Fall 2011

A Future of Equality for Virginia's Tribes: Reform the Federal Recognition Process to Repair Injustice

Katherine A. Womack
University of Richmond

A FUTURE OF EQUALITY FOR VIRGINIA'S TRIBES: REFORM THE FEDERAL RECOGNITION PROCESS TO REPAIR INJUSTICE

Katherine Womack

I. INTRODUCTION

Four hundred years after the founding of the Virginia Colony, the descendents of the early tribes that the English met at Jamestown still seek "recompense in their ongoing and righteous struggle for federal tribal recognition."[1] While Virginia's American Indians retain their culture and identity, the federal government continues to deny them equal benefits with other American Indian tribes[2]—benefits that help repair the social and economic conditions many American Indians face because of state and federal policies from the colonial period through the present. The self-determination and identification of the American Indian is not enough to access these benefits.[3] Tribes petitioning for federal recognition must meet historical, anthropological, and genealogical requirements that stem from racist and ignorant social constructs.[4] The process of federal recognition does not promote or protect the equal status of American Indians as American citizens,[5] but continues to marginalize or even erase American Indian identities.

This article first examines the historical background of the Virginian-American Indian identity after European contact in Part I. This section looks at the early interactions between American Indians

---

[1] Rodney A. Smolla, *Contemplating the Meaning of "The Rule of Law,"* 42 U. RICH. L. REV. 1, 7 (2007).
[2] *See generally* discussion *infra* Part IV. A–C.
[3] Rachael Paschal, *The Imprimatur of Recognition: American India Tribes and the Federal Acknowledgement Process*, 66 WASH. L. REV. 209, 210 (1991).
[4] *Id.* at 223.
[5] *See generally* discussion *infra* Part IV A–C.

and colonial settlers, the treaties that defined American Indian identity, and the first government-to-government relationships between the tribes and colonial powers. It also follows the changing social attitudes toward American Indians. Part II discusses how social attitudes in the early twentieth century about American Indians led to long-reaching legal effects for Virginian-American Indians. Part III details the federal recognition process, and discusses how and why it denies Virginia's tribes an equal place in modern America. The article concludes with recommendations to Congress for improving the future of equality for Virginia's American Indians.

II. EVOLVING IDENTITY

A. First Interactions

1. Early Impressions

Unlike the generally heterogeneous European countries from which the colonists embarked, the burgeoning American colonies produced the melting pot for which America is known today, so "[c]olor and race . . . gradually replaced class and birth as the primary determinant of belonging."[6] Through this social and political lens, the images the English colonists had of American Indians indicated the "intentions and desires" driving "Indian policy" in Virginia.[7] The shift in English intentions from merely trading to creating an enduring society "reshaped the nature of contact" between the English and the American Indians, and altered each party's perception of the other.[8]

To establish the colony and a new English society, the English had to acquire land occupied by Virginia's tribes, which pre-

---

[6] MICHAEL J. LYNCH & E. BRITT PATTERSON, RACE AND CRIMINAL JUSTICE 13 (1991) (quoting J.O. ROBERTSON, AMERICAN MYTH, AMERICAN REALITY 93 (1980)).
[7] Gary B. Nash, *The Image of the Indian in the Southern Colonial Mind*, 29 WM. & MARY Q. 197, 197–98 (1972).
[8] *Id.* at 209. *See also id.* at 198 n.1 (quoting Roy HARVEY PEARCE, A STUDY OF THE INDIAN AND THE IDEA OF CIVILIZATION 5 (1953) ("The [American] Indian became important for the English mind, not for what he was in and of himself, but rather for what he showed civilized men they were not and must not be.")). For a detailed discussion of the American Indian's view of "the Other," *see* Jeffrey L. Hantman, *Caliban's Own Voice: American Indian Views of the Other*, 23 NEW LITERARY HIST. 69 (1992).

sented the English with a legal and moral issue.[9] European society centered around the concept of private land ownership, and by entering the land of another people, the English may have felt tension between their colonial imperative and their belief in the superiority of their cultural attachment to property rights.[10] They resolved this tension under the banner of coming to the New World to *share* resources with the American Indians, contending that there would be enough land for everyone.[11]

Further, the English colonists believed that the American Indians would benefit from exposure to a more advanced civilization and Christianity.[12] Thomas Jefferson advocated intermarriage between whites and American Indians, believing that "[w]e shall all be Americans . . . you will mix with us by marriage, your blood will run in our veins, and will spread over this great island."[13] These intermarriage practices accelerated the rate at which the "Indian" disappeared, as Jefferson did not intend for American Indians to retain or celebrate their culture and heritage.[14] Some public officials held a more practical than idealistic viewpoint than Jefferson, and simply viewed intermarriage as an "effective solution to the 'Indian problem.'"[15]

Still others reconciled this issue by going so far as to deny the humanity of the American Indians.[16] Inhumanity would disqualify the American Indians from possessing land, and any "savage" acts by the American Indians, from the English point of view, would entitle the colonists to seize their land.[17] After extended contact, some English believed that the "hostile Indian revealed his true nature while

---

[9] STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 13 (2005); Nash, *supra* note 7, at 197–198.
[10] Nash, *supra* note 3, at 209; *See generally*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 544–50 (1823) (discussing the "discovery doctrine").
[11] Nash, *supra* note 7, at 209–10.
[12] Nash, *supra* note 7, at 209; FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT & THE AMERICAN INDIANS 9 (1995).
[13] Thomas Jefferson, Address: To Captain Hendrick, the Delawares, Mohiccons, and Munries *in* THE COMPLETE JEFFERSON 503,503 (Saul K. Padover ed., 1943).
[14] Kevin Noble Maillard, *The Pocahontas Exception: The Exemption of American Indian Ancestry from Racial Purity Law*, 12 MICH. J. RACE & L. 351, 360 (2007).
[15] *Id.* at 362.
[16] *Id.*
[17] *See* Nash, *supra* note 7, at 210; *see also* Kim Chandler Jòhnson & John Terrence Eck, *Eliminating Indian Stereotypes from American Society: Causes and Legal and Societal Solutions*, 20 AM. INDIAN L. REV. 65, 68 (1995).

the friendly Indian feigned friendship while waiting for an opportunity to attack."[18]

However, explorer and author John Smith brought change in English attitudes and policy toward the Powhatans.[19] Many of the colonists accepted Smith's policy of intimidation as the most effective for peace.[20] This strategy brought peaceful relations, but it changed following the success of tobacco and with the English drive for more land for the crop.[21] The desire for land gave rise to tension that fueled the cycle of coups and peace treaties.[22] However, as time went on and American Indian abandoned resistance to the English taking of land, the image of the American Indians in Virginia changed again.[23] The last American Indian attack in Virginia was in 1675.[24] Through the development of treaties between the English government in Virginia and American Indian tribes, many American Indians either moved further west, or lived within the colonial settlements in a subservient status.[25]

2. Treaties

In colonial Virginia, treaties defined American Indian identity,[26] and it was through treaty recognition that the assimilation of Virginia's American Indian tribes began. In 1644, the growing threat of English expansion led the Powhatans, the dominant American Indian confederation of tribes in Eastern Virginia, to stage a great coup, or massacre, against the Jamestown colonists.[27] The English casualties neared five hundred, but the coup failed to exterminate the colo-

