

**IDENTITY PROPERTY:  
PROTECTING THE NEW IP IN A RACE-RELEVANT WORLD**

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## I. INTRODUCTION

This Article explores the relatively new idea in American legal thought that people of color are human beings whose dignity and selfhood are worthy of legal protection. While the value and protection of whiteness throughout American legal history is undeniable, non-whiteness<sup>1</sup> has had a more turbulent history. For most of American history, the concept of non-whiteness was constructed by white society and reinforced by law—i.e., through a process of socio-legal construction—in a way that excluded its possessor from the fruits of citizenship. However, people of color have resisted this negative construction of selfhood. This resistance led to the development of a number of empowered racial minority identities<sup>2</sup> that were created through labor and affirmatively claimed by people of color. I analyze in this Article the concept of racial minority identity as a form of identity property and utilize examples from intellectual property and defamation law to illustrate some of the nuances of such a concept.

This Article proceeds in three parts. Part I begins by exploring the socio-legal construction of race and explains Cheryl Harris's idea that whiteness has been a form of property. Part II sets forth the argument that people of color have constructed empowering racial identities in resistance to the socio-legal construction of negative racial meaning that has been imposed on them. Finally, Part III explores the idea of identity property and provides examples of how intellectual property and reputational harm concepts can elucidate ways in which identity property can be expressed and protected.

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<sup>1</sup> In the dominant socio-legal construction of race in America, the world was divided into white and non-white categories. This is particularly evident in the historic examples I discuss later in this Article, including federal naturalization laws, state evidentiary rules, and local segregation policies. These examples also illustrate how the definitional boundaries of whiteness and non-whiteness have been contested and have evolved over time. See NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (2008) (analyzing how people of Irish descent, initially perceived as non-white, secured a place in white American society by constructing their own whiteness and embracing white supremacy). Nonetheless, the white/non-white dichotomy remained an organizing principle for American society.

<sup>2</sup> I make a distinction between non-whiteness and racial minority identity. Non-whiteness is something that was imposed by white people on people of color. On the other hand, racial minority identity is something that was constructed by people of color themselves. There are, however, points of overlap. As I will argue later, racial minority identity is informed by the experience of being deemed non-white in this society. It is in resistance to the negative consequences of such ascription.

## II. THE SOCIO-LEGAL CONSTRUCTION OF RACE IN AMERICA

A. *The Legal Protection of Whiteness and Degradation of Non-White Status*

Whiteness is a thing. It is not a biological term,<sup>3</sup> but refers to a social and legal construct that has real-world effects on people's lives. Specifically, whiteness is a type of status based on other people's perception that someone possesses it. By "status," I borrow from sociologist Max Weber, who has defined the term as "an effective claim to social esteem in terms of positive or negative privileges."<sup>4</sup> Non-whiteness is also a social and legal construction based on other people's perception that someone possesses it. Both whiteness and non-whiteness have practical ramifications for their possessors. These outcomes are not neutral. Michael Omi and Howard Winant contend that racial categories such as whiteness and non-whiteness are continually evolving in a contested process they call "racial formation."<sup>5</sup> This racial formation has been mainly created by the dominant culture and reinforced by law—a process of socio-legal construction. For most of American history, the construction of non-whiteness has been the counterpoint to whiteness. Specifically, while whiteness was a requirement for access, opportunity, and resources, non-whiteness has been just the opposite—something that has led to exclusion and degradation. However, as we shall see, there has been room for resistance by those designated as non-white.

Cheryl Harris first wrote about whiteness as property in a groundbreaking and highly influential article that appeared in the *Harvard Law Review*.<sup>6</sup> She posited that racial identity and property have been deeply interrelated concepts in American law. She examined how whiteness, initially constructed as a form of identity, evolved into a form of legally protected property right. Harris wrote:

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<sup>3</sup> In 1987, the Supreme Court appeared to reject biological notions of race in favor of a socio-political definition of the concept. *See Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987). Justice Byron White, writing for the Court, observed:

The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the "average" individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature.

*Id.* at 610 n.4.

<sup>4</sup> MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 305 (1978).

<sup>5</sup> MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 109–12 (3d ed. 2015).

<sup>6</sup> Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

Whiteness has functioned as self-identity in the domain of the intrinsic, personal, and psychological; as reputation in the interstices between internal and external identity; and, as property in the extrinsic, public, and legal realms. According to Harris, whiteness actual legal status converted an aspect of identity into an external object of property, moving whiteness from privileged identity to a vested interest.<sup>7</sup>

Harris also observed, “Whiteness determined whether one could vote, travel freely, attend schools, obtain work, and indeed, defined the structure of social relations along the entire spectrum of interactions between the individual and society.”<sup>8</sup> Because whiteness enabled access to valuable resources, Harris argues that it has been a form of property. In other words, whiteness has been like an access card that certain people possessed that opened up the doors of social, political, and economic opportunity. Non-white status has been deemed the absence of this access card and people who were deemed to possess this quality were denied opportunity. American legal history has a plethora of examples consistent with this idea.

#### 1. Non-Whiteness as a Bar to Legal Rights

I begin in the context of American chattel slavery with the case of *Dred Scott v. Sandford*.<sup>9</sup> *Dred Scott* involved an African American slave who was taken by his owner, Dr. John Emerson, from Missouri, a slave state, to Illinois and Minnesota, which were a free state and a free territory respectively, and then back to Missouri.<sup>10</sup> Dr. Emerson later sold Scott and his wife, Harriet, fourteen-year-old daughter, Eliza, and seven-year-old daughter, Lizzie, to John A. Sandford.<sup>11</sup> Based on Scott’s status as a free man in Illinois and Minnesota, Scott subsequently sued in federal court to obtain his freedom after he returned to Missouri.<sup>12</sup> He claimed that Sandford wrongfully “laid his hands” upon Scott and his family and falsely imprisoned them.<sup>13</sup> If Scott was deemed to still be a slave, his claims would fail. He claimed that the court had diversity jurisdiction because he was a citizen of Missouri suing Sandford, a citizen of New York. Justice Roger B. Taney, writing for the majority, held that Scott did not have standing to sue because people of African descent were not citizens of this

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<sup>7</sup> *Id.* at 1725 (citations omitted).

<sup>8</sup> *Id.* at 1745.

<sup>9</sup> 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

<sup>10</sup> *Id.* at 397.

<sup>11</sup> *Id.* at 398.

<sup>12</sup> *Id.* at 400.

<sup>13</sup> *Id.* at 397.

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country under the U.S. Constitution. Regarding their legal status, Justice Taney observed:

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.<sup>14</sup>

*Dred Scott* was, therefore, nothing less than a judicial statement that African Americans, whether slave or free, were not and have never been intended to be citizens of this country. As such, according to the opinion of the highest court in the land, they were precluded from seeking any form of relief in federal court. African Americans lacked the access card of white status and thus were denied legal protections. Indeed, the majority opinion made clear that the American legal system was never meant to protect people of African descent in any way. Don Fehrenbacher notes, “[t]he views of the Court majority in the *Dred Scott* case seemed to confer a certain amount of high legal sanction upon the thriving racist anthropology of the day which defined the black race as a distinct and lower species of mankind, the product of a separate creation.”<sup>15</sup> But the majority opinion did much more than this. Justice Taney further held that the Missouri Compromise was unconstitutional in that the federal government did not have the authority to make slavery illegal in the territories. This decision exacerbated deepening tensions within America on the question of states’ rights to legalize slavery.<sup>16</sup> It helped lead to the Civil War, which was fought over the issue of slavery and was the bloodiest war in America’s history.<sup>17</sup>

## 2. Non-Whiteness as a Bar to Naturalization

The socio-legal construction of race is also apparent in the country’s first-ever federal naturalization law, which was enacted in 1790.<sup>18</sup> This law

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<sup>14</sup> *Id.* at 407.

<sup>15</sup> DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN LAW AND POLITICS* 428 (1978).

<sup>16</sup> See JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 175–79* (1988).

<sup>17</sup> Recent scholarship has placed the death count as high as 752,000, as compared with the commonly cited estimate of 620,000. See J. David Hacker, *A Census-Based Count of the Civil War Dead*, 57 *CIV. WAR HIST.* 307, 339 (2011); see also Guy Gugliotta, *New Estimate Raises Civil War Death Toll*, *N.Y. TIMES*, Apr. 3, 2012, at D1.

<sup>18</sup> Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795). Naturalization is “[t]he granting of citizenship to a foreign-born person under statutory authority.” *BLACK’S LAW DICTIONARY* 1126 (9th ed. 2009).

restricted naturalization to “white” persons.<sup>19</sup> Thus, whiteness was an explicit legal requirement for naturalization, and the absence of whiteness, or non-whiteness, was a bar. The whiteness requirement for naturalization was not removed from the law until 1952.<sup>20</sup> During this 163-year period, litigants from various racial backgrounds contested the meaning of whiteness in court.<sup>21</sup> Two Supreme Court cases that were decided close in time are telling.

In *Ozawa v. United States*,<sup>22</sup> Takao Ozawa sought naturalization to become a U.S. citizen. Ozawa had lived in the United States for 20 years, graduated from high school in California, enrolled at the University of California, educated his children in American schools, attended American churches, and spoke English at home.<sup>23</sup> However, Ozawa’s application for citizenship was denied because his Japanese ancestry precluded him from naturalization. Ozawa’s appeal eventually reached the Supreme Court. Even though the Court acknowledged that “he was well qualified by character and education for citizenship,”<sup>24</sup> it ultimately held that Ozawa was excluded from naturalization because he was not white. Justice George Sutherland, himself an immigrant from England,<sup>25</sup> wrote the Court’s unanimous opinion. He initially observed that “federal and state courts, in an almost unbroken line, have held that the words ‘white person’ were meant to indicate only a person of what is popularly known as the Caucasian race.”<sup>26</sup> From this proposition, Justice Sutherland reasoned:

The appellant, in the case now under consideration, however, is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side. A large number of the federal and state courts have so decided and we find no reported case definitely to the contrary. These decisions are sustained by numerous scientific authorities, which we do not

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<sup>19</sup> The law provided, in relevant part, that “any alien, being a free white person . . . may be admitted to become a citizen [of the United States].” Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795).

<sup>20</sup> See Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163, available at <http://library.uwb.edu/guides/usimmigration/66%20stat%20163.pdf>.

<sup>21</sup> See generally ARIELA J. GROSS, WHAT BLOOD WON’T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA (2010); IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (2006).

<sup>22</sup> 260 U.S. 178 (1922).

<sup>23</sup> *Id.* at 189.

<sup>24</sup> *Id.*

<sup>25</sup> THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 848 (Kermit L. Hall ed., 2d ed. 1992).

<sup>26</sup> *Ozawa*, 260 U.S. at 197.

deem it necessary to review. We think these decisions are right and so hold.<sup>27</sup>

In other words, based on this reasoning, to be white meant to be Caucasian.

Justice Sutherland's opinion in *Ozawa* gave Bhagat Singh Thind hope of winning his case before the Supreme Court, which was captioned *United States v. Thind*.<sup>28</sup> Thind was "a high-caste Hindu, of full Indian blood, born at Amritsar, Punjab, India."<sup>29</sup> According to scientific authorities of the time, individuals with Thind's South Asian ancestry were considered Caucasian.<sup>30</sup> Consistent with other federal courts that have held that Asian Indians are white,<sup>31</sup> Thind's application for naturalization was granted by a district court in Oregon. The federal government objected to this grant because it did not consider Thind white, and its appeal reached the Supreme Court. Three months after the *Ozawa* decision, Thind's case was decided by the same Court and was also written by Justice Sutherland.<sup>32</sup> Justice Sutherland, in another unanimous decision, overruled the district court's grant of naturalization and reasoned that "[w]hat we now hold is that the words 'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word 'Caucasian' only as that word is popularly understood."<sup>33</sup> He further noted, "It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them to-day."<sup>34</sup> Even though Justice Sutherland ruled in *Ozawa* that "white" meant Caucasian, three months later, he held that "white" meant whatever the "common man"—specifically the common white man—thought it meant.

