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# Making Strategic Choices: How and Why Indian Groups Advocated for Federal Recognition from 1977 to 2012

Kirsten Matoy Carlson

How and why do groups employ law strategically in different venues? This article combines theoretical and methodological insights from sociolegal and interest-group studies to investigate how and why nonfederally recognized Indian groups used administrative and legislative strategies for federal recognition from 1977 to 2012. By detailing the circumstances leading Indian groups to employ varying strategies, it provides a more nuanced understanding of the dynamic interplay among the goals, motivations, and constraints influencing groups to use administrative and legislative processes over time.

Advocates use the law in arguing for social change in multiple venues (Handler 1978; McCann 1994; Rosenberg 1991; Silverstein 1996; Silverstein 2009). Juridification, or advocates' reliance on legal language, formal structures, and automated procedures both inside and outside the courts has increased over time (Silverstein 2009). Moreover, advocates' use of multidimensional strategies "across different domains (courts, legislatures, media), spanning different levels (federal, state, local), and deploying different tactics (litigation, legislative advocacy, public education)" has grown in recent decades (Cummings and NeJaime 2010; Rhode 2007–08). This trend toward the increased use of law across institutional venues raises the question of how and why groups employ law strategically in different venues.

In this article, I start to unpack this question about how and why groups use the law in different institutional settings by examining the various administrative and legislative strategies employed by 124 Indian groups seeking federal recognition from

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1977 to 2012. The federal recognition of Indian groups is a particularly rich setting for investigating how and why groups use legislative and administrative processes to make their legal claims. Since its formation, the United States has dealt with American Indians by establishing legal relationships with them as separate political communities, commonly referred to as "tribes" or "nations" (Goldberg-Ambrose 1994). The United States and tribes entered into treaties acknowledging the tribes' preexisting and ongoing rights and governmental authority. These treaty relationships, along with federal legislation and Supreme Court decisions, form the basic legal framework governing Indians in the United States today. The key elements of this framework include: federal recognition of inherent governmental authority possessed by Indian tribes, which usually supplants state powers; a federal trust obligation toward and special federal powers over Indian tribes and their citizens; and federally protected lands for designated Indian tribes (Ibid.). This legal framework, and the status and power that flow from it, however, only applies to Indian groups recognized as tribes by the federal government (Newton 2006 §3.02). Nonfederally recognized Indian groups lack this legal status. The estimated 400 nonfederally recognized Indian groups in the United States suffer from high rates of poverty and unemployment, often live in rural areas, and lack political clout (Cramer 2008: 52–54). As a result, many of these groups seek recognition—the legal status that affirms Indian groups as self-governing tribes.

Some Indian groups have pursued legislative strategies, others have employed administrative ones, and still others have utilized both in seeking recognition. Many groups have shifted their strategies in different ways and for diverse reasons over time. This variation among strategies used by several groups seeking a similar goal over a 25-year period provides an opportunity to investigate how and why groups employ the law strategically in legislative and administrative settings.

I utilize a relatively novel approach drawing on theoretical and methodological insights from the interest group and sociolegal literatures to explore the circumstances in which Indian groups developed different strategies for recognition over time. I take useful insights from the interest group literature about the role of motivations, goals, and constraints in the development of lobbying strategies and integrate them with a constitutive perspective to construct a more nuanced approach to understanding how and why groups employ the law strategically in different venues. By exploring the interactive dynamics among goals, motivations, and constraints in strategic decisionmaking, my approach contributes to a fuller understanding of the complex of meaning,

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setting, and action involved in the development and use of advocacy strategies.

Building on the interest group literature, I consider how motivations, goals, and constraints influence the development of advocacy strategies (Baumgartner et al. 2009; Lowery 2007; Smith 1995). My approach, however, goes beyond existing interest group studies to investigate how motivations, goals, and constraints interact to shape and reshape strategies over time. Borrowing from sociolegal studies, I conceptualize the development of advocacy strategies as an ongoing, constitutive, and dynamic (rather than linear) process (McCann 1996). Treating the development of advocacy strategies as an interactive process allows for in-depth exploration of the dynamic interplay among goals, motivations, and constraints over time. I directly observe the goals and motivations Indian groups assigned to the strategies they used as they interacted with legislators and bureaucrats in congressional hearings. Examining such interactions reveals how Indian groups' understandings of their goals and motivations shifted over time and encouraged them to reshape their advocacy strategies in response to the institutions and social contexts in which their strategies were employed.

My account expands on existing sociolegal studies by exploring how groups use the law to influence legislative and administrative processes. Like previous sociolegal studies, I emphasize the role of law in advocacy strategies, perceiving the law to be a resource that may be employed in legal and political struggles (Handler 1978; McCann 1994; Silverstein 1996) and as "constantly constructed and reconstructed through human interaction" (Barnes and Burke 2012: 168; Sarat 1990; Silverstein 1996). By investigating how groups use the law in legislative and administrative contexts, I start to identify some of the multiple, instrumental and constitutive uses and effects of legal frameworks and arguments in legislative contexts and how they influence group motivations and goals for pursuing particular strategies over time.

Moreover, my analysis demonstrates that applying a constitutive approach to nonjudicial settings produces valuable insights into understanding how and why groups use the law in different institutional settings. I show how using a constitutive approach provides a richer, more nuanced account of the use of advocacy strategies in legislative and administrative settings. A constitutive approach facilitates a fuller discussion of the various influences on advocacy strategies and how those influences interact in complex ways over time to shape and reshape strategies. My approach, thus, indicates the applicability of sociolegal theory in nonjudicial contexts and models a way for scholars to devise

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more complex understandings of advocacy strategies and how they develop across venues over time.

The article proceeds as follows. First, I discuss how current theoretical frameworks for understanding group advocacy overlook the interplay among multiple factors in strategic decision-making. Second, I explain the relatively novel mixed methods approach I employed in exploring how and why nonfederally recognized Indian groups pursued administrative and legislative strategies for recognition. Third, I describe how complex and shifting goals, motivations, and constraints interacted and combined to influence the development of Indian groups' strategies over time. Finally, I explore the implications of my approach for sociolegal, interest group, and American Indian studies.

## Understanding Advocacy Strategies: Interest Group and Sociolegal Approaches

My theoretical framework for understanding how and why groups pursue advocacy strategies draws from interest group and sociolegal studies. Interest group scholars seek to understand how interest groups influence political outcomes. They have devoted considerable attention to lobbying (Baumgartner et al. 2009; Lowrey 2007; Smith 1995). An instrumental approach has dominated this literature with political scientists assuming that groups lobby to attain a particular policy goal (Lowrey 2007). Yet empirical studies demonstrate that not all lobbying efforts are successful (Baumgartner et al. 2009; Lowrey 2007; Smith 1995). Due to the mixed results of lobbying, some scholars have observed that goals other than policy change may drive lobbying behavior (Baumgartner et al. 2009; Godwin et al. 2013; Lowery 2007). These scholars have suggested that lobbyists have additional motivations for lobbying, including leveraging institutional relationships (Boehmke et al. 2013; Godwin et al. 2013), ensuring organizational survival (Lowery 2007), building support for the issue, educating the public, and developing credibility among congressional staffers (Baumgartner et al. 2009). They have yet to fully conceptualize these goals and motivations, determine how they relate to one another over time, operationalize their success, and ascertain how they influence groups' decisions to and success in lobbying.

Despite the lack of attention to the various motivations for lobbying, recent studies have described lobbyists as strategic actors that consider their goals as well as other factors in decision-making (Ibid.: 126). Lobbyists have to adapt and react to various constraints, including lack of engagement on an issue, limited

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resources, active opposition by other advocates or policy makers, and obstacles that arise in the policy-making process (Ibid.: 78). Studies have determined that several of these factors influence lobbyists' venue choices, including the chances of obtaining the policy goal (Holyoake 2003; McKay 2011), resources (Godwin et al. 2013; Holyoake 2003; McKay 2011; McQuide 2010), access (Holyoake 2003), and the external political environment (McQuide 2010). Depending on the circumstances, lobbying may be a long-term effort (Baumgartner et al. 2009). Lobbyists may have to pursue goals in the short-term, such as building relationships with policy makers or raising awareness of an issue, to achieve policy change in the long-term.

Interest group scholars have identified many factors affecting strategic decisionmaking, but they have yet to delve into the interplay among these influences to explain fully how groups craft strategies. They acknowledge the complexity of strategic decisionmaking (Ibid.), suggesting that lobbyists make choices based on goals and constraints and that they may pursue long-term strategies when policy change cannot be attained in the short-term. But they have yet to explore adequately when and how goals, motivations, and constraints interact to influence strategic decisionmaking over time.

Sociolegal scholars also investigate advocacy group strategies. Sociolegal scholars seek to understand how advocates use the law as a political and strategic resource to challenge the status quo, change institutional rules, and redistribute power (Cummings and Rhode 2009: 605; Handler 1978; McCann 1994). Advocates use the law in arguing for social change in multiple venues (Handler 1978; McCann 1994; Rosenberg 1991; Silverstein 1996; Silverstein 2009).

Some sociolegal scholars use a constitutive approach to study how advocates make strategic choices. The constitutive approach views human actions as ongoing, dialectical processes (McCann 1996: 462). It emphasizes the dynamic interactions among multiple contextual factors that influence the choices and implications of advocates' actions (Ibid.). These "factors are mutually constitutive of action as an ongoing process across time and space" (Ibid.: 465). Sociolegal scholars have identified several factors that affect decisionmaking, including organizational and material resources (Epp 1998; Galanter 1974), existing institutional and political barriers (Silverstein 2009; Wasby 2000), perceptions of efficiency, effectiveness, and moral acceptability of various institutions (Silverstein 2009; Wasby 2000), and views of the law (Silverstein 1996).

Motivations also play a role in decisionmaking, and groups often have multiple motivations for choosing a strategy (Galanter 1983; Handler 1978; McCann 1994: 10). Like interest group scholars, most sociolegal scholars agree that groups employ strategies

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for their instrumental effects, such as winning a legal change beneficial to the group (Galanter 1983; McCann 1991; Meyer and Boutcher 2007; Sarat and Kearns 1993; Silverstein 1996). The utility of a strategy, thus, depends in part upon identifying its instrumental effect, for example whether a legislative strategy will lead to the enactment and implementation of the proposed legislation.

