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DECOLONIZING THE MINDSET

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ABSTRACT: There has never been an all-purpose definition of "Indian" or "Indian tribe" for federal purposes.[2] Initially, questions concerning the definition of "tribe" arose in the context of treaty relations.[3] Later, federal legislation required determinations of which Tribal Nations could be considered "tribes" within the meaning of a particular statute.[4] More recently, such determinations are necessary to identify those recipients eligible for federal benefits, as well as sovereign tribal political entities whose authority is respected and protected by the federal government in various matters such as economic development, child welfare, and environmental protection.[5] The need for formal definitions of "Indian" and "Indian tribe" derived from the policy goals of the federal government. What it means to be an Indian or a federally recognized tribe in the United States is a product of the legal history of the federal government's relationship with, and policies toward, Native Americans and Alaska Natives.[6] Today, the government's definition of "Indian" and "Indian tribe" frequently includes a federal acknowledgment requirement. The inclusion of a federal acknowledgement requirement poses a direct threat to the rights and sovereignty of all tribes, and creates a particular challenge for non-BIA listed tribes by attempting to link tribal sovereignty to federal acknowledgment.[7] Additionally, the federal acknowledgment requirement perpetuates the indignities of colonization and is out of line with the United Nations Declaration on the Rights of Indigenous Peoples. Such attacks upon the rights of non-BIA listed tribes have been dubbed termination's modern equivalent.[8] Thus the legitimacy of state recognized tribes is frequently attacked despite the fact that colonial and often state recognition predates federal recognition, and the Federal Acknowledgement Process persists in functioning as a barrier to historically well documented tribes seeking to achieve federal recognition. In light of the current political landscape, alternative means for recognition are necessary to protect the inherent rights and sovereignty of historic non-BIA listed tribes.

Since its establishment in 1944, protecting the inherent and legal rights of tribes remains the National Congress of American Indians' (NCAI) primary focus.[9] Moreover, supporting non-federally recognized tribes as they pursue recognition is consistent with NCAI's mission to "[p]rotect and enhance treaty and sovereign rights;" "[s]ecure traditional laws, cultures, and ways of life for our descendants;" "[p]romote a common understanding of the rightful place of tribes in the family of American governments;"

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[2] Cohen's Handbook of Federal Indian Law § 3.02 (Nell Jessup Newton ed., 2017) [hereinafter Cohen's Handbook].
[3] Cohen's Handbook § 3.02.
[4] *Id.*
[5] *Id.*
[6] Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L .REV. 1041, 1060 (2012).
[7] ALL. OF COLONIAL ERA TRIBES, HERITAGE AND SOVEREIGNTY UNDER ATTACK! (2011).
[8] *Id.*
[9] *About NCAI—Mission & History*, NAT'L CONG. OF AM. INDIANS, http://www.ncai.org/about-ncai/mission-history (last visited May 19, 2020).

and "[i]mprove the quality of life for Native communities and peoples."[10] The modern emphasis on federal acknowledgment has resulted in such status operating as a prerequisite for protection of inherent rights and recognition of tribal sovereignty, and it is NCAI's obligation to defend against the threats to both federally recognized and non-Bureau of Indian Affairs (BIA) listed tribes that accompany such narrow interpretations of "Indian" and "tribe." In a 1978 paper prepared for the National Congress of American Indians in conjunction with NCAI's National Conference on Federal Recognition, The Institute for the Development of Indian Law provided the following reminder regarding fundamental principles of inherent rights and tribal sovereignty:

> Remember that unrecognized tribes have the same status as terminated tribes. The ultimate question may not be whether recognized tribes are for or against unrecognized tribes, but whether recognized tribes are for or against themselves and their own future.[11]

Part I of this paper discusses the inherent rights of tribes notwithstanding the absence or presence of recognition. Part II analyzes the history of the federal government's relationship with Native Americans and Alaska Natives from the United States' founding up until the formalization of the Federal Acknowledgement Process. Specifically, Part II will explain how evolving federal policy goals influenced the government's definition of "Indian" and "Indian tribe," and ultimately resulted in the formalization of the Federal Acknowledgement Process. Lastly, Part III describes the implications of federal and state recognition, discusses the importance and legitimacy of state recognition, and advocates for the adoption of a federal definition of "Indian tribe" which more closely resembles the *Montoya* standard and the Indian Arts and Crafts Act.

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[10] *Id.*

[11] TERRY ANDERSON & KIRKE KICKINGBIRD, AN HISTORICAL PERSPECTIVE ON THE ISSUE OF FEDERAL RECOGNITION AND NON-RECOGNITION, INS. FOR THE DEV. OF INDIAN LAW 17 (1978).

I. Inherent Rights

All Indigenous Peoples have inherent rights. These rights exist independently of any colonial state definitions of who is and who is not Indigenous. However, because the foundation of colonial governments requires those entities to ignore the inherent rights of Indigenous Peoples, these governments—such as the United States government—tend to ignore some Indigenous Peoples, and recognize others. Indeed, the United States legal system has long viewed Indigenous Peoples as inferior to people of European descent, and as people deserving of lesser rights.[12] However, the fact that the United States legal system has taken this approach to Indigenous Peoples does not make the inherent rights of Indigenous Peoples vanish; it merely means they have been ignored.

