published in "2006" may not actually appear in print until 2007 and an article listed in 2006 may have actually been posted on Social Science Research Network in 2005, potentially garnering citations before its formal issue date. The vagaries of law review publishing make a perfectly exact calculation impossible, but we feel that the method described does an acceptable job of creating a meaningful citations-per-year score.

59. For a discussion of how Westlaw and Lexis produce similar but not identical search results see Jon R. Cavicchi, *Intellectual Property Research Tools and Strategies: Lexis v. Westlaw for Research – Better, Different, or Same and the QWERTY Effect*, 47 IDEA 363 (2007). For verification that Shepards and KeyCite perform the same basic function see Emery G. Lee III, *Precedent Direction and Compliance: Horizontal Stare Decisis on the U.S. Court of Appeals for the Sixth Circuit*, 1 SETON HALL CIR. REV. 5, 7 (2005).

60. Jessica Van Buren, *Hi-Tech in the Law Office: KeyCite Offered Free of Charge*, 23 ALASKA B. RAG 21 (1999) ("KeyCite is an electronic citator service which, like Shepard's, traces the history of a case and lists cases and secondary sources citing your case. KeyCite data is as current as the Westlaw database . . .").

61. There were a couple articles, typically from before 1990, where the citation count for court opinions differed by one. For example Westlaw identified one additional court citation for Judith Resnick, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989), while Lexis identified one additional court citation for Robert Williams, *The Algebra Of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219 (1986).

62. We recognize that the 'other' category of Westlaw is not perfectly analogous to the 'treatise' category of Lexis but some qualitative analysis demonstrated that most of the citations identified as 'other' by Westlaw were roughly equivalent to treatises or other professional publications which would have an incentive to cite to a work for the merits of its scholarly insights.

searched using quotation marks for both the exact citation and the verbatim article title and recorded the larger number of reported citations in each category.

After collecting the KeyCite data it was possible to create a Westlaw score in the same manner that we identified a Lexis score. Adding up the citation count in each category provided a raw total number of citations in Westlaw. Dividing the number of citations by the number of years the article had been in print provided a rough citations-per-year approximation for sources indexed by Westlaw.

### 3. Final Reported Score

To create the final score we added the number of case, law review, and treatise citations from Lexis with the number of case, law review, and other citations from Westlaw. We then divided that total citation count by the number of years since the article was published. This created a score which is roughly twice the number of citations per article per year. It gives equal weight to both Lexis and Westlaw citations. It essentially double counts a citation that was indexed by both search engines while still giving an article full credit when it was identified in a source captured by only one search tool. The result was a single score that allowed direct comparisons between articles. By sorting articles by their combined score, a ranking of Indian law scholarship emerged that was exact enough to identify the top 100 Indian law articles when measured by their relative citation count.<sup>63</sup>

#### C. *Caveats: The Limits of Quantitative Analysis*

We recognize that there are some inherent limits to any quantitative analysis. Inevitably there will be persons who react negatively to the final rankings published here, either because they feel a particular piece is ranked comparatively too high, or too low, or was omitted entirely. As scholars we recognize the inherent limitation in any ranking system, and we discuss some of those limitations below.<sup>64</sup> However, we also feel that despite these limitations this work represents an important collection of scholarship in a field that has never been subject to a robust review of its scholarly impact.

In this section, we identify some of the potential limits of analysis related to the ranking methodology we have selected. We also explain how we have attempted to correct for the limitation in order to ensure that our results are as robust as possible. This discussion proceeds to consider limitations including time, the timing of the study, the omission of citations contained in books or other materials, the qualitative impact of legal scholarship, and our methodology's apparent preference for 'big think' pieces on the field as a whole over well-crafted and important pieces that may focus on a subset of Indian law.

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63. Few articles had an identical or 'tied' score. They received an identical rank, as described in Part IV *infra*.

64. For another perspective on the inherent limitations of using purely citation count to rank law review scholarship see Russell Korobkin, *Ranking Journals: Some Thoughts on Theory and Methodology*, 26 FLA. ST. U. L. REV. 851, 865-67 (1999).

### 1. Time

The ranking system accounts for total citations per year. In theory this places all articles on an equal playing field. It should not discriminate against a new but important article because, while that article will have fewer absolute citations, it can be compared to older pieces on a proportional basis. It also should not discriminate against an older article. Something truly impactful should, theoretically, continue to build its citation count consistently so that, while it is admittedly older, it has established itself thoroughly enough in the literature to maintain a reasonably high score.

We recognize however that time is an important and potentially contravening variable in this analysis. There were many fewer Indian law professors and fewer articles written in the 1980s compared with the last five years.<sup>65</sup> These older articles may benefit in some ways because, with fewer total articles written on Indian law, they are comparatively more likely to be cited. However, older articles may similarly suffer because they were written when there were fewer other articles to cite to them and fewer Indian law scholars writing generally, potentially resulting in fewer proportional citations due to fewer total citations in the early years of the field. It is also possible that an article loses its relevance with time; either because the law changes or because the issue loses prominence in the field. In those cases, an article that would have been captured as among the most cited ten years ago may have lost its relevance today, and thus its comparative place when the study was conducted in 2017.<sup>66</sup>

The ranking system's results bear out some of the challenges of comparing scholarship over time. For example, there were roughly as many Indian law articles written in 2015 as in the entire period from 1985-1989. Only three articles from the 1980s are included in this list of the 100 most impactful pieces, but five articles from 2015 appear.<sup>67</sup> While the ranking system has certainly captured the most important articles from the late 1980s, it is possible that, twenty years from now, several of the 2015 pieces will have seen their comparative impact fade. We understand these risks, but have reported the articles faithfully as the ranking system has identified them in 2017.