---

[18] Nash, *supra* note 7, at 212.
[19] Nash, *supra* note 7, at 213; *see* DAVID A. PRICE, LOVE & HATE IN JAMESTOWN: JOHN SMITH, POCAHONTAS, & THE START OF A NEW WORLD 7 (2005).
[20] Nash, *supra* note 7, at 213–14.
[21] Alden T. Vaughan, *"Expulsion of the Salvages": English Policy and the Virginia Massacre of 1622*, 35 WM. & MARY Q. 57, 74 (1978).
[22] Maillard, *supra* note 10, at 199.
[23] *See id.* at 200.
[24] *Id.* at 202. *See generally*, *Nathaniel Bacon 1647-1676*, ENCYCLOPEDIA VIRGINIA, http://www.encyclopediavirginia.org/Bacon_Nathaniel_1647-1676, (last visited Oct. 2, 2011).
[25] *Id.*
[26] *See generally* Colonial National Historical Park: a Study of Virginia Indians and Jamestown—the First Century, NATIONAL PARK SERVICE, http://www.nps.gov/history/history/online_books/jame1/moretti-langholtz/chap6.htm (last visited Oct. 26, 2011).
[27] *See* FRANK E. GRIZZARD & D. BOYD SMITH, JAMESTOWN COLONY: A POLITICAL, SOCIAL, & CULTURAL HISTORY 134 (2007).

ny and "correct the colonists' inappropriate behavior."[28] Though the English attacked first in the Second Anglo-Powhatan War, changing social desires between both the tribes and the English eventually led to the peace treaties in 1646 and 1677.[29]

The relationship of younger Powhatans with the English colony—and their own identity—had evolved since the coup, and the desire for peace may have been a result of coming-of-age under constant conflict with the English.[30] This treaty drew lines between the two groups' land, and established that the American Indian parties to the treaty had to wear identifying badges upon entering English land, or else suffer the "pain of death."[31] Three years after the treaty, the punishment for entering English land was restricted only to those "Indian[s] . . . doing trespass or other harm," and the colonists began to take other measures to "protect" Virginia's American Indians.[32] The colony enacted measures to teach the American Indian children English, and prohibited their sale as slaves.[33] In addition, land patents between the English and the Powhatan chiefs planted the earliest seeds for a formal legal process between the colonial government and Virginia tribes.[34] The English also began to grant legal rights to American Indians, allowing those that colonists employed to carry guns.[35]

Even so, relations with tribes beyond the Powhatan confederation remained troublesome for the English.[36] The English expected that their positive relations with the Powhatans would protect them

---

[28] *See* FREDERIC W. GLEACH, POWHATAN'S WORLD AND COLONIAL VIRGINIA: A CONFLICT OF CULTURES 175 (Raymond J. DeMaillie & Douglas R. Parks eds., 1997).
[29] *Cf. id.* at 176–77; W. Stitt Robinson, Jr., *The Legal Status of the Indian in Colonial Virginia*, 61 VA. MAG. HIST. & BIOGRAPHY 247, 248 (1953).
[30] *Cf.* GLEACH, *supra* note 28, at 176,178.
[31] *See* WILLIAM W. HENING, THE STATUTES A LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619 323 (1809).
[32] GLEACH, *supra* note 28, at 184.
[33] *Id.*; W. Stitt Robinson, *Indian Education and Missions in Virginia*, 18 J. S. HIST. 152,155 (1952).
[34] GLEACH, *supra* note 28, at 185. *See also* JOHN SEWITT, A SHORT ACCOUNT OF THE FIRST SETTLEMENT OF THE PROVINCES OF VIRGINIA, MARYLAND, NEW-YORK, NEW-JERSEY, AND PENNSYLVANIA, BY THE ENGLISH 8–9 (Am. Geographical Soc'y 1922) (1630).
[35] J. Frederick Fausz, *Fighting "Fire" With Firearms: The Anglo-Powhatan Arms Race in Early Virginia*, 3 AM. INDIAN CULTURE & RESEARCH J. 33, 40–41 (1979); GLEACH, *supra* note 28, at 186.
[36] GLEACH, *supra* note 28, at 188.

from the western tribes.[37] In exchange for protection, the colony conferred more benefits on the Powhatans, and outlawed the killing of any American Indian found to be in trespass on English land.[38] One benefit was that the Powhatans could enter the colony's land to hunt and gather.[39] These measures continued to improve the legal position of the Powhatans.[40]

However, Bacon's Rebellion in 1675 interrupted this peace, when rebel colonists attacked friendly Powhatan settlements in their quest to overthrow the English colonial Governor Berkeley.[41] While successful in returning Berkeley to England, the Rebellion damaged relations with the Powhatans.[42] It resulted in the 1677 Treaty of Middle Plantation, which made even more Virginia tribes subjects of the King of England.[43]

Following the incorporation of these Virginia tribes under the English crown, the College of William and Mary began to education young male members of Virginia's tribes that were governed under treaty in 1693.[44] At first, none of the tribes sent their children to the school, but to encourage assimilation, colonial Governor Spotswood decided to waive tribal tributes for those tribes that sent their boys to the school.[45] This practice continued from the late eighteenth century until 1964, when William and Mary temporarily closed its doors to nonwhites.[46] Assimilation through economic pressure was successful in the eyes of English settlers, and by the 1790s, most surviving Virginia tribes had converted to Christianity[47] and only spoke English.[48]

---

[37] *Id.*; Jeffrey L. Hantman, *Between Powhatan and Quirank: Reconstructing Monacan Culture and History in the Context of Jamestown*, 92 AM. ANTHROPOLOGIST 676, 686 (1990).
[38] GLEACH, *supra* note 28, at 188–89.
[39] GLEACH, *supra* note 28, at 189.
[40] *Id.* at 193.
[41] *Id.* at 195–96; Edward Ragan, *A Brief Survey of Anglo-Indian Interaction in Virginia during the Seventeenth Century*, *in* A STUDY OF VIRGINIA INDIANS AND JAMESTOWN: THE FIRST CENTURY ch. 6 (Danielle Moretti-Langholtz ed., 2005), *available at* http://www.nps.gov/history/history/online_books/jame1/moretti-langholtz/chap6.htm (last visited Sep. 20, 2011).
[42] GLEACH, *supra* note 28, at 196; Ragan, *supra* note 41.
[43] SANDRA F. WAUGAMAN & DANIELLE MORETTI-LANGHOLTZ, WE'RE STILL HERE: CONTEMPORARY VIRGINIA INDIANS TELL THEIR STORIES ix (2000).
[44] HELEN C. ROUNTREE & E. RANDOLPH TURNER III, BEFORE AND AFTER JAMESTOWN: VIRGINIA'S POWHATANS AND THEIR PREDECESSORS 183–84 (2002).
[45] Robinson, *supra* note 33, at 163–65.
[46] ROUNTREE & TURNER, *supra* note 44.
[47] HELEN ROUNTREE, POCAHONTAS'S PEOPLE 175 (1990).
[48] *See* Helen Rountree, *The Indians of Virginia: A Third Race in a Biracial State*, *in* SOUTHEASTERN INDIANS SINCE THE REMOVAL ERA 27–28 (Walter L. Williams, ed., 1979).

