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On the Meaning of Color and the End of White(ness)

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On the Meaning of Color and the End of White(ness)

William J. Aceves*

This Article explores the history of the term “people of color” and its current status in a country struggling to overcome its racist origins. The murders of Trayvon Martin, Michael Brown, George Floyd, Breonna Taylor, and so many other victims of state violence have generated profound anger, calls for action, and demands for dialogue. It is undoubtedly simplistic to assert that words matter. But accurate descriptions are essential for honest conversations, and words convey meanings beyond their syntax. In discussions about race and racial identity, the term “people of color” is routinely used as the antipode to the white community. Yet little thought is given to its etymology or meaning. Through the use of historical documents, including many from the colonial era, and recent data compiled from search engine queries and social media activity, this Article reveals that the term “people of color” has a rich yet complicated heritage. For centuries, “people of color” was a term with legal significance. While it no longer defines rights, its use still matters. Today, we should embrace this collective terminology because it reflects a shared history among diverse communities and generates power against hierarchy. Because the white community serves as the antipode to people of color, we must also interrogate this other example of collective terminology. To engage in honest conversations about race, power, and privilege, it is time to separate white(ness) from the white community.

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INTRODUCTION

“People of color” is a curious term.¹ It is a phrase born out of human division, and yet, it is now meant to symbolize solidarity and community. It replaces a pejorative term with more tolerant and inclusive language, and yet, the term remains controversial.²

Its origins can be traced to the sixteenth century, when European explorers used the phrase “of colour” to identify indigenous populations in newly discovered territories.³ By the eighteenth century, the term “people of color” was well-established in the English-speaking world.⁴ However, it is not unique to the English language, as evidenced by its foreign counterparts, such as *gens de couleur* or *gente de color*.⁵ The term lacks a formal legal definition, although the word “color” presumably refers to skin color—an ethereal quality measured by pigmentation.⁶ It is broadly understood to refer to indi-

¹ Given its English origins, the term “people of colour” was also used in the United States throughout the eighteenth and nineteenth centuries. See, e.g., *Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110, 123 (1828) (referring to “people of colour”); *Republica v. Gaoler of City & County of Philadelphia*, 2 Yeates 258 (1797) (referring to a “merchant of colour” as a “person of colour”).

² See generally Fernanda Zamudio-Suarez, *Race on Campus: BIPOC, Minority, or People of Color?*, CHRON. OF HIGH. EDUC. (June 8, 2021), <https://www.chronicle.com/newsletter/race-on-campus/2021-06-08> [<https://perma.cc/G82M-B9B8>]; Jamiyla Chisolm, *What’s the Right Term: POC, BIPOC, or Neither?*, YES! MAGAZINE (Oct. 8, 2020), <https://www.yesmagazine.org/social-justice/2020/10/08/poc-bipoc-or-neither/> [<https://perma.cc/8DSC-Y3DQ>]; Anita Kalunta-Crumpton, *The Inclusion of the Term “Color” in Any Racial Label is Racist, Is It Not?*, 20 ETHNICITIES 115 (2020); Kate Sablosky Elengold, *Branding Identity*, 93 DENV. L. REV. 1, 26 (2015); Elizam Escobar, *Language, Identity and Liberation: A Critique of the Term and Concept “People of Color,”* 2 YALE J.L. & LIB. 95 (1994); see also Shereen Marisol Meraji, Natalie Escobar & Kumari Devarajan, *Is It Time to Say R.I.P. to ‘POC’?*, NPR: CODE SWITCH (Sept. 30, 2020), <https://www.npr.org/2020/09/29/918418825/is-it-time-to-say-r-i-p-to-p-o-c> [<https://perma.cc/DP3Z-CGK2>]; E. Tammy Kim, *The Perils of “People of Color,”* NEW YORKER (July 29, 2020), <https://www.newyorker.com/news/annals-of-activism/the-perils-of-people-of-color> [<https://perma.cc/D548-NCPH>]; Jonathan Kolatch, *“People of Color” Came Out of the Blue*, WALL ST. J. (Dec. 18, 2019), <https://www.wsj.com/articles/people-of-color-came-out-of-the-blue-11576713913> [<https://perma.cc/WJ3X-GTRB>].

³ See PIETRO MARTIRE D’ANGHERA, *THE HISTORY OF TRAUAYLE IN THE WEST AND EAST INDIES, AND OTHER COUNTRYS LYING EYTHER WAY 378–82 (1577)* (referring to various inhabitants as “of colour”).

⁴ See, e.g., WILLIAM GUTHRIE, *A NEW SYSTEM OF MODERN GEOGRAPHY: A GEOGRAPHICAL, HISTORICAL, AND COMMERCIAL GRAMMAR; AND PRESENT STATE OF THE SEVERAL NATIONS OF THE WORLD* 618–21 (1796); JEAN-PAUL RABAUT, *THE HISTORY OF THE REVOLUTION OF FRANCE* 231, 233, 235, 237 (James White trans., 1792).

⁵ See ALEJANDRO DE LA FUENTE & ARIELA J. GROSS, *BECOMING FREE, BECOMING BLACK: RACE, FREEDOM, AND LAW IN CUBA, VIRGINIA, AND LOUISIANA* 24 (2020) (describing *gente de color* in eighteenth century Cuba); FEDERICA MORELLI, *FREE PEOPLE OF COLOR IN THE ATLANTIC: RACE AND CITIZENSHIP, 1780–1850*, at 2 (2020) (referencing *libres de color*, which refers to free people of color); GENTE DE COLOR ENTRE ESCLAVOS: CALIDADES RACIALES, ESCLAVITUD Y CUIDANIA EN EL GRAN CARIBE 127 (José Antonio Piqueras & Imilcy Balboa Navarro eds., 2019); DAVID W. COHEN & JACK P. GREENE, *NEITHER SLAVE NOR FREE: THE FREEDMAN OF AFRICAN DESCENT IN THE SLAVE SOCIETIES OF THE NEW WORLD* 37, 285 (1974).

⁶ See generally RACISM IN THE 21ST CENTURY: AN EMPIRICAL ANALYSIS OF SKIN COLOR (Ronald Hall ed., 2008); Vinay Harpalani, *To Be White, Black, or Brown? South Asian*

viduals who are not white, which captures a diverse group with a multitude of distinct experiences.⁷ These experiences are informed by history, politics, culture, and racism.⁸ There are, in fact, several variants of the term, including persons of color, communities of color, and even citizens of color.⁹ Some variants incorporate intersectionality—a concept that acknowledges the complex geometry of human identity—such as women of color, queer people of color, and disabled people of color.¹⁰

In this third decade of the twenty-first century, we are living in an era of profound social upheaval, where the pillars of structural racism are under siege. The murders of Trayvon Martin, Michael Brown, George Floyd, Breonna Taylor, and so many other victims of state violence have generated intense anger, calls for action, and demands for dialogue.¹¹ As reflected in

Americans and the Race-Color Distinction, 14 WASH. U. GLOB. STUD. L. REV. 609 (2015); Carolyn Purnell, *Why We Think of Color When We Think of Race: A Brief History of Race as a Visual Construct*, PSYCH. TODAY (June 2, 2020), <https://www.psychologytoday.com/us/blog/making-sense/202006/why-we-think-color-when-we-think-race> [<https://perma.cc/TA92-XVUX>].

⁷ EFRÉN O. PÉREZ, *DIVERSITY'S CHILD: PEOPLE OF COLOR AND THE POLITICS OF IDENTITY* 3 (2021); Salvador Vidal-Ortiz, *People of Color*, in *ENCYCLOPEDIA OF RACE, ETHNICITY, AND SOCIETY* 1037 (Richard T. Schaefer ed. 2008); PHILIP H. HERBST, *THE COLOR OF WORDS: AN ENCYCLOPAEDIC DICTIONARY OF ETHNIC BIAS IN THE UNITED STATES* 178 (1997). An entire encyclopedia is devoted to “people of color.” STEWART R. KING, *ENCYCLOPEDIA OF FREE BLACKS & PEOPLE OF COLOR IN THE AMERICAS* (2011).

⁸ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 60, 88, 102, 196, 232 (2012).

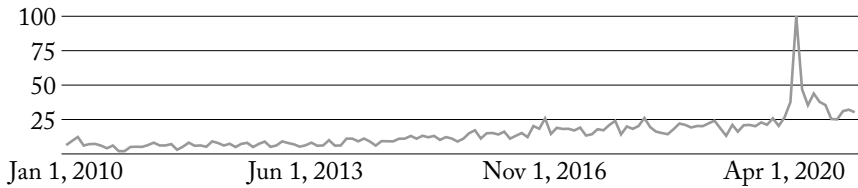
⁹ See, e.g., Ann Tweedy, *Uncovering the Little-Known Legacy of Suffragists of Color*, JOTWELL (Mar. 25, 2021), <https://equality.jotwell.com/uncovering-the-little-known-history-of-suffragists-of-color/> [<https://perma.cc/JWE8-BW9S>]; Kee Malesky, *The Journey from “Colored” to “Minorities” to “People of Color.”* NPR: CODE SWITCH (Mar. 30, 2014), <https://www.npr.org/sections/codeswitch/2014/03/30/295931070/the-journey-from-colored-to-minorities-to-people-of-color> [<https://perma.cc/3NM6-926B>]; Vidal-Ortiz, *supra* note 7, at 1038.

¹⁰ See, e.g., Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. LEGAL F. 139 (1989). See generally *THE COMPLEXITIES OF RACE* (Charmaine L. Wijeyesinghe ed. 2021); ANGLIQUE HARRIS, ANTONIO (JAY) PASTRANA, JR., & JUAN BATTLE, *QUEER PEOPLE OF COLOR: CONNECTED BUT NOT COMFORTABLE* (2018); *THIS BRIDGE CALLED MY BACK: RADICAL WRITINGS BY WOMEN OF COLOR* (Gloria Anzaldúa & Cherrie Moraga eds., 4th ed. 2015); Lisa M. Fairfax, *Some Reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated with Women of Color*, 79 ST. JOHN'S L. REV. 1105 (2005); Linda S. Greene, *From Tokenism to Emancipatory Politics: The Conferences and Meetings of Law Professors of Color*, 5 MICH. J. RACE & L. 161 (1999). The breadth of usage for the term is striking. See POCIT: PEOPLE OF COLOR IN TECH, <https://peopleofcolorintech.com/> [<https://perma.cc/327U-DTF7>]; PEOPLE OF COLOR IN EUROPEAN ART HISTORY, <https://medievalpoc.tumblr.com/> [<https://perma.cc/8YXL-CCWB>]. In 1804, the Haitian government referred to “men of color” in a proclamation to facilitate their return from the United States. JEAN SENAT FLEURY, JEAN-JACQUES DESSALINES: WORDS FROM BEYOND THE GRAVE 245 (2018).

¹¹ See, e.g., Audra D.S. Burch, Amy Harmon, Sabrina Tavernise & Emily Badger, *The Death of George Floyd Reignited a Movement. What Happens Now?*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2021/04/20/us/george-floyd-protests-police-reform.html> [<https://perma.cc/4PAD-ZMDF>]; Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/2020/07/03/us/politics/black-lives-matter-movement.html>

Google Trends, the term “people of color” is an essential part of this dialogue.

TABLE 1: GOOGLE TRENDS (SEARCH TERM “PEOPLE OF COLOR”)¹²



Between 2010 and 2019, there was a gradual and steady increase in the number of Google search queries in the United States for the term “people of color.”¹³ This changed significantly in March 2020. As the racial justice movement spread across the country, there was a corresponding increase in queries about the term “people of color.” There was curiosity about the term, what it meant, and who it included. Searches peaked the week of May 31–June 6, 2020, which coincides with the timing of massive protests in the United States on racial justice.¹⁴ Related queries also peaked during this time, including “people of color definition” and “who are people of color.”

www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/RJ4J-S8Q8]; Joshua Jamerson & Warren P. Strobel, *Thousands March on National Mall Continuing Racial-Justice Push*, WALL ST. J. (Aug. 28, 2020), <https://www.wsj.com/articles/protesters-pour-into-national-mall-renewing-racial-justice-push-11598615232> [https://perma.cc/SG9P-NXHH]; Deborah Netburn, *The Concerted Campaign That Got Public Health Experts to Declare Racist Policing a Crisis*, L.A. TIMES (Oct. 20, 2020), <https://www.latimes.com/science/story/2020-10-20/how-police-violence-became-a-public-health-issue> [https://perma.cc/2D39-F7U3].

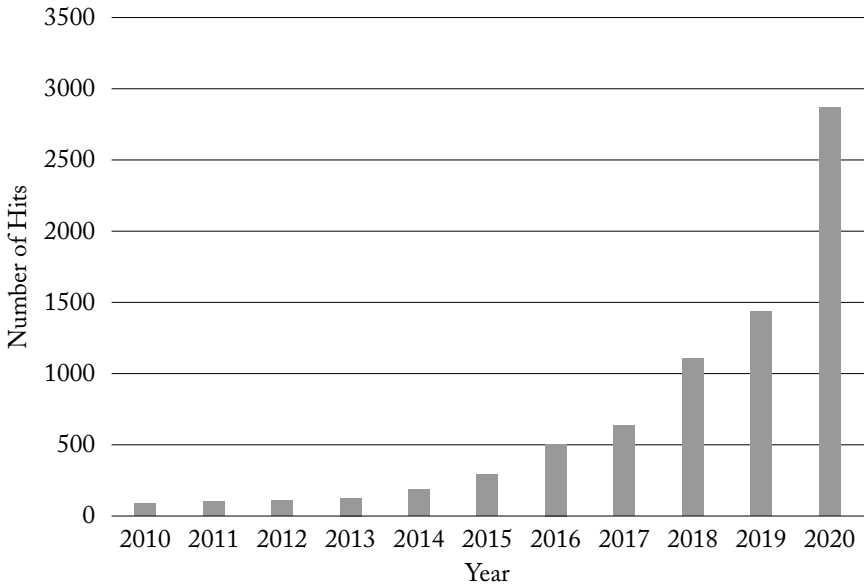
¹² Google Trends measures the number of Google search queries for a term over time. For an explanation of Google Trends, including its methodology, see FAQ ABOUT GOOGLE TRENDS DATA, https://support.google.com/trends/answer/4365533?hl=en&ref_topic=6248052 [https://perma.cc/JXZ5-2UDH].

¹³ According to Google Trends, “[n]umbers represent search interest relative to the highest point on the chart for the given region and time. A value of 100 is the peak popularity for the term. A value of 50 means that the term is half as popular. A score of 0 means there was not enough data for this term.” *Id.*

¹⁴ See, e.g., Meagan Flynn, Katie Shepherd, Teo Armus, Hannah Knowles, Alex Horton & Isaac Stanley-Becker, *Mass Protests and Mayhem Continue Into a Sixth Night; Thousands Nationwide are Arrested During Weekend*, WASH. POST (June 1, 2020), <https://www.washingtonpost.com/nation/2020/05/31/george-floyd-protests-live-updates/> [https://perma.cc/R8QL-AVG9]; Jeremy Gorner, Madeline Buckley & Paige Fry, *Mayor Imposes Curfew After Chaotic Scenes Unfold in Loop, Near North Side as Protestors Clash with Police During Demonstration Over Death of George Floyd in Minneapolis*, CHI. TRIB. (May 31, 2020), <https://www.chicagotribune.com/news/breaking/ct-loop-protests-property-damage-20200530-ncvxjtwglnfoddyj4yuhd6lwm-story.html> [https://perma.cc/A9XD-JPR2]; David Gonzalez, *New York’s Days of Protest: What It Looked Like From the Streets*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/nyregion/nyc-protest-photos.html> [https://perma.cc/VX39-RLHQ]; Ruben Vives & Dakota Smith, *L.A. Reels From Looting and Arrests Not Seen in Decades*, L.A. TIMES (May 31, 2020), <https://www.latimes.com/california/story/2020-05-31/l-a-reels-from-looting-and-arrests-not-seen-in-decades> [https://perma.cc/U3U2-4Z5R].

Media references to the term “people of color” have also grown significantly over the past ten years. In fact, this growth is remarkable. The following table illustrates the number of times the term “people of color” appeared in three major news sources (*New York Times*, *Los Angeles Times*, and *Boston Globe*) between 2010 and 2020.

TABLE 2: MEDIA REFERENCES TO PEOPLE OF COLOR¹⁵



While informative, this data offers little explanation.¹⁶ When did the term “people of color” originate? What did it first mean? What does it now mean? And who is a “person of color?”

This Article explores the history of the term “people of color,” and its current status in a country struggling to overcome its racist origins.¹⁷ It is

¹⁵ This data was compiled using LexisNexis® for Law Schools and was then recorded in Microsoft Excel. The columns represent aggregated data for the three media sources (*New York Times*, *Los Angeles Times*, and *Boston Globe*) and include the total number of hits per year.

¹⁶ For similar measurements of the term “people of color” in various sources, see PÉREZ, *supra* note 7, at 41–63.

¹⁷ This Article references historical documents and court opinions that include words that are racist or, at best, archaic. Such references reflect a past that is both hateful and hurtful. But in keeping with this Article’s purpose—to engage in a meaningful dialogue about color, race, power, and privilege—it is necessary to include these words when exploring the meaning of color. However, some words can be modified while still retaining historical and descriptive accuracy. See, e.g., Eric Zorn, *Language Matters: The Shift From “Slave” to “Enslaved Person” May Be Difficult, But It’s Important*, CHI. TRIB. (Sept. 6, 2019), <https://www.chicagotribune.com/columns/eric-zorn/ct-column-slave-enslaved-language-people-first-debate-zorn-20190906-audkncytayrarfjimpz6uk7hvy-story.html> [https://perma.cc/3N6T-XLX7]; Katy Waldman, *Slave or Enslaved Person?*, SLATE (May 19, 2015), <https://slate.com/>

informed by critical race theory, which examines the role of race in the United States and how law has been used to subordinate people of color for centuries.¹⁸ Part I reviews the term's journey, from its European roots to its contemporary usage in the United States. For centuries, "people of color" was a term with legal significance, but it also served other purposes. Reflecting the influence of social and political factors, its meaning has changed throughout history. In the United States, "people of color" now describes a broad set of individuals from distinct racial and ethnic groups who are not members of the white community.¹⁹ The term's meaning is complicated because the white community is also neither monolithic nor static. Indeed, collective terminology will always suffer from some imprecision. Human beings are unique and complex, with overlapping identities that can obfuscate categorization. Collective terminology also raises concerns about essentialism.²⁰ Recognizing these challenges, Part II examines the debate surrounding the term's extant meaning and use. This debate can be traced to the "names controversy" of the nineteenth century, a time of robust deliberation about collective terminology within the Black community.²¹ Modern critics argue the term "people of color" marginalizes its own members and perpetuates the significance of color in society.²² Advocates, however, recognize the truth, power, and consequences of color. They point out the common struggles faced by people of color, and the need to coalesce in response to white privilege.²³ Finally, Part III acknowledges history and celebrates the value of

human-interest/2015/05/historians-debate-whether-to-use-the-term-slave-or-enslaved-person.html [https://perma.cc/LY55-25VB].

¹⁸ See generally KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER (2018); DOROTHY A. BROWN, CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS (3d ed. 2014); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed., 1999); CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé W. Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas, eds., 1996); Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215 (2002).

¹⁹ The question of "who is a white person" has been asked for over a century. The answer was often framed in racist terms. See, e.g., R.L.H., Jr., *Aliens: Naturalization: Who is a "White" Person?*, 11 CALIF. L. REV. 349 (1923); L.I. Shelley, *Constitutional Law: Naturalization: Who is a White Person?*, 2 CORNELL L.Q. 115 (1916-17).

²⁰ See, e.g., Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193 (2019); Kenneth B. Nunn, "Essentially Black." *Legal Theory and the Morality of Conscious Racial Identity*, 97 NEB. L. REV. 287 (2018); Dorothy E. Roberts, *BlackCrit Theory and the Problem of Essentialism*, 53 U. MIAMI L. REV. 855 (1999); Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERK. WOMEN'S L.J. 16 (1995); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

²¹ See generally STERLING STUCKEY, SLAVE CULTURE: NATIONAL THEORY AND THE FOUNDATIONS OF BLACK AMERICA 224 (2013); GINA PHILOGENE, FROM BLACK TO AFRICAN AMERICAN: A NEW SOCIAL REPRESENTATION (1999); Ben L. Martin, *From Negro to Black to African American: The Power of Names and Naming*, 106 POL. SCI. Q. 83 (1991). The names controversy is not unique to the Black community and has confronted other communities. SUZANNE OBOLER, ETHNIC LABELS, LATINO LIVES: IDENTITY AND THE POLITICS OF (RE)PRESENTATION IN THE UNITED STATES (1995); IRVING LEWIS ALLEN, UNKIND WORDS: ETHNIC LABELING FROM REDSKIN TO WASP (1990).

²² See *infra* Section III.B.

²³ See *infra* Section III.A.

this collective terminology. The term “people of color” reflects a shared history among diverse communities and generates power against hierarchy. While the term no longer has legal significance, this Article argues “people of color” is a term that should be embraced.

The term “people of color” does not exist in isolation. It only exists as the antipode to the white community.²⁴ It is important, however, to distinguish between the white community and white(ness). In this Article, white(ness) reflects the privilege of the white community that also generates the marginalization of people of color.²⁵ Accordingly, this Article concludes with a provocative assertion—it is time to end the connection between the white community and white(ness).²⁶ Because language is easily misinterpreted or co-opted, an important clarification is necessary. The “end of white(ness)” is directed at ending the racial hierarchy that established white as the baseline and all other colors in opposition and subordination. It is targeted at ending white privilege and the corresponding burden of color. In this Article, the “end of white(ness)” serves no other purpose.²⁷

²⁴ See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 21 (rev. ed. 2006) (“[I]t is clear that White identity is tied inextricably to non-White identity as its positive mirror, its superior opposite.”); TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* 52 (1993) (“Africanism is the vehicle by which the American self knows itself as not enslaved, but free; not repulsive, but desirable; not helpless, but licensed and powerful; not history-less but historical; not damned but innocent; not a blind accident of evolution, but a progressive fulfillment of destiny.”).

²⁵ There is a long history on the study of white(ness). See, e.g., STEVE GARNER, *WHITENESS: AN INTRODUCTION* (2008); *WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM* (Ashley W. Doane & Eduardo Bonilla-Silva eds., 2003); *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* (Richard Delgado & Jean Stefancic eds., 1997); *DISPLACING WHITENESS: ESSAYS IN SOCIAL AND CULTURAL CRITICISM* (Ruth Frankenberg ed. 1997); France Winddance Twine & Charles Gallagher, *The Future of Whiteness: A Map of the “Third Wave,”* 31 *ETHN. & RACIAL STUD.* 4 (2008).

²⁶ There is also a long history of studies on the “end of whiteness.” See, e.g., MALCOLM X, *THE END OF WHITE WORLD SUPREMACY* (2020); Eric Kerl, *The End of Whiteness*, *RAMPANT MAG.* (Dec. 16, 2020), <https://rampantmag.com/2020/12/the-end-of-whiteness/> [<https://perma.cc/8A8U-R8WC>]; Hua Hsu, *The End of White America?*, *THE ATLANTIC* (Jan./Feb. 2009), <https://www.theatlantic.com/doc/200901/end-of-whiteness> [<https://perma.cc/5JCL-9AGE>]; Michael Morris, *Book Review: Standard White: Dismantling White Normativity*, 104 *CALIF. L. REV.* 949 (2016); Such studies even extend beyond the United States. See, e.g., NICKY FALKOF, *THE END OF WHITENESS: SATANISM AND FAMILY MURDER IN LATE APARTHEID SOUTH AFRICA* (2016).

