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Race, American Law and the State of Nature

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RACE, AMERICAN LAW AND THE STATE OF NATURE

George A. Martinez*

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ABSTRACT

This Article advances a new theoretical framework to help explain and understand race and American law. In particular, the Article argues that we can employ a philosophical model to attempt to understand what often occurs when

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the dominant group deals with persons of color. The Article contends that when the dominant group acts with great power or lack of constraint, it often acts as though it were in what political philosophers have called the state of nature. Thus, the Article argues that there is a tendency for the dominant group to act as though it were in the state of nature when dealing with persons of color. There is a tendency not to feel any constraints or move toward a situation with fewer constraints on the dominant group. The Article contends that there is reason to believe that operating with great power or lack of constraint will have bad effects on the persons wielding such power.

I. INTRODUCTION

Recently, Dean Kevin Johnson argued that we can understand immigration law as a “magic mirror” into the Heart of Darkness.¹ Immigration law shows how the United States might treat domestic racial minorities if legal restraints were lifted.² He argues that immigration law’s “harsh treatment of non-citizens of color reveals terrifying lessons about how society views citizens of color.”³

Dean Johnson’s article led me to wonder about the connection between immigration law and racism against other groups. The dominant groups act with great power in the context of immigration law.⁴ There are far fewer constraints on the dominant group when it deals with non-citizens.⁵ Because most immigrants to the United States are persons of color,⁶ immigration law necessar-

¹ 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, 1114 (1998).

² *Id.* at 1116. Perhaps surprisingly, only in recent years have scholars begun to address the connection between race and immigration law. See Kevin R. Johnson, *Race and the Immigration Laws: The Need for Critical Inquiry*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 187 (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris, eds. 2002); Jennifer Gordon & R. A. Lenhardt, *Citizenship Talk: Bridging the Gap between Immigration and Race Perspectives*, 75 FORDHAM L. REV. 2493 (2007); Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference to the Race Critique*, 2000 U. ILL. L. REV. 525 (2000); George A. Martínez, *Race and Immigration Law: A Paradigm Shift?* 2000 U. ILL. L. REV. 517 (2000).

³ Johnson, *supra* note 1, at 1114.

⁴ See *infra* notes 106–110.

⁵ See *infra* notes 106–119.

⁶ See Kevin R. Johnson, *The End of “Civil Rights” as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1505 (2002) [hereinafter *The End of Civil Rights*] (“The vast majority of today’s immigrants are people of color, a widely recognized phenomenon that has garnered popular attention.”); Kenneth Juan Figueroa, Note, *Immigrants and the Civil Rights Regime: Parens Patriae Standing, Foreign Governments and Protection from Private Discrimination*, 102 COLUM. L. REV. 408, 412–13 (2002) (describing how “the source of immigration” has shifted “away from Europe and towards Asia and Latin America” to the point where most immigrants are racial minorities).

ily implicates issues of race, and has much to teach us about race generally.⁷ This is consistent with the critical insight that the subordination of the various groups of people of color is related in complex ways.⁸

I believe that the characteristics of immigration law that I just mentioned — power⁹ and lack of constraint on the part of the dominant group as it deals with persons of color — is an idea that needs further explanation. In fact, I believe that we often see a similar phenomenon when the dominant group deals with persons of color. And I want to argue here that we can use a philosophical¹⁰ model to try to understand what is going on not only in immigration law but whenever the dominant group deals with persons of color. Accordingly, at a time when, in the view of one leading commentator, Richard Delgado, theoretical work on race and law has come to a “standstill,” this Article advances a new conceptual framework to help explain¹¹ and understand race and American law.¹²

When the dominant group acts with great power and lack of constraint, it acts as though it were in what political philosophers have called the state of nature — a situation where people have not been formed or shaped by society. Thus, there is a tendency for the dominant group to act as though it were in the state of nature when dealing with persons of color, a tendency to not feel any

⁷ See *The End of Civil Rights*, *supra* note 6, at 1491. “Scholarly focus on the civil rights implications of the immigration laws is eminently sensible because immigration enforcement disparately impacts certain groups, particularly those of Asian and Latina/o ancestry. As these groups increase as a proportion of the U.S. population, we can expect immigration- and immigrant-related civil rights issues to grow in significance, thereby transforming the balance of the civil rights agenda.” *Id.*

⁸ See 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 one cannot understand the racial oppression of one group without considering that of other groups).

⁹ *But cf.* STEVEN LUKES, *POWER: A RADICAL VIEW* (Palgrave Macmillan, 2d ed. 2005) (1974) (arguing for the importance of studying and analyzing power); Adam D. Galinsky, Deborah H. Gruenfeld & Joe C. Magee, *From Power to Action*, 85 J. OF PERSONALITY & SOC. PSYCHOL., No. 3, 453–66, 454 (2003) (observing that there has been “a recent wave of interest in the social and psychological consequences of power”).

¹⁰ See BAILEY KUKLIN & JEFFREY W. STEMPEL, *FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER* 1 (1994) (observing that law has become interdisciplinary and that disciplines other than law such as philosophy may be used “to explain how rules have developed and should develop”); Gregory Leyh, *Introduction*, in *LEGAL HERMENEUTICS: HISTORY, THEORY AND PRACTICE* xvii (Gregory Leyh ed. 1992) (arguing that lawyers and philosophers should collaborate in interpreting law because “it is in combination and collaboration, especially in *critical* combinations and collaborations, that we are all most likely to see the richness of the subject and to come away with fresh insights into old problems”).

¹¹ *But cf.* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81–130 (1978) (discussing theory building in law to explain particular areas of law); GILBERT HARMAN, *THOUGHT* 130 (1973) (“Inductive inference is conceived as inference to the best of competing explanatory statements.”).

¹² Richard Delgado, *Rodrigo’s Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 VAND. L. REV. 1691, 1700 (2007).

constraints or to move toward a situation of fewer constraints on the dominant group, and a tendency to attempt to return to a state of nature in how they deal with racial minorities.

In Part II, the Article sets out the philosophical background regarding state of nature theory, focusing on the approaches of Thomas Hobbes and Benedict de Spinoza. In Part III, the Article argues that the dominant group has often acted with great power or lack of constraint or has had a tendency to move to a situation with fewer constraints in dealing with racial minorities, illustrating this phenomenon through the use of a number of examples regarding various racial groups. In Part IV, the Article contends that there is reason to believe that operating with great power or lack of constraint will have negative effects on the persons wielding such power. In Part V, the Article offers a different sort of critique of the plenary power doctrines and other legal doctrines that lift constraints off of the dominant group in their dealings with racial minorities.

II. STATE OF NATURE THEORY: HOBBS AND SPINOZA

There is a distinguished tradition in political philosophy which is known as state of nature theory.¹³ Such theorists try to describe what human beings would be like if they were not shaped by society and instead lived in the state of nature.¹⁴ In this section, I set out the theories of two of the best known state of nature theorists: Thomas Hobbes¹⁵ and Benedict de Spinoza.¹⁶

¹³ See, e.g., THOMAS HOBBS, *LEVIATHAN* (Meridian Books 1969); BENEDICT DE SPINOZA, *A THEOLOGICO-POLITICAL TREATISE AND A POLITICAL TREATISE* (Dover Publications 1951) [hereinafter *SPINOZA*]. Contemporary philosophers also have offered state of nature theories. See, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). Nozick argues that “state-of-nature explanations of the political realm are fundamental potential explanations of this realm and pack explanatory punch and illumination, even if incorrect.” *Id.* at 8–9. They are fundamental potential explanations in the sense that they “would explain the whole realm under consideration were it the actual explanation.” *Id.* at 8.

¹⁴ See RICHARD TUCK, *HOBBS* 57 (1989) (Hobbes “contrasted a ‘state of nature’ (by which he meant the condition of men without some proper political organization) with the state of men under a regime of civil laws.”).

¹⁵ See Noel Malcolm, *A Summary Biography of Hobbes*, in *THE CAMBRIDGE COMPANION TO HOBBS* 37 (Tom Sorell ed. 1996) (The philosopher Leibniz praised Hobbes as follows: “I shall, God willing, always publicly declare that I know of no other writer who has philosophized as precisely, as clearly, and as elegantly as you have — no, not excepting Descartes with his superhuman intellect.”) *Id.*; see also James Boyle, *Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism*, 135 U. PA. L. REV. 383 (1987) (stating that Hobbes holds a “revered” position in the field of jurisprudence).

¹⁶ See Don Garrett, *Introduction*, in *THE CAMBRIDGE COMPANION TO SPINOZA* 1 (Don Garrett ed. 1996) (“Later philosophers have classified Spinoza, alongside Descartes and Leibniz, as one of the three most important figures of ‘Continental Rationalism.’ Succeeding generations of natural scientists and psychologists, novelists and poets have found in his writings a continuing source of inspiration.”) *Id.* at 11.

A. *Hobbes*

Thomas Hobbes sets out his state of nature theory in his classic work on political philosophy, *Leviathan*. For Hobbes,

the state of nature is . . . a thought-experiment in which Hobbes considers what rights of action and reasons for action men would have if there were no common authority to which they could turn to settle their disputes, or on which they could rely to give stability to their expectations of how other men would act towards them.¹⁷

Put another way, 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.”¹⁸ In the state of nature, people are roughly equal “in the faculties of the body, and mind.”¹⁹ People are able to kill one another regardless of their strength.²⁰ Everyone is satisfied with their mental capabilities which shows that such abilities have been distributed equally.²¹ Because of this equality, people have the same hope for achieving their goals.²² People become enemies if they want the same things and they cannot both share it. In trying to obtain that thing, they attempt to dominate or eliminate one another.²³ Under these circumstances, if someone is on his own, others can be expected to “deprive him, not only of the fruit of his labors, but also of his life, or liberty.”²⁴ Where there is no power sufficient to keep people in check, “men have no pleasure but on the contrary a great deal of grief.”²⁵

¹⁷ NOEL MALCOLM, *ASPECTS OF HOBBS* 35 (2002).

¹⁸ Alan Ryan, *Hobbes's Political Philosophy*, in *THE CAMBRIDGE COMPANION TO HOBBS*, *supra* note 15, at 217–18.

¹⁹ HOBBS, *supra* note 13, at 141; *see also* SIR LESLIE STEPHEN, *HOBBS* 183 (1904) (for Hobbes “men are naturally equal”).

²⁰ HOBBS, *supra* note 13, at 141; *see also* STEPHEN, *supra* note 19, at 183 (“[t]he weakest in body, at any rate, may kill the strongest”).

²¹ HOBBS, *supra* note 13, at 141.

²² *Id.* at 142.

²³ *Id.*; *see also* C.B. Macpherson, *Hobbes's Bourgeois Man*, in *HOBBS STUDIES* 173 (K.C. Brown ed. 1965) (“The argument is that men are so fundamentally hostile to each other because they have appetites for things which they cannot enjoy in common and of which there is such scarcity that all who want them cannot have them.”).

²⁴ HOBBS, *supra* note 13, at 142; *see also* Ryan, *Hobbes's Political Philosophy*, in *THE CAMBRIDGE COMPANION TO HOBBS*, *supra* note 18, at 219 (“We are to consider men in an ungoverned condition . . . they are vulnerable to one another — you may be stronger than I, but when you are asleep I can kill you as easily as you can kill me.”).

²⁵ HOBBS, *supra* note 13, at 142.

In the state of nature, there are three causes of disputes: competition, diffidence, and glory.²⁶ Competition for things leads people to invade one another or use violence “for gain.”²⁷ Diffidence, or distrust of others, leads people to invade or use violence against others to make themselves safe or in self-defense.²⁸ The desire for glory leads people to invade others or use violence against others for “trifles” — *e.g.*, “any . . . sign of undervalue.”²⁹

According to Hobbes, when there is no “common power to keep them all in awe,” people live in a “condition which is called war; and such a war, is of every man, against every man.”³⁰ In this state of nature, where “every man is enemy to every man,” there is “continual fear, and the danger of violent death; and the life of many, solitary, poor, nasty, brutish, and short.”³¹ Thus, for Hobbes, the state of nature shows how people would act if there were no authority to enforce the law — *i.e.*, in the absence of legal constraints. For Hobbes, there are many locations where people exist in a state of nature or condition of war. For instance, countries are in a state of nature in dealing with other nations: “in all times, Kings and persons of sovereign authority . . . are in continual jealousies . . . having their weapons pointing, and their eyes fixed on one another . . . which is a posture of war.”³²

The state of nature has implications for justice. In this war of all against all, “nothing can be unjust.”³³ Indeed, the ideas “of right and wrong, justice and

²⁶ *Id.* at 142–43.

²⁷ *Id.* at 143; *see also* Macpherson, *Hobbes's Bourgeois Man*, in *THE CAMBRIDGE COMPANION TO HOBBS*, *supra* note 23, at 176 (“The desire for gain is the competitive search to gratify material appetites, necessarily at the expense of others since there is not enough to satisfy all.”).

²⁸ HOBBS, *supra* note 13, at 143; *see also* TUCK, *supra* note 14, at 65 (“By the terms of Hobbes’s account of the state of nature, conflict arises because people judge differently about what is a danger to them.”).

²⁹ HOBBS, *supra* note 13, at 143; *see also* Macpherson, *Hobbes's Bourgeois Man*, in *HOBBS STUDIES*, *supra* note 23, at 176 (“The desire for glory is the desire to be recognized as a superior individual, not merely to share in the prestige customarily accorded a superior rank or status. It leads therefore to an unending individual struggle for power.”).

³⁰ HOBBS, *supra* note 13, at 143; *see also* Ryan, *Hobbes's Political Philosophy*, in *THE CAMBRIDGE COMPANION TO HOBBS*, *supra* note 18, at 218 (“In the state of nature, he says, we are governed by no rules, recognize no authority, are therefore a threat to each other, and must fall into the state he describes as a war of all against all.”).