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65. In the first five years of the study, 1985-1989, it was not uncommon for our survey to have only about 40 Indian law articles. In contrast, in the last five years of the study, 2011-2015, every year had at least 150 articles represented, and more than one year exceeded 200.

66. For example, consider the issue of the Indian Land Consolidation Act. Parts of it were found unconstitutional in two United States Supreme Court cases in 1987 and 1997, so a scholarly piece on the Act was timely during the first half of the period of the study. See Kathleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595 (2000). The American Indian Probate Reform Act substantially modified the Indian Land Consolidation Act in 2004. While Professor Guzman's piece has commanded an impressive 34 citations in law reviews and 2 additional citations in treatises, the change in the law may have cost the piece some citations more recently and thus prevented the piece from placement in the top 100 during the period of this study.

67. However, two of the three articles from the 1980s appear in the top 10. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989); and Robert Williams, *The Algebra Of Federal Indian Law: The Hard Trail Of Decolonizing And Americanizing The White Man's Jurisprudence*, 1986 WIS. L. REV. 219 (1986) (Appearing in the ranking system at numbers 9 and 10 respectively). The highest scoring piece from 2015, in contrast, comes in at number 39: Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 295 (2015).

## 2. Timing

New cases, law review articles, and treatises are added to the Westlaw and Lexis databases every day and so it is important to try to collect citation counts as closely together in time as possible. The full list of 3,334 articles and their comparative citations in Lexis were collected during September and October 2017. The 261 Westlaw citation verifications were completed over the course of a single weekend in early November 2017.

For the initial analysis in Lexis it is possible that the difference in when the article was Shepardized could result in one or two additional citations, but the speed of citation and the verification of the citations in November appropriately mitigated against this risk. Short of having the resources to simultaneously check the citation count for each piece, we are comfortable that the analysis was run close enough in time so that the timing of the search should have no discernable effect on the final ranking outcome.

## 3. Books & Other Material

Looking at citation count in cases, treaties, and other scholarly articles necessarily omits capturing citation in other forms like books, monographs, non-legal academic writing, or training materials. We recognize that these other forms of citation also serve as good indicia of scholarly impact, but we lack a robust way to capture all of the relevant citation. Additionally, because the study is ranking only law review articles against themselves, and not attempting to rank the value of any of these articles against books, monographs, or other academic writing, we feel it is fair to limit the material from which to measure an article's impact to similar materials likely published by the target audience. In the end, we determined that cases, treatises, and legal scholarship were an acceptable proxy for overall academic impact, although every case ranked among the top 100 doubtless has countless additional citations in these other formats.

## 4. Qualitative Impact

Looking at citation count also does not measure the qualitative impact of a particular citation or how it is used. The results do not capture whether an article was merely mentioned in a footnote or formed the basis for a new way of thinking about the law. We feel, however, that pieces making new and important observations about the state of our field are, in the aggregate, much more likely to be cited by others. So while it is possible that a piece gets cited occasionally as a rogue footnote, measuring the number of citations per year is a good method for collectively identifying the most important and impactful scholarship.<sup>68</sup>

## 5. Topic

We recognize that the topic of an article will have an important effect on its citation count. The articles that are the most cited tend to deal with observations that affect the entire field or that have applications in many different Indian law contexts, like

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68. See Korobkin, *supra* note 52–53.

sovereignty,<sup>69</sup> tribal property,<sup>70</sup> or federal-tribal relations.<sup>71</sup> Alternatively, some of the most cited pieces deal with singular topics that exist throughout Indian country and are regularly the subject of observation or critique, like the Indian Child Welfare Act<sup>72</sup> or the status of tribal attorneys.<sup>73</sup> Articles that cover these universal issues are much more likely to be widely cited and therefore be elevated in the ranking system.

We recognize that there are some very important articles in our field that, because they deal with niche issues that may affect only one tribe or region, are not cited enough to make their way into the top 100 articles listed here.<sup>74</sup> Their omission certainly does not take away from their importance or say anything about the merits of their scholarship. The authors hope to highlight some of these pieces in future work now that the complete database of articles has been created.

#### 6. One Omitted Result

Finally, there was one article identified by the selection methodology and subsequently scored that is omitted from the top 100 articles. The piece, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs* by Sarah Cleveland,<sup>75</sup> is a scholarly work of almost 160,000 words and argues that, while the Constitution imagines the federal government generally to have limited powers, it has developed plenary power in the area of foreign affairs. While Professor Cleveland's article has clearly been impactful (it earned an average of 32.0 citations per year), its thesis discusses plenary power and American foreign affairs. It does little to develop Indian law and has not been widely cited by other Indian law articles.<sup>76</sup>

69. See, e.g., Angela R. Riley, *(Tribal) Sovereignty And Illiberalism*, 95 CAL. L. REV. 799 (2007); Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471 (1994); Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993).

70. See, e.g., Kristen A. Carpenter, Sonia K. Katyal, & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022 (2009); Kristen Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Non-Owners*, 52 UCLA L. REV. 1061 (2005); Joseph Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991).

71. See, e.g., William Bradford, *"With A Very Great Blame On Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace With Justice*, 27 AM. INDIAN L. REV. 1 (2003); Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77 (1993); Robert A. Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219 (1986).

72. See, e.g., Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 295 (2015); Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587 (2002).

