Recognition: Indianness and Invisibility in the Federal Acknowledgment Process

by

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Contents

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Introduction

The struggle for recognition is first a struggle to be seen. It is a contest over perception, and over interpretation, which precede and enable recognition. In the arena of US acknowledgment of Indian peoples within its borders, debates over recognition are conflicts between ways of seeing.[1] Individual players in the debate present competing interpretations of history, bodies of "evidence" under consideration, and paradigms for understanding Indian identity. Since recognition is the endpoint of a process of seeing and making sense of what we see, it is a subjective experience and determination. While some aspects of federal acknowledgment have been codified, namely the seven political and ethnological criteria with which petitioning groups must demonstrate compliance, administrative recognition decisions are based on the perceptions and interpretations of individuals employed by the Department of the Interior's Bureau of Indian Affairs (BIA). The current Federal Acknowledgment Process was established in 1978 in response to the pressing need for a standardized, criteria-driven, and therefore more "objective" process following important court cases pertaining to tribal recognition and land claims.[2] Although the BIA's Office of Federal Acknowledgment now possesses the authority to evaluate recognition cases and set criteria by which to do so, the FAP cannot escape the inherently subjective nature of recognition determinations. As political scientist Renée Ann Cramer writes, "As locations of power that deal intimately with the construction of Indian identity, federal acknowledgment processes cannot be value-free, neutral and objective endeavors."[3] The process masks but does not transcend bias, which

is located in the interpretative frameworks through which tribal histories and identities are perceived.

This work is about how the state "sees" and fails to see Indians seeking recognition in the ways that they see themselves, and the preconceived images of "Indianness" and tribalism that account for those discrepancies. I argue that the current acknowledgment process ensures that tribes who have been historically invisible to outsiders or invisibilized by them continue to be "unrecognizable" in the eyes of the federal government. Certain tribes' invisibility results largely from the historical conditions under which they interacted with Euro-American colonists, particularly the era in which first colonial contact occurred, which generally dictated whether or not a tribe would have a treaty relationship with the United States and a resulting federally-protected land-base. Native historian Jean O'Brien writes, for example, that New England Indians lack a treaty relationship with the United States because the US came into existence long after English colonialism largely dispossessed those tribes.[4] The time of first contact with Euro-American colonialism also dictated the number of years of violence, disease, encroachment, economic and cultural domination, and federal anti-tribalism that tribes were forced to endure. The widely varying political circumstances of tribes' relationships with Euro-American colonial powers produced different results in terms of tribes' current conceptions of what makes them "Indian," and their ability to prove their existence in terms of past and present hegemonic discourses around Indian identity.

Because the criteria require that petitioners demonstrate their "substantially continuous" existence as a "distinct Indian entity" using historical documentation

written by outsiders, tribes must have complied with the popular, "common sense" understandings of Indianness in every era from historical times to the present in order to be acknowledged today. Multiple lenses of subjective interpretation thus mediate federal attempts to recognize Indians—the perceptions of historical and contemporary "observers," typically white officials, historians, and scholars, interpreted through the dominant constructions of Indian identity and tribalism prevailing in each observer's time. The predominant images of Indian tribes in the contemporary era, which have racial, cultural, economic and geographical components, are powerful stereotypes rooted in colonial ideologies of race and indigeneity and developed through the processes of racial formation of Native Americans. Mark Miller writes:

> Imprinted by the popular media, most non-Indians conjure up images of primitive, dark-skinned individuals living in self-contained, egalitarian villages when they think of Indian tribes. Inevitably, non-Indians also envision Indian tribes living in the American West on barren reservations where the modern image of Indian tribes comes to an end. While patently stereotyped, each of these constructs affects how non-Indians and even many recognized tribes view hopeful groups and how each interprets recognition policy.[5]

Miller argues that these contemporary constructions of Indian tribes leave little room for tribes with alternative histories in the federal acknowledgment process. While I accept and support this claim, my work centrally focuses on the ways in which colonial constructions of Indianness *historically* affected tribes' visibility to non-Indians, which is the basis of federal acknowledgment today. As Miller and others have asserted, unrecognized tribes who fail to comply with contemporary images of Indian tribes face greater difficulties convincing outsiders that they are Indian tribes.[6] Acknowledgment decisions, however, are ultimately based on how outsiders have viewed and written about Indians since historical times. This work critically examines the dependence of the

current federal acknowledgment process on those historical perceptions and the ideological constructs that shaped them.

By relying on outsiders' documented interpretations of a group's identity, the acknowledgment process enshrines whites' perceptions of specific groups throughout history, and the paradigms through which they are seen, as historical "truth." In this way, legacies of colonial definitions of Indianness and tribalism are preserved and sustained in the current process, as is the position of white outsiders as the authors of history and arbiters of tribal status. The colonial ideological prisms through which Indian identity has been historically viewed or obscured are protected by the BIA's claims to objectivity and political neutrality. In acknowledging the impossibility of objectivity in recognition decisions, and critically examining the definitions of Indian tribal identity upon which they are founded, this work aims to open up space for deserving yet still unacknowledged Indian peoples to be seen and recognized as Indian tribes.

Gaining Perspective

In July 2010, mid-way through my research on US federal acknowledgment, I had a conversation that changed my perspective on the process and redirected the focus of my research. I spoke over the phone with a Native professor of anthropology, who also was employed for years by the Bureau of Indian Affairs.[7] She is an enrolled member of one of the Five Civilized Tribes based in Oklahoma and the Southeast, who have historically supported the administrative federal acknowledgment process (FAP) and have been well represented in the ranks of the BIA.[8] Her passionate response to my research questions opened my eyes to the depth and complexities of several issues central to the FAP, as well as to their politically and emotionally incendiary nature.

At the time of our conversation, my research questions revolved around the ways race might be present in the FAP despite not being explicitly part of the acknowledgment criteria laid out in 25 C.F.R. §83. My interviewee was adamant that race has absolutely no bearing on the BIA process. She asserted that not only do the criteria have nothing to do with race, but they were specifically designed to combat the racialization of American Indians by codifying the federal definition of Indian tribes as nations. The development of the FAP, she explained, was a collaborative effort between tribes and the BIA to define tribes as political entities, based on past precedents such as the Supreme Court case *Morton v. Mancari (1974)*.[9] Additionally, when the criteria were developed in the 1970s, the BIA itself was controlled by Indians—primarily from Oklahoma-based recognized tribes—who were sensitive to issues of racialization. She cited the acknowledgment of "Black tribes," such as the Mashantucket Pequots, the Narragansetts, the Mashpees and the Schaghticokes, as evidence that race was irrelevant to the FAP, though she neglected to mention that the BIA reversed its recognition of the Schaghticokes under pressure from Connecticut lawmakers in 2005.[10] The forces that racialize American Indians, she said, come from the non-Indian American lay public. Does that matter at all? She asked, rhetorically. Her answer was no—the views of non-Indians had no impact on federal acknowledgment decisions at all. Under the current federal acknowledgment process, she said, racialization of American Indians no longer poses a threat to the recognition of tribal political status.

To my interviewee, the federal acknowledgment process through the BIA is an enormously important source of protection to tribes. It counters the historical construction of American Indians as a racially-defined group with a governmental definition of an Indian tribe as a political entity—a nation. This political definition

affirms the historical and present realities of Indian tribes as sovereign entities, to whom the federal government has a unique relationship of trusteeship and specific responsibilities implied therein. The process also serves, my interviewee emphasized, to protect recognized tribes against fraudulent groups claiming Indian identity and access to resources allotted to recognized tribes. As an example, she cited a Southeastern state-recognized tribe that claims shared ancestry with her tribe. The tribe's efforts to secure federal recognition based on these claims, which she believes are false, were personally offensive to her and objectionable to her tribe. My interviewee suggested that the recognition attempts of the Lumbee Tribe of North Carolina, a focus of my research, were fraudulent as well. She referenced a genealogical study of the Lumbee by genealogists Paul Heinegg and Virginia DeMarce that asserts that Lumbee ancestors were primarily whites and blacks, not Indians. She opposed Lumbee recognition based on the belief that they did not descend from historical tribes and only began to identify as Indian in the 1860s, when compelled to send their children to African American schools. It is critical that the federal acknowledgment process be upheld, she said, to ensure that fraudulent tribes do not gain recognition.

As a final caution against wading into the territory of federal acknowledgment and race, my interviewee warned me that an examination of ways racial issues may be present in the FAP would be too highly politicized to be legitimate and responsible scholarship. Recognized tribes will hate this research, she said, and unrecognized tribes will love it. The political divide inherent in the subject would render my work useless at best and damaging at worst. She suggested some alternative projects—an ethnographic study of how members of federally recognized tribes construct their Indian identities, or

a politically neutral study of how the acknowledgment process works, which she believed hadn't yet been done in a sophisticated way.

Together, the primary points that I took away from this conversation had a profound impact on the direction of my research. I realized from our conversation that the reasons why the federal acknowledgment process failed some tribes, which was the question at the heart of my scholarly inquiry, were far too complex and varied for a focus on race alone to be appropriate. Based on the works of other scholars that I had read and my own understanding of the acknowledgment criteria, I disagreed with my interviewee's assertion that race is irrelevant to the FAP.[11] I found it interesting that she presented the highly controversial Schaghticoke case to exemplify the irrelevance of the opinions of non-Indian public, as non-Indian political forces were the impetus for the reversal of the Schaghticoke acknowledgment decision in October 2005.[12] I agreed with her, however, that it is important to remember the FAP's origins as an endeavor to move away from the racialization of American Indians and establish a system to protect the political identities and rights of Indian tribes vis à vis the federal government. By establishing the seven criteria for acknowledgment in 1978, the BIA institutionalized the principles held by the Supreme Court in *Morton v. Mancari* and articulated in an important article by Native political scientist David E. Wilkins, entitled, "Indian Peoples are Nations, not Minorities."[13] I decided to pursue my own answer to the question she posed: does the image of Indian tribes perpetuated by non-Indian American lay public, which has racial, cultural and political elements, matter in the FAP? To address this question, I redirected my research towards interrogating whether the criteria themselves succeed, in practice, in moving away from racialized definitions of Indianness. I aimed to

elucidate the image of an Indian tribe that the criteria conjure, and how that image compares to that imagined by the non-Indian American public.

This conversation also instilled in me an understanding of the divide in Indian Country between the interests of recognized and unrecognized tribes, and the grave personal and political implications that an acknowledgment decision can have on other tribes. As my interviewee intimated, the stakes of acknowledgment are very high, not only for the petitioner but for recognized tribes in the region, in other regions (as the recognition of the Southeastern tribe would affect her Oklahoma tribe), and sometimes all tribes nationwide. One acknowledgment decision that would have repercussions for my interviewee's tribe and tribes across the US is that of the Lumbee, due to the their unusually large membership of over 50,000. My interviewee argued against Lumbee recognition on the basis of Heinegg and DeMarce's genealogical study that determined Lumbee ancestors were historically *recorded* to be whites and blacks. Lumbee scholar Malinda Maynor Lowery contests the bases of this study, however, which were pre-Civil War records labeling families with common Lumbee surnames as "mulatto," "white," "mixt," and "free Negro," among others. Lowery argues that historians widely acknowledge the need for context when examining these classifications, and Heinegg and DeMarce provide no contextualization but rather accept the labels as reliable indicators of ancestry.[14] The fierce opposition to Lumbee recognition, which my interviewee shares with members of other recognized tribes such as the Eastern Cherokee of North Carolina, illustrates the complicated dynamics between recognized and unrecognized tribes around issues of authenticity of ancestry and racial identity, scarcity of federal resources allotted to Indians, and the types of histories that are trusted as neutral and reliable within the acknowledgment process. Her opposition to the

recognition of the two tribes she discussed helped me understand some of the many tensions within Indian Country over federal acknowledgment, and reminded me of the many parties invested in the outcomes of acknowledgment decisions. Our discussion of these cases drove me to examine the intersections and divergences of definitions of Indianness employed by various interested parties, Indian and non-Indian, governmental and popular.

My interviewee's acceptance of a genealogy that treats historical racial classifications by outsiders as factual reflections of ancestry falls in line with the BIA's overwhelming reliance on historical written documentation of outsider identifications of tribal existence. Her uncritical reliance on that genealogy contradicts her assertion that race has no bearing on the process. Rather, documented racial classifications assigned by the non-Indian lay public from historical times to the present are exactly the kind of evidence that she and the Office of Federal Acknowledgment value as legitimate "proof" of ancestry. The question of what constitutes legitimate evidence of ancestry and existence as a distinct community throughout history brought out my interest in how certain epistemologies and ontologies are privileged or disadvantaged in the process. Since the burden of proof falls on the petitioner, and since "proof" must primarily consist of historical written documentation of a specific quality, part of what is codified in the process is the acceptance of a Western, document-centered historical record as legitimate, while oral traditions and other indigenous ways of keeping history are devalued. Additionally, there is a clear risk of historical documents written by white outsiders being cast in a light of false objectivity and accepted as historical fact. This aspect of our conversation inspired me to question what the commonalities are between tribes who face greater difficulty seeking acknowledgment, in terms of their histories and

the kinds of "proof" they are able to provide, and what happens to those tribes in the process.

Researching Recognition

I began my research after reading several local and national newspaper articles on the unfolding struggle of the Lumbee Tribe of North Carolina to receive federal recognition as an Indian tribe. Interested to know more about the history of the Lumbee and their efforts, I read several ethnographies and histories of the tribe.[15] Initially, my research focused on Lumbee self-identification as an Indian tribe and governmental definitions of Indian authenticity, with race as a central category of analysis. The definitions I was interested in examining were the seven criteria for federal acknowledgment as an Indian tribe as established in 25 C.F.R. §83. While the Lumbee have sought recognition through Congress rather than through the BIA, the criteria and whether a tribe would meet them are at the heart of Congressional and public debate around recognition of the Lumbee and other tribes seeking Congressional acknowledgment. Currently the only codified governmental standards for federal recognition as an Indian tribe, the criteria can serve as a site of interrogation of governmental ideas of who constitutes an Indian tribe. The role of outsider "identifications" in the criteria led me to investigate the relationship between the processes of acknowledgment and of the racial formation of Native Americans. I initially had three primary research questions: (1) Are there coded racial elements at play in the current BAR criteria for federal recognition, and if so, how do they function? (2) How does the Lumbee case bring to light underlying racial elements in the BIA criteria? (3) What patterns, if any, can be seen in the obstacles to the Lumbee case, and in the

justifications for recent denials of acknowledgment of East Coast Indian tribes with similar histories?

These research questions led me to examine many documents produced by the Bureau of Indian Affairs since the creation of the federal acknowledgment process in 1978. These documents included: 25 C.F.R.§83 itself, which outlines the logistics of the process in addition to the seven criteria; the thirteen most recent Proposed Findings and Final Determinations issued by the BIA (all of the decisions provided as full documents on their website); numerous notices in the Federal Register on additional recent cases. Reading how the OFA interpreted the criteria and made determinations in many different cases gave me a nuanced understanding of each criterion and the intersections between them, the level and type of evidence required by the Bureau, and the types of evidence presented by the petitioners. The Proposed Findings and Final Determinations provided a history of the petitioning tribe and detailed examinations of the pieces of evidence submitted by the tribes for each criterion. I was therefore able to identify similarities among different tribes' histories and the types of evidence they were or were not able to collect and submit. I was also exposed to the particularities of the most recent cases of tribes that had been granted or denied recognition, and was able to analyze the reasoning behind those different decisions. The documents allowed me to construct a broader picture of common challenges facing petitioning tribes, and the conditions under which a tribe has the greatest success in the process. After reading the decision documents and the conducting the interview I discussed, I found that coded racial elements were but one many important factors in the acknowledgment equation. I moved away from race as a central focus, and towards a deeper examination of my third

research question, having to do with broader patterns in the challenges facing certain petitioning tribes.

Among the Proposed Findings (PFs) I read was that of the Brothertown Indian Nation, which was issued on August 17, 2009. The Brothertown PF gave me an overview of the tribe's history and heritage, in which I saw many parallels to the Lumbee Tribe in terms of tribal origins, religion, language, relationships to non-Indian communities, and positions in relation to state and federal governments, including their status as "terminated" tribes. The two tribes are also currently facing a similar fate: the routes to recognition they have pursued for decades have led to the attempted rerouting of each tribe into a different bureaucratic recognition process—from the Legislative into the Executive process, and vice versa. The Brothertown PF offered a detailed official decision breaking down how the federal government constructs the illegitimacy of Brothertown as an Indian tribe. This decision, like the debates around Lumbee recognition, sheds some light on the particular components of the interwoven images of tribalism against which tribes must prove their existence and their Indianness to federal officials and state representatives. An examination of these two cases together might allow us to bring a bigger picture into perspective, of hegemonic discourses and governmental constructions of Indian authenticity, the limitations of these notions, and how they perhaps preclude a more expansive and dynamic understanding of collective Indian identity in the twenty-first century. The comparative study of these two cases allowed me to return to some of my earliest questions as refocused research inquiries: What particular portrait of an Indian tribe does the federal process conjure, and what happens to tribes that do not conform to this image? The comparison also raised some

new research questions, including: How can public understandings of tribal authenticity illuminate the logics underlying the BIA criteria for acknowledgment?

To explore these questions, I began researching in greater depth the governmental documents, newspaper articles, editorials, and public debates pertaining to the two cases. I conducted a close reading of the Brothertown PF, and researched the tribe's history and recognition attempts through articles in Indian and non-Indian publications (*Indian Country Today*, *Indianz.com*, *The Fond du Lac Reporter*, among others). I also read the tribe's narratives of their own history and petition on their two websites. Multiple primary source documents on the Brothertown have been fundamental to my research on the tribe's history, particularly the 1839 Act granting the Brothertown US citizenship, and the numerous petitions and memorials submitted to Congress immediately preceding the passage of that Act. My research on the Brothertown case focuses heavily on the 1839 Act and the Brothertown Proposed Finding, as the BIA's interpretation of Brothertown tribal existence hinges largely on the Bureau's interpretation of the 1839 Act. I present my own interpretation of the intentions of the Brothertown Tribe and of Congress as stated in these source materials in contrast with that of the OFA. My research on the Brothertown has foundations in historical and journalistic texts on the tribe, but centers around the 1839 Act granting the Brothertown US citizenship and the Proposed Finding issued on their acknowledgment petition.

My research on the Lumbee has focused on the conversations and debates around Lumbee recognition legislation in Congress. The bulk of this research has been on the Congressional hearings on Lumbee recognition bills since the establishment of the administrative FAP in 1978, specifically on the shifting discourses opposing Lumbee

recognition. I focus on the changing arguments against Lumbee recognition in order to parse out the components of the definitions of Indian identity against which the tribe's opponents assess their legitimacy. By examining Lumbee recognition debates together with the Brothertown PF, I draw out the assumptions undergirding oppositions to the recognition of these tribes, which are rooted in multifaceted but specific images of Indianness that have never been justifiably applicable to the histories of some tribes.

Methodology

A major impetus for my research into conceptions of recognition and Indian authenticity was my sense of a disconnect between the legal and historical meanings of federal acknowledgment and the conversation around acknowledgment happening in the public sphere. While the Bureau of Indian Affairs' criteria for acknowledgment require historical outside identifications of continuous existence as an Indian political and cultural entity, the discourse in public online forums, editorials and reader's comments on news articles revolves around racial and cultural signifiers and the petitioner's interest in gaming. The different focal points of governmental and public discourse around recognition reflect popular misunderstandings of the origins of federal acknowledgment and skepticism towards the plight of tribes seeking recognition, and of their motivations for doing so. The opacity in the public sphere of the history and current workings of the federal acknowledgment process may be partially due to a relative paucity of scholarship on the acknowledgment process itself. While scholarship on tribal sovereignty and the federal-tribal relationship is relatively accessible, scholarly work on the process remains very limited twenty-two years after the establishment of the Office of Federal Acknowledgment. This work aims to demystify some aspects of acknowledgment by

contributing to scholarship on the interpretative parts of the process. My project looks at governmental and popular discourses around Indian authenticity and acknowledgment in the same frame, bringing into focus: the specific images of Indianness each discourse produces; the historical construction of some aspects of those images; and the historical conditions necessary for a tribe to be able to embody those definitions. These definitions are not fully distinct, but rather intersect, overlap, and inflect one other in administrative and particularly in legislative acknowledgment. I suggest that these portraits of tribalism are highly constructed but have very real, material implications for petitioning tribes, particularly for tribes like the Brothertown and the Lumbee, who remain suspended in the process largely because of their inability to comply with those images.

My examination of the spheres of state and public discourses on Indianness requires an interdisciplinary methodological approach. Through the lens of the Lumbee and Brothertown recognition cases, I analyze a wide range of governmental primary source documents, including nineteenth century Congressional documents, 25 C.F.R.§83, the BIA Proposed Finding on the Brothertown, and the Congressional hearings for the multiple Lumbee recognition bills. My analysis is grounded in and supplements existing scholarship on the federal acknowledgment and on the Lumbee and Brothertown recognition struggles. These works include historical, sociological, legal, and anthropological texts in the fields of American Studies, Native American Studies and Indian Law.

I chose to examine the cases of the Lumbee and the Brothertown, because of the prominence of their cases, as the largest unrecognized tribe on the East coast, and as one of the most recent Proposed Findings published by the BIA, respectively; because of the

parallels I saw in the tribes' culture and histories vis-à-vis the BIA criteria for acknowledgment; and because of the way that I began and developed this research project. The cases of the Lumbee and the Brothertown are relatively visible in Native and non-Native media, due to the controversies that have surrounded their cases and, with the Lumbee, due to their large membership. As tribes with similar cultural practices, origins in terms of amalgamation and geographical region, termination statuses, and pending acknowledgment petitions, the Lumbee and the Brothertown tribes are parallel cases brought through two different bureaucratic avenues toward acknowledgment. Because of these key commonalities, connections between these to cases are in some ways indicative of what happens to tribes of this type of history, along two pathways to recognition. Looking at these two cases together allows one to gain some insight into a broader phenomenon experienced by other tribes of analogous histories.

In connecting state and public discourses of Indianness through these two case studies, I aim to conduct a critical reading of the portrait of an Indian tribe conjured by the executive and legislative acknowledgment processes. By interrogating the model against which the state measures Indian authenticity, I hope to make space for remembering the heterogeneity of indigenous histories and understandings of Indian identity. I choose not to adjudicate whether any particular tribe should or should not be acknowledged, but I do hold, in agreement with the Government Accountability Office, that the condemnation of petitioners to indefinite periods of bureaucratic indecision constitutes a failure on the part of the OFA.[16] Governmental ambivalence on a tribe's status, produced largely by that tribe's inability to neatly conform to a particular construction of Indianness, suggests a weakness in the fabric of the acknowledgment criteria for which tribes like the Brothertown and the Lumbee pay dearly.

My position as a non-Native, Southern student of Ethnic Studies has influenced my research interests in this project. As a student of Ethnic Studies, I am interested in marginalized American histories, in critical re-readings of American historical narratives, in Critical Race Theory, and in recognizing heterogeneity within marginalized groups and their histories. This project grows out of and develops each of these interests. As a white North Carolinian growing up in Raleigh, Indian histories and living Indian communities in my region were invisibilized throughout my American history education in public schools. My interest in making these histories visible within state and popular understandings of indigenous histories in this country, as well as within the dominant narrative of American history, has guided my aims in this project.

Literature Review

My work is grounded in Critical Race Theory, particularly Michael Omi and Howard Winant's theory of racial formation, explained in their work *Racial Formation in the United States from the 1960s to the 1990s.*[17] Omi and Winant argue that race is a social construct, which they define as "a concept which signifies and symbolizes social conflicts and interests by referring to different types of human bodies."[18] They argue that race has been typically treated as an epiphenomenon of other categories of social organization, namely *ethnicity, class,* and *nationality*, but cannot be subsumed under these concepts because race itself has been a "*fundamental axis* of social organization in the US."[19] As a way of examining racial dynamics in the US that is distinct from these three paradigms, Omi and Winant offer the theory of racial formation: that race takes on social meaning through "a process of historically situated *projects*,"[20] which connect the representation of human bodies to social organization and distribution of resources. A racial project, Omi

and Winant explain, is "simultaneously an interpretation, representation or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines."[21] Racial projects constantly permeate social relations in the US on large and small scales, such that racial categories are embedded in the ways that Americans identify and recognize individuals and social structures. Though race is a ubiquitous element of social structure and human representation in the US, it is continuously shifting—race is an "unstable and 'decentered' complex of social meanings constantly being transformed by political struggle."[22] Omi and Winant connect the processes of racial formation in the US to the "evolution of hegemony," the development of the conditions for the consolidation of rule.[23] Italian political philosopher Antonio Gramsci, whose life's work centered on the concept of hegemony, wrote that hegemony could not be achieved without a combination of coercion from a ruling group and consent from the ruled.[24] Consent from the ruled is slowly gained through the broad dissemination and maintenance of a dominant ideology that the ruled accept and uphold. Omi and Winant write, "In order to consolidate their hegemony, ruling groups must elaborate and maintain a popular system of ideas and practices—through education, the media, folk wisdom, etc.—which [Gramsci] called "common sense."[25] In the US, racial rule was established through "a slow and uneven historical process from dictatorship to democracy, from domination to hegemony."[26]

Representations of "the Indian" as "savage" and "primitive" "Red man" were an important part of the development of a US hegemonic racial ideology, according to which white seizure of Indian lands was an inevitable consequence of the "progress" of human civilization. These representations can be considered part of a broad racial project undertaken by whites, that cast Indians as an inferior "dying race" in order to

channel land and resources from Native peoples to Euro-American colonists. Hegemonic or "common sense" notions of Indianness are the multifaceted results of centuries of whites assigning Indian racial identity with meanings that facilitate their dispossession and situate them below whites in the US racial hierarchy. These images of Indian identity are racialized, but also include cultural elements such as Native language, religious practices, and dress, and traits such as laziness, drunkenness, poverty and dependency. Hegemonic definitions of Indian identity produced in early US history have shifted and acquired new meanings over the centuries, but continue to shape the ways in which Indian identity is seen and assessed by federal officials and other outsiders, as they always have. The "common sense" notions of Indianness that I refer to in this work are therefore the deeply entrenched images of Indian identity that are familiar to and generally accepted by the American public, which have their roots in racist colonial rationales for the seizure of Indian lands. Omi and Winant write, "Our ability to interpret racial meanings depends on preconceived notions of a racialized social structure… We expect people to act out their racial identities; indeed we become disoriented when they do not."[27] Although federal acknowledgment is a political designation, the process is heavily dependent on historical evaluations of a group's identity against a pervasive racialized definition of Indianness. The sense of disorientation evoked by tribes that fail to embody this definition can in some part account for continuous bureaucratic ambivalence towards their recognition cases. It was with these theoretical foundations that I approached my research on the specific problems of invisibility confronting the Brothertown, the Lumbee, and other unrecognized tribes with similar historical backgrounds.

My research is grounded in scholarly work on the multiple meanings of "recognition" of Indian tribes—the processes of governmental acknowledgment of tribes as political entities, as well as the recognition of Indian groups as such in the public domain. As Jean O'Brien writes, these ideas are central to her project in *Firsting and Lasting: Writing Indians Out of Existence in New England*, an important influence on my work. O'Brien analyzes local nineteenth-century historical texts, in which non-Indians construct a narrative of Indian "extinction," which fixes Indians in the past in order to affirm by contrast the modernity of European Americans. This narrative equates Indianness with ancientness, and thus refuses to acknowledge that surviving tribes are authentic Indians. O'Brien writes that "a toxic brew of racial thinking—steeped in their understanding of history and culture" led New Englanders to deny the Indianness of the Indians there.[28] She writes that the narrative reflects an insistence on "blood purity" as an essential criterion of "authentic" Indianness, which stemmed from nineteenth-century scientific racism.[29] The ideas of ancientness and purity of blood characterize the narrative of Indian extinction and European replacement of Indians on the land. *Firsting and Lasting* aims to undermine this claim, and to show the ways in which "non-Indians produced their own modernity by denying modernity to Indians," as well as the ways Indians in New England continuously resisted this effacement.[30]

O'Brien's ideas that the "colonial archive" perpetuates the extinction narrative to the exclusion of alternative histories, and that this narrative persists in popular thinking about Indian history today, are particularly important to my research. While O'Brien's research is in the context of nineteenth century southern New England, her assertions about the techniques and motivations for crafting the narrative of Indian extinction, based on scientific racism and cultural stereotypes, provides a genealogy for some ways

that Indianness is measured and discussed today. Her work also highlights the potential problems inherent in a federal acknowledgment process that relies on historical "recognition" of Indian tribes as such by outside entities, as those outsiders were often engaged in project to specifically deny the continued existence of those tribes. O'Brien's work elucidates that there are historical and persistent motivations behind seeing or not seeing New England Indians as such, and that the denial of their existence failed even as it was being asserted, evidenced, for example, by the continued existence of state bureaus of Indian affairs. She writes, "It is this long term ideological construct, I would argue, that shapes contemporary debates and confusion over the 'authenticity' of New England Indians."[31] In my work, I take up this project of examining these debates and confusion in the context of two eastern tribes' cases for recognition. I aim to bring O'Brien's ideas about recognition and authentic Indianness to bear on present-day tensions between popular understandings of Indianness and governmental assessments of Indian authenticity.

