

Rethinking Legislative Advocacy

Kristen Matoy Carlson

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Kristen M. Carlson, *Rethinking Legislative Advocacy*, 80 Md. L. Rev. 960 (2021)

Available at: <https://digitalcommons.law.umaryland.edu/mlr/vol80/iss4/2>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

RETHINKING LEGISLATIVE ADVOCACY

KIRSTEN MATOY CARLSON*

In an age of statutes, legislative advocates influence the substantive content of almost every law. Yet scholars know very little about the role that advocates play in shaping statutory law because the study of legislative advocacy has been left to political scientists, who focus on the political rather than the legal aspects of legislative lawmaking. This Article responds to this gap in the literature by presenting an innovative, mixed methods approach to studying legislative advocacy that brings law back into the study of legislative advocacy and provides more accurate descriptions of how legislative advocates behave. This legal approach to legislative advocacy improves on the existing political science literature by emphasizing the legislative process as a lawmaking enterprise and highlighting the importance of the substantive content of statutory laws to legislative advocates and their behavior. The Article demonstrates the utility of this approach by presenting new empirical data on American Indian advocacy. My analysis produces two important insights about legislative advocates' behavior overlooked in previous studies. First, it reveals that advocates perceive legislative advocacy to be about modifying the substantive content of a proposed law. Legislative advocates take the law seriously as they engage in nuanced and sophisticated strategies to interact with legislators and other political actors to craft statutory laws. They advocate on a wide range of proposed laws, shift their positions strategically throughout the legislative process, and frequently seek to modify proposed laws. Second, my account of Indian advocacy emphasizes that legislative advocacy involves legal as well as political work. Indian advocates regularly used legal frames and arguments to educate and persuade legislators to shape the law in ways that better responded to their needs.

© 2021 Kirsten Matoy Carlson.

*Associate Professor, Wayne State University Law School. 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 participants at the 2018 Politics of Race, Immigration, and Ethnicity Conference, 2018 Midwest Law and Society Retreat, and the 2019 Law and Society Annual Meeting for their comments on earlier versions of the article. The National Science Foundation Law and Social Science Program funded this research (#SES 1353255).

2021]	RETHINKING LEGISLATIVE ADVOCACY	961
I. INTRODUCTION		961
II. UNDERSTANDING ADVOCATE BEHAVIOR IN THE LEGISLATIVE PROCESS		
.....		967
III. EMPIRICALLY INVESTIGATING LEGISLATIVE ADVOCATE BEHAVIOR: A		
LEGAL APPROACH		973
IV. STUDYING AMERICAN INDIAN LEGISLATIVE ADVOCACY		976
A. Research Design.....		976
B. Methodology		979
C. Limitations		982
V. NEGOTIATING THE LEGISLATIVE PROCESS: AMERICAN INDIAN		
LEGISLATIVE ADVOCACY		983
A. Proponents.....		986
B. Opponents		988
C. Modifiers		992
1. Why American Indians Use Modification Strategies		993
2. How Modifiers Advocate: Positions, Tactics, and Arguments		
.....		995
a. Positions Taken by Modifiers		995
i. Support the Bill, but Prefer Some Changes		996
ii. Only Support the Bill if Changes are Made.....		998
iii. Prefers an Alternative Bill		1000
iv. Raising New Issues		1002
b. Tactics Used by Modifiers.....		1004
c. Arguments Made by Modifiers.....		1008
i. Policy arguments.....		1009
ii. Legal Arguments.....		1010
V. IMPLICATIONS OF A LEGAL APPROACH FOR STUDYING LEGISLATIVE		
ADVOCACY		1014
VI. CONCLUSION.....		1020

I. INTRODUCTION

Americans spent \$3.4 billion trying to influence legislative lawmaking through lobbying in 2019 alone.¹ Legislative advocacy continues to rise, with

1. Erin Duffin, *Total Lobbying Spending in the United States from 1998 to 2019*, STATISTA (Mar. 4, 2021), <https://www.statista.com/statistics/257337/total-lobbying-spending-in-the-us/>; Karl Evers-Hillstrom, *Lobbying Spending Reaches \$3.4 Billion in 2018, Highest in 8 Years*, OPEN SECRETS (Jan. 25, 2019, 11:34 AM), <https://www.opensecrets.org/news/2019/01/lobbying-spending-reaches-3-4-billion-in-18/>.

lawyers frequently playing a role in the legislative process.² Legislative advocates influence every major—and almost every minor—piece of federal legislation. They often draft portions of the laws that Congress enacts.³ Yet, legal scholars have historically left the study of legislative advocacy to political scientists and focused primarily on judicial advocacy.⁴

This Article argues that legal scholars need to reclaim the study of legislative advocacy. It presents an innovative new approach to investigating advocate behavior and demonstrates how this new approach produces more accurate descriptions of legislative advocacy by examining American Indian legislative advocacy. As Part II shows, the current division of labor leaves legal scholars relying on political scientists to understand the role advocates play in legislative lawmaking. From a legal perspective, political scientists' understanding of legislative advocacy often appears incomplete and underdeveloped. Political scientists emphasize the role of professional lobbyists and downplay the importance of legislative lawyering in the legislative process.⁵ They have produced important studies documenting some of the political strategies, tactics, and arguments used by lobbyists.⁶ But political scientists overlook many aspects of legislative advocacy

2. 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 R. Baumgartner et al., *Congressional and Presidential Effects on the Demand for Lobbying*, 64 POL. RSCH. Q. 3, 4 (2011) (documenting the same); Beth L. Leech et al., *Drawing Lobbyists to Washington: Government Activity and the Demand for Advocacy*, 58 POL. RSCH. Q. 19, 20 (2005) (documenting the same). Sociolegal studies confirm that lawyers often play a role in legislative advocacy. 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).

3. Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 194 (2012).

4. See, e.g., Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 808–09 (2014).

5. A legislative lawyer is a lawyer who practices law in a political, advocacy context. Chai R. Feldblum, *The Art of Legislative Lawyering and the Six Circles Theory of Advocacy*, 34 MCGEORGE L. REV. 785, 786 (2003). In this Article, I use legislative advocacy to connote a wider range of behaviors and concerns than that of professional lobbyists hired to represent clients. This broader term more accurately describes the behavior I observed in my study, in which many of the advocates were tribal leaders or leaders of tribal organizations rather than lobbyists.

6. For descriptions of lobbying activities, see, e.g., KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* (1986); FRANK R. BAUMGARTNER ET AL., *LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* 150 (2009).

important to lawyers, legal scholars, and activists.⁷ Their studies often omit discussions of the nuanced positions that legislative advocates take as they draft legislative language and overlook how legislative advocates negotiate the process to shape the law.⁸ Legislative advocates frequently use legal frames and arguments to influence legislative lawmaking⁹ but political science studies often underemphasize these discursive aspects of the legislative process and overlook the often complicated ways that advocates interact with other political actors in legislative lawmaking.

Lawyers, lawyer-lobbyists, legislative lawyers, and legal scholars have long recognized the various roles that lawyers play in drafting legislation and using the law to influence legislators, but few studies have thoroughly investigated these behaviors.¹⁰ Recently, legal scholars have begun to provide more nuanced accounts of legislative advocacy, but they have yet to devise an approach to studying legislative advocacy across issues and contexts from a legal perspective that fully addresses the gaps left by the political science literature.¹¹

Legal scholars and advocates deserve more accurate descriptions of how advocates behave in the legislative process and influence legislative lawmaking. Statutory law governs almost every aspect of modern life.¹² In an age of statutes, lawyers cannot affect legal change without understanding the legislative process and the role of advocates within it.¹³ Developing more accurate descriptions of legislative advocates' behavior is an important first step toward understanding how, when, and why advocates influence lawmaking. Without accurate descriptions of what legislative advocates do, it is impossible to determine how, when, and why they influence legislators and other political actors. Further, without more nuanced understandings of the legislative process and how it can be used to change the law, lawyers may overlook the legislative process as an alternative to judicial or administrative processes in their law reform efforts.¹⁴

7. See *infra* Part II.

8. See *infra* Part II.

9. See, e.g., Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 112–17 (2013).

10. Shobe, *supra* note 4 (2014) (discussing the few studies empirically discussing legislative drafting).

11. See *supra* Part II.

12. ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 3 (4th ed. 2015).

13. See, e.g., Feldblum, *supra* note 5, at 785–86 (noting the need for better instruction in legislative lawmaking in law schools); Dakota S. Rudesill, *Closing the Legislative Experience Gap: How a Legislative Law Clerk Program Will Benefit the Legal Profession and Congress*, 87 WASH. U. L. REV. 699, 699–700 (2010) (arguing for a legislative internship program to remedy the lack of legislative experience among U.S. lawyers).

14. Rudesill, *supra* note 13, at 708–09.

Relying on a political science literature that does not consider questions relevant to lawyers leads legal scholars, judges, and advocates to base their legal analyses on incorrect or inaccurate assumptions about how the legislative process and legislative advocacy works. Underdeveloped or incorrect theories about the legislative process and how advocates influence it undermines legal scholars' and judges' ability to formulate theories of statutory interpretation, prescriptive recommendations for how the courts and Congress can interact, and reforms to electoral, lobbying, and other laws.¹⁵ In short, good prescription depends on good description.

Part III responds to this need for more accurate information. It seeks to improve on existing understandings of legislative advocacy by introducing an innovative, mixed-methods approach to studying legislative advocacy from a legal perspective. Unlike recent political science approaches, my approach emphasizes that legislative advocacy occurs within an interactive, discursive process that aims to make laws. Building on my previous work, I combine theoretical and methodological insights from political science and legal literatures in devising my approach.¹⁶ I take useful insights from the political science literature on advocate strategies, positions, and tactics and integrate them with legal scholars' conceptualization of the legislative process as an interactive and discursive lawmaking enterprise. Borrowing from sociolegal studies of judicial advocacy,¹⁷ I emphasize how legislative advocates employ the law—legal arguments, frameworks, and practices—in the legislative process. By examining the various positions advocates take and the arguments they make throughout the legislative process, my approach facilitates an in-depth exploration of how advocates negotiate legislative lawmaking and interact with legislators to craft the law through this dynamic process.

The Article then demonstrates how my innovative approach provides a more accurate description of advocate behavior by presenting new, empirical data on American Indian advocacy. Part IV explains how I operationalized my approach to conduct a study of American Indian advocacy. The study of Indian advocacy facilitates a thorough investigation of legislative advocate behavior. Most organized interests focus on a few issues,¹⁸ but Indian

15. Shobe, *supra* note 4, at 808–12 (discussing how inaccurate theories about legislatures harm statutory interpretation).

16. 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, 932 (2017); Kirsten Matoy Carlson, *Lobbying Against the Odds*, 56 *HARV. J. ON LEGIS.* 23, 52–55 (2019).

17. See *infra* Part III.

18. See, e.g., Frank R. Baumgartner & Beth L. Leech, *Interest Niches and Policy Bandwagons: Patterns of Interest Group Involvement in National Politics*, 63 *J. POLITICS* 1191 (2001); JACK L. WALKER, JR., *MOBILIZING INTEREST GROUPS IN AMERICA* (1991); William P. Browne, *Organized*

advocates have a much broader agenda. They use myriad advocacy strategies to advocate on subject matters of concern to the general public (e.g., education, healthcare) as well as their interests as business owners (e.g., employment, taxation, gaming) and governments (e.g., environmental regulation, economic development, preservation of culture and language, housing).¹⁹ Due to its breadth, Indian advocacy covers most of the issues pursued by various interests across the United States. Thus, Indian advocacy can be treated like a microcosm for better understanding legislative advocacy within the United States more generally.²⁰

Part V reveals how legislative advocates negotiate the legislative process and interact with legislators and other political actors to craft legal texts. It shows that advocates perceive legislative advocacy to be about modifying the substantive content of a proposed law. Contrary to recent political science studies, which have emphasized legislative advocates as acting as either proponents or opponents to a proposed law,²¹ my data demonstrate that advocates often have a third choice: to engage in the lawmaking process to shape laws that better reflect their interests. Modifiers do not simply engage in preference aggregation like many interest group theories suggest advocates do.²² Rather, they advocate to change the substance of the proposed law and focus on shaping the text.

Modifiers play an impressive role in the legislative process. Indian advocates sought to modify 53% of the bills studied with over a quarter, 28%, of all Indian advocates engaged in modification strategies.²³ They sought to shape legislative texts across a wide range of subject matters on general, national policies (e.g., healthcare, education, and nuclear waste storage), tribe specific issues (e.g., land claims and water rights settlements), and federal Indian policy. These findings significantly broaden and enrich many political science studies, which have focused more narrowly on major players advocating on significant legislation. My work presents a wider view of legislative advocacy, showing that some legislative advocates do not limit their advocacy to major bills but attempt to shape a wide range of legislation

Interests and their Issue Niches: A Search for Pluralism in the Policy Domain, 52 J. POLITICS 477 (1990).

19. Kirsten Matoy Carlson, *Lobbying as a Strategy for Tribal Resilience*, 2018 BYU L. REV. 1159, 1173–74 (2018).

20. DAVID E. WILKINS & HEIDI KIIWETINEPINESIIK STARK, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM* xxviii (3d ed. 2011).

21. See, e.g., BAUMGARTNER ET AL., *supra* note 6, at 6–7.

22. For a discussion of interest group theories, see generally KENNETH GODWIN ET AL., *LOBBYING AND POLICYMAKING: THE PUBLIC PURSUIT OF PRIVATE INTERESTS* (2013).

23. See *infra* Part V.

in sophisticated and nuanced ways.²⁴ For example, American Indians have sought to alter the content of bills affecting only one or a few tribes, to protect or improve programs in general legislation, and to renegotiate federal Indian policy.²⁵

Taking modifiers into account uncovers the full range of strategies used, positions taken, tactics employed, and arguments made by legislative advocates. Legislative advocates employ a much broader range of positions in trying to negotiate the legislative process than the binary proponent/opponent model relied on in some recent political science studies. Indian advocates utilized at least six different positions in their advocacy. Based on these findings, I devise a more accurate typology of the different positions taken by advocates in the legislative process.

Exploring this range of positions shows how advocates use the legislative process to negotiate with other political actors to craft the law. Contrary to recent political science studies, which describe legislative advocates as having fixed positions, my data demonstrate how Indian modifiers perceived their positions as relational and changeable throughout the legislative process. Indian advocates often emphasized the drawbacks to a bill as a way to negotiate for provisions within the legislation that more accurately responded to their needs.

The various and changing positions taken by Indian advocates exposes an important reality overlooked in most of the recent political science literature: “*legislative work is legal work.*”²⁶ Legislative advocates care about legal texts and frequently use legal frames and arguments to shape statutory law. American Indian proponents, opponents, and modifiers all employed the law in their legislative advocacy to influence lawmakers. While some utilized legal frames central to federal Indian law, like self-determination and the trust responsibility, others made cogent arguments about how specific bills would conflict with or undermine existing laws. My research demonstrates how advocates take the law and legal arguments seriously as a part of legislative advocacy.

Part VI considers the significant implications of a legal approach to studying legislative advocacy for key constituencies of American democracy. For scholars of advocacy groups, my research demonstrates an innovative methodology for studying legislative advocacy that produces richer accounts of advocate behavior and its influence on lawmaking. For Indian nations and advocacy groups more generally, the application of my approach

24. BAUMGARTNER ET AL., *supra* note 6, at 3 (studying the most active lobbying organizations on a random sample of issues that generated more lobbying activity).

25. *See infra* Part V.

26. Rudesill, *supra* note 13, at 700.

demonstrates how advocacy can be used broadly and in nuanced and sophisticated ways to shape statutory law. This insight suggests that multiple possibilities and pathways may exist for advocates to influence the creation and development of the law.

II. UNDERSTANDING ADVOCATE BEHAVIOR IN THE LEGISLATIVE PROCESS

In this Part, I review the many important insights into the behavior of legislative advocates produced by political scientists and explain how that literature leaves unanswered important questions about how legislative advocates craft statutes as legal texts.

Legal scholars have historically left the study of legislative advocacy to political scientists.²⁷ Political scientists ask questions about the political aspects of legislative advocacy and seek to develop models that predict political behaviors and outcomes.²⁸ Their focus does not mirror that of lawyers and legal scholars, who desire information on how to shape the law.²⁹ Rather, political scientists seek to understand how interest groups influence political outcomes; as a result, they have devoted considerable attention to studying lobbying.

Political scientists have identified many of the basic strategies, arguments, and tactics used by legislative advocates to achieve their goals. They describe legislative advocates as sophisticated, strategic actors.³⁰ Legislative advocates develop nuanced strategies by adapting to various opportunities and constraints³¹ and may use the legislative process to pursue goals other than policy enactment or failure.³²

In terms of basic strategies, political scientists describe legislative advocates as either defending the status quo or trying to change it.³³

27. See, e.g., Shobe, *supra* note 4, at 808–09.

28. See, e.g., GODWIN ET AL., *supra* note 22.

29. Edward L. Rubin, *Law and the Methodology of Law*, 1997 WIS. L. REV. 521, 522 (1997).

30. See, e.g., BAUMGARTNER ET AL., *supra* note 6, at 126 (describing lobbyists as strategic actors responding to various constraints).

31. BAUMGARTNER ET AL., *supra* note 6, at 78.

32. Some interest group scholars have observed that goals other than policy change may drive lobbying behavior. GODWIN ET AL., *supra* note 22, at 203–05; BAUMGARTNER ET AL., *supra* note 6, at 195–98; David Lowery, *Why Do Organized Interests Lobby? A Multi-Goal, Multi-Context Theory of Lobbying*, 39 POLITY 29, 29–30 (2007). These scholars suggest lobbyists have additional motivations for lobbying, including leveraging institutional relationships. GODWIN ET AL., *supra* note 22; Frederick J. Boehmke, Sean Gailmard, & John Wiggins Patty, *Business as Usual: Interest Group Access and Representation Across Policy-Making Venues*, 33 J. PUB. POL'Y 3, 21 (2013) (ensuring organizational survival); LOWERY, *supra* (building support for the issue, educating the public, and developing credibility among congressional staffers).

33. BAUMGARTNER ET AL., *supra* note 6, at 61.

Advocates make arguments based on their position on a bill.³⁴ Political scientists have identified the policy-based arguments made by advocates to include the ease of implementation or feasibility, costs, ability of the bill to achieve specific goals, and other consequences of enacting the bill.³⁵ Common tactics used by lobbyists include engaging in direct contact with members of Congress and their staffs, testifying at hearings, drafting legislative language, mobilizing grassroots advocacy, and conducting public education campaigns.³⁶

Most political scientists agree that advocates influence the legislative process by providing credible information to legislators and staffers about a proposed law.³⁷ Advocates strategically provide information to change or reinforce legislators' beliefs about legislative outcomes, the operational effects of policies, and the electoral ramifications of their actions.³⁸ But few have investigated how these exchanges of information work on the ground.³⁹ Some political scientists started to develop models that saw legislators and advocates engaged in negotiation and persuasion,⁴⁰ but recent studies have shifted away from the discursive aspects of legislative lawmaking.

Recent political science studies have leveraged the increased availability of data in the digital age to examine the efforts of major participants from multiple organized interests on various issues or legislative proposals.⁴¹ These studies often produce important insights into the behavior of legislative advocates, but their findings often overlook the more nuanced strategies, tactics, and arguments advocates use. For example, some recent studies have described legislative advocacy strategies as binary. Legislative advocates act as either proponents or opponents.⁴² Proponents, sometimes

34. *Id.* at 133–43.

35. *Id.* at 145 (listing different kinds of policy arguments made by lobbyists).

36. *Id.* at 150. For descriptions of lobbying activities, see, e.g., SCHLOZMAN & TIERNEY, *supra* note 6, at 295–96.

37. See, e.g., GODWIN ET AL., *supra* note 22, at 5; JOHN R. WRIGHT, INTEREST GROUPS AND CONGRESS: LOBBYING, CONTRIBUTIONS, AND INFLUENCE 75–97 (1996); BAUMGARTNER ET AL., *supra* note 6, at 65.