²⁷ This is a controversial topic. See, e.g., Ibram X. Kendi, *The Mantra of White Supremacy*, *THE ATLANTIC* (Nov. 30, 2021), <https://www.theatlantic.com/ideas/archive/2021/11/white-supremacy-mantra-anti-racism/620832/> [<https://perma.cc/DXF7-4L62>]; Senator Mike Lee, *Critical Race Theory Attacks What it Means to Be an American*, *DESERET NEWS* (July 13, 2021), <https://www.deseret.com/opinion/2021/7/13/22575354/critical-race-theory-attacks-what-it-means-to-be-an-american> [<https://perma.cc/6WS8-W4EH>]; *Extremists See Critical Race Theory as Evidence of “White Genocide,”* *ADL* (June 30, 2021), <https://www.adl.org/blog/extremists-see-critical-race-theory-as-evidence-of-white-genocide> [<https://perma.cc/UX6Y-FXQP>]; Claudia Rankine, *I Wanted to Know What White Men Thought About Their Privilege. So I Asked*, *N.Y. TIMES MAG.* (July 17, 2019), https://www.nytimes.com/2019/07/17/magazine/white-men-privilege.html?campaign_id=9&emc=edit_nn_20220111&instance_id=49977&nl=the-morning®i_id=71008608&segment_id=79338&cte=1&user_id=5e04a0445b11014b4d78d942bb5d19b9 [<https://perma.cc/PM9Y-CKB9>]; Joshua Rothman, *The Origins of “Privilege,”*

It is undoubtedly simplistic to assert that words matter.²⁸ But accurate descriptions are essential for honest conversations.²⁹ And words convey meanings beyond their etymology and syntax.³⁰ In discussions about race and racial identity, the term “people of color” is routinely used as the antipode to white(ness). Yet little thought is given to its history or meaning. To engage in a meaningful dialogue about color, race, power, and privilege, there is value in exploring the history and meaning of the words we use.³¹

I. EXPLORING THE HISTORY OF PEOPLE OF COLOR

Perhaps reflecting the most primitive of human observations, distinctions of people based on skin color can be traced to antiquity. Yet these distinctions did not always reflect racial or ethnic superiority.³² That associa-

NEW YORKER (May 12, 2014), <https://www.newyorker.com/books/page-turner/the-origins-of-privilege> [<https://perma.cc/5F7N-US8L>].

²⁸ The phrase “words matter” is routinely used in conversations about race. See, e.g., NOEL A. CAZENAVE, *CONCEPTUALIZING RACISM: BREAKING THE CHAINS OF RACIALLY ACCOMMODATIVE LANGUAGE* ix (2016); Louis Capstick, *Why Words Matter*, OXFORD BLUE (June 20, 2020), <https://www.theoxfordblue.co.uk/2020/06/25/why-words-matter/> [<https://perma.cc/44GJ-A2DÁ>]; Alia E. Dastagir, “Riots,” *Violence*,” “Looting:” *Words Matter When Talking About Race and Unrest, Experts Say*, USA TODAY (May 31, 2020), <https://www.usatoday.com/story/news/nation/2020/05/31/george-floyd-riots-violence-looting-words-matter-experts-say/5290908002> [<https://perma.cc/6LBK-P6KL>]; Quin Hillyer, *Beyond “Racism,” Let’s Get Language Right*, WASH. EXAMINER (July 16, 2019), <https://www.washingtonexaminer.com/opinion/beyond-racism-lets-get-language-right>; Esther J. Cepeds, “*Black Words Matter*,” ST. LOUIS AM. (Dec. 31, 2014), http://www.stlamerican.com/news/columnists/guest_columnists/black-words-matter/article_9ad82d76-9072-11e4-b890-f7dff6a8d6e6.html [<https://perma.cc/WLX2-PFG7>].

²⁹ See generally Patricia Hill Collins, *Intersectionality’s Definitional Dilemmas*, 41 ANN. REV. SOCIO. 1 (2015); SpearIt, *Enslaved by Words: Legalities & Limitations of “Post-Racial” Language*, 2011 MICH. ST. L. REV. 705; Karen Finlon Dajani, *Other Research: What’s in a Name? Terms Used to Refer to People with Disabilities*, 21 DISABILITY STUD. Q. 196 (2001); Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465 (1996); Martha Minow, *Words and the Door to the Land of Change: Law Language, and Family Violence*, 43 VAND. L. REV. 1665 (1990).

³⁰ Even the capitalization of words conveys a message. See Nancy Coleman, *Why We’re Capitalizing Black*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/2020/07/05/insider/capitalized-black.html> [<https://perma.cc/2HH9-LHLZ>] (describing the decision to capitalize the word “Black”); John Eligon, *A Debate Over Identity and Race Asks, Are African-Americans “Black” or “Black?”*, N.Y. TIMES (June 27, 2020), <https://www.nytimes.com/2020/06/26/us/black-african-american-style-debate.html> [<https://perma.cc/TS53-R9R3>] (addressing the debate whether to capitalize “black”); ASSOCIATED PRESS, *Race-Related Coverage*, AP-STYLEBOOK (2022), <https://www.apstylebook.com/race-related-coverage> [<https://perma.cc/8TFG-VW5G>] (stating that “[o]missions and lack of inclusion can render people invisible and cause anguish.”).

³¹ Questions about identity and meaning of color have existed for decades, if not centuries. See, e.g., F. JAMES DAVIS, *WHO IS BLACK? ONE NATION’S DEFINITION* (1991). Even courts have asked the question, “[W]hat is white?” *Ex parte Shahid*, 205 F. 812, 813 (E.D. S. Car. 1913).

³² See Henry Louis Gates, Jr. & Andrew S. Curran, *WHO’S BLACK AND WHY?: A HIDDEN CHAPTER FROM THE EIGHTEENTH-CENTURY INVENTION OF RACE* xii (Henry Louis Gates, Jr. & Andrew S. Curran eds., 2022); DENISE EILEEN MCCOSKEY, *RACE: ANTIQUITY AND ITS LEGACY* 8–11, 23–26 (2019); NELL IRVIN PAINTER, *THE HISTORY OF WHITE PEOPLE* 1 (2010); FRANK M. SNOWDEN, JR., *BEFORE COLOR PREJUDICE: THE ANCIENT*

tion came later, and is most often attributed to the European colonial era and the rise of the transatlantic slave trade. As sailing ships extended the reach of colonial powers, a new nomenclature to distinguish groups based on color became necessary for several reasons.³³ It established separation between individuals of European ancestry and other groups. It supported the racial hierarchy that would be used to justify the occupation of foreign lands and the enslavement of human beings. And, it was used to describe the growing diversity of humanity—from the discovery of new peoples around the world to the progeny of mixed-race relations, or what some referred to as miscegenation.³⁴ The Age of Discovery found more than just land: “It was in the making of the New World that humans were set apart on the basis of what they looked like, identified solely in contrast to one another, and ranked to form a caste system based on a new concept called race.”³⁵

A. 1607–1865: Slavery in America

In the United States, the term “people of color” has long been associated with slavery, segregation, and racial subordination.³⁶ These connections first arrived on American shores with the colonists of the Jamestown settlement in 1607, which set the foundation for the arrival of enslaved people in

VIEW OF BLACKS 66–67 (1983); Anton L. Allahar, *When Black First Became Worth Less*, 34 INT’L J. COMP. SOC. 39 (1993). *But see* BENJAMIN ISAAC, *THE INVENTION OF RACISM IN CLASSICAL ANTIQUITY* (2006) (arguing that early forms of proto-racism existed in the Greek and Roman worlds).

³³ See Gates & Curran, *supra* note 32, at xiii–xiv; McCoskey, *supra* note 32, at 3–4; Andrew S. Curran, *THE ANATOMY OF BLACKNESS: SCIENCE & SLAVERY IN AN AGE OF ENLIGHTENMENT* (2011); Winthrop D. Jordan, *First Impressions, in THEORIES OF RACE AND RACISM* 37 (Les Back & John Solomos eds., 2d ed. 2009); Matthew Frye Jacobson, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* 8–9, 30–38 (1999); St. Clair Drake, *BLACK FOLK HERE AND THERE* (1987); Reginald Horsman, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLI-SAXONISM* 3 (1981).

³⁴ See Randall Kennedy, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY* 10, 20, (2003). *See generally* Peggy Pascoe, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* (2010); Elise Lemire, “MISCEGENATION: MAKING RACE IN AMERICA” (2002); Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 U. MIA. L. REV. 1219, 1221 (1999).

³⁵ Isabel Wilkerson, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 53 (2020). In contrast, George Fredrickson argues that racism can trace its origins to religion and the rise of antisemitism in Europe. *See* George M. Fredrickson, *RACISM: A SHORT HISTORY* 19 (2002).

³⁶ *See* Natsu Taylor Saito, *SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS* 1 (2020); David Brion Davis, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 281–82 (2d ed. 1988); Ariela Gross & Alejandro de la Fuente, *The History of Slavery Remains With Us Today*, WASH. POST (Mar. 9, 2020), <https://www.washingtonpost.com/outlook/2020/03/09/history-slavery-remains-with-us-today/> [<https://perma.cc/LVH6-L5UB>]; Danyelle Solomon, Connor Maxwell & Abril Castro, *CTR. AM. PROGRESS, SYSTEMATIC INEQUALITY AND ECONOMIC OPPORTUNITY* (2019), <https://www.americanprogress.org/issues/race/reports/2019/08/07/472910/systematic-inequality-economic-opportunity/> [<https://perma.cc/U5RJ-T4ZT>].

1619.³⁷ Yet, color did not only refer to skin color; it also served as a proxy for race, class, ancestry, and national origin. On some occasions, the term “people of color” was used to designate enslaved people of African origin.³⁸ This reflects its most narrow definition. On other occasions, its meaning was broader and there was a clear distinction between “the African race and people of color.”³⁹ Thus, the term included individuals who were of African or Native American ancestry, individuals who were of mixed African and European ancestry, and individuals of mixed African and Native American ancestry.⁴⁰ Over time, the term “people of color” would be used to describe an even broader swath of humanity.⁴¹ These labels had legal consequences, and color would eventually play an integral role in the law.⁴² Because of this, designating someone as a person of color was a life-altering decision.⁴³ The legal consequences of color were significant and would continue for centuries.⁴⁴

³⁷ See JAMES HORN, 1619: JAMESTOWN AND THE FORGING OF AMERICAN DEMOCRACY 85 (2018). Some scholars argue the first enslaved people arrived in the Americas in the 16th century with Spanish explorers. See, e.g., MICHAEL GUASCO, SLAVES AND ENGLISHMEN: HUMAN BONDAGE IN THE EARLY MODERN ATLANTIC WORLD (2016).

³⁸ 2 DEFINITIONS OF WORDS AND PHRASES 1274–75 (Editorial Staff Nat’l Reporter System ed., 1904).

³⁹ JAMES PYLE WICKERSHAM, A HISTORY OF EDUCATION IN PENNSYLVANIA 253 (1886); see also SOCIETY OF FRIENDS, A STATISTICAL INQUIRY INTO THE CONDITION OF THE PEOPLE OF COLOR, OF THE CITY AND DISTRICTS OF PHILADELPHIA 5–8 (1848).

⁴⁰ See JACK D. FORBES, AFRICANS AND NATIVE AMERICANS: THE LANGUAGE OF RACE AND THE EVOLUTION OF RED-BLACK PEOPLES 239, 259–60 (2d ed. 1993); ALRUTHEUS AMBUSH TAYLOR, THE NEGRO IN SOUTH CAROLINA DURING THE RECONSTRUCTION 43–44 (1924); BRYAN EDWARDS, THE HISTORY, CIVIL AND COMMERCIAL, OF THE BRITISH WEST INDIES 1 (5th ed. 1819); see also State v. Chavers, 50 N.C. 11, 15–16 (1857) (defining free persons of color as “persons coloured by Indian blood, or persons descended from negro ancestors beyond the fourth degree”).

⁴¹ See generally JULIE WINCH, BETWEEN SLAVERY AND FREEDOM: FREE PEOPLE OF COLOR IN AMERICA FROM SETTLEMENT TO THE CIVIL WAR (2014); David L. Horowitz, *Color Differentiation in the American Systems of Slavery*, 3 J. INTERDISC. HIST. 509 (1973).

⁴² See Bryan Stevenson, *A Presumption of Guilt: The Legacy of America’s History of Racial Injustice, in POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* 3 (Angela J. Davis ed., 2017); ALEXANDER, *supra* note 8, at 8–13; Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063 (1993).

⁴³ See WINCH, *supra* note 41, at xiv; ARIELA J. GROSS, WHAT BLOOD WON’T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA (2008); see also State v. Belmont, 35 S.C.L. 445, 448 (1848) (assessing whether an individual was a “free person of color,” and entitled to no other rights or privileges than those which appertain to all such persons, whether mulattoes, mestizos, Indians, or negroes”); *Cauchois v. Dupuy*, 3 La. 206, 207 (1831) (finding the plaintiff was “not a man of color”). See generally Michael A. Elliott, *Telling the Difference: Nineteenth-Century Legal Narratives of Racial Taxonomy*, 24 L. & SOC. INQ. 611 (1999); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998); *Daniel v. Guy*, 19 Ark. 121 (1857) (determining whether an individual was white and thereby entitled to freedom).

⁴⁴ See generally ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016) (examining how modern crime legislation perpetuates racial inequality and poverty); KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010) (describing the historical connection between race and crime); James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465 (2019); Dorothy E. Roberts, *Abolition Constitu-*

References to “people of color” can be found throughout the colonial era and the early years of the Republic.⁴⁵ In 1782, for example, a Virginia Quaker made a proposal to establish a private school “for the Instruction of the Children of Blacks and people of Color.”⁴⁶ The school would teach “the principles of virtue and religion” and other subjects that would “render so numerous a people fit for freedom and to become useful Citizens.”⁴⁷ In 1793, a North Carolina newspaper announced the arrival in Maryland of a ship with “people of color and negroes” onboard.⁴⁸ In 1797, the Supreme Court of Pennsylvania used the term “people of colour” in a decision freeing two enslaved women.⁴⁹ This varied usage is representative of how the term was used throughout the country and across U.S. history.

References to “free people of color”—individuals who were born free, were emancipated, escaped, or were granted manumission from slavery—also appear throughout U.S. history.⁵⁰ From the founding of the Virginia Colony in 1607, the scourge of slavery resulted in legal distinctions between free men and women, enslaved people, and “free people of color.”⁵¹ This

tionalism, 133 HARV. L. REV. 1 (2019); Edward J. Littlejohn, *Black Before the Bar: A History of Slavery, Race Laws, and Cases in Detroit and Michigan: American Law, Slaves, and Freedmen: 1619–1860*, 18 J.L. Soc’y 1 (2018).

⁴⁵ See, e.g., Act of Nov. 2, 1795, ch. 16, 1795 N.C. Sess. Laws 70, 79 (imposing certain restrictions on free persons of color); Private Act of Nov. 2, 1795, ch. 41, 1795 N.C. Sess. Laws 70, 84 (emancipating “Frank, a person of colour”); see also RICK STÄTTLER, GUIDE TO MANUSCRIPTS AT THE RHODE ISLAND HISTORICAL SOCIETY RELATING TO PEOPLE OF COLOR (June 24, 2004), <https://www.rihs.org/mssinv/PeopleofColorweb.htm> [<https://perma.cc/Z2Q7-3SY3>].

⁴⁶ WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550–1812, at 357 (1968); see also STEPHEN BEAUREGARD WEEKS, SOUTHERN QUAKERS AND SLAVERY: A STUDY IN INSTITUTIONAL HISTORY 215 (1896).

⁴⁷ VI VIRGINIA HISTORICAL SOCIETY, COLLECTIONS OF THE VIRGINIA HISTORICAL SOCIETY 18 (1887).

⁴⁸ *Domestic Articles: Maryland*, FAYETTEVILLE GAZETTE (N.C.), (July 30, 1793), at 3 (referencing “people of color and negroes” on board arriving French ships).

⁴⁹ *Respublica v. Blackmore*, 2 Yeates 234, 239 (1797); see also *Evans v. Kennedy*, 2 N.C. 422, 422 (1796) (describing an enslaved person as a person of color). The U.S. Supreme Court first used the term “people of color” in 1813. *Queen v. Hepburn*, 11 U.S. 290, 299 (1813) (Duvall, J., dissenting) (“And people of color from their helpless condition under the uncontrolled authority of a master, are entitled to all reasonable protection.”). The term “person of color” was first used by the Supreme Court in 1810. *The Brigantine Amiable Lucy v. United States*, 10 U.S. (6 Cranch) 330, 330 (1810) (referencing the 1803 Act of Congress that used the term “person of color”).

⁵⁰ See generally EMILY WEST, FAMILY OR FREEDOM: PEOPLE OF COLOR IN THE ANTEBELLUM SOUTH (2012); PAUL HEINEGG, FREE AFRICAN AMERICANS OF NORTH CAROLINA, VIRGINIA, AND SOUTH CAROLINA: FROM THE COLONIAL PERIOD TO ABOUT 1820 (5th ed. 2005); JAY HINSBRUNER, NOT OF PURE BLOOD: THE FREE PEOPLE OF COLOR AND RACIAL PREJUDICE IN NINETEENTH CENTURY PUERTO RICO (1996); NEITHER SLAVE NOR FREE: THE FREEDMAN OF AFRICAN DESCENT IN THE SLAVE SOCIETIES OF THE NEW WORLD (David William Cohen & Jack P. Greene eds., 1972); JOHN HOPE FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA, 1790–1860 (1971); JOHN BELTON O’NEALL, THE NEGRO LAW OF SOUTH CAROLINA (1848); COMMITTEE OF THE WHOLE HOUSE, 15TH CONGRESS, REPORT ON COLONIZING THE FREE PEOPLE OF COLOUR OF THE UNITED STATES (Comm. Print 1817).

⁵¹ See JAMES OLIVER HORTON, FREE PEOPLE OF COLOR: INSIDE THE AFRICAN AMERICAN COMMUNITY 2–3 (1993); LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860 (1961); Sherri Burr, *The Free Blacks of Virginia: A Personal*

nomenclature followed European practice, which distinguished between those who were enslaved or subject to indentured servitude and those who were free.⁵² The American colonies would continue this practice.⁵³ Its use in the United States would grow as free people of color, known as *gens de couleur*, arrived from the Caribbean.⁵⁴

Free people of color held a unique position and became prominent advocates of abolition, including Frederick Douglass, Harriet Tubman, and Sojourner Truth.⁵⁵ Many free people of color could own property and operate businesses, and many played prominent roles in their states.⁵⁶ Yet free people of color were still subject to discrimination, such as being unable to vote, to serve as witnesses in legal proceedings, or to possess firearms.⁵⁷ Even the most basic acts could give rise to legal liability. In Alabama, for example, free people of color could be prosecuted for simply writing a letter or note on behalf of an enslaved person.⁵⁸ In Georgia, the failure of a free person of

Narrative, A Legal Construct, 19 J. GENDER, RACE & JUST. 1 (2016); A. Leon Higginbotham, Jr. & Greer C. Bosworth, "Rather Than the Free:" *Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17 (1990).

⁵² See MATT CHILDS, FREE PEOPLE OF COLOR 3 (2011); 2 STEFAN GOODWIN, AFRICA IN EUROPE: INTERDEPENDENCIES, RELOCATIONS, AND GLOBALIZATION 62–68 (2009); MAGNUS MÖRNER, RACE MIXTURE IN THE HISTORY OF LATIN AMERICA 56–60 (1967); Irene Diggs, *Color in Colonial Spanish America*, 38 J. NEGRO HIST. 403 (1953).

⁵³ By 1790, the U.S. population stood at approximately 3,939,000 people. Within this population, there were 697,000 enslaved people and 59,000 free people of color. CARROLL D. WRIGHT, THE HISTORY AND GROWTH OF THE UNITED STATES CENSUS, S. DOC. NO. 194, at 17 (1900). See PATHS TO FREEDOM: MANUMISSION IN THE ATLANTIC WORLD 6 (Rosemary Brana-Schute & Randy J. Sparks eds., 2009); NORAH L.A. GHARALA, TAXING BLACKNESS: FREE AFROMEXICAN TRIBUTE IN BOURBON NEW SPAIN 3 (2019); LIBERIAN DREAMS: BACK-TO-AFRICA NARRATIVES FROM THE 1850S x (Wilson Jeremiah Moses ed., 1998).

⁵⁴ HORTON, *supra* note 51, at 140; IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 35 (1974).

⁵⁵ See generally CATHERINE CLINTON, HARRIET TUBMAN: THE ROAD TO FREEDOM (2004); NELL IRVIN PAINTER, SOJOURNER TRUTH: A LIFE, A SYMBOL (1996); NATHAN IRVIN HUGGINS, SLAVE AND CITIZEN: THE LIFE OF FREDERICK DOUGLASS (1980).

⁵⁶ MARY GEHMAN, THE FREE PEOPLE OF COLOR OF NEW ORLEANS: AN INTRODUCTION 12–14 (2017); Higginbotham & Bosworth, *supra* note 51, at 34–39. See, e.g., Parks v. Hewlett, 36 Va. (9 Leigh) 511 (1838) (affirming the right of free people of color in Virginia to inherit property); Wilson v. Shackelford, 25 Va. (4 Rand.) 5 (1826) (affirming the right of free people of color in Virginia to sue).

⁵⁷ See WARREN EUGENE MILTEER, JR., NORTH CAROLINA'S FREE PEOPLE OF COLOR, 1715–1885, at 244 (2020); FRANK MAROTTI, HEAVEN'S SOLDIERS: FREE PEOPLE OF COLOR AND THE SPANISH LEGACY IN ANTEBELLUM FLORIDA 50, 129–31 (2013); State v. Newson, 27 N.C. 250, 250 (1844) (holding that "free people of color" are not considered citizens "in the largest sense of the term"); Groning v. Devana, 18 S.C.L. (2 Bail) 192, 192 (1831) (holding that a free person of color is not a competent witness). There were some exceptions to the restrictions imposed on free people of color although these were often temporary. See Act of Dec. 23, 1833, § 7, 1833 Ga. Acts 226, 228 (declaring that "it shall not be lawful for any free person of colour in this state, to own, use, or carry firearms of any description whatever").