³¹ HOBBS, *supra* note 13, at 143; *see also* TUCK, *supra* note 14, at 59 (“The state of nature thus becomes a state of war, savagery, and degradation — of which, Hobbes remarked, ‘present-day Americans give us an example.’” (citing HOBBS, *DE CIVI* I. 13)).

³² HOBBS, *supra* note 13, at 144–45.

³³ *Id.* at 145; *see also* MALCOLM, *supra* note 17, at 33 (“In the state of nature, when conditions are always potentially hostile and the scope for acting in accordance with the laws of nature is reduced almost to vanishing point, all sorts of actions may be justified by the right of nature.”); MALCOLM, *supra* note 17, at 34 (“in the state of nature there is no requirement to ‘respect’ the rights of others, no duty towards other people”).

injustice have there no place.”³⁴ “Force, and fraud, are in war the two cardinal virtues.”³⁵ In the state of nature, everyone may “use his own power, as he will himself,” to preserve “his own life.”³⁶ He can use anything to preserve “his life against his enemies.”³⁷ Accordingly, “every man has a right to every thing; even to another’s body.”³⁸ In other words, in the state of nature, people have the right to do anything they like.

B. *Spinoza*

In developing his political philosophy, Benedict de Spinoza also constructs a state of nature very much like the war of all against all imagined by Hobbes.³⁹ Spinoza writes:

In so far as men are tormented by anger, envy or any passion implying hatred, they are drawn asunder and made contrary to one another, and therefore are so much more to be feared, as they are more powerful, crafty and cunning than the other animals. And because men are in the highest degree liable to these passions, therefore men are naturally enemies.⁴⁰

“This state of nature is completely amoral.”⁴¹ People have a right to do whatever they have the power to do.⁴² According to Spinoza, “in the state of nature,

³⁴ HOBBS, *supra* note 13, at 145; *see also* MALCOLM, *supra* note 17, at 34 (“Externally, however (in the field of interpersonal relations), Hobbes put forward a strong version of the modern ‘subjective’ notion of a right, a freedom or liberty of action which, far from being generated by any normative requirements, consisted of an absence of obligations. Hobbes was presupposing a sort of moral vacuum so far as interpersonal moral duties were concerned.”).

³⁵ HOBBS, *supra* note 13, at 145.

³⁶ *Id.*; *see also* MALCOLM, *supra* note 17, at 35 (“In Hobbes’s argument, self-preservation is a sheer need which takes precedence over other needs . . . in Hobbes theory, self preservation could *in extremis* justify doing anything”); TUCK, *supra* note 14, at 63 (“In the Elements of Law, [Hobbes] said that the right [of nature] was for a man to ‘preserve his own life and limbs, with all the power he hath’ . . . and in Leviathan he said . . . that the right ‘is the Liberty each man hath to use his own power, as he will himselfe, for the preservation of his own Nature.’”).

³⁷ HOBBS, *supra* note 13, at 146.

³⁸ *Id.*; *see also* MALCOLM, *supra* note 17, at 33 (“Hobbes clearly stated that in the state of nature ‘Every man by nature hath right to all things, that is to say, to do whatsoever he listeth to whom he listeth, to possess, use, and enjoy all things he will and can.’” (quoting THOMAS HOBBS, ELEMENTS OF LAW, I. xiv. 10 (1651))).

³⁹ Edwin Curley, *Kissinger, Spinoza, and Genghis Khan*, in THE CAMBRIDGE COMPANION TO SPINOZA 315 (Don Garrett, ed. 1996).

⁴⁰ SPINOZA, *supra* note 13, at 296.

⁴¹ Curley, *supra* note 39, at 316.

⁴² SPINOZA, *supra* note 13, at 292 (“The natural right of universal nature, a consequently of every individual thing, extends so far as its power”); *see also* MALCOLM, *supra* note 17, at 49

wrongdoing is impossible.”⁴³ “[I]t is never unjust to do what your power permits you to do.”⁴⁴ In the state of nature, there are no constraints on action: one acts “unencumbered by moral scruples.”⁴⁵

III. RACIAL MINORITIES IN THE STATE OF NATURE

In this part of the Article, I argue that the dominant group has often acted as if it were in the state of nature — *i.e.*, with great power or lack of constraint or with a tendency to move to a situation with fewer constraints — in relating to racial minorities. This phenomenon is illustrated by considering a number of examples regarding various racial groups. In so doing, the section also explains how state of nature theory aligns with certain race theories, including critical race theory.

A. *African-Americans and the State of Nature*

The dominant group often has treated African-Americans as though they were in the state of nature. We see clearly that the dominant group has operated with a lack of constraint in the way that they have treated blacks. Perhaps no other group of people has suffered as much as blacks did under the

(Spinoza “makes use of the concept of ‘right,’ but identifies it completely with ‘power.’ This is not a piece of casual cynicism on his part: it flows from the heart of his philosophical theology, which attributes both infinite right and infinite power to God and identifies the universe as an expression of God’s nature. It follows from this that every event in the physical world is an expression both of God’s power and of His right. ‘Whatever man does . . . he does it according to the laws and rules of nature, that is, by natural right.’”).

⁴³ SPINOZA, *supra* note 13, at 297.

⁴⁴ Curley, *supra* note 39, at 327; *see also* MALCOLM, *supra* note 17, at 49 (“Spinoza can argue both that men have the right to do whatever they can do, and that an order of preference can be established when considering alternative courses of action: actions which help ensure the agent’s self-preservation will increase his right because they increase his power”).

⁴⁵ Curley, *supra* note 39, at 327.

brutal system of American slavery.⁴⁶ Under the regime of slavery, blacks were commodified and reduced to property.⁴⁷

Recall that Hobbes said that in the state of nature everything is permissible.⁴⁸ Everyone has a right to everything, even to another person's body. Obviously, slavery gave the white masters control over the bodies of blacks. In the state of nature, there is no one to constrain one's actions in the war of all against all. Accordingly, nothing can be unjust.

Chief Justice Taney in the infamous⁴⁹ *Dred Scott v. Sandford*,⁵⁰ described precisely such a situation for blacks. Taney observed that at the time

⁴⁶ See *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d 721, 780 (2005) ("It is beyond debate that slavery has caused tremendous suffering and ineliminable scars throughout our Nation's history. No reasonable person can fail to recognize the malignant impact, in body and spirit, on the millions of human beings held as slaves in the United States."); Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1072 (1992) (describing the African-American experience of racism as unique since other minority "groups were not subject to slavery"); James Boyd White, *Essay, What's Wrong with Our Talk about Race? On History, Particularity, and Affirmative Action*, 100 MICH. L. REV. 1927, 1932–33 (2002) (The suffering of African-Americans is unique because of "their forced subjection to a legalized form of slavery that was designed to destroy their cultures, their dignity, and their sense of humanity . . . American slavery was one of the greatest crimes ever committed by one people against another.").

⁴⁷ See Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1720 (1993) ("[T]he critical nature of social relations under slavery was the commodification of human beings. Productive relations in early American society included varying forms of sale of labor capacity, many of which were highly oppressive; but slavery was distinguished from other forms of labor servitude by its permanency and the total commodification attendant to the status of the slave. Slavery as a legal institution treated slaves as property that could be transferred, assigned, inherited, or posted as collateral.").

⁴⁸ See *supra* notes 33–38.

⁴⁹ ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 41 (1978) (observing that *Dred Scott* was a "ghastly error"); Michael L. Buenger, *Friction by Design: The Necessary Contest of State Judicial Power and Legislative Policymaking*, 43 U. RICH. L. REV. 571, 576 (2009) ("[A]rguably, the *Dred Scott* decision contributed greatly to the Civil War, the great polarizing event in American history."); Paul Finkelman, *Was Dred Scott Correctly Decided? An "Expert Report" for the Defendant*, 12 LEWIS & CLARK L. REV. 1219, 1220–21 (2008) ("Almost no one today defends Chief Justice Taney's opinion or the racism on which it is built. *Dred Scott* is a universally condemned decision . . . *Dred Scott* has come to symbolize bad jurisprudence, or even 'evil' in constitutional law"); Michael Stokes Paulson, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227 (2008) ("The Supreme Court's decision in *Dred Scott v. Sandford* created a crisis of judicial authority . . . The grounds on which the Court rested its decision in *Dred Scott* were legally wrong, morally wrong, and seemingly deliberately wrong. Indeed the Court appeared gratuitously to have gone out of its way to produce the most possible wrong that could be packed into a single decision.").

⁵⁰ 60 U.S. (19 How.) 393 (1856). For recent work on *Dred Scott*, see DON FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978); PAUL FINKELMAN, *DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS* (1995); MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006); Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49 (2007); Finkelman, *supra* note 49.

our nation was founded, blacks were not intended to be “constituent members” or “citizens” of the United States.⁵¹ Instead, they were “considered as a subordinate and inferior class of beings who had been subjugated by the dominant race.”⁵² And indeed, he wrote:

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, *that they had no rights which the white man was bound to respect*; and that the negro might justly and lawfully be reduced to slavery *for his benefit*.⁵³

This is precisely how one acts in the state of nature. The dominant group pursued their benefit or self-interest — economic interest in slavery — without regard to moral scruples.

In this regard, in the era of slavery, apologists for the “peculiar institution”⁵⁴ of slavery sought to justify slavery on economic grounds.⁵⁵ For instance, Thomas Jefferson recognized that “slaves provided the labor that made the southern economy possible.”⁵⁶ Similarly, at the Constitutional Convention, delegates argued that the Constitution had to provide protection for slavery because the nation’s economy depended on slavery.⁵⁷ Indeed, some argue that slavery, in fact, created substantial wealth.⁵⁸

⁵¹ *Dred Scott*, 60 U.S. (19 How.) at 404.

⁵² *Id.* at 404–05.

⁵³ *Id.* at 407 (emphasis added).

⁵⁴ KENNETH M. STAMPP, *THE PECULIAR INSTITUTION* (1956).

⁵⁵ See PAUL FINKELMAN, *DEFENDING SLAVERY: PROSLAVERY THOUGHT IN THE OLD SOUTH: A BRIEF HISTORY WITH DOCUMENTS* 3 (2003) (some “argued that slave produced products — cotton, sugar, rice, and tobacco — were vital to the national economy”).

⁵⁶ *Id.* at 22.

⁵⁷ *Id.* at 22–24.

⁵⁸ See DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 181 (2006) (“Scholars still dispute some questions relating to the economics of American slavery, but during the past thirty years a broad consensus has confirmed the arguments . . . concerning the extraordinary efficiency and productivity of plantation slave labor, which in no way implies the system was less harsh or even less criminal”); ROBERT WILLIAM FOGEL & STANLEY LEWIS ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY: EVIDENCE AND METHODS* (1974); Wendy B. Scott, “*CSI*” *After Grutter v. Bollinger: Searching for Evidence to Construct the Accumulation of Wealth and Economic Diversity as Compelling State Interests*, 13 TEMP. POL. & CIV. RTS. L. REV. 927, 933 (2004) (“Although economists and historians have disagreed on the market forces behind the profitability of slavery, and employed different methods to measure its economic impact, they agree that slavery was both a profitable business and economic system. Slavery reaped enormous economic benefit for both private purses and public coffers.”); Jeffrey W. Stempel, *Mandating Minimum Quality in Mass Arbitration*, 76 U. CIN. L. REV. 383, 437 (2008) (observing that “[s]lavery appears to have been an economically successful institution, at least when measured by aggregate creation of wealth and

The amoral state of nature, like behavior, is clearly seen in one case. In *State v. Mann*,⁵⁹ “the central text” in the law of slavery,⁶⁰ Judge Thomas Ruffin, writing for the North Carolina Supreme Court, considered the power of the slave masters over their slaves. At issue was whether the slave master could be indictable under the criminal law for a battery committed against his slave. The court held that the master could not be punished under the criminal law because “[t]he power of the master must be absolute to render the submission of the slave perfect.”⁶¹ Significantly, the court recognized that such a position was contrary to morality and that “as a principle of moral right every person in his retirement must repudiate it.”⁶² Despite these moral qualms, the court authorized this brutal conduct, observing that “in the actual condition of things it must be so. There is no remedy.”⁶³

Another leading example of judges’ failures to apply moral principles in decisions involving African-Americans is found in Robert Cover’s classic work

discounting the collateral impact of harm to slave families and social unrest generated by opposition to the system (and the psychological cost of maintaining an immoral system”).

⁵⁹ *State v. Mann*, 13 N.C. 263 (1829); see Anthony Alfieri, *Teaching the Law of Race*, 89 CAL. L. REV. 1605, 1610 (2001) (describing the opinion in *State v. Mann* as “perverse”); Sally Greene & Eric L. Muller, *Introduction: State v. Mann and Thomas Ruffin in History and Memory*, 87 N.C. L. REV. 669, 669 (2009) (describing *State v. Mann* as containing “what is undoubtedly the coldest and starkest defense of the brutality of slavery ever to appear in an American judicial opinion”).

⁶⁰ Stanley N. Katz, *Opening Address*, 17 CARDOZO L. REV. 1689, 1690 (1996); see also Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 642 (2001) (“*State v. Mann* triggered extensive commentary by both legal philosophers and Southern historians. Historians and moral philosophers alike were captivated by the *Mann* case because it posed so starkly the ethical question of how a ‘good’ system, the common law, could do evil.”); Sanford Levinson, *Thomas Ruffin and the Politics of Public Honor: Political Change and the “Creative Destruction” of Public Space*, 87 N.C. L. REV. 673, 674 (2009) (describing *State v. Mann* as “one of the truly canonical proslavery decisions in American law”).