38. WRIGHT, *supra* note 37, at 75 (1996).

39. PAUL BURSTEIN, AMERICAN PUBLIC OPINION, ADVOCACY, AND POLICY IN CONGRESS: WHAT THE PUBLIC WANTS AND WHAT IT GETS 100 (2014) (“Very little is known about whether individuals and organizations provide elected officials with the information they want or if the information affects policy.”).

40. Richard A. Smith, *Interest Group Influence in the U.S. Congress*, 20 LEGIS. STUD. Q. 89, 98–104 (1995).

41. See, e.g., BAUMGARTNER ET AL., *supra* note 6, at 6–7.

42. *Id.*; BURSTEIN, *supra* note 39, at 115. Not all interest group scholars frame their studies in this binary manner. See, e.g., CHRISTINE MAHONEY, BRUSSELS VERSUS THE BELTWAY: ADVOCACY IN THE UNITED STATES AND THE EUROPEAN UNION 33 (2008) (noting that advocates

called status quo challengers, seek to change law and policy.⁴³ Opponents, or status quo defenders, are the adversaries of proponents. They seek to defend the status quo by preventing changes to law and policy. Recent studies report that the typical structure of a policy conflict has one proactive side, the status quo challengers, and one opposition side, the status quo defenders.⁴⁴

These studies present important findings about the different tactics and arguments used by status quo challengers and defenders but, in their efforts to produce generalizable and parsimonious explanations, they overlook the role of the law in these arguments and tactics. Few details are provided about differences in tactics and arguments used by advocates on the same side. The assumption seems to be that since the goal is the same—enactment or defeat of the proposed law—advocates on the same side largely agree among themselves about tactics, arguments, and positions. This simple model overlooks the complexity of the interactions and negotiations that occur within the legislative process and the role that legislative advocates play in them. The focus on proponents and opponents obscures the more complicated and nuanced positions that advocates may take in the legislative process. Further, the rhetoric of proponents and opponents presupposes that one side will win and the other will lose and perpetuates the idea that legislative lawmaking is an all or nothing game. Laws, however, frequently result from negotiations and provide benefits to more than one group.⁴⁵ Advocacy groups may consider short term successes and incremental impacts on the details of a proposed law as important wins. As earlier political science studies emphasized, “the ability to have an impact on the details of a policy is not in the least a trivial form of influence.”⁴⁶ Recent political science studies, however, have overlooked this important fact. By

take different positions, including promoting, modifying, or blocking a proposal); see SCHLOZMAN & TIERNEY, *supra* note 6.

43. See, e.g., BAUMGARTNER ET AL., *supra* note 6, at 6–7; BURSTEIN, *supra* note 39, at 115.

44. BAUMGARTNER ET AL., *supra* note 6, at 61.

45. Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L. Q. 1, 32–33 (1994) (“But what interest group theories of legislation suppose is the norm—a victorious interest group capturing the statute . . . —is more likely the exception, rather than the rule. One searches in vain for many instances in which we can confidently describe a regulatory statute as the creation of a particular interest group. Much more common are those statutes that represent a combination of interest group pressures filtered through legislative processes and ameliorated through the struggle within the legislature and with legislators and their constituents, all of which results in a statute with multiple winners and losers.”) (internal citations omitted).

46. SCHLOZMAN & TIERNEY, *supra* note 6, at 311 (suggesting that “[o]n the contrary, one of the axioms of policy analysis is that to know what a piece of legislation actually does, it is important to look beyond its broad purposes to the particulars; it is the details that specify such critical matters as when the measure is to take effect, whom it covers, how much is to be spent, and who has what authority to implement it.”).

oversimplifying wins and losses as policy enactment or failure, they may obscure the nuanced relationships that may develop between advocates and legislators as they negotiate the substantive content of laws.

Recent political science studies provide a big picture view of legislative advocacy, but in doing so, they often overlook how advocates use the law to negotiate the legislative process. By focusing on how advocates build coalitions and aggregate preferences, they underemphasize the fact that legislative advocacy produces substantive legal texts. As lawyers, lawyer-lobbyists, and legal scholars have noted, legislative advocacy includes making constitutional, statutory, and other legal arguments, drafting statutory language and amendments to statutory language, and conducting legal research to support arguments for or against proposed laws.⁴⁷ Recent political science studies emphasize that legislative advocacy is normative in that advocates take positions for or against proposed laws, but they limit their discussion of the arguments used by advocates to policy arguments and overlook how advocates use arguments to construct meanings and laws.⁴⁸ Legislative advocates may rely on legal arguments and frameworks to construct these meanings and shape the law, but political scientists have yet to examine this aspect of legislative advocate behavior.

Political scientists have made considerable contributions to understanding the behavior of legislative advocates, but they understate the legal nature of the legislative process and fall short of providing lawyers, lobbyists, and legal scholars with nuanced and accurate descriptions of how legislative lawmaking actually works.⁴⁹ As a result, legal scholars have lamented that lawyers, legal scholars, and judges lack in-depth knowledge about the legislative process and the role that advocates play in it.⁵⁰

47. ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 259 (2013).

48. See, e.g., BAUMGARTNER ET AL., *supra* note 6, at 145.

49. See, e.g., Shobe, *supra* note 4, at 808–09; Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1122, 1125 (2011).

50. See, e.g., Shobe, *supra* note 4, at 808–12 (discussing how inaccurate theories about legislatures harm statutory interpretation); William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2073 (2006) (reviewing ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* (2006)) (noting that younger scholars do not have a deep grounding in legislative processes); Nourse, *supra* note 49, at 1125 (arguing that three dominant theories of statutory interpretation rely on misguided views of the legislative process); Rudesill, *supra* note 13, at 700–01 (lamenting the lack of legislative work experience among lawyers and noting what new lawyers need to learn about the legislative process). Federal judges have also lamented the lack of knowledge that federal judges in general have about the legislative process. See, e.g., Abner J. Mikva, *Reading and Writing Statutes*, 28 S. TEX. L. REV. 181, 183 (1986); James L. Buckley, *Introduction of Discussion Subject and Panelists*, in *Proceedings of the Forty-Ninth Judicial Conference of the District of Columbia Circuit*, 124 F.R.D. 241, 313 (1989); Frank M. Coffin, *The Federalist Number 86: On Relations*

Despite the gaps in the political science literature, legal scholars have historically paid less attention to the study of legislative advocacy.⁵¹ Some legal scholars have developed case studies of legislative advocacy leading to the enactment of important state or federal laws.⁵² These legislative histories tend to characterize the legislative process as interactive and deliberative.⁵³ They highlight the complicated nature of the process, including how it proceeds in stages.⁵⁴ Each stage provides some opportunities, albeit different ones, for legislative advocacy.⁵⁵ Legislative advocates engage in negotiations with other stakeholders and legislators throughout the process.⁵⁶ Advocates and political actors have to make calculated decisions about what can be achieved in the process now and what has to be pursued over the long

Between the Judiciary and Congress, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 21, 22 (Robert A. Katzmann ed., 1988).

51. Legal scholars have focused more on normative discussions of statutory law and have generated descriptions, critiques, and evaluations of existing laws as well as proscriptive arguments about what the law should be. Recently, a few scholars have advocated for law schools to take legislative advocacy more seriously. See, e.g., Feldblum, *supra* note 5, at 785–87; Rudesill, *supra* note 13, at 699. Legal scholars have also started to investigate the legislative drafting process and how it relates to statutory interpretation. See, e.g., Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 905 (2013); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 728 (2014); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002).

52. Brayden G. King et al., *Winning Woman Suffrage One Step at a Time: Social Movements and the Logic of the Legislative Process*, 83 SOC. FORCES 1211, 1214 (2005); Chai R. Feldblum & Robin Appleberry, *Legislatures, Agencies, Courts, and Advocates: How Laws Are Made, Interpreted, and Modified*, in THE WORK AND FAMILY HANDBOOK: MULTI-DISCIPLINARY PERSPECTIVES, METHODS, AND APPROACHES 627, 633–35 (Marcie Pitt-Catsoupes et al. eds., 2006).

53. See, e.g., Feldblum & Appleberry, *supra* note 52, at 627–50; Bethany R. Berger, *United States v. Lara as a Story of Native Agency*, 40 TULSA L. REV. 5, 11–13 (2004); 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 A GLOBAL ERA 211, 212 (Austin Sarat & Stuart Scheingold eds., 2001).

54. Textbook descriptions of the legislative process describe a bill as proceeding through several stages on the way to enactment. Simplified versions of the legislative process detail these stages as: drafting of the bill, introduction of the bill by a member of Congress in the House, referral to a House committee, committee consideration and action, scheduling floor action in the House, floor action in the House, referral to the Senate, referral to a standing committee, committee consideration and action, referral to conference committee, and presentment to the President. WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 23–34 (2d ed. 2006). See also MIKVA & LANE, *supra* note 12.

55. King et al., *supra* note 52, at 1214; Feldblum & Appleberry, *supra* note 52, at 633–35.

56. Feldblum & Appleberry, *supra* note 52, at 633–35.

term.⁵⁷ They may change their preferences based on these political realities.⁵⁸ These studies highlight the fluidity of the legislative process and how that fluidity encourages advocates to act relationally and reflexively to maximize their influence over the legislative text. These studies provide important insights into the legislative process and how advocates engage with legislators in it, but most of them either focus on the development of one bill or a few related bills or describe the activities of a single advocacy group.⁵⁹ They do not attempt to describe legislative advocate behavior across a range of bills or advocacy groups and the generalizability of their findings remains unknown.

Legal scholars have started to integrate investigations of legislative advocacy into their studies of advocacy more generally.⁶⁰ These scholars frequently borrow from and situate their examinations of legislative advocacy within sociolegal studies on judicial advocacy.⁶¹ Unlike political scientists, sociolegal scholars study how advocates use the rhetorical

57. Berger, *supra* note 53, at 12 (explaining that tribal advocates and their legislative champions initially settled for a Duro Fix with a sunset provision because it was better than no Duro Fix at all and they knew they would continue to advocate for a permanent one).

58. Some legal scholars view the legislative process as relational and reflexive. Ziv, *supra* note 53, at 212. Political actors may enter the legislative process with predetermined interests, but those interests change as the legislative initiative proceeds, “through the constant interaction with other codeliberators who partake in this process.” *Id.* An evolving process of dialogues, negotiations, and deliberations among advocacy groups, staffers, and members of Congress translates the various interests held by each into law. *Id.* at 213 (“The ‘interest’—an abstract idea that leads groups to initiate a political move—breaks down into a series of dialogues, negotiations, and deliberations. Each one proceeds through the legislative process through the formation of diverse alliances and relations—within the social group acting for legislative reform, between the group and its representatives, between those representatives and key players in the state apparatus, and vice versa.”).

59. Dinner, *supra* note 9, at 80; Berger, *supra* note 53, at 12.

60. See, e.g., Carlson, *Making Strategic Choices*, *supra* note 16, at 932; Scott L. Cummings & Douglas NeJaime, *Lawyer for Marriage Equality*, 57 UCLA L. REV. 1235, 1242 (2010); 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); HOLLY J. MCCAMMON, THE U.S. WOMEN’S JURY MOVEMENTS AND STRATEGIC ADAPTATION: A MORE JUST VERDICT 12 (2012); Stephen L. Wasby, *Litigation and Lobbying as Complementary Strategies for Civil Rights*, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT (Bernard Grofman ed., 2000).

61. See generally MICHAEL MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); GORDON SILVERSTEIN, LAW’S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS (2009); Wasby, *supra* note 60; Cummings & NeJaime, *supra* note 60, at 1247–56. Sociolegal studies 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. See generally STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (1975); MCCANN, *supra* note 61; JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978); Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L. J. 603, 605 (2009).

resources of the law—legal arguments, frameworks, and practices—to argue for social change.⁶² But most sociolegal studies continue to emphasize litigation strategies rather than legislative advocacy. A few studies have sought to determine whether, when, and how legislative advocates employ the law in legislative contexts.⁶³ But legal scholars have yet to develop a legal approach to studying legislative advocacy across issues and contexts that fills the gaps left by political science studies.

Legal scholars, lawyers, and advocates need more accurate descriptions of legislative advocacy to improve their ability to change the law through the legislative process⁶⁴ and to develop better theories of statutory interpretation and separation of powers.⁶⁵ Despite the juricentrism in most law schools, litigation is not the only way to resolve legal problems.⁶⁶ The legislative process often provides a viable alternative but lawyers cannot effectively use it to help their clients if they either do not see it as another way to change the law or do not know how to use it.⁶⁷ Similarly, a lack of knowledge of the legislative process and how advocates influence it undermines legal scholars' abilities to craft theories about how Congress should relate to courts and agencies.⁶⁸ The next Part proposes a legal approach to studying legislative advocacy that will provide legal scholars and lawyers with more nuanced descriptions of the legislative process as a lawmaking enterprise.

III. EMPIRICALLY INVESTIGATING LEGISLATIVE ADVOCATE BEHAVIOR: A LEGAL APPROACH

This Part combines insights from the political science and legal literatures to devise an innovative, mixed methods approach to studying the behavior of legislative advocates. This approach responds to the political science literature's failure to view legislative advocacy as legal work. It treats advocates as sophisticated actors engaged in nuanced behaviors to shape the law and emphasizes the interactive aspects of the legislative process.

62. See generally HANDLER, *supra* note 61; MCCANN, *supra* note 61; GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); SILVERSTEIN, *LAW'S ALLURE*, *supra* note 61; HELENA SILVERSTEIN, *UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT* (1996); Reva Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 303–04 (2001).

63. Carlson, *Making Strategic Choices*, *supra* note 16, at 932.

64. Rudesill, *supra* note 13, at 709.

65. Nourse, *supra* note 49, at 1122–36.

66. Rudesill, *supra* note 13, at 709; CHEN & CUMMINGS, *supra* note 47, at 201–02.

67. Rudesill, *supra* note 13, at 709–10; Feldblum, *supra* note 5, at 785–86.

68. Nourse, *supra* note 49, at 1122.

In devising this new approach, I start from the premise, shared by many political scientists and legal scholars, that the legislative process is complex and interactive.⁶⁹ I emphasize that the purpose of this complicated process is to make laws.

Like other legal scholars, I conceptualize advocacy as a prescriptive enterprise, in which advocates interpret and critique existing laws and policies and then propose recommendations to legal decisionmakers.⁷⁰ In short, advocates are strategic actors seeking prescriptive goals within an interactive and discursive legislative process.

I take useful insights from the political science literature on advocate strategies, positions, and tactics and integrate them with this conceptualization of the legislative process as an interactive and discursive lawmaking enterprise. By highlighting the interactive and discursive nature of the legislative process, my approach facilitates an in-depth exploration of how advocates use different strategies, positions, and tactics to negotiate and interact with legislators to craft different kinds of compromises across a range of issues on proposed legislation. Once a wider range of strategies, positions, and tactics is identified, I examine how legislative advocates employ the law—legal arguments, frameworks, and practices—in the legislative process. Borrowing from sociolegal scholars studying judicial advocacy, my approach investigates how legislative advocates use the law.⁷¹ Like sociolegal scholars, I emphasize the role of law in advocacy strategies, perceiving the law to be a resource that may be employed in legal and political struggles⁷² and as “constantly constructed and reconstructed through human interaction.”⁷³ My approach thus investigates how legislative advocates use the law to construct meanings and provides a better understanding of the modes of discourse that advocates employ in making arguments.

My approach improves upon existing approaches in several ways. First, by integrating insights from the political science and legal literatures, my approach provides a more accurate description of advocate behavior. Political scientists have explored the strategies and positions taken by legislative advocates, but they tend to oversimplify them by emphasizing their binary nature.⁷⁴ My approach moves beyond this binary view by

69. Ziv, *supra* note 53, at 212.

70. See, e.g., Rubin, *supra* note 29, at 522.

71. See generally HANDLER, *supra* note 61; MCCANN, *supra* note 61; SILVERSTEIN, LAW'S ALLURE, *supra* note 61; SILVERSTEIN, UNLEASHING RIGHTS, *supra* note 62.

72. HANDLER, *supra* note 61; MCCANN, *supra* note 61; SILVERSTEIN, UNLEASHING RIGHTS *supra* note 62.

73. Jeb Barnes & Thomas F. Burke, *Making Way: Legal Mobilization, Organizational Response, and Wheelchair Access*, 46 LAW & SOC'Y REV. 167, 168 (2012).

74. See, e.g., BAUMGARTNER, ET AL., *supra* note 6, at 6–7; BURSTEIN, *supra* note 39, at 115.

contextualizing legislative advocacy as part of a fluid, relational, and interactive process for making the law. Adopting this view of the legislative process suggests that advocate strategies and positions may be more nuanced and flexible than recent political science studies have indicated. Legislative advocates, even ones working together towards either enactment or non-enactment of a proposed law, may vary in terms of positions, tactics, and arguments. While they may agree on a desired, final outcome, they may disagree on how to get there or what changes they want made to the proposed law first. Further, advocates constantly engage with one another, legislators, legislative staffers, and other political actors throughout the legislative process. Their strategies and positions may change over time as a result of these interactions. Contextualizing legislative advocacy as part of an interactive process facilitates investigation into variation among advocates in their strategies, positions, arguments, and tactics over time and provides a more accurate description of legislative advocate behavior.

Second, my approach allows for deeper investigations into the legislative process as a series of negotiations about the content of the law. My approach expands on earlier political science studies that sought to integrate “the study of law and legal reasoning with more analytic and explanatory approaches to the study of” legislative politics.⁷⁵ By focusing on how legislative advocates build coalitions and aggregate preferences in the legislative process, recent political science studies have understated advocates’ attempts to influence the content of the law. As legal scholars have long emphasized, legislative advocates take positions and make arguments to negotiate statutory language.⁷⁶ Legislative advocates frequently do this through texts (for example, committee hearings, reports, and draft bills), but political scientists rarely analyze these texts. Analyzing these texts allows for examination of how legislators and advocates interact and negotiate lawmaking as an enterprise in meaning making and text creation.

Third, my approach facilitates an in-depth analysis of how legislative advocates use the law to argue for and against specific proposed bills. Sociological scholars have long documented how advocates employ legal frames and arguments in judicial processes,⁷⁷ but few have considered the role that law plays in legislative advocacy. Building upon my previous work,⁷⁸ my approach extends this research into the legislative arena by

75. John Ferejohn, *Law, Legislation, and Positive Political Theory*, in *MODERN POLITICAL ECONOMY: OLD TOPICS, NEW DIRECTIONS* 192 (Jeffrey S. Banks & Eric A. Hanushek, eds., 1995).

76. CHEN & CUMMINGS, *supra* note 47, at 259.

77. See, e.g., SILVERSTEIN, *LAW’S ALLURE*, *supra* note 61; Siegel, *supra* note 62, at 303.

78. Carlson, *Making Strategic Choices*, *supra* note 16, at 931.

adding interpretive and textual analysis to an examination of targeted advocacy on specific proposed laws.⁷⁹ A more in-depth analysis of texts facilitates the identification and exploration of the legal frames and arguments used by legislative advocates. My approach brings law back into the study of legislative advocacy and allows for investigation into how, when, and why legislative advocates utilize the law.

Finally, my approach models a way for scholars to devise more complex understandings of advocate behavior in legislative lawmaking. Like recent political science studies that examine advocacy across a range of issues, it allows for the development of insights that are applicable across a number of contexts and can be used to formulate some generalizable insights about how legislative advocates behave.⁸⁰ My approach, however, improves upon these studies by incorporating interpretative and textual analyses that provide more nuanced understandings of how advocates use the law to negotiate with legislators and other political actors to craft laws. As a result, my approach starts to answer questions that recent political science studies have overlooked yet are important to lawyers, advocates, and legal scholars.

IV. STUDYING AMERICAN INDIAN LEGISLATIVE ADVOCACY

This Part describes how I operationalized my approach and used it to conduct a study of legislative advocacy by American Indians over time. It explains the research design, case selection, data collection, and limitations to the study.

A. *Research Design*

Legislative advocacy by American Indians is the object of my study for a variety of reasons. American Indians, and especially Indian nations, have a long and rich history of engaging with the United States government.⁸¹ Indian nations have employed a variety of advocacy strategies over the past five centuries from declaring war on the United States to sending delegations

79. Previous scholars pioneered a methodology for examination of targeted advocacy on proposed laws. BURSTEIN, *supra* note 39, at 102–03.

