

1-1-2008

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Alexa Koenig

Jonathan Stein

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## Recommended Citation

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 (2008).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol48/iss1/2>

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# FEDERALISM AND THE STATE RECOGNITION OF NATIVE AMERICAN TRIBES: A SURVEY OF STATE-RECOGNIZED TRIBES AND STATE RECOGNITION PROCESSES ACROSS THE UNITED STATES

Alexa Koenig\* and Jonathan Stein\*\*

## I. INTRODUCTION

The territory that comprises the state of Virginia has been home to Native Americans for hundreds—if not thousands—of years. Documentary and other evidence establishes that Indians were present in the area long before the building of the Jamestown colony. American lore and numerous historic records tell the tale of “Pocahontas,” a Native American from present-day Virginia who fascinated London society as early as the 1610s as a tribal member who

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\* Alexa Koenig is an assistant professor at the University of San Francisco School of Law. She earned her B.A. *summa cum laude* from the University of California, Los Angeles and her J.D. *magna cum laude* from the University of San Francisco, where she was a Dean’s Scholar and Managing Editor of the U.S.F. Law Review. She is currently pursuing her Ph.D. in Jurisprudence and Social Policy at the University of California, Berkeley School of Law. Professor Koenig thanks Professor Peter Jan Honigsberg for his invaluable feedback on earlier drafts of this Article; Rosalie Leung for her research assistance; Don, Alexander and Sophie Mercer for their patience and support; and the Santa Clara Law Review for their careful editing. Any errors within this Article are, of course, the authors’ own.

\*\* Jonathan Stein is a trial lawyer in Santa Monica, California. Mr. Stein graduated Harvard College *magna cum laude* in 1979, and University of Pennsylvania Law School in 1983, where he was an editor of the University of Pennsylvania Law Review. Before beginning his own practice in 1992, Mr. Stein was associated with the New York office of Morgan, Lewis & Bockius, the Los Angeles office of Hughes, Hubbard & Reed, and the Los Angeles office of Brobeck, Phleger & Harrison. More recently, Mr. Stein and the companies he owns have focused on raising development capitol for state-recognized tribes, including \$21 million recently obtained for the Gabrielino-Tongva Tribe of Los Angeles County, California.

circulated among aristocratic society.<sup>1</sup> Two Virginia tribes, the Mattaponi Indian Nation and the Pamunkey Nation, still live on Indian reservations that have been intact since colonial times.<sup>2</sup> Yet, despite the overwhelming evidence of longstanding tribal presence in Virginia, not one of Virginia's tribes is currently recognized by the federal government.<sup>3</sup>

Unfortunately, Virginia's tribes do not have the genealogical records needed to prove their continued, uninterrupted existence—a requirement for federal recognition.<sup>4</sup> Their genealogical records were destroyed during the first half of the twentieth century by officials enforcing Virginia's Racial Integrity Act of 1924.<sup>5</sup> The Act declared that only "white" and "colored" people existed in Virginia.<sup>6</sup> In addition, birth records for Native Americans were changed to indicate individuals were "colored" instead of American Indian, effectively eliminating all documentary evidence of Indians within the state.<sup>7</sup> Consequently, even those tribes that have inhabited Virginia's Indian reservations for nearly 400 years have little chance of becoming recognized in the foreseeable future.

In New York, adjacent to the well-known Shinnecock Hills PGA Golf Course and the toney residences of

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1. Wikipedia, Pocahontas, <http://en.wikipedia.org/wiki/Pocahontas> (last visited Sept. 22, 2007).

2. Telephone Interview by Alexa Koenig with Deanna Beacham, Va. Council on Indians (July 14, 2006).

3. See National Conference of State Legislatures, State-Tribal Relations: Indian Tribe States, <http://www.ncsl.org/programs/statetribe/tribes.htm> (last updated Apr. 2007), for a list of federally recognized tribes. The last list available from the federal government is from 2002, and thus is somewhat outdated. See Notice, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 67 Fed. Reg. 46,327-46,333 (July 12, 2002), available at [www.census.gov/pubinfo/www/FRN02.pdf](http://www.census.gov/pubinfo/www/FRN02.pdf) (last visited Sept. 22, 2007).

4. 25 C.F.R. § 83.7 (2007) (listing the seven requirements for federal recognition). All seven requirements must be met, or the tribe will not be recognized by the United States, 25 C.F.R. § 83.6 (2007), and thus will not be eligible for the often-critical services and benefits that attend recognition, 25 C.F.R. § 83.2 (2007).

5. For the text of the Act, see Virginia Racial Integrity Act of 1924, An Act to Preserve Racial Integrity, [http://www.vcdh.virginia.edu/lewisandclark/students/projects/monacans/Temporary\\_Monacans/racial.html](http://www.vcdh.virginia.edu/lewisandclark/students/projects/monacans/Temporary_Monacans/racial.html) (last visited July 19, 2006).

6. Telephone Interview with Deanna Beacham, *supra* note 2.

7. For more information on the Virginia Racial Integrity Act of 1924, see *infra* Part III.B.16.

Southhampton, Long Island, lies the Shinnecock Indian Reservation.<sup>8</sup> The reservation was first established in 1703 by lease from the Colony of New York, and is still occupied.<sup>9</sup> After close to thirty years battling to secure federal recognition through the Bureau of Indian Affairs (BIA), the Shinnecock, like Virginia's tribes, remain unsuccessful.<sup>10</sup> While the United States District Court for the Eastern District of New York recently declared the tribe "recognized" based on overwhelming evidence of its longstanding presence within the state,<sup>11</sup> the BIA argues that the court's judgment does not bind the federal government, and refuses to acknowledge the tribe as eligible for the rights that accompany federal recognition.<sup>12</sup>

In Los Angeles County, the Gabrielino-Tongva Indians also remain unrecognized by the federal government, despite a treaty signed with the United States in 1851—one of the famous "18 lost treaties" signed by President Millard Fillmore but never ratified by the Senate<sup>13</sup>— and more than 2800 archeological sites that delineate their history.<sup>14</sup> The Gabrielinos cannot realistically expect federal recognition by the BIA any time soon because their petition for recognition submitted two years ago still has not been assigned a number by the BIA's Office of Federal Recognition, indicating any chance of recognition remains decades away. They have yet to even make it onto the list of more than 100 tribes seeking recognition—a line that progresses at a rate of just one or two

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8. See Shinnecock Indian Nation, <http://www.shinnecocknation.com/history.asp> (last visited Sept. 22, 2007) (noting the Shinnecock reservation's location as adjacent to Southhampton).

9. *New York v. Shinnecock Indian Nation*, 400 F. Supp. 2d 486, 489 (E.D.N.Y. 2005).

10. See, e.g., John Moreno Gonzales, *Waiting to be Recognized*, NEWSDAY.COM, Jan. 16, 2007, <http://www.theverifiabletruth.com/2007/01/newsday-waiting-to-be-recognized.html>.

11. *Shinnecock Indian Nation*, 400 F. Supp. 2d 486 (E.D.N.Y. 2005).

12. See, e.g., Gonzales, *supra* note 10.

13. See Alexa Koenig & Jonathan Stein, *Lost in the Shuffle: State-Recognized Tribes and the Tribal Gaming Industry*, 40 U.S.F. L. Rev. 327, 331-37 (2006).

14. See *id.*; see also Gabrielino Tongva, Tribal History-Lost Treaty Rights and Current Status, [http://www.tongvatribes.org/TribalHistory/tribal\\_history.cfm](http://www.tongvatribes.org/TribalHistory/tribal_history.cfm) (last visited Sept. 22, 2007).

tribes per year.<sup>15</sup>

These are just three examples of the federal intransigence faced by over 200 domestic Indian tribes that seek some form of government-to-government relationship with the United States. The federal government's inability to recognize tribes in a timely manner (or to recognize them at all) increasingly appears to be not so much a policy failure as a policy choice. Following the significant expansion of Indian casinos in the 1990s, tribes have faced increasing opposition to federal recognition due to fears that newly recognized tribes will open Las Vegas-style casinos under authority of the Indian Gaming Regulatory Act (IGRA),<sup>16</sup> a right that comes with federal recognition.<sup>17</sup> Even federally recognized tribes have begun opposing the recognition of their less fortunate neighbors due to competition based on Indian gaming. For example, in recent cases in Connecticut, gaming tribes have opposed the recognition sought by neighboring Indian groups, presumably because the competition would reduce their casino earnings.<sup>18</sup>

Meanwhile, the Virginia, New York and California tribes mentioned above do belong to a category of tribal governments that is growing in prevalence and importance. These tribes are known as "state-recognized."<sup>19</sup> They are

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15. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 159 (2005) [hereinafter COHEN TREATISE] (discussing the rate at which tribes have received recognition through the BIA process).

16. Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2000).

17. *Id.* §§ 2703(5)(A)-(B) (defining Indian tribes able to conduct Las Vegas-style gaming under IGRA as "any Indian tribe . . . recognized . . . by the Secretary [of the Interior] . . . as possessing powers of self-government.").

18. See, e.g., Interior Bd. of Indian Appeals, *In re Fed. Acknowledgment of the Historical Eastern Pequot Tribe* (May 12, 2005), available at <http://www.ibiadections.com/Ibiadections/41ibia/41ibia001.pdf>. Although no state-recognized tribe has secured the most lucrative federal benefit of all—Indian gaming—this is a potential benefit that some tribes have been exploring. As recently as August 2006, Assembly Bill 1563 was submitted in California to establish a state Indian reservation for the Gabriellino-Tongva Tribe at Hollywood Park, a racetrack near the Los Angeles airport. For an overview of the potential gaming rights of state-recognized tribes, see Koenig & Stein, *supra* note 13.

19. Tribes that have been acknowledged by the federal government are also usually recognized by the states in which they reside and are therefore also technically "state-recognized." In order to minimize confusion, in this Article we refer to tribes that have not earned federal recognition—only state recognition—as "state-recognized" or "state tribes." Tribes that have both federal and state recognition are referred to as "federally-recognized" or "federal

those tribes that have not yet managed to secure the federal government's confirmation of their sovereign status. However, their ongoing presence as bona fide tribes is acknowledged by the states in which they reside. These tribes receive some limited benefits from the United States' federalist system, which empowers states to recognize these Indian tribes on their own to establish mutually beneficial political relationships.<sup>20</sup> In all, while the federal government recognizes more than 500 tribes, only sixty-two tribes are recognized solely by their respective states.<sup>21</sup>

In the last few years, states and tribes have increasingly realized that state recognition can serve as an important, albeit limited, alternative to federal recognition. This realization is evidenced by the many states that have recently codified their state recognition processes or are planning to implement recognition processes to facilitate communication between state and tribal governments, and better the condition of tribal members and surrounding communities.<sup>22</sup> State recognition can also provide tribes with limited state and federal benefits,<sup>23</sup> and clarify which tribes are exempt from the purview of state legislation that explicitly excludes "Indians."<sup>24</sup> Consequently, several tribes are now bidding for state recognition and many states are implementing or strengthening processes for acknowledging the tribes within their borders.<sup>25</sup>

Because of the sudden growth and renewed interest in state recognition, there is a pressing and significant need for

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tribes."

20. See generally COHEN TREATISE, *supra* note 15, § 3.02[9] at 168-71 (providing an overview of state recognition and its foundation in relationships between tribes and the original English colonies. Such relationships were eventually assumed by the states.).

21. See *infra* Part III (detailing the tribes recognized by the various recognition states). Throughout this Article, we refer to the states that recognize tribes independent of federal recognition as "recognition states."

22. See *infra* Part III (providing an overview of which states recognize tribes and which may be planning to recognize tribes in the near future).

23. COHEN TREATISE, *supra* note 15, § 3.02[9] at 169-71.

24. For example, tribes are exempt from many states' fishing and hunting regulations. See, e.g., FLA. STAT. ANN. § 285.09 (West 2003); Op. Att'y Gen. 358 (1953-54) (noting the game and fishing commission's inability to prevent hunting and fishing by Indians).

25. Telephone Interview with Deanna Beacham, *supra* note 2.

additional information, including which tribes *are* state-recognized, and what rights come with state recognition. Internet sources that list state-recognized tribes vary dramatically in those they include, offer little explanation as to their inclusion standards, and do not detail widely disparate state recognition processes.<sup>26</sup> The leading authority on Indian Law, *Cohen's Handbook of Federal Indian Law*, offers only a cursory overview of state recognition, and does not include a comprehensive list of tribes that fall into this subset.<sup>27</sup> This Article fills that gap by clarifying which tribes have achieved state recognition, and providing Indian law practitioners, state governments and tribal governments with a broad overview of the various means states use to recognize tribes. This area of the law is changing rapidly. As a result, the information compiled below is meant as a starting place for further research, not as a static overview of recognition states and state tribes.

According to our research, sixteen states—Alabama, California, Connecticut, Delaware, Georgia, Hawaii, Louisiana, Massachusetts, Montana, New Jersey, New York, North Carolina, Ohio, South Carolina, Vermont and Virginia—now recognize a total of sixty-two tribes that are not federally recognized.<sup>28</sup> An additional five states—Kansas, Kentucky, Michigan, Missouri and Oklahoma—have been included in various lists as having some type of state recognition scheme.<sup>29</sup> They are included in Part III, *infra*, as

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26. See, e.g., National Conference of State Legislatures, Federally Recognized Tribes, <http://www.ncsl.org/programs/statetribe/tribes.htm> (last visited Sept. 22, 2007); Access Genealogy Indian Tribal Records, State Recognized Tribes, <http://www.accessgenealogy.com/native/staterectribes.htm> (last visited Sept. 22, 2007); Native Data, State Recognized Tribes (on file with author).

27. See COHEN TREATISE, *supra* note 15, § 3.02[9] at 168-71 (providing five paragraphs on the tribal status of state-recognized tribes).

28. This list was compiled through general online and statutory research, as well as phone interviews with numerous state and tribal organizations. For information on the tribes recognized by each state and an overview of each state's tribal-state regulatory scheme, see Part III below. There are many lists of state-recognized tribes available online, which vary significantly in the number of tribes included as state-recognized. See, e.g., Federally Recognized Tribes, *supra* note 26 (detailing fourteen states as having acknowledged state tribes); State Recognized Tribes, *supra* note 26 (including eleven states as having acknowledged state tribes); Native Data, State Recognized Tribes (on file with author) (showing thirteen states as having state-recognized tribes).

29. See, e.g., Federally Recognized Tribes, *supra* note 26; State Recognized

utilizing some lesser form of recognition than full state recognition. The states and tribes included in our primary list are those that most clearly appear to utilize a state recognition process.

The information has also been compiled to encourage other states to implement recognition programs for mutual tribal and state benefit. We hope this Article will demonstrate the growing prevalence of state recognition and inspire greater standardization of the state recognition process.

To meet these goals, Part II briefly discusses the origins of state recognition within our federalist system, how state recognition functions today, and why it is becoming increasingly important to tribal governments. State authority to recognize Indian tribes is further explained as occurring within the context of three historical periods: 1) pre-American Revolution, 2) post-American Revolution, and 3) a modern period that emerged in the latter half of the twentieth century with the advent of the civil rights movement, and has continued to today. This part also discusses how state recognition functions against the backdrop of federal recognition, and categorizes state recognition into state law, administrative, legislative and executive recognition processes. Part III includes our survey data, detailing the recognition processes used by the various states, the Indian tribes recognized by each state, the regulatory approach to government-to-government relations, and the presence of any state Indian reservations. Part IV concludes with a brief argument in favor of greater rights on the part of state tribes. A chart summarizing the states' various recognition processes, the number of tribes recognized, the number of state Indian reservations, if any, and the predominant eras during which tribes were recognized is included as an appendix at the end.

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Tribes, *supra* note 26; Native Data, State Recognized Tribes (on file with author).

## II. WHAT STATE RECOGNITION IS AND HOW STATE RECOGNITION HAS EVOLVED WITHIN OUR FEDERALIST SYSTEM

State recognition is an alternative tribal status to formal federal recognition.<sup>30</sup> Much like federal recognition, it operates as a means for states to acknowledge the longstanding existence of tribes within their borders and to establish a government-to-government relationship to coordinate and communicate with tribes. State recognition is also a prerequisite to certain federal and state benefits meant to foster and preserve indigenous communities and to facilitate mutually beneficial relationships following centuries of conflict.<sup>31</sup>

While state recognition offers several benefits, the powers granted through state recognition are quite limited. State-recognized tribes do not generally have the same immunities from state law that federal tribes enjoy.<sup>32</sup> Instead, they are endowed only with those sovereign characteristics recognized by that state's laws, legislative resolutions, administrative regulations and other documents that collectively define the government-to-government relationship. Thus, the rights tribes do enjoy vary dramatically between states, ranging from powers of self-government such as the right to operate a police force,<sup>33</sup> to exemptions from paying state and local

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30. For an overview of additional tribal statuses beyond state and federal recognition, see Noelle M. Kahanu & Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview*, 17 U. HAW. L. REV. 427, 430-38 (1995) (discussing how some tribes operate as state chartered corporations and municipalities subject to state law).

31. Perhaps the most notorious conflicts between states and tribes have occurred over land – land possessed by tribes, and desired by states or states' non-tribal inhabitants. For example, during the nineteenth century, the California legislature consistently opposed any law that permitted California tribes to obtain or retain land that might prove of value, such as land that might contain gold, or land suitable to farming. See K. Alexa Koenig, *Gambling on Proposition 1A: The California Indian Self-Reliance Amendment*, 36 U.S.F. L. REV. 1033, 1048 n.111 (2003).

32. See COHEN TREATISE, *supra* note 15, § 3.02[9] at 169 (noting that it is state law that generally determines the governmental authority of state-recognized tribes).

33. See *id.* at 170-71.

taxes,<sup>34</sup> to primarily symbolic acknowledgment of a tribe's longstanding presence within a state.<sup>35</sup>

State recognition has a long history, enjoying several centuries of precedent and evolution. In some states, recognition was secured in colonial times and has continued into the present, as in Connecticut, New York and Virginia. In other states, such as Georgia and Vermont, recognition may have been achieved as recently as the early twenty-first century.<sup>36</sup>

The history of state and federal recognition is typically divided into two periods, demarcated by the American Revolution and the founding of the United States.<sup>37</sup> However, we suggest there is also a third, modern period that differs from the first two, as explained below.

The first period has its basis in treaties negotiated by administrators of the primarily British colonies prior to the formation of the United States. These treaties recognized indigenous Indian nations as foreign powers possessed of a government status equal to that of the colonies themselves, and were considered agreements between sovereigns.<sup>38</sup> Such relationships were appropriate to struggling colonies trying to gain a foothold on the wild North American continent. The original thirteen colonies came to recognize certain Indian tribes as sovereign entities with whom they could trade and work for mutual benefit. Today, such colonial-era relationships provide the foundation for state recognition in several states, including New York, Connecticut and Virginia.<sup>39</sup>

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34. *See id.* at 169 n. 235.

35. *See id.* at 171.

36. *See infra* Part III (detailing when tribes within each recognition state were granted state recognition).

37. *See* COHEN TREATISE, *supra* note 15, § 3.02[9] at 169.

38. Wilcomb E. Washburn, *Indians and the American Revolution*, <http://www.americanrevolution.org/ind1.html> (last visited Sept. 22, 2007).

39. In Virginia, both the Mattaponi Indian Nation and the Pamunkey Nation continue to operate under treaties that were first ratified in the mid-1600s. Telephone Interview with Deanna Beacham, *supra* note 2; *see also* Treaty Between Virginia and the Indians, 1677, <http://www.baylink.org/treaty> (providing the text of the 1677 treaty between the Virginia Colony and the Pamunkey Nation); Virginia's First People - Past and Present, Virginia Indians Today, [http://virginiaindians.pwnet.org/today/reservations\\_mattaponi.php](http://virginiaindians.pwnet.org/today/reservations_mattaponi.php) (last visited Sept. 22, 2007) (discussing the tributes—started in 1646—made

The second period of state recognition, which has its genesis in the aftermath of the American Revolution, was largely characterized by efforts to clear the continent of its indigenous people. When the United States Constitution was adopted, the federal government was charged with subjugating numerous Indian nations. As Thomas Jefferson chillingly concluded, the task of the United States was to clear a continent of its aboriginal inhabitants to extend federal authority on behalf of a largely European constituency.<sup>40</sup>

Federal supremacy over tribal law commenced with the Proclamation of 1763, which subsumed the colonies' rights to deal with Indians with that of the British Crown.<sup>41</sup> It is because of doctrines and laws established during this second, post-revolutionary time period that Indian law is viewed as predominantly federal in nature. Consequently, the rights of state-recognized tribes and the authority of recognition states have rarely been the focus of legal or academic research involving American Indians.

