

2010

## Bobbitt, the Rise of the Market State, and Race

George A. Martinez

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### Recommended Citation

Martinez, George A. "Bobbitt, the Rise of the Market State, and Race." *American University Journal of Gender Social Policy and Law* 18, no. 3 (2010): 587-605.

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# BOBBITT, THE RISE OF THE MARKET STATE, AND RACE

GEORGE A. MARTÍNEZ\*

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## I. INTRODUCTION

Recently, renowned legal scholar, Philip Bobbitt has put forward far-reaching and influential ideas in two books<sup>1</sup> that some have hailed as being classics on the order of Thomas Hobbes' *Leviathan* and Niccolo Machiavelli's *The Prince*.<sup>2</sup> In his works, Bobbitt argues that the nature of

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\* Professor of Law, Dedman School of Law at Southern Methodist University, B.A. Arizona State University; M.A. (Philosophy) University of Michigan; J.D. Harvard University.

1. PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* (2002) [hereinafter BOBBITT, *ACHILLES*]; PHILIP BOBBITT, *TERROR AND CONSENT* (2008) [hereinafter BOBBITT, *TERROR*].

2. See, e.g., Dennis Patterson, *The New Leviathan*, 101 MICH. L. REV. 1715, 1732 (2003) (indicating Sir Michael Howard's conviction that Bobbitt's *THE SHIELD OF ACHILLES* will become "one of the most important works on international relations [in] the last fifty years").

the state is changing in a fundamental way in that we are in the process of shifting from a nation state into a market state.<sup>3</sup>

The authority of the nation state is based on the idea that the state offers to improve the material well-being of its people in exchange for its power to govern.<sup>4</sup> According to Bobbitt, the nation state will not be able to satisfy this goal because of a number of current developments in the world. One such development is the realization that nation states will no longer be able to protect their citizens or to preserve their national cultures.<sup>5</sup> Instead, the market state is emerging as an entity to take the nation state's place. In contrast to the nation state, the market state offers to maximize individual opportunities for the people in exchange for power.<sup>6</sup>

Bobbitt's theories have profound legal implications and scholars are beginning to explore these implications in a number of legal and non-legal fields.<sup>7</sup> This article seeks to fill a gap in the literature by considering the significance of his views in the area of race, including immigration law and policy. In particular, this article argues that Bobbitt's theories explain a number of phenomena we observe resulting from the U.S.'s racial politics including the hyper-incarceration of lower-class blacks, the current structure of affirmative action, the radical changes in pleading requirements in civil rights matters, and that much of current immigration law and policy—especially the sub-national attempts to control immigration—are based on outmoded ideas of the nation state. Much of immigration law and restrictive immigration policy constitutes an effort to preserve our national identity or culture. These efforts are misguided inasmuch as the nation state will not be able to preserve its culture. This paper argues that race theorists must take into account Bobbitt's view in their own analysis: that

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3. See BOBBITT, ACHILLES, *supra* note 1, at 17 (suggesting that with the demise of the nation state, the market state "will ultimately be defined by its response to the strategic threats that have made the nation state no longer viable").

4. See *id.* at xxvi (identifying the differences between the promises offered by the nation state and the market state).

5. See *id.* at xxii (proffering population expansion, disease, famine, and environmental damage as examples of threats against which the nation state cannot protect its citizens).

6. *Id.* at xxvi.

7. See, e.g., Ari Afilalo & Dennis Patterson, *Statecraft, Trade and the Order of States*, 6 CHI. J. INT'L L. 725, 730 (2006) (applying Bobbitt's theory to the international trade system); Robert J. Delahunty & Antonio F. Perez, *Moral Communities or a Market State: The Supreme Court's Vision of the Police Power in the Age of Globalization*, 42 HOUS. L. REV. 637, 642-43 (2009) (applying Bobbitt's theory to explain changes in American constitutional law); Ron Sievert, *A New Perspective on the International Criminal Court: Why the Right Should Embrace the ICC and How America Can Use It*, 68 U. PITT. L. REV. 77, 83 (2006) (examining the International Criminal Court in light of Bobbitt's theory); Lindsay J. Thompson, *The Future of Enterprise Regulation: Corporate Social Accountability and Human Freedom*, 3 J. BUS. & TECH L. 357, 363 (2008) (examining the future of enterprise regulation in light of Bobbitt's theory).

we are changing into a market state.

In Part II of this article, I set out Bobbitt's views on the rise of the market state. In Part III, I describe Constitutional law that is facilitating the rise of the market state. In Part IV, I explain that the shift to a market state has important implications for issues of race, particularly in immigration law. Finally, in Part V, I argue that race theorists need to take account of Bobbitt's views in analyzing issues of race.

## II. BOBBITT AND THE RISE OF THE MARKET STATE

In recent years, a number of big picture theorists have sought to interpret changes in the modern state.<sup>8</sup> For example, Francis Fukuyama has argued that when the Berlin Wall fell, democracy won the global struggle with communism and history ended.<sup>9</sup> Working within this grand theoretical tradition, Phillip Bobbitt has recognized that history has not ended but continues to develop and unfold. In support of his argument, he has mapped out the changing nature of the state.<sup>10</sup>

The nature of our constitutional order is changing from a nation state into a market state.<sup>11</sup> Bobbitt argues that the wars, or "long war,"<sup>12</sup> of the twentieth century produced the nation state, which is based on the notion that it would provide for the material welfare of its citizens.<sup>13</sup> At issue in the "long war" was what form of the nation state would prevail: democracy, communism, or fascism.<sup>14</sup> According to Bobbitt's account, regardless of its form, the nation state will no longer be able to fulfill its side of the bargain—to provide for the material welfare of the people—and it will be delegitimized.<sup>15</sup> He asserts that the nation state will fall because

8. See ROBERT COOPER, *THE BREAKING OF NATIONS: ORDER AND CHAOS IN THE TWENTY-FIRST CENTURY* (2003); FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

9. See Francis Fukuyama, *The End of History?*, NAT'L INTEREST, Summer 1989, at 3, 4 (suggesting that the world would be governed by Western liberal democracy following the end of the Cold War).

