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**The Rhetoric of Common Enemies in the Racial Prerequisites to  
Naturalized Citizenship Before 1952**

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**The Rhetoric of Common Enemies in the Racial Prerequisites to  
Naturalized Citizenship Before 1952**

**by**

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**The Rhetoric of Common Enemies in the Racial Prerequisites to  
Naturalized Citizenship Before 1952**

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The University of Texas at Austin, 2013

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This dissertation examines the rhetorical strategy by which groups unite against common enemies as it appears in a series of judicial cases between 1878 and 1952 deciding whether petitioners for naturalization in the United States were “free white persons” as required by the United States naturalization act at the time. Beginning in 1870, the naturalization act limited racial eligibility for naturalization to “free white persons” and “aliens of African nativity and persons of African descent.” Based on the conclusion that Asians were neither “white” nor African, many courts interpreted these provisions to reflect a policy of Asian exclusion. As the distinction between “white” and Asian became increasingly disputed, however, the racial eligibility requirements of the act raised difficult questions about the boundaries of whiteness. I examine the rhetorical strategies adopted in a series of these cases between World War I and the early cold war involving Asian Indian, Armenian, Kalmyk, and Tatar petitioners who were represented as political or religious refugees at risk of becoming stateless if they were denied racial eligibility for naturalization in the United States. I argue that by representing the petitioners in the cases as victims of persecution by

the nation's adversaries, the cases reflect a rhetorical strategy of uniting against common enemies which is also prevalent in the legislative, executive, and judicial discourse surrounding the act. I argue that the prevalence of this rhetorical strategy in racial prerequisite discourse suggests that a martial ideal of citizenship often influenced racial classifications under the act and that by recognizing the ways in which this discourse adapted to the rapidly changing enmities of the early twentieth century, a rhetorical interpretation of the cases offers advantages over other interpretive approaches and highlights the value of a rhetoric of law.

*“Give me your . . . huddled masses . . . .”*

—Mother of Exiles, in Emma Lazarus’s “The New Colossus”

*Martyrdom (bearing witness) is so essentially rhetorical, it even gets its name from the  
law courts.*

—Kenneth Burke, *A Rhetoric of Motives*

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## **Chapter 1: Rhetorical Constructions of Race and Citizenship**

On November 11, 1937, the sixth grade class of Herman Klix Elementary School of Mt. Clemens, Michigan wrote the following letter to United States Secretary of State Cordell Hull:

Dear Sir,

We have been studying about India, and we would like to know if a native of India could become a citizen of the United States. We would especially like to know about untouchables.

Sincerely yours,  
The Sixth Grade

More than a decade before the children posed this question to the Secretary of State, the United States Supreme Court had specifically decided whether a “high caste Hindu, of full Indian blood, born at Amrit Sar, Punjab, India,” was a “white person” under a provision of the naturalization act that limited eligibility for naturalization to “free white persons” and “aliens of African nativity and persons of African descent.” The children’s letter received a typically bureaucratic response. The Secretary of State forwarded the letter to the Department of Labor, which oversaw the Bureau of Naturalization at the time, and the Chief Naturalization Examiner sent a reply to the Principal of Herman Klix Elementary. With regard to the racial eligibility of natives of India for citizenship, the Chief Naturalization Examiner informed the Principal only as follows:

The principal law governing racial limitation of naturalization in this country is found in Section 2169 of the Revised Statutes of the United States which reads: “The provisions of this title (Naturalization) shall apply to aliens being free white persons, and to persons of African descent.”

The Supreme Court of the United States decided in the case of the United States of America, appellant, v. Bhagat Singh Thind, that a high caste Hindu of full Indian blood, born in India, was not a white person within the meaning of Section 2169 of the Revised Statutes of the United States, and therefore, was not eligible to naturalization. A copy of the Court's decision in that case is attached.

The letter also declined to address the eligibility of India's untouchables—the casteless communities of India associated with occupations considered ritually impure and polluting—instead declaring that the question of their eligibility was outside “the province of the duties of this Service.”<sup>1</sup>

If the children of Herman Klix Elementary read the Supreme Court's opinion in *Thind*, they would have learned that the Court overruled a federal district court's grant of naturalized citizenship to Bhagat Singh Thind, “a high caste Hindu of full Indian blood, born at Amrit Sar, Punjab, India,” despite the Court's acknowledgement that Europeans and high caste Hindus shared a common biological ancestor. The Court acknowledged that high caste Hindus had descended from European ancestors who migrated to the Indian subcontinent in antiquity, but the Court argued that “it is not impossible, if that common ancestor could be materialized in the flesh, we should discover that he was himself sufficiently differentiated from both of his descendants to preclude his racial classification with either.” The question of whether a native of India could become a citizen of the United States under the racial prerequisite in the naturalization act was not whether by the “speculative processes” of ethnological reasoning European and high caste Hindus shared a common biological ancestor, but

whether we can satisfy the common understanding that they are now the same or sufficiently the same to justify the interpreters of a statute—written in the words of common speech, for common understanding, by unscientific men—in classifying them together in the statutory category of white persons.<sup>2</sup>

The opinion argues that the Europeans who resided in the Indian subcontinent in antiquity had intermarried with the “darkskinned Dravidians” of India over the centuries, “destroying to a greater or less degree the purity of the ‘Aryan’ blood” to such an extent that contemporary Asian Indians were “readily distinguishable from the various groups of persons in this country commonly recognized as white.” Furthermore, the opinion concludes that the children born of Asian Indian parents in the United States would “retain indefinitely the clear evidence of their ancestry,” rendering them non-“white” and therefore racially ineligible for naturalized citizenship.<sup>3</sup>

The children of Herman Klix Elementary would have learned the basic policy of racial segregation and the anxiety surrounding social intercourse and marriage between races, as well as the rhetoric that the Court used to support racial segregation at the time. Reflecting the “separate but equal” argument that supported racial segregation until it was rejected by *Brown v. Board of Education* in 1954, the Court declares in *Thind* that

it is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.

Thus, the children of Herman Klix Elementary would have learned of the Asian exclusion policy of American immigration and naturalization laws at the time, along with the segregationist logic that supported it. What the Court’s opinion in *Thind* does not reveal is that the Bureau of Naturalization opposed Thind’s petition for naturalization under pressure from the British government based on intelligence reports detailing Thind’s involvement with the Ghadr party, a militant activist movement whose primary purpose

was to promote an armed rebellion against the British government in India.<sup>4</sup> The federal district court that granted Thind's petition for naturalization had rejected the Bureau's claim that Thind posed a threat of violence to the United States or its allies in part because the district court noted that Thind had served honorably in the United States military during World War I and offered witnesses who testified of his good character. The Government appealed the district court's decision, however, and following the Supreme Court's rejection of Asian Indian racial eligibility for naturalization, Thind directed his bitterness regarding the decision not only at the United States but at the British government. During a speech he gave in 1933, Thind claimed that "America . . . sided with perfidious Albion to insult India in the matter of citizenship."<sup>5</sup>

The children of Herman Klix Elementary would also not have learned from reading the Court's opinion in *Thind* that two years before they wrote the Secretary of State, Thind had finally achieved his dream of becoming an American citizen by petitioning for naturalization once again under the Nye-Lea Act of 1935, which provided that "any alien veteran of the World War heretofore ineligible to citizenship because not a free white person or of African nativity or of African descent may be naturalized."<sup>6</sup> Thind was among many Asian immigrants who obtained exemptions from the naturalization act's racial eligibility requirements because they had served in the United States military. Their military service in defense of the nation proved more important than any perceived racial difference to their fitness for citizenship.

The naturalization act passed by the First Congress limited eligibility for naturalization to "free white persons," and shortly after the Civil War an amendment was

passed further extending racial eligibility for naturalization to not only “free white persons” but “aliens of African nativity and persons of African descent” in response to a Reconstruction amendment that sought to remove the racial eligibility requirements from the act altogether. This amendment was a compromise designed to address the question of African American citizenship that was so important to Reconstruction while leaving the question of Asian racial eligibility for naturalization unresolved to appease West Coast senators who opposed the naturalization of Chinese immigrants. Consequently, from 1870 to 1940, to be eligible for naturalization a person had to be either “white” or “African,” but the racial eligibility of Asian petitioners remained disputed because some claimed that they fit neither of the racial categories recognized by the act.<sup>7</sup> Although after 1940 eligibility for naturalization was also extended to “descendants of races indigenous to the Western Hemisphere,” “Filipino persons or persons of Filipino descent,” “Chinese persons or persons of Chinese descent,” and “persons of races indigenous to India,” the Act continued to limit eligibility by race until the racial prerequisites were finally removed in 1952.<sup>8</sup> Throughout the history of the racial eligibility requirements in the naturalization act, any court of general jurisdiction could grant a naturalization certificate, and no published judicial opinions were issued regarding the racial prerequisite in the act until 1878.<sup>9</sup> Between 1878 and 1954, however, numerous federal and state courts, and ultimately the United States Board of Immigration Appeals, issued written opinions offering interpretations of the phrase “white person” in response to the naturalization petitions of numerous immigrants from Asia and the Pacific Rim.<sup>10</sup> These cases, which have come to be known as the “racial prerequisite cases,” offer conflicting opinions about

the meaning of race in cases involving Chinese, American Indian, Hawaiian, Burmese, Japanese, Hindu, Mexican, Parsi, Filipino, Syrian, Korean, Afghan, Iraqi, Armenian, Turkish, Arabian, Tatar, and Kalmyk petitioners.<sup>11</sup>

The racial prerequisite cases are unique for many reasons, among them the fact that they forced participants to contrast “white” not with the racial category of “black” or “African” but with “Asian.” In their first encounters with Chinese and Japanese people Europeans often described them as “white.” Early classifications of Chinese and Japanese people as “white” even used particularly unequivocal descriptions such as “rather white” (*zimblich weiß*), “truly white” (*véritablement blanc*), “completely white” (*fulkomligen hvita*), “white like us” (*bianchi, si come siamo noi*), and “as white as we are” (*aussi blancs que nous*). In one particularly noteworthy example, George Washington wrote in 1785 correspondence with his former aid-de-camp, Tinch Tilghman, that he was surprised to receive a report that Chinese sailors resembled Native Americans because he “had conceived an idea that the Chinese, tho’ droll in shape and appearance, were yet white.”<sup>12</sup> Moreover, early courts granted Chinese immigrants naturalization certificates without apparently questioning their racial eligibility for naturalization. Until the Chinese Exclusion Act expressly prohibited Chinese naturalizations in 1882, courts frequently granted Chinese immigrants naturalization certificates, as reflected in accounts of Chinese naturalizations in New York and North Carolina as early as the 1830s.<sup>13</sup> A July 22, 1870 newspaper article also recounts Massachusetts’ longstanding practice of naturalizing “Chinese as well as other Asiatics” since at least 1843, along with “natives of the Sandwich Islands” and “persons of African descent, who are not darker than

ordinary white persons.”<sup>14</sup> By the mid-nineteenth century, however, racialist science had begun to advance the theory that Asians belonged to a “yellow” race that occupied a suspect “middle” position between the “white” and “black” races.<sup>15</sup> The racial prerequisite cases challenged this newly emerging distinction between “white” and “yellow” races as petitioners from all corners of Asia claimed to be “white.”

As Ian Haney López remarks in *White by Law: The Legal Construction of Race*, the only book-length treatment of the racial prerequisite cases, the cases are also intriguing because they expose the taxonomical practices of racial discourse insofar as they forced the participants into a case-by-case struggle to define who was or was not “white” and to provide arguments and evidence to support their definitions:

Beyond simply issuing declarations in favor of or against a particular applicant, the courts, as exponents of the applicable law, had to explain the basis on which they drew the boundaries of Whiteness. The courts had to establish by law whether, for example, a petitioner’s race was to be measured by skin color, facial features, national origin, language, culture, ancestry, the speculations of scientists, popular opinion, or some combination of these factors. Moreover, the courts also had to decide which of these or other factors would govern in the inevitable cases where the various indices of race contradicted one another. In short, the courts were responsible for deciding not only who was White, but *why* someone was White. Thus, the courts had to wrestle in their decisions with the nature of race in general and of White racial identity in particular.<sup>16</sup>

According to López, the taxonomical practices reflected in the cases reveal both the highly contingent quality of racial identity and the way in which “white” racial identity operates as a “falsely homogenizing term” for a group recognized to possess “fluid borders and heterogeneous members.”<sup>17</sup> Although rhetorical concepts have not yet been applied to the cases, scholars in a variety of other disciplines have raised distinctly rhetorical questions regarding the construction of racial identities in the cases. Such

scholars have focused on the rhetorical strategies and performative quality of the discourse adopted by the participants in the cases, and Mark Weiner even cites the cases as an example of a specific way of speaking and writing about race and law that he refers to as a “civic rhetoric.”<sup>18</sup> Thus, the cases are particularly instructive for a rhetorical study of race, citizenship, and law, which promises to contribute to recent studies by rhetoric scholars who have drawn on legal scholarship from the critical race theory movement to argue for a critical interrogation of race and whiteness in the field.<sup>19</sup>

The ineligibility of Asian immigrants for naturalization had a substantial impact on both the petitioners and the nation’s international relations in Asia and the Pacific Rim. Because citizenship was required to vote, to obtain a passport, and in some states to own land, incorporate a business, or become a lawyer or notary, eligibility for citizenship carried with it the ability of Asian immigrants to advance and defend significant rights and interests.<sup>20</sup> In 1928, Vaisho Das Bagai, an Asian Indian who emigrated to America in 1915 and became a naturalized citizen before having his naturalization canceled after the Supreme Court held Asian Indians to be racially ineligible for naturalization in *Thind*, committed suicide over the loss of his citizenship, writing that he tried to be “as American as possible” but would not live the life of “an interned person” unable to exercise his rights or leave the country without being barred from return, “obstacles this way, blockades that way, and the bridges burnt behind.”<sup>21</sup> In addition, as nationalisms intensified during the early twentieth century the judicial decisions in the racial prerequisite cases had serious geopolitical consequences for the United States. The largest groups excluded by the racial prerequisite to naturalization—Chinese, Japanese,

and Asian Indians—viewed their racial ineligibility for naturalized citizenship as a diplomatic affront, relentlessly criticized the prejudicial basis of the exclusion, and lobbied for the racial prerequisite to be removed. In the case of the Japanese, this tension even played a significant role in the failure of the Paris Peace Conference and of inter-war peace, and major amendments to the statute were first made during World War II to solidify America’s alliances with China and India, critical allies in the Pacific by silencing propaganda regarding America’s racial discrimination toward Asians.<sup>22</sup>

In 1997, Rogers Smith wrote in his study of conflicting visions of citizenship in American history that “in these times little justification may be needed for a study of American citizenship laws that pays special attention to issues of race, ethnicity, and gender.”<sup>23</sup> The same could have been said when the Supreme Court decided *Thind* and is true today, when the relationship between race and citizenship remains controversial. The United States Attorney General recently exercised his authority under the Voting Rights Act of 1965 to block voting laws passed by Florida, South Carolina, and Texas, asserting that the laws would not only disproportionately suppress voter turnout among eligible racial minorities but were actually motivated by a desire to resist the political impact of changing racial demographics in the country.<sup>24</sup> With what many believe to be similarly racial motives, state and federal legislators and various groups advocating restrictive immigration policies have also recently pressed for ending birthright citizenship in the United States by reinterpreting or amending the Citizenship Clause of the Fourteenth Amendment, which guarantees citizenship to all who are “born or naturalized in the United States, and subject to the jurisdiction thereof.”<sup>25</sup> President Barack Obama, the

nation's first African-American president, has even faced speculation that he is not a "natural born Citizen" as required by Article Two of the United States Constitution to be eligible to become President, a claim that studies have linked to racial prejudice.<sup>26</sup> The debates regarding these issues involving the relationship of race and citizenship also frequently invoke ideals of martial citizenship, as in the Attorney General's argument in litigation to stop Florida's recent voting laws that the laws would erroneously disenfranchise, among others, "decorated combat veterans who served in the United States Armed Forces,"<sup>27</sup> and the Immigration and Nationality Act continues to provide a streamlined naturalization process for military personnel and their families.<sup>28</sup>

Through a series of case studies of the racial prerequisite cases of the early twentieth century, I will examine the rhetorical strategies adopted in a series of cases between World War I and the early cold war era in which petitioners were represented as political or religious refugees at risk of becoming stateless if they were denied eligibility for naturalization, arguing that the rhetorical strategies in these cases appealed to the call to unite against common enemies as a means of navigating the often tense relationship between race and citizenship during the early twentieth century. In contrast to prior studies of the racial prerequisite cases, I argue that the cases must be understood as essentially rhetorical, which necessarily entails a close consideration of the arguments adopted by the participants in specific social and historical contexts. Such a study reveals a judicial rhetoric regarding the racial prerequisites to naturalization that is consistent with the executive and legislative discourse regarding the racial prerequisites, particularly the emphasis on ideals of martial citizenship and unification against common enemies, which is neglected or obscured by the less rhetorical approaches of formalism and critical theory. In order to study the rhetorical

strategies involved in the racial prerequisite cases, I conducted extensive research of the legislative, executive, and judicial discourse regarding the racial prerequisites to naturalization covering the entire period in which the racial prerequisites existed. I not only conducted a comprehensive search of the legislative history of the United States in the *Congressional Globe* and the *Congressional Record* regarding the use of the word “white” in legislative debates surrounding the racial prerequisite and related legislation from the time of the original act in 1790 until the racial prerequisites were eliminated in 1952, but I conducted similar searches of Attorney General opinions, executive orders, and other governmental records throughout the same period. I also conducted a comprehensive search of legal and news databases for published and unpublished judicial and administrative cases involving the racial prerequisites to naturalization in federal and state courts as well as in the United States Board of Immigration Appeals. Finally, I identified, collected, and reviewed approximately 1,500 pages of documents related to the racial prerequisite to naturalization from the National Archives and Records Administration’s Pacific Region, Pacific Alaska Region, and Washington, DC archives, including judicial files, United States attorney files, and files from the Department of Commerce and Labor which oversaw the Bureau of Naturalization, and I obtained British intelligence service files regarding the surveillance of Ghadr leaders such as Bhagat Singh Thind which were used to oppose his naturalization in the United States. Through these and other sources, I have compiled a vast record of the arguments and authorities used to support the racial classifications made in the cases, particularly those of the early twentieth century. These materials are necessary to study the rhetorical strategies adopted in the cases in ways earlier studies have neglected, and by recognizing the highly contingent ways in which racial prerequisite discourse adapted to the rapidly changing

geopolitical enmities of the early twentieth century, a rhetorical interpretation of the cases offers advantages over other interpretive approaches and highlights the value of a rhetoric of law.

