1995

"Constructing" Nation Within States: The Quest for Federal Recognition by the Catawba and Lumbee Tribes

Anne Merline McCulloch

David E. Wilkins
University of Richmond, dwilkins@richmond.edu

Recommended Citation

Wilkins, David E. "'Constructing' Nations Within States: The Quest for Federal Recognition by the Catawba and Lumbee Tribes." *The American Indian Quarterly* 19, no. 3 (Summer 1995), 361-388.

"CONSTRUCTING" NATIONS WITHIN STATES:
THE QUEST FOR FEDERAL RECOGNITION BY THE CATAWBA AND LUMBEE TRIBES

BY ANNE MERLINE MCCULLOCH AND DAVID E. WILKINS

Creating and in some cases re-creating viable tribal political communities within the construct of the modern nation-state has proven to be a troublesome task for indigenous populations worldwide. The task for indigenous governments in the United States has been further complicated by federalism's divisions of power between the states and the national government. Native American tribes often find themselves waging a two-front battle in which they must resist state encroachments over their lands and their inherent governing authority; while at the same time they must lobby the federal government for protection of those same lands and powers.

History is replete with attempts by the federal government to forcibly remove tribes from their ancestral and treaty-recognized homelands,[1] to facilitate assimilation using acts of cultural genocide,[2] and to sever the federal trust relationship with tribes.[3] These often well-intentioned, but highly destructive policies have taken their toll on tribes' political status, economic resources, and cultural integrity. This is particularly true for many Eastern tribes, especially those in the mid-Atlantic region, that generally were not accorded federal recognition in the form of treaties and thus did not benefit from the accompanying "protection" of the federal trust relationship.[4] In addition, many Eastern tribes never had reservations set aside for them, a major source of geographic security that many Western tribes have enjoyed.

Federal recognition is the primary method used by tribes to affirm their existence as distinct political communities within the American system. Federal recognition buffers tribal existence from most jurisdictional encroachments by state and local governments and, ideally, should shield the tribes from federal encroachments as well. It also provides tribes and their members with certain political, legal, and economic benefits. Tribes have been marginalized and have experienced great difficulty sustaining themselves as viable political and cultural entities without federal recognition.

This paper will analyze the campaigns for federal recognition of the Catawba Indian Tribe of South Carolina and the Lumbee Indian Tribe of North Carolina. The Catawba were successful in their battle to re-establish a federal relationship when Congress passed legislation in 1993 finalizing the

ANNE M. MCCULLOCH IS A PROFESSOR OF POLITICAL SCIENCE AT COLUMBIA COLLEGE IN COLUMBIA, SOUTH CAROLINA. DAVID E. WILKINS IS AN ASSISTANT PROFESSOR OF POLITICAL SCIENCE AT THE UNIVERSITY OF ARIZONA IN TUCSON, ARIZONA.

settlement between the Catawba tribe and South Carolina. The settlement transferred responsibility for the tribe and its reservation from South Carolina to the federal government and also settled a treaty land claim that had been outstanding since 1840. The Lumbee Tribe, on the other hand, has been unsuccessful in its quest for complete federal recognition despite efforts dating to the 1880s.

Our analysis of these campaigns for federal recognition is based on the thesis that federal recognition is dependent on the tribes' externally and internally constructed social identities. The model we have chosen in analyzing this thesis is the policy formulation model recently proposed by Anne Schneider and Helen Ingram.[5] This model uses the socially constructed identity of a target group or population to analyze and predict the types of federal policies that will be directed toward that group. Schneider and Ingram argue that the "dynamic interaction of power and social constructions leads to a distinctive pattern in the allocation of benefits and burdens to the different types of target groups."[6] Those groups with positive social constructions and with strong levels of power, as defined by the ability to mobilize resources for action, will be overcompensated and are termed "advantaged groups." "Contenders" are those groups that are negatively constructed but have sufficient power to affect policymakers. In the case of the latter group, public officials "will prefer policy that grants benefits noticed only by members of the target groups and largely hidden from everyone else."[7] "Dependent groups" are positively constructed but lack sufficient power to direct political benefits. Finally, "deviants" are both negatively constructed and are lacking in power, making them susceptible to policy constraints or even punishments. It is our argument that Native American tribes constructed by the "Anglo" community as "advantaged" or "dependent," i.e., as having a positive image, will have a greater probability of becoming federally recognized than those constructed as "contenders" or "deviant."

By examining two Southeastern tribes, each with extensive historical relations with the United States, we hope to illuminate the factors inherent in the construction of the tribes' social identity and to determine which factors seem most critical to federal recognition. Analysis of these factors may benefit the more than one hundred other tribal groups that are petitioning the federal government for the establishment of diplomatic relations.

FEDERAL RECOGNITION:

Federal recognition historically has had two distinctive meanings. Before the 1870s, "recognize" or "recognition" was used in the cognitive sense. In other words, federal officials simply acknowledged that a tribe existed.[8] During the 1880s, however, "recognition" or, more accurately, "acknowledgment," began to be used in a formal jurisdictional sense. Today

the federal government's acknowledgment is a formal act that establishes a political relationship between a tribe and the United States. Federal acknowledgment affirms a tribe's sovereign status. Simultaneously, it outlines the federal government's responsibilities to the tribe.

Federal acknowledgment means that a tribe is not only entitled to the immunities and privileges available to other tribes, but is also subject to the same federal powers, limitations, and other obligations of recognized tribes. What this means, particularly the "limitations" term, is that "acknowledgment shall subject the Indian tribe to the same authority of Congress and the United States to which other federal acknowledged tribes are subjected."[9] In short, tribes are informed that they are now subject to federal, particularly congressional, plenary power. The doctrine of "plenary power" is one of the central, yet most problematic, concepts in federal Indian policy and law.[10] Since Indian nations were not and have not been included in the constitutional structure of the United States, the doctrine of federal "plenary power" has been derived through Supreme Court interpretation of the Indian Commerce Clause to give to the United States Congress the right to exercise all but unbridled power over tribal governments, lands, and resources. Because the power is not within the construct of the Constitution, it is not limited by it. Constitutional protections (federalism, equal protection, Bill of Rights) against governmental intrusion into the lives of people do not apply to Indian governments.[11]

Although Congress traditionally has had recognition authority, in 1978 the Bureau of Indian Affairs developed an administrative process which unacknowledged tribes were to follow when seeking recognition. This set of guidelines was based mainly on confirmation by individuals and groups outside the tribe that members of the group were Indians. The mandatory criteria were as follows: the identification of the petitioners "from historical times until the present on a substantially continuous basis, as 'American Indian' or 'Aboriginal' "[12] by the federal government, state or local governments, scholars, or other Indian tribes; the habitation of the tribe on land identified as Indian; a functioning government that had authority over its members; a constitution; a roll of members based on criteria acceptable to the Secretary of the Interior; not being a terminated tribe; and members not belonging to other tribes. These criteria largely were designed to fit the aboriginal image of the existing and recognized western tribes and were problematic for many eastern tribes that sought recognition.[13] As M. Annette Jaimes has complained, some of these requirements presented a catch-22: "An Indian is a member of any federally recognized Indian Tribe. . . . To gain federal recognition, an Indian Tribe must have a land base. To secure a land base, an Indian Tribe must be federally recognized."[14]

Because of the problematic nature of many of these criteria, and Congress's impatience with a process that seemed interminable, unfair, and ponderous, the BIA was forced on February 25, 1994, to issue revised criteria.

The new criteria, it is alleged, are more in keeping with the contemporary condition of tribes seeking federal recognition. For instance, instead of requiring that the tribe be continuously identified as a distinctive Indian entity since "historical times," the criteria require only that there has existed an "American Indian entity on a substantially continuous basis since 1900."[15] Also, the land requirement has been changed to require evidence of a "distinct community," a broader term that has in its meaning social as well as geographic ties. It is too early to ascertain the effect of these rules on the remaining petitioners.

