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“THE MERCEDES DIVIDE?”—AMERICAN SEGREGATION SHAPES THE COLOR OF ELECTRONIC COMMERCE*

LEONARD M. BAYNES†

INTRODUCTION

Thirty-three percent of American households made online purchases during the 2005 holiday season.¹ This online retail spending totaled \$30.1 billion, which was a 30 percent increase over the prior year’s holiday season purchases.² It is estimated that total online retail spending was \$143.2 billion last year and constituted 6 percent of total retail purchases.³ During the 2005 holiday season, both Circuit City and Best Buy reported huge increases in online

* Former FCC Chairman Michael Powell described the “Digital Divide” as a “Mercedes Divide.” He specifically said that “I think that there is a Mercedes Divide. . . . I’d like to have one; I can’t afford one.” Anthony Shadid, *Report Shows Narrowing Digital Divide GAO Finds Net Use up in Rural Areas, Among Minorities*, BOSTON GLOBE, Feb. 22, 2001, at C1, available at 2001 WLNR 2236815 (Westlaw). Chairman Powell seemed to be blaming the Digital Divide on economic differences and suggested a belief that those who could not afford the technology should not be entitled to it. He later described his comment as “regrettable.” *Agenda and Plans for Reform of the FCC: Hearing Before the Subcomm. On Telecomms. and the Internet of the H. Comm. on Energy and Commerce*, 107th Cong. 54 (2001) (statement of Michael Powell, Chairman, FCC), available at http://www.thegully.com/essays/US/politics_2001/010212_powell_fcc.html.

† Professor of Law and Director of the Ronald H. Brown Center for Civil Rights and Economic Development, St. John’s University Law School; J.D.-M.B.A., Columbia University; B.S., New York University. © 2006 by Leonard M. Baynes. All rights reserved.

1. Rosemary Roberts, *The Importance of Shopping Locally*, GREENSBORO NEWS & REC. (N.C.), Jan. 6, 2006, at A11, available at 2006 WLNR 363604 (Westlaw); Michael Barbaro, *Web Stores Break into Mainstream*, THE OREGONIAN, Dec. 30, 2005, at D1, available at 2005 WLNR 22299184 (Westlaw).

2. Teresa F. Lindeman, *Gifts That Keep On Giving: Consumers are Buying into the Idea of Selling Unwanted Presents Online*, PITTSBURGH POST-GAZETTE, Jan. 6, 2006, at E1, available at 2006 WLNR 342048 (Westlaw). *But see* Michael Barbaro, *Retailers Find Little to Cheer: December Sales were Lukewarm*, N.Y. TIMES, Jan. 6, 2006, at C1, available at 2006 WLNR 325970 (Westlaw) (estimating that holiday online sales grew 25 percent); Lorrie Grant, *Most Online Buyers Happy, Surveys Say: Websites Satisfied about 75%*, USA TODAY, Jan. 12, 2006, at 4B, available at 2006 WLNR 623517 (Westlaw) (estimating holiday online sales at \$19.6 billion).

3. Grant, *supra* note 2.

sales—49 percent and 40 percent respectively.⁴ It is estimated that customers spent, on average, eighty-four minutes researching prices online.⁵ During the 2005 holiday season, in-store sales rose by a “modest 3.2 percent.”⁶ This small increase may be attributed to the huge increase in online purchases.⁷ As we enter the new world of advanced telecommunications technologies, quaint twentieth century methods of conducting business will be passé.

The availability of online technology spurs electronic commerce.⁸ Online purchases give consumers the flexibility to comparison shop without leaving their homes. Online shopping allows consumers to buy goods and services “before going to bed at night, and before going to work in the morning—times when most malls are closed.”⁹ According to one report, “[n]early 90 percent of online shoppers use the Internet to compare the prices of online retailers, catalogs, and retail stores before they buy” goods or services.¹⁰ Approximately “70 percent of online shoppers reported they were able to find better sales and discount offers online than offline through a retail or catalog merchant.”¹¹ In fact, “Neiman Marcus and L.L. Bean said that, for the first time, they received more orders from their Web sites than telephone orders through their catalogs.”¹² Moreover, some retailers have taken the technology into the virtual realm by allowing the consumer to clothe models in an online dressing room.¹³

Online transactions do not require face-to-face contact. By

4. Joshua Freed, *Best Buy, Circuit City See Rise in Holiday Sales*, BRANDENTON HERALD (Florida), Jan. 7, 2006, at 3B, available at 2006 WLNR 374573 (Westlaw) (“Both [Best Buy and Circuit City] reported strong gains in Web sales . . . as more customers shopped and redeemed gift cards online.”).

5. Jen Haberkorn, *Luxury, Teen Retailers Fare Well: Despite Last-Minute Holiday Push, Wal-Mart's Sales Were Off*, WASH. TIMES, Jan. 6, 2006, at C10, available at 2006 WLNR 365411 (Westlaw).

6. Michele Chandler, *Holiday Shoppers Showed Restraint: Many Retailers Report Disappointing Sales During Crucial Period*, SAN JOSE MERCURY NEWS, Jan. 6, 2006, at 3, available at 2006 WLNR 333356 (Westlaw).

7. *Id.*

8. Howard A. Shelanski, *The Speed Gap: Broadband Infrastructure and Electronic Commerce*, 14 BERKELEY TECH. L.J. 721, 734 (1999).

9. Tom Zucco & Mark Albright, *Online Retailers See Strong Holiday Sales*, ST. PETERSBURG TIMES, Dec. 31, 2005, at 1A, available at 2005 WLNR 22352328 (Westlaw) (quoting Helen Malani, a researcher at Shopzilla.com, an online shopping comparison search engine).

10. *Id.*

11. *Id.*

12. *Id.*

13. Michael Barbaro, *Internet Sales Show Big Gains Over Holidays*, N.Y. TIMES, Dec. 30, 2005, at A1, available at 2005 WLNR 22097963 (Westlaw).

merely pointing and clicking, a consumer can complete a transaction. Online shopping allows companies to reduce their overhead by employing a smaller, though more technologically advanced, workforce. As a consequence, there will likely be a further decline in the number of low-skill jobs. Moreover, as the world becomes smaller through the removal of trade barriers through NAFTA, GATT, and the WTO, many of the jobs, skilled and unskilled, are moving overseas. Many major corporations require online procurement of goods and services. Vendors, therefore, will have to be able to identify and complete bids online.¹⁴

Broadband Internet service is high-speed service available through local telephone companies, wireless service providers, and cable companies. Broadband makes accessing the Internet like turning on the television. It gives the consumer quick and uninterrupted service. In fact, 46 percent of high-speed Internet users use their search engines each day as compared to only 25 percent of narrowband users.¹⁵ Broadband makes electronic transactions much simpler and more accessible, yet the United States ranks sixteenth in the world for broadband deployment.¹⁶ This underrepresentation may be the result of high broadband prices.¹⁷ Ninety-three percent of Americans can access broadband service from their homes but less than 25 percent of American homes actually subscribe.¹⁸

In contrast, narrowband technology is provided through traditional telephone dial-up service. It is much slower than broadband. With narrowband service, the user will very slowly retrieve video images from online sites. Consumers are often frustrated by this slowness, and as a consequence, are less likely to comparison shop. Accordingly, the frequency and number of Internet transactions are likely to be lower with narrowband technology than with broad-

14. MARGARET C. SIMMS, MEASURING THE DIVIDE: AFRICAN AMERICANS' ACCESS TO THE ONLINE UNIVERSE 10 (2006), available at <http://www.jointcenter.org/publications1/Broadband/Broadband%20Full%20Report.pdf>.

15. THE PEW INTERNET & AMERICAN LIFE PROJECT, INTERNET: THE MAINSTREAMING OF ONLINE LIFE 68 (2005), available at http://www.pewinternet.org/pdfs/Internet_Status_2005.pdf.