### **CRITICAL RACE THEORY SCHOLARSHIP ON THE RACIAL PREREQUISITE CASES**

The earliest scholarly commentaries on the racial prerequisite cases came from legal scholars who were critical of the inconsistent reasoning and results of the cases, which were often perceived to reflect ad hoc decisions designed to exclude all non-Europeans from American citizenship, and of the inconsistency of the racial prerequisites to citizenship with the progressive ideals of welcoming immigrants based on individual character and fitness for citizenship.<sup>29</sup> During World War II, this criticism increased as the United States formed important alliances in Asia and the Pacific Rim with people formerly targeted for racial exclusion, specifically the Chinese, Asian Indians, and Filipinos. Toward the end of the war, Department of Justice analyst Charles Gordon noted of the significance of the war to ending the racial prerequisites to naturalization:

In time of war many things can be seen quite clearly. Under the stress of a great common adventure, we are able to shed some of our misconceptions and to recognize some of our mistakes. Thus it has transpired that an increasing public sentiment has challenged the validity of racial exclusions in our naturalization laws.<sup>30</sup>

Gordon writes that many of the courts that found petitioners racially ineligible for citizenship had “commented on the eminent qualifications of the persons before them and have deplored their inability to admit such individual applicants to American citizenship,” and he outlines the numerous military expediencies that resulted in

expansions of the racial demographics of American citizenship even before the Chinese Exclusion Repeal Act of 1943.<sup>31</sup> In support of his conclusion that the remaining racial prerequisites to naturalization should be repealed, Gordon notes that the Nazi Nuremberg laws appeared to be the only other example of a modern nation that had imposed a racial restriction on naturalization.<sup>32</sup>

Shortly after the war, Milton Konvitz similarly frames his proposal for an end to the “race problem” in American jurisprudence and for greater civil liberty protections for Asian immigrants in the context of recent events in Nazi Germany, noting that “the smallness of a minority group is not always a factor tending to eliminate prejudice or intolerance [as] shown tragically by the history of the Jews in Germany under Hitler.”<sup>33</sup> Like Gordon, Konvitz also cites the claim that Nazi Germany and the United States were the only modern nations to impose racial eligibility requirements in naturalization, quoting a remark made by former Commissioner of Immigration and Naturalization Earl Harrison that “we all agree that this is not very desirable company.”<sup>34</sup> The Immigration and Naturalization Service itself even published a commentary in its October 1943 *Monthly Review* challenging a recent judicial decision that had denied an Arab naturalization by warning that the decision was deplored in part “because it comes at a time when the evil results of race discrimination are so disastrously apparent.”<sup>35</sup> These and other sources recognized that national defense considerations during the war had a significant impact on the racial prerequisites to naturalization.

The impact of the war on American race relations also extended into the cold war, when the racial prerequisite cases were largely ignored by scholarly commentators.<sup>36</sup> At

the end of the cold war, however, Francis Lyman would argue that as a consequence of the fact that World War II was the first major challenge to America's practice of white supremacy,

desegregation and the extension of civil rights became not only the single most important domestic event in postwar America, but also an important feature of American international impression management during the entire era of the Cold War—the struggle against communism requiring the escutcheon of America to be cleansed of any racist blemishes.

Lyman argues that as the cold war came to an end “there appears to be less a rising of capitalist market economies or of newly invigorated Enlightenment than of angry ethnonationalism and parochial chauvinism” such that Marxism and Soviet communism “seem in retrospect to have merely covered over the seething senses of ethnocentrism that had been so prominent before the first World War.”<sup>37</sup> Writing at approximately the same time as Lyman, historians Michael Omi and Howard Winant also claim that the political importance of race in America had been “systematically overlooked” in previous decades and despite its uncertainties and contradictions “continues to play a fundamental role in structuring and representing the social world.”<sup>38</sup>

Perhaps in recognition of the international impression management that resulted in racism being cleansed from the American image during the cold war, as Lyman claims, and echoing Omi and Winant's claim that the political importance of race in America had been systematically overlooked as the cold war ended, many of the studies of the racial prerequisite cases followed the end of the cold war. These studies began with the only book-length study of the cases in Ian Haney López's 1996 book *White by Law*, in which López refers to the racial prerequisite cases as “now largely forgotten” and seeks to

revive interest in the cases.<sup>39</sup> López situates his study within critical race theory, a movement that arose during the early post-cold war period in response to critical legal studies, a movement among legal scholars who applied the methods of critical theory to critique the liberal ideal of law as objective, determinate, and independent of cultural and political forces. According to critical legal studies scholars, this ideal of objective, determinate, value-neutral law is a fiction that lends existing social structures a false appearance of legitimacy and inevitability, and many scholars have noted that critical legal studies and its related legal reform movements, including critical race theory, have “all been informed by and addressed to the rhetorical dimensions of legal governance.”<sup>40</sup> Critical race theory extended the methods of critical legal studies to a study of the relationship of race and power in American culture, particularly by expressing dissatisfaction with traditional civil rights discourse and by challenging the professed ideals of American legal liberalism by offering analyses of the ways in which race is constructed in American legal culture and informs legal practices.<sup>41</sup> Critical race theory scholars have particularly rejected the idea that “color-blindness” will eliminate racism, that racism is a matter of individuals rather than systems, and that one can fight racism in isolation from sexism, homophobia, and other forms of oppression and injustice.<sup>42</sup> Accordingly, López argues that the racial prerequisite cases illustrate the fact that racial identity does not exist wholly independent of law but is a social construction created partly by law, through which structures of social power are elaborated and given content.<sup>43</sup> According to López, previous critical race theory scholars made no attempt “to evaluate systematically just how the law creates and maintains race,” and he claims to fill

that void by studying the legal construction of whiteness in the racial prerequisite cases because they constitute “that rare instance when White racial identity is unexpectedly drawn out of the background and placed abruptly in question.”<sup>44</sup>

Like earlier critics, López primarily restricts his analysis of the cases to the published judicial opinions and even with respect to the fifty-two published opinions that López catalogues he discusses only the first thirty-seven, stopping with the Supreme Court’s 1923 opinion in *Thind* because he concludes that “subsequent lower court opinions adduce little new in terms of racial rationales.”<sup>45</sup> López also acknowledges that he offers only limited social and historical context to his study of the cases:

I do not intend to provide an exhaustive historical study of these cases, or to offer a periodization of the cases that can serve [all] analytical purposes. Thus, this book neither explores the prerequisite cases as social history, for example, by closely examining the lives of the applicants or the judges, nor attempts to situate the cases within the broader context of U.S. legal history. In all of these ways, the prerequisite cases remain a rich vein of information about how we became who we are as a racialized country, and deserve continued and more ambitious excavation.<sup>46</sup>

López not only excludes a careful consideration of the social and historical context of the cases and limits his analysis to the racial “rationales” of the cases, but he considers only those judicial opinions regarding the racial prerequisites to naturalization that courts decided to publish in official reporters, neglecting many unpublished judicial opinions and other evidence of decisions issued without opinion, and he considers the briefs in only two of the cases and no trial transcripts. As a result, López neglects any consideration of the rhetorical strategies adopted in the cases or the persuasive effect the racial “rationales” advanced actually had in individual cases.

López identifies two primary rationales used by the courts to justify their divisions in the cases: “common knowledge,” based on popular, widely held conceptions of race, and “scientific evidence,” based on the supposedly objective, technical, and specialized knowledge of nineteenth century racialist science.<sup>47</sup> According to López, the courts in the early prerequisite cases used both rationales to support decisions that overwhelmingly concluded petitioners were non-“white” and therefore racially ineligible for naturalization.<sup>48</sup> Beginning in 1909, however, these two rationales came into conflict due to the ever-broadening definition of the Caucasian racial classification among ethnologists.<sup>49</sup> This conflict manifested itself in the later prerequisite cases, and López claims that beginning in 1909 every court applying the scientific definition of Caucasian held that the petitioner was “white” and every court applying “common knowledge” held that the petitioner was non-“white.”<sup>50</sup>

This conflict between “common knowledge” and “scientific evidence” of race was finally resolved by the Supreme Court’s opinions in *Ozawa* and *Thind*. López claims that the Court’s opinions in these cases offer duplicitous rationales by first holding that the phrase “white persons” should be interpreted as synonymous with the Caucasian racial classification in *Ozawa* before revising this interpretive approach in *Thind* when the Court was first confronted with a high caste Hindu who ethnologists found to be Caucasian. López claims the Court then held that the phrase “white persons” should be interpreted as synonymous with the Caucasian racial classification only in its “popular” sense. In López’s words, “the Supreme Court in *Ozawa* manifests an abiding faith in science; but only a few months later, in *Thind*, the same Court, the same justices, even the

same judicial author, becomes furiously apostate and rejects any role for science in racial classifications when the Indian petitioner offered scientific evidence that high caste Hindus were Caucasian.” Thus, López contrasts *Ozawa* and *Thind* as a reversal in the Court’s position that reveals it only adopted the “common knowledge” rationale when science failed to reinforce popular beliefs about racial difference, a reversal that confirms race is not a natural phenomenon but “a social product measurable only in terms of what people believe.”<sup>51</sup> As discussed further in Chapter 2, a number of commentators have criticized López’s reading of the Court’s opinions in these cases for his failure to recognize the nearly identical rhetorical situation of the two cases as reflected in the fact that the petitioner in *Ozawa* also presented the Court with scientific evidence to support his claim that the Japanese were Caucasian. As Rogers Smith states in his review of *White by Law*, López “strains to read George Sutherland’s opinions in the two Supreme Court cases of the 1920s, *Ozawa* and *Thind*, as more contrasting than they are.”<sup>52</sup> I argue that the specific contrast López claims between these cases is not defensible but a careful reading of *Ozawa* reveals that the Court actually approved of two lower court cases that had held high caste Hindus to be “white,” raising even more challenging questions about the relationship of the cases than López or other scholars have noted.

Based on his analysis of the racial prerequisite cases, López concludes that the cases reveal the means by which the law legitimizes the existence of races, enables racial categories to “transcend the sociohistorical contexts” in which they are created, and reifies racial categories into abstract differences, such as wealth, which in turn confirms racial ideas by giving them the appearance of natural realities.<sup>53</sup> Thus, insofar as the

courts that ruled on whether someone was Mongolian, “white,” or Hindu validated those racial categories, “giving them the prestige of law and rendering them that much more credible as categories of difference,” the legal recognition of racial categories in such cases “entrenches the belief that racial categorization is a necessary part of human differentiation.”<sup>54</sup> The significance of the cases, according to López, lies “not so much in the morphological distinctions they proffered as in their normative claims regarding racial difference,” particularly the claims that “whites” are “civilized, capable of republican government, and deserving of citizenship,” while non-“whites” are “savage, fit subjects of despotism, and perpetual aliens.” Petitioners claiming whiteness in the cases, in other words, constructed their racial identity “as the superior opposite to those constructed as others.”<sup>55</sup> López also claims that the cases reveal the debilitating effects of whiteness by illustrating the difficulty judges had in articulating who was “white” within the meaning of the naturalization act, a difficulty López attributes to the “transparency phenomenon,” which renders whites incapable of seeing themselves in racial terms. Once again López’s failure to adequately contextualize the cases mars his analysis, however, as Rogers Smith notes that the “transparency phenomenon” is “far more a product of the post-W.W. II era, when the U.S. officially repudiated racial ideologies, than of previous periods when the government openly employed them, including the early 20th century period on which *White by Law* focuses.” During the early twentieth century, by contrast, “American intellectuals and officials elaborated highly visible, self-conscious, and excruciatingly articulate doctrines of ‘whiteness’ that became part of the ‘common sense’ to which courts eventually appealed.”<sup>56</sup> Finally, López argues that the debilitating effects

of whiteness affected the petitioners in the racial prerequisite cases who he claims were not only victims of racialization but were complicitous in the construction of whiteness by consistently claiming whiteness and assimilability to secure belonging in the “white” community.<sup>57</sup>

Numerous scholars succeeding López also focus on how the racial prerequisites to naturalization required petitioners to prove assimilability and the role of the petitioners in this process, including some consideration of the rhetorical practices of the petitioners. Janice Okoomian claims that like the Armenian genocide, the history of Armenian whiteness has been repressed in part through the racial prerequisite cases that involved Armenians. According to Okoomian, the racialization of Armenian Americans has carried “bodily consequences” insofar as whiteness “as a disciplinary regime configures bodies as they are assimilated, excluding some behaviors and signs while producing others.” Thus, she writes, “the body’s historical (genocide) origins . . . must be read in the context of the bodily effects of racial assimilation.”<sup>58</sup> The judicial opinions in the 1909 case of *In re Halladjian* and the 1925 case of *United States v. Cartozian*, Okoomian claims, “followed a trajectory in racializing Armenians, the endpoint of which was that Armenian whiteness had to be sanctioned in biological terms” and that naturalization discourse became “an apparatus for the production of bodies as racialized bodies.” In both cases the judicial acceptance of Armenian biological whiteness was premised on the assumption that Armenians would readily “amalgamate” with European Americans, meaning “their physical differences would be erased through genetic mixing,” and this racialization had bodily effects:

Although whiteness confers the privilege of not having to be reduced to the body in representation, the process of assimilation that had to take place discursively in order for Armenian whiteness to be established occurred not only in the cultural realm but in the bodily realm as well. The “Oriental” differences had to be downplayed.

The judicial opinion in *Halladjian*, Okoomian argues, effects “a rhetorical displacement of Armenian subjects, metonymically substituting Europeans in their place” by evoking a picture of European suffering at the hands of Turkish imperialism in medieval Europe rather than Turkish oppression of Armenians themselves, a rhetorical strategy that argued in favor of Armenian whiteness by suggesting that “their racial congruence with Europeans rested on Turkish racial difference.” Furthermore, the judicial discourse in *Halladjian* “made the Armenian body irrelevant in order to establish Armenian whiteness.”<sup>59</sup> Like López, Okoomian primarily limits her analysis to the published judicial opinions in *Halladjian* and *Cartozian*, however, and as this dissertation demonstrates in Chapter 3, the trial transcript in *Cartozian* reveals that the Armenian defense adopted a rhetorical strategy in which they did foreground Turkish oppression of Armenians themselves rather than Europeans and that the judicial opinion in the case was largely a condensed recitation of the defense’s argument. While Armenian amalgamation through racial mixing with Europeans was certainly a part of the rhetorical strategy in the case, the defense also appealed to the call to unite against a common enemy, a rhetorical strategy that may have operated in the metonymic substitution Okoomian identifies in the judicial opinion in *Halladjian* as well. By attributing this racialization and its bodily effects to the judges in the cases rather than to the claims of whiteness and assimilation that were advanced by the petitioners, Okoomian also appears to frame the Armenian

petitioners as passive victims of the judicial discourse rather than as complicitous in the racialization themselves. She does not examine the rhetoric of the petitioners themselves in the cases.

In contrast to Okoomian, Susan Gualtieri argues that Syrian petitioners involved in litigating racial prerequisite cases in the early twentieth century became “white” only after they had successfully claimed whiteness and when law and custom confirmed it and that “there were (and are) reasons to be profoundly ambivalent about the process by which their claims to whiteness were made.”<sup>60</sup> Specifically, Gualtieri claims that the cases encouraged Syrians to view themselves as “white” only in relation to non-“white” others, particularly blacks and Asians, as their struggle to establish their own whiteness and eligibility for citizenship progressed. Not only did Syrians not challenge the premise that whiteness was a legitimate prerequisite to citizenship, but they ultimately learned to position themselves within, and make sense of, American racial categories in terms of racial hierarchies by denigrating the eligibility of blacks and Asians for citizenship after Syrian appeals to their religious affinity with Western civilization as mediators of the Christian tradition failed to secure them the whiteness they sought.<sup>61</sup> Initially Syrians advanced a religious argument for whiteness, arguing that they were Semites related to European Jews whose racial eligibility for citizenship had never been questioned and that the historical connection of the Syrians with the peoples to whom the Judeo-Christian world owed its religion made it inconceivable that the racial prerequisite to naturalization had intended to exclude them.<sup>62</sup> After this argument repeatedly failed to secure their “white” status in the lower courts, however, Syrians began to frame their whiteness as

superior to that of blacks and Asians and ultimately secured a victory in the United States Court of Appeals for the Fourth Circuit.<sup>63</sup> Although Gualtieri does not specifically claim that the Syrians' appellate victory was due to the fact that they framed their argument in terms that denigrated blacks and Asians (the appellate opinion does not reference the argument but does cite the conclusion that Syrians differ widely from ““their rulers, the Turks, who are in origin Mongolian””<sup>64</sup>), she claims that the decision “corresponded to, and was even made possible by, a decision on the part of individual Syrians to think of themselves” as “white” in relation to non-“white” others.<sup>65</sup>

Similarly, in John Park's *Elusive Citizenship: Immigration, Asian Americans, and the Paradox of Civil Rights*, Park argues that while early Asian American scholarship focused on the harm to Asian American immigrants as relatively passive victims of discriminatory laws, such as the racial prerequisites to naturalization, and more recent scholarship focused on the courageous ways that Asian American immigrants actively fought against racial discrimination in American law, none of the scholarship had sufficiently focused on Asian American complicity in the construction and defense of white supremacy in the United States.<sup>66</sup> Park seeks to provide “something in between” these two approaches by “detailing the way that specific actors and litigants evaded, fought, and embraced American law, first when they were told that they could not belong, and then, ultimately, when they were told that they could.” Their story, he writes, is one of “resisting *and* embracing the principles of white supremacy, which were (and perhaps still are) at the core of American citizenship.”<sup>67</sup> As one prominent example of the ways in which Asian Americans embraced the principles of white supremacy, Park notes

that Asian petitioners for naturalization often claimed to be “white” themselves “in an effort to ‘pass’ as loyal, assimilated Americans.”<sup>68</sup> Focusing particularly on the Supreme Court’s opinions in *Ozawa* and *Thind*, Park writes that what is as striking as the judicial opinions in these cases is the legal strategy—or more precisely the rhetorical strategy—employed by the petitioners and their lawyers which “openly provoked a debate about the relationship between race and citizenship.”<sup>69</sup> In both *Ozawa* and *Thind*, Park argues, the petitioners and their lawyers sought to establish their whiteness by demonstrating their assimilability with “white” American society and their revulsion for “inferior races,” a revulsion which Parks claims to be “the essence of white supremacy.”<sup>70</sup>

Mark Weiner takes a broader, more jurisprudential view of the cases and their assimilatory force in *Americans Without Law: The Racial Boundaries of Citizenship*. Weiner cites the *Ozawa* case as an example of what he calls “juridical racialism,” a specific way of speaking and writing about race and law, or a “civic rhetoric,” through which “the racial character of civic belonging in the United States was understood from the late nineteenth through the mid-twentieth century” and employed to further national economic growth by managing the country’s civic boundaries.<sup>71</sup> With regard to *Ozawa*, Weiner argues that “the rhetoric of judicial racialism” served the goal of stabilizing domestic labor markets in the 1920s by restricting immigration into the United States on the basis of national plenary power over immigration and that *Ozawa* provided crucial federal authority for the exclusion of Japanese immigrants from immigration in the Immigration Act of 1924 by prohibiting all aliens “ineligible for citizenship” from entering the United States.<sup>72</sup> Through a close study of Justice Sutherland’s opinion in

*Ozawa*, Weiner argues that ironically the Court furthered the principle of juridical racialism by making the exclusion of Japanese immigrants possible under the Immigration Act of 1924 at the same time that the Court rejected the racist science Madison Grant was developing to advocate Asian exclusion in immigration.<sup>73</sup> Recognizing the assimilatory force of the racial prerequisites to naturalization, or what he calls the “powerful rhetorical amalgam” of juridical racialism, Weiner concludes that the judicial rhetoric that facilitated the development of federal power in *Ozawa* and other cases was “linked to a distinct mode of personal being centered on individual subjection to the idea and institutions of the state.”<sup>74</sup>