73. See, e.g., Kristen A. Carpenter & Eli Wald, *Lawyering for Groups: The Case of American Indian Tribal Attorneys*, 81 FORDHAM L. REV. 3085 (2013); Christine Zuni Cruz, *(On The) Road Back In: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557 (1999).

74. See, e.g., Rina Swentzell, *Testimony of a Santa Clara Woman*, 14 KAN. J.L. & PUB. POL'Y 97 (2004); James W. Zion and Elsie B. Zion, *Hozho' Sokee' - Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L.J. 407 (1993); Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375 (1991).

75. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

76. While several Indian law pieces have cited its discussion of the comparison between Indians and Aliens in the constitutional origin of birthright citizenship or the parallel between plenary power in Indian affairs and foreign policy, it has been much more widely cited by constitutional law scholars for its central thesis related



Accordingly we recognize its contribution here but have omitted it from the rankings.

#### IV. RESULTS: THE TOP 100 ARTICLES

The top 100 Indian law articles as determined by the ranking system are reported here, ranked by their score. When an article had multiple authors, the authors' names are reported in the order they appeared in the article. Citation abbreviation for each journal conforms with the Bluebook rules for journal citation. When two or more articles had an identical score, they have been given an identical rank and listed in alphabetical order by the first author's surname. The next number is then skipped to ensure that only 100 articles are listed. For example, there are two articles with a score of 8.43 and thus tied for 54th place. Each of those articles is ranked 54th and the next article is ranked 56th.

Several authors are represented more than once, helping to cement their status as leaders in the field. We extend a special congratulations to those authors with more than three pieces represented: Matthew Fletcher (7 Articles), Philip Frickey (6 Articles), Angela Riley (6 Articles), and Bethany Berger (4 Articles).

RANK	AUTHOR	ARTICLE TITLE	CITATION	SCORE
1	Philip Frickey	<i>A Common Law For Our Age Of Colonialism: The Judicial Divestiture Of Indian Tribal Authority Over Nonmembers</i>	109 YALE L.J. 1 (1999)	21.50
2	David Getches	<i>Beyond Indian Law: The Rehnquist Court's Pursuit Of States' Rights, Color-Blind Justice And Mainstream Values</i>	86 MINN. L. REV. 267 (2001)	20.94
3	Judith Royster	<i>The Legacy Of Allotment</i>	27 ARIZ. ST. L.J. 1 (1995)	20.09
4	Robert Clinton	<i>There Is No Federal Supremacy Clause For Indian Tribes</i>	34 ARIZ. ST. L.J. 113 (2002)	19.80

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directly to the development of the federal government's assumption of plenary power in foreign policy. Of its 242 citations in law review articles fewer than 30 of them were articles also included in this study.

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5	Philip Frickey	<i>Marshalling Past And Present: Colonization, Constitutionalism, And Interpretation In Federal Indian Law</i>	107 HARV. L. REV. 381 (1993)	19.29
6	Kristen Carpenter, Sonia Katyal, & Angela Riley	<i>In Defense Of Property</i>	118 YALE L.J. 1022 (2009)	17.88
7	Philip Frickey	<i>(Native) American Exceptionalism In Federal Public Law</i>	119 HARV. L. REV. 431 (2006)	17.64
8	David Getches	<i>Conquering The Cultural Frontier: The New Subjectivism Of The Supreme Court In Indian Law</i>	84 CAL. L. REV. 1573 (1996)	17.29
9	Judith Resnik	<i>Dependent Sovereigns: Indian Tribes, States, And The Federal Courts.</i>	56 U. CHI. L. REV. 671 (1989)	16.32
10	Robert Williams	<i>The Algebra Of Federal Indian Law: The Hard Trail Of Decolonizing And Americanizing The White Man's Jurisprudence</i>	1986 WISC. L. REV. 219 (1986)	15.94
11	Angela Riley	<i>(Tribal) Sovereignty And Illiberalism</i>	95 CAL. L. REV. 799 (2007)	15.70
12	Kevin Washburn	<i>American Indians, Crime, And The Law</i>	104 MICH. L. REV. 709 (2006)	14.82

13	Daniel Meltzer	<i>The Seminole Decision And State Sovereign Immunity</i>	1996 SUP. CT. REV. 1 (1996)	14.14
14	Siegfried Wiessner	<i>Rights And Status Of Indigenous Peoples: A Global Comparative And International Legal Analysis</i>	12 HARV. HUM. RTS. J. 57 (1999)	13.83
15	Joseph Singer	<i>Sovereignty And Property</i>	86 NW. U. L. REV. 1 (1991)	13.54
16	Bethany Berger	<i>Red: Racism And The American Indian</i>	56 UCLA L. REV. 591 (2009)	13.13
17	Mary Wood	<i>Indian Land And The Promise Of Native Sovereignty: The Trust Doctrine Revisited</i>	1994 UTAH L. REV. 1471 (1994)	12.61
18	Kevin Washburn	<i>Federal Criminal Law And Tribal Self-Determination</i>	84 N.C. L. REV. 779 (2006)	12.36
19	Vicki Jackson	<i>Seminole Tribe, The Eleventh Amendment And The Potential Evisceration Of Ex Parte Young</i>	72 N.Y.U. L. REV. 495 (1997)	12.10
20	Sarah Krakoff	<i>A Narrative Of Sovereignty: Illuminating The Paradox Of The Domestic Dependent Nation</i>	83 OR. L. REV. 1109 (2005)	11.92
21	Angela Riley	<i>Good (Native) Governance</i>	107 COLUM. L. REV. 1049 (2006)	11.91
22	Philip Frickey	<i>Congressional Intent, Practical Reasoning, And</i>	78 CAL. L. REV. 1137 (1990)	11.74