The significance of recognition is two-fold: First, federally recognized tribes are eligible for a number of federal benefits. These benefits include educational and medical services and exemption from many state taxes. Second, by recognizing an Indian tribe the federal government is affirming the legal position of its members as Indians. Without such recognition, an ethnically identified "Indian" may not be able to benefit from federal programs tailored for "legally-recognized" Indians. Monroe E. Price and Robert N. Clinton note that according to the 1982 amended regulations of the Indian Reorganization Act of 1934 an Indian is defined as: (1) a member of a federally recognized tribe, (2) descendants of members of recognized tribes who were residing on an Indian reservation on June 1, 1934, or (3) a person who has one half or more Indian blood.[16] This definition entails both an ethnological and a political/legal meaning. As Felix S. Cohen observed in his classic *Handbook of Federal Indian Law*,

> ethnologically, the Indian race may be distinguished from the Caucasian, Negro, Mongoloid, and other races. If a person is three-fourths Caucasian and one-fourth Indian, it is absurd, from the ethnological standpoint, to assign him to the Indian race. Yet legally such a person may be an Indian. From a legal standpoint, then, the biological question of race is generally pertinent, but not conclusive. Legal status depends not only upon biological, but also upon social factors, such as the relation of the individual concerned to a white or Indian community.[17]

Equally pertinent to our discussion is that when the United States deals with tribes in an intergovernmental way it has done so not on the basis of race, but on a political basis. This is to say, the United States treats with tribes as social-political groups towards which it has unique legal/political responsibilities because of the inherent sovereignty of each party.[18]

While Cohen's categorization of four racial groups has a number of problems scientifically, it remains a pertinent fact that for the purposes of federal Indian policy and law *race* coexists uneasily alongside the *political basis* (as exemplified in the hundreds of ratified treaties negotiated between tribes and the European nations and later the United States) as the defining factors

in the tribal-Western relationship. Price and Clinton and Cohen's definitions of "Indian" actually raise more questions than they answer. And since the term "tribe" has similar racial/political connotations, it also is problematic. For example, to what extent is the federal government's relationship with tribes based on race? On politics? Does this vary from tribe to tribe? From administration to administration? Does the United States have a legal and moral obligation to *all* indigenous groups, or only to those with whom it has maintained long-standing political (read: treaty) relations? Does the issue of "domicile" (geographic location) have any legitimate bearing on the tribal-federal relationship? Finally, should the issue of "federal recognition" be used to distinguish tribes apart from "state-recognition"? And if so, to what degree?

We argue that the social construction of "Indianness" created by Euroamericans is among the most critical elements in determining which tribes will be recognized. What a person or group is perceived to be is just as much a function of subjective phenomena as of objective phenomena. Therefore, as we will demonstrate, the concepts of race, rights, obligations, and even domicile are as much dependent on the social construction put upon them as on their objective existence. The ability of an Indian tribe to become and remain a federally recognized tribe is dependent on how well that tribe "fits" the social construction of "Indian tribe" as perceived by federal officials.

SOCIAL CONSTRUCTION OF GROUPS AND FEDERAL INDIAN POLICY:

The literature on interest groups and public policy is extensive. Factors such as size and cohesiveness,[19] resources,[20] social status,[21] and incentives[22] have all been analyzed in attempts to explain the differential success rates of interest groups in policy formulation and implementation. But until recently the concept of the social construction of group identity has been overlooked as a factor in public policy analysis. The concept of group identity may be of little importance in a homogeneous society, in that everyone in the population has a similar racial, religious, or cultural identity. In a heterogeneous, pluralistic society, particularly one in which discrimination based on racial or ethnic identity has been relatively common, group identity can be critical to the benefits or burdens levied on the group. The difficulty in addressing the impact of socially constructed identities of groups in the United States derives from the regime's commitment to liberalism. Lockean liberalism, upon which the United States Constitution is based, argues that governments are created to protect the individual natural rights of "life, liberty and property."[23] Liberalism has been an attractive and successful political philosophy worldwide because it rejects the political legitimacy of most socially constructed group identities such as class and race. Yet despite philosophical and constitutional denial of group differences, in

practical politics they remain firmly entrenched. Behavioral scientists often use group identity (e.g. race, religion, gender, etc.) as explanatory factors in social analysis. The high explanatory power of these "identity" factors demonstrates their significance for study and discourse about political issues and theory.

Identity politics is critical to understanding the background and intent of federal Indian policies. The term "Indian" itself is a social construction. Historians Robert F. Berkhofer Jr.[24] and Brian W. Dippie[25] both argue that "Indian" is a social construction created by the European immigrants to America. According to Berkhofer, "The initial image of the Indian, like the word itself, came from the pen of Columbus."[26] The Arawak people were described by Columbus as "well built and of handsome stature," "marvellously timorous," "so guileless and so generous," and having a "very acute intelligence,"[27] in other words, he crafted the image of the "noble savage," the innocents of nature extolled by the later Romantic poets and philosophers.[28] Columbus also originated the concept of the hostile and depraved "red devil" when he described the ferocious and cannibalistic Caribs. That image was permanently embedded in the European immigrants' impressions as well. The frontier stories of Indian "massacres" are but later examples of this same social construction of the indigenous inhabitants of the Americas.

Dippie maintains that these images served to reflect the moral dichotomy of Euroamericans' lives. On the one hand, these settlers championed the moral superiority of the civilization they were bringing to the wilderness and, on the other hand, they mourned the loss of innocence and virtue that civilization meant. Since the Indian represented the innocence of the lost wilderness to the white man, the Indian, by definition, could not continue to exist.[29] So the myth of the "Vanishing American" was born.[30] Books like *The Last of the Mohicans* by James Fenimore Cooper and artistic depictions like *The End of the Trail* by James E. Fraser helped to cement this myth into the American culture.

A curious aspect of these constructions was their timelessness. "In spite of centuries of contact and the changed conditions of Native American lives,[31] Whites picture the 'real' Indian as the one before contact or during the early period of that contact."[32] By creating an image that was "uncivilized" by European standards, the immigrant Americans were able to define away any Native Americans who adopted white culture. Federal Indian policy in the nineteenth century reflected these myths. Indians were removed to reservations where they were illegally confined until they had become suitably acculturated so that they could begin "productive" lives in the Euroamerican political/economic culture.

In the attitudes of federal policymakers of the time, it was thought impossible for Indians to lead "productive lives" in their homelands. Reservations were considered little more than temporary detention colonies

where tribal members languished until such time as the communal land could be individually allotted. The 1887 General Allotment Act[33] was the inaugurating policy which eventually culminated in the allotment of 118 of 213 reservations by 1934, a gross reduction in indigenous land control from 138 million acres to 52 million acres.[34] Importantly, most of the land loss was a result of subsequent amendments to the allotment measure and in the specific congressional acts which subdivided reservations.[35]

Alongside allotment, a number of devastating assimilation measures—i.e., federally-funded Christian missionaries, exertions of criminal jurisdiction over reservation lands and residents, boarding school policies, among others—were introduced to Americanize indigenous peoples.[36] As long as Indians maintained ties to their tribe or tribal homeland, they were denied status as "Americans," entitled to the full panoply of federal benefits and protections. Federal citizenship prior to the 1924 Indian citizenship law[37] was conferred only upon those who accepted an allotment (or who, preferably, left the reservation altogether). With citizenship, Indians became subject to state law.[38] But even in cases where Indians voluntarily left the reservations[39] or where they had received individual land allotments,[40] they were still denied full citizenship rights and benefits because, according to the Supreme Court, they "remained Indians by race." Although Indians were unilaterally extended federal citizenship in 1924 and have since World War II been at least nominally integrated into the general Euroamerican political culture, the myth persists that the only "real Indian" is the "aborigine he once was, or as they imagine he once was."[41]

It is important to note that the social construction of indigenous Americans, involving more than 540 distinctive groups, as "Indians" has persisted without input from the Native Americans themselves who traditionally, and in many cases still today, regard themselves primarily in terms of their tribal affiliation rather than in terms of "Indianness" or political allegiance to the United States or the states. Early European explorers and settlers homogenized the vastly heterogeneous tribes under the misnomer "Indians" despite their knowledge of the myriad languages and customs of the tribes. The rise of the nation-state in Europe made Europeans sensitive to differences among themselves. This sensitivity, however, was not extended to non-Western peoples.

Only in the last two decades has there been serious reevaluation of the concepts of race and ethnicity by the Census Bureau,[42] anthropologists, and others. For much of the twentieth century, schools taught that there were three races: Caucasoid, Mongoloid, and Negroid. The category Mongoloid was then divided into two racial groups, Asians and Native Americans. Recent scientific scholarship categorically demonstrates that physiognomy and skin color are useless measures of race, and that the concept of race itself is more a process of self identification and social construction than physical characteristics. Nevertheless, the ongoing tendency by a number of federal

agencies to treat Indian tribes monolithically is based on the obsolete and, more importantly, fictitious concept of "the" mythic, aboriginal Indian. However, by socially constructing a mythic Indian and then measuring demands for recognition against it, federal recognition seems more often to depend on how many Aboriginal traits the petitioning tribe retains in common with the mythic notion of "Indian" or "tribe."

The social construction of the Aboriginal Indian has "benefited" Western tribes more than the Eastern tribes. The western tribes (excepting the Southwestern groups, and their long history of interactions with the Spanish) had later contact with European culture; thus they have been able to retain more of their pre-Columbian cultures and much of their ancestral lands. The Northwest tribes who treated with Great Britain over trade developed quite different intergovernmental relations than those that evolved between the British, the colonies, and the Eastern tribes.[43] By the time the United States treated with the Western tribes, the policy of removal (1830s-1840s) was being replaced by the reservation system. While reserved land had been used by the British Crown during colonial times, it was not until the 1850s, when the policy of removal became impossible because of the westward migration of Americans to Oregon, California, and other Western regions, that the United States began as a general policy to set aside or "reserve" lands for its indigenous inhabitants.[44] Many eastern Indian communities were biologically, materially, and culturally transformed by the British and American experience to the point where they no longer fit the "image" of the "Indian"—that is, the western Indian—which by the twentieth century was well ingrained in the minds of federal policymakers.