Several authorities from this time period have reinforced the paradigm of tribal law as strictly federal law. The United States Constitution's Commerce Clause has been repeatedly interpreted as granting the federal government plenary power to recognize tribes as sovereign entities<sup>42</sup> with its declaration that Congress has the power to "regulate [c]ommerce with foreign Nations, and among the several States, and with the Indian Tribes."<sup>43</sup> The Supremacy Clause further confirmed the rights of the federal government over those of the states.<sup>44</sup> But it was the Supreme Court's "Marshall trilogy" that most clearly articulated the relationship between tribes and the United States, establishing a federal "trust" responsibility over tribal affairs that significantly increased federal authority over tribes.<sup>45</sup>

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annually by the Mattaponi to the Governor on the fourth Wednesday of November).

40. See President Jefferson and the Indian Nations, <http://www.monticello.org/jefferson/lewisandclark/presidentindian.html> (last visited Sept. 22, 2007).

41. COHEN TREATISE, *supra* note 15, § 2.01[2] at 117.

42. *Id.* § 3.02[4] at 140.

43. U.S. CONST. art. I, § 8, cl. 3.

44. COHEN TREATISE, *supra* note 15, § 2.01[2] at 118.

45. *Worcester v. Georgia*, 31 U.S. 515 (1832); *Cherokee Nation v. Georgia*,

Such tribes were still viewed as sovereigns, but ones “subordinate” to the authority of the United States, as “domestic dependent nations.”<sup>46</sup> The Marshall trilogy articulated the parameters of the federal-tribal relationship by declaring that Indian tribes were indigenous, sovereign nations that had inherent sovereign rights, but were subordinate to the federal government based on the “conquering” of such tribes.<sup>47</sup> The Marshall trilogy also established the concept that Indian title was possessory only, and, like tenants, tribes could be removed by the federal government from the lands and resources they held.<sup>48</sup>

Over time, these cases came to be used to justify critical exercises of federal dominance over tribal nations, such as the “trail of tears,” when Indian nations from Georgia and Alabama were forcibly removed to the Oklahoma Indian territory.<sup>49</sup> The large-scale use of emergent federal powers to design, organize and execute a genocidal march of men, women, children and the elderly on foot from southern Georgia to Oklahoma satisfied the federal government’s goal of building and settling a nation by clearing out indigenous inhabitants in the face of a tidal wave of largely European settlement.<sup>50</sup>

Another landmark that established federal primacy in Indian affairs and simultaneously deprecated state authority over Indian matters was the Indian Nonintercourse Act of

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30 U.S. 1 (1831); *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

46. See Koenig & Stein, *supra* note 13, at 343-47 (detailing the jurisprudence that recognized Indian tribes as subjected sovereigns).

47. See *id.*

48. *Johnson v. M’Intosh*, 21 U.S. 543 (1823); COHEN TREATISE, *supra* note 15, at 420.

49. For example, in cases such as *Stephens v. Cherokee Nation*, 174 U.S. 445, 484 (1899), the United States Supreme Court referenced *Worcester v. Georgia*, 31 U.S. 515 (1832), to uphold Congress’s power to determine who were and are tribal members, to the exclusion of membership rolls kept by the tribes themselves. The Court noted that while such cases established tribes as “vested with rights” befitting states, “that falls far short of saying that they are a sovereign state, with no superior within the limits of its territory.” *Stephens*, 174 U.S. at 484.

50. See, e.g., Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875 (2003); see also Wikipedia, *Indian Territory*, [http://en.wikipedia.org/wiki/Indian\\_Territory](http://en.wikipedia.org/wiki/Indian_Territory) (last visited Sept. 22, 2007).

1790.<sup>51</sup> Under the Nonintercourse Act and its subsequent amendments, the right to acquire Indian land was made exclusive to the United States government; Indians and states were prohibited from engaging in tribal land transactions without federal approval.<sup>52</sup> While the Act stopped rampant theft of Indian lands by ordinary American entrepreneurs, as it had been designed to do,<sup>53</sup> it did nothing to stop the appropriation of the North American continent by the federal government. Consequently, the Act established that tribes' most valuable asset—land prime for settlement—would be managed by the federal government and not the various states.

In keeping with this post-Revolutionary theme of federal dominance over issues involving Indian tribes, only two states on our list, Delaware and North Carolina, came to recognize tribes on their own authority during this period.<sup>54</sup>

The assumption that emerged from this second period—that tribal recognition is exclusively a federal matter—has softened. For example, *Cohen's Handbook of Federal Indian Law* contains a brief section that directly addresses state recognition of tribal groups.<sup>55</sup> Developments in individual states such as South Carolina, which has recently codified its process for recognizing state tribes,<sup>56</sup> further illustrate a reemerging interaction between tribal and state governments.

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51. Indian Nonintercourse Act, ch. 23, 1 Stat. 137 (July 22, 1790) (since modified as 25 U.S.C. § 117 (2000)); see also Findlaw, Indian Lands, <http://library.findlaw.com/1999/Jan/1/241490.html> (last visited Sept. 22, 2007).

52. 25 U.S.C. § 177 (2000).

53. See *Cass County Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Township*, 643 N.W.2d 685, 695 (N.D. 2002) (noting the intent of the Act as “to protect Indian tribes by ensuring Indian lands were settled peacefully and Indians were treated fairly, and to protect them from the ‘greed of other races’ and ‘artful scoundrels inclined to make a sharp bargain.’” (quoting *Lummi Indian Tribe v. Whatcom County, Wash.*, 5 F.3d 1355, 1358 (9th Cir. 1993))).

54. See Nanticoke Indian Tribe, *Tribe History*, <http://www.nanticokeindians.org/history.cfm> (last visited July 18, 2006) (stating that the Nanticoke tribe was recognized by the state of Delaware on March 10, 1881); Letter from John Brown, Governor of Ky., to Mr. Martin of the S. Cherokee Nation (Dec. 26, 1893), <http://www.southerncherokeeanation.net/images/commonwealth.jpg> (last visited July 28, 2007); see also *infra* Part V (noting the era in which each state has recognized tribes).

55. See COHEN TREATISE, *supra* note 15, § 3.02[9] at 168-71 (providing five paragraphs on the tribal status of state-recognized tribes).

56. Telephone Interview with Deanna Beacham, *supra* note 2.

As a result, we posit that a third period of state recognition and state involvement in tribal issues has begun to emerge with the end of the twentieth century and the beginning of the twenty-first. While previous decades have emphasized the federal government's supremacy in tribal affairs, largely ignoring state-tribal relations, more contemporary concepts of federalism have fostered a resurgence in the power of states to work directly with tribes. Although the United States Constitution's Commerce Clause and the Supremacy Clause of Article VI establish federal dominance over tribal relations with Indians,<sup>57</sup> the Tenth Amendment establishes that state sovereignty continues in any field not preempted by the federal government, potentially authorizing states to work directly with tribes in limited situations.<sup>58</sup> Additionally, states have garnered the ability to interact directly with tribes based on a delegation of powers from the federal government.<sup>59</sup>

The ability of states to work directly with tribes does not fit traditional notions of state-federal-tribal dynamics, which were based on the conquering and subsuming of tribes within the national fabric. The federal government's role of purportedly "protecting" tribes from states<sup>60</sup> was viewed as appropriate within this traditional framework. However, it is not appropriate for a nation at peace. Traditionally, states and tribes have conflicted with one another over land and other precious resources. Consequently, the federal government's involvement was viewed (perhaps too optimistically) as necessary to ensure that a balance between state and tribal rights was retained. Modern ideals, encapsulated by our civil rights movement and the intrinsic value now recognized in indigenous cultures,

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57. COHEN TREATISE, *supra* note 15, § 2.01[2] at 118.

58. See Koenig & Stein, *supra* note 13, at 342 (noting the powers reserved to the states by the Tenth Amendment in the context of Indian gaming). *But see* COHEN TREATISE, *supra* note 15, at 538-39 (stating that authorities that argue states possess a jurisdiction over Indian-state relations in the absence of federal preemption ignore Supreme Court cases establishing the federal preemption of Indian affairs).

59. COHEN TREATISE, *supra* note 15, § 3.02[9] at 171 (noting "[t]he United Supreme Court has held that the federal power to enact legislation in discharge of trust obligations to Indian tribes may be delegated to the states").

60. COHEN TREATISE, *supra* note 15, § 2.01[2] at 118.

multiculturalism and diversity, represent a different mindset than that fostered when one of the nation's top priorities was settling the continent by forcibly controlling its indigenous inhabitants, both legally and physically.

This modern era—marked by the last forty to fifty years and coinciding with this country's civil rights movement—has produced another wave of tribal recognition by state governments. This time, however, recognition has come in a broader range of forms because resolutions passed by state legislatures, gubernatorial proclamations, and increasingly detailed statutes provide very explicit criteria for recognition.<sup>61</sup> This criteria substantiates and lends additional authority to such recognition, an element largely missing from earlier forms of recognition. Fifteen of the sixteen states profiled in this Article have used some form of recognition process during this modern era, whether to substantiate prior recognition or establish state recognition for the first time.<sup>62</sup>

This modern era also represents a time when state authority has begun to shift back into balance with federal authority. While state recognition does not provide the same benefits as federal recognition, it does enable tribes to seek some progress in the face of federal intransigence, and allows states to better address domestic relationships and needs in their interactions with the Indian groups within their borders. The emerging paradigm is one of seeking mutual advantage and fostering positive relations for the future. States are increasingly recognizing that working with indigenous groups can be helpful to tourism, fill gaps in local history and benefit multiculturalism and diversity in education and other aspects of society. Concerns of settling a continent and dispossessing tribal groups are beginning to be replaced with a better appreciation of the many contributions of this nation's indigenous people. This comports with the original view of our federalist society as envisioned by James Madison in *The Federalist Papers*:

[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people,

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61. See *infra* Part V (providing an overview of the means by which each state has recognized tribes).

62. See *infra* Part III.

and the internal order, improvement, and prosperity of the State. The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security.<sup>63</sup>

The federal government has validated the legitimacy of state recognition, regardless of its form and regardless of the era in which it was obtained. By providing some benefits to tribes that have state recognition<sup>64</sup> and leaving it largely to the states to determine who those tribes are, the government has acknowledged the authority of states to recognize tribes within their borders.<sup>65</sup>

As the Founding Fathers proclaimed, the genius of the federalist system is its flexibility.<sup>66</sup> Since Congress is generally accepted as having plenary power over Indians, tribal law treatises, cases and articles explain that state authority to interact with and recognize tribes necessarily has its basis in a delegation of federal powers to the state.<sup>67</sup> This is related to the general theory that federal laws involving tribes preempt state laws, which is in-turn grounded in the historic paradigm of federal supremacy being necessary to

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63. THE FEDERALIST NO. 45 (James Madison), *available at* <http://www.constitution.org/fed/fedara45.htm> (last visited Jan. 30, 2007).

64. *See* COHEN TREATISE, *supra* note 15, § 3.02[9] at 169-70 (noting that several federal statutes extend services to state tribes); Koenig & Stein, *supra* note 13, at 368-69 (arguing that the federal government has validated state recognition by extending services to such tribes). Examples of federal legislation that extend benefits to state tribes include Health and Human Services Block Grants, 45 CFR §96.44(b) (providing direct funding to Indian tribes, and defining such tribes as including “organized groups of Indians that the State in which they reside has determined are Indian tribes”); Administration of Food Stamp Program on Indian Reservations, 7 CFR §281.2(a)(1) (recognizing as an “established reservation” those areas “currently recognized and established by Federal or State treaty”); Energy Conservation Grant Programs, 10 CFR §455.2 (defining an eligible Indian tribe as “any tribe . . . which . . . is located on, or in proximity to, a Federal or State reservation or rancherías); and Native American Welfare Programs, 45 CFR §1336.10 (defining “Indian” as “a member or a descendent of a member of a North American tribe . . . who . . . [has] a special relationship with the United States or a State through treaty, agreement or some other form of recognition”).

65. *See* COHEN TREATISE, *supra* note 15, § 3.02[9] at 169-71.

66. *See generally* THE FEDERALIST NO. 46 (James Madison), *available at* <http://www.constiuttion.org/fed/federa46.htm> (comparing the respective powers that would be reserved for the state and federal governments if united under one federalist system).

67. *See* COHEN TREATISE, *supra* note 15, § 2.01[2] at 116-18.

protect tribes from state involvement in tribal affairs.<sup>68</sup> However, where tribes do not need to be “protected” from the states (as when tribes have asked or applied for state recognition), state authority is arguably not preempted by the federal government. In such situations, this is because state action does not conflict with the federal government’s predominant goal of furthering tribal self-governance.

Another view is that the states’ authority emerges from the 10<sup>th</sup> Amendment, which guarantees that powers not specifically enumerated in the United States Constitution as rights of the federal government, are reserved to the states.<sup>69</sup> When state recognition benefits and is desired by tribes, this perspective makes sense under the Indian “canons of construction” where “all ambiguities [in the law] are to be resolved in favor of the Indians.”<sup>70</sup> In such cases, state authority compliments federal authority, encouraging experimentation and the flexibility necessary to meet local needs. When the federal government fails or refuses to address a policy problem, it is often state government that will address it first. As noted within *Cohen’s Handbook of Federal Indian Law*, “[s]tate-recognized tribes are, by definition, not considered federally recognized tribes, and the legal status of their reservations and the scope of their governmental authority, if any, is a matter of state—not federal—law.”<sup>71</sup> Since the primary federal recognition process has been increasingly viewed as “broken,” some states appear to be filling that gap by increasing state-tribal communication, providing state tribes with limited benefits and support, and beginning the process of resolving centuries of conflict.<sup>72</sup>

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68. *Id.* § 2.01[2] at 118 (“[t]he field of federal Indian law has been centrally concerned with protecting Indian tribes from illegitimate assertions of state power over tribal affairs”).

69. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved for the States respectively, or to the people.”).

70. COHEN TREATISE, *supra* note 15, § 2.01[2] at 119.

71. *Id.* § 3.02[9] at 169.

72. The three eras of state recognition—and the corresponding power of state tribes—roughly parallel the rise and fall of tribal power for federally recognized tribes. As noted in the article *The Politics of Indian Gaming: Tribe/State Relations and American Federalism*,

Indian tribes started out equivalent to the national government when treaties were made between sovereign nations. In 1831, the tribes

A. *The Three Types of Federal Recognition*

Before explaining the various state recognition processes, the processes that exist for federal recognition are reviewed below to provide a basis for comparison and illustrate the weaknesses inherent in the federal recognition system that increase the need for a supplementary state process.

Today, there are three ways for a tribe to secure federal recognition, which match the three branches of the federal government.<sup>73</sup> The first, “administrative recognition,” originates in the executive branch through an application made pursuant to regulations issued by the Department of the Interior’s Bureau of Indian Affairs (BIA) and its Office of Federal Acknowledgement. Second, an Indian tribe may seek recognition through an act of Congress. Third, an Indian tribe can seek a judicial determination of its tribal status.<sup>74</sup> Each means of recognition comes with respective strengths and weaknesses.

1. *“Administrative” Recognition*

The first process, administrative recognition through the BIA’s Office of Federal Acknowledgement, is the most recent. The BIA’s tribal recognition regulations were first adopted in the late 1970s and have become the most dominant means for securing recognition.<sup>75</sup> Recognition through this procedure involves a number of steps, and is extremely time-consuming. According to a 2001 report by the Government Accounting Office, since 1978 (when the process was first implemented), out of more than 250 petitions, the BIA had administratively

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dropped to ‘domestic, dependent nations.’ By 1886, the tribes were ignored as political institutions, and Indians became individual wards of the federal government. Tribes were again acknowledged in 1934 through the Indian Reorganization Act, which gave tribes powers similar to those of city councils. Today, the Congress and the courts are equating tribal power with state power. Tribes have thus run nearly the full gamut of possible relations to the federal government.

Anne Merline McCulloch, *The Politics of Indian Gaming: Tribe/State Relations and American Federalism*, 24 PUBLIUS: J. FEDERALISM 99, 111 (1994).

73. See COHEN TREATISE, *supra* note 15, § 3.02[4] at 140-43 (discussing the federal power to recognize tribes, and thereby establish a government to government relationship between such tribes and the United States. The Cohen Treatise provides a detailed overview of all three means of recognition).

74. See *id.* § 3.02 at 135-71.

75. See *id.* § 3.02[7][a] at 154-61.

recognized only fourteen tribes, denying recognition to fifteen.<sup>76</sup>

Administrative recognition involves a number of steps. First, each tribal group must file a letter of intent requesting federal recognition and noting that tribe's intent to submit a documented petition.<sup>77</sup> Second, the tribe must submit a documented petition,<sup>78</sup> a large document detailing the tribe's history and meeting the requirements of 25 C.F.R. § 83.7 (if the Indian tribe has not been previously recognized) or 25 C.F.R. § 83.8 (if the tribe was previously recognized and later that recognition was terminated).<sup>79</sup> Third, the tribe must present evidence that demonstrates it meets the eight mandatory criteria laid out in 25 C.F.R. § 83.7,<sup>80</sup> including the most challenging one, that the Indian tribe has enjoyed a continued, uninterrupted existence from historic times to the

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76. *See id.* § 3.02[7][a] at 159 (discussing a 2001 report noting the tribes recognized through the BIA process).

77. *See* 25 C.F.R. § 83.4(a) (2007).

78. *See id.* § 83.5(e).

79. *See id.* § 83.8(a).

80. There are seven mandatory criteria that must be met. They are provided here as a basis for comparing various state recognition processes:

(a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. . . . (b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present. . . .

(c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present. . . . (d) A copy of the group's present governing document including its membership criteria. . . . (e) The petitioner's membership

consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity. . . . (f) The membership of the petitioning group is composed principally of persons who are not members of any

acknowledged North American Indian tribe. However, under certain conditions a petitioning group may be acknowledged even if its membership is composed principally of persons whose names have appeared on rolls of, or who have been otherwise associated with, an acknowledged Indian tribe. The conditions are that the group must establish that it has functioned throughout history until the present as a separate and autonomous Indian tribal entity, that its members do not maintain a bilateral political relationship with the acknowledged tribe, and that its members have provided written confirmation of their membership in the petitioning group. (g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

*Id.* § 83.7.

present.<sup>81</sup> Because the BIA operates very slowly, often taking decades to consider a tribe's petition,<sup>82</sup> this route has proven extraordinarily frustrating—especially when years of work and hundreds of thousands of dollars in research and filing costs end in a denial. Even the individual who created the federal recognition process in 1978 has publicly acknowledged the process as a “monster,” noting that the “standards got to be impossible.”<sup>83</sup>

One recent victim of the BIA recognition process is the Golden Hill Paugussett tribe, which was denied federal recognition in 2004 after twenty-two years navigating the BIA's federal recognition process.<sup>84</sup> Their petition failed despite 350 years of state recognition in Connecticut.<sup>85</sup> Another example is that of the Schaghticoke Tribal Nation, which finally succeeded in being granted acknowledgment by the federal government in 2004, only to have that decision reversed at the end of 2005.<sup>86</sup> The reversal is alleged to have occurred based on intense political pressure asserted by an organization called TASK (Town Action to Save Kent), which purportedly fought the tribe's recognition based on a fear that the tribe would reacquire valuable lands in the area and open a casino.<sup>87</sup>

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81. *Id.* § 83.7(a)-(c).

