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# FURTHER THOUGHTS ON RACE, AMERICAN LAW, AND THE STATE OF NATURE: ADVANCING THE MULTIRACIAL PARADIGM SHIFT AND SEEKING PATTERNS IN THE AREA OF RACE AND LAW

George A. Martínez\*

## I. INTRODUCTION

Philosophy reveals what is hidden.<sup>1</sup> It discloses or makes things comprehensible or understandable.<sup>2</sup> In my article on Race, American Law and the State of Nature,<sup>3</sup> I have sought to use philosophical theory—state of nature theory—as a way to understand American law and issues of race. Philosophical state of nature theory reveals or discloses what is often hidden: the nature of race and American law.

This project is consistent with a recent trend in legal scholarship, which has been noted by Yishai Blank, consisting of scholars who seek to “reenchant” law “by reconnecting it to a transcendental or even divine sphere.”<sup>4</sup> This project seeks to “uncover . . . hidden meanings” in law “through historical analysis, cultural critique or philosophical contemplation.”<sup>5</sup> Although there may be a

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<sup>1</sup> ROBERT C. SOLOMON, *INTRODUCING PHILOSOPHY: PROBLEMS AND PERSPECTIVES* 38 (2nd ed. 1981) (“The world is not as it seems. And the beginnings of both philosophy and science were the first attempts of men and women to see beyond their ‘common sense’ views of things and try to find the reality behind them”); *Id.* at 46 (According to Plato, “Forms are the ultimate reality. Things change, people grow old and die, but forms are eternal and unchanging. Thus, Plato could agree with Heraclitus that the world of our experience is constantly changing, but he could also agree with Parmenides, who insisted that the real world, the eternal and unchanging world, was not the same as the world of our experience”).

<sup>2</sup> *Id.* at 46 (philosophical reasoning is our “only access” to “a world of ideas, an unchanging world, the real world or the world of being”).

<sup>3</sup> George A. Martínez, *Race, American Law and the State of Nature*, 112 W. VA. L. REV. 799 (2010).

<sup>4</sup> Yishai Blank, *The Reenchantment of Law*, 96 CORNELL L. REV. 633, 634 (2011); *see also id.* at 663 (“The reenchanters articulate an understanding of law that reasserts its inherent morality; commitment to transcendental wisdom, truth, and values; artful being; and non-positivist authority”). For examples of the effort to “reenchant” law, *see* RONALD DWORKIN, *LAW’S EMPIRE* 225-75 (1986) (law and morality); Mark C. Modak-Truran, *Reenchanting the Law: The Religious Dimension of Judicial Decision Making*, 53 CATH. U. L. REV. 709, 813 (2004) (advancing an argument in favor of reenchanting the law and contending that “religious convictions are required for fully justifying judges’ decisions in hard cases”).

<sup>5</sup> Blank, *supra* note 4, at 666-67 (the reenchanters seek to analyze law “through the prism of the humanities, of philosophy” to reveal “what it means, and what it is”).

tendency for the dominant group to see itself as unknowable or inscrutable,<sup>6</sup> philosophical theory is able to reveal the hidden truth.

In my article on the state of nature and race, I have argued that there is a tendency for the dominant group to relate to racial minorities as if they were in the state of nature — *i.e.*, a tendency to act as if they were in a situation where there is absence of legal or moral constraints.<sup>7</sup> In the state of nature “nothing can be unjust.”<sup>8</sup> Indeed, the “state of nature is completely amoral.”<sup>9</sup> People have the right to do whatever they have the power to do.<sup>10</sup> In the state of nature, therefore, there is nothing to limit or constrain one’s actions and one acts “unencumbered by moral scruples.”<sup>11</sup>

In this article, I seek to further develop this state of nature theory by discussing new examples that illustrate and provide evidence in support of the theory. In addition, I examine whether it is possible for us to extricate ourselves from the state of nature and explain how state of nature theory advances a multiracial paradigm shift in the area of race and is consistent with scientific practice in that it seeks patterns in the area of race and law. In Part II, I set out a number of new examples to illustrate state of nature theory, including: (1) amoral decision-making in the context of affirmative action; (2) the lifting of constraints off of the dominant group in the creation of new federal pleading standards for lawsuits, and in the areas of campaign financing, voting rights, and international law; (3) psychological studies that reveal discriminatory behavior where there are no legal constraints; (4) the exercise of the key state of nature virtues—force and fraud—against Native Americans; (5) the existence of a state-of-nature-like situation in the removal of Native Americans from certain areas of the United States; (6) a state- of-nature-like existence outside of the American polity on the part of African-Americans, Asian-Americans and Latinos; and (7) the connection

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<sup>6</sup> Owen J. Dwyer & John Paul Jones III, *White Socio-Spatial Epistemology*, SOCIAL & CULTURAL GEOGRAPHY 209, Vol. 1, No. 2, 2000, at 215 (the white majority believes that it is “insulate[d] . . . from a critical gaze” of racial minorities and “imagines it is altogether invisible to racialized others”); David R. Roediger, *Introduction*, in BLACK ON WHITE: BLACK WRITERS ON WHAT IT MEANS TO BE WHITE 6 (David R. Roediger ed., 1998) (“What bell hooks describes as the fantastic white ability to imagine ‘that black people cannot see them’ constitutes a white illusion at once, durable, powerful and fragile. It exists alongside a profound fear of actually being seen by people of color”).

<sup>7</sup> Martínez, *supra* note 3, at 806-833; see also Alan Ryan, *Hobbes's Political Philosophy*, in CAMBRIDGE COMPANION TO HOBBS 217-18 (Tom Sorrell ed., 1996) (the state of nature “is simply the condition where we are forced into contact with each other in the absence of a superior authority which can lay down and enforce rules to govern our behavior toward each other”).

<sup>8</sup> THOMAS HOBBS, LEVIATHAN 145 (Meridian Books 1969).

<sup>9</sup> Edwin Curley, *Kissinger, Spinoza, and Genghis Khan*, in THE CAMBRIDGE COMPANION TO SPINOZA 316 (Don Garrett ed. 1996).

<sup>10</sup> BENEDICT DE SPINOZA, *A Theological- Political Treatise and a Political Treatise*, in WORKS OF SPINOZA 292 (Dover Publications 1991) (“[T]he natural right of universal nature, and consequently of every individual thing, extends so far as its power”).

<sup>11</sup> Curley, *supra* note 9, at 327.

between racial neoliberalism and the state of nature. In Part III, I argue that acting as if in the state of nature has generated consciousness of guilt in the dominant group. In part IV, I consider evidence regarding the relative health of racial minorities, which suggests that racial minorities may be enduring a state of nature existence. In Part V, I consider whether it is possible to escape from the state of nature. Finally, in Part VI, I argue that state of nature theory is a way to advance the multiracial paradigm shift in the area of race and law and that scholars working in the area of race should follow the example of science and seek patterns in the area of race and law.

## II. THE STATE OF NATURE: AMORAL DECISION-MAKING, THE LIFTING OF CONSTRAINTS ON THE MAJORITY AND THE VIRTUES OF FORCE AND FRAUD

### A. Amoral Decision-making and Affirmative Action

The Supreme Court's recent decisions, in the context of affirmative action, provide a powerful example of state-of-nature-like amoral decision-making as the dominant group deals with racial minorities. In the course of this analysis, the term "Affirmative Action" will refer to:

A broad array of race-, ethnicity-, and gender-conscious programs, enacted by the government and private sector, voluntarily or by court order, to promote equality of opportunity and racial diversity . . . . It . . . includes programs that favor—among similar candidates who satisfy necessary qualifications—members of historically underrepresented groups.<sup>12</sup>

One way to approach affirmative action from the perspective of morality instead of the state of nature is to justify affirmative action on a theory of corrective justice<sup>13</sup> that one has a moral duty to make amends for the damages that racial minorities have sustained because of race discrimination — *e.g.*, the

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<sup>12</sup> Gabriel Chin, Sumi Cho, Jerry Kang & Frank Wu, *Beyond Self-Interest: Asian Pacific Americans toward a Community of Justice: A Policy Analysis of Affirmative Action*, 4 ASIAN PAC. AM. L. J. 129, 133 (1996).

<sup>13</sup> Tareq Al-Tawil, *Does Restitution for Wrongdoing Give Effect to Primary or Secondary Rights?*, 24 CAN. J. L. & JURIS. 243, 261 (2011) ("The idea of corrective justice received an early formulation in Aristotle's treatment of justice . . . . For Aristotle, corrective justice is the theory of the mean; more specifically, 'the just, or the equal, is the mean between the more and the less.' Once it is established that the defendant has, as a result of his wrongful act, taken and acquired more than he ought to have—that is, more than the mean—then he must surrender the surplus to the claimant, who has less than the mean, or who has less than what he would have had, had the defendant never acted wrongfully towards him").

effects of slavery and Jim Crow.<sup>14</sup> The Supreme Court's opinions have, however, taken an amoral state-of-nature-like approach that seeks to justify affirmative action on amoral grounds unconnected to corrective justice.<sup>15</sup> Thus, in the original *Regents of the University of California v. Bakke*<sup>16</sup> case, affirmative action was justified, not on the basis of corrective justice, but on the ground that it promoted "diversity."<sup>17</sup> Indeed, the Supreme Court in another leading case, *Adarand Constructors, Inc. v. Peña*,<sup>18</sup> saw affirmative action programs that were based on corrective justice as "highly dangerous threats to the stability and peace of our constitutional order."<sup>19</sup> In the Supreme Court's most recent decision in *Grutter v. Bollinger*,<sup>20</sup> the Court continues to justify affirmative action on the

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<sup>14</sup> Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 708 (2004) ("If American society disrupted the racially just distribution of black people's rights, resources and opportunities by discriminating on the basis of race, then as a matter of corrective justice, society has a prima facie obligation to redress the harmful effects of that discrimination"); see also Robert J. Delahunty, "Constitutional Justice" or "Constitutional Peace"?: *The Supreme Court and Affirmative Action*, 65 WASH. & LEE L. REV. 11, 28 (2008); Kaimipono David Wenger, "Too Big to Remedy?": *Rethinking Mass Restitution for Slavery and Jim Crow*, 44 LOY. L. A. L. REV. 177, 197 (2010) ("Corrective justice ideas in reparations are backward-looking and would require society to compensate for harms suffered by Blacks"); Liav Orgad & Theodore Ruthizer, *Race, Religion and Nationality in Immigration Selection 120 Years after the Chinese Exclusion Case*, 26 CONST. COMMENT. 237, 241 (2010) ("From a moral perspective based on the principle of corrective justice, race can matter when it is aimed at correcting past wrongs, a kind of reparation for past exploitation").

<sup>15</sup> Delahunty, *supra* note 14, at 37 (in its affirmative action decisions "the Court seemed to bypass the debate over justice altogether, focusing instead on the instrumentalist question how affirmative action policies, designed as a method of elite formation, could best serve the interests of the nation"). See also Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 677 (2004) ("Affirmative action is increasingly being justified not as a remedy to historical discrimination and inequality, but as an instrumentally rational strategy used to achieve the positive effects of racial and gender diversity in modern society").

<sup>16</sup> 438 U.S. 265 (1978). For analysis of *Bakke*, see generally Laurence H. Tribe, *Perspectives on Bakke: Equal Protection, Procedural Fairness or Structural Justice*, 92 HARV. L. REV. 864 (1979); Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 U.C.L.A. L. REV. 1745 (1996); Gabriel J. Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL RTS. J. 881 (1996).

<sup>17</sup> *Regents of the University of California*, 438 U.S. at 315-317 (1978) (With respect to affirmative action, "diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial and ethnic origin is but a single though important element . . . . In such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive . . ."); Delahunty, *supra* note 14, at 43.

<sup>18</sup> 515 U.S. 200 (1995).

<sup>19</sup> Delahunty, *supra* note 14, at 62.

<sup>20</sup> 539 U.S. 306 (2003). For analysis of *Grutter*, see generally Lee C. Bollinger, *A Comment on Grutter and Gratz v. Bollinger*, 103 COLUM. L. REV. 1589 (2003); Harry T. Edwards, *The Journey from Brown v. Board of Education to Grutter v. Bollinger: From Racial Assimilation to Diversity*,

amoral basis of diversity.<sup>21</sup> The *Grutter* Court, however, put a new spin on the diversity justification. Diversity is necessary “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry.”<sup>22</sup> This amoral justification for affirmative action means that

The historic losses caused by slavery, Jim Crow and racial segregation are left to lie where they fell. The condition of African-Americans, other than those fortunate enough to be selected into the nation’s leadership ranks, is to be left essentially undisturbed . . . .<sup>23</sup>

*Grutter*, thus, is a decision that is written from the amoral perspective of the state of nature. Its amorality consists in “its utter indifference to the normative demands of racial justice . . . .”<sup>24</sup>

What is the condition of racial minorities that is left undisturbed? Sociologist Edwardo Bonilla-Silva has recently summarized the situation for racial minorities in the United States as follows:

[R]acial considerations shade almost everything in America. Blacks and dark-skinned racial minorities lag well

102 MICH. L. REV. 94 (2004); Rachel F. Moran, *Of Doubt and Diversity: The Future of Affirmative Action in Higher Education*, 67 OHIO ST. L. J. 201 (2006); Kenneth B. Nunn, *Diversity as a Dead End*, 35 PEPP. L. REV. 705 (2008).

<sup>21</sup> *Grutter*, 539 U.S. at 328 (“Today, we hold that the Law School has a compelling interest in attaining a diverse student body”). See also Bryan W. Leach, *Race As Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond*, 113 YALE L. J. 1093 (2004) (*Grutter* held “that ‘obtaining the educational benefits that flow from a diverse student body’ represents a compelling state interest”).

<sup>22</sup> *Grutter*, 539 U.S. at 332; Delahunty, *supra* note 14, at 63–68. See also Leach, *supra* note 21, at 1094 (the *Grutter* Court “described the visible presence of minority lawyers in the upper echelons of politics and the judiciary as crucial to the public’s continued confidence in these institutions”); Angelique M. Davis, *Descriptive Representation Matters: The Connection between Access to Legal Representation and Nonwhite Lawyer-Legislators in the United States*, 22 BERKELEY LA RAZA L. J. 117, 118 (2012) (“The *Grutter* decision embraced democratic legitimacy as a justification for student body diversity in law schools . . . . According to the Supreme Court, accessibility to law school for every race and ethnicity is crucial to the legitimacy of our nation’s leadership”). For extensive analysis on how such “leaders” are to be developed in order to implement *Grutter*, see generally Rebecca K. Lee, *Implementing Grutter’s Diversity Rationale: Diversity and Empathy in Leadership*, 19 DUKE J. GENDER L. & POL’Y 113 (2011).

