

THE LOGIC OF THE MODERN NATION-STATE AND THE LEGAL CONSTRUCTION OF NATIVE AMERICAN TRIBAL IDENTITY

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INTRODUCTION

I. A NATION STATE OF MIND

“Nationalism,” argued Hans Kohn a half-century ago, “is first and foremost a state of mind, an act of consciousness.”¹ As June Starr notes in a companion Article in this volume, nations are hardly the inevitable entities—the natural convergences of blood and territory—that their propagandists insist. Rather, Starr tells us, “nationalistic ideas are ‘social constructs,’ products of particular times, places, and events.”² In Benedict Anderson’s recent and immensely influential formulation, the nation is an “imagined community.” “Nationality[,] . . . nation-ness, [and] nationalism,” he tells us, “are cultural artifacts of a particular kind.”³ The “nation,” Anderson argues, is a form of community

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I have been pleased to supervise an award-winning 1994 University of California, Irvine honors thesis on the Federal Acknowledgement Process, *American Indians and the Illusion of Federal Recognition*, by Jody Moore.

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All errors of fact and interpretation remain the personal property of the author.

This Article is dedicated to the work of Allogan Slagle.

1. HANS KOHN, *THE IDEA OF NATIONALISM* 10 (1944). Benedict Anderson names Kohn as one of the “founding fathers” of the academic study of nationalism. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 4 (1991).

2. June Starr, *Passionate Attachments: Reflections on Four Myths of Nationalism*, 28 *IND. L. REV.* 601 (1995). Professor Starr has identified “four myths of nationalism.” Among these myths are: (1) “One People, One Nation”; (2) “One People, One Territory”; (3) “A People Has a Historic Identity Which Associates It with a Land”; (4) “Religion is Often the Impetus Behind Nationalism.” Starr, *supra*.

3. ANDERSON, *supra* note 1, at 4. Like Starr, Anderson argues that:

[T]o understand [these artifacts] properly[,] we need to consider carefully how they have come into historical being, in what ways their meanings have changed over time, and why, today they command such profound emotional legitimacy. . . . [T]he creation of these [artifacts] towards the end of the eighteenth century was the spontaneous distillation of discrete historical forces; but, that, once created, they became “modular,” capable of being transplanted, with varying degrees of self-consciousness, to a great variety of social terrains, to merge and be merged with a

that—again, notwithstanding the sorts of origin-myths piously invoked by nationalists themselves—“from the start was conceived in language, not in blood.”⁴

This newer understanding of “nation-ness” put forward by Starr and Anderson—that “nationalist ideas are social constructs,” and that the nation itself is an artifact of the political culture, cognition, and discourse peculiar to modernity—has been brought to view by a recent flourishing of scholarship on nationalism that has followed the collapse of the Soviet bloc and the realignment of strategic global politics. This new understanding of nationalism as an “emergent phenomenon,”⁵ which itself serves as an organizing principle of modern socio-legal thought, will be my focus as I consider one specific genre of nation-hood claim—an identity assertion whose form is mandated by American law and structured by the conceptual frames of American legal culture. This identity assertion is the Federal Acknowledgement Process (FAP), an administrative law program conducted by the Bureau of Indian Affairs (BIA) under the executive branch authority of the United States Department of the Interior.⁶

FAP regulations specify the narrative genre in which Native American communities must petition the federal government to “acknowledge” them as a “federally recognized Indian tribe.”⁷ As Rachael Paschal has described the meaning of federal recognition:

Federal recognition of Indian tribes is a formal political act that establishes government-to-government relationships between the tribes and the United States. Recognition acknowledges both the sovereign status of the tribes and the responsibilities of the United States toward the tribes.⁸

Federal acknowledgement of a particular community as a “recognized Indian tribe” is hardly a matter of tracing the community’s roots simply in order to validate its members’ sentimental attachment to the “authenticity” of their own ethno-historical identity.⁹

correspondingly wide variety of political and ideological constellations. [We must] also attempt to show why these particular cultural [artifacts] have aroused such deep attachments.

ANDERSON, *supra* note 1, at 4.

4. ANDERSON, *supra* note 1, at 145.

5. The notion of nationalism as an “emergent phenomenon” is discussed in LIAH GREENFELD, NATIONALISM: FIVE ROADS TO MODERNITY 7 (1992).

6. The FAP is the common informal designation for this program, the term used by Congress itself. See, e.g., *Federal Acknowledgement Process: Hearing Before the Select Comm. on Indian Affairs*, 100th Cong., 2d Sess. 77 (1988). The regulations governing the FAP are codified at 25 C.F.R. §§ 83.1-83.11 (1994).

7. See generally Rachael Paschal, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgement Process*, 66 WASH. L. REV. 209 (1991). Paschal’s thoughtful assessment of the FAP is one of the very few instances of law review scholarship to consider the acknowledgement process.

8. Paschal, *supra* note 7, at 209.

9. See generally M. Annette Jaimes, *Federal Indian Identification Policy: A Usurpation of Indigenous Sovereignty in North America*, in THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE 123 (M. Annette Jaimes ed., 1992) [hereinafter GENOCIDE, COLONIZATION, AND RESISTANCE] (discussing the “appropriation of the definition of Indian identity” by the United States). In the view of Lenore Stiffarm and Phil Lane, Jr.:

The first, and perhaps most important, issue [on which the future of Native North America hinges] is whether American Indians will continue to allow themselves to be defined mainly by their

Rather, tribal recognition is necessary for many Native American groups to attain the legal rights due them under federal law and to gain access to resources they need to survive as viable communities. Currently, the United States recognizes approximately 300 tribes, but Paschal cites a BIA estimate that there are at least 230 "extant and functioning tribes" that remain in unrecognized status.¹⁰

Federal recognition allows Native peoples to exercise a "limited sovereignty over their own territories, which are held in trust for them by the United States."¹¹ This limited sovereign status confers upon Native peoples limited powers of self-government and provides federal protection against infringement on "tribal lands and powers" by the individual states.¹² Recognition is also frequently required for the protection of native hunting and fishing rights, in addition to being necessary for communities to obtain important federal services. Paschal notes that Indian Health Service eligibility as well as other important education, social service, employment, and housing benefits are all linked to recognized tribal status.¹³

M. Annette Jaimes, a Native American scholar who has studied the question of tribal identity under the law, has described the situation confronted by unrecognized groups as a "Catch-22." She points out the circularity implicit in the "federal criteria for recognition of Indian existence [which are, she says, still in force] to the present day":

1. An Indian is a member of any federally recognized Indian tribe. To be federally recognized, an Indian tribe must be comprised of Indians.
2. To gain federal recognition, an Indian tribe must have a land base. To secure a land base, an Indian tribe must be federally recognized.¹⁴

colonizers, in exclusively racial/familial terms (as "tribes"), or whether they will (re)assume responsibility for advancing the more general and coherently political definition of themselves they once held, as *nations* defining membership/citizenship in terms of culture, socialization, and the good of the group.

Lenore Stiffarm & Phil Lane, Jr., *The Demography of Native North America: A Question of American Indian Survival*, in GENOCIDE, COLONIZATION, AND RESISTANCE, *supra*, at 23, 45.

10. Stiffarm & Lane, *supra* note 9, at 209 (citing *Federal Acknowledgement Process: Hearing Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 2d Sess. 77 (1988)). Francis Prucha cites a communication to him from the Federal Acknowledgment Branch (the BIA office in charge of processing acknowledgement petitions) that estimated "the number of unrecognized groups as 251, of which 150 might submit petitions." 2 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 1196 (1984).

11. Paschal, *supra* note 7, at 212 (citing *Worcester v. Georgia*, 31 U.S. 515, 557-62 (1832)).

12. Paschal, *supra* note 7, at 212 (citing *McClanahan v. Arizona*, 411 U.S. 164 (1973)).

13. Paschal, *supra* note 7, at 213. In addition, the 1988 Federal Indian Gaming Regulatory Act permits recognized tribes rights to establish gambling casinos on their tribal lands in states that otherwise permit gaming. See 29 U.S.C. §§ 2701-2725 (1988). See also Penny Arevalo, *Playing the Odds: Indian Tribes Want Casino Gambling, and Say the Law is on Their Side*, CALIF. L. AND BUS., February 22, 1994, at 8, 31.

14. Jaimes, *supra* note 9, at 33 (citing a report contracted pursuant to P.L. 95-561, Title IV, Section 1147, by Native American Consultants, Inc., submitted to the Office of the Assistant Secretary of Education, U.S. Department of Education, Washington, D.C., January 1980, at 2).

The federal recognition process has received too little attention from legal scholars. This Article will focus upon the specific conceptualization of "Indian tribe" that structures federal recognition as a genre of legal discourse, and upon how the law's ethno-racial conception of Native American collective identity functions to "normalize"¹⁵ entire populations, under the modern "civic nationalism" of American legal culture.¹⁶

It is from this perspective that I will look at the logic of national identity embedded in the legal process that determines whether a community is or is not a *federally recognized Indian tribe*. I will argue that the process of federal tribal recognition imposes a narratology for the assertion of ethno-racial nationalist identity whose structure reflects how notions of group identity function in Western-American political culture today.¹⁷ I

15. I intend the term "normalizing" here in the sense in which Michel Foucault and others have introduced it into recent socio-legal theory.

Foucault argued that, with the rise of the modern state, "law operates more and more as a norm, and that the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory." 2 MICHAEL FOUCAULT, *THE HISTORY OF SEXUALITY* 144 (Robert Hurley trans., 1980). His associate Francois Ewald describes the "norm," in this sense, both as "a measurement and a means of producing a common standard" and agrees with Foucault that "modernity coincides with the coming of a normative age." Francois Ewald, *Norms, Discipline, and the Law*, in *LAW AND THE ORDER OF CULTURE* 141 (Robert Post ed., 1991).

Jonathan Simon has studied the logic of actuarial categories in the contemporary Western social order. Rather than seeking to change people, Simon suggests that the effect of actuarial categories is to "normalize" them in Foucault's sense, to "manage them in place." Jonathan Simon, *The Ideological Effects of Actuarial Practices*, 22 L. & SOC'Y REV. 773 (1988). For a similar view, see also Iain A. Boal, *The Rhetoric of Risk*, 1 PSYCHOCULTURE 2 (1995).