⁵⁸ ALA. CODE § 32 (Slaves, and Free Persons of Color), in A DIGEST OF THE LAWS OF THE STATE OF ALABAMA 397 (John G. Aiken ed., 2d ed. 1836). Violation of this provision would result in "thirty-nine lashes on the bare back" and would require the free person of color to leave the state within thirty days. *Id.* The failure to leave the state would result in forfeiture of liberty, and the free person of color would "be sold as a slave for the term of ten years. . . ."

color to pay taxes could result in temporary enslavement, and “the status of the free person of color during the time of hiring is that of a slave.”⁵⁹

The U.S. Constitution makes no reference to color or “people of color,” although it distinguishes between “free Persons,” “Indians,” and “all other Persons.”⁶⁰ To be clear, “all other Persons” meant enslaved people who, for purposes of taxation and calculating legislative representation, would be considered “three-fifths” of “free Persons.”⁶¹ In addition, the Constitution provided that any “Person held to Service or Labour in one State” would not gain their freedom by escaping to another State.⁶² Like the Three-Fifths Clause, the Fugitive Slave Clause did not reference color or “people of color.” To protect slavery, the Constitution precluded any congressional legislation prohibiting the “migration or importation of such persons as any of the States now existing shall think proper to admit” until 1808.⁶³ And to ensure this restriction remained in place, the Constitution prohibited any constitutional amendment of this provision until 1808.⁶⁴ Through careful drafting and terminology, the drafters of the Constitution avoided using the terms “slave” or “slavery.” However, the document would still affect people of color for centuries.⁶⁵

In 1797, a group of four freemen of color petitioned Congress for relief from future enslavement.⁶⁶ They had been granted manumission in North Carolina and had fled to Pennsylvania. Fearing capture and return to bondage, they submitted a petition to the House of Representatives. After spirited debate, Congress declined to act.⁶⁷ A larger group filed a similar petition to Congress in 1799, titled “*The Petition of the People of Colour, Freemen*

Id. This was a common offense in many Southern states. See An Act Concerning Slaves and Free Persons of Color, N.C. Revised Code No. 105, Ch. 6, § 2 (1816) [hereinafter 1816 N.C. Act] (“No slave to teach another to read.”).

⁵⁹ GA. PENAL CODE §1826 (1861); see also Ralph B. Flanders, *The Free Negro in Antebellum Georgia*, 9 N.C. HIST. REV. 250, 262–63 (1932).

⁶⁰ U.S. CONST. art. I, § 2. See generally Paul Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 CHI.-KENT L. REV. 1009, 1031 (1993); David Hall, *The Constitution and Race: A Critical Perspective*, 5 N.Y. L. SCH. J. HUM RTS. 229 (1988).

⁶¹ U.S. CONST. art. I, § 2. Howard A. Ohline, *Republicanism and Slavery: Origins of the Three-Fifths Clause of the United States Constitution*, 28 WM. & MARY Q. 563 (1971).

⁶² U.S. CONST. art. IV, § 2, cl. 3. For a general overview of the antebellum debate over the interpretation of the Fugitive Slave Clause, see H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 L. & HIST. REV. 1133 (2012).

⁶³ U.S. CONST. art. I, § 9, cl. 1.

⁶⁴ U.S. CONST. art. V.

⁶⁵ See Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1460 (2012) (“One of the ironies of the U.S. Constitution is that although it was clearly designed to accommodate the interests of slaveholding states, the word ‘slavery’ first appears in the Constitution in the Thirteenth Amendment, which claims to abolish slavery forever.”).

⁶⁶ Nicholas P. Wood, *A “Class of Citizens.” The Earliest Black Petitioners to Congress and Their Quaker Allies*, 74 WM. & MARY Q. 109, 111 (2017). Similar petitions were filed in state legislatures. See, e.g., THE BLACK PRESENCE IN THE ERA OF THE AMERICAN REVOLUTION 268 (Sidney Kaplan & Emma Nogrady Kaplan eds., rev. ed. 1989) (describing petition by three Black men to the South Carolina legislature “on behalf of themselves & other Free-Men of Colour”).

⁶⁷ Wood, *supra* note 66, at 114.

Within the City, and Suburbs of Philadelphia,” seeking relief “from the oppression and violence which so great a number of like colour and National Descent are subjected.”⁶⁸ This second petition sought to challenge the slave trade and slavery. While both petitions were rejected by Congress, they reflected growing political activism by people of color and the move for abolition.⁶⁹

The first reference to “person of color” in federal law occurred in 1803, when Congress adopted An Act to Prevent the Importation of Certain Persons into Certain States, Where, by the Laws Thereof, Their Admission is Prohibited.⁷⁰ The law banned any person from bringing into a state that had prohibited their entry “any negro, mulatto, or other person of colour” who was not “a native, citizen, or registered seaman of the United States, or seamen natives of countries beyond the Cape of Good Hope. . . .”⁷¹ This language suggests the term “person of color” originally applied to individuals who were similar to, yet distinct from, Black people and persons of mixed white and Black ancestry. This interpretation is supported by the legislative history. During deliberations in the House of Representatives, several statements were made highlighting the distinction between “negroes, mulattoes, and persons of color.”⁷²

This federal law was adopted primarily at the request of southern states, which were concerned about the rise of free people of color in the United States, and viewed the successful slave rebellion in Haiti and the “contagion of liberty” with trepidation.⁷³ By prohibiting importation, slave states hoped to maintain control over the existing slave populations within their states. To comply with the Constitution, this law only applied to those states that had prohibited the entry of any “negro, mulatto, or other person of colour” into their territory.⁷⁴ Sanctions for violating the law were significant. Breaches would give rise to the payment of \$1,000 for each “negro, mulatto, or other person of colour.”⁷⁵ In addition, the ship or vessel bringing in such persons would be subject to forfeiture.⁷⁶ Case law reveals a varied meaning to the

⁶⁸ WOODY HOLTON, *BLACK AMERICANS IN THE REVOLUTIONARY ERA: A BRIEF HISTORY WITH DOCUMENTS 127–30* (2009); see also *THE BLACK PRESENCE IN THE ERA OF THE AMERICAN REVOLUTION*, *supra* note 66, at 267–72.

⁶⁹ Wood, *supra* note 66, at 114.

⁷⁰ An Act to Prevent the Importation of Certain Persons into Certain States, Where, by the Laws Thereof, Their Admission is Prohibited, ch. 10, 2 Stat. 205 (1803) [hereinafter 1803 Act]. See generally Paul Finkelman, *The First Federal Human Rights Legislation: Suppressing the African Slave Trade*, 3 *CRIT.* 20 (2010).

⁷¹ 1803 Act, *supra* note 70, at § 1.

⁷² 7 *ANNALS OF CONG.* 470–72 (1803).

⁷³ WINCH, *supra* note 41, at 40; see also DAVID SCOTT FITZGERALD & DAVID COOK MARTIN, *CULLING THE MASSES: RACIST IMMIGRATION POLICY IN THE AMERICAS* 89 (2014).

⁷⁴ 1803 Act, *supra* note 70, at § 1.

⁷⁵ *Id.*

⁷⁶ *Id.* at § 2.

term “people of color,” with legal decisions using the term to identify both enslaved people and free citizens of other countries.⁷⁷

When the constitutional restriction prohibiting legislation to end the migration or importation of enslaved people ceased, Congress adopted the Act to Prohibit the Importation of Slaves Into Any Port or Place Within the Jurisdiction of the United States in 1807.⁷⁸ The statute was drafted to end the slave trade in the United States and applied to “any negro, mulatto, or person of colour.”⁷⁹ Significantly, the statute took effect on January 1, 1808—the first day that Congress could enact such a law under the Constitution.⁸⁰ Despite language which suggests a distinction among these three groups, subsequent practice reveals the term “person of color” was often used interchangeably with “negroes” and “colored persons.”⁸¹ Other federal statutes also distinguished between “negroes, mulattoes, and persons of colour.”⁸² State laws used similar terminology.⁸³

In 1816, the Society for the Colonization of Free People of Color of America was established by an American pastor in New Jersey and gradually gained support from abolitionist groups.⁸⁴ It would soon change its name to the American Colonization Society.⁸⁵ The organization proposed the relocation of free people of color from the United States to a colony in west Africa.

⁷⁷ See, e.g., *The Wilson v. United States*, 30 Fed. Cas. 239 (No. 17846) (C.C.D. Va. 1820) (referring to free people of color as free citizens of a foreign state). See generally Jeffrey Orenstein, *Joseph Almeida: Portrait of a Privateer, Pirate and Plaintiff, Part II*, 12 GREEN BAG 35, 50–52 (2008); W. Howard Mann, *The Marshall Court: Nationalization of Private Rights and Personal Liberty from the Authority of the Commerce Clause*, 38 IND. L.J. 117, 120–25 (1963).

⁷⁸ Ch. 22, 2 Stat. 426 (1807).

⁷⁹ *Id.* at § 1.

⁸⁰ Pursuant to Article I of the Constitution, Congress did not have the authority to end the slave trade until 1808 at the earliest. U.S. CONST., art. I, § 9, cl. 1. See Paul Finkelman, *The American Suppression of the African Slave Trade: Lessons on Legal Change, Social Policy, and Legislation*, 42 AKRON L. REV. 431, 460–63 (2009).

⁸¹ See, e.g., *United States v. Preston*, 28 U.S. (3 Pet.) 57, 61, 64 (1830); *The Josefa Segunda* 18 U.S. (5 Wheat.) 338, 339 (1820); see also *Restoration of a Danish Slave*, 1 OP. ATT’Y GEN. 566 (1822) (using the term “people of color” in reference to enslaved people).

⁸² See Act of Mar. 3, 1819, ch. 101, 3 Stat. 532; Act of Apr. 20, 1818, ch. 91, 3 Stat. 450.

⁸³ See, e.g., An Act for the Better Regulation of Free Negroes and Persons of Color, and for Other Purposes, Act of Dec. 21, 1822, No. 2277, 7 Stat. S.C. 461 (1822); *Elkison v. Delieesseline*, 8 F. Cas. 493 (C.C.D.S. Car. 1823); see also 2 FREE BLACKS, SLAVES, AND SLAVEOWNERS IN CIVIL AND CRIMINAL COURTS 1–22 (Paul Finkelman ed., 1988) (describing legal challenge to South Carolina law that allowed for the arrest and detention of free people of color who entered the ports of the state); Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215, 2231–32 (2021).

⁸⁴ See ROBERT FINLEY, THOUGHTS ON THE COLONIZATION OF FREE BLACKS (1816); Henry N. Sherwood, *Early Negro Deportation Projects*, 2 MISS. HIST. REV. 484 (1916). Proposals to establish a home for former enslaved people in west Africa had been considered for many years. See WINCH, *supra* note 41, at 36–37 (discussing the Free African Society and the Newport African Union); CARL B. WADSTROM, AN ESSAY ON COLONIZATION, PARTICULARLY APPLIED TO THE WESTERN COAST OF AFRICA (1794) (addressing the establishment of a colony in Africa for Blacks and people of colour).

⁸⁵ See generally ERIC BURN, SLAVERY AND THE PECULIAR SOLUTION: A HISTORY OF THE AMERICAN COLONIZATION SOCIETY (2005); Henry Noble Sherwood, *The Formation of the American Colonization Society*, 2 J. NEGRO HIST. 209 (1917).

“People of color” meant individuals of African ancestry, and “free people of color” were those individuals who were no longer enslaved.⁸⁶ This proposal proved highly controversial.⁸⁷ Some Black people refused to leave the United States for a continent they did not know. Others denounced it as a racist ploy to remove Black people from the United States. Frederick Douglass argued African Americans had a right to remain in the United States as “American citizens.”⁸⁸ Advocates supported the proposal because it offered both freedom and a future to people of color.⁸⁹ Many enslavers supported the proposal because it would remove the growing population of free persons of color from the United States. In 1819, Congress even adopted legislation authorizing the President “to appoint a proper person or persons, residing on the coast of Africa, as agent or agents for receiving negroes, mulattoes, or persons of colour, delivered from on board of vessels seized in the prosecution of the slave trade.”⁹⁰ However, a subsequent opinion by the Attorney General indicated the Act did not grant the President authority to purchase land in Africa “for the purposes of a settlement” or to transport any free people of color living in the United States to Africa.⁹¹ Eventually, thousands migrated to Africa and settled in the territory that would become the independent country of Liberia.⁹²

Government use of the term “people of color” continued throughout the nineteenth century, primarily motivated by states seeking to perpetuate white control over an enslaved population and white privilege over free people of color.⁹³ For example, Georgia’s criminal law distinguished between

⁸⁶ The term “people of color” was also used by other abolitionist groups. *See, e.g.*, VINCENT HARDING, *THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA* 139 (1981) (describing the work of the New York Association for the Elevation and Improvement of People of Color).

⁸⁷ *See* A. Leon Higginbotham, Jr. & F. Michael Higginbotham, “*Yearning to Breathe Free: Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*,” 68 N.Y.U. L. REV. 1213, 1231–32 (1993).

⁸⁸ JOHN STAUFFER, *GIANTS: THE PARALLEL LIVES OF FREDERICK DOUGLASS AND ABRAHAM LINCOLN* 80 (2008). *See generally* DAVID W. BLIGHT, *FREDERICK DOUGLASS: PROPHET OF FREEDOM* (2018).

⁸⁹ *See* MEMOIR OF CAPTAIN PAUL CUFFEE, *A MAN OF COLOUR: TO WHICH IS JOINED THE EPISTLE OF THE SOCIETY OF SIERRA LEONE, IN AFRICA* (1812). Cuffee’s work in bringing free people of color to Africa would help inspire the establishment of the American Colonization Society; *see also* WINCH, *supra* note 41, at 57–60; PENNSYLVANIA COLONIZATION SOCIETY, *REPORT OF THE BOARD OF MANAGERS OF THE PENNSYLVANIA COLONIZATION SOCIETY, WITH AN APPENDIX* (1830).

⁹⁰ Act of Mar. 3, 1819, ch. 101, 3 Stat. 532; *see also* *The Antelope*, 23 U.S. 66 (1825) (discussing the Act).

⁹¹ *Suppression of the Slave-Trade*, 1 OP. ATT’Y GEN. 314, 316 (1819).

⁹² *See generally* MARIE TYLER-MCGRAW, *AN AFRICAN REPUBLIC: BLACK AND WHITE VIRGINIANS IN THE MAKING OF LIBERIA* (2014); CLAUDE ANDREW CLEGG III, *THE PRICE OF LIBERTY: AFRICAN AMERICANS AND THE MAKING OF LIBERIA* (2004).

⁹³ The term “persons of color” was regularly used as a form of self-identification by Blacks. *See, e.g.*, *Disabilities of American Persons of Color*, N.Y. HERALD, (Jan. 24, 1860), at 4 (describing the inability of a Black woman to receive a U.S. passport because she was a “person of color”); DAVID WALKER, *WALKER’S APPEAL, IN FOUR ARTICLES; TOGETHER WITH A PREAMBLE, TO THE COLOURED CITIZENS OF THE WORLD, BUT IN PARTICULAR, AND VERY*

whites, enslaved people, and free persons of color.⁹⁴ North Carolina adopted the same typology.⁹⁵ In a world where rights were defined by color, definitions took on added significance. Many state statutes defined membership in these groups with great detail. Florida law provided that “[t]he words ‘negro,’ ‘colored,’ ‘colored persons,’ ‘mulatto’ or ‘persons of color,’ when applied to persons, include every person having one-eighth or more of African or negro blood.”⁹⁶ In South Carolina, a person of color “is to be understood in our law, at this day, to mean a person descended from a negro within the fourth degree inclusive, though an ancestor in each intervening generation was white.”⁹⁷

While the term was often used to define and limit legal rights, the Black community also began using the term “people of color” as a form of collective terminology.⁹⁸ Reluctant to use either “African American” or “negro,” some groups chose “people of color.” For example, the African Baptist Church of Boston changed its name and became the First Independent Church of the People of Color in the 1830s because congregants believed “the name African is ill applied to a church composed of American citizens.”⁹⁹ “Negro” posed concerns because of its connection to a word that was recognized as offensive and an extreme disparagement even in the nineteenth century.¹⁰⁰ Other groups seeking to define their unique status within the Black community used the term “free people of color,” such as Philadelphia’s Society of Free People of Color and New York’s Society of Free People of Color.¹⁰¹ In 1827, the inaugural issue of *Freedom’s Journal*—the first national newspaper published by the Black community in the United

EXPRESSLY, TO THOSE OF THE UNITED STATES OF AMERICA 12, 19, 58, 62 (1830) (addressing the plight of “men of colour” and “people of color”).

⁹⁴ GA. PENAL CODE, Pt. 4, Tit. 3, Ch. 1 (1861) (titled “Slaves and Free Persons of Color”), see also BERLIN, *supra* note 54, at 94–95 (describing Georgia legislature’s concerns in 1808 regarding the movement of “free negroes and persons of color”).

⁹⁵ See 1816 N.C. Act, *supra* note 58, at § 1. See generally WILLIAM L. BYRD, III, NORTH CAROLINA GENERAL ASSEMBLY SESSIONS RECORDS: SLAVES AND FREE PERSONS OF COLOR, 1709–1789 (2011).

⁹⁶ REV. GEN. ST. 1920, § 3939; COMP. GEN. LAWS 1927, § 5858 (FL.), see also Albert Ernest Jenks, *The Legal Status of Negro-White Amalgamation in the United States*, 21 AM. J. SOCIO. 666 (1916).

⁹⁷ State v. Dempsey, 31 N.C. 384, 388 (1849). Connecticut used a similar definition. See Johnson v. Town of Norwich, 29 Conn. 407, 408 (1860) (defining a person having “one-fourth negro blood” to be a person of color).

⁹⁸ PATRICK RAE, BLACK IDENTITY AND BLACK PROTEST IN THE ANTEBELLUM NORTH 103, 106, 148 (2002).

⁹⁹ PATRICK RAE, EIGHTY-EIGHT YEARS: THE LONG DEATH OF SLAVERY IN THE UNITED STATES, 1777–1865, at 148 (2015); see also HORTON, *supra* note 51, at 159; JAMES OLIVER HORTON & LOIS E. HORTON, IN HOPE OF LIBERTY: CULTURE, COMMUNITY AND PROTEST AMONG NORTHERN FREE BLACKS, 1700–1860, at 201 (1996).

¹⁰⁰ See JOHN DILLARD, CASTLE AND CLASS IN A SOUTHERN TOWN 47 (1947); R.B. LEWIS, LIGHT AND TRUTH: COLLECTED FROM THE BIBLE AND ANCIENT AND MODERN HISTORY, CONTAINING THE UNIVERSAL HISTORY OF THE COLORED AND THE INDIAN RACE, FROM THE CREATION OF THE WORLD TO THE PRESENT TIME 342 (1844); J.C. Embry, *Afro-American vs Negro*, reprinted in 32 NEGRO HIST. BULL. 18 (1969).

¹⁰¹ See FINLEY, *supra* note 84, at 1; THE BLACK PRESENCE IN THE ERA OF THE AMERICAN REVOLUTION, *supra* note 66, at 104; AUGUST MEIER & ELLIOTT RUDWICK, FROM PLANTATION TO GHETTO 110 (3d. ed. 1976).

States—expressed its commitment to support “free persons of color.”¹⁰² Another prominent newspaper, *The Colored American*, used the terms “free people of color,” “colored people,” and “colored Americans” interchangeably.¹⁰³ But even the term “free people of color” would eventually be shortened to simply “people of color” within the Black community as a “universalizing gesture” of solidarity.¹⁰⁴

The movement to use the term “people of color” was not without criticism. Some Black leaders were suspicious of any collective terminology defined by race or color. Noted abolitionist William Whipper was a leading critic of terms that used “color” or “colored,” arguing “the baneful effects of distinctions founded in hatred and prejudice.”¹⁰⁵ Other critics also denounced “complexional distinctions.”¹⁰⁶ While significant, these concerns did not generate sufficient traction within the Black community to displace the term “people of color.”¹⁰⁷ A common response to those who challenged “complexional distinctions” was that color came from God, and “[t]hat we are colored, is a fact, an undeniable fact.”¹⁰⁸ Henry H. Garnet, who would become the first Black man to speak in the U.S. House Chamber, offered a more pragmatic response: “[h]ow unprofitable it is for us to spend our golden moments in long and solemn debate upon the question whether we shall be called ‘*Africans*,’ ‘*Colored Americans*’ or ‘*Africo Americans*,’ or ‘*Blacks*.’ The question should be, my friends, *shall we arise and act like men, and cast off this terrible yoke?*”¹⁰⁹ However, the names controversy would always remain in the background of the Black experience. Other terms, including colored people, colored Americans, and Afro Americans, would also be used for decades.

The use of the term “people of color” is further evidenced in the Colored Conventions.¹¹⁰ Beginning in 1830, Black advocates of abolition

¹⁰² See Editor, *To Our Patrons*, FREEDOM’S JOURNAL (Mar. 16, 1827), at 1, <https://web.archive.org/web/20150209163534/http://www.wisconsinhistory.org/pdfs/la/Freedom-sJournal/v1n01.pdf> [<https://perma.cc/YSC7-GXHK>].

¹⁰³ THE COLORED AMERICAN (Mar. 4, 1837), <https://sismo.inha.fr/files/original/1b88d58b0e6603f538d672025bd8d66d419722d6.jpeg> [<https://perma.cc/DPY8-RH8W>]. The weekly newspaper was originally published as *The Weekly Advocate*, and its name change reflected its focus on the Black community.

¹⁰⁴ RAEI, *supra* note 99, at 148.

¹⁰⁵ Nat’l Reformer 18–19 (Oct. 1838), *quoted in* JULIE WINCH, *A GENTLEMAN OF COLOR: THE LIFE OF JAMES FORTEN* 310 (2002).

¹⁰⁶ BENJAMIN QUARLES, *BLACK ABOLITIONISTS* 57 (1969); *see also* STUCKEY, *supra* note 21, at 232; GEORGE A. LEVESQUE, *BLACK BOSTON: AFRICAN AMERICAN LIFE AND CULTURE IN URBAN AMERICA, 1750–1860*, at 129 (1994).

¹⁰⁷ See RAEI, *supra* note 98, at 102–15.

¹⁰⁸ THE COLORED AMERICAN (Mar. 13, 1841); *see also* STUCKEY, *supra* note 21, at 248.

¹⁰⁹ HENRY H. GARNET, *THE PAST AND PRESENT CONDITION, AND THE DESTINY OF THE COLORED RACES: A DISCOURSE* 17–18 (1848) (emphasis in original).

¹¹⁰ See generally THE COLORED CONVENTIONS MOVEMENT: BLACK ORGANIZING IN THE NINETEENTH CENTURY (P. Gabrielle Foreman, Jim Casey & Sarah Lynn Patterson eds., 2021) [Hereinafter THE COLORED CONVENTIONS MOVEMENT]; MINUTES OF THE PROCEEDINGS OF THE NATIONAL NEGRO CONVENTIONS, 1830–1864 (Howard Holman Bell ed., 1969); HOWARD HOLMAN BELL, *A SURVEY OF THE NEGRO CONVENTION MOVEMENT 1831–1861* (reprint 1969) (1953).

and racial equality convened a series of local, regional, and national meetings to organize their communities. Many of these meetings were initiated in response to racial attacks against free people of color.¹¹¹ In September 1830, free people of color from five states convened at the Mother Bethel AME Church in Philadelphia.¹¹² The meeting was called in response to a series of racially motivated attacks against the Black community in Cincinnati.¹¹³ At this first meeting, the delegates called for the establishment of the American Society of Free Persons of Colour.¹¹⁴ Its mission was to address emancipation and racial equality in the United States. It would also work to purchase land and create a settlement for free people of color in Canada.¹¹⁵ The following year, the First Annual Convention of the People of Colour was held in Philadelphia.¹¹⁶ While there was continued support for the establishment of a Canadian settlement, there was striking opposition to the work of the American Colonization Society and its proposal to establish a colony in west Africa.¹¹⁷ At this meeting, delegates called for improving “the general character of the coloured population” in the United States. For example, delegates proposed establishing a school for “Young Men of Color” in New Haven, Connecticut.¹¹⁸

In subsequent years, similar conventions were held throughout the United States and addressed a multitude of issues, including emancipation, labor rights, education, temperance, and health care.¹¹⁹ The Colored Conventions reflected the growing activism of people of color and their struggle for racial equality. Black leaders would continue to organize meetings during the antebellum period and throughout the Reconstruction era.¹²⁰

¹¹¹ See Rael, *supra* note 99, at 145; Winch, *supra* note 41, at 76; P. Gabrielle Foreman, *Black Organizing, Print Advocacy, and Collective Authorship*, in *THE COLORED CONVENTIONS MOVEMENT*, *supra* note 110, at 21.