<sup>23</sup> Delahunty, *supra* note 14, at 68. See also Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60, 69 (2004) (“the Court [in *Grutter*] has not embraced their view that affirmative action can be justified as compensation for past societal discrimination. The goal articulated in *Grutter* — integrating the leadership of major American institutions — does not look back to catalogue all the multifold harms of slavery and Jim Crow, and offer a remedy. Rather the opinion places us in the Here and Now, and looks to our national future”).

<sup>24</sup> Delahunty, *supra* note 14, at 70. See also Leach, *supra* note 21, at 1099 (“Indeed, occupational need arguments risk diverting attention from the social justice claims that would otherwise underpin the campaign for affirmative action”).

behind whites in virtually every area of social life; they are about three times more likely to be poor than whites, earn about 40 percent less than whites, and have about an eighth of the net worth that whites have. They also have an inferior education compared to whites, even when they attend integrated institutions. In terms of housing, black-owned units comparable to white owned ones are valued at 35 percent less. Blacks and Latinos also have less access to the entire housing market because whites, through a variety of exclusionary practices by white realtors and home owners, have been successful in effectively limiting their entrance into many neighborhoods. Blacks receive impolite treatment in stores, in restaurants, and in a host of other commercial transactions. Researchers have also documented that blacks pay more for goods such as cars and houses than do whites. 'Finally, blacks and dark skinned Latinos are the targets of racial profiling by police that, combined with the highly racialized criminal court system, guarantees their over-representation among those arrested, prosecuted, incarcerated, and, if charged for a capital crime, executed. Racial profiling on the highways has become such a prevalent phenomenon that a term has emerged to describe it: driving while black. In short, blacks and most minorities are 'at the bottom of the well.'<sup>25</sup>

### **B. The Lifting of Constraints off the Majority in the Creation of New Federal Pleading Standards**

One of the hallmarks of the state of nature is the absence or lifting of legal constraints on the dominant group.<sup>26</sup> The U.S. Supreme Court has recently

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<sup>25</sup> EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 1-2 (2006). See also Mario Barnes, Erwin Chemerinsky & Trina Jones, *A Post-race Equal Protection?*, 98 GEO. L. J. 967, 983-992 (2010) (offering evidence showing that: (1) there is a high poverty rate for racial minorities; (2) "the median net worth of white households is more than ten times that of black households;" (3) "African-Americans and Latinos still disproportionately tend to occupy lower paying and lower status jobs;" and (4) there is "unequal treatment within the U.S. criminal justice system"); Angela Onwuachi-Willig & Mario Barnes, *The Obama Effect: Understanding Emerging Meanings of "Obama" in Anti-discrimination Law*, 87 IND. L. J. 325, 346 (2012) (showing that since the election of President Barack Obama, "new and increased forms of racial discrimination" have been created in the workplace); Ian Haney Lopez, *Post-racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1025 (2010) (establishing that "[t]he public security system in the United States produces shocking racial disparities at every level, from stops to arrests to prosecutions to sentencing to rates of incarceration and execution").

<sup>26</sup> Martínez, *supra* note 3, at 826-833.

lifted constraints off of the majority through an astonishing<sup>27</sup> establishment of new tough pleading standards for federal lawsuits, including civil rights and employment discrimination cases. Since the middle of the twentieth century, the Supreme Court has had a fairly lenient standard for pleading a claim in federal court: “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.”<sup>28</sup> Recently, in *Bell Atlantic v. Twombly*,<sup>29</sup> the Supreme Court held in the context of an antitrust lawsuit, that in order to plead a claim in federal court one must allege “enough facts to state a claim for relief that is plausible on its face.”<sup>30</sup> Subsequently, in *Ashcroft v. Iqbal*,<sup>31</sup> the Supreme Court held that this new heightened plausibility pleading standard applies to all civil cases filed in federal court, including those that allege civil rights or race discrimination violations.<sup>32</sup> This tough new pleading standard is expected to result in the dismissal of meritorious civil rights lawsuits, especially lawsuits that allege racial discrimination.<sup>33</sup> Such dismissal is likely to result because, among other things, judges may see race discrimination as something relegated to the distant past and therefore claims of race discrimination will not be seen as plausible.<sup>34</sup> In this regard, new studies show that these predictions and

<sup>27</sup> The Court’s decision was very surprising because “the Court replaced the prior [pleading standard] with a new [pleading standard] and did so without utilizing the process created by the Rules Enabling Act that calls for large scale consultative efforts, as well as substantial public comment and feedback.” Ronald J. Allen, *Complexity, the Generation of Legal Knowledge and the Future of Litigation*, 60 U.C.L.A. L. REV. 1384; 1391 (2013).

<sup>28</sup> *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

<sup>29</sup> 550 U.S. 544 (2007). For analysis of *Twombly*, see generally Robert G. Bone, *Twombly, Pleading Rules and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1013; Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008).

<sup>30</sup> *Twombly*, 550 U.S. at 570.

<sup>31</sup> 556 U.S. 662 (2009). For analysis of *Iqbal*, see generally Jordan D. Shepherd, *When Sosa Meets Iqbal: Plausibility Pleading in Human Rights Litigation*, 95 MINN. L. REV. 2318 (2011); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849 (2010); Kevin M. Clermont, *Three Myths about Twombly-Iqbal*, 45 WAKE FOREST L. REV. 1337 (2010); David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L. J. 117 (2010).

<sup>32</sup> *Iqbal*, 556 U.S. at 684.

<sup>33</sup> Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Predismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 85-106 (2010). See also Elizabeth M. Schneider, *The Changing Shape of Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 520 (2010) (“Empirical studies of the effect of *Twombly* and *Iqbal* suggest that these decisions have resulted in the disproportionate dismissal of civil rights cases”); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 555-56 (2010) (finding a statistically significant increase in dismissals of civil rights cases in the wake of *Iqbal*).

<sup>34</sup> Malveaux, *supra* note 33, at 93-94. See also Vicki Schultz & Stephen Fettererson, *Race, Gender, Work and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases*



fears are now being realized.<sup>35</sup> These studies show that under the *Iqbal* plausibility pleading regime: (1) “federal district courts have increased the dismissal rate for Black plaintiffs’ claims of race-based employment discrimination: after *Iqbal* it is 2.66 times more likely that these claims will be dismissed when challenged under Rule 8(a)” and (2) “Under *Iqbal*, federal district courts increasingly dismissed Black pro se plaintiffs’ claims of race discrimination in the workplace: it is 2.10 times more likely that these claims will be dismissed,” and (3) there is “a robust trend in which White judges are dismissing Black plaintiffs’ claims of employment discrimination under *Iqbal* at a higher rate (57.5%) than Black judges (33.3%).”<sup>36</sup>

In this regard, one of the main characteristics of the state of nature is the exercise of unchecked power or the lack of constraint on one’s actions.<sup>37</sup> The new federal pleading standard creates such a state of nature like situation in that it creates an unchecked power on the part of judges to dismiss cases. In determining whether a claim is “plausible,” the court is “to draw on its judicial experience and common sense.”<sup>38</sup> As one commentator has explained, the use of such vague terms as “plausibility” and “common sense” “clears a path for unchecked judicial subjectivity to function as a major determinant of a lawsuit’s threshold viability.”<sup>39</sup> The introduction of this unchecked power to dismiss cases through this “subjective plausibility standard entrenches majority group skepticism towards discrimination claims to the detriment of lawsuits brought by members of minority groups, which can now be more readily dismissed.”<sup>40</sup> In making it more difficult to bring race discrimination claims against the majority, the Supreme Court has lifted a major legal constraint off of the majority as they deal with minorities. This places minorities in a state-of-nature-like position with respect to the dominant group.

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*Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1180 (1992) (“After a decade of efforts to enforce Title VII, federal judges apparently began to share the general public’s belief that employment discrimination against minorities had been largely eradicated”).

<sup>35</sup> See Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal’s Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1, 36-38 (2011).

<sup>36</sup> *Id.* at 36-39.

<sup>37</sup> Martinez, *supra* note 3, at 806-833.

<sup>38</sup> *Iqbal*, 556 U.S. at 679.

<sup>39</sup> Ramzi Kassem, *Implausible Realities: Iqbal’s Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN. ST. L. REV. 1443, 1450-1451 (2010).

<sup>40</sup> *Id.* at 1481. See also Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 562-63 (2001) (“courts often analyze race cases from an anti-affirmative action mindset, one that views both the persistence of discrimination and the merits of the underlying claims with deep skepticism . . . . Moreover, it seems that the general consensus today is that the role discrimination plays in contemporary America has been sharply diminished, and those who take this view are reluctant to find discrimination . . .”).

### C. *Citizen's United*, Campaign Financing and the Lifting of Legal Constraints.

The Supreme Court's recent decision in *Citizen's United v. FEC*,<sup>41</sup> regarding campaign financing is consistent with state of nature theory in that it operates to lift constraints off of the dominant group. In *Citizens United*, the United States Supreme Court held that federal regulations prohibiting corporate spending on elections were unconstitutional.<sup>42</sup> The decision was extremely controversial and apparently surprised many since for six decades it had been a fundamental aspect of election law to bar such corporate spending.<sup>43</sup> Critics see the *Citizens United* decision as undermining equality by allowing "wealth to dominate the operation of the political process."<sup>44</sup>

In this regard, *Citizens United* held that "corporations were persons entitled to *unlimited* speech rights."<sup>45</sup> For the Court, "the corporation merely was a proxy for the persons behind it" and "thus held political personhood to function for them,"<sup>46</sup> The corporation, therefore, was "entitled [to] the full panoply of first amendment rights in relation to spending in elections."<sup>47</sup> Since corporations "are organized by, controlled by, and provide profits to a privileged group of . . . white men," the *Citizens United* decision has the effect of enabling white men "to ensure their dominance over society through insuring them privilege through the political process."<sup>48</sup> *Citizens United*, then, lifts constraints off of the dominant

<sup>41</sup> 558 U.S. 310 (2010). For analysis of *Citizens United*, see generally Teneille R. Brown, *In-Corporo-real: A Psychological Critique of Corporate Personhood and Citizens United*, 12 FLA. ST. U. BUS. REV. 1 (2013); Zephyr Teachout, *The Historical Roots of Citizens United v. FEC: How Anarchists and Academics Accidentally Created Corporate Speech Rights*, 5 HARV. L. & POL'Y REV. 163 (2011); Jessica A. Levinson, *We the Corporations?: The Constitutionality of Limitations on Corporate Electoral Speech after Citizens United*, 46 U.S.F.L. REV. 307 (2011); Mark C. Alexander, *Citizens United and Equality Forgotten*, 35 N.Y.U. REV. L. & SOC. CHANGE 499 (2011); Jarrod L. Schaeffer, *The Incorporation of Democracy: Justice Kennedy's Philosophy of Political Participation in Citizens United*, 91 B.U.L. REV. 1783 (2011).

<sup>42</sup> *Citizens United*, 558 U.S. at 365.

<sup>43</sup> See generally Michael S. Kang, *The Campaign Finance Debate after Citizens United*, 27 GA. ST. U. L. REV. 1161 (2011).

<sup>44</sup> Gene Nichol, *Citizens United and the Roberts Court's War on Democracy*, 27 GA. ST. U. L. REV. 1007, 1013 (2011).

<sup>45</sup> Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 743 (2011) (emphasis added).

<sup>46</sup> *Id.* at 744.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* See also Regina F. Burch, *Worldview Diversity in the Boardroom: A Law and Social Equity Rationale*, 42 LOY. U. CHI. L. J. 585, 597-600 (2011) (setting out statistics showing that "corporate boards still reflect neither the demographics of the U.S. Population nor the demographics of the labor force" and that there is a "predominance of white males on corporate boards"); William Patton & Randall Bartlett, *Corporate "Persons" and Freedom of Speech: The Political Impact of Legal Mythology*, 1981 WISC. L. REV. 494, 498 (1981) ("corporations as such do not speak or think or have ideas. Corporate actions are the medium of expression of those natural persons who control them"); Ronnie Cohen & Shannon O'Byrne, *Can You Hear Me Now . . . Good!: Feminisms and the*

group by providing white men with “an *unfettered* voice in the political market place” which can be used to “dominate ordinary citizens.”<sup>49</sup> This development dramatically shifts “power away from communities of color.”<sup>50</sup> Since racial and ethnic minorities are set to “become the majority in this country” by the year 2050, *Citizens United* means that “by 2050, political, economic, and social power may be concentrated in the hands of a minority of mostly white, mostly male powerbrokers who may effectively be an oligarchy in relation to the majority-minority population of the United States.”<sup>51</sup>

This conclusion is consistent with Senate Majority Leader Harry Reid’s concerns expressed during the 2012 presidential campaign about the effect of *Citizen’s United*:

My concern is that . . . 17 angry old white men are trying to buy the election. And that’s the truth . . . . They are literally trying to buy the election.<sup>52</sup>

#### **D. *Shelby County v. Holder*, Voting Rights and the Lifting of Legal Constraints**

One of the most controversial recent instances of the U.S. Supreme Court lifting constraints off of the dominant group is its recent decision in *Shelby County v. Holder*,<sup>53</sup> striking down an important aspect of the Voting Rights Act of 1965. Congress enacted the Voting Rights Act in order to help enforce the Fifteenth Amendment’s prohibition against race discrimination in the context of voting.<sup>54</sup> In particular, Section 5 of the Voting Rights Act requires that certain

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*Public/Private Divide, and Citizens United v. FEC*, 20 U.C.L.A. WOMEN’S L. J. 39, 60-61 (2013) (“corporate managers articulate their political views through the corporate vehicle they control. On this basis, when the majority in *Citizens United* ignores the line between public and private by admitting corporations as fully unregulated citizens, it is actually conferring a state created mechanism for speaking on those individuals behind the corporation. Therefore the problem is not merely that corporations do not speak. It is that, based on the majority’s analysis, some people get to speak twice—once as the individual speaking for himself and once as a corporate officer or director speaking for the corporation”).