In *What Blood Won't Tell: A History of Race on Trial in America*, Ariela Gross argues that while what happens in the courtroom is a strategic rhetoric and not a faithful mirror of racial realities, a critical reading of the briefs and trial transcripts in racial identity trials such as the racial prerequisite cases can nevertheless reveal “glimpses of ordinary people’s, as well as lower-level legal actors’, understandings of legal and racial categories and of their own places in the racial hierarchy.”<sup>75</sup> Gross discusses numerous racial prerequisite cases as examples of a broader phenomenon of trials adjudicating racial identity through which she hopes to “observe the changing meanings of race throughout our history, and the changes and continuities in racism itself, from its roots in slave society up through the twentieth century.”<sup>76</sup> Gross writes that rather than a self-evident fact of nature or property of blood, race is a powerful ideology that “came into being and changed forms at particular moments in history as the product of social, economic, and psychological conditions,” and was based “at different times, on

appearance, ancestry, performance, reputation, associations, science, national citizenship, and cultural practice.” She argues that beginning in the mid-nineteenth century, racial identity trials such as the racial prerequisite cases frequently relied on community observation and retellings of racial performances: “Doing the things a white man or woman did—attending white churches or dances, sitting on juries and voting (for men), exhibiting sexual purity (for women)—became the law’s working definition of what it meant to be white.”<sup>77</sup> She notes that unlike earlier nineteenth century trials in which the race of particular individuals was determined, the racial prerequisite cases “turned less on personal appearance or performance of whiteness and more on the attributes of an entire people.”<sup>78</sup> In *Halladjian*, for example, “what interested the court was not whether a single Armenian man ‘acted white’ but whether an entire group of people could live up to the standards of performing whiteness.”<sup>79</sup>

Closely paralleling the commentary of Gross and the other scholars above regarding the performance of whiteness in the racial prerequisite cases, John Tehranian argues in *Whitewashed: America’s Middle Eastern Minority* that the racial prerequisites to naturalization “advanced a strict assimilationist directive,” particularly with respect to Middle Eastern immigrants who found themselves on the boundary of “white” and non-“white.” The courts in the cases largely determined whiteness through performance, Tehranian claims, and a “dramaturgy of whiteness” emerged as successful petitioners demonstrated their whiteness “in their character, religious practices and beliefs, class orientation, language, ability to intermarry, and a lot of other traits that had nothing to do with intrinsic racial grouping.”<sup>80</sup> According to Tehranian, the racial prerequisite cases

involving Middle Eastern petitioners particularly reveal the “bizarre fiction” of the state adopting a uniform and mandatory classification of all Middle Easterners as “white,” while “on the street, Middle Eastern Americans suffer from the types of discrimination and racial animus endured by recognized minority groups.” Through this “dualist ontology of Middle Eastern racial classification,” Middle Easterners are selectively racialized, classifying them as “white” when they conform to societal norms and non-“white” when they transgress those norms. Tehranian claims that this fiction of Middle Eastern whiteness has fostered an invisibility that “paradoxically enables the perpetuation and even expansion of discriminatory conduct, both privately and by the state, against individuals of Middle Eastern descent.”<sup>81</sup> Similarly, David Roediger and George Martinez have argued that although Mexicans were held to be racially eligible for naturalization they nonetheless continued to suffer discrimination.<sup>82</sup>

Other scholars have focused on the rhetorical process by which groups whose whiteness was in doubt, such as the Irish, southern Europeans, or as Gualtieri notes, Syrians, secured belonging in the “white” community through the racial prerequisite cases. As Theodore Allen writes in *The Invention of the White Race*, the “whites-only” policy embodied in the racial prerequisites to naturalization “carried with it a status entirely new to the newcomers; the moment they set foot on United States soil, however lowly their social status might otherwise be they were endowed with all the immunities, rights and privileges of ‘American whites.’”<sup>83</sup> David Roediger notes that when the First Congress included the phrase “white persons” in the naturalization act, “the language reflected an expansiveness among lawmakers who would have grown up harboring

certain suspicions of non-British immigrants,” but “the confidence of Revolution, the need to build and defend the new nation, and a transformation of attitudes and realities that made recruiting English settlers seem less ideal and practical made a variety of ‘whites’ seem desirable.”<sup>84</sup> As Noel Ignatiev writes, although the Irish were once known as “the blacks of Europe,” their status as immigrants rather than as slaves probably improved their racial status but did not settle it “since it was by no means obvious who was ‘white.’” According to Ignatiev, the Irish became “white” by turning from oppressed to oppressors by opposing the abolition of slavery. By joining with other American “whites” to defend slavery, the Irish resolved the doubts regarding their racial classification in the United States and became “white.”<sup>85</sup> They joined “white” Americans in solidarity of fear of freed slaves and the black vote.

Perhaps most significantly, Matthew Frye Jacobson includes a chapter on the racial prerequisite cases in his examination of whiteness and American imperialism in *Whiteness of a Different Color: European Immigrants and the Alchemy of Race*, arguing that the cases played a crucial role in what he refers to as the “crucible of empire” by which the whiteness of European immigrants whose whiteness had been considered inferior to that of Anglo-Saxons was confirmed when American expansion into the Pacific and the representation of Pacific natives as dangerous “savages” dissolved the boundary between “superior” and “inferior” whites from Europe.<sup>86</sup> Jacobson argues that the racial prerequisite cases were not just about citizenship but about whiteness itself, which was perceived to have an intrinsic value of its own, and that one of the most important functions of the cases was how they “shored up the whiteness of Europe’s

probationary white races by inflating the difference between the insiders and the outsiders of 1790, and at a time when so much other cultural authority was tending in the opposite direction.” According to Jacobson, the efforts of Chinese, Asian Indian, Armenian, Syrian, and Filipino petitioners for naturalization “were *part* of what kept the probationary white races of Europe white.”<sup>87</sup> Jacobson claims that

like the nation’s frontier warfare and its perpetual narrations, . . . these legal skirmishes along the borders of naturalized citizenship staked out a brand of monolithic whiteness which corroborated the reasoning of 1790 precisely in a period when that reasoning was undergoing massive revision.<sup>88</sup>

Whereas for some the phrase “white persons” in the naturalization act signified an instrument of exclusion, “for others it became a powerful crucible whose exclusions based upon distinctions of color blurred other potentially divisive physical distinctions,” forming a true “melting pot” in which the whiteness of certain European immigrants was confirmed.<sup>89</sup> Jacobson’s “crucible of empire” is one of the most specific instances in which commentators have focused on the rhetorical strategy of uniting against common enemies in racial prerequisite discourse, but by framing it solely in terms of the role American imperialism played in confirming the whiteness of the “probationary white races of Europe,” Jacobson neglects the much more pervasive presence of this rhetorical strategy in the discourse and its impact not only on the non-Anglo-Saxon races of Europe but on a wide variety of groups and across a wider period than the rise of American imperialism alone.

The wealth of recent scholarship on the racial prerequisite cases demonstrates that if they ever were “largely forgotten,” as López claims in *White by Law*, the cases now attract substantial commentary regarding the relationship between race and citizenship in

American culture. The cases have not only proven instructive for better understanding race and citizenship, however, but have also raised distinctly rhetorical questions concerning the role of legal rhetoric and argumentation in the construction of racial identities, from Janice Okoomian's analysis of how the judicial opinion in *Halladjian* effects a "rhetorical displacement" of the Armenian subject,<sup>90</sup> to Susan Gualtieri's claim that Syrian petitioners learned to position themselves within American racial hierarchies in their arguments before the courts,<sup>91</sup> to John Park's claim that what is as remarkable as the judicial opinions in the cases is the rhetorical strategies adopted by the petitioners in which they openly provoked a debate about the relationship of race and citizenship,<sup>92</sup> to Mark Weiner's examination of *Ozawa* as an example of a specific way of speaking and writing about race and law that he calls a "civic rhetoric,"<sup>93</sup> to Ariela Gross's and John Tehranian's focus on the performative and dramaturgical rhetoric of the petitioners in the cases,<sup>94</sup> to Matthew Frye Jacobson's claim that the cases operated as a crucial component of a "crucible of empire" that forged the whiteness of southern Europeans through the representation of Pacific natives as dangerous "savages."<sup>95</sup> Thus, the existing scholarship suggests that the racial prerequisite cases may be particularly instructive for rhetorical study and that such a study is needed. In conducting such a study, I follow a number of other scholars in rhetorical studies who have drawn on the critical race theory movement for purposes of critically interrogating race and whiteness.<sup>96</sup>

## COMMON ENEMIES IN RACE AND NATURALIZATION

While prior commentaries on the racial prerequisite cases have argued that performative efforts to establish assimilability with contemporary Europeans and Americans played a crucial role in the decisions of the cases, this emphasis fails to account both for cases in which petitioners were held to be racially ineligible for naturalization despite having offered impressive evidence of assimilability and for cases in which petitioners were held racially eligible for naturalization despite having offered little or no evidence of assimilability. When considered as a rhetorical strategy, in other words, efforts to imitatively perform whiteness often failed to persuade the courts that petitioners in the cases were “white.” In *Ozawa*, the first racial prerequisite case to come before the Supreme Court, numerous commentators including the Court itself noted that the Japanese petitioner attended American schools and churches with his family and maintained the use of English in his home, but because he belonged to the “Japanese race” he was held to be non-“white” and therefore racially ineligible for naturalization.<sup>97</sup> Similarly, as Sarah Gualtieri writes, a federal district court in South Carolina repeatedly held that Syrian petitioners were not “white” and were therefore racially ineligible for naturalization despite ample evidence that they belonged to the Judeo-Christian religious tradition by both faith and geography.<sup>98</sup> On the other hand, various Turkish, Arab, Parsi, Asian Indian, Kalmyk, and Tatar petitioners were held to be “white” and therefore racially eligible for naturalization despite their geographical origins and acculturation in Asia and their Islamic, Zoroastrian, Hindu, Sikh, and Buddhist religious backgrounds.<sup>99</sup> Prior commentators such as Gualtieri have also frequently noted that the racial

prerequisite cases led the petitioners to denigrate other races in the effort to position themselves within American racial hierarchies and thereby establish their whiteness, but I argue that where this rhetorical strategy appeared most prominently in the cases it appears to have failed. The racial prerequisite cases cannot be adequately understood solely by reference to the “performance of whiteness and perceived assimilatory capacity” of the petitioners alone.<sup>100</sup>

The racial prerequisite cases reveal another rhetorical strategy that has been largely overlooked by prior commentaries, however, one that is the inverse of efforts to imitatively perform whiteness. The legislative, executive, and judicial discourse regarding the racial prerequisite in the naturalization act from the mid-nineteenth century through the mid-twentieth century also frequently reflect rhetorical appeals to a common enemy in support of arguments regarding racial eligibility for citizenship, suggesting that the participants in racial prerequisite discourse found this rhetorical strategy particularly persuasive of racial belonging and exclusion. The frequent appearance of this rhetorical strategy in racial prerequisite discourse suggests that a martial ideal of citizenship often influenced racial classifications under the act. It is this rhetorical strategy that this dissertation unpacks.

In 1917, one racial prerequisite court wrote that the First Congress did not intend to limit citizenship to people then commonly recognized as belonging to the “white” race but instead the phrase “white persons” was used to describe in general terms the class of people who might enjoy the privilege of citizenship, but the court described how the boundaries of whiteness broadened as a result of the Revolutionary War:

As the inhabitants of what was then the United States were a more or less homogeneous people who or whose immediate forbears had come from what has been termed “Northern Europe,” and as the vast territories then known as Florida and as Louisiana formed no part of our national domain, and as our people had been in almost continuous conflict with the French and Spaniards, it is doubtful whether the words “white persons,” as used in common speech, originally included any of the so-called Latin races. The events of the Revolution, however, and the gratitude which our people felt toward France, and more especially the large number of French Huguenots who had come to make their homes here, caused instant recognition of the French as having a common heritage with us, and the phrase automatically expanded to include them. The desire to be consistent forced us to include the Spaniards and Portuguese, and later the Italian peoples, and broadly the Latin race.<sup>101</sup>

This court draws on the shared fears of the Anglo-Saxon and French inhabitants of North America facing a common enemy during the Revolutionary War to transcend preexisting racial differences, explaining their belonging in the “white” racial classification as a result of this unification against a threatening other.

Similarly, legislative debates regarding the racial prerequisites to naturalization frequently reflected rhetorical strategies of unifying against common enemies. For example, during Civil War Reconstruction debates regarding whether the word “white” should be removed from the naturalization act, West Coast senators warned of the threat posed by rising numbers of Chinese immigrants, which they described as a “mighty tide of ignorance and pollution that Asia is pouring with accumulating force and volume into the bosom of our country.”<sup>102</sup> By contrast, during the debates regarding the Chinese Exclusion Repeal Act of 1943, which extended racial eligibility for naturalization to the Chinese, congressmen appealed to China’s alliance with the United States in the war against the “bloody Hirohito dynasty of Japan,” noting that “today we are allied with [China] in every way that a great and honorable people can be allied with another great

people to fight for the principles of government we hold so dear,” and “we must act together, and to act together we must wipe out every vestige, whatever the cause may have been for its enactment, which speaks contempt and disrespect for the great Chinese people.”<sup>103</sup> During World War II, the congressional debates regarding the extension of racial eligibility of Asian Indians for naturalization also reflected appeals to fear of a common enemy, justifying an effort to strengthen America’s alliance with India first by appealing to the Axis threat while the war continued and then by appealing to the Soviet communist threat once the war had ended. In these and other legislative debates, the rhetorical strategies adopted in support of racial eligibility or ineligibility for naturalization often turned on whether a group was represented as a threat to the nation or important to the nation’s defense.

In addition, the naturalization provisions of numerous treaties governing the annexation of additional territories during the nineteenth and twentieth centuries naturalized all of the inhabitants of the annexed territories without regard to race, or as Supreme Court Justice John McLean writes in his dissent in *Dred Scott*, “on the question of citizenship it must be admitted that we have not been very fastidious.” Justice McLean specifically refers to the Treaty of Guadalupe-Hidalgo, in which he writes that “we have made citizens of all grades, combinations, and colors” and the Adams–Onís Treaty which naturalized the inhabitants of the annexed Florida and Louisiana territories without regard to race.<sup>104</sup> In nearly every instance in which the United States annexed territory during the nineteenth and twentieth centuries—mostly through military conquest or in furtherance of military objectives—the inhabitants of the annexed territories were

naturalized without regard to race. Thus, in addition to the naturalization of the inhabitants of Arizona, California, Colorado, Florida, Louisiana, Nevada, New Mexico, Texas, Utah, and Wyoming without regard to race, the inhabitants of Alaska, Hawaii, Puerto Rico, and the Virgin Islands were all naturalized without regard to race as the United States extended its territory beyond the continent and these naturalizations undoubtedly encompassed numerous inhabitants who would not otherwise have been racially eligible for naturalization.<sup>105</sup> Furthermore, in an 1897 judicial opinion holding that a “pure-blooded Mexican” petitioner was racially eligible for naturalization, Judge Thomas Maxey of the United States District Court for the Western District of Texas also relied heavily on the fact that the Treaty of Guadalupe-Hidalgo, the Adams–Onís Treaty, and the Gadsden Treaty had naturalized numerous Mexican inhabitants of the annexed territories.<sup>106</sup> In all of these cases, exceptions to the racial prerequisites to naturalization have been made for those within a new territorial border established by military conflict or with military objectives.

Moreover, numerous exceptions to the racial prerequisites to naturalization were made for military veterans who had served in the United States military, particularly those who had served during wartime. In addition to the Nye-Lea Act of 1935 which allowed Bhagat Singh Thind to finally acquire citizenship as a veteran who had served in the United States military during World War I, exceptions to the racial prerequisite to naturalization were made for Filipino and Puerto Rican veterans in 1918, American Indian veterans in 1919, and all World War II veterans in 1942.<sup>107</sup> In fact, even before the formal legislative exceptions providing for alien veterans who were racially ineligible for

citizenship to become citizens without regard to race in 1935 and 1942, decisions regarding whether or not the racial prerequisites to naturalization limited the scope of an act providing for the expedited naturalizations of alien soldiers prompted a crisis within the federal courts as Asian soldiers claimed their military service entitled them to citizenship.<sup>108</sup>

Although conflicting opinions arose regarding whether or not the grant of an expedited path to citizenship for alien soldiers remained conditioned on the racial eligibility of the petitioners and the Supreme Court eventually held that the racial prerequisites continued to apply, Lucy Salyer writes that the Bureau of Naturalization's records reveal that the majority of lower courts ruled in favor of the Asian soldiers seeking citizenship in the cases.<sup>109</sup> Similarly, officials in the Bureau of Naturalization unilaterally decided not to target Asian Indian veterans with denaturalization proceedings following *Thind*, as reflected in a list of Asian Indian veterans against which the Bureau chose not to institute denaturalization proceedings, a list that was produced during 1926 congressional hearings regarding the denaturalization proceedings and their impact on the Asian Indians targeted.<sup>110</sup> According to Salyer, the martial citizenship ideal that had been "propagated by the U.S. government to mobilize and assure soldiers' allegiance [during the war], outlasted the war" and "undermined the assumptions of racial nativism."<sup>111</sup> As a result, the story of Asian veterans and the dilemma they posed for the racial prerequisites to citizenship "reveals that racialist definitions of citizenship remained contested and could be dislodged when other ideals of citizenship—in particular, the warrior ideal—better served strategic and ideological needs."<sup>112</sup> Similarly, Rogers Smith argues that

major changes in American citizenship toward liberal democratic ideals of inclusiveness have come during periods when the nation fought great wars “against opponents hostile to such ideals.” Only when such wars made egalitarian principles politically advantageous and even necessary did Americans extend citizenship rights to racial minorities and women.<sup>113</sup>

Finally, this rhetorical strategy not only appeared at the highest levels of national policy-making by legislative, executive, and judicial officials, but the petitioners frequently employed this rhetorical strategy in individual cases by framing their arguments for whiteness not in terms of the inferiority of non-“white” races but in terms of their danger and the threat they posed to the petitioners in common with “white” Americans, particularly in connection with the new political category of displaced and stateless persons that emerged after World War I. In *Cartozian*, for example, the Armenian defense in the case not only argued that Armenians readily assimilated with “white” Americans but that they were entirely inassimilable with the Ottoman Turks whose religious persecution of the Armenians since the rise of the Ottoman Empire had recently culminated in the Armenian genocide of World War I. This genocide not only left many Armenians stateless but also occurred while Turkish aggression toward the United States during the war lingered in recent memory and Turkey continued to oppose American efforts to create an independent Republic of Armenia and kill American missionaries during Armenian massacres. Similarly, Sakharam Ganesh Pandit, the only Asian Indian to successfully defend himself against the denaturalization proceedings that followed the Supreme Court’s opinion in *Thind*, argued that if he were to lose his

American citizenship he would be rendered stateless because Indian society would discriminate against him for becoming an American citizen and no longer recognize his high caste status, leaving him casteless and among the untouchables of India. Likewise, in two cases before the United States Board of Immigration Appeals during the early cold war era in which the Board considered the racial eligibility of Tatar and Kalmyk refugees from the Soviet Union seeking admission to the United States after being refused entry by immigration officials on the basis that they were not “white” and were therefore ineligible to citizenship under the Immigration Act of 1924, the Board of Immigration Appeals highlighted the systematic displacement and deportation of these immigrants by America’s cold war adversary the Soviet Union.<sup>114</sup>

The adoption of this rhetorical strategy by legislators, judges, executive officials, and the petitioners across a wide time period and referencing a variety of enmities suggests a much deeper rhetorical dimension to the strategy than Matthew Frye Jacobson’s claim in *Whiteness of a Different Color* that the racial prerequisite cases functioned as a “crucible of empire” to confirm the whiteness of the “probationary white races of Europe” against the danger posed by Pacific natives. Instead, this rhetorical strategy appears to reflect a deeply-held belief that participating in common defense of the nation against its enemies transcends perceived racial differences in individual cases and afforded those engaged in racial prerequisite discourse a particularly powerful means of persuading their audiences of racial classifications. At the same time, by not challenging whether race was an appropriate prerequisite to naturalization at all, this

rhetorical strategy reinforced the racial category of whiteness and the belief in Asian racial difference.