Much of the legal framework around the rights of Indigenous Peoples has been developed in international law. In the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the General Assembly of the United Nations affirmed that "[I]ndigenous peoples are equal to all other peoples" and have the right to be different and to be respected.[13] The most fundamental right is the right of self-determination, including the right for Indigenous Peoples to determine their own political status.[14] The right of self-determination—for all peoples—has been acknowledged in the United Nations Charter; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; and the Vienna Declaration and Programme of Action.[15] The UNDRIP notes that Indigenous Peoples have "various historical and cultural backgrounds [that] should be taken into consideration."[16]

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[12] *See generally Johnson v. M'Intosh*, 21 U.S. 543 (1823).
[13] G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).
[14] *Id.*
[15] *Id.*
[16] *Id.*

The backbone of UNDRIP is found in Article 3; the right of self-determination.[17] The right to self-determination includes the right not to "be subjected to forced assimilation or destruction of their culture."[18] Some scholars have defined self-determination as the right for "culturally and historically distinct people" to choose their own political status.[19] Furthermore, Indigenous Peoples "have the right to practise and revitalize their cultural traditions and customs."[20] They also have the right to "manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies."[21] Indigenous Peoples further have the right to participate in all "decision-making in matters which would affect their rights."[22] These rights are not dependent on a country's recognition of people as Indigenous; Article 33 explicitly states that "Indigenous peoples have the right to determine their own identity."[23] The United States initially objected to the passage of UNDRIP, noting that it already recognizes these rights. Since becoming a signatory to UNDRIP, the United States has misappropriated its aspirations. By recognizing self-determination for federally recognized Tribes, rather than all indigenous peoples, the United States has failed to implement UNDRIP in accordance with the spirit and principle of the Declaration.[24]

Similar to the right of self-determination announced in UNDRIP, the International Covenant on Civil and Political Rights provides that ethnic, religious, or linguistic minorities "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."[25] Nowhere in this covenant are these rights declared to be dependent on the country's acknowledgement of Indigenous Peoples as such.

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[17] *Id.*, art. 3.
[18] *Id.*, art. 8.
[19] Mary Ellen Turpel, *Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, 25 CORNELL INT'L L. J. 579, 592 (1992).
[20] G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples, art.11 (Sept. 13, 2007).
[21] *Id.*, art. 12.
[22] *Id.*, art. 18.
[23] *Id.*, art. 33.
[24] Don Wedll, *The United Nations Declaration on the Rights of Indigenous Peoples and its Relevance to American Indians in Minnesota and Beyond*, 30 HAMLINE J. PUB. L. & POL'Y 387, 392 (2009).
[25] G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 27 (Mar. 23, 1976).

The Organization of American States (OAS) has also recognized "the urgent need to respect and promote the inherent rights of [I]ndigenous peoples."[26] In Article 1 of the OASDRIP, it is explicitly declared that "[s]elf-identification as [I]ndigenous peoples will be a fundamental criteria for determining to whom this Declaration apples. The states shall respect the right to such self-identification as indigenous, individually or collectively."[27] Inherent rights are thus belonging to those who identify as Indigenous, not merely to those whom the state chooses to recognize as Indigenous. Mirroring the UNDRIP, article 3 of the OASDRIP provides that self-determination is a fundamental right.[28] Countries do not have the right to assimilate Indigenous Peoples. Indigenous Peoples "have the right to maintain, express, and freely develop their cultural identity in all respects, free from any external attempt at assimilation."[29] Indigenous Peoples have inherent rights to cultural identity and heritage,[30] and the right to "freely exercise their own spirituality and beliefs."[31] Moreover, it is the responsibility of countries to ensure the full enjoyment of these rights.[32] Perhaps unsurprisingly, the United States has "persistently objected" to the OASDRIP.[33] Convention 169 of the International Labour Organization includes language that, in relevant part, mirrors language of the UNDRIP and OASDRIP.[34] The United States never ratified Convention 169.[35]

Of course, the international legal regime pertaining to the rights of Indigenous Peoples is far from perfect. At least one scholar has noted that in international legal systems, state sovereignty is frequently given priority over human rights and Indigenous self-determination claims.[36] In the debate leading up to

[26] A.G. Res. 288 (XLVI-O/16), American Declaration on the Rights of Indigenous Peoples (June 15, 2016).
[27] *Id.*, art. I.
[28] *Id.*, art. III.
[29] *Id.*, art. X.
[30] *Id.*, art. X, art. XIII.
[31] *Id.*, art. XVI.
[32] *Id*.
[33] *Id.*, n.1.
[34] INTERNATIONAL LABOUR ORGANIZATION C169, Indigenous and Tribal Peoples Convention, 1989.
[35] INTERNATIONAL LABOUR ORGANIZATION, *Ratifications for the United States of America*, https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871 (last visited April 30, 2020).
[36] Catherine J. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199, 203 (1992).

the passage of UNDRIP, Indigenous representatives insisted on the inclusion of the right to self-determination, because it is both inherent and "essential for the realization of their fundamental human rights," arguing that because it is inherent it need not be recognized by states to exist as a right.[37]

Self-determination has also been viewed as a way that Indigenous communities can "guarantee cultural integrity and strengthen social cohesion."[38] Additionally, self-determination is protective, because "[I]ndigenous peoples are vulnerable to hostile majoritarian interests."[39] Indigenous Peoples are vulnerable to—and sometimes adopt and perpetuate—such hostile interests regardless of whether they are federally recognized. Indeed, the claimed federal power to revoke Tribal sovereignty—as occurred during the Termination period—is wholly inconsistent with the right of self-determination.[40] Unfortunately, Tribes that are federally recognized have on occasion opposed efforts of Tribes seeking recognition.[41] This too runs counter to the principles of self-determination. Furthermore, the lack of federal recognition for many unrecognized Tribes is a result of the fact that "the federal recognition process is painfully unwieldy [and] often takes decades to resolve."[42] Allowing the definition of who is and who is not Indigenous to be created by a government that has largely opposed Tribal self-governance and self-determination is to allow the rights of all Indigenous Peoples to be shrunk or expanded as that government sees fit.

