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August, 2004

# The Network Economic Effects of Whiteness

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# THE NETWORK ECONOMIC EFFECTS OF WHITENESS

BRANT T. LEE\*

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## INTRODUCTION

In this Essay I demonstrate that a network economic analysis of race provides an important and intuitive explanation of racial inequality. In short, Whiteness<sup>1</sup> is Microsoft's Windows operating system, or the QWERTY keyboard, or the standard (non-metric) measurement system, and it is difficult to dislodge for many of the same reasons. Network effects explain how (1) the establishment of a dominant market standard can be contingent on historical context, and it is not necessarily derived from superior intrinsic merit, and (2) a dominant standard exhibits strong self-reinforcing characteristics that can maintain the dominance of the standard in perpetuity, even in the absence of any explicit or conscious determination to maintain it. All of these factors are present with regard to the economic and cultural dominance of Whiteness in the United States. This insight casts new light on mainstream explanations of racial inequality, supporting the critique that (1) current racial inequality is not the result of unequal "merit," but is the legacy of history, and (2) no racist intent or conspiracy is required for this inequality to continue. Rather, specific intent and determination is required to dislodge it.

We live in an age of liberal economic thought. Not only have the totalitarian socialist countries either fallen or made significant concessions to the power of free markets, but the country most devoted to individualism and free-market capitalism, the United States, remains standing as the only remaining superpower.<sup>2</sup> The dominant narrative of modern history seems clear: free markets won.

Moreover, we recently experienced the longest, strongest, unbroken period of economic growth in modern history, and although parts of the economy are weaker than others, the current recession has been relatively mild.<sup>3</sup> Americans are to be forgiven, then, for imagining that these immutable lessons of history are simply to be absorbed. For example, the title of Francis Fukuyama's book, *The End of History and the Last Man*,<sup>4</sup> is

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1. I capitalize "White" and "Whiteness" throughout, on the premise that these terms are not natural, objective descriptions of a biological characteristic but instead represent a socially and culturally constructed identity category, much like religious or national affiliations, and therefore should be capitalized. See discussion *infra* notes 142-47.

2. See SAMIR AMIN, OBSOLEScent CAPITALISM: CONTEMPORARY POLITICS OF GLOBAL DISORDER 81 (2003) (discussing President Bush's declaration that the United States is the only remaining superpower that is willing to create a "new international order").

3. See President Bill Clinton, Address Before a Joint Session of the Congress on the State of the Union (2000) ("We begin the new century with over twenty million new jobs; the fastest economic growth in more than thirty years; the lowest unemployment rates in thirty years; the lowest poverty rates in twenty years; the lowest African American and Hispanic unemployment rates on record; the first back-to-back surpluses in forty-two years; and next month, American will achieve the longest period of economic growth in our entire history.").

4. FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN xii-xiii (1993).

meant to suggest that humanity has discovered the appropriate political ideology for perpetual self-governance and social order.<sup>5</sup> Free-market liberal democracies are the answer.<sup>6</sup> While there might still be subsidiary social issues to address and fine-tuning to do, the basic debate is over. We no longer need to entertain serious ideological debate regarding the fundamental structure of government. Resistance is futile.

On the ground, the effects of this kind of thinking are palpable. The wealth and income gaps between the very rich and the rest of the world grows unabated<sup>7</sup> and unabashedly.<sup>8</sup> Both the winners and the losers accept the uneven distribution of goods as being their just desserts.<sup>9</sup> After all, the impartial market is presumed to weigh the relative merits without regard to status or historical context and determine the outcome. We reserve our disdain for those who presume to advocate government intervention in the market and unfairly seek special, unearned privileges or advantages for themselves.<sup>10</sup>

For those who seek racial justice, the intellectual and cultural hegemony of this kind of economic thinking is not a welcome development.<sup>11</sup> According to neoclassical economic doctrine, (1) government need only prevent the exercise of the lingering vestiges of irrational racism, although even this might unnecessarily impede the self-correcting features of the

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5. See Sherman A. Jackson, *Shari'Ah, Democracy, and the Modern Nation-State: Some Reflections on Islam, Popular Rule, and Pluralism*, 27 *FORDHAM INT'L L.J.* 88, 89 n.5 (2003) (stating that in *The End of History and the Last Man*, Fukuyama suggests that "Western Capitalism and democracy have now emerged as the final form" of human democracy).

6. See FUKUYAMA, *supra* note 4, at xii-xiv (believing that humanity will ultimately practice liberal democracy and stating, "[L]iberal principles in economics—the 'free market'—have spread, and have succeeded in producing unprecedented levels of material prosperity, both in industrially developed countries and in countries that had been, at the close of World War II, part of the impoverished").

7. See, e.g., MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 29 (1995) (stating that in the United States twenty percent of the population earns forty-three percent of all income while the poorest one-fifth earn four percent of the total income).

8. See, e.g., DINESH D'SOUZA, *THE VIRTUE OF PROSPERITY* 64-69 (2000) (discussing economist Edward Wolff's assertion that eighty-five percent of the nation's wealth increase between 1983 and 2000 went to the top one percent of wealth individuals, and the remaining fifteen percent of new wealth went to the next nine percent of wealth holders).

9. See Kurt Finsterbusch, *The Social Impact of Scarcity*, in *THE COMING AGE OF SCARCITY: PREVENTING MASS DEATH AND GENOCIDE IN THE TWENTY-FIRST CENTURY* 144, 154 (Michael N. Dobkowski & Isidor Walliman eds., 1998) (stating that even losers support the system because they hope to eventually win and gain something from economic growth).

10. See, e.g., Robert D. Cooter, *Market Affirmative Action*, 31 *SAN DIEGO L. REV.* 133, 156 (1994) (discussing rent-seeking by racial groups, which "refers to efforts of people to secure laws that convey monopoly power and profits upon themselves").

11. See Richard Delgado, *The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality*, *The Rodrigo Chronicles: Conversations about America and Race*, 84 *CAL. L. REV.* 377, 408-09 (1996) (arguing that legal economists do not appreciate the role of racial bias in shaping market forces, and noting that critical race theorists do not have as much faith that the market will eliminate racism).

market;<sup>12</sup> and (2) any remaining racial disparities are either fading historical vestiges or fair, color-blind results.<sup>13</sup> Under this paradigm, affirmative action is seen as an unjust or even racist intervention in the market,<sup>14</sup> which hurts everyone, including the supposed beneficiaries. This view has become so widespread and conventional that I have observed many White law students confronted with a defense of affirmative action respond not with resistance, but with pity, bolstered by a well-founded confidence that affirmative action will not long be a significant threat to them in the real world.<sup>15</sup> The recent claims by African Americans for reparations for slavery are met with hostility and similar dismissal: what possible relevance could historical slavery have on the failure of minorities to thrive in today's merit-based marketplace?<sup>16</sup>

Critical Race Theorists in particular have identified traditional economic analysis, and the methodological individualism that underlies classical economic theory, as the enemy. "Race crits" have deployed persuasive and empathy-provoking personal narratives,<sup>17</sup> detailed factual historical research,<sup>18</sup> and sophisticated theoretical analysis<sup>19</sup> to delineate systems,

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12. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 29-31 (1992) ("Freedom of contract is the position that results when the employment discrimination laws are removed, and it yields vastly different results from the removal of all legal restraints on aggressive action.").

13. *Id.* at 139 (arguing that perfect competition eliminates discrimination).

14. See Cooter, *supra* note 10, at 156 (stating that formal laws actually sustain discriminatory norms because these laws interfere with the market forces' ability to "disintegrate" discrimination).

15. See, e.g., *Gutter v. Bollinger*, 539 U.S. 306, 309-10 (2003) (expressing the expectation that affirmative action will no longer be necessary in twenty-five years). See also, e.g., Robert J. Bliwise, *Reaffirming Affirmative Action—From Courtroom to Classroom*, *Duke Mag.*, Sept.-Oct. 2003, at <http://www.dukemagazine.duke.edu/dukemag/issues/091003/action1.html> (quoting white Duke student Jonathan Bigelow's comment, "I have not observed any explicit resentment from white students on campus . . . And Duke students probably have little to gripe about from a personal perspective, since we were all admitted.").

16. See, e.g., David Boyle, *Unsavory White Omissions: A Review of Uncivil Wars*, 105 W. VA. L. REV. 655, 657 (2003) (disagreeing with David Horowitz's book entitled, *Uncivil Wars: The Controversy over Reparations for Slavery*, which argues that paying reparations to descendants of former slaves is unnecessary and burdensome on taxpayers who never owned slaves, and arguing that Horowitz ignores the unsavory omissions of Whites in the area of African-American justice).

17. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987) (detailing the history of racial oppression through various fables); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (using an autobiographical essay to depict the author's struggle with race, gender, and class).

18. See generally MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2002) (analyzing how United States foreign policy efforts abroad were impacted by the American Civil Rights Movement because, as the United States claimed to be the human rights leader in the world, it received scrutiny from other countries, including communist regimes).

19. See IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* xiii-xiv (1996) (arguing that Whiteness is changeable and ultimately social, based on an analysis of various cases in which state and federal courts developed the concept of Whiteness).

cultures, and ideologies of racial oppression that persist, and that demand a modern remedy. Yet a simple and powerful foundational economic premise—that individuals make independent, self-interested decisions<sup>20</sup> that distribute benefits efficiently according to the collective valuation of market actors<sup>21</sup>—works together with a virtuous, conscious determination to foreswear irrational, intentional, racial discrimination to produce a blunt counter to all of the persuasive power that race critics can muster: “We’re not racists and we don’t discriminate, so any unequal conditions reflect the impartial judgment of the market. Theorizing about racial oppression is a distraction, and counterproductive to true equality.”<sup>22</sup>

There is, however, something new on the economic front. We are moving into an information economy, we are told, which has different economic rules.<sup>23</sup> Strikingly, the new “network economics,” which is driving the creation of vast new fortunes and industries, breaks some of the standard economic assumptions we have learned to profess.<sup>24</sup> Economists have noticed that in such a market, fair competition based on traditional understandings of merit does not always occur.<sup>25</sup>

A brief and familiar example will illustrate the point. Microsoft’s Windows has become the undisputed dominant product in the market for personal computer operating systems.<sup>26</sup> The claim of network economics is that this is not, or at least not necessarily, because Windows is the best operating system around. Instead, Microsoft dominates because: (1) the more people there are who own Windows, the more attractive it is for others to own it;<sup>27</sup> (2) the more Windows users there are, the more likely it

20. See, e.g., PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 85-86 (17th ed. 2001) (discussing the theory of demand and utility, where consumers make decisions based on personal satisfaction and other rational consumer behavior).

21. See, e.g., *id.* at 28 (discussing dominance in market economies, where consumers ultimately determine, through market forces, where resources are channeled).

22. See Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 298-99 (1990) (arguing against the general notion that society does not discriminate and instead stating that the presence and power of unconscious racism is embedded in every aspect of society).

23. See KEVIN KELLY, *NEW RULES FOR THE NEW ECONOMY: 10 RADICAL STRATEGIES FOR A CONNECTED WORLD* 1 (1998) (noting that the emerging new economic order has “its own distinct opportunities and pitfalls . . . those who play by the new rules will prosper, while those who ignore them will not”).

24. See *id.* at 94 (explaining the argument that with expanding networks and technological advancement, distance, place, real estate, and geography are no longer relevant).

25. See W. Brian Arthur, *Competing Technologies, Increasing Returns, and Lock-In by Historical Events*, 99 ECON. J. 116, 117 (1989) (finding that the market sometimes adopts inferior technologies as increasing-return technologies compete in the market system).

26. See KELLY, *supra* note 23, at 4 (stating that Microsoft is now the role model for the new economy, and recognizing that it is the “highest-valued company” in the world).

27. See Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727, 732-33 (2000) (noting that as more programs become compatible with Microsoft, future users are more likely to use Windows because they prefer

is that more software applications will be offered by other firms that run on Windows;<sup>28</sup> (3) the more firms there are that use Windows, the more useful it becomes to learn Windows skills;<sup>29</sup> (4) the more people there are in the world using Windows, the more useful it is to operate a system with disks, protocols, and file formats that are compatible with Windows;<sup>30</sup> and (5) the more Windows applications, Windows-trained personnel, and Windows-compatible systems there are in the world, the more inexorable the conclusion that one must own a computer system that runs on Windows, even if you think it is an impossibly buggy and sluggish system. Network economics makes Windows an indispensable product.<sup>31</sup>

In markets that exhibit network economic effects, there is no single equilibrium regarding valuable products that the market will settle on.<sup>32</sup> Instead, there are multiple available equilibria. These markets are “tippy”<sup>33</sup>—one among perhaps several competing products or standards will tend to achieve a dominant position, but any of them could be the

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a broader array of software that is also compatible with other users).

28. See Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 501-02 (1998) (stating that Microsoft may even encourage internet service providers to feature Microsoft’s Internet Explorer web browser thus making it more difficult for users to use Netscape’s Navigator browser—Microsoft’s main competitor). See generally *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999) (recognizing the significance of “The Applications Barrier to Entry,” which prevents any Intel-compatible PC operating system, other than Microsoft’s, from gaining an edge in the system).

29. See *Microsoft*, 84 F. Supp. 2d at 20 (discussing how Microsoft enjoys positive network effects because, for example, corporate consumers want to use an operating system that new employees are already familiar with, and academic consumers want to use software that enables them to share files with colleagues more easily).

30. See *id.* at 15 (stating that only Microsoft’s Intel-compatible PC operating systems will work with Intel-compatible PCs, which means that consumers who own Intel-compatible PC systems would incur substantial costs if they decided to switch to a non-Intel compatible system).

31. See Roithmayr, *supra* note 27, at 733 (“Microsoft’s advantage may become sufficiently large that other competitors cannot possibly catch up, and the leader’s dominant position then becomes ‘locked into’ the market.”). Obviously these advantages can be characterized as barriers to entry, giving Microsoft monopoly power, and giving rise to the antitrust issues raised in numerous federal, state, and private actions against Microsoft in recent years. See Lemley & McGowan, *supra* note 28, at 506 (discussing the various antitrust issues related to the network effects of Microsoft). However, in-depth analysis of these issues is beyond the scope of this Essay. I note that the similarity between antitrust and antidiscrimination laws has not gone unnoticed. Robert Cooter points out that discrimination by social groups can resemble cartel behavior. See Cooter, *supra* note 10, at 153-54 (suggesting that such discrimination is inherently unstable). Cooter compares disparate impact analysis in antidiscrimination law with the failed struggle against structural monopolies in antitrust law, implying that this effort is equally in vain. *Id.*

32. See Lemley & McGowan, *supra* note 28, at 496-97 (discussing the ebb and flow of the market where system markets are prone to tipping, which is where one system pulls ahead of rivals based on increased popularity once it has gained an initial advantage).