¹¹² CONSTITUTION OF THE AMERICAN SOCIETY OF FREE PERSONS OF COLOUR, FOR IMPROVING THEIR CONDITION IN THE UNITED STATES; FOR PURCHASING LANDS; AND FOR THE ESTABLISHMENT OF A SETTLEMENT IN UPPER CANADA, ALSO THE PROCEEDINGS OF THE CONVENTION, WITH THEIR ADDRESS TO THE FREE PERSONS OF COLOUR IN THE UNITED STATES 9 (1831), <https://omeka.coloredconventions.org/items/show/70> [<https://perma.cc/24CR-B94W>].

¹¹³ See Foreman, *supra* note 111, at 21; Meier & Rudwick, *supra* note 101, at 124–25.

¹¹⁴ Foreman, *supra* note 111, at 5.

¹¹⁵ See *id.* at 10.

¹¹⁶ Minutes and Proceedings of the First Annual Convention of the People of Colour (1831), <https://omeka.coloredconventions.org/items/show/72> [<https://perma.cc/R727-Y8QE>].

¹¹⁷ See *id.* at 5 (“We cannot for a moment doubt, but that the cause of many of our unconstitutional, unchristian, and unheard of sufferings, emanate from that unhallowed source; and we would call on Christians of every denomination firmly to resist it.”).

¹¹⁸ *Id.* at 6.

¹¹⁹ See MINUTES OF THE PROCEEDINGS OF THE NATIONAL NEGRO CONVENTIONS, *supra* note 110, at ii; Shawn C. Cominey, *National Black Conventions and the Quest for African-American Freedom and Progress, 1847–1867*, 91 INT’L SOC. SCI. REV. 1 (2015); Jane H. Pease & William H. Pease, *Negro Conventions and the Problem of Black Leadership*, 2 J. BLACK STUD. 29 (1971).

¹²⁰ See Foreman, *supra* note 111, at 40. See generally KATE MASUR, *UNTIL JUSTICE BE DONE: AMERICAN’S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION* (2021).

In 1846, “Dred Scott, a man of color,” filed his Petition to Sue for Freedom in Missouri state court.¹²¹ Scott’s wife, “Harriett, a woman of color,” filed a similar petition.¹²² Their pleas were rejected by the Missouri Supreme Court in *Emmerson v. Dred Scott (of Color)*¹²³ and again in *Scott, A Man of Color v. Emerson*.¹²⁴ The use of the term “of color” in the caption of these lawsuits was consistent with the Missouri statute authorizing such lawsuits.¹²⁵ In fact, dozens of freedom lawsuits were brought in Missouri courts.¹²⁶ While filed in a receptive jurisdiction, the cases reflect the challenges facing enslaved persons seeking freedom. As noted by the Missouri Supreme Court, “color raises the presumption of slavery, and until the contrary is shown, a man or woman of color is deemed to be a slave . . . in slaveholding states.”¹²⁷

In 1853, Scott filed a new petition in federal court, alleging subject matter jurisdiction under the federal diversity statute. Three years later, the U.S. Supreme Court issued its infamous decision in *Dred Scott v. Sandford*, holding that Scott, a man of African descent, was not a U.S. citizen.¹²⁸ Referring to several federal statutes, the Court noted “[p]ersons of color . . . were not included in the word citizens, and they are described as another and different class of persons. . . .”¹²⁹ As such, Scott could not file suit in federal court under the diversity statute. While the decision addressed the legal status of enslaved Black people, the Court also spoke of other groups. In its decision, the Court differentiated among the “white,” “black,” and “red”

¹²¹ Petition for Leave to Sue for Freedom (Dred Scott), St. Louis Circuit Court (Apr. 6, 1846) (on file with author). See generally PAUL FINKELMAN, *DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS* (2d ed. 2016); David Thomas Konig, *The Long Road to Dred Scott: Personhood and the Rule of Law in the Trial Court Records of St. Louis Slave Freedom Suits*, 75 UMKC L. REV. 54 (2006).

¹²² Harriett’s case was eventually subsumed by Dred Scott’s petition, which was a strategic error because Harriett had a more compelling claim from freedom than her husband. See generally Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033, 1088–89 (1997).

¹²³ 11 Mo. 413 (1848). The caption of the case misspelled the name of Dr. John Emerson, Scott’s putative owner. Oddly, another misspelling occurred when Scott’s case was heard by the U.S. Supreme Court. The caption of that case misspelled the name of John Sanford, who then claimed ownership of Scott and his family.

¹²⁴ 15 Mo. 576 (1852).

¹²⁵ See An Act to enable persons of color held in slavery to sue for freedom, 1825 Mo. Laws. 404. See, e.g., *Winnay v. Whitesides*, 1 Mo. 472 (Miss. Sup. Ct. 1824). The original complaint filed in 1818 was titled *Winnay a free Blackwoman v. Phebe Pruitt*. See *University Libraries: Winnay vs Phebe Whitesides (alias Pruitt)* <http://repository.wustl.edu/concern/texts/8w32r6647> [https://perma.cc/Y7V7-83DK].

¹²⁶ For an overview of freedom lawsuits filed in Missouri courts, see Robert Moore, Jr., *A Ray of Hope, Extinguished: St. Louis Slave Suits for Freedom*, 14 GATEWAY HERITAGE 5 (1994).

¹²⁷ *Rennick v. Chloe*, 7 Mo. 197, 203 (1841) (emphasis in original); see also Moore, *supra* note 126, at 12–14.

¹²⁸ 60 U.S. 393 (1857).

¹²⁹ *Id.* at 420 (citing to 1813 statute that provided it shall be unlawful to employ, “on board of any public or private vessels of the United States, any person or persons except citizens of the United States, or persons of color, natives of the United States.”) (emphasis in original).

racess and the corresponding rights afforded to each group.¹³⁰ It also distinguished between “colored persons” and members of “the Indian race.”¹³¹ But there was a clear hierarchy among these groups. The Court referred to the inferiority of the “black race” twenty-nine times.¹³² The Native American population fared no better, as they were labeled uncivilized and in a “state of pupilage.”¹³³

The Supreme Court’s affirmation of slavery in *Dred Scott* set the stage for the Civil War and the military defeat of the Confederacy.¹³⁴ But while slavery ended in 1865, the color line remained.

B. 1865–1954: Reconstruction and the Rise of Segregation

Distinctions based on color, and laws targeting people of color, continued after the Civil War. In fact, the first Black Codes—state and local laws designed to perpetuate the subordination of newly freed enslaved people—were adopted within months of the war’s end.¹³⁵ Beginning in Mississippi and soon followed by South Carolina, these laws were eventually implemented by most southern states to limit the freedom of “persons of color.”¹³⁶ These laws imposed punitive sanctions for the most mundane acts so that local officials could compel continued servitude from free men and women despite emancipation and the ratification of the Thirteenth Amendment.¹³⁷

¹³⁰ *Id.* at 404, 407, 410.

¹³¹ *Id.* at 403. In dissent, Justice Curtis made a brief reference to “people of color.” *Id.* at 574 (Curtis, J., dissenting).

¹³² Higginbotham & Bosworth, *supra* note 51, at 19.

¹³³ *Dred Scott*, 60 U.S. at 404. The federal courts, including the Supreme Court, have a long and sordid history of using racist language to describe Native Americans. See ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005).

¹³⁴ See generally DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN LAW AND POLITICS* 712 (1978); ROBERT K. CARR, *THE SUPREME COURT AND JUDICIAL REVIEW* 208 (1942); Louise Weinberg, *Dred Scott and the Crisis of 1860*, 82 *CHI.-KENT L. REV.* 97 (2007); Faith Joseph Jackson, *Dred Scott v. Sandford: A Prelude to the Civil War*, 15 *RICH. J. L. & PUB. INT.* 377 (2011).

¹³⁵ See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877*, at 199–201 (1988); BERLIN, *supra* note 54, at 382; DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 83–90 (2d ed. 1973); THEODORE BRANTNER WILSON, *THE BLACK CODES OF THE SOUTH 98–99* (1965); *REPORTS OF ASSISTANT COMMISSIONERS OF FREEDMEN, AND SYNOPSIS OF LAWS ON PERSONS OF COLOR IN LATE SLAVE STATES*, S. EXEC. DOC. NO. 6, 39th Cong., 2d Sess., (1867).

¹³⁶ In South Carolina, for example, the Black Code of 1865 applied only to “persons of color,” which was defined as anyone with more than one-eighth Negro blood. See 3 *RACE AND ETHNICITY IN AMERICA: FROM PRE-CONTACT TO THE PRESENT* 28 (Russell M. Lawson & Benjamin A. Lawson eds., 2019). See generally MONROE N. WORK, *NEGRO YEAR BOOK* 62, 69 (1912) (describing the treatment of people of color in several states); *The Negro Term*, *THE INDIANAPOLIS RECORDER*, Nov. 23, 1912, at 4 (describing how several states defined “a person of color”).

¹³⁷ See generally DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008); JANE PURCELL GUILD, *BLACK LAWS OF VIRGINIA* (1995); THEODORE B. WILSON, *THE BLACK CODES OF THE SOUTH* (1965); Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Injunctions*, 107 *YALE L.J.* 2249 (1998).

In North Carolina, the state legislature adopted laws to ensure that “all persons of color” would effectively be subject to the same restrictions that governed them prior to emancipation.¹³⁸ Even the terminology of the Black Codes was meant to perpetuate the slave era. In South Carolina, state law provided that “[a]ll persons of color who make contracts for service or labor, shall be known as servants, and those with whom they contract, shall be known as masters.”¹³⁹

While the Thirteenth Amendment was passed to make permanent the Emancipation Proclamation and the Union’s military victory over the slave states, the Fourteenth and Fifteenth Amendments served a different purpose—to ensure equality for newly freed enslaved people and all African Americans.¹⁴⁰ Of the three post-war Reconstruction amendments, the Fifteenth Amendment alone references color.¹⁴¹ Ratified in 1870, the Fifteenth Amendment provided “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”¹⁴²

In *The Slaughter-House Cases*, the Supreme Court considered the meaning of the newly adopted Reconstruction amendments.¹⁴³ While these cases were ostensibly about the right of butchers in New Orleans to challenge state legislation under the Thirteenth and Fourteenth Amendments, race and color permeated the Court’s opinion. According to the Court, the Reconstruction amendments were adopted in response to legislation in the former slave states, which had reacted to emancipation by enacting a series of punitive laws that imposed “upon the colored race onerous disabilities and burdens and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value. . . .”¹⁴⁴ But while the Reconstruction amendments had been ratified in response to discrimination that targeted those of African descent, the Court noted they were not limited to “negro slavery,” and that they could address other races and colors, such as “the Mexican or Chinese race within our territory.”¹⁴⁵ Despite this broad language, the Court narrowly interpreted the Fourteenth Amend-

¹³⁸ An Act Concerning Negroes and Persons of Color or of Mixed Blood, Act of Mar. 10, 1866, Ch. 40 §§ 1–5, 1866 N.C. Sess. Laws 99–101. In fact, the 1866 Act echoed legislation adopted before the Civil War. See 1816 N.C. Act, *supra* note 58.

¹³⁹ An Act to Establish and Regulate the Domestic Relations of Persons of Colour, and to Amend the Law in Relation to Paupers and Vagrancy, § XXXV, 1865 S.C. Acts, 13 Stat. 269 (1865).

¹⁴⁰ See ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 55, 93 (2019); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 10 (2004).

¹⁴¹ The Civil Rights Act of 1866 references color, but in a different way. It required “[a]ll persons within the jurisdiction of the United States” to have the same rights and benefits as those “enjoyed by white citizens. . . .” Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.

¹⁴² U.S. CONST. amend. XV, § 1.

¹⁴³ 83 U.S. (16 Wall.) 36 (1872).

¹⁴⁴ *Id.* at 70.

¹⁴⁵ *Id.* at 72.

ment, and this construction would hamper the assertion of constitutional rights for decades.¹⁴⁶

In response to Reconstruction, many of the Black Codes were rescinded, but they were soon replaced by the equally discriminatory features of Jim Crow legislation.¹⁴⁷ While these laws began in northern states, their most pernicious forms appeared in the South.¹⁴⁸ Yet again, state and local governments passed legislation promoting segregation along racial lines, although skin color was often the defining feature. These laws used various words and phrases, including “colored,” “colored people,” “person of color,” and “people of color,” to limit access to public and private resources and venues.¹⁴⁹ Other laws, while silent on color, were only used against people of color.¹⁵⁰ For example, literacy tests, poll taxes, and residency requirements were routinely used to limit Black voting rights while grandfather clauses protected white suffrage.¹⁵¹ Jim Crow laws addressed every facet of life, including access to public and private accommodations, transportation, voting, employment, medicine, education, social activities, and even religion.¹⁵²

In *Plessy v. Ferguson*, the Supreme Court legalized the principle of “separate but equal,” and upheld the prosecution of Homer Plessy for violating a Louisiana statute requiring separate railway cars for “the white and colored races.”¹⁵³ Throughout its decision, the Court referenced the terms “colored race,” “colored persons,” “colored people” as well as both “people of color” and “persons of color.”¹⁵⁴ These terms were used interchangeably by the Court. That Plessy would even be subject to the restrictions of the Separate

¹⁴⁶ See David S. Bogen, *Rebuilding the Slaughter-House: The Cases’ Support for Civil Rights*, 42 AKRON L. REV. 1129 (2009); Kevin Christopher Newson, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643 (2000).

¹⁴⁷ See WILLIAM STURKEY, *HATTIESBURG: AN AMERICAN CITY IN BLACK AND WHITE* 4–6 (2019); HENRY LOUIS GATES, JR., *STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW* 7 (2019); RICHARD WOUMSER, *THE RISE AND FALL OF JIM CROW* 130 (2003).

¹⁴⁸ See WOUMSER, *supra* note 147, at 130. See generally STATES’ LAWS ON RACE AND COLOR (Pauli Murray ed., 1997).

¹⁴⁹ For example, Alabama defined “[t]he term ‘mulatto’ or ‘person of color,’ . . . [as] a person of mixed blood, descended, on the part of the father or mother, from negro ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person.” ALA. REV. CODE, Pt. I, Title I, ch. 1, § 2(4) (1897). See generally David Martin, *The Birth of Jim Crow in Alabama: 1865–1896*, 13 NAT’L BLACK L.J. 184 (1993). Georgia defined “persons of color” to include “[a]ll negroes, mulattoes, and their descendants, having any ascertainable trace of . . . either Negro or African, West Indian, or Asiatic Indian blood in his or her veins. . . .” GA. CODE ANN. § 79–103 (1927).

¹⁵⁰ See, e.g., ALA. REV. CODE, Pt. IV, Title I, ch. 5, § 3630 (1896) (“Any person who, having no visible means of support, or being dependent on his labor . . . must each, on conviction for the first offense, be fined . . .”).

¹⁵¹ See CAROL ANDERSON, *ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY* 3–6 (2018); ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 111 (2000); Note, *The Grandfather Clause and the Fifteenth Amendment*, 24 HARV. L. REV. 388 (1911).

¹⁵² See STURKEY, *supra* note 147, at 83–86; WOUMSER, *supra* note 147, at 12.

¹⁵³ 163 U.S. 537 (1896). See generally STEVE LUXENBERG, *SEPARATE: THE STORY OF PLESSY V. FERGUSON, AND AMERICA’S JOURNEY FROM SLAVERY TO SEGREGATION* (2019).

¹⁵⁴ *Plessy*, 163 U.S. at 546, 549, 551, 557. See generally Glenn Rifkin, *Homer Plessy, Who Sat on a Train and Stood Up for Civil Rights*, N.Y. TIMES, (Feb. 3, 2020).

Car Act reveals how entrenched views on color and race were at the time.¹⁵⁵ Plessy was a man “of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood” and, in fact, “the mixture of colored blood was not discernible in him.”¹⁵⁶ Unlike most southern states, Louisiana did not define the meaning of the terms “colored race” or “people of color.”¹⁵⁷ Plessy argued this omission alone justified the reversal of his conviction for violating the Separate Car Act because it granted the railway conductor unfettered power to decide his status and fate.¹⁵⁸ In raising this point to the Court, Plessy noted “that there are almost as many definitions of the terms, ‘colored persons’ and ‘persons of color,’ as there are lexicographers and courts of the highest resort in the several states of the Union.”¹⁵⁹ Yet once the conductor concluded that Plessy was a person of color and was, therefore, excludable from the whites-only car, this “finding of fact” was never in dispute, and the Court declined to address it.¹⁶⁰

Plessy empowered federal, state, and local governments to perpetuate a brutal system of legalized repression and racial subordination that extended well into the twentieth century.¹⁶¹ As a result, distinctions based on color continued.

At the state level, the meaning of color varied by time and geography. In fact, a defining feature of the term “people of color” is its changing meaning.¹⁶² While Black people were always considered “people of color,” other groups were categorized as members at different times and for different reasons. In Mississippi, for example, Chinese Americans were considered “people of color” and, therefore, they were subject to the burdens and ignominies attached to that status. The U.S. Supreme Court upheld this treatment in *Gong Lum v. Rice*, which held the exclusion of a Chinese American child from a Mississippi high school did not violate the Equal Protection Clause.¹⁶³ The Court found the segregationist principles set forth in *Plessy* applied with equal rigor to legislation calling for separation of “white pupils

¹⁵⁵ It is significant that *Plessy v. Ferguson* arose out of Plessy’s arrest in New Orleans. *Gens de couleur libre* had a long history in the city, and it was a prominent group of Black residents who convinced Plessy to challenge the discriminatory law. See LUXENBERG, *supra* note 153, at 431–32; KEITH WELDON MEDLEY, *WE AS FREEMEN: Plessy v. Ferguson* (2003).

¹⁵⁶ *Plessy*, 163 U.S. at 538.

¹⁵⁷ Brief for Plaintiff in Error at 37–39, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (No. 210), 1896 WL 13990 [hereinafter *Plessy* Brief].

¹⁵⁸ See LUXENBERG, *supra* note 153, at 469–72.

¹⁵⁹ *Plessy* Brief, *supra* note 157, at 38 (citing definitions from several states, including Louisiana, Michigan, and North Carolina).

¹⁶⁰ See *Plessy*, 163 U.S. at 548–49.

¹⁶¹ See Maureen Johnson, *Separate But (Un)Equal: Why Institutionalized Anti-Racism is the Answer to the Never-Ending Cycle of Plessy v. Ferguson*, 52 U. RICH. L. REV. 327, 337–338 (2017); James C. Cobb, *Segregating the New South: The Origins and Legacy of Plessy v. Ferguson*, 12 GA. ST. U. L. REV. 1017 (1996); John P. Roche, *Plessy v. Ferguson: Requiescat in Pace?*, 103 U. PA. L. REV. 45, 46–47 (1954).

¹⁶² Laws provided detailed criteria for defining “people of color.” See MONROE N. WORK, *NEGRO YEAR BOOK* 147 (1914–15) (reviewing definitions of “people of color” from several states).

¹⁶³ 275 U.S. 78 (1927).

and the pupils of the yellow races.”¹⁶⁴ In contrast, efforts by Georgia state officials to adopt a similar law targeting Chinese Americans failed due to local views that such restrictions were unnecessary.¹⁶⁵ Disparate treatment was the result of numerous factors, including the size of non-white minority groups, their ability to assimilate into the community, local beliefs about color and race, and fears of white majority groups about domination by minority groups.¹⁶⁶ The status and treatment of Mexican Americans as “people of color” throughout the Southwest varied for similar reasons.¹⁶⁷

At the federal level, the meaning of color also varied across time, and this is most evident in U.S. immigration and nationality laws. Distinctions based on color and race had long appeared in immigration and nationality laws.¹⁶⁸ Since 1790, federal naturalization laws had limited citizenship to “free white persons,” thereby excluding other colors and races from U.S. citizenship.¹⁶⁹ At that time, “white” was associated with “European” origins, although some interpretations were narrower.¹⁷⁰ In 1875, eligibility for naturalization was expanded to “aliens of African nativity and to persons of African descent.”¹⁷¹ However, other groups, such as individuals of Chinese ancestry, were subject to explicit exclusion.¹⁷² These distinctions led to numerous challenges and corresponding decisions by U.S. courts that estab-

¹⁶⁴ *Id.* at 86–87.

¹⁶⁵ See STEPHANIE HINNERSHITZ, *A DIFFERENT SHADE OF JUSTICE: ASIAN AMERICAN CIVIL RIGHTS IN THE SOUTH* 110 (2017). However, equality did not extend to other areas as evidenced by Georgia’s anti-miscegenation statutes, which did apply to Chinese Americans. See *id.* at 102.

¹⁶⁶ See *id.* at 109–11; D. WU, *THE COLOR OF SUCCESS: ASIAN AMERICANS AND THE ORIGINS OF THE MODEL MINORITY* 2–3 (2015); LESLIE BOW, *PARTLY COLORED: ASIAN AMERICANS AND RACIAL ANOMALY IN THE SEGREGATED SOUTH* 21, 46 (2011).

¹⁶⁷ See JENNIFER R. NAJERA, *THE BORDERLAND OF RACE: MEXICAN SEGREGATION IN A SOUTH TEXAS TOWN* 17 (2015); Cybelle Fox & Irene Bloemraad, *Beyond “White By Law:” Explaining the Gulf in Citizenship Acquisition between Mexican and European Immigrants, 1930, 94 SOC. FORCES* 181, 184 (2015); Kenneth Prewitt, *Racial Classification in America: Where Do We Go from Here?*, 134 *DAEDALUS* 5, 7 (2005).

¹⁶⁸ See generally Patrick Weil, *Races at the Gate: A Century of Racial Distinctions in American Immigration Policy (1865–1965)*, 15 *GEO. IMMIGR. L.J.* 625 (2001). In 1911, the U.S. Immigration Commission, established by Congress to study the subject of immigration, published a book to facilitate the classification of immigrants seeking entry into the United States. *U.S. IMMIGRATION COMM’N, DICTIONARY OF RACES OR PEOPLES*, S. Doc. No. 61-662 (3d Sess. 1911).