16. PUBLIC KNOWLEDGE, PRINCIPLES FOR AN OPEN BROADBAND FUTURE: A PUBLIC KNOWLEDGE WHITEPAPER 2 (2005), available at <http://www.publicknowledge.org/pdf/open-broadband-future.pdf> (citing Int'l Telecomm. Union, Broadband Penetration by Technology, Top 20 Economies Worldwide, 2004, http://www.itu.int/ITU-D/ict/statistics/at_glance/top20_broad_2004.html).

17. *Id.* (citing U.S. DEP'T OF COMMERCE, A NATION ONLINE: HOW AMERICANS ARE EXPANDING THEIR USE OF THE INTERNET, *infra* note 96, at 19).

18. *Id.* at 13.

band technology.¹⁹

African Americans and Latinos/as are poised to remain at the bottom of the barrel, as both consumers and entrepreneurs, in this new technological era for several reasons. First, there is disparate access to broadband technologies for people of color. Only 14.2 percent of African Americans and 12.6 percent of Latinos/as live in a home with a broadband Internet connection, as compared with 25.7 percent of whites.²⁰ Second, this broadband disparity coincides with the existing Digital Divide in the rates of access to the Internet and computers by people of color. Third, many African Americans and Latinos/as suffer from poor public school educations, making it much harder for them to have the skills to work in the advanced telecommunications industries. Fourth, discrimination and mass incarceration have limited the economic progress of a large minority of the African American and Latino/a populations. Lastly, given the lower percentage of African American and Latino/a consumers online, minority-owned businesses specializing in wares attractive to these customers will have to continue to merchandise their goods and services the old-fashioned way with high overhead and lots of staff. My study of the business community in Queens, New York, shows that many of its largest minority-owned businesses provide goods and services almost exclusively to members of their own racial and ethnic groups.²¹ As a consequence of all these restraints, African American and Latino/a consumers will not be able to comparison shop from the luxury of their computer chairs and will be constrained by the shops and stores in their geographic location. Likewise, if a minority business cannot go online, it will be unable to compete for potentially beneficial contracts that require completion of online applications.

Members of racial minority groups want to, and do, start businesses. On the national level, people of color have started businesses at higher rates than the general population.²² From 1997 to 2002, African American, Latino/a, and Asian American-owned businesses “grew 33 percent, to 3.9 million.”²³ The growth rate for

19. Shelanski, *supra* note 8, at 731-32.

20. *Id.*

21. See Leonard M. Baynes, *The Q-626 Report: A Study Analyzing the 626 Largest Businesses and the 105 Largest Minority-Owned Businesses, in Queens*, 80 ST. JOHN'S L. REV. 1007 (2006) [hereinafter Baynes, *The Q-626 Report*].

22. Krissah Williams, *Marketplace Diversification: Census Shows More Women, Minorities Own Businesses*, WASH. POST, July 29, 2005, at D1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/28/AR2005072802050.html>.

23. *Id.*

African American businesses was 45 percent; for Latino/a-owned businesses, it was 31 percent, and for Asian American businesses, it was 24 percent.²⁴

Many of these minority-owned businesses face discrimination in the marketplace, especially capital market discrimination. But capital market discrimination is not the only barrier to minority economic development;²⁵ technological barriers are also significant. The National Black Chamber of Commerce asserts that the lack of access to advanced technologies inhibits the growth and development of minority-owned businesses.²⁶ Minority-owned businesses are limited to certain communities and geographical areas because of the lack of technological infrastructure. Moreover, many minority-focused high-tech businesses face significant challenges because African Americans and Latinos/as are less frequent users of this technology. Even though high-tech businesses are an ever-increasing segment of our economy, the federal government has failed to properly track the demographic differences, and recently has obfuscated these differences in access and usage. This article examines how race has become associated with geographic place; how this racial segregation affects educational opportunities of African Americans and Latinos/as; how mass incarcerations affect the economic wellbeing of the minority community; and how the lack of access to Internet and broadband technologies poses a barrier to minority economic development.

THEORETICAL FRAMEWORK

A. *Racialized Spaces, Places, and Educational Disparities*

In the United States, geographical space is racialized so that residential location and community carry a “racial identity.”²⁷ Res-

24. Press Release, Nat'l Black Chamber of Commerce, Inc., eBLAST 080105 (Aug. 1, 2005) (on file with *Western New England Law Review*) (discussing the Department of Census survey on the Characteristics of Businesses and Business Owners, which tracked the growth rate of businesses between 1997 and 2002); see also Baynes, *The Q-626 Report*, *supra* note 21, at 1008-09.

25. See generally Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042, 26,057-58 (May 23, 1996) (compilation of studies showing a disparity in lending rates between minority and non-minority businesses).

26. Nat'l Black Chamber of Commerce, Comments of National Black Chamber of Commerce: In the Matter of Request for Comments on Deployment of Broadband Networks and Advanced Telecommunications Services, http://www.ntia.doc.gov/ntia_home/broadband/comments3/NBCC.htm (last visited Dec. 26, 2006).

27. John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope From a Mountain of Despair"*, 143 U. PA. L. REV. 1233, 1245 (1995).

idential segregation leads to racialized space, which allows for racialized oppression and domination. African Americans and some Latinos/as are often hyper-segregated, i.e., unevenly distributed, isolated, clustered, concentrated, and centralized in sixteen metropolitan urban areas.²⁸ In *American Apartheid: Segregation and the Making of the Underclass*, authors Douglas Massey and Nancy Denton reported that 35 percent of all African Americans in the United States, and 41 percent of all African Americans who reside in urban areas, live in six of the largest metropolitan areas in the United States.²⁹ In contrast, 86 percent of suburban white Americans live in neighborhoods where the percentage of African Americans is less than 1 percent.³⁰

This extreme segregation causes isolation and allows business and government decision makers to treat those who live in these communities differently than the rest of the nation. This hyper-segregation may in fact make these communities and their needs invisible to the decision makers. This geographical segregation transforms the problems of certain racialized spaces into the specific problems of those groups who happen to live in those racialized spaces. It has an impact in terms of the allocation of resources. Given the geographical isolation of certain groups, the fair distribution of resources is virtually impossible.

This geographical isolation leads to educational segregation where African American and Latino/a children attend wholly segregated schools with inferior resources, whereas most whites attend much better schools with better resources. This educational segregation leads to continued disparities in income and class in the United States. The *New York Times* recently ran a series about economic class in the United States.³¹ These articles indicated that economic mobility has stagnated and actually flattened.

The indicia of economic class revolve around four elements: education, income, occupation and wealth. Receiving a higher education can foster class mobility. Income and wealth are often byproducts of one's birth. Parents who are wealthy and have high income pass that bounty on to their children. Unlike in-

28. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 74 (1993).

29. *Id.* at 77.

30. *Id.*

31. See, e.g., Janny Scott & David Leonhardt, *Class in America: Shadowy Lines That Still Divide*, N.Y. TIMES, May 15, 2005, at A11, reprinted in *CLASS MATTERS* 1, 3 (Times Books 2005).

come and wealth, education is one of the factors over which an individual has some control.

Our public school systems, however, often fail disadvantaged students of color. Although more individuals are graduating with a four-year bachelor's degree than in the past, economic class and race unfortunately still dictate who receives a bachelor's degree Only 41 percent of low-income students entering a four-year college graduate within five years, as compared to 66 percent of high-income students. At elite schools, the disparity is even more stark. [Former] Harvard President Lawrence Summers noted that "There is a widening gap between the education of the rich and the poor."