The exclusion of people that the courts determined were non-white from naturalization created tangible negative effects on those excluded. One of the most salient examples were alien land laws, which were passed by a number of states, particularly in the West.<sup>35</sup> For example, California's law

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<sup>27</sup> *Id.* at 198.

<sup>28</sup> 261 U.S. 204 (1923).

<sup>29</sup> *Id.* at 206.

<sup>30</sup> *Id.* at 210.

<sup>31</sup> *Id.* at 213. Ian Haney Lopez notes that up to the time that *Thind* was decided, "four lower courts had specifically ruled that Asian Indians were White [and eligible for naturalization], while only one had held to the contrary." LOPEZ, *supra* note 21, at 62 (citation omitted).

<sup>32</sup> *Ozawa* was decided on November 13, 1922, and *Thind* was decided on February 19, 1923.

<sup>33</sup> *Thind*, 261 U.S. at 214–15.

<sup>34</sup> *Id.* at 209.

<sup>35</sup> See generally *The Alien Land Laws: A Reappraisal*, 56 YALE L.J. 1017 (1947); Gabriel J. Chin, *Citizenship and Exclusion: Wyoming's Anti-Japanese Alien Land Law in Context*, 1 WYO. L. REV. 497 (2001).

precluded “aliens ineligible for citizenship” from owning real property in the state.<sup>36</sup> Although these land ownership restrictions seemed facially neutral, apparently relying on citizenship status instead of racial categories, if taken in conjunction with *Ozawa* and *Thind*, they had the effect of preventing land ownership for foreign-born people of Asian and South Asian descent. One year after *Ozawa* was decided and in the same year as *Thind*, the Supreme Court upheld alien land laws in *Porterfield v. Webb*<sup>37</sup> and *Terrace v. Thompson*.<sup>38</sup> Devon Carbado contends that the combination of the judicial construction of whiteness and the highest court’s affirmation of alien land laws locked Asian people “out of an aspect of formal citizenship (naturalization) and one of citizenship’s crucial social markers (property).”<sup>39</sup> In addition, these restrictions on naturalization and property ownership had cascading negative effects. Keith Aoki argues that the judicially approved anti-Asian land ownership restrictions paved the way for the subsequent internment of Japanese Americans during World War II.<sup>40</sup> Aoki observes, “The Alien Land Laws provided a bridge that sustained the virulent anti-Asian animus that linked the Chinese Exclusion Act of 1882 with the internment of Japanese-American citizens pursuant to Executive Order 9066.”<sup>41</sup>

### 3. Non-Whiteness as Reputational Harm to White People

Another illustration of the socio-legal construction of race comes from the law of defamation. Defamation law exists to protect a person who suffers harm to her or his reputation.<sup>42</sup> Defamation can be in the form of libel or slander. Libel is “the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.”<sup>43</sup> On the other hand, slander is “the publication of

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<sup>36</sup> Act of May 19, 1913, ch. 113, §§ 1–8, 1913 Cal. Stat. 206–08 (1913).

<sup>37</sup> 263 U.S. 225, 233 (1923) (upholding the constitutionality of California’s 1920 Alien Land Law).

<sup>38</sup> 263 U.S. 197, 224 (1923) (upholding the constitutionality of Washington’s 1921 Alien Land Law).

<sup>39</sup> Devon W. Carbado, *Yellow by Law*, 97 CAL. L. REV. 633, 682 (2009).

<sup>40</sup> Keith Aoki, *No Right To Own?: The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment*, 40 B.C. L. REV. 37, 37–38 (1998).

<sup>41</sup> *Id.* at 68. The Supreme Court subsequently invalidated certain provisions of California’s Alien Land Law as being unconstitutional in *Oyama v. California*, 332 U.S. 633, 673–74 (1948). The California Supreme Court found the law unconstitutional in *Sei Fujii v. State*, 242 P.2d 617 (Cal. 1952).

<sup>42</sup> See BLACK’S LAW DICTIONARY 479 (9th ed. 2009) (defining “defamation” as “[t]he act of harming the reputation of another by making a false statement to a third person”).

<sup>43</sup> RESTATEMENT (SECOND) OF TORTS § 568 (1977).

defamatory matter by spoken words, transitory gestures or by any form of communication other than those [defined as libel].”<sup>44</sup> Under judicial interpretations of both libel and slander, whiteness has been given positive value and Blackness negative value.

Until the late 1950s, a number of courts had affirmed the positive value of whiteness for white people by deeming the erroneous attribution of non-whiteness on a white person to be so detrimental to that person’s status that it was a form of defamation.<sup>45</sup> In an early case decided in 1791, *Eden v. Legare*,<sup>46</sup> a South Carolina court held that falsely calling a person “mulatto,” meaning a person with mixed white and black ancestry, was actionable because such a classification would deprive the person of “all civil rights” and the “privilege of a trial by jury.”<sup>47</sup> In *King v. Wood*,<sup>48</sup> another South Carolina court held in an action for slander that erroneously calling someone’s wife “mulatto” was actionable per se, in which proof of damages was not required. The Constitutional Court of Appeals of South Carolina justified this outcome by noting that “if the words are true, [they] would tend to reduce this plaintiff to the state and condition in which that degraded class of people is placed.”<sup>49</sup>

By the 1840s and 1850s, Mississippi and Louisiana courts were ruling along the same lines. For example, in *Scott v. Peebles*,<sup>50</sup> the High Court of Errors and Appeals of Mississippi held that the plaintiff was slandered by the defendant when the defendant falsely told a third party that the plaintiff “had negro blood in him.” In *Dobard v. Nunez*,<sup>51</sup> the Supreme Court of Louisiana ruled that even if the defendant acted without malice in merely repeating the words that he overheard to a third party, the words erroneously describing the white plaintiffs as “colored people” were still slanderous. In another Louisiana case, *May v. Shreveport Traction Co.*,<sup>52</sup> a train conductor told the white plaintiff to move to the “colored” section of the train. The conductor also made two newspaper statements that the plaintiff had sat in the “colored” section in the past.<sup>53</sup> The Supreme Court of Louisiana held that the conductor’s words

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<sup>44</sup> *Id.*

<sup>45</sup> See Samuel Brenner, “*Negro Blood in his Veins*”: *The Development and Disappearance of the Doctrine of Defamation Per Se by Racial Misidentification in the American South*, 50 SANTA CLARA L. REV. 333, 334–36 (2010).

<sup>46</sup> 1 S.C.L. (1 Bay) 171 (1791).

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

<sup>48</sup> 10 S.C.L. (1 Nott & McC.) 184, 184 (1818).

<sup>49</sup> *Id.* at 185.

<sup>50</sup> 10 Miss. (2 S. & M.) 546, 547 (Miss. 1844).

<sup>51</sup> 6 La. Ann. 294, 294 (La. 1851).

<sup>52</sup> 53 So. 671 (La. 1910).

<sup>53</sup> *Id.* at 672.

were slanderous.<sup>54</sup> It observed that it was following a well-established doctrine “that, to charge a white person, in this part of the world, with being a negro, is an insult, which must, of necessity, humiliate, and may materially injure, the person to whom the charge is applied.”<sup>55</sup>

For the next several decades, other courts had similar holdings recognizing a tort for racial misidentification where non-whiteness was falsely imputed to white people.<sup>56</sup> Indeed, as late as the mid-1950s, courts continued to rule that misidentifying a white person as non-white was a type of defamation. In *Natchez Times Publishing Co. v. Dunnigan*,<sup>57</sup> the Supreme Court of Mississippi held that to list a white person incorrectly as a “negro” in the telephone book was defamatory per se. The court reasoned that “[a]t common law any written or printed language which tends to injure one’s reputation, and thereby expose him to public hatred, contempt or ridicule, degrade him in society, lessen him in public esteem or lower him in the confidence of the community is actionable per se.”<sup>58</sup> Similarly, in *Bowen v. Independent Publishing Co.*,<sup>59</sup> a newspaper falsely identified the plaintiff’s son as a “colored soldier.” The Supreme Court of South Carolina held that the newspaper committed libel per se. It observed “[t]hat such a publication is libelous per se is supported by the very great weight of authority.”<sup>60</sup>

Judicial holdings of defamatory injury in cases involving racial misidentification of white people began to subside after the late 1950s.<sup>61</sup> For over 150 years, however, these court decisions illustrated how whiteness was protected as a valuable status and false attributions of non-whiteness served to severely harm that status. Therefore, whiteness was constructed as a status that was protected by law, and non-whiteness was so negative that a false attribution of the latter was deemed a legal injury to the former. During this time, non-white people did not have any legal remedy if they were misidentified as white. Indeed, such racial misidentification would have given

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<sup>54</sup> *Id.* at 674–75.

<sup>55</sup> *Id.* at 674.

<sup>56</sup> See e.g., *Jones v. R.L. Polk & Co.*, 67 So. 577 (Ala. 1915); *Morris v. State*, 160 S.W. 387 (Ark. 1913); *Hargove v. Okla. Press Publ’g Co.*, 265 P. 635, 636 (Okla. 1928); *O’Connor v. Dall. Cotton Exch.*, 153 S.W.2d 266, 268 (Tex. Civ. App. 1941); *Mopsikov v. Cook*, 95 S.E. 426, 427 (Va. 1918).

<sup>57</sup> 72 So. 2d 681, 684 (Miss. 1954).

<sup>58</sup> *Id.* (quoting *Conroy v. Breland*, 189 So. 814, 815 (Miss. 1939)).

<sup>59</sup> 96 S.E.2d 564, 564 (S.C. 1957).

<sup>60</sup> *Id.* at 566.

<sup>61</sup> See Brenner, *supra* note 45, at 392 (The Court notes that the doctrine of defamation per se for racial identification disappeared for three reasons: “[T]he judicial move away from the slander per se element of the doctrine; the societal and statutory move away from official, state-sponsored racism; and the Supreme Court move toward using First Amendment doctrine to limit tort liability in libel cases involving public figures or matters of public concern.”).

racial minorities certain advantages, including access to social spaces, jobs, and education that was designated for whites only. Thus, for most of this nation's history, minorities had incentives to "pass" as white, which was an attempt to "overturn the social and political limitations imposed by a racist society."<sup>62</sup>

#### 4. Non-Whiteness as a Bar to Courtroom Testimony Against White People

As another example of the socio-legal construction of race, some states had evidentiary rules that prohibited certain people from testifying against others based on a particular construction of whiteness and non-whiteness. In *People v. Hall*,<sup>63</sup> a white man named George Hall murdered Ling Sing, a Chinese man, in California.<sup>64</sup> The only witness at trial against Hall was a Chinese person. Based on this trial testimony, Hall was found guilty of murder. He then appealed because California law at the time provided, "No Black, or Mulatto person, or Indian shall be allowed to give evidence in favor of, or against a White man."<sup>65</sup> The issue before California's highest court was whether or not Chinese people were included in the categories set forth in the statute. The court held they were included and that the Chinese person's testimony was inadmissible—the murderer was set free. The court noted:

In using the words, "No Black, or Mulatto person, or Indian shall be allowed to give evidence for or against a White person," the Legislature, if any intention can be ascribed to it, adopted the most comprehensive terms to embrace every known class or shade of color, as the apparent design was to protect the White person from the influence of all testimony other than that of persons of the same caste. The use of these terms must, by every sound rule of construction, exclude every one [sic] who is not of white blood.<sup>66</sup>

The court further observed, "The word 'White' has a distinct signification, which *ex vi termini*, excludes black, yellow, and all other colors."<sup>67</sup> The world

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<sup>62</sup> Kevin Noble Maillard & Janis L. McDonald, *The Anatomy of Grey: A Theory of Interracial Convergence*, 26 LAW & INEQ. 305, 312 (2008). Cheryl Harris contends that "[p]assing is well-known among Black people in the United States and is a feature of race subordination in all societies structured on white supremacy." See Harris, *supra* note 6, at 1712 (citations omitted).

<sup>63</sup> 4 Cal. 399 (Cal. 1854).

