WHY OBAMA IS BLACK: LANGUAGE, LAW AND STRUCTURES OF POWER

SpearIt*

“Words are our tools, and, as a minimum we should use clean tools: we should know what we mean and what we do not, and we must forewarn ourselves against the traps that language sets us.”

When he filled out the race section of the 2010 U.S. Census survey, President Barack Obama checked the “Black, African Am., or Negro” box despite the fact that Obama is of both European-American and African ancestry. This simple fact raises a number of complicated questions and challenges the idea that race, or more properly, racism, is a thing of the past or “post” as used in “post-racial.” “Post-racial” is rhetoric for an ideology that promotes “a larger national and legal consensus that ignores the bulk of racial disparities, inequities, and imbalances in society, and pursues race-neutral remedies as a fundamental, a priori value.”

Ironically, the ideology garners support from Obama’s presidential election in 2008, which launched widespread reports that the country elected its

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first “black” president. For many, the election provided concrete proof of improved race relations. Such believers epitomized Obama’s election as fulfilling the American promise; for others, however, he symbolized a formidable challenge to the “post-racial” posture. Hence, although the term “post” intends to point to the past, it is really about the future, a destination that has yet to be achieved. It is a way of wishing away the present and supplanting it with an idealized future. Under such pretentions, “post-racial” reflects a desire to identify with something more sublime than the status quo.

Framing Obama as a poster for “post-racial” suffers from various defects. The most fundamental is the assumption that he is “black” in the first place. Although the decision that the president indeed is “black” is practically unanimous, such a conclusion neglects his “white” heritage. President Obama could have checked black and white on the census survey, but he passed on the option. This decision raises unsettling questions for post-racial ideologues. Rather than signal arrival into the post-racial age, however, his choice on the survey could be read as a denial of whiteness or an unfair response given the survey’s purposes, which imply an obligation to represent oneself based on parental lineage as opposed to racial ideology. But what if Obama’s logic led him to identify as “white”? For many this proposition would not ring true. Yet Obama’s self-identification as “black” raises no protest. Why the double standard? Of course the question itself is rhetorical— because a rigorous baseline logic is already at play.

Although Obama’s story is not the only forceful challenge to the “post racial” concept, it affords a solid frame to consider the merits and myths. A sober read of Tea Party rhetoric and the Henry Louis Gates episode indicate that talk of “post-racial” is premature, a point further exclaimed by the resignation of Shirley Sherrod. Far


6 Sherrod resigned after a blogger edited an innocuous speech she delivered, which had the effect of depicting her as racist. David S. Morgan, Shirley Sherrod Resigns from USDA over Race Remark Furor, CBS NEWS (July 20, 2010, 9:53 AM), http://www.cbsnews.com/8301-503544_162-20011026-503544.html. The edited video went viral and was condemned by NAACP and government officials who called for her resignation. Id. The blogger's
from relegating racism to the back burner, events since Obama’s election have stoked racial flames and revealed that race still matters. His presidential victory might have ignited widespread faith in a “post-racial” era, but a more pessimistic read would render it a backlash from the country’s collective guilt over the Bush regime that moved voters to “reject the party of an unpopular president.” The election may have helped herald in an era of wishful thinking called “post-racial,” yet its logic, paradoxically enough, was governed by the rule of hypodescent, which can drown an oceanic man in the tide of one drop.

What follows is a critique of the “post-racial” ideology. It begins with “Language and Law,” which provides a theoretical backdrop to map how law influences common language, and more importantly, how concepts rooted in racism maintain in the American lexicon through the force of law. The next section, “White by Law,” analyzes the legal and social constructions of whiteness, a historical survey that arrives at constructions in the American context. Building from the previous parts, “Structures of Racism,” outlines how racial language and ideals of white superiority work in tandem to produce structural racism, that is, racism beyond individual bigotry. Today’s racism is not simply the aggregate of individual interactions; rather, the discrimination resides in the institutions and polity of American society, particularly in the language of law. The last section, “Beyond Binaries and Reinscribed Racism,” is a normative venture that offers ideas for stemming the force of these linguistic and conceptual burdens. Centuries of racial sedimentation have made some aspects of racism invisible to the eye, yet an analysis of the post-racial concept shows that debates on race and color are fundamentally flawed. This Essay exposes the concept as a type of wishful thinking, and more critically, how the law prevents this wish from being fulfilled.

