ARTICLE

LOBBYING AGAINST THE ODDS

KIRSTEN MATOY CARLSON*

* Associate Professor of Law and Adjunct Associate Professor of Political Science, Wayne State University. Ph.D. 2007 (political science), The University of Michigan; J.D. 2003, The University of Michigan Law School; M.A. 1999 Victoria University of Wellington, New Zealand (Fulbright scholar); B.A. 1997, The Johns Hopkins University. I thank Sarah Abramowicz, Bethany Berger, Scott Cummings, Peter Hammer, Chris Lund, Steve Meili, William Ortman, Kevin Washburn, Jon Weinberg, Steve Winter, and participants at the 2018 Yale/Stanford/Harvard Junior Faculty Forum, the 2016 Law and Society Annual Meeting, and the 2016 Midwest Law and Society Retreat for their comments on earlier versions of the article. The National Science Foundation Law and Social Science Program funded this research (#SES 1353255).

I. Introduction

Conventional narratives maintain that groups lacking political power litigate because they cannot attain their goals politically. They predict that American Indians—who remain the most impoverished group in the United States and are hardly electorally significant with two percent of the population spread across 35 states—will pursue litigation strategies.[1] In contrast to the prevailing narrative, lawyers, tribal advocates, and political scientists have suggested that American Indians have increasingly engaged in political advocacy since the mid-twentieth century.

In this Article, I extend my earlier research investigating the relationships among groups, courts, and political processes by starting to evaluate the widely-accepted proposition that groups that lack political power litigate through a case study of American Indian advocacy at the end of the twentieth century.[2] American Indian advocacy is a particularly rich setting for investigating how and why groups craft advocacy strategies over time. American Indians, and especially Indian nations, have a long and rich history of engaging with the United States government.[3] Since its formation, the United States has established legal relationships with American Indians, treating them as separate political communities or tribes.[4] During the first century of its existence, the United States government and Indian nations entered into over 400 treaties.[5] These treaties acknowledge the tribes' preexisting and ongoing rights and governmental authority. Treaties, federal legis-

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[1] *Federal and State Recognized Tribes*, Nat'l Conference of State Legislatures, http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx [https://perma.cc/GKZ3-44d9] (last updated Oct. 2016).

[2] Kirsten Matoy Carlson, *Congress and Indians*, 86 U. Colo. L. Rev. 78, 82–83 (2015) (questioning whether advocates should assume that legislatures treat Indians more favorably than courts without systematic, empirical data on the amount and kinds of Indian-related legislation enacted by Congress and producing the first comprehensive study of Indian-related legislation).

[3] *See generally* Fredrick E. Hoxie, This Indian Country: American Indian Activists and the Place They Made (2013); Edward Lazarus, Black Hills/White Justice: The Sioux Nation versus the United States, 1775 to the Present (1991) (documenting over two decades of Sioux advocacy for a congressional act authorizing the bringing of the Black Hills claim in federal court).

[4] *See generally* Carol Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 Law & Soc'y Rev. 1123 (1994).

[5] *See* Cohen's Handbook of Federal Indian Law § 1.03[1] (2012). Congress unilaterally ended treaty making with Indian nations in 1871 and started dealing with Indian nations statutorily. Indian Law Res. Cent., Native Land Law: General Principles of Law Relating to Native Lands and Natural Resources 123-24 (2012).

lation, and Supreme Court decisions form the basic legal framework governing Indians in the United States today. The key elements of this framework include: federal recognition of inherent governmental authority possessed by Indian tribes, which usually supplants state powers; a federal trust obligation toward and special federal powers over Indian tribes and their citizens; and federally protected lands for designated Indian tribes.[6]

Indian nations have interacted with the federal government in various ways over the past five centuries. Some Indian nations have petitioned and sent delegates to Washington, D.C. to meet with members of the Executive Branch and Congress.[7] Others have litigated, protested, occupied federal lands, or exercised treaty rights. Over time, different tribes have used various combinations of these strategies.[8] Despite this variation, few scholars have studied, and to my knowledge none have systematically documented, the different strategies used by American Indians.[9]

This Article starts to fill the gap in existing knowledge about American Indian advocacy by presenting the first comprehensive study of reported lobbying by American Indian tribes and organizations. Part II describes the study and situates it within the history of American Indian advocacy more generally. Part III reveals a dramatic 600 percent increase in reported lobbying by American Indian tribes and organizations from 1978 to 2012.[10] This increase exceeds the rise in legislative advocacy that has occurred more generally in the U.S. population over the past five decades.[11] My findings, however, mirror those of other scholars who have documented other politically

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[6] *See generally* Goldberg-Ambrose, *supra* note 4.

[7] *See* Hoxie, *supra* note 3, at 70–71 (documenting Choctaw delegations to Washington, D.C. in the 1820s); W. DALE MASON, INDIAN GAMING: TRIBAL SOVEREIGNTY AND AMERICAN POLITICS 40 (2000); *see also* Daniel Carpenter, *On the Emergence of the Administrative Petition: Innovations in Nineteenth-Century Indigenous North America, in* ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 349 (Nicholas R. Parrillo ed.) (2017).

[8] *See, e.g.*, DAVID E. WILKINS & HEIDI K. STARK, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 165–70, 189–209 (3d ed. 2011).

[9] *See infra* Part II.A.

[10] The author generated this percentage from original quantitative data she collected and analyzed. For a full discussion of the author's data collection methods, see *infra* Part II.

[11] *See* BURDETT A. LOOMIS & WENDY J. SCHILLER, THE CONTEMPORARY CONGRESS 38 (4th ed. 2004) (documenting a 300 percent increase in the number of registered lobbyists from 1981 to 2001—from 6,000 registered lobbyists in 1981 to 20,000 in 2001); *see also* JEFFREY M. BERRY & CLYDE WILCOX, THE INTEREST GROUP SOCIETY 17–22 (5th ed. 2016) (documenting the increase in lobbying over time more generally); Frank Baumgartner, et al., *Congressional and Presidential Effects on the Demand for Lobbying*, 64 POL. RES. Q. 3, 4 (2011) (documenting the same); Beth Leech, et al., *Drawing Lobbyists to Washington: Government Activity and the Demand for Advocacy*, 58 POL. RES. Q. 19, 20 (2005) (documenting the same). Sociolegal studies confirm the escalation in legislative activity reported by political scientists. *See* Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 304 (1996); Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1242 (2010); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2046–48 (2008).

powerless groups, including individuals with disabilities[12] and marriage equality activists[13] engaged in legislative strategies. Moreover, my research suggests considerable variation among Indian tribes in their lobbying efforts and qualitative changes in lobbying as some Indian tribes have expanded their lobbying efforts beyond traditional Indian law topics. The extraordinary increase in the use of legislative strategies by American Indians, especially when considered as related to the larger trend towards increased lobbying in the United States, calls into question the prevailing narrative about when and why groups advocate in particular institutions.

Contrary to the dominant narrative, my data reveal that some groups may choose to lobby even if the odds seem stacked against them. Lobbying gained momentum as a viable strategy for American Indians in the late 1970s even though they had little political influence, the courts were still largely receptive to their claims, and gaming had yet to infuse some tribes with new financial resources to support their political efforts. American Indians did not turn to Congress because the courts were unavailable, and they did not abandon their litigation strategies in appealing to Congress. Rather, they appear to have been using legislative advocacy as a parallel or complement to other strategies. My findings, thus, suggest that groups may turn to legislative advocacy when they appear to lack political power even if another institution is receptive to their claims. Moreover, they indicate that groups may utilize legislative advocacy in a broader array of circumstances than usually thought. These circumstances include but are not limited to using legislative advocacy as a parallel, an alternative, a complement, or a precursor to litigation.[14] My data, thus, indicates that the common wisdom is either just plain wrong or substantially oversimplifies how, when, and why groups chose advocacy strategies.[15]

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[12] *See* Neta Ziv, *Cause Lawyers, Clients, and the State: Congress as a Forum for Cause Lawyering During the Enactment of the Americans with Disabilities Act*, *in* CAUSE LAWYERING AND THE STATE IN THE GLOBAL ERA 212 (Austin Sarat & Stuart Scheingold, eds.) (2001); *see also* Cummings & NeJaime, *supra* note 11, at 1248–62.

[13] *See* Cummings & NeJaime, *supra* note 11, at 1242.

[14] *See* Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 616 (2009); Michael McCann & William Haltom, *Alta Shrugged: Why Personal Injury Lawyers Are Not Public Defenders of Their Own Causes, in* THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE 433–38 (Austin Sarat ed.) (2005) (describing parallel legislative and litigation strategies by the American Trial Lawyers Association to curb tort law reform).

[15] Skepticism about the prevailing narrative is not new. Several different literatures question aspects of this popular narrative and suggest its limited utility as a general proposition. Robert Dahl investigated the assertion that the Supreme Court's primary role is to protect the rights of the minority against the tyranny of the majority and found that "policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States." Robert A. Dahl, *Decisionmaking in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957). While political scientists have contested Dahl's findings, *see, e.g.*, Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50, 50–51 (1976), some scholars have grown increasingly skeptical about the usefulness of litigation as a tool for successful law reform or policy change. *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS

Part IV answers an even more important question raised by problematizing the prevailing narrative: how and why do groups craft advocacy strategies? This question is not new. But in answering it, few scholars have questioned a key assumption underlying the dominant narrative, namely its treatment of advocacy strategies as a dichotomous choice between litigation and legislative strategies. By and large, political scientists and sociolegal scholars have continued to rely on this assumption in formulating frameworks for understanding how groups craft advocacy strategies. Political scientists have focused on explaining why groups lobby while sociolegal scholars have investigated why groups litigate.[16] In contrast, my data demonstrate that American Indians did not face a binary choice when they turned to lobbying strategies in the 1970s. Rather they actively engaged in both litigation and legislation. Like previous empirical studies, my findings suggest that viewing advocacy strategies as an either/or choice oversimplifies how advocates actually craft advocacy strategies. I argue that abandoning this assumption and combining insights from the political science and sociolegal literatures allows for the development of a more generalizable theory about how and why groups craft advocacy strategies in multiple institutions over time. The value of a more generalizable theory cannot be overstated in an era when advocates increasingly pursue advocacy strategies in non-judicial contexts and in multiple institutions simultaneously.[17]

Part V then proposes a more generalizable and relational approach for understanding how and why groups craft advocacy strategies across institutions over time. I combine insights from the existing sociolegal and political science approaches to construct a generally applicable framework for understanding the evolution of advocacy strategies. Consistent with the sociolegal approach,[18] I conceptualize the development of advocacy strategies as an ongoing and interactive process. Treating the development of advocacy strategies as an interactive process allows for in-depth exploration of the dynamic interplay among the factors influencing how strategies develop over time. From the interest group literature, I borrow the factors found to influence lobbying and integrate them into the sociolegal approach to emphasize the ongoing, dynamic nature of crafting advocacy strategies.

My approach improves upon existing frameworks in three main ways. First, it goes beyond existing sociolegal and interest group approaches to consider a fuller range of factors influencing advocacy strategies and how those factors interact in complex ways over time to shape and reshape strate-

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4–7 (2004); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 336–343 (1991); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 4–10, 97–116 (1974). Political scientists have also argued that some minority groups actually fare better in the political process. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 35 (1971).

[16] *See infra* Part III.

[17] *See supra* note 3.

[18] *See generally* MICHAEL MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).

gies. It highlights how changes in one factor may facilitate changes in others, either spurring or deterring the adoption of a particular strategy. For example, a change in the political context, such as the loss of the support of political elites due to electoral losses, may encourage a group to reconsider a legislative strategy.[19] Moreover, it emphasizes how feedback loops may develop among factors, reinforcing existing conditions supportive of a particular advocacy strategy. Second, my approach allows for in-depth exploration of the relational aspects of making advocacy decisions. Advocates choose strategies while considering the alternatives. The receptivity of one institution may encourage or discourage advocacy in another institution, but that receptivity may shift over time, causing advocates to reconsider or alter their strategies. For example, marriage equality advocates considered litigating, but court decisions unsupportive of gay rights encouraged them to rethink that strategy and consider legislative ones instead.[20] Examining institutional interactions reveals the relational aspects of advocacy choices, including how a group's strategy may depend on how it perceives its chances of success in another institution and how such perceptions change over time. Third, my approach models a way for scholars to devise more complex understandings of advocacy strategies and how they develop in and across different institutions over time.

In Part VI, I demonstrate the value of my approach by using it to explain the explosion in legislative advocacy by American Indians from 1978 to 2012. American Indians increased lobbying after a dramatic shift in federal Indian policy in 1975. The creation of a new federal Indian policy signaled a change in the receptivity of members of Congress toward Indian claims and opened the door for American Indians to lobby. Around the same time, the Senate created the Senate Committee on Indian Affairs, which provided access to Congress and new opportunities for American Indians to engage in legislative strategies. Lacking in financial resources and electoral clout, American Indians nonetheless used these opportunities to build relationships with members of Congress and their staffers, which further reinforced their access to the legislative process. American Indians continued to use legislative strategies as the Supreme Court grew increasingly hostile towards their claims in the 1980s. In the 1990s, the emergence of Indian gaming further encouraged and reinforced American Indian legislative advocacy. The American Indian case study illustrates how strategies develop in response to a confluence of factors that evolve over time, including changes in the political context, the development of a group's own political capacity, a

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[19] *See, e.g.*, Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons from School Finance Litigation in Kentucky 1984-1995*, 26 LAW & SOC. INQUIRY 631, 655–58 (2001) (explaining how established interest groups changed strategies and formed a coalition in response to changes in the governorship in Kentucky in 1988, which led to executive-legislative gridlock over education reforms and court intervention in education policy).

[20] *See* Cummings & NeJaime, *supra* note 11, at 1248–62.

dramatic shift in institutional receptivity, and the infusion of new financial resources.

Part VII concludes by considering the implications of the approach for studies of advocacy strategies, interest groups, and federal Indian law. My research demonstrates that groups may turn to legislative advocacy more frequently and in different ways than previously thought, which suggests that scholars need to think more carefully about how interactions among different factors affect advocacy strategies over time. It also raises important questions about the role of American Indians in the political process, including the impact of their lobbying on substantive policy and the success of their legislative advocacy.

II. Empirically Investigating the Prevailing Narrative: American Indians and Legislative Advocacy, 1978-2012

This Part describes how I investigated the prevailing narrative that politically powerless groups choose litigation strategies by empirically documenting American Indian legislative advocacy at the end of the twentieth century. Part II.A situates the study in the history of American Indian advocacy generally. Part II.B explains the data collection, methodology, and limits of the study.

A. *American Indian Advocacy in Historical Perspective*

American Indian advocacy predates the formation of the United States. Indian nations started petitioning colonial governments almost as soon as Europeans landed on American soil.[21] They have continually advocated for the recognition and protection of their tribal sovereignty and land rights since then. During the nineteenth century, Indian nations used the treaty-making process to retain their existing governmental and property rights.[22] Indian nations also petitioned and sent delegates to Washington, D.C. to meet with members of the Executive Branch and Congress.[23] They continued to petition and send delegations to Washington, D.C. after Congress unilaterally terminated treaty-making in 1871.[24]

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[21] *See* Herman Viola, Diplomats in Buckskins: A History of Indian Delegations in Washington City 13–21 (1995); Carpenter, *supra* note 7, at 349.

[22] *See* Cohen's Handbook, *supra* note 5, at § 1.03[1]; Indian Law Res. Cent., *supra* note 5, at 123. For example, Anishinaabek nations in present day Wisconsin and Minnesota negotiated the retention of their hunting, gathering, and fishing rights even when they ceded lands to the United States government. 1837 Treaty with the Chippewa, Chippewa-U.S., July 29, 1837, 7 Stat. 536; *see also* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 175 (1999).

[23] *See* Hoxie, *supra* note 3, at 70–71 (documenting Choctaw delegations to Washington, D.C. in the 1820s); *see also* W. Dale Mason, *supra* note 7, at 40; Carpenter, *supra* note 7, at 349.

[24] *See* Viola, *supra* note 21, at 190–99.

Indian nations have used different advocacy strategies over time. As early as the 1830s, Indian tribes started utilizing United States courts to protect their land and sovereignty rights.[25] Others have gone to war, protested, occupied federal lands, exercised treaty rights, or used various combinations of these strategies to protect their interests and resist encroachments on their lands and rights.[26]

American Indian advocacy continued into the twentieth century.[27] The twentieth century, however, brought tremendous changes to American Indian identities and ways of life, which in turn influenced their advocacy efforts. American Indians left the reservations at an unprecedented rate during World War II to join the armed forces or seek jobs supporting the war effort.[28] As a result, Indians met Indians from other tribes.[29] They slowly came together to form pan-Indian organizations and encourage advocacy across tribal lines.[30] These pan-tribal efforts, while not always successful, reflected an emerging pan-tribal Indian identity.[31] They culminated in the formation of the National Congress of American Indians ("NCAI"), the oldest existing national pan-Indian organization in 1944.[32] In the 1950s, the NCAI mobilized resistance against the termination policy, which sought to end the federal government-to-government relationship with Indian tribes and dissolve the trust status of Indian reservations.[33]

The relocation of American Indians to urban centers in the 1950s further facilitated a resurgence in Indian identity and advocacy.[34] The relocation program failed to secure steady jobs for Indians but led to the creation of urban Indian organizations, which further brought Indians from different tribes together.[35] Federal resources flowed to these new urban centers, and

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[25] *See, e.g.*, Worchester v. Georgia, 31 U.S. 515, 536–42 (1832).

[26] *See, e.g.*, WILKINS & STARK, *supra* note 8, at 189–206.

[27] For a more in-depth discussion of American Indian political action in the twentieth century, see STEPHEN CORNELL, THE RETURN OF THE NATIVE 187–201 (1988).

[28] *See* Stephen Cornell, *The New Indian Politics*, 10 WILSON Q. 113, 118–19 (1986) [hereinafter "*The New Indian Politics*"].

[29] *See id.* at 119–20.

[30] The first pan-Indian organizations emerged in the early twentieth century with the creation of the Society of the American Indian and the National Council of American Indians. *See* Dexter Fisher, *Zitkala-Sa: The Evolution of a Writer*, 5 AM. INDIAN Q. 229, 235 (1979). These organizations advocated for Indian citizenship, Indian employment in the Bureau of Indian Affairs, equitable settlement of tribal land claims, and legal reforms relating to Indians. *See id.*; *see also* WILKINS & STARK, *supra* note 8, at 195 (describing the Society of the American Indian). These organizations no longer exist.

[31] *See, e.g.*, JOANE NAGEL, AMERICAN INDIAN ETHIC RENEWAL: RED POWER AND THE RESURGENCE OF IDENTITY AND CULTURE 119–21 (1996).

[32] For a discussion of how World War II encouraged tribal advocacy, see Bethany R. Berger, Williams v. Lee *and the Debate Over Indian Equality*, 109 MICH. L. REV. 1463, 1472 (2011).

[33] *See* THOMAS W. COWGER, THE NATIONAL CONGRESS OF AMERICAN INDIANS: THE FOUNDING YEARS 3 (1999).

[34] *See* NAGEL, *supra* note 31, at 119–21 (explaining how relocation increased contact among American Indians, and thus, identification of common issues and goals).

[35] *See id.*

they generated urban American Indian identities and communities.[36] Urban Indian centers cultivated Indian activism in the early 1960s, as disillusioned urban Indians founded the American Indian Movement to end police mistreatment.[37] The red power movement, the American Indian corollary of the civil rights movement, would emerge out of the early efforts of these urban Indian centers.

With the advent of the civil rights movement, Indian political activism continued to grow in the 1960s and 1970s.[38] Indian tribes persevered in resisting restrictions on their hunting, fishing, and resource rights.[39] American Indians also borrowed organizational forms, practices, and rhetoric from the civil rights movement and tailored them to their own grievances against the federal government.[40] American Indian activists reclaimed land by occupying Alcatraz Island,[41] marched on Washington, D.C. to reiterate the importance of the United States honoring its treaties,[42] occupied the Bureau of Indian Affairs ("BIA") building in Washington, D.C. to express dissatisfaction with federal regulation of Indian affairs,[43] and protested during the standoff at Wounded Knee.[44]

American Indians also turned to legislative activities in the 1960s, but these focused primarily on a highly visible campaign for the U.S. government to abandon its policy of terminating tribal governments and assimilating American Indians.[45] Congress remained committed to the termination policy throughout the 1960s.[46] The Indian lobby, however, remained weak as Indian nations had limited financial resources and little experience in federal policymaking.[47] Historically, tribes had approached Congress to resolve tribe-specific issues, but significant changes were on the horizon. In the

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[36] *See* NAGEL, *supra* note 31, at 126–27 (describing how an influx of funding from federal programs "sparked a dramatic growth in urban Indian social, economic, and political programs").