### **THE RHETORIC OF ENEMIES AND REALISTIC GROUP CONFLICT THEORY**

In the early twentieth century, Kenneth Burke introduced “identification” as the central concept of rhetoric to replace the more traditional term “persuasion,” proposing that persuasion operates by the process of identification and division by which people form group identities, or a perpetual struggle between “us” and “them.” In *A Rhetoric of Motives*, Burke writes that with the term “identification” he hopes to “mark off the areas of rhetoric, by showing how a rhetorical motive is often present where it is not usually recognized, or thought to belong.”<sup>115</sup> According to Burke, identification is never complete but instead where there is identification there is also division and the line between the two is always ambiguous, or “wavering,” and it is within this ambiguity between the two that the realm of rhetorical activity operates: “Put identification and division ambiguously together, so that you cannot know for certain just where one ends and the other begins, and you have the characteristic invitation to rhetoric.”<sup>116</sup> Despite this basic insight that identification and division are always found together, however, Burke also notes that the term “identification” can be applied in at least several ways. The first is by a direct attempt to identify with others, such as the performative efforts to establish assimilability in the racial prerequisite cases. Burke offers by way of example the effort of a rich politician to identify with voters by describing his humble origins.

Burke calls this form of identification “quite dull,” however, in contrast with less direct forms of identification.

Among the more powerful alternatives to these direct efforts at identification, Burke describes what he calls “identification by antithesis,” which “involves the workings of antithesis, as when allies who would otherwise dispute among themselves join forces against a common enemy.” Burke specifically discusses this form of identification in terms of its transcendent function, seeking to unite those who would otherwise be divided. He also notes that identification by antithesis “can serve to deflect criticism, as a politician can call any criticism of his policies ‘unpatriotic,’ on the grounds that it reinforces the claims of the nation’s enemies. According to Burke, less direct efforts to create identification such as the use of antithesis are more effective because the major power of identification derives from forms in which it goes unnoticed, giving as an example the various uses of the first person plural “we.”<sup>117</sup> Burke only makes occasional references to identification by antithesis as a particular form of identification and division distinguished from others, however, and instead discusses the role of identification and division in forming identity more generally.

Numerous scholars in rhetorical and literary studies, political science, and history have given the rhetorical strategy of uniting against a common enemy closer scrutiny than Burke, specifically studying rhetorical constructions of common enemies to reduce intergroup tension and strengthen group identification in the writing of history, literature, and war propaganda.<sup>118</sup> In *Constructing the Political Spectacle*, for example, Murray Edelman writes that political enemies, whether real or imaginary, are an inherent part of

the political scene and that one of the most valuable functions of political enemies is their power to generate defensive alliances:

Because the evocation of a threatening enemy may win political support for its prospective targets, people construct enemies who renew their own commitment and mobilize allies: witches in seventeenth-century Salem, communists in the army in the 1950s, Jews in Nazi Germany, homosexuals, a foreign regime associated with an unpopular ideology, dissident peasants in Vietnam or El Salvador.

The unification of disparate interests through the shared fear of a common enemy “lends intensity to common causes and sometimes creates a belief in nonexistent common interests,”<sup>119</sup> and as a result when the enemy helps galvanize support for a cause those who construct an enemy “have every reason to perpetuate and exaggerate the threat he poses.”<sup>120</sup> Thus, while the construction of enemies makes it possible to hurt or kill them, Edelman claims that in ordinary political language enemies are more likely to be perpetuated for the political benefits they confer.<sup>121</sup>

As a result, Edelman claims long-established enmities create a highly predictable and stable discourse and a correspondingly predictable distribution of power and material resources.<sup>122</sup> In such relationships, the dangerous propensity of an enemy is often constructed as an inherent character trait or set of traits and therefore “a continuing threat regardless of what course of action they pursue, regardless of whether they win or lose in any particular encounter, and even if they take no political action at all.”<sup>123</sup> Hostile language and gestures often become ritualized to preserve the relationship:

To stop exaggerating the enemy’s dangerous potentialities or to employ physical force to eliminate him would signal change; but to continue verbal assaults and indecisive physical movements that have long taken place is to signal that all will remain as it has been: that the dramaturgy of enmity is consolidating public support for regimes, for causes, and for inequalities.

Nonetheless, Edelman claims that enemies are typically constructed out of intellectual and emotional involvement in present conflicts, and history becomes in this process merely “a set of myths to justify current resentments and aggressions rather than as a basis for understanding and explanation.”<sup>124</sup> Edelman concludes that given the performative quality of enmity rhetoric, “the frightening implication is that anyone, no matter how well-intentioned, is likely to attribute harm to others when there is no warrant for doing so,” and the construction of enemies underlies not only human conflict and war but “the policy formation, the elections, and the other seemingly rational and even liberal activities of the contemporary state as well.”<sup>125</sup>

In *Democracy and America's War on Terror*, Robert Ivie argues that the rhetoric of America's war on terror is part of a broader rhetoric of enmity that forms a central theme throughout American history, in which “the discourse of foreign threat demarcates American identity and constitutes national purpose.” Contrary to its proclaimed commitment to peace, Ivie claims, the United States is instead “a violent nation motivated by a tragic sense of fear, a country tyrannized by an exaggerated image of the danger endemic to domestic politics and international affairs.” Moreover, this rhetoric of fear plays a critical role in national identity because without the rhetorical construction of a threatening other, “the possibility of national identity is diminished,” or in other words, Americans must feel endangered “in order to exist purposefully and meaningfully as a people.”<sup>126</sup> Ivie argues that this construction of identity in relationship to a threatening other derives from the perceived vulnerabilities of democracies, or what Ivie calls “demophobia,” a fear of a distempered public sphere caricatured as “prone to popular

rage and fits of passion, convulsions of factionalism that poison public deliberations, and a contagion of jealousy and avarice that reduces the people to a collection or mere dupes subject to the manipulation of unsavory politicians.”<sup>127</sup> To better address the threats and challenges facing the United States without relying on a rhetoric of fear that ensures a reciprocal process of demonization and an escalating cycle of violence in international relations, Ivie calls for the country to promote a more agonistic model of democracy both domestically and abroad that addresses others “strategically as consubstantial rivals rather than as evil enemies,” a rhetoric that “converts antagonism into the provisional, temporary, and partial condition of friendly enemies.”<sup>128</sup> Such a rhetoric, he argues, “reduces the impulse to exaggerate danger, invent scapegoats, and rely too singularly or heavily on the hard power of military coercion.”<sup>129</sup> In contrast to Edelman and others who study the rhetorical construction of enemies, Ivie suggests that this rhetorical form takes on a unique quality as a response to fears of American democracy, but he offers no comparative study and little evidence to support his claim that the construction of identity in relation to threatening others is a unique theme of American history and not a more pervasive rhetorical form.

In *Enemyship: Democracy and Counter-Revolution in the Early Republic*, Jeremy Engels offers a study of the rhetoric of enemy-making, or “enemyship,” as he calls it, which signifies “the many ways that political actors name the enemy in order to achieve desirable rhetorical effects.” Unlike friendship, which is based on mutual affection, Engels writes that enemyship is “a bond of mutual antagonism for an enemy, resulting in a solidarity of fear, a community of spite, a kinship in arms, and a brotherhood of hatred.”

According to Engels, during the American Revolution “unity was premised as much on the danger of an external enemy as it was on shared ideals such as life, liberty, and the pursuit of happiness,” as frequently reflected in writings of the period:

In the first installment of *The American Crisis*, published in December 1776, Thomas Paine observed that “Mutual fear is the principal link in the chain of mutual love.” Later, looking back on the Revolutionary War, John Kay reported in Federalist 2 that Americans became “a united people,” “a band of brethren,” when “fighting side by side” against “common enemies.” For John Quincy Adams, colonial union was “formed by the coalescence of a common enemy,” and for George Clinton, during the war Americans were “cemented by the ties of common danger and the imperious motives of self-preservation.” Thomas Jefferson made a similar observation in his *Autobiography*. For these Americans, colonial unity was the product of mutual fear, common enmity, and shared danger, as threatened hostilities fostered relationships between colonists under siege.<sup>130</sup>

Thus, Engels argues that enemyship is a “technique of governing” that provides a means of controlling and containing the will of the governed.<sup>131</sup> The ultimate rhetorical end of enemyship is that rhetors use tropes of imminence and inevitability to make it appear that a crisis is unavoidable, along with “discourses of fear, paranoia, and anxiety to focus their audience’s thoughts on how best to defend themselves and their families from the enemy.”<sup>132</sup>

The rhetoric of persecution by a common enemy may also suggest an appeal to pity, or *argumentum ad misericordiam*, often considered a fallacy of relevance, but commentators often distinguish a nonfallacious variety of the *argumentum ad misericordiam* in language that remarkably describes the appeal to unify against a common enemy. In Douglas Walton’s study of the *argumentum ad misericordiam*, for example, he argues that although it is commonly listed as a fallacy in twentieth century logic textbooks, not all forms are fallacious.<sup>133</sup> Unlike fallacious appeals to pity, which

involve the belief that the object of pity is inferior, Walton argues that when the belief in the inferiority of the object is absent and “a relation between equals, or persons in the same or a comparable situation that is bad or unfortunate for both,” the appeal is a nonfallacious appeal to compassion:

There is an immediacy or urgency about compassion that pity lacks. . . . We can pity someone while maintaining a safe emotional distance from what he or she is undergoing. When we feel compassion this emotional distance is crossed. We desire to relieve the other’s plight, and in so doing, relieve ourselves of the burden of sharing the trauma caused by his or her condition.<sup>134</sup>

Like social scientists who argue that human altruism and cooperation are the result of intergroup conflict, Walton argues that appeals to compassion, which depend on the subject and object of compassion being in a relation of shared suffering, appear to have an evolutionary basis as a “built-in human bias” that creates a heightened arousal of emotions potentially important to successful deliberation and group survival “from a broad evolutionary perspective,” a reasonable use of emotion to shift the burden of proof in balance-of-considerations analyses.<sup>135</sup> Walton also notes “one of the most plentiful types of cases of *ad misericordiam* cited in the textbooks are the legal cases.”<sup>136</sup> Like Walton, Martha Nussbaum also argues that when accompanied by a belief that one’s own possibilities are similar to those of the sufferer, the emotion of compassion (pity) is a necessary component of rational judgment, “essential in order to take the full measure of the adversity and suffering of others, and . . . necessary for a full social rationality.”<sup>137</sup> These considerations suggest that this form of appeal should not be hastily dismissed as a fallacious appeal to emotion, but that it may reflect an important form of practical reasoning critical to group survival.

In research related to the rhetorical construction of enemies, social and evolutionary psychologists, sociologists, and anthropologists have also studied the relationship between out-group threats and in-group cooperation in the development and resolution of intergroup conflict. From the earliest introduction of the terms “in-group” and “out-group” by William Graham Sumner in *Folkways: A Study of the Sociological Importance of Usages, Manners, Customs, Mores, and Morals*, Sumner observed that “the relation of comradeship and peace in the we-group and that of hostility and war towards others-groups are correlative to each other” because “the exigencies of war with outsiders are what makes peace inside, lest internal discord should weaken the we-group for war.” Sumner accordingly theorized that the intensity of in-group solidarity and the intensity of warfare correspond:

The closer the neighbors, and the stronger they are, the intenser is the warfare, and then the intenser is the internal organization and discipline of each. Sentiments are produced to correspond. Loyalty to the group, sacrifice for it, hatred and contempt for outsiders, brotherhood within, warlikeness without—all group together, common products of the same situation.<sup>138</sup>

Beginning in the 1950s and 1960s, social scientists developed a model of intergroup conflict known as realistic group conflict theory based in part on Sumner’s conclusion about the corresponding nature of in-group and out-group relations. The central assertion of realistic group conflict theory is that intergroup hostility is caused by the actual or perceived existence of conflicting goals or competition over limited material resources or power and is reduced by the existence of superordinate goals attainable only by the cooperation of both groups.<sup>139</sup> Realistic group conflict theory also recognizes that

intergroup conflict may involve not only objective conditions of conflicting goals or competition but also the subjective perception that the out-group poses a threat.<sup>140</sup>

Like Sumner's commentary on the relationship of correspondence between in-groups and out-groups, social scientists who have advocated and studied realistic group conflict theory have claimed that the intensity of intragroup solidarity and intergroup conflict correspond to each other because as identification with an in-group intensifies, intergroup conflict is more likely to develop.<sup>141</sup> Realistic group conflict theory also proposes a theory of reducing and eventually resolving intergroup conflict, however, through the introduction of a series of superordinate goals, defined as "goals which are compelling for members of two or more groups and cannot be ignored, but which cannot be achieved by the efforts and resources of one group alone."<sup>142</sup> In this respect, realistic group conflict theory significantly challenges the theory that simply increasing contact between hostile groups, even in favorable circumstances, will reduce hostility. Instead, realistic group conflict theory suggests that such contact may increase intergroup hostility and proposes that superordinate goals are the motive condition necessary to induce members of the in-group to reformulate their views of the out-group so that "information about the out-group—ignored, rejected, or distorted before—will be viewed in a new, more positive light."<sup>143</sup> As Muzafer and Carolyn Sherif write,

until this optimal motive condition is created, attempts to disseminate correct information, conferences of leaders, exhortations to take every man for what he is rather than seeing him through the darkening influence of negative images or stereotypes, and intergroup contacts on pleasant occasions prove to be rather futile.<sup>144</sup>

Moreover, the effects of superordinate goals are also generally cumulative, requiring a series of such goals to substantially reduce intergroup conflict.<sup>145</sup> Ultimately, realistic group conflict theory proposes to reduce human conflict by broadening human interdependence, which it holds to be the prerequisite for morality in dealing with people outside of a narrow in-group and “for creation of a widening sense of ‘we-ness’” and a world free of tension and violence.<sup>146</sup>

What is most important about realistic group conflict theory for purposes of this dissertation is how a common enemy can serve as a particularly compelling superordinate goal that cannot be ignored and requires groups otherwise adverse to unite to defend themselves. The most elaborate investigation of intergroup conflict is known as the Robbers Cave experiment, in which researchers investigated intergroup conflict through a series of experiments at a summer camp. Although the researchers claim to have rejected the introduction of a “common enemy” as a means of reducing the conflict in their experiment because it would implicate intergroup conflict on a larger scale than they sought to study, in at least one of the experiments the researchers suggested to their subjects that “vandals” may have been responsible for an interruption of a valuable water supply that intergroup cooperation would be required to restore.<sup>147</sup> More recently, a study of the effects of out-group threats on in-group cooperation concluded that participants who unwittingly read written texts in which a person from another culture criticized the readers’ culture in an offensive way were more likely to engage in intergroup discrimination in a subsequent reward allocation task,<sup>148</sup> indicating that written threats may be sufficient to intensify in-group cooperation. Moreover, out-group threats are

claimed to have such a powerful effect on in-groups that it may explain the findings of war and suicide terrorism researchers regarding the willingness of individuals to sacrifice their lives on behalf of a group.<sup>149</sup> While studies of realistic group conflict theory have not specifically considered the significance of the theory to rhetorical invention, it can help explain how rhetorical strategies affect and are affected by intergroup hostility, including the rhetorical strategy of uniting against a common enemy.

Perhaps not surprisingly, veteran war correspondents and those writing about their experiences in war have also reflected on the powerful solidarity that forms between those who have been under fire together in war.<sup>150</sup> Such writings frequently note the deep emotional attachment that results from fear of a common enemy and the costly sacrifices that individuals experiencing this attachment make to defend their group. As Chris Hedges writes, “the communal march against an enemy generates a warm, unfamiliar bond with our neighbors, our community, our nation, wiping out unsettling undercurrents of alienation and dislocation,” and “reduces and at times erases the anxieties of individual consciousness” until “we abandon individual responsibility for a shared, unquestioned communal enterprise, however morally dubious.”<sup>151</sup> As Hedges explains the close bond felt by fellow soldiers in war,

The closeness of a unit, and even as a reporter one enters into that fraternity once you have been together under fire, is possible only with the wolf of death banging at the door. The feeling is genuine, but without the threat of violence and death it cannot be sustained.<sup>152</sup>

The feelings of those who share suffering in war frequently invoke the strongest language to describe their experience, noting that the solidarity they experienced “allowed them to love men and women they hardly knew, indeed, whom they may not have liked before

the war,”<sup>153</sup> and led them to believe they had more complete communion with their comrades in arms than lovers. This experience can even be longed for as an idyllic moment when the war is over,<sup>154</sup> as reflected in the title of British journalist Anthony Lloyd’s 1999 memoir of his experiences in the war in Bosnia, *My War Gone By, I Miss It So*.<sup>155</sup> As Sam Keen writes in his study of war propaganda, we create enemies “not because we are intrinsically cruel, but because focusing our anger on an outside target, striking at strangers, brings our tribe or nation together and allows us to be part of a close and loving in-group,” or “we create surplus evil because we need to belong.”<sup>156</sup>

These and other sources have also particularly emphasized the importance of victimage rhetoric to the solidarity that arises out of the shared suffering of war. In *The Psychology of War*, Lawrence Leshan writes that both sides in a war tend to view the conflict as having been started by the other, who acts as the aggressor out of a desire for power, and to view themselves by contrast as acting out of self-defense.<sup>157</sup> Chris Hedges similarly writes that “the cultivation of victimhood is essential fodder for any conflict” and carefully constructed by the state, often placing particular importance on the first victim as a justification for war.<sup>158</sup> As Elias Canetti writes,

It is the first death which infects everyone with the feeling of being threatened. It is impossible to overrate the part played by the first dead man in the kindling of wars. Rulers who want to unleash war know very well that they must procure or invent a first victim. It need not be anyone of particular importance, and can even be someone quite unknown. Nothing matters except his death; and it must be believed that the enemy is responsible for this. Every possible cause of his death is suppressed except one: his membership of the group to which one belongs oneself.<sup>159</sup>

In his study of the rhetoric of American justifications for war, Robert Ivie also writes that an enemy’s behavior is typically constructed as “voluntary” and “initial” in contrast to

the victim's reaction as "involuntary" and "defensive."<sup>160</sup> I argue that the agency at work in the rhetorical strategy of unifying against a common enemy is persecutory, representing the enemy as the aggressor, the persecutor, the tyrant, the "wolf of death banging at the door" that brings solidarity, rather than through representations of shared aggression toward an enemy. This rhetorical strategy and the importance of the agency it requires is evident in the series of racial prerequisite cases from the early twentieth century that this dissertation studies.