80. See, e.g., BURSTEIN, *supra* note 39, at 115; BAUMGARTER, ET AL., *supra* note 6, at 6–7.

81. 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); 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).

to Congress and the White House to occupying the Bureau of Indian Affairs.⁸² Indian nations advocate on a wide range of issues from land and natural resources to health care and education to language and culture. Scholars have increasingly studied this advocacy and have produced studies on individual Indians as voters in mainstream elections,⁸³ Indian protest movements after World War II,⁸⁴ campaign contributions made by Indian nations involved in gaming enterprises,⁸⁵ and Indian engagement in state and local politics.⁸⁶

This study builds on the few existing studies on American Indian legislative advocacy.⁸⁷ Early studies on the relationship between Congress and American Indians found that Indian-related legislation falls into three categories: (1) pan-tribal legislation, which has an overriding purpose of developing federal Indian policy by addressing an issue faced by all Indian nations or citizens of Indian nations; (2) tribe specific legislation, which does not seek to establish general federal Indian law or policy but addresses a specific issue for one or a few but not all tribes; and (3) general legislation, which has a main substantive focus other than Indians (such as health, education, employment, etc.) but specifically mentions Indians or Indian tribes.⁸⁸ Indian advocates have supported legislation across these three categories, suggesting that Indian advocates do not just target their advocacy

82. Robert Odawi Porter, *Tribal Disobedience*, 11 TEX. J. ON C.L. & C.R. 137, 138–47 (2006); Carlson, *Lobbying Against the Odds*, *supra* note 16, at 29–35.

83. *See, e.g.*, 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).

84. *See generally* DANIEL M. 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 (1996); JOANE NAGEL, AMERICAN INDIAN ETHNIC RENEWAL: RED POWER AND THE RESURGENCE OF IDENTITY AND CULTURE (1996).

85. *See, e.g.*, Fredrick J. Boehmke & Richard Witmer, *Indian Nations as Interest Groups: Tribal Motivations for Contributions to U.S. Senators*, 65 POL. RSCH. Q. 179, 179–81 (2012); Jeff J. Comtassel & Richard C. Witmer, II, *American Indian Tribal Government Support of Office-Seekers: Findings from the 1994 Election*, 34 SOC. SCI. J. 511, 514–22 (1997).

86. *See, e.g.*, Comtassel & Witmer, *supra* note 85; LAURA E. EVANS, POWER FROM POWERLESSNESS: TRIBAL GOVERNMENTS, INSTITUTIONAL NICHES, AND AMERICAN FEDERALISM (2011); KENNETH N. HANSEN & TRACY A. SKOPEK, THE NEW POLITICS OF INDIAN GAMING: THE RISE OF RESERVATION INTEREST GROUPS (2015); W. DALE MASON, *supra* note 81; Fredrick J. Boehmke & Richard Witmer, *State Lobbying Registrations by Native American Tribes*, 2015 POL., GROUPS & IDENTITIES 2 (2015); Raymond Foxworth, et al., *Incorporating Native American History into the Curriculum*, 96 SOC. SCI. QUARTERLY 955 (2015).

87. Carlson, *Making Strategic Choices*, *supra* note 16, at 938; Carlson, *Lobbying as a Strategy for Tribal Resilience*, *supra* note 19, at 1174–1220; Richard Witmer & Frederick J. Boehmke, *American Indian Political Incorporation in the Post-Indian Gaming Regulatory Act Era*, 44 SOC. SCI. J. 127, 129 (2007).

88. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 10–11 (1987).

towards bills creating federal Indian policy but also advocate on a broad range of bills and subject matters.⁸⁹ The wide range of subject matters and kinds of legislation that Indian nations and organizations advocate on serves as a microcosm for understanding American politics more generally and facilitates a thorough investigation of advocate behavior in a legislative setting. Moreover, while this study emphasizes Indian advocacy, my data include non-Indian witnesses, many of whom act similarly to Indian advocates.⁹⁰ This suggests that my findings may extend beyond Indian advocates to legislative advocates more generally.

Existing studies on American Indian legislative advocacy have focused on Indian advocates as proponents of legal change.⁹¹ In my own previous research, I have distinguished between offensive strategies—used by proponents to support a legal change—and defensive strategies—used by opponents against a legal change—and documented that American Indians employ both kinds.⁹² But neither my work, nor any other study that I am aware of, broadly explores the behavior of Indian nations and organizations in their legislative advocacy.

This study examines American Indian advocacy on Indian-related bills starting at the committee hearing stage of the legislative process and with a particular focus on committee hearing testimony. I chose committee testimony for several reasons. First, scholars have found that legislative advocates have more influence in the earlier stages of the legislative process.⁹³ Committee hearings are early in the legislative process and they provide advocates with an opportunity to engage in targeted advocacy on specific proposed laws.⁹⁴ Many legislative advocates testify at hearings because they deem it an important activity, and they widely use testimony to access and influence lawmakers.⁹⁵ Second, advocacy groups employ

89. Most organized interests advocate on one or a few issues. *See, e.g.*, Frank R. Baumgartner & Beth L. Leech, *Interest Niches and Policy Bandwagons: Patterns of Interest Group Involvement in National Politics*, 63 JOURNAL OF POLITICS 1191 (2001); JACK L. WALKER, JR., MOBILIZING INTEREST GROUPS IN AMERICA (1991); William P. Browne, *Organized Interests and their Issue Niches: A Search for Pluralism in the Policy Domain*, 52 JOURNAL OF POLITICS 477 (1990). In contrast, American Indians testify on a wide range of bills and subject matters. *See infra* Part IV.

90. *See, e.g.*, *Hearings before the H. Subcomm. on Civil and Constitutional Rights on H.R. 3112, An Act to Amend the Voting Rights Act of 1965, Part I*, 97th Cong. (May 27-28, 1981 and June 3, 1981) (demonstrating that non-Indian advocates take positions and make arguments similar to the ones identified used by Indian advocates in this study).

91. Berger, *supra* note 53, at 12; Carlson, *Making Strategic Choices*, *supra* note 16, at 938; Carlson, *Lobbying as a Strategy for Tribal Resilience*, *supra* note 19, at 1174–20.

92. Carlson, *Lobbying as a Strategy for Tribal Resilience*, *supra* note 19, at 1174.

93. King, et al., *supra* note 52, at 1214.

94. BURSTEIN, *supra* note 39, at 104. As a result, “individuals and organizations invited to testify at congressional hearings may legitimately feel that their testimony will have an impact.” *Id.*

95. SCHLOTZMAN & TIERNEY, *supra* note 6, at 295.

hearings to gain access to lawmakers, to present carefully reasoned arguments and technical information, and to shape the legislative record in ways that may help them later in legislative, judicial, and administrative processes.⁹⁶ Hearings provide advocacy groups with a public forum in which to make their arguments and sometimes increase publicity about proposed legislation.⁹⁷ Third, committee hearings present an opportunity for targeted advocacy on a specific legislative proposal and allow for the linking of advocacy to a particular legislative proposal.⁹⁸ By linking advocacy to a specific legislative proposal, the hearing data allow for examination of the impact of that advocacy on the legislative outcome (enactment or non-enactment) of the legislative proposal. Moreover, the textual nature of hearings facilitates the tracking and comparison of legislative arguments and texts over time, which reveal the extent to which legislators adopt language proposed by advocates.

I used a mixed methods approach to investigate how and why American Indians advocated to influence legislative lawmaking. Borrowing from the political science literature, I use quantitative data to provide a big picture view of advocate behavior. Qualitative analysis supplements and enriches the quantitative data. It ensures that the big picture view does not obscure important details about how advocates behave in legislative settings. This mixed methods approach navigates a middle ground between non-generalizable case studies and political science studies that produce generalizable insights but sacrifice nuance.

B. Methodology

I used quantitative methods to identify, describe, and compare the advocacy strategies that Indian nations and organizations used as witnesses testifying at committee hearings on specific proposed laws during two congressional sessions. Consistent with previous studies,⁹⁹ I expected to find that Indian advocates more frequently testified in favor of bills than against them.¹⁰⁰ I investigated this expectation by coding the witnesses testifying for and against each bill in the dataset and then looking at the frequencies of proponents and opponents across all Indian-related bills.

I accessed primary data on advocacy by American Indians from several sources, including a database of Indian-related bills,¹⁰¹ publicly available and

96. *Id.* at 296.

97. *Id.*

98. BURSTEIN, *supra* note 39, at 104.

99. BAUMGARTER, ET AL., *supra* note 6, at 6–7; BURSTEIN, *supra* note 39, at 115.

100. BAUMGARTER, ET AL., *supra* note 6, at 6–7; BURSTEIN, *supra* note 39, at 115.

101. Kirsten Matoy Carlson, *Congress and Indians*, 86 U. COLO. L. REV. 78, 95 (2015).

archival materials on legislation introduced in Congress,¹⁰² and interviews with advocates for American Indian nations and organizations. I examined a sample of congressional hearings held on Indian-related bills during two congressional sessions.¹⁰³ The two congressional sessions—the 97th and 106th—were selected because they reflected variation in several important variables, including the party in control of Congress, enactment rate, and enactment rate by bill type.

I developed a database including all legislative hearings held by Congress on each of the 821 Indian -related bills in the two congressional sessions to measure Indian advocacy, including tribal support and opposition. Committee hearings present an opportunity to study targeted advocacy on a specific legislative proposal and, thus, allowed me to measure Indian support for and opposition to proposed legislation. I reviewed the hearings to determine whether any Indian witnesses testified. I defined an Indian witness as any witness explicitly identifying as an Indian, Alaska Native, or Native Hawaiian, or testifying on behalf of an Indian tribe, an Indian nonprofit organization, a tribal consortium, a tribal business, and/or an Alaska for-profit or nonprofit corporation.¹⁰⁴ When a hearing included at least one Indian witness, I coded all the testimony (every witness) in the hearing. The total number of witnesses coded was 2,137.¹⁰⁵ If the hearing did not include any Indian witnesses, it was not coded because it did not include any Indian advocacy. Of the 821 bills, 204, or 25%, had hearings.¹⁰⁶ Of the 204 bills with hearings, half, 54% (110), included testimony from an Indian witness.

I coded all the witnesses in each legislative hearing with an Indian witness, including the oral statements, responses to questions, and written statements.¹⁰⁷ I coded each witness by the witness's affiliation (e.g., tribe,

102. 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.

103. The original database included 7799 Indian-related bills introduced in the 94th through the 112th Congresses. Carlson, *Congress and Indians*, *supra* note 101, at 95–98.

104. Representatives of state, local, or federal agencies (for example, the Bureau of Indian Affairs) were not counted as Indian witnesses even if the witness identified as Indian and spoke to the Indian issues in the bill because the witness was not representing Indians. For similar reasons, I also excluded friends of the Indians, for example, non-profits that seek to assist Indians but are not made up of Indians, such as the Friends Committee on National Legislation.

105. There are no issues of intercoder reliability because the same coder coded all the hearings in the two Congresses.

106. On average, committees hold hearings on only one-sixth of all bills introduced. ESKRIDGE, ET AL., *supra* note 54, at 25.

107. The position of each witness, whether Indian or non-Indian, was coded. For a similar coding scheme, see BURSTEIN, *supra* note 39, at 134–43.

tribal consortium, state, etc.);¹⁰⁸ the witness's position on the bill (for, for but raises issues, against, against but prefers alternative, no position);¹⁰⁹ and the committee holding the hearing.

This coding scheme allowed me to identify and analyze the different strategies and positions that Indian witnesses took on each bill.¹¹⁰ I aggregated the positions taken by Indian witnesses on the bills into three categories: (1) proponents, who were for the bill and wanted it enacted; (2) opponents, who were against the bill and wanted it defeated; and (3) modifiers, who wanted to amend the bill.¹¹¹ Each bill was already coded by bill number, Congress, title, date of introduction, bill progress, enactment, type of legislation, and subject matter.¹¹²

I then conducted a more substantial, qualitative review of the legislative histories of each bill. This review included a close reading of the hearing testimony to determine the grounds upon which witnesses supported, opposed, or wanted the bill modified; to identify any amendments made to the bills after the hearing process, including whether the bill was combined with another bill or superseded either by a substitute, related, or companion bill; and to check to see if any of the bills were miscoded.¹¹³ I also gathered other committee hearings, committee reports, debates on the floor, and archival materials on the bill where available.¹¹⁴ I used textual analysis to compare the language in various versions of a bill to determine whether and

108. I coded witnesses into the following affiliations: tribe, tribal consortium, Indian non-profit association, tribal business, Indian individual, Alaska for profit corporation, Alaska non-profit corporation, Native Hawaiian, non-Indian organization, federal agency, White House, state government, member of Congress, individual, and other. Detailed information on the coding of these affiliations is available from the author upon request.

109. I coded each of these positions as follows: (1) *For*: the witness indicated that they were in favor of the bill and wanted it enacted without any changes to it; (2) *For, but raises issues*: the witness stated that they supported the bill, but suggested changes to it; (3) *Against*: the witness opposed the enactment of the bill and did not ask for any changes to it; (4) *Against, but prefers an alternative*: the witness indicated opposition to the bill and suggested amendments or alternatives to it; and (5) *No position*: the witness did not take a position on the bill.

110. BURSTEIN, *supra* note 39, at 134–40.

111. The modifier category includes all the witnesses requesting changes to the bill and originally coded as either “for, raises issues” or “against, prefers alternative.”

112. For a full discussion of the coding of the bills in the database, see Carlson, *Congress and Indians*, *supra* note 101, at Appendix 1.

113. I checked the initial coding to ensure that none of the bills had been miscoded due to actions taken by Congress after the hearing.

114. Not all of these materials were available for each bill. Some bills never progressed beyond the hearings stage, so no committee reports, or floor debates exist for them. The availability of archival and supplemental materials also varied by bill. Archival materials were only available for the bills in the 97th Congress. Supplemental materials existed on some, but not all bills, in both the 97th and 106th Congresses.

how arguments made by advocates at hearings were incorporated into specific bills.

I used an interpretive approach in reviewing the congressional testimony. An interpretive approach seeks “to understand how specific human beings in particular times and locales make sense of their worlds.”¹¹⁵ I employed this approach to develop an understanding more sensitive to that of the advocates themselves of what they expressed they were doing in pursuing a particular position and to situate their strategies, positions, and arguments in the larger political and social context.¹¹⁶ I closely read congressional testimony and archival materials, when available, to identify Indian advocates’ strategies, positions, and arguments and their motivations and goals for using that strategy, taking that position, or making that argument. I investigated the discourses used by Indian advocates in congressional testimony on a specific legislative proposal. I traced the interactions and negotiations among advocates and lawmakers over time to observe how advocates use different strategies, tactics, and arguments to negotiate compromises across a range of bills with varying subject matters. As a result, I was able to gain a deeper understanding of how negotiations among advocates and legislators developed and changed over time as they crafted specific laws.

C. Limitations

Several limitations exist to this study. First, the data only represent legislative advocacy at committee hearings, one of multiple stages in the legislative process.¹¹⁷ Testimony given at congressional hearings reflects only a small part of legislative advocacy. They do not represent the full record of advocacy on a bill, which would include informal contacts and letters to members of Congress. I addressed this issue by drawing on supplemental data sources, such as archival materials or interviews, to augment the hearing data and provide a more complete picture of the advocacy effort.

Committee hearings also may reflect more the preferences of the committee than the advocacy of the witness.¹¹⁸ Some Indian nations and

115. PEREGRINE SCHWARTZ-SHEA AND DEVORA YANOW, INTERPRETIVE RESEARCH DESIGN: CONCEPTS AND PROCESSES 10 (2012).

116. Robert Adcock, *Generalization in Comparative and Historical Social Science: The Difference that Interpretivism Makes*, in INTERPRETATION AND METHOD: EMPIRICAL RESEARCH METHODS AND THE INTERPRETIVE TURN 91 (Dvora Yanow and Peregrine Schwartz-Shea eds., 2d ed. 2014).

117. For a description of the stages in the legislative process, see *supra* note 54 and accompanying text.

118. BURSTEIN, *supra* note 39, at 104.

organizations may not have been able to testify at committee hearings due to the costs and time involved—even if the Committee invited them to testify. To address these concerns, I reviewed both solicited and unsolicited testimony by Indian advocates at committee hearings and used additional sources to confirm my findings.

Second, this study only explores Indian advocacy within the era of Tribal Self-Determination. It presents snapshots of Indian advocacy during this period because it only includes data from two Congresses. While efforts were made to select a cross-section of Congresses,¹¹⁹ my data may not represent all the advocacy strategies used by Indian advocates over time.

A third limit to this study is that it does not attempt to evaluate fully or systematically the effects of American Indian advocacy. While that question is important and merits close investigation, this study has a more limited purpose: to provide a more accurate description of advocate behavior. It seeks to identify and examine strategies, positions, and arguments used by Indian advocates. It only makes preliminary insights into the influence of American Indian advocacy on legislative outcomes by determining the extent to which the changes requested by Indian advocates were incorporated into enacted laws.¹²⁰

V. NEGOTIATING THE LEGISLATIVE PROCESS: AMERICAN INDIAN LEGISLATIVE ADVOCACY

This Part uses the approach described in Part IV to provide a more accurate description of how American Indian advocates behaved and used the law in the legislative process during the 97th and 106th Congresses. My data reveal that legislative advocates perceive the legislative process to be about modifying the substantive content of a proposed law. They often negotiate the legislative process by targeting and framing their advocacy in nuanced ways and employing the rhetoric of the law—legal frames and arguments—to shape legislation.

American Indian advocates, like advocacy groups generally, regularly testified on proposed federal laws related to their interests. Of the 2,137 witnesses on the 110 bills coded, 45%, were Indian advocates.¹²¹ Interest group studies have found that organized interests in general comprise 35.5%

119. *See supra* Part IV.B.

120. I preliminarily measure influence in this study by comparing the changes requested by Indian advocates with the amendments made to the bill and the text of the final bill as enacted. Future articles will investigate the relationship between advocacy and influence more thoroughly. Kirsten Matoy Carlson, *Beyond Descriptive Representation: American Indian Opposition to Federal Legislation* (forthcoming).

121. Over one-third, 37% (355 out of 954), of these Indian advocates represented Indian nations.

of all witnesses on federal bills so Indian advocates may be more likely to testify on bills that affect them.¹²² Other witnesses testifying on Indian-related bills have affiliations similar to those testifying on federal legislation generally.¹²³ They included non-Indian organizations, federal agencies, state government officials, members of Congress, and non-Indian individuals. Figure 1 displays the breakdown of witnesses testifying on Indian-related bills by organizational affiliation.¹²⁴

Figure 1: Witnesses Testifying on Indian-related Bills by Organizational Affiliation

Witness Affiliation	Percentage
Indians	45% (954)
Non-Indian organizations	22% (476)
Federal agencies	7% (142)
State governments	11% (238)
Members of Congress	4% (97)
Non-Indian Individuals	9% (187)
Other	2% (39)

Number of witnesses = 2137

122. BURSTEIN, *supra* note 39, at 103.

123. *Id.*

124. In comparison to a general study of advocacy on federal legislation, Indian-related bills generate more testimony from state or local governments and federal agencies and less advocacy from members of Congress, non-Indian individuals, and interest organizations. Burstein, *supra* note 39, at 103.

Indian advocates engaged in a wide range of advocacy strategies to shape the law as they negotiated the legislative process. Similar to interest groups, American Indians regularly testified in support of bills that they favored and against bills that they did not want to see enacted.¹²⁵ As Figure 2 shows, half of Indian witnesses were proponents. In contrast, only 20% of Indian witnesses acted as opponents.

Contrary to recent studies, which have emphasized legislative advocates as acting as either proponents or opponents,¹²⁶ my data reveal that Indian advocates often had a third choice: to engage in the lawmaking process to shape laws that better reflect their interests. Modifiers differ from both proponents and opponents in the positions they take, arguments they make, and tactics they use in the legislative process. Perceiving the legislative process as interactive and negotiable, Indian modifiers sought to educate members of Congress and craft bills that better responded to their concerns and interests. Over a quarter, 28%, of Indian witnesses sought to modify bills in their testimony.