Unlike interest group scholars, sociolegal scholars have devoted more attention to how strategies can provide important benefits to groups even in the absence of an instrumental victory (McCann 1994; Silverstein 1996). Under a constitutive approach, law has broader effects on social life because it is not just a tool or resource, but is constituted and reconstituted through social practices (Brigham 1987; Sarat and Kearns 1993; Silverstein 1996). Legal practices have multiple consequences and can be deployed strategically (McCann 1994; Silverstein 1996). Groups litigate not only to affect legal change but also to build movements, educate politicians and the public, increase movement credibility, and pressure agencies (Abel 1998: 70–71; Handler 1978; McCann and Silverstein 1998: 268–69; Silverstein 1996). The multiple effects of legal practices allow advocates to challenge, resist, and reconstruct existing legal meanings. Thus, the use of law shapes and reshapes legal meanings and practices over time. As groups advocate to change existing legal meanings, they may be motivated by constitutive, as well as instrumental factors in their strategic decision-making about which legal practices to use.

By examining the broader effects of litigation, constitutive approaches situate litigation as part of a broader political struggle (Handler 1978; McCann 1994; Silverstein 1996). As a result, sociolegal studies have paid more attention to the evolution of advocacy strategies over time than interest group studies have. They have emphasized how the multiple effects of a strategy may shape future strategies and goals (Cummings and NeJaime 2010; Leachman 2014).

In studying advocacy over time, sociolegal scholars have increasingly examined the interplay between litigation and legislative strategies as well as the linkages between courts and legislatures (e.g., McCann 1994; Silverstein 2009; Wasby 2000). Less attention, however, has been paid to whether the constitutive approach employed in understanding how groups decide to litigate could also provide insights into the use of nonjudicial strategies. For example, scholars have yet to examine legislative practices closely, identify their multiple, instrumental and constitutive uses and effects, and determine the influence of those effects on venue decisions. Increased juridification, especially in nonjudicial arenas, raises the question of whether law has similar instrumental and constitutive effects in nonjudicial settings as it does in judicial

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settings. If it does—and since law is a common denominator across venues, it may—then constitutive as well as instrumental motivations may affect venue strategies more generally. Thus, an exploration of the constitutive approach in a legislative context will provide important insights into the question of how and why groups use particular strategies in pursuing their legal claims.

Combining insights from the two literatures facilitates a more complete account of how groups employ advocacy strategies and how their strategies evolve over time. First, integrating the two literatures provides a fuller discussion of the influences on advocacy strategies. Recent lobbying studies suggest the importance of motivations, goals, and constraints in the development of lobbying strategies, but have yet to explore them fully (Baumgartner et al. 2009). The constitutive approach developed by sociolegal scholars considers group motivations and goals by investigating the broad social and political effects of litigation strategies. The multiple uses and effects of litigation strategies provide groups with various motivations and goals for using them. The goals and motivations for utilizing nonjudicial strategies, however, have yet to be examined fully. Applying a constitutive approach to the venue strategies used by Indian groups seeking federal recognition will facilitate the identification of the multiple uses and effects of and, thus, the various motivations and goals groups have, for using legislative and administrative strategies. Thus, it will expand the existing literatures by generating more detailed information about group motivations and goals and how they influence strategies across venues.

Second, using a constitutive approach will provide a more nuanced account of the complexity and adaptability of strategies over time. The constitutive approach expands theoretical understandings of strategic decisionmaking by viewing the development of advocacy strategies as ongoing, interactive processes. Adopting this view suggests that the motivations and effects of a strategy can change over time, especially as new constraints arise to the advocacy effort. As goals and motivations evolve, groups may respond by reshaping their advocacy strategies. The application of a constitutive approach, thus, should allow for deeper investigation into how various goals, motivations, and constraints interact with one another to influence how and why groups use different strategies over time.

## Methodology

### Research Design and Approach

I used a mixed methods approach to investigate how and why groups pursued different legislative and administrative strategies. First, I used quantitative methods to identify, describe, and compare the various strategies—administrative, legislative, and

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dual—used by Indian groups over time. Second, I employed statistical analysis to evaluate the significance of some factors identified by political scientists as influencing interest groups' decisions to lobby Congress. This allowed me to determine whether these factors could apply to Indian groups, which have been understudied in the existing literature (Boehmke and Witmer 2012). Using strategy (legislative or dual) as the dependent variable, I used Pearson's Chi Square tests to determine the effect of: (1) access to the administrative process, as measured by the kind of recognition sought by the group;[1] (2) resources, as measured by whether the group hired a lobbyist prior to the introduction of its first recognition bill in Congress;[2] and (3) the external political environment, as measured by party in control of Congress (McKay 2011; McQuide 2010) on a group's decision to lobby Congress.[3] Consistent with prior research, I expected that access, resources, and a Congress controlled by Democrats would encourage Indian groups to go to Congress.

I then used an interpretive approach to identify the goals and motivations of Indian groups using a legislative strategy (for more information on interpretative methods, see Schwartz-Shea and Yanow 2013). I closely read congressional testimony and interviews with leaders of Indian groups to identify the

[1] To measure access, I coded the bills into three kinds of recognition: (1) restorations of terminated tribes; (2) reaffirmations of groups that lost recognition by administrative mistake; and (3) recognitions of groups that have never had a government-to-government relationship with the federal government (even though some of their members may have received federal services as individual Indians). I used restoration as a proxy for termination; most groups seeking restoration were not in the administrative process.

[2] The lack of information available on the finances of Indian groups made it difficult to collect data on the resources of each group. Indian groups generally lack resources (Cramer 2008), but some have obtained grants from the federal government (Miller 2013) and others have secured gaming contracts to help fund recognition (Klopotek 2011).

[3] While political scientists have theorized that conflict on an issue encourages groups to lobby in more than one venue (see, e.g., McKay 2011), empirical testing of this proposition has produced mixed results (Lowery 2007). I excluded it from my statistical analysis because I could not adequately measure conflict or opposition across enough of the cases. My interpretive analysis suggests that opposition may influence Indian groups in their strategic decisionmaking, but contrary to the interest group literature, it indicates that Indian groups may not seek congressional recognition because of increased opposition by state agencies, local governments, and third parties.

Case studies have emphasized the role of a legislative champion in assisting an Indian group in its pursuit of recognition (Miller 2004; Moberg and Moberg 2005). Legislative support encourages an Indian group to pursue a legislative strategy, but most likely that support comes before the introduction of legislation. All the groups in my study had at least enough support to get a bill introduced in Congress. Many also had at least one member of Congress testify in favor of their recognition. I suspect from informal conversations with advocates that some groups did not pursue a legislative strategy because they could not garner any support, but I could not assess this based on the data. Where possible, I considered it in the interpretive analysis. A legislative champion could also affect the progress of a bill (Moberg and Moberg 2005). I had no way to measure this based on the available data.

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motivations and goals Indian groups themselves assigned to their use of a legislative strategy. I used the hearings to trace the discourses groups utilized to explain their use of a particular strategy and to observe the interactions among Indian groups, legislators, and bureaucrats over time.

Taking an interpretive approach enabled me to gain a deeper understanding of how Indian groups expressed and understood what they were doing in utilizing particular strategies and arguments to contest a legal status unreflective of their sense of the world (Adcock 2014: 91). It allowed me to map the different meanings Indian groups assigned to their recognition struggles, how those meanings changed over time, and how they informed group motivations, goals, and responses to the obstacles they faced (Yanow 2000).

Unlike earlier lobbying studies, I considered the evolution of Indian groups' strategies over time (McQuide 2010). I closely read secondary materials, including newspaper articles about and case studies of Indian groups' recognition struggles and oversight hearings and governmental reports on the administrative process, to situate Indian groups' strategies in their social and historical contexts. Taking time and context into account enabled me to identify how groups' goals and motivations as well as the constraints they faced changed and influenced advocacy strategies over time. It allowed me to track emulation of earlier groups by later ones, to uncover linkages between groups and strategies, and to reveal the interplay between the legislative and administrative processes. As a result, I was able to gain a deeper understanding of the circumstances involved and how goals, motivations, and constraints evolved and interacted to influence venue choice over time.

### Case and Data Selection

Federal recognition of Indian groups is the object of my study for a variety of reasons. First, nonfederally recognized Indian groups seek to change their legal status and can gain recognition either legislatively or administratively. In 1978, the Department of the Interior (DOI) adopted regulations, which created an administrative process for recognizing Indian groups (Riley 2013). The creation of this administrative process did not foreclose Congress from extending recognition to Indian groups. It has, however, chilled court action on recognition issues.[4] The courts' relative silence in this area has promoted legislative juridification, allowing

[4] Federal courts have adjudicated questions of tribal status under federal statutes, see, e.g., United States v. Sandoval, 231 U.S. 28 (1913), but have not developed a consistent definition of a tribe (Newton 2006 § 302[6][g]). The courts have never overturned a congressional or executive determination of tribal status and regularly defer to Congress and the Executive Branch to make decisions on these matters (Ibid. § 3.02[7][b]).

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for exploration of how and when nonjudicial juridification occurs and affects legislative-agency interactions. This institutional choice facilitates the study of advocacy strategies. Scholars, however, have not studied the strategies used by Indian groups seeking recognition and have only recently paid attention to lobbying by American Indians (Boehmke and Witmer 2012).

The use of legislative strategies by Indian groups may seem unsurprising due to the unique political relationship between Indians and the federal government. Indian groups have used various strategies in interacting with the federal government. Some tribes have long histories of petitioning and sending delegates to meet with members of the Executive Branch and Congress (Carpenter 2017; Hoxie 2012). Others have litigated, protested, occupied federal lands, exercised treaty rights, or used various combinations of strategies (Wilkins and Stark 2010). The myriad strategies utilized by Indian groups suggest that going to Congress is one option among many.

Moreover, turning to Congress may seem easy and risk free, especially when compared to the administrative process. The administrative process is expensive, time-consuming, and risky.[5] If an Indian group loses in the administrative process, it has limited opportunities for appeal (Cramer 2008). In contrast, if Congress does not pass a bill, it is not a net loss and has no precedential effect. The Indian group can always try again and members of Congress can introduce bills repeatedly.

Seeking congressional recognition, however, comes with significant costs and risks (Cramer 2008; Miller 2004; Moberg and Moberg 2005). An Indian group has to generate the access and resources to lobby (Cramer 2008). Some groups may not be able to persuade a member of Congress to support them. Others may not have the financial resources to hire a lobbyist or lobby themselves, especially if they are already engaged in the administrative process. Further, a legislative strategy does not reduce scrutiny of the group's claims. Indian groups often face skepticism from outsiders that the group is really "Indian." Members of other tribes, state and local officials, businesses, and individual neighbors of the group may challenge its recognition and lobby members of Congress to vote against the bill (Miller 2013; Moberg and Moberg 2005: 95). In fact, Bureau of Indian Affairs (BIA) officials oppose and testify against almost all bills seeking to recognize an Indian group (Carlson 2016). Further, a group's success in gaining legislative recognition does not end these attacks. For example,

[5] A petition costs at least $50,000 with the price tag for recognition close to $1 million per petition and the administrative process taking years to complete (Cramer 2008: 51–4).