33. See KELLY, *supra* note 23, at 34 (charting the exponential gains associated with the tipping point). For a popular treatment of consumer markets that “tip,” see generally MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000).

product that achieves the dominant position, and their relative features do not particularly determine which of them it is.<sup>34</sup> The network benefits are so powerful that, given a head start and a broad user base, the market will accelerate toward a standard without discriminating as to which standard it turns out to be.<sup>35</sup> Thus, contingent, historical factors, rather than inherent value, determine market domination.<sup>36</sup> It matters more, perhaps, that Bill Gates dropped out of college early<sup>37</sup> than it does that Apple's Macintosh operating system was, at least early on, and arguably even now, a superior product.<sup>38</sup> While certain aspects of the above portrayal are disputed by some,<sup>39</sup> the existence of network advantages are widely accepted and viewed as being within the economic paradigm.<sup>40</sup>

Positive feedback occurs whenever communication or interoperability requires that a standard be adopted, and their effects are not new.<sup>41</sup> Telephones, the gauge of railroad tracks, and even language<sup>42</sup> are examples of markets in which a standard is adopted for historically contingent reasons, and then get "locked in,"<sup>43</sup> because the same effects which made

34. See Lemley & McGowan, *supra* note 28, at 497.

35. *Id.*

36. See Arthur, *supra* note 25, at 127.

37. See JAMES WALLACE & JIM ERICKSON, *HARD DRIVE: BILL GATES AND THE MAKING OF THE MICROSOFT EMPIRE* 10 (1993); see also Charles M. Gastle & Susan Boughs, *Microsoft III and the Metes and Bounds of Software Design and Technological Tying Doctrine*, 6 VA. J.L. & TECH. 7 n.132 (2001), at <http://www.vjolt.net/vol6/issue1/v6i1a07-Gastle.html> (on file with the American University Law Review) (noting that the advent of the personal computer prompted "Bill Gates to drop out of Harvard").

38. See STEVEN LEVY, *INSANELY GREAT: THE LIFE AND TIMES OF MACINTOSH, THE COMPUTER THAT CHANGED EVERYTHING* 7 (1994) (arguing that Macintosh "is the most important consumer product," which will change how we view computers).

39. See, e.g., STAN J. LIEBOWITZ & STEPHEN E. MARGOLIS, *WINNERS, LOSERS & MICROSOFT* (1999). Skeptics of the significance of network effects typically argue either that significant competition nonetheless occurs in the establishment of network standards with benefits for consumers such as low-priced cell phones or software or that the barriers to entry are exaggerated. See William J. Kolasky, *Network Effects: A Contrarian View*, 7 GEO. MASON L. REV. 577, 578 (1999) (stating that network effects, on their own, do not make the emergence of a "single-firm" monopoly more likely, nor do they "always create high barriers to entry"). However, my claim is not that the dominance of Whiteness is inefficient, or that it produces monopoly profits, but that it exhibits network effects. It is unlikely that any of the critics of the recent focus on network effects would argue that a skilled Macintosh sales person faces a level playing field.

40. See Lemley & McGowan, *supra* note 28, at 484 (stating, "That network effects exist to a greater or lesser degree in various markets is uncontroversial . . .").

41. See Arthur, *supra* note 25, at 127 (describing the importance of historical effects when analyzing the evolution of the market).

42. See David G. Post, *"The Free Use of Our Faculties": Thomas Jefferson, Cyberspace, and the Language of Social Life*, 49 DRAKE L. REV. 407, 409-12 (2001) (relating the prospect of decentralized governance of the Internet to the historical debate over the control of the development of language).

43. See Arthur, *supra* note 25, at 116-17 (discussing how certain companies may corner the market if they can gain an early lead at the outset).



the market tip toward a standard also work to make the standard “sticky,”<sup>44</sup> or resistant to changing to an alternative standard.

The potential implications of network economics for race theory are significant.<sup>45</sup> The network economic theory, which is widely accepted,<sup>46</sup> posits that (1) contingent, historical context is important in determining market dominance; (2) a market might tip toward a particular standard for reasons other than the inherent merit or value of that standard; (3) once adopted, a dominant standard might become locked in and sticky; (4) the market might produce this outcome even where there is no single firm or entity guiding the maintenance of the standard; and (5) these conditions adhere in markets in which communication and interoperability are essential features. The deep context, the systemic and coercive power, the unconscious<sup>47</sup> and self-reinforcing behaviors, and the persistence that Critical Race Theorists have been insisting on all along with regard to racism are all here. The relevant markets, in which communication and interoperability are essential, can be the market for employees, for retail customers, or the market for cultural and social norms among human beings, and the dominant racial standard in each of these markets is Whiteness.

The remainder of this Essay is simply an exploration of this idea. This Essay sets forth the basic argument that Whiteness works like a network standard in three important ways. First, network effects operate in markets where communication and interoperability create increasing returns to scale,<sup>48</sup> which drives these markets toward a single, dominant standard.<sup>49</sup>

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44. See *id.* (noting that a dominant technology in a system may lead to inflexibility).

45. See Margaret Chon, 1999-2000 *Oliver Wendell Holmes Symposium and Lectureship: The Market Place of Ideas in Cyberspace, Panel Discussion*, 51 *MERCER L. REV.* 859, 874-75 (2000) (commenting that white supremacy is “a bad idea that has a large network base”); Roithmayr, *supra* note 27, at 762 (stating that the use of the LSAT in law school admissions constitutes a locked-in standard imposed historically by Whites acting intentionally as a racial cartel). But cf. Jim Chen, *Diversity and Damnation*, 43 *UCLA L. REV.* 1839, 1907 (1996) (dismissing the idea that network economics could support the hiring of more than a token number of minority employees).

46. See, e.g., Mark A. Lemley, *Antitrust and the Internet Standardization Problem*, 28 *CONN. L. REV.* 1041, 1044-45 (1996) (arguing that the pressure toward standardization in some markets seems indisputable).

47. See, e.g., JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* 154-55 (1997) (arguing that unconscious mental habits and stereotypes, among other unconscious acts, perpetuate discrimination against Blacks); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317, 322 (1987) (stating that because of our shared historical and cultural heritage, which has been dominated by racism, everyone is influenced by unconscious racism).

48. See Lemley & McGowan, *supra* note 28, at 488-89 (noting that network markets involve products that facilitate communication between users); see generally Arthur, *supra* note 25, at 116 (analyzing the “dynamics of allocation” in our market system, which leads to increasing returns).

49. See *id.* (arguing that a technology that gains a lead by chance in the market may

In Part I, I explain that in significant respects, markets such as those for employees and for cultural images of people, are examples of markets in which the importance of communication and information tends to produce a single racial standard. An important corollary of this analysis is that no irrational, racist malice is necessary to create and maintain the dominance of the racial standard. Only ordinary economic incentives are required.

Second, because of various forms of positive feedback, network markets tend to “lock in” to the dominant standard, which proves “sticky,” or difficult to change or penetrate. I describe in Part II how various complementary goods and services support Whiteness and further strengthen its dominance. In addition, a collective action problem makes it costly for a firm or individual to switch standards unless everyone else does at essentially the same time. Thus Whiteness tends to persist as a racial standard. I argue that displacing Whiteness would require personal and institutional retraining.

Third, the establishment of dominant standards in network markets is “path-dependent,” that is, it is contingent on small events and historical circumstance rather than optimal intrinsic features, utility, or merit. In Part III I argue that the dominance of Whiteness in the economy is primarily due to the history of the social and legal construction of Whiteness, rather than to superior merit and open competition.

#### I. WHITE NETWORK ECONOMICS: HOW WHITENESS WORKS AS A NETWORK STANDARD

Economists have shown that certain goods, once established as a market standard, reap network effects that enable them to dominate a market persistently.<sup>50</sup> Examples include telephones, personal computer operating systems, and language.<sup>51</sup>

The central argument of this Part is that Whiteness operates as a racial standard that provides network economic advantages. An important consequence of this analysis is that the dominant and persistent nature of network standards—rather than “merit”—explains current racial disparities.

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eventually lock in the market, leaving other technologies effectively locked out).

50. See Roithmayr, *supra* note 27, at 742-49 (describing that as network markets grow larger and more valuable, demand increases for the technology, which may lead to market domination and standardization).

51. See *id.* at 733-34 (noting that network economics can be applied to various networks including the network of the legal profession and the network of computer systems, among many others).

*A. Network Economics and Standards*

A brief introduction contrasting classical and network economics is in order. For conventional goods following an ordinary downward-sloping demand curve, consumers buy less of a commodity at higher prices.<sup>52</sup> If demand greatly exceeds supply, then the commodity will be exclusive to the relatively few people willing to pay the high price it demands. Generally, as the amount of a good consumed increases, the marginal utility diminishes.<sup>53</sup> As the marginal utility diminishes, the price the marginal purchaser is willing to pay for each additional unit also decreases. In other words, ordinary markets exhibit decreasing returns to scale on the demand side.<sup>54</sup> Thus the ordinary instruction to a job seeker is to make oneself stand out, or to obtain rare skills to differentiate oneself from the mass of others in the employment market. Similarly, cultural projects become less valuable the more often they are reproduced.

Network economics turns that fundamental economic maxim on its head: network goods exhibit increasing returns to scale on the demand curve.<sup>55</sup> Consider the value of that archetypal network good, the telephone, if one person owns the only one in existence. Since its purpose is communication and there is no one on the other end of the line, a single telephone is worthless. In the real world, however, a telephone is so valuable it is considered an essential service, precisely because so many other people have one and can be reached through it on the telephone network, but only if one owns a telephone.<sup>56</sup>

This network value is only realized if your telephone can communicate with other telephones through the network. This communication requires a technical standard of some kind that each item must comply with in order to function as a telephone. Because of increasing returns to scale, however, competing standards fail—even if they are technically superior—if they fail to attain a dominant position in the market. No one cares if you have the ultimate communications gizmo (better than the telephone!) if everyone else is, in fact, using the telephone. Thus network economies are driven toward single, dominant standards.

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52. See, e.g., SAMUELSON & NORDHAUS, *supra* note 20, at 56 (demonstrating that fewer goods would be bought at higher prices through supply and demand graphical analysis).

53. See, e.g., *id.* at 86-87 (defining marginal utility as the extra utility a consumer receives from “the consumption of an additional unit of a commodity”).

54. See, e.g., *id.* at 89-90 (comparing the theory of marginal utility to the value of time to the individual).

55. Lemley & McGowan, *supra* note 28, at 484.

56. See Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424 (1985) (using a similar example with personal computers).

Network economics analysis has been extended more broadly to markets that do not involve the sale of goods.<sup>57</sup> For instance, the use of a particular language to communicate with others is behavior that exhibits network effects.<sup>58</sup> The ability to speak English is virtually useless unless there are others who speak the same language. The more people there are who speak English, the more valuable that ability is. English speakers share a common technical communication standard—here, a set of words, definitions, grammatical rules, and idioms—that allows them to communicate with a great number of people. Thus one might expect that a dominant language standard would develop. Indeed, some claim that despite intense cultural and nationalist opposition, English is becoming the de facto worldwide language standard, especially for business, scientific, and tourism purposes.<sup>59</sup>

A product need not involve direct communications to produce network effects. Increasing returns can result if products are merely functionally compatible.<sup>60</sup> An operating system like Microsoft Windows will benefit a user even if nobody else owns (or leases) it. However, its value increases as the number of users increase. People can share documents with others using the same word processing software, or share disks with other people using the same operating system. Here, the technical standard involved enables not communication but compatibility with regard to skills, applications, and work product.<sup>61</sup>

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57. Lemley & McGowan, *supra* note 28, at 491.

58. *Id.* at 489-91.

59. Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 347 (1992).

60. See Katz & Shapiro, *supra* note 56, at 424 (stressing the need for products of different firms within a network to be compatible).

61. See *United States v. Microsoft Corp.*, 253 F.3d 34, 95 (D.C. Cir. 2001) (explaining that, because of Microsoft's monopoly over the PC operating system and the internet browser market, its product is valuable to the owner). Legal scholarship in this area has also, for the most part, related to antitrust implications. See, e.g., LIEBOWITZ & MARGOLIS, *supra* note 39, at 247-49 (recounting the origins of Microsoft's antitrust cases); David S. Evans & Richard Schmalensee, *A Guide to the Antitrust Economics of Networks*, 10 ANTITRUST 36 (1996) (noting that only a few entities tend to dominate "Network industries," thus giving cause for antitrust concerns); Lemley & McGowan, *supra* note 28, at 500-23 (claiming that existing antitrust laws adequately address issues raised by networks); Gregory J. Werden, *Network Effects and Conditions of Entry: Lessons from the Microsoft Case*, 69 ANTITRUST L.J. 87, 87-88 (2001) (discussing how networks affect entry into an industry). In the antitrust context, the issue is generally whether network effects comprise a barrier to entry into a market, resulting in inefficient monopoly profits and the exclusion of more efficient competitors. See, e.g., LIEBOWITZ & MARGOLIS, *supra* note 39, at 128 (demonstrating that network standards can be efficient); see also Werden, *supra*, at 97-108 (considering whether network effects constitute economic barriers to entry). Scholars applying network economic analysis to other areas of law similarly focus on efficiency. See Roithmayr, *supra* note 27, at 734 (claiming that admissions standards in the legal education market are inefficient). I do not contest the claim that standards in network economies are efficient. However, I assume for the purposes of this paper that market efficiency does not justify racial subordination. It may be that we need not shed a tear for

*B. A Dominant Racial Standard*

Whiteness is a network standard in two respects. First, it can operate as an actual technical standard that limits access to networks. If you do not comply with the standard, you are completely excluded from working or communicating with those who are using it. You may as well be a telegraph operator trying to make someone's telephone ring.

Non-White people are not, of course, literally excluded in this way. With the demise of *de jure* racial discrimination, as well as the universal condemnation of intentional racism, Whiteness is not generally a formal requirement for any position or function.

