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Comparing the Behavior of Indigenous Tribes, States, and Foreign Sovereigns as Submitters of Amicus Curiae within the Supreme Court

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Comparing the Behavior of Indigenous Tribes, States, and Foreign Sovereigns as Submitters of
Amicus Curiae within the Supreme Court

A thesis submitted in partial fulfillment of the requirement
for the degree of Bachelor of Arts in Government from
The College of William and Mary

by
Grace Ellen Murray

Accepted for __________________________
(Honors)

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Comparing the Behavior of Indigenous Tribes, States, and Foreign Sovereigns as Submitters of Amicus Curiae within the Supreme Court

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College of William & Mary
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Indigenous tribes, states, and foreign sovereigns possess different degrees of sovereignty outside the federal government yet frequently interact within the United States’ judicial system. In their presence in the Supreme Court, do indigenous tribes behave more like foreign sovereigns or more like states? I explore how each actor behaves as a submitter of amicus curiae briefs in order to compare the macro-level behavior of tribes, sovereigns, and states. I analyze the amicus brief submissions of these actors to all merits cases throughout the Roberts Court. My dataset is unique in the attention paid to the network of signees and entities involved in each amicus brief: I record all entities co-signing on to a single brief and compare the patterns within and between the entities in how frequently they file, to which party they file for, and with whom entities co-file. Through analyzing my dataset of briefs and beginning to evaluate the network compilation of signees, I demonstrate that tribes’ behavior as amicus submitters lies in between that of states and foreign sovereigns, mirroring the state of their semi-sovereignty in the eyes of the Supreme Court.

Thesis Committee:
Jaime Settle, Chair
Christine Nemacheck, Second Reader
Alexandra Joosse, Third Reader
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Indigenous tribes’ sovereignty is incomplete; they exist in a state of jurisdictional limbo. In making this claim, sovereignty is defined as the authority to self-govern (NCAI Policy Research Center 2012, 4). As the relationship between the United States and indigenous tribes currently stands, tribal nations possess powers of self-governance while simultaneously remaining limited. In the wake of recent high-profile decisions perceived as impinging on tribal sovereignty (Carcieri v. Salazar 2009 555 U.S. __; Duro v. Reina 1990 495 U.S. 676), tribal nations have vocalized their struggles to adjudicate within a fluctuating state of quasi-sovereignty. This state creates a “patchwork of various federal and tribal laws that work in tandem to utterly obfuscate justice” (Deer 2015, 31). Indigenous tribes are frequently required to work within the United States legal system in order to retain their self-governance due to the complex nature of their relationship with the United States. The Supreme Court regularly evaluates indigenous tribes’ sovereignty and the importance of cultivating a presence within the Court to advocate for an actor’s interest has grown significantly. Prior to this research, there has been no comprehensive evaluation comparing the manner in which indigenous tribes advocate for their interests to the lobbying actions of other sovereign entities within the Court.

Current research acknowledges the rise of lobbying strategies before the Court but provides little evidence of how actors lobby; without a baseline understanding of how, the impacts of lobbying efforts are unable to be accurately measured. Amicus curiae briefs are intentionally submitted legal briefs which play key roles in decision-making processes within the Supreme Court. These briefs are intended to promulgate the views of the submitting actors

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1 I use the term “indigenous tribe” to refer to Native American tribal communities and tribal nations within the United States. This research is limited by the confines of my perspective as a researcher of settler origins. To this end, I measure behavior through observable statistics and take great care not to take ownership of the complex histories affecting each indigenous tribe.
(Krislov 1963) and are carefully coordinated to impact the decisions of the Court (Gleason 2017; Collins 2008). Organizations such as the Tribal Supreme Court Project, the National Association of Attorneys General Center for Supreme Court Advocacy, and the Supreme Court Project coordinate brief-writing efforts and facilitate communication throughout interest groups with shared priorities. The rise of these organizations within the past few decades demonstrates national recognition of the lasting impact of the Court’s decisions and the importance of pooling resources in order to lobby the Court for desired outcomes most successfully. While it is accepted that these organizations have greatly improved the quality of amici contributed by actors (Fletcher 2010, 517; Labin 2002, 696; Clayton 1994, 542), there is very little known about the mechanisms of the coordination techniques and how actors’ amici submissions differ based on their varying impetuses for coordination. Frequently, amicus curiae research pays more attention to how the Court considers submissions rather than how submitters consider their presence in the Court. By looking at the behavior of the actors rather than the Court, we begin to understand how interest groups conceptualize their relationship with the Court and, by extension, the how they visualize the Courts as an effective arena in which to pursue justice. Through tracing the amici coordination strategies of indigenous tribes, states, and foreign sovereigns, I depict the overall behavior of each actor and, most critically, lay the foundation of descriptive analyses for understanding why each actor behaves as they do.

The heart of my argument is that an entity’s type changes their amici-submitting behavior; an indigenous tribe will submit amici in a distinct manner due to their different relationship with the federal government. The theory that different groups submit in different ways is upheld within the literature (Hansford 2004, Caldeira and Wright 1990, Collins and Solowiej 2007). Uneven research on institutional interest groups makes it difficult to understand
how different actors, with different degrees of sovereignty, behave within the Supreme Court. My research question targets this relationship between actor sovereignty and amici submission behavior, asking whether indigenous tribes behave more like foreign sovereigns or more like states. I focus on the behavior of the actors themselves rather than attempting to isolate the implications of actor behavior and further narrow in scope by focusing on descriptive patterns of behavior. The behavior of amici actors on the whole is significantly under-researched. Before we can accurately estimate the effect of amici on judicial decision making, we need to know more about the descriptive patterns of amici submission. I define the broad term of “behavior” as how frequently, in favor of which party, and with whom actors file amicus briefs.

As Justice Sandra Day O’Connor (1997, 1) emphasized, “whether tribal court, state court, or federal court, we must all strive to make the dispensation of justice in this country as fair, efficient, and principled as we can.” The knowledge of how tribal nations are working towards equal dispensation of justice is limited by the lack of understanding of how indigenous tribes act as lobbying forces in their amicus curiae briefs. Amicus curiae briefs are instances in which indigenous tribes are voluntarily presenting the Court with information. By investigating submission behavior, I contribute an understanding of how indigenous tribes compare to other sovereign actors in how they treat the Court as a venue in which to evoke change.

In this paper, I first review the literature on amicus curiae briefs in general, followed by the research on indigenous tribes, states, and foreign sovereigns in the Court. My literature review closes with a discussion of the research on how actors behave as amici submitters and the lobbying strategies they employ within the Court. Next, I present my hypotheses on the actors’ amici submission behavior as based in my theory of their strategy. I subsequently explain my
dependent variable classification, data collection, and statistical processes. Following my explanation of the structure of my study, I discuss my findings for each hypothesis and qualitatively support what the data depict for certain relationships. Finally, in light of my findings, I draw conclusions and identify possible extensions of this topic in social network analysis.

**Literature Review**

The minimal literature available discussing indigenous tribes’ amicus curiae focuses only on amici in cases regarding federal Indian law rather than analyzing the behavior and treatment of tribal nations as submitters across all case types. My research asks whether the *behavior* of indigenous tribes as submitters of amicus curiae briefs in the Supreme Court is more like that of foreign sovereigns or states. How do indigenous tribes compare to states and foreign sovereigns as submitters of amicus curiae?

In order to answer my overarching question comparing the behavior of these three actors, I first outline the general discussion on amicus curiae within the Supreme Court. Subsequently, I analyze the understanding of how tribes, states, and foreign sovereigns behave in the Court – I address the research on these actors in the Court overall and finally target the research on the actors’ three behavioral qualities in which I am interested. As there is significant research missing for indigenous tribes, I theorize expected behavior for this actor based on the known behavior of states and foreign sovereigns and on the limited information available regarding amici in federal Indian law.

**Amicus Curiae Research At-Large**

Amicus curiae, or “friend of the court” briefs, are briefs submitted to either side of a Supreme Court docket. These briefs are meant to lend a previously unrepresented perspective in
regards to the details or context of a case before the Court and are typically submitted in favor of either the petitioner or respondent. The rules concerning amicus curiae are outlined in Supreme Court Rule 37. For each brief, the Court mandates proper methods for submission and the appropriate “content, format, and circumstances” (Legal Information Institute “Federal Rules of Civil Procedure”). Amici briefs garner a significant amount of attention within the political science and legal communities as there is disagreement as to how amici evoke change within case decisions, and to what extent.

Justices Black, Breyer, and Scalia highlight the critical role amicus curiae play in extending the justices’ perspectives and knowledge concerning cases. In a dissent in Jaffe v. Redmond in 1996, Justice Scalia noted a disparity in amicus briefs submitted by the parties and suggested an impact in decision making because of this (518 U.S. 1 (1996) (Scalia, J., dissenting)). Further outlining the importance of amicus curiae, Justice Black stated he disliked “the almost insuperable obstacles” that Supreme Court Rule 37 creates for amici submissions as they impede individuals seeking to contribute information in a case to which they are not a party. According to Justice Black, a wide range of amici is critical as “most of the cases before this Court involve matters that affect far more people than the immediate record parties” (346 U.S. 946 (1954)). Justice Black’s statement emphasizes the importance of the Court as a venue in which decisions affect far more than the two parties involved. In order to understand truly the ramifications of a case beyond the two parties involved, varied input is crucial in decision-making. Justice Breyer discussed the utility of amicus briefs as filling voids in knowledge during cases that rely heavily on scientifically based evidence (Breyer 1998). Through this, Justice Breyer underlines how amici inform the justices beyond the abilities of either party to do so.
Amici, in Justice Breyer’s reasoning, allow the Court to come to an informed decision on cases that intersect with specialties other than the law.