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opponents have claimed that the Mashantucket Pequot Tribe, which received recognition as part of its land claims settlement legislation in 1983, are not "real" Indians (Cramer 2008). These attacks imply that only "real" Indians can withstand the rigor that the BIA uses in recognizing Indian groups. Additionally, Congress can—and has—placed limitations on an Indian group's authority in granting it recognition (Carlson 2016). While limitations have decreased over time, they can restrict a tribe's ability to exercise jurisdiction or prevent the tribe from gaming (Ibid.).

Second, studying federal recognition allows for the comparison of strategies used by several groups, all seeking a similar goal, over time. In most cases, the Indian group can obtain substantially the same outcome regardless of the venue choice. Thus, Indian groups do not necessarily have to redefine issues or reinvent themselves entirely to advocate in multiple venues (see Pralle 2003). They face fewer tradeoffs in outcomes based on venue choice because both the BIA and Congress can recognize them.

A focus on nonfederally recognized Indian groups allows me to study variation across groups. While similar in their legal status and lack of resources generally, Indian groups vary in terms of size, region, and history. Groups have entered the recognition process at varying times, made diverse claims, and faced different obstacles to their recognition. These differences facilitate consideration of how group characteristics could play a role in interest group strategies.

I accessed primary data on Indian groups pursuing recognition from 1977 to 2012 from several sources, including a database of all Indian-related bills (Carlson 2015), congressional hearings and U.S. General Accounting Office's (GAO) reports on recognition, and DOI reports on the administrative process (detailing the numbers and names of petitioners and their status). I used the DOI's list of active and decided petitions for acknowledgement and bills related to federal recognition to identify 124 Indian groups. My data underrepresent the number of Indian groups actually attempting to use a legislative strategy because it does not include groups, who were unsuccessful in persuading a member of Congress to introduce a bill on their behalf. I coded the groups based on their strategy (administrative, legislative, or dual),[6] whether they had access to the administrative process,

[6] If a bill named a particular group, I identified that group has having a legislative strategy. If the OFA included the group on its official list or I found evidence of the group having filed an OFA petition in a congressional hearing (either through BIA or other testimony), I identified that group as having an administrative strategy. Groups named both in a bill and as having filed a letter of intent with the OFA were identified as having dual strategies. I could not link eight Indian groups listed in the California Tribal Status Act of 1990, H.R. 5436, 101st Cong. (1990), to Indian groups listed on the BIA List of Petitioners. These groups were included as having a legislative only strategy.

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and whether they received recognition either legislatively or administratively. Indian groups with legislative strategies (either dual or only) were also coded based on region,[7] kind of recognition sought (restoration, reaffirmation, recognition), their resources, and the party in control of Congress at the time of their first recognition bill.

I located congressional hearings held on 46 bills seeking the federal recognition, acknowledgment, or restoration of a specific Indian group between 1977 and 2012. I used the hearings to trace the discourses groups used to explain why they employed legislative strategies. Advocates for the group seeking recognition testified at many of the hearings, allowing me to closely link the legislative proposal with its supporters (Burstein 2014).[8] I also used secondary sources, including studies of individual groups' experiences in the recognition process. These additional sources along with the statistical analysis enabled me to triangulate the data to ensure adequate evidentiary support for my conclusions (McCann 1994; Woodward 2015).

## How and Why Indian Groups Have Used Various Strategies in Seeking Federal Recognition

This part compares the use of different administrative and legislative strategies by Indian groups over time. It details the circumstances under which groups have developed and changed their strategies and highlights the interplay among motivations, goals, and constraints in the advocacy process.

### Facilitating Diverse Strategies: The Federal Recognition Process

Historically, Congress recognized the majority of tribes through treaties, but treatymaking ended in 1871, and no clear process for recognizing tribes replaced it until 1978 (Miller 2004). As a result, hundreds of Indian groups have remained nonfederally recognized. Some Indian groups have never established a legal relationship with the United States, either because they never entered into a treaty with the United States or because Congress never ratified the treaties they signed (Barker 2005–06: 135). The United States recognized other Indian groups through treaties, legislation, or executive orders but, either for administrative reasons or through

[7] I used Census regions to code geographic location. Geographic Terms and Concepts Census Divisions and Regions. Available at: https://www.census.gov/geo/reference/gtc/gtc_census_divreg.html.

[8] A few hearings were not available on Proquest, and one did not include representatives of the Indian group.

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error, the federal government stopped dealing with them (Fletcher 2006). The federal government terminated the recognition of an additional 151 Indian tribes in the 1950s (Termination Act of, H.R. Con. Res. 108, 83rd Cong. [1953]) and another 41 tribes in California lost federal recognition in 1958 (California Rancheria Act, Pub. L. 85–671 [1958]). Congress may reinstate these "terminated" tribes, but has yet to restore all terminated tribes (Barker 2005–06: 135).

In 1978, the DOI adopted regulations under 25 C.F.R. § 83 to formalize federal recognition through an administrative process (see Riley 2013: 633–38 for a description of the process). The regulations allow an Indian group "to petition for, respond to, and possibly appeal from a federal recognition determination by the DOI" (Ibid.: 632). To obtain recognition, an Indian group must show by a "reasonable likelihood" that it: (1) has been identified as an American Indian entity on a substantially continuous basis since 1900; (2) comprises a distinct community and has existed as a community from historical times until the present; (3) has maintained political influence or authority over its members as an autonomous entity from historical times until the present; (4) has provided a copy of the group's present governing documents; (5) consists of individuals who descend from a historical Indian tribe or from historical Indian tribes that combined and functioned as a single autonomous political entity; (6) is composed principally of persons who are not members of any other previously acknowledged Indian tribe; and (7) neither it nor its members are the subjects of legislation that has expressly terminated or forbidden the federal relationship (25 C.F.R. § 83[a–g]).

The DOI established a specialized branch of the BIA, now known as the Office of Federal Acknowledgment (OFA), to oversee the recognition process. It developed a list of all nonfederally recognized Indian groups in the United States and informed them of their eligibility to petition for recognition. The OFA expected to receive a significant number of petitions and estimated that it would take only a few years to review each petition.

The establishment of the administrative process, however, did not foreclose Congress from extending recognition to Indian groups. By excluding terminated tribes, it ensured that some Indian groups would use legislative strategies. Further, it did not prevent other Indian groups from asking Congress to recognize them legislatively or to intervene in the administrative process.

### Recognition Strategies

Nonfederally recognized Indian groups responded to the creation of the administrative process by developing three strategies

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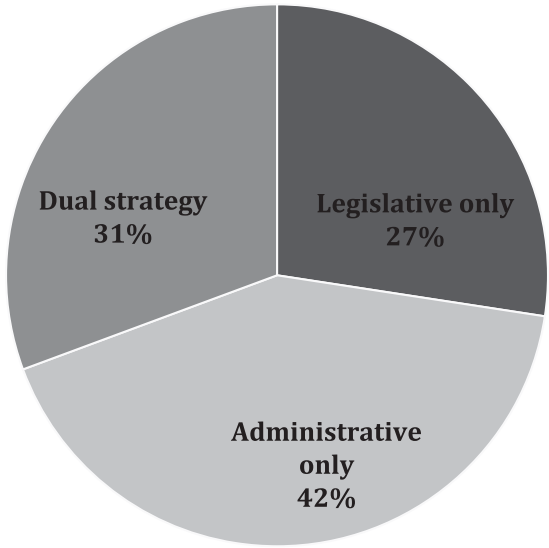


**Figure 1. Strategies Used by 124 Indian Groups Seeking Federal Recognition in Percentages, 1977–2012.**

for seeking recognition: administrative, legislative, and dual. Figure 1 reports the percentages of groups employing each strategy. Of the 124 Indian groups studied, 42 percent (52), sought recognition through the administrative process only, 27 percent (34), though legislation only, and 31 percent (38), sought recognition both administratively and legislatively during the time period studied. Of the 72 Indian groups pursuing legislative recognition, 52.8 percent engaged in dual strategies.

Legislative strategies used by Indian groups varied by kind of recognition. Scholars, government officials, and tribes have historically subdivided nonfederally recognized Indian groups into three categories: (1) terminated tribes; (2) tribes that lost federal recognition by administrative mistake; and (3) Indian groups never recognized by the United States (Fletcher 2006).[9] As Figure 2 shows, Indian groups seeking restoration overwhelmingly used legislative only strategies while Indian groups seeking recognition and reaffirmation used dual strategies. It confirms that access—one of the factors predicted by political scientists to affect venue strategies—influenced Indian groups to use a legislative strategy. As expected, the majority—82 percent (23/28)—of Indian groups

[9] There is some fluidity to these terms. For example, some tribes are restored tribes under the Indian Gaming Regulatory Act even though they were never terminated. Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney, 369 F.3d 960 (2004). They were categorized as reaffirmed rather than restored in this study.

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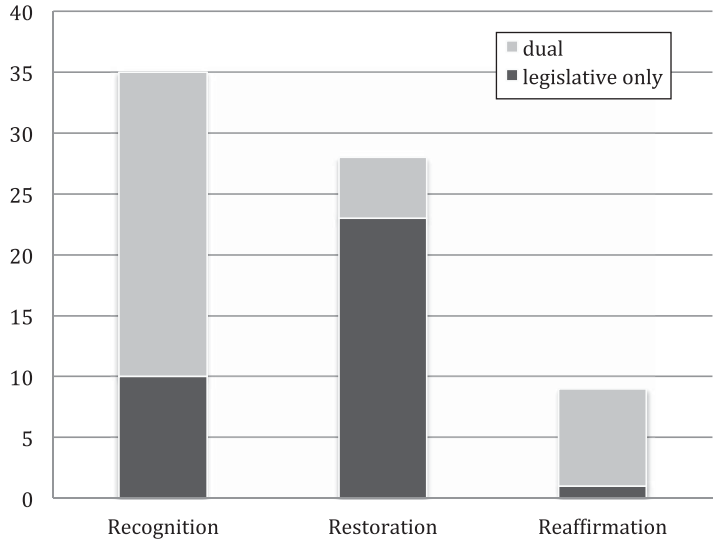


**Figure 2. Strategies Used by 72 Indian Groups Seeking Recognition by Kind of Recognition Bill, 1977–2012.**

using a legislative only strategy did not have access to the administrative process.[10]

Moreover, the kind of recognition sought varied by region. Indian groups located in the Midwest were more likely to seek reaffirmation and used a dual strategy. Accordingly, 66.7 percent sought reaffirmation and 77.8 percent used a dual strategy.[11] Indian groups in the South were similarly inclined with 68 percent using a dual strategy, but the majority—76 percent—sought recognition. The majority—63.3 percent—of Western Indian groups sought restoration and used legislative only strategies. All the Northeastern groups sought recognition, and the majority—60 percent—used legislative only strategies.