Even so, "[w]hereas the Powhatans had worked to accommodate the English colonists, had even come to accept and live with their political subordination to the English crown, the attitudes of the colonists were largely unchanged," and prejudices against Virginian-American Indians remained constant.[49]

B. Paternalistic Attitudes

Once the English felt dominant and secure in their position in the New World, the image of the American Indian was able to change, at least among the higher classes.[50] As the social context of relations changed, the English could see the American Indians as just another cultural group, rather than the enemy.[51] Without the threat of violence, the English could develop more refined and philosophical perspectives of American Indian life and culture, and could admit that American Indian culture "was worth examining on its own terms."[52] Even so, some commentators in eighteenth century Virginia maintained that the Virginia tribes had repaid the kindness of the English colonists with repeated attacks.[53] As more diverse groups of Europeans and increasingly greater numbers of African slaves inhabited the American Indians' traditional lands, the colonial perception of the American Indians changed, and the identity of Virginia's American Indians reflected these changes.[54]

However, the marginalization of American Indians in Virginian society fueled feelings of paternalism. As early as 1781, colonial Virginians regarded the American Indian as a remnant of a storied past—outsiders from the general population, with no place in the present.[55] In his *Notes on the State of Virginia*, Thomas Jefferson relegated Virginia's American Indians to the discussion on "Productions mineral, vegetable and animal" and "Aborigines" as opposed to the chapter on "Population."[56] In the section on "Productions, miner-

---

[49] GLEACH, *supra* note 28, at 198.
[50] *Id.*
[51] *Id.*
[52] Nash, *supra* note 7, at 22.
[53] Nash, *supra* note 7, at 224–25.
[54] Nash, *supra* note 7, at 225.
[55] *See generally* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA QUERIES 6, 8, 11 (Frank Shuffleton ed., 1998).
[56] *Id.*

al[s], vegetable[s] and animal[s]," Jefferson takes a paternalistic stance toward the American Indians, stating that:

> Before we condemn the Indians of this continent as wanting genius, we must consider that letters have not yet been introduced among them. Were we to compare them in their present state with the Europeans North of the Alps, when the Roman arms and arts first crossed those mountains, the comparison would be unequal, because, at that time, those parts of Europe were swarming with numbers; because numbers produce emulation, and multiply the chances of improvement, and one improvement begets another. Yet I may safely ask, How many good poets, how many able mathematicians, how many great inventors in arts or sciences, had Europe North of the Alps then produced?[57]

For Jefferson and his like-minded peers, the American Indians were not necessarily *inferior* compared to whites, but lagging in advancement.[58] He believed that exposure to European white culture could raise the progress and level of culture of the American Indians, but was still reluctant to admit that "civilized" American Indians could actually become American citizens.[59] But perhaps Jefferson did not foresee American Indians ever becoming citizens, since he believed that the tribes would be extinguished, as a "conquered and dying race."[60] He predicted that American Indians who did not sell their hunting grounds and adopt white civilization were "destined for extinction."[61]

C. Racism and Assimilation

In the nineteenth century, whites in Virginia undermined American Indian identity by attacking ties to tribal land, and the pressure to remove tribal status meant that many tribes sold their treaty-granted reservations to whites or divided the land.[62] After the Civil War, reservation tribes reclaimed cultural identities and tried to improve their image in the Commonwealth—that Virginia Indians were alive and well, and proud of their heritage.[63] However, reestablished groups faced racism in the binary black-white society of post-Civil

---

[57] *Id.* at 68.
[58] *Id.*
[59] ANTHONY F. WALLACE, JEFFERSON AND THE INDIANS: THE TRAGIC FATE OF THE FIRST AMERICANS 77–78 (1999).
[60] *Id.* at 79.
[61] *Id.*
[62] KEITH EGLOFF & DEBORAH WOODWARD, FIRST PEOPLE: THE EARLY INDIANS OF VIRGINIA 53 (1992). Only the Pamunkey and Mattaponi tribes have maintained their reservations. *Id.*
[63] *Id.*

War Virginia. In addition, the sociological concept of racial identity through phenotype meant that American Indians understood that mixing with blacks could "corrupt" or "destroy" an American Indian identity.[64] For American Indians, physical appearance became the hallmark of racial identity, and could subject them to the "Negro" classification in southern states.[65] For example, members of Virginia's Pamunky tribe had to issue membership certificates so that slave catchers did not confuse them with escaped slaves.[66]

In addition, racial politics in the late nineteenth and early twentieth centuries brought poverty, poor living conditions, lack of health care, limited educational opportunities, and racism.[67] For example, public and social policies often sent American Indian children to boarding schools that separated families and forced students to abandon traditional language and culture.[68] Not until 1924 did American Indians legally become American citizens, under the American Indian Citizenship Act, which granted American Indians the right to vote.[69] Furthermore, American Indians often whitewashed their own identities because of Virginia's heritage of a slave-based economy, meaning that it was advantageous for Virginia tribal members to "perform whiteness" if their legal race was questioned.[70] "Passing"

---

[64] Carla D. Pratt, *Loving Indian Style: Maintaining Racial Caste and Tribal Sovereignty Through Sexual Assimilation*, 2007 WIS. L. REV. 409, 446 (2007).
[65] *Id.* at 447.
[66] *Id.* (citing Laura L. Lovett, *"African and Cherokee by Choice": Race and Resistance under Legalized Segregation*, 22 AM. INDIAN Q. 203, 222 (1998)).
[67] Gabrielle Tayac, Edwin Schupman, & Genevieve Simermeyer, *We Have A Story to Tell: Native Peoples of the Chesapeake Region* (Mark Hirsch ed.,), *available at* http://www.learnnc.org/lp/editions/native-chesapeake/1812 (last visited Oct. 3, 2011).
[68] *Id.*
[69] The Snyder Act, 43 Stat. 253 (1924) (current version codified at 8 U.S.C. § 1401(b) (2006)). The Act states:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all non citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property. *Id.*

[70] Professor Ariela Gross uses the term "performing whiteness" to explain evidentiary demonstrations of individuals in the court to prove that they were in fact, white, such as having whites testify that they regarded the individual as white. *See* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 114–19 (1998).

enabled an individual to adopt an identity and the privileges it provided, from which he or she would otherwise not benefit.[71]

D. Modern Issues

Today, Virginia's American Indians are "political casualties" of laws created with the "black-white paradigm in mind" in early twentieth century Virginia, and American Indians often find themselves "wedged in the middle of the black-white models of racial subordination and ultimately adjust to the existing racial hierarchy through social and legal assimilation."[72] Furthermore, Professor Rachel Moran argues that society pressures multiracial individuals to choose one identity over another and comply with the social norms associated with that identity so it is easier to understand and draw lines in the "political race war" and interact with those individuals.[73] In addition, although the United States is increasingly heterogeneous in racial and cultural makeup, white privilege persists.[74] Many adopt the definition of white privilege as "an invisible package of unearned assets."[75] The "characteristics of the privileged group" become the social norm, and society tends to judge its individual members against the characteristics society privileges.[76]

Most importantly for American Indians, members of the privileged group—whites—can ignore mistreatment that does not affect them personally, and can thus continue to "ignore oppression."[77] In addition, the contemporary "colorblind" approach to society remains problematic for oppressed racial groups and seeks to move on from racial categories, treating them merely as social not biological, categories.[78] This ideology continues to promote historical systematic racism and oppression. In America, the "winners" tell the history of

---

[71] *See* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 283–84 (2003).
[72] Pratt, *supra* note 57, at 412–13.
[73] *See* RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE 156–58 (2001).
[74] *See generally* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).
[75] Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, *in* LESLIE BENDER & DAAN BRACEMAN, POWER, PRIVILEGE, AND LAW: A CIVIL RIGHTS READER 23 (1995).
[76] Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL'Y 245, 247 (2005).
[77] *Id.*
[78] Michael Omi, *Rethinking the Language of Race and Racism*, 8 ASIAN L.J. 161, 161–62 (2001).