Jean O'Brien draws upon the work of Amy Den Ouden in her book *Beyond Conquest: Native Peoples and the Struggle for History in New England*, another important influence on my work. Den Ouden argues that colonial Indian policy in Connecticut that was designed to "divert attention from the problem of illegal encroachment on reservation lands and focus instead on the presumed cultural and political illegitimacy of reservation communities and particular Native identities."[32] These contests are immensely important, she writes, because they reflect present struggles—in Connecticut, Euro-American scrutiny of Indian identity, frequently in racialized and racist terms, has been the "prevailing response to federal acknowledgment petitions over the last decade and has been an effective means of silencing local Native histories."[33] In *Beyond Conquest,*

Den Ouden thoroughly articulates a history of denial of Indian identity as a strategic tactic for colonial dispossession, and ties that legacy to present-day scrutiny of Indian identity related to the federal acknowledgement, as a disempowerment tactic. Like O'Brien, Den Ouden identifies the historical denial of Indian authenticity as an intentional technique of historical narration, aimed at monopolizing modernity and divesting Indians of their land and political status. Both authors also emphasize the importance of the "colonial calculus" of race employed towards these ends.[34] O'Brien quotes Den Ouden's argument that "the surveillance of racialized Indian identities and communities in connection with ideas about blood purity and the supposed 'degeneration' of Indians as of 'mixed ancestry' emerged as a governmental tactic of control in the late eighteenth century."[35] Den Ouden's research is in primary source documents from eighteenth-century New England, but the relevance of her work extends into the present, and informs my understanding of the ongoing race-based contestation of authentic Indianness in the context of federal acknowledgment, which she discusses in her final chapter. *Beyond Conquest* is an important influence on my work in that, like O'Brien, Den Ouden traces an epistemological genealogy of attitudes towards Indianness that continue to underlie processes and debates of federal acknowledgment to this day. My project differs from Den Ouden's in that hers is an archival project focusing on colonial Indian policy in Connecticut, while mine focuses on two currently unfolding cases for federal acknowledgment, of a North Carolina tribe and a Wisconsin-based tribe that originated in southern New England.

Mark E. Miller's *Forgotten Tribes: Unrecognized Indians and the Federal Acknowledgment Process* has been a very important resource for my project, as one of the only book-length texts taking a comprehensive look at the FAP's development, recent history, and efficacy

in terms of its stated aims.[36] Miller presents the histories of four unrecognized tribes and their efforts towards acknowledgment as case studies through which he explores the most important recurring issues facing petitioning tribes today. In *Forgotten Tribes*, Miller utilizes extensive archival research and over thirty oral history interviews to grapple with the many layers of "modern Indian identity," including "how the state identifies and legitimizes tribes and how recognized tribes, non-Indian scholars, and the American public perceive Indians."[37] While Miller writes that his investigation provides a "rare glimpse" into "Indian and non-Indian representations of 'Indianness' and tribalism," my project aims to focus in on those constructions, identify parts of their origins and distinct components, and understand their functions in acknowledgment debates.[38]

Several key texts on the history of US Indian policy and tribal-federal relations have been authored or co-authored by David E. Wilkins. These texts range from broad overviews of tribal-federal politics, to analyses of the doctrines that have guided federal Indian policy, to specific examinations of the Lumbee case for federal acknowledgment, all of which have been helpful to me in my research. Wilkins' *American Indian Politics and the American Political System* is a comprehensive text on American Indian governmental structures and Indian nations' relationship to the US federal government.[39] Wilkins situates the current political positions of federally recognized and unrecognized tribes in historical context by providing an overview of US federal policy on federal-tribal relations. Wilkins' text has been a concise and informative reference on issues ranging from tribal-federal political relations to the political effects of representations of Indians in the media. *American Indian Politics* includes Wilkins' chapter entitled, "Indian peoples are nations, not minorities," which clarifies the unique political position of Indian tribes vis à vis the federal government that distinguishes them from other racial or ethnic

minority groups. This chapter is particularly crucial to understanding tribal sovereignty—what it is, its history in this country, and what is at stake in debates over federal recognition.

Another text by Wilkins co-authored with K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* provides an important history of the doctrines that have been codified through US Supreme Court decisions and have guided the course of US federal Indian policy. Wilkins and Lomawaima trace the origins of the doctrine of discovery, the trust doctrine, and the doctrines of plenary power, reserved rights, implied repeals and sovereign immunity. These doctrines, particularly the first three, are essential to understanding the political history of tribal-federal relations and how policy is influenced by ideology. The authors go beyond the kind of narration of a policy history that Wilkins presents in *American Indian Policy*, towards a critique of these doctrines and practical suggestions for the development of a more balanced and ethical tribal-federal relationship. They write, "it is critically important to recognize that legal doctrines are not 'facts'; they demand analysis, and analysis sometimes (but not always) demands doctrinal reconfiguration."[40] An understanding of the doctrines analyzed in *Uneven Ground* is essential to my project because they are the foundations from which federal Indian policy and therefore governmental and certain public perceptions of Indian peoples stem. They lie at the center of the concept of federal acknowledgment of Indian tribes, and are critical to understanding its meaning and relation to dominant American racial and political ideologies in historical context.

Wilkins also wrote or co-wrote two articles that specifically discuss the Lumbee case for federal acknowledgment, including some issues that I aim to address, such as the

intersections between governmental and popular constructions of Indian identity, and the specific difficulties that the Lumbee face in seeking recognition. In "'Constructing' Nations within States: The Quest for Federal Recognition by the Catawba and Lumbee Tribes," Anne McCulloch and David E. Wilkins connect the "social construction" of Indian identity to federal recognition processes, using the case studies of the federally recognized Catawba of South Carolina and the federally unrecognized Lumbee of North Carolina. They argue that the social construction of Indianness by Euro-Americans is a critical factor affecting the outcomes of tribal petitions for federal acknowledgment. They address the BIA criteria for federal recognition directly, stating that they are largely based on stereotypes of western Indian tribes. The authors trace the "ongoing tendency by a number of federal agencies to treat Indian tribes monolithically… based on the obsolete, and more importantly, fictitious concept of 'the' mythic, aboriginal Indian."[41] They use their two case studies to confirm three factors of particular importance to the success or failure of a tribe to achieve recognition: (1) how well the tribe meets the social construction of the image of an Indian; (2) how cohesive the self-identity of tribal members is; (3) the perception of the tribe's legitimacy in the eyes of the general public.[42] Thus, McCulloch and Wilkins connect the BIA criteria for acknowledgment to public perceptions of racial and cultural Indian authenticity, and to the implications of the three factors they discuss for the outcomes of future acknowledgment cases.

David E Wilkins also authored an article entitled, "Breaking into the Intergovernmental Matrix: The Lumbee Tribe's Efforts to Secure Federal Acknowledgment." In this article, Wilkins discusses the concept of state and federal political recognition of Indian tribes, explaining the difference between legislative and administrative recognition, Lumbee motivations for petitioning for federal

acknowledgment, and the major factors that have prevented the Lumbee from being fully federally acknowledged, after over 100 years of efforts toward that goal.[43] This latter section was the most useful portion of the article for my research, which he split into four sections, dividing the factors arresting Lumbee federal acknowledgment into (1) policy/administrative; (2) fiscal/demographic; (3) administrative/legislative; and (4) cultural reasons. Wilkins calls this last category "cultural" factors, but culture here is coded for race, as he is actually discussing "racially based attitudes" in the body of this section.[44] This article is highly relevant to my research, as it analyzes federal acknowledgment through the lens of obstructions to Lumbee recognition. This article goes into greater depth on the Lumbee case and has a broader focus than the McCulloch and Wilkins article, and some of its justifications for looking the Lumbee could also apply to the Brothertown recognition case. Also, my research questions overlap with Wilkins' on the question: "Why have the Lumbee not received complete recognition to date?"[45] Wilkins focuses on the tribal role in the "intergovernmental matrix," the web of relationships between federal, state, local, and tribal governments. He discusses Lumbee recognition as a case study of a state-recognized tribe's reasons for pursuing federal acknowledgment, and the difficulties they have faced therein, which I also discuss, My central focus, however, is the process of acknowledgment rather than the federal-tribal relationship.

In "The Common Sense of Anti-Indian Racism: Reactions to Mashantucket Pequot Success in Gaming and Acknowledgment," Renée Ann Cramer uses journalistic sources and archival research to examine the backlash against the expansion of casino enterprises, which has fueled anti-Indian sentiment and anxiety over the racial identity of Indian groups seeking recognition. Cramer argues that the backlash against

Mashantucket Pequot acknowledgment and successful casino development has taken the form of racialized attacks on the tribe's Indian identity.[46] She emphasizes that although anti-Indian anti-casino backlash is a recent phenomenon, the derisive questioning of Mashantucket Pequot racial identity is connected to a clash between the image of affluent and successful Indians with legacies of colonial stereotypes of Indians as lazy, drunken, poor and primitive. She argues that "Rich Indian Racism," the belief that affluent and successful individuals cannot be "real" Indians, forms the basis of the current negative sentiment towards the Mashantucket Pequots.[47] This argument connects to Cramer's work in *Cash, Color, and Colonialism: The Politics of Tribal Acknowledgment*, in which she uses ethnographic fieldwork and document analysis to argue that within a context of colonialism, Indian gaming and Indian racial identity are the two "points of crystallization" around which federal acknowledgment debates occur.[48] To examine these factors, she compares the similarities in history and goals between two tribes who became federally acknowledged—the Poarch Creek of Alabama and the Mashantucket Pequots of Connecticut—and the similar obstacles faced by tribes who were denied recognition—the Mowa Choctaws of Alabama, and the Eastern Pequots and Golden Hill Paugussetts of Connecticut.[49] As in "Common Sense," Cramer states that much public outcry over gaming in acknowledgment debate is rooted in public perceptions of American Indian racial identity, which largely derive from negative colonial stereotypes. Cramer's work emphasizes racial notions of Indianness and the effects of Indian gaming on public perceptions and tribal experiences of acknowledgment.[50] These issues are not the central focus of my research, but are very important elements of public perceptions and debates around federal acknowledgment. My work benefits from the connections

she draws between public anxieties over the racial identities of specific East coast tribes in a gaming context and developments in two tribes' quests for federal acknowledgment.

Scholarship on the two tribes of my case studies varies significantly. As Wilkins states, the Lumbee "have been studied by various government officials and by the academic community 'more often and in more depth than any tribe not presently acknowledged by the Department of the interior.'"[51] In contrast, there are relatively few scholarly works on the Brothertown Indians of Wisconsin. Two recently published texts have given me some historical background on the Brothertown, Brad D. E. Jarvis's *The Brothertown Nation of Indians: Land Ownership and Nationalism in Early America, 1740-1840*, and David J. Silverman's *Red Brethren: The Brothertown and Stockbridge Indians and the Problem of Race in Early America.*[52] These works are important contributions to scholarship on Brothertown formation and relations with the US, but both focus exclusively on the tribe's early history. Fortunately, there is an abundance of rich primary source material on the Brothertown that I have relied upon in my research, including historical writings on and by the Brothertown, the BIA Proposed Finding, and narratives the tribe has published on its own history and culture. I have analyzed primary source material when researching the Lumbee as well, but have also gained important insights on their case from the following scholarly works.

One influential work on Lumbee identity and federal definitions of Indianness is Malinda Maynor Lowery's new book, *Lumbee Indians in the Jim Crow South: Race, Identity, and the Making of a Nation.* Lowery conducts a historical analysis focusing on the 1934 Indian Reorganization Act, the centerpiece of the Indian New Deal. She argues that historical factionalism within the Indians of Robeson County was primarily strategic, and

occurred in response to specific political circumstances imposed by US Congress and the Office of Indian Affairs (OIA). The book focuses on race, explicating federal definitions of Indian identity, including explicitly racial Congressional definitions, the OIA's use of notions of "tribal" culture to stand in for race, and the tense and complicated racial dynamics of the segregated South. Lowery examines conversations about identity between "insiders" and "outsiders," emphasizing that race is not only prescribed by dominant groups but is strategically claimed, and is but one of many layers of identity for Robeson County Indians.[53] Lowery's work is very important to my project, as it provides a rigorous analysis of the intersections of the federal Indian policies in place for the greater part of the twentieth century, racial "purity" as Indian authenticity, and the developing roles of the BIA and Congress, in the context of Lumbee politics and struggles for self-identification and self-determination. Her work is confined to the period of the Indian New Deal, while I focus on acknowledgment developments of recent decades including the codified criteria, and incorporate cultural as well as racial definitions of Indianness. I also aim to explore the implications of these connections for future petitioning tribes of similar histories to that of the Lumbee.

Finally, I will note several texts on the Lumbee from which I have gleaned historical background knowledge, understandings of Lumbee self-identification and relationships with other racial groups of Robeson County, and Lumbee political activism in the late 1960s and 1970s. *The Only Land I Know: A History of the Lumbee Indians*, by Adolph L. Dial and David K. Eliades, is an overview of important people and events in the history of the Lumbee people. This text was the first text I read on the Lumbee, and it introduced me to Lumbee stories, heroes, hopes and concerns. Karen Blu's *The Lumbee Problem: The Making of an American Indian People* and Gerald Sider's *Living Indian*

Histories: Lumbee and Tuscarora People in North Carolina are ethnographic studies conducted in the late 1960s-early 1970s. *The Lumbee Problem* helped me understand the internal dynamics within the tribe, including discussions of the many aspects of Lumbee Indian identity, as well as Lumbee relationships to the black and white communities of Robeson County. *Living Indian Histories* gave me an understanding of Lumbee political activity in recent decades, and the new and expanded preface to the second edition provided a very informative analysis of recent history of the Lumbee recognition process. Although these texts are now several decades old, they remain important and informative for anyone studying the Lumbee.

Chapter Overview

In Chapter One, "Cognition and Recognition," I discuss the different meanings of recognition, and the shift over the course of federal Indian policy from a cognitive to a political usage of the term. Recognition of Indian tribes generally reflected the era of Indian policy in which it occurred, which vacillated between protecting some measure of tribal sovereignty and the destruction of tribalism and Indian cultures. This chapter shows that most tribes were recognized through treaties or other negotiations with the federal government, not through either an administrative or legislative process. Tribes who have never had any relations with the federal government face significant difficulties establishing recognition now, as a tribe's location on a protected land base affects their ability to remain distinct from neighboring non-Indians and preserve their cultural identity. This chapter traces the development of the current acknowledgment criteria out of previous policy and various methods of determining Indian identity, which were bound up with the racial formation of American Indians. I describe the current criteria

as stemming from these precedents as well as from the efforts of tribal leaders pushing for the standardization of an administrative process that would move recognition away from entanglement with racialized notions of an "Indian tribe," towards a political and ethnological definition.

Chapter Two, "Conditions of Visibility: Brothertown Citizenship and Non-Recognition," examines the question of whether the current acknowledgment criteria have successfully established a definition of tribalism that is distanced from the popular image of "the Indian" and the "Indian tribe." Centered upon the Brothertown recognition case through the BIA process, this chapter examines the language of the 1839 Act granting Brothertown citizenship as a window into the historical, racialized construction of "the Indian" in opposition to "the" US citizen. This chapter fleshes out some historical hegemonic images of Indianness and tribalism in the context of their continuing influence in the administrative process, primarily due to the criterion requiring identifications of the tribe as such by external "observers" on a "substantially continuous" basis. I then connect the difficulties that the Brothertown faced in meeting the "external identifications" criterion with the particular conditions that facilitate a tribe's historical visibility as an Indian tribe to outsiders, and therefore affect their chances for success achieving recognition today.

Chapter Three, "Threads of Discourse and Lines of Descent: Lumbee Hearings on Lumbee Recognition," focuses on the century-long quest of the Lumbee Tribe of North Carolina for Congressional acknowledgment. The consistent opposition of the Department of the Interior has been the primary deciding factor preventing the Lumbee from achieving recognition thus far. This chapter investigates the changing justifications

for opposing Lumbee acknowledgment, from the DOI and from the Eastern Band of Cherokee Indians, and how those rationales include the suggested inauthenticity of Lumbee Indian identity. This chapter demonstrates how Lumbee opponents selectively invoke governmental and popular constructions of Indianness in order to undermine the tribe's case, while clear political and economic conflicts of interest are at play. In the arena of legislative acknowledgment, the acknowledgment criteria, "common sense" definitions of Indianness, and concerns over jurisdiction and Indian gaming intermingle and carry unclear weight in determining the outcome of the Lumbee case. The Lumbees' inability to cleanly square with outsiders' images of tribalism, particularly in regards to the "descent from a historical tribe" criterion (83.7(e)), is a result of the historical conditions in which the tribe formed and developed, which would place them and other similar tribes at a unique disadvantage in either process.

A comparative study of the Lumbee and the Brothertown in these chapters provides a framework for analyzing tribal experiences in the FAP based on parallels in specific key aspects of their histories and cultural practices and in the outcomes of their acknowledgment efforts. In conducting this type of analysis, however, I do not aim to conflate the experiences of these tribes, or to suggest that the outcomes of their acknowledgment petitions were necessarily determined by the factors I discuss. I merely aim to make connections between the cases of two tribes with histories that run up against some elements of historical governmental and popular perceptions of Indian tribes as landed, bounded, and static political and cultural entities that are located on reservations in isolation from non-Indian communities, practice distinctly Native religions, speak Native languages, and perform other highly visible cultural indicators of Indian identity. By allowing these cases to inform one another, I hope to challenge

notions of Indianness that exclude tribes with alternative histories, including eastern tribes with unique histories of survival and creative resistance to British and American colonialism.

1

Cognition and Recognition

In October 2008, American Indian news source *Indian Country Today* published an Editor's Note condemning the lack of support from federally recognized Indian tribes for deserving tribes seeking recognition from the US government.[54] The article, headlined, "Indian recognition of non-recognized tribes," opens by specifying the case of the Lumbee Tribe of North Carolina as the "primary case" in which federally recognized tribes are failing to support a tribe in its struggle for acknowledgment. As the opening statement, and as the only example case provided by the article, this statement suggests that a lack of support from recognized tribes for the current Lumbee recognition bill, H.R.31, was a likely impetus for publishing the article. The article addresses this political divide in Native America, which is a persistent and urgent issue facing the hundreds of tribes like the Lumbee that remain unrecognized by the United States. The editors note that this rift is rooted in two primary anxieties among recognized tribes: 1) that recognition results in a diminished pot of financial resources for all recognized tribes and 2) that recognition implies new competition for existing tribal casinos. "While the financial incentives of the federal relations inhibit tribal support for more tribally recognized communities," the article states, "Indian communities should not bow to these material constraints, and [should] recognize the cultural diversity and political sovereignty of all tribal communities." The editors encourage Native readers to

prioritize their belief in tribal sovereignty over their fears of competition for federal resources or casino revenue.

When I read this article one year after its publication, bill H.R. 31, the Lumbee Recognition Act of 2009, had recently passed the House of Representatives and had been placed on the Senate calendar. I had heard of the tribe's quest for recognition when local news sources covered these developments in their case. As a non-Native person growing up in Raleigh, North Carolina, I had little exposure to the histories and present-day realities of nearby Native communities. I was surprised to discover that the Lumbee, a tribe of 55,000 members, were based two hours south of my home. I became interested in understanding why the Lumbee remained unrecognized by the federal government, despite having sought recognition repeatedly for over a century. I also wanted to understand why the only federally recognized tribe in the state was a primary opponent of Lumbee recognition. While this Editor's Note in *Indian Country Today* offered some answers and insights, the readers' comments on the article raised just as many questions.

While the article cited competition for financial resources as the main concern over recognition of tribes like the Lumbee, commentary by readers concentrated on doubts about the legitimacy of the Lumbee as an Indian tribe. Individual commentators, who may or may not identify as Native, opposed Lumbee recognition on grounds that they are not a "real" tribe. Readers attack Lumbee tribal identity based on notions of Indianness grounded in specific implicit criteria pertaining to race, culture, and ancestry. The following excerpts from the reader comments are a representative sample of the readers' conversation around Lumbee recognition:

> **stan** said on Tuesday, Mar 16 at 4:55 PM
>
> At first the lumbee [*sic*] claimed Tuscarora then the lost colony of Roanoke then claimed Cherokee of Robeson county, now claimed [*sic*] to be Cheraw or some coastal dead tribe, the latest theory! [W]ithout historical or scientific proof or any remnant cultural remains but for sure the european [*sic*] ancestry can be proven… what a fraud tribe!
>
> **atta** said on Tuesday, Oct 7 at 3:21 PM
> I think the editor brought up some very valid points but missed the most pivotal concern having to do with non-recognized Tribes, blood quantum! ...In essence these new Tribes are basically white and have no real culture but what they read in books or what they make up.
>
> **Frank Cooper Lumbee/Cheraw/Tuscarora** said on Saturday, Oct 10 at 10:05 PM
>
> Thank GOD I am Lumbee! I have traced my ancestors and I know exactly who I am. I am Cheraw, Tuscarora, and Sapony. I spend a great deal of time researching my people. These remnant tribes had to come together to survive. They eventually became one group. That group is the LUMBEE![55]

Readers of the article invoke the Lumbees' changing tribal name, lack of cultural practices that appear distinctly "Indian," and mixed racial ancestry as evidence that the Lumbees are a "fraud tribe." Several readers like "stan" interpret the Lumbees' multiple tribal names and descent theories over time to indicate that the tribe cannot "prove" their Indian ancestry. Readers including stan and "atta" claim that the Lumbees have "no real culture," and that their customs are fabricated. These assertions are interwoven with racial notions of inauthenticity, which fixate on "blood quantum," or the calculated degree of Indian ancestry, DNA testing of tribal members to determine their race, and tribal members' white or black ancestry, concluding that the tribe is "basically white" or mixed-race and therefore not Indian. The comment from "Frank Cooper" is representative of responses to these attacks—Lumbee supporters attempt to explain the tribe's formation as an amalgamated but long-established tribe, and Lumbees assert their pride in their Indian identity. These accusations are not anomalous, but rather are typical of the tenor of public conversations on Lumbee recognition. In almost every online

news article I read on the unfolding Lumbee case, and on websites following Congressional activity on H.R. 31 and previous Lumbee bills, the readers' comments sections contained heated debates over the authenticity of Lumbee tribal identity.[56]

The conversation happening in the comment section of this article differs significantly from the tensions over financial issues discussed by the editors. Opposition to Lumbee recognition may be broadly rooted in concerns over federal resources and gaming revenues, but this opposition articulates in other ways—namely, as accusations of a fraudulent Indian identity. The attacks on Lumbee authenticity in these comments invoke a variety of standards for measuring Indianness, some of which connect to the BIA criteria for acknowledgment and some of which rely on "common sense" racial and cultural notions of Indian identity and tribalism. This article and exchange raised questions for me about notions of race, culture, and tribal community as they relate to Indian authenticity, as defined by the federal government and in popular imagination. The federal acknowledgment process for Indian tribes through the BIA proved to be a fruitful site to investigate governmental definitions of Indianness, and how they intersect, affect or reflect popular notions of Indian authenticity historically and today.

Meanings of Recognition

> rec·og·ni·tion
>
> –noun
>
> 1. the acknowledgment of something as valid or as entitled to consideration: the recognition of a claim.
>
> 2. the identification of something as having been previously seen, heard, known, etc.
>
> 3. the perception of something as existing or true; realization.

> 4. *International Law*. an official act by which one state acknowledges the existence of another state or government, or of belligerency or insurgency.[57]

The various meanings of the word "recognition" evoke divergences and overlaps of the "common sense" popular judgments of Indian identity and tribal status based on a familiar, stereotyped definition, and the political act of bureaucratic assessment of tribal identity. The latter definition, the official acknowledgment of another political entity, applies to the task of the BIA federal acknowledgment process as it exists today. The recognition of something as existing or true more accurately describes the nature of acknowledgment in the early eras of federal Indian policy, preceding the Indian Reorganization Act (IRA) of 1934. Recognition as the "identification of something previously seen" alludes to how Indianness is assessed and imagined in popular debate. Finally, the first definition, the acknowledgment of the validity of a claim, suggests what is at stake for tribes pursuing recognition. In this chapter, I address the intertwining and the shifting predominance of the different meanings of recognition in the context of federal acknowledgment, which reflect the influence of both governmental and popular "recognitions" of Indianness on the current criteria and process. I outline the changing eras of federal Indian policy since the formation of the United States, and aim to provide a sense of how tribal status has been historically defined by the US government, in spite of the US's formidable attempts to obliterate the possibility of perceiving tribes as existing and legitimate. I trace the historical shift from (cognitive) "recognition" to (political) "Recognition," as William Quinn, David E. Wilkins, and Sara-Larus Tolley have described it, following the passage of the IRA. First, however, some context on the meaning and practice of federal acknowledgment is necessary.

What is federal acknowledgment?

Federal acknowledgment is a formal political act that affirms a tribe's status as a sovereign, and establishes a government-to-government relationship between the tribe and the United States.[58] As of October 2010, the US federal government had recognized 565 tribal entities, including 335 Indian nations and 230 Alaska Native villages, as being eligible to receive benefits administered by the BIA due to their status as Indian tribes.[59] Acknowledgment, interchanged colloquially with the term recognition, affords tribes powers, privileges and protections that can strengthen tribes' ability to survive as culturally and socially cohesive entities on their land.[60] Federal acknowledgment generally increases a tribe's ability to exercise its inherent sovereignty, through self-governance, exemptions from certain state taxations, regulations, and jurisdiction, and federal programs and legislation designed to benefit tribes and their citizens.[61] Recognition often directly effects the economic survival and wellbeing of tribes, as eligibility for federal assistance programs through the BIA makes a critical economic difference to impoverished unrecognized tribes. [62] Recognition also affects a tribe's cultural survival, as it is a legal affirmation of a tribe's history and cultural identity that also affects tribes' economic ability to preserve that cultural identity, through maintaining community bonds on a land base, and supporting educational and cultural preservation and revitalization programs.[63] The effects of federal acknowledgment are significant not only for tribes but also for their resident states, local non-Indian communities, all recognized tribes, and tribes that have yet to be acknowledged, as acknowledgment changes the rights and political relationship that tribes have in relation to each of these entities.

Federal acknowledgment establishes a trust relationship between the US and tribal governments and delineates the responsibilities of the federal government to the tribe.[64] Interpretations of the trust responsibility have varied widely and have changed over time, but this relationship is commonly understood to entail the federal government's protection and responsible management of tribal "fiscal, natural, human, and cultural resources."[65] While the federal government is charged with holding tribal assets in trust, the BIA has historically severely mismanaged tribal monies and has failed to act in the best interests of tribes in regards to their lands and other resources.[66] Still, the trust responsibilities of the US towards tribes are essential services for the survival of tribes on their lands.[67] Tribes with a trust relationship with the federal government are eligible as individuals and as a collective for various federal programs and services, as well as rights and protections afforded to recognized tribes by federal legislation.[68] These services range from the administration of tribal trusts and lands to the provision of health care, to loan opportunities for education, housing, land leases, and economic development.[69]

The trust relationship also implies that tribes are subject to the US plenary power, or the exclusive and absolute power of the federal government over tribes. David E. Wilkins and K. Tsianina Lomawaima articulate the contradiction inherent in the assertion of plenary power over tribes—the jurisdictional monopoly of the federal government over tribes claimed simultaneously with the acknowledgment of that American Indian nations have inherent sovereignty.[70] Wilkins and Lomawaima break down the definition of "plenary" into its component definitions of exclusivity, preemption, and absolute power in an attempt to reconcile federal plenary power with jurisdictional multiplicity.[71] The notion of exclusivity, they write, derives from judicial

interpretations of the commerce clause (Article 1, Sec. 8, cl. 2) and the treaty clause (Article 2, Sec. 2, cl. 2) of the US Constitution, and refers to the exclusive authority of Congress to deal with Indian affairs. [72] A second aspect of plenary power, preemptive power, means that federal powers supersede or "preempt" state powers. Thus, the extension of plenary power over tribes through acknowledgment subjects tribes to federal jurisdiction and protects them from states' infringement on tribal lands and rights.[73] According to Wilkins and Lomawaima, the third definition of plenary power, as absolute and unlimited power over tribes is unconstitutional and has been legally rationalized with ethnocentric claims of Indian helplessness and faulty claims of US land ownership based on European "discovery."[74] Although it cannot be justified by any clause in the Constitution, plenary power has been a foundational principle of federal Indian policy since 1832, when Chief Justice of the US Supreme Court John Marshall ruled that the federal government derives jurisdictional authority over tribes from the discovery doctrine, in *Worcester v. Georgia.* Plenary power both protects tribes from states and places severe limitations on tribal sovereignty.

Anthropologist Gerald Sider writes that another paradox of plenary power and jurisdictional multiplicity is that while tribes fall under federal and in some cases state criminal jurisdiction, they are considered exempt from federal and state regulatory laws. One implication of this is that gambling regulations do not apply to Indian lands in states where gaming is permitted.[75] This exemption has allowed some recognized tribes to open large-scale bingo halls or casinos which provide jobs for tribal members, draw huge crowds and generate a great deal of revenue for the tribes.[76] Due to their employment opportunities and potential to generate large profits, gaming operations such as bingo halls and casinos are enormously important economic development opportunities for

often otherwise impoverished tribes.[77] Recently, Indian gaming has been the cause of controversy among tribes seeking recognition, recognized tribes, neighboring non-Indian communities and state governments. In these controversies, examined by scholars Renée Ann Cramer in *Cash, Color, and Colonialism* and Amy Den Ouden in *Beyond Conquest*, different definitions of Indianness (racial versus governmental/political) are employed by various parties towards their political ends.[78] Public debates around gaming are one example of a site where definitions of Indian authenticity employed in conversations in the public sphere are juxtaposed with the current governmental definition of Indianness, highlight the ambiguities therein, and can have considerable effects of the acknowledgment process.