Indian groups have faced varying rates of success in pursuing legislative, administrative, and dual strategies. Indian groups seeking legislative only strategies have experienced the most success with Congress recognizing 61.7 percent (21/34). In comparison,

[10] Using a Pearson's Chi Square test, access correlated with strategy (administrative, legislative, or dual) at the 0.00 significance level. Logistic regression analysis, using legislative only strategy as the dependent variable and access, resources, and party in control of Congress as the independent variables, confirmed the significance of access. It also indicated that Indian groups were more likely to use legislative only strategies when Democrats controlled Congress and to use a dual strategy when Republicans controlled Congress. The regression analysis is available upon request.

[11] Pearson's Chi Square tests showed that region and kind of recognition bill were correlated at the 0.00 significance level and region and filing of an OFA petition were correlated at the 0.05 level.

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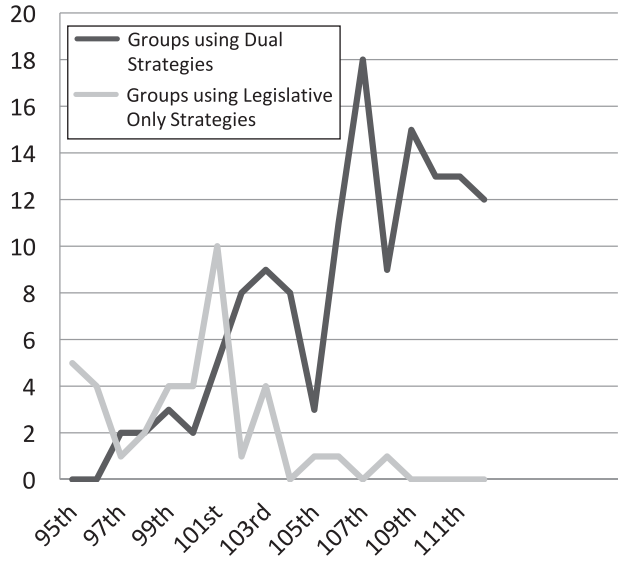


**Figure 3. Strategies Used by 72 Indian Groups Seeking Recognition by Congressional Session, 1977–2012.**

Congress has recognized 28.9 percent (11/38) of Indian groups using dual strategies. The OFA has recognized 30.7 percent (16/52) of Indian groups using administrative only strategies and one Indian group using a dual strategy.

The use of each strategy has changed over time. Since 1977, the number of Indian groups engaged in legislative only strategies has decreased while the number pursing dual strategies has increased. Figure 3 compares the number of Indian groups pursing legislative only strategies with those using dual strategies by congressional session from 1977 to 2012.

Figure 4 shows how the success of each strategy has changed over time. The OFA has consistently recognized a few Indian groups while the number of Indian groups receiving recognition through a legislative only strategy has decreased over time. The success of dual strategies varied considerably by congressional session.

The next section enriches this quantitative analysis by using interpretative analysis to reveal the confluence of circumstances leading Indian groups to use various legislative and administrative strategies over time.

## Federal Recognition Strategies over Time

### *Early Strategies 1977–1986*

Optimism prevailed after the establishment of the administrative process as the BIA, tribes, and members of Congress anticipated

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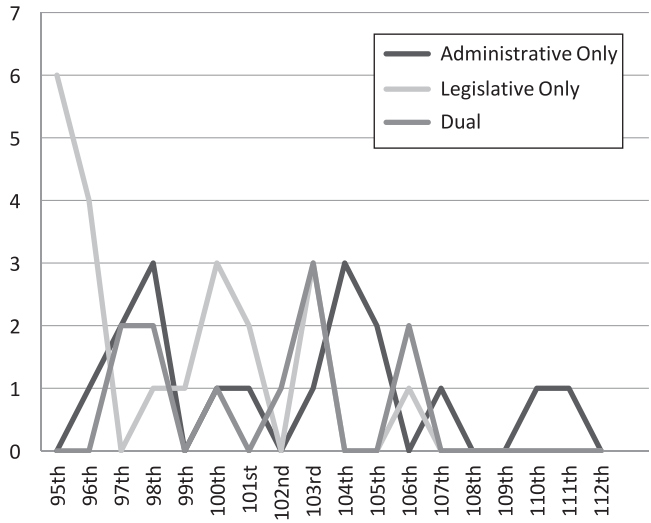


**Figure 4. Federal Recognition by Indian Group Strategy by Congressional Session, 1977–2012.**

that it would evolve into an effective, uniform process for recognizing Indian groups. Aside from the terminated tribes that did not have access to the administrative process, nonfederally recognized Indian groups overwhelmingly responded to the OFA's creation by filing letters of intent for acknowledgment. Forty groups had submitted requests for recognition by the time the regulations became effective in 1978,[12] and 71 petitions were on file with the OFA by 1980.[13]

Members of Congress expressed similar hopes about the administrative process and actively supported it. The Chairman of the Senate Select Committee on Indian Affairs explained during a 1980 oversight hearing, "Congress delayed any passage of legislation establishing such a process in order to allow the administrative process an opportunity to work."[14] This optimism seemed well placed as the OFA recognized three Indian groups in its first five years, and seven in its first decade.

Such support, however, did not mean that Congress would stay out of recognition. As the OFA started up, Congress continued to recognize Indian groups. During the first decade after the OFA's creation, 19 Indian groups sought recognition legislatively. The majority—63 percent (12/19)—were terminated tribes located

[12] *Hearing Before the S. Select Comm. on Indian Affairs*, 96th Cong. 33 (2 June 1980).

[13] Ibid. at 34.

[14] Ibid. at 1.

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in the West, using legislative only strategies to seek restoration and lacking access to the administrative process. In seeking restoration, they testified to the devastating effects of termination on their land ownership, culture, identity, and health and educational benefits. Most likely, the majority of these Indian groups turned to Congress because they had no access to the administrative process, and Congress had recently restored several other terminated tribes.

An additional three Indian groups—the Penobscot Nation, Passamaquody Tribe, and Houlton Band of Malisleet—pursued a legislative only strategy. They sought recognition as part of a land claims settlement. Congress had to approve the land claims settlement and a legislative strategy enabled them to settle their claims and achieve recognition simultaneously.

Despite concerns about costs and the efforts of the Reagan administration to cut the BIA budget, Indian groups seeking legislative recognition at this time were remarkably successful. Congress extended recognition to 89.5 percent of the Indian groups using a legislative strategy from 1977 to 1986. Every Indian group pursing restoration received it during this period.

Fewer Indian groups engaged in dual strategies early on, but the few who did were highly successful. Four Indian groups pursued dual strategies from 1977 to 1986 with 100 percent receiving congressional recognition. Two Indian groups from the Northwest sought restoration and filed a petition with the OFA. Congress quickly restored them. The Mashantucket Pequot Tribe used a dual strategy, arguing for congressional recognition as a part of and to ensure the security of its land claims settlement.[15] They emphasized the efficiency of legislative recognition and their strong belief that the OFA would recognize them.[16] Finally, the Texas Band of Kickapoo did not explain their use of a dual strategy, but citizenship issues complicated their case, and may have affected their venue choice.

Congress's recognition of these groups signaled to other Indian groups that it remained a viable option for recognition. This message came as the OFA started denying recognition. By the end of its first decade, the OFA had denied recognition to 10 Indian groups—three more groups than it had recognized. Instead of establishing uniformity, the administrative process simply opened another venue to Indian groups seeking recognition.

[15] *Hearing before the House Comm. on Interior and Insular Affairs*, 97th Cong. (15 July 1982).

[16] *Hearing Before the Select Comm. on Indian Affairs on S. 2719*, 97th Cong. (14 July 1982).

### *Emulating Success 1987–1996*

The high success rate of Indian groups seeking congressional recognition, especially when compared to the number of groups denied administratively, in the late 1970s and early 1980s appears to have stimulated Indian groups to turn to Congress. Indian groups identified legislative strategies as successful and increasingly employed them. Twenty-eight Indian groups used legislative strategies with 53.6 percent (15) using legislative only strategies and 46.4 percent (13) using dual strategies from 1987 to 1996. Terminated tribes continued to pursue legislative only strategies making up 92.3 percent (12/13) of the groups utilizing this strategy.

In particular, the success of an Indian group in achieving recognition encouraged others in the region to emulate their tactics and arguments. Indian groups in the West had predominately sought and received restoration, and this trend continued with 92.3 percent (12/13) of Western groups pursuing restoration. Similarly, an overwhelming majority—83 percent (5/6)—of groups in the Midwest used dual strategies to seek reaffirmation, arguing that the BIA had wrongly stopped dealing with them for administrative reasons in the 1930s.[17]

Success, however, was not the only factor influencing Indian groups to imitate earlier groups' legislative strategies. The administrative process did not operate as smoothly as expected and provided another motivation for going to Congress. While the number of petitions increased, the OFA's processing of petitions slowed. The OFA made final determinations in 17 cases during its first decade, but only processed eight cases from 1987 to 1996. While the OFA recognized the majority of these groups, the slowness of the process encouraged groups to seek alternatives and laid the foundation for them to develop dual strategies as a way to leverage their influence over the process. As early as 1980—just two years after the OFA's creation—Indian groups started complaining to Congress about the timeliness of the process.[18] BIA officials had to admit that reviewing petitions took longer than anticipated, but they expected to gain efficiency with expertise.[19] By the mid-1990s, however, it was clear that OFA's efficiency had not improved over time.

Indian groups increasingly adopted arguments for legislative recognition based on the cost and painstaking slowness of the

[17] *Michigan Indian Recognition: Hearing Before the House Subcomm. on Indian Affairs*, 103rd Cong. (17 September 1993) (suggesting emulation, similar histories and ties among Indian groups in the testimony of Michigan Indian Legal Services lawyers).