Figure 2: Indian Witnesses by Position Taken on Indian-related Bills in Percentages

Position	Percentage of Indian Witnesses
Proponent	50% (479)
Opponent	20% (192)
Modifiers	28% (268)
No position	2% (17)

Number of witnesses = 954

125. See, e.g., BAUMGARTNER ET AL., *supra* note 6, at 58; BURSTEIN, *supra* note 39, at 115, 143–45.

126. See, e.g., BAUMGARTNER ET AL., *supra* note 6, at 6–7; BURSTEIN, *supra* note 39, at 115, 143–45.

As Figure 3 shows, Indian modifiers testified on over half, 53%, of the bills in the dataset. The proponent, opponent, and modification strategies used by Indian advocates is discussed below.

Figure 3. Positions of Indian Witnesses by Bill in Percentages

	Percentage of Bills
Proponents	71% (77)
Opponents	21% (23)
Modifiers	53% (57)

Number of bills = 108*

*Indian witnesses did not take positions on two bills in the dataset so they are not included. The numbers do not add up to 108 because multiple Indian witnesses testified on most bills and they rarely all took the same position.

A. Proponents

As expected, and consistent with earlier studies of interest group behavior, Indian witnesses testified in support of proposed laws more frequently than they opposed them.¹²⁷ Indian advocates testified for 71% and used a unified proponent strategy on 37% of the bills in the 97th and 106th Congresses.¹²⁸ They supported bills on various subject matters, including youth, claims, culture, economic development, education, federal recognition of Indian groups, health care, lands, and natural resources. Indian advocates most frequently testified only in support of tribe specific bills dealing with claims, lands, and/or natural resources.

As my previous research shows, Indian proponents have used legislative advocacy to protect their tribal sovereignty, build their institutions, and maintain control over their lands and natural resources.¹²⁹ Indian nations

127. BAUMGARTNER, ET AL., *supra* note 6, at 6–7; BURSTEIN, *supra* note 39, at 115.

128. I generated the percentage of bills with only proponents by dividing the number of bills with only proponents (40) by all the bills in the dataset (108).

129. Carlson, *Lobbying as a Strategy for Tribal Resilience*, *supra* note 19, at 1163. For a fuller discussion of how tribal proponents have employed legislative strategies to protect tribal sovereignty, see *id.* at 1177–20.

have advanced tribal sovereignty by initiating new policies, reversing court decisions, and encouraging the oversight and implementation of existing policies.¹³⁰

Indian proponents acted remarkably like other proponents.¹³¹ Like other status quo challengers, Indian proponents proposed and drafted legislation.¹³² Indian advocates initiated every bill that they supported in the Congresses studied. Some Indian nations and organizations drafted the bill themselves,¹³³ while others proposed legislation as part of a larger coalition.¹³⁴ Similar to proponents more generally, Indian proponents worked closely with members of Congress and their staffs on legislative language,¹³⁵ mobilized the public to support their efforts,¹³⁶ and emphasized positive arguments for changing the law in their testimony.¹³⁷

130. *Id.* at 1174.

131. For a discussion of how proponents behave, see *supra* Part II.

132. See, e.g., *1981–82 Miscellaneous Tax Bills, XVI: Hearing on S. 1298 Before the Subcomm. on Taxation and Debt Mgmt. of the S. Comm. on Fin.* 97th Cong. 86 (July 19, 1982) (statement of Barry E. Snyder, President, Seneca Indian Nation) (explaining that the Association on American Indian Affairs instigated the drafting of the original bill).

133. *Id.*

134. Tribes frequently proposed land claims and water rights settlements as part of a coalition. See, e.g., *Hearing before the S. Comm. on Indian Affs. on S. 2102, Timbisha Shoshone Homeland Act*, 106 Cong. (Mar. 21, 2000) (explaining that the bill emerged out of negotiations between the National Park Service, the Tribe, and other federal agencies).

135. See, e.g., Carlson, *Lobbying as a Strategy for Tribal Resilience*, *supra* note 19, at 1202–08 (describing how Indian nations worked with Senator Evans to ensure that a tribal self-governance demonstration project was added to the ISDEAA Amendments of 1988).

136. For example, the Texas Kickapoo Tribe galvanized support among the Oklahoma Kickapoo Tribe and local churches in their efforts to obtain federal recognition and lands. See, e.g., *Hearings before the H. Comm. on Interior and Insular Affs. on H.R. 4496, Confirming the Citizenship Status of the Texas Band of Kickapoo Indians*, 97th Cong. (Oct. 30, 1981 and Aug. 5, 1982).

137. For example, Indian tribes argued that Indian Tribal Government Tax Status Act of 1982 was essential to the realization of tribal self-determination. *1981–82 Miscellaneous Tax Bills, XVI: Hearing on S. 1298 Before the Subcomm. on Tax'n and Debt Mgmt. of the S. Comm. on Fin.* 97th Cong. 71–72 (July 19, 1982) (statement of Delbert Frank, Sr., Chairman, Confederated Tribes of the Warm Springs Reservation) (“This legislation is extremely important to all Indian tribal governments.”), *id.* at 136 (statement of the National Congress of American Indians); consistent with recent federal legislation recognizing tribes as separate sovereigns, *id.* at 72 (statement of Delbert Frank, Sr., Chairman, Confederated Tribes of the Warm Springs Reservation), and necessary to ensure equal treatment for state and tribal governments in the United States. *Id.* at 73 (statement of Delbert Frank, Sr., Chairman, Confederated Tribes of the Warm Springs Reservation); *id.* at 139 (statement of the National Congress of American Indians); *id.* at 131 (statement of Darrell “Chip” Wadena, Minnesota Chippewa Tribe); *id.* at 132 (statement of W. Richard West, Jr., Association on American Indian Affairs). At the same time, they pointed out that the bill would not lead to a significant revenue loss to the United States. *Id.* at 139–40 (statement of the National Congress of American Indians).

B. Opponents

Indian advocates testified against 21%, but only uniformly opposed 3% of the bills with Indian testimony in the 97th and 106th Congresses.¹³⁸ Similar to other opponents, they used an opposition strategy to prevent the bill's enactment and protect the status quo.¹³⁹ Most often, Indian advocates opposed the proposed federal law because they thought it would harm the interests of the tribe or Indian people.¹⁴⁰ Indian advocates employed opposition strategies to defeat bills that would limit Indian gaming under the Indian Gaming Regulatory Act,¹⁴¹ extinguish Indian land claims,¹⁴² undermine protections for subsistence practices of Native peoples,¹⁴³ allow

138. I generated the percentage of bills with only opponents by dividing the number of bills with only opponents (3) by all the bills in the dataset (108). The three bills that Indian witnesses uniformly opposed are the Internet Gambling Prohibition Act of 2000, H.R. 3125, 106th Cong. (2000), the Steelhead Protection Act, 97th Cong. (1981), and the Indian Land Consolidation Act Amendments of 2000, 106th Cong. (1999). *Hearing before the Subcomm. on Telecomm., Trade, and Consumer Prot. of the H. Comm. on Com. on H.R. 3125, Internet Gambling Prohibition Act of 2000*, 106th Cong. (June 15, 2000); *Hearing before the S. Comm. on Indian Affs. on S. 984, the Steelhead Trout Prot. Act, Part I*, 97th Cong. (June 29, 1981); *Joint Hearing before the S. Comm. on Indian Affs. and the H. Comm. on Res. on S. 1586, Indian Land Consolidation Act Amendments of 2000*, 106th Cong. (Nov. 4, 1999).

139. BAUMGARTNER, ET AL., *supra* note 6, at 115 (describing how opponents seek to protect the status quo).

140. *See, e.g., Hearing before the Subcomm. on Telecom., Trade, and Consumer Prot. of the H. Comm. on Com. on H.R. 3125*, 106th Cong. 59-61 (June 15, 2000) (statement of Richard Williams, Chairman, Lac Vieux Desert Band of Lake Superior Chippewa Indians); *Hearing before the S. Comm. on Indian Affs. on S. 984, the Steelhead Trout Prot. Act, Part I*, 97th Cong. (June 29, 1981); *Hearing before the S. Comm. on Indian Affs. on the Ancient Indian Land Claims Settlement Act*, S. 2084, 97th Cong. (June 23, 1982); *Hearing before the Sen. Comm. on Indian Affs. on Alaska Native Claims Technical Amendments Act of 1999*, S. 2214, 106th Cong. (Mar. 31, 1982) (statement of Guvo District of the Tohono O'odham Nation); *Hearing before the S. Comm. on Energy and Nat. Res. on the Alaska Native Claims Technical Amendments Act of 1999*, S. 1702, 106th Cong. (Oct. 14, 1999) (statement of the Alaska Inter-Tribal Council); *Hearing before the S. Comm. on Indian Affs. on the Indian Gaming Regulatory Improvement Act of 1999*, S. 399, 106 Cong. (Mar. 24, 1999) (statement of Montie Deer, Chairman, National Indian Gaming Commission); *Hearing before the H. Comm. on Interior and Insular Affs. on the Tribal-State Compact Act of 1981*, H.R. 5001, 97th Cong. (Mar. 18, 1982) (statement of the American Indian Law Center).

141. *Hearing before the Subcomm. on Telecomm., Trade, and Consumer Prot. of the H. Comm. on Com. on H.R. 3125*, 106th Cong. 59-61 (June 15, 2000) (statement of Richard Williams, Chairman, Lac Vieux Desert Band of Lake Superior Chippewa Indians); *Hearing before the S. Comm. on Indian Affs. on the Indian Gaming Regulatory Improvement Act of 1999*, S. 399, 106 Cong. (Mar. 24, 1999).

142. *Hearing before the S. Comm. on Indian Affs. on the Ancient Indian Land Claims Settlement Act*, S. 2084, 97th Cong. (June 23, 1982).

143. *Hearing before the S. Comm. on Energy and Nat. Res. on the Alaska Native Claims Technical Amendments Act of 1999*, S. 1702, 106th Cong. (Oct. 14, 1999) (statement of the Alaska Inter-Tribal Council).

for drilling for oil on sacred lands,¹⁴⁴ and abrogate treaty fishing rights.¹⁴⁵ Indian advocates also cited the lack of a need for the legislation in explaining their opposition to bills.¹⁴⁶ Indian advocates used opposition strategies to defeat tribe specific bills, pan-tribal bills, and general bills that affected their interests.

In opposing these bills, Indian opponents engaged in tactics and made arguments typical of other opponents seeking to protect the status quo. As previous studies have shown, opponents focus on the shortcomings of the proposed law, highlighting how much it costs and how it will not solve the targeted problem.¹⁴⁷ Similarly, Indian advocates who opposed a bill discredited the proponent's arguments by emphasizing how these bills would violate existing federal laws and tribal rights. Like other opponents, they also raised fears about the bills' potential impacts on tribal and other communities.¹⁴⁸

The Steelhead Trout Protection Act demonstrates how Indian nations and organizations opposing a bill with the singular goal of defeating the bill acted like other opponents.¹⁴⁹ The Act would have decommmercialized steelhead trout, designated it as a national game fish, and made commercial interstate transportation of the fish illegal under federal law.¹⁵⁰ It would also have abrogated treaties between the federal government and Indian nations by applying state laws and regulations governing the harvest, transportation,

144. *Hearing before the Sen. Comm. on Indian Affs. on Alaska Native Claims Technical Amendments Act of 1999, S. 2214*, 106th Cong. (Mar. 31, 1982) (statement of Gu-vo District of the Tohono O'odham Nation).

145. *Hearing before the S. Comm. on Indian Affs. on S. 984, the Steelhead Trout Protection Act, Part I*, 97th Cong. (June 29, 1981).

146. *See, e.g., Hearing before the H. Comm. on Interior and Insular Affairs on the Tribal-State Compact Act of 1981, H.R. 5001*, 97th Cong. (Mar. 18, 1982) (statement of the American Indian Law Center); *Hearing before the S. Comm. on Indian Affairs on S. 5108, Indian Tribal Justice Technical and Legal Assistance Act of 2000*, 106 Cong. (Sept. 29, 1999) (statement of the Navajo Nation).

147. BAUMGARTNER, ET AL., *supra* note 6, at 138 (explaining that status quo defenders "[r]aise doubts and fears, especially about cost to government, costs to private sector actors, and the feasibility of any government solution to what is probably an exaggerated problem in any case" and that status quo defenders "need not explain the benefits of the status quo, they need only cast doubt on the policy alternatives being proposed."). The study also considered the influence of advocacy group opposition on policymaking and found that it was not a predictor of policy success or failure. *Id.* at 76; *see also* Burstein, *supra* note 39, at 148 (listing arguments made by opponents to federal legislation).

148. *Id.* at 138.

149. Steelhead Trout Protection Act, S. 874, 97th Cong. (1981). A related bill to the Steelhead Trout Protection Act, H.R. 2978, was introduced in the House, but the House never held a hearing on the bill.

150. *Id.*

and sale of steelhead trout to Indian fishermen exercising their treaty rights.¹⁵¹ Twenty-six Indian witnesses opposed the proposed law.¹⁵² Seventeen Indian nations and eight tribal organizations testified against the Steelhead Trout Protection Act at the hearing held by the Senate Committee on Indian Affairs in June 1981.¹⁵³ None of these Indian nations and organizations sought to amend the bill.¹⁵⁴ Instead, they mobilized to defeat the bill.¹⁵⁵

Tribes opposed the bill because it would unilaterally abrogate their treaty rights to fish commercially even though the Supreme Court had repeatedly upheld these rights.¹⁵⁶ Rather than offer amendments, Indian

151. *Id.*

152. *Hearing before the S. Comm. on Indian Affs. on S. 874, the Steelhead Trout Protection Act, Part I, 97th Cong.* (June 29, 1981) [hereinafter *Hearing on S. 874, Part I*].

153. *Id.* The seventeen Indian nations that testified against the bill are: Makah Indian Tribe, Quinalt Indian Nation, Nez Perce Tribe, Confederated Tribes of Warm Springs Reservation, Confederated Tribes and Bands of the Yakama Nation, Tulalip Tribes of Washington, Quileute Indian Tribe, Swinomish Indian Tribal Community, Upper Skagit Indian Tribe, Sauk-Suiattle Indian Tribe, Lummi Indian Nation, Hoh Tribe, Nisqually Tribe of Washington State, Muckleshoot Indian Tribe, Puyallup Tribe of Washington, Confederated Tribes of Umatilla Indians, and Ak-Chin Indian Community. The eight tribal organizations that opposed the bill are: Point No Point Treaty Council, Point Elliot Treaty Council and Fisheries Manager, Columbia River Inter-Tribal Fish Commission, Northwest Indian Fisheries Commission, Quinalt Treaty Area, Skagit System Cooperative, Columbia River Inter-Tribal Fish Commission, and the National Tribal Chairmen's Association. Many reiterated their opposition to the bill at the second hearing held in September 1981. *Hearing before the S. Comm. on Indian Affs. on S. 874, Part II, 97th Cong.* (Sept. 28, 1981) [hereinafter *Hearing on S. 874, Part II*].

154. *See generally Hearing before the S. Comm. on Indian Affs. on S. 874, Part I, 97th Cong.* (June 29, 1981); *Hearing before the S. Comm. on Indian Affs. on S. 874, Part II, 97th Cong.* (Sept. 28, 1981).

155. *Id.* Several Indian nations and organizations also submitted letters to Senators to reiterate their opposition to the bill. *See, e.g.*, Letter from Gilbert King George, Chairman, Muckleshoot Tribal Council to Senator John Melcher, March, 16, 1982, National Archives, The Center for Legislative Archives, Senate Committee on Indian Affairs files on S. 874 (asking for the Senator's support in opposing S. 874); Letter from Elmer Savilla, Executive Director, National Tribal Chairman's Association to Senator John Melcher, Feb. 1, 1982, National Archives, The Center for Legislative Archives, Senate Committee on Indian Affairs files on S. 874 (adamantly opposing S. 874 because it "is intended as a direct abrogation of Pacific Northwest Indian commercial fishing rights so that sportsman may enjoy sole access to this steelhead resource."); Letter from the National Congress of American Indians to Senator John Melcher, Feb. 8, 1982, National Archives, The Center for Legislative Archives, Senate Committee on Indian Affairs files on S. 874 (stating that every American Indian tribe in the United States opposes S. 874 because the bill "would directly abrogate Pacific Northwest Indian tribal fishing rights upheld twice by the Supreme Court in the last decade.").

156. *See, e.g. Hearing on S. 874, Part II, supra* note 153, at 104 (statement of Chris Morganroth, Quileute Tribe); *id.* at 68–69 (statement of Billy Frank, Jr., Northwest Indian Fisheries Commission); *id.* at 141 (statement of Mary K. Leitka, Chairwoman, Hoh Indian Tribe); *Hearing before the Senate Committee on Indian Affairs on S. 874, Part I, 97th Cong.* 62 (June 29, 1981) (statement of Gary Peterson, Point No Point Treaty Council); *id.* at 66 (statement of Dale Johnson, Makah Treaty Area, Northwest Indian Fish Commission). Many of the tribes emphasized their reliance on fishing for economic, spiritual, and cultural purposes. *See, e.g., Hearing on S. 874,*

nations and organizations revealed the misleading statistics and arguments relied on by the state of Washington and other supporters of the bill and attempted to correct the record.¹⁵⁷ They emphasized how the bill would

Part II, supra note 153, at 98–99 (Sept. 28, 1981) (statement of Joe DeLaCruz, Quinalt Nation); *id.* at 69 (statement of Billy Frank, Jr., Northwest Indian Fisheries Commission) (“For some tribes, steelhead serve as the ‘bread and butter’ salmon, the main source of income. For all tribes, steelhead and salmon are essential in sustaining the cultural and traditional life of the Pacific Northwest Indians.”); *Hearing on S. 874, Part I, supra* note 152, at 65 (June 29, 1981) (statement of Tony Forsman, Chairman, Point Elliot Treaty Council and Fisheries Manager) (“The treaty right to harvest steelhead is not for sale, and it cannot be bought. It is clear that steelhead is necessary for the survival of Indian tribes. For no amount of money will tribes trade that survival. No amount of money could compensate for the loss suffered by decommmercializing steelhead. Tribal fishermen do not want to be paid not to fish. They do not seek welfare. They want to fish.”); *id.* at 66 (statement of Dale Johnson, Makah Treaty Area, Northwest Indian Fish Commission) (“The Makah people have been dependent on fishing since time immemorial. Today, fishing is still the most important livelihood for our people.”); *id.* at 80 (statement of Nelson Wallulatum, Confederated Tribes of the Warm Springs Reservation) (“Taking steelhead, like taking salmon, is at the heart of Warm Springs culture. We are river people and we are fishermen. Catching these fish is not sport or recreation. It is our way of life.”).