Berkeley Law Professor Goodwin Liu estimates that "as many as 300,000 students with apparent potential to achieve high SAT-equivalent scores do not attend a four-year college" and that "fully 43 percent took neither the SAT nor the ACT." As a consequence, the number of students from these low-income backgrounds available [to go to college] is also limited.³²

Educational segregation is most evident in a recent federal study that showed that eleven million people, or 5 percent of the 2003 U.S. population, are illiterate in English.³³ The study also found that thirty million Americans have reading skills below basic levels.³⁴ In New York, the Court of Appeals found that the New York City public schools poorly prepared their students to be effective citizens.³⁵ In its findings of fact, the trial court found that schools in low income areas of New York City were presented with the most difficult challenges.³⁶ They had the largest concentration of students with low incomes, whose families were recent immi-

32. Leonard M. Baynes, *Don't Let the Present Dictate the Future*, BUS. L. TODAY, Nov./Dec. 2005 at 55, 59 available at <http://www.abanet.org/buslaw/blt/2005-11-12/baynes.shtml>; see also David Leonhardt, *The College Dropout Boom*, N.Y. TIMES, May 24, 2005, at A1, available at 2005 WLNR 8188008 (Westlaw); Goodwin Liu, *Race, Class, Diversity, Complexity*, 80 NOTRE DAME L. REV. 289, 292, 300 (2004).

33. NAT'L CTR. FOR EDU. STATISTICS, NATIONAL ASSESSMENT OF ADULT LITERACY: A FIRST LOOK AT THE LITERACY OF AMERICA'S ADULTS IN THE 21ST CENTURY 4 (2005), available at <http://nces.ed.gov/NAAL/PDF/2006470.PDF>.

34. Mark Schneider, Comm'r, Nat'l Center for Edu. Statistics, *2005 National Assessment of Adult Literacy (NAAL) Results* (Dec. 15, 2005), available at http://nces.ed.gov/whatsnew/commissioner/remarks2005/12_15_2005.asp ("Thirteen percent of all adults had Below Basic prose literacy. This translates into 30 million adults with Below Basic prose literacy-recall that these 30 million Americans cannot do much more than sign a form or search a simple document to find out what they are allowed to drink before a medical test.").

35. Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 337 (N.Y. 2003).

36. Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 490 (N.Y. Sup. Ct. 2001).

grants, and for whom English was a second language.³⁷ These most-challenged schools also had the largest percentage of inexperienced and uncertified teachers.³⁸ Many of the New York City schools had crumbling infrastructure and the students had an insufficient number of books.³⁹ This sad state of educational affairs precludes a large percentage of African Americans and Latinos/as from participating in the New Economy and its technological advances as employees, consumers, or entrepreneurs.

B. *Race, Employment, and Crime*

Geographical and educational segregation precludes many African Americans and Latinos/as from holding good-paying jobs. A recent study published by the *New York Times* found that approximately one-half of the African American men in New York City were unemployed.⁴⁰ These individuals are not counted in any unemployment surveys because their unemployment is long-term and chronic. Their unemployment may result from a lack of skills necessary to participate in the New Economy, especially given the state of New York City's public school system. Their unemployment may result from discrimination. For instance, a recent study found that those applicants with African-American-sounding names were 50 percent less likely to be called for a job interview than those with white-sounding names.⁴¹ A more disturbing study showed that employers were more likely to call back a white ex-convict than an African American without a criminal record.⁴²

As a result of discrimination, many African Americans and Latinos/as are underutilized in our economy. Some unfortunately may engage in illicit and illegal activity for survival.⁴³ As a consequence, one-third of young African American men are now on probation, in

37. *Id.*

38. *Id.* at 493-95.

39. *Id.* at 502-13.

40. Janny Scott, *Nearly Half of Black Men Found Jobless*, N.Y. TIMES, Feb. 28, 2004, at B1, available at 2004 WLNR 5604688 (Westlaw).

41. David Wessel, *Capital: Racial Discrimination Is Still at Work*, WALL ST. J., Sept. 4, 2003, at A2, available at LEXIS. As part of the study, applications were sent to help-wanted ads in Chicago and Boston. *Id.* The African American-sounding names were "Jamal Jackson" or "Lakisha Washington." The white-sounding names were "Greg Kelly" or "Emily Walsh." *Id.*

42. *Id.*

43. See, e.g., Regina Austin, "An Honest Living": *Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119, 2120 (1994) (discussing the African American street vendors who sell goods and services without a license).

jail, or are being prosecuted for a crime.⁴⁴ This percentage is larger than the percentage of young African American men attending colleges and universities.⁴⁵ The United States has the highest per capita prison population in the world.⁴⁶ Many of these men suffer long sentences for victimless drug crimes. A significant difference exists in sentencing requirements for those in possession of crack cocaine, which is perceived as being used more by African Americans, and those in possession of powder cocaine, which is perceived to be used more by whites.⁴⁷ The effect has been the widespread incarceration of a generation of young African American men.

This mass incarceration has been accompanied by other “get tough” policies that make it more difficult for these men to get jobs once they have “done their time.” The removal of these men from their families causes economic distress to their communities. This removal creates social disorganization, which creates a cycle of crime, poverty, and despair for these neighborhoods.⁴⁸

C. Race and the Income/Spending Disparity Paradox

Decades of discrimination have prevented African Americans and Latinos/as from accumulating wealth to the same degree as white Americans.⁴⁹ For instance, the percentage of African Ameri-

44. See Mary Mitchell, *Excuses for Troubled Young Men Only Go So Far*, CHI-SUN TIMES, Mar. 21, 2006, at 14, available at 2006 WLNR 4649748 (Westlaw).

45. Vincent Schiraldi, *Spend More on Education, Not Prisons*, NEWSDAY, Aug. 29, 2002, at A39, available at <http://www.justicepolicy.org/news/news020829spend-more.html>.

46. *Bermuda's Prison Population One of the Highest in World*, FIN. TIMES INFO., June 28, 2005; Judge David Branstool, *Guest Column*, NEWARK ADVOCATE (Ohio), July 30, 2005, at 7A, available at LEXIS (discussing an educational program on alternative sentences in light of the fact that “the per-capita rate of incarceration is the highest in the world”); Mara Lee, *Judge: Time to Legalize Drugs*, DAYTON DAILY NEWS, Feb. 3, 2005, at B3, available at 2005 WLNR 1568032 (Westlaw).

47. Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 STAN. L. REV. 37, 63 (2005) (noting how the disparity in sentencing penalizes African American defendants); Albert W. Alshuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 102-06 (2005) (noting that before the change in sentencing guidelines, African Americans, Latinos, and whites were sentenced at the same rates, but after the change in sentencing for crack cocaine, African Americans are sentenced to disproportionately longer sentences).

48. See, e.g., Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281-1300 (2004) (discussing the community harm to social networks, social norms, social citizenship, and political subordination caused by mass incarceration of African Americans).

49. See Kathleen C. Engel & Patricia A. McCoy, *From Credit Denial to Predatory Lending: The Challenge of Sustaining Minority Homeownership* (2006), at 1 (unpublished manuscript on file with *Western New England Law Review*).

cans making over \$50,000 annually stands at approximately 30 percent of the African American population.⁵⁰ In contrast, approximately 40 percent of whites earn over \$50,000.⁵¹ African Americans earning these middle-class salaries are clustered in the high-priced coastal regions of California and the Northeast as well as other high-priced urban areas.⁵² As a consequence, these middle-class salaries may be illusory and in reality only compensate these African Americans for the high cost of living in their geographical locations.⁵³

The National Urban League found that the economic status of African Americans is only 56 percent of that of white Americans.⁵⁴ Disparities exist in income, poverty status, and wealth among African Americans, Latinos/as, and whites. African Americans and Latinos/as earn approximately 70 percent of the incomes that white Americans earn.⁵⁵ In terms of wealth, African American households have a median net worth of \$7,500 and Latino/a households have one of \$9,750, compared with \$79,400 for their white counterparts. Twenty-three percent of African Americans and 21 percent of Latinos/as live in poverty, compared with only 8 percent of whites.