action was inspired by a resolution passed by the NAACP, which called on Tea Party leaders to repudiate those in their ranks who employ racist language in their signs and speeches. Gates was arrested outside his home by police officers, which he claimed was racially motivated. Obama publicly stated that the arresting officers acted “stupidly,” a comment that he linked to America’s long history of police profiling based on race. Michele McPhee & Sara Just, Obama: Police Acted Stupidly in Gates Case, ABC NEWS (July 22, 2009), http://abcnews.go.com/US/story?id=8148986&page=1. The episode not only had a racial undertone, but Obama’s comment unleashed widespread fervor and criticism that Obama was siding with Gates for racial reasons.

7 Johnson, supra note 4.
I. LANGUAGE AND LAW

The law enshrines racial vocabulary in constitutions, court opinions, statutes and particularly, U.S. Census survey questionnaires. This set of laws and legal documents have a profound influence on the way Americans conceive and speak of one another. At minimum, they may be seen as providing society with a legal base of racial vocabulary. This is not to say that the law is not influenced by social forces in the construction of race, but it is a limited factor so long as the law continues to recognize race as reality. The quibble is not merely about what someone wants to be called, but about how the law structures routine practices of life by “eliciting compliance or generating acts of resistance . . . [by providing] the framework for legitimate discourse and action.” The law discursively enshrines words and concepts, and imports them into other political arenas, including politically correct speech. Although texts like federal and state constitutions are not the originators of the terminology supporting structural distinction, the governing documents legitimatize these terms and help lay cornerstones for the lexical foundation.

Since the penning of the U.S. Constitution, the term “Indian” has been used to describe generically a vast group of cultural and linguistic groups. This misnomer is attributed to the hagiography of Christopher Columbus. It is a piece of Americana that encapsulates the story of Columbus’ arrival to the “New World” in 1492. He arrived on what would become American shores, yet he thought he had arrived in India, and hence called the people he encountered “Indians.” Although perhaps more myth than history, even if one accepts Columbus as the blunderer behind the mislabeling of these people, it is interesting that the misnomer persists, through the repetitive telling of how these people became “Indians” in the first wrongful place, and further through the Constitution, which fossilized the term.

As it has in other imperialistic contexts, labeling “Indian” in colonial America helped in the construction of a savage, lawless, unordered individual, which was a prerequisite for intervention.

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11 See Michael Bhatia, Fighting Words: Naming Terrorists, Bandits, Rebels and Other Violent Actors, 26 Third World Q. 5, 14 (2005).
Like the Greek’s use of “barbarian” to denigrate all non-Greeks, the construction of the “savage” against the civility of Christianity was made possible by the power inherent in naming. Later, more politically correct attempts to transform the “Indian” into “American Indian” were laced with equally troublesome connotations since “America” derived from the European sailor, Amerigo Vespucci. The label “American Indians” thus represented a hegemonic tag-team, the mistaken “Indian,” compounded by reference to an Italian merchant.

To depict the Indian’s political organization, the Constitution uses the term “tribes,” a word with derogatory denotations that “served to differentiate the minorities and deviants and those only partially colonized from the mainstream or the colonial powers.” For the Supreme Court, “tribe” linked to a foreign lifestyle, one that had to be left behind in order to be granted the rights of a full-fledged foreigner. Certainly, when referring to groups in the African context, Europeans and colonial Americans already had a long history of using “tribes” under such negative stereotypes.

The term “race” made its constitutional debut with the Fifteenth Amendment in 1870. This Amendment also uses the term “color,” which had already appeared in the 1850 Census.

12 See MATTHEW F. JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE 23 (2002) (explaining that references to the “New World’s ‘barbarous’ or ‘savage’ inhabitants were standard in the [colonial] charters’ articulations of political necessity”).


15 Dred Scott v. Sandford, 60 U.S. 393, 404 (1857) (explaining how an Indian, if he “should leave his nation or tribe, and take up his abode among the white population . . . would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people”).