American Indians, which "recasts events to show [the winners] in a favorable light."[79]

Therefore, the majority of modern Americans limit their view of the "Indian" to a "socially and morally significant part of the past."[80] As one scholar noted, "[i]n American collective memory, Indians disappeared, and Whites multiplied."[81] For most Americans, "Indians" exist in museum exhibits as the "Noble Savage" and have no place in contemporary society.[82] An "Indian" often refers to members of a group "suspended in time, [a] living [artifact] of the 19th century."[83] The collective view demands that "Indians [have] to be located outside modern American societal boundaries" to be "authentic."[84] Society has a "fixed idea" about what an "Indian" looks like, an image that the media continuously reproduces.[85] The modern reality, in which most American Indians reject forced assimilation and seek equality with members of the dominant white society, while still desiring to retain their distinct cultures, complicates this view.[86] Furthermore, most tribal membership is racially diverse, given intermarriage and assimilation.[87] Intermarriage and the actual lack of an "Indian phenotype" may "confuse the public, and tend[s] to throw motives for self-identifying as Indian into question."[88]

As a result, tribe members may resent these preconceived ideas about how an "Indian" should dress or act,[89] but may find that living up to these notions is a requirement to socially or legally "be Indian" in the United States.[90] The modern American image of an

---

[79] VINE DELORIA, JR., AMERICA IN 1492: THE WORLD OF THE INDIAN PEOPLES BEFORE THE ARRIVAL OF COLUMBUS 429 (Alvin M. Josephy, Jr. ed., 1991).
[80] Maillard, supra note 14, at 382 (citing *generally*, ROY HARVEY PEARCE, THE SAVAGES OF AMERICA: A STUDY OF THE INDIAN AND THE IDEA OF CIVILIZATION (1953)).
[81] Maillard, *supra* note 14, at 382–83.
[82] *Id.* at 383.
[83] HERMAN J. VIOLA, AFTER COLUMBUS: THE SMITHSONIAN CHRONICLE OF THE NORTH AMERICAN INDIAN 18 (1990).
[84] PHILIP J. DELORIA, PLAYING INDIAN 115 (1998).
[85] RENEE ANN CRAMER, CASH, COLOR, AND COLONIALISM 105 (2005). For a thorough discussion of modern American stereotypes of the American Indian, *see* Jòhnson & Eck, *supra* note 13, at 70–77.
[86] J. Milton Yinger & George Eaton Simpson, *The Integration of Americans of Indian Descent*, 436 ANNALS AM. ACAD. POL. & SOC. SCI. 137, 140–41 (1978).
[87] Cramer, *supra* note 84, at 106. Assimilation includes both voluntary and forced assimilation. *Assimilation*, ENCYCLOPEDIA BRITANNICA ONLINE ACADEMIC EDITION, http://www.britannica.com/EBchecked/topic/39328/assimilation (last visited Sept. 20, 2011).
[88] Cramer, *supra* note 84, at 106.
[89] Yinger & Simpson, *supra* note 86, at 142.
[90] For further discussion, *see* infra Part IV.A.i and Part V.

"Indian" has important legal effects, not just sociological, that affect the equal status of many American Indians as American citizens. The *legal* construct of "Indian" depends entirely on federal law, "as the Fourteenth Amendment required for its Privileges and Immunities Clause protection."[91] Once the government defines "Indian," the result may be that individuals with complete American Indian ancestry may *not* meet the definitional requirements to be "Indian," for example, if they are "in proximity to a tribe of which they are not members, or are not found in proximity to their tribe."[92] So what happens when Congress terminates the federal status of a tribe? The members of the former tribe may or may not still be legal "Indians."[93] While federal statutes, such as citizenship and voting rights, sometimes depend more on the ethnological status of American Indians, Congress and other federal agencies deny benefits and equal treatment for American Indians who do not meet the federal requirements.[94] Acknowledging the racism and ignorance behind the social image of the American Indian as separate from modern society is important, since this attitude bleeds into the federal policies for recognition.

III. Erasing Identity

Virginia is a prime example of how modern society socially and legally compartmentalizes American Indians as relics of a past era. The story of Virginia's American Indian tribes sets the stage for the modern struggles tribes face when seeking federal recognition and the privileges such recognition provides.

A. Eugenics

Using his cousin Charles Darwin's research on natural selection as a starting point, scientist Sir Frances Galton founded the science of eugenics in the late nineteenth century.[95] The theory be-

---

[91] James B. Wadley, *Indian Citizenship and the Privileges and Immunities Clauses of the United States Constitution: An Alternative to the Problems of the Full Faith and Credit and Comity?*, 31 S. ILL. U. L.J. 31, 53 (2006).
[92] *Id.* at 53.
[93] *See, e.g.*, 20 U.S.C. § 1221h (2006); 25 U.S.C. § 1603(c) (2006) (repealed).
[94] *See* United States v. Sandoval, 231 U.S. 28, 47–48 (1913).
[95] Gregory Michael Dorr, *Principled Expediency: Eugenics,* Naim v. Naim, *and the Supreme Court*, 42 AM. J. LEGAL HIST. 119, 122–23 (1998); *See generally* Francis Galton, *Hereditary Talent and Character*, MacMillan's Mag. (1865).

hind eugenics is that through the understanding of genetics, scientists could develop stronger breeds of plants, animals, and even humans.[96] Galton believed selective breeding could rid the human race of "undesirables."[97] Galton observed that "genius" seemed to run in families, so selection would make it possible to "breed out" human traits that the white upper classes found to be "undesirable."[98] While the British advocated "positive eugenics," which would encourage breeding among the "best stock" of humans but largely ignored the "lower classes" of people, Americans advocated for "negative eugenics," which would theoretically improve society by removing the "lower orders."[99] American eugenicists promoted the belief that heredity produces differences among and between the races, and validated a social order influenced by nativism and racism.[100]

B. The Racial Integrity Act

Following the assimilation policies in post-colonial Virginia, the twentieth century brought "segregationist discontent," far from the previous "[p]aternalistic benevolence."[101] The emergence of scientific racism and the eugenics movement in the early twentieth century brought fears about nonwhite threats to white racial purity, and with these fears came new approaches to the "Indian problem."[102] During this period, Virginia's American Indians had begun reorganization into official tribes, but faced opposition from Walter A. Plecker, head of Bureau of Statistics in Virginia.[103] A follower of the eugenics movement,[104] Plecker believed that few "true" Virginia Indians remained in the commonwealth, since Indians of mixed race did not count.[105] Some anthropologists, such as Laurence Foster, challenged Plecker's assessment of Virginia. Foster agreed that mixing between black and American Indian blood did exist to the extent Plecker contemplated, but did not find that the mixture extinguished

