Articles

DOCUMENTS OF BARBARISM: THE CONTEMPORARY LEGACY OF EUROPEAN RACISM AND COLONIALISM IN THE NARRATIVE TRADITIONS OF FEDERAL INDIAN LAW

Robert A. Williams, Jr.*

I. INTRODUCTION

As an eastern Indian moved West, I have become more appreciative of the importance of a central theme of all American Indian thought and discourse, the circle. To come West, and listen to so many Indian people speak and apply a vital and meaningful discourse of tribal sovereignty, has been a redemptive experience. It has enabled me to envision what must have been for all Indian peoples before Europeans established their hegemony in America.

As an eastern Indian moved West, I continually reflect on the cycles of confrontation between white society and American Indian tribalism.[1] I am most alarmed by the structural similarities which can be constructed between the early nineteenth century Removal era and the modern West today. In the early nineteenth century, white society confronted the unassimilability of an intransigent tribalism in the East, and responded with an uncompromising and racist legal discourse of opposition to tribal sovereignty.[2] The full-scale deployment of this discourse resulted in tribalism's virtual elimination from the eastern United States. Particularly in the modern West today, white society again finds itself confronting a resurgent discourse of tribal sovereignty as its intercourse with once remote Indian Nations increases. The revival of an uncompromising and racist legal discourse of opposition to tribal sovereignty, articulated by many segments of

* Professor of Law, University of Arizona College of Law. Member, Lumbee Indian Tribe.

1. A classic study on the cycles of contact, confrontation and conquest between white society and American Indian tribalism in the southwestern United States is Professor Edward Spicer's CYCLES OF CONQUEST (1962).

2. For a discussion of the concepts of discourse and discursive formations and their role as tools of analysis in a general history, see M. FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE 3-39 (A. Smith trans. 1972).

white society today, just as certainly seeks tribalism's virtual elimination from the western United States. While there are many differences between the Removal era confrontations with tribalism and the confrontations occurring today in Indian Country over the place and meaning of tribal sovereignty in contemporary United States society, the importance of the circle in American Indian thought and discourse particularly alerts me to many alarming similarities.

In this Article, I present a short account of an early nineteenth century discourse of tribal sovereignty, that of the Cherokee Nation.[3] This vibrant and applied discourse of tribal sovereignty is contained in the documents of the Cherokee Nation's war for America with the white man. Its themes of an Indian people's fundamental human right to retain and rule its ancestral lands and the Unites States' recognition of that right in formal treaties can be found manifested in the form of the Cherokees' written laws, court systems and stubborn resistance to state jurisdictional encroachments. The Cherokees' discourse of their treaty-recognized rights of self-governing autonomy ought to sound familiar to anyone conversant with contemporary Indian Country's discourses of tribal sovereignty.[4]

Having articulated the basic themes of the Cherokees' early nineteenth century discourse of tribal sovereignty, I then analyze the opposing legal discourse deployed by whites during the Removal era in response to Indian resistance to white hegemony.[5] This analysis suggests that the principal themes of the Removal era's discourse of opposition to tribal sovereignty were appropriated from the corpus of well-known and oft-cited texts and arguments comprising a two-centuries old legitimating narrative tradition on tribalism's deficiency and unassimilability with the values of white society.[6]

I conclude this Article with a brief discussion of white society's contemporary public discursive practices that seek to constrain tribalism's self-determining rights, including the modern Supreme Court's discourse of implied limitations on tribal sovereignty. I suggest that these modern public discourses seek to confine and even to eliminate tribalism in the West today by use of central themes and thematic devices of the same racist, narrative tradition of the Indian's cultural inferiority that informed the Removal era's dominant legal discourse of opposition to tribal sovereignty. This still-vital narrative tradition of tribalism's incompatibility with the supposed superior values of the dominant society is, I argue, part of the broader legacy of European-derived colonialism and racism reflected throughout modern federal Indian law and discursive practice.[7]

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3. *See infra* text accompanying notes 23-30.

4. *See generally* Williams, *The Discourses of Sovereignty in Indian Country*, 9 INDIAN L. SUPPORT CENTER REP. 1, 1-11 (1988).

5. *See infra* text accompanying notes 31-55.

6. *See infra* text accompanying notes 60-109.

7. *See infra* text accompanying notes 110-215.

II. THE REMOVAL OF TRIBALISM IN THE EAST[8]

A. *Documents of Civilization: The Cherokees' Discourse of Tribal Sovereignty*

In his illuminating *Theses on the Philosophy of History*[9] written in 1940, a few months prior to his death in the face of Hitler's final solution, the German-Jewish writer Walter Benjamin observed that there is no document of civilization which is not at the same time a document of barbarism.[10] By all documented accounts, the United States' forced removal of the Five "Civilized" Tribes of the Indians—the Cherokees, Creeks, Chickasaws, Choctaws and Seminoles—from their ancestral homelands in the south across the Great Father of Waters was an act of barbarism.[11] In his classic

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8. I have relied on the following collections of primary documentary sources for the discussion and analysis in this part of the Article: J. EVARTS, CHEROKEE REMOVAL: THE "WILLIAM PENN" ESSAYS AND OTHER WRITINGS (F. Prucha ed. 1981); A. GUTTMAN, STATES' RIGHTS AND INDIAN REMOVAL: *THE CHEROKEE NATION V. GEORGIA* (1965); W. LUMPKIN, THE REMOVAL OF THE CHEROKEE INDIANS FROM GEORGIA (1969); R. PETERS, THE CASE OF THE CHEROKEE NATION AGAINST THE STATE OF GEORGIA (1831); DOCUMENTS OF UNITED STATES INDIAN POLICY (F. Prucha ed. 1975).

The following secondary sources were also relied on for this part of the Article: F. PRUCHA, I THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 179-242 (1984) [hereinafter GREAT FATHER]; F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834 (1962); R. SATZ, AMERICAN INDIAN POLICY IN THE JACKSONIAN ERA (1975); Royce, *The Cherokee Nation of Indians: A Narrative of Their Official Relations with the Colonial and Federal Governments*, in ANNUAL REPORT OF THE BUREAU OF ETHNOLOGY, 1883-1884 (1887); Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969); C. WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY 729-79 (rev. ed. 1937); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 58-92 (1982 ed.) [hereinafter COHEN III]; W. MOHR, FEDERAL INDIAN RELATIONS 1774-1788 (1933); R. STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT (1975); J. REID, A BETTER KIND OF HATCHET: LAW, TRADE, AND DIPLOMACY IN THE CHEROKEE NATION DURING THE EARLY YEARS OF EUROPEAN CONTACT (1976).

9. In W. BENJAMIN, ILLUMINATIONS (H. Arendt ed. 1969). For a critique and analysis of Benjamin's thought on the philosophy of history, see J. HABERMAS, *Walter Benjamin: Consciousness-Raising on Rescuing Critique*, in PHILOSOPHICAL-POLITICAL PROFILES 129-63 (1972).

10. *See* W. BENJAMIN, *supra* note 9, at 256-57.

> [A]ll rulers are the heirs of those who conquered before them. Hence, empathy with the victor invariably benefits the rulers. Historical materialists know what that means. Whoever has emerged victorious participates to this day in the triumphal procession in which the present rulers step over those who are lying prostrate. According to traditional practice, the spoils are carried along in the procession. They are called cultural treasures, and a historical materialist views them with cautious detachment. For without exception the cultural treasures he surveys have an origin which he cannot contemplate without horror. They owe their existence not only to the efforts of the great minds and talents who have created them, but also to the anonymous toil of their contemporaries. There is no document of civilization which is not at the same time a document of barbarism. And just as such a document is not free of barbarism, barbarism taints also the manner in which it was transmitted from one owner to another. A historical materialist therefore dissociates himself from it as far as possible. He regards it as his task to brush history against the grain.

Id.

11. *See generally* G. FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS (1932); A. DE ROSIER, JR., THE REMOVAL OF THE CHOCTAW INDIANS (1970); Wright, *The Removal of the Choctaws to the Indian Territory, 1830-1833*, in 6 CHRONICLES OF OKLAHOMA 103 (1928); R. SATZ, *supra* note 8, at 64-96; A. GIBSON, THE CHICKASAWS 122-83 (1972); J. MAHON, HISTORY OF THE SECOND SEMINOLE WAR, 1835-1842 (1967); J. SPRAGUE, THE ORIGIN, PROGRESS, AND CONCLUSION OF THE FLORIDA WAR (1848); F. PRUCHA, I GREAT FATHER, *supra* note 8, at 214-42.

As Professor Prucha emphasizes, the federal government's removal policy was intended to apply to all of the Indian tribes east of the Mississippi River, not just the southern tribes. The Chero-

and ironically titled text, *Democracy in America*,[12] Alexis de Tocqueville, who was *there* when the Choctaws crossed the Mississippi at Memphis in 1831, described the horrible scene as follows:

> It was then in the depths of winter, and that year the cold was exceptionally severe; the snow was hard on the ground, and huge masses of ice drifted on the river. The Indians brought their families with them; there were among them the wounded, the sick, newborn babies, and old men on the point of death. They had neither tents nor wagons, but only some provisions and weapons. I saw them embark to cross the great river, and the sign will never fade from my memory. Neither sob nor complaint rose from that silent assembly. Their afflictions were of long standing, and they felt them to be irremediable.[13]

While Tocqueville was a witness to Removal, his most famous insight into the American character was his notation of a national obsession with legal process. Thus, Tocqueville's digressions in *Democracy in America* on United States Indian policy in general contain a special poignancy in light of his reflections on the Choctaw removal. Commenting on the history of the nation's treatment of Indian tribal peoples, Tocqueville noted the United States' "singular attachment to the formalities of law" in carrying out a policy of Indian extermination.[14] Contrasting the Spaniards' Black Legend of Indian atrocities,[15] Tocqueville's *Democracy in America* complemented the United States for its clean efficiency in "legally" dealing with its Indian problem. It would be "impossible," the Frenchman declared in mock admiration of the Americans' Indian policy, "to destroy men with more respect for the laws of humanity."[16]

The cases, treatises and other scholarly commentary comprising the textual corpus of modern federal Indian law discourse revere the documents of an ineffectual United States Supreme Court declaring the Cherokee Nations' impotent rights to resist the forces intent on their destruction. In particular, the celebratory narrative traditions of federal Indian law scholarship regard the Marshall Court's 1832 decision in *Worcester v. Georgia*,[17] recognizing the inherent sovereignty of Indian Tribes, as perhaps the Removal era's most important legal legacy for American tribalism.[18] But there was a

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kee's conflict with Georgia focused public attention on the plight of the South's Five Civilized Tribes, but the federal government removed numerous tribes from the Old Northwest territory and even tribes from New York. See F. PRUCHA, I GREAT FATHER, *supra* note 8, at 243-69.

12. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 298-99 (J. Mayer & M. Lerner eds., G. Lawrence trans. 1966).

13. *Quoted in* F. PRUCHA, I GREAT FATHER, *supra* note 8, at 218.

14. A. DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 336-55 (H. Reeve trans. 1945), *quoted in* Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713, 718 (1986).

15. On Spanish New World colonizing theory and practice, see Williams, *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1, 25-48 (1983), and sources cited therein.

16. *Quoted in* Strickland, *supra* note 14, at 718.

17. 31 U.S. (6 Pet.) 515 (1832).

18. From the earliest years of the Republic the Indian tribes have been recognized as "distinct, independent, political communities," and, as such, qualified to exercise powers of self-government, not by virtue of any delegation of power from the Federal Government, but rather by reason of their original tribal sovereignty.

F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122-23 (1942) (quoting *Worcester v. Georgia*, 31

competing legal discourse in the early nineteenth century on tribalism's rights and status east of the Mississippi that denied, and in fact overcame the assertions of tribal sovereignty contained in the Marshall Court's much-celebrated *Worcester* opinion.[19]

The dominant forces of political and legal power in United States society effectively ignored Marshall's declaration in *Worcester* that the Cherokee Nation "is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter."[20] The Cherokees, along with the other southern tribes, were coerced into abandoning their territory and were resettled in the West. The laws of Georgia are now in force in the Cherokees' ancestral homelands; in fact, the traces of many once vital forms of tribalism east of the Mississippi can be found only in the pages of the historian and place names on road maps.[21] And, as noted by the witness Tocqueville, it was all accomplished with a "singular attachment to the formalities of law;" a law violently opposed to that laid down by Chief Justice Marshall in his *Worcester* opinion.

Modern federal Indian law discourse largely ignores the Removal era's now seemingly irrelevant but once dominant legal discourse of opposition to tribal sovereignty. I call it dominant because *its* basic assumptions were implemented and actualized by the dominant white society during the Removal era. The Removal era's dominant discourse on tribal rights and status was, however, itself a response to the reemergence of intransigent and militant discourses of tribal sovereignty throughout the eastern half of the United States in the early decades of the nineteenth century.

Wars and conflicts consumed the early nineteenth century Indian frontier as tribes and tribal confederacies between the eastern mountain ranges and the Mississippi River resisted further white expansion into their territories. Tecumseh of the Shawnees, the Sac Warrior Black Hawk, and Red Eagle of the Creeks were among many Indian leaders and patriots of the period who proclaimed discourses of tribal sovereignty and resistance to the white man's hegemony, and who led their people into battle in their respective wars for America with the United States.[22]

U.S. at 559). *See also* COHEN III, *supra* note 8, at 232-33 (reformulating Cohen's original celebration of *Worcester*'s ineffectual announcement of the tribal sovereignty doctrine as follows: "From the earliest years of the Republic the political independence and self-governing status of Indian tribes have been recognized by the courts. The earliest complete expression of these principles by the Supreme Court is found in *Worcester v. Georgia*." *Id.* at 233 (footnotes omitted)).

19. *See infra* text accompanying notes 31-55.

20. 31 U.S. at 561.

21. *See* Ball, *Constitution, Court, Indian Tribes*, 1 AM. B. FOUND. RES. J. 3 (1987).