17 U.S. CONST. amend. XV, § 1.

18 Id.

Three decades after the enactment of the Amendment, the Census reinforced the Constitution’s use of “race” in its introduction to the 1900 Census survey. Thus, between the U.S. Census and Constitution, race and color became legitimate categories for American organization, whose linguistic force was practically inscrutable.

Like constitutions, black letter law represents a means through which racial language inscribes in federal and state polity. At various legislative levels, biased conceptions of race are entrenched in statutory language:

“[W]hite” did attain wide usage in New World political discourse, and it was written into an immense body of statutory law. In the colonies the designation “white” appeared in laws governing who could marry whom; who could participate in the militia, who could vote or hold office; and in laws governing contracts, indenture, and enslavement. Congressional edicts such as the Naturalization Act of 1790 asserted that “any alien, being a free white person . . . may be admitted to become a citizen,” essentially codifying whiteness as a prerequisite for citizenship for immigrants. Prior to this legislation was the Northwest Ordinance of 1787, which, the Supreme Court would later hold, forbade nonwhites from becoming citizens of the new territory. This law of exclusivity played out fiercely in the infamous Dred Scott case nearly sixty years later. Here, the Court held that no person descending from Africa, whether slave or free could become a citizen of the United States—a rationale that relied heavily
on the Declaration of Independence.\textsuperscript{25} At the state level, legislators used race and color to create the notorious anti-miscegenation statutes. Some of these efforts aimed to patrol racial borders directly and comprehensively like Virginia’s Racial Integrity Act of 1924,\textsuperscript{26} but most anti-miscegenation legislation aimed to exercise personal jurisdiction over bodies and sexual relations. In the statutes, “race” and “color” play a most pernicious role in social relations and offer a candid look at how law and language intersected to the detriment of those designated non-white.

Perhaps more than any form of institutional discourse, the U.S. Census survey has set the course for contributing to politically correct racial language. For over two centuries, the survey forms have been the most grassroots broadcast of racial taxonomy. The Census is mandated by Article I, Section 2 of the U.S. Constitution that explains “[e]numeration” for tax purposes.\textsuperscript{27} As such, the Census was initially used as a means to determine tax liability that necessitated an accurate count of slaves. From the first survey in 1790, this attempt to document American demographics has occurred at ten year intervals, making the 2010 Census the twenty-third.\textsuperscript{28} This ten-year ritual is a national broadcast of official race classifications, which make their way into a preponderance of state jurisdictions, their laws, and jurisprudence. Since the earliest days the census survey divided “white” from other racial classifications—and this is quite the same today, a feat made substantively possible by census instructions to enumerators that “a person of mixed blood, Negro and White, should be returned as Negro, no matter of

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\item \textit{Id.} at 407 ("In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, \[sic\] that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.").
\item VA. CODE ANN. §§ 20-50 to 20-60 (West 2011) (repealed 1968) (empowering a new bureaucracy to track people from birth and prohibit whites from marrying other races and compromising the racial integrity of white purity).
\item U.S. CONST. art. I, § 2 ("Representatives and direct Taxes shall be apportioned among the several States . . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.").
\item U.S. CENSUS BUREAU, MEASURING AMERICA, supra note 19, at 140.
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how small the percentage of Negro blood.” 29 Meanwhile, in cases of Negro and Indian miscegenation, the rules were much different since a person of both Indian and African blood could be counted as Indian if Indian blood predominated and the person was accepted as Indian in the community. 30

II.  WHITE BY LAW

“White” is a historically contingent category, and in the American colonial period, the granting of “white” status to ethnic groups was more selective than it is today. The New World reconfiguration of whiteness showed how concepts of race and color could be reworked to virtually any end; even the Irish, who started off as “white niggers” in America, 31 could be bleached under such a racial project, where the “interpretation, representation or explanation of racial dynamics” is “an effort to reorganize and redistribute resources along particular racial lines.” 32