Amicus curiae submission rates skyrocketed at the latter end of the twentieth century and from this increase grew research attempting to ascertain the extent to which an amicus brief can impact judicial decision-making. Amici were submitted to an average of 10% of cases at the beginning of the twentieth century; by the end, 85% of cases had at least one amicus curiae submitted (Bradly and Gardner 1985; Kearney and Merrill 2000, 753). Currently, amicus filings reach unprecedented heights (Larsen 2014). Scholars of the Court share a common interest in isolating and understanding the many variables that affect the justices and in turn impact case outcomes (Baum 1997, Frank 1963). As amici submission rates rose, scholars saw a need to evaluate the extent of the impact of these briefs on case decisions ((Krislov 1963, Puro 1971, Kearney and Merrill 2000, 751). From this need grew the overwhelming focus within amicus curiae literature on determining the effect of groups’ submissions on the Court’s decisions – I label this variable as “amici effectiveness.” Amici effectiveness has been examined time and time again with varying methods of measurement. Litigant success rate (Kearney and Merrill 2000, Songer and Sheehan 1993) and citation rate, or the rate at which a brief is cited within the Court’s opinions, are two commonly utilized measures (Collins 2004a). More recently, Collins (2008) incorporated justice-vote directionality, or measuring effectiveness based on how certain justices vote for cases to which certain interest groups submit. Litigation success rate, citation rate, and vote directionality all attempt to assess the effectiveness of amici on the justices. As evidenced by the changing standards of measure, amici effectiveness is notoriously difficult to isolate, yet it is valued as it is part of the larger structure of forces impacting judicial decisions.
A significant amount of amicus curiae research focuses on the interplay of “interest groups” within the Court; my research is in line with precedent by labelling indigenous tribes, states, and foreign sovereigns as a type of institutional interest groups. There are various methods of classifying interest groups within amicus curiae research (Caldeira and Wright 1990; Collins and Solowiej 2007; Collins 2008). Generally, “interest groups” are defined in this literature as all organized groups representing the interests of more than one individual. The title of “interest groups” is a broad category that encompasses actors with varying institutional functions (ex.: states, private corporations, non-profit organization). As interest groups, these actors typically seek to work on behalf of their interests to sway policy or legal outcomes in a desired direction. Previous research has analyzed the impacts of actors with varying interest groups subcategories across a broad-range of studies. The framework set by Caldeira and Wright (1990) for classifying interest groups has four separate classifications for portions of the United States government: United States, state, county, municipality and other. All non-United States institutional entities are relegated to the category of “Other” and are combined with different actors, many of whom are not structured in comparable institutional formats. This method allows for thorough analysis of certain submitters but ignores significant differences in the actors relegated to the rank of “other.” While this shows precedent for including state actors within a definition of “interest group,” it severely restricts opportunities to compare the behavior of institutional actors. More recently, authors have eliminated institutional actors from their analyses all together. Box-Steppensmeier (2014) and Gibson (1997) are in the minority of researchers in excluding actors representing government interests, or “institutional interest groups” (Caldeira and Wright 1990), when looking at interest group activity within the courts.
These deviations from the norm preclude the possibility of understanding the important function which actors representing their citizens’, rather than merely members’, interests play.

I limit my analyses to indigenous tribes, states, and foreign sovereigns as to target three types of interest groups with comparable motivations. While structurally distinct, all three actor types represent the interests of a group of citizens rather than non-democratically-bound membership organizations. My independent variable is actor type – I seek to more accurately probe the amici behavioral differences between governmental actors and to fill a currently incomplete understanding of how institutional interest groups act as submitters of amici and how an institution’s degree of self-governance impacts their behavior. The existing literature tends to pay more attention to charting the behavior of membership-based groups rather than government-based groups and this oversight results in a lack of information on how institutional actors submit as compared to membership-based groups. Caldeira and Wainwright (1990, 789) posit that institutional interest groups enjoy greater freedom in their amici submission behavior due to the absence of a membership framework. Nevertheless, this greater freedom is currently uncharted. I am interested in how sovereignty, or institutional separation from the Court, impacts the manner in which actors behave within the Court.

Amicus briefs are lobbying mechanisms – they are intentionally submitted in favor of certain interests and with certain parties. The emergence of lobbying strategies within the judicial branch is by no means a novel claim (Barker 1967), yet still necessitates systematic evaluation at a large scale as the literature is missing the behavioral details needed in order to make claims as to the extent and impact of lobbying within the Courts. While well-defended within the literature, the claim that amici are strategically submitted in order to further actors’ interests is significant.
as it represents the change in nature of an institutional mechanism. Gone is the pure, original intent of amicus briefs: to act as information-gathering agents informing the Court as a friend (Rustad and Koenig 1993, 91). Hansford (2004) stipulates that amicus curiae are intentional as they are stimulated by the desire to increase influence policy changes in the direction that an actor desires. Amicus briefs are thereby meaningful; signing a brief illustrates the position which a group supports and emphasizes the shared interests of a coalition (Box-Steffensmeier 2014). Furthermore, there is a plethora of manners in which they go about advocacy (Krislov 1963). One manner of orchestrating advocacy is deciding with whom to sign. Interest groups tactically organize, or form coalitions, to better portray their interests within the United States government, and vary these tactics based on the actors they work with (Victor 2007, Hula 1999). Different groups have different levels of wealth, status, and credibility, which prior work suggests plays a key role in determining the recognition an organized interest group obtains in the courts (Box-Steffensmeier 2013, Galanter 1974, Lazarus 2007).

Given that actors strategically sign amici with other actors, what do we know about why amici submit to certain parties over others? Actors can submit in favor of the appellant, the appellee, or in support of neither. It is relatively uncommon for an interest group to submit a brief in favor of neither party; the overwhelming majority are submitted in favor of either the appellant or appellee (Ennis 1984). To this end, critics point out the fallacious nature of the title of “amicus curiae” as today they are no longer meant purely to support the Court (Banner 2003). In regard to whether an actor is likely to submit to either party and when, there is very little research exploring the causal chain that stimulates an amicus brief submission (Hansford 2004). Factors likely to increase amici submission rates are high complexity in a case, the inexperience of lawyers participating, and a relevant lack of information held by the justices. Hansford (2004)
further suggests that membership-based interest groups are more likely to submit when the case is likely to rule in their desired direction already. This research separates membership-based organizations from government-based groups in the motivating desires for submitting a brief. It suggests a disconnect between conclusions drawn from research on the behavior of membership-based groups outside of that category. Further investigation is needed into the differing behaviors of actors as submitters of amicus briefs, and, ultimately, as lobbying forces within the Court. Ultimately, we care about the causal chain stimulating an amicus submission and the consequence of that submission. However, it is impossible to understand that inquiry without first pursuing a macro-level understanding of how certain interest groups, especially institutional ones, systematically submit.

*The Presence of Tribes, States, and Countries in the Courts*

**Indigenous Tribes**

Tribal nations are at the center of this research due to their unique quasi-sovereign state of existence within the United States’ borders. For hundreds of years, the dynamic between indigenous tribes within the United States and the United States government can be characterized as “an ongoing contest over sovereignty” (Wilkins and Lomawaima 2001, 5). Rather than two sovereign actors meeting on equal footing, the quasi-sovereign status that the Court projects on indigenous tribes complicates their interactions. Federal Indian law, or law analyzing the dynamics between indigenous tribes and the federal government, has a long and varied history. Indigenous tribes present a unique instance which lends well to comparison with both

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2 I use the phrase “quasi-sovereignty” to highlight an actor’s incomplete self-governance. The “quasi” component of this sovereignty is a consequence of the dual-sovereign structure which the Supreme Court implemented in federal Indian law with cases at the beginning of the nineteenth century. These cases are discussed in the following paragraph.
independent nations and states within the United States. The research on federal Indian law focuses more on legal analysis than on understanding the patterns of interest group activity and there is minimal overlap between federal Indian law and amicus curiae research. Indigenous tribes are currently ignored within the literature on interest groups within the Court. The research that does exist analyzes only amicus briefs within cases concerning federal Indian law, with the unit of analysis as the case, rather than analyzing briefs regardless of case topic. By changing the scope of research to their briefs, we may learn more about indigenous tribes’ previously ignored lobbying tactics beyond cases focused only on federal Indian law. I provide an understanding of tribes as interest groups at-large, regardless of the range of case topics, rather than how they approach cases in a single area of the law.

I first supply a limited overview of the presence of indigenous tribes within the Court over the past two centuries with an emphasis on the ever-changing status of tribal sovereignty. Three cases at the turn of the nineteenth century, colloquially known as the Marshall Trilogy (Fletcher 2015), solidified the Court’s stance on tribes’ sovereignty for over a century. These cases, *Johnson v. M’Intosh*, 21 U.S. 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), and *Worcester v. Georgia*, 31 U.S. 515 (1832) enacted the Doctrine of Discovery and set the relationship between states and indigenous tribes in the “dual sovereign structure” that remains today. The Doctrine of Discovery recognized the “discovering” and colonizing of North America as evidence that the United States government rightfully holds the power and reigns supreme over tribal nations but still independently recognized a degree of autonomy of indigenous tribes (Wildenthal 2003).

The twentieth century brought significant changes. Implicit divestiture is at the root of many cases regarding tribal sovereignty (LaVelle 2006, 732). This concept was first utilized in
Oliphant v. Squamish Indian Tribe in Chief Justice Rehnquist's majority opinion (Oliphant v. Squamish Indian Tribe, 435 U.S. 191 (1978)). He held that, over an extended period of time, tribes had implicitly relinquished their sovereign status to the United States government and thus lost possession of their sovereignty in criminal jurisdiction on tribal lands (Wildenthal 2003, 73). Until 1978, tribes retained authority unless explicitly divested of such authority by Congress (Duthu 1994). In ruling that power could be implicitly divested by tribes, the Courts widened the jurisdiction of the Courts in regard to tribal sovereignty, instituting the equivalent of a seizure of judicial review on par with Marbury v. Madison. Whether or not the Court intended to widen the tribal caseload within its docket, the diagnosis which Oliphant gave lends a dynamic, ever-changing relationship between tribes and the United States, and forces tribe after tribe back towards the Supreme Court in an attempt to elucidate the confusing parameters of Oliphant's curtailed view of indigenous sovereignty (Duthu 1994). The basis for Rehnquist's ruling stemmed from tribes’ "dependent status," and was largely an attempt to prevent tribes from receiving too much political autonomy (United States v. Wheeler, 435 U.S. 326 (1978); Bruce 1994). Oliphant remains largely still in function today in spite of several cases attempting to repair the damage caused by this decision (Duro v. Reina (1990)). While there are many cases that contributed to shifts in tribal rights within the Supreme Court’s history, the Court’s treatment of indigenous tribes in the beginning of its tenure with the Marshall Trilogy and in the modern age with Oliphant help to frame the “quasi-” portion of the quasi-sovereignty possessed by indigenous tribes.

The development of the Tribal Supreme Court Project (“Project”) demonstrates a clear recognition of the importance of the Supreme Court’s decisions on tribal sovereignty and the role amici play in those decisions. In response to a series of cases at the turn of the twenty-first
century that encroached on tribal sovereignty, the National Congress of American Indians (NCAI) and the Native American Rights Fund (NARD) founded the Project (Guest 2011, 2). The Project, mirroring the States’ Supreme Court Project, developed into an institution focused on paying close attention to cases relevant to indigenous tribes moving through the channels towards the Court and coordinating collective action in those cases (Labin 2002, 696). Their work focuses particularly on amici coordination (Guest 2017, 29; Fletcher 2013, 45). The creation of an entire institution focusing on coordinating indigenous tribes’ presences in the Court upholds the intentional nature that I argue structure the submission of indigenous tribes’ briefs.

Any existing research that involves the amici of indigenous tribes focuses more on federal Indian law than on the amici and their submitters. Pommersheim (2011) focuses on the arguments made by all submitters of amicus briefs in federal Indian law. In the majority of cases evaluated in this study, states and indigenous tribes are on opposing party sides. However, Pommersheim notes that the Justice Department frequently submits amici in favor of tribes, barring instances in which the federal government is a party in opposition to the tribe, and credits the “deeply entwined historical and contemporary relationship” between the United States federal government and indigenous tribes as the cause of this dynamic. The Justice Department’s frequent submission in favor of indigenous tribes suggests that the federal government is not completely at odds with the interests of indigenous tribes. The relationship between the federal government and indigenous tribes is complicated and occasionally clashes, but also does not prevent sporadic cooperation or agreement on legal interpretations.