16. Jimmie Durham argues that the word "tribe"

is not a descriptive word, nor a scientific one. Its use in anthropology has been completely discredited, and came from the European concept of progress at the pinnacle of which were the capitals of Europe. "Tribe," "chief," and similar words do not describe a part of reality for any people. They are descriptive only within the discourse of enclosure and concealment, for purposes of fabricating impressions of relative primitiveness.

Jimmie Durham, *Cowboys and ... Notes on Art, Literature, and American Indians in the Modern American Mind*, in *GENOCIDE, COLONIZATION, AND RESISTANCE*, *supra* note 9, at 433. Durham also notes that one

cannot realistically insist that the terminology of modern states be applied, such as "president" or "prime minister." At best one ends up with "tribal president," "tribal chair," or in the case of my own people, "president of the Cherokee Nation of Indians." In that example, the use of the word "nation" has been rendered synonymous with the word "tribe." (One does not, after all, refer to the "president of the Nation of France," or "president of the French Nation.").

Id. To carry Durham's ironic observation about the notions of race, tribe, and nation invoked by titles such as "the President of the Cherokee Nation of Indians" just one step further, one is even less likely to hear Monsieur Chirac referred to anytime soon as the "president of the French Nation of Caucasians."

17. My use of the terms "narrative" and "genre" here derive loosely from recent work in cultural and socio-legal studies. See generally HOMI BHABHA, *THE LOCATION OF CULTURE* 139-197 (1994); Homi Bhabha, *Narrating the Nation*, in JOHN HUTCHINSON AND ANTHONY D. SMITH, *NATIONALISM* 306-312 (1994); Susan Staiger Gooding, *Place, Race, and Names: Layered Identities in United States v. Oregon, Confederated Tribes of the Colville Reservation, Plaintiff Intervenor*, 28 L. & SOC'Y REV. 1181 (1994).

propose that an investigation of federal tribal recognition standards may tell us something about “identity management” as a technology of governance characteristic of the late modern multi-ethnic state.¹⁸

I wish to suggest that an implicit relation exists between this discussion of the use of narrative (or “storytelling,” and other vernacular discursive forms) with the recent focus on the use of narrative by ethnic and racial minority scholars writing within the North American legal academy, especially scholars associated with feminism and Critical Race Theory. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1988); Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?* 76 VA. L. REV. 95 (1990); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) [hereinafter *Voices of America*]; Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); and see generally *Symposium: Legal Storytelling*, 87 MICH. L. REV. 2073 (1989).

The harsh attacks by other legal scholars on these uses of narrative suggest that it is not so much any purely formal consideration of narrative structure that so exercises these critics as it is their understanding that narrative and other vernacular discourse genres have been quite effectively reappropriated as oppositional rhetorical forms. See, e.g., Daniel Farber & Susannah Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992).

18. I situate this Article within a recent trend within socio-legal scholarship (and, more broadly, within cultural studies) that focuses on practices of law and governmentality that operate through the management of identities. These identities are formations organized most typically around social and political conceptions of race, ethnicity, language, religion, gender, sexuality, class, and immigration status—and of the multiple intersections among these formations. I have briefly touched upon these questions in an earlier short essay where my co-author and I argued that the American Civil Rights movement of the 1950s and 1960s was not so much the triumph of liberal individualism that recent neo-conservatism has depicted as it was a “fight to expand the social space of all blacks and to rearticulate the political semantics of the collective identity of the descendants of slaves.” See Richard Perry and Patricia J. Williams, *Freedom of Hate Speech*, TIKKUN, July/Aug. 1991, at 55, 57.

The notion of “identity management” applied to individual social actors has been current in American social thought at least since Erving Goffman’s foundational work on “the presentation of self in everyday life,” social stigma, and the “management of spoiled identity.” See ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959); ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SOCIAL IDENTITY* (1963). For an example of close analysis of social interaction between a North American Native community and their white neighbors in the style of Goffman, see NIELS WINTHER BRAROE, *INDIAN AND WHITE: SELF-IMAGE AND INTERACTION IN A CANADIAN PLAINS COMMUNITY* (1975).

More recent work has focused on how the collective identities that emerge from shared experiences of ethnicity, gender, class, or sexuality are no less constructed and managed than are individual identities. On the management of group identities in late-modern multi-ethnic states, see Duncan Kennedy’s discussion of “group identities” and the “managed heterogeneity” of post-colonial “settler societies” such as the United States in DUNCAN KENNEDY, *SEXY DRESSING, ETC.* 14-16 (1993); see also MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (2d ed. 1994); Avery Gordon & Christopher Newfield, *White Philosophy*, 20 CRITICAL INQUIRY 737 (1994); Gary Peller, *Notes Toward a Post-Modern Nationalism*, 1992 U. ILL. L. REV. 1095; Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758.

This Article is not at all intended as an ethnographic study of Native cultures or voices. Quite the contrary, it is offered in the spirit of Gary Peller's proposal that socio-legal scholars should seek to historicize the culture of American legal institutions, in order "to begin to understand these institutions as reflections of a particular, as opposed to universal white culture."¹⁹ Peller recommends the "constructive work of doing voice scholarship on the dominant culture . . . [of] demonstrating what its roots are, its genealogy, what its voice is."²⁰

II. A POLITICS OF IDENTITIES AND ANXIETIES

We hear a great deal these days about something called the "politics of identity." This phrase, as it has been tossed around in contemporary American political discourse, expresses a widely felt, weary cosmopolitan disdain for a certain sort of claim made against the state or its bureaucratic agencies on behalf of a broad range of collectivities.²¹

19. Peller, *Notes Toward a Post-Modern Nationalism*, *supra* note 18, at 1101. Forty years ago, the anthropologist Clyde Kluckhohn and his collaborator Robert Hackenberg suggested that attention be paid to the culture of that "other tribe," the United States Indian Service. PRUCHA, *supra* note 10, at 943 (citing Clyde Kluckhohn & Robert Hackenberg, *Social Science Principles and The Indian Reorganization Act*, in INDIAN AFFAIRS AND THE INDIAN REORGANIZATION ACT: THE TWENTY YEAR RECORD 31 (William H. Kelly ed., 1954)).

20. Peller, *Notes Toward a Post-Modern Nationalism*, *supra* note 18, at 1101. For a sampling of this trend, see OMI & WINANT, *supra* note 18; Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Neil Gotanda, *A Critique of "Our Constitution is Color Blind"*, 44 STAN. L. REV. 1 (1991); Mari Matsuda, *Voices of America*, *supra* note 17; Peller, *Race Consciousness*, *supra* note 18.

Other writings that have influenced this discussion include JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE* 277-346 (1988); VINE DELORIA JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* (1988); DAVID THEO GOLDBERG, *RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING* (1993); DAVID ROEDIGER, *THE WAGES OF WHITENESS* (1993); MICHAEL PAUL ROGIN, *FATHERS AND CHILDREN: ANDREW JACKSON AND THE REMOVAL OF THE AMERICAN INDIAN* (1975); Rosemary Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, VI CAN. J. OF L. AND JURISPRUDENCE (July 1993); Gordon & Newfield, *supra* note 18; Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705; Elizabeth Mertz, *The Uses of History: Language, Ideology, and Law in the United States and South Africa*, 22 L. & SOC'Y REV. 661 (1988); Joseph William Singer, *Legal Theory, Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991); Allogan Slagle, *The Native American Tradition and Legal Status: Tolowa Tales and Tolowa Places*, 7 CULTURAL CRITIQUE 103 (1987); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Jurisprudence*, 1986 WIS. L. REV. 219.

21. See, e.g., DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991); ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* (1991). For a far more sophisticated critique of identity politics that focuses on the question of gender identity, see JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 1-6, 142-194 (1990).

The content of these group-claims, most typically, is altogether ordinary—demands for increased access to state resources or for enhanced political representation, etc.—but what ultimately makes these claims objectionable to cosmopolitans is that they are grounded in some narrative of the group's collective historical existence—its “identity.”²²

Of course group-based claims are routinely asserted on behalf of all sorts of constituencies—from religious conservatives to war veterans to populations defined by social welfare categories (e.g., the various managerial classifications of persons “at risk,” such as populations with heightened incidence of HIV infection or of spousal abuse or of drive-by shootings). But the paradigm case of “identity politics” is the kind of claim based upon the specificity of the collective history of an ethnic or racial group (just the sort of narrative mandated by the federal recognition process). Such identity assertions are routinely conflated by their cosmopolitan critics with the range of phenomena that Michael Ignatieff has called the “new nationalism”—with the recent surge of inter-ethnic strife in the post-Cold War world.²³

This curious lumping of the defense of minority interests and identities within large modern states together with ethno-nationalist, or even racist and fascist, movements elsewhere in the world is typically signaled by the baleful references to “balkanization” that routinely form the substance of attacks upon multi-cultural reforms in American institutions. Supreme Court Justice Anthony Kennedy made one of the most improbable of these comparisons when he likened the Federal Communications Commission's effort to reserve some small number of broadcast licenses for minorities to the white-supremacist apartheid system of South Africa.²⁴

According to these new cosmopolitans, civil society is endangered from within and from without by group claims asserted in the rhetoric of militant particularism. In light of this Article's focus on the FAP as an assertion of “ethnic nationalism,”²⁵ it is worth noting that when critics of identity politics wish to express especial contempt for any specific identity claim, they call it “tribalism.”²⁶

22. For one of the most influential recent discussions of these issues, see CHARLES TAYLOR, *MULTICULTURALISM AND THE POLITICS OF RECOGNITION* (1992).

23. MICHAEL IGNATIEFF, *BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM* (1993).

24. *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 110 S. Ct. 2997, 3046 (1990) (Kennedy, J., dissenting). For a rather different view, see Patricia J. Williams, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990); see also Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615 n.49 (1992).

25. I take the term “ethnic nationalism” from Michael Ignatieff's widely noted recent book. IGNATIEFF, *supra* note 23, at 5. I shall discuss Ignatieff's distinction between “ethnic nationalism” and what he calls “civic nationalism” later in this Article. See *infra* text accompanying notes 90-96.

