

THE TWO CLASSES OF TRIBES: UNIFYING THE STATE AND FEDERAL TRIBAL RECOGNITION SYSTEMS

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ABSTRACT

This paper seeks to analyze the historical and political outcomes of the federal recognition process within the Bureau of Indian Affairs (BIA) and suggests that the BIA should eliminate the continuous existence requirement from that process. This paper also suggests that the BIA should consider ratifying state tribal recognition through an alternative criterion rather than the federal acknowledgment process. Without taking action, the current structure of recognition fails the United States' duties to its Indigenous population and underscores its role in extinguishing the continuous existence of many Indian tribes.

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TABLE OF CONTENTS

Introduction	251
I. Federal Recognition of Tribes.....	257
A. Federal Acknowledgement Process	257
B. Other Methods of Federal Recognition.....	261
II. The Continuous Existence Requirement	263
A. History of Federal Recognition	263
B. Shortcomings of the 1900 Benchmark.....	269
C. Elimination of the Continuous Existence Requirement.....	275
III. State Tribal Recognition.....	277
A. Types of State Recognition.....	277
B. State Recognition Procedures	283
1. Alabama.....	284
2. Connecticut.....	287
3. Louisiana	290
4. Missouri	292
5. Michigan	293
C. Origins of State Recognition	294
D. Federal Consideration of State Tribes	298
1. Federal Ratification of State Tribal Recognition	298
2. A Tiered Approach to Federal Ratification of State Tribe Recognition	300
3. Economic Interests of States, Tribes, and the Federal Government.....	303
Conclusion.....	306

INTRODUCTION

“On the far end of the Trail of Tears was a promise,” Justice Neil Gorsuch began in his latest opinion in *McGirt v. Oklahoma*, which found that a majority of Oklahoma remained Indian land absent explicit abrogation by Congress.¹ Now, almost 200 years after the Trail of Tears, lawyers are in the zeitgeist of the human rights movement. This comes with a renewed focus on Indigenous communities. The result is revitalized political energy and declarations which have promised much with little results. Now, the United States must look inwardly and begin to decolonize the structures of federal tribal recognition. Only then will the promise of true self-government be realized.

Today, federal tribal recognition rests on an acknowledgment process which requires, among other factors, that tribes prove continuous existence from 1900.² The federal government must eliminate this requirement, as it creates an unworkable system for many federal tribes and does little to recognize a history of extermination. The majority of federally recognized tribes did not undergo this acknowledgment process.³ Originally, tribes were recognized by executives or legislative bodies through treaties.⁴ Those treaties formalized the relationship between individual tribes and the federal government, establishing the concept of domestic dependent nation status.⁵ In this period, there was a lack of formality as there were few guidelines as to which tribes deserved to be recognized and which did not. Many tribes were left out of these historical practices for a variety of reasons.⁶ Military power and size were metrics that

1. See *McGirt v. Oklahoma*, 140 S. Ct 2452, 2459 (2020) (holding that Native American land that had not been expressly disestablished by Congress continues to belong to the Tribe in question, despite State failure to recognize the land as such).

2. See generally Matthew L.M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 NOTRE DAME L. REV. 490 (2006) (discussing the federal acknowledgment process).

3. NAT'L CONG. OF AM. INDIANS, TRIBAL NATIONS OF THE UNITED STATES 16 (2019), https://www.ncai.org/tribalnations/introduction/Indian_Country_101_Updated_February_2019.pdf [<https://perma.cc/Y9AS-2TUM>].

4. *Id.*

5. *Cherokee Nation v. Georgia*, 30 U.S. 1, 15, 30 (1831).

6. Gabriel Furshong, *Some “Unrecognized” Tribes Still Waiting After 130 Years*, YES! MAGAZINE (Dec. 19, 2016), <https://www.yesmagazine.org/democracy/2016/12/19/some-unrecognized-tribes-still-waiting-after-130-years> [<https://perma.cc/JVL7-2N4J>].

weighed in favor of government recognition—many of those without political power disappeared.⁷ Often, the U.S Government saw no need to recognize or move these small tribes, and historical records for their descendants are mostly non-existent.⁸ Some tribes were conquered too early, including many on the East Coast, before the treaty period began.⁹ Other tribes were conquered too late, such as those in California, who joined the union after the treaty-making period ended.¹⁰ There were also tribes which were independent of another larger tribe but conflated with that tribe by their political classification.¹¹ Other tribes, such as those in the South, fled and hid from the government as a method of preservation.¹² In this way, many Indigenous people within the United States did not receive recognition and now must fight the administrative process.¹³ Contrary to what some may believe, these tribes did not escape discrimination or persecution simply because they were not recognized by the federal government.

One author calls these people the “outalucks”—people of Indian ancestry who are unable to prove their identity by enrollment or with current legal definitions.¹⁴ For federally recognized tribes, membership criteria is determined almost exclusively by the tribal government, with many tribes employing differing methods of recognition.¹⁵ These definitions are legal—what is known as being a card-carrying Indian—but that designation has little to do with being

7. Faith Roessel, *Federal Recognition – A Historical Twist of Fate*, NARF LEGAL REV. 1 (1989), <https://www.narf.org/nill/documents/nlr/nlr14-3.pdf> [<https://perma.cc/7V9M-DXHZ>].

8. *Id.*

9. Vine Deloria, Jr., *Foreword* in KIRKE KICKINGBIRD & KAREN DUCHENEAUX, *ONE HUNDRED MILLION ACRES, X* (MacMillan, 1973).

10. *Id.*

11. *Id.*

12. *Id.*

13. Furshong, *supra* note 6.

14. *See generally* EVA GARROUTTE, *REAL INDIANS: IDENTITY AND THE SURVIVAL OF NATIVE AMERICA* 14–37 (U.C. Press, 2003) (exploring changing racial identities at the start of the twenty-first century, particularly those of “Native Americans”).

15. For example, the Santa Clara Pueblo requires paternal descent for tribal enrollment, the Seneca tribe requires maternal descent for tribal enrollment, the Tohono O’Odham automatically admits all children born to parents living on reservation, and the Swinomish require a variety of different indicators to be met. *Id.* at 15.

of Native American descent.¹⁶ These legal rules are a political classification, not a racial one, and have nothing to do with ancestry. For non-enrolled tribe members, identity can be a challenging conversation, especially surrounding who is Indian.¹⁷

This is even more controversial when discussing state tribes. Many state tribes are documented historically and have unique cultures that are increasingly difficult to preserve without federal recognition.¹⁸ Prior to their federal recognition in 2019, the Little Shell Tribe of Montana suffered from such a fate. During colonization, the multiethnic bands of Chippewa, Cree, and Assiniboine Tribes were exterminated or dispersed by the U.S. military at the turn of the twentieth century.¹⁹ Poor records due to the U.S. military's action, and a lack of reliance by Native American tribes on written histories made it extraordinarily difficult to provide the necessary types of documentation for federal recognition.²⁰ Like many Native American tribes, the Little Shell Tribe relied on oral histories and lacked the kind of written documentation the Federal Acknowledgment Process (FAP) requires. The acknowledgment process gave no hope for recognition, and the culture of the Little Shell was at risk of being lost forever.²¹ By working with their representatives, the Little Shell Tribe was able to receive congressional recognition after Montana Senator Jon Tester introduced a bill.²² Without congressional action, there would have

16. There are many "card-carrying" Indians who do not descend from Native American ancestors. Some tribes allow adopted children to be enrolled. Freedmen, or formerly enslaved people, were allowed tribal enrollment in some tribes. Famously, many white people paid \$5 to be listed on federal Indian rolls and gained access to land. All three of these types of enrollments show no Native American ancestry. See generally Alys Landry, *Paying to Play Indian: The Dawes Rolls and the Legacy of the \$5 Indians*, INDIAN COUNTRY TODAY (Sept. 13, 2018), <https://indiancountrytoday.com/archive/paying-play-indian-dawes-rolls-legacy-5-indians> [<https://perma.cc/6QEG-3BAF>] (discussing the history of exploitative laws surrounding the seizure of Native American land and the enrollment of specific individuals as Native Americans); *Freedmen*, OKLAHOMA HIST. SOC'Y, <https://www.okhistory.org/publications/enc/entry.php?entry=FR016> [<https://perma.cc/7GEJ-KSN6>].

17. Landry, *supra* note 16.

18. Furshong, *supra* note 6.

19. *Id.*

20. *Id.*

21. *Id.*

22. Kathleen McLaughlin, *A Big Moment Finally Comes for the Little Shell: Federal Recognition of Their Tribe*, THE WASH. POST (Dec. 21, 2019),

been no hope for federal recognition, despite the Little Shell people being an important cultural tribe to Montana.²³ Not all tribes are able to sponsor congressional action and are stuck trying to prove their existence. The U.S. requires proof of existence, despite its own heavy hand in exterminating historical records. Thus, for peoples like the Little Shell, the FAP must change.

The FAP began as an effort to create inclusive metrics to make federal recognition more accessible. Since 1961, when the Bureau of Indian Affairs (BIA)²⁴ shifted from a policy of termination to one of self-determination, FAP has done a disservice to state tribes.²⁵ Under international law, self-determination is the political ideology that Indigenous people should be free to determine their political status and pursue economic, social, and cultural development.²⁶ The International Court of Justice has described the right to self-determination as intrinsic to paying regard to the “freely expressed will of the peoples.”²⁷ In 1975, the United States enacted the Indian Self-Determination and Education Assistance Act which gave tribes greater autonomy over tribal affairs and responsibility for programs and services administered by the Secretary of the Interior.²⁸ For the purposes of this paper, I use self-determination to mean that all tribes, even those yet to be federally recognized, are given a path to exercise autonomy and freely determine their own political statuses.

In 2010, the United States once again committed to self-determination for the Indian tribes by agreeing to support the United

https://www.washingtonpost.com/national/a-big-moment-finally-comes-for-the-little-shell-federal-recognition-of-their-tribe/2019/12/20/72f5ee86-204d-11ea-bed5-880264cc91a9_story.html [<https://perma.cc/X232-BKQA>].

23. *Id.*

24. The BIA is housed within the Department of the Interior. *BIA Home*, BUREAU OF INDIAN AFFS., <https://www.bia.gov/bia> [<https://perma.cc/N6DM-3JVU>].

25. *Self-Determination*, U.S. DEPT OF THE INTERIOR, <https://www.bia.gov/regional-offices/great-plains/self-determination> [<https://perma.cc/A58H-Z9VP>].

26. *See* International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171 (establishing the international right to self-determination); International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 5 U.S.C. § 601, 999 U.N.T.S. 3. (also conveying the right to self-determination).

27. *See* MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLE 356 (Claire Charters & Rodolfo Stavenhagen eds., 2009) (describing the impact of the U.N.’s Declaration on the Rights of Indigenous People).

28. *Self-Determination*, *supra* note 25.

Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which outlines the right to self-determination and preservation of Native American culture.²⁹ Article 3 reaffirms that “Indigenous peoples have the right to self-determination.”³⁰ The United States continuously cites the right to self-determination as important to its relationship with the Indian tribes.³¹ However, state tribes cannot freely determine their political status, nor can they engage in cultural, economic, and social development.³² These tribes lack many of the rights bestowed upon federal tribes, which has resulted in two classes of tribes within the United States. Federal tribal recognition is vital for tribal socio-economic development.³³ Once tribes are federally recognized, they may establish tribal governments which include tribal courts.³⁴ The tribal government is able to express a degree of sovereignty over its people as a domestic dependent nation operating within the United States.³⁵ This allows them to address a wide variety of concerns from expressing environmental sovereignty to health care access. That expression of sovereignty helps fulfill the promise of self-determination. Non-federally recognized tribes do not enjoy sovereign powers or a trust relationship with the government but must try to maintain tribal structures and traditions through other means.³⁶ Those indigenous people cannot be said to have true self-determination as a tribe.

A major component of self-determination is land. Federally recognized tribes may own land that is held in trust by the federal government, which protects it from being purchased or taken by non-

29. See generally Matthew Birkhold, *The Indigenous McClain Doctrine: A New Legal Tool to Protect the Cultural Patrimony and Right to Self-Determination*, 97 WASH. U. L. REV. 113 (2019) (discussing the U.S. agreeing to UNDRIP and evaluating how faithfully it has maintained this obligation).

30. Rep. of the Hum. Rts. Council, at 21, U.N. Doc. A/61/53 (2006).

31. *Self-Determination*, *supra* note 25.

32. Martha Salazar, *State Recognition of American Indian Tribes*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 2016), <https://www.ncsl.org/research/state-tribal-institute/state-recognition-of-american-indian-tribes.aspx> [<https://perma.cc/2KWW-RF7N>].

33. *Id.*

34. *Id.*

35. Tribes are considered “domestic dependent nations,” a term first coined by Justice John Marshall to describe tribes, which are distinct independent political communities that remain under the paternalistic powers of the U.S. government. This relationship resembles a “ward to his guardian.” *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831).

36. Salazar, *supra* note 32.

Indians.³⁷ Non-federally recognized tribes can acquire land by organizing as an approved entity within the state, but they do not receive the same level of protection as tribes whose land is held in trust by the federal government.³⁸ While state recognition provides some benefits, they are mostly symbolic. To fulfill its goals and duties, the BIA must look to ensure self-determination is available to all tribes—not just federal ones. Additionally, the burden of receiving that recognition must not be so heavy that pursuing it severely damages the economic future of the tribe.³⁹

In Part I of this paper, I will explain the federal acknowledgment process that exists today and how that system operates in conjunction with other methods of recognition available to tribes within the federal government. In Part II, I will examine the continuous existence requirement under FAP and analyze whether it is tenable as part of the broader federal recognition policy. In Part III, I will analyze state recognition systems, their creation, and how states with robust guidelines and interest in assisting tribes may be better suited to tackle questions of legitimacy than the federal government. Furthermore, I will analyze what changes can be made within the federal system to address the growing role state governments play in recognizing tribal governments. Finally, I will conclude with policy recommendations to improve the FAP and integrate state procedures and recognition.

37. *Trust Land*, NAT'L. CONF. OF STATE LEGISLATURES (Aug. 2012), <https://www.ncsl.org/research/state-tribal-institute/trust-land-overview.aspx> [<https://perma.cc/7HFA-VL6L>].

38. Several Californian tribes have used the nonprofit structure as a way to preserve important cultural and environmental sites as a way around lack of access to the trust relationship. Debra Utacia Krol, *Can Native American Tribes Protect Their Land If They're Not Recognized by the Federal Government*, THE REVELATOR (Mar. 12, 2019), <https://therevelator.org/native-american-tribes-protect-land/> [<https://perma.cc/F25L-2TB5>].

39. The costs of pursuing federal recognition for the Muwekma Ohlone Tribe were steep, including closing tribal headquarters due to financial strain. *CA Tribe Has New Recognition Hopes After Costly, Two-Decade Struggle*, INDIAN COUNTRY TODAY (July 21, 2014), <https://indiancountrytoday.com/archive/ca-tribe-has-new-recognition-hopes-after-costly-two-decade-struggle> [<https://perma.cc/H5V5-NX3Y>].

I. Federal Recognition of Tribes

A. Federal Acknowledgement Process

Federal recognition, “the conquering culture’s modest, even weak, attempt at apology,” currently fails to provide an adequate path to recognition for many tribes left out of the popular historical accounts.⁴⁰ Despite its inadequacies, the recognition process is necessary moving forward to ensure justice for those tribes and address the past wrongs of colonialism. As currently implemented, however, the process cannot do the important work of reversing, at least in part, the harms done to tribes.