In American courts, litigation around the issue of determining “whiteness” has been contentious, and whiteness, as defined by the courts, has been a “slippery substance.” 33 In some instances, the difficulty was not the indeterminacy of whiteness as much as the judiciary’s role, since “most judges were eager to explain how a certain petitioner might be readily distinguishable from ‘white persons.’” 34 The consequence of this racial reorientation, aside from betraying tendencies of European history, meant that the path to becoming “American” was open to other Europeans. Here, it is relevant to speculate whether the hyphenation phenomenon in American culture is relevant. For example, phrases like Arab-American, Asian-American, and African-American are common, yet one hardly hears of an English-American, German-American, or French-American; the trends perhaps indicate that not to be hyphenated, to be just “American” is a toll paid by whiteness. As naming goes, the law has prescribed that whites are always American, the axis mundi, while non-whites

29 Id. at 59.
30 Id.
31 George Bornstein, Afro-Celtic Connections: Frederick Douglass to the Commitments, MICH. TODAY (Mar. 1996), http://michigantoday.umich.edu/96/Mar96/mta15m96.html.
33 JACOBSON, supra note 12, at 226.
34 Id.
are always some derivative form of American, but never quite the real thing.

Although some groups which historically have been the colored other are now part of the colorless white race, the force of law continues to maintain racial divisions. Since being deemed “white” by law and society directly ties to benefits and privileges, this reality supports critical race arguments that “whiteness” is a form of property. Atoms at acquiring and exploiting whiteness were certainly the trend in the post Civil War era, where the lighter-skinned mulatto elite modeled life after affluent whites and “distanced themselves from the larger African-American community by excluding darker blacks from their social organizations.” By these practices and others like “conking” hair to straighten it and selecting lighter skinned mates to “whiten up,” whiteness proves itself a commodity that leads to a sphere of social benefit. It is the light-skinned “black” who gets a better job and treatment because “white” people think she is one of their own, a stroke of fate that is viewed among the highest of compliments back in her darker community, where she garners further privilege—all of which builds on a baseline of white superiority.

III. STRUCTURES OF RACISM

The law influences social discourse by institutionalizing inherently discriminatory words and concepts, thereby embedding racism in spaces outside of individual consciousness. The aggregate of such bias may be described as “structural racism,” where the notion of “structural” expands the analysis beyond the individual, interpersonal prejudice of day-to-day existence to include “the totality of the social relations and practices that reinforce white privilege.” This perspective insists that racism persists not merely in the “[sum total] of . . . individual acts in which white people discriminate, harass, stereotype, or otherwise mistreat people of

35 Cheryl I. Harris, Whiteness as Property, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 276, 277 (Kimberlé Crenshaw et al. eds., 1995).


color," but rather the "accumulated effects of centuries of white racism have given it an institutional nature that is more entrenched than racial prejudice." This approach "treats racism as institutional and explores how groups successfully defining themselves as ‘white’ have been able to marshal political, economic, and social power for themselves at the expense of those they define as ‘nonwhite.’" Like the skeletal frame of a building hidden by the façade of sheetrock and paint, structural racism is hidden behind concepts like "color" and "race" and their infirmities, the lead and asbestos of language. Indeed such manifestations are more difficult to combat since the discrimination is systemic and endemic, and thus, often “immune to antidiscrimination remedies.” The idea accounts for ideological gaps between whites and nonwhites, namely, that for whites, racism is a question of individual prejudice, whereas for nonwhites, the issue is systemic or institutional.

This point plays out semantically in common speech, where, in the English language, black and white embody additional meaning beyond a direct correspondence to color. “Black” has been connected to the most sinister, threatening concepts, extreme hazard and negativity, while “white” attaches to cleanliness, innocence, and purity. In contrast to the positive associations of whiteness, dark things are often categorized as “dangerous, threatening, manipulative, dishonest, or immoral,” and therefore as things that must be sequestered, perhaps symbolized by chattel slavery or post-Civil Rights trends in incarceration.