[37] *See* CORNELL, *supra* note 27, at 189–90.

[38] American Indian political activism predates the civil rights movement. For example, American Indians in Washington State protested Washington state fishing laws in the early 1950s. *See* GEORGE PIERRE CASTILE, TO SHOW HEART: NATIVE AMERICAN SELF-DETERMINATION AND FEDERAL INDIAN POLICY, 1960-1975 62 (1998).

[39] *Id.*; CORNELL, *supra* note 27, at 189.

[40] *See* NAGEL, *supra* note 31, at 130.

[41] *See id.* at 131–35.

[42] *See id.* at 135–37.

[43] *See id.* at 131–37. For a fuller discussion of the emergence of the red power movement, see *id.* at 158–86.

[44] *See* CORNELL, *supra* note 27, at 113–15.

[45] Some tribes engaged in aggressive lobbying both historically, see Carpenter, *supra* note 7, and at this time to achieve specific tribal goals. Two examples of successful lobbying efforts in the late 1960s and early 1970s include the almost seventy-year struggle of the Pueblo of Taos to restore sacred lands around Blue Lake, CASTILE, *supra* note 38, at 93, 100–03, and the Menominee campaign to reverse their termination, *id.* at 148–52. Castile suggests that these tribal lobbying efforts encouraged other tribes to pursue their claims against the federal government legislatively. *Id.* at 100–03.

[46] *See* CASTILE, *supra* note 38, at 21.

[47] The BIA had denied tribes the ability to use their own trust funds to finance lobbying visits to Washington well into the late 1940s. *See* CASTILE, *supra* note 38, at xxv.

1950s and 1960s, with the resurgence in Indian identity and the development of pan-tribal organizations, tribes started to combine their advocacy efforts and shift their focus to national level issues.[48] As a result, pan-tribal organizations, led by the NCAI, started taking American Indian concerns directly to Congress in the 1950s and 1960s.[49]

Litigation served as another advocacy strategy used by American Indians throughout the twentieth century.[50] Even though they were not always successful, Indian nations had long resorted to courts as a check on detrimental U.S. policies.[51] In the 1950s, Indian nations litigated and won several influential cases, which acknowledged their land claims along the East Coast,[52] recognized their civil jurisdiction,[53] and validated their fishing and hunting rights.[54] These wins encouraged American Indians to bring more cases to protect their self-determination, lands, and water rights.[55] As a result, American Indians largely perceived the courts to be friendly to their interests in the 1960s, 1970s, and 1980s.[56] And they were right. The Supreme Court handed down a few worrisome decisions in the late 1970s and early 1980s, but found in favor of American Indian litigants almost 60 percent of the time from the late 1950s to the late 1980s.[57]

While American Indians have used various advocacy strategies over time, few studies have tried to document American Indian advocacy systematically.[58] Most political scientists routinely omit American Indians from

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[48] *See* Berger, *supra* note 32, at 1472–73.

[49] *See The New Indian Politics*, *supra* note 28, at 117–20, 194–95. Castile describes the Indian lobby in the 1960s as making modest legislative proposals and not having much clout among members of Congress. *See* CASTILE, *supra* note 38, at 19.

[50] *See* CORNELL, *supra* note 27, at 195.

[51] *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832).

[52] *See* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

[53] *See* Williams v. Lee, 358 U.S. 217 (1959).

[54] *See* United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

[55] *See* Lloyd Burton, *The American Indian Water Rights Dilemma: Historical Perspective and Dispute-Settling Policy Recommendations*, 7 UCLA J. ENVTL. L. & POL'Y 1, 39 (1987) (explaining "until quite recently the tribes have been highly successful in court").

[56] *See* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 267 (2001) (describing the Supreme Court's positive approach to Indian rights in the late 1970s and early 1980s).

[57] *See* Matthew L. M. Fletcher, *Factbound and Splitless: The Certiorari Process as a Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 942 (2009).

[58] Scholars have produced several case studies on Indian advocacy. *See, e.g.*, MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD 127–61 (2014) (describing Indian efforts to enact the Indian Child Welfare Act); Bethany R. Berger, United States v. Lara *as a Story of Native Agency*, 40 TULSA L. REV. 5, 6, 11–18 (2004) (recounting Indian efforts to enact legislation restoring tribal criminal jurisdiction over non-member Indians); Clayton Dumont, Jr., *Contesting Scientists' Narrations of NAGPRA's Legislative History Rule 10.11 and the Recovery of "Culturally Unidentifiable" Ancestors,* 26 WICAZO SA REV. 5, 10 (2011) (discussing the efforts of Indian nations, pan-tribal organizations, and Native Hawaiians to secure passage of the Native Ameri-

studies of American politics entirely.[59] At least one scholar tried to document changes in collective action by American Indians over time but did not systematically consider legislative strategies largely because Indian nations did not yet have the resources to pursue them.[60]

The few other studies on American Indians do not represent the full range of advocacy strategies utilized by American Indians. These studies have focused on more limited subjects including voting rights,[61] Indian protest movements after World War II,[62] campaign contributions made by Indian nations involved in gaming enterprises,[63] and Indian engagement in state and local politics.[64]

Of these, a few studies have examined legislative advocacy by American Indians. These studies often frame their research within the theoretical frameworks used by interest group scholars.[65] They expect, and often find, that American Indians act like organized interests.[66] Most of these studies

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can Graves and Repatriation Act); Patrick Haynal, *Termination and Tribal Survival: The Klamath Tribes of Oregon*, 101 Or. Hist. Q. 270, 294–96 (2000) (recounting the efforts of the Klamath tribes of Oregon to regain federal recognition congressionally from 1987 to 1990); Mark Miller, *The Timbisha Shoshone and the National Park Idea: Building toward Accommodation and Acknowledgement at Death Valley National Park, 1933-2000*, 50 J. Southwest 415, 434–38 (2008) (describing the successful efforts of the Timbisha Shoshone to obtain legislation providing them with homeland from 1994 to 2000). Some scholars have also included short descriptions of Indian legislative advocacy on a particular bill in articles focused on the bill and how it changed the law. *See, e.g.*, Judith Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources*, 29 Tulsa. L.J. 541, 582–84 (1993) (describing the tribal dissatisfaction with mineral leasing on Indian lands leading up to the enactment of the Indian Mineral Development Act of 1982).

[59] *See generally* Wilkins & Stark, *supra* note 8; Jeff J. Corntassel & Richard C. Witmer, II, *American Indian Tribal Government Support of Office-Seekers: Findings from the 1994 Election*, 34 Soc. Sci. J. 511 (1997).

[60] *See The New Indian Politics*, *supra* note 28, at 116–31.

[61] *See generally* Daniel McCool, et al., Native Vote: American Indians, the Voting Rights Act, and the Right to Vote (2007); Laughlin McDonald, American Indians and the Fight for Equal Voting Rights (2011).

[62] *See generally* Daniel Cobb, Native Activism in Cold War America: The Struggle for Sovereignty (2008); Paul Chaat Smith & Robert Allen Warrior, Like a Hurricane: The Indian Movement from Alcatraz to Wounded Knee (1997); Joane Nagel, American Indian Ethnic Renewal: Red Power and the Resurgence of Identity and Culture (1996).

[63] *See generally* Fredrick J. Boehmke & Richard Witmer, *Indian Nations as Interest Groups: Tribal Motivations for Contributions to U.S. Senators*, 65 Pol. Res. Q. 179 (2012); Corntassel & Witmer, *supra* note 59.

[64] *See generally* Laura E. Evans, Power from Powerlessness: Tribal Governments, Institutional Niches, and American Federalism (2011); Mason, *supra* note 7; K.N. Hansen & T.A. Skopek, The New Politics of Indian Gaming: The Rise of Reservation Interest Groups (2011); Fredrick J. Boehmke & Richard Witmer, *State Lobbying Registrations by Native American Tribes*, 2015 Pol., Groups & Identities 2 (2015); Jeff Corntassel & Richard C. Witmer II, Forced Federalism: Contemporary Challenges to Indigenous Nationhood (2008).

[65] *See* Hansen & Skopek, *supra* note 64, at 14–16; Boehmke & Witmer, *supra* note 64, at 5; Richard Witmer & Frederick J. Boehmke, *American Indian Political Incorporation in the Post-Indian Gaming Regulatory Act Era*, 44 Soc. Sci. J. 127, 129 (2007).

[66] *See* Boehmke & Witmer, *supra* note 64, at 5; Witmer & Boehmke, *supra* note 65, at 129.

have documented the increased use of interest group strategies, especially lobbying and campaign contributions, by Indian tribes at the federal, state, and local levels.[67]

Professors Witmer and Boehmke conducted the most comprehensive study to date on legislative advocacy by Indians at the federal level. They reported an increase in federal lobbying expenditures made by American Indians from 1997 to 2000.[68] Witmer and Boehmke argued that resource constraints limited American Indians' potential for legislative advocacy historically and that gaming has altered that constraint since the late 1980s.[69] They concluded that gaming has provided opportunities in terms of resources for tribes to increase their lobbying activities.[70] The insights from the study, however, are limited because of its narrow focus on the influence of one factor (gaming), and its short time frame (only three years). Due to the short time frame of their analysis, they do not really compare American Indian legislative advocacy before and after the rise of gaming and thus cannot assess fully how gaming may have altered lobbying.[71]

To my knowledge, only one other study has considered American Indian lobbying activities on the federal level.[72] A recent study investigated lobbying strategies employed by Indian groups seeking federal recognition from 1977 to 2012.[73] It demonstrated that the political context helped to shape Indian groups' advocacy strategies over time.[74] While it analyzed a longer time period than Witmer and Boehmke, the study was more limited in scope in that it only analyzed lobbying by non-federally recognized Indian groups. As a result, the findings may be limited only to that subset of Indian groups.

Similarly, scholars have yet to systematically study the use of litigation strategies by American Indians. Several scholars have tried to determine how successfully tribes have litigated before the U.S. Supreme Court over time,[75] but I have yet to identify a study that looks at how frequently tribes litigate in federal, tribal, or state courts.

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[67] *See* HANSEN & SKOPEK, *supra* note 64, at 211–13; Boehmke & Witmer, *supra* note 64, at 134–35; Corntassel & Witmer, *supra* note 59, at 2, 7–8; *see also* Boehmke & Witmer, *supra* note 63, at 179, 181; Kirsten Matoy Carlson, *Making Strategic Choices: How and Why Indian Groups Advocated for Federal Recognition from 1977 to 2012*, 51 LAW & SOC'Y REV. 930, 942–45 (2017).

[68] Witmer & Boehmke, *supra* note 65, at 134–35.

[69] *Id.* at 130–31.

[70] *Id.* at 140.

[71] *Id.* at 130–31. They include a short description of American Indian legislative advocacy prior to the Indian Gaming Regulatory Act, but they do not include any quantitative data on reported lobbying or contributions by American Indians before 1988. *Id.*

[72] *See generally* Carlson, *supra* note 67 (investigating the advocacy strategies of 124 Indian groups seeking federal recognition from 1977 to 2012).

[73] *See generally id*.

[74] *Id.* at 945–51.

[75] *See generally* Bethany Berger, *Hope for Indian Tribes in the U.S. Supreme Court? Menominee, Nebraska v. Parker, Bryant, Dollar General. . .and Beyond*, 2017 ILL. L. REV. 1901 (2017); Fletcher, *supra* note 57; Getches, *supra* note 56; Alexander Tallchief Skibine, *The*

The dearth of studies on Indian advocacy indicates an acute need for more research on Indian advocacy strategies and how they have developed over time. It motivated the study on reported lobbying by American Indians described in the next section.

B. The Study

This study is a first step towards developing more comprehensive knowledge about American Indian advocacy strategies. It seeks to describe reported lobbying by American Indians from 1978 to 2012 and to start to fill some of the gaps in the existing literature on American Indian advocacy.

1. Data Collection

I accessed primary data on lobbying by American Indians from several sources, including serial publications and lobbying disclosure reports, publically available and archival materials on legislation introduced in Congress from 1975 to 2012, and interviews with lobbyists for American Indian nations and organizations. I collected data on reported lobbying by American Indians from serial publications and lobbying disclosure reports.[76] For the years 1978 to 1996, data on Indian organizations and tribes reporting the lobbying of federal officials was collected from the serial publication *Washington Representatives*.[77] After 1996, the Lobbying Disclosure Act of 1995 required lobbyists to register with the House or Senate and report regularly the name of the registrant, the name of the client, the amount spent on lobbying, the issue areas in which they lobbied, and the specific bills and regula-

Supreme Court's Last 30 Years of Federal Indian Law: Looking for Equilibrium or Supremacy?, 8 COLUM. J. RACE & L. 277 (2018).

[76] I wanted to collect data starting in 1975 so that it would coincide with the adoption of the Tribal Self-Determination Policy by Congress and with a related database on Indian-related federal legislation. I chose to use 1978 as the baseline year instead, after reviewing several serial publications and determining that it was the first year for which I could find consistent and reliable data.

[77] My use of serial publications is consistent with other interest group studies. *See generally* JEFFREY M. BERRY, LOBBYING FOR THE PEOPLE: THE POLITICAL BEHAVIOR OF PUBLIC INTEREST GROUPS (1977); KAY LEHMAN SCHLOTZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY (1986). I identified tribes and Indian organizations with lobbyists by searching the subject matter index. For the years 1978-1992, I used the subject matter category "minorities" to identify Indian tribes and organizations (none of the other subject matter indices seemed relevant). For 1993-1996, I used both the "minorities" and "Native American" subject matter categories. Most of the tribes and Indian organizations were identifiable by name, but occasionally, I looked up an entity online. If I could not tell if an organization was made up of American Indians and advocated for their benefit, I did not include it on the list. I excluded charitable organizations that appeared to be non-Indian friends of the Indians, such as the Bureau of Catholic Indian Missions.

tions on which they lobbied.[78] For the years 1997 to 2012, data was collected from the Open Secrets website run by the Center for Responsive Politics.[79]

To facilitate comparative analysis over time, data was collected on the name of the organization or tribe reporting lobbying; the years and congressional sessions in which each reported lobbying; the issue areas in which they lobbied; and the lobbyists, if any hired by the organization or tribe; and the years it used a specific lobbyist.[80] Organizations had to start reporting lobbying expenditures in 1997, and data was collected on the amount of money each organization reported spending on lobbying by year and congressional session beginning in that year. Additional data was collected from publically available sources on the geographical location of each Indian tribe that reported lobbying during the time period studied and whether the tribe engaged in gaming during the years they reported lobbying.[81]

2. Methodology

This study investigates the use of lobbying strategies by American Indian nations and organizations from 1978 to 2012. It is the first to use empirical methods to look systematically at reported lobbying and lobbying expenditures by American Indians over a thirty-five year time period. This time period allows for the identification and comparison of trends in reported lobbying and lobbying expenditures over time.

I use quantitative methods to describe and compare reported lobbying and reported lobbying expenditures by American Indian organizations and tribes from 1978 to 2012. Drawing on the few existing studies of Indian legislative activity and the general trend towards increased lobbying by groups over time, I expected to find an increase in reported lobbying and reported lobbying expenditures by Indians over time. I investigated this expectation by looking at the frequencies of reported lobbying and reported lobbying expenditures by American Indians nation and organizations and comparing them over time. I collected and analyzed additional data on gaming, the issues Indians lobbied on, and geography to provide context and a broader understanding of trends in Indian lobbying behavior. I supplemented this quantitative analysis with archival research and interviews with lobby-

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[78] 2 U.S.C. § 1601 (2012). The Lobbying Disclosure Act of 1995 required biannual reporting. It was amended in 2008 to require quarterly reporting. Honest Leadership and Open Government Act of 2007, Pub. L. No. 110–81, 121 Stat. 735 (codified as amended in scattered sections of 2 U.S.C and 18 U.S.C.).

[79] I used the "Indian/Native American Affairs" issues index to identify tribes and tribal organizations lobbying before Congress in a given year from the Open Secrets website. OPENSECRETS.ORG, https://www.opensecrets.org [https://perma.cc/QH9D-ZAAF] (last visited Nov. 4, 2018). I then cross-referenced this list with the "Gaming" issues index.

[80] Data was not collected on the specific bill or regulations on which the lobbyist lobbied because this information was often either missing or unreliable.

[81] This information was collected from tribal websites and TILLER'S GUIDE TO INDIAN COUNTRY: ECONOMIC PROFILES OF AMERICAN INDIAN RESERVATIONS (Veronica E. Velarde Tiller ed., 2006).

ists both to substantiate my findings and to determine qualitative changes to lobbying behaviors.

3. Limits to the Study

Several limits exist to this study. First, the data only represents American Indian organizations and tribes that reported lobbying from 1978 to 2012 and reported lobbying expenditures from 1997 to 2012. They may underrepresent lobbying and lobbying expenditures by American Indian organizations and tribes for several reasons. First, the Lobbying Disclosure Act only requires the reporting of direct lobbying not indirect or grassroots lobbying. Second, some organizations and tribes may not have reported lobbying prior to 1995.[82] Third, after 1995, some organizations and tribes may not have conducted enough lobbying to report their activities under the Lobbying Disclosure Act of 1995 or may have chosen not to do so.[83] Fourth, after 1997, some organizations and tribes may not have spent enough money on lobbying expenditures to report their activities. The underreporting of lobbying and lobbying expenditures raises concerns that the data may underrepresent actual lobbying by American Indian nations and organizations.

The benefit of the data presented here (even if imperfect) is that it presents a much broader and more systematic view of reported lobbying and lobbying expenditures by American Indians over time. The study spans thirty-five years—a much longer time period than previous studies of lobbying by American Indians at the federal level—and thus, allows for the identification of trends and changes in lobbying behaviors over time. Moreover, it includes the collection and analysis of data on reported lobbying and lobbying expenditures by American Indians both before and after the rise of Indian gaming. This allows for important comparative analysis over time, missing from earlier studies.[84]

A second limit to this study is that it does not attempt to evaluate the effects of American Indian lobbying. While that question is important and merits close investigation, this study has a more limited purpose. It seeks to investigate and explain changes in lobbying trends over time.

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[82] Several scholars have noted possible inaccuracies in data reported by lobbyists. *See, e.g.*, WILLIAM N. ESKRIDGE, ET AL., LEGISLATION AND STATUTORY INTERPRETATION 198–200 (2d ed. 2006); Timothy M. LaPira, *Lobbying in the Shadows: How Private Interests Hide from Public Scrutiny and Why That Matters*, *in* INTEREST GROUP POLITICS 224, 238–40 (9th ed. Allan J. Cigler, et al. eds., 2016). Congress first started requiring lobbyists to register in the Federal Regulation of Lobbying Act of 1946, but many interest groups may have felt that they did not have to register after the Supreme Court seriously limited the Act's application in 1954 in *United States v. Harriss*, 347 U.S. 612, 619 (1954). ESKRIDGE, ET AL., *supra*, at 201. Lobbying registrations increased after enactment of the Lobbying Disclosure Act of 1995. *Id*. But they have recently dropped. LaPira, *supra*, at 238–40. For a discussion of the limits of data collected under the Lobbying Registration Act, see LaPira, *supra*, at 233–39.

[83] LaPira, *supra* note 82, at 224–26, 238–39 (noting some of the reasons why lobbyists do not report their lobbying activities).

[84] Witmer & Boehmke, *supra* note 65, at 132.

Third, this article evaluates strategic decisionmaking on a macro rather than a microlevel. It describes trends in lobbying over time but has not attempted to disaggregate or analyze the data on an individual, tribal level. Thus, it cannot explain any particular tribe or Indian organization's decision to lobby on a specific issue at a given moment in time. Similarly, the analysis cannot directly compare strategy choices or why an Indian tribe or organization decided to lobby rather than, or in addition to, litigating any particular issue.[85] The article attempts to situate the increase in lobbying by American Indians generally with trends in litigation by American Indians but acknowledges the limits of doing so given the lack of data on how frequently American Indian tribes and organizations engage in litigation.[86]

Another limit to the study is that it only measures changes in legislative advocacy from 1978 onward. Due to the difficulty of collecting data, I can only compare lobbying starting in 1978 and lobbying expenditures starting in 1997. This date is somewhat arbitrary because historical studies and accounts document Indian legislative advocacy from contact. These historical studies suggest that my data are part of a larger, ongoing narrative of Indian advocacy.[87] Unfortunately, I have yet to find a way to measure systematically such advocacy efforts.

III. Changing Strategies: The Rise of American Indian Legislative Advocacy

American Indian advocacy started to change dramatically in the 1970s as American Indians increasingly engaged in legislative strategies. This shift continued over the next thirty-five years with American Indian legislative advocacy growing significantly from 1978 to 2012.