26. As Patrick Macklem has observed in a recent essay, “What some regard as the nurturing of cultural difference, others view as a dangerous new form of tribalism.” *Distributing Sovereignty: Indian Nations and the Equality of Peoples*, 45 STAN. L. REV. 1311, 1313 (1993).

See also Tony Judt's observation that “For a long time, the conventional wisdom was that such ‘tribal’, ideological alliances were *passé*.” *The New Old Nationalism*, N. Y. REV. OF BOOKS, May 26, 1994, at 44; JOEL KOTKIN, *TRIBES: HOW RACE, RELIGION, AND IDENTITY DETERMINE SUCCESS IN THE NEW GLOBAL ECONOMY* (1992).

III. INDIANS, TRIBES, NATIONS, STATES

A. *The Cult of the Vanishing Native American*

The "Indian" as a concept of the European and Euro-American imagination has had a long history as a focal point for concerns about political and cultural identity.²⁷ Reports of the Native peoples of North America influenced Thomas Hobbes's view of humankind in the "state of nature."²⁸ According to John Locke's conjectural history, "in the beginning all the world was America."²⁹ Locke's belief that a "king of the large and fruitful territory [of North America] feeds, lodges, and is clad worse than a day-laborer in England" and that the vast North American continent had been left a wilderness and a wasteland by its Native peoples "for want of improving it by their labor" provided subsequent generations of colonists with a natural rights rationale to disposes the indolent Native peoples in favor of industrious Christians.³⁰ According to de Tocqueville:

The Indian, in the dreary solitudes of his woods, cherishes the same ideas, the same opinions, as the noble of the Middle Ages in his castle. . . . Thus, however strange it may seem, it is in the forest of the New World, and not among the Europeans who people its coasts, that the ancient prejudices of Europe still exist.³¹

Peter Fitzpatrick notes that the European Enlightenment came to identify use of tradition and custom as a source of law with the "reduced remnants of the 'small-scale' peasant community [and] with the 'savages' . . . of North America," with all that remained "outside of the inexorable reason of Enlightenment and outside of the universal truth of humanity."³²

Contemporary literary historians have identified a veritable "cult of the vanishing American" in nineteenth century Euro-American culture.³³ This cult was based on a

27. See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990); PRUCHA, *supra* note 10; Jaimes, *supra* note 9.

28. THOMAS HOBBS, *LEVIATHAN* (E.P. Dutton & Co. 1950) (1651).

29. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 343 (1963) (1690).

30. *Id.* at 338-39. See also WILLIAMS, *supra* note 27, at 246-51 (discussing the influence of Locke's views of North America and its peoples). This Lockean theory of property underlaid Justice John Marshall's acceptance of the Doctrine of Discovery in *Johnson v. McIntosh*, 21 U.S. 503 (1823). WILLIAMS, *supra* note 27, at 246-51.

31. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 344 (1966) (1831, first English translation 1835).

32. Peter Fitzpatrick, *The Desperate Vacuum: Imperialism and Law in the Experience of Enlightenment*, in *POST-MODERN LAW: ENLIGHTENMENT, REVOLUTION, AND THE DEATH OF MAN* 90, 92-93 (Anthony Carty ed., 1990) [hereinafter *POST-MODERN LAW*].

Elizabeth Mertz speaks of how European theories of progress have characteristically conscripted colonized indigenous peoples to "stand for"—as in an historical *tableau vivant*—some earlier, more primitive stage in the Europeans' own narratives of societal development. Mertz, *supra* note 20. See generally GOLDBERG, *supra* note 20.

33. See Lora Romero, *Vanishing Americans: Gender, Empire, and the New Historicism*, 63 *AM. LITERATURE* 385 (1991). See also ANDREW ROSS, *THE CHICAGO GANGSTER THEORY OF LIFE: NATURE'S DEBT*

“belief that the rapid decrease in the [N]ative population was both spontaneous and inevitable.”³⁴

Lora Romero invokes Renato Rosaldo’s notion of “imperialist nostalgia” to account for this cult among Euro-Americans. This is “a particular kind of nostalgia,” Rosaldo tells us, “where people mourn the passing of what they themselves have transformed.” It is, he says, “a form of longing . . . closely related to secular notions of progress.” As Euro-Americans followed their manifest destiny across the continent, they sentimentalized the progressive disappearance of the Native population. They regarded this extinction as the inevitable price of the civilizing process, a price which—despite their pangs of nostalgia (or perhaps *because of them*)—they managed to resign themselves to having the natives pay. Rosaldo notes that “[w]hen the so-called civilizing process destabilizes forms of life, the agents of change experience transformations of other cultures as if they were personal losses.”³⁵ He describes how Euro-Americans “began to deify nature and its Native American inhabitants . . . at the same time that [they] intensified their destruction of [North America’s] human and natural environment.”³⁶ A theme of vanishing *Indian* identity has long served as a sort of elegiac counterpoint to the triumphal fanfare of the common “white” man that has been the anthem of Euro-American discourse of progress.³⁷

TO SOCIETY 24 (1994).

34. The leading texts of the cult remain school classics: Henry Wadsworth Longfellow’s *Hiawatha* and the *Leatherstocking* novels of James Fenimore Cooper, especially *The Last of the Mohicans*. From my experience as an American schoolchild, I can attest that the leading texts of this cult remained elementary classroom standards as late as the 1960s. My third grade class in Michigan was taught to recite in unison Henry Wadsworth Longfellow’s *Hiawatha*, accompanied by a pseudo-Indian sign-language pantomime; and James Fenimore Cooper’s *The Last of the Mohicans* was required reading in my high school.

See also Benedict Anderson’s discussion of Cooper’s *The Pathfinder* as an example of the American nationalist sentimentalization of the “bloodbrotherhood” that binds “the ‘white’ woodsman Natty Bumppo and the noble Delaware chieftain Chingachgook.” ANDERSON, *supra* note 1, at 202.

35. RENATO ROSALDO, *CULTURE AND TRUTH* 69-70 (1989). See also Romero, *supra* note 33, at 402.

36. ROSALDO, *supra* note 35, at 71. We might wonder at just what moment in the nineteenth century white imagination did the figure of the “Indian” shift from being a symbol of Euro-Americans’ feared “Other” to being the “logo” of the United States government itself in the friendly, solid reproducibility of the “Indian-head” penny. How did “Indian-ness” attain a nearly infinite iterability as the emblem of Euro-American manly vigor: the “Indian” as totemic symbol for school and professional sports teams (The Stanford Indians, the Cleveland Indians, The Washington Redskins, etc.); automobiles (the Pontiac Superchief); etc. (I borrow the notion of the “logo-ization” from Benedict Anderson’s discussion of the appropriation of local ethnic imagery to forge nationalist consciousness during the colonial era in Southeast Asia. ANDERSON, *supra* note 1, at 178-85.)?

37. For one of the most remarkable examples of this nostalgic affection for “the vanishing Indian,” see THEODORA KROEBER, *ISHI IN TWO WORLDS: A BIOGRAPHY OF THE LAST WILD INDIAN IN NORTH AMERICA* (1961). She recounts how the appearance of Ishi, the last survivor of the Yahi people, aroused a widespread passionate interest among the general American public in 1911.

Ishi was one of a small number of Yahi who hid for decades in the Mt. Lassen region after their community had been all but exterminated by white settlers. After he had outlived the rest of his group, Ishi came out of hiding and walked into Oroville, California—and became an instant celebrity. Under the supervision of Theodora Kroeber’s husband, the anthropologist Alfred Kroeber, Ishi spent the last years of his life as a sometime

Yet, as events in fact turned out, the nineteenth century campaign to exterminate the Native population was not entirely successful,³⁸ and from today's perspective the cult of the vanishing Indian appears as a curious, premature aestheticization of a genocide *manqué*. The 1990 United States census reports a Native population of more than 1.6 million. Against the background of the recent debates over the politics of collective identity, the socio-legal question of the meaning of the status of "Indian tribe" has once again come to the fore.

*B. A Casino in Connecticut: The Reservation as Theme Park
and Other Trials of Indian Identity*

In the Eastern United States, in recent years, a series of lawsuits seeking the return of native lands have highlighted what is at issue in determining the socio-legal identity of an "Indian tribe." In the largest of these cases, in 1980, the Passamaquoddy and Penobscots of Maine were awarded three hundred thousand acres of land and twenty-seven million dollars in compensatory damages for territories that had been taken from them without valid legal title.³⁹ In another northeastern case that went to trial in the late 1970s, the Narragansetts of Rhode Island were obliged to meet the tribal definition criteria that had been laid down in a 1901 United States Supreme Court decision, *Montoya v. United States*.⁴⁰ Following *Montoya*, the burden of proof was placed on the Narragansetts to prove that they were "a body of people of same or similar race, united in community under one leadership, and inhabiting a particular though sometimes ill-defined territory."⁴¹ Ultimately, the Narragansetts received both federal recognition and 1800 acres of land in 1978.⁴²

living exhibit and sometime assistant janitor in the anthropology museum of the University of California. In her concluding chapter, entitled *Death in a Museum*, Kroeber describes how Ishi died of tuberculosis in 1916 in the room of the museum that housed the Pacific Island exhibit.

Of course one variant of this "imperialist nostalgia" for the "vanishing American" is still evident in the fact that the image of the "crying Indian" became the logo for Euro-American environmentalist concern. This is a concern, however, not about the plight of Native peoples themselves but rather about the deterioration of geographic locations—understood as the nation's endangered natural resources—from which the Natives have been removed. Andrew Ross notes that this "American model" of conservationism has been taken up in Africa, Amazonia, the Pacific islands, and elsewhere. It "had its origin," he says, "in John Muir's Yosemite, created by excluding the Miwok Indians, followed by the eviction of the Ute and Navajo Indians from Bryce and Zion." ROSS, *supra* note 33, at 91-92.

38. Of course many groups were wiped out entirely and estimates of the reduction in the Native population of North America as a whole vary from 70% to well over 90%. The 1900 census listed approximately 200,000. See Stiffarm and Lane, *supra* note 9.

39. Ward Churchill reports that these lands had in fact been taken despite written assurances from George Washington himself. See Ward Churchill, *The Earth is Our Mother: Struggles for Land and Liberation in the Contemporary United States*, in GENOCIDE, COLONIZATION, AND RESISTANCE, *supra* note 9, at 139, 150-51. See also Maine Indian Land Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735 (1988).