The reduction of the Native American population caused by the coming of Europeans has been more gradual than a nuclear holocaust but proportionately equivalent to one, as what happened in Georgia illustrates. The land presently enclosed by the state's borders once supported several Indian nations with a combined population in the hundreds of thousands. The census currently registers the presence of a few thousand individual Indians scattered around the state. The nations are gone. The last of them, the Cherokee, were forced out in the 1830s along the Trail of Tears. Left, spread over Georgia, are shadows of nations: mounds, a great rock eagle, a blanket of names (Chattahoochee, Okefenokee, Dahlonega, Oconee, Ellijay, Tallulah). They represent what once was. *Id.* (footnote omitted).

22. *See generally* F. PRUCHA, I GREAT FATHER, *supra* note 8, at 76-88, 185-89, 219-21, 253-57.

The period's best preserved discourse of tribal sovereignty is that articulated by the Cherokee Nation. Having survived their military subjugation by the United States in the post-Revolutionary period, the Cherokee's war against white repression was continued through other means, by law and politics. Thus, there exists a large corpus of official documents declaring Cherokee resistance preserved in enabling acts of Cherokee self-government,[23] memorials to Congress,[24] and arguments made before United States tribunals of justice.[25] The basic themes of this discourse asserted the Cherokees' fundamental human right to live on the land of their elders, their right to the sovereignty and jurisdiction over that land, and the United States' acknowledgment and guarantee of those rights in treaties negotiated with the tribe.[26]

The tribe's 1830 memorial to Congress contains perhaps the most concise summary of the principal themes of the Cherokees' discourse of sovereignty.[27] The Cherokees presented their petition to the national government shortly after the passage of the Removal Act.[28] The Cherokee memorial declared the tribe's firm opposition to abandoning its eastern homeland in the following terms:

> We wish to remain on the lands of our fathers. We have a perfect and original right to remain without interruption or molestation. The treaties with us, and the laws of the United States made in pursuance of treaties, guaranty our residence and privileges, and secures us against intruders. Our only request is, that these treaties may be fulfilled, and these laws executed.[29]

The Cherokees' discourse of resistance, with its organizing theme of an Indian tribe's fundamental human right to retain and rule over its ancestral homeland, asserted itself most threateningly in an adamant refusal to voluntarily remove from Georgia westward to an Indian Territory beyond the Mississippi River. It was the Cherokees' refusal to abandon their homeland that rendered their discourse so "presumptuous" and intolerable to those segments of United States society determined to see tribalism eliminated from within the borders of white civilization.[30]

B. *Documents of Barbarism: The Removal Era's Discourse of Opposition to Tribal Sovereignty*

As described by Professor Francis Prucha,[31] it was primarily the hunger for the homelands of the southern tribes that determined Georgia and the other southern states' opposition to any discourse of tribal sovereignty.

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23. *See The Constitution of the Cherokee Nation* (1828), in A. GUTTMAN, *supra* note 8, at 18-27.

24. *Memorial of the Cherokee Indians* (1830), in *id.* at 56-62.

25. R. PETERS, *supra* note 8, at 2-3, 32-37, 38-64, 65-152, 225-48.

26. *See id.* at 249-73 (containing the treaties between the United States of America and the Cherokee Nation).

27. *Reprinted in* A. GUTTMAN, *supra* note 8, at 56-62.

28. Act of May 28, 1830, ch. 148, 4 Stat. 411.

29. *Reprinted in* A. GUTTMAN, *supra* note 8, at 58.

30. The Georgians in Congress considered the Cherokees' written constitution a "presumptuous document." F. PRUCHA, I GREAT FATHER, *supra* note 8, at 189.

31. *Id.* at 195.

"When the cotton plantation system began its dynamic drive West across the gulf plains after the War of 1812, a movement stimulated by the invention of the cotton gin and the seemingly endless demand for cotton to feed the new mills in England and the Northeast, the lands held by the Indians seemed an enormous obstacle."[32]

Helen Hunt Jackson, whose 1881 book, *A Century of Dishonor*,[33] still represents the "classic indictment"[34] of the Removal policy, also recognized the material factors that informed the early nineteenth century's dominant discourse of opposition to tribal sovereignty:

> [T]he Indians, finding themselves hemmed in on all sides by fast thickening, white settlements, had taken a firm stand that they would give up no more land. So long as they would cede and cede, and grant and grant tract after tract, and had millions of acres still left to cede and grant, the selfishness of white men took no alarm; but once consolidated into an empire, with fixed and inalienable boundaries, powerful, recognized, and determined, the Cherokee Nation would be a thorn in the flesh to her white neighbors. The doom of the Cherokees was sealed on the day when they declared, once and for all, officially as a nation, that they would not sell another foot of land.[35]

Thus, the southern states' struggle for control of the Cherokee Indians' country in the early nineteenth century had as its goals the traditional material ends of all wars: land and empire. But the singular feature of the conflict which illuminates the structural similarities between the Removal era and the contemporary situation in Indian Country in the western United States is the white man's use of law and legal discourse as a means to wage war against American tribalism.

In response to the Cherokees' legal discourse of sovereignty over their ancestral lands, Georgia enacted a series of laws that partitioned the Cherokee country to several of the state's counties, extended its jurisdiction over the territory, and declared all Indian customs null and void. Under these laws, Indians were also deemed incompetent to testify in Georgia's courts in cases involving whites.[36]

These positive expressions of Georgia's intent to exercise political jurisdiction over the Cherokee country were accompanied by a legal discourse stridently opposed to the Cherokees' own discourse of tribal sovereignty. This legal discourse of opposition to tribal sovereignty was not, however, directed only at the Cherokees, and was not the exclusive possession of the Georgians. The themes of this discourse focused beyond the Cherokee controversy, and were embraced by many members of the dominant white society who denied all Indian tribes the right to retain sovereignty over their ancestral lands. According to this discourse, tribal Indians, by virtue of their radical divergence from the norms and values of white society regard-

32. *Id.*
33. H. JACKSON, A CENTURY OF DISHONOR (1881).
34. A. GUTTMAN, *supra* note 8, at 81.
35. *Quoted in id.* at 82-83.
36. *See* F. PRUCHA, I GREAT FATHER, *supra* note 8, at 191-95; COHEN III, *supra* note 8, at 80-81.

ing use of and entitlement to lands, could make no claims to possession or sovereignty over territories which they had not cultivated and which whites coveted.[37] Treaties of the federal government allegedly recognizing tribal rights to ancestral homelands had been negotiated primarily to protect the tribes from certain destruction.[38] Destruction of the tribes now appeared inevitable, however, as the territories reserved to the tribes east of the Mississippi were being surrounded by land hungry whites.[39] Because conditions had changed so dramatically from the time of the treaties' negotiation, the treaties could no longer be regarded as binding. Only removal could save the tribes from inevitable destruction.[40]

In 1830, Georgia Governor George C. Gilmer summed up the basic thesis of the legal discourse legitimating the breach of treaties required by the Removal policy as follows: "[T]reaties were expedients by which ignorant, intractable, and savage people were induced without bloodshed to yield up what civilized peoples had a right to possess by virtue of that command of the Creator delivered to man upon his formation—be fruitful, multiply, and replenish the earth, and subdue it."[41]

Georgia Congressman, later governor, Wilson Lumpkin made virtually the same claim in his speech before the House of Representatives in support of the 1830 Removal Act, which would facilitate the expulsion of all remaining tribal Indians to the western Indian territory:

> The practice of buying Indian lands is nothing more than the substitute of humanity and benevolence, and has been resorted to in preference to the sword, as the best means for agricultural and civilized communities entering into the enjoyment of their natural and just right to the benefits of the earth, evidently designed by *Him* who formed it for purposes more useful than Indian hunting grounds.[42]

The Georgians consistently stressed that tribalism's claims to sovereignty and ownership over lands coveted by a civilized community of cultivators were inconsistent with natural law. Tribalism's asserted incompatibility with United States society east of the Mississippi was in fact the most frequently articulated theme in the argument of all the advocates of the Removal policy. President John Quincy Adams, in a message to Congress in 1828,[43] recognized the need for a "remedy" to the anomaly of independence-claiming tribal communities in the midst of white civilization.[44] This "remedy," of course, was removal of the Indians to the west, an idea which had been debated as the final solution to the "Indian problem" since Jefferson's 1803 Louisiana Purchase.[45] Noting that the nation had been far

37. *See, e.g.*, W. LUMPKIN, *supra* note 8, at 82-84.
38. *See, e.g.*, F. PRUCHA, I GREAT FATHER, *supra* note 8, at 195-97.
39. *See, e.g., Andrew Jackson's First Annual Message to Congress* (Dec. 8, 1829), in II A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 456-59 (J. Richardson ed. 1907) [hereinafter *Jackson's Message*].
40. *See, e.g., John Quincy Adams' Message to Congress* (Dec. 2, 1828), in *id.* at 415-16 [hereinafter *Adams' Message*].
41. *Quoted in* F. PRUCHA, I GREAT FATHER, *supra* note 8, at 196.
42. W. LUMPKIN, *supra* note 8, at 83.
43. *See Adams' Message*, *supra* note 40, at 415-16.
44. *Id.* at 416.
45. *See* F. PRUCHA, I GREAT FATHER, *supra* note 8, at 183-84.

more successful in acquiring the eastern tribes' territory "than in imparting to them the principles or inspiring in them the spirit of civilization,"[46] Adams observed that:

> [I]n appropriating to ourselves their hunting grounds we have brought upon ourselves the obligation of providing them with subsistence; and when we have had the same good fortune of teaching them the arts of civilization and the doctrines of Christianity we have unexpectedly found them forming in the midst of ourselves communities claiming to be independent of ours and rivals of sovereignty within the territories of the members of our Union. This state of things requires that a remedy should be provided—a remedy which, while it shall do justice to those unfortunate children of nature, may secure to the members of our confederates their right of sovereignty and soil.[47]

Even so-called "friends of the Indian" argued that tribalism's incompatibility with the values and norms of white civilization left removal as the only means to save the Indian from destruction.[48] In 1829, Thomas L. McKenney, head of the national government's Office of Indian Affairs, organized New York's Board for the Emigration, Preservation, and Improvement of the Aborigines. McKenney formed the Board to gain support from missionaries and clergymen for the government's removal plan. He asked former Michigan territorial governor Lewis Cass, a well-regarded expert on the Indian in early nineteenth century white society,[49] to publish the arguments in favor of the Removal policy in the widely circulated *North American Review*.[50] As Cass explained in one article:

> A barbarous people, depending for subsistence upon the scanty and precarious supplies furnished by the chase, cannot live in contact with a civilized community. As the cultivated border approaches the haunts of the animals, which are valuable for food or furs, they recede and seek shelter in less accessible situations . . . [W]hen the people, whom they supply with the means of subsistence, have become sufficiently numerous to consume the excess annually added to the stock, it is evident, that the population must become stationary, or, resorting to the principal instead of the interest, must, like other prodigals, satisfy the wants of to-day at the expense of to-morrow.[51]

Cass further argued in this article that any attempt by the tribes to establish independent sovereign governments in the midst of white civilization "would lead to their inevitable ruin."[52] The Indians had to be removed from the path of white civilization for their own good.

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46. *Adams' Message*, *supra* note 40, at 415.

47. *Id.* at 416.

48. *See generally* J. VIOLA, THOMAS L. MCKENNEY: ARCHITECT OF AMERICA'S EARLY INDIAN POLICY, 1816-1830 (1974); G. SCHULTZ, AN INDIAN CANAAN: ISAAC MCCOY AND THE VISION OF AN INDIAN STATE (1972).

But see F. PRUCHA, I GREAT FATHER, *supra* note 8, at 200-08 (describing the strenuous efforts on behalf of the Cherokees by Jeremiah Evarts, a true friend of the Indian).

49. Cass served as Michigan's territorial governor from 1813 through 1829. *See generally* J. VIOLA, *supra* note 48.

50. *Governor Cass on the Need for Removal*, 30 N. AM. REV. 62-121 (1830), *reprinted in* A. GUTTMAN, *supra* note 8, at 30-36.

51. *Id.* at 31.

52. *Id.* at 35.

President Andrew Jackson outlined his strident views in favor of the Removal policy in his first annual message to Congress in 1829.[53] Jackson declared that it would be "visionary," in light of the fateful demise of other tribes brought into close contact with white civilization, to allow the southern tribes to make unsustainable claims "on tracts of country on which they have neither dwelt nor made improvements, merely because they have seen them from the mountain or passed them in the chase."[54] The President somberly told the Congress:

> Our conduct toward these people is deeply interesting to our national character. Their present condition, contrasted with what they once were, makes a most powerful appeal to our sympathies. Our ancestors found them the uncontrolled possessors of these vast regions. By persuasion and force, they have been made to retire from river to river, and from mountain to mountain, until some of the tribes have become extinct, and others have but remnants to preserve, for awhile, their once terrible names. Surrounded by the whites, with their arts of civilization, which by destroying the resources of the savage, doom him to weakness and decay, the fate of the Mohegan, the Narragansett, and the Delaware, is fast overtaking the Choctaw, the Cherokee, and the Creek. That this fate surely awaits them if they remain within the limits of the states does not admit of a doubt. Humanity and national honor demand that every effort should be made to avert so great a calamity.[55]

The early nineteenth century proponents of Removal consistently asserted several central arguments in their discourse of opposition to tribal sovereignty in the eastern United States. Their arguments were always grounded in an assumed consensus on the dictates of natural law, and contended that tribalism and tribal control of lands desired by whites were antithetically opposed to the values of white society. The white man's God had privileged the land uses of a white society of cultivators over those of a savage tribe of red hunters and foragers. As that civilized white society sought to actualize its superior rights to the New World by reclaiming the savage's wilderness for civilization, the savage was threatened with extinction. This cycle of white civilization's contact, confrontation, and conquest over the tribal Indian was inexorable and predestined. Only removal far from the path and needs of white society could save the inferior savage race.

