

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 7,799 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

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legislation for the general welfare of its citizens, including Indians and Indian nations. It suggests that federal Indian law 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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INTRODUCTION

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.¹ This simple narrative has tremendous appeal, but it greatly oversimplifies the relationships among groups, courts, and the political process.² 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

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 for long 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. KLARMAN, *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).

investigated the relationships among various groups and political and legal processes,³ one important group remains understudied—American Indians.⁴

Despite scant information about the success of law reform efforts by Indians,⁵ federal Indian law scholars and tribal advocates have largely bought into the allure of litigation as the focus of law and policy reform efforts.⁶ 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.⁷

3. See, e.g., William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002).

4. See Jeff J. Cornstassel & 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. Boehmke, *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.

6. See, e.g., John E. Echohawk, *Native American Rights in the 21st Century*, in *LAW AND THE QUEST FOR JUSTICE* 39, 40–41 (Marjorie S. Zatz et al. eds., 2013) (noting a litigation explosion in the 1970s and a Supreme Court willing to uphold Indian rights in the late twentieth century); CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 1–5 (1987) (expressing a faith in the courts to affirm Indian rights based on litigation in the 1970s and 1980s); 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, 267 (2001) (describing the Supreme Court’s positive approach to Indian rights in the late 1970s and early 1980s).

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*

Yet Indian nations, the most impoverished group in the United States,⁸ lose in the Supreme Court over 75 percent of the time—more frequently than convicted felons.⁹ 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.¹⁰ 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.¹¹ These scholars and advocates assume that Congress can and will create more effective and beneficial policies for Indian nations than the Supreme Court.¹²

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

Barrier to Justice for Indian Tribes, 51 ARIZ. L. REV. 933 (2009); Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997); DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE* (1997); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996).

8. *Profile America Facts for Features: American Indian and Alaska Native Heritage Month: November 2013*, U.S. CENSUS BUREAU (Oct. 31, 2013) http://www.census.gov/newsroom/releases/pdf/cb13ff-26_aian.pdf, archived at <http://perma.cc/GG22-SSGR> (reporting that American Indians and Alaska Natives have the highest rate of poverty of any race group (29.1 percent)); DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 15–16 (6th ed. 2011).

9. Getches, *supra* note 6, at 281 (“Convicted criminals achieved reversals in 36 percent of all cases that reached the Supreme Court in the same period, compared to the tribes’ 23 percent success rate.”).

10. *See id.* at 276–77 (suggesting that the legislative process has advantages over adjudication).

11. *See, e.g., id.*; Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. REV. 759, 762–65 (2014); Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 483 (2005).

12. *See supra* notes 10–11.

may better understand the relationships between them.

Scholars, advocates, and tribal leaders currently know very little about Congress and its relationships with Indians.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.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.¹⁵ Scholars in other fields shed scarcely more light on the topic. Political scientists routinely omit American Indians from studies of congressional politics,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.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.¹⁸ The study combines the content-focused

13. See WILKINS & STARK, *supra* note 4, at 170.

14. See, e.g., Getches, *supra* note 6, at 267; Fletcher, *supra* note 7, at 933; Labin, *supra* note 7, at 695.

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).

16. See WILKINS & STARK, *supra* note 4, at 170; Witmer & Boehmke, *supra* note 4, at 127.

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).

18. For examples of empirical studies in federal Indian law, see Fletcher,

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

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 Indian Civil Rights Act*, in THE INDIAN CIVIL RIGHTS ACT AT FORTY 275, 323 (Kristen A. Carpenter et al. eds., 2012); Kirsten Matoy Carlson, *Political Failure, Judicial Opportunity: The Supreme Court of Canada and Aboriginal and Treaty Rights*, 44 AM. REV. CANADIAN STUDIES 334 (2014); Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005); Kirsten Matoy Carlson, *Does Constitutional Change Matter? Canada’s Recognition of Aboriginal Title*, 22 ARIZ. J. INT’L & COMP. L. 449 (2005); Gavin Clarkson, *Racial Imagery and Native Americans: A First Look at the Empirical Evidence Behind the Indian Mascot Issue*, 11 CARDOZO J. INT’L & COMP. L. 393 (2003); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998).

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.

20. See generally Jacob T. Levy, *Three Perversities of Indian Law*, 12 TEX. REV. L. & POL. 329 (2008) (describing Congress’s Self-Determination Policy); accord Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 142–44 (2006).

and developing the economies of their respective 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

21. 25 U.S.C. § 450a (2012); *see also* 25 U.S.C. § 4101 (2012) (stating a commitment to working with tribal governments and recognizing Indian self-determination and tribal self-governance).

22. *See* Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 781 (2006); JOHN BORROWS, LEGISLATION AND INDIGENOUS SELF-DETERMINATION IN CANADA AND THE UNITED STATES 17 (Patrick Macklem & Douglas Sanderson eds.) (forthcoming).

23. Fletcher, *supra* note 20, at 128. For example, the Supreme Court decided *Oliphant v. Suquamish Indian Tribe*, stripping Indian nations of their inherent authority to prosecute non-Indian offenders, a mere three years after Congress passed the Indian Self-Determination and Education Assistance Act. 435 U.S. 191, 195 (1978), *superseded in part by statute*, Civil Rights Act of 1968, 25 U.S.C. § 1304.

24. Joseph Kalt, *Constitutional Rule and the Effective Governance of Native Nations*, in AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 184, 184 (Eric D. Lemont ed., 2006) (“[T]he evidence is overwhelming that political self-rule is the only policy that has enabled at least some tribes to break out of a twentieth-century history of federal government-dominated decision-making that yielded social, cultural, and economic destruction.”); Stephen Cornell & Joseph P. Kalt, *Two Approaches to the Development of Native Nations: One Works, the Other Doesn’t*, in REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 3, 18 (Miriam Jorgensen ed., 2007).

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).

stance on what Congress should do in legislating, but rather to 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”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 not constitute a majority in any state.²⁷ Indians comprise a majority in only one or two congressional districts and rarely affect electoral outcomes.²⁸ Financially, most Indian nations and individuals are impoverished and are not major contributors to electoral campaigns.²⁹ Accordingly, Indians

26. Laurence, *supra* note 25, at 435.

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).

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).

29. Fredrick J. Boehmke & Richard Witmer, *Indian Nations as Interest Groups: Tribal Motivations for Contributions to U.S. Senators*, 65 POL. RES. Q.

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.³⁰ Indian issues rarely, if ever, decide congressional elections.³¹ 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.³² 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.³³ 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.³⁴ 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.³⁵ Congress has also ignored Indian nations' opposition to particular bills and

179, 179, 181 (2012) (stating that prior to gaming, tribes previously did not have financial resources to participate politically).

30. See, e.g., Owen G. Abbe et al., *Agenda Setting in Congressional Elections: The Impact of Issues and Campaigns on Voting Behavior*, 56 POL. RES. Q. 419, 422 (Dec. 2003) (identifying education, social security, health care, and the economy as the most important issues in the 1998 House Elections). Public opinion polls also routinely find that Americans do not rank Indian issues as important. See, e.g., *Most Important Problem*, GALLUP (2014), <http://www.gallup.com/poll/1675/most-important-problem.aspx>, archived at <http://perma.cc/C75Z-PNKX>.

31. MCCOOL, OLSON & ROBINSON, *supra* note 28, at 176–91.

32. WILKINS & STARK, *supra* note 4, at xxx–xxxii, 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).

34. See Dawes Allotment Act of 1887, 24 Stat. 388 (1887), available at http://digital.library.okstate.edu/kappler/Vol1/html_files/SES0033.html, archived at <http://perma.cc/HPQ8-SVM7>.

35. See Termination Act of 1953, H.R. Con. Res. 108, 83d Cong. (1953).

overlooked tribal requests for legislation benefiting their interests.³⁶

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.³⁷ 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.³⁸

Second, the study revealed the volume and importance of the different kinds of Indian-related legislation generated by Congress.³⁹ While recent scholarship has focused on the passage of pan-tribal legislation that substantially alters federal Indian law and policy,⁴⁰ Congress also enacts legislation on behalf of specific tribes and regularly includes

36. See, e.g., EDWARD LAZARUS, *BLACK HILLS / WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT* (1991) (documenting over two decades of Sioux advocacy for a congressional act authorizing the bringing of the Black Hills claim in federal court).

37. See *infra* Part II.

38. See ELY, *supra* note 1, at 135–79.

39. See *infra* Part II.

40. See, e.g., Skibine, *supra* note 15; Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 AM. INDIAN L. REV. 109 (1992); Bethany R. Berger, *United States v. Lara as a Story of Native Agency*, 40 TULSA L. REV. 5 (2004).

Indians in general legislation.⁴¹ 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.⁴² Recent studies have provided insights into criminal law and procedure in

41. See, e.g., Western Shoshone Claims Distribution Act, Pub. L. No. 108-270 (2004); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-14 (2013).

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,⁴³ tribal court practices and procedures,⁴⁴ and the success of Indian interests both in the certiorari process and on the merits in the Supreme Court.⁴⁵ 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.⁴⁶ 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.⁴⁷ Scholars have conducted only a few studies purporting to review legislation over Indian affairs passed by Congress since the 1970s.⁴⁸ These studies either list major legislation relating to Indian affairs⁴⁹

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.

46. For a discussion of the role of Congress in Indian affairs historically, see generally Vine Deloria, Jr., *The Evolution of Federal Indian Policy Making, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY* 239–56 (Vine Deloria, Jr. ed., 1985).

47. U.S. CONST. art. I, § 8, cl. 3.

48. See, e.g., Vine Deloria, Jr., *Legislation and Litigation Concerning American Indians*, 436 ANNALS AM. ACAD. POL. & SOC. SCI. 86 (1978); WILKINS & STARK, *supra* note 4.

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 as a bill passed without tribal opposition. Histories of ANCSA, however, suggest

or compare United States and Canadian legislation relating to indigenous self-determination.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.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.⁵² Finally, they note that Congress has haphazardly dealt with Indian affairs issues, leaving many important questions open and therefore subject to judicial interpretation.⁵³

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

that there was not universal support for the bill among Alaska Natives. *See, e.g., The Land Claims Settlement Act of 1971*, ARCTIC CIRCLE <http://arcticcircle.uconn.edu/SEEJ/Landclaims/ancsa6.html> (last visited Sept. 15, 2014), *archived at* <http://perma.cc/Q5DF-V9SB>. Wilkinson's efforts, however, contribute to our knowledge on the subject and are especially laudable since his book focuses on judicial decisions, not legislation.

50. *See, e.g.*, BORROWS, *supra* note 22.

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

52. *See, e.g.*, WILKINS & STARK, *supra* note 4, at 94–99.

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.

54. *See, e.g.*, THE INDIAN CIVIL RIGHTS ACT AT FORTY (Kristen A. Carpenter et al. eds., 2012); Skibine, *supra* note 15, at 767; Berger, *supra* note 40.

55. *See, e.g.*, Nell Jessup Newton, *Let a Thousand Policy-Flowers Bloom: Making Indian Policy in the Twenty-First Century*, 46 ARK. L. REV. 25 (1993) (critiquing congressional proposals in three bills for the creation of national tribal organizations or a national Indian policy institute in Washington, D.C.).

56. *See, e.g.*, Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Policy that Works* 21–26 (Harv. Kennedy Sch. Faculty Res. Working Paper Series, Paper No. RWP10-043, 2010), available at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:4553307>, *archived at* <http://perma.cc/62DY-VUYW>.

the appropriate application of the Indian canons of construction.⁵⁷ 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.⁵⁸ 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.⁵⁹

Studies of federal Indian policy tend to include some discussion of federal legislation relating to Indians.⁶⁰ Most of these are limited to major pieces of legislation and often discuss such legislation as an aspect of presidential policymaking.⁶¹ 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.⁶² 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 doctrinal debates on the subject of Congress and Indian

57. See, e.g., David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403 (1994); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137 (1990).