Until 1871, the president retained power to negotiate treaties with the Indian tribes.⁴¹ In 1978, the Bureau of Acknowledgment and Research (BAR) promulgated regulations to govern the federal recognition process.⁴² The newly implemented Federal Acknowledgment Process did little to lift up tribal citizens and celebrate culture, but it did much to gatekeep by creating new, harsh requirements that a majority of previously federally recognized tribes were never subjected to.⁴³ As a result of the unclear FAP, several different methods arose in the political process as ways for a tribe to secure recognition.⁴⁴ This created disorder and the federal government felt it lacked a single, formal acknowledgment process that would allow for equitable application. Thus, in 1997, the BAR established seven criteria to define federal recognition and create one streamlined process.

First, a petitioning group must show continuous existence since 1900.

40. Fletcher, *supra* note 2, at 490.

41. See Act of March 3, 1871, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71) (declaring that the U.S. shall not recognize Indian tribes as an independent nation); FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 66–67 (Nell Jessup Newton et al. eds., 2005) (providing background information on the creation of the Federal Acknowledgment Process).

42. Fletcher, *supra* note 2, at 491.

43. See generally 25 C.F.R. § 83 (stating the criteria required for federal acknowledgement and the process for petitioning for federal acknowledgement).

44. Fletcher, *supra* note 2, at 491; see U.S. GOV’T ACCOUNTABILITY OFF., GAO-02-49, IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS 25–26 (Nov. 2001) (providing evidence that tribes were recognized through a variety of means including administrative and Congressional recognition as well as internal BIA opinions).

Second, a predominant portion of the membership must come from a distinct community. Third, a tribal leadership has maintained political influence over the community. Fourth, the petitioning group must develop membership criteria.

Fifth, the membership of the petitioning group must show that they descend from a historical tribe and functioned as a “single autonomous political entity.”

Sixth, the membership is not also a member of a federally recognized Indian tribe.

Last, the petitioning group must not have been terminated by an Act of Congress.⁴⁵

The reality of the process is a far cry from its original intent. The process is time-consuming, expensive, and arduous because it places the burden of proving all seven factors on the tribes without acknowledging that the United States itself has made proving criteria like continuous existence impossible for many of them.⁴⁶ The petition process requires many complicated steps, and if by chance a tribe manages to get to the review stage, the success rate is very low.⁴⁷ Furthermore, due to the controversy surrounding casinos, many governmental players seek to bar recognition of more tribes despite federal recognition being about access to social and political rights like self-determination. Daniel Akaka, a senator from Hawaii, remarked in a committee hearing that despite the process, the road to federal recognition remains a long one. “Many Native nations wait

45. Fletcher, *supra* note 2, at 492 (citing 25 C.F.R. § 54 (1978)).

46. Deloria, *supra* note 9; *see also* E. RICHARD HART, AMERICAN INDIAN HISTORY ON TRIAL: HISTORICAL EXPERTISE IN TRIBAL LITIGATION 98 (2018) (“[P]olicy toward Indians was aimed at eliminating traditional tribal political leadership, acculturating tribal members into white society, removing tribes from their aboriginal homelands, and even terminating the special relationship that existed between the government and the recognized tribes. Thus providing the necessary evidence for recognition obviously is difficult . . .”).

47. The BIA website contains information about resolved petitions for federal recognition by tribes. Of the petitions that have been resolved through the process set out in 25 C.F.R. § 83, only 18 have been successful, while 34 petitions have been denied. Bureau of Indian Affairs, *Petitions Resolved – Acknowledged*, <https://www.bia.gov/as-ia/ofa/petitions-resolved/acknowledged> [<https://perma.cc/2N95-VLF3>]; Bureau of Indian Affairs, *Petitions Resolved – Denied*, U.S. DEPT. OF THE INTERIOR, <https://www.bia.gov/as-ia/ofa/petitions-resolved/denied> [<https://perma.cc/P9RC-3BL4>]; *see also* 25 C.F.R. § 83 (outlining in the History and Development of Rule Section why changes were proposed); *see generally* 25 C.F.R. § 83 (detailing procedures for federal acknowledgment of tribes).

sometimes decades for the Federal Government to acknowledge the trust responsibility [t]he length of the process, interpretation of the criteria, and staffing needs have been raised countless times [s]adly, little has changed”⁴⁸ To succeed in a claim for recognition, a tribe must meet all the seven mandatory criteria from 25 C.F.R. § 83, and must produce records that prove continuous existence.⁴⁹

While many tribes and some state governments resist federal recognition of tribes for economic reasons, depriving one tribe of the political, social, cultural, and economic freedoms that federal recognition provides because of those concerns is not the duty of the BIA. Its mission is to “enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes and Alaska Natives.”⁵⁰ It is estimated that 72% of federally recognized tribes could not survive the rigorous FAP requirements, or, even if they could, would not have enough resources to pursue recognition.⁵¹ One reason is that of the 574 federally recognized tribes, 370 signed treaties with the federal government between 1778 and 1871 during the treaty period.⁵² Tribes that were not politically or militarily powerful enough were not given that opportunity, and were often exterminated or removed west. The BIA states that, historically, most of the federally recognized tribes were recognized through “treaties, acts of Congress, presidential executive orders or other federal administrative actions, or federal court decisions.”⁵³ After the treaty period ended, it became much harder for tribes to become recognized, hence the need for the creation of FAP. Since then, very few tribes

48. *Federal Recognition: Politics and Legal Relationship Between Governments: Hearing Before the Comm. on Indian Affs.*, 112 Cong. 4 (2012) (statement of Sen. Akaka).

49. See generally 25 C.F.R. § 83 (detailing the procedures for federal acknowledgment of Indian Tribes).

50. *Bureau of Indian Affairs*, U.S. DEP’T OF THE INTERIOR, <https://www.bia.gov/bia> [<https://perma.cc/RQ2Q-THAN>].

51. *Oversight Hearing on Federal Recognition: The Political and Legal Hearing Before the Comm. on Am. Indian Affs.*, 112 Cong. 20 (2012) (testimony of Rev. John Norwood, Nanticoke Lenni-Lenape Tribal Nation).

52. NAT’L CONG. OF AM. INDIANS, *supra* note 3 at 18.

53. Bureau of Indian Affairs, *Indian Affairs: Why Tribes Exist Today in The United States*, U.S. DEPT. OF THE INTERIOR (Nov. 15, 2019), <https://www.bia.gov/faq-category/why-tribes-exist-today-united-states> [<https://perma.cc/W3FL-QJFD>].

have been granted federal recognition.⁵⁴ Under the current scheme, certain tribes enjoy the protection that comes with recognition and the political influence to prevent recognition of other tribes simply because they were able to form early treaty relations with the federal government or achieved recognition either before FAP's enactment or through fiscal means.⁵⁵ Allowing decisions to revolve around economic concerns of already established tribes or state governments only furthers the disparities present today between the different classes of tribes.

The Shinnecock Nation provides an illustrative example of just how arduous the federal recognition process has become. The tribe spent an estimated over two million dollars to provide evidence that their community continuously existed since 1900, and that the community consisted of the same surnames from generation-to-generation.⁵⁶ After this expense, the Office of Federal Acknowledgment expressed that these types of records were unnecessary.⁵⁷ The Shinnecock Nation pursued recognition for over 30 years, dating back to 1978, and filed a suit against the Interior Department in 2006.⁵⁸ That suit focused on the agency's failure to process the tribe's application in a reasonable amount of time and ended in a settlement with the Interior Department which resulted in the tribe's federal recognition in 2009.⁵⁹ According to public records, from 2005 to 2009 the tribe paid at least 1.74 million dollars to seven different lobbying firms to aid its recognition efforts.⁶⁰ Despite these high expenditures, the tribe's economic conditions are less than ideal. Nearly 60% of the tribe lives below the federal poverty line, despite being located near Southampton, one of the wealthiest neighborhoods

54. Bureau of Indian Affairs, *Petitions Resolved – Acknowledged*, U.S. DEPT OF THE INTERIOR, <https://www.bia.gov/as-ia/ofa/petitions-resolved/acknowledged> [<https://perma.cc/2N95-VLF3>]; see generally 25 C.F.R. § 83 (detailing the procedures for federal acknowledgment of Indian Tribes).

55. Deloria, *supra* note 9, at X.

56. *Shinnecock Nation Spent \$32M in 32 Years for Federal Recognition*, INDIANZ (Aug. 12, 2014), <https://www.indianz.com/News/2014/08/12/shinnecock-nation-spent-32m-in.asp>.

57. *Id.*

58. Danny Hakim, *U.S. Eases Way to Recognition for Shinnecock*, N.Y. TIMES, Dec. 15, 2009, <https://www.nytimes.com/2009/12/16/nyregion/16tribe.html> (on file with the *Columbia Human Rights Law Review*).

59. *Id.*

60. *Id.*

in the country.⁶¹ For the Shinnecock Nation, the fight for federal recognition was the beginning of a struggle that persists to this day.

B. Other Methods of Federal Recognition

As of 1994, when Congress enacted the Federally Recognized Indian Tribe List Act, tribes could be recognized in three ways: (1) through an act of Congress; (2) through FAP; or (3) by a decision of a United States court.⁶² Each type of recognition involves the three different branches of the federal government: administrative recognition, legislative recognition, and “judicial” recognition.⁶³ It is important to note that while the judicial branch may technically determine if a plaintiff qualifies as an “Indian tribe,” many courts decline to do so.⁶⁴

Judicial recognition is where a court, in reviewing the details provided by the tribe, makes the determination that the tribe qualifies for federal recognition. In one case where the court made the determination to recognize a tribe, it only did so after allowing the BIA eighteen months to determine if the tribe could receive federal status.⁶⁵ The BIA was unable to meet the deadline, and thus the court determined for itself that the tribe did qualify.⁶⁶ Following the decision, the BIA insisted that the court did not have the authority to grant all the rights associated with federal recognition—primarily the right to build a casino under the Indian Gaming Regulatory Act.⁶⁷

61. Peter O’Dowd & Elie Levine, *Shinnecock Nation Protests to Protect Its Land, Monument with Weeks-Long ‘Sovereign Camp’*, WBUR, Nov. 27, 2020, <https://www.wbur.org/hereandnow/2020/11/27/shinnecock-nation-protest> [<https://perma.cc/D33A-N6RH>].

62. Federally Recognized Indian Tribe List Act of 1994, 108 Stat. 4791–4792 (1994).

63. Alexa Koenig & Jonathan Stein, *Federalism and the State Recognition of Native American Tribes: A Survey of State-Recognized Tribes and State Recognition Processes across the United States*, 48 SANTA CLARA L. REV. 79, 99 (2008).

64. *Id.*

65. *Id.* at 99. This theory relies on the “primary jurisdiction doctrine,” which dictates where an executive agency with more expertise than the court has the duty of making a particular determination it should enjoy “primary jurisdiction” of the case at issue. *Id.*

66. See generally *New York v. Shinnecock Indian Nation*, 400 F. Supp. 2d 486 (E.D.N.Y. 2005).

67. Tribal casinos are a major topic of conversation when it comes to tribal recognition. Many legislators and other tribes that run casinos have an economic

Judges may also recognize tribes through federal common law. However, this does not convey the many significant rights that come with federal recognition. Federal common law tribes are “a body of Indians of the same race or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.”⁶⁸ This type of recognition is very limited in scope, and does not replace federal recognition through legislative or administrative means.

Legislative recognition occurs through an act of Congress under the power of the Commerce Clause, which gives Congress the power to “regulate commerce with foreign nations, among several states, and with the Indian Tribes.”⁶⁹ Pursuing legislative recognition is very difficult because it requires political power, but it is the last hope for many tribes that cannot meet the BIA’s petition process criteria.⁷⁰ For example, those tribes in Virginia whose records were destroyed through state policy will likely not be able to secure documentation proving continuous existence, and thus might have to pursue legislative action.

Finally, administrative recognition is the petition process or FAP. These three methods of receiving federal recognition all come with their own hardships, and many smaller tribes that are not federally recognized do not have a surplus of funds or members who are able to support such efforts. This current structure provides little in the way of equity to tribes that could not form relationships with

interest in barring new tribes from federal recognition in the interest of preventing a tribal casino. The varying stakes at play here muddy the waters of a process which should revolve around Indigenous culture and preservation into a process concerned with exclusivity and economic gain. While many states would have reasons for and against their new tribes being adopted and enjoying all the federal privileges, those stakes should not outweigh the true goal of tribal recognition—the right to self-determination and self-governance. *See generally* 25 U.S.C. § 2701 (2021) (establishing the exclusive right of Native American Tribes to regulate gaming activity on their sovereign land); Brandon Byers, *Federal Question Jurisdiction and Indian Tribes: The Second Circuit Closes the Courthouse Doors in New York v. Shinnecock Indian Nation*, 82 U. CIN. L. REV. 901 (2014) (considering the implications of Shinnecock Indian’s inability to litigate their land rights in a federal court).

68. Koenig & Stein, *supra* note 63, at 102 (quoting *Montoya v. United States*, 180 U.S. 261, 266 (1901)).

69. U.S. CONST. art. I, § 8.

70. Koenig & Stein, *supra* note 63.

the federal government prior to the FAP's creation and fails to take adequate steps to mitigate a history of removal and extermination.

II. The Continuous Existence Requirement

A. History of Federal Recognition

In their best iteration, “the complexities of Indian land titles are very much like the dialogue in *Alice in Wonderland*. Indian title means what the United States has wanted it to mean whenever the subject come up.”⁷¹ Whether the bar is set at the first contact with the Europeans, such as 1778, 1871, 1900, or any other date decided on by mere happenstance, the federal recognition process preserves only a fragmented version of history, and leaves many forgotten tribes in its wake. The ability to freely determine political status is abridged by the system of federal recognition in the United States.⁷² Currently, the path to federal recognition is long, expensive, and difficult for many tribes. Federal recognition rests completely on proving continuous existence since 1900.⁷³ Many tribes today cannot prove continuous existence due to extermination efforts furthered by the federal government for decades.⁷⁴

The heritage of federal recognition finds its origins in the treaty negotiations held between the federal government and the many Indian tribes.⁷⁵ During the treaty period, which lasted from approximately 1774 until 1832, the United States entered into formal relations with the tribes as “domestic dependent nations.”⁷⁶ The colonial government modeled early negotiations after the Treaty of Paris, which officially ended the Revolutionary War.⁷⁷ The tribes and the United States government signed the treaties, which were later

71. Deloria, *supra* note 9, at X.

72. *Id.*

73. See 25 C.F.R. § 83.11(a) (2015) (explaining the criteria for acknowledgment as a federally recognized Indian tribe).

74. Deloria, *supra* note 9.

75. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 20 (1831) (discussing the origins of the process to federally recognize Indian tribes).

76. *Id.*

77. *American Indian Treaties*, NAT'L ARCHIVES (last updated June 2, 2022), <https://www.archives.gov/research/native-americans/treaties> [<https://perma.cc/6LEM-MTL3>]; see also Koenig & Stein, *supra* note 63, at 87 (discussing the history of the negotiation between the U.S. government and Native American tribes).

approved by Congress.⁷⁸ The tribes almost always agreed to cede land to the government and occupy a smaller parcel of land than was originally understood to be Indian land in exchange for peace.⁷⁹ It was understood that within that parcel the tribal government would retain sovereign control.⁸⁰ The first treaty, officially adopted in 1778 with the Delawares, was the standard until 1871.⁸¹ Many of the secessions of land during this time led to the development of the territories that would later become the States of New York, Virginia, Massachusetts, and Connecticut.⁸² Most of the tribes recognized today received their status during the treaty period and never had to undergo the FAP.