<sup>49</sup> Ellis, *supra* note 45, at 744 (emphasis added); Cohen & O’Byrne, *supra* note 48, at 65 (“the corporate dominance created by *Citizens United* will affirm the relative power of historically privileged white males over other groups”); Robin West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 723 (2011) (observing that *Citizens United* by “extending speech rights to corporations to influence political elections subordinates individual to corporate interests”).

<sup>50</sup> Ellis, *supra* note 45, at 748.

<sup>51</sup> *Id.* at 749.

<sup>52</sup> Nick Wing, *Harry Reid, Worried about ‘Karl Rove and 17 Angry Old White Men’ Buying the Election*, THE HUFFINGTON POST (Oct. 30, 2012), [http://www.huffingtonpost.com/2012/10/30/harry-reid-karl-rove-white-men\\_n\\_2042900.html](http://www.huffingtonpost.com/2012/10/30/harry-reid-karl-rove-white-men_n_2042900.html).

<sup>53</sup> 133 S.Ct. 2612 (2013).

<sup>54</sup> See Paul F. Hancock & Laura L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 URBAN LAWYER 379, 383-85 (1985) (“Congress determined

jurisdictions secure preclearance from the U.S. Department of Justice or the federal district court in Washington D.C. of any changes in voting laws.<sup>55</sup> The covered jurisdiction would have then to prove that such changes will not limit the right to vote on the basis of race.<sup>56</sup> In *Shelby County*, the Supreme Court struck down as unconstitutional Section 4 of the Voting Rights Act which provides the coverage formula for the preclearance requirement in Section 5 of the Voting Rights Act.<sup>57</sup> The Court struck down the coverage formula in large part because it was out of date inasmuch as it was based on forty-year-old data.<sup>58</sup> The Court's decision has been heavily criticized with some commentators expecting that with the lifting of all legal constraints of the Voting Rights Act the jurisdictions that had been covered "will once again engage in rampant racial discrimination against voters of color."<sup>59</sup> These fears seem justified since in the wake of the decision in *Shelby County*: "state officials across the South are aggressively moving ahead with new laws requiring voters to show photo identification at the polls," which is expected to make it more difficult for persons of color to vote.<sup>60</sup> *Shelby County* has lifted constraints off the dominant group to the detriment of racial minorities.

It is worth remembering that this is not the first time the United States Supreme Court has lifted constraints off the majority to the detriment of the voting rights of racial minorities. Following reconstruction in the late 1800s, southern states sought to disenfranchise black voters by a number of devices, including by imposing voter registration requirements such as literacy tests which were intended to:

disproportionally disqualif[y] blacks even if applied fairly given the higher rates of illiteracy among blacks. But nobody expected registrars appointed by white supremacist Democrats to impartially administer the tests.<sup>61</sup>

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that stringent new remedies were required if racial discrimination was to be eliminated from the electoral process. The Voting Rights Act of 1965 contains those remedies. The 1965 enactment began with a provision to be applied nationwide, restating the Fifteenth Amendment's prohibition against racial discrimination in the electoral process, and followed with a 'complex scheme of stringent remedies aimed at areas where voting discrimination had been most flagrant').

<sup>55</sup> See *id.* at 386 (in order to make sure "that states and counties did not implement new methods of racial discrimination in voting . . . Congress . . . adopted the provision contained in section 5 of the Act, requiring each targeted or 'covered' jurisdiction, if it wished to implement a voting standard, practice or procedure" to secure approval from "the United States District Court for the District of Columbia" or "the attorney general of the United States").

<sup>56</sup> 42 U.S.C. 1973, *invalidated by Shelby County v. Holder*, 133 S.Ct. 2612 (2013).

<sup>57</sup> See 133 S.Ct. at 2625-30.

<sup>58</sup> See *Id.* at 2628-29.

<sup>59</sup> Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Mapping a Post-Shelby County Contingence Strategy*, 123 YALE L. J. ONLINE 131, 131 (2013).

<sup>60</sup> Michael Cooper, *After Ruling States Rush to Enact Voter Laws*, N.Y. TIMES, July 5, 2013.

<sup>61</sup> MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE

These techniques were effective and black voter registration was essentially ended by the early 1900s.<sup>62</sup> In any event, Southerners primarily sought to nullify the voting rights of blacks by giving “discretion [to] local officials and trust[ing] them to preserve white supremacy.”<sup>63</sup>

The United States Supreme Court aided this effort to undermine voting rights by removing the constraints on the majority in the area of voting rights in the 1898 case of *Williams v. Mississippi*<sup>64</sup> where an African-American challenged the voting registration laws in Mississippi arguing that, among other things, the literacy tests established by the laws gave local officials too much discretion to deny African-Americans the right to vote. The Supreme Court held that the Mississippi voting laws were constitutional, explaining that “[t]hey do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them.”<sup>65</sup> This ruling in effect lifted the constraints off of the majority and removed protection from racial minorities in the area of voting rights.

### E. The Effort to Lift the Constraint of International Law

State of nature theory holds that there is a tendency for the dominant group to act without legal constraints or seek to move to a position with fewer legal constraints as it deals with racial minorities.<sup>66</sup> An important recent example of this phenomenon is the effort of a number of states to ban the use of international law in their courts.<sup>67</sup> For instance, voters of the State of Oklahoma have recently approved an amendment to the state’s constitution, which mandates that Oklahoma courts “shall not look to the legal precepts of other nations and cultures” and “shall not consider international . . . law.”<sup>68</sup> That this may amount to an effort to lift constraints off of the dominant group as it deals with minorities may be seen in the case of Arizona. There is proposed legislation in Arizona which would prohibit Arizona courts from relying on international law as either “controlling or influential authority” in reaching decisions in lawsuits.<sup>69</sup> Significantly, this proposed law follows in the wake of United Nations human rights experts warning in May 2010 that Arizona’s new draconian immigration

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STRUGGLE FOR RACIAL EQUALITY 31 (2004).

<sup>62</sup> *Id.* at 32.

<sup>63</sup> *Id.* at 33.

<sup>64</sup> 170 U.S. 213 (1898).

<sup>65</sup> *Williams*, 170 U.S. at 225.

<sup>66</sup> Martínez, *supra* note 3, at 806-833.

<sup>67</sup> Martha F. Davis & Johanna Kalb, *Oklahoma State Question 755 and An Analysis of Anti-International Law Initiatives*, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY ISSUE BRIEF (January 2011) (describing “initiative[s] aimed at blocking consideration of foreign and international law”).

<sup>68</sup> H.R.J. Res. 755, 52nd Leg. (Okla. 2010); *Voters Ban Judges from Using International Law*, NEWS OK (Nov. 2, 2010), <http://newsok.com/article/3510666> (“Oklahoma voters have approved a measure that would forbid judges from considering international law . . . when deciding cases”).

<sup>69</sup> H. B. 2379, 49th Leg. (Ariz. 2010).

legislation — Senate Bill 1070 — which authorized racial profiling<sup>70</sup> of Latinos and legislation outlawing ethnic studies programs in Arizona constitute “a disturbing pattern of legislative activity hostile to ethnic minorities and immigrants.”<sup>71</sup> The experts also pointed out that this system of laws may amount to human rights violations under international law.<sup>72</sup> Given this context, the proposed legislation barring the use of international law seems to be an effort to lift the constraint of international law off of the majority and thereby remove legal protection from Latinos and other minorities in Arizona. This lifting of the constraint of international law is consistent with state of nature theory.

#### **F. Psychological Studies and Discriminatory Behavior Where There Are No Legal Constraints**

In the state of nature, where there is an absence of legal constraints, I have argued that there is too much temptation for the dominant group to do wrong or bad things.<sup>73</sup> Psychological literature provides evidence that where there is a lack of legal constraint, members of the majority do act in discriminatory ways toward members of minority groups.

Psychologists have recently determined that certain “implicit attitudes” or racial stereotypes are spontaneously triggered when persons are in contact with racial minorities.<sup>74</sup> These attitudes may operate at an unconscious level.<sup>75</sup> These implicit attitudes generate discriminatory behavior in interracial contexts.<sup>76</sup> For instance, whites with higher implicit prejudice will engage in less nonverbal

<sup>70</sup> See Gabriel J. Chin *et al*, *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L. J. 47, 66-67 (2010) (explaining that Senate Bill 1070 authorizes racial profiling).

<sup>71</sup> *Independent U.N. Rights Experts Speak Out against Arizona Immigration Law*, U.N. NEWS SERVICE (May 11, 2010), <http://www.un.org/apps/news/story.asp?NewsID=34663#.V5Vc02Nln-Z>.

<sup>72</sup> *Id.*

<sup>73</sup> Martinez, *supra* note 3, at 833-37.

<sup>74</sup> Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action”*, 94 CAL. L. REV. 1063, 1083-84 (2006) (“when we see a Black (or a White) person, the attitudes and stereotypes associated with that racial category automatically activate”); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1499 (2005) (“Once a person is assigned to a racial category, implicit and explicit racial meanings associated with that category are triggered”).

<sup>75</sup> Kang, *Trojan Horses of Race*, *supra* note 74, at 1505-06 (racial schemas “operate automatically—without conscious intention and outside of our awareness”).

<sup>76</sup> Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 972 (2006) (“those who demonstrate implicit bias also manifest this bias in various forms of actual behavior”). The damaging effects of racial stereotypes have been recognized for some time in law. For instance, Professor Louis Lusky argued in 1963 that the purpose of the segregation of blacks was to preserve the stereotype that blacks were fundamentally different from whites and somehow less than human. See Louis Lusky, *The Stereotype: Hard Core of Racism*, 13 BUFF. L. REV. 450, 451-52 (1963-64) (“segregation’s significant function is not to deliver an insult but to preserve the group stereotype by minimizing contact between the races in situations where they would necessarily see and deal with each other as individuals, and by putting the official imprimatur on the reposition that Negroes and Whites differ in a legally material way”).

friendliness — e.g., less smiling or eye contact when interacting with blacks.<sup>77</sup> Such “[i]nterpersonal discrimination” is not forbidden by law.<sup>78</sup> As a result, the dominant group has unchecked power to engage and will likely be inclined to engage in such discriminatory behavior.

### G. The State of Nature Virtues of Force and Fraud

According to Thomas Hobbes, the key virtues that are practiced in the state of nature are force and fraud.<sup>79</sup> The dominant group appears to have exercised something like these “virtues” against Native Americans.

Consider the use of something like deceptive tactics and force against Native Americans in the acquisition of tribal lands. First, as to the use of fraud, it is now recognized that “the United States consciously engaged in ‘ruse, subterfuge, circumvention, and outright fraud to achieve through chicanery, under the cloak of voluntary cooperation, a continued stream of land cessions’” from Native Americans.<sup>80</sup> For instance, the representatives of the United States who negotiated the treaties that ceded Indian land to the United States “secured fraudulent advantage by dulling Indian wits with alcohol” and by providing “[d]eliberately faulty translations of treaty texts and inaccurate explanations of treaty terms to Indian tribes possessed of limited language skills.”<sup>81</sup> Similarly, with respect to the use of force, in *Tee-Hit-Ton Indians v. United States*,<sup>82</sup> the Supreme Court explained that the Indian tribes typically were stripped of their lands through the use of conquering force:

Every American schoolboy knows the savage tribes of this continent were deprived of their ancestral ranges by force, and that, even when the Indians ceded millions of acres by treaty in

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<sup>77</sup> John Dovidio, Samuel L. Gaertner, Kerry Kawakami & Gordon Hodson, *Why Can't We Just Get Along? Interpersonal Biases and Interracial Distrust*, CULTURAL DIVERSITY AND ETHNIC MINORITY PSYCHOLOGY, Vol. 8, No. 2, 88, 95 (2002).

<sup>78</sup> Michelle R. Hebl, Jessica Bigazzi Foster, Laura Mannix & John Dovidio, *Formal and Interpersonal Discrimination: A Field Study of Bias toward Homosexual Applicants*, PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN, Vol. 28, No. 6, 815, 816 (2002).

<sup>79</sup> HOBBS, *supra* note 8, at 145.

<sup>80</sup> Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1124 (2000) (quoting MICHAEL D. GREEN, THE POLITICS OF INDIAN REMOVAL: CREEK GOVERNMENT AND SOCIETY 50 (1982)); see also William Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation and an American Indian Plea to Peace with Justice*, 27 AM. INDIAN L. REV. 1, 27-29 (2002-2003) (“In sum, many, if not all, of the Indian treaties ceding land to the United States are physical embodiments of the fraud, unconscionability, and duress governing their drafting”).

<sup>81</sup> Bradford, *With a Very Great Blame*, *supra* note 80, at 27-29.

<sup>82</sup> 348 U.S. 272 (1955).

return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.<sup>83</sup>

Perhaps not surprisingly, and in light of the history of the exercise of state of nature virtues, Thomas Jefferson seems to have viewed Native Americans as though in the state of nature when he wrote:

Let a philosophic observer commence a journey from the savages of the Rocky Mountains, eastwardly towards our sea-coast. There he would observe in the earliest stage of association living under no law but that of nature, subsisting and covering themselves with flesh and skins of wild beasts.<sup>84</sup>

### H. Indian Removal, the State of Nature, and War

In the early 1800s, there was an effort—which clearly reveals a state of nature-like situation for Native Americans—to remove Native Americans from certain areas in the American south.<sup>85</sup> In the state of Georgia, the legislature enacted a series of laws designed to impose hardships on the Cherokee Indian Tribe so that they would give up their lands and leave the state of Georgia.<sup>86</sup> In order to prevent Native Americans from challenging the validity of these statutes, laws were enacted to bar Native Americans from using the courts.<sup>87</sup> Among other

<sup>83</sup> *Id.* at 289-90; see also Ann E. Tweedy, "Hostile Indian Tribes . . . Outlaws, Wolves, . . . Bears . . . Grizzlies and Things Like That?" *How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense*, 13 U. PENN. J. CONST. L. 687, 721-22 (2011).