157. *See, e.g., Hearing on S. 874, Part II, supra* note 153 (statement of Joe DeLaCruz, Quinalt Nation) (presenting detailed statistics on treaty fishing in Washington state); *id.* at 110–21 (statement of Chris Morganroth, Quileute Tribe) (same); *id.* at 69 (statement of Billy Frank, Jr., Northwest Indian Fisheries Commission) (rejecting contentions that the bill is necessary for conservation); *Hearing on S. 874, Part I, supra* note 152 (statement of Dale Johnson, Makah Treaty Area, Northwest Indian Fish Commission) (same). The hearings were acrimonious. Some tribes accused Senator Gorton of selling out to special interests and used strong language to voice their displeasure, including that they were furious, found the bill and proceedings distasteful and a waste of money, and perceived the bill to be a political device by Senators and interest groups. *See, e.g., Hearing before the S. Comm. on Indian Affs. on S. 874, Part I, 97th Cong. 66* (June 29, 1981) (statement of Tony Forsman, Squamish Tribe) (calling out Slade Gorton for introducing legislation to abrogate tribal treaty rights after saying he would abide by the Supreme Court’s decision); *Hearing before the S. Comm. on Indian Affs. on S. 874, Part II, 97th Cong. 69* (Sept. 28, 1981) (statement of Dale Johnson, Makah Treaty Area, Northwest Indian Fish Commission) (“Now we see that the man [Slade Gorton] who led an unsuccessful crusade to beat us in court wants to exploit our lack of political power in Congress so his constituency can take the fish which were guaranteed to us by the United States by solemn promises made on the treaty grounds.”); *id.* at 69 (statement of Billy Frank, Jr., Northwest Indian Fisheries Commission) (“Your bill, Mr. Chairman [Slade Gorton], is another attempt to abrogate the treaties between the United States and tribal governments.”); *id.* at 97 (statement of Joe DeLaCruz, Quinalt Nation) (“Arguments supporting the bill are fraught with . . . misrepresentation. As an example, consider the statement that was made by you, Mr. Chairman [Slade Gorton], in the introduction of S. 874, which contains highly misleading statistics that are apparently intended to deceive the public and the Congress, in thinking that Indians are overfishing the resource because they may account for more than 50 percent of the catch taken from certain rivers.”). Others noted their frustration with the attempt of a special interest to abrogate their treaty rights. *See, e.g., Hearing on S. 874, Part I, supra* note 152 (statement of Dale Johnson, Makah Treaty Area, Northwest Indian Fish Commission) (noting that “a vocal and well-financed minority has been clamoring to take away our rights for years” and that “this bill is just the latest in a long line of bills supported by this lobby and introduced to steal our rights.”); *id.* at 68 (statement of Joe DeLaCruz, Quinalt Nation) (“I find it extremely distasteful and objectionable to have to participate in this process. I have appeared . . . not out of choice, but out of necessity. The anger and dismay of my people over the shameful attempt to benefit the recreation of a few sportsmen by breaking the treaty promises made to our forefathers deserves to be heard.”).

violate the law by abrogating treaty rights and would express congressional bad faith towards Indians.¹⁵⁸ The Senate Committee on Indian Affairs chose not to take further action on the bill, and the bill never made it out of committee.¹⁵⁹

The Steelhead Trout Protection Act is one example of how Indian nations and organizations used an opposition strategy to defeat a bill that they felt undermined their rights. It illustrates how Indian advocates strongly and uniformly oppose proposed legislation that threatens their sovereign rights.¹⁶⁰ If Congress had enacted the Steelhead Trout Protection Act, it would have undermined tribal sovereignty, abrogated treaty fishing rights, dramatically altered existing federal Indian law, and devastated tribal economies.¹⁶¹ In response, Indian nations and organizations mobilized to defeat the threat. They sought to protect the status quo to prevent major changes to existing laws that recognized and protected their sovereignty. Not all of the bills in the dataset generated as much opposition as the Steelhead Trout Protection Act. But the arguments made by Indian nations and organizations against the bill resemble both the kinds of arguments made by opponents generally and by other Indian opponents seeking to protect the status quo and defeat a proposed law.

C. Modifiers

Modifiers illuminate how legislative advocates perceive the legislative process to be about changing the substantive law. Rather than either support or oppose a proposed law, advocates can—and do—seek to modify its

158. *Hearing on Indian Affs. on S. 874, Part I, supra* note 152, at 63–65 (statement of Tony Forsman, Chairman, Point Elliot Treaty Council and Fisheries Manager); *id.* at 65 (statement of Tony Forsman, Squamish Tribe) (“The Tribe, in opposing this steelhead legislation are firmly convinced that this bill is a direct abrogation of treaty rights, and refuse that money be traded for this right.”); *id.* at 66 (statement of Dale Johnson, Makah Treaty Area, Northwest Indian Fish Commission) (describing the legislation as abrogating the Makah peoples’ treaty rights to benefit sportsmen); *id.* at 77 (statement of A.K. Scott, Nez Perce Tribal Chairman) (“That Congress is even considering this legislation is an outrage. This proposed act is a violation of lawful principles and legal rights.”); *id.* at 79–80 (statement of Nelson Wallulatum, Confederated Tribes of the Warm Springs Reservation) (“The Warm Springs Tribe, however, considers this a treaty abrogation bill and we are unalterably opposed to it. When our ancestors signed the treaty of 1855 they reserved for our people the right to fish at our usual and accustomed stations beyond the reservation.”).

159. Similar bills introduced in the 99th Congress experienced a similar fate, dying in committee. Steelhead Trout Protection Act, H.R. 2136, 99th Cong. (1985); Steelhead Trout Protection Act, S. 954, 99th Cong. (1985).

160. See *supra* note 138 for a list of other bills that Indian nations and organizations opposed because the bill would harm their rights.

161. See generally *Hearing on S. 874, Part II, supra* note 153 (Sept. 28, 1981) (statement of Indian nations and organizations); *Hearing on S. 874, Part I, supra* note 152 (statement of Indian nations and organizations); *Hearing before the S. Comm. on Indian Affairs on S. 692*, 106th Cong. (June 9, 1999) (statement of Indian nations and organizations).

provisions. Modifiers express neither unqualified support for nor unqualified opposition to the bill.¹⁶² Rather, modifiers seek to influence the substantive content of the bill. Contrary to recent political science studies, which downplay the existence of modifiers,¹⁶³ Indian witnesses used modification strategies on 53% of the bills studied.

Modification strategies differ from both proponent and opponent strategies in the positions taken, arguments made, and tactics used by the legislative advocates pursuing them. Modifiers often perceive their goals as more incremental than either opponents or proponents because they seek to educate members of Congress and influence the bill's content. Their advocacy appears more fluid and relational, as they sometimes change their position on the bill throughout the course of the legislative process. Indian modifiers often targeted provisions of the bill most relevant to them or used the legislative process to negotiate the terms of federal Indian law and policy more generally. As a result, the behavior of modifiers often differed from and appeared to be more strategic and complicated than that of either proponents or opponents.

1. Why American Indians Use Modification Strategies

Most frequently, Indian advocates used a modification strategy because they wanted to improve the law so that it better served American Indians.¹⁶⁴

162. Modifiers used different rhetoric than proponents or opponents. For example, while opponents outright opposed a bill, modifiers often focused on changing the bill to better reflect Indian interests. Some even indicated their support for the general concept of the bill, but then raised strong concerns about specific provisions in the legislation. *See, e.g., Hearings before the S. Comm. on Energy and Natural Resources on S. 2305, The Federal Royalty Management Act of 1982*, 97th Cong. 400 (May 8 and 17, 1982) (statement of Patricia Brown, Three Affiliated Tribes of the Fort Berthold Reservation) (testifying that the tribe supported changing the royalty management system but wanted to see Section 20 removed from the bill); *Hearing before the H. Comm. on Resources on H.R. 701, the Conservation and Reinvestment Act*, 106th Cong. 59 (June 12, 1999) (statement of Leslie Ramirez, Attorney, on behalf of Pueblo Santa Ana) (indicating that tribe supported the bill in theory but recommended that Title II and III of the legislation be amended to provide grants to Indian Tribes without any cost match or in the alternative to make the maximum cost share requirement for Indian tribes to be twenty-five percent).

163. *See, e.g., BAUMGARTNER, ET AL., supra* note 6, at 6–7; BURSTEIN, *supra* note 39, at 115.

164. *See, e.g., Hearing before the Subcomm. on Human Resources of the H. Comm. on Education and Labor on H.R. 3046, Older Americans Act Amendments of 1981*, 97th Cong. (April 29, 1981) (statement of the National Congress of American Indians) (requesting that Congress amend the bill to remove certain barriers to participation for Indian elders); *Hearing before the H. Comm. on Resources on H.R. 701, the Conservation and Reinvestment Act*, 106th Cong. (June 12, 1999) (statement of Leslie Ramirez, Attorney, on behalf of Pueblo Santa Ana) (recommending that Title II and III of the legislation be amended to provide grants to Indian Tribes without any cost match or, in the alternative, to make the maximum cost share requirement for Indian tribes to be twenty-five percent); *Hearing before the H. Comm. on Resources on H.R. 798, the Resources 2000 Act*, 106th Cong. (June 12, 1999) (Leslie Ramirez, Attorney, on behalf of Pueblo Santa Ana) (requesting that the amount allocated to tribes be increased to twenty percent of the total and that the maximum

Indian advocates sought to improve all three kinds of Indian-related bills—pan-tribal, tribe specific, and general. Indian modifiers provided information on Indian experiences that enabled legislators to enact laws more responsive to the conditions in Indian country. They frequently suggested alternative language or ideas, sometimes even draft amendments, during the hearings.¹⁶⁵ As discussed in more detail below, Indian advocates varied in their commitments to the suggestions they made. Some refused to support the bill unless their proposed changes were incorporated into it while others would have supported the bill even if the changes they proposed were rejected.

As modifiers, Indian advocates could—and often did—provide information to Congress about proposed laws on which they were not major stakeholders.¹⁶⁶ They employed modification strategies to negotiate for language and/or provisions that they preferred on bills that affected regional or national policies. Unlike proponents and opponents, Indian advocates frequently did not express a strong position in favor of or against a general bill, but rather targeted their advocacy to educate members of Congress about how specific provisions of the bill would affect them and could be improved to serve them better.

Indian advocates identified multiple ways that Congress could respond more effectively to conditions on the ground in Indian country. Some of their suggestions included Congress increasing funding available to Indians for programs,¹⁶⁷ refining existing programs to better serve Indians,¹⁶⁸ improving

grant amount for any one tribe in a fiscal year be increased to twenty percent); *Joint hearings before the S. Comm. on Energy and Natural Resources and the Subcomm. on Nuclear Regulation of the S. Comm. on Environment and Public Works on S. 1662, the National Nuclear Waste Policy Act of 1982*, 97th Cong. (Oct. 5–6, 1981) [hereinafter *Joint Hearings on S. 1662*] (statement of Russell Jim, The Council on Energy Resource Tribes) (suggesting that Congress amend the bill to improve effective participation by tribes).

165. See, e.g., *Hearing before the H. Comm. on Resources on H.R. 701, the Conservation and Reinvestment Act*, 106th Cong. (June 12, 1999) (statement of Leslie Ramirez, Attorney, on behalf of Pueblo Santa Ana); *Joint hearings before the S. Comm. on Energy and Natural Resources and the Subcomm. on Nuclear Regulation of the S. Comm. on Environment and Public Works on S. 1662, the National Nuclear Waste Policy Act of 1982*, 97th Cong. (Oct. 5–6, 1981) (statement of Russell Jim, The Council on Energy Resource Tribes).

166. See, e.g., *Hearing before the Subcomm. on Human Resources of the H. Comm. on Education and Labor on H.R. 3046, Older Americans Act Amendments of 1981*, 97th Cong. (April 29, 1981) (statement of the National Congress of American Indians) (requesting that Congress amend the bill to remove certain barriers to participation for Indian elders).

167. *Hearing before the H. Comm. on Resources on H.R. 798, the Resources 2000 Act*, 106th Cong. (June 12, 1999) (Leslie Ramirez, Attorney, Pueblo Santa Ana) (requesting that the amount allocated to tribes be increased).

168. *Hearing before the Subcomm. on Human Resources of the H. Comm. on Educ. and Lab. on H.R. 3046, Older Americans Act Amendments of 1981*, 97th Cong. (April 29, 1981) (statement of the National Congress of American Indians) (requesting amendments to the bill to enable more Indian communities to receive Title VI benefits, lower the eligibility age requirements to allow the

the oversight and/or implementation of existing programs,¹⁶⁹ altering the scheme for making grants to Indian nations or organizations,¹⁷⁰ and taking actions to increase tribal participation in a new program.¹⁷¹

2. *How Modifiers Advocate: Positions, Tactics, and Arguments*

Modifiers behave differently than either proponents or opponents because they aim to influence the substantive content of the legislative proposal. In short, for modifiers, it's all about the text. Like proponents, they advocate for changes in the law, but the changes they seek focus on specific provisions in a bill. Modifiers recommend different kinds of changes to proposed laws depending on how the bill affects them. Thus, they frequently take positions, use tactics, and make arguments that distinguish them from both proponents and opponents and aid them in their quest to improve a legislative text to serve their community more effectively. Each of the sections below describes some of the positions, tactics, and arguments employed by Indian advocates acting as modifiers.

a. *Positions Taken by Modifiers*

Unlike proponents and opponents, who clearly expressed either support or opposition for a proposed law, Indian advocates often approached a proposed law in a more nuanced and sophisticated way. Rarely did Indian modifiers take a position either unconditionally for or against a bill. Rather, Indian modifiers took a range of positions on proposed laws. Indian advocates' positions on a proposed law often depended on how they wanted members of Congress to alter the law. They varied both in the recommendations that they made and their commitments to those recommendations.

Indian modifiers displayed a continuum of positions with most modifiers falling into one of four distinct categories.¹⁷² These positions

majority of Indian elders to qualify for the program, and make the dietary recommendations more accommodating of traditional diets).

169. *Hearing before the S. Comm. on Indian Affs. on S. 400, NAHASDA Amendments of 2000*, 106th Cong. (March 17, 1999) (statement of Chester Carl, Chairman, National American Indian Housing Council) (recommending that Congress amend the bill to improve implementation of the Native American Housing Assistance and Self-Determination Act).

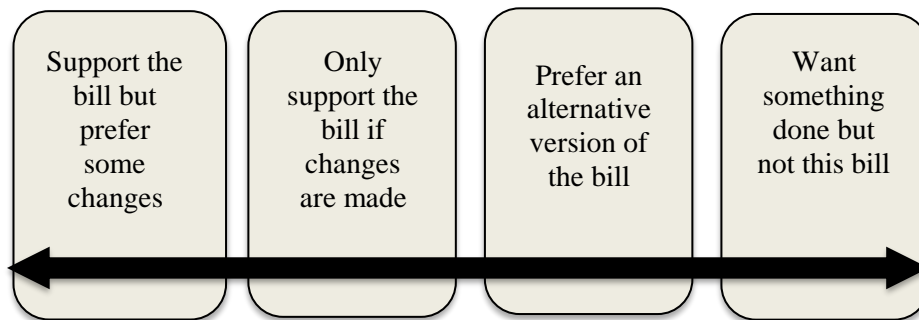
170. *Hearing before the H. Comm. on Resources on H.R. 701, the Conservation and Reinvestment Act*, 106th Cong. (June 12, 1999) (statement of Leslie Ramirez, Attorney, on behalf of Pueblo Santa Ana) (recommending that Title II and III of the legislation be amended to provide grants to Indian Tribes without any cost match or, in the alternative, to make the maximum cost share requirement for Indian tribes to be 25 percent).

171. See *Joint Hearings on S. 1662*, *supra* note 164.

172. These categories are meant to be representative rather than exhaustive.

include: (1) supporting the bill but preferring some changes, (2) only supporting the bill if the requested changes are made, (3) preferring an alternative version of the bill, and (4) wanting something done but expressing deep concerns about the bill as drafted. Figure 4 displays this continuum of positions taken by Indian modifiers.¹⁷³ Often advocate behavior depended on their position on the bill. Unlike opponents and proponents, modifiers' positions were relational rather than fixed and could change throughout the legislative process based on interactions with legislators and other political actors.¹⁷⁴ The following subsections illustrate these varying positions and discuss each in more depth.

Figure 4: Continuum of Positions of Indian Witnesses Wishing to Modify a Bill



i. Support the Bill, but Prefer Some Changes

Just under half, 47%, of Indian witnesses using a modification strategy indicated that they supported the proposed law and also requested changes to it.¹⁷⁵ Often these modifiers advocated for minor changes to the proposed law, and it was not clear that their support for the bill depended upon the changes being made. Sometimes the Indian advocate recommended amendments to the bill but indicated support for it regardless of whether those changes were made.

The National Indian Health Board's ("NIHB") advocacy on the Native American Alcohol and Substance Abuse Program Consolidation Act of 2000

173. For a continuum of all positions taken by Indian advocates, see *supra* Part VI.

174. Ziv, *supra* note 53, at 212–13 (discussing how legislative advocates' positions are often relational).

175. Of the 268 Indian modifiers, 125 supported the bill, but preferred changes to it.

illustrates how an Indian organization supported a proposed law while arguing that it could be improved to serve Indian country more effectively. The Native American Alcohol and Substance Abuse Program Consolidation Act of 2000 sought to enable Indian tribes to consolidate and integrate alcohol and other substance abuse programs into one program.¹⁷⁶ The NIHB, a nonprofit organization representing tribal governments,¹⁷⁷ testified in support of the bill, but strongly recommended that the Indian Health Service (“IHS”) rather than the Bureau of Indian Affairs (“BIA”) serve as the lead agency in implementing and overseeing programs consolidated under the law.¹⁷⁸ The NIHB argued for the IHS to take the lead because alcoholism is a disease that affects physical and behavioral health.¹⁷⁹ The IHS had already engaged in numerous programs related to alcohol and substance abuse, and the NIHB expressed concerns that these initiatives would be derailed if the BIA became the lead agency.¹⁸⁰ The NIHB’s recommendation to make the IHS the lead agency was uncontroversial. None of the other witnesses opposed the idea, and both the Department of the Interior and the IHS agreed that the IHS was the appropriate agency to coordinate these programs.¹⁸¹ The Senate Committee on Indian Affairs made the requested change during committee markup,¹⁸² and the amended bill was later enacted.

The NIHB’s advocacy on the Native American Alcohol and Substance Abuse Program Consolidation Act of 2000 shows how even advocates supportive of a bill see the legislative process as an opportunity to improve the legislative text to better serve their constituents. The NIHB supported the bill, but also cared deeply about specific provisions within it and requested

176. Native American Alcohol and Substance Abuse Program Consolidation Act of 2000, S. 1507, 106th Cong. (2000).

177. The NIHB represents both tribal governments who compact or contract with the federal government to operate their own health care delivery systems and those who receive health care directly from the Indian Health Service. NATIONAL INDIAN HEALTH BOARD, *About NIHB*, https://www.nihb.org/about_us/about_us.php (last visited Feb. 22, 2021).

178. *Hearing Before the S. Comm. on Indian Affairs on S. 1507*, 106th Cong. 24 (Oct. 13, 1999) (statement of Yvette Joseph-Fox, Executive Director, National Indian Health Board) (“The National Indian Health Board supports the intent of S. 1507, as we support the desire of tribal governments to consolidate many of their programs into a flexible and responsible program at the local level. However, we strongly recommend that the primary agency responsible for Federal oversight of these consolidated programs be the Department of Health and Human Services’ Indian Health Service program.”).

179. *Id.* at 24–25.

180. *Id.* at 46. The NIHB also pointed out that tribes found it easier to contract and compact with the IHS. *Id.* at 46–47.

181. *Alcohol and Substance Abuse Program Consolidation Act: Hearing on S. 1507 Before the S. Comm. on Indian Affairs*, 106th Cong. 14 (1999) (statement of Kevin Gover, U.S. Department of the Interior). *Id.* at 15 (statement of Michel Lincoln, Indian Health Service).

182. S. REP. NO. 106-306, at 5 (2000) (explaining that the bill was amended to designate the Indian Health Service the lead agency for coordinating the program).

changes to it. They treated the legislative process like an interactive negotiation over the bill's substantive content. In this case, their advocacy appears to have paid off; the Senate Committee changed the bill in response to their concerns. Not all suggestions to amend a bill are as uncontroversial and easily made as the ones requested by the NIHB in this case. But many modifiers who support a bill also simultaneously seek to change it, albeit sometimes in minor ways. The inclination of Indian advocates to make even minor suggestions to alter a bill they support indicates how they see the legislative process as an opportunity to influence the content of proposed legislation.

ii. Only Support the Bill if Changes are Made

Some Indian modifiers clearly indicated that they would only support a proposed law if Congress made the changes to the law that they recommended. Indian advocates often took this position when they perceived the bill as drafted as problematic and harmful to their interests. Many preferred to oppose the bill if it could not be changed. Some modifiers took this position to mitigate the harm to Indian nations and peoples in the event the law passed. Their tactic seemed to be: if the bill cannot be defeated, it can at least be altered to harm Indian nations and peoples less. These mitigation tactics were often employed by tribal governments and organizations to protect their existing tribal rights.¹⁸³

The modification strategy used by the Osage Tribal Council on H.R. 4926 serves as an example of advocates only supporting the enactment of a proposed law if specific changes were made before its enactment.¹⁸⁴ H.R.