40. 180 U.S. 261 (1901).

41. *Id.* at 266.

42. Narragansett Tribe of Indians v. S.R.I. Land Dev. Corp., 418 F. Supp. 798 (1976). See Churchill, *supra* note 39.

In a case that highlighted the ironies surrounding the contemporary legal understanding of Indian tribal identity, in 1983 the Mashantucket Pequot people of Connecticut were able to recover, over the opposition of the Reagan administration, 800 acres of their former lands (of 2000 acres that had been set aside for them in 1686 and later reduced by encroachment to 184 acres).⁴³

The Pequots have since constructed a casino and entertainment complex on their land, which has become one of the most profitable economic enterprises in the state of Connecticut.⁴⁴ The residents of the nearby town of North Stonington have recently sought to block the Pequots' plans to expand their entertainment facilities and landholdings. With tenuous legal grounds for opposing the Pequots' expansion, these townspeople—clearly a group not much impeded by any sense of historical irony—have resorted to arguing against the Pequots' plans on the basis of custom, historical tradition, and the sheer antiquity of Euro-American settlement. North Stonington was established in 1717. As one spokesperson for the townspeople (identified as having resided in the area since 1971) lamented to the *Los Angeles Times*, “We have a history, we have a heritage.”⁴⁵

The most celebrated of these New England cases hinged precisely upon the determination at trial of whether one Native community's identity met the *Montoya* definition of “Indian tribe.” As Ward Churchill reports, the Wampanoags of the Mashpee area of Cape Cod

filed suit in 1974 to recover about 17,000—later reduced to 11,000—of the 23,000 acres that were historically acknowledged as being theirs. . . . At trial, the all-white jury, all of whom had property interests in the Mashpee area, were asked to determine whether the Wampanoag plaintiffs were “a tribe within the meaning of the law.” After deliberating for twenty-one hours, the jury returned with the absurd finding that they were not such an entity in 1790, 1869, and 1870 (the years that were key to the Indians case), but that they *were* in 1834 and 1842 (years during which that they were a “tribe” for purposes of ceding land to the government).⁴⁶

James Clifford's 1986 essay, *Identity in Mashpee*, has placed the Mashpee case in the center of recent debates over the politics of identity.⁴⁷ The issue at trial was whether the

43. The Mashantucket Pequot Tribe Indian Claims Settlement Act of 1983, 25 U.S.C. §§ 1751-1760 (1988). See Churchill, *supra* note 39, at 150.

44. Jonathan Weber, *Turning the Tables: Tribe's Casino Success Upsets Rural Area's Power Structure*, L.A. TIMES, February 13, 1994, at D3, D5.

45. *Id.*

46. See Churchill, *supra* note 39, at 150 (discussing *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom.*, *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979)). See also Jo Carrillo, *Identity as Idiom: Mashpee Reconsidered*, 28 IND. L. REV. 511 (1995).

47. For a partial list sampling of this debate, see JACK CAMPISI, *THE MASHPEE INDIANS: TRIBE ON TRIAL* (1991); CLIFFORD, *supra* note 20, at 280; Walter Benn Michaels, *The No-Drop Rule*, 20 CRITICAL INQUIRY 758 (1994); Walter Benn Michaels, *Race into Culture: A Critical Genealogy of Cultural Identity*, 18 CRITICAL INQUIRY 655 (1992); Gordon & Newfield, *supra* note 18; Gerald Torres & Kathryn Milun, *Translating*

Mashpee could reframe their identity to fit the American legal conception of “tribe,” in which racial, ethnic, and political notions of group identity intersect. Clifford observes that “[a]lthough the trial was formally about ‘tribal’ status, its scope was considerably wider.” One central underlying concern, says Clifford, was “[t]he idea of cultural wholeness and structure” implicit in the *Montoya* “definition of tribe.” Clifford suggests that, although the *Mashpee* court relied upon the legal definition of “Indian tribe”—based on “race, territory, community, and government”—these *Montoya* criteria invoked a notion of culture, emerging in 1901, as “a multifaceted, whole way of life, determined neither by biology or politics . . . [which had become] by 1978 . . . part of the trial’s common sense.”⁴⁸

The logic of ethno-racial identity embedded in American legal discourse and culture was what most intrigued Clifford as a historian of ideas. He found that the *Mashpee* court had behaved like an analytic philosopher “who wanted to know positively whether a cat was on the mat in Mashpee.”⁴⁹ It applied an “either-or logic” to the question of tribal status.⁵⁰ The court, in Clifford’s words, “imposed a literalist epistemology” according to which “Indian identity could not be a real yet essentially contested concept. It had to exist or not exist as an objective documentary fact persisting through time.”⁵¹

“In this trial,” says Clifford, “the facts” did not speak for themselves.⁵² The trial was “a contest between oral and literate forms of knowledge” in which the court ultimately imposed a “hierarchical distinction.”⁵³ In effect, the text-based discourse genres of Euro-American legal culture reframed the vernacular forms through which the Wampanoags’ understood their identity. The Wampanoags, Clifford says, were effectively “trapped by the stories that could be told about them. . . . Tribal life had to be emplotted, told as a coherent narrative.”⁵⁴ Similarly, in Gerald Torres and Kathryn Milun’s study of the *Mashpee* trial, they argue that “[i]n order for the state to hear their claims, [the Wampanoags] were forced to speak in a formalized idiom of the language of the state, the idiom of legal discourse.”⁵⁵ They suggest that:

[T]he dimension of power hidden in the idiomatic structure of legal storytelling forecloses one version in favor of another. . . . The law does not permit the *Mashpee*’s story to be particularized and still be legally intelligible. By

YONNONDIO by Precedent and Evidence: *The Mashpee Indian Case*, 1990 DUKE L. J. 625 (1990).

48. CLIFFORD, *supra* note 20, at 337. See *Montoya*, 180 U.S. at 266.

49. CLIFFORD, *supra* note 20, at 336.

50. CLIFFORD, *supra* note 20, at 341.

51. CLIFFORD, *supra* note 20, at 340. As Gordon and Newfield note, “Clifford describes the *Mashpee* as attempting to establish a valid *tribal* rather than a *cultural* identity; culture comes up as a demand of the court.” *Supra* note 18, at 745.

52. CLIFFORD, *supra* note 20, at 342.

53. CLIFFORD, *supra* note 20, at 339.

54. CLIFFORD, *supra* note 20, at 342.

55. Torres & Milun, *supra* note 47, at 628. As they maintain: “The telling of stories holds an important role in the work of courts. Within a society, there are specific places where most of the activities making up social life within that society simultaneously are represented, contested, and inverted. Courts are such places.” Torres & Milun, *supra* note 47, at 628.

imposing specific ethno-legal categories such as "Tribe" on the Mashpee, law universalizes their story. This universalizing process eliminates differences the dominant culture perceives as destabilizing.⁵⁶

"In fact," observes Clifford,

only a few basic stories are told, over and over, about Native Americans and other "tribal" peoples. These societies are always either dying or surviving, assimilating or resisting. Caught between a local past and a global future, they either hold on to their separateness or "enter the modern world." The latter entry—tragic or triumphant—is always a step toward a global future defined by technological progress, national and international relations. Are there other possible stories?⁵⁷

IV. TRIBALISM ABROAD: ON THE NEW CONSCIOUSNESS OF THE NEW NATIONALISM

Nationalism, one hears, is very much on the upswing all around the world these days. What Michael Ignatieff has called the "new nationalism" is widely regarded as a "return of the repressed."⁵⁸ It is looked upon as a terrifying, quasi-volcanic outpouring of atavistic, pre-modern urges, of just the sort of impulses generally assumed to have been left behind in the early stages of modern state-formation.

Nationalism's fortunes have fluctuated wildly over the last decade or so. Only a couple of years ago nationalism was all but declared extinct when, after the bi-centenary celebrations of the American Constitution and the French Revolution, the political classes in the West were eagerly anticipating a scheduled event that was billed as the "unification of Europe." This was the moment when, in the wake of what was widely seen as the "Fall of Communism" and the final triumph of the free market, the Enlightenment hope of a universal convergence of reason and the social order was at long last to become reality. The moment of Europe's unification was announced by Francis Fukuyama as the "End of History."⁵⁹ And surely no one was more eager for the old history of ethno-nationalist rivalries and conflicts to end than the German legal theorist Jürgen Habermas. For Habermas, "Europe as a whole [was] being given a second chance."⁶⁰ This was a grand, universal vision, of a sort not much observed in European politics since Napoleon the First was last observed acting as Hegel's messenger of the world-spirit. This vision seems

56. Torres & Milun, *supra* note 47, at 630. Torres and Milun argue that: "We should suspect that the legal coding through which such translation is conducted highlights a problem inherent in the post-modern condition—the confrontation between irreconcilable systems of meaning produced by two contending cultures." Torres & Milun, *supra* note 47, at 629 (footnote omitted).

57. CLIFFORD, *supra* note 20, at 342.

58. IGNATIEFF, *supra* note 23, at 5.

59. See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

60. Jürgen Habermas, *Citizenship and National Identity: Some Reflections on the Future of Europe*, Keynote Address presented at the Conference on European Identity, Brussels, Belgium (May 1991) (on file with author). See *Quel Identité pour l'Europe?*, in *L'EUROPE AU SOIR DU SIECLE* (Nicole Dewandre & Jaques Lenoble eds., 1992).

to have slipped away almost without notice and now, in the Spring of 1995, it seems almost beyond recalling.

It has, in my view, been too little remarked that things in Europe have not exactly turned out as planned. There is no question that the array of changes commonly grouped under the label of "globalization" has continued or even accelerated. But the apotheosis of modern reason that was to be the new Europe—not to mention the "New World Order"—is nowhere to be seen. The historian Tony Judt observed recently that "[i]n place of these universal Europes of our fond imaginings we are faced now . . . with a bizarre resurrection of the ghosts of particularism."⁶¹

It now seems clear that the fall of the Berlin Wall hardly signaled the end of ethnic particularism. As our virtual global village watched on CNN, tens of thousands danced atop the crumbling wall to the tune of Beethoven's *Ode to Joy*. But the lyrics that went with the music—*Ein Land! Ein Volk! Einheit! Einheit! Einheit! Deutschland!*—sounded a note rather more *Volkisch* than one might expect of a hymn to universal reason. In fact, in the years since 1991, Western Europe has been the scene of an apparently implacable revenge of the particular against the universal. This has meant the bristling resurgence of local ethno-national identity claims in Scotland, Wales, Lapland, Friesland, Flanders, Wallonie, Brittany, Lombardy, Catalonia, Euskadi, etc.