Hence, eastern tribes have often had a difficult time convincing the federal government (and their neighbors) that they remained "indigenous" and were entitled to comparable recognition and benefits as their western cousins. In fact, there is evidence[45] that the intention of certain federal lawmakers in the 1930s for narrowing the "blood quantum"[46] requirement from one-half to one-quarter during Indian reorganization was to reduce the number of Indians eligible for federal services, while maintaining a policy that the more "primitive" and "ancient" tribes like the Hopi, Navajo, and Tohono-O'odham needed ongoing federal tutelage in the form of education, cultural activities, and technical support, to facilitate their gradual assimilation into the American mainstream.

Two additional factors are particularly salient when examining the persistence of the federal government's efforts in attempting to assimilate Indians by destroying their cultures and religions. The first is land ownership. The tribes held lands coveted by the United States and her citizens for settlement or for their natural resources. In order to legally acquire title to the land and its attendant resources, federal policymakers, the press, state governments, railroad interests, and others had to eliminate the Indian title. It was easier, less expensive, and more moral to do this by allotting

reservations and forcibly assimilating Indians rather than attempting an extermination policy that would have violated the very principles on which the United States was founded. Other racial minorities held no comparable economic leverage/burden to the budding hegemony of Euroamericans. African-Americans, Asian-Americans, and Hispanics were often segregated or simply denied any chance to assimilate.

The second factor to be considered is the level of group solidarity exhibited by the Native American tribes. Most tribes were quite cohesive social, economic, and political units. The national or tribal ties to ancestral lands and culture of other minority groups within the United States were generally broken by the immigration process or, in the case of African-Americans, by slavery. Since Native Americans still had some physical power over their traditional lands, as well as a functioning social and political unit, the only way to overcome Native Americans' collective resistance was to eliminate the tribal unit and disperse the individuals. The General Allotment Act of 1887[47] and House Concurrent Resolution 108[48]—the Termination Resolution—were both attempts by the federal government to accomplish this.

FACTORS OF SOCIAL CONSTRUCTION IMPORTANT FOR RECOGNITION:

The above discussion leads us to suggest that the following four factors are of particular importance in affecting the success or failure of a tribe to gain federal recognition.

1. **How well the tribe and its members meet the social construction of the image of an Indian.** The model of social construction proposed by Scheider and Ingram lends weight to earlier suggestions that the image policymakers have of a group will have a profound impact on the policies that are directed toward the group. Since social constructions continually evolve, we believe the time period in which recognition is sought will affect both the characteristics of the social construction and the ability of the tribe to meet that image.[49] We hypothesize that tribes whose members exhibit the most cultural and physical attributes of the mythic, aboriginal "Indian" will have the greatest likelihood of being acknowledged with federal recognition.

2. **How cohesive is the self-identity of the tribes' members?** Self-identification is a crucial element in the construction of an image by others. If the tribe has a well-defined social image, it will have a better chance of projecting that image effectively to others. The more ambiguity there is in the tribe's self-image, the more room there will be for projection of traits onto that group by others. We suggest tribes

that are internally cohesive with a well-developed tribal image will be more successful in pressing their demands for recognition than those that are not.

3. **The general public's perception of the legitimacy of the benefits or burdens directed toward a target population.** The moral value of the perceived rewards or punishments are important here. The more the general public perceives a tribe as legitimately "Indian" and morally due its benefits, the greater the likelihood of success. An established record of broken treaties and historically harsh treatment of tribal citizens lends greater legitimacy to claims against the system. As Schneider and Ingram note, "Social constructions become part of the reelection calculus when public officials anticipate the reaction of the target population itself to the policy and also anticipate the reaction of others to whether the target group *should* be the beneficiary (or loser) for a particular policy proposal."[50] Since federal recognition provides significant benefits to the tribe and tribal members, we hypothesize that the tribe's demands for acknowledgment *must* be considered legitimate by the general public, including other Indian tribes, if the tribe is to be successful.

4. **What are the tribes resources that can be used in support of its recognition efforts?** Interest group theory would lead us to predict that factors such as size, wealth, and social status are positively associated with successful efforts. For tribes that are alienated from the system,[51] or have been negatively constructed,[52] then the use of threats is the most likely lobbying tactic.[53] Tribes constructed as "dependent" have fewer resources to bring to bear in lobbying efforts but have a positive climate in which to use those resources. In keeping with interest group theory and Scheider and Ingram's model, we hypothesize that those tribes with greater resources, i.e., population, wealth, land, etc., will be more likely to be recognized by the federal government because they can bring more resources to the effort of lobbying the Congress.

In the next two sections we will use these factors to analyze the history of the Catawba and Lumbee campaigns for federal recognition.

Catawba Tribe:

On November 10, 1763, King George III of England ceded the Catawba Tribe of South Carolina a tract of land "fifteen miles square" comprising about 144,000 acres in the Treaty of Augusta (Georgia).[54] The Catawba were treated well because they had had a long-term friendship with

the English that included sending men to fight alongside Colonel George Washington in the French and Indian War and alongside the English in the Cherokee War. Though the Catawba were not completely satisfied with the Treaty of Augusta, it was accepted and became the basis for the Catawba land claims and recognition demands 230 years later.

European settlers began moving onto the Catawba Reservation sometime before the Revolutionary War. One of the first European settlers among the Catawba was Thomas "Kanawha" Spratt II who settled on the land near present-day Fort Mill about 1761. Though Spratt got along well with his Catawba neighbors, he soon began selling parcels of the land the Catawbas had leased him to other non-Indians. Within a few years almost all of the most fertile tracts within the reservation had been leased to English colonists. In 1782, after boundary disputes arose, the leaseholders agreed to have all the lands surveyed, platted, and recorded. That same year, the Catawba petitioned Congress to secure their land so it would not be "Intruded into by force, nor alienated even with their own consent."[55] Not wanting to deal with the tribe, Congress the following year passed a resolution stating that the British title over the Catawba Nation had passed into the hands of South Carolina. Congress recommended that South Carolina "take such measures for the satisfaction and security of the said tribe as the said legislature shall, in their wisdom, think fit."[56] Thus the Catawba nation became beneficiaries of a trust relationship with South Carolina rather than the United States. Ironically, the Cherokee, who had sided with the British during the Revolutionary War, were federally recognized and taxes from Fort Mill on the Catawba Reservation were sent to support them while the Catawba were left to their own resources.

Settlers continued to invade Catawba lands and by the early 1800s most of their remaining land had been leased. The non-Indian leaseholders worried about the permanence of their leases, so in 1838 South Carolina Governor Patrick Noble authorized commissioners to enter into negotiations with the Catawbas for the sale of their land. The Catawbas were willing to part with full title if the state provided enough money for land acquisition near the Cherokee in North Carolina. In 1840 the Catawba Nation and the State of South Carolina entered into the Treaty of Nation Ford. The treaty provided that the Catawbas would cede the land granted to them under the Treaty of Augusta in 1763 in return for

> a tract of land of the value of $5,000, 300 acres of which is to be good arable lands fit for cultivation, to be purchased in Haywood County, North Carolina, or in some other mountainous or thinly populated region, where the said Indians may desire, and if no such tract can be procured to their satisfaction, they shall be entitled to receive the foregoing amount in cash from the state.
>
> The Commissioners further engage that the State shall pay the said Catawba Indians $2,500 at or immediately after the

> time of their removal, and $1,500 each year thereafter, for the space of nine years . . .[57]

Unfortunately, in its haste to remove the Catawba, South Carolina had neglected to secure North Carolina's permission to have the Catawba moved to the Cherokee reservation. When the permission was belatedly requested, North Carolina refused. Some Catawba journeyed to the Cherokee reservation and did live there for a time but old tribal jealousies and the stress suffered by the remaining Cherokee as a result of the "Trail of Tears" tragedy prevented them from making a permanent home with the Cherokee. Eventually, most of the Catawbas found themselves back on their former soil but without land or money. The settlement of $2,500 and the annual payment of $1,500 promised them under the 1840 Treaty were withheld by the state because the Catawba had returned to the land. The plight of the Catawbas led South Carolina Indian Agent Joseph White to secure for them in 1843 a tract of 630 acres near the center of the "Old Reservation."[58]

South Carolina and the United States continued to try to rid themselves of the "Catawba problem." During the Removal, Congress appropriated money in 1848 and again in 1854 in an effort to remove the Catawba west of the Mississippi. In the meantime, Governor Seabrook of South Carolina was trying to get the Commissioner of Indian Affairs to underwrite the outstanding debt of $18,000 owed by South Carolina to the Catawba. As early as the 1840s the Catawba realized that they had been defrauded but it was not until the 1880s that the tribe retained lawyers to investigate their claims against South Carolina. In 1905 the Catawba launched their legal battle to recover their lands, arguing that the 1840 Treaty of Nation Ford was null and void because it violated the Indian Nonintercourse Acts[59] which required submission of all land transactions involving tribal lands to Congress.