Many Americans point to the growth of the African American middle class as evidence of discriminatory barriers tumbling and of equal opportunity available for all U.S. citizens. However, most of the so-called progress has benefited only the African American

50. William H. Frey, *Revival*, in AMERICAN DEMOGRAPHICS, Oct. 2003, at 28.

51. *Id.*

52. *Id.*

53. Cf. FRANK WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 54 (2002) (analyzing how Asian Americans have higher average incomes because they tend to live in high-cost urban areas. Similarly African Americans also are more likely to live in high-cost urban areas where incomes are higher to compensate for the high cost of living). Moreover, as reported by Ellis Cose in his book, *The Rage of a Privileged Class*, many middle-class African Americans are angry because they have been on the front lines of integration, thereby confronting personal discrimination more frequently. ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (HarperPerennial 1995) (1993).

54. Rondel Thompson & Sophia Parker, GLOBAL INSIGHT, INC., *The National Urban League Equality Index*, in THE STATE OF BLACK AMERICA 13, 16 (Stephanie J. Jones et al. eds., Nat'l Urban League 2006).

55. Asian Americans, on average, are likely to earn more than whites are. However, the seeming Asian American advantage in income stems from geographical proximity to high cost urban areas where salaries and expenses are higher. WU, *supra* note 53, at 54. Moreover, Asian American families are more likely to consist of dual earners who, because of discrimination, are likely to be more educated for their positions as compared with their white counterparts. *Id.* at 51, 53-54.

middle class, whose average income has risen, whereas the African American poor have suffered actual declines in average income.⁵⁶ Because of the cumulative effect of racism and discrimination, even members of the so-called African American middle class are likely to have far fewer accumulated assets than their white demographic counterparts. In fact, low-income whites have, on average, almost as much accumulated wealth as high-earning middle-class African Americans.⁵⁷

As Harvard sociologist William Julius Wilson wrote:

Long periods of racial oppression can result . . . in a system of inequality that lingers even after racial barriers come down. The most disadvantaged minority individuals, crippled by the cumulative effects of both race and class subjugation, disproportionately lack the resources to compete effectively in a free and open market.⁵⁸

Race discrimination in employment is responsible for much of the disparity in incomes between and among people of color and whites. Historically, African Americans and other people of color have been excluded from opportunities for higher-paying jobs, and this exclusion precludes them from accumulating wealth and capital. These lower-paying, lower-status jobs are more likely to disappear during cyclical economic downturns and more likely to become obsolete due to technological innovations.⁵⁹ But herein lies the paradox: In recent years, African American and Latino/a consumers had spending power of \$631 billion⁶⁰ and \$700 billion

56. See *African-American Incomes Remain Low Under Bush*, U.S. FED. NEWS, Mar. 1, 2006, available at 2006 WLNR 3676257 (Westlaw) (noting that incomes for African Americans fell by “more than \$2,000 . . . and nearly 25 percent of African-Americans remain in poverty, an increase of 250,000 over the past two years”).

57. MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH / WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 101 (1997).

58. WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 196 (1996).

59. Some of this disparity may be related to the disparity in educational attainment between African Americans, Latinos/as, and whites. However, historically, well-educated African Americans were unable to market their advanced degrees. DERRICK A. BELL, *RACE, RACISM AND AMERICAN LAW* 619 (5th ed. 2004) (quoting Francis Olsen, *Employment Discrimination Litigation: New Priorities in the Struggle for Black Equality*, 6 HARV. C.R.-C.L. L. REV. 20, 24 (1970)). For example, in 1959, white male middle-school graduates earned more than African American college graduates. *Id.*

60. Target Market News, Inc., *The Buying Power of Black America*, available at <http://www.targetmarketnews.com/buyingpowerstats.htm> (last visited Dec. 26, 2006) (stating that, in 2002, African Americans had purchasing power of \$631 billion); see also Tamara E. Holmes, *Study: Black Spending Power Tops \$630 Billion*, BLACK ENTERPRISE, Sept. 9, 2003, available at <http://www.blackenterprise.com/ExclusivesEKOpen>

respectively.⁶¹ This spending power would put each of these communities, standing alone, in the top twenty economies in the world in 2005.⁶² Many corporations are therefore doubly negligent when dealing with this market. First, they fail to take into account that these groups may actually outspend whites on certain products, thereby failing to maximize corporate earnings by not marketing to these racial groups. For example, African Americans and Latinos/as actually spend more, on average, on telecommunications services than whites.⁶³ Second, by engaging in inequitable workplace practices or consumer redlining, these corporations may fail to take advantage of this important market.

D. *Minority-Owned Businesses Often Confront Discrimination*

A study entitled *Why Are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances, and Business Capital* found that “nearly 40 percent of all black-owned firms have negative profits”; moreover, they have lower survival rates than their demographic counterparts, and “[t]he average probability of business closure . . . is 26.9 percent for black-owned firms compared to 22.6 percent for white-owned firms.”⁶⁴ Average sales for black-owned businesses were \$59,415,

.asp?id=489 (citing data from *The Multicultural Economy 2003*, a report published by the University of Georgia’s Selig Center for Economic Growth).

61. Press Release, Nat’l Latino Media Council, National Latino Media Council Encouraged but not Satisfied with Progress on Network Television (Dec. 1, 2005), available at <http://www.nalip.org/News/NLMCReportCard2005.pdf> (quoting Esteban Torres, Chair of the National Latino Media Council, who noted that the purchasing power of Latinos/as is \$700 billion); Ruben Navarrette, Jr., *Lifting the Veil Off “Latino-phobia”: Immigration Debate Covers for an Assault on Culture*, CHI. TRIB., May 26, 2006, at 27, available at 2006 WLNR 9050598 (Westlaw) (stating that the nation’s 40 million Latinos/as have over \$700 billion in annual spending power).

62. See Central Intelligence Agency, *The World Factbook*, Rank Order-GDP, available at <https://www.cia.gov/cia/publications/factbook/rankorder/2001rank.html> (last visited Dec. 26, 2006).

63. Leonard M. Baynes, *Deregulatory Injustice and Electronic Redlining: The Color of Access to Telecommunications*, 56 ADMIN. L. REV. 263, 269, 344 n.521 (2004) [hereinafter Baynes, *Electronic Redlining*] (citing TRACY WALDON & JAMES LANDE, THE INDUSTRY ANALYSIS DIVISION’S REFERENCE BOOK OF RATES, PRICES INDICES, AND HOUSEHOLD EXPENDITURES FOR TELEPHONE SERVICE 43 tbl.9B (1997), available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/ref96.pdf).

64. Robert W. Fairlie & Alicia M. Robb, *Why Are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances, and Business Human Capital* (Inst. for the Study of Labor, IZA Discussion Paper No. 1292 (2004)), available at <http://ideas.repec.org/p/iza/izadps/dp1292.html> (click on “download the selected file”).

as compared with \$219,190 for white-owned businesses.⁶⁵ Only 11.3 percent of black-owned firms hired employees, as compared with 21.4 percent of white-owned firms that had at least one employee.⁶⁶ The authors attributed the disparity of business success to the lack of human capital in the African American business community.⁶⁷ Few African Americans have a family business background wherein they can learn how to run and operate a business.⁶⁸

Another factor that hampers the growth and development of minority-owned businesses is capital market discrimination.⁶⁹ Some minority-owned broadcast companies also face discrimination by the communications industry and the advertising community.⁷⁰ Both minority-owned wireless and broadcast companies were less likely to be approved for loans, and if they were approved for a loan, it was usually on less favorable conditions than their white-owned counterparts.⁷¹ Given these disparities for minority-owned businesses, those who exclusively operate in the broadband market will likely face similar hurdles as well as additional ones like the Digital Divide.

E. *Minority-Owned Businesses with Broadband Service Thrive*

The Covad Broadband Entrepreneur Program provides low-income and disadvantaged microentrepreneurs with twelve months of free Covad broadband Internet service and \$500.⁷² The recipients of this support uniformly reported how broadband access helped their businesses. Ms. Sandtricia Andrews-Strickland, operator of a Chicago-based embroidery business, reported that broadband service provided her with a simple and effective method of communicating with customers, and allowed her to process orders through her website.⁷³ Ms. Leonor Banos-Stoute, an Austin, Texas, restaurateur, found that broadband access allowed her to reach geo-

65. *Id.* at 40 tbl.1.