---

[96] *See* DANIEL KEVLES, IN THE NAME OF EUGENICS 3 (1985).
[97] *Id.*
[98] Dorr, *supra* note 95, at 123.
[99] *Id.*
[100] *Id.*
[101] Maillard, *supra* note 14, at 364–65.
[102] *Id.* at 366.
[103] *Id.* at 369–70.
[104] Warren Fiske, *The Black-and-White World of Walter Ashby Plecker*, The Virginian-Pilot, Aug. 18, 2004, http://home.hamptonroads.com/stories/print.cfm?story=74481&ran=162825.
[105] *Id.*

American Indian *identity*.[106] Foster wrote in 1935 that "[e]ven through the present-day Indian leaders deny vehemently that their tribes possess Negro blood, it is true . . . that there is no Indian group in Virginia today which does not have some Negro strains."[107]

However, Virginia found a rational basis to justify the Racial Integrity Act, an anti-miscegenation statute, in the eugenics movement.[108] Since no party ever challenged the reasonableness of the racial classifications which supported the Act, even the Supreme Court of the United States was able to avoid the constitutional issues surrounding the Act and Virginia's miscegenation statutes until 1967, when the case of *Loving v. Virginia* presented a proper federal question.[109] Virginia did not stand alone on the national landscape—the

---

[106] LAURENCE FOSTER, NEGRO-INDIAN RELATIONSHIPS IN THE SOUTHEAST 16–17 (1985).
[107] *Id.* at 16. In addition, many Virginians found that the absolutism of the proposed Act undermined their "social definition" of white, which permitted some Amerindian ancestry. Maillard, *supra* note 14, at 370. The *Richmond News Leader* went so far as to call the proposed Act "an amazing ignorance of Virginia history and work[ing] the most cruel sort of injustice." *Id.* (citing Richard B. Sherman, *"The Last Stand:" The Fight for Racial Integrity in the 1920s*, 54 J.S. HIST. 69, 85 (1988)). In response, the revised Act allowed prominent Virginians who had ancestral links to John Rolfe and Pocahontas to remain legally "white" through the "Pocahontas clause." Maillard, *supra* note 14, at 370–71.
[108] Dorr, *supra* note 95, at 119. *See also* VA. CODE ANN §§ 20-54–20-57 (1950).
[109] Dorr, *supra* note 95, at 119; *see generally* Loving v. Virginia, 388 U.S. 1 (1967); *see generally* Naim v. Naim, 197 Va. 80 (1955), *vacated by* 350 U.S. 985 (1956). Within *Loving v. Virginia*, there lies a narrative about Amerindian identity, and how the miscegenation laws separated blacks from American Indians. Pratt, *supra* note 64, at 410–11. While some scholars and others believe that American Indians freely intermarried with blacks, tribal miscegenation laws actually demonstrate that some Amerindian communities viewed marriage to blacks as "taboo." *Id.* at 411–12. However, state miscegenation laws allowed whites to marry American Indians in Virginia, arguably "as a form of racial rehabilitation." *Id.* at 411. Tribes may not have been very concerned about white and Amerindian intermarriage, but often, tribes still restricted the political and economic power of white men who married Amerindian women to keep white men from marrying Amerindian women solely to gain access to tribal lands. Karen M. Woods, *"A Wicked and Mischievous Connection:" Origins and Development of Indian-White Miscegenation Law*, 23 LEGAL STUD. FORUM 37, 62 (1999). In addition, these laws sought to preserve "Indian" as a racial category "separate and distinct" from blacks "to maintain the relatively privileged social and legal status of American Indians compared to that of blacks; and . . . . to protect and maintain tribal sovereignty. Pratt, *supra*, note 64, at 441. Therefore, these tribal laws did not "protect" the purity of the Amerindian race, but mostly protected individual American Indians and the whole community from exploitation by whites. Virginia's miscegenation law classified Mildred Loving as a "Negro," but her racial identity included Cherokee Indian. *See* Robert A. Pratt, *Crossing the Color Line: A Historical Assessment and Personal Narrative of* Loving v. Virginia, 41 HOW. L.J. 229, 233–35 (1998) (discussing Mildred Loving's own racial identity). Central Point, Virginia, where Mildred grew up, was a notoriously interracial community. PHYL NEWBECK, VIRGINIA HASN'T ALWAYS BEEN FOR LOVERS: INTERRACIAL MARRIAGE BANS AND THE CASE OF RICHARD AND MILDRED LOVING 21 (2004). The "predominant blood in [Central Point's

Act and a compulsory sterilization law in the commonwealth passed the same year as the federal Immigration Act of 1924, which also sought to prevent the mixing of races.[110] However, it is possible that Virginia's measures were also born from a desire to "reinforce and codify [a] distinctively southern race."[111] The hierarchies of southern society relied on "paternalism, white supremacy, and elite social and political control."[112]

"[T]he true motive behind the Racial Integrity Act of 1924 was the maintenance of white supremacy and lack economic and social inferiority—racism, pure and simple."[113] Empowered by law, this racism affected all aspects of life in Virginia—it controlled the creation of family units that could hold property, limited the redistribution of wealth and economic advancement of nonwhite members of the lower classes, and restricted individual liberty.[114] This "paper genocide" continued until Plecker retired in 1946.[115] However, not until 1997 could any American Indian born in Virginia have his or her records changed for free to reflect his or her American Indian ancestry.[116]

IV. Denying Equality

A. The Federal Recognition Process

Originally, there was no formal federal process for tribal recognition; treaties and executive orders were some of the means through which the federal government recognized tribes.[117] When undertaking treaties with tribes through the Department of the Interior, the executive branch determined which tribes were eligible for

---

population was] that of Indian and white races." *Id.* at 22. Mildred Loving described herself as "part negro, & part indian" in a letter. *Id.* at illustration, Mildred Loving's Plea for Help.

[110] *See* Immigration Act of 1924, Pub. L. No. 139 43 Stat. 153 (1924).

[111] Dorr, *supra* note 95, at 125.

[112] *Id.*

[113] Paul Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to* Loving v. Virginia, 21 U.C. DAVIS L. REV. 421, 425 (1988).

[114] Dorr, *supra* note 95, at 128–29.

[115] Fiske, *supra* note 104.

[116] *See generally* Samuel R. Cook, *The Monacan Indian Nation: Asserting Tribal Sovereignty in the Absence of Federal Recognition*, 17 WICAZO SA REV. 91, 91 (2002); Waugaman & Moretti-Langholtz, *supra* note 43, at 29.