Six times as many American Indian organized interests reported lobbying in 2012 as in 1978.[88] Figure 1 depicts the frequency of reported lobbying

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[85] For examples of this kind of microlevel analysis of group decisionmaking, see, e.g., Carlson, *supra* note 72; Cummings & NeJaime, *supra* note 11.

[86] *See supra* Part II.

[87] *See generally* Hoxie, *supra* note 3; Hermann J. Viola, Diplomats in Buckskins: A History of Indian Delegation in Washington City (1995); *The New Indian Politics*, *supra* note 28.

[88] Thirty-six American Indian organizations, including tribes, reported lobbying in 1978 and 242 in 2012, an increase of over 600 percent (36/242). The numbers are even more startling for tribes: 24 tribes reported lobbying in 1978 and 177 in 2012. This is an over 700 percent (24/177) increase in the number of tribes lobbying (and 2012 does not even represent the highpoint for tribes reporting lobbying over this time period). While lobbying rates have generally increased over the past five decades, it is hard to compare the increase in American Indian lobbying with other groups due to differences in variables and measurements. Leech et al. included Indian affairs as an issue area, but they only reported the average number of interest groups per issue area and the average number of lobbyists per issue area over a four-year period (1996-2000), and they did not break down the numbers by year. Leech, et al., *supra* note 11, at 24–25. According to their data, very few interest groups lobbied on Indian affairs in comparison with other issue areas. *Id*. at 24. They did not, however, explain whether they included Indian tribes as interest groups in their data set. Moreover, they reported that the

over time by American Indian interest organizations, including Indian nations, tribal consortiums, American Indian non-profit organizations, Alaska Native for- and non-profits under the Alaska Native Claims Settlement Act, Alaska Native villages, and Native Hawaiian groups. Political scientists have documented a similar rise in lobbying, but these numbers exceed the increases in reported lobbying found by political scientists studying the general population. For example, in 2004, Professors Loomis and Schiller noted that "registered lobbyists rose in numbers from . . . almost 6000 in 1981 to an astonishing 20,000 in 2002"—an increase of over 300 percent.[89] Recent studies, however, have documented a decline in lobbying after 2007.[90]

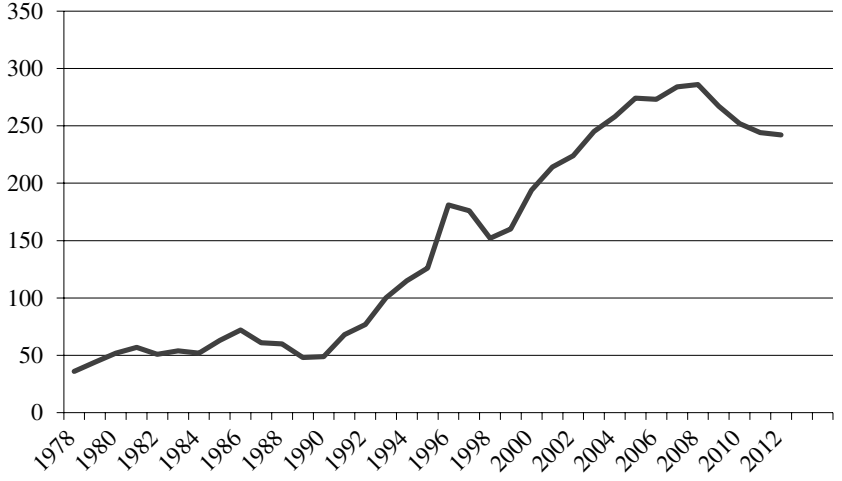

Figure 1. American Indian organizations, including Indian nations, reporting lobbying over time, 1978-2012.

Of the American Indian interest organizations reporting lobbying during this time, Indian nations filed the vast majority, 71 percent, of the reports.[91] Figure 2 displays reported lobbying by Indian nations over time. Over half—a total of 325 Indian nations or 57.4 percent[92] of the 566 feder-

average number of contract lobbyists hired in Indian affairs exceeded that of the majority of issue areas. *Id*. at 25.

[89] LOOMIS & SCHILLER, *supra* note 11, at 38. Loomis and Schiller reported an even greater 400 percent increase in the number of Washington-based interest representatives (from 4,000 in 1977 to about 17,000 in 2002). *Id*. They also noted that the rise in interest group advocacy has not been spread evenly across groups. *Id.*

[90] *See, e.g.*, LaPira, *supra* note 82, at 240 fig.1.

[91] I generated this number by dividing the number of tribes filing reports by the total number of reports filed by American Indian organizations from 1978 to 2012. American Indian organizations filed a total of 5,111 annual reports from 1978 to 2012, but some of these organizations filled more than one report. Indian nations filed 3,646 of these reports.

[92] I generated this percentage by dividing 325 by 566. It does not accurately represent the actual percentage because the number of tribes increased rather than remained constant over the time period studied. As a result, the actual percentage may be lower.

ally recognized tribes in the United States at the time—reported lobbying at least once during this time period. While the overall trend for Indian nations indicates a 700 percent increase in the number of tribes lobbying, it has varied some over time.[93] Reported lobbying by tribes rose dramatically in the late 1970s, leveled off in the early 1980s, and then grew significantly from 1984 to 1986 before dipping slightly in the late 1980s. From 1990 to 1995, the number of tribes reporting lobbying steadily increased again. It declined in the late 1990s, surged in the early 2000s, decreased with the economic recession of 2008, and appears to be rebounding in the past few years.[94]

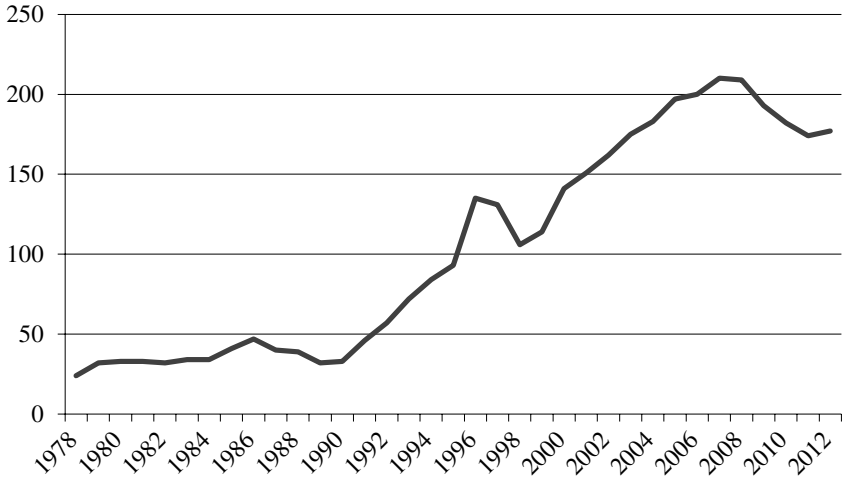

Figure 2. Indian nations reporting lobbying over time, 1978-2012.

Not all Indian nations reported lobbying during this time period. In fact, 43.7 percent of federally recognized Indian nations did not report lobbying at all during the time period studied.

The tribes that did report lobbying varied in the frequency of their lobbying. Some tribes reported lobbying almost every year, such as the Makah Indian Tribe and Quinault Indian Nation, while others reported lobbying only once or twice during the time period studied.[95] On average, tribes re-

[93] I generated this number by dividing the number of tribes reporting lobbying in 1978 by the number reporting lobbying in 2012. Twenty-four tribes reported lobbying in 1978 and 177 in 2012.

[94] I have not tried to explain these variations in the lobbying pattern. Several factors could influence fluctuations in individual tribal decisions to lobby, including the growth of gaming in the early 1990s and changes in party alignments in Congress and the Executive Branch. In contrast, reported lobbying in general has been decreasing since 2007. LaPira, *supra* note 82, at 240 fig.1.

[95] Other Indian nations that report lobbying frequently include, but are not limited to, the Standing Rock Sioux Tribe, the Tulalip Tribes of Washington, the Three Affiliated Tribes of the Fort Berthold Reservation, the Navajo Nation, the Miccosukee Tribe of Indians of Florida, the Menominee Tribe of Wisconsin, the Lummi Indian Nation, and the Hoopa Valley Tribe. It is

ported lobbying during 11 of the 34 years in the data set. A quarter of tribes, however, reported lobbying during five years or less, and another quarter reported lobbying for 18 years or more.[96]

As Figure 3 shows, very few of the tribes that reported lobbying were engaged in gaming prior to 1991. The number of Indian nations engaged in gaming and reporting lobbying increased dramatically over the time period studied as more tribes opened gaming operations in the mid-1990s. Indian nations engaged in gaming exceeded non-gaming Indian nations in reporting lobbying for the first time in 1995—the same year that most of the tribes in the dataset started gaming operations. Gaming tribes have outnumbered non-gaming tribes in reported lobbying every year since then. Over the entire time period studied, the majority—60 percent—of the Indian nations that reported lobbying operated gaming establishments at the time they reported lobbying.[97]

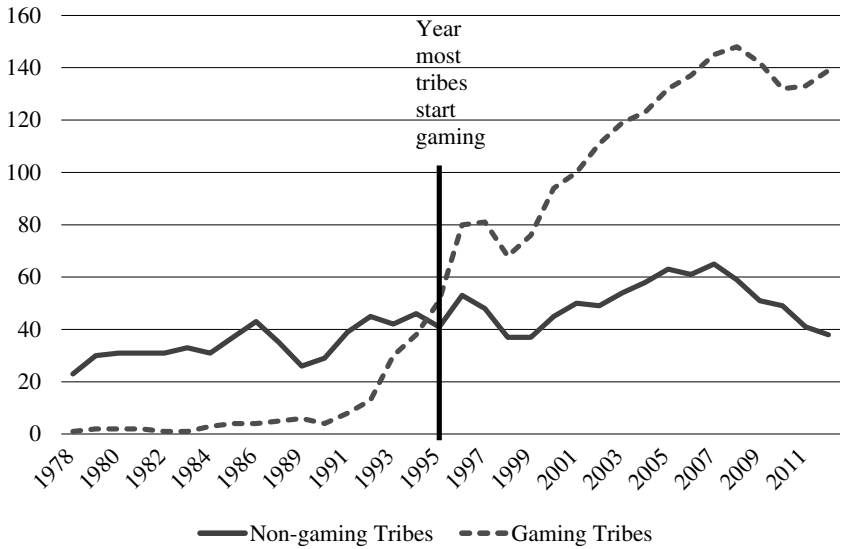

Figure 3. Reported lobbying by gaming and non-gaming tribes over time, 1978-2012.

Both gaming and non-gaming Indian nations reported more lobbying over time. As Figure 3 shows, reported lobbying by gaming and non-gaming

not clear whether this variation is a function of the reporting requirements or whether it reflects actual variation among the advocacy strategies used by Indian nations.

[96] In terms of congressional sessions, on average, tribes reported lobbying six congressional sessions. A quarter of tribes reported lobbying three or fewer congressional sessions, and a quarter reported lobbying nine or more congressional sessions.

[97] The median year that tribes in the dataset started gaming was 1995. A tribe was coded as operating a gaming establishment if it engaged in gaming the year(s) in which it reported lobbying. To code tribes as gaming or non-gaming, data was collected from public sources (e.g., Tiller's Guide, tribal websites, etc.). Tribes were coded as gaming for years in which they operated a gaming establishment and as non-gaming for years in which they did not.

tribes has followed the same trend line—lobbying by both dipped in the late 1990s and then rebounded. The rate in reported lobbying for gaming tribes, however, has increased more steadily and by a larger amount over time than the rate increase for non-gaming tribes.[98]

The amount of money American Indian organizations reported spending on lobbying has fluctuated more than reported lobbying but overall supports a trend toward increased legislative advocacy during the past thirty-five years. Figure 4 reports the amount of money spent on lobbying by American Indian organizations over time, starting in 1997 (the first year in which the amount spent is available).[99] In nine of the fifteen years for which data is available, reported lobbying expenditures by American Indian organizations increased.

Unlike reported lobbying, the money spent by American Indian organizations did not consistently increase over time. In this respect, reported lobbying expenditures by American Indians do not mirror trends in reported lobbying expenditures in the U.S. population generally. Recent studies show that reported lobbying expenditures increased from 1998 to 2010.[100]

American Indian organizations reported spending a particularly high amount in 1999, but then spending leveled off at a much lower level until 2004 when it decreased dramatically.[101] The most significant decrease, however, occurred in 2005. Since 2010, reported spending has increased inconsistently, but appears to be on the rise generally. Most likely the decrease in reported lobbying expenditures from 2005 to 2010 responded to the Abramoff lobbying scandal that broke in 2006 and revealed that lobbyists had swindled Indian tribes out of millions of dollars.[102] It may also have reflected the economic downturn. The inconsistencies in reported lobbying expenditures by American Indians could also indicate that money is a less consistent resource for tribes, that effective lobbying costs less, or that tribes rely more on lobbying by tribal members or in-house counsel.

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[98] Reported lobbying by non-gaming tribes has always been more variable than for gaming tribes. This may reflect the fewer resources that non-gaming tribes have to spend on lobbying and choices that they make in prioritizing what issues to lobby on and when.

[99] Like the lobbying data, these numbers only include reported spending. They may underrepresent the amount spent on lobbying by American Indian organizations as some may choose to lobby on their own behalf or not conduct enough lobbying to report such activities under the Lobbying Disclosure Act of 1995.

[100] LaPira, *supra* note 82, at 240 fig.1 (noting that reported lobbying expenditures have increased in general from 1998 to 2010 and then decreased from 2010 to 2013).

[101] I have not tried to investigate the reasons for this dip in lobbying after 1999. This dip is not reflected in data on reported lobbying among the general population. Reported lobbying continued to increase during the late 1990s. LaPira, *supra* note 82, at 240 fig.1.

[102] *See* WILKINS & STARK, *supra* note 8, at 168–69.

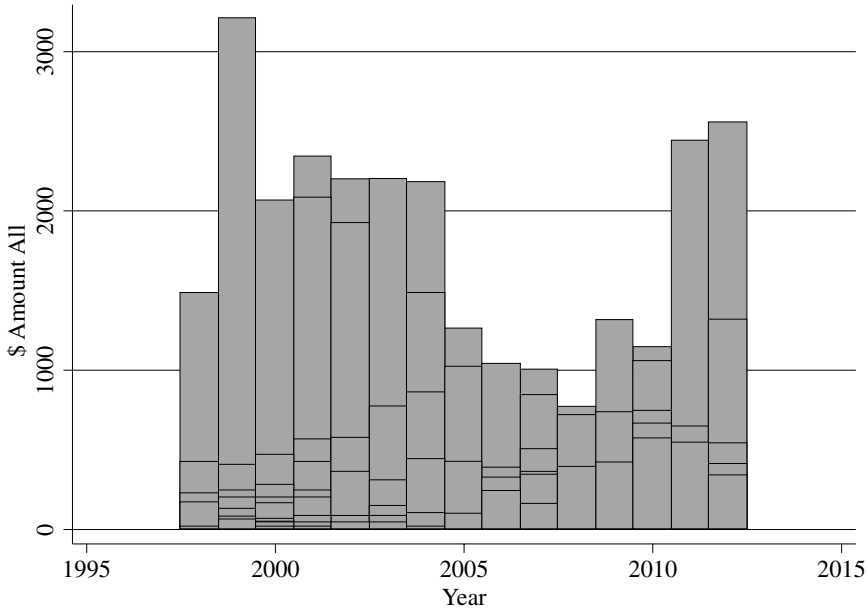

Figure 4. Amount of money spent on lobbying by American Indian organizations over time, 1997-2012.

American Indian organizations reported spending on average $94,411 a year with a median of $40,000.[103] A quarter of all organizations did not report spending any money on lobbying.[104] Another quarter reported spending over $112,000 with the top spender (an Indian tribe) reporting spending $3,205,000 in a single year.

Indian nations reported spending significant amounts of money on lobbying and more than American Indian organizations in general. On average, Indian nations spent $109,408 on lobbying per year, but this number conceals significant variation among tribes. A quarter of all tribes did not report spending any money on lobbying. Half of all tribes reported spending between $40,000 and $120,000. Another quarter reported spending $120,000 or more. The Mississippi Band of Choctaw Indians topped the list of high spenders and reported spending over $3 million in 1999. While a few tribes annually reported spending over $200,000 a year on lobbying,[105] most did

[103] While the mean is $94,411, there is a large standard deviation (201.644). Here, American Indian organizations include Indian nations.

[104] Tribal consortiums reported the lowest levels of spending of the American Indian organizations.

[105] Tribes consistently reporting spending over $200,000 annually on lobbying include the Agua Caliente Band of Cahuilla Indians, the Jicarilla Apache Nation, the Gila River Indian Community, the Mashantucket Pequot Tribal Nation, the Mississippi Band of Choctaw Indians, the Oneida Indian Nation, the Pechanga Band of Luiseno Mission Indians, the Seminole Tribe of Florida, the Tunica-Biloxi Tribe of Louisiana, and the Viejas Band of Kumeyaay Indians.

not consistently report spending high amounts of money on lobbying but tended to increase spending in a particular year. For example, the Osage Nation reported spending over $2 million dollars in 2011 but returned to its much lower regular spending level (under $100,000) in 2012. Such variations in spending most likely reflect changing tribal priorities.

Indian nations engaged in gaming reported spending more on lobbying than non-gaming tribes.[106] On average, gaming tribes reported spending twice as much—almost $135,000—on lobbying per year as Indian nations not engaged in gaming, which reported spending only $51,500 on lobbying per year.[107]

Consistent with earlier studies on lobbying by American Indians on the state and federal levels,[108] the evidence on reported lobbying and lobbying expenditures shows that American Indians increased their lobbying in the 1970s even though they had not overcome the constraints the prevailing narrative suggests should have prevented them from lobbying.[109] Anecdotal evidence from secondary sources, archival research, and interviews with Indian law advocates confirm these findings.[110] In addition to reporting lobbying and expenditures, Indian tribes started opening offices in Washington, D.C. to support their lobbying efforts in the 1980s.[111] Tribal organizations, including the National Tribal Chairman's Association and the NCAI, launched a major initiative to defeat anti-Indian legislation in the late 1970s and have continued to closely monitor legislation ever since. Indian tribes have also testified extensively before Congress since the early 1970s.[112]

American Indians had neither gained in electoral significance nor become less impoverished when they increased their lobbying efforts in the

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[106] ANOVA tests indicate that this difference in spending between gaming and non-gaming tribes is significant at the 0.00 level.

[107] The median amount of money reported as spent on lobbying was significantly less for both gaming and non-gaming tribes. The median amount reported as spent by gaming tribes was $60,000 per year and $20,000 per year for non-gaming tribes.

[108] *See supra* Part II.

[109] *See supra* fig.2.

[110] I conducted research on Indian-related bills with files retained by the Senate Committee on Indian Affairs and the House Committee on Interior and Insular Affairs at the Center for Legislative Archives. I also reviewed files on or related to legislation in the National Congress of American Indians archives (1933-1990) at the Smithsonian National Museum of the American Indian Archives Center.

[111] *About the Navajo Nation*, NAVAJO NATION WASH. OFFICE, http://www.nnwo.org\content\about-navajo-nation [http://perma.cc/HJ5B-N2Y5] (last visited Nov. 4, 2018) (explaining that the office opened in 1984).

[112] *See, e.g.*, *1981–82 Miscellaneous Tax Bills, XVI: Hearing on S. 1298, S. 2197, and S. 2498 Before the S. Subcomm. on Taxation and Debt Management*, 97th Cong. 86–90 (1982) (statement of Barry E. Snyder, President, Seneca Nation of Indians of New York); *Hearing on Miscellaneous Minor Tax Bills Before the H. Comm. on Ways and Means*, 94th Cong. 21–27 (1976) (statement of Richard Schifter); *Hearing on Misc. Tax Bills Before the H. Subcomm. on Misc. Revenue Measures*, 95th Cong. 107–26 (1977) (statement of William E. Sudow); *see also* Kirsten Matoy Carlson, *Tribes Lobbying Congress: Who Wins and Why* 7–9 (2016) (draft report presented at the 13th Annual Indigenous Law Conference, Mich. State Univ.) https://ssrn.com/abstract=3043226 [https://perma.cc/U82Z-BDQ7].