A Brief History of Acknowledgment

In June of 1978, the US Department of the Interior published a set of seven criteria in the Code of Federal Regulations (25 C.F.R. §83) that a group must meet in order to be legally identified as an Indian tribe.[79] The criteria were part of the establishment of the Federal Acknowledgment Process (FAP), to be administered by the newly created Branch of Acknowledgment and Research within the Bureau of Indian Affairs (BIA).[80] A congressional survey reporting 33 different definitions of an Indian tribe in federal legislation, and several significant land claims cases in the 1970s, were the impetus for the standardization of one definition and the procedures for assessing tribes' compliance with it.[81] As the first codified governmental mechanism for assessing collective Indian identity, the FAP ended the *ad hoc* acknowledgment that the federal government had practiced since its formation. The rate and manner in which tribes were acknowledged prior to the establishment of the FAP generally reflected the era of federal

Indian policy in which acknowledgment occurred, which oscillated every several decades between supporting tribal sovereignty and enforcing assimilation into white society.[82] In establishing one process to apply to all tribes, the BIA created a bureaucracy specifically designed to manage acknowledgment petitions, whose lack of efficiency has been highly criticized by scholars and Congressional representatives alike.[83] As of September 2008, 332 tribes had petitioned the BIA seeking federal acknowledgment since the establishment of the administrative process in 1978.[84] Only 68 petitions have been resolved to date, and 16 petitions are being actively considered by the BIA Office of Federal Acknowledgment (OFA).[85] Though the Branch of Acknowledgment and Research (BAR) was initially intended to be a temporary branch of the BIA, Mark Miller writes that the BAR has become "almost self-perpetuating, with an 'acknowledgment industry' having developed around the process."[86] While some of the first tribes to petition for acknowledgment were in the process for just three to four years, the length of the bureaucratic process has since grown such that the average time tribes spend in it exceeds ten years.[87] Congressional recognition has generally been equally inefficient, with some tribes such as the Lumbee spending multiple decades attempting to gain recognition through bills that are voted down or never reach a vote in the Senate. Bureaucratic inefficiency is one of many significant challenges that unrecognized groups face in the acknowledgment process. This section will provide a brief overview of the development of the FAP and of some obstacles that most unrecognized tribes face in the process, including its glacial pace and concerns over "wannabe" tribes and over the politics of Indian gaming. I will also summarize some proposed changes to the FAP suggested since its establishment, only some of which have been adopted.

The current standardized process towards acknowledgment is a relatively new development in the course of federal recognition of Indian tribes, which stretches back to the beginnings of US history. Since its inception as a settler-colonial nation, the United States necessarily made treaties with Indian peoples, the original inhabitants of North America. As political scientist David E. Wilkins writes in his important book chapter "Indian peoples are nations, not minorities," treaty-making between the US and Indian peoples "confirmed a nation-to-nation relationship between the negotiating tribal and nontribal parties," and acknowledged aboriginal sovereignty as inherent.[88] From the treaty-making era (1775-1870s) to later periods in federal Indian policy, the meaning of the term "recognition" shifted from a cognitive definition, in the sense of to "know" or "realize" to a specifically political definition, as Wilkins and William Quinn note in their histories of federal Indian policy.[89] "Recognition" in the treaty-making era indicated the acknowledgment that a tribe existed through the negotiation of treaties with them, whereas in the 1870s, recognition came to signify the formal political act establishing a governmental relationship between the US and the tribe. This shift in implications of the term reflected the US government's movement from a necessary acknowledgment of Indian tribes as unquestionably distinct, sovereign entities with unalienable rights to their lands towards the position of the US government as the arbiter of political tribal identity, with the power to decide which groups remained "Indian" and remained "tribes." This shift stemmed from and was bolstered by several intertwining social and political ideologies that dominated US governmental language and actions regarding political relations with Indian tribes. US Indian policy was propelled and rationalized by: the myth of Indian extinction or inevitable assimilation into mainstream white society;[90] the racialization of American Indians as "savage," "primitive," and "ancient," which was

accompanied by a narrative of racial degeneration of Indian identity and the dilution of Indian "blood" over the generations; and Manifest Destiny, or the divinely-ordained expansion of white American society across the continent.[91] These narratives constituted racial projects, in that they represented Indians as an "inferior race" in order to justify white usurpation of Indian lands—they connected racial representations of Indianness with the redistribution of resources along racial lines, from Indians to whites. These are large-scale, long-term projects that have characterized the racial formation of Native Americans in the US and have heavily influenced the course of federal Indian policy from early American history to the present day. As they were frequently at odds with recognition of tribes in the cognitive sense, and with the language of treaties signed with Indian tribes between 1775-1880s that guaranteed tribal rights to their lands in perpetuity, these narratives created a high degree of US colonial ambivalence towards Indian tribes throughout the 19th and 20th centuries.[92]

Following the treaty-making period, federal Indian policy including federal recognition practices vacillated every 20-50 years between the acknowledgment and the deliberate destruction of tribal sovereignty, through genocide, removal, assimilation and termination.[93] Although the US continued to make treaties with tribes until 1871, the US entered a new era of federal Indian policy with the forced removal of thousands of Indians from the Southeast to lands West of the Mississippi River during the 1830s and 1840s.[94] Also during this period, the Supreme Court cases *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832) marked a permanent change in Indian policy and law by designating Indian tribes as "domestic dependent nations" whose relationship to the US was described as a "state of pupilage" and likened to that of a ward to a guardian.[95] These decisions built on the Supreme Court case *Johnson v. McIntosh* (1823),

which justified US possession of Indian lands with the "doctrine of discovery"-- a "legal fiction" which conferred legal title of American lands to the US as the successors of the European states that "discovered" them. [96] These three cases, known as the Marshall Trilogy after Chief Justice John Marshall, have characterized Indian policy and the contradictory limitations on expressions of tribal sovereignty since their rulings.

In addition to these rulings, which would thereafter restrictively define tribal sovereignty as secondary to US sovereignty, federal Indian policy from 1871-1934 was characterized by the systematic destruction of Indian governments and lifeways.[97] The Removal Era was followed by a period of "allotment, Americanization, and acculturation," as Wilkins terms it, in which the US implemented a policy of assimilation through several strategies: the breaking up of communal land bases and implementation of an economic system based on private property; assimilationist education through boarding schools; the regulation of Indian social institutions; the granting of citizenship; and the promotion of self-government through constitutions subject to US approval.[98] As Miller writes, missionaries, non-Indian settlers, and federal officials were complicit agents in these efforts to destroy tribalism and Indian cultural practices.[99] Very few tribes were recognized during this period, as federal Indian policy was centered on the deliberate undermining of tribal societies based on the idea that tribes would inevitably fully assimilate into mainstream American society. Influential white philanthropists and policy makers justified assimilationist policies with the nineteenth-century scientific racist notion that tribal social and political structures inhibited "progress" of Indians from "savagery" towards "civilization."[100] These policies were devastating for tribes, particularly the land allotment system established in the Dawes General Allotment Act of 1887 and its amendments.[101] The General Allotment Act divided up tribal reservation

lands held in trust by the federal government, and assigned plots to individual tribal members. The division of communal lands into severalty was a strategy intended to "civilize" Indians by instilling an economic and value system based on private property, and by promoting Euro-American farming practices.[102] Allotment resulted in the rapid loss of tribal lands, as individual plots were more vulnerable to encroachment and were more often sold than the reservations held in trust, and because tribal lands not allotted to members were declared "surplus" lands and sold to non-Indians. Although not all tribal lands were allotted—118 out of 213 reservations— sixty percent of all Indian tribal lands were lost, totaling almost ninety million acres.[103] Because of the contingency of tribal social and political cohesion on retaining their lands and tribal cultural practices, the loss of communal lands had catastrophic effects on tribal sovereignty, economies, and cultures that persist today.[104]

Although few tribes were acknowledged during this era, the meanings of "recognition" and the criteria for tribal status were being questioned and negotiated fairly consistently in the courts. William Quinn describes this era, from 1871-1934, as a period of "overlap" between the predominant usage of "recognition" in the cognitive sense, in the treaty-making era, and the its usage in the political sense, after the Indian New Deal.[105] The 1871 Congressional Act ending the treaty-making era raised questions about how tribal status would be established without treaties, but the issue was not taken up at that time by Congress nor by the Department of the Interior, and would resurface in Congress with the passage of the 1891 Indian Depredations Act. During the 1870s and 1880s, several important US Supreme Court decisions directly addressed federal recognition of tribes.[106] These cases, *United States v. 43 Gallons of Whiskey* (1876), *United States v. Joseph* (1876), *Elk v. Wilkins* (1884) and *Eastern Band of Cherokees v. United States*

(1886), each used the term "recognized" in describing the US government's acknowledgment of a tribe as a semi-autonomous political entity.[107] In *Eastern Band of Cherokees v. United States*, the Court went further in its description of the Eastern Band of Cherokees as unrecognized, citing that "no treaty has been made with them; they can pass no laws; they are citizens of that State and bound by its laws."[108] Thus, by negation, the *Eastern Band* decision identified past treaty relations and political organization or efficacy, and lack of state citizenship as guidelines for determining tribal status.

Another several important cases followed the Indian Depredations Act of 1891, which allowed for the claims to be made by US citizens in the US Court of Claims for crimes committed by Indians "belonging to any band, tribe, or nation in amity with the United States."[109] This vague definition of tribal status, which Quinn describes as "reaching into the past" and ignoring the recent Supreme Court rulings, gave rise to additional cases grappling with the issue. The most significant of these decisions was that of *Montoya v. United States* (1901), because it was the first case to establish an explicit definition of what constituted a federally recognized tribe. In this case, E. Montoya and Sons filed claims against the US and the Mescalero Apache Tribe of New Mexico under the Indian Depredations Act, for damages caused by the 1880 raid of Victorio's Band of Mescalero Apache.[110] The question before the Court was whether the Mescalero Apache were accountable for the actions of Victorio's Band, or whether the band had acted as a distinct entity.[111] The Court determined that a tribe could be "recognized" while not being "in amity with the United States"—the two terms were not synonymous— and provided a definition for "tribe" that would become the common law definition used by the DOI through the 1940s.[112] The justices of the Court stated: "By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under

one leadership or government, inhabiting a particular though sometimes ill-defined territory."[113] The *Montoya* decision exemplifies the overlap of different meanings of recognition within one definition of tribal status—it includes the ethnological criterion of appearing to be of a common "race," and the political criterion of operating under one government.

The passage of the 1934 Indian Reorganization Act (IRA) was a milestone in a new era of Indian policy spanning the 1920s-1940s, characterized by the reevaluation of particular assimilationist strategies such as allotment and an emphasis on renewed but limited tribal self-governance.[114] In the wake of several federal reports on the physical, economic, and cultural devastation of Indian communities caused by the forced assimilation of the allotment era, the passage of the IRA ushered in major changes to federal Indian policy, which were collectively known as the "Indian New Deal." The stated objectives of the IRA were "to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; [and] to provide for vocational education for Indians," among other purposes.[115] Strongly supported by Commissioner of Indian Affairs John Collier, the passage of the IRA effectively ended the allotment policy of the previous era that had led to enormous losses of tribal lands.[116] The original intentions of the bill, however, suffered in Congress due to US interests in preserving its gains in lands and resources at the expense of Indian tribes.[117] Wilkins writes that the IRA represented "a legitimate but inadequate effort on the part of the Congress to protect, preserve, and support tribal art, culture, and public and social organization."[118] Significantly, Wilkins notes that the IRA did not mark a departure from pro-assimilationist justifications of Indian policy, but rather strengthened

tribal institutions in order to employ them as "transitional devices" for assimilation.[119] The IRA also sought to "reorganize widely varying Indian governments along Euro-American political lines."[120] The Act authorized tribes to organize and adopt constitutions, but these constitutions were subject to the approval Secretary of the Interior.[121] As a result, Wilkins writes, these constitutions "only rarely coincided with tribes' traditional understandings of how political authority should be exercised," and that the IRA sometimes supplanted traditional political institutions.[122] As Mark Miller remarks in *Forgotten Tribes*: *Unrecognized Indians and the Federal Acknowledgment Process*, the Indian New Deal gave renewed strength to tribal cultures and governments, but shaped the US federal government into the arbiter of tribal status, permanently unbalancing tribal-federal dynamics in the recognition process.[123] Because the IRA authorized Indian tribes to politically organize and hold elections, the act necessitated a means for determining how groups would qualify as Indian tribes. Thus, the IRA both clarified "recognition" to thereafter signify its political rather than cognitive meaning in US-tribal relations, and established three definitions for "Indian" to identify groups who could form tribal governments under the Act.[124] The IRA states:

> The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any reservation, and shall further include all other persons of one-half or more Indian blood.[125]

These definitions established in the IRA framed Indian identity in terms of existing political relationship with the US, of individual descent from a group with such a relationship, and in terms of "blood," a metaphor for Indian racial identity that was typically conflated with cultural "authenticity."[126] Officials in the Department of the Interior determined whether groups satisfied these definitions.[127] The IRA marked the

beginning of the modern era of federal acknowledgment, in which the federal government assumed the role of determining a group's Indianness and consequent relationship to US Indian legislation and policies.

Also during this era, Felix Cohen, author of the *Handbook of Federal Indian Law* and important influence in the drafting of the IRA, developed a set of criteria for determining tribal status.[128] Published in the *Handbook* by the Interior Department in 1942, the criteria were established for the government's use in deciding challenging jurisdictional cases under the IRA.[129] Department of the Interior Indian officials relied on the "Cohen Criteria" as their primary means of determining D.O.I jurisdiction. The Cohen Criteria included both political and ethnological considerations and according to Cohen were based on the limited legal and policy precedents that had developed over time to define collective Indian identity and political status as a tribe. [130] However, as Sara-Larus Tolley notes, the Cohen Criteria did not merely reflect but rationalized precedents of federal Indian policy, which represented the historically contradictory nature of the US's engagement with Indian tribes.[131] The "Cohen Criteria" required compliance with just one of the following criteria:

(1) That the group has had treaty relations with the United States.
(2) That the group hash been denominated a tribe by an act of Congress or Executive order.
(3) That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe.
(4) That the group has been treated as a tribe or band by other Indian tribes.
(5) That the group has exercised political authority over its members, through a council or other governmental forms.[132]

The D.O.I. also considered Congressional appropriations extended to the group, and the group's "social solidarity" and other ethnological factors, but these were treated as "less conclusive" evidence than the five listed criteria.[133] Tolley emphasizes the importance of the fact that a group that met any *one* of these five criteria was legally considered a

tribe.[134] Also significantly, Mark Miller writes, "Interior Department lawyers never made clear the weight afforded to each factor."[135] Although Felix Cohen understood the great ambiguities in bureaucratic determinations of tribal status, as well as the limitations of his criteria, these reservations would be glossed over in their adoption and adaptation into the BAR acknowledgment criteria published in 1978.[136] Under John Collier, the Bureau of Indian Affairs improved its acknowledgment practices by moving towards a set standardized criteria and a more favorable climate for tribal recognition. Inconsistencies continued to plague the application of the criteria, however, partly due to the subjective nature of ethnological criteria. Miller writes, "Determinations thus often hinged on the perceived level of assimilation of the group in question, racial issues, finances, or opinions whether the group needed wardship—not necessarily on the merits of a group's tribal identity or status."[137]

Considerable changes in the political climate of the United States after World War II led to major upheavals in federal Indian policy, which shifted from an environment fairly supportive of acknowledgment to the complete "termination" of US relations with specific tribes. Wilkins cites a wide variety of converging causes that led to the Termination policy of the 1940s-1960s, including post-war governmental "cost-cutting measures," John Collier's resignation in 1945, and the passage of the 1946 Indian Claims Commission Act, which allowed Indians to make compensatory claims against the United States.[138] Also, federal legislators began to view tribal organization as constraining American Indians, either by inhibiting their "progress" as American citizens, or by continuing to subject them to racial discrimination and colonial rule under the BIA.[139] Termination policy was therefore framed in terms of "freeing" Indians from Federal supervision and from "all disabilities and limitations specifically applicable to [them],"

and bestowing upon them the same rights as all other US citizens.[140] The tribes deemed by federal policymakers and BIA personnel to be "ready" for termination were those that had seemed to have assimilated the most fully into mainstream American society, and therefore no longer appeared in need of federal trusteeship. The BIA would afford less acculturated tribes more time before terminating them, but conceived of termination as the endpoint towards which all tribes were "progressing."[141] Termination was accompanied by a policy of coercive relocation of reservation-based Indians to urban centers, in an effort to disperse members of tribal communities. Termination had extremely detrimental effects on tribes' ability to exercise their sovereignty, maintain social and political community, and retain their lands and rights to natural resources. With the loss of the federal trusteeship, tribal lands became privatized, tribes became subject to state taxes, regulations, and laws, and lost access to federal assistance programs along with the legal affirmation of their sovereignty and identity as Native peoples.[142] Quinn writes that determinations of tribal preparedness for termination were partially based on data compiled in a 1953 study on the state of Indian Affairs, conducted by the House Committee on Interior and Insular Affairs.[143] Quinn quotes the report's definition of "'tribes or bands' as those 'which were reconstructed with the passage of the Indian Reorganization Act of 1934 and were set up with the formal legal existence as tribes recognized by the government', and [of] an 'Indian' as a 'person who is a member of an Indian group of tribe which has special relations to the Federal Government.'"[144] Termination thus solidified definitions of Indianness and tribal status in administrative terms, which would persist until the establishment of the modern federal acknowledgment process.[145]

In the 1960s, the tone of federal Indian policy reversed once again, after a series of important triumphs of many forms of Indian activism to end termination policy. This political action ranged from the American Indian Chicago Conference in 1961 to the highly publicized occupations of Alcatraz Island in 1969, of the BIA building in 1972, and of Wounded Knee in 1973.[146] These more radical actions were associated with the American Indian Movement (AIM), which was established in 1968. Issues involving recognition and the status of unrecognized tribes came to the fore, culminating in the 1977 two-volume report written by the congressional American Indian Policy Review Commission.[147] One of the "task forces" within the Commission was dedicated to "Terminated and Non-Federally Recognized Indians," and made recommendations that the BIA adopt a standardized federal acknowledgment process and set of criteria to make its determinations.[148] Several significant court decisions in the 1970s that hinged on the tribal status of the parties involved, as well as a spike in acknowledgment petitions to the BIA, placed further pressure on the Bureau to develop a uniform procedure for acknowledgment.[149] Recognized tribes expressed concern as plans for such a process began to develop, over possible diminishment of available funding for all tribes and the erosion of tribal sovereignty if questionable groups were acknowledged.[150] In 1978, the National Conference of American Indians submitted recommendations to the BIA for the development of the federal acknowledgment process, which did not state specific criteria, but stated that the criteria should be based on "ethnological, historical, legal, and political evidence."[151] The result of the BIA negotiations, Miller writes, were "a set of strict rules for acknowledging tribes that were based on past precedent, case law, and scholarly and indigenous understandings of tribalism… [and] a rigorous, document-driven process that is largely used today."[152] Thus, the criteria for federal

acknowledgment published in 25 C.F.R. §83 were a product of historical common law of federal Indian policy; the limited and often contradictory case law defining tribal status; the hard-won struggles of indigenous activists; congressional investigations of Indian affairs; and heated negotiations between representatives of recognized tribes, unrecognized tribes, and BIA officials.

The current federal acknowledgment process is the culmination of a long transition from governmental practices of cognitive recognition to political recognition based on the evaluation of a group against official definitions of the "Indian tribe" as a governmental body. The history of acknowledgment and the origins of the criteria, however, reveal the consistent and continuing presence of cognitive recognition in acts of acknowledgment. As the following chapters demonstrate, federal acknowledgment today hinges as much on non-Indians' identification of a tribe with images of tribes "previously seen" and outsiders' "perception [of a tribe] as existing or true" as it does on the identity of the petitioner as a political entity. In applying and interpreting the criteria in 25 C.F.R. §83, officials in the BIA, members of Congress, members of recognized tribes, and other outsiders uncomfortably negotiate constructions of tribal identity that may or may not conform to hegemonic understandings of Indianness and tribalism permeating the criteria. In the cases of the Brothertown Indian Nation of Wisconsin and the Lumbee Tribe of North Carolina, the historical difficulties that both tribes have faced in being "recognized" as Indian tribes by outsiders have had profound negative effects on their ability to be "Recognized" by the United States today.

2

Conditions of Visibility: Brothertown Citizenship and Non-Recognition

In 1839, eighty-five years before the Indian Citizenship Act, the Brothertown Indians of Wisconsin petitioned Congress requesting to become US citizens.[153] As a Christianized, English-speaking, agrarian tribe, the Brothertown appeared to federal officials and Congress to be worthy and needy candidates for this political designation, which they viewed as the marker of the tribe's complete acculturation to white society. In the early eighteenth century, full citizenship was a category legally and socially accessible to whites only, and government officials rhetorically equated or coupled citizenship with assimilation into the dominant white culture.[154] "The said Brothertown Indians," the Committee on the Territories reported to Congress, "having laid aside the chase, and having devoted themselves to the cultivation of the soil, have become both civilized and Christianized, to a higher degree than perhaps any other tribe of Indians on this continent."[155] The committee's report details the qualities of the tribe that indicate that they are practically indistinguishable from their white neighbors in behavior, and therefore highly deserving of citizenship, which the Committee deems "the only effectual means of *civilizing* the Indian."[156] Congress granted citizenship to the Brothertown as a "civilizing" project paternalistically cast as an act of benevolence and philanthropy. The report states,

> The high boon of citizenship has not been one to which the Indian could aspire. He has been taught the language, the manners, customs, and pursuits of civilized life. The church and the school-house, the Bible and cross, have been made to

> occupy the places of the hunting lodge and wigwam, the tomahawk and the scalping knife; agriculture and its peaceful pursuits have been made to take the place of the chase, and, so far, the Indian has been civilized; but he is an Indian still… The last great and crowning inducement, the right of citizenship, has been denied, and, consequently, all efforts to civilize the Indian have, and, until this boon is granted, ever will, cease at a certain point, and the measure will be but half accomplished.[157]

The language of the Committee's report clarifies the motivations and intentions of Congress in passing the 1839 Act, which were deeply embedded in the racial and cultural discourses around Indianness that had served to justify Euro-American policy towards tribes since colonial times. The report relies on a particular ideological construct of "the Indian," a term whose fabrication by non-Indians and whose totalizing power are apparent in the word itself.[158] An examination of the Brothertown decision to request citizenship and Congress's decision to grant it requires an understanding of the constructions of "the Indian" and "the" US citizen on which white lawmakers depended and to which the Brothertown appealed. Considering that the current federal acknowledgement process was established as part of Native-led efforts to move away from racialized construct of "the Indian," I ask, has the FAP succeeded in leaving behind this image? Has such a strict, document-reliant system based on specific criteria simply replaced that image with another one? In this chapter, I explore some possible answers to these questions, examining the ways in which the image of "the Indian" persists and continues to pose great obstacles for tribes like the Brothertown Indian Nation. In contextualizing the 1839 Act through a brief analysis of the racial ideology that produced "the Indian," I emphasize the enduring elements of that image that I deem relevant to the Brothertown case. I then juxtapose white interpretations of Brothertown citizenship with Brothertown intentions in requesting that designation, and provide the important context of the Act as a response to fraudulent Removal treaties.

Concentrating on the first acknowledgment criterion, I examine aspects of the BIA's Proposed Finding on the tribal status of the Brothertowns Indian Nation, which gathers around the Act. Finally, I turn to scholarship on the federal acknowledgment criteria and process more broadly, to inform my analysis of the Brothertown case and connect it to the experiences of eastern and southern tribes, who have gone or will go through the BIA channels toward recognition.

Brothertown Citizenship and Images of "the Indian"

The Brothertown Indian Nation was formed in the early 1770s by seven separate communities of Christian members of the Narragansett-Niantic, Pequot, Mohegan, and Montauk tribes of southern New England and eastern Long Island.[159] Among the many to convert to Christianity during the Great Awakening in the 1740s, these fragments of tribes held together in seven New England towns called the "Praying Towns."[160] Their tribes' populations had been decimated by King Phillip's War (1675-1676), other wars, and disease, and struggled to survive economically and culturally in the face of continual colonial encroachment on their lands.[161] In response to external pressures to abandon their agricultural way of life and sell their lands, a group of Native students at Eleazer Wheelock's Indian Charity School in Lebanon, CT organized under the leadership of Mohegans Joseph Johnson and Samson Occom to plan a group relocation to lands granted to them by the Oneida in upstate New York.[162] The Brothertown faced unrelenting pressures to cede those lands from the British and their Indian allies before the Revolutionary War, and from New York State and white Euro-American settlers after the war.[163] After repeated negotiations and treaties between the Brothertown, the Stockbridge, the Oneida, and the Menominee in Wisconsin, the US federal government

mediated a sale from the Menominee to the three tribes, including 23,000 acres reserved for the Brothertown to the East of Lake Winnebago.[164] Brothertown members began to move to the Wisconsin lands in 1831. Just seven years later, the federal government drafted the Treaty of Buffalo Creek (1838), with the intention of removing the Brothertown to the territory of present-day Kansas.[165] Desperate to prevent another relocation of their people, the Brothertown Indians resolved to protect their lands through the laws of private property ownership, as non-Indians did, by gaining the rights of US citizenship.[166] The tribe's public account of their history states, "By a perversity of law, as long as the land was held in trust by the federal government, common and inalienable, it was subject to loss by government action."[167] Thus, the tribe successfully appealed for US citizenship, divided their commonly held lands into private tracts, and avoided removal to the Indian Territory. After dividing their lands into severalty, the Brothertown lost much of the land to non-Indians but retained community ties. The Brothertown maintained strong social and political connections despite many members moving to urban areas due to economic strain in the 1920s and 1930s.[168] Kinship ties, family reunions, homecomings, and gatherings around the Brothertown Methodist church have held the Brothertown together as a people over the years, defying white encroachments and dispersion of members throughout the area.[169] Today the tribe is based in Fond du Lac, Wisconsin and has over 3,000 members. The Brothertown Indian Nation first notified the BIA of its intent to petition for federal acknowledgment through the OFA in 1980, and continues to pursue federal recognition today.[170] After receiving a Proposed Finding from the BIA to deny them acknowledgment in August 2009, the BIN resolved to submit further evidence and see through the administrative

process to a Final Determination, rather than immediately redirect its efforts towards Congressional acknowledgment.[171]

Although the Territories Committee's report preceding the Act of 1839 addresses the Brothertown Indians, a specific Native American people with a unique history and cultural identity, the document continually refers to a generalized construction of "the Indian" manufactured by Euro-Americans. The report illustrates that Congress's perception of the Brothertown Indians was filtered through this image, which overlooked the distinctive features of Brothertown cultural life and identity as well as the enormous diversity among the Native peoples of North America. As Robert F. Berkhofer writes, "Since the original inhabitants of the Western Hemisphere neither called themselves by a single term nor understood themselves as a collectivity, the idea and the image of the Indian must be a White conception."[172] He writes,

> The first residents of the Americas were by modern estimates divided into at least two thousand cultures and more societies, practiced a multiplicity of customs and lifestyles, held and enormous variety of values and beliefs, spoke numerous languages mutually unintelligible to the many speakers, and did not conceive of themselves as a single people—if they knew about each other at all. By classifying all these many peoples as *Indians,* Whites categorized the variety of cultures and societies as a single entity for the purpose of description and analysis, thereby neglecting or playing down the social and cultural diversity of Native Americans then—and now—for the convenience of a simplified understanding.[173]

This categorization was far more than a matter of convenience, however, as "Indianness" originated with Euro-Americans and benefited them in tangible ways. Applying one image to all Native peoples allowed the US government to treat them as a homogenous collective entity and employ race-based colonial rationales for land dispossession. The particular construction of Indian identity that the Committee invokes touches on several intersecting cultural, racial, and temporal discourses around

Indianness that were pervasive in the nineteenth century. Together these discourses gave rise to myths of Indian racial degeneration and disappearance, and the inevitable trajectory of societal "progress" from "savagery" to "civilization," among other narratives that served to justify white ownership of Indian lands. In governmental rhetoric, constructions of "the Indian" as vanishing were critical tools in ideologically affirming the legitimacy of US existence and control over North American lands.

The report considers the Brothertown in terms of their compliance with their image of "the Indian" and their image of "the" US citizen, rather than in terms of the way the tribe identifies itself. White lawmakers understood the "wigwam," "tomahawk and scalping knife," and "the chase" as symbols of Indianness, which demonstrates the generalization of certain cultural signifiers within the racialized image of the Indian they employed. The "wigwam" and the "tomahawk" are just two of many cultural elements that white outsiders decontextualized from their specific tribal origins and fixated on as representative symbols of "the Indian."[174] The "chase" might be considered another such symbol as well, but like the "scalping knife," it evokes the racial formation of Native Americans as "primitive," "savage," and "warlike." The Congressional image of Indianness, comprised of symbols unrelated to the cultural realities of the Brothertown Indians, was the sole basis for white lawmakers' understanding of the Brothertowns as a people and dictated their actions towards the tribe. Through their employment of the construction of "the Indian," white lawmakers reduced thousands of distinct Native peoples into one mold, which allowed them to take one policy approach towards all tribes, to claim racial superiority over all Native peoples, and to claim the authority to define Indianness.