To know the status of universal reason in Central and Eastern Europe, one need only call to mind the newly minted Czech Republic and its former Siamese twin, Slovakia; or whisper the new-old names "Slovenia," "Bosnia," "Croatia," "Serbia," "Kosovo," "Montenegro," "Macedonia"—shadow entities that recalled to life Judt's "bizarre ghosts," a parade of nationalist undead, stepping stiff-legged from the cold-storage vault of frozen identities (as scandalized political observers constantly depict the former Yugoslavia). And looking eastward from the Balkan killing fields, a student of the new nationalism must struggle to keep up with the lengthening inventory of the newly and fiercely assertive shards of the former Soviet Union that now lay claim to national identity: Lithuania, Latvia, Estonia, Belarus, Ukraine, Moldavia, Georgia, Chechnya, Ossetia (North and South), Abkhazia, Armenia, Azerbaijan, Kirgizia, Tadzikistan, and Uzbekistan (and this list, which does not even count such deterritorialized populations as the Crimean Tatars and Volga Germans, will surely be longer still before this Article sees print).⁶²

History seems not to have slowed much outside of Europe either. Apparently, somebody forgot to let the Hutus and the Tutsis in on the news that ethnic feuds are *passé* and that we are all deracinated modern individuals these days. Nor, in the waning days of South Africa's apartheid regime, did large numbers of Afrikaaners or Zulus seem to have understood that ethno-nationalism had gone out of style. Neither did word of communal identity's irrelevance show much sign of having been heard in Eritrea, Sudan, Liberia, Angola, Cyprus, Palestine, Kurdistan, Kashmir, the Punjab, Sri Lanka, Tibet, Burma, Timor, Peru, Guatemala, Chiapas, Quebec, or California.

So, briefly put, as things have turned out, the odds are not looking good that European unification—let alone the "End of History"—will arrive before the end of the millenium. The "key narrative of the new world order," argues Michael Ignatieff, "is the

61. Judt, *supra* note 26, at 44.

62. Tony Judt notes that approximately 26 million ethnic Russians are "stranded in someone else's state." Judt, *supra* note 26, at 47.

disintegration of nation-states into civil war; the key architects of that order are warlords; and the key language of our time is ethnic nationalism."⁶³ The implications of these developments for our understanding of the contemporary scene have been too little commented upon in recent socio-legal scholarship.

V. MODERNIZATION AND ITS DISCONTENTS: LESSONS FROM THE RECENT BOOM IN SCHOLARSHIP ON NATIONALISM

A. *The Big Narrative of Modernity*

A canonical narrative exists in Western political culture and socio-legal theory of a quite specific form of historical change that we call "modernization." According to this vision, as Lawrence Friedman has described it, "[t]he societies of the Western world seem to be traveling together, on a single master-journey, tracing a single line of evolution."⁶⁴

This plot, the itinerary of Friedman's "master-journey," is of course just the sort of story that skeptics have come to call a "grand narrative"—indeed, the modernization story is arguably *the* "grand narrative."⁶⁵ This plot line of socio-political development is so familiar, so implicitly accepted, that one needs only to utter the word "development" (as for example in the academic specialization called "Development Studies") and everyone knows just what sort of development is meant.⁶⁶

This familiar narrative traces the path to "modernity" followed by a "developing nation" along a well-marked "upward" trajectory. In the standard North Atlantic model, this is a climb up from *Gemeinschaft* to *Gesellschaft*, up from race, culture, ethnicity, tribe, or clan toward liberal autonomy; up from status to contract; up from plowshares to personal computers; up and out of the dark shadows of traditional culture and kinship-based community toward the redemptive light of civic individualism. This is the "single line of evolution" toward what Friedman nicely calls *The Republic of Choice*.⁶⁷

This modernization narrative, in one version or another, is so unreflectively presupposed by so much of Western social thought that it goes about its business much of the time utterly unremarked, tacitly framing our understanding of history and social organization. But the unexpected "resurrection of the ghosts of particularism"⁶⁸ is a turn of events that cannot be accommodated within the standard modernization narrative. The "new nationalism" has called into question the modernization story's pretention to

63. IGNATIEFF, *supra* note 23, at 5.

64. LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE* 47-48 (1990).

65. The best-known discussion of the "grand narrative" is JEAN-FRANCOIS LYOTARD, *THE POST-MODERN CONDITION: A REPORT ON KNOWLEDGE* (1984).

66. For a critical review of the specifically legal variant of development studies, "law and modernization," see David Trubek & Marc Galanter, *Scholars in Self-Estrangement*, 1974 WIS. L. REV. 1062, 1078-80. In connection with the experience of Native Americans, see also Joel Martin's discussion of the "gaze of development" in his remarkable history of the Muskogee people's confrontation with European invasion and ongoing colonization in the early modern era. JOEL MARTIN, *SACRED REVOLT: THE MUSKOGEE'S STRUGGLE FOR A NEW WORLD* 87 (1991).

67. FRIEDMAN, *supra* note 64, at 47-48.

68. See Judt, *supra* note 26, at 44.

universality and inevitability, and has thereby unsettled the status of our knowledge about the social world.

The modern world, or more accurately, the "modern" vision overlaid on world history by the European Enlightenment traditions, Judt tells us, has "rested upon an optimistic universalism which bequeathed us both liberalism and socialism, both competing visions of a progressive emancipatory project."⁶⁹ Noting a "widespread 'cosmopolitan disdain and astonishment' at the ferocity of peoples' demands for their own nation-state," Judt observes that "[f]or liberals and Marxists alike, national attachments and their attendant emotions make no rational sense in the contemporary world."⁷⁰

B. The Marxian Account of Nationalism: The World Spirit Gets the Address Wrong

The appearance of ethno-nationalism amongst the rubble of the collapse of East European state-socialism has attracted more attention than anywhere else. The long-standing orthodox Marxian version of the modernization narrative has regarded nationalist consciousness as, at best, a sort of ideological way station, a transitory stage, on the road to the historical realization of class-consciousness.⁷¹ Ernest Gellner scornfully calls this version the Marxian "Wrong Address Theory" of nationalism.⁷² According to Gellner,

Marxists basically like to think that the spirit of history or human consciousness made a terrible boob. The awakening message was intended for *classes*, but by some terrible postal error was delivered to *nations*. It is now necessary for revolutionary activists to persuade the wrongful recipient to hand over the message, and the zeal it engenders, to the rightful and intended recipient. The unwillingness of both the rightful and the usurping recipient to fall into line with this requirement causes the activist great irritation.⁷³

Judt suggests that the reasons for orthodox Marxism's failure to come to terms with the persistence of nationalism are "related to its inability to account for its own demise."⁷⁴

Outside the former Soviet bloc, scholars working in the Western Marxist tradition have been freer to acknowledge that, as Benedict Anderson puts it, "nationalism has proved an uncomfortable *anomaly* for Marxist theory and, precisely for that reason, has

69. Judt, *supra* note 26, at 50.

70. Judt, *supra* note 26, at 44 (citing IGNATIEFF, *supra* note 23).

71. Marx himself, says Judt,

divided mid-nineteenth century Europe into "historic" nations and others; the latter, mostly small Slav peoples, were consigned to eventual oblivion. His heirs treated national sentiment as an illusion, induced by manipulated ignorance and a collective misapprehension of interest. Marxism could not, however, account for the persistence and resurfacing of nationalist sentiment . . . or for the apparently deep-seated attachment to ethnic or other affiliations of people who could not indefinitely be dismissed as suffering from a collective hallucination.

Judt, *supra* note 26, at 45.

72. ERNEST GELLNER, *NATIONS & NATIONALISM* (1983).

73. *Id.* at 129-30.

74. Judt, *supra* note 26, at 45.

been largely elided, rather than confronted."⁷⁵ But Anderson and other scholars working in the critical tradition have not retreated into either silent dismay or dogmatic denial. The political collapse of the Warsaw Pact states and the recent worldwide bull market in nationalisms have been met by a remarkable flourishing of scholarship on the topic. Anderson himself remarks that, during this period, "the study of nationalism has been startlingly transformed in method, scale, sophistication, and sheer quantity."⁷⁶ This new wave of scholarship has shown that Marxism is hardly alone in its failure to account for the persistence of ethnic particularism.

C. *The Liberal View of the New Nationalism:
A Pathology of Incomplete Modernity*

Much like the Marxian account, the specifically liberal version of the modernization narrative—the vision whose culmination in the unification of Europe and the "End of History" was so keenly anticipated during the Reagan-Thatcher era—has imagined that the "era of nation-state-making was the necessary prelude to a world of constitutional states and equal citizens."⁷⁷ According to Judt:

It therefore made sense that liberalism and nationalism were intertwined in nineteenth-century European politics. Traditional liberal thinkers, however, could not sympathize with the later problem of smaller communities within or between such states, such as the Slovaks or the Flemish, seeking a distinctive national and international identity in preference to, and often instead of, civic equality and democratic rights. Rightly regarding these demands as a threat to the liberal state, historians and political theorists grew unsympathetic to nationalism, treating its presence as a pathological condition of incomplete "modernity."⁷⁸

75. ANDERSON, *supra* note 1, at 3. Anderson is himself a leading scholar of nationalism whose work has important roots in the Western Marxist tradition. In the preface to the 1991 second edition of his pathbreaking work *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM*, Anderson notes that the "immediate occasion" for his original 1983 text had been the "armed conflicts of 1978-79 in Indochina" and the fact that these nationalist struggles had left him "haunted by the prospect of further full-scale wars between the socialist states." *Id.* at xi.