¹⁶⁹ See, e.g., Naturalization Act of 1790, ch. 3, § 2169, 1 Stat. 103-04 (Mar. 26, 1790), Revised Statutes Title XXX (U.S. Comp. Stat. § 4358) [hereinafter Naturalization Act of 1790]; Naturalization Act of 1795, 1 Stat. 414; Naturalization Act of June 18, 1798, 1 Stat. 566; Naturalization Act of April 12, 1802, 2 Stat. 153.

¹⁷⁰ See, e.g., BENJAMIN FRANKLIN, *OBSERVATIONS CONCERNING THE INCREASE OF MANKIND, PEOPLING OF COUNTRIES, ETC.* ¶ 24 (1755) (arguing “[t]hat the Number of purely white People in the World is proportionably very small,” and it excludes those from Africa, Asia, and the Americas as well as numerous Europeans, such as Spaniards, Italians, Russians, Swedes, and most Germans).

¹⁷¹ Act of Feb. 18, 1875, ch. 80, § 1, 18 Stat. 318.

¹⁷² See Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (1882) (prohibiting the immigration of Chinese laborers into the United States). See generally ROGER DANIELS, *GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882* (2004); BILL ONG HING, *MAKING AND REMAKING ASIA AMERICA THROUGH IMMIGRATION POLICY, 1850-1990* (1993).

lished legal differences to the meaning of white.¹⁷³ Dozens of cases attempted to explain who was—and was not—white.¹⁷⁴

In *Ozawa v. United States*, for example, the Supreme Court considered the application for U.S. citizenship by an individual of Japanese ancestry.¹⁷⁵ “That he was well qualified by character and education” was conceded by federal officials.¹⁷⁶ Yet his application was challenged because he was not considered a “free white person” as required by the naturalization statute.¹⁷⁷ The Supreme Court agreed. To the Court, it was significant that the naturalization statute was intended “to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified.”¹⁷⁸ In assessing the meaning of the term “white person,” the Court equated color with race and, specifically, “what is popularly known as the Caucasian race.”¹⁷⁹ Any other approach would be impracticable because skin color “differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races.”¹⁸⁰ Because an individual of Japanese ancestry was “clearly of a race which is not Caucasian,” he was not a “free white person” eligible for naturalization.¹⁸¹ Despite its holding, the Court pointed out that neither the naturalization statute nor its decision implied the “individual unworthiness or racial inferiority” of the Japanese people.¹⁸²

The following year, the Supreme Court issued a similar decision. In *United States v. Bhagat Singh Thind*, the Court considered whether “a high-caste Hindu, of full Indian blood, born in Amritsar, India” was a white person as required by the naturalization statute.¹⁸³ The Court acknowledged the complexities of defining both color and race. But the Court declined to apply the racial standard it used in *Ozawa* to assess eligibility. It seemed to recog-

¹⁷³ See generally Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595 (2005); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998).

¹⁷⁴ See, e.g., *In re Burton*, 1 AK 111 (1900) (discussing whether a Native American was a white person); *In re Rodriguez*, 81 F. 337 (W.D. Tx. 1897) (discussing whether a Mexican national was white); *Matter of San C. Po.*, 7 Misc. 471 (N.Y. Misc. 1894) (discussing whether Burmese national was white); *In re Kanaka Nian*, 21 Pac. (Utah) 993 (1889) (discussing whether a Native Hawaiian was white).

¹⁷⁵ 260 U.S. 178 (1922). See generally Devon W. Carbado, *Yellow by Law*, 97 CALIF. L. REV. 633 (2009).

¹⁷⁶ *Ozawa*, 260 U.S. at 189.

¹⁷⁷ Naturalization Act of 1790, *supra* note 169.

¹⁷⁸ *Ozawa*, 260 U.S. at 195.

¹⁷⁹ *Id.* at 197.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 198.

¹⁸² *Id.*

¹⁸³ 261 U.S. 204 (1923). See generally Jennifer Snow, *The Civilization of White Men: The Race of Hindu in United States v. Bhagat Singh Thind*, in RACE, NATION, AND RELIGION IN THE AMERICAS 259 (Henry Goldschmidt & Elizabeth McAlister eds., 2004). The U.S. Immigration Service used the term “Hindu” to refer to “any native of India.” U.S. IMMIGRATION COMM’N, *supra* note 168, at 75.

nize the speculative processes associated with “ethnological reasoning.”¹⁸⁴ Instead, it relied on the common usage of the term “free white persons,” as understood by “the common man from whose vocabulary they were taken.”¹⁸⁵ The Court indicated the “average man knows perfectly well that there are unmistakable and profound differences between . . . the blond Scandinavian and the brown Hindu.”¹⁸⁶ When the words “free white persons” were “interpreted in accordance with the understanding of the common man,” it was evident that children born of Hindu parents were ineligible for naturalization, as were all others of Asian ancestry.¹⁸⁷

In 1952, Congress removed race and color distinctions from immigration and naturalization laws, although the vestiges of these distinctions would remain for decades.¹⁸⁸

C. 1954–2022: Structural Racism and the Perpetuation of Color

In the midst of the growing civil rights movement and the rise of the Second Reconstruction, the Supreme Court developed a more nuanced understanding of both color and equality.¹⁸⁹ In *Hernandez v. Texas*, the Court considered whether the systematic exclusion of persons of Mexican ancestry from a criminal jury in Jackson County, Texas was a violation of the Equal Protection Clause.¹⁹⁰ To establish the existence of group discrimination, the Court considered evidence from the local community, including signs at the courthouse that directed “Colored Men” and “*Hombres Aqui*” to separate restroom facilities.¹⁹¹ Based on this evidence, the Court concluded that “persons of Mexican descent” were considered “distinct from ‘whites’” in Jackson County.¹⁹² Having established the existence of a discriminatory class, the Court held that constitutional protections extended beyond the “white” and “Negro” classes and included other colors, races, and groups, such as those of Mexican ancestry.¹⁹³ As the Court noted, “community prejudices are not static, and from time to time other differences from the community norm

¹⁸⁴ *Thind*, 261 U.S. at 210.

¹⁸⁵ *Id.* at 209.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 214.

¹⁸⁸ See FITZGERALD & MARTIN, *supra* note 73, at 82; Marian L. Smith, *INS Administration of Racial Provisions in U.S. Immigration and Nationality Law Since 1898*, 34 PROLOGUE MAG. 90 (Summer 2002).

¹⁸⁹ See generally MANNING MARABLE, *RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION AND BEYOND IN BLACK AMERICA, 1945–2006* (3rd ed. 2007); RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* (2004).

¹⁹⁰ 347 U.S. 475 (1954). See generally Ian F. Haney Lopez, *Retaining Race: LatCrit Theory and Mexican American Identity in Hernandez v. Texas*, 2 HARV. LATINO L. REV. 279 (1997); see also Kristi L. Bowman, *The New Face of School Desegregation*, 50 DUKE L.J. 1751 (2001).

¹⁹¹ *Hernandez*, 347 U.S. at 480. In Spanish, the phrase “*Hombres Aqui*” means “men here.” The Court determined the phrase was directed at men of Mexican descent.

¹⁹² *Id.* at 479.

¹⁹³ See *id.* at 477–78.

may define other groups which need the same protection.”¹⁹⁴ The Fourteenth Amendment protected such groups from unequal treatment. *Hernandez* would become even more significant because of another Supreme Court decision issued two weeks later.

In *Brown v. Board of Education*, the Supreme Court ended “separate but equal” as a legal doctrine by holding that the segregation of white and “colored children” violated equal protection.¹⁹⁵ Color could no longer be used in such an explicit and repressive manner. According to the Court, “in the field of public education the doctrine of ‘separate but equal’ has no place.”¹⁹⁶ The Court’s reasoning was that segregation in educational settings was unconstitutional because it had “a detrimental effect upon the colored children” by instilling in them “a sense of inferiority.”¹⁹⁷ This approach has been subject to some criticism because it relied on social science to reject legal segregation.¹⁹⁸ Nonetheless, *Brown* was both a moral and legal repudiation of *Plessy*. Subsequent decisions extended the equality principles of *Brown* to all facets of American life.¹⁹⁹ Despite these rulings, the inequities generated by entrenched racism ensured that “separate but equal” would be perpetuated in a different form.

This new regime of structural racism—where public and private norms, rules, and institutions reinforce and perpetuate racial inequality—would survive the civil rights battles of the 1960s and would continue into the next century.²⁰⁰ Unlike its predecessors, which lived openly in law, structural racism is pernicious because it hides in plain sight, even within the pillars of

¹⁹⁴ *Id.* at 478 (“The Fourteenth Amendment is not directed solely against discrimination due to a ‘two-class theory’—that is, based upon differences between ‘white’ and Negro.”).

¹⁹⁵ 347 U.S. 483 (1954). See generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (2004); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001).

¹⁹⁶ *Brown*, 347 U.S. at 495.

¹⁹⁷ *Id.* at 494.

¹⁹⁸ See Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 L. & CONTEMP. PROBS. 57 (1978); Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150 (1955).

¹⁹⁹ See, e.g., *Turner v. City of Memphis*, 369 U.S. 350 (1962) (equal access to private restaurant located at municipal airport); *Johnson v. Virginia*, 373 U.S. 61 (1963) (equal access to courtroom); *Gayle v. Browder*, 352 U.S. 903 (1955) (equal access to bus system); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (equal access to municipal golf course); *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955) (equal access to public beach).

²⁰⁰ See generally Zinzi D. Bailey, Justin M. Feldman & Mary T. Bassett, *How Structural Racism Works—Racist Policies as a Root Cause of U.S. Racial Health Inequities*, 384 N. ENG. J. MED. 768 (2021); Deborah N. Archer, “White Men’s Roads Through Black Men’s Homes: Advancing Racial Equity Through Highway Reconstruction,” 73 VAND. L. REV. 1259 (2020); Michael Siegel, *Racial Disparities in Fatal Police Shootings: An Empirical Analysis Informed by Critical Race Theory*, 100 B.U. L. REV. 1069 (2020); Dayna Bowen Matthew, *On Charlottesville*, 105 VA. L. REV. 269 (2019); William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KENT. L. REV. 1 (2011); Joe R. Feagin & Bernice McNair Barnett, *Success and Failure: How Systemic Racism Trumped the Brown v. Board of Education Decision*, 2004 U. ILL. L. REV. 1099 (2005); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000).

the legal system.²⁰¹ It does not require animus. Yet, it still bestows privilege to white(ness) and burden to color.

In recent decades, the Supreme Court has not used the term “people of color” in its opinions.²⁰² Two brief exceptions—albeit in dissenting opinions—are revealing. In *Adarand Constructors, Inc. v. Peña*, for example, the Supreme Court considered the appropriate level of judicial scrutiny for assessing a federal program designed to provide opportunities for socially and economically disadvantaged businesses.²⁰³ The program used “race-based presumptions” to identify such businesses.²⁰⁴ In a 5-4 decision, the Court acknowledged “[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups.”²⁰⁵ Yet the Court still required the program to undergo strict scrutiny—the most rigorous form of judicial review—because consistency in the treatment of race was necessary to achieve equality.²⁰⁶ In dissent, Justice Stevens rejected the majority’s assertion about the need for consistency, arguing that “[t]here is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.”²⁰⁷ Echoing this point, Justice Ginsburg stated that racial inequality continues to exist in this country—manifestations “of a system of racial caste only recently ended. . . .”²⁰⁸ From job interviews and business transactions to the search for housing, Justice Ginsburg noted “[p]eople of color . . . still face discriminatory treatment.”²⁰⁹ In fact, this discrimination had become structural, as “[b]ias both conscious and unconscious, reflecting traditional and unexamined habits of thought,” perpetuated subjugation, and undermined the equal protection of the law.²¹⁰ The dissenting opinions made clear that a color-blind approach to racial justice would not achieve equality.

In *Utah v. Strieff*, the Supreme Court upheld an arrest and subsequent conviction for drug possession despite the police officer’s lack of a constitutional basis for the initial stop.²¹¹ While this case involved a white defendant,

²⁰¹ See JOE R. FEAGIN, *SYSTEMIC RACISM: A THEORY OF OPPRESSION* (2006); LAWRENCE E. MITCHELL, *STACKED DECK: A STORY OF SELFISHNESS IN AMERICA* (1998); Eric Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997).

²⁰² Throughout its history, the Supreme Court has used the term “people of color” in fifteen cases. The Court has used the term “person of color” in sixty-four cases. The Court’s use of the term “person of color” typically occurs in citations to state legislation or reports. See, e.g., *Timbs v. Indiana*, 139 S. Ct. 682, 697 (2019) (Thomas, J., concurring) (referencing congressional report); *Bond v. United States*, 572 U.S. 844, 892 (Thomas, J., concurring in part) (referencing South Carolina law); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 845 (2010) (Thomas, J., concurring in part) (referencing Georgia law). The term “people of color” appears in 113 federal appeals court decisions and 610 district court cases.

²⁰³ 515 U.S. 200 (1995).

²⁰⁴ *Id.* at 204.

²⁰⁵ *Id.* at 237.

²⁰⁶ *Id.* at 224, 229–30.

²⁰⁷ *Id.* at 243 (Stevens, J., dissenting).

²⁰⁸ *Id.* at 273 (Ginsburg, J., dissenting).

²⁰⁹ *Id.*

²¹⁰ *Id.* at 274.

²¹¹ 579 U.S. 232 (2016).

the disproportionate impact of police stops on “black and brown” people was evident.²¹² Citing the work of W.E.B. Du Bois, James Baldwin, Ta-Nehisi Coates, and Michelle Alexander, Justice Sotomayor noted in dissent that “people of color are disproportionate victims” of suspicionless stops by police.²¹³ They are, in fact, “canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere.”²¹⁴ It is difficult to read this passage without thinking of George Floyd, Eric Garner, Breonna Taylor, and countless other Black men and women who have suffocated at the hands and knees of police.

Congressional use of the term “people of color” has changed throughout history.²¹⁵ Since the Second Reconstruction, Congress has referenced “color” rather than “people of color” in legislation. The word “color” is identified in civil rights legislation as one of several protected categories.²¹⁶ For example, the Civil Rights Act of 1964 prohibits discrimination on the basis of “race, color, religion, sex, or national origin.”²¹⁷ The Voting Rights Act of 1965 prohibits voting qualifications that deny or abridge the right of any citizen to vote on account of “race or color.”²¹⁸ The Fair Housing Act of 1968 prohibits discrimination in the sale or rental of housing on the basis of “race, color, religion, sex, familial status, or national origin.”²¹⁹ Color is acknowledged in other ways, such as through references to ethnicity or minority status.²²⁰ In 2022, the term “people of color” made one brief appearance

²¹² *Id.* at 254 (Sotomayor, J., dissenting).

²¹³ *Id.* (citing TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015); MICHELE ALEXANDER, *THE NEW JIM CROW* (2010); JAMES BALDWIN, *THE FIRE NEXT TIME* (1963); W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* (1903)).

²¹⁴ *Id.* (citing LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 274–83 (2002)).

²¹⁵ The term “people of color” was used occasionally as a description in federal legislation. *See, e.g.*, Pub. L. 107-255, 116 Stat. 1734 (2002) (Joint Resolution recognizing the work of Patsy Takemoto Mink and her influence on “millions of women and people of color across America”). In contrast, the term “person of color” was used more frequently in federal legislation and often with legal consequences. *See, e.g.*, An Act: Making Appropriations for the Support of the Army for the Year Ending the Thirtieth of June, Eighteen Hundred and Sixty-Five, and for Other Purposes, Ch. 124, 13 Stat. 126 (1864) (providing that all persons of color engaged in U.S. military service shall receive the same equipment and support as all other soldiers).

²¹⁶ *See* 42 U.S.C. § 1996b (interethnic adoption); 42 U.S.C. § 2000e-2 (prohibiting unlawful employment practices); 42 U.S.C. § 200e-16b (discriminatory practices prohibited).

²¹⁷ Civil Rights Act of 1964, 42 U.S.C. § 2000a.

²¹⁸ Voting Rights Act of 1965, 52 U.S.C. § 10101.

²¹⁹ Fair Housing Act, 42 U.S.C. § 3601.

²²⁰ For example, the Small Business Administration (“SBA”) maintains a program designed to assist small businesses that are owned by “socially disadvantaged individuals.” The SBA defines this group to include “those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities.” 13 C.F.R. § 124.103(a). There is a rebuttable presumption that the following individuals are socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands,

in federal legislation. The Federal Housing Finance Agency is required to seek diversity in its workforce by placing employment advertisements in publications oriented toward women and “people of color.”²²¹

Despite the advances of the Second Reconstruction, structural racism still exists within the federal code. Several statutes—with origins in the era of the First Reconstruction—continue to reference “white citizens” as the baseline for assessing equality. For example, 42 U.S.C. § 1981 protects the right of all U.S. citizens to make and enforce contracts as well as to receive the equal benefit of all laws and proceedings “as is enjoyed by white citizens.”²²² 42 U.S.C. § 1982 protects the right of all U.S. citizens to acquire property “as is enjoyed by white citizens.”²²³ Thus, both statutes measure compliance by reference to the rights “enjoyed by white citizens.”

Some state and local jurisdictions still use the term “people of color” and its derivations. For example, Indiana has established several programs to assist vulnerable populations, including “young persons of color.”²²⁴ The Indiana code defines a “young person of color” as anyone under the age of eighteen who belongs to one of the following groups: Black or African American, Hispanic or Latino, Asian, American Indian, Alaska Native, or Native Hawaiian and other Pacific Islander.²²⁵ In Washington, the state legislature created an interagency coordinating council to address health disparities among women and people of color.²²⁶ Massachusetts uses the term in legislation that prohibits discrimination against “colored persons of African descent” in the sale of life insurance policies.²²⁷ Similar references appear in other state codes.²²⁸

Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); and Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal). *Id.* § 124.103(b). This regulatory provision has been subject to litigation. *See Vitolo v. Guzman*, 999 F.3d 353, 357 (6th Cir. 2021).

²²¹ 12 U.S.C. § 4520(f)(2).

²²² 42 U.S.C. § 1981 (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by *white citizens*, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”) (emphasis added).

²²³ 42 U.S.C. § 1982 (“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by *white citizens* thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”) (emphasis added).

²²⁴ IND. CODE § 4-23-30.2-11 (2022).

²²⁵ IND. CODE § 4-23-30.2-7 (2022).

²²⁶ WA. REV. CODE 43.20.270 (2022).

²²⁷ MASS. GEN. LAWS ch. 175, § 122 (2020). While the statute is titled, “Discrimination against Colored Persons of African Descent,” the text of the statute uses broader language by referencing “a person of color.”

²²⁸ *See, e.g.*, CAL. PUB. CONT. CODE § 2051 (West 2020) (defining “minority” for purposes of certification of minority and women business enterprises to include “an ethnic person of color” who is also a member of an enumerated group).

Finally, the federal census questionnaire reveals the country's changing approach to color.²²⁹ The first census of 1790 asked for information about free white males and females, other free persons, and enslaved people.²³⁰ In the mid-nineteenth century, questionnaires asked about color and distinguished among free whites, free colored persons, and enslaved people.²³¹ In 1880, the census asked about color and distinguished among individuals who identified as White, Black, Mulatto, Chinese (which included all east Asians), or American Indian. In 1890, the focus on color was replaced by race, and the census questionnaire distinguished among White, Black, Mulatto, Quadroon, Octoroon, Chinese, Japanese, and Indian.²³² Between 1900 and 1940, the census questionnaires asked about color and race but did not distinguish between them. Ironically, it was in the 1920 census that Homer Plessy—a person of color in the Supreme Court's decision of 1897—was identified as white.²³³ Reflecting the growing diversity of the U.S. population, the 1930 census included instructions on how to report the race of interracial persons.²³⁴ It also began incorporating questions about American Indians, Mexicans, Filipinos, Hindus, and Koreans. Since 1950, U.S. census questionnaires have focused exclusively on race.

The 2020 federal census questionnaire reflects the diversity of the American population. But it also highlights the complexity and difficulty of creating a taxonomy for classifying human beings.²³⁵ The census questionnaire lists fourteen distinct racial categories: White, Black or African Ameri-

²²⁹ See generally KENNETH PREWITT, *WHAT IS YOUR RACE: THE CENSUS AND OUR FLAWED EFFORTS TO CLASSIFY AMERICANS* (2013); *ENCYCLOPEDIA OF THE U.S. CENSUS* (Margo J. Anderson, Constance F. Citro & Joseph J. Salvo eds., 2d ed. 2011); Anna Brown, *The Changing Categories the U.S. Census Has Used to Measure Race*, PEW RESEARCH CENTER (Feb. 25, 2020), <https://www.pewresearch.org/fact-tank/2020/02/25/the-changing-categories-the-u-s-has-used-to-measure-race/>.

²³⁰ *Index of Questions: 1790*, U.S. CENSUS BUREAU (Dec. 8, 2021), https://www.census.gov/history/www/through_the_decades/index_of_questions/1790_1.html [<https://perma.cc/K7EQ-2D5A>].

²³¹ *Index of Questions: 1840*, U.S. CENSUS BUREAU (Dec. 8, 2021), https://www.census.gov/history/www/through_the_decades/index_of_questions/1840_1.html [<https://perma.cc/BB45-6T5W>].

²³² *Index of Questions: 1890*, U.S. CENSUS BUREAU (Dec. 8, 2021), https://www.census.gov/history/www/through_the_decades/index_of_questions/1890_1.html [<https://perma.cc/2TMX-D6N3>].

²³³ LUXENBERG, *supra* note 153, at 489–90.

²³⁴ *Index of Questions: 1930*, U.S. CENSUS BUREAU (Dec. 8, 2021), https://www.census.gov/history/www/through_the_decades/index_of_questions/1930_1.html [<https://perma.cc/Q6RB-ZNKX>].

²³⁵ See Sujata Gupta, *To Fight Discrimination, the U.S. Census Needs a Different Race Question*, SCIENCE NEWS (Mar. 8, 2020), <https://www.sciencenews.org/article/census-2020-race-ethnicity-questions> [<https://perma.cc/G4GG-KP5R>]; Janai Nelson, *Counting Change: Ensuring an Inclusive Census for Communities of Color*, 119 COLUM. L. REV. 1399 (2019); Richard Alba, *There's a Big Problem with How the Census Measures Race*, WASH. POST (Feb. 6, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/06/theres-a-big-problem-with-how-the-census-measures-race/> [<https://perma.cc/N9WV-X3W8>]; Manav Bhatnagar, *Identifying the Identified: The Census, Race, and the Myth of Self-Classification*, 13 TEX. J. CIV. LIB. & CIV. RTS. 85 (2007); Naomi Mezey, *Erasure and National Recognition: The Census, Race and the National Imagination*, 97 NW. L. REV. 1701 (2003).

can, American Indian or Alaska Native, Chinese, Vietnamese, Native Hawaiian, Filipino, Korean, Samoan, Asian Indian, Japanese, Chamorro, other Asian (such as Pakistani, Cambodian, Hmong), and other Pacific Islander (such as Tongan, Fijian, and Marshallese).²³⁶ The census also allows respondents to identify as “some other race.” In addition, respondents are asked to identify their origins. For example, respondents who selected White are provided several examples of origins, including German, Irish, English, Italian, Lebanese, and Egyptian.²³⁷ Respondents who selected Black or African American may indicate African American, Jamaican, Haitian, Nigerian, Ethiopian, Somali, or other place of origin.²³⁸ Respondents who selected American Indian or Alaska Native are asked to identify the name of their enrolled or principal tribe, such as Navajo Nation, Blackfeet Tribe, Mayan, Aztec, Native Village of Barrow Inupiat Traditional Government, or Nome Eskimo Community.²³⁹ Finally, the questionnaire asks respondents to identify whether they are of Hispanic, Latino, or Spanish origin, and it lists several options, including Mexican, Mexican American or Chicano, Puerto Rican, Cuban, or another form of Hispanic, Latino, or Spanish origin.²⁴⁰ In the 2020 federal census questionnaire, the only mention of color is the reference to the white or Black races.