The deficiency and unassimilability of tribalism with the norms and values of white civilization was, without doubt, the principal organizing theme of the legal discourse associated with the Removal policy. The idea was applied with a virtually bloodless, but extremely efficient genocidal fury to the southern tribes in the early nineteenth century, with that "singular attachment to the formalities of law" Tocqueville so admired.[56] From the perspective of modern federal Indian law discourse, this reliance on law and legal argument by the early nineteenth century opponents of tribal sover-

53. *See Jackson's Message, supra* note 39.
54. *Quoted in* W. LUMPKIN, *supra* note 8, at 81-82.
55. *Id.* at 80-81.
56. *See supra* text accompanying notes 11-16.

eignty represents perhaps the Removal era's most alien and seemingly impenetrable feature. As practiced, litigated, decided and theorized today, modern federal Indian law is grounded in conventions and assumptions that a conqueror nation can be governed by the Rule of Law, and not brute politics, in its dealings with its indigenous, colonized tribal peoples.[57] Thus the Removal era's reliance on law and legal argument as tools of genocide appears as a seemingly aberrant, anachronistic blip on the screen of relevant data for analyzing contemporary legal discursive practices regarding modern tribalism's self-determining rights and status in United States society. Nevertheless, when law and legal discourse are so often used today as the principal tools of those segments of white society who seek to constrain or even eliminate tribalism from contemporary United States society,[58] those who practice, litigate, decide and theorize in the field of modern federal Indian law cannot afford to ignore the documents of barbarism of the Removal era. History reveals that no self-regarded "civilized" society can sustain its engagement in the horror of destroying a race of people without appeal to a long-revered, legal discourse justifying its privileges of barbarism and repression.[59] For the proponents of Indian Removal in the early nineteenth century, that discourse was readily constructed from the long-revered themes of a narrative tradition focused on tribalism's deficiency and unassimilability, a tradition that had sustained the legitimacy of white society's denial of rights and status to tribal Indians since the earliest days of colonial contact. In ignoring the importance of the legitimating narrative tradition which sustained the Removal era's dominant legal discourse of opposition to tribal sovereignty, modern federal Indian law discourse also ignores the significance of the revival of many of its same basic racist themes, identifiable in the legal arguments of many modern-day opponents of tribal sovereignty.

C. *The Narrative Tradition of Tribalism's Deficiency and Unassimilability*

1. *The emergence of the idea of the savage in English colonizing discourse*[60]

The theme of tribalism's normative divergence from a civilized white

57. For the classic text from which this celebratory narrative tradition in modern Federal Indian law emerges, see Cohen, *The Spanish Origin of Indian Rights in the United States*, 31 GEO. L.J. 1, 3 (1942). *See also* COHEN III, *supra* note 8, at 50-53.

58. *See* Part III, *infra*.

59. *See* W. BENJAMIN, *supra* note 9, at 256-57. On law's legitimating function, see generally Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 257-61 (1979). *See also* Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 L. & SOC'Y REV. 529, 540-45 (1977).

60. I relied primarily upon the following sources for the discussion and analysis in this section of the Article: R. PEARCE, THE SAVAGES OF AMERICA: A STUDY OF THE INDIAN AND THE IDEA OF CIVILIZATION (rev. ed. 1965); PURITANS, INDIANS AND MANIFEST DESTINY (C. Segal & D. Stineback eds. 1977); R. BERKHOFER, JR., THE WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT (1979); W. CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS AND THE ECOLOGY OF NEW ENGLAND (1983); F. PRUCHA, I GREAT FATHER, *supra* note 8, at 5-28; H. PORTER, THE INCONSTANT SAVAGE: ENGLAND AND THE NORTH AMERICAN INDIAN, 1500-1600 (1979); B. SHEEHAN, SAVAGISM AND CIVILITY: INDIANS AND ENGLISHMEN IN COLONIAL VIRGINIA (1980); F. JENNINGS, THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST (1975); A. VAUGHAN, NEW ENGLAND FRONTIER: PURITANS AND INDIANS, 1620-1675 (rev. ed. 1979); G. NASH, RED, WHITE, AND

society's ethical prescriptions, and the use of that difference as a justification for denying the Indian rights of ownership and sovereignty in America, did not originate with the confrontation between eastern tribalism and white society in the Removal era. The idea that the tribal savage's way of life was inferior to the norms and values of white civilization was part and parcel of the cultural treasure carried along by white America in its two hundred-year-old triumphal procession into the New World.[61] The emergence of a richly elaborated and well-regarded corpus of texts and familiar arguments, constituting, in effect, an orienting narrative tradition[62] on tribalism's incompatibility with a "civilized" race of European-descended cultivators, can be traced back to the earliest English settlements in the New World.

Massachusetts' first colonial governor, the Puritan John Winthrop, could cite scripture for support of his legal proposition that the New World's Indian tribes lacked any sovereign rights to the lands they claimed but had not utilized according to English norms.

> The whole earth is the Lord's Garden and he hath given it to the sons of men, with a general condition, Gen[esis] 1.28. Increase and multiply, replenish the earth and subdue it. . . . And for the Natives of New England they inclose noe land neither have any settled habitation nor any tame cattle to improve the land by, and soe have noe other but a natural right to those countries soe as if we leave them sufficient for their use we may lawfully take the rest, there being more than enough for them and us.[63]

The English promoter of New World colonization, Samuel Purchas, arguing for the benefits of Virginia settlement in the early seventeenth century, put forward the following precis in favor of dispossessing the savage tribes of America.

BLACK: THE PEOPLES OF EARLY AMERICA (1974); Thomas, *Introduction*, in C. ROYCE, INDIAN LAND CESSIONS IN THE UNITED STATES, 18TH ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY, 1896-1897, pt. 2, at 527-644 (1899).

61. *See* W. BENJAMIN, *supra* note 9, at 256.

62. My use of the term "narrative tradition" to describe the corpus of texts and familiar arguments on tribalism drawn on by the early nineteenth century advocates of Removal borrows from the jurisprudential illuminations of Robert Cover on legal narratives contained in his *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

> A legal tradition is hence part and parcel of a complex normative world. The tradition includes not only a corpus juris, but also a language and a mythos—narratives in which the corpus juris is located by those whose wills act upon it. These myths establish the paradigms for behavior. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic. These myths establish a repertoire of moves—a lexicon of normative action—that may be combined into meaningful patterns of the past. The normative meaning that has inhered in the patterns of the past will be found in the history of ordinary legal doctrine at work in mundane affairs; in utopian and messianic yearnings, imaginary shapes given to a less resistant reality; in apologies for power and privilege and in the critiques that may be leveled at the justificatory enterprises of law.

Id. at 9.

See also Professor Mark Tushnet's insightful discussion of "traditions" and their role in political and legal discourse contained in his book, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 4-17 (1988). "Traditions are not systematic, well-organized bodies of thought; rather, they help people to understand the world by providing some familiar categories to use." *Id.* at 6.

63. *Quoted in* F. PRUCHA, AMERICAN INDIAN POLICY, *supra* note 8, at 240.

> On the other side considering so good a Country, so bad a people, having little of humanity but shape, ignorant of Civility, of Arts, of Religion; more brutish than the beasts they hunt, more wild and unmanly than that unmanned wild country, which they range rather than inhabite; capitulated also to Satan's tyranny in foolish pieties, mad impieties, wicked idleness, busy and bloody wickedness.[64]

As elegantly articulated in Roy Harvey Pearce's classic 1953 study on the American Indian and the European-derived idea of civilization, *The Savages of America*,[65] a readily identifiable set of themes and assumptions deployed by Englishmen on both sides of the Atlantic regarding the tribal Indian's perceived difference emerged within a few short decades of the English invasion of America. These themes comprised the genesis of a narrative tradition focused on tribalism's deficiency and unassimilability with the agrarian civilization sought to be transplanted in America by Englishmen. It was this tradition, and its basic themes of the savage, inferior nature of American tribalism and the incompatibility of tribal norms and land use practices with the values and needs of a superior society of cultivators, that grounded the arguments for dispossessing the Indian in the early seventeenth century texts of Winthrop and Purchas.[66] Englishmen required the lands claimed by American Indian tribes in order to sustain English colonial enterprises in the New World. Once tribes felt their own subsistence needs threatened by English agrarian expansion or encroachment, Indian-English contact was transformed into Indian-English confrontation over tribal land claims.[67] Thus, as described by Pearce, the narrative tradition which emerged out of English-American colonial society prior to the American Revolution sought to understand the tribal Indian, "not as one to be civilized and to be lived with, but rather as one whose nature and whose way of life was an obstacle to civilized progress westward."[68]

That tribalism would be removed as an *obstacle* to white civilization's procession westward across America was an implicit assumption of this narrative tradition on tribalism's inferior rights and status. The Puritan leader Cotton Mather spoke with assurance that indeed Providence intended success for His elect in the New World wilderness, though the Indian admittedly presented a formidable obstacle. The "Promised Land," Mather warned, "is all over fill'd with fiery flying serpents. . . . [t]here are incredible droves of *devils in our way*."[69] Whether divinely planted obstacle temporarily thwarting the English Puritan's errand into the New World wilderness, or simply a fierce enemy stubbornly resisting the Virginia Company's colonizing encroachments, tribalism was destined to be removed from the path

64. In Purchas, *Virginia's Verger: Or a Discourse Showing the Benefits Which May Grow to This Kingdom from American English Plantations*, 19 HAKLUYTUS POSTHUMUS OR PURCHAS HIS PILGRIMS 231 (1905-1907).

65. *See* R. PEARCE, *supra* note 60, at 1-49.

66. *Id.*

67. The cycles of English-Indian contact, confrontation and conquest in the early colonial period are well-documented in W. CRONON, *supra* note 60; H. PORTER, *supra* note 60; F. JENNINGS, *supra* note 60. *See also* Thomas, *supra* note 60.

68. R. PEARCE, *supra* note 60, at 41.

69. C. MATHER, THE WONDERS OF THE INVISIBLE WORLD 63 (1693), *quoted in* PURITANS, INDIANS AND MANIFEST DESTINY, *supra* note 60, at 49.

of a superior society pursuing its divine mandate to cultivate the "unmanned and wild country" that was the Indian's America.[70] In the narrative tradition which emerged out of the English-American colonial experience of the seventeenth and eighteenth centuries, the tribal Indian's difference was the assumed source of white society's privileged claims to the underutilized lands of the New World. Thus, in many ways, the formal implementation of the Removal policy in the early nineteenth century simply represented a further elaboration of a theme that had already become a central part of the discursive legacy of two centuries of white contact and confrontation with the obstacle presented by American tribalism.

2. *John Locke's contributions to the narrative tradition of tribalism's inferior land rights*

On both sides of the Atlantic and throughout the seventeenth and eighteenth centuries, the narrative tradition of tribalism's incompatibility with white civilization generated a rich corpus of texts and legal arguments for dispossessing the Indian.[71] These texts and arguments, while enriching and extending the tradition itself, enabled English-Americans to better understand and relate the true nature of the Indian problem confronting their transplanted New World society. John Locke's chapter on *Property*, contained in his widely read *Second Treatise of Government*,[72] was but one famous and influential text that can be located within this tradition. Written towards the end of the seventeenth century, Locke's text illustrates the widely diffused nature of the impact of more than seventy years of English colonial activity in the New World on so many aspects of English life and society.

In Locke's philosophical discussion of the natural law basis of private property, an earlier colonizing generation's self-serving attempts to justify the American Indian's dispossession[73] have been transformed into the unquestioned assumptions of English Enlightenment era political and legal speculative discourse.

Locke himself was a one-time functionary in the slave plantation enterprise of the colonial proprietors of South Carolina.[74] His late seventeenth century philosophical discussion on the natural law rights of an individual to acquire "waste" and common lands by labor assumed the status of a canonical text in a number of still vital narrative traditions emerging out of early United States political and legal culture.[75] With respect to the narrative tra-

70. Quoting Purchas, *supra* note 64.

71. *See generally* sources cited *supra* note 60.

72. J. LOCKE, TWO TREATISES OF GOVERNMENT (P. Laslett rev. ed. 1963).

73. *See supra* text accompanying notes 62-66.

74. *See* K. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH 18 (1956). It was Secretary Locke who drafted the Carolina Lord Proprietors' 1669 "Fundamental Constitutions," which granted every English colonial freeman "absolute power and authority over his negro slaves." *See id.*

75. *See, e.g.*, R. EPSTEIN, TAKINGS (1987). For varying assessments of Locke's contributions to the narrative traditions of Anglo-American political and legal culture, *see, e.g.*, C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM (1962); J. TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES (1980); L. HARTZ, THE LIBERAL TRADITION IN AMERICA (1955). Professor Tushnet's book, RED, WHITE AND BLUE, *supra* note 62, at 4-17, pro-

dition of tribalism's incompatibility with white norms and values, Locke's famous text represents the principal philosophical delineation of the normative argument supporting white civilization's conquest of America.

The Second Treatise's legitimating discourse of a civilized society of cultivators' superior claim to the "waste" and underutilized lands roamed over by savage tribes provided a more rigidly systematized defense of the natural law-grounded set of assumptions by which white society had traditionally justified dispossessing Indian society of the New World. The primary philosophical problem set out in Locke's famous chapter on *Property* in his *Second Treatise* was a demonstration of "how men might come to have a property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners."[76] Thus, Locke's text constructed its methodically organized argument for dispossessing the Indian of the presumed great "common" that was America in indirect fashion, through abstraction. Locke sought to demonstrate, through a series of carefully calculated contrasts between English and American Indian land use practices, how individual labor upon the commons removes "it out of the state of nature" and "begins the [private] property."[77] For Locke, the narrative tradition of tribalism's normative deficiency provided the needed illustrations for his principal argument that " 'Tis labour indeed that puts the difference of value on everything."[78] In turn, this "difference" was the source of a cultivator society's privileges to deny the wasteful claims of tribalism to the underutilized "commons" of America. Locke wrote:

> There cannot be a clearer demonstration of any thing, than several Nations of the Americans are of this [the value added to land by labor] who are rich in Land, and poor in all the Comforts of Life; whom nature having furnished as liberally as any other people, with the materials of Plenty, i.e., a fruitful soil, apt to produce in abun-

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vides a brief, yet illuminating discussion of the problems inherent in any scholarly effort attempting to specify Locke's contributions to the American political and legal tradition.

