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STATUTES AND SPECIAL INTERESTS

Kirsten Matoy Carlson

ABSTRACT—Who really decides what statutes say? Most Americans think that special interests play an outsized role in our lawmaking processes. Yet empirical studies have produced little evidence that special interests get everything, or even most of, what they ask for from Congress. This Article takes an innovative new approach to tackling the difficult question of how advocates influence legislation. It presents the first comprehensive empirical study of how advocates influence the law through amendments in the legislative process. The Article analyzes an original dataset of 2,137 witnesses and their testimony at referral hearings on 108 Indian-related bills in the 97th and 106th Congresses. The analysis identifies amendments as an important yet previously undocumented way in which advocates influence legislation. It uncovers a rarely observed relationship between legislative advocates and sitting members of Congress. Comparison of advocates' testimony on bills to amendments proposed by members of Congress reveals similar and even identical language, providing compelling evidence that advocacy groups persuaded legislators to introduce amendments valued by the group. The analysis also demonstrates how advocate influence at the hearing stage of the legislative process frequently shapes the law by dramatically increasing the likelihood of legislative enactment. These findings reveal an important mechanism advocates can use to change the law. Further, they challenge prevailing narratives about power by demonstrating how underrepresented groups can leverage the legislative process in their law reform efforts.

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INTRODUCTION

Ask people about who really controls lawmaking, and they almost always mention special interests. Most Americans believe that, beneath the timelines and descriptions they learned about in school, "special interests" have an outsized role in the legislative process. To a certain extent, that is true. The question for political scientists, sociologists, and others is how and when special interests influence legislation. This Article explores that question empirically, but from a different perspective than much of the existing literature—and one that is of particular importance to lawyers. It

focuses on how advocates make arguments that influence the content of statutory law during the legislative process.

A lawyer's ability to shape statutory law depends on an understanding of the legislative process.[1] Statutory law governs almost every aspect of modern life, making this ability essential.[2] Legislative law reform strategies bear increasing importance at a time when many question the Supreme Court's commitment to protecting individual rights.[3] A Supreme Court less receptive to rights claims raises special concerns for underrepresented groups, which are thought to fare worse in the political process.[4] Lawyers must know how to craft legislative strategies to advocate successfully for their clients. They deserve more nuanced understandings of the legislative process and how it can be employed to change the law so they can use legislative strategies effectively as part of their law reform efforts.[5] Otherwise, lawyers may overlook the tremendous value of legislative fora as alternative and complementary avenues to courts and administrative agencies for legal change.[6]

In this Article, I tackle the difficult question of how advocates influence legislation. I unpack this question by presenting the first comprehensive empirical study of how advocates use amendments in the legislative process to change the law. The study analyzes an original dataset of referral hearings on 108 Indian-related bills in the 97th and 106th Congresses. My research asks: To what extent do legislators adopt amendments proposed by advocacy groups in referral hearings? The analysis uncovers a rarely observed relationship between legislative advocates and sitting members of Congress, showing that advocates exercise influence over the text of bills and enacted laws. It provides compelling evidence that advocates persuade members of Congress and shape the law through amendments.

Part I provides the theoretical framework of this Article and situates it within the various approaches to the study of "interest groups" and their

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[1] *See infra* Part I.

[2] ABNER J. MIKVA, ERIC LANE & MICHAEL GERHARDT, LEGISLATIVE PROCESS 3 (4th ed. 2015).

[3] *See* Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, 130 YALE L.J.F. 821, 821–27, 831–32 (2021) (discussing the legitimacy crisis surrounding the Court and scholarly suggestions for reform); Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 231–53 (2020) (discussing structural reforms to increase democratic practices in uncertainty over individual rights).

[4] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135–79 (1980) (noting that discrete and insular minorities are politically disadvantaged).

[5] 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, 709 (2010).

[6] *See infra* Part I.

influence. The framework pivots on an understanding of what is known as the "legal model" of decision-making. The legal model of decision-making states that legal arguments made by parties in briefs and oral arguments influence the opinions written by judges.[7] This model is distinct from the approach generally taken by political scientists, who rarely examine statutory texts but instead focus on bill enactments. Bill enactment rates are important, but they overlook the importance of statutes as legal texts. For example, studying the enactment of the Violence Against Women Act of 2013 does not provide any information on the significant legal protections it contains for women or how those provisions affect existing law. Yet, the statute dramatically changed the law. The title on Native women alone transformed the existing criminal law by reaffirming inherent tribal criminal jurisdiction over non-Indians in response to the epidemic of violence against Native women.[8] The content of statutes is central to understanding the law and explaining its development.

Here, I borrow from the legal model to argue that advocates have the potential to influence the content of statutes through the language used in referral hearings on a specific bill. I conceptualize bills as legal texts akin to judicial opinions. I argue that the influence of advocacy groups can be identified by comparing the amendments they request in a referral hearing with the final bill. Mirroring how scholars have traced litigants' arguments through the judicial process to show their influence on judicial opinions, I trace amendments suggested by advocacy groups through the legislative process to determine their influence on statutes.

My adaptation of the legal model is valuable because it facilitates understanding how advocacy groups shape the law. The approach allows for an examination of influence in the legislative process beyond the existing interest group literature by revealing how information influences a bill as it progresses through the legislative process. It builds on previous research examining how interest groups leverage language in their advocacy efforts across legal and political venues.[9] This enables an investigation of how groups use amendments to influence statutory language and, thus, law reform. It contextualizes advocates' use of information by examining how advocates make arguments in response to texts and utilize amendments to shape the law and ongoing legal discourse.

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[7] *See infra* Part I.

[8] Kirsten Matoy Carlson, *Lobbying as a Strategy for Tribal Resilience*, 2018 BYU L. REV. 1159, 1194.

[9] *See, e.g.*, Paul M. Collins Jr., Pamela C. Corley & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 L. & SOC'Y REV. 917, 919 (2015) (using quantitative methods to study the effects of amicus curiae briefs on Supreme Court opinion content).

Beyond its theoretical value, the approach taken in this Article could help bridge the divide between the two dominant methodological approaches to understanding legislation. On the one hand, legal approaches to studying legislation involve in-depth legislative histories or interpretation of specific statutes. In contrast, political scientists study Congress using statistical techniques to analyze hundreds or thousands of statutes in a single investigation. Thus, this Article's approach combines the generalizability of quantitative studies with the depth provided by more traditional qualitative approaches that focus on statutory history or interpretation.

Part II adapts and operationalizes the legal model to study legislative influence. Native advocacy provides an illustrative case study of the utility of the generalizable methodology theorized in Part I. The study investigates congressional testimony by tribal governments and Native organizations on 108 Indian-related bills introduced in the 97th and 106th Congresses.[10] The examination of Native advocacy facilitates a thorough investigation of legislative influence for two reasons. First, most organized interests focus on a few issues,[11] but advocates for tribal governments and Native organizations have a much broader agenda. They use myriad 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).[12] Due to its breadth, Indian advocacy covers most issues pursued by interests across the United States. Thus, Native advocacy can be used to understand legislative advocacy within the United States across many subject matters.[13] Second, conventional narratives suggest that as a politically underrepresented group, Native Nations would not fare well in the political process. Yet, in comparison to the amount of general legislation enacted, Congress passes a

[10] This study focuses on advocacy by governments, organizations, and individuals identified as American Indian or Native American. Throughout the Article, I use aggregate terms rather than tribe-specific names (e.g., Navajo Nation) because the study is not limited to a particular nation, government, or community. I use "Indian" or "American Indian" interchangeably with "Native" or "Native American" because federal laws refer to and define governments, communities, and individuals as Indian. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.01 (LexisNexis Nell Jessup Newton et al. eds., 2012) (1941).

[11] *See, e.g.*, Frank R. Baumgartner & Beth L. Leech, *Interest Niches and Policy Bandwagons: Patterns of Interest Group Involvement in National Politics*, 63 J. POL. 1191, 1202 (2001); *see also* JACK L. WALKER JR., MOBILIZING INTEREST GROUPS IN AMERICA 68–73 (1991) (finding that most interest groups specialize in a narrow subset of issues); William P. Browne, *Organized Interests and Their Issue Niches: A Search for Pluralism in a Policy Domain*, 52 J. POL. 477, 477 (1990) (finding that interest groups "define themselves in terms of carefully constructed issue niches").

[12] Carlson, *supra* note 8, at 1172–220.

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

disproportionately high number of bills affecting individual American Indians and tribal governments.[14] The high number of bills enacted affecting American Indians provides an opportunity to investigate the mechanisms by which groups influence the law through the legislative process.

Relying on original data collected from testimony at congressional hearings on 108 bills during the 97th and 106th Congresses, I describe whether, when, and how tribal governments and Native organizations suggest amendments to specific bills. I then compare amendments requested by Native witnesses with amendments adopted by members of Congress to identify Native influence on a specific bill. I contend that Native groups influenced the bill's development when members of Congress incorporated their suggested amendments into the bill. Finally, I present logistic regression models that examine whether Congress is more likely to enact a bill if a committee first amended the bill in response to Native testimony.

Part III presents the major findings from the study. The results show that advocates frequently influence federal legislation through amendments. As expected, Indian advocates used the congressional hearing process to advance favorable amendments and negotiate with members of Congress over legislative texts. They requested amendments on a majority (54%) of the Indian-related bills with Indian advocacy at the referral hearing for the bill.

More significantly, the study reveals a rarely observed relationship between legislative advocates and sitting members of Congress in which Native advocates influenced the law by proposing amendments that members of Congress adopted before bill enactment. Members of Congress amended over half (57%) of the bills in response to Indian requests for amendments.[15] Comparative textual analysis showed that amendments incorporated by members of Congress responded directly to the amendments suggested by Native advocates. The adoption of these amendments thus provides compelling evidence that Native advocates influenced the content of the law by proposing these amendments.

Further analysis built on these results shows how advocate influence at the hearing stage of the legislative process frequently shaped the law by boosting the likelihood of legislative enactment. The likelihood of enactment for a bill dramatically increased if Congress amended the bill in response to Native advocacy. The numbers tell an incredible story. Congress routinely enacts about 4% of all introduced bills.[16] Previous research has shown

[14] Kirsten Matoy Carlson, *Congress and Indians*, 86 U. COLO. L. REV. 77, 113–17 (2015).

[15] *See infra* Part III.

[16] Carlson, *supra* note 14, at 118 (finding that Congress enacted 3.9% of all introduced bills from 1975 to 2012).

that Congress often enacts Indian-related bills at twice that rate.[17] In the period considered in this study, Congress enacted a quarter of the Indian-related bills introduced. That number, however, escalated when amendments in response to Indian advocacy were considered. Congress enacted 39% of the bills it amended in response to Indian advocacy.[18] The percentage increased to 70% when accounting for enacting a policy in a bill that was amended in response to Indian advocacy and incorporated into a subsequent, related, or alternate bill. While my findings do not necessarily show that adopting an amendment influenced a bill's enactment, they demonstrate that hearing testimony influenced statutory content and thus shaped the law.

Part IV considers the significant implications of this research for key constituencies in American democracy. For lawyers and legal scholars, the findings in this Article demonstrate the utility of a legal model for studying legislation because it more accurately responds to their interests in using the legislative process to shape the law. For scholars of advocacy groups, the results indicate the importance of looking beyond traditional conceptions of interest group influence based on policy adoption to uncover how advocates shape legislative texts and may influence legislation incrementally, even if they fail to attain everything they want. For Native Nations and advocacy groups more generally, the study reveals an important mechanism, namely amendments, for influencing the development of the law.

I. UNDERSTANDING ADVOCACY GROUP INFLUENCE ON LEGISLATION

This Part situates the theoretical model advanced in this Article within the existing cross-disciplinary literature on legislation. First, I explain how legal scholars have effectively ceded key scholarly inquiries into legislative advocacy to political scientists, who have primarily focused on bill enactment as the key variable of interest. As a result, there have been very few investigations into how information provided by advocates to lawmakers influences statutes. I turn to legal scholarship to identify conceptual and methodological tools to develop a richer understanding of bills as legal texts. Finally, I extend the legal decision-making model to the legislative process to conceptualize and measure advocacy group influence on statutes.

A. Interest Group Approaches

Legal scholars have largely left the study of legislative advocacy and influence to political scientists.[19] Interest group scholars have made

[17] *Id.* at 113–17.

[18] *See infra* Section III.C.

[19] Kirsten Matoy Carlson, *Rethinking Legislative Advocacy*, 80 MD. L. REV. 960, 967–73 (2021).

important contributions to understanding how, when, and why advocacy groups influence the legislative process. Yet, they have largely ignored statutory content, focusing instead on how political factors, such as resources, partisanship, and opposition, affect bill enactment.[20]

Most political scientists agree that groups attempt to influence legislative decision-making by providing members of Congress with information or resources.[21] Informational theories posit that advocates influence the legislative process by providing credible information to legislators and staffers about a proposed law.[22] Advocates provide information to change or reinforce legislators' beliefs about legislative outcomes, the operational effects of policies, and the electoral ramifications of their actions.[23]

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[20] FRANK R. BAUMGARTNER & BETH L. LEECH, BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND IN POLITICAL SCIENCE xv–xix (1998); PAUL BURSTEIN, AMERICAN PUBLIC OPINION, ADVOCACY, AND POLICY IN CONGRESS: WHAT THE PUBLIC WANTS AND WHAT IT GETS 16–18 (2014); Baumgartner & Leech, *supra* note 11, at 1194.

[21] JEFFREY M. BERRY, LOBBYING FOR THE PEOPLE: THE POLITICAL BEHAVIOR OF PUBLIC INTEREST GROUPS 11 (1977); JOHN R. WRIGHT, INTEREST GROUPS AND CONGRESS: LOBBYING, CONTRIBUTIONS, AND INFLUENCE 75–97 (Longman 2003) (1996); Paul Burstein & C. Elizabeth Hirsh, *Interest Organizations, Information, and Policy Innovation in the U.S. Congress*, 22 SOCIO. F. 174, 175 (2007); BURSTEIN, *supra* note 20, at 100.

[22] KEN GODWIN, SCOTT H. AINSWORTH & ERIK GODWIN, LOBBYING AND POLICYMAKING: THE PUBLIC PURSUIT OF PRIVATE INTERESTS 5 (2013); WRIGHT, *supra* note 21, at 75–97; FRANK R. BAUMGARTNER, JEFFREY M. BERRY, MARIE HOJNACKI, DAVID C. KIMBALL & BETH L. LEECH, LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY 65 (2009).

[23] WRIGHT, *supra* note 21, at 75. Other political science theories for understanding how interest groups influence legislative lawmaking include exchange and pluralist theories. Exchange theories contend that "members of Congress agree to support legislation and advocate for certain special interests in exchange for electoral support from those special interests." Lee Drutman, *The Complexities of Lobbying: Toward a Deeper Understanding of the Profession*, 43 PS: POL. SCI. & POL. 834, 834–35 (2010); *see also* GODWIN ET AL., *supra* note 22, at 25, 30–36. Pluralist theories assume that groups compete for policy outcomes. Lobbyists on both sides of an issue use their resources to influence policy in their preferred direction. *See id.*

Empirical support for exchange and pluralist theories are mixed. *Id.* at 38–39, 42–43. Scholars have struggled to show how resources translate into influence and lead to specific outcomes. David Lowery, *Lobbying Influence: Meaning, Measurement and Missing*, 2 INT. GRPS. & ADVOC. 1, 4 (2013); BAUMGARTNER ET AL., *supra* note 22, at 208–09. Similarly, scholars have not found direct evidence of the exchange theory, relying instead on indirect evidence that interest groups benefit from lobbying while legislators gain financial advantages from interest group support. GODWIN ET AL., *supra* note 22, at 38–39; Drutman, *supra*, at 835 (noting that he saw no evidence in support of this theory as a legislative staffer); Lowery, *supra*, at 1; Amy McKay, *Buying Policy? The Effects of Lobbyists' Resources on Their Policy Success*, 65 POL. RSCH. Q. 908, 908 (2012). *But see* Amy Melissa McKay, *Fundraising for Favors? Linking Lobbyist-Hosted Fundraisers to Legislative Benefits*, 71 POL. RSCH. Q. 869, 869 (2018) [hereinafter McKay, *Fundraising for Favors?*] ("[S]enators are more likely to perform legislative favors for lobbyists who fundraise for them than for lobbyists and groups that do not.").