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.

61. See, e.g., Dean J. Kotlowski, *From Backlash to Bingo: Ronald Reagan and Federal Indian Policy*, 77 PAC. HIST. REV. 617 (2008); THOMAS CLARKIN, *FEDERAL INDIAN POLICY IN THE KENNEDY AND JOHNSON ADMINISTRATIONS, 1961–1969* (2001).

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.

affairs.⁶³ They frequently discuss the sources,⁶⁴ constitutionality,⁶⁵ and scope⁶⁶ 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.⁶⁷ This literature tends to emphasize major pieces of legislation that establish or transform federal Indian law and policy,⁶⁸ and confrontations between Congress and the

63. See *infra* notes 64–69.

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).

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, e.g., 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.

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.

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).

68. See, e.g., Laurence, *supra* note 25, at 421 (discussing the relationship between plenary power and the Indian Civil Rights Act); accord Williams, *supra* note 25, at 452.

Supreme Court.⁶⁹ 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,⁷⁰ political scientists “devote little attention” to how the subject matter of legislation may affect its enactment.⁷¹ Rather, political scientists tie party politics, individual legislator influence, presidential support, and interest group behavior to legislative success.⁷² So, by the nature of their inquiries, many political science studies omit any discussion of Indians or Indian issues.⁷³ The political science studies that do consider bill subject matter have not looked at Indian-related legislation.⁷⁴ 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.

70. For a sampling of the extensive political science literature on Congress and policymaking, see generally DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974); JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICY (2d ed. 1995); DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002 (2d ed. 2005) [hereinafter MAYHEW, DIVIDED WE GOVERN]; SARAH A. BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK (2003); BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (3d ed. 2007); KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING (1998); JAMES L. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS (1981); NELSON W. POLSBY, HOW CONGRESS EVOLVES: SOCIAL BASES OF INSTITUTIONAL CHANGE (2004).

71. E. SCOTT ADLER & JOHN WILKERSON, THE SCOPE AND URGENCY OF LEGISLATION: RECONSIDERING BILL SUCCESS IN THE HOUSE OF REPRESENTATIVES 1 (2005), available at <http://www.congressionalbills.org/APSA%202005%20%203.pdf>, archived at <http://perma.cc/9EXR-Z4P4>.

72. *See infra* Part III.B (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 LOSES, 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); Corntassel & 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).

78. Since the early 1990s, tribal advocates and Indian law scholars have launched legislative campaigns to overturn Supreme Court decisions. Most notably, Congress restored inherent criminal jurisdiction over non-member Indians in the *Duro* Fix as a result of tribal advocacy. See Skibine, *supra* note 15, at 767–68. More recently, Indian nations have sought a *Carcieri* Fix, to overturn *Salazar v. Carcieri* and allow all Indian nations to take land into trust under 25 U.S.C. § 465. See, e.g., Rob Capriccioso, *Tester Introduces Clean Carcieri Fix*, INDIAN COUNTRY TODAY MEDIA NETWORK (Apr. 1, 2014), <http://indiancountrytodaymedianetwork.com/2014/04/01/tester-introduces-clean-carcieri-fix-154275>, archived at <http://perma.cc/U9EA-3MHP>. A recent study of legislative overrides also includes Indian-related overrides. Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1358 (2014).

79. THEODORE LOWI ET AL., *AMERICAN GOVERNMENT POWER AND PURPOSE* 194 (10th ed. 2008).

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 2013.⁸¹ 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.⁸² 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—Database Creation and Coding [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.⁸³

I collected the data from THOMAS.gov, a website created and run by the Library of Congress, which electronically compiles legislative information.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.⁸⁵ I initially searched THOMAS.gov for public bills with a CRS subject matter code including the term “Indian.”⁸⁶ The search generated 6,907 bills introduced in the 94th

83. 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.

84. THOMAS, LIBRARY OF CONGRESS, <http://thomas.loc.gov/home/thomas.php> (last visited July 14, 2014), *archived at* <http://perma.cc/W4DV-7JF8>. THOMAS includes the text and other information on legislation introduced and enacted in Congress. Political scientists have also created publicly available legislative datasets. For a list of publicly and privately available legislative databases, see *Resources*, CONGRESSIONAL BILLS PROJECT, <http://congressionalbills.org/research.html> (last visited July 14, 2014), *archived at* <http://perma.cc/EXK9>. 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> (last visited July 14, 2014), *archived at* <http://perma.cc/QXQ6-3KM7>. 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.

85. 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> (last visited Aug. 12, 2014), *archived at* <http://perma.cc/TEP4-X3MN>.

86. For a description of how CRS assigns subject matter terms, see *Standard Subject Term*, LIBRARY OF CONGRESS, http://thomas.loc.gov/bss/bss_help.htm#index (last visited July 14, 2014), *archived at* <http://perma.cc/F37B-BNUQ>.

through the 112th Congresses. I downloaded these bills into a database.

I compared this data with other sources to ensure that I had identified as many Indian-related bills as possible.⁸⁷ First, I downloaded all the bills coded into the Native American Affairs subtopic in the Congressional Bills Project (“CBP”) database.⁸⁸ 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.⁸⁹ 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.⁹⁰ 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,⁹¹ (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> (last visited July 14, 2014), *archived at* <http://perma.cc/ZM6W-ZQNX>. 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 CBP 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,⁹² or (3) the bill was a private bill.⁹³ 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 verify 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.⁹⁴ 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 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.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),⁹⁶ or some other facet of the bill's provisions (e.g., whether the bill seeks to reauthorize an existing policy⁹⁷ or overturn a court decision).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.⁹⁹ These studies answer questions about how

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); accord J. Tobin Grant & Nathan J. Kelly, *Legislative Productivity of the U.S. Congress, 1789-2004*, 16 *POL'Y ANALYSIS* 303, 318 (2008); ADLER & WILKERSON, *supra* note 80, at 7, 153–57 (describing literature on legislative success as focusing on lawmaker preferences, committees, and interbranch influences).

95. *See, e.g.*, ADLER & WILKERSON, *supra* note 80, at 17; William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 344 (1991–1992); Bethany Blackstone, *An Analysis of Policy-Based Congressional Responses to the U.S. Supreme Court's Constitutional Decisions*, 47 *LAW & SOC'Y REV.* 199, 208 (2013).

96. Cornell & Kalt, *supra* note 56, at 21–26 (looking at self-determination bills).

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);

Congress responds to court decisions rather than look at how Congress enacts legislation in a single, substantive policy area.¹⁰⁰ They often include breakdowns of legislative overrides by subject matter.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.¹⁰²

Political scientists have conducted numerous studies focusing on congressional productivity and explaining why one Congress enacts more legislation than another.¹⁰³ These studies focus on “major” legislation, but they disagree on how to define major legislation.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.¹⁰⁵ These studies, along

Blackstone, *supra* note 95, at 204–05 (defining decision reversal legislation).

100. Eskridge, *supra* note 95, at 333; Blackstone, *supra* note 95, at 199.

101. Christiansen & Eskridge, *supra* note 78, at 1358.

102. 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.

103. *See, e.g.*, BINDER, *supra* note 70; MAYHEW, *DIVIDED WE GOVERN*, *supra* note 70.

104. BINDER, *supra* note 70, at 34–40; MAYHEW, *DIVIDED WE GOVERN*, *supra* note 70, at 40–41.

105. 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).

Recently, political scientists have built publicly 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 creation of

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.¹⁰⁶ Political scientists Adler and Wilkerson argue that bill content influences the prospects of legislative enactment.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.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.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.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-

these databases facilitates more systematic studies that consider the substantive content of legislation. They suggest a growing interest in more information about the substantive content of legislation and its possible influence on law and policymaking.

106. See KINGDON, *supra* note 70.

107. ADLER & WILKERSON, *supra* note 71, at 11–12.

108. ADLER & WILKERSON, *supra* note 80, at 17.

109. Adler and Wilkerson include a simple chart showing the substantive focus of the legislation. *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).

110. See *supra* Part I.A; Cornell & Kalt, *supra* note 56, at 21–26.

determination.

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.¹¹¹ It reflects how federal Indian law scholars have previously distinguished between kinds of Indian-related legislation¹¹² 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.¹¹³ 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.¹¹⁴

111. One of the limits of this coding scheme is that it obscures the fact that pan-tribal and tribe-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.

113. *See, e.g.,* Deloria, *supra* note 46, at 254–55; Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservations*, 25 U.C. DAVIS L. REV. 85, 88 (1991).

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.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 Maliseet Tribe, but it does not affect any other tribes (except as a possible model for other tribe-specific federal recognition bills).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;¹¹⁷ the Mescalero Apache Tribe Leasing Authorization Act, which authorizes the tribe to lease or transfer some of its water rights under specific conditions;¹¹⁸ and the Native Hawaiian Education Reauthorization Act, which would have reauthorized appropriations for Native Hawaiian education.¹¹⁹

substantive, self-implementing legislation that deals with a specific subject area within Indian law and applies across the board to all tribes. *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.

115. 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).

116. 25 U.S.C. §§ 1721–1735 (2012).

117. Western Shoshone Claims Distribution Act, Pub. L. No. 108–270, 118 Stat. 805 (2004).

118. Mescalero Apache Tribe Leasing Authorization Act, H.R. 1461, 112th Cong. (2011).

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.¹²⁰ 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;¹²¹ the Indian Gaming Regulatory Act, which establishes a regulatory scheme for the operation of gaming establishments on Indian lands;¹²² 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.¹²³

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.¹²⁴ 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.¹²⁵ Another example is the Hazardous Materials Transportation Act, which was amended to treat Indian nations like state governments, without requiring them

(2001).

120. For a similar definition, see WILKINSON, *supra* note 49, at 10–11.

121. Tribal Law and Order Act of 2010, Pub. L. No. 111–211, tit. 2, 124 Stat. 2258 (2010).

122. 25 U.S.C. §§ 2701–2721 (2012).

123. *Id.* §§ 2101–2108.

124. See, e.g., Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, 127 Stat. 54 (2013).

125. *Id.* § 904.

to seek state status.¹²⁶ 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.¹²⁷

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 with, and treat them 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,¹²⁸ and the Patient Protection and Affordable Care Act, which provides improvements and funding to the Indian Health Service and new benefits to American Indians.¹²⁹

My research assistant and I used the CRS bill summaries to code most of the bills.¹³⁰ 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.¹³¹ If the bill's summary

126. 49 U.S.C. § 5112 (2012).

127. Keith S. Porter, *Good Alliances Make Good Neighbors: The Case for Tribal-State-Federal Watershed Partnerships*, 16 CORNELL J.L. & PUB. POL'Y 495, 507–13 (2007) (recounting the history of the incorporation of treatment as a state for Indian tribes in the Clean Water Act).

128. Secure Border Act of 2012, H.R. 1299, 112th Cong. (2012).

129. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 §§ 2901–2902, 3314, 9021, 10221 (2010).

130. Legislative analysts in CRS write a summary for each bill introduced in Congress. *About CRS Summary*, LIBR. CONG., http://thomas.loc.gov/bss/abt_dgst.html (last visited Aug. 13, 2013), *archived at* <http://perma.cc/6TS2-WYAQ>. Political scientists often use bill titles and CRS summaries to code legislation. *See, e.g.*, Frank R. Baumgartner et al., *Studying Policy Dynamics*, CONG. BILLS PROJECT, <http://www.congressionalbills.org/Ch2-B,J,W.pdf> (2005), *archived at* <http://perma.cc/TH8W-9HX2>. If my research assistant or I could not find American Indians, Native Americans, Native Hawaiians, Alaska Natives, or their respective governments or organizations mentioned in the summary, we checked the bill text. The coding procedures are discussed in more detail in Methodological App.

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

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.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).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

summaries did not always include sufficient information to determine that the bill was high-focus. As a result, the study may underreport high-focus bills and overreport low-focus bills.