<sup>84</sup> RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA* 48 (2008) (quoting Letter from Thomas Jefferson to William Ludlow (September 6, 1824), in *WRITINGS OF JEFFERSON* VOL. 16 74-75 (Andrew A. Lipscomb & Albert E. Bergh eds., 1904)). Interestingly, Jefferson developed a plan, that was detailed in a "Confidential Message" to Congress, to secure lands from Native Americans. *Id.* at 46-47. According to this plan, Native Americans could be induced to sell their land by encouraging them to become farmers and give up their hunting mode of living and by seeking to make them debtors who could settle large debts only by selling their lands. *Id.* at 47.

<sup>85</sup> See Kathleen Sands, *Territory, Wilderness, Property and Reservation: Land and Religion in Native American Supreme Court Cases*, 36 AM INDIAN L. REV. 253, 271 (2012) (describing "a policy that the federal government began to push vigorously in the 1820s: the voluntary removal of all eastern Indians from the area west of the Mississippi River").

<sup>86</sup> See *id.* at 271 ("By the late 1820s, Georgia was aggrieved with the federal government for failing to secure the Cherokees' voluntary emigration . . . It was in this context that Georgia had set about dissolving the Cherokee Nation through its own legislative measures"); Gerald N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L. J. 875, 885 (2003) ("Over the next few years, [the Georgia Legislature] passed a series of measures aimed at forcing the Cherokees to accept second-class status or leave the state").

<sup>87</sup> See WALTER R. ECHOHAWK, *THE COURTS OF THE CONQUEROR: THE WORST INDIAN LAW CASES EVER DECIDED* 95-96 (2010).



things, these statutes outlawed contracts between Native Americans and white people, set up a lottery to allow whites to acquire Native American lands, confiscated Native American gold and silver mines, nullified Native American laws, and directed the Georgia governor to request the American President to remove the Native Americans from the state.<sup>88</sup> The Cherokee Tribe sought to challenge these laws in the U.S. Supreme Court in a case styled *Cherokee Nation v. Georgia*.<sup>89</sup> The Supreme Court held that the Cherokee Tribe could not proceed in federal court because it was not a foreign nation and only a foreign nation could sue a state under the Eleventh Amendment, which protects the state's sovereign immunity from suit.<sup>90</sup> The Court explained:

The Court has bestowed its best attention to this question, and after mature deliberation, the majority is of the opinion that an Indian tribe or Nation within the United States is not a foreign state in the sense of the Constitution, and cannot maintain an action in the courts of the United States.<sup>91</sup>

In addition, the Supreme Court concluded that it lacked jurisdiction to consider the matter of Cherokee self-government and the protection of land with respect to the state of Georgia because there were political questions not susceptible to resolution by the courts.<sup>92</sup> The Court explained:

The bill requires us to control the Legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the Court may be well questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department . . . If it be true that the Cherokee Nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.<sup>93</sup>

In a separate opinion, Justice Johnson further explained that this case raised non-justiciable political questions because a state-of-nature-like situation of war<sup>94</sup> existed between the Cherokee Tribe and the State of Georgia:

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<sup>88</sup> See Magliocca, *supra* note 86, at 885; Echohawk, *supra* note 87, at 96-98.

<sup>89</sup> 30 U.S. 1 (1831).

<sup>90</sup> See *id.* at 20.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> See HOBBS, *supra* note 8, at 143 (in the state of nature, people live in a "condition which is called war, and such a war, is of every man, against every man").

What does this series of allegations exhibit but a state of war and the fact of invasion? They allege themselves to be a sovereign independent state, and set out that another sovereign state has, by its laws, its functionaries, and its armed force, invaded their State and put down their authority. This is war in fact; though not being declared with the usual solemnities, it may perhaps be called war in disguise. And the contest is distinctly a contest for empire. It is not a case of *meum* and *tuum* in the judicial, but in the political sense. Not an appeal to laws, but to force. A case in which a sovereign undertakes to assert his right upon his sovereign responsibility; to right himself, and not appeal to any arbiter but the sword, for the justice of his cause . . . . In the exercise of sovereign right, the sovereign is the sole arbiter of his own justice.<sup>95</sup>

In not allowing the Cherokee Tribe access to the courts to challenge these anti-Native American laws, the Supreme Court lifted the constraint of any law on the dominant group and exposed the Cherokees to state-of-nature-like condition of war, where notions of justice or morality were not applicable. Instead, the state of nature “virtue” of force was applied to the Cherokee Tribe.

More generally, this “virtue” of force was brutally applied to Native Americans in the course of this state-of-nature-like situation of war. William Bradford explains:

In the aftermath of the Civil War, the might of the U.S. Army was directed toward Indian eradication. Military and civilian contractors induced deliberate starvation by destroying primary food sources such as the buffalo, yet Indian tenacity necessitated more direct application of force. One by one, the Seminole, the Nez Perce, Lakota, Shoshone, Comanche, Apache and other tribes were hunted, pursued, cornered and murdered. A series of “massacres” were written in Indian blood on the pages of American history . . . . By the conclusion of the Indian wars in 1890, the pre-Columbian Indian population was reduced [by] as much [as] 98%, and an *Indianrein* United States was not beyond possibility.<sup>96</sup>

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<sup>95</sup> *Cherokee Nation*, 30 U.S. at 29 (Johnson, B., dissenting).

<sup>96</sup> William Bradford, “*With a Very Great Blame on Our Hearts*”: *Reparations, Reconciliation and an American Indian Plea to Peace with Justice*, 27 AM. INDIAN L. REV. 1, 24-25 (2002-2003).

# I. The State of Nature, Malcolm X, the Permanent Foreignness of Asian-Americans and Latinos, and Existence Outside of the American Polity

## J.

State of Nature theory explains some interesting and puzzling remarks by the black American civil rights leader Malcolm X.<sup>97</sup> In his famous “The Ballot or the Bullets” speech, Malcolm X speaks “as an outsider to the [American] polity.”<sup>98</sup> Indeed, he states that he did not self-identify as an American.<sup>99</sup> What explains these puzzling remarks? I suggest that he is speaking as someone in the state of nature—*i.e.*, as a member of a group of black Americans who are unprotected by law from the majority and, therefore, existing in a state-of-nature-like situation somewhere outside of the American polity or state.<sup>100</sup> In this regard, he criticizes the Democrats for their failure to enact legal protection for blacks, pointing out that, although the Democrats were the majority in both houses of Congress and held the presidency of the United States, they refused to pass and enact civil rights legislation to protect African-Americans.<sup>101</sup> Thus, as people who were unprotected by law, he states that they are not truly Americans but just “Africans who are in America.”<sup>102</sup> Accordingly, Malcolm X asserts that, as long as blacks are unprotected by law, they should engage in self-defense.<sup>103</sup>

A parallel situation of a people in a state-of-nature-like position existing somewhere outside of America seems to arise in the context of Asian Americans. Asian Americans have been legally and socially constructed as unassimilated “permanent foreigners” existing “outside the American citizenry.”<sup>104</sup> The case law is instructive on this point. For instance, in *People v. Hall*,<sup>105</sup> in holding that the testimony of a Chinese person was inadmissible to convict a white person, the California Supreme Court described the Chinese living in California as being unable to assimilate into mainstream America and instead constituting:

a distinct people, living in our community, recognizing no laws of this State except through necessity, bringing with them their prejudices and national feuds, in which they indulge in open violation of law; whose mendacity is proverbial; a race of people

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<sup>97</sup> For recent work on Malcolm X, see generally John M. Kang, *Martin v. Malcolm: Democracy, Non-violence, Manhood*, 114 W. VA. L. REV. 937 (2012); Ali Khan, *Lessons from Malcolm X: Freedom by Any Means Necessary*, 38 HOW. L. J. 79 (1944).

<sup>98</sup> Pratheepan Gulasekaram, *Guns and Membership in the American Polity*, 21 WM. & MARY BILL RTS. J. 619, 630, 632 (2012).

<sup>99</sup> MALCOLM LITTLE, MALCOLM X SPEAKS: SELECTED SPEECHES AND STATEMENTS 25 (George Breitman, ed., 1965).

<sup>100</sup> See *id.* at 26.

<sup>101</sup> See *id.* at 27.

<sup>102</sup> *Id.* at 36.

<sup>103</sup> *Id.* at 43.

<sup>104</sup> Neil Gotanda, *The Racialization of Islam in American Law*, 637 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 184, 190 (2011).

<sup>105</sup> 4 Cal. 399 (1854).

whom nature has marked as inferior, and who are incapable of progress and intellectual development beyond a certain point as their history has shown, differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference . . . .<sup>106</sup>

Similarly, in *Fong Yue Ting v. United States*,<sup>107</sup> the U.S. Supreme Court observed that the Chinese living in the United States are “of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people.”<sup>108</sup> As Neil Gotanda has explained, these cases show that the Chinese living in America “are and will forever be marked by a permanent taint of ‘foreignness’” . . . and are not included “within American law and American life.”<sup>109</sup>

Likewise, Latinos are also perceived as foreign and apparently existing somewhere outside of the American polity because they are seen as unable to assimilate into the dominant Anglo-American culture.<sup>110</sup> Indeed, because Latinos are allegedly unable to assimilate, they supposedly constitute a threat to the “cultural and political integrity of the United States.”<sup>111</sup>

This phenomenon of placing Asian Americans and Latinos outside of the American polity has recently intensified with efforts by state and local governments to regulate immigration. For example, the state of Arizona has enacted draconian anti-immigrant legislation that provides, among other things, that state officials are to “make a reasonable attempt to determine the immigration status of a person stopped, detained or arrested if there is a reasonable suspicion that the person is unlawfully present in the United States.”<sup>112</sup> The language of this Arizona statute authorizes the racial profiling of Latinos and Asians, including American citizens and undocumented persons.<sup>113</sup> This is because “[t]he Arizona law as drafted permits the consideration of race to

<sup>106</sup> *Id.* at 404-05; Gotanda, *Racialization of Islam*, *supra* note 104, at 190.

<sup>107</sup> 149 U.S. 698 (1893).

<sup>108</sup> *Id.*; Gotanda, *Racialization of Islam*, *supra* note 104, at 190.

<sup>109</sup> Gotanda, *The Racialization of Islam*, *supra* note 104, at 190.

<sup>110</sup> See Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 117 (1997) (“An important commonality of the Latino experience in the United States is that dominant society views Latinos, and the differences that they bring, as something foreign to the Anglo-Saxon core”); SAMUEL P. HUNTINGTON, WHO ARE WE?: THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY 222 (2004) (“Mexican immigrants and their progeny have not assimilated into American society as other immigrants did in the past and as many other immigrants are doing now”).

<sup>111</sup> HUNTINGTON, *supra* note 110, at 243.

<sup>112</sup> *United States v. Arizona*, 703 F. Supp. 2d 980, 987 (D. Ariz. 2010).

<sup>113</sup> See Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L. J. 47, 66-67 (2010).

the extent permitted by the U.S. Constitution, which as interpreted by the Supreme Court, sanctions the consideration of race as a relevant factor in immigration enforcement . . . [or] in making an immigration stop . . . ”<sup>114</sup> Asian Americans and Latinos will be subject to such racial profiling in this immigration enforcement context because they suffer from “a recurrent form of racism” which “identif[ies] the Other Non-White [e.g., Asian-Americans and Latinos] as possessing a dimension of ‘foreignness’ and “this foreignness translates into racially discriminatory treatment for Other Non-Whites [e.g., Asian-Americans and Latinos] under the guise of disparate treatment of non-citizens.”<sup>115</sup> Under these circumstances, these anti-immigrant efforts may be seen as attempts to build community by “banding together against the ‘other.’”<sup>116</sup> As a result, these efforts place Asian-Americans and Latinos in a state-of-nature-like situation somewhere outside of America inasmuch as they “do not include ‘Other Non-Whites in their vision of political community.’”<sup>117</sup>

### K. Racial Neoliberalism and the State of Nature.

The project of “racial neoliberalism” has arisen in recent years and seeks to construct a world where “race” is no longer viewed “as a legitimate topic or term of public discourse or public policy.”<sup>118</sup> According to this racial neoliberal project, the notions of racism or discourse on race are outmoded ideas and no longer relevant to contemporary society.<sup>119</sup> Indeed, this program “seeks to wipe out the terms of reference, to wipe away the very vocabulary necessary to recall

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<sup>114</sup> Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona’s S.B. 1070 and the Failure of Comprehensive Immigration Reform*, 2 U. C. IRVINE L. REV. 313, 332 (2012).

<sup>115</sup> Neil Gotanda, *Race, Citizenship, and the Search for Political Community among “We the People,”* 76 OREGON L. REV. 233, 252-53 (1997).

<sup>116</sup> *Id.* at 258.

<sup>117</sup> *Id.*

<sup>118</sup> Darrel Enck-Wanzer, *Barack Obama, the Tea Party, and the Threat of Race: Or Racial Neoliberalism and Born Again Racism*, 4 COMMUNICATION, CULTURE & CRITIQUE 23-24 (2001). See also David J. Roberts & Minelle Mahtani, *Neoliberalizing Race, Racing Neoliberalism: Placing “Race” in Neoliberal Discourses*, 42 ANTIPODE, no. 2, 2010, at 248, 253 (“claims of racism under neoliberalism are fundamentally ruled as outside of the way in which society . . . is structured”).

<sup>119</sup> Enck-Wanzer, *Barack Obama*, *supra* note 118, at 25; Roberts & Mahtani, *supra* note 118, at 254 (“Neoliberalist policy is sneaky because it can force the hand of apparent race-blindness by insisting that race does not play an important role”); Henry A. Giroux, *Spectacles of Race and Pedagogies of Denial: Anti-Black Racist Pedagogy under the Reign of Neoliberalism*, 52(3-4) COMMUNICATION EDUCATION 191-211 (2003) (“Neoliberal racism asserts the insignificance of race as social force, and it aggressively roots out any vestige of race as a category at odds with an individualistic embrace of formal legal rights”); cf. Anthony V. Alfieri, *Post-racialism in the Inner City: Structure and Culture in Lawyering*, 98 GEO. L. J. 921, 923 (2010) (“many in politics and in the media proclaim the end of race, engendering a new orthodoxy of colorblind neutrality in popular discourse on racial equality”).

and recollect, to make a case, to make a claim” of racism or racial discrimination or racial justice.<sup>120</sup> In this context, any effort to construct a societal critique on the basis of a demand for racial justice is “met with resistance, ridicule and reactionary politics.”<sup>121</sup> This project denies that racism exists and explains any apparent inequalities among the races as generated through the fault of racial minorities and holds that any attempt by the state to remedy or correct racial inequalities constitutes racism.<sup>122</sup> Obviously, to the extent that this neoliberal project is successful, and minorities are deprived of the ability to make claims for racial justice in law or elsewhere in society, constraints are lifted off of the majority and minorities are relegated to the state of nature.