<sup>64</sup> For a more detailed account of the facts in this case, see JEAN PFAELZER, DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS 39–40 (2008).

<sup>65</sup> *Hall*, 4 Cal. at 399.

<sup>66</sup> *Id.* at 403.

<sup>67</sup> *Id.* at 404.

was, according to this court, legally divided into two status categories: white and non-white. In justifying its conclusion, the court argued that a parade of horrible outcomes would commence if these non-white people were given permission to testify against white people. The Supreme Court of California warned:

The same rule which would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls.

This is not a speculation which exists in the excited and over-heated imagination of the patriot and statesman, but it is an actual and present danger.

The anomalous spectacle of a distinct people, living in our community, recognizing no laws of this State except through necessity, bringing with them their prejudices and national feuds, in which they indulge in open violation of law; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference, is now presented, and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our Government.<sup>68</sup>

This exclusion of Chinese people from testifying against white people had real-world effects. Jean Pfaelzer writes, “*People v. Hall* stimulated a rash of roundups [of Chinese people to drive them out of entire towns], for now, with the promise of all-white juries and the absence of any Chinese testimony, conviction of a vigilante became virtually impossible.”<sup>69</sup>

##### 5. Non-Whiteness as a Bar to Public Spaces

While the positive value of whiteness was recognized by the Supreme Court during the Jim Crow<sup>70</sup> era, the degradation of racial minority status went

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<sup>68</sup> *Id.* at 404–05.

<sup>69</sup> PFAELZER, *supra* note 64, at 40.

<sup>70</sup> Jim Crow refers to state and local laws and customs that segregated people based on race according to white supremacist ideology. Jim Crow takes its name from a minstrel character. W.T. Lhamon, Jr., *Turning Around Jim Crow*, in BURNT CORK: TRADITIONS AND LEGACIES OF BLACKFACE MINSTRELSY 18, 28 (Stephen Johnson ed., 2012) (discussing how by 1842, Jim Crow—a popular minstrel character—had become an adjective for racial segregation). Note that

unacknowledged. In *Plessy v. Ferguson*,<sup>71</sup> the Court callously declared that any harm that resulted from racial segregation was an erroneous perception that was created by people of color. In *Plessy*, Homer Plessy purchased a first class ticket on the East Louisiana Railroad and then sat in a seat designated for whites, and was subsequently imprisoned for violating a state segregation law. Plessy was “of mixed descent, in the proportion of seven-eighths Caucasian and one-eighth African blood; that the mixture of colored blood was not discernible in him.”<sup>72</sup> Because Plessy appeared white, part of his argument in court was that he was being deprived of his property right in whiteness. In his brief, Plessy argued:

How much would it be *worth* to a young man entering upon the practice of law, to be regarded as a *white* man rather than a colored one? . . . Probably most white persons if given a choice, would prefer death to life in the United States *as colored persons*. Under these conditions, is it possible to conclude that the *reputation of being white* is not property? Indeed, is it not the most valuable sort of property, being the master-key that unlocks the golden door of opportunity?<sup>73</sup>

The Court was not persuaded. It held:

It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is “property,” in the same sense that a right of action or of inheritance is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man, and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called “property.” Upon the other hand, if he be a colored man, and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.<sup>74</sup>

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Jim Crow commonly divided people into white and non-white categories. *See, e.g.,* Gong Lum v. Rice, 275 U.S. 78, 85–87 (1927) (holding that racial segregation of a Chinese American student to a “school for colored children” was constitutional under the case that upheld separate but equal, *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954)).

<sup>71</sup> 163 U.S. at 551.

<sup>72</sup> *Id.* at 538.

<sup>73</sup> Brief for Plaintiff in Error, *Plessy v. Ferguson*, 163 U.S. 537, 1893 WL 10660, at \*9.

<sup>74</sup> *Plessy*, 163 U.S. at 549.

Through this language, the Supreme Court acknowledged the value of whiteness. Similar to the defamation cases regarding racial misidentification, the Court here recognized that a white person could sue for damages to whatever property interests were harmed if he or she were assigned to the non-white train car. However, the Court held that racial classification was to be determined by state law,<sup>75</sup> and since Plessy was non-white in Louisiana, he was without remedy.

In *Plessy*, whiteness was deemed to have positive value that could be injured through the false imputation of the negative attribute of non-whiteness. However, the Court failed to recognize the flip side of the coin: that non-whiteness could be a source of legal limitation for those who had this characteristic. Indeed, in a later part of the opinion, the Court found that Jim Crow segregation did not stamp any badge of inferiority on racial minorities, observing that even if it did, “it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”<sup>76</sup> Such mendacity from the nation’s highest court helped normalize segregation during the Jim Crow era as a fair practice consistent with equal protection of the law.

These historical examples have continuing relevance. Indeed, they created the socio-legal foundation for how race is understood today. In the next section, I will highlight some modern examples of how the past construction of race continues to manifest in contemporary contexts.

*B. Contemporary Examples That Reflect the Continuing Dominant Socio-Legal Construction of Race in America*

A number of contemporary examples reflect a certain socio-legal construction of race in which whiteness continues to give its possessors access to social, political, and economic resources, while those who do not possess this valuable property continue to be given less access to these things, or denied access altogether.

In November 2014, the Greater New Orleans Fair Housing Action Center (GNOFHAC) released a report highlighting racial discrimination against African Americans in 50 predominantly white neighborhoods—all of which had white populations of at least 70% (compared to 34% of the city’s average)

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<sup>75</sup> *Id.* at 552 (“It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different states . . . . But these are questions to be determined under the laws of each state, and are not properly put in issue in this case.”).

<sup>76</sup> *Id.* at 551.

and relatively lower poverty and crime rates than the rest of the city.<sup>77</sup> GNOFHAC sent paired sets of testers—always one white and one African American matched by incomes, career paths, family types, and rental histories—to housing sites, including apartment complexes, multi-family residences, and single family homes.<sup>78</sup> In 22 of those 50 housing providers, “African-Americans who were otherwise fully qualified were denied the opportunity to rent or received less favorable treatment.”<sup>79</sup> Specifically, the GNOFHAC found that “housing providers spontaneously reduced application fees, lowered rental and deposit amounts, discounted utility fees, or waived the application process entirely for white testers. In one case, the white tester was offered an entire free month of rent.”<sup>80</sup> These behaviors favoring white renters created a white discount, which was not available to African American renters. They are consistent with past housing practices that locked most African Americans out of white communities.<sup>81</sup>

In 2014, José Zamora was seeking employment.<sup>82</sup> This 32-year-old Mexican American man applied for 50 to 100 jobs a day that he found on Craigslist that he felt qualified for.<sup>83</sup> He did not receive any interviews.<sup>84</sup> After a few months of not hearing back from the prospective employers, Zamora decided to change the way he wrote his name on his application from “José” to “Joe.”<sup>85</sup> After a week, he was inundated with responses from employers.<sup>86</sup> These were some of the same employers that did not respond before, the only difference this time being that he was now applying as “Joe.” Zamora’s story is consistent with a study that shows that applicants with white-sounding names (e.g., Emily Walsh or Brendan Baker) received 50% more callbacks than applicants with African American-sounding names (e.g., Lakisha Washington

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<sup>77</sup> GREATER NEW ORLEANS FAIR HOUS. ACTION CTR., WHERE OPPORTUNITY KNOCKS THE DOORS ARE LOCKED 10–11 (2014), available at <http://www.gnofairhousing.org/wp-content/uploads/2014/11/11-06-14-Where-Opp-Knocks-FINAL.pdf>.

<sup>78</sup> *Id.* at 9–11.

<sup>79</sup> *Id.* at 9.

<sup>80</sup> *Id.* at 13.

<sup>81</sup> See, e.g., PATRICIA SULLIVAN, LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT 102 (2009) (“Restrictive covenants, discriminatory lending practices, and white neighborhood associations combined to create what one Los Angeles resident described as ‘invisible walls of steel,’ confining blacks to marginal residential areas.”).

<sup>82</sup> Aaron Taube, *How One Man Changed His Fruitless Job Search Around by Changing His Name*, BUS. INSIDER, Sept. 3, 2014, <http://www.businessinsider.com/job-seeker-changed-his-name-2014-9>; see also Buzzfeed Yellow, *José vs. Joe: Who Gets A Job?*, BUZZFEED.COM (Aug. 30, 2014), <https://www.youtube.com/watch?v=PR7SG2C7IVU>.

<sup>83</sup> Taube, *supra* note 82.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

or Jamal Jones).<sup>87</sup> Similarly, in a *New York Times* article titled, *Whitening the Resume*, Michele Luo recounts how African American job applicants, in order to get job interviews, have attempted to hide markers of their racial identities on their resumes.<sup>88</sup> For example, one applicant changed her name on her resume from “Tahani Tompkins” to “T.S. Tompkins.”<sup>89</sup> Another applicant removed her attendance at a historically black college, leaving just her master’s degree institution, which did not have such a marker.<sup>90</sup> Legal scholar Kenji Yoshino stated in the same article that “people can have stigmatized identities that either they can’t or won’t hide but nevertheless experience a huge amount of pressure to downplay those identities.”<sup>91</sup> The hiding of one’s racial identity is a form of modern-day passing as white. Since whiteness still provides the access card to economic opportunities, some people on the job market feel compelled to hide any attribute that signals the absence of whiteness—at least to get the initial interview. This inauthentic performance of race does not end here. Devon Carbado and Mitu Gulati argue that once racial minorities are hired, they may feel pressure to perform their identities in a strained attempt to counter certain racial stereotypes held by their colleagues—a burden that “consumes resources in the form of time and effort.”<sup>92</sup>

In the spring of 2014, the leadership consulting firm Nextion released a study focusing on confirmation bias in law firms.<sup>93</sup> Sixty partners from 22 law firms agreed to participate in what was labeled a “writing analysis study.”<sup>94</sup> Fifty-three partners completed the task.<sup>95</sup> Of these partners, 29 were told that the memo was written by an African American third-year associate named Thomas Meyer, and 24 were told that the memo was written by a white third-year associate named Thomas Meyer.<sup>96</sup> Unknown to the law firm partners, they

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<sup>87</sup> Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004), available at <http://www.povertyactionlab.org/publication/are-emily-and-greg-more-employable-lakisha-and-jamal-field-experiment-labor-market-discr>.

<sup>88</sup> Michael Luo, “Whitening” the Résumé, N.Y. TIMES (Dec. 5, 2009), [http://www.nytimes.com/2009/12/06/weekinreview/06Luo.html?\\_r=0](http://www.nytimes.com/2009/12/06/weekinreview/06Luo.html?_r=0).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

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

<sup>92</sup> Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1279 (2000).

<sup>93</sup> ARIN N. REEVES, WRITTEN IN BLACK & WHITE: EXPLORING CONFIRMATION BIAS IN RACIALIZED PERCEPTIONS OF WRITING SKILLS (2014), available at [http://www.nextions.com/wp-content/files\\_mf/14151940752014040114WritteninBlackandWhiteYPS.pdf](http://www.nextions.com/wp-content/files_mf/14151940752014040114WritteninBlackandWhiteYPS.pdf).