Few empirical studies, however, have tried to operationalize and test how information affects legislation.[24] Scholars have shown that advocates provide legislators with information through their arguments on bills.[25] They have documented how the arguments made by advocates vary by the positions advocates take on the bill.[26] A recent study demonstrated how legislative advocates use existing law to argue for, argue against, and modify proposed bills during congressional hearings.[27]

Even fewer scholars have investigated beyond the documentation of advocacy arguments to see how the information provided by advocates influences lawmakers as they craft specific policies.[28] Professor Paul Burstein used testimony at referral hearings to link advocacy on a specific bill to its enactment.[29] He found that arguments made at congressional hearings on specific policy proposals influenced the likelihood of the policy's enactment.[30] His research showed that proponents' arguments for the law increased the likelihood of a bill's enactment, while opponents' arguments against a bill decreased the likelihood of its enactment.[31]

Two recent studies have extended Burstein's findings by showing how the influence of legislative advocates may emerge in amendments proposed by members of Congress. Professor Amy McKay demonstrated how similar

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Lawyers often find the emphasis on resources, and their link to influence prominent in exchange and pluralist theories, oversimplifies legislative lawmaking. Resources may play a role, but many legal scholars contend that ideas and arguments matter as well.

[24] Political scientists started to develop models that saw legislators and advocates engaged in negotiation and persuasion, but most recent studies have shifted away from the discursive aspects of legislative lawmaking. Richard A. Smith, *Interest Group Influence in the U.S. Congress*, 20 LEGIS. STUD. Q. 89, 98–104 (1995).

[25] BAUMGARTNER & LEECH, *supra* note 20, at 129–48; BURSTEIN, *supra* note 20, at 142–59.

[26] BAUMGARTNER & LEECH, *supra* note 20, at 139–43; BURSTEIN, *supra* note 20, at 148.

[27] Carlson, *supra* note 19, at 1010–14.

[28] BURSTEIN, *supra* note 20, at 100 ("Very little is known about whether individuals and organizations provide elected officials with the information they want or if the information affects policy."); Kirsten Matoy Carlson, *Beyond Descriptive Representation: American Indian Opposition to Federal Legislation*, 7 J. RACE, ETHNICITY & POL. 65, 76–82 (2022).

[29] A referral hearing is a hearing held by a congressional committee on a specific introduced bill.

[30] BURSTEIN, *supra* note 20, at 154–56. Arguments about the proposed law's effectiveness influenced the likelihood of enactment, while arguments about the importance of the problem did not. *Id.* at 154–55. Attempts to reframe an issue did not impact enactment when made by proponents but reduced the odds of enactment when made by opponents. *Id.* at 155–56.

Some scholars have sought to understand advocate influence on lawmaking in regulatory processes. For example, Professors Yackee and Yackee measured the relative influence of businesses in agencies' comment and rulemaking process. Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 135 (2006).

[31] BURSTEIN, *supra* note 20, at 156 ("The likelihood of enactment is increased by proponents' arguments that the proposed policy would be effective and reduced by opponents' claims that the policy would be ineffective and by the amount of evidence provided by both supporters and opponents.").

language between advocacy letters to senators and the amendments they proposed to the Affordable Care Act revealed compelling evidence that groups persuaded legislators to introduce amendments favorable to the advocacy group.[32] Previous research has also confirmed that amendments may provide evidence of influence by advocates on a specific piece of legislation. A recent study found that members of Congress frequently amended bills in response to Indian opposition and that Congress was much more likely to enact bills with Indian opposition if a committee had amended the bill in response to that opposition.[33] These studies suggest that amendments may serve as one way that advocates use information to influence the legislative process. However, neither study investigates in detail the mechanics of this influence as a proposed law progresses through the legislative process nor fully considers how the specific language could affect legislative lawmaking.[34] As a result, neither examines how arguments shape statutory content.

These studies highlight the limits of the interest group approach. First, political scientists rarely consider statutory content. They emphasize political but not legal arguments in their studies of how arguments affect legislative enactment.[35] This focus on political arguments privileges the political process over the legislative product, namely statutes. It ignores how arguments affect the laws that develop out of the legislative process.

Second, the focus on bill enactment has led many interest group studies to take an instrumental, winner-take-all approach to influence that overlooks the often incremental nature of advocacy.[36] Political scientists have examined the relationship between advocacy and legislative outcomes by using enactment of legislation that a group favors to measure that group's influence.[37] Scholars have consistently found that it is easier for advocacy groups to defeat bills than enact them.[38] Beyond that, they have struggled to identify empirically the links between advocacy and the likelihood of a bill's enactment[39] or to show consistently that advocacy groups influence

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[32] McKay, *Fundraising for Favors?*, *supra* note 23, at 876.

[33] Carlson, *supra* note 28, at 76–82.

[34] *Id.*; McKay, *Fundraising for Favors?*, *supra* note 23, at 876–77. McKay suggests that the lobbyists were successful in getting many of their proposed amendments into the final bill but did not present data or analysis to support it. *Id.*

[35] Carlson, *supra* note 19, at 967–68.

[36] Lowery, *supra* note 23, at 11 ("If there is a resolution, one side must win, more or less. This implies that the other side must lose, more or less.").

[37] *See* BURSTEIN, *supra* note 20; BAUMGARTNER ET AL., *supra* note 22.

[38] BAUMGARTNER ET AL., *supra* note 22, at 239.

[39] *Id.* at 220–21; BURSTEIN, *supra* note 20, at 98.

legislative outcomes.[40] Further, the focus on bill enactment may explain the inattention to amendments, which seek to alter the substantive content of the law but, in most cases, are not thought to have a major effect on bill enactment.[41]

Interest group scholars have rarely examined incremental changes to statutory content as important wins, even though the legislative process often invites incrementalism, especially for repeat players.[42] Effective influence early on may affect success later. Members of Congress and their staffers often recycle language proposed in one bill and use it in later bills on the same subject matter. Consider, for example, the two most recent reauthorizations of the Violence Against Women Act (VAWA). Native women, in collaboration with the National Indigenous Women's Resource Center, the National Congress of the American Indian Violence Against Women Task Force, and the Indian Law Resource Center, gained the support of the Department of Justice. Together, they persuaded members of Congress to restore tribal criminal jurisdiction to tribal governments over four specific domestic violence crimes in the VAWA of 2013.[43] This restoration of jurisdiction set the stage for advocacy to extend tribal jurisdiction over other crimes when Congress reauthorized the VAWA again in 2022. Native advocates used the same language to argue for an extension of tribal criminal jurisdiction in 2022 as in 2013. Congress adopted this language in extending tribal criminal jurisdiction in the VAWA of 2022.[44] Native women's advocacy demonstrates how influence may occur over time through continued advocacy using the same ideas and language. Yet interest group studies rarely capture this, leaving open important questions about how the law develops incrementally over time through statutes.

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[40] Smith, *supra* note 24, at 122; BAUMGARTNER & LEECH, *supra* note 20, xv–xxii; Paul Burstein & April Linton, *The Impact of Political Parties, Interest Groups, and Social Movement Organizations on Public Policy: Some Recent Evidence and Theoretical Concerns*, 81 SOC. FORCES 381, 398–400 (2002).

[41] Amendments do not determine the fate of most bills, even though legislators have used or tried to use amendments to derail the passage of major legislation. WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY & JOSH CHAFETZ, LEGISLATION AND STATUTORY INTERPRETATION 55–64 (4th ed. Supp. 2011) (describing how Senator Ervin proposed the addition of gender discrimination to the 1965 Civil Rights Act to undermine its enactment); McKay, *Fundraising for Favors?*, *supra* note 23, at 872.

[42] KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 311 (1986) ("[T]he ability to have an impact on the details of a policy is not in the least a trivial form of influence.").

[43] Native women and the Department of Justice borrowed the language they suggested for inclusion in the VAWA of 2013 from earlier legislation restoring criminal jurisdiction over nonmember Indians to tribal governments. Carlson, *supra* note 8, at 1187–95; *see also* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120–23 (acknowledging inherent tribal criminal jurisdiction over domestic violence, dating violence, and criminal violations of a qualifying protection order); 25 U.S.C. § 1304 (adopting the jurisdictional language from the VAWA of 2013).

[44] 25 U.S.C. § 1304.

B. Studies of Legal Advocacy and the Legal Model of Decision-Making

Legal and socio-legal scholars also investigate advocacy, but they have yet to address fully the gaps in the political science literature. They study how advocates change the law[45] but have focused on advocates' influence on judicial lawmaking rather than legislative advocacy and its influence on statutory law.[46]

Lawyers, judges, and scholars largely adopt the legal model of decision-making, which theorizes that lawyers play a vital role in shaping the law.[47] The legal model suggests that lawyers influence the law by making arguments in briefs and oral arguments that judges adopt in their written opinions. Scholars trace this influence through the judicial process with the help of textual analysis.[48] They use textual analysis to document how legal

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[45] *See generally* STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (University of Michigan Press 2d ed. 2004) (1974) (assessing the impact of lawyers and litigation on public policy); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994) (discussing "the significance of legal norms, tactics, and institutional processes in the campaign for gender-based pay equity"); JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978) (examining how social movements attempt to use courts to change policy); Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 605 (2009) (analyzing how lawyers mobilize the law to effect policy changes and redistribute power).

[46] Legal scholars have traditionally focused on normative discussions of statutory law and have generated descriptions, critiques, and evaluations of existing laws and proscriptive arguments about what the law should be. More recently, some legal scholars have started investigating 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, 919–24 (2013) (surveying congressional staffers on topics including legislative history, canons of interpretation, and the legislative process); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 731–35 (2014) (relaying the second part of the survey results of the congressional staffers); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 578–82 (2002) (analyzing "a case study of legislative drafting"). Administrative law scholars have recently produced studies investigating the role of agencies in crafting federal legislation. *See* Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 467–95 (2017); CHRISTOPHER J. WALKER, FEDERAL AGENCIES IN THE LEGISLATIVE PROCESS: TECHNICAL ASSISTANCE IN STATUTORY DRAFTING 1, 11–28 (Sept. 2015), https://www.acus.gov/sites/default/files/documents/technical-assistance-draft-report.pdf [https://perma.cc/H3WP-LQAM].

[47] *See* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 748 (2000); JONATHAN D. CASPER, LAWYERS BEFORE THE WARREN COURT: CIVIL LIBERTIES AND CIVIL RIGHTS, 1957–66, at 6–7 (1972); Clement E. Vose, *The National Consumers' League and the Brandeis Brief*, 1 MIDWEST J. POL. SCI. 267, 290 (1957); Paul J. Wahlbeck, *The Life of the Law: Judicial Politics and Legal Change*, 59 J. POL. 778, 782 (1997).

[48] Collins et al., *supra* note 9, at 918, 920; Pamela C. Corley, *The Supreme Court and Opinion Content: The Influence of Parties' Briefs*, 61 POL. RSCH. Q. 468, 469 (2008); *see* LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 7

arguments and framing influence legal opinions and ideas.[49] Many legal and socio-legal scholars seem to assume that advocates use the law similarly in nonjudicial fora. Few studies in this field have sought to determine whether, when, and how legislative advocates employ the law in legislative contexts or influence legislation.[50] While some scholars have started to include legislative advocacy in their studies, they tend to borrow from and situate their examinations of legislative advocacy within socio-legal studies on social movements, cause lawyering, and/or judicial advocacy.[51] To my knowledge, no studies have tried to borrow the methodology of the legal model and apply it to the legislative process.

Nevertheless, existing work does indicate the potential usefulness of the legal model as a lens through which to analyze legislative lawmaking. For example, some legal and socio-legal scholars have developed case studies of legislative advocacy, leading to the enactment of important state or federal laws.[52] These legislative histories have provided insights into the legislative process as interactive and deliberative[53] and proceeding in stages with

(1992); TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 17–18 (2004); James F. Spriggs II & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RSCH. Q. 365, 369–71 (1997).

[49] *See* Kearney & Merrill, *supra* note 47, at 749.

[50] *See* 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).

[51] *See generally* MCCANN, *supra* note 45 (nestling discussion of legislative advances within discussion of broader social and legal movement); GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS (2009) (discussing legislative advocacy in the context of the law's influence on policy debate); Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1247–56 (2010) (providing an example of a socio-legal study on a social movement).

[52] *See, e.g.*, Holly J. McCammon, Courtney Sanders Muse, Harmony D. Newman & Teresa M. Terrell, *Movement Framing and Discursive Opportunity Structures: The Political Successes of the U.S. Women's Jury Movements*, 72 AM. SOCIO. REV. 725 (2007) (analyzing how legislative advocacy in support of women serving on juries affected lawmakers' decisions); Brayden G. King, Marie Cornwall & Eric C. Dahlin, *Winning Woman Suffrage One Step at a Time: Social Movements and the Logic of the Legislative Process*, 83 SOC. FORCES 1211 (2005) (providing an example of legislative advocacy leading to the enactment of laws); Chai Rachel Feldblum & Robin Appleberry, *Legislatures, Agencies, Courts and Advocates: How Laws Are Made, Interpreted, and Modified*, *in* THE WORK AND FAMILY HANDBOOK: MULI-DISCIPLINARY PERSPECTIVES AND APPROACHES 627 (Marcie Pitt-Catsouphes, Ellen Ernst Kossek & Stephen Sweet eds., 2006) (providing a case study to explain the processes by which laws are made with the help of legal advocates).

[53] *See, e.g.*, Feldblum & Appleberry, *supra* note 52, at 627–50 (demonstrating how the legislative process is evolving through legal advocacy); Bethany R. Berger, United States v. Lara *as a Story of Native Agency*, 40 TULSA L. REV. 5 (2004) (analyzing the relationship between Native agency and American policies); 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) (discussing lawyering for legislative reform on behalf of disadvantaged groups).

different opportunities for advocacy and influence at each stage.[54] These studies highlight the fluidity of the legislative process and how that encourages advocates to act relationally and reflexively to maximize their influence over the legislative text.[55] They emphasize that the purpose of the process—and advocate engagement in it—is to create law. These studies provide important insights into the legislative process as a lawmaking enterprise and how advocates engage with legislators throughout it.[56]

Some studies suggest that the core idea of the legal model, namely that arguments can be traced through a lawmaking process to identify influence, may extend to the legislative process. For example, previous research has revealed that legislative advocates perceive the legislative process to be about the law. It demonstrated that legislative advocates often rely on the law in the arguments they make to legislators.[57] Similarly, Professor Holly McCammon and her colleagues linked legal frames to influence; they found that legally framed arguments had a significant, positive effect on the passage of jury laws.[58] They argued that the persuasive power of arguments derives from advocates framing them in response to the cultural and political context.[59] These studies suggest that advocates may use legal arguments to persuade legislators to change the law, but scholars have yet to identify the various pathways through which influence may occur.

C. Extending the Legal Model of Decision-Making

This Article adapts and extends aspects of the legal decision-making model to examine advocates' influence in the legislative process. I argue that advocates can influence the content of statutes through the language they use in referral hearings on specific bills similar to how parties influence court opinions in briefs and oral arguments.

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

[55] 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 each holds 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.").

[56] Berger, *supra* note 53, at 12; Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 112–17 (2016).

[57] Carlson, *supra* note 19, at 1010–14.

[58] McCammon et al., *supra* note 52, at 740.

[59] *Id.* at 730.

I borrow the legal model's method and adapt it to the legislative process. To do this, I conceptualize and analyze statutes as legal texts, much like scholars treat judicial opinions in a legal decision-making model. I do not mean to imply that statutes are the same as judicial opinions but that both can be analyzed as legal texts.[60] Statutes differ from opinions in at least one important aspect: statutory language becomes the law, whereas judicial opinions often include language that is not legally binding. This makes understanding the content of statutes central to explaining the development of the law. My approach departs from that of interest group scholars, who rarely conceive of statutes as laws or discuss the substantive content of the law in their analyses of advocate influence on legislation.[61]

I trace bills through the legislative process to see how interactions among advocates and members of Congress shape them. Like close readings of oral arguments and briefs, close readings of hearings reveal the arguments made by advocates.[62] The discussions during the hearings, such as questions by judges at oral arguments, provide insights into how members of Congress respond to advocacy in the legislative process.[63] Further, comparisons of draft bills as they evolve and are amended throughout the process allow for the identification of changes and potential influence.

The legislative process differs from the judicial process, which makes it harder to detect influence. The legal process relies on briefs and oral arguments provided by parties and amicus curiae, which have limited opportunities for ex parte communications with the judge. In contrast, much occurs behind closed doors in the legislative process and remains invisible to the public, which is why, in part, political scientists have struggled to detect how advocates use information to influence statutes. My analysis of texts, including hearing transcripts and drafts of bills, allows us to peek into the legislative process and observe the influence of these public exchanges and documents.

The legislative process provides multiple opportunities for advocates to influence a bill's substantive content. For example, suppose a bill originates in the House of Representatives. There, it goes through the following process: (1) drafting of the bill, (2) introduction by a House member, (3) referral to a House committee, (4) committee consideration and action,

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[60] Much could be said about the similarities and differences of statutes and judicial opinions as legal texts. Such a comparison is beyond the scope of this Article.

[61] *See infra* Section II.A; Carlson, *supra* note 19, at 967–73.

[62] BURSTEIN, *supra* note 20, at 142–59.