[117] Paschal, *supra* note 3, at 209.

services.[118] The Supreme Court guided these decisions when in 1901 it defined a "tribe" in *Montoya v. United States* 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."[119] In addition, the first solicitor of the Bureau of Indian Affairs ("BIA") developed the "Cohen criteria" for executive recognition, which focused on treaty relations, legislation, and recognition by others and other governments as a tribe.[120] The criteria also looked at ethnology, history, and solidarity.[121]

However, the formal process did not incorporate these criteria until the later part of the twentieth century. In 1978, the Bureau of Indian Affairs ("BIA") established an administrative process for federal acknowledgement of unrecognized tribes.[122] In the 1970s, the legacy of the Civil Rights Movement brought attention to the state of affairs for American Indians, and Congress established the American Indian Policy Review Commission ("AIPRC") in 1975 to address social and political issues facing American Indians.[123] AIPRC's findings provoked Congress to introduce a bill to formalize its recognition policy within the BIA.[124] Congress intended that this process would protect tribes that are denied rightful recognition,[125] but the process actually places burdens on tribes, such as the legal presumption against recognition.[126]

Now there are three ways for tribes to obtain federal recognition: (1) administrative recognition, (2) through an act of Congress, or (3) a judicial determination of tribal status.[127]

---

[118] Paschal, *supra* note 3, at 210.
[119] Montoya v. United States, 180 U.S. 261, 266 (1901).
[120] Paschal, *supra* note 3, at 210–211 (citing FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 271–72 (1986).
[121] Paschal, *supra* note 3, at 211.
[122] 25 C.F.R. § 83.2 (2011).
[123] Paschal, *supra* note 3 , at 212.
[124] *See Recognition of Certain Indian Tribes: Hearing on S. 2375 Before the Select Comm. on Indian Affairs*, 95th Cong. 5–14 (1978).
[125] TASK FORCE TEN, AMERICAN INDIAN POLICY REVIEW COMM'N, 94TH CONG., 2D SESS., REPORT ON TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS 3 (1976).
[126] Paschal, *supra* note 3, at 217–19.
[127] Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103–454, § 103, 108 Stat. 4791 (1994).

1. Administrative Federal Recognition

To embark on the administrative federal recognition process, a tribe must first petition the BIA with evidence that it meets seven criteria: (1) that it has had a continuous American Indian identity from historical times to the present; (2) that it occupies a specific area or has a distinctly American Indian community, and that the community members are descendents of the historic tribe; (3) that the tribe has maintained an autonomous political authority over its members throughout history; (4) that it has a governing document or statement that describes membership criteria and governance procedures; (5) that it has a membership roll with evidence that all members descended from the historic tribe; (6) that members do not belong to other American Indian tribes; and (7) that the tribe's relationship with the federal government was not terminated by Congress.[128] Once a tribe submits its petition and documents, the BIA reviews it and gives the tribe notice of any deficiencies, and provides more time to establish documentation.[129] Once the petition is complete, a team of experts appointed by the BIA—usually a historian, an anthropologist, and a genealogist—reviews the petition to determine the tribe's status.[130] Afterwards, the experts summarize their reports and issue their findings regarding the position, and after a notice and comment period, the Assistant Secretary of Indian Affairs authorizes and issues the final determination.[131]

2. Legislative Federal Recognition

The Indian Commerce Clause in Article 1 of the Constitution gives Congress the authority to recognized tribes.[132] However, this process is rarely used, and it has some drawbacks. For example, Congress does not have to give reasons for rejecting a tribe's claim, and the process has no substantive requirements in making determinations.[133]

---

[128] 25 C.F.R. § 83.7(2011).
[129] *Id.* §§ 83.9–83.10.
[130] *Id.* § 83.11.
[131] *Id.*
[132] U.S. CONST. art. 1, § 8, cl. 3 (c).
[133] Cramer, *supra* note 85, at 45.

This could be good or bad for tribes seeking acknowledgment, since Congress can make laws or change them.[134]

3. Recognition through Judicial Determination

The process of judicial recognition is the most controversial process, since it raises separation of powers issues.[135] Furthermore, the Supreme Court has declared that Congress has the "ultimate authority" in American Indian affairs.[136] In an 1865 case, *United States v. Holliday*, the Supreme Court declared that federal tribal recognition is a political question that only Congress or the Executive branch can decide.[137] Arguably, the Articles of Confederation, the Constitution, and the ratification of the Fourteenth Amendment all provide support for the notion that the Framers believed that the American government needed to deal with American Indian affairs "in the context of tribal political relationships with the federal government."[138]

B. Federal Recognition Benefits

Federal recognition formally establishes a "government-to-government relationship" between tribes and the U.S. government, and establishes the tribe as a sovereign entity.[139] Having sovereign status, tribes then possess the power of self-government and have federal preemption, which would protect tribal lands and powers from state and local threats.[140] In addition, as a sovereign entity, a tribe is eligible for federal assistance programs, and can fund com-

---

[134] *Id.*
[135] FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 142–43(1986).
[136] Duro v. Reina, 495 U.S. 676, 698 (1990).
[137] United States v. Holliday, 70 U.S. 407, 419 (1865).
[138] Matthew L. M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN'S L. REV. 153, 180 (2008).
[139] *Benefits and Service*, U.S. DEP'T. OF THE INTERIOR, http://www.doi.gov/tribes/benefits.cfm (last visited Oct. 26, 2011); *see* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 4–5 (3d ed. 1998) ("Unequivocal federal recognition may serve to establish tribal status for every purpose . . . . Federal recognition may arise from treaty, statute, executive or administrative order, or from a course of dealing with the tribe as a political entity. Any of these events . . . then signifies the existence of a special relationship between the federal government and the concerned tribe . . . .").
[140] *See* McClanahan v. Arizona, 411 U.S. 164, 172–73 (1973) (holding that the imposition of personal income tax by Arizona upon a reservation of Indians is unlawful and violates the Indian's sovereign status).

munity services and health clinics.[141] This trust relationship means that tribes and their members may benefit from a favorable tax position; federal services through the BIA, Indian Health Service, and the Department of Housing and Urban Development; the exercise of treaty rights; and other advantages.[142]

Federal agencies generally define American Indian clients by the Indian Self-Determination and Education Assistance Act of 1975, which defines a tribe as "any Indian tribe, band, nation or other organized group or community . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."[143] However, the BIA adopted this definition with the phrase "or other organized group or community" deleted, and then added the federal recognition requirement.[144] This change has had a cyclical effect, since other agencies often define eligibility for their services by membership in a BIA recognized tribe.[145] The Indian Affairs program within the BIA supports and assists federally recognized tribes in "develop[ing] . . . . tribal governments, strong economies, and quality programs."[146] The program is comparable to programs run by state and local governments, but carries federal power and funding for programs relating to education, social services, law enforcement, courts, and resource protection, among others.[147] There are also other federal agencies that serve recognized tribes, such as Indian Health Service under the U.S. Department of Health and Human Services.[148]

The most important benefit of federal recognition stems from Congress's view that American Indian status has a direct impact upon privileges and immunities, with respect to Congressional power.[149]

---

[141] *Federal Recognition*, NCAI: NAT'L CONG. OF AM. INDIANS, http://www.ncai.org/Federal-Recognition.70.0.html (last visited Oct. 26, 2011).
[142] Matthew L.M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 490 (2006).
[143] 25 U.S.C. §§ 450 (b), 450b (e) (2006).
[144] *See, e.g.*, Financial Assistance and Social Services Program, 25 C.F.R. § 20.100 (2006); Loans to Indians, 25 C.F.R. § 101.1 (2006); Housing Improvement Program, 25 C.F.R. § 256.2 (2006).
[145] *See, e.g.*, 42 C.F.R. § 36.12 (a) (2001) (limits Indian Health Service eligibility to federally recognized tribes).
[146] *Benefits and Service*, U.S. DEP'T OF THE INTERIOR, http://www.doi.gov/tribes/benefits.cfm (last visited Oct. 26, 2011).
[147] *Id.*
[148] *Id.*
[149] Wadley, *supra* note 91, at 57.