Alongside these supposedly synecdochic representations of "Indian culture" run other currents within white-imagined Indianness, alluded to in the Territories Committee's report—the racial discourse of Native Americans as "the Red man," and the temporal discourse of Indians as "primitive" and ancient.[175] The development and perpetuation of the intertwined cultural, racial, and temporal constructions of Euro-Americans' image of "the Indian" were intimately connected to the battle for legitimacy and land in which Indians and Europeans were engaged since the first colonial encounters. These discourses converged under an ideological narrative of the "vanishing American" or "Indian extinction," the myth that Native peoples were dwindling and would imminently disappear in death or assimilation into white culture.[176] Ann McCulloch and David E. Wilkins write, "By creating an image that was 'uncivilized' by European standards, the immigrant Americans were able to define away any Native Americans who adopted white culture. Federal Indian policy in the nineteenth century reflected these myths."[177] The myth of Indian extinction was woven from the racial concept of purity of "blood," and the equation of Indianness with ancientness.[178] Indian extinction was not merely an assumption under which white lawmakers operated in crafting Indian policy, but was explicitly inscribed into the historical record by non-Indian historians the Northeast and elsewhere in the country, despite all evidence to Native peoples' continued survival.[179] Federal policy aimed at destroying tribalism was thus accompanied by the "definitional violence" of whites circumscribing Indianness.[180]

The racial discourse around Indianness stems from the notion of innate racial difference between Indians and white Euro-Americans, based in nineteenth century theories of distinct racial types with corresponding physical, intellectual, and emotional traits, organized in a white-dominated hierarchy.[181] Whites' dualistic conception of these

two categories was part of the project of defining an American national identity and establishing a rationale for US sovereignty on North American lands.[182] Kevin Bruyneel writes that the white construction of Indianness functioned as a "constitutive outside" against which white Euro-Americans endeavored to establish their own identity and rationalize their occupation of indigenous lands.[183] Bruyneel writes, "a defining national narrative imposes the temporal boundaries of colonial rule that frame settler-state sovereignty as legitimate and indigenous peoples' sovereignty as illegitimate, because the former is progressive and civil and the latter is archaic and savage."[184] The construction of "the Indian" as "primitive" and "ancient," as Bruyneel explains, was a deliberate imposition of temporal boundaries on indigenous peoples to systematically undermine their inherent sovereignty and thereby dispossess them of their lands.

"Blood purity" was another facet of white racial constructions of Indianness that protected white colonial domination over both African Americans and Native Americans by rigidly circumscribing the categories of Blackness and Indianness in different ways. Historian Jean O'Brien succinctly articulates the workings of colonial racial thought about Indians:

> Non-Indians thought about race and blood according to a colonial calculus in which the possession of even a single drop of African American "blood" relegated one to the status of "Black" and "slave," whereas it demanded of Indians evidence of just the opposite: purity of blood. This calculus operated within the colonial order, on the one hand securing a labor supply in hereditary bondage, and on the other justifying the seizure of Indian lands on the basis of Indian "disappearance."[185]

The measurement of racial "purity" led to the calculation of Indian "blood" in measurements by fractions, gave rise to terms such as "full blood" and "mixed blood," and facilitated a narrative of "degeneration" regarding Indian authenticity.[186] This

narrative presumed that "blood quantum" was an accurate indicator of the authenticity of one's Indian identity. As J. Kehaulani Kauanui writes in the context of indigenous Hawaiian blood quantum measurement, "Blood quantum is a fractionalizing measurement—a calculation of 'distance' in relation to some supposed purity to mark one's generational proximity to a 'full-blood' forbear.'"[187] The logic of blood quantum measurement, she writes, "presumes that one's 'blood amount' correlates to one's cultural orientation and identity."[188] This logic relies on the notion that cultural identity is innately tied to racial identity, and that the authenticity of one's Indian identity claims directly corresponds to one's proportions of Indian and non-Indian "blood." According to the logic of blood quantum measurement, Indian cultural identity would disappear as Indian "blood" is "diluted" over time; in other words, Indianness would inevitably fade away over the generations through Indians' intermarriage with non-Indians. Founded on the concept of blood purity, the narrative of the inevitable degeneration of Indian identity afforded whites the power to quantitatively define and evaluate claims to Indianness, and served as a key component of their justification for overtaking Indian lands.

This racial-cultural degeneration theory was strengthened by whites' equation of authentic Indianness with ancientness, which cast any cultural dynamism of Native peoples as a betrayal of their Indian identity, or an indication of their assimilation into the mainstream. O'Brien writes, "non-Indians refused to regard cultural change as normative for Indian peoples… Indians could only be ancients, and refusal to behave as such rendered Indians inauthentic in their minds."[189] In the context of Brothertown citizenship, historian David J. Silverman writes,

> Whites were generally unwilling to accept the complexities of Indian identity among people who were Christian, civilized, and finally citizens… Indians who adjusted to make their people viable for a new era, especially Indians who thrived despite the odds, were incomprehensible according to this schema [of Indian extinction], so whites ignored them or defined them away as inauthentic, cartoonish, or a sham.[190]

White interpretation of Native cultural adaptations and survival strategies as a loss of Indian identity functioned to fix Indian identity in the past, denying the existence of modern Indians. The continued existence of people claiming Indian identity in contradiction to the myth of extinction led whites to deny the Indianness of those people, largely to solidify their claims to Indian lands.[191] Thus, the failure of white citizens and officials to recognize collective Indian identity has historically been bound up in efforts to preserve the power structures of Euro-American colonialism.

Discourses around blood quantum, cultural authenticity, degeneration and extinction are interlocking racial projects that cast Indians as an inferior and dwindling race in order to channel Indian resources towards whites in power. White blindness towards Indian tribal identity is a product of these discourses as well as a force that has historically lent them strength. By controlling the boundaries of racial and cultural definitions of Indian authenticity, whites possessed the power to define Indians out of existence, and to cease to recognize Indian peoples as such.[192] This surveillance of Native identities, writes Amy Den Ouden, emerged in colonial New England as a "significant governmental strategy for controlling, silencing, and dispossessing Native peoples."[193] Thus, white denial of Indian identity was also a racial project in itself, as it excluded Native peoples from the racial category of Indianness in order to strip them of their aboriginal title to their lands. By throwing a tribe's claims to Indianness into doubt or claiming that a tribe had vanished, whites in power clouded that tribe's aboriginal title in

an effort to strengthen their own claims to the land. The legacy of governmental policing of Indian identity as a mechanism to dominate land contests and the production of history has created "a history of struggle in which Indian identity was never simply 'recognizable' or not to colonial, or white, 'observers.'"[194] For tribes whose histories and cultures did not square with the image of "the Indian," being seen as an Indian people by white outsiders was particularly improbable.

Given the context of the racial ideology of the Vanishing American, two aspects of the report on Brothertown citizenship create particular problems of visibility affecting the current acknowledgment case of the Brothertown Indian Nation: (1) the Committee's oppositional construction of "the Indian" and "the" US citizen; and (2) that the Committee's definition of Indianness hinges on the presumption that Indian identity is easily visible and verifiable by outsiders. These aspects of the Congressional perspective on Indian in 1839 create rifts in the logic of the present-day federal acknowledgment system, and shed light on the ways in which difficulties tribes faced centuries ago continue to plague the current system.

The Committee on the Territories' report recommending Brothertown citizenship exhibits the mutually constitutive nature of the image of the "the Indian" and that of "the" US citizen. Congress defines these two categories in contrast to one another, as opposite endpoints of a linear teleology of societal development. Berkhofer writes, "Whether describing physical appearance or character, manners or morality, economy or dress, housing or sexual habits, government or religion, Whites overwhelmingly measured the Indian as a general category against those beliefs, values, or institutions they most cherished in themselves at the time."[195] Thus, as Jean O'Brien

argues, whites firmly established their own modernity by denying modernity to Indians.[196] The oppositional construction of the Indian and the US citizen contributed to the racial formation of the Indian as the "primitive" and "ancient" non-white Other, and the notion of societal "progress" along a specific trajectory. The report considers citizenship to be the pinnacle of civilization, and the endpoint of a people's inevitable social evolution from savagery to civilization, from Indianness to whiteness, or white-likeness. Since full US citizenship in the nineteenth century was a political category reserved for whites only, to gain citizenship was to become legally "white."[197] Due to the oppositional construction of Indianness and whiteness in US hegemonic racial ideology, as James Clifford writes, "Life as an American meant death as an Indian."[198] Congress's perception of Indianness and citizenship as mutually exclusive categories precluded the possibility of the Brothertown Indians maintaining the consistent appearance of an Indian entity after gaining citizenship.

Secondly, the authors of the report view Indian identity to be easily recognizable, and able to be visually authenticated by outsiders. The image of Indianness employed both explicitly and implicitly in the report is characterized by the organizing unit of the collective rather than the nuclear family; a lack of institutionalized religion and education; Native language and religious practice; warlike tendencies; and subsistence hunting rather than farming. The report ties these characteristics to the ideological construct of "the Indian," by concluding that because of their lack of these visible traits, the Brothertown "abandoned the savage habits and customs of their forefathers… [and] adopted the religion, language, dress, manners, and mode of living, of their white neighbors."[199] The authors of the report measure the Indianness of the Brothertown in relation to their construction of the US citizen, through the *visual* assessment of the group's compliance

with an image with explicit and implicit racial, cultural, and temporal components. In a social climate that incentivized white denial of Indian identity, the Brothertowns' lack of recognizable racial and cultural identifiers of "the Indian" rendered them invisible as a tribe to Congress as well as to the white public, especially after gaining the historically "white" status of citizenship.

These two facets of the report's brand of Indianness provide glimpses into some of the difficulties faced by the Brothertown Indian Nation and tribes like them in seeking federal acknowledgment in the present day. They represent two problems that underlie aspects of the BIA acknowledgment process and create problems for tribes who have historically failed to comply with hegemonic images of Indianness, and were therefore invisible as Indian tribes to outsiders. The acknowledgment process relies on historical identifications of the petitioner as an Indian entity by outsiders, and documentation of continuous existence as an Indian entity socially and politically. In examining the Brothertown case, I am interested in what happens to tribes who maintain their collective Indian identity but have appeared, to outsiders, to be indistinguishable from their "white neighbors." In the case of the Brothertown, these problems are points of intersection and co-influence of persistent historical ideological constructions of Indian tribal identity within and the US government's position on the group's tribal status in 1839 and today. Together, the oppositional construction of "the Indian" and the US citizen and the assumed visibility of Indianness have affected the way the Brothertown were and continue to be perceived by outsiders. These are two of many factors contributing to the OFA determination that a collective Brothertown Indian entity ceased to exist shortly after receiving citizenship. I aim to analyze this narrative against its counterstories-- what are other readings of Brothertown history? How do they

reveal the assumptions filtering and constructing the official federal narrative? I do not attempt to adjudicate on the BIA Proposed Finding against the Brothertown, but rather am interested in the contradictions therein that highlight the potential inadequacies of the BIA FAP to appropriately address certain Indian histories.

The 1839 Act lies at the heart of the OFA's Proposed Finding on the Brothertown—it has incited controversy over the tribe's termination status, and inflects the OFA's negative determinations for other criteria as well. The Act illustrates the hegemonic image of Indianness in the nineteenth century, which the federal government incorporated into policy and used to constrain Native peoples by perpetuating the colonial racial hierarchy. The construction of "the Indian" against the US citizen, embedded in myth of Indian extinction, and the presumed immediate visibility of Indianness apparent in the Act continue to create problems in the Brothertown recognition case today. My analysis of the Brothertown Proposed Finding expands on these elements. A deeper history and analysis of the Act and the events that precipitated it is necessary, however, for a more comprehensive understanding of the difficulties that the Brothertown face. While the Brothertown case is somewhat unique in that tribal members became citizens almost a century before the Indian Citizenship Act of 1924, the 1839 Act arose from a common dilemma Native peoples faced in the Removal Era—the US government drafting fraudulent treaties aimed at dispossessing tribes of their lands. Citizenship was the Brothertowns' creative solution to this problem, which the tribe had already encountered and adapted to many times. With this history in mind, I examine the BIA's reading of what citizenship meant for the federal-tribal relationship and for the "verifiable" existence of the Brothertown as a tribe. This analysis provides an

entry point into a brief discussion of the some of the limitations of the criteria in 25 C.F.R.§83.

Brothertown Citizenship as Resistance

The Treaty with the New York Indians of 1838, also known as the Treaty of Buffalo Creek, was drafted on January 15, 1838 and signed between the Seneca, Tuscarora, St. Regis, Oneida, Cayuga, and Onondaga tribes of New York and the United States.[200] The treaty states that it also applied to the Munsee, Stockbridge, and Brothertown tribes of New York, although representatives of those tribes did not sign the treaty. Following the policy of removal of Indian tribes from the East coast to western territories codified in the Indian Removal Act of 1830, the US sought to remove the New York Indians from their lands in New York and Wisconsin to an area in what is now the state of Kansas.[201] The treaty, which was amended in the Senate and ratified April 4, 1840, addresses an 1831 treaty between the US and the "Menomonie" [Menominee] tribe of Green Bay, Wisconsin, through which the New York Indians purchased 500,000 acres of land in Wisconsin from the Menominee and Winnebago tribes.[202] According to the 1831treaty, many but not all members of the New York Indian tribes had relocated to Wisconsin. Because the tribes had not fully relocated from New York, the US sought to fully remove them from lands in New York and Wisconsin to the territory west of Missouri, and to then claim their vacated lands.[203] The treaty states that "the several tribes of New York Indians…hereby cede and relinquish to the United States all their right, title and interest to the lands secured to them at Green Bay by the Menomonie treaty of 1831."[204] In exchange for this cession of lands, the treaty states that US would set apart a "tract of country, situated directly west of the State of

Missouri, as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes…"[205] The statement that the New York Indians "have no permanent homes" contradicts the history of treaty-making between the United States and the Seneca Nation, which guaranteed the Senecas their reservation lands until they voluntarily decided to sell them.[206] The 1838 treaty marked the sale of the four remaining Seneca reservations—Buffalo Creek, Tonawanda, Cattaraugus, and Allegany—to the Ogden Company.[207] The exchange dictated by the treaty was considered a "sale" because of the annuities promised to the six tribes that signed the treaty, despite the fact that the amounts of those payments constituted inadequate compensation for the lands, and that lands were sold in the absence of and/or against the will of many Indian leaders.[208]

According to the language of the treaty, the removal of the New York Indians to the Indian territory in the West was an act of beneficence on the part of the President of the United States, who was merely responding to the requests of the tribes for "a new home among their red brethren in the Indian territory."[209] The treaty states, "…whereas, the President being anxious to promote the peace, prosperity and happiness of his red children, and being determined to carry out the humane policy of the Government in removing the Indians from the east to the west of the Mississippi within the Indian territory, by bringing them to see and feel, by his justice and liberality, that it is in their true policy and for their interest to do so without delay."[210] These two statements alone are replete with contradictions—the President is simultaneously described as fulfilling the tribes' desire to relocate and convincing the tribes that they desire to relocate, within the context of a treaty that deprives them of their land and compels them to relocate.[211] While claiming to be initiated by the Senecas and crafted and conducted in their best

interests, the Treaty of Buffalo Creek was characterized by the Tonawanda Band of Senecas as "infected by the vilest bribery, fraud and deception," a description echoed by concerned non-Indian citizens of New York.[212] The Senecas strongly protested the corrupt treaty proceedings, resulting in a new Treaty of Buffalo Creek in 1842.[213] In this treaty, the Senecas sold the Buffalo Creek and Tonawanda reservations to the Ogden Company, but retained the Allegany and Cattaraugus reservations, allowing them to remain on some of their lands and not relocate to the West. The Senecas residing at the Tonawanda reservation were not present at the 1842 signing, and objected to the treaty by seceding from the Seneca nation, establishing themselves as a separate Tonawanda Band of Senecas, and purchasing back most of their reservation lands.[214]

The 1838 Treaty of Buffalo Creek identifies the Indian territory of present-day Kansas as "a future home for the following tribes, to wit: The Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns residing in the State of New York."[215] The treaty addresses the members of these New York tribes residing in both New York as well as in Wisconsin, including the latter three tribes, who did not sign the treaty. Likewise, the treaty mandated the sale of the Tonawanda reservation, although representatives of the Tonawanda Band of Senecas were not present at the signing of the treaty and the tribe adamantly protested both Treaties of Buffalo Creek. Tribal objections to the treaties were expressed to the US Congress in the form of petitions, memorials, and speeches, and the cases were evaluated by the Committees on Indian Affairs in the House of Representatives and the Senate. The documents conveying the tribes' objections to the Treaties of Buffalo Creek reflect a high degree of political organization and the tribes' profound understanding of the treaties as violations of their rights as sovereign peoples over their lands, and of the

catastrophic consequences these treaties would have on their collective survival and wellbeing. The tribes were also acutely aware that the treaties constituted the United States' government's violation of its previous treaties and agreements with the tribes, which had affirmed tribal ownership and sovereignty over their lands.[216]

While the Seneca resisted removal by refusing to abide by the treaty and petitioning against its enforcement, and the Tonawanda objected by seceding from the Seneca Nation, the Brothertown sought to protect their claim on their Wisconsin lands by requesting US citizenship and dividing their commonly-held lands into severalty.[217] All three of these strategies were effective means to avoid removal, prevent the theft of tribal lands and resources, and protect tribal rights as sovereign entities. In this sense, all three of these strategies were successful modes of resistance to Euro-American colonial domination that were essential to the survival of each of these tribes as cohesive communities to the present day. The responses of the Seneca Nation, the Tonawanda Band of Senecas, and the Brothertown Indian Nation to the Treaty with the New York Indians of 1838 represent a broad spectrum of indigenous strategies for survival and assertions of sovereignty over their lands. The US government has and continues to interpret these various strategies to have different implications for each group's tribal status, and thus for each group's relationship to the federal government. The Treaty of Buffalo Creek and the responses it engendered therefore continue to affect tribal sovereignty in very different ways today. I focus on the Brothertowns' response, as it is the origin of the 1839 Act and thus of the OFA's 2009 negative determination on the tribe's acknowledgment petition.

The Seneca Nation and the Tonawandas successfully resisted removal by protesting the federal government and negotiating new treaties, but the Brothertown Indian Nation of Wisconsin took a very different approach. The Brothertown Indians, who had already been twice removed from their original home in southern New England, first to upstate New York and then to Wisconsin, were one of the tribes that the 1838 Treaty of Buffalo Creek would have forcibly removed from Wisconsin against their will. The Brothertown Indians decided to petition Congress to grant them United States citizenship and "a good and sufficient title to the lands ceded to them… [T]he Government promised to secure [the lands] to the Brothertown tribe, by giving them a good and sufficient title. That title was never given."[218] The Brothertown believed that by possessing US citizenship and owning their lands individually in fee simple, the US government would be unable to deprive them of their lands and remove them to the Indian territory, as intended. In addition to preventing removal by the federal government, gaining citizenship would afford the Brothertowns important protections under the law from individuals' encroachments on the tribe's lands. Historian Brad D. E. Jarvis writes, "Citizenship and ownership offered the Brothertowns protection for their lands because it granted them powerful access to territorial courts in which they, as legal property owners, could prosecute potential trespassers."[219] Incorporation under the jurisdiction of the United States court system would also provide a means of prosecuting violent crimes against tribal members, an issue that the Brothertowns and Stockbridges had yet to resolve in their Wisconsin locations. Silverman writes, "There is little question that the Brothertowns' main purpose in lobbying for citizenship was to protect their homes, but another consideration was that they needed an outside authority to police murders both among Indians and between Indians and whites."[220] The 1836 murder of

Brothertown member Joseph Palmer by two Stockbridge men made the tribe's lack of an effective justice system more pressing, Silverman continues. Thus, petitioning for citizenship and to divide their lands into severalty was a strategic attempt to gain inviolable rights and protection of their land and community, in the wake of the severe and imminent threat to their lives and lifeways represented by the corrupt 1838 treaty.

In contrast, Congress viewed the Brothertown petition as a desire to fully assimilate into white American society, which the Committee on the Territories believed them to be already embodying. As their report to Congress explains, the committee supported the granting of citizenship as a "civilizing" and assimilating project, completing the transition of "the Indian" into a "civilized" subject.[221] For this reason, Congress responded favorably to the petition and passed "An act for the relief of the Brothertown Indians, in the Territory of Wisconsin" on March 3, 1839, granting them citizenship and dividing their lands into individual tracts.[222] What Congress interpreted as the tribe's desire to become indistinguishable from white society was, in fact, a strategic maneuver to gain a title to their lands that would be respected by the US government. Jarvis writes, "While the federal government deemed this action [acceptance of citizenship] to be a step toward cultural assimilation, the Brothertowns viewed citizenship as a necessary step to preserve lands and political autonomy."[223] After being granted citizenship, with the exception of their lands being privately held, the Brothertown continued to operate as a community much as they had before. They identified themselves as the Brothertown Nation of Indians, and continued to regulate tribal membership and land distribution.[224] "Contrary to the federal assumptions that the Brothertowns had abandoned their tribal status," Jarvis writes, "the Brothertowns believed they had obtained the necessary protections for their land, community, and

political sovereignty."[225] The Brothertown Indian Nation's petition for citizenship following the 1838 Treaty of Buffalo Creek was a strategy the tribe employed to secure the title to their lands in Wisconsin and maintain their community on those lands.

Gaining citizenship was a successful response to the fraudulent 1838 Treaty of Buffalo Creek in that the Brothertown avoided removal and remain on their Wisconsin lands today. This strategy unfortunately has also had severe consequences in terms of the political status of the Brothertown Indian Nation vis à vis the US federal government. Whereas the responses of the Seneca Nation and the Tonawanda Band of Senecas to the Treaties of Buffalo Creek are considered evidence of the tribes' histories as sovereign entities with a government-to-government relationship with the US, the Brothertown response was deemed in 2009 to have constituted the termination of US-tribal relationship. In a negative Proposed Finding on the Brothertown Indian Nation's petition for federal acknowledgment, the BIA ruled that the 1839 Congressional Act that divided the Brothertown land into severalty and granted them citizenship stated that the Brothertowns' "rights as a tribe" would "'cease and determine,' that is, end and be limited permanently."[226] One of the criteria for federal acknowledgment through the BIA's Office of Federal Acknowledgment is that a petitioning tribe must not have been terminated.[227] Thus, this interpretation of the 1839 act granting Brothertown citizenship renders the tribe currently ineligible for federal acknowledgment through the BIA process. The Brothertowns' strategy for retaining their sovereignty over their Wisconsin lands succeeded in securing their continued existence as a community there since 1839, but ironically has rendered them ineligible for federal recognition through the BIA as a continuous, autonomous Indian community today. In contrast, the Seneca Nation and the Tonawanda Band of Senecas are both federally acknowledged by the US

government. Although the responses of the Seneca Nation, the Tonawanda Band of Senecas, and the Brothertown Indian Nation to the 1838 and 1842 Treaties of Buffalo Creek were successful in protecting the tribes from forced relocation, their divergent outcomes for tribes' political status reflect the persistent, insidious effects of Removal Era policy and termination as a practice, whether or not it occurred during the Termination Era. Despite the blatantly corrupt and fraudulent nature of the Treaties of Buffalo Creek, and the tribes' creative and multi-faceted forms of resistance to removal, the specter of the Brothertowns' termination has thwarted their efforts to reestablish their political status as an Indian tribe acknowledged by the US government. A reexamination of the intentions of the Brothertown Indian Nation in petitioning for citizenship, and of the realities of their post-citizenship social and political community regardless of the "cease and determine" language of the 1839 Act, could produce a more sensitive and accurate interpretation of the collective identity of the Brothertown then and thereafter.

Rather than taking up this task, the OFA's Proposed Finding appears to accept Brothertown termination at face value, and interprets the tribe's lack of visibility from 1855-1981 as their non-existence as a tribe. The Proposed Finding's "Overview of the Petitioner," a description of Brothertown history, ends with the statement, "Their petition was granted by the Act of 1839, and they divided their reservation lands among their members and became citizens."[228] That the OFA's account of Brothertown history ends with citizenship is evocative of the dichotomous historical construction of "the" US citizen and "the Indian," part of the racial ideology that tribal peoples "progress" along a teleological course towards "civilization," symbolized by the white ideals of individual property ownership and citizenship. The idea that the Brothertown ceased to

exist as tribe in 1839 is an undercurrent permeating the OFA's rulings on the first three criteria: that the group has not been continuously identified as Indian by white outsiders since 1900 or since the last unambiguous acknowledgment, and that the group has not existed as a "distinct community" and has not maintained political authority over its members since historical times. The OFA's reading of citizenship as the opposite of tribalism, in some ways reveals the Office's interpretation of the construct of a "tribe," which is necessarily although often implicitly defined by 25 C.F.R.§83.7. In the following section, I analyze the OFA's ruling focusing on the first criterion, the image of tribalism that it comprises, and the problems that lie therein for certain unrecognized tribes.

A Portrait of Tribalism

The BIA's handling of the termination question in the Brothertown case provides some important context and exposes the bureaucratic ambivalence within the BIA's treatment of tribes whose histories do not comply with their image of an Indian tribe. The Bureau's interpretation of the 1839 Act as a termination of the Brothertown Indian Nation was shocking for the tribe and controversial for others, because it constituted a reversal of the Bureau's position clearly stated in a 1993 memorandum from the Department of the Interior's Office of the Solicitor. The memorandum supported the position of the Office of the Field Solicitor in Twin Cities that the 1839 Act "did not constitute termination of the Brothertown tribe."[229] The memorandum continued, "Since we believe the Brothertown tribe was not terminated by the Act of March 3, 1839, the group calling themselves the Brothertown Indians is eligible to petition the department for federal acknowledgment as an Indian tribe pursuant to (the statutes)."[230] When the tribe received notification clarifying their eligibility, members

resumed efforts on their petition and submitted it to the OFA in 1996.[231] The ruling on criteria 83.7(g) that the 1839 Act did constitute termination therefore came as a crushing blow to the Brothertown, who had spent sixteen years pursuing acknowledgment through the OFA.[232] In reversing its stance, the OFA led the tribe to waste sixteen years, thousands of dollars, and countless volunteer hours assembling their petition, due to the Office's own bureaucratic inefficiencies and lack of consensus or clarity on the subject of the tribe's termination. According to their acknowledgment committee chairman Kathleen Brown-Pérez, had the OFA informed the Brothertown of their terminated status in 1990, the tribe would have pursued Congressional restoration of their tribal status then.[233] Instead, in addition to wasting the tribe's time and resources, the OFA's additional negative rulings on four other criteria potentially severely damaged the credibility of the case that the tribe would present to Congress, which Brown-Pérez called, "gratuitous."[234] The BIA's reversal of its own judgment, at great expense to the Brothertown, illustrates the Bureau's ambivalence when it comes to tribes whose histories appear ambiguous—that is, tribes who have historically not been highly visible as such to white society.

83.7(a)

Under criterion 83.7(a) (hereafter simply (a)), the petitioner must demonstrate that external observers have identified their group as an "American Indian entity" on a "substantially continuous basis" since 1900, or since the date of the last unambiguous federal acknowledgment of the group as a tribe. I focus my analysis of the Brothertown Proposed Finding on this criterion, because it is the site where a tribe's current visibility in the eyes of the federal government emerges as contingent upon that tribe's historical

visibility to whites and other outsiders, the limits of which were prescribed by the racial ideological construct of "the Indian." It is one criterion under which the political and economic motivations of outsiders in recognizing a tribe are overlooked, and written "observations" of Indians by whites are frequently taken for granted as "fact." Certain conditions within some tribes' histories have made them more visible to whites in the past and present, while tribes with histories like the Brothertown have suffered in the FAP. To close this chapter, I analyze parts of the Brothertown Proposed Finding and draw upon available scholarship to flesh out these ideas. Although the BIA determined that the language of the 1839 Act constituted a failure to meet criterion (g), that a tribe must not have been terminated by Congress, the Act significantly affected the tribe's historical visibility to whites after 1839, which in turn affects the tribe's ability to satisfy criteria (a), (b), and (c)—historical identification by outsiders, continuous existence as a distinct community, and continuous political influence over tribal members. I have restricted the scope of my analysis to criterion (a), because the problems of visibility inherent in (a) for the Brothertown and other tribes would also apply to their positions in regards to criteria (b) and (c). Since the criteria overlap significantly, particularly (a), (b) and (c), I focus on (a) as the most obvious site of what anthropologist Philip Laverty calls, "the bitter irony of the federal acknowledgment process."[235] Laverty describes the contradiction of criterion (a) in the context of the history of the image of "the Indian":

> When "experts" and the general public hold views crafted through the colonial experience of what constitutes Indian identity, when non-Indians partake in widespread ideologies of extinction, and when Indians hid their identity because of concrete fears of violence, mandatory criteria relating to the identification of a community as an "Indian tribe" by external sources prove patently senseless.[236]

This contradiction in criterion 83.7(a) makes more sense when one considers the BIA's conflict of interest in the FAP. Miller writes, "The BIA acknowledgment program reigns

supreme precisely because it represents the interests of recognized tribes and the general public by performing its understated function of limiting the number of groups that qualify for federal status."[237] Miller argues that the interests of recognized tribes and the Bureau converge to create recognition requirements that are extremely difficult for some tribes to meet.[238] Because increasing numbers of recognized tribes are understood to indicate a decreased pot of funding for all acknowledged tribes, it is in the interest of those tribes to limit the number of tribes that gain acknowledgment.[239] The BIA acknowledgment process is therefore designed such that it fails certain of the tribes whom it was created to serve, by putting historically less visible tribes at a disadvantage. I argue that largely due to the nature of criterion (a), the current FAP is inadequate to address the cases of tribes like the Brothertown, whose histories do not neatly map onto the historical image of "the Indian" and who experienced none of the conditions that typically have enabled tribes' recognition as such by outsiders.