⁶¹ *Mann*, 13 N.C. at 266. A federal court in Ohio described the master/slave relationship in a similar fashion in *Wood v. Ward*, 30 F. CAS. 479, 482 (S.D. Ohio 1879) (No. 17,966) (“[u]nconditional submission of the slave is due to the authority of the master; and the master may, therefore, use such force and means necessary to enforce submission to his authority, even to the destruction of life or limb of the slave. The law of slavery is absolute authority on the part of the master, and unconditional submission on the part of the slave.”). For more analysis of the slave/master relationship, see MARK V. TUSHNET, *THE AMERICAN LAW OF SLAVERY 1810–1860: CONSIDERATIONS OF HUMANITY AND INTEREST* 6 (1981) (“Social relations in slave society rest on the interaction of owner with slave Slave relations are total, engaging the master and slave in exchanges where each must take account of the entire range of belief, feeling, and interest embodied in the other.”).

⁶² *Mann*, 13 N.C. at 266.

⁶³ *Id.* For arguments that Judge Ruffin was not legally compelled to reach the result in *State v. Mann*, and could have reached a decision that would have given more favorable treatment to slaves, see Eric L. Muller, *Judging Thomas Ruffin and the Hindsight Defense*, 87 N.C. L. REV. 757, 771–75 (2009); Judge James A. Wynn, Jr., *State v. Mann: Judicial Choice or Judicial Duty?*, 87 N.C. L. REV. 991 (2009).

Justice Accused.⁶⁴ The cases dealt with the Fugitive Slave Clause of the United States Constitution which provides:

No person held for service or labor in one state, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.⁶⁵

Exercising plenary power,⁶⁶ the Congress provided in the Fugitive Slave Act⁶⁷ that slave owners could enforce this clause through a “summary process before any federal judge or state magistrate.”⁶⁸ Lawyers who opposed slavery argued that the clause and the Act did not forbid states from augmenting the procedural protections in these cases and they argued in favor of the power of states to enact procedural safeguards, including the right of trial by jury and the right to present evidence.⁶⁹

Cover found that antislavery judges enforced these clauses and took positions against the slave even though they morally opposed slavery.⁷⁰ For in-

⁶⁴ ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975). For analysis of Cover's *Justice Accused*, see Derrick A. Bell, Jr., *Justice Accused: Antislavery and the Judicial Process*, 76 COLUM. L. REV. 350 (1976); Christopher L.M. Eisgruber, *Justice Story, Slavery and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273 (1988); Eugene Genovese, *The Political Foundations of Justice*, 85 YALE L.J. 582 (1976); Ronald Dworkin, *The Law of the Slave Catchers*, TIMES LITERARY SUPPLEMENT 1437 (Dec. 5, 1975).

⁶⁵ U.S. CONST. art. IV, § 2, cl. 3. The Fugitive Slave Clause is remarkable because it “expanded a common law right of property . . . in slaves and elevated it into a new constitutional right that authorized slaveholders to pursue and recover their slave property even when the slaves escaped to a state that did not recognize slavery.” Robert J. Kaczorowski, *Fidelity Through History and To It: An Impossible Dream?*, 65 FORDHAM L. REV. 1663, 1674–75 (1997).

⁶⁶ See Kaczorowski, *supra* note 65, at 1674 (“The Fugitive Slave Act of 1793 is extraordinary, for it is an act of Congress in which Congress exercised plenary power to enforce a constitutional right, however reprehensible that right might be to us today.”).

⁶⁷ *Id.* at 1673 (“Congress enacted the Fugitive Slave Act in 1793, and President Washington immediately signed it into law without any question of Congress’s legislative power.”).

⁶⁸ COVER, *supra* note 64, at 162; see also Kaczorowski, *supra* note 65, at 1675–76 (“In addition to prescribing a summary process for the rendition of fugitive slaves, this statute is extraordinary for the two civil remedies it conferred on slaveholders against anyone who knowingly interfered with the owners’ recapture of a fugitive slave or assisted in her escape. The first was a civil ‘penalty’ of five hundred dollars recoverable by the owner in an action of debt. Even more remarkable was the second remedy: a tort action for damages.”).

⁶⁹ COVER, *supra* note 64, at 162.

⁷⁰ See *id.* at 169; see also Robin West, *Natural Law Ambiguities*, 25 CONN. L. REV. 831, 832 (1993) (Cover found that “judges who expressed in their nonjudicial lives deep and sincere opposition to slavery — generally espoused a positivist understanding of the nature of law and legal obligation. Cover argued that because of that commitment, when they were faced with the need to decide Fugitive Slave Act cases and therefore a possible conflict between their moral and legal

stance, in one case, Chief Justice Shaw of the Massachusetts Supreme Judicial Court rejected a slave's right to have a trial by jury explaining that the appeal to natural law or morality was not relevant. Shaw explained:

that he probably felt as much sympathy for the person in custody as others, but this was a case in which an appeal to natural rights and the paramount law of liberty was not pertinent! It was to be decided by the Constitution . . . and by the Law of Congress These were to be obeyed, however disagreeable to our natural sympathies or views of duty.⁷¹

Cover explains the general approach of these judges in declining to apply morality to these cases:

The prevailing course of action of the antislavery judge was to speak in conclusory terms of the obligation to apply 'the law and the law alone;' of the obligation to refrain from considering conscience, natural right or justice.⁷²

Like African-Americans, Native Americans also have experienced state-of-nature-like conditions.

B. Native Americans and the State of Nature

The dominant group also has acted with great power and lack of constraint with respect to Native Americans. Congress acts with plenary power over Native Americans.⁷³ As the Supreme Court explained in *Lone Wolf v. Hit-*

obligations, they tended to self-censor their abolitionist moral convictions so as not to compromise their felt 'positivist' duty to apply the 'positive' law.").

⁷¹ See COVER, *supra* note 64, at 169; see also Morton J. Horwitz, *History and Theory*, 96 YALE L.J. 1825, 1834 (1987) ("As Robert Cover demonstrated in *Justice Accused*, some antislavery judges were able to conceive of law as incorporating normative ideals while at the same time rejecting any appeal to higher law outside the body of legal principles.").

⁷² See COVER, *supra* note 64, at 233; see also *State v. Hoppess*, 10 Ohio 279, 285–86 (1845) ("Slavery is wrong inflicted by force, and supported alone by the municipal power of the State or territory wherein it exists. It is opposed to the principles of natural justice and right, and is the mere creature of positive law. Hence it being my duty to declare the law, not to make it, the question is not, what conforms to the great principles of natural right and universal freedom — but what do the positive laws and institutions . . . command and direct."); *Johnson v. Tompkins*, 13 F. Cas. 840, 843 (C.C.E.D. Pa. 1833) ("It is not permitted to you or to us to indulge our feelings of abstract right on these subjects; the law of the land recognizes the right of one man to hold another in bondage, and that right must be protected from violation.").

⁷³ *United States v. Lara*, 541 U.S. 193, 200 (2004) ("First, the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that have consistently been described as 'plenary and exclusive.'"); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes

chcock,⁷⁴ the “[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”⁷⁵

As Vine Deloria further explains, “The political influence that Congress wields over Indian affairs has been characterized as plenary, which means complete, absolute, and unqualified, and in practice this has proven to be true.”⁷⁶ As a result, it is not surprising that the Supreme Court has never held that Congress lacks the power to regulate Native Americans.⁷⁷

Robert Williams has explained that the plenary power doctrine in the context of Native Americans is rooted in European cultural racism against Native Americans.⁷⁸ Williams argues that early on the U.S. Supreme Court adopted the European “discovery doctrine”⁷⁹ which gave “superior sovereign rights” to the white Americans’ government in the Native American lands.⁸⁰

retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”).

⁷⁴ 187 U.S. 553 (1903).

⁷⁵ *Id.* at 565.

⁷⁶ VINE DELORIA & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 40 (1983).

⁷⁷ *Id.* at 42.

⁷⁸ See Robert A. Williams, Jr., *Columbus’s Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples’ Rights of Self-Determination*, 8 ARIZ. J. INT’L & COMP. L. 51 (1991); see also Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 596 (2009) (“Robert Williams, the foremost legal scholar on Indian race, identifies the ways that assumptions of Indian inferiority help to shape federal Indian law.”).

⁷⁹ The Supreme Court explained the “discovery doctrine” as follows:

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of the inhabitants afforded an apology for considering them a people over whom the superior genius of Europe might claim an ascendancy But, as they were all in pursuit of nearly the same object, it was necessary in order to avoid conflicting settlements, and subsequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

Johnson v. M’Intosh, 21 U.S. 543, 572–73 (1823).

⁸⁰ Williams, *supra* note 78, at 72; see also Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 5 (2005) (“the Doctrine of Discovery, as applied by England and the United States to the American tribes, came to mean that when European, Christian nations first discovered new lands, the discovering country automatically gained sovereign and property rights in the lands of the non-Christian, non-European nation even though, obviously, the natives already owned, occupied, and used these lands”).

Williams contends that the “presumed superior sovereignty” to the Native American lands was a racist notion based on the idea that Native Americans were racially and culturally inferior out of which the Supreme Court developed the idea that Congress had plenary power over the Native Americans.⁸¹

Congress has employed the plenary power doctrine to abrogate many treaties with Indian tribes.⁸² In holding that Congress could unilaterally abrogate treaties with Native American tribes, the Supreme Court explained:

We must presume that Congress acted in perfect good faith in its dealings with the Indians of which complaint is made and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation.⁸³

Congress has also used its plenary power to deny the basic human rights of Native Americans.⁸⁴ For example, the religion of Native Americans has been

⁸¹ Williams, *supra* note 78, at 74. Robert Williams and other contemporary scholars seek to “decolonize” legal doctrines and precedents by “critically analyzing both the written text and subtext within the judgments.” Brenda L. Gunn, *Protecting Indigenous Peoples’ Lands: Making Room for the Application of Indigenous Peoples’ Laws Within the Canadian Legal System*, 6 *INDIGENOUS L. J.* 31, 39 (2007).

⁸² VINE DELORIA, *BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE* (1974); Sabay Ghoshray, *Race, Symmetry and False Consciousness: Piercing the Veil of America’s Anti-Immigration Policy*, 16 *TEMPLE POL. & CIV. RTS. L. REV.* 335, 345–46 (2007) (“Through countless broken treaties, slaughters and strategic isolations, Native Americans were marginalized and rendered an insignificant minority with no power.”).

⁸³ *Lone Wolfe v. Hitchcock*, 187 U.S. 553, 568 (1903).

⁸⁴ See Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 *HARV. C.R.-C.L. L. REV.* 65, 122 (2008) (“The treatment of Native Americans . . . was a grotesque violation of contemporary human rights norms . . .”); Lorie M. Graham, *Reparations, Self-Determination and the Seventh Generation*, 21 *HARV. HUM. RTS. J.* 47 (2008) (describing long history of human rights violations committed against Native Americans); Don Wedll, *The United Nations Declaration of the Rights of Indigenous Peoples and Its Relevance to American Indians in Minnesota and Beyond*, 30 *HAMLIN J. PUB. L. & POL’Y* 387, 388 (2008) (“[T]he human rights of indigenous people continue to be violated in the United States.”).

suppressed,⁸⁵ Native American children have been separated from their parents,⁸⁶ and Native Americans have been sterilized against their will.⁸⁷

Under these circumstances, the dominant group has treated Native Americans as though they were in the State of Nature. We observe the hallmarks of the State of Nature: acting without constraint or moral scruples through the use of plenary power. In the breaking of treaties, we observe the failure to keep promises. Significantly, Hobbes believed that in the State of Nature “covenants, without the sword, are but words, and of no strength to secure a man at all.”⁸⁸ Hobbes explained in the state of nature it would be impossible to make covenants or keep promises because “there can be no rational motive [to be the first person to keep a promise]”; in a state of nature, “he that performeth first, has no assurance the other will perform after And therefore: he which performeth first, does but betray himself his enemy.”⁸⁹ Not surprisingly, Hobbes believed that Native Americans exist in the State of Nature.⁹⁰

⁸⁵ William Bradford, *“With A Very Great Blame on Our Hearts”*: *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 44 (2002–2003) (“the United States, exercising its plenary power, posted Christian missionaries to the reservations as Indian agents with orders to ban tribal religions, initiate Christianization of tribal populations”); Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 774–75 (1996–1997).

⁸⁶ Bradford, *supra* note 85, at 43 (describing separation of Native American children from their families); Gaylene J. McCartney, *American Indian Child-Welfare Crisis: Cultural Genocide or First Amendment Preservation?* 7 COLUM. HUM. RTS. L. REV. 529 (1976).

⁸⁷ See Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L. J. 45, 113 (2006–2007); Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 515 (1993) (“Native American women were subjected to forced sterilization”); Mary Romero, *“Go after the Women”: Mothers Against Illegal Aliens’ Campaign against Mexican Immigrant Women and Their Children*, 83 IND. L. J. 1355, 1368 (2008).

⁸⁸ Ryan, *supra* note 18, at 226.

⁸⁹ TUCK, *supra* note 14, at 68; see also Ryan, *supra* note 18, at 226 (“It seems that to establish a power that can make us all keep our covenants, we must covenant to set it up, but that the covenant to do so is impossible to make in the absence of the power it is supposed to establish.”); Johann Sommerville, *Lofty Science and Local Politics*, in THE CAMBRIDGE COMPANION TO HOBBS 257 (“Hobbes argued that in a contract between two people who ‘are not compellable’ — because they do not live under a sovereign — it would be irrational for either party to perform his part of the bargain first.”).

⁹⁰ HOBBS, *supra* note 13, at 144; see also Ryan, *supra* note 18, at 218 (“Like many of his contemporaries, Hobbes thought that the Indians of North America were still living in the state of nature.”).