66. *Id.* at 8.

67. *Id.* at 8-14.

68. *Id.* at 10-11, 13-15.

69. *Id.* at 18-20; *see also* TIMOTHY BATES, *BANKING ON BLACK ENTERPRISE: THE POTENTIAL OF EMERGING FIRMS FOR REVITALIZING URBAN ECONOMIES* (Joint Ctr. for Political & Econ. Studies 1992).

70. Leonard M. Baynes, *Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action Programs for Broadcast Licensing*, 57 *RUTGERS L. REV.* 235, 268-74, 283-90 (2004).

71. *Id.* at 265-66, 274.

72. ASS'N FOR ENTER. OPPORTUNITY, *COVAD BROADBAND ENTREPRENEUR PROGRAM: SUCCESS STORIES 5* (report on file with *Western New England Law Review*).

73. *Id.* at 6.

graphical markets outside Austin.⁷⁴ She has received orders for her tamales from customers in California and New England.⁷⁵ Ms. Kekelwa Dall, a Fairfax, Virginia, home health care entrepreneur, found that broadband service saved her company money, simplified her correspondence with clients, and allowed her to use business resources on the Internet.⁷⁶ Mr. Patrick Jerome of Dorchester, Massachusetts, owns a photo image shop.⁷⁷ He found that broadband service improved his marketing strategy and record-keeping system.⁷⁸ Mr. Rafael Lainez, of Huntington Park, California, has a business that sells traditional Charro ensembles.⁷⁹ He uses broadband service to research the products that he needs to manufacture the outfits that he sells.⁸⁰ Lastly, Mr. Anthony Thomas, a carpet cleaner in Redwood City, California, is using broadband service to become a certified mold remediation technician through an online course.⁸¹

F. *The Digital Divide Persists*

Even those African Americans and Latinos/as who are able, and who want, to participate in the New Economy may not participate because they do not own a computer that has Internet service. This disparity in access, called the Digital Divide,⁸² separates those who have access to this technology from those who do not. In general, most Americans have increased their access to home computers and to the Internet. For example, 24.1 percent of American households had home computers in 1994, as compared with 51 percent in 2000.⁸³ During this same time period, African Americans

74. *Id.* at 7.

75. *Id.*

76. *Id.* at 10.

77. *Id.* at 12.

78. *Id.*

79. *Id.* at 15. Charros are traditional Mexican cowboys dressed in colorful shorts, fitted jackets and pants adorned with silver buttons, and wide hats, all with heavily embroidered outside seams. See Susanne Kirchberg, *Charros*, EL ANTIQUARIO (Online Ed.), <http://www.elantiquario.com/article.cfm?story=6c> (last visited Dec. 26, 2006).

80. ASS'N FOR ENTER. OPPORTUNITY, *supra* note 72, at 15.

81. *Id.* at 20.

82. Allen S. Hammond, *The Digital Divide in the New Millennium*, 20 CARDOZO ARTS & ENT. L.J. 135, 140-41 (2002). Some minority-owned banks, like Legacy Bank in Wisconsin, seek to fill the breach and provide capital to businesses that historically had limited access to traditional capital. See Deloris Sims & Frederick Jones, *Letter from the President and Chairman*, in LEGACY BANK 2004 ANNUAL REPORT 2 (2004) (on file with *Western New England Law Review*).

83. U.S. DEP'T OF COMMERCE, FALLING THROUGH THE NET II: NEW DATA ON THE DIGITAL DIVIDE 8 chart 1 (1997) [hereinafter NEW DATA ON THE DIGITAL DI-

and Latinos/as had starkly lower computer ownership rates than Asian Americans and whites. At higher levels of income, this disparity among these demographic groups shrank significantly, but still persisted at a much lower interval, i.e., 76.3 percent for whites, and 64.1 percent for African Americans.⁸⁴

TABLE 1. PERCENTAGE OF HOUSEHOLDS WITH COMPUTERS BY RACE⁸⁵

	1994	1997	1998	2000
White Not Hispanic	27.1%	40.8%	46.6%	55.7%
Black Not Hispanic	10.3%	19.3%	23.2%	32.6%
Other Not Hispanic <i>or</i> Asian American ⁸⁶ /Pacific Islander	32.6%	47.0%	55.0%	65.6%
Hispanic	12.3%	19.4%	25.5%	33.7%

The United States Department of Commerce found that “all ethnic groups experienced comparable increases in computer” ownership in 2000.⁸⁷ However, Table 1 shows that significant disparities remained.

Internet access has grown, but a divide exists for African Americans and Latinos/as. In fact, the size of the divide between and among the racial and ethnic demographic groups increased between 1997 and 2000, showing a persistent disparity in home access for African American and Latino/a Internet users as compared with their white counterparts.⁸⁸ Internet access in 2000 was 23.5 percent for African Americans, 23.6 percent for Latinos/as, and 46.1 percent for whites.⁸⁹

VIDE], available at <http://www.ntia.doc.gov/ntiahome/net2/falling.html>; U.S. DEP'T OF COMMERCE, FALLING THROUGH THE NET: TOWARD DIGITAL INCLUSION 30 tbl.I-1 (2000) [hereinafter TOWARD DIGITAL INCLUSION], available at <http://search.ntia.doc.gov/pdf/ftn00.pdf>.

84. NEW DATA ON THE DIGITAL DIVIDE, *supra* note 83, at 20 chart 13.

85. *Id.*; TOWARD DIGITAL INCLUSION, *supra* note 83, at 16 fig.I-13.

86. In 1998, the United States Department of Commerce replaced the “other non-Hispanic” classification with “Asian American.”

87. TOWARD DIGITAL INCLUSION, *supra* note 83, at 17.

88. *Id.* at 16.

89. *Id.* at 13. Without any substantiation, the United States Department of Commerce concluded that because the rate of Internet access growth for African Americans and Latinos/as was so great that the divide would subside over time. *Id.* at 16.

TABLE 2. PERCENTAGE OF HOUSEHOLDS WITH INTERNET ACCESS BY RACE⁹⁰

	1997	1998	2000
White Not Hispanic	21.2%	29.8%	46.1%
Black Not Hispanic	7.7%	11.2%	23.5%
Asian American/Pacific Islander ⁹¹	25.2%	36%	56.8%
Hispanic	8.7%	12.6%	23.6%

As income increases, all demographic groups reach almost universal access, but a gap for African American and Latino/a households remains, even at these high incomes levels.⁹² Disparities in income and educational levels of African Americans and Latinos/as failed to explain the lower levels of Internet access for these two groups.⁹³ In 2000, African Americans and Latinos/as “had home internet [disparities] 18 [percentage] points below the national average.”⁹⁴ Moreover, disparities in income and education of these groups as compared with the national average explained only 8 percentage points of the difference for African Americans and 11 percentage points for Latinos/as.⁹⁵

In its 2002 report, *A Nation Online: How Americans are Expanding Their Use of the Internet*, the United States Department of Commerce tracked this information by surveying whether individuals have Internet access from any location, i.e., school, work, library, home, or a friend’s house.⁹⁶ Despite this new methodology in examining access, the Department of Commerce acknowledged that demographic “differences in computer and Internet use . . . persist.”⁹⁷ The report shows that the computer use rate for whites

90. NEW DATA ON THE DIGITAL DIVIDE, *supra* note 83, at 29 chart 21; TOWARD DIGITAL INCLUSION, *supra* note 83, at 13 fig.I-10.

91. The figures for 1997 were designated for the demographic group “other, not Hispanic,” which probably was comprised primarily of Asian Americans.

92. TOWARD DIGITAL INCLUSION, *supra* note 83, at 14. Likewise, as income goes down, Internet access rates also go down. *Id.* However, 33.2 percent of Asian Americans at very low income levels—below \$15,000—have Internet access, compared with only 5.2 percent of Latinos/as and 6.2 percent of African American households at the same income level. *Id.*

93. *Id.* at 15.