183. See, e.g., *Rail Safety and Service Improvement Act of 1982: Hearing on H.R. 6308 Before the Subcomm. on Pub. Lands and Nat'l Parks, 97th Cong.* 251 (1982) (statement of Alaska Federation of Natives, Inc.); *Internet Gaming Prohibition Act of 1999: Hearing on S. 692 Before the S. Comm. on Indian Affairs, 106th Cong.* 66–68 (1999) (statement of Richard Williams, Chairman, Lac Vieux Desert Band of Chippewa Indians).

184. For other examples of Indian advocates taking a similar position, see *Hearing on S. 1340 Before the S. Comm. on Indian Affairs, 97th Cong.* 10–12 (1981) (statement of Ted George, representing Port Gamble Indian Community, Lower Elwha Tribal Community, and Jamestown Band of Clallam Indians) (expressing deep dissatisfaction with the bill and requesting amendments to it); *Hearing on S. 1986 Before the S. Comm. on Indian Affairs, 97th Cong.* 12 (1982) (statement of John Capture, on behalf of the Gros Ventre Tribe of the Fort Belknap Indian Reservation) (requesting that bill be amended to specify which individuals were to receive per capita payments); *Id.* at 14 (statement of Gilbert Horn, on behalf of the Assiniboine Tribe of the Fort Belknap Indian Reservation) (calling for bill to be amended to exempt payments from taxes). Like the Osage Tribal Council, these Tribes refused to support the bill until Congress amended it to make the changes they requested. Once Congress made the changes, their positions shifted to support the bill. S. REP. NO. 97–654, at 2 (1982) (detailing changes to the S. 1349 that responded to concerns raised by the Clallam tribes); S. REP. NO. 97–492, at 3 (1982) (indicating that amendments to S. 1986 were adopted after consultation with the tribes).

4926 authorized the Secretary of the Army to acquire interests in mineral rights owned by the Osage Indians to complete construction of Lake Skiatook.¹⁸⁵ The Osage Tribal Council initially requested changes to the bill because it did not clearly state what lands the Tribe had to cede for the Skiatook Reservoir or the amount of compensation the U.S. Army Corps of Engineers had to pay the Tribe for the land.¹⁸⁶ During a hearing before the House Committee on Interior and Insular Affairs in 1981, the Tribe suggested that the bill be amended to include these details.¹⁸⁷ Subsequently, the Tribe entered into negotiations with the U.S. Army Corps of Engineers to determine the lands to be ceded and the amount of compensation.¹⁸⁸ After the Tribe negotiated an agreement with the U.S. Army Corps of Engineers to resolve these issues, the House Committee on Interior and Insular Affairs amended H.R. 4926, and the Osage Tribal Council passed a resolution agreeing to support the amended bill.¹⁸⁹

The Osage Tribal Council's advocacy on H.R. 4926 illustrates how Indian advocates may use a modification strategy to support the enactment of a proposed law only if specific changes are made before its enactment. It demonstrates how legislative advocates view the legislative process to be a lawmaking enterprise. First, the Tribe was focused on improving the substantive content of the bill and used what power it had to alter the bill's content. Unlike opponents who raise fears about what will happen if a bill is enacted, the Osage Tribal Council engaged in negotiations with the U.S. Army Corps of Engineers to resolve the issues they identified in the bill.¹⁹⁰ Their behavior shows that Indian advocates perceive the legislative process as a way to negotiate bill content. Second, it demonstrates how Indian modifiers see the legislative process as relational and negotiable. The Osage

185. A bill to authorize the Secretary of the Army to acquire, by purchase or condemnation, such interests in oil, gas, coal, and other minerals owned or controlled by the Osage Tribe of Indians as are needed for Skiatook Lake, Oklahoma, and for other purposes, H.R. Res. 4926, 97th Cong., 95 Stat. 1721 (1981).

186. *Hearing on H.R. 4926 Before the H. Comm. on Interior and Insular Affairs*, 97th Cong. 17 (1981) (statement of Ralph Adkisson, Attorney, Osage Tribal Council); William J. Broad, *Despite Feds, a Tribe Keeps Its Oil Flowing*, WASH. POST (June 8, 1980), <https://www.washingtonpost.com/archive/opinions/1980/06/08/despite-feds-a-tribe-keeps-its-oil-flowing/e09c3214-fc69-4d0b-a53d-82a59a98f12c/>.

187. See *Hearing on H.R. 4926 Before the H. Comm. on Interior and Insular Affairs*, *supra* note 178.

188. Memorandum from Alex Skibine to Congressman Kildee, (Nov. 30, 1981) (on file with the National Archives, The Center for Legislative Archives, House Committee on Natural Resources Files on H.R. 4926).

189. H.R. REP. NO. 97-382, at 4-5.

190. Memorandum to Congressman Kildee from Alex Skibine, (Nov. 30, 1981) (on file with the National Archives, The Center for Legislative Archives, Senate Committee on Indian Affairs files on H.R. 4926).

Tribal Council went into the legislative process, opposing the bill and expecting to negotiate its provisions. In fact, one could argue that they used their opposition on the bill to encourage the negotiations. Third, the Osage Tribal Council's advocacy illustrates how advocates, who are major stakeholders on a bill, can leverage their position on a bill to affect its substantive content. In this case, the Osage Tribal Council may have been able to negotiate the changes it wanted because members of Congress knew that they could not enact the bill without the support of the Osage Tribal Council.¹⁹¹ Finally, it illuminates the relational, interactive nature of the legislative process and how advocates may change their position on a bill as they respond to and negotiate with other political actors.¹⁹² Here, the Osage Tribal Council shifted its position from opposing the bill and seeking modifications to it to supporting the bill. The Osage Tribal Council's behavior in this case was not usual. As later case studies reiterate, Indian advocates pursued similar strategies on other bills.

iii. Prefers an Alternative Bill

Some Indian modifiers used a modification strategy because they preferred an alternative bill and wanted to see Congress enact the bill that they preferred. Most frequently, this happened when multiple bills on the same subject matter were introduced in the House and the Senate at the same time.¹⁹³ Occasionally, Indian advocates preferred a bill or provisions within a bill that had been introduced in a previous congressional session and used a modification strategy to encourage Congress to amend the latest draft bill to adopt provisions from an earlier bill.

The Tohono O'odham Nation's (then the Papago Tribe) advocacy on the Southern Arizona Water Rights Settlement Act of 1982 demonstrates a strategy used by a tribe when it preferred an alternative bill. Members of Congress introduced two bills to settle the long-standing water rights claims

191. Indian advocates may also be able to use this kind of leverage when they unify in opposition against a bill that they perceive harms their interests. For example, Indian advocates strongly opposed the Internet Gambling Regulatory Act unless it was modified to exempt Indian gaming under IGRA. *See, e.g., Internet Gaming Prohibition Act of 1999: Hearing on S. 692 Before the S. Comm. on Indian Affairs*, 106th Cong. 66–68 (1999). The Senate responded to tribal advocacy by amending the bill on the floor, but the bill never passed both chambers.

192. Ziv, *supra* note 53, at 212–13.

193. *See, e.g., The Federal Royalty Management Act of 1982: Hearing on S. 2305 Before the S. Comm. on Energy and Natural Resources*, 97th Cong. 400 (1982) (statement of Patricia Brown, Three Affiliated Tribes of the Fort Berthold Reservation) (testifying that the tribes preferred H.R. 5121 to S. 2305); *Water Claims of the Papago Tribe: Hearing on H.R. 5118 and S. 2118 Before the S. Comm. on Indian Affairs*, 97th Cong. 70 (1982) (statement of Max H. Norris, Chairman, Papago Tribe of Arizona (now Tohono O'odham Nation)).

of the Nation in southern Arizona.¹⁹⁴ Drafted after several years of negotiations between the Nation and local stakeholders, these bills provided a settlement of the water rights claims of the San Xavier Papago Indian Reservation and the Schuk Toak District of Sells Papago Indian Reservation with a minimum of social and economic disruption to the Indian and non-Indian communities in Tucson and eastern Pima County.¹⁹⁵ The Tohono O’odham Nation was guaranteed an annual supply of water from specified sources in exchange for the settlement of its water rights claims.

The Nation preferred the Senate version of the Southern Arizona Water Rights Settlement Act of 1982, S. 2114, to the House one, H.R. 5118. S. 2114 included a stipulation that the Bureau of Reclamation and not the Bureau of Indian Affairs would be the lead agency for the construction of the water delivery provisions and a provision that the Secretary would pay damages in the amount of the actual replacement cost of water if the Secretary could not acquire and deliver the quantities of water promised to the Nation.¹⁹⁶ When it became clear that the House was going to move on H.R. 5118, the Nation advocated to have H.R. 5118 amended to include the more favorable provisions in S. 2114 and testified that it would oppose the bill unless the changes to the bill’s language were made.¹⁹⁷ The House Committee on Natural Resources amended the bill in response to the Nation’s concerns.¹⁹⁸

The legislative advocacy by the Tohono O’odham Nation is an example of a tribe preferring an alternative bill when the House and Senate have introduced similar bills on the same topic. Like the advocacy of the NIHB and the Osage Tribal Council, it shows how Indian advocates view the legislative process as a negotiation over the legislative text. Here, the Nation

194. Southern Arizona Water Rights Settlement Act of 1982, S. 2114, 97th Cong. (1982); Southern Arizona Water Rights Settlement Act of 1982, H.R. 5118, 97th Cong. (1982).

195. Letter to President Reagan from Morris K. Udall, (June 4, 1982) (on file with the National Archives, The Center for Legislative Archives, House Committee on Natural Resources, files on H.R. 5118).

196. See *Water Claims of the Papago Tribe: Hearing on H.R. 5118 and S. 2118 Before the S. Comm. on Indian Affairs*, supra note 185; Letter from Barry Goldwater to William Cohen, (Mar. 31, 1982) (on file with the National Archives, The Center for Legislative Archives, Senate Committee on Indian Affairs, files on H.R. 5118).

197. See *Water Claims of the Papago Tribe: Hearing on H.R. 5118 and S. 2118 Before the S. Comm. on Indian Affairs*, supra note 185.

198. H.R. REP. NO. 97-422, at 12 (1982) (“The bill as reported by this Committee is endorsed and supported by the major water users in eastern Pima Count[y], including the major mining interests and farm operations, the City of Tucson and officials of the Papago Tribe.”). President Reagan vetoed the bill because the federal government had not participated in the water settlement negotiations. President Reagan’s Veto Message to Congress on H.R. 5118, National Archives, The Center for Legislative Archives, House Committee on Natural Resources, files on H.R. 5118. The bill was later added as a separate title and enacted as part of a related bill. Pub. L. 97-293 (1982).

used its hearing testimony to encourage Congress to enact the provisions of the bill they preferred and threatened to oppose the bill if those changes were not made. It also illustrates how advocates can leverage their influence over the text of a proposed law through the position that they take on it. The Nation, like the Osage Tribal Council, used their criticisms of the bill to encourage members of Congress to support a bill that better suited them. Like the Osage Tribal Council, the Nation may have had more power in this case because it was a tribe-specific bill and members of Congress may have had reservations about enacting a bill that directly affected one tribe without its support.¹⁹⁹

iv. Raising New Issues

Some Indian advocates appeared to engage in modification strategies because they wanted to raise issues related to, but not addressed in, the legislation.²⁰⁰ These modifiers used the legislative process as an opportunity to suggest that the proposed legislation had missed the real issues affecting Indian country and that members of Congress should consider approaching the issue in a vastly different way or address a related issue that Indian advocates perceived to be more important.

The Oglala Sioux Tribe's advocacy on the Indian Tribal Economic Development and Contract Encouragement Act of 2000 serves as an example of Indian modifiers raising issues related to, but not addressed in, the proposed legislation.²⁰¹ The Indian Tribal Economic Development and Contract Encouragement Act of 2000 proposed amendments to 25 U.S.C.

199. The Nation may have had more leverage on this particular bill because it was a key stakeholder in the water rights settlement. The water rights settlement basically could not move forward without the Nation's consent.

200. See, e.g., *Gaming Regulatory Improvement Act of 1999: Hearing on S. 399 Before the S. Comm. on Indian Affairs*, 106th Cong. 47 (1999) (statement of W. Ron Allen, President, National Congress of American Indians) (arguing that this bill was not necessary and that Congress really needed to enact a Seminole Fix); *Indian Tribal Justice Technical and Legal Assistance Act of 2000: Hearing on S. 5108 Before the S. Comm. on Indian Affairs*, 106th Cong. 23–24 (1999) (Navajo Nation arguing that Congress needed to fund tribal justice systems); *To Amend the Indian Judgement Funds Act of 1973: Hearing on H.R. 3731 Before the H. Comm. On Interior and Insular Affairs*, 97th Cong. 10–16 (1981) (statement of Robert T. Coulter); *Indian Land Consolidation Act Amendments: Joint Hearing on S. 1586, S. 1315 and H.R. 3181 Before the S. Comm. on Indian Affairs and the H. Comm. on Resources*, 106th Cong. 56–57 (1999) (statement of Delmar “Poncho” Bigby, Indian Land Working Group) (testifying that the bill completely ignores the needs of individuals and does not provide any options for individuals to consolidate land).

201. *Business Development on Indian Lands: Hearing on S. 613 and S. 614 Before the S. Comm. on Indian Affairs*, 106th Cong. 77 (1999) (statement of Harold D. Salway, President, Oglala Sioux Tribe). The Confederated Tribes of the Umatilla Indian Reservation also testified on the bill. They sought specific changes to the text of the bill. *Id.* at 23–24.

§ 81, which governs contracts with Indian tribes.²⁰² Enacted in 1872, the original section 81 established technical drafting requirements for and mandated that the Secretary of the Interior approve most contracts between tribal governments and non-Indians.²⁰³ The Indian Tribal Economic Development and Contract Encouragement Act of 2000 proposed changes to the scope and operation of section 81. It sought to clarify which contracts required secretarial approval, specify the criteria for the approval of those contracts, and provide that contracts covered by the Act had to disclose or waive tribal sovereign immunity.²⁰⁴ The Tribe employed its testimony on this bill as a way to argue for the repeal of 25 U.S.C. § 81.²⁰⁵ It argued against the provisions of the bill requiring tribal governments and businesses to disclose or waive tribal sovereign immunity in certain contracts approved by the Secretary of the Interior by asserting that the Secretary should not be approving any contracts with Indian tribes.²⁰⁶ The Tribe contended that secretarial approval of contracts with Indian tribal governments and businesses had outlived its usefulness and was unnecessary because tribes are capable of managing and administering their own affairs.²⁰⁷ Most likely, the Tribe knew that repeal of Section 81 was unlikely, but it utilized the opportunity to start educating members of Congress about the competency of tribal governments and businesses, the problems with Section 81, and their desire to have the section repealed.

The Oglala Sioux Tribe's advocacy shows how Indian advocates use modification strategies to educate members of Congress about important issues overlooked in a proposed bill. Like the Osage Tribal Council and NIHB, the Oglala Sioux Tribe saw the legislative process as interactive and used it to engage with members of Congress about existing laws. The Tribe's strategy also provides insights into how and why legislative advocates using modification strategies act differently from both proponents and opponents. The Tribe argued for a different approach than the one taken in the bill, but unlike opponents, it was not trying to protect the status quo. Rather, the Tribe wanted to reform the status quo through the repeal of an existing law. In this respect, their efforts resemble incremental law reform strategies used by

202. S. 613, 106th Cong. (2000).

203. Ann-Emily C. Gaupp, *The Indian Tribal Economic Development and Contracts Encouragement Act: Smoke Signals of a New Era in Federal Indian Policy*, 33 CONN. L. REV. 667, 669–70 (2001).

204. *Id.*

205. *Business Development on Indian Lands: Hearing on S. 613 and S. 614 Before the S. Comm. on Indian Affairs*, 106th Cong. 77 (1999) (statement of Harold D. Salway, President, Oglala Sioux Tribe) (recommending repeal of section 81).

206. *Id.*

207. *Id.*

proponents.²⁰⁸ Similar to proponents, the Tribe engaged in a long-term strategy by trying to educate members of Congress about an issue and set the stage for later reforms.

* * *

The broad range of positions that legislative advocates take in advocating for modifications to proposed laws illuminate key aspects of advocate behavior overlooked in the present literature. First, it suggests tremendous variation in how advocates seek to change proposed laws prior to their enactment. Second, across this variation, commonalities in advocate's behaviors and perceptions about the legislative process emerge. Importantly, the case studies reveal how legislative advocates, regardless of their position on the bill, perceive the legislative process as a lawmaking enterprise. Advocates are engaged because they shape the content of the laws, either in terms of the bill being discussed or over the long term. Relatedly, they view the process as interactive and dynamic. Advocates voice their views and expect that legislators, their staffs, and other political actors will react to their arguments and that collectively, they will craft statutory laws. As a result, legislative advocates have both a role and power within the legislative process. Frequently, they can negotiate with other actors and use whatever power they may have to influence legislative texts.

b. Tactics Used by Modifiers

The tactics used by Indian advocates often reflected their motivations for using a modification strategy and the kind of bill on which they chose to advocate. Indian advocates used two different tactics depending on the kind of Indian-related bill on which they advocated. Each of these tactics further shows how legislative advocates perceive the legislative process as a lawmaking enterprise and an opportunity to shape the substantive content of the law.

One tactic of Indian modifiers was to engage in targeted advocacy on a bill. This tactic appeared most frequently when Indian advocates sought changes to general bills that included provisions affecting Indians. Indian advocates often targeted their advocacy on a particular program or provisions within the general bill. For example, the National Congress of American Indians ("NCAI"), the oldest, largest, and most representative American Indian and Alaska Native organization, requested very specific amendments

208. For a detailed discussion of proponents employing an incremental law reform strategy, see Carlson, *Lobbying as a Strategy for Tribal Resilience*, *supra* note 19, at 1191–92, 1194–95 (recounting the strategy used by tribal advocates to obtain limited jurisdiction over non-Indian perpetrators of intimate violence in the Violence Against Women Act of 2013).

to the Older Americans Act Amendments of 1981.²⁰⁹ The Older Americans Act Amendments of 1981 sought to extend the Older Americans Act of 1965 for an additional three years and clarify the functions of the Commissioner on Aging and other aspects of federal programs and assistance for older Americans.²¹⁰ NCAI focused its advocacy on Title VI, which provides grants to tribal organizations to assist older Indians. It wanted certain barriers to participation for Indian elders removed, including: (1) a community to have at least seventy-five elders before it could receive Title VI benefits, (2) the eligibility age requirements, which were too high to allow the majority of Indian elders to qualify for the program, and (3) the dietary recommendations because they differed so drastically from traditional diets that they created emotional and health conflicts for Indian elders.²¹¹ The Committee responded to some of the NCAI's requests by amending Title VI to change the definition of Indians to be served from "Indians aged 60 and over" to "older Indians" and striking the requirement that a state's Title III allocation be reduced by an amount attributable to the number of Indians to be served.²¹² The NCAI asked for these changes because the circumstances of Indian elders differ from those of the general population and it wanted to educate Congress about these differences.²¹³ The Committee Report on the bill also suggested that the Commissioner on Aging take note of the historical differences in dietary practices between Indian and non-Indian populations to allow for some flexibility for the dietary preferences of the Indian population.²¹⁴ These amendments appear to respond directly to the concerns raised by the NCAI, but it is not clear whether Congress' enactment of a very similar bill with identical changes to Title VI satisfied all the concerns raised by NCAI.²¹⁵ As this case shows, even when Congress does not adopt all the amendments proposed by Indian nations and organizations, they may influence the bill by shaping its content. Without NCAI's input, Congress

209. *Hearing on H.R. 3046 Before the Subcomm. on Human Resources of the H. Comm. on Educ. and Labor*, 97th Cong. 107 (1981) (statement of Ronald Andrade, National Congress of American Indians).

210. H.R. 3046, 97th Cong. (1982).

211. *See Hearing on H.R. 3046 Before the Subcomm. on Human Res. of the H. Comm. on Educ. and Labor*, *supra* note 209.