For unrecognized tribes, the road was much harder. Although many tribes sought recognition from the federal government as early as the 1920s, the recognition movement did not emerge until the end of the Termination and Relocation eras.⁸³ By the 1960s, tribes were organizing for the first time at a national level to enact change on the shared issue of non-recognition.⁸⁴ The BIA, along with Congress, responded to this movement by recognizing seven tribes between 1962 and 1974 restoring one previously terminated tribe.⁸⁵ Administrative channels were preferred but difficult to use for many tribes due to a lack of a formal process. At the time, the Bureau used Cohen's determination of federal practice as a guideline:

[T]he considerations which, singly or jointly, have been particularly relied upon [by the solicitor and

78. *American Indian Treaties*, *supra* note 77; Koenig & Stein, *supra* note 63.

79. Michael Hibbard, *Tribal Sovereignty, the White Problem, and Reservation Planning*, 5 J. PLAN. HIST. 87, 90 (2006); *see also* Koenig & Stein, *supra* note 63, at 90.

80. *American Indian Treaties*, *supra* note 77; Koenig & Stein, *supra* note 63.

81. Dennis Zotigh, *A Brief Balance of Power – The 1778 Treaty with the Delaware Nation*, SMITHSONIAN MAG. (May 21, 2018), <https://www.smithsonianmag.com/blogs/national-museum-american-indian/2018/05/22/1778-delaware-treaty/> [<https://perma.cc/Q7DS-NNPP>].

82. *By the United States in Congress Assembled. August 7, 1786: An Ordinance for the Regulation of Indian Affairs*, 31 J. THE CON'L CONG. 490 (1786) <https://www.loc.gov/resource/bdsdcc.19601> [<https://perma.cc/2UHH-GQE9>].

83. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975); *see*, BRIAN KLOPOTEK, RECOGNITION ODYSSEYS: INDIGENEITY, RACE, AND FEDERAL TRIBAL RECOGNITION POLICY IN THREE LOUISIANA INDIAN COMMUNITIES 20–23 (2011) (discussing the collaboration of non-federally recognized tribes as they worked together on the issue of non-recognition).

84. KLOPOTEK, *supra* note 83 at 23.

85. *Id.* at 24.

others in the bureau] in reaching the conclusion that a group constitutes a ‘tribe’ or ‘band’ have been:

- That the group has had treaty relations with the United States.
- That the group has been denominated a tribe by act of Congress or Executive order.
- That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe.
- That the group has been treated as a tribe or band by other Indian tribes.
- That the group has exercised political authority over its members, through a tribal council or other governmental forms.

Other factors considered, though not conclusive, are the existence of special appropriation items for the group and the social solidarity of the group.⁸⁶

The BIA applied these criteria to recognize seven tribes, but some within the organization were unconvinced that the agency had the authority to recognize tribes.⁸⁷ The BIA then began to evaluate its recognition criteria, noting that all pending requests for recognition would be dealt with following the completion of a legal study.⁸⁸ This coincided with *Passamaquoddy v. Mortin*, a 1975 First Circuit decision, in which the court recognized that the Passamaquoddy tribe’s cession of their land should be voided because it was carried out in contravention of the Indian Trade and Intercourse Acts.⁸⁹ The court acknowledged that the federal laws applied to all tribes, even new ones, whether or not the federal government previously recognized the obligation.⁹⁰ This shift created concerns that if a tribe became federally recognized, it would have subsequent land claims to all of its original territory.⁹¹ Given the nature of colonialism in the U.S., this would put a large portion of the country’s land in dispute.

86. *Id.* at 25–26 (quoting Cohen, *supra* note 41, at 270–71).

87. *Id.* at 26.

88. *Id.*

89. *Id.* at 27.

90. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

91. Dana Hedgpeth, *Wampanog, Who Helped Pilgrims Survive, Win Rights to Tribal Land*, THE WASHINGTON POST (Dec. 31, 2021)

Subsequently, Congress created Task Force 10, a congressional commission consisting of six Congresspeople and five members of tribes, including representatives from non-federally recognized tribes, to tackle this issue.⁹² Among Task Force 10's recommendations were to eliminate the distinction between federally recognized Indians and non-federally recognized ones.⁹³ This was because the decision in *Passamaquoddy* showed that there was no legal distinction, because once a tribe became recognized, the United States had to comport with legal obligations regardless of the fact that the government did not recognize the tribe when it violated the law.⁹⁴ The decision acknowledged that recognition by biological ancestry was a government requirement, not a tribal tradition.⁹⁵ The American Indian Policy Review Commission (AIPRC), another congressional commission, released its final report in 1977. This report urged that any group recognized by any other tribe or state, county, or local municipal government should automatically be recognized as a tribe by the United States.⁹⁶ This proposal was never implemented due to concern about disagreements between those bodies as to whether a tribe existed.⁹⁷

The final process took little from either the AIPRC report or from the Task Force 10, but instead focused on expanding Cohen's criteria. Instead of focusing on race, the final process focused on political class, and brought forth the system under which a failure to be acknowledged did not coincide with whether or not a group of people were Indigenous.⁹⁸ As a result, nationalism amongst tribes has become problematic; in which reservation Native Americans are considered to have suffered under the hands of colonialism by not disappearing into the general population, and thus should be able to maintain their heritage over non-federally recognized Native Americans.⁹⁹ A member of the Tulalip Tribe, Francis J. Sheldon, said

<https://www.washingtonpost.com/history/2021/12/31/wampanoag-tribe-interior-department-reservation-land/> [https://perma.cc/WU4U-FYXJ].

92. Kirke Kickingbird, *The American Indian Policy Review Commission: A Prospect for Future Change in Federal Indian Policy*, 3 AM. INDIAN L. REV. 243, 250 (1975).

93. KLOPOTEK, *supra* note 83, at 28.

94. *Id.*

95. *Id.*

96. *Id.* at 29.

97. *Id.*

98. *Id.* at 31.

99. KLOPOTEK, *supra* note 83, at 35.

that those “group[s] of people have left their culture, disappeared into the general society, and only now are resurfacing because there is money around,’ become[ing] destructive of Native culture.”¹⁰⁰

This does not hold true in a historical context, nor in an empirical one. While tribes with significant military and political power were still subjected to gross negligence and human rights violations,¹⁰¹ there were many tribes, especially along the further West coast and in the Southern United States, that were immediately displaced upon the arrival of colonizers.¹⁰² These tribes, if they had been properly recognized at the time instead of removed, would arguably have the same rights as other federally recognized nations.¹⁰³ Their lack of political and military power led to those tribes either being extinguished or severely split up. Thus, they were unable to gain recognition from the United States government.¹⁰⁴ The least powerful tribes were not displaced to Oklahoma, nor are they listed in the many federal registries or national archives which survive today.¹⁰⁵ Tribes from states without much exploration, or that joined the union after the end of the treaty period also suffer from difficulties proving their existence and never had a chance to develop

100. *Id.* at 34.

101. Many of the tribes that survived and were able to secure treaty negotiations with the federal government were large enough that they invited political recognition. George P. Generas, Jr. & Karen Gantt, *This Land Is Your Land, This Land Is My Land: Indian Land Claims*, 28 J. LAND RESOURCES & ENVTL. L. 1, 8 (2008) (noting that both the Delaware Tribe and the Cherokee entered into treaties with the nascent United States Government and received political recognition). However, there are a countless number of tribes that were smaller in military power and number that were dealt with in a more militaristic way by government officials. Donald L. Fixico, *When Native Americans Were Slaughtered in the Name of ‘Civilization’*, HISTORY.COM (last updated Oct. 25, 2021), <https://www.history.com/news/native-americans-genocide-united-states> [<https://perma.cc/6AEC-JCZQ>] (describing various military conflict between the United States and Native American tribes). These tribes often were smaller and reliant on trade between tribes to function. Without assistance, they had no choice but to cede land and move West, even without securing a treaty. *Id.* (“From 1830 to 1840, the U.S. army removed 60,000 Indians—Choctaw, Creek, Cherokee and others—from the East in exchange for new territory west of the Mississippi . . . as whites pushed ever westward, the Indian-designated territory continued to shrink.”).

102. Deloria, *supra* note 9, at vii–xi.

103. *Id.* at xv.

104. *Id.* at x.

105. *Id.* at xi.

a formal relationship with the federal government.¹⁰⁶ Despite this, many of these tribes have descendants surviving today attempting to preserve their tribal culture. Due to all these factors, however, these people have little hope for federal recognition under the current FAP. Furthermore, statistics from the AIPRC have shown that non-federally recognized Indigenous people fell behind their recognized peers in most socioeconomic indicators.¹⁰⁷

This is not to say tribal leaders of recognized tribes are inherently wrong, but that the economic nature of tribal recognition and casino ownership have made it against the interest of individual tribes to see other nearby groups receive federal recognition. This can be analogized to how many Indigenous people joined the anti-Black sentiment to distinguish themselves from Black people and gain access to educational and economic opportunities during the Jim Crow era.¹⁰⁸ This was manipulated by politicians in Washington D.C. who determined Indians would be “colored,” and thus downplayed tribal rights and pitted Indigenous rights against Black freedom.¹⁰⁹ Similar politics persist today where tribal leaders have the obligation to protect their tribe’s rights and the well-being of their tribal members, which are often tied to casinos and the limited amount of federal funds available. If more tribes are recognized, the slice of the pie gets smaller in both funds from the federal government and casino profits due to competition. Non-federally recognized tribes are often discriminated against at national meetings and are challenged on their identity as “Indian.” Skip Hayward, a chair of the Mashantucket Pequots, said, “I resent the implication that I am a second-class Indian,”¹¹⁰ in reference to his status among his peers as a member of a non-recognized tribe.

Perhaps the most contentious issue to come out of the creation of the FAP is the continuous existence requirement.¹¹¹ In 2015, the introduction of the 1900 date was considered a victory. The original proposed rule suggested that the bar be set as “time

106. *Id.* at xi.

107. KLOPOTEK, *supra* note 83, at 35.

108. *Id.* at 8.

109. *Id.*

110. *Id.* at 39.

111. Deloria, *supra* note 9; Arica L. Coleman, *From the ‘Pocahontas Exception’ to a ‘Historical Wrong’: The Hidden Cost of Formal Recognition for American Indian Tribes*, TIME MAG. (Feb. 9, 2018), <https://time.com/5141434/virginia-indian-recognition-pocahontas-exception/> [<https://perma.cc/YR2D-ZRSD>].

immemorial,” which creates an arduous documentary burden.¹¹² By setting 1900 as the start date, all periods prior to 1900 become “historical” for the purposes of federal recognition.¹¹³ This was considered a positive change because tribes only need to provide documentation from the twentieth century, which is much less of a burden than proving continuous existence since first contact with Europeans.¹¹⁴ While this victory was important at the time, there are important historical notes that make this distinction untenable for future generations. The specific date of 1900 most likely comes from the *Mashpee* case where a jury found that the tribe did not satisfy continuous existence, because while it is clearly documented that the tribe existed in 1870 and had relations with the Massachusetts government, the tribe did not exist in 1790, 1869, 1870, or 1976.¹¹⁵ Neither the Cohen treatise, from which the criterion are modeled, nor any of the task forces involved in the promulgation of the original regulations support the continuous existence requirement.¹¹⁶ Its creation is a political shield against the land concerns stemming from tribal recognition.

B. Shortcomings of the 1900 Benchmark

To address why 1900 is an improper date from which to prove continuous existence, one must first understand the suppression efforts furthered by the United States Government at every level. The era of termination in the United States did not end until the 1960s.¹¹⁷ The last state to grant Native Americans voting rights was Utah in 1962.¹¹⁸ There are continued policies of erasure and extermination along with deep-rooted distrust of Native American people in the

112. 25 C.F.R. § 83.

113. *Id.*

114. KLOPOTEK, *supra* note 83, at 40.

115. Ellsworth Oakley, *Indians Lose in Court in Fight to Gain Land*, N.Y. TIMES, Jan. 7, 1978, <https://www.nytimes.com/1978/01/07/archives/indians-lose-in-court-in-fight-to-gain-land-jury-says-mashpee-group.html> [<https://perma.cc/MNN7-U9F5>].

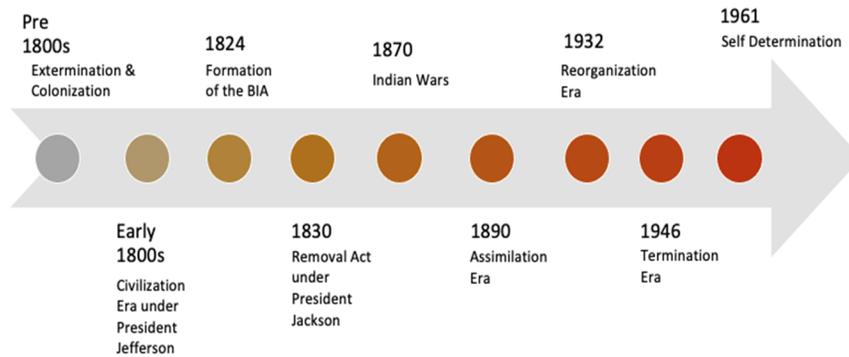
116. KLOPOTEK, *supra* note 83, at 37–40.

117. *Id.* at 31, 39.

118. Peter Dunphy, *The State of Native American Voting Rights*, BRENNAN CTR. FOR JUST. (Mar. 13, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/state-native-american-voting-rights> [<https://perma.cc/9NMN-XTGY>].

United States, which has made proving continuous, uninterrupted existence from 1900 nearly impossible for many tribes.¹¹⁹

TABLE 1.1: TIMELINE OF FEDERAL INDIAN POLICIES



First created in 1824, the BIA has been involved in tribal affairs for much of the United States' existence.¹²⁰ John Marshall, in a landmark decision, set the tone for how the federal government and courts would treat the Indian tribes:

If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.¹²¹

While this policy was later supplemented by decisions supporting tribal sovereignty like, *Johnson v. M'Intosh*¹²² and *Worcester v.*

119. Bureau of Indian Affairs, *Our History*, U.S. DEP'T OF INTERIOR, <https://www.bia.gov/bia/ojs/careers/our-history> [<https://perma.cc/MS57-H8SM>].

120. See Bureau of Indian Affairs, U.S. DEP'T OF INTERIOR, <https://www.bia.gov/bia> [<https://perma.cc/C9F6-9P8U>] (providing a historical account of the relationship between the United States government and Indigenous tribes through the BIA).

121. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 20 (1831) (holding that the Supreme Court did not have the jurisdiction to determine the rights of the Cherokee Nation).

122. See generally *Johnson v. M'Intosh*, 21 U.S. 543 (1823) (setting one of the most preliminary and consequential legal standards for Indigenous access to and control of land).

Georgia,¹²³ courts rarely utilize their ability to engage in tribal recognition. Courts have maintained that distance for nearly 200 years. Since the BIA's founding, federal courts have been unwilling to hold the federal government responsible for its actions and failures to act in its trust relationship with the tribes.¹²⁴ While the United States does much by recognizing federal tribes, fear of outcomes like that in *Passamaquoddy* should not color policies of recognition.¹²⁵

In that time, the BIA survived through the federal government's many different approaches to the "Indian problem."¹²⁶ That history led to the creation of the FAP, as discussed above. Here, before going into further detail, it is important to understand the role the BIA itself has played in discriminatory efforts against the United States' Indigenous communities. Following the Indian Wars, which arose after the federal government engaged in removal of all Native Americans west of the Mississippi,¹²⁷ the BIA engaged in one of its

123. *See generally* *Worcester v. Georgia*, 31 U.S. 515 (1832) (holding that it is the exclusive duty of the federal government to regulate Indigenous affairs, limiting the scope of the state police power).