<sup>94</sup> *Id.* at 2.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

received *exactly the same memo*.<sup>97</sup> The reviewers gave the memo supposedly written by the white man an average rating of 4.1 out of 5, while they gave the memo supposedly written by the African American man an average of 3.2 out of 5.<sup>98</sup> The white Thomas Meyer was praised for his potential and academic skills, while the black Thomas Meyer was criticized as needing much improvement.<sup>99</sup> This outcome was an example of confirmation bias, a term that Nextion defines as “[a] mental shortcut—a bias—engaged by the brain that makes one actively seek information, interpretation and memory to only observe and absorb that which affirms established beliefs while missing data that contradicts established beliefs.”<sup>100</sup> The law firm partners’ established beliefs were about the lower intellectual abilities—specifically legal writing skills—of African American law firm associates as compared to white law firm associates. Thus, in the study, the partners sought out evidence that confirmed this bias by scrutinizing the memo purportedly from an African American associate, while not being so critical in the memo purportedly written by a white associate. This bias is consistent with, and shaped by, the long history in Western civilization that degraded the intelligence of racial minorities in an attempt to categorize human intelligence based on racial categories.<sup>101</sup>

As a final example, in May 2014, Professors Katherine Milkman, Modupe Akinola, and Dolly Chugh released the results of a study that, in part, explored the racial biases of university professors.<sup>102</sup> As part of the study, the scholars sent emails to 6,548 randomly selected professors from 259 American universities.<sup>103</sup> Each email was from a fictional prospective out-of-town student who expressed interest in the professor’s Ph.D. program and was asking for guidance.<sup>104</sup> The emails were identical, varying only in the name of the sender. The scholars explained that “[t]he messages came from students with names like Meredith Roberts, Lamar Washington, Juanita Martinez, Raj Singh and Chang Huang, names that earlier research participants consistently perceived as belonging to either a white, black, Hispanic, Indian or Chinese student.”<sup>105</sup> The

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 3.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 1.

<sup>101</sup> See, e.g., STEPHEN J. GOULD, *THE MISMEASURE OF MAN* (1993) (highlighting the racial, class, and gender bias of historical efforts to measure intelligence in America and Europe).

<sup>102</sup> Katherine L. Milkman et al., *What Happens Before? A Field Experiment Exploring How Pay and Representation Differentially Shape Bias on the Pathway into Organizations* (Dec. 13, 2014) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2063742](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2063742).

<sup>103</sup> *Id.* at 1.

<sup>104</sup> *Id.* at 15.

<sup>105</sup> Dolly Chugh et al., *Professors Are Prejudiced, Too*, N.Y. TIMES (May 9, 2014), <http://www.nytimes.com/2014/05/11/opinion/sunday/professors-are-prejudiced-too.html>.

scholars found that “[p]rofessors were more responsive to white male students than to female, black, Hispanic, Indian or Chinese students in almost every discipline and across all types of universities.”<sup>106</sup> The names, serving as proxies for various racial identities, limited educational opportunities for people of color in the form of mentoring and guidance, while white males were the favored group to receive this valuable resource. Once again, this pattern of favoring white access, in particular white male access, is consistent with the history of educational exclusion in this country.<sup>107</sup>

Despite the historic negative construction of non-white status, people of color have resisted internalizing this degrading construction of their identities. I will explore this resistance in the next part.

### III. A COUNTERNARRATIVE: RACIAL MINORITY IDENTITIES AS AUTHENTIC POSITIVE IDENTITIES

In this part, in the face of a continuing reification of whiteness as property, I argue a positive racial minority identity has been constructed and publicly expressed since the 1960s that conflicts with, and is in resistance to, the dominant negative narratives imposed on people of color. In contrast to whiteness, which started as an identity and transformed into a form of property,<sup>108</sup> non-whiteness started as a socio-legal status created by courts and later transformed into a number of empowering racial identities created by people of color in active struggle against such imposed status.

This brings me to the issue of racial authenticity as it applies to people of color. I do not argue for an essentialized conception of racial identity, meaning that racial identity is immutable and creates fixed ways of knowing

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<sup>106</sup> *Id.* The scholars also found that “Chinese students were the most discriminated-against group in our sample.” *Id.* Further, the researchers found that reaching out to a professor of the same race or gender did not alleviate the discrimination, with the scholars reporting “the same levels of bias in both same-race and same-gender faculty-student pairs that we saw in pairs not sharing a race or gender (the one exception was Chinese students writing to Chinese professors).” *Id.*

<sup>107</sup> See NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 156 (2000) (“The idea that women should devote themselves to housekeeping and child rearing and volunteer work, no matter how talented they were, was so deeply ingrained in the American leadership class in the mid-twentieth century that calls for greater opportunity for women are just about impossible to find—even though the air was thick with calls for greater opportunity generally. The rhetoric of a perfected America, though, made it difficult to deny the aspirations of either [white] women or blacks as they arose, and of the two groups [white] women had generally better access to good education and so were better positioned to move through the narrow gates of the American meritocracy.”). See generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (2004) (detailing the lower court cases involving racial segregation in public schools that were combined to be heard in *Brown*).

<sup>108</sup> See Harris, *supra* note 6, at 1743.

and being in the world. I fully acknowledge that any claim of authentic racial identity is complex, malleable, and can be contested at any given time. Natasha Warikoo observes: “The criteria by which authenticity is determined are socially constructed—that is, an amalgamation of elements from the past and chosen to meet present needs—by process of ‘fabricating authenticity.’”<sup>109</sup> Ian Haney Lopez has written about a similar concept that he calls “racial fabrication,” which rejects the idea that racial formation consists of “neutral constructions and processes indifferent to individual intervention,” but instead “emphasizes the human element and evokes the plastic and inconstant character of race.”<sup>110</sup> Since all racial identities and claims of racial authenticity are fabricated, I argue that positive minority identities should be defined and embraced to counter and contest hundreds of years of historically constructed, externally imposed, and negatively defined non-white status. If such positive racial minority identity resonates with people of color, then they are free to claim it or reject it. In other words, they have agency to decide whether or not to choose this identity; it should not be imposed on them by anyone. Further, I take Nancy Leong’s critique of racial capitalism seriously.<sup>111</sup> Thus, I am not arguing that people of color should adopt a commodified identity imposed and approved by white people and predominantly white institutions. Instead, I contend that people of color should define what an empowering identity means

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<sup>109</sup> NATASHA K. WARIKOO, *BALANCING ACTS: YOUTH CULTURE IN THE GLOBAL CITY* 47 (2011).

<sup>110</sup> Ian F. Haney Lopez, *Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 28 (1994).

<sup>111</sup> Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2154 (2013) (defining racial capitalism as “the way that white people and predominantly white institutions derive value from non-whiteness”). Similarly, Patrick Shin and Mitu Gulati discuss a concept they call “showcasing,” which means the “practices by which an employer makes its women and minority constituents visible or otherwise salient to observers.” Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017, 1033 (2011). Shin and Gulati critique this narrow view of diversity on normative and legal grounds. First, as a normative matter, they contend that showcasing regards “minority hires as passive emblems whose value is unrelated to their active agency.” *Id.* at 1044. Under showcasing, a corporation reduces non-whiteness to a form of window dressing that demonstrates to the world that the corporation is not racist. It easily generates into tokenism in which a handful of visible non-white employees is sufficient for creating the desired effect. Second, as a legal matter, they argue that hiring women and minorities because of their showcase value will not survive judicial scrutiny. *Id.* at 1045–53. They conclude:

But what we want to drive home is this: as practitioners and participants in diversity-oriented hiring processes, we cannot be content with justifying those practices in references to their signaling value, as reflected in the increasingly trite idea that they “send a positive message.” Our reasons for our diversity-promoting practices cannot possibly be so empty, so non-aspirational, and so devoid of respect for our fellow colleagues and candidates.

*Id.* at 1053.

to them as part of a project embedded in the “thick version” of diversity.<sup>112</sup> I further argue that given the historic white supremacist trajectory of racial formation in this country, non-white identity should be based partly on the legacy of struggle and resistance against the disempowerment and dehumanization of racial minorities.

Modern white racial identity “is usually invisible and unconscious because societal norms have been constructed around [white people’s] racial, ethnic, and cultural frameworks, values, and priorities and then referred to as ‘standard American culture’ rather than as [white] ‘ethnic identity.’”<sup>113</sup> Barbara Flagg calls this phenomenon “transparency.”<sup>114</sup> On the other hand, the development of racial minority identity typically involves a continuously changing process of what that identity should mean.<sup>115</sup> Part of non-white identity development entails a “conscious immersion into cultural traditions and values through religious, familial, neighborhood, and educational communities [that] instills a positive sense of ethnic identity and confidence.”<sup>116</sup> This development of positive racial and ethnic identity as part of a person’s authentic self is counter to, yet shaped by, the negative images

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<sup>112</sup> Leong, *supra* note 111, at 2169 (The thick version “is not focused on the appearance of diversity, but rather views diversity as a prerequisite to cross-racial interaction, which fosters inclusivity and improves cross-racial relationships, thereby benefiting institutions and individuals of all races.”).

<sup>113</sup> Alicia Fedelina Chavez & Florence Guido-DiBrito, *Racial and Ethnic Identity Development*, in 84 NEW DIRECTIONS FOR ADULT AND CONTINUING EDUCATION 39 (1999). *But see* TIM WISE, *WHITE LIKE ME: REFLECTIONS FROM A PRIVILEGED SON* (2011) (arguing for the conscious acknowledgement of whiteness and white privilege by white people as a type of anti-racist practice). Sociologists mean different things when discussing “race” and “ethnicity.” “Racial categorization is frequently (though not always) based on phenotypical differences; that is, differences of facial characteristics, skin colour, and so forth.” JOHN SCOTT, *OXFORD DICTIONARY OF SOC.* 622 (2014). Ethnic groups, on the other hand, “share certain characteristics on the basis of common historical origin, close-knit patterns of social interaction, and a sense of common identity.” *Id.* These concepts are not independent. For example, ethnic identities can be formed by a common historical experience of being categorized and subsequently treated as non-white.

<sup>114</sup> Barbara J. Flagg, “*Was Blind, but Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993) (“The most striking characteristic of whites’ consciousness of whiteness is that most of the time we don’t have any. I call this the *transparency* phenomenon: the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific.”).

<sup>115</sup> *See, e.g.*, DERALD W. SUE ET AL., *MULTICULTURAL COUNSELING COMPETENCIES* (1998); William E. Cross, Jr., *The Negro-to-Black Conversion Experience*, 20 BLACK WORLD 13 (1971); Jean S. Phinney, *Ethnic Identity in Adolescents and Adults: A Review of Research*, 108 PSYCHOL. BULL. 499 (1990); Robert M. Sellers et al., *Racial Identity Matters: The Relationship Between Racial Discrimination and Psychological Functioning in African American Adolescents*, 16 J. OF RES. ON ADOLESCENCE 187 (2006); Beverly D. Tatum, *African-American Identity Development, Academic Achievement, and Missing History*, 56 SOC. EDUC. 331 (1992).

<sup>116</sup> Chavez & Guido-DiBrito, *supra* note 113, at 39.

and media messages about non-whiteness received from the dominant culture.<sup>117</sup>

People of color have historically resisted overtly negative socio-legal narratives regarding what it means to be a racial minority in America.<sup>118</sup> Starting with the death of Jim Crow in the 1960s, this resistance has gained substantial momentum and has become increasingly vocalized in public expressions of affirmation and outrage—affirmation as to what racial identity should mean, outrage as to how it has been constructed in the past. The end of legal segregation in America coincided with decolonization movements around the world, which in turn, provided the impetus for a number of social movements in this country. Cornel West writes,

During the late 1950s, 1960s and early 1970s in the United States, these decolonized sensibilities fanned and fueled the civil rights and black power movements, as well as the student antiwar, feminist, gay, brown, gay and lesbian movements. . . . The inclusion of African Americans, Latino/a Americans, Asian Americans, Native Americans and American women into the culture of critical discourse yielded intense intellectual polemics and inescapable ideological polarization that focused principally on the exclusions, silences and blindnesses of male, WASP cultural homogeneity.<sup>119</sup>

With the death of Jim Crow came a public challenge to an externally imposed negative identity, and the birth of racial minority identity as a self-asserted positive identity.<sup>120</sup>

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<sup>117</sup> Sociologists have acknowledged the hybrid nature of racial identities emphasizing the interplay with the identities and the social and historical contexts in which they are situated. Paul Gilroy, for example, in discussing the development of Black identity and culture, highlights the mixing and movement of cultural forms in the Americas and Europe. See PAUL GILROY, *BLACK ATLANTIC: MODERNITY AND DOUBLE-CONSCIOUSNESS* (1995).