We can observe the effort to redefine attempts to remedy racial inequality as racism in recent Supreme Court cases. For instance, in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>123</sup> the Seattle and Louisville School districts developed voluntary racial integration programs. The Supreme Court held that these integration schemes were unconstitutional under the 14<sup>th</sup> Amendment’s Equal Protection Clause.<sup>124</sup> The plans had been constructed to reduce segregation and create a “racially integrated environment.”<sup>125</sup> A plurality of the Supreme Court suggested that this effort to remedy racial inequality through integration is unconstitutional: “In design and operation, the plans are directed only to racial balance pure and simple, an objective this Court has repeatedly condemned as illegitimate.”<sup>126</sup> Indeed, “the plurality’s approach lends credence to the idea that integration itself may be a

<sup>120</sup> DAVID T. GOLDBERG, *THE THREAT OF RACE: REFLECTIONS ON RACIAL NEOLIBERALISM* 21 (2009). See also Dana-Ain Davis, *Narrating the Mute: Racializing and Racism in a Neoliberal Moment*, 9(4) *SOULS* 346-360 (2007) (“Under neoliberal racism the relevance of the raced subject, racial identity and racism is subsumed under the auspices of meritocracy. For in a neoliberal society, individuals are supposedly freed from identity and operate under the limiting assumptions that hard work will be rewarded if the game is played according to the rules. Consequently, any impediments to success are attributed to personal flaws. This attribution affirms notions of neutrality and silences claims of racializing and racism”).

<sup>121</sup> Enck-Wanzer, *Barack Obama*, *supra* note 118, at 25.

<sup>122</sup> ANDREW BARLOW, *BETWEEN FEAR AND HOPE: GLOBALIZATION AND RACE IN THE UNITED STATES* 8 (2003). See also HENRY GIROUX, *AGAINST THE TERROR OF NEOLIBERALISM* 65, 71 (2008) (According to the neoliberal framework, racism is eliminated because “success is attributed to . . . entrepreneurial genius while those who do not succeed are viewed as failures or utterly expendable . . . neoliberal racism either dismisses the concept of institutional racism or maintains that it has no merit”).

<sup>123</sup> 551 U.S. 701 (2007). For analysis of *Parents Involved*, see generally Pamela S. Karlan, *What Can Brown Do for You? Neutral Principles and the Struggle over the Equal Protection Clause*, 58 *DUKE L. J.* 1049 (2009); Rachel F. Moran, *Rethinking Race, Equality and Liberty: The Unfulfilled Promise of Parents Involved*, 69 *OHIO ST. L. J.* 1321 (2008); Goodwin Liu, *Seattle and Louisville*, 95 *CALIF. L. REV.* 277 (2007).

<sup>124</sup> *Parents Involved in Community Schools*, 551 U.S. at 733-35.

<sup>125</sup> *Id.* at 725.

<sup>126</sup> *Id.* at 726; Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 *IOWA L. REV.* 837, 851 (2011).

discriminatory purpose . . . and raises profound doubts that integration is an objective the government should pursue. It is an insignificant step toward destabilizing the concept of 'discrimination.'"<sup>127</sup> Integration was supposed to generate social equality and remedy racial inequalities.<sup>128</sup> However, "if integration equals discrimination, then all governmental integration efforts . . . are suspect and potentially even unconstitutional."<sup>129</sup> In *Parents Involved*, then, we observe the neoliberal project in the process of redefining "discrimination" so that efforts to remedy racial inequalities through integration are unconstitutional acts of racial discrimination.

This neoliberal redefinition of "discrimination" and other racial terms and the general racial neoliberal project also reflects the shift taking place in our country where the United States is changing from a nation state into a neoliberal market state. According to Philip Bobbitt, the constitutional order of the United States is transforming from a nation state into a market state.<sup>130</sup> The fundamental rationale of the nation state is to improve the material well-being of the people whereas the market state is based on expanding or maximizing the opportunities to be offered to the public.<sup>131</sup> To accommodate this shift, the U.S. Supreme Court is currently reconstructing constitutional law.<sup>132</sup> One of the consequences of this shift is that the Supreme Court no longer views the assimilation or integration of racial minorities into mainstream American society as a fundamental objective.<sup>133</sup> According to this account, the Supreme Court's decision in *Brown v. Bd. Of Education*,<sup>134</sup> which overturned legislatively mandated segregation in public schools, represents the Supreme Court's establishment of a policy to integrate or assimilate racial minorities into American society—a policy the Supreme Court developed in order to respond to cold war international concerns—in particular, to prevent the Soviet Union from exploiting issues of race as the Soviet Union

<sup>127</sup> Adams, *Is Integration a Discriminatory Purpose*, *supra* note 126, at 853.

<sup>128</sup> Michelle Adams, *Radical Integration*, 94 CAL. L. REV. 261, 271-72 (2006) ("[T]he integration vision most closely associated with the Civil Rights Movement had three primary characteristics: (i) the belief that 'assimilation would eventually cure racial bigotry,' (ii) the expectation that race mixing under conditions of social equality would break down racial stereotypes and allow members of each group to appreciate a common, shared humanity, and (iii) the belief that integration would eradicate the advantages that whites had accrued through segregation").

<sup>129</sup> Adams, *Is Integration a Discriminatory Purpose*, *supra* note 126, at 865.

<sup>130</sup> PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 228 (2002). For analysis of Bobbitt's theory, see generally Ari Afilalo & Dennis Patterson, *Statecraft, Trade and the Order of States*, 6 CHI. J. INT'L L. 725 (2006); Robert J. Delahunty & Antonio Perez, *Moral Communities or a Market State: The Supreme Court's Vision of Police Power in the Age of Globalization*, 42 HOUS. L. REV. 637 (2005); Ron Sievert, *A New Perspective on the International Criminal Court: Why the Right Should Embrace the ICC and How America Can Use It*, 68 U. PITT. L. REV. 77 (2006); Lindsay J. Thompson, *The Future of Enterprise Regulation: Corporate Social Accountability and Human Freedom*, 3 J. BUS. & TECH. L. 357 (2008).

<sup>131</sup> BOBBITT, *SHIELD OF ACHILLES*, *supra* note 130, at xxvi.

<sup>132</sup> Delahunty & Perez, *Moral Communities or a Market State*, *supra* note 130, at 643.

<sup>133</sup> *Id.* at 703-04.

<sup>134</sup> 347 U.S. 483 (1954).

and the United States competed for influence at home and abroad.<sup>135</sup> In the wake of the disintegration of the Soviet Union, the United States is now moving away from the goal of integrating or assimilating racial minorities.<sup>136</sup> Given this background, the redefinition of “discrimination” in the *Parents Involved* case to view racial integration as unconstitutional is consistent with this ongoing shift in constitutional law and constitutional order—a shift that does not view the integration of racial minorities as an important or necessary goal.

This shift away from integrationism is a radical change. At one time, integration was seen as an anti-racist world view which was to challenge racism wherever it appeared in society.<sup>137</sup> Indeed, as Gary Peller has explained:

[T]he idea of racial integration represented a powerful, spiritually-rooted social resistance movement that threatened to destabilize the status quo of American institutional life in profound ways. Under the banner of integrationism, hundreds of thousands of people mobilized to challenge the political, economic, and cultural power relations in cities and towns across the country, employing tactics that included mass protest, economic boycotts, civil disobedience, sit-ins and strikes.<sup>138</sup>

### III. THE STATE OF NATURE: SELF-KNOWLEDGE AND GUILT

In my State of Nature article, I argued that acting as if in the state of nature with respect to minorities—i.e., with great power or lack of constraint—would lead to bad consequences for the dominant group, including knowledge of

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<sup>135</sup> Delahunty & Perez, *Moral Communities or a Market State*, *supra* note 130, at 703. See also Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 524-25 (1980); Eric K. Yamamoto & Ashley Kai-ao Obrey, *Reframing Redress: A “Social Healing through Justice” Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L. J. 5, 41 (2009) (“historically, harsh international criticism of America’s racist Jim Crow democracy during the Cold War compelled United States political leaders to shift positions and argue for ending the separate-but-equal doctrine in *Brown v. Board of Education*”); Richard Delgado, *Explaining the Rise and Fall of African-American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R. – C.L. L. REV. 369, 371 (2002) (“gains for blacks coincide with white self-interest and materialize at times when elite groups need a breakthrough for African-Americans usually for the sake of world appearances or the imperatives of international competition”).

<sup>136</sup> Delahunty & Perez, *Moral Communities or a Market State*, *supra* note 130, at 703-704; cf. Gary Peller, *Race Consciousness*, 1990 DUKE L. J. 758, 767 (recognizing that the ideal of integrationism was “not inevitable or self-evident, but rather is situated within the confines of a particular set of social, cultural, and philosophical assumptions about the world”).

<sup>137</sup> See Peller, *supra* note 136, at 769 (“The solution to segregation, then is integration, understood as a social vision opposed to racism, in each realm in which racism manifests itself”).

<sup>138</sup> Peller, *supra* note 136, at 767.



their own wrongdoing and consciousness of guilt.<sup>139</sup> This state of affairs has come about. Consider some important examples that illustrate this phenomenon.

Thomas Jefferson, one of the founders of the American Republic and the third President of the United States, acknowledged that the racism of whites in establishing the institution of slavery and taking away the liberty of African Americans deserved just punishment from God. Jefferson wrote:

And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of people that these liberties are of the gift of God? That they are not to be violated but with his wrath? Indeed I tremble for my country when I reflect that God is just; that his justice cannot sleep for ever; that considering numbers, nature and natural means only, a revolution of the wheel of fortune, an exchange of situation is among possible events; that it may become probable by supernatural interference! The Almighty has no attribute which can take side with us in such a contest.<sup>140</sup>

Other members of the American founding generation also believed that slavery would draw down a divine wrath on America.<sup>141</sup> For instance, Luther Martin stated at the Maryland Constitutional Convention that “the continuance of the slave trade . . . ought to be considered as justly exposing us to the displeasure and vengeance of him, who is equally Lord of all, and who views with equal eye the poor African slave and his American master.”<sup>142</sup>

Similarly, President Abraham Lincoln saw the American civil war as punishment from God for slavery in the United States. We see this in Lincoln’s second inaugural address:

One-eighth of the whole population were colored slaves, not distributed generally over the Union, but localized in the southern part of it. These slaves constituted a peculiar and powerful interest. All knew that this interest was, somehow, the

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<sup>139</sup> See Martínez, *supra* note 3, at 834-37.

<sup>140</sup> Thomas Jefferson, *Notes on Virginia*, in THE WRITINGS OF THOMAS JEFFERSON 403-04 (H.A. Washington ed., New York, Derby & Jackson 1859). See also Samuel W. Calhoun, *May the President Appropriately Invoke God? Evaluating the Embryonic Stem Cell Votes*, 10 RUTGERS J. L. & RELIGION 1, 15 (2008) (“Jefferson later gave equally irrefutable evidence that his condemnation of slavery was premised in his religious beliefs. He feared the wrath of God against the country on account of slavery”).

<sup>141</sup> Sandra L. Rierson, *The Thirteenth Amendment as a Model for Revolution*, 35 VT. L. REV. 765, 776 (2011).

<sup>142</sup> *Id.* at 776-77 (quoting *Remarks of Luther Martin and the Maryland Constitutional Convention* (Nov. 29, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 172, 211 (Max Farrand ed., 1966)).

cause of the war. To strengthen, perpetuate, and extend this interest was the object for which the insurgents would rend the Union even by war; while the government claimed no right to do more than to restrict the territorial enlargement of it. Neither party expected for the war the magnitude or the duration which it has already attained. Neither anticipated that the *cause* of the conflict might cease with, or even before the conflict itself should cease. Each looked for an easier triumph, and a result less fundamental and astounding. Both read the same Bible, and pray to the same God; and each invokes His aid against the other. It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces; but let us judge not, that we be not judged. The prayers of both could not be answered. That of neither has been answered fully. The Almighty has His own purposes. "Woe unto the world because of offenses; for it must needs be that offenses come, but woe to that man by whom the offense cometh." If we shall suppose that American Slavery is one of those offenses which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South this terrible war as the woe due to those by whom the offense came, shall we discern therein any departure from those divine attributes which the believers in a living God always ascribe to Him? Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said "the judgments of the Lord are true and righteous altogether."<sup>143</sup>

Beyond this, the famous footnote four<sup>144</sup> of the *U.S. v. Carolene Products*<sup>145</sup> case seems to imply that the dominant group is conscious of its guilt

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<sup>143</sup> RONALD C. WHITE JR., LINCOLN'S GREATEST SPEECH: THE SECOND INAUGURAL 718-19 (2002). See also JOHN RAWLS, POLITICAL LIBERALISM 254 (1996) (describing Lincoln's Second Inaugural as a "prophetic (Old Testament) interpretation of the Civil War as God's punishment for the sin of slavery").

<sup>144</sup> Justice Lewis Powell has described this footnote four as "the most celebrated footnote in constitutional law." Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087 (1982). See generally Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L. J. 1287 (1982) ("Each constitutional generation organizes itself about paradigmatic events and texts. For my generation, it is clear that these events are *Brown v. Board of*

with respect to its treatment of minorities. The footnote seems to recognize that there is a tendency for the majority to treat minorities in racist ways. The Supreme Court suggested that legislation directed at racial minorities should not be entitled to a presumption of constitutionality and instead should receive very careful judicial scrutiny because “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities and which may call for a correspondingly more searching judicial inquiry.”<sup>146</sup>

#### IV. THE HEALTH OF RACIAL MINORITIES AND THE STATE OF NATURE

According to Thomas Hobbes, in the state of nature life is “nasty, brutish and short.”<sup>147</sup> The evidence regarding the relative health of racial minorities raises a question as to whether minorities are enduring a state of nature existence. For instance, in 2004, blacks had a shorter life expectancy than whites: 73.1 years as compared to 78.3 years.<sup>148</sup> Indeed, both blacks and Native-Americans “have a consistent pattern of elevated mortality risk compared to whites.”<sup>149</sup> Blacks are twenty times more likely than whites to experience heart failure before age 50.<sup>150</sup>

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*Education* and the civil rights movement and that the text is footnote four. For whether or not the footnote is a wholly coherent theory, it captures the constitutional experience of the period from 1954 to 1964. And that experience, more than the logic of any theory, is the validating force in law”).