124. Kevin K. Washburn, Essay, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 HARV. L. REV. F. 200 (2017).

125. *See generally* *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (upholding a declaratory judgement that paved the way for indigenous people in Maine to reclaim their land rights).

126. First used by Andrew Jackson, the term "Indian problem" was used by many U.S. presidents to refer to relations between the federal government and the Indian tribes. ROBERT V. REMINI, *ANDREW JACKSON AND HIS INDIAN WARS* (2001). It was thought that reservations interfered with western expansion, and so assimilation of many Native Americans into colonist ideology was necessary. Smithsonian National Museum of the American Indian, *Indian Removal Act Forces Indigenous Peoples to Migrate West*, A HIST. OF RACIAL INJUSTICE: THE EQUAL JUST. INITIATIVE, <https://calendar.eji.org/racial-injustice/may/28> [<https://perma.cc/7JYQ-66AP>]. One such policy was the Dawes Act, which dissolved tribal ownership of reservations into individual allotments for Native American ownership. General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C. §§ 331–333 (1887)) (repealed 2000). Tribes resisted this because it interfered with traditional ways of life, but in the end the policy was successful in divesting tribes of nearly two-thirds of remaining reservation lands. Another facet of the Dawes Act is the blood quantum rules which remain in effect to some extent today. Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1068 (2012). These rules imposed colonialist standards on who was "eligible" for tribal enrollment.

127. *See generally* *Indian Removal Act of 1830*, 4 Stat. 411–12 (creating a process that led to the removal of Native Americans).

most controversial policies—Indian boarding schools.¹²⁸ Following the passage of the Civilization Fund Act of 1819, many boarding schools began to develop on and around reservations.¹²⁹ In schools, children were forced to adopt new names and were subjected to physical, sexual, and mental abuse.¹³⁰ Under the authority of the BIA, everything “Indian” was banned including traditional languages, cultures, and practices.¹³¹ These practices persisted until the late 1960s, years after the end of the termination era.¹³² Policies like these that forced many Native Americans to hide their cultural practices and destroyed the ability of tribes to keep records of continuous existence are not treated as an impediment to implementation of FAP.¹³³ Instead, tribes are viewed independently of the many horrors and extermination policies which shaped their inability to meet the requirements.

Thus, the BIA often fails its mandate to stand for Indigenous rights, but it still remains the primary body which represents Native Americans within the federal government.¹³⁴ This tension between the history of the agency, the state and federal Indian policies, and the movement for Indigenous rights within the United States resulted in an over-complicated system that fails to resolve prior

128. Julie Davis, *American Indian Boarding School Experiences: Recent Studies from Native Perspectives*, 15 OAH MAG. OF HIST. 20 (2001).

129. Mato Canil Win, *Civilization Act*, LAKOTA TIMES, June 17, 2021, <https://www.lakotatimes.com/articles/civilization-act/> [<https://perma.cc/J3YH-MVY5>].

130. *Id.*; Charla Bear, *American Indian Boarding Schools Haunt Many*, NPR (May 12, 2008, 12:01 AM), [<https://www.npr.org/templates/story/story.php?storyId=16516865>] [<https://perma.cc/SB55-G7HS>]; Mary Annette Pember, *Death by Civilization*, THE ATLANTIC (Mar. 8, 2019), <https://www.theatlantic.com/education/archive/2019/03/traumatic-legacy-indian-boarding-schools/584293/> [<https://perma.cc/2YUP-HQ73>].

131. Pember, *supra* note 130; Bear, *supra* note 130.

132. Davis, *supra* note 128; Olivia B. Waxman, *The History of Native American Boarding Schools is Even More Complicated Than a New Report Reveals*, TIME MAG. (May 17, 2022), <https://time.com/6177069/american-indian-boarding-schools-history/> [<https://perma.cc/FU7K-3LUX>].

133. Gabriel Furshong, *Some “Unrecognized” Tribes Still Waiting After 130 Years*, YES! MAG. (Dec. 19, 2016), <https://www.yesmagazine.org/democracy/2016/12/19/some-unrecognized-tribes-still-waiting-after-130-years> [<https://perma.cc/AY23-5C6Z>] (noting that tribes often struggle to provide historical documentation of existence because of the actions of the U.S. government).

134. Bureau of Indian Affairs, U.S. DEP’T. OF INTERIOR, <https://www.bia.gov/bia> [<https://perma.cc/4SFT-MCP5>].

conflicts.¹³⁵ For example, many tribes in the state of Virginia that do not have genealogical records needed to prove their continued, uninterrupted existence, because of Virginia law.¹³⁶ State officials destroyed many of these records while acting under Virginia's Racial Integrity Act of 1924, which created a racial registration system and banned interracial marriage.¹³⁷ This Act also allowed officials to change many birth records of Native Americans to "colored" instead of Indian.¹³⁸ Thus, due to the nature of the State's history and treatment of Indigenous peoples, Virginia tribes may never have a path to federal recognition under the current process.¹³⁹ State laws like this carry deep repercussions to this day due to the nature of the federal recognition process.¹⁴⁰ The party best positioned to understand that tumultuous history which a tribe must struggle with may be the very state in which it is situated. However, the current era of tribal recognition provides a one-size-fits-all solution without acknowledging the unique nature of tribal history with both the federal government and the states.

While this is the current situation of FAP, it is uncontested that the BIA can be a champion for Indigenous rights. Reform of the FAP process would allow the BIA to act as a better advocate and address concerns which led to the development of an acknowledgment process in the first place. Granting recognition to state tribes, either by ratifying state recognition as federal recognition, or creating a different process to analyze state tribes, is a viable option. The politics of federal recognition involve a balancing act between already recognized tribes and their interests, non-Indians, state and local

135. See generally Rachael Paschal, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 WASH. L. REV. 209 (1991) (arguing in part that federal acknowledgment criteria are inconsistently applied and interpreted).

136. Koenig & Stein, *supra* note 63, at 80.

137. S.B. 219, 1924 Gen. Assemb. (Va. 1924), *invalidated by* *Loving v. Virginia*, 388 U.S. 1 (1967) (full statutory text can be found at: http://www2.vcdh.virginia.edu/lewisandclark/students/projects/monacans/Contemporary_Monacans/racial.html) [<https://perma.cc/AC85-MPRT>] [hereinafter Racial Integrity Act] (describing how people would be classified based on race and outlawing interracial marriage); Koenig & Stein, *supra* note 63, at 80.

138. Racial Integrity Act, *supra* note 137; Koenig & Stein, *supra* note 63, at 80.

139. Koenig & Stein, *supra* note 63, at 80.

140. *Id.*

governments, as well as the federal government.¹⁴¹ Granting federal recognition to the sixty-three state-recognized tribes is sure to come with its own challenges.

Within the BIA is the Branch of Acknowledgement and Research (BAR), which implements the FAP.¹⁴² As of now, the BAR uses one process to examine all tribes and determine if they should receive federal recognition. However, a majority of the tribes recognized by the federal government were not recognized through this process instituted in 1997.¹⁴³ Even if they were, the process is a far cry from the streamlined one envisioned by those who created it. Thus, this broken system should not continue to serve as the way to recognition in the United States. As of 2013, the Department of the Interior received 356 letters of intent submitted by tribes seeking federal recognition.¹⁴⁴ Since 1978, eighty-seven petitions have been completed and only seventeen tribes have received federal recognition in the past forty-three years.¹⁴⁵ Of the successful federally recognized tribes, only 3% underwent the FAP process, and the remaining 97% received recognition through other means.¹⁴⁶ The petition process with these abysmal rates also prevents tribes with failed petitions from revising and re-petitioning. This bar was recently challenged in *Chinook Indian Nation v. Bernhardt*, in which the tribe argued that: (1) the Department of the Interior (DOI) lacked authority to promulgate such a ban; and (2) the failure to include an exception to the re-petitioning ban was arbitrary and capricious.¹⁴⁷ The court

141. See generally Koenig & Stein, *supra* note 63 (analyzing how state tribal recognition fits within the American legal landscape).

142. U.S. DEPT. OF THE INTERIOR, OFFICE OF FED. ACKNOWLEDGMENT, THE OFFICIAL GUIDELINES TO THE FEDERAL ACKNOWLEDGMENT REGULATIONS 25 C.F.R. § 83 (1997).

143. 25 C.F.R. § 83.

144. M. MAUREEN MURPHY, CONG. RSCH. SERV., LSB10411, DISTRICT COURT REJECTS DOI'S BAN ON TRIBES' RE-PETITIONING FOR FEDERAL RECOGNITION 1 (2020).

145. Elizabeth Coronado, *The Plight of New England Tribes Pursuing Federal Recognition*, 4 AM. INDIAN L.J. 546, 552 (2016).

146. *Id.* at 522.

147. In general, federal agencies are given broad powers to promulgate regulations within the federal government. Courts reviewing agency actions will consider whether the agency's action was arbitrary or capricious, an abuse of discretion, or contrary to law. To survive the arbitrary and capricious standard, the agency must show that their underlying rationale or factual assertions were reasonable. *Chinook Indian Nation v. Bernhardt*, No. 3:17-CV-05668-RBL, 2020 WL 128563, at *5 (W.D. Wash. Feb. 10, 2020).

sided with the tribe and found that “DOI’s reasons . . . are illogical, conclusory, and unsupported by the administrative record.”¹⁴⁸ The district court’s analysis of this portion of the rule can be understood to describe much of the FAP process and decision-making.

C. Elimination of the Continuous Existence Requirement

This history is directly tied to why the current iteration of the FAP requirements are untenable. The process is arduous and expensive for many tribes, which must compile sufficient historical data to show that they are a distinct autonomous community that has existed continuously since historic times.¹⁴⁹ While the federal government currently has an arguably favorable definition of the Indian tribes today, historical Native erasure and systematic oppression of Indigenous people were rampant within the federal government.¹⁵⁰ These policies and the indisputable impact they have had on tribal communities are irreconcilable with the policy of substantially continuous existence. Actions such as the destruction of federal tribal documents,¹⁵¹ and the erasure of actual lineage through blood quantum and federal rolls created in the Indian New Deal era make proving continuous existence even harder.¹⁵² Prior to these periods, the idea of blood quantum and federal registries were not part of recognition within tribes.¹⁵³ Tribal rolls are often still used to determine enrollment.¹⁵⁴ For many, the stripping of culture is an ongoing process which continues into the present day.

Many tribes, like those in Louisiana, face unique challenges that are impossible to solve without the resources federal recognition

148. *Chinook Indian Nation v. Bernhardt*, No. 3:17-CV-05668-RBL, 2020 WL 128563, at *8 (W.D. Wash. Feb. 10, 2020).

149. Deloria, *supra* note 9.

150. Bureau of Indian Affairs, *Our History*, U.S. DEPT OF INTERIOR, <https://www.bia.gov/bia/ojs/careers/our-history> [<https://perma.cc/MS57-H8SM>].

151. Bureau of Indian Affairs, *Petitions Resolved*, U.S. DEPT. OF THE INTERIOR, <https://www.bia.gov/as-ia/ofa/petitions-resolved> [<https://perma.cc/VYF3-9HB3>].

152. See Koenig & Stein, *supra* note 63, at 110.

153. Kat Chow, *So Exactly What is ‘Blood Quantum’?*, NPR (Feb. 9, 2018), <https://www.npr.org/sections/codeswitch/2018/02/09/583987261/so-what-exactly-is-blood-quantum> [<https://perma.cc/Z78C-WWYL>].

154. *Dawes Rolls*, NAT’L ARCHIVES, <https://www.archives.gov/research/native-americans/dawes/tutorial/intro.html> [<https://perma.cc/G4F9-VB9W>].

provides.¹⁵⁵ Recognition allows for tribal environmental sovereignty under both the Clean Air and Clean Water Acts, which treat federally recognized tribes as states.¹⁵⁶ For example, the Isle de Jean Charles Biloxi-Chitimacha-Choctaw band are going to be the first climate refugees within America, along with the rest of the Isle de Jean Charles community as the Isle sinks and sea levels rise.¹⁵⁷ The Chief of the tribe remarked, “We’re going to lose all our heritage, all our culture. It’s all going to be history.”¹⁵⁸ Circumstances like this are why federal recognition is so important, as recognition provides many resources and rights that states cannot or will not provide.

Many of the changes in the most recent 2015 amendments to the recognition process focus on efficiency and transparency.¹⁵⁹ First, it provides for a phased review to allow for faster decisions and reduce the documentary burden on tribes.¹⁶⁰ Second, it creates the opportunity for a hearing in which third parties can object before an administrative law judge.¹⁶¹ Third, it increases access to publicly available documents.¹⁶² The 2015 changes also included a number of other policy changes aimed at lessening the significant burden on tribes to satisfy the seven criteria.¹⁶³ However, in an effort to decrease the substantial workload, the process also disallowed repetition of final decisions.¹⁶⁴ The rule change which was meant to increase favorability to tribes, also became a shackle. Since 2015, only one

155. Coral Davenport & Campbell Robertson, *Resettling the First American ‘Climate Refugees’*, N.Y. TIMES, May 2, 2016, <https://www.nytimes.com/2016/05/03/us/resettling-the-first-american-climate-refugees.html> (on file with the *Columbia Human Rights Law Review*).

156. See Navigable Waters Protection Rule, 33 U.S.C. § 1377 (2020) (defining the scope of waters subject to federal regulation under the Clean Water Act); 42 U.S.C. § 7601(d)(A) (2020) (authorizing the Administrator of the Clean Air Act to treat Indian tribes as States for most purposes of the Act).

157. Davenport & Robertson, *supra* note 155.

158. *Id.*

159. *Id.*; *Highlights of the Final Federal Acknowledgment Rule (25 CFR 83)*, U.S. DEPT. OF THE INTERIOR, (June 29, 2015), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/pdf/idc1-030769.pdf> [<https://perma.cc/2KVV-RUPJ>].

160. See generally 25 C.F.R. § 83 (stating the criteria required for federal acknowledgement and the process for petitioning for federal acknowledgement).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Highlights of the Final Federal Acknowledgment Rule (25 CFR 83)*, U.S. DEPT. OF THE INTERIOR, (June 29, 2015), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/pdf/idc1-030769.pdf> [<https://perma.cc/2KVV-RUPJ>].

tribe, the Pamunkey Tribe, has received recognition through the petition process.¹⁶⁵

The only way to move forward with the FAP and stay true to the BIA's mandate is to remove the continuous existence requirement. The other six requirements adequately address who can be a member of a petitioning tribe. In particular, four of these include: (b) the tribe must come from a distinct community; (e) the tribe descends from a historical tribe and functions as a political entity; (c) the tribal leadership has political influence over the community; and (f) that there is no overlap in membership with a current federal tribe.¹⁶⁶ These requirements as written are sufficient to establish if a tribe exists, without further steps. If a tribe can sufficiently show a connection to a historic tribe, as well as a sense of community and political identity that continues today, it does not matter that there were periods of time where that community was not active or could not gather. This is especially true given that many state governments along with the federal government made gathering illegal, or otherwise discouraged it. Historically victimized tribes must not be responsible for the actions of termination by others, but should be acknowledged for persevering against those odds and maintaining strong political and cultural communities. Only then can tribes realize the self-determination of their social, economic, and political identities.