One instance in which Whiteness may be considered a technical standard might be when casting an actor for a part that is seen as inflexibly requiring a White person, such as Hamlet or George Washington. A non-White actor will never be able to meet the technical standard of being White.<sup>62</sup>

Second, and more broadly, Whiteness is a dominant network standard in the sense that it is the default race. People are presumed to be White unless otherwise stated. Thus the "standard" judge, teacher, student, or customer—the standard person—is imagined to be White. In particular, the standard employee in many cases is presumed to be White. Although an employer could overcome this presumption when faced with a non-White applicant, it would nonetheless be an initial presumption burdening the applicant.

Absent economic advantages, overcoming this second type of "default" standard might simply require an employer with flexibility and imagination. The extent to which there might be network racial advantages depends in part on the extent to which non-White employees can communicate and work with White employees. Thus the following analysis focuses on ways in which the ability to communicate across racial lines might be impeded. If people of different races are unable to communicate, then they are, in a sense, technically incapable of becoming part of the same network.

Note that my example of the first type of standard described above—a racial requirement in casting actors for parts—is not truly a technical requirement in the sense that it would be physically impossible for a non-White actor to play a part. A director with enough imagination might overcome this standard, although to be feasible, this flexibility would also

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the superior but unused Beta videotapes, Macintosh computers and Netscape Web browsers. I presume that meritorious but unemployed people of color deserve greater sympathy.

62. See Neil Gotanda, *Asian Americans and the "Miss Saigon Syndrome"*, in *ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1087, 1087-88* (Hyungchan Kim ed., 1992) (noting that actors exhibiting Whiteness are nonetheless welcome to perform non-White roles).

have to be shared by the producer and the audience. Similarly, a manager making an employment decision contrary to the default standard must overcome not only personal reservations, but must also keep in mind the possible reservations of customers, coworkers, and superiors.<sup>63</sup> Thus the two kinds of standards operate along a spectrum of flexibility: the least flexible preferences for Whiteness operate as a technical standard, while more flexible preferences for Whiteness operate merely as a default presumption.

Either way, the Whiteness standard means that the ordinary economic advice to “stand out” is reversed with regard to race. Non-White applicants are well advised *not* to try to stand out by emphasizing their racial differences.<sup>64</sup> Employers, recognizing the incompatibility of the non-White applicant with the dominant White standard, are likely less inclined to hire non-White individuals. Advertising agencies or movie and television producers might be advised not to develop or cast non-White lead characters or models. This reversal of the ordinary advice is a hint that network economics may be involved.<sup>65</sup>

The ordinary discourse regarding racial identity is that because race is, or should be, irrelevant to employment, employees should not “inject” race into a situation by being outspoken about their racial identity.<sup>66</sup> Note that White employees are not seen as introducing race issues no matter how White—say, suburban and preppy—they present themselves. By viewing Whiteness as a racial standard, we see that in this discourse it is not *race* that is irrelevant. It is Blackness (or Asian-ness, etc.) that is irrelevant. In other words, race is irrelevant only so long as one meets the default standard of being White.

### C. Interoperability: Communication and Culture

In the information economy, the ability to communicate—to meaningfully receive and transmit information—has become recognized as a crucial economic asset.<sup>67</sup> That asset is embodied most significantly in

63. See, e.g., *McGinnis v. Ingram Equip. Co.*, 685 F. Supp. 224, 225 (N.D. Ala. 1988) (referring to a supervisor who was concerned about how it would look to have “a n—foreman with all my white customers”).

64. See Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 719-20 (2001) (emphasizing the performative nature of race within an institution; individual employees of color must choose how to perform their race in order to be racially palatable to their employers).

65. Critical Race Theorists have noted that the “transparency” of Whiteness is the source of much of what has come to be called “White privilege.” See BARBARA J. FLAGG, *WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW* 65 (1998) (analyzing Whites’ reliance on Blacks for explanations of racism).

66. *Id.*

67. Kevin Kelly goes so far as to insist that in the new economy, “[t]he net is our future.” KELLY, *supra* note 23, at 9.

people. Workers are now information and knowledge brokers.<sup>68</sup> Especially in this context, race makes a difference. First, race often correlates strongly with verbal communication style, dialect, or accent.<sup>69</sup> Second, race correlates with distinct cultural references and beliefs,<sup>70</sup> which facilitate trust, social comfort, and communication.<sup>71</sup> Finally, race itself communicates because racial subjects are perceived through a complex series of racial images regarding competence, beliefs, and attitudes, which comprise cultural and social norms that compete for dominance.<sup>72</sup>

Whether a market tips towards a dominant standard depends in part on the demand for variety.<sup>73</sup> If consumers prefer to buy unique jewelry, a dominant standard will not develop. One might expect that in markets where demand for variety is high, the need for interoperability will be low. There is no need for one's jewelry to match that of others. Hence, high demand for variety and low economies of scale tend against tipping a market towards a dominant standard.<sup>74</sup> The recent emphasis on racial diversity as an important value can be seen as an effort to counterbalance the efficiency pressure towards racial homogeneity.<sup>75</sup> However, if the preference for racial variety is weak or vague, it will not overcome the network effects of the strong communication function.

#### 1. *Verbal communication: language, dialect, and accent*

To the extent that employees must communicate with colleagues, customers or clients, and employees at other firms or agencies, they serve a communicative function. If race correlates with factors that affect the ability to communicate effectively, then network effects may exist.

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68. ROBERT B. REICH, *THE FUTURE OF SUCCESS* 60-62 (2001).

69. See discussion *infra* at Part I.C.1.

70. Neil Gotanda, *A Critique of "Our Constitution is Colorblind,"* 44 STAN. L. REV. 1, 56-59 (1991) (emphasizing that race cannot be viewed as distinct from "culture, community, and consciousness").

71. See FRANCIS FUKUYAMA, *TRUST* 3-12 (1995) (arguing that only societies with a high degree of social trust will be able to compete).

72. See Gotanda, *supra* note 70, at 56 (stating that a color-blind assimilationist ideal neglects positive aspects of race, particularly cultural components, and that failure to recognize this key aspect of race amounts to cultural genocide); see Lawrence, *supra* note 47, at 322-23 (asserting that racism in America remains dominant in part due to the unconscious transmission of racially discriminatory attitudes to children through adults' behavior); Reginald Leamon Robinson, *White Cultural Matrix and the Language of Nonverbal Advertising in Housing Segregation: Toward an Aggressive Theory of Liability*, 25 CAP. U. L. REV. 101, 120 (1996) (defining "culture" as a system of beliefs, symbols, and rules through which people organize and understand the world in which they live).

73. Gotanda, *supra* note 70, at 56.

74. See Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1762 (2003) (emphasizing that due to the impact of anti-discrimination laws and changing social norms regarding diversity, the incentive for a homogenous environment is minimal).

75. See *id.* at 1788 (criticizing the tendency of employers to promote homogeneity to realize "truth, fairness, and loyalty" in the workplace).

Consider at the most fundamental and direct level of analysis, actual language barriers. A common language is a communications standard that operates as a network standard.<sup>76</sup> It would be difficult to argue that someone who actually could not communicate with others because of a language barrier was not disadvantaged in the workplace.<sup>77</sup> Certainly language, inextricably entwined with identity and culture,<sup>78</sup> correlates at least partly with national origin and race.<sup>79</sup> Whether or not this effect is appropriate or fair, my only point here is that the English language standard is important in employment, and has the effect of excluding non-English speakers.<sup>80</sup>

A slightly less direct example of a racial communication barrier in network markets is Black English.<sup>81</sup> An illustrative scenario appears in the movie "Airplane!"<sup>82</sup> In an exaggerated African-American dialect, two Black passengers speak to each other and to the confused White flight

76. Lemley & McGowan, *supra* note 28, at 489.

77. *But see* Mari J. Matsuda, *Voices of America: Accent, Anti-discrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1377-78 (1991) (questioning the assumption that accents necessarily disadvantage speakers when seeking employment).

78. *But see* STEVEN PINKER, *THE LANGUAGE INSTINCT* 258 (1994) (challenging the myth that ethnicity plays a predominant role in an individual's ability to learn a specific language); Jill Gaubling, *Against Common Sense: Why Title VII Should Protect Speakers of Black English*, 31 U. MICH. J.L. REFORM 637, 652-54 (1998) (discussing the intrinsic and biological basis of the language function, and asserting that the lack of proper education in standard English results in blacks using different speech).

79. *See, e.g.*, Steven W. Bender, *Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and the Language Vigilantism Experience*, 2 HARV. LATINO L. REV. 145, 146-47 (1997) (identifying the causal link between state Official-English laws and private attacks on non-government speech); Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CAL. L. REV. 1395, 1409-12 (1998) (discussing language disputes involving Asian-Americans); Allison M. Dussias, *Waging War With Words: Native Americans' Continuing Struggle Against the Suppression of Their Languages*, 60 OHIO ST. L.J. 901, 923-28 (1999); Grace A. Pasigan, *Sign Language: Colonialism and the Battle Over Text*, 17 LOY. L.A. ENT. L. REV. 625, 636-41 (1997). *See also* Hernandez v. New York, 500 U.S. 352, 371-72 (1991) (contemplating the correlation of race and language).

80. *See* Kiyoko Kamio Knapp, *Language Minorities: Forgotten Victims of Discrimination*, 11 GEO. IMMIGR. L.J. 747, 759 (1997) (claiming language discrimination is a growing factor in employment discrimination). Much of the literature in this area discusses Official English or English-Only laws. *See, e.g.*, Bender, *supra* note 79, at 146-47; Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1349 (1997); Perea, *supra* note 59, at 355 (claiming that language has often been the root of discrimination against non-English speakers). Generally the importance of a single language standard for genuine employment-related communication purposes is not contested. However, these laws also regulate the use of language in settings where the employer's interest is less direct, and they often arise in circumstances in which a particular ethnic group is targeted. *See* Chang & Aoki, *supra* note 79, at 1409-12; Pasigan, *supra* note 79, at 627.

81. *See* Gaubling, *supra* note 78, at 652.

82. AIRPLANE! (Paramount Pictures 1980).



attendant. A “translation” is presented in “Standard English”<sup>83</sup> subtitles along the bottom of the screen. The joke is that the passengers might as well be speaking a foreign language considering their ability to communicate with the attendant. A fellow passenger—an elderly, distinguished-looking White woman—offers to help, saying, “I speak Jive.” She proceeds to “translate” the Black passengers’ requests, and then replies to them in the same exaggerated dialect, complete with “attitude.” The incongruity of the White woman’s appearance and the language coming out of her mouth is another joke that plays on the cultural and class connotations of race.

While this example is exaggerated, the point remains that people speaking English communicate in racially identifiable ways that are not always easily understood across racial lines. Thus, at the simplest level, employers might hire Whites because they tend to communicate better with White customers, other White employees, and the White employees of other firms, because they speak the same dialect. This serves as a technical standard.

The debate over Black English, or Ebonics, for example, often comes down to whether or not to recognize inherent value in having a distinct American dialect.<sup>84</sup> Proponents note that African-American dialect has identifiable rules of grammar and syntax, sometimes traced to African roots,<sup>85</sup> and thus ought to be recognized<sup>86</sup> and even studied as a true dialect, rather than being dismissed as simply “bad English.”<sup>87</sup> This is a merit argument. The proponents are claiming that in substantive, objective terms, Black English is a coherent and inherently valid language of its own, and therefore should be given respect and recognition equal to that given to Standard English.

The pragmatic response, of course, is that it simply does not matter whether Ebonics has a cognizable and inherently valid structure. In order to participate in the broader world, one must learn to speak the standard

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83. See Gaulding, *supra* note 78, at 658 (discussing “Standard Language Ideology” as a bias toward a homogenous spoken language imposed by dominant institutions); see also ROSINA LIPPI-GREEN, *ENGLISH WITH AN ACCENT: LANGUAGE, IDEOLOGY, AND DISCRIMINATION IN THE UNITED STATES* 65 (1997) (claiming dominant institutions play a lead role in establishing a dominant language).

84. See, e.g., Lori Olszewski, *Oakland Schools OK Black English*, S.F. CHRON., Dec. 19, 1996, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/1996/12/19/MN11848.DTL>.

85. See Gaulding, *supra* note 78, at 662-73 (citing the Linguistic Society of America’s unanimous support for the Oakland School Board’s decision to recognize Black English).

86. See ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 190 (1999) (raising the possibility of Asian-Americans aiding in resistance to English-Only laws).

87. See Gaulding, *supra* note 78, at 642 (observing that most school administrators equate Black English with poor grammar).

American dialect or risk being unable to communicate effectively.<sup>88</sup> Network effects drive culture toward a single dominant dialect and therefore devalue competing standards.

The extent to which this language standard serves as a racial barrier to workforce participation<sup>89</sup> depends, of course, on a racial generalization. Most African-Americans are of course capable of speaking Standard English and do so. Note that when African-Americans speak Standard English, they do not “sound Black.” Thus the dialect analysis can extend to instances where, rather than prohibiting communication entirely, dialect serves instead to identify the race of the speaker. Studies have shown that people can identify the race of an unseen speaker—say, over the phone—with a high degree of accuracy.<sup>90</sup>

Commentators who have focused on this as linguistic profiling<sup>91</sup> or accent discrimination<sup>92</sup> seem to be describing a subtle way to effect old-fashioned intentional discrimination: the listener determines the race of the caller and then discriminates based on racist stereotypes.<sup>93</sup> This method might also be used to identify and discriminate against callers based not only on race but also on sexual orientation, and national or regional origin, i.e., immigrants and Southerners.

While these forms of invidious discrimination undoubtedly occur, a network economic analysis might produce an account of incentives for accent discrimination, even in the absence of racist intent or bias. For example, a listener who is expecting, or is simply accustomed to hearing, a White voice on the telephone might be slightly surprised or disturbed to hear a non-White speaker instead.<sup>94</sup> This would be an example of

88. GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 50 (2002).

89. See Gaulding, *supra* note 78, at 643-46 (reviewing studies showing that Black English speakers are at a disadvantage in every aspect of employment).

