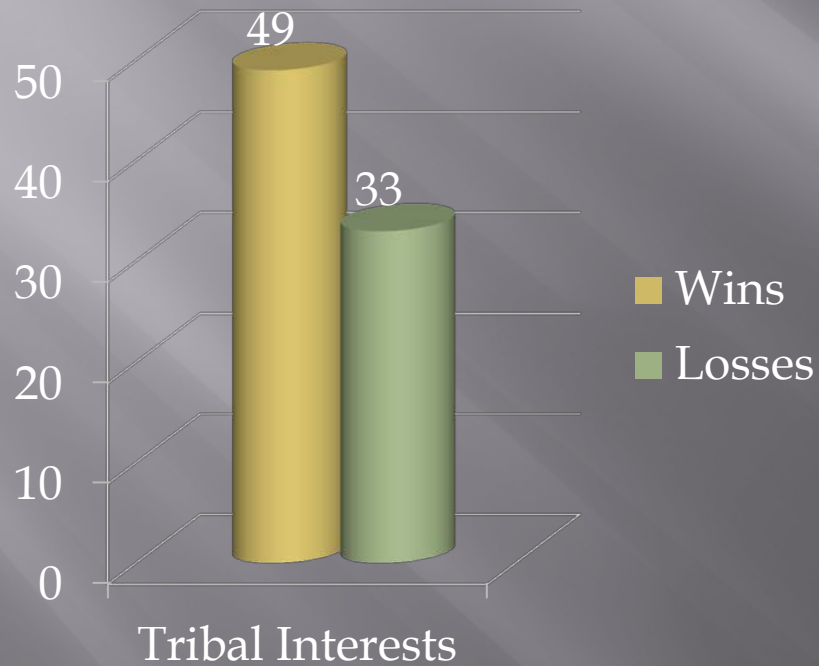


# THE TENTH JUSTICE LOST IN INDIAN COUNTRY

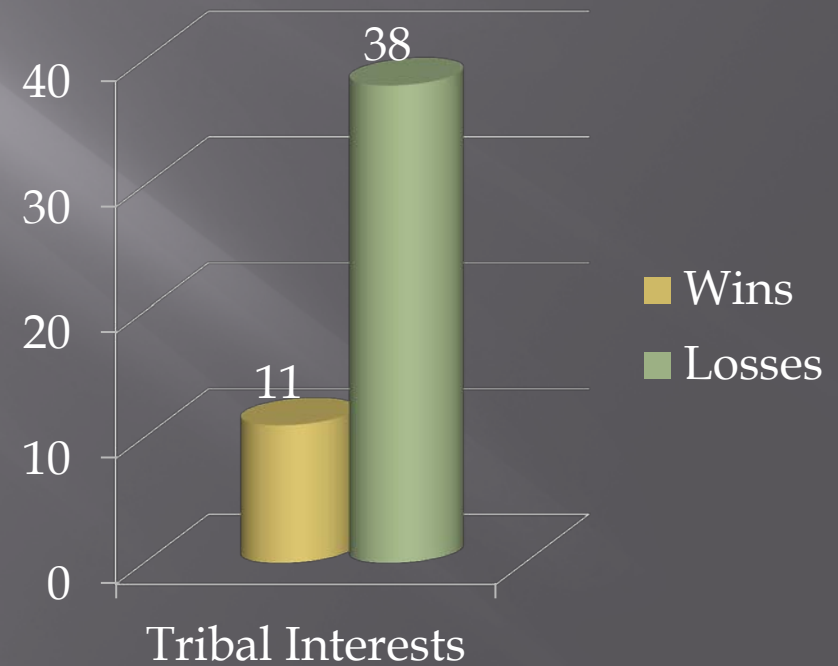
Matthew L.M. Fletcher  
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College of Law

# Supreme Court Outcomes 1958-2009

OT 1958-1986



OT 1986-2009



# “The Tenth Justice Lost in Indian Country” Research

- ▣ Current, ongoing study on the success of the Office of Solicitor General in Indian law cases (OT 1998 to 2008)
- ▣ Rule of Thumb in SCT litigation – get the OSG on your side (Patricia Millet’s paper on obtaining the OSG’s support in SCT cases)
- ▣ Preliminary research strongly suggests that the OSG is likely to succeed in Indian law cases when it opposes tribal interests
- ▣ But when the OSG sides with tribal interests, the success rates drop dramatically