10. See Afilalo & Patterson, *supra* note 7, at 30 (indicating Bobbitt's rejection of Fukuyama's contention that the fall of the Berlin Wall marked the end of history).

11. BOBBITT, *ACHILLES*, *supra* note 1, at xxi-xxii (articulating that the market state is emerging from the relationship between strategy and the legal order).

12. See *id.* at 24 (suggesting that the conflicts starting with World War I through the end of the Cold War should all be thought of as one war "because all were fought over a single set of constitutional issues that were strategically unresolved until the end of the Cold War and the Peace of Paris in 1990").

13. *Id.* at xxvi.

14. See *id.* at 24-25 (arguing that the struggle of two imperial states, Germany and Russia, propelled others in Europe to fight to "determine what kind of state would supersede the imperial states of Europe that emerged in the nineteenth century").

15. *Id.* at 215; see also Daniel R. Williams, *Averting a Legitimation Crisis and the Paradox of the War on Terror*, 17 MICH. ST. J. INT'L. L. 493, 522 (2009) (suggesting that the legitimacy of the nation state is in question if it is unable to confront and tackle

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it will be unable to: (1) protect its citizens from weapons that are able to destroy on a mass scale; (2) escape the reach of international law; (3) control its economy; (4) protect its culture; and (5) protect itself from global problems, for example, global warming.<sup>16</sup> The market state will then emerge to replace the nation state. Unlike the nation state, the market state will seek to “maximize the opportunities enjoyed by all members of society” in exchange for giving the state power.<sup>17</sup> The market state achieves its goals through market-based, rather than redistributive, incentives.<sup>18</sup> The market state operates more to “prevent social instability” than to promote ideals of justice or any set of moral values.<sup>19</sup> The market state is indifferent to culture, including race, ethnicity, and gender.<sup>20</sup> As a result, the market state is “an ideal environment for multiculturalism.”<sup>21</sup>

### III. THE TRANSFORMATION OF CONSTITUTIONAL LAW IN THE SHIFT TO A MARKET STATE

Constitutional scholars have recognized that periodically, the Supreme Court brings about major Constitutional shifts.<sup>22</sup> For example, Bruce Ackerman has described a system of “higher lawmaking” where the Supreme Court at certain moments will issue “a series of transformative opinions” which may be at odds with fundamental principles of the earlier era.<sup>23</sup> Ackerman argues that such a shift took place when the Supreme Court approved the New Deal legislation of President Franklin Roosevelt.<sup>24</sup> The Supreme Court is now similarly engaged in another project of transformational decision-making.

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problems such as the economy and global warming).

16. See BOBBITT, ACHILLES, *supra* note 1, at 228; Fukuyama, *supra* note 9, at 5 (describing Alexandre Kojève’s conception of human history as “based on the existence of ‘contradictions’” which are resolved in a universal, homogeneous state).

17. BOBBITT, ACHILLES, *supra* note 1, at 229.

18. See *id.* (illustrating that the nation state achieves behavioral conformity through “impartial rules and regulations” while the market state achieves the same through “incentive structures and sometimes draconian penalties”).

19. *Id.* at 229-30.

20. *Id.* at 230.

21. *Id.*

22. See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 575-83 (2009); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1051 (2001) (describing a “veritable revolution in constitutional doctrine” and observing that “we are in the middle of a paradigm shift that has changed the way that people write, think and teach about American constitutional law”).

23. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 267-69 (1991) (illustrating the conflict the Court faces in confronting transformative statutes).

24. See *id.* at 268 (arguing, additionally, that Reagan Republicans used the same system to repeal the New Deal legislation).

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Robert Delahunty and Antonio Perez have recently argued that the Supreme Court is in the process of restructuring American constitutional law so as to help usher in the era of the market state, as understood by Bobbitt, which would then allow the United States to be competitive in the globalized economy.<sup>25</sup> According to this account, the primary purpose of the United States government is “to increase the international competitiveness of the American economy.”<sup>26</sup>

According to Delahunty and Perez, we can understand the Supreme Court’s new doctrine in a number of areas in light of the Court’s effort to accommodate the emerging market state as we move away from the nation state.<sup>27</sup> For instance, with respect to federalism, the Supreme Court is taking the position that if states were to become involved in foreign affairs, they might introduce issues of morality, which could inhibit the development of the market state and the international market.<sup>28</sup> They interpret the Supreme Court’s decision in *American Insurance Ass’n v. Garamendi*<sup>29</sup>—which invalidated California’s attempt to tie foreign corporations to the Holocaust—to mean that states have no legitimate interest in subjecting international capital markets to moral judgments.<sup>30</sup> Instead, the top priority is to construct efficient international and cross-border markets.<sup>31</sup>

In the area of race and gay rights, the Supreme Court’s cases also reflect the emerging market state. For instance, in *Lawrence v. Texas*, the Supreme Court held that states could not outlaw sodomy.<sup>32</sup> The moral judgment of the state could not serve as a basis to outlaw this activity.<sup>33</sup> In

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25. See Delahunty & Perez, *supra* note 7, at 643 (suggesting that the Court has aligned its views with those of the American business and political elites).

26. See ROBERT GILPIN, *THE CHALLENGE OF GLOBAL CAPITALISM: THE WORLD ECONOMY IN THE 21ST CENTURY* 252 (2000) (citing a speech by then President Clinton in which he expressed his belief that the United States’s position in the world would depend on its international economic competitiveness).

27. See Delahunty & Perez, *supra* note 7, at 664-69 (indicating that the Court may not be aware of its effect on the transition from nation state to market state).

28. See *id.* at 648-49 (explaining the Court’s view that states should not be allowed to introduce “moral norms and judgments” into the otherwise free market).

29. See 539 U.S. 396 (2003) (holding that California’s Holocaust Victim Insurance Relief Act (HVIRA) was preempted by the president’s power to conduct foreign policy).