[18] *Hearing Before the S. Select Comm. on Indian Affairs*, 96th Cong. 22 (2 June 1980).

[19] Ibid.

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administrative process similar to those made successfully by the Mashantucket Pequot Tribe in the 1980s (Miller 2004). For example, in the early 1990s, the Pokagon Band of Potawatomi advocated for congressional recognition after the OFA delayed review of their petition for the fourth time (Fletcher 2006: 32). Similarly, the Little River Band of Ottawa Indians, the Little Traverse Bay Bands of Odawa Indians, and the Burt Lake Band of Ottawa and Chippewa Indians cited the slowness of the process, their prior relationship with the federal government, and the similarity of their cases to the already-reaffirmed Grand Traverse Band of Ottawa and Chippewa Indians as reasons for Congress to recognize them.[20] Groups outside the Midwest also employed this strategy for gaining recognition quickly. Jerry Jackson of the Jena Band of Choctaw Indians recalled pursuing a legislative strategy after the OFA told him that it would take close to two decades for the agency to get to his tribe's petition (Miller 2004: 162). The United Houma Nation used similar arguments to explain their turn to Congress, describing the administrative process as a fishing expedition and testifying that they did not have the resources to continue producing the copious amounts of information the BIA kept requesting (Miller 2004: 195).

Indian groups also discovered that they could utilize legislative strategies to influence the BIA. For example, the Jena Band of Choctaw Indians lost their bid for congressional recognition after President George H.W. Bush succumbed to BIA opposition and pocket vetoed their bill, but the OFA ultimately recognized them and did so much sooner than they expected (Miller 2004: 162). Jerry Jackson attributed this success in part to their legislative strategy, which influenced Senator Bennett Johnston to pressure the BIA to process the Jena Band's petition and recognize them (Ibid.).

As the OFA denied petitions, Indian groups had another motivation for resorting to alternative venues for recognition. The OFA's denial of the Miami Nation of Indians of Indiana's petition forced them into both the legislative process and the judicial system. Representatives of the Miami Nation informed Congress that they would have sought congressional recognition earlier if they had had any idea that the OFA would decline to recognize them after they had spent 13 years and staggering amounts of money on the administrative process.[21]

[20] *Michigan Indian Recognition: Hearing Before the House Subcomm. on Indian Affairs*, 103rd Cong. (17 September 1993).

[21] *Federal Acknowledgment of Various Indian Groups: Hearing Before the House Comm. On Interior and Insular Affairs*, 102nd Cong. 120 (8 July 1992).

Indian groups soon learned that legislative strategies had spillover effects on institutional dynamics and could be used to leverage their power in the recognition process. A legislative strategy highlighting the OFA's problems ensured Congress stayed engaged in recognition, heard groups' complaints about the administrative process, and considered reforms to it. Four different committees held eight oversight hearings on recognition from 1988 to 1995. Members of Congress participated in discussions about the criteria for recognizing tribes, attempted to determine how long groups spent in the administrative process, and debated whether to remove the process from the BIA. They also expressed various responses to the growing number of groups seeking congressional recognition and criticizing the administrative process in the early 1990s. Some members of Congress saw the problems with the administrative process as a reason to champion legislation recognizing Indian groups.[22] Others grew weary of Indian groups' legislative strategies and counseled them to use the administrative process.[23] A few legislators responded by introducing bills to reform or replace the administrative process (Carlson 2016).

None of the bills seeking to overhaul the administrative process passed, but Congress and the BIA reacted to the increasing complaints about the process by enacting limited reforms. In 1994, Congress required the BIA to publish a list of all federally recognized tribes in the Federal Register (Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103–454, 108 Stat. 4781, 4782). Congress also increased funding for the process in the 1990s. The OFA hired more staff and modified its process in 1994 and 1997 (Barker 2005–06: 135). Significantly, the 1994 reforms to the administrative process responded to arguments made by Michigan Indian groups to Congress by lessening the evidentiary burden on Indian groups with a prior relationship with the federal government (Miller 2004: 75). Indian groups had appealed to Congress as a way to circumvent the bureaucracy and found that arguments made legislatively also influenced the administrative process.

The decrease in Indian groups using legislative strategies in the 1990s may have reflected a willingness to give the reforms a chance to work, but changes to the political environment also may have contributed to this decrease (see, e.g., 105th Congress on Figure 6). Congressional recognitions declined, and Indian groups may have foregone legislative strategies because going to

[22] See, e.g., *Michigan Indian Recognition: Hearing Before the House Subcomm. on Indian Affairs*, 103rd Cong. (17 September 1993).

[23] *Hearing Before the H. Subcomm. on Native American Affairs on H.R. 2366*, 103rd Cong. 15–22 (22 July 1993).

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Congress did not increase their chances of recognition. Despite the increase in Indian groups using legislative strategies in the late 1980s, Congress recognized fewer Indian groups from 1987 to 1996 than it had in the previous decade (42.8 percent [12/28] as compared with 89.5 percent).[24]

Opposition toward recognition grew with Indian gaming in the 1990s, making recognition harder to attain (Cramer 2008; Miller 2013). In 1987, the Supreme Court held that Indian nations could operate gaming establishments free of state regulation in *California v. Cabazon Band of Mission Indians* (480 U.S. 202). Congress enacted the Indian Gaming Regulatory Act (25 U.S.C. § 2701 et seq.) a year later. Indian gaming expanded exponentially in the 1990s, transforming the economic, social, and political landscape of Indian country (see, e.g., Rand and Light 2005). Gaming expanded the role of Indian tribes as political actors in multiple venues at all levels of government (Corntassel and Witmer 2008; Hanson and Skopek 2011; Rand and Light 2005; Mason 2000), challenged stereotypes of American Indians as poor and disadvantaged (Corntassel and Witmer 2008), and unleashed new opposition to Indian interests (Corntassel and Witmer 2008; Rand and Light 2005). These impacts of gaming spilled over onto the recognition process, altering "public perceptions of and Indian group's experiences" (Cramer 2008). Gaming, previously mentioned only in the recognition of the Ysleta del Sur Pueblo and Alabama and Coushatta Tribes of Texas, emerged more regularly in hearings as members of Congress asked about gaming negotiations in Michigan, Louisiana, and South Carolina.

Gaming raised the stakes of federal recognition by making tribal identity infinitely more valuable (Miller 2013: 312). Gaming exacerbated concerns over "wannabe" groups that have questionable claims to Indian ancestry (Miller 2004: 69). Opponents have questioned the authenticity of Indian groups that seek or obtain gaming financing before they achieve recognition (Rand and Light 1996–97: 430). They have also portrayed Indian groups as financed by gaming interests and seeking recognition solely to open casinos. For example, in 1994, Representative Kildee, long a supporter of recognizing Indian groups, opposed the recognition of the Swan Creek Black River Confederated Ojibwa Tribes of Michigan, characterizing them as a splinter group of the Saginaw Chippewa Tribe financed by entrepreneurs planning to build a casino in Detroit.[25]

[24] Indian groups pursuing legislative only strategies experienced more success in achieving recognition (46.7 percent or 7/15) than groups using dual strategies (38.4 percent or 5/13).

[25] *Hearing Before the H. Comm. on Resources on H.R. 2822*, 105th Cong. 1–3 (7 October 1998).

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As gaming altered perceptions of nonfederally recognized Indian groups, opposition to recognition increased. Some federally recognized tribes, which had not expressed views on recognition before, vocally opposed it. Gaming revenues provided them with resources to fight the recognition of groups they perceived to be significant threats to their gaming operations (Miller 2013: 23). For example, in the 1990s, the nearest tribe with a lucrative gaming establishment, the Poarch Creek Band, reversed its position and started advocating against the legislative recognition of the MOWA Band of Choctaw, insisting that all Indian groups go through the administrative process.[26] Other groups mobilized against recognition as well. Officials, members of Congress, and local communities in states with large Indian gaming establishments organized to voice strong opposition to recognition (Cramer 2008). Gaming also encouraged conservative and religious groups to rally against recognition on the grounds that more federally recognized tribes meant more casinos, which would degrade public morality (Miller 2013: 345).

This changed political environment has deterred some Indian groups from using legislative strategies. For example, Ronald "Red Bone" Van Dunk, chief of the Ramapough Mountain Indians, explained that his New Jersey-based tribe, which was denied administrative recognition in 1993, has not pursued legislative recognition because of the opposition it would face from Atlantic City (Miller 2004). Other groups may have also avoided legislative strategies due to a lack of local support and anti-gaming mobilization within their states. Still other groups—even some denied by the OFA—abandoned their legislative strategies in the late 1990s and early 2000s as gaming increased opposition and made recognition more controversial. Not all Indian groups, however, responded to the growing skepticism toward and decline in recognitions by giving up on legislative strategies.

### *Changing Motivations and Strategies 1997–2012*

By the late 1990s, Indian groups had returned to using legislative strategies for recognition. Some groups continued legislative strategies commenced in the early 1990s, others sought congressional recognition after the OFA denied them, and a few groups engaged both processes for the first time. Unlike earlier groups, all but one had access to the administrative process, and all employed dual strategies even as the number of congressional recognitions continued to decline (see Figure 5).

[26] *Hearing Before the H. Subcomm. On Native American Affairs on S. 282*, 103rd Cong. 592 (17 May 1994).

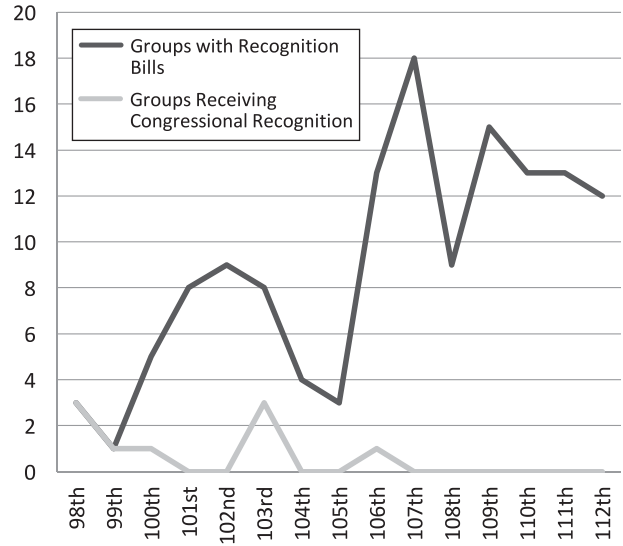


**Figure 5. Comparison of Indian Groups with a Recognition Bill Before Congress with Indian Groups Receiving Congressional Recognition by Congressional Session, 1977–2012.**

As the politics of recognition intensified and made recognition harder to attain, Indian groups motivations for going to Congress and the goals they hoped to achieve changed. Some groups, like the Burt Lake Band of Ottawa and Chippewa Indians and the MOWA Band of Choctaw Indians, originally petitioned Congress for recognition in the early 1990s because it seemed to be the more efficient way to achieve their goal. By the end of the 1990s, however, Congress no longer appeared to be a quick way to obtain recognition. Gaming put these groups on the defensive even though they entered the recognition process before the advent of gaming and could not be seeking recognition only for gaming purposes (Miller 2013). It also provided new resources and incentives to nearby federally recognized tribes to oppose these group's recognition (Ibid.). As mentioned previously, after it attained recognition, the Poarch Creek Band developed a restrictive position on recognition and used its gaming resources to launch an aggressive, long-term lobbying effort opposing recognition of the MOWA Band (Ibid.).