#### **HISTORICAL BACKGROUND AND SCOPE OF THE STUDY**

A brief historical background of the racial prerequisite cases of the late nineteenth and early twentieth centuries is necessary to understand the cases studied in this dissertation. To understand the interpretive questions the courts in the racial prerequisite cases faced and the interpretive approaches they took to address those questions, it is first critical to understand the legislative history of the naturalization act that followed the Civil War and the impact the "Chinese Question" had on the subsequent interpretation of the act. From the earliest days after California became a state in the mid-nineteenth century, large numbers of Chinese immigrants began arriving in California as part of a massive exodus of emigration out of southeastern China precipitated by population pressures, internal conflicts such as the Taiping rebellion, and the British-Chinese War, and facilitated by the rapid growth of shipping running relatively cheap passages abroad and business arrangements between Chinese and foreign merchants to transport cheap Chinese labor to plantation colonies.<sup>161</sup> The Chinese who had entered the United States

during the initial decades of this exodus or earlier had been admitted to citizenship in many Eastern states for years as reflected, for example, by accounts of Chinese naturalizations in New York and North Carolina as early as the 1830s<sup>162</sup> and by a July 22, 1870 newspaper article in the *Boston Daily Advertiser* that recounts the longstanding practice in Massachusetts of naturalizing “Chinese as well as other Asiatics” since at least 1843, as well as “natives of the Sandwich Islands” and “persons of African descent who are not darker than ordinary white persons.”<sup>163</sup> The United States Circuit Court for the District of Massachusetts also found as late as the turn of the twentieth century that it had long been its practice to admit Asians to citizenship: “While an exhaustive search of the voluminous records of this court, sitting as a court of naturalization, has been impossible, yet some early instances have been found where not only western Asiatics, but even Chinese, were admitted to naturalization.”<sup>164</sup> In fact, there is ample evidence that immigrants from all corners of Asia were readily admitted to naturalized citizenship in the United States until the massive immigration of Chinese laborers created alarm on the West Coast between the earliest arrivals of large numbers of Chinese laborers in the 1850s and the passage of the Chinese Exclusion Act of 1882 prohibiting Chinese immigration and naturalization.

On the Pacific Coast, the racial prerequisite in the naturalization act was contested from the earliest days of Chinese immigration to California. As early as 1854, for example, West Coast senators objected during congressional debates regarding the Homestead Act to a provision of the act that would provide a right of land to any “individual,” without regard to race, who filed a declaration of intention to become a

citizen as required by the naturalization act.<sup>165</sup> West Coast senators objected to this draft provision because they believed the omission of the naturalization act's requirement that a petitioner had to be a "white person" to be eligible for citizenship from the express language of the Homestead Act might suggest a legislative abrogation of the racial prerequisite in the naturalization act and extend the benefits of the Homestead Act to Africans, Chinese, East Indians, and others who the senators claimed were not "white."<sup>166</sup> Reflecting the disagreement regarding the scope of the racial prerequisite during these debates, however, Delaware Senator Thomas Clayton also openly acknowledged that contrary to his own views, "a very respectable and considerable portion of the people of the northern States" believed that "colored persons [were eligible to] become citizens of the United States" under the original naturalization act.<sup>167</sup>

Following the Civil War, despite this West Coast sinophobia Massachusetts Senator Charles Sumner proposed a legislative amendment to strike the word "white" from the naturalization act in furtherance of Reconstruction.<sup>168</sup> Although the proposed amendment was stalled in legislative committees for years, Senator Sumner reintroduced the amendment during congressional debates regarding a new naturalization act on July 4, 1870, and the amendment provoked a lengthy and impassioned debate in the United States Senate that would eventually result in the failure of the amendment but profoundly affect subsequent interpretations of the racial prerequisite in the naturalization act. The principal opposition to the amendment came from West Coast senators who objected to it on the grounds that it would allow the naturalization of the Chinese who the objecting senators claimed were not "white persons" within the meaning of the original

naturalization act and were not fit for admission to United States citizenship.<sup>169</sup> Reflecting the frequently violent tone that accompanied anti-Chinese sentiment of the West Coast at the time, Nevada Senator William Stewart even warned that a race war would result if the Chinese were admitted to citizenship, remarking that the federal government did not have a large enough army and navy to protect the civil rights of the Chinese if they were admitted to citizenship.<sup>170</sup> As a compromise to defeat Senator Sumner's amendment, the naturalization act was amended to extend naturalization to "aliens of African nativity and persons of African descent," but retained the original "white persons" prerequisite. As a result, from 1870 until 1940 only "whites" and "Africans" were eligible for naturalization.<sup>171</sup>

It was in the context of this disputed question between the East and West Coasts that in 1878, eight years after the congressional debates in which Senator Sumner's amendment to remove the word "white" from the naturalization act failed and four years before the Chinese Exclusion Act of 1882 was passed, that the United States Circuit Court for the District of California issued the first published opinion in a racial prerequisite case, holding in *In re Yup* that a Chinese petitioner was racially ineligible for naturalization.<sup>172</sup> The court bases its holding in large part on the 1870s congressional debates, after reading which the court concluded it was "difficult to perceive whom [the phrase "white person"] could exclude *unless* it be the Chinese."<sup>173</sup> The court adds that the words "white persons" have "undoubtedly acquired a well settled meaning in common popular speech," and as ordinarily used, "one would scarcely fail to understand that the party employing the words 'white person' would intend a person of the Caucasian

race.”<sup>174</sup> Like the court in this first published opinion in a racial prerequisite case, later courts frequently pointed to the 1870 congressional debates as evidence of congressional intent to exclude the Chinese and other Asian petitioners from naturalized citizenship. Many later courts also relied on *Yup* as precedent.<sup>175</sup>

Further complicating the judicial construction of congressional intent regarding the racial prerequisite in the naturalization act, however, Congress included among the provisions of the Chinese Exclusion Act of 1882 an express prohibition of Chinese naturalization: “No State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are repealed.”<sup>176</sup> Later courts would question why this express legislative prohibition was necessary if it was “simply declaratory of the existing conditions, unless it was feared that some one might figure out that the Chinese were free white persons or of African nativity or descent.”<sup>177</sup> Despite the lingering questions of statutory interpretation regarding the precise scope of the racial prerequisite, however, many courts remained convinced that it was intended to exclude some category of Asian immigrants from citizenship and the express prohibition of the Chinese Exclusion Act merely confirmed this conclusion.

Before the Supreme Court’s opinions in *Ozawa* and *Thind* in the 1920s, lower courts had examined numerous historical sources to discover the original intent of the phrase “white persons” in the minds of the First Congress and often split over whether the phrase should be interpreted affirmatively to refer to those who the First Congress commonly considered “white” or negatively as a catch-all term referring to everyone but those the First Congress commonly considered non-“white,” or in other words everyone

but Africans and American Indians. Many early courts reached the latter conclusion.<sup>178</sup> Indeed, this interpretation was supported by numerous historical sources cited by early courts but was ultimately rejected by the Supreme Court in *Ozawa* based on the conclusion that the affirmative form of the act and the petitioner's burden of proof did not support the definition:

It may be true that [the African and American Indian] races were alone thought of as being excluded, but to say that they were the only ones within the intent of the statute would be to ignore the affirmative form of the legislation. The provision is not that Negroes and Indians shall be excluded but it is, in effect, that only free white persons shall be included. The intention was 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. It is not enough to say that the framers did not have in mind the brown or yellow races of Asia. It is necessary to go farther and be able to say that had these particular races been suggested the language of the act would have been so varied as to include them within its privileges.<sup>179</sup>

In this passage, the Court not only rejects the negative definition of whiteness as a catch-all term referring to all but those the First Congress considered non-“white,” but it assumes that most or all of the “races of Asia” were “brown or yellow” and not “white” within the original meaning of the naturalization act, an assumption that is contradicted by historical evidence. Thus, the Court resolved the original intent question by imposing a particularly high burden of proof on Asian petitioners to prove that the First Congress would have considered them racially eligible for naturalization.

Courts interpreting the racial prerequisite to naturalization also struggled to identify specific factors, or what Ian Haney López refers to as “racial rationales,”<sup>180</sup> that might be used to determine whether petitioners should be classified as “white” or non-“white” within the meaning of the act. Only a small fraction of the published judicial

opinions addressing the racial prerequisite in the act were issued before 1909, and with one exception the opinions in the early cases are brief and primarily rely on the racial classification systems of the leading ethnological authorities of the nineteenth century such as Friedrich Blumenbach, George Buffon, Georges Cuvier, Thomas Huxley, Augustus Keane, and Carl Linnaeus, particularly the ethnographic classification of Caucasian which the Court ultimately rejected in *Ozawa* and *Thind* as broader than the ordinary usage of the term “white.”<sup>181</sup> As acceptance of racialist science began to decline in the scientific community by the early twentieth century, however, many courts began to anticipate the conclusion that popular and scientific meanings of race could not be reconciled and turned to other means of defining race. Many of these courts openly recognized that race was socially, culturally, and historically constructed, one judge even writing that “there is no European or white race, as the United States contends, and no Asiatic or yellow race which includes substantially all the people of Asia.”<sup>182</sup> Some courts also recognized that whiteness was a highly contingent and negotiable political commodity and that the judicial interpretation of the phrase “white persons” in the naturalization act had been broadened to include groups whose whiteness had once been unrecognized as well as narrowed to exclude groups whose whiteness had previously gone unchallenged.<sup>183</sup>

The courts that reached the conclusion that racialist science was unreliable as a guide to interpreting the racial prerequisites in the act developed what was sometimes referred to as the “geographical test” of race, described as a commonality of geographical origin, blood, previous social and political environment, laws, usages, customs, and

traditions, or as the “historical interpretation” of race, best exemplified by the Solicitor General’s argument in *Thind* that what constitutes a “white person” cannot be “wholly determined upon either geographical, philological, or ethnological bases” but “can only be determined in the light of history,” including only “those peoples of the white race who, at the time of the formation of the government, lived in Europe and were inured to European governmental institutions, or upon the American continent,” who “from tradition, teaching, and environment, would be predisposed toward our form of government, and thus readily assimilate with the people of the United States.”<sup>184</sup>

Courts adopting this “historical interpretation” of race relied on historical narratives rather than ethnological authorities to justify their racial classifications, often referencing authorities as old as the Hebrew and Christian scriptures and a wide variety of historians, geographers, and travel writers from ancient Greece through the Middle Ages and the Renaissance in lengthy discussions of the geographical, political, religious, and cultural histories of various groups from Central and Western Asia to determine if they were “white.”<sup>185</sup> Although the Supreme Court did not expressly adopt the “historical interpretation” of race in *Thind*, its adoption of this interpretation is suggested by the Court’s conclusion that the phrase “white person” in the act should be interpreted according to ordinary usage rather than scientific definitions of race and by the significance the Court placed on the history of the Indian subcontinent in its opinion in the case, particularly the conclusion that “high caste Hindus” had intermarried with the darkskinned Dravidians of the Indian subcontinent and that as a result contemporary Asian Indians were inassimilable with “white” society in the ordinary usage of that term.

The “historical interpretation” of race required the courts to negotiate particularly difficult identity issues in the conflict between race, religion, and nationality in the early twentieth century. Since Benedict Anderson’s groundbreaking work on nationalism in which he claims that the nation is only an “imagined political community,”<sup>186</sup> numerous scholars in rhetorical studies have studied the ways in which national identity is rhetorically constructed. According to M. Lane Bruner, for example, national identities are negotiated through “the clash of multiple and conflicting discourses, including battles over memory, over domestic and foreign policy, and over constitutions and the meaning of laws,” battles in which contradictory aspects of national history are erased or suppressed through narrative omissions to create the false appearance of a heterogeneous history.<sup>187</sup> As Vanessa Beasley also notes, the diversity of American culture offers unique rhetorical problems for constructing such homogeneous histories:

Because the American people have never been characterized by the level of ethnic or religious homogeneity that has historically marked the inhabitants of most other nations, Americans have always had to imagine their national political community in alternative yet compelling ways.

As Beasley explains, this diversity presents “certain rhetorical challenges to its leaders, who must persuade their constituencies that they are part of a historic, expansive, and enduring national community.”<sup>188</sup>

Studies of national identity have frequently compared and contrasted national identity with race and religion, the imagined communities that the nation displaced. According to Benedict Anderson, in Western Europe the eighteenth century “marks not only the dawn of the age of nationalism but the dusk of religious modes of thought,” and nationalism “has to be understood by aligning it, not with self-consciously held political

ideologies, but with the large cultural systems that preceded it,” specifically religious communities and dynastic realms, “out of which—as well as against which—it came into being.”<sup>189</sup> Similarly, Maurice Olender writes of the indelible mark left on the twentieth century by eighteenth- and nineteenth-century philologists, whose search for the origins of human language linked philology with the preeminence of particular races, religions, and nations, and whose emphasis on the declining importance of race in favor of linguistic and religious identities eventually rendered race “a matter of language, religion, laws, and customs, more than of blood.”<sup>190</sup> Furthermore, Anderson writes that contrary to claims that racism derives from nationalism, there is a fundamental incompatibility between racism and nationalism because racism “erases nation-ness by reducing the adversary to his biological physiognomy,” and although “nationalism thinks in terms of historical destinies,” racism “dreams of eternal contaminations, transmitted from the origins of time through an endless sequence of loathsome copulations: outside history.”<sup>191</sup>

In American historical writing, before the idea of a unified national history was challenged, “racial tensions and discriminations within society were often ignored” and “national history was white history.”<sup>192</sup> The tension between race, religion, and national identity as competing forms of imagined communities is also evident in the nineteenth century race theories of Arthur de Gobineau, who rejected not only national but religious identities in favor of race as the predominant power in human history.<sup>193</sup> Similar tensions persist in the post-cold war era, as reflected in Michael Omi and Howard Winant’s claim that although efforts to explain race in terms of ethnicity, class, or nationality have produced powerful paradigms for understanding race, race cannot be reduced to any of

these competing group identities but is “an autonomous field of social conflict, political organization, and cultural/ideological meaning.”<sup>194</sup>

With the consolidation of nationalisms that began with World War I and culminated in World War II, the tension between race, religion, and nationality increased as national identities became increasingly important. Because global contact simultaneously became more frequent, however, it also became increasingly difficult to avoid the realities of transnational relationships. Recently historians have noted that the increasing pressure of transnational relationships during this period was accompanied by a crisis in American exceptionalism reflected in a tension in American historical writing after World War I between writing that emphasized American exceptionalism to the exclusion of transnational and comparative histories and writing that acknowledged transnational relationships. This tension led to a protracted and uneven historiography that while generally favoring exceptionalism also generated alternate strands of transnational interpretation.<sup>195</sup> The nation-centered focus of American historiography has recently become an increasing source of complaint as reflected in the Organization of American Historians’ La Pietra Report published at the turn of the twenty-first century, in which American historians declared that recent discussions of globalization have promoted important thinking about the historicity of the nation that “invite more complex understandings of the American nation’s relation to a world that is at once self-consciously global and highly pluralized.” In connection with this effort to resituate American history within its many transnational contexts and identities, historians have recently begun to study the alternative strands of transnational and comparative history

that emerged in the first half of the twentieth century.<sup>196</sup> The historical narratives in the later prerequisite cases reflect this alternative tradition of American historiography as courts constantly renegotiated the boundaries of national identity in the process of determining which of the world's peoples were racially eligible for citizenship.<sup>197</sup>

In contrast to prior studies which cover the early racial prerequisite cases, such as López's study which stops with the Supreme Court's 1923 opinion in *Thind* because he concludes that the later judicial opinions in the cases adduce little new in terms of "racial rationales,"<sup>198</sup> this dissertation primarily focus on the cases of the interwar and World War II period and how they applied the "historical interpretation" of race that found support in the Supreme Court's opinion in *Thind*. Thus, I examine *Thind* and the cases that followed it, particularly cases involving the denaturalization of Asian Indians who had been naturalized before *Thind*, the 1924 naturalization trial of Tatos Cartozian in which the government renewed its challenge to Armenian racial eligibility for whiteness after *Thind*, and cases from World War II and the early cold war regarding the significance of the Chinese Exclusion Repeal Act and the racial eligibility for naturalization of Kalmyk and Tatar refugees from the Soviet Union seeking entry to the United States under the Displaced Persons Act. In all of these cases, the participants in the discourse regarding racial eligibility for naturalization invoked a rhetorical strategy of constructing common enemies in order to establish racial belonging and exclusion which is consistent with the history of legislative, executive, and judicial discourse regarding the racial prerequisites in the naturalization act, particularly by invoking the claim that they would be rendered stateless if they were denied racial eligibility for naturalization in the

United States. I argue that the rhetoric of these cases reveals more than earlier studies about the relationship of race and citizenship in the racial prerequisite cases as well as how the rhetorical strategy of uniting against common enemies can function to create identification in judicial cases.

In Chapter 2, I examine the rhetorical strategies in the racial prerequisite cases involving Asian Indians, particularly in *Thind* and the denaturalization proceedings that followed until Sakharam Pandit successfully defended himself against denaturalization several years after *Thind*. I begin by reexamining the Supreme Court's opinions in *Ozawa* and *Thind* and the claim that the Court's reasoning in the cases is inconsistent. I argue that prior interpretations of these cases not only fail to account for the fact that the Court was faced with a conflict between ordinary usage and scientific definitions of race in both cases, but perhaps more importantly, the fact that in *Ozawa* the Court expressly approved of two lower court cases that had held "high caste Hindus" to be "white" and therefore racially eligible for naturalization before reversing those cases a mere three months later in *Thind*. I argue that this more specific reversal on the racial eligibility of Asian Indians for citizenship refutes any view that the decision in *Thind* was driven by a racial ideology that predisposed the Court to exclude Asian Indians from citizenship in the first place, and I suggest instead that the explanation for the reversal may lie in the petitioner's relationship to the Ghadr party and the rhetorical strategies employed in the cases. In particular, I examine the relationship between Bhagat Singh Thind's agitational rhetoric before the Supreme Court in which he asserts the racial supremacy of high caste Hindus over the whiteness of even the justices themselves and how this rhetorical strategy was

influenced by the ideology of the Ghadr party. I then compare and contrast two lower court cases involving Asian Indian cancellation proceedings immediately following *Thind* and how the rhetorical strategies of the petitioners in the cases parallel a shift in the broader rhetorical strategies of the Indian independence movement from the radical rhetoric of the Ghadr party to Gandhi's philosophy of nonviolent resistance, or *satyagraha*, with different outcomes. I argue that the rhetorical strategies of the petitioners in these cases were highly motivated by the geopolitical conflict between the Indian independence movement and British imperialism and conclude by considering the influence of the complex publics of judicial settings on the participants in legal proceedings.