30. See Delahunty & Perez, *supra* note 7, at 649-50 (suggesting that the Court’s holding was based on faulty logic regarding the ability of “mere” executive agreements to trump state law).

31. *Id.* at 648-49.

32. See 539 U.S. 558 (2003) (striking down anti-sodomy laws as violating due process and equal protection rights).

33. See Delahunty & Perez, *supra* note 7, at 693-94 (explaining that under the Equal Protection Clause, moral disapproval alone is an insufficient rationale to justify a law that discriminates against a group of people).

addition, *Lawrence*, properly understood, is an effort to promote efficient markets.<sup>34</sup> The general idea is that gay workers may be more efficient than non-gay workers for a number of reasons.<sup>35</sup> As Delahunty and Perez explain:

Homosexual employees may, for example, be able or willing to work longer hours than married heterosexuals with families; may be more open to relocating as corporate needs require; may not be as likely to sacrifice career goals to childbearing or child rearing; [and] may require a lower level of health care benefits . . . .<sup>36</sup>

Similarly, in *Grutter v. Bollinger*,<sup>37</sup> the Supreme Court upheld affirmative action in large part because of the needs of the market.<sup>38</sup> For instance, Justice O'Connor, who wrote the majority opinion, observed that: "[m]ajor American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints."<sup>39</sup>

Beyond all of this, the Supreme Court is reaching these conclusions in large part through its reliance on elite decision makers and their views on what is needed for the nation to succeed in the international market.<sup>40</sup> Summarizing these developments, Delahunty and Perez conclude that:

Our review of the Court's decisions should have made it clear that fundamental premises of constitutional law are undergoing a tectonic shift . . . . What is happening in the case law reflects, on the judicial plane, the processes by which the nation state is steadily yielding its place to a new order . . . . The Court is more or less self-consciously engaged in the project of adapting and restructuring the Constitution so that it can be made to fit the perceived requirements of the multicultural, value-free, libertarian, market state whose emergence Professor Bobbitt envisages and describes.<sup>41</sup>

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34. *See id.* at 694-95 (promoting the mainstreaming of homosexuality, as homosexuals as a group are perceived to bring certain competitive advantages to the marketplace).

35. *Id.*

36. *Id.*

37. *See* 539 U.S. 306 (2003) (determining that the University of Michigan Law School's asserted interest in obtaining the educational benefits that flow from a diverse student body was compelling).

38. *See* Delahunty & Perez, *supra* note 7, at 697-704 (explaining that universities represent training grounds for a number of our nation's leaders and that the pathways need to be open to qualified individuals of all races and ethnicities).

39. 539 U.S. at 328-32.

40. *See* Delahunty & Perez, *supra* note 7, at 697-99 (suggesting that community morality is subordinate to the desires of the "winners" in the market).

41. *Id.* at 722.

## IV. THE MARKET STATE AND THE IMPACT ON RACE

The ongoing turn toward a market state has important implications for issues of race, including immigration law. In particular, this section argues that the shift to a market state explains a number of race-related phenomena negatively impacting racial minorities and that sub-national efforts to control immigration in order to preserve “American” culture are doomed to failure and should be viewed as the last gasp of a dying nation state. The following discusses each of these matters in further detail.

*A. The Market State, Hyper-incarceration, Affirmative Action, and the Assimilation of Minorities*

This shift toward a market state is generating a worldview that does not see the integration or assimilation of minorities into dominant society as a necessary goal. In this respect, it is most important to notice that *Grutter*’s reliance on the need to be competitive in the globalized market<sup>42</sup> means that the decision moves away from *Brown v. Board of Education*’s concern that minorities had to be assimilated into a unified country so that communism could not take advantage of divisions in society based on race.<sup>43</sup> *Brown*, therefore, represents the Supreme Court’s Cold War effort to desegregate or assimilate minorities into dominant American society.<sup>44</sup> At the present, however, to be competitive in the international market, minorities need not be assimilated into the larger society. Instead, it is only important to select leaders from a range of racial and ethnic backgrounds.<sup>45</sup> As Delahunty and Perez explained, the Court no longer “feel[s] a need to foster a national unity that transcends racial consciousness or to further the assimilation of racial minorities. Such strategic needs have passed with the passing Cold War’s chief external threat.”<sup>46</sup>

The end of *Brown*’s assimilation project was apparently confirmed in the Supreme Court’s recent case, *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>47</sup> In *Parents Involved*, the Supreme Court

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42. *Id.* at 697-704.

43. *See* 347 U.S. 483, 483 (1954) (holding that state laws establishing separate public schools for black and white students denied black children equal educational opportunities); *see also* Delahunty & Perez, *supra* note 7, at 703 (explaining that the Court now sees diversity as an asset to be exploited rather than a liability with the potential to weaken or even fracture the nation).

44. *See* 347 U.S. at 483 (determining that separate is not equal and that minorities should be assimilated into society).

45. *See* Delahunty & Perez, *supra* note 7, at 703-04 (describing the push to ensure that diversity in the leadership roughly matches the diverse population of the global marketplace).

46. *Id.*

47. *See* 551 U.S. 701 (2007) (prohibiting the assignment of students to public schools solely for the purpose of achieving racial integration and declining to recognize

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struck down voluntary racial integration schemes that were established by the Seattle and Louisville School Districts.<sup>48</sup> Dissenting, Justice Breyer seemed to recognize the end of the *Brown* era, observing that the decision breaks the promise of *Brown* and that America would one day regret this decision.<sup>49</sup>

As discussed above, the move to the market state has generated the notion that minorities need not be assimilated. This explains the phenomena that are now observable. For instance, University of California at Berkeley sociologist Loïc Wacquant has powerfully argued in recent years that the United States is in the process of constructing a “gargantuan penal state.”<sup>50</sup> This process, which Wacquant argues is fueled by neoliberalism or globalization, and targets for hyper-incarceration, instead of assimilation into mainstream society, “lower class black men in the crumbling ghetto.”<sup>51</sup>

In this regard, Wacquant describes a “sudden ‘blackening’” of the “carceral system” where “since 1989 and for the first time” in American history, most new prisoners are African-American.<sup>52</sup> In 1999, approximately 800,000 African-American males were in prison.<sup>53</sup> He connects today’s hyper-incarceration of African Americans to America’s racial history. Indeed, he argues that American society has employed a number of “peculiar institutions”—slavery, Jim Crow laws, and the ghetto—to isolate and control African-Americans.<sup>54</sup> According to Wacquant, the prison system is the fourth such peculiar institution.<sup>55</sup> Significantly, these peculiar institutions arose because blacks were “deemed inassimilable.”<sup>56</sup>

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racial balancing as a compelling state interest).