The Fourteenth Amendment did not confer citizenship status for American Indians.[150] Once Congress granted citizenship for American Indians, the major concern became "content analysis" of federal statutes conferring privileges or those federal statutes under which American Indians may claim protected status.[151] It is still difficult to treat tribes as "natural persons" and recognize them as having any privileges or immunities under the Constitution, due to the unique status of tribes under federal law complicates this distinction.[152] Even so, these privileges and immunities still apply to individual members of federally recognized tribes.[153]

C. Obstacles for Virginia's Tribes

While treaties exist recognizing Virginia's American Indian tribes, they are solely pre-Independence agreements with the British government, as Virginia's colonization predates the United States by 169 years.[154] Virginia's tribes did not gain federal recognition by signing peace treaties with the U.S. government, since they had previously signed peace treaties with monarchs of England.[155] Due to Plecker's paper genocide, however, Virginia's tribes lack the documentation to meet the BIA's administrative requirements established in 1978.[156] Since the process requires anthropological, historical, and *genealogical* evidence, and Virginia's nonreservation tribes lack the birth, marriage, and death certificates needed for genealogical records, the administrative route is not a possibility.[157] Congress recognizes that with "the history of abuse, targeted racism, and coordinated efforts to disband the tribes," it is "amazing" that they still stand strong in Virginia.[158] Virginia's tribes lost their land, and like all American Indians, they did not receive their full rights as United

---

[150] *See, e.g.*, Deere v. New York, 22 F.2d 851,853 (N.D. N. Y. 1927).
[151] Wadley, *supra* note 90, at 58.
[152] *Id.* at 60.
[153] *Id.*
[154] *See supra* Part II.A. ii.
[155] *See supra* Part II. A. ii.
[156] *See infra* Part IV. C.
[157] *See supra* Part IV.A. i.
[158] *Bill To Extend Federal Recognition to The Chickahominy Tribe, the Chickahominy Indian Tribe—Eastern Division, The Upper Mattaponi Tribe, The Rappahannock Tribe, Inc., The Monacan Tribe, and The Nansemond Tribe: Hearing on H.R. 2345 Before the H. Comm. on Resources*, 107th Cong. 3 (2002) (statement of Rep. Rahall, Member, H. Comm. on Resources).

States citizens until the twentieth century.[159] Some in Congress compare the situation Virginia's American Indians faced with South African Apartheid.[160] Without federal recognition, the federal government continues to deny Virginia tribes their full rights. [161] For example, tribes that "[do not] exist" have no standing in federal court.[162]

In 1999, the Virginia General Assembly passed House Joint Resolution No. 754 in support of federal recognition, which passed unanimously in the Senate, and with only two nays in the House.[163] Since 2000, Virginia's tribes have sought federal recognition through Congress.[164] The Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act was introduced in: the 106th Congress, with no success;[165] the 107th Congress, where it did not pass in House[166] or in the Senate;[167] the 108th Congress where it again did not pass in the House[168] or the Senate;[169] the 109th Congress, where it again did not pass in the House [170] and failed in the Senate;[171] the 110th Congress where it passed in the House but died in the Senate[172]; and the 111th

---

[159] *Id.* at 7 (statement of Rep. Moran, Rep. in Cong. From Va.).
[160] *Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act: Hearing on S. 2694 Before the S. Comm. on Indian Affairs*, 107th Cong. 76 (2002) (statement of Sen. Campbell, Vice Chairman S. Comm. on Indian Affairs).
[161] *Id.* at 56 (statement of Sen. Allen, Sen. from Va.).
[162] *Id.* at 90 (statement of Rep. Moran, Rep. from Va.).
[163] *Bill to Extend Federal Recognition to The Chickahominy Tribe, the Chickahominy Indian Tribe—Eastern Division, The Upper Mattaponi Tribe, The Rappahannock Tribe, Inc., The Monacan Tribe, and The Nansemond Tribe: Hearing on H.R. 2345 Before the H. Comm. on Resources*, 107th Cong. 4 (2002) (statement of Rep. Davis, Rep. from Va.).
[164] *See* Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act, H.R. 5073, 106th Cong. (2000).
[165] *Id.*
[166] Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act, H.R. 2345, 107th Cong. (2001).
[167] Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act, S. 2694, 107th Cong. (2002).
[168] Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act, H.R. 1938, 108th Cong. (2003).
[169] Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act, S. 1423, 108th Cong. (2003).
[170] Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act, H.R. 3349, 109th Cong. (2005).
[171] Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act, S. 480, 109th Cong. (2005).
[172] Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act, H.R. 1294, 110th Cong. (2007).

Congress, where it passed in the House,[173] but has been tabled in the Senate.[174] This determination demonstrates the importance of federal recognition, as explained by Barry Bass, Chief of the Nansemond: "[w]e want the same rights that other Indians in our country have. We want our children to be eligible for the educational programs that other Indian children have access to, and we want our elders to be eligible for the health care they need."[175]

Virginia's tribes seek federal recognition to obtain the rights and statutory benefits federally recognized tribes receive, but also to validate that these tribes are indeed American Indian tribes.[176] The federal government must grant recognition for these tribes out of respect and honor, as well as to redress the history of discrimination.[177] However, the administrative route to recognition is difficult and can take more than twenty years through the Bureau of Indian Affairs.[178] In addition, Congress resists granting any American Indian tribe federal recognition, due to issues surrounding the economic and moral aspects of gambling.[179] The gambling issue has overshadowed the need to recognize the heritage and legacy of American Indians. A major concern for some, especially the Christian right, in granting Federal recognition for Virginia tribes was that it would bring gambling to Virginia.[180] However, under current state law, Virginia tribes can run bingo games, but they do not; casinos and casino interests offered to help in the campaign for recognition, but the tribes declined assistance.[181] Even so, if future tribe members sought Class II gaming operations, the Governor of Virginia would still have the power to deny approval.[182]

---

[173] Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act, H.R. 1385, 111th Cong. (2009).
[174] Indian Tribes of Virginia Federal Recognition Act, S. 1178, 111th Cong. (2009).
[175] Brian Stockes, *Virginia Tribes Continue Push for Federal Recognition*, 20 INDIAN COUNTRY TODAY 24, at C7 (2000).
[176] *Bill to Extend Federal Recognition to The Chickahominy Tribe, the Chickahominy Indian Tribe—Eastern Division, The Upper Mattaponi Tribe, The Rappahannock Tribe, Inc., The Monacan Tribe, and The Nansemond Tribe: Hearing on H.R. 2345 Before the H. Comm. on Resources*, 107th Cong. 4 (2002) (statement of Rep. Davis, Rep. from Va.).
[177] *Id.*
[178] *Id.*
[179] *Id.* at 6 (statement of Rep. Moran, Rep. from Va.).
[180] *Id.* at 4 (2002) (statement of Rep. Davis, Rep. from Va.).
[181] *Id.*
[182] *Bill to Extend Federal Recognition to The Chickahominy Tribe, the Chickahominy Indian Tribe—Eastern Division, The Upper Mattaponi Tribe, The Rappahannock Tribe, Inc., The*

While some may question why the tribes only recently attempted to seek federal recognition, the timing is due to the practices of Dr. Walter Plecker and the Bureau of Vital Statistics.[183] Virginia's Racial Integrity Act of 1924 "empowered zealots" like Plecker to destroy state records, as well as criminalizing the act of designating one's self a "Indian," punishable by up to a year in jail.[184] Plecker believed that there were no real American Indians native to Virginia, and removed the designation from birth records and other vital Virginia records.[185] Plecker threatened tribes with imprisonment for using "Indian" as an identifying term on records, and instead referred to all nonwhites as "colored."[186] Due to these threats, many American Indians in Virginia suppressed their identities to avoid controversy or retaliation.[187] However, this adversity strengthened tribal bonds, and substantial proof of the tribes' lineage endured this systematic discrimination, through historical and anthropological works.[188]

For example, Chief Kenneth Adams of the Mattaponi Indian Tribe of Virginia testified before the Senate Committee on Indian Affairs and described his experiences growing up as an American Indian in Virginia.[189] When Chief Adams was a child, "high school education for Indians was almost nil."[190] However, in 1965, Chief Adams became the first American Indian to graduate from King William High School, in King William County, Virginia.[191] Chief Adams also shared an anecdote from 1946 where one of the Mattaponi chiefs sought to obtain high school educational resources through the Office of Indian Affairs, and but fount the only help of-

---

Monacan Tribe, and The Nansemond Tribe: Hearing on H.R. 2345 Before the H. Comm. on Resources, 107th Cong. 4 (2002) (statement of Rep. Davis, Rep. from Va.).