90. See, e.g., Lis Wiehl, “*Sounding Black*” in *the Courtroom: Court-Sanctioned Racial Sterotyping*, 18 HARV. BLACKLETTER L.J. 185 (2002) (citing a Kentucky court case where the court held a police officer was reasonable in determining a suspect was Black on the basis of the sound of his voice); see also *Rhea v. State*, 147 S.W. 463, 472-73 (Ark. 1912) (upholding a conviction based on identified race of a White speaker’s voice); *Clifford v. Commonwealth*, 7 S.W.3d 371, 375 (Ky. 1999) (upholding a conviction based on a witness identification of the race of a speaker as Black by his voice); Matsuda, *supra* note 77, at 1337 (suggesting that a prevailing prejudice against an accent is prone “to cause some listeners to ‘turn off’ and not comprehend it”).

91. See Michael Erard, *The Role of Profiling in American Society: Linguistic Profiling*, 5 J.L. & SOC. CHALLENGES 225, 228 (2003) (arguing that allowing witnesses to testify as to the racial characteristics of a speaker’s voice embodies racial profiling).

92. See Matsuda, *supra* note 77, at 1350 (citing courts’ recognition of accent discrimination); see also Gaulding, *supra* note 78, at 646 n.149 (referring to studies that demonstrate employers believe a person with a Standard English accent, in addition to having better grammar, is more likely to have other more desirable personality traits).

93. See Matsuda, *supra* note 77, at 1347.

94. Discussing his theory of racial stigmatization, Glenn Loury writes:

Everything depends, I am arguing, on racially biased social cognitions that cause some situations to appear anomalous, disquieting, contrary to expectation, worthy

Whiteness working as a default standard. The listener might, as a consequence, feel more awkward or uncomfortable than one would if the speaker was White. If the listener was unable or unwilling to overcome the disturbance, or to understand the accented words, then this failure to meet the racial norm in voice communication would work as a technical standard to exclude an incompatible speaker—the speaker’s effectiveness at communicating information, making a sale, establishing rapport, or forming a social bond would be diminished.

A light accent does not interfere with “actual” communication.<sup>95</sup> That is, the listener understands the spoken words. However, communication consists of much more than the transmission of words. Individuals also communicate intent, meaning, and identity through gait, posture, facial expression, physical proximity, and eye contact. Indeed, the entire range of social context in which the communication takes place also influences the transmission of meaning.<sup>96</sup> These forms of communication may be received peripherally or subconsciously, but affect the meaning communicated. Thus, a more nuanced examination of effective interracial communication must include at least a cursory review of broader avenues of communication through cultural competence and racial stereotyping.

## 2. *Culture*

To the extent that dialect, accent, and the social conventions that comprise nonverbal forms of communication are determined by culture, and culture is integral to communication, Whiteness constitutes a kind of racial cultural literacy that is essential to communication.<sup>97</sup> Thus, someone might, on the basis of a brief phone interview, determine that the speaker

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of further investigation, inconsistent with the natural order of things—while other situations appear normal, about right, in keeping with what one might expect, consistent with the social world as we know it.

LOURY, *supra* note 88, at 71.

95. On the other hand, I have observed that when listeners expect, perhaps on the basis of race, not to understand the speaker’s speech, they become incapable of interpreting even a slight accent. Thus, a White store clerk confronted with an Asian immigrant customer and expecting to hear a “foreign” language fails to understand the customer’s lightly accented English. Indeed, the listener’s attitude determines whether communication is successful. The clerk’s complaint that it is “impossible” to communicate with Asian foreigners fulfills itself. See Wiehl, *supra* note 90, at 194 (describing an experiment in which different listeners of an identical speech recording matched with videotape footage of children of different races assessed the speech differently for fluency and for being “standard”); see also Matsuda, *supra* note 77, at 1376-79 (discussing “the problem of the prejudiced listener”).

96. Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1169 (1985). See generally Anthony P. Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457 (1997).

97. Roithmayr, *supra* note 27, at 734.

sounds like someone who will fit in and work out well within the specific workplace.<sup>98</sup>

Consider the following: “Man, did you catch Duval on the back nine? He’s three back on the 16<sup>th</sup> and goes birdie-eagle-birdie with a chip from the bunker to win the British Open! Damn!”<sup>99</sup>

The statement not only requires familiarity with the intricacies and rules of golf, golfers, and the significance of a particular tournament, but also presumes a shared enthusiasm and a common affinity for a certain style of discourse about sports. It is imbedded in culture.<sup>100</sup>

There can, of course, be cross-cultural communication. However, to the extent that there are cultural differences among races,<sup>101</sup> racial homogeneity results in shared cultural references within racial groups.<sup>102</sup> These shared cultural references can in turn enhance communication and productivity.<sup>103</sup> Employers can have greater confidence that their employees will share certain values with regard to work habits or general attitudes towards work,<sup>104</sup> family, and government. They will be more likely to understand each other’s jokes, and identify when a joke is being made. They are likely to have more in common to discuss. Potential employees who are culturally White and can speak “White” are more literate in a communication standard that will allow the employer to reap network benefits.<sup>105</sup> Indeed, the argument for cultural homogeneity on utilitarian grounds is often made expressly in the debate over “multiculturalism.”<sup>106</sup>

98. See Wiehl, *supra* note 90, at 186 (citing a Kentucky Supreme Court case where a police officer’s deduction that a speaker’s voice indicated a specific race represented proper testimony).

99. Thanks to E. Stewart Moritz for his help with the nuances of translation.

100. As part of their sophisticated body of work on the performative aspects of racial identity in the workplace, Carbado and Gulati explore in particular the communication problems that arise through workplace conversations. See Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103 (2000).

101. See Gotanda, *supra* note 70, at 56 (asserting that the Supreme Court’s adoption of color-blind constitutionalism ignores, and thereby devalues, unique cultural components such as custom, belief, and intellectual and artistic traditions that distinguish races from one another).

102. See generally Carbado & Gulati, *supra* note 74 (discussing racial homogeneity as an economic asset in the workplace); see also Eleanor Brown, *Black Like Me? “Gangsta” Culture, Clarence Thomas, and Afrocentric Academies*, 75 N.Y.U. L. REV. 308, 323-40 (2000) (describing the development of oppositional cultural norms in Black urban communities).

103. See Carbado & Gulati, *supra* note 74, at 1795-1802 (discussing incentives for homogeneity).

104. Cf. ERIC A. POSNER, *LAW AND SOCIAL NORMS* 133-34 (2000) (discussing racial discrimination as a signal to other in-group members that one will be a loyal worker).

105. Carbado and Gulati observe that not only must racial outsiders negotiate their identity in the workplace, but they must do so against a headwind consisting of stereotypes about their outsider status. Thus, neither a Black employee combating stereotypes about laziness nor a female employee battling stereotypes about her commitment to her career are as free to choose to go home early or to decline work as is a White male employee. Carbado & Gulati, *supra* note 100, at 110-12. Roithmayr argues similarly that the value placed on

In this regard, note the prevalence of “private” social discrimination that is often described as “benign” or “natural.”<sup>107</sup> Commentators have noted that Black and White Americans lead lives that are publicly integrated but privately segregated; they may work at an integrated workplace, but often go home to segregated neighborhoods, worship in segregated congregations, and enjoy different forms of cultural entertainment.<sup>108</sup> The sources of this de facto segregation are, without doubt, complex and varied. Here, I simply observe that the social ease that results when parties of the same race are able to interact without having to “deal with” race produces a system that functions most efficiently when all of the interacting parties are of the same race.

Thus, language, culture, and personal comfort in the context of social segregation produce network effects that push the market toward a dominant standard. The efficient choice for employers is to hire employees who already use the cultural operating system that is the norm, in the same way that businesses are well advised to use the Windows operating system rather than Apple’s Macintosh, regardless of the relative qualitative merits<sup>109</sup> of the two systems.

### 3. *Stereotypes*

Beyond the effectiveness of direct and indirect communications among individuals by means of their speech and behavior, race communicates through stereotypes and images. Thus the young Black male in a White neighborhood addressing a fearful White homemaker at her doorstep may be incapable of communicating, through any effort of his own, an ordinary sales pitch for vinyl siding. Her perception of poverty, lawlessness, and

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White cultural practices in the legal education market gives White people the advantage of lower costs of production, because they have easier access to the transmission of White cultural norms. Roithmayr, *supra* note 27, at 754-55.

106. See, e.g., ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* 104 (1992); Sylvia R. Lazos Varga, *Deconstructing Homo[Geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1507 (1998) (asserting that the utilitarian justification for cultural homogeneity is that the process of assimilating immigrants from cultures similar to the Anglo-Saxon culture is less stressful on the host group and results in less social conflict).

107. See, e.g., RACHEL F. MORAN, *INTERRACIAL INTIMACY* 185 (2001) (observing that, in explaining marital choices, Americans focus on similarity of background without characterizing them as racial discriminations and fail to acknowledge how such a focus creates a pattern of segregation that is taken for granted).

108. See, e.g., LEONARD STEINHORN & BARBARA DIGGS-BROWN, *BY THE COLOR OF OUR SKIN: THE ILLUSION OF INTEGRATION AND THE REALITY OF RACE* (1999); ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992).

109. One might debate whether characteristics that affect an individual’s ability to communicate should not be included in the definition of “merit.” My intent is merely to note that communication, including the messages that race convey in contemporary culture, plays a large part in the ability of an individual to participate in a network economy that has adopted a racial standard of Whiteness.

propensity for physical violence prevents her from understanding him as someone offering household services for sale.<sup>110</sup>

His task of overcoming the default standard of Whiteness is difficult in light of the messages that his race communicates. He is identified as an outsider; he has invaded private space; he matches the popular image of a dangerous or violent person.<sup>111</sup> He can, of course, attempt to overcome these disabilities by affecting a pleasant and non-threatening disposition, and by wearing neat, orthodox clothing.<sup>112</sup> Generally, door-to-door sales are a difficult business, and all who try it must develop strategies to make it work. Nonetheless, some strategies are foreclosed according to the communication that race sends. This salesperson is racially incompatible with the network standard because of stereotypes.

Moreover, race communicates for the employer as well as for the employee. Consider the role of the public spokesperson. An individual represents a public official, government agency, or private firm to the media, and indirectly to the entire public. To the extent that race communicates a message to the American audience, a firm must be careful with regard to the race of the individual who represents it.<sup>113</sup> This is true of all front-office, direct sales, or “window” positions with high visibility.<sup>114</sup> The communicative aspect of race would have somewhat less impact in the back room, the accounting office, or the research lab.

Some kinds of employment might combine a direct or indirect communicative effect with a stereotype communicative effect. Consider, for instance, the corporate lawyer. Lawyers must communicate effectively with staff, with colleagues, with their counterparts at other firms with whom they do business, with clients, and with the clerks, judges and juries within the judicial system. They must employ the direct language communication tools of prose, idiom, and metaphor. They must also

110. Her racial stereotypes may or may not be “irrational.” See generally ARMOUR, *supra* note 47 (exploring whether such racial stereotypes are rational). My point here is not that her racism prevents him from succeeding, but that the social context renders him unable to communicate with her and excludes him from the network economy.

111. *Id.*

112. See generally PAUL M. BARRETT, *THE GOOD BLACK* (1999) (describing the discrimination lawsuit eventually brought by a Black corporate lawyer who always tried to fit into his White surroundings).

113. See, e.g., Amy Harmon, *A Limited Partnership*, N.Y. TIMES, June 14, 2000, at A1 (describing a partnership of internet entrepreneurs in which the White partner became the spokesperson).

114. See Harry J. Holzer & Keith R. Ihlanfeldt, *Customer Discrimination and Employment Outcomes for Minority Workers*, 113(3) Q. J. OF ECON. 835, 845-47 (1998) (finding that the racial composition of a business’ customers has a substantial effect on the race of the person who gets hired, particularly in jobs that involve direct contact with customers), available at <http://mitpress.mit.edu/catalog/item/default.asp?sid=80AE70CB-8038-4502-A7D9-2068740DDF9A&ttype=6&tid=460>. Note that rather than focusing on suggesting invidious discrimination by buyers or patrons, my focus is on market power and the impact of communication standards.

master the cultural references, such as conferences, drinks, golf, and gender dynamics. The message that their race sends is unavoidable.<sup>115</sup>

Stereotypes greatly complicate the already tenuous communication situation that exists when an employee is trying to make a good impression but must consider, in addition to all of the typical considerations, the employer's preconceptions about the employee.<sup>116</sup>

The stereotypes need not be dramatic ones, such as that a Black male is a dangerous criminal. Because network effects depend on effective communication, all that is necessary for race to exhibit a network effect is for a stereotype to impede communication. Identifying the race of another person and then assuming, based on race, that the person will not be able to chat about golf, have a different attitude towards the police, or disagree about affirmative action and the general fairness of the marketplace, will hamper communication, regardless of whether those assumptions are true. These communication barriers can of course be overcome with conscious effort. That extra effort, however, is a transaction cost that is not present for employees who meet the racial standard.<sup>117</sup>

#### 4. *In general*

In general, my claim is that language, culture, and stereotypes compromise interracial communications barriers that make non-Whites incompatible with a network standard and therefore inefficient to hire. While plausible, these observations are certainly speculative. I have not attempted a mathematical or empirical proof. However, determining the precise cause of interracial communication barriers is not essential to this argument. One need only presume that White people, especially White Americans, generally (but of course not always) communicate better with each other than with non-Whites. I take it as common background knowledge that this is so. Specifically, I assume that Whites generally communicate better with other Whites as coworkers within firms, as employees dealing with customers, and as employees dealing with the employees of other firms.

To the extent that this is so, every employer, regardless of their race, has economic cause to prefer to hire employees that will not experience this communication barrier. Because most of those coworkers, customers, and counterparts are White, the employer ought to prefer White employees, all

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115. Carbado and Gulati have shown that in law firms, women and minority associates must negotiate stereotypes regarding their competence and beliefs, which in turn interferes with their ability to negotiate work assignments freely and hurts their prospects for advancement. See Carbado & Gulati, *supra* note 100, at 117 and accompanying text.

116. *Id.*

117. Cf. CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 33-37 (1999).

else being equal.<sup>118</sup> And this is so regardless of whether the racial domination of Whiteness among these populations is due to sheer numbers or to historical advantage.