Fletcher (2013) also analyzed amici submitted in federal Indian law and posits several guidelines for actors seeking to make contributions to such cases. Fletcher conducted qualitative
analysis of amicus brief content and general success of amicus curiae in specific cases. This work focuses more on evaluating which types of amicus briefs are preferred by the Court rather than observing indigenous tribes’ behavior as submitters. He characterizes successful briefs as capable of utilizing the institutional dynamics between tribes, private interests, and the federal government in favor of tribal interest should amici submitters intentionally and effectively structure their argument and orchestrate their submissions. Fletcher labels tribal interests as a growing area of litigation within the Supreme Court and calls for further research into how submitters intentionally frame and shape cases.

In regard to the procedure for amici submissions, an important difference to note is that actors representing portions of the United States government are given special treatment which other sovereign actors, such as tribes and foreign countries, do not receive. Even before an amici crosses the desk of a clerk, the amici submissions of foreign countries and indigenous tribes are denied sovereign recognition by the constraints of Rule 37. McAllister (2010) argues that the Supreme Court’s Rule 37, which concerns amici submission protocol, prevents the equal treatment within the Court of sovereign entities such as indigenous tribes and foreign sovereigns. As compared to the United States, state, or even local governments, “Indian Tribes and foreign nations are treated less generously” within Rule 37.4 (McAllister 2010, 1). This “less generous” treatment is the requirement that, prior to submitting an amicus brief, all entities must have the approval of both parties involved in the case. Even though indigenous tribes and foreign sovereigns are government entities, they are not given the same privileges as United States government entities in their submission practices. The only briefs spared this impediment are the amici filed “on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court...; on behalf of a State,
Commonwealth, Territory or Possession when submitted by its Attorney General or on behalf of a city, county, Town or similar entity when submitted by its authorized legal office” (Legal Information Institute “Rules of the Supreme Court of the United States”). McAllister argues that the automatic acceptance of the amicus curiae of United States entities and the required submission and approval of the amicus curiae of foreign sovereigns amounts to “disparate treatment” and defies the importance of dignitary interests for tribes and foreign nations. Regardless of normative claims as to whether this difference in treatment is a miscarriage of justice, McAllister’s work shows the separate playing field made available to the United States, States, and local governments. This procedural disparity indicates that the Court unquestionably accepts the briefs of United States actors but does not do so for all other actors. While amicus briefs are not regularly denied, this process demonstrates the deference given to actors such as states.

My brief history of the Court’s rulings on indigenous sovereignty and analysis of the limited research on tribes’ amici submissions underline the complex nature of the relationship of indigenous tribes and the courts. While my overarching research question focuses on indigenous tribes’ amici submission patterns as compared to states and foreign sovereigns, one first needs to understand the behavior of tribes independently. The gaps in the literature on indigenous tribes in the Court provide evidence that further descriptive analysis is needed in order to understand the overarching patterns of behavior of tribes.

States

States’ behavior as submitters of amici is already subject to serious evaluation. There is a wealth of research available on the presence of states in the Supreme Court. Unlike indigenous tribes, the current literature provides answers to the question, “how do states behave as
submitters of amicus curiae?” In general, states appear to have success in their presence as submitters (Kearney and Merrill 2000, 749). States’ regular presence in cases in front of the Court is an important differentiation from tribes and foreign sovereigns. In the final decade of the twentieth century, states submitted amici to 29.64% of all total cases (Kearney and Merrill 2000, 753). In comparison to all submitters of amici within the Court, only the solicitor general submits as frequently as states (Morris 1986, 299). Although the solicitor general is the frequent point of comparison for states (Kearney and Merrill 2000; Morris 1986), it is not an adequate comparison due to the unique relationship between the solicitor general as an extension of the executive branch and the Supreme Court. States are more suitably compared to tribes and foreign nations due to their quasi-sovereign status as they are ultimately deferential to the United States Constitution but also possess their own constitutions that work in tandem with United States regulations. As no such research currently exists, I anticipate that my comparison of the behavior of tribes and foreign sovereigns with states will reveal a previously overlooked perspective of states’ behavior.

In spite of shifts in states’ amici submission behavior over the past few decades, the majority of research on the topic does not extend into the past decade. States’ submission patterns have changed considerably with the creation of the Supreme Court Project of the National Association of Attorneys General. At the end of the twentieth century, states began to notice the potential for growth as actors within the Supreme Court, and the Supreme Court Project were founded in order to unify efforts before the Court and to “promote and coordinate the states’ amicus curiae activity on issues where there is a common state interest” (Swinford and Waltenburg 1999, 249). The Supreme Court Project represents the beginning of a significant increase in state attorneys general amici coordination habits (Gleason 2017, 25), and laid the
groundwork for foundation of the Tribal Supreme Court Project in 2002. States’ amici-submitting behavior is meaningful because of their tactical, goal-oriented nature; the amici coordination that grew from the Supreme Court Project supports the depiction of amici in this light. Additionally, the recent beginning of this shift in coordination efforts solidifies the importance of consistent research charting the current behavior of institutional actors – my research fills a void in large-scale descriptive analyses of states’ behavior over the past decade.

Why certain states submit with whom they do and to which side they do is a seemingly logistical yet deeply important question that has only recently been broached (Provost 2011). Provost’s findings further the conception of amicus curiae submissions as tactical decision-making. In examining why states submit when they do, evidence suggests that attorneys general are more likely to sign on to amicus curiae when there is an opportunity to advance their own “policy making and electoral goals” (Provost 2011, 22). This supports the assumption that amici are intentionally submitted not just to help the Court, or even the party to whom an amicus brief is submitted. One step further, a state’s amicus brief is also an attempt to position itself or its leaders in a favorable light, either by achieving the outcomes desired or by providing an outwardly visible display of effort on the part of institutional leaders. The importance of being seen helping highlights the electoral component for states: attorneys general seeking reelection can use amicus submissions as examples of actively pursuing constituents’ desires at the national level. This conception of amici as visible evidence of an attorney general’s efforts is unique to states.
Foreign Sovereigns

In his recent book, *The Court and the World*, Justice Breyer emphasizes the inherently domestic nature of the Supreme Court. There is not, he says, a "Supreme Court of the World with power to harmonize differences among the approaches of different nations" (Breyer 2016). At most, the Supreme Court may act as a mediator between international law and its applications and implications for the United States Constitution (Bradley 2016). However, Breyer emphasizes the importance of learning about and drawing from other sovereign nations' systems of law as a means of listening to the "many voices" of foreign governments. The presence of foreign nations within the Court is a contentious topic. Justice Thomas cautions against imposing “foreign moods, fads, or fashions on Americans” (537 U.S. 990, 990 n.* (2002) (Thomas, J. concurring in denial of certiorari).

Justice Breyer and Justice Thomas’ statements show a glimpse of the growing normative debate regarding the proper interaction with and participation of foreign sovereigns within the Supreme Court. Within the past decade a growing body of research has evaluated the interaction of foreign countries in the Court through their amicus curiae (Godi 2017). Amicus curiae expand the Court’s understanding of a case’s ramifications throughout and beyond the United States. Although the Supreme Court is inherently a domestic court, there is frequent, necessary interaction of foreign sovereigns. Amicus briefs represent a significant portion of the Court’s interaction with these sovereigns. Comparing the behavior of amicus curiae between indigenous tribes and foreign sovereigns builds an understanding, which the current literature has not yet produced, of the differing manifestations of amicus curiae influence and how different sovereign actors wield this influence.
A change in submission protocol for sovereigns submitting amicus briefs occurred in 1978. Before this point, foreign sovereigns either formally submitted amici or submitted statements to the U.S. Department of State, who would communicate necessary sentiments to the Court. This change emphasizes the solidification of the adjudicative, rather than diplomatic, role of the Court even when interacting with foreign sovereigns (Martyniszyn 2016, 617). Beyond mere procedural implications, this change is important as it shifted the executive branch away from the role of the middleman between foreign sovereigns and the Court. This movement facilitated, for the first time, regular and direct contact between foreign sovereigns and the judicial branch (Eichensehr 2016, 300).

Plass (1995) writes on the “futility” of international amicus briefs. This work took a case study approach qualitatively examining foreign sovereigns’ briefs individually. Plass concludes that domestic amici are more likely to sway the Court, and that foreign amici are “doomed to a response of indifference” (Plass 1995, 1228). Although Plass’ work is important as it emphasizes the unique role of foreign sovereigns as submitters in the United States’ highest domestic court, his work theorizes rather than evaluates the strategic behavior of foreign amici.

Eichensehr’s (2016) descriptive account of foreign sovereigns’ amici participation was the first quantitative research on the topic and provided evidence in stark contrast with Plass’ qualitative assumptions. Eichensehr’s dataset includes all amicus briefs submitted by foreign sovereigns to the Court for cases on the merits from 1978 – 2013. She evaluates submitter behavior and notes factors such as the rate of filing, the types of cases in which foreign sovereign amici file, and the type of arguments made (Eichensehr 2016, 312). This research is unique in the attention paid to the behavior of amici, or “who files, when they file, how they file, and how they influence the Court” (Eichensehr 2016). Additionally, Eichensehr breaks away from Plass’
perspective on foreign sovereigns’ amici; she finds significant reference to foreign sovereigns’ amicus briefs by the Court and frames this as “evidence - though imperfect – of the influence foreign sovereign amici have on the Court” (Eichensehr 2016, 319). As citation-rate is the currently accepted metric for measuring an amici’s effect, this suggests that foreign nations’ amici carry significant weight with the justices. The sharp juxtaposition of Eichensehr’s quantitative findings with the previously exclusively qualitative research on foreign sovereigns’ amici underlines the importance of providing descriptive accounts of actors’ behavior. While the data she gathers is impressive, it lacks the full context of a comparison with fellow submitters of amicus briefs. A comparison of foreign sovereigns and indigenous tribes as submitters is of interest as it will extend the understanding of how foreign sovereigns involve themselves in the Supreme Court.

How the Actors Submit Amici

In spite of literature on the general presences of indigenous tribes, states, and foreign sovereigns within the Court, the disparity in research on indigenous tribes is clear as my analysis narrows on amicus curiae. The implications of this disparity are myriad. Research on amicus submissions allow for an understanding of how interest groups envision their own role within the judicial branch. Without knowing more about the activity of a variety of interest group types it is impossible to draw meaningful conclusions about why groups interact with the Court in certain ways and how certain groups impact the Court more than others. Even the comparatively robust understanding of states’ submissions is less meaningful without the context of foreign sovereigns and indigenous tribes as there is no framework of comparison with which to understand whether states act as they do because of their degree of legal autonomy from the Court or because of their constitutionally-induced dependency on the Court. I analyze the current understanding, or lack
thereof, of how frequently these actors submit, to which party they submit, and with whom they submit. Where there are gaps, I offer theories for how each actor may approach their submissions based on their prior history of activity within the Court at-large. These theories form the basis of my hypotheses in the subsequent section.