82. See, e.g., *More Consistent and Timely Tribal Recognition Process Needed: Hearing on Indian Issues Before the Subcomm. on Energy Policy, Natural Res., and Regulatory Affairs of the H. Comm. Gov't Reform*, 107th Cong. (2002) (statement of Barry T. Hill, Dir., Natural Res. and Environment).

83. Stephen Magagnini, *'Lost' Tribes: Why Must We Prove We're Indians?*, SACRAMENTO BEE, July 1, 1997, at A1, available at [http://dwb.sacbee.com/static/archive/news/projects/native/day3\\_main.html](http://dwb.sacbee.com/static/archive/news/projects/native/day3_main.html) (last visited Nov. 13, 2005).

84. Staff Reports, *Golden Hill Paugussett Denied Federal Recognition*, INDIAN COUNTRY TODAY, Jan. 22, 2003 (stating the tribe first applied for recognition in April 1982).

85. See Brian Lyman, *BIA Rejects Paugussetts: Tribe Loses Bid for Recognition, Casino*, NORWICH BULLETIN, June 15, 2004 (on file with author).

86. Notice of Final Determination to Acknowledge the Schaghticoke Tribal Nation, 69 Fed. Reg. 5570 (Feb. 5, 2004), *remanded*, Schaghticoke Tribal Nation, 41 I.B.I.A. 30 (2005).

87. Telephone Interview with Richard Velky, Chief of the Schaghticoke Indian Nation, and Thomas Downie, Public Relations Dir. for the Schaghticoke Indian Nation (July 10, 2006); see also Complaint, Schaghticoke Tribal Nation v. Barbour Griffith & Rogers, LLC (July 10, 2006) (on file with author); Press Release, Schaghticoke Tribal Nation Takes Aim at Opponents' "Back Door" Effort that Reversed Recognition: Lawsuit Aimed at Culture of Corruption in

## 2. "Legislative" Recognition

The second federal recognition process is legislative recognition through an act of Congress. Under the Constitution's Commerce Clause, legislative recognition is unquestionably valid,<sup>88</sup> but can be a political nightmare to achieve, especially since federal recognition and casino gaming are now so intimately connected. Partially because of the political ramifications of legislative recognition, Congress has recognized only two California Indian tribes through this process in the last ten years.<sup>89</sup> Nonetheless, for tribes that have little chance of meeting the BIA's eight mandatory criteria, this can be the preferable option. For example, as noted above, Virginia's tribes cannot meet the BIA's requirement of continued, uninterrupted existence due to the records that were changed by the registrar of Virginia's Bureau of Vital Statistics in the early twentieth century in a racist attempt to erase all evidence of Native American presence within the state.<sup>90</sup> As a result, Virginia's state-recognized tribes are currently pursuing federal acknowledgment through this alternate process.<sup>91</sup>

## 3. "Judicial" Recognition

The third federal recognition scheme is judicial recognition, a controversial route that has come under significant scrutiny because it raises issues of separation of powers between the co-equal branches of the federal government.<sup>92</sup> Through a court judgment in a lawsuit, a

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D.C. (July 10, 2006) (on file with author) (noting that the tribe's lawsuit "outlines the Tribe's good faith understanding of how TASK worked in concert with certain Connecticut elected officials and orchestrated an improper and illegal effort that included secret and ex parte communications with federal officials at the Department of the Interior and Bureau of Indian Affairs." The press release and complaint alleged that "Kenneth F. Cooper, founding member of TASK, described his organization's efforts through BGR as a 'beneath the radar' effort based on 'backroom deals' designed to 'undo' the Tribe's 2004 federal acknowledgment.")

88. COHEN TREATISE, *supra* note 15, § 3.02[4] at 140-41.

89. See 25 U.S.C. § 1300m-1 (2000) (granting federal recognition to the Paskenta Band of Nomlaki Indians in 1994); 25 U.S.C. § 1300n-2 (granting federal recognition to the Federated Indians of Graton Rancheria in 2000).

90. See *infra* Part III (discussing the difficulties Virginia tribes have had in securing federal recognition).

91. Telephone Interview with Deanna Beacham, *supra* note 2.

92. See COHEN TREATISE, *supra* note 15, § 3.02[4] at 142-43 ("[w]hile clear

federal judge must consider whether the plaintiff qualifies as an “Indian tribe” for federal purposes. This determination invokes the “primary jurisdiction doctrine,” which establishes that when an executive agency with more expertise than the court is ascribed with the duty of making a particular determination in non-judicial proceedings, that agency has “primary jurisdiction” to make that same decision in a current case.<sup>93</sup> Based on this doctrine, a federal court will often allow the BIA to complete its administrative recognition process within a specified time and stay the court case until the issue of whether the federal government recognizes the party as an “Indian tribe” can be determined.<sup>94</sup>

For example, in *New York v. Shinnecock Indian Nation*,<sup>95</sup> a suit was brought to enjoin the state-recognized Shinnecock tribe from building a tribal casino, pending the BIA’s determination of the tribe’s federal status. A federal judge stayed the case for eighteen months to allow the BIA “a reasonable time” to complete its review of a twenty-five-year old petition submitted by the Shinnecoaks.<sup>96</sup> However, once the BIA admitted its inability to meet the court’s eighteen-month deadline for considering the tribe’s petition, the court noted its intention to decide for itself whether the tribe must be acknowledged as federally recognized.<sup>97</sup> After all, the court reasoned, the BIA’s primary jurisdiction had not been utilized

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indications from the political branches demonstrating federal recognition warrant judicial deference, a separate question is whether courts may make determinations affecting federal recognition when the intentions of those other branches are more ambiguous”). *See also id.* § 3.02[7][b] at 161-163.

93. *See* Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 58-59 (2d Cir. 1994).

94. *See id.* at 59; *see generally* New York v. Shinnecock Indian Nation, 280 F. Supp. 2d 1 (E.D.N.Y. 2003).

95. *Shinnecock Indian Nation*, 280 F. Supp. 2d 1.

96. *Id.* at 9-10.

97. *See* Ann Givens, *Shinnecock Case Could Set National Precedent*, NEWSDAY, Jan. 26, 2004, available at <http://www.shinnecocknation.com/news/news74.aspx> (last visited Mar. 22, 2004) (discussing the potential role of the judiciary in the federal recognition process of the Shinnecock Tribe); *see also* Michael Colello, *Shinnecock Casino Trial Begins in Spring*, THE EAST HAMPTON INDEPENDENT, Jan. 27, 2004, available at <http://www.shinnecocknation.com/news/news75.aspx> (last visited Mar. 22, 2004) (noting a trial to decide whether the tribe should be granted federal recognition status is likely to start in April 2004).

and so the court's jurisdiction could now be employed.<sup>98</sup>

The court found the Shinnecoeks qualified as an Indian tribe, referring to a rich history of government-to-government relations with the federal government and the state of New York.<sup>99</sup> However, the BIA refuses to acknowledge this recognition as granting the Shinnecock tribe full federal rights, including the right to conduct gaming under the Indian Gaming Regulatory Act.<sup>100</sup> Regardless of whether the judiciary's findings bind the BIA, the tribe's recognition has also faced considerable opposition from the BIA, local entities that oppose gaming, and members of Congress who have no desire to see an Indian casino erected on Long Island.<sup>101</sup>

There is one other type of federal recognition, which also stems from the courts: that provided by federal common law. Federal common law recognition is a status many state-recognized tribes enjoy. A federal common law tribe is defined as "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."<sup>102</sup> This form of recognition is not subject to similar controversy, since it has not been found to confer gaming or other significant rights to Indian tribes, such as federal grants.<sup>103</sup> Federal common law recognition means only that the tribe is recognized by the courts as a tribal entity for limited purposes, such as federal court jurisdiction.<sup>104</sup> Common law recognition does not grant the tribe formal recognition status, nor compel recognition by the federal

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98. See *New York v. Shinnecock Indian Nation*, 400 F. Supp. 2d 486, 492-93 (E.D.N.Y. 2005) (noting that while the federal court should rely on a federal agency's aid, the federal court has final authority to rule on a federal statute).

99. *Shinnecock Indian Nation*, 400 F. Supp. 2d 486.

100. See Gonzales, *supra* note 10.

101. For additional precedent in which the judiciary has played a role in the federal recognition process, see generally Alva C. Mather, Comment, *Old Promises: The Judiciary and the Future of Native American Federal Acknowledgment Litigation*, 151 U. PA. L. REV. 1827 (2003). For more information on the federal recognition process and what federal recognition means for tribes, see Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271 (2001).

102. *Montoya v. United States*, 180 U.S. 261, 266 (1901).

103. See Koenig & Stein, *supra* note 13, at 377.

104. See, e.g., *Koke v. Little Shell Tribe of Chippewa Indians of Mont., Inc.*, 68 P.3d 814 (2003).

government.<sup>105</sup> A tribe's status as a federal common law tribe, like its status as a state-recognized tribe, may provide evidence that it *should* be federally recognized. However tribal status under federal common law is not enough to grant a tribe full federal recognition.

The current political environment threatens to further slow the achievement of federal recognition, as legislators and citizens in various communities band together to oppose recognition for fear that newly recognized tribes will establish a casino in their community.<sup>106</sup> This opposition is sometimes financed by competing Indian casinos, adding additional money and political muscle to an already uphill fight.<sup>107</sup> Unfortunately, this is unfairly hindering recognition opportunities for longstanding tribes and standing in the way of such tribes acquiring much needed non-casino related benefits, such as federal grants and governmental immunities.<sup>108</sup> For example, when the state-recognized Golden Hill Paugussetts were recently denied federal

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105. In *Koke*, Montana's Supreme Court applied the test for federal common law recognition to determine whether a non-federally recognized tribe was sovereign: if yes, then Montana's state courts would have no authority to adjudicate the case's underlying issues. *Koke*, 68 P.3d at 816-18. The *Koke* court distinguished between the two types of recognition: "Although [the tribe] hasn't yet received federal recognition, tribes may still be recognized as such under common law." *Koke*, 68 P.3d at 816. There, the tribe was ultimately recognized as a federal common law sovereign, even though it was not recognized by the Secretary of the Interior as a tribe for the purpose of receiving federal recognition benefits. *See id.* at 816-18.

106. *See, e.g.*, Tom Wanamaker, *No Casinos in My Backyard*, INDIAN COUNTRY TODAY, Sept. 26, 2002 (discussing the overlapping political issues of casinos and federal recognition in Connecticut).

107. *See* California Indian Legal Services, *The Future of Tribal Lands: Gaming Legislation and Land-Divestiture Negotiations*, Winter 2005/2006, <http://www.calindian.org/groundhog.winter2005.htm> (stating that tribes that have successful casinos have begun opposing other tribes' efforts to secure casinos, which would include by inference state tribes' attempts to secure federal recognition).

108. *See* Koenig & Stein, *supra* note 13, at 373-79 for an overview of the benefits provided by tribal gaming. *See also* 25 C.F.R. § 83.2 (2007) ("Acknowledgment of tribal existence by the Department [of the Interior] is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes.").

recognition, “[a]nti-casino advocates applauded the decision.”<sup>109</sup> Jeff Benedict, president of the Connecticut Alliance Against Casino Expansion, stated, “my simple response would be the BIA finally got one right.”<sup>110</sup>

Such a response oversimplifies the importance of federal recognition by equating recognition with gaming and ignoring the significant non-gaming benefits that adhere with recognition. This one-dimensional view of petitioning tribes as greedy, casino-seeking entities also overlooks the fact that many, if not most, of the tribes up for recognition first submitted their petitions years before tribal gaming became the financial powerhouse it is today. In addition, as explained by Deanna Beacham of the Virginia Council on Indians, such a prejudice unfairly hinders tribes with no intent to game. In Virginia, tribes have had the right to open bingo parlors for decades, yet none have. Beacham notes several of the tribes’ socially conservative stances and strong Baptist ties as additional evidence that few Virginia tribes would be interested in gaming.<sup>111</sup>

As detailed above, the federal recognition process is painfully unwieldy,<sup>112</sup> often takes decades to resolve and has left hundreds of Indian tribal groups without the recognition or legal status necessary to secure self-governance and valuable federal support. Consequently, state recognition is becoming increasingly valuable as a living, breathing alternative to the moribund federal recognition process, offering the potential for tribes and states to work together for mutual benefit.

### *B. The Four Types of State Recognition*

The strength of the United States’ federalist system lies in the flexibility and experimentation made possible with fifty different state governments, each responsive to local needs,

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109. Lyman, *supra* note 85.

110. *Id.*

111. Telephone Interview with Deanna Beacham, *supra* note 2.

112. See, e.g., Barry T. Hill, Testimony Before the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Committee on Government Reform, House of Representatives, *More Consistent and Timely Tribal Recognition Process Needed* (Feb. 7, 2002) (noting it could take more than 15 years to resolve all completed recognition petitions currently on file with the BIA); Mather, *supra* note 101 (discussing the difficulties inherent in acquiring formal federal recognition).

history and concerns. When it comes to relationships between states and historic Indian tribes, regulatory schemes vary widely. In some states, numerous agencies coordinate interaction between tribes and state governments. In others, one entity is vested with such responsibility. Some states have passed detailed legislative enactments to coordinate these government-to-government relationships, while other states use legislative resolutions to recognize tribes and handle the relationship with tribes more informally.<sup>113</sup> Part III of this Article details our research into the state regulatory frameworks used in sixteen recognition states and five other states that offer Indian tribes some form of official acknowledgement short of formal recognition. We have categorized states' widely varying approaches to recognition into four groups: 1) State Law; 2) Administrative; 3) Legislative; and 4) Executive. Each is discussed below.

### 1. "State Law" Recognition

The first form of state recognition, which we refer to as "state law" recognition, involves recognition of an Indian tribe by the passage of a new law. This requires the origination of a bill in one house of the state legislature, passage of the bill by both houses and then approval by the Governor. This process is the most formal. It unquestionably binds the state and constitutes a political act, establishing a government-to-government relationship with a domestic Indian tribe through the force of law.<sup>114</sup> Twelve of the sixteen states have employed state law recognition for at least one state-recognized Indian tribe. These include Alabama, Connecticut, Delaware, Georgia, Hawaii, New Jersey, Montana, New York, North Carolina, South Carolina, Vermont and Virginia. Of these states, laws were passed as early as 1881 in Delaware (recognizing the Nanticoke Indians), and as late as 2006 in Vermont (the Nulhegan Band of Coosuk-Abenaki People).<sup>115</sup>

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113. See *infra* Part III (providing an overview of each state's recognition process).

114. According to the Cohen Treatise, "The term 'state-recognized tribes' refers to tribes that are not federally recognized, *but have been acknowledged by state law.*" COHEN TREATISE, *supra* note 15, § 3.02[1] (emphasis added).

115. See *infra* Part III.

## 2. "Administrative" Recognition

A second form of recognition, administrative recognition, is related to state law recognition. Under this scheme, recognition is bestowed by executive agencies that are empowered by statute to create recognition standards and use those standards to recognize tribes. For example, in South Carolina, the State Commission for Minority Affairs was recently granted the authority to "acknowledge by certification state recognition for Native American Indian entities."<sup>116</sup> This form of recognition, like state law recognition, also carries the weight of law. Three of the sixteen states—Alabama, Massachusetts and South Carolina—fall into this category.<sup>117</sup>

## 3. "Legislative" Recognition

The third recognition process can be thought of as "legislative" recognition. The state acts only through its legislature, without the signature of the Governor or the passage of a state statute. A joint or concurrent resolution by one or both houses of the state legislature creates the government-to-government relationship. Legislative recognition often does not carry the force of law. By comparison to state law and administrative recognition, the process is less formal and more easily accomplished. This process has been used in six out of sixteen states: California, Georgia, Louisiana, New Jersey, Ohio and Virginia.

The question that emerges with this process is whether such recognition binds the state and constitutes a political act. We posit that there are two reasons why a joint or concurrent resolution should be viewed as sufficient to express state recognition of an Indian tribe. First, our federalist system permits many different methods to be used to grant state recognition since the federal government leaves it up to the individual states to decide for themselves which tribes to recognize.<sup>118</sup> Second, precedent establishes joint resolutions as an accepted method for garnering state

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116. S.C. CODE ANN. REGS. § 1-31-40(A)(6) (2003).

117. Alabama, Massachusetts and South Carolina all recognize state tribes through administrative agencies, as part of their executive branches of government. *See infra* Part III.

118. *See* COHEN TREATISE, *supra* note 15, §3.02[9] at 170.

recognition.

As for the first reason, the Tenth Amendment guarantees powers to the states, and they may decide how best to exercise those powers within broad parameters set by the United States Constitution.<sup>119</sup> Certainly, the United States Constitution does not require states to recognize Indian tribes at all, let alone in a particular manner. Joint resolutions effectively express the legislature's intent, which, absent a constitutional limitation, should be sufficient to "recognize" an existing Indian tribe for state law purposes, so long as the state itself agrees, and that agreement concords with limitations placed on the legislature by the state's constitution.<sup>120</sup> Thus, it would appear that each state and its constitution is the delimiting factor when considering whether legislative recognition is valid.

This issue has emerged, for example, in California, where two Indian tribes have been recognized by joint resolution: the Gabrielino-Tongva of Los Angeles<sup>121</sup> and the Juaneno Band of Mission Indians in Orange County.<sup>122</sup> California recognized the Gabrielino-Tongva Tribe in its Assembly Joint Resolution 96, Chapter 146.<sup>123</sup> The legislative digest for Assembly Joint Resolution 96 notes that "[t]his measure would recognize the Gabrielinos as the aboriginal tribe of the Los Angeles Basin and would memorialize the President and Congress to give similar recognition to the Gabrielinos."<sup>124</sup> This language suggests that the Legislature's intent was to officially recognize the Gabrielino-Tongva Indian tribe. The Legislature uses the term of art "recognize" and notes its desire that the federal government "give similar recognition."<sup>125</sup> Based on authority granted by the California Constitution, Article IV, joint resolutions do not need to be signed by the Governor to go into effect.<sup>126</sup> According to the

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119. U.S. CONST. amend. X.

120. See COHEN TREATISE, *supra* note 15, §3.02[9] at 170.

121. Assem. J. Res. 96, Chapter 146, 1993-1994 Reg. Sess. (Cal. 1994) (recognizing the Gabrielino Tribe of Los Angeles).

122. Assem. J. Res. 48, Chapter 121, 1993-1994 Reg. Sess. (Cal. 1993) (recognizing the Juaneno Band of Mission Indians in Orange County).

123. Assem. J. Res. 96, Chapter 146, 1993-1994 Reg. Sess. (Cal. 1994).

124. *Id.*

125. *Id.*

126. State of California's State Administrative Manual, Chapter 6925,

State of California's State Administrative Manual,

Joint resolutions are initiated when the Legislature wants to comment to Congress and/or the President on a federal matter of concern to the state. These resolutions require a majority vote in both houses. Joint resolutions neither need the signature of the Governor nor have the force of law. They take effect upon being filed with the Secretary of State.<sup>127</sup>

Thus, so long as the California Legislature had the authority under its state constitution to grant official recognition to the Gabrielinos through a joint resolution, the resolution should suffice to create a government-to-government relationship.

The 2005 edition of the COHEN TREATISE similarly agrees that states have the right to recognize tribes through a variety of methods, including joint resolutions.<sup>128</sup> “[T]he legal status of [state-recognized tribes’] reservations and the scope of their governmental authority, if any, is a matter of state – not federal – law. . . . State recognition can take a variety of forms, and federal laws extending to state-recognized tribes defer to the states’ characterizations.”<sup>129</sup> According to the Cohen treatise, one “form of state recognition may consist of merely acknowledging that a particular tribal group constitutes the indigenous people of a particular area in the state.”<sup>130</sup> Notably, the treatise cites to California Assembly Joint Resolution 96, which recognizes the Gabrielinos as the aboriginal inhabitants of the Los Angeles basin, for this proposition.<sup>131</sup> Thus, this critical treatise also suggests that a joint resolution potentially grants state recognition.