These Indian groups responded to the changing politics of recognition by shifting from a short-term strategy of obtaining recognition as quickly as possible to a long-term one. These groups had come close to attaining congressional recognition in the 1990s and determined to work harder to obtain it. As a result, their long-term strategies included educating the public

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and policy makers, countering misperceptions about them, and maintaining relationships with legislators. These noninstrumental goals have increased in importance as the OFA denied these groups recognition, leaving congressional recognition as their only option.

Like these groups, the Lumbee Tribe had embarked on a dual strategy in the late 1980s and continued its legislative strategy for federal recognition into the 2000s. Unlike other groups, the BIA deemed the Lumbee Tribe ineligible for the administrative process in 1989, leaving them no choice but to seek congressional recognition (Miller 2013: 320). Similar to other groups, they have had to respond to increased opposition and misperceptions stemming from the rise of gaming in Indian country (Ibid.). They have attempted to counter gaming-related concerns by agreeing to provisions limiting their gaming rights in federal recognition bills (Ibid.).[27] Significantly larger than most groups with an estimated population of 55,000 members, the Lumbee Tribe has also faced concerns about what recognizing them will cost the federal government (Ibid.: 336).

Other Indian groups in the South, including the Rappahannock Tribe, Monancan Indian Nation, Chickahominy Indian Tribe, Chickahominy Indian Nation—Eastern Division, Upper Mattaponi Tribe, and Nanesemond Indian Tribe, entered the federal recognition process for the first time in 1999 and have employed dual strategies to achieve multiple goals. These Indian groups have built on their political experience attaining state recognition in the 1980s in pursuing federal recognition (Cook 2002). They seek recognition, but have realized that they have to overcome significant obstacles to attain it, including correcting misperceptions about their histories, educating the public and policy makers, and building relationships with legislators.

These groups have used legislative strategies to educate the public about their unique histories. The legislative process is more open than the administrative process, which only allows the submission of documents to the BIA. Thus, Congress provides a forum for Indian groups to make their case publically. Indian groups have utilized legislative hearings to tell and legitimize their stories. They have had historical and ethnographic experts document their cases, recounted their stories of survival despite hardship, and submitted hundreds of pages of documentation. In particular, the Virginia groups have exposed the trials and

[27] Some opponents discount these provisions, pointing to several Indian groups who disavowed an interest in gaming only to open casinos shortly after obtaining recognition (Miller 2013: 336).

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tribulations they suffered under Jim Crow laws and publicized how their unique history has undermined their recognition efforts.[28]

Unlike earlier Indian groups, these groups have had to combat misperceptions about recognition and gaming. They have responded to accusations that their interests in recognition stem from or are financed by gaming by publically disclaiming an interest in gaming and refusing to accept gaming money to finance their recognition. Some, like the Lumbee Tribe, have shown a willingness to forego gaming by acquiescing to limitations on their gaming authority in recognition bills.

These groups, like previous ones, have used legislative hearings to educate policy makers and the public about the OFA's inefficiency and lack of predictability and transparency. Unlike earlier groups, however, some have challenged the OFA's legal monopoly on defining who a tribe is and offered more complicated, alternative views of what constitutes an Indian tribe. Several Southern groups have argued that the administrative process is ill-equipped to address the complexities of Indian identity. They have suggested that the process cannot address their specific, historical experiences and thus, indicated a need for Congress to recognize them or significantly reform the OFA process. For example, the Rappahannock Tribe, Monancan Indian Nation, Chickahominy Indian Tribe, Chickahominy Indian Nation—Eastern Division, Upper Mattaponi Tribe, and Nanesemond Indian Tribe have explained that they cannot provide the documents necessary to receive administrative recognition due to the racial policies in Virginia in the mid-twentieth century.[29] These groups have leveraged hearings to educate members of Congress about the inadequacies of the OFA criteria and how to reshape the meaning of a tribe to better suit their lived experiences. In this respect, these groups are using the law differently than earlier groups. Rather than employing a legal framework to argue for congressional recognition, these groups have openly challenged that legal framework by suggesting the need to redefine what a tribe is legally to fit better their more complex Indian identities.

In continuing or commencing legislative strategies, Indian groups appeared to be responding to a groundswell of attention to the recognition process in the 2000s. The reform efforts undertaken by the OFA in the 1990s delayed an already prolonged process and failed to curtail complaints against it

[28] *Hearing Before the S. Comm. On Indian Affairs on S. 437 and s. 480*, 109 Cong. 75 (21 June 2006).

[29] Ibid.

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(Klopotek 2011: 4–5; Riley 2013: 632). They did not lead to more administrative recognitions and thus, encouraged Indian groups to complain to Congress about the process. By 1997, the OFA had denied almost as many Indian groups as it had recognized. Denials increased dramatically over the next 15 years as the OFA denied recognition to 22 Indian groups and only recognized five groups between 1996 and 2012. With limited procedures for appeal, these Indian groups no longer had access to the administrative process. The OFA often recommended Congress as an option in its final determination to reject a petitioner,[30] and those with political support resorted to Congress, arguing that the OFA should have recognized them.

Tensions within the government over recognition, including the GAO rebuke and Congress's continual oversight of the OFA process, may have encouraged Indian groups to try or continue their legislative strategies. The GAO conducted an independent investigation into the recognition process after the BIA reversed several recognition decisions. In 2000, then outgoing Assistant Secretary of Indian Affairs (ASIA) Kevin Gover used his authority to recognize two Connecticut Indian groups and extended recognition to three more groups over the OFA's objections (Miller 2004). State officials and members of Congress from Connecticut protested Gover's actions to the GAO and publically charged that Gover gained financially in recognizing Indian groups (Miller 2004). Gover's replacement, Neal McCaleb, reversed many of Gover's decisions (Miller 2004). The GAO investigated and criticized the OFA for not responding to petitions in a timely manner, not transparently communicating the criteria used in assessing petitions, and not providing consistent explanations for decisions made on petitions (GAO 2001). McCaleb responded to the 2001 GAO report by agreeing to consider reforms to the administrative process.

Congress reacted to this bureaucratic wrangling by holding 11 oversight hearings from 2000 to 2008, signaling to Indian groups that it was still engaged in federal recognition and open to hearing their concerns about the process. By 2003, interactions between members of Congress and the BIA were strained. Members of Congress asserted that the OFA process was broken,[31] critically observed the absence of the ASIA from hearings,[32] and asked pointed questions of the BIA officials present.[33] The BIA

[30] See, e.g., *Oversight Hearing Before the House Comm. on Resources*, 108th Cong. 25 (31 March 2004).

[31] *Hearing Before the House Comm. on Resources*, 108th Cong. 1 (31 March 2004).

[32] *Hearing Before the S. Comm. on Indian Affairs on S. 297*, 108th Cong. 6 (21 April 2004).

[33] Ibid. at 12–14.

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responded by reasserting its expertise in the area, continuing to oppose recognition bills, and insisting that Indian groups should go through the administrative process.[34] The political climate continued to evolve as the Obama Administration, perceived to be more supportive of recognizing Indian groups, took office in 2008.

Indian groups may have perceived the shifting political climate as an opportunity to go to Congress. A few groups in the administrative process added a legislative strategy. For example, after more than 30 years in the process, the Little Shell Tribe of Chippewa Indians turned to Congress in 2008. Like the Michigan Indian groups in the 1990s, the Little Shell Tribe emphasized the OFA's inefficiency: "the BIA concluded in 2000 that the Tribe had met all the criteria for recognition under the regulations, and yet the Bureau asked for more documents, which we provided, and still we wait."[35] Supported by the state of Montana, local governments, and tribes, the Little Shell Tribe argued that Congress should reaffirm them due to the federal government's long history of interacting with them (Shield 2007). Other groups, already in the legislative process, stepped up their efforts. For example, the Lumbee Tribe renewed its efforts due to the support of Senator Dole and President Obama (Miller 2013).

Indian groups denied by the OFA also may have viewed the political process as opening up, and those who could garner enough support tried a legislative strategy. Even if they could not obtain recognition, they could use legislative strategies to highlight the OFA's inadequacies, add credibility to their claims of Indian identity by educating the public about their experiences, and convey their resolve not to give up on recognition. Two groups granted and then denied recognition by the BIA—the Duwamish Indian Tribe of California and the Chinook Indian Nation—pursued legislative strategies, emphasizing the injustices they faced in the process, reiterating their claims to tribal status, and vowing not to give up on federal recognition (Gardner 2007; Robinson 2013; Schilling 2013).[36]

[34] *Hearing Before the S. Committee on Indian Affairs on S. 420*, 108th Cong. 38 (2003).

[35] *Hearing Before the Senate Comm. on Indian Affairs on S. 724, S. 1058, H.R. 1294*, 110th Cong. 14 (25 September 2008).

[36] The OFA also reversed its recognition of the Eastern Pequot Tribal Nation and the Schaghticoke Tribal Nation in the early 2000s. These groups, as well as other Northeastern groups denied by OFA in the 2000s, have not pursued legislative strategies most likely due to the anti-gaming backlash in the Northeast. See, e.g., Schaghticoke Acknowledgment Repeal Act of 2005, H.R. 1104 (109th Cong. 2005). Some groups have used congressional testimony to recount the injustices they faced in the administrative process even though they have not sought congressional recognition. See, e.g., *Oversight Hearing Before the House Comm. on Resources*, 108th Cong. 22 (31 March 2004).