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 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 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, *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. WILKINS & STARK, *supra* note 4, at 96–97.

133. Bills were coded as enacted based on the action description in 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.

Indians. These bills were excluded from the dataset and further analysis.¹³⁴

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

134. For a list of these bills, see *infra* Methodological App.

take a multi-phase approach to coding the bills. In this first 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.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.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.¹³⁷ Although some bills clearly seem pro- or anti-Indian, others are

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

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

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.

much harder to code because they include both pro- and anti-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.¹³⁸ However, the bill also prohibits gaming on trust land, which could be considered anti-Indian.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 disproportionately 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

138. Bridgeport Indian Colony Land Trust, Health, and Economic Development Act of 2012, Pub. L. No. 112-212, 126 Stat. 1538 (2012).

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.

through the 112th Congresses.

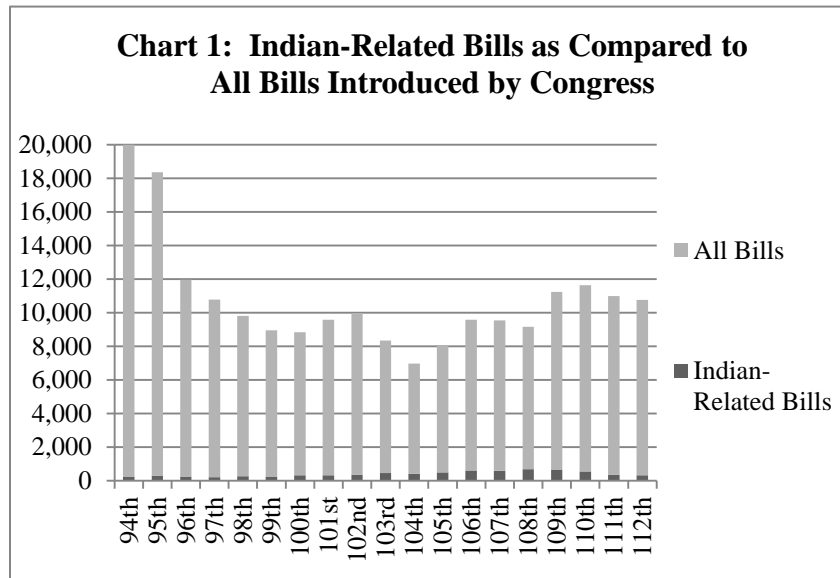
Proportionally speaking, legislators introduced a small number of Indian-related bills in each Congress. Chart 1 shows that Indian-related bills made up a relatively small proportion of the congressional agenda. Indian-related bills never exceeded 8.1 percent of the total number of bills introduced in Congress, and on average comprised about 4 percent of the total number of bills introduced.¹⁴⁰ The low number of bills introduced does not seem unusual given the scarcity of resources in Congress,¹⁴¹ the small percentage of Indians in the general United States population (less than 2 percent),¹⁴² and the weak link between electoral politics and Indian issues.¹⁴³

140. The author generated this number (3.9 percent) 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, https://www.senate.gov/pagelayout/reference/two_column_table/Resumes.htm (last visited July 2, 2014), *archived at* <http://perma.cc/JY6U-7WA6>.

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.¹⁴⁴ 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

Congress	Party in Control	All Bills¹⁴⁵	Indian-Related Bills¹⁴⁶
94th (1975–77)	Dem.	19,762	251 (1.3%)
95th (1977–79)	Dem.	18,045	308 (1.7%)
96th (1979–81)	Dem.	11,722	242 (2.1%)
97th (1981–83)	Split	10,582	208 (2.0%)
98th (1983–85)	Split	9,537	264 (2.8%)
99th (1985–87)	Split	8,694	257 (3.0%)
100th (1987–89)	Dem.	8,515	324 (3.8%)
101st (1989–91)	Dem.	9,258	323 (3.5%)
102nd (1991–93)	Dem.	9,604	370 (3.8%)
103rd (1993–95)	Dem.	7,883	455 (5.8%)
104th (1995–97)	Rep.	6,545	422 (6.4%)
105th (1997–99)	Rep.	7,532	494 (6.6%)
106th (1999–2001)	Rep.	8,968	613 (6.8%)
107th (2001–03)	Rep./Split	8,956	593 (6.6%)
108th (2003–05)	Rep.	8,468	689 (8.1%)
109th (2005–07)	Rep.	10,560	670 (6.3%)
110th (2007–09)	Dem.	11,081	554 (5.0%)
111th (2009–11)	Dem.	10,629	358 (3.4%)
112th (2011–13)	Split	10,439	319 (3.1%)

145. Data pulled from the congressional record daily digest Resume of Congressional Activity. *Résumé of Congressional Activity*, U.S. SENATE, https://www.senate.gov/pagelayout/reference/two_column_table/Resumes.htm (last visited July 2, 2014), archived at <http://perma.cc/JY6U-7WA6>. See also *Legislation of the U.S. Congress, 1973–Present*, CONGRESS.GOV, <https://beta.congress.gov/legislation> (last visited July 2, 2014), archived at <http://perma.cc/4Y7Q-Q48A> (reporting similar but not identical numbers).

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.

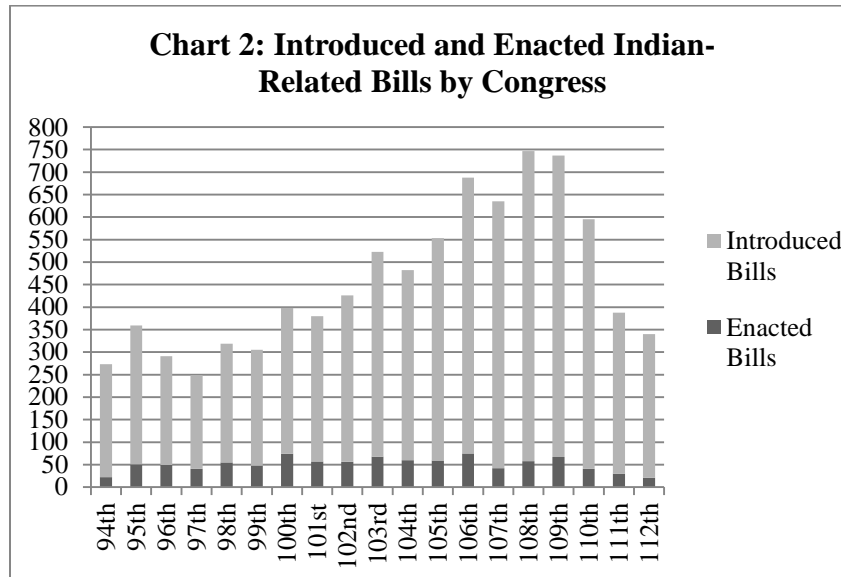


Table 2 reports the enactment rate of Indian-related bills for each Congress studied. It indicates the proportion of Indian-related bills enacted in each Congress as a percentage.¹⁴⁷ The enactment rate is much lower than the number of bills introduced in each Congress. This unsurprising finding reflects the more general phenomenon that Congress does not enact the majority of bills introduced.¹⁴⁸

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: Indian-Related Bills Introduced and Enacted by Congress

Congress	Party in Control	Introduced Bills	Enacted Bills
94th (1975–77)	Dem.	251	22 (8.8%)
95th (1977–79)	Dem.	308	51 (16.6%)
96th (1979–81)	Dem.	242	49 (20.2%)
97th (1981–83)	Split	208	41 (19.7%)
98th (1983–85)	Split	264	55 (20.8%)
99th (1985–87)	Split	257	48 (18.7%)
100th (1987–89)	Dem.	324	74 (22.8%)
101st (1989–91)	Dem.	323	57 (17.6%)
102nd (1991–93)	Dem.	370	56 (15.1%)
103rd (1993–95)	Dem.	455	68 (14.9%)
104th (1995–97)	Rep.	422	60 (14.2%)
105th (1997–99)	Rep.	494	59 (11.9%)
106th (1999–2001)	Rep.	613	75 (12.2%)
107th (2001–03)	Rep./Split	593	42 (7.1%)
108th (2003–05)	Rep.	689	58 (8.4%)
109th (2005–07)	Rep.	670	67 (10.0%)
110th (2007–09)	Dem.	554	41 (7.4%)
111th (2009–11)	Dem.	358	30 (8.4%)
112th (2011–13)	Split	319	21 (6.6%)

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.¹⁴⁹ Similarly, Congress consolidated nine tribe-specific bills introduced in the 111th Congress into the Claims Resolution Act of 2010.¹⁵⁰

The data presented in Table 3 and Chart 3 suggests that Congress more frequently (often *twice* as frequently) enacted Indian-related bills than it enacted bills generally.¹⁵¹ Chart 3

149. Consolidated Appropriations Resolution of 2003, Pub. L. No. 108–7, 117 Stat. 11 (2003). The joint resolution consolidated the following bills: Department of the Interior and Related Agencies Appropriations Act, 2003, H.R. 5093 (107th Cong.); Treasury and General Government Appropriations Act, 2003, H.R. 5120 (107th Cong.); Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act, 2003, H.R. 5263 (107th Cong.); Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2003, H.R. 5320 (107th Cong.); Energy and Water Development Appropriations Act, H.R. 5431 (107th Cong.); Department of the Interior and Related Agencies Appropriations Act, 2003, S. 2708 (107th Cong.); Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act, 2003, S. 2801 (107th Cong.); Energy and Water Development Appropriations Act, S. 2784 (107th Cong.); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2003, S. 2797 (107th Cong.); Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2003, H.R. 246 (108th Cong.); and Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2003, H.R. 247 (108th Cong.). Congress enacted eleven additional appropriations bills jointly as the Consolidated Appropriations Act, 2005, Pub. L. No. 108–447, 118 Stat. 2809 (2004), during the 108th Congress.

150. Pub. L. No. 111–291, 124 Stat. 3064 (2010). Congress enacted the following tribe-specific bills as part of the Claims Resolution Act of 2010: White Mountain Apache Tribe Water Rights Quantification Act of 2010, Pub. L. No. 111–291, 124 Stat. 3073 (2010); Taos Pueblo Indian Water Rights Settlement Act, Pub. L. No. 111–291, 124 Stat. 3122 (2010); Aamodt Litigation Settlement Act, Pub. L. No. 111–291, 124 Stat. 3134 (2010); Crow Tribe Water Rights Settlement Act of 2009, Pub. L. No. 111–291, 124 Stat. 3097 (2010).

151. Due to duplicate bills in the database, the enactment rate of Indian-related legislation may actually be higher. The database includes many duplicate bills. Only one of these bills is likely to pass even though they all represent the same policy proposal, and this may depress the actual enactment rate of policy proposals relating to Indians (e.g., more policy proposals relating to Indians could pass than the data suggests based on the unit of analysis). For a discussion of bills as a unit of analysis, see Paul Burstein et al., *Bill Sponsorship and Congressional Support for Policy Proposals, from Introduction to Enactment or Disappearance*, 58 POL. RES. Q. 295, 296 (June 2007) (distinguishing between bills and policy proposals).

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.