In Chapter 3, I examine the rhetorical strategies reflected in both the trial transcript and judicial opinion in the 1924 racial prerequisite trial of Armenian immigrant Tatos Cartozian. I begin by situating the case within its historical framework during a time of crisis for Armenian refugees as postwar negotiations for an independent Armenia grew increasingly doubtful. I then examine the rhetorical strategies of the Armenian defense as reflected in the trial transcript in the case, particularly the defense's portrayal of Turks, Kurds, and Syrian Muslims as historical persecutors of Armenians. I argue that by portraying Turkey as a common enemy during the postwar period, the defense's narrative created a powerful sense of social solidarity with Americans, but that the transcript also reflects a deep tension between this claimed solidarity and Armenians' proto-nationalist aspirations for an independent republic of Armenia. Moreover, the solidarity sought through the defense's persecutory narrative was premised on a negation

of Armenian agency that metaphorically echoed the genocide the Armenians had recently suffered during World War I, highlighting difficult identity issues that the judicial opinion in the case does not reflect. The chapter then examines Judge Charles Wolverton's judicial opinion and argues that despite the fact that his opinion reflects a marked ambiguity regarding the agency in the narrative on which his opinion relies and reflects a broader refusal of narrativity in the opinion as a whole, suggesting the biological determinism of natural histories and an uncomfortable relationship with the narrative content of the "historical interpretation" of race, he adopts the defense's narrative of Armenian inassimilability with the Ottoman Turks, Kurds, and Syrian Muslims of Asia Minor as a central justification for his decision that Armenians are "white" and therefore eligible for naturalization. I conclude by reflecting on how the rhetoric of martyrdom employed by the Armenian defense in the case exemplifies the rhetorical strategy of uniting against a common enemy.

In Chapter 4, I examine the shifting historical narrative of American race relations during World War II and the early cold war and the impact this narrative had on the racial prerequisites to naturalization from World War II until the racial prerequisites were repealed in 1952. The shifting narrative of American race relations during this era not only led authorities to reconsider whether specific races should be excluded from eligibility for naturalization, eventually leading to the repeal of racial restrictions on naturalization for Chinese, Asian Indians, and Filipinos, but also altered the meaning of whiteness and other racial prerequisites in the act. As is true of earlier cases, the interpretations of race in racial prerequisite discourse during this period rely on a rhetoric

of enmity in which persecution by the Japanese and Soviet governments play a pivotal role in the “historical interpretation” of race and the emergence of a new era of American identity. I first examine Japan’s hostile response to Japanese exclusion from immigration and naturalization in the United States during the interwar period, eventually contributing to Japan’s decision to declare war on the United States in the attack on Pearl Harbor, and examine how legislators responded to the threat from Japan in the Pacific by extending racial eligibility for naturalization to the Chinese the year after Pearl Harbor to strengthen its alliance with China and how legislators similarly extended racial eligibility to Asian Indians to strengthen its alliance with India after the war in response to the threat posed by Soviet communism. I then examine two opinions of the United States Board of Immigration Appeals during the early cold war that considered the whiteness of Tatar and Kalmyk immigrants from the Soviet Union, groups the Board found to be “white” despite their Mongolian ancestry and Asian origins based in part on their persecution by the Soviet Union, a “historical interpretation” of race that I argue reflects a new cold war enmity against which racial classifications were rhetorically constructed as the final chapter in the legacy of the racial prerequisite cases.

## NOTES

<sup>1</sup> Correspondence from The Sixth Grade of Harman Klix School to Secretary of State Cordell Hull dated November 11, 1937, correspondence from the Secretary of State to the Secretary of Labor dated November 26, 1937, and correspondence from Assistant Naturalization Examiner Henry B. Hazard to The Principal of Herman Klix Schook, in Records of the Immigration and Naturalization Service of the United States, Record Group 85, Box 1573, File 19783/43, National Archives Building, Washington, DC.

<sup>2</sup> *United States v. Thind*, 261 U.S. 204, 206, 209-10 (1923).

<sup>3</sup> *Ibid.*, 212-13.

<sup>4</sup> See, e.g., Phillip E. Lothyan, “A Question of Citizenship,” *Prologue: Quarterly of the National Archives* 21 (1989): 267-73.

<sup>5</sup> Quoted in Amanda de la Garza, *Doctorji: The Life, Teachings, and Legacy of Dr. Bhagat Singh Thind* (Malibu, Calif.: David Singh Thind, 2010), 20-21.

<sup>6</sup> See *Nye-Lea Act of 1935*, 74th Cong., 1st Sess., *U.S. Statutes at Large* 49 (1935): 397.

<sup>7</sup> See *Naturalization Act of 1790*, 1st Cong., 2nd Sess., *Statutes at Large of the United States of America* 1 (1790): 103; *Naturalization Act of 1795*, 3rd Cong., 2nd Sess., *Statutes at Large of the United States of America* 1 (1795): 414; *Naturalization Act of 1802*, 7th Cong., 1st Sess., *Statutes at Large of the United States of America* 2 (1802): 153; *Naturalization Act of 1804*, 8th Cong., 1st Sess., *Statutes at Large of the United States of America* 2 (1804): 292; *Naturalization Act of 1824*, 18th Cong., 2nd Sess., *Statutes at Large of the United States of America* 4 (1824): 69; *Naturalization Act of 1828*, 20th Cong., 1st Sess., *Statutes at Large of the United States of America* 4 (1828): 310; *Naturalization Act of 1870*, 41st Cong., 2nd Sess., *Statutes at Large of the United States of America* 16 (1870): 254; *Naturalization Act of 1875*, 43rd Cong., 2nd Sess., *U.S. Statutes at Large* 18 (1875): 316; Darrell Hevenor Smith, *The Bureau of Naturalization: Its History, Activities and Organization* (Baltimore: Johns Hopkins Press, 1926).

<sup>8</sup> See *Nationality Act of 1940*, 76th Cong., 3rd Sess., *U.S. Statutes at Large* 54 (1940): 1137; *Chinese Exclusion Repeal Act of 1943*, 78th Cong., 1st Sess., *U.S. Statutes at Large* 57 (1943): 600; *Filipino and Indian Naturalization Act of 1946*, 79th Cong., 2nd Sess., *U.S. Statutes at Large* 60 (1946): 416.

<sup>9</sup> See generally Smith, *The Bureau of Naturalization*.

<sup>10</sup> Only two of the cases addressed the subsequent extension of the act to non-“white” racial classifications. One case addressed the meaning of the phrase “aliens of African nativity and persons of African descent,” see *In re Cruz*, 23 F. Supp. 774 (E.D.N.Y. 1938) (holding that a petitioner who was three-quarters Native American and one-quarter African was not of sufficient “African descent” to be eligible under the act), and another case addressed the meaning of the phrase “persons of Chinese descent,” see *In re B---*, 3 I. & N. Dec. 304 (B.I.A. 1948) (holding that a person born in Germany of a German mother, but of a father who was Siamese and “predominantly Chinese in blood,” was neither a “white person” nor a “person of Chinese descent”).

<sup>11</sup> For a list of published judicial opinions addressing the racial prerequisites in the naturalization act, see Ian F. Haney López, *White by Law: The Legal Construction of Race* (New York: New York Univ. Press, 1996). In addition to the cases identified by López, the United States Board of Immigration Appeals issued a series of racial prerequisite cases under § 13(c) of the Immigration Act of 1924, which prohibited the admission to the United States of any alien “ineligible to citizenship” as defined in part by the racial eligibility provisions of the naturalization act. See *Immigration Act of 1924*, 68th Cong., 1st Sess., *U.S. Statutes at Large* 43 (1924): 153, 162, 168. See also *In re S---*, 1 I & N Dec. 174 (B.I.A. 1941) (holding that a native and citizen of Iraq, whose parents were “full-blooded Arabians” and whose ancestors “came from Turkish stock,” was a “white person”); *In re K---*, 2 I & N. Dec. 253 (B.I.A. 1945) (holding that a native and citizen of Afghanistan, “of the Afghan race,” was a “white person”); *In re B---*, 3 I. & N. Dec. 304 (B.I.A. 1948) (holding that a person born in Germany of a German mother, but of a father who was Siamese and “predominantly Chinese in blood,” was neither a “white person” nor a “person of Chinese descent”); *In re S---*, 4 I & N. Dec. 104 (B.I.A. 1950) (holding that a native and citizen of Russia “of the Tartar race, born in Ufa, Russia,” was a “white person”); *In re R---*, 4 I & N. Dec. 275 (B.I.A. 1951) (holding that natives of Russia “whose blood was found to be predominantly that of the Kalmuk race” were

“white persons”); *In re J--- W--- F---*, 6 I. & N. Dec. 200 (B.I.A. 1954) (holding that a native of the Philippines, but “racially Chinese (full blood)” was not a “white person”).

<sup>12</sup> See Michael Keevak, *Becoming Yellow: A Short History of Racial Thinking* (Princeton: Princeton Univ. Press, 2011), 4, 27, 36-37, 41-42.

<sup>13</sup> See, e.g., John Kuo Wei Tchen, *New York Before Chinatown: Orientalism and the Shaping of American Culture 1776-1882* (Baltimore: Johns Hopkins Univ. Press, 1999), 76, 136, 231-32.

<sup>14</sup> See *Boston Daily Advertiser*, July 22, 1870. As late as the turn of the twentieth century, the United States Circuit Court for the District of Massachusetts found that it had long been its practice to admit Asians to citizenship. See *In re Halladjian*, 174 F. 834, 843-44 (C.C.D. Mass. 1909).

<sup>15</sup> See Keevak, *supra* note 11, at 19, 49, 60, 74-75.

<sup>16</sup> López, *White by Law*, 2-3.

<sup>17</sup> *Ibid.*, xiv.

<sup>18</sup> Weiner, *Americans Without Law*, ix, 1-4.

<sup>19</sup> See generally, e.g., Adam J. Banks, *Race, Rhetoric, and Technology: Searching for Higher Ground* (Mahwah, N.J.: Lawrence Erlbaum Associates, 2006); Detine L. Bowers, “When Outsiders Encounter Insiders in Speaking: Oppressed Collectives on the Defensive,” *Journal of Black Studies* 26 (1996): 490-503; Carrie Crenshaw, “Resisting Whiteness’ Rhetorical Silence,” *Western Journal of Communication* 61 (1997): 253-78; Keith Gilyard, ed., *Race, Rhetoric, and Composition* (Portsmouth, N.H.: Boynton/Cook, 1999); AnnLouise Keating, “Interrogating ‘Whiteness,’ (De)Constructing ‘Race,’” *College English* 57 (1995): 901-918; Tammie M. Kennedy, Joyce Irene Middleton, and Krista Ratcliffe, “Symposium: Whiteness Studies,” *Rhetoric Review* 24 (2005): 359-402; Thomas K. Nakayama and Robert L. Krizek, “Whiteness: A Strategic Rhetoric,” *Quarterly Journal of Speech* 81 (1995): 291-309; Gary A. Olson and Lynn Worsham, eds., *Race, Rhetoric, and the Postcolonial* (New York: State Univ. of New York Press, 1999); Catherine Predergast, “Race: The Absent Presence in Composition Studies,” *College Composition and Communication* 50.1 (1998): 36-53; Krista Ratcliffe, *Rhetorical Listening: Identification, Gender, Whiteness* (Carbondale: Southern Illinois Univ. Press, 2005); Victor Villanueva, Jr., “Maybe a Colony: And Still Another Critique of the Comp Community,” *JAC: A Journal of Composition Theory* 17 (1997): 183-90.

<sup>20</sup> See generally Ronald Takaki, *Strangers From a Different Shore: A History of Asian Americans*, rev. ed. (1989; rpt., New York: Little, Brown and Co., 1998). The 1922 Cable Act also provided that any American woman who married a person “ineligible to citizenship” would cease to be a citizen of the United States, effectively discouraging the intermarriage of American-born women to immigrants who were racially ineligible for citizenship. See *Cable Act of 1922*, 67th Cong., 2nd Sess., *U.S. Statutes at Large* 42 (1922): 1021; see also Gabriel J. Chin, “Twenty Years on Trial: Takuji Yamashita’s Struggle for Citizenship,” in *Race on Trial: Law and Justice in American History*, edited by Annette Gordon-Reed (Oxford: Oxford Univ. Press, 2002), 103-17.

<sup>21</sup> Takaki, *Strangers From a Different Shore*, 299-300.

<sup>22</sup> See generally, e.g., Sean Brawley, *The White Peril: Foreign Relations and Asian Immigration to Australasia and North America 1919-78* (Sydney, Austral.: Univ. of New South Wales Press, 1995), 8-189; John W. Dower, *War Without Mercy: Race and Power in the Pacific War* (New York: Pantheon, 1986); Takaki, *Strangers From a Different Shore*, 24-25.

<sup>23</sup> Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale Univ. Press, 1997), 1.

<sup>24</sup> David Adams, "Civil rights groups join battle over Florida vote purge," *Reuters*, June 11, 2012, <http://www.reuters.com/article/2012/06/11/us-usa-voting-florida-idUSBRE8571GT20120611> (accessed on July 21, 2012); Terry Frieden, "Justice Department lawsuit challenges Florida voter purge," *CNN*, June 12, 2012, <http://www.cnn.com/2012/06/12/politics/florida-voting-lawsuit-holder/index.html> (accessed July 21, 2012); Maribel Hastings, "Voter Suppression: A Perfect Storm," *Huffington Post*, June 7, 2012, [http://www.huffingtonpost.com/maribel-hastings/voter-suppression-a-perfe\\_1\\_b\\_1575451.html](http://www.huffingtonpost.com/maribel-hastings/voter-suppression-a-perfe_1_b_1575451.html) (accessed July 21, 2012); Chris McGreal, "Texas voter ID law motives questioned during arguments in federal court," *The Guardian (UK)*, July 13, 2012, <http://www.guardian.co.uk/world/2012/jul/13/texas-voter-id-federal-court> (accessed July 20, 2012); Charlie Savage, "Justice Dept. Cites Race in Halting Law Over Voter ID," Dec. 23, 2011, <http://www.nytimes.com/2011/12/24/us/justice-department-rejects-voter-id-law-in-south-carolina.html> (accessed July 21, 2012).

<sup>25</sup> See generally, e.g., Lourdes Medrano, "Immigration fight: Bill to end 'birthright citizenship' advances in Arizona," *Christian Science Monitor*, Feb. 23, 2011, <http://www.csmonitor.com/USA/Politics/2011/0223/Immigration-fight-Bill-to-end-birthright-citizenship-advances-in-Arizona> (accessed July 21, 2012); Julia Preston, State Lawmakers Outline Plans to End Birthright Citizenship, Drawing Outcry," *New York Times*, Jan. 6, 2011, <http://www.nytimes.com/2011/01/06/us/06immig.html> (accessed July 21, 2012); Shankar Vedantam, "Several states want court ruling on birthright citizenship," *Washington Post*, Jan. 6, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/05/AR2011010506372.html> (accessed July 21, 2012); see also Rachel E. Rosenbloom, "Policing the Borders of Birthright Citizenship: Some Thoughts on the New (and Old) Restrictionism," *Washburn Law Journal* 51 (2012): 311-30.

<sup>26</sup> Dan Vergano, "Study: racial prejudice plays role in Obama citizenship views," *USA Today*, April 27, 2011, <http://content.usatoday.com/communities/sciencefair/post/2011/04/social-scientists-look-at-racisms-role-in-birther-viewpoint/1> (accessed July 20, 2012).

<sup>27</sup> Complaint at 5, *United States v. Florida*, No. 4:12-cv-00285-WS-CAS (N.D. Fla., June 12, 2012).

<sup>28</sup> See *Immigration and Nationality Act*, §§ 319, 328, 329, 329A (2012).

<sup>29</sup> See, e.g., William S. Bernard, "The Law, The Mores, and The Oriental," *Rocky Mountain Law Review* 10 (1938): 105-16; Raymond Leslie Buell, "Some Legal Aspects of the Japanese Question," *The American Journal of International Law* 17 (1923): 29-49; Max J. Kohler, "Naturalization and the Color Line," *Journal of the American Asiatic Association* 1 (1907), 9-12; Max J. Kohler, "Un-American Character of Race Legislation," *Annals of the American Academy of Political and Social Science* 34 (1909), 275-93; Roy Malcolm, "American Citizenship and the Japanese," *Annals of the American Academy of Political and Social Science* 93 (1921): 77-81; Dudley O. McGovney, "Race Discrimination in Naturalization," *Iowa Law Bulletin* 8 (1923): 129-61; Dudley O. McGovney, "Naturalization of the Mixed-Blood—A Dictum," *California Law Review* 22 (1934): 377-91; John H. Wigmore, "American Naturalization and the Japanese," *American Law Review* 28 (1894): 818-27.

<sup>30</sup> Charles Gordon, "The Racial Barrier to American Citizenship," *University of Pennsylvania Law Review* 93 (1945): 246.

<sup>31</sup> *Ibid.*, 246-50.

<sup>32</sup> *Ibid.*, 251. Gordon's conclusion that no other modern nation had imposed racial eligibility requirements in naturalization takes the laws and administrative policies of former British dominions such as Australia, New Zealand, and Canada at face value. The legal systems of these nations contained racial barriers to naturalization that were equally effective if less overt than those in the United States. See generally, e.g., Henry F. Angus, "The Legal Status in British Columbia of Residents of Oriental Race and Their Descendants," in *The Legal Status of Aliens in Pacific Countries: An International Survey of Law and Practice Concerning Immigration, Naturalization and Deportation of Aliens and Their Legal Rights and Disabilities*, ed. Norman MacKenzie (London: Oxford Univ. Press, 1937); Brawley, *The White Peril*; Tom Clark and Brian Galligan, "'Aboriginal Native' and the Institutional Construction of the Australian Citizen 1901-48," *Australian Historical Studies* 26 (1995): 523-43; David Dutton, *One of Us?: A Century of Australian Citizenship* (Sydney, Austral.: Univ. of New South Wales Press, 2002); Robert A. Huttenback, *Racism and Empire: White Settlers and Colored Immigrants in the British Self-Governing Colonies 1830-1910* (Ithaca, N.Y.: Cornell Univ. Press, 1976); Andrew Markus, *Australian Race Relations 1788-1993* (St. Leonards, Austr.: Allen and Unwin, 1994); Andrew Markus, *Fear and Hatred: Purifying Australia and California 1850-1901* (Sydney, Austral.: Hale and Iremonger, 1979); John McLaren, "The Early British Columbia Judges, the Rule of Law and the 'Chinese Question': The California and Oregon Connection," in *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West*, eds. John McLaren, Hamar Foster, and Chet Orloff (Pasadena, Calif.: Ninth Judicial Circuit Historical Society, 1992); Charles A. Price, *The Great White Walls Are Built: Restrictive Immigration to North America and Australasia 1836-1888* (Canberra: Australian National Univ. Press, 1974); Patricia E. Roy, *A White Man's Province: British Columbia Politicians and Chinese and Japanese Immigrants, 1858-1914* (Vancouver: Univ. of British Columbia Press, 1989); Shah, *Stranger Intimacy*; W. Peter Ward, *White Canada: Popular Attitudes and Public Policy Toward Orientals in British Columbia* (Montreal: McGill-Queen's Univ. Press, 1978); Myra Willard, *History of the White Australia Policy to 1920* (London: Cass, 1967). Nevertheless, Gordon's association of America's racial prerequisite to naturalization with those of Nazi Germany expresses the broader association of racial discrimination in the United States with the Nazi race theories that the United States condemned during the World War II period.

<sup>33</sup> See Milton Ridvas Konvitz, *The Alien and the Asiatic in American Law* (Ithaca, N.Y.: Cornell Univ. Press, 1946), viii.

<sup>34</sup> *Ibid.*, 80-81.

<sup>35</sup> Department of Justice, Immigration and Naturalization Service, "The Eligibility of Arabs to Naturalization," *Monthly Review* 1 (1943): 16.

<sup>36</sup> Stanford M. Lyman, *The Asian in the West* (Reno: Univ. of Nevada System, Western Studies Center, Desert Research Institute, 1970), 6-8; Lyman, "The Race Question and Liberalism," 209.