48. See *id.* at 710-11 (explaining that these schemes were not narrowly tailored and were actually quotas).

49. See *id.* at 868-69 (Breyer, J., dissenting) (agreeing, however, that the Constitution does not impose a duty to desegregate districts if the district has not practiced racial discrimination).

50. See Loïc Wacquant, *Racial Stigma in the Making of America’s Punitive State 1* (2008), [http://sociology.berkeley.edu/faculty/wacquant/wacquant\\_pdf/RACIALSTIGMAINMAKINGPUNITIVESTATE.pdf](http://sociology.berkeley.edu/faculty/wacquant/wacquant_pdf/RACIALSTIGMAINMAKINGPUNITIVESTATE.pdf) [hereinafter Wacquant, *Racial Stigma*] (suggesting that hypertrophic and hyperactive police, court, and prison systems have led to the incarceration of many minorities and is evidence of a backlash to the civil rights movement).

51. *Id.* at 3.

52. See Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95, 96 (2001).

53. See *id.*

54. See *id.* at 98-99.

55. See *id.*

56. See Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the ‘Race Question’ in the U.S.*, 13 NEW LEFT REV. 41, 44 (2002) (explaining that the first three peculiar institutions were designed to extract labor from and socially ostracize an

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Wacquant argues that the astonishing growth of the penal state is the result of the “planned atrophy of the social state.”<sup>57</sup> Understood in Bobbitt’s terms, the hyper-incarceration of blacks is a result of the shift from the nation state to a market state. Because a nation state seeks to improve the well-being of its citizens—*e.g.*, provide welfare—and a market state does not, the result of the shift is to “criminalize poverty.”<sup>58</sup> Lower class blacks need not be assimilated into dominant society.

This shift to a market state also explains the major change that is taking place among beneficiaries of affirmative action. Kevin Brown and Jeannine Bell argue that the beneficiaries of affirmative action are biracial and black immigrants and their offspring.<sup>59</sup> Blacks who are descended from ancestors who were oppressed in America— “Ascendant Blacks”<sup>60</sup>— are “likely more underrepresented in affirmative action.”<sup>61</sup> As a result, such persons will not qualify for important social benefits in the future.

The Constitutional law developing to facilitate the emergence of the market state would explain this change in affirmative action beneficiaries. Since it is no longer necessary to assimilate minorities, “Ascendant Blacks” need not be incorporated into affirmative action programs. The Supreme Court in *Grutter* relied on the needs of the market place to justify affirmative action.<sup>62</sup> In particular, the globalized market only requires “leaders” from racial minorities.<sup>63</sup> For this purpose, it would seem that affirmative action decision-makers might have determined that biracial and black immigrants can fulfill that leadership role and there is no need to assimilate “Ascendant Blacks” into these programs. Earlier affirmative

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outcast group: Blacks).

57. See Wacquant, *Racial Stigma*, *supra* note 50, at 7 (identifying the spread of blackened images of urban destitution and dependency as the source of mounting resentment towards public aid which bolstered support for restricted welfare).

58. See *id.*

59. See Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229, 1230 (2008) (suggesting that the disparity raises the question of whether or not all blacks should be grouped together for affirmative action purposes).

60. See *id.* at 1236 (explaining that “the general goal of defining blacks as ‘Ascendants’ is to limit the term ‘Ascendants’ to either those who personally experienced America’s racially discriminatory history their entire lives or were born from parents who were generally considered black at the time that affirmative action was adopted”).

61. See *id.* at 1230 (explaining why such persons are less likely to qualify for positions of social advantage and are simultaneously less likely to overcome their circumstances).

62. See *Grutter v. Bollinger*, 539 U.S. 306, 328-32 (2003) (identifying diversity in the market place as a compelling state interest).

63. See Delahunty & Perez, *supra* note 7, at 703 (distinguishing the need for integration and advancement of the entire group from the education and success of a handful of leaders).

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action programs that benefitted “Ascendant Blacks” would have been carrying out the cold war goal of assimilation of minorities in response to the perceived external Soviet threat, which no longer exists in the age of the emerging market state.

*B. The Market State, New Heightened Pleading Standards, and Discrimination Cases*

Some law and economics scholars have argued in recent years that there is no need to outlaw employment discrimination.<sup>64</sup> For instance, Gary Becker argues that laws against employment discrimination are unnecessary because the operation of the market would make discrimination unprofitable.<sup>65</sup> Similarly, Richard Posner has argued that employment discrimination laws are inefficient and wasteful in that they impose costs, such as litigation costs, which do not promote or advance productivity.<sup>66</sup>

Concerns about the competitiveness of American businesses—the shift to a market state—now may be generating a major change in pleading requirements for civil rights or discrimination cases, including in the employment context. For a half century, the standard for a motion to dismiss was set out in *Conley v. Gibson* where the Supreme Court ruled that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.”<sup>67</sup> Subsequently, in *Bell Atlantic Corp. v. Twombly*,<sup>68</sup> an antitrust case, the Supreme Court established a new heightened pleading standard that required a complaint to allege “enough facts to state a claim for relief that is plausible on its face.”<sup>69</sup> At first, some thought the new *Twombly* standard might be

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64. See GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 1 (2d ed. 1971) (asserting that discrimination could not be responsible for the high unemployment rates in minority communities because if minorities were paid less there would be more incentive to hire them).