C. *Mexican-Americans and Lack of Constraint*

Although often forgotten and overlooked,⁹¹ Mexican-Americans have experienced significant oppression as they have tried to establish themselves in American society.⁹² Among other things, Mexican-Americans have been segregated in public schools,⁹³ excluded from public accommodations⁹⁴ and neighborhoods,⁹⁵ and excluded from juries.⁹⁶ Mexican-Americans have found it hard to secure protection under the law⁹⁷ as they have discovered that constitutional constraints have been lifted or reduced, and the majority sometimes has been allowed to exercise unchecked power as it has dealt with Mexican-Americans. *Hernandez v. Texas* is instructive on this point.⁹⁸ In *Hernandez*, a Mexican-

⁹¹ See LA RAZA: FORGOTTEN AMERICANS (Julian Samora ed. 1966); GEORGE I. SANCHEZ, FORGOTTEN PEOPLE (1940 rev. ed., 1967).

⁹² See RUDOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS (3d ed. 1988); George A. Martínez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930–1980*, 27 U.C. DAVIS L. REV. 555 (1994).

⁹³ See GUADALUPE SAN MIGUEL, JR., “LET THEM ALL TAKE HEED”: MEXICAN-AMERICANS AND THE CAMPAIGN FOR EDUCATION EQUALITY IN TEXAS, 1910–1981 (1st ed. 1987); DAVID MONTEJANO, ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836–1986, at 160 (1987) (“The emergence of a Mexican school system suggests definite patterns. The first ‘Mexican School’ was established in 1902 in Central Texas (in Seguin) and the practice continued unabated until Mexican ward schools existed throughout the state.”); Martínez, *supra* note 92, at 574–606; Tom I. Romero II, *Our Selma Is Here: The Political and Legal Struggle for Educational Equality in Denver, Colorado, and Multiracial Conundrums in American Jurisprudence*, 3 SEATTLE J. SOC. JUST. 73 (2004).

⁹⁴ See *Terrell Wells Swimming Pool v. Rodriguez*, 182 S.W.2d 824, 827 (Tex. Civ. App. 1944) (upholding the exclusion of Mexican-Americans from amusement enterprise swimming pools).

⁹⁵ See Gary A. Greenfield & Don B. Kates, Jr., *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662, 716 (1975) (Mexican-Americans often dealt with restrictive covenants in attempting to rent or buy property); D.O. McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional*, 33 CAL. L. REV. 5, 15 (1945) (noting common exclusion of Mexican-Americans in the Southwest).

⁹⁶ See *Hernandez v. State*, 251 S.W.2d 531 (Tex. Crim. App. 1952), *rev’d by Hernandez v. State of Tex.*, 347 U.S. 475 (1954) (stating that proportional representations of Mexican-Americans is not required in juries).

⁹⁷ See Richard Delgado, Book Review, *Rodrigo’s Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship and the Black White-Binary*, 75 TEX. L. REV. 1181, 1189–93 (1997) (Equal Protection clause produces inequality for Mexican-Americans).

⁹⁸ 251 S.W. 2d 531. For recent scholarship on *Hernandez*, see Ian Haney Lopez & Michael Olivas, *Jim Crow, Mexican-Americans, and the Anti-Subordination Constitution: The Story of Hernandez v. Texas*, in RACE LAW STORIES 273 (Rachel F. Moran & Devon Wayne Carbado eds., 2008); Richard Delgado, *Rodrigo’s Roundelay: Hernandez v. Texas and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23 (2006); Kevin R. Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153 (2005); Clare Sheridan, *Peremptory Challenges: Lessons from Hernandez v. Texas*, 25 CHICANO-LATINO L. REV. 77 (2005); Steven Harmon Wilson, *Some Are Born White, Some Achieve Whiteness, and Some Have Whiteness Thrust Upon Them: Mexican Americans and the Politics of Racial Classification in the*

American had been convicted of murder. He sought to reverse his conviction on the ground that Mexican-Americans had been excluded from the jury.⁹⁹ He relied on cases holding that the exclusion of African-Americans from jury service constituted a violation of due process and equal protection. The court recognized that only two groups of people were protected by the Fourteenth Amendment: whites and blacks.¹⁰⁰ The court held that Mexican-Americans were white people for purposes of the Fourteenth Amendment.¹⁰¹ Since the juries that indicted and convicted the defendant were composed of white persons, he had not been denied equal protection of the laws.¹⁰²

In *Hernandez*, Mexican-Americans were unable to assert a distinctive non-white group identity. As a result, in reality, the Fourteenth Amendment offered them no protection. The Constitutional constraint of the Fourteenth Amendment disappeared and the white majority was free to exclude them from juries.

Subsequently, the United States Supreme Court held in *Hernandez v. Texas*¹⁰³ that “persons of Mexican descent” are a cognizable group for equal protection purposes in areas where they are subject to local discrimination.¹⁰⁴ Unfortunately, this allowed the lack of constitutional constraint to persist in areas where Mexican-Americans were unable to prove that they experienced discrimination. In such areas, Mexican-Americans did not constitute a class warranting constitutional protection.¹⁰⁵

Federal Judicial Bureaucracy Twenty-five Years after Hernandez v. Texas, 25 CHICANO-LATINO L. REV. 201 (2005).

⁹⁹ On appeal, the record showed that although Mexican-Americans made up fourteen percent of the community, no Mexican-Americans had served on a jury in twenty-five years. *Hernandez v. Texas*, 347 U.S. 475, 480–81 (1954).

¹⁰⁰ *Hernandez*, 251 S.W.2d. at 535.

¹⁰¹ *Id.*

¹⁰² *Hernandez v. State*, 251 S.W.2d 531, 536 (Tex. Crim. App. 1952); *see also* Aniceto Sanchez v. State, 243 S.W.2d 700, 701 (Tex. Crim. App. 1951) (rejecting a jury exclusion claim explaining that “[Mexicans] are not a separate race but are white people of Spanish descent, as has often been said by this court”).

For more on Mexican-Americans and their status as legally white, *see* LAURA GOMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN-AMERICAN RACE* 3 (2007); Ariela J. Gross, “*The Caucasian Cloak*”: *Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 GEO. L.J. 337 (2007); Thomas A. Guglielmo, *Fighting for Caucasian Rights: Mexicans, Mexican Americans, and the Transnational Struggle for Civil Rights in World War II Texas*, 92 J. AM. HIST. 1212, 1212–37 (2006); George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321, 323–29 (1997).

For additional work on Mexican-American racial identity, *see* Taunya Lovell Banks, *Mestizaje and the Mexican Mestizo Self: No Hay Sangre Negra, So There is No Blackness*, 15 S. CAL. INTERDISC. L.J. 199 (2006).

¹⁰³ 347 U.S. 475 (1954).

¹⁰⁴ *Id.* at 477–79.

¹⁰⁵ *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, 395 (1975).

Like Native Americans, Mexican-Americans have also encountered difficulties arising from the breach of treaty obligations. Mexico and the United States resolved the Mexican War by entering into the Treaty of Guadalupe Hidalgo in 1848.¹⁰⁶ The Treaty ceded much of what is now the American southwest to the United States.¹⁰⁷ The Treaty was supposed to protect the citizenship and civil rights of Mexicans who decided to remain in the United States and become American citizens.¹⁰⁸ In fact, many of the promises in the Treaty regarding the rights of Mexican-Americans were not kept.¹⁰⁹ As Richard Delgado has explained:

The Treaty of Guadalupe Hidalgo . . . purported to guarantee to Mexicans caught on the U.S. side of the border full citizenship and civil rights, as well as protection of their culture and language. The treaty, modeled after ones drawn up between the U.S. and various Indian tribes, was given similar treatment: the Mexican's properties were stolen, rights were denied, language and culture suppressed, opportunities for employment, education, and political representation were thwarted.¹¹⁰

This breach of Treaty obligations is consistent with the state of nature theory. As explained in the section on Native Americans, it is characteristic of the state of nature that promises will be broken.¹¹¹

¹⁰⁶ See Treaty of Peace, Friendship, Limits and Settlement with the Republic of Mexico Feb. 2, 1848, U.S. – Mex., 9 Stat. 922 [hereinafter Treaty].

¹⁰⁷ See Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. REV. 201, 201 (1996) (“The states of California, Nevada, and Utah, as well as portions of Colorado, New Mexico, Arizona, and Wyoming were carved out of that 529,000 square mile cession by the Republic of Mexico.” (citations omitted)).

¹⁰⁸ See Treaty, *supra* note 106, at arts. VIII, IX.

¹⁰⁹ Kevin R. Johnson, *An Essay on Immigration, Citizenship, and U.S./Mexico Relations: The Tale of Two Treaties*, 5 SW. J. L. & TRADE AM. 121, 123 (1998) (“Most fundamentally, many Mexican citizens, transformed by the Treaty into United States citizens of Mexican descent, and their descendants, never enjoyed full membership rights in this society, despite the Treaty’s promise that they would.”); Guadalupe T. Luna, *En El Nombre De Dios Todo — Poderoso: The Treaty of Guadalupe Hidalgo and Narrativos Legales*, 5 SW. J. L. & TRADE AM. 45, 70–72 (1998) (describing breaches of Treaty obligations).

¹¹⁰ Richard Delgado, Book Review, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved? And We Are Not Saved: The Elusive Quest for Racial Justice*, By Derrick Bell, 97 YALE L.J. 923, 940 (1988); see also Johnson, *supra* note 109, at 129 (“The U.S. government ultimately failed to protect the rights guaranteed under the Treaty to Mexican citizens who became U.S. citizens.”).

¹¹¹ See *supra* notes 88–90 and accompanying text.

D. *Immigration and Plenary Power*

In the immigration context, the government also acts with maximum power — plenary power.¹¹² The plenary power doctrine in the context of immigration law is generally understood to arise out of Congressional efforts to restrict Chinese immigration to the United States in the late 19th century. In *Chae Chan Ping v. United States* (the “*Chinese Exclusion Case*”),¹¹³ Congress had acted to halt the immigration of Chinese labourers. Suggesting that the Congress had unlimited power to regulate immigration, the Court upheld the Chinese exclusion provisions, observing that if Congress “considers the presence of foreigners of a different race in this country, who will not assimilate with us to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary.”¹¹⁴ Peter Shuck has explained the far-reaching nature of this plenary power over immigration matters:

Immigration has long been a maverick, a wild card in our public law. Probably no area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure and judicial role that animate the rest of our legal system . . . [I]mmigration law remains the realm in which government authority is at the zenith, and individual entitlement is at the nadir.¹¹⁵

In immigration law, then, the government is operating with maximum power. Just as in the state of nature, it would seem that it is sometimes the case that notions of justice are inapplicable. There is sometimes no constraint. The government sometimes does whatever it has the power to do. Since most immigrants are persons of color,¹¹⁶ in the context of immigration law, authorities

¹¹² See Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 346 (2008) (“The doctrine of ‘plenary power’ is the most famous jurisprudential piece of American constitutional immigration law. . . . The Supreme Court first established the federal government’s plenary power over immigration matters in the late nineteenth century.”); *Developments in the Law — Access to Courts, Access to Courts and Video-conferencing in Immigration Court Proceedings*, 122 HARV. L. REV. 1181, 1188 (2009) (“Congress’s plenary power to regulate immigration is well established”).

¹¹³ 130 U.S. 581 (1889).

¹¹⁴ *Id.* at 606; see also Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1572 (2008) (In the Chinese Exclusion case, “the Supreme Court held that the federal government had plenary power — profound discretion unrestrained by constitutional limitations — in the areas of national security, foreign affairs and immigration.”).

¹¹⁵ Peter H. Shuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984).

¹¹⁶ See Julian Wonjung Park, Comment, *A More Meaningful Citizenship Test? Unmasking the Construction of a Universalist, Principle-Based Citizenship Ideology*, 96 CAL. L. REV. 999, 1016 (2008) (“Issues of immigration and race are not distinct but are inextricably intertwined since the majority of contemporary immigrants are nonwhite.”).

sometimes deal with minorities in an unconstrained way. This lack of constraint operates to hurt racial and ethnic minorities.

For instance, in the immigration context, authorities are free to engage in racial profiling.¹¹⁷ This goes counter to our normal view that targeting minorities for criminal investigation on the basis of race is immoral and contrary to our American ideals.¹¹⁸ As a result, equal protection law would normally not allow the use of racial profiling in the criminal context.¹¹⁹ Instead, the authorities “must have a particularized and objective basis for suspecting the particular person . . . of criminal activity” in order to stop or investigate.¹²⁰

Because of the plenary power doctrine, in the immigration context, the normal constitutional constraint disappears. In *United States v. Brignoni-Ponce*,¹²¹ the Supreme Court allowed the consideration of race in immigration stops. The court explained that “the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone, it does not justify stopping all Mexican-Americans to ask if they are aliens.”¹²² Just as in the state of nature, normal constraints do not exist when dealing with minorities.

One of the most striking recent examples of the use of plenary power against persons of color in the immigration context is the government’s use of secret evidence to deport or detain Arabs or Muslims.¹²³ Such evidence is nei-

¹¹⁷ See Cesar Cuauhtemoc Garcia Hernandez, *La Migra in the Mirror: Immigration Enforcement and Racial Profiling on the Texas Border*, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 167, 180 (2009) (“In the most egregious and wide-reaching example of the Supreme Court’s unwillingness to extend important constitutional protections to non-citizens, the Court in a 1975 decision firmly approved racial profiling in the immigration policing context.”); Abby Sullivan, *On Thin Ice: Cracking Down on the Racial Profiling of Immigrants and Implementing a Compassionate Enforcement Policy*, 6 HASTINGS RACE & POVERTY L. J. 101, 108 (2009) (“[B]ecause the court has relaxed constitutional standards in the immigration context,[the] general prohibition on racial profiling does not govern the context of law enforcement.”).