II. Federal Policy Eras & Their Impacts on the Definition of "Indian" and "Indian Tribe"

Over time, the federal government's use of the terms "acknowledgement" and "recognition" has evolved from elusive to rigid. Upon examining the evolution of the government's attitude towards Native Americans and Alaska Natives from the founding of the United States to present, history reveals a

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[37] *Id.* at 224.
[38] Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65, 87 (1992).
[39] *Id.*
[40] *See id.*
[41] Alexa Koenig and Jonathan Stein, *Federalism and the State Recognition of Native American Tribes: A Survey of State-Recognized Tribes and State Recognition Processes across the United States*, 48 SANTA CLARA L. REV. 79, 82 (2008).
[42] *Id.* at 102.

correlation between the increasing formalization of these terms and the government's policy goals.[43] Accordingly, the formalization of the Federal Acknowledgement Process influenced the way in which the government defines "Indian" and "Indian tribe." While "acknowledged" and "recognized" did not always carry the weight they do today, the government has implicitly incorporated these formalized terms into the definitions of "Indian" and "Indian tribe."[44] In order to understand the government's current perception of tribal sovereignty, it is helpful to examine the development of federal Indian policy leading up to the promulgation of the Federal Acknowledgement Process.[45] Two conflicting notions characterize the policies of the new government at the outset of the United States. First, the federal government—at least in some sense—respected Tribal Nations.[46] At the very least, the size and political force of these Nations rendered their alliance imperative to the new government's success.[47] Second, the new government planned to strip the Nations of their land and resources.[48] The shift in United States' Indian policy over time reflects these contradictory stances which continue to characterize the government's interaction with Tribal Nations.[49] United States' Indian policy eras resemble a pendulum—as the government's goals swing back and forth between promoting and eliminating Tribal sovereignty.[50]

Several policy eras illustrate the evolution United States' relationship with Tribal Nations from the country's foundation to present, and these policy eras ultimately influence the Federal Acknowledgment Process.[51] The Treaty Making Era describes the sovereign-to-sovereign relationship between tribes and the

[43] Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L .REV. 1041, 1060 (2012).
[44] Cohen's Handbook § 3.02
[45] 25 C.F.R. § 83
[46] ANGELIQUE WAMBDI EAGLEWOMAN & STACY L. LEEDS, MASTERING AMERICAN INDIAN LAW 68 (Russell Weaver, 2d ed. 2019).
[47] *Id.*
[48] *Id.*
[49] *Id.* at 10.
[50] *Id.*
[51] *Id.*

U.S. government from 1778 to 1871.[52] Although "tribe" was not formally or legally defined, overlapping policy goals within this era—such as Removal and Reservation policies—enhanced the government's need to categorize reservation tribes.[53] The Removal Era refers to the period during which the government's official policy was to remove tribes from the eastern seaboard to the west, and it began in 1830 when Congress passed the Indian Removal Act under Andrew Jackson's Administration.[54] However, not all tribes were removed west and several documented members amongst those tribes that were removed remained in their eastern homelands.

Removal and consolidation policies required the U.S. to categorize removed tribes based on which would receive federal assistance and designated Indian agents, [55] as many tribes relied on treaty-guaranteed resources after being relocated.[56] The BIA fulfilled certain treaty obligations by providing federal assistance such as rations, farming equipment, and other resources, and placed federal Indian agents on reservations to impose federal control.[57] During the Reservation Era, which began in 1849, the U.S. emphasized formal boundaries for tribal property and distinguished between Native and white communities.[58] However, some eastern reservations were established as early as the 17th Century.

The Supreme Court initially alluded to the implications associated with being categorized as a tribe towards the end of the Treaty Making Era. In 1867, the case *In re Kansas Indians* required the Court to decide whether the state could tax land owned by individual Indians from three different tribes.[59] In holding

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[52] ANGELIQUE WAMBDI EAGLEWOMAN & STACY L. LEEDS, MASTERING AMERICAN INDIAN LAW 10 (Russell Weaver, 2d ed. 2019).
[53] Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L .REV. 1041, 1063–64 (2012).
[54] ANGELIQUE WAMBDI EAGLEWOMAN & STACY L. LEEDS, MASTERING AMERICAN INDIAN LAW 13 (Russell Weaver, 2d ed. 2019).
[55] Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L .REV. 1041, 1064 (2012).
[56] ANGELIQUE WAMBDI EAGLEWOMAN & STACY L. LEEDS, MASTERING AMERICAN INDIAN LAW 15 (Russell Weaver, 2d ed. 2019).
[57] *Id.*
[58] *Id.* at 14–15.
[59] In re Kansas Indians, 72 U.S. 737 (1866).