[63] *See generally* Nancy Kassop, *From Arguments to Supreme Court Opinions in* Planned Parenthood v. Casey, 26 PS: POL. SCI. & POL. 53 (1993) (tracing the arguments made in briefs for *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and how they found their way into the Supreme Court's decision).

(5) floor action in the House, (6) referral to the Senate if the House passes the bill, (7) referral to a Senate committee, (8) committee consideration and action, (9) floor action in the Senate, (10) referral to a conference committee if the Senate passes the bill, and (11) presentment to the President.[64] A bill is enacted and becomes law when it passes both the House and the Senate in the same form and the President signs it.

Bill content often evolves throughout this process. Congressional committees solicit public input on a bill through referral hearings, which are held to consider a specific bill's advantages and disadvantages. Referral hearings inform the committee's decisions to amend a bill and favorably vote for its consideration by the chamber as a whole. Organized interests and members of the general public often participate in referral hearings through written or in-person testimony.[65]

I contend that influence occurs when an enacted bill uses the same or similar language that advocates use in written or oral testimony at the referral hearing. Influence may also occur if an enacted bill omits language or sections that advocates requested be removed from the bill in oral or written testimony at the referral hearing. The fact that the statute shares or omits language based on witness testimony does not necessarily show causation. I cannot account for how the statute would have been written without witness testimony or if the testimony was different. I also cannot rule out other influences in the process that may have contributed to the presence or absence of the language in the bill but cannot be detected from public hearings and records. Advocates, however, have influenced the law as evidenced by a statute's use or omission of their language.[66] This presence or absence of particular language does not necessarily mean that the advocate has influenced the bill's enactment or failure, but it does mean that the advocate has influenced the development of the law.

Some may argue that this is not influence. They may suggest that congressional staffers regularly borrow language from written and oral testimony at referral hearings, especially when it is drafted as a proposed amendment, because it is easy or rational to do so. My concept of influence, however, does not depend on the *motivations* of a member of Congress or their staffers in their choice to use or omit language suggested by advocates

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[64] ESKRIDGE ET AL., *supra* note 41, at 23–34.

[65] *See generally* SCHLOZMAN & TIERNEY, *supra* note 42, at 295 (discussing how advocates use legislative hearings); Rodney E. Hero & Robert R. Preuhs, *Beyond (the Scope of) Conflict: National Black and Latino Advocacy Group Relations in the Congressional and Legal Arenas*, 7 PERSPS. ON POL. 501, 506–09 (2009) (noting that one way Black and Latino advocacy groups seek to influence policy is by presenting congressional testimony); BURSTEIN, *supra* note 20, at 143–45 (discussing who participates in congressional hearings).

[66] For a similar definition of influence, see Corley, *supra* note 48, at 469–70.

at referral hearings. Regardless of the motive, the *language* of the bill enacted is the law—if the language is amended in response to an advocate's testimony, that advocate has influenced the law. The advocate may shape the development of the law even if the bill is not enacted because its requested language may be relied on in future discussions over similar bills or reintroduced in subsequent legislation. Later enactment of the policy, as amended in the original bill, also indicates influence because the language (or the omission of it) requested in the advocates' testimony becomes law.

The legal approach allows for an examination of influence in the legislative process that goes beyond the interest group literature by suggesting how advocates use language to influence a bill as it progresses through the legislative process. Both political scientists and legal scholars perceive information or argumentation as one currency advocates may use to influence legislators.[67] Political scientists, however, have struggled to operationalize informational theories of influence and determine the mechanisms advocates use to influence legislators.[68] Borrowing from the legal model allows for the development of more accurate and sophisticated ways of understanding how advocates use language and texts to shape the law throughout the legislative process.[69] It situates advocates' use of information in the ongoing legislative process by examining both how advocates make arguments in response to texts and how members of Congress react to advocates' testimony.

This approach is important because it provides insights into how legislators craft the content of statutes. Bills often undergo revision at the markup stage of the legislative process and can be amended once they reach the floor of the House or Senate. Political scientists have yet to examine how members of Congress respond to testimony provided by advocacy groups at referral hearings as they revise bills throughout the legislative process. This approach facilitates an in-depth exploration of how advocates interact with legislators to craft the law by analyzing the interactions between advocates and members of Congress throughout the legislative process, as evidenced in congressional hearings and draft statutes.

This approach also provides more nuanced accounts of influence because, unlike studies focused only on bill enactment, it captures influence as it develops out of incremental, long-term relationships. Many political scientists acknowledge that advocates see the legislative process as a

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[67] *See generally* BAUMGARTNER ET AL., *supra* note 22 (exploring the success of argumentation and information in changing the way issues are discussed); BURSTEIN, *supra* note 20, at 154–58 (finding that information provided by advocates can impact the likelihood a proposal is enacted).

[68] *See infra* Section II.B.

[69] Carlson, *supra* note 19, at 973–76.

long-term game in which influence occurs incrementally.[70] They have yet, however, to fully develop approaches to studying influence that investigate incrementalism.[71] Their studies assess a group's influence by determining whether an organized interest achieved its policy goals at a particular moment (usually bill enactment).[72] Socio-legal scholars and legislative lawyers counter this view by showing how the legislative process often invites incrementalism, especially for repeat players. They describe the process as multistaged and interactive. Adopting this view expands theoretical understandings of influence by suggesting that it occurs incrementally over time. It allows for exploration of how influence may occur as a law progresses through the legislative process.

This approach demonstrates a technique that has significant potential to bridge methodological divides in dominant approaches to understanding legislation. Legal approaches to studying legislation involve in-depth legislative histories, statutory interpretation, or both.[73] Conversely, political scientists use statistical techniques to analyze hundreds or thousands of statutes in a single investigation.[74] Each of these approaches has strengths and weaknesses. For example, in-depth case histories of legislation provide nuanced insights into congressional debates over statutory language, but the generalizability of these studies beyond a single case remains unclear.

In contrast, large-scale quantitative studies offer generalizability but tend to oversimplify the legislative process and overlook statutory content. My approach combines the generalizability of quantitative studies with the depth provided by more traditional qualitative approaches that focus on legislative history, statutory interpretation, or both. This approach has the potential to be applied more generally to generate more accurate and nuanced understandings of the legislative process, legislation, and legal texts. In the

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[70] LAURA E. EVANS, POWER FROM POWERLESSNESS: TRIBAL GOVERNMENTS, INSTITUTIONAL NICHES, AND AMERICAN FEDERALISM 6–9 (2011); BAUMGARTNER ET AL., *supra* note 22, at 29–46.

[71] A few studies attempt to capture incremental policy change. For example, Baumgartner and his coauthors consider incrementalism in their study by trying to determine the extent of policy change that occurs. *See* BAUMGARTNER ET AL., *supra* note 22, at 236.

[72] *See, e.g.*, BERRY, *supra* note 21, at 74–76 (constructing a kind of win–loss ratio based on the group's assessment of whether it achieved its policy goals); BAUMGARTNER ET AL., *supra* note 22, at 232–36 (testing several variables and predictors of policy success by observing whether there is policy change after two and four years); BURSTEIN, *supra* note 20, at 98 (referencing studies that evaluate policy change by identifying circumstances where elected officials are responsive to advocacy).

[73] *See, e.g.*, Feldblum & Appleberry, *supra* note 52 (exploring the legislative history of the Family and Medical Leave Act of 1993 to explain the legislative process); Berger, *supra* note 53 (scrutinizing the development of federal Indian law absent legitimate tribal interests); Ziv, *supra* note 53 (analyzing the enactment of the Americans with Disabilities Act).

[74] *E.g.*, E. SCOTT ADLER & JOHN WILKERSON, THE SCOPE AND URGENCY OF LEGISLATION: RECONSIDERING BILL SUCCESS IN THE HOUSE OF REPRESENTATIVES 8–12 (2005) (evaluating all 6,212 bills introduced in the House of Representatives during the 102nd Congress).

next Part, I illustrate such an approach by analyzing the influence of Native advocates on congressional lawmaking.

II. EMPIRICALLY INVESTIGATING LEGISLATIVE INFLUENCE

This Part demonstrates the utility of the legal model in studying legislative influence by applying it to an illustrative case study of American Indian legislative influence. It shows how the legal model fills the gaps left by the existing literature. I first discuss the advantages and disadvantages of using Native advocacy to examine influence in the legislative process. I then present my multistage, mixed-methods approach to investigating advocate influence on federal legislation. Finally, I introduce the original data collected, present the testable hypotheses designed to test the viability of the legal model of legislative influence, and discuss the study's limitations.

A. Case Selection

The selection of Indian advocacy as a case study is meant to be illustrative rather than generalizable. Many case studies "seek to elucidate the features of a broader population."[75] The ambition of this study is not to produce results generalizable to other groups or the general public. This study's goals are two-fold. First, it demonstrates the utility of a new, generalizable theoretical and methodological approach to studying influence in the legislative process. Second, it provides much-needed information on Native participation and influence in the federal legislative process—something often understudied and rarely mentioned in mainstream studies.

The study of advocacy by Native Nations and organizations is a particularly rich setting for investigating how groups influence the law in the legislative process. Since its formation, the United States has dealt with American Indians by establishing legal relationships with them as separate political communities, commonly called tribes or nations.[76] The United States and Native Nations entered into treaties acknowledging the tribes' preexisting and ongoing rights and governmental authority. These treaty relationships, the U.S. Constitution, federal legislation, and Supreme Court decisions form the basic legal framework governing Indians and tribal governments in the United States today.[77]

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[75] Jason Seawright & John Gerring, *Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options*, 61 POL. RSCH. Q. 294, 294 (2008).

[76] Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC'Y REV. 1123, 1125–26 (1994).

[77] The foundational principles of this framework include: (1) tribes are governments with inherent sovereign powers not delegated or granted by the United States; (2) the U.S. Constitution gives Congress

American Indians, especially Indian Nations, have a long and rich history of engaging with the United States government.[78] Native Nations have employed a variety of advocacy strategies over the past five centuries, from declaring war on the United States, to sending delegations to Congress and the White House, to occupying the Bureau of Indian Affairs.[79] They have continually advocated for recognizing and protecting their claims to sovereignty over their lands and people rather than equal rights under the law.[80] Indian Nations advocate on a wide range of issues, from land and natural resources, to health care and education, and to language and culture. Scholars have increasingly studied this advocacy and have produced studies on individual Indians as voters in mainstream elections,[81] Native protest movements after World War II,[82] campaign contributions made by Indian

full control or plenary power over Indian affairs—including authority to limit tribal powers; (3) the federal government holds responsibilities to Indian tribes and individual Indians, known as the trust relationship; (4) Indian Nations retain powers unless Congress has expressed clear and plain intent to abrogate them; and (5) state governments have no authority to regulate Indian affairs absent an express congressional delegation or grant. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122–23 (4th prtg. 1945); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 10, § 5.01; Alex Tallchief Skibine, *Dualism and the Dialogic of Incorporation in Federal Indian Law*, 119 HARV. L. REV. F. 28, 28–37 (2006); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 269–73 (2001).

[78] *See generally* FREDERICK E. HOXIE, THIS INDIAN COUNTRY: AMERICAN INDIAN POLITICAL ACTIVISTS AND THE PLACE THEY MADE (2012) (describing the history of Native people entering the nation's political arena as lawyers, lobbyists, agitators, and writers); EDWARD LAZARUS, BLACK HILLS/WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT (1991) (documenting over two centuries of Sioux advocacy, including 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 pt. 5, at 349 (Nicholas R. Parrillo ed., 2017).

[79] Robert Odawi Porter, *Tribal Disobedience*, 11 TEX. J. ON C.L. & C.R. 137, 138–47 (2006); Kirsten Matoy Carlson, *Lobbying Against the Odds*, 56 HARV. J. ON LEGIS. 23, 29–35 (2019).

[80] VINE DELORIA JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 7–12 (1969); Will Kymlicka, *American Multiculturalism and the 'Nations Within*,*' in* POLITICAL THEORY AND THE RIGHTS OF INDIGENOUS PEOPLES 216, 222 (Duncan Ivison, Paul Patton & Will Sanders eds., 2000).

[81] *See, e.g.*, DANIEL MCCOOL, SUSAN M. OLSON & JENNIFER L. ROBINSON, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE (2007) (describing how Indians achieved citizenship and the right to vote); LAUGHLIN MCDONALD, AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS (2010) (documenting difficulties Indians face in electing candidates of their choice in jurisdictions where they constitute a numerical minority).

[82] *See generally* DANIEL M. COBB, NATIVE ACTIVISM IN COLD WAR AMERICA: THE STRUGGLE FOR SOVEREIGNTY (2008) (exploring Indian activism during the post-World War II period); PAUL CHAAT SMITH & ROBERT ALLEN WARRIOR, LIKE A HURRICANE: THE INDIAN MOVEMENT FROM ALCATRAZ TO WOUNDED KNEE (1996) (writing how Indian people staged a campaign of resistance and introspection in the 1960s); JOANE NAGEL, AMERICAN INDIAN ETHNIC RENEWAL: RED POWER AND THE RESURGENCE OF IDENTITY AND CULTURE (1996) (arguing that Indians "flourished in the fertile political cultural soil of the 1960s—the civil rights era—which encouraged ethnic identification, pride, and activism").

Nations involved in gaming enterprises,[83] and Indian engagement in state and local politics.[84] Few scholars, however, have considered legislative advocacy by Indian Nations and organizations, as they are often not mentioned in mainstream political science studies on legislative advocacy.[85]

This study builds on the few existing studies on Indian legislative advocacy.[86] Early studies on the relationship between Congress and 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 issues 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 tribes; and (3) general legislation, which has a main substantive focus other than Indians (such as health, education, and employment) but specifically mentions Indians or Indian tribes.[87] They demonstrate that Native advocates do not just target their advocacy towards bills creating federal Indian policy but rather advocate on a broad range of bills and subject matters similar to organized interests across the United States more generally.[88] Indian advocates use myriad 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).[89] The wide range of subject matters and kinds of legislation on which Indian Nations and organizations

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

[84] *See* Corntassel & Witmer, *supra* note 83; EVANS, *supra* note 70; KENNETH N. HANSEN & TRACY A. SKOPEK, THE NEW POLITICS OF INDIAN GAMING: THE RISE OF RESERVATION INTEREST GROUPS (2011); Frederick J. Boehmke & Richard Witmer, *State Lobbying Registration by Native American Tribes*, 3 POL., GRPS. & IDENTITIES 1, 1 (2015).

[85] Boehmke & Witmer, *supra* note 83, at 181; BAUMGARTNER ET AL., *supra* note 22, at 9, 17 (listing interest group participants and lobbying issues included with no mention of Indians); MASON, *supra* note 78; MATT GROSSMANN, THE NOT-SO-SPECIAL INTERESTS: INTEREST GROUPS, PUBLIC REPRESENTATION, AND AMERICAN GOVERNANCE (2012) (subsuming Native Americans within the larger category of ethnic groups).

[86] Carlson, *supra* note 50, at 938; Carlson, *supra* note 8, at 1174–220; Richard Witmer & Frederick J. Boehmke, *American Indian Political Incorporation in the Post-Indian Gaming Regulatory Act Era*, 44 SOC. SCI. J. 127, 129 (2007).

[87] CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 10–11 (1987).

[88] Carlson, *supra* note 79, at 33; Carlson, *supra* note 19, at 983–93.

[89] Carlson, *supra* note 8, at 1173–74; Kirsten Matoy Carlson, *Representation, Participation, and Influence: Comparing Native Advocacy with Organized Interests at the Federal Level*, SOC. SCI. J., June 1, 2023, 1, 41–43 (2023).

advocate facilitates a thorough investigation of advocate behavior in legislative lawmaking.

Native advocacy also provides an interesting case for investigating influence in legislative lawmaking. Conventional narratives suggest that as a politically underrepresented group with almost no electoral clout and few resources, Native Nations would not fare well in the political process. Yet, in comparison with the amount of general legislation enacted, Congress passes a disproportionately high number of bills affecting individual Indians and tribal governments.[90] This discrepancy begs the questions of how, when, and how much influence they can exert over legislation. Previous research has shown that Natives, like Black and Latino people, can successfully defeat legislation, but only when they present a unified front against it.[91] It has also indicated that Native advocacy for a bill does not increase the likelihood of its enactment.[92] The high number of bills enacted affecting Indians and their variable success in the legislative process provides an opportunity to investigate the mechanisms by which groups influence the law through the legislative process.

A limitation of studying Native advocacy is that it may not produce a sample representative of the broader public. Indians are often considered exceptional in law and politics because they exist as separate, sovereign governments.[93] The role of Congress in crafting federal Indian law and the history of diplomatic relations between the United States and tribal governments may encourage greater interaction between the two groups.[94] Moreover, the weak electoral connection among Natives and members of Congress could affect the relationship between the two. Some members of Congress may discount Native views due to their lack of electoral clout,[95] while others may rely more on Natives based on their expertise or treat tribal leaders with more esteem because they are elected officials.[96]

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[90] Carlson, *supra* note 14, at 115–17.