Frequency of Amici Submissions

While there is evidence of how frequently states and foreign sovereigns submit amicus briefs there is no understanding of how regularly indigenous tribes submit briefs to cases before the Court. The frequency of amici submissions gives a general measurement of how regularly an actor type interacts with the Court; it is impossible to accurately measure the relevance of actor’s amici or amici effectiveness without first understanding the frequency of submission. A submission implies at the very least a willingness to contribute and to aid in the Court’s perspective as amicus briefs are voluntary contributions. One step further, amici represent an interest in effecting change in a case. As amici are investments of resources, an actor’s submission frequency implies the regularity of vested interest in the outcomes of cases in addition to a degree of expectation that the Court is willing to listen. Understanding the frequency of an actor’s submission builds the foundation for further measures of an actor’s behavior. In spite of the importance of this information, there is no research on the frequency of foreign sovereigns or indigenous tribes’ amici submissions over the past ten years. This presents a significant gap in our understanding of how regularly certain sovereign actors interact with the Court.

States submit amicus briefs at a rate comparable only to the Solicitor General’s office; this high submission frequency indicates a regular presence within the Court akin to that of a “repeat player.” In 1982, states submitted 381 amicus curiae during the certiorari process and
684 on the merits. This amounts to over one thousand briefs in total. As compared to all other submitters this year, states submit more amici than any other single actor to cases both during the cert process and on the merits (Caldeira and Wright 1990, 794). These briefs necessitate a considerable amount of coordination as many are cosigned by multiple states. States’ high frequency of amici submission is in part stimulated by the constitutionally interwoven nature of states and the Court. Yet, despite the high submission rates of attorneys general in the Court, they are still unanimously viewed within the literature as “procedurally rational actors” (Waltenburg & Swinford 1999, 255). This means that states still intentionally gauge whether or not to submit an amicus brief and assuages the potential concern that a high quantity of briefs from states indicates submission with reckless abandon. The wealth of research on states’ amici submissions stops short of the past decade; while I do not anticipate a significant drop or spike, it is crucial to continue to remain watchful of the manner in which one of the biggest players in the Court approaches their amici submissions.

Foreign sovereigns’ drastically lower submission frequency demonstrates the significant investment which amici require from actors not within the United States’ legal system. In her thirty-five-year period of analysis, Eichensehr collected only 68 amicus briefs from foreign sovereigns. This low submission rate dismisses arguments that states submit as frequently as they do simply because they are numerous – there are significantly more countries than states in the world. The difference in the quantity of amici submissions between states and foreign sovereigns indicates that the frequency of amici submissions is not merely a question of actor quantity, but also actor interest and investment. In a similar quantitative study of foreign sovereigns’ amicus brief submissions, Martyniszyn (2016) compiled a complete list of foreign amici submissions in U.S. antitrust cases at the District Court, Court of Appeals, and Supreme Court levels.
Martyniszyn finds that developed nations make up the majority of foreign sovereigns’ amicus submissions and that nations submit amici out of a desire to “protect their prerogatives.” (Martyniszyn 2016, 642). Given the considerable undertaking and coordination which amici necessitate, it is unsurprising that developed nations participate more frequently. Developed nations are more likely to have the flexibility to invest time and resources into creating an amici. The high frequency of developed nations demonstrates the importance of either familiarity with the United States judicial system or the means to obtain counsel with such familiarity. Foreign sovereigns’ amici submissions, while not robust enough in the past as to allow for significantly generalizable conclusions, lend a critical framework of comparison for attempting to estimate the submission behavior of indigenous tribes.

The absence of literature on indigenous tribes’ amici leaves no conception of submission quantity; however, I anticipate that the quasi-sovereign nature of indigenous tribes plays a key role in their amicus submission frequency. On a continuum of quasi-sovereignty, states and foreign sovereigns are on opposite ends. States are significantly beholden to the rulings of the Supreme Court and frequently submit amicus briefs as there are regularly cases which directly affect states and their interests. Foreign sovereigns, on the other side of the spectrum, are comparatively less directly impacted by the Supreme Court’s rulings and, thus, are less frequently motivated to write amici. While caught in between, indigenous tribes are invested in United States policy at a level more akin to a foreign sovereign than a state (Duthu 1994, 401; Coffey and Tsotsie 2001, 192; Gould 1996, 837; Dussias 1993, 78; Porter 1997). The precarious balance of needing communication with the federal government while also wanting sovereignty leads to a fluctuating relationship in which, I estimate, tribes enter the Court at a frequency higher than foreign sovereigns but significantly lower than states.
To Whom Amici Are Submitted

Submitting briefs to either the petitioner or the defendant at disparate rates showcases actors’ efforts to make amicus briefs cost-effective. Given that actors choose when to submit amici strategically, the likelihood of a party’s success is a key determinant in when an actor will invest the resources in an amicus submission. A case more likely to win before the Supreme Court could be seen as a better investment for actors looking to strategically yet sparingly submit their amici. Petitioners are overwhelmingly more successful before the Court (Provine 1980, 41; Kearney and Merrill 2000, 790); previous research indicates that respondents only succeed 33% of the time (Segal 1988, 140). Additionally, petitioners receive more amicus curiae briefs (Kearney and Merrill 2000, 793). In light of the large difference in success rates for either party, I contend that an actor’s significant difference in submission rate to the petitioner or respondent demonstrates an effort to make a brief more cost-effective. If an actor submits more regularly to the petitioner, they are likely attempting to capitalize on the already-favored stance of the petitioner before the Court and view respondents’ cases as lost causes. In an opposing vein of logic, an actor submitting more regularly to a respondent may be trying to help make up for the disadvantage of the underdog respondent. I suggest that actors trying to submit more cost-effectively utilize the former strategy. There is not currently any literature discussing whether or not any of my actors submit more regularly to a petitioner or a respondent; nevertheless, I analyze the significant research on the frequency and effectiveness of amici from states and foreign sovereigns as to anticipate the party to whom each actor will submit.

Although there is no literature on whether states and foreign sovereigns submit to either petitioners or respondents more often, the difference between the actors’ abilities to invest in amici indicates whether they are likely to submit to a petitioner or a respondent. Previous
research supports the assertion that certain groups submit amici based on when is most “cost-effective” for an actor type (Caldeira and Wright 1990, 795). This argument portrays member interest groups’ higher submissions to cases on the merits as due to the perception that amicus briefs are more effective at this stage. I extend this argument as to explain why foreign sovereigns are likely to view amici as more cost-effective when for the petitioner as there is already a likelihood of winning. States’ high rates of amicus brief submissions, established by Caldeira and Wright (1990), confirms the assumption that amici are not a difficult investment for the offices of attorneys general and that these actors have “fewer worries about keeping constituencies happy.” The offices of states’ attorneys general are increasingly well-funded (Clayton 1994, 538). A regular presence before the Court and largely unlimited funds enables states to submit amici with less concern for conserving resources. Amici are less cost-effective for actors such as foreign sovereigns. Foreign sovereigns’ low amicus brief submission frequency, established by Eichensehr (2016), indicates that they are more selective than states in deciding when to invest resources in amici and, I argue, will be more likely to submit when a case is worth the investment. The difference discussed between petitioner and respondent success rates suggests that a brief for the petitioner would constitute a worthier investment.

I anticipate that limits on indigenous tribes’ resources necessitate cost-effective amici submissions on par with those of foreign sovereigns. This argument is in accordance with how often I expect indigenous tribes submit amici as I anticipate that tribal nations are more similar to foreign sovereigns due to the factors they prioritize in order to maximize amici effectiveness. Finding competent, affordable counsel in the United Stated legal system constitutes a significant impediment for indigenous tribes’ interest groups (Johnny 1991, 205). Furthermore, due to the quasi-sovereign status of indigenous tribes, there is significant oversight between the tribal
justice systems and the states in which they geographically reside as tribal courts struggle to work in the fluctuating jurisdiction lines drawn by the federal government (Deer 2004, 22). These obstacles suggest a significant difference between a tribal nation’s ability to invest in coordinating an amicus brief and a state’s.

With Whom Amici Are Submitted

Instances of co-submission emphasize the extent to which an entity type coordinates amici with entities of different types, and, I argue, displays the amici network cohesion within an entity type. Frequent co-submission of amici with actors of the same type rather than different types would suggest the presence of regularly used amici-coordination mechanisms within an entity’s actor-type community. In using the term network cohesion, I target the regularity with which actors coordinate amici within a network of their actor type. As I have previously argued, actors intentionally select their co-submitters; therefore, the decision to sign with actors of the same or different types is an intentional one. A significantly high or low rate of network cohesion, or the pattern of submitting with the same actor type, demonstrates an intentional decision to either remain connected to or break away from the implications which one’s actor type may have within the Court. In sum, the network cohesion of an actor type suggests how actors conceptualize the potential implications of their actor type in the Court. I anticipate that these implications rely on an institutional connection or pattern of success an actor has with the Supreme Court.

The literature on states’ amici formation suggests that there is substantial motivation for co-submission amongst states with few impetuses for co-submission with entities of different types. States’ intimate institutional connection with the Supreme Court and history of heightened success supports the assumption of high network cohesion. Gleason (2017) analyzed attorney
general coalition forming in amici submissions from 1980-2009 and their research upholds my illustration of states’ amici submissions as the product of intentional, dynamic coordination – amongst themselves. Furthermore, the more states there are signing on to a brief, the more likely a brief is to impact a case decision (Clayton 1994; Goelzhauser and Vouvalis 2013). This incentivizes states to coordinate amongst themselves as to heighten an amicus brief’s effectiveness. While the positive relationship between the quantity of states signing a brief and amici effectiveness does not necessarily de-incentivize co-submissions with entities of different types, I anticipate that states focus more on coordinating with one another and less on building amicus briefs with entities who may not directly help them. Gleason (2017, 27) highlights the importance of homophily in amicus coalition formation. This tendency towards homophily, or the preference for like-minded co-signers, presents an impediment to signing amici with entities of different types. While the desire for increased amici effectiveness provides motivation for states to find common ground with one another, no such incentive exists for states signing with actors of different types.

The general infrequency of foreign sovereigns’ briefs would suggest low levels of regular amici submission coordination and, at best, a weakly constructed amici-submission network facilitating this coordination throughout the international community. This would be an example of low network cohesion in regard to amicus submissions. Foreign sovereigns’ lack the institutional connection that states do, as they are not bound to the United States constitution. Unlike states, there is no evidence that foreign sovereigns’ briefs increase in effectiveness through collective coordination. These two factors suggest that there is not much pull for countries to strategically align their views and coordinate briefs together. Furthermore, the already high effectiveness of foreign sovereigns’ solo amici submissions would suggest that they
do not feel as much of a drive to coordinate in order to further their impact. Foreign sovereigns are cited at exceptionally high rates which indicates that they are a desirable counterpart with whom to sign. Eichensehr (2016, 322) found that foreign sovereigns’ amici are cited even more than the Solicitor General. The high effectiveness of foreign sovereigns’ amici briefs and lack of clear institutional connection with one another indicates that foreign sovereigns are less prone to inter-entity type coordination and more likely than states to work with entities of a different type.