<sup>145</sup> 304 U.S. 144, 152 n. 4 (1938).

<sup>146</sup> *Carolene Products*, *supra* note 80, at 152 n. 4. Justice Lewis Powell describes the theory expressed in footnote four as follows:

The fundamental character of our government is democratic. Our constitution assumes that majorities should rule and that the government should be able to govern. Therefore, for the most part, Congress and state legislatures should be allowed to do as they choose. But there are certain groups that cannot participate effectively in the political process. And the political process therefore cannot be trusted to protect these groups in the way that it protects most of us. Consistent with these premises . . . the Supreme Court . . . [must] review with heightened scrutiny legislation inimical to discrete and insular minorities who are unable to protect themselves in the legislative process.

Powell, *supra* note 144, at 1088-89.

<sup>147</sup> HOBBS, *supra* note 8, at 143.

<sup>148</sup> David R. Williams *et al*, *Race, Socioeconomic Status, and Health: Complexities, Ongoing Challenges, and Research Opportunities*, ANN. N.Y. ACAD. SCI. 1186, pp. 69-101, 70 (2010). [hereinafter *Race, Socioeconomic Status, and Health*]. See also Vernellia R. Randall, *Eliminating Racial Discrimination in Healthcare: A Call for State Health Care Anti-Discrimination Law*, 10 DEPAUL J. HEALTH CARE L. 1, 2 (2006) (“Racial minorities are sicker than white Americans; they are dying at a significantly higher rate”).

<sup>149</sup> Williams, *Race, Socioeconomic Status, and Health*, *supra* note 148, at 71.

<sup>150</sup> *Id.* at 72.

Blacks experience hypertension or high blood pressure at a younger age than whites.<sup>151</sup> In addition, as compared to whites, “African-Americans are less likely to receive analgesics for pain, cardiac medications, surgery for early-stage lung cancer, treatment for glaucoma, and referral for cardiac catheterizations.”<sup>152</sup>

Some of the bad health consequences would seem to be traceable to state of nature like behavior. Arab-Americans experienced hostile attacks following the tragic events of 9/11.<sup>153</sup> These attacks seem to be based on their foreign appearance, which seems to trigger the harshness of the state of nature.<sup>154</sup> This harsh post 9/11 environment seems to have generated stress for Arab-Americans resulting in bad health consequences.<sup>155</sup> In particular, in the six months following 9/11, Arab-American women in California experienced an “increased risk of low birth weight and pre-term birth compared with similar women who gave birth a year earlier.”<sup>156</sup>

In addition, Native Americans have suffered deprivations of human rights as the dominant group has exercised its state of nature like unchecked plenary power against them.<sup>157</sup> It is now understood that such “historical trauma” has negatively impacted the health of Native Americans.<sup>158</sup> “Historical trauma” is

<sup>151</sup> *Id.* at 72.

<sup>152</sup> Mary L. Fennell, *et al*, *Facility Effects on Racial Differences in Nursing Home Quality of Care*, 15 AM. J. MED. QUALITY 174, 175 (2000). See also Dania Palanker, *Enslaved by Pain: How the U.S. Public Health System Adds to Disparities in Pain Treatment for African Americans*, 15 GEO. J. ON POVERTY L. & POL’Y 847, 851 (2008) (“Numerous studies show that African Americans receive less analgesics and other pain treatment than whites”).

<sup>153</sup> Laurie Goodstein & Tamar Lewin, *Victims of Mistaken Identity, Sikhs Pay a Price for Turbans*, N.Y. TIMES, Sept. 19, 2001, at A1 (“since the attacks, people who look Middle Eastern and South Asian, whatever their religion or nation of origin, have been singled out for harassment, threats and assaults”); Tamar Lewin & Gustav Niebuhr, *Attacks and Harassment Continue on Middle Eastern People and Mosques*, N.Y. TIMES, Sept. 18, 2001, at B5 (describing a “continuing wave of attacks . . . on Muslims . . . and others who appear to be Middle Eastern”).

<sup>154</sup> Martínez, *supra* note 3, at 824-826.

<sup>155</sup> C. DeMaggio, S. Galea & L.D. Richardson, *Emergency Department Visits for Behavioral and Mental Health Care after a Terrorist Attack*, ANNALS OF EMERGENCY MED., 50(3), 327-334 (2007) (describing the negative health consequences — including stress-related disorders — subsequent to terrorist attack); Diane S. Lauderdale, *Birth Outcomes for Arabic-Named Women in California before and after September 11*, DEMOGRAPHY 43(1), 185, 187-188 (2006) (“Diverse sources identify the weeks after 9/11 as a period when persons who were perceived to be Arabs in the United States were victims of harassment, hate crimes, and workplace discrimination . . . . While each pregnant woman of Arab descent in the United States might not have personally experienced discrimination, it seems likely that concern about what might happen would be a widespread stressor, perhaps especially for pregnant women”).

<sup>156</sup> Lauderdale, *supra* note 155, at 197.

<sup>157</sup> Martínez, *supra* note 3, at 811-14.

<sup>158</sup> Les B. Whitbeck, Gary W. Adams, Dan R. Hoyt, and Xiaojin Chen, *Conceptualizing and Measuring Historical Trauma among American Indian People*, 33(3/4) AM. J. OF CMTY. PSYCHOL. 119-130, June (2004); Maria Yellow Horse Brave Heart & Lemyra M. DeBruyn, *The American Indian Holocaust: Healing Historical Unresolved Grief*, AM. INDIAN AND ALASKA NATIVE MENTAL HEALTH RES., 8(2) 60-82 (1998).

defined as “the cumulative psychological wounding of an individual and his/her group due to the history of genocide and other atrocities that American Indians and other indigenous people experienced from European colonizers.”<sup>159</sup>

### V. Can One Escape from the State of Nature?

To escape from the state of nature, it would seem that constraints or additional constraints might be placed on the dominant group in their interactions with minorities. One way to do this may be to use the Implicit Association Test (IAT) for measuring racial bias in lawsuits that allege racial discrimination.

Social psychologists have found that members of the dominant group may develop certain implicit attitudes or stereotypes regarding racial minorities that are triggered by the presence of the racial minority.<sup>160</sup> These attitudes may be unconscious.<sup>161</sup> For example, members of the dominant group may learn negative stereotypes regarding racial minorities, which may become implicit attitudes that are retained in the memory.<sup>162</sup> The IAT is a procedure that is used to determine and measure such implicit racial bias.<sup>163</sup>

There is an extensive body of research concerning the IAT — hundreds of published studies — and over seven million IAT tests have been taken on line at Harvard University’s website.<sup>164</sup> The studies have shown “that socially dominant groups have implicit bias against subordinate groups (White over non-White, for example).”<sup>165</sup> Thus, the tests show that three fourths of whites “display an unconscious tendency to value white people over black people.”<sup>166</sup> In addition,

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<sup>159</sup> David Williams & Selina A. Mohammed, *Discrimination and Racial Disparities in Health: Evidence and Needed Research*, J. BEHAV. MED. 20, 30 (2009).

<sup>160</sup> Kang & Banaji, *supra* note 74, at 1083-84 (“Significantly, the mental constructs that guide our evaluations include beliefs (stereotypes) and feelings (prejudice) about entire social categories . . . . They are automatically prompted by the mere presence of a target mapped into a particular social category”).

<sup>161</sup> Natalie Bucciarelli Pedersen, *A Legal Framework for Uncovering Implicit Bias*, 79 U. CIN. L. REV. 97, 104-05 (2010) (the term “implicit bias” is used to refer to the “notion that everyone holds certain biases at an unconscious level, and these biases may influence our decision-making processes in ways of which we are completely unaware”).

<sup>162</sup> John F. Dovidio, Samuel L. Gaertner, Kerry Kwakami & Gordon Hodson, *Why Can’t We Just Get Along? Interpersonal Biases and Interracial Distrust*, 8(2) CULTURAL DIVERSITY AND ETHNIC MINORITY PSYCHOLOGY, 88-94 (2002) (describing the development of negative stereotypes); Kang & Banaji, *supra* note 74, at 1494 (bias may come from “vicarious experience with the racial other, transmitted through the media. If these experiences are somehow skewed, we should not be surprised by the presence of pervasive implicit bias”).

<sup>163</sup> Kang & Banaji, *supra* note 74, at 1509 (“The Implicit Association Test . . . has become the state-of-the-art measurement tool” of implicit bias).

<sup>164</sup> Jerry Kang & Kristin Lane, *Seeing through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 473 (2010) (“over seven million completed tests”); Bruce Bower, *The Bias Finders*, SCIENCE NEWS, April 22, 2006, Vol. 169 at 250-253.

<sup>165</sup> Kang & Banaji, *supra* note 74, at 1512.

<sup>166</sup> Bower, *supra* note 164, at 250.

there is “persuasive evidence” that such implicit bias “predicts disparate” treatment of racial minorities.<sup>167</sup>

The research developed in the IAT studies might be used in litigation alleging race discrimination as “[s]ocial framework evidence” which “uses general conclusions from tested, reliable and peer-reviewed social science research and applies them to the case.”<sup>168</sup> Expert witness testimony would be employed to provide such evidence to the jury which would then be used to find facts in a particular case.<sup>169</sup> Such structural framework evidence regarding implicit sexism has been allowed in a recent case alleging gender discrimination,<sup>170</sup> and therefore, such evidence regarding implicit racial bias should be admissible in a case alleging race discrimination.<sup>171</sup>

In addition, one commentator has argued that the IAT should be administered to prospective jurors during the jury selection process known as *voir dire*.<sup>172</sup> He argues that since jurors’ decisions are affected by implicit bias, the IAT should be used “to improve our ability to detect this bias in jurors and remove those who are unable to approach a trial with relative neutrality.”<sup>173</sup> He suggests that the use of the IAT is particularly important in light of the constitutional right to a fair jury.<sup>174</sup> In these ways, the IAT and its results might be used to place constraints on the dominant group in an effort to escape the state of nature.

Another possible way to escape the amoral state of nature is for judges to reject legal positivism in favor of a non-positivist theory and approach to legal decision-making. Positivism takes the position that law is separate or autonomous from morality or morals.<sup>175</sup> On the other hand, natural law theories or “naturalism” deny the separation of law and morality and assert that the notion of law incorporates notions of morals.<sup>176</sup> Thus, for example, according to the leading contemporary naturalist, Ronald Dworkin, judges should decide cases by using theories or principles that best explain the existing legal precedents and

<sup>167</sup> Kang & Banaji, *supra* note 74, at 1514.

<sup>168</sup> Kang & Lane, *supra* note 164, at 493-95.

<sup>169</sup> Kang & Lane, *supra* note 168, at 493-94.

<sup>170</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 293-94 (1989).

<sup>171</sup> Kang & Lane, *supra* note 168, at 494-95.

<sup>172</sup> Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test during Voir Dire*, 3 DEPAUL J. FOR SOC. JUST. 139 (2010).

<sup>173</sup> Larson, *supra* note 172, at 142.

<sup>174</sup> *Id.* at 152-53.

<sup>175</sup> Jeffrey Goldsworthy, *The Limits of Judicial Fidelity to Law: The Coxford Lecture*, 24 CAN. J. L. & JURIS. 305, 308 (2011) (“legal positivism. . . regards law as ultimately a matter of fact and not of morality”).

<sup>176</sup> Ronald A. Dworkin, *Natural Law Revisited*, 34 U. FLA. L. REV. 165 (1982) (“any theory which makes the content of law sometimes depend on the correct answer to some moral question is a natural law theory”). See also Goldsworthy, *supra* note 175, at 308 (“Non-positivist theories maintain that establishing what law is depends partly on considerations of justice”).

which are superior as a matter of moral theory.<sup>177</sup> The use of such a naturalist theory of judicial decision-making might enable us to escape the confines of the amoral state of nature in making judicial decisions.

Significantly, Dr. Martin Luther King, Jr., urged the use of naturalism in law in his famous "Letter from Birmingham Jail."<sup>178</sup> In the letter, he urged resistance to laws that were inconsistent with morality.<sup>179</sup> Instead, he urged that just laws should be enacted by legislators or handed down by judges which "uplift [the] human personality" and that dominant groups should not seek to apply laws to minorities that they would not be willing to have applied to themselves—*i.e.*, laws which violate the golden rule—do not do to others what you would not have done to yourself.<sup>180</sup> Given this, we can understand Martin Luther King, Jr., as attempting to lift racial minorities out of the state of nature by imposing moral constraints on the majority in his philosophy of law.

#### **VI. State of Nature Theory, the Black/White Binary, the Multiracial Paradigm Shift, Seeking Patterns in the Area of Race and Law, and the Heideggerian Clearing and Race**

Roy Brooks and Kirsten Widner have recently argued that race scholars should, in producing scholarship, retain the black/white binary or paradigm—the view that the relationship between blacks and whites should be "central to racial analysis."<sup>181</sup>

<sup>177</sup> Dworkin, *supra* note 176, at 165 ("According to naturalism, judges should decide hard cases by interpreting the political structure of their community in the following, perhaps special way: by trying to find the best *justification* they can find, in principles of political morality, for the structure as a whole, from the most profound constitutional rules and arrangements to the details of, for example, the private law of tort or contract"); Dworkin, *Natural Law Revisited*, *supra* note 176, at 166 (judges are to "try to justify, under some set of principles, those parts of the legal background which seem to them immediately relevant").

<sup>178</sup> Martin Luther King, Jr., *Letter from Birmingham Jail*, in PHILOSOPHICAL PROBLEMS IN THE LAW 58-62 (David M. Adams ed., 1992). Martin Luther King, Jr. is an "icon embodying social justice and community compassion values." Jeffrey W. Stempel, *Adam, Martin and John: Iconography, Infrastructure and America's Pathological Inconsistency about Medical Insurance*, 14 CONN. INS. L. J. 229, 234 (2008).