[91] Carlson, *supra* note 28, at 65, 67, 75.

[92] Carlson, *supra* note 89, at 29–30.

[93] For a discussion of Indian exceptionalism arguments, see Carlson, *supra* note 14, at 131–33.

[94] *Id.* at 132–33.

[95] The 574 federally recognized Native Nations in the United States are spread across thirty-five states, undercutting their electoral clout and ability to elect representatives of their choice. They have rarely elected their own citizens to Congress, Carlson, *supra* note 28, at 67–68; WILKINS & STARK, *supra* note 13, at 165–70, and almost always rely on surrogate representation.

[96] *See* EMMA R. GROSS, CONTEMPORARY FEDERAL POLICY TOWARD AMERICAN INDIANS 81–84, 99–100 (1989).

Recent studies, however, have demonstrated that Native advocates frequently engage in legislative advocacy like other groups.[97] My previous research documented an explosion in advocacy by tribal governments and Native organizations[98] that mirrored and exceeded the general rise in U.S. legislative advocacy over the past five decades.[99] Other studies have shown an increased use of interest group strategies, especially lobbying and campaign contributions, by Indian tribes at the federal, state, and local levels.[100] A few studies have compared tribal governments and Native organizations to organized interests. One found that, similar to other groups, American Indians often testify at hearings to advance their interests and can block federal legislation when they take a unified position on it.[101] Another

[97] Boehmke & Witmer, *supra* note 84, at 5; Witmer & Boehmke, *supra* note 86, at 129; Carlson, *supra* note 19, at 983–84, 987.

[98] Carlson, *supra* note 79, at 38–39 (documenting a dramatic 600% increase in Native advocacy).

[99] *See* BURDETT A. LOOMIS & WENDY J. SCHILLER, THE CONTEMPORARY CONGRESS 38 (4th ed. 2004) (documenting a 300% 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, Heather A. Larsen-Price, Beth L. Leech & Paul Rutledge, *Congressional and Presidential Effects on the Demand for Lobbying*, 64 POL. RSCH. Q. 3, 4 (2011) (documenting the same); Beth L. Leech, Frank R. Baumgartner, Timothy M. La Pira & Nicholas A. Semanko, *Drawing Lobbyists to Washington: Government Activity and the Demand for Advocacy*, 58 POL. RSCH. Q. 19, 19 (2005) (documenting the same). Socio-legal studies confirm the escalation in legislative activity reported by political scientists. *See* Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 306 (1996); Cummings & NeJaime, *supra* note 51, at 1242; Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2047–48 (2008).

[100] *See, e.g.*, EVANS, *supra* note 70, at 7 (discussing the tactics that tribal groups use to lobby for legislative change, including using access to federal officials to alter the "rules" of the legislative game from within); HANSEN & SKOPEK, *supra* note 84, at 2, 16 (describing the "inside" and "outside" political strategies utilized by tribal governments and other interest groups to expand and protect their own interests); Boehmke & Witmer, *supra* note 84, at 637 (summarizing the various strategies tribal groups have used to advocate for their own interests); Boehmke & Witmer, *supra* note 83, at 179–80, 187 (discussing studies finding that lobbying and campaign contributions by tribal organizations have increased over time); Carlson, *supra* note 50, at 939, 945 (discussing the appeal of legislative-only versus "dual"—i.e., a combination of legislative and administrative—strategies as utilized by American Indian advocates, and how their use has changed over time); JEFF CORNTASSEL & RICHARD C. WITMER, FORCED FEDERALISM: CONTEMPORARY CHALLENGES TO INDIGENOUS NATIONHOOD (2008) (discussing the impact of shifting power structures in government and changing public perceptions of tribal groups on Native advocacy).

[101] Carlson, *supra* note 28, at 72. Both general studies of legislative advocacy and studies of disadvantaged groups have found that organized interests wield more influence when they oppose, rather than support, a bill. BAUMGARTNER ET AL., *supra* note 22, at 236, 239; BURSTEIN, *supra* note 20, at 143; Robert R. Preuhs, *Descriptive Representation, Legislative Leadership, and Direct Democracy: Latino Influence on English Only Laws in the States, 1984–2002*, 5 STATE POL. & POL'Y Q. 203, 207–08 (2005) (discussing how blocking legislation is a powerful tool used by minority groups). *See generally* Wayne A. Santoro, *Conventional Politics Takes Center Stage: The Latino Struggle Against English-Only Laws*, 77 SOC. FORCES 887, 887–909 (1999) (finding that Latino voting blocs and legislators could unify to block English-only legislation).

study confirmed that Native advocates, similar to organized interests, often use a variety of strategies including lobbying and testifying at congressional hearings, but it found that their levels of participation and representation in Congress occurred at rates similar to state and local governments rather than businesses.[102] These findings align with more general comparative interest group studies showing that participation and representation vary by group within our political system.[103] They suggest that Native advocacy often reflects advocacy by other groups and may not be as exceptional as some may think. The useful variation on several dimensions of theoretical interest, including a wide range of subject matters and kinds of legislation, justifies the selection of Native advocacy for this case study, especially given the limited generalizability of a microlevel study of any group.[104]

Even though the results may not prove generalizable, the selection of Native advocacy with its variation across several variables of interest suggests that the observations made here about how advocates influence the development of statutes by requesting changes to draft bills in the legislative process most likely occur in other contexts.[105] Other studies have documented advocacy groups' use of hearings to shape the law and suggest Native groups are not unique in doing so.[106] The data in this study include non-Indian witnesses and confirm that many of them request amendments and changes to bills similar to Native advocates.[107] These findings suggest that my approach may apply more generally to advocate–representative interactions. The breadth of subject matters, kinds of legislation, and congressional committees included in this study also indicate the utility of treating bills as legal texts for studying advocate influence more generally. The amount of influence may vary by advocacy group, area of law, or kind of bill, but the model presented and observations made here about how advocates shape the law through amendments in the legislative process most likely extend beyond American Indians.

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[102] Carlson, *supra* note 89, at 7, 31; Carlson, *supra* note 28, at 69, 82; Boehmke & Witmer, *supra* note 83, at 179.

[103] GROSSMANN, *supra* note 85, at 5–6; BAUMGARTNER ET AL., *supra* note 22, at 11.

[104] Seawright & Gerring, *supra* note 75, at 296 (noting that the twin aims of case selection are representativeness and useful variation on dimensions of theoretical interest).

[105] Preliminary analyses of amendments to Indian-related bills suggested by non-Native witnesses suggest that the observations reported here are not limited to Native advocacy.

[106] BURSTEIN, *supra* note 20, at 135; Hero & Preuhs, *supra* note 65, at 506.

[107] *See, e.g.*, *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary*, 97th Cong. 417–883 (1981) (statement of Herbert O. Reid Sr., Charles Hamilton Houston Distinguished Professor, Howard University) (demonstrating that non-Indian advocates take positions and make arguments similar to the ones identified as being used by Indian advocates in this study). For a comparison of advocacy by tribal governments and Native organizations with other groups, see Carlson, *supra* note 89.

B. Research Design

I use a multistage, mixed-methods approach to investigate how and why Indian advocates influence federal legislation. This methodological approach reflects my theoretical framework, which recognizes that influence occurs at various stages of the legislative process as members of Congress respond to advocate behavior.[108] Success at each stage affects, but does not determine, success at subsequent stages.[109] I examined the texts of Indian-related bills throughout the legislative process for evidence of influence by tribal governments and Native organizations.

I identified requests for changes or amendments to bills by examining oral and written testimony at hearings in both the Senate and the House of Representatives. I chose the hearing stage of the legislative process for three reasons. First, scholars have found that legislative advocates have more influence in the earlier stages of the legislative process.[110] Second, many legislative advocates testify at hearings because they deem it an important way to influence lawmakers.[111] Third, committee hearings present an opportunity to examine targeted advocacy linked to a particular bill.[112] By linking advocacy to a specific legislative proposal, the hearing data allow for examination of how that advocacy impacted multiple legislative texts, including proposed amendments, adopted amendments, and various bills incorporating the amendments. This approach can measure influence both during the legislative process and on the proposed law's legislative outcome (enactment or non-enactment). The textual nature of hearings facilitates the tracking and comparison of legislative arguments with texts over time, which reveals the extent to which legislators adopt language identical or similar to that proposed by advocates.[113]

The main drawback of using committee hearings is that the data may underrepresent tribal governments' and Native organizations' advocacy as well as the number of bills with amendments they suggest. Testimony at congressional hearings reflects only a small part of advocacy. Congressional committees do not hold hearings on most bills and only report one-sixth of them for further consideration.[114] Congressional committees held hearings on

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[108] King et al., *supra* note 52, at 1214; BURSTEIN, *supra* note 20, at 139.

[109] BAUMGARTNER ET AL., *supra* note 22, at 253 (noting that initial actions in the legislative process may affect subsequent ones).

[110] King et al., *supra* note 52, at 1214.

[111] SCHLOZMAN & TIERNEY, *supra* note 42, at 295.

[112] BURSTEIN, *supra* note 20, at 104.

[113] For similar methodologies, see McKay, *Fundraising for Favors?*, *supra* note 23, at 871; Yackee & Yackee, *supra* note 30, at 131–32; Corley, *supra* note 48, at 469; and Collins et al., *supra* note 9, at 918–20.

[114] ESKRIDGE ET AL., *supra* note 41, at 25.

one-fourth of the bills in the dataset of all Indian-related bills used in this study. Moreover, advocates may and often do request amendments outside of congressional hearings.[115] Many of these requests may occur behind closed doors and remain unobservable. As a result, my data may represent only a portion of Native efforts to influence federal legislation through amendments. Despite these limits, my analysis of written and oral testimony at referral hearings overcomes some challenges to detecting advocate influence in the legislative process and allows for the observation and analysis of some, if not all, advocate influence.

C. Data Collection, Coding, and Analysis

This study draws on original research on advocacy by Indians on 108 Indian-related bills introduced in the 97th and 106th Congresses. I accessed primary data on advocacy by Natives from several sources, including a database of Indian-related bills,[116] publicly available and archival materials on legislation introduced in Congress,[117] and interviews with advocates for tribal governments and Native organizations.

I examined advocacy on a sample of Indian-related bills during two congressional sessions.[118] The two congressional sessions—the 97th and 106th—were selected because they reflected variations in several important variables, including the party in control of Congress, enactment rate, and enactment rate by bill type. Moreover, the 97th Congress predates the enactment of the Indian Gaming Regulatory Act, which brought with it an influx of financial resources to some tribal governments, while the 106th Congress follows it.[119] The congressional sessions were selected from a larger database of Indian-related bills, which includes 7,799 bills introduced in Congress from 1975 to 2013.[120] The database defines Indian-related bills

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[115] *See, e.g.*, McKay, *Fundraising for Favors?*, *supra* note 23, at 871–72 (documenting amendments that advocates proposed in letters to members of Congress).

[116] Carlson, *supra* note 14, at 95.

[117] I researched 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's archives (1933–1990) at the Smithsonian National Museum of the American Indian Archives Center.

[118] The original database includes the 94th through the 112th Congresses. Carlson, *supra* note 14, at 95–98.

[119] Other scholars have argued that the enactment of the Indian Gaming Regulatory Act (IGRA) led to significant changes in Native politics in the United States because it introduced significant wealth into some communities and enabled more state encroachments into tribal sovereignty. *See* CORNTASSEL & WITMER, *supra* note 100, at 4–5; Boehmke & Witmer, *supra* note 86, at 129. *But see* Carlson, *supra* note 79, at 79 (suggesting the increase in legislative advocacy by tribal governments and Native organizations predated IGRA).

[120] Carlson, *supra* note 14, at 95–98.

as any bill proposed in the House or the Senate which includes reference to Indians, tribes, a specific Indian tribe, nation, pueblo, or organization, or to Native Americans in the United States.[121] It may, however, underrepresent all federal legislation affecting Indians, as proposed laws not explicitly mentioning Indians, tribes, or Native Americans may still impact them.[122] Each bill had been previously coded by bill number, Congress, title, date of introduction, bill progress, enactment, type of legislation, and subject matter.[123]

My investigation proceeded in three steps. First, I looked at congressional hearings to determine whether, when, and how tribal governments and Native organizations suggest amendments to specific legislation. Based on earlier studies, I expected Native advocates to request amendments to shape legislation and influence the lawmaking process.[124]

I used qualitative methods to identify and track amendments suggested by Indians on Indian-related bills during the committee hearing.[125] The hearings were reviewed to determine whether any Indian witnesses testified.[126] I defined an Indian witness as any witness explicitly identifying as an Indian or testifying on behalf of an Indian tribe, an Indian nonprofit organization, a tribal consortium, a tribal business, or an Alaska for-profit or nonprofit corporation.[127] When a hearing included at least one Indian witness,

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[121] *Id.*

[122] In comparison, the Indigenous Affairs subcategory of the Comparative Bills Project database is much more limited, with only 2,909 bills for the same period. *Id.* at 118 (comparing the two databases to show that analyzing each indicates that Congress enacts Indian-related legislation at a higher rate than legislation generally).

[123] For a full discussion of the coding of the bills in the database, see Carlson, *supra* note 14, at 157–58 app. 1.

[124] Previous studies have found that advocates often use hearings to inform legislators. *See* BURSTEIN, *supra* note 20, at 104. Similarly, research has shown that tribal governments and Native organizations, like interest groups, have used hearings to provide information to legislators in support of their position on proposed legislation. *See* Carlson, *supra* note 19, at 983–1014; Carlson, *supra* note 8, at 1177–220. They have sought to modify proposed legislation through their hearing testimony and to negotiate with members of Congress over the bill's text. Carlson, *supra* note 19, at 992–1014.

[125] The data here is descriptive because previous scholars have rarely studied amendments. *See* BURSTEIN, *supra* note 20, at 149–56 (explaining the difficulty of tracking amendments and his decision not to include them in his study). As a result, a baseline does not currently exist by which to measure the amount or frequency of proposed amendments.

[126] I use "Indian witnesses" interchangeably with "Indian advocates" and "Native advocates" throughout this Article.

[127] Representatives of state, local, or federal agencies (e.g., 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 (e.g., nonprofits that seek to assist Indians but are not made up of Indians, such as the Friends Committee on National Legislation). For a full description of each of the coded categories, see Carlson, *supra* note 14, at 164 app. 1, which describes the coded categories as used in a previous study.

I coded the entire oral and written testimony of every witness in the hearing. If the hearing did not include any Indian witnesses, it was not coded because it did not include Native advocacy. A quarter (204 / 821) of the bills had hearings. Over half, 54% (110 / 204), of the bills with hearings included oral or written testimony from an Indian witness.[128]

I closely read each legislative hearing with an Indian witness, including the oral statements, responses to questions, and written statements, and coded them by the witness's affiliation (e.g., tribe, tribal consortium, state), the witness's position on the bill (e.g., for, against, no position),[129] the committee holding the hearing, and requests for amendments or changes to the legislation.[130] If Native advocates suggested substantive changes to the bill, the bill was coded as having amendments requested by Native advocates.[131] The total number of witnesses coded was 2,137.[132] I then employed quantitative methods to determine how frequently Native witnesses suggested amendments to Indian-related bills.

The second stage of my investigation examined how members of Congress responded to amendments suggested by tribal governments and Native organizations. Consistent with the political science literature, I expected that members of Congress would amend some bills in response to advocates' requests.[133] Previous studies have not systematically studied the

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[128] Two bills were excluded from the analyses because the Indian witnesses did not take a position on either bill.

[129] The position of each witness, whether Indian or non-Indian, was coded. For a similar coding scheme, see BURSTEIN, *supra* note 20, at 141–42.

[130] Advocates varied in how they presented requests for changes to a bill. Some specifically requested amendments to a bill, and a few even listed proposed changes as amendments. Others asked for substantive changes to a bill's content but did not say they were requesting an amendment per se. The coding included any request to change a bill that affected its substantive content as an amendment. It excluded technical corrections or minor changes that did not affect the substantive content. Occasionally, coders had to make subjective determinations about whether advocates suggested amendments to a bill.

[131] The bill was used as the unit of analysis. Bills were coded dichotomously as either having a request(s) for amendment or not. The limit to this approach is that data was not collected on the number of requests for amendment per bill. Some bills had only one request for amendment, while others had several. The limits in the data collection prevent comparison for each bill of the number of requests adopted to the number ignored by members of Congress.