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		<i>The Dynamic Nature Of Federal Indian Law</i>		
23	Addie Rolnick	<i>The Promise Of Mancari: Indian Political Rights As Racial Remedy</i>	86 N.Y.U. L. REV. 958 (2011)	11.50
24	Gregory Ablavsky	<i>The Savage Constitution</i>	63 DUKE L.J. 999 (2014)	11.33
25	Angela Riley	<i>Straight Stealing : Towards An Indigenous System Of Cultural Property Protection</i>	80 WASH. L. REV. 69 (2005)	11.00
26	Nell Jessup Newton	<i>Tribal Court Praxis: One Year In The Life Of Twenty Indian Tribal Courts</i>	22 AM. INDIAN L. REV. 285 (1998)	10.79
27	Bethany Berger	<i>Justice And The Outsider: Jurisdiction Over Nonmembers In Tribal Legal Systems</i>	37 ARIZ. ST. L.J. 1047 (2005)	10.75
28	William Bradford	<i>"With A Very Great Blame On Our Hearts": Reparations, Reconciliation, And An American Indian Plea For Peace With Justice</i>	27 AM. INDIAN L. REV. 1 (2003)	10.64
29	L. Scott Gould	<i>The Consent Paradigm: Tribal Sovereignty At The Millennium</i>	96 COLUM. L. REV. 809 (1996)	10.57
30	Philip Frickey	<i>Adjudication And Its Discontents: Coherence And Conciliation In</i>	110 HARV. L. REV. 1754 (1997)	10.45

		<i>Federal Indian Law</i>		
31	Angela Riley	<i>Indians And Guns</i>	100 GEO. L.J. 1675 (2012)	10.40
32	Robert Clinton	<i>Redressing The Legacy Of Conquest: A Vision Quest For A Decolonized Federal Indian Law</i>	46 ARK. L. REV. 77 (1993)	10.33
33	Donna Coker	<i>Enhancing Autonomy For Battered Women: Lessons From Navajo Peacemaking</i>	47 UCLA L. REV. 1 (1999)	10.28
34	Robert Williams	<i>Encounters On The Frontiers Of International Human Rights Law: Redefining The Terms Of Indigenous Peoples' Survival In The World</i>	1990 DUKE L.J. 660 (1990)	10.04
35	Barbara Atwood	<i>Flashpoints Under The Indian Child Welfare Act: Toward A New Understanding Of State Court Resistance</i>	51 EMORY L.J. 587 (2002)	10.00
36	Holly Doremus & A. Dan Tarlock	<i>Fish, Farms, And The Clash Of Cultures In The Klamath Basin</i>	30 ECOLOGY L.Q. 279 (2003)	9.79
37	Zachary Price	<i>Dividing Sovereignty In Tribal And Territorial Criminal Jurisdiction</i>	113 COLUM. L. REV. 657 (2013)	9.75

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38	Matthew Fletcher	<i>The Supreme Court's Indian Problem</i>	59 HASTINGS L.J. 579 (2008)	9.67
39	Bethany Berger	<i>In The Name Of The Child: Race, Gender, And Economics In Adoptive Couple V. Baby Girl</i>	67 FLA. L. REV. 295 (2015)	9.50
40	Philip Frickey	<i>Domesticating Federal Indian Law</i>	81 MINN. L. REV. 31 (1996)	9.48
41	Angela Riley	<i>Recovering Collectivity: Group Rights To Intellectual Property In Indigenous Communities</i>	18 CARDOZO ARTS & ENT. L.J. 175 (2000)	9.47
42	Nathalie Martin & Joshua Schwartz	<i>The Alliance Between Payday Lenders And Tribes: Are Both Tribal Sovereignty And Consumer Protection At Risk?</i>	69 WASH. & LEE L. REV. 751 (2012)	9.40
43	Gloria Valencia-Weber	<i>Tribal Courts: Custom And Innovative Law</i>	24 N.M. L. REV. 225 (1994)	9.30
44	Jack Trope & Walter Echo-Hawk	<i>The Native American Graves Protection And Repatriation Act: Background And Legislative History</i>	24 ARIZ. ST. L.J. 35 (1992)	9.28
45	Gerald Torres & Kathryn Milun	<i>Translating Yonondio By Precedent And Evidence: The Mashpee Indian Case</i>	1990 DUKE L.J. 625 (1990)	9.22

46	Patty Gerstenblith	<i>Identity And Cultural Property: The Protection Of Cultural Property In The United States</i>	75 B.U. L. REV. 559 (1995)	9.14
47	Saikrishna Prakash	<i>Against Tribal Fungibility</i>	89 CORNELL L. REV. 1069 (2004)	9.08
48	Sarah Krakoff	<i>Inextricably Political: Race, Membership, And Tribal Sovereignty</i>	87 WASH. L. REV. 1041 (2012)	9.00
48	Elizabeth Kronk Warner	<i>Tribes As Innovative Environmental "Laboratories"</i>	86 U. COLO. L. REV. 789 (2015)	9.00
50	Carole Goldberg & Duane Champagne	<i>Is Public Law 280 Fit For The Twenty-First Century? Some Data At Last</i>	38 CONN. L. REV. 697 (2006)	8.82
51	Matthew Fletcher	<i>Indian Courts And Fundamental Fairness: 'Indian Courts And The Future' Revisited</i>	84 U. COLO. L. REV. 59 (2013)	8.75
52	Allison Dussias	<i>Ghost Dance And Holy Ghost: The Echoes Of The Nineteenth-Century Christianization Policy In Twentieth-Century Native American Free Exercise Cases</i>	49 STAN. L. REV. 773 (1997)	8.70
53	Allison Dussias	<i>Geographically-Based And Membership-Based Views Of Indian Tribal</i>	55 U. PITT. L. REV. 1 (1993)	8.63