III. State Tribal Recognition

A. Types of State Recognition

Unlike the federal system, each state system of recognition is unique. In the sixteen states that have full recognition systems for tribes, there are generally four categories of recognition that exist: state law, administrative action, legislative action, and executive action.¹⁶⁷ While this paper argues that the federal government should ratify all state-recognized tribes as federal tribes, there is some flexibility in this stance. Given the four differing types of recognition, the federal government could choose to only ratify the recognition of

165. *Federal Recognition for the Pamunkey*, NAT'L PARK SERV., (Aug. 24, 2020), <https://www.nps.gov/jame/learn/historyculture/federal-recognition-for-the-pamunkey.htm> [<https://perma.cc/5K33-2RDA>].

166. *Fletcher*, *supra* note 2, at 492 (citing 25 C.F.R. § 54).

167. *See* Koenig & Stein, *supra* note 63, at 103.

tribes that have been recognized through the most arduous methods. This would help to alleviate concerns over lowering the standards for federal recognition while also honoring the State's ability to recognize its own history and culture, and grant recognized status to certain tribes.

If the federal government adopted this pick-and-choose approach, however, it would still be complacent in allowing two different classes of recognized Indigenous groups to exist. Furthermore, the pick-and-choose approach opens the government up to criticism from States using other methods that their judgment in identifying tribes is somehow faulty. Given the delicate balance within the federalist system, this method is the least flexible to States in allowing them jurisdiction over their own unique historical and political concerns surrounding tribal recognition. Right now, with the current state of the BIA, it does not have the resources available to analyze the historical context of tribes who cannot provide sufficient evidence under its petition process' deeply nuanced relationship with their mother State.¹⁶⁸ Thus, the most inclusive way to navigate these concerns would be to formally adopt all state-recognized tribes, or create standardized criteria¹⁶⁹ each State must follow for their state-recognized tribes to receive federal recognition.

The most formal of the four categories, state law recognition, involves using the bicameral process of the state legislature and approval by the state's governor to recognize a tribe through the passing of a new law.¹⁷⁰ This establishes a very similar government-to-government relationship between the state government and the Indigenous tribe, as to the current relationship between the federal government and federally recognized tribes, but lacks many of the benefits which fuel the right to self-determination. Twelve states currently employ state recognition in some form including Alabama, Connecticut, Delaware, Georgia, Hawaii, New Jersey, Montana, New York, North Carolina, South Carolina, Vermont, and Virginia.¹⁷¹ The federal government has not intervened in the use of state law to recognize tribes since Delaware first did so in 1881.¹⁷²

168. *Id.* at 108.

169. The topic of standardized criteria for the states is beyond the scope of this paper.

170. Koenig & Stein, *supra* note 63, at 103.

171. *Id.*

172. *Id.*

Legislative recognition is similar in scope in that it involves the state legislature, but is less formal than passing a new law. Usually, a joint or concurrent resolution is passed by both houses of the state legislature, creating the relationship between the state government and the tribe.¹⁷³ While this process is less formal than passing a law, it still involves garnering enough support from the State's policy makers to recognize a tribe. This method is commonly used in California, Georgia, Louisiana, New Jersey, Ohio, and Virginia.¹⁷⁴ Critics of legislative recognition point to the uncertainties it creates (i.e., does it carry the same weight as state law?).¹⁷⁵ The power to recognize tribes through their own processes has been reserved to the states through the Tenth Amendment, so long as state law does not conflict with federal Indian law.¹⁷⁶ The Cohen Treatise explains that since the federal government is generally unconcerned with state tribes, and since state recognition provides the tribe with distinct and separate benefits, there is no worry of federal Indian law preemption.¹⁷⁷ States filling in the gaps of non-recognition within the United States do not directly interfere with the federal government's oversight of federal tribes. If anything, it provides resources where the federal government's power is unable to reach state tribes. Thus, there is no conflicting interest to raise the preemption doctrine.

The question then becomes, what happens when the federal government recognizes these tribes, and thus has an intervening interest? Louisiana is an illustrative example of why no conflict would arise. Louisiana is perhaps the best example of a state recognizing tribes through legitimate joint resolutions which allow those tribes to receive benefits, like funding, from their government-to-government relationship.¹⁷⁸ First, the federal government, along with the Louisiana state government, provides funds to its nine state-recognized tribes. This funding includes grants from the Department of Education.¹⁷⁹ In the few areas where there is a "dominant federal

173. *Id.* at 104.

174. *Id.*

175. *Id.* at 103–10.

176. *See* U.S. CONST. amend. X (establishing that any power not enumerated nor codified to the federal government belongs to the states).

177. *Cohen*, *supra* note 41.

178. *See* Koenig & Stein, *supra* note 63 at 107 (discussing the services and benefits Louisiana provides to its recognized tribes).

179. U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-348, FEDERAL FUNDING FOR NON-FEDERALLY RECOGNIZED TRIBES 17 (Apr. 2012), [hereinafter FEDERAL FUNDING FOR NON-FEDERALLY RECOGNIZED TRIBES].

interest,” state law is preempted and replaced by the prescribed federal law.¹⁸⁰ Even when conflict arises, it is generally not significant and does not aggravate the special objectives of the federal regulatory scheme.¹⁸¹ The Bureau of Indian Affairs’ mission is “to enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes, and Alaska Natives.”¹⁸² Recognition by the state of Louisiana does not intervene in that purpose, nor do any of the state programs mimic the benefits of federal recognition in any serious way. Thus, the federal government retains superiority over issues of tribal law, and no problems would arise from federally recognizing tribes that have been recognized by their respective state legislatures.

Administrative recognition at the state level operates much like administrative recognition at the federal level. Within the state’s executive power, an agency reviews and recognizes tribes using standards promulgated by the state. For example, South Carolina’s State Commission for Minority Affairs retains the authority to grant tribes state recognition.¹⁸³ This form of recognition carries the weight of state law, even though it comes from an agency. While far less popular, administrative recognition is still used by three states—Alabama, Massachusetts, and South Carolina.¹⁸⁴

Finally, the fourth type of recognition is executive recognition. This type uses the powers of the executive branch, such as gubernatorial proclamations, executive orders, or treaties, to establish a government-to-government relationship with state tribes.¹⁸⁵ As mentioned above, some states retain treaties that were formed with tribes during the colonial period or shortly thereafter. Although States continue to honor these treaties, the federal government has chosen not to adopt them at the federal level. The other types of executive action are most often proclamations, usually

180. JAY B. SYKES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 17 (2019).

181. See generally Koenig & Stein, *supra* note 63 (arguing in part that state recognition of tribes is consistent with the federal goal of promoting tribal self-governance).

182. *Bureau of Indian Affairs*, U.S. DEP’T OF THE INTERIOR, <https://www.bia.gov/bia> [<https://perma.cc/RQ2Q-THAN>].

183. Koenig & Stein, *supra* note 63, at 104.

184. *Id.*

185. *Id.* at 108.

made by the Governor's office, and are sufficient to establish a state tribe.¹⁸⁶

While these are the main four approaches to recognition, some states support tribal efforts to maintain autonomy without going so far as to provide state tribal recognition. Michigan and Missouri both employ a recognition status for tribal groups that allows access to state resources such as social services and funding, but does not go so far as to create a state-recognized tribe.¹⁸⁷ These states and their schemes are not included in this proposal because they lack a commitment by the state to the tribe on a government-to-government level.¹⁸⁸ There are five states that employ this type of process.¹⁸⁹ For the sake of federal recognition, these states must take more direct responsibility for their tribal members. The tribes which this note argues should qualify for federal recognition on the basis of their state recognition status are listed in Table 1.2.¹⁹⁰

TABLE 1.2: STATE-RECOGNIZED TRIBES

State	State-Recognized Tribes
Alabama	Cher-O-Creek Intra Tribal Indians Cherokee Tribe of Northeast Alabama Cherokees of Southeast Alabama Echota Cherokee Tribe of Alabama Ma-Chis Lower Creek Indian Tribe of Alabama Mowa Band of Choctaw Indians Piqua Shawnee Tribe Southeastern Mvskoke Nation United Cherokee Ani-Yun-Wiya Nation
Connecticut	Eastern Pequot Tribal Nation The Golden Hill Paugussett Schaghticoke Tribal Nation

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *List of Federal and State Recognized Tribes*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/state-tribal-institute/state-recognition-of-american-indian-tribes.aspx> [<https://perma.cc/AK99-PEKQ>] (last updated Mar. 2020).

Delaware	Lenape Indian Tribe of Delaware Nanticoke Indian Tribe
Georgia	Cherokee of Georgia Tribal Council Georgia Tribe of Eastern Cherokee Lower Muskogee Creek Tribe
Louisiana	Addai Caddo Tribe Biloxi-Chitimacha Confederation of Muskogee Choctaw-Apache Community of Ebarb Clifton Choctaw Four Winds Tribe Louisiana Cherokee Grand Caillou/Dulac Band Isle de Jean Charles Band Louisiana Choctaw Tribe Natchitoches Tribe of Louisiana Pointe-Au-Chien Indian Tribe United Houma Nation
Maryland	Piscataway Indian Nation Piscataway Conoy Tribe
Massachusetts	Nipmuc Nation
New Jersey	Nanticoke Lenni-Lenape Tribal Nation Ramapough Lenape Nation The Powhatan Renape Nation
New York	Tonawada Band of Seneca Tuscarora Nation Unkechaug Nation
North Carolina	Cohaire Intra-Tribal Council, Inc. Haliwa-Saponi Indian Tribe Lumbee Tribe Meherrin Nation Occaneechi Band of the Saponi Nation Sappony Waccamaw-Siouan Tribe
South Carolina	Beaver Creek Indians Edisto Natchez Kusso Tribe of South Carolina Pee Dee Indian Nation of Upper South Carolina Pee Dee Indian Tribe of South Carolina Santee Indian Organization The Waccamaw Indian People Wassamasaw Tribe of Varnertown Indians

Vermont	Elnu Abenaki Tribe Nulhegan Band of the Coosuk Abenaki Nation Koasek Abenaki Tribe Mississquoi Abenaki Tribe
Virginia	Cheroenhaka (Nottoway) Chickahominy Tribe Eastern Chickahominy Tribe Mattaponi Monacan Nation Nansemond Nottoway of Virginia Pamunkey Pattawomeck Rappahannock Upper Mattaponi Tribe

B. State Recognition Procedures

While the three methods of recognition at the state level mirror recognition at the federal level, the specific procedures can be quite varied. Some states recognize tribes they have enjoyed political relationships with since the colonial era.¹⁹¹ Other states have adopted criteria for state recognition similar to FAP and have established an agency to review petitions. Those tribes are then recognized by legislation, executive power, or an agency determination.¹⁹² Other states leave recognition criteria up to the executive making direct relationships with tribes.

It is worth mentioning that only a minority of states actually engage in tribal recognition practices. It might be fairer to state that there are actually three classes of Indigenous people within the United States: federally recognized, state recognized, and non-recognized. Those tribes who are unrecognized completely have the hardest climb to federal recognition. The issues with state and federal tribal recognition creating separate systems, however, rests with the fact that it creates two types of recognized Indigenous people who enjoy different rights and abilities to govern. This distinction prevents tribes from engaging in self-determination, which goes

191. Koenig & Stein, *supra* note 63, at 79–130.

192. *Id.*

against the federal Indian policy, and the international scheme regarding Indigenous rights.

However, before any type of formal ratification of state processes can take place, the federal government must understand state procedures for recognition. While all of these procedures may differ, states, which have traditionally been a large barrier to tribal sovereignty, play a significant role in tribal survival by providing funds and recognition. Currently, state action only has a negative bearing on the FAP because states can protest tribal recognition, even if they recognize that tribe on a state level. This creates a category of second-class recognized tribes. To remedy this, the federal government must review the different methods states use to recognize tribes in order to understand how state recognition can fit within the broader federal framework.

1. Alabama

In Alabama, tribes are recognized administratively. The Alabama Indian Affairs Commission serves as a liaison between local, state, and federal agencies and state tribal governments.¹⁹³ The commission was established in 1978 through legislation enacted by the State Congress to oversee policies surrounding Native Americans and the issues they face.¹⁹⁴ The State has given the commission the authority to recognize Indian tribes, prescribe rules for the recognition of tribes, and take action to further cultural, social, and economic development of the State's tribes. To be recognized, tribes must submit a petition to the commission which contains the information outlined in the commissions administrative code, including:

- (1) Petitioner must meet all criteria as specified in this section.
- (2) Petitioner must present a list of at least five hundred (500) members who reside in the state of Alabama, of the tribe, band, or group (list must be inclusive by name and addresses), unless this requirement is waived by an affirmative vote of three-fourths (3/4) of the membership of the commission.

193. *Overview*, STATE OF ALA. INDIAN AFF. COMM'N, <https://aiac.alabama.gov/overview.aspx> [<https://perma.cc/9S3A-ZJNW>].

194. *Id.*

- (3) Petitioner must present evidence that each of its members is a descendent of individuals recognized as Indian members of an historical Alabama tribe, band, or group found on rolls compiled by the federal government or otherwise identified on other official records or documents. Ancestry charts for each member citing sources of documentation must accompany the petition. Each chart must bear the notarized signature of the individual to whom it pertains.
- (4) Petitioner must present satisfactory evidence that its members form a kinship group whose Indian ancestors were related by blood and such ancestors were members of a tribe, band or group indigenous to Alabama. This evidence may be the equivalent of the ancestry charts required in Section 3 above.
- (5) The petitioner must swear or affirm the following:

 - a. No individual holding or eligible for membership in a federally or state-recognized tribe, band or group may be accepted for membership in the petitioning group.
- (6) Evidence must be presented that the petitioning tribe, band or group has been identified with a tribe, band or group from historical times (200 years) until the present as “American Indian” and has a currently functioning governing body based on democratic principles.

 - a. Ancestry charts must be verified and approved by written acknowledgement of a Certified
 - b. Genealogist (CSL) who is a non-member of the petitioning tribe, band, group or Indian community.
 - c. Tribal history is a requirement. It may be prepared and written by the tribe, but it must be validated by a certified historian and/or anthropologist.

- d. Historian must submit a resume of prior work along with documentation of credentials.
- (7) Petitioner must include a statement bearing the notarized signatures of the three highest ranking officers of the petitioning tribe, band or group certifying that to the best of their knowledge and belief all information contained therein is true and accurate.¹⁹⁵

If these criteria are met, the state may recognize the group. Alabama defines Indian Tribes, Bands, or Groups as a population related by blood through their Indian ancestry, traceable through heritage.¹⁹⁶ Another type of organization regulated by the commission are “Indian Associations,” which require 90 percent of their members to be Indian.¹⁹⁷ These are not tribes, but groups of people from tribes organizing as Indians.