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

[133] Studies have shown that members of Congress respond to the information witnesses provide on specific policy proposals during legislative hearings, including the arguments advocates make for and against proposed laws. *See, e.g.*, BURSTEIN, *supra* note 20, at 154–56 (showing that information provided by proponents of a bill increases the likelihood that Congress passes the bill and information provided by opponents of a bill decreases the likelihood that Congresses passes the bill). One recent study suggests that members of Congress are more likely to respond to a group when its lobbyists can raise meaningful campaign contributions for them. McKay, *Fundraising for Favors?*, *supra* note 23, at 876. Another recent

frequency with which Congress amends bills in response to advocacy, so I did not develop more specific expectations or hypotheses about how frequently or under what conditions Congress would amend bills in response to Native requests.[134]

I used a comparative analysis of legislative texts to determine whether members of Congress adopted amendments suggested by Native advocates. I reviewed congressional testimony at referral hearings, committee reports, and the texts of the bills with Indian testimony at their referral hearings to determine whether Congress amended the bill in response to Indian advocacy. I employed content analysis to compare the language in various versions of a bill to determine whether and how arguments for changes to a bill made by advocates at hearings were incorporated into specific bills. Comparing the text of amendments requested by Indians in their testimony on a bill to the language adopted in the final bill provided a direct means of matching Indian advocacy to policy outcomes and measuring Indian influence.[135] If Congress adopted amendments to the bill that responded to the testimony of Indian advocates, I coded the bill as amended in response to Indian testimony. I contend that when a bill uses or omits the same or similar language that advocates requested in testimony at a referral hearing, the advocates have influenced the law by affecting the nature and substance of the legislation.

Two examples demonstrate how I coded the data to identify requested amendments and determine their influence. 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

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study found that members of Congress frequently amended bills in response to opposition from Indian advocates. Carlson, *supra* note 28, at 67. These studies suggest that members of Congress amend bills in response to advocates' requests.

[134] McKay's research did not look at the frequency of amendment requests. Rather, she analyzed the relationships among amendment requests, fundraising events, and adoption of the amendment to determine whether a lobbyist holding a fundraising event for a senator increased the likelihood that the senator would propose the amendment. McKay, *Fundraising for Favors?*, *supra* note 23, at 871. She found that the existence of a fundraising event made it 3.5 times more likely that the senator would offer the amendment in committee. *Id.* at 875.

[135] *See, e.g.*, *id.* at 871 (explaining that a comparison of the text of interest group preferences to the language of legislative proposals establishes a more direct means of matching advocacy to policy outcomes); BURSTEIN, *supra* note 20, at 139 (testing the question of whether testimony at congressional hearings affects the likelihood that policy proposals will be enacted); Corley, *supra* note 48, at 469 (testing the question of whether the language contained in amicus briefs can influence the content of Supreme Court opinions). For a similar measure of influence in agency rulemaking, see Yackee & Yackee, *supra* note 30, at 131.

practices necessary to ensure proper collection of revenues.[136] 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, which required tribes to pay up to one percent of their royalties into a fund for royalty accounting services, from the bill.[137] They argued that section 20 violated a fundamental tenet of federal Indian law: the trust responsibility between the tribes and the federal government.[138] The Senate Energy and Natural Resources Committee responded to tribal concerns by deleting section 20.[139] Congress then incorporated the amended language from the Federal Energy and Mineral Resources Act of 1982 into a broader related

[136] Federal Energy and Mineral Resources Act of 1982, S. 2305, 97th Cong. (1982). The bill (also known as the Federal Royalty Management Act of 1982) 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: Hearings on S. 2305 Before the S. Comm. on Energy & Nat. Res.*, 97th Cong. (1982) [hereinafter *FEMRA Hearings*].

[137] *FEMRA Hearings*, *supra* note 136, at 400, 403 (statement of Patricia L. Brown, Three Affiliated Tribes of the Fort Berthold Reservation); *id.* at 128–29 (statement of Saul Goodman, Shoshone and Arapahoe Indian Tribes, Wind River Reservation, Wyo.); *id.* at 139 (statement of Ed Gabriel, Former Director, Council of Energy Resource Tribes). Other tribes supported these efforts as well. Mailgram from John Melcher, Sen., U.S. Senate, to Norman Hollow, Tribal Exec. Bd. Chairman, Fort Peck Tribes (May 11, 1982) (on file with the Center for Legislative Archives at the National Archives); Letter from Marvin Sonosky to James McClure, Sen., U.S. Senate (May 24, 1982) (on file with the Center for Legislative Archives at the National Archives); Comments of the Blackfeet Tribe on S. 2305 (n.d.) (on file with the Center for Legislative Archives at the National Archives); Mailgram from Allen Rowland, Chairman, N. Cheyenne Tribal Council, to John Melcher, Sen., U.S. Senate (May 10, 1982) (on file with the Center for Legislative Archives at the National Archives); Mailgram from John Windy Boy, Chairman, Chippewa-Cree Bus. Comm., to John Melcher, Sen., U.S. Senate (May 10, 1982) (on file with the Center for Legislative Archives at the National Archives).

[138] *See FEMRA Hearings*, *supra* note 136, at 130 (statement of Saul Goodman, Shoshone and Arapahoe Indian Tribes, Wind River Reservation, Wyo.) ("[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 L. 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 . . . .").

[139] S. REP. NO. 97-512, at 19 (1982).

bill: House Bill 5121, or the Federal Oil and Gas Royalty Management Act of 1982.[140] Congress subsequently enacted House Bill 5121.[141]

The Federal Oil and Gas Royalty Management Act of 1982 is instructive for two reasons. First, it shows how advocates may shape the law by seeking to have provisions removed from legislation. Second, it highlights how the failure of a bill may not end the advocacy or indicate that the policy has failed. It suggests that emphasizing the outcome of a particular bill may not represent what happened to the policy more generally, which Congress may enact subsequently in a related or companion bill.

A second example shows how advocates sought amendments that added language they wanted incorporated into a bill.[142] The Indian Tribal Justice Technical and Legal Assistance Act of 2000 sought to provide direct federal support to tribal governments by authorizing grants to national and regional tribal justice system organizations to provide legal assistance services for tribes through training, technical assistance, and civil and

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[140] H.R. 5121, 97th Cong. (1983); *see also* S. REP. NO. 97-512, at 19 (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 preferred House Bill 5121 to Senate Bill 2305. *FEMRA Hearings*, *supra* note 136, at 400 (statement of Patricia L. Brown, Three Affiliated Tribes of the Fort Berthold Reservation).

[141] Federal Oil and Gas Royalty Management Act of 1982, Pub. L. No. 97-451, 96 Stat. 2447 (1983).

[142] The Native American Alcohol and Substance Abuse Program Consolidation Act of 2000 represents another example of Indian testimony influencing Congress to change the language of a bill. S. 1507, 106th Cong. (2000). It sought to enable Indian tribes to consolidate and integrate alcohol and other substance abuse programs into one program. *Id.* at 2. The National Indian Health Board (NIHB), a nonprofit organization representing tribal governments, testified in support of the bill but requested that the Committee amend the bill so that the Indian Health Service (IHS) rather than the Bureau of Indian Affairs (BIA) served as the lead agency in implementing and overseeing programs consolidated under the law. *Alcohol and Substance Abuse Program Consolidation Act: Hearing on S. 1507 Before the S. Comm. on Indian Affs.*, 106th Cong. 24 (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 responsive 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."). The NIHB argued for the IHS to take the lead because alcoholism is a disease that affects physical and behavioral health. *Id.* 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. *Id.* at 46. The NIHB also noted that tribes found contracting and compacting with the IHS easier. *Id.* at 46–47. The NIHB's request to make the IHS the lead agency was uncontroversial. None of the other witnesses opposed the idea, and the Department of the Interior and the IHS agreed that the IHS was the appropriate agency to coordinate these programs. *Id.* at 43 (statement of Kevin Gover, Assistant Secretary for Indian Affairs, U.S. Department of the Interior); *id.* at 18 (statement of Michel Lincoln, Deputy Director, Indian Health Service). The Senate Committee on Indian Affairs made the requested change during committee markup and reported the bill as amended to the Senate floor. S. REP. NO. 106-306, at 5 (2000) (explaining that the bill was amended to designate the IHS as the lead agency for coordinating the program).

criminal legal assistance.[143] The Navajo Nation supported the bill in its testimony but criticized Congress for not appropriating funds for tribal justice systems under the Indian Tribal Justice Act of 1993.[144] The Navajo Nation requested amendments to the bill that would reauthorize and fund the Indian Tribal Justice Act of 1993.[145] The Senate Committee on Indian Affairs added section 202, which reauthorized funding for the Indian Tribal Justice Act of 1993, to the bill during markup; the Tribal Justice Technical and Legal Assistance Act of 2000 then passed the Senate as amended and was enacted into law.[146]

To move beyond illustrative explorations of legislative influence and provide a more robust examination of the model, I used quantitative methods to determine how frequently Indian witnesses requested and members of Congress adopted amendments on various subject matters and kinds of bills. I compared how often Indian witnesses requested amendments with how frequently members of Congress amended the bill to adopt their suggestions.

The third stage looked at influence on final outcome by determining how frequently Congress adopted bills and policies that had been amended in response to Native advocacy. By adopted or enacted, I mean that both the Senate and the House passed the bill, it was presented to the President, and it became law. Based on a recent study that found that members of Congress were more likely to enact a bill that Indians opposed if they first amended the bill in response to the Indian opposition,[147] I hypothesized that Congress is more likely to enact a bill if members of Congress amended the bill in response to witness testimony. I used logistic regression models to determine whether an amendment of the bill in response to Indian testimony increased the likelihood of the law's enactment.

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[143] Indian Tribal Justice Technical and Legal Assistance Act of 2000, 25 U.S.C. § 3681.

[144] *Tribal Justice Systems: Hearing on S. 1508 Before the S. Comm. on Indian Affs.*, 106th Cong. 24 (1999) [hereinafter *Hearing on S. 1508*] (statement of Taylor McKenzie, Vice President, Navajo Nation).

[145] *Id.* at 65 ("If S. 1508 is designed to supplement the Indian Tribal Justice Act, then there should be an amendment which re-authorizes spending under the 1993 statute, and at far higher levels to accommodate the many new Indian justice systems which have come on line or are about to come on line.").

[146] S. REP. NO. 106-219, at 4, 9 (1999); Indian Tribal Justice Technical and Legal Assistance Act of 2000, 25 U.S.C. § 3681. The Senate Committee on Indian Affairs also amended the bill to add section 201, which responded to concerns raised by the Navajo Nation. At the hearing, Vice President Taylor McKenzie expressed a need for basic infrastructure funding for tribal judicial systems. *Hearing on S. 1508*, *supra* note 144, at 24 (statement of Taylor McKenzie, Vice President, Navajo Nation). Senator Ben Nighthorse Campbell interpreted this as a request for block grants to tribal courts. *Id.* at 31 (statement of Sen. Ben Nighthorse Campbell, Chairman, S. Comm. on Indian Affs.). The Committee included section 201, authorizing the Attorney General to award grants directly to tribal justice systems in the bill reported. S. REP. NO. 106-219, at 4.

[147] Carlson, *supra* note 28, at 80.

The next Part shows the richness of the data collected and analyzed. The quantitative data collection and analysis produced a big-picture view of how advocates use amendments to influence statutory content, while the qualitative review of the hearings allowed for observation of the richness of advocate–representative interactions throughout the legislative process.

III. CHANGING THE LAW: AMERICAN INDIAN INFLUENCE ON FEDERAL LEGISLATION

This Part reports the results from the study, which show how tribal governments and Native advocates used amendments to influence the legislative process during the 97th and 106th Congresses. It reveals a rarely observed relationship between advocates and sitting members of Congress. It provides compelling evidence that tribal governments and Native organizations used an opportunity to argue for changes in a bill's content to shape the law by persuading legislators to introduce, adopt, and enact amendments valued by them into law. I begin by reporting the descriptive results showcasing advocates' frequent use of requests for amendments as a mechanism to shape the law across various subject areas. I then examine congressional responses to Native requests for amendments and evaluate how testimony influences the final language of a bill. Finally, I present logistic regression results showing the relationship between Native advocacy and bill adoption.

A. Indians and Amendments

Native advocates regularly attempted to influence legislation by suggesting amendments to bills they testified on at committee hearings in the 97th and 106th Congresses.[148] They frequently requested changes or proposed specific amendments as part of their advocacy strategy. Indian witnesses sought amendments to 54% of the Indian-related bills on which they testified.[149]

This finding builds on and extends previous research describing legislative advocates negotiating the legislative process and interacting with legislators and other political actors to craft legal texts.[150] It furthers that research by documenting that amendments are one mechanism that tribal governments and Native organizations use to shape the law. The data indicate that Indian advocates perceive amendments as a mechanism to

[148] As previous studies have detailed, witnesses provide all kinds of information to members of Congress during referral hearings. *See supra* Section I.A.

[149] *See infra* Table 1.

[150] *See* Carlson, *supra* note 19, at 1014.

influence the law and regularly use them in attempts to change proposed legislation. The finding that Natives frequently seek changes to bills is both unsurprising and consistent with earlier research suggesting that advocates, including Black and Latino advocacy groups, use the hearing process to affect the substantive content of legislation.[151] The data suggest that this behavior was not unique to Indian witnesses. Other witnesses, both for and against a bill, regularly suggested textual changes and even provided specific language to improve a bill before its enactment.[152] The data on the frequency of requests for amendment, however, are difficult to interpret. No baseline expectation of the frequency of requests exists. Nor can the data be compared directly with other groups because previous studies have not systematically examined requests for amendments in witness testimony.[153]

A close reading of the hearings in the database indicates that members of Congress and their staffers sometimes used referral hearings to solicit amendments and other information from Indian witnesses, especially tribal leaders.[154] Anecdotal evidence suggests that many of these solicitations came from staffers or Congress members when a bill was referred to a committee with Indian affairs jurisdiction.[155] Thus, Indian advocates' requests for amendments sometimes responded to solicitations for input by

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[151] *See generally* SCHLOZMAN & TIERNEY, *supra* note 42, at 295 (discussing how advocates use legislative hearings to affect change); Hero & Preuhs, *supra* note 65, at 502 (noting that one way Black and Latino advocacy groups seek to influence policy is by presenting congressional testimony); BURSTEIN, *supra* note 20, at 154 (finding that policy supporters' testimony increases the likelihood of enactment); Carlson, *supra* note 28, at 82 (finding that American Indian interest groups testifying in opposition to legislation were successful in blocking enactment or in proposing amendments).

[152] *See, e.g.*, *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary*, 97th Cong. 417–883 (1981) (demonstrating that non-Indian advocates take positions and make arguments similar to the ones identified as being used by Indian advocates in this study).

[153] *See, e.g.*, BAUMGARTNER ET AL., *supra* note 22 (studying what happens after interest groups lobby for or against specific issues, but not the frequency of requests for amendments); BURSTEIN, *supra* note 20, at 142–59 (studying whether the substantive information interest groups provide to Congress affects enactment, but not the frequency of requests for amendment).

[154] This practice appears to have started sometime in the early 1970s when members of Congress started hiring Indians as their staffers. GROSS, *supra* note 96, at 86. As I have detailed elsewhere, it coincides with a shift in congressional policy towards tribal self-determination and away from relying on non-Indian expertise in developing statutes relating to tribal governments. Kirsten Matoy Carlson, *Bringing Congress and Indians Back into Federal Indian Law: The Restatement of the Law of American Indians*, 97 WASH. L. REV. 725, 726, 735 (2022); *see also* GROSS, *supra* note 96, at 31. Unlike their predecessors, Indian staffers often contacted tribal governments for their input on legislation. Congressional staffers on the House Committee on Natural Resources and the Senate Committee on Indian Affairs institutionalized this practice in the 1980s. Interview with Anonymous, former Cong. Staffer, U.S. Cong. (Mar. 13, 2019) (on file with author).

[155] This anecdotal evidence comes from a series of interviews with former congressional staffers, legislative advocates, and tribal leaders conducted by the author. *See also* GROSSMANN, *supra* note 85, at 116; WRIGHT, *supra* note 21, at 40–43.

members of Congress and their staff. These solicitations reflect a common practice of congressional committees that is not limited or specific to tribal governments or Indian-related bills. The committee chair and ranking member invite the witnesses who testify at a referral hearing. Other scholars have documented how congressional staffers regularly invite certain advocacy groups to testify at hearings and comment on legislation.[156] As discussed below, this practice does not appear to have increased the likelihood of bill amendment or adoption. Moreover, the testimony analyzed in this study includes written testimony, which is usually not solicited by the committee. Anyone can submit written testimony.

Native advocates used various strategies, arguments, and tactics to request amendments to change the law through the legislative process.[157] Some sought to educate legislators about the unique conditions and needs of tribal governments and their communities through their proposed amendments.[158] Others emphasized how specific provisions of the bill would affect them and how the provisions could be improved to serve their communities better.[159] Many used the law rhetorically in their arguments to amend a bill.[160] For example, the Shoshone and Arapahoe Indian Tribes of the Wind River Reservation in Wyoming and the Council of Energy Resource Tribes (CERT) used legal arguments to persuade members of Congress to eliminate section 20 of the Federal Energy and Mineral Resources Act of 1982.[161] They argued that section 20 violated a fundamental tenet of federal Indian law—the trust responsibility among the tribes and the federal government.[162] 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

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[156] *See* GROSSMANN, *supra* note 85, at 10.