## II. THE PERSISTENCE OF WHITENESS: LOCK-IN AND STICKY STANDARDS

Economist Brian Arthur has described how positive feedback magnifies the effects of small economic shifts, and can drive markets towards any of several competing standards.<sup>119</sup> In economic terms, network markets exhibit several possible equilibrium points. There is no guarantee that the particular economic outcome selected will be the “best” one.<sup>120</sup>

Furthermore, once random historical events set the market on a particular path, the choice may become locked-in, regardless of the advantages of the alternatives.<sup>121</sup> Thus if one product, firm or nation in a competitive marketplace gets ahead by “chance,” it tends to stay ahead and even increase its lead.<sup>122</sup> This kind of “path dependence” results when small “random” events accumulate and become magnified by positive feedbacks so as to determine the eventual outcome.<sup>123</sup>

Such phenomena as the location of cities and the geographic concentration of high technology industries have been characterized as the result of feedback effects regarding access to markets, support services, complementary goods, and the availability of individuals with the necessary experience and know-how.<sup>124</sup>

Beyond the direct operation of network effects through shared communication standards, Whiteness also persists as the dominant racial standard because of positive feedback effects that continually reinforce its dominance.<sup>125</sup> Any dynamic that causes Whiteness to increase in value when it becomes more widely adopted as a standard can create a positive feedback loop that causes the standard to “lock in,” or become “sticky,” and resistant to change.<sup>126</sup> Simple economies of scale can contribute to this effect.<sup>127</sup>

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118. See Holzer & Ihlanfeldt, *supra* note 114, at 859 (finding that a racial preference for employees that reflects the racial composition of a business' customers reduces the overall labor demand and wages for blacks).

119. See Arthur, *supra* note 25, at 116.

120. *Id.* at 116-17.

121. *Id.*

122. *Id.*

123. *Id.*

124. W. Brian Arthur, *Positive Feedbacks in the Economy*, 262 SCI. AM. 92, 92-99 (1990).

125. See Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089, 1111 (2002) (maintaining that law school admissions standards operate as a positive feedback loop that reinforces and strengthens the advantage of White applicants over applicants of other races).

126. Cf. Katz & Shapiro, *supra* note 56, at 425 (exploring the dynamics of positive



### A. *Switching Costs*

Switching costs are the costs of switching from one standard to another.<sup>128</sup> They play a role in determining whether a product or service becomes an enduring standard. If the switching costs are high, it becomes more difficult to induce consumers to change their behavior. For example, entire cherished record collections became outmoded when the CD was introduced, slowing its acceptance.<sup>129</sup> The loss of the value of those LPs represents a cost of switching to the proposed new standard. In this example of course, the switching costs were overcome, despite the protests of many avid audiophiles.

Note that even when switching costs are low, they can be critical. "A million customers, each of whom has switching costs of \$100, are just as valuable, collectively, as a single customer whose switching costs are \$100 million."<sup>130</sup>

High individual or collective switching costs can represent a kind of positive feedback as the installed base of users becomes more committed to a standard.<sup>131</sup> Their investment in the standard is what stands to be lost if they switch. These costs can be in the form of physical goods, but can also be the psychic costs of loosening strong psychological or emotional commitments.<sup>132</sup>

With regard to a racial standard, one must consider the level of commitment that the installed base of employers, employees, and consumers of cultural images has to Whiteness. Although many Whites claim not to be especially aware of race, they identify their own race with confidence, and studies suggest that the value they place on this identification is extraordinarily high.<sup>133</sup>

One example of a kind of direct switching cost might be in the area of cultural images. Many of the icons of popular culture are White. Our political leadership is predominantly White. Similarly, most of the eminent figures in the dominant American historical narrative are White.

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feedback loops creating market dominance).

127. See Lemley & McGowan, *supra* note 28, at 494-95.

128. Roithmayr, *supra* note 27, at 775.

129. See SHAPIRO & VARIAN, *supra* note 117, at 11.

130. SHAPIRO & VARIAN, *supra* note 117, at 108 (discussing "Mass Market Lock-in").

131. See Roithmayr, *supra* note 27, at 775 (observing that male decision-makers tend to select job applicants and employees to mentor based on preexisting contacts and commonalities that correlate with gender).

132. *Id.*

133. See generally FLAGG, *supra* note 65, at 29 (asserting that Whites perceive and interact with other Whites as individuals who have no significant racial characteristics, leading to circumstances where Whites rely on White referents to formulate the norms and expectations of White decision-makers to the detriment of minorities).

One might explain that the majority of the White population simply feels more affinity with White celebrities, politicians, and historical figures. Setting aside the presumed naturalness of Whiteness implicit in that explanation,<sup>134</sup> note that White racial identity and racial identification are essential to it. A White person must recognize and identify with both her own Whiteness and the Whiteness of the cultural icon for this kind of racial affinity to apply.

In order to establish non-White cultural images as preeminent in the national imagination, Whites must give up this racial identity and affinity. What would it take for Whites to feel an equal affinity toward Black politicians, to identify with African-American historical figures as being “our” heroes rather than “their” heroes, or for White children commonly and comfortably to choose Black dolls?<sup>135</sup> These might be examples of psychic or emotional switching costs in the displacement of racial identities and images.

Recently, of course, the all-White (and male) pantheon of heroes and protagonists has in fact had to change in order to make room for others. So the psychic switching costs are, to some extent, being paid. White resentment and backlash demonstrate that, in some cases, the costs are not being paid voluntarily and that they are in fact painful.<sup>136</sup>

Some of the changes have required new textbooks, new curricula, and in the case of streets and buildings now named after Dr. Martin Luther King, Jr., new signage. Resistance to renaming Chink’s Peak in Idaho in 2001 included the argument that renaming the mountain would not be historically accurate.<sup>137</sup> Some historical literary works have fallen out of favor because they represent a more consciously racist viewpoint. These are actual switching costs.

More importantly, one might note where changes have not occurred. The emotional attachment of Cleveland baseball fans to their grinning, red-skinned mascot, Chief Wahoo, is unwavering. The ubiquity of this image

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134. See Carrie Lynn H. Okizaki, “What Are You?” *Hapa Girl and Multi-Cultural Identity*, 71 U. COLO. L. REV. 463, 482 (2000) (observing that Whiteness is so ingrained as the cultural norm that, once an individual is identified as White, race “fades almost instantaneously from white consciousness into transparency”).

135. See WALDO E. MARTIN JR., *BROWN V. BOARD OF EDUCATION: A BRIEF HISTORY WITH DOCUMENTS* (1998). Social psychologists Kenneth and Mamie Clark devised a doll test as a way to gauge evidence of personality dysfunction among black children under Jim Crow. When asked to choose between a white doll and a black doll, a preponderance of the black children expressed a preference for the white doll.

136. See, e.g., 2002: *A Critical Year for European-Americans*, 53 DAVID DUKE REP. (The David Duke Report, Mandeville, La.), 2002, at 1 (contending that American schools ban all mention of Christians, while promoting “Black pagan celebrations such as Kwanza,” and decrying the “primitive Black rhythms” that pervades White homes on MTV).

137. Ji Hyun Lim, *All in a Name: Chinks Peak*, ASIAN WEEK, Oct. 4, 2001, available at [http://www.asianweek.com/2001\\_09\\_28/news\\_chinkspeak.html](http://www.asianweek.com/2001_09_28/news_chinkspeak.html).

in northern Ohio on cars, on clothes, and in front yards represents both emotional commitment and sunk costs. The story of “Little Black Sambo” has been republished with a White illustrator who said, “We [White people] look at [the story] with affection.”<sup>138</sup> The Confederate flag continues to be displayed on the grounds of the Georgia State capitol. One account ascribes the recent electoral defeat of a popular Georgia governor to his support for changing the state flag of Georgia to reduce the eminence of the Confederate flag.<sup>139</sup>

Many of these costs represent sentimental attachments to historic images. There is great nostalgia for the “good old days.” Note, however, that there is little sentimental longing for outhouses, the lack of air-conditioning, and explicit racial subjugation. The attachment is to images that happen to be of industrious and meritorious White persons,<sup>140</sup> and, typically, the absence of racial others. One might see in this attachment a form of property, that over time, familiarity and possession ripen into ownership.<sup>141</sup> One senses that objections to newly written histories—histories that note the racist sensibilities of traditional White American heroes and introduce the contributions and struggles of other populations—are, in essence, property claims—“[t]hey are taking away *our* history.” To the extent that that history is a narrative representation that muddies and ignores the racist origins of the country, this complaint is accurate: the multiculturalists have targeted that history for replacement.<sup>142</sup>

Uncertainty represents a type of switching cost when the reliability of the old standard is a known quantity and the reliability of the proposed replacement is less certain. One might reassure oneself by doing further research, but this merely replaces uncertainty costs with search costs.

Here, an employer or employee who has never hired or worked with an African-American or other non-White employee might hesitate simply because of the uncertainty. The price of overcoming this hesitation is a switching cost. One might reassure oneself, for instance, by asking pointed

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138. Louise Kennedy, *The Story of Little Black Sambo*, BOSTON GLOBE, 2003, available at [http://www.handprintbooks.com/html\\_files/BOSTONGLOBEarticle.html](http://www.handprintbooks.com/html_files/BOSTONGLOBEarticle.html).

139. Jeffrey Gettleman, *An Old Battle Flag Helps Bring Down a Governor*, N.Y. TIMES, Nov. 7, 2002, at B2.

140. See Lazos Varga, *supra* note 106, at 1502 (asserting that the White ethnic immigrant belief that hard work, assimilation, and virtue can overcome any adversity that dominates the American cultural narrative is hegemonic because it mandates assimilation, dismisses the power dynamics of racism, and ultimately pits the White assimilated ethnics against the “raced” and the culturally different).

141. See generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1734-36 (1993) (arguing that Supreme Court jurisprudence reflects the protection of a property right in Whiteness).

142. See generally RONALD TAKAKI, *A DIFFERENT MIRROR* (1993) (asserting that past scholarship has defined American history too narrowly because it often reflects the scholar’s particular perspective of the world and what is needed to create a more complete, more accurate picture of history).

questions in an extended interview, or taking special care to contact all listed references, but these extra steps also represent switching costs.

One might argue that antidiscrimination legislation, such as Title VII, imposes potential costs on employers who do not hire non-White applicants, and might thus balance these switching costs.<sup>143</sup> Also plausible, however, is the claim that the manner in which statutes like Title VII are enforced might lead employers to avoid liability altogether by refusing to hire non-White employees in ways that avoid successful discrimination claims.<sup>144</sup> Whether rational or irrational, a careful, motivated employer likely will be able to avoid hiring non-Whites.

### B. Skills

Switching costs can also be represented in the human capital costs of retraining, for instance in converting to new accounting or word processing programs. As software program improvements outpace the capacity of human beings to learn new systems, most American employers in recent years have become aware of how significant these retraining costs can be.

Every American is aware of the discomfort and awkwardness that can take place in unfamiliar racial contexts. Communicating across racial barriers requires new skills. The acquisition of new skills is a switching cost that may not even be recognized as being necessary by many employers. When courts impose diversity training as a remedy, it is often considered an attempt to cure employers of unconscious bias.<sup>145</sup> It might better be considered one of the costs of adopting a new standard in the workplace. A wise employer would anticipate such costs and implement training of its own accord, rather than wait for it to be imposed.

One might, of course, simply encourage non-White employees to learn and use Whiteness, as many have learned to do. Note that the costs of this kind of accommodation are borne entirely by the non-White employees.<sup>146</sup> This is the current approach taken by most employers, and the high burnout

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143. See John J. Donohue, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1412 (1986) (arguing that legislation that prohibits employer discrimination enhances rather than impairs economic efficiency).

144. EPSTEIN, *supra* note 12, at 262-63 (asserting that the methods available for avoiding the sting of Title VII are numerous, such as purposefully locating a worksite in an area with few minorities).

145. See, e.g., Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 685 (2003) (discussing cases where court-approved consent decrees required diversity training, review of human resources practices, and monitoring the effectiveness of the decree).

146. Cf. ARMOUR, *supra* note 47, at 13 (defining the "Black Tax" as "the price Black people pay in their encounters with Whites (and some Blacks) because of Black stereotypes").

and low retention rates of minorities in many industries are to be expected under this analysis.<sup>147</sup>

“Diversity training” must educate employees about other racial cultures, but the point should not be to teach the details of a foreign culture—as though one might then “know” what every Black person thinks and feels. Rather, the focus should turn inward, so that White employees can understand the ways in which they participate in and support Whiteness.<sup>148</sup> Just as those who learn to speak a language other than English come to understand the rules of English better, those who study diversity should come to understand their own racial standard better. One might then better understand when one is excluding non-White peers from a network based on Whiteness norms.

### C. Coordination Costs

Note that even if there are few switching costs, there can still be a coordination problem. There may not seem to be much of a network effect at work if users of a standard are poorly committed to it and are willing to switch to the next standard that comes along. If the market is one in which it is valuable for there to be only one standard, there is nonetheless the problem of not wanting to switch unless everyone else does as well, and the uncertainty of not knowing if everyone else will.

The difficulty of coordinating such a switch makes switching less likely. For example, a change from the QWERTY keyboard to the supposedly superior Dvorak keyboard is difficult not only because of collective switching costs, but also because of the difficulty in coordinating the switch.<sup>149</sup> One wants trained typists, so one must use the system that typists are trained in. Typists want a marketable skill, so they should choose to learn the skill that most employers and keyboard makers support.<sup>150</sup> Unless everyone changes, there is no reason for anyone to change, despite the efficiency gains that a new keyboard design might offer. Human capital that is compatible with specific a keyboard layout gives rise to network effects.<sup>151</sup>

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147. ARMOUR, *supra* note 47, at 17; see Carbado & Gulati, *supra* note 74, at 1762; David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 564 (describing the attrition of Black lawyers at large corporate law firms).

148. See Robin D.G. Kelley, *The Abolition of Whiteness and Black Freedom*, RACE TRAITOR (1997), at <http://www.postfun.com/racetractor/features/rkelley.html> (on file with the American University Law Review).

149. See SHAPIRO & VARIAN, *supra* note 117, at 185-86.

150. See *id.* at 186.

151. But see LIEBOWITZ & MARGOLIS, *supra* note 39, at 19-39 (arguing that the Dvorak keyboard was not in fact a superior standard).

Thus, an employer, who was convinced that the work required to develop a more racially diverse workforce would be well worth the effort because it would produce important business benefits, might be stymied by the failure of other firms to reach the same conclusion.<sup>152</sup> Firms that continued to operate on a de facto Whiteness standard might not appreciate the benefits of diversity, and the well-meaning employer could end up simply cutting itself out of the network.