There is no understanding as to whether indigenous tribes are more likely to submit alone or in groups, yet tribal councils’ lack of leverage within the United States judicial system would indicate that they are likely to seek submissions with groups with more leverage. Indigenous tribes are not as institutionally connected to one another as states are; while there are conglomerations of tribal councils, there is no structured bureaucracy that allows for perfect syntheses of tribes’ governance systems and external systems (Becker 1997, 7). While this does not eliminate coordination, tribes are less likely to mirror states’ efficient and regular amici co-submission patterns as they are not as institutionally tied to one another. There is neither an understanding of indigenous tribes’ amici effectiveness nor knowledge as to whether their amici effectiveness grows with coordination. The lack of evidence that indigenous tribes’ amici grow in impact with each indigenous signee suggests that there is not motivation for inter-council coordination of amici on par with states. Furthermore, interest groups with fewer resources desire to sign amici with actors with more resources (Gleason 2017; Caldeira and Weight 1988). Given indigenous tribes’ lack of resources on par with states, as evidenced in their desire for cost-effective amici strategies, they are a prime example of an actor likely to sign amicus briefs with groups with more leverage.
Throughout amicus curiae research there is very little attention paid to the networks of signers who frequently sign together, be they states, tribes, countries, or interest groups. My comparative analysis will aid contributions to this topic, in addition describing the broader patterns of sovereign actors within the United States Supreme Court. The literature defends several assertions that I make: amici are tactically and intentionally submitted; different interest groups have different behavior patterns as submitters; and these patterns of submission are significant as they impact the Court’s decisions. The differing levels of information available in regard to indigenous tribes, states, and foreign sovereigns as submitters of amicus curiae solidifies the importance of further investigation.

**Research Design**

My hypotheses on the manifestations of indigenous tribes’ submitting behavior as compared to states and foreign sovereigns stem from my discussion of the theory behind each actor’s focus while submitting amici. I anticipate that the motivating factor for states is affecting the maximum amount of change while indigenous tribes and foreign sovereigns seek to contribute impactful yet cost-effective amici. Overall, I foresee that indigenous tribes utilize strategies more similar to foreign sovereigns than states.

**Hypotheses**

My research provides a descriptive account of the behavior of indigenous tribes, states, and foreign sovereigns as submitters of amicus curiae in the Supreme Court from 2008-2017. My first hypothesis focuses on the most basic measurement of amicus curiae behavior - amicus submission frequency. Different actors have historically submitted amicus curiae at significantly different rates. While indigenous tribes and foreign sovereigns were not included in previous comparative studies of actors’ amicus submission quantities, I still anticipate the significant
frequency of submissions possessed by states to remain unparalleled. States are one of the largest actors in the Court. Given these conditions, I anticipate that indigenous and foreign sovereigns submit fewer total amicus curiae than states (H1).

My second hypothesis focuses on the party to whom an actor submits as an indication of whether an actor is attempting to submit amici briefs in a cost-effective manner; I am attempting to identify the strategic nature behind amicus submissions. While amicus submission frequency indicates the regularity of an actor before the Court, it is only a small portion of an actor’s overall submission habits (Caldeira and Wright 1990). Petitioners and respondents have varying degrees of success before the Court; petitioners tend to be more successful when success is measured by achieving the party’s desired outcome from the Court (Segal 1988, 140; Provine 1980, 41; Kearney and Merrill 2000, 790). In light of H1, I anticipate that as indigenous tribes and foreign sovereigns submit a lower quantity of briefs, they are inclined to choose which cases to submit to more strategically. I further expect that this strategy is to submit to cases which already have a higher chance of winning, as cases that are likely to lose could be seen as a waste of resources. As states submit an enormous quantity of briefs in general, I do not foresee a large disparity in submission rates in favor of petitioners, as this theory applies to actors attempting to strategically submit their amicus briefs and conserve resources. Consequently, I anticipate that indigenous tribes and foreign sovereigns submit amicus briefs to a petitioner rather than a respondent at a higher rate than states (H2).

My final hypothesis assesses the strategic manner in which an actor coordinates their co-submitters on an amicus brief. The existence of repeat players (Bradley and Gardner 1985, 86) emphasizes the disparity in prestige between actors before the Court. Certain actors carry more prestige than others and have less need to partner with an actor of a different type. States are one
of the biggest repeat players in the Supreme Court (Morris 1987). Indigenous tribes and foreign sovereigns, on the other hand, submit so infrequently that they are not even separately categorized in previous research on actor behavior (Kearney and Merrill 2000). Furthermore, states are incentivized to coordinate with one another by the increase in effectiveness which each state lends to a brief; foreign sovereigns and indigenous tribes do not possess similar incentive.

In light of this, I expect that Indigenous tribes and foreign sovereigns cosign amicus briefs with an entity which is not of their own type at a higher rate than states (H3).

<table>
<thead>
<tr>
<th>Actor Behavior Examined</th>
<th>Hypothesis</th>
<th>Variables examined</th>
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<tbody>
<tr>
<td>How Often</td>
<td>H1</td>
<td>“Entity_Type_Overall”</td>
</tr>
<tr>
<td>To Whom</td>
<td>H2</td>
<td>“Entity_Type_Overall”, “Filed_For”</td>
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<tr>
<td>With Whom</td>
<td>H3</td>
<td>“Entity_Type_Overall”, “Multi_Entities”</td>
</tr>
</tbody>
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Table 1: Dependent variable collection.

Data Collection

My dataset includes all amicus briefs from 2008-2017 signed by a state, indigenous tribe, or foreign sovereign. This amounts to 400 total briefs; in this dataset, the unit of analysis is each brief submitted by one or more of the actors. In order to ensure that every brief submitted by one of the actors was included, I examined every amicus curiae brief submitted to all cases on the merits before the Supreme Court from 2018, working backward. SCOTUSblog was a critical tool in the data-gathering process. I used LexisNexis and NexisU in order to gather details regarding cases which were missing from SCOTUSblog. I discuss my data collection process more in depth in Appendix A.

The dataset discriminates in content as I only examine briefs submitted to cases on the merits. This decision follows the trend within research on amicus curiae coalition networks (Collins 2008, Box-Steffensmeier 2014; Hansford 2004; Eichensehr 2016, 304). The intent of
amicus curiae briefs at the certiorari stage is different than that for a case on the merits. Briefs at the certiorari stage are arguing for the Court to hear the case; briefs on the merits argue for the Court’s decision on a case (Cordray and Cordray 2008). By narrowing my scope to cases on the merits, I eliminate amicus curiae submissions with motivations significantly different from those which I project on to amicus curiae in my literature review. My research falls in line with recent efforts to further the understanding of the presence of amici in only cases on the merits, as previous research pays more attention to cases at cert (Solowiej and Collins 2009; Solberg and Waltenburg 2006).

**Dependent Variable Measurement**

Table 1 displays each dependent variable I examine, the corresponding hypotheses, and the coded variables within my dataset. I expand on the measurement of each variable and explain why I chose to measure the different capacities of each actor as I did.

*How often each actor type submits amicus briefs.* I analyze “how often” by looking at the overall quantity of briefs submitted by each actor. In order to collect the total quantity of briefs from each actor, I coded each brief as either from a state, indigenous tribe, or foreign sovereign – I titled this quality “Entity_Type_Overall.” I coded states as 1s, indigenous tribes as 2s, and foreign sovereigns as 3s.

I count a brief as from one of the three actors when the full, technical name of the actor itself (ex.: “Nex Perce Tribe,” “Alaska,” “Hashemite Kingdom of Jordan”) appears as a signee on the brief. I count foreign sovereigns when the technical title of a nation appears on a brief; this does not include conglomerations of nations, such as the European Union, as I am interested in instances of direct submission from actors to the Supreme Court. I also did not include legislative bodies or governors from states – I focus on interactions in which the legal
representative of each actor is communicating to the Supreme Court. Although eliminating briefs signed by anyone other than the chief legal representative limited my dataset, my overarching intention was to isolate the connections between actors and the Court to allow for consistent comparisons across actor type.3

While hand-coding each brief, I noted the overall entity type – whether the brief was that of an indigenous tribe, state, or foreign sovereign. I measure H1 by obtaining the frequency statistics for this variable. This simple method gives a clear depiction of the overall quantity of submission.

To whom each actor type submits amicus briefs. I discuss “to whom” in whether an actor submits a brief to the petitioner or to the respondent. I chose this method as there is an unquestionable, readily supplied binary of petitioner or respondent that still carries significant meaning. Other methods of measurement do not as accurately get at the type of connection between the submitter and party to the case as the petitioner/respondent binary does; they instead focus more on the relationship between an amicus curiae submitter and certain case factors, such as the subject of a case, rather than the type of amici-party relationship. Even at the outset, amicus briefs differ in intention depending on whether they are looking to help either party: a petitioner is typically in an offensive stance; a respondent is in a defensive stance. There is a myriad of options for further narrowing analyses into to whom actors submit; future research could emphasize the type of actor to whom the independent variable is submitting instead of the type of party. I felt that due to the large scope of analysis of “behavior” that I am attempting, this

3 There were several instances of briefs in which states signed with either the District of Columbia, Guam, Puerto Rico, or the U.S. Virgin Islands. I categorized these four actors as states, as definitionally and behaviorally they are more in line with the function that states play in the United States and have a similar degree of dependence on the federal government as states. While this is an imperfect solution, and there is a potential for further research examining these actors independently, these four actors, whom I label “federally deferential” on par with states, do not significantly interfere with my results as they a) submit at a low frequency and b) in my dataset they only submit alongside states, which further confirms the accuracy of my categorizing them as such.
research project was not best suited to approach defining and applying categories of actor types for this variable.

I ran two tests of equal or given proportions in order to measure \( H2 \); one compared the difference between indigenous tribes and states and the latter compared foreign sovereigns and states. In the first test, I compared the significance of the difference between the proportion of indigenous tribes’ briefs submitted to the petitioner and the proportion of states’ briefs submitted to the petitioner. In the second test, I compared the significance of the difference between the proportion of foreign sovereigns’ briefs submitted to the petitioner and the proportion of states’ briefs submitted to the petitioner. I qualitatively compare indigenous tribes and foreign sovereigns following my discussion of my quantitative results.