76. Anderson's own treatment is cited in *supra* note 1. Other works that he cites as "key texts" include: J.A. ARMSTRONG, *NATIONS BEFORE NATIONALISM* (1982); JOHN BREUJLY, *NATIONALISMS AND THE STATE* (1994); P. CHATTERJEE, *NATIONALIST THOUGHT AND THE COLONIAL WORLD* (1986); GELLNER, *supra* note 72; ERIC HOBBSBAWM, *NATIONS AND NATIONALISM SINCE 1788* (1990); MIROSLAV HROCH, *SOCIAL PRECONDITIONS OF NATIONAL REVIVAL IN EUROPE* (1985); and, ANTHONY SMITH, *THE ETHNIC ORIGINS OF NATIONS* (1986). ANDERSON, *supra* note 1, at xii.

A recent monograph that highlights the links between nationalism, the sociology of language, and the construction of social space is COLIN WILLIAMS, *CALLED INTO LIBERTY: ON LANGUAGE AND NATIONALISM* (1993). The discussion of the "paradigms of race, ethnicity, and nation" in Part I of OMI & WINANT, *supra* note 18, is helpful in understanding the American situation.

77. Judt, *supra* note 26, at 44.

78. Judt, *supra* note 26, at 44. See also JÜRGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* (Frederick Lawrence trans., 1987); Jürgen Habermas, *Modernity: An Unfinished Project*, in *THE*

Jürgen Habermas, the German socio-legal theorist, whose intellectual trajectory has taken him from Western Marxist Frankfurt School beginnings to the ramparts of contemporary neo-liberalism, stands among the most truculent defenders of the Enlightenment modernization narrative. He argues that any particularist identity claim is a pathological affront to the universalist aspirations that define the project of modernity.⁷⁹ According to Habermas's straightforward evolutionary version of the modernization story, nationalism was an early stage in the modernization process, a necessary prelude to the construction of the modern nation-state as *Rechtstaat*, or government of laws. He argues that "[t]he nation-state and democracy are the twins born out of the French revolution . . . [but f]rom a cultural point of view, both have been growing in the shadow of *nationalism*."⁸⁰

This early nationalist stage, Habermas says, laid "the foundations for the cultural and ethnic homogeneity on the basis of which it then proved possible to push ahead with the democratization of government since the late eighteenth century."⁸¹ In his interpretation, nationalism is a "specifically modern phenomenon of cultural integration[,] . . . [a] type of consciousness [that] is formed in social movements and [which] emerges from modernization processes at a time when people are at once both mobilized and isolated as individuals."⁸² "Nationalism," Habermas maintains,

is a form of collective consciousness which both presupposes a reflective appropriation of cultural traditions that have been filtered through historiography and [which] spreads only via channels of modern mass communication. Both of these elements lend nationalism the artificial traits of something that is to a certain extent a construct, thus rendering it by definition susceptible to manipulative misuse by political elites.⁸³

To those familiar with the main themes of Habermas's massive body of work, it will be apparent that his observation that "nationalism" is "by definition susceptible to manipulative misuse by political elites," must be read against the backdrop of German history since the rise of Nazism, which Habermas witnessed as a child. Despite the weight of this history, and even though Habermas acknowledges that the "homogeneity" of the nation-state was "achieved at the cost of excluding ethnic minorities,"⁸⁴ he maintains that the modern state has managed to rise above its distasteful origins in a "form of collective consciousness."

Habermas defines his "modern understanding of republican freedom" in opposition to any "concept of popular sovereignty [which owes] its identity to a prior homogeneity of descent or form of life."⁸⁵ Instead, for Habermas, the distinctively modern understanding of the nation-state is grounded on the "procedural rationality of political

POST-MODERN READER (Charles Jencks ed., 1992).

79. See HABERMAS, *supra* note 78; Habermas, *supra* note 78.

80. Habermas, *supra* note 60, at 3 (*italics in original*).

81. Habermas, *supra* note 60, at 3.

82. Habermas, *supra* note 60, at 3.

83. Habermas, *supra* note 60, at 3-4.

84. Habermas, *supra* note 60, at 3.

85. Habermas, *supra* note 60, at 6.

will-formation.”⁸⁶ Curiously enough, however, given that he so vehemently rejects the notion of a community of language, culture, and history as a basis for socio-political belonging, what ultimately guarantees for Habermas the requisite “procedural rationality of political will-formation” in citizenship-praxis is precisely the “discursive character” he posits for it.⁸⁷ The distinguishing mark of this discursive, procedural rationality is the fact that it is grounded in a hypothetical consensus among autonomous citizens conceived as rational participants in an “ideal speaker-hearer relation.” And for Habermas, it is fortunate that “modern law [provides a public] medium which allows for a much more abstract notion of the citizen’s autonomy.”⁸⁸ In a recent *Los Angeles Times* interview, when asked to characterize the key insight that runs through all his work, Habermas offered his belief that there is a “form of unrestrained communication [which] brings to the fore the deepest force of reason, [and] which enables us to overcome egocentric or ethnocentric perspectives and reach an expanded . . . view.”⁸⁹

Michael Ignatieff’s 1993 book, *Blood and Belonging: Journeys into the New Nationalism*,⁹⁰ is a widely noted comparative study of nationalist movements in Croatia and Serbia, Germany, Ukraine, Quebec, Kurdistan, and Northern Ireland, which, like Habermas’s account, essentially accepts the Enlightenment narrative on its own terms. Much as Habermas has re-envisioned his modern “nation of citizens” as a form of purely procedural political organization contrary to the earlier “ethnic” conception of the nation-state, Ignatieff posits a bi-polar contrast between two distinct visions, “civic nationalism” and “ethnic nationalism,” two models that he presents effectively as contrasting ideal types between which the future must choose.

Ignatieff locates the roots of “ethnic nationalism” in the German anti-Enlightenment backlash against Napoleon’s invasion of the German principalities. The French conquest, he says,

unleashed a wave of German patriotic anger and polemic against the French ideal of the nation-state. The German Romantics argued that it was not the state that created the nation, as the Enlightenment believed, but the nation, its people, that created the state. What gave unity to the nation, what made it a home, a place of passionate attachment, was not the cold contrivance of shared rights but the people’s preexisting ethnic characteristics: their language, religion, customs,

86. Habermas, *supra* note 60, at 18.

87. Habermas, *supra* note 60, at 18.

88. Habermas, *supra* note 60, at 17.

89. Mitchell Stephens, *The Theologian of Talk*, L.A. TIMES MAG., October 23, 1994, at 26, 30. The title of the article was taken from Stanley Fish’s ironic description of Habermas’s “theory of communicative ethics” quoted in the article: “It’s the liberal answer to everything. Let’s talk it to death. Habermas preaches the theology of talk—the elevation of philosophy department seminars to a mode of public life.” *Id.* at 44.

Habermas’s “theology of talk” suggests his own description of the cognitive form of modernity: what he has called the “linguistification of the sacred.” See 2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION § V.3 (1987). Indeed, it would not be an overstatement to characterize Habermas’s own theory of communicative ethics as a utopian sacralization of the linguistic.

90. IGNATIEFF, *supra* note 23. Ignatieff’s study also served as the basis for a BBC television series.

and traditions. The nation as *Volk* began its long and troubling career in European thought.⁹¹

For Ignatieff, “civic nationalism,” on the other hand, is the very embodiment of the Enlightenment ideal which “maintains that the nation should be composed of all those—regardless of race, color, creed, gender, language, or ethnicity—who subscribe to the nation’s political creed.”⁹² Like Habermas’s “nation of citizens,” Ignatieff’s “civic nationalism” is constituted not by shared ways of knowing sedimented through a living community of language, history, and culture, but rather by a uniformity of political procedures and practices. It is, he says, “called civic because it envisages the nation as a community of equal, rights-bearing citizens, united in patriotic attachment to a shared set of political practices and values.”⁹³ Under this view, by “subscribing to a set of democratic procedures and values individuals can reconcile their right to shape their own lives with their need to belong to a community.”⁹⁴ And, much as Habermas has imagined the modern state, according to Ignatieff’s “civic nationalism,” what “holds a society together is not common roots but law . . . [which] in turn assumes that national belonging can be a form of rational attachment.”⁹⁵ Here we see once again that the modern liberal vision of the legitimacy of the legal order establishes itself on an opposition that situates the putative cognitive universality of law and reason on one side and the lived particularity of culture or ethnicity on the other.⁹⁶ Indeed, the cosmopolitan universality of law’s reason is precisely what keeps at bay the unreasoning romantic attachments of “ethnic nationalism,” whose dangers Ignatieff so vividly portrays.

Much as Ernest Gellner has mocked the Marxian “Wrong Address” view of nationalism, he is no less impatient with what he calls the “Dark Gods” explanation of it. This “Dark Gods Theory,” encountered in Habermas’s and other contemporary liberal theorists of modernity, views “ethnic nationalism” as a quasi-volcanic eruption of a repressed primitive drive. This view assumes a stage-theory of socio-political development that, much like the Freudian model of personality formation, represents “ethnic nationalism” as a regression to some earlier, more primitive, vestigial, or even infantile, stage. Ethno-nationalism is envisioned rather like an expression of the nation-state’s unbridled “id.” Popular commentaries on contemporary ethnic conflicts constantly portray nationalist consciousness in these terms, as a re-emergence of repressed primitive passions that normally lie seething not far below the polished veneer of modern civil society.

91. IGNATIEFF, *supra* note 23, at 7.

92. IGNATIEFF, *supra* note 23, at 6.

93. IGNATIEFF, *supra* note 23, at 6.

94. IGNATIEFF, *supra* note 23, at 7.

95. IGNATIEFF, *supra* note 23, at 7.

96. Ignatieff notes that in eighteenth century Great Britain, “some elements of this [civic] ideal were first achieved.” “But,” he argues, apparently quite without irony, “it was not until the French and American revolutions, and the creation of the French and American republics, that civic nationalism set out to conquer the world.” IGNATIEFF, *supra* note 23, at 6.

But nationalism cannot be explained, Gellner says flatly, as a “re-emergence of the atavistic forces of blood or territory.”⁹⁷ Indeed, the great lesson of the recent scholarship on nationalism is that it cannot be understood—or ideologically contained—as Habermas and many other modernists would like to do. It is far from a simple regression to a Hobbesian state-of-nature, or to a pre-modern condition governed by vestigial, brutish, instincts. As Judt tells us, it is not merely a “pathological condition of incomplete modernity.”⁹⁸ Contemporary nationalist consciousness is not just a resurgence of some submerged stratum or dark primal urge as liberals would like to imagine any more than it can be understood as simply a mistake, a wrong turn, or a momentary detour from the high road of reason unfolding through history, as many orthodox Marxists have proposed.