While Alabama’s criteria are very similar to the FAP requirements, there are a few key differences which provide for a more equitable result. First, the use of ancestry charts instead of rolls created by the federal government allow groups of people who were previously disallowed from enrolling in tribes due to federal policies to become recognized members.¹⁹⁸ Determining who qualifies as “Indian” on a tribal level is the main issue faced by tribes, but the federal government also had a role in striking certain classes of people from tribal recognition altogether while granting non-Indian’s status.¹⁹⁹ Many individuals listed on these rolls, such as the Cherokee Dawes Roll, had no Indian heritage beyond buying land on a reservation.²⁰⁰ In contrast, however, racial separation policies prevented the rolls from listing many African Americans with Indian

195. ALA. ADMIN. CODE r. 475-X-3.03 (1985).

196. *Id.*

197. *Id.*

198. Bureau of Indian Affairs, *A Guide to Tracing American Indian & Alaska Native Ancestry*, U.S. DEP’T. OF THE INTERIOR, <https://www.bia.gov/sites/bia.gov/files/assets/foia/ois/pdf/idc-002619.pdf> [<https://perma.cc/6GHF-DCQ9>].

199. See GARROUTTE, *supra* note 14 (discussing the history of status stripping actions and policies by the United States Government against Native Americans).

200. Alysa Landry, *Paying to Play Indian: The Dawes Rolls and the Legacy of \$5 Indians*, ICT (Sept. 13, 2018), <https://indiancountrytoday.com/archive/paying-play-indian-dawes-rolls-legacy-5-indians>.

heritage, known as freedmen.²⁰¹ The adjustment to ancestry charts allows tribes to identify a common ancestor and work from there instead of relying on records collected during the Indian Wars and Assimilation Era.

Another improvement is that Alabama's criteria do not impose a continuity requirement, but instead require petitioning groups to identify with a Tribe, Band, or Group from historical times and currently maintain a functioning governing body based on democratic principles.²⁰² While requiring a certain type of tribal government structure interferes with the right of self-determination, this provision keeps the spirit of the FAP requirements but does not impose limitations on the basis of periods of inactivity.

2. Connecticut

The state of Connecticut recognizes five state-tribes, two of which also have federal recognition. The state tribes were recognized legislatively through the passage of a statute in 1973.²⁰³ This legislation identified the five tribes and defined "Indian" as someone from one of these five tribes. It also created an Indian Affairs Council to oversee the State reservations.²⁰⁴ This Act gave tribes control over their membership, the right to create tribal governments, regulatory power over the reservation, and the ability to make contracts.²⁰⁵ The statute also allows the Governor to enter into trust agreements with willing tribes to define the state-tribe relationship.²⁰⁶ The state has since passed further legislation allowing the state to take tribal land into trust in a similar manner to the federal government.²⁰⁷

The tribes Connecticut recognizes are all historical and enjoy a clearly established relationship with the state's government since

201. Lucianne Lavin, *Freedmen*, OKLA. HIST. SOC'Y (Apr. 6, 2013), <https://www.okhistory.org/publications/enc/entry.php?entry=FR016> [<https://perma.cc/A4EZ-SEAW>].

202. ALA. ADMIN. CODE r. 475-X-3.

203. CHRISTOPHER REINHART, CONN. OFF. OF LEGIS. RSCH, 2002-R-0072, QUESTIONS ABOUT STATE RECOGNITION OF INDIAN TRIBES (Jan. 22, 2002), <https://www.cga.ct.gov/2002/rpt/2002-R-0072.htm> [<https://perma.cc/VFK7-HZVU>].

204. *Id.*

205. 1989 Conn. Acts 89-368 (Reg. Sess.).

206. *Id.*

207. *Id.*

colonial times.²⁰⁸ The Eastern Pequot Tribe has a storied history within the state, including several conflicts reaching back to the early 1600s.²⁰⁹ Conflict within the area led to the Pequot War of 1637, between the Pequot and the English. This conflict forced the tribe to move after suffering heavy losses. In 1683, Connecticut set aside land for the Eastern Pequot's use in what became the Lantern Hill reservation, and the tribe received a formal deed for this reservation.²¹⁰ The BIA originally recognized the Eastern Pequot in 2002,²¹¹ but Connecticut Attorney General Richard Blumenthal filed an appeal, which resulted in the BIA revoking recognition in 2005. Blumenthal's objections centered concern that the tribe would establish a third casino within the state.²¹² The petition resulted in the BIA revoking its decision and denying the tribe federal recognition in 2005.²¹³ Since then, the tribe sought a legal remedy through the U.S. District Court in Washington, DC, but changes to the rules prevent the Eastern Pequot from repetitively.²¹⁴

The Golden Hill Paugussett tribe traditionally existed along Connecticut's west coast. In 1614, Dutch traders began to operate along the Hudson River near the Paugussett territory.²¹⁵ By 1659, the Golden Hill peoples lived within boundaries decided by the English living in the New Haven and Hartford areas. The tribe was given a

208. See generally Koenig & Stein, *supra* note 63, at 37 (discussing the conflicts between Connecticut tribes and Connecticut spanning over 350 years).

209. History, E. PEQUOT TRIBAL NATION, <http://easternpequottribalnation.org/history> [<https://perma.cc/V4QM-MLWF>].

210. *Id.*

211. David M. Herszenhorn, *Two Feuding Indian Tribes are Recognized, but as One*, N.Y. TIMES, June 25, 2002, <https://www.nytimes.com/2002/06/25/nyregion/two-feuding-indian-tribes-are-recognized-but-as-one.html?src=pm> (on file with the *Columbia Human Rights Law Review*).

212. Paul Zielbauer, *Federal Court Agrees to Hear State's Appeal on Tribal Issue*, N.Y. TIMES, Oct. 26, 2002, <https://www.nytimes.com/2002/10/26/nyregion/federal-court-agrees-to-hear-state-s-appeal-on-tribal-issue.html?src=pm> (on file with the *Columbia Human Rights Law Review*).

213. E. PEQUOT TRIBAL NATION, *supra* note 209.

214. James Mosher, *Eastern Pequot Tribe Fighting for Recognition*, NORWICH BULLETIN (Feb. 6, 2012), <https://archive.vn/20130411124002/http://www.norwichbulletin.com/news/x1341762647/Eastern-Pequot-tribe-fighting-for-recognition%23ixzz2OBhtsAKP> (on file with the *Columbia Human Rights Law Review*).

215. Charles Brilvitch, *The Golden Hill Paugussett Tribe*, BRIDGEPORT LIBR., <https://bportlibrary.org/hc/south-end/the-golden-hill-paugussett-tribe/> [<https://perma.cc/VCB2-HBPZ>].

general allotment area, which was reduced to approximately eighty acres by 1760.²¹⁶ Records of the Paugussetts were maintained until the assimilation era when historians failed to keep proper accounts of the tribe. The relationship between Connecticut and the Paugussetts has existed for nearly 350 years, but when the tribe applied for federal recognition, the state and its entire congressional delegation stood in opposition due to concerns over historic land claims and gaming casinos. As of 2004, the BIA had not granted the tribe federal recognition.²¹⁷

The Schaghticoke Tribal Nation received its nearly 2000-acre reservation from the general assembly of the Colony of Connecticut in 1736.²¹⁸ Today, the tribe only maintains a fifth of that original territory due to sales by the government, which are still in litigation. It too has a long lineage with the state of Connecticut dating back to the colonial era. Like the Eastern Pequot, the Schaghticoke nation had its recognition rescinded by the BIA due to political circumstances. The tribe had gathered and submitted over 45,000 pages supporting its continuous existence and meeting other requirements imposed by FAP. Former BIA assistant secretary Aurene Martin said the Schaghticoke's petition was one of the "best and most thoroughly researched petitions ever reviewed by the [BIA]."²¹⁹ The other two state-recognized tribes are federally recognized.

Thus, even though Connecticut maintained relationships with five tribes since colonial times, most of them have been denied federal recognition. The rules that disallow repetition are especially harsh for these tribes. While the state has provided a pathway to state recognition, many politicians favor disallowing repetitions because it

216. *Id.*

217. *Id.*

218. Lucianne Lavin, *The Moravian Mission at Schaghticoke: Indigenous Survival Strategies and the Melding of Christian-Indian Ideologies*, THE INST. FOR AM. INDIAN STUD. (Apr. 6, 2013), https://www.iaismuseum.org/wp-content/uploads/2017/02/The_Moravian_Mission_at_Schaghticoke_Ind.pdf. [https://perma.cc/ANK8-A76G].

219. Gale Courey Toensing, *Former BIA Head Says Schaghticoke Petition Was the Best*, INDIAN COUNTRY TODAY (Aug. 31, 2016), <https://indiancountrytoday.com/archive/former-bia-head-says-schaghticoke-petition-was-the-best> [https://perma.cc/ANK8-A76G].

would result in more tribal land claims and possibilities for casinos.²²⁰ Chief Quiet Hawk of the Golden Paugusett tribe said that many Connecticut politicians worked behind closed doors in Washington to ensure that the rule preventing repetition would be passed in a way which further violates the rights of certain Native American tribes.²²¹ Connecticut's politicians are responsible for the only two instances of federal recognition revocation by the BIA. Despite the state recognizing tribes, state politicians bar these tribes from enjoying a federal trust relationship with the government for political purposes, which underscores the BIA's internal corruption. These tribes are denied their right to self-determination and constrained by the state which recognizes them.

3. Louisiana

In Louisiana, state tribes are usually recognized through concurrent resolutions by the State's House and Senate chambers.²²² A concurrent resolution is a legislative instrument used for making declarations or stating policies.²²³ Both houses consider resolutions to express legislative intent, authorize certain suits, adopt changes to joint rules of the legislature, memorialize Congress, and request or direct a state agency to take a specific action.²²⁴ Louisiana's type of recognition is intrinsically tied to federal funds from the Departments of Education and Health Care.²²⁵ The Four Winds Cherokee and Choctaw-Apache tribes in Louisiana have both received federal

220. Ana Radelat, *U.S. Denies CT Tribes Chance at Federal Recognition*, CT MIRROR (June 29, 2015), [https://ctmirror.org/2015/06/29/u-s-denies-ct-tribes-another-chance-at-federal-recognition/\[https://perma.cc/XN4Q-24KA\]](https://ctmirror.org/2015/06/29/u-s-denies-ct-tribes-another-chance-at-federal-recognition/[https://perma.cc/XN4Q-24KA]).

221. *Id.*

222. See Koenig & Stein, *supra* note 63 (detailing among other things a brief overview of each state's recognition process).

223. U.S. CONST. art. III, § 17(B).

224. See generally S.J. Res. J. Rule No. 3 (La. 1975) (outlining the process for signing a bill). For more information regarding the processes for legislative instruments, bills and resolutions in the Louisiana House of Representatives, see H. Rule 7.1 (La. 1973); H. Rule 7.4 (La. 1973); H. Rule 7.10 (La. 1973); H. Rule 7.16 (La. 2010); H. Rule 12.3 (La. 1998). ; For more information regarding the processes for legislative instruments, bills and resolutions in the Louisiana Senate, see S. Rule 7.1 (La.); S. Rule 7.3 (La.); S. Rule 7.9 (La.); S. Rule 7.11 (La.); S. Rule 7.12 (La.); S. Rule 7.14 (La.); S. Rule 12.10 (La.); S. Rule 14.3 (La.).

225. *Id.*

education grants.²²⁶ These grants, which are an example of how beneficial federal backing can be, have had a dramatic effect on education within Louisiana's Native American communities. Earnest Dardar, vice-chairman of the Biloxi Choctaw Confederation of Muskogeans, noted that in 1962 there was only one Indian graduate in his parish. In 2003, that number grew to ninety-four, which Dardar said was in large part due to the money providing necessary educational resources such as tutors to youth.²²⁷

Louisiana has recognized ten tribes through joint resolution. There are no official criteria like those within the BIA process for state recognition, as tribes are recognized through resolutions. All tribes need do is find a sponsor to introduce the bill and get a majority vote of both the House and Senate. This is more difficult than it seems at first blush because many lawmakers oppose such recognition in favor of existing state tribes or want more stringent requirements.²²⁸

For example, in 2017 the Louisiana House of Representatives passed a resolution for the recognition of the Natchitoches tribe within the state. The Natchitoches tribe first made contact with Europeans in the late 1600s and the village still enjoys the tribe's namesake today.²²⁹ The tribe has a storied history supported by land registers, conflicts with Fort St. Jean Baptiste, a French military base, and agreements to move to reservation lands in the 1750s.²³⁰ The federal government never directed a tribal roll of the Natchitoches tribe, and during the aftermath of the Indian Removal Act of 1835, many members of both the Natchitoches and Caddo tribes hid in French or Spanish territories.²³¹ The 2017 state

226. See generally Koenig & Stein, *supra* note 63 (providing an updated list of federally and state-recognized tribes).

227. Jeremy Shapiro, *Local Tribes Marking Official State Recognition*, HOUMA TODAY (June 29, 2004), <https://www.houmatoday.com/article/DA/20040629/News/608096623/HC> [<https://perma.cc/9NCL-NS7E>].

228. Sarah Gamard, *Natchitoches Tribe Could Soon Have Statewide Recognition*, SHREVEPORT TIMES (May 19, 2017), <https://www.shreveporttimes.com/story/news/local/louisiana/2017/05/19/bill-recognizing-natchitoches-tribe-moves-senate/101869344/> [<https://perma.cc/EBD3-JZDV>].

229. Belinda Brooks, *The Past, Present and Future of the Natchitoches Tribe*, NATCHITOCHES TIMES (Aug. 2, 2018), <https://www.natchitochestimes.com/2018/08/02/the-past-present-and-future-of-the-natchitoches-tribe/> [<https://perma.cc/V4GT-VDYS>].

230. *Id.*

231. *Id.*

resolution, despite the storied history, almost failed in committee in Louisiana's Senate chambers due to concerns over how the tribe would interfere with the previously recognized Caddo tribe. While the tribe ultimately gained recognition, it took several years for the bill to be introduced and passed. Due to politics and the fact that many state decisionmakers are hostile toward tribal economic development, as well as concerns that state recognition could support federal recognition, legislative recognition can be one of the hardest methods to obtain at the state and federal level. This dichotomy of a tribe being important enough to a state's history to receive recognition, but still being prevented from enjoying the benefits of federal recognition only furthers socio-economic disparities faced by many unrecognized tribal communities.

4. Missouri

Although recognition by executive agencies, like the process used by Alabama, technically fall under the executive branch, true "executive recognition" is either by gubernatorial proclamation or through a governor's treaty-making power.²³² Unlike recognition determinations made by agencies, this type of recognition relies solely on one person's view of the tribe. The state's governor is the sole person responsible for establishing a government-to-government relationship with the tribe. This method has been used in Missouri, although many do not consider the tribe recognized through this method officially recognized by the state.²³³

In 1983, Governor Christopher Bond issued an executive order acknowledging the existence of the Northern Cherokee Tribe as a tribe within the state of Missouri.²³⁴ This type of acknowledgment is different than state recognition because it is simply an acknowledgment of existence rather than forming a government-to-government relationship with the tribe. Other states that have governors who engaged in treaty-making during colonial times include New York and Connecticut, although those treaties do not

232. Proclamation, Christopher Bond, Governor of the State of Missouri (Sept. 13, 1983), https://www.sos.mo.gov/library/reference/orders/1983/eo1983_P [<https://perma.cc/DQY5-8XVJ>].

233. *Id.*

234. *See* Koenig & Stein, *supra* note 63, at 108 ("Missouri has 'recognized' tribes by gubernatorial proclamation.").

necessarily confer state recognition either.²³⁵ Connecticut, for example, had historical treaties, and yet still saw a need to pass legislation formally recognizing tribes.²³⁶ Thus, executive recognition in Missouri by executive order or recognition by treaty are the weakest surviving forms of state recognition.