65. See *id.* at 45 (applying economic theory to illustrate that when the difference between the wages for minorities and whites is zero, the employer’s income is maximized).

66. See Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 513, 514 (1987) (arguing that Title VII is a more costly means of eradicating discrimination than the machinations of the market, specifically competition between those employers willing to hire blacks and those unwilling).

67. 355 U.S. 41, 45-46 (1957).

68. See 550 U.S. 544, 556 (2007) (holding that, in order to survive a motion to dismiss, a claim made pursuant to the Sherman Act must provide plausible factual allegations).

69. See *id.* at 570 (upholding the dismissal of the plaintiff’s claim since the plaintiff did not provide any facts that could establish that the defendant violated the Sherman Act).

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confined to antitrust cases,<sup>70</sup> but the Supreme Court has recently made clear in *Ashcroft v. Iqbal*<sup>71</sup> that the tough new pleading standard applies to all civil cases, including civil rights or discrimination cases.<sup>72</sup> Plaintiffs must allege sufficient facts to state a plausible claim in order to survive a motion to dismiss.<sup>73</sup> Perhaps the most significant casualties of this shift in pleading standard are employment discrimination cases.<sup>74</sup> Using this plausibility standard, courts are now dismissing employment discrimination cases at a higher rate than under the previous, more lenient notice pleading standard.<sup>75</sup>

In extending *Twombly*'s<sup>76</sup> plausibility standard to all civil cases, the Supreme Court emphasized market considerations as an explanation for the new heightened pleading requirement.<sup>77</sup> Thus, the shift to a market state may now have a seriously negative impact on the ability for plaintiffs to bring discrimination claims. At a minimum, this change would seem to be consistent with the views of the law and economics scholars who see employment discrimination laws as wasteful and unnecessary. Erecting barriers to discrimination lawsuits is a way to eliminate waste, including

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70. See Kendall W. Hannon, *Much Ado about Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1814-15 (2008) (concluding that, in contrast to the expectation that *Twombly* would apply only to antitrust cases, only 3.7% of the cases it was cited in dealt with antitrust issues).

71. See 129 S. Ct. 1937, 1950-51 (2009) (sustaining the dismissal of the respondent's complaint on the grounds that he failed to state a claim that was facially plausible).

72. See *id.* at 1953 (providing that *Twombly* applies to the application of Rule 8 of the Federal Rules of Civil Procedure in all cases).

73. See *id.* at 1949 (explaining that the plausibility requirement set forth in *Twombly* requires that the plaintiff provide the court with facts that implicate the defendant).

74. See *The Supreme Court, 2008 Term: Leading Cases*, 123 HARV. L. REV. 252, 262 (2009) (asserting that *Iqbal*'s probability requirement will make it harder for plaintiffs in employment discrimination cases to survive a motion to dismiss since they are less likely to have evidence to support their allegations); see also Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss under Iqbal and Twombly*, in ILLINOIS PUBLIC LAW AND LEGAL THEORY RESEARCH PAPER SERIES, 1 (2009).

75. See Thomas, *supra* note 74, at 14 (noting that after *Iqbal*, there has been a "greater effect of the motion to dismiss on employment discrimination cases than most other types of cases" with such motions being granted at the rate of 53% as compared to 42% under *Conley*); Joseph A. Seiner, *After Iqbal*, 454 WAKE FOREST L. REV. (forthcoming 2010) (contrasting the *Conley* pleading standard with the pleading standard after *Iqbal* and concluding that the *Conley* standard was more "relaxed").

76. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

77. *Id.* at 557-58. See A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 21 (2009) (stating that the Court was concerned with increasing efficiency when it raised the pleading standard in *Twombly* since a higher standard would lead to a greater number of cases being dismissed and thus lower litigation costs).

litigation costs, that do not promote productivity and competitiveness in the international market.

That the emergence of the market state may be generating this historic shift in pleading requirements is made clear when one considers pleading in the global context. Historically, America's lenient standard of notice pleading has stood at odds with the rest of the world's practice.<sup>78</sup> Most civil and common-law countries have imposed higher fact pleading requirements.<sup>79</sup> In fact, in the rest of the world, the standards are virtually the same as the standard articulated in *Twombly*, and require "that the facts supporting a claim be stated with reasonable particularity."<sup>80</sup> Through its decisions in *Iqbal* and *Twombly*, the Supreme Court moved to the "global norm" in pleading requirements.<sup>81</sup> And indeed: "[t]his shift in pleading focus from notice to facts, is a momentous shift in kind, and one that takes American pleading from its traditional notice-based exceptionalism to a fact based system fundamentally more akin to foreign pleading regimes."<sup>82</sup> This move to a global norm in pleading standards may be designed to place American businesses on a level playing field as they attempt to compete in an international market.

Additionally, the shift to heightened pleading standards in the area of discrimination cases is consistent with other developments in the area of race discrimination litigation. It has become extremely difficult for racial minorities to bring class actions to challenge racial discrimination, particularly in the employment context.<sup>83</sup> One important study examined "all reported employment discrimination class action decisions issued in federal courts between January 1, 1998, and May 3, 2001," and found that "courts denied certification . . . 69% of the time."<sup>84</sup> In addition, Professor Wendy Parker conducted a comprehensive empirical examination of employment cases alleging race discrimination and concluded "plaintiffs

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78. See Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 442-43 (2010) (articulating the difference between the strict pleading requirements of civil law countries and the traditional Rule 8 pleading requirements in the United States).

79. See *id.* at 13-16 (describing the pleading requirements of the court systems in Germany, France, Japan, and England).

80. *Id.* at 16.

81. See *id.*

82. *Id.* at 25.

83. See George A. Martinez, *Race Discrimination and Human Rights Class Actions: The Virtual Exclusion of Racial Minorities from the Class Action Device*, 33 J. LEGIS. 181, 187 (2007) (explaining that Federal Rule of Civil Procedure 23, designed to assist racial minorities in having cases certified as class actions, has served more as an obstacle to this end due to the fact that court decisions have resulted in heightening its requirements).