The tribe had been able to maintain its internal cohesiveness and social identity throughout the nineteenth century despite the lack of federal or state protection because of several factors acknowledged by BIA Special Indian Agent Charles Davis in a report to the agency dated January 5, 1911.[60] These factors included, among others, size, tribal organization, religion, and character. At the time he was writing, ninety-seven individuals lived on or near the Catawba reservation who were recognized by South Carolina as being members of the Catawba Tribe. One-hundred and ten individuals were recognized as members by the tribe, the discrepancy hinging on a matrilineal descent requirement by the state. Davis noted that the small tribe had not intermarried much with their white neighbors and not at all with their black neighbors, thus "[t]he large majority are so nearly full blood as to retain the Indian characteristics, and by reason thereof they have retained their tribal life and organization. . . . This tribe has maintained a tribal organization for all time, so far as can be ascertained now. And the State [sic] has seemingly

always recognized their tribal character."[61] Religion was another factor he discussed as having some impact on the tribe's internal cohesion. Most Catawba tribal members had converted to the Mormon religion twenty to thirty years earlier and had continued in that religion during a time when there were violent activities against Mormons in South Carolina.[62] Despite poverty, lack of schooling, and general neglect by the State, the Catawba tribe was still regarded by Davis as ranking very high in regard to integrity.[63] The tribe's solidarity, acknowledged both internally and externally, helped to support the perseverance needed to pursue its legal claims against South Carolina.

The tribe persisted in its campaign in the courts and in Congress until 1934 when the South Carolina Legislature passed a resolution recommending that the care and maintenance of the Catawba Indians should be transferred to the United States. It was not until 1943 that a Memorandum of Understanding was signed between the tribe, the state, and the Department of Interior. South Carolina acquired 3,434 acres of farmland for a federal reservation. The tribe adopted a constitution under the Indian Reorganization Act, and the federal government assumed its trust responsibility over tribal affairs.[64]

The Catawba's federal recognition was short-lived. In keeping with the federal government's termination philosophy instituted in 1953[65] the Catawba tribe was approached in 1958 by both the BIA and South Carolina with a proposal for termination. The BIA agent at the time assured the Catawba that their long-standing land claim against the state based on the Treaty of Augusta and the Treaty of Nation Ford (which still had not been resolved) would be unaffected by the termination. Thus, in 1962 the federal trust relationship between the United States and the Catawba tribe was terminated. The 3,434 acre federal reservation was divided up and distributed to tribal members. South Carolina continued to hold the 640 acre tract from the 1840 treaty in trust for the tribe. At the time of termination, there were 631 enrolled members.[66]

The activism of the American Indian Movement in the early 1970s served to reignite the determination of the Catawbas—and many other tribes—to reinstitute claims. The tribe contacted the Native American Rights Fund, and in 1976 papers were filed with the Department of Interior to recover the land recognized under the 1763 Treaty of Augusta. Negotiations were proceeding between the tribe, South Carolina, and the United States when two events in December 1977 dashed all hopes of resolution. First, the local paper obtained and published tribal maps identifying specific parcels of land the tribe and state were considering for a reservation. Threatened non-Indian landowners quickly organized the Tri-County Landowners Association with the intention of stopping any settlement by asking Congress to extinguish the land claim in return for a monetary payment. Second, the increased publicity of the pending land claims led to demands by nonresident tribal members

who wanted to join in the action in hopes of securing land, benefits, or both. Negotiations stalled. The impasse continued until 1980 when the tribe filed suit in federal district court to recover possession of the 1763 treaty reservation.

In 1982, Senior Judge Joseph P. Wilson[67] dismissed the Catawba's case on the basis that the ten-year state statute of limitations for claims had expired—it being twenty years since the Catawbas' 1962 termination. The Fourth Circuit, however, reversed the decision arguing that termination did not affect the 1763 reservation. The State appealed to the United States Supreme Court. In the meantime the Solicitor for the United States Department of Justice under the Reagan Administration switched sides and filed an *amicus curiae* brief in support of South Carolina. The Supreme Court reversed the Fourth Circuit by ruling that termination did make the land claim subject to state law and then remanded the case to the Fourth Circuit to determine what the impact would be on the tribe's claim.[68]

The Fourth Circuit Court in 1989 found that there was still some standing for the claim. South Carolina law concerning adverse possession of real property limits claims to ten years when there has been continuous occupancy of the land by the trespasser, and to twenty years if the land has changed hands during that period.[69] The twenty-year limit (1962-1982) meant that a substantial amount of the land claimed would still be subject to litigation since the clock had stopped running on the claim when the tribe filed suit in 1980. It was estimated that sixty percent of the original 27,000 land owners were still subject to litigation by the tribe. Most real estate transactions in York County, home of the Catawba claims, were held up because of the unwillingness of mortgage companies to provide title insurance.

At this point Congressman John Spratt (a descendent of Thomas "Kanawha" Spratt), Governor Carroll Campbell, and Secretary of the Interior Manuel Lujan expressed their interest in a settlement. Negotiations began again in 1990 and continued through 1991, until South Carolina's interest faded after both the Federal District and Appeals Court denied the Catawba's petition for a class-action suit. It seems South Carolina and the landowners believed they could win the case by outlasting the tribe. With the clock running on the twenty-year statute of limitations (the clock had been restarted in 1991 when Judge Wilson refused the class-action petition), the tribe decided to proceed with its claim, and NARF attorneys began preparations to serve papers on 61,767 individual occupants of the disputed claim area.

This action prompted immediate interest on the part of South Carolina and land holders in renewed negotiations. To facilitate negotiations, Congress enacted legislation extending the statute of limitation for an additional year to October 1, 1993. The tribe established the date of September 2, 1993 as the deadline. If agreement had not been reached by that date, they argued, the summons would be mailed. On January 5, 1993, H.R.

2399, the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, was introduced into Congress by Congressman John Spratt. Negotiations were resumed in good faith and on February 20, 1993 the tribe voted 289 to 42 to accept the settlement.[70] Congress passed the act that summer and the final agreement was signed by South Carolina Governor Carroll Campbell on November 29, 1994 at the Catawba Reservation.[71]

The settlement provided for the following: The trust relationship between the Catawba Indian Tribe and the United States would be restored, the tribe would become a federally recognized tribe, and its members would be eligible for federal benefits. The United States and South Carolina would contribute $50 million dollars over a period of five years to be put into five trust funds: Land Acquisition Trust, Economic Development Trust, Social Services and Elderly Assistance Trust, Education Trust and a Per Capita Payment Trust to be managed by the Secretary of the Interior. The tribe was given ten years to expand the existing reservation to 3,000 acres, plus 600 acres of wetlands or undeveloped land. Tribal jurisdiction was recognized over basic governmental powers, including zoning, misdemeanors, business regulation, taxation, and membership. Tribal membership would be based on direct descendency from the 1961 Federal Catawba Roll. South Carolina, however, reserved the right to continue to exercise criminal jurisdiction over Indians and non-Indians on the reservation. Finally, the tribe was exempted from the Indian Gaming Regulatory Act.[72]

The victory for the Catawbas was as welcomed as it was incomplete. Some tribes complained that the Catawbas gave too much of their sovereign powers to the state. However, after 153 years of negotiation, legislation, and litigation (the final litigation process having been continuously in the federal courts for seventeen years), it appeared that the settlement was at least sufficient. The Catawbas were able to recover their status as a federally recognized tribe and their land base was expanded and confirmed. The fact that both issues were so clearly drawn by the long-standing claim and the cohesiveness of the tribe in pressing that claim helped to cement the perception that the Catawbas were still a tribe. Conversely, the fact that they were so acculturated into the Euroamerican system and had lived so long under South Carolina law negatively affected their ability to reclaim criminal and regulatory powers from the state. In the areas that the Catawbas managed to fit the image of the "real" Indian, they were successful; in areas where they seemed too "westernized" and assimilated, they lost. The losses were sustained because the claims were not considered legitimate.