Since the Brothertown were last acknowledged by the US in 1839, the tribe had to prove continuous outside identifications since that year.[240] The Proposed Finding against Brothertown acknowledgment states that external observers did identify a historical Brothertown Indian entity from 1839 to 1855. The PF states,

> Between 1855 and 1981, outside observers periodically identified a Brothertown Indian entity… However because the periodic identifications between 1855 and 1981 are separated by long periods of time in which the petitioner or its members' ancestors were not identified as an Indian entity, the petitioner does not satisfy the standard of "substantially continuous" identification…[241]

This criterion is certainly one of the most problematic of the regulations for the Brothertown Indian Nation and for most tribes seeking recognition. The "outsider identification" criterion, (a), requires the Brothertown to present written documentation

of external observers perceiving their ancestors as a tribe, in an era in which the prevailing racial ideology dictated that Indians who adopted elements of white culture were no longer "authentically" Indian. To be both seen and recorded as an Indian tribe in every decade over a 170-year span poses a major obstacle for the Brothertown, who have spoken English, practiced Christianity, farmed, and dressed similarly to whites since the tribe's formation. In determining that the Brothertown were not sufficiently identified as Indian due to the "long periods of time" between written identifications, the OFA suggests the belief that the Brothertown ceased to exist as a tribe in the periods in between recorded identification. In the context of Federal Indian policy and white supremacist attitudes stretching from colonial times into the twentieth century, the notion that the Brothertown tribe actually ceased to exist and was revived every few decades over the course of 130 years logically appears less likely than the possibility of the tribe existing throughout but operating on a less visible level at times. The logic that the only tribes whose existence can be proven are those that were documented by whites carries forward the legacy of whites as the authorities on Indian authenticity and as the arbiters of tribal status. To penalize petitioning tribes for gaps of invisibility in their history ignores the stereotypical filter through which whites saw or failed to see Indians, the power-based incentives for whites to write tribes out of existence, and federal Indian policy aimed at tribal decimation and assimilation.[242]

Several aspects of criterion (a) appear counter-intuitive in the ways that they ignore the historical realities of the social environments Native peoples navigated and further enshrine the perspectives of white colonists as "observation" (with an implied objectivity) or historical "fact." Amy Den Ouden, Jean O'Brien and Renée Ann Cramer have each shown in their respective works that from the colonial era to the present, the

recognition or non-recognition of Indians as such by white outsiders has never been the innocuous observation of the reality of Native peoples that the FAP presumes it to be. Rather, white visual assessment of Indian authenticity is a highly subjective and political act over which whites have claimed authority, and then maneuvered situationally to see or not see Indians in order to preserve their own social, political, and economic domination.[243] Within this history, it follows that certain tribes were more visible than others to white outsiders, depending on the degree to which they fulfilled white expectations of "the Indian," and where whites stood in land contests with the tribe in question.

Excerpts from the Proposed Finding against Brothertown recognition illustrate one of multiple ways the OFA used the tribe's lack of visibility to white outsiders to write a history of their non-existence from 1855-1981. In the OFA's ruling on criterion (a), the PF cites multiple pieces of historical documentation that not only fail to identify the Brothertown Indians as "contemporary Indian entity" but expressly describe Brothertown disappearance or assimilation in the familiar terms of the myth of Indian extinction. The documents that the OFA chooses to quote are whites' reiterations of the narrative of Brothertown assimilation into white culture immediately upon receiving citizenship. The OFA neglects to qualify or explain its selected quotations, leaving much of the Bureau's reasoning up to the reader's inference and suggesting that the OFA trusts the quotations to be unbiased and therefore reliable sources. The PF states:

> In a history of Wisconsin Territory published in 1885, Moses Strong described the Act of 1839 as relating to Brothertown Indians and added, "[s]ince then they have been recognized as citizens… and have become homogeneous with other inhabitants of the State." This description did not identify a contemporary Indian entity.[244]

In this excerpt, Moses Strong, a white lawyer and Speaker of the House in the Wisconsin State Assembly the 1850s, subscribed to the equation of Brothertown citizenship with the tribe's dissolution as an Indian people. The OFA's inclusion of this statement as valuable evidence against the tribe's existence exemplifies the Office's validation of the historical invisibilization of the tribe by white historians. Other white records of Brothertown history referenced in the PF echo the popular belief in Brothertown disappearance and frame their citizenship in the terms of the mythic Vanishing American. One such source is Coe Hayne's 1934 manuscript on Brothertown history, a condensed version of which was published in a religious journal.[245] The PF states,

> [Hayne] noted the passage of the Act of 1839 and concluded that "[d]uring the subsequent one hundred years they gradually lost their identity as a people." This statement declined to identify a contemporary Indian identity. The journal that published Hayne's article introduced it with the note that this was the story "of a vanished tribe of Indians."[246]

This passage is immediately followed by a discussion of another white manuscript on Brothertown history written in 1937, which sketches the history of the tribe from 1743 to 1852. Written by "local resident" Otto Heller, the manuscript does not end immediately with the Act of 1839, but again couches the tribe's history in the familiar terms of the myth of Indian extinction. The PF states,

> Heller ended his 1937 manuscript with the comment that "today all that remains of this tribe in Brothertown are eighteen souls and… in a few more years the Brothertown Indians will be but a memory." Heller's remark in 1937 is an identification of an Indian entity that was a contemporary remnant of a historical Indian tribe.[247]

The PF addresses these two documents written by admittedly "amateur historians" as concrete evidence of the Brothertowns' non-existence. The two statements above are each the last statements in the paragraphs addressing these two documents. The OFA's failure to qualify or contextualize the statements regarding the "vanishing" Brothertown

give the impression that the OFA understands these statements to speak for themselves, as objective observations that therefore serve as legitimate evidence pertinent to the Brothertown case. Hayne and Heller's accounts of Brothertown history are afforded the weight of historical fact, and are analyzed as such by the OFA. Their statements do not merely fail to identify a contemporary Indian entity, as the PF indicates, but rather expressly state that the Brothertown tribe has vanished. That their assessments of Brothertown identity and existence are part of a powerful colonial discourse of Indian extinction goes unmentioned in the PF, and their statements are readily accepted as possessing a measure of "truth." In contrast, because criterion 83.7(a) is written with an exclusive emphasis on external "identifications" of the tribe, the Brothertowns' evidence such as oral histories, ancestors' diary entries, and accounts of social and political community activities that counter the extinction claims of these manuscripts are categorized as "self-identifications" and deemed irrelevant to the criterion.[248] For tribes like the Brothertown, the inability or unwillingness of whites to recognize the continued existence of their people against the image of "the Indian" and the myth of Indian extinction, combined with the discarding of the tribe's own historical accounts as unreliable "self-identifications," renders criterion (a) extraordinarily difficult to satisfy. The FAP disregards Brothertown "self-identification" due to the tribe's presumed conflict of interest while simultaneously failing to acknowledge white interest and investment in *not* identifying the tribe as such.

As the Brothertown case demonstrates, the FAP uncritically relies on white identification and documentation as objective recordings of reality, and dismisses Indian histories maintained through oral tradition as "akin to hearsay," as historian Mark E. Miller writes.[249] "This requirement," writes Miller "…has disadvantaged many eastern

and southern groups whose avoidance strategies and lack of visibility as Indians has often left their descendents with few records confirming that outsiders saw them as Indians in the past."[250] In deeming Native oral historical records relatively unreliable sources, the OFA ensures that the tribes that were historically most visible to the federal government and white society in general will remain the most visible today, and face the fewest difficulties in demonstrating evidence for (a), as well as for (b) and (c). In that sense, the mythical image of "the Indian" is alive and well in the current FAP. By believing white vision to be unfettered by political motivations and racist rationales, the OFA continues to recognize more easily those tribes that were historically most "recognizable" to whites.[251]

Conditions of Visibility

In the context of criterion (a), the three conditions that lend a tribe visibility to whites are: location on a federally protected land-base; relatively late contact with whites; and historical relationships with Euro-American governments. Miller writes that a bias favoring tribes with such characteristics exists because "it is these very relationships and the structures they generate that allow many modern groups to be historically, genetically, and politically visible as 'tribes.'"[252] Writings by Mark Miller, Ann McCulloch and David Wilkins, James Clifford, and Philip Laverty have touched on different facets of the idea that for this reason, the image of an Indian tribe cast by the current acknowledgment criteria is based upon perceptions of "reservation tribes" of the western United States.[253] McCulloch and Wilkins argue, "The ability of an Indian tribe to become and remain a federally recognized tribe is dependent on how well that tribe 'fits' the social construction of 'Indian tribe' as perceived by federal officials."[254] The authors

assert that the social construction of the Aboriginal Indian has benefited western tribes more than eastern tribes. This imbalance is rooted in eastern tribes' much earlier contact with the destructive forces of Euro-American colonialism and their comparative lack of intergovernmental relationships and of a federally protected land base. Due to a higher degree of sustained contact with non-Indian populations, eastern tribes retain fewer traits in common with the mythic image of the "Indian" or the "tribe."[255] McCulloch and Wilkins write,

> Many eastern Indian communities were biologically, materially, and culturally transformed by British and American experience to the point where they no longer fit the "image" of the "Indian"—that is, the western Indian… Hence, eastern tribes have often had a difficult time convincing the federal government (and their neighbors) that they remained "indigenous" and were entitled to comparable recognition and benefits [as western Indians].[256]

Mark Miller reiterates this point, stating,

> [A]cknowledgment criteria are patterned upon, and judged against, existing reservation tribes. To gain status, petitioners are forced to exhibit at least some characteristics of recognized tribes or nations such as having some manner of formal or informal territories, laws, and sanctions… attributes that many non-reservation peoples simply could not maintain in light of the United States' longtime goal of obliterating these very attributes.[257]

Miller focuses on the problem of visibility as "authentic" Indians for eastern tribes, due to their very early contact with whites, their general lack of federally protected reservation lands, and their lack of historical relationships with the US federal government and European governments. He describes the struggles of Indian peoples in Michigan, the South, and the eastern United States who experience the imposition of colonial forces long before US independence, and felt "the ensuing demographic collapse, political disintegration, forced acculturation, and loss of tribal lands."[258] Because colonial-tribal contact occurred so early in these places, federal Indian policy generally overlooked these peoples and focused on tribes of the western United States, who

acquired federally-protected lands when forcibly relocated there or when pushed onto reservations due to white westward expansion.[259]

Eastern Native peoples met the devastating effects of centuries of colonial imposition and violence with diverse and creative solutions to maintaining community and Indian identity. The results of these strategies of course did not produce the kinds of visible indicators of Indianness that whites expected and still expect to see in "authentic" Indian peoples. As James Clifford writes, "the boundaries of the community were permeable. There was intermarriage and routine migration in and out of the tribal center… Aboriginal languages were much diminished… Religious life was diverse—sometimes Christian (with a distinctive twist)."[260] These phenomena did not signify a loss or "dilution" of Indian identity, as US racial ideology holds, but rather indicate Native peoples' adaptations to the devastation wrought by Euro-American colonialism in ways that allowed them to maintain their Indian identity, as they defined it for themselves.

Scholars writing on the BIA acknowledgment process have agreed that tribes that have historically and currently displayed visible traits that whites have identified with Indianness are less likely to face difficulties in the FAP than tribes like the Brothertown.[261] The acknowledgment criteria themselves do not evaluate tribal status based on those visible traits but upon the conditions within a community that those traits are understood to indicate. Miller writes, "This emphasis on cultural survival stems from the fact that it was once widely believed that cultures were handed down, largely unchanged, by societies from the primordial past."[262] According to this logic, he writes, "groups that still possessed indigenous traits were logically still Indian tribes."[263] Retention of a Native language, for example, is considered to be one of the clearest

indicators of continuing existence of social ties and a "distinct community," the second acknowledgment criterion.[264] The logic of reading cultural elements as proof of tribal identity falls in line with the image of "authentic" Indianness as existing only before Euro-American contact, unchanging and located firmly in the past. Jean O'Brien writes, "[H]ewing too closely to a project of identifying 'cultural retentions' carries the danger of insisting on cultural stasis that is so centrally embedded in the New England project of modernity."[265] The common sense association of visible cultural traits with historical continuity as a collective demonstrates one way in which the supposedly balanced scales of the acknowledgment criteria are tipped in favor of tribes that have been isolated or insulated from non-Indian communities enough to preserve those elements of their indigenous culture. Tribes like the Brothertown, whose culture is grounded in practices typically identified more with the image of "the" US citizen rather than "the Indian" (such as Christianity) are at an immediate disadvantage in the FAP in that they must demonstrate both their historical communal existence and their continuous distinctiveness from white society, which are both inferred and generally unquestioned by outsiders in the case of Native-language speakers. The conditions that enable the retention of a Native language—long-term community cohesion in a particular geographic location (on a land-base), and relatively late or limited contact with non-Indian communities—are also the conditions that increase a tribe's visibility to white society, because they allow for such recognizable "cultural retentions."

The problems that the Brothertown Indian Nation has encountered throughout their thirty-year acknowledgment struggle are inherent to the frameworks to which all tribes must conform in order to be seen and recognized. The creators of the federal acknowledgment criteria intended them to be a template that could stretch to encompass

the particular histories and cultures of any of the myriad and diverse indigenous peoples in what is now the United States. The case of the Brothertown, however, illustrates how the requirement of historical visibility to whites proves to be a fatal flaw in the FAP's ability to address the histories of certain tribes. Historically and currently, tribes that experienced the conditions of early contact with whites, lack of a federally-protected land base, and the lack of relationships with Euro-American governments have not conformed to non-Indians' racial and cultural expectations of Indian tribes, which are rooted the persistent image of "the Indian," and the generalization of certain characteristics of western, reservation-based tribes to all Native peoples. Thus, although Brothertown citizenship originated as a successful strategic move to resist colonial domination, the way whites saw it continues to prevail; in 2009, the OFA's ruling reinforced the interpretation of the Brothertown case as a "success story" not of creative indigenous survival tactics, but of Indian assimilation and ultimate disappearance. As long as the FAP relies on whites' "identifications" of Indians as such as objective "fact," while overlooking the political and economic motivations and incentives behind white perceptions of tribal existence and "authenticity," the process will continue to perpetuate whites' historical selective blindness towards certain tribes.

Although the acknowledgment criteria were created as part of the BIA process, they have had a strong influence on the ways that Indian tribal identity is viewed and debated in legislative acknowledgment cases as well. The following chapter explores the influence of the criteria and the ideological paradigms of tribal identity that they uphold on the Congressional recognition case of the Lumbee Tribe of North Carolina. As a site in which official and popular notions of tribal identity are invoked simultaneously, the Congressional debates on Lumbee recognition reveal the ways in which the tribe's

historical invisibility in the terms of both of these definitions has contributed to their inability to achieve recognition today.

3

Threads of Discourse and Lines of Descent: Hearings on Lumbee Recognition

On March 18, 2009, representatives of the Lumbee Tribe of North Carolina appeared before the US House Committee on Natural Resources for a legislative hearing on H.R. 31, an Act to establish federal acknowledgment of the tribe.[266] At the time, the hearing was the culmination of 121 years of the Lumbee Tribe's persistent efforts towards federal acknowledgment through Congressional action. Lumbee Tribal Chairman Jimmy Goins testified before the Committee, "I am the great, great grandson of Solomon Oxendine, who along with 44 other tribal leaders petitioned the Federal Government for recognition in 1888. Today I come before you once again requesting federal recognition for my people."[267] In 1888, Chairman Goins' great-great grandfather cosigned on a petition to Congress requesting federal acknowledgment in the form of funding from the Federal Indian Education Grant, for an Indian school recently created but underfunded by the State of North Carolina. As tribal attorney Arlinda Locklear recounted at the hearing on H.R. 31, the 1888 petition was deferred to the Department of the Interior, where it was dismissed based on a shortage of funds for tribes already acknowledged.[268] The failure of that petition led the Lumbee to seek acknowledgment directly from Congress through a series of about a dozen bills introduced between 1899 and 1936.[269] In 1952, the tribe decided under the leadership of D.F. Lowry to adopt the name "Lumbee," and the State of North Carolina legally changed the name of the tribe to "Lumbee" from "Cherokee Indians of Robeson County" the following year. In 1955,

a bill identical to the NC State legislation recognizing the Lumbee was introduced in the US House of Representatives.[270] Facing opposition from the Department of the Interior, the bill was revised in the Senate to include a clause terminating the federal-tribal relationship with the Lumbee. This clause reads:

> Nothing in this Act shall make such Indians eligible for any services performed by the United States for Indians because of their status as Indians, and none of the statutes of the United States which affect Indians because of their status as Indian shall be applicable to the Lumbee Indians.[271]

Although the original intention of the 1956 "Lumbee Act" was to federally acknowledge the Lumbee as an Indian tribe, the Act that passed terminated the federal government's relationship with the tribe, due to this clause.[272] Passed at the height of the termination era, the 1956 "Lumbee Act" and its potential amendments became a major focal point of debates over Lumbee recognition from then on. Although debate continues over whether the language of the 1956 Lumbee Act in part constituted acknowledgment that the Lumbee existed as an Indian tribe, supporters and opponents of Lumbee recognition generally agree that the Lumbee Act effectively acknowledged the name of the group as "Lumbee" and that the Lumbee were Indians.[273] Because the Lumbee Act terminated any relationship of the federal government to the tribe, it rendered the Lumbee ineligible for the administrative Federal Acknowledgment Process established in 25 C.F.R§83 in 1978. After submitting a petition to the BAR in 1980 and having their ineligibility confirmed, the Lumbee resumed petitioning for acknowledgment through Congress, which they continue to do to this day. H.R. 31, "The Lumbee Recognition Act" of 2009 was the most recent bill of its kind to pass the House and be placed on the Senate calendar, the House Interior Committee hearing for which was the sixth legislative hearing on a Lumbee recognition bill in six years.[274] As the span of the Lumbee quest for

recognition approaches a century and a quarter, an examination of the bases for the opposition of the tribe's acknowledgment begins to clarify the multiplicity of factors contributing to the failure of the Lumbees' highly persistent and thorough petitions for federal acknowledgment.

The history of the interchange between the Congress and the Department of the Interior on Lumbee recognition in the twentieth century reveals the powerful influence of the Department in Congressional acknowledgment cases, and the reluctance or inability of either body to address the cases of the tribes with histories that contradict their constructions of tribalism. In this chapter, I analyze the evolving discourse of the Eastern Band of Cherokees and Interior Department officials in their oppositions to Lumbee acknowledgment from the first hearing after the establishment of the FAP, in 1989, to more recent hearings in 2004, 2006 and 2009. The opposing arguments of these entities both explicitly and implicitly prescribe a particular model of tribalism and Indianness for petitioning groups, to which the Lumbee do not unambiguously comply. The Department's and the Eastern Band's arguments before Congress reveal the ways in which the acknowledgment criteria permeate Congressional discussions of federal recognition and intermingle with the political concerns of individual representatives acting in their own and their constituents' interests. As the Lumbee hearings illustrate, the invocation of the acknowledgment criteria by DOI bureaucrats, members of Congress, and members of other tribes is frequently accompanied by the implicit suggestion that the Lumbee would not be able to meet the criteria, and therefore serves to cast doubt upon Lumbee Indianness and tribal identity. The DOI's and the Eastern Band's attempts to undermine the authenticity of Lumbee Indian and tribal identity are

tied up in the images of tribalism that the acknowledgment criteria perpetuate and in the political and economic interests of both parties.

The Lumbee Tribe of North Carolina

The Lumbee are a state-recognized tribe of around 55,000, making them the largest tribe East of the Mississippi River.[275] The name "Lumbee" derives from the Lumber River, which winds through the tribe's homeland of Robeson County in southern North Carolina. The Lumbee are an amalgamated tribe formed, like the Brothertown Indian Nation, by "remnant people" from East coast tribes that had been devastated by the warfare and disease brought by early colonial contact. Due to the conditions of the place and era in which Lumbee ancestors came together as a people, the present-day Lumbee tribe lacks some of the most visible markers of Indianness in governmental and popular imagination, such as a Native language, or distinctly Native religious rituals or artistic traditions.[276] The Lumbee have spoken English and practiced Christianity for centuries, have mixed Native American, African-American, and European-American racial ancestry (as do most eastern tribes), and currently live, work, and dress in ways similar to their non-Native neighbors.[277] In her important anthropological text on Lumbee identity formation, *The Lumbee Problem: The Making of an American Indian people*, Karen Blu suggests that multiple tribal remnants probably consolidated in Robeson County in the early to mid-1700s, when that area of North Carolina was the subject of a border dispute with South Carolina, in which both colonies claimed the area and thus neither exercised control over it.[278] Blu speculates that the area, lacking a strong colonial presence and governance, likely served as "an ideal refuge for those seeking to avoid all-White settlements," and the remnant tribal groups that were drawn there subsequently intermarried and formed a cohesive people.[279] Lumbee scholar

Malinda Maynor Lowery writes in her book *Lumbee Indians in the Jim Crow South*, "The Lumbee… are the offspring of nearly 300 years of migration and cultural exchange between the varied Indigenous communities that inhabited Virginia, North Carolina, and South Carolina."[280] Scholars Karen Blu, Malinda Maynor Lowery, and Anne McCulloch and David E. Wilkins have suggested that the Lumbee descend from remnants of multiple Southeastern Indian tribes, including but not limited to the Cheraw, Tuscarora, Hatteras and Saponi tribes.[281] McCulloch and Wilkins write that these tribal remnant groups "from the 1780s through the 1840s worked their way into Robeson County where they intermarried and gradually developed a distinctive tribal identity."[282] As with other amalgamated tribes, the lack of a Native language can be attributed to the compounding factors of the often intentional destruction of Native cultural sovereignty that resulted from European colonization, and the probability that English served as a *lingua franca* for Native people that had come together from different linguistic groups.[283]

The interconnected swamps around the Lumber River afforded the ancestors of the Lumbee relative geographical isolation and protection from White colonial encroachments until the 1830s, leaving a relatively sparse record of historical documentations of the Robeson County Indian community in the eighteenth century.[284] When there was contact with outsiders, as Lowery notes, it was common during the colonial period for Indian communities to incorporate members of other racial or ethnic groups through marriage or other rituals.[285] Lowery writes, "The area's cultural and linguistic diversity and the nature of Indian political and social organization thus make it difficult for historians to define *one* particular group from which the present-day Lumbee and Tuscarora descend."[286] These factors, combined with negotiations between Indian and non-Indian political interests, would lead the State to ascribe five different tribal

names and corresponding descent theories to the Indians of Robeson County throughout the late nineteenth and twentieth centuries. The changing names of the Robeson County Indians obscure the consistency with which the tribe now called the Lumbee has lived and practiced their sovereignty as a distinct indigenous people.

The Indian identity of the Lumbee Tribe therefore manifests in less obvious ways than through visibly Native cultural elements. As Blu, Lowery and anthropologist Jack Campisi have written, Lumbee Indian identity is grounded in genealogical ties to "the original 22" Native ancestors from which all tribal members descend; strong kinship ties among members of the tribe; a profound connection to the land of Robeson County, where their people have always resided; continuous cultivation of Lumbee schools and church communities; and certain valued character traits such as "progressiveness," "pride," and "meanness."[287] Campisi, who conducted fieldwork with the Lumbee Tribe from 1982 to 1988, testified before Congress in 1989 on Lumbee tribal identity:

> The Lumbees represent an intense, close-knit, well-organized and sometimes argumentative community… They are linked together by an incredible system of genealogical ties, family ties…They hold separate from other groups. There are 112 or so Lumbee churches with Lumbee ministers. Church is a significant aspect of their cultural heritage. They have an inordinate feeling toward education…and they have fought to maintain their school system… No one who looks at the Lumbees can deny that they are a community… No one can deny they are a tribe.[288]

While Campisi's testimony is supported by abundant documentation of the Lumbee Tribe's political and social activity as a distinct community, the tribe has experienced great difficulties being seen as a distinct Indian entity descended from one historical tribe. Similarly to other eastern tribes such as the Golden Hill Paugussetts, the primary difficulty that the Lumbee have faced in seeking recognition is that "they had to 'look

Indian'—not as individuals but as [a community]—to the society at large, and they had to do so by the standards and images and stereotypes of the larger society."[289] To appear authentically "Indian" to members of Congress, DOI officials, members of other tribes, and the general public requires conformity with both governmental and popular definitions of Indianness, which both have relied heavily on cultural indicators and unambiguous ancestry traceable to one historical tribe. The requirement that present-day tribes must be able to demonstrate descent from a historical tribe has an implicit racial element, as conversations on genealogical descent, intermarriage, and Indian authenticity cannot escape the discourse of racial "purity" and degeneration shaping the racial formation of Native Americans. In Congressional hearings and in public forums, the Lumbee recognition case has been a site of overlap of governmental and popular discourses of Indian authenticity in terms of genealogical descent from a historic tribe. The genealogical ambiguity stemming from Lumbee affiliation with various tribes over time has been a persistent focus of Congressional, administrative, and tribal opposition to Lumbee recognition. Combined with the Lumbees' lack of visibly "Indian" cultural indicators, this point of contention has been interpreted by commentators in public forums as evidence that the Lumbee are racially non-Indian and therefore a fraudulent tribe. As political scientists McCulloch and Wilkins write:

> [T]he major argument used by Lumbee opponents is their contention that the Lumbee "lack" certain "genetic" and "cultural" features which other recognized tribes are said to possess… [M]any local whites and some other tribes express the opinion that Lumbees are not "real" Indians. In other words, they are perceived as not being a "pure genetic race, they do not have a distinctive aboriginal language, and they lack a 'distinct tribal religion.'" This is a perception that dates back to the nineteenth century and continues today even when contradicted by solid historical, anthropological, and political evidence.[290]

In " 'Constructing' Nations Within States: The Quest for Federal Recognition by the Catawba and Lumbee Tribes," McCulloch and Wilkins argue that the ability of a tribe meets the image of the "mythic, aboriginal 'Indian'" significantly affects their success or failure in gaining federal recognition. The arguments presented in legislative hearings against Lumbee recognition indicate one such way that attacks on Lumbee authenticity based on outsiders' images of Indianness have monopolized the debate on Lumbee recognition. Even as Lumbee opponents' arguments have changed over the course of two decades, the undermining of Lumbee Indian identity has dominated the conversation on their acknowledgment, and therefore affected their lack of recognition today. The hearings reveal the overlaps in governmental and popular definitions of Indianness, the underlying logics informing those standards, and their limitations for addressing tribes with alternative histories.

Names

> Let me put to rest some myths about our people, myths that some use to oppose our recognition effort. Let's start with the State of North Carolina recognized us in 1885, but under different names. We did not choose those names. Let me repeat that. We did not choose those names. The State legislature of North Carolina chose those names. The only name we ever chose was Lumbee, derived from the name of the river where we always lived, which is not uncommon among Indian people. But whatever the name, we have always been there and are the same people today. – James Ernest Goins[291]

In his testimony before the United States House of Representatives in 1989, Lumbee Tribal Chairman Jimmy Goins responded to the skepticism expressed that day in the testimonies of BIA bureaucrats and Eastern Band of Cherokee leaders and the about the Indian identity of his tribe. The "myth" that the Lumbee do not have a sufficient genealogical link to an historical tribe derives from the fact, which Goins addresses, that the Lumbee have be designated by the State of North Carolina as

"Croatan," "Cherokee," "Indians of Robeson County," "Cheraw" and "Siouan" in different pieces of legislation throughout the twentieth century.[292] In the 1989 hearing on H.R. 2335, one of the earliest Lumbee recognition bills introduced after the tribe had confirmed its ineligibility for the administrative FAP, the issue of the Lumbees' changing name was the foundation of the opposition of both the BIA and the Eastern Band of Cherokees. While these oppositional forces frame the Lumbees' shifting tribal names and affiliations as indicative of their inauthenticity and lack of tribal ancestry, Lowery contends that each name was a "result of strategic choices about how to represent Indian identity and gain affirmation of it."[293] Operating under the white racial dictatorship of the Jim Crow South, the Lumbee allowed themselves to be legally associated with different tribes at different times in order to maintain visibility as Indians to whites in power. The Lumbee negotiated each decision to legally change their name and/or tribal affiliation, in attempts to appeal to white lawmakers' ideas about who the Lumbee were without compromising the Lumbees' ideas about their own identity. Each name was an effort to make the tribe visible in the terms of powerful whites, to protect the tribe's rights to important resources and secure their capacity to exercise tribal sovereignty. Remaining visible as Indians was particularly important in the context of Lumbee schools, over which the tribe maintained its authority through segregation laws. Segregation was a means for both Indians and whites to protect against intrusion and threats from outsiders, Lowery writes, and "Indians embraced it as a tool to promote their interests," in regards to their schools and other institutions.[294] By asserting their difference from whites and blacks, Indians in Robeson County received a state-sponsored school over which it would exercise significant control.