* * ** *

Data mining can offer a different perspective on the use of collective terminology.²⁴¹ Through Google Ngram, the frequency of use for the term “people of color” in printed English language sources can be measured over time. While the dataset is limited by the number of printed materials available through Google’s English language corpus, it offers an innovative method for measuring use of the term over time.

²³⁶ U.S. CENSUS BUREAU, CENSUS 2020, at 2, Quest. No. 9 (2020), <https://www2.census.gov/programs-surveys/decennial/2020/technical-documentation/questionnaires-and-instructions/questionnaires/2020-informational-questionnaire.pdf> [<https://perma.cc/5BDA-S4J6>].

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at Quest. No. 8. The questionnaire offers several examples, including Salvadoran, Dominican, Colombian, Guatemalan, Spaniard, and Ecuadorian.

²⁴¹ Data mining consists of extracting information and identifying patterns from large caches of data. See generally JIAWEI HAN, MICHELLE KAMBER & JIAN PEI, DATA MINING: CONCEPTS AND TECHNIQUES 1–2 (3d ed. 2013).

TABLE 3: GOOGLE NGRAM
 (USE OF THE TERM “PEOPLE OF COLOR”
 AND THREE VARIANTS)²⁴²



According to the Google English language corpus, the term first appeared in the early nineteenth century, although it was originally phrased as “people of colour.” Several variants soon emerged, including “person of colour” and “person of color.” The term “people of color” became the preferred phrasing by 1940. Its use increased significantly in the 1950s, coinciding with the rise of the civil rights movement in the United States. By then, the term was much broader in scope. The use of the term reached its peak in 2001. By that time, other terms had entered the lexicon and were also being used, such as “minorities,” “indigenous people,” “marginalized groups,” and “disadvantaged communities.” But “people of color” remains an accepted and common term.

II. DEBATING COLLECTIVE TERMINOLOGY

In the United States, the term “people of color” refers to individuals who are not white—an admittedly imprecise definition. This includes a diverse group of people who are differentiated in multiple ways, including skin color, race, ethnicity, religion, and national origin.²⁴³ For 232 years, the term “people of color” has been used in the United States to identify virtually every non-white group in the country.

²⁴² This Google Ngram plots the frequency in which the term “people of color” and three variants appeared in English language publications available through the Google search engine from 1700 through 2019. (Search query from the corpus “English (2019)” with a smoothing of three.) For an explanation of Google Ngram including its methodology, see GOOGLE BOOKS NGRAM VIEWER, <https://books.google.com/ngrams/info>.

²⁴³ See generally HANEY LOPEZ, *supra* note 24, at xxi–xxii; JACOBSON, *supra* note 33, at 13–14.

A. The Benefits of Color

The term “people of color” is a form of collective terminology.²⁴⁴ To supporters, the term has significant benefits.

First, it reflects the shared experiences of marginalized groups living in a racialized society and who suffer at the hands of white privilege. People of color face many of the same challenges that arise out of discrimination and subordination—poverty, inequality, and disparate treatment under the law.²⁴⁵ This dynamic has existed throughout American history and has affected every non-white group in the country. The term brings together these distinct groups. By embracing the term, people of color also gain authorship to their name and take ownership of their collective history.²⁴⁶ To be clear, the experiences of people of color are similar, but they are not the same.²⁴⁷ Each group has a unique history—from the Black victims of slavery to the Japanese American victims of internment during the Second World War. And each group faces its own unique struggles.

Second, the term supports collective action by promoting community building, solidarity, and allyship from individuals who identify as people of color.²⁴⁸ It generates power by facilitating the formation of coalitions, a strategy many marginalized groups have pursued in speaking truth to power.²⁴⁹ As explained by Efrén Pérez, “‘your’ political battle is ‘my’ battle because we

²⁴⁴ See generally Adam Alter, *The Power of Names*, NEW YORKER (May 29, 2013), <https://www.newyorker.com/tech/annals-of-technology/the-power-of-names> [<https://perma.cc/9VUJ-4AJ4>]; Peter J. Aspinall, *Collective Terminology to Describe the Minority Ethnic Population: The Persistence of Confusion and Ambiguity in Usage*, 36 SOCIOLOGY 803 (2002).

²⁴⁵ See, e.g., THE COST OF RACISM FOR PEOPLE OF COLOR (Alvin N. Alvarez, Christopher T. H. Liang & Helen A. Neville eds., 2016); PEOPLE OF COLOR IN THE UNITED STATES: CONTEMPORARY ISSUES IN EDUCATION, WORK, COMMUNITIES, HEALTH, AND IMMIGRATION (Kofi Lomotey ed., 2016); JAIME SEBA, *GAY PEOPLE OF COLOR: FACING PREJUDICES, FORGING IDENTITIES* (2011); LAWYERS FOR ONE AMERICA, *BAR NONE: REPORT TO THE PRESIDENT OF THE UNITED STATES ON THE STATUS OF PEOPLE OF COLOR AND PRO BONO SERVICES IN THE LEGAL PROFESSION* (2000).

²⁴⁶ See Edward Yuen, *Social Movements, Identity Politics and the Genealogy of the Term “People of Color,”* 19 NEW POL SCI. 97, 100 (1997) (noting the term “people of color” reflects an identity “charged with counter-hegemonic politics simply by its naming”); Gregory Coles, *The Exorcism of Language: Reclaimed Derogatory Terms and Their Limits*, 78 COLL. ENG. 424 (2016).

²⁴⁷ Cf. HORTON, *supra* note 51, at 3 (“At crucial times, at points of crisis, this diverse people united to support common goals. It was not necessary that they walk lockstep in order to form a community of common direction. There were many black experiences, yet one overwhelming common black history.”).

²⁴⁸ JOSEPH S. TUMAN, *COMMUNICATING TERROR: THE RHETORICAL DIMENSIONS OF TERROR* 36–37 (2003); Deborah Ramirez, *Multicultural Empowerment: It’s Not Just Black and White Anymore*, 47 STAN. L. REV. 957 (1995).

²⁴⁹ See, e.g., Marie-Amelie George, *The LGBT Disconnect: Politics and Perils of Legal Movement Formation*, 2018 WIS. L. REV. 504; Carey E. Flanders, *Under the Bisexual Umbrella: Diversity of Identity and Experience*, 17 J. BISEXUALITY 1 (2017). But even social justice coalitions may experience internal conflict. See William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997).

are all *people of color*.²⁵⁰ While they have gained significant influence in recent years, people of color still constitute a numerical minority in the United States.²⁵¹ The term thus offers an inclusive and empowering counterpoise to white privilege. To reject the term is to weaken the movement.²⁵²

Third, the term “people of color” is preferred to other phrasing, such as non-whites.²⁵³ Writing in a 1988 *New York Times* article about the term “people of color,” William Safire noted pointedly, “[w]hy should anybody want to define himself by what he is not?”²⁵⁴ White should not be considered the standard from which all others are assessed and distinguished. Such criticisms raise serious concerns about existing federal civil rights legislation, which continues to treat “white citizens” as the baseline.²⁵⁵ While the term “colored people” was used during the nineteenth and twentieth centuries, its syntax is outdated and its modern usage is exceedingly rare.²⁵⁶ Even the word “minority” is flawed.²⁵⁷ It implies marginalization and begs the question—a minority to whom?

²⁵⁰ Efrén Pérez, *(Mis)Calculations, Psychological Mechanisms, and the Future Politics of People of Color*, 6 J. RACE, ETHN. & POL. 33 (2021) (emphasis in original).

²⁵¹ However, this demographic dynamic is changing. See generally WILLIAM H. FREY, *DIVERSITY EXPLOSION: HOW NEW RACIAL DEMOGRAPHICS ARE REMAKING AMERICA* (2018); VALERIE WILSON, *ECON. POL’Y INST., PEOPLE OF COLOR WILL BE A MAJORITY OF THE AMERICAN WORKING CLASS IN 2032* (2016).

²⁵² See Nunn, *supra* note 20, at 313–21; Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1593–94 (2009).

²⁵³ See Neil H. Buchanan, *White Privilege: What It Is, What It Is Not, and How It Shapes American Discussions of Policing and the Historical Figures We Honor*, 31 U. FL. J. L. & PUB. POL’Y 100, 101 (2020) (referring to non-White people); Valerie Fontaine, *Progress Report: Women and People of Color in Legal Education and the Legal Profession*, 6 HASTINGS WOMEN’S L.J. 27 (1995) (using “non-white” intentionally in lieu of minority).

²⁵⁴ William Safire, *On Language; People of Color*, N.Y. TIMES, Nov. 20, 1988, at 18.

²⁵⁵ See *supra* text accompanying notes 222 and 223. Cf. Michael Morris, *Standard White: Dismantling White Normativity*, 104 CALIF. L. REV. 949 (2016) (addressing white normativity in the United States).

²⁵⁶ RAEL, *supra* note 98, at 102–15 (“By the end of the nineteenth century, [the term ‘colored American’] . . . had become sullied by time and the malevolent intentions of hostile whites.”). The National Association for the Advancement of Colored People (“NAACP”) is perhaps the most well-known modern use of this term. In 1909, the National Negro Committee was established in New York to address the civil rights of African Americans. PATRICIA SULLIVAN, *LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT* 6–13 (2009). Prominent members included W.E.B. Du Bois, John Dewey, Ida Wells-Barnett, and Stephen Wise. *Id.* at 12–13. The following year, the Committee proposed the creation of a permanent organization. At the insistence of Du Bois, the organization would be called the National Association for the Advancement of Colored People to proclaim “the association’s commitment to advance the interests of all dark-skinned people.” *Id.* at 15. Despite the strong connection between the term “colored persons” and segregation, the NAACP has not changed its name. According to the organization, “[t]imes change and terms change. Racial designations go through phases; at one time, Negro was accepted, at an earlier time, colored and so on. This organization has been in existence for 80 years and the initials NAACP are part of the American vocabulary, firmly embedded in the national consciousness, and we feel it would not be to our benefit to change our name.” WILLIAM SAFIRE, *SAFIRE’S POLITICAL DICTIONARY* 536 (2008) (quoting NAACP spokesperson James Williams). Reflecting its broad mandate, the NAACP now addresses all forms of discrimination based on race.

²⁵⁷ See Rinku Sen, “Minorities?” *It’s Not Even Accurate. Try “People of Color,”* COLOR LINES (May 18, 2012), <https://www.colorlines.com/articles/minorities-its-not-even-accurate-try->

A different approach—one that uses acronyms to reflect several distinct groups—has its own shortcomings. For example, “BIPOC” is used in the United States to identify “Black, Indigenous, and People of Color.”²⁵⁸ The term “non-black people of color” also appears in conversations about race.²⁵⁹ In the United Kingdom, “BAME” is used to reference “Black, Asian, and Minority Ethnic.”²⁶⁰ Yet these neologisms raise significant concerns.²⁶¹ They inevitably prioritize some groups over others, essentially generating a system of *primus inter pares*.²⁶² To be fair, this is often intentional. Advocates of BIPOC argue such prioritization is necessary to address centuries of oppression against Black and indigenous people.²⁶³ But as a result, both terms explicitly marginalize some groups by placing them within a residual category, whether it is “people of color” in BIPOC or “minority ethnic” in BAME.²⁶⁴

people-color [<https://perma.cc/Z4HP-9G4B>]; Lewis M. Killian, *What or Who is a “Minority?”*, 10 MICH. SOC. REV. 18 (1996).

²⁵⁸ See Sandra E. Garcia, *Where Did BIPOC Come From?*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/article/what-is-bipoc.html> [<https://perma.cc/ZEX6-VK6Q>] (describing the use of the acronym BIPOC); see also THE BIPOC PROJECT, www.thebipocproject.org (“We use the term BIPOC to highlight the unique relationship to whiteness that Indigenous and Black (African Americans) people have, which shapes experiences of and relationship to white supremacy for all people of color within a U.S. context.”).

²⁵⁹ See, e.g., Ana Cecilia Pérez, *As Non-Black POC, We Need to Address Anti-Blackness*, YES! MAGAZINE (July 6, 2020), <https://www.yesmagazine.org/opinion/2020/07/06/non-black-poc-anti-blackness> [<https://perma.cc/J9H7-VCB9>]; Sharon Park, *Non-Black People of Color Need to Start Having Conversations About the Anti-Blackness in Our Communities*, DOSOMETHING.ORG (Oct. 14, 2020), <https://www.dosomething.org/us/articles/our-role-as-non-black-people-of-color-in-disrupting-racism> [<https://perma.cc/KRV2-ECPM>]; Tamara K. Nopper, *Minority, Black and Non-Black, People of Color: “New” Color-Blind Racism and the U.S. Small Business Administration’s Approach to Minority Business Lending in the Post-Civil Rights Era*, 37 CRIT. SOC. 651 (2011).

²⁶⁰ See BIRMINGHAM CITY UNIVERSITY, *BAME: A REPORT ON THE USE OF THE TERM AND RESPONSES TO IT* (2021); Myriam Toua, *BAME Background Meaning: What is BAME Background?*, EXPRESS (June 2, 2020), <https://www.express.co.uk/news/uk/1290431/BAME-background-meaning-What-is-BAME-background-BAME-people> [<https://perma.cc/BW58-Q8GS>] (describing the use of the acronym BAME in the United Kingdom); see also JOHN PITTS, *AFROPEAN: NOTES FROM BLACK EUROPE* (2019) (using the term “Afropean” to describe individuals of African ancestry living in Europe).

²⁶¹ See Meera E. Deo, *Why BIPOC Fails*, 107 VA. L. REV. ONLINE 115 (2021); Peter J. Aspinall, *Ethnic/Racial Terminology as a Form of Representation: A Critical Review of the Lexicon of Collective and Specific Terms in Use in Britain*, 4 GENEALOGY 87 (2020); Constance Grady, *Why the Term “BIPOC” Is So Complicated, Explained by Linguists*, VOX (June 30, 2020), <https://www.vox.com/2020/6/30/21300294/bipoc-what-does-it-mean-critical-race-linguistics-jonathan-rosa-deandra-miles-hercules> [<https://perma.cc/PYE8-KLQ7>].

²⁶² See Paul MacInnes, *“BAME” Term Offends Those It Attempts to Describe, Sporting Survey Finds*, THE GUARDIAN (Nov. 20, 2020), <https://www.theguardian.com/sport/2020/nov/12/bame-term-offends-those-it-attempts-to-describe-sporting-survey-finds-sporting-equals> [<https://perma.cc/QFY3-AYFU>]; Nora Fakim & Cecilia Macaulay, *“Don’t Call Me BAME,” Why Some People are Rejecting the Term*, BBC NEWS (June 30, 2020), <https://www.bbc.com/news/uk-53194376> [<https://perma.cc/F57G-36ZC>].

²⁶³ THE BIPOC PROJECT, *supra* note 258; Grady, *supra* note 261; Garcia, *supra* note 258.

²⁶⁴ Deo, *supra* note 261, at 193 (BIPOC “can be misleading, overly simplistic, and even incorrect when centering the experiences of Black and Indigenous communities over others within the people of color umbrella.”). See generally Amy Harmon, *BIPOC or POC? Equity or Equality? The Debate Over Language on the Left*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/2021/11/01/us/terminology-language-politics.html> [<https://perma.cc/ED9F-R5EY>].

Thus, these terms can undermine the unity and solidarity they are meant to promote. They also lack the simplicity and clarity offered by “people of color.”²⁶⁵

Finally, the term “people of color” challenges the narrative of a color-blind society.²⁶⁶ To be anti-racist requires color consciousness.²⁶⁷ The United States was built as a racialized nation, and so it remains.²⁶⁸ Despite progress, people of color still suffer because of structural racism as well as implicit bias.²⁶⁹ Indeed, the power of these phenomena resides in their ability to exert a hidden, subtle, and yet overwhelming force.²⁷⁰ Denying that color matters deters meaningful reflection and eventual change.²⁷¹ As Justice Stevens noted in *Adarand Constructors, Inc.*, “irrational racial prejudice—along with its lingering effects—still survives” and ignoring it simply perpetuates racial subordination.²⁷² A commitment to color consciousness, according to Michelle Alexander, is also empathic. It “places faith in our capacity as humans to show care and concern for others, even as we are fully cognizant of race and possible racial differences.”²⁷³ Thus, the term “people of color” is essential for

²⁶⁵ In the United States, for example, the term “indigenous” is generally not used to describe the Native American population. In addition, recognition of Indian tribes and membership within these tribes is often contested. See NATIONAL CONGRESS OF AMERICAN INDIANS, TRIBAL NATIONS AND THE UNITED STATES: AN INTRODUCTION (2019).

²⁶⁶ See HANEY LÓPEZ, *supra* note 24, at 147–62; EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 2–4 (3d ed. 2009); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM xviii–xxi (1999); Michael Morris, *Standard White: Dismantling White Normativity*, 104 CALIF. L. REV. 949 (2015).

²⁶⁷ IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 110 (2019); Nunn, *supra* note 20, at 315–16.

²⁶⁸ See generally A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978); Charisse Jones, *Black and White Still Define America as Biden Prepares to Take Office, Country Deals with Capitol Riots Aftermath*, USA TODAY (Jan. 14, 2021), <https://www.usatoday.com/story/money/2021/01/14/black-america-history-social-economic-inequalities/5759328002/> [https://perma.cc/DH3U-NX79]; Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000).

²⁶⁹ See generally MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE (2013); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

²⁷⁰ See Isabel Wilkerson, *America’s Enduring Caste System*, N.Y. TIMES MAG., July 5, 2020, at 26, 52 (“Modern day caste protocols are often less about overt attacks or conscious hostility. They are like the wind, powerful enough to knock you down but invisible as they go about their work.”). Indeed, there is a strong analogy between the Indian caste system and racial discrimination in the United States. See also HINSBRUNER, *supra* note 50, at 19; BERLIN, *supra* note 54, at 15.

²⁷¹ See Molly P. Matter, *The Shaw Claim: The Rise and Fall of Colorblind Jurisprudence*, 18 SEATTLE J. SOC. JUST. 25 (2020); Elise C. Boddie, *The Indignities of Color Blindness*, 64 UCLA L. REV. DISCOURSE 64 (2016); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011); Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1 (1991); MIXED MESSAGES: MULTIRACIAL IDENTITIES IN THE “COLOR-BLIND ERA” (David L. Brunsma ed. 2006).

²⁷² *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243, 260 (1995) (Stevens, J., dissenting).

²⁷³ ALEXANDER, *supra* note 8, at 230; see also Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination* 101 HARV. L. REV. 1331, 1369 (1988) (arguing that race consciousness is essential for challenging subordination).

meaningful conversations about race and color.²⁷⁴ Its absence makes these conversations more difficult.

B. *The Costs of Color*

To critics, the term “people of color” has significant limitations.²⁷⁵ First, it perpetuates the color line, which distinguishes people based on skin color.²⁷⁶ The term places people of color and the white community in permanent opposition because the term lacks meaning without its own “other.” It thus promotes divisions based on immutable characteristics with historically troubling antecedents. This alone justifies eliminating color labels.²⁷⁷ Focusing on differences in skin also implicates colorism, which promotes disparate treatment within groups based on differences in skin shade or tone.²⁷⁸ Lighter shades are often privileged, even within Black and Brown communities.²⁷⁹

²⁷⁴ The failure to confront color can inhibit meaningful conversations. See Yuvraj Joshi, *Racial Transition*, 98 WASH. U. L. REV. 1 (2020); Neil S. Siegel, *The Supreme Court is Avoiding Talking About Race*, THE ATLANTIC (Aug. 7, 2020), <https://www.theatlantic.com/ideas/archive/2020/08/supreme-court-doesnt-like-talk-about-race/614944/> [<https://perma.cc/MGM3-EZWT>]; Desmond S. King & Rogers M. Smith, *Racial Orders in American Political Development*, 99 AM. POL. SCI. REV. 75 (2005).

²⁷⁵ See, e.g., Efrén Pérez, “People of Color” are Protesting: Here’s What You Need to Know About This New Identity, WASH. POST (July 2, 2020), <https://www.washingtonpost.com/politics/2020/07/02/people-color-are-protesting-heres-what-you-need-know-about-this-new-identity/> [<https://perma.cc/M57K-DPAT>]; Brooke Sparks, *Opinion: The Term “POC” Contributes to Solidarity, But Also to Erasure*, THE STUDENT LIFE (Oct. 16, 2019), <https://tsl.news/opinion-the-term-poc-contributes-to-solidarity-but-also-to-erasure/> [<https://perma.cc/6QPS-KQUK>]; Janani, *What’s Wrong with the Term “Person of Color,”* BGD (Mar. 20, 2013), <https://www.bgdblog.org/2013/03/2013321whats-wrong-with-the-term-person-of-color/> [<https://perma.cc/TQ2W-4C6X>].

²⁷⁶ See W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 125 (1903); Frederick Douglass, *The Color Line*, 132 NORTH AM. REV. 567 (1881). See generally ENOBONG HANNAH BRANCH & CHRISTINA JACKSON, BLACK IN AMERICA: THE PARADOX OF THE COLOR (2020); Sheldon Novick, *Homer Plessy’s Forgotten Plea for Inclusion: Seeing Color, Erasing Color-Lines*, 118 W. VA. L. REV. 1181 (2016).

²⁷⁷ See Kalunta-Crumpton, *supra* note 2, at 130.

²⁷⁸ See KIMBERLY NORWOOD, COLOR MATTERS: SKIN TONE BIAS AND THE MYTH OF A POST RACIAL AMERICA (2014); ALICE WALKER, IN SEARCH OF OUR MOTHER’S GARDENS (1983); Karla Cornejo Villavicencio, *The Spectacle of Latinx Colorism*, N.Y. TIMES (Aug. 1, 2021), <https://www.nytimes.com/2021/07/30/opinion/latino-racism-colorism-latinx.html> [<https://perma.cc/8CUT-YEED>]; Taylor J. Mathews & Glenn S. Johnson, *Skin Complexion in the Twenty-First Century: The Impact of Colorism on African American Women*, 22 RACE, GENDER & CLASS 248 (2015); Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705 (2000).

²⁷⁹ See PEW RESEARCH CENTER, MAJORITY OF LATINOS SAY SKIN COLOR IMPACTS OPPORTUNITY IN AMERICA AND SHAPES DAILY LIFE (2021); Ellis P. Monk, Jr., *The Unceasing Significance of Colorism: Skin Tone Stratification in the United States*, DAEDALUS 76 (Spr. 2021); Taylor J. Mathews & Glenn S. Johnson, *Skin Complexion in the Twenty-First Century: The Impact of Colorism on African American Women*, 22 RACE, GENDER & CLASS 248 (2015); Holland Cotter, *Testimony of a Cleareyed Witness*, N.Y. TIMES, Jan. 24, 2014, at C25. This phenomenon extends to Asian communities as well. See Ana Salvá, *Where Does the Asian Obsession with White Skin Come From?*, THE DIPLOMAT (Dec. 2, 2019), <https://thediplomat.com/2019/12/where-does-the-asian-obsession-with-white-skin-come-from/> [<https://perma.cc/RQK3-LP4Z>].