¹¹⁸ See Memorandum on Fairness in Law Enforcement, 35 WEEKLY COMP. OF PRES. DOC. 1067 (June 9, 1999) (“[S]topping or searching individuals on the basis of race . . . is not consistent with our democratic ideals”); Hearing of the Senate Judiciary Committee, FED. NEWS SERV., May 5, 1999 (Attorney General Janet Reno stated “Racial profiling focused on conduct based on race or ethnic background is just plain wrong.”).

¹¹⁹ See *Whren v. United States*, 517 U.S. 806, 813 (1996) (In criminal context, “the Constitution prohibits selective enforcement of the law based on considerations such as race”).

¹²⁰ *United States v. Cortez*, 449 U.S. 411, 417–18 (1981).

¹²¹ 422 U.S. 873 (1979).

¹²² *Id.* at 886–87; see also Sullivan, *supra* note 117, at 109–10 (“[T]he Brignoni-Ponce Court opened the floodgates for immigration agents to rely on race in their enforcement efforts in a manner that would be impermissible for standard law enforcement officers . . . Brignoni-Ponce is a judicial blessing of disparate treatment based on race, and it stands for our invitation . . . to engage in racial profiling.”).

¹²³ Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 19 (2003) [hereinafter *The Enduring Effect*]. For additional scholarship on the use of secret evidence in immigration proceedings, see Jaya Ramji-Nogales, *A Global Approach to Secret Evidence: How Human*

ther disclosed to the target of government action nor to their attorney.¹²⁴ The morally troubling nature of such a process is clear. As one federal court observed in one such case, for a target to survive the use of secret evidence against him, he would have to “rebut the undisclosed evidence against him It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.”¹²⁵

E. *Interest Convergence and the State of Nature*

One of the basic tenets of critical race theory is that the white majority acts out of self-interest with respect to racial minorities.¹²⁶ This is similar to how one acts in the state of nature. One acts out of self-interest. Morality is not really relevant.

For instance, in a classic article, critical race theory scholar Derrick Bell explained the principle of interest convergence by arguing that blacks will enjoy success only when it is in the interest of the white majority.¹²⁷ He illustrated this point by examining the famous case of *Brown v. Board of Education*.¹²⁸

In *Brown*, the Supreme Court held that legally compelled segregation in public schools was unconstitutional.¹²⁹ The *Brown* decision is one of the most celebrated judicial decisions in American legal history.¹³⁰ There may be a ten-

Rights Law Can Reform Our Immigration System, 39 COLUM. HUM. RTS. L. REV. 287 (2008); Steven Townley, *The Use and Misuse of Secret Evidence in Immigration Cases: A Comparative Study of the United States, Canada, and the United Kingdom*, 32 YALE J. INT'L L. 219 (2007).

¹²⁴ *The Enduring Effect*, *supra* note 123, at 19.

¹²⁵ *Rafeedie v. INS*, 880 F.2d 506, 516 (D.C. Cir. 1989).

¹²⁶ See CRITICAL RACE THEORY: THE CUTTING EDGE xvii (Richard Delgado & Jean Stefancic eds. 2000) (“A third premise underlying much of Critical Race Theory is interest convergence . . . this concept holds that white elites will tolerate or encourage racial advances for blacks only when such advances also promote white self-interest.”); see also DERRICK BELL, RACE, RACISM AND AMERICAN LAW 44–45 (3d ed. 1992) [hereinafter RACE, RACISM, AND AMERICAN LAW] (“But courage and effort aside, it does not require an unreasonable reading of history to conclude that the degree of progress blacks have made away from slavery and toward equality has depended on whether allowing blacks more or less opportunity best served the interests and aims of white society.”).

¹²⁷ See generally Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) [hereinafter *Interest Convergence Dilemma*].

¹²⁸ 347 U.S. 483 (1954). For analysis of *Brown*, see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); CHARLES OGLETREE, ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION (2004); MARK V. TUSHNET, BROWN V. BOARD OF EDUCATION: THE BATTLE FOR INTEGRATION (1995).

¹²⁹ *Brown*, 347 U.S. at 495.

¹³⁰ See Jack M. Balkin, *Brown v. Board of Education: A Critical Introduction*, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 3, 4 (Jack M. Balkin ed. 2001) (*Brown* “is the single most honored opinion in the Supreme Court's corpus.”); Taunya Lovell Banks,

dency to regard the case as a moral breakthrough — that the white majority acted out of a concern for morality or justice.¹³¹ Bell argues to the contrary. According to Bell, the court handed down this landmark decision out of a concern to advance the interests of the white majority.¹³² Bell argues that in fact the decision in *Brown* can be best explained as necessary to enable the United States to present a better image to the world during the cold war.¹³³ As Bell notes, the image of the United States abroad had suffered because of segregation and racism in the United States.¹³⁴ In addition, Bell argued that the decision resulted from a concern that American blacks who had just returned from serving in World War II against the Axis powers would not accept a system that permitted racial discrimination in the United States.¹³⁵ Thus, Richard Delgado and Jean Stefancic explain, “world and domestic considerations — not moral qualms over blacks’ plight — precipitated the pathbreaking decision.”¹³⁶

Subsequently, legal historian Mary Dudziak confirmed Bell’s theory by offering further evidence showing that powerful elites in the United States Department of State encouraged the eventual decision in *Brown* in order to pro-

Brown at 50: Reconstructing Brown’s Promise, 44 WASHBURN L.J. 31, 64 (2004) (“[T]here still are many reasons to celebrate the 1954 *Brown* decision.”); Mark A. Graber, *The Price of Fame: Brown as Celebrity*, 69 OHIO ST. L.J. 939 (2008) (describing the celebrity status of *Brown*); William S. Koski & Rob Reich, *When “Adequate” Isn’t: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 554 (2006) (“On the fiftieth anniversary of *Brown v. Board of Education*, advocates, scholars and educators convened across the nation to celebrate *Brown*’s promise”); Michael A. Olivas, *Commemorating the 50th Anniversary of Hernandez v. Texas*, 25 CHICANO-LATINO L. REV. 1, 7 (2005) (“In its fiftieth year anniversary in 2004, all of America has remembered the towering *Brown v. Board* decision and assessed its impact.”).

¹³¹ See ROBERT BORK, *THE TEMPTING OF AMERICA* 76 (1990) (“the end of state-mandated segregation was the greatest moral triumph constitutional law had ever produced”); Bryan L. Adamson, *A Thousand Humiliations: What Brown Could Not Do*, 9 SCHOLAR 187, 192 (2007) (“Without doubt, the *Brown* decision was a triumph in restorative justice, offering all African-Americans a vindication of sorts.”); Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973 (2005) (“*Brown* was seen, in much of the nation, as a great moral victory.”); Book Review, *The Priest Who Kept His Faith but Lost His Job*, 103 HARV. L. REV. 2074, 2075 (1990) (*Brown* was “a decision which was at once hailed as constitutional law’s greatest moral triumph.”).

¹³² See *Interest Convergence Dilemma*, *supra* note 127, at 524.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 524–25.

¹³⁶ DELGADO AND STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 18–19 (2001); see also RACE, RACISM, AND AMERICAN LAW, *supra* note 126, at 13 (“But even a rather cursory look at American political history suggests that in the past, the most significant political advances for blacks resulted from policies that were intended to, and had the effect of, serving the interests and convenience of whites rather than remedying racial injustices against blacks”); RACE, RACISM, AND AMERICAN LAW, *supra* note 126, at 46 (“Values and morals . . . appear to be powerless to motivate any large segment of whites to action in unison against their perceived interests.”).

mote the interests of the United States abroad.¹³⁷ In this connection, in arguing that racial segregation was unconstitutional, the U.S. government's amicus brief in the *Brown* case relied heavily on U.S. Secretary of State Dean Acheson's statements that race discrimination was causing serious damage to U.S. foreign relations.¹³⁸

This phenomenon described as interest convergence theory is exactly what state of nature theory would predict would happen when the white majority is dealing with minorities. When the dominant group deals with minorities, one is in the state of nature. In the state of nature, one pursues one's own self-interest. Self-preservation is fundamental. Self-interest is pursued unencumbered by moral scruples. One of the virtues of the state of nature theory that I am setting out in this paper is that it explains why interest convergence theory is correct.

F. *Protective Associations and the State of Nature*

Recent state of nature theorist, Robert Nozick, argues that in the state of nature people might create protective associations in order to defend against or deal with problems in the state of nature.¹³⁹ Historically, such vigilante protective associations formed lynch mobs to police blacks.¹⁴⁰ Operating without constraints and outside the apparatus of the law or state, in the twentieth century, "lynching was inflicted almost exclusively by white southerners upon black southerners."¹⁴¹ Such "lynchers never faced any serious deterrent from the government and could murder black people openly, notoriously and boldly, without fear of reprisal."¹⁴²

¹³⁷ See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 103–13 (1988). For recent work on interest convergence theory, see Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class and Ideology Through Interest Convergence*, 79 ST. JOHN'S L. REV. 253 (2005); Robert S. Chang & Peter Kwan, *When Interests Diverge*, 100 MICH. L. REV. 1532 (2002); Richard Delgado, *Rodrigo's Roundelay: Hernandez v. Texas and the Interest Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23 (2006); Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49, ARIZ. L. REV. 911 (2007); Catherine Smith, *Unconscious Bias and "Outsider" Interest Convergence*, 40 CONN. L. REV. 1077 (2008).

¹³⁸ See Dudziak, *supra* note 137, at 109–13.

¹³⁹ NOZICK, *supra* note 13, at 12–15.

¹⁴⁰ See Barbara Holden-Smith, *Lynching, Federalism and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31 (1996). For additional work on the history of lynching, see PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICANS* (2002); ROBERT L. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909–1950* (1980).

¹⁴¹ Holden-Smith, *supra* note 140, at 36.

¹⁴² *Id.* at 39.

Similarly, there is a long history of vigilante violence along the U.S./Mexican border.¹⁴³ Indeed, white vigilante groups acting out of “racial prejudice” and “without reprisal from the wider community” and operating in the U.S./Mexico borderlands lynched 597 persons of Mexican descent from 1848 to 1928.¹⁴⁴

In our own day, some continue to form vigilante protective associations to deal with persons of color. For instance, in the wake of the devastation of Hurricane Katrina, white vigilantes patrolled the City of New Orleans, resulting in the shooting deaths of at least eleven African-Americans.¹⁴⁵ To date, there has been no official investigation of these activities and some believe that “the white mentality is that these people are exempt . . . from any kind of legal repercussion.”¹⁴⁶ One woman, a relative of some of the vigilantes, explained that these vigilantes were “out to wage a race war” and that “the opportunity to hunt black people was a joy.”¹⁴⁷

Beyond this, the American southwest now resembles a state of nature where armed vigilantes patrol the United States/Mexican border, in an effort to keep Mexicans out of the United States.¹⁴⁸ The best known of these groups is the Minuteman Project.¹⁴⁹ The Minuteman Project contends that the federal government has failed to secure our borders against undocumented immigrants and they seek to police the U.S./Mexican frontier.¹⁵⁰ The Minuteman vigilantes

¹⁴³ See Peter Yoxall, *The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History and Future of Citizen Activism in the United States-Mexico Border*, 37 U. MIAMI INTER-AM L. REV. 517, 522–23 (2006).

¹⁴⁴ William D. Carrigan & Clive Webb, *The Lynching of Persons of Mexican Origin or Descent in the United States, 1848–1928*, 37 J. SOC. HIST. 411, 413, 417 (2003); see also Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.-C.L. L. REV. 297 (2009).

¹⁴⁵ A.C. Thompson, *Katrina's Hidden Race War*, THE NATION, Dec. 17, 2008 (describing “a group of white residents” that “stockpiled handguns, assault rifles, shotguns, and at least one Uzi and began patrolling the streets in pickup trucks and SUVs”).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See Lupe S. Salinas, *Latinos and Criminal Justice in Texas: Has the New Millennium Brought Progress?* 30 T. MARSHALL L. REV. 289, 342–43 (2005); see also Karen S. Kopitsky, *How the Scope of States' Citizen's Arrest Statutes Affects the Activity Level of Vigilante Groups on the U.S.–Mexico Border*, 11 J. GENDER, RACE & JUST. 307 (2008); Ray Ybarra, *Thinking and Acting Beyond Borders: An Evaluation of Diverse Strategies to Challenge Vigilante Violence on the U.S.-Mexico Border*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 377 (2007).

¹⁴⁹ Dennis Wagner, *Minuteman's Goal: To Shame Feds into Action*, USA TODAY, May 25, 2006 (describing “Minuteman Civil Defense Corps” vigilantes who patrol the United States/Mexico frontier). For additional work on the Minuteman Project, see Justin A. McCarty, Note, *The Volunteer Border Patrol: The Inevitable Disaster of the Minuteman Project*, 92 IOWA L. REV. 1459 (2007); Adalgiza A. Nunez, Note, *Civilian Border Patrols: Activists, Vigilantes, or Agents of Government?*, 60 RUTGERS L. REV. 797 (2008).

¹⁵⁰ See Wagner, *supra* note 149 (The Minuteman Manifesto states: “The existing border crisis is a dereliction of duty by those entrusted with American security and sovereignty . . .”).

carry guns and many have military experience.¹⁵¹ In addition, the Minuteman group appears to “be riddled with racism, violence and abuse.”¹⁵²

The activities of the Minuteman Project are consistent with the general privatization of immigration enforcement that is taking place on the U.S./Mexican border. Blackwater, Inc., perhaps best known for its private military activities in Iraq,¹⁵³ is positioning itself to enter into the border enforcement business in the United States.¹⁵⁴ Blackwater’s move to the borders is part of a much larger trend to privatized immigration control in America.¹⁵⁵ This trend toward privatization is potentially dangerous because it is “not beholden to law” and even increases power over immigrants beyond that already exercised by the government through its plenary power.¹⁵⁶ Such private actors as Blackwater would “have nearly unchecked discretion to decide the fate of asylum applicants and immigrants at our borders.”¹⁵⁷ In this regard, Blackwater, Inc., may be accustomed to operating with unlimited power since it seems to have operated outside the law in Iraq.¹⁵⁸ Private companies operating with unlimited power and outside the law with respect to minority groups is consistent with the state of nature theory.