94. *Id.*

95. *Id.*

96. U.S. DEP’T OF COMMERCE, *A NATION ONLINE: HOW AMERICANS ARE EXPANDING THEIR USE OF THE INTERNET* 10 n.5 (2002) [hereinafter *A NATION ONLINE: HOW AMERICANS ARE EXPANDING THEIR USE OF THE INTERNET*], available at <http://www.ntia.doc.gov/ntiahome/dn/anationonline2.pdf>.

97. *Id.* at 21. This new measurement makes it impossible to compare and con-

was 70 percent, as compared with 55.7 percent for African Americans and 48.8 percent for Latinos/as.⁹⁸ Meanwhile, Internet use from any location was approximately 60 percent for whites, as compared with 39.8 percent for African Americans and 31.6 percent for Latinos/as.⁹⁹

TABLE 3. COMPUTER AND INTERNET USE RATES BY RACE¹⁰⁰

	Computer Use Rates	Internet Use Rates
White Not Hispanic	70.0%	59.9%
Black Not Hispanic	55.7%	39.8%
Asian American/Pacific Islander	71.2%	60.4%
Hispanic	48.8%	31.6%

A recent Department of Commerce report, *A Nation Online: Entering the Broadband Age*, virtually ignores race.¹⁰¹ Instead, the report focuses on other disparities, such as geography.¹⁰² Only a chart in an appendix examines demographic differences and shows that a Digital Divide remains between African American and Latino/a Internet access as compared with white and Asian American Internet access.¹⁰³

trast household access to the Internet over the past decade. In addition, it is based on the fallacy that computer use and Internet access are the same irrespective of where they originate. Moreover, it is contrary to most other measures of penetration rates, e.g., telephone, broadcast television, and cable television, which calculate penetration rates based on home usage. This expanded notion of tracking access is highly unusual.

98. *Id.*

99. *Id.* For Latinos/as who speak only Spanish in the home, Internet use was a paltry 14.1 percent. *Id.* at 23 box 2-2. The Department of Commerce speculated that these lower rates for Spanish-speaking households might endure because most Internet commercial content is written in English or because these solely Spanish-speaking households often have very low incomes, which strongly correlates with low Internet usage. *Id.* On the other hand, for Latinos/as who lived in households where Spanish and other languages were spoken, 37.6 percent reported using the Internet. *Id.* In fact, 68 percent of web pages are in English, as compared with only 3 percent in Spanish. ROBERT W. FAIRLIE, *IS THERE A DIGITAL DIVIDE? ETHNIC AND RACIAL DIFFERENCES IN ACCESS TO TECHNOLOGY AND POSSIBLE EXPLANATIONS* 19 (2003), available at http://cjtc.ucsc.edu/docs/r_techreport5.pdf.

100. A NATION ONLINE: HOW AMERICANS ARE EXPANDING THEIR USE OF THE INTERNET, *supra* note 96, at 22 fig.2-12.

101. U.S. DEP'T OF COMMERCE, *A NATION ONLINE: ENTERING THE BROADBAND AGE* (2004), available at <http://www.ntia.doc.gov/reports/anol/NationOnlineBroadband04.pdf> [hereinafter *A NATION ONLINE: ENTERING THE BROADBAND AGE*].

102. *Id.* at 4, 11-15.

103. *Id.* at A-1. The report also examines access from "any location." *Id.*

TABLE 4. INTERNET USE BY RACE IN 2003¹⁰⁴

White not Hispanic	65.1%
Black not Hispanic	45.2%
Hispanic	37.2%
Asian American	63.0%

The Pew Internet & American Life Project conducted a recent demographic study of Internet access and use.¹⁰⁵ In this report, every demographic group increased access, but the size of the gap between most demographic groups remained the same.¹⁰⁶ A larger percentage of African American and Latinos/as are offline as compared with whites.¹⁰⁷

TABLE 5. INTERNET USE RATES BY RACE¹⁰⁸

	2000	2002
White Not Hispanic	50%	60%
Black Not Hispanic	34%	45%
Hispanic	43%	54%

Like the Department of Commerce studies, the Pew Study found that a gap in Internet use still existed for African Americans even at high-income levels.¹⁰⁹

The Pew Study found that "being white is a strong predictor of whether a person is online, controlling for all the other demographic variables."¹¹⁰ In fact, the Pew Study concluded: "In sum, race and ethnic origin matter. Holding all other factors constant, blacks and Hispanics are less likely to go online than whites."¹¹¹

104. *Id.*

105. AMANDA LENHART ET AL., PEW INTERNET & AM. LIFE PROJECT, THE EVER-SHIFTING INTERNET POPULATION: A NEW LOOK AT INTERNET ACCESS AND THE DIGITAL DIVIDE (2003), available at http://www.pewinternet.org/pdfs/PIP_Shifting_Net_Pop_Report.pdf.

106. *Id.* at 6.

107. *Id.* at 7.

108. *Id.* at 8.

109. *Id.* at 7.

110. *Id.* at 8.

111. *Id.*; see also Andrew G. Celli, Jr. & Kenneth M. Dreifach, *Postcards from the Edge: Surveying the Digital Divide*, 20 CARDOZO ARTS & ENT. L.J. 53, 55-56 (2002); Patricia F. First & Yolanda Y. Hart, *Access to Cyberspace: The New Issue in Educational Justice*, 31 J.L. & EDUC. 385, 385-87 (2002); Hammond, *supra* note 82, at 145-48. Although information on American Indian access is scant, one study found that only 26.8 percent of rural American Indian households have access to computers and only

According to the Pew Study, many African Americans and Latinos/as are either “Net Dropouts” or intermittent Internet users.¹¹² Net Dropouts stopped using the Internet, and intermittent users used the Internet, then “dropped offline for an extended period and are now back online.”¹¹³ The minority group members who “dropped out” described the web as “unhelpful and uninteresting.”¹¹⁴

On March 31, 2006, the *New York Times* reported, in a banner headline, “Blacks Turn to Internet Highway, and Digital Divide Starts to Close.”¹¹⁵ In this article, the reporter claims that the Digital Divide is closing because a large majority of people of all races go online; however, the article implicitly acknowledges that there is a gap between African American and white use of the Internet.¹¹⁶ The *New York Times* reporter also asserts that the gap between African American and white teenagers has become less pronounced.¹¹⁷ This *New York Times* article is in error.¹¹⁸ The latest Pew Internet & American Life Study demonstrated that the Digital Divide remains.¹¹⁹ The study showed that 57 percent of African Americans go online as compared with 70 percent of whites.¹²⁰ In its most recent full report, the Pew Internet study found that the percentage of the “truly disconnected” remained stable in the last three years.¹²¹ Moreover, even among teenagers, there is still a demographic disparity in Internet access: 23 percent of African American teenagers do not use the Internet, as compared with 13 percent of white teenagers who are not online.¹²² In fact, the study

18.9 percent have access to the Internet. Thomas Davis & Mark Trebian, *Shaping The Destiny of Native American People by Ending The Digital Divide: The Nation's Tribal Colleges and Universities*, EDUCAUSE REV. 38, 40 (2001).

112. LENHART, *supra* note 105, at 21.

113. *Id.* at 19.

114. *Id.* at 22.

115. Michel Marriott, *Blacks Turn to Internet Highway, and Digital Divide Starts to Close*, N.Y. TIMES, Mar. 31, 2006, at A1, available at 2006 WLNR 5382869 (Westlaw).

116. *Id.*

117. *Id.*

118. SIMMS, *supra* note 14, at 3 (suggesting that the recent polling is wrong because it combines all locations—home, work, and other).

119. SUSANNAH FOX, PEW INTERNET & AM. LIFE PROJECT, DIGITAL DIVISIONS 3 (2005), available at http://www.pewinternet.org/pdfs/PIP_Digital_Divisions_Oct_5_2005.pdf.