LUMBEE TRIBE:

The Lumbee Nation, numbering about 39,000, are a majority of Robeson County's indigenous population. According to Robert K. Thomas, the noted Cherokee anthropologist, genetically the Lumbee people (the term

Lumbee, we shall see shortly, is of recent vintage) are the descendants of remnants of several small Southeastern tribes: the Hatteras, Saponi, and Cheraw, who from the 1780s through the 1840s worked their way into Robeson County where they intermarried and gradually developed a distinctive tribal identity.[73] This account of Lumbee origins, however, directly contradicts the most prominent theory of Lumbee roots that posits that the Hatteras Indians living on the Outer Banks of North Carolina intermarried with John White's "Lost Colony" of Roanoke Island sometime in the late 1500s.[74] The latest Lumbee "origin" theory asserts that the Lumbees are primarily descended from the Cheraw Tribe of South Carolina and related Siouan speakers who were said to have inhabited the area now known as Robeson County since the later eighteenth century.[75] These conflicting origin theories have contributed in no small part to some of the identity questions Lumbees have confronted internally. Since we are focusing, in part, on how important the federal government's social construction of "Indian identity" is, we will see that these socio-cultural questions have clearly discernible political manifestations.

Interestingly, there are six other groups in Robeson County that insist they also are distinctive political-cultural tribal polities. This tribal differentiation—the separation of Robeson County's indigenous population into several politically, though not genetically, disparate groups—and the ramifications of this segmentation for internal tribal dynamics and intergovernmental relations is a powerful dynamic affecting the Lumbees' quest for federal acknowledgment. This is arguably the most persistent conundrum confronting the county's indigenous population, especially as it pertains to the tribe's efforts to project a common tribal identity that might facilitate federal recognition. The Lumbee's leadership understands, in other words, that it is crucially important for recognition purposes that they be able to meet, or at least give the appearance of having met, the extant Anglo social construction of what a "tribe" should appear to be like: that is a tight, fairly cohesive unit lacking any disruption to their common identity.

The non-Lumbee indigenous population of the county, however, is less concerned about satisfying the federal government's social construction, and seems more intent on satisfying the perception of other tribes, particularly established Northeastern tribes like those constituting the Iroquois Confederacy. This has contributed to the proliferation of disparate organizations—six in all, besides the Lumbee Tribe.[76] Most of these groups have adopted the name Tuscarora as part of their tribal designation, because the Tuscarora Tribe for several centuries inhabited portions of eastern North Carolina before they were defeated in battles with North Carolina colonists. The bulk of the tribe departed for New York in the early 1700s.

Each of these six other groups is pursuing an independent path toward federal recognition. This is not the forum, however, to detail the controversial developments leading to this recent proliferation of groups.

This splintering and the lack of consensus among the competing political, yet biologically related, groups have made it much more difficult for the Lumbees or the other groups to secure federal acknowledgment.

This has been most evident since the latest administrative and legislative recognition began in the late 1980s. Before then, the Lumbee tribe generally understood itself internally and presented itself externally as a relatively cohesive people. However, since the formation of the first splinter group, the Eastern Carolina Tuscarora Organization in 1970, this cohesion has been shattered. Thus, when the early versions of the Lumbee recognition bill were introduced in Congress during the 1980s, the measures were vigorously opposed not only by some other tribes and BIA officials, but also by the non-Lumbee indigenous groups. The general fear of these tribal fragments was that they would be subsumed under the Lumbee tribe and would not be allowed to petition the federal government separately.

This indigenous segmentation also creates uncertainty and confusion among outsiders about Lumbee identity. For instance, the federally recognized Eastern Band of Cherokee has been a stalwart opponent of Lumbee recognition. In part, its resistance results from the historical fact that the Lumbees were misnamed Cherokees of Robeson County by non-Indians and that at least one segment of contemporary Robeson County Indians still identifies itself as "Cherokee." Jonathan Taylor, a former Eastern Cherokee chief, said in testimony against the Lumbee recognition bill in 1988 that "there are only two Cherokee Tribes; one of them is in North Carolina [the Eastern Band] and the other one is in Oklahoma [the Cherokee Nation of Oklahoma]."[77]

Notwithstanding the importance of tribal segmentation, we concentrate on the Lumbee for several reasons: first, the Lumbee tribe dwarfs the other factions and all other non-recognized Indian tribes; second, the Lumbees are one of a handful of tribal groups that was informed by the associate solicitor of Indian affairs of the Department of Interior that they were precluded from using the administrative process for recognition established by the BIA in 1978; and third, a focus on the Lumbees is warranted because their original (1956) acknowledgment legislation arose during the termination era when the United States unilaterally severed its political relationship with a number of tribes. The termination years have since been replaced by self-determination and a majority of the tribes and Indian groups that were terminated in the 1950s and 1960s have since been restored to federal status. The Lumbee Tribe remains, politically speaking, frozen in time—connected to an aberrant federal policy that has since been forcefully repudiated by the Congress and the executive branch.

The Lumbee Nation, unlike the Catawba Nation, which has had bilateral political dealings with European nations, the colony (later state) of South Carolina, and the federal government since the 1700s, has been in active pursuit of either federal acknowledgment or federal aid for a little more

than 100 years. The Lumbee's initial contact with the federal government was in 1888 when the tribe's leadership petitioned Congress for education aid. The Commissioner of Indian Affairs denied the tribe's request on the grounds that North Carolina already was providing some money for the Indians' education and because the BIA maintained that it did not have enough money to meet the "recognized" tribes' needs.

And unlike the Catawba, who had long-standing dealings with South Carolina from the colonial period, the Lumbees relations with North Carolina were of a more recent vintage. This is the result of several factors. The Lumbees were a relatively small and powerless tribe during the formative years when the colonial, later state government, was evolving. The Lumbees' predecessors settled in an area of North Carolina that enabled them to avoid prolonged contact with colonial/state government. They largely were ignored by the federal government because they posed no military threat to the United States or American settlers, they did not inhabit lands deemed desirable, and they were perceived to have been an incorporated tribe in relation to the state's political and economic infrastructure.

Collectively, the Lumbee tribe had few formal political dealings with the state before the 1860s. This era of nonpolitical relations began to change after the Civil War when the legislature enacted a law that provided for separate white and Negro schools. The Lumbees then sought political redress from the state because they were denied admittance to white schools and refused to send their children to Negro schools.[78]

Gradually, the county's Democratic leadership became aware of the tribe's growing voting potential. North Carolina's response was enactment of a law in 1885 which acknowledged the Lumbee as the Croatan Indians of Robeson County. What this law did was establish a separate school system for tribal members. The Lumbees (Croatans) were able to parlay their growing political clout into additional state legislation that established the Croatan Normal School, which was under exclusive Indian control.

By the early 1900s, the term Croatan had attained a pejorative connotation, with local whites often shortening it to "Cro," short for "Jim Crow," the vernacular term for institutionalized racial segregation. The Croatans perceived this as a racial slur and requested a different tribal name. In 1911 the legislature enacted a law that deleted the now-despised word "Croatan" and simply inserted the generic term "Indian." They were henceforth to be known as "Indians of Robeson County."

This terminology proved unsatisfactory as well and, in 1913, anxious to be defined culturally and socially as distinct from others, they were given yet another name. This time they were designated as "Cherokee Indians of Robeson County." This resulted from the contention of some historians and anthropologists who argued that some western North Carolina Cherokees had intermarried with the Indians of Robeson County during the Revolutionary War.[79]

Officially, the "Cherokee" designation remained on the state's statute books, and over the Eastern band of Cherokees' strenuous objections, until the 1950s, when the name Lumbee was adopted. In the early 1930s, there had been another legislative push, this one on the federal level, to rename the Robeson County Indians. The term bandied about was "Cheraw," an historical tribe inhabiting north-central South Carolina. Research on the Cheraw connection was conducted by the noted anthropologist Dr. John P. Swanton of the Smithsonian Institution. At the time it was the most historically accurate and detailed to date. Swanton argued that the Indians of Robeson County were "descended mainly from certain Siouan Tribes of which the most prominent were the Cheraw and Keyauwee."[80] He proposed the name "Siouan Indians of Lumber River." This measure, however, was opposed by the BIA who argued that it would entitle the tribe's fairly substantial membership to federal services. Ultimately the measure was tabled.

In the early 1950s, a campaign was begun by several prominent local Indians to have the tribe's name changed again. The Reverend Doctor F. Lowry, the leader of this movement, argued that because the tribe was comprised of members from various tribes, no single historical name was appropriate. He suggested that the tribe adopt a more geographically-based name. The name chosen was "Lumbee," which was derived from the Lumber River that flows through the county. In 1953 North Carolina enacted a law designating the people as the "Lumbee Indians of North Carolina."[81] This law often is interpreted as an extension of "recognition," but a credible case can be made that the state still had not explicitly defined the services to which the tribe was entitled, the immunities to which recognition entitled the tribe, and the aspects of self-government the state was willing to acknowledge.[82]

After the Lumbees were acknowledged by North Carolina, they then launched their drive for federal recognition. Three years later, on June 7, 1956, Congress passed "An Act Relating to the Lumbee Indians of North Carolina."[83] The federal law used language nearly identical to that of the state law. However, at the request of the Department of Interior—the agency spearheading the national termination policy—an exclusionary clause was inserted providing that "nothing in this Act shall make such Indians eligible for any services performed by the United States for Indians because of their status as Indians, and none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Lumbee Indians."[84]

Ironically, then, the 1956 federal law acknowledged the Lumbees as a distinctive tribe, yet simultaneously precluded them from the federal services and protection generally provided to other acknowledged tribes. In other words, the tribe was recognized and terminated in the same legislation.