[157] Carlson, *supra* note 19, at 983–1014.

[158] *See id.* at 985.

[159] *Id.* at 994.

[160] *Id.* at 983. Native advocates have emphasized the importance of making arguments based on federal Indian law to federal legislators since at least the 1970s. *See* GROSS, *supra* note 96, at 82. For a more detailed description of the legal arguments used by Native advocates, see Carlson, *supra* note 19, at 1010–13.

[161] *FEMRA Hearings*, *supra* note 136, at 131–49.

[162] *Id.* at 135–37 (statement of Mitchell Rogovin and Saul Goodman, Shoshone and Arapahoe Tribes, Wind River Reservation, Wyo.); *id.* at 140 (statement of Ed Gabriel, Former Director, 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 we now see the financial burden of correcting the Department's problems being placed on the tribes through section 20.").

trustee and protect Indian interests in their oil and gas.[163] 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.[164]

Indian witnesses requested all kinds of changes to proposed laws through amendments. The amendments they suggested included increased funding available to Indians for programs,[165] refinements to existing or new programs to better serve Indians,[166] deletions of sections of bills harmful to them,[167] and improvements in the oversight and implementation of existing

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[163] *See id.* at 136 (statement of Mitchell Rogovin and Saul Goodman, Shoshone and Arapahoe Tribes, Wind River Reservation, Wyo.). They also informed Congress of the extent of the theft and underreporting of royalties that had already occurred. *Id.* at 128 (statement of Saul Goodman, Shoshone and Arapahoe Tribes, Wind River Reservation, Wyo.) (noting that the tribes had to recover over one million dollars in previously unpaid royalties after they investigated allegations of theft and underreporting of royalties on their reservation).

[164] *Id.* at 129 ("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 [sic] 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, Former Director, Council of Energy Resource Tribes) (noting that section 20 would place a substantial burden on Indian tribes and questioning the equity of that burden).

[165] *H.R. 701, Conservation and Reinvestment Act of 1999*, *and H.R. 798, to Provide for the Permanent Protection of the Resources of the United States in the Year 2000 and Beyond: Field Hearing Before the H. Comm. on Res.*, 106th Cong. 62 (1999) (statement of Leslie W. Ramirez, Attorney, Pueblo Santa Ana) (recommending that Title II and III of the legislation be amended to provide grants to Indian tribes rather than a cost match or, in the alternative, to make the maximum cost-share requirement for Indian tribes 25%).

[166] *To Reauthorize and Extend the Older Americans Act Amendments of 1965, as Amended: Hearing on H.R. 3046 Before the Subcomm. on Hum. Res. of the H. Comm. on Educ. & Lab.*, 97th Cong. 107 (1981) [hereinafter *Hearing on the Older Americans Act Amendments of 1965*] (statement of Ronald P. Andrade, Executive Director, 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 majority of Indian elders to qualify for the program, and make the dietary recommendations more accommodating of traditional diets).

[167] *FEMRA Hearings*, *supra* note 136, at 400 (statement of Patricia Brown, Three Affiliated Tribes of the Fort Berthold Reservation) (asking 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

programs.[168] The National Congress of American Indians' (NCAI) request for several amendments in its testimony on the Older Americans Act of 1981 illustrates the breadth of amendments proposed by Native advocates.[169] NCAI prepared a detailed list of requested changes, including, *inter alia*, enabling more Indian communities to receive Title VI benefits, lowering the eligibility age requirements to allow the majority of Indian elders to qualify for the program, and making the dietary recommendations more accommodating of traditional diets.[170] Not all Indian advocates asked for as many changes as the NCAI, but many viewed amendments as a way to alter or shape proposed laws.

My data expands existing knowledge about legislative advocacy by providing insights into the circumstances in which Indian witnesses requested amendments to Indian-related bills. As Table 1 shows, Indian advocates sought amendments to pan-tribal and general policy bills twice as often as tribe-specific bills. The low level of amendments on tribe-specific bills may be because Indian witnesses rarely sought amendments on bills they initiated, and they initiated 78% of them.[171] In contrast, Native advocates initiated only 17% of all general bills but requested amendments on 78% of the general bills on which they testified. These findings suggest that Indian advocates often sought to shape general legislation even if they did not initiate it. The case of the NCAI's requests for amendments described above is one example of Indian advocates using amendments to influence the content of general legislation even though they were not considered major players in the bill's negotiations.

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fund for royalty accounting services); *id.* at 128 (statement of Saul Goodman, Shoshone and Arapahoe Indian Tribes, Wind River Reservation, Wyo.) (same); *id.* at 138 (statement of Ed Gabriel, Former Director, Council of Energy Resource Tribes) (same).

168 *NAHASDA Amendments of 1999: Hearing on S. 400 Before the S. Comm. on Indian Affs.*, 106th Cong. 8 (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).

169 "[T]he National Congress of American Indians . . . is the oldest, largest, and most representative American Indian and Alaska Native organization serving the broad interests of tribal governments and communities." *About NCAI*, NAT'L CONG. OF AM. INDIANS, https://www.ncai.org/about-ncai [https://perma.cc/PTM5-DAVP].

170 *Hearing on the Older Americans Act Amendments of 1965*, *supra* note 166, at 107 (statement of Ronald P. Andrade, Executive Director, National Congress of American Indians).

171 Chi-square tests showed that bill type was significantly correlated with Indian initiation of a bill at the 0.00 level. An analysis of variance (ANOVA) test showed a negative correlation between Indian initiation of a bill and Congress amending the bill in response to Indian testimony. The relationship was statistically significant at the 0.05 level.

TABLE 1: FREQUENCY OF REQUESTS BY INDIAN WITNESSES FOR AMENDMENTS ON 108 INDIAN-RELATED BILLS WITH INDIAN TESTIMONY IN THE 97TH AND 106TH CONGRESSES BY BILL TYPE IN PERCENTAGES

	Native-Requested Amendments	
Bill Type	**Total**	**Bills Amended**
Tribe-Specific	33% (18 / 55)	67% (12 / 18)
Pan-Tribal	74% (26 / 35)	50% (13 / 26)
General	78% (14 / 18)	57% (8 / 14)
All	54% (58 / 108)	57% (33 / 58)

Note. Chi-square tests (Pearson's and Fisher's exact) showed that bill type was significantly correlated with Native-requested amendment at the 0.01 level.
Source: Author's data.

Native advocates more frequently requested amendments on bills covering some subjects than others. Indian witnesses suggested amendments to every Indian-related bill introduced on courts, employment, energy development, environmental regulation, gaming, housing, self-government, taxation, and transportation. As Table 2 shows, they asked for changes on most bills addressing culture, education, health care, federal recognition, and lands, among other subjects. In contrast, they often did not seek amendments to proposed laws covering subjects on which they often initiated legislation, including land into trust, hunting and fishing, and natural resources.

TABLE 2: FREQUENCY OF REQUESTS BY INDIAN WITNESSES FOR AMENDMENTS ON 108 INDIAN-RELATED BILLS WITH INDIAN TESTIMONY IN THE 97TH AND 106TH CONGRESSES BY PRIMARY SUBJECT MATTER OF THE BILL IN PERCENTAGES

	Native-Requested Amendments	
Primary Subject Matter	**Total**	**Bills Amended**
Claims	35% (8 / 23)	87.5% (7)
Courts	100% (1 / 1)	100% (1)
Culture	67% (2 / 3)	50% (1)
Economic Development	50% (3 / 6)	33% (1)
Education	67% (4 / 6)	25% (1)
Employment	100% (3 / 3)	33% (1)
Energy Development	100% (2 / 2)	100% (2)
Environmental Regulation	100% (2 / 2)	100% (2)
Federal Recognition	67% (2 / 3)	50% (1)
Gaming	100% (3 / 3)	67% (2)
Health Care	67% (4 / 6)	50% (2)
Housing	100% (3 / 3)	100% (3)
Hunting and Fishing	0% (0 / 1)	0% (0)
Intergovernmental Relations	50% (1 / 2)	0% (0)
Land into Trust	0% (0 / 7)	0% (0)
Lands	59% (10 / 17)	50% (5)
Natural Resources	0% (0 / 6)	0% (0)
Other	57% (4 / 7)	0% (0)
Self-Government	100% (4 / 4)	75% (3)
Taxation	100% (1/1)	0% (0)
Transportation	100% (2 / 2)	50% (1)

Note. Pearson's chi-square tests showed that primary subject matter was significantly correlated with Native-requested amendment at the 0.01 level and with amendment in response to Native request at the 0.05 level.
Source: Author's data.

Requests for amendments by Native advocates also varied by the strength of the support for the bill among Indian witnesses more generally.[172] Indian witnesses only asked for amendments on one-quarter of the bills that Native advocates uniformly supported. Native requests for amendments occurred over 3.5 times more frequently when Indian witnesses uniformly opposed the bill. This finding validates earlier research indicating that Native opponents frequently seek to change proposed laws that they find problematic rather than just prevent their enactment.[173]

TABLE 3: FREQUENCY OF REQUESTS BY INDIAN WITNESSES FOR AMENDMENTS AND AMENDMENTS ENACTED IN RESPONSE TO NATIVE ADVOCACY ON 108 INDIAN-RELATED BILLS WITH INDIAN TESTIMONY IN THE 97TH AND 106TH CONGRESSES BY AGGREGATED NATIVE POSITION ON THE BILL IN PERCENTAGES

Aggregate Native Position on the Bill	***Native-Requested Amendments***	
	Total	**Bills Amended**
Unified in Support	25% (14 / 57)	43% (6 / 14)
Unified in Opposition	94% (16 / 17)	87% (14 / 16)
Both Support and Opposition	82% (28 / 34)	46% (13 / 28)
All Bills	54% (58 / 108)	57% (33 / 58)

Note. Chi-square tests (Pearson's and Fisher's exact) showed that aggregate Native position on the bill was significantly correlated with Native-requested amendment and amended in response to Native advocacy at the 0.01 level.
Source: Author's data.

B. Congressional Responses to Amendments Requested by Indian Witnesses

Members of Congress reacted to requests for amendments in different ways. Some simply ignored them, and the requests went nowhere.[174] The data, however, indicate that members of Congress heard some of the concerns made by witnesses during referral hearings and responded in a variety of ways. The interactions among members of Congress and witnesses

[172] I aggregated the Indian testimony on the bills into three categories: (1) uniformly supported or unified in support, when no Indian witnesses testified in opposition to the bill; (2) uniformly opposed or unified in opposition, when all Indian witnesses on the bill testified against it at the hearing; and (3) both support and opposition, when some Indian witnesses testified against the bill but others supported it.

[173] Carlson, *supra* note 28, at 82.

[174] The study used the bill rather than the request for amendment as the unit of analysis, so the data do not provide information on how many requests for amendment were ignored by members of Congress.

were often rich and indicative of the dialectic nature of the legislative process.

Some members of Congress showed great interest in the testimony of and requests made by tribal leaders. For example, Senator Ben Nighthorse Campbell, Chairman of the Senate Committee on Indian Affairs, acknowledged that his staff had written and actively solicited input from the Intertribal Monitoring Association on American Indian Trust Funds, the Yurok Tribe, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, and the First Nations Development Institute on Senate Bill 1587, a bill to amend the American Trust Fund Management Reform Act.[175] His colleague, Senator Daniel K. Inouye, asked tribal leaders to assist the Senate Committee on Indian Affairs by suggesting changes to the bill in the same referral hearing.[176]

In other hearings, members of Congress acknowledged the need for action to be taken even if the issue could not be addressed in the current bill. For example, Senator Kent Conrad recognized that a bridge on the Fort Berthold Reservation needed replacement even though Senate Bill 623, a reclamation bill, was not the appropriate vehicle to do it.[177] On other occasions, members of Congress agreed to add language sought by advocates to the report on a bill even if it could not be included directly in the legislation.[178]

Most importantly, for this Article, some members of Congress proposed amendments requested by Indian witnesses in referral hearings during the committee markup or consideration of the bill on the floor. Comparing the text of amendments requested by Indian witnesses in referral hearings with the language adopted in the final bill shows that Indian-related bills were frequently amended to address the concerns of Indian advocates. Members

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[175] *Trust Fund Management Reform Act: Hearing on S. 1587 and S. 1589 Before the S. Comm. on Indian Affs.*, 106th Cong. 38 (1999) [hereinafter *Trust Fund Management Reform Act Hearing*] (statement of Sen. Ben Nighthorse Campbell, Chairman, S. Comm. on Indian Affairs) ("We appreciate that and we do appreciate any constructive criticism for the bills because the bills were put together by us and our staff but the people whose lives are going to be affected need to have some input also.").

[176] *Id.* at 51 (statement of Sen. Daniel K. Inouye) ("Mr. Chairman, it seems apparent that all witnesses here have questions and concerns. I think it may help the committee if they assisted us by suggesting changes, if they have any. It would help me."). Chairman Campbell responded that it would assist him as well. *Id.* (statement of Sen. Ben Nighthorse Campbell, Chairman, S. Comm. on Indian Affairs) ("It would help me too, Senator.").

[177] *See, e.g.*, *Miscellaneous Water and Power Bills: Hearing on S. 244, S. 623, S. 769, S. 1027, and H.R. 459 Before the Subcomm. on Water & Power of the S. Comm. on Energy & Nat. Res.*, 106th Cong. 40 (1999) (statement of Sen. Kent Conrad) ("[W]e have received a commitment from the head of the Office of Management and Budget they would find another place to pay for [the Four Bears Bridge], but it would not be part of this legislation.").

[178] For example, the report on the Older Americans Act bill adopted many of the requests made by the NCAI in their testimony. H.R. REP. NO. 97-70, at 14 (1981).

of Congress amended over half (57%) of the bills to which Indian advocates proposed amendments.[179] The adoption of these amendments suggests that Native advocates influence legal change by requesting amendments that members of Congress adopt in the legislative process.[180] The data on the frequency of amendment of a bill in response to Indian advocacy, however, are hard to interpret because no baseline expectation exists. Previous studies have not examined congressional responses to requests for amendments in witness testimony, so the data cannot be directly compared with those of other groups.[181]

The data provide some insights into when and how members of Congress respond to Native proposals to amend federal legislation. As Table 3 shows, members of Congress amended bills in response to Native testimony approximately twice as often when Indians were unified in their opposition against the bill than when Indians only supported or did not have a unified position on the bill.[182] This finding supports earlier studies showing that Natives can block the enactment of federal legislation when they unite in opposition to it and that Natives use opposition to amend bills they deem problematic or harmful to them.[183]

Members of Congress more frequently amended bills with certain subject matters. Table 2 shows that they amended all the bills that addressed courts, energy development, environmental regulation, and housing, and a majority of bills relating to claims, gaming, and self-government in response to Native requests.

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[179] *See supra* Table 3. The data may underrepresent the responsiveness of members of Congress to Native concerns because sometimes members of Congress respond to Native concerns even if they do not amend the bill. For example, Senator Campbell invited constructive criticism from tribal governments and in the hearing on bills to amend the American Indian Trust Fund Management Act. *Trust Fund Management Reform Act Hearing*, *supra* note 175, at 1 (statement of Sen. Ben Nighthorse Campbell, Chairman, S. Comm. on Indian Affs.). The Senate Committee on Indian Affairs did not mark up or report the bill, so Senator Campbell's responsiveness to Indian testimony is not included in the data.

[180] The data on the frequency with which members of Congress adopt amendments proposed by Indian witnesses are hard to interpret. No baseline expectation exists for adopting amendments proposed by witnesses at referral hearings.

[181] McKay analyzed the relationships among amendment requests in letters to senators, fundraising events, and adoption of the amendment to determine whether a lobbyist holding a fundraising event for a senator increased the likelihood that the senator would propose the amendment. McKay, *Fundraising for Favors?*, *supra* note 23, at 871. She found that a fundraising event made it 3.5 times more likely that the senator would offer the amendment in committee. *Id.* at 875.

[182] A logistic regression model showed no significant statistical differences in the amendment of bills in response to Indian advocacy by tribal advocacy (measured as advocacy on behalf of a federally recognized Indian tribe) or advocacy by a tribal consortium (defined as an organization of federally recognized Indian tribes). The dependent variable in the logistic regression model was "bill amended in response to Indian testimony." The results of the model are on file with *Northwestern University Law Review*.

[183] Carlson, *supra* note 28, at 74–76, 82.

Committees with jurisdiction over Indian affairs amended 55% of the bills that Native advocates sought to amend, yet chi-square tests showed no significant statistical differences in the amendment of bills in response to Indian advocacy referred to committees with and without jurisdiction over Indian affairs.[184] In other words, referral to and markup of a bill by a committee with Indian affairs jurisdiction does not seem to be associated with whether or not Congress adopted amendments proposed by Native advocates. This finding suggests that members of Congress amended bill texts to satisfy, at least in part, Indian advocates even when a committee without Indian affairs jurisdiction marked up the bill.