<sup>118</sup> Cornel West observes:

The initial black struggle against degradation and devaluation in the enslaved circumstances of the New World was, in part, a struggle against nihilism. . . . that is, loss of hope and absence of meaning. . . . The genius of our black foremothers and forefathers was to create powerful buffers to ward off the nihilistic threat, to equip black folk with cultural armor to beat back the demons of hopelessness, meaninglessness, and lovelessness. . . . In other words, traditions for black surviving and thriving under usually adverse New World conditions were major barriers against the nihilistic threat. These traditions consisted primarily of black religious and civic institutions that sustained familial and communal networks of support.

CORNEL WEST, *RACE MATTERS* 15 (1993).

<sup>119</sup> CORNEL WEST, *THE CORNEL WEST READER* 127 (1999).

<sup>120</sup> Jerome Karabel observes, “By 1967–68, signs of a new mood among African Americans were visible everywhere. At the symbolic level, the term ‘Negro’ was giving way, especially in militant circles, to ‘black’—a shift attributable in no small amount to the rise of ‘black power,’

As just one example of how people of color have constructed and embraced positive racial minority identities, I turn to the Ethnic Studies movement at American colleges and universities. This movement was an attempt to transform racial minority status from something that was externally defined as ugly, immoral, and unintelligent to something that was internally defined as beautiful, valuable, and morally and intellectually empowering. One of the earliest student demands for Ethnic Studies was the Third World strikes of the late 1960s. The linkage of their activism with the developing nations of the Third World was an attempt to form historic and symbolic connections with the decolonization movements across the world. It was an attempt to build international solidarity against Western imperialism at all levels. It was an attempt to create an empowering identity that cut across racial and ethnic groupings.

As part of the Third World Liberation Front, African American, Asian American, Chicano/a, and Native American students at San Francisco State College boycotted classes from November 6, 1968, to March 27, 1969, and the University of California at Berkeley from January 19, 1968, to March 14, 1969.<sup>121</sup> The students acted in an attempt “to achieve self-determination for themselves and their communities and to eradicate individual and institutional racism.”<sup>122</sup> Their primary demand was the establishment of Ethnic Studies programs, which the students “deemed necessary because conventional educational institutions offered a curriculum that was said to be irrelevant to the experiences of people of color.”<sup>123</sup> In response to the student activism, the first Ethnic Studies programs were subsequently created in 1969 at both Berkeley and San Francisco State. This activism was not limited to California.

During the late 1960s and 1970s, American college and university students of color all over the country began to demand the creation of Ethnic Studies programs, increased minority access to higher education, and recruitment and advancement of more professors and administrators of color.<sup>124</sup> The student-led push for Ethnic Studies was an attempt to redefine and legitimate what racial identity meant to racial minorities, instead of focusing on what non-whiteness meant to white people. For example, on reflecting why African American Studies arose, Perry Hall contends, “Black humanity was invisible, whether absent altogether or considered in the marginalized, ‘othering’ context of concerns peripheral to existing disciplines and

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which Stokely Carmichael introduced in June 1966.” JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF EXCLUSION AT HARVARD, YALE, AND PRINCETON* 386 (2005).

<sup>121</sup> WILLIAM WEI, *THE ASIAN AMERICAN MOVEMENT* 15 (1993).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> See generally Ramon A. Gutierrez, *Ethnic Studies: Its Evolution in American Colleges and Universities*, in *MULTICULTURALISM: A CRITICAL READER* 157–67 (David Theo Goldberg ed., 1994) (tracing history of Ethnic Studies at American colleges and universities).

practices.”<sup>125</sup> Micahel Soldatenko argues that Chicano Studies “sought to disrupt academic knowledge that had denied space to the Mexican American experience.”<sup>126</sup> By disrupting the status quo, proponents of this new perspective could transform what being Chicano/a meant into something positive and empowering. Writing about Native American Studies, Clara Sue Kidwell notes that

the strategy was to challenge stereotypes of Indians as hostile savages in the past or as drunken, poverty-stricken individuals in contemporary communities. The academic enterprise of presenting Indians as real people rather than stereotypes was part of the broader Civil Rights movement, which was played out not only in the political arena, but in cultural endeavors as well.<sup>127</sup>

Further, William Wei writes, “Asian Americans attributed their individual and group powerlessness, in part, to the dominant society’s control over and manipulation of their identity and culture. Conversely, they believed that a prerequisite for attaining power was the development of an identity and culture they could call their own.”<sup>128</sup>

The struggle to define the meaning of racial minority identity through the Ethnic Studies movement supports the idea that racial minority identity was labored for by those who valued a counternarrative that separated itself from the derogatory socio-legal construction of racial meaning. This newly constructed identity expressed an empowering sense of personhood.<sup>129</sup> The

<sup>125</sup> Perry A. Hall, *African American Studies: Discourses and Paradigms*, in *AFRICAN AMERICAN STUDIES* 15, 17 (Jeanette R. Davidson ed., 2010). See generally FABIO ROJAS, *FROM BLACK POWER TO BLACK STUDIES: HOW A RADICAL SOCIAL MOVEMENT BECAME AN ACADEMIC DISCIPLINE* (2010) (analyzing how the Black Power movement shaped African American studies).

<sup>126</sup> MICHAEL SOLDATENKO, *CHICANO STUDIES: THE GENESIS OF A DISCIPLINE* 6 (2009). See generally RODOLFO ACUÑA, *MAKING OF CHICANO STUDIES: IN THE TRENCHES OF ACADEME* (2011) (discussing the history of Chicano Studies).

<sup>127</sup> CLARA SUE KIDWELL, *NATIVE AMERICAN STUDIES* 4 (2005). See generally *NATIVE AMERICAN STUDIES IN HIGHER EDUCATION: MODELS OF COLLABORATION BETWEEN UNIVERSITIES AND INDIGENOUS NATIONS* (Duane Champagne & Jay Stauss eds., 2002) (discussing the development of Native American Studies at different colleges and universities).

<sup>128</sup> WEI, *supra* note 121, at 9. See generally *ASIAN AMERICANS: THE MOVEMENT AND THE MOMENT* (Steven J. Louie & Glenn K. Omatsu eds., 2001) (discussing the evolution of Asian American Studies); SUCHENG CHAN, *IN DEFENSE OF ASIAN AMERICAN STUDIES: THE POLITICS OF TEACHING AND PROGRAM BUILDING* (2005) (same); MARK CHIANG, *THE CULTURAL CAPITAL OF ASIAN AMERICAN STUDIES: AUTONOMY AND REPRESENTATION IN THE UNIVERSITY* (2009) (same).

<sup>129</sup> Margaret Radin’s theory of property and personhood has particular salience here. See Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 1013–15 (1982) (arguing that some property should receive heightened legal protection because it expresses personhood).

1990s witnessed a robust round of activism, which included student arrests and hunger strikes.<sup>130</sup> The struggle continues today.<sup>131</sup>

In the following part, I take as my starting point the existence of positive racial minority identities, which were forged, in part, out of a legacy of resistance to white supremacist degradation and devaluation, and grapple with the question of how the law can protect such identities. In other words, given that new forms of minority identity have been socially constructed by people of color themselves, I ask how the law can acknowledge and protect such constructs.

#### IV. AUTHENTIC RACIAL MINORITY IDENTITY AS VALUABLE IDENTITY PROPERTY

##### A. Identity Property

Cheryl Harris centered her analysis on traditional concepts of property as constituting tangible things and the rights and obligations associated with these things. For example, Harris examined the functions of whiteness using traditional tangible property concepts including the rights of disposition, use and enjoyment, and the absolute right to exclude.<sup>132</sup> This analytic lens provided a powerful tool to explain how whiteness has been given legal protection over time. As Harris explains, in the context of early America, “Because the system of slavery was contingent on and conflated with racial identity, it became crucial to be ‘white,’ to be identified as white, to have the property of being white. Whiteness was the characteristic, the attribute, the property of free human beings.”<sup>133</sup> Further, Harris notes:

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<sup>130</sup> See, e.g., *Macalester Students Demand Ethnic Studies*, CHRON. OF HIGHER EDUC. (Dec. 14, 1994), <http://chronicle.com/article/Macalester-Students-Demand/82354/>; *Princeton University Students Protest for Ethnic Studies*, CHRON. OF HIGHER EDUC. (May 5, 1999), <http://chronicle.com/article/Princeton-University-Students/83019/>; *Columbia U. Students Strike for Ethnic Studies*, CHRON. OF HIGHER EDUC. (Apr. 12, 1996), <http://chronicle.com/article/Columbia-U-Students-Strike/94731/>; *81 Arrested in Protest of Ethnic-Studies Cuts at Berkeley*, CHRON. OF HIGHER EDUC. (May 14, 1999), <http://chronicle.com/article/81-Arrested-in-Protest-of/32391/>; Philip Lee, *The Griswold 9 and Student Activism for Faculty Diversity at Harvard Law School in the Early 1990s*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 49 (2011).

<sup>131</sup> See, e.g., Sofie C. Brooks, *Building Ethnic Studies*, HARVARD CRIMSON, Feb. 26, 2010, <http://www.thecrimson.com/article/2010/2/26/studies-ethnic-romansalazar-secondary/> (discussing the recent creation of an ethnic studies secondary field at Harvard College); Tamar Lewin, *Citing Individualism, Arizona Tries To Rein in Ethnic Studies in School*, N.Y. TIMES, May 13, 2010, [http://www.nytimes.com/2010/05/14/education/14arizona.html?module=Search&mabReward=relbias%3Ar%2C{%22%22%3A%22RI%3A16%22}&\\_r=0](http://www.nytimes.com/2010/05/14/education/14arizona.html?module=Search&mabReward=relbias%3Ar%2C{%22%22%3A%22RI%3A16%22}&_r=0) (discussing an Arizona bill that, in effect, bans Chicano/a studies in public schools).

<sup>132</sup> See Harris, *supra* note 6, at 1731–37.

<sup>133</sup> *Id.* at 1721.

In *Johnson* [*v. M'Intosh*]<sup>134</sup> and similar cases, courts established whiteness as a prerequisite to the exercise of enforceable property rights. Not all first possession or labor gave rise to property rights; rather, the rules were qualified by race. This fact infused whiteness with significance and value because it was solely through being white that property could be acquired and secured under law. Only whites possessed whiteness, a highly valued and exclusive form of property.<sup>135</sup>

Although Harris's idea of whiteness as a form of tangible property is quite useful and continues to be relevant, in the context of a positively reconstructed racial minority identity, I argue in this section that intellectual property concepts, which by definition are intangible forms of property, are more apropos.<sup>136</sup> Before turning to specific examples, I address the utility of such an approach.

### 1. The Benefits of Identity Property

Identity property highlights the positive social and legal value of authentic minority racial identity. This is a new idea. It veers away from centuries of negatively constructed racial minority identity—under a blanket non-white category—by the dominant society in general, and American courts in particular. From slavery to whiteness requirements for naturalization to segregation to the modern day manifestations of a historic legacy in which people of color have had no rights that white people were bound to respect, urging legal protection for authentic expressions of racial minority identity certainly cuts against the grain of racial formation in America.

Identity property also focuses attention on the positive value of racial minority identity, instead of framing this value in terms of the benefits that this identity gives to white people. A number of scholars have critiqued how equal protection in the context of race conscious admissions cases<sup>137</sup> have framed the

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<sup>134</sup> 21 U.S. (8 Wheat.) 543 (1823) (holding that Native Americans did not have title to their lands, but only the right of occupancy).

<sup>135</sup> See Harris, *supra* note 6, at 1725.

<sup>136</sup> An analysis of racial identity as a form of cultural property is also worthy of exploration, yet beyond the scope of this Article. Cultural property has been called property's "fourth estate," in addition to real, personal, and intellectual property. Steven Wilf, *What Is Property's Fourth Estate? Cultural Property and the Fiduciary Ideal*, 16 CONN. J. INT'L L. 177, 177 (2001). For analysis of the meaning of cultural property, see Sarah Hardin, *Defining Traditional Knowledge—Lessons from Cultural Property*, 11 CARDOZO J. INT'L & COMP. L. 511 (2003); Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 FORDHAM INT'L L.J. 690 (2008).