<sup>179</sup> King, *supra* note 178, at 60 ("One may well ask, 'How can you advocate breaking some laws and obeying others?' The answer is found in the fact that there are two types of laws: there are just and there are unjust laws. I would agree with St. Augustine that 'An unjust law is no law at all.'"). See also Charles I. Lugosi, *How Secular Ideology Is Marginalizing the Rule of Law and Catholic Contributions to Law and Society II: The Ten Commandments and the Rejection of Divine Law in American Jurisprudence*, 47 J. CATH. LEGAL STUD. 145, 153 (2008) ("Natural law is also found in the Letter from the Birmingham Jail, wherein Dr. Martin Luther King, Jr. cited to Thomas Aquinas to claim the high moral ground in his civil rights war against racism in America").

<sup>180</sup> King, *supra* note 178, at 60.

<sup>181</sup> Roy L. Brooks and Kirsten Widner, *In Defense of the Black/White Binary: Reclaiming a Tradition of Civil Rights Scholarship*, 12 BERKELEY J. AFR. AM. L. & POL'Y 107, 109-10 (2010). See also Juan F. Perea, *The Black/White Binary Paradigm of Race: The Normal Science of American Racial Thought*, 85 CAL. L. REV. 1213, 1219 (1997) ("The most pervasive and

In advancing their position, they suggest that retaining a focus on blacks and whites will not “distort our understanding of civil rights history and racism.”<sup>182</sup> They argue that the retention of a black/white paradigm is justified because the “racial histories” of other minority groups is “not a prerequisite for understanding civil rights” and that the situation of blacks is unique.<sup>183</sup> As a result, they conclude that “it makes sense for African-American and other civil rights scholars to focus on black/white racial relations” and that “racial problems facing particular groups must be analyzed separately.”<sup>184</sup>

State of nature theory provides a reason to reject the current effort to retain or return to a black/white binary or paradigm and instead adopt a multiracial paradigm in the area of race. Contrary to Brooks and Widner, retention of the black/white binary cannot be justified on the ground that the racial histories of other minorities are not necessary for understanding civil rights or because the situation of blacks is unique. State of nature theory shows that the true condition of racial minorities cannot be understood unless one considers the condition or histories of other subordinated groups.<sup>185</sup> Once the other racial groups are considered, it is possible to see that the dominant group has often treated racial minorities as if they were in a state of nature—*i.e.*, with an absence of legal or moral constraints. Given this common situation, it is also possible to

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powerful paradigm of race in the United States is the Black/White binary paradigm. I define this paradigm as the conception that race in America consists, either exclusively or primarily, of only two constituent racial groups, the Black and the White”); Leslie Espinoza & Angela Harris, *Afterward: Embracing the Tar Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585, 1596 (1997) (describing “black exceptionalism” as the assertion that “African-Americans play a unique and central role in American social, political, cultural, and economic life, and have done so since the nation’s founding” and that “the ‘black-white paradigm’ . . . is no accident or mistake; rather it reflects an important truth”); Kevin R. Johnson, *The Future of Latino Legal Scholarship*, 2 HARV. LATINO REV. 101, 110 (1997) (“civil rights concerns traditionally have been seen through the black-white paradigm, a longstanding feature of race relations discourse in this country”); Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L. J. 1157, 1185 (1999) (“race collapses into a binary white/black opposition in spite of the vagaries of color”); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C. L. REV. 323, 335 n.50 (1987) (referring to African-Americans as “the paradigm victim group of [American] history” inasmuch as African-Americans have a “400-year experience of sustained and brutal American racism”); Paul Brest & Miranda Oshige, *Affirmative Action for Whom*, 47 STAN. L. REV. 855, 900 (“no other group compares to African-Americans” with respect to the need for remedies for racism).

<sup>182</sup> Brooks and Widner, *In Defense of the Black/White Binary*, *supra* note 181, at 122-24.

<sup>183</sup> *Id.* at 123-24; 131-141.

<sup>184</sup> *Id.* at 142. See also Espinoza & Harris, *supra* note 181, at 1603 (“the black white paradigm . . . rightly places black people at the center of any analysis of American culture or American white supremacy” and “indeed the story of ‘race’ itself is the story of the construction of blackness and whiteness”).

<sup>185</sup> See also George A. Martínez, *African-Americans, Latinos and the Construction of Race: Toward an Epistemic Coalition*, 19 CHICANO-LATINO L. REV. 213, 221-22 (1998) (arguing from a philosophical perspective “that the truth about the various minority groups (Latinos, Asian-Americans, Native Americans and African-Americans) cannot be ascertained without considering propositions about the various groups”).



see that the situation of blacks is not unique—all groups must often contend with a similar state of nature-like situation. Given this, it makes more sense at this time in history to broaden the discussion, operate from within a multiracial paradigm in the area of race and focus on commonalities among the various racial groups. It is time to connect the dots. The epistemic coalition among the racial groups is arising.<sup>186</sup> This is the way to achieve knowledge in the area of race. Race theorists, therefore, should advance theories to connect the dots among the various racial groups through the lens of a multiracial paradigm and attempt to explain as much as possible of what we observe in the area of race and law.

In this regard, state of nature theory helps one understand the situation of African-Americans today. For instance, Roy Brooks has observed that “[g]iven the contradictory racial dynamics that define the age of Obama—unprecedented racial advancement for selected individuals<sup>187</sup> and continued racial frustration for the group—it is not easy to conceptualize the problem of race.”<sup>188</sup> As I have argued above, state of nature theory explains that this “contradictory” situation has come about through amoral state-of-nature judicial decision-making, which has restructured affirmative action to elevate certain “leaders” of racial groups whereas the condition of the remainder of the groups will be left unchanged.<sup>189</sup> Thus, a multiracial approach does help one to better understand issues of civil rights.

This reconstruction of affirmative action would also help explain the current situation of African-Americans with respect to whether they will benefit from affirmative action programs. Kevin Brown and Jeannine Bell have recently pointed out that “Ascendant Blacks”—African-Americans who are descended from kin who were subordinated in the United States—are “likely more underrepresented in affirmative action.”<sup>190</sup> Instead, the beneficiaries of

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<sup>186</sup> See *id.* (arguing that “Latinos, African-Americans, Asian-Americans and Native-Americans must establish an epistemic coalition to achieve knowledge about themselves and their place in the world”).

<sup>187</sup> See Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-racial Society*, 91 N.C. L. REV. 1555, 1564 (2013) (“Oprah Winfrey, Denzel Washington, Eddie Murphy, and countless other successful Blacks in business, law, medicine and politics are reminders that many Blacks have made it to the top of American society in terms of wealth, power and fame”).

<sup>188</sup> Roy L. Brooks, *The Crisis of the Black Politician in the Age of Obama*, 53 HOW. L. J. 699, 701 (2010).

<sup>189</sup> See *supra* text accompanying notes 12-24.

<sup>190</sup> Kevin Brown and Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229, 1230, 1236 (2008). See also Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141 (2007) (affirmative action programs are failing to select the descendants of slaves in the United States); Tom I. Romero & Kevin Brown, *The Social Reconstruction of Race & Ethnicity of the Nation's Law Students: A Request to the ABA, AALS, and LSAAC for Changes in Reporting Requirements*, 2011 MICH. ST. L. REV. 1133, 1140 (“[L]aw

affirmative action tend to be black immigrants, biracials and their children.<sup>191</sup> What has happened? Because of amoral state-of-nature-like legal decision-making, the Supreme Court in *Grutter* has established that affirmative action programs need only promote certain “leaders” and the situation of the remaining racial minorities is left unchanged.<sup>192</sup> Given this, it may be that affirmative action officers have decided that black immigrants and biracials are able to fill the role of being “leaders.” According to this logic, the condition of Ascendant Blacks would then be left unaltered.

In any event, the paradigm has already shifted from a black/white paradigm to a multiracial paradigm in doing scholarship on race. Thomas Kuhn in his classic work on *The Structure of Scientific Revolutions*,<sup>193</sup> has pointed out that new paradigms become normal science or the reigning paradigm once the new paradigm is incorporated “into textbooks from which the future practitioner will learn his trade.”<sup>194</sup> Kuhn explains the role of textbooks in scientific revolutions or paradigm shifts as follows:

Textbooks, however, being pedagogic vehicles for the perpetuation of normal science, have to be rewritten in whole or in part whenever the language, problem structure, or standards of normal science change. In short, they have to be rewritten in the aftermath of each scientific revolution . . . .<sup>195</sup>

The relevant textbooks in law have already been rewritten to reflect the multiracial paradigm shift away from a black/white paradigm. The leading textbooks in the area of race take a multiracial approach and consider the racial histories or situation of all the major racial groups in analyzing race and law.<sup>196</sup> For instance, the authors of *Race and Races* explain their multiracial approach to the study of race as follows:

Each of us has taught and written about race for most of our careers. We have all confronted the need for and the difficulty of assembling varied interdisciplinary and historical materials to

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schools may be in the process of ethnically cleansing their buildings of Ascendant Blacks . . .”).

<sup>191</sup> Brown & Bell, *supra* note 190, at 1230. See also Onwuachi-Willig, *Legacy Blacks*, *supra* note 190, at 1145 (affirmative action programs are promoting “either mixed-race students or only first or second generation black Americans”).

<sup>192</sup> See *supra* text accompanying notes 12-24.

<sup>193</sup> THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2<sup>nd</sup> Edition 1970).

<sup>194</sup> *Id.* at 46.

<sup>195</sup> *Id.* at 137.

<sup>196</sup> See generally JUAN F. PEREA, RICHARD DELGADO, ANGELA P. HARRIS, JEAN STEFANCIC AND STEPHANIE M. WILDMAN, *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (Second Edition, 2007); TIMOTHY DAVIS, KEVIN R. JOHNSON & GEORGE A. MARTINEZ, *A READER ON RACE, CIVIL RIGHTS AND AMERICAN LAW: A MULTIRACIAL APPROACH* (2001); RICHARD DELGADO AND JEAN STEFANCIC, *CRITICAL RACE THEORY: THE CUTTING EDGE* (Second Edition 2000); RACHEL F. MORAN AND DEVON W. CARBADO, *RACE LAW STORIES* (2008).

cover race and racism comprehensively in a manner that accounted for each of the principal racial groups in the United States — African-Americans, Indians, Latinos/as, Asian Americans, and Whites . . . . This casebook . . . presents[s] race and racism in a way that corresponds to the racial complexity of United States society.<sup>197</sup>

Similarly, the authors of a *Reader on Race, Civil Rights and American Law* explain their adoption of a multiracial paradigm as follows:

This reader offers a range of legal literature, analyzing major issues of race and civil rights in modern United States. Previous scholarship in this field has tended to focus on the relationship between whites and African-Americans. Modern social life, however, has become considerably more complex, particularly with the changing demographics of the twenty first century . . . . As influential sociologist Nathan Glazer has emphatically declared, “We are all multiculturalists now.” . . . Premised on this principle, the anthology considers race and civil rights from a wide range of minority perspectives and offers readings from African-American, Asian-American, Latina/o and Native American perspectives on the pressing civil rights issues of the day.”<sup>198</sup>

Likewise, the authors of *Race Law Stories* explain that in putting together their text they, too, have adopted a multiracial perspective: “[I]n elaborating these themes, we are careful to recognize the complexity created by America’s multiracial population. We have chosen cases that include Blacks, Latinas/os, Asian-Americans, Native Americans and Whites.”<sup>199</sup>

Evidence of the multiracial paradigm shift is further found in the fact that race scholars working in the new paradigm are seeing and studying new and different things. As Thomas Kuhn has explained, as paradigms shift,

[T]he world itself changes with them. Led by a new paradigm, scientists adopt new instruments and look in new places. Even more important, during revolutions scientists see new and different things when looking with familiar instruments in places they have looked before. It is rather as if the professional community had suddenly been transported to another planet where familiar objects are seen in a different light and are joined

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<sup>197</sup> PEREA ET AL., *supra* note 196, at 1.

<sup>198</sup> DAVIS, ET AL., *supra* note 196, at xvii.

<sup>199</sup> MORAN AND CARBADO, *supra* note 196, at 35.

by unfamiliar ones as well . . . . Nevertheless, paradigm changes do cause scientists to see the world of their research-engagement differently.<sup>200</sup>

For example, one of the earliest legal scholars to expressly call, in effect, for a multiracial paradigm shift and operate within the new paradigm was Professor Neil Gotanda.<sup>201</sup> In reviewing a book dealing with the internment of Japanese-Americans during World War II, he argues that the subject of Japanese-Americans must be viewed as “one component in the larger question of race in American law.”<sup>202</sup> Directly challenging the black/white binary, he contends “[w]hile in legal history the discussion of race has usually meant the analysis of the legal condition of Blacks, I suggest an examination of non-black racial minorities—as a distinct mode of analysis.”<sup>203</sup> Accordingly, as a scholar working with the new multiracial paradigm, he began to study new and different things. In particular, he argues that in studying “*Other Non-Whites*,” such as Japanese-Americans, one must consider that the notion of “foreignness” is an aspect of their racial identity.<sup>204</sup> Specifically, a key characteristic of other non-Whites is that “even American-born non-Whites are somehow foreign.”<sup>205</sup> He argues that this “underserved stigma” of foreignness serves as a reason for unjust laws against such racial minorities.<sup>206</sup> Similarly, other Asian-American scholars began to operate within the multiracial paradigm. For instance, Mari Matsuda analyzed accent discrimination—a type of discrimination that has been employed against Asian-Americans and others.<sup>207</sup> Lisa Ikemoto examined the story of conflict between Korean-Americans and African-Americans in the civil disorder that took place in Los Angeles in the early 1990s.<sup>208</sup> Robert Chang expressly called for the development of an Asian-American Legal Scholarship.<sup>209</sup> Leti Volpp explored the use of the “cultural defense” in criminal cases and its impact on Asian women.<sup>210</sup> Pat Chew explored certain “paradoxes of public perception and

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<sup>200</sup> KUHN, *supra* note 193, at 111.

<sup>201</sup> See generally Neil Gotanda, “*Other Non-Whites*” in *American Legal History: A Review of “Justice at War,”* 85 COLUM. L. REV. 1186 (1985).

<sup>202</sup> *Id.* at 1188.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> See generally Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L. J. 1329 (1991).

<sup>208</sup> See generally Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed “Los Angeles,”* 66 S. CAL. L. REV. 1581 (1993).

<sup>209</sup> See generally Robert S. Chang, *Toward An Asian-American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993).