The Lumbees made several sporadic efforts to have the restrictive language excised in the 1970s, all to no avail. It was not, however, until 1988 that the tribe decided to go full speed for the establishment of diplomatic

relations. Bills have been introduced in every Congress since then to extend the full range of federal benefits and sanctions to the Lumbee tribe. To date, each bill has been defeated.

While the end to the Lumbee's quest is closer than ever (the House in 1993 passed the measure), there are no guarantees that it will be enacted anytime soon with the Republicans steering Congress toward less government and lower federal expenditures. The overwhelming preponderance of evidence suggests that the Lumbee tribe meets most of the ethnological and legal-political criteria that the federal government uses to determine the Indian groups to which it has obligations. Yet it retains a nebulous status as a quasi-recognized tribe.

Analysis of Recognition Factors:

In this last section we return to our social construction model and comparatively assess the political "success" of the Catawbas, in contrast to the political "defeats" of the Lumbees.

Social Construction of the Tribe:

There have been nearly 300 years of relations between the Catawba Tribe, South Carolina and the United States. Since before the French and Indian Wars, South Carolina has had formal government-to-government relations with the Catawbas. Although the state had tried several times to terminate the relationship, the social construction was one of an established Indian tribe.

On the other hand, the major argument used by Lumbee opponents is their contention that the Lumbee "lack" certain "genetic" and "cultural" features which other recognized tribes are said to possess. Thomas noted this in his 1980 study and said that many local whites and some other tribes express the opinion that Lumbees are not "real" Indians. In other words, they are perceived as not being a "pure genetic race, they do not have a distinctive aboriginal language, and they lack a 'distinct tribal religion.'"[85] This is a perception that dates back to the nineteenth century and continues today even when contradicted by solid historical, anthropological, and political evidence. The matter is further complicated by the fact that the Lumbees "present themselves as members of different tribes [i.e. the six other Indian groups in the county], which causes some confusion on the part of many Indians of other tribes."[86]

Karen Blu's 1980 study, *The Lumbee Problem: The Making of an American Indian People*,[87] which focused on the political and legal history of the Lumbees, essentially argued that Lumbee political activities have been affected by the "interplay between their own and others' conceptions of who they are."[88] More importantly, her work posited that Lumbee ethnic identity—

which is a blend of several tribes with an unquantifiable but discernible amount of Euroamerican and African-American ancestry—by "lacking what are thought to be 'traditional' Indian customs and traits, that Indianness is based in an orientation toward life, a sense of the past, 'a state of mind.' It is a *way* of doing and being that is 'Indian,' not what is done or the blood quantum of the doer."[89] This unique brand of indigenous identity is a central factor that has precluded the Lumbee people from securing federal acknowledgment.

Additionally, because the Lumbees did not sign treaties with colonial, state, or federal powers (political recognition), and since they have never inhabited a reservation (territorial dimension), these factors are sometimes weighed against them as further evidence that the Lumbees are not a legitimate tribe.

Social cohesiveness:

There are at least three factors contributing to the maintenance of the continued social cohesion of the Catawba tribe. First, outsiders accord the tribe legitimacy. Second, importance has been placed on continuing the traditional cultural arts of the tribe, particularly pottery from the clay of the Catawba River bottoms, despite having lost title to most of the land wherein the clay is found. The Catawba are the only Eastern tribe to have continued, uninterrupted, pottery making using the traditional designs and the same clay used by their ancestors. One tribal member credited the survival of the tribe during the Great Depression to pottery, as it was the only income-producing activity the tribal members had during that period.[90] The third factor was religion. Although the Catawba were exposed to Christian missionaries since the early 1700s, it was not until Mormon missionaries approached the tribe in the 1880s that many Catawba converted to Christianity. A report from 1934 noted that ninety-five percent of the 300 tribal members participated in Mormon services. The Mormon affiliation contributed to social cohesion through church participation, a banding together for protection, and a sense of uniqueness.[91]

The fact that the Lumbees are a melange of several tribes appears to be an inherent weakness in their social cohesion from the federal government's perspective. The recognition process seems to prefer tribes with a long historical track record, even though it was European colonization that scattered the original tribes and destroyed their internal governing structures. Nevertheless, the Lumbees have developed, over a relatively short period of time, a fairly strong internal cohesion. However, the contemporary fragmentation which has erupted within the tribe has caused severe intertribal and intergovernmental problems.

Perception of the Legitimacy of Tribal Benefits:

The United States history of severed treaties and broken promises with American Indian tribes has generated a reservoir of sympathy toward Indians. In the case of the Catawbas, the failure by South Carolina to live up to its treaty obligations was well-documented and contributed to public empathy for the Catawbas. The major roadblock toward resolution of the claim was the time that had elapsed and the number of people involved in the claim as a result of the centuries of inequitable treatment. But as Justice Blackmun stated in his dissent in *South Carolina* v. *Catawba Indian Tribe*:

> When an Indian Tribe has been assimilated and dispersed to this extent—and when, as the majority points out, thousands of people now claim interest in the Tribe's ancestral homeland. . . the Tribe's claim to that land may seem ethereal, and the manner of the Tribe's dispossession may seem of no more than historical interest. But the demands of justice do not cease simply because a wronged people grow less distinctive, or because the rights of innocent third parties must be taken into account . . . I agree with Justice Black that "[g]reat nations, like great men, should keep their word."[92]

The perception of the legitimacy of the Lumbee claim for benefits, on the other hand, is problematic for the reasons listed above. Although the tribe has garnered a great deal of support over the years, there is still the perception that the Lumbees simply have not fared as poorly as tribes with whom the United States negotiated and then subsequently broke treaties. In other words, while the Catawba have been seen as weak and dependent, the Lumbee are often perceived as strong contenders. Their large population size, relative to other tribes, also makes it more difficult for the Lumbees to gain the sympathy of non-Indians and western tribes who believe that the Lumbees' needs are not as legitimate as those of other tribes because they have not suffered the historical humiliations of tribes like the Catawbas.

Economic Resources:

The Catawbas are a small and relatively poor tribe. In 1980 there were only 953 enrolled members. The tribe had no other resources than its 640 acre reservation. Yet it had an unresolved land claim stemming from the Augusta Treaty in 1763. Ultimately, it was that claim that provided the leverage to obtain federal recognition, as well as a substantial cash settlement.

The Lumbee, by contrast, are the largest non-federally recognized tribe, and they are in the top five among all tribes in population.[93] The elements of large population and the estimated costs of serving the tribe's membership have been used as evidence by the BIA on many occasions to oppose the Lumbees' legislative attempts at recognition. In 1890, Indian

commissioner Thomas J. Morgan responded to the Lumbee request with the following statement:

> While I regret exceedingly that the provisions made by the State of North Carolina are entirely inadequate, I find it quite impractical to render any assistance at this time. . . . So long as the immediate wards of the government (some 36,000 Indian children) are so insufficiently provided for, I do not see how I can consistently render any assistance to the Croatans or any other civilized tribes.[94]

Testifying in 1988, Assistant Secretary of Indian Affairs Ross Swimmer (Cherokee), said a major reason for the administration's opposition to Lumbee recognition was "the sheer [financial] impact, which is estimated to be $30 to $100 million per year."[95] BIA officials have been quoted as saying that if it had not been for the size of the tribe, the Lumbees would have been recognized long ago.[96]

On the first three factors our original hypotheses hold. It is only on the last factor the hypothesis was contradicted. It was the very size and wealth of the Lumbee tribe that in the end helped defeat its demand for recognition. The findings have import for interest group theory and the newly emerging work in identity politics, in that the factors surrounding how tribes are socially constructed have in this area of public policy at least as much and perhaps more significance than traditional measures of power such as size, wealth, and economic resources.

CONCLUSION:

This preliminary research[97] and the social construction theory applied within it is intuitively understandable to indigenous nations, their citizens, and their political representatives. Tribal groups have known for the better part of nearly two centuries that Americans, particularly Anglo-Americans, harbor well-defined, if inherently contradictory ideas about who is an "Indian," and what constitutes a "tribe." In fact, indigenous groups have sometimes been able to manipulate the competing social constructions to gain tangible benefits (i.e., the Hopi in their long-standing battle with the Navajo Nation over disputed territory in Northern Arizona, effectively parlayed the image many Anglos have of them as a small, surrounded, and still largely "traditional" people in the grips of the Navajo, a numerically superior and somewhat less "traditional" people, to wrest substantial congressional victories *vis-a-vis* the Navajo Nation.)