From the perspective of the scholarly traditions of peoples of color, what seems most problematic about the continued and unquestioned reliance on Locke's theories by segments of the dominant society, particularly the libertarian right, is the fact that Locke, the theorist of individual rights, was such a willing follower of orders in the chain of command by which Europe perpetrated acts of genocide against African and American peoples of color. *See, e.g., supra* text accompanying note 74. Few white scholars would seek to legitimate the assumptions of their political or legal speculative discourses by citing to a functionary in the Third Reich's genocidal enterprises. For instance, regardless of the ultimate truth about the charges of complicity with the Nazis brought against Austrian President Kurt Waldheim, isn't it safe to assume that Waldheim's moral authority as a theorist and practitioner of international law and peace has been severely undermined by those charges? Yet, at my own law school, in a talk before a diverse audience of law students and others, Associate Justice of the United States Supreme Court Anthony Kennedy can cite without shame or scandal John Locke's philosophy as the source of the moral, political and legal principles on which this nation was founded, and argue for continuing to follow Lockean-derived principles about possessive individualism in contemporary United States law. Can scholars and judges from the dominant society even recognize their insensitivity and the insulting implications for peoples of color when someone like Locke is cited in support of a legal or political principle? Isn't it time we expelled from a "civilized" society's discourse the authority of an author of such racist documents of barbarism as the "Fundamental Constitutions" of an American slave colony and *The Second Treatise of Government* advocating dispossession of the Indian as compelled by natural law?

76. J. LOCKE, *supra* note 72, at 327.

77. *Id.* at 330.

78. *Id.* at 338.

> dance, what might serve for food, rayment, and delight; yet for want of improving it by labour, have not one hundredth part of the Conveniences we enjoy; and the king of a large fruitful territory there feeds, lodges, and is clad worse than a day labourer in *England*.[79]

Locke's argument was firmly grounded in a narrative tradition familiar to any late seventeenth century Englishman who had heard the countless sermons or read the voluminous promotional literature designed to encourage English colonization of the unenclosed, uncultivated expanses of territory in America claimed by Indian tribes. Locke's gross anthropological overgeneralizations of the living conditions of the kings "of several Nations of the Americans"[80] serve to illustrate his basic theme that land without labor-added value, such as Indian-occupied land, remains in the state of nature free for individual English appropriation as property. This use of the Indian's "difference" as a shorthand device to demonstrate the value added to uncultivated land by labor illuminates the economizing and legitimating functions of a narrative tradition when skillfully deployed in expository and rhetorical discourses.

At the time Locke wrote, the narrative tradition of tribalism's normative deficiency was already sufficiently developed and so integrated into English colonizing discourse that Locke could draw on its basic themes of savagism and civilization to provide the grounding assumptions for his philosophical demonstration that, while God had granted the world to men in common, yet

> since he gave it them for their benefit and the greatest conveniences of life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational and labour was to be his title to it.[81]

For those Englishmen who actually heeded the call to colonization to stake their claim in the New World, Locke's natural law foundation affirmed their privilege to dispossess the Indian of his underutilized lands. Man, argued Locke, pursued his natural rights by appropriating land in those parts of the world where people and livestock had not yet made land scarce, and therefore there was no market for land.[82] Again, Locke buttressed this claim by reference to America, where the concept of money had not yet been introduced, and where there was no incentive for a man to "enlarge his possessions beyond the use of his family."[83] He argued:

> For I ask, what would a man value ten thousand acres of excellent land, ready, cultivated, and well stocked too with cattle, in the middle of the in-land parts of *America*, where he had no hopes of commerce with other parts of the world, to draw money to him by the sale of the product?[84]

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79. *Id.* at 338-39.

80. There were "several" hundred American tribal nations, with widely disparate land use practices, traditions of wealth accumulation, and political organization at the time Locke wrote. *See generally* H. DRIVER, INDIANS OF NORTH AMERICA (2d ed. 1975).

81. J. LOCKE, *supra* note 72, at 333.

82. *Id.* at 334-36.

83. *Id.* at 343.

84. *Id.*

Where land was sparsely populated and therefore not regarded as a scarce commodity, there was little incentive to enclose, cultivate, or sell the surplus for money: "It would not be worth the enclosing, and we should see him give up again to the wild common of nature, whatever was more than would supply the Conveniences of Life to be had there for him and his Family."[85]

Locke's famous argument in his *Second Treatise* that land lying waste and uncultivated has no owner and can therefore be appropriated by labor actually contained an express normative judgment on the Indian's claims under natural law to the "in-land parts of America."[86] Drawing on the narrative tradition's dominant theme of tribalism's deficiency and unassimilability respecting land use, Locke declared toward the end of his text:

> Yet there are still *great tracts of ground* to be found, which (the inhabitants thereof not having joined with the rest of mankind, in the consent of the use of their common money) lie waste, and are more than the people, who dwell on it, do, or can make use of, and so still be in common. Tho' this can scarce happen amongst that part of mankind, that have consented to the use of money.[87]

Locke's famous refrain in the closing sentences of his discussion in *Property* that "thus, in the beginning, all the world was America,"[88] was therefore far more than a metaphorical illustration of the conditions of the state of nature from which private property emerged. The oft-quoted allusion was also a tactical deployment of a principal theme of a narrative tradition that had legitimated and energized the call to colonization of the vast "commons" that was supposedly the Indian's America since the beginnings of the English invasion of the New World.

Locke's natural law thematic of the Indian's failure to adopt the supposedly universal "rational" norms by which Englishmen assessed claims to natural rights drew heavily on the narrative tradition of tribalism's normatively deficient land use practices. In supporting the claims of a society of cultivators to the Indian's America, Locke in turn strongly reinforced and extended that same tradition. But while extremely influential, Locke's philosophical text simply supplemented the cumulative burden already placed upon Indian land rights in a narrative tradition focused on tribalism's difference from white culture. Nevertheless, Locke more systematically rationalized the privileges flowing to white society by virtue of that difference, and for a society that valued systemic rationalization as a confirmation of divinely inspired natural law,[89] this was indeed an enlightening achievement.[90]

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85. *Id.*
86. *Id.*
87. *Id.* at 341.
88. *Id.* at 343.
89. *See generally* Williams, *Jefferson, The Norman Yoke, and American Indian Lands*, 29 ARIZ. L. REV. 165 (1987).
90. Locke, of course, was not the only theorist of the European natural law tradition that nineteenth century United States society could turn to for systemic exposition of principles legitimating the white man's seizure of the Indian's America. All of the major writers of the Renaissance and Enlightenment eras' emerging international legal discourse could be cited for support of the proposition that tribalism's divergence from European norms justified denial of the privileges and rights belonging to "civilized" nations. The eighteenth century Swiss diplomat and theorist on the European "Law of Nations," Emmerich de Vattel, was widely cited and highly regarded by the Founding

D. *The Narrative Tradition of Tribalism's Deficiency and Unassimilability and the Idea of Removal*

The dominant themes of tribalism's fundamental incompatibility with white society which legitimated and sustained the Removal era's dominant legal discourse of opposition to tribal sovereignty were thus familiar staples of one of the oldest and most respected European-derived narrative traditions in the New World. It was already widely assumed in the public discourses of early United States Indian policy that Indian tribes, by virtue of their normatively deficient social organizations and land use practices, held an inferior claim to lands required for labor by a superior civilization of cultivators.[91] By the time of the American Revolution, the idea of tribalism's eventual elimination as an obstacle on white civilization's errand unto the Promised Land that was the North American continent was already part of the national mythos.[92] Particularly in the post-Revolutionary era, as United States Indian policymakers confronted the intransigency of those most powerful tribes and Indian confederacies that had not succumbed yet to this premise, the idea of tribalism's physical removal from the east by the federal government itself emerged as the most frequently articulated policy solution to post-Revolutionary white society's perceived Indian problem.

1. *The idea of removal in the post-revolutionary period*

The idea of removal, legitimated by the narrative tradition's themes of tribalism's inferior status and rights, can be found implied in the Founding generation's earliest discussions of Indian policy. In 1789, Henry Knox, President Washington's Secretary of War, suggested the inevitability of removal as the only honorable policy for the Founding Fathers to follow in a report to Congress on the situation on the southern Indian frontier. While digressing on the fate of tribalism east of the Mississippi, Knox offered the following ruminations:

> Although the disposition of the people of the states to emigrate into the Indian country cannot be effectually prevented, it may be restrained by postponing new purchases of Indian territory, and by prohibiting the citizens from intruding on the Indian lands. . . . As population shall increase and approach the Indian boundaries, game

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Fathers of the United States. His crystallization of the more indirect implications of Locke's attack on the territorial rights of American tribalism was a staple of the early nineteenth century legal discourse of the advocates of Indian Removal:

> There is another celebrated question which has arisen principally in connection with the discovery of the New World. It is asked whether a Nation may lawfully occupy any part of a vast territory in which are to be found only wandering tribes whose small numbers can not populate the whole country . . . . [T]hese tribes can not take to themselves more land than they have need of or can inhabit and cultivate. Their uncertain occupancy of these vast regions can not be held as a real and lawful taking of possession; and when the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them.

E. VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 85-86 (1964). According to Vattel, European civilization obeyed the dictates of natural law when it restricted "the savages within narrower bounds." *Id.*

91. *See* Williams, *supra* note 89.

92. *See generally id.*

> will be diminished and new purchases may be made for small considerations. This has been and probably will be the inevitable consequence of cultivation. It is, however, painful to consider that all the Indian tribes, once existing in those states now the best cultivated and most populous, have become extinct. If the same causes continue, the effects will happen and, in a short period the idea of an Indian this side of the Mississippi will be found only in the pages of the historian.[93]

Knox's military colleague, the Revolutionary War general and prominent political figure Benjamin Lincoln, in a letter to a contemporary, echoed many of these very same themes drawn from the narrative tradition of tribalism's incompatibility:

> Civilized and uncivilized people cannot live in the same territory, or even in the same neighborhood. Civilization directs us to remove as fast as possible that natural growth from the lands which is absolutely essential for the food and hiding place of those beasts of the forests upon which the uncivilized principally depend for support.[94]

Lincoln projected the geographical trajectory of the ultimate solution to tribalism's destiny, if it was ever to have one, on the North American continent, in a 1793 journal entry:

> [T]o people fully this earth was in the original plan of the benevolent Deity. I am confident that sooner or later there will be a full accomplishment of the original system; and that no men will be suffered to live by hunting on lands capable of improvement, and which would support more people under a state of cultivation. So that if the savages cannot be civilized and quit their present pursuits, they will, in consequence of their stubbornness, dwindle and moulder away, from causes perhaps imperceptible to us, until the whole race shall become extinct, or they shall have reached those climes about the great lakes, where, from the rocks and mountainous state, the footsteps of the husbandman will not be seen.[95]

Tribalism's normative deficiency and unassimilability with white civilization in the eastern United States was a consistently articulated and dominant premise of post-Revolutionary Indian policy discourses. But it was not until the Louisiana Purchase in 1803 that United States policymakers actually began to seriously debate the actual tactics of inducing the once independent tribes of Indians east of the Mississippi to exchange the small,

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93. *Quoted in* W. MOHR, *supra* note 8, at 171. Knox went on in his report to speculate on a possible preferred solution to the Indian problem:

> How different would be the sensation of a philosophic mind to reflect, that, instead of exterminating a part of the human race by our modes of population, we had preserved, through all difficulties, and at last had imparted our knowledge of cultivation and the arts to the aborigines of the country by which the source of future life and happiness had been preserved and extended. But it has been conceived to be impracticable to civilize the Indian of North America. This opinion is probably more convenient than just. But to deny that under a course of favorable circumstances, it could be accomplished, is to suppose that human character [is] under the influence of such stubborn habits as to be incapable of melioration or change—a supposition entirely contradicted by the progress of society, from the barbarous ages to its present degree of perfection.

Id. at 171-72.

94. R. PEARCE, *supra* note 60, at 68.

95. *Id.* at 69.

reserved portions of their remaining ancestral lands for a permanent, distantly removed territory in the West. Professor Prucha credits President Thomas Jefferson, who engineered the Louisiana Purchase, with originating the idea of a trans-Mississippi exchange of lands with the eastern tribes.[96] In an "unofficial and private" letter written in the year of the Purchase to Indiana's territorial governor and famous Indian fighter, William Henry Harrison,[97] Jefferson articulated his long-term strategy for solving the eastern Indian problem. The letter is written in the tactical cadences of an armchair empire-builder, unconstrained by the politician's usual need for discretion. Jefferson's secret instructions to his military commander on the frontier confided the following inside information:

> . . . from the Secretary of War you receive from time to time information and instructions as to our Indian affairs. These communications being for the public records, are restrained always to particular objects and occasions; but this letter being unofficial and private, I may with safety give you a more extensive view of our policy respecting the Indians, that you may the better comprehend the parts dealt out to you in detail through the official channel, and observing the system of which they make a part, conduct yourself in unison with it in cases where you are obliged to act without instruction.[98]

Jefferson related to Governor Harrison the choice confronting the eastern Indian tribes. The Indians could either surrender their tribal ways to the inevitable victory of white civilization and assimilate themselves as individual citizens within the dominant polity east of the Mississippi, or retreat across the Great Father of Waters to avoid their extinction as a race. Jefferson predicted:

> [O]ur settlements will gradually circumscribe and approach the Indians, and they will in time either incorporate with us as citizens of the United States, or remove beyond the Mississippi. . . As to their fear, we presume that our strength and their weakness is now so visible that they must see we have only to shut our hand to crush them, and that all our liberalities to them proceed from motives of pure humanity only. Should any tribe be foolhardy enough to take up the hatchet at any time, the seizing of the whole country of that tribe, and driving them across the Mississippi, as the only condition of peace, would be an example to others, and a furtherance of our consolidation. . . .[99]

While portions of the Cherokee tribe agreed to remove west during the

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96. *See* F. PRUCHA, I GREAT FATHER, *supra* note 8, at 183-85.