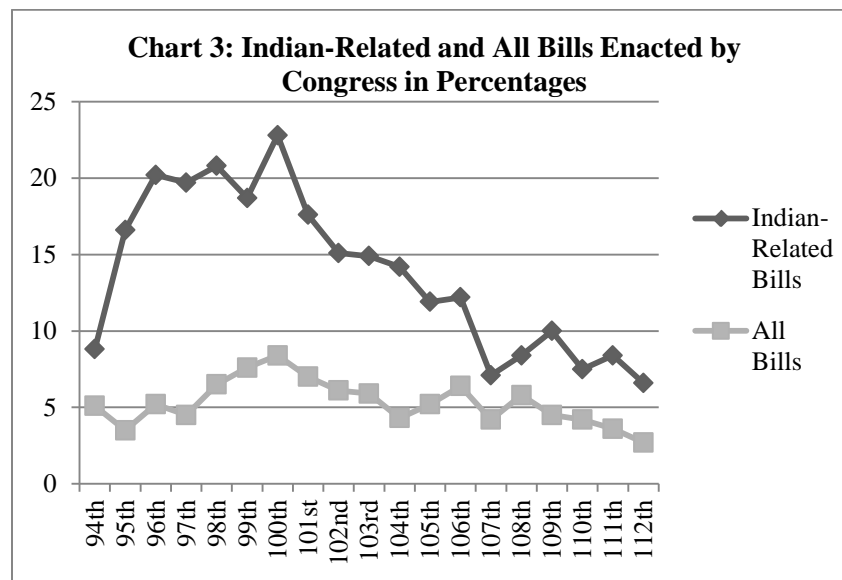


Table 3 provides a more detailed comparison of the enactment rates for Indian-related and all bills. It confirms that even though the difference between the two enactment rates varied over time, Congress consistently enacted Indian-related bills at a higher rate than its average rate of bill enactment 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.¹⁵²

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.

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

Congress	Party in Control	Indian-Related	
		Bills	All Bills
94th (1975–77)	Dem.	8.8%	5.1%
95th (1977–79)	Dem.	16.6%	3.5%
96th (1979–81)	Dem.	20.2%	5.2%
97th (1981–83)	Split	19.7%	4.5%
98th (1983–85)	Split	20.8%	6.5%
99th (1985–87)	Split	18.7%	7.6%
100th (1987–89)	Dem.	22.8%	8.4%
101st (1989–91)	Dem.	17.6%	7.0%
102nd (1991–93)	Dem.	15.1%	6.1%
103rd (1993–95)	Dem.	14.9%	5.9%
104th (1995–97)	Rep.	14.2%	4.3%
105th (1997–99)	Rep.	11.9%	5.2%
106th (1999–2001)	Rep.	12.2%	6.4%
107th (2001–03)	Rep./Split	7.1%	4.2%
108th (2003–05)	Rep.	8.4%	5.8%
109th (2005–07)	Rep.	10.0%	4.5%
110th (2007–09)	Dem.	7.4%	4.2%
111th (2009–11)	Dem.	8.4%	3.6%
112th (2011–13)	Split	6.6%	2.7%

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.¹⁵³ The

153. The results of similar analyses based on other subtopics from the CBP

analysis generated comparable results. The CBP coded 2,909 bills in the 93rd through 111th Congresses as Native American Affairs.¹⁵⁴ Of these 2,909 bills, 375 (or 12.9 percent) were enacted.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.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.¹⁵⁷

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 problems, Alaska Native claims settlement, land conveyance involving Native American lands or Native American groups, Indian Child Welfare Act, Indian gambling and casinos, Indian Gaming and Regulatory Act.

PAP, *supra* note 84. It also notes that “[t]his covers many subject area that would normally be coded in other subtopics (housing, medical programs, transportation systems, etc.)” *Id.*

155. As discussed in *supra* Part I.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 I.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* Appendix 3: Additional Analysis of the CBP Data.

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

157. The variation over time evident in Table 4 may indicate that

Table 4: Enactment Rates of Indian-Related Bills With and Without Appropriations Bills by Congress

Congress	All Bills	Indian-Related Bills	Indian-Related Bills without Approps.
94th (1975–77)	5.1%	8.8%	8.8% (22/251)
95th (1977–79)	3.5%	16.6%	16.0% (49/306)
96th (1979–81)	5.2%	20.2%	19.7% (47/239)
97th (1981–83)	4.5%	19.7%	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)

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

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 103rd Congress than the 98th Congress.

power.¹⁵⁸ It provides limited support for tribal advocates' and Indian law scholars' recent predictions that Indians may fare better in the legislative than in the legal process.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 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.¹⁶⁰ 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,

158. See *supra* Introduction.

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.

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 I.A.

water rights, women, and youth.¹⁶¹ 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.¹⁶² This trend of adding subcategories continued until 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

161. See *infra* Appendix 4: Breakdowns of CRS Subcategories of Indian-Related Legislation [hereinafter 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.

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 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.¹⁶⁵ 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.¹⁶⁶ Some general high-focus bills, such as the HEARTH Act of 2012, incorporated a pan-tribal bill into a general bill.¹⁶⁷ Topically, general high-focus bills cover such subcategories as violence against women, environmental regulation, education, and public lands. The low

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 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 I.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.

167. Homeless Emergency Assistance and Rapid Transition to Housing Act, Pub. L. No. 111-22, 123 Stat. 1663 (2009).

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.¹⁶⁸

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 decades ago.¹⁶⁹ His subcategories included enrollment issues, land acquisition, and claims distributions.¹⁷⁰ 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.¹⁷¹ 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.¹⁷²

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

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.

169. WILKINSON, *supra* note 49, at 139 n.12.

170. *Id.*

171. *See, e.g.*, Siletz Indian Restoration Act, H.R. 11221, 94th Cong. (1975) (federal recognition); Yavapai-Prescott Indian Tribal Water Rights Act, S. 1146, 103d Cong. (1994) (water rights settlement); Western Shoshone Claims Distribution Act, Pub. L. No. 108-270 (2004) (claims settlement distribution); Mescalero Apache Tribe Leasing Authorization Act, H.R. 1461, 112th Cong. (2011) (natural resources); Native Hawaiian Education Reauthorization Act, S. 86, 106th Cong. (2001) (Native Hawaiian issues); To Facilitate Shareholder Consideration of Proposals to Make Settlement Common Stock under the Alaska Native Claims Settlement Act Available to Missed Enrollees, Eligible Elders, and Eligible Persons Born after December 18, 1971, and for Other Purposes, Pub. Law No. 109-179, 120 Stat. 283 (2006) (Alaska Native issues).

172. *See* WILKINSON, *supra* note 49, at 7, 10.

self-governance.¹⁷³

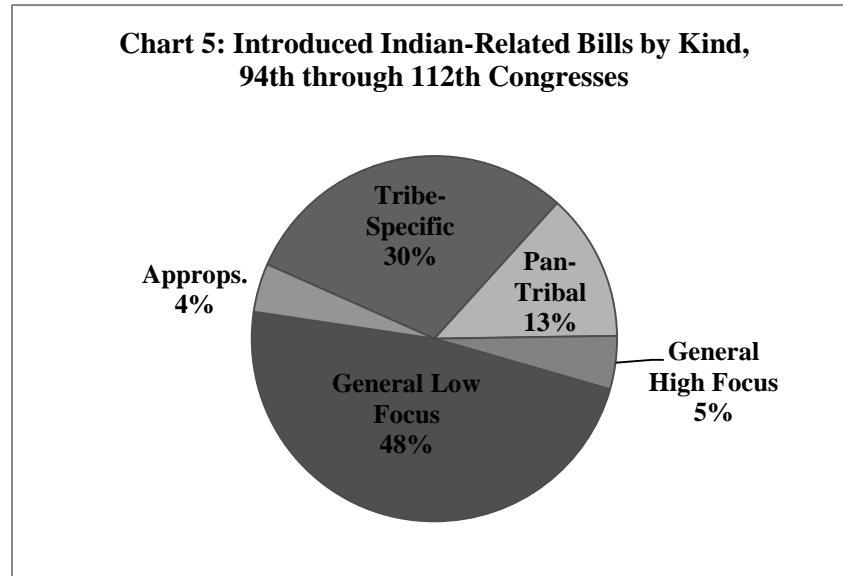


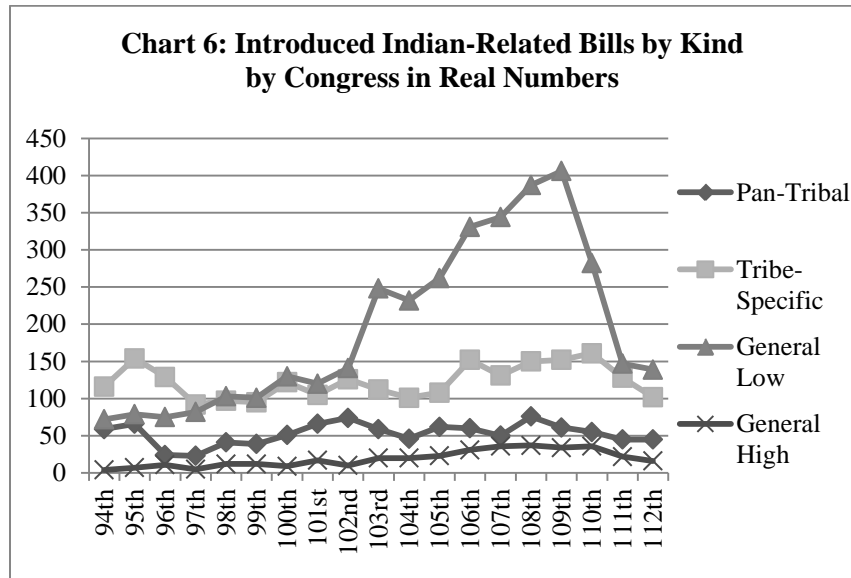
Chart 6 compares pictorially the actual numbers of Indian-related bills by kind by Congress.¹⁷⁴ It indicates that the number of general low-focus bills increased steadily, if not consistently, for most of the time period studied but decreased dramatically after the 109th Congress.¹⁷⁵ The data thus somewhat confirms some scholars' predictions that Congress increasingly includes Indians in general legislation.¹⁷⁶

173. See, e.g., Tribal Law and Order Act of 2010, 25 U.S.C. §§ 2801–2815 (2010); Indian Healthcare Improvement Act, Indian Gaming Regulatory Act of 2011, 25 U.S.C. §§ 2701–2721 (1988); Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (1978); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450a (1975).

174. For a breakdown of the numbers and percentages of Indian-related bills by kind by Congress, see *infra* Appendix 2: Details Regarding Introduced Indian-Related Bills in the Study.

175. 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.

176. 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.*



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 tribe-specific 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.¹⁷⁷ 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

177. See Chart 6.

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 (36.9 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 10.3 percent (99/974) of the enacted bills—the same percent as introduced pan-tribal bills.

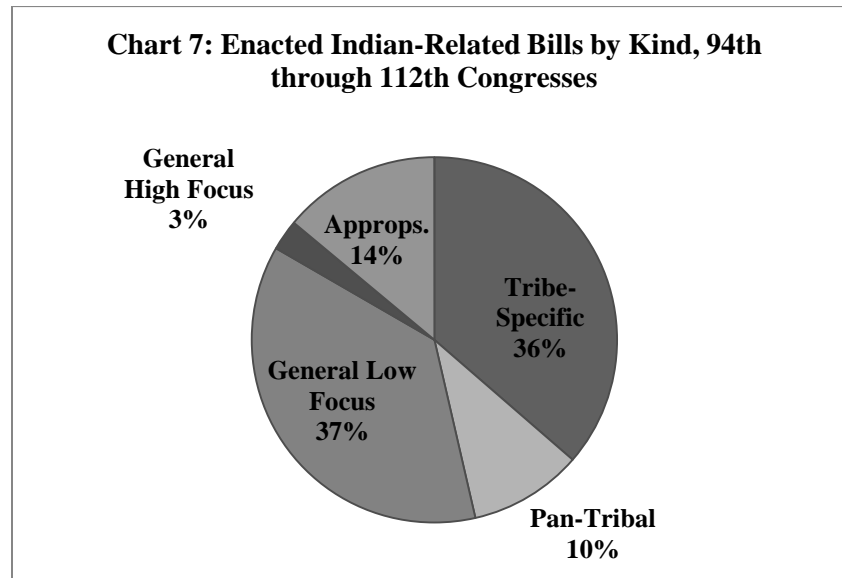


Chart 8 provides information on the kinds of Indian-related bills enacted by each Congress. It shows the actual numbers of Indian-related bills enacted by kind. Congress enacted a total of 974 Indian-related bills, with an overall enactment rate of 12.6 percent (974/7,714). Chart 8 suggests some consistency 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.