84. Steven J. Rosenwasser, *Employment Discrimination Class Actions: The Importance of Case Selection*, 18 EMP. DISCRIMINATION REP. (BNA) 15 (2002).

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almost always lose.”<sup>85</sup> These developments are consistent with a market state’s disfavoring of employment discrimination claims.

*C. The Market State, Voter Initiatives, and the Impact on Minorities*

Bobbitt argues that as the country shifts into a market state, we will see more and more use of voter initiatives in the political realm.<sup>86</sup> This prospect does not bode well for minorities. There have been a number of recently enacted initiatives that have damaged the interests of minorities. These initiatives have, among other things, outlawed affirmative action,<sup>87</sup> established English only regimes,<sup>88</sup> and outlawed bilingual education.<sup>89</sup> One scholar has reviewed over eighty initiatives and 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.”<sup>90</sup> Thus, the shift to a market state means that minorities ought to expect to face more and more initiatives that will undermine their interests.

*D. The Market State, Privatization, and Racial Minorities*

Bobbitt also argues that increased privatization will characterize the market state. The trend toward privatization is already negatively impacting minorities. For instance, Blackwater, Inc., is about to begin operations patrolling the U.S. borders as it gears up to undertake

85. See Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 894 (2006) (noting that out of 192 race discrimination cases brought in 2002 in Pennsylvania’s Eastern District and Texas’s Northern District, only one plaintiff was successful).

86. See BOBBITT, ACHILLES, *supra* note 1, at 238 (theorizing that as technology advances the government will increasingly interact with the people through informal decision-making processes such as plebiscite, initiatives, and referenda).

87. See *Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1495 (N.D. Cal. 1996) rev’d, 122 F.3d 692 (9th Cir. 1997) (describing the passage of Proposition 209 in California, which made it illegal for public employers to utilize affirmative action policies); see also CAL. CONST. art. 1, § 31 (making the consideration of race in employment unlawful); WASH. REV. CODE § 49.60 400(1) (2002) (declaring illegal the use of affirmative action in public employment, education, or contracting decisions); Tamar Lewin, *Michigan Rejects Affirmative Action and Backers Sue*, N.Y. TIMES, Nov. 9, 2006, at P16. (detailing the debate over affirmative action in Michigan after Proposition 2, banning the practice, was passed in 2009).

88. See Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in which Majorities Vote on Minorities’ Democratic Citizenship*, 60 OHIO ST. L. J. 399, 435-36 (1999) (explaining that English-only regimes have been established in states with a large population of bilingual minorities by having citizens vote on amendments to the state constitution).

89. See Kevin R. Johnson & George A. Martinez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1227-28 (2000) (concluding that the passage of proposition 227 in California, which made bilingual education in public schools illegal, violates the Equal Protection Clause of the Fourteenth Amendment).

90. Lazos Vargas, *supra* note 88, at 425.

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immigration enforcement.<sup>91</sup> Blackwater is perhaps best known for its private military activities in Iraq.<sup>92</sup> This trend toward privatization in immigration, which scholars are beginning to recognize,<sup>93</sup> poses a threat to immigrants, most of whom are racial minorities,<sup>94</sup> in that such private actors would operate with virtually no checks on their discretionary actions.<sup>95</sup>

Similarly, racial minorities have been directed into privatized alternative dispute resolution (“ADR”) procedures.<sup>96</sup> Such ADR procedures pose serious problems for racial minorities and other weak litigants because there are fewer due process checks on the ADR decision-makers.<sup>97</sup> As a result, the interests of minorities and other disadvantaged litigants may suffer harm.<sup>98</sup>

#### *E. The Market State, Immigration, and the Preservation of Culture*

Perhaps surprisingly, scholars have only recently begun to recognize that immigration necessarily implicates issues of race.<sup>99</sup> It is reasonable to

91. See Robert Koulisch, *Blackwater and the Privatization of Immigration Control*, 20 ST. THOMAS L. REV. 462, 462-63 (2008) (detailing the scale of Blackwater’s proposed operations on the U.S.-Mexico border, which includes an arsenal of weapons and a massive training complex, where the company plans to make a large profit by charging the U.S. government to prevent illegal border-crossings).

92. See JEREMY SCAHILL, *BLACKWATER: THE RISE OF THE WORLD’S MOST POWERFUL MERCENARY ARMY* 3-13 (2008) (describing the infamous shooting of innocent Iraqi civilians in Baghdad in 2007, the culmination of a four-year pattern of unprovoked violence perpetrated by Blackwater mercenaries in Iraq).

93. See Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L. J. 777, 779 (2008).

94. 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).

95. Koulisch, *supra* note 91, at 467-74; see Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT’L L. 383, 384 (2006) (asserting that because many constitutionally derived protections are enforceable only against government actors, “privatization will dramatically reduce the scope of public law protections in the United States”).

96. See David Hoffman & Lamont E. Stallworth, *Leveling the Playing Field for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity*, 63 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 STEPHEN N. SUBRIN, ET AL., *CIVIL PROCEDURE: DOCTRINE, PRACTICE AND CONTEXT* 583-84 (3d ed. 2008) (stating that alternative dispute resolution is now “commonly used in public sector disputes, including discrimination claims”).

97. See Richard Delgado, et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1374 (observing that, while “modern rules of procedure and evidence” reduce prejudice in traditional litigation, alternative dispute resolution “has few such safeguards”).

98. See *id.* at 1394-95 (arguing that formal litigation assumes the inequality of the parties, while ADR incorrectly assumes their equality thus placing weaker parties at a disadvantage).

99. See George A. Martínez, *Race and Immigration Law: A Paradigm Shift*, 2000

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connect immigration to race because most immigrants are persons of color.<sup>100</sup> It is therefore appropriate to discuss issues of immigration law in an essay that seeks to evaluate the implications of Bobbitt's theory in the area of race. Indeed, Bobbitt's theory contains important insights for immigration law and policy.