Within the federalist system, states have the autonomy and flexibility to determine what method to use to recognize a tribe without federal recognition. However, as the COHEN TREATISE acknowledges, the federalist framework places one inherent limitation on state autonomy: “[S]tate law addressing state-recognized tribes may not conflict with any

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<http://sam.dgs.ca.gov/TOC/6000/6925.htm> (last visited June 13, 2006).

127. *Id.*

128. *See* COHEN TREATISE, *supra* note 15, §3.02[9] at 170-71.

129. *Id.* §3.02[9] at 169-70.

130. *Id.* §3.02[9] at 171.

131. *Id.* §3.02[9] at 171 n. 249 (“Gabrielino/Tongva Tribe acknowledged as aboriginal people of Los Angeles basin.”). For the text of the resolution, see *Assem. J. Res. 96*, Chapter 146, 1993-1994 Reg. Sess. (Cal. 1994).

rules of federal Indian law.”<sup>132</sup> This same limitation is consistent with traditional notions of federalism:

[S]tate-recognized tribes are generally not the subject of federal legislation and concern. Hence, there would not appear to be any conflict with federal law when states administer their own programs of respect and protection.<sup>133</sup>

Legislative recognition by joint resolution would arguably no more interfere with rules of federal Indian law than state law or administrative recognition.

The second reason that legislative recognition likely suffices to declare a government-to-government relationship with an Indian tribe is precedent. Of the sixteen states that host state-recognized tribes, five have recognized tribes through joint resolutions, suggesting legislative recognition is an appropriate means for granting recognition.

Louisiana offers the best example of a state that recognizes tribes through joint resolutions and whose tribes are widely acknowledged as legitimately state-recognized. Louisiana’s nine state tribes are solely recognized through joint or concurrent resolutions passed by the Louisiana legislature, which do not carry the weight of law, and do not require the signature of the Governor<sup>134</sup>—just as in California. Nonetheless, legislative recognition has been enough for Louisiana’s state-recognized tribes to qualify for services and benefits available to state-recognized tribes from the federal government and elsewhere.<sup>135</sup>

#### 4. “Executive” Recognition

We refer to the fourth recognition process as “executive recognition.” This type of recognition results from gubernatorial proclamation, executive order, or historically by a treaty or other relationship established between the tribes and original colonies. This category generally involves action by the Governor’s office or other executive department. No action by the state legislature is required. Four of the sixteen

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132. COHEN TREATISE, *supra* note 15, §3.02[9] at 171.

133. *Id.*

134. Letter from Colonel Joey Strickland, La. Office of Indian Affairs, to Alexa Koenig, Univ. of S. F. School of Law (July 18, 2006) (on file with author).

135. *Id.*

states on our primary list—Connecticut, Montana, New York and Virginia—have employed this method of recognition, as have several of the states mentioned in Part III B, although those states do not consider such exercises recognition *per se*.<sup>136</sup> Three of the four states' relationships with state tribes have been carried over from pre-revolutionary times. As for the states mentioned in Part III B, Missouri has "recognized" tribes by gubernatorial proclamation.<sup>137</sup> An additional state, Michigan, arguably recognizes tribes through a method that is even less formal. Instead of "state-recognized tribes," the state has a status called "eligible for state services and state funding," for which tribal organizations can apply.<sup>138</sup> While the states of Michigan and Missouri do not consider their tribes officially state-recognized and therefore they are not included on our primary list of recognition states, they are included on several Internet lists of recognition states, suggesting their practices may be viewed by some individuals as resulting in valid recognition.

Ultimately, these four approaches offer important models for those who wish to facilitate cooperation and communication between tribal governments and the states in which they reside.

### III. SURVEY OF RECOGNITION STATES, STATE-RECOGNIZED TRIBES, STATE RECOGNITION PROCESSES, AND STATE INDIAN RESERVATIONS

Below is an overview of the sixteen recognition states and the tribes they recognize.<sup>139</sup> In addition, we discuss five other states that accord some type of status short of official state recognition, and three states that may be considering implementing some form of recognition.

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136. *See infra* Part III.

137. Proclamation of Christopher S. Bond, Governor of the State of Mo. (June 22, 1983), [http://www.angelfire.com/mo2/ncnolt/Missouri\\_Bond.html](http://www.angelfire.com/mo2/ncnolt/Missouri_Bond.html).

138. Telephone Interview with Donna Budnick, Mich. Dep't of Civil Rights Native Am. Affairs Office (Mar. 29, 2004).

139. Complicating the formation of this list was the practice of many tribes being referred to by more than one name, or tribal names reflected in variant spellings. For simplicity purposes, the name used here is usually the one recognized by the state. Whenever possible, we have tried to validate the tribes' state-recognized status through more than one source. However, it should be noted that lists of state-recognized tribes can vary dramatically as to the states and tribes included. *See supra* note 26 and accompanying text.

This information was compiled through traditional legal research, including a review of numerous state statutes, legislative resolutions and administrative regulations. This information was also gathered through a series of interviews with state and tribal organizations around the country, and supplemented by extensive Internet research.<sup>140</sup>

### A. *Recognition States*

The survey information provided below details (1) which states recognize domestic Indian tribes; (2) a list of the tribes recognized by each state, as well as a list of state Indian reservations; (3) a brief overview of each state's recognition process, including whether that process can be categorized as state law recognition, administrative recognition, legislative recognition or executive recognition; and (4) a summary of the regulatory scheme utilized for managing these government-to-government relationships.<sup>141</sup>

#### 1. *Alabama*

Alabama currently recognizes nine tribes, including the Mowa Band of Choctaws, the Star Clan of Muscogee Creeks,<sup>142</sup> the Echota Cherokees of Alabama, the Cher-O-Creek Intra Tribal Indians, the Cherokees of Northeast Alabama, the Cherokees of Southeast Alabama, the Piqua Shawnee Tribe, the United Cherokee ani-Yun-Wiya Nation and the Ma-Chis Lower Creek Indian Tribe.<sup>143</sup>

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140. For an excellent summary of state organizations vested with responsibility for state-tribal communications, see the National Conference of State Legislatures, *State-Tribal Relations: State Committees and Commissions on Indian Affairs*, <http://www.ncsl.org/programs/statetribestlegcom.htm> (last updated July 2007).

141. This compilation does not delve into a nuanced analysis of each state recognition process; instead, it is designed to provide a broad overview of the various schemes used to recognize tribes across the country, as a starting point for further research.

142. The Star Clan of Muscogee Creeks is currently trying to secure a reservation. See Alabama Indian Affairs Commission, *Yufala "Star" Clan of Lower Muscogee Creek Indians*, <http://aiac.state.al.us/STAR%20CLAN%20tribal%20history.htm> (last visited Sept. 22, 2007).

143. Alabama Indian Affairs Commission, *Tribes Recognized by the State of Alabama*, <http://aiac.state.al.us/Tribes,%20Chiefs%20&%20Commissioners.htm> (last visited July 28, 2006) (listing each of the above tribes as recognized by the state); see also *State Recognized Tribes*, *supra* note 26; National Conference of

Alabama utilizes a hybrid state law and administrative recognition process. Each state tribe was recognized by statute in the 1970s under the authority of Alabama Code § 41-9-708(b).<sup>144</sup> The Alabama Indian Affairs Commission was also established by Alabama Code § 41-9-708.<sup>145</sup> Today, the Commission's duty is to coordinate the relationship between these nine tribes and the state and "to recognize additional Indian tribes, bands, or groups,"<sup>146</sup> suggesting Alabama has shifted to an administrative recognition process. The Commission may also adopt an "appropriate [recognition] procedure" for recognizing any additional "tribes, bands or groups."<sup>147</sup> For a petitioning tribe to earn recognition, each of the following requirements must be met:

(2) Petitioner must present a list of at least five hundred (500) members who reside in the state of Alabama, . . . unless this requirement is waived . . .

(3) Petitioner must present evidence that each of its members is a descendent of individuals recognized as Indian members of an historical Alabama tribe, band, or group found on rolls compiled by the federal government or otherwise identified on other official records or documents . . . .

(4) Petitioner must present satisfactory evidence that its members form a kinship group whose Indian ancestors were related by blood and such ancestors were members of a tribe, band or group indigenous to Alabama. This evidence may be the equivalent of the ancestry charts required in Section 3 above.

(5) The petitioner must swear or affirm the following:

(a) No individual holding or eligible for membership in a federally or state recognized tribe, band or group may be accepted for membership in the petitioning group.

NOTE: This requirement is for the protection of members of federally or state recognized tribes who might otherwise

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State Legislatures, State-Tribal Relations: Indian Tribe States, *supra* note 3.

144. ALA. CODE § 41-9-708(b) (LexisNexis 2000). This code section declares that "[a]ll above stated tribes, bands, and groups shall be state recognized upon passage of this article." *Id.*

145. *Id.* § 41-9-708(a).

146. *Id.* § 41-9-708(b).

147. *Id.* § 41-9-708(b).

forfeit services by becoming members of a non-recognized tribal group.

(6) Evidence must be presented that the petitioning tribe, band or group has been identified with a tribe, band or group or Indian community from historical times (200 years) until the present as “American Indian” and has a currently functioning governing body.

(a) Ancestry charts must be verified and approved by written acknowledgement of a Certified Genealogist (CSL) who is a non-member of the petitioning tribe, band, group or Indian community.

(b) Genealogist must submit a copy of current licensure and documentation of credentials.

(c) Tribal history is a requirement. It may be prepared and written by the tribe, but it must be validated by a certified historian and/or anthropologist.

(d) Historian must submit a resume of prior work along with documentation of credentials.

(7) Petitioner must include a statement bearing the notarized signatures of the three highest ranking officers of the petitioning tribe, band or group certifying that to the best of their knowledge and belief all information contained therein is true and accurate.<sup>148</sup>

The Commission is comprised of a representative from each of the nine tribes (appointed by the Governor), a member of the House of Representatives (appointed by the Speaker of the House), and a member of the State Senate (appointed by the Lieutenant Governor).<sup>149</sup> In addition, the Commission is directed to appoint a member of a federally recognized Indian tribe, who is not a member of any tribe already represented on the Commission, and the Governor appoints a single “member at large,” who can be Indian or non-Indian.<sup>150</sup>

The MOWA Band of Choctaw Indians has a state reservation.<sup>151</sup> Other tribes may own land in fee.

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148. ALA. ADMIN. CODE r. 475-X-3-.03(1)-(7) (2005).

149. ALA. CODE § 41-9-708(b) (LexisNexis 2000).

150. *Id.*

151. E-mail from Cedric Sunray, Member of the MOWA Band of Choctaw Indians, to Alexa Koenig (Sept. 11, 2007); MOWA Band of Choctaw Indians Website, <http://www.mowachoctaw.org/history.html> (last visited Sept. 22, 2007).

## 2. California

California recognizes two state tribes: the Gabrielino-Tongva Tribe, a California Indian tribe indigenous to Los Angeles County and northern Orange County known historically as the San Gabriel Band of Mission Indians, and the Juaneno Band of Mission Indians, which is indigenous to Orange County.<sup>152</sup> Both were recognized in the 1990s.<sup>153</sup>

California utilizes a legislative recognition process. The state has not devised official criteria for recognition. Instead, state recognition has been granted on a case-by-case basis through joint resolutions passed by the legislature, without the Governor's signature.

While some opponents of state recognition in California have argued that the joint resolutions acknowledging California's two state tribes may not be enough to garner "official" recognition for any practical purposes, the resolutions are arguably powerful enough to stand in as a valid form of state recognition.<sup>154</sup> In California, the legislature's powers are provided and limited by the California Constitution, Article IV ("[t]he legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum"<sup>155</sup>). The primary issue is whether the legislature's power includes the ability to recognize a tribe through a joint resolution, or whether a statute is needed.

According to *California Jurisprudence, Third Edition*:

[a] resolution is a declaration or expression of the will of one of the houses of the legislature, other than by passage of a bill, and a joint or concurrent resolution is one that is concurred by both house of the legislature. Every concurrent and joint resolution takes effect upon the filing of it with the Secretary of State. A resolution is not a legislative act, and the legislature in passing a resolution

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152. Assem. J. Res. 96, Chapter 146, 1993-1994 Reg. Sess. (Cal. 1994) (recognizing the Gabrielino Tribe of Los Angeles); Assem. J. Res. 48, Chapter 121, 1993-1994 Reg. Sess. (Cal. 1993) (recognizing the Juaneno Band of Mission Indians in Orange County).

153. *Id.*

154. *See supra* Part II (discussing why joint resolutions should be viewed as sufficient to bestow official state recognition).

155. CAL. CONST. art. IV, § 1.

does not exercise its lawmaking power. *A resolution or joint resolution is, of course, sufficient to express the will of one or both houses for certain purposes, where a formal statute is not required.*<sup>156</sup>

Thus, the issue is whether a formal statute is required for California to officially recognize a tribe. In California, joint resolutions do not need to be signed by the Governor to go into effect, based on authority granted by the California Constitution, Article IV. According to the State of California's State Administrative Manual,

Joint resolutions are initiated when the Legislature wants to comment to Congress and/or the President on a federal matter of concern to the state. These resolutions require a majority vote in both houses. Joint resolutions neither need the signature of the Governor nor have the force of law. They take effect upon their being filed with the Secretary of State.<sup>157</sup>

Thus, if a resolution is all that is needed, the Governor's signature is not needed for it to go into effect—the final step is filing with the Secretary of State, which, for example, occurred with the Gabrielino-Tongva tribe on September 13, 1994.<sup>158</sup>

Based on the arguments presented in the above section on legislative recognition, and the precedent established by Louisiana and other states, we include the Juaneno and Gabrielino-Tongva tribes in our list as state-recognized. However, California has little formal regulation of its relationships with these state tribes, which have not been granted any state-sponsored benefits by virtue of their tribal status.

State legislative committees help regulate California's state-tribal relations, and would presumably coordinate the relationship with California's two state tribes as well. Native American issues may be assigned to the Assembly Select Committee on California Indian Nations, the Committee on

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156. 58 CAL. JURISPRUDENCE, STATUTES § 2 at 358 (3d ed. 2004) (emphasis added).

157. State of California's State Administrative Manual, Chapter 6925, <http://sam.dgs.ca.gov/TOC/6000/6925.htm> (last visited June 13, 2006).

158. See Complete Bill History, [http://leginfo.public.ca.gov/pub/93-94/bill/asm/ab\\_0051-0100/ajr\\_96\\_bill\\_history](http://leginfo.public.ca.gov/pub/93-94/bill/asm/ab_0051-0100/ajr_96_bill_history).

Governmental Organization, the Committee on the Judiciary, or the Committee on Health and Human Services.<sup>159</sup> In the executive branch, tribal issues are generally referred to the Native American Heritage Commission.<sup>160</sup>

Neither of California's state-recognized tribes have state Indian reservations, although the tribes may own land in fee.

### 3. Connecticut

Connecticut recognizes three state tribes: the Paucatuck Eastern Pequot, the Golden Hill Paugussett, and the Schaghticoke Indian Tribes.<sup>161</sup> Today, Connecticut uses a state law recognition process: the tribes were recognized by statute in the 1970s.<sup>162</sup> Specifically, Connecticut General Statute section 47-59a(b) notes the state's recognition of each tribe and details the rights that come with recognition.<sup>163</sup> However, all three tribes have also been recognized by the state for hundreds of years, first through the Colony (an executive form of recognition) and then the State of Connecticut.<sup>164</sup>

While the Schaghticoke and Paucatuck Indian Tribes were both acknowledged by the BIA as federal "Indian tribes" in 2004, the BIA's decisions were remanded in 2005.<sup>165</sup> As for

159. See State Committees and Commissions on Indian Affairs, *supra* note 140.

160. *Id.*

161. See CONN. GEN. STAT. ANN. § 47-63 (West 2004) (defining "Indian" as a person who is a member of the Paucatuck Eastern Pequot, Golden Hill Paugussett, and Schaghticoke Indian Tribes, in addition to members of federally recognized tribes).

162. See *id.* § 47-59a(b) (recognizing these tribes and expressing the rights that come with state recognition).

163. *Id.*

164. See Golden Hill Paugussett Indian Tribe, The State of Connecticut Should Support the Golden Hill Paugussett, <http://www.paugussetts.com/corr16.htm> (last visited Sept. 23, 2007).

165. For the announcement that recognition of the Paucatuck Eastern Pequot tribe's federal acknowledgment petition had been declined, see Press Release, U.S. Dep't of the Interior, The Dep't of the Interior Issued Reconsidered Final Determination to Decline Fed. Acknowledgement of the E. Pequot Indians of Connecticut and the Paucatuck Eastern Pequot Indians of Conn. (Oct. 12, 2005), [http://www.doi.gov/news/05\\_News\\_Releases/051012.htm](http://www.doi.gov/news/05_News_Releases/051012.htm) (last visited Sept. 23, 2007). For the announcement that recognition of the Schaghticoke tribe's federal acknowledgment petition had been declined, see Press Release, U.S. Dep't of the Interior, The Dep't of the Interior Issued Reconsidered Final Determination to Decline Fed. Acknowledgement of the Schaghticoke Tribal Nation (Oct. 12, 2005),

the Paucatuck, the state of Connecticut, several towns within the state and the Wiquapaug Eastern Pequot Tribe all challenged the Paucatuck's Final Determination before the Interior Board of Indian Appeals.<sup>166</sup> Specifically, the Interior Board of Indian Appeals rejected the BIA's previous use of state recognition as evidence for meeting the criteria of two of the BIA's requirements.<sup>167</sup> The department reevaluated the relationship between the state and tribe to see if there was enough evidence of internal tribal social interaction or political influence without looking at the tribe's longstanding state recognition.<sup>168</sup> Ultimately, it was concluded there was not enough evidence of political authority or influence from 1913-1973 to merit recognition, and that a split within the tribe in the 1980s meant that the tribe was no longer the community that had existed previously.<sup>169</sup>

The "reconsidered" final determination of the Schaghticoke's federal status was announced on the same day and reads almost identically.<sup>170</sup> The tribe's recognition was similarly contested by the State of Connecticut and several towns within Connecticut.<sup>171</sup> Upon reconsideration, the board found that while the tribe provided "sufficient evidence" of their community status "from colonial times to 1920 and 1967 to 1996," there was not enough evidence of the tribe's existence for the time period from 1920-1967 and 1997 to the present.<sup>172</sup> The board declared there were similar gaps in the tribe's ability to establish "political authority or influence" during the nineteenth and twentieth centuries.<sup>173</sup> Previously, the board had found those gaps filled by the tribe's continued state recognition during those time periods.<sup>174</sup> The precedent set by the board's refusal to use state recognition to fill these

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[http://www.doi.gov/news/05\\_News\\_Releases/051012a.htm](http://www.doi.gov/news/05_News_Releases/051012a.htm).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *See* Press Release, The Dep't of the Interior Issued Reconsidered Final Determination to Decline Fed. Acknowledgement of the Schaghticoke Tribal Nation, *supra* note 165.

171. *Id.*

172. *Id.*

173. *Id.*

174. *See id.*

gaps has dealt a blow not only to these two tribes, but to state tribes across the country who already face an uphill battle establishing their eligibility for federal recognition.

Perhaps most alarming, some feel that the unprecedented review of the tribes' recognition was motivated more by political persuasion from parties who wanted to block the tribes from engaging in tribal gaming, rather than a true concern with the tribes' legitimacy.<sup>175</sup> Shockingly, it has come out during the Schaghticoke tribe's appeal that "a powerful congressman [Republican Frank Wolf of Virginia] threatened to use his influence at the White House to get [then-Interior Department Secretary Gale Norton] fired if she did not reverse the tribe's federal status."<sup>176</sup> Norton continues to assert that she believes the decision she and her staff made in approving the tribe's recognition was the right one because they "made a considered policy judgment that, as a matter of constitutional principles of federalism, the Tribe's hundreds of years of State recognition merited important consideration in the recognition process."<sup>177</sup> However, the appeals board ultimately declined to include longstanding state recognition as part of their decision-making, and the reconsidered final judgment denying recognition was signed by Associate Deputy Secretary James Cason in 2005.<sup>178</sup>

The Connecticut Office of American Indian Affairs, a branch of the Environmental Protection Department, is responsible for regulating these tribes' relationship with the state.<sup>179</sup> The Connecticut Indian Affairs Council also regulates tribal-state relations.<sup>180</sup> The Council's responsibility is to "review the regulations governing Indian affairs" and "advise the Commissioner of Environmental

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175. See Press Release, Schaghticoke Tribal Nation Takes Aim at Opponents' "Back Door" Effort that Reversed Recognition, *supra* note 87.