In 1885, the State of North Carolina formally recognized Lumbee ancestors as an Indian tribe under the name, "Croatan Indians," in an Act that also established a separate Indian school system for the tribe and authorized its funding.[295] The legislation, the name "Croatan," and tribal origin theory it reflects were the results of successful lobbying by Conservative Democrat legislator Hamilton McMillan, who represented Robeson County.[296] McMillan saw a political opportunity in the State's acknowledgment of the Indians in Robeson County, as securing the Indian vote for the Democratic party in exchange for educational funding would divide the Indian and black coalition support for the Republican party, which had formed under the leadership of Lumbee cultural hero Henry Berry Lowry in the aftermath of the Civil War.[297] McMillan stood to gain politically from supporting separate Indian schools without challenging the white supremacist political agenda of the Democratic Party. Robeson County Indians supported the legislation because it provided much needed educational resources and allowed the tribe to exercise a modicum of sovereignty through choosing their own teachers and Indian-only educational committees.[298] Thus, Indian support for this segregationist legislation was grounded in the tribe's own interests in securing educational resources and increasing tribal autonomy.

Additionally, as Lowery writes, "Indians welcomed this segregation act because it affirmed their identity to non-Indians."[299] Robeson County Indians were well aware that the power of self-determination that they sought, in the context of a white supremacist social hierarchy and the rise of Jim Crow laws, was contingent upon their visibility as a distinct Indian people to whites in power. In this respect, Robeson County Indians benefited from the "Croatan" origin story promoted by Hamilton McMillan, which traced the tribe's ancestry to unions between the first English colonists in the State, "the

Lost Colony," and Roanoke and Hatteras Indians of Eastern North Carolina who gave them aid.[300] "Croatan" derived from the placename "Croatoan," the supposed destination of the colonists when they abandoned their settlement on Roanoke Island in the late 1580s.[301] Hamilton McMillan, as an amateur historian, had conducted some research through interviews with Robeson County Indians, from which he formulated this theory of their descent.[302] The Croatan name benefited Robeson County Indians in that it both allowed white lawmakers to view the tribe as a distinct Indian people with sovereign rights, and by connecting them to a "noble" lineage of white ancestry. Lowery writes, "Hidden behind the name 'Croatan' was legend of white ancestry, white sacrifice and white heroism. For a society obsessed with race… emphasizing the tribe's white ancestry gained much-needed support for separate schools."[303] Thus, adopting the name "Croatan" and the tribal lineage it suggested was a strategy to gain visibility to State lawmakers, and along with it, financial resources and some autonomy over their educational system. Again largely through the lobbying of Hamilton McMillan, the State answered the Croatan Indians' requests for the establishment of an Indian Normal School in 1887. Created to train Indian teachers, the Normal School was severely underfunded, which led the tribe to seek federal acknowledgment for the first time along with funding for the school in 1888.[304] When that petition failed, the tribe continued to seek federal acknowledgment through bills introduced to Congress in 1899, 1910, and 1911.[305]

In the decades following State recognition, in which the passage of Jim Crow laws increasingly entrenched racial segregation and white social and political domination, local whites shortened "Croatan" into the derogatory term "Cro."[306] This term associated Robeson County Indians with the character "Jim Crow," a popular derogatory caricature

of blacks, which reflected whites' "consistent, historical tendency to erase Indian identity and [their attempts] to classify Indians as blacks socially and politically."[307] "In response," Lowery writes, "Indians petitioned to have their legal name changed to 'Indians of Robeson County' in 1911 and 'Cherokee Indians of Robeson County' in 1913," accepting the latter name change for reasons similar to those behind their acceptance of the Croatan name.[308] The adoption of the names, "Indians of Robeson County" and shortly thereafter, "Cherokee Indians of Robeson County," asserted the tribe's Indian identity and sovereignty against whites' treatment of tribal members as blacks or "melungeons," a pejorative term for communities of mixed white, black, and Native ancestry.

The adoption of the name "Cherokee" resulted from another descent theory, devised and promoted by Democratic Senator Angus W. McLean of Robeson County, who would serve one term as Governor of North Carolina in 1925.[309] McLean believed that the Robeson County Indians descended from Cherokee Indians who had refused to remove westward and intermarried with Indians in the Robeson County area, a theory that was supported by many Indians including leaders such as Reverend D.F. Lowry, a "political protégé of McLean."[310] Though the Cherokee name change passed through the North Carolina legislature, the Cherokee descent theory lacked sufficient evidentiary support to secure a passage of a similar recognition bill introduced into Congress, and was consistently opposed by the Eastern Band of Cherokee Indians, the only federally recognized tribe in the state.[311] The Cherokee affiliation theory's lack of credibility in the eyes of the Eastern Band and non-Indians cast a shadow of doubt over Robeson County Indians' identity claims in general. After claiming Cherokee ancestry that was not recognized by outsiders, "people 'did not believe anything' that Robeson County Indians

said about their Indian identity."[312] Lowery writes, "[D. F.] Lowry found that Indians' own markers of identity were insufficient to explain their heritage to outsiders who depended on tribal names to mark authenticity." In the early 1950s, Robeson County Indians therefore mounted a campaign to adopt a tribal name that expressed their consistent existence as an Indian people on their land but avoided affiliation with one historic tribe, since no historical tribal name seemed to encompass the community's mixed tribal ancestry.[313] D. F. Lowry led the movement to adopt the name "Lumbee," which resulted in State recognition as the "Lumbee Indians of North Carolina," in 1953 and the passage of the almost identical "Lumbee Act" by Congress in 1956.[314] The tribe retained the "Cherokee" designation in North Carolina law until the 1953 adoption of the Lumbee name.

Anthropologists and Special Indian Agents from the Department of the Interior conducted multiple studies on the tribal characteristics and rights of the Indians of Robeson County in the early twentieth century, at the request of Congress.[315] BIA Indian Agent O.M. McPherson traveled to Robeson County to conduct research, and produced a 252-page report on the tribal history of the Indians of Robeson County in 1915, but the Congress neglected to act on the findings of the report. After two unsuccessful federal acknowledgment bills under the tribal name "Cherokee Indians of Robeson County" in 1924 and 1933, anthropologist Dr. John P. Swanton, a Bureau of American Ethnology specialist in Southeastern Indians, conducted the most thorough study that had yet been completed on the Robeson County Indians.[316] Based on a variety of historical sources including colonial records, tribal genealogies, and oral histories, Swanton discounted the Croatan and Cherokee descent theories as unsupported by historical evidence. He believed the tribe's ancestry was primarily traceable to the

Cheraw and Keyauwee, two Siouan-speaking tribes that had settled in the area around Drowning Creek (now called the Lumber River).[317] Swanton's theory was based in large part upon the assumption that the most likely ancestors of the Robeson County Indians would have been the Indians historically located in the same area.[318] Robeson County Indians also shared family names with members of the Cheraw tribe, including Locklear, Chavis, and Groom, among others, which represent several surnames of major kinship networks of the present-day Lumbee tribe.[319] Based on his conclusions, Swanton suggested the tribe be recognized as the "Siouan Indians of the Lumber River," but the DOI again objected to acknowledgment of the tribe due to the high cost of providing them with federal services.[320]

Perhaps the strongest evidence supporting the Cheraw descent theory is the consistent presence of the four core Lumbee family names—Locklear, Lowry, Oxendine, and Chavis—recorded in Robeson County on every federal census dating to 1790, as well as in one individual's account of a civil disturbance in 1773, just two years after the last recorded reference to the Cheraw settlement there.[321] These names represent the extensive kinship networks that still form the foundations of the Lumbee community. While family names are the clearest indicator of the connection between the Lumbee and an ancestral historical tribe, the various names and descent theories that Robeson County Indians were ascribed in State law since 1885 have incited doubt about the Lumbees' Indian identity, and have been used to justify opposition to their Congressional acknowledgment. A deeper examination of the repeated changes to the Lumbee tribal name in state law reveals that they were strategic attempts to gain affirmation of the tribe's Indian identity and attendant resources from white lawmakers in a social climate of racial segregation.[322] The factionalism that occurred among

Robeson County Indians around names, origin stories, and ways of defining Indian identity were also strategic reactions to outsiders' impositions of racial and political identity categories onto their people. Lowery argues, "Names and factions emerged as responses to specific sets of political circumstances put forth by Congress and the Office of Indian Affairs… [who] disagreed about what constituted Indian identity."[323] Today, the name changes sharply contrast with an image of tribalism codified in the federal acknowledgment criteria that associates Native-language tribal names with "cultural retention" and authentic identity without acknowledging the role of whites in creating these names. In the context of this construction and the BIA's consideration of gaps in documentation as periods of tribal non-existence, opponents to Lumbee recognition understand the tribe's changing names and origin theories as indicators of a lack of any significant tribal ancestry, and therefore of a fraudulent Indian identity. Despite the continual historical affirmation of Robeson County Indians' Indian identity by anthropologists, the NC State legislature, and DOI officials, the Lumbees' changing name and relative paucity of documentation of their tribal origins have created problems of visibility for the tribe in their ongoing recognition efforts. The Lumbees' consistent collective identity as an Indian people despite their multiple legal names and contested origin stories over the years defies the expectations of "continuous" tribal existence codified in the BIA acknowledgment criteria, which are contingent upon visibility to outsiders.

83.7(e) and the Opposition of the Eastern Band of Cherokee Indians

The Eastern Band of Cherokee Indians in North Carolina remains the only federally recognized tribe in the State, and has unwaveringly and vocally opposed

Congressional acknowledgment of the Lumbees since the State recognized Lumbee ancestors as the "Cherokee Indians of Robeson County" in 1913.[324] Principal Chiefs of the Eastern Band have voiced their tribe's opposition in testimonies and statements before in House and Senate committee hearings on the various Lumbee recognition bills introduced in both houses since 1989.[325] The Eastern Band of Cherokees are based in western North Carolina and descend from Cherokees who avoided the forced removal of most of their tribe to Oklahoma in 1838, on the 1,200-mile forced march today known as the "Trail of Tears."[326] The Eastern Band of Cherokees strongly objected to 1913 legal designation of Indians in Robeson County as "Cherokee" and has since consistently opposed Lumbee acknowledgment due to their economic conflict of interest and the Lumbees' past Cherokee descent theory. Principal Chief Michell Hicks called this link "questionable at best," and drew a connection between the Lumbee and the many other groups petitioning for recognition that fraudulently claim to descend from the Cherokee.[327] Although the focal points of the Eastern Band's stated opposition to Lumbee recognition have shifted slightly from 1989 to 2009, the tribe has relied most heavily on the argument that the Lumbees' tribal name changes and affiliations over time indicate a lack of any tribal ancestry. In a 2009 legislative hearing on the most recent Lumbee recognition bill, H.R. 31, Principal Chief Michell Hicks' statement suggested that the "uncertain background" of the Lumbee tribe was the reason that they had petitioned for recognition with four different descent theories. Hicks continues:

> The cultural and political integrity of the Eastern Band and other tribes with living tribal languages and longstanding government-to-government relations with the United States is undermined when Congress acts arbitrarily in federal acknowledgment matters, allowing politics and emotion to drive decision making, rather than facts about tribal identity. Eastern Cherokee leaders have raised these identity concerns about the Lumbee since at least 1910, when the Lumbees first claimed a Cherokee identity.[328]

In this statement, Hicks identifies the primary concern of the Eastern Cherokee with respect to Lumbee recognition attempts since 1910 to be their skepticism regarding the tribe's Indian ancestry. Hicks casts the Lumbee as a threat to the cultural survival and the integrity of sovereignty of the tribes he deems authentically Indian, in contrast with the Lumbee—those tribes with a living language, a cultural criterion, and a history of federal-tribal relations, a political criterion. Lumbee claims to Indian identity have been deemed fraudulent and offensive by the Eastern Cherokee, because the Lumbee do not fit the image of Indianness supported by the tribe and the federal government, a definition that can be gleaned from the kind of argument the tribe puts forth regarding Lumbee identity claims.

From 1989 to 2009, the foundation of the Eastern Band of Cherokees' statements opposing Lumbee recognition transformed from a legislation-based argument about the tribe's political status towards intensified accusations of a fraudulent Indian identity, based on the notion that "the Lumbee have self-identified as four different tribes," and on their lack of visible cultural traits.[329] Even in 1989, however, the Eastern Cherokees' arguments were based on the two facts that the Lumbee were known under several different tribal names and affiliations in State law, and that the tribe has been repeatedly denied federal recognition under these names. Because the tribe cites these facts as evidence without further interpretation or analysis thereof, they are repeatedly presented in the hearings as self-evident indicators of the illegitimacy of Lumbee Indian identity. The representation of the Lumbees' multiple legal names as inherently exposing the tribe's "tenuous" claims to any of those tribal affiliations reveals important assumptions within the Eastern Cherokees' definition of authentic Indian identity. The Eastern Cherokees' construction of tribalism includes a continuous Native-language

tribal name, unambiguous and traceable descent from a single tribe, visible cultural traits such as a living language, and a treaty-making history with the US. This picture disregards the specific and complex historical conditions that led the Lumbees to change their name as attempts, as an amalgamated, Christianized, English-speaking tribe, to remain visible an Indian people to white lawmakers in the segregated South. In the context of the black-white racial binary that dominated Southern race relations, the Lumbee had to creatively appeal to white lawmakers' perceptions and political interests to appear to outsiders as racially and socially distinct from both groups. The images of Indianness against which the Eastern Band measures Lumbee identity are based upon characteristics they believe comprise their own Indian identity and those of many other reservation-based tribes, but which fail to account for the particular historical conditions through which the Lumbee tribe formed and survived. The undermining of Lumbee Indian identity claims, which distract from Eastern Band's and the BIA's economic conflict of interest in Lumbee recognition, evokes a long history of governmental and civilian racial projects to erase Indians' identities and histories as such to destabilize tribal claims to contested land and resources.[330]

Although the emphasis of the Eastern Cherokees' opposition to Lumbee recognition shifted over the last two decades, the Lumbees' multiple names served as an unexplained evidentiary point throughout. In a 1989 hearing before the House Committee on Interior and Insular Affairs on H.R. 2335, the first of many Lumbee recognition bills after the establishment of the BIA FAP, representatives of the Eastern Band testified and presented a written statement opposing the bill. About half of the tribe's statement focuses on past state and federal legislation pertaining to the Lumbee, and makes the argument that Congress had no intention of acknowledging the Lumbee

with the passage of the 1956 Lumbee Act. The Eastern Band's statement reads, "No federal or state legislation has extended any recognition to the Lumbee Indians of North Carolina as an Indian tribe enjoying a government-to-government relationship with the United States. In fact, past actions of Congress more specifically resembled non-recognition than recognition."[331] Immediately following the assertion of this position, the tribe's statement reads, "The Lumbee Indians of North Carolina were not known by that name until 1953… Prior to 1953 these Indian people had been officially known and designated under several other names, including Croatan Indians, Indians of Robeson County and Cherokee Indians of Robeson County."[332] The statement then notes that the State of North Carolina has also "designated and officially recognized" other tribes using the same language.[333] Presumably, the Eastern Cherokees suggest that the Lumbees' changing names indicate the lack of a history of US-Lumbee relations, and that state recognition does not necessarily justify federal recognition, but Taylor does not elaborate on this point. Without any contextualizing information, Taylor's statements that the Lumbee claimed multiple names and adopted their current name relatively recently can be read as facts intended to speak for themselves, as evidence of the tribe's inconsistent self-identification and therefore illegitimacy. In neglecting to provide any context or analysis regarding the tribe's different names, Taylor allows for the interpretation of the Lumbees' changing names as minimizing the relevance of state recognition to federal recognition, and/or as casting doubt on the tribe's identity claims. The latter interpretation relies on an underlying construction of an Indian tribe as possessing a fixed Native-language name for themselves as a people, and an assumption that the survival or loss of a tribal name is literally indicative of the continuous or discontinuous existence of an Indian people as such. Thus, Taylor's ambiguous connection between the

Lumbees' changing names and the tribe's historical political status of "non-recognition" reveals an implicit definition of Indian identity with specific cultural criteria derived from the experiences of tribes like his own.

What begins as an argument based on the lack of historical US-Lumbee relations unfolds into speculation that the Lumbee would not be able to meet the BIA criteria, because they do not comply with the tribe's construction of its own Indianness, which it projects as the singular template of authentic Indian identity. The Eastern Cherokees' statement asserts that in the hearings on the 1956 Lumbee Act, and a 1974 bill (H.R. 12216) that proposed to strike the "Nothing in this Act…" clause from the 1956 Act, members of Congress and the Lumbee tribe stated that those pieces of legislation were not intended to federally acknowledge the tribe.[334] These points in part comprise Taylor's argument that the "special circumstances" requiring the Lumbee to seek legislative rather than administrative recognition are "fabrications," and that the Lumbee should go through the BIA process.[335] Inserted just before the conclusion of this argument pertaining to Lumbee historical political relations, the statement reads:

> The Lumbees have not demonstrated long-standing governmental structure, a language, a unique religion and culture including burial practices, prayers, songs, or dances nor did they enter into any treaties with the United States. These are the types of things that the Cherokees have always felt make us a distinct tribe and these are the types of practices and cultural activities that most other recognized tribes feel make up a tribe and distinguish a tribe from a group of people who may have some Indian ancestry.[336]

In this statement, Taylor expresses skepticism towards Lumbee claims to Indian identity, because the tribe does not possess the cultural traits and federal treaties that he, his tribe, and other recognized tribes believe to confirm a group's historical and current existence as a distinct Indian people. Contrasting the Lumbee with his own tribe, Taylor highlights

the Lumbees' lack of certain visible cultural practices and lack of federal relations as evidence of their inauthenticity, despite the fact that these characteristics are not uncommon among Southeastern Indians and other Indians that experienced early contact with colonial forces. While the Eastern Band of Cherokees remained in North Carolina, their history of treaty-making with the US, federal removal of most of the tribe to Oklahoma, and land held in federal trust distinguishes them from the Southeastern tribes who experienced early colonial contact and were never recognized by the US government. In *Forgotten Tribes*, Mark E. Miller discusses the historical conditions contributing to some tribes possessing more visible cultural traits than others. Miller writes:

> By the time of US independence, federal Indian policy came to focus on the western regions of the nation, with tribes living in the American West generally securing federal lands while eastern Indians found themselves passed by and neglected… [Some] individuals retreated to marginal areas, reverted to the family as their basic unit of social organization, and assumed the outward appearances and customs of European Americans or African Americans. Despite their outward appearances, however, these people still clung to an Indian identity.[337]

The Lumbees' history as a tribe falls more in line with this description of many Eastern tribes' experiences than with the Eastern Cherokees' understanding of Indian identity. The Eastern Cherokees hold the Lumbee to a standard that stems from their own history and hegemonic notions of Indianness, which are inapplicable to the experiences of the Lumbee.

In more recent hearings, the Eastern Band of Cherokees' stated opposition has shifted focus away from the "non-recognition" intentions of the 1956 Lumbee Act and other legislation, and has placed increasing emphasis on explicit attacks on Lumbee Indian identity. While only two pages of the Eastern Cherokees' fourteen-page statement

were devoted to questions about Lumbee identity in the 1989 H.R. 2335 hearing, four pages of their six-page statement focused on these doubts in 2004, in the House Resources Committee hearing on H.R. 898.[338] Along with a proportional increase of identity questions to other concerns such as "harm to existing tribes and waste of tax payer money," the Eastern Cherokees' statements on H.R. 898 and H.R. 31 (2009) include entire separate sections addressing "Lumbee Self-Identification as 'Croatan' Indians," and as each of the other names by which the tribe has been known to the State—"Cherokee," "Siouan," and "Cheraw." Principal Chief Michell Hicks' statement on H.R. 898 reflects the tribes' replacement of their 1989 argument on the Lumbees' "non-recognition" political status with the position that the Lumbee pose a threat to the cultural and political integrity of existing recognized tribes. This threat looms, the statement reads, "due to the real problems that the Lumbee have in demonstrating that it is [*sic*] a tribe, including their inability to trace the genealogy of its 54,000 members to a historic tribe."[339] Hicks briefly recounts Lumbee recognition attempts under their previous names in the first three sections on Lumbee "self-identification," before taking a more argumentative stance in the section entitled, "The Lumbees' Current Efforts to Link Themselves to the Cheraw Tribe Are Tenuous."[340] Hicks begins to support this claim by quoting the acknowledgment criterion 25 C.F.R§83.7(e): a petitioning group's membership must consist of "individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity."[341] By framing his tribe's concerns about Lumbee Indianness in terms of BIA criterion 83.7(e), Hicks subsumes the implicit "common sense" notion of directly corresponding tribal name and tribal identity under the widely accepted governmental definition of tribalism codified in 25 C.F.R.§83. In Hicks' application and interpretation

of this acknowledgment criterion, one can see the blurring of the boundaries of governmental and popular definitions of Indian identity. In the highly politicized context of the Lumbee legislative acknowledgment hearings, the presumed objectivity and universal applicability of the acknowledgment criteria obscure the political and economic interests of the parties assessing the legitimacy of a tribe.

Hicks cites the language of the 1956 Lumbee Act as evidence of the tribe's inability to demonstrate a link with an historical tribe. The statement reads:

> Congress in the 1956 Lumbee Act went far to avoid a historical tribal designation of the "Lumbee" Indians, reiterating the "claim" of the Lumbee to unnamed tribes. The 1956 Lumbee Act states, "The Indians now residing in Robeson and adjoining counties of North Carolina… and claiming joint descent from remnants from early American colonists and certain tribes of Indians originally inhabiting the coastal region of North Carolina, shall, from and after the ratification of this Act, be known and designated as Lumbee Indians of North Carolina…"[342]

Hicks reads the Lumbee Act's avoidance of tribal affiliations as an attempt to skirt the issue due to a lack of any ties to a historical tribe. This interpretation is in accordance with the Eastern Cherokees' position that the Lumbee accepted many different tribal designations over the years because of the weakness of their connection to any one of those tribes. Hicks' statement suggests that the Lumbees' changing tribal affiliations and ultimate avoidance of an affiliation in the Lumbee Act indicate their desperation to prove Indian ancestry where it does not exist. Lumbee stories and outsiders' anthropological studies, including those done by BIA officials in 1934, counter this narrative and reflect the unique history of the Lumbee as a people. The Lumbee chose a geographically-based name precisely because the specific tribal designations they had had in the past were inappropriate to the tribe's history as a group of amalgamated remnants of many different tribes.[343]

The competing narratives explaining the Lumbees' ambiguous link to a historical tribe brings to light a significant gap in criterion 83.7(e) with respect to amalgamated tribes. Criterion 83.7(e) requires that the petitioning group demonstrate descent from one historical tribe or multiple tribes that combined to form one entity. The criterion does not account for tribes formed by multiple *fragments* of tribes or by individuals from different tribes who came together to form a single tribal entity, but who never established a relationship with the federal government. This point distinguishes the predicament of the Lumbee from that of the Brothertown Indian Nation. Though the BIN was formed from fragments and individuals from different tribes who amalgamated into one tribal entity, that entity had a treaty relationship with the United States, and therefore the "Brothertown Indians" are considered a historical tribe. The tribe called the "Croatan Indians" in 1885 formed from tribal fragments in the late eighteenth and early nineteenth centuries in Robeson County, but they never made a treaty with the federal government and were repeatedly denied recognition due to the budgetary concerns of the Office of Indian Affairs.[344] Because the federal definition of "Indian tribe" is a group that the federal government recognizes as such, the Lumbees must trace their ancestry to an already recognized tribe, rather than from the state-recognized tribe called the Croatan Indians from which the Lumbee directly descend. Thus, due to the fact that the tribe now called the "Lumbee" never secured federal acknowledgment in the past, criterion 83.7(e) effectively precludes them from being administratively recognized today. This is another profound contradiction within the federal acknowledgment criteria that places amalgamated, state-recognized tribes like the Lumbee at a unique and potentially insurmountable disadvantage in the FAP.

Shifting Grounds: Opposition of the BIA

In their acknowledgment efforts throughout the past two decades, the Lumbees have attempted to demonstrate their descent from the historical tribe to which they can trace the most and the clearest lines of descent, the Cheraw tribe. In the petition that the Lumbee submitted to the BIA in 1987, the tribe acknowledged that they do not descend as a group from one federally recognized tribe but rather from fragments and individuals from various tribes who formed a tribal entity. The Lumbee petition reads, "while it is certainly true that the eighteenth century 'Lumbee' tribe included individuals from a number of tribes, the principal tribe from which the present-day Lumbee descend is most assuredly the Cheraws."[345] Patrick A. Hayes, Acting Deputy to the Assistant Secretary of Indian Affairs, addressed the Lumbees' BIA petition when he testified before the House Interior Committee in the 1989 hearing on H.R. 2335. Hayes's written statement submitted at the hearing reads, "We [the BIA] strongly oppose the enactment of H.R. 2335… because we believe that this group should go through the Federal acknowledgment process as prescribed in 25 C.F.R.§83."[346] As other opponents to Lumbee recognition bills have done since the establishment of the FAP, Hayes frames legislative recognition as Congress unfairly allowing the Lumbee to "bypass" the "unbiased" administrative process. Opponents' suggestions that the Lumbee are trying to "circumvent" the FAP is typically coupled with the insinuation or explicit conclusion that the Lumbee are seeking legislative recognition because they would not be able to meet the acknowledgment criteria. Eastern Cherokee Principal Chief Jonathan Taylor states this position outright, later in the same hearing. Taylor speculates:

> We have to wonder why the group that submitted this lengthy and well-documented proposal [to the BIA] would then almost immediately turn around

> and go to Congress in a deliberate attempt to circumvent the process. The answer must be that they know that there were serious gaps and that they will have difficulty in meeting the criteria. If this is [*sic*] the case the Congress would be making a large mistake in granting legislative recognition.[347]

Hayes' insistence that the Lumbee case be decided through the administrative process is therefore laden with the implication that they would not be able to meet the criteria, and would be denied acknowledgment. In the 1989 hearing, Hayes also explicitly stated that the Bureau's skepticism regarding Lumbee Indian identity was specifically founded on the tribe's changing names and subsequent presumed inability to meet 83.7(e). Hayes states, "A brief review of the petition suggests that there are questions that need to be raised with the petitioning group… Our major concern is that they have not documented their descent from an historic tribe."[348]

At the same hearing on H.R. 2335, the testimony of Jack Campisi, the anthropologist and professor at Wellesley College who worked closely with the Lumbee tribe and wrote their BIA petition, summarized the basis of the Lumbees' link to the Cheraw. Campisi states, "it is my best professional judgment that the present-day Lumbee tribe is directly descended from Siouan-speaking peoples who inhabited the region at the beginning of the eighteenth century, and that the Cheraw tribe formed the core population of this group."[349] Campisi cites five different eighteenth-century documents that reference a Cheraw settlement near Drowning Creek [Lumber River] in the area now known as Robeson County. These documents include: a 1725 map showing a Cheraw settlement; a 1737 land grant from the Chief of the Cheraw ceding lands on the Pee Dee River but retaining lands on Drowning Creek; a 1754 report of the settlement created upon the request of NC Governor Arthur Dobbs; a 1771 newspaper article referencing the Cheraw settlement on Drowning Creek; and the 1773 list of

individuals with Lumbee names involved in a civil disturbance.[350] These documents supplement the evidence of the consistent presence of Lumbee family names in the area since the 1790s. Campisi also references the 1934 study on Lumbee ancestry conducted by John R. Swanton. Despite the sparse historical record on Lumbee origins and on the Robeson County area in the eighteenth century, the Lumbee present significant evidence indicating a Cheraw settlement in the Lumbees' ancestral homeland, and lineal descent from the individuals in that area. Even though the Interior Department's chosen anthropologist in 1934 supported the theory of Lumbee descent from Siouan-speaking tribes and from the Cheraw in particular, Hayes' statement contests the theory. The statement reads:

> The documents presented in the petition do not support the theory that the present Lumbee community can be linked to the historic Cheraw Tribe… These documents have been misinterpreted in the Lumbee petition. Their real meanings have more to do with the colonial history of North and South Carolina than with the existence of any specific tribal group in the area in which the modern Lumbee live.[351]

This is perhaps the most opaque assertion of Hayes' comments on behalf of the BIA. Hayes decisively attacks the validity of Campisi's readings of the historical record, but offers no further explanation of how they constitute a misinterpretation, nor does he offer any alternative interpretation. Hayes claims to have access to the "real meanings" of the documents, but the only insight he provides into those possible meanings is his vague allusion to the "colonial history" of the Carolinas, as though the colonial history of those states is separate from Carolinian tribal histories and individual Indian lives. That Hayes and by proxy, the BIA, claims that historical documents have "real" or objective "meanings," and that the BIA claims sole authority over the "unbiased" interpretation of those documents, reveals a fundamental problematic element of the FAP. While Hayes's

statement provides no evidence to support his argument that Campisi has misinterpreted the documents, the BIA's construction of their own work as the objective exposition of the "true" significance of historical documents obscures the inherently subjective nature of historical interpretation and of federal acknowledgment. In casting its interpretations as unbiased, the BIA shields itself from criticism and protects its own political, economic and administrative interests in the outcomes of specific acknowledgment cases.