Racism and white supremacy have a long history in the United States, the thrust of which begins with the arrival of the

39 Id.
40 Angela P. Harris, Introduction: Economies of Color, in Shades of Difference, supra note 36, at 1.
42 Bonilla-Silva, supra note 37, at 8.
43 Kivel, supra note 38, at 24 (“Whiteness has been a defining part of our culture for hundreds of years. We have embedded the idea that white people are good and people of color are bad and dangerous into our everyday language.”).
44 Id.
Puritans and their religious vision. Their definitive ideas about “enlightenment” and “darkness” were contemporaneous with slave-master invocations of the Curse of Ham used to justify slavery. In this narrative, Noah curses his own grandson and makes him a slave to his brothers. In due time, however, the curse came to be interpreted as a “burn”—that his offspring had black skin, the mark that evidenced their punishment of subservience. Structural analysis thus also reveals the role of religious thought in shaping racial ideas in law and within institutions.

IV. BEYOND BINARIES AND REINSCRIBED RACISM

The issue that inspired this Essay, President Barack Obama’s lost whiteness, has seemingly been swallowed by the rules of race in the United States, most notably, of hypodescent. Obama’s decision to select only “black” is merely incidental to the public’s perception, for his physical appearance made him “black” long before he chose it on the Census. Making Obama “black” further provided proof that the country had progressed in race-consciousness by electing a black person, notwithstanding the relentless reinforcement of one-drop ideology that supported the evidence. Everyone’s acceptance of Obama as a black man and not a white man is revealing. This fact critiques “post-racial” as imaginary, for regardless of how Obama might have responded on the Census, even if he checked both black and white, even Native Hawaiian, the public’s mind was made up—he was “black.” So, although there has been pitched debate about Obama’s birth and citizenship, there is little to no debate on why the president is black; even prior to his presidential election, Obama had been called many things, racial epithets included, but “white” has not been one of them.

Obama’s story offers a prime example of how the law institutionalizes racial language such that elitist concepts which

46 Genesis 9:25.
47 Anti-slavery religious and political leaders have refuted such interpretations for more than a century. Contemporary biblical scholars note that the ancient Hebrew word “ham” does not have to be translated as “burnt” or “black”—but there is little consensus on how the name and passage should be interpreted. Further complicating matters is the position of some Afrocentrists that Ham, although not actually cursed, was indeed black, as was Noah. See *Stephen R. Haynes, Noah’s Curse: The Biblical Justification of American Slavery* 196 (2002).
informed the earliest taxonomies extend to the present. Today, nonwhites are still enslaved by words, bound by names and labels born of race and color. The ultimate expression of the hegemony is when subjective language itself is internalized by minorities, and allegiance to the socio-legal construct becomes the primary marker of identity. Sometimes the allegiance leads people to defend the notion of being “black” or a “woman of color,” that “black is beautiful,” appropriations which, in addition to whatever else they do, superordinate whiteness. They are expressions of captivated minds bound by colonial dialect. Thus, even though scholars and scientists have long argued against the category of “race” and have described the term as a “social construct,”48 the more accurate portrayal is a construct of power. It is a tool to construct taxonomies and legal classifications in order to stratify and segregate, rendering Obama’s “historic” election only a half-truth. Many have been too busy feasting on this political crumb to see the reinforcement of centuries-old racism. Rather than waste more time in self-congratulation and celebration, progressive thinkers might seize this opportune moment to separate the merit from the myth, clear the mind from post-racial swirl, and see where other bias resides.

Foremost is the rhetoric of “color” and how it undermines post-racial potential. Although some theoreticians find it fashionable to talk about people “of color” or to identify as a person “of color,” the thinking is less than liberatory. Rather, designations like “white” and “colored” are modern incarnations of public signs which characterized segregationist spaces in pre-civil rights America. This was the language of the racist establishment that coded color with slavery and freedom with whiteness. The repetition of this racist vision rears its head every time some individual or group claims to be “of color,” not to mention that groups like the National Association for the Advancement of Colored People (NAACP) were conceived on this hierarchical division. The misnomer roots in its inaccuracy as a descriptive since it reiterates “white” as beyond the pale of “color,” a mutual exclusion. It is modern doublespeak for society to talk of white as a color for paint, paper, or any objective other, yet to exclude white as a color when it comes to humans, as in the 1850 Census instruction number six, which directs

48 Gómez, supra note 41, at 470 (“Critical race scholars have been at the vanguard of legal scholars who have embraced the social constructionist perspective . . . . In particular, critical race scholars have argued that law (in its varied forms as positive law, legal institutions, and law in action, to name just a few) has played a central role in the social construction of racial identity.”).
that for one who is “White,” the color box should be left blank.49 Such schemes and word-wielding might be expected of nineteenth and twentieth century American racists who spoke this way to separate drinking fountains, restrooms, and restaurants, but for legal theory in the twenty first century, they are unacceptable. Use of the term “of color” reiterates white exclusivity, artificially divides, and hinders potential for alliance and bridge-building, helping to push “post-racial” deeper into the realm of rhetoric.