1970s. In fact, American Indians remain largely electorally insignificant to this day.[113] While gaming eventually introduced new financial resources that tribes could use on lobbying, the data demonstrate that most tribes did not start gaming operations until 1995—almost two decades after American Indians initially increased their lobbying efforts. Contrary to the view expressed in popular culture, the media, and some scholarship,[114] Indian gaming could not have caused the dramatic increase in the lobbying of federal officials by American Indians over the past thirty-five years. Rather, the data show that American Indians have been gaining momentum as lobbyists over time. Gaming appears to have encouraged and reinforced the use of legislative strategies by American Indians at the end of the twentieth century, but it was not the primary or only influence leading to it and lobbying expenditures have not consistently increased over time with the advent of gaming. Moreover, American Indians chose to engage in legislative advocacy even as their claims continued to be recognized and validated by the Supreme Court.[115] American Indians turned to lobbying even when the odds

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[113] American Indians rarely affect electoral outcomes because they do not comprise a majority population in any state, TINA NORRIS, PAULA L. VINES, & ELIZABETH M. HOEFFEL, U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010 6–7 (Jan. 2012) (noting that California has the highest percentage of Indians living in any state at 14 percent), and constitute a majority in only one or two congressional districts. *See* MCCOOL ET AL., *supra* note 61, at 176–91 (noting the few instances in which Native voters may have made a difference in elections in Western swing states); TOVA WANG, DEMOS, ENSURING ACCESS TO THE BALLOT FOR AMERICAN INDIANS & NATIVES: NEW SOLUTIONS TO STRENGTHEN AMERICAN DEMOCRACY 3 (2012) http://www.demos.org/sites/default/files/publications/IHS%20Report-Demos.pdf [http://perma.cc/SB2N-V2CJ] (reporting low voter turnout rates among American Indians). Indian issues rarely, if ever, decide congressional elections. *See* MCCOOL ET AL., *supra* note 61, at 176–91. The issues that American Indians care about are not highly salient to the general public and are not among the issues upon which most non-Indian constituents base their voting decisions. *See, e.g.*, Owen G. Abbe et al., *Agenda Setting in Congressional Elections: The Impact of Issues and Campaigns on Voting Behavior*, 56 POL. RES. Q. 419, 422 (2003) (identifying education, social security, health care, and the economy as the most important issues in the 1998 House Elections). Public opinion polls also routinely find that Americans do not rank Indian issues as important. *See, e.g.*, *Most Important Problem*, GALLUP, http://www.gallup.com/poll/1675/most-important-problem.aspx [http://perma.cc/AC7Z-MUKB] (last visited Nov. 4, 2018). To the extent that non-Indians care about Indian issues, it may jeopardize a member of Congress's reelection due to an increased backlash movement against Indians in recent decades. *See* WILKINS & STARK, *supra* note 8, at xxx–xxxi, 169. Thus, as a collection of election-minded politicians (rather than conscientious lawmakers), members of Congress have few incentives to pay attention to Indian issues. *See* CHARLES C. TURNER, THE POLITICS OF MINOR CONCERNS: AMERICAN INDIAN POLICY AND CONGRESSIONAL DYNAMICS 130–33 (2005). More often than not, politicians may gain political support from non-Indians by disfavoring Indian interests. *See, e.g.*, CASTILE, *supra* note 38, at 166–68 (describing how Senator Henry Jackson (D-Wash.) and Congressman Lloyd Meeds (D-Wash.) waivered in their support for tribal self-determination due to fishing rights controversies in Washington state). Financially, most Indian nations and individuals have historically been impoverished and unable to contribute to electoral campaigns. *See* Boehmke & Witmer, *supra* note 63, at 179, 181 (stating that prior to gaming, tribes previously did not have financial resources to participate politically).

[114] *See, e.g.*, *House of Cards, Chapter 21* (Netflix 2014). For a discussion of the scholarly literature on gaming and lobbying see *infra* Part IV.A.

[115] *See supra* Part II.A.

seemed to be against them. This reality suggests that the prevailing narrative does not fully explain the rise in American Indian advocacy. The next Part reviews the interest group and sociolegal literatures in search of a more accurate explanation of how groups craft advocacy strategies.

IV. Interest Group and Sociolegal Approaches to Understanding Advocacy

The dramatic rise in American Indian legislative advocacy raises an important question: What compels groups to engage in some advocacy strategies but not others? In this Part, I evaluate the interest group and sociolegal approaches to understanding why groups pursue different advocacy strategies.

A. Interest Group Approach

Interest group scholars study lobbying.[116] Their primary focus has been on why groups lobby legislatures.[117] They have paid significantly less attention to the lobbying of other institutions and have only recently begun to consider how venue choice affects lobbying decisions.[118] Groups lobby legislatures to attain a particular policy goal,[119] but the tactics and strategies available to them are constrained by external conditions, including their political

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[116] *See e.g.*, Anthony J. Nownes, Total Lobbying: What Lobbyists Want (And How They Try to Get It) 5 (2006).

[117] *See, e.g.*, Jack L. Walker, Jr., Mobilizing Interest Groups in America (1991); Berry, *supra* note 77; Schlotzman & Tierney, *supra* note 77. Interest group scholars, however, have not agreed on how to define lobbying. Baumgartner et al., Lobbying and Policy Change: Who Wins, Who Loses, and Why 33 (2009). For a discussion of the varying definitions see *id*. Within political science and sociology, a broad literature exists on why groups mobilize. *See generally* Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (1971); Jack L. Walker, Jr., *supra*; Robert H. Salisbury, *An Exchange Theory of Interest Groups*, 13 Midwest J. Pol. Sci. 1 (1969); Jack L. Walker, Jr., *The Origins and Maintenance of Interest Groups in America*, 77 Am. Pol. Sci. Rev. 390 (1983). I am less interested in group formation and more interested in the decisions groups make to engage in certain kinds of advocacy strategies. In terms of McCann's four stages of movement development, I am interested in the second stage, "reform policy negotiation between movement activists and the state or other elites" rather than the first stage, "the movement building process." Michael McCann, *Legal Mobilization and Social Reform Movements: Notes on Theory and Its Application*, *in* Studies in Law, Politics and Society II 231 (1991).

[118] *See generally* Thomas T. Holyoake, *Choosing Battlegrounds: Interest Group Lobbying Across Multiple Venues*, 56 Pol. Res. Q. 325 (2003); Amy Melissa McKay, *The Decision to Lobby Bureaucrats*, 147 Pub. Choice 123 (2011); Bryan S. McQuide, *Interest Groups, Political Institutions and Strategic Choice: What Influences Institutional Lobbying Strategies?* 5–6 (Am. Pol. Sci. Ass'n, Annual Meeting Paper, Sept. 2010), http://ssrn.com\abstract=1642311 [http://perma.cc/9L8F-7AZJ].

[119] *See generally* David Lowery, *Why Do Organized Interests Lobby? A Multi-Goal, Multi-Context Theory of Lobbying*, 39 Polity 29 (2007).

capacity and resources, the political context, and active opposition by other advocates or policymakers.[120]

Interest group scholars have defined different aspects of these external conditions. Political capacity refers to the characteristics of the group, including its access to policymakers,[121] its electoral influence,[122] and the kind of claims it makes.[123] Resources include the number of members in a group, the degree to which the public supports the initiative, the group's financial resources, the number of other organizations allying with the group, and the number of staff (including in-house lobbyists).[124] The political context includes issue salience, party control of government, and support of political elites but rarely institutional alternatives to lobbying a legislature.[125] Opposition means active opposition by others, such as blocking legislative action or mobilizing a countermovement. It may come from other organized interests, administration officials, members of important committees in Congress, other members of Congress, or unorganized individuals.[126]

Interest group studies have sought to determine the relationships among these variables and lobbying activities. A few studies have determined that some of these factors influence lobbyists' institutional choices.[127] Groups with political capacity, including electoral influence and access to policy-

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[120] *See* BAUMGARTNER, ET AL., *supra* note 117, at 110–11.

[121] Holyoake, *supra* note 118, at 333–34.

[122] For an in-depth study of how electoral concerns shape legislators' policymaking decisions see generally R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION (1990).

[123] *See* ESKRIDGE ET AL., *supra* note 82, at 62. Political scientists have found that groups seeking to challenge the status quo are more likely to mobilize than groups seeking to defend the status quo. BAUMGARTNER ET AL., *supra* note 117, at 164 ("In general, supporters of the status quo need to do much less than do status quo challengers."). Status quo defenders may adopt a watchful approach and choose not to mobilize unless they feel they have to. *See id*. at 57–58, 152–53. They may only mobilize if the issue gains attention and merits a response. In contrast, status quo challengers may have to use legislative advocacy to increase attention to the issue to get policymakers to act on it. *See id*. at 147, 164.

[124] BAUMGARTNER ET AL., *supra* note 117, at 194.

[125] McQuide, *supra* note 118, at 12–13 (measuring the political environment by looking at issue salience, party in control of government, presidential party, issue conflict, stage of the President's term, and presidential agenda priority); Baumgarter, et al., *supra* note 11, at 13 (measuring government activities in terms of congressional hearings, federal spending, and presidential attention to an issue).

[126] Scott L. Cummings, *Litigation at Work: Defending Day Labor in Los Angeles*, 28 UCLA L. REV. 1617, 1624 (2011). Some political scientists have defined opposition more broadly to consider other obstacles in the policy making process, including a lack of interest, effort, support, concern or attention from policy makers. *See* BAUMGARTNER ET AL., *supra* note 117, at 78. They have considered the influence of active opposition on policymaking and find that it is not a predictor of policy success or failure. *See id*. at 76. Some scholars have considered active opposition in their studies of American Indian politics. In their study of contemporary challenges to indigenous nationhood, Corntassel and Witmer identify opposition or backlash, and particularly backlash based on misperceptions of American Indian nations and their people as one of, if not the, greatest threat to Indian nations today. CORNTASSEL & WITMER, *supra* note 64, at 3–6, 24–28. Their study focused on state-tribal interactions and indicated that these misperceptions have motivated state officials to oppose tribal initiatives and that Indian nations have responded by mobilizing politically on the state level. *Id*. at 6.

[127] *See generally* Holyoake, *supra* note 118, at 325; McKay, *supra* note 118, at 123; McQuide, *supra* note 118, at 5–6.

makers, are more likely to engage in legislative advocacy.[128] Similarly, political scientists have found that higher levels of resources, including personnel, allies, and money, increase the likelihood that a group will lobby a specific institution or across multiple institutions.[129]

Studies have shown that a positive external political context fosters lobbying. Lobbying may increase during divided partisan government as it provides more opportunities to lobby against proposed policy changes.[130] The support of political elites also encourages lobbying activities.[131] Several forms of political support motivate groups to lobby, including congressional hearings, federal spending, and presidential attention to an issue.[132] In response to increased levels of federal activities, affected interests lobby to fight off new federal incursions, encourage the activity, or attempt to modify the proposals before they are complete.[133]

Scholars have found opposition to both encourage and discourage lobbying. While some suggest that opposition may deter political mobilization, at least one study argues that "[c]onflict seems to propel groups into political activity."[134] Other scholars have noted that by challenging the status quo, groups encourage mobilization by opponents.[135] This oppositional organization, however, may help draw attention to the issue, and thus, benefit the

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[128] *See* Holyoake, *supra* note 118, at 333–34. Political scientists have consistently found that groups lobby their allies or legislators that are already friendly to their causes. *See, e.g.*, Ken Kollman, *Inviting Friends to Lobby: Interest Groups, Ideological Bias, and Congressional Committees*, 41 AM. POL. SCI. REV. 519, 519 (1997). Access may be linked to financial resources as studies have shown that money buys access to decision makers but not policy outcomes. *See* BAUMGARTNER, ET AL., *supra* note 117, at 193–94 (summarizing the literature on the relationship between money and policymaking). Groups, however, may be able to overcome the financial obstacles to access by building expertise and relationships with policymakers over time. *See* EVANS, *supra* note 64, at 74, 88–97. Thus, they gain access because policymakers identify them as informational resources and turn to them for advice.

[129] *See, e.g.*, Holyoake, *supra* note 118, at 333–34 (finding that membership in a coalition increased the likelihood of lobbying in a venue); McKay, *supra* note 118, at 135 (explaining that "the more money an organization spends on overall lobbying, the more likely the lobbyist is to direct his or her efforts toward Congress or both branches over agencies."); McQuide, *supra* note 118, at 14 (reporting that level of resources affected lobbying behavior with groups having their own in-house lobbyist more likely to lobby beyond Congress).

[130] *See* McQuide, *supra* note 118, at 16 (finding that groups take partisanship into account in determining which institutions to lobby).

[131] Legal mobilization scholars have also noted the influence of elite support in advocacy decision making. *See* Cummings & NeJaime, *supra* note 11, at 1257–67 (explaining how the support of Gov. Davis influenced marriage equality strategies). In her assessment of the Tribal Self-Determination Policy, Professor Gross notes that Indian advocacy was successful when tribal leaders gained the support of political elites. *See* EMMA R. GROSS, CONTEMPORARY FEDERAL POLICY TOWARD AMERICAN INDIANS 80, 85–86 (1989).

[132] *See* Baumgartner, et al., *supra* note 11, at 13. Further, they argue, "Clearly, federal government activities send strong cues to interested constituencies." *Id.*

[133] *Id.*

[134] Thomas L. Gais & Jack L. Walker, Jr., *Pathways to Influence, in American Politics, in* MOBILIZING INTEREST GROUPS IN AMERICA: PATRONS, PROFESSIONS, AND SOCIAL MOVEMENTS 103, 112 (Jack L. Walker, Jr. ed., 1991).

[135] BAUMGARTNER ET AL., *supra* note 117, at 80.

group challenging the status quo.[136] Another scholar found that the presence of opposition, either alone or in a coalition, increased the likelihood of an organization lobbying in a particular institution.[137] These findings align with the predictions of other scholars, who have suggested that interest organizations mobilize politically when their interests are threatened.[138] At the same time, however, some groups may avoid conflict with opposing groups by choosing to lobby in a different institution.[139]

Interest group scholars have identified many factors affecting groups' decisions to lobby, but they have historically treated decisions to lobby in isolation instead of considering how institutional dynamics could affect lobbying decisions. Only recently have these scholars started to consider how, when, and why lobbyists lobby particular institutions.[140] Thus, interest group scholars have not explored thoroughly how institutional alternatives may affect a group's decision to lobby.

Interest group scholars have also more generally overlooked interactions among variables and how those interactions could affect advocates' decisions to engage in legislative advocacy. Take resources as an example. Groups vary in terms of financial resources, group membership, public support of their cause, allies, and personnel. A group with few financial resources but a large, active membership and a network of other allied groups may have incentives to engage in legislative advocacy. The combination of variables involved as well as how they interact may determine the incentives and disincentives that groups face in deciding whether to engage in a particular strategy. For example, although some causes may not be salient to the public, a group may choose to engage in legislative advocacy because they have the support of political elites. Moreover, changes in one variable may affect others and encourage a group to reformulate its advocacy strategy over time. For instance, Witmer and Boehmke have argued that the increase in resources provided by Indian gaming altered the opportunities tribes had to lobby and contributed to their increased legislative advocacy.[141] While interest group scholars acknowledge the complexity of strategic decision-making and suggest that lobbyists make choices in response to constraints,

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[136] *Id.*

[137] *See* Holyoake, *supra* note 118, at 333.

[138] *See* John Mark Hansen, *The Political Economy of Group Membership*, 79 Am. Pol. Sci. Rev. 79 (1985). Ann Southworth's description of the rise in conservative and libertarian public interest groups also seems illustrative of how groups mobilize when their interests are threatened. *See generally* Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of "Public Interest Law,"* 52 UCLA L. Rev. 1223 (2005).

[139] *See* Holyoake, *infra* note 118, at 334.

[140] *See, e.g.*, Holyoake, *supra* note 118; McKay, *supra* note 118; McQuide, *supra* note 118.

[141] *See* Witmer and Boehmke, *supra* note 66, at 140.

they have yet to explore adequately when and how opportunities and constraints interact to influence strategic decisionmaking over time.[142]

B. Sociolegal Approach

Sociolegal scholars investigate how and why groups use the law as a political and strategic resource to challenge the status quo, change institutional rules, and redistribute power.[143] Advocates use the rhetorical resources of the law—legal arguments, frameworks, and practices—to argue for social change in multiple institutions, including but not limited to courts, agencies, and legislatures.[144] Most sociolegal studies, however, have focused on courts and litigation activities.

Litigation strategies develop out of an ongoing interplay among advocates and the broader social and political environment. Advocates make choices in "respon[se] to distinct political opportunities and constraints."[145] Constraints may include limited organizational and material resources;[146] existing institutional and political barriers;[147] the advocate's own experience, skills, and understandings; countermobilization or opposition; perceptions of efficiency, effectiveness, and the moral acceptability of various institutions;[148] and views of the law.[149] Sociolegal scholars have demonstrated

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[142] *See* Austin Sarat & Stuart A. Scheingold, *State Transformation, Globalization, and the Possibilities of Cause Lawyering: An Introduction*, *in* CAUSE LAWYERING, *supra* note 12, at 13–14 (noting that merely listing factors is not enough to explain strategic decisionmaking).

[143] *See generally* SCHEINGOLD, *supra* note 15; MCCANN, *supra* note 18; JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978); Cummings & Rhode, *supra* note 14, at 605.

[144] *See generally* HANDLER, *supra* note 143; MCCANN, *supra* note 18; GERALD ROSENBERG, *supra* note 15; GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS (2009); HELENA SILVERSTEIN, UNLEASHING, RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT (1996).

[145] *See* ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 500 (2013). For a discussion of the choices faced by advocates, see James M. Jasper, *A Strategic Approach to Collective Action: Looking for Agency in Social-Movement Choices*, 9 MOBILIZATION 1, 7–10 (2004).

[146] *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); *see also* CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998); HANDLER, *supra* note 144.

[147] *See* Sarat & Scheingold, *in* CAUSE LAWYERING, *supra* note 12, at 12–13; SILVERSTEIN, LAW'S ALLURE, *supra* note 144, at 127–28; Stephen L. Wasby, *Litigation and Lobbying as Complementary Strategies for Civil Rights, in* LEGACIES OF THE 1964 CIVIL RIGHTS ACT (Bernard Grofman ed., 2000).

[148] *See* SILVERSTEIN, LAW'S ALLURE, *supra* note 144, at 131; Wasby, *supra* note 147, at 66–67.

[149] *See* SILVERSTEIN, UNLEASHING RIGHTS *supra* note 144, at 21. This list is exemplary not exhaustive. Other variables can also shape decisions to litigate, and scholars have produced varying lists of them. *See, e.g.*, Sarat & Scheingold, *in* CAUSE LAWYERING, *supra* note 12, at 12–13 (listing the goals of the cause or the movement, the resources that it can make available or that lawyers can mobilize, the possibilities at the practice site, the lawyer's own experience, skills, and understandings, the lawyer's social capital and networks, the nature of existing social, political, and legal arrangements); *see also* CHEN & CUMMINGS, *supra* note 145, at

through case studies how oftentimes these variables interact to facilitate the use of a litigation strategy.[150] Moreover, studies have shown that advocacy decisions are fluid rather than static; advocates frequently adapt their strategies to fit changing social, political, and institutional conditions.[151] Strategic decisionmaking, thus, is an ongoing, reiterative process that evolves over time.[152]

In studying advocacy over time, sociolegal scholars have increasingly examined the interplay between litigation and legislative strategies as well as the linkages between courts and legislatures.[153] But the focus has been on explaining why groups litigate and understanding the effects of political mobilization on the development of litigation strategies.[154] As a result, sociolegal scholars have yet to question and test the conventional wisdom about when groups choose to lobby.[155] Rather, their studies have continued to suggest that groups litigate unless they are foreclosed from doing so and focused on the effects of political mobilization on the success of litigation strategies. They have yet to fully consider how legal mobilization could positively or negatively affect advocates' use of a legislative strategy.[156] In short, sociolegal scholars have yet to unpack fully the complex relationships between litigation and legislative strategies.

Sociolegal scholars have recently suggested the need for further investigations into the utility of applying sociolegal theories in non-judicial con-

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511–26 (identifying political support, political background, social context, institutional settings, and background as influencing advocacy decisions); Scott L. Cummings, *Litigation at Work: Defending Day Labor in Los Angeles*, 28 UCLA L. Rev. 1617, 1623 (2011) (listing legal capacity, receptivity of the judiciary, mechanism of legal enforcement, and extent of rights saturation); Cummings & Rhode, *supra* note 14, at 615 (explaining that "the effective use of litigation requires a strategic analysis of the forces that shape its outcome, including organizational capacity, the likelihood of success on the merits, the challenges of enforcement, and the possible political responses.").

[150] *See* Cummings, *supra* note 149, at 1623–24; *see generally* Handler, *supra* note 143.