the state had no such authority, the Court reasoned that if a Tribe's political organizations were preserved and "recognized by the political department of the government as existing, they are people distinct from others, capable of making treaties, separated from the state's jurisdiction, and governed exclusively by the government of the Union." [60]

After the treaty-making period ended in 1871, and towards the end of the Removal and Reservation Eras, the Allotment and Assimilation Era began. As federal policy goals shifted, the government's need to define "Indian" and "Indian Tribes" increased.[61] The Allotment and Assimilation Era refers to the period during which the United States using egregious and genocidal tactics, attempted to destroy tribal nations, tribal customs, native languages, spirituality, and family.[62] The United States. had two main goals during this era, and employed various tactics—many of which violated treaty provisions, formal agreements, and promises to tribal leaders—to achieve them.[63] First, the government wanted to assimilate Native Americans into white civilization.[64] The United States attempted to achieve this goal by kidnapping tribal children and forcing them to attend Indian boarding schools, and establishing Courts of Indian Offenses as a means to punish tribal members for practicing spiritual and traditional customs.[65] Second, the government sought to break up the tribal land base.[66] The General Allotment Act of 1887, also known as the Dawes Act, established a mechanism for parceling out tribal land to individual tribal members and making "surplus land" available to white settlers, thereby achieving the government's second goal.[67] Additionally, the Dawes Act led federal officials to create formal tribal membership rolls to determine who was entitled to a parcel

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[60] *Id.* at 755.
[61] Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L .REV. 1041, 1066 (2012).
[62] ANGELIQUE WAMBDI EAGLEWOMAN & STACY L. LEEDS, MASTERING AMERICAN INDIAN LAW 15 (Russell Weaver, 2d ed. 2019).
[63] *Id.*
[64] *Id.*
[65] *Id.* at 15–16.
[66] *Id.* at 15.
[67] The General Allotment Act, 25 U.S.C. § 331 (1887). *See also* ANGELIQUE WAMBDI EAGLEWOMAN & STACY L. LEEDS, MASTERING AMERICAN INDIAN LAW 17 (Russell Weaver, 2d ed. 2019).

of land, or an allotment.[68] These federal membership rolls continue to impact decisions regarding who can be considered a citizen of a tribal nation.[69] Ultimately, the Allotment and Assimilation Era and laws associated with it defined tribes and tribal members in order to eliminate tribal nations and culture, as well as to eliminate the federal government's obligations to the tribes.[70]

During the Allotment and Assimilation Era, the Supreme Court rendered several opinions defining tribe. In *United States v. Joseph*, the Supreme Court considered whether the Pueblo of Taos was a tribe under the Indian Nonintercourse Act.[71] Because the Court determined that the Pueblo people were too civilized to necessitate a guardian-ward relationship to protect against settlement by non-Indians, the Court held the Pueblo was not a tribe within the Act's meaning.[72] In *Montoya v. United States*, the Court determined whether the Native Americans in question belonged to a "band, tribe, or nation in amity with the United States" as required under the Indian Depredation Act of 1891.[73] In considering the issue, the Court articulated the following common-law standard to determine whether a Native American entity constituted a tribe:

> 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, and inhabiting a particular though sometimes ill-defined territory; by a "band," a company of Indians not necessarily, though often, of the same race or tribe, but united under the same leadership in a common design.[74]

Through its references to race, the *Montoya* Court implied some amount of Indian blood was necessary for an individual to be considered a tribal member. The Court did not stop there, and continued to explain why the term "nation" was not an appropriate term to describe a collection of tribal members:

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[68] ANGELIQUE WAMBDI EAGLEWOMAN & STACY L. LEEDS, MASTERING AMERICAN INDIAN LAW 17 (Russell Weaver, 2d ed. 2019).
[69] *Id.*
[70] Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L .REV. 1041, 1069 (2012).
[71] *United States v. Joseph*, 94 U.S. 614, 616–17 (1876).
[72] *Id.*
[73] *Montoya v. United States*, 180 U.S. 261, 261 (1901).
[74] *Id.* at 266.

> Owing to the natural infirmities of the Indian character, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits, and lack of mental training, they have as a rule shown a total want of that cohesive force necessary to the making up of a nation in the ordinary sense of the word.[75]

The Supreme Court later overruled *Joseph*, and applied the *Montoya* standard to the Indian Nonintercourse Act in *United States v. Candelaria*.[76] In *Candelaria*, the United States sued on behalf of the Pueblo Indians of New Mexico. Whether the United States could represent the Tribe in court depended upon whether the federal government had a guardian-ward relationship with the Pueblos. Citing the *Montoya* standard, the Supreme Court found that the Pueblo Indians were a tribe by virtue of their "un-civilized" nature.[77] Therefore, a guardian-ward relationship existed, and the United States could sue on the Tribe's behalf.