176. Gale Courey Toensing, *Gale Norton Told: Reverse Recognition or be Fired*, INDIAN COUNTRY TODAY, Jan. 26, 2007.

177. See *id.*

178. See *id.*

179. See National Conference of State Legislatures, State-Tribal Relations: State Committees and Commissions on Indian Affairs – Connecticut, <http://www.ncsl.org/programs/statetribe/stlegcom.htm#ct> (last updated July 2007).

180. See CONN. GEN. STAT. ANN. § 47-59b (West 2004) (establishing the Council, which is comprised of representatives from each of Connecticut's state-recognized tribes as appointed by those tribes, and three non-Indian representatives appointed by the governor).

Protection on promulgations of new regulations.”<sup>181</sup>

Connecticut has long recognized all three tribes' lands as having official status as state tribal reservations. The Paucatuck Eastern Pequot Nation has resided on the Lantern Hill Reservation in North Stonington, Connecticut since 1683.<sup>182</sup> Additionally, the Connecticut General Assembly set aside 2,500 acres of land for the Schaghticoke Indian Tribe in 1736.<sup>183</sup> The tribe still has 480 acres today that exist as reservation lands.<sup>184</sup> Finally, the Golden Hill Paugussett have two state-recognized reservations, one in Trumbull, and one in Colchester.<sup>185</sup> The Connecticut Indian Affairs Council and Connecticut Department of Environmental Protection are vested with jurisdiction over these state reservations.<sup>186</sup>

#### 4. Delaware

Delaware recognizes one state tribe: the Nanticoke Indians.<sup>187</sup> Delaware utilizes a state law recognition process, recognizing the Nanticoke by statute on March 10, 1881.<sup>188</sup> According to a representative of the Nanticoke Indian Tribe, “[I]n 1903 [the] Delaware State Legislature enacted a law called ‘An act to better establish the Identity of a race of people known as the offspring of Nanticoke Indians. The descendants of the Nanticoke Indians shall hereafter be recognized as such within the State of Delaware.’”<sup>189</sup> On February 24, 1922, the Nanticoke Indian Association was chartered as an Indian Tribal group. The tribe's members

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181. *Id.*

182. *See* § 47-63 (recognizing the Pequot lands as a reservation).

183. Gale Courey Toensing, *Schaghticoke await BIA's final determination*, INDIAN COUNTRY TODAY, Oct. 10, 2005.

184. *See* § 47-63 (West 2004) (recognizing the Schaghticoke lands as a reservation).

185. § 47-63 (recognizing the Paugussett lands as reservations).

186. CONN. AGENCIES REGS. § 47-59b-3 (2007).

187. *See* State-Tribal Relations: Indian Tribe States, *supra* note 3 (listing the Nanticoke Indians as the only state-recognized tribe in Delaware); *see also* DEL. CODE ANN. tit. 29, § 105 (1997 Replacement Vol.) (addressing proof of descent and recognition of the Nanticoke Indians).

188. Nanticoke Indian Tribe, *Tribe History*, <http://www.nanticokeindians.org/history.cfm> (last visited July 18, 2006); *see also* e-mail from Jean Norwood to Alexa Koenig (Aug. 1, 2006) (on file with author).

189. E-mail from Jean Norwood to Alexa Koenig (Aug. 1, 2006) (on file with author).

were named as claimants of Nanticoke Indian ancestry.<sup>190</sup>

Delaware has no official regulatory scheme. According to the tribe, there is no identified organization within the state dedicated to Indian Affairs.<sup>191</sup> While one did previously exist, the office was eventually eliminated due to budget reductions.<sup>192</sup>

Delaware encompasses no state Indian reservations. Three thousand acres were originally set aside as reservation lands for the Nanticoke Indians by the Maryland Assembly in the 1700s.<sup>193</sup> However, because the tribe retained its seasonal hunting practices, which necessitated leaving the reservation at certain times of the year, the lands were eventually taken over by squatters and the reservation properties were lost. Today, the tribe owns two acres of land in Delaware in fee; these house the Nanticoke Indian Center and Nanticoke Indian Museum.<sup>194</sup>

### 5. Georgia

Georgia utilizes a hybrid state law and legislative recognition process. The state recognizes four state tribes by statute.<sup>195</sup> Three have been recognized since 1993—these include the Georgia Tribe of Eastern Cherokee, the Lower Muscogee Creek Tribe and the Cherokee of Georgia.<sup>196</sup> The Kokeneschv Natchez Nation, which was previously listed as “extinct,” was reinstated as a state tribe in 2005 by statutory authority.<sup>197</sup> However, any future state tribes will be

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190. *Id.*

191. *Id.*

192. *Id.*

193. The Nanticoke Indian Tribe, Tribe History, <http://www.nanticokeindians.org/history.cfm> (last visited July 18, 2006).

194. The Nanticoke Indian Tribe, <http://www.nanticokeindians.org/> (last visited October 10, 2007).

195. GA. CODE ANN. § 44-12-300(a) (West 2007) (recognizing as “legitimate American Indian tribes” the Georgia Tribe of Eastern Cherokee, the Lower Muscogee Creek Tribe, and the Cherokee of Georgia); H.R.B. 223 (Ga. 2005), [http://www.legis.state.ga.us/legis/2005\\_06/fulltext/hb223.htm](http://www.legis.state.ga.us/legis/2005_06/fulltext/hb223.htm) (last visited Nov. 21, 2006) (regarding the Kokeneschv Natchez Nation); *see also* Telephone Interview by Rosalie Leung with Rachel Pashman, Dir. and Chief of the Kokeneschv Natchez Nation (Nov. 13, 2006).

196. *See* § 44-12-300(a).

197. Telephone Interview by Rosalie Leung with Rachel Pashman, *supra* note 195; *see also* H.R.B. 223 (Ga. 2005), [http://www.legis.state.ga.us/legis/2005\\_06/fulltext/hb223.htm](http://www.legis.state.ga.us/legis/2005_06/fulltext/hb223.htm) (last visited Nov. 21, 2006).

recognized legislatively because Georgia law does not provide any established statutory criteria for recognizing domestic Indian tribes. Instead, Georgia Code Annotated section 44-12-300(b) grants Georgia's General Assembly the power to "recognize [additional] tribes, bands, groups, or communities . . . as the General Assembly deems appropriate."<sup>198</sup> Therefore, while state law recognition has been used in the past and sets the statutory framework for state recognition, any Indian tribes that are recognized in the future will likely be recognized through a legislative recognition process.

Georgia provides little formal regulation of its state and tribal relationships. Recognized Indian tribes are not granted any special benefits by virtue of their tribal status.<sup>199</sup> Tribal regulation primarily consists of legislation concerning the regulation of Indian burial grounds.<sup>200</sup> While Georgia does not have a statewide organization specifically designed to facilitate communication with tribes, some coordination is achieved through the Council on American Indian Concerns, which primarily focuses on the repatriation of burial objects and human remains. The Council was established in 1992, and is comprised of Native Americans and scientists appointed by the Governor.<sup>201</sup>

Georgia has no federally recognized tribes. This is primarily because it is difficult for local tribes to document an uninterrupted history in one location and under one form of government, as required by the BIA, since many of the tribes that once occupied Georgia were forcibly removed to Oklahoma in the 1830s.<sup>202</sup> Consequently, Georgia tribes (and many others like them) have been subjected to double victimization. Not only were they forced to leave their ancestral lands, but they are now denied validity by the federal government because of such removal.

Georgia does not have any state Indian reservations,

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198. § 44-12-300(a).

199. See Council on Am. Indian Concerns, About the Council, <http://www.state.ga.us/indcouncil/index.html> (last visited July 21, 2006).

200. Telephone Interview with Ga. Council on Am. Indian Concerns (Mar. 26, 2004).

201. See GA. CODE. ANN. § 44-12-280(b) (West 2007).

202. New Georgia Encyclopedia, *Cherokee Removal*, <http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h-2722> (last visited Oct. 10, 2007).

although land may be owned in fee by individual Indian tribes.<sup>203</sup>

## 6. *Hawaii*

Native Hawaiians do not yet have a tribal government, although legislation is currently being promulgated to create a government entity for native Hawaiians that would provide a legal status similar to that of tribes on the mainland United States.<sup>204</sup> However, native Hawaiians do have a long history of being federally recognized as the native peoples of the Hawaiian Islands, and many federal statutes addressing Native Americans include native Hawaiians within their purview.<sup>205</sup> In 1959, when Hawaii obtained statehood, the federal government delegated its authority over issues specific to native Hawaiians to the infant state.<sup>206</sup> Since there is a long history of official relations between the state and native Hawaiians as a group, they could very well be considered state-recognized.<sup>207</sup> The form of recognition would be state law recognition, since the transfer of responsibility from the federal government to the state was completed with the full weight of law.<sup>208</sup>

As for land, while native Hawaiians do not enjoy a formal reservation per se. The federal government, through the federal Admissions Act, did convey to the state 1.2 million acres of land to be held in trust “for the betterment of the conditions of native Hawaiians.”<sup>209</sup> Because this is land held

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203. Telephone Interview by Rosalie Leung with Rachel Pashman, *supra* note 195.

204. Native Hawaiian Government Reorganization Act of 2007, [http://www.nativehawaiians.com/HR505\\_01-07.htm](http://www.nativehawaiians.com/HR505_01-07.htm) (last visited May 23, 2007); *see also* Editorial, *A Chance for Justice in Hawaii*, N.Y. TIMES, June 7, 2006.

205. *See* COHEN TREATISE, *supra* note 15, § 4.07[4] at 364-86.

206. *Rice v. Cayetano*, 528 U.S. 495, 507-08 (2000); COHEN TREATISE, *supra* note 15, § 4.07[4][b] at 370-71.

207. For more information on the history of the relationship between native Hawaiians and the state of Hawaii, *see Rice v. Cayetano*, 528 U.S. at 500-10. In *Rice*, the Supreme Court briefly discusses whether native Hawaiians should be deemed to have a legal status equivalent to that of mainland tribes, but declines to make that determination. *Id.* at 518.

208. *See* The Admission Act, Pub. L. No 86-3, 73 Stat. 4 (1959) (conferring some trust responsibilities from the federal government to the state of Hawaii); *see also* COHEN TREATISE, *supra* note 15, 4.07[4][b] at 370-71 (discussing The Admission Act and the impact of statehood on federal and state trust responsibilities regarding Hawaii’s public lands).

209. *Rice*, 528 U.S. at 532-33 (Stevens J., dissenting).

in trust by the state, we have included Hawaii as having state "reservation lands."

The Office of Hawaiian Affairs is vested with the responsibility to better the conditions of native Hawaiians.<sup>210</sup> The existence of this Office further suggests a trust relationship between the state and native Hawaiians. A full analysis of the legal status of native Hawaiians as a tribal government must and should be quite detailed and therefore falls outside the scope of this Article. However, based on the formal relationship that does exist, we have included Hawaii as a recognition state.

### 7. Louisiana

Louisiana has nine state-recognized tribes,<sup>211</sup> including the Choctaw Tribe,<sup>212</sup> the Caddo Adais Tribe,<sup>213</sup> the Four Winds Tribe Louisiana Cherokee Confederacy,<sup>214</sup> the Pointe-au-Chien Indian Tribe,<sup>215</sup> the Isle de Jean Charles Band of the Biloxi Chitimacha Confederation of Muskogeans (BCCM),<sup>216</sup> the Bayou LaFourche Band of the BCCM,<sup>217</sup> the Grand Caillou/Dulac Band of the BCCM,<sup>218</sup> the Clifton Choctaw Tribe and the United Houma Tribe.<sup>219</sup> Recognition

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210. Office of Hawaiian Affairs, <http://www.oha.org>.

211. Telephone Interview with Colonel Joey Strickland, Director, La. Office of Indian Affairs (June 27, 2006).

212. See S. Con. Res. 163, Reg. Sess. (La. 1987); H.R. Con. Res. 117, Reg. Sess. (La. 1987).

213. See S. Con. Res. 16, Reg. Sess. (La. 1993).

214. See S. Con. Res. 137, Reg. Sess. (La. 1997).

215. See S. Con. Res. 105, Reg. Sess. (La. 2004).

216. See *id.*

217. See *id.*

218. See *id.*

219. For information on recognition of the Clifton Choctaw and United Houma Tribes, see La. Governor's Office of Indian Affairs, Tribes, <http://www.indianaffairs.com/tribes.htm> (last visited July 21, 2006) (providing a complete list of tribes recognized by the state of Louisiana); see also Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, *supra* note 3, for those which are Article III Subordinate Sovereigns (with the remaining constituting non-IGRA tribes). In June 2004 the state of Louisiana officially re-recognized its state tribes. Seven had been initially recognized in the 1970s and 1990s through the state legislature; several received independent recognition after breaking out from the United Houma Tribe. Telephone Interview with Colonel Joey Strickland, *supra* note 211; see also La. Governor's Office of Indian Affairs, Tribes, <http://www.indianaffairs.com/tribes.htm> (last visited July 21, 2006) (providing

has occurred over a thirty year time span beginning in the 1970s and continuing through 2004, when Louisiana officially re-recognized its state tribes.<sup>220</sup>

Louisiana utilizes a legislative recognition process. As mentioned above,<sup>221</sup> Louisiana has never developed official criteria for state recognition. Instead, recognition is achieved through the passage of concurrent resolutions by the Louisiana Senate and House of Representatives.<sup>222</sup>

Louisiana's Office of Indian Affairs was established by state statute<sup>223</sup> to monitor relations between the state and tribes. Its "powers and duties" include, but are not limited to: administering Louisiana's tribal programs; making "recommendations to the governor and to the legislature for needed improvements and additional resources to promote the welfare" of state Indians; "promulgat[ing] rules and regulations" necessary to implement the organization's mission; and "serv[ing] as the official negotiating agent of the state" to receive notice of any tribal request to negotiate tribal compacts.<sup>224</sup> State recognition in Louisiana primarily operates to secure the right for tribes to participate in some federal programs.<sup>225</sup>

Louisiana has no state Indian reservations, although individual tribes may own land in fee.<sup>226</sup>

#### 8. *Massachusetts*

Massachusetts' six state-recognized tribes include the Chappaquiddick Wampanoag, Chaubunagungamang Band / Nipmuc Tribal Council, Hassanamisco Nipmuc Band, Herring

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the year each of the tribes received state recognition); S. Con. Res. 105, Reg. Sess. (La. 2004) (explaining that the Pointe-au-Chien Indian tribes and the BCCM tribes were previously recognized as members of the United Houma Nation).

220. Telephone Interview with Colonel Joey Srickland, *supra* note 211.

221. *See supra* Part II.

222. Telephone Interview with Colonel Joey Srickland, *supra* note 211.

223. § 46:2301.

224. LA. REV. STAT. ANN. § 46:2302 (1999).

225. *See* Biloxi-Chitimacha-Choctaw of Louisiana: State Recognized Indian Tribes of Lafourche and Terrebonne, Recognition or Acknowledgement as an Indian Tribe, <http://www.biloxi-chitimacha.com/recognition.htm> (last visited July 21, 2006).

226. Telephone Interviews by Rosalie Leung with the United Houma Nation, Clifton Choctaw Tribe, Four Winds Tribe, Point au Chien Tribe, Adai Caddo Tribe (Nov. 13, 2006).

Pond Wampanoag Tribe, Pocasset Wampanoag Tribe and the  
Seaconke Wampanoag Tribe.<sup>227</sup>

Massachusetts utilizes an administrative recognition process. The Commonwealth of Massachusetts Commission on Indian Affairs coordinates the relationship between Massachusetts tribes and the state.<sup>228</sup> The Commission is also charged with creating recognition criteria.<sup>229</sup> The purpose of the Commission is to “assist Native American individuals, tribes and organizations in their relationship with state and local government agencies and to advise the Commonwealth in matters pertaining to Native Americans.”<sup>230</sup> The Commission’s responsibility includes recommending programs and policies to the Commonwealth that will best serve local tribal interests.<sup>231</sup> The Commission consists of seven members of American Indian descent who are appointed by the governor.<sup>232</sup>

Both the Pocasset Wampanoag and Hassanamisco Tribes have state-recognized reservations. The latter is commonly known as the Hassanamisco Indian Reservation.<sup>233</sup>

## 9. Montana

Montana is home to one state-recognized tribe: the Little Shell Tribe of Chippewa Indians.<sup>234</sup> While the tribe has unsuccessfully sought federal recognition for more than 100

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227. See Commonwealth of Massachusetts Department of Housing & Community Development Commission on Indian Affairs Official List of Historic Tribes and Bands in Massachusetts Acknowledged by the Commission on Indian Affairs (Jan. 2003). Since publication of this list, the Wampanoag of Gay Head-Aquinnah (which are included on the list) have been granted federal recognition, and therefore are not included here.

228. See Massachusetts Commission on Indian Affairs, <http://www.mass.gov/dhcd/main/factsheet/ia.htm> (last visited Sept. 23, 2007).

229. Massachusetts Commission on Indian Affairs, Current Goals, <http://www.mass.gov/dhcd/ia/page4.htm> (last visited July 31, 2006).

230. Massachusetts Commission on Indian Affairs, <http://www.mass.gov/dhcd/ia/default.htm> (last visited July 28, 2006).

231. *Id.*

232. MASS. GEN. LAWS. ANN. ch. 6A, § 8A (West 2006).

233. Telephone Interview with John Peters, Executive Dir., Mass. Commonwealth on Indian Affairs (Mar. 26, 2004).

234. See, e.g., Tribune Staff, *Rehberg Requests Hearing for Little Shell Bill*, GREAT FALLS TRIBUNE, May 26, 2007; see also Little Shell Tribe of Montana, <http://www.littleshelltribe.com> (last visited July 28, 2007) (featuring a series of articles that note the tribe’s recognition by the state in 2000).

years, state recognition was finally granted in 2000.<sup>235</sup> According to Russell Boham, tribal executive officer for the Little Shell Tribe, recognition came in the form of a series of declarations from the governor, as well as through a landmark case decided by the Montana Supreme Court.<sup>236</sup>

Montana legislation passed since that time acknowledges the tribe's "recognized" status: Montana has a state-tribal economic commission that is tied to the state's department of commerce.<sup>237</sup> Members of the commission are to include state representatives, as well as "one member from each of the seven federally recognized tribes in Montana and one member from the Little Shell band of Chippewa Indians."<sup>238</sup> The preamble to the original legislation authorizing the commission elucidates the intent behind the commission's creation: a desire for the state and tribes to work together more closely for state and tribal benefit.<sup>239</sup> Specifically, the preamble reads:

WHEREAS, Indians comprise approximately 7% of Montana's population, and tribal lands comprise about 9% of the total land area of the state; and

WHEREAS, state law requires the Department of Commerce to assist Indian communities and tribal governments in efforts to expand business activity and economic development on the seven Indian reservations in Montana; and

WHEREAS, the Governor and certain state agencies could, if provided with guidance and suitable resources from the Legislature, more actively seek federal assistance that would directly benefit tribal communities and the state; and

WHEREAS, the efforts expended by the Agricultural Development Council and other state boards and commissions intended to help boost the Montana economy

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235. *Rehberg Requests Hearing for Little Shell Bill*, *supra* note 234.

236. Telephone Interview with Russell Boham, Tribal Executive Officer, Little Shell Tribe (July 31, 2007); *see also* *Koke v. Little Shell Tribe of Chippewa Indians of Montana, Inc.*, 68 P.3d 814 (2003).