97. Harrison (1773-1841) was Governor of the Indiana Territory from 1800-1812. He was the federal government's field commander in the War for America with the Old Northwest tribes in the early nineteenth century. He defeated the Northwest tribes, first at the Battle of Tippecanoe in November of 1811, and then decisively at the Battle of the Thames where the Indians had allied with Great Britain in the War of 1812. After that War, he represented the state of Ohio in the House of Representatives (1816-19) and as Senator (1825-28). My slender two volume COLUMBIA VIKING DESK ENCYCLOPEDIA (1960), gives this nice summation of the first United States president to be nicknamed after his victory in a war over America's tribal nations: "The Whigs, presenting Harrison as a rugged Westerner and using 'Tippecanoe and Tyler too' as a slogan, waged first 'rip-roaring' campaign in U.S. history to elect him President. He died a month after taking office." *Id.* at 569.

98. *President Jefferson to William Henry Harrison* (Feb. 27, 1803), in DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 8, at 22.

99. *Id.* at 22-23.

administration of Presidents Jefferson and Monroe, the War of 1812 interrupted attempts at implementing a trans-Mississippi exchange of lands as a solution to the eastern Indian problem. However, Jefferson's imperial discourse with its principal theme of tribalism's incompatibility with European-derived civilization east of the Mississippi echoed the dominant refrain of a narrative tradition that resonated strongly throughout the public discourses of United States society in the early nineteenth century. This refrain would sound even more strongly after the War of 1812, when the last vestiges of tribal resistance to United States hegemony east of the Mississippi were suppressed in conjunction with the defeat of Great Britain, eastern tribalism's former historical ally against United States' imperialism.[100]

Perhaps the most elegant recapitulation of the dominant refrain of this narrative tradition can be located, appropriately, at the dawn of the Removal era, in 1802, one year prior to Jefferson's Louisiana purchase—the act which would make Removal tactically feasible as a solution to nineteenth century United States society's Indian problem. As president in 1828, John Quincy Adams had been a strong advocate of the "remedy" of Indian removal.[101] That tribalism's inevitable removal from the path of white civilization was a deeply and long-held belief of Adams' is evident from his 1802 oration before the Sons of the Pilgrims.[102] In this great document from the American narrative tradition of tribalism's incompatibility with white society, Adams, promulgator of the Monroe Doctrine,[103] provided a homiletic apologia for the past sins of the Founding Fathers committed against the Indian; and also, perhaps unwittingly, for the future sins their sons would soon commit in removing tribalism from their civilization. Adams began his oration as follows:

> There are moralists who have questioned the right of Europeans to intrude upon the possessions of the aborigines in any case and under any limitations whatsoever. But have they maturely considered the whole subject? The Indian right of possession itself stands, with regard to the greatest part of the country, upon a questionable foundation.[104]

Adams' oration went on to ground Indian property rights according to the narrative tradition's central legitimating normative text: the "law of nature." Europeans had recognized the Indians' right to "[t]heir cultivated fields, their constructed habitations, a space of ample sufficiency for their subsistence, and whatever they had annexed to themselves by personal labor." But Adams asked rhetorically: "what is the right of a huntsman to the forest of a thousand miles which he has accidentally ranged in quest of prey? Shall the liberal bounties of Providence to the race of man be monopolized by one of ten thousand for whom they were created?"[105]

100. *See generally* F. PRUCHA, I GREAT FATHER, *supra* note 8, at 183-213 for the leading narrative historical account of national Indian policy articulation during the period between the Revolution and Removal Act.

101. *See supra* text accompanying notes 43-47.

102. *Excerpted in* Thomas, *supra* note 60, at 536-37.

103. Adams formulated the doctrine as Monroe's Secretary of State from 1817-25, and then went on to the presidency (1825-29).

104. *Quoted in* Thomas, *supra* note 60, at 536.

105. *Id.*

Adams' speech continued with a rhetorical cavalcade of questions designed to illustrate the unassimilable nature of the Indian's claims over the lands of America with the expansionary needs of United States society. "Shall the lordly savage not only disdain the virtues and enjoyments of civilization himself, but shall he control the civilization of a world?"[106]

Adams argued in his oration that it was tribalism's divergence from the norms governing a civilized society's use of land which provided the source of white society's privileges to the New World. The Indian was a "tenant of the woods," whose claims to territorial sovereignty violated natural law; a law followed by the white man in cultivating the Indian's waste lands.[107]

Adams' final and definitive answer to the series of rhetorical questions he posited as to whether America's Indians possessed rights to the lands they claimed was, of course, "no." "Heaven has not been this inconsistent in the works of its hands. Heaven has not thus placed at irreconcilable strife its moral laws with its physical creation."[108]

In a vast country where tribal claims to uncultivated land, if recognized, would have constituted an insuperable barrier to European territorial expansion, it was primarily the divergent nature of tribal land claims from the norms of European-derived land use practices that provided the strongest arguments to those who sought to resist or limit tribalism's rights within United States society. And the perceptions of the divergent nature of tribalism's claims to sovereignty over lands coveted by whites strongly reinforced and illustrated the central argument of the Removal era's dominant legal discourse of opposition to tribal sovereignty. That argument was that tribalism itself, given its radically divergent and deficient character, was unassimilable with the political and legal values of the dominant non-Indian society.[109] Removal of the eastern Indians to the west was the privilege of a superior race of conquerors responding to tribalism's difference in the only way it knew how, by reliance on a sustaining narrative tradition that had comfortingly sanctioned and upheld the repression of the Indian as lawful and just since the commencement of white civilization's half-millennium long and still continuing war for America.

III. THE DISCOURSE OF OPPOSITION TO TRIBAL SOVEREIGNTY IN CONTEMPORARY UNITED STATES SOCIETY

A. *The Task of Hearing What Has Already Been Said*

The pre-nineteenth century narrative tradition on tribalism's deficiency and unassimilablity with white civilization provided the Removal era's legal discourse of opposition to tribal sovereignty with a number of valuable and venerable themes and thematic devices. Its central vision of tribalism's normative deficiency respecting land use grounded the claims of Georgia and the other southern states to superior rights of ownership and sovereignty over Indian Country. Its intimately connected themes of tribalism's unas-

106. *Id.*
107. *Id.* at 537.
108. *Id.*
109. *See supra* text accompanying notes 37-55.

similability and doomed fate in the face of white civilization's superior difference and privileges arising from that difference, perfectly complemented the advocates of Removal's claims that the only way to save the tribes was to banish them from the midst of white civilization.

As has been illustrated, the idea that tribalism east of the Mississippi was incompatible with the territorial ambitions and superior claims of United States society had been an integral component of United States public discourses on Indian policy long prior to the emergence of the Removal era's dominant legal discourse of opposition to tribal sovereignty. The widely asserted position of the early nineteenth century advocates of Removal that tribalism was doomed to extinction in its confrontation with United States civilization east of the Mississippi was appropriated from a narrative tradition refined by Europeans in the New World in the course of two centuries of colonial contact with American Indians.

Just as it is possible to reconstruct the emergence of the early nineteenth century Removal era's dominant legal discourse of opposition to tribal sovereignty out of a broader legitimating narrative tradition on tribalism's normative deficiency and unassimilability with white civilization, so too can this tradition itself be explained as a localized extension of a more global discursive legacy. That legacy, of course, would be the colonizing discourses and discursive strategies of the West's one thousand-year-old tradition of repression of peoples of color.[110] For so many of the world's peoples of color, their history has been dominated by the seemingly eternal recurrence of the West's articulation and rearticulation of the privileges of its superior difference in their homelands.[111]

To say that it has all been heard before does not trivialize the significance of the circle in the thought of so many of the world's peoples of color, particularly the tribal peoples of America. Rather, it resignifies the importance of the circle's organizing vision that, borrowing from an apostate's discourse of opposition to the West's mythos of historical linearity,[112] "a meaning has taken shape that hangs over us, leading us forward in our blindness, but awaiting in the darkness for us to attain awareness before emerging into the light of day and speaking."[113]

There exists little in the way of theoretical work on the underlying thematic relationships between United States' race-related public discourses of law and politics and the broader legacy of a thousand years of European-derived racist-imperial discourse.[114] Like many settler-colonized nations,[115]

110. *See* Williams, *supra* note 15; Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219 [hereinafter *The Algebra*].

111. We are, after all, borrowing Foucault's haunting words, "doomed historically to history, to the patient construction of discourses about discourses, and to the task of hearing what has already been said." M. FOUCAULT, THE BIRTH OF THE CLINIC: AN ARCHAEOLOGY OF MEDICAL PERCEPTION xv-xvi (1975).

112. See M. FOUCAULT, *Nietzche, Genealogy, History, in* LANGUAGE, COUNTER-MEMORY, PRACTICE 139-64 (1977), which contains the best short account of Foucault's problematization of the idea of historical linear development in Western thought.

113. M. FOUCAULT, *supra* note 111, at xv-xvi.

114. There is a vast literature, however, on imperialism, racism and public discourse in Third World countries. *See, e.g.*, P. CURTIN, THE IMAGE OF AFRICA: BRITISH IDEA AND ACTION 1750-

the United States has been thus far successful in repressing by various means the insurrectionist discourses and attempted insurgencies of its colonized and/or enslaved peoples of color.[116] The Removal era's genocidal repression of the Cherokee's discourse of sovereignty and insurgency represents a case study of the tactics and strategy by which such successes are normally achieved by European-derived civilizations, through the barbaric exercise of brute power. The distinguishing feature of the United States' successful repression of the Cherokees and the other removed tribes, was, as Tocqueville noted,[117] the exercise of this brute power with utmost respect for the white man's conception of the Rule of Law.

Lacking to date the vital unbroken and thematically integrated competing narrative traditions that the discourses and insurgencies of repressed peoples generate, the relative absence of such theoretical work in the United States is not surprising. The anomalous ability of United States society to energize and legitimate its repression of peoples of color by means of the Rule of Law effectively frustrates sustained interrogation of the underlying assumptions about peoples of color contained in the dominant society's legal and political discourses on race-relations. Indeed, only a work of tremendous power and theoretical insight could ever likely demonstrate to white society that its self-legitimating and self-congratulatory discourses on race-relations were not only inconsistent with any conception of a Rule of Law, but were also grounded in and sustained by themes derived from the thousand-year-old legacy of European racism and imperialism.

There do exist, however, decolonized societies that have undergone the cathartic experience of successfully terminating the overt manifestations of European imperial hegemony within their homelands. These societies have

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1850 (1964); O. COX, CASTE, CLASS AND RACE (1970); E. HERMASSI, THE THIRD WORLD REASSESSED (1980); V. KIERNAN, THE LORDS OF HUMANKIND: EUROPEAN ATTITUDES TOWARDS THE OUTSIDE WORLD IN THE IMPERIAL AGE (1969); Ranger, *Colonialism in Africa and the Understanding of Alien Societies*, 26 ROYAL HIST. SOC'Y TRANSACTIONS 115 (1976); E. SAID, ORIENTALISM (1978); B. STREET, THE SAVAGE IN LITERATURE (1975).

Several historical studies by United States authors discuss the role of law in Indian-white colonial and post-colonial relations, but only as part of a broader historical analysis of Indian-white contact, confrontation, and conquest. *See, e.g.*, R. BERKHOFER, THE WHITE MAN'S INDIAN (1979); W. WASHBURN, RED MAN'S LAND/WHITE MAN'S LAW (1971).

115. A brief overview of the sociological dynamics of settler colonialism is provided in Emmanuel, *White-Settler Colonialism and the Myth of Investment Imperialism*, in INTRODUCTION TO THE SOCIOLOGY OF "DEVELOPING SOCIETIES" (H. Alavi & T. Shanin eds. 1982).

116. There is, however, a vital and rapidly expanding corpus of work currently being produced by contemporary legal scholars of color that opposes the dominant self-legitimating and self-congratulatory discourses of law and legal analysis of United States race relations. In particular, the published works of Professors Derrick Bell, Richard Delgado and Vine Deloria, Jr. provide invaluable and illuminating foundations for the development of alternative perspectives and interpretations of the dominant society's law and legal discourse regarding peoples of color. *See, e.g.*, D. BELL, SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION (1980); Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 VILL. L. REV. 767 (1988); D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); Bell, *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5 (1976); Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984); Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L.L. REV. 302 (1987); V. DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES (1974); V. DELORIA, JR., CUSTER DIED FOR YOUR SINS (1969); V. DELORIA, JR., GOD IS RED (1973); V. DELORIA, JR., WE TALK YOU LISTEN (1970).

117. *See supra* text accompanying notes 11-16.

produced writers and theorists who have contributed to the construction of narrative traditions opposed to European-derived colonialism and its racist distortions of legal and political discourse. These competing narrative tradition have generated works of tremendous power and theoretical insight into the underlying assumptions, themes, and thematic strategies of European-derived, race-related public discourses and their relation to the broader legacy of European-derived racist and imperial discourse. This decolonized narrative tradition is strongly represented in the works of writers such as Frantz Fanon[118] and Albert Memmi.[119] Borrowing from such works, it is possible to patiently construct competing, decolonized strategies for interpreting the possible meanings and relations of themes deployed in contemporary Indian public policy discourses. These competing, decolonized strategies may, in turn, suggest the relation, if any, between the principal themes of the dominant contemporary Indian policy discourses and the broader legacy of European-derived racist-imperial discourse. These strategies may thereby illuminate the incompatibility of certain contemporary Indian policy discourses, infected by European racism and colonialism, with white society's opposed narrative tradition of the Rule of Law.

B. *Attempt at a Definition*

The writings of a number of Third World theorists of European colonizing discourse can be drawn upon to construct decolonized interpretive strategies for better understanding the meanings of United States race-related public discourses. By providing a more precise definition of the legacy of European racism and colonialism in United States public discourses on Indian-white relations, these strategies ought to encourage more sustained interrogation of the underlying assumptions about tribalism contained in those discourses.

The writings of Albert Memmi,[120] for example, deserve much closer scrutiny than they have previously received by theorists of Indian-white race relations in the United States. Memmi was a Tunisian Jew who wrote one of the most influential works to emerge out of the Third World decolonization movement, *The Colonizer and the Colonized*.[121] Jews as a racial minority have been so long subjected to European racism and imperialism that the West has invented a special term, anti-Semitism, for this long-legacied genus of European assertions of privilege over an encircled Jewish minority and its difference. Memmi felt the power of European colonialism and racism throughout his life with a doubled intensity, therefore, as a colonized Jewish subject of a white imperial power, and as a Jewish prisoner in a Nazi work camp during World War II. Memmi drew on his intensely personal experiences as a colonized Jew to construct a genealogy of European racist-impe-

118. *See, e.g.*, F. FANON, THE WRETCHED OF THE EARTH (1963); F. FANON, BLACK SKIN, WHITE MASKS (1968).