#### *D. Complementary Products*

Goods may increase in value even when not connected to a network of like or compatible goods if economies of scale sustain production of complementary goods and services. For example, exotic car repair services are viable only where there are sufficient consumers to support them.<sup>153</sup> The positive feedback is that it is worth more to own such a car in an area where special services and parts are available. This occurs only when a critical mass<sup>154</sup> of others own the same kind of car. The fact that there are so many software applications for Windows enhances its value, and all the software is written for Windows because there are so many people who use it.<sup>155</sup> In contrast, other operating systems are handicapped by the relative paucity of programs.

In the race context, to the extent that consumers of different races consume different goods and services, there can be supply-side economies of scale in the production of such complementary goods and services. Thus one might observe that in many communities Whites have an easier time than non-Whites in finding foods they like to eat, clothes in the sizes, colors, and styles that they feel complement their looks or personal style, or hair stylists competent to take care of their hair.<sup>156</sup> If we view work environments as goods offered to the population of workers, Whites will have an easier time than non-Whites finding work environments in which they feel comfortable.<sup>157</sup>

On the production side, people of any race can of course provide goods and services that cater to White consumers and thus take advantage of this larger market. However, to the extent that race signals expertise, there may

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152. See Brief of Amicus Curiae Exxon Mobil Corp. at 2, *Grutter v. Bollinger*, 537 U.S. 1043 (2003) (No. 02-241).

153. Lemley & McGowan, *supra* note 28, at 494.

154. *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003). But see Chen, *supra* note 45, at 1844-45.

155. Lemley & McGowan, *supra* note 28, at 500-07.

156. See STEINHORN & DIGGS-BROWN, *supra* note 108, at 225 (citing as an example that in Corning, New York, because there were only White barbershops, Corning Inc. recruited a Black barber to help make its Black employees feel more at home).

157. See *id.* at 59-60 (explaining that since the majority of employees in America are white, blacks have to navigate alone in the work world).

be some limit on the ability of minority entrepreneurs to participate in this market. A firm that serves the cultural needs of non-Whites can survive when there is a critical mass to support it. Consider for instance, the prevalence of Chinese grocery stores in Chinatown. But the availability of Chinese groceries in many other communities is much more limited.

Many complementary products are not standard-specific, of course. For example, much of the automotive infrastructure—garages, gas stations, driving skills—easily supports both Ford and Toyota vehicles.<sup>158</sup> Thus while the automobile is a dominant standard for personal transportation, no single automaker controls that standard. Similarly, many services are equally compatible with white and non-white people alike. In contrast, early Macintosh users made durable investments in assets that were complementary only to a system controlled by Apple.<sup>159</sup> Because of the hampering effects of switching costs, the producer of a locked-in product can extort users.<sup>160</sup>

Can White people charge a premium for their services? In a sense, they do. No one else can provide the image, the communications capacity, the signaling effects, the customer relations, the network advantages that White people can. This is the flip side of economic analyses suggesting that Blacks might offer themselves at lower wages in order to gain entry to the market and demonstrate their value.<sup>161</sup>

Perhaps more importantly, commitment to Whiteness causes users to incur opportunity costs when that commitment conflicts with other values. Thus, an individual who might feel some motivation to advance racial harmony, or who might otherwise derive some satisfaction or pleasure from a racially diverse environment, might give these values up when faced with the prospect of forced desegregation or falling home values.<sup>162</sup>

One interpretation of a more concrete complementary racial product might be represented in the segregated nature of American residential neighborhoods,<sup>163</sup> schools,<sup>164</sup> churches,<sup>165</sup> and other social venues.<sup>166</sup> Many

158. SHAPIRO & VARIAN, *supra* note 117, at 103.

159. *Id.* at 104.

160. See Paul Klemperer, *Competition When Consumers Have Switching Costs: An Overview with Applications to Industrial Organization, Macroeconomics, and International Trade*, 62 REV. OF ECON. STUD. 515, 515-16 (1995) (noting that future exploitation of customers gives firms incentive to attract new customers).

161. EPSTEIN, *supra* note 12, at 263 (suggesting that less-educated blacks should take jobs on an at-will basis and at lower wages to develop the skills they need to move ahead).

162. STEINHORN & DIGGS-BROWN, *supra* note 108, at 33.

163. STEVEN GRANT MEYER, AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS 212-22 (2000) (stating results of studies conducted to analyze the racial composition of American neighborhoods).

164. See STEINHORN & DIGGS-BROWN, *supra* note 108, at 42-44 (discussing the millions of White and Black students attending racially segregated schools despite efforts around the country to desegregate schools).

165. *Id.* at 62-64.

Americans pay a lot to go to predominantly-White schools. They pay more to live in neighborhoods where these schools are located and where there are few, if any, Blacks. They will pay more to buy a house if they think that they are buying it from a White person rather than a Black person.<sup>167</sup>

If this behavior were simply motivated by irrational racism,<sup>168</sup> one might characterize the behavior as a premium that White racists pay in support of their evil intentions.<sup>169</sup> However, none of these behaviors are in fact penalized in the market.<sup>170</sup> A decision to purchase a home in a more integrated neighborhood for a lower price does not net the purchaser the same quality of life, the same housing appreciation,<sup>171</sup> or the same educational opportunities.<sup>172</sup> The cumulative wealth of Whites who value Whiteness in the housing market drives the valuation of the market, as well as the provision of such services as law enforcement, education, street cleaning, favorable zoning designations, housing code enforcement, street repair, and recreational opportunities.

The appreciation of real estate in White neighborhoods has generated immense wealth for many people,<sup>173</sup> all of it founded on racial segregation and the network benefits of Whiteness. Giving up Whiteness as a standard in residential housing threatens that continuing avenue of disparate wealth creation. The loss of quality of life and future appreciation is therefore a switching cost that many residents understandably hesitate to incur.

#### *E. Complementary Standards*

Sometimes two or more complementary standards can support the dominance of the others.<sup>174</sup> The dominance of Windows also supports the dominance of the particular computer chips manufactured by Intel that Windows uses. Or one might imagine that but for the dominance of

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166. *See id.* at 64-68 (explaining that Blacks and Whites attend and enjoy different social and cultural activities).

167. *See id.* at 29-30.

168. *See generally id.* at 37-39 (discussing the intentional steering away of blacks to white neighborhoods by real estate agents); MEYER, *supra* note 163, at 30-47 (discussing that intentional racism played a large part in maintaining housing segregation).

169. *See* GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 8 (1957) (explaining that those who discriminate must act as if they are willing to forego financial benefits in order to avoid certain transactions).

170. OLIVER & SHAPIRO, *supra* note 7, at 147.

171. *See id.* at 147-51 (comparing the property value appreciation rate in White communities as opposed to integrated communities).

172. *See id.* at 150 (stating that blacks are unable to obtain information about better-quality school systems when they are isolated to inner-city ghettos).

173. *See generally id.* at 147.

174. *See* Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 273-74 (2002) (asserting that gender status does not exist in "a pure form," but rather that an individual's dominant or subordinate status is affected by the combination of racial and gender stereotypes).



Windows, an internet-only browser and e-mail appliance might have gained a greater audience, rather than the personal computer standard on which Windows operates.

Because a strong national antiracism norm has been adopted, any explicit reference to Whiteness is now frowned upon. For Whiteness to survive as a standard, it must go undercover. Approval and disapproval of individuals based on racial standards are now expressed in language that does not refer to race directly. Thus, one might comment on an applicant's professionalism, attitude, values, "classic American" looks,<sup>175</sup> or communication skills rather than mentioning the applicant is White. Public discourse regarding such issues as crime, welfare, poverty, immigration, drug use, or "urban" issues also carries strong racial connotations without explicitly mentioning race.

These complementary standards might serve simply to disguise hidden or unconscious racism. But even assuming they do not, to the extent that they transmit qualifications that favor White people, they serve to buttress Whiteness as a dominant standard. Thus, for example, when a group is described as "patriotic," it invokes both Whiteness (because the historical patriot is White) and an impression of national history and identity that is founded on Whiteness.<sup>176</sup>

Consider two broader examples: (1) the idea of Western progress and civilization originating in Europe; and (2) the parallel theories of meritocracy, evolution, and liberal economics. Given the close correlation of Whiteness to European ancestry, the dominant historical narrative of the triumph (as opposed to, say, the historical accident,<sup>177</sup> the travesty, or the merciless conquest<sup>178</sup>) of Western civilization serves as a powerful foundation to justify the historic position of Whites.<sup>179</sup> Combine that narrative with the theme that it is only fair (merit), natural (evolution), and

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175. See Steven Greenhouse, *Abercrombie & Fitch Bias Case Settled*, N.Y. TIMES, Nov. 17, 2004, at A16 (noting that the settlement of the case included a requirement to add diversity to marketing materials); Steven Greenhouse, *Clothing Chain Accused of Discrimination*, N.Y. TIMES, June 17, 2003, at A21 (reporting on the suit filed against Abercrombie & Fitch for discriminating against non-Whites in seeking to project a "classic American" look).

176. See generally Lazos Varga, *supra* note 106, at 1584-95 (discussing the negative stereotypes expressed toward foreigners who are viewed as less patriotic).

177. See generally JARED DIAMOND, GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES (1997) (explaining that the success of Eurasians was a historical accident of geography propelled in part by the availability of iron ore deposits and the suitability of European terrain for large, domesticated animals).

178. See *Johnson v. M'Intosh* 21 U.S. 543, 544 (1823) (discussing the impact of the rule of conquest on the status of Indian land title); see also DIAMOND, *supra* note 177, at 197 (stating that Native Americans were victims of murderous Spanish conquistadores).

179. See Lazos Varga, *supra* note 106, at 1522-23 (explaining the White ethnic immigrant myth, which connects White ethnics to a heroic story of "the immigrant, who arrived poor and was discriminated against, but worked hard and eventually made it").

efficient (economics) for the dominant culture to be left to prevail without interference, and one is left with a powerful weave of ideology and theory that, without explicitly mentioning race, justifies the modern dominance of Whiteness. Just as the success of Intel chips supports the dominance of Windows, adherence to ideals of Western civilization, social evolution, and the free market supports Whiteness.

#### *F. Reputation and Status*

Note that at a seasonal level, many phenomena exhibit increasing returns.<sup>180</sup> Examples include: seeing “hit” movies, reading “hot” books, or listening to the most popular music so that your appreciation can be shared with others who have done the same. Any item or behavior that comes to signify status can have a similar, conformity-inducing effect.<sup>181</sup> The “Must-see TV” slogan is an attempt to induce this effect by naming it.

To the extent that the emotional commitment to a product is internalized, as with brand loyalty, displacing a dominant standard can be very difficult. Brands, of course, also represent a reputational effect. One hopes to be able to rely on the quality and consistency of a familiar brand.<sup>182</sup> The tremendous information costs of consumers choosing from among a vast array of goods is thus dramatically reduced for those who find a brand they can trust. The firms that can produce the branded products that earn this trust can thus gain superior returns.<sup>183</sup> Brand management, the process of carefully guiding the image of an identifiable mark, is consequently an essential issue.

One might further develop the ways in which brand management resembles the management of racial lines. My point here is that Whiteness might be thought of as a strong brand because it is familiar, has a long history of reliability, has connotations of patriotism and wholesome values, and is easily distinguished from other products through the familiar physical characteristics of its packaging. TV shows, books, movies, and advertising for residential developments, vacation resorts, cars, or clothes that feature entirely White models or casts are essentially extending and exploiting the racial brand of Whiteness. The producers of these works need not be explicitly or consciously racist: they are simply seeking a particular aesthetic appeal that Whiteness captures.<sup>184</sup>

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180. See, e.g., MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 3-5 (2000) (using the example of Hush Puppies sales that unexpectedly rose as a result of a new style that emerged in Manhattan).

181. *Id.* at 12-13.

182. See, e.g., DAVID ARNOLD, *THE HANDBOOK OF BRAND MANAGEMENT* 8-9 (1992) (explaining that consumers save time and energy when depending on a certain brand).

183. *Id.* at 3.

184. See generally E. Christi Cunningham, *Identity Markets*, 45 *HOW. L.J.* 491, 492

Cheryl Harris notes that once it was invented, “Whiteness was a form of status property,” recognized as a reputational interest in being regarded as White.<sup>185</sup> Note that it was libelous per se to call a White person Black, as an allegation likely to cause injury. The reverse was not true—“the law expressed and reinforced the social hierarchy as it existed.”<sup>186</sup>

Some goods operate most importantly as signals of status, “hipness,” or patriotism. Modern advertising that does not picture or even describe the product being advertised is all about creating an impression of the kind of person who owns the product. One purchases a product to express and demonstrate one’s identity as a rebel, a roamer, or a Romeo. Note that this effect requires that both the seller and the intended audience understand what the signal means.

Racial stereotypes operate this way as well. Because the physical characteristics that have come to denote race are so important to visual identification in the United States, race is a necessary part of personal image. Shared impressions of racial images are reinforced when one’s peers agree that a particular section of town seems dangerous, even when there have been no reports of crimes there. A home for sale that has pictures of its African-American owners on display receives offers far lower than if the owners are presumed to be White. The house is, in effect, carrying the wrong brand.

One might try to counter the perceived impression of their race. An Asian-American might take pains not to look foreign or nerdy. Blacks might be careful never to appear poor or menacing. In discussions that deal with race, White students tend to place special emphasis on their lack of any kind of economic advantage or privilege. This counters the racial stereotype applicable to White people: that they are the beneficiaries of racism. An alternative strategy might be to give up fighting the image and instead exploit it. A Black male, tired of fearful stares, might come to act boisterously or menacingly and at least gain the small satisfaction of inducing fear on his own terms.

Wherever there is White privilege, such as when traveling on the highway, in shopping malls, in interactions with law enforcement, in school placement, in neighborhood facilities, or in everyday interactions with coworkers, strangers, and friends on the street, in the cafeteria, or in the classroom, giving up that privilege will be a cost of switching from Whiteness to a different standard.

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(2002) (“Values from race markets brand actors in the labor market.”).

185. Harris, *supra* note 141, at 1734-36.

186. *Id.* at 1736; *see also* DENNIS CHONG, RATIONAL LIVES: NORMS AND VALUES IN POLITICS AND SOCIETY 20-24 (2000) (discussing status politics).