237. MONT. CODE ANN. § 90-1-131 (2007).

238. *Id.* § 90-1-131(2)(c).

239. *See* MONT. CODE ANN. § 90-1-131 (2007), Compiler's Comments.

will be enhanced by Indian representation; and

WHEREAS, certain Montana statutes and state programs, including loan programs, fail to include tribal entities and thereby fail to maximize the benefit of the existing network of tribal business information centers and other economic development opportunities in Indian communities across the state; and

WHEREAS, Indians who are citizens of Montana are both entitled to and deserving of a more vigorous effort on the part of the state, in cooperation with tribal governments, to foster economic development on the reservations in the state; and

WHEREAS, each of the tribal governments and their respective reservation communities will benefit from closer cooperation with new and existing boards, commissions, and agencies of the state, especially those most directly related to economic development.<sup>240</sup>

The state and tribe are continuing to break ground with their relationship as they work together to “figure out what state recognition means.”<sup>241</sup> In addition to including the state tribe in most legislation that affects federal tribes within Montana, funds have been earmarked to develop tribal history projects related to the Little Shell Tribe.<sup>242</sup> The governor of Montana, Brian Schweitzer, has been dedicated to making funds available for tribal history purposes, reflecting the state’s intent to “recognize the distinct and unique cultural heritage of the American Indians” and realiz[e] the state’s commitment in its educational goals “to [aid] the preservation of their cultural integrity.” The tribe has also become eligible for economic development grants provided by the state.<sup>243</sup>

As for land, while the state has recently leased a building and approximately six acres to the tribe, the tribe does not have an official reservation.<sup>244</sup> However, the building and the land may be permanently transferred to the tribe when the

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240. *Id.*

241. Telephone Interview with Russell Boham, *supra* note 236.

242. *Id.*

243. *Id.*

244. Eric Newhouse, *Schweitzer Signs Law Giving Little Shell a New Home, Land*, GREAT FALLS TRIBUNE, Apr. 26, 2007.

lease is up in 2017.<sup>245</sup>

### 10. New Jersey

According to a number of sources, New Jersey potentially recognizes three state tribes, including the Nanticoke Lenni-Lenape, Powhatan Renape Nation and Ramapough Mountain Indians.<sup>246</sup>

New Jersey primarily utilizes a state law recognition process but has used a legislative recognition process in the past. New Jersey Statute section 26:8-49 mentions the Nanticoke Lenni-Lenape, Powhatan Renape Nation and Ramapough Mountain Indians as “the three New Jersey tribes of American Indians” in the context of a statute for correcting birth records.<sup>247</sup> New Jersey Statute section 52:16A-53 establishes the New Jersey Commission on American Indian Affairs, and notes New Jersey’s three state-recognized tribes for the purpose of membership eligibility in the Commission.<sup>248</sup>

Two tribes have been recognized legislatively: The Powhatan Renape Nation was recognized by the state of New Jersey in 1980 by concurrent resolution.<sup>249</sup> The Nanticoke Lenni-Lenape tribe was also recognized by state resolution in the 1980s.<sup>250</sup>

However, since New Jersey Statute section 52:16A-56 was amended in 2002, state tribes must be recognized by state law.<sup>251</sup> The legislation establishes and empowers the New Jersey Department of State’s Commission on American Indian Affairs, and requires that domestic Indian tribes only

245. *See id.*

246. *See* N.J. STAT. ANN. § 26:8-49 (West 2007) (recognizing the Nanticoke Lenni-Lenape, Powhatan Renape Nation and Ramapough Mountain Indians as “the three New Jersey tribes of American Indians” in the context of a statute for correcting birth records); *see also* N.J. STAT. ANN. § 52:16A-53 (West 2001) (establishing the New Jersey Commission on Native American Affairs, and noting New Jersey’s three state-recognized tribes); State Recognized Tribes, *supra* note 26 (listing all three tribes as state-recognized).

247. § 26:8-49.

248. § 52:16A-53.

249. Powhatan Renape Nation History, <http://www.powhatan.org/history.html> (last visited July 28, 2006).

250. Indianz.com, *New Jersey Tribe Sees Support for Recognition Bid*, July 14, 2005, <http://indianz.com/News/2005/009285.asp>.

251. § 52:16A-56(g).

be recognized by “statutory authorization.”<sup>252</sup> Thus, the Commission does not have the authority to recognize tribes administratively, and apparently, the Legislature cannot do so on its own, either.<sup>253</sup> However, the Commission does play a role in the recognition process:

When requested by the Governor, [the Commission shall] assist the Legislature and Governor to investigate the authenticity of any organization, tribe, nation or other group seeking official recognition by the State as an American Indian tribe and submit a report of its findings to the Legislature and Governor within 180 days of the completion of an investigation.<sup>254</sup>

Because of the relatively new requirement that tribes be statutorily recognized, the validity of the tribes’ previous recognition has been questioned. As a result, there have been several efforts in recent years to confirm that recognition. The Governor has suggested a reluctance to do so, stating that “[t]he official recognition of groups as an Indian tribe is generally better left to the federal Bureau of Indian Affairs.”<sup>255</sup> Bills were introduced in both 2005 and 2006 to “officially” recognize all three tribes and to recognize the Nanticoke Lenni-Lenape tribe separately in order to ensure its tribal members’ eligibility for various federal benefits, but none have passed to date.<sup>256</sup>

The New Jersey Department of State Commission on Native American Affairs regulates state-tribal relations.<sup>257</sup> Members consist of the Secretary of State and eight “public” members, two from each New Jersey tribe, as appointed by the governor on the recommendation of each respective tribe, plus two “Intertribal People” (American Indians who are not members of one of the three tribes but who reside in New Jersey).<sup>258</sup>

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252. *Id.*

253. *Id.*

254. *Id.*

255. New Jersey Governor’s Conditional Veto of Assembly 2957-L.2001 c.H17, [http://www.njleg.state.nj.us/2000/Bills/A3000/2957\\_V1.PDF](http://www.njleg.state.nj.us/2000/Bills/A3000/2957_V1.PDF) (last visited Sept. 15, 2007).

256. *See, e.g.*, Assem. 4214, 211th Leg. (N.J. 2005) (specific to the Nanticoke); Assem. 1340, 212th Leg. (N.J. 2006) (including all three tribes).

257. *See* N.J. STAT. ANN. § 52:16A-53.

258. *Id.*

New Jersey has one state Indian reservation. In 1982, the Powhatan Renape Nation negotiated an agreement with New Jersey to take over 350 acres of state land, which is now recognized by the state as the Rankokus Indian Reservation.<sup>259</sup>

### 11. *New York*

New York recognizes two state tribes, the Shinnecock Tribe and the Poospatuck Indian Nation.<sup>260</sup> New York utilizes a hybrid state law recognition process that has its basis in historic relations between New York and the tribes, which has since been supplemented through the passage of legislation that describes the powers and functioning of the tribes.<sup>261</sup> For example, “[t]he issue of whether the Shinnecock Indians were and are an Indian tribe was decided in New York by the enactment of a law by the New York State legislature and signed by the Governor in 1792, and that law remains in effect today.”<sup>262</sup> The Shinnecock and Poospatuck tribes’

relationship with the State of New York was cultivated in colonial times when on July 2, 1700 the Poospatuck received a deed for land from William Tangier Smith and on August 16, 1703 the Colony of New York and the Town of Southampton gave the Shinnecock a one thousand year lease for certain land on Long Island. The State continued

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259. See Powhatan Renape Nation History, <http://www.powhatan.org/history.html> (last visited Sept. 23, 2007).

260. See N.Y. INDIAN LAW § 120-21 (McKinney 2001) (providing for the election and powers of trustees of the Shinnecock Tribe, which has been recognized by the state of New York for more than 200 years); N.Y. INDIAN LAW § 150 (McKinney 2001) (establishing the functioning of the leadership of the Poospatuck Indian Nation); see also N.Y. TAX LAW § 1116(a)(6) (McKinney 2001) (recognizing the Shinnecock Tribe and Poospatuck Indian Nations as “Indian nations or tribes” exempt from certain sales and compensating use taxes); New York State Racing and Wagering Board, Indian Gaming - Frequently Asked Questions, <http://www.racing.state.ny.us/indian/FAQ.html> (last updated Nov. 24, 2004) (noting that New York has seven federal and two state-recognized tribes, the two latter being the Shinnecock and Poospatuck Tribes).

261. See N.Y. INDIAN LAW § 120-21 (McKinney 2001); N.Y. INDIAN LAW § 150 (McKinney 2001).

262. *New York v. Shinnecock Indian Nation*, 400 F. Supp. 2d 486, 489 (E.D.N.Y. 2005); see also *Shinnecock Indian Nation, Testimony of Shinnecock Tribal Trustee Lance A. Gumbs Before The House Resources Committee*, Mar. 31, 2004, <http://www.shinnecocknation.com/testimony.asp> (last visited Feb. 28, 2007).

to treat these groups as Indian tribes after the American Revolution.<sup>263</sup>

According to the New York State Racing and Wagering Board, “[a] group known as the Ramapough Mountain Indians also have a presence in the State in Rockland County, but they have been unsuccessful in obtaining either State or Federal recognition as a Tribe.”<sup>264</sup>

According to the Board, “as a matter of policy, the State of New York does not grant recognition to or enter into government-to-government relationships with Indian nations that are not federally recognized.”<sup>265</sup> The Board explains that recognition of these two tribes by state law is based upon their historical connections to New York.<sup>266</sup> Due to this policy against state recognition of any additional Indian tribes, there is no scheme in place for further recognition.

Tribal-state relations are primarily coordinated by the New York State Office of Children and Family Services’ Native American Services.<sup>267</sup> The Office’s duties include “[s]erving as liaison between state agencies and tribal groups” and “[p]ayment of annuities and related obligations to the state’s various Indian Nations.”<sup>268</sup> Further, “Native American Services works with the federal Department of the Interior’s Bureau of Indian Affairs in processing applications for training schools and colleges. It also assists with interstate services concerning tribal identity and other matters.”<sup>269</sup> Section 39 of New York’s Social Services Law provides a general overview of the Office’s responsibilities.<sup>270</sup>

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263. New York State Racing and Wagering Board, Indian Gaming - Frequently Asked Questions, <http://www.racing.state.ny.us/indian/FAQ.html> (last updated Nov. 24, 2004).

264. *Id.*

265. *Id.*

266. *Id.*

267. See New York State Office of Children and Family Services, Native American Services, <http://www.ocfs.state.ny.us/main/nas/> (last visited July 28, 2006) (noting the Department of Education and Department of Health also have obligations to Native American populations within New York state); State-Tribal Relations: State Committees and Commissions on Indian Affairs, *supra* note 140.

268. New York State Office of Children and Family Services, Native American Services, <http://www.ocfs.state.ny.us/main/nas/> (last visited July 28, 2006).

269. *Id.*

270. See N.Y. SOC. SERV. LAW § 39 (McKinney 2003).

The Shinnecock Tribe has made national news headlines in the last few years by attempting to open a casino without federal recognition on land they own in fee. They commenced this effort after repeated frustrated attempts to secure federal acknowledgement through the glacial BIA administrative process. "Despite more than 200 years of official recognition by the State of New York, almost 400 years of contact with white settlers, and thousands of years in the greater New York area, the Tribe has yet to be recognized by the United States federal government."<sup>271</sup> As soon as the tribe broke ground on casino construction, in an attempt to secure an injunction to stop the development, the State of New York and the Town of Southampton sued the tribe for alleged violations of state and federal gambling laws.<sup>272</sup> Out of deference to the doctrine of primary jurisdiction, the court stayed the case for eighteen months to give the BIA time to make a final determination as to whether the Shinnecock should be federally recognized and thus eligible to engage in gaming under the Indian Gaming Regulatory Act.<sup>273</sup> Two years later, the tribe had still not been recognized by the federal government.<sup>274</sup> The tribe ultimately secured a favorable ruling from Judge Platt in November 2005, when the federal district court decided to recognize the Shinnecock as an Indian "tribe" despite their lack of federal recognition through the BIA or Congress, based on an abundance of evidence of the tribe's longstanding presence in the state.<sup>275</sup> The BIA was not a party at the time of the ruling and has since taken the position that the ruling does not bind them, and that the ruling does not make the Shinnecock federally recognized.<sup>276</sup> When the tribe recommenced construction following the judge's ruling, the Town of Southampton again sued in federal court, arguing the tribe has no right to build on the site because of an insufficient nexus to the tribe's

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271. Koenig & Stein, *supra* note 13, at 337.

272. *New York v. Shinnecock Indian Nation*, 280 F. Supp. 2d 1 (E.D.N.Y. 2003).

273. *Id.*

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

275. *Id.* For more information on the Shinnecock Indian Nation's quest to secure a casino without federal acknowledgment, see Koenig & Stein, *supra* note 13, at 337-39.

276. *See Gonzales*, *supra* note 10.

historic reservation.<sup>277</sup> It is unlikely there will be an end to the litigation anytime soon, especially since the Shinnecock are trying to build in an area populated by wealthy and influential individuals who passionately oppose any casino development.

New York is home to two state Indian reservations. The Unkechaug Indian Nation resides on the state-recognized Poospatuck Reservation in Long Island, New York.<sup>278</sup> The Shinnecock Tribe is located on a reservation on the East End of Long Island, and retains approximately 1200 acres of its original lands.<sup>279</sup>

### 12. North Carolina

North Carolina recognizes seven state tribes. These include the Meherrin Tribe of North Carolina,<sup>280</sup> the Occaneechi Band of Saponi Nation,<sup>281</sup> the Lumbee Tribe,<sup>282</sup> the Waccamaw-Siouan Tribe,<sup>283</sup> the Haliwa-Saponi Indian Tribe,<sup>284</sup> the Coharie Tribe<sup>285</sup> and the Sappony.<sup>286</sup> The tribes were most recently recognized over five decades, starting with the Lumbee Tribe in 1953<sup>287</sup> and ending with the Meherrin and Occaneechi Tribes in 2003.

North Carolina utilizes a state law recognition process: all of the tribes have been recognized by statute. Each statute declares that the respective tribe shall be “officially recognized,” and that the tribe “shall continue to enjoy all rights, privileges and immunities enjoyed by them as citizens of the State as now provided by law, and shall continue to be subject to all the obligations and duties of citizens under

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277. *See id.*

278. *Id.*

279. Shinnecock Indian Nation, History, <http://www.shinnecocknation.com/history.asp> (last visited July 31, 2006).

280. N.C. GEN. STAT. § 71A-7.1 (2005).

281. *Id.* § 71A-7.2.

282. *Id.* § 71A-3.

283. *Id.* § 71A-4.

284. *Id.* § 71A-5.

285. *Id.* § 71A-6.

286. N.C. GEN. STAT. § 71A-7.

287. The Lumbee Tribe was first recognized by the state in 1885, although under a different name (the Croatan Tribe), and has been re-recognized several times since then under various additional names. E-mail from Arlinda Locklear, Counsel for the Lumbee Tribe of N.C. (Oct. 2, 2007).

law.”<sup>288</sup>

North Carolina enjoys one of the nation’s most sophisticated regulatory schemes for tribal-state relations. Among its other responsibilities, North Carolina’s Department of Administration’s Commission on Indian Affairs sets domestic Indian tribe recognition criteria.<sup>289</sup> As a threshold for eligibility, tribes must be able to “trace their historic origins to indigenous American Indian tribes prior to 1790.”<sup>290</sup> The Department’s criteria include the following: the petitioner must 1) “demonstrate continuous American Indian identity on a historic basis,” explaining any gaps in continuity; 2) list any “[t]raditional Northern Carolina American Indian names”; 3) detail any “[k]inship relationships with other recognized American Indian tribes”; 4) submit official records, such as birth, medical, military or local or county government records; 5) submit documents demonstrating any historic government-to-government relationships between the petitioner and the state or federal governments; 6) submit any “[a]nthropological, historical, or genealogical documents identifying the group as American Indian”; 7) submit documents from other state or federally recognized tribes with historic or current relationships with the petitioner identifying the petitioner as American Indian; 8) include “any other documented traditions, customs, legends, etc., that are uniquely American Indian;” and finally, 9) signify the group’s Indian heritage and grant participation in programs designed for American Indians.<sup>291</sup> In order to earn state recognition, at least five of the above criteria numbered two through nine must be met.<sup>292</sup>

The Commission’s statutory duties include, but are not

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288. See, e.g., *id.* § 71A-3.

289. See *id.* § 143B-404 (establishing the Commission).

290. Commission of Indian Affairs, Chapter 15, Legal Recognition of American Indian Groups, § 01 NCAC 15 .0203, <http://www.doa.state.nc.us/cia/legal.pdf> (last visited July 24, 2007).

291. Commission of Indian Affairs, Chapter 15, Legal Recognition of American Indian Groups, Criteria for Recognition as an American Indian Tribe, § 01 NCAC 15 .0212, <http://www.doa.state.nc.us/cia/legal.pdf> (last visited July 24, 2007).

292. *Id.* The Commission provides a clear overview of their recognition criteria through a PDF document available on their Web site. See North Carolina Department of Administration Commission of Indian Affairs, <http://www.doa.state.nc.us/cia/indian.htm> (last visited July 28, 2006) (follow “Legal Recognition of Indian Groups” hyperlink).

limited to: gathering information on Indian affairs; reviewing all proposed or pending state legislation that affects North Carolina Indians; and studying and providing for official state recognition of Indian tribes, groups and communities within the state.<sup>293</sup> In addition to tribes, North Carolina recognizes individual “urban” Indians, providing them with economic and educational benefits.<sup>294</sup> According to the Commission, it has eight statutory duties, which include the following:

- (1) Study, consider, accumulate, compile, assemble and disseminate information on Indian affairs
- (2) Investigate relief needs of Indians and assist in preparation of plans for the alleviation of such needs
- (3) Confer with appropriate officials of local, state and federal governments
- (4) Review all legislation concerning Indians
- (5) Conduct public hearings on matters relating to Indian affairs and subpoena any information deemed necessary
- (6) Study the existing status of recognition of all Indian groups, tribes and communities
- (7) Establish appropriate procedures for legal recognition by the state and provide for official recognition [and]
- (8) Initiate procedures for recognition by the federal government.<sup>295</sup>

The Commission is comprised of “two persons appointed by the General Assembly, the Secretary of Health and Human Services, the Director of the State Employment Security Commission, the Secretary of Administration, the Secretary of Environment and Natural Resources, the Commissioner of Labor or their designees and twenty-one representatives of the Indian community.”<sup>296</sup> The tribal members are selected by North Carolina’s recognized tribes.<sup>297</sup>

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293. N.C. GEN. STAT. § 143B-406 (2005).

294. *See id.*

295. *See* North Carolina Department of Administration Commission of Indian Affairs, Welcome to the Commission of Indian Affairs, <http://www.doa.state.nc.us/cia/welcome.htm> (last visited Sept. 22, 2007).

296. N.C. GEN. STAT. §143B-407(a) (2005).

297. *Id.*

While the Meherrin Indian Tribe once occupied a state reservation located at the mouth of the Meherrin River at what is now Parker's Ferry, North Carolina, that reservation was eventually abandoned.<sup>298</sup> Today, there are no state Indian reservations in North Carolina, although individual tribes may own land in fee.<sup>299</sup>

### 13. Ohio

Ohio recognizes one state tribe, the United Remnant Band.<sup>300</sup> Ohio utilizes a legislative recognition process because the state recognized the tribe by way of joint resolution during the Legislature's 1979-1980 session.<sup>301</sup>

Ohio does not have a detailed scheme for regulating tribal-state relations. Indian tribal issues are usually assigned to the House State Government Committee, and not an agency or other organization that specializes in tribal matters.<sup>302</sup>

While the Shawnee United Remnant Band purchased land in Ohio in 1995,<sup>303</sup> the land probably would not qualify as a reservation.