Campisi directly challenges the BIA's claim to objectivity and Hayes' lack of evidentiary support for his contradiction of Campisi's testimony. Campisi states in his oral testimony before the Committee:

> This is a question of how one interprets documents… I suggest to you [the Committee] that the Branch of Acknowledgment and Research does not have the same caliber of scholars that we have approached, individuals with specialized training, skills, knowledge and research in these categories. I suggest to you that they are wrong, the Branch is wrong in its interpretation of the origin question. The documents are not that difficult… I submit to you the documentation is strong in favor of the conclusion we've come to. I have seen no evidence submitted that offers a contrary interpretation of that documentation.[352]

In identifying the BIA's assessment of the documents as interpretations akin to any other scholar's analysis, and questioning the quality of the BAR's scholarly analysis, Campisi begins to break down the protective illusion of "unbiased" authority surrounding the BAR. Campisi in a sense inverts the perceived hierarchy of "expertise" cultivated by the BIA, in which the Bureau secures its BAR at the top. The destabilization of the ultimate scholarly authority of the BAR allows the variety of political and economic concerns that play into all acknowledgment decisions to emerge. These interests and conflicts of interest in acknowledgment outcomes are slightly more visible in the arena of legislative acknowledgment, in which the various invested parties articulate their positions, are

subject to questioning, and change their arguments over time. In legislative acknowledgment cases, witnesses like Campisi are able to address the BIA's positions before the Committee and expose the Bureau's interests and investment in a particular acknowledgment outcome. Legislative hearings on the Lumbee case therefore provide a unique window into the possible underlying political interests of the BIA, regarding issues on which, in the FAP, the Bureau has the final word.

Some of the interests and concerns of the BIA with respect to the Lumbee case can be gleaned from the ways in which the Bureau's grounds for opposition shifted over time. As with the Eastern Band of Cherokees, the Bureau has consistently opposed Lumbee recognition since 1989, and the rationalization of their position changed significantly over that period. While the Eastern Cherokees' justifications shifted from legislative non-recognition precedents to identity attacks, the BIA's moved from questioning Lumbee identity claims in 1989 towards more diffuse political concerns in 2004. These issues raised by the BIA in the 2004 legislative hearing on H.R. 898 have no relevance to the acknowledgment criteria or the FAP, which marks a complete departure from the Bureau's position in 1989. Hayes' 1989 statement on H.R. 2335 reads, "We oppose the bill because we believe that this group should go through the Federal acknowledgment process as prescribed in 25 C.F.R.§83."[353] The sole content of the Bureau's oppositional argument in 1989 pertains to the Lumbees' suspected inability to meet criterion 83.7(e), collective descent from an historical tribe. In contrast, the 2004 statement of Michael D. Olsen, Counselor to the Assistant Secretary for Indian Affairs, on behalf of the Bureau does not even include an outright expression of opposition to the legislation. Rather, Olsen's statement takes a cautionary tone, warning the Committee of several complicated political issues in which the Bureau is invested with respect to the

Lumbee case. These concerns pertain primarily to technicalities of the legislation, rather than the acknowledgment decision itself. The Bureau avoids submitting an opinion regarding the decision, opting instead to emphasize the "questions" left "unanswered" by the legislation. Namely, these issues are that the bill does not prohibit Lumbee gaming; the bill does not explicitly define the terms of the trust relationship; and that the bill requires that the Administration define eligibility and a budget for Lumbee benefits and verify Lumbee membership rolls.[354]

In the BIA's statement on an identical 2006 Lumbee recognition bill, S.660, before the Senate Committee on Indian Affairs, the Bureau's central concerns shifted yet again. This statement delivered by Lee Fleming, Director of the OFA, reiterated some of the concerns the Bureau articulated in the 2004 hearing—the potentially unconstitutional requirement that the President submit a budget pertaining to Lumbee benefits as part of his annual budget, and the requirement that the Secretary verify Lumbee tribal rolls within one year. The Bureau's 2004 recommendation that the bill explicitly define the terms of the trust relationship was dropped from their 2006 statement, as was their concern over the requirement that the Secretary determine all Lumbee members eligible for benefits. The 2006 statement introduced a new recommendation that the Congress "clarify the Lumbee group that would be granted recognition," in order to distinguish the tribe from several other petitioning groups from Robeson County, "that may overlap with each other."[355] Fleming states, "Not doing so could potentially expose the Federal Government to unwarranted lawsuits and possibly delay the recognition process."[356] While this concern appears somewhat unnecessary considering that the Lumbee Tribe is already "clarified" by its membership rolls, the Bureau articulates that its cause for concern is the threat of potential lawsuits. The Bureau fails to clarify its cause for

concern regarding the fact that recognition would afford the Lumbee the ability to conduct gaming. When the Bureau explains, in both 2004 and 2006, that the Lumbee "would be authorized to conduct gaming activities pursuant to the Indian Gaming Regulatory Act," their concern appears to be just that. Olsen concludes the Bureau's discussion of the issue stating, "The bill as drafted does not prohibit gaming."[357] Olden does not elaborate on how this constitutes an "unanswered question" in the Lumbee case. Fleming's statement frames the Bureau's concern over Lumbee gaming as a jurisdictional question: "The legislation [S.660]… does not address the State's civil regulatory jurisdiction, which includes jurisdiction over gaming, zoning and environmental regulations."[358] The Bureau has a clear interest in keeping the prospect of Lumbee gaming as part of the conversation on the tribe's acknowledgment, although its reasons for sustaining that concern are unclear.

Rather than endorsing or explicitly opposing Lumbee recognition in 2004 and 2006, the BIA introduced multiple problems that it saw with parts of H.R.898 and S.660, which had no relation to Lumbee tribal identity claims nor to the federal acknowledgment criteria or process. Interestingly, when Senator Craig Thomas of Wyoming asks Lee Fleming why the Lumbee have faced more difficulties than other terminated tribes seeking acknowledgment, Fleming reverts back to the Bureau's 1989 argument that the Lumbee have shown no link to an historical tribe. Thomas asks Fleming, "There have been lots of tribes that go through lots of problems and get listed [recognized]… What has been so unique and peculiar about this?" Fleming replies:

> I think the uniqueness is the lack of pinning down the historical tribe. And as you heard, there were quite a number of possibilities. You even heard that there was contact with the early colonists, as early as 1585. But from 1585 to 1885, 300

> years, there is a considerable period of time where evidence would be needed to understand who this group was and is.[359]

From 1989 to 2004, the BIA replaced the accusations of inauthenticity in its written statements with various technical objections to the bills and allusions to the major hot-button issue of Lumbee recognition, their ability to conduct gaming. The explicit undermining of Lumbee Indian identity has dropped out of the Bureau's official statements on the case, but lies just below the surface, to be drawn out again when the Bureau's opposition is challenged.

In the 2009 legislative hearing on H.R. 31, the BIA endorsed Lumbee acknowledgment for the first time in history. "[W]e recognize that there are rare circumstances when Congress should intervene and recognize a troubled group," BIA representative George Skibine stated, "and the case of the Lumbee Indians is one such case."[360] The complete reversal of the BIA position on Lumbee recognition could not have been due to the merits of their case, regarding criterion 83.7(e) nor any other criteria, because no significant developments in the facts of the case occurred from 2006 to 2009. Two important changes did occur, however—the Presidential Administration of Barack Obama, who had taken office that year, supported Lumbee recognition; and, H.R. 31 contains a clause that prohibits the Lumbee from conducting gaming activities. These two political factors were entirely irrelevant to the Lumbees' identity claims as an Indian tribe, which have been consistent regardless of Presidential Administrations and which they asserted a century before the advent of Indian gaming as a tribal enterprise under US federal law. The profound effects of these changes, primarily the change of Administrations, on the Bureau's decision illustrates the highly political nature of all federal acknowledgment decisions and the Bureau's positions on them, despite its claims

to political neutrality. While the BIA was not in the position of evaluating the merits of the Lumbees' case, BIA officials nonetheless repeatedly asserted the opinion that the Lumbee case would not meet criterion 83.7(e), under the guise of objectivity and superior academic authority. The other political issues that gained emphasis in the BIA statements over the years merely masked the identity questions that persisted through implication in the BIA's arguments. The other issues raised by the BIA also demonstrated the Bureau's choice to latch onto certain technicalities as justifications for opposing the spirit of the bills, rather than proposing those concerns as amendments, as it did for H.R.31. Accompanied by the intensifying identity attacks from the Eastern Cherokees, the Bureau's lack of endorsement based on largely technical "concerns" effectively lent support and credibility to the Eastern Cherokees' definition of Indianness, which Lee Fleming explicitly echoed in his 2006 oral testimony. Each element of the Eastern Cherokee construction of Indianness is a product of particular historical conditions that enabled that tribe to cultivate Native cultural elements and a relationship with the federal government. To ignore the historical specificity of the Eastern Cherokee construction of Indian identity is to impose one story upon all Native peoples, and reinforces the limited conceptual framework in which most Americans typically think about Native histories. As James Clifford writes in the context of the *Mashpee Tribe v. New Seabury* trial, which addressed Mashpee existence as a "tribe":

> The Mashpee were trapped by the stories that could be told about them. In this tribal "the facts" did not speak for themselves. Tribal life had to be emplotted, told as a coherent narrative. In fact only a few basic stories are told, over and over, about Native Americans and other "tribal" peoples… Are there other possible stories?[361]

In recognizing the alternative histories and conceptions of Indian identity that we see in cases like the Lumbees', we begin to break openings in the monolithic story against which Native peoples are understood.

Conclusions: Procedural Holds and Colonial Holdovers

Six anonymous Senators intentionally killed the Lumbee Recognition Act, H.R. 31, by procedurally preventing it from coming to a vote in the 111th Congress. Despite support from President Barack Obama, the Department of the Interior, the House of Representatives, the Senate Committee on Indian Affairs, and NC politicians, lawmakers politically invested in keeping the Lumbee unrecognized foreclosed the possibility of a vote on the bill before Congress adjourned on December 29, 2010. An article entitled "Congress leaves without acting on the Lumbee bill" in the *Winston-Salem Journal* reports that according to sources in Washington, "six senators had procedural holds on the bill, blocking it from consideration as a stand alone item, while other lawmakers lobbied Democratic leaders to keep the Lumbee bill from being attached to other pieces of legislation."[362] A procedural hold is a practice by which a Senator expresses to the floor leader that he or she does not want a bill to reach the Senate floor for consideration, and may filibuster the bill if it does.[363] The article states that the opponents of the bill, "mostly lawmakers representing states populated by other federally recognized tribes," successfully prevented the bill from coming to a vote in the Senate.[364] By placing holds on the bill, this small group of Senators exercised an inordinate amount of control over the fate of the 50,000 members of the Lumbee Tribe. While it is not uncommon for Senators to place procedural holds on a bill, these holds have a unique significance for recognition bills—they allow a few individuals' political concerns to trump even a long-standing and (now) well-supported case like the Lumbees', at great expense to the tribe. Rather than presenting a solid case against the bill's passage and allowing the Senate to

speak, these six individuals prioritized their own political concerns to such a degree that they made a decision, effectively on behalf of the Senate body, to deny the bill by deferral.

The political issues that the holders deemed pressing enough to provoke this decision, and to cost the tribe at least several more years of their time and resources towards their goal, appear to have no relevance to the merits of the Lumbee case. In a moment when opposition based on identity attacks has lost its sway and even the DOI supports Lumbee recognition, it is commonly understood that the holders' reservations are purely political. As reporter Mike Hixenbaugh writes that the holders are supposedly bipartisan, the holders' objections to Lumbee acknowledgment may derive from the common opposition argument that their recognition will deplete the scarce resources for already-recognized tribes. The emergence of the Lumbees' perceived interest in gaming, however, is believed to be the major factor now inciting opposition and the holds.

The House and the Senate Indian Affairs Committee had passed the bill earlier in the year, but the Lumbee Tribe experienced significant internal conflicts in the following months regarding the clause amending the bill that prohibited Lumbee gaming activities. In early 2009, the Lumbee Tribe saw the collapse of the Tribal Council's relationship with Arlinda Locklear, a Maryland-based Lumbee attorney who had spearheaded Lumbee recognition efforts for over twenty years.[365] Locklear's passionate efforts on the case, which brought the tribe the closest it has ever come to achieving recognition, ended due to a lack of communication about tribal leadership's "secret meetings" with lobbyists in the gaming industry. Tribal Chairman Jimmy Goins signed a contract in March of 2009 with Nevada-based gaming consultants Lewin International, despite the

prohibitive gaming clause in H.R. 31. The contract dictated that Lewin would provide the tribe with "resources for a focused and professional lobbying effort before Congress to secure Federal Recognition," but Lewin pulled out of the agreement within a few months due to mounting internal conflicts among the Lumbee over the agreement.[366] As the article "Congress leaves without acting" reports, the contract was short-lived and was terminated by both parties, but the brief relationship nonetheless "damaged the tribe's credibility and made the recognition bill difficult to pass this year."[367] Locklear addressed this damage in an open letter to the Lumbee people, stating:

> [T]he House passed the Lumbee bill twice with the gaming prohibition in it. And the debate on the bill, both in committee and on the floor, made it very clear that many members were willing to allow the bill to move forward only because they took the Tribe at its word – we said it was about recognition, not gaming. Chairman Goins himself told the committee at a hearing that it was all about recognition, the Tribe had no interest in having a casino.

Another article on the bill continues, "Tribal leaders maintained that the agreement had nothing to do with gaming, but the perception that the tribe had reversed its position gave otherwise neutral lawmakers reason to oppose the bill, [a] Burr aide said."[368] The tribe's perceived interest in gaming damaged the tribe's case because, as Locklear mentioned, the bill's success up to that point was contingent upon the elimination of gaming as a political factor weighed in the case. Suggestions that the tribe damaged their "credibility" refer to the fact that the Lumbee stated in committee hearings that they were not concerned with gaming, but proceeded to hire a gaming consultant. These statements invoke suspicions of greed-based "ulterior motives" to gaining recognition, which are a common rhetorical recurrence in recognition debates aimed at undermining the rights of unrecognized tribes.[369] Conversations over the "reversal" of the tribe's position on gaming scandalize the tribe's interest in gaming and divert attention away

from the fact that all recognized tribes have a general right to act in their best economic interests, within the bounds of federal law.

As sovereign political entities, tribes have an inherent right to pursue economic self-sufficiency and development in the manner of their choosing, including through gaming establishments on their lands.[370] The Indian Gaming Regulatory Act of 1988 (IGRA) both protected Indian gaming by providing statutory and regulatory bases for it, and placed severe limitations on Indian gaming by allowing states to control the types of gaming permitted within their borders, and thereby exercise control over an Indian enterprise.[371] David E. Wilkins writes that since the Seminole Nation of Florida opened the first high-stakes bingo operation on Indian lands in 1979, Indian gaming has provided tribes with a viable means to economic self-determination for the first time since the late nineteenth-century.[372] The clause of the H.R. 31 prohibiting Lumbee gaming constitutes a profound constraint on Lumbee tribal sovereignty and on the tribe's options for economic development, considering that high-stakes gaming is permitted for the Eastern Cherokees of North Carolina. In December 2010, NC Senator Kay Hagan stated, "[I]t's high time that the Senate vote on this critical bill [H.R. 31]… I'm determined to ensure the Lumbees are no longer treated as a second-class tribe."[373] In terms of exercising their right to economic self-determination, however, the no-gaming clause of H.R. 31 had already relegated the Lumbee to second-class status, by denying them a powerful means to economic development that is afforded to the Eastern Band and other recognized tribes. Thus, Lumbee interest in preserving their inherent right to conduct gaming, which the IGRA affirms and protects for all other recognized tribes to the extent permitted by the state, would be a legitimate concern for the tribe, having already been subjected to a combined recognition and denial of

resources in the 1956 Lumbee Act. In spite of the undeniable connection between Indian gaming enterprises and tribal economic self-sufficiency, even the *possibility* that the Lumbee would be interested in gaming after achieving recognition is scandalized in Congressional debates as an illegitimate motivation for pursuing acknowledgment. House Resources Committee member Jimmy Duncan (R-TN) stated on Lumbee recognition bill H.R. 65 in 2007:

> I would probably go along with some of these Indian recognition efforts—in fact, many of them—if these tribes would waive or give up their right to get into this lucrative gambling business in return for being granted recognition. But I don't believe they will do it. I believe that their primary goal is to get into this gambling business, and I think it [Indian gaming in the US] has gone beyond the point of being at a reasonable level.[374]

Congressman Duncan's objections to Lumbee recognition are generalized, entirely political, and irrelevant to the specific trajectory of Lumbee acknowledgment efforts. In stating that the primary goal of the Lumbees, indeed of all tribes, in pursuing recognition is to capitalize on the growing Indian gaming industry, Duncan belittles and undermines their histories and identities as Indian peoples with inherent sovereign rights. Duncan relies on an image of tribalism that views the Lumbees' desire to protect their economic self-determination as greed, which he suggests is their "true" motivation. As Mark Miller writes, "Although a consideration of motives does not appear in the BIA acknowledgment regulations, it is clear from past decisions that groups with purer, apparently less materialistic and more stereotypically 'Indian' motives have succeeded more often than others."[375] There is an implicit accusation of fraud in Duncan's suggestion that tribes seeking recognition for legitimate reasons would give up their sovereign right to consider gaming as an economic opportunity in order to be recognized. This accusation is made explicit in readers' comments on newspaper articles

on Lumbee gaming, exemplified by the comment by "Equalitylaw" on a December 2010 *Fayetteville Observer* article entitled, "Hagan still sees hope for Lumbee recognition bill":

> It should be clear by now, there is no noble or historic objective for the scattered and itinerant Lumbees in their efforts to obtain official acknowledgment and recognition as an official "tribe" of Indians by the federal government. These often fractional and mixed race descendants are merely seeking federal welfare and grant monies that are paid to acknowledged Indian tribes forever, and of course the ability to get into the casino gambling business. That is why they entered into the "consulting agreement" with a casino promoter.[376]

Duncan's suggestion that a tribe should voluntarily "waive" any of its sovereign rights in order for those rights to be legally affirmed by the federal government reflects a misunderstanding of the meaning of federal acknowledgment, and illustrates the tendency of gaming issues to confuse and derail recognition debates. The expectation that a tribe have a "noble objective" rather than any economic motivations in seeking recognition, despite the extreme poverty most unrecognized tribes endure, falls in line with the mythic image of "the Indian," to whom a modern existence, including self-sufficiency in a twenty-first century free-market economy, is denied. After overcoming repeated attempts of their opponents to undermine their tribal identity over the course of twenty years of recognition bills, the specter of Lumbee gaming sustains conversations on the tribe's deviation from hegemonic images of Indianness, which in turn obscure various parties' political and economic interests in their non-recognition.

Justice deferred: Bureaucratic ambivalence

The Lumbee Tribe did make significant gains by securing DOI and Presidential support, but the tribe now faces a very different environment in the 112th Congress, and a high probability that a Lumbee recognition bill will not pass. The *Fayetteville Observer* article, "Hagan still sees hope," reports that sweeping gains made by Republicans in the

House and Senate severely decreased the chances of Lumbee recognition in the current Congress. The article states:

> The Lumbee bill passed the House last year by a 61-vote margin, but of the lawmakers who voted in support, 59 were defeated in November. In addition, the newly appointed GOP chairmen on the two key House committees that would need to approve the bill each voted against the Lumbee bill during this session [111th Cong., 2nd Sess.].[377]

The Lumbee therefore will likely encounter some serious challenges to their recognition efforts during the 112th Congress, despite the newfound support from highly influential administrative players in the debate. Lumbee recognition bills have thus far been repeatedly locked out of the Senate floor, due to Senators placing holds on the bills when they get close to reaching a Senate vote. The Lumbee have been condemned to a space of bureaucratic limbo, in which their case is perpetually deferred. The continuing refusal or neglect of Congress to vote on the Lumbee case represents a failure of both the administrative and legislative acknowledgment processes to fairly and expeditiously address the question of Lumbee tribal status, as was the intention of the FAP at its establishment.[378] The Lumbees' current position back at the beginning of the legislative process yet again constitutes a failure of the administrative process as well because criterion 83.7(g) requires that terminated tribes seek Congressional restoration of their status. The Lumbee tribe is therefore excluded from the administrative process and deflected by the Congressional one, due to their non-compliance with the models of Indianness and tribalism steering recognition discussions and decisions, most recently in regards to gaming and economic development.

The Brothertown Indian Nation (BIN) faces a similar fate in their quest for acknowledgment. Following their 2009 negative Proposed Finding from the OFA,

Brothertown members and any other interested parties were able to submit further evidence or comments on the tribe's case during a180-day comment period, as outlined in 25 CFR §83. At the close of the comment period on August 29, 2010, the OFA began reviewing the additional materials towards a Final Determination on the tribe's status. The comment period appears to give tribes the opportunity to "appeal" and transform negative decisions from the OFA, but this outcome is highly unlikely, as Brothertown Acknowledgment Committee leader Kathleen Brown-Pérez has stated. "It gives us an impression that there's almost an appeals process—people can submit their comments… and then the OFA makes a final determination," Brown-Pérez stated in a radio interview on her tribe's case.[379] "The truth is…it's not really an appeals process because there isn't another layer," she continued. "We are 'appealing' to the exact same people who already decided that we did not meet five of seven criteria. They're not going to change their mind." The BIN therefore view their comment period as exhausting their administrative acknowledgment options, but do not expect the OFA to overturn its negative Proposed Finding on their case. The comment period ended on August 23, 2010, but no further developments in the case have been announced by the OFA. After the BIN receives the OFA's Final Determination, the Brothertown anticipate turning to Congress for acknowledgment. "So we're looking at many decades ahead of us still," Brown-Pérez stated. The OFA's finding with respect to criterion 83.7(g) that the Brothertown Tribe was terminated by the 1839 Act, effectively reroutes the BIN from the administrative to the legislative channel towards recognition. Before doing so, however, the OFA severely compromised the Brothertown case by casting doubt on the tribe's identity under four other criteria as well, because of the tribe's historical inability to comply with outsiders' definitions of Indianness, which the current acknowledgment criteria uphold. When the

Brothertown receive a decision from the OFA, they will likely stand in the position in which the Lumbee find themselves now—at the mouth of a highly politicized and interminable process of proving their identity in terms that make them visible in the constructions of Indianness underlying Congressional debates.

The deflection or attempted redirection of the Lumbee and the Brothertown tribes from one acknowledgment path into another reflects the ultimate inadequacy of either system to expeditiously and sensitively address the cases of tribes that do not neatly comply with governmental or popular images of Indian identity. The inconsistency of the BIA's stance on both cases over the decades reveals a fundamental bureaucratic ambivalence towards tribes that developed amid social conditions preventing them from easily complying with dominant images of "the Indian" historically and today. This ambivalence is exacerbated by century-old political concerns such as budgeting Lumbee benefits, and newer political concerns, such as the prospect of tribal gaming. The BIA's inability to articulate a clear and consistent position on these tribes places an overwhelming burden on the Brothertowns, the Lumbees, and other tribes lacking federal-tribal relations, a federally protected land-base, and visible Native cultural traditions, especially if they were terminated.

The Bureau's ambivalence parallels a broader "American colonial ambivalence" towards Indian tribes, which is reflected in the many major shifts in federal Indian policy between supporting and undermining tribal sovereignty, as described by political scientist Kevin Bruyneel.[380] In Bruyneel's work, *The Third Space of Sovereignty*, he locates the origins of colonial ambivalence, "the inconsistencies in the application of colonial rule," in the multitude of often competing actors, interests, and institutions working within the US

government, and in the ambiguous status of Indian tribes inscribed into the Constitution itself, which distinguishes tribes from both states and foreign nations.[381] While states are located within the US political boundaries and foreign nations lie outside of them, the position of tribes has always been unclear, resulting in US Indian policies rife with contradiction. Bruyneel writes, "The ambiguous boundary imposed by the United States places a colonial bind on indigenous political choices, trapping indigenous people and tribes in a place neither here nor there."[382] In a similar manner, tribes with histories like the Lumbee and the Brothertown are situated on the boundaries of the category of Indian identity. As state-recognized tribes that have maintained an Indian political and cultural community on their lands since historical times, the Lumbee and the Brothertown fall within the boundaries of this category in multiple ways. As Christian, English-speaking people with mixed tribal and racial ancestry and no relationship to the federal government, these tribes fall outside of the boundaries of hegemonic definitions of Indianness in significant ways as well. Over the course of their quests for recognition, the BIA has repeatedly reversed its official positions and changed its rationales for those positions regarding the tribal status of these groups. This bureaucratic ambivalence results in the inability of the BIA and of Congress to decisively place the Brothertown and the Lumbee on either side of the boundaries of tribal status, condemning them to a space of bureaucratic contradiction or inaction through the deferral of their cases into a different process.

Bruyneel writes that an American colonialist tradition prevails in US-indigenous relations, which is consistent in US policy, regardless of the ambivalence therein. "Through the lens of an American colonialist tradition," Bruyneel writes, "the reconceptualization of American boundaries—of who is in and who is out—persistently

serves to both contain and fracture indigenous sovereignty and political identity…"[383] Likewise, in the cases of the Lumbee, the Brothertown, and other tribes positioned on the boundaries of Indian identity and tribal status, the BIA has been consistently predisposed to deny and undermine tribal identity claims and rights rather than accept or affirm them. In a chapter entitled "A Matter of Visibility," Mark Miller details the challenges that the United Houma Nation has faced in the FAP due to their lack of visible cultural indicators, lack of a land base, and lack of high blood quantum, among other factors. Miller writes,

> Like many southern and eastern unacknowledged groups the United Houma Nation had come face to face with the burdens of proving its visibility during periods in the distant past… In cases with less ambiguity on certain issues, the BAR [now the OFA] had shown an ability to assume certain facts, assumptions that it did not make with the United Houma Nation.[384]

Miller suggests that the OFA has somewhat different standards for evaluating cases depending on the level of ambiguity with which they adhere to dominant images of Indianness and tribalism. When the OFA attempts to reckon with the cases of tribes that were historically invisible in the terms of hegemonic racial and cultural constructions of Indianness, the Bureau typically responds with unrelenting skepticism. The acknowledgment criteria were created to be applicable to all tribes deserving of recognition. In practice, however, the OFA is more inclined to deny the existence and sovereignty of unrecognized groups with atypical histories and appearances resulting from earlier colonial contact, which has grave implications for many unrecognized southern and eastern tribes. When tribes are positioned on the boundaries of the categories of Indian identity and tribal status, the OFA typically either pushes them out or lets them lie in a state of bureaucratic limbo. The OFA's practices of rigidly circumscribing the categories of Indianness and tribalism to the exclusion of certain

deserving tribes effectively "contains and fractures" the sovereignty of those tribes. In this way, the FAP falls in line with the colonialist tradition that has always characterized US-indigenous relations.

In addition to the inconsistent attitudes of the OFA in interpreting cases depending on the ambiguity of the tribe's history, this work has shown that the acknowledgment criteria are fundamentally flawed in the ways that they are stacked against tribes like the Lumbee and the Brothertown. As these tribe's cases illustrate with respect to (a), the "historical identifications" requirement and (e) "descent from *a* historic tribe," the acknowledgment criteria grow out of and serve to protect an ideology of Indianness forged from colonial narratives of Indian savagery, ancientness, and extinction that served to justify their dispossession. Jean O'Brien writes that the authors of these narratives at the local level, which are among the "observers" revered in the acknowledgment process, were engaged in "an ideological project that involved working out a vision of American Indians that continues to shape, limit, and inhibit views of Indians even today."[385] Colonial ideologies of Indian identity continue to influence how Indians are seen (or not seen) today largely because the acknowledgment process is founded upon historical narratives recorded by the colonizer. Ironically, Indians must prove their continual existence to the present day using, as O'Brien writes, "a deeply flawed and incomplete documentary record that frequently was forged in processes that were meant to bureaucratically make Indians disappear."[386] The current acknowledgment process thus ensures that tribes who have historically challenged dominant constructions of Indianness will never be "recognizable" to the federal government. As long as these acknowledgment criteria are in place, they preserve and protect whites' historical claim to the authority to define Indianness, sustaining that power into the present era.

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Notes

[1] I use the terms "Indian," "Native American," "Native," and "indigenous" throughout this work in reference to peoples indigenous to lands now encompassed by the United States, in acknowledgment of the multiplicity of terms in use. I have used the term "Indian" and "Indianness" throughout the work to simultaneously emphasize the origins of this identity category as a colonial ideological construct; the legal history of Indian identity as a political category; and the common claim and usage of this word by Native people today. Following the terminology of the scholars I reference, I do not capitalize the terms "white" or "black," but acknowledge that these are equally constructed racial categories.