With whom each actor type submits amicus briefs. I address “with whom” in whether a brief includes entities of the same type – this was coded as binary. This measurement shows how frequently actors move from outside of the network of their own entity-type and work with others. By targeting “Multi-Entity” interaction within a brief rather than within a case, I gain a better understanding of the coordinated efforts that went into deciding with whom to submit. For instances in which indigenous tribes, states, or foreign sovereigns signed a brief with an entity of a type different from their own, I coded this instance as a “Multi-Entity” brief regardless of whether the different actor was one of the entity-types in which I am interested. To unpack this further, a brief was “Multi-Entity” when signed by one of my actors and another entity type, such as Alaska and the Governor of Alaska, or Alaska and Ireland. I only found one instance in which there were multiple of my entity types of interest (indigenous tribes, states, and foreign sovereigns) signing together (Brief for the National Congress of American Indians, et al. as Amicus Curiae Supporting Respondents, *Lewis v. Clarke*, 581 U.S. __ (2016)). Multiple
indigenous tribes and states signed in this brief. I coded this instance separately and did not include it in the entity-type brief totals, as it clouds my ability to differentiate between the independent habits of each actor in its approach to the Court. This intentional framing of my definition of “Multi-Entity” for briefs allows me to examine amici coordination. The literature supports a differentiation between case and brief qualities as brief qualities tend to better analyze the “intensity of effort” (Caldeira and Wright 1990, 795). In observing the patterns of briefs as “Multi-Entity,” I target the intensity with which an actor is attempting to maximize the effectiveness of their amicus brief through intentional coordination.

I measure H3 by running two tests of equal or given proportions, again with one between indigenous tribes and states and one between foreign sovereigns and states. The first test measures the significance of the difference between the proportion of indigenous tribes’ briefs submitted with another entity and the proportion of states’ briefs submitted with another entity. The second measures the difference significance in the proportion of foreign sovereigns’ briefs submitted with another entity and the proportion of states’ briefs submitted with another entity. Again, I qualitatively compare indigenous tribes and foreign sovereigns after my discussion of my results as the low quantity of foreign sovereigns’ briefs precludes statistical evaluation.

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4 Lewis v. Clarke had several briefs from both tribal nations and states. I included all briefs except for the one that included tribal nations and states as co-signees. This brief was signed by the National Congress of American Indians, Texas, Colorado, New Mexico, the Ute Mountain Ute Tribe, the Navajo Nation, the Fort Belknap Indian Community, the Confederated Tribes of the Umatilla Indian Reservation, and the Confederated Salish and Kootenai Tribes. In this brief, the amici discuss the “government-to-government” basis in which they interact and convey their shared views on the case to the Court (Brief for the National Congress of American Indians, et al. as Amicus Curiae Supporting Respondents, Lewis v. Clarke, 581 U.S. __ (2016), 3). While a worthwhile focus for research discussing coordination between states and indigenous tribes, including this brief in my descriptive analyses of each actor’s distinct strategies would impinge on the comparative nature of my research question.
Results

At the outset of this research, I sought to ascertain whether indigenous tribes are more similar to foreign sovereigns or states in their amici submitting behavior. My results demonstrate significant differences between the behaviors of indigenous tribes and those of states. I address the findings for each hypothesis in turn and discuss how my theory of each actor’s strategy is affected by the results.

Frequency of Amici Submission

I hypothesized that indigenous tribes and sovereigns would submit fewer amicus briefs than states overall – this hypothesis is supported by my data. States’ briefs far outnumber those of indigenous tribes and foreign sovereigns. From 2008-2017, states submitted 348 briefs, indigenous tribes submitted 37, and foreign sovereigns submitted 15. Figure 1 visualizes these results. The disparity in submission frequencies is substantial.

![Quantity of Briefs Collected](image)

Figure 1: The total quantity of amicus briefs submitted to cases on the merits in the Supreme Court by each actor from 2008-2017.
My analytic intentions at the outset of this research were cut short due to the low number of briefs available from foreign sovereigns. The central limit theorem does not apply for a sample size of less than thirty, and this prevents an accurate estimation of the population standard deviation; therefore, my conclusions are statistically unreliable as they lack generalizable comparisons. In response to this conundrum, I qualitatively support my comparison of indigenous tribes to foreign sovereigns in amicus curiae submissions – I make this comparison in the discussion section following the rest of my hypotheses.

The significant disparity in submission frequencies between indigenous tribes and states provides evidence that there are meaningful differences in the way that these actors approach the Court. There are myriad factors at work that could contribute to the drastic disparity in amicus curiae submission. As my literature review describes, there are inherent institutional differences between states, indigenous tribes, and sovereigns in spite of structural similarities which keep their comparison salient. For one, there are simply more cases in the Supreme Court which directly affect states. The actors’ significant dissimilarity in submission rates is shocking. Nevertheless, this difference neither elucidates why these actors approach submission at different rates nor precludes commonalities in submission behavior strategies. It does, however, confirm the existence of a significant difference in approaches to amicus submissions – comparing the quantity of briefs submitted lays the groundwork for understanding the grand-scale behavior of these three actors. In circling back to my original research question, the quantity of amicus curiae briefs submitted by indigenous tribes is significantly closer to that of foreign sovereigns than of states. The similarity in frequency of submission suggests that indigenous tribes and foreign sovereigns may approach strategies that determine the quantity of briefs they submit in a similar way. I posit that this is either due to similar approaches to their status of self-governance or a
common need to share resources. Nevertheless, this rate is a minute portion of the larger picture of describing the behavior of a submitter of amicus curiae.

**To Whom Actors Submit Amici**

I anticipated that indigenous tribes and foreign sovereigns submit a greater proportion of briefs to the petitioner than states do – this hypothesis was not upheld, but the relationship that I target is significant in the opposite direction. Figure 2 visualizes the observed proportions in my dataset. States submitted to the petitioner 48% of the time, indigenous tribes submitted 10.8% of the time, and countries submitted 26.7% of the time. Table 2 displays the raw totals for how often each actor type submitted to either party.

![Proportion of Briefs Submitted to the Petitioner](image)

**Figure 2:** The proportion of amicus briefs submitted to the petitioner by each of the actors. The delta symbol indicates a p-value of less than .05, representing a significant difference between actors’ proportions.

As there is no previous research on whether these actors submit more frequently to the petitioner or to the respondent, my findings are unique in displaying a significant difference between how often certain actors submit to either party. Yet, while the results are significant,
they contradict my theory of indigenous tribes’ strategy for choosing when to submit based on party advantage. As I predicted, there is little discernible difference in the proportion of states’ briefs submitted to either party. I argue that states are not as likely to consider the likelihood of an actor’s success when they are submitting – they do not need to be quite as intentional as they are such frequent submitters and have regular success within the Court. I formerly hypothesized that indigenous tribes would submit to petitioners at a high rate due to a higher likelihood that the party may win. This prediction stemmed from my portrayal of indigenous tribes as “cost-effective” submitters, or submitters with fewer resources than wealthy actors such as states and, consequently, looking to conserve resources. Given that this theory, evidently, does not hold true, I adjust my explanation for this manifestation of indigenous tribes’ behavior while maintaining the principle that indigenous tribes submit in contexts which allow them to maximize impact while limiting costs.

<table>
<thead>
<tr>
<th></th>
<th>States</th>
<th>Indigenous Tribes</th>
<th>Foreign Sovereigns</th>
</tr>
</thead>
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<td><strong>Petitioner</strong></td>
<td>168</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td><strong>Respondent</strong></td>
<td>176</td>
<td>32</td>
<td>9</td>
</tr>
<tr>
<td><strong>In Favor of Neither</strong></td>
<td>4</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td><strong>Total Briefs</strong></td>
<td>348</td>
<td>37</td>
<td>15</td>
</tr>
</tbody>
</table>

Table 2: The total quantity of briefs submitted by each actor type to each possible option.

In light of my updated reasoning as to why indigenous tribes submit to either party, I offer two alternative theories which could explain the significantly higher proportion of submissions to respondents. The first theory suggests that indigenous tribes’ behavior trends towards defensive tactics rather than offensive tactics within the Courts. This behavior is “defensive” in that by submitting to the respondent they are supporting the party attempting to prevent the Court from overturning a decision from the Court below. In discussing the growth of
the Tribal Supreme Court, Guest (2017, 30) described the brief in opposition as “perhaps the most important and effective brief filed with the Supreme Court” due to the critical role it plays in defending a decision favorable to tribal interests in the courts below. This view, expressed by a leader in the organization created to facilitate amicus briefs from indigenous tribes, highlights the emphasis placed on a defensive role within the Courts by tribal communities. Amicus briefs to respondents would be filed in support of the brief in opposition. Therefore, it is logical to assume that as the Tribal Supreme Court Project focuses on briefs in opposition, they also take great lengths to facilitate amicus briefs in favor of briefs in opposition.

My second theory explaining the disproportionate submissions for respondents rests on a new interpretation of tribes’ cost-effective strategy; rather than submitting to the candidate more likely to win and striving not to waste a brief’s resources on a lost-cause case, indigenous tribes see briefs as more “cost-effective” if there is a belief that a brief will be more impactful. While Kearney and Merrill (1990) provide evidence that petitioners are more likely to win in the Court in general (790), they also suggest that amicus briefs evoke the most change when filed for the respondent (792). This measurement was based on whether the presence of amicus filings was correlated with higher than average success for the party to whom they were submitted. This new theory shifts the interpretation of indigenous tribes’ amici submission considerations from a question of “is this amicus likely to be submitted to a case that already has a chance of winning?” to a question of “is this amicus likely to resonate with the justices and does it have the potential to significantly impact a decision?” Ultimately, this conception of tribes’ submitting strategies makes sense when viewing amici as lobbying mechanisms, as a brief could be seen as more effective and worth the cost if there were a high-likelihood of its being impactful on the desired audience. This theory abandons considering cases with a lower chance of winning a waste of
resources and instead considers them a better investment of resources as there is a greater need to significantly change the outcome.

My two new theories of amici submission considerations attempt to explain the statistically significant proportional disparity in to whom states and indigenous tribes submit amicus curiae briefs. While in an unexpected direction, the difference in proportions confirms my underlying argument that indigenous tribes and states employ distinct strategies when submitting briefs. This claim finds further support in my final hypothesis.

**With Whom Actors Submit Amici**

I hypothesized that indigenous tribes and foreign sovereigns submitted with entities of a different type at a higher rate than states do – my evidence supports this hypothesis. Figure 3 demonstrates the difference in proportions between the actors. States submit with entities of a different type 3.5% of the time, indigenous tribes do 62% of the time, and foreign sovereigns did not submit with any entities other than foreign sovereigns. The difference in proportions is statistically significant between states and indigenous tribes; states sign with other entities a minority of the time while indigenous tribes sign with other entities a majority of the time.
Figure 3: The proportion of amicus briefs submitted by each actor with an entity outside of their type. The delta symbol indicates a significant difference between actors’ proportions.

Two different manifestations of a common effort induce this major behavioral difference between states and indigenous tribes: increasing the potential effectiveness of amici. For states, there is significant incentive to co-sign with other states as evidence suggests that briefs increase in effectiveness as more states that sign on (Clayton 1994; Goelzhauser and Vouvalis 2013). This is responsible for what I have previously labeled as high network cohesion within amici co-signings. Amicus briefs are the result of communication throughout a network of possible signers; regularly co-signing with one another rather than with different entities suggests the presence of solid communication structures. These structures allow for consistent, coordinated contact. States’ amici increase in effectiveness as more states sign on – this provides substantial motivation for them to sign with one another. There is no impetus for states to open amici-coordination networks with different types of actors. My evidence suggests that this incentive to work with one another precludes working with other groups the majority of the time. While it is
not clear whether states are explicitly de-incentivized to work outside of their actor type, the high rate at which states sign with only one another suggests that there are significant impeding factors.