# OSG Certiorari Success Rates

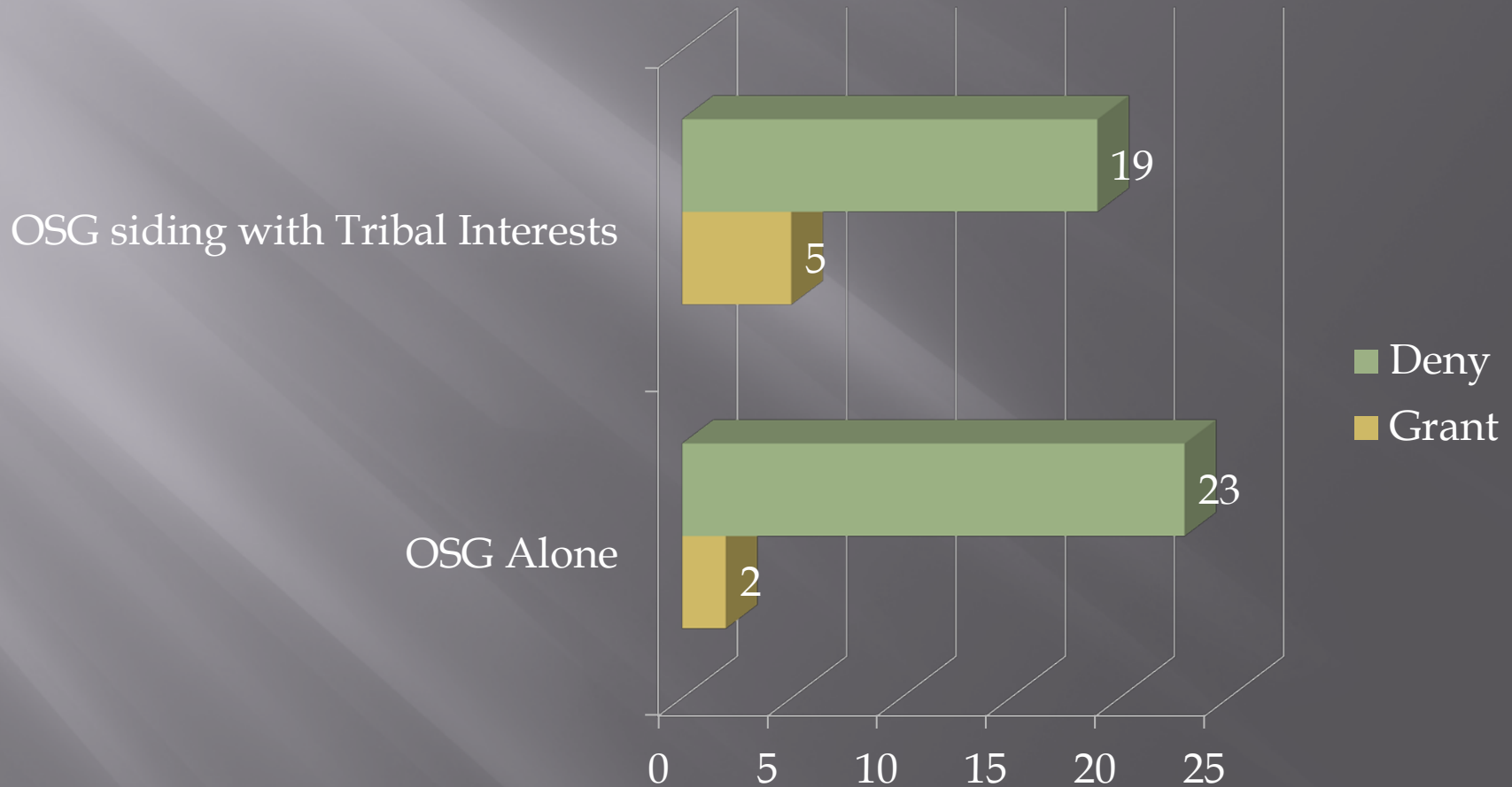
- ▣ Petitioning for certiorari – 65-70 percent
- ▣ Opposing certiorari – ~99 percent
- ▣ Opposing certiorari as amicus – 75-83 percent
- ▣ Recommending certiorari as amicus – 44-93 percent
- ▣ Non-OSG petitioner certiorari success rate – less than 1 percent
- ▣ Source: David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 *Geo. Mason L. Rev.* 237 (2009)

# OSG Merits Stage Success Rates

- ▣ Forthcoming – expected to be pretty good 😊



# OSG Certiorari Success Rates: Indian Law Cases – Cert Opposition



# OSG Merits Stage Success Rates: Indian Law Cases



# Representative Cases: Common Law Cases

- ▣ Land claims – *City of Sherrill v. Oneida Indian Nation* (2005) and *United States v. Pataki* (2006)
- ▣ Indian tax cases – *Atkinson Trading v. Shirley* (2001) and *Wagnon v. Prairie Band Potawatomi Nation* (2005)
- ▣ Jurisdiction cases – *Nevada v. Hicks* (2001) and *Plains Commerce Bank v. Long Family Land and Cattle Co.* (2008)
- ▣ Others – *C&L Enterprises v. Citizen Potawatomi Nation* (2001)



# Representative Cases: Statutory Interpretation

- ▣ *Dept. of Interior v. Klamath Water Users Assn.* (2001)
- ▣ *Carcieri v. Salazar* (2001)

# *Contra: Treaty Rights Cases*

- ▣ *Minnesota v. Mille Lacs Band of Chippewa Indians* (1999)
- ▣ *Arizona v. California* (2000)
- ▣ *Idaho v. United States* (2001)

# Representative Cases: U.S. Opposing Tribal Interests

- ▣ *Arizona Dept. of Revenue v. Blaze Construction* (1999)
- ▣ *Chickasaw Nation v. United States* (2001)
- ▣ *Inyo County v. Paiute-Shoshone Indians* (2003)
- ▣ *United States v. White Mountain Apache* (2003)
- ▣ *United States v. Navajo Nation I* (2003) and *II* (2009)
- ▣ *Cherokee Nation v. Leavitt* (2005)

# One Special Case

- ▣ *United States v. Lara* (2004)
- ▣ OSG's main theory: Duro Fix a reaffirmation of inherent tribal authority (Breyer, Stevens, O'Connor, Rehnquist, Ginsburg)
- ▣ OSG's alternative theory: tribal court jurisdiction invalid (Kennedy, Thomas)
- ▣ Is *Lara* safe? Simply put, no.
- ▣ The line up: Breyer, Stevens (?!?!), and Ginsburg versus Scalia, Kennedy, and Thomas
- ▣ Unknowns? Roberts, Alito, Sotomayor