“None of these theories,” Gellner says flatly, “is remotely tenable.”⁹⁹ In much the same vein, Judt argues persuasively that the Enlightenment tendency to treat “nationalism in all its forms as a historical mistake, a cognitive error to be made good by clear-sighted analytical demystification,” is empirically unsupportable. This approach fails to take nationalism and the persistence of national consciousness seriously on their own terms and thereby allows these phenomena to elude any adequate understanding.¹⁰⁰ The lesson of the recent flourishing of scholarship on nationalism is that virtually all social thought in the Enlightenment tradition—both liberal and Marxist—has missed the implication that recurrent assertions of particularist identities are in fact a corollary of the organization of knowledge and the logic of the social order under the modern nation-state. “Communities,” says Anderson, “are to be distinguished, not by their falsity/genuineness, but by the style in which they are imagined.”¹⁰¹

VI. THE NATION-STATE AS REGIME OF KNOWLEDGE, A MODERN MODE OF IMAGINING

For Benedict Anderson, as we have seen, the nation is “a community imagined through language.”¹⁰² Eric Hobsbawm has observed that “the very process of . . . modernization . . . implicate[s] a homogenization and standardization of . . . inhabitants, essentially by means of a written ‘national language.’”¹⁰³

97. GELLNER, *supra* note 72, at 130.

98. Judt, *supra* note 26, at 44.

99. GELLNER, *supra* note 72, at 130.

100. Judt, *supra* note 26, at 45.

101. ANDERSON, *supra* note 1, at 6.

102. ANDERSON, *supra* note 1, at 146. Taking Switzerland as an example, Benedict Anderson notes that religion gave way to language as the index of identity after Europe was swept by the wave of liberal revolutions of 1848. ANDERSON, *supra* note 1, at 138.

103. HOBBSBAWM, *supra* note 76, at 93. Max Weber argues that:

[I]n the main, it has been the work of *jurists* to give birth to the modern Occidental ‘state’ . . . [through] the triumph of *formalistic* juristic rationalism. . . . Bureaucratic rule . . . is not the only variety of legal authority, but it is the purest. . . . [It] is fixed by *rationally established* norms, by enactments, decrees, and regulations, in such a manner that the legitimacy of the authority becomes the legality of the general rule, which is purposely thought out, enacted, and announced with formal correctness.

Yet, language alone cannot serve as a nucleus for the development of national consciousness—for what Anderson calls the new “state-mind,” its “mode of imagining.”¹⁰⁴ Gellner describes how the modern “*esprit d’analyse*” effectively homogenizes all forms of discourse, just as the modernization of language seeks to normalize all local or social non-standard dialects to the national standard.¹⁰⁵ Thus, this “social construct” that is modern nationalism in fact emerges, crucially, as a constructed uniformity or a regimented homogeneity at the level of cognition, culture, and discourse.

This fact is something of a scandal for modern nationalists, both civic and ethnic, for as Gellner argues, a “basic deception and self-deception [is] practiced by nationalism.” For nationalism, Gellner says, takes power most characteristically

in the name of a putative folk culture . . . [whose] symbolism is drawn from the healthy, pristine, vigorous life of the peasants Yet, in fact, nationalism is, essentially, the general imposition of a high culture on society It means that generalized diffusion of a school-mediated, academy-supervised idiom, codified for the requirements of reasonably precise bureaucratic and technological communication. It is the establishment of an anonymous, impersonal society, with mutually substitutable atomized individuals, held together above all by a shared culture of this kind, in place of a previous complex structure of local groups, sustained by folk cultures reproduced locally.¹⁰⁶

The implication of Gellner’s analysis is that the entire grand narrative of modernization—especially the canonical version of it associated with Max Weber’s emphasis on the progress of formal rationality as a condition of possibility of the modern nation-state—requires a faith that one can know, in Gellner’s words:

the human mind in general: namely, a common measure of fact, a universal conceptual currency, so to speak, for the general characterization of things Each of these elements is presupposed by rationality . . . as the secret of the modern spirit. By the common or single conceptual currency I mean that all facts are located within a single continuous logical space, that statements

FROM MAX WEBER: *ESSAYS IN SOCIOLOGY* 299 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

104. ANDERSON, *supra* note 1, at 166.

105. Whether one is distinguishing between different “dialects” or between different “languages” is a longstanding question in sociolinguistics. For example, Norwegian and Danish are both considered distinct “languages,” although they are for the most part mutually intelligible, whereas spoken Cantonese and Mandarin are both called “dialects” of the Chinese language, although they are not.

The difference lies in whether a particular style or register of speech is the official idiom of a state—whether it is a “national language.” The linguist Max Weinreich is said to have remarked that a language is simply a dialect with an army and a navy. THOMAS PAIKEDAY, *THE NATIVE SPEAKER IS DEAD* 26 (1985). See generally JOHN EARL JOSEPH, *ELOQUENCE AND POWER: THE RISE OF LANGUAGE STANDARDS AND STANDARD LANGUAGES* (1987).

The relevance of this point for the present discussion is that if, as Anderson argues, a nation is a “cultural artifact of a particular kind,” that is, “a community imagined through language,” the status of any language is itself no less a “cultural artifact,” and no less “imagined.” See ANDERSON, *supra* note 1, at 146.

106. GELLNER, *supra* note 72, at 57.

reporting them can be conjoined and generally related to each other, and so that in principle one single language describes the world and is internally unitary . . . [In modern] society it is assumed that all referential uses of language ultimately refer to one coherent world, and can be reduced to a unitary idiom.¹⁰⁷

According to Anderson, it was the seventeenth and eighteenth century development of what he calls "print-capitalism"¹⁰⁸—the technology of the printing and distribution of books and newspapers and the development of mass markets or "publics"—that provided "a new way of linking fraternity, power, and time meaningfully together . . . [and] made it possible for rapidly growing numbers of people to think about themselves, and to relate themselves to others, in profoundly new ways."¹⁰⁹ Anderson argues persuasively that this new medium for the social distribution of cognition "created the possibility of a new form of imagined community, which in its basic morphology set the stage for the modern nation."¹¹⁰

Anderson observes that this "new form of imagined community," the nation, "is always conceived as a deep, horizontal comradeship."¹¹¹ "Ultimately," he says, "it is this fraternity that [has made] it possible, over the past two centuries, for so many millions of people, not so much to kill, as willingly to die for such limited imaginings" as the nation-state offers.¹¹² Mary Louise Pratt, drawing our attention to the gendered-ness of Anderson's term "fraternity," notes that as his "image suggests, the nation-community is embodied metonymically in the finite, sovereign, fraternal person of the citizen soldier."¹¹³

The process of "socially constructing" a modern nation-state, then, is carried out through the establishment of a national language and a national high culture. The nation state is, before anything else, a new, modern regime of knowledge. It comes into being through a nationalistic regimentation and normalization of the cognitive, discursive, and cultural aspects of the "sovereign, fraternal" identity of the new citizen-subject.

The title of Lawrence Friedman's recent book, *The Republic of Choice*, nicely captures the essentially individualist and voluntarist ideology that undergirds modern legal

107. GELLNER, *supra* note 72, at 21. See also GOLDBERG, *supra* note 19.

108. ANDERSON, *supra* note 1, at 46.

109. ANDERSON, *supra* note 1, at 36.

110. ANDERSON, *supra* note 1, at 46. See also JACK GOODY, *THE LOGIC OF WRITING AND THE ORGANIZATION OF SOCIETY* (1986); *PERSPECTIVES ON SOCIALLY SHARED COGNITION* (Lauren B. Resnick et al. eds., 1991).

111. ANDERSON, *supra* note 1, at 7.

112. ANDERSON, *supra* note 1, at 7.

113. Mary Louise Pratt, *Linguistic Utopias*, in *THE LINGUISTICS OF WRITING: ARGUMENTS BETWEEN LANGUAGE AND LITERATURE* 49 (Derek Attridge et al. eds., 1989).

In their discussions of the linguistic dimension of the modern state, Anderson and Pratt bring to view precisely this normalization of subjectivity, this homogenization of the cognitive identity of the newly imagined citizen-subject. Pratt ironically observes of Jürgen Habermas's effort to locate a principle for democracy in a universal pragmatics of communicative action that "the only sure sign of a non-hierarchical society would be complete linguistic homogeneity." *Id.* at 59-60.

culture's understanding of the source of its own legitimacy.¹¹⁴ A mobile modern society, Friedman observes,

is in a curious way unified within its complexity. . . . [Modern] nationalism tries to level out cultural diversity and ethnic pluralism. . . . [Individual mobility] broke up old ethnic enclaves; . . . [it] led to a massive *legal* uniformity. This is no paradox. In democratic republics law centers on individuals rather than on groups. The individual is the *unit* of modern mobility. It is the individual, not the people or the tribe, who wanders through the republic of choice.¹¹⁵

"Tribes," then, are not just local enclaves of ethno-national identity. Rather, the lesson is that, under the modern nation-state, the tribe is one form of *residual* minority or subaltern identity, one that has lost the struggle to set the terms of its own mode of knowing. As Gellner remarks on the relation between nationalism and tribalism as alternative regimes of knowledge:

[N]ationalisms are simply those tribalisms . . . which through luck, effort or circumstance succeed in becoming an effective force under modern circumstances. They are only identifiable *ex post factum*. Tribalism never prospers, for when it does, everyone will respect it as a true nationalism, and no one will dare call it tribalism.¹¹⁶

VII. IDENTITY CATEGORIES AND THE MANAGEMENT OF HETEROGENEITY

As we have seen, the standard account of state formation locates the origins of the modern nation-state model in the rising identity consciousness of ethno-national movements in early modern Western Europe.¹¹⁷ And, as the story goes, it was from Europe's Atlantic shores that the ideal-type of the nation-state was subsequently exported

114. FRIEDMAN, *supra* note 64. Friedman identifies this key notion of individual choice with a modern ethic of personal independence and mobility in a way that demonstrates the continuing reliance of Western legal culture on the sort of "status to contract" modernization story first formulated in the mid-nineteenth century.