For groups already in the legislative process, denial by the OFA fueled their legislative strategies but also negatively affected perceptions of their claims (Miller 2013: 313). After denial, these groups faced the additional burden of explaining why the OFA had wrongly interpreted the evidence supporting their petition. For example, the MOWA Band of Choctaw Indians have had to contend with an OFA report finding that the group failed to prove that it descended from Choctaws (Ibid.: 319). The MOWA Band and other groups have persisted in seeking congressional recognition, adding documentation to bolster the legitimacy of their claims and arguments about the injustice of the administrative process.

Other Indian groups may have seen the conflicts over recognition and the resulting reforms as an opportunity to go to Congress to gain leverage in the administrative process. Earlier groups, such as the Jena Band of Choctaw Indians, had successfully used legislative strategies to leverage their power vis-à-vis the administrative process and increased their chances for recognition. Learning from this, some groups have sought to pressure the BIA by introducing legislation to expedite their petitions.[37] For example, the Grand River Band of Ottawa has pursued this strategy—rather than congressional recognition—because they are confident that they will be granted recognition through the administrative process but they are tired of waiting for the OFA to review their petition and issue a decision.[38]

## Goals, Motivations, and Constraints in Strategic Decisionmaking: Lessons from Indian Country

The implications of this research for sociolegal, interest group, and American Indian studies are significant. In a world in which advocates increasingly rely on legal arguments, frameworks, and forms in judicial and extrajudicial settings (Rhode 2007–08; Silverstein 2009), sociolegal and interest group scholars need to develop more complex approaches to understanding how and why groups employ law strategically in different venues. My account of the strategies used by Indian groups seeking federal recognition contributes to this larger project by providing a more nuanced understanding of how, when, and why groups engage in different strategies.

[37] See, e.g., To require the prompt review by the Secretary of the Interior of the long-standing petitions for Federal recognition of certain Indian tribes, and for other purposes, H.R. 5134, 108th Cong. (2004).

[38] *Hearing Before the Senate Committee on Indian Affairs on S. 724, S. 514, S. 1058, and H.R. 1294*, 110th Cong. 24 (25 September 2008).

The experiences of Indian groups seeking federal recognition suggests that more complicated narratives exist about how multiple goals, motivations, and constraints interact with one another to influence groups' advocacy strategies over time. Indian groups employed legislative strategies for different reasons as the political climate evolved. They were affected by and responded in distinct ways to the significant changes that the rise of Indian gaming brought to the politics of federal recognition in the 1990s. Some Indian groups emulated earlier groups' strategies while others adapted their goals and strategies to meet new obstacles to recognition. Indian groups developed different strategies because they had diverse motivations for and faced different constraints in pursuing recognition. I argue that combining the approaches of interest group and sociolegal studies allows us to see the multiple motivations, goals, and constraints influencing venue strategies and how they interact over time. This approach leads to richer, more nuanced understandings of groups' strategic decisionmaking.

A few final observations suggest the broader implications of my argument. First, the experiences of Indian groups seeking federal recognition demonstrates how integrating interest group and sociolegal approaches provides for a fuller discussion of the motivations, goals, and constraints influencing venue choices over time. My account confirms earlier interest group studies on venue choice by showing how the chance of success, access, and the political environment influence group decisionmaking (Holyoake 2003; McKay 2011). Indian groups initially turned to Congress for instrumental reasons because they were excluded from the administrative process. The success of these groups in achieving recognition demonstrated the effectiveness of a legislative strategy and encouraged other groups to turn to Congress to secure recognition. Indian groups quickly realized that seeking recognition both legislatively and administratively had benefits beyond just increasing their chances for recognition. As more Indian groups engaged in legislative strategies, the apparent multiple uses of a legislative strategy grew and Indian groups found additional motivations for turning to Congress. Like litigation strategies, legislative strategies can be used to leverage institutional relationships, make cases publically, increase a group's credibility, correct misrepresentations made about them, and challenge existing legal definitions and processes, as well as to obtain a policy outcome (Abel 1998; McCann and Silverstein 1998). Thus, my account demonstrates that multiple motivations play an important role in strategic decisionmaking across legislative, administrative, and judicial fora. Moreover, it indicates that some of the same circumstances that encourage groups to litigate

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may also influence groups' decisions to pursue strategies across venues.

Second, my approach demonstrates how scholars can develop richer accounts of groups' strategic decisionmaking by detailing how motivations, goals, and constraints evolve and interact to shape advocacy strategies over time. The insight that goals and strategies change over time as advocates respond to constraints is not new (Baumgartner et al. 2009; Smith 1988) but by importing the constitutive approach used by sociolegal scholars into the legislative context my account provides a more complex way of thinking about the interplay among motivations, goals, and constraints in strategic decisionmaking. My account shows how a confluence of shifting motivations, goals, and constraints led Indian groups to shape and reshape their strategies over time. As Indian groups discovered the multiple uses and effects of a legislative strategy, their motivations and goals for using such strategies evolved. Moreover, changes in the political environment significantly altered the attainability of certain goals and further encouraged groups to rethink their goals and motivations for using particular strategies. As a result, Indian groups adapted their strategies as their motivations and goals evolved and the obstacles to federal recognition increased in the 1990s with the advent of Indian gaming.

This more complicated understanding of the interplay of goals, motivations, and constraints indicates that attempting to categorize goals and strategies into short-term and long-term as some scholars have suggested (Baumgartner et al. 2009) may be too simplistic. For example, in the 1990s, some Indian groups saw recognition as a short-term goal and used legislative strategies to obtain it quickly. As the receptivity toward recognition changed with the advent of gaming, the short and long-term nature of Indian groups' goals changed. Now harder to attain, federal recognition emerged as a long-term goal for Indian groups. This shift suggests that it may be hard to determine definitively the long and short-term nature of goals. If so, the interest group literature's view that groups make choices between long-term and short-term goals may be overly simplistic because groups may consider more than the temporality of goals in their strategic decisionmaking.

Rather a more complicated picture emerges about the relationships among goals and strategies in my account. As recognition became more difficult, Indian groups developed complementary and sequential goals as part of their strategies. Indian groups identified additional goals—such as building relationships with legislators, educating the public, countering misperceptions about them, and pressuring the BIA—for using a legislative strategy. They perceived

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these goals as complementary and sometimes sequential to their main goal of achieving recognition. For example, the Virginia Indian groups realized that they had to gain the attention of legislators and build relationships with them to have a bill introduced. At the same time, Indian groups perceived some of these goals as having broader, long-term benefits as well—even if they never attained federal recognition, educating the public could change public opinion or the political environment. My account indicates that more attention needs to be paid to the various roles—complementary, sequential, and temporal—that goals play and how that affects the development of groups' advocacy strategies.

Finally, my account provides new insights into how and why learning takes place within and across groups. As mentioned previously, some Indian groups emulated earlier groups while others created new strategies as gaming introduced additional obstacles to recognition. In doing so, Indian groups learned from the success or failure of other groups' strategies as well as from their own earlier advocacy attempts (Pralle 2003). For example, the legislative strategies pursued by Indian groups in the 1990s and 2000s appear to reflect lessons learned from groups using similar strategies previously. Indian groups have retained and repeated arguments that seemed persuasive. The Little Shell Band, for instance, has made arguments about the inefficiency of the administrative process and their prior relationship with the federal government that resemble the arguments made successfully by the Little Traverse Bay Bands of Odawa and the Pokegan Band of Potawatomi in the early 1990s. In this way, Indian groups have structured and reconstructed their strategies based on what they learned from other groups' legislative practices (Silverstein 1996). The success of legal framings and arguments early on made "certain strategies and claims more attractive or promising than others" and shaped the strategies that later groups used in going to Congress (Meyer and Boutcher 2007).

Indian groups, however, did not just adopt previous strategies wholesale; some have adapted earlier strategies as the politics of recognition changed. For example, Indian groups have continually complained to Congress about the administrative process. Indian groups have learned that these complaints increase their limited power vis-à-vis the BIA by keeping Congress involved in recognition and can led to reforms of the administrative process. The success of groups in getting the process reformed in the 1990s encouraged other groups to complain to Congress. But groups have also identified the limits of these earlier strategies, which did not lead to the recognition of more Indian groups. Groups have shifted their criticisms to reflect more long-term considerations by challenging the OFA's legal monopoly on

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defining an Indian tribe. This shift suggests a significant change in how Indian groups employ the law as they have moved from making arguments demonstrating that they fit within the legal criteria established by the administrative process to using legal arguments to contest the meaning of what a tribe is. It demonstrates how groups can learn from previous groups' strategies and use them to shape their own strategies. Moreover, groups can learn how to adapt earlier strategies to reshape the political and legal environment that constrains them.

Given increased juridification across institutional venues, it is critical to evaluate the application of sociolegal theories more fully in nonjudicial arenas. The distinctive features of Indian groups seeking federal recognition provide an opportunity to explore this juridification and the application of sociolegal theories to administrative and legislative contexts. Integrating the constitutive perspective developed by sociolegal scholars with the interest group literature allows for fuller consideration of how the interplay among multiple motivations, goals, and constraints influences the development of legislative strategies. It, thus, provides a more expansive, subtle, and complex understanding of groups' strategic choices. In this respect, the approach developed here offers some foundation for future investigations into the ways in which groups use the law in nonjudicial contexts and chose particular venues.

## References

Abel, Richard (1998) "Speaking Law to Power: Occasions for Cause Lawyering," in Sarat, Austin & Stuart Scheingold, eds., *Cause Lawyering: Political Commitments and Professional Responsibilities*. New York: Oxford Univ. Press.

Adcock, Robert (2014) "Generalization in Comparative and Historical Social Science: The Difference that Interpretivism Makes," in Yanow, Dvora & Peregrine Schwartz-Shea, eds., *Interpretation and Method: Empirical Research Methods and the Interpretive Turn, 2nd ed*. Armonk: M.E. Sharp.

Barker, Joanne (2005–06) "Recognition," 46 *American Studies* 133.

Barnes, Jeb & Thomas F. Burke (2012) "Making Way: Legal Mobilization, Organizational Response, and Wheelchair Access," 46 *Law & Society Rev.* 167–98.

Baumgartner, Frank R., et al. (2009) *Lobbying and Policy Change: Who Wins, Who Loses, and Why*. Chicago: Univ. of Chicago Press.

Boehmke, Frederick J. & Richard Witmer (2012) "Indian Nations as Interest Groups: Tribal Motivations for Contributions to U.S. Senators," 65 *Political Research Q.* 179.

Boehmke, Frederick J., Sean Gailmard, & John Wiggins Patty (2013) "Business as Usual: Interest Group Access and Representation Across Policy-Making Venues." 33 *J. of Public Policy* 3–33.