120. *Id.* at 7.

121. *Id.* at 3.

122. E-mail from Nolan Bowie, Adjunct Lecturer in Public Policy, John F. Kennedy School of Government at Harvard University, to Leonard M. Baynes, Professor of Law, St. John's School of Law (Apr. 28, 2006) (on file with author) (commenting on Marriott, *supra* note 115, at A1).

showed that the groups that lagged in Internet access now lag in access speeds.¹²³ In 2005, the Pew Internet & American Life Project again reported that African Americans were less likely to use the Internet than whites were.¹²⁴ The Pew study also acknowledged that large percentages of Americans across demographic groups use e-mail as a basic communications tool.¹²⁵ It failed to discuss the number of non-English-speaking Latino/as who do not use the Internet.¹²⁶ Given that the vast majority of Internet content is in the English language, this information is important.¹²⁷ Moreover, the study does not investigate whether some of the use is from a home computer and whether the functions being used are purely for social and entertainment purposes as opposed to more practical or educational purposes. For all of these reasons, the recent *New York Times* article overstates the case that the Digital Divide is closing.

G. *Disparate Rollout of Broadband*

Broadband access allows a computer to search web-based information at faster speeds. It allows consumers to engage in more sophisticated use of the Internet. With broadband, the user can more quickly analyze transactions, purchase goods, or examine merchandise from remote locations. Moreover, with broadband technology, a computer can remain “‘connected, and [the Internet] becomes as convenient as any appliance in the house.’”¹²⁸ Broadband technology also “lets software developers present [merchandise] in more compelling ways such as 360-degree views, or recall details of previous purchases” made by the customer.¹²⁹

123. *Id.*

124. Lee Rainie, *Internet: The Mainstreaming of Online Life*, in *TRENDS 2005* 57, 63 (Carroll Doherty ed. 2005).

125. Memorandum from Susannah Fox, Assoc. Dir., Pew Internet & Am. Life Project, Data Memo: Generations Online (Dec. 2005), available at http://www.pewinternet.org/pdfs/pip_generations_memo.pdf; see also TOM SPOONER & LEE RAINIE, PEW INTERNET & AM. LIFE PROJECT, *AFRICAN-AMERICANS AND THE INTERNET*, PEW ONLINE LIFE REPORT 4 (2000), available at http://www.pewinternet.org/pdfs/PIP_African-Americans_Report.pdf (“27% of blacks with Internet access send or receive email on a typical day, compared to 49% of online whites who send or receive email on a typical day.”).

126. Bowie, *supra* note 122.

127. *Id.*

128. Grant, *supra* note 2 (quoting Tim Krause, Chief Marketing Officer, Alcatel); *Staff Discussion Draft of Legislation to Create a Statutory Framework for Internet Protocol and Broadband Services: Hearing Before the H. Subcomm. on Telecommunications and the Internet*, 109th Cong. 68 (2005), available at <http://energycommerce.house.gov/108/Hearings/11092005hearing1706/Krause.pdf> (Mr. Tim Krause’s prepared testimony).

129. Grant, *supra* note 2. Broadband requires the following infrastructure:

Broadband service requires the deployment of equipment and facilities necessary for the service to operate. Broadband is not available in all locations; it is estimated that 62 percent of households have broadband access.¹³⁰ Consumers can choose between wireless, cable, or DSL access to broadband. Broadband is the cutting-edge technology for Internet access.¹³¹

Pursuant to § 706 of the Telecommunications Act, the FCC is required to periodically report on the status of broadband deployment.¹³² Many complicated economic and marketing issues occur when a carrier decides to roll out new and advanced services. But given that members of minority groups spend more on average than whites for telecommunications products and services, it is surprising that the carriers do not market services on at least an equal opportunity basis. In its Second § 706 Report and Order, however, the FCC found that members of minority groups “are particularly vulnerable to [lack of] access to advanced services.”¹³³ According to the FCC’s Third § 706 Report and Order, 96 percent of the nation’s most populated zip codes have one or more high-speed subscribers as compared to 61 percent of the most sparsely populated zip codes.¹³⁴

The FCC’s Third Report and Order failed to examine the comparisons between racial groups for broadband deployment. Public interest groups have made allegations that carriers have rolled out new or advanced services, like broadband, to affluent, white areas before low-income, minority areas. In making this Report, the FCC lacked the appropriate data and relied on the Internet providers for information. In his dissenting opinion, Commissioner Copps stated “[w]e simply did not have access to the information necessary to carry out our section 706 mandate. It is our statutory duty to obtain

“backbone, middle mile, last mile, last 100 feet, and connection points.” See INQUIRY CONCERNING THE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY, SECOND REPORT, FCC 00-290, 2000 WL 1199533, at *4-5 (2000) [hereinafter INQUIRY CONCERNING THE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY, SECOND REPORT].

130. Grant, *supra* note 2.

131. INQUIRY CONCERNING THE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY, SECOND REPORT, *supra* note 129.

132. Telecommunications Act of 1996, 47 U.S.C. § 157 (2000).

133. INQUIRY CONCERNING THE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY, SECOND REPORT, *supra* note 129, at *4.

134. INQUIRY CONCERNING THE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY, THIRD REPORT, FCC 02-33 (2002), available at 2002 WL 186930, at *13-14.

this data."¹³⁵

An appendix of the United States Department of Commerce report, *A Nation Online: Entering the Broadband Age*, has a chart in which one can deduce that a Digital Divide exists between African American and Latino/a broadband access as compared to white and Asian American broadband access.¹³⁶

TABLE 6. BROADBAND ACCESS IN 2003¹³⁷

White not Hispanic	25.7%
Black not Hispanic	13.9%
Hispanic	12.6%
Asian American	34.7%

A significant disparity exists between African American and Latino/a access to broadband services as compared to their demographic counterparts. However, the United States Department of Commerce and the FCC now ignore and fail to provide an explanation of these divides. Policy analysts and businesses are less likely to rely on these reports because they fail to provide accurate information necessary for the investment of resources.

H. *Advanced Services Summary*

Because of this geographical segregation, upgrading and installing more advanced technologies may bypass minority neighborhoods and instead focus exclusively on upper-class white communities.¹³⁸ These geographically isolated and segregated communities may have a lag of deployment of advanced broadband services for several reasons. First, the broadband companies have absolute discretion in the allocation of their deployment budgets between and among different sites. The broadband companies attempt to maximize their expected profitability by minimizing some of their expected costs in allocating their investment in the deployment of infrastructure. So for that infrastructure that the broadband companies expect great demand for, they will devote more

135. *Id.* at *50 (Capps, Comm'r, dissenting), also available at <http://www.fcc.gov/Speeches/Capps/Statements/2002/stmjc204.pdf>.

136. A NATION ONLINE: ENTERING THE BROADBAND AGE, *supra* note 101, at 30.

137. *Id.*

138. See Baynes, *Electronic Redlining*, *supra* note 63, at 274-75 (discussing the lack of telecommunications facilities on American Indian reservations and inferior maintenance of telephone equipment in inner-city neighborhoods).

resources than to those for which they expect demand to be less. If the expected demand for infrastructure in minority areas is expected to be less than the expected demand for lines in non-minority areas, then the deployment of infrastructure in the non-minority areas will be superior to its demographic counterpart. The deployment of infrastructure will vary due to the broadband companies' expectations about consumer demand. Because those expectations are informed by income and race, infrastructure deployment depends on income and race. Given this dynamic, competition may be an ineffective approach to achieving universal and quality broadband deployment.

Broadband companies may bypass minority urban and rural residential neighborhoods for more lucrative urban business areas. Therefore, it should also be no surprise that these rural and urban areas with a higher concentration of minority residents may have less broadband infrastructure. Neither the FCC nor the Department of Commerce has imposed an equal opportunity deployment requirement on the broadband companies. Even if the regulators did impose such a standard, it would have no effect if it did not affect the broadband companies' business calculus. These conditions may be harder to address given that both the FCC and the Department of Commerce recently have issued reports that obfuscate the demographic differences in access to broadband technologies.