[151] *See, e.g.*, Holly J. McCammon, The U.S. Women's Jury Movements and Strategic Adaptation: A more Just Verdict 12 (2012); Chen & Cummings, *supra* note 145, at 518.

[152] *See, e.g.*, McCammon, *supra* note 151, at 12; *see generally* Silverstein, Law's Allure, *supra* note 144.

[153] *See generally* McCann, *supra* note 18; Silverstein, Law's Allure, *supra* note 144; Wasby, *supra* note 147. Some have developed case studies of why groups choose particular strategies, but they have not tried to extrapolate a broader understanding of the factors influencing institutional choices from these cases. *See, e.g.*, Cummings & NeJaime, *supra* note 11, at 1247–56 (arguing that marriage equality lawyers chose legislative strategies to avoid litigating).

[154] *See, e.g.*, Silverstein, Law's Allure, *supra* note 144, at 15–41; Cummings, *supra* note 149, at 1623. Sociolegal scholars have also emphasized the importance of political mobilization to enforce court decisions.

[155] Some sociolegal scholars have repeated rather than questioned the conventional wisdom. For example, one sociolegal scholar recently hypothesized that a group will only choose a legislative strategy if it has a high degree of political mobilization and does not have the option of using a litigation strategy. Cummings, *supra* note 149, at 1625.

[156] Carlson, *supra* note 67, at 935–36; Cummings, *supra* note 149, at 1623. A few scholars have started to consider the effects of legal mobilization on legislative advocacy. *See, e.g.*, Silverstein, Law's Allure, *supra* note 144, at 35–41.

texts and explored some initial ways of doing this.[157] These studies suggest that the interactive approach used by sociolegal studies may enhance existing understandings of groups' advocacy choices. But they have yet to extend the sociolegal approach to address fully when and why groups engage in legislative and other non-judicial forms of advocacy and to explore the relational aspects of institutional choices.

V. A Generalizable Approach for Understanding Advocacy Choices

This Part combines insights from the interest group and sociolegal literatures to construct a generally applicable framework for understanding how groups choose advocacy strategies and how their strategies evolve across institutions over time. It treats institutional choices as relational and evolving rather than binary and emphasizes that advocates craft strategies by considering their alternatives and options.

In devising this new approach, I start from the premise, shared by many political scientists and sociolegal scholars, that advocates choose strategies in response to social, political, and institutional constraints. Then I borrow the factors found by political scientists to influence lobbying and integrate them into the interactive approach for understanding advocacy choices used by sociolegal scholars. These factors include, but are not limited to, resources, opposition, political capacity, legal capacity, institutional receptivity, and the political context. By including factors relevant to both legislative and judicial processes, my approach allows for a fuller discussion of the factors influencing advocacy choices and for a more nuanced investigation of how advocates consider institutional alternatives in crafting strategies. Once these factors are identified, I, like other sociolegal scholars, consider the interactions among them and how those interactions affect strategic choices. Finally, I highlight the relational aspects of advocacy decisions by considering the interactions among the different strategies that groups face.[158] Thus, my approach emphasizes the ongoing, dynamic nature of crafting advocacy strategies over time.

My approach improves on the existing frameworks in several ways. First, by integrating the two literatures, it provides for a fuller discussion of the conditions influencing the development of advocacy strategies. Recent political science and sociolegal studies suggest that political capacity, resources, the political context, and opposition influence the development of lobbying strategies.[159] They have predicted how each category of variables affects the likelihood that advocates will choose a legislative strategy but

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[157] Carlson, *supra* note 67, at 962.

[158] *See generally* Silverstein, Law's Allure, *supra* note 144, at 35–41 (considering some of the negative effects of legal mobilization on legislative advocacy); Cummings, *supra* note 149, at 1623 (noting the potential relationships among political and legal mobilizations).

[159] *See supra* Part II.

have yet to consider the dynamics among these different factors.[160] Sociolegal theory expands understandings of strategic decisionmaking by viewing the development of advocacy strategies as ongoing, interactive processes. Adopting this view suggests that groups continually respond to opportunities and constraints and may respond by reshaping their advocacy strategies. But its singular application to questions of why groups litigate overlooks how institutional differences may influence advocates' choices. Advocates cannot make informed choices about which strategy to use without understanding the different factors that influence the various strategies that they may pursue. Integrating the factors identified by interest group scholars into the sociolegal framework expands it to include information about legislative advocacy strategies and thus, provides for a more comprehensive consideration of the conditions influencing advocacy strategies as they develop across institutions.

Second, my approach allows for deeper investigation into how various conditions interact with one another to influence how and why groups use different strategies over time. The interest group literature has identified many of the factors influencing decisions to lobby but has yet to analyze fully the dynamics among them.[161] The sociolegal approach suggests how to uncover the interactions among variables that shape and reshape advocacy decisions. As sociolegal scholars have demonstrated, contextualized investigations are needed to understand how variables interact in any particular case.[162] Variables may exist in various combinations and have different effects on advocacy choices. Some variables may correlate and have a multiplicative impact. For example, a favorable political context and resources may produce a stronger political capacity and facilitate the use of a legislative strategy. Other combinations of variables could have crosscutting influences on an advocacy strategy.[163] For instance, a favorable political context in terms of a legislative champion may encourage the use of a legislative strategy but a group may be limited in its ability to mobilize if it lacks resources, and thus the group may choose not to lobby. The dynamics of other factors may produce feedback effects, reiterating or undermining legislative advocacy. For example, changes in the political context may alter a group's

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[160] *See supra* Part II.

[161] *See supra* Part II.

[162] Chen and Cummings note that:

> As this work illustrates, careful case studies of law and social change campaigns can provide rich descriptive accounts of the strategic and tactical decisions that lawyers and other movement leaders have to make and whether those decisions prove effective, what barriers arise, which institutional settings are the battlegrounds for the campaign and why, how groups collaborate and work against opponents to reach their desired goals, and what happens in the aftermath of even a successful campaign.

CHEN & CUMMINGS, *supra* note 145, at 500.

[163] For an exploration of how variables act in crosscutting ways in affecting the success of social reform movements, see generally HANDLER, *supra* note 143.

political capacity, making legislative advocacy an option and encouraging a group to lobby. Over time, the group's decision to lobby may create a feedback loop in which the group's increased political capacity enables it to further improve the political context by generating allies within the legislature.[164] Contextualized investigations will allow scholars to examine how advocacy decisions evolve through various pathways and will lead to the identification of those pathways.

Third, my approach provides a more comprehensive view of the choices advocates make and the constraints they face in crafting strategies because it includes consideration of institutional differences. Some of the variables affecting decisions to lobby either differ from those influencing decisions to litigate or operate differently depending on the institutional context.[165] While some factors transcend institutional targets and play a role in advocates' strategic decisionmaking across institutions,[166] other factors influence one institution more than another. For example, electoral concerns may matter considerably less, if at all, to a court but can play a significant role in the legislative process.[167] By considering differences in factors based on institutional venue, my framework enhances current understandings of why groups craft specific advocacy strategies and change them over time.

Fourth, this approach emphasizes the relational nature of advocacy decisions. It builds on existing insights by considering how various institutional options relate to one another and how those relationships affect institutional choices. Advocacy strategies do not develop in isolation but in the shadow of the other available options.[168] The most well-known example of this is the conventional wisdom that groups litigate because they have no other avenue for redress due to their exclusion from the political process.[169] Some scholars, however, have suggested that the inverse may also be true: Advocates may choose legislative strategies because of judicial risk or hos-

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[164] This situation may produce more of a feedback spiral than a feedback loop because the advocacy choices were made at different points in time and the advocacy at time one affects the advocacy decision made at time two (in this particular example, the decision at time one increases the likelihood of the use of the same strategy at time two).

[165] For a review of the factors sociolegal scholars have found to influence advocates' decisions to litigate, see *supra* note 149.

[166] For instance, almost all advocates consider their financial resources in crafting a strategy regardless of the institutional target.

[167] BAUMGARTNER ET AL., *supra* note 117, at 325–26 n.10. Other examples of factors that play out differently in courts than legislative processes include: access, which may affect legislatures more because courts have to accept cases filed in them as long as the jurisdictional and pleading requirements are met; electoral concerns, which may only affect courts with elected judges and may impact them less than legislators; and support of political elites, which may influence courts less due to judicial independence. A few factors play special roles in one institution but not the other. For example, courts are bound by precedent and the rules of stare decisis in ways that legislatures are not. SILVERSTEIN, LAW'S ALLURE, *supra* note 144, at 68–70. Thus, legislatures may have more freedom to depart from precedent than a court does.

[168] Sociolegal scholars have long noted that institutions do not operate in isolation. *See, e.g.*, Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

[169] *See, e.g.*, HANDLER, *supra* note 143.

tility.[170] While these accounts suggest that an institution's receptivity (or lack thereof) to a groups' claims may affect venue choice, institutional relationships may influence advocates' choices in other ways as well, especially as advocates turn to multi-institutional strategies. Advocates may choose a strategy that seeks to maximize coordination among institutions.[171] A common instance of this kind of strategy is advocates' choosing to litigate to raise awareness of an issue and get it on a legislative agenda.[172] Alternatively, advocates may craft strategies that play institutions off one another. For example, advocates may develop legislative strategies to highlight problems in judicial or administrative processes and use the legislature either to pressure these institutions or to reverse their decisions.[173] By considering various factors and how they interact across institutions over time, contextualized investigations illuminate the social dynamics in which groups shape society through the claims they make but, at the same time, are shaped by the institutions and social contexts in which they make those claims.

Finally, the framework presented here expands theoretical understandings by suggesting an approach to studying advocacy that applies across institutions and does not just explain why groups litigate or lobby. This approach acknowledges differences in interest communities rather than attempts to develop a one-size-fits-all theory. It offers a straightforward explanation, namely that advocates choose strategies in response to opportunities and constraints. The approach, however, also allows for complexity by integrating factors specific to particular institutions and adopting the contextualized investigations of specific cases used by sociolegal scholars. This approach, thus, models a way for scholars to devise more complex understandings of advocacy strategies and how they develop across institutions over time.

VI. How and Why American Indians Choose Legislative Advocacy

This Part uses the approach outlined in Part V to provide a more nuanced and complete explanation of the rise in legislative advocacy by American Indian tribes and organizations over the past thirty-five years. It

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[170] *See, e.g.*, Silverstein, Law's Allure, *supra* note 144, at 30–33; Chen & Cummings, *supra* note 145, at 524.

[171] Some scholars have suggested that advocates could use strategic coherence, the conscious coordination of legal and political strategies, to increase their chances of success. Erich W. Steinman, *Legitimizing American Indian Sovereignty: Mobilizing the Constitutive Power of Law Through Institutional Entrepreneurship*, 39 Law & Soc. Rev. 759, 763 (2005). For a fuller discussion of coherence, see generally Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons from School Finance Litigation in Kentucky 1984-1995*, 26 Law & Soc. Inquiry 631 (2001).

[172] Steinman describes this model as: "legal mobilization → political pressure → gains." Steinman, *supra* note 171, at 763.

[173] *See, e.g.*, Carlson, *supra* note 67, at 948–50.

identifies some of the factors influencing American Indians to choose legislative strategies and the mechanisms by which these factors interacted to encourage American Indian legislative advocacy. The overarching theory here is that American Indians have chosen legislative strategies in response to a combination of factors, including changes in the political context, the availability of resources, the development of their political capacity, and the receptivity of federal institutions towards Indian claims.

Changes in congressional policy and process set the stage for the increase in legislative advocacy by American Indians at the end of the twentieth century. In the 1970s, Congress enacted the Tribal Self-Determination Policy, which acknowledged the importance of tribal input and participation in Indian affairs policymaking. American Indians further gained access to the political system with the institutionalization of Indian affairs within the congressional committee system. These changes in the political context in turn altered the political capacity of American Indians. As Indian tribes engaged more in the policymaking process, they gained expertise and access to policymakers, enabling them to secure a more favorable political climate. This feedback loop encouraged American Indians to choose to advocate legislatively. Changes in the receptivity of the Supreme Court to rights claims further bolstered American Indian legislative advocacy. An increasingly hostile Supreme Court pushed American Indians to consider alternatives to litigation and to seek congressional fixes to detrimental Supreme Court decisions. Finally, the introduction of new resources into Indian country, especially the rise in economic development due to gaming, further contributed to American Indian legislative advocacy. It both enabled and encouraged some American Indians to expand their lobbying and fueled new opposition to American Indian legislative advocacy.

A. Political Context: The Tribal Self-Determination Policy Sets the Stage for American Indian Legislative Advocacy

A tremendous shift in federal Indian-affairs policy occurred in the 1970s and set the stage for the explosion in American Indian legislative advocacy.[174] Congress, historically the primary actor in the creation of Indian policy, had relegated Indian affairs a backseat in the legislative process by 1951.[175] The Legislative Reorganization Act of 1946 reduced the status of the Indian Affairs Committees in both houses.[176] This change in committee status along with a resurgence of assimilationist voices in Congress negatively affected Congress's ability to legislate appropriate solutions to

[174] For a full discussion of the role of the Executive Branch in this shift, see generally CASTILE, *supra* note 38.

[175] WILKINS & STARK, *supra* note 8, at 89.

[176] *Id.*

problems affecting Indian people.[177] Congress continued to promote termination and relocation policies aimed at undermining tribal self-determination and encouraging Indian assimilation throughout the 1960s.[178]

Forces outside the legislative branch precipitated the shift in Indian affairs policy. The inclusion of Indians in general legislation and programs had the unintended consequence of encouraging both Indians and Executive Branch officials to rethink Indian affairs. Despite a lack of presidential interest[179] and a weak Indian lobby,[180] the Kennedy and Johnson administrations wrote Indians into various bills meant to improve the lives of the poor and underserved.[181] Central to the War on Poverty, the Economic Opportunity Act created the Office of Economic Opportunity ("OEO") and its Community Action Program to empower poor people on a local level to reform institutions to end poverty. The Johnson Administration wanted to include Indians in these programs.[182] In 1964, American Indian leaders lobbied for OEO funding to go directly to tribes (rather than the states).[183] As a result, the Economic Opportunity Act of 1964 made tribal governments eligible for OEO grants.[184] Bypassing the BIA, the OEO programs channeled significant amounts of federal money directly to Indian tribes.[185] Indian tribes could spend this money and administer programs on their own.[186] As a result of this transfer of authority for local decisionmaking, tribal governments gained competence in planning and running their own programs.[187] These experiences empowered Indians, encouraging them to consider policy proposals similar to the OEO programs that could replace the termination policy.[188] Moreover, the success of these programs in Indian country prompted federal officials to reconsider their approach to Indian affairs.[189] The policy climate

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[177] *Id.*; *see also* CASTILE, *supra* note 38, at xxi–xxvii (discussing the forces facilitating the creation of the termination policy).

[178] CASTILE, *supra* note 38, at 58–60.

[179] *Id.* at 4 (explaining that the Kennedy Administration showed very little interest in Indian affairs).

[180] To be fair, the NCAI launched a campaign against termination in the early 1950s and scored some important victories. COWGER, *supra* note 33, at 116–19 (noting that the NCAI managed to modify the first termination bill and prevent termination of certain tribes). But the Indian lobby more generally remained weak. CASTILE, *supra* note 38, at 4.

[181] CASTILE, *supra* note 38, at 4, 24–25.

[182] *Id.* at 29.

[183] CHARLES F. WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 127–28 (2005) (identifying this as the first time in American history that "Indian people had conceived of a provision to be inserted in national legislation and then lobbied it through Congress into law.").

[184] Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508.

[185] CASTILE, *supra* note 38, at 31–33.

[186] *Id.* at 33 ("Prior to the entry of the Community Action programs, virtually all funds on reservations were directly administered by the federal agencies that allocated them.").

[187] WILKINSON, *supra* note 183, at 191–94.

[188] CASTILE, *supra* note 38, at 48.

[189] *Id.* at 68–69.

was shifting from one of termination to self-determination by the end of the Johnson Administration.[190]

President Nixon embraced the self-determination approach in his 1968 presidential campaign and his support stimulated the adoption of this approach as federal Indian policy.[191] By 1970, President Nixon had publicly repudiated the negative Indian policies of the 1950s and replaced them with the Tribal Self-Determination Policy.[192] During his presidency, Nixon sent several legislative proposals to Congress, which renounced termination in favor of a policy of tribal self-determination.[193]

While resistance from a Democratic Congress initially undermined many of President Nixon's initiatives, his enduring commitment to tribal self-determination may have helped soften such opposition in this area. Aiming to run for the presidency, Senator Henry Jackson (D-Wash.) reversed his position on termination and sponsored a self-determination bill that the Senate passed in 1972.[194] Senator Jackson continued to sponsor self-determination legislation with Representative Lloyd Meeds (D-Wash.) and Senator James Abourezk (D-S.D.) supporting his efforts in 1974.[195]

Strong executive branch support along with the failure of the termination policy and supportive leadership in Congress encouraged Congress to embrace a tribal self-determination policy.[196] It formally adopted the Self-

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[190] *Id.*

[191] *Id.* at 73–74.

[192] GROSS, *supra* note 131, at 34–38. According to Gross, Nixon attributed his positive stance towards American Indians to the influence of his college football coach. *Id.* at 70–71.

[193] CASTILE, *supra* note 38, at 92–98, 155–56. Unable to secure passage of their legislative proposals, the Nixon administration sought to implement the self-determination policy by making changes to and within the BIA. *Id.* at 87–91.

[194] CASTILE, *supra* note 38, at 105–06. Senator Jackson's pro-Indian stance waivered in the 1970s, but lasted long enough to secure passage of self-determination legislation. *Id.* at 166–68.

[195] CASTILE, *supra* note 38, at 166–68.

[196] GROSS, *supra* note 131, at 75–86; CASTILE, *supra* note 38, at 165–68. Lobbying may have also played a role in Congress's adoption of the Self-Determination Policy, but scholars disagree about the extent to which Congress consulted tribes in formulating the Indian Self-Determination and Education Assistance Act ("ISDEAA"). Wilkinson admits that Indian people did not play a direct role in formulating the Self-Determination Policy, WILKINSON, *supra* note 183, at 189, but notes that the arrival of American Indians as staffers to the Senate Interior Committee and the House Interior Committee in the early 1970s contributed to the change in policy and explosion of Indian legislation, *id.* at 195. Strommer and Osborne similarly report a lack of tribal input on the ISDEAA. Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 20 (2015). In contrast, Delaney suggests that tribal advocates initially suggested that the Kennedy administration "use the government contracting process as a mechanism for transferring control over federal funds and programs from agencies to tribes." Danielle Delaney, *The Master's Tools: Tribal Sovereignty and Tribal Self-Governance Contracting/Compacting*, 5 AM. INDIAN L.J. 308, 328 (2017). It is unclear whether Delaney is referring to tribal lobbying for Office of Economic Opportunity (OEO) funding to go directly to tribes (rather than the states) in 1964 or something else. Tribes and tribal coalitions testified at committee hearings held prior to the enactment of the ISDEAA, but it is not clear whether they played any other role in the policy's development. *See, e.g.*, *Indian Self-Determination and Education Assistance Act Amendments of 1987: Hearing on S. 1703*

Determination Policy with the enactment of the Indian Self-Determination and Education Assistance Act ("ISDEAA") in 1975.[197] The Act declared, "[T]he United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities."[198] It enabled tribes to build their institutional capacities and economies by transferring control over federal programs to the tribes. The ISDEAA required the Secretaries of the Interior and Health and Human Services, upon the request of any Indian tribe, to contract with tribal organizations to operate federal programs for Indians.[199]

Before the S. Select Comm. on Indian Affairs, 100th Cong. 37 (1987) (statement of Joe DeLaCruz, President, Affiliated Tribes of Northwest Indians) (explaining that he was "directly involved in the policy discussion leading to the original Self-Determination Act"); *Indian Self-Determination and Education Program Hearing on S. 107 and Related Bills Before S. Comm. on Interior and Insular Affairs*, 93d Cong. 106–12, 133–37 (1973) (statements of Valentino Cordova, Chairman, All Indian Pueblo Council, Joe Upicksoun, Chairman, Education Committee of the National Tribal Chairman's Association); *Indian Self-Determination Act of 1972: Hearing on S. 3157, S. 1573, S. 1574, and S. 2238 Before the S. Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 92d Cong. 69–76, 78–79 (1972) (statements of Franklin Ducheneaux, Legislative Consultant, NCAI, Buffalo Tiger, Chairman, Miccosukee Business Committee, and S. Bobo Dean, Council for Association on American Indian Affairs). Their testimony may have influenced some members of Congress. Even if the testimony did not sway any legislators to vote for the ISDEAA, it demonstrated that Indians could participate in the policymaking process and it probably impacted future lobbying efforts, especially as the political context shifted. A reinforcing cycle emerges: Indians testify before Congress, which impacts substantive policy decisions and opens the door for more political participation leading to more Indian lobbying. This feedback loop contributed to the rise in American Indian lobbying at the end of the twentieth century.