Some scholars argue that we should restrict immigration to preserve our American culture. In particular, some scholars now argue that Mexican immigrants constitute a major threat to a unified or cohesive American identity. For instance, Harvard University Professor Samuel Huntington argues that the American identity is comprised of certain elements—the “Anglo Protestant Culture,” the “American Creed”—understood as holding a distinctive set of values or principles, and adherence to the Christian religion.<sup>101</sup> The American people assimilate over time to this basic American culture.<sup>102</sup> Huntington contends that Latinos are problematic in that they retain the Latino culture of their origins, fail to assimilate into dominant American culture and therefore fail to become truly American.<sup>103</sup> He raises the prospect that as the United States becomes more and more multicultural, the country could dissolve into ethnic enclaves and divisions and undermine the American way of life. Accordingly, he suggests that

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U. ILL. L. REV. 517, 517-19 (2000) (noting that though traditional immigration law scholarship has compartmentalized the issue of immigration and inadequately addressed issues of race, the paradigm is shifting to include issues of race); see also Jennifer Gordon & R. A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 *FORDHAM L. REV.* 2493, 2493-94 (2007) (explaining why critical race theory and immigration scholarship have “often proceeded on separate tracks,” and attempting to bridge the gap between the two fields in the context of citizenship); 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, 525-27 (2000) (asserting that race theorists and immigration law scholars should treat race and immigration as interconnected issues rather than as matters secondary to their respective fields).

100. See Kenneth Juan Figueroa, *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”); see also Julian Wonjung Park, *A More Meaningful Citizenship Test? Unmasking the Construction of a Universalist, Principle-Based Citizenship Ideology*, 96 *CAL. L. REV.* 999, 1016 (2008) (stating that issues of immigration and race are necessarily intertwined because most immigrants are non-white).

101. SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY 59-80 (2004).

102. *Id.* at 61.

103. See *id.* at 221-56 (contending that Mexican immigration differs from that of other immigrant groups in various ways, including number of individuals, illegality, and regional concentration of immigrants, and stating that Mexican assimilation lags due to the retention of the Spanish language, low levels of education, and income relative to other immigrant groups, citizenship, and most significantly, immigrants' and Mexican-Americans' weak self-identification with America).

immigration from Mexico must be reduced or curtailed.<sup>104</sup>

Similarly, former U.S. presidential candidate Patrick Buchanan in his new book, *State of Emergency—The Third World Invasion and Conquest of America*, contends that “America is being invaded” and could come to an end as a result of Mexican/Latino immigration.<sup>105</sup> Indeed, he suggests that Mexico is trying to “repopulate America” and bring about “La Reconquista”—to reacquire land lost in the war between the United States and Mexico.<sup>106</sup> Buchanan explains that Mexico’s “strategy aims directly at reannexation of the southwest, not militarily, but ethnically, linguistically, and culturally, through transfer of millions of Mexicans into the United States and a migration of ‘Anglos’ out of the lands Mexico lost in 1848.”<sup>107</sup>

Like Huntington, he argues that, because Mexicans fail to assimilate into American culture and instead retain their language and culture, America will cease to be one nation.<sup>108</sup> He calls for a halt to Mexican immigration and for the deportation and repatriation of Mexicans and the construction of a “permanent fence” along the United States/Mexico border.<sup>109</sup>

In response to such concerns, various state and local governments have sought to regulate immigration.<sup>110</sup> For instance, the Cities of Irving and Farmer’s Branch in north Texas, and the State of Oklahoma, have initiated programs to crack down on illegal immigrants.<sup>111</sup> Their programs seem to be driven by a concern to protect American culture from the influx of Latino immigrants.<sup>112</sup>

104. *Id.* at 243.

105. PATRICK J. BUCHANAN, *STATE OF EMERGENCY: THE THIRD WORLD INVASION AND CONQUEST OF AMERICA* 7-12 (2006).

106. *Id.* at 7, 105-32 (noting that several Mexican officials, journalists, and academics, as well as the U.S.-based student organization Movimiento Estudiantil Chicano de Aztlan (MECHA) believe that Mexican migration is re-conquering portions of the United States which they believe historically belong to Mexico).

107. *Id.* at 125.

108. *See id.* at 133-37.

109. *See id.* at 250, 254, 268-69.

110. *See* Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 569 (2008) (describing state and local efforts to control and regulate immigrant movement and behavior as “among the most notable regulatory trends of recent years . . .”).

111. *See* George A. Martínez, *Immigration: Deportation and the Pseudo-Science of Unassimilable Peoples*, 61 SMU L. REV. 7, 8-9 (2008) (describing specific measures taken by local governments: the city of Irving, TX implemented a federal program whereby federal officials interview individuals arrested by local police and detain those suspected of being illegal aliens; Oklahoma state law, which criminalizes harboring or transporting illegal immigrants and hiring undocumented workers, has now “one of the toughest immigration laws in the country. . . ;” city ordinances passed in Farmer’s Branch, TX “authorize local police officers to examine the immigration status of anyone arrested. . .” and provide for fines on landlords who rent to undocumented persons).

112. *See id.* at 11 (noting that the local immigration crackdown is justified as

In light of Bobbitt's theory and the shift to the market state, these efforts to regulate immigration are doomed to failure, as the nation state will not be able to preserve its culture.<sup>113</sup> The emerging market state will be multicultural and "largely indifferent to the norms of justice, or . . . to any particular set of moral values" and will not be "held together by adherence to fundamental values."<sup>114</sup> As a result, these sub-national efforts to intervene in the immigration context in an effort to preserve American culture should be seen as futile. The only question—from the perspective of the market state—is "What immigration policy will further the interests of American economic competitiveness in the globalized world?"<sup>115</sup> The evidence indicates that liberalized immigration policy will further U.S. economic interests.<sup>116</sup> We now live in a global economy where employers must seek employees in a global market.<sup>117</sup> Countries around the world can achieve tremendous economic gains by liberalizing immigration law and policy.<sup>118</sup> The United States economy has been made significantly stronger by virtue of immigrant labor and its contributions to the economy.<sup>119</sup> Other countries are in the process of liberalizing their economic policies so as to remain economically competitive.<sup>120</sup> The United States will have to

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"necessary to preserve American culture").