5. Michigan

In a similar vein, Michigan creates a pseudo-recognition status for state tribes which denotes that the tribes are eligible for “state services and state funding,” but purposefully avoids going as far as other states to say that those tribes have a government-to-government relationship with the state.²³⁷ It is important to mention this type of recognition because it provides an example of how states can avoid giving outright recognition to a community, while still trying to implement support services that are necessary for the tribe’s survival. On its website, Michigan describes the types of communities it works with as including: “Michigan’s federally recognized tribes, the state historic tribes, [and] Indian organizations.”²³⁸ This type of recognition, at the very least, creates a safety net for tribes and Indian organizations. This is especially true given how federal coronavirus relief funding for tribes is generally inaccessible by state tribes, even though state tribes may suffer from an even harsher impact from the coronavirus pandemic.²³⁹ Michigan’s form of recognition, like executive recognition, could be considered one of the least reliable forms of state recognition. Michigan could change this by pursuing legislation or establishing an agency which formally recognizes tribes and establishes that state-tribal relationship.

235. *Id.*

236. *Federal Recognition*, MOHEGAN TRIBE, <https://www.mohegan.nsn.us/about/government/tribal-sovereignty/federal-recognition> [https://perma.cc/H743-7UPL] (last visited Nov. 26, 2022).

237. *Id.* at 108–10 (quoting Telephone Interview with Donna Budnick, Mich. Dep’t of Civil Rights Native Am. Affairs Office (Mar. 29, 2004)).

238. *Native American Services*, MICHIGAN DEPT OF HEALTH & HUMAN SERVS., https://www.michigan.gov/mdhhs/0,5885,7-339-73971_7209---,00.html [https://perma.cc/2TXR-W6GV] (referring likely to inter-tribal organizations which exist between members of different tribes).

239. Meghanlata Gupta, *Despite Legal Battle, Michigan Tribe Remains Hopeful for Recognition*, BRIDGE MICH. (June 17, 2020), <https://www.bridgemi.com/quality-life/despite-legal-battle-michigan-tribe-remains-hopeful-recognition> [https://perma.cc/AJ66-TEAE].

Without doing so, the tribes in Michigan have an even more uncertain future than those fully recognized by their states.

C. Origins of State Recognition

Despite the inadequate federal recognition process and unfavorable conditions tribes face when seeking recognition, the fact remains that Tribal Nations pre-exist the United States; and their rights, while severely diminished at times, were not terminated.²⁴⁰ The economic and cultural continuance of Indian tribes rest on the protection of their sovereignty and right to self-determination. While the federal government retains the power to engage with the Indian tribes, the BIA recognizes the ability of states to form treaties or other agreements between tribal groups and the state government.²⁴¹ A federally recognized tribe is an entity recognized by the federal government. Thus, it stands to reason that Congress, or the BIA itself, may adopt the treaties or recognition given by state tribes and thus recognize those tribes federally. The overburdened federal system led policy makers to seek to ban repetitious recognition applications; as a result, state governments may be best suited to evaluate their own histories, and the extermination of small, less powerful tribes and give them recognition rather than the federal government. State recognition is well-rooted in tribal law, as it has existed since colonial times.²⁴² The earliest forms of state recognition are like those of the federal government—treaty based. During the colonial period, several colonies needed to gain a foothold and operated with tribes on a sovereign-to-sovereign basis. States like New York, Connecticut, and Virginia still honor those colonial agreements.²⁴³ After the American Revolution, removal became the

240. Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law of Economics and Indian Self-Rule* 4 (Harv. Univ. John F. Kennedy Sch. of Gov't, Working Paper No. 04-016, 2004), https://scholar.harvard.edu/files/jsinger/files/myths_realities.pdf [<https://perma.cc/52F5-BE9E>].

241. *Frequently Asked Questions*, U.S. DEP'T OF THE INTERIOR INDIAN AFFS., <https://www.bia.gov/frequently-asked-questions> [<https://perma.cc/VZY6-R6JB>] (“[F]ederally recognized tribes generally are not subordinate to states, [and] they can have a government-to-government relationship with [states] . . . tribes frequently collaborate and cooperate with states through compacts or other agreements on matters of mutual concern.”).

242. Koenig & Stein, *supra* note 63, at 87.

243. *Id.*

policy of the early United States Government in dealing with the Indian tribes.

For states which use a full state recognition system and not some lesser form of recognition, the federal government should recognize their processes as sufficient to grant equal federal recognition. Thomas Jefferson, perhaps one of the most influential figures in early Indian law, engaged in treaties with Indigenous peoples. This was the first part in a two-part plan to either retrain Indigenous peoples through adoption of European-style agriculture and culture to progress them from “savagery” to “civilization,” or to remove them west of the Mississippi.²⁴⁴ This led to the splintering or destruction of many tribes. The Indian Removal Act, signed in 1830 by President Andrew Jackson, authorized removal of southern Native American tribes to federal territory west of the Mississippi River in exchange for their ancestral lands.²⁴⁵

Some tribes, such as the Tunica-Biloxi and the Chitimacha in Louisiana, had no historical relationship with the federal government and “were not slated for removal.”²⁴⁶ The relationship between Louisiana’s Indigenous people further colors the difficulty of recording a history that simply does not exist. In 1896, the commissioner of Indian affairs insisted that the federal government had no relations with the tribes of Louisiana, and the Louisiana Supreme Court ruled that Louisiana Indians were solely under state

244. Alysa Landry, *Thomas Jefferson: Architect of Indian Removal Policy*, INDIAN COUNTRY TODAY (Sept. 13, 2018), <https://indiancountrytoday.com/archive/thomas-jefferson-architect-of-indian-removal-policy> [https://perma.cc/E78X-XU6Y] (describing how Jefferson offered two options to Indian people near the end of his presidency: “Indians could be ‘absorbed’ into the United States or face military obliteration”); *Thomas Jefferson’s Enlightenment and American Indians*, THE JEFFERSON MONTICELLO, <https://www.monticello.org/thomas-jefferson/louisiana-lewis-clark/origins-of-the-expedition/jefferson-and-american-indians/jefferson-s-enlightenment-and-american-indians/> [https://perma.cc/6JHL-PSNL]; Christian B. Keller, *Philanthropy Betrayed: Thomas Jefferson, the Louisiana Purchase, and the Origins of Federal Indian Removal Policy*, 144 PROC. AM. PHIL. SOC’Y 39, 57–58 (Mar. 2000).

245. *Indian Removal Act: Primary Documents in American History*, LIBR. OF CONG., <https://guides.loc.gov/indian-removal-act> [https://perma.cc/52U7-A77Q] (last updated May 14, 2019). The effects of the Removal Act are still in dispute today. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (holding that for the purposes of the Major Crimes Act, land throughout much of eastern Oklahoma remains Creek Nation territory).

246. Theda Perdue, *The Legacy of Indian Removal*, 78 J. S. HIST. 3, 9 (Feb. 2012).

jurisdiction. Many of these tribes never had an opportunity to form relationships with the federal government.²⁴⁷ A Louisiana attorney would later make the following remarks about Louisiana's Indigenous citizens: "they have intermarried with negroes and with rare exceptions with white persons, so that there is not now a full-blooded Indian."²⁴⁸ The federal government and state governments alike used methods and rhetoric like this to eliminate records of Indigenous peoples and to assert that one could not possess the multiculturalism of being both Indigenous and Black.²⁴⁹ In this way, many tribes were eradicated from written history long before the arbitrary recognition date of 1900.²⁵⁰ Today, Louisiana only has four federally recognized tribes, but the State recognizes eleven other distinct tribes.²⁵¹ Descendants of these tribes have little chance of federal recognition under FAP.

While the nature of tribal law rests on federal supremacy,²⁵² the federal government allows for state recognition historically and has not challenged it. Even after the 1790 Nonintercourse Act's passage, which forbid states from engaging in tribal land transactions without federal approval, Congress did nothing to abrogate existing state-Indian tribe treaties or their relationships.²⁵³ During this period, Delaware and North Dakota began to recognize tribes on their

247. *State v. Chiqui*, 49 La. Ann. 131, 133 (1897) (finding that by 1897, the "federal government [did] not have jurisdiction over any Indians in Louisiana").

248. Perdue, *supra* note 246, at 9 n.24 (citing Letter from Emmet Alpha to Samuel M. Brossus (Jan. 30, 1914) (on file in General Service, Central Classified Files, 1907-1939, RG 75, NARA, Washington)).

249. Philip Deloria, *When Tribal Nations Expel Their Black Members*, NEW YORKER (July 18, 2022) <https://www.newyorker.com/magazine/2022/07/25/when-tribal-nations-expel-their-black-members-caleb-gayle-we-refuse-to-forget-alaina-e-roberts-ive-been-here-all-the-while> [<https://perma.cc/Z8QR-NQTQ>].

250. *Id.*

251. *Federal and State Tribal Contact List*, OFF. OF THE GOVERNOR (2018), <https://gov.louisiana.gov/assets/Programs/IndianAffairs/LouisianaTribes.pdf> [<https://perma.cc/3BUL-89BW>].

252. Since the time of federal removal policies and the Supreme Court's rhetoric of tribes as "domestic dependent nations," tribal law has been considered the exclusive purview of the federal government. *See Worcester v. Georgia*, 31 U.S. 515 (1832) (holding that the federal government has exclusive authority over relations with native peoples); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (discussing the origins of the process to federally recognize Indian tribes); *Johnson v. McIntosh*, 21 U.S. 543 (1823) (setting one of the most preliminary and consequential legal standards for Indigenous access to and control of land).

253. Koenig & Stein, *supra* note 63, at 90.

own authority.²⁵⁴ The federal government, while maintaining its supremacy in tribal law, largely ignored state-tribal relations within the sphere of granting recognition.

Finally, during the last 200 years, the consensus that federal law is supreme over tribal law has begun to loosen. The Cohen Treatise on tribal law states that the Supreme Court has noted that the federal power to enact legislation discharging trust obligations to Indian tribes could be delegated to States.²⁵⁵ This and the changing notions of the value of tribes and their cultures has marked a new era where States recognize tribes through state legislatures, executive proclamations, and statutory paths for recognition.²⁵⁶ The value that each State's Indigenous communities bring to the state identity, whether historical, cultural, or economic, has been increasingly recognized. As James Madison noted in *The Federalist Papers*, "the operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security."²⁵⁷ Thus, as peace with tribes continues, states have begun to take more of a role in instances where tribes no longer require "protection" from the federal government.²⁵⁸

While federal supremacy is clearly established in the Supremacy Clause,²⁵⁹ States retain the right to recognize tribes under the Tenth Amendment. First, these tribal relationships existed since before the nation's founding and were adopted and ratified by their continued existence.²⁶⁰ Second, despite having clear policies barring states from certain actions with the tribes, Congress remained silent on new states creating state recognition programs for tribes.²⁶¹ The federal government has, since the inception of the FAP, been unable to process petitions in a timely manner, which reflects an era of disregard for the rights of Indigenous peoples within the United States.

254. *Id.*

255. *Cohen*, *supra* note 41, at 118.

256. Koenig & Stein, *supra* note 63, at 92.

257. *Id.* at 92–93 (quoting THE FEDERALIST No. 45 (James Madison)).

258. *Id.* at 91.

259. U.S. CONST. art. VI.

260. *See generally* Koenig & Stein, *supra* note 63 (analyzing the history of and modern practices of state recognition for tribes).

261. *Id.*

These states, while they may not champion for federal tribal recognition, acknowledge that many state-recognized tribes hold both historical and cultural value for the state. This acknowledgment fills in the gaps created by the flawed federal recognition process, and the federal government seems to accept that authority under the Tenth Amendment, and has indeed provided funds to state-recognized tribes.²⁶² For the fiscal years 2007 through 2010, federal programs awarded more than \$100 million to twenty-six non-federally recognized tribes, primarily through the Department of Education, the Department of Health and Human Services, and the Department of Housing and Urban Development.²⁶³ While the Constitution rests as a framework of government, “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned” shows the gloss on which we must view state tribal recognition.²⁶⁴ Thus, it is indisputable that the federal government both recognizes and respects the State’s ability to form recognition relationships with tribes.

D. Federal Consideration of State Tribes

1. Federal Ratification of State Tribal Recognition

As the United States welcomes its first Native American Interior Secretary, Deb Haaland, now is the time for change. For the first time, an Indigenous person will “oversee the 500 million acres of public lands including national parks, oil and gas drilling sites, and endangered species habitat, and control the federal agencies most responsible for the wellbeing of over 1.9 million Indigenous peoples.”²⁶⁵ To rise to that challenge, the federal government must create a path to federal recognition for those tribes recognized by their states.

262. See generally FEDERAL FUNDING FOR NON-FEDERALLY RECOGNIZED TRIBES, *supra* note 178 (showing how the U.S. has historically provided funding to tribes).

263. *Id.*

264. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

265. Nathan Rott, *Deb Haaland Confirmed As 1st Native American Interior Secretary*, NPR (Mar. 15, 2021), <https://www.npr.org/2021/03/15/977558590/deb-haaland-confirmed-as-first-native-american-interior-secretary> [<https://perma.cc/ZBG9-5XYM>].

If the federal government were to ratify all state-recognized tribes as automatically receiving federal recognition, this problem would be easily solved. This measure would allow for the immediate recognition of sixty-two tribes already verified by their respective states, not a full adoption of the 356 tribes that have submitted letters of intent to the BIA.²⁶⁶ When compared to the 574 federally recognized tribes, the majority of which that did not undergo the FAP, sixty-two tribes are a drop in the bucket.²⁶⁷ There are unique policy advantages to adopting these tribes, mainly taking them off the list of the overburdened federal system. Federal recognition would help provide resources to those tribes, which often face severe economic disparities. The involvement of federal recognition in the funds and sovereign control that recognition affords tribes is incomparable to non-federally recognized tribes in how it improves education, healthcare, environmental, cultural, and economic outcomes for tribal citizens. This is especially important because non-recognized tribes tend to face worse socio-economic conditions than their recognized counterparts.²⁶⁸ Lifting these communities through federal recognition removes the burden on states trying to revitalize these communities, often organized as non-profit corporations, through limited budgetary tools.²⁶⁹

Ratification would also reduce the amount of spending on the FAP in general. The federal process is extremely arduous and expensive for tribal governments. State government programs are likely to be less expensive, quicker, and involve individuals more in touch with the tribal communities. This would be ideal as a way to balance federal shortcomings, but might result in a shallower inspection into the recognized tribes than the federal government engages in. However, it is reasonable for the federal government to adopt recognition of all state tribes due to the policies of extermination and lack of record-keeping at the federal level that have left states in a better situated position to understand their own history and the relationship between a given tribe and the state government.

Despite the fact that some states honor that history and recognize tribes, they also often are the biggest opponent to federal

266. 25 C.F.R. § 83.

267. *Id.*

268. KLOPOTEK, *supra* note 83, at 35.

269. Furshong, *supra* note 6.

recognition. This is the heart of the issue where economic outcomes infringe on tribal sovereignty. The fruits of colonization have led to the current scheme, in which tribes with rich cultures and significant ties to a state's history are not recognized, despite considerable efforts from its members.²⁷⁰ Thus, states would likely resist automatic recognition the most, and it could seriously impact the creation and protection of state tribal programs. If states believed any tribe they gave recognition to would get federal recognition, they would be disincentivized to administer state tribal programs. However, these programs provide aid to struggling tribes that cannot meet the high federal standards. While the most equitable solution would be ratification of all state-recognized tribes, this would likely deter states from engaging in tribal recognition in fear of opening the door to historical land claims and casino politics. Even if states did not eliminate current programming, they would likely cease recognition of any new tribes out of fear for economic repercussions. Limiting or creating negative incentives for recognition will only harm tribal sovereignty. Thus, to create a balance between state interests in recognizing tribes, concerns over possible land and casino claims, federal interests in protecting Indian tribes, engaging in a timely recognition process, and tribal interests in self-determination, the federal government should adopt a tiered approach which treats state-recognized tribes differently than those petitioning without state recognition.