212. H.R. REP. NO. 97-70, at 3 (1981).

213. NCAI asked for a lower age requirement because "[t]he median Indian lifespan is approximately six years less than the rest of the Nation's population." *Hearing on H.R. 3046 Before the Subcomm. on Human Resources of the H. Comm. on Educ. and Labor*, *supra* note 209 at 107. Similarly, the NCAI cited the isolated, rural locations of most Indian reservations as contributing to the inability of tribes to meet the numerical requirements for hosting a program. *Id.*

214. H.R. REP. NO. 97-70, *supra* note 212, at 3.

215. Older Americans Act Amendments of 1981, S. 1086, 97th Cong. (1981).

probably would not have amended the Older Americans Act Amendments of 1981, and the provisions problematic for Indian elders would have remained.

The NCAI's advocacy on the Older Americans Act Amendments of 1981 demonstrates how advocates may use targeted advocacy to shape provisions in general bills. It illustrates how advocates viewed specific provisions of the bill as important to them and engaged in advocacy even though they were not major stakeholders on the bill. Indian advocates saw the bill as an opportunity to use targeted advocacy to focus on the provisions of the bill that affected their communities. They sought to improve the content of a general policy that affected a significant portion of the American Indian population and added their voices to the mix of advocacy on the bill. Indian modifiers used advocacy to educate members of Congress about issues specific to them and to shape the provisions in the bill with the most impact on them.

Indian advocates used a different tactic when they advocated on pan-tribal bills.²¹⁶ Pan-tribal bills differ from general bills because Indian nations and their citizens are the major stakeholders on pan-tribal bills, which are designed to shape federal Indian policy for all tribes. In advocating on pan-tribal bills, Indian modifiers employed a modification strategy to negotiate with the federal government, other Indian advocates, and sometimes, the states, over the direction of federal Indian policy. Indian advocates did not necessarily target certain provisions of the bill like they did when seeking to modify a general bill, but often suggested changes throughout the bill and/or tried to refocus the bill to shift federal Indian law and policy in a direction favorable to them. Their negotiations with members of Congress were also more dialectic on pan-tribal bills than general bills. Sometimes members of Congress solicited input from Indian advocates and invited them to suggest changes to pan-tribal bills.²¹⁷ Committees also tended to consult with Indian nations and advocates throughout the legislative process on pan-tribal bills.

216. See, e.g., Indian Needs Assessment and Program Evaluation Act of 1999, S. 612, 106th Cong. (1999); *The Indian Federal Recognition Administrative Procedures Act of 1999: Hearing on S. 611 before the S. Comm. on Indian Affairs*, 106th Cong. (2000); *A bill to amend the American Indian Trust Fund Management Reform Act of 1994: Hearing on S. 1587 and S. 1589 Before the S. Comm. on Indian Affairs*, 106th Cong. (1999); *The Indian Tribal Development Consolidated Funding Act of 2000: Hearing on S. 2052 Before the S. Comm. on Indian Affairs*, 106th Cong. (2000); Indian Health Care Improvement Act Reauthorization of 2000, S. 2526, 106th Cong. (2000).

217. See, e.g., *A bill to amend the American Indian Trust Fund Management Reform Act of 1994: Hearing on S. 1587 and S. 1589 Before the S. Comm. on Indian Affairs*, 106th Cong. (1999); *The Indian Tribal Development Consolidated Funding Act of 2000: Hearing on S. 2052 Before the S. Comm. on Indian Affairs*, 106th Cong. (2000).

The National American Indian Housing Council's ("NAIHC") advocacy²¹⁸ on the Native American Housing Assistance and Self-Determination Act ("NAHASDA") Amendments of 2000 illustrates how Indian advocates use modification strategies to negotiate federal Indian policy with the federal government.²¹⁹ The NAHASDA Amendments of 2000 proposed to improve delivery of housing assistance to Indian tribes in a manner that recognized tribal self-governance.²²⁰ Senators Inouye and Campbell introduced the bill after receiving complaints from tribes about the implementation of the 1996 Native American Housing Assistance and Self-Determination Act.²²¹ The NAIHC perceived the legislative process as a way to negotiate improvements in federal Indian housing policy and the implementation of NAHASDA. It saw its testimony as "a beginning for discussions on NAHASDA."²²² The NAIHC made multiple recommendations for improving the implementation of NAHASDA in its reauthorization, including, *inter alia*, defining the terms used in the bill, restricting the authority given to the Secretary to conduct audits, authorizing adequate funding for the block grant program, limiting the time frame for performance agreements, and revising the environmental review provisions to allow tribes to make mistakes and not lose their funding.²²³ The NAIHC sought both to focus the bill on improving the implementation of NAHASDA, which many tribal governments had found lacking, and to make detailed suggestions about specific provisions of the proposed bill. After the hearing, the Committee submitted a long list of specific questions to NAIHC about different proposed provisions in the bill. The Committee's request for more information from NAIHC indicated its willingness to consult NAIHC on and negotiate with tribal governments over the content of the bill. The Committee amended the bill before reporting it out and included several amendments responsive to NAIHC's concerns.²²⁴ The Senate passed the amended bill, but it did not move forward in the House. Many of the

218. The National American Indian Housing Council "represents the unique and historic interests of tribes and tribally designed housing entities on American Indian and Alaskan Native housing issues." NATIONAL AMERICAN INDIAN HOUSING COUNCIL, *NAIHC's Advocacy Mission*, <http://naihc.net/advocacy/> (last visited Feb. 23, 2021).

219. S. 400, 106th Cong. (2000).

220. *Id.*

221. *The Native American Housing Assistance and Self-Determination Act Amendments of 2000: Hearing on S. 400 Before the S. Comm. on Indian Affairs*, 106th Cong. (1999).

222. *Id.* at 21 (statement of Carl Chester, National American Indian Housing Council).

223. *Id.* at 26–28.

224. For example, the Committee appears to have responded to the NAIHC's comments by amending the bill to allow the Secretary to waive the requirements of the environmental review process in certain limited circumstances, change the auditing authority of the Secretary, and authorize more funding for certain tribes. S. REP. NO. 106–145 at 4–7 (1999).

NAIHC's recommendations, however, were later adopted and enacted in the American Homeownership and Economic Opportunity Act of 2000.²²⁵

NAIHC's approach to the hearing on the NAHASDA Amendments of 2000 demonstrates how advocacy groups see the legislative process as an interactive and dynamic negotiation over federal Indian policy. It reveals how Indian advocates used the multiple stages of the legislative process to create a dialogue with members of Congress over NAHASDA and its implementation, which ultimately led Congress to amend the Act to serve Indian communities better. Tribal governments raised concerns about the lack of implementation of NAHASDA, which encouraged Senator Inouye and Senator Campbell to draft the NAHASDA Amendments of 2000.²²⁶ NAIHC continued the dialogue with members of Congress about the bill during the next stage of the legislative process. NAIHC testified on the bill, knowing that it may not move forward but seeing it as an opportunity to educate members of Congress, shape the bill's text, and influence federal Indian policy more broadly by reiterating the importance of Indian self-determination in housing. The Committee listened to the NAIHC's concerns. It then further engaged with the NAIHC on the bill's provisions by asking NAIHC for its input through a series of questions, and finally amended the bill in response to this series of interactions.²²⁷ Like other legislative advocates,²²⁸ Indian advocates strategically used the stages of the legislative process to engage members of Congress and to negotiate substantive amendments to federal Indian housing policy through a series of interactive exchanges with legislators.

c. Arguments Made by Modifiers

Modifiers' separate agenda—to shape the proposed law in a way that better responds to their interests—informs the arguments they make and demonstrates the role that law plays in legislative advocacy. As the examples in the previous sections show, modifiers focus on shaping a legislative text in ways that respond to their concerns. Modifiers make different kinds of arguments in their efforts to do this. Consistent with the behavior of

225. Pub. L. No. 106-569, § 503, 114 Stat. 2961–62 (amending NAHASDA to, inter alia, permit the Secretary to waive certain environmental review requirements under specified conditions and to revise the audit, review, and hearing provisions). Congress also enacted some amendments to NAHASDA in the Omnibus Indian Advancement Act. Pub. L. No. 106-568, § 1003, 114 Stat. 2925–27.

226. *The Native American Housing Assistance and Self-Determination Act Amendments of 2000: Hearing on S. 400 Before the S. Comm. on Indian Affairs*, 106th Cong. 1 (1999) (statement of Senator Ben Nighthorse Campbell).

227. *Id.*

228. King, et al., *supra* note 52, at 1214.

legislative advocates more generally,²²⁹ Indian modifiers drew on policy arguments in advocating for changes in the proposed law. Indian modifiers, however, did not use policy arguments in the same ways as proponents and opponents.

Significantly, modifiers did not rely solely on political arguments. Legal arguments also emerged as integral to Indian advocates' efforts to shape proposed laws. Consistent with their focus on changing provisions in the legislative text, Indian advocates frequently used legal frames and arguments in their advocacy.

i. Policy arguments

Political science studies have well documented the kinds of policy arguments made by proponents and opponents.²³⁰ Indian modifiers made arguments similar to proponents and opponents, but not in the same ways that opponents or proponents do.

Indian modifiers borrowed arguments from both proponents and opponents. Their use of these arguments complicates existing understandings of how advocates argue about the status quo. Recall that existing studies show that proponents argue for the status quo and opponents argue against the status quo.²³¹ The kinds of arguments that legislative advocates make then flow from their position on the status quo. For example, proponents make arguments about how the bill benefits society, is not prohibitively expensive or is worth the cost, and will meet its objectives.²³²

Modifiers' use of policy arguments did not easily fit within this existing model of for and against the status quo. Often Indian modifiers highlighted the drawbacks of a proposed law not because they wanted the bill defeated but because they wanted Congress to amend the bill to improve it.²³³ Consider the Osage Tribal Council's advocacy on H.R. 4926, discussed

229. *See supra* Part II.

230. *See supra* Part II.

231. *See supra* Part II.

232. *See supra* Part II.

233. For an example of this, see the discussion of the advocacy of the Three Affiliated Tribes of the Fort Berthold Reservation, the Shoshone and Arapahoe Indian Tribes of the Wind River Reservation in Wyoming, and the Council of Energy Resource Tribes on the Federal Energy and Mineral Resources Act of 1982. *See infra* Part III.c.ii. In that case, the Indian advocates supported the bill, but they used arguments highlighting its drawbacks to encourage members of Congress to amend it. *See also Indian Land Consolidation Act Amendments: Joint Hearing on S. 1586, S. 1315, and H.R. 3181 Before the S. Comm. on Indian Affs. and the H. Comm. on Res.*, 106th Cong. 56–57 (1999) (statement of Delmar “Poncho” Bigby, Indian Land Working Group) (testifying that the bill needed to be amended because it completely ignored the needs of individuals and did not provide any options for individuals to consolidate land).

previously, as an example of this.²³⁴ The Osage Tribal Council opposed the bill and made arguments about its unfairness to encourage legislators to support amendments to it. The Osage case demonstrates how Indian modifiers were not for the status quo like opponents but were using arguments similar to opponents to negotiate for changes to the bill. Like proponents, Indian modifiers wanted changes in the law, but they did not like the ones in the proposed bill. Rather than accept the proposed changes to the law in the bill, Indian modifiers suggested amendments to the bill that Congress could enact to improve both the bill and existing law. In short, these Indian modifiers wanted the status quo changed, just not in the way the bill proposed.

Other Indian modifiers wanted to have a say about the status quo that was about to be created by the bill. For example, Indian tribes and the Council on Energy Resource Tribes testified on the Nuclear Waste Policy Act of 1982²³⁵ because they wanted to ensure that tribal governments were treated like states in any comprehensive program that Congress developed to deal with nuclear waste storage.²³⁶ These Indian advocates were advocating to have a say in the status quo to be established in the bill because it was the first time Congress had created a comprehensive program for dealing with nuclear waste storage.

These examples indicate that while Indian modifiers frequently made policy arguments in their advocacy, they did not use these arguments in the same way as proponents or opponents. Nor did Indian modifiers fit neatly into categorizations of legislative advocates as either for or against the status quo. Rather, Indian modifiers were using policy arguments in more nuanced and strategic ways.

ii. Legal Arguments

Indian advocates did not rely solely on policy arguments. The law often played a key role in Indian advocates' arguments. Indian modifiers, proponents, and opponents all used legal frames and arguments in their advocacy.²³⁷ Indian advocates frequently invoked key tenets of existing

234. See *supra* Part V.

235. H.R. 3809, 97th Cong. (1982).

236. *Radioactive Waste Legislation: Hearing on H.R. 1993, H.R. 2800, H.R. 2840, H.R. 2881, and H.R. 3809 Before the Subcomm. on Energy and the Env't of the H. Comm. on Interior and Insular Affs.*, 97th Cong. (1981) (statement of the Council of Energy Resources Tribes, the Yakima Indian Nation, and the Shoshone-Bannock Tribes of Ft. Hall, ID).

237. Indian nations and organizations opposing the Steelhead Trout Protection Act heavily relied on legal frames and arguments to persuade members of Congress to protect their tribal sovereignty and treaty fishing rights. See *infra* Part V. My previous research details how Indian proponents have used legal arguments and frames to protect their tribal sovereignty, build their institutions, and

federal Indian law, including tribal sovereignty,²³⁸ self-determination,²³⁹ the trust relationship,²⁴⁰ and treaties.²⁴¹ They also made very specific legal arguments about how a particular proposed law would undermine existing federal laws.²⁴²

Indian advocates used the law in varying ways across subject matters and kinds of Indian-related bills. Indian advocates often employed the law to argue for improvements to general bills that would harm their interests.²⁴³ They seemed to be utilizing the law to educate members of Congress about the government-to-government relationship between the federal government

maintain control over their lands and natural resources. Carlson, *Making Strategic Choices*, *supra* note 16, at 939; Carlson, *Lobbying as a Strategy for Tribal Resilience*, *supra* note 19, at 1177–20.

238. See, e.g., *Steelhead Trout Protection Act Part I: Hearing on S. 874 Before the S. Comm. on Indian Affairs*, 97th Cong. (1981).

239. See, e.g., *Trust Fund Management Reform Act: Hearing on S. 1587 and S. 1589 Before the S. Comm. on Indian Affairs*, 106th Cong. 43 (1999) (statement of Reid Chambers) (raising concerns about the Office of Trust Fund Management not honoring self-determination); *Id.* at 42 (statement of Anna Whiting Sorrell) (requesting that Committee consider the impact of the proposed legislation on self-determination, which is an effective Indian policy); *Business Development on Indian Lands: Hearing on S. 613 and S. 614 Before the S. Comm. on Indian Affairs*, 106th Cong. 77 (1999) (statement of Harold D. Salway, President, Oglala Sioux Tribe) (referring to tribal self-determination by emphasizing the capacity of tribes to manage their own affairs).

240. See, e.g., *Trust Fund Management Reform Act: Hearing on S. 1587 and S. 1589 Before the S. Comm. on Indian Affairs*, 106th Cong. 50–51 (1999) (statement of Reid Chambers, Assiniboine and Sioux Tribes of the Ft. Peck Reservation) (discussing the importance of the trust responsibility and its relationship to treaties); *Federal Energy and Mineral Resources Act of 1982: Hearing on S. 2305 Before the S. Comm. on Energy and Natural Resources*, 97th Cong. 400 (1982) (statement of Patricia Brown, Three Affiliated Tribes of the Fort Berthold Reservation); *Id.* at 128 (statement of Saul Goodman, Shoshone and Arapahoe Indian Tribes, Wind River Reservation, WY).

241. See, e.g., *Trust Fund Management Reform Act: Hearing on S. 1587 and S. 1589 Before the S. Comm. on Indian Affairs*, 106th Cong. 50–51 (1999) (statement of Reid Chambers, Assiniboine and Sioux Tribes of the Ft. Peck Reservation); *Federal Energy and Mineral Resources Act of 1982: Hearing on S. 2305 Before the S. Comm. on Energy and Nat. Res.*, 97th Cong. 400 (1982) (statement of Patricia Brown, Three Affiliated Tribes of the Fort Berthold Reservation); *id.* at 128 (statement of Saul Goodman, Shoshone and Arapahoe Indian Tribes, Wind River Reservation, WY).

242. See, e.g., *Trust Fund Management Reform Act: Hearing on S. 1587 and S. 1589 Before the S. Comm. on Indian Affairs*, 106th Cong. 40–41 (1999) (statement of Anna Whiting Sorrell, Confederated Salish and Kootenai Tribes of the Flathead Reservation) (arguing that current implementation of the Trust Reform Act of 1994 conflicts with the Indian Self-determination Act of 1995 and forestalls implementation of tribal self-determination); *Internet Gaming: Hearing on S. 692 Before the S. Comm. on Indian Affairs*, 106th Cong. 66–68 (1999) (statement of Richard Williams, Chairman, Lac Vieux Desert Band of Chippewa Indians) (arguing that the bill amends IGRA in a harmful manner that would disrupt the delicate balance between tribes and states and recommending that Class II gaming be exempted from the prohibition on internet gaming).

243. See, e.g., *Trust Fund Management Reform Act: Hearing on S. 1587 and S. 1589 Before the S. Comm. on Indian Affairs*, 106th Cong. 40–41 (1999) (statement of Anna Whiting Sorrell, Confederated Salish and Kootenai Tribes of the Flathead Reservation); *Internet Gaming: Hearing on S. 692 Before the S. Comm. on Indian Affairs*, 106th Cong. 68–70 (1999) (statement of Richard Williams, Chairman, Lac Vieux Desert Band of Chippewa Indians).

and Indian nations, as well as raising concerns about how specific proposed laws could impact existing federal laws.

The advocacy of the Three Affiliated Tribes of the Fort Berthold Reservation, the Shoshone and Arapahoe Indian Tribes of the Wind River Reservation in Wyoming and the Council of Energy Resource Tribes on the Federal Energy and Mineral Resources Act of 1982 illustrates how Indian advocates employed the law to persuade legislators to improve a proposed bill. The Federal Energy and Mineral Resources Act of 1982 sought to improve laws related to the obligations of lessees of federal and Indian oil and gas leases, to clarify the authority of the Secretary of the Interior to maintain a proper system of royalty management, accounting and collection, and to encourage enforcement practices necessary to ensure proper collection of revenues.²⁴⁴ The Three Affiliated Tribes of the Fort Berthold Reservation, the Shoshone and Arapahoe Indian Tribes of the Wind River Reservation in Wyoming, and the Council of Energy Resource Tribes wanted Congress to eliminate Section 20 of the Federal Energy and Mineral Resources Act of 1982, which required tribes to pay up to one percent of their royalties into a fund for royalty accounting services.²⁴⁵ Indian advocates employed legal frames and arguments to persuade members of Congress to amend the bill. They argued that Section 20 violated a fundamental tenet of federal Indian law—the trust responsibility that exists among the tribes and the federal

244. The Federal Royalty Management Act of 1982, S. 2305, 97th Cong. (1982). The bill responded to concerns about the archaic nature of the royalty accounting system and thefts of oil and gas from federal and Indian lease sites that lacked adequate security measures. The Department of the Interior had appointed a Commission on Fiscal Accountability of the Nation's Energy Resources (commonly known as the Linowes Commission, after its Chairman, David F. Linowes), which conducted a thorough investigation. The draft bill included many of the recommendations made by the Linowes Commission. *Federal Energy and Mineral Resources Act of 1982: Hearing on S. 2305 Before the S. Comm. on Energy and Nat. Res.*, 297th Cong. (1982).