Brigham, John (1987) "Right, Rage, and Remedy: Forms of Law in Political Discourse," in Orren, Karen & Stephen Skowrenek, eds., *Studies in American Political Development*. Vol. 2. Cambridge, Cambridge Univ. Press.

Burstein, Paul (2014) *American Public Opinion, Advocacy, and Policy in Congress: What the Public Wants and What It Gets*. Cambridge: Cambridge Univ. Press.
Carlson, Kirsten Matoy (2015) "Congress and Indians," 86 *Univ. of Colorado Law Rev.* 77.
——— (2016) "Congress, Tribal Recognition, and Legislative-Administrative Multiplicity," 91 *Indiana Law Rev.* 955–1021.
Carpenter, Daniel (2017) "On the Emergence of the Administrative Petition: Innovations in Nineteenth-Century Indigenous North America," in Parrillo N., ed., Administrative Law from the Inside Out: Essays on Themes in the Work of Jerry L. Mashaw. Cambridge: Cambridge Univ. Press.
Cook, Samuel R. (2002) "The Monacan Indian Nation: Asserting Tribal Sovereignty in the Absence of Federal Recognition," 17 *Wicazo Sa Rev.* 91–116.
Corntassel, Jeff & Richard C. Witmer II (2008) *Forced Federalism: Contemporary Challenges to Indigenous Nationhood*. Norman: Univ. of Oklahoma Press.
Cramer, Renee Ann (2008) *Cash, Color, and Colonialism: The Politics of Tribal Acknowledgement*. Norman: Univ. of Oklahoma Press.
Cummings, Scott L. & Deborah L. Rhode (2009) "Public Interest Litigation: Insights from Theory and Practice," 36 *Fordham Urban Law J.* 603–51.
Cummings, Scott L. & Douglas NeJaime (2010) "Sexuality and Gender Law: Assessing the Field, Envisioning the Future," 57 *UCLA Law Rev.* 1235–330.
Epp, Charles R. (1998) *The Rights Revolution*. Chicago: The Univ. of Chicago Press.
Fletcher, Matthew L. M. (2006) "Politics, History, and Semantics: The Federal Recognition of Indian Tribes," 82 *North Dakota Law Rev.* 487.
Galanter, Marc (1974) "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 *Law & Society Rev.* 95–160.
——— (1983) "The Radiating Effects of Courts," in Boyum, Keith O. & Lynn Mather, eds., *Empirical Theories About Courts*. New Orleans: Quid Pro Books.
Gardner, Ray (2007) "The Chinook Nation and Its Struggle for Federal Recognition," in Horse Capture, George, Duane Champagne, & Chandler C. Jackson, eds., *American Indian Nations: Yesterday, Today, and Tomorrow*. Lanhan, MD: Altamira Press.
Godwin, Ken, Scott H. Ainsworth, & Erik Godwin (2013) *Lobbying and Policymaking: The Public Pursuit of Private Interests*. Los Angeles: Sage Press.
Goldberg-Ambrose, Carole (1994) "Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life," 28 *Law & Society Rev.* 1123–48.
Handler, Joel F. (1978) *Social Movements and the Legal System*. New York: Academic Press.
Hanson, Kenneth N. & Tracy A. Skopek (2011) *The New Politics of Indian Gaming: The Rise of Reservation Interest Groups*. Las Vegas: Univ. of Nevada Press.
Holyoake, Thomas T. (2003) "Choosing Battlegrounds: Interest Group Lobbying across Multiple Venues," 56 *Political Research Q.* 325–36.
Hoxie, Fredrick E. (2012) *This Indian Country: American Indian Activists and the Place They Made*. New York: Penguin Books.
Newton, Nell Jessup (2006) *Cohen's Handbook of Federal Indian Law*. Newark, NJ: Lexis Nexis.
Klopotek, Brian (2011) *Recognition Odyssey: Indigeneity, Race, and Federal Recognition in Three Lousiana Communities*. Durham: Duke Univ. Press.
Leachman, Gwendolyn M. (2014) "From Protest to *Perry*: How Litigation Shaped the LGBT Movement's Agenda," 47 *Univ. of California, Davis Law Rev.* 1667–751.
Lowery, David (2007) "Why Do Organized Interests Lobby? A Multi-Goal, Multi-Context Theory of Lobbying," 39 *Polity* 29–54.
Mason, Dale W. (2000) *Indian Gaming: Tribal Sovereignty and American Politics*. Norman: Univ. of Oklahoma Press.
McCann, Michael (1991) "Legal Mobilization and Social Reform Movements: Notes on Theory and Its Application," 11 *Studies in Law, Politics, and Society* 225–54.
——— (1994) *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. Chicago: Univ. of Chicago Press.

——— (1996) "Causal v. Constitutive Explanations (or, On the Difficulty of Being so Positive," 21 *Law & Social Inquiry* 457–82.

McCann, Michael & Helena Silverstein (1998) "Rethinking Law's Allurements," in Sarat, Austin & Stuart Scheingold, eds., *Cause Lawyering: Political Commitments and Professional Responsibilities*. New York: Oxford Univ. Press.

McKay, Amy Melissa (2011) "The Decision to Lobby Bureaucrats," 147 *Public Choice* 123–38.

McQuide, Bryan S. (2010) "Interest Groups, Political Institutions, and Strategic Choices: What Influences Institutional Lobbying Strategies." Paper presented at the American Political Science Association Conference, Washington, DC, 2–4 Sept 2010.

Meyer, David S. & Steven A. Boutcher (2007) "Signals and Spillover: Brown v. Board of Education and Other Social Movements," 5 *Perspectives on Politics* 81–93.

Miller, Mark Edwin (2004) *Forgotten Tribes: Unrecognized Indians and the Federal Acknowledgment Process*. Lincoln: Univ. of Nebraska Press.

——— (2013) *Claiming Tribal Identity: The Five Tribes and the Politics of Federal Acknowledgment*. Norman: Univ. of Oklahoma Press.

Moberg, Mark & Tawnya Sesi Moberg (2005) "The United Houma Nation in the U.S. Congress: Corporations, Communities, and the Politics of Federal Acknowledgment," 34 (Spring) *Urban Anthropology and Studies of Cultural Systems and World Economic Development* 85–124.

Pralle, Sarah B. (2003) "Venue Shopping, Political Strategy, and Policy Change: The Internationalization of Forest Advocacy," 23 *J. of Public Policy* 233–60.

Rand, Kathryn R. L. & Steven A. Light (1996–97) "Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity," 4 *Virginia J. of Social Policy & Law* 381–437.

——— (2005) *Indian Gaming and Tribal Sovereignty: The Casino Compromise*. Lawrence: Univ. of Kansas Press.

Rhode, Deborah L. (2007–08) "Public Interest Law: The Movement at Midlife," 60 *Stanford Law Rev.* 2027–86.

Riley, Lorinda (2013) "Shifting Foundation: The Problem with Inconsistent Implementation of Federal Recognition Regulations," 37 *N.Y.U. Rev. of Law and Social Change* 629–69.

Robinson, John R. (2013) "From 'Boston Men' to the BIA: The Unacknowledged Chinook Nation," in Den Ouden, Amy E. & Jean M. O'Brien, eds., *Recognition, Sovereignty Struggles and Indigenous Rights in the United States*. Chapel Hill, NC: Univ. of North Carolina Press.

Rosenberg, Gerald (1991) *The Hollow Hope: Can Courts Bring about Social Change?* Chicago: Univ. of Chicago Press.

Sarat, Austin (1990) "'... The Law Is All Over': Power, Resistance and the Legal Consciousness of the Welfare Poor," 2 *Yale J. Law & Humanities* 343–79.

Sarat, Austin & Thomas R. Kearns (1993) "Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life," in Sarat, Austin & Thomas R. Kearns, eds., *Law in Everyday Life*. Ann Arbor: Univ. of Michigan Press.

Schilling, Vincent (2013) "Duwamish Chairwoman Speaks About Fighting for Federal Recognition and Getting Another Chance." Indian Country Media Network. Available at: https://indiancountrymedianetwork.com/news/politics/duwamish-chairwoman-speaks-about-fighting-for-federal-recognition-and-getting-another-chance/ (accessed 7 September 2017).

Schwartz-Shea, Peregrine & Dvora Yanow (2013) *Interpretive Research Design: Concepts and Processes*. Florence: Taylor and Francis.

Shield, James Parker (2007) "Tribal Nationalism: The Concept of Governmental Recognition of Tribes and the Little Shell Chippewa Tribe," in Horse Capture, George, Duane Champagne, & Chandler C. Jackson, eds., *American Indian Nations: Yesterday, Today, and Tomorrow*. Lanham, MA: Altamira Press.

Silverstein, Gordon (2009) *Law's Allure: How Law Shapes, Constrains, and Kills Politics*. Cambridge: Cambridge Univ. Press.
Silverstein, Helena (1996) *Unleashing Rights: Law, Meaning, and the Animal Rights Movement*. Ann Arbor: The Univ. of Michigan Press.
Smith, Richard A. (1995) "Interest Group Influence in the U.S. Congress," 20 *Legislative Q.* 89–139.
Smith, Rogers M. (1988) "Political Jurisprudence, the 'New Institutionalism,' and the Future of Public Law," 82 *The American Political Science Rev.* 89–108.
U.S. General Accountability Office (GAO) (2001) *Indian Issues: Improvements Needed in Tribal Recognition Process*. GAO-02-49.
Wasby, Stephen L. (2000) "Litigation and Lobbying as Complementary Strategies for Civil Rights," in Gofman, Bernard ,ed., *Legacies of the 1964 Civil Rights Act*. Charlottesville, VA: Univ. of Virginia Press.
Wilkins, David E. & Heidi K. Stark (2010) *American Indian Politics and the American Political System*, 3rd ed. Lanham, MD: Rowman & Littlefield.
Woodward, Jennifer (2015) "Making Rights Work: Legal Mobilization at the Agency Level," 49 *Law & Society Rev.* 691–723.
Yanow, Dvora (2000) *Conducting Interpretative Policy Analysis*. Thousand Oaks: Sage Publications.

## Cases Cited

*California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).
*Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney*, 369 F.3d 960 (2004).
*United States v. Sandoval*, 231 U.S. 28 (1913).

## Statues Cited

California Rancheria Act, Pub. L. 85–671 (1958).
Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103–454, 108 Stat. 4781, 4782.
Indian Gaming Regulatory Act of 1988 (25 U.S.C. § 2701 et seq.).
Termination Act of 1953, H.R. Con. Res. 108, 83rd Cong.

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