### 14. South Carolina

South Carolina recognizes five state Indian tribes, two state Indian "groups," and one state Indian organization: the Beaver Creek Indians, the Pee Dee Indian Tribe of South Carolina, the Pee Dee Indian Nation of Upper South Carolina, the Piedmont American Indian Association (a state-recognized group), the Santee Indian Organization, the Waccamaw Indian People, the Chaloklowa Indian People (also a state-recognized group) and the Edisto Indian Organization.<sup>304</sup>

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298. Meherrin Indian Tribe, <http://www.meherrintribe.com> (last visited July 25, 2007) (follow "Our History" hyperlink).

299. Telephone Interview by Rosalie Leung with Greg Richardson, Dir., No. Carolina Comm'n of Indian Affairs (Nov. 13, 2006).

300. See Ohio Joint Resolution No. 8 (1979-1980) (entitled "A Joint Resolution to Recognize the Shawnee Nation United Remnant Band").

301. See *id.*

302. See State-Tribal Relations: State Committees and Commissions on Indian Affairs, *supra* note 140.

303. See Shawnee United Remnant Band Website, <http://www.zaneshawneecaverns.net/shawnee.shtml> (last visited Oct. 6, 2007).

304. South Carolina Indian Affairs Commission, Members,

South Carolina originally utilized a state law recognition process, recognizing tribes by statute.<sup>305</sup> However, South Carolina now utilizes the nation's newest administrative law recognition process.<sup>306</sup> In 2003, the state amended its existing statutes to grant new authority to the State Commission for Minority Affairs to "determine, approve, and acknowledge by certification state recognition for Native American Indian entities."<sup>307</sup> The statute also provided authority to "promulgate regulations as may be necessary to carry out the provisions of this article including, but not limited to, regulations regarding State Recognition of Native American Indian entities in the State of South Carolina; and . . . perform other duties necessary to implement programs."<sup>308</sup> According to the SCIway, a Web site dedicated to information on South Carolina with a special section on the state's tribes, "[s]tate recognition of tribes varies but is generally similar to federal recognition in that it acknowledges the right of tribes to govern themselves."<sup>309</sup>

Unlike many states, South Carolina grants state recognition to three different kinds of tribal entities. These include the traditional "Native American Indian Tribe," the "Native American Indian Group," and the "Native American Special Interest Organization."<sup>310</sup> South Carolina's Criteria for State Recognition, designed to identify these three types of entities within the state, were created in conjunction with several Native American leaders. These criteria are as follows:

- (1) The tribe is headquartered in the State of South Carolina and indigenous to this State. . . .
- (2) Historical presence in the State for past 100 years and entity meet all of the characteristics of a "tribe" as defined in R.139-102(D).
- (3) Organized for the purpose of preserving, documenting

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<http://southcarolinaindianaffairs.com/members.html> (last visited July 19, 2006).

305. Telephone Interview with Deanna Beacham, *supra* note 2.

306. *Id.*

307. S.C. CODE ANN. § 1-31-40(A)(6) (2005).

308. *Id.* § 1-31-40(A)(10)-(11).

309. SCIway.net, South Carolina – Indians, Native Americans – Glossary, <http://www.sciway.net/hist/indians/terms.html> (last visited July 19, 2006).

310. S.C. CODE ANN. REGS. 139-101 (Supp. 2006).

and promoting the Native American Indian culture and history, and have such reflected in its by-laws.

(4) Exist to meet one or more of the following needs of Native American Indian people - spiritual, social, economic, or cultural needs through a continuous series of educational programs and activities that preserve, document, and promote the Native American Indian culture and history.

(5) Claims must be supported by official records such as birth certificates, church records, school records, U.S. Census records, and other pertinent documents.

(6) Documented kinship relationships with other Indian tribes in and outside the State.

(7) Anthropological or historical accounts tied to the group's Indian ancestry.

(8) A minimum of 100 living descendents whose Indian lineage can be documented by a lineal genealogy chart, and whose names, and current address appear on the Tribal Roll.

(9) Documented traditions, customs, legends, etc., that signify the group's Indian heritage.

(10) Letters, statements and documents from state or federal authorities, which document a history of tribal related business and activities that specifically address Native American Indian culture, preservation, and affairs.

(11) Letters, statements, and documents from tribes in and outside of South Carolina which attest to the Indian heritage of the group.<sup>311</sup>

Requirements one through nine are mandatory for tribal entities seeking recognition as a Native American Indian Tribe, while ten through eleven are optional,<sup>312</sup> but can support the petition for recognition. Native American Indian Groups must establish criteria one through six, with number seven optional,<sup>313</sup> and Native American Special Interest Organization must establish criteria one through four, with number five being optional.<sup>314</sup>

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311. *Id.* 139-105(A).

312. *Id.*

313. S.C. CODE ANN. REGS. 139-105(B) (Supp. 2006).

314. S.C. CODE ANN. REGS. 139-105(C) (Supp. 2006). At the time of this

The number of state-recognized Indian tribes may grow rapidly under the mandate of the South Carolina Indian Affairs Commission. The Commission listed among its priorities for 2006-2007 to “[p]rovide assistance, support and resources to enable each member partner seated upon the South Carolina Indian Affairs Commission to obtain South Carolina State Recognition Status.”<sup>315</sup> South Carolina further updated its view of state-tribal government-to-government relations. According to the Commission’s website, its goal is to “work together as one to improve the lives of South Carolina’s Indian People through networking and resources as well as to substantiate, establish and provide essential leadership for government-to-government relations for the legitimate tribes with the state government of South Carolina.”<sup>316</sup>

South Carolina also created the Native American Indian Advisory Committee, whose purpose is:

[t]o preserve the true aboriginal culture of the Americas in the State of South Carolina and to advance the Native American Indian culture by:

- (A) Advising the Commission regarding Native American Indian Affairs.
- (B) Identifying the needs and concerns of the Native American Indian people of South Carolina by bringing such needs and concerns to the attention of the Commission.
- (C) Making recommendations to the Commission to address the needs and concerns of Native American Indian people.
- (D) Inviting individuals recognized as specialists in Native American Indian Affairs and representatives of the state and federal agencies to present information to members of

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Article’s publication, these criteria were being modified, according to e-mail from Harold Hatcher, Chief of the Waccamaw, to Alexa Koenig (July 18, 2006) (on file with author), and may now differ from the requirements stated above.

315. South Carolina Indian Affairs Commission, Home Page, <http://southcarolinaindianaffairs.com> (last visited July 19, 2006).

316. South Carolina Indian Affairs Commission, About Us, <http://southcarolinaindianaffairs.com/about.html> (last visited July 19, 2006).

the Advisory Committee.<sup>317</sup>

Limitations were put on the sovereignty of such tribes, however, to meet local political concerns. Specifically, the tribes are subject to civil, criminal, and regulatory jurisdiction and laws of South Carolina to the same extent as others within the state.<sup>318</sup> Indian gaming by state tribes is currently forbidden by regulation:

Notwithstanding their state certification, Native American Indian entities have no power or authority to take any action that would establish, advance or promote any form of gambling in the State of South Carolina; nor does this provision of law confer power or authority to take any action which could establish, advance or promote any form of gambling in the State.<sup>319</sup>

South Carolina presumably does not have any state Indian reservations. The 2003 Act states that “[n]othing in this act recognizes, creates, extends, or forms the basis of any right or claim of interest in land or real estate in this State for any Native American Indian entity recognized by the State.”<sup>320</sup> The Waccamaw Indian People have tax-exempt tribal grounds listed on the county maps as the Waccamaw Tribal Grounds. It is unclear whether these grounds are considered a state reservation, as opposed to lands held in fee by the tribe.<sup>321</sup>

### 15. Vermont

Vermont recognizes the “Abenaki people,” a term which may encompass several tribes, including the Nulhegan Band of the Coosuk-Abenaki People<sup>322</sup> and the St. Francis/Sokoki Band of the Missisquoi Abenaki.<sup>323</sup>

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317. S.C. CODE ANN. REGS. 139-106 (Supp. 2006).

318. *Id.* 139-104(A).

319. *Id.* 139-104(B).

320. *Id.* 139-104(C).

321. E-mail from Buster Hatcher, Chief of the Waccamaw, to Alexa Koenig (Aug. 30, 2006) (on file with author).

322. Nulhegan Band Coosuk-Abenaki, Nulhegan Band of the Coosuk-Abenaki People, <http://www.nulheganband.org/about.html> (last visited Sept. 22, 2007); see also Massachusetts Center for Native American Awareness, *Vt. Governor Signs Law Recognizing Abenaki*, May 3, 2006, <http://www.mcnaa.org/newsletters/2006-Spring.html>.

323. See Abenaki Nation, Recognition, <http://www.abenakination.org/recognition.html> (last visited July 28, 2007) (“On Thanksgiving Day in 1976, Governor Thomas Salmon issued an executive order

Vermont utilizes a state law recognition process. The tribe's recognition was formalized on May 3, 2006, when the Governor of Vermont signed a bill into law acknowledging the Abenaki.<sup>324</sup> The statute states that such recognition, however, grants no "rights or privileges that the state does not confer on or grant to other state residents."<sup>325</sup> The statute also notes that such acknowledgment also creates no rights in land or real estate for the Abenaki people.<sup>326</sup>

Vermont also took preliminary steps in establishing formal government-to-government relations through the 2006 statute by establishing the Vermont Commission on Native American Affairs. The goal of the Commission is to "recognize the historic and cultural contributions of Native Americans to Vermont, to protect and strengthen their heritage, and to address their needs in state policy, programs and actions."<sup>327</sup> The Commission's authority includes assisting tribal councils, tribal organizations, and Native American individuals to:

- (1) Secure social services, education, employment opportunities, health care, housing, and census information.
- (2) Permit the creation, display, and sale of Native American arts and crafts and legally to label them as Indian- or Native American-produced . . . .
- (3) Receive assistance and support from the federal Indian arts and crafts board . . . .
- (4) Become eligible for federal assistance with educational, housing, and cultural opportunities.
- (5) Establish and continue programs offered through the U.S. Department of Education Office on Indian Education . . . .<sup>328</sup>

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providing state recognition to the St. Francis/Sokoki Band. Governor Richard Snelling who followed and was of a more conservative bent revoked that recognition. Renewed recognition by the State of Vermont (S.117) passed and signed into law May 3rd, 2006.").

324. *Id.*

325. VT. STAT. ANN. tit. 1, § 853(B) (Supp. 2006).

326. *Id.* § 853(C).

327. *Id.* § 852(A).

328. *Id.* § 852(C)(1)-(5).

Vermont recognizes no state Indian reservations.<sup>329</sup>

### 16. Virginia

Virginia recognizes eight state tribes, including the Chickahominy Tribe, Eastern Chickahominy Tribe, Mattaponi Indian Nation, Pamunkey Nation, United Rappahannock Tribe, Upper Mattaponi Tribe, Nansemond Indian Tribal Association and Monacan Indian Tribe.<sup>330</sup>

Virginia has utilized executive, legislative and state recognition processes. Virginia originally utilized an executive recognition process, first acknowledging two tribes—the Mattaponi and Pamunkey—based on an historic relationship that began in the mid-1600s between the tribes and the Virginia Colony.<sup>331</sup> Later, this relationship was formalized by implementing a legislative recognition process: six of the eight federally recognized tribes in Virginia were recognized through Virginia Joint Resolution 54 of March 25, 1983 (the Chickahominy Tribe, Eastern Chickahominy Tribe, Mattaponi Indian Nation, Pamunkey Nation, United Rappahannock Tribe, and Upper Mattaponi Tribe).<sup>332</sup> Additional joint resolutions were passed in 1985 (recognizing the Nansemond Indian Tribal Association) and in 1989 (recognizing the Monacan Indian Tribe).<sup>333</sup>

The Commonwealth of Virginia now utilizes one of the most detailed and structured state law recognition processes

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329. Telephone Interview by Rosalie Leung with Jeff Benay, Former Chair, Governor's Advisory Comm'n on Native American Affairs (Nov. 13, 2006).

330. See Virginia Joint Resolution 54 of March 25, 1983 (recognizing six of the eight federally recognized tribes in Virginia: the Chickahominy Tribe, Eastern Chickahominy Tribe, Mattaponi Indian Nation, Pamunkey Nation, United Rappahannock Tribe, and Upper Mattaponi Tribe). Additional joint resolutions were passed in 1985 (recognizing the Nansemond Indian Tribal Association) and in 1989 (recognizing the Monacan Indian Tribe). See H.R.J. Res. 754, 1999 Sess. (Va. 1999), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?991+ful+HJ754> (last visited July 27, 2007).

331. Telephone Interview with Deanna Beacham, *supra* note 2; see also History of the Pamunkey Tribe, [http://www.baylink.org/Pamunkey/2fr\\_history.html](http://www.baylink.org/Pamunkey/2fr_history.html) (last visited July 25, 2007).

332. See, e.g., H.R.J. Res. 754, 1999 Sess. (Va. 1999), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?991+ful+HJ754> (last visited July 27, 2007) (noting the tribes' state recognition in the context of a proposed resolution recommending the federal government's recognition of Virginia's eight state recognized tribes).

333. See *id.*

in the United States.<sup>334</sup> Since 1983, state tribes must be officially recognized through an Act originated in the General Assembly and signed or otherwise approved by the Governor.<sup>335</sup>

Once a petition for recognition is submitted, an ad hoc committee reviews the documents, with a decision typically rendered after approximately one year.<sup>336</sup> Two tribes are currently petitioning for recognition through this process.<sup>337</sup>

Virginia's tribal-state relations are coordinated through the Virginia Council on Indians.<sup>338</sup> The Council's powers include establishing tribal recognition criteria, and recommending to the Governor and the General Assembly any tribes that should be granted official state recognition.<sup>339</sup>

The recognition criteria have been summarized as follows:

- (1) Showing that the group's members have retained a specifically Indian identity through time
- (2) Descent from an historical Indian tribe(s) that lived within Virginia's current boundaries at the time of that tribe's first contact with Europeans
- (3) Ability to trace that tribe's continued existence within Virginia from first contact down to the present
- (4) Providing a complete genealogy of current group members, traced as far back as possible
- (5) Showing that the community has been socially distinct – at least for the 20th century, and farther back if possible – from other cultural groups, preferably by organizing separate churches, schools, political organizations, etc.
- (6) Providing evidence of contemporary formal organization, with full membership restricted to people

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334. For the list of questions that must be answered by a tribe in order to obtain state recognition, see Virginia Council on Indians, State Recognition of Indian Tribes, <http://indians.vipnet.org/stateRecognition.cfm> (last visited July 17, 2006) (follow "Tribal Recognition Criteria" hyperlink).

335. See State Recognition of Indian Tribes, *supra* note 334.

336. Telephone Interview with Deanna Beacham, *supra* note 2.

337. *Id.*

338. See VA. CODE ANN. § 2.2-2628 (2005) (establishing the Council).

339. *Id.* § 2.2-2629(C).

genealogically descended from the historical tribe(s).<sup>340</sup>

As explained above, Virginia's tribes have had an especially difficult time proving their continued existence—and thereby meeting the BIA's criteria for federal recognition—due to records that were destroyed during the forty-five year reign of Virginia's Racial Integrity Act.<sup>341</sup> The Act, which was complicit in the eugenics movement, was promulgated by a man named Walter Plecker, the registrar at Virginia's Bureau of Vital Statistics,<sup>342</sup> who believed that tribes should be assimilated into the mainstream culture and that the races should be kept "pure" by prohibiting intermarriage.<sup>343</sup> Plecker made it his personal mission to ensure that no one could register as an Indian in the state and that no one could name their child an Indian name or they would be jailed.<sup>344</sup> In addition, Plecker manually changed vital records to indicate that Native Americans were "colored" instead of Indian, effectively erasing "Indian" from the lexicon.<sup>345</sup> During the more than four decades the Act was in place, many Native Americans moved out of state to marry and/or give their children Indian names.<sup>346</sup> The Racial Integrity Act remained in place from its passage in 1924 until

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340. State Recognition of Indian Tribes, *supra* note 334. For a more detailed overview of the recognition criteria, including the burden of proof and the kinds of evidence that will satisfy each requirement, please see the document entitled "Tribal Recognition Criteria," a PDF file available for download from this site. The document is also available by writing, e-mailing or calling the Council at P.O. Box 1475, Richmond, VA 23218, [vci@governor.virginia.gov](mailto:vci@governor.virginia.gov), 804-225-2084.

341. Racial Integrity Act of 1924, VA. CODE ANN. § 20-53 *et seq.* (1960) (repealed 1975).

342. See Paul Lombardo, *Eugenic Laws Against Race Mixing*, <http://www.eugenicsarchive.org/html/eugenics/essay7text.html> (last visited Sept. 22, 2007); see also American Studies at the University of Virginia, *Battles in Red, Black, and White, Virginia's Racial Integrity Law of 1924*, [http://xroads.virginia.edu/~CAP/POCA/POC\\_law.html](http://xroads.virginia.edu/~CAP/POCA/POC_law.html) (last visited Sept. 22, 2007).

343. Telephone Interview with Deanna Beacham, *supra* note 2; see also W.A. Plecker, *The New Family and Race Improvement*, 17 VIRGINIA HEALTH BULLETIN 12, 18-19 (1925), available at [http://www.eugenicsarchive.org/eugenics/image\\_header.pl?id=1314&detailed=1](http://www.eugenicsarchive.org/eugenics/image_header.pl?id=1314&detailed=1) (last visited Sept. 22, 2007).

344. Telephone Interview with Deanna Beacham, *supra* note 2.

345. *Id.*

346. *Id.* For a detailed overview of Plecker and the Racial Integrity Act, see Peter Hardin, "Documentary Genocide," *Families' Surnames on Racial Hit List*, RICHMOND TIMES-DISPATCH, Mar. 5, 2000.

it was finally repealed in 1969.<sup>347</sup>

While current and previous governors and many members of the state legislature have tried to help Virginia's tribes overcome this hurdle to establishing their continued existence, many of Virginia's politicians have not. Those who have tried have found little success. Several of Virginia's tribes are now trying to secure federal recognition through the United States Congress, even though other Virginia tribes have been participating in a bid for Congressional recognition for more than six years to no avail.<sup>348</sup> This is yet another example of the ways in which the federal recognition process has failed several of the nation's most longstanding and deserving tribes.

Virginia is home to two state Indian reservations. The Virginia General Assembly granted land for the Mattaponi's reservation in 1658.<sup>349</sup> On that basis, the Mattaponi tribe was deemed recognized by the Virginia Colony. The tribe still resides on the remaining 150 acres in King William County, Virginia. The Pamunkey tribe is located on the 1200 acre Pamunkey Indian Reservation near Lester Manor, Virginia, which has been recognized by the state as the tribe's reservation since 1646. Both the Mattaponi and Pamunkey tribes have paid an annual "tribute" to the governor since the mid-1600s. Such payment is in lieu of property taxes and taxes on the land itself.<sup>350</sup>

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347. A major blow to the Act came with the case *Loving v. Virginia*, 388 U.S. 1 (1967), which concerned a black woman and white man who were married in Washington, DC, and then moved to Virginia, only to be indicted for violating the Act. While the Virginia state courts ruled against the couple, the United States Supreme Court ultimately found for the couple in 1967 by unanimous decision, thereby striking down the Racial Integrity Act and similar laws in fifteen states. Lombardo, *supra* note 342.

348. Telephone Interview with Deanna Beacham, *supra* note 2.

349. *Id.*; see Virginia Indians Today, *supra* note 39.

350. See Virginia Indians Today, [http://virginiaindians.pwnet.org/today/reservations\\_mattaponi.php](http://virginiaindians.pwnet.org/today/reservations_mattaponi.php) (last visited Feb. 23, 2007) (noting that the Mattaponi began paying tribute to the governor in 1646).

*B. Other States That Provide Some Form of Tribal Status to Indian Groups That May Rise to the Level of State Recognition*

*1. Kansas*

According to at least one tribal listing, Kansas recognizes two state tribes: the Wyandot Nation and the Delaware-Muncie.<sup>351</sup> Initially, we found no evidence that any state law, legislative, executive or administrative recognition process has formally recognized either tribe. Similarly, we were unable to locate either tribe, including any evidence of their official presence.