245. *Federal Energy and Mineral Resources Act of 1982: Hearing on S. 2305 Before the S. Comm. on Energy and Nat. Res.*, 97th Cong. 400 (1982) (statement of Patricia Brown, Three Affiliated Tribes of the Fort Berthold Reservation); *Id.* at 128 (statement of Saul Goodman, Shoshone and Arapahoe Indian Tribes, Wind River Reservation, WY); *Id.* at 138 (statement of Ed Gabriel, Council of Energy Resource Tribes). Other tribes supported these efforts as well. Mailgram from Norman Hollow, Chairman of the Ft. Peck Tribal Executive Board to Senator John Melcher (May 11, 1982) (on file with the National Archives, The Center for Legislative Archives, Senate Committee on Indian Affairs, files on S. 2305); Letter from Marvin Sonosky to Senator James McClure (May 24, 1982) (on file with the National Archives, The Center for Legislative Archives, Senate Committee on Indian Affairs, files on S. 2305); Comments of the Blackfoot Tribe on S. 2305 (on file with the National Archives, The Center for Legislative Archives, Senate Committee on Indian Affairs, files on S. 2305); Mailgram from Allen Rowland, Chairman, Northern Cheyenne Tribal Council to Senator Melcher (May 10, 1982) (on file with the National Archives, The Center for Legislative Archives, Senate Committee on Indian Affairs, files on S. 2305); Mailgram from John Windy Boy, Chairman, Chippewa-Cree Business Committee to Senator Melcher (May 10, 1982) (on file with the National Archives, The Center for Legislative Archives, Senate Committee on Indian Affairs, files on S. 2305).

government.²⁴⁶ They emphasized how problems with the royalty management system, which allowed oil companies not to pay royalties to the tribes for many years, breached the federal government's duty to act as a trustee and protect Indian interests in their oil and gas.²⁴⁷ They argued that it was contrary to the government's trust responsibility and unfair for the government to now make the tribes pay for the administration of a program that had mismanaged leases on tribal trust land to their substantial financial detriment.²⁴⁸ Congress responded to tribal concerns by deleting Section 20 before incorporating the amended version of S. 2305 into H.R. 5121, the

246. *Federal Energy and Mineral Resources Act of 1982: Hearing on S. 2305 Before the S. Comm. on Energy and Natural Resources*, 97th Cong. 130 (1982) (statement of Saul Goodman, Shoshone and Arapahoe Indian Tribes, Wind River Reservation, WY) (“[I]t would be a breach of fiduciary duty to use tribal funds to pay for the royalty accounting on nontribal leases, and in this regard they are somewhat concerned by the manner in which section 20 is now drafted”); *Id.* at 403 (statement of Patricia Brown, Three Affiliated Tribes of the Fort Berthold Reservation) (“[Section 20] should be deleted. Its effect is to exact a charge from Indians for the fulfillment of the United States’ basic governmental and trust responsibilities. The treaties and statutes under which trust responsibilities were established do not contemplate such a charge. Surely, no segment of the population, never mind one of the neediest, should be directly charged for basic governmental services . . .”).

247. *Id.* at 140 (statement of Ed Gabriel, Council of Energy Resource Tribes) (“The DOI, as trustee to the tribes has the responsibility to effectively protect the tribes’ interests in Indian-owned resources held in trust. In regard to minerals management, it is clear that the Department, not the tribes, has failed over the years in carrying out that responsibility. It is also clear that the companies operating on Indian lands have too often failed to carry out their responsibilities as lessees, yet now we see the financial burden of correcting the Department’s problems being placed on the tribes through Section 20.”). They also informed Congress of the extent of the theft and underreporting of royalties that had already occurred. *Id.* at 128–29 (statements of Saul Goodman, Shoshone and Arapahoe Indian Tribes, Wind River Reservation, WY) (noting that the tribes had to recover over \$1 million in previously unpaid royalties after they investigated allegations of theft and underreporting of royalties on their reservation).

248. *Id.* at 129 (statement of Saul Goodman, Shoshone and Arapahoe Indian Tribes, Wind River Reservation, WY) (“Section 20 would require the Indian tribe to contribute up to 1 percent of their royalties to a fund to be used for royalty accounting purposes. In effect, the tribe would be required to pay the fund for the royalty management services of the Department of the Interior, at least to contribute a pro rata share. It is the view of the tribes that in light of what they have discovered during this investigation and what the Linowes Commission has concluded, that is, that these leases have been seriously mismanaged for years, the tribes do feel it is simply unfair to be asked to pay for these services. The services have been inadequate. The tribes have been required to put out a lot of money to bring the lease accounts into order now. The tribes have no assurance that they can stop investing, that they ought to stop investing their money now, but rather they must keep a careful eye to insure that things will be taken care of properly in the future, and in addition, although they have recovered substantial royalties, there are certain problems that occurred in the past that they may never be able to fully recover their losses for. Under these circumstances, the tribes simply feel that it would be unfair to be asked to pay the burden for these services that in the past have been so woefully inadequate.”); *id.* at 139–40 (statement of Ed Gabriel, Council of Energy Resource Tribes) (noting that Section 20 would place a substantial burden on Indian tribes and questioning the equity of that burden).

Federal Oil and Gas Royalty Management Act of 1982.²⁴⁹ Congress subsequently enacted the amended version of H.R. 5121.²⁵⁰

Indian advocacy on the Federal Oil and Gas Royalty Management Act of 1982 is instructive because it shows how Indian advocates employed legal frames and arguments in negotiating with legislators over the text. It reiterates that legislative advocacy is about the creation of legal texts and demonstrates how Indian advocates engaged with legislators to craft the law. Moreover, the response of legislators to legal frames and arguments used by Indian advocates indicates that these arguments may have some influence on legislators and that the law may matter more to legislators than previous studies have suggested.²⁵¹

V. IMPLICATIONS OF A LEGAL APPROACH FOR STUDYING LEGISLATIVE ADVOCACY

The implications of this research for advocacy studies, interest group studies, and legal scholars are significant. In a world in which advocates increasingly influence legislation and frequently draft laws, legal scholars, political scientists, and advocacy scholars need to develop more nuanced approaches to understanding the role advocates play and how they use the law in legislative lawmaking.²⁵² My research contributes to this larger project by expanding existing understandings of advocate behavior and emphasizing how advocates employ the law in legislative lawmaking.

This Article presents an innovative new approach to studying legislative advocacy from a legal perspective. It improves upon existing political science approaches for understanding how advocates behave by emphasizing how legislative advocacy occurs within and responds to an interactive and dynamic legislative process. It views the legislative process as a lawmaking enterprise and highlights the importance of the substantive content of its final product, statutory law, to legislative advocates and their behavior.

My legal approach to studying legislative advocacy combines theoretical and methodological insights from political science and legal literatures. It starts from the premise that advocates are strategic actors

249. H.R. 5121, 97th Cong. (1982); *see also* S. Rep. No. 97-512 (1982) (indicating that the Committee deleted the provision requiring tribal payment for royalty management services prior to reporting out the bill). The Three Affiliated Tribes of the Fort Berthold Reservation actually preferred H.R. 5121 to S. 2305. *Federal Energy and Mineral Resources Act of 1982: Hearing on S. 2305 Before the S. Comm. on Energy and Natural Resources*, 97th Cong. 400 (1982) (statement of Patricia Brown, Three Affiliated Tribes of the Fort Berthold Reservation).

250. Federal Oil and Gas Royalty Management Act of 1982, Pub. L. No. 97-451, 96 Stat. 2447.

251. BAUMGARTNER, ET AL., *supra* note 6, at 145; BURSTEIN, *supra* note 39, at 145–48 (not discussing legal arguments); Rubin, *supra* note 29, at 522.

252. Hasen, *supra* note 3, at 194.

seeking prescriptive goals within an interactive legislative process. It takes useful insights from the political science literature on lobbyist strategies, positions, and tactics and integrates them with legal scholars' conceptualization of the legislative process as a lawmaking enterprise.²⁵³ Borrowing from sociolegal studies of judicial advocacy, I emphasize how legislative advocacy is about the substance of the law and how legislative advocates employ legal frames and arguments in the legislative process.²⁵⁴ By examining the various positions advocates take and the arguments they make throughout the legislative process, my approach facilitates an in-depth exploration of how advocates negotiate legislative lawmaking and interact with legislators to craft the law through this dynamic, discursive process.

My analysis of American Indian advocacy serves as an illustrative example of the utility and richness of this approach. It uncovers two key insights about legislative advocacy that earlier approaches overlook. First, my account shows that advocates perceive legislative advocacy to be about modifying the substantive content of a proposed law. Recent political science studies discount the importance of a bill's substantive content by emphasizing binary win/loss advocacy strategies. In contrast, my account reveals that legislative advocates can—and frequently do—pursue a third strategy: to modify the substantive text of a proposed law. Indian advocates engaged in modification strategies, seeking to shape provisions in the legislative text, on the majority—53%—of the bills in this study.²⁵⁵ As modifiers, Indian advocates advocated broadly, frequently providing input on general laws as well as pan-tribal and tribe specific laws. Their advocacy covered a variety of subject matters from health, housing, and nuclear waste policy to water rights settlements and mineral resource development.

My data reveal that legislative advocates take a wider range of and more flexible positions on proposed bills than previous political science studies have suggested and that they use these positions strategically in their efforts to change the law.²⁵⁶ The positions taken by Indian advocates varied from proponents strongly for the bill to opponents strongly against, with several options in between in which advocates sought to modify the legislative text. Figure 5 displays the range of positions that legislative advocates take when advocating on a proposed law.

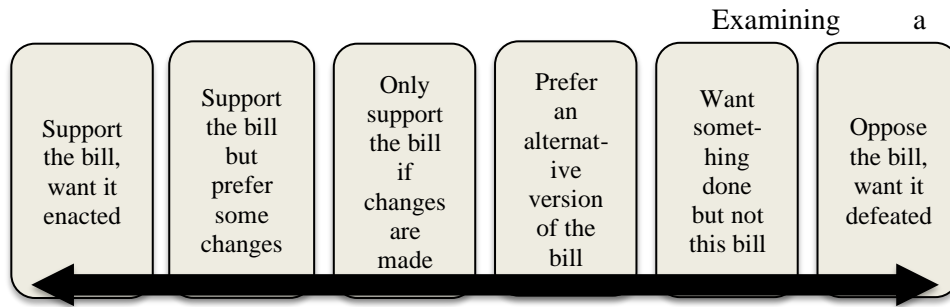
Figure 5: Continuum of Positions of Indian Witnesses Advocating on a Bill

253. *See supra* Part III.

254. *See supra* Part III.

255. *See supra* Part V.

256. *See supra* Part II.



wider range of advocacy positions provides unique insights into advocate behavior. It enables scholars to see aspects of legislative advocacy overlooked by existing political science studies, which have emphasized legislative advocacy as political rather than legal work.²⁵⁷ In contrast, my account of Indian advocacy highlights how Indian advocates emphasize the creation of legal texts in their advocacy and demonstrates how they use the law in shaping these texts. Focusing on the text enabled Indian advocates to interact with legislators to shape the law. As advocacy on the Older Americans Act Amendments of 1981, the Federal Energy and Mineral Resources Act of 1982, and the NAHASDA Amendments of 2000 shows, Indian advocates frequently educated members of Congress on how existing laws affected and could be improved to better serve the needs of Indian country by arguing for changes to specific provisions in proposed laws.²⁵⁸

Indian advocates often acted strategically in taking positions on and making arguments about proposed laws. Indian advocates frequently used their position on a bill to negotiate legislative texts and were open to shifting their positions as they interacted with legislators to craft laws. Consider how the Osage Tribal Council and Tohono O’odham Nation navigated the legislative process.²⁵⁹ Both tribes used their positions to negotiate for provisions in proposed laws more responsive to their needs. By uncovering these interactions among legislative advocates and legislators, my account validates existing descriptive theories and studies that portray the legislative process as dynamic and interactive. As a result, it produces a more accurate description of how advocates treat the legislative process as a lawmaking enterprise.²⁶⁰

257. See *supra* Part II.

258. See *supra* Part IV.

259. See *supra* Part IV.

260. See *supra* Part II.

Second, my account of Indian advocacy emphasizes that legislative advocacy is legal work. Recognizing modifiers and highlighting their role within the legislative process illuminates the legal aspects of the legislative process because modifiers are all about shaping the content of the proposed law. Indian modifiers often targeted provisions of bills or used the legislative process to negotiate and shape federal Indian policy more generally.

My examination of Indian advocacy also reveals that Indian advocates perceived the law to be an important part of their advocacy. Indian proponents, opponents, and modifiers frequently relied on legal frames, especially those central to federal Indian law, and legal arguments to shape proposed laws affecting their interests. While some Indian advocates made cogent arguments about how proposed laws would undermine existing ones, others used wider legal frames, such as the trust relationship between tribal and federal governments, to educate members of Congress about their sovereign status as governments and to justify their requests for changes to proposed laws.

A few final observations suggest the broader implications of this legal approach for advocacy studies, interest group studies, and legal scholars. First, my research indicates that legal scholars need to rethink their reliance on political science studies of legislative advocacy. A political science framework underemphasizes the interactive and legal aspects inherent in the legislative process. Congress is the primary author of federal law and, as this study shows, should be viewed as potentially the most powerful legal institution in the United States.²⁶¹ Overlooking how legislative advocates interact with legislators to craft statutory laws leaves legal scholars and advocates with a limited view of the lawmaking process. It undermines their ability to develop law reform strategies and prescriptive theories to improve the law.

To facilitate scholars in rethinking legislative advocacy, this Article presents an innovative, mixed-method approach for studying legislative advocacy that produces richer and more accurate descriptions of how advocates behave and use the law in legislative lawmaking. My account of Indian advocacy demonstrates how legislative advocacy extends beyond proponents and opponents by describing how legislative advocates frequently act as modifiers, seeking to shape the law. Modification strategies enabled Indian advocates to participate widely in the lawmaking process. Indian modifiers used the legislative process to educate members of Congress on a wide variety of subject matters and kinds of bills. This broader description of legislative advocacy expands on existing studies by

261. Rudesill, *supra* note 13, at 700.

uncovering how advocates view the legislative process as an opportunity to negotiate legal texts. It also documents how advocates attempt to shape the law even when they are not major participants or stakeholders on a proposed bill.²⁶² Indian modifiers often behaved strategically through the positions they took even when they were not considered major stakeholders on a proposed law. My legal approach, thus, devises a way for scholars to develop more accurate descriptions of legislative advocacy by recognizing that the legislative process is an interactive, lawmaking enterprise widely used by legislative advocates to craft statutory laws.

A second important implication of my account is that it indicates that scholars and advocates need to think more carefully and critically about how legislative advocates act strategically to negotiate the legislative process through the positions they take. The widespread use of modification strategies by Indian advocates suggests that legislative advocates see the legislative process as negotiable and relational.²⁶³ Contrary to recent political science studies,²⁶⁴ legislative advocates do not always take binary or fixed positions but frequently adapt their positions throughout the process in response to their interactions with legislators and other political actors. My account, thus, expands on recent studies of how legislative advocates act strategically by documenting how, when, and why legislative advocates adapt their positions throughout the legislative process in response to the opportunities and constraints that arise.²⁶⁵ Importantly, it shows how Indian modifiers sought to create their own opportunities to change the law through the positions they took and the arguments they made about specific provisions in a bill. Consider the sophisticated strategy used by the Three Affiliated Tribes of the Fort Berthold Reservation on Federal Energy and Mineral Resources Act of 1982 as an example. The Tribes supported the general goal of the bill to improve oversight of leasing of federal lands, but they used the bill as an opportunity to address particular problems plaguing the leasing of tribal lands and drew heavily on legal arguments to prevent Congress from enacting sections that would further deprive tribes of revenues generated from the leasing of their lands.²⁶⁶ Accounts that do not consider the dynamic, interactive nature of the legislative process may overlook or miss much of the strategic behavior that legislative advocates engage in throughout the legislative process.

262. BAUMGARTNER, ET AL., *supra* note 6, at 3.

263. ZIV, *supra* note 53, at 212–13.

264. See, e.g., BAUMGARTNER, ET AL., *supra* note 6, at 6–7; BURSTEIN, *supra* note 39, at 115.

265. BAUMGARTNER, ET AL., *supra* note 6, at 110–13.

266. See *supra* Part IV.

Third, my findings may have significant implications for how scholars and advocates think about the power groups have and how they exercise it within the legislative process. Indian modifiers frequently leveraged what power they had through their positions and arguments. They were able to leverage their power more broadly than one would have expected possible for a group that has almost no electoral clout and few political resources.²⁶⁷ Yet, Indian advocates leveraged their positions to shape the content of proposed laws even when they were not major stakeholders on a bill. For example, even though Indian elders constitute a very small percentage of the elderly population in the United States, the NCAI used targeted advocacy on the Older Americans Act Amendments of 1981 to improve programs for elders in Indian country.²⁶⁸ While determining exactly how and why Indian advocates were able to do this is beyond the scope of this Article, it raises important questions about how our most accountable lawmaking institution interacts with underrepresented groups. Previous studies have lamented the inequalities of the lobbying system,²⁶⁹ but my research suggests that a deeper look may reveal that underrepresented groups engage in the legislative process more frequently or in different ways than scholars currently think, and that Congress sometimes responds to them.²⁷⁰ Future studies could reshape how scholars, advocates, and courts think about power and power relationships.

My research also challenges scholars to think more carefully about how legislative advocates use the status quo in their arguments and advocacy. Scholars have long recognized the force of the status quo as an obstacle to legal change in the legislative process.²⁷¹ Recent political science studies have emphasized the status quo as a tool used by opponents to defeat proposed legislation.²⁷² My investigation of American Indian advocacy, however, calls into question whether these scholars have accurately described how legislative advocates use arguments about the status quo.²⁷³ Indian modifiers frequently sought to challenge the status quo yet made arguments that highlighted the negative consequences that would occur if Congress

267. Carlson, *Lobbying Against the Odds*, *supra* note 16, at 45.

268. *See supra* Part IV.

269. BAUMGARTNER, ET AL., *supra* note 6, at 254-59; SCHLOTZMAN & TIERNEY, *supra* note 6, at 311.

270. The examples in this study suggest that Indian modifiers frequently used texts to educate members of Congress about the unique conditions and needs of Indian country. Members of Congress appeared interested in learning about these needs and responding to them. A pernicious side may exist to this in terms of rent-seeking by lobbyists for specialized interests, but my data does not suggest that Indian advocates are engaged in rent-seeking.

271. BAUMGARTNER, ET AL., *supra* note 6, at 140; ESKRIDGE, ET AL., *supra* note 54, at 25.

272. BAUMGARTNER, ET AL., *supra* note 6, at 140.

273. *See supra* Part II.

enacted the proposed bill. These Indian modifiers emphasized the drawbacks of the proposed bill not because they were defending the status quo but because they wanted Congress to improve the bill to serve the needs of Indian country more efficiently and effectively. My findings, thus, suggest that scholars need to pay closer attention to the arguments being made by legislative advocates and how they relate to the status quo.

A final important implication of this research is that it reveals that, contrary to recent political science studies deemphasizing legislative advocacy as legal work, legislative advocates perceive the law as an important aspect of their legislative advocacy. Indian advocates often used the law in their arguments for changes to legislative texts. In this respect, my research expands on existing advocacy studies, which have emphasized how and when legislative advocates make policy arguments, by demonstrating that legal arguments also play a vital role in legislative lawmaking.

My research, thus, contributes to a growing literature on how advocates use the law in non-judicial settings and suggests that advocacy scholars need to think more carefully and critically about how advocates employ the law in legislative settings. Contrary to the view that the law matters less in the legislative process because legislators respond to policy arguments,²⁷⁴ the law mattered to Indian advocates. They found the law to be a useful tool in educating members of Congress about the special government-to-government relationship between Indian nations and the federal government. They employed legal arguments to persuade members of Congress to make changes to proposed laws so that they would not undermine existing federal laws, treaty rights, or tribal sovereignty.²⁷⁵ The fact that legislative advocates take the law and legal arguments seriously as part of their advocacy suggests that future studies should pay more attention to the kinds of legal frames and arguments that advocates use in legislative settings and evaluate their influence on legislators.

VI. CONCLUSION

Legislative advocacy has increased exponentially in the past five decades, yet recent scholarship has overlooked the legal aspects of legislative lawmaking. This Article responds to this gap in the literature by presenting an innovative, mixed-methods approach to studying legislative lawmaking. My approach improves on existing political science studies by emphasizing the legislative process as a lawmaking enterprise. It highlights the importance of the substantive content of laws to legislative advocates and their behavior. The

274. Rubin, *supra* note 29, at 522.

275. *See supra* Part V.

Article then demonstrates the utility of a legal approach through an investigation of American Indian advocacy, which reveals two important insights about legislative advocates' behavior overlooked in previous studies. First, my account reveals that legislative advocates perceive legislative advocacy as about modifying the substantive content of a proposed law. It shows how Indian advocates engaged in nuanced and sophisticated strategies to interact with legislators and other political actors to craft statutory laws. Second, my account of Indian advocacy emphasizes that legislative advocacy involves legal as well as political work. Indian advocates regularly used legal frames and arguments to educate and persuade legislators.