Few scholars, however, have attributed this shift in policy to the Red Power Movement, which reached its height in the early 1970s. At least one scholar has noted that the American Indian Movement movement did not mention self-determination in its demands and most likely stalled implementation of the tribal self-determination policy. CASTILE, *supra* note 38, at 111–46.

[197] CORNELL, *supra* note 27, at 204.

[198] 25 U.S.C. § 5302 (2012); *see also* 25 U.S.C. § 4101 (2012).

[199] 25 U.S.C. § 5302. In 1994, Congress amended the ISDEAA to allow tribes more flexibility in administering Bureau of Indian Affairs and Indian Health Service programs through the creation of self-governance compacts. Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250. The Self-Determination Policy, however, has come to encompass more than the ISDEAA. Congress has enacted several other major pieces of legislation, which reinforce its commitment to treating Indian tribes as governments and building their institutions and economies. WILKINS & STARK, *supra* note 8, at 267–69 (listing 23 bills enacted between 1975 and 2010 as major congressional law affecting Indians). Castile identifies several other pieces of legislation that implement the Self-Determination Policy. GEORGE PIERRE CASTILE, TAKING CHARGE: NATIVE AMERICAN SELF-DETERMINATION AND FEDERAL INDIAN POLICY, 1975-1993, 30, 90 (2006). For example, Congress has recognized the importance of tribal self-determination in the delivery of healthcare through the Indian Healthcare Improvement Act of 1976, see, e.g., Indian Healthcare Improvement Act of 1976, 25 U.S.C. §§ 1601–1603 (2012); Tribally Controlled Schools Act of 1988, 25 U.S.C. §§ 2501–2511. Congress ensured tribal control over the placement of Indian children in the Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069, and fostered the development of tribal legal systems in the Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004 (1993), and the Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258.

The adoption of the Tribal Self-Determination Policy signaled a dramatic shift in the federal government's position on American Indian policy.[200] For the first time since the 1930s, Congress promulgated a policy that supported Indian nations as separate governments and invited their participation in federal policymaking.[201] Under the ISDEAA, money flowed directly to tribal governments, bypassing the BIA and enabling Indian nations to make important decisions regarding their welfare. Tribes, which had begun to administer programs under the OEO, embraced the ISDEAA and complained about the BIA's reluctance in implementing it.[202]

Despite some initial resistance, the new perspective on Indian affairs embodied in the Tribal Self-Determination Policy "eventually came to pervade [Congress's] entire approach to Indian affairs."[203] Throughout the rest of the 1970s and early 1980s, Congress enacted several key bills expanding and enhancing the Tribal Self-Determination Policy.[204] This legislation institutionalized the Tribal Self-Determination Policy and reinforced the growing capacity of Indian nations as governments.[205]

This change in the political context facilitated the development of Indian political capacity and lobbying. By encouraging Indian political participation, the Tribal Self-Determination Policy increased opportunities for tribes to lobby. As tribes engaged in more lobbying, they gained experience and developed more sophisticated lobbying strategies, which further reinforced their ability to lobby. After decades of enacting policies destructive to American Indians, Congress appeared much friendlier to American Indian interests.

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[200] GROSS, *supra* note 131, at xvi.

[201] CORNELL, *supra* note 27, at 204–05.

[202] E. Fletcher McClellan, *Implementation and Policy Reformulation of Title 1 of the Indian Self-Determination and Education Assistance Act of 1975-80*, 6 WICAZO SA REV. 45, 50 (1990); Kirsten Matoy Carlson, *Lobbying as a Strategy for Tribal Resilience* (forthcoming 2018) ___ BYU L. Rev.

[203] GROSS, *supra* note 131, at 78.

[204] *See* 25 U.S.C. §§ 1601-1603; 25 U.S.C. §§ 2501-2511; 108 Stat. 42–50; 107 Stat. 2004; 92 Stat. 3069; American Indian Religious Freedom Act of 1978, Pub. Law. No. 95-341, 92 Stat. 469; *see also supra* note 199.

[205] The Tribal Self-Determination Policy may have also stimulated American Indian legislative advocacy by helping some Indian nations build their internal capacities to deliver programs and services to their citizens. The stakes Indian nations had in the implementation of these programs and services increased as they gained direct managerial control over them. Tribes, thus, had more incentives both in protecting these programs and in advocating for improvements in them. Moreover, as their internal capacities grew, Indian tribes gained expertise in these areas, making them more knowledgeable about the programs that work in their communities and more able to advocate effectively to policymakers. GROSS, *supra* note 131, at 108.

B. Political Capacity: The Senate Committee on Indian Affairs Creates Access for American Indians

While the Tribal Self-Determination Policy signaled a new receptivity to American Indian participation in policymaking, the formation of the Senate Select Committee on Indian Affairs helped create the basic conditions for American Indians to engage in legislative advocacy.[206] The Senate Select Committee on Indian Affairs emerged out of the recommendations of the American Indian Policy Review Commission ("AIPRC"), a bipartisan committee charged with investigating the historical and legal relationship between Indians and the government and proposing ways to revise Indian policy and programs to benefit Indians.[207] The AIPRC specifically recommended the creation of permanent Indian Affairs committees in both houses of Congress.[208] The AIRPC expressed grave concerns about the results of the termination of such committees in 1946. It justified its recommendation on congressional plenary power over the administration of Indian affairs.[209] In response to the AIPRC recommendations, the Senate extended the duration of a temporary Select Committee on Indian Affairs in 1977 and then made the committee permanent in 1984.[210]

The existence of a longstanding Senate Committee on Indian Affairs has created unprecedented opportunities for American Indian legislative advocacy. Structurally, it gives "Indian constituencies a unique opportunity to make their policy preferences known."[211] American Indians have seized this opportunity by directly lobbying members of the committee and hiring Washington lobbyists to represent them on important matters.[212]

A spillover effect of these increased opportunities for American Indian legislative advocacy has been that congressional perceptions about who speaks for American Indians have changed dramatically. Historically, members of Congress had ignored Indian constituencies in formulating Indian policy.[213] If they paid attention to Indian interests at all, members of Congress turned to the BIA or non-Indian friends of the Indians for advice.[214] The influx of American Indians lobbying members of Congress, however, has altered this dynamic and created a feedback loop supportive of Indian legislative advocacy. As American Indians gained access to members of Congress and their staffs, they built relationships with them.[215] Through

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[206] *Id.* at xx.
[207] WILKINS & STARK, *supra* note 8, at 90.
[208] *Id.*
[209] *Id.*
[210] *Id.* at 91.
[211] GROSS, *supra* note 131, at 77, 103.
[212] *Id.* at 99–105.
[213] *Id.* at 79 ("In fact, before 1970, Indian constituencies were so insignificant in policy development that they were virtually invisible.").
[214] *Id.* at 77.
[215] EVANS, *supra* note 64, at 7, 74.

these relationships, members of Congress and their staffs have increasingly learned to trust the information and advice they obtain from American Indians.[216] As a result, they now identify American Indian organizations and tribal governments as experts and, thus, seek their advice on policymaking.[217] Thus, relationship building has reinforced the ability of American Indians to influence policy by providing them with increased and continued access to legislators and their staffs.

The institutionalization of the Senate Committee on Indian Affairs over the past forty years has demonstrated political support for Indian affairs and further encouraged American Indians to choose legislative strategies. The Senate Committee on Indian Affairs has broad authority to develop and oversee polices related to American Indians.[218] In setting its own agenda, it has been exceptionally active and committed to implementation of the Tribal Self-Determination Policy.[219] The committee has "examined a plethora of issues, including land-related topics, health concerns, housing, education, economic development, water claims, land claims, trust funds, gaming, recognition, natural resources and environmental concerns, religious freedom, the committee administrative tasks, Alaska Natives, Indian child welfare, and tribal-state relations."[220] The hearings and other congressional attention to these myriad issues has stimulated legislative advocacy by signaling to American Indians that the committee, or at least some of its members, support their issues and want to hear their concerns.[221]

Moreover, this government support led to results, and thus, further spurred American Indians to use legislative strategies. Members of Congress

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[216] *Id.* at 74–97. In effect, American Indians have become repeat players in legislative policymaking. They gain many of the benefits that repeat players obtain in other policymaking venues, such as the courts. For a discussion of repeat players, see generally Marc Galanter, *supra* note 146.

[217] GROSS, *supra* note 131, at 99 ("Indian tribes played a central role in developing the political agenda and in bringing about the policy successes of the seventies.").

[218] Wilkins & Stark explain:

> The Committee on Indian Affairs is the authorizing committee for programs of the BIA in the Department of the Interior, the Indian Health Service and the Administration for Native Americans in the Department of Health and Human Services, and the Office of Indian Education in the Department of Education. Furthermore, the Committee has oversight responsibility for programs affecting Indians in all other federal agencies, including the Indian Housing program of the Department of Housing and Urban Development.
>
> These responsibilities dovetail with those specified in Senate Resolution 4, which include matters relating to tribal and individual lands; the federal government's trust responsibilities; and Indian education, health, Indian land claims, and natural resources. In effect, this committee (like the subcommittee in the House) is charged with an enormous task: the oversight of Congress's continuing historical, constitutional, and legislative responsibilities to 565 distinctive indigenous entities.

WILKINS & STARK, *supra* note 8, at 92–93.

[219] *Id.* at 93.

[220] *Id.*

[221] *See* Baumgartner et al., *supra* note 11, at 13 (showing that governmental support of an issue increases lobbying on that issue).

have proposed, and Congress has enacted a tremendous amount of legislation related to American Indians.[222] Moreover, a significant proportion of these bills supported or expanded the Tribal Self-Determination Policy.[223] In 1994, Congress dramatically broadened the self-determination program, expanding the tribal role beyond the federal responsibilities of the Department of Interior to include health, housing, and environmental protection.[224] Congress also entertained multiple legislative proposals aimed at improving the health, education, and housing of American Indians.[225] The receptivity of Congress to pro-Indian bills both reflected and encouraged American Indian legislative advocacy. It appeared that American Indians had little to lose and much to gain by going to Congress.

C. *Shifting Institutional Dynamics: Legislative Advocacy and the Courts*

Indian nations had several options for pursuing their claims when they initially turned to Congress. Indian tribes had successfully gone to the courts for recognition of their rights, and the courts remained a viable option. As Congress opened its doors to American Indian advocacy, however, the courts increasingly closed theirs. The rise of American Indian legislative advocacy occurred as federal courts, and especially the Supreme Court, became less receptive to American Indian litigants.[226] Federal courts were never consistent protectors of American Indian rights, but their decisions started trending against American Indian litigants in the late 1970s.[227] The Court handed down some particularly devastating cases in the late 1970s and early 1980s.[228] These early losses, however, did not dissuade American Indi-

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[222] *See* Carlson, *supra* note 2, at 119 (showing that Congress enacted close to 20 percent of all Indian-related bills from 1979 to 1991 and close to 15 percent from 1991 to 1997 as compared to less than 10 percent of all bills generally during this time period).

[223] *See* Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Policy that Works* 22 (Harvard Kennedy Sch., Faculty Research Working Paper Series No. RWP10-043, 2010) ("Over 1973–2010, there have been 151 sponsors of 41 combined House and Senate legislative proposals supporting or expanding tribal self-determination.").

[224] Indian Self Determination Act Amendments, Pub. L. No. 103-413, tit. 2, 108 Stat. 4250 (1994); *see generally* Strommer & Osborne, *supra* note 196.

[225] *See* Cornell & Kalt, *supra* note 223. at 22 ("Over the same period [1973-2010], there have been 2,405 sponsors of 305 legislative measures aimed at improving conditions for American Indians, typically through increased spending on health, education, housing and the like.").

[226] Fletcher, *supra* note 57, at 935 (showing that the success rate of tribal litigants in the Supreme Court has not improved since 2001); Getches, *supra* note 56, at 280–81 (2001) (finding that tribes lost 82 percent of the cases decided by the Supreme Court from 1991–2000).

[227] *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978); Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 478–83 (1976).

[228] *Oliphant*, 435 U.S. at 195; *Moe*, 425 U.S. at 478–83; Montana v. United States, 450 U.S. 544, 547–50 (1981); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152–58 (1980). In hindsight, these cases appeared to forewarn that a shift was coming in the Supreme Court, and Indian advocates were displeased with them at the time. *See, e.g.*, Sarah Krakoff, *Mark the Plumber v. Tribal Empire, or Non-Indian Anxiety v. Tribal*

ans from litigating, and American Indians continued to win 60 percent of the cases heard by the Supreme Court until 1987.[229] It would take almost another decade of decisions adverse to Indian country for American Indians to question their faith in the Supreme Court.

A growing number of losses in the Supreme Court, however, eventually pushed American Indians to consider alternative strategies and engage in legislative advocacy. By the mid-1980s, American Indians were accumulating losses in the Supreme Court.[230] The Supreme Court stripped tribes of their criminal jurisdiction over non-Indians[231] and non-member Indians,[232] limited tribal civil adjudicatory jurisdiction over non-Indians,[233] permitted state taxation on Indian lands,[234] and refused to recognize some tribal water rights.[235]

The extent of the losses further encouraged Indian tribes to go to Congress. The Supreme Court started to "veer[ ] away from the foundations of Indian law."[236] It ignored precedents favorable to tribal rights and abandoned its earlier approach of relying on Congress "to decide clearly the bounds of Indian sovereignty."[237] As a result, the Court started remaking federal Indian law on terms much less favorable to American Indians[238] and placing the

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Sovereignty? The Story of Oliphant v. Suquamish Indian Tribe, *in* INDIAN LAW STORIES 283–85 (Carole Goldberg, et al. eds., 2011) (describing reactions to *Oliphant*). But in the same year that the Court decided *Oliphant*, the Court also handed down two cases that upheld tribal sovereignty. *See* United States v. Wheeler, 435 U.S. 313, 326–32 (1978) (holding that tribes retain the inherent power to try their own members); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 52, 55–56 (1978) (holding that the Indian Civil Rights Act did not allow suits against tribes in federal courts except for petitions for habeas corpus).

[229] Fletcher, *supra* note 57, at 942.

[230] Getches, *supra* note 56, at 273–74.

[231] *Oliphant*, 435 U.S. at 195.

[232] Duro v. Reina, 495 U.S. 676, 688 (1990).

[233] Nevada v. Hicks, 533 U.S. 353, 363–70 (2001); Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997); *Montana*, 450 U.S. at 565–67.

[234] *Moe*, 425 U.S. at 478–83 (1976).

[235] *See, e.g.*, Colorado River Dist. v. United States, 424 U.S. 800, 809–13, 820–21 (1976); *Montana*, 450 U.S. at 565–67; Nevada v. United States, 463 U.S. 110, 113 (1983); Arizona v. San Carlos Apache, 463 U.S. 545, 570–71(1983); *see also* Lloyd Burton, *supra* note 55, at 39 (noting that in 1987 Indian nations had lost five of the last six water rights cases brought before the U.S. Supreme Court).

[236] Getches, *supra* note 56, at 274 ("Indeed, the Court has forsaken not only those foundational cases, but it has ignored most of the intervening 150 years of decisions, including nearly all of its approximately eighty modern decisions."). For example, a mere three years after Congress enacted the Tribal Self-Determination Policy, the Court stripped Indian nations of their inherent criminal authority to prosecute non-Indian offenders in *Oliphant*. 435 U.S. at 205–06. In *Oliphant*, the Court departed from its previous practice of deferring to Congress in Indian affairs and introduced a new doctrine, called implicit divestiture, which allowed the Court to divest tribal powers that it deemed inconsistent with the tribe's status as a domestic dependent nation. *Id.* at 206, 208. Prior to the *Oliphant* decision, only Congress had plenary power over Indian affairs and could determine the sovereign rights of Indian nations. The Court in *Oliphant* seemed to be allocating plenary power to itself.

[237] Getches, *supra* note 56, at 276.

[238] *Id.* ("[T]he present Supreme Court is shunning its own legal traditions and creating new rules that conform to its own perceptions of current realities, instead of staying its hand and forcing the political branches to deliberate the difficult choices.").

burden on American Indians to convince Congress to clarify its position on Indian affairs in legislation.[239]

These shifts in the Court's Indian law jurisprudence deterred some American Indians from litigating[240] and provided incentives for tribal lawyers and advocates to turn to Congress to protect tribal interests, especially tribal self-determination and jurisdiction.[241] Adverse decisions ceased being outliers, and scholars started reporting the abysmally low win rates of American Indians.[242] One influential study revealed that American Indians lost in the Supreme Court over seventy-five percent of the time—more frequently than convicted felons—from 1986 to 2000.[243] A later study confirmed the continued hostility of courts towards American Indians, reporting that American Indians were still losing seventy-five percent of their cases in the Supreme Court in 2009.[244] The risks of losing seemed to outweigh the benefits of litigating cases.

These changing institutional dynamics encouraged American Indians to avoid the courts and engage more in legislative processes. By the 1990s, American Indians had responded to the devastating losses they were facing in the courts by actively coordinating and launching legislative campaigns to overturn unfavorable Supreme Court decisions.[245] For example, less than a month after the Supreme Court held that Indian nations did not have criminal jurisdiction over non-member Indians in *Duro v. Reina*,[246] the NCAI "had convened a meeting of tribal, Bureau of Indian Affairs, and congressional representatives to discuss the implications of the case and discuss possible legislative responses."[247] Meetings with tribal leaders ensued over the summer to develop a legislative proposal and mobilize Indian country behind it.[248] Congress acted swiftly to reverse the Court. Six months after the Court handed down the *Duro* decision, Congress enacted temporary legislation restoring inherent criminal jurisdiction over non-member Indians as part of a defense appropriations bill.[249]

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[239] Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 483 (2005) (noting how, in the past, tribal success in the courts placed the legislative burden on tribal opponents, so that tribes were in the easier position of trying to kill reactive legislation rather than seeking legislation on their own behalf).

[240] Burton, *supra* note 55, at 39.

[241] Berger, *supra* note 58, at 12 (detailing advocacy in the *Duro* fix legislation); Getches, *supra* note 56, at 276 (suggesting that the legislative process has advantages over adjudication).

[242] Getches, *supra* note 56, at 280–81.

[243] *Id*. ("Convicted criminals achieved reversals in 36 percent of all cases that reached the Supreme Court in the same period, compared to the tribes' 23 percent success rate.").

[244] Fletcher, *supra* note 57, at 935.

[245] Berger, *supra* note 58, at 12; Nell Jessup Newton, *Permanent Legislation to Correct* Duro v. Reina, 17 AM. INDIAN L. REV. 109, 110 (1992).

[246] 495 U.S. 676 (1990).

[247] Berger, *supra* note 58, at 12; Newton, *supra* note 245, at 110.

[248] Berger, *supra* note 58, at 12.

[249] Berger, *supra* note 58, at 12; Newton, *supra* note 245, at 111; *see also* Skibine, *supra* note 75, at 767–68.

This temporary *Duro* fix expired at the end of a year so Indian advocates and tribal leaders mobilized to amend the law and remove the expiration date.[250] Congressman Bill Richardson (D-N.M.) introduced a bill, which quickly passed in the House.[251] Two similar bills, introduced by Senator Inouye (D-Haw.) and supported by Senators John McCain (R-Ariz.), Pete Domenici (R-N.M.), Paul Simon (D-Ill.), and Paul Wellstone (D-Minn.), encountered opposition from Senator Slade Gorton (R-Wash.), who argued that because of its constitutional nature, Congress could not alter the *Duro* decision.[252] As a result, the Senate amended one of the bills to include another temporary two-year extension, and the amended bill passed the Senate.[253] The bill went to conference committee, but the committee could not reconcile the differences in the House and Senate versions of the bill and it died.[254]

This initial failure led Indian advocates and tribal leaders to redouble their efforts. The temporary *Duro* fix expired during their efforts to secure a permanent one, making the issue more pressing.[255] Indian advocates stepped up their lobbying inside the halls of Congress and mounted an outside lobbying effort by mobilizing "an avalanche of telegrams from tribes expressing outrage and concern about the passing of the deadline and the need for a permanent solution."[256] The Senate Committee on Indian Affairs marked up the second *Duro* fix bill, and it passed the Senate.[257] With two bills having passed the Senate and one the House, the conference committee reconvened—this time to agree on a bill that would make the *Duro* fix permanent.[258] President George H.W. Bush signed the *Duro* fix into law on October 28, 1991.[259]

The success of the *Duro* fix affected American Indian legislative advocacy in several significant ways. First, it established a precedent of using legislative advocacy to reverse negative Supreme Court decisions. The *Duro* fix demonstrated that American Indians could use the law to reframe "the formulation of congressional acts regarding tribal power," and thus, reconceptualize the power relations between Congress and Indian nations.[260] In the past, Congress had delegated power to Indian nations rather than acknowl-

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[250] Newton, *supra* note 245, at 114; *see also* Berger, *supra* note 58, at 13 ("Opponents of the bill were overwhelmed by witness after witness from Indian organizations and tribes.").