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		<i>Sovereignty: The Supreme Court's Changing Vision</i>		
54	Katherine Florey	<i>Indian Country's Borders: Territoriality, Immunity, And The Construction Of Tribal Sovereignty</i>	51 B.C. L. REV. 595 (2010)	8.43
54	Joseph Singer	<i>Canons Of Conquest: The Supreme Court's Attack On Tribal Sovereignty</i>	37 NEW ENG. L. REV. 641 (2003)	8.43
56	Ann Tweedy	<i>Connecting The Dots Between The Constitution, The Marshall Trilogy, And United States V. Lara: Notes Toward A Blueprint For The Next Legislative Restoration Of Tribal Sovereignty</i>	42 U. MICH. J.L. REF. 651 (2009)	8.38
57	Sandra Day O'Connor	<i>Lessons From The Third Sovereign: Indian Tribal Courts</i>	33 TULSA L.J. 1 (1997)	8.35
58	Paul Spruhan	<i>A Legal History Of Blood Quantum In Federal Indian Law To 1935</i>	51 S.D. L. REV. 1 (2006)	8.27
59	Graham Dutfield	<i>TRIPS-Related Aspects Of Traditional Knowledge</i>	33 CASE W. RES. J. INT'L. L. 233 (2001)	8.25
59	Samuel Ennis	<i>Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An</i>	57 UCLA L. REV. 553 (2009)	8.25



		<i>Argument For A Statutory Abrogation Of Oliphant</i>		
61	Kenneth Bobroff	<i>Retelling Allotment: Indian Property Rights And The Myth Of Common Ownership</i>	54 VAND. L. REV. 1559 (2001)	8.19
61	Sarah Krakoff	<i>Undoing Indian Law One Case At A Time: Judicial Minimalism And Tribal Sovereignty</i>	50 AM. U. L. REV. 1177 (2001)	8.19
63	Christine Farley	<i>Protecting Folklore Of Indigenous Peoples: Is Intellectual Property The Answer:</i>	30 CONN. L. REV. 1 (1997)	8.15
64	Gabe Galanda & Ryan Dreveskracht	<i>Curing The Tribal Disenrollment Epidemic: In Search Of A Remedy</i>	57 ARIZ. L. REV. 383 (2015)	8.00
64	Christine Zuni Cruz	<i>(On The) Road Back In: Community Lawyering In Indigenous Communities</i>	5 CLINICAL L. REV. 557 (1999)	8.00
64	Unsigned Note	<i>Indian Law - Tribal Courts - Congress Recognizes And Affirms Tribal Courts' Special Domestic Violence Jurisdiction Over Non-Indian Defendants - The</i>	127 HARV. L. REV. 1509 (2014)	8.00

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		<i>Violence Against Women Reauthorization Act Of 2013</i>		
67	Matthew Fletcher	<i>The Supreme Court And Federal Indian Policy</i>	85 NEB. L. REV. 121 (2006)	7.91
68	Matthew Fletcher	<i>Tribal Consent</i>	8 STAN. J. C.R. & C.L. 45 (2012)	7.80
69	Kristen Carpenter	<i>A Property Rights Approach To Sacred Sites Cases: Asserting A Place For Indians As Non-Owners</i>	52 UCLA L. REV. 1061 (2005)	7.75
70	Robert Yazzie	<i>"Life Comes From It": Navajo Justice Concepts</i>	24 N.M. L. REV. 175 (1994)	7.74
71	Wenona Singel	<i>Indian Tribes And Human Rights Accountability</i>	49 SAN DIEGO L. REV. 567 (2012)	7.60
72	Robert Clinton	<i>The Dormant Indian Commerce Clause</i>	27 CONN. L. REV. 1055 (1995)	7.59
73	Sanford Levinson	<i>"Who Counts?" "Sez Who?"</i>	58 ST. LOUIS U. L.J. 937 (2014)	7.33
74	Milner Ball	<i>Stories Of Origin And Constitutional Possibilities.</i>	87 MICH. L. REV. 2280 (1989)	7.29
75	Matthew Fletcher	<i>Tribal Membership And Indian Nationhood</i>	37 AM. INDIAN L. REV. 1 (2013)	7.25
76	Mark Rosen	<i>Multiple Authoritative Interpreters Of Quasi-Constitutional</i>	69 FORDHAM L. REV. 479 (2000)	7.24