Many Indian law scholars herald *Montoya* as the first Supreme Court decision to set forth a standard for identifying federally recognized tribes.[78] It is important to note that the definitions of tribes and tribal members articulated in Allotment Era legislation and judicial opinions presume tribal inferiority as opposed to tribal sovereignty, focus on individual blood quantum, and are rooted in blatant racism.[79] Incorporating paternalistic notions of the guardian-ward relationship into the definition of tribe and creating federal membership rolls to formalize a descent-based definition of tribal member, was a means by which the federal government aimed to achieve its political goals of assimilating tribal members into white culture and shrinking the tribal land base.[80]

Congress passed the Indian Reorganization Act (IRA) in 1934, marking the dawn of the Indian Self-Government Era.[81] The IRA significantly altered the economic and political landscape for Tribal

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[75] *Id.* at 617–18.
[76] *United States v. Candelaria*, 271 U.S. 432 (1926).
[77] *Id.* at 442.
[78] Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L .REV. 1041, 1073 (2012).
[79] *Id.*
[80] *Id.* at 1074.
[81] ANGELIQUE WAMBDI EAGLEWOMAN & STACY L. LEEDS, MASTERING AMERICAN INDIAN LAW 19 (Russell Weaver, 2d ed. 2019).

Nations, as the legislation not only ended Allotment and Assimilation policies, but also included key provisions promoting tribal self-government and economic development.[82] The IRA defined three categories of Indians that were eligible to receive government services and form tribal governments:

> 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 Indian reservation, and shall further include all other persons of one-half or more Indian blood.[83]

Additionally, the IRA defined "tribe" as "any Indian tribe, organized band, pueblo or the Indians residing on one reservation."[84] These definitions appearing in the final version of IRA differ from their original form in two important aspects. First, the original version of the bill did not include the phrase "now under federal jurisdiction." Thus, the definitions of Indian and tribe in the original bill encompassed any collective body of Indians residing on a reservation.[85] Second, the original bill made no distinction between state and federal reservations.[86] Therefore, the term "recognized" could be interpreted as simply referring to the fact of a tribe's existence.[87] Ultimately the IRA's definitions provided that a tribe's authority to reorganize its government and establish corporate charters under the IRA depended on whether or not the tribe in question was federally recognized.

The IRA identified 258 tribes that the federal government deemed eligible for pursuing certain economic development activities and deciding whether to reorganize their tribal government under the Act.[88] The names of those 258 eligible tribes were compiled into a single list, which implicitly resulted in the first informal list of federally recognized tribes.[89] The IRA definition of Indian formalized *Montoya's*

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[82] *Id.* at 19–20.
[83] TERRY ANDERSON & KIRKE KICKINGBIRD, AN HISTORICAL PERSPECTIVE ON THE ISSUE OF FEDERAL RECOGNITION AND NON-RECOGNITION, INS. FOR THE DEV. OF INDIAN LAW 3 (1978).
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L .REV. 1041, 1075 (2012).
[89] *Id.*

race-based standard of tribal membership by referring to blood quantum requirements—perpetuating its racially discriminatory attitude towards tribes and tribal members.[90] In the years following the IRA's passage, the Indian Organization Division within the Office of Indian Affairs commissioned anthropologists to visit some non-BIA listed tribes, including the Shinnecock and Poospatuck Reservations, the Mole Lake Band of Lake Superior Chippewa, the Lumbee Tribe of North Carolina, "Creek towns" in Oklahoma, "the Houma, Tunica, and various Choctaw groups" in Louisiana, the Chickahominy in Virginia, and the Poarch Creek in Alabama.[91] This insinuates that the BIA and DOI actively considered providing federal services to non-BIA listed tribes.[92] Anthropologists employed overtly racist methods based on phenotype to determine which Indians had the requisite degree of blood. Carl Seltzer, a physical anthropologist, referred to Lumbee tribal members' physical features, blood-type, and measurements and concluded that 22 out of more than 200 individuals had at least one-half or greater Indian blood.[93]

Many tribes were omitted from the initial IRA list, which inevitably raised questions regarding how tribes could achieve this newly formalized federal recognition status.[94] Following the IRA's passage, Felix Cohen authored the Handbook of Federal Indian Law in 1941. The Handbook provided criteria for DOI to consider when determining which tribes were eligible for federal recognition. Cohen identified the following five factors as favorable to a finding of federal recognition: (1) "[t]hat the group has had treaty relations with the United states;" (2) "[t]hat the group has been denominated a tribe by act of Congress or Executive Order;" (3) "[t]hat the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe;" (4) "[t]hat the group has been treated as a tribe or band by other Indian tribes;" and (5) "[t]hat the group has exercised political authority over its members, through a

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[90] 25 U.S.C. § 479.
[91] TERRY ANDERSON & KIRKE KICKINGBIRD, AN HISTORICAL PERSPECTIVE ON THE ISSUE OF FEDERAL RECOGNITION AND NON-RECOGNITION, INS. FOR THE DEV. OF INDIAN LAW 5–6 (1978).
[92] *Id.*
[93] *Id.* at 5.
[94] Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L .REV. 1041, 1075 (2012).

tribal council or other governmental forms."[95] The Department of the Interior (DOI) referred to Cohen's five factors when determining whether a tribe omitted from the IRA list was otherwise eligible for federal recognition.[96]

As many tribal communities sought to re-establish the strength of their governments and stimulate economic activity in the years following IRA's passage, the DOI frequently answered questions regarding the eligibility of tribes that were omitted from the IRA list. However, this initial recognition process was abruptly halted by anti-tribal initiatives which aimed to eliminate tribal governments.[97] Congress responded to these forces by enacting legislation that terminated the government-to-government relationship with certain tribal nations.[98] Although brief, the government terminated federal recognition of 109 tribes during this period, which is commonly known as the Termination Era.[99] The recognition process resumed in the early 1960s as the civil rights movement ushered in the Indian Self-Determination Era.[100]