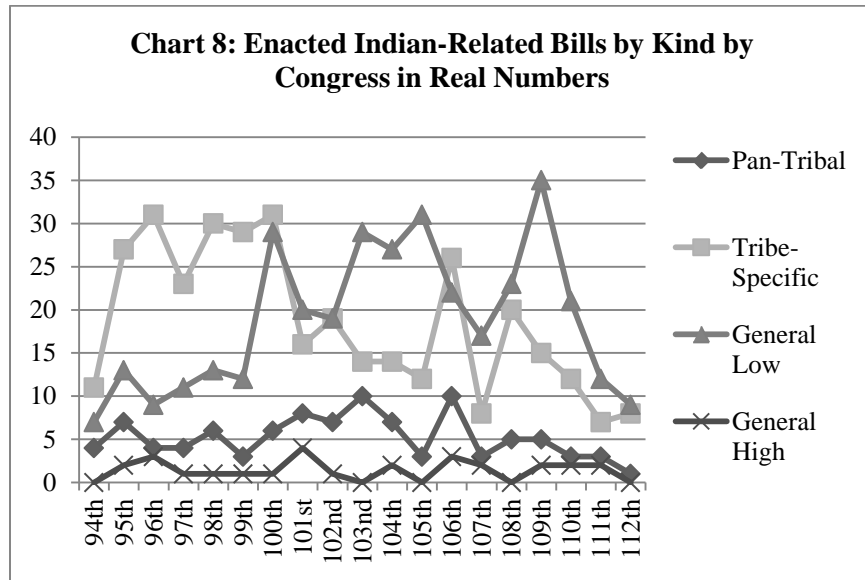


Table 5 reports more detailed information on the kinds of Indian-related bills enacted during the time period studied. Like Chart 8, it shows no consistent trends based on bill type over time, but does show variation in the enactment rates by kind of bill by Congress.

Table 5: Enactment Rates of Indian-Related Bills by Kind by Congress

Congress	Kind of Bill					
	Pan-Tribal	Tribe-Specific	General Low	General High	Approps.	Total Enacted
94th	6.8% (4/59)	9.5% (11/116)	9.7% (7/72)	0 (0/4)	0 (0)	8.8% (22/251)
95th	10.6% (7/66)	17.5% (27/154)	16.5% (13/79)	28.6% (2/7)	100% (2/2)	16.6% (51/308)
96th	16.7% (4/24)	24.0% (31/129)	12.0% (9/75)	27.3% (3/11)	66.7% (2/3)	20.2% (49/242)
97th	17.4% (4/23)	25.0% (23/92)	13.4% (11/82)	20.0% (1/5)	33.3% (2/6)	19.7% (41/208)
98th	14.6% (6/41)	30.9% (30/97)	12.6% (13/103)	8.3% (1/12)	45.5% (5/11)	20.8% (55/264)
99th	7.7% (3/39)	30.5% (29/95)	11.9% (12/101)	8.3% (1/12)	30.0% (3/10)	18.7% (48/257)
100th	11.8% (6/51)	25.4% (31/122)	22.3% (29/130)	10.0% (1/10)	63.6% (7/11)	22.8% (74/324)
101st	12.1% (8/66)	15.2% (16/105)	16.7% (20/120)	23.5% (4/17)	60.0% (9/15)	17.6% (57/323)
102nd	9.5% (7/74)	15.1% (19/126)	13.4% (19/141)	10.0% (1/10)	52.6% (10/19)	15.1% (56/370)
103rd	16.9% (10/59)	12.5% (14/112)	11.7% (29/248)	0 (0/20)	93.8% (15/16)	14.9% (68/455)
104th	15.2% (7/46)	13.9% (14/101)	11.6% (27/232)	10.0% (2/20)	43.5% (10/23)	14.2% (60/422)
105th	4.8% (3/62)	11.1% (12/108)	11.8% (31/262)	0 (0/23)	33.3% (13/39)	11.9% (59/494)
106th	16.7% (10/60)	17.1% (26/152)	6.6% (22/331)	9.7% (3/31)	35.9% (14/39)	12.2% (75/613)
107th	6.0% (3/50)	6.1% (8/131)	4.9% (17/344)	5.6% (2/36)	37.5% (12/32)	7.1% (42/593)
108th	6.6% (5/76)	13.3% (20/150)	5.9% (23/387)	0 (0/37)	25.6% (10/39)	8.4% (58/689)
109th	8.2% (5/61)	9.9% (15/152)	8.6% (35/406)	5.9% (2/34)	58.8% (10/17)	10.0% (67/670)
110th	5.5% (3/55)	7.5% (12/161)	7.4% (21/282)	5.6% (2/36)	15.0% (3/20)	7.4% (41/554)
111th	6.7% (3/45)	5.5% (7/128)	8.2% (12/147)	9.1% (2/22)	37.5% (6/16)	8.4% (30/358)
112th	2.2% (1/45)	7.8% (8/102)	6.5% (9/139)	0 (0/16)	17.6% (3/17)	6.6% (21/319)

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 15.1 percent (353/2,333) 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 30.9 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 9.8 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 (9.9 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.

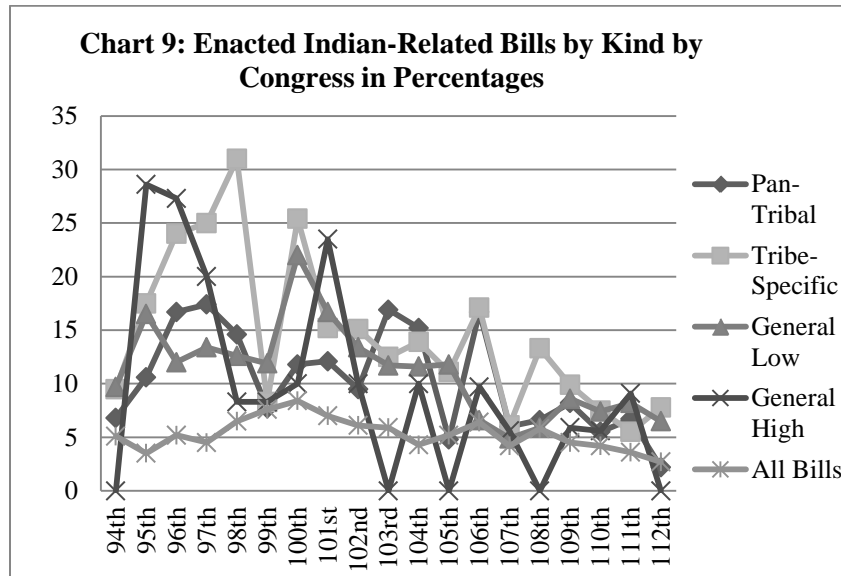


Chart 9 displays the enactment rate by bill kind in percentages and compares them to the enactment rate for all bills by each Congress. While Congress enacts more Indian-related legislation than it does legislation generally, the wide variation by Congress in enactment rates for each kind of bill suggests that no single 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.¹⁷⁸ 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 better understanding 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

government. *See, e.g.*, BINDER, *supra* note 70, at 11. But the data does not seem to comport with Cornell and Kalt's study, which implied that Indian interests fare better with Democrats than Republicans in Congress. Cornell & Kalt, *supra* note 56, at 21–26.

exceptional.¹⁷⁹ Scholars offer different explanations for the 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 Constitution¹⁸¹ 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

179. Frickey, *supra* note 11, at 445; WILKINSON, *supra* note 49, at 7–9.

180. *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831) (coining the phrase “domestic dependent nations”); *Worcester v. Georgia*, 31 U.S. 515 (1832) (holding that the state of Georgia had no authority over the Cherokee Nation even though it was located within the state’s boundaries). *See also* Frickey, *supra* note 11, at 445; Alex Tallchief Skibine, *Dualism and the Dialogic of Incorporation in Federal Indian Law*, 119 HARV. L. REV. F. 28, 28–29 (2005) (discussing Frickey’s view of exceptionalism in Indian law).

181. WILKINSON, *supra* note 49, at 13 (“Indian policy is one of the few threads of federal activity that is continuous from the founding of the Republic, when Indian relations was one of the most pressing federal issues.”).

182. *Id.* at 7.

183. The relationship between Indian nations and the federal government has long been described as a trust relationship. NELL JESSUP NEWTON ET AL., COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 5.04(4)(a) (2012) (describing the development of the trust responsibility). This trust relationship, however, is not actually or legally a trust. Instead of having a basis in the common law of trusts, this relationship is based on an analogy, namely that the relationship between Indian nations and the federal government is like a ward-guardian relationship. *See Cherokee Nation v. Georgia*, 30 U.S. at 2.

184. WILKINSON, *supra* note 49, at 7.

185. Frickey, *supra* note 11, at 445; Skibine, *supra* note 180, at 28–29.

186. *Cherokee Nation v. Georgia*, 30 U.S. at 2; *Worcester v. Georgia*, 31 U.S. 515 (1832). *See also* Frickey, *supra* note 11, at 445; Skibine, *supra* note 180, at 28–29.

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

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.

I considered two other possible comparisons. First, I could have compared the Indian-related bills to policies directed at state governments. The CBP data, however, does not include any codes allowing for such comparison. Second, I could have compared the proportion of general bills in a policy area (e.g., health or education) with bills in the same area that were specific to Indians. This approach was problematic because (1) Congress has exclusive authority over Indians, so it may be more likely to legislate for Indians in a policy field (e.g., health) than it would for the general public because the states would also have legislative authority in that field, and (2) some bills relating to Indians are later subsumed into general bills, making it hard to distinguish between general bills and Indian bills.

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,¹⁹¹ (3) Copyrights and Patents,¹⁹² (4) Maritime Issues,¹⁹³ (5) U.S. Dependencies and Territorial Issues,¹⁹⁴ and (6) District

issues, general legislation that amends the Internal Revenue Code.

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

[I]mmigration 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:

[F]uture 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

of Columbia (D.C.) Affairs.¹⁹⁵ 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.

territories, former territories and U.S. protectorates.

Id. (noting that “[t]his covers many subject areas that would normally be coded in other subtopics (housing, medical programs, transportation systems, etc.).”).

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

Subtopic	Introduced	Enacted
Taxation, Tax Policy, and Tax Reform	5,758	56 (0.9%)
Immigration and Refugee Issues	2,870	74 (2.6%)
Copyright and Patent	858	72 (8.4%)
Maritime Issues	2,540	126 (5.0%)
U.S. Dependencies and Territorial Issues	625	47 (7.5%)
D.C. Affairs	1,202	165 (13.7%)
Native American Affairs	2,909	375 (12.9%)

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.¹⁹⁶

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.¹⁹⁷ Due to the special relationship (not

196. 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).

197. 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).¹⁹⁸ Indian nations, however, greatly outnumber United States dependencies and territories and could, as a result, require more legislation.¹⁹⁹ 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.²⁰⁰ 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.²⁰¹ 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

Indians and the federal government and how it has changed over time, see Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 129–34 (1993).

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.

199. The United States has nine territories and associated states. *State Government*, USA.GOV, <http://www.usa.gov/Agencies/State-and-Territories.shtml> (last visited July 17, 2014), archived at <http://perma.cc/MQ3H-7PZQ> (listing American Samoa, Federated States of Micronesia, Guam, Midway Islands, Northern Marianas Islands, Puerto Rico, Republic of Palau, Republic of the Marshall Islands, and the U.S. Virgin Islands). In comparison, there are 566 federally recognized Indian nations. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 79 Fed. Reg. 4748 (Jan. 29, 2014).

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).

201. See Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775 (2014).

the relationships between Congress and Indians are different from the relationship between Congress and other groups.²⁰² 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.²⁰³

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.

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

202. 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. *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>.

203. 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*.

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 demonstrated high enactment rates of tribe-specific and pan-tribal bills and low enactment rates of general bills. In

204. See ESKRIDGE ET AL., *supra* note 94, at 47–80.

205. *Id.* at 48–50.