		<i>Federal Law: Of Tribal Courts And The Indian Civil Rights Act</i>		
77	Bethany Berger	<i>"Power Over This Unfortunate Race": Race, Politics And Indian Law In United States V. Rogers</i>	45 WM. & MARY L. REV. 1957 (2004)	7.23
78	Carole Goldberg	<i>American Indians And "Preferential" Treatment</i>	49 UCLA L. REV. 943 (2002)	7.13
79	David Williams	<i>The Borders Of The Equal Protection Clause: Indians As Peoples</i>	38 UCLA L. REV. 759 (1991)	7.12
80	L. Scott Gould	<i>Mixing Bodies And Beliefs: The Predicament Of Tribes</i>	101 COLUM. L. REV. 702 (2001)	7.06
81	Robert Anderson	<i>Water Rights, Water Quality, And Regulatory Jurisdiction In Indian Country</i>	34 STAN. ENVTL. L.J. 195 (2015)	7.00
81	Matthew Fletcher	<i>Factbound And Splitless: The Certiorari Process As Barrier To Justice For Indian Tribes</i>	51 ARIZ. L. REV. 933 (2009)	7.00
81	Steven Quesenberry, Timothy Seward & Adam Bailey	<i>Tribal Strategies For Protecting And Preserving Groundwater</i>	41 WM. MITCHELL L. REV. 431 (2015)	7.00
81	Winona Singel	<i>The First Federalists</i>	62 DRAKE L. REV. 775 (2014)	7.00

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85	Naomi Mezey	<i>The Paradoxes Of Cultural Property</i>	107 COLUM. L. REV. 2004 (2007)	6.90
86	Judith Royster	<i>Practical Sovereignty, Political Sovereignty, And The Indian Tribal Energy Development And Self-Determination Act</i>	12 LEWIS & CLARK L. REV. 1065 (2008)	6.89
87	Russel Barsh	<i>Indigenous Peoples In The 1990S: From Object To Subject Of International Law?</i>	7 HARV. HUM. RTS. J. 33 (1994)	6.83
88	Rebecca Hart	<i>Honoring Sovereignty: Aiding Tribal Efforts To Protect Native American Women From Domestic Violence</i>	96 CAL. L. REV. 185 (2008)	6.78
88	Siegfried Wiessner	<i>Indigenous Sovereignty: A Reassessment In Light Of The UN Delcaration On The Rights Of Indigenous Peoples</i>	41 VAND. J. TRANSNAT'L. L. 1141 (2008)	6.78
90	Mary Wood	<i>Protecting The Attributes Of Native Sovereignty: A New Trust Paradigm For Federal Actions Affecting Tribal Lands And Resources</i>	1995 UTAH L. REV. 109 (1995)	6.77

91	Eric Kades	<i>The Dark Side Of Efficiency: Johnson V M'Intosh And The Expropriation Of American Indian Lands</i>	148 U. PA. L. REV. 1065 (2000)	6.76
91	Nell Jessup Newton	<i>Indian Claims In The Courts Of The Conqueror</i>	41 AM. U. L. REV. 753 (1992)	6.76
93	Kristen Carpenter & Eli Wald	<i>Lawyering For Groups: The Case Of American Indian Tribal Attorneys</i>	81 FORDHAM L. REV. 3085 (2013)	6.75
94	Kevin Washburn	<i>Tribal Self-Determination At The Crossroads</i>	38 CONN. L. REV. 777 (2006)	6.73
95	Robert Anderson	<i>Indian Water Rights, Practical Reasoning, And Negotiated Settlements</i>	98 CAL. L. REV. 1133 (2010)	6.71
95	Matthew Fletcher	<i>Resisting Federal Courts On Tribal Jurisdiction</i>	81 U. COLO. L. REV. 973 (2010)	6.71
97	Robert Natelson	<i>The Original Understanding of the Indian Commerce Clause</i>	85 DENV. L. REV. 201 (2007)	6.60
97	Rebecca Tsosie	<i>Reclaiming Native Stories: An Essay On Cultural Appropriation And Cultural Rights</i>	34 ARIZ. ST. L.J. 299 (2002)	6.60
99	Randall Abate	<i>Public Nuisance Suits For The Climate Justice Movement: The Right Thing And The Right Time</i>	85 WASH. L. REV. 197 (2010)	6.57

100	Robert Porter	<i>Strengthening Tribal Sovereignty Through Peacemaking: How The Anglo-American Legal Tradition Destroys Indigenous Societies</i>	28 COLUM. HUM. RTS L. REV. 235 (1997)	6.55
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#### V. ADDITIONAL OBSERVATIONS

It is impossible to collect and then cite check 3,334 articles without making some observations beyond the article's total citation count. While the dataset of articles that we have produced can be mined for all kinds of observations about Indian law, and will form the basis of some future collaborative scholarship, we would like to share some of those general observations here.

##### A. Short Titles

Disproportionately shorter titles that clearly communicated the subject matter of the piece earned higher citation counts. Several titles stand out among the Top 100 as being particularly pithy. Angela Riley's "Indians and Guns"<sup>77</sup> and Matthew Fletcher's "Tribal Consent"<sup>78</sup> are both excellent examples from the highest scoring 100, but many other examples emerge in the top 10% of submissions. Consider the directness of "Congress and Indians" by Kirsten Carlson<sup>79</sup> or "Tribal Immunity and Tribal Courts" by Catherine Struve<sup>80</sup> which would each be found in the next 100.

We can only speculate why shorter titles might be favored in the citation count. Short titles have the advantage of being easier to remember and take less time to type out. When titles are short and direct their clarity may better attract the attention of a busy clerk or legal scholar who is looking for a focused discussion of a particular legal point.

While short titles were generally favored, the wit of our colleagues should not go unmentioned. Some used clever puns about fish, like William Howry's *Native Village of Eyak v. Blank: Fish is Best Rare; Justice, Not so Much*<sup>81</sup> or Joseph Gribbin's *The Glass Eeling: Maine's Glass Eel and Elver Regulations and Their Effects on Maine's Native American Tribes*.<sup>82</sup> Others were more direct, like Laura Seelau's *When I Want Your*

77. Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675 (2012).

78. Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45 (2012).