The adoption of amendments suggested by tribal governments and Native organizations does not appear to depend upon having the bill referred to or marked up by a committee with Indian affairs jurisdiction. Rather, members of Congress—regardless of whether they sit on a committee with Indian affairs jurisdiction—introduce amendments requested in Native testimony. This finding suggests that Native advocates have influence beyond the committees with Indian affairs jurisdiction. The amendments they suggest may shape bills assigned to and vetted by various congressional committees. This result may reflect efforts by Native advocates to build relationships with members of Congress that are not known (through their committee assignment) to take an active interest in Indian affairs.

Similarly, the amendment of bills with Indian advocacy occurred on all types of proposed bills (pan-tribal, tribe-specific, or general).[185] Chi-square tests showed no significant statistical differences in the amendment of bills in response to Indian advocacy by bill type. This finding suggests that Congress amended bills that directly targeted Indians and general bills devising broader policies for the public in response to Native advocacy. Indian influence, thus, appears to extend beyond legislation targeted at Indian affairs (e.g., pan-tribal and tribe-specific bills).

C. Amendments and Enactment

The amendment of a bill to reflect changes requested by Indian witnesses indicates influence but does not by itself produce a change in the law. For the law to change, members of Congress must adopt the bill or policy that was amended in response to Indian advocacy. Thus, I investigated the relationship between amendments and enactment. My investigation does not seek to explain why Congress enacted a bill. Other studies have

[184] Native witnesses requested amendments to forty-two bills referred to the committee with Indian affairs jurisdiction in either the House or the Senate. Of these, members of Congress amended twenty-three of them.

[185] *See supra* Table 1.

demonstrated the complexity of and difficulties in explaining congressional policymaking, including causation of bill enactment.[186] I aim to determine whether the amendment of the bill increases its likelihood of enactment. I contend that the increased likelihood of enactment means that advocates have influenced the development of the law (even if they did not influence the enactment of the bill).

As expected, members of Congress amended bills that Indian advocates sought to have changed, and Congress frequently enacted Indian-related policies that were amended in response to Indian advocacy. The descriptive data suggested a dramatic increase in enactment rates once Congress amended the legislation. Recall that, on average, Congress enacts and the President signs less than 4% of all introduced bills and about 11% of Indian-related bills.[187] As Table 4 shows, 25% of the bills in the dataset became law. Almost half of those bills (48%, or 13 / 27) were amended in response to Indian testimony prior to enactment. The enactment rate increased to 39% when reviewing bills that Congress amended in response to Native advocacy. Similarly, 54% of the policies included in the bills in the dataset became law. A little under half of those policies (23 / 58) were amended in response to Native testimony prior to enactment. 70% of policies amended in response to Native advocacy eventually became law. The enactment rates also increased when analyses were run on bills and policies amended in response to advocacy by non-Indian witnesses.[188]

[186] It is unlikely that I could model bill enactment due to the small number of bills in the study and the high number of variables that potentially affect bill enactment. For a sampling of the extensive political science literature on Congress and policymaking, see generally BAUMGARTNER ET AL., *supra* note 22; DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974) [hereinafter MAYHEW, CONGRESS]; JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (2d ed. 1995); DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002 (2d ed. 2005) [hereinafter MAYHEW, DIVIDED WE GOVERN]; SARAH A. BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK (2003); BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (4th ed. 2012); KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING (1998); JAMES L. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS (1981); NELSON W. POLSBY, HOW CONGRESS EVOLVES: SOCIAL BASES OF INSTITUTIONAL CHANGE (2004).

[187] *See* Carlson, *supra* note 14, at 118.

[188] Statistical analyses are on file with *Northwestern University Law Review*.

TABLE 4: FREQUENCY OF ENACTMENT OF BILLS AND POLICIES AMENDED IN RESPONSE TO NATIVE ADVOCACY ON 108 INDIAN-RELATED BILLS WITH INDIAN TESTIMONY IN THE 97TH AND 106TH CONGRESSES

	Amended in Response to Native Testimony and Enacted	**Total Enacted**
Bills	39% (13 / 33)	25% (27 / 108)
Policies	70% (23 / 33)	54% (58 / 108)

Note. Chi-square tests (Pearson's and Fisher's exact) showed that enactment of a bill or policy was significantly correlated with "amended in response to Native advocacy" at the 0.05 level.
Source: Author's data.

I ran two multivariate logistic regression models to further examine the relationships between bills amended in response to Indian testimony and policy enactment shown in Table 5.[189] In the first model, the dependent variable is enactment of the bill. The primary independent variable is amendment of the bill in response to Indian testimony.

The second model seeks to determine the likelihood of enactment of a policy when a committee amends a bill in response to Indian testimony and does not enact the initial bill but incorporates the amendment into a related bill. An example is the Federal Energy and Mineral Resources Act of 1982, described in Part II. In this model, the dependent variable is enactment of the policy as amended and incorporated into a companion or subsequent bill when Congress did not enact the original amended bill. This dependent variable accounts for the fact that policies in failed bills may be enacted in another bill. It captures how advocates' influence may persist in the long run and affect later versions of legislation. Again, the primary independent variable is amendment of the bill in response to Indian testimony.

Both models include several control variables. Indian initiation of the bill examines whether Congress is more likely to enact bills that Native advocates initiate. The expectation was that Indian initiation of the bill might increase the likelihood of enactment because Congress has a trust responsibility to protect tribal lands and governance.[190] The type of bill (pan-tribal, tribe-specific, and general) is included to assess whether Congress is more likely to enact Indian affairs bills than general legislation. The expectation was that consistent with public choice theories, tribe-specific and pan-tribal bills would be easier to enact because they tend to be narrower

[189] Multicollinearity tests run on both regression models indicated no multicollinearity issues among the dependent and independent variables. The tests are on file with the author and available upon request.

[190] RESTATEMENT OF THE L. OF AM. INDIANS § 4 (AM. L. INST. 2022).

and less salient to the general public.[191] The Indian committees variable investigates whether assignment of the bill to a committee with Indian affairs jurisdiction increases the likelihood of enactment. These committees may be more likely to enact Indian-related legislation because they have a responsibility to enact Indian legislation and present Indians with a unique structural opportunity to influence members of Congress.[192] Congress is a binary variable included to control for any effects the congressional session could have on bill enactment. The expectation was that the 97th Congress would be more likely to enact Indian-related legislation because Democrats controlled the House and are thought to be more likely to enact Indian-related legislation.[193] The 106th Congress was used as the reference category for this dichotomous variable.[194]

The main drawback of these models is that they do not explain the underlying cause of any correlation between the variables.[195] They are not presented as models explaining or predicting bill enactment but examining the relationship between amendment in response to Native testimony and enactment. The existence of a relationship, however, does not establish a causal pathway or allow for the ruling out of alternative causal pathways due to omitted variables. It is unlikely that any model could include all possible omitted variables, due to the high number of variables potentially affecting bill enactment.[196] As a result, this research does not necessarily show that adopting the amendment influences the bill's enactment. It provides

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[191] Carlson, *supra* note 14, at 141. Public choice theories conceptualize the political process as driven by interest groups. ESKRIDGE ET AL., *supra* note 41, at 59, 115–16. They suggest that Congress is more likely to enact statutes that concentrate benefits on special interests while distributing the costs of those benefits to the general public and is less likely to enact statutes that distribute benefits broadly. *Id.* at 121. Under public choice theories, Congress should enact more tribe-specific and pan-tribal bills, concentrating benefits on a specific tribe or Indian nation more generally than general bills related to Indians, which are more likely to have diffuse benefits and costs. The model did not include a separate measure of salience because previous studies of Indian-related legislation have not found a relationship between salience and enactment. CHARLES C. TURNER, THE POLITICS OF MINOR CONCERNS: AMERICAN INDIAN POLICY AND CONGRESSIONAL DYNAMICS 50 (2005).

[192] *See* GROSS, *supra* note 96, at 77–79; WILKINS & STARK, *supra* note 13, at 91.

[193] Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Policy That Works* 16, 27 (Harvard Kennedy Sch., Working Paper No. RWP10-043, 2010).

[194] More robust measures of partisanship, both for the congressional session and on the bill itself, were used in other specifications of the models. They are omitted because they did not significantly improve or change the models.

[195] This identification problem generally arises with observational data and is not unique to this study.

[196] *See generally* GROSS, *supra* note 96, at 49–50, 61–62, 75–76 (providing examples of variables related to federal spending, presidential initiative, and congressional advocacy that may impact bill enactment); TURNER, *supra* note 191, at 22–23, 33–34, 51 (citing, among others, salience, party, institutional structure, partisanness, and voting patterns as variables relevant to likelihood of enactment).

additional support for the hypothesis that the hearing testimony influenced the content of the legislation.

TABLE 5: STATISTICAL MODELS OF ENACTMENT FOR INDIAN-RELATED BILLS AND POLICIES WITH INDIAN TESTIMONY

	Model 1 Bill Enacted	**Model 2 Policy Enacted**
Amended in Response to Native Testimony	1.30** (0.51)	1.38* (0.53)
Native Initiation of the Bill	0.07 (0.55)	0.81 (0.52)
Type of Bill		
Pan-Tribal Bill	–0.29 (0.61)	–0.15 (0.56)
General Bill	–1.35 (0.86)	–1.09 (0.74)
Committee with Indian Affairs Jurisdiction	–0.63 (0.62)	–0.62 (0.59)
Congress	0.01 (0.50)	1.26* (0.46)
Number of Cases	107	107

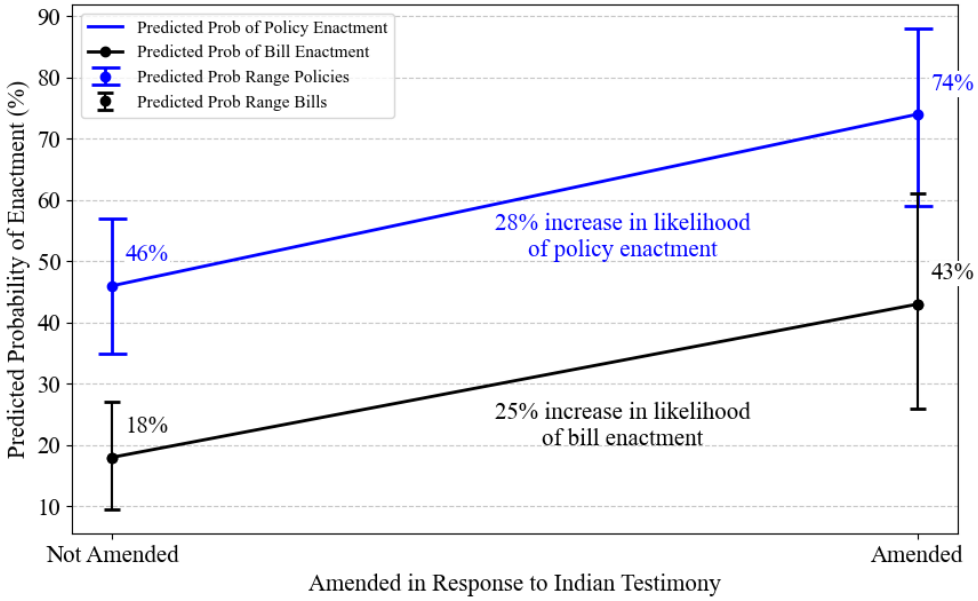
Note. * Significant at the 0.01 level, ** Significant at the 0.05 level.
Cell entries are logit coefficients (standard errors in parentheses).
Source: Author's data.

The regression models further support the hypothesis that Congress is more likely to enact a bill or policy if Congress amends the bill in response to Indian advocacy first.[197] As expected, amendment of a bill in response to Indian testimony increased the likelihood of the bill's enactment. The coefficient for the variable of interest (amended in response to Indian advocacy) is positive and statistically significant at the 0.05 level. This means that amendment of the bill in response to Indian testimony is associated with the increase in the likelihood of the bill's adoption. The predicted probabilities generated from the logit model show that, other things being equal, the likelihood of enactment of a bill without amendment in response to Indian testimony was 18% (9% to 27%). Figure 1 shows that

[197] Logistic regression models run on amendments to Indian-related bills, including those not proposed by Native advocates, showed that the likelihood of enactment of a bill increased whenever Congress amended the bill before enacting it. An analysis of these models is on file with the author and is available upon request.

that likelihood increased dramatically by 25% to 43% (26% to 61%) when Congress amended the bill in response to Indian testimony.

FIGURE 1: NOMOGRAM OF LOGISTIC REGRESSION ANALYSIS OF WHETHER AMENDMENT OF A BILL IN RESPONSE TO INDIAN TESTIMONY AFFECTS BILL OR POLICY ENACTMENT



Source: Author's data

The results are even more striking in the second model. It shows an even greater likelihood of enactment of a policy amended in response to Native testimony when the enactment of companion or subsequent bills is included in the analysis. The coefficient for "amended in response to Indian testimony" is also positive and statistically significant at the 0.01 level. Again, this means that amendment of the bill in response to Indian testimony is associated with an increase in the likelihood of the policy's adoption. The predicted probabilities generated from the logit model show that, other things being equal, the likelihood of enactment of a policy without amendment in response to Indian testimony was 46% (35% to 57%). Figure 1 shows that the likelihood increased dramatically by 28% to 74% (60% to 88%) when Congress amended the bill in response to Indian testimony. These increased likelihoods of enactment after amendment indicate that amendments serve as a mechanism for influence in legislative lawmaking. The regression analysis and predicted probabilities reiterate the finding that members of Congress frequently responded to Native advocates by amending bills in

response to their requests before enacting them. This does not necessarily mean that adoption of the amendment influenced the bill's enactment. Nonetheless, it demonstrates that the hearing testimony influenced the legislators, as evidenced in Congress's most significant legal output: statutes.

Contrary to my expectations, none of the control variables affected the likelihood of enactment for bills or policies in Model 1, and only Congress significantly impacted the likelihood of policy enactment in Model 2.[198] None of the measures for Indian initiation of the legislation, bill type, or assignment to a committee with Indian affairs jurisdiction was statistically significant. The finding that assignment to a committee with jurisdiction over Indian affairs did not significantly increase the likelihood of enactment of an Indian-related bill is somewhat inconsistent with earlier studies. Professor Emma Gross has described congressional committees on Indian affairs as providing Indian advocates with unique, structural opportunities to make their policy preferences known.[199] However, a recent study did not confirm her analysis. Rather, it suggested that even if committees with Indian affairs jurisdiction create opportunities for Native participation in federal policymaking, that may not translate into Indian influence on federal laws.[200] The findings here cast further doubt on the theory that a link exists between the assignment of a bill to a committee with Indian affairs jurisdiction and bill enactment.

The measure for Congress was positive and significant in Model 2, suggesting that the policy was more likely to be enacted if the bill was in the 97th Congress. This result matched expectations, which posited that bills and policies were more likely to be enacted if they were in the 97th Congress. Consistent with Professors Stephen Cornell and Joseph Kalt's research, the findings suggest that Republican control of the House and the Senate

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[198] Earlier studies have run similar logistic regression models with additional independent variables for opposition. Carlson, *supra* note 28, at 74. Opposition examines whether testimony against the bill by other groups influences bill enactment. BAUMGARTNER ET AL., *supra* note 22, at 68, 76–77. Chi-square tests showed that opposition was not significantly correlated with enactment, so it was excluded from the analysis.

[199] GROSS, *supra* note 96, at 77.

[200] Carlson, *supra* note 89, at 31. Studies have yet to investigate why Natives have greater access than influence on the legislative process. Several factors, including specialized committees with Indian affairs jurisdiction and the status of tribal leaders as elected representatives of their communities, may increase their access to federal legislators. *See* GROSS, *supra* note 96, at 77, 99–100. This access, however, does not make it easier for Natives to persuade members of Congress to enact their desired legislation. Their limited influence may result from the low salience of many Native issues, opposition (from other Natives or non-Natives), or increased deference to party alliances rather than the committee with Indian affairs jurisdiction. TURNER, *supra* note 191, at 33–34, 51 (noting how salience impacts federal American Indian-related policy). Scholars have similarly found that cities and states often have access to federal policymakers but limited influence over lawmaking. PAUL L. POSNER, THE POLITICS OF UNFUNDED MANDATES: WHITHER FEDERALISM? 79 (1998).

decreased the likelihood of policy enactment.[201] It is not clear why the party in control would affect policy enactment but not bill enactment, but this finding is consistent with previous studies that have found the party in control of Congress not to affect bill enactment.[202] The data do not rule out the possibility that something other than the party in control within the 97th Congress affected policy enactment.