Indian activism continued to surge in the early 1970s, as President Nixon publicly implored Congress to promote Indian self-determination.[101] Congress responded by establishing the American Indian Policy Review Commission.[102] The Commission was tasked with conducting a comprehensive investigation of the historical and legal developments characterizing the unique relationship between tribes and the federal government, including an examination of the government's relationship with tribes that were never

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[95] Cohen's Handbook § 3.02.
[96] Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L .REV. 1041, 1075 (2012).
[97] Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L .REV. 1041, 1077 (2012).
[98] ANGELIQUE WAMBDI EAGLEWOMAN & STACY L. LEEDS, MASTERING AMERICAN INDIAN LAW 20 (Russell Weaver, 2d ed. 2019).
[99] Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L .REV. 1041, 1077 (2012).
[100] ANGELIQUE WAMBDI EAGLEWOMAN & STACY L. LEEDS, MASTERING AMERICAN INDIAN LAW 22 (Russell Weaver, 2d ed. 2019); *see also* Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L .REV. 1041, 1077 (2012).
[101] *Id.*
[102] American Indian Policy Review Commission, Final Report (1977).

federally recognized.[103] According to the Commission's Task Force on Terminated and Nonfederally Recognized Indians, arbitrary decision-making by federal officials coupled with an acknowledgement process devoid of uniformity resulted in hundreds of tribes being denied federal recognition.[104] In 1977, the Commission issued its final report with various recommendations for improving federal Indian affairs policy. The Commission noted the federal government's history of employing vague, inconsistent, and contradictory standards throughout the recognition process, and recommended that Congress adopt a systematic process by which tribes could pursue federal recognition, maintain consistent criteria by which the eligibility of such tribes could be determined, and create an office independent from the Bureau of Indian Affairs (BIA) to oversee the process.[105] Additionally, the Commission recommended that the burden of proof be on the United States to prove that a tribe does not meet the criteria for federal recognition.[106] Lastly, the Commission recommended a set of criteria derived from the factors developed and applied by the DOI following IRA's enactment.[107]

In 1978, the DOI promulgated formal regulations governing the process by which tribes could become federally recognized. However, the DOI disregarded the Commission's recommendations and instead opted to place the burden of proof on the tribe seeking federal acknowledgment. The Office of Federal Acknowledgment clarified the regulations in 1994 and included provisions that purportedly reduced the burden of proof on tribes capable of demonstrating previous federal recognition.[108] In 2015, the BIA issued a revised rule establishing the procedures and applicable criteria for federal acknowledgement.[109] The amended regulations were not promulgated to substantively alter the

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[103] *See id.*; *see also* Task Force Ten: Terminated and Nonfederally Recognized Indians, American Indian Policy Review Commission, Report on Terminated and Nonfederally Recognized Indians 94–2 (Oct. 1, 1976) [hereinafter Task Force Ten].
[104] *See* Task Force Ten, *supra* note 102.
[105] American Indian Policy Review Commission, Final Report 457, 477–82 (1977).
[106] *Id.*
[107] *Id.*
[108] *See* 59 Fed. Reg. 9280 (1994); 70 Fed. Reg. 16, 513—16, 516 (March 31, 2005).
[109] 80 Fed. Reg. 37, 862 (July 1, 2015) (codified at 25 C.F.R. § 83).

acknowledgement process, but were intended to render it more efficient and transparent.[110] Despite these reformative efforts, the federal acknowledgement process remains expensive, inefficient, and extremely burdensome.

III. Recognition and Its Modern Implications

According to Congress, "'[r]ecognized' is more than a simple adjective; it is a legal term of art."[111] Today, federal acknowledgment or recognition refers to the formal political act of affirming a tribe's legal status as an independent political community, and institutionalizing the government-to-government relationship between the federal government and tribe.[112] Congress enacted the Federally Recognized Indian Tribe List Act in 1994, which formally announced three ways in which a tribe may become federally recognized: through statute, the administrative process, or by decision of a United States court.[113] The very existence of recognized tribes indicates the existence of another category—non-recognized tribes.[114] Non-BIA listed tribes are those which have not been recognized by the federal government despite historical and ethnographic evidence demonstrating their existence,[115] and are different from non-historically verifiable groups of non-interrelated individuals claiming tribal identity. Such labels are accompanied by substantial political and legal implications, such as a tribe's eligibility for federal benefits and services, whether a fiduciary trust relationship exists between the tribe and government, and whether the federal government has affirmed a tribe's sovereign authority to form tribal governments and promulgate tribal laws.[116]

Under U.S. law, federally recognized tribes are considered independent sovereigns exercising governmental authority over their own territory, while the federal government seeks to prevent non-federally recognized tribes from exercising their inherent authority because such tribes lack a "legal