206. DAVID TRUMAN, *THE GOVERNMENTAL PROCESS* 33 (1951).

207. See generally Frederick J. Boehme & Richard Witmer, *Indian Nations as Interest Groups: Tribal Motivations for Contributions to U.S. Senators*, 65 POL. RES. Q. 179 (2010) (treating Indian nations as interest groups).

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).

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.²¹² These studies find that interest group influence depends upon the context,

212. See, e.g., BAUMGARTNER ET AL., *supra* note 74. Empirical social science studies have identified several factors, which may influence legislative success. ESKRIDGE ET AL., *supra* note 94, at 47–48. 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. *Id.*

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. *Id.* 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. *Id.*

The low public salience of most Indian issues suggests that public salience does not affect the enactment rate. See *supra* note 30 and accompanying text. 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 legislators and legislative success are not seen as producing hypotheses that could help us to understand the relationship between Congress and Indians.

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 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

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.”).

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.²¹⁷ 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.²¹⁸ 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.²¹⁹ 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.²²⁰

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.²²¹ Recent studies, particularly on omnibus legislation, have documented successful departures from the textbook version of the legislative process.²²² Some scholars have more generally

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.

220. ESKRIDGE ET AL., *supra* note 94, at 62–63.

221. *See, e.g.*, KINGDON, *supra* note 70.

222. *See, e.g.*, SINCLAIR, *supra* note 70, at 3–7.

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.”²²³ 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.²²⁴ 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.²²⁵ 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.²²⁶

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

223. ESKRIDGE ET AL., *supra* note 94, at 64 (citing KINGDON, *supra* note 70).

224. 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.

225. *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.

226. Most likely, general legislation is not referred to the SCIA, so the influence of the SCIA may not be as relevant.

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.²²⁷ 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

227. See *supra* Part I.

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.²²⁸ 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.²²⁹ 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,²³⁰ 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.²³¹ 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, 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

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.

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.²³² 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.²³³ As a result, scholars 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.²³⁴ Other

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.

234. For a full list of these proposals, see Fletcher, *supra* note 20, at 36. *See*

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.²³⁵

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.²³⁶ 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.²³⁷ 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.²³⁸ 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 clashing with—Congress on federal Indian law and policy.²³⁹ 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

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.”).

239. Frickey, *supra* note 11, at 445; Fletcher, *supra* note 20, at 127–28.

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.²⁴⁰ 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.²⁴¹ 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 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.²⁴² It can also establish broadly

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/> (last visited July 21, 2014), archived at <http://perma.cc/SW96-LMTK> (listing the 117 Indian law cases heard by the Supreme Court from 1975 to 2012).

241. Steele, *supra* note 11, at 784.

242. For example, Congress has the ability to settle water rights or claims on

applicable policies to resolve problems throughout Indian country, or categorize tribal governments with and treat them similar to state and local 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.²⁴³ 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.²⁴⁴ 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

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).

243. 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).

244. *See supra* Part I.

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.

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 categorizing tribes with, and treating them as, state and local 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 creating special grant programs or set-asides for Indian tribes,²⁵¹ or specifically extending general programs to

246. Clean Water Act, 33 U.S.C. §§ 1370, 1377 (1987); Clean Air Act, 42 U.S.C. § 7601(d)(2)(1) (1990).

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).

250. See, e.g., Columbia-Pacific National Heritage Area Study Act, H.R. 407, 110th Cong. (2007); Nez Perce National Historical Park Act, H.R. 2032, 102d Cong. (1991).

251. See, e.g., Federal Energy Development Impact Assistance Act, H.R. 11792, 94th Cong. (1976).

Indians.²⁵² Other bills, however, propose less common actions like directing federal agencies to explore foreign markets for American Indian arts and crafts,²⁵³ or declaring that any abandoned shipwreck on Indian lands is the property of the Indian tribe owning the land.²⁵⁴ 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.²⁵⁵

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 cases²⁵⁶ and policy areas,²⁵⁷ but few scholars have paid much attention to this area more generally.²⁵⁸ 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 canons for statutory construction.²⁵⁹

252. See, e.g., Emergency Agricultural Relief Act, S. 2603, 100th Cong. (1988) (specifically stating that the relief extends to Indian farmers).

253. Omnibus Trade and Competitiveness Act, S. 2613, 100th Cong. (1988).

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 like state 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.

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.

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 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

260. Laurence, *supra* note 25, at 435; Newton, *supra* note 65, at 195; Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories and the Nineteenth Century Origins of Plenary Power in Foreign Affairs*, 81 TEX. L. REV. 1 (2002); Savage, *supra* note 25, at 76, 79.

261. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

262. United States v. Lara, 541 U.S. 193, 200 (2004); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989); United States v. Wheeler, 435 U.S. 313, 323 (1978), *superseded by statute on other grounds as stated in* United States v. Lara, 541 U.S. 193 (2004). For example, the Court has relied on the plenary power doctrine to uphold congressional legislation extending federal criminal jurisdiction over Indian lands, *United States v. Kagama*, 118 U.S. 375 (1886), divesting Indian nations of criminal and civil jurisdiction, *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979), permitting federal control of liquor on Indian lands, *Rice v. Rehner*, 463 U.S. 713 (1983), reducing reservation boundaries without the consent of, or compensation to, the Indian nation, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 594 (1977), abrogating treaties, *Lonewolf v. Hitchcock*, 187 U.S. 553 (1903), and subjecting an Indian nation’s tax law to secretarial approval, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982). Congress’s authority in this area is so extensive that Dean Nell Newton has described Congress’s plenary power over Indian affairs as “[w]hat Congress wants, Congress gets.” Newton, *supra* note 65, at 195.

263. See *supra* note 25.

focuses on issues specific to federal Indian policy.²⁶⁴ 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.²⁶⁵ 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.²⁶⁶ 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.²⁶⁷ 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 nations.”²⁶⁸ Yet the existence and proliferation of pan-tribal

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 . . .”).

267. See Deloria, *supra* note 46, at 254–55; Robert B. Porter, *The Demise of Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous People*, 15 HARV. BLACKLETTER L. J. 107 (1999).

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

and tribe-specific legislation over time suggests that Indians are not being incorporated or assimilated wholesale into mainstream America.²⁶⁹ 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.²⁷⁰

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.²⁷¹ 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 Indian policy—as not recognizing both the diversity of Indian nations and the individualized nature of the political relationship.²⁷² The data may indicate that the federal

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.”).

272. See, e.g., *id.*; Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95

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.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 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

CALIF. L. REV. 799, 847 (2007) (rejecting a one-size-fits-all approach to civil liberties for Indian nations); Stacy L. Leeds & Erin S. Shirl, *Whose Sovereignty? Tribal Citizenship, Federal Indian Law, and Globalization*, 46 ARIZ. ST. L.J. 89, 101 (2014) (advocating against one-size-fits-all approaches in Indian country); Frickey, *supra* note 11, at 483 (decrying the court for crafting one-size-fits-all solutions in Indian country).

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* (working title) (forthcoming).

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

274. See PAP, *supra* note 84.

275. For a full discussion of the coding framework used by the project, how and why it was developed, and its limits, see PETER JOHN, THE POLICY AGENDAS PROJECT: A REVIEW (2006), available at http://www.unc.edu/~fbaum/books/comp/Comp_Agendas_Files/JEPP_Web_May_06/JEPP_John_Review_May_2006.pdf, archived at <http://perma.cc/BS5T-EYJG>; Frank R. Baumgartner et al., *Studying Policy Dynamics*, ¶ 2 in POLICY DYNAMICS 29 (Frank R. Baumgartner ed., 2002), available at <http://www.congressionalbills.org/Ch2-B,J,W.pdf>, archived at <http://perma.cc/TH8W-9HX2>.

1975 to 2013.²⁷⁶ 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.²⁷⁷ I initially searched THOMAS.gov

276. For a full description of why I chose this time period, see *supra* Part II.B of the Article.

277. 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> (last visited Aug. 12, 2014), *archived at* <http://perma.cc/TEP4-X3MN>. 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> (last visited Sept. 15, 2014), *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> (last visited Sept. 15, 2014), *archived at* <http://perma.cc/6D9H-4KGG> (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.²⁸¹ First, I downloaded all the bills coded into the Native American Affairs subtopic in the CBP database.²⁸² 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.²⁸³ 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.²⁸⁴ 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

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.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.²⁸⁶

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.

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

1. A Bill to Establish as Part of the Outdoor Recreation Programs a Program to Permit Certain Residents to Cultivate Gardens on Dormant Federal Lands, H.R. 13140, 94th Cong. (1976) (no Indians).
2. A Bill to Authorize the Appropriation of \$12.4 Million at July 1976 Prices for Rehabilitation and Resettlement of Enewetak Atoll, Trust Territory of the Pacific Islands, S. 3833, 94th Cong. (1976) (no Indians).
3. A Bill Authorizing the Wichita Indian Tribe of Oklahoma, and Its Affiliated Bands and Groups of Indians, to File with the Indian Claims Commission Any of Their Claims Against the United States for Lands Taken Without Adequate Compensation, and for Other Purposes, S. 3515, 94th Cong. (1976) (private bill).
4. An Act Designating Gathright Lake on the Jackson River, Virginia, as Gathright Dam and Lake Moomaw, H.R. 12112, 95th Cong. (1978) (no Indians).
5. An Act 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, State of Wyoming, H.R. 2501, 95th Cong. (1977) (no Indians).
6. Indian Cyclone Rehabilitation and Reconstruction Act of 1977, S. 2353, 95th Cong. (1977) (India not American Indians).
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).
8. A Bill to Designate the Indian Mounds Wilderness, Sabine National Forest, State of Texas, H.R. 4203, 96th Cong. (1979) (place name).
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).
10. A Bill to Designate the Indiana Dunes National Lakeshore as the “Paul H. Douglas Indiana Dunes National Lakeshore,” H.R. 95, 96th Cong. (1979) (Indiana).
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).

12. Federal Lobbying Disclosure Act, H.R. 111, 97th Cong. (1981) (no Indians).

13. 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 Indians).

14. A Bill to Amend the Internal Revenue Code of 1954 to Allow the Deduction for Retirement Savings to be Computed for a Married Individual on the Basis of the Sum of Such Individual's Compensation and So Much of the Compensation of the Spouse of Such Individual as Exceeds the IRA Deduction of Such Spouse, H.R. 3662, 98th Cong. (1983) (no Indians).

15. Interstate Commerce Protection Act of 1983, S. 646, 98th Cong. (1983) (no Indians).

16. A Bill to Settle Certain Claims Arising out of Activities on the Pine Ridge Indian Reservation, S. 2260, 99th Cong. (1986) (private bill).

17. A Bill to Amend the Job Training Partnership Act to include American Samoans in Native American Employment and Training Programs, H.R. 1536, 99th Cong. (1985) (no Indians).

18. 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) (no Indians).

19. A Bill to Amend the Job Training Partnership Act to Include American Samoans in the Native American Employment and Training Programs, S. 73, 99th Cong. (1985) (no Indians).

20. A Bill to Settle Certain Claims Arising Out of Activities on the Pine Ridge Indian Reservation, H.R. 2711, 100th Cong. (1988) (private bill).

21. A Bill to Settle Certain Claims Arising Out of Activities on the Pine Ridge Indian Reservation, S. 1305, 100th Cong. (1988) (private bill).

22. A Bill to Enroll 20 Individuals Under the Alaska Native Claims Settlement Act, S. 2865, 100th Cong. (1988) (private bill).

23. A Bill to Transfer Ownership of Certain Lands Held in Trust for the Blackfeet Tribe, and for Other Purposes, S. 802, 100th Cong. (1988) (private bill).

24. 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) H.R. 1137, 100th Cong. (1987) (no Indians).