119. *See, e.g.*, A. MEMMI, THE COLONIZER AND THE COLONIZED (1965) [hereinafter THE COLONIZER]; A. MEMMI, *Attempt at a Definition*, in DOMINATED MAN: NOTES TOWARD A PORTRAIT (1968) [hereinafter *Definition*].

120. *See, e.g., id.*

121. A. MEMMI, THE COLONIZER, *supra* note 119.

rial discourse, contained in a short 1964 essay entitled "Attempt at a Definition."[122] His genealogical discussion of European-derived racist-imperial discourse identified four related strategies by which European-derived cultures sanctioned and upheld their exercise of colonial power over non-European races. Memmi's essay first suggested the following definition of racism within the European-derived imperial context:

> Racism is the generalized and final assigning of values to real or imaginary differences, to the accuser's benefit and at his victim's expense, in order to justify the former's own privileges or aggression.[123]

His "analysis of the racist attitude" revealed the following "essential" elements, or discursive strategies, of European-derived racist-imperial discourse.

1) Stressing *the real or imaginary differences* between the racist and his victim.
2) *Assigning values* to these differences, to the advantage of the racist and the detriment of his victim.
3) Trying to make them *absolutes* by *generalizing* from them and claiming that they are final.
4) *Justifying* any present or possible *aggression* or *privilege*.[124]

All four of the racist discursive strategies Memmi articulates can be found deployed throughout the narrative tradition of tribalism's normative deficiency and unassimilability, and also as specific discursive strategies of the Removal era's discourse of opposition to tribal sovereignty. Most alarmingly, however, the lurking presence of the "racist attitude" Memmi identifies is strongly suggested in a number of major policy documents recently generated by contemporary Indian policy discourses.

These discourses, articulated by federal judges, executive branch policymakers, members of Congress, and increasing segments of white society, all seek to constrain tribalism in one way or another. But most disturbing in light of the narrative traditions informing modern federal Indian law,[125] all of these discourses share in their unquestioned reliance on law and legal discourse as the principal tool for mediating and controlling tribalism's perceived difference from the values of the dominant society.

1. *The strategy of difference*

Memmi's analysis of the racist attitude clarifies the repeated use of the category of difference in both the United States' narrative tradition on tribalism's deficiency and unassimilability, and in the Removal era's dominant discourse of opposition to tribal sovereignty. But even more importantly, Memmi's analysis of the use of *difference* as an essential element of European-derived racist-imperial discourse strongly suggests underlying thematic relationships between contemporary public discourses regarding tribal self-

122. *In* A. MEMMI, *Definition*, *supra* note 119, at 185-195.
123. *Id.* at 185.
124. *Id.* at 186.
125. *See supra* text accompanying notes 60-90.

determination in the United States and the broader thousand-year-old legacy of European-derived racism and imperialism.

The strategy of stressing differences between European "civilization" and the New World savage in order to intensify the separation by which the Indian was placed outside white society[126] recurs throughout the seventeenth and eighteenth century texts discussing tribalism's deficiency and unassimilability.[127] Locke's use of the American Indian as his primary philosophical strawman in illustrating his argument on possessive individualism and natural rights to private property is but the most famous use of the Indian's difference in the narrative tradition on tribalism's incompatibility with the norms and values of a superior civilization.[128] And for the advocates of Removal who appropriated the tradition's principal themes of the Indian's inferior culture, habits and usages of land to sustain their arguments for exclusion of tribalism from the eastern United States, the savage's normative difference was repeatedly emphasized as evidence of the Indian's incompatibility with white values.[129]

While this strategy of stressing the Indian's difference has been frequently deployed throughout the history of public discourses on United States Indian policy, the modern United States Supreme Court also frequently cites tribalism's continuing difference from the norms of the dominant society in its opinions articulating the inherent limitations on tribal sovereignty.[130] The strategy of stressing difference in order to intensify the exclusion by which tribalism was placed outside white civilization clearly animates the discussion of then-Associate Justice William Rehnquist's 1978 majority opinion in *Oliphant v. Suquamish Indian Tribe*.[131] *Oliphant* is the modern Supreme Court's most important discussion on the inherent limitations on tribal sovereignty.[132] The Court held in *Oliphant* that Indian tribes lacked the inherent sovereign power to try and punish non-Indians for minor crimes committed in Indian Country.[133] The decision constrained the exercise of tribal sovereign power so as not to interfere with the interests of United States citizens to be protected from "unwarranted intrusions" on their personal liberty.[134] The decision also obviously constrains the ability of tribal government to maintain law and order in Indian Country according to a possibly divergent tribal vision.[135]

Rehnquist's *Oliphant* text legitimated these Supreme Court-created

126. "The assertion that there is a difference takes on a special *significance* in the racist context: by emphasizing the difference, the racist aims to intensify or cause the *exclusion*, the *separation* by which the victim is placed outside the community or even outside humanity." A. MEMMI, *Definition*, *supra* note 119, at 187 (emphasis in original).

127. *See supra* text accompanying notes 60-90.

128. *See supra* text accompanying notes 71-89.

129. *See supra* text accompanying notes 36-56.

130. *See* Williams, *The Algebra*, *supra* note 110, at 267-89.

131. 435 U.S. 191 (1978).

132. For an extended discussion of *Oliphant* and its discourse of difference, see Williams, *The Algebra*, *supra* note 110, at 267-74.

133. *Oliphant*, 435 U.S. at 210.

134. *Id.*

135. *See* Williams, *The Algebra*, *supra* note 110, at 272-74.

constraints on modern tribalism by first noting the following historical distinctions marking the administration of tribal criminal jurisdiction:

> Until the middle of this century, few Indian tribes maintained any semblance of a formal court system. Offenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes; emphasis was on restitution rather than on punishment. In 1834 the Commissioner of Indian Affairs described the then status of Indian criminal systems: 'With the exception of two or three tribes . . . the Indian tribes are without laws, and the chiefs without much authority to exercise any restraint.'[136]

Having identified this historical difference by which the exercise of tribal criminal jurisdiction was placed outside white civilization, Rehnquist's opinion in *Oliphant* declared that this difference had been essentially continued in the contemporary divergence of modern tribal court systems from the norms governing the exercise of criminal jurisdiction in the dominant society's courts.[137] Citing to the Indian Civil Rights Act of 1968,[138] a congressional act extending to tribal court criminal defendants "many of the due process protections accorded to defendants in federal or state criminal proceedings,"[139] Rehnquist observed that the protections afforded defendants in tribal court "are not identical" to those accorded defendants in non-Indian courts.[140] "Non-Indians, for example, are excluded from . . . tribal court juries" in a tribal criminal prosecution, Rehnquist noted, even if the defendant is a non-Indian.[141] It was this and other substantive differences stated and implied throughout the opinion between tribal and federal and state court proceedings[142] that determined, in Rehnquist's opinion, that Indian tribes do not possess the "power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[143] Quoting from an 1834 House of Representatives report,[144] Rehnquist declared that the "principle" that tribes, by virtue of their difference, lacked criminal jurisdiction over non-Indians

> would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice." It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.[145]

Rehnquist's implication in *Oliphant* was clear; despite their "dramatic advances," tribal courts operate according to norms that are too radically different from those governing United States courts. Tribes cannot be permitted to exercise their deficient forms of criminal jurisdiction over white

136. *Oliphant*, 435 U.S. at 197.
137. *Id.* at 193-94.
138. 25 U.S.C. § 1302 (1982 & Supp. 1986).
139. *Oliphant*, 435 U.S. at 194.
140. *Id.*
141. *Id.*
142. *See* Williams, *The Algebra*, *supra* note 110, at 267-74.
143. *Oliphant* 435 U.S. at 210.
144. *Id.* (quoting H.R. REP. No. 474, 23d Cong., 1st Sess. 18 (1834)).
145. *Id.*

society.[146]

To Memmi, the deployment of a strategy of difference in a European-derived discourse "is likely to be suspect and deserve denunciation."[147] Memmi illustrated the deployment of such a strategy of difference by reference to anti-Semitism, with which he was intimately familiar; but the strategic use of difference to intensify the separation of peoples of color unites the colonizing discourses deployed by Europeans in all the lands they have invaded and conquered.[148] Thus, Memmi's illustration illuminates the extremely suspect nature of the use of the strategy of difference by the Supreme Court in *Oliphant*. The theme of tribalism's difference in fact appears throughout the modern Court's Indian law opinions articulating its legal discourse of implied limitations on tribal sovereignty,[149] and suggests that the Court's unquestioned reliance on a strategy of difference can be most readily understood in the context of a thousand year legacy of European-derived racist-imperial discourse. According to Memmi:

> The colonizer discriminates to demonstrate the impossibility of including the colonized in the community: because he would be too biologically and culturally different, technically and politically inept, etc. Anti-Semitism attempts, by depicting the Jew as radically foreign and strange, to explain the isolation of the Jew, the quarantine under which he is placed.[150]

2. *The assignment of negative values to difference*

Memmi identified a second discursive strategy as "essential" to European-derived racist-imperial discourse, the assigning of values to the difference between a racist and his victim. The assignment of values in a racist discourse is, of course, always to the advantage of the racist and the detriment of his victim.[151]

The assigning of negative values to tribalism's difference with white society has been a persistently deployed strategy in the narrative tradition of tribalism's deficiency and unassimilability since the invasion of America by Englishmen.[152] In the biblically infused discourse of the New England Puritans,[153] and in the arguments made by the promoters of the Virginia Company's New World colonization venture,[154] the Indian's divergent culture, norms and particularly land use practices were consistently devalued in relation to those of a civilized race of cultivators. Georgia's leading politicians, in advocating Indian removal in the early nineteenth century, drew upon this same narrative tradition which devalued tribal land use practices and

146. *See* Williams, *The Algebra*, *supra* note 110, at 272-74.
147. A. MEMMI, *Definition*, *supra* note 119, at 188.
148. *See generally* sources cited *supra* note 110.
149. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Kerr-McGee Corp. v. Navajo Tribe of Indians, 105 S. Ct. 1900 (1985). *See generally* Williams, *The Algebra*, *supra* note 110, at 274-89.
150. A. MEMMI, *Definition*, *supra* note 119, at 187.
151. *Id.* at 188-89.
152. *See supra* text accompanying notes 71-89.
153. *See supra* text accompanying note 63.
154. *See supra* text accompanying note 64.

privileged white society's intended agricultural uses to construct their legal discourse of opposition to tribal sovereignty.[155]

The continuing vitality in United States Indian policy public discourses of this discursive strategy of assigning negative values to the difference presented by tribalism is strongly suggested by the major national Indian policy documents of the past decade. These documents, generated by the executive branch of the federal government, have sought to frame current debate on tribalism's place or non-place in the dominant society.

The now familiar words of former President Ronald Reagan's much publicized 1983 Indian Policy statement spoke of a "government-to-government" relationship between American Indian tribes and the federal government.[156] The Indian policy statement declared that this new relationship could only be achieved by removing the obstacles to Indian political and economic independence. The release of the Report and Recommendations of the Presidential Commission on Indian Reservation Economies in November 1984,[157] the follow-up document to the Reagan Indian Policy Statement, stated in the plainest terms that the negatively perceived values of tribalism itself represented the primary obstacles to Indian self-determination and increased economic development in Indian Country.

The establishment of the Presidential Commission on Indian Reservation Economies was one of the major initiatives outlined in the President's 1983 policy statement.[158] Its stated purpose was to propose recommendations "on what actions should be taken to develop a stronger private sector on federally recognized Indian reservations, lessen tribal dependence on Federal monies and programs and reduce the Federal presence in Indian affairs."[159] Given the present budget deficit-conscious mood in Washington, the Commission's budget deficit-dictated mandate, and the Commission's membership comprised of many prominent non-Indians and even Indians, all well-versed in the budget deficit-dictated discourse presently dominating national Indian policy debates in Washington, the Commission's recommendations merit close scrutiny. Despite the ascendancy of a kinder and gentler presidential administration in Washington, the continuing federal budgetary crisis strongly suggests that the 1984 Commission's basic discourse of reducing the federal presence and increasing private sector investment in Indian Country will likely remain dominant themes of national Indian policy debates for some time to come. The Commission's report has already been prominently cited in the halls of Congress in support of recent Indian policy legislative initiatives.[160]

The Commission's discourse of reduced federal and increased private sector presence in Indian Country incorporates, in the Commission's own

155. *See supra* text accompanying notes 37-42.

156. *See* Statement by the President on Indian Policy, 19 WEEKLY COMP. PRES. DOC. 98, 98 (Jan. 24, 1983) [hereinafter Reagan Policy].

157. REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES (1984) [hereinafter RECOMMENDATIONS].

158. Reagan Policy, *supra* note 156, at 102.

159. RECOMMENDATIONS, *supra* note 157, at pt. I, 7.

160. *See infra* text accompanying notes 203-04.

words, a radical redefinition of the role of tribal governments.[161] Economic development without federal "subsidy" requires, according to the Commission, "a new social and economic setting" in Indian Country.[162] This new "setting" is to be achieved by altering the communal philosophy of shared benefits and maximum employment reflected in most tribally controlled enterprises. This tribally articulated philosophy, according to the Commission, is irreconcilable with the dominant society's more highly valued norms of private ownership and profit-oriented management:

> Private property, individual freedom and the profit motive are basic attributes of the national economic system. By contrast, Indian reservations are characterized by government-run tribal businesses, utilizing tribally held property, and operated in many instances in a not-for-profit manner. In all capitalist systems, governments display an economic role, but not to the same extent as tribal governments.[163]

To illustrate tribalism's radical divergence from the preferred values of capitalism, the Commission provided an illuminating chart of the key differences between the private sector and tribal government.[164]

Private Sector	Tribal Government
Profit Driven	Social Welfare Driven
Business Planning	Big Picture Planning
Cost Control	Budget Based Proposals
Entrepreneur, CEO	Tribal Bureaucracy
Reward System	Patronage System
Products Competition	Organization Competition
Focus on Needs	Focus on Rights
Independent	Dependent

The opposing discourses of tribal self-determination detailed by the Commission's chart merit careful scrutiny. As illustrated by its derogatory nomenclature for describing tribal government's differences ("social welfare driven"; "patronage system"; "dependent"), the Commission's discourse of tribal self-determination clearly devalues tribal enterprises operated by tribal governments according to tribal values. Such enterprises "focus on employment rather than profits as a goal."[165] To remedy this deficient philosophy, tribal governments are strongly urged by the Commission to "make private ownership . . . of tribal enterprises an objective of their involvement in business activity."[166]

The Commission's point of reference for assigning negative values to contemporary tribalism's perceived self-determining vision of economic development is of course the dominant society's profit driven norms. Thus, if tribalism further declines in response to the federal government's failure to adequately fund its trust responsibility to Indian people, tribalism's own

161. RECOMMENDATIONS, *supra* note 157, at pt. I, 26.
162. *Id.*
163. *Id.* at pt. I, 41.
164. *Id.* at pt. II, 33.
165. *Id.*
166. *Id.* pt. I, 47.

stubbornly held difference from the superior values of the dominant society will be blamed.

Certainly, it is unarguable, if not somewhat amazing, given the history of United States Indian policy, that differences remain between many of the values of contemporary tribalism and those held by the dominant society. These differences in fact are particularly marked with respect to norms of wealth creation and its societal value and uses. To Memmi, the fact that "real" differences might be the basis for assigning negative values was immaterial as far as an analysis of European-derived racist discourse was concerned: "The racist can base his argument on a *real trait*, whether biological, psychological, cultural or social—such as the color of the black man's skin or the solid tradition of the Jew."[167] Difference is just a category; a racist discursive strategy "always adds an *interpretation* of such differences, a prejudiced attempt to *place a value* on them."[168] Memmi regards this assigning of negative values to differences between a colonizer and colonized race as a key element in European-derived racist-imperial discourse.

The Commission's charted contrast of the profit-driven motives of the dominant society with the divergent communal values represented in contemporary tribalism's management of Indian Country businesses suggests the reiteration of familiar themes derived from a thousand-year-old discursive legacy of European colonialism and racism. Since their first violent contacts with normatively divergent peoples in the medieval crusading era, Europeans have always sought to prove the inferiority of those they desired to conquer and colonize by mere reference to Europe's own supposed superior value system.[169] As described by Memmi, in the narrative traditions informed by the ancient legacy of European-derived racist-imperial discourse, "*difference is evil.*" This means, of course, the difference characterizing the victim in relation to the accuser, who is taken as the point of reference."[170]

3. *Totalization*

Memmi's third postulated strategy of a racist discourse generalizes about the differences between the racist and his victim, and asserts those differences as final. "So the discriminatory process enters the stage of generalization, 'totalization'. One thing leads to another until *all of the victim's personality* is characterized by the difference, and *all of the members* of his social group are targets for the accusation."[171] The narrative tradition of tribalism's deficiency and unassimilability illustrates the efficacy of this totalizing strategy. In the post-revolutionary war Indian policy discourses of Knox and Lincoln, for example,[172] all tribal Indians were assumed to suffer from the defects of tribalism, although there were many types of tribes, and

167. A. MEMMI, *Definition*, *supra* note 119, at 187-88.
168. *Id.* at 188.
169. *See generally* sources cited *supra* in note 110.
170. A. MEMMI, *Definition*, *supra* note 119, at 188-89.
171. *Id.* at 189.
172. *See generally supra* text accompanying notes 93-95.

all tribal Indians, because of their normative differences, were unassimilable and doomed to extinction in the face of white civilization.

In the case of the Removal era discourse of opposition to tribal sovereignty, the thematic device of totalization was a particularly potent discursive weapon. Removal was most strongly argued as necessary for the salvation of the Five Civilized Tribes, an oxymoron if there ever was one in European-derived racist discourse.[173] As President John Quincy Adams' final message to Congress in 1828 admitted, the southern tribes had learned "the arts of civilization" and "the doctrines of Christianity."[174] But to Adams, a "remedy" was still mandated that might "do justice to those unfortunate children of nature," while at the same time recognize the superior rights of white society to the lands they claimed.[175] So long as the southern Indians remained as tribal communities, their difference could never be assimilated within white "civilization."

Memmi's own comments[176] on this strategy help explain why the Cherokees, who most closely approximated their tribal culture to white values, were unable to overcome the assumptions of the Removal era's dominant discourse on tribalism's radical inferiority: "Racism, on whatever level it occurs, always includes this *collective* element which is, of course, one of the best ways of totalizing the situation: there must be no loophole by which any Jew, any colonized or any black man could escape this *social determinism*."[177]

The use of "totalizing" strategies is strongly suggested throughout contemporary public discourses seeking to constrain tribalism in the United States. Evidence of this "*collective* element," as Memmi called it, essential to the legacy of European-derived racist and imperial discourse, recurs throughout the modern Supreme Court's discourse of implied limitations on tribal sovereignty. The Court's *Oliphant* decision,[178] for instance, incorporated all tribes within its total prohibition against the exercise of tribal criminal jurisdiction over non-Indians based on a generalized assumption of the divergent character of the norms and rules governing all tribal courts.

At the executive level of national Indian policymaking, the Presidential Commission on Indian Reservation Economies reduced its totalizing strategy to a convenient chart contrasting the difference in values between business enterprises in the "private sector" and those managed by "tribal governments."[179] The particular fact that there are hundreds of tribal philosophies governing hundreds of tribal enterprises was of course not reflected in the Commission's chart. Just as significantly, the Commission's chart failed to explain the many tribal business success stories that might contradict its gross overgeneralizations about modern tribalism's deficient approaches to economic development and business management.[180] The

173. *See supra* text accompanying notes 36-42.
174. *See supra* text accompanying note 47.
175. *See id.*
176. *See* A. MEMMI, *Definition*, *supra* note 119, at 189-91.
177. *Id.* at 190.
178. *See supra* text accompanying notes 131-46.
179. *See supra* text accompanying notes 156-66.
180. *See, e.g., Indian Tribes, Incorporated: Native Americans Are Beginning to Have Remarkable*

accuracy of a Presidential Commission's broad schematization of Indian Country economic development philosophies may at first appear as a trivial concern, until one remembers the inability of the Five *Civilized* tribes to escape the totalizing strategy of the Removal era's dominant discourse of opposition to tribal sovereignty. That discourse was unhesitatingly extended by white society to Indian tribes, "civilized" or "uncivilized," and condemned tribalism generally as normatively deficient and unassimilable with the values of white civilization.

Thus, regard for the significance of the circle in American Indian thought focuses particular attention on any Indian policy public discourse which appears to rely too heavily on a totalizing strategy to impute to all Indian tribal nations negatively valued differences of a monolithically depicted tribalism. And given the history of the United States national Indian policy, tribal peoples are indeed paying particular attention to the legal and political discourses articulated by increasing segments of white society focused on tribal administration of justice in Indian Country. Recent proposals to constrain the exercise of tribal sovereignty by tribal courts clearly suggest the use of a totalizing discursive strategy to condemn tribalism in general for its asserted deficiency and unassimilability with the superior norms of white society.

The ubiquity of these proposals to constrain tribal courts is in itself alarming. As reflected in *Oliphant*,[181] federal court judges have voiced concerns over the divergence of the norms reflected in tribal court practices from those of the dominant society for over a decade.[182] At the executive level of national politics, the already cited Report and Recommendations of the Presidential Commission on Indian Reservation Economies[183] focused extensively on the administration of tribal justice by tribal courts as it related to Indian Country economic development.[184] According to the Commission, Indian tribal governments are hindered in the pursuit of economic and business development by their failure to adhere to a constitutional principle separating executive, legislative, and judicial powers within the tribal council and the tribal judiciary. The result of this difference between tribal legal and political processes and those of the dominant society, in the Commission's opinion, was the weakening of the independence of tribal courts and the raising of doubts about fairness, the rule of law, and the stability of tribal government. Such "failures" allegedly make the private sector reluctant to

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Success as Small Businessmen, NEWSWEEK, Dec. 5, 1988, at 40-41. After detailing a number of "success" stories about successful tribal business enterprises, the article notes

> disputes over what role tribal government should play in Indian business. Ross O. Swimmer, the head of Bureau of Indian Affairs [and also former head of the Cherokee Nation in Oklahoma and a member of the 1984 President's Commission on Reservation Economics, ed.] argues that tribal councils often allow political motivations to rule their decisions. Indian leaders counter that aggressive tribal government is imperative for economic development and blame the BIA for bogging down projects with endless red tape.

Id. at 41.

181. *See supra* text accompanying notes 131-146.

182. *See, e.g.*, Shortbull v. Looking Elk, 677 F.2d 645 (8th Cir. 1982); Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980); Little Horn State Bank v. Crow Tribal Court, 690 F. Supp. 919 (D. Mont. 1988).

183. *See supra* text accompanying notes 156-166.

184. *See* RECOMMENDATIONS, *supra* note 157, at pt. I, 29-30.

invest in Indian Country. Correction of these failures would "promote greater certainty for business activity."[185] Thus, the Commission recommended that tribal governments "modernize" their constitutions "to achieve an effective separation of governmental powers."[186] It further recommended that federal legislation "be provided for appellate review of tribal court decisions to the federal court system where constitutional or statutory rights are involved."[187]

In addition to the federal courts and the 1984 Presidential Commission, numerous other segments of white society have focused on the seemingly unassimilable differences between tribal justice systems and the norms of the dominant white society. Proposals to constrain the exercise of tribal sovereignty by tribal court systems reflecting the institutional and substantive values of tribal peoples have been forwarded or are being debated by individuals and groups with ideological agendas as diverse as Senator Orrin Hatch,[188] the United States Civil Rights Commission,[189] and the American Civil Liberties Union.[190] All of these proposals strongly suggest the use of the discursive strategies identified by Memmi as essential to the legacy of European-derived racist and imperial discourse.[191] But their most significant unifying aspect is a commonly expressed conviction that *all* tribal courts collectively must be presumed incapable of protecting the rights of all those who come under tribal jurisdiction in Indian Country.

The rights that are the focus of all these proposals are enumerated in the Indian Civil Rights Act of 1968 (ICRA).[192] That legislation, which was a focus of the Supreme Court's attention in the previously discussed *Oliphant* case[193] was passed by Congress in response to the fact that Indian tribal governments are not subject to the Bill of Rights and other constitutional guarantees restraining state and federal governments in their treatment of individuals under their jurisdiction.[194] The ICRA imposes many of the same restraints on tribal governments that are imposed on state and federal governments, such as requirements of due process and equal protection.[195] But the Act does not contain an establishment of religion clause, a privileges and immunities clause, a provision involving the right to vote, a requirement of free counsel for indigent criminal defendants, or a specified right to a jury trial in a civil case.[196] The United States Supreme Court

185. *Id.* at pt. I, 30.
186. *Id.*
187. *Id.*
188. On August 11, 1988, Senator Hatch introduced S. 2747, 100th Cong., 2d Sess., 134 CONG. REC. 11652 (1988) (A Bill to Provide Federal Court Authority to Enforce Rights Secured by the Indian Civil Rights Act of 1968).
189. *See id.* at 11654-55.
190. Letter from William F. Reynard, Chair of the Indian Rights Committee, American Civil Liberties Union, to Claudine Sattler, Solicitor to the Courts of the Navajo Nation (Jan. 9, 1989) (on file with the author).
191. *See supra* text accompanying notes 123-24.
192. 25 U.S.C. § 1302 (1982 & Supp. 1986).
193. *See supra* text accompanying notes 137-38.
194. *See generally* COHEN III, *supra* note 8, at 202-04. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).
195. *See* D. GETCHES & C. WILKINSON, FEDERAL INDIAN LAW 368-69 (2d ed. 1986).
196. *See id.* at 368.

interpreted the ICRA in *Santa Clara Pueblo v. Martinez*,[197] holding that federal courts may review tribal court enforcement of the ICRA only when presented with petitions for writs of *habeas corpus*, thus limiting intrusions on tribal government functions to the criminal law area. As a result, tribal courts are currently the final forum for adjudication of ICRA questions in a civil context.[198]

One of the most important and potentially significant proposals seeking to assure that Indian tribes protect the rights of those under their jurisdiction and sovereignty according to white society's supposed superior norms is contained in a Senate bill introduced by Senator Orrin Hatch of Utah.[199] Senator Hatch's legislative proposal would give federal courts the authority to enforce the rights secured by the Indian Civil Rights Act in a civil context by mandating federal court review and enforcement of the ICRA after an individual has exhausted his or her tribal remedies.[200] In other words, if an individual still felt that his or her rights under the ICRA were not being protected after a final decision by the tribe's highest judicial authority, that individual could petition for final review of the tribal decision in the white society's courts.

In introducing his proposed legislation to the Senate, Senator Hatch first explained the important substantive differences between tribal governments and the dominant society's governments. He remarked:

> Constitutionally, tribal governments differ from most State and Federal governments. Some of the fundamental checks and balances existing within the Federal and state constitutional framework, for example, are not present at the tribal level. Real power in many tribal governments rests with the tribal council or legislative branch. Tribal councils pass the ordinances, resolutions, and other processes which create tribal law. Through standing committees in such areas as social welfare, law enforcement, or the judiciary, tribal councils then perform executive, management, and implementation functions as well. The tribal councils often micro-manage tribal programs and their function is substantially different from the more general oversight role performed by non-Indian legislative bodies.[201]

Having stressed these differences between the political values of contemporary tribalism and those of "non-Indian" society, Hatch next offered an interpretation of these differences. Significantly, Hatch utilized the presumptively superior values of the non-Indian society as the point of reference for his assigning of negative values to contemporary tribalism's difference. He observed:

> Separation of powers into coequal branches of government in order that one may check the potential abuse of another is not a concept well-established in tribal governments. As a result, tribal governments

197. 436 U.S. 49.
198. *Id.* at 56-57, 61-66.
199. *See supra* note 188.
200. *See* Senator Hatch's introductory comments to his bill, S. 2747, 134 CONG. REC. at 11654-55.
201. *Id.* at 11652.

may lack pluralism, respond more to majority concerns, and ignore minority interests.