G. *The Perception of Foreignness and the State of Nature*

Latinos, Asian-Americans, and Arab-Americans are viewed as foreign to the Anglo-American core culture.¹⁵⁹ Interestingly, this notion applies regard-

¹⁵¹ See Yoxall, *supra* note 143, at 533.

¹⁵² *Id.* at 535–36.

¹⁵³ For an excellent history on the rise of Blackwater, Inc., and its role in Iraq, see JEREMY SCAHILL, *BLACKWATER: THE RISE OF THE WORLD’S MOST POWERFUL MERCENARY ARMY* (2008).

¹⁵⁴ See generally Robert Koulish, *Blackwater and the Privatization of Immigration Control*, 20 ST. THOMAS L. REV. 462 (2008).

¹⁵⁵ *Id.* at 463. For more on privatization in immigration law, see Jeffrey Manns, *Private Monitoring of Gatekeepers: The Case of Immigration Enforcement* 2006 U. ILL. L. REV. 887 (2006); Huyen Phan, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 779 (2008) (describing and analyzing a “growing trend” toward private enforcement of the immigration laws); Adam J. Homicz, Note, *Private Enforcement of Immigration Law: Expanded Definitions under RICO and the Immigration and Nationality Act*, 38 SUFFOLK U.L. REV. 621 (2005).

¹⁵⁶ Koulish, *supra* note 154, at 464, 467–74.

¹⁵⁷ *Id.* at 473. Cf. Laura A. Dickinson, *Public Law Values in a Private World*, 31 YALE J. INT’L L. 383, 384 (2006) (“Because many constitutional norms protect individuals only from government misconduct, and because courts have been largely unwilling to view such norms as applicable to private contractors, these critics have argued that privatization will dramatically reduce the scope of public law protections in the United States.”).

¹⁵⁸ See SCAHILL, *supra* note 153, at 35 (“the bottom line was that Blackwater operated in a legal grey zone, seemingly outside the scope of both U.S. civilian and military law and immune from Iraqi law.”); SCAHILL, *supra* note 153, at 57 (“Blackwater has openly declared its forces above the law.”).

¹⁵⁹ See Neil Gotanda, *Asian American Rights and the “Miss Saigon Syndrome,”* in ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1087, 1096 (Hyung-Chan Kim

less of whether one is a citizen or non-citizen.¹⁶⁰ One appears foreign and is therefore undesirable and unwelcome inside American borders.¹⁶¹ Thus, some argue that Latinos are foreign to American culture and they should not be permitted to immigrate into our country.¹⁶² The perception of foreignness can generate harsh treatment. For instance, the perception of foreignness helped generate the infamous internment of Japanese-Americans during the Second World War.¹⁶³ Similarly, Robert Chang has described how Asian-Americans have suffered physical attacks because of perceived foreignness.¹⁶⁴ For example, autoworkers in Detroit attacked an Asian-American man because they thought

ed. 1992) (“[W]ithin the United States, if a person is racially identified as African American or white, that person is presumed to be legally a U.S. citizen and socially an American . . . [but] these presumptions are not present for Asian Americans, Latinos, Arab Americans, and other non-Black racial minorities. Rather, there is the opposite presumption that these people are foreigners.”); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 295 (1997) [hereinafter *Alien and Non-Alien Alike*] (“Perhaps because Asian immigrants were excluded from citizenship for so long, or perhaps because the imagery slips from race to nationality so easily, foreignness is a deeply ingrained aspect of the racial identification of Asian Americans.”).

¹⁶⁰ See JOHN TEHRANIAN, *WHITE WASHED: AMERICA’S INVISIBLE MIDDLE EASTERN MINORITY* 110 (2009) (“Middle Eastern Americans can never escape their skin. Under the dominant gaze, they remain perpetual foreigners, never quite equal, always part of the Other.”); *Alien and Non-Alien Alike*, *supra* note 159, at 281 (“Asian Americans are often identified as foreign, not because of their citizenship, but as part of a racial identity that is attributed to them.”); Natsu Taylor Saito, *For “Our” Security: Who Is An “American” and What is Protected by Enhanced Law Enforcement and Intelligence Powers?*, 2 SEATTLE J. SOC. J. 23, 28 (2003) (“Asian Americans and Latinos/as are still commonly treated as ‘foreigners,’ regardless of how long their families have lived in the United States.”).

¹⁶¹ See TEHRANIAN, *supra* note 160, at 112 (“Middle Easterners are portrayed as the perpetual foreigner, the enemy, the Other, the terrorists, the uncivilized heathens who threaten the American way of life with their inhumane thirst for violence.”); Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U.L. REV. 965, 989 (1995) (The attribution of foreignness is stigmatizing because “[t]he American identification of foreign origins with disloyalty to the United States and its form of government has been a prominent theme throughout American legal history.”).

¹⁶² See PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER* 232, 260–61, 270 (1995); PATRICK J. BUCHANAN, *STATE OF EMERGENCY: THE THIRD WORLD INVASION AND CONQUEST OF AMERICA* 133–37, 250, 254, 268–69 (2006); SAMUEL P. HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO AMERICAN NATIONAL IDENTITY* 221–56 (2004).

¹⁶³ See Gotanda, *supra* note 159, at 1098 (“The evacuated Japanese Americans, including U.S. citizens, were presumed to be sufficiently foreign for an inference by the military that such racial-foreigners must be disloyal. Japanese Americans were therefore characterized as different from the African-American racial minority. With the presence of racial foreignness, a presumption of disloyalty was reasonable and natural.”); Reggie Oh & Frank Wu, *The Evolution of Race in the Law: The Supreme Court Moves from Approving Internment of Japanese Americans to Disapproving Affirmative Action for African Americans*, 1 MICH. J. RACE & L. 165, 173 (1996) (“With respect to the World War II internment, race supposedly served as a proxy for disloyalty, i.e., to be Japanese American was to be disloyal.”).

¹⁶⁴ See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism and Narrative Space*, 81 CAL. L. REV. 1241, 1252–55 (1993).

he was Japanese and they believed that Japanese car manufacturers were undermining jobs in America.¹⁶⁵ In the wake of the tragic events of September 11, Arab-Americans were subjected to violence because of their apparent foreignness.¹⁶⁶ Thus, foreign appearance seems to generate harsh treatment — it seems to generate the harshness of the state of nature. Indeed, concerns about foreignness helped generate the conclusion that Congress enjoys state-of-nature-like plenary power over immigration in *Chae Chan Ping v. United States*:

If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . [Congress's] determination is conclusive upon the judiciary.¹⁶⁷

Similarly, Congress's state-of-nature-like plenary power over Native Americans is rooted in the federal foreign affairs power.¹⁶⁸

This link between foreignness and the state of nature is consistent with Hobbes' theory. Hobbes believed that sovereigns are in the state of nature when dealing with foreign nations.¹⁶⁹ In the same way, the perception of foreignness seems to trigger the harshness of the state of nature.

H. *The State of Nature and Alternative Dispute Resolution*

State of nature theorist Robert Nozick argues that in the state of nature, people would set up systems of dispute resolution as part of private protective

¹⁶⁵ See *id.* at 1252.

¹⁶⁶ See, e.g., TEHRANIAN, *supra* note 160, at 123 (describing “a fourfold increase in hate crimes and incidents of discrimination against Americans of Middle Eastern descent since 9/11”); 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”).

¹⁶⁷ *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889); see also Victor C. Romero, *On Elian and Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. LEGIS. PUB. & POL’Y 343, 378 (2000–2001).

¹⁶⁸ See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (“[The Constitution] confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes.”); Nell Jessup Newton, *Federal Power Over Indians: Its Sources Scope and Limitations*, 132 U. PA. L. REV. 195, 199 (1984) (“The Plenary Power Doctrine, a fixture of American Indian law . . . can be traced . . . to the treaty, war, and other foreign affairs powers”).

¹⁶⁹ HOBBS, *supra* note 13, at 144–45.

associations.¹⁷⁰ Operating outside of the apparatus of state leads to the state of nature. Thus, minorities should avoid extra-legal/private associations such as alternative dispute resolution (ADR)¹⁷¹ which operate outside of the state's legal system.

Minorities do less well in less formal ADR settings.¹⁷² Despite this, minorities are being pushed or directed into the ADR setting even for discrimination claims.¹⁷³ ADR deals with techniques of dispute resolution other than traditional litigation such as arbitration¹⁷⁴ or mediation.¹⁷⁵ Although ADR may resolve disputes in a way that offers some efficiencies, the downside is that because ADR does not offer the same due process protections of traditional litigation, it may be unfair to litigants who do not operate from a position of strength such as minorities.

For instance, ADR takes place in a private setting as opposed to the public setting of traditional litigation.¹⁷⁶ Because of lack of public scrutiny, there are fewer checks on the ADR decision makers and they are freer to operate outside of traditional procedures and law than the judges who operate in the state court system.¹⁷⁷ For example, the rules of civil procedure and evidence do

¹⁷⁰ NOZICK, *supra* note 13, at 13–14 (In the state of nature, “when a member of the association is in conflict with non-members, the association will want to determine in some fashion who is in the right, if only to avoid constant and costly involvement in each member’s quarrels, whether just or unjust.”).

¹⁷¹ STEPHEN N. SUBRIN ET AL., *CIVIL PROCEDURE: DOCTRINE, PRACTICE AND CONTEXT* 577 (3d ed. 2008) (“Alternative Dispute Resolution (ADR) is a general term referring to alternatives to the formal adversarial process that offers more guidance and support than simple negotiation between the parties or their representatives.”).

¹⁷² See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

¹⁷³ See SUBRIN, *supra* note 171, at 591 (“To deal with complex court cases and heavy dockets, many judges have experimented with . . . directing cases to mediation or other alternative dispute resolution methods.”); David A. Hoffman & Lamont E. Stallworth, *Leveling the Playing Field for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity*, 63 APR. DISP. RESOL. J. 37, 138–39 (2008) (describing how increasing numbers of race discrimination claims are being raised in alternative dispute resolution settings); see also SUBRIN, *supra* note 171, at 583–84 (Alternative dispute resolution is now “commonly used in public sector disputes, including . . . discrimination claims.”).

¹⁷⁴ See ALLAN IDES & CHRISTOPHER MAY, *CIVIL PROCEDURE: CASES AND PROBLEMS* 24 (2006) (“Arbitration is a process in which a neutral panel or individual considers the evidence and arguments of the parties and then issues a decision concerning the dispute.”).

¹⁷⁵ See IDES & MAY, *supra* note 174, at 24–25 (“Mediation . . . involves a neutral individual who simply helps disputants to settle a controversy on terms that are mutually agreeable to them.”).

¹⁷⁶ See Jean Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad*, 56 DEPAUL L. REV. 569, 570 (2007) (describing private nature of alternative dispute resolution).

¹⁷⁷ See Delgado, *supra* note 172, at 1374 (describing how “modern rules of procedure and evidence contain numerous provisions that are intended to reduce prejudice” in traditional litigation and observing that alternative dispute resolution “has very few such safeguards” and that

not ordinarily operate in ADR.¹⁷⁸ Because of the lack of these procedural protections, weaker parties may suffer prejudice.¹⁷⁹

A good example of the imposition of ADR on minorities is found in the proposed AgJOBS legislation, which purports to provide rights to farm workers, most of whom are of Mexican descent.¹⁸⁰ The legislation requires farm workers to participate in binding arbitration in order to enforce their right to just cause termination.¹⁸¹ This renders the farm workers' rights "illusory" since the lack of due process protection involved in such an ADR procedure will place the minority farm workers at a severe disadvantage.¹⁸² This is not a positive for persons of color as they should avoid the state of nature. This is another example of the dominant group treating minorities as if in the state of nature — pushing minorities into ADR.

I. Difficulties with Bringing Lawsuits as the Lifting of Constraints

Constraints have been lifted off of the dominant group in that it has been and is often difficult to bring actions to enforce race discrimination claims.

alternative dispute resolution is "conducted out of the view of the public . . . with little, if any, provision for review"); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1590 (1991) ("[T]he average white American exhibits increased prejudice in intimate as opposed to formal or public settings. The consequences of this tendency is that prejudicial behavior will be discouraged in settings in which institutional expectations and rules of procedure check overt signs of prejudice. In sum, the forms that are required of judges provide some . . . protection against bias. Because these forms are not available in mediation, the potential that bias will influence the outcome is increased.").

¹⁷⁸ See Amber McKinney, 6 PEPP. DISP. RESOL. L.J. 109, 130 (2006) ("The due process protections provided in the formal court system to safeguard the rights of parties are not incorporated into internal ADR processes.").

¹⁷⁹ See Delgado, *supra* note 172, at 1394–95 (describing how informal proceedings disadvantage weaker parties).

¹⁸⁰ See Vanessa Vogl, *Congress Giveth, and Congress Taketh Away: How the Arbitration and Mediation Clauses Jeopardize the Rights Granted to Immigrant Farmers by AgJOBS*, 29 HAMLINE J. PUB. L. & POL'Y 463, 464 (2008).

¹⁸¹ See AgJOBS Act of 2007, H.R. 371, § 102(c)(2)(B).

INITIATION OF ARBITRATION — If the Secretary finds that an alien has filed a complaint in accordance with subparagraph (A) and there is reasonable cause to believe that the alien was terminated from employment without just cause, the Secretary shall initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint a mutually agreeable arbitrator from the roster of arbitrators maintained by such Service for the geographical area in which the employer is located. The procedures and rules of such Service shall be applicable to the selection of such arbitrator and to such arbitration proceedings. The Secretary shall pay the fee and expenses of the arbitrator, subject to the availability of appropriations for such purpose.