[183] *Id.* While American Indians can change their records now to reflect Amerindian identity, this did not solve the issue of insufficient genealogical records for those that have passed, and the records still lack continuity.

[184] *Id.* at 7 (statement of Rep. Moran, Rep. from Va.).

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Bill to Extend Federal Recognition to The Chickahominy Tribe, the Chickahominy Indian Tribe—Eastern Division, The Upper Mattaponi Tribe, The Rappahannock Tribe, Inc., The Monacan Tribe, and The Nansemond Tribe: Hearing on H.R. 2345 Before the H. Comm. on Resources*, 107th Cong. 7 (2002) (statement of Rep. Moran, Rep. from Va.).

[189] *See Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act: Hearing on S. 2694 Before the S. Comm. on Indian Affairs*, 107th Cong. 71 (2002) (statement of Chief Adams, Upper Mattaponi Indian Tribe of Va.).

[190] *Id.*

[191] *Id.*

fered was to send students to federal boarding schools outside of Virginia.[192] Many American Indian children left Virginia to pursue secondary education in places like Oklahoma and Michigan.[193]

Chief Stephen Adkins of the Chickahominy Tribe also described life during and after Plecker's regime.[194] Chief Adkins described the fear of jail his father and his father's peers felt during the Plecker years, and their fear of "rock[ing] the boat" were they to pursue state or federal recognition.[195] Chief Adkins also described how his family photo albums lacked pictures of graduations from schools, wedding pictures from local churches, or other American rites of passage, such as homecoming games or prom pictures.[196] However, he also went on to describe the photo albums full of pictures of powwows and tribal festivals as well as service members and their certificates of honor.[197] To sum up the situation, Chief Adkins stated that "[t]here was no place for an Indian in a State that recognized only two races: white and colored."[198]

If Congress recognizes Virginia's tribes, then the BIA will provide funding for welfare services, adult care, community development, and general assistance.[199] The members of the tribes would also be eligible for health services through the IHS.[200] However, attempts to the Indian Tribes of Virginia Federal Recognition Act of 2009,[201] introduced in the Senate by Senators Jim Webb and Mark Warner, has been tabled.[202] While the bill was approved and calendared for a vote, Senator Tom Coburn, a Republican from Oklahoma,

---

[192] *Id.* at 72.
[193] *Id.*
[194] *Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act: Hearing on S. 2694 Before the S. Comm. on Indian Affairs*, 107th Cong. 77 (2002) (statement of Chief Adkins, Chickahominy Indian Tribe of Va.).
[195] *Id.*
[196] *Id.*
[197] *Id.* at 77–78.
[198] *Id.* at 77.
[199] *See, e.g.*, THERESA GULLO, Deputy Assistant Dir. for Budget Analysis, Cong. Budget Office, CONGRESSIONAL BUDGET OFFICE COST ESTIMATE: H.R. 1385 THOMASINA E. JORDAN INDIAN TRIBES OF VIRGINIA FEDERAL RECOGNITION ACT OF 2009, *available at* http://www.govtrack.us/data/us/111/bills.cbo/h1385.pdf.
[200] *Id.*
[201] Indian Tribes of Virginia Federal Recognition Act, S. 1178, 111th Cong. (2009).
[202] Robert Dilday, *Baptist Executives Urge Federal Recognition of Virginia Tribes*, ASSOC. BAPTIST PRESS, Aug. 19, 2010, *available at* http://www.abpnews.com/content/view/5456/53/.

placed a hold on the bill due to "jurisdictional concerns."[203] Legislators like Coburn believe that requests for recognition should *only* be processed through the BIA administrative route, and not legislatively.[204] However, if the administrative route becomes the only route, then as it currently stands, the majority of Virginia's tribes would remain without federal recognition.

V. Conclusion

Unrecognized American Indians may appear white, black, American Indian, or mixed race, and they may not fit the popular image of "Indian." As a result, non-American Indians are often reluctant to accept these communities or groups as "real" American Indians. Reliance on appearances instead of historical and anthropological facts reinforces the notion that "true Indians" have died out—a prediction popularized by Thomas Jefferson—and that these groups have long ago "abandoned" tribal lands and customs, assimilating into American society.[205] The cross-section between society and policy creates a conundrum for modern American Indians. With no place for the stereotypical "Indian" in modern society, American Indians who were forced to abandon lands and customs due to twentieth century paternalism and assimilation policies have also lost their American Indian identity, at least in the eyes of the law. The criteria required for both administrative and legislative recognition is rooted in racism and stereotypical views of what an makes someone an "Indian."

Policymakers seem to lack the ability to look back and see *why* exactly modern groups and communities claiming American Indian status cannot meet the standards set by the BIA. While the process of federal recognition on its face attempts to protect American Indian tribes from aggressive states and localities,[206] in practice it actually can harm American Indians by demanding they meet inflexible standards to access more aid and protection. Like Virginia's tribes,[207] many of these tribes have state recognition, but cannot meet the stringent standards for federal recognition.

---

[203] *Id.*
[204] *Id.*
[205] *See supra* notes 60–61, 72.
[206] *See supra* note 124.
[207] *See supra* notes 154, 156.

Congress continues to prevent all American Indian groups from receiving equal treatment under the law, across the American Indian community, and in comparison with other United States citizens by insisting that tribes must meet BIA administrative standards,[208] and not acknowledging the roadblocks that make that route impossible for many groups. There are two possible courses of action to repair past injustices and provide hope for the future through access to federal resources and protection. The first option would be for Congress to become more open to legislative appeals for recognition. Congress should not tether the process to the administrative standards that frustrate historical tribes that lack accurate genealogical records, especially in the face of strong historical and anthropological evidence. A second option is that if legislators strongly believe that only the BIA can and should grant acknowledgement, then Congress and the BIA must reform the administrative process to accommodate special circumstances, such as those created for Virginia's American Indians by Plecker's regime.[209]

Inequality breeds social and economic ills. Plecker's paper genocide of Virginia's American Indians was the result of racism, and ensured that society's ignorance and suspicion of self-identifying American Indians would perpetuate inequality and the disadvantages it creates through the twentieth century and beyond. Virginia's American Indians will continue to suffer from ills such as lack of health care and poverty as long as the federal recognition process remains unchanged.

---

[208] *See supra* notes 123, 144.
[209] *See supra* notes 182–85.