Second, the term is vague. The word “color” presumably refers to skin color, which itself is a subjective concept. All human beings possess skin color.²⁸⁰ In addition, the word “color” is often used as a proxy for race, which raises a distinct set of concerns. The concept of race remains deeply contested, and it is viewed as a social construct lacking scientific foundation. Its meaning is fluid through time.²⁸¹ Indeed, the “race question” has been debated for decades in the United States and throughout the world.²⁸²

Third, the term “people of color” is neither consistently applied nor universally applicable. Determining someone’s color or race often leads to arbitrary classifications.²⁸³ For example, the notorious “one-drop rule,” also known as hypodescent, was historically used to designate someone as “Black” or “colored” if any descendant met that criteria.²⁸⁴ Such rules were used to

²⁸⁰ Even people with albinism—a genetic condition that limits the production of melanin pigment—possess skin color. ALBINISM IN AFRICA: HISTORICAL, GEOGRAPHIC, MEDICAL, GENETIC, AND PSYCHOLOGICAL ASPECTS 1 (Jennifer Kromberg & Prashiela Manga eds., 2018). In fact, the lack of melanin pigment in their skin has resulted in significant persecution against people with albinism. See SHANTHA RAU BARRIGA, HUM. RTS. WATCH, OUT OF THE SHADOWS: THE RESILIENCE AND COURAGE OF PEOPLE WITH ALBINISM IN MOZAMBIQUE (2019), <https://www.hrw.org/news/2019/07/01/out-shadows-resilience-and-courage-people-albinism-mozambique> [<https://perma.cc/46DB-J53T>]; Peter Ash, *Albino Persecution Must Stop. We Are People Too*, NEWSWEEK (June 13, 2017), <https://www.newsweek.com/albinos-albinism-africa-tanzania-albinos-624463> [<https://perma.cc/897T-R9C2>]; William J. Aceves, *Two Stories About Skin Color and International Human Rights Advocacy*, 14 WASH. U. GLOBAL STUD. L. REV. 563 (2015).

²⁸¹ See KWAME ANTHONY APPIAH & AMY GUTMAN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 30 (1998); Ta-Nehisi Coates, *How Racism Invented Race in America*, THE ATLANTIC (June 23, 2014), <https://www.theatlantic.com/politics/archive/2014/06/the-case-for-reparations-a-narrative-bibliography/372000/> [<https://perma.cc/WC63-URA5>]; Michael Banton, *The Idiom of Race: A Critique of Presentism*, in THEORIES OF RACE AND RACISM, *supra* note 33, at 55, 67.

²⁸² See Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CALIF. L. REV. 1213 (1997); Robert Bernasconi, *Who Invented the Concept of Race?*, in THEORIES OF RACE AND RACISM, *supra* note 33, at 83. As early as 1950, the United Nations Educational, Scientific, and Cultural Organization (“UNESCO”) issued a statement on “The Race Question” that challenged common assumptions about race and asserted that any purported biological distinctions within humanity were far less meaningful than distinctions based on nationality, ethnicity or culture. See U.N. EDUCATIONAL, SCIENTIFIC, AND CULTURAL ORGANIZATION, FOUR STATEMENTS ON THE RACE QUESTION (1969).

²⁸³ See Uki Goñi, *Time to Challenge Argentina’s White European Self-Image*, *Black History Experts Say*, THE GUARDIAN (May 31, 2021), <https://www.theguardian.com/world/2021/may/31/argentina-white-european-racism-history> [<https://perma.cc/XUE8-UTMM>]; Laura E. Gómez, “Other” As The Nation’s 2nd-Largest Race? Latinos and the 2020 Census May Make That Happen, L.A. TIMES (Apr. 29, 2021), <https://www.latimes.com/opinion/story/2021-04-29/other-latinos-census-2020-race> [<https://perma.cc/RK4F-H3G4>]; Lucia Benavides, *Why Labeling Antonio Banderas A “Person of Color” Triggers Such a Backlash*, NPR (Feb. 9, 2020), <https://www.npr.org/2020/02/09/803809670/why-labeling-antonio-banderas-a-person-of-color-triggers-such-a-backlash> [<https://perma.cc/VUL3-GDW5>]; Rebecca Morin, *GOP Congressman on Trump Tweets: ‘I’m a Person of Color. I’m White. I’m an Anglo-Saxon.’* USA TODAY (July 17, 2019), <https://www.usatoday.com/story/news/politics/2019/07/17/rep-mike-kelly-trump-tweets-im-person-color-im-white/1762259001/> [<https://perma.cc/SN7Z-SYQ2>]. See generally Salvador Vidal-Ortiz, *On Being a White Person of Color: Using Autoethnography to Understand Puerto Ricans’ Racialization*, 27 QUALITATIVE SOCIOLOGY 179 (2004).

²⁸⁴ See Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600-1860*, 91 MINN. L. REV. 592 (2007); Christine Hickman, *The Devil and the One*

discriminate against individuals who could not establish their white lineage.²⁸⁵ It also perpetuated a stigma against individuals of mixed-race and reinforced racial boundaries, such as anti-miscegenation laws.²⁸⁶ While the one-drop rule no longer exists in most legal systems, it remains entrenched in perceptions about color, race, and class.²⁸⁷

In countries where whites represent the majority population, the term “people of color” is often used to describe a broad range of individuals who are identified by physical, social, and cultural characteristics.²⁸⁸ The unifying feature of these individuals is that they are not members of the white community. But membership within both groups continuously changes, which makes this collective terminology less valuable.²⁸⁹ Moreover, there is no consistency in how the term is used.²⁹⁰ In countries where whites do not represent the majority, the term is essentially meaningless.²⁹¹ Many of these countries do not even have a comparable word or term in their official language.²⁹²

Drop Rule: Racial Categories, African Americans, and the U.S. Census, 95 MICH. L. REV. 1161 (1997).

²⁸⁵ See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

²⁸⁶ See *Loving v. Virginia*, 388 U.S. 1 (1967).

²⁸⁷ See generally Deborah W. Post, *Cultural Inversion and the One-Drop Rule: An Essay on Biology, Racial Classification, and the Rhetoric of Racial Transcendence*, 72 ALBANY L. REV. 909 (2009); David A. Hollinger, *One Drop & One Hate*, 134 DAEDALUS 18 (2005).

²⁸⁸ See, e.g., Luke Pearson, *Who Identifies as a Person of Colour in Australia?*, ABC NEWS (Nov. 30, 2017), <https://www.abc.net.au/news/2017-12-01/who-identifies-as-poc-in-australia/9200288> [<https://perma.cc/J3A2-BD6K>]. In South Africa, the apartheid regime distinguished among three groups: blacks, whites, and colored. See MOHAMED ADHIKARI, NOT WHITE ENOUGH, NOT BLACK ENOUGH: RACIAL IDENTITY IN THE SOUTH AFRICAN COLOURED COMMUNITY 4–5 (2005); GEOFFREY C. BOWKER & SUSAN LEIGH STAR, SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES 185 (1999); Alan Cowell, *South Africa's "Coloreds": A Group Torn Between Black and White Worlds*, N.Y. TIMES, Sept. 11, 1985, at A10.

²⁸⁹ See DEVON W. CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN “POST-RACIAL” AMERICA (2013); Eduardo Bonilla-Silva & David G. Embrick, *Black, Honorary White, White: The Future of Race in the United States?*, in MIXED MESSAGES: MULTIRACIAL IDENTITIES IN THE “COLOR-BLIND” ERA 33 (David L. Brunnsma ed., 2006); KEVIN R. JOHNSON, HOW DID YOU GET TO BE MEXICAN? A WHITE/BROWN MAN’S SEARCH FOR IDENTITY (1999); GREGORY WILLIAMS, LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK (1995); Naseeb Bhargal & Oiyen Poon, *Are Asian Americans White? Or People of Color?*, YES! MAGAZINE (Jan. 15, 2020), <https://www.yesmagazine.org/social-justice/2020/01/15/asian-americans-people-of-color/> [<https://perma.cc/423G-SMY6>]; Min Zhou, *Are Asian Americans Becoming “White,”* 3 CONTEXTS 29 (2004).

²⁹⁰ BIRMINGHAM CITY UNIVERSITY, *supra* note 260, at 56.

²⁹¹ Distinctions based on race and color still exist in most of these countries. See Adeel Hassan, *What It’s Like to Be a Black Man in Japan*, N.Y. TIMES (Mar. 9, 2019), <https://www.nytimes.com/2019/03/09/us/what-its-like-to-be-a-black-man-in-japan.html> [<https://perma.cc/38WS-XQDD>]; Marketus Presswood, *On Being Black in China*, THE ATLANTIC (July 17, 2013), <https://www.theatlantic.com/china/archive/2013/07/on-being-black-in-china/277878/> [<https://perma.cc/YTP9-P2AG>]; David Wright, *The Use of Race and Racial Perceptions Among Asians and Blacks: The Case of the Japanese and African Americans*, 30 HITOTSUBASHI J. SOC. STUD. 30 (1998); Hiroshi Wagatsuma, *The Social Perception of Skin Color in Japan*, 96 DAEDALUS 407 (1967).

²⁹² In countries where whites do not represent the majority, the terminology used to describe whites often reflects unique social, political, and historical dynamics. See, e.g., Lawrence

Finally, the term promotes essentialism and an undifferentiated approach to people of color.²⁹³ While there may be reasons to use collective terminology, this can also raise significant concerns.²⁹⁴ There are profound differences within these communities. Moreover, there will be occasions when discrete communities prefer and deserve acknowledgment of the distinct issues affecting them. When Dr. Martin Luther King, Jr. spoke of citizens of color in his 1963 *I Have a Dream* speech, he was speaking about African Americans as the descendants of enslaved people.²⁹⁵ The Black Lives Matter movement denounces the targeted violence and disparate treatment of Black people by law enforcement.²⁹⁶ Referring to discrete groups as people of color may be accurate, but it can fail to capture their unique experiences and the distinct issues they face.²⁹⁷ As a result, these communities may feel further marginalized. At worst, they may feel erased.²⁹⁸ Or, in Ralph Ellison's words, "invisible . . . simply because people refuse to see [them]."²⁹⁹

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While the debate over collective terminology is ongoing, it is not new. The arguments, both real and rhetorical, can trace their origins to the names

Bosiwah, Kofi Busia Abrefa & Charles Okofo Asenso, *An Etymological Study of the Word "Aboɔfo" (Europeans) and Its Impact on Akan Language*, 1 INT'L J. APP. LING. & TRANSL. 1 (2015) (describing the meaning of the Akan word for Europeans and other white people).

²⁹³ See KATHARINE T. BARTLETT & ANGELA HARRIS, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 1007 (1998); Rachele Hampton, *Which People? How "People of Color" Evolved From a Gesture of Solidarity and Respect to a Cover For Avoiding the Complexities of Race*, SLATE (Feb. 13, 2019), <https://slate.com/human-interest/2019/02/people-of-color-phrase-history-racism.html> [<https://perma.cc/RMR5-E2AC>]; Alvira Bonsu, "People of Color" is an Unjust Umbrella Term, THE TEMPLE NEWS (Sept. 18, 2019), <https://temple-news.com/people-of-color-is-an-unjust-umbrella-term/> [<https://perma.cc/HFA5-AHGE>]; Anna Stubblefield, *Racial Identity and Non-Essentialism About Race*, 21 SOC. THEORY & PRAC. 341 (1995).

²⁹⁴ See Donna F. Edwards & Gwen McKinney, *We Are Black Women. Stop Calling Us "Women of Color"*, WASH. POST (Sept. 14, 2020), <https://www.washingtonpost.com/opinions/2020/09/14/we-are-black-women-stop-calling-us-women-color/> [<https://perma.cc/R3BB-4NH5>]; Jason Parham, *What We Get Wrong About "People of Color"*, WIRED (Nov. 26, 2019), <https://www.wired.com/story/rethinking-phrase-people-of-color/> [<https://perma.cc/7RMH-5UNX>].

²⁹⁵ See Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963), in A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR. 75 (Clayborne Carson & Kris Shepard eds., 2001).

²⁹⁶ See Jay Caspian Kang, *Off Topic: Can We Please Talk About Black Lives Matter for One Second?*, N.Y. TIMES MAG., July 5, 2020, at 7; Jennifer J. Garcia & Mienah Z. Sharif, *Black Lives Matter: A Commentary on Racism and Public Health*, 105 AM. J. PUB. HEALTH 27 (2015).

²⁹⁷ Similar criticisms have been made about other forms of collective terminology. Deo, *supra* note 261, at 131–39 (highlighting the shortcomings of the term "BIPOC").

²⁹⁸ Nadra Widatalla, *The Term "People of Color" Erases Black People. Let's Retire It*, L.A. TIMES (Apr. 28, 2019), <https://www.latimes.com/opinion/op-ed/la-oe-widatalla-poc-intersectionality-race-20190428-story.html> [<https://perma.cc/DB7V-B88N>]; Adebola Lamuye, *I Am No "Person of Colour," I Am a Black African Woman*, INDEPENDENT (U.K.) (July 31, 2017), <https://www.independent.co.uk/voices/phrase-people-person-of-colour-bme-black-woman-women-different-experiences-race-racism-a7868586.html> [<https://perma.cc/6AYC-WZJM>].

²⁹⁹ RALPH ELLISON, INVISIBLE MAN 3 (Modern Library ed. 1994) (1947).

controversy of the nineteenth century. From the antebellum period and throughout Reconstruction, Black leaders considered numerous forms of collective terminology, including people of color, colored people, colored Americans, and negroes as well as Free Africans, Anglo-Africans, Afro-Americans, Afmericans, and Afro-Saxons.³⁰⁰ This variation reflects a search for identity and belonging. While various terms were considered, they all shared a common goal: “the demand for freedom, liberty, and equality.”³⁰¹

III. REFLECTIONS ON COLOR AND WHITE(NESS)

Throughout history, the terminology used to describe racial and ethnic groups has changed. Yet, it has always reflected extant power structures and the political, economic, and legal dominance of a community that defined itself as white. Despite their prevalence, this collective terminology remains obscured by a reluctance to engage in candid discourse and difficult conversations.³⁰² In promoting meaningful dialogue, there is value in exposing both color and white(ness) to the light.³⁰³

A. The Meaning of Color

Historically, the term “people of color” was used to describe the broad group of individuals who were not members of the white community and who were, therefore, treated differently and adversely under the law. The term distinguished between individuals who were granted privilege and status within society and those who were not entitled to the full protection of the law. Its legal and social relevance continued for centuries—from the antebellum period through the Civil War, Reconstruction, and the Jim Crow era. By the end of the Second Reconstruction, the term “people of color” had ceased to define legal rights. Both case law and civil rights legislation made clear that such legal distinctions could no longer exist. However, the term still had meaning.

While it was often used to describe a variety of racial and ethnic groups, the term developed a rich history within the Black community. Initially, free people of color embraced the term to let others know of their legal status and corresponding rights—from national organizations such as the Society for the Colonization of Free People of Color to local groups such as Philadelphia’s Society of Free People of Colour for Promoting the Instruction and

³⁰⁰ STUCKEY, *supra* note 21, at 224.

³⁰¹ RAEL, *supra* note 98, at 117.

³⁰² MORRISON, *supra* note 24, at 91 (“All of us, readers and writers, are bereft when criticism remains too polite or too fearful to notice a disrupting darkness before its eyes.”).

³⁰³ See Henry Louis Gates Jr. & Andrew S. Curran, *We Need a New Language for Talking About Race*, N.Y. TIMES (Mar. 3, 2022), <https://www.nytimes.com/2022/03/03/opinion/sunday/talking-about-race.html> [<https://perma.cc/SD2G-BRGB>].

School Education of Children of African Descent.³⁰⁴ Similar groups developed throughout the United States.³⁰⁵ Eventually, this collective terminology came to reflect the emerging consciousness of the Black community.³⁰⁶ Recognizing its rhetorical and unifying power, Black leaders intentionally used “people of color” to project unity and common purpose.³⁰⁷ After the Civil War and the adoption of the Thirteenth Amendment, “free people of color” became simply “people of color.” While other terms would wax and wane in usage, the term “people of color” would remain a constant form of collective terminology for the Black community.

In the twentieth century, the burgeoning civil rights movement and its extension beyond the Black community led to increasing use of the term “people of color.” As other groups—including Hispanics, Asian Americans, and Native Americans—grew in size and strength, this collective terminology brought them together. Thus, the term proved invaluable for descriptive and strategic reasons.³⁰⁸

This historical reflection is instructive. Unlike some words that were intentionally used as insults and slurs, “people of color” was different.³⁰⁹ The term was generally not used in a pejorative sense, although it had significant legal consequences. Thus, “people of color” does not share the mark of ignominy that so many historical words and terms contain.³¹⁰ Indeed, the term

³⁰⁴ See FINLEY, *supra* note 84, at 1; THE BLACK PRESENCE IN THE ERA OF THE AMERICAN REVOLUTION, *supra* note 66, at 104.

³⁰⁵ In Charleston, for example, a benevolent society known as the “Free Dark Men of Color” was established in 1791. See PETER P. HINKS, TO AWAKEN MY AFFLICTED BRETHREN: DAVID WALKER AND THE PROBLEM OF ANTEBELLUM SLAVE RESISTANCE 24 (1997). The New York Society of Free People of Color established a school for orphans in 1812. MEIER & RUDWICK, *supra* note 101, at 110. The Pennsylvania Augustine Society for the Education of People of Colour was established in 1818. HORTON & HORTON, *supra* note 99, at 151.

³⁰⁶ See RAEL, *supra* note 99, at 148; STUCKEY, *supra* note 21, at 218.

³⁰⁷ See RAEL, *supra* note 98, at 83, 89, 106–07, 115.

³⁰⁸ Even the terms used to identify these individual communities raised difficult questions about inclusion, and how people should be defined. See, e.g., G. CRISTINA MORA, MAKING HISPANICS: HOW ACTIVISTS, BUREAUCRATS & MEDIA CONSTRUCTED A NEW AMERICAN (2014); Li Zhou, *The Inadequacy of the Term “Asian American,”* VOX (May 5, 2021), <https://www.vox.com/identities/22380197/asian-american-pacific-islander-aapi-heritage-anti-asian-hate-attacks> [<https://perma.cc/K8N6-3W7P>]; Michael Yellow Bird, *What We Want to Be Called: Indigenous Peoples’ Perspectives on Racial and Ethnic Identity Labels*, 23 AM. IND. Q. 1 (1999).

³⁰⁹ John H. McWhorter, *Why is Colored Person Hurtful and Person of Color OK? A Theory of Racial Euphemisms*, SLATE (Aug. 24, 2016), <https://slate.com/human-interest/2016/08/colored-person-versus-person-of-color-how-does-society-decide-which-racial-terms-are-acceptable.html> [<https://perma.cc/X8VV-MEE3>].

³¹⁰ See, e.g., JABARI ASIM, THE N WORD: WHO CAN SAY IT, WHO SHOULDN’T, AND WHY (2007). See generally Taylor Telford, *Six Dr. Seuss Books With Racist Imagery Will Go Out of Print*, WASH. POST (Mar. 2, 2021), <https://www.washingtonpost.com/business/2021/03/02/dr-seuss-racist-imagery/> [<https://perma.cc/9R43-ZFUL>]; Nicole Daniels, *How Should Racial Slurs in Literature Be Handled in the Classroom?*, N.Y. TIMES (Dec. 16, 2020), <https://www.nytimes.com/2020/12/16/learning/how-should-racial-slurs-in-literature-be-handled-in-the-classroom.html> [<https://perma.cc/7523-6WY2>].

has been fully claimed by the community it now describes.³¹¹ Such reclamation projects have a long history within marginalized communities.³¹² While “people of color” does not carry the shame of racist language, this does not absolve the term from critical inspection.³¹³

Today, the term “people of color” represents an inclusive effort to identify diverse groups that share a common experience and similar struggles. When used contextually, there is value in the term.³¹⁴ It reflects a shared history among disparate people. Aggregating their experiences through collective terminology generates power against hierarchy. At its core, it represents “a shared form of identity in which members of distinct groups see one another interchangeably as a single, unified group.”³¹⁵ The term is intentionally color conscious at a time when color consciousness is essential. In addition, language should always be used to make visible that which is unseen or ignored.

³¹¹ See Mistinguette Smith, *After Asian American Hate, I’m Reclaiming Racial Solidarity and the Term “People of Color,”* USA TODAY (May 11, 2021). See generally RAEI, *supra* note 99, at 147. But see Damon Young, *The Phrase “People of Color” Needs to Die*, GQ (Aug. 19, 2020), <https://www.gq.com/story/author-damon-young-on-bipoc-phrasing> [<https://perma.cc/H9JH-4ELT>].

³¹² See, e.g., Symposium, *Non-Derogatory Uses of Slurs*, 97 GRAZER PHIL. STUD. 1 (2020); Sarah Jeong, *Should We Be Able to Reclaim a Racist Insult—as a Registered Trademark?*, N.Y. TIMES MAG. (Jan. 17, 2017), <https://www.nytimes.com/2017/01/17/magazine/should-we-be-able-to-reclaim-a-racist-insult-as-a-registered-trademark.html> [<https://perma.cc/J7VJ-GMAN>]; Gregory Coles, *The Exorcism of Language: Reclaimed Derogatory Terms and Their Limits*, 78 COLL. ENG. 424 (2016). These issues have been explored in a variety of contexts, including gender studies. See Gary Nunn, *Power Grab: Reclaiming Words Can Be a Bitch*, THE GUARDIAN (Oct. 30, 2015), <https://www.theguardian.com/media/mind-your-language/2015/oct/30/power-grab-reclaiming-words-can-be-such-a-bitch> [<https://perma.cc/6XX5-HFXH>]. But see Sherryl Kleinman, Matthew B. Ezzell & A. Corey Frost, *Reclaiming Critical Analysis: The Social Harms of “Bitch,”* 3 SOCIO. ANAL. 47 (2009).

³¹³ See Kalunta-Crumpton, *supra* note 2, at 131. Other terms remain controversial and reflect the complexity of language. See John McWhorter, *I Can’t Brook the Idea of Banning “Negro,”* N.Y. TIMES, (Jan. 7, 2022), <https://www.nytimes.com/2022/01/07/opinion/negro-ban-word-dont.html> [<https://perma.cc/H2EL-KKQL>].