Thus, the core political question of "Who gets what, when, and how?" is a reciprocal process in which tribes are far from passive recipients of power-

driven policymakers. Of course, federal lawmakers control not only the purse strings, but the recognition string as well. Therefore, their decisions have greater weight in terms of the benefits to be dispensed or withheld. Moreover, federal policymakers are not above manipulating their constructs of Indian tribes though the motivations and goals vary from person to person and agency to agency. And while tribes today are in a better position to respond practically and quickly to such image orchestrations, they remain tenuously situated and are overly dependent on the good will of Washington lawmakers to make sound policy decisions since they lack lobbying clout.

By adding the concept of social construction to interest group theory we have been able to more completely analyze the factors associated with federal recognition. We are not suggesting that interest group theory is unimportant. On the contrary, the ability of the Catawba Tribe to use economic resources in the form of a land claim to apply pressure to the system was the catalyst that eventually led to their success in Congress. The sheer size of the Lumbee Tribe, and the implications of that size for the federal budget, has been a critical factor in the denial of their petition. Nevertheless the social construction of each tribe presents the image and framework within which those factors are addressed and at least in these cases is the more powerful determinant. The social construction of the Catawbas as a historic Indian tribe with an outstanding claim against South Carolina lent legitimacy to their petition. On the other hand, the petitions of the Lumbees, despite more resources, have been denied because the social construction of the tribe has not as yet been seen by either the federal government, or for that matter enough other recognized Indian tribes, as legitimate.

Social constructions of tribes—particularly of so-called non-recognized tribal groups—which are overtly prejudicial, based on archaic understandings, or simply steeped in wrong-headed and pseudo-scientific language, must be counteracted with balanced, historically based, accurate information so that intertribal and intergovernmental decisions as important as the extension of diplomatic relations are made in full view of the facts and not in the shadows of lingering stereotypes.

Notes

1. See, e.g. Grant Foreman, *Indian Removal: The Emigration of the Five Civilized Tribes of Indians* (Norman: University of Oklahoma Press).

2. See, e.g., Helen Hunt Jackson, *A Century of Dishonor*, reprint ed. (Norman, OK: University of Oklahoma Press, 1995, originally published in 1881); and K. Tsianina Lomawaima, *They Called it Prairie Light: The Story of Chilocco Indian School* (Lincoln, NE: University of Nebraska Press, 1994).

3. See, e.g., Donald Fixico, *Termination and Relocation: Federal Indian Policy, 1945-1960* (Albuquerque, NM: University of New Mexico Press, 1986).

4. See, e.g., J. Anthony Paredes, ed. *Indians of the Southeastern United States in the Late Twentieth Century* (Tuscaloosa, AL: University of Alabama Press, 1992).

5. Anne Schneider and Helen Ingram, "Social Construction of Target Populations:

Implications for Politics and Policy," *American Political Science Review* 87 (June 1993), pp. 334-347.

6. Ibid., p. 337.

7. Ibid., p. 338.

8. See William Quinn, Jr., "Federal Acknowledgment of American Indian Tribes? The Historical Development of a Legal Concept," *The American Journal of Legal History* 34 (October 1990):331-363.

9. 56 *Federal Register* 47, 325 (1991).

10. See David E. Wilkins, "The U.S. Supreme Court's Explication of 'Federal Plenary Power:' An Analysis of Case Law Affecting Tribal Sovereignty, 1886-1914," *American Indian Quarterly*, vol. 18, no. 3 (Summer 1994): 349-368.

11. The Indian Civil Rights Act (1968), which incorporates most of the protections of the Bill of Rights and the Fourteenth Amendment, was passed by Congress to protect tribal members from tribal government, but does nothing to protect tribal governments from the federal government. The fears of the Founding Fathers against an all-powerful, centralized government have been realized in federal Indian policy through the "plenary power" doctrine.

12. 25 C.F.R. 83.7 (a)-(g) (1991).

13. See, e.g., Terry Anderson, "Federal Recognition: the Vicious Myth," *American Indian Journal* (May 1978): 7-19; Russel Lawrence Barsh, "Dialogue on Federal Acknowledgment of Indian Tribes: A Challenge to Anthropologists," *Practicing Anthropology*, vol. 10, no. 2 (1988); 2, 20-21; and Susan D. Greenbaum, "In Search of Lost Tribes: Anthropology and the Federal Acknowledgment Process," *Human Organization*, vol. 44, no. 4 (1985): 361-367.

14. M. Annette Jaimes, "Indian Identification Policy," *Native Americans and Public Policy*, eds. Fremont J. Lyden and Lyman H. Legters, (Pittsburgh: University of Pittsburgh Press, 1992), pp. 125-126.

15. *Federal Register* Vol. 59 (February 25, 1994), p. 9295.

16. Monroe E. Price and Robert N. Clinton, *Law and the American Indian: Readings, Notes and Cases* 2nd ed. (Charlottesville, VA: The Michie Company, 1983), p. 62. See also Indian Reorganization Act of 1934, 25 U.S.C. 479 (1976, 43 Fed. Reg. 2393 (1978), 25 C.F.R. 51 (1982). Indian Country, according to 18 U.S.C.A. 1151 (1948), is (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

17. Felix Cohen, *Handbook of Federal Indian Law*, 1972 reprint (Albuquerque, NM: Univ. of New Mexico Press), p. 2.

18. See *Morton* v. *Mancari*, 417 U.S. 535 (1974).

19. Mancur Olson, *The Logic of Collective Action* (New York: Schocken Books, 1971); Roger V. Cobb and Charles D. Elder, *Participation in American Politics: The Dynamics of Agenda Building* (Boston: Allyn and Bacon, 1972).

20. C. Wright Mills, *The Power Elite* (London: Oxford University Press, 1956).

21. G. William Domhoff, *The Higher Circles: The Governing Class in America* (New York: Vintage Books, 1971); Thomas R. Dye, *Who's Running America: The Bush Era*, 5th ed. (Englewood Cliffs, NJ: Prentice-Hall, 1990); E.E. Schattschneider, *The Semi-Sovereign People: A Realist's View of Democracy in America* (New York: Holt, Rinehart and Winston, 1960).

22. James Q. Wilson, *Political Organizations* (New York: Basic Books, 1973).

23. John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988).

24. Robert F. Berkhofer, Jr., *The White Man's Indian: Images of the American Indian from Columbus to the Present*, (New York: Vintage Books, 1978).

25. Brian W. Dippie, *The Vanishing American: White Attitudes & U.S. Indian Policy*, (Lawrence, Kansas: University of Kansas Press, 1982).

26. Berkhofer, p. 5.

27. In Cecil Jane translation revised by L. A. Vineras, *The Journal of Christopher Columbus* (London: Hakluyt Society, 1960), pp. 194-200, as quoted in Berkhofer, p. 6.

28. Jean Jacques Rousseau, *Emile, or Concerning Education* (Boston: D.C. Heath, 1983); Francois-Rene Chateaubriand, *Atala; Rene; Les Adventures du denier Abercerage* (Paris: Gallimass, 1971).

29. See Alexis de Tocqueville, "The Three Races in the United States," *Democracy in America* Vol. I (New York: Vintage Books, 1945), pp. 343-452. de Tocqueville, like his contemporaries, believed that the Indian (culturally and physically) was doomed to death by civilization.

30. Dippie, 18-24.

31. Since the 1890s, the Native American population has been growing, not diminishing, a fact which those who subscribe to the myth of the "Vanishing American" conveniently overlook. Marlita A. Reddy (ed.), *Statistical Record of Native North Americans*, (Detroit, Mich.: Gale Research, Inc., 1993), pp. 9, 232.

32. Berkhofer, p. 28.

33. 24 St. 388.

34. Janet A. McDonnell, *The Dispossession of the American Indian, 1887-1934* (Bloomington, IN: Indiana University Press, 1991): 10.

35. The following is an inexhaustive list of some of the most important specific amendments to the Allotment Act and a number of tribal specific allotment agreements: Act of February 28, 1891 (26 St. 794); Act of August 15, 1894 (28 St. 305); Act of March 2, 1895 (28 St. 900) Act of June 10, 1896 (29 St. 340); Act of June 7, 1897 (30 St. 85); Act of May 31, 1900 (31 St. 229); Act of March 1, 1901 (31 St. 861); Act of June 30, 1902 (32 St. 500); Act of May 8, 1906 (34 St. 182–The Burke Act); Act of June 21, 1906 (34 St. 326); Act of June 28, 1906 (34 St. 855); Act of June 25, 1910 (36 St. 855); Act of September 21, 1922 (42 St. 995); and Act of February 21, 1931 (46 St. 1202).