[2] The case of *Mashpee Tribe v. New Seabury (1979)* is particularly important to note here. When the Mashpee Wampanoag Tribal Council sued in federal court for around 16,000 acres of land of the Town of Mashpee, the court was charged with determining whether the Mashpee existed as an Indian tribe, which would determine their standing in court. As James Clifford writes in "Identity in Mashpee," this was an unprecedented case that raised complex issues regarding the assessment of the authenticity of tribal identity by a jury, and which brought public attention to the lack of established guidelines for determining tribal status. The jury determined that the Mashpee were not an Indian tribe, and the case was dismissed, a decision which was upheld when appealed. The Mashpee Wampanoag were federally acknowledged through the BIA process in 2007. See: Clifford, James A. "Identity in Mashpee." *The Predicament of Culture: Twentieth-Century Ethnography, Literature and Art*. Cambridge, MA: Harvard University Press, 1988. Print.

[3] Cramer, Renée Ann. *Cash, Color and Colonialism: The Politics of Tribal Acknowledgment*. Norman: University of Oklahoma Press, 2005: xvii. Print.

[4] O'Brien, Jean. *Firsting and Lasting: Writing Indians out of Existence in New England*. Minneapolis: University of Minnesota Press, 2010: 203. Print.

[5] Miller, Mark Edwin. *Forgotten Tribes: Unrecognized Indians and the Federal Acknowledgment Process*. Lincoln: University of Nebraska Press, 2004: 7. Print.

[6] Ibid.; McCulloch, Anne Merline and David E. Wilkins, "'Constructing' Nations within States: The Quest for Federal Recognition by the Catawba and Lumbee Tribes," *American Indian Quarterly* 19.3 (1995).

[7] The interview I refer to in the following pages was a telephone conversation that occurred on July 7, 2010 while I was living and working in Washington, D.C. The conversation was not recorded, and my reflections on our conversation were composed from detailed notes taken during the call. I do not name my interviewee or provide details of her tribal affiliation because I wish to protect her identity, as my comments are not directed at her personally. Rather, I am utilizing the content of our conversation in order to highlight an important shift in my research and introduce several issues that are central to my work. I am indebted to my interviewee for her input and guidance in this conversation.

[8] Miller, *Forgotten Tribes*, 71.

[9] Cramer, Renée Ann. *Cash, Color and Colonialism*, 36.

In *Morton v. Mancari (1974)*, the Supreme Court determined that Indian hiring preferences in the BIA were constitutional, as they were based on the unique political relationship between the US federal government and tribes and thus did not constitute racial

preference or discrimination. The case set a precedent for defining Indian tribes and their members in political rather than racial terms.

[10] United States Dept. of the Interior, Bureau of Indian Affairs. *Reconsidered Final Determination Denying Federal Acknowledgment of the Petitioner Schaghticoke Tribal Nation.* Washington: 11 Oct 2005. Accessed 24 November 2010 <http://www.bia.gov/idc/groups/xofa/documents/text/idc-001596.pdf>.

[11] Cramer, *Cash, Color and Colonialism* and "The Common Sense of Anti-Indian Racism"; Ouden, Amy Den. *Beyond Conquest: Native Peoples and the Struggle for History in New England.* Lincoln: University of Nebraska Press, 2005. Print. Fourth World Rising.; O'Brien, Jean. *Firsting and Lasting: Writing Indians out of Existence in New England.* Minneapolis: University of Minnesota Press, 2010. Print.; Sider, Gerald. *Living Indian Histories: Lumbee and Tuscarora People in North Carolina.* 2nd ed. Chapel Hill: University of North Carolina Press, 1993. Print.; Lowery, Malinda Maynor. *Lumbee Indians in the Jim Crow South: Race, Identity, and the Making of a Nation.* Chapel Hill: University of North Carolina Press, 2010. Print.

[12] United States Dept. of the Interior, Bureau of Indian Affairs. Office of Federal Acknowledgment. *Reconsidered Final Determination Denying Federal Acknowledgment of the Petitioner Schaghticoke Tribal Nation.*

[13] Wilkins, *American Indian Politics and the American Political System*, 44.

[14] Lowery, *Lumbee Indians in the Jim Crow South*, 280.

[15] Dial, Adolph L. *The Only Land I Know: A History of the Lumbee Indians.* Syracuse: Syracuse UP, 1996. The Iroquois and Their Neighbors, ed. Laurence M. Hauptman.; Blu, Karen. *The Lumbee Problem: The Making of an American Indian People.* Cambridge: Cambridge UP, 1980. Print. Cambridge Studies in Cultural Systems, ed. Clifford Geertz; Sider, Gerald. *Living Indian Histories: Lumbee and Tuscarora People in North Carolina,* 2nd ed. Chapel Hill: University of North Carolina Press, 1993. Print.; The Lumbee Tribe of North Carolina. "Federal Recognition: The Lumbee Tribe's One Hundred Year Quest." Available: <http://www.lumbeetribe.com/History_Culture/100_year_quest.pdf.>

[16] United States General Accounting Office. *Indian Issues: Improvements Needed in Tribal Recognition Process.* Washington: 2001. Print.

[17] Omi, Michael and Howard Winant. *Racial Formation in the United States from the 1960s to the 1990s,* 2nd ed. New York: Routledge, 1994.

[18] Ibid., 55.

[19] Ibid., 11, emphasis in original.

[20] Ibid., 56.

[21] Ibid.

[22] Ibid., 55.

[23] Ibid., 67.

[24] Ibid.

[25] Ibid.

[26] Ibid.

[27] Ibid.

[28] O'Brien, Jean. *Firsting and Lasting: Writing Indians out of Existence in New England.* Minneapolis: University of Minnesota Press, 2010. Print, xv.

[29] Ibid., xxii.

[30] Ibid., xxiii.

[31] Ibid.
[32] Ouden, Amy Den. *Beyond Conquest: Native Peoples and the Struggle for History in New England*. Lincoln: University of Nebraska Press, 2005. Print. Fourth World Rising.
[33] Ibid., 6.
[34] O'Brien, *Firsting and Lasting*, xvii.
[35] O'Brien, *Firsting and Lasting: Writing Indians out of Existence in New England,* xvii.
[36] Miller, Mark Edwin. *Forgotten Tribes: Unrecognized Indians and the Federal Acknowledgment Process*.
[37] Ibid., 2.
[38] Ibid.
[39] Wilkins, David E. *American Indian Politics and the American Political System*. 2nd ed. Lanham: Rowan and Littlefield Publishers, Inc., 2007. The Spectrum Series. Ed. Paula D. McClain and Joseph Stewart, Jr.
[40] Wilkins, David E. and K. Tsianina Lomawaima. *Uneven Ground: American Indian Sovereignty and Federal Law*. Norman: University of Oklahoma Press, 2001: 11. Print.
[41] McCulloch, Anne Merline and David E. Wilkins, "'Constructing' Nations within States: The Quest for Federal Recognition by the Catawba and Lumbee Tribes," 368.
[42] Ibid., 381-4.
[43] David E. Wilkins, "Breaking into the Intergovernmental Matrix: The Lumbee Tribe's Efforts to Secure Federal Acknowledgement," *Publius* 23.4 (1993) 123.
[44] Wilkins, "Breaking into the Intergovernmental Matrix: The Lumbee Tribe's Efforts to Secure Federal Acknowledgement," 140.
[45] Ibid., 128.
[46] Cramer, "The Common Sense of Anti-Indian Racism: Reactions to the Mashantucket Pequot Success in Gaming and Acknowledgment," *Law and Social Inquiry* 31.2 (2006) 315.
[47] Ibid.
[48] Cramer, *Cash, Color and Colonialism*, xv.
[49] Ibid.
[50] Ibid.
[51] Wilkins, "Breaking into the Intergovernmental Matrix: The Lumbee Tribe's Efforts to Secure Federal Acknowledgment," 125.
[52] Jarvis, Brad D. E. *The Brothertown Nation of Indians: Land Ownership and Nationalism in Early America, 1740-1840*, Lincoln: University of Nebraska Press, 2010. Print.; Silverman, David J. *Red Brethren: The Brothertown and Stockbridge Indians and the Problem of Race in Early America,* Ithaca: Cornell University Press, 2010. Print.
[53] Lowery, *Lumbee Indians in the Jim Crow South: Race, Identity and the Making of a Nation,* xviii.
[54] "Indian recognition of non-recognized tribes." *Indian Country Today* (2008). Web. 18 Sep 2010. Accessed at <http://www.indiancountrytoday.com/opinion/30272599.html>.
[55] Ibid.
[56] Some representative examples include: Mike Hixenbaugh, "Hagan Still Sees Hope for Lumbee Recognition Bill," *Fayetteville Observer* (2010), <http://fayobserver.com/articles/2010/12/09/1053963.aspx?sac=Home>; "H.R. 31, the Lumbee Recognition Act," *WashingtonWatch*, Available: http://www.washingtonwatch.com/bills/show/111_HR_31.html2010.

[57] Selections from: "recognition." *Dictionary.com*. Random House, Inc. 19 Dec. 2010. <http://dictionary.reference.com/browse/recognition>.

[58] Wilkins, David E. *American Indian Politics and the American Political System*,19.; William W. Quinn, Jr. "Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. 83." *American Indian Law Review* 17.1 (1992): 38. Print.; Paschal, Rachel. "The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process." *Washington Law Review* 66.209 (1991). Print.

[59] United States Dept. of the Interior. *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*. Washington: 2010. Print.; Wilkins, *American Indian Politics*, 21.

Alaska Native villages, while eligible to receive benefits from the BIA as Indian tribes, differ from Indian tribes in the lower 48 states ethnologically and in the political history of their relationship to the United States. These differences are important to remember when discussing recognized tribal entities as a whole, but are not a primary focus of this work.

[60] Paschal, "The Imprimatur of Recognition," 3.; Garroutte, Eva Marie. *Real Indians: Identity and the Survival of Native America*. Berkeley: University of California Press, 2003: 27. Print.

[61] Barker, Joanne, ed. *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination*. Lincoln: University of Nebraska Press, 2005. Print.; Vine Deloria, Jr. and Clifford M. Lytle. *The Nations Within: The Past and Future of American Indian Sovereignty*. University of Texas Press, 1998. Print.; Wilkins, David E. *American Indian Politics and the American Political System*; Lomawaima, David E. Wilkins and K. Tsianina. *Uneven Ground: American Indian Sovereignty and Federal Law*.

Scholars Vine Deloria, Jr. and Clifford M. Lytle, Taiaiage Alfred, Joanne Barker, and David E. Wilkins and Tsianina Lomawaima, among others have elaborated on the origins, expression and recognition of tribal sovereignty. They write that tribal sovereignty is inherent, as it derives from original occupancy of the lands that now comprise the United States, and predates the arrival of European colonists and the formation of the United States. In treaties with Indian tribes, the United States government implicitly and explicitly recognized tribal sovereignty as inherent. Examples of pieces of federal legislation that apply to recognized Indians include the Indian Education Act (1972), the Indian Child Welfare Act (1978) and the Native American Graves Protection and Repatriation Act of 1990.

[62] Paschal, "The Imprimatur of Recognition," 3.

[63] Garroutte, *Real Indians*, 27.

[64] Wilkins, *American Indian Politics*, 21; Cramer, *Cash, Color and Colonialism*, 5.

[65] Wilkins and Lomawaima, *Uneven Ground*, 65; Garroutte, *Real Indians*, 25.

[66] Cramer, *Cash, Color and Colonialism*, 6; Wilkins and Lomawaima, *Uneven Ground*, 64-97; Sider, *Living Indian Histories*, 22.

[67] Cramer, *Cash, Color and Colonialism*, 6.

[68] Ibid.; Garroutte, *Real Indians*, 25.

[69] Cramer, *Cash, Color and Colonialism*, 6.

[70] Wilkins and Lomawaima, *Uneven Ground*, 99.

[71] Ibid.

[72] Ibid.,102-3.
[73] Ibid., 104-5; Paschal, "The Imprimatur of Recognition," 3.
[74] Wilkins and Lomawaima, *Uneven Ground*, 108.
[75] Sider, *Living Indian Histories*, 22.
[76] Ibid.; Cramer, *Cash, Color and Colonialism*, 86.
[77] Wilkins, *American Indian Politics*, 172.
[78] Cramer, *Cash, Color and Colonialism*; Den Ouden, Amy. *Beyond Conquest.*
[79] Garroutte, *Real Indians*, 28; Miller, *Forgotten Tribes*, 44.
[80] Sider, *Living Indian Histories*, 17.
[81] William W. Quinn, Jr. "Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. 83," 40.
[82] Miller, *Forgotten Tribes*, 23-47; Wilkins, *American Indian Politics*, 109-125.
[83] United States General Accounting Office. *Indian Issues: Improvements Needed in Tribal Recognition Process.* Washington: 2001. Print.; United States General Accounting Office. *Indian Issues: Timeliness of the Tribal Recognition Process Has Improved, but It Will Take Years to Clear the Existing Backlog of Petitions.* Washington: 2005. Print.; Garroutte, *Real Indians*, 27.
[84] United States Dept. of the Interior, Bureau of Indian Affairs. *Number of Petitioners By State.* Ed. Washington: 2008. Web. Accessed at: <http://www.bia.gov/idc/groups/public/documents/text/idc-001212.pdf>.
[85] United States Dept. of the Interior, Bureau of Indian Affairs. *Status Summary of Acknowledgment Cases.* Washington: 2010. Web. Accessed at: <http://www.bia.gov/idc/groups/mywcsp/documents/text/idc012303.pdf>.
[86] Miller, *Forgotten Tribes*, 64.
[87] Ibid.
Miller provides the examples of the Death Valley Timbisha Shoshones and the Tunica-Biloxis as two tribes that were in the process for several years. The tribes in the case studies of this work, the Lumbee of North Carolina and the Brothertown Indian Nation have been in the process for several decades or longer.
[88] Wilkins, *American Indian Politics*, 46.
[89] Ibid., 113; Quinn, "Federal Acknowledgment: Authority," 39.
[90] O'Brien, Jean. *Firsting and Lasting: Writing Indians out of Existence in New England,* xv.; Ouden, Amy Den. *Beyond Conquest,* 31.

[91] Ibid.
[92] Bruyneel, Kevin. *The Third Space of Sovereignty: The Poscolonial Politics of U.S.-Indigenous Relations.* Minneapolis, MN: University of Minnesota Press, 2007. Print.; Quinn, William. "Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept." *The American Journal of Legal History* 34.4 (1990); Wilkins, *American Indian Politics*, 109-124.
[93] Wilkins, *American Indian Politics*, 109-124.
[94] Ibid., 113.
[95] Ibid.
[96] Ibid.; Wilkins and Lomawaima, *Uneven Ground*, 19-63.
[97] Wilkins, *American Indian Politics*, 113-118; Miller, *Forgotten Tribes*, 27.
[98] Wilkins, *American Indian Politics*, 116.
[99] Miller, *Forgotten Tribes*, 27.

[100] Ibid.; Wilkins, *American Indian Politics*, 117; Frantz, Klaus. *Indian Reservations in the United States*. Chicago: The University of Chicago Press, 1999: 23. Print.
[101] Miller, *Forgotten Tribes*, 27; Wilkins, *American Indian Politics*, 116.
[102] Klaus, *Indian Reservations in the United States*, 23.
[103] Ibid., 25; Wilkins, *American Indian Politics*, 117.
[104] Ibid.
[105] Quinn, "Federal Acknowledgment: Historical," 247.
[106] Ibid., 348.
[107] Ibid., 349; *US v. 43 Gallons of Whiskey*, 93 US 188, 195 (1876); *US v. Joseph*, 94 US 614, 617 (1876); *Elk v. Wilkins*, 112 US 94, 98-99 (1884); *Eastern Band of Cherokees v. US*, 117 US 288, 309-310 (1886).
[108] Quinn, "Federal Acknowledgment: Historical," 349. Quinn quotes the text of the Court ruling.
[109] Ibid., 350.
[110] Miller, *Forgotten Tribes*, 28.
[111] Ibid.
[112] Ibid,; Quinn, "Federal Acknowledgment: Historical," 351-352.
[113] Ibid.
[114] Wilkins, *American Indian Politics*, 118.
[115] Indian Reorganization Act 1934 (P.L. 72-323).
[116] Wilkins and Lomawaima, *Uneven Ground*, 213; Miller, *Forgotten Tribes*, 28.
[117] Larus-Tolley, Sara. *Quest for Federal Acknowledgment: California's Honey Lake Maidus*. The University of Oklahoma Press, 2006: 53. Print.
[118] Wilkins, *American Indian Politics*, 119.
[119] Ibid.
[120] Miller, *Forgotten Tribes*, 27.
[121] Wilkins, *American Indian Politics*, 119.
[122] Ibid., 120.
[123] Miller, *Forgotten Tribes*, 27.
[124] Ibid., 28.
[125] Indian Reorganization Act 1934 (P.L. 72-323).
[126] Den Ouden, *Beyond Conquest*, 33.
[127] Miller, *Forgotten Tribes,* 28.
[128] Ibid.
[129] Ibid.; Larus-Tolley, *Quest for Federal Acknowledgment*, 61.
[130] Ibid.
[131] Tolley, *Quest for Federal Acknowledgment*, 61.
[132] Ibid.
[133] Ibid., 62.
[134] Ibid.
[135] Miller, *Forgotten Tribes*, 29.
[136] Ibid.; Tolley, *Quest for Federal Acknowledgment*, 61.
[137] Miller, *Forgotten Tribes*, 30.
[138] Wilkins, *American Indian Politics*, 120.
[139] Ibid.; Miller, *Forgotten Tribes*, 31.
[140] Ibid.

[141] Ibid.
[142] Wilkins, *American Indian Politics*, 121.
[143] Quinn, "Federal Acknowledgment: Historical," 360. The study was known as House Report #2503.
[144] Ibid.
[145] Ibid.
[146] Ibid., 361; Wilkins, *American Indian Politics*, 121.
[147] Ibid.
[148] Quinn, "Federal Acknowledgment: Historical," 362.
[149] Ibid.; *US v. Washington*, 520 F. 2d 676 (9th Cir. 1975); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F. 2d 370 (1st Cir. 1970).
[150] Miller, *Forgotten Tribes*, 42.
[151] Ibid.
[152] Ibid., 44.
[153] Silverman, *Red Brethren: The Brothertown and Stockbridge Indians and the Problem of Race in Early America*, 184-210.
[154] Ibid.
[155] United States. Cong. House. *Brothertown Indians—Wisconsin, Report*. 25th Cong., 3rd sess., 1839.
[156] Ibid.
[157] Ibid.
[158] Berkhofer, Robert F., Jr. *The White Man's Indian: Images of the American Indian from Columbus to the Present*. New York: Random House, 1978. Print.
[159] "Brothertown History," *Indian Country Wisconsin*, Available: http://www.mpm.edu/wirp/ICW-157.html, 10 September 2010, William A. Starna, "Brothertown." *Native America in the Twentieth Century*. Vol. 1. Ed. Mary B. Davis. New York: Garland Pub., 1994.; Caroline K. Andler. "Brief History." Brothertown Indian Nation. Accessed at: <http://www.brothertownindians.org/History.htm>, 9 September 2010.; Walter, Jason S. "The Brothertown Indians and American Indian Policy." 2002. Accessed 9 September 2010 at: <http://www.fdlpl.org/davis_books/brothertown.html>.; Jarvis, *The Brothertown Nation of Indians*.; United States. Cong. House. *Brothertown Indians—Wisconsin, Report*. 25th Cong., 3rd sess., H. Doc. 244, 5.
[160] Starna, "Brothertown."
[161] Jarvis, *The Brothertown Nation of Indians*.
[162] Andler, "Brief History."
[163] Ibid.; Starna, "Brothertown."
[164] Starna, "Brothertown."
[165] Ibid.
[166] Andler, "Brief History."
[167] Ibid.
[168] Starna, "Brothertown."
[169] Ibid.
[170] Andler, "Brief History."

[171] Brian Bull, "Tribes Renew Efforts to Win Federal Recognition," Wisconsin Public Radio (2009). Accessed at: <http://www.npr.org/templates/story/story.php?storyId=120111685>.
[172] Ibid., 3.
[173] Ibid.
[174] Ibid.
[175] Bruyneel, *The Third Space of Sovereignty*.
[178] O'Brien, *Firsting and Lasting*, xvii.
[179] Ibid., xiii.
[180] Brown-Pérez, Kathleen. Interview by J. Kehaulani Kauanui. "Brothertown Indian Nation Rejected for Federal Recognition." *Indigenous Politics From Native New England and Beyond*. WESU, Middletown, CT. 2009.
[181] Dippie, Brian W. Dippie, Brian W. *The Vanishing Ameican: White Attitudes and the U.S. Indian Policy*. Lawrence: University of Kansas Press, 1982: 84. Print.
[182] Bruyneel, *The Third Space of Sovereignty*, 8.
[183] Ibid.
[184] Ibid.
[185] O'Brien, *Firsting and Lasting*, xvii.
[186] Ibid.; Berkhofer, *The White Man's Indian*; Den Ouden, *Beyond Conquest*.
[187] Kauanui, J. Kehaulani. *Hawaiian Blood: colonialism and the politics of sovereignty and indigeneity*. Durham: Duke University Press, 2008: 2. Print.
[188] Ibid.
[189] O'Brien, *Firsting and Lasting*, xxi.
[190] Silverman, *Red Brethren*, 210.
[191] O'Brien, *Firsting and Lasting,* xiv.
[192] Ibid., Introduction.
[193] Den Ouden, *Beyond Conquest*, 207.
[194] Ibid.
[195] Berkhofer, *The White Man's Indian,* 27.
[196] O'Brien, *Firsting and Lasting,* xxi.
[197] Silverman, *Red Brethren*.
[198] James A. Clifford, "Identity in Mashpee," *The Predicament of Culture: Twentieth-Century Ethnography, Literature and Art*. Cambridge: Harvard University Press, 1988.
[199] United States. Cong. House. *Brothertown Indians—Wisconsin, Report*. 25th Cong., 3rd sess., H. Doc. 244, 1839: 5. Print.
[200] The Treaty with the New York Indians (Buffalo Creek Treaty), 1838, 7 Stat. 550, 2 Kappler 502, Whipple Report 15. Accessed electronically at: <http://digital.library.okstate.edu/kappler/Vol2/treaties/new0502.htm#mn28>.
[201] Walter, Jason S. "The Brothertown Indians and American Indian Policy." 2010 (2002). <http://www.fdlpl.org/davis_books/brothertown.html#fn30>.
[202] The Treaty with the New York Indians, Preamble.
[203] Ibid.
[204] The Treaty with the New York Indians, Article 1.
[205] The Treaty with the New York Indians, Article 2.
[206] Agreement with the Senecas, 1797, 7 Stat. 601.

[207] Becker, Mary Druke. "Seneca." *Encyclopedia of North American Indians*. Ed. Hoxie, Frederick E. New York: Houghton Mifflin Company, 1996. 579. Print.
[208] United States. Cong. Senate. *In the Senate of the United States, Mr. Bagby made the following Report: The Committee on Indian Affairs, to whom were referred sundry petitions and memorials from citizens of New York, and others, praying that the Tonawanda Band of the Seneca Tribe of Indians may be exempted from the operation of the treaty of the 20th May, 1842, Report..."* 29th Cong., 2nd sess., 1847. S. Doc. 156: 7.

[209] The Treaty with the New York Indians, Preamble.
[210] Ibid.
[211] Ibid., Article 3.
[212] United States Cong. House. *Memorial of Benjamin Ferris, on behalf of the four yearly meetings of Friends, of Genessee, New York, Philadelphia, and Baltimore, remonstrating against any appropriation being made to carry out the treaty with the Seneca Indians.* 24th Cong., 2nd sess., 1841, H. Doc. 66.
[213] The Treaty with the New York Indians, Preamble; "The Buffalo Creek Treaties". Holland Land Office. 2010. <http://www.hollandlandoffice.com/tirbuf.htm>.
[214] Treaty with the Seneca, Tonawanda Band, 1857, 11 Stat. 735. 12 Stat. 991. 2 Kappler 767. Accessed electronically at: <http://digital.library.okstate.edu/kappler/vol2/treaties/sen0767.htm>.
[215] The Treaty with the New York Indians, Article 2.
[216] S. Doc. 156, 7.
[217] Becker, "Seneca."
[218] United States. Cong. House. *Brothertown Indians—Wisconsin, Report.*
[219] Silverman, *Red Brethren*; Jarvis, *The Brothertown Nation of Indians.*
[220] Silverman, *Red Brethren.*
[221] United States. Cong. House. *Brothertown Indians—Wisconsin, Report*, 4.
[222] United States. Cong. House. *An Act for the relief of the Brothertown Indians, in the Territory of Wisconsin.* 25th Cong., 3rd sess., 1839.
[223] Jarvis, *The Brothertown Nation of Indians*, 3.
[224] Ibid., 11.
[225] Ibid.
[226] United States Department of the Interior, Bureau of Indian Affairs. *Proposed Finding Against the Brothertown Indian Nation.* Washington: 2009, 133. Print.
[227] Ibid.
[228] Ibid.
[229] Toensig, Gale Courey. "Bia Denies Brothertown Federal Acknowledgment," *Indian Country Today*. 2009. Accessed 11 September 2010.
[230] Ibid.
[231] Brothertown Indian Nation. *Brothertown Recognition.* Accessed at: <http://www.TheBrothertown.org/rec.php>, 9 September 2010.
[232] Brown-Pérez, Kathleen. "Brothertown Indian Nation Awaiting Federal Acknowledgment Decision." Fond du Lac: Brothertown Indian Nation, 2009.; Toensig, "Bia Denies Brothertown Federal Acknowledgment."
[233] Toensig, "Bia Denies Brothertown Federal Acknowledgment."

[234] Brown Pérez, Kathleen. Interview by J. Kehaulani Kauanui. "Brothertown Indian Nation Rejected for Federal Recognition." *Indigenous Politics from Native New England and Beyond*. WESU, Middletown. 2009.
[235] Laverty, Phillip. "The Ohlone/Costanoan-Esselen Nation of Monterey, California: Dispossession, Federal Neglect, and the Bitter Irony of the Federal Acknowledgment Process," *Wicazo Sa Review* 18.2 (2003).
[236] Ibid.
[237] Miller, *Forgotten Tribes.*
[238] Ibid.
[239] Ibid.
[240] United States Department of the Interior, Bureau of Indian Affairs. *Proposed Finding Against the Brothertown Indian Nation.*
[241] Ibid.
[242] O'Brien, *Firsting and Lasting.*
[243] O'Brien, *Firsting and Lasting*; Ouden, *Beyond Conquest*; Cramer, *Cash, Color and Colonialism.*
[244] United States Department of the Interior, Bureau of Indian Affairs. *Proposed Finding Against the Brothertown Indian Nation.*
[245] Ibid., 18.
[246] Ibid.
[247] Ibid.
[248] Ibid., 16.
[249] Miller, *Forgotten Tribes.*
[250] Ibid., 58.
[251] Ibid., 1-22; Wilkins, "'Constructing' Nations within States: The Quest for Federal Recognition by the Catawba and the Lumbee Tribes."
[252] Miller, *Forgotten Tribes.*
[253] Miller, *Forgotten Tribes*; Wilkins, "'Constructing' Nations within States: The Quest for Federal Recognition by the Catawba and the Lumbee Tribes"; Clifford, "Identity in Mashpee"; Laverty, "The Ohlone/Costanoan-Esselen Nation of Monterey, California: Dispossession, Federal Neglect, and the Bitter Irony of the Federal Acknowledgment Process."
[254]Wilkins, "'Constructing' Nations within States: The Quest for Federal Recognition by the Catawba and the Lumbee Tribes," 365.
[255] Ibid., 367.
[256] Ibid., 368.
[257] Miller, *Forgotten Tribes.*
[258] Ibid., 19.
[259] Ibid.
[260] Clifford, "Identity in Mashpee," 183.
[261] Wilkins, "'Constructing" Nations within States: The Quest for Federal Recognition by the Catawba and the Lumbee Tribes," 365; Miller, *Forgotten Tribes.*
[262] Miller, *Forgotten Tribes*.
[263] Ibid.
[264] Ibid., 144.
[265] O'Brien, *Firsting and Lasting.*

[266] US. Cong. House of Representatives. *Hearing before the Committee on Natural Resources on H.R. 31, Lumbee Recognition Act and H.R. 1385, Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2009*.
[267] Ibid., 64.
[268] Ibid., 81.
[269] Ibid.
[270] "Federal Recognition: The Lumbee Tribe's One Hundred Year Quest." The Lumbee Tribe of North Carolina. Web. Accessed at:
<http://www.lumbeetribe.com/History_Culture/100_year_quest.pdf>.
[271] Pub .L. 570, Act of June 7, 1956, 70 Stat. 254
[272] "Federal Recognition: The Lumbee Tribe's One Hundred Year Quest." The Lumbee Tribe of North Carolina.
[273] Ibid., 8.
[274] US. Cong. House of Representatives. Hearing before the Committee on Natural Resources on H.R. 31, Lumbee Recognition Act and H.R. 1385, Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2009. 111th Cong., 1st Sess., 2009: 26.
[275] "Lumbee History and Culture." The Lumbee Tribe of North Carolina. 2009. Accessed at : <http://www.lumbeetribe.com/History_Culture/History_Culture%20Index.html#WhoaretheLumbee>. 3 February 2010.
[276] Blu, *The Lumbee Problem: The Making of an American Indian People,* 44; Dial, *The Only Land I Know: A History of the Lumbee Indians*, 23.
[277] Ibid.
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