My findings also support my argument that indigenous tribes are placed in a starkly contrasting position of needing to coordinate with outside actor types as to maximize amici effectiveness. As interest groups with a less regular presence in the Court, I previously suggested that tribes are more likely to sign with entities of different types as to gain leverage through alignment with other groups’ prestige. While this theory is supported in research on lobbying tactics (Gleason 2017; Caldeira and Weight 1988), there has never previously been evidence of how indigenous tribes approach coordinating amici briefs. Indigenous tribes do not merely occasionally or sporadically seek to utilize connections with other actors – they do so an overwhelming majority of the time. This majority is made even more meaningful through its comparison to states – the significant disparity validates not just the presence of strategy, but that this strategy differs with actor-type. The evidence supporting H3 and my analysis thereof demonstrates the results of disparate strategies employed by states and indigenous tribes. While I have posited theories on the different tactics used by each actor and their probable sources, even just the evidence supporting how these two actors submit amicus curiae briefs in significant different manners is the first quantitative contribution on the topic.

**Qualitative Evaluation of Foreign Sovereigns**

In spite of the low power of foreign sovereigns’ briefs, they still provide a vital comparative tool for understanding the framework of indigenous tribes’ actions. Given that the low quantity of foreign sovereigns’ briefs does not allow for meaningful statistical assessment for H2 and H3, I now qualitatively analyze their presence and compare their behavior with
indigenous tribes and states in to whom they submit and with whom they submit. Throughout these analyses, I use Appendix B and Appendix C, which include all of the briefs submitted by indigenous tribes and foreign sovereigns, respectively.

In regard to the rate at which foreign sovereigns submit to either party, their behavior suggests that they, much like indigenous tribes, submit more to the respondent than to the petitioner. From this, I argue that they focus more on strategies of defending decisions already decided in favor of their interests than on submitting to a party based on higher likelihood of winning. While it may not be a statistically meaningful comparison that foreign sovereigns submit to respondents at a higher rate than states due to the low quantity of briefs available, foreign sovereigns did submit substantially more to respondents throughout the ten-year period that I examined. As with indigenous tribes, this disparity demonstrates that they tend to write amici in defense of a lower court’s decision rather than asking the Court to strike down a prior decision. Indigenous tribes and foreign sovereigns both prefer the defensive brief, potentially because of greater impact that respondents’ briefs are known to have on the Court (Kearney and Merrill 792); this upholds my argument that foreign sovereigns seek to submit the most effective possible brief.

With the low quantity of foreign sovereigns’ briefs, it is difficult to ascertain whether they submit with concern to which party (petitioner or defendant) or with concern for the type of actor. Foreign sovereigns file in favor of international actors in a majority of the cases in which they submit amici, and they submit to these international actors regardless of whether they are petitioner or respondent. Seven of the eleven total cases in which foreign sovereigns submitted briefs were submitted in favor of an international corporations, interest group, or individual (Morrison v. National Australia Bank 2010; Samantar v. Yousuf 2010; Kiobel v. Royal Dutch
Based on this evidence of their submissions in favor of international actors, foreign sovereigns invest resources in contributing amici briefs when there is direct involvement of international interests; it is possible that any correlation between actor type and the party to whom they submit says less about the strategy the actor uses when deciding to whom to submit and more about how regularly the actor’s interests appear in the role of the respondent.

While states demonstrated a tendency to submit with one another and tribes regularly submitted alongside different entity types, foreign sovereigns appear to prefer to submit alone. Foreign sovereigns did not submit any briefs with entities other than foreign sovereigns, and only two of foreign sovereigns’ briefs had more than one signing entity. This directly contradicts my hypothesis that foreign sovereigns would, like indigenous tribes, submit more briefs with other entities than states. While my hypothesis was not correct for foreign sovereigns, the underlying theory is still in part supported. I argued that foreign sovereigns were more likely to sign with other entities than with one another due to low rates of regular communication on amicus briefs throughout networks of foreign sovereigns. This lack of an amici-submitting network is strongly supported – as only two of the fifteen briefs from foreign sovereigns were instances of co-submission, there is quite definitely a lack of “network cohesion” in that there is no evidence of heavily-used channels facilitating amici coordination between foreign sovereigns. This is an important point of comparison for indigenous tribes, who regularly submit with different entity types. As I discussed in my results section, regular co-signing with entities of different types suggests indigenous tribes strive to boost their amicus briefs’ effectiveness and minimize costs. Foreign sovereigns’ lack of co-signing demonstrates no push to minimize resource costs in
addition to confidence in obtaining the attention of the Court. Foreign sovereigns’ positive outlook on their own effectiveness, deduced from their solo-submissions, is a critical point to emphasize when comparing their co-submission behavior with that of indigenous tribes.

Indigenous tribes, as Appendix B displays, submitted all but five of their thirty-seven briefs with at least one other actor. Because neither actor submits with great regularity, the difference in co-submission behavior exposes starkly contrasting strategies. I contend that indigenous tribes sign with other entities because they perceive a need for advantage; the lack of cross-entity submissions from foreign sovereigns solidifies indigenous tribes’ strategy as unique to their entity type. Foreign sovereigns’ differences with indigenous tribes may not be statistically significant, but they nevertheless provide context on how much of sovereigns’ actions are based on strategies unique to their entity type.

Extensions into Social Network Analysis

Social network analysis should be used in future research aimed at charting the dynamics amongst amici-submitters as to better understand the coordination of lobbying tactics before the Court. Throughout my research, I evaluate actors’ patterns of amicus curiae submission as to better understand the strategic behavior of actors within the Court – my preceding analyses indicate a wealth of meaningful differences in how actors of different entity types submit amicus curiae. As H3 demonstrates, there are significant differences in with whom actors of different types submit; this indicates ripe opportunities for further research addressing the “co-” submission aspect of amicus briefs. Targeting the dynamics of coordination between amicus curiae submitters would reveal more about how these actors approach one another while coordinating their briefs. By understanding the behavior of submitters in the creation of jointly-filed amicus curiae briefs, we gain knowledge of the strategies of collective action used in
coordinating the lobbying efforts that are amicus briefs. Ultimately, understanding the extent of variation within amici-submitting networks, or how actors approach co-submission differently, would build a more complete understanding of how actors approach the Court.

Amicus briefs are the result of months of coordination between signing actors; when instances of co-submission, amicus briefs represent a shared investment meant to promulgate a desired outcome. By signing on to an amicus brief, actors not only share the cost of resources needed to submit to the Court but also increase the weight of the words written by demonstrating an agreed upon, shared interest in the content of the brief. Borgatti (2009, 894) set out a typology of the different types of ties possible in social network analysis. These ties are the crux of why a social network functions and affects in the manner which it does – a tie can be based on similarities (spatial, membership, personal characteristics), social relations (mother, friend, cognitive), interactions (physical or intellectual), and flows (of physical or intellectual resources). In an instance of an amicus co-signing there is significant flow and interaction. For the interaction, actors actively discuss and co-sign this brief together. For the flow, there is sharing of belief in addition to a sharing of information as the amici work on creating the brief and agreeing on what the argument within the brief itself will say. A co-submission of an amicus brief is a relationship in which actors align themselves along a common interest, lending an argument in favor of either the petitioner or respondent, and it represents a collaboration through physical and intellectual means with the intent of evoking an impact on a decision before the Court. What does it mean to sign on to a brief with another actor? Most importantly, it is evidence of an intentional alignment of legal analyses and allocated resources.

I argue that different patterns of co-submission, whether within an actor’s type or across different entity types, are particularly telling manifestations of actors’ lobbying tactics.
Submitting a brief with an entity of the same type emphasizes the commonality of a stance amongst institutions that already share interests and have comparable relationships with the Court. In coordinating within an entity type, there is an exchange of resources and knowledge between actors with some degree of similarity in knowledge and resources. For example, states’ attorneys general offices have comparable funding and bear equal constitutional obligations to the Court. On the other hand, submitting a brief with an entity of a different type may lead to more asymmetric exchanges of knowledge and resources. If certain actors seek to submit cost-effectively, they may create situations in which there is an uneven flow of resources or knowledge amongst submitters. These different possible significances of co-submissions underline the importance of knowing more about the networks in which actors co-submit. Some entities, such as states, reap benefits when they sign with entities of the same type and are thus incentivized to do so (Clayton 1994; Goelzhauser and Vouvalis 2013). As my findings in H3 support, entity types differ in the rate at which they submit outside of their entity type. The difference in rates for states and indigenous tribes are statistically significant and suggest that groups have unique reasons for deciding with whom to submit. However, before beginning to understand what co-submission tendencies indicate of actors’ lobbying tactics, more information is needed on the overall network composition of actors. Do coalition patterns appear within the networks of actors signing together? Are there different degrees of communication within a network, and does this result in certain actors becoming more desirable connections to possess? Do different networks value different manifestations of network power? These are a few of the many questions which my descriptive behavioral analysis of co-submissions give rise to. I propose future research should continue to first, evaluate the underlying tactics which foment co-
submission behavior, and second, describe co-submission behavior across institutional actors of multiple types.

I am most interested in the networks of signees that regularly write and submit briefs together and how these patterns of co-submission vary across different interest group types, representing different motivations for lobbying. Social network analysis is the approach best-suited to target these relationships and my research has laid a conceptual framework with which to approach attributing meaning to connections between amicus submitters. There is currently limited social network research available tracing the behavior of states as signatories and, therefore, little evidence that provides answers as to why patterns occur between signers (Gleason 2017). Most scholars studying amicus curiae limit their research to analyzing brief content and effects rather than patterns and irregularities within submission rates. The number of signees on briefs has increased while amici submission has grown (Collins 2004, 811), and as a result the discussion of specific actors in the Supreme Court has shifted to one in which broader categories of actor networks are now examined. Rather than looking at the relationship between an amicus signer and a case outcome, increases in the quantity of signees on briefs shifts the lens of interest to the relationship between a network of signees and a case outcome. Without further understanding of the behavior of amici submitters within their brief-signing networks, amici effectiveness is increasingly difficult to isolate. Current research provides no understanding of which actors are at the center of coordinated amici submissions before the Court, and, accordingly, we have an incomplete understanding of the leveraging strategies used by states, or why certain actors’ presences or coordination efforts could carry more weight than others. SNA will expand perspectives within amicus research as it will enable further isolation of the consequences of an amicus brief.
Social network analysis adds a critical perspective in understanding how certain groups capture the attention of the Court and position themselves within the existing channels that facilitate amici signing. SNA is frequently used in order to analyze the structure of a network and the impact of this network structure on the function of its members (Hawe and Ghali 2007, 63). This is the necessary next step for research on amicus curiae. Social network theory frequently manifests itself in the social sciences with a focus on nodule consequences (Borgatti 2009, 894). I theorize that an actors’ role in an amicus submission network impacts the available options for connections with other actors, which in turn impacts whether their amicus briefs are effective enough to achieve their desired outcome. Social network analysis allows me to test this theory as it treats the actors as interdependent (Gleason 2017, Wasserman and Faust 1994, Snijders 2010). Better understanding amicus submission network structure will, long term, help us see how relationships between actors impact the effectiveness of their briefs. While amici effectiveness has always been a priority within the literature on amicus curiae, prior research has focused on amici effectiveness as products of specific actors rather than products of actors’ relationships. SNA will allow for deeper investigations into both the creation and impact of amicus curiae.