79. Kirsten Matoy Carlson, *Congress and Indians*, 86 U. COLO. L. REV. 77 (2015).

80. Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137 (2005).

81. William H. Howery III, Note, *Native Village of Eyak v. Blank: Fish is Best Rare; Justice, Not So Much*, 44 GOLDEN GATE U. L. REV. 47 (2014).

82. Joseph O. Gribbin, *The Glass Eeling: Maine's Glass Eel and Elver Regulations and Their Effects on Maine's Native American Tribes*, 20 OCEAN & COASTAL L.J. 83 (2015).

*Opinion, I'll Give it to You: How Governments Support the Indigenous Right to Consultation in Theory, But Not in Practice.*<sup>83</sup> And then Robert Laurence is in a class all his own with such creativity as *Don't Think of a Hippopotamus: An Essay on First-Year Contracts, Earthquake Prediction, Gun Control in Baghdad, the Indian Civil Rights Act, the Clean Water Act, and Justice Thomas's Separate Opinion in United States v. Lara*<sup>84</sup> which remarkably covers each of the topics in its title in an Indian law narrative that is certainly worth a read.

### B. Journals

By far the journal that published the largest number of articles captured in our survey of Indian law was the American Indian Law Review with 348 entries. The Arizona State Law Journal was a distant second with 105 entries, while the North Dakota Law Review and the St. Thomas Law Review tied for third with seventy-three articles each. Notably, the Tulsa Law Review, which was the Tulsa Law Journal until 2001, had 103 articles when citations for the two names are combined together. Among the signature law reviews at the top three schools; the Yale Law Journal published fourteen articles,<sup>85</sup> the Stanford Law Review published ten articles, and the Harvard Law Review published twelve articles on Indian law between 1985-2015. These counts include unsigned notes. Of those thirty-six combined articles, seven scored among the top 100 most cited and are reported above.<sup>86</sup>

### C. Supreme Court Citations

Lexis has recorded eighteen Indian law articles that have been cited by the Supreme Court,<sup>87</sup> although only two of these articles have been cited more than once. Justice

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83. Laura M. Seelau & Ryan Seelau, *When I Want Your Opinion, I'll Give it to You: How Governments Support the Indigenous Right to Consultation in Theory, But Not in Practice*, 23 CARDOZO J. INT'L & COMP. L. 547 (2014).

84. Robert Laurence, *Don't Think of a Hippopotamus: An Essay on First-Year Contracts, Earthquake Prediction, Gun Control in Baghdad, the Indian Civil Rights Act, the Clean Water Act, and Justice Thomas's Separate Opinion in United States v. Lara*, 40 TULSA L. REV. 137 (2004).

85. Our methodology missed one article published in 2015 from the Yale Law Journal because it was not indexed by either the National Indian Law Library or the Journal of Legal Periodicals when we culled through those volumes. See Ablavsky, *supra* note 49; see also *supra* note 47. The Yale Law Journal could therefore count fifteen Indian law articles during the period of the study.

86. See Ablavsky, *supra* note 49. Ablavsky's *Beyond the Indian Commerce Clause* would have ranked in the top 100, giving the signature three journals a total of seven of the 100 most impactful articles.

87. Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004) (Three times by Justice Thomas); William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587 (2013) (By Justice Sotomayor concurring in *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2040 (2014)); Nathalie Martin and Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751 (2012) (By Justice Scalia dissenting in *Michigan*, 134 S. Ct. at 2052); Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595 (2010) (By Justice Scalia dissenting in *Michigan*, 134 S. Ct. at 2049); Mary-Beth Moylan, *Sovereign Rules of the Game: Requiring Campaign Finance Disclosure in the Face of Tribal Sovereign Immunity*, 20 B.U. PUB. INT. L.J. 1 (2010) (By Justice Scalia dissenting in *Michigan*, 134 S. Ct. 2024, 2052); Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. L. REV. 201 (2007) (By Justice Thomas concurring in *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 663-64 (2013) and dissenting from a denial of cert. in *Upstate Citizens for Equality, Inc. v. United States*, \_\_\_ U.S. \_\_\_, 199 L.Ed. 2d 372, 373 (2017)); Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. REV. 597 (2005) (By Justice Scalia dissenting in *Michigan*, 134 S. Ct. at 2050); Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a*

Thomas has cited *Against Tribal Fungibility*<sup>88</sup> by his former clerk, Saikrishna Prakash, twice in recent concurrences<sup>89</sup> and once in an opinion dissenting from the denial of certiorari.<sup>90</sup> Justice Thomas has also cited Robert Natelson's *The Original Understanding of the Indian Commerce Clause* twice.<sup>91</sup> Unfortunately for the advance of Indian law, Justice Thomas appears to have taken from the piece that not all tribes should enjoy the benefits of sovereignty and that Congress sometimes lacks the power to prevent state encroachment into Indian country.<sup>92</sup>