<sup>137</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (striking down UC-Davis Medical School's race-conscious admissions program as not narrowly tailored but affirming educational benefits of diversity as a compelling state interest); *Grutter v. Bollinger*, 539 U.S.

value of racial minority identity in terms of the benefit that white people and institutions derive from such identity.<sup>138</sup> Identity property offers a different treatment. By recognizing racial minority identity as valuable in and of itself, it counters the tendency of certain legal frameworks to define the legal issues and solutions in terms of white benefits. It centers the attention on the possessors of such valuable identity property and how their interest in such property can be protected from unauthorized appropriation.

Further, it creates an alternative path to colorblindness, particularly in equal protection cases, for protecting racial minorities' legal rights. A colorblind approach to racial justice can be found in Chief Justice John Roberts's words in his plurality opinion regarding race-based pupil assignment for the purposes of achieving school diversity: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>139</sup> In this view, the evil that courts are fighting against is one of racial categorization per se and not the vicious legacy of white supremacy in this country. Colorblindness conflicts with identity property because it ignores the positive value of racial minority identity, assuming that any and all racial classifications are legally suspect. In a powerful critique against a preoccupation with categorization, Stephen Carter argues:

Racism has declared its presence in many millions of lives with stunning force and pervasiveness. Racism has an existential reality that has defied most attempts to discover its sources and explain its power. But whatever the source of racism, to count

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306 (2003) (upholding University of Michigan Law School's race-conscious admissions policy as both serving a compelling state interest and narrowly tailored to achieve that interest); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down University of Michigan's undergraduate race-conscious admissions policy as not narrowly tailored but affirming educational benefits of diversity as a compelling state interest); *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (affirming the educational benefits of diversity as a compelling state interest, but remanding the case to see if UT's admissions process was narrowly tailored to that interest).

<sup>138</sup> See Tara J. Yosso et al., *From Jim Crow to Affirmative Action and Back Again: A Critical Race Discussion of Racialized Rationales and Access to Higher Education*, 28 REV. RES. IN EDUC. 1, 14 (2004) ("The unquestioned 'standard' or 'normative' point of reference reveals the basis for the diversity rationale. By their presence, students of color diversify otherwise White, homogeneous university campuses. This rationale centers White students as the standard or normative students. By default, students of color fulfill the role of enriching the learning environment for White students. The goal is not necessarily to provide access and equal opportunities for students of color but to provide access to diverse groups so that White students can learn in a diverse context."); Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J. C.R. & C.L. 51, 168 (2005) ("Justice O'Connor's rationale in *Grutter* . . . treats African Americans as white property by expressly stating that those few chosen African Americans whom whites pick to integrate elite educational institutions are merely 'diversity commodity' (the author's term, not the Court's), expressly there to enhance the white majority's educational experience.").

<sup>139</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. District No. 1*, 551 U.S. 701, 748 (2007).

it the same as racialism [i.e., acknowledging racial categories], to say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression, is to trivialize the lives and deaths of those who have suffered under racism.<sup>140</sup>

Identity property creates, at the very least, a form of judicial recognition that it is not racial categorization that is at the heart of America's race problem, but a history of intentionally excluding racial minorities from the fruits of American life. It reinforces the radical idea that people of color have selves and identities worthy of legal protection.

Some scholars have argued that treating racial minority identity as property dangerously reifies a concept that does not exist. For example, Jim Chen argues, albeit rhetorically, that non-whiteness can be viewed as a form of new property.<sup>141</sup> He starts with Charles Reich's seminal article, which defines the concept of new property as a proprietary interest in the distribution of government-created benefits.<sup>142</sup> Chen contends, "Whatever the role of subordination and exploitation in older notions of property, the new property rests on nothing more than positive law—on accounts of what legislatures have done in fact."<sup>143</sup> For Chen, while a beneficial property interest in racial identity has historically been limited to white people, a more expansive interest is now the case. He posits that non-white identity can be a form of new property, particularly in the context of affirmative action benefits, in light of the Supreme Court's procedural due process decisions regarding other government benefits that have adopted Reich's idea of the new property.<sup>144</sup> Chen observes, "now

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<sup>140</sup> Stephen L. Carter, *When Victims Happen To Be Black*, 97 YALE L.J. 420, 433–34 (1988); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting) ("The consistency that the Court espouses [in terms of using strict scrutiny for all racial classifications] would disregard the difference between a "No Trespassing" sign and a welcome mat.").

<sup>141</sup> Jim Chen, *Embryonic Thoughts on Racial Identity as New Property*, 68 U. COLO. L. REV. 1123 (1997).

<sup>142</sup> See Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964).

<sup>143</sup> Chen, *supra* note 141, at 1133.

<sup>144</sup> See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) ("It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property."); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) ("A person's property interest in a benefit is a 'property' interest for due process purposes if there . . . are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."); *But see Bishop v. Wood*, 426 U.S. 341, 347 (1976) (holding that the plaintiff did not have a property interest in his job at the police department); *Bd. of Regents v. Roth*, 408 U.S. 564, 578 (1972) (holding that plaintiff did not have a property right to his non-tenured, short-term university teaching position).

that a generation of non-whites has come to rely, and reasonably so, on a stream of race-based governmental benefits, that generation and its heirs have prescriptively acquired a valuable interest in their race as new property.”<sup>145</sup> Even though Chen proposes that non-white identity can be considered a form of new property, his purpose is to critique this possibility. He warns, “Reifying race comes dangerously close to deifying race . . . treating race as a form of property threatens serious, perhaps irreparable, social harm.”<sup>146</sup> His solution, therefore, would be to adopt colorblind policies and to altogether “[a]bolish race as property.”<sup>147</sup> My response would be that race is without a doubt a social construct that has been reinforced in law. Although it has no basis in biological difference, it continues to have practical significance to people in their day-to-day lives. Ignoring this reality would only solidify the racial stratification that is the result of hundreds of years of whiteness as property.<sup>148</sup> Consistent with this idea, in a recent case upholding a Michigan referendum to ban race conscious policies in public university admissions, Justice Sonia Sotomayor wrote in dissent:

[R]ace matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a young man’s view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman’s sense of self when she states her hometown, and then is pressed, “No, where are you *really* from?”, regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: “I do not belong here.”

As Justice Sotomayor argues here, we cannot ignore that race has mattered and continues to matter in American life. Acknowledging the continuing relevance of race and recognizing the value of identity property would serve to place a positive socio-legal construction on identities that have been demonized and degraded for so long.

With these benefits in mind, I turn to the expression and protection of identity property though intellectual property and defamation law.

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<sup>145</sup> Chen, *supra* note 141, at 1155.

<sup>146</sup> *Id.* at 1160–61.

<sup>147</sup> *Id.* at 1163.

<sup>148</sup> *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1676 (2014).

## 2. Expression and Protection of Identity Property Through Intellectual Property and Defamation Law

Intellectual property protects “commercially valuable products of the human intellect.”<sup>149</sup> Like other forms of intellectual property, racial minority identity is a product of human intellect and labor and it can, in certain situations, be deemed “commercially valuable.” It is not, at least at this moment in time, akin to a physical good that grants broad access to opportunities for obtaining political, social, and economic resources. Therefore, moving away from a property analysis rooted in tangible items, I turn to intellectual property and defamation law concepts as useful, although imperfect, analytical tools for expressing and protecting positive expressions of authentic racial minority identity.

### *i. Right of Publicity: Representational Autonomy and Racial Minority Identity*

The right of publicity is “[t]he right to control the use of one’s own name, picture, or likeness and to prevent another from using it for commercial benefit without one’s consent.”<sup>150</sup> It is a form of protection from unfair competition in the “inherent right of human identity.”<sup>151</sup> In an early case, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,<sup>152</sup> the Second Circuit defined this right as follows:

We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made “in gross,” i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled a “property” right is immaterial; for here, as often elsewhere, the tag “property” simply symbolizes

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<sup>149</sup> BLACK’S LAW DICTIONARY 881 (9th ed. 2009).

<sup>150</sup> *Id.* at 1439. William Prosser posits that the right of privacy is “not one tort but four” which are “distinct and only loosely related.” William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 385 (1960). These four torts are: (1) intrusion on seclusion or solitude, (2) publication of embarrassing private facts, (3) false light, and (4) appropriation of the plaintiff’s name or likeness. *Id.* at 389. The right of publicity is based on the fourth category.

<sup>151</sup> J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION 28:1 (2011).

<sup>152</sup> 202 F.2d 866 (2d Cir. 1953).

the fact that courts enforce a claim which has pecuniary worth. This right might be called a “right of publicity.”<sup>153</sup>

Subsequent decisions would confirm that the right of publicity was, indeed, a property right.<sup>154</sup>

As an oft-cited example of a common law right of publicity,<sup>155</sup> in *White v. Samsung*,<sup>156</sup> the Ninth Circuit recognized that television game show personality Vanna White had a cognizable claim against Samsung based on this right. In *White*, Samsung created an advertisement using a robot that was intentionally dressed up to resemble Vanna White and posed next to a Wheel of Fortune game show board. Along with other causes of action, White sued on California’s common law right of publicity based on the following elements: “(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.”<sup>157</sup> The court noted that the right was meant to protect the “[c]onsiderable energy and ingenuity” that went into a celebrity’s construction of her identity.<sup>158</sup> The Ninth Circuit held that Samsung’s actions created a potential violation of this common law right. White’s persona was thereby protected by the right of publicity.

Racial minority identity can be akin to celebrity or commercial identity and, in certain situations, be protected by the right of publicity. I take the case of Diallo Shabazz as an example. Shabazz was an African American student at the University of Wisconsin-Madison when the university, without Shabazz’s knowledge or consent, Photoshopped his image into its admissions marketing materials.<sup>159</sup> In 2000, Shabazz was stopped by an admissions counselor who asked him if he saw himself on the cover of the admissions application, which was a picture of Shabazz and a number of white students at a football game.<sup>160</sup>

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<sup>153</sup> *Id.* at 868.

<sup>154</sup> *See e.g.*, *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538, 1541 (11th Cir. 1983) (analyzing the right of publicity as “an intangible personal property right”).

<sup>155</sup> *See e.g.*, DAVID CRUMP ET AL., PROPERTY: CASES, DOCUMENTS, AND LAWYERING STRATEGIES 62–68 (3d ed. 2013); JESSE DUKEMINIER, ET AL., PROPERTY 84–90 (8th ed. 2014); JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 249–50 (5th ed. 2010).

<sup>156</sup> 971 F.2d 1395 (9th Cir. 1992).

<sup>157</sup> *Id.* at 1397.

<sup>158</sup> *Id.* at 1399. Note that this court believes that the right of publicity protects celebrity status regardless of “whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof.” *Id.*

<sup>159</sup> Deena Prichep, *A Campus More Colorful Than Reality: Beware That College Brochure*, NPR, Dec. 29, 2013, <http://www.npr.org/2013/12/29/257765543/a-campus-more-colorful-than-reality-beware-that-college-brochure>.

<sup>160</sup> *Id.*

Shabazz was perplexed because he had never been to a football game. Then he saw it—Shabazz explains, “I saw my head cut off and kind of pasted onto the front cover of the admissions booklet.”<sup>161</sup>

The university was attempting to appropriate Shabazz’s Blackness in order to create a false representation of a diverse campus. Shabazz, an African American studies major at the university who received personal enrichment from such studies,<sup>162</sup> noted, “The admissions department that we’ve been talking about, I believe, was on the fourth floor, and multicultural student center was on the second floor of that same building. . . . So you didn’t need to create false diversity in the picture—all you really needed to do was go downstairs.”<sup>163</sup>

Shabazz sent the university an intent-to-sue letter.<sup>164</sup> The university eventually settled, and as part of the settlement, it earmarked ten million dollars for its university-wide diversity initiatives.<sup>165</sup> Although this dispute was not tried in court, I would like to explore a legal theory that would have allowed Shabazz a mechanism to protect his racial identity from this type of appropriation.