Id.

¹⁸² See Vogl, *supra* note 180, at 489–91.

The harder it is to sue to enforce rights for minorities, the dominant group is freer to act without a check on what it does.

It is worth remembering that in the era of slavery, slaves faced certain procedural obstacles which made it difficult or even impossible to proceed in court and which served to eliminate checks on the power of whites, placing members of the dominant group, in essence, outside of the law. In fact, slaves were unable to bring lawsuits.¹⁸³ In addition, the rules of evidence did not allow slaves to testify against white persons.¹⁸⁴ This rule had the effect of lifting legal constraints off whites because it was so hard to prove facts that whites could not be limited or restrained by the law.¹⁸⁵

In more recent times, one of the areas where we have seen that it has been hard for minorities to proceed in court and enforce their rights is in the area of class actions.¹⁸⁶ This is very significant since the drafters of Rule 23 of the Federal Rules of Civil Procedure, which governs the procedures for class actions, intended class actions to be a way to vindicate social rights, including civil rights.¹⁸⁷ For an example of difficulties that minorities have encountered in bringing class actions, consider *Lopez Tijerina v. Henry*.¹⁸⁸ In *Lopez Tijerina*, the Mexican-American plaintiffs sought to bring a class action on behalf of all “Indo-Hispano, also called Mexican-American and Spanish-American persons” in New Mexico.¹⁸⁹ The court held that the class action could not proceed because the plaintiffs had “failed to adequately define the class.”¹⁹⁰ Although the plaintiffs had tried to define the class as “having Spanish surnames, Mexican, Indian and Spanish ancestry and that the class speaks Spanish as a primary or maternal language,” the court held that this was “too vague to be meaningful.”¹⁹¹

Racial minorities continue to find it difficult to have cases certified as class actions. One important study, which examined class actions involving allegations of race discrimination in an employment context, found that “courts denied [class] certification . . . 69% of the time.”¹⁹²

¹⁸³ See William W. Fisher, III, *Ideology and Imagery in the Law of Slavery*, in *SLAVERY AND THE LAW* 43 (Paul Finkelman ed. 2002).

¹⁸⁴ THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW 1619–1860*, at 229 (1996).

¹⁸⁵ *Id.*

¹⁸⁶ See George A. Martínez, *Race Discrimination and Human Rights Class Actions: The Virtual Exclusion of Racial Minorities from the Class Action Device*, 33 J. LEGIS. 181 (2007).

¹⁸⁷ See Abram Chayes, *The Supreme Court 1981 Term — Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 27 (1982).

¹⁸⁸ 48 F.R.D. 274 (D.N.M. 1969).

¹⁸⁹ *Lopez Tijerina v. Henry*, 48 F.R.D. 274, 275 (D.N.M. 1969).

¹⁹⁰ *Id.* at 276.

¹⁹¹ *Id.*

¹⁹² Steven J. Rosenwasser, *Employment Discrimination Class Actions: The Importance of Case Selection*, 18 BNA EMPLOYMENT DISCRIMINATION REPORT 15 (2002).

Beyond this, legal scholar Wendy Parker has undertaken a comprehensive empirical examination of employment cases alleging race discrimination and she has concluded that “plaintiffs almost always lose.”¹⁹³ She found that the courts operate with “an anti-race plaintiff ideology” which, in essence, affirms the defendant’s view of the matters at issue.¹⁹⁴ Under these circumstances, legal constraints are lifted off of the majority in the employment law context.

Another area where minorities have faced difficulties in litigation is in the area of damages — minorities’ damages awards have been reduced or smaller than damages awards for members of the dominant group. For instance, blacks have received lower tort damages awards than whites.¹⁹⁵ Similarly, there is evidence that non-English speaking Hispanics receive lower damages awards than English speakers.¹⁹⁶ This is important because damages awards are supposed to deter wrongdoing.¹⁹⁷ If damages awards are smaller for minorities, it means that members of the dominant group have a constraint lifted off their actions with respect to racial minorities.¹⁹⁸ The lifting of constraints off the dominant group in the litigation context is consistent with the state of nature theory.

J. Direct Democracy and Lack of Constraint

One of the areas in which the dominant group has moved to a situation of fewer constraints as it deals with minorities is in the area of direct democracy

¹⁹³ Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 894 (2006).

¹⁹⁴ *Id.* at 896.

¹⁹⁵ See Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 464 (1998) (“Most empirical studies indicate that . . . minority men continue to receive significantly lower damages awards than white men in personal injury and wrongful death suits.”); Jennifer B. Wiggins, *Torts, Race, and the Value of Injury, 1900–1949*, 49 HOW. L.J. 99, 101 (2005) (“This Article claims that a range of evidence compels the conclusion that African Americans’ tort claims generally were devalued relative to whites’ tort claims during the first half of the twentieth century.”).

¹⁹⁶ See Ewing, B. T., Reyes III, A. L., & J.D. Wetherbe, *Estimating the Effect of Non-English Speaking Hispanic on Personal Injury Jury Trial Outcomes*, Texas Tech University, Rawls College of Business, ISQS Working Paper (2008).

¹⁹⁷ See *Owen v. City of Independence*, 445 U.S. 622, 651–52 (1980) (damages for constitutional torts are “intended not only to provide compensation to victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well”); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1100 (2009) (“[M]any commentators have argued that compensatory damages serve the function of deterrence as well as compensation.”); F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: “Morals without Technique?”*, 60 FLA. L. REV. 349, 375 (2008) (“[J]udicial enforcement of private rights through compensatory damages awards in the tort system has become an important part of deterring wrongful conduct.”).

¹⁹⁸ See Wiggins, *supra* note 195, at 137–38 (lower damages awards give “potential defendants lower incentives to prevent harm to blacks than whites”).

or the initiative lawmaking process — a process by which voters directly formulate legislation and place it before the public for a vote. At one time, progressives were very much in favor of the initiative process because they thought that it provided a way for citizens to exercise more power and to avoid the influence of special interests.¹⁹⁹ Although there may have been high hopes and great expectations for initiative lawmaking early on, what has come to pass is less than inspiring. The initiative process has, particularly in recent years, been employed “to undermine the civil rights gains of racial and other minorities”²⁰⁰ Consider some examples of initiatives that have harmed the interest of racial minorities. The voters of the states of California,²⁰¹ Washington,²⁰² and Michigan²⁰³ all approved initiatives which outlawed race conscious affirmative action in these states. Voters also have approved English only initiatives in a number of states.²⁰⁴ In this regard, California voters enacted an initiative prohibiting bilingual education in public schools.²⁰⁵ These initiatives targeting language are particularly egregious because language operates as a proxy for race, and in

¹⁹⁹ See THOMAS E. CRONIN, *DIRECT DEMOCRACY* 44 (1989) (Initiatives were originally viewed favorably because “the two main political parties were largely, and sometimes entirely, under the influence of the railroads, trusts and monopolies.”); PHILIP L. DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE* 2 (1998) (“[Progressives] believed that legislators and political party machines had become too dependent on special interests. Trusting the populace to make better judgments they thought that the cure was more democracy.”).

²⁰⁰ Kevin R. Johnson, *A Handicapped, Not “Sleeping,” Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CAL. L. REV. 1259, 1261 (2008); see also Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities’ Democratic Citizenship*, 60 OHIO ST. L.J. 399, 425 (1999) (“These data show that direct democracy, for the most part, has been an important lawmaking mechanism that has decreased the content of, or staved off advances in, minority rights.”). Some also argue that initiatives or direct democracy violate the constitutional requirement of a republican form of government. See Hans A. Linde, *When Is Initiative Lawmaking Not “Republican Government”?*, 17 HASTINGS CONST. L.Q. 159 (1989); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

²⁰¹ See *Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1495 (N.D. Cal. 1996), *vacated*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997); 1996 Cal. Legis. Serv. Prop 209 (West). For analysis of Proposition 209, see Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997). For analysis of the impact of Proposition 209 in the law school context, see ANDREA GUERRERO, *SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION* (2002); Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241 (2000).

²⁰² See WASH. REV. CODE § 49.60.400(1) (2002); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1192 (9th Cir. 2000). For analysis of the Washington initiative, see Jodi Miller, “*Democracy in Free Fall*”: *The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 N.Y.U. ANN. SURV. AM. L. 1 (1999).

²⁰³ See Tamar Lewin, *Michigan Rejects Affirmative Action, and Backers Sue*, N.Y. TIMES, Nov. 9, 2006, at P16.

²⁰⁴ See Lazos Vargas, *supra* note 200, at 435–36.

²⁰⁵ See Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1227 (2000).

particular a way to single out Latinos.²⁰⁶ In reviewing eighty-two such initiatives, one scholar has concluded that minorities “almost always lose” and that “majorities voted to repeal, limit, or prevent any minority gains in their civil rights over eighty percent of the time.”²⁰⁷

This initiative process serves to lift constraints on the majority with respect to lawmaking which harms minorities. As Dean Johnson explains, “[T]he cloak of the voting booth makes it easier for the public to cast anti-minority votes than it would be for a public official to vote in favor of a patently anti-minority bill, in which votes are public and legislators must explain extreme positions to constituents, including minority constituents.”²⁰⁸ Likewise, critical scholar Derrick Bell observes:

[W]hen the legislative process is turned back to the citizenry either to enact laws by initiative or to review existing laws through referendum, few of the concerns that can transform the “conservative” politician into a “moderate” public official are likely to affect the individual voter’s decision. No political factors counsel restraint on racial passions emanating from long-held and little considered beliefs and fears.²⁰⁹

Beyond this, constraints are lifted off the majority to the detriment of minorities through the initiative law-making process because initiatives are enacted without deliberation by the legislature.²¹⁰ Traditionally, legislative deliberation is supposed to protect the interests of minority groups.²¹¹ Thus, the lack of deliberation removes a protection for minorities. Significantly, social psychologists recognize that the lack of deliberation is characteristic of those who abuse power.²¹² Thus, the initiative process, by lifting constraints, presents ra-

²⁰⁶ See *id.* at 1228.

²⁰⁷ Lazos Vargas, *supra* note 200, at 425.

²⁰⁸ Johnson, *supra* note 200, at 1273.

²⁰⁹ Derrick A. Bell, Jr., *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1, 14 (1978); see also Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1522–30 (1990) (arguing that initiatives should be given heightened judicial review because they fail to screen out majority hostility against minorities).

²¹⁰ See Elizabeth R. Leong, Note, *Ballot Initiatives and Identifiable Minorities: A Textual Call to Congress*, 28 RUTGERS L.J. 677, 689–90 (1997) (“Ballot initiatives uniquely burdening an identifiable group have not had the benefit of deliberation by elected representatives. The protracted legislative hurdles through which the deliberative process is manifested, consisting of committee studies, hearings, amendments, and legislative cooperation and compromise, are completely bypassed when the initiative process is utilized.”).

²¹¹ See *id.* at 690 (“[O]ne of the primary goals of this deliberative structure was to protect minorities.”).

²¹² See Galinsky, *supra* note 9, at 454 (“[P]ossessing and experiencing power will reduce deliberation and increase the propensity to act.”).

cial minorities with the familiar position of a state-of-nature-like situation with respect to the majority.

IV. BAD EFFECTS OF OPERATING WITH GREAT POWER

There is reason to be concerned that operating with great power will have bad effects on the person wielding such power. Machiavelli argued long ago that a person “who is able to do what he wishes, that is, who is unrestrained by laws, is apt to behave like a madman”²¹³ The history books demonstrate that a ruler’s “possession of absolute power was very apt to drive him mad.”²¹⁴ For example, the Roman historian Tacitus focused on “the corrupting effect of power.”²¹⁵ Similarly, the Enlightenment philosopher Montesquieu observed that “[E]xperience in all ages has proved that every man who possesses power is inclined to abuse it.”²¹⁶ Likewise, the seventeenth century author Racine described in his *Britannicus* “the effects of power on personality: how the subservience of his subjects permits an autocratic ruler to act on desires others must repress.”²¹⁷

In this regard, sociologists Pitirim Sorokin and Walter Lunden have studied the corrupting effect of power on government and societal rulers.²¹⁸ They found that “[t]he greater, more absolute, and coercive the power of rulers, political leaders and big executives of business, labor and other organization . . . the more corrupt and criminal such ruling groups and executives tend to be.”²¹⁹ For instance, Sorokin and Lunden examined the historical record of a number of different countries and found that the “ruling group is indeed the most murderous group among all the groups of the ruled populations of almost all countries or nations.”²²⁰

More recently, social psychologists have studied the bad effects of power.²²¹ They have found that power is like a drug that “acts to lower inhibi-

²¹³ Curley, *supra* note 39, at 332.

²¹⁴ *Id.*

²¹⁵ *Id.* at 333.

²¹⁶ Raymond Aron, *Macht, Power, Puissance: Democratic Prose or Demoniactal Poetry?*, in POWER 253 (Steven Lukes, ed. 1986).

²¹⁷ Curley, *supra* note 39, at 333.

²¹⁸ See PITIRIM A. SOROKIN & WALTER A. LUNDEN, POWER AND MORALITY: WHO SHALL GUARD THE GUARDIANS (1959).

²¹⁹ *Id.* at 37; see also *id.* at 83 (“We have seen in the preceding chapter proofs that heads of state tend to be more criminal than the populations they rule. We have noted, too, that the greater their power and the more independent of public support, the more corrupt they seem to become.”).

²²⁰ *Id.* at 59, 61–72.