In that context, tribal courts exist in only about one-half the tribal governments. Where courts do exist, they are often a creation of the tribal council and therefore subject to and dependent on the council. Rarely do tribal courts exist constitutionally as a separate coequal branch of the tribal government. As a consequence, tribal courts may lack the powers to review tribal council actions, may be otherwise limited jurisdictionally, and may lack independence from the tribal council or tribal chairman.[202]

Not surprisingly, Hatch quoted the 1984 report of the Presidential Commission on Indian Reservation Economies[203] in constructing his discourse on the deficiency of tribal courts:[204]

Both Indians and non-Indians complain of political discrimination against them by tribal governments and tribal courts which are arms of tribal governments. Access to tribal physical resources, to the benefits of tribally managed programs, and to tribal employment is considered to be unfair by many Indians. Decisions rendered by tribal courts which are controlled by tribal councils, are also perceived to be unfair by Indians and non-Indians.[205]

While Senator Hatch's discourse suggests strong reliance on strategies of difference and assigning negative values to difference to support his proposal to constrain the exercise of tribal sovereignty by tribal courts, what is more alarming is the Senator's totalizing approach in advocating a remedy for "systemic" and "institutional" Indian Civil Rights Act problems.[206] Senator Hatch acknowledged at several points in his introductory remarks that the "problems" with enforcement of the ICRA which motivated him to submit his bill were limited to only "some tribes," and were "not necessarily occurring in all or even a majority of the tribal governments."[207] His bill, however, would extend federal court review of tribal court ICRA decisions to all tribes. Hatch claimed that the isolated "problems" and abuses of tribal enforcement of the ICRA were so "serious" in his opinion that generalized federal court review of *all* tribal court ICRA-related decisions was mandated.[208] He stated:

[T]he situation was serious enough to warrant congressional action in 1968, and it appears that at least with some tribes such is still the case. . . .

. . .

Examples of systemic or institutional Indian Civil Rights Act problems include the failure of tribal governments to insist on independent judicial review or an equally effective compliance proce-

202. *Id.*
203. *See supra* text accompanying notes 157-66.
204. 134 CONG. REC. at 11653-54.
205. *Id.*
206. *Id.* at 11655.
207. *Id.* at 11654.
208. *See id.* at 11655.

dure. Some tribal governments fail to create tribal courts or, where they do exist, extend to them the power of judicial review.

Efforts have been made to increase federal funding and provide effective training programs for tribal court systems. However, while appropriate funding and training levels are important, they will not resolve the Indian Civil Rights Act enforcement problems that do exist. The remedy lies with federal court enforcement. Federal court enforcement, coupled with a requirement of exhaustion of tribal remedies and limited to equitable relief, will achieve the goal of providing an effective Indian Civil Rights Act compliance program without unnecessarily limiting other legitimate tribal goals.

The bill that I am introducing today does just that. It provides for federal court review and enforcement after an individual has exhausted his or her tribal remedies. The bill will also prohibit the defense of sovereign immunity in civil rights cases. It is a fair and balanced solution. . . .[209]

Many of the "problems" with tribal court ICRA enforcement motivating Senator Hatch's generalized strategy in his bill were identified through reported federal court cases involving individuals claiming tribal abuses of ICRA-granted rights. For instance, at one point in his introductory remarks, Senator Hatch cited,[210] with apparent approval, the observations of a federal judge in the United District Court for Montana in the case of *Little Horn State Bank v. Crow Tribal Court*.[211] The judge in that case expressed the view that the Crow Tribal Court had acted as a "Kangaroo Court" with "no pretense of due process or judicial integrity" in badly mistreating a plaintiff under its jurisdiction.[212]

For Senator Hatch, the isolated incidents culled from federal court cases and other select archives[213] demonstrated the necessity of a compre-

209. *Id.* at 11654-55.

210. *Id.* at 11654.

211. 690 F. Supp. 919, 923-24 (D. Mont. 1988), *cited in id.*

212. The district court described the controversy between the bank and the tribe as follows:

Plaintiff was met not only with bias and uncooperativeness, but with a blatantly arbitrary denial of any semblance of due process. The tribal judge's conduct makes a mockery of any orderly system of justice, and renders any attempt to deal with the Tribe in a professional and competent manner a farce. The Court seriously questions whether the conduct of the Tribal Court is befitting the title of a sovereign, and the respect and deference customarily accorded along with that status.

It would appear that the Crow Tribal government changes judges at a whim, to the detriment of non-Indian litigants, and of the Tribe. As a result, the Tribal Court lacks any continuity and uniform precedent which is the foundation of our judicial system. While the tribal members enjoy the protection of their rights under both the United States Constitution and the ICRA, depending on the forum, it appears that non-Indians are not granted the same privileges of dual citizenship in Tribal Court. If the Crow Tribe wishes to earn the respect and cooperation of its non-Indian neighbors, it must do more to engender that respect and cooperation, not abuse those neighbors who attempt to work within its system.

690 F. Supp. at 923-24, *quoted in* 134 CONG. REC. at 11654.

213. In his introductory remarks, Senator Hatch stated:

Because of the enforcement problems that have occurred since the *Martinez* case, time has now come to follow the Supreme Court's dictum and legislate a federal court remedy. A review of post-*Martinez* Federal and tribal caselaw, existing federal studies, news reports and other available information, makes clear that rights secured by the Indian Civil Rights Act have been less than fully enforced.

In earlier testimony before the U.S. Civil Rights Commission, the Department of Jus-

hensive solution to the "problems" of tribal enforcement of the ICRA. Hatch's totalizing strategy for dealing with tribalism's perceived difference in protecting the rights of those under its jurisdiction is grounded in apparent fear that other tribal courts might act like "kangaroo courts" unless constrained by the ever-present potential threat of federal court review of the ICRA-related decisions.

Memmi's description of the useful functions of a discursive strategy of totalization suggests the nature of the relation between the Indian policy discourses of Senator Hatch, the federal judges, and other segments of white society so fearful of the proliferation of Indian "kangaroo" courts throughout Indian Country and the thousand-year-old legacy of European racist and imperial discourse. As Memmi illustrates:

> The racist ascribes to his victim a series of surprising traits, calling him incomprehensible, impenetrable, mysterious, strange, disturbing, etc. Slowly he makes of his victim a sort of animal, a thing or simply a symbol.
>
> As the outcome of this effort to expel him from any human community, the victim is chained once and for all to his destiny of misfortune, derision and guilt. And as a counterpart, the accuser is assured once and for all of keeping his role as rightful judge.[214]

4. *Justifying privileges*

According to Memmi, the final essential element of European-derived racist and imperial discourse relies on the mythology of the deficient, dehu-

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tice provided some interesting statistics and background with respect to its involvement and monitoring of Indian Civil Rights Act enforcement. I would like to share some of that testimony with my colleagues at this point:

"In the 7 years prior to *Santa Clara*, the Department of Justice received about 280 complaints of ICRA violations on the part of tribal governments. ICRA complaints during this period accounted for just over 18 percent of all civil rights complaints involving Indians. Several of these matters were settled by informal discussion between the Department and the affected tribes. Others were not pursued because of non-ICRA commitments on our part. The Department did, however, participate in six federal civil lawsuits which raised ICRA issues, including two brought solely on ICRA claims. No cases have been brought subsequent to *Santa Clara*. Most complaints brought to the Department's attention pre-*Santa Clara* involved allegations of tribal election irregularities. Other alleged violations occurred in the area of tribal employment, law enforcement, that is, police and court irregularities, and housing assignment policies.

"Since the Court's 1978 decision in *Santa Clara*, the Justice Department has received about 45 ICRA complaints alleging violations of the civil rights of Indians by tribal governments. No action has been taken on any complaint and no effort has been made, post-*Santa Clara*, to involve the jurisdiction of the federal courts. Seventeen complaints allege tribal court irregularities including a failure to allow retained attorneys to appear in tribal court, a failure to permit defendants an opportunity to be heard and the failure to afford criminal defendants a trial by jury. Thirteen complaints allege flaws in the tribal election process including improper interference by the tribal council, fraud and malapportioned election districts. Six complaints allege improper tribal hiring practices including political interference and nepotism. Four complaints allege housing violations including noncompliance with tribal housing assignment policies, favoritism and improper interference by the tribal council. The remaining miscellaneous complaints range from an alleged failure to provide tribal benefits equally to all members (similar to the *Santa Clara* facts) to an allegation of unsanitary and inadequate tribal jail conditions."

134 CONG. REC. at 11654-55.

214. A. MEMMI, *Definition*, *supra* note 119, at 191.

manized victim to justify and explain the racist's own privileges and aggression.[215] Memmi's pointed exposition of this strategy suggests the close relationship between white society's historical and continuing repression of tribalism's devalued difference and the thousand-year-old legacy of European racism and imperialism. He explains:

> Whatever is different or foreign can be felt as a disturbing factor, hence a source of scandal. The attempt to wipe it out follows naturally. This is a primitive, virtually animal reaction, but it certainly goes deeper than we care to admit. . . . However that may be, the mechanism remains the same. By an accurate or falsified characterization of the victim, the accuser attempts to explain and to *justify* his attitude and his behavior toward him.[216]

It was the tribal Indian's strange and disturbing difference that, according to the narrative tradition of tribalism's inferiority, justified the English colonists' privilege of dispossessing the Indian of the New World.[217] It was this same devalued difference that justified early nineteenth century white society's removal of a race of people long-doomed as an obstacle on civilization's intended path.[218]

Today, the white man's courts, his executive branch and his elected legislators increasingly rely on law and legal arguments in their public discourses on Indian policy to justify the imposition of constraints on contemporary tribalism. Disturbingly, as white society finds itself confronting a resurgent discourse of tribal sovereignty, and as its intercourse with once remote Indian Nations in the West grows more frequent, it increasingly draws upon themes of tribalism's supposed deficiency and unassimilability to sustain its privileges as "rightful judge" in the Indian's Country.[219] These privileges, sustained by legal argument, are unashamedly declaimed in public discourses which assume white society's superior right to dictate the implied limitations on tribal sovereignty, the philosophy that ought to govern tribal economic development initiatives, and the procedural and substantive norms that ought to be enforced in tribal courts. These contemporary discourses of opposition to tribal self-determining autonomy, which draw so heavily on familiar themes of tribalism's deficiency and unassimilability, appear to be clearly situated within the same narrative tradition that once explained white society's privilege to colonize the Indian's America and to remove the Indian from the eastern United States.

Like all the varied discourses comprising and enriching Western society's thousand-year-old legacy of aggression against peoples of color, the discourses of opposition to tribal sovereignty reflected throughout the various documents of barbarism of past and contemporary Indian policy discourses seek to justify the white man's privileges of aggression against tribalism through racism. The tribal Indian's cultural inferiority justifies the superior white society's privilege of domination. This use of racism to privilege the

215. *Id.* at 191-94.
216. *Id.* at 192.
217. *See supra* text accompanying notes 63-70.
218. *See supra* text accompanying notes 36-58.
219. *See supra* text accompanying note 214.

white man's aggression against peoples of color is, as Memmi recognized, the fundamental mechanism common to all European-derived colonizing discursive practices. Memmi points out:

> The fact remains that *we have discovered a fundamental mechanism*, common to all racist reactions: *the injustice of an oppressor toward the oppressed*, the former's permanent *aggression* or the aggressive act he is getting ready to commit, *must be justified*. And isn't privilege one of the forms of permanent aggression, inflicted on a dominated man or group by a dominating man or group? How can any excuse be found for such disorder (source of so many advantages), if not by overwhelming the victim? Underneath its masks, *racism is the racist's way of giving himself absolution*.[220]

C. *The Contemporary Legacy of European-Derived Racism and Colonialism in Federal Indian Law: A Definition*

The legacy of a thousand years of European colonialism and racism can be located in the underlying shared assumptions of Indian cultural inferiority reflected in the narrative tradition of tribalism's normative deficiency, the Removal era's dominant discourse of opposition to tribal sovereignty, and in those contemporary Indian policy discourses seeking to constrain tribalism. Since its invasion of America, white society has sought to *justify*, through law and legal discourse, its privileges of aggression against Indian people by stressing tribalism's incompatibility with the superior values and norms of white civilization. For half a millenium, the white man's Rule of Law has most often served as the fundamental mechanism by which white society has absolved itself for any injustices arising from its assumed right of domination over Indian people.

Memmi's genealogy of European-derived racist-imperial discourse illuminates the continuing determinative role of racism and cultural imperialism in United States public discourses on the legal rights and status of Indian tribes. The racist attitude, focusing on the tribal Indian's cultural inferiority as the source of white society's privilege of acting as rightful judge over the Indian, can be located in the discourses of seventeenth century Puritan divines, nineteenth century Georgia legislators, and twentieth century members of Congress, the federal judiciary and the federal executive branch.

Memmi's genealogy therefore suggests that the relationship between the thousand-year-old legacy of European racism and colonialism and United States public discourses of law and politics regarding Indian rights and status can be more precisely defined by focusing on the racist attitude itself. This racist attitude can be found recurring throughout the history of white society's contact with Indian tribalism. *The legacy of European colonialism and racism in federal Indian law and policy discourses can be located most definitively, therefore, in those Indian policy discourses that seek to justify white society's privileges or aggression in the Indian's Country on the basis of tribalism's asserted deficiency and unassimilability.*[221] That so many con-

220. A. MEMMI, *Definition*, *supra* note 119, at 194.
221. *See supra* text accompanying note 123.

temporary Indian policy discourses unhesitatingly cite tribalism's deficient difference as the legitimating source of white society's role as rightful judge over Indian people understandably causes great alarm to those who appreciate the significance of the circle in American Indian thought. The genocidal legacy of European racism and colonialism in the narrative traditions of federal Indian law continues to threaten tribalism with elimination from what once was the Indian's America.