[251] Newton, *supra* note 245, at 114.

[252] *Id.* at 115.

[253] *Id.* at 115–16 (providing details on the compromise).

[254] *Id.* at 116. Newton attributed this impasse to neither side wanting to compromise. The House members insisted on making the *Duro* fix permanent while the Senate members of the conference committee felt bound to honor the compromise they made with Senator Gorton. *Id.*

[255] *Id.* at 116.

[256] *Id.* at 117.

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] Berger, *supra* note 58, at 13.

edged the inherent sovereignty possessed by them.[261] Delegation had the potential to limit tribal power by subjecting it to constitutional restrictions not applicable to Indian nations otherwise.[262] Savvy Indian advocates saw the danger of a *Duro* fix that delegated authority to Indian nations.[263] As an alternative, they proposed new language that would reiterate the status of Indian nations as separate governments with their own inherent powers.[264] Consequently, instead of delegating power to Indian nations and suggesting that they occupy a lesser position as sovereigns, Congress "recognized and reaffirmed" the "inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians."[265] This language ensured that the Supreme Court "could only hold that Congress intended that tribes exercising jurisdiction over non-members under the *Duro* fix were exercising inherent tribal, not federal, power, and the Constitution did not prevent this result."[266] In effect, by adopting this language, Congress reasserted its importance, and historical primacy, in the area of Indian affairs and signaled to American Indians and the courts that it could and would act to restore tribal sovereignty. Moreover, American Indians learned that they could effectively use the law to leverage institutional dynamics. Knowing the power of the Court to undermine a legislative victory, they had lobbied for—and Congress adopted—language that limited the Court's ability to interpret the statute against their interests. This lesson would shape future legislative efforts by American Indians.

Second, the success of the *Duro* fix encouraged Indian nations and tribal organizations to embark on additional campaigns to reverse negative Supreme Court decisions. Since the *Duro* fix, advocates have proposed legislation to overturn several other Supreme Court decisions.[267] After the Supreme Court restricted tribal court jurisdiction in *Nevada v. Hicks*,[268] tribal advocates, including the NCAI, sought congressional reaffirmations of tribal criminal and civil jurisdiction.[269] Similarly, Indian nations have sought to overturn *Salazar v. Carcieri* and allow all Indian nations to take land into trust under 25 U.S.C. § 465 since 2011.[270] Most significantly, however,

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[261] *Id.*; *see also* Rice v. Rehner, 463 U.S. 713, 715 (1983) (delegating federal power to Indian tribes).

[262] Berger, *supra* note 58, at 13.

[263] Berger, *supra* note 58, at 13; Newton, *supra* note 245, at 112.

[264] Berger, *supra* note 58, at 13.

[265] 25 U.S.C. § 1301 (2014).

[266] Berger, *supra* note 58, at 13.

[267] The Supreme Court decisions are: Carcieri v. Salazar, 555 U.S. 379 (2009); Nevada v. Hicks, 533 U.S. 353 (2001); Seminole Tribe of Indians v. Florida, 517 U.S. 44 (1996); and Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[268] 533 U.S. at 363–70 (holding that tribe could not hear civil rights claims against state police arising out of search on-reservation for evidence of off-reservation crimes).

[269] *See Tribes Seek to Overturn Supreme Court,* INDIANZ.COM (Feb. 27, 2002), http://www.indianz.com/News/printme.asp?ID=law02/02272002-1 [https://perma.cc/F5SS-CHH8] (describing the legislative proposals drafted to restore tribal sovereignty after *Hicks*).

[270] *See, e.g.*, Rob Capriccioso, *Tester Introduces Clean* Carcieri *Fix*, U.S. S. AND E. TRIBES, INC. (Apr. 2, 2014), http://www.usetinc.org/news/tester-introduces-clean-carcieri-fix/

American Indian advocates commenced a long-term campaign to partially reverse the Supreme Court's decision in *Oliphant v. Suquamish*,[271] prohibiting tribal criminal jurisdiction over non-Indians, as part of the reauthorization of the Violence Against Women Act.[272] Advocates adopted language similar to that used in the *Duro* fix and argued for a section restoring the inherent power of tribal governments to exercise special criminal jurisdiction over all persons committing specific intimate-partner-related crimes in Indian country.[273] These efforts came to fruition with the Violence Against Women Reauthorization Act of 2013.[274] Once again, astute Indian advocates used a legislative strategy to reconfigure the power dynamics between Indian nations and the U.S. government and to protect Indian country from further encroachment on its sovereignty by hostile courts.

Moreover, the success of the *Duro* fix stimulated American Indians to use legislative advocacy more broadly. American Indians interpreted the legislative success of the *Duro* fix as tribal advocacy paying off in a Congress more supportive of Indian issues than the Court.[275] Scholars, tribal leaders, and advocates started suggesting that Congress may be more responsive than the courts to Indian interests.[276] Some even argued that Congress is the most appropriate institution within the U.S. government to make federal Indian law and policy and that the courts should defer heavily to Congress.[277]

This perception of Congress as a more favorable institution encouraged Indian nations and organizations to engage in legislative strategies across a wide range of issues. For example, Indian nations have turned to Congress to argue for the congressional restoration of their government-to-government status,[278] to acquire homelands,[279] to protect and repatriate their cultural ob-

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[https://perma.cc/N2S5-N6SJ]; Rob Capriccioso, *Tribal Lease Bill Clears Senate After* Carcieri *Wrangling*, Indian Country Today Media Network (July 18, 2012), https://web.archive.org/web/20120814231240/http://indiancountrytodaymedianetwork.com/2012/07/18/tribal-lease-bill-clears-senate-after-carcieri-wrangling-124131 [https://perma.cc/W5LX-S2T2].

[271] 435 U.S. 191, 194 (1978).

[272] *See Congress May Restore Tribal Jurisdiction over Non-Indians Under the Following*, Restoration Native Sovereignty & Safety for Native Women Mag., Mar. 2013, at 5.

[273] *See id.*

[274] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, 127 Stat. 54, 122.

[275] By 2001, tribal leaders and advocates in Indian country formed the Tribal Supreme Court Project, which seeks to "strengthen tribal advocacy before the U.S. Supreme Court." *What is the Tribal Supreme Court Project?*, Native Am. Rts. Fund, http://sct.narf.org [https://perma.cc/HSK3-X47R] (last visited Oct. 16, 2018). The Project monitors and coordinates litigation in Indian country. *Id.* It also advises tribal leaders about whether to appeal a case to the Supreme Court. *Id.*

[276] *See, e.g.*, Getches, *supra* note 56, at 276–77 (suggesting that the legislative process has advantages over adjudication).

[277] *See, e.g.*, *id.*; *see also, e.g.*, Philip P. Frickey, *supra* note 239, 483; Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. Colo. L. Rev. 759, 765, 814 (2014).

[278] *See, e.g.*, Haynal, *supra* note 58, at 294–96 (recounting the efforts of the Klamath tribes of Oregon to regain federal recognition congressionally from 1975 to 1986).

jects and remains,[280] to settle natural resource claims,[281] and to gain federal recognition as Indian tribes.[282]

The institutional dynamics around American Indian policymaking shifted as the courts' receptivity towards American Indian claims declined in the early 1980s. American Indians had increased their lobbying efforts in the 1970s, so they had gained considerable experience and skill in lobbying by the time the Supreme Court grew hostile to their claims. With little hope of vindication of their rights in court, American Indians had no choice but to continue to lobby Congress for help. Indian advocates built on their earlier experiences and expanded their lobbying efforts. They used legislative advocacy to enact statutes that redefined their relationship with the U.S. government and protected their rights from hostile courts.

D. *Resources: Legislative Advocacy and the Rise of Indian Gaming*

For most of the twentieth century, almost all American Indians lacked the financial resources to engage in lobbying.[283] The rise of gaming by Indian nations in the late twentieth century has provided some but not all tribes with financial resources to invest in legislative strategies.[284]

American Indian legislative advocacy predates gaming,[285] but has increased steadily and consistently with the growth of gaming.[286] In 1987, the Supreme Court held that Indian nations could operate gaming establishments free of state regulation in *California v. Cabazon Band of Mission Indians.*[287] Congress enacted the Indian Gaming Regulatory Act ("IGRA") a year later.[288] Gaming in Indian country has grown tremendously ever since, with

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[279] *See, e.g.*, Miller, *supra* note 58, at 434–38 (describing the successful efforts of the Timbisha Shoshone to obtain legislation providing them with homeland from 1994 to 2000).

[280] *See, e.g.*, Dumont, *supra* note 58, at 10 (discussing the efforts of Indian nations, pantribal organizations, and Native Hawaiians to secure passage of the Native American Graves and Repatriation Act).

[281] *See, e.g.*, Benjamin A. Kahn, *Sword or Submission? American Indian Natural Resource Claims Settlement Legislation,* 37 Am. Indian L. Rev. 109, 113 (2012).

[282] For example, the number of non-federally recognized Indian groups seeking recognition legislatively spiked after the *Duro* fix in 1991. *See* Kirsten Matoy Carlson, *Congress, Tribal Recognition, and Legislative-Administrative Multiplicity*, 91 Ind. L.J. 955, 972 (2016). For a discussion of why non-federally recognized Indian groups chose legislative strategies, see Carlson, *supra* note 67, at 941–58.

[283] *See* Cornell, *supra* note 28, at 129–30 (describing lack of Indian financial resources to engage in politics until 1970s).

[284] Many scholars have linked rises in political mobilization, both at the state and federal levels, to gaming. *See, e.g.*, Corntassel & Witmer, *supra* note 59, at 522; Witmer & Boehmke, *supra* note 65, at 139; Steven Andrew Light & Kathryn R.L. Rand, Indian Gaming and Tribal Sovereignty: The Casino Compromise 65–69 (2005).

[285] *See infra* Part III fig.3.

[286] Light & Rand, *supra* note 282, at 65–69 .

[287] 480 U.S. 202, 221–22 (1987).

[288] 18 U.S.C. §§ 1166–1168 (2012); 25 U.S.C. §§ 2701–2721 (2012). Interestingly, Indian nations did not uniformly support the enactment of the Indian Gaming Regulatory Act. For a detailed history of the IGRA's enactment. *See generally* Robert N. Clinton, *Enactment of the*

just under half of all tribes engaging in gaming operations today.[289] The effects of gaming remain uneven—with only a few tribes experiencing spectacular success—but it has provided some tribes with new resources to invest in lobbying.[290]

By introducing new financial resources into Indian country, gaming has enabled Indian nations with profitable gambling operations to engage in legislative strategies.[291] Gaming revenues provide these tribes with resources "to employ skilled lobbyists and savvy public relations firms . . . 'to win influence, make friends, and crush opponents' in a manner heretofore unknown."[292] Thus, as gaming revenues have skyrocketed from a few million dollars in 1985 to 28 billion dollars in 2015, expenditures spent on lobbying have also risen, albeit inconsistently.[293] Indian nations engaged in gaming have exceeded non-gaming Indian nations in reporting lobbying since 1995.[294] Gaming tribes lobby more consistently over time than non-gaming tribes[295] and report spending more on lobbying expenditures than non-gaming tribes. On average, Indian nations engaged in gaming report spending twice as much annually on lobbying as Indian nations not engaged in gaming.[296] The Indian nations that report spending the most money on lobbying—over $200,000 annually—run some of the most profitable gaming operations. For example, the Agua Caliente Band of Cahuilla Indians, the Jicarilla Apache Nation, the Gila River Indian Community, the Mashantucket Pequot Tribal Nation, the Mississippi Band of Choctaw Indians, the Oneida Indian Nation, the Pechanga Band of Luiseno Mission Indians, the Seminole Tribe of Florida, the Tunica-Biloxi Tribe of Louisiana, and the

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Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty?, 42 ARIZ. ST. L.J. 17 (2010).

[289] *See Dispelling the Myths About Indian Gaming*, NATIVE AM. RTS. FUND, https://web.archive.org/web/20150512032353/www.narf.org/indian-gaming/ [https://perma.cc/GS6P-NULP] (last visited Nov. 5, 2018).

[290] *See id.* (reporting that forty percent of all gaming revenue is concentrated in the hands of a few small tribes located near major urban areas and that other tribes with gaming operations "are only marginally profitable").

[291] LIGHT & RAND, *supra* note 282, at 65–66; Witmer & Boehmke, *supra* note 65, at 132 (explaining resource mobilization theory and how it applies to gaming tribes).

[292] WILKINS & STARK, *supra* note 8, at 165–66.

[293] *See infra* Part III fig.4; *see also* Randall K. Q. Akee et al., *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 J. ECO. PERSPS. 185, 194 (2015). Figures depicting lobbying expenditures and annual gaming revenues closely mirror one another with consistent growth until about 2006. While lobbying expenditures decreased from 2007 to 2010, *see infra* Part III fig.5, gaming revenues leveled off around the same time, *see* Akee et al., *supra*, at 194.

[294] *See supra* Part III fig.4; *see also* Witmer & Boehmke, *supra* note 65, at 139 (reporting that "far more gaming tribes than non-gaming tribes actively engage in lobbying members of Congress"). The increase in legislative mobilization is not limited to Congress. Several recent studies document the influence of gaming revenues on state politics. *See* MASON, *supra* note 7, at 70–145; CORNTASSEL & WITMER, *supra* note 64, at 125–33; *see generally* HANSEN & SKOPEK, *supra* note 64.

[295] *See* Witmer & Boehmke, *supra* note 65, at 139.

[296] *See supra* Part III.

Viejas Band of Kumeyaay Indians—all tribes with lucrative gaming operations—report spending the most on lobbying annually.[297]

The increase in legislative advocacy stimulated by gaming, however, is not limited to lobbying related to gaming or Indian affairs. Gaming tribes have strong incentives to lobby to protect their businesses and governmental interests, but they lobby on other issues as well. They have "seized the opportunity to express their positions on a variety of other issues of importance to them."[298] Thus, gaming has enabled some tribes to weigh in on issues that seem unrelated to gaming or tribal affairs and, as a result, expand their policy influence.[299] Tribes have reported lobbying on federal appropriations, taxation, transportation, and natural resources.[300] As a result, the effects of American Indian lobbying reach beyond the individual tribes engaging in it.

Gaming, or rather the introduction of new financial resources into Indian country as a result of it, has facilitated the growth in American Indian legislative advocacy. It has provided some Indian nations with the financial resources necessary to advocate legislatively and to expand their lobbying efforts.

E. *Opposition: The Backlash to Gaming and Legislative Advocacy*

The new resources provided to Indian country by gaming, however, have had crosscutting impacts on legislative advocacy. Gaming has not only stimulated the use of legislative strategies by providing the money to hire lobbyists, but also it has encouraged a growing backlash movement against Indian-owned casinos and Indian country more generally.[301] Opposition to American Indian interests is not new, but the rise of Indian gaming and the political power thought to accompany it has reinvigorated anti-Indian sentiments.[302] These sentiments, however, are not simply lodged against the most successful gaming tribes.[303] Rather, they pervade Indian country and often contribute to stereotypes and misperceptions of American Indians.[304] Contrary to these misguided notions of Indians as rich,[305] American Indians "re-

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[297] *See supra* Part III.

[298] Frederick J. Boehmke & Richard Witmer, *Tribal Political Expenditures in California and Washington, D.C.*, *in* HANSEN & SKOPEK, *supra* note 64, at 25, 34; *see also* Carlson, *supra* note 112, at 7–9.

[299] *See* WILKINS & STARK, *supra* note 8, at 165.

[300] Boehmke & Witmer, *in* HANSEN & SKOPEK, *supra* note 298, 34.

[301] *See* CORNTASSEL & WITMER, *supra* note 64, at 6.

[302] *Id.* at 28–46.

[303] Some extremely successful gaming tribes have experienced relentless backlash attacks. In particular, the Mashantucket Pequot Tribe has faced extensive, racialized challenges both to their federal recognition and their gaming enterprises. *See, e.g.*, RENÉE ANN CRAMER, CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT 137 (2005).

[304] *See id*. at 105; CORNTASSEL & WITMER, *supra* note 64, at 45.

[305] Rich Indian racism is a post-IGRA phenomenon, "where false images related to indigenous gaming are created and propagated by governmental and media entities." CORNTASSEL & WITMER, *supra* note 64, at 4.

main Americas poorest people"[306] and now may need to engage in lobbying to protect the little they have.[307]

Countermobilization to American Indians, largely catalyzed by Indian gaming, has both undermined and facilitated the growth in American Indian legislative advocacy. Some American Indians have responded to this backlash by investing more in legislative strategies.[308] For example, after facing extensive opposition from members of the local non-Indian community, the Gun Lake Band of Pottawatomie lobbied to reaffirm their ability to take land into trust.[309] In other cases, strong opposition seems to have prevented Indian groups from engaging in legislative strategies. For example, Ramapough Chief Ronald Red Bone Van Dunk has suggested that his New Jersey-based tribe, which was denied federal recognition by the BIA, has not pursued legislative recognition because of the opposition it would face from Atlantic City.[310]

A variety of alternative explanations can be formulated for the rise in American Indian lobbying. Some common alternatives include that the number of tribes has grown over time, reporting compliance has changed, and public choice theories suggest that small groups fare better in the political process. But, like the assertion that gaming has led to the increase in lobbying, the evidence shows that American Indians have been gaining momentum as lobbyists over time as the political context has changed, they have increased their political capacity, and gaming has introduced new resources to support their lobbying. Figure 5 displays how American Indian lobbying has increased in relation to this confluence of events. In contrast, the number of federally recognized tribes has increased over time but not at a rate that could explain the increase in lobbying.[311] Similarly, reporting regimes and

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[306] NATIVE AM. RTS. FUND, *supra* note 289. Moreover:

> [T]he needs of reservation Indians are so great that even if the total annual Indian gaming revenue in the country could be divided equally among all the Indians in the country, the amount distributed per person would still not be enough to raise Indian per capita income (currently $11,259) to anywhere near the average of $21,587.

Id.

[307] As Corntassel and Witmer argue, tribes may have to use multiple strategies to challenge rich Indian racism. CORNTASSEL & WITMER, *supra* note 64, at 134–49.

[308] For example, the Tigua Nation (Ysleta del Sur Pueblo) responded to the closure of their casino by hiring a lobbyist. CORNTASSEL & WITMER, *supra* note 64, at 7. Unfortunately, the lobbyist they hired, Jack Abramoff, scammed them out of millions of dollars. *Id.*

[309] Gale Courey Toensing, *Gun Lake Trust Land Reaffirmed by Congress*, INDIAN COUNTRY TODAY MEDIA NETWORK (Nov. 7, 2014), https://web.archive.org/web/20141110091053/http://indiancountrytodaymedianetwork.com/2014/11/07/gun-lake-trust-land-reaffirmed-congress-157741 [https://perma.cc/B48P-SZYL].

[310] MARK EDWIN MILLER, FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGEMENT PROCESS 253 (2004); *see also* Carlson, *supra* note 282, at 976 n.92 (noting that many of the non-federally recognized tribes that face tremendous state or local opposition to their recognition have not sought congressional recognition); Carlson, *supra* note 67, at 952.

[311] The number of Indian groups gaining federal recognition slowed tremendously in the mid-1990s, about the same time that reported lobbying dramatically increased. *See* Carlson, *supra* note 282, at 974 (reporting the number of Indian groups gaining federal recognition

rates of compliance have changed over time,[312] but the data suggest that the trend toward increased lobbying occurred prior to the changes in the lobbying disclosure regime which took effect in 1996.[313] Moreover, the downturn in reported lobbying by American Indians from 1996 to 1998 seems contrary to the assertion that the new regime accounts for the increase in American Indian lobbying.[314] It is also unlikely that the regime change accounts for the dramatic increase in reported lobbying by American Indians in the early 2000s.