*G. The Trump Card: Direct Network Benefits to the Employer*

In theory, Whiteness could have become a dominant network standard regardless of the racial identity of the employers in a market, just as English has become a standard in many countries where English is not the native language. The benefits accrue to employers as a result of the network effects among employees. If a mythical African-American-owned super-firm bought all of the top 500 corporations, the firm would still benefit from adhering to the standard of Whiteness for employees in the United States.

Because of the historical status and advantage of Whites, however, an added feedback effect exists that does not exist in the orthodox examples of network markets: the individuals in each firm making and approving the hiring decisions are usually White.<sup>187</sup> In addition to the firm's interest in having employees that meet the Whiteness standard, each individual White actor has a personal economic self-interest in seeing the dominance of Whiteness in society and culture maintained.

Thus any rationalization required for a person in a supervisory position to prefer Whiteness while maintaining an antidiscriminatory stance benefits not only the firm but the individual himself. The same applies to the producers and developers of mass media who are usually White and whose emphasis is on White protagonists. The triumph of Western civilization caters not only to the tastes of White consumers but justifies their status as well. It is as though consumers of computer operating systems were themselves personal computers running Windows. Not only do they benefit from the network advantages of adopting the dominant standard when they choose Windows, but they advance their own interests by choosing a standard in which they themselves are valued.

III. ESTABLISHING STANDARDS: PATH DEPENDENCE AND THE IMPORTANCE OF HISTORY TO THE DOMINATION OF WHITENESS

Network dominance is the product of positive feedback. One might argue that a product or standard has to be well-situated to achieve the communication norms and market position required to exploit that positive feedback. In other words, one might expand the definition of merit to argue that in fact Windows is a better product than Macintosh *because* Bill Gates had the foresight to distribute his operating system software cheaply and freely in order to take advantage of network effects. Thus, the

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187. See Mary Margaret Penrose, *Beyond Observable Prejudice—Moving From Recognition of Differences to Feasible Solutions: A Critique of Ian Ayres' Pervasive Prejudice?*, 55 OKLA. L. REV. 361, 363 (2002) (asserting that the disproportionately large number of white males holding positions of power affecting minorities contributes to structural prejudice in the United States).

dominance of the network standard might be conceived of as having been earned. Here I describe how market dominance in network markets can depend on small, random, historical events rather than any meritorious design or foresight. I briefly allude to the recently burgeoning scholarship on the invention of Whiteness to argue that the market dominance of Whiteness was established through brute force and legal manipulation rather than through any admirable notion of merit.

#### A. *Contingency on Historical Events*

In network markets, the positive relationship between demand and value creates a virtuous cycle.<sup>188</sup> Because this positive feedback accelerates the market towards the choice of a standard, several economic equilibriums are possible.<sup>189</sup> That is, regardless of their features or merits, any one of several possible alternative standards could emerge as the dominant standard, but only one will. The achievement of actual market dominance can be based on small historical events.

Because of their unique preferences or their high switching costs, some consumers prefer to continue to use non-standard products.<sup>190</sup> They may, however, experience a vicious cycle: the product loses value as it is abandoned by users, eventually stranding those diehards who hang on the longest. The initial defectors pay a high cost in changing standards, but if the defector is at the leading edge of a virtuous cycle, the defection can accelerate into a new norm. Arguably this has happened with regard to overt racism. Whereas the first Whites to embrace nondiscrimination were scorned and met with strong formal and informal social sanctions,<sup>191</sup> now it is David Duke who is the outcast.<sup>192</sup> The main point is that if you are in the middle of the curve, a very small historical push can determine whether your cycle is vicious or virtuous.

#### B. *The Social and Legal Construction of Whiteness*

In light of the above, if one is to characterize Whiteness as a standard in a network market, one might expect to find arbitrary historic events

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188. SHAPIRO & VARIAN, *supra* note 117, at 175-79.

189. *See id.* at 181 (explaining the demand side economies).

190. *Id.*

191. Cf. Richard McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 352 (1997) (stating that “[a] norm exists as long as the sanctions imposed on violators create an expected cost for noncompliance that exceeds the expected cost of compliance”); POSNER, *supra* note 104, at 138-39 (explaining how discriminating against deviants among the in-group can serve as a signal to enforce norms).

192. David Duke is a former Grand Wizard of the Knights of the Klu Klux Klan and actively promotes the cause of “White Rights.” *See* ANTI-DEFAMATION LEAGUE, DAVID DUKE: IN HIS OWN WORDS, (May 2000), available at [http://www.adl.org/special\\_reports/duke\\_own\\_words/duke\\_intro.asp](http://www.adl.org/special_reports/duke_own_words/duke_intro.asp).

establishing this standard. Here, the literature on the origins of Whiteness is growing rapidly.<sup>193</sup>

Many aspects of the history of the establishment of White racial domination are widely received. Hundreds of years of Black slavery followed by another 100 years of explicit, legal, public and private race segregation and discrimination is certainly enough of an historical push to establish a dominant standard. My point here is that the domination of Whiteness is contingent on that specific history.<sup>194</sup> Racial standards exhibit path dependence. That is, Whiteness continues to be the dominant racial standard simply because it was established as such in the past, rather than because of any intrinsic merit.

It is no longer novel to speak of the social construction of race, except perhaps in law and economics.<sup>195</sup> Economic analysts sometimes describe people as being “Black” or “White” in the same way that a chair or a cat is black or white, and the economic puzzle of racism is why anyone would presume that a Black person is less attractive, capable, or qualified than a White person.<sup>196</sup>

It is tempting, given the color-consciousness in which most Americans are socialized, to think that Blackness and Whiteness are simply so obvious a physical distinction as to be a “natural” basis for racial difference. There are many strongly entrenched group conflicts around the world, however, that in form mimic what we call racial divisions, but which take place between groups that might appear to us to be “naturally” similar. Consider conflicts between equally Semitic Jews and Arabs in the Middle East, between equally Slavic Serbians and Croats in the former Yugoslavia, or among castes in India. The question thus reappears: how did racial Whiteness/Blackness, assigned according to (roughly) European and African ancestry, become the locus for status division in America?

To say that race is socially constructed, is to observe that the category is primarily a human invention,<sup>197</sup> a social classification, albeit a social

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193. See, e.g., RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* (1993); MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR* (1998); DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991).

194. Cf. DIAMOND, *supra* note 177, at 22-23 (arguing that simple geographic features conducive to the development of biological immunities, steel, and firearms explain the rise of Europe as the dominant world power).

195. Carbado & Gulati, *supra* note 74, at 1763 (explaining that most economic studies of race treat it as though it were simply a physical biological characteristic).

196. See STEINHORN & DIGGS-BROWN, *supra* note 108, at 181-83 (describing a racist’s perception of blacks).

197. See generally MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* 54-55 (1994) (emphasizing that race is a social classification that in turn imposes certain social order and has cultural consequences).

classification based on physical characteristics.<sup>198</sup> In hindsight, modern racial divisions seem so vast that it is hard to imagine that small, random events might have altered the development of the strong racial identity that Americans experience. Rather, it seems as though large, inexorable historic tides created race in America.<sup>199</sup> The idea of the ordinary functioning of market forces is so strong that there is a danger of assuming that whatever the current state of events, they are the result of the invisible hand and the market. Therefore, many assume that Windows is in fact the best operating system around, and that Microsoft must be an efficient and smart company—look how much money they make! Yet most of those who reach this conclusion have never tried a computer operating on Macintosh or Linux. It is important to separate the current state of affairs from the implicit conclusion that they are the result of ordinary market forces. Could things have been different here?

One might attempt to imagine a world in which different historical circumstances prevailed and a different racial standard was established.<sup>200</sup> More to the point, one might imagine a world in which a standard developed along lines that we would not today consider racial. Scholars tracing the historical development of the construction of Whiteness note that among early colonists in America, racial divisions were neither consistently respected nor strictly enforced.<sup>201</sup> White indentured servants existed alongside free Blacks, and interracial social relations were observed to be widespread.<sup>202</sup>

Suppose that at this moment in American history, the ideal of height had been valued more than it already was. Blacks might have been separated by cultural or educational barriers but greatly respected for their height. A general division of Talls and Shorts might have developed. These are, of course, hereditary characteristics, and one might expect that Talls would prefer to marry each other, and produce Tall families, regardless of skin color. Talls might be known for their bravery and industriousness; everyone knows, on the other hand, that Shorts are greedy and impatient,

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198. LOPEZ, *supra* note 19, at 14.

199. See JACOBSON, *supra* note 193, at 2.

200. Numerous authors have depicted a future universe in which the Earth is dominated by China and Chinese culture. See generally JOHN HERSEY, *WHITE LOTUS* (1965); MAUREEN F. MCHUGH, *CHINA MOUNTAIN ZHANG* (1992); DAVID WINGROVE, *THE CHUNG KUO SERIES* (1990); KIM STANLEY ROBINSON, *THE YEARS OF RICE AND SALT* (2002).

201. See William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1742-73 (1996) (describing how Massachusetts' Body of Liberties Code both prohibited and legitimized slavery).

202. See Jason A. Gillmer, *Suing For Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post Revolutionary and Antebellum South*, 82 N.C. L. REV. 535, 550 (2004) (citing Ira Berlin, who wrote that for the "first fifty years of English and African settlement in the Chesapeake, black and white workers lived and worked together in ways that blurred racial lines").

notable exceptions going only to prove the general point. The occasional Tall-looking offspring of a Short couple might produce a warning among Talls: “she looks Tall, but she’s *really* Short.”<sup>203</sup> Or one might speculate about scandalous behavior by an indiscrete Tall among the Short couple’s ancestors.<sup>204</sup> Tall and Short children would come to understand their height identity from birth and would both internalize and enforce the social meanings that came along with that identity. This would not, of course, be a non-racial standard. Rather, it is an alternate history of race, where race revolves around height rather than skin color.

In reality, the distinction between African and White indentured labor grew even as the demand for slave labor increased, resulting in a reliance on what became African slave labor.<sup>205</sup> The formation of White identity was intimately tied to the evolution and expansion of chattel slavery.<sup>206</sup> “The dominant paradigm of social relations, however, was that, although not all Africans were slaves, virtually all slaves were not white.”<sup>207</sup> Economic interests dependent on Black slavery had powerful interests in stabilizing that system.<sup>208</sup> White indentured servitude diluted the clarity of a racial polarity aligned along labor status divisions.<sup>209</sup>

If there were to be both free individuals and bound labor, and bound labor was to be justified in a country founded in part on post-enlightenment egalitarian principles, one might imagine a search for a “natural” division among workers. A theory of blended economic and biological specialization would be that one or more races might be fit especially for bound labor and another race or races might be suited for entrepreneurship and management. Thus one might imagine the circumstances of a free Black with White indentured servants in the South during the evolution of African chattel slavery. While initially being merely a statistical anomaly, the free Black might soon find his very existence challenged the developing identification of Blackness with subjugation and Whiteness with dominant status. Social ostracism would cause difficulty finding business partners

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203. See GREGORY HOWARD WILLIAMS, *LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK* (1995) (telling the story of a boy with white skin who was raised by Black relatives, and because of this, experienced racism and discrimination).

204. Cf. WILLIAM PETERS, *A CLASS DIVIDED: THEN AND NOW* (1987) (documenting a 1970 third grade class that underwent a discrimination experiment where the children role-played after being broken down into blue-eyed people and brown-eyed people).

205. See Harris, *supra* note 141, at 1716-17 (highlighting the development of race-based slavery).

206. *Id.*; see also Wiecek, *supra* note 201, at 1756-57.

207. Harris, *supra* note 141, at 1717.

208. ROEDIGER, *supra* note 193, at 34.

209. Wiecek, *supra* note 201, at 1713.



with which to transact.<sup>210</sup> In time, the enforcement of powerful social norms moves beyond economic notions of boycott and towards violence.<sup>211</sup>

Prior to this evolution, however, race was understood more narrowly to define groups that we would today characterize as “ethnicities.” In order to comprehend the challenge of understanding why Whiteness emerged as the dominant racial standard, imagine that the dominant division instead turned out to be Anglo-Saxon v. non Anglo-Saxon races<sup>212</sup> or Aryan v. non-Aryan races. In other words, one might imagine that the Irish,<sup>213</sup> Italian, and Greek “races” came to be considered “Black.” It is no historical accident that Whites are the vast majority of workers. Jews, Catholics, Southern Europeans of all nationalities, Irish, Slavs, and other groups now considered White<sup>214</sup> have all been racially despised and risked outsider status in American history.<sup>215</sup> Had they remained outsiders, there might have been a greater danger that the dominant standard would have failed. Imagine a world in which all of these workers came to be characterized as “Black.” Instead, just as Microsoft often purchases and absorbs software companies that might have become a threat, Whiteness expanded to include these groups. That they all came to be identified—and to identify themselves—as White demonstrates the success of Whiteness in becoming the dominant network standard. There were obvious material benefits to the decision of White workers to define themselves according to their Whiteness.<sup>216</sup> Whiteness helped avoid class conflict because White workers could accept their lower class status by forming positive White identities in opposition to slavery and Blackness.<sup>217</sup> As a result,

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210. See discussion *infra* Part III.C regarding the enforcement of social norms through informal, third-party mechanisms.

211. See Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (describing how the current American legal system is a social organization of legal violence).

212. See JACOBSON, *supra* note 193, at 43-44 (noting the emphasis on distinctions between Anglo-Saxon and other European races until the issue of slavery arose).

213. See, e.g., THEODORE ALLEN, *THE INVENTION OF THE WHITE RACE* (1994) (tracing the transformation of the Irish from downtrodden “Celts” to privileged “Whites”); NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* 2-3 (1995) (describing the stigmatization and assimilation of Irish immigrants from high-risk, low-wage employment to competitive employment and social status).

214. See Harris, *supra* note 141, at 1742-43 (explaining that the “amalgamation of various European strains into an American identity was facilitated by an oppositional definition of Black as ‘other’”).

215. See Juan Perea, *The Black/White Binary Paradigm of Race: The ‘Normal Science’ of American Racial Thought*, 85 CAL. L. REV. 1213, 1230 (1997) (citing Toni Morrison’s example of how acts of racial contempt against Blacks transform immigrants into “entitled white[s]”).