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*Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759 (2005) (By Justice Sotomayor concurring in *Michigan*, 134 S. Ct. at 2044); Richard J. Ansson Jr., *State Taxation of Non-Indians Whom Do Business with Indian Tribes: Why Several Recent Ninth Circuit Holdings Reemphasize the Need For Indian Tribes to Enter Into Taxation Compacts with Their Respective States*, 78 OR. L. REV. 501 (1999) (By Justice Ginsburg dissenting in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 131 (2005)); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998) (By Justice Souter concurring in *Nevada v. Hicks*, 533 U.S. 353, 384 (2001)); Jon M. Van Dyke, *The Political Status of Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95 (1998) (By Justice Kennedy in *Rice v. Cayetano*, 528 U.S. 495, 518 (2000)); Vanessa J. Jimenez and Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627 (1998) (By Justice Ginsburg in *United States v. Bryant*, 136 S. Ct. 1954, 1960 (2016)); Phillip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997) (By Justice Stevens dissenting in *Rice v. Cayetano*, 528 U.S. 495, 535 (2000)); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995) (By Justice Sotomayor concurring in *Michigan*, 134 S. Ct. at 2044); Allison M. Dussias, *Heeding the Demands of Justice: Justice Blackmun's Indian Law Opinions*, 71 N.D. L. REV. 41 (1995) (By Justice Stevens dissenting in *Kiowa Tribe v. Mfg. Tech.*, 523 U.S. 751, 762 (1998)); H. Barry Holt, *Can Indians Hunt in National Parks? Determinable Indian Treaty Rights and United States v. Hicks*, 16 ENVTL. L. 207 (1986) (By Justice Thomas dissenting in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 226 (1999)); Russel Lawrence Barsh, *The Illusion of Religious Freedom for Indigenous Americans*, 65 OR. L. REV. 363 (1986) (By Justice Blackmun dissenting in *Employment Division v. Smith*, 494 U.S. 872, 920 (1990)); Robert A. Williams, Jr., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982*, 22 HARV. J. ON LEGIS. 335 (1985) (By Justice Sotomayor concurring in *Michigan*, 134 S. Ct. at 2044).

88. See Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004).

89. *United States v. Bryant*, 136 S. Ct. 1954, 1968 (2016) ("Indian tribes have varied origins, discrete treaties with the United States, and different patterns of assimilation and conquest. In light of the tribes' distinct histories, it strains credulity to assume that all tribes necessarily retained the sovereign prerogative of prosecuting their own members. And by treating all tribes as possessing an identical quantum of sovereignty, the Court's precedents have made it all but impossible to understand the ultimate source of each tribe's sovereignty and whether it endures. See Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1070–74, 1107–10 (2004)"); *Adoptive Couple*, 570 U.S. at 663–64 ("It is, thus, clear that the Framers of the Constitution were alert to the difference between the power to regulate trade with the Indians and the power to regulate all Indian affairs. By limiting Congress' power to the former, the Framers declined to grant Congress the same broad powers over Indian affairs conferred by the Articles of Confederation. See Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1090 (2004).").

90. *Upstate Citizens for Equality, Inc.*, \_\_\_ U.S. \_\_\_, 199 L. Ed. 2d at 373 (2017) ("And in cases like these, where the tribe already owns the land, neither money nor property changes hands. Instead, title is slightly modified by adding 'the United States in trust for' in front of the name of 'the Indian tribe or individual Indian' who owns the land . . . . This arrangement does not affect the Indian tribe's beneficial ownership of the property, and it does not afford the United States any meaningful property rights. See . . . Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1093–94, and n.152 (2004).").

91. See *Upstate Citizens for Equality, Inc. v. United States*, 2017 WL 5660979, at \*2 (Thomas, J., dissenting), *cert denied* ("[T]he Indian Commerce Clause does not appear to give Congress the power to authorize the taking of land into trust under the IRA. Even assuming that land transactions are 'Commerce' within the scope of the Clause, but see Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. L. REV. 201, 214–15, and n.94 (2007), many applications of the IRA do not involve trade of any kind.").

92. *Id.*



## VI. CONCLUSION

The field of Indian law has evolved tremendously over the last thirty years. Helping courts, practitioners, tribal governments, scholars, congressmen, and students make sense of these changes and critique them has been the primary work of tremendous contributions to Indian law scholarship. The 100 articles highlighted here, and hundreds more, deserve to be celebrated and even more widely read by all audiences.<sup>93</sup>

It is our hope that readers will not use this piece to quarrel over whether Professor Royster's work on allotment is really two places more important than Professor Frickey's work on the Marshall Trilogy. In many ways a direct comparison of the substantive ideas embedded in these works is truly impossible. Instead we hope to celebrate all of these pieces as making foundational contributions to our field.

As professors and scholars of Indian law ourselves, it has been a remarkable year of immersion in the scholarship of our students, friends, mentors, and colleagues. When we started out, we never expected to find more than 3,000 Indian law articles. Some titles made us laugh.<sup>94</sup> Others caused us to cringe.<sup>95</sup> At times we were haunted by the collective works of legends in our field who have walked on: Bill Rice, David Getches, Philip Frickey, and so many others. After cataloging three decades worth of Indian law scholarship, we have both rediscovered old favorites and come across new pieces that have challenged and informed our own understanding of what 'Indian Law' really is. We hope that this piece ultimately sparks some of those same feelings of rediscovery and excitement in every reader.

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93. If you are a professor, consider assigning this list of 100 law review articles to your students. Ask them to read and summarize one or two of these works as a class assignment. The topics covered are broad enough to attract interest from any student and actually reading legal scholarship is something most students do not do often enough.

94. See Robert Laurence, *Don't Think of a Hippopotamus: An Essay on First-Year Contracts, Earthquake Prediction, Gun Control in Baghdad, the Indian Civil Rights Act, the Clean Water Act, and Justice Thomas's Separate Opinion in United States v. Lara*, 40 TULSA L. REV. 137 (2004).

95. See Bruce C. Kelber, "Scalping the Redskins: Can Trademark Law Start Athletic Teams Bearing Native American Nicknames and Images on the Road to Racial Reform?", 17 HAMLINE L. REV. 533 (1994).