Wisconsin has both a common law and statutory right of publicity. In *Hirsch v. S. C. Johnson & Son*,<sup>166</sup> the Wisconsin Supreme Court recognized a common law claim for “appropriation of a person’s name for trade purposes.”<sup>167</sup> Elroy “Crazylegs” Hirsch, an athlete of national prominence, sued to protect his identity from unauthorized commercial appropriation. Johnson & Son was attempting to market a shaving gel product by calling it “Crazylegs.” Hirsch claimed that such marketing was unauthorized appropriation of his nickname. The court held that unlike the common law privacy rights that were not recognized by prior state court decisions, the right of publicity “is different because it protects primarily the property interest in the publicity value of one’s name.”<sup>168</sup> The court observed that Hirsch “over a period of years assiduously cultivated a reputation not only for his skill as an athlete, but as an exemplary person whose identity was associated with sportsmanship and high qualities of character.”<sup>169</sup> The court defined the elements of such a claim as follows: (1)

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<sup>161</sup> *Id.*

<sup>162</sup> Telephone Interview with Diallo Shabazz, University of Wisconsin-Madison alumnus (Oct. 10, 2014).

<sup>163</sup> Prichep, *supra* note 159.

<sup>164</sup> Telephone Interview with Diallo Shabazz, *supra* note 162.

<sup>165</sup> *Id.*

<sup>166</sup> 280 N.W.2d 129 (Wis. 1979).

<sup>167</sup> *Id.* at 130.

<sup>168</sup> *Id.* at 132.

<sup>169</sup> *Id.* at 134.

plaintiff must be readily identifiable; and (2) plaintiff has suffered damages based on plaintiff's loss or defendant's unjust enrichment.<sup>170</sup>

Applying the common law claim, Shabazz would argue that his racial identity is readily identifiable in University of Wisconsin's admissions material—especially because his picture was spliced onto a photograph of white students attending a football game in order to appropriate his Blackness without his permission. Additionally, he would argue that the university is unjustly enriched by this unauthorized use of his African American identity—an identity that he developed over time and cultivated through his life experiences and his studies at the university.

In addition, Wisconsin's statutory right of publicity is codified in Wisconsin Statute § 995.50.<sup>171</sup> The law provides, in relevant part:

- (1) The right of privacy is recognized in this state. . . .
- (2) In this section, "invasion of privacy" means any of the following: . . .
  - (b) The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.<sup>172</sup>

The Wisconsin Court of Appeals has interpreted that a claim under § 995.50(2)(b) requires the following proof:

1. "use . . . of the name, portrait or picture of any living person";
2. "use" that is "for advertising purposes or for purposes of trade"; and
3. "use" without written consent.<sup>173</sup>

Under the statutory claim, Shabazz would argue that the University of Wisconsin used his picture for advertising purposes without his written consent. Although the purported purpose of creating a representation of a diverse campus in order to recruit a more diverse student body is by no means malicious, it should have, as a matter of law, been with the written consent of Shabazz. Thus, according to this statute, Shabazz should have had the right to protect his racial identity from this type of unauthorized use.<sup>174</sup>

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<sup>170</sup> *Id.* at 140.

<sup>171</sup> Wis. Stat. § 995.50 (2013).

<sup>172</sup> *Id.*

<sup>173</sup> *Rottier v. Cannon*, 828 N.W.2d 876, 878 (Wis. Ct. App. 2013).

<sup>174</sup> I acknowledge that this analogy is not perfect. The right of publicity relies on a commercial element that may be missing in many forms of racial minority identity appropriation.

In sum, under both Wisconsin's common law and statutory right of publicity, Shabazz would have been able to assert that his valuable identity property should be protected.<sup>175</sup> In this case, the university appropriated Shabazz's Blackness in order to create a false representation of diversity to the potential applicant pool. This unauthorized appropriation raises the question of how a court should treat minority-defined constructions of their own identity when it conflicts with externally imposed constructions of such identity. In the next section, I take an example from another area of intellectual property—trademark law—that may illustrate a possibility.

ii. *Trademark Rights Versus Protection for Authentic Tribal Identity*

“The protection of trade-marks is the law's recognition of the psychological function of symbols.”<sup>176</sup> Trademark protection extends to a “word, phrase, logo, or other graphic symbol used by a manufacturer or seller to distinguish its product or products from those of others.”<sup>177</sup> Similar to the right of publicity, trademark is a type of protection from unfair competition.<sup>178</sup> To be clear, I do not argue that racial minorities should trademark their individual racial identities. Instead, I wish to illustrate how internally-constructed, positive racial minority identity can be acknowledged as valid under the trademark system. Specifically, the Trademark Act of 1946 (the Lanham Act)<sup>179</sup> allows sellers or producers to register their marks as a form of intellectual property; however, these entities are not entitled to trademark protection if their marks disparage persons or bring them into contempt or disrepute.<sup>180</sup> Through this legal structure, people of color have an opportunity to assert their positively constructed racial identities in the face of disparaging marks. I contend that these constructions of racial identity can be interpreted as a form of valuable property that conflicts with the property rights of those who

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Nonetheless, it is useful for illustrating how positive constructions of racial minority identity can be protected as property.

<sup>175</sup> On the other hand, the university may have been able to assert the defense of incidental use. *See Stayart v. Google*, 710 F.3d 719 (7th Cir. 2013); *Bogie v. Rosenberg*, 705 F.3d 603 (7th Cir. 2013).

<sup>176</sup> *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942).

<sup>177</sup> BLACK'S LAW DICTIONARY 1630 (9th ed. 2009).

<sup>178</sup> *See MCCARTHY*, *supra* note 151, at 28:16. However, “[w]hile the key to the right of publicity is the commercial value of a human identity, the key to the law of trademarks is the use of a word or symbol in such a way that it identifies and distinguishes a *commercial source*.” *Id.*

<sup>179</sup> 15 U.S.C. §§ 1051–1127 (2013).

<sup>180</sup> Section 2(a) the Lanham Act prohibits registration of a mark “which may disparage . . . persons . . . or bring them into contempt, or disrepute.” 15 U.S.C. § 1052(a).

hold derogatory trademarks. I take the recent “Redskins” trademark case as an example.<sup>181</sup>

On June 18, 2014, in *Blackhorse v. Pro-Football*,<sup>182</sup> the Trademark Trial and Appeals Board (the Board) cancelled six trademark registrations associated with the Washington “Redskins” football team. Five Native American petitioners<sup>183</sup> brought this cancellation proceeding pursuant to Section 14 of the Lanham Act.<sup>184</sup> The petitioners claimed that contrary to

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<sup>181</sup> I acknowledge that comparing Native Americans to any other racial minority groups is somewhat flawed. Unlike other American minority groups, Native American tribes have legal status as sovereign nations. See Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311, 1317 (1993) (“Indian nations in the United States enjoy a measure of sovereignty, which is seen as the authority for indigenous forms of government.”). Issues of indigenous identity are, thus, linked with issues of sovereignty. However, as a common denominator with other racial minority groups, Native peoples have struggled against white supremacy. See ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, TRIBAL RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005) (discussing the legal effects of racist language against Native Americans throughout history); Bethany Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591 (2009) (arguing that the idea that Native Americans are racially inferior was a form of racism that provided justification for the taking of tribal resources). With this in mind, I analyze the recent “Redskins” trademark case.

<sup>182</sup> 111 U.S.P.Q.2d 1080 (T.T.A.B. 2014). Note that a similar case was brought earlier but dismissed in 1999 because the Trademark Trial and Appeal Board determined that petitioners had waited too long to challenge the registrations. *Harjo v. Pro-Football*, 50 U.S.P.Q.2d 1705 (T.T.A.B. 1999). Lead petitioner in the prior case, Susan Harjo, helped organize the new group of petitioners that sought cancellation in *Blackhorse*. See Hunter Walker, *Meet the Native American Grandmother Who Just Beat the Washington Redskins*, BUS. INSIDER (June 18, 2014), <http://www.businessinsider.com/meet-the-native-american-grandmother-who-just-beat-the-redskins-2014-6>.

<sup>183</sup> The opinion describes the five petitioners as follows:

Amanda Blackhorse is a member of the Navajo Nation. She testified that she considers the term REDSKINS in respondent’s marks to be derogatory and is offended by it.

Phillip Martin Gover is a member of the Paiute Indian Tribe of Utah. He testified that he perceives the terms REDSKIN and REDSKINS to be disparaging, even in connection with respondent’s services.

Courtney Tsothigh is a member of the Kiowa Tribe of Oklahoma. She testified that she finds the term REDSKIN to be disparaging in any context including for an “NFL team.”

Marcus Briggs-Cloud is a member of the Muscogee Nation of Florida. He testified that he finds the term REDSKINS in the registrations to be disparaging and offensive.

Jillian Pappan testified that she is a Native American. She testified, *inter alia*, that the use of the term REDSKIN is analogous to the term “nigger,” and that people should not profit by dehumanizing Native Americans.

*Blackhorse*, 111 U.S.P.Q.2d at 7.

<sup>184</sup> 15 U.S.C. § 1046(c).

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Section 2(a),<sup>185</sup> the six registrations issued to respondent between 1967 and 1990 disparaged Native Americans and brought them into contempt and disrepute.

The Board relied on a two-step analysis in evaluating the Native American petitioners' claim: (1) "What is the meaning of the matter in question, as it appears in the marks and as those marks used in connection with the goods and services identified in the registrations?"<sup>186</sup> and (2) "[W]as the meaning one that may have disparaged"<sup>187</sup> a substantial composite, which need not be a majority, of Native Americans, at the times of the registrations?"<sup>188</sup> As for the first step regarding the meaning of the matter, the Board found that it was clearly satisfied noting, "The term REDSKINS in the registered marks when used in connection with professional football retains the meaning of Native Americans."<sup>189</sup>

As for the second step regarding disparagement, the Board noted that it will "look not to the American public as a whole, but to the views of the referenced group (i.e., Native Americans)."<sup>190</sup> Further, the views of the referenced group are "reasonably determined by the views of a substantial composite thereof."<sup>191</sup> The Board considered expert reports and testimony concerning the derivation of the word "redskin(s)," dictionary usage labels,<sup>192</sup> statements from Native Americans on what the word means, and the usage of the term by various media over time.<sup>193</sup> Of particular significance to the Board was NCAI Resolution 93-11 passed by the National Congress of American Indians (NCAI) in 1993. The Board, in its written opinion, included the following pertinent language from NCAI Resolution 93-11:

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<sup>185</sup> 15 U.S.C. § 1052(a).

<sup>186</sup> *Blackhorse*, 111 U.S.P.Q.2d. at 8.

<sup>187</sup> Note that the Board "use[d] the word disparage in this case as an umbrella term for 'may disparage . . . or bring them into contempt or disrepute.'" *Id.* at 7 n.33.

<sup>188</sup> *Id.* at 28.

<sup>189</sup> *Id.* at 9.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> On this point, the Board found that

the earliest restrictive usage label in dictionary definitions in [the respondent's expert] report dates back to 1966 from the *Random House Unabridged* First Edition indicating REDSKIN is 'Often Offensive.' From 1986 on, all of the entries presented by [the respondent's expert] include restrictive usage labels ranging from 'not the preferred term' to 'often disparaging and offensive.'

*Id.* at 12.

<sup>193</sup> *Id.* at 11.

NCAI is the oldest and largest intertribal organization nationwide representative of and advocate for national, regional, and local tribal concerns; . . . .

[T]he term REDSKINS is not and has never been one of honor or respect, but instead, it *has always been* and continues to be a pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for Native American's [sic]; and

[T]he use of the registered service marks . . . by the Washington Redskins football organization, has always been and continues to be offensive, disparaging, scandalous, and damaging to Native Americans.<sup>194</sup>

The Board, in its findings of fact, noted, "NCAI has been in existence since 1944 and between 1972 and 1993, a span of twenty years, the record shows that NCAI has represented approximately one third of Native Americans. It is reasonable to infer that NCAI represented approximately one third of Native Americans merely five years earlier in 1967."<sup>195</sup> It further found that NCAI objected to respondent's use of the word "Redskins" in the late 1960s, 1972, 1988, 1992, and 1993.<sup>196</sup> From these facts, the Board concluded that "NCAI Resolution 93-11 represents the views of a substantial composite of Native Americans."<sup>197</sup> The Board specifically observed "that, *at a minimum*, approximately thirty percent of Native Americans found the term REDSKINS used in connection with respondent's services to be disparaging at all times including 1967, 1972, 1974, 1978 and 1990."<sup>198</sup> The second step of the analysis was satisfied. The Board, therefore, cancelled the respondent's trademark registrations.<sup>199</sup>

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<sup>194</sup> *Id.* at 17.