216. *Id.*

217. IGNATIEV, *supra* note 213, at 124-41 (describing how Irish immigrants claimed Whiteness by attacking blacks).

“Whiteness produced—and was reproduced by—the social advantage that accompanied it.”<sup>218</sup>

To the extent that cultural norms constitute Whiteness, note Jack Balkin’s argument that cultural practices evolve through a process that is entirely dependent on historical antecedents.<sup>219</sup> Building on the work of Richard Dawkins, Balkin emphasizes the self-regenerating aspects of cultural practices and norms and deemphasizes the individuals in whose lives those practices are performed.<sup>220</sup> Thus, cultural standards are path dependent and sticky in the same way that network standards are.

### C. *The Old Boys’ Network*

My claim that Whiteness operates as a network racial standard is not merely that White people have an exclusive network, although the two are related. While the “old boys” network does operate to preserve privileges, it is usually imagined differently than a network standard in the sense that I mean. The idea of the old boys’ club is that people with certain biological and genetic characteristics—White men—intentionally and perhaps covertly reserve economic benefits for other members of the club, particularly those who share certain social or class characteristics such as school ties, inherited wealth, or shared acquaintances.<sup>221</sup> Often these ties harken back to local or family history, to periods when Whites “happen” to have been formally dominant, both socially and economically.

There is a sense in this depiction that individuals use the old boys’ network intentionally to subvert merit-based selection to benefit the “right” kind of people.<sup>222</sup> Importantly, then, those who are not intentionally racist or who do not share the right kind of exclusive class and social ties can claim not to be practitioners or beneficiaries of the old boys’ privilege.

However, the operation of network standards requires no intentional, irrational discrimination, and no special, direct connections. For example, the consumer has only rational benefits in mind when choosing the telephone, the English-speaking employee, or Windows. No malice

218. Harris, *supra* note 141, at 1742.

219. See JACK BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 17 (1998) (explaining that “[t]o exist in history means to be the bearer of a particular variety of cultural software that has been produced through a process of cultural evolution”). Balkin gives an example of how sixteenth and twentieth century people have different kinds of existence because of their different “cultural software.” *Id.*

220. *Id.* at 43-72.

221. See Charles R. Lawrence, III, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. REV. 429, 435-36 (1986) (discussing the old boys’ network in the context of legal academia).

222. See, e.g., *id.* at 435 (pointing out that in the realm of appointing faculty in academia, “[t]he fact that the ‘Old Boy Network’ is alive, well, and more often than not the source of information most critical to the appointments process is news to none of us”).

towards the short-wave radio, the applicant who speaks only Polish, or Apple's Macintosh is required.

The network effects of Whiteness operate this way—without necessary discriminatory intent, and with regard to real economic benefits. The standard of Whiteness is a socially and legally-constructed standard, rather than merely an irrelevant biological characteristic.<sup>223</sup>

I do not mean to understate the pervasive impact that an old boys' network can have in preserving privilege. Especially in small communities, a particular established social network of acquaintances—the “pillars” of the community—could so dominate a market that outsiders and newcomers are absolutely, or at least significantly, excluded from important economic benefits.<sup>224</sup> These exclusive networks are often White because they are based on historical advantage. Moreover, the exclusion need not be intentionally racist to have a continuing racial impact. When an important local contractor hires the friend of a son, or the son of a friend, for a summer job, he is simply doing favors, perhaps for someone who looks like him, or who reminds him of himself when he was young.<sup>225</sup> However, because social segregation remains the norm, such casual and innocent favors have an unequal racial impact.<sup>226</sup>

Nonetheless, these kinds of social networks do not produce the kind of economic network effects that are the subject of this Essay. While the dominance of a social clique is path-dependent and race-correlated, it does not produce positive returns such that the benefit to each member becomes greater the larger the network extends.

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223. Whiteness is, of course, much more than skin color or biology. Neither the Japanese Ozawa, who tried to prove how pale his skin was (*Ozawa v. United States*, 260 U.S. 178 (1927)), nor the Indian Thind, scientifically classified as Caucasian (*United States v. Thind*, 261 U.S. 204 (1923)), were (or are) deemed White. See LOPEZ, *supra* note 19, at 79-92. The one-drop rule that rendered those with the tiniest bit of African descent to be Black, and therefore subject to slavery, is not a biological rule but a social one. See Kenneth Payson, *Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed Race People*, 84 CAL. L. REV. 1233, 1243-49 (1996). The histories of how Jews and Irish became White reveals a social and political, rather than biological, transformation. Consider the ambiguous racial regard that Americans currently have for Arabs, Iraqis, Turks, Argentineans, and other groups. See Jerry Kang, *Cyber-race*, 113 HARV. L. REV. 1130, 1142 n.35 (2000) (citing Doug Daniels, *The White Race is Shrinking: Perceptions of Race in Canada and Some Speculations on the Political Economy of Race Classification*, 4 ETHNIC & RACIAL STUD. 353, 354 (1981) (showing results of an informal student survey on the race of certain nationalities)).

224. See CHONG, *supra* note 186, at 20 (discussing how status issues show the public commitment of society and government to certain groups, cultures, and lifestyles).

225. See Wilkins & Gulati, *supra* note 147, at 569 (discussing the “bias that potential mentors have for protégés who remind them of themselves”).

226. See, e.g., Lawrence, *supra* note 221, at 435 (giving the example that minority students derive fewer benefits from the “old boys’ network” because they are less likely to have developed close relationships with the White professors).

## CONCLUSION

This Essay has laid out a vision of how Whiteness maintains itself as the dominant racial standard in America through network economics. The vision offers rich possibilities for further development. I note in particular three suggestions of topics for further development, and one broader agenda:

*Topic 1: Racial stances and attitudes are analogous to the strategic business behavior of those defending or coping with a dominant standard.* Much of the popular literature on network economics has come from the field of business management.<sup>227</sup> Having identified the power of networks, these analysts offer advice with regard to how a firm might capture these benefits by controlling the dominant standard.<sup>228</sup> Some of the questions that arise relate to the best strategies for sharing a standard to ensure that it dominates; how to prevent other standards from being established; or what one's alternatives are when losing a struggle over standards. It appears as though the advice given correlates well with racial strategies adopted by both Whites and non-Whites. In order to maintain the dominance of Whiteness, for instance, Whites would be well-advised to ignore the existence of non-Whites, to assume that everyone adheres to the default standard of Whiteness unless an explicit exception is made,<sup>229</sup> and to ignore claims of unfair treatment as unmeritorious or just sour grapes. Non-Whites facing a market that adheres to a Whiteness standard would be well-advised to develop an effective interface with that standard,<sup>230</sup> and to absorb the costs of making that translation work, or to carve out small niche markets within which alternative racial standards might dominate.<sup>231</sup>

White Network Economics challenges the foundational economic notion of the rational individual. For Whiteness to be maintained as a network standard, Whites—if they are to be taken at their word that they are not conscious racists—are not rational because they are acting in ways that are directly contrary to their expressed and sincere beliefs in color-blindness. Moreover, they are not even entirely individuals, as they are acting in concert to maintain racial domination. These two charges—that Whiteness operates as a racial standard despite conscious commitments to color-

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227. See, e.g., SHAPIRO & VARIAN, *supra* note 117, at 173-225.

228. Given the competitive pressure to control standards in network markets, legal analysts focus on whether and how competitive behavior in such markets should be regulated, or how standard-setting might best be accomplished. See, e.g., Lemley, *supra* note 46, 1059-65.

229. FLAGG, *supra* note 65, at 1-18, 30-38.

230. Cf. SHAPIRO & VARIAN, *supra* note 117, at 285-87 (noting how firms losing a standards battle might try to adapt their product to connect to the larger network).

231. Cf. *id.* at 248 (pointing out that Apple has survived in the wake of Microsoft's success because of its niche strategy).

blindness, and that Whiteness operates as a racial standard even in the absence of external direction—require further exploration.

*Topic 2: Behavioral psychology and cognitive dissonance can explain how White Network Economics can work in the age of color-blindness.* The emerging insights of behavioral law and economics<sup>232</sup> offer the beginnings of an explanation of how it is that individuals apply limited available information, overvalue initial allocations, and construct self-serving rationalizations to justify their conclusions and actions. While the resulting racial disparities are hard to ignore, Whites can thus understand them as not resulting from racism.<sup>233</sup> In short, it is in the interest of Whites both to maintain the dominance of Whiteness and not to understand themselves as supporting White domination. Human beings appear to be capable of managing this trick.

*Topic 3: Social norms can result in the organization of Whiteness without hierarchy.* There is, of course, no Bill Gates of Whiteness directing the actions of all White people to maintain a dominant market position. However, recent work in law and social norms<sup>234</sup> applies economic analysis and game theory to produce a theory of how sophisticated social cooperation and organization can develop even in the absence of a directing intelligent actor.<sup>235</sup> Thus, Richard McAdams in particular lays out a theory of esteem payments which would support the development of intragroup loyalty and intergroup competition along racial lines.<sup>236</sup> Eric Posner suggests that racial discrimination might arise out of a series of signaling conventions.<sup>237</sup> Glenn Loury has written about the socio-mechanisms that produce racial stigma of African-Americans.<sup>238</sup> Together, these theories suggest that Whiteness is perfectly capable of maintaining itself without there being any leader.<sup>239</sup>

232. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476 (1998) (explaining that the purpose of this approach is to look at the affect on the law of actual human behavior, which includes “bounded rationality, bounded willpower and bounded self-interest”).

233. See ARMOUR, *supra* note 47, at 12-13; Lawrence, *supra* note 47, at 374-76 (citing polls that found that most Whites do not blame racism and discrimination as the major causes of inequality between Blacks and Whites).

234. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); POSNER, *supra* note 104.

235. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); DENNIS CHONG, *COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT* (1991).

236. See McAdams, *supra* note 191, at 355, 356-75 (arguing that “norms arise because people seek the esteem of others”).

237. See POSNER, *supra* note 104, at 133-40 (suggesting that “discrimination against people with salient and immutable characteristics that systematically differ from those of desired cooperative partners serves as a signal to the latter that one has a low discount rate”).

238. See LOURY, *supra* note 88, at 61-65 (giving an example of racial profiling and explaining that this act perpetuates false beliefs and prohibits learning).

239. See BALKIN, *supra* note 219, at x (pointing out that “[a]dvocates of social

*Topic 4: A broader agenda: Whiteness and other natural complex systems.* Current racial orthodoxy puts forth the autonomous individual as the principal unit of analysis and characterizes race as an irrelevant biological characteristic. Absent racist intent on the part of individuals, disparate racial effects magically disappear from view. Network economics alters this perspective by pointing out the effect that systems can have on individual incentives and actions.<sup>240</sup> But network economics is not the only new field of study in which the phenomenon is playing out. Biologists and computer scientists are studying swarm intelligence to see how simple insects can produce sophisticated group behavior.<sup>241</sup> Richard Dawkins posits that genetic characteristics might be thought to propagate themselves, regardless of the intent or motive of the organisms that carry the characteristics.<sup>242</sup> Carrying over this insight into cultural evolution, one sees a system in which individuals are not cultural actors but vessels for cultural continuity. Leaf formation, city formation,<sup>243</sup> cellular automata,<sup>244</sup> and certain random numbers are seen to produce similar patterns, not through divine guidance or intelligent supervision, but because of the universal nature of pattern formation. In the right circumstances, a market can reach a “tipping point,” and the actions of thousands of independent market actors can produce coordination and unison so perfect as to resemble a conspiracy<sup>245</sup> or a choir. The study of the complexity and coordination that simple actors can produce by following simple instructions is everywhere it seems. The time has come to apply these insights to the problem of race. The general point is the same: individuals acting without malice can nonetheless produce a complex and oppressive racial scheme in the same way that ants can build cities,<sup>246</sup> cells can

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construction have been looking in the wrong place” and need to look “deeper inside” individuals).

240. Cf. SHAPIRO & VARIAN, *supra* note 117, at 10 (“When you are selling one component of a system, you can’t compete if you’re not compatible with the rest of the system.”).

241. See, e.g., STEVEN JOHNSON, *EMERGENCE: THE CONNECTED LIVES OF ANTS, BRAINS, CITIES, AND SOFTWARE* 18 (2001); Thomas Earl Geu, *Chaos, Complexity, and Coevolution: The Web of Law, Management Theory, and Law Related Services at the Millennium*, 66 TENN. L. REV. 137 (discussing evolutionary biologist Richard Dawkins and his Biomorph Land computer program).

242. See generally RICHARD DAWKINS, *THE SELFISH GENE* (1990); see also Geu, *supra* note 241; BALKIN, *supra* note 219, at 43 (describing how Dawkins’ “memes” “spread from person to person by observation and social learning . . . [through which] people internalize and assimilate skills, beliefs, attitudes and values”).

243. JOHNSON, *supra* note 241, at 33.

244. STEVEN WOLFRAM, *A NEW KIND OF SCIENCE* 1-16(2002).

245. See Regina Austin, *Beyond Black Demons & White Devils: Antiblack Conspiracy Theorizing & the Black Public Sphere*, 22 FLA. ST. U. L. REV. 1021, 1023 (1995) (discussing the antiblack conspiracy theory “dealing with the wholesale destruction of urban black communities by means of drugs and guns”).

246. See JOHNSON, *supra* note 241, at 29-33 (pointing out that ants conjure up colonies

produce trees, and people can produce trends, fashions,<sup>247</sup> and social movements.<sup>248</sup>

To make progress on race, a new vocabulary must be developed that is both critical of institutions and structures that maintain the racial domination of Whiteness, yet is accessible and understandable to ordinary well-meaning people who identify themselves as White.<sup>249</sup> White Network Economics is only one example of analysis that describes, not oppressors or supremacists, but ordinary people making ordinary economic decisions not based on malice or intentional racism and not even conscious of the racial nature of their behavior, but nonetheless contributing to the perpetuation of the dominance of Whiteness.

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without a leader the same way that collective human behavior builds cities).

247. See GLADWELL, *supra* note 180, at 3-9, 139 (giving as an example the rise of Hush Puppies as a fashion trend as a result of contagious human behavior).

248. CHONG, *supra* note 186, at 1 (discussing “public-spirited collective action” as large scale activism based on concerns such as peace, women’s issues, the environment, civil rights and other moral issues).

249. The language of oppression and White supremacy may certainly be accurate and achieve empowerment and awareness on the part of non-Whites. This is not an insignificant or unimportant task. Indeed, my own dedication to racial progress has been nourished and encouraged by various sophisticated analyses of race inequality. However this language is not designed to accomplish the kind of access that is necessary to bring about broader change.