<sup>37</sup> Lyman, "The Race Question and Liberalism," 233-34. For a more recent and detailed treatment of the influence of the cold war on the American civil rights movement, see generally Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton: Princeton Univ. Press, 2000).

<sup>38</sup> Michael Omi and Howard Winant, *Racial Formation in the United States From the 1960s to the 1980s*, 2nd ed. (New York: Routledge, 1994), 55, 138.

<sup>39</sup> See López, *White by Law*.

<sup>40</sup> *Encyclopedia of Rhetoric*, Thomas Sloane, ed. (New York: Oxford Univ. Press, 2001), s.v. “Law”; Marouf Hasian, Jr. *Legal Memories and Amnesias in America’s Rhetorical Culture* (Boulder, Colo.: Westview, 2000), 9 (noting that critical legal studies appears to take “the notion of rhetoric and the role of the public in the formation of judicial principles” seriously); Francis J. Mootz III, *Rhetorical Knowledge in Legal Practice and Critical Legal Theory* (Tuscaloosa: Univ. of Alabama Press, 2006), xvii (“My central themes are that rhetorical knowledge . . . is a feature of social life; that rhetorical knowledge plays an important role in legal practice; and that legal critique is appropriately grounded by the normative injunction to maximize the generation of and reliance on rhetorical knowledge in the administration of justice by legal actors.”); William E. Wiethoff, “Critical Perspectives on Perelman’s Philosophy of Legal Argument,” *Journal of the American Forensic Association* 22 (1985): 8 (noting that Chaïm Perelman’s new rhetoric and critical legal studies both see “a salutary role for rhetorical method in jurisprudence”). Although much of Chaïm Perelman’s work discusses law and legal arguments, in his as yet untranslated work *Logique Juridique, Nouvelle Rhetorique*, Perelman explicitly applies his new rhetoric to jurisprudence and to the art of legal judgment. See *Encyclopedia of Rhetoric*, s.v. “Law;” Chaïm Perelman, *Logique Juridique, Nouvelle Rhetorique* (Paris: Dalloz, 1976).

<sup>41</sup> Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, eds. *Critical Race Theory: The Key Writings That Formed the Movement* (New York: The New Press, 1995), xiii.

<sup>42</sup> *Ibid.*, xiii; Francisco Valdes, Jerome McCristal Culp, and Angela P. Harris, “Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium,” introduction to *Crossroads, Directions, and a New Critical Race Theory*, eds. Francisco Valdes, Jerome McCristal Culp, and Angela P. Harris (Philadelphia: Temple Univ. Press, 2002), 1-2.

<sup>43</sup> López, *White by Law*, 13, 165.

<sup>44</sup> *Ibid.*, 13, 155.

<sup>45</sup> *Ibid.*, 33.

<sup>46</sup> *Ibid.*, 34.

<sup>47</sup> *Ibid.*, 5.

<sup>48</sup> *Ibid.*, 65.

<sup>49</sup> *Ibid.*, 71.

<sup>50</sup> *Ibid.*, 67.

<sup>51</sup> *Ibid.*, 7-8, 79-80, 86-87, 89, 92-95.

<sup>52</sup> Rogers Smith, review of *White by Law: The Legal Construction of Race*, by Ian F. Haney López, *The American Journal of Legal History* 42 (1998): 66; see also, e.g., Mark S. Weiner, *Americans Without Law: The Racial Boundaries of Citizenship* (New York: New York Univ. Press, 2006), 100-02; Braman, “Of Race and Immutability,” 1403-04; J. Allen Douglas, “The ‘Priceless Possession’ of

Citizenship: Race, Nation and Naturalization in American Law, 1880-1930,” *Duquesne Law Review* 43 (2005): 416-17; Dudley O. McGovney, “Race Discrimination in Naturalization,” *Iowa Law Bulletin* 8 (1923): 152; Dudley O. McGovney, “Naturalization of the Mixed-Blood—A Dictum,” *California Law Review* 22 (1934): 380.

<sup>53</sup> López, *White by Law*, 124-27.

<sup>54</sup> *Ibid.*, 124.

<sup>55</sup> *Ibid.*, 167.

<sup>56</sup> Smith, review of *White by Law*, 66.

<sup>57</sup> López, *White by Law*, 22-25.

<sup>58</sup> See Janice Okoomian, “Becoming White: Contested History, Armenian American Women, and Racialized Bodies,” *MELUS* 27 (2002): 214.

<sup>59</sup> *Ibid.*, 219-20.

<sup>60</sup> Sarah Gualtieri, “Becoming ‘White’: Race, Religion and the Foundations of Syrian/Lebanese Ethnicity in the United States,” *Journal of American Ethnic History* 20.4 (2001): 30.

<sup>61</sup> *Ibid.*, 40, 46.

<sup>62</sup> *Ibid.*, 42.

<sup>63</sup> *Ibid.*, 47; see also Koshy, “Morphing Race Into Ethnicity,” 165-66.

<sup>64</sup> *Dow v. United States*, 226 F. 145, 147 (4th Cir. 1915) (quoting the 1911 *Dictionary of Races or Peoples* contained in the Dillingham Commission Report of the United States Congress).

<sup>65</sup> Gualtieri, “Becoming ‘White,’” 47.

<sup>66</sup> Park, *Elusive Citizenship*, 6.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*, 121.

<sup>69</sup> *Ibid.*, 122.

<sup>70</sup> *Ibid.*, 122-27.

<sup>71</sup> Weiner, *Americans Without Law*, ix, 1.

<sup>72</sup> Ibid., 2-4.

<sup>73</sup> Ibid., 93-94.

<sup>74</sup> Ibid., 1, 4.

<sup>75</sup> Ibid., 12.

<sup>76</sup> Gross, *What Blood Won't Tell*, 7.

<sup>77</sup> Ibid., 8-9.

<sup>78</sup> Ibid., 213-14.

<sup>79</sup> Ibid., 233.

<sup>80</sup> Tehranian, *Whitewashed*, 5.

<sup>81</sup> Ibid., 6-7. For a similar argument regarding Middle Eastern Americans, see also Salah D. Hassan, "Arabs, Race and the Post-September 11 National Security State," *Middle East Report* 224 (2002): 16-21.

<sup>82</sup> See George A. Martinez, "The Legal Construction of Race: Mexican-Americans and Whiteness," *Harvard Latino Law Review* 2 (1997): 339-47; Roediger, *Working Toward Whiteness*, 122.

<sup>83</sup> Theodore W. Allen, *The Invention of the White Race*, vol. 1, *Racial Oppression and Social Control* (London: Verso, 1994), 185.

<sup>84</sup> David Roediger, *How Race Survived U.S. History: From Settlement and Slavery to the Obama Phenomenon* (London: Verso, 2008), 56.

<sup>85</sup> Noel Ignatiev, *How the Irish Became White* (New York: Routledge, 1995), 41. In one of the earliest published opinions announcing a racial classification under the naturalization act, the North Carolina Supreme Court found that an Irish woman was a "free white person" within the meaning of the naturalization act in order to determine her eligibility to inherit property under North Carolina law that required she be eligible for citizenship. See *Kane v. McCarthy*, 63 N.C. 299, 301 (N.C. 1869).

<sup>86</sup> Jacobson, *Whiteness of a Different Color*, 203-222.

<sup>87</sup> Ibid., 225.

<sup>88</sup> Ibid., 226.

<sup>89</sup> Ibid., 233; see also Koshy, "Morphing Race Into Ethnicity," 165-66; Murphy, "How the Irish Became Japanese."

<sup>90</sup> Okoomian, "Becoming White," 219-20.

<sup>91</sup> See Gualtieri, "Becoming 'White,'" 40, 46.

<sup>92</sup> Park, *Elusive Citizenship*, 122.

<sup>93</sup> Weiner, *Americans Without Law*, ix, 1-4.

<sup>94</sup> Gross, *What Blood Won't Tell*, 8-9; Tehranian, *Whitewashed*, 5.

<sup>95</sup> Jacobson, *Whiteness of a Different Color*, 203-22.

<sup>96</sup> See generally, e.g., Adam J. Banks, *Race, Rhetoric, and Technology: Searching for Higher Ground* (Mahwah, N.J.: Lawrence Erlbaum Associates, 2006); Detine L. Bowers, "When Outsiders Encounter Insiders in Speaking: Oppressed Collectives on the Defensive," *Journal of Black Studies* 26 (1996): 490-503; Carrie Crenshaw, "Resisting Whiteness' Rhetorical Silence," *Western Journal of Communication* 61 (1997): 253-78; Keith Gilyard, ed., *Race, Rhetoric, and Composition* (Portsmouth, N.H.: Boynton/Cook, 1999); AnnLouise Keating, "Interrogating 'Whiteness,' (De)Constructing 'Race,'" *College English* 57 (1995): 901-918; Tammie M. Kennedy, Joyce Irene Middleton, and Krista Ratcliffe, "Symposium: Whiteness Studies," *Rhetoric Review* 24 (2005): 359-402; Thomas K. Nakayama and Robert L. Krizek, "Whiteness: A Strategic Rhetoric," *Quarterly Journal of Speech* 81 (1995): 291-309; Gary A. Olson and Lynn Worsham, eds., *Race, Rhetoric, and the Postcolonial* (New York: State Univ. of New York Press, 1999); Catherine Predergast, "Race: The Absent Presence in Composition Studies," *College Composition and Communication* 50.1 (1998): 36-53; Krista Ratcliffe, *Rhetorical Listening: Identification, Gender, Whiteness* (Carbondale: Southern Illinois Univ. Press, 2005); Victor Villanueva, Jr., "Maybe a Colony: And Still Another Critique of the Comp Community," *JAC: A Journal of Composition Theory* 17 (1997): 183-90.

<sup>97</sup> See *Ozawa v. United States*, 260 U.S. 178, 189-190 (1922). Ozawa argued that the Japanese were assimilable with "white" America in part by noting that "in art and literature, the criticism of the Japanese today is of the abandonment of their ideas, and too easy adaptation to western methods." In addition, Ozawa quoted an American educator who had written that "those Japanese born and nurtured in Hawaii are as much American as the children of the descendants of the Pilgrim Fathers that came to this country to Christianize the Hawaiians." Brief for Petitioner at 78, 83, *Ozawa v. United States*, 260 U.S. 178 (1918) (No. 222).

<sup>98</sup> See *Ex parte Shahid*, 205 F. 812, 816 (E.D.S.C. 1913); see also *In re Dow*, 213 F. 355 (E.D.S.C. 1914). The decisions in these cases were later reversed by *Dow v. United States*, 226 F. 145 (4th Cir. 1915). See generally Gualtieri, "Becoming 'White,'" 41-42.

<sup>99</sup> See, e.g., *United States v. Balsara*, 180 F. 694, 696 (2d Cir. 1910); *In re Mozumdar*, 207 F. 115, 117 (E.D. Wash. 1913); *In re Singh*, 257 F. 209, 212 (S.D. Cal. 1919); *In re Sallak*, No. 14876 (N.D. Ill., East. Div., June 27, 1924), in Significant Civil and Criminal Case Files, 1899-1925, District of Oregon (Portland), Records of U.S. Attorneys and Marshals, Record Group 118, National Archives and Records Administration Pacific Alaska Region (holding that a petitioner "born in Palestine" was a "white person"); *In re S---*, 1 I & N Dec. 174 (B.I.A. 1941); *Ex parte Mohriez*, 54 F. Supp. 941, 942 (D. Mass. 1944); *In re Shaikhaly*, Nat. Case No. 119332 (S.D. Cal. Dec. 20, 1944), in Folder 119332, Contested Naturalizations, Southern District of California, Central Division (Los Angeles), National Archives and Records Administration Pacific Region (holding that "a native and citizen of Palestine . . . of the Arabian race," was a "white person"); *In re K---*, 2 I & N Dec. 253 (B.I.A. 1945); *In re R---*, 4 I & N Dec. 275 (B.I.A. 1951).

- <sup>100</sup> Tehranian, *Whitewashed*, 51-54.
- <sup>101</sup> *In re Singh*, 246 F. 496, 498-500 (E.D. Pa. 1917).
- <sup>102</sup> *Congressional Globe*, 41st Cong., 2d Sess. 42 (July 4, 1870), pt. 6:5121-25 and 5148-77.
- <sup>103</sup> *Chinese Exclusion Repeal Act of 1943*, HR 314, 78th Cong., 1st Sess., *Cong. Rec.* 89 (October 20, 1943): 8598.
- <sup>104</sup> See *Scott v. Sandford*, 60 U.S. 393, 529 (1856) (McLean, J., dissenting).
- <sup>105</sup> See generally Gordon, “The Racial Barrier,” 247; Patrick W. Hanifin, “To Dwell on the Earth in Unity: *Rice, Arakaki*, and the Growth of Citizenship and Voting Rights in Hawai’i,” *Hawaii Bar Journal* 5 (2002): 15-44; Lemay and Barkan, *U.S. Immigration and Naturalization Laws*, 87, 112-13, 156.
- <sup>106</sup> *In re Rodriguez*, 81 F. 337, 349 (W.D. Tex. 1897); cf. *In re M---*, 2 I. & N. Dec. 196 (B.I.A. 1944) (finding without discussion that a native and citizen of Mexico is “a person of the white race”). For a historical account of the *Rodriguez* case and the Texas politics that motivated the challenge to Rodriguez’s racial eligibility for naturalization, see generally Martha Menchaca, *Naturalizing Mexican Immigrants: A Texas History* (Austin: University of Texas Press, 2011).
- <sup>107</sup> See generally Gordon, “The Racial Barrier,” 248; Lemay and Barkan, *U.S. Immigration and Naturalization Laws*, 116-18, 121-22.
- <sup>108</sup> See Lucy E. Salyer, “Baptism by Fire: Race, Military Service, and U.S. Citizenship Policy, 1918-1935,” *Journal of American History* 91 (2004): 854, 858.
- <sup>109</sup> *Ibid.*, 862.
- <sup>110</sup> See U.S. Senate Committee on Immigration, *Hearings on S.J. Res. 128, Providing for the Ratification and Confirmation of Naturalization of Certain Persons of the Hindu Race*, 69th Cong., 2nd sess. (Washington, DC: GPO, 1926), 7.
- <sup>111</sup> See Salyer, “Baptism by Fire,” 848.
- <sup>112</sup> *Ibid.*, 849.
- <sup>113</sup> Smith, *Civic Ideals*, 16.
- <sup>114</sup> See *In re R---*, 4 I & N. Dec. 275, 276, 280 (B.I.A. 1951); *In re S---*, 4 I & N. Dec. 104 (B.I.A. 1950).
- <sup>115</sup> Kenneth Burke, *A Rhetoric of Motives*, Calif. ed. (Berkeley: Univ. of California Press, 1969), xiii; see generally *Encyclopedia of Rhetoric*, edited by Thomas Sloane (New York: Oxford Univ. press, 2001), s.v. “Identification.”
- <sup>116</sup> Burke, *A Rhetoric of Motives*, 25.

<sup>117</sup> Kenneth Burke, *Dramatism and Development* (Barre, Mass.: Clark Univ. Press, 1972), 28-29.

<sup>118</sup> See, e.g., Susan A. Brewer, *Why America Fights: Patriotism and War Propaganda from the Philippines to Iraq* (New York: Oxford Univ. Press, 2009); Jeffrey Jerome Cohen, *Hybridity, Identity and Monstrosity in Medieval Britain: On Difficult Middles* (New York: Palgrave Macmillan, 2006); Murray Edelman, *Constructing the Political Spectacle* (Chicago: Univ. of Chicago Press, 1988), 66-89; Jeremy Engels, *Enemyship: Democracy and Counter-Revolution in the Early Republic* (East Lansing: Michigan State Univ. Press, 2010); Igal Halfin, *Intimate Enemies: Demonizing the Bolshevik Opposition, 1918-1928* (Pittsburgh: Univ. of Pittsburgh Press, 2007); Douglas Walton, *Appeal to Pity: Argumentum ad Misericordiam* (Albany: State Univ. of New York Press, 1997); Robert L. Ivie, *Democracy and America's War on Terror* (Tuscaloosa: Univ. of Alabama Press, 2005); Robert L. Ivie, "Images of Savagery in American Justifications for War," *Communication Monographs* 47 (1980): 279-94; Eve Kornfeld, "Encountering 'the Other': American Intellectuals and Indians in the 1790s," *The William and Mary Quarterly* 52 (1995): 287-314; Michael William Pfau, "Who's Afraid of Fear Appeals? Contingency, Courage, and Deliberation in Rhetorical Theory and Practice," *Philosophy and Rhetoric* 40 (2007): 216-37; Vladimir Zorić, "The Furies of Orestes: Constructing Persecutory Agency in Narratives of Exile," *Comparative Critical Studies* 5 (2008): 179-92.

<sup>119</sup> See Edelman, *Constructing the Political Spectacle*, 66.

<sup>120</sup> *Ibid.*, 68-69.

<sup>121</sup> *Ibid.*, 88.

<sup>122</sup> *Ibid.*, 83.

<sup>123</sup> *Ibid.*, 67.

<sup>124</sup> *Ibid.*, 83.

<sup>125</sup> *Ibid.*, 83.

<sup>126</sup> Ivie, *Democracy and America's War on Terror*, 10-11.

<sup>127</sup> *Ibid.*, 6.

<sup>128</sup> *Ibid.*, 7, 196.

<sup>129</sup> *Ibid.*, 7-8.

<sup>130</sup> Engels, *Enemyship*, 13.

<sup>131</sup> *Ibid.*, 20.

<sup>132</sup> *Ibid.*, 22.

<sup>133</sup> Walton, *Appeal to Pity*, 1.

<sup>134</sup> Douglas Walton, *Appeal to Pity: Argumentum ad Misericordiam* (Albany: State University of New York Press, 1997), 1, 73-75, 88-89.

<sup>135</sup> *Ibid.*, 1, 90, 98, 100, 105, 120-21, 195. Walton also concludes that appeals of this kind are “very common in everyday argumentation, and bear investigation as an important type of nonfallacious argument.” *Ibid.*, 100

<sup>136</sup> *Ibid.*, xiv-xv, 5, 11, 41.

<sup>137</sup> Martha C. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Boston: Beacon, 1995), 65-66.

<sup>138</sup> William Graham Sumner, *Folkways: A Study of the Sociological Importance of Usages, Manners, Customs, Mores, and Morals* (New York: Ginn, 1906), 12-13. Similarly, Arthur Koestler writes that it is the human capacity for devotion rather than aggression that causes wars. See Arthur Koestler, *Janus: A Summing Up* (New York: Random House, 1978), 14. Koestler notes that most wars are not fought for personal gain but “out of loyalty and devotion to king, country or cause,” and crimes committed for selfish motives are far outnumbered in human history by the number of people “massacred in unselfish loyalty to one’s tribe, nation, dynasty, church, or political ideology, *ad majorem gloriam dei*.” *Ibid.*, 14, 77-78, 82-83, 89, 93 (“The crimes of Caligula shrink to insignificance compared to the havoc wrought by Torquemada.”).