<sup>195</sup> *Id.* at 27.

<sup>196</sup> *Id.* at 27–28.

<sup>197</sup> *Id.* at 28.

<sup>198</sup> *Id.* at 29.

<sup>199</sup> As this Article is being written, the respondents are appealing the decision. See Associated Press, *Redskins Appeal Trademark Decision on Team Name*, N.Y. TIMES, Aug. 14, 2014, [http://www.nytimes.com/aponline/2014/08/14/sports/football/ap-fbn-redskins-name.html?partner=rss&emc=rss&\\_r=0](http://www.nytimes.com/aponline/2014/08/14/sports/football/ap-fbn-redskins-name.html?partner=rss&emc=rss&_r=0). The respondents are also suing the petitioners. See Megan Finnerty, *Navajo Woman Targeted by NFL Team's Lawsuit Remains Defiant*, AZ CENTRAL (Sept. 25, 2014), <http://www.azcentral.com/longform/news/local/arizona/2014/09/25/amanda-blackhorse-nfl-washington-suing-defiant/16128077/>; Drew Katchen, *Redskins Clear To Sue Native Americans—For Now*, MSNBC.COM (Nov. 1, 2014), <http://www.msnbc.com/msnbc/redskins-clear-sue-native-americans-now>.

The lead petitioner in the case, Amanda Blackhorse,<sup>200</sup> is a social worker for the Navajo Nation in Kayenta, Arizona.<sup>201</sup> Blackhorse developed a strong sense of indigenous identity, in part, through her experiences in college.<sup>202</sup> She took courses in social work at Haskell Indian Nations University,<sup>203</sup> where she learned about the colonization and de-colonization of Native American peoples.<sup>204</sup> She continued her undergraduate studies at University of Kansas and proceeded to University of Washington at St. Louis for her masters in social work, places that allowed her to further her understanding of the longstanding harm that Native American peoples have suffered in this country.<sup>205</sup>

This legal challenge was part of Blackhorse's struggle to resist the legacy of white supremacy that continues to harm her people to this day. After the victory before the Board, Blackhorse explained why this case is so important:

I have an interest in what we call historical trauma, the oppression that Native Americans went through and continue to go through has a tremendous effect on our mental health and our overall well[-]being as people. So that is something that is my passion . . . . We need to work on healing our people and to also educate the public about the oppression we have experienced and continue to experience, like these mascots.<sup>206</sup>

Blackhorse linked the resistance to historical oppression against Native Americans to the resistance to current dominant cultural practices that harm her people. Specifically, she wanted to highlight and question the norm of using a racial slur against her people as a football team's name. In discussing why this practice is harmful, Blackhorse states that the language and images of the

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<sup>200</sup> Blackhorse is an enrolled member of the federally recognized Navajo Nation. Telephone Interview with Amanda Blackhorse, petitioner in *Blackhorse*, 111 U.S.P.Q.2d 1080 (Dec. 9, 2014).

<sup>201</sup> Walker, *supra* note 182.

<sup>202</sup> She also remembers the influence of her grandmothers, "who were frail, but very strong in [her] eyes." Telephone Interview with Amanda Blackhorse, *supra* note 200.

<sup>203</sup> Haskell Indian Nations University (HINU) is the premiere tribal university in the United States, offering quality education to Native American students. Haskell's student population averages about 1000 per semester, and all students are members of federally recognized tribes. Haskell's faculty and staff is predominantly native. Haskell offers Associate and Bachelor's degrees. Haskell's historic campus is centrally located in Lawrence, KS in what is known as Kaw Valley.

*About*, HASKELL INDIAN NATIONS UNIVERSITY, <http://www.haskell.edu/about/index.php> (last visited Jan. 3, 2015).

<sup>204</sup> Telephone Interview with Amanda Blackhorse, *supra* note 200.

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

<sup>206</sup> Walker, *supra* note 182.

“Redskins” says to the world, “You are our mascot, you can sing and dance, and we can downplay the history of genocide and trauma by portraying you like this.”<sup>207</sup> Blackhorse fought this representation because it is contrary to the empowering, positive conception of self that she has created over time. Blackhorse said, “When people are empowered and understand their history, their identity changes, their behaviors change, their lifestyle changes. You are not ashamed of who you are anymore.”<sup>208</sup> Similarly, another named petitioner in the case, Marcus Briggs-Cloud,<sup>209</sup> explains his own transformation through Ethnic Studies in college:

What I gained from the Native Studies project, which emerged from its parent, Ethnic Studies, was exposure to this concept and practice called critical analysis. . . . Acquiring command of concepts like *colonization* and *decolonization* and all their matrix of connotative syntheses within Indigenous applications was liberating, namely equipping me with the ability to a) understand more clearly my experiences of marginalization among my father’s People, b) the discursive nature of lateral oppression’s origins, and c) most importantly extract resolve and healing from the conceptualized picture.<sup>210</sup>

In discussing the harm to his Native American identity caused by the “Redskins” label and imagery, Briggs-Cloud observed:

Once I came to realize that negative stereotype imagery in phenomena like Indian mascotry is a major contributor to the dehumanization and marginalization of Indigenous Peoples, I was able to acknowledge the nexus of colonialism and the obstacles we face in trying to save Indigenous languages, struggle for Indigenous religious rights for the continuity of ceremonial traditions, have our voices heard about alarming rates of alcoholism, suicide, drug abuse, gang activity in Indigenous communities.<sup>211</sup>

In other words, under my analysis, these petitioners’ valuable property rights in their positively constructed identities conflicted with Pro-Football’s claimed

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<sup>207</sup> Telephone Interview with Amanda Blackhorse, *supra* note 200.

<sup>208</sup> *Id.*

<sup>209</sup> Briggs-Cloud is a member of the Maskoke Nation of Florida and holds a Certificate Degree of Indian Blood from this federally recognized tribe. Telephone Interview with Marcus Briggs-Cloud, petitioner in *Blackhorse v. Pro-Football*, 111 U.S.P.Q.2d 1080 (T.T.A.B. 2014) (Dec. 5, 2014).

<sup>210</sup> E-mail from Marcus Briggs-Cloud, petitioner in *Blackhorse v. Pro-Football*, 111 U.S.P.Q.2d 1080 (T.T.A.B. 2014), to author (Jan. 2, 2015, 10:47 P.M.) (on file with author).

<sup>211</sup> *Id.*

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intellectual property rights in words and images that have historically degraded Native American peoples. In the “Redskins” case, the positively constructed indigenous identities superseded Pro-Football’s trademark claims. Identity property was, thus, protected.

This case also illustrates a relatively new trend in the law that finds racial minority voices valid in determining whether certain constructions of racial minority identity are demeaning. Here, under the rules of trademark law, the court looked to a substantial composite of the community to see whether the trademarks were disparaging or not. My next example will explore this concept of internal definition of racial identity in a different context involving tortious reputational harm.

*iii. Defamation Law and Judicial Recognition of Minority  
Definitions of Authentic Identity*

The idea that people of color have a say in defining what authentic and inauthentic racial identity should mean is starting to take hold in law. This was not always the case. Fifty years ago, in *Moore v. P.W. Publishing Co.*,<sup>212</sup> the Ohio Supreme Court was faced with the issue of whether the phrase “Uncle Tom” directed to an African American was libelous. The jury found that it was libelous per se. However, the Ohio Supreme Court disagreed and held that the depiction of an African American plaintiff as an “Uncle Tom” could not be libelous. It noted, “The words, ‘Uncle Tom,’ have no commonly understood opprobrious meaning to one who is not knowledgeable in the language of the comparatively recent militant civil rights movement.”<sup>213</sup> The court’s opinion was contrary to the testimony of a number of African Americans during trial that explored what the words meant to the African American community. For instance, the African American plaintiff testified “that the phrase, ‘Uncle Tom,’ as directed to a person has an established meaning in ordinary usage today *among the Negro population generally* as ‘a person who will sell out his community, his race, who will do things for himself rather than for his people.’”<sup>214</sup> A prominent African American member of the Democratic party testified that the words referred to “a person who for selfish reasons would . . . ‘sell out.’”<sup>215</sup> Finally, an African American minister testified that the words generally referred to a “Judas Goat.”<sup>216</sup> All of these community understandings of the meaning of “Uncle Tom” pointed to someone who betrayed the interests of his or her race and who was acting in inauthentic ways for personal gain.

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<sup>212</sup> 209 N.E.2d 412 (Ohio 1965).

<sup>213</sup> *Id.* at 415.

<sup>214</sup> *Id.* at 416.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

The court not only failed to see such meaning in the phrase, but even noted its own understanding of the positive implications of such words: “The term ‘Uncle Tom’ takes its definition from the character in Harriet Beecher Stowe’s ‘Uncle Tom’s Cabin.’ One visualizes that character as loyal, patient, humble and long suffering.”<sup>217</sup> The court, in other words, refused to acknowledge the legitimacy of the interpretation of racial meaning that came from within a minority community—instead, it used its own interpretation to supersede such understanding and impose a contradictory understanding as a matter of law.

However, times are changing. In the recent past, some courts have started to recognize that African Americans’ interpretations of certain words implying inauthentic racial identity are valid. Indeed, at least one court has held, based on these community understandings, that accusations of racial inauthenticity could be considered a form of defamation per se. In *Goodwin v. Kennedy*,<sup>218</sup> an African American assistant high school principal sued an African American minister in a defamation action. The minister called the assistant high school principal a “house nigger” in connection with the assistant principal’s actions involving student discipline.<sup>219</sup> The South Carolina Court of Appeals found that these words were slanderous per se by imputing “racism and bias” to him in carrying out his profession.<sup>220</sup> *Goodwin* represents a major shift from *Moore*. It acknowledges that the phrase “house nigger,” which is similar to “Uncle Tom” or “sell out” in that they all implicate someone who is racially inauthentic for personal gain, are actually negative. In fact, they are so potentially damaging to a person of color’s reputation, that they can be deemed a form of slander per se. As such, the *Goodwin* court was willing to protect the plaintiff’s reputation from such harm.

The *Goodwin* court’s recognition of slander per se on these facts is noteworthy in two respects. First, the court acknowledged that there is reputational value in racial authenticity that is worth protecting—on the flip side, there is serious reputational harm that can be caused by false imputations of racial inauthenticity. Second, the court accepts minority definitions of words that relate to the construction of minority identity—definitions that were irrelevant to courts just three decades prior. Both points are consistent with my idea of identity property in which people of color should be constructing what positive racial identity should mean, and such constructions should be allowed legal protections.

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<sup>217</sup> *Id.* at 415.

<sup>218</sup> 552 S.E.2d 319 (S.C. Ct. App. 2001).

<sup>219</sup> *Id.* at 322.

<sup>220</sup> *Id.* at 324. *But see* Madison v. Frazier, 539 F.3d 646, 657 (7th Cir. 2008) (“We find that the phrase ‘sell out’ is incapable of being verified as a statement of fact; it is merely an opinion that Madison betrayed his race.”).

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## V. CONCLUSION

In conclusion, I argue for the acknowledgement and legal protection of identity property. Identity property represents a drastic shift away from the dominant socio-legal construction of race in America by recognizing the positive value of racial minority identity. Further, identity property focuses attention on the positive value of racial minority identity in and of itself, instead of framing this value in terms of the benefits that this identity gives to white people and white institutions. Finally, it creates an alternative path to colorblindness for discussing and protecting racial minority rights in a race-relevant world—a world in which centuries of whiteness as property continue to have real-world effects today.