²²¹ See Dacher Keltner, Deborah H. Gruenfeld & Cameron Anderson, *Power, Approach, and Inhibition*, 110 PSYCHOL. REV. 265, 265 (2003) (“Psychologists have begun to illuminate how power influences cognitive processes . . . [and] social behavior . . .”).

tions.”²²² Stanford University Professor Deborah Gruenfeld says that “disinhibition is the very root of power.”²²³ She explains the effect of power: “Many of those internal regulators that hold most of us back from bold or bad behaviour diminish or disappear. When people feel powerful they stop trying to ‘control themselves.’”²²⁴

People with power “tend to be more oblivious to what others think, more likely to pursue the satisfaction of their own appetites . . . and more likely to take risks.”²²⁵ As a result, “they start to see people merely as means to their own ends . . . act in more cavalier ways . . . [and] see themselves as above the law.”²²⁶ “[H]igh-power individuals . . . more frequently act on their desires in socially inappropriate ways.”²²⁷

This is consistent with the research of psychologist David Kipnis. He theorizes that those who exercise power over others see such other persons as lacking autonomy or control over themselves.²²⁸ As a result, the power holders view such controlled persons as less worthy of respect.

Similarly, psychologists inform us that “sociopaths” act without any “internal constraints.”²²⁹ Sociopaths feel free to do “anything at all.”²³⁰ When

²²² Vicki Haddock, *Power Is Not Only An Aphrodisiac, It Does Weird Things to Some of Us*, SAN FRANCISCO CHRON., Nov. 19, 2006, at G1; see also Keltner, *supra* note 221, at 268 (“Our theory reveals how one important aspect of social contexts — power — influences the relative balance of tendencies to approach and inhibit. More specifically, elevated power activates approach-related processes.”); Keltner, *supra* note 221, at 275 (“We propose that elevated power disinhibits a wide array of behaviors.”).

²²³ Haddock, *supra* note 222; see also Galinsky, *supra* note 9, at 454 (“A distinguishing consequence of power appears to be disinhibition . . .”).

²²⁴ Haddock, *supra* note 222; see also Galinsky, *supra* note 9, at 454 (“Power allows the grip of social norms and standards to lose their hold on regulating behavior.”); Keltner, *supra* note 221, at 269 (“[T]he experience of power involves the awareness that one can act at will without interference or serious social consequences. Acting within reward-rich environments and being unconstrained by others’ evaluations or the consequences of one’s actions, people with elevated power should be disposed to elevated levels of approach-related affect, cognition, and behavior.”).

²²⁵ Haddock, *supra* note 222.

²²⁶ *Id.*; see also Keltner, *supra* note 221, at 272 (“[H]igh-power individuals, inclined to approach rewards, will attend to others in terms of how they enable the power holder to satisfy current goals and desires.” (citation omitted)).

²²⁷ Keltner, *supra* note 221, at 276; see also Keltner, *supra* note 221, at 277 (“High-power individuals tend to act in ways that disregard conventions, morals, and the effects on others.”); Galinsky, *supra* note 9, at 459 (“It has been widely observed that power can lead to corruption and ultimately produce antisocial consequences. Much empirical research supports this claim. Power leads to egocentrism, a preoccupation with the concerns of the self at the expense of the awareness of others’ motives.”).

²²⁸ See DAVID KIPNIS, *THE POWERHOLDERS* 176–77 (1976).

²²⁹ MARTHA STOUT, *THE SOCIOPATH NEXT DOOR* 1–2 (2005).

²³⁰ *Id.* at 3; see also *id.* at 9 (“About one in twenty-five individuals are sociopathic, meaning, essentially, that they do not have a conscience. It is not that this group fails to grasp the distinction between good and bad; it is that the distinction fails to limit their behavior. The intellectual difference between right and wrong does not bring on the emotional sirens and flashing blue

one acts with great power and lack of constraints, then, one moves in the direction of sociopathy.²³¹

I have argued in this paper that there is a tendency for the dominant group to act as though they were in the state of nature when dealing with racial minorities. There is a tendency to not feel any constraint or to move to a situation of fewer constraints when relating to persons of color. This exercise of power will very likely corrupt the dominant group in the way that I have described above. They will be tempted to become bad persons. The philosopher Schopenhauer argues that when someone does wrong things whenever constraints are removed, they are called bad.²³² He identifies two primary characteristics of bad persons: (1) they pursue only their own interests and (2) they are indifferent to the interests of others and, in fact, see their lives as totally distinct from the lives of other people.²³³ They regard themselves as absolutely different from every other person. Indeed, they regard them “as masks without any reality.”²³⁴

When one acts with plenary power — from the perspective of the state of nature — one is tempted to be a bad person. One pursues self-interest and sees others as foreign and different — not real; just masks. Thus, acting with great power as though in the state of nature is apt to make the dominant group into bad persons. It presents too much temptation to do bad things. It reveals the heart of darkness. Acting as though in the state of nature will lead to pain in the dominant group — what Schopenhauer calls the “sting of conscience”²³⁵ and the knowledge of one’s wickedness.²³⁶

lights, or the fear of God, that it does for the rest of us. Without the slightest blip of guilt or remorse, *one in twenty-five people can do anything at all.*”).

²³¹ See Keltner, *supra* note 221, at 271 (suggesting a connection “between elevated power and psychopathy”).

²³² ARTHUR SCHOPENHAUER, *THE WORLD AS WILL AND REPRESENTATION* Vol. I 362 (Dover Publications 1969) (when a person is “inclined to do wrong the moment the inducement is there and no external power restrains, we call him bad.”).

²³³ *Id.* at 363.

²³⁴ *Id.*

²³⁵ Schopenhauer explains: “This pain is felt in the case of every bad action, whether it be mere injustice arising out of egoism or pure wickedness; and according to its duration it is called the sting of conscience or pangs of conscience.” *Id.* at 364–65; see also JOHN RAWLS, *A THEORY OF JUSTICE* 445 (1971) (one feels guilty when one wrongly advances one’s interests).

²³⁶ SCHOPENHAUER, *supra* note 232, at 366 (“[I]t is the self-knowledge of one’s own will and of its degree that gives conscience its sting.”). For the sake of contrast, John Rawls has argued that when one acts from the moral point of view, one acts from the perspective of eternity. See RAWLS, *supra* note 235, at 587 (“Thus to see our place in society from the perspective of this position is to see it *sub specie aeternitatis*: it is to regard the human situation not only from all social but all temporal points of view. The perspective of eternity is not a perspective from a certain place beyond the world, nor the point of view of a transcendent being; rather it is a certain form of thought and feeling that rational persons can adopt within the world . . . Purity of heart, if one could attain it, would be to see clearly and act with grace and self-command from this point of view.”).

The experience of slavery is instructive in this area. That operating with great power or with lack of constraint could have seriously negative and corrupting effects on the wielders of such power — the slave masters — was well recognized during the era of slavery. For instance, the famous *Somerset v. Stewart*²³⁷ court explained the morally corrupting effects on the slave master as follows:

Let us reflect on the consequences of servitude in a light still more important. The corruption of manners in the master, from the entire subjection of the slaves he possesses to his sole will, from whence spring forth luxury, pride, cruelty, with the infinite enormities appertaining to their train²³⁸

Similarly, Thomas Jefferson recognized the morally deleterious effects on the slave masters:

The whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part and degrading submissions on the other The man must be a prodigy who can retain his manners and morals undepraved by such circumstances. And with what execration should the statesman be loaded, who permitting one half the citizens thus to trample on the rights of the other, transforms those into despots, and these into enemies, destroys the morals of the one part, and the amor patriae of the other.²³⁹

The effect of such power on the dominant group may already be revealing itself in the present day in damaging ways. Racial minorities report that they are often subject to attacks in every day personal encounters.²⁴⁰ Such at-

²³⁷ 98 Eng. Rep. 499 (K.B. 1772). *Somerset* was a “landmark decision” where the court of the King’s Bench of England “proclaimed that neither moral nor political grounds existed to support slavery.” A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 313 (1978); see also Samuel J.M. Donnelly, *Reflecting on the Rule of Law, Its Reciprocal Relation with Rights, Legitimacy and Other Concepts and Institutions*, 32 SYRACUSE J. INT’L. L. & COM. 233, 237 (2005) (*Somerset* is “the starting point for the falling dominos that led to the abolishment of slavery, desegregation and ultimately affirmative action in the United States.”).

²³⁸ 98 Eng. Rep. at 500. *Somerset*’s attorney, Francis Hargrave, argued that slavery “corrupts the morals of the master, by freeing him from those restraints with respect to the slave, so necessary for control of the human passions” HIGGINBOTHAM, JR., *supra* note 237, at 337.

²³⁹ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 173–74 (J.W. Randolph 1853); see also DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 28 (1987) (“Slavery, Jefferson has written, brutalizes slave owner as well as slave”); Andrew E. Taslitz, *Hate Crimes, Free Speech and the Contract of Mutual Indifference*, 80 B.U.L. REV. 1283, n.157 (2000) (“Thomas Jefferson feared that slavery made whites haughty and overbearing.”).

²⁴⁰ See Peggy C. Davis, *Law of Microaggression*, 98 YALE L.J. 1559, 1565–68 (1988).

tacks or “microaggressions” are the “subtle, stunning often automatic, and non-verbal exchanges which are ‘put downs’ of [minorities].”²⁴¹ Schopenhauer’s prediction that bad actions would result in the sting of conscience has perhaps come to pass in the phenomenon known as “white guilt.” According to some commentators, whites feel guilty for the racism perpetrated against minorities.²⁴²

V. THE CRITIQUE OF PLENARY POWER AND THE LIFTING OF CONSTRAINTS REVISITED

This Article has discussed plenary power doctrines and other legal doctrines that lift constraints off the dominant group with respect to interactions with racial minorities. As discussed, Congress has plenary power over Native Americans and immigration matters.²⁴³ Such plenary power has been exercised to the detriment of Native Americans and non-citizens.²⁴⁴ Some have questioned the vitality of the plenary power doctrine in the immigration context.²⁴⁵ Others question that analysis and assert that the plenary power doctrine continues to exist within immigration law and policy.²⁴⁶ Similarly, scholars have ar-

²⁴¹ *Id.* at 1565 (citation omitted); see also Anthony Alfieri, *Color/Identity/Justice: Chicano Trials*, 53 DUKE L.J. 1569, 1605 n.156 (2004) (“The mayhem of racism extends to covert cultural forms of violence.”); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1129 (2008) (“[S]ome white people repeatedly engage in such racial ‘microaggressions’ without any apparent awareness of how they are perceived by black people.”).

²⁴² See Angela Mae Kupenda, *Simply Put: How Diversity Benefits Whites and How Whites Can Simply Benefit Diversity*, 6 SEATTLE J. FOR SOC. JUST. 649, 660 (2008) (“Over the years, some of the white students in my Race and the Law class have told me that they do not want to discuss race (even though they have enrolled in a race and the law class) because these discussions make them feel guilty as whites. Diverse perspectives in a classroom help expose nonwhite anger and white guilt.”); Shelby Steele, *White Guilt*, 59 AM. SCHOLAR 497, 498–99 (1990); Janet K. Swim & Deborah Miller, *White Guilt: Its Antecedents and Consequences for Attitudes toward Affirmative Action*, 25 PERSONALITY SOC. PSYCHOL. BULL. 500, 505, 507, 509 (1999) (“The more participants believed . . . that Blacks often experience discrimination . . . the higher were their feelings of White guilt.”); Abigail Thernstrom, *Steele Sense: From White Racism to White Guilt*, NATIONAL REVIEW ONLINE, May 10, 2006, <http://article.nationalreview.com/279331/steele-sense/abigail-thernstrom> (“white guilt about the nation’s racist past has been a powerful . . . force”).

²⁴³ See *supra* notes 73–76, 112–115.

²⁴⁴ See *supra* notes 84–87, 117–125.

²⁴⁵ See Gabriel Chin, *Is There A Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 258–59 (2000) (suggesting that the language in the cases supporting the plenary power doctrine may be dicta).

²⁴⁶ See T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT’L L. 862, 865 (1989) (“The ‘plenary power’ cases — harsh in their implications as they are — have been reaffirmed and even extended in the Constitution’s second hundred years. Immigration law has remained blissfully untouched by the virtual revolution in constitutional law since World War II, impervious to developments in due process, equal protection and criminal procedure.”); Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?* 14 GEO. IMMIGR. L.J. 289, 304 (2000) (“I am ultimately not willing to

gued that Congress's plenary power over Native Americans is "baseless"²⁴⁷ and that it has been created by "judicial fiat."²⁴⁸ This Article criticizes plenary power doctrines and other legal doctrines that remove constraints from the dominant group from another perspective: such power has bad effects on the wielders of such power. This critique is significant because law should be structured to promote the good.²⁴⁹

VI. CONCLUSION

This Article advances a new theoretical framework to help explain and understand race and American Law. In particular, the Article argues that we can employ a philosophical model to try to understand what often happens when the dominant group deals with persons of color. The Article contends that when the dominant group acts with great power or lack of constraint, it often has acted or acts as if it were in what political philosophers have called the state of nature. Thus, the Article argues that there is a tendency not to feel any constraints or move toward a situation with fewer constraints on the dominant group. The Article examines a number of areas within law to illustrate this phenomenon. The Article contends that there is reason to believe that operating with great power or lack of constraint will have bad effects on the persons wielding such power.

accept . . . that the plenary power doctrine is a figment of immigration law professors' collective imagination.").

²⁴⁷ Ann E. Tweedy, *Connecting the Dots between the Constitution, the Marshall Trilogy, and United States v. Lara: Notes toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 659 (2009).

²⁴⁸ Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1168 (2003).

²⁴⁹ See RAYMOND A. BELLIOTTI, JUSTIFYING LAW: THE DEBATE OVER FOUNDATIONS, GOALS AND METHODS 24 (1992) ("Thus, a proposition is not truly a law, regardless of its genesis and pedigree, if it is contrary to the common good."); LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 60 (1987) ("A law is unjust if it is 'contrary to human good'; it is '*no law at all*' and does not bind in conscience . . .").