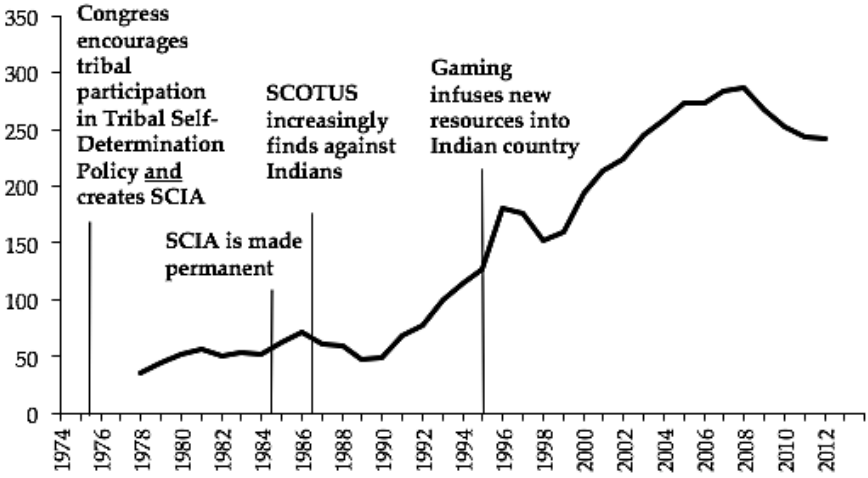

Figure 5. Reported lobbying by American Indian organizations, including Indian nations, 1978-2012, in relation to changes in the political context, institutional dynamics, and resources.

Public choice theory also provides an alternative explanation for the increase in American Indian lobbying.[315] In terms of legislative advocacy,

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either administratively or legislative from 1975 to 2013). Moreover, the federal recognition of Indian groups slowed even more after 2000, *see id*., yet reported lobbying by American Indians continued to increase, *see infra* fig.5.

[312] LAPIRA, *supra* note 82, at 238–44.

[313] Further undermining the regime change explanation is the fact that reported lobbying by the general population increased in the late 1990s. ESKRIDGE ET AL., *supra* note 82, at 203 (noting that reported lobbying nearly doubled within six months after the Lobbying Disclosure Act of 1995 went into effect). The fact that reported lobbying by American Indians decreased suggests that the regime change was not driving their lobbying strategies.

[314] Most scholars suspect that lobbyists underreport lobbying activities. LAPIRA, *supra* note 82, at 225 (discussing the existence of shadow lobbyists).

[315] Public choice theory suggests that interest groups are more likely to influence Congress to enact client policies, or statutes that concentrate benefits on special interests while distributing their costs to the general public. JAMES Q. WILSON, AMERICAN GOVERNMENT: INSTITUTIONS AND PROCESSES 432–33 (5th ed. 1992). Conversely, interest groups are less likely to influence Congress to enact general or majoritarian policies that distribute benefits and costs broadly across large numbers of people or entrepreneurial policies that benefit large numbers of people at the expense of a small, identifiable segment of society. *See, e.g.*, WIL-

public choice theory suggests that groups will have incentives to engage in legislative strategies when their interests are not salient to the larger public and are perceived as narrow, technical, or nonpartisan.[316] To the extent that American Indians lobby on narrow issues specific to them, public choice theory seems to provide a viable explanation for the increase in lobbying. The evidence presented here, however, suggests that American Indian lobbying has increased generally across a range of issues affecting tribes both individually and nationally. Some of these issues are highly contested, of interest to the general public, and do not only benefit Indians. This suggests that public choice theories do not adequately explain the general increase in lobbying by American Indians over time.

VII. Implications for Understanding Strategic Advocacy and Federal Indian Law

This Part explores some of the implications of this research for studies of advocacy strategies, interest groups, and federal Indian law. Part VII.A considers how the framework builds on and improves current understandings of how groups choose advocacy strategies. Part VII.B highlights the new and important questions that the Article raises for the study of federal Indian law.

A. *Strategic Advocacy*

The implications of this research for sociolegal and interest group studies are significant. The dramatic rise in American Indian legislative advocacy suggests that the conventional wisdom that groups litigate because they are foreclosed from the political process simply does not explain a world in which advocates increasingly rely on multi-institutional and non-judicial advocacy strategies.[317] More complicated narratives exist for how groups respond to multiple, interactive, and often reinforcing influences in crafting advocacy strategies. As a result, sociolegal and interest group scholars need to develop more complex approaches to understanding how and why groups develop different advocacy strategies over time. This Article contributes to this larger project by presenting a more generalizable and nuanced approach to studying how groups make advocacy decisions across institutions over time.

This Article improves upon the sociolegal approach for understanding why groups litigate by adding insights from the interest group literature to provide more complete explanations of advocates' strategic choices. This approach starts from the premise emerging in the literature that advocates choose strategies in response to social, institutional, and political opportuni-

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liam N. Eskridge, Jr. et al, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 59–60 (4th ed. 2007).

[316] Eskridge, *supra* note 315, at 62.

[317] *See supra* note 10.

ties and constraints.[318] Borrowing from the interest group literature, it identifies the potentially relevant factors influencing the development of legislative advocacy strategies and integrates them into an interactive, sociolegal perspective. Viewing advocacy strategy development through this interactive lens allows for examination of how the dynamics and interactions among factors influence advocates' strategic choices. This approach highlights the evolving nature of advocacy decisions, including the ways in which groups shape society through the claims they make and how those claims are in turn shaped by the institutions and social contexts in which they are raised. As a result, it provides a more comprehensive view of the choices advocates make and the opportunities and constraints they face in crafting strategies because it considers how institutional differences and relationships influence the choices advocates make. Revealing the multitude of considerations underlying advocates' choices and the relationships among them, thus, allows for identification of the multiple pathways leading advocates to pursue different advocacy strategies.

My analysis of American Indian legislative advocacy serves as an illustrative example of the utility and richness of this approach. It demonstrates how groups respond to multiple interactive, and often reinforcing, influences in crafting advocacy strategies. Figure 6 portrays these interactions and how they contributed to the escalation in American Indian lobbying at the end of the twentieth century.

Contrary to conventional wisdom, American Indians increased their lobbying when the odds still appeared to be against them. Lobbying emerged as a viable strategy for American Indians in the late 1970s when the courts were still largely receptive to their claims and before gaming infused some tribes with new financial resources to support their efforts. A perceived change in the receptivity of Congress toward Indian claims reflected in the Tribal Self-Determination Policy opened the door for American Indians to lobby. The creation of the Senate Committee on Indian Affairs then provided access to Congress and new opportunities for American Indians to engage in legislative strategies. Lacking in financial resources and electoral clout, American Indians nonetheless used these opportunities to build relationships with members of Congress and their staffers, which further ensured their access to the legislative process. Thus, American Indians were committed to and skilled at using lobbying strategies by the time the Supreme Court became more hostile toward their claims in the late 1980s. The Supreme Court's increasing reluctance to uphold tribal rights simply further pushed American Indians toward the legislative arena. Similarly, the emergence of gaming and the money it introduced into Indian country provided some Indian nations with the financial resources to lobby Congress more actively and reinforced the existing trend toward legislative advocacy by American Indians.

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[318] *See supra* Part III.

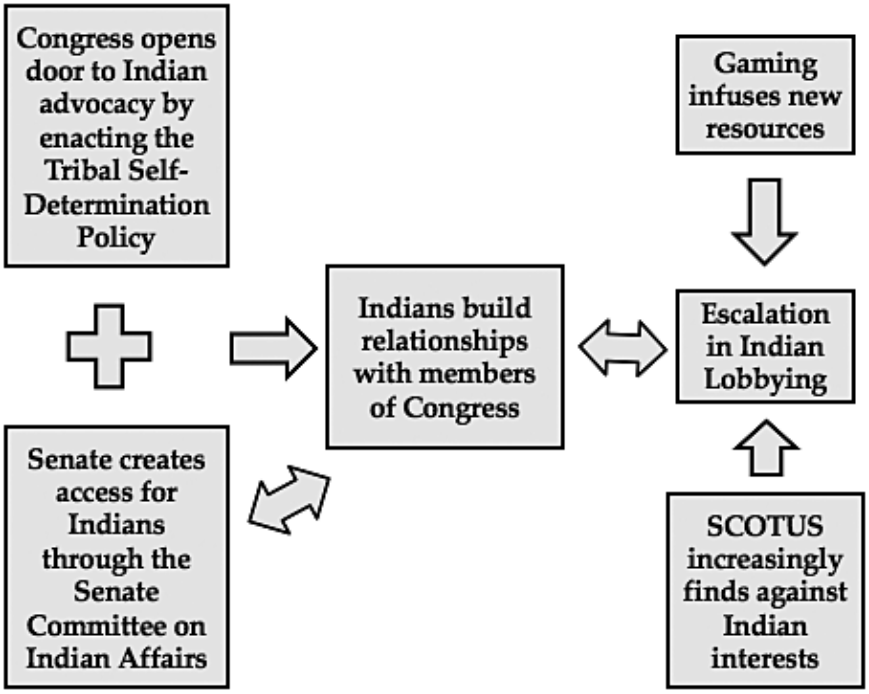

Figure 6. Interactions among multiple variables leading to increased American Indian lobbying from 1978–2012.

A few final observations suggest the broader implications of this approach for sociolegal and interest group studies. First, my approach shows how scholars can develop richer accounts of groups' strategic decisionmaking by detailing how various factors interact to shape and reshape institutional choices over time. The role of the political context in facilitating American Indian legislative mobilization in the 1970s illuminates how considering the dynamics among variables produces a more comprehensive account. Congress's support of Indian affairs through the creation of the Senate Committee on Indian Affairs signaled to American Indians that Congress might be receptive to their lobbying. As previous studies have shown, this government support encouraged legislative advocacy by creating a political context conducive to it.[319] But the committee's formation did more than signal support. It also changed the opportunity structure by providing access for American Indian advocates. These two factors—access and government support—occurred simultaneously and reinforced each other's influence. The interaction of these two variables developed into a self-reinforcing pattern (or feedback loop) as American Indians used their increased access to garner more governmental support. Once they had access, they built relationships

[319] *See* Baumgartner et al., *supra* note 11, at 3.

with members of Congress and their staff, which enabled them both to shape a political context favorable to their claims and to build their political capacity. Accounts that do not consider the dynamics among the variables often obscure or miss entirely these interactions and reinforcing mechanisms.

A second important implication of my account is that it indicates that scholars and advocates need to think more carefully and critically about the multitude of possible interactions among different institutions and how those interactions affect advocates' strategic choices. Sociolegal scholars have long recognized the importance of institutional dynamics in the context of legal mobilization.[320] For example, scholars have recently noted that judicial risk—or the recognition that the courts may not be willing to recognize rights as broad as a group wants—may discourage advocates from litigating.[321] My findings, however, suggest that institutional dynamics may play more complicated roles in group advocacy decisions. American Indians did not engage in legislative strategies in a vacuum—they made calculated decisions about how best to pursue their legal claims in an ever-changing legal and political world. Like previous interest group studies, my account stresses the importance government support plays in groups' decisions to lobby.[322] The rise in American Indian legislative advocacy depended not only upon American Indians' decisions to act but on a pro-Indian congressional policy and increased political access to members of Congress and the Senate Committee on Indian Affairs. But it diverges from most sociolegal accounts, which describe legislative advocacy as a response to a hostile court or an effort to enforce an important court decision.[323] Instead, American Indians seized an opportunity to make their claims to Congress even though their chances of success seemed slim and they had alternative institutions open to them. These results contradict the classic argument that minority groups litigate because they are excluded from the political process and suggest that groups may turn to legislative advocacy more frequently and in different ways than previously thought. The traditional sociolegal emphasis on how groups use political strategies to supplement or implement litigation strategies may be too narrow. Advocates may pursue legislative advocacy in a variety of circumstances, including, but not limited to, as a parallel, an alternative, a complement, or a precursor to litigation.

Moreover, my findings highlight how advocates pay close attention to the various institutional options and the dynamics among them in crafting advocacy strategies. In contrast, most scholars have studied advocacy decisions based on advocates targeting one primary institution and paid less attention to how advocates consider the alternatives.[324] Such singular approaches may be too simplistic and overlook important influences on

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[320] CHEN & CUMMINGS, *supra* note 145, at 524; Steinman, *supra* note 171, at 763.
[321] CHEN & CUMMINGS, *supra* note 145, at 524.
[322] *See e.g.*, Leech et al., *supra* note 11, at 21.
[323] *See, e.g.*, Cummings & Rhode, *supra* note 14, at 616–17.
[324] *See supra* Part II.A.

group decisionmaking. American Indians did not initially turn to Congress because they were losing in the Supreme Court, but as the Court and their perceptions of its receptivity towards their claims changed, they had more incentives to continue to use legislative strategies. Shifting institutional dynamics, thus, reinforced American Indians' decisions to lobby and expanded their legislative strategies to include efforts to overturn unfavorable Supreme Court decisions.[325] But advocates may have other reasons for pursuing multi-institutional venue strategies. They may want to maximize coordination among institutions,[326] highlight problems in another institutional process, or play institutions off one another.[327] My findings suggest that groups may choose strategies in relation to their assessments about other options and that their strategies may shift over time as their assessments change. As a result, scholars need to continually check their assumptions and pay more attention to institutional dynamics—when and why the political process may be more appealing to specific groups at certain times than the courts or other institutions.

My approach devises a way for scholars to study different venue options and the relationships among them in a more integrated fashion by incorporating consideration of the various institutional options and how they relate to one another into investigations of venue choice. This emphasis allows for examination of how institutional relationships affect how and why advocates choose particular strategies.

My results also contribute to a growing literature on how groups use the law in non-judicial settings by highlighting how American Indians have used legal arguments and frameworks in their legislative advocacy to craft substantive federal Indian law and policy beneficial to them.[328] My findings build on these earlier studies by demonstrating how groups consider the relationships among courts and legislatures in their lobbying efforts. American Indians have sometimes paid particularly close attention to how the Supreme Court would interpret legislation during the drafting process. For example, in the case of the *Duro* fix, they drafted statutory language and developed a legislative history that limited the Court's ability to interpret the statute against their interests. This indicates that advocates consider not only the options among institutions but also how the institutions may interact with one another later in time in their advocacy strategies. While this insight is not new, my findings illustrate how advocates consider future litigation in their legislative strategies as well as how litigation may affect politics or

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[325] *See supra* Part VI.C.

[326] Steinman, *supra* note 171, at 763 (discussing how advocates could use conscious coordination of legal and political strategies to increase their chances of success); Paris, *supra* note 19, at 631 (same).

[327] Carlson, *supra* note at 67, 958–59, 961–62.

[328] *See, e.g.*, *id.* at 958–59.

require later political mobilization for enforcement.[329] Accordingly, future studies should pay more attention to how advocates consider various interactions among institutions over time in crafting and coordinating more long-term advocacy strategies.

Finally, by questioning existing assumptions about the power of groups to use the political process, my results contribute to contemporary debates over how to understand and measure power and powerlessness for doctrinal purposes. They suggest that the dichotomy between powerful and powerless used to identify suspect classes in existing equal protection doctrine may oversimplify reality.[330] Groups may exercise power in some contexts but not others. Thus, my research challenges scholars and judges to think more carefully about what power is, how to conceptualize and measure it, and what it means for groups to exercise it. Moreover, it suggests that future studies should investigate how, when, and why other marginalized groups exercise power in the political process and identify the different conditions leading to power and powerlessness.

B. *Federal Indian Law*

This Article also has important implications for the study of federal Indian law and American Indian advocacy. First, it debunks the prevailing myth that gaming has led to the increase in American Indian legislative lobbying by presenting original quantitative data on American Indians' reported lobbying over a thirty-five year period. The collection and analysis of data on lobbying and lobbying expenditures by American Indians both before and after the rise of Indian gaming allows for important comparative analysis over time, missing from earlier studies.[331] The analysis confirms earlier studies' conclusions that gaming has created opportunities and incentives for Indian tribes to engage in lobbying.[332] It also reveals that the increase in reported Indian lobbying predates the rise of gaming and that reported lobbying expenditures have not consistently increased since the advent of gaming. My findings, thus, indicate that gaming plays a more complicated role in American Indian lobbying on the federal level than the prevailing narrative suggests. They suggest the need for scholars to question their assumptions about the role of gaming in influencing American Indian lobbying and de-

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[329] *See, e.g.*, SILVERSTEIN, LAW'S ALLURE, *supra* note 144, at 1–3 (considering how litigation may affect politics).

[330] *See* Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1527 (2015) (trying to theorize and operationalize political powerlessness to identify suspect classes for equal protection purposes); Bertrall L. Ross, II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 377–79 (2016) (arguing for a holistic definition of a group's power in applications of equal protection doctrine).

[331] *See* Witmer & Boehmke, *supra* note 65, at 132 (analyzing lobbying and gaming compacts after signing of IGRA in 1989).

[332] *See id.*

velop more nuanced explanations of when and why American Indians craft advocacy strategies over time.

Second, the data reveal the staggering growth in American Indian legislative advocacy over the past thirty-five years. This incredible growth raises important questions about the efficacy of this advocacy. How successful are American Indians at enacting policies beneficial to them? How successful are they at preventing the enactment of policies detrimental to them? Are some tribes more successful than others? Does success depend on the issue being advocated on?[333] These questions merit investigation. Even if they are not entirely successful in their advocacy efforts, American Indians are clearly playing a larger role in the creation of federal Indian law and policy than they did three decades ago when they lobbied less frequently. The tactics American Indians are using in lobbying deserve closer attention to determine if and how they are affecting the drafting, introduction, and progression of bills through the legislative process.[334]

Third, the infusion of American Indian voices into the legislative process may contribute to substantive changes in the content of legislation governing American Indians, especially if they are playing an increased role in drafting legislation. As my account demonstrates, American Indians largely shaped the language of the legislation restoring tribal criminal jurisdiction over non-member Indians.[335] They intentionally crafted the statutory text to limit the Supreme Court's ability to overturn the statute. Their efforts extended beyond that statute as they used the language as a template for drafting the section of the Violence Against Women Act of 2013 that restored the inherent power of tribal governments to exercise criminal jurisdiction over all persons committing specific intimate-partner-related crimes in Indian country.[336] American Indians may have an impact on the substantive context of legislation in other areas as well.[337] The evidence shows that they lobby on a broad range of issues so the potential for such influence may extend beyond Indian-related policies.[338] Future studies should more closely examine how exactly American Indians are engaging in legislative advocacy and what impact it could have on the substantive content of federal Indian law.

Finally, like recent studies on Indian nations' use of interest group strategies on the state and local level, my findings show that Indian nations are increasingly turning to institutions other than the federal courts to influence

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[333] Public choice theories suggest that the issue lobbied on could affect American Indian legislative success. *See supra* Part VII.A.

[334] For an initial exploration of how tribes have used legislative strategies to argue for policies beneficial to them, see Carlson, *supra* note 202.

[335] *See supra* Part VI.C.

[336] *See, e.g.*, *Congress May Restore Tribal Jurisdiction*, *supra* note 272, at 1, 5.

[337] For an investigation into how tribal lobbying efforts influence substantive provisions in federal statutes, see Carlson, *supra* note 202.

[338] *See supra* Part VI.D.

the creation of federal Indian law.[339] These findings run contrary to the bulk of federal Indian law scholarship, which has traditionally focused on court decisions. They suggest the need for more research into how federal Indian law is made in non-judicial settings.

VIII. Conclusion

Popular narratives maintain that groups lacking political power, electoral influence, and resources litigate because they cannot use legislative strategies to achieve their goals. Contrary to this conventional wisdom, the new empirical evidence presented in this Article documents a 600 percent increase in legislative advocacy by American Indians in the past three decades. This discrepancy suggests the need for more accurate explanations of how and why groups choose advocacy strategies. This Article presents a new approach for understanding how and why groups engage in advocacy strategies across institutions over time. It integrates the factors identified by interest group scholars as influencing advocates' decisions to lobby into the interactive approach to strategic decisionmaking formulated by sociolegal scholars. This approach highlights the evolving nature of advocacy decisions, including the ways in which groups shape society through the claims they make and how those claims are in turn shaped by the institutions and social contexts in which they are raised. As a result, it provides a more comprehensive view of the choices advocates make and the opportunities and constraints they face in crafting strategies because it considers how institutional differences and relationships influence those choices.

The Article demonstrates the utility of this approach through a case study of American Indian advocacy from 1978 to 2012. American Indians started lobbying more frequently in the 1970s even though they lacked political power and the odds appeared stacked against them. My account produces a richer narrative about how and why this happened. It reveals that multiple factors influenced American Indians to pursue legislative strategies, and that these factors often interacted with one another to encourage or undercut the development of American Indian advocacy strategies over time. In particular, this account of American Indian legislative advocacy highlights how institutional dynamics may influence lobbying strategies. As a result, it encourages scholars and advocates to question the conventional narrative about when and why groups lobby and to think more carefully and critically about the multitude of possible interactions among different institutions and how those dynamics affect advocates' strategic choices.

[339] *See* Hansen & Skopek, *supra* note 64, at 212.