I. *Failure of African American Political Leadership*

It may be difficult for the African American community to rely on African American elected and appointed officials to protect it and allow for equal deployment of broadband technology. Recently, *Black Commentator* reported that former Black Panther, now Congressman, Bobby Rush co-sponsored the Rush-Barton Act, which would allow telephone companies to charge websites for allowing content or e-mail to reach users and prohibit municipalities from regulating the deployment of cable service.¹³⁹ These proposed laws would affect the neutrality and free use of the Internet by consumers and remove key regulatory oversight that would allow municipalities to ensure that broadband technology is deployed in minority communities. *Black Commentator* charged that Con-

139. Bruce Dixon, *The Black Stake in the Internet: Net Neutrality is an African American Issue*, BLACK COMMENTATOR (May 11, 2006), http://www.blackcommentator.com/183/183_cover_black_stake_internet.html.

gressman Rush supported this legislation because AT&T gave \$1 million as a donation to a community-based project in his district.¹⁴⁰ In his defense, Congressman Rush reported that since the donation was from a single telephone company as opposed to several telephone companies, no conflict existed.¹⁴¹ Assuming that a conflict of interest existed, Congressman Rush seemed to justify the conflict by arguing that “[t]he real conflict here is America’s unwillingness to invest much needed capital in (oppressed) communities.”¹⁴² Congressman Rush was not alone in his support of this bill. *Black Commentator* pointed out that two-thirds of the Congressional Black Caucus supported the Rush-Barton Act and accused the Black Congressmen of betraying the African American community.¹⁴³

Some civil rights advocacy groups also sometimes allege electronic redlining against the wrong companies. For example, the civil rights community accused WorldCom of redlining African American and Latino/a subscribers when deploying universal service was not part of WorldCom’s business plan.¹⁴⁴ In contrast, one of the incumbent telephone companies like Verizon would have been a better and more fruitful target of electronic redlining allegations.¹⁴⁵ One can only speculate that they may have not chosen the more productive target for the wrong reasons.

Former FCC Chair Michael Powell, who was the second African American Chair of the FCC, seemed to exhibit benign neglect, if not outright hostility, to the notion that the Digital Divide existed. He smugly referred to the Digital Divide as a “Mercedes Divide.”¹⁴⁶ He specifically said that “‘I think there is a Mercedes Divide . . . I’d like to have one; I can’t afford one.’”¹⁴⁷ Chairman Powell seemed to be blaming the Digital Divide solely on economic differences between those who had access to the Internet and those who did not. This assumption is contrary to all the FCC and United

140. *Id.*

141. *Id.*

142. *Id.*

143. Bruce Dixon, *Black Caucus Caves to Corporate Power: Two-Thirds Vote Against Black Interests*, *BLACK COMMENTATOR* (June 15, 2006), http://www.blackcommentator.com/188/188_cover_cbc_www_dixon_pf.html.

144. See Baynes, *Electronic Redlining*, *supra* note 63, at 338-39.

145. *Id.*

146. See Anthony Shadid, *Report Shows Narrowing Digital Divide GAO Finds Net Use Up in Rural Areas, Among Minorities*, *BOSTON GLOBE*, Feb. 22, 2001, at C1, available at 2001 WLNR 2236815 (Westlaw).

147. *Id.*

States Department of Commerce reports, which have previously determined that the Digital Divide is not solely the result of lower income. Implicit in Powell's statement seems to be the belief that those who do not have the technology do not deserve it. He seemed to be suggesting that the Digital Divide is analogous to someone desiring a Mercedes Benz when she has only a Hyundai salary. Powell later described his comment as "regrettable."¹⁴⁸ Although he later regretted his remarks, his comments help to explain some of his policies while Chair of the FCC.

Lastly, recent Department of Commerce reports also seem to be working to obscure and cover the existence of a Digital Divide. One such report, *A Nation Online*, indicates that access to computers and to the Internet in schools, libraries, and at work tends to equalize the disparity.¹⁴⁹ The report concluded that "[o]ver time, however, declining prices, increased availability in schools and libraries and wider applications in many occupations have combined to reduce inequality in both computer and Internet use."¹⁵⁰ The report fails to provide a date when the inequality will diminish. It also appears that the federal government now plans to ignore the disparity in Internet and broadband access between African Americans and Latinos/as and their demographical counterparts. By ignoring the continuing problem, they make it invisible.¹⁵¹ The United States Department of Commerce and FCC reports of Internet access and broadband deployment now attempt to deceive and mislead the reader into thinking the Digital Divide is closing or no longer exists. In the same manner that former FCC Chairman Powell smugly called the Digital Divide a "Mercedes Divide," the reports issued during his administration have also smugly allowed this advanced technology to remain predominately in the hands of the "haves." The bottom line is there are few African American political leaders looking out for the interests of underserved minority communities.

148. *Agenda and Plans for Reform of the FCC: Hearing Before the Subcomm. on Telecomms. and the Internet of the H. Comm. on Energy & Commerce*, 107th Cong. 54 (2001) (statement of Michael Powell, Chairman, FCC) (describing his Mercedes Divide comment as "regrettable").

149. *A NATION ONLINE: ENTERING THE BROADBAND AGE*, *supra* note 101, at 30.

150. *Id.*

151. See generally RALPH ELLISON, *INVISIBLE MAN* (Random House 1952) (1947).

CONCLUSION

Another generation of African Americans and Latinos/as are poised to be left behind and remain at the bottom of the barrel, as citizens, consumers, and entrepreneurs in this new technological era. For the past ten years, more white families have had access to computers and the Internet in their homes than minority families have had, who are provided with second class access in schools and libraries. As a result, more white children will grow up technologically savvy in a way that their demographic counterparts will not. By having computers and the Internet in their homes, white children will be able to explore and experiment with how to use this technology so that it becomes second nature. They have the luxury of using the technology safely and comfortably from their homes. They can use this technology after their schools and public libraries close. They can use it on their own time. They do not have to wait in long lines. Their home computers probably will not have over-expansive filters designed to limit access to indecent material, but unintentionally screening out important health and science information. When white students become adults, their use of computers and the Internet will be an integral part of them and more easily applied in their career objectives. Meanwhile, their African American and Latino/a counterparts will lack these opportunities and will therefore suffer the consequences.

Given the lower percentage of African American and Latino/a consumers online, minority-owned businesses specializing in wares attractive to these customers will have to continue to merchandise goods and services the old fashioned way with high overhead and lots of staff. As a consequence of all of these restraints, African American and Latino/a consumers are less able to comparison shop from the convenience of their computer chair. Rather, they will largely be constrained to the shops and stores in their neighborhood.

At very high rates, members of racial minority groups want to start, and are starting, businesses. But many of these businesses face capital market discrimination and technological barriers. The National Black Chamber of Commerce asserts that the lack of access to advanced technologies inhibits the growth and development of minority-owned businesses.¹⁵² These technological barriers im-

152. Comments of Nat'l Black Chamber of Commerce, In the Matter of Request For Comments on Deployment of Broadband Networks and Advanced Telecommunications Services, National Telecommunications and Information Administration,

pose overhead constraints on minority-owned businesses. Moreover, they effectively segregate these businesses to certain communities and geographical areas because of the lack of technological infrastructure.

Existing minority-owned high-technology businesses face significant challenges because African Americans and Latinos/as are less frequent users of this technology. As a consequence, businesses are not able to reach these minority consumers through advanced technologies. These consumers are worse off because they will be unable to comparison shop from the comfort of their home computer. Even though high-tech businesses are an ever-increasing segment of our nation's economy, they have less of a presence in the African American and Latino/a communities, which will inevitably lead to the further disenfranchisement of minority businesses and consumers.