Kansas currently has no government-to-government relations with state tribes, although at one time the state appeared to be moving in that direction. The Kansas Office of Native American Affairs, which was a branch of Kansas' Department of Human Resources,<sup>352</sup> seems to be defunct since there is no forwarding phone number and Internet research turned up no evidence of its existence.<sup>353</sup> A call to the legislative office responsible for Indian Affairs—the Joint Committee on State-Tribal Relations—also provided no information on the committee or on Kansas' state Indian tribes.<sup>354</sup> For a time, however, the tribe was served by the Pottawatomie Agency in Nadeau, Kansas.<sup>355</sup>

According to Mike Ford, a pro-bono documents and historical researcher for the Delaware-Muncie Tribe (which is now known as the Munsee or Christian Tribe of Indians), the tribe was terminated by a plenary act of Congress, an action that he asserts should be reversed.<sup>356</sup> The tribe is currently pursuing federal recognition.<sup>357</sup>

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351. Native Data, State Recognized Tribes (on file with author).

352. See State-Tribal Relations: State Committees and Commissions on Indian Affairs, *supra* note 140.

353. Telephone call to the former Kan. Office of Native American Affairs (July 21, 2006).

354. Telephone call to the Joint Comm. on State-Tribal Relations (July 21, 2006).

355. E-mail from Mike Ford to Alexa Koenig (Mar. 21, 2007) (on file with the author).

356. *Id.*

357. Steve Brisendine, *Munsee Descendants Need Act of Congress for Restoration of Benefits*, ASSOCIATED PRESS, Jan. 30, 2005, available at [http://www2.ljworld.com/news/2005/jan/30/tribe\\_tries\\_to/](http://www2.ljworld.com/news/2005/jan/30/tribe_tries_to/).

While the Munsee originally had a reservation in Franklin County (in conjunction with two Chippewa Bands of Indians), all that remains is a cemetery, which is now owned by the Moravian Church in America.<sup>358</sup> The tribe hopes to eventually take ownership of that land.<sup>359</sup>

## 2. Kentucky

Kentucky potentially recognizes one tribe: the Southern Cherokee Nation.<sup>360</sup> Kentucky's recognition process is executive in nature. In 1893, Kentucky's governor, John Young Brown, sent a letter to the tribe welcoming the tribe to the Commonwealth of Kentucky's "fair state" and noting that the Commonwealth "regonize[s] [sic] the Southern Cherokee Nation, as an Indian tribe."<sup>361</sup> This recognition was arguably validated in a proclamation authored by Governor Ernie Fletcher in 2006, celebrating the tribe's "rich tradition and culture," and noting the tribe's continued presence in the state.<sup>362</sup>

## 3. Michigan

The Burt Lake Band of Ottawa and Chippewa Indians, the Grand River Band of Ottawa Indians and the Swan Creek Black River Confederated Ojibwa Tribe are three Michigan "historic tribes."<sup>363</sup>

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358. Brisendine, *supra* note 357.

359. *Id.*

360. See Letter from John Brown, Governor of Ky., to Mr. Martin of the So. Cherokee Nation (Dec. 26, 1893), available at <http://www.southerncherokeeanation.net/images/commonwealth.jpg> (last visited July 28, 2007).

361. *Id.*

362. See Proclamation by Ernie Fletcher, Governor of Ky. (Nov. 20, 2006), <http://www.southerncherokeeanation.net/govfletcher.htm> (last visited July 28, 2007).

363. See MICH. DEP'T OF CIVIL RIGHTS, MICH. INDIAN DIRECTORY (2005-2006), available at [http://www.michigan.gov/documents/MID05\\_125020\\_7.pdf](http://www.michigan.gov/documents/MID05_125020_7.pdf) (last visited Feb. 27, 2007); see also Press Release, Dep't of Interior, Anderson Issues Proposed Finding to Decline Fed. Acknowledgment of Burt Lake Band of Ottawa and Chippewa, Inc. (March 26, 2004), available at <http://www.doi.gov/news/040326a> (noting the Burt Lake Band's probable denial for federal recognition). While there are other lists that include greater numbers of Michigan historic tribes, John Werner, Deputy Legal Counsel, State of Michigan Governor's Office, confirmed that these are three of the most stable and longstanding. Telephone Interview with John Werner, Deputy Legal

As for its regulatory scheme, Michigan operates somewhat differently from other states. It does not have state-recognized tribes per se. Instead, the state has a status called “eligible for state services and state funding,” to which tribal organizations can apply. Once accepted, such tribal organizations are then eligible for some state services as recognized state “historic tribes.”<sup>364</sup> While this would seem to constitute a form of recognition, the Michigan Department of Civil Rights Native American Affairs Office now takes the position that these tribes do not qualify as state-recognized.<sup>365</sup> No Michigan statutes or formal processes establish criteria for “state” or “historic tribal” recognition.

Michigan has no state tribal reservations.<sup>366</sup>

#### 4. *Missouri*

Missouri potentially recognizes two tribes: the Northern Cherokee Nation of Old Louisiana Territory<sup>367</sup> and the Chickamauga Cherokee.<sup>368</sup> Both have been included on popular lists of state-recognized tribes.<sup>369</sup>

As explained below, Missouri has arguably utilized an executive recognition process, which may change to a state law recognition process. Recognition of the Northern Cherokee Nation tentatively began in 1983, when the Governor of Missouri signed a proclamation noting the tribe’s 200-year residency in the State<sup>370</sup> and “acknowledg[ing] the existence of the Northern Cherokee Tribe as an American Indian Tribe within the boundaries of the State of Missouri.”<sup>371</sup> In the proclamation, the Governor noted that the tribe had “continued a form of tribal government for the past 140 years.”<sup>372</sup> Since then, several resolutions and bills

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Counsel, State of Mich. Governor’s Office (May 29, 2007).

364. Telephone Interview with Donna Budnick, *supra* note 138.

365. *Id.*

366. Telephone Interview with John Werner, *supra* note 363.

367. *See* Northern Cherokee Nation of the Old Louisiana Territory, <http://ncnolt1.homestead.com> (last visited July 28, 2006).

368. Federally Recognized Tribes, *supra* note 26.

369. *See, e.g., id.*

370. Northern Cherokee Nation of the Old Louisiana Territory, *History*, <http://www.awiakta.org/NCNOLT%20History.pdf> (last visited Oct. 12, 2007).

371. Proclamation of Christopher S. Bond, Governor of the State of Mo.(June 22, 1983), [http://www.angelfire.com/mo2/ncnolt/Missouri\\_Bond.html](http://www.angelfire.com/mo2/ncnolt/Missouri_Bond.html).

372. *Id.*

have been introduced in the state Senate and House of Representatives that aim to provide the tribe with a more secure form of recognition;<sup>373</sup> however, none have passed into law to date. We were unable to locate information on the potential recognition of the Chickamauga Cherokees.

The Missouri American Indian Council asserts that there are no domestic Indian tribes recognized by the state, insisting that only by passage of a state law can Missouri officially recognize one of its domestic Indian tribes, and thus neither tribe is state recognized.<sup>374</sup>

There are no state Indian reservations in Missouri.

### 5. Oklahoma

While some lists of state-recognized tribes provide that Oklahoma is home to the Euchee (or “Yuchi”) Indian Tribe, like the Michigan tribes, the Euchee are not technically considered “state-recognized.”<sup>375</sup> Instead, they are classified as an Oklahoma “historic” tribe,<sup>376</sup> which, according to the Oklahoma Indian Affairs Commission, does not qualify as state recognized.<sup>377</sup> The state of Oklahoma does not have a policy of recognizing tribes, although Oklahoma does include the Euchee on lists of the state’s tribes, along with the state’s federally recognized tribes.<sup>378</sup> The Euchee do not have a state Indian reservation.<sup>379</sup>

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373. See, e.g., Journal of the Senate, 11th Day, 1st Sess., (Mo. 2001) available at <http://www.senate.mo.gov/01info/journals/DAY11.htm>.

374. Telephone Interview by Rosalie Leung with Chris Molle, Dir., Am. Indian Council (Nov. 13, 2006).

375. Telephone Interview with Barbara Warren, Executive Dir., Oklahoma Indian Affairs Commiss’n (July 31, 2006).

376. Oklahoma Indian Affairs Commission, Tribal Governments, Officials and Locations (on file with author).

377. Telephone Interview with Barbara Warren, Executive Dir., Okla. Indian Affairs Comm’n (July 31, 2006); Telephone Interview with Carol, Okla. Indian Affairs Comm’n (May 29, 2007).

378. Telephone Interview with Carol, Okla. Indian Affairs Comm’n (July 31, 2007).

379. Telephone Interview with Carol, *supra* note 378.

*C. States That Have Considered Providing Some Form of State Recognition: Tennessee, Maryland, Florida*<sup>380</sup>

Other states have flirted with the possibility of implementing processes for state recognition. While Tennessee claims not to recognize any state tribes, a proclamation signed by the governor in 1978 states that the governor “hereby officially recognize[s] the Etowah Cherokee Nation . . . as a nation of people.”<sup>381</sup> In 1991, the Tennessee Department of Conservation backtracked, claiming the governor had no authority to recognize the tribe.<sup>382</sup> However, the state has periodically convened a council to discuss the possibility of recognizing tribes, and is in the process of reconvening their council.<sup>383</sup> Tennessee does have a Commission of Indian Affairs, which was established under Tennessee Code Annotated sections 4-34-101 through 108.<sup>384</sup> There also appears to be a second, “unofficial” Tennessee Commission of Indian Affairs.<sup>385</sup> At the Web site for the unofficial commission, there are links to helpful resources, such as information from the Advisory Council on Tennessee Indian Affairs, including their proposed recognition criteria for Native American Tribes.<sup>386</sup> In the meantime, the state of Tennessee has been trying to provide some security and acknowledgment to Tennessee Indians by granting some form of recognition as “individuals.”<sup>387</sup>

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380. This list is likely not exhaustive; these states are included as examples only.

381. Proclamation by Ray Blanton, Governor of Tenn. (May 25, 1978), available at <http://cita.chattanooga.org/etowahcherokee1978.html>.

382. See Memorandum from John R. White to Luvenia H. Butler (Dec. 5, 1991), available at <http://cita.chattanooga.org/etowahcherokee1978.html>.

383. Telephone Interview with Deanna Beacham, *supra* note 2. For an overview of the Tennessee Commission of Indian Affairs’ Recognition Criteria for Native American Tribes, which were developed in the 1990s, see <http://www.tncia.org/1991TCLAreognitioncriteri.html> (last visited Sept. 22, 2007).

384. TENN. CODE ANN. §§ 4-34-101 to -108 (2005).

385. A Hitchhiker’s Guide to the TN Commission of Indian Affairs, <http://www.tncia.org/> (last visited Sept. 22, 2007).

386. 2005 TN NA Recognition Criteria, <http://www.tncia.org/ACTIA-RC-proposal-2006.html> (last visited Sept. 29, 2006).

387. See Maryland Commission on Indian Affairs, *Upcoming Events*, at <http://www.gcia.sailorsite.net/calendar.htm> (last visited July 31, 2006) (listing the commission’s upcoming meetings, including none for 2006 or beyond, and indicating the last two in 2005 were cancelled); Telephone Interview with Deanna Beacham, *supra* note 2.

Maryland has also considered state recognition. A commission to recognize tribes exists but is not currently meeting.<sup>388</sup> Maryland currently recognizes no tribes within the state. A Web site for the Maryland Commission on Indian Affairs, however, includes as their mission to help domestic tribes achieve state and/or federal recognition.<sup>389</sup>

Florida does not currently have a state recognition process, although the state is home to several recognized bands of Indians. While state recognition has been considered and debated,<sup>390</sup> there are no plans to start recognizing tribes in the future.<sup>391</sup>

#### IV. CONCLUSION

This Article provides an overview of the states that enjoy a government-to-government relationship with tribes that do not have federal recognition and offers a classification for state recognition processes, differentiating between state law, administrative, legislative and executive recognition.

This Article also posits two theories crucial to understanding how state recognition fits into the larger legal landscape. First, that state recognition of tribes is an important experiment in federalism that allows states to respond to the needs of its tribal inhabitants and establish government-to-government relationships for mutual benefit. Second, the Article challenges the notion that tribal recognition should be understood solely as part of a federal paradigm involving the subjugation of this country's Indian nations. Three eras of state recognition reflect an exercise in states' abilities to adapt to local conditions and needs.

While state recognition is playing an increasingly important role in validating tribal histories and facilitating state-tribal interaction, more is needed. First, states that

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388. See Maryland. Commission on Indian Affairs, Calendar of Events, <http://www.gcia.sailorsite.net/calendar.htm> (last visited July 31, 2006) (listing the commission's upcoming meetings, including none for 2006 or beyond); Telephone Interview with Deanna Beacham, *supra* note 2.

389. See Maryland Commission on Indian Affairs, About the Commission, <http://www.gcia.sailorsite.net/about.htm> (last updated Jan. 3, 2007).

390. See Florida Governor's Council on Indian Affairs, Inc., <http://www.fgcia.com/council.htm> (last visited Sept. 22, 2007).

391. Telephone Interview with Rick Whitfield, Fla. Governor's Council on Indian Affairs, Inc. (Feb. 27, 2007).

have eligible tribes but no recognition process should implement recognition schemes for state and tribal benefit. Especially in Kentucky, Michigan, Missouri and Oklahoma, where the state government is already working with domestic Indian tribes, formal state recognition and the implementation of a state recognition process would constitute a significant step forward.

For states that do have a recognition process, but whose process remains uncodified, it would be beneficial to pass legislation to confirm and clarify their recognition schemes. For example, while joint resolutions are sufficient for establishing state recognition (as evidenced by Louisiana and other states), the state law recognition processes of North Carolina, South Carolina and Virginia can and should be used as models for the future. Although joint legislative resolutions and gubernatorial proclamations can provide the basis for a government-to-government relationship, they often lack the power of law. Thus, these state-recognized tribes remain vulnerable to legal challenges. Statutes that clearly lay out the criteria for recognition and/or explicitly recognize specific tribes provide little room for questioning tribal status.

Similarly, Deanna Beacham of the Virginia Council on Indians believes it has become increasingly important for states to clarify their recognition processes.<sup>392</sup> Through legislation, bona fide tribal nations can finally achieve the benefits of a government-to-government relationship, and states can develop relationships with tribes that they can consult with on matters of tribal concern.<sup>393</sup> By drawing a line as to which Indian groups achieve recognition and which do not, state recognition will have greater meaning, and its validity and importance will grow as a complement and supplement to the federal recognition process. Beacham has also stressed the importance of seeing more state-recognized tribes represented on the National Congress of American Indians,<sup>394</sup> and on the National Governor's Interstate Indian Council, an organization within the National Governors' Association, in order to encompass a wider range of tribal

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392. Telephone Interview with Deanna Beacham, *supra* note 2.

393. This is especially important in states where there are no federally-recognized tribes.

394. For more on this organization, see <http://www.ncai.org> (last visited Sept. 22, 2007).

voices and perspectives.<sup>395</sup> This can only be accomplished when it is clear which tribes have state recognition, and which do not.

It is also important that states provide greater funding to their recognized tribes. Even though their needs may be just as great, state-recognized tribes do not enjoy most federal benefits.<sup>396</sup> Colonel Joey Strickland, Director of the Louisiana Governors' Office of Indian Affairs, has expressed related sentiments, noting how important it is that state governments make a concerted effort to support their tribes.<sup>397</sup> While state recognition is a positive first step, it is critical to put enough money into the various offices of Indian affairs and other coordinating agencies to grant tribes a greater voice in their future and to give such recognition greater weight. For example, states can hire genealogists and archeologists to help establish tribal ties to each state, and formalize state recognition processes in order to ensure the tribes that are acknowledged are those that should be.<sup>398</sup>

As explained by Harold Hatcher—Chief of South Carolina's Waccamaw Tribe, fiscal agent for the South Carolina Indian Affairs Commission and contributor to the development of South Carolina's recognition process—there is yet another important reason to clarify the recognition process. Since many states expressly exclude Indian tribes from the ambit of particular laws, "it is . . . imperative [they] define who [their] Indians are."<sup>399</sup> As Chief Hatcher states,

[t]housands of people [in South Carolina, as elsewhere] are undoubtedly of Indian decent. Some have the stereotypical appearance and some do not. Some hold and practice the ancient beliefs, and some do not. Some have

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395. National Governors Association, <http://www.nga.org> (last visited Sept. 22, 2007)

396. Examples include the exercising of self-governance over tribal members, eligibility for most federal grants, the right to conduct Las Vegas-style gaming under IGRA, and more. See, e.g., COHEN TREATISE, *supra* note 15, § 3.02[9] at 169.

397. Telephone Interview with Joey Strickland, *supra* note 211.

398. *Id.* John Werner, Deputy Legal Counsel, State of Mich. Governor's Office similarly noted that it is critical to have a process that distinguishes legitimate tribes from "imposters" for the benefit of both states and tribes. Telephone Interview with John Werner, *supra* note 363.

399. Report prepared by Chief Harold D. Hatcher, Chief of the Waccamaw Indian People of Conway SC (on file with author).

the cultural knowledge of their ancestors, and some do not. Some have passed as Black and some have passed as White. Here again, some have not! . . . Black and White youth are seldom challenged as to their ethnic ties. Indians always are! . . . Indians . . . are compelled to prove who they are and to do so based upon “White” acceptance. . . . This leaves the legitimacy of the application to the discretion of the reviewer.<sup>400</sup>

He notes that when states set no standards, “[s]ubjective decisions foster a process open to every prejudice imaginable, and one where fraud will inevitably abound.”<sup>401</sup>

While the federal government takes a painstakingly long time to acknowledge the inherent sovereignty of many of our nation’s tribes, some states have started to actively counter this injustice. The strength of our federalist system lies in its flexibility. With gridlock at the federal level, states are nonetheless free to adopt their own form of governance to meet local needs and conditions. By recognizing the existence and contributions of tribes within their borders and creating government-to-government relationships with tribes that challenge decades of undeserved invisibility, states may gain the benefits of diversity and cultural distinction, enrich multi-cultural understanding and communication within their communities and take steps to begin to heal old wounds. In the long run, this is a federalist process that should be encouraged as potentially beneficial for both tribes and states.

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400. *Id.*

401. *Id.*

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V. SUMMARY OF STATES THAT RECOGNIZE TRIBES

STATE	NO. OF STATE TRIBES	STATE RESERVATIONS	RECOGNITION PROCESS	ERA(S) OF STATE RECOGNITION
Alabama	9	Yes	State Law/ Administrative	Modern (1970s)
California	2	No	Legislative	Modern (1990s)
Connecticut	3	Yes	Executive/ State Law	Pre-Revolutionary/ Modern (1970s)
Delaware	1	No	State Law	Post-Revolutionary (1880s)
Georgia	4	No	State Law/ Legislative	Modern (1990s/2000s)
Hawaii	1 (native Hawaiians)	Yes (land is held in trust for the benefit of native Hawaiians)	State Law	Modern (1950s)
Louisiana	9	No	Legislative	Modern (1970s to 2000s)
Massachusetts	6	Yes	Administrative	Modern (1970s)
Montana	1	No	Executive/ State Law	Modern (2000s)
New Jersey	3	Yes	Legislative/ State Law	Modern (1980s/1990s)
New York	2	Yes	Executive/ State Law	Pre-Revolutionary/ Modern
N. Carolina	7	No	State Law	Post-Revolutionary (1880s)/Modern (1950s-2000s)
Ohio	1	No	Legislative	Modern (1970s)
S. Carolina	5 <sup>402</sup>	Yes	State Law/ Administrative	Modern (2000s)
Vermont	2	No	State Law	Modern (2000s)
Virginia	8	Yes	Executive/ Legislative/ State Law	Pre-Revolutionary/ Modern (1980s)
Totals	62	8 states	12 State Law 3 Administrative 6 Legislative 4 Executive	3 Pre-Revolutionary 2 Post- Revolutionary 15 Modern

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402. South Carolina recognizes five state tribes, two state "groups", and one state Indian organization.

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