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[110] Cohen's Handbook § 3.02 [7][a].
[111] H.R. Rep. No. 103–781, 103rd Cong., 2d Sess., 2 (1994).
[112] Cohen's Handbook § 3.02 [3].
[113] Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791-92, § 103(3).
[114] Cohen's Handbook § 3.02 [3].
[115] *Id.*
[116] *Id.*

relationship" with the United States.[117] Adding a tribe to the official list of federally recognized tribes typically clarifies remaining uncertainty surrounding such tribe's legal status and governmental authority. However, a tribe omitted from the official list must pursue other means to achieve federal recognition simply to exercise their inherent rights. Since the Federal Acknowledgement Process was initially implemented in 1978, 356 tribes announced their intention to apply for federal recognition through the administrative process.[118] Yet the government has decided only 52 cases in the last four decades.[119] Of those determinations, the federal government granted 18 petitions for recognition and denied 35 others.[120] In addition to the administrative process, Congress has recognized 36 tribes since 1978. For example, the Office of Federal Acknowledgement denied the Little Shell Tribe of Chippewa Indians of Montana's petition for federal recognition, and Congress later recognized the Tribe through legislation.[121] While 574 Indian tribes are currently "recognized" or "acknowledged" and included on the list of federally recognized tribes, "hundreds of others remain nonexistent, ineligible for government services, denied their sovereignty, and dismissed by courts."[122]

The problem with the modern definition of tribe—as the federal government commonly uses it today—is that it typically refers only to federally recognized tribes. As a result, the government frequently ignores the inherent rights of non-federally recognized tribes. By defining tribes this way, the federal government falsely links tribal sovereignty to federal acknowledgement as if the government delegates tribal authority and affirms tribal legitimacy.[123] Such a definition directly contradicts the modern federal

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[117] Rebecca Tsosie, *Reconceptualizing Tribal Rights: Can Self-Determination be Actualized Within the U.S. Constitutional Structure?*, 15 Lewis & Clark L.R. 923, 937 (2012).
[118] Bureau of Indian Affairs, Letters of Intent Received as of July 31, 2012 (2012), available at https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/admindocs/NumLetrIntent_2013-11-12.pdf
[119] *Id.*
[120] *Id.*
[121] Little Shell Tribe of Chippewa Indians of Montana Restoration Act of 2019, S. 51, 116th Cong. (2020).
[122] Gerald Carr, *Origins and Development of the Mandatory Criteria within the Federal Acknowledgement Process*, 14 Rutgers Race & the Law Review 1, 2 (2013).
[123] ALL. OF COLONIAL ERA TRIBES, HERITAGE AND SOVEREIGNTY UNDER ATTACK! (2011).

Indian policy of self-determination, and infringes upon the inherent sovereignty of all tribal nations.[124] Perhaps the most fundamental principle of Indian law, supported by numerous Supreme Court decisions, is that those powers lawfully vested in a tribal nation are not delegated by the federal government, but are instead inherent sovereign powers which have never been extinguished.[125] This principle extends equally to non-BIA listed tribes. Non-BIA listed tribes may nonetheless be recognized under state law, and frequently reside on state-recognized reservations.[126] Aside from qualifying for state support, state-recognition is significant because it acknowledges the tribes' historical and cultural contributions.[127] In certain instances, state recognized tribes—recognition of which predate the federal government—later achieve federal recognition in addition to state recognition through the Office of Federal Acknowledgment process or congressional legislation.[128] For example, six of the most recently federally recognized tribes were previously state recognized.[129]

Unfortunately, widespread misinformation has resulted in unwarranted opposition to state recognition.[130] Opponents have incorrectly asserted that state recognized tribes are non-historical tribes which lack lineal descent requirements necessary for enrollment, and further claim that state recognition is unconstitutional.[131] Contrary to such assertions, state recognized tribes often maintain rigorous enrollment standards and many have sustained communities in their aboriginal homelands.[132] Additionally, the United States Departments of Housing and Urban Development, Labor, Education, and Health and Human

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[124] *Id.*
[125] Cohen's Handbook § 3.02.
[126] Cohen's Handbook § 3.02 [9].
[127] State Recognition of American Indian Tribes, National Conference of State Legislatures, https://www.ncsl.org/research/state-tribal-institute/state-recognition-of-american-indian-tribes.aspx (last visited Sept. 14, 2020).
[128] *Id.*
[129] NAT'L CONF. OF STATE LEGISLATURES, *Federal and State Recognized Tribes*, https://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx#State (last visited Oct. 15, 2020).
[130] ALL. OF COLONIAL ERA TRIBES, HERITAGE AND SOVEREIGNTY UNDER ATTACK! (2011).
[131] *Id.*
[132] *Id.*

Services are bound by statutes and regulations to provide funding for state-recognized tribes.[133] The extension of these benefits, protections, and privileges to state-recognized tribes affirms their tribal identities and inherent sovereignty.[134] State recognized tribes strive to protect their culture, provide services to members, preserve the environment, defend inherent tribal rights and sovereignty, and adamantly support federally recognized tribes.[135] State recognized tribes struggle to defend their legitimacy against not only non-historic groups seeking recognition, but also against certain initiatives within Indian Country.[136] The Alliance of Colonial Era Tribes describes such internal attacks upon the legitimacy of historic non-federally recognized tribes as a form of political genocide which undermines all tribes' inherent sovereignty, "by linking tribal sovereignty and authenticity to federal recognition."[137]

While the federal acknowledgment process was supposedly promulgated to assist tribes seeking to affirm their government-to-government relationship with the United States, it has become an obstacle for tribes to obtain acknowledgment.[138] An application consisting of a few hundred pages was typically sufficient to achieve recognition through the administrative process in the initial years following the promulgation of the federal regulations.[139] Modern applications, however, are composed of tens of thousands of pages and often require legal assistance as well as research expertise.[140] The cost alone of receiving recognition through the modern Federal Acknowledgement Process often precludes otherwise qualifying tribes from achieving federal recognition.[141] Thus, a less stringent standard is necessary to