113. See Delahunty & Perez, *supra* note 7, at 646 (explaining Bobbitt's view that the nation state will be unable "to protect the State's cultural integrity" because the nation state assumes that the population of a state is relatively homogeneous, is poorly suited for the realities of the modern world, and is being supplanted by the market state).

114. BOBBITT, ACHILLES, *supra* note 1, at 230. See Delahunty & Perez, *supra* note 7, at 647.

115. See BOBBITT, ACHILLES, *supra* note 1, at 230 (stating that the law should be structured so as to not impede economic competition).

116. See KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* 137 (2007) (arguing that free immigration and the promotion of labor mobility will confer substantial economic benefits on the United States because "[e]mployers and businesses gain handsomely" from readily available, inexpensive labor).

117. See Paschal O. Nwokocho, *American Employment-Based Immigration Program in a Competitive Global Marketplace: Need for Reform*, 35 WM. MITCHELL L. REV. 38, 60 (2008) (explaining that human capital is "increasingly mobile," requiring states and businesses to "compete for talent in a worldwide market").

118. See Howard E. Chang, *Liberalized Immigration As Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1150 (1997) (citing studies suggesting that the world economy would gain more from the removal of immigration barriers than it has from the removal of trade barriers).

119. See Larry J. Obhof, *The Irrationality of Enforcement? An Economic Analysis of U.S. Immigration Law*, 12 KAN. J.L. & PUB. POL'Y 163, 173-76 (2002) (asserting that the net gain to the national economy—in terms of production levels, taxes paid relative to services provided, and higher-quality labor due to increased competition and large application pools—far outweighs the "negligible" affect immigration has upon wage and employment levels in particularly immigrant-heavy sectors).

120. See Nwokocho, *supra* note 117, at 66 (noting that both emerging markets and growing economies, such as China and India, and "traditional competitors" such as Europe and Canada, are liberalizing their immigration policies to compete for skilled

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liberalize immigration policy as well in order to compete in the global economy.<sup>121</sup> We therefore can expect to see significant liberalization of immigration policy with the advent of the market state.

Subnational efforts to regulate immigration also represent an effort to impose a moral judgment on the cross border immigrant labor market. This is the case because these efforts are based on the longstanding perception that the culture of the immigrants—Latino culture—is inferior to the dominant Anglo culture.<sup>122</sup> This Latino culture has been vilified and under siege for years and such ill treatment continues into the present day.<sup>123</sup> The emerging market state and the Supreme Court's new approach in *Garamendi* will not or does not permit sub-national entities to impose their moral judgments regarding culture on the international market.<sup>124</sup> Thus, such regulation should fall by the wayside as the market state emerges.

#### V. RACE THEORY AND BOBBITT

Historically, race theorists have taken an eclectic, interdisciplinary approach in analyzing issues of race.<sup>125</sup> Race theorists have taken a pragmatic approach, looking to the use of any tools that work or are useful in analyzing race.<sup>126</sup> Philip Bobbitt's theory of the nature of the state is of

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migrant labor while the United States, conversely, is adopting increasingly restrictive immigration policies, making it more difficult for U.S. companies to attract global talent).

121. See JOHNSON, *supra* note 116, at 166-67 (arguing that “[f]ree labor migration is the next frontier for the global economy” and that the United States must liberalize its immigration policy in order to compete in a globalized labor market or cease to remain at the forefront of economic development).

122. See ARNOLDO DE LEON, *THEY CALLED THEM GREASERS: ANGLO ATTITUDES TOWARD MEXICANS IN TEXAS, 1821-1900* 24 (1983) (explaining that in nineteenth century Texas, whites viewed Mexicans as “apathetic and complacent,” lazy, and directionless, while whites viewed themselves as “more advanced, more progressive, and more civilized”).

123. See CAREY MCWILLIAMS, *NORTH FROM MEXICO: THE SPANISH SPEAKING PEOPLE OF THE UNITED STATES* 126 (1990) (explaining that Mexicans in the southwestern United States are a “conquered” people, who have suffered physical attack, followed by years of cultural “attack” and “economic attrition” at the hands of Anglo-Americans).

124. See Delahunty & Perez, *supra* note 7, at 650 (interpreting the Supreme Court's decision in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), as “denying the weight and legitimacy of the State's interest in subjecting foreign corporations operating locally to the moral views of its citizens . . .”).

125. See Charles Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (employing psychological theory in analyzing discrimination).

126. See George A. Martínez, *Philosophical Considerations and the Use of Narrative in Law*, 30 RUTGERS L. J. 683, 699-700 (1999) (arguing that race theorists should employ approaches “external” to traditional legal argument, such as narrative and counter narrative [that challenges the dominant perspective] in order to affect practical reform).

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major importance.<sup>127</sup> Scholars in a number of legal fields have begun to analyze their areas of law in light of Bobbitt's theory.<sup>128</sup> Accordingly, race theorists need to take account of his views in analyzing the issues of the 21<sup>st</sup> century. I have tried to outline the implications of his views in a number of areas touching on race and American law.

#### VI. CONCLUSION

The importance of Philip Bobbitt's seminal works are already being recognized as on par with such classics as Thomas Hobbes' *Leviathan*. In these books, Bobbitt argues that the nature of the state is changing in a fundamental way in that our country is shifting from a nation state into a market state.

Bobbitt's theories have profound significance for many areas of law which scholars are just beginning to explore. This article has sought to fill a gap in the literature by considering the implications of his views in the area of race and immigration law. Specifically, the article contends that Bobbitt's theories explain much of what we observe in the area of race, including hyper-incarceration of blacks, the current beneficiaries of affirmative action, radical changes in pleading requirements in civil rights actions, and that sub-national attempts to preserve culture through the control of immigration will fail. This paper argues that race theorists must take into account Bobbitt's theories regarding the changing nature of the state.

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127. See Patterson, *supra* note 2, at 1731-32.

128. See *supra* note 7.