Network analysis has only recently begun to intersect with the body of research on amicus submissions, and there is significant further research needed. Box-Steffensmeier (2013) applies network analysis in order to examine the degree to which the eigenvector centrality of an interest group correlated with the impact of their amicus briefs on the Court. Their use of eigenvector centrality underlines the importance of a node’s role in the amici-submission network overall. Whether an actor is connected to other well-connected actors matters. Box-Steffensmeier’s research excludes states and foreign governments and isolates membership-based organizations as the sole actors examined. While their work lays groundwork for future
research attempting to conceptualize the importance of an edge between two amici signees, it is necessary to study institutional interest groups in order to gain a deeper understanding of how sovereign actors interact with the Court and impact judicial decision-making. Gleason (2017) employs social network analysis in their study of attorney general coalition forming and emphasizes states as particularly important amicus submitters to study due to their unique role in the United States’ system of federalism. Gleason, in line with Box-Steffensmeier, uses exponential random graph models, and evaluates actor attributes at the dyadic level, by measuring attorneys general ideological distance from one another, and at the individual level, by measuring the office budget of attorneys general. They find that the factors that increase an actor’s likelihood to participate in coalition formation with other states have changed over time (Gleason 2017, 21).

There are currently no systematic, comparative evaluations of interest groups’ co-submission behavior patterns. While previous research has focused on predicting interest groups’ amici behavior, there is no understanding of how coalition forming behavior varies across entity types. By looking at dyadic and individual attributes which increase actors’ propensity to form coalitions, we will learn more about the factors motivating interest groups to form coalitions. In future research, I aim to fill this void by evaluating whether the predictive determinants of coalition forming through amicus co-submission vary across institutional interest group types. This provides further opportunity to examine the puzzle at the center of my research: do indigenous tribes behave more like states or more like foreign sovereigns in their submission of amicus curiae before the Supreme Court? Within the context of social network analysis, my research question would transform to: do the factors which determine coalition formation for indigenous tribes more closely resemble those of states or foreign sovereigns?
I converted my dataset to allow for future social network analysis. My data were originally set up in a two-mode network with an edge representing a connection between an actor and the brief they are signing on to. For the preliminary SNA analyses I ran, I only evaluated states’ briefs as my data for indigenous tribes and foreign sovereigns were limited. I first converted my two-mode network into a weighted, one-mode network in which each edge represented an instance of co-signing between two states. This logic is in line with the previous social network analysis conducted on amicus submissions – Gleason (2017, 15) also treated a co-submission as a dyadic tie between a pair of attorneys general. Converting into a one-mode network allows for targeting the network of ties which result in the amicus briefs submitted by certain types of structurally equivalent actors. It is not the product being submitted, in this case an amicus brief, that piques interest. Rather, it is the effort of creating the product which I label as meaningful.

Looking towards future extensions of my project, I intend to continue social network analyses. I would extend my dataset further back, ideally to 1968, to allow for more briefs from indigenous tribes and foreign sovereigns. I would then convert these data into one-mode networks for indigenous tribes and foreign sovereigns respectively. In a manner similar to my current project, I would evaluate the actors’ networks individually and in a comparative context. In addition to measurements of centrality, I am interested in evaluating subgraph-based measures of groups. Isolating subgraphs will highlight the coalitions which occur in amicus signings within and between institutional interest groups. Ultimately, this is the necessary method to adopt in order to isolate amici submitter behavior; such research will solidify our understanding.

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5 I have been awarded a fellowship to attend the 2019 Political Networks Conference. This conference presents the opportunity to learn more about social networks analysis on the whole and to discuss ongoing social networks research in judicial politics. I anticipate that this opportunity will play a pivotal role in forming how I approach continuing this project in graduate school.
of interest groups’ lobbying tactics before the Court to an extent that descriptive analyses are unable to adequately target. My current research describes the behavior of institutional amicus curiae submitters and theorizes the motivating strategies behind amicus submitters’ behavioral considerations in their lobbying of the Court. My next step will be to analyze factors which impact coalition formation through social network analysis.

**Conclusion**

Closely examining how indigenous tribes coordinate amicus curiae submissions will better reveal how indigenous tribes view their own power within the Court. By charting differences in behavior based on actor-type, I lay the foundation for future work investigating how amici-submitting behavior indicates actors’ relationship with the Court, or how different actors pursue justice. In signing with actors of different types, indigenous tribes are in part acknowledging the limits of their persuasive powers before the Court. Prior to an actor deciding which tactical decision to make, the actor must have some understanding of the need for tactics. An actor’s self-perception within the Court targets whether or not an actor feels the Court is listening to them. This relationship has consequences in how an actor works within the Court’s channels and approaches the Court’s legitimacy. Ultimately, this logic leads to a question of whether different relationships with the Court amount to disparate judicial treatment.

The act of compiling a dataset of all of the amicus briefs from indigenous tribes, states, and foreign sovereigns is a significant contribution to the field of amicus curiae research. There has been no prior understanding of the regularity of indigenous tribes submissions, let alone attempts to compile and describe patterns of their coordination behavior. Eichensehr (2016) was only recently the first to compile a dataset isolating all foreign sovereigns’ amicus briefs. I extensively further her dataset by adding foreign sovereigns’ amicus briefs from the past few
years. I provide original data on states’ submissions as there are few macro-level analyses of states’ behavior in the twenty-first century and none with data from the last five years. My data present a bird’s eye view of institutional interest groups’ amicus briefs in a manner that has never before been compiled. There are numerous qualities in my full dataset which my hypotheses do not address. This leaves a myriad of opportunities for further research.

With the intention of fomenting future investigations into the unique relationships that institutional actors share with the Court, the descriptive analyses in this paper provide a foundational understanding of how different actors coordinate briefs and reveals, at the very least, the significantly different manners in which actors approach amici submissions. From the frequency of submission, to the party to whom they submit, to the actors with whom actors submit, indigenous tribes mirror neither states nor foreign sovereigns in their behavior before the Supreme Court; in their lobbying efforts as amicus curiae submitters, indigenous tribes are distinct.
References


*Carcieri v. Salazar.* 2009. 555 U.S. ____.


*Foster v. Florida.* 2002. 537 U.S. 990, 990 n.* (Thomas, J. concurring in denial of certiorari)


*Hernandez v. Mesa.* 2017. 582 U.S. __


*Jaffe v. Redmond.* 1996. 518 U.S. 1 (Scalia, J., dissenting)

*Jesner v. Arab Bank, PLC.* 2018. 584 U.S. __


https://www.law.cornell.edu/rules/frcp

Legal Information Institute. “Rules of the Supreme Court of the United States.”
https://www.law.cornell.edu/rules/supct/rule_37


*Samantar v. Yousuf*. 2010. 560 U.S. 305


Appendix A: Data Collection Process

In order to capture every brief submitted by each of my actors, I accessed and opened every amicus brief submitted to the Court between 2008 and 2017 for cases on the merits. The SCOTUSblog website lists every case on the merits and includes a page with essential case citation details and a complete list of all briefs submitted to the Court for the case. These briefs are listed by primary signee and include a hyperlink to a copy of the full brief. I opened every brief to check for each signee, thus ensuring knowledge of every co-signer. I also confirmed that I captured all signees listed at the beginning and end of each brief – there is not complete consistency throughout submissions.

Occasionally, there were missing links to briefs on SCOTUSblog. The farther back one goes, the more this occurs. SCOTUS blog loses consistency for cases prior to 2008. When there was a missing link to a brief on SCOTUSblog, I searched for the case on LexisNexis and confirmed that every brief and signee had been captured.

As I accessed each brief, I coded a number of qualities relating to the case. The case name, case docket number, and lower circuit of origin are all basic descriptive case qualities that were noted for each brief. The number of total amicus briefs submitted to the case, dissent votes in the decision of the Court, and majority votes in the decision were also coded. The case decision of the Court was also noted. Finally, I noted whether there were briefs submitted to the case from more than one of the actors, such as a brief from states and one from indigenous tribes in the same case.

Beyond case attributes, I coded for qualities unique to each brief as well. Most importantly, I noted whether a brief was submitted by a state, indigenous tribe, or foreign sovereign. I clarified whether the brief was an instance of co-submission: this was coded in
noting whether the brief was submitted jointly in addition to noting the total number of co-signing entities. I also coded for whether there were multiple entity types in the signers of the brief. Lastly, I noted whether the amicus brief was submitted on behalf of the petitioner, the respondent, or to neither.

The final, most expansive part of the dataset is a brief quality: the name and type of each entity signing on to the brief. Each signing entity was listed by name with the type immediately following (e.g., “Arkansas” in one column and “1” in the following column to indicate that Arkansas is a state, with “Mexico” and “3” in the two columns following to show that Mexico is a country).

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<th>Case</th>
<th>Year</th>
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<tbody>
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<td>Navajo Nation*</td>
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<tr>
<td>United States v. Navajo Nation</td>
<td>2008</td>
<td>National Congress of American Indians*</td>
</tr>
<tr>
<td>Carcieri v. Kempthorne</td>
<td>2008</td>
<td>Standing Rock Sioux Tribe*</td>
</tr>
<tr>
<td>Carcieri v. Kempthorne</td>
<td>2008</td>
<td>Narragansett Indian Tribe</td>
</tr>
<tr>
<td>United States v. Jicarilla Apache Nation</td>
<td>2010</td>
<td>Navajo Nation*</td>
</tr>
<tr>
<td>Montana v. Wyoming and North Dakota</td>
<td>2010</td>
<td>Northern Cheyenne Tribe</td>
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<td>United States v. Tohono O’odham Nation</td>
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<td>Colorado River Indian Tribes*</td>
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<td>Salazar v. Ramah Navajo Chapter</td>
<td>2011</td>
<td>National Congress of American Indians*</td>
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<td>Tarrant Regional Water District v. Herrmann</td>
<td>2012</td>
<td>Chickasaw Nation*</td>
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<td>Adoptive Couple v. Baby Girl</td>
<td>2012</td>
<td>Agua Caliente Band of Cahuilla Indians of the Agua Caliente Indian Reservation, California*</td>
</tr>
<tr>
<td>Adoptive Couple v. Baby Girl</td>
<td>2012</td>
<td>Bad River Band of Lake Superior Chippewa Indians*</td>
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<td>Patchak v. Zinke</td>
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Appendix C: Foreign Sovereigns’ Briefs Collected.

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<td><em>Hernandez v. Mesa</em></td>
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<td><em>Pena-Rodriguez v. Colorado</em></td>
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