115. FRIEDMAN, *supra* note 64, at 152. It is relevant to the point of this discussion that Friedman has identified the privileging of the "individual" over the "tribe" as the unit of modern social life as one distinguishing mark of the modern socio-legal order and that he has linked this fact to the leveling effects of modern nationalism on cultural diversity and ethnic pluralism.

As Friedman observes, modern "social theorists and thinkers tend to draw a picture of primitive or ancient man as a prisoner of status, locked in the iron cage of custom, and unable, except in rare instances, to break free of this cage." Or, at least this was the classical view, for, as Friedman says, "Social theorists in this century tend to have a gloomier view; the confident exuberance is gone. . . . Victorian exuberance is hard to maintain in the era of Auschwitz." He suggests that it "is likely that social theory simply stumbles along behind changes in human consciousness, which are themselves the product of profound changes in the social and physical environment of human beings." FRIEDMAN, *supra* note 64, at 23-25.

116. GELLNER, *supra* note 72, at 87.

117. According to a common version of this story, it was first in Spain (with the unification effected by Ferdinand and Isabella, and the expulsion of the Jews and the Moors), then in Great Britain and France (as they pacified their own internal tribes: the Welsh, Scots, Bretons, Basques, etc.) that the nation-state model of a unitary cultural and political identity assumed its now-canonical form.

both eastward across Europe and Asia and westward across the Atlantic to the New World.

One of the most original aspects of Benedict Anderson's account of the origin and spread of nationalism is that he turns this standard story of the origin of the nation-state model on its head. He argues that modern nationalism had its beginnings in the eighteenth and early nineteenth century fragmentation of the European empires in the New World. Anderson suggests that the new model arose when the "creoles"—the population of, as he says, "(at least theoretically) pure European descent but born in the Americas"¹¹⁸—sought to differentiate themselves on the one hand "from their respective imperial metropolises"¹¹⁹ and on the other from the unassimilated, non-white indigenous and slave populations. The creoles accomplished this by achieving a historical convergence of a secularized national culture with the bureaucratic structure they had inherited from the colonial administration.

Studying the history of Western legal thought, Peter Fitzpatrick has arrived at a similar conclusion. He argues against the prevailing modernist liberal view that regards European imperial expansion as a "pathology" that was fundamentally at odds with the Enlightenment ideology of "the universal rights of man." In Fitzpatrick's words, "imperialism [was in fact] characteristic of the Enlightenment experience," and the "experience of imperialism . . . [was] central and enduring in the making of modern law."¹²⁰ Like Anderson, he maintains that the identity that early modern Europeans imagined for themselves, "as the bearers of universal Enlightenment," was an "identity constituted in opposition to the savages and barbarians without."¹²¹ "Racism was," says Fitzpatrick, "in short, basic to the creation of liberalism and the identity of the European."¹²²

In Anthony Carty's view, "[i]t is a simple historical fact that the Enlightenment created Civilization which in turn created the 'Primitive.'" As Carty observes:

Within the civilisation of the Enlightenment, the limits of the legal order were defined in terms of the boundaries of civilised nations. Yet these same limits rested upon the uncivilised and the primitive as a shadow, engaged in a compulsive and obsessive contradiction of suppression and incorporation. Beyond the obvious economic subordination of the non-Western world, this meant the creation of native identities in a dialectic of opposition to the civilised European. However, rebellious natives are to be seen as not merely constituted by imperialism, but as part of an inevitable series of oppositions which grow up integrally with the Enlightenment project, as its shadow side, along with nature, gender and whatever other concrete particularity can appear to threaten the "free" individual.¹²³

118. ANDERSON, *supra* note 1, at 47.

119. ANDERSON, *supra* note 1, at 47.

120. Fitzpatrick, *supra* note 32, at 90, 96.

121. Fitzpatrick, *supra* note 32, at 98.

122. Fitzpatrick, *supra* note 32, at 97.

123. Anthony Carty, *Introduction: Post-Modern Law*, in POST-MODERN LAW, *supra* note 32, at 23.

Anderson observes that these native identities were created by the “mode of imagining of the colonial state.”¹²⁴ In particular, he highlights the “identity categories”¹²⁵ that were employed in colonial censuses and in related technologies of population management. Anderson says:

The new demographic topography put down deep social and institutional roots as the colonial state multiplied its size and functions. Guided by its imagined map it organized the new educational, juridical, public-health, police, and immigration bureaucracies it was building on the principle of ethno-racial hierarchies. . . . The flow of subject populations through the mesh of [these institutions] created “traffic-habits” which in time gave real social life to the state’s earlier fantasies.¹²⁶

In the United States, no less than in other settler societies formed through the processes of European colonization and emigration, the “ethno-racial” categories and hierarchies of the colonial era have endured to influence the contemporary social order. The explicit restriction of the franchise to free white males in the early republic was gradually “diversified” to other categories. The Jim Crow system of de jure segregation established in the late nineteenth century in the former slave-holding states relied, of course, upon explicit legal categories of racial identity.¹²⁷

A similar arbitrariness and spurious precision characterizes the criteria the BIA uses to define the category “Indian tribe.” In a recent *Los Angeles Times* interview, the deputy director of the BIA in California, Michael R. Smith, acknowledged that many legally recognized tribes, especially in California, are “political—not racial—entities.” These entities, says Smith, “were created by Congress . . . [which] created a land base for them and said ‘You’re a tribe.’”¹²⁸

CONCLUSION

One often hears it said of Native communities that they refuse to enter the modern world. It would be more accurate to observe that it is the “modern world’s” vision of itself that cannot admit Native peoples in their particularity. As James Clifford remarks,

The institution of tribe, still trailing clouds of aboriginal sovereignty and reminiscent of its eighteenth-century synonym *nation*, is less easily integrated into the modern multiethnic, multiracial state. The resurgent cultural-political identity asserted by Indian tribes is more subversive than that of Irish-Americans

124. ANDERSON, *supra* note 1, at 166.

125. ANDERSON, *supra* note 1, at 164.

126. ANDERSON, *supra* note 1, at 169.

127. See *Plessy v. Ferguson*, 163 U.S. 537 (1896). The celebrated phrase from footnote four of *United States v. Carolene Products Co.* which spoke of “prejudice against discrete and insular minorities” provided the conceptual framework for the legal construction of collective identities in the period after the Second World War. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 (1938). See also ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); Robert Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982).

128. Duane Noriyuki, *Nation of One*, L.A. TIMES, November 14, 1994, at E1, E4.

or Italian-Americans: Native Americans claim to be both full citizens of the United States *and* radically outside it.¹²⁹

The federal standards of recognition for Indian tribes serve not as a gateway to the recognition of Native American peoples right to self-determination. Rather they form a bureaucratic process that hinders recognition by placing enormous burdens of proof upon the petitioning Native community, burdens which require these communities to demonstrate that they fit a definition of their own identity constructed of European stereotypes of race, tribe, and nation. The federal recognition standards thereby function as a filter that effectively taxes Native groups for their resolute particularity and in fact works to exclude numerous "extant and functioning tribes."¹³⁰

The recognition process exemplifies the sort of contest to control the semantics of a population's identity which has become a central political question in the late-modern state. This sort of process effectively grants or withholds socio-political recognition of identity. This process—a process which operates at the level of category definition and redefinition, allotting or denying, shaping, extending, or restricting the social space accorded to specific forms of collective subjectivity—determines whether a population's social identity is normal or deviant, central or marginal.

A number of scholars, most notably Michael Omi and Howard Winant, have argued that the Civil Rights movement of the 1950s and 1960s (along with allied "cultural nationalist" currents such as the Black Consciousness, *Negritude*, and Third World movements) had its "greatest triumphs, its most permanent successes . . . in its ability to create new racial 'subjects' [It] *redefined the meaning of racial identity* . . . in American society."¹³¹ As Omi and Winant continue,

Social movements create collective identity by offering their adherents a different view of themselves and their world; different, that is, from the worldview and self-concepts offered by the established social order. They do this by the process of *rearticulation*, which produces new subjectivity by making use of information and knowledge already present in the subject's mind. They take elements and themes of his/her culture and infuse them with new meaning.¹³²

Omi and Winant maintain that it was on this basis that the Civil Rights Movement "could rearticulate black collective subjectivity."¹³³

129. CLIFFORD, *supra* note 20, at 339.

130. Paschal, *supra* note 7, at 209.

131. OMI & WINANT, *supra* note 18, at 99 (italics in original).

132. OMI & WINANT, *supra* note 18, at 99.

133. OMI & WINANT, *supra* note 18, at 99. Elsewhere, Patricia Williams and I have criticized the way in which later commentators have sought to portray Martin Luther King, Jr. and other strategists of the Civil Rights movement as essentially concerned with individual liberation. Much like Omi and Winant, we argue that there has been an effort to ignore the fundamental question of collective identity, to elide the sense in which the struggle of the 1950s and 60s was a "fight to expand the social space of all blacks and to re-articulate the political semantics of the collective identity of the descendants of the slaves." Perry & Williams, *supra* note 18, at 229.

From this perspective, the very framing of the current controversy in terms of “identity politics,” “essentialism,” “victimhood,” and “status claims,” stigmatizes deviation from unacknowledged standards, marginalizes recalcitrant particularisms, and works ultimately to manage entire populations through the normalization of collective subjectivities. To frame the controversy in this way is to refuse to acknowledge the extent to which identity formations are both constituted by legal and bureaucratic processes of government and, once so constituted, are deployed in the contests over the meaning of these identities.

“Nationalisms,” Gellner suggests, are simply tribalisms that have carried the day.¹³⁴ Modern civic nationalism and the notions of civic identity that inform it rest upon the historical triumph of a particular cultural identity no less ethnic nor tribal than those it condemns. But it enacts a triumph so complete that its identity becomes constitutive of a new regime of knowledge, a new “mode of imagining”—a triumph so complete that its ethnic dimension can henceforth pass as universal. And it is then from this position of “universalized” identity that the particularity of any other tribe can be made to appear as a “pathology of incomplete modernity” rather than, as Professor Starr argues more accurately, “products of particular times, places, and events.”¹³⁵

134. See text accompanying *supra* note 107.

135. See *supra* text accompanying note 2.