IV. IMPLICATIONS FOR UNDERSTANDING AND ADVOCATING FOR LEGAL CHANGE IN THE LEGISLATIVE PROCESS

The conventional wisdom tells two stories about the role of advocacy in legislative lawmaking. One is that special interests wield tremendous power over lawmakers. A second casts considerable doubt on the ability of underrepresented groups to change the law legislatively.[203] The validity of these prevailing narratives matters tremendously in a world in which the majority of laws are statutes.[204] Effective law reform efforts often depend upon exercising influence over lawmaking processes.

The foregoing evidence tells a more nuanced and complex story about how groups change the law through legislation. It emphasizes draft bills as legal texts and suggests that advocacy groups may influence the content of statutes by providing lawmakers with legal information and suggested amendments. Contrary to the prevailing narrative about underrepresented groups, this research shows that at least one such group—Native advocates—has shaped the law legislatively. Further, it demonstrates how they did this by documenting how amendments serve as one important tool for influencing legislation. Finally, it indicates the durability of this influence, as Congress later enacted a majority of the proposed laws amended in response to Native advocacy.

These findings suggest that legal scholars, political scientists, and advocacy scholars must develop more nuanced approaches to understanding how advocates influence legislation.[205] Lawyers and advocates cannot craft effective strategies to shape the law through the legislative process without more accurate descriptions of how and when legislative advocacy influences the law. My research contributes to this larger project by adapting the legal decision-making model and applying it to the study of influence in the

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[201] Cornell & Kalt, *supra* note 193, at 23–24.

[202] Carlson, *supra* note 28, at 80 (finding in an analysis of five congressional sessions that the party controlling Congress was not significantly related to the enactment of Indian-related bills).

[203] *See, e.g.*, ELY, *supra* note 4, at 135–79 (noting that discrete and insular minorities are politically disadvantaged and suggesting that this justifies judicial review in certain cases).

[204] MIKVA & LANE, *supra* note 2, at 3.

[205] HANSEN & SKOPEK, *supra* note 84, at 194.

legislative process. This approach expands existing understandings of the various mechanisms and pathways advocates can use to influence legislative lawmaking. It also highlights the need for more research on several important topics.

To the extent that measuring influence based on legislative outcome alone overlooks the substantive content of statutes, this research suggests the need for more accurate and nuanced measures of influence. My treatment of bills as legal texts and the legislative process as a legal one allows for one reconceptualization of what constitutes influence—and in a way that matters most to lawyers who care about the development of the law and provides a more accurate description of the legislative process. The data demonstrate how a bill's failure may not be viewed as a "loss" by participants in the legislative process but simply evidence that the advocate has not won *yet*.[206] These findings confirm that advocacy groups may consider short-term successes and incremental impacts on the details of a proposed law to be important wins.[207] They indicate one reason why binary measures focused on bill enactment may have failed to capture advocate influence in previous studies. More accurate measures appear to look beyond the bill and its enactment[208] to examine the substantive bill content crafted through a dialectical, ongoing process that occurs over the long term. Future studies should move beyond definitions of influence based on policy enactment, conceptualize the legislative process as a legal one, and further explore how legal reform may occur incrementally through changes in proposed bills in the legislative process.

If information has a meaningful impact on legislation, additional studies must explore the mechanisms by which that influence occurs. Legislative scholars have long hypothesized that advocates influence legislators by providing them with information,[209] but they have struggled to figure out precisely how information influences legislators. My research presents a novel methodology for tracing the influence of information through the legislative process. Approaches like this one that allow for direct comparison of a group's attempts at influence and evidence of that influence in enacted laws reveal the mechanisms by which advocates use information and

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[206] Interview with Anonymous, Lawyer/Lobbyist, in D.C. (July 30, 2018) (on file with author); BAUMGARTNER ET AL., *supra* note 22, at 244–45.

[207] SCHLOZMAN & TIERNEY, *supra* note 42, at 311.

[208] Burstein makes a similar point in using policy proposals rather than bills as the unit of analysis in his study. His work also demonstrates how the policies in many bills resurface in later legislation. BURSTEIN, *supra* note 20, at 2; Burstein & Hirsh, *supra* note 21, at 182–83.

[209] BERRY, *supra* note 21, at 10–11; WRIGHT, *supra* note 21, at 75–97; Burstein & Hirsh, *supra* note 21, at 175–78; BURSTEIN, *supra* note 20, at 154–56.

arguments to influence legislative texts.[210] My study documents one important mechanism, amendments, as a pathway for advocates to shape the law through legislation. Future research should continue to explore innovative ways to examine texts, including amendments, to assess how groups use information to influence federal lawmaking.

Another significant line of inquiry for future research is what information is useful or persuasive to members of Congress and why. My findings contribute to a growing literature on the kinds of information that are decisive for lawmakers.[211] The data may support Professor John Wright's hypothesis that lawmakers value scarce information.[212] A possible explanation for the adoption of Native amendments is that members of Congress deferred to Natives as experts on Indian law and policy. To the extent that expertise and scarcity may influence lawmakers, they merit attention in future studies.

Legal arguments emerge in the data as another important kind of information that could potentially persuade lawmakers, but political scientists have largely overlooked this possibility. My findings support the few previous studies indicating that legal frames and arguments influence legislators by suggesting that Native witnesses often relied on legal arguments in their attempts at influence.[213] Native witnesses emphasized how bills would change, impact, or violate existing federal laws. These findings may suggest that political science studies emphasizing political arguments have overlooked the importance and effectiveness of legal and law-based arguments on members of Congress. Further investigation into the effectiveness of legal arguments would illuminate how the law develops through the legislative process and how legislators view legal arguments as they craft statutes. Future studies should consider how the use of and receptivity of members of Congress to legal arguments may vary by group. For instance, legal arguments may prove more persuasive to lawmakers when made by groups whom Congress heavily regulates, such as American Indians.

Related to the inquiry into when and why information is important for congressional lawmakers in their decision-making is the need for deeper exploration into the motivations underlying lawmakers' behavior. The exploration of lawmakers' motivations is beyond the scope of this study, but the findings problematize existing understandings. Political scientists maintain that electoral politics typically fuel legislative behavior because

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[210] BURSTEIN, *supra* note 20, at 154–58; McKay, *Fundraising for Favors?*, *supra* note 23, at 871.

[211] For a description of this literature, see *supra* Section I.A.

[212] WRIGHT, *supra* note 21, at 89.

[213] McCammon et al., *supra* note 52, at 740.

achieving their policy and other goals depends upon reelection.[214] Electoral concerns alone seem neither likely nor wholly satisfactory as an explanation for why members of Congress responded by adopting amendments proposed by Natives—a group with almost no electoral clout and few political resources.[215] Yet members of Congress adopted many of the amendments that they suggested. It may be that adopting amendments suggested by Natives posed no electoral threat and allowed members of Congress to present a policy win to their constituents. Future studies should delve more deeply into understanding the motivations underlying the representative's responses to amendments suggested by witnesses at hearings and how they vary by individual member of Congress.

If the proposal of amendments is a necessary but insufficient condition for legal change, one wonders what causal relationship might exist between amendments and enactment of a law or policy. Like previous studies, my research documents the interactions between members of Congress and advocates and suggests an openness on the part of legislators to negotiate the substantive content of proposed laws.[216] It goes beyond earlier accounts by analyzing the next stage in the legislative process to see if the amendments adopted by legislators in response to Native advocacy are enacted into law.[217] It provides compelling evidence that they are, finding that the likelihood of enactment increases dramatically once members of Congress amend a proposed law. This research raises important yet unexplored questions about why amendment of a bill increases the likelihood of its enactment.[218] For example, advocates could simply be requesting amendments on bills that would have been enacted regardless, or requests for amendments could signal something about the bill to members of Congress that encourages them to move it through the legislative process. Future studies should investigate further the relationship between amendment and enactment in

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[214] MAYHEW, CONGRESS, *supra* note 186, at 6; GARY C. JACOBSON, THE POLITICS OF CONGRESSIONAL ELECTIONS 182 (2d ed. 1987). Some studies have not found evidence to support these assertions. For example, Burstein found that the witnesses in his study rarely provided legislators with information related to electoral concerns. BURSTEIN, *supra* note 20, at 153.

[215] Carlson, *supra* note 79, at 45; *see also* Carlson, *supra* note 89, at 3–4 (documenting that tribal governments and Native organizations do not spend as much on lobbying expenditures as businesses and other organized interests).

[216] Ziv, *supra* note 53, at 212–13 (discussing the negotiations between advocates and members of Congress on the Americans with Disabilities Act); McKay, *Fundraising for Favors?*, *supra* note 23, at 871–72 (showing links between letters sent to senators and amendments to the Affordable Care Act).

[217] McKay, *Fundraising for Favors?*, *supra* note 23, at 876 (hypothesizing but not confirming empirically that many of the amendments to the Affordable Care Act were enacted as part of the final bill).

[218] The question of why legislators are more likely to enact amended bills is beyond the scope of this Article.

legislative lawmaking, including whether members of Congress only amend laws likely to get enacted.

If groups can use amendments to shape legislation, one wonders about their use by various groups. Interest group studies suggest that Native advocates are not unique in their efforts to influence legislation by suggesting amendments that would make the laws more acceptable to them.[219] Most likely, other groups use similar strategies and tactics. Scholars have increasingly documented how groups differ in the ways and extent to which they engage in the political system,[220] but comparison among groups frequently proves difficult because scholars do not use the same measures.[221] This research provides a methodology that other scholars can replicate and a baseline for comparisons with other groups. Additional microlevel and comparative studies are needed to examine how, when, and with what success other groups use amendments to shape legislative texts.

To the extent legislators responded to an underrepresented group with almost no electoral clout and few political resources,[222] one wonders who legislators respond to and why. Contrary to conventional narratives, my data tell a surprisingly positive story about how tribal governments and Native organizations have leveraged their testimony at congressional hearings to persuade members of Congress to enact legislation that better suits their needs. It presents an alternative narrative about how our most accountable lawmaking institution interacts with underrepresented groups. My findings, however, are limited to one group and do not alleviate the real concerns that previous studies have raised about the inequalities of the lobbying system.[223] Rather, they suggest 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.[224] For example, my research pushes race and ethnicity scholars to think beyond descriptive representation as a pathway to influence the legislative process by showing that Native advocates use testimony to

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[219] *See supra* Section II.A.

[220] BAUMGARTNER & LEECH, *supra* note 11, at 1193; GROSSMANN, *supra* note 85, at 16; Carlson, *supra* note 89, at 3–4; LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE 9 (2015). For example, citizen groups may spend less on lobbying and lobby on fewer issues than business organizations. BAUMGARTNER & LEECH, *supra* note 11, at 1197.

[221] BAUMGARTNER & LEECH, *supra* note 20, at 120–21, 128–29, 135–36.

[222] Carlson, *supra* note 79, at 45.

[223] BAUMGARTNER & LEECH, *supra* note 11, at 1206–07; SCHLOZMAN & TIERNEY, *supra* note 42, at 311.

[224] Indian advocates 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.

influence legislators. Future research should investigate when, how, and to what extent other underrepresented groups can leverage the legislative process and use amendments to shape the law.

The rosy picture of legislative advocacy portrayed by the data, however, raises another important question for future research. Amendments are a strategy to create change within the legislative process rather than to challenge it. My data confirms earlier studies showing that groups—even underrepresented ones—may effectively change the law by working incrementally through the existing system.[225] It also indicates that this may produce substantive and not just technical changes to a proposed law.[226] This research, however, has not questioned or investigated how working within the legislative system may limit law reform efforts. Thus, it begs the question of whether the system itself limits law reform efforts and what, if anything, advocacy groups are achieving. In a world in which Native advocates increasingly call for decolonization and other underrepresented groups seek racial justice, it is fair to ask whether a focus on working within the system is enough and whether it may undermine efforts to transform the system itself. This study has not tried to answer those important questions and leaves them for future research.

CONCLUSION

Empirical studies have largely been unable to uncover evidence that consistently supports the prevailing narrative that advocacy groups influence legislation. Even when their results indicate that advocates have shaped the law, scholars struggle to explain how advocates did it. This Article adapts the legal model of decision-making to present the first comprehensive empirical study of how advocates change the law through amendments in the legislative process. Its innovative approach emphasizes legislative lawmaking within an interactive, discursive process influenced by amendment advocacy. The analysis produces three significant insights. First, it shows that advocates frequently influence legislation through amendments. Amendments serve as an important pathway for negotiating the content of statutes. Second, it uncovers a rarely observed relationship between legislative advocates and sitting members of Congress. Comparison of advocates' testimony on bills to legislative amendments enacted by

[225] BAUMGARTNER ET AL., *supra* note 22, at 246 (finding that substantial policy change may occur when attention is focused on an issue); EVANS, *supra* note 70, at 6–7 (finding that tribal governments have successfully shifted federal laws and programs over time through subtle, persistent, and often incremental strategies).

[226] *See supra* Section II.C (discussing how Congress removed an entire section of a bill in response to a request by Native witnesses to do so).

Congress in final bills reveals similar and even identical language, providing compelling evidence that groups persuaded legislators to introduce and adopt amendments valued by the group. Finally, it shows how advocate influence at the hearing stage of the legislative process frequently shapes the law by dramatically increasing the likelihood of legislative enactment. The findings challenge existing narratives about how groups influence legislation and provide important, new insights into how advocates can effectively utilize the legislative process to reform the law.

APPENDIX: DESCRIPTIVE STATISTICS OF THE 97TH AND 106TH CONGRESSES

TABLE A1: CHARACTERISTICS OF INDIAN-RELATED BILLS IN THE 97TH AND 106TH CONGRESSES

	97th Congress	**106th Congress**
Enactment	26% (13)	24% (14)
Type		
Tribe-Specific	16% (8)	47% (27)
Pan-Tribal	22% (11)	41% (24)
General	22% (11)	12% (7)
Bill Initiated by Natives	52% (26)	62% (36)
Native-Requested Amendment	52% (26)	55% (32)
Amended in Response to Indian Testimony	38% (19)	24% (14)
Amended in Response to Indian Testimony & Bill Enacted	18% (9)	8% (4)
Amended in Response to Indian Testimony & Policy Enacted	34% (17)	12% (7)
Indian Committee	68% (34)	74% (43)
	n = 50	n = 58

Source: Author's data.

TABLE A2: PRIMARY SUBJECT MATTER OF INDIAN-RELATED BILLS IN THE 97TH AND 106TH CONGRESSES

Subject Matter	97th Congress	106th Congress
Claims	16	7
Courts	0	1
Culture	1	2
Economic Development	1	5
Education	3	3
Employment	2	1
Energy Development	2	0
Environmental Regulation	2	0
Federal Recognition	1	2
Gaming	0	3
Health Care	1	5
Hunting and Fishing	2	0
Intergovernmental Relations	1	1
Land in Trust	5	2
Lands	6	11
Natural Resources	2	4
Other	2	5
Self-Government	0	4
Taxation	1	0
Transportation	1	1
Total	50	58

Source: Author's data.

TABLE A3: TYPE OF BILL BY NATIVE REQUEST FOR AMENDMENT, AMENDMENT IN RESPONSE TO NATIVE TESTIMONY, AND ENACTMENT AFTER AMENDMENT IN RESPONSE TO NATIVE TESTIMONY FOR THE 97TH CONGRESS

	Pan-Tribal	**Tribe-Specific**	**General**	**Total**
Native-Requested Amendment	73% (8 / 11)	36% (10 / 28)	73% (8 / 11)	52% (26 / 50)
Amended in Response to Indian Testimony	75% (6 / 8)	90% (9 / 10)	63% (5 / 8)	77% (20 / 26)
Amended in Response to Indian Testimony & Bill Enacted	33% (2 / 6)	56% (5 / 9)	40% (2 / 5)	45% (9 / 20)
Amended in Response to Indian Testimony & Policy Enacted	67% (4 / 6)	89% (8 / 9)	100% (5 / 5)	85% (17 / 20)

Source: Author's data.

TABLE A4: TYPE OF BILL BY NATIVE REQUEST FOR AMENDMENT, AMENDMENT IN RESPONSE TO NATIVE TESTIMONY, AND ENACTMENT AFTER AMENDMENT IN RESPONSE TO NATIVE TESTIMONY FOR THE 106TH CONGRESS

	Pan-Tribal	**Tribe-Specific**	**General**	**Total**
Native-Requested Amendment	75% (18 / 24)	30% (8 / 27)	86% (6 / 7)	55% (32 / 58)
Amended in Response to Indian Testimony	39% (7 / 18)	50% (4 / 8)	50% (3 / 6)	44% (14 / 32)
Amended in Response to Indian Testimony & Bill Enacted	43% (3 / 7)	25% (1 / 4)	0% (0)	29% (4 / 14)
Amended in Response to Indian Testimony & Policy Enacted	71% (5 / 7)	50% (2 / 4)	0% (0)	50% (7 / 14)

Source: Author's data.