<sup>210</sup> See generally Leti Volpp, *(Mis)identifying Culture: Asian Women and the “Cultural Defense,”* 17 HARV. WOMEN’S L. J. 57 (1994).

contradictory reality” regarding the status of Asian-Americans.<sup>211</sup> Margaret Chon examined the need for Asian-American storytelling in law.<sup>212</sup>

Similarly, Latino legal scholars moved into the new paradigm and began to study new and different topics. For example, in an early article, Richard Delgado and Vicky Palacios focused on a topic of particular concern to Mexican-Americans and moved beyond the black/white binary in arguing that Mexican-Americans should be recognized as a “class” for purposes of bringing civil rights class action lawsuits—a major device for bringing about reform of social institutions.<sup>213</sup> Juan Perea and Christopher Cameron examined discriminatory laws targeting Latinos on the basis of the language they often speak—Spanish.<sup>214</sup> I examined the Mexican-American litigation experience in the area of civil rights and the legal construction of the race of Mexican-Americans.<sup>215</sup> Kevin Johnson and Ian Haney Lopez analyzed racial issues impacting Latinos and others arising in the context of immigration law.<sup>216</sup> Margaret Montoya and Michael Olivas pioneered the use of narrative in the context of analyzing Latinas/os and the law.<sup>217</sup> Latino Critical Legal Theory also emerged as an expressly named subject position<sup>218</sup> in the 1990s.<sup>219</sup>

<sup>211</sup> See Pat K. Chew, *Asian-Americans: The “Reticent” Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 7 (1994).

<sup>212</sup> See generally Margaret H.R. Chon, *On the Need for Asian-American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 ASIAN PAC. AM. L. J. 4 (1995).

<sup>213</sup> See Richard Delgado & Vicky Palacios, *Mexican Americans as a Legally Cognizable Class under Rule 23 and the Equal Protection Clause*, 50 NOTRE DAME L. REV. 393, 418 (1975).

<sup>214</sup> See generally Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism and Official English*, 77 MINN. L. REV. 269 (1992); Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions, Approving Speak-English-Only Rules As the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347 (1997).

<sup>215</sup> See generally George A. Martínez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555 (1994); George A. Martínez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997).

<sup>216</sup> See generally Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42 (1995); IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (David. R. Roediger eds., 1996).

<sup>217</sup> See generally Margaret E. Montoya, *Mascaras, Trenzas y Greñas: Un/masking the Self While Unbraiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN’S L. J. 185 (1994); Michael A. Olivas, *The Chronicles, My Grandfather’s Stories, and Immigration Law: The Slave Traders as Racial History*, 34 ST. LOUIS U. L. J. 425 (1990). Margaret Montoya has recently explained the meaning of her “Mascaras article” as being “about finding one’s voice and speaking one’s truths, however unconventional, and, in doing so, challenging the epistemological and ideological constraints of traditional legal discourse.” Margaret E. Montoya, *Mascaras y Trenzas: Reflexiones Un Proyecto de Identidad y Analysis a Traves de Veinte Años*, 36 HARV. J. L. & GENDER 469 (2013).

<sup>218</sup> Political theorist Chantal Mouffe explains the notion of “subject position” as follows:

Within every society, each social agent is inscribed in a multiplicity of social

Likewise Native American legal scholars moved away from the black/white paradigm and began to examine new topics. For instance, Robert Williams studied the European roots of the effort to assimilate Indian tribal culture into dominant western European culture as a means of appropriating Indian natural resources.<sup>220</sup> Williams also examined how the underlying basis of American federal Indian law is found in a “colonizing [European] legal discourse [which] denies respect to the Indian’s version of an Americanized way of life.”<sup>221</sup> Williams therefore called for “the decolonization and Americanization” of American federal Indian law.<sup>222</sup> Luralene Tapahe analyzed the failure of American courts to properly protect the right to practice Native American religions.<sup>223</sup> Rebecca Tsosie explored Supreme Court Justice Thurgood Marshall’s Indian law jurisprudence.<sup>224</sup> Alex Tallchief Skibine examined the right to tribal self-government in American law.<sup>225</sup>

Beyond this, further evidence that a multiracial paradigm shift has occurred is found in the fact that scholars working within this paradigm are engaged in the process of theoretical integration or interdisciplinary research.<sup>226</sup> Paradigm shifts may only come about “through the process of theoretical

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relations—not only social relations of production but also the social relations, among others, of sex, race nationality, and vicinity. All these social relations determine positionalities or subject positions and every social agent is therefore the locus of many subject positions and cannot be reduced to only one. Thus, someone inscribed in the relations of production as a worker is also a man or woman, white or black, Catholic or Protestant, French or German, and so on.

Chantal Mouffe, *Hegemony and New Political Subjects: Toward a New Concept of Democracy*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 89-90 (Cary Nelson & Lawrence Grossberg eds., 1988).

<sup>219</sup> See generally Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory and Post Identity. Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 *LA RAZA L. J.* 1 (1996); Francisco Valdes, Foreword: *Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 2 *HARV. LATINO L. R.* 1 (1997) (describing “the rapid and increasing adoption of a ‘LatCrit’ identification among Latina/o academics (and others) to describe a new and particularized subject position”).

<sup>220</sup> See generally Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 *S. CAL. L. REV.* 1 (1983).

<sup>221</sup> Robert A. Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Jurisprudence*, 1986 *WISC. L. REV.* 219, 290 (1986).

<sup>222</sup> Williams, *The Algebra of Federal Indian Law*, *supra* note 221, at 290.

<sup>223</sup> See Luralene D. Tapahe, *After the Religious Freedom Act: Still No Equal Protection for First American Worshippers*, 24 *N.M. L. REV.* 331 (1994).

<sup>224</sup> See Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall’s Indian Law Jurisprudence*, 26 *ARIZ. ST. L. J.* 495 (1994).

<sup>225</sup> See Alex Tallchief Skibine, *Reconciling Federal and State Power Inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination*, 1995 *UTAH L. REV.* 1105.

integration” or interdisciplinary research.<sup>226</sup> Although there is a tendency for researchers operating within one discipline to resist the effort to assimilate the insights of another discipline, sciences can only make progress when they incorporate theories and ideas from other disciplines.<sup>227</sup> For instance, Robert Williams drew on Western European intellectual history to analyze American Indian law.<sup>228</sup> I have used philosophical theory to analyze issues affecting Latinos and other racial minorities.<sup>229</sup> Kevin Johnson has applied psychological theory to analyze racial issues impacting various racial groups in the context of immigration law.<sup>230</sup> Ian Haney-Lopez has examined institutional racism against Mexican-Americans in the context of jury selection using the methodology of the “New Institutionalism, a genre within organizational sociology.”<sup>231</sup> Richard Delgado has applied post-colonial theory in analyzing Latinos and other racial groups.<sup>232</sup> Robert Chang and others have applied narrative and epistemological theory to analyze issues impacting Asian-Americans and others.<sup>233</sup> Keith Aoki and others have applied the insights of the discipline of geography to analyze issues affecting various racial groups.<sup>234</sup>

State of nature theory advances this multiracial paradigm in considering the situation of the various racial groups in developing a theory to help explain and understand race and American law. The paradigm shift away from a black/white binary to a multiracial paradigm has already been accomplished. It makes no sense to attempt to return to the past of an older black/white paradigm any more than it would make sense to attempt to return to an older paradigm which held that the sun revolves around the earth instead of the current paradigm which holds that the earth revolves around the sun.

<sup>226</sup> Jonathon A. Cooper, Anthony Walsh & Lee Ellis, *Is Criminology Moving toward a Paradigm Shift?: Evidence from a Survey of the American Society of Criminology*, 21 JOURNAL OF CRIMINAL JUSTICE EDUCATION 332-397 (2010).

<sup>227</sup> *Id.* at 333-34.

<sup>228</sup> ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990).

<sup>229</sup> See George A. Martínez, *Latinos, Assimilation and the Law: A Philosophical Perspective*, 20 CHICANO-LATINO L. REV. 1 (1999); Martínez, *Race, American Law and the State of Nature*, *supra* note 3 (applying philosophical state of nature theory to issues of race).

<sup>230</sup> See Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A Magic Mirror into the Heart of Darkness*, 73 IND. L. J. 1111 (1998).

<sup>231</sup> Ian F. Haney-Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L. J. 1717, 1723 (2000).

<sup>232</sup> See Richard Delgado, *Rodrigo's Corrido: Race, Post-colonial Theory, and U.S. Civil Rights*, 60 VAND. L. REV. 169 (2007).

<sup>233</sup> See Robert S. Chang, *Toward an Asian-American Legal Scholarship: Critical Race Theory, Post-Structuralism and Narrative Space*, 81 CAL. L. REV. 1243, 1268-1286 (1993).

<sup>234</sup> See Keith Aoki, *Space Invaders: Critical Geography, the 'Third World in International Law and Critical Race Theory*, 45 VILL. L. REV. 913 (2000); George A. Martínez, *Arizona, Immigration and Latinos: The Epistemology of Whiteness, the Geography of Race, Interest Convergence and the View from the Perspective of Critical Theory*, 44 ARIZ. ST. L. J. 175 (2012).

Beyond this, state of nature theory, by seeking out patterns in law—i.e., the dominant group tending to act without legal or moral constraints as it deals with racial minorities—is consistent with scientific methodology. Philosophers of science explain the importance of patterns in science:

The concept of “pattern” is fundamental to science because the “completely disordered is unimaginable” and “if we are going to say anything at all, some structure is certain to be involved . . . . Put simply, intelligibility in science requires that objects be patterned.”<sup>235</sup>

Thus, as Robert MacArthur has observed, “to do science is to search for repeated patterns.”<sup>236</sup> Accordingly, if we are going to understand law and make it intelligible, then there must be patterns in law that we can discern. Scholars working in the area of race and American law, therefore, should look for such patterns. State of nature theory is an effort to bring such patterns into view in constructing a theory of how the dominant group tends to relate to racial minorities.

Finally, it seems possible to place a Heideggerian interpretation on state of nature theory as applied in the area of race and American law. According to the philosopher Martin Heidegger, there is a “cultural context” or “clearing in which things show themselves.”<sup>237</sup> Hubert Dreyfus explains this cultural context or clearing or “understanding of what it is for anything to be at all”—e.g., a human being or thing—as follows:

The shared practices into which we are socialized, moreover, provide a background understanding of what matters and what it makes sense to do, on the basis of which we can direct our actions. This understanding of being creates what Heidegger calls a *clearing* in which things and people can show up as

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<sup>235</sup> Jay Odenbaugh, *Searching for Patterns, Hunting for Causes: Robert MacArthur, the Mathematical Naturalist* quoting G.E. Hutchinson, *The Concept of Pattern in Ecology*, 105 PROCEEDINGS OF THE ACADEMY OF NATURAL SCIENCES OF PHILADELPHIA 1, 2-3 (1953).

<sup>236</sup> ROBERT H. MACARTHUR, GEOGRAPHICAL ECOLOGY 1 (1972). Cf. also KEITH DEVLIN, MATHEMATICS: THE SCIENCE OF PATTERNS 3 (1994) (“Mathematics is the science of patterns. What the mathematician does is examine . . . patterns . . . . Those patterns can be real or imagined . . . . They can arise from the world around us, from the depths of space and time, or from the inner workings of the human mind”).

<sup>237</sup> Carol White, *The Beginning of the History of Being*, at 323, <http://www.scu.edu/cas/philosophy/upload/Chapter%206.pdf>; Theodore R. Schatzki, *Early Heidegger on Being, The Clearing, and Realism* at 81, in HEIDEGGER: A CRITICAL READER (Hubert L. Dreyfus & Harrison Hall eds., 1992) (“Perhaps the most prominent concept in Heidegger’s philosophy is that of a clearing in which entities can be, a space or realm of illumination in whose light things can show or manifest themselves to people. Heidegger’s central concern, throughout his philosophical career, was to understand the nature and constitution of this clearing”).



matter and meaningful for us. We do not produce the clearing. It produces us as the kind of human beings that we are.<sup>238</sup>

In the current cultural context or clearing, then, racial minorities in America tend to show up as being in the state of nature in the context of their relationship to the dominant group.

#### IV. Conclusion

In this article, I have sought to further develop state of nature theory by considering new examples that illustrate and provide evidence in support of the theory. In addition, I have explored whether it is possible to escape from the state of nature and explained how state of nature theory advances a multiracial paradigm shift in the area of race and is consistent with scientific practice in that it seeks to discover patterns in the area of race and law. Thus, I provide a number of new examples to illustrate state of nature theory, including: (1) amoral decision-making in the context of affirmative action; (2) the lifting of constraints off of the majority in the creation of new federal pleading standards for federal lawsuits and in the areas of campaign financing, voting rights, and international law; (3) psychological studies that show discriminatory behavior where there are no legal constraints; (4) the exercise of the key state of nature virtues — force and fraud — against Native Americans; (5) the existence of a state-of-nature-like situation in the removal of Native Americans from certain areas of the country; (6) a state-of-nature-like existence outside of the American polity on the part of African-Americans, Asian-Americans and Latinos; and (7) the link between racial neoliberalism and the state of nature. I also argue that acting as if in the state of nature has led to the consciousness of guilt in the dominant group. In addition, I consider evidence regarding the relative health of racial minorities, which suggests that racial minorities are enduring a state of nature existence. I also suggest some possible ways to escape from the state of nature. Finally, I argue that state of nature theory is a way to advance the multiracial paradigm shift in the area of race and law and that scholars working the area of race and law should follow the example of science and seek to discover and reveal the existence of patterns in the area of race and law.

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<sup>238</sup> Hubert L. Dreyfus, *Heidegger on the Connection between Nihilism, Art, Technology and Politics* at 296, in *THE CAMBRIDGE COMPANION TO HEIDEGGER* (Charles Guignon ed., 1993). See also Charles B. Guignon, Introduction at 11, in *THE CAMBRIDGE COMPANION TO HEIDEGGER*, *supra* note 238 (“Dasein is said to be a ‘clearing’ or a ‘lighting’ through which entities can stand forth as such and such. In other words it is because we take a stand on our being in the world— because we are ‘understanding,’ in Heidegger’s special use of this word—that we engage in familiar, skillful practices in everyday contexts, and we thereby open a leeway or field of free play . . . where things can stand out as counting or mattering in some determinate ways”).