25. A Bill to Amend the Job Training Partnership Act to Include American Samoans in Native American Employment and Training Programs, H.R. 1138, 100th Cong. (1987) (no Indians).

26. A Bill to Amend the Job Training Partnership Act to Include American Samoans in the Native American Employment and Training Programs, S. 102, 100th Cong. (1987) (no Indians).

27. A Bill to Amend 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, 100th Cong. (1987) (no Indians).

28. A Bill to Authorize the Vietnam Women's Memorial Project, Inc., to Construct a Statue at the Vietnam Veterans Memorial in Honor and Recognition of the Women of the United States who Served in the Vietnam Conflict, S. 2042, 100th Cong. (1988) (no Indians).

29. International Indigenous People's Protection Act of 1989, H.R. 879, 101st Cong. (1990) (no U.S. Indians, Alaska Natives or Native Hawaiians).

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30. Quinebaug and Shetucket Rivers Valley National Heritage Corridor Act of 1992, H.R. 5423, 102d Cong. (1992) (no Indians).
 31. Champlain Valley Heritage Corridor Study Act, S. 2778, 102d Cong. (1992) (no Indians).
 32. National Park System Reform Act of 1994, S. 471, 103d Cong. (1994) (no Indians).
 33. Omnibus Insular Areas Act of 1996, H.R. 1332, 104th Cong. (1996) (no Indians).
 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).
 35. To Amend the Act Entitled "An Act to Provide for the Establishment of the Indiana Dunes National Lakeshore, and for Other Purposes" to Ensure an Opportunity for Persons who Convey Property for Inclusion in That National Lakeshore to Retain a Right to Use and Occupancy for a Fixed Term, and for Other Purposes, H.R. 1994, 105th Cong. (1997) (no Indians).
 36. To Amend the Lobbying Disclosure Act of 1995, H.R. 233, 105th Cong. (1997) (no Indians).
 37. To Provide for Fairness and Accuracy in Student Testing, H.R. 4333, 106th Cong. (2000) (no Indians).
 38. Utah Public Lands Artifact Preservation Act of 2001, H.R. 1491, 107th Cong. (2001) (no Indians).
 39. Utah Public Lands Artifact Preservation Act, H.R. 3928, 107th Cong. (2002) (no Indians).
 40. A Bill to Authorize the Expenditure of Funds on Private Lands and Facilities at Mesa Verde National Park, in the State of Colorado, and for Other Purposes, S. 2595, 107th Cong. (2002) (no Indians).
 41. To Extend the Authority for the Construction of a Memorial to Martin Luther King, Jr., in the District of Columbia, and for Other Purposes, H.R. 1209, 108th Cong. (2003) (no Indians).
 42. Seniors Health and Independence Preservation Act of 2002, H.R. 960, 108th Cong. (2003) (no Indians).
 43. Arrow Excise Tax Simplification Act of 2003, S. 339, 108th Cong. (2003) (no Indians).
 44. To Remove Certain Use Restrictions on Property Located in Navajo County, Arizona, H.R. 1436, 109th Cong. (2005) (no Indians).
 45. Restoring the Everglades, an American Legacy Act of 2007, H.R. 617, 110th Cong. (2007) (no Indians).
 46. Video Game Rating Enforcement Act of 2008, S. 3315, 110th Cong. (2008) (no Indians).
 47. Restoring the Everglades, an American Legacy Act of 2007, S. 353, 110th Cong. (2007) (no Indians).
 48. Rural Wind Energy Development Act, S. 673, 110th Cong. (2007) (no Indians).
 49. Endangered Species Recovery Act of 2007, S. 700, 110th Cong. (2007) (no Indians).
 50. Invest Act of 2007, S. 740, 110th Cong. (2007) (no Indians).
 51. Railroad Antitrust Enforcement Act of 2007, S. 772, 110th Cong. (2007) (no Indians).
 52. Access to Competitive Power Act of 2007, S. 864, 110th Cong. (2007) (no Indians).
 53. A Bill Granting the Consent and Approval of Congress to an Interstate Forest Fire Protection Compact, S. 975, 110th Cong. (2007) (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.²⁸⁷ Table 7 lists the codes, their definitions, and their application to the bills.

Table 7: Coding Scheme

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

[Table Continued on Next Page.]

Endangered by the Cherokee County National Priorities List Site, and for Other Purposes, H.R. 3058, 111th Cong. (2009) (place name).

55. Same Day Registration Act, H.R. 3957, 111th Cong. (2009) (no Indians).

56. To Extend the Authorization of the Quinebaug and Shetucket Rivers Valley National Heritage Corridor Act of 1994, and for Other Purposes, H.R. 397, 111th Cong. (2009) (no Indians).

57. African Burial Ground International Memorial Museum and Educational Center Act, H.R. 784, 112th Cong. (2011) (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).

59. HALE Scouts Act, S. 610, 112th Cong. (2011) (no Indians).

287. JOHN, *supra* note 275; ADLER & WILKINSON, *supra* note 80.

Code/Variable	Definition	How Applied
Major Action Date	States date of major action taken (described in the Major Action code)	Downloaded from the Bill Status and Summary in the THOMAS.gov database
Latest Action	Connotes latest action on bill	Downloaded from the Bill Status and Summary in the THOMAS.gov database
Latest Action Date	States date of the last action taken on the bill (described in the Latest Action code)	Downloaded from the Bill Status and Summary in the THOMAS.gov database
Public Law Number	Public law citation number assigned to the bill upon its enactment; identifies the bill that passed both chambers and presentment	Identified from the action section of the Bill Status and Summary downloaded from the THOMAS.gov database
Enumerated	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)	Determined by looking at the action section of the Bill Status and Summary downloaded from the THOMAS.gov database. ²⁸⁸ 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. ²⁸⁹

[Table Continued on Next Page.]

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 accidentally miscoded as enumerated.

Code/Variable	Definition	How Applied
Notes	Any notes on the legislation included in THOMAS.gov Bill Status and Summary	Downloaded from the Bill Status and Summary in the THOMAS.gov database
Related bills	Identifies related bills introduced across multiple Congresses; indicates that the bill may have been introduced in more than one Congress	Downloaded from the Bill Status and Summary in the THOMAS.gov database; this information has not been used or verified
ENR/Public Law	Links to the Public Law Number and text of the final bill passed by the House and Senate	These links were identified in the major action and notes sections of the Bill Status and Summary
Reports	Identifies any House or Senate reports on the bill	Downloaded from the Bill Status and Summary in the THOMAS.gov database
Tribe-Specific Bills	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	Usually identifiable by the title of the legislation or the summary on 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, or Native Hawaiians

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Code/Variable	Definition	How Applied
Pan-Tribal Bills	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	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
General Low-focus bills	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, 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

[Table Continued on Next Page.]

Code/Variable	Definition	How Applied
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
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

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.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 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

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.

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, 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 eighty-five bills from the dataset for any one of the following reasons: (1) the bill summary or text did not

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. All analyses (including the percent agreements) were run using ReCal 0.1 Alpha for 2 Coders. See Deen Freelon, *ReCal: Intercoder Reliability Calculation as a Web Service*, 5 INT'L J. OF INTERNET SCI. 20 (2010); Deen Freelon, *ReCal2: Reliability for Coders*, DFREELON.ORG, <http://dfreelon.org/utis/recalfront/recal2/> (last visited Aug. 3, 2014), archived at <http://perma.cc/9N4R-8NW8>.

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).
2. An Act to Establish the Chickasaw National Recreation Area, S. 1725, 94th Cong. (1976) (place name).
3. An Act to Extend Certain Social Security Act Provisions, H.R. 3387, 95th Cong. (1977) (no Indians).
4. Supplemental Housing Authorization Act, H.R. 3843, 95th Cong. (1977) (no Indians).
5. Intergovernmental Antirecession Assistance Act, H.R. 6810, 95th Cong. (1977) (no Indians).
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).
7. Home Energy Assistance Act, H.R. 5552, 96th Cong. (1979) (no Indians).
8. Nuclear Waste Policy Act, S. 2189, 96th Cong. (1980) (no Indians).
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).
11. Juvenile Justice Amendments of 1980, S. 2441, 96th Cong. (1980) (no Indians).
12. An Act to Amend the Surface Transportation Assistance Act of 1978, S. 3210, 97th Cong. (1981) (no Indians).
13. Educational Mining Act of 1982, S. 1501, 97th Cong. (1983) (no Indians).
14. Local Government Fiscal Assistance Amendments, S. 1426, 98th Cong. (1983) (no Indians).
15. Public Works Improvement Act of 1984, S. 1330, 98th Cong. (1984) (no Indians).
16. Preventive Health Amendments of 1984, S. 2301, 98th Cong. (1984) (no Indians).
17. Great Smoky Mountains Wilderness Act, H.R. 4262, 98th Cong. (1984) (no Indians; place name).
18. Great Smoky Mountains Wilderness Act, S. 1947, 98th Cong. (1984) (no Indians; place name).
19. Great Smoky Mountains Wilderness Act, S. 2183, 98th Cong. (1984) (no Indians).
20. Central American Counterterrorism and Law Enforcement Professionalization Act, S. 1915, 99th Cong. (1985) (no U.S. Indians; Indians in Guatemala).
21. Coast Guard Authorization Act of 1986, H.R. 4208, 99th Cong. (1986) (no Indians).
22. Federal Trade Commission Authorization Act of 1985, S. 1078, 99th Cong. (1985) (no Indians).
23. 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, H.R. 1535, 99th Cong. (1985) (no Indians).

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24. International Security and Development Cooperation Act of 1985, H.R. 1555, 99th Cong. (1985) (no U.S. Indians; Indians in Latin America).
 25. Health Services Amendments Act of 1986, S. 1282, 99th Cong. (1986) (no Indians).
 26. International Security and Development Cooperation Act of 1985, S. 960, 99th Cong. (1985) (no U.S. Indians; Indians in Latin America).
 27. Omnibus Insular Areas Act of 1988, S. 721, 100th Cong. (1987) (no Indians).
 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).
 29. A Bill to Require Monthly Reports by the President on the Extent to Which the Government of Nicaragua has Undertaken Reforms, H.R. 4285, 100th Cong. (1988) (no U.S. Indians).
 30. National Mimbres Culture Study Act of 1988, S. 1912, 100th Cong. (1987) (no Indians).
 31. A Bill to Require Monthly Reports by the President on the Extent to Which the Government of Nicaragua has Undertaken Reforms, H.R. 376, 101st Cong. (1989) (no U.S. Indians).
 32. Mimbres Culture National Monument Establishment Act of 1990, S. 2429, 101st Cong. (1990) (no Indians).
 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).
 34. International Cooperation Act of 1992, H.R. 5757, 102d Cong. (1992) (no U.S. Indians).
 35. International Cooperation Act of 1992, H.R. 4546, 102d Cong. (1992) (no U.S. Indians).
 36. To Redesignate Custer Battlefield National Monument as the Little Bighorn National Battlefield Park, H.R. 847, 102d Cong. (1991) (no Indians; place name).
 37. Veterans' Medical Programs Amendments of 1992, S. 2344, 102d Cong. (1992) (no Indians).
 38. Yucca House National Monument Expansion Act of 1992, S. 2397, 102d Cong. (1992) (no Indians).
 39. Progressive Endangered Species Act of 1992, S.3159, 102d Cong. (1992) (no Indians).
 40. Emergency Nurse Shortage Relief Act of 1993, H.R. 560, 103d Cong. (1993) (no Indians).
 41. To Provide for the Management of Portions of the Presidio under the Jurisdiction of the Secretary of the Interior, H.R. 3433, 103d Cong. (1993) (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).
 44. Rangelands Restoration Act, S. 896, 103d Cong. (1993) (no Indians).
 45. Rural Community Tourism Act of 1995, S. 1078, 103d Cong. (1993) (no Indians).
 46. Old Faithful Protection Act, S. 274, 104th Cong. (1995) (no Indians).
 47. Old Faithful Protection Act, H.R. 723, 104th Cong. (1995) (no Indians).