Of course, the question of how to combat this legacy or what any redistribution of power might look like is only relevant inasmuch as there is recognition of this privilege and from whence it came. Thus, despite whatever normative gains might ensue from this Essay, attempts at linguistic reform will only succeed inasmuch as there is relinquishment of the privileges which attach to whiteness, those “economic ‘extras’ that those . . . who are middle class and wealthy gain at the expense of poor and working-class people of all races.”50 Despite how this rigorous maintenance of purity and superiority flies in the face of world history, it detracts nothing from the absolute truth: humans have always intermingled across color lines and have never been in isolation from one another, a point that concomitantly admits that there is no pure—not even a pure Indian. For practical starters, then, reform might begin with a symbolic gesture like striking down the appearance of “Indian” and “tribes” in the U.S. Constitution. This is one simple thing—but it is easy to think of more, most obviously, retiring the attempt to count by “race”—the Census should be relieved of this impossible task and collect a pension for showing just how conceptually unstable “race” has proved from one decade to the next.

Among the towering influences on common parlance and politically correct speech, the U.S. Census rides high as a beacon of confusion that simultaneously reveals the illusory nature of “race” in its mash-up of conceptual apples and oranges. On the latest 2010 Census, what constitutes race categorizes by geography, as in “Asian,” by color, as in “black” or “white,” or even nationality, as in “Chinese” or “Korean.”51 The list goes on. The absence of any division within the white category is conspicuous and suggests that all the light-skinned people of the world are invited into the “white” club of America, where color status alone can help pave a path to

49 U.S. CENSUS BUREAU, MEASURING AMERICA, supra note 19, at 10.
50 KIVEL, supra note 38, at 26.
51 U.S. CENSUS BUREAU, CENSUS 2010, supra note 5.
success and wealth. For newcomers, abandoning “unique histories, primary languages, accents, distinctive dress, family names, and cultural expressions” is a small price to pay for acceptance into the circle. For everyone else, there are qualifications to having American status. A dark-skinned, Spanish-speaking American, despite being a citizen and taxpayer, will always be called something else. It will be “Latin-American” or “Mexican-American,” or some other elongated hyphenation that falls short of “American.” The otherness of dark complexion, slanted eyes, and different gods is kept alive by the law’s use of a range of words, from “black,” to “Jap,” to “Hindu,” categories of the Census that reveal a method of data collection that is really no method at all.

As a means to break the dominance of contemporary linguistic patterns, recognition of rhetoric’s role in the law is the first step. The primary lesson is how language is used persuasively and even coercively; it is recognition “not merely that whiteness is oppressive and false; it is that whiteness is nothing but oppressive and false.” The stakes beyond include awakening to the taxonomies that artificially divide people and the limitations of the master’s tools. No matter how beautiful black is, it implies a victory for “white.” Today’s names and concepts are the linguistic remnants of a master who used them to separate freemen from slave in the project of social stratification. The awesome power exercised in naming has staggered minority groups since before the drafting of the first U.S. Census, which was contemporaneous with the drafting of the Constitution itself. These realities render suspect the “data” generated by the Census, which falters under methodological scrutiny, undermining any claim to the production of reliable information. Rather, the collection and crunching is skewed by the one-drop rule and other biases which presume a white baseline. Only when “race” and “color” are eradicated from thought and speech can we start to move toward a post-racial world—the law and Census are no exception.

52 See Jacobson, supra note 12, at 40 (“Whiteness in the early decades of the republic remained a legislative and conceptual monolith that left the gates open to all European comers.”).
53 Kivel, supra note 38, at 26.
54 David R. Roediger, Towards the Abolition of Whiteness: Essays on Race, Politics, and Working Class History 13 (1994).