2. A Tiered Approach to Federal Ratification of State Tribe Recognition

Just because tribes form a government-to-government relationship with their states does not mean that relationship should automatically be created with the federal government. This is due to the delicate balance of concerns at the federal level. While the FAP does little good to the many tribes stuck in the petition phases, its process is one that should not be completely discarded.²⁷¹ However, it is a waste of resources at the federal level to reverify and go through the arduous burdens of FAP for state-recognized tribes. Thus, if immediate ratification is too extreme, the BIA should adopt a tiered

270. See generally Koenig & Stein, *supra* note 63 (detailing state recognition of Indigenous Tribes).

271. *Id.*

approach which examines the state procedure and then determines the level of scrutiny with which documentation should be examined.

For states with detailed procedures that resemble the Federal Acknowledgment Process, like Alabama, automatic ratification should be pursued.²⁷² These tribes have fulfilled rigorous evidentiary requirements and proved their existence to their state governments. This level of scrutiny passed inspection by the most involved stakeholders in the tribal recognition process. Based on all the evidence provided, these state tribes have sufficiently proved that they are historical and deserve continued support. On this basis, there is no need for the federal government to re-evaluate the tribes' historical claims or current membership. These states have walked through specific requirements, which were established after determining what was appropriate based on that state's specific history and relationship with tribes.²⁷³ In this tier, states are the best situated to determine recognition criteria based on their own policies of termination and extermination as well as state-to-tribal government relationships that may have existed during colonial times where there was no equivalent federal relationship. Questioning the state decision at the federal level is a waste of resources and takes much needed attention from the hundreds of petitions from tribes that enjoy no state or federal recognition.

The second tier of recognition should apply to tribes recognized by state legislatures either due to historical connections or simply by-passing concurrent resolutions. While recognition done legislatively may seem less stringent than an administrative acknowledgment process, it is often much harder to receive a majority supporting tribal recognition. This would include the processes of states like Connecticut and Louisiana.²⁷⁴ These tribes should receive a strong presumption in favor of recognition, only negatable by inability to prove that the current membership meets the set membership criteria, and that the tribe forms a distinct community.

272. *Overview*, STATE OF ALA. INDIAN AFFAIRS COMM'N, <https://aiac.alabama.gov/overview.aspx> [<https://perma.cc/69SY-69JJ>].

273. *See generally* Koenig & Stein, *supra* note 63 (detailing state recognition of Indigenous Tribes).

274. *Id.*; *see also* REINHART, *supra* note 203; Shannon Heckt, *Louisiana Tribes Denied State Recognition by Senate Committee*, BRPROUD (May 24, 2022), <https://www.brproud.com/news/local-news/louisiana-tribes-denied-state-recognition-by-senate-committee/> [<https://perma.cc/U3SV-3TTF>] (noting that past state tribal recognition in Louisiana occurred legislatively).

These two requirements can both be found under the current federal acknowledgment process. These two factors are important to federal recognition in a different way than state recognition because membership determinations can affect eligibility for federal assistance.²⁷⁵ The other factors such as ties to a historic tribe, political influence over the community, a sense of existence as a political entity, and non-termination requirements are addressed by the state's recognition. If the state legislature acknowledges a tribe, it is doing so because it believes it has historical ties to the state and the tribe has pursued political avenues to make their representatives bring forth legislation for their recognition. By doing so, they exhibit political control over the community and their existence as a political entity. The non-termination requirement is a product of a bygone era where over 100 tribes were terminated.²⁷⁶ President Nixon acknowledged that forced termination was wrong and sought to restore tribal status.²⁷⁷ Many terminated tribes have been restored. Other tribes previously terminated but recognized by their respective states should not be discriminated against. In a similar vein, if this new process is adopted, the bar on repetitious applications should not apply to state tribes undergoing FAP.

Finally, the last tier of recognition should focus on states which recognize tribes by executive order, and states which provide resources to tribes without formal recognition. Tribes recognized by executive order, such as in Michigan and Missouri, have the least amount of review and only have to convince a state's respective Governor, without involvement of stakeholders like the legislature or agency representatives. Thus, recognition through executive order is the least reliable in terms of the FAP requirements. Second, states that provide economic resources to tribes, but not formal recognition, should be carefully reviewed. The state is showing a commitment to the tribes, but not concretely forming a government-to-government relationship. In these cases, the federal government should presume that the tribe meets the historical requirements but should require tribes to go through the FAP for all other requirements.

275. Fletcher, *supra* note 2, at 491 (citing 25 C.F.R. § 54).

276. *Termination Era, the 1950s, Public Law 280*, UNIV. OF ALASKA FAIRBANKS, <https://uaf.edu/tribal/academics/112/unit-2/terminationerathe1950spubliclaw280.php> [<https://perma.cc/5MZB-S23X>].

277. Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 163–34 (1977).

Using this tiered approach, the federal government may avoid doing the double work of re-evaluating the state approaches while also keeping a standard level of scrutiny to those seeking federal trust relationships. States and other federally recognized tribes may still resist a tiered approach due to concerns that further recognition decreases the availability of federal funds and creates a lineage of historical land claims. Having a tiered approach like this does not mean anything would change in the short-term, but that tribes would be able to use state recognition primarily as proof of historical and current existence, given the tier structure.

3. Economic Interests of States, Tribes, and the Federal Government

While recognizing tribes is vital to their survival, tribal recognition involves a number of economic concerns which prevent actors from supporting the most just outcome. For other tribes, that concern revolves around competition from the introduction of new casinos and further splitting of federal funds. For states and the federal government, one concern is subsequent historical land claims under *Passamaquoddy*.²⁷⁸ These unique balances of interests create strong economic incentives to oppose federal recognition.

First, state and tribal governments are immune from antitrust laws, and thus face no implications from direct interference in the casino market through lobbying against new petitions for tribal recognition.²⁷⁹ There are types of federal recognition, such as those through courts, which do not confer the ability to form casinos to tribes, and this narrower form of recognition would likely please other tribes. However, there can be no equality in eliminating the two classes of tribes that exist within the United States unless they can enjoy the same privileges and immunities which come from federal recognition. One way to offset these challenges is to consider how to

278. See generally *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), (establishing a trust relationship between the U.S Gov't and the Passamaquoddy tribe); Margot Kempers, *There's Losing and Winning: Ironies of the Maine Indian Land Claim*, 13 LEGAL STUD. F. 267, 290 (1989) (describing the controversy at the center of the *Passamaquoddy* case as "the first of a series of eastern Indian land claim suits...[that] has been used as a model for a number of claims cases").

279. See generally *Miller v. Wright*, 705 F.3d 919 (9th Cir. 2012) (holding that "federal antitrust law does not abrogate tribal sovereign immunity").

reduce the economic impact of recognizing new tribes on existing tribes.

Generally, federal tribes and their casinos are tax-exempt because they are run by a government, not a business.²⁸⁰ However, when that money is distributed to specific tribe members, they pay federal income tax on that distribution, as it counts as income. To offset the negative financial consequences on the individual tribal members, to whom the tribal leaders owe the highest duty, the federal government could offer an exemption for that income for a set period of time when a new tribal casino within a certain mile radius is approved. This would encourage tribal governments to use casino funds to directly support their tribal citizenships, and create a buffer on some of that income while adjusting to having another casino in the area. Using incentives from the government to alleviate burden on tribes would help equal the playing field and remove a culture of tribe-to-tribe competition for recognition. For the betterment of all Indigenous people within the United States, removing the incentive structure for lobbying against sister tribes is a vital element of self-determination.

The second major issue faced by state and federal governments under the *Passamaquoddy* regime is historic land claims to much of the United States.²⁸¹ For much of that land, it is questionable whether tribes lawfully ceded it and received compensation, or if the government engaged in unlawful takings. Economically, the issue of subsequent land claims exists so long as a tribe continues to organize politically and seek recognition. The era of termination is over, and the hope that the BIA criteria will stay stagnant for another fifty years, despite all the criticism, is a conservative argument at best. More realistically, it is a careless one.

280. Robert W. Wood, *Native American Casino and Tax Rules That May Surprise You*, FORBES, Oct. 11, 2012, <https://www.forbes.com/sites/robertwood/2012/10/11/native-american-casino-and-tax-rules-that-may-surprise-you/?sh=2964fa9a2306> [<https://perma.cc/M4WV-88NW>].

281. See generally *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (refraining explicitly from deciding whether the Nonintercourse Act afforded relief to the Passamaquoddy Tribe in regarding its land disputes with the Maine); see also Kempers, *supra* note 278; George P. Generas Jr. & Karen Gantt, *This Land Is Your Land, This Land Is My Land: Indian Land Claims*, 28 J. LAND RESOURCES & ENVTL. L. 17–18 (2008) (highlighting the *Passamaquoddy* case as one of the first successful land claims in the eastern United States giving rise to subsequent land claim litigation resulting in land claim settlements).

If the government wrongfully took land, then the United States must eventually reckon with that reality. Delaying tribal recognition or outright denying it for the purpose of avoiding historical land claims prevents the country from moving forward.

Internationally, more political pressure is mounting for recognition of Indigenous groups and consideration of reparations. In 2006, the Canadian government announced a class action settlement, the Indian Residential Schools Settlement Agreement (“IRSSA”), which provides reparations to nearly 86,000 Indigenous people subjected to the Canadian Indian residential school system between 1879 and 1996.²⁸² The payment scheme includes \$1.9 billion for “common experience” payouts, a system for victims of sexual or physical abuse to recover between \$5,000 and \$275,000 each, and over \$200 million dedicated to social programs for healing and reconciliation.²⁸³ Indigenous Namibians are in negotiation talks with Germany to address reparations for the mass killings of the Nama and Herero people that occurred during its colonial period. In late 2020, Germany offered €10 million (~\$11.7 million) in reparations which was refused by the Namibian President.²⁸⁴ The policies of self-determination under UNDRIP, to which the United States supports, do not acknowledge separate classifications of Indigenous groups like the current federal-state system. The implication that some tribes deserve to litigate their traditional land claims while those who are recognized by their prospective states or have not been recognized but have undisputable historical ties to an area cannot go against the entire regime of the Fifth Amendment and the BIA’s efforts to create equity. This is not a problem that will be erased by allowing more time to elapse. Additionally, institutional bars, such as the prohibition on repetitions, will fail to act as a sealant.

282. Settlement Notice, In re Residential Schools Class Action Litigation (Can., 2006), http://www.residentialschoolsettlement.ca/detailed_notice.pdf [<https://perma.cc/N45X-RHVH>]; *A Timeline of Residential Schools, the Truth and Reconciliation Commission*, CBC NEWS (May 16, 2008), <https://www.cbc.ca/news/canada/a-timeline-of-residential-schools-the-truth-and-reconciliation-commission-1.724434> (reporting that approximately 86,000 people were eligible for compensation under the settlement).

283. Settlement Notice, *supra* note 282.

284. *Namibia Rejects Germany’s Reparations Offer for Genocide*, DW (Dec. 18, 2020), <https://www.dw.com/en/namibia-germany-reparations/a-54535589> [<https://perma.cc/LXF3-S5J6>].

Many non-federally recognized tribes lack reservations or any current land to claim. One way to mitigate this concern could be the creation of a commission within the BIA that investigates potential historical land claims and establishes ways to engage in compensation and the creation of reservations for tribes once acknowledged. While allowing a federal agency to arbitrate land claims between states and tribal governments creates unique problems, having no way to manage land claims and historic land rights creates avenues for corruption. Waiting to battle both federal recognition decisions and historical land claims in courts is also ineffective. It has created the current system where federal recognition becomes a bogeyman to the states, when in reality it is a way to empower members of its community to engage in their cultural and political development. This must be done now, while understandings of and willingness of states to pay reparations change on an international scale.

On that international stage, the current federal regime in the United States is progressive in recognizing land claims for existing tribes and does more for native communities than many other countries are able to claim. Despite this, states have not been able to address socio-economic disparities non-federally recognized tribes face. Being proactive in negotiations with tribes will create a healthier relationship between all involved parties as political pressure builds around human rights of Indigenous groups.

This highlights the final economic point—it cannot be underscored enough the serious impact that a New Tribes program alone would create in transforming the socio-economic status of many tribes.

CONCLUSION

The Department of the Interior's history of neglect and mismanagement does not have to be the continued inheritance of its secretaries. Now is a pivotal moment in history where the BIA, the oldest federal agency in continuous existence, could be reformed to serve those communities it is meant to protect.²⁸⁵ The first step to stopping those harms is to view its mandate more broadly and focus on the health and welfare of all tribes, recognized and non-recognized.

285. Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 *BYU J. PUB. L.* 1, 6–7 (2004).

However weak the BIA's position, it serves as the main advocacy group for tribes within the federal government and is necessary to defend Indigenous rights. Reform must be approached in a way that both "strengthens tribal sovereignty and reinforces the tribal trust responsibility."²⁸⁶

First, the federal government must reanalyze the current criteria and remove the continuous existence requirement. This is one way in which the federal government can acknowledge a history of termination and extermination that extends well beyond the 1900 date, while still maintaining recognition criteria that maintain the sanctity of the acknowledgment process. The inability to prove continued existence is often the result of actions by the state and federal governments. The responsibility for the inability of tribes to meet this requirement should not rest on the tribes which escaped movement west, who avoided recording on federal rolls, and who have had to maintain their culture in secret. The current recognition regime falls short of providing true self-determination to the many tribes within the United States recognized by their states.

Second, state tribe relationships must be reevaluated. State-recognized tribes have overcome a high bar to recognition by the government most closely related to them, and thus deserve closer scrutiny to be federally recognized. This is vital to ensuring that there are not second-class Indigenous people who are recognized in a historical and social context but barred from federal programming and recognition. The root of that separation rests with the BIA and state governments themselves, not with the tribes. In the current scheme, tribes have been the least empowered actors when they should be given the most agency. Given the severe socio-economic disparities Indigenous people face within the United States and internationally, failure to acknowledge that reality allows harms to proliferate within the present day. The BIA and Congress, in all their actions since the beginning of the self-determination era, have fought against injustice committed against tribes and must continue to do so.

Thus, the federal government could either grant immediate recognition to all state tribes or adopt a tiered approach taking into account each state's specific procedures. If the federal government chooses to ratify recognition of state tribes, it should be through either administrative or congressional action. Recognition by the courts or through executive action would likely provide more legal

286. *Id.* at 10.

questions and instability regarding pseudo-status than it answers, as well as fail to extend the full array of federal benefits to the state tribes.

Congressional action is the most formal and binding, and thus is the best path forward. Congress has exclusive authority and plenary power over Indian tribes. It is well within Congress's authority to recognize tribes directly without going through the FAP process. If enough Congressional support could not be gathered, the BIA could also choose to recognize state tribes through the administrative process. Regardless of the method, the continued failure to recognize the disparities between state tribes and federal tribes, and the government's role in preventing many state tribes from receiving federal recognition under the current statutory scheme, must not continue. Only then can self-determination of all tribes within the United States begin to be realized.