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48. Cache La Poudre River Corridor Act, S. 342, 104th Cong. (1995) (no Indians).
 49. Foreign Relations Revitalization Act of 1995, S. 908, 104th Cong. (1995) (no U.S. Indians).
 50. Foreign Relations Revitalization Act of 1995, H.R. 1561, 104th Cong. (1996) (no U.S. Indians).
 51. 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. 563, 104th Cong. (1995) (no Indians).
 52. Regulatory Transition Act of 1995, S. 219, 104th Cong. (1995) (no Indians).
 53. Lewis and Clark Expedition Bicentennial Commemorative Coin Act, H.R. 1560, 105th Cong. (1997) (no Indians).
 54. Lewis and Clark Expedition Bicentennial Commemorative Coin Act, S. 2205, 105th Cong. (1998) (no Indians).
 55. 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. 193, 105th Cong. (1997) (no Indians).
 56. Wetlands and Wildlife Enhancement Act of 1997, S. 1677, 105th Cong. (1998) (no Indians).
 57. Lewis and Clark Expedition Bicentennial Commemorative Coin Act, H.R. 1033, 106th Cong. (1999) (no Indians).
 58. Leif Erickson Millineum Commemorative Coin Act, H.R. 3373, 106th Cong. (1999) (no Indians).
 59. Lewis and Clark Expedition Bicentennial Commemorative Coin Act, S. 1187, 106th Cong. (1999) (no Indians).
 60. To Exempt Certain Reports from Automatic Elimination and Sunset Pursuant to the Federal Reports Elimination and Sunset Act of 1995, H.R. 3111, 106th Cong. (1999) (no Indians).
 61. Peopling of America Theme Study Act, H.R. 5263, 106th Cong. (2000) (no Indians).
 62. Peopling of America Theme Study Act, S. 2478, 106th Cong. (2000) (no Indians).
 63. United and Strengthening America Act, H.R. 2975, 107th Cong. (2001) (no Indians).
 64. Peopling of America Theme Study Act, H.R. 2420, 107th Cong. (2001) (no Indians).
 65. Economic Security and Worker Assistance Act of 2001, H.R. 3529, 107th Cong. (2001) (no Indians).
 66. CARE Act of 2002, H.R. 7, 107th Cong. (2001) (no Indians).
 67. Peopling of America Theme Study Act, S. 329, 107th Cong. (2001) (no Indians).
 68. Marriage Protection Act of 2004, H.R. 3313, 108th Cong. (2003) (no Indians).
 69. A Bill to Amend the IRC to Provide Credit Parity, S. 4104, 109th Cong. (2006) (no Indians).
 70. Marriage Protection Act of 2005, H.R. 1100, 109th Cong. (2005) (no Indians).
 71. A Bill to Authorize Funding for the National Crime, S. 3641, 110th Cong. (2008) (no Indians).
 72. A Bill to Authorize Funding for the National Crime, S. 3602, 110th Cong. (2008) (no Indians).
 73. A Bill to Authorize Funding for the National Crime, S. 3601, 110th Cong. (2008) (no Indians).
 74. Community Health Center Capital Investment Act, S. 2270, 110th Cong. (2007) (no Indians).

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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).
 77. Marriage Protection Act, H.R. 724, 110th Cong. (2007) (no Indians).
 78. SAFETEA-LU Technical Corrections Act of 2008, H.R. 1195, 110th Cong. (2007) (no Indians; street name).
 79. Feeding America's Families Act of 2007, H.R. 2129, 110th Cong. (2007) (no Indians).
 80. Hopewell Culture National Historical Park Boundary Act, H.R. 2197, 110th Cong. (2007) (no Indians).
 81. Supplemental Appropriations Act, 2008, H.R. 2642, 110th Cong. (2007) (no Indians).
 82. SAFETEA-LU Technical Corrections Act of 2008, H.R. 3248, 110th Cong. (2007) (no Indians; street name).
 83. Clean Energy Investment Act of 2008, H.R. 5231, 110th Cong. (2008) (no Indians).
 84. Hopewell Culture National Historical Park Boundary Act, S. 1993, 110th Cong. (2007) (no Indians).
 85. Hopewell Culture National Historical Park Boundary Act, H.R. 283, 111th Cong. (2009) (no Indians).

APPENDIX 2: DETAILS REGARDING INTRODUCED INDIAN-RELATED BILLS IN THE STUDY

The table on the following page 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.

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Table 8: *Kinds of Introduced Indian-Related Bills by Congress*

Congress	Kind of Bill				
	Pan-Tribal	Tribe-Specific	General Low	General High	Approps.
94th	23.5% (59/251)	46.2% (116/251)	28.7% (72/251)	1.6% (4/251)	0
95th	21.4% (66/308)	50.0% (154/308)	25.6% (79/308)	2.3% (7/308)	0.7% (2/308)
96th	9.9% (24/242)	53.3% (129/242)	31.0% (75/242)	4.5% (11/242)	1.2% (3/242)
97th	11.1% (23/208)	44.2% (92/208)	39.4% (82/208)	2.4% (5/208)	2.9% (6/208)
98th	15.5% (41/264)	36.7% (97/264)	39.0% (103/264)	4.5% (12/264)	4.2% (11/264)
99th	15.2% (39/257)	37.0% (95/257)	39.3% (101/257)	4.7% (12/257)	3.9% (10/257)
100th	15.7% (51/324)	37.7% (122/324)	40.1% (130/324)	3.1% (10/324)	3.4% (11/324)
101st	20.4% (66/323)	32.5% (105/323)	37.2% (120/323)	5.3% (17/323)	4.6% (15/323)
102nd	20.0% (74/370)	34.1% (126/370)	38.1% (141/370)	2.7% (10/370)	5.1% (19/370)
103rd	13.0% (59/455)	24.6% (112/455)	54.5% (248/455)	4.4% (20/455)	3.5% (16/455)
104th	10.9% (46/422)	23.9% (101/422)	55.0% (232/422)	4.7% (20/422)	5.5% (23/422)
105th	12.6% (62/494)	21.9% (108/494)	53.0% (262/494)	4.7% (23/494)	7.9% (39/494)
106th	9.8% (60/613)	24.8% (152/613)	54.0% (331/613)	5.1% (31/613)	6.4% (39/613)
107th	8.4% (50/593)	22.1% (131/593)	58.0% (344/593)	6.1% (36/593)	5.4% (32/593)
108th	11.0% (76/689)	22.7% (150/689)	56.2% (387/689)	5.4% (37/689)	5.7% (39/689)
109th	9.1% (61/670)	22.6% (152/670)	60.6% (406/670)	5.1% (34/670)	2.5% (17/670)
110th	9.9% (55/554)	29.1% (161/554)	50.9% (282/554)	6.5% (36/554)	3.6% (20/554)
111th	12.6% (45/358)	35.8% (128/358)	41.1% (147/358)	6.1% (22/358)	4.5% (16/358)
112th	14.1% (45/319)	32.0% (102/319)	43.6% (139/319)	5.0% (16/319)	5.3% (17/319)

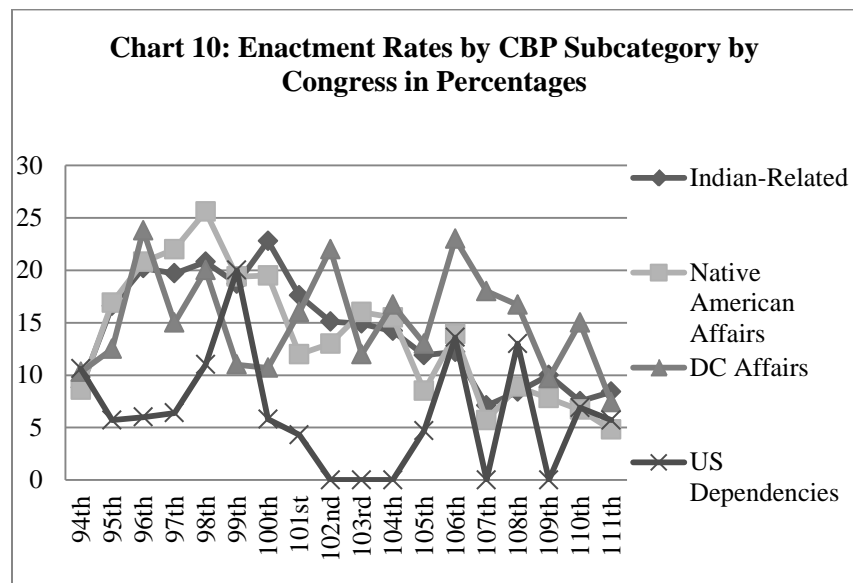
APPENDIX 3: ADDITIONAL ANALYSIS OF THE CBP DATA

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

Congress	Native American Affairs Bills	Indian-Related Bills
94th (1975-77)	8.6% (14/163)	8.8%
95th (1977-79)	16.9% (34/201)	16.6%
96th (1979-81)	20.8% (26/125)	20.2%
97th (1981-83)	22.0% (24/109)	20.8%
98th (1983-85)	25.6% (32/125)	19.7%
99th (1985-87)	19.8% (22/111)	18.7%
100th (1987-89)	19.5% (30/154)	22.8%
101st (1989-91)	12.1% (17/141)	17.6%
102nd (1991-93)	13.0% (20/154)	15.1%
103rd (1993-95)	16.1% (22/137)	14.9%
104th (1995-97)	15.5% (18/116)	14.2%
105th (1997-99)	8.5% (11/130)	11.9%
106th (1999-2001)	13.9% (23/165)	12.2%
107th (2001-03)	5.7% (10/174)	7.1%
108th (2003-05)	8.9% (17/192)	8.4%
109th (2005-07)	7.8% (13/166)	10.0%
110th (2007-09)	6.7% (12/179)	7.4%
111th (2009-11)	4.8% (7/147)	8.4%

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.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.



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 II.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

	94 th	95 th	96 th	97 th	98 th	99 th	100 th	101 st	102 nd
Children	– ²⁹⁶	–	–	–	–	–	–	–	–
Claims	51	67	84	53	43	39	50	53	43
Courts	–	–	16	12	6	8	4	1	7
Economic development	–	–	–	–	–	–	–	–	40
Education	–	37	–	–	–	–	–	–	–
Gambling operations	–	–	–	–	–	–	–	–	–
Housing	–	–	–	–	–	–	–	1	18
Hunting & fishing rights	–	7	20	3	5	10	13	15	3
Lands	68	119	121	77	77	103	123	115	131
Law enforcement	–	–	–	–	–	–	–	–	–
Medical care	–	–	–	–	–	–	–	17	44
Social & development programs	–	–	–	–	–	–	–	–	–
Water rights	–	2	8	8	8	14	20	24	35
Women	–	–	–	–	–	–	–	–	–
Youth	–	–	–	–	–	–	–	–	–

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.

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Table 11: CRS Subcategories of Indian-Related Bills by Congress, 103rd to 110th Congresses²⁹⁷

	103 rd	104 th	105 th	106 th	107 th	108 th	109 th	110 th
Children	25	56	43	58	57	61	54	44
Claims	48	51	55	60	64	50	50	43
Courts	8	7	12	19	7	7	8	3
Economic development	52	41	79	83	52	67	35	40
Education	–	–	86	139	105	120	102	93
Gambling operations	1	23	24	30	21	–	–	–
Housing	37	35	34	39	36	42	38	37
Hunting & fishing rights	10	13	10	6	11	–	–	12 ²⁹⁸
Lands	179	174	215	251	204	266	223	154
Law enforcement	17	8	43	62	39	64	66	46
Medical care	73	68	73	81	92	101	101	89
Social & development programs	–	–	–	–	–	–	–	4
Water rights	16	19	29	32	20	26	12	18
Women	3	5	6	11	22	10	16	5
Youth	–	6	12	17	14	–	–	–

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.