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[133] *Id.*
[134] NAT'L CONF. OF STATE LEGISLATURES, *State Recognition of American Indian Tribes*, https://www.ncsl.org/research/state-tribal-institute/state-recognition-of-american-indian-tribes.aspx (last visited September 14, 2020).
[135] *Id.*
[136] *Id.*
[137] ALL. OF COLONIAL ERA TRIBES, HERITAGE AND SOVEREIGNTY UNDER ATTACK! (2011).
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*; *See also* Gale Courey Toensing, *Federal Recognition Process: A Culture of Neglect*, Indian Country Today (Jan. 23, 2014), https://indiancountrytoday.com/archive/federal-recognition-process-a-culture-of-neglect (explaining that the Shinnecock Indian Nation spent $33 million over the course of 32 years on the Federal Acknowledgement Process).

adequately assist those tribes seeking to affirm their government-to-government relationship with the United States.

The Indian Arts and Crafts Act of 1990 provides an appropriate alternative. The Act defines "Indian tribe" as:

> (B) any Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority.[142]

The Act further defines an "Indian" as any individual that is either a member of a tribe, or certified as an Indian artisan by an Indian tribe.[143] Employing the Indian Arts and Crafts Act standards for Indian and Indian tribe effectively addresses the concerns surrounding acknowledgement process as initially articulated by the American Indian Policy Review Commission. For example, in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, the First Circuit held that the Passamaquoddy Tribe was a "tribe" within meaning of the Nonintercourse Act despite not being federally recognized.[144] A similar standard which protects inherent tribal rights without being contingent upon a tribe's federal recognition status is consistent with fundamental principles of Indian law, as well as the NCAI's mission and founding principles.[145]

Shrinking the definition of "Indian" to mean only those who are BIA-listed has resulted in a colonized mindset, which ultimately leads to Indians discriminating against other Indians based upon their BIA status. The Institute for Development of Indian Law's 1978 Report articulates the problem perfectly, stating:

> The reasons that are usually presented to withhold recognition from tribes are 1) that they are racially tainted with the blood of African tribes-men, or 2) greed, for newly recognized tribes will share in the appropriations for services given to the Bureau of Indian Affairs. The names of justice, mercy, sanity, common sense, fiscal responsibility, and rationality

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[142] The Indian Arts and Crafts Act, 25 U.S.C. § 305 (1990).
[143] *Id.*
[144] Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1975).
[145] *About NCAI—Mission & History*, NAT'L CONG. OF AM. INDIANS, http://www.ncai.org/about-ncai/mission-history (last visited May 19, 2020).

> can be presented just as easily on the side of those advocating recognition. A sound recognition policy can place all Indian communities on a solid legal and economic basis once and for all.[146]

The treatment of Indian boarding school attendees—whose alumni are affiliated with non-BIA listed and historical tribal communities—further illustrates the way in which the modern definition of "Indian" perpetuates systemic marginalization and racism. In 1970, forty-one non-BIA listed tribes were considered attendees of "Indian Boarding Schools and boarding schools with Indian programs," with members attending boarding schools throughout their communities' histories.[147] Despite clear documentary evidence of their members attendance, fifteen of those forty-one tribes have yet to receive federal recognition.[148] Additionally, tribes who reside on some of the nation's oldest reservations remain unrecognized by the BIA.[149] Before the United States' founding, before the establishment of the federal government, and long before the introduction of the federal acknowledgment process, there were tribal nations. The sovereignty of these tribal nations and historical indigenous communities is as legitimate today as it was more than 250 years ago, and federal policy should reflect such enduring legitimacy.

IV. Conclusion

Notions of paternalism and inferiority historically characterize the federal government's attitude towards indigenous peoples. These notions are reflected throughout the various policy eras which illustrate the evolution of the relationship between indigenous nations and the federal government. The modern concept of federal acknowledgment inadvertently perpetuates colonial policies by allowing the government to define the scope of a tribe's sovereignty. A tribe's inherent power is derived from its status as an independent sovereign, and the legitimacy of such power is not contingent upon the federal government's

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[146] TERRY ANDERSON & KIRKE KICKINGBIRD, AN HISTORICAL PERSPECTIVE ON THE ISSUE OF FEDERAL RECOGNITION AND NON-RECOGNITION, INS. FOR THE DEV. OF INDIAN LAW 17 (1978).
[147] Cedric Sunray, HASKELL ENDANGERED LEGACY PROJECT, https://helphaskell.wixsite.com/iyikowa/help-dedication-project-overview (last visited Sep. 27, 2020).
[148] *Id.*
[149] *Id.*

approval. However, this principle is significantly undermined when federal acknowledgement is treated as a prerequisite to a valid exercise of tribal authority. The very notion of inherent sovereignty is threatened when "federally recognized" operates as a threshold inquiry to determine whether an individual is an "Indian" or an entity is an "Indian tribe." Under this standard, the legitimacy of tribal authority—for both federally and non-BIA listed tribes—is at the mercy of a government that formalized definitions of "Indian" and "Indian tribe" with the primary goal of eliminating tribal authority all together. Accordingly, a definition that protects a tribe's inherent rights without regard to their recognition status—such as the standard articulated by the Indian Arts and Crafts Act—is consistent with fundamental principles of Indian law, and furthers the NCAI's primary goals of defending against termination and safeguarding inherent sovereignty.