<sup>139</sup> See, e.g., Lawrence Bobo, “Whites’ Opposition to Busing: Symbolic Racism or Realistic Group Conflict?,” *Journal of Personality and Social Psychology* 45 (1983): 1196-1210; Catherine A. Cottrell, “Different Emotional Reactions to Different Groups: A Sociofunctional Threat-Based Approach to ‘Prejudice,’” *Journal of Personality and Social Psychology* 88 (2005): 770-89; Victoria M. Esses, Lynne M. Jackson, and Tamara L. Armstrong, “Intergroup Competition and Attitudes Toward Immigrants and Immigration: An Instrumental Model of Group Conflict,” *Journal of Social Issues* 54 (1998): 699-724; Susan T. Fiske, “What We Know Now About Bias and Intergroup Conflict, the Problem of the Century,” *Current Directions in Psychological Science* 2 (2002): 123-28; Jerome D. Frank, *Sanity and Survival in the Nuclear Age: Psychological Aspects of War and Peace* (New York: Random House, 1967); Robert A. Levine and Donald T. Campbell, *Ethnocentrism: Theories of Conflict, Ethnic Attitudes, and Group Behavior* (New York: John Wiley, 1972); Muzafer Sherif, *In Common Predicament: Social Psychology of Intergroup Conflict and Cooperation* (New York: Houghton Mifflin, 1966); Muzafer Sherif and Carolyn W. Sherif, *Groups in Harmony and Tension: An Integration of Studies on Intergroup Relations* (New York: Harper and Brothers, 1953): 229-70; Muzafer Sherif, O.J. Harvey, B. Jack White, William R. Hood, and Carolyn W. Sherif, *The Robbers Cave Experiment: Intergroup Conflict and Cooperation* (1961; repr. Middletown, Conn.: Wesleyan Univ. Press, 1988); Mark Van Vugt, David De Cremer, and Dirk P. Janssen, “Gender Differences in Cooperation and Competition: The Male Warrior Hypothesis,” *Psychological Science* 18 (2007): 19-23; Masaki Yuki and Kunihiro Yokota, “The Primal Warrior: Outgroup Threat Priming Enhances Intergroup Discrimination in Men But Not Women,” *Journal of Experimental Social Psychology* 45 (2009): 271-74; see generally Jay W. Jackson, “Realistic Group Conflict Theory: A Review and Evaluation of the Theoretical and Empirical Literature,” *Psychological Record* 43 (1993): 395-415; Bernard E. Whitley Jr. and Mary E. Kite, *The Psychology of Prejudice and Discrimination* (Belmont, Calif.: Thomson Wadsworth, 2006), 301-05.

<sup>140</sup> See, e.g., Bobo, “Whites’ Opposition to Busing,” 1199-1200.

<sup>141</sup> See Jackson, “Realistic Group Conflict Theory,” 396-97.

<sup>142</sup> Muzafer Sherif and Carolyn W. Sherif, "Research on Intergroup Relations," in *The Social Psychology of Intergroup Relations*, eds. William G. Austin and Stephen Worchel (Monterey, Calif.: Brooks/Cole, 1979), 11.

<sup>143</sup> Jackson, "Realistic Group Conflict Theory," 398, 405.

<sup>144</sup> Sherif, "Research on Intergroup Relations," 259.

<sup>145</sup> See Jackson, "Realistic Group Conflict Theory," 398.

<sup>146</sup> Sherif, *In Common Predicament*, 174.

<sup>147</sup> Sherif, *Robbers Cave Experiment*, 162, 204.

<sup>148</sup> See Yuki, "The Primal Warrior."

<sup>149</sup> See *Ibid.*, 22.

<sup>150</sup> See, e.g., Chris Hedges, *War Is a Force That Gives Us Meaning* (New York: Anchor, 2002); Anthony Lloyd, *My War Gone By, I Miss it So* (New York: Atlantic Monthly, 1999).

<sup>151</sup> Hedges, *War Is a Force*, 9, 45, 74.

<sup>152</sup> *Ibid.*, 115-16.

<sup>153</sup> *Ibid.*, 7.

<sup>154</sup> See Lawrence Leshan, *The Psychology of War: Comprehending Its Mystique and Its Madness* (Chicago: The Noble Press, 1992), 28.

<sup>155</sup> See Lloyd, *My War Gone By*.

<sup>156</sup> Sam Keen, *Faces of the Enemy: Reflections of the Hostile Imagination* (San Francisco: Harper, 1986), 17, 27.

<sup>157</sup> Leshan, *The Psychology of War*, 35-36.

<sup>158</sup> Hedges, *War Is a Force*, 64, 67, 73, 92, 144.

<sup>159</sup> Elias Canetti, *Crowds and Power* (New York: Viking 1962), 138.

<sup>160</sup> Ivie, "Images of Savagery," 290.

<sup>161</sup> See Price, *The Great White Walls Are Built*, 60.

<sup>162</sup> See Tchen, *New York Before Chinatown*, 76, 136, 231-32.

<sup>163</sup> *Boston Daily Advertiser*, July 22, 1870. The article states what whatever interpretation others may give the phrase “white persons,” “any Chinaman within the limits of [Massachusetts] may become a citizen upon the fulfilment of the conditions required of others by the naturalization laws.” *Ibid.*

<sup>164</sup> *Halladjian*, 174 F. at 843-44.

<sup>165</sup> See *Homestead Act of 1854*, 33rd Cong., 1st sess., *Cong. Globe* 28 (July 14, 1854), pt. 3:1740-42.

<sup>166</sup> See *ibid.*

<sup>167</sup> *Ibid.*, 1744.

<sup>168</sup> See *Congressional Globe*, 41st Cong., 2d Sess. 42 (July 4, 1870), pt. 6:5121. Senator Sumner’s proposed amendment provided: “And be it further enacted, That all acts of Congress relating to naturalization be, and the same are hereby, amended by striking out the word ‘white’ wherever it occurs, so that in naturalization there shall be no distinction of race or color.” *Ibid.*

<sup>169</sup> See *ibid.*, 5121-25, 5148-77.

<sup>170</sup> See *ibid.*, 5151.

<sup>171</sup> See *Naturalization Act of 1870*, 41st Cong., 2nd Sess., *Statutes at Large of the United States of America* 16 (1870): 254.

<sup>172</sup> See *In re Yup*, 1 F. Cas. 223, 223 (C.C.D. Cal. 1878).

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.* (emphasis added).

<sup>175</sup> See, e.g., *Bessho v. United States*, 178 F. 245, 246 (4th Cir. 1910) (“The attention of the legislative branch of the government was thus particularly called to the point we are now considering, and the action then taken by it is most significant, and clearly indicates that the Congress then intended to exclude all persons of the Mongolian race from the privileges of the naturalization laws.”); see also, e.g., *In re Saito*, 62 F. 126, 127 (C.C.D. Mass. 1894).

<sup>176</sup> *Chinese Exclusion Act of 1882*, 47th Cong., 1st Sess., *U.S. Statutes at Large* 22 (1882): 58.

<sup>177</sup> *In re Po*, 7 Misc. 471, 472 (City Ct. N.Y. 1894). In *In re Rodriguez*, Judge Thomas Maxey of the United States District Court for the Western District of Texas stated that the court’s language in *Yup* “may well convey the meaning that the amendment of the naturalization statutes referred to by him was intended solely as a prohibition against the naturalization of members of the Mongolian race,” but then asked why, “if Chinese were denied the right to become naturalized citizens under laws existing when *In re Ah Yup* was decided, . . . did congress subsequently enact the prohibitory statute?” *Rodriguez*, 81 F. at 349.

<sup>178</sup> See, e.g., *Rodriguez*, 81 F. at 349 (“Indeed, it is a debatable question whether the term ‘free white person,’ as used in the original act of 1790, was not employed for the sole purpose of withholding the

right of citizenship from the black or African race and the Indians then inhabiting this country.”). The petitioners and amici curiae in racial prerequisite cases also frequently made similar claims. See, e.g., *United States v. Balsara*, 180 F. 694, 696 (2d Cir. 1910) (“Counsel for certain Syrian interveners as amici curiae contend the words ‘free white persons’ were used simply to exclude slaves and free negroes.”).

<sup>179</sup> See *Ozawa*, 260 U.S. at 195-96; cf. *Scott v. Sandford*, 60 U.S. 393 (writing that the racial prerequisite in the naturalization act “would seem to have been used merely because it followed out the line of division which the Constitution has drawn between the citizen race, who formed and held the Government, and the African race, which they held in subjection and slavery, and governed at their own pleasure”).

<sup>180</sup> López, *White by Law*, 33.

<sup>181</sup> See, e.g., *Yup*, 1 F. Cas. at 223; *Saito*, 62 F. at 127; *Po*, 28 N.Y.S. at 383; *In re Yamashita*, 10 P. 482 (Wash. 1902). For a discussion of the scientific evidence of race introduced in the early prerequisite cases, see López, *White by Law*, 49-77. One notable exception to this early trend is *In re Rodriguez*, in which Judge Thomas Maxey of the United States District Court for the Western District of Texas wrote a lengthy opinion in support of his conclusion that whatever conclusions ethnologists may draw regarding the racial classification of Mexicans, they were not racially ineligible for naturalization. See *Rodriguez*, 81 F. 337. In *Rodriguez*, Judge Maxey carefully analyzes the racial classifications of early census forms and the history of treaties entered into by the United States to support his conclusion that Mexicans had never previously been denied citizenship on the basis of race and had arguably been classified as “white” in congressional acts. *Ibid.*, 349, 352; cf. *M---*, 2 I. & N. Dec. 196 (finding without discussion that a native and citizen of Mexico is “a person of the white race”). Many early courts also considered “complexion” or skin “color” to determine whether a petitioner was “white” and referenced skin color in their opinions. Given its variability, however, the courts largely rejected the “utter impracticability” of such a measure of race standing alone. See *In re Singh*, 246 F. 496, 497-98 (E.D. Pa. 1917). The United States Court for the Southern District of Georgia, for example, admitted a petitioner from Calcutta, India, whose parents were natives of Afghanistan, finding among other things that “the skin of his arm where it had been protected from the sun and weather by his clothing was . . . several shades lighter than that of his face and hands, and was sufficiently transparent for the blue color of the veins to show very clearly.” *United States v. Dolla*, 177 F. 101, 102 (5th Cir. 1910).

<sup>182</sup> *Halladjian*, 174 F. at 845.

<sup>183</sup> See, e.g., *ibid.*; *Singh*, 246 F. at 498-99.

<sup>184</sup> Brief for the United States at 20, *United States v. Thind*, 261 U.S. 204 (1923) (No. 202); cf. *In re Ellis*, 179 F. 1002, 1003 (D. Or. 1910).

<sup>185</sup> See, e.g., *Halladjian*, 174 F. 834; *Mozumdar*, 207 F. 115; *Shahid*, 205 F. 812; *Dow*, 213 F. 355; *Thind*, 261 U.S. 204; *Mohriez*, 54 F. Supp. 941; *S---*, 4 I & N. Dec. 104; *R---*, 4 I. & N. Dec. 275. One judge commented on the peculiarity of this form of writing in his opinion, noting that the lengthy genealogy of racial history in the opinion “may seem wholly out of place in a reasoned judicial opinion as to the construction of a statute, except as illustrating the Serbonian bog into which a court or judge will plunge that attempts to make the words ‘white persons’ conform to any racial classification.” *Dow*, 213 F. at 364.

<sup>186</sup> See Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev. ed. (New York: Verso, 2006), 145-46; see also, e.g., Vanessa B. Beasley, *You, the*

*People: American National Identity in Presidential Rhetoric* (College Station: Texas A&M University Press, 2004); Francis A. Beer and Christ'l De Landtsheer, eds., *Metaphorical World Politics* (East Lansing: Michigan State Univ. Press, 2004); M. Lane Bruner, *Strategies of Remembrance: The Rhetorical Dimensions of National Identity Construction* (Columbia: Univ. of South Carolina Press, 2002); Cohen, *Hybridity, Identity and Monstrosity*; Maurice Olender, *The Languages of Paradise: Race, Religion, and Philology*, trans. Arthur Goldhammer (Cambridge: Harvard Univ. Press, 2008); Sara Suleri, *The Rhetoric of English India* (Chicago: Univ. of Chicago Press, 1992); Leroy G. Dorsey and Rachel M. Harlow, "'We Want Americans Pure and Simple': Theodore Roosevelt and the Myth of Americanism," *Rhetoric and Public Affairs* 6 (2003): 55-78; Jason C. Flanagan, "Woodrow Wilson's 'Rhetorical Restructuring': The Transformation of the American Self and the Construction of the German Enemy," *Rhetoric and Public Affairs* 7 (2004): 115-48; Mary E. Stuckey, "One Nation (Pretty Darn) Divisible: National Identity in the 2004 Conventions," *Rhetoric and Public Affairs* 8 (2005): 639-56; David Zietsma, "Building the Kingdom of God: Religious Discourse, National Identity, and the Good Neighbor Policy, 1930-38," *Rhetoric and Public Affairs* 11 (2008): 179-214; cf. Burke, *A Rhetoric of Motives*, 41 (noting that German philosopher Ernst Cassirer's *The Myth of the State*, which examines the history and methods of political myths by which modern totalitarian states were born, "is really about nothing more nor less than a most characteristic concern of rhetoric: the manipulation of men's beliefs for political ends").

<sup>187</sup> Bruner, *Strategies of Remembrance*, 1-11, 89; cf. Eve Darian-Smith, "Postcolonialism: A Brief Introduction," *Social and Legal Studies* 5 (1996): 297 (noting that "law, alongside climate, geography, history, and cultural practices, shapes the mythological imagery" of national identities).

<sup>188</sup> See Beasley, *You, the People*, 5-6.

<sup>189</sup> Anderson, *Imagined Communities*, 11-19.

<sup>190</sup> Olender, *The Languages of Paradise*, 58-59.

<sup>191</sup> Anderson, *Imagined Communities*, 145-46.

<sup>192</sup> Stefan Berger, ed., *Writing the Nation: A Global Perspective* (New York: Palgrave Macmillan, 2007), 20; Nakayama and Krizek, "Whiteness: A Strategic Rhetoric," 300 (finding that one of the rhetorical strategies of whiteness is to confuse whiteness with nationality, so that whiteness means of American descent or "white" American).

<sup>193</sup> Ernst Cassirer, *The Myth of the State* (New Haven: Yale Univ. Press, 1946), 225-31.

<sup>194</sup> Omi and Winant, *Racial Formation in the United States*, 48-50.

<sup>195</sup> Ian Tyrrell, "Making Nations/Making States: American Historians in the Context of Empire," *Journal of American History* 86 (1999): 1017.

<sup>196</sup> Tyrrell, "Making Nations/Making States," 1015.

<sup>197</sup> *La Pietra Report: Project on Internationalizing the Study of American History* (New York: The Organization of American Historians and New York University, 2000).

<sup>198</sup> López, *White by Law*, 33.

## Chapter 2: Asian Indian Naturalization Discourse and the Indian Independence Movement

*Although in the southern plains of India the caste restrictions were broken down to some extent by contact of the Aryan invaders with the native peoples, unquestionably they were strictly adhered to in the north, east and western part, where the Aryan invaders drove back the natives and took complete possession, to the exclusion of the natives, almost to the same extent that the Caucasian people of this country have taken possession and driven out the native red men.*

\* \* \*

*History teaches us that our pioneers and frontiersmen intermarried with the natives, but those who boast of being descended from the first citizens would be surprised if they were told that they were not Caucasians. . . . It may be said with equal force that the high-caste Hindus who settled in India some 4000 years ago are as distinct from the natives of India as the people of this country are from the American Indian.*

Bhagat Singh Thind's Statement Regarding His Race, attached as Exhibit "A" to Brief of Respondent, *United States v. Thind*, No. 202 (U.S. Sup. Ct. Dec. 30, 1921)<sup>1</sup>

*Whatever the Hindu may be to the ethnologist[,] . . . in the popular conception he is alien to the white race and part of the "white man's burden." This phrase of Kipling, the great poet of the imperial destinies of the white race, has become part of the language and understanding of the English-speaking race. And, while the problem of British rule in India is not our affair, whatever may be the white man's burden, the Hindu does not share it, rather he imposes it.*

Brief for the United States, *United States v. Thind*, No. 202 (U.S. Sup. Ct. Jan. 11, 1923)<sup>2</sup>

*The defendant avers that because of his . . . taking citizenship in the United States and his . . . marriage [to an "American White" woman], . . . he has lost his . . . high social station in India, and if he should return to his native land he would be an outcast; and if [his naturalization] certificate is now canceled the defendant will be a man without a country, greatly to defendant's damage and to his irreparable injury.*

Defendant's Answer, *United States v. Pandit*, No. G-111-T (S.D. Cal. March 10, 1924)<sup>3</sup>

The epigraphs above are taken from arguments made before the Supreme Court in *Thind* and before the United States District Court for the Southern District of California in *United States v. Pandit*, a case the Government filed shortly after *Thind* seeking to have a naturalization certificate issued ten years earlier to Asian Indian immigrant Sakharam Pandit declared void based on the Court's conclusion in *Thind* that "high caste Hindus" were racially ineligible for naturalization. In the first epigraph, taken from a statement appended to Bhagat Singh Thind's Supreme Court brief, Thind argues that he is the descendant of Europeans who invaded the Indian subcontinent and conquered the native inhabitants 4,000 years earlier and that his European racial identity had been preserved into the modern era by virtue of fact that the caste restrictions on marriage outside of one's caste had been "strictly adhered to" in his northwestern India homeland. Accordingly, Thind claimed, he was a "white" person with all the privileges whiteness afforded. These included, in the context of the case, racial eligibility to become a naturalized citizen of the United States. In the passage of Thind's statement reflected in the epigraph above, Thind asserts the privileges of his high caste status as those of whiteness by framing the ancient Indian civilization of the Vedas as the accomplishment of European invaders of the Indian subcontinent who drove out the non-"white" natives. He also claims

that the acts of conquest parallel those of the European invaders who drove out the American Indians to take possession of North America, and yet Thind suggests that the parallel was not exact. High caste Hindus, Thind claimed, had preserved a racial purity superior to that of European Americans. By noting that the caste restrictions on marriage had been “strictly adhered to” in his homeland of northwestern India while American pioneers and frontiersmen intermarried with the American Indian, Thind expresses one of his central arguments to the Court: as a high caste Hindu he held a claim to whiteness superior even to that of the European immigrants of North America.

Thind based his claim to European descent in part on a long line of European scholars of the Oriental Renaissance such as Sir William Jones, Franz Bopp, and Max Müller. After discovering that Sanskrit was an Indo-European language, European scholars believed the study of Sanskrit texts from ancient Indian civilization would offer contributions to Western knowledge as substantial as the study of newly discovered Greek texts during the fifteenth century.<sup>4</sup> In the second epigraph above, the United States Solicitor General does not attempt to rebut the historical claims of such authorities but instead dismisses the significance of ancestry to whether Asian Indians are “white” within the meaning of the naturalization act, arguing that whether or not they shared a common biological ancestor with Europeans, in “popular conception” they are alien to the “white” race. As evidence of this popular belief, the Solicitor General cites

Rudyard Kipling's poem "The White Man's Burden," originally subtitled "The United States and the Philippine Islands," in which Kipling portrays the subjects of European imperialism as a symbol of resistance to the "imperial destinies of the white race." Although Kipling's poem is often interpreted as an endorsement of American imperialism, the poem also warns of the dangers of empire by depicting imperial subjects as "sullen peoples, / Half-devil and half-child," whose "sloth and heathen Folly" would frustrate the imperial reader and "bring all your hopes to nought."<sup>5</sup> The key phrase