36. See, e.g., Henry Fritz, *The Movement for Indian Assimilation, 1860-1890* (Philadelphia, PA: University of Pennsylvania Press, 1963); Francis P. Prucha, *American Indian Policy in Crisis: Christian Reformers and the Indian, 1865-1900* (Norman, OK: University of Oklahoma Press, 1976); and Janet McDonnell, *The Dispossession of the American Indian, 1887-1934* (Bloomington, IN: Indiana University Press, 1991).

37. 43 St. 253.

38. See Article I Sec. 2 and Amendment XIV Sec. 2 of the United States Constitution.

39. *Elk* v. *Wilkins*, 112 U.S. 94 (1884).

40. *U.S.* v. *Celestine*, 215 U.S. 278 (1909); *U.S. v. Nice*, 241 U.S. 591 (1916).

41. Berkhofer, p. 29.

42. Dvora Yanow, "American Ethnogenesis, Policy Judgment, and Administrative Action," *Democracy and Difference*, eds. Carol Greenhouse and Davydd Greenwood (Albany, NY: State University Press of New York, forthcoming).

43. See Howard Peckham and Charles Gibson, eds. *Attitudes of Colonial Powers Toward the American Indian* (Salt Lake City, UT: University of Utah Press, 1969). While a number of tribes, in the Southwest and Florida, had significant contact with the Spanish, those colonial relations were less invasive than relations in the British colonies.

44. See, Robert A. Trennert Jr., *Alternative to Extinction: Federal Indian Policy and the Beginnings of the Reservation System, 1846-1851* (Philadelphia, PA: Temple University Press, 1975).

45. See, U.S. Congress, Senate, Committee on Indian Affairs, Hearings on S. 2755 and S. 3645, Part 2, 73rd Cong., 2nd sess., (Washington, D.C..: Government Printing Office, 1934): 266.

46. The "blood quantum" standard, with historical (mid-13th century) roots in feudal English common law surrounding the inheritance of personal property, was originally known as the "parentelic system." It was devised by European lawyers as a means of determining heirship to a man's landed estate. The first congressional use of a specific blood-quantum, was a 1908 law which declared that the allotment of any deceased tribal member of the Five Civilized Tribes of "one-half or more Indian blood," would remain protected provided the Secretary of Interior did not arbitrarily lift trust restrictions. (35 St. 312, 315). Section 3 of this statute acknowledged that the Secretary of Interior's approval of tribal rolls was to be "conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedmen..." (Ibid., p. 313).

Four years later, in 1912, Congress, in an effort to cut federal expenditures for Indian education programs, established a one-quarter blood degree limit (37 St. 518). This act excluded from day and industrial schools Indian children with less that one-quarter Indian blood. By 1917, when Commissioner of Indian Affairs Cato Sells introduced his "New Policy," degree or quantum of blood "betrayed a deep-seated, racially-defined perception of Indian peoples' corporal physical bodies as 'uncivilized'" (Lomawaima, 1994: 82).

Blood quantum criteria since this era have been one of the most utilized, if problematic, scales for determining tribal membership/citizenship and Indian eligibility for tribal, federal, and in some cases, state social services.

47. Ch. 119,24 Stat.388; 25 U.S.C. Sect. 331.

48. Ch. 732,68 Stat. 718, codified at 25 U.S.C. Sect. 564 *et. seq.*

49. For an excellent discussion on the impact of time on policy making see: Richard E. Neustadt and Ernest R. May, *Thinking in Time: The Uses of History for Decision Makers* (New York: The Free Press, 1986).

50. Ibid. p. 335.

51. L. Harmon Zeigler and G. Wayne Peak, *Interest Groups in American Society*, 2nd ed. (Englewood Cliffs, NJ: Prentice-Hall, 1972).

52. Schneider and Ingram, "Social Constructions of Target Populations."

53. Jane H. Bayes, *Minority Politics and Ideologies in the United States* (Novata, CA: Chandler & Sharp Publishers, 1982), pp. 16-17.

54. Douglas Summers Brown, *The Catawba Indians: The People of the River* (Columbia, SC: University of South Carolina Press, 1966), pp. 250-251.

55. Ibid., p. 293.

56. Ibid.

57. Ibid., p. 306. Recorded in Vol. II of Miscellaneous Records, Office of the Secretary of State, State of South Carolina, 1896, p. 234.

58. James H. Merrell, *The Indians' New World: Catawbas and Their Neighbors from European Contact through the Era of Removal* (Chapel Hill, NC: University of North Carolina Press, 1989), pp. 250-255.

59. Section four of the 1790 Act provided that "no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." 1 Stat. 138. In 1793 Congress passed a stronger act which declared that "no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution . . ." 1 Stat. 330, 8. This latter act also included criminal penalties for violators.

60. Exhibit G, *Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993*, Hearing before the Subcommittee on Native American Affairs, Committee on Natural Resources, House of Representatives, July 2, 1993, pp. 794-814.

61. Ibid., p 796.

62. "Mormon Elders Arrested in Columbia," *The State* (June 8, 1894) p. 6; "Mormons Persecuted in Fairfield," *The State* (July 21, 1897), p.1; "Mormons Threatened in Saluda," *The State* (November 14, 1901), p. 6; "Mormon Elder Beaten in Williamsburg," *The State* (March 27, 1903) p. 1.

63. Ibid., p. 798.

64. Don B. Miller, "Catawba Tribe v. South Carolina: A History of Perseverance," *NARF Legal Review*, Vol. 18 (Winter/Spring 1993), pp. 5-6.

65. 67 St. B132.

66. Reddy, *Statistical Record of Native North Americans*, p. 215.

67. Judge Wilson was a retired District Court Judge from Pennsylvania. He was called out of retirement by the federal government when all the South Carolina judges recused themselves from the case.

68. *South Carolina* v. *Catawba Indian Tribe*, 476 U.S. 498 (1986).

69. S.C. Code Ann 15-3-370, 15-67-210 (1976).

70. "Catawba Tribe Approves Settlement with South Carolina," *NARF Legal Review* Vol 18 (Winter/Spring 1993), p.1.

71. Jeff Miller, "Future Arrives for Catawba Nation," *The State* (November 30, 1994), p. B1.

72. H.R. 2399.

73. *A Report on Research of Lumbee Origins* (Unpublished Manuscript, 1980). Authors have copy of this report.

74. See Adolph Dial and David K. Eliades, *The Only Land I Know*, (San Francisco: Indian Historian Press, 1975).

75. Jack Campisi, *The Lumbee Petition* (Pembroke, NC: Lumber River Legal Services, 1987).

76. These are: Hatteras Tuscarora Tribe, Cherokees of Robeson and Adjoining Counties, Tuscarora Indian Tribe of Drowning Creek Reservation, Tuscarora Tribe of North Carolina, Eastern Carolina Tuscarora Indian Organization, and Tuscarora Nation of North Carolina.

77. U.S. Congress, Senate, Select Committee on Indian Affairs, Hearings on S. 2672: Federal Recognition of the Lumbee Indian Tribe of North Carolina, 100th Cong., 2nd sess., 1988, p. 36.

78. Jack Campisi, *The Lumbee Petition* (1987), p. 30.

79. Adolph Dial, *The Lumbee* (New York: Chelsea House, 1993), p. 63.

80. U.S. Congress. House Report, No. 73-1752, p. 6.

81. N.C. Public Laws, 1953, Chapter 874, p. 747.

82. See Arlinda Locklear, "Recognition," *Public Policy and Native Americans in North Carolina: Issues for the '80s*, ed. Susan M. Presti (Raleigh: North Carolina Center for Public Policy Research, 1981), p. 56.

83. 70 Stat. 254.

84. Ibid.

85. Thomas, *A Report on Research of Lumbee Origins*, (1980), p. 63.

86. Ibid.

87. New York: Cambridge University Press, 1980.

88. Ibid., p. ix.

89. Ibid., p. xii.

90. Interview with Dr. Weynona Haire, Catawba Cultural Committee.

91. Charles M. Hudson, *The Catawba Nation* (Athens, GA: University of Georgia Press, 1970), pp. 77-80.

92. 476 U.S. 498, 513 (1986).

93. The Lumbee are the ninth largest tribal population when separate tribes and bands of a tribal population are combined. Reddy, *Statistical Record of Native North Americans*, p. 233.

94. U.S. Congress, House, Report #102-215, September 24, 1991, p. 2, note 1.

95. U.S. Congress, Senate, Select Committee on Indian Affairs, Hearings on S. 2672: Federal Recognition of the Lumbee Indian Tribe of North Carolina, 100th Cong., 2nd sess., 1988, p. 9.

96. *Congressional Record*, 102nd Cong., 1st sess., 1991, Vol. 137, p. H6894.

97. This study is a preliminary part of a larger book-length project in which the authors are now engaged. Comments, questions, and comparisons are invited from readers.