³¹⁴ See THE COST OF RACISM FOR PEOPLE OF COLOR, *supra* note 245; PEOPLE OF COLOR IN THE UNITED STATES: CONTEMPORARY ISSUES IN EDUCATION, WORK, COMMUNITIES, HEALTH AND IMMIGRATION (Kofi Lomotey ed., 2016). However, there are times when disaggregation is preferred to collective terminology. See, e.g., MEASURING RACE: WHY DISAGGREGATING DATA MATTERS FOR ADDRESSING EDUCATIONAL INEQUALITY (Robert T. Teranishi, Bach Mai Dolly Nguyen, Cynthia M. Alcantar & Edward R. Curammeng, eds., 2020). This issue has been particularly significant for assessing the impact of the COVID-19 pandemic on distinct racial groups. See Manish Pareek, Mansoor N. Bangash, Nilesh Pareek, Daniel Pan, Shirley Sze, Jatinder S. Minhas, Wasim Hanif & Kamlesh Khunti, *Ethnicity and COVID-19: An Urgent Public Health Research Priority*, 395 LANCET 1421, 1422 (2020) (noting disaggregated data based on ethnicity would assist in identifying potential risk factors through recognizing confounding variables within specific and unique community groups); Namratha Kandula & Nilay Shah, *Asian Americans Invisible in COVID-19 Data and in Public Health Response*, CHI. REP. (June 16, 2020), <https://www.chicagoreporter.com/asian-americans-invisible-in-covid-19-data-and-in-public-health-response/> [<https://perma.cc/PWN7-NYSK>] (describing the significant racial disparity in COVID-19 cases).

³¹⁵ PEREZ, *supra* note 7, at 186.

But when used indiscriminately—an ironic phrasing, to be sure—the term “people of color” hides identity, and its flaws become evident.³¹⁶ Inter-term dynamics require a nuanced approach to collective terminology. For this reason, it should always be used intentionally and contextually.³¹⁷ Moreover, it should never be used to define legal rights. Harkening back to Homer Plessy’s arguments at the Supreme Court, there are simply too many definitions of the term “people of color” to escape arbitrary outcomes or inequitable treatment.³¹⁸ Individuals and groups should also be free to accept or decline inclusion in this collective terminology.³¹⁹ Agency is essential.

B. *The Meaning of White(ness)*

As history reveals, the term “people of color” cannot be studied in isolation to its antipode—the white community.³²⁰ They exist in a dialectic relationship. Each, as Toni Morrison and bell hooks described, is their “other.”³²¹ They were bound together throughout American history by the chains of slavery, and they remain inexorably linked. People of color are still shackled by structural racism that permeates every aspect of the American experience. The white community is constrained in other ways, trapped “in a history which they do not understand and until they understand it, they cannot be released from it.”³²²

Like its counterpart, the definition of the white community has also undergone significant change.³²³ Throughout American history, membership

³¹⁶ See Higginbotham & Bosworth, *supra* note 51, at 17 (“We recognize that it is impossible to use one phrase that satisfies everyone. Sometimes the debate on semantics as to which term should be used diverts people from the important substantive issue. The important issue is whether people are being treated adversely because of their skin color.”); Andrea Plaid & Christopher Macdonald-Dennis, *Stop Saying “People of Color” When You Mean Black*, NEWSWEEK (May 26, 2021), <https://www.newsweek.com/stop-saying-people-color-when-you-mean-black-opinion-1595113> [<https://perma.cc/VQB8-2XJJ>].

³¹⁷ See Kalunta-Crumpton, *supra* note 2, at 131 (“[P]roponents of the term *people of color* (and related terms) ought to review their real reasons for using and advancing the use of the term.”) (emphasis in original).

³¹⁸ See *Plessy* Brief, *supra* note 157, at 38.

³¹⁹ See Marc P. Johnston-Guerrero, *Who Gets to Choose? Racial Identity and the Politics of Choice*, in *THE COMPLEXITIES OF RACE*, *supra* note 10, at 36; Kalunta-Crumpton, *supra* note 2, at 131; Steven Pinker, *The Game of the Name*, N.Y. TIMES, (Apr. 5, 1994), <https://www.nytimes.com/1994/04/05/opinion/the-game-of-the-name.html> [<https://perma.cc/8R2T-UPE7>] (“Respect means treating people as they wish to be treated, beginning with names.”).

³²⁰ See HANEY LÓPEZ, *supra* note 24, at 21; Finkelman, *supra* note 42, at 952–57.

³²¹ MORRISON, *supra* note 24, at x, xi; BELL HOOKS, *BLACK LOOKS: RACE AND REPRESENTATION* 166 (1992). See generally MONICA McDERMOTT, *WORKING-CLASS WHITE: THE MAKING AND UNMAKING OF RACE RELATIONS* (2006).

³²² James Baldwin, *A Letter to My Nephew*, THE PROGRESSIVE MAG., (Dec. 1, 1962), <https://progressive.org/magazine/letter-nephew/> [<https://perma.cc/S6NA-SCK9>]; see also *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting) (“[W]e remain imprisoned by the past as long as we deny its influence in the present.”).

³²³ See JIA LYNN YANG, *ONE MIGHTY AND IRRESISTIBLE TIDE: THE EPIC STRUGGLE OVER AMERICAN IMMIGRATION, 1924-1965*, at 270 (2020); MONICA McDERMOTT, *WHITENESS IN AMERICA* (2020); JACOBSON, *supra* note 33, at 91; ARE ITALIANS WHITE?

in the white community has varied.³²⁴ At times, it was limited to those of Anglo-Saxon origin, thereby excluding many nationalities, including individuals of German, Irish, Italian, Russian, Spanish, and Swedish ancestry.³²⁵ Other ethnic and religious groups have also been excluded.³²⁶ Even today, the meaning of white is in flux and who it defines is unclear.³²⁷ In sum, both “the white community” and “people of color” are dynamic terms whose membership has never been fixed.

It is important, however, to separate white(ness) from the white community. White(ness) was constructed—as W.E.B. Du Bois observed over 100 years ago—which means it can be changed.³²⁸ After many centuries, it is time to reframe white(ness). Scholars such as Ian Haney López have called for separating white(ness) from the white community, writing “[j]ustice lies, then, not in embracing Whiteness (that is, advantage), but in seeking to

HOW RACE IS MADE IN AMERICA (Jennifer Guglielmo & Salvatore Salerno eds., 2003); NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995); Brent Staples, *How Italians Became “White,”* N.Y. TIMES (Oct. 12, 2019), <https://www.nytimes.com/interactive/2019/10/12/opinion/columbus-day-italian-american-racism.html> [<https://perma.cc/5M76-LND6>]; Tanya Katerí Hernández, “Multiracial” Discourse: *Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97 (1998).

³²⁴ In *St. Francis College v. Al-Khazraji*, the Supreme Court noted the diverse manner in which the “white race” had been defined throughout U.S. history. 482 U.S. 604, 610–13 (1987).

³²⁵ See, e.g., FRANKLIN, *supra* note 170, at ¶ 24 (arguing “[t]hat the Number of purely white People in the World is proportionably very small,” and it excludes those from Africa, Asia, and the Americas as well as numerous Europeans, such as Spaniards, Italians, Russians, Swedes, and most Germans); see also DAVID R. ROEDIGER, WORKING TOWARD WHITENESS: HOW AMERICA’S IMMIGRANTS BECAME WHITE (2005); Kamala Kelkar, *How a Shifting Definition of “White” Helped Shape U.S. Immigration Policy*, PBS NEWS HOUR (Sept. 16, 2017), <https://www.pbs.org/newshour/nation/white-u-s-immigration-policy> [<https://perma.cc/DD99-LFPA>]; Cybelle Fox & Thomas A. Guglielmo, *Defining America’s Racial Boundaries: Blacks, Mexicans, and European Immigrants, 1890–1945*, 118 AM. J. SOC. 322 (2012); Alastair Bonnett, *Who Was White? The Disappearance of European White Identities and European Racial Whiteness*, 21 ETHNIC & RACIAL STUD. 1029 (2008).

³²⁶ See, e.g., JOHN TEHRANIAN, WHITEWASHED: AMERICA’S INVISIBLE MIDDLE EASTERN MINORITY (2008); KAREN BRODKIN, HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA (1998). Cf. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (holding that individuals of the Jewish faith could bring a claim for racial discrimination under 42 U.S.C. § 1982).

³²⁷ See GEORGE A. YANCEY, WHO IS WHITE?: LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE (2003); Frank H. Wu, *Are Asian Americans Now White?*, 23 ASIAN-AM. L. REV. 201 (2016); Nate Cohn, *More Hispanics Declaring Themselves White*, N.Y. TIMES (May 21, 2014), <https://www.nytimes.com/2014/05/22/upshot/more-hispanics-declaring-themselves-white.html> [<https://perma.cc/HG25-ZDMZ>].

³²⁸ See W.E.B. DU BOIS, DARKWATER: VOICES FROM WITHIN THE VEIL 29–30 (1920). See generally 1 THEODORE W. ALLEN, THE INVENTION OF THE WHITE RACE: RACIAL OPPRESSION AND SOCIAL CONTROL (2012); RUTH FRANKENBERG, WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS (1993); Robert P. Baird, *The Invention of Whiteness: The Long History of a Dangerous Idea*, THE GUARDIAN (Apr. 20, 2021), <https://www.theguardian.com/news/2021/apr/20/the-invention-of-whiteness-long-history-dangerous-idea> [<https://perma.cc/3VWZ-KS9Y>]; Jay Caspian, *Noel Ignatiev’s Long Fight Against Whiteness*, NEW YORKER (Nov. 15, 2019), <https://www.newyorker.com/news/post-script/noel-ignatievs-long-fight-against-whiteness> [<https://perma.cc/9UPF-KMC7>].

dismantle race as a system that correlates to power and privilege.³²⁹ White(ness) is built on a legacy of slavery, racial terror, and discrimination—a legacy that remains entrenched in U.S. law. It is embedded in countless institutions, including criminal justice, health care, employment, housing, immigration, and education.³³⁰ It still offers privilege to some and burden to others.³³¹

Indeed, the connection between white(ness) and privilege is so powerful, it has affected how both “white” and “white community” are used. There is a dissonance to these words. They generate discomfort, and people avoid their use as collective terminology. This dissonance even affects their spelling. For example, many media organizations decline to capitalize “white” when referring to someone’s color or race. According to the *Associated Press*, “capitalizing the term white, as is done by white supremacists, risks subtly conveying legitimacy to such beliefs.”³³² The *New York Times* offers a different rationale: “white doesn’t represent a shared culture and history in the way Black does.”³³³ Of course, there are different perspectives.³³⁴ But significantly, this debate about capitalization is really a debate about the power and legacy of white(ness).

One way to challenge white(ness) is to end its use as a legal baseline. Several statutes with origins in the era of the First Reconstruction continue to reference “white citizens” as the baseline for assessing equality. For example, 42 U.S.C. § 1981 protects the right of all U.S. citizens to make and enforce contracts as well as to receive the equal benefit of all laws and pro-

³²⁹ HANEY LOPEZ, *supra* note 24, at xvii; *see also* Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

³³⁰ *See* Deborah N. Archer, *Exile from Main Street*, 55 HARV. CIV. RTS.-CIV. LIB. L. REV. 789 (2020); Zinzi D. Bailey, Nancy Krieger, Madina Agénor, Jasmine Graves, Natalia Linos & Mary T. Bassett, *Structural Racism and Health Inequities in the USA: Evidence and Interventions*, 389 LANCET 1453 (2017).

³³¹ *See* DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (2007); KARYN D. MCKINNEY, *BEING WHITE: STORIES OF RACE AND RACISM* (2005); THOMAS SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* (2004); GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* (1998).

³³² David Bauder, *AP Says It Will Capitalize Black But Not White*, ASSOCIATED PRESS (July 20, 2020), <https://apnews.com/article/entertainment-cultures-race-and-ethnicity-us-news-ap-top-news-7e36c00c5af0436abc09e051261fff1f> [<https://perma.cc/AY4X-X2XM>].

³³³ Nancy Coleman, *Why We’re Capitalizing Black*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/2020/07/05/insider/capitalized-black.html> [<https://perma.cc/AD3M-UKSW>].

³³⁴ *See* Nell Irvin Painter, *Why “White” Should Be Capitalized, Too*, WASH. POST (July 22, 2020), <https://www.washingtonpost.com/opinions/2020/07/22/why-white-should-be-capitalized/> [<https://perma.cc/HZT5-C2DE>]; Kwame Anthony Appiah, *The Case for Capitalizing the B in Black*, THE ATLANTIC (June 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-white/613159/> [<https://perma.cc/4UA3-M76F>]; Eve L. Ewing, *I’m a Black Scholar Who Studies Race. Here’s Why I Capitalize “White,”* ZORA (July 1, 2020), <https://zora.medium.com/im-a-black-scholar-who-studies-race-here-s-why-i-capitalize-white-f94883aa2dd3> [<https://perma.cc/D28G-6N22>].

ceedings “as is enjoyed by white citizens.”³³⁵ Another federal statute, 42 U.S.C. § 1982 protects the right of all U.S. citizens to acquire property “as is enjoyed by white citizens.”³³⁶ Thus, both statutes measure compliance by reference to the rights “enjoyed by white citizens.” Given the significance of these civil rights statutes, the perpetuation of white normativity and privilege is both ironic and deeply troubling; it should end.³³⁷ These statutes should be amended to exclude such references. The Constitution also contains the vestiges of white(ness), as the notorious Three-Fifths Clause and the Fugitive Slave Clause remain etched in the text. These provisions should be struck from the Constitution.³³⁸

Another way to challenge white(ness) is to change the collective terminology used to identify the white community.³³⁹ This can help separate white(ness) from the white community. Perhaps “non-people of color” is a more appropriate term.³⁴⁰ It would reflect a transfer of power and build a new narrative for both people of color and the white community. Admittedly, it has some shortcomings. William Safire’s admonition against defining people by what they are not would apply to this term.³⁴¹

³³⁵ 42 U.S.C. § 1981 (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by *white citizens*, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”) (emphasis added).

³³⁶ 42 U.S.C. § 1982 (“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by *white citizens* thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”) (emphasis added).

³³⁷ See generally John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135 (1990); Judith Olans Brown, Daniel J. Givelber & Stephen N. Subrin, *Treating Blacks as If They Were White: Problems of Definition and Proof in Section 1982 Cases*, 124 U. PA. L. REV. 1 (1975).

³³⁸ See, e.g., William J. Aceves, *Amending a Racist Constitution*, 170 U. PA. L. REV. ONLINE 1 (2021); Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899 (2019).

³³⁹ The question of “who is white” has existed for as long as race and color categories have existed. See HANEY LÓPEZ, *supra* note 24, at 1–2, 17–26.

³⁴⁰ The term “non people of color” is rarely used although this is changing. See, e.g., ALLIES IN ACTION, <https://www.allies-in-action.com/> [<https://perma.cc/FW9D-ZGTP>] (“The Allies in Action Membership Network is a place for non people of color to unite in solidarity, taking action to champion, support and celebrate women of color in fundraising and philanthropy.”). However, this term has generated significant controversy. See Jennifer Henderson Carma Hassan & Leah Asmelash, *University of Michigan-Dearborn Apologizes for Segregated “Virtual Cafes” Meant to Spur Discussion*, CNN (Sept. 11, 2020), <https://www.cnn.com/2020/09/11/us/michigan-dearborn-cafes-segregated-trnd/index.html> [<https://perma.cc/LG9E-DQEJ>]; Jessica Campisi, *Festival Backtracks After Backlash For Charging White People More*, THE HILL (July 9, 2019), <https://thehill.com/blogs/blog-briefing-room/news/452123-festival-backtracks-over-backlash-for-charging-white-people> [<https://perma.cc/W2Z2-6MXA>]; Derrick Bryson Taylor, *Detroit Festival Backtracks After Charging White People Double*, N.Y. TIMES (July 7, 2019), <https://www.nytimes.com/2019/07/07/us/afrofutur-fest-tiny-jag.html> [<https://perma.cc/59SX-4MYV>] (describing a musical festival that charged “non-POC” double the price of admission).

³⁴¹ See Safire, *supra* note 254, at 18.

A different approach would add a new color to the racial lexicon.³⁴² Race is a social construct, and the history of color reveals the same.³⁴³ In discussions about racial identity, there is no reason we cannot add, change, or mix colors. For example, the color gray could be used to represent individuals who now self-identify as members of the white community. For several reasons, individuals may choose to self-identify as members of this new gray community. First, these individuals choose to reject the history of white privilege and the continuing power of white(ness). This new collective terminology signals separation from a brutal history that established the power and privilege of white(ness). Second, the term “gray community” can be structured to be more inclusive than “white.” It can represent a multitude of ethnicities, nationalities, and experiences. Third, these individuals recognize that they are members of a group that is distinct from people of color. Finally, the term can serve as a “universalizing gesture” of solidarity to people of color.³⁴⁴ Terminology alone cannot end white privilege.³⁴⁵ But it can help change the meaning of color.

There is a powerful symbolism to this new collective terminology, and it is here where history can offer its final lessons. For centuries, people of color grappled with their identity. Indeed, the names controversy of the nineteenth century reflects this long-standing struggle. Modern debates over the term “people of color” are simply extensions of this historical struggle. It is now time for the white community to engage in a similar process of self-reflection and embrace their own names controversy.

History reveals another benefit to this new terminology. When enslaved people were abducted from their ancestral homes in Africa and transported

³⁴² This approach is inspired by the artist Amy Sherald. In her remarkable portraiture, Sherald reflects skin color through the *grisaille* technique, which uses shades of gray. Through this approach, Sherald seeks to “exclude the idea of color as race” and “even the playing field” for Black people. Amy Sherald: Gallery Guide, Contemporary Art Museum, St. Louis (May 11 – Aug. 18, 2018), <https://camstl.org/wp-content/uploads/2018/01/gallery-guide-amy-sherald.pdf> [https://perma.cc/XD4Z-25CG]. See generally Steve Johnson, *Amy Sherald Painted Michelle Obama and Many People Didn't Get It, and to Her, That's Just Fine*, CHI. TRIB. (Feb. 19, 2020), <https://www.chicagotribune.com/entertainment/museums/ct-amy-sherald-michelle-obama-portrait-explained-0220-20200219-bnf4267cyrekrdbtomybuh4dy-story.html> [https://perma.cc/5WDR-WWHB]; High Museum of Art, *What's Behind the Gray Skin Tones and Arresting Eyes in Amy Sherald's Portraits?*, MEDIUM (Apr. 11, 2018), <https://medium.com/high-museum-of-art/whats-behind-the-gray-skin-tones-and-arresting-eyes-in-amy-sherald-s-portraits-8d21477d6b40> [https://perma.cc/64TU-CHMW]; Doreen St. Félix, *The Mystery of Amy Sherald's Portrait of Michelle Obama*, NEW YORKER (Feb. 13, 2018), <https://www.newyorker.com/culture/annals-of-appearances/the-mystery-of-amy-sheralds-portrait-of-michelle-obama> [https://perma.cc/EM3W-75GR].

³⁴³ See TONI MORRISON, *RECITATIF: A STORY* (2022); Honorée Fanonne Jeffers, *Toni Morrison's Only Short Story Addresses Race by Avoiding Race*, N.Y. TIMES (Jan. 30, 2022), <https://www.nytimes.com/2022/01/28/books/review/toni-morrison-recitatif.html> [https://perma.cc/PJL5-SNBM].

³⁴⁴ RAEL, *supra* note 99, at 148.

³⁴⁵ See, e.g., Rashmi Dyal-Chand, *Autocorrecting for Whiteness*, 101 B.U. L. REV. 191 (2021).

to the United States, they were often given new names by their enslavers.³⁴⁶ This was meant to sever their remaining ties to the past and confirm the end of their agency. When enslaved people eventually gained their freedom, they gave themselves new names that represented an end to their bondage and a return of their agency.³⁴⁷ Changing the terminology of the white community could offer a similar opportunity for “white Americans . . . [to] be released from” their own history and to build a new one.³⁴⁸

CONCLUSION

In his memoirs, Henry Louis Gates, Jr. wrote to his children about living in West Virginia in the midst of the civil rights era.³⁴⁹ He chronicled the lives of the people he knew and loved, and the humiliations wrought by segregation. Gates self-identified as a “colored person” while documenting the rich history of the Black experience. To his children, he acknowledged that their journey in America would be different from his own.³⁵⁰ Even the labels that would be used to describe them would change. “In your lifetimes,” Gates wrote, “I suspect, you will go from being African Americans, to ‘people of color,’ to being, once again, ‘colored people.’ (The linguistic trend toward condensation is strong.)”³⁵¹ Gates knew all too well the transient nature of identity and color.

Today, we should embrace the term “people of color.” It empowers current generations by connecting their struggle for equality to past generations. It also has rhetorical and political force. Growing concerns about racial inequality and social justice make this collective terminology even more relevant.³⁵² Yet despite its long history and the symbolism it now provides, we should not become too comfortable with this term.³⁵³ The complicated role

³⁴⁶ See CATHERINE ADAMS & ELIZABETH H. PLECK, *LOVE OF FREEDOM: BLACK WOMEN IN COLONIAL AND REVOLUTIONARY NEW ENGLAND* 7 (2010); GEORGE FRANCIS DOW, *SLAVE SHIPS AND SLAVING* 295 (1927); Martha S. Jones, *Ida, Maya, Rosa, Harriet: The Power in Our Names*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/style/self-care/sojourner-truth-harriet-tubman-slavery-names.html> [<https://perma.cc/63H2-XM4S>].

³⁴⁷ See STUCKEY, *supra* note 21, at 260; Susan Benson, *Injurious Names: Naming, Disavowal, and Recuperation in Contexts of Slavery and Emancipation*, in *THE ANTHROPOLOGY OF NAMES AND NAMING* (Gabriele vom Bruck & Barbara Bodenhorn eds., 2006); Sarah Abel, George F. Tyson & Gisli Palsson, *From Enslavement to Emancipation: Naming Practices in the Danish West Indies*, 61 COMP. STUD. SOC’Y & HIST. 332 (2019).

³⁴⁸ Baldwin, *supra* note 322.

³⁴⁹ HENRY LOUIS GATES, JR., *COLORED PEOPLE: A MEMOIR* (1995).

³⁵⁰ *Id.* at xi.

³⁵¹ *Id.* at xvi.

³⁵² See DEMOCRACY FUND VOTER STUDY GROUP, *RACING APART: PARTISAN SHIFTS ON RACIAL ATTITUDES OVER THE LAST DECADE* (2021); Stacey Y. Abrams, *Identity Politics Strengthens Democracy*, 98 FOR. AFF. 160 (Mar.-Apr. 2019).

³⁵³ See Lee Sigelman, Steven A. Tuch & Jack K. Martin, *What’s In a Name? Preference for “Black” Versus “African-American” Among Americans of African Descent*, 69 PUB. OPINION Q. 429 (2005); Tom W. Smith, *Changing Racial Labels: From “Colored” to “Negro” to “Black” to “African American,”* 56 PUB. OPINION Q. 496 (1992); Lerone Bennett, Jr., *What’s in a Name? Negro vs. Afro-American vs. Black*, 26 ETC: REV. GEN. SEM. 399 (1969).

of color in human relations suggests the terminology we use in conversations about ourselves will continue to evolve until, eventually, we get it right.³⁵⁴

³⁵⁴ See STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* 213 (2002) (“Names for minorities will continue to change as long as people have negative attitudes toward them. We will know that they have achieved mutual respect when the names stay put.”); W.E.B. Du Bois, *The Name “Negro,”* 35 *THE CRISIS* 96–97 (1928) (“Do not . . . make the all too common error of mistaking names for things. Names are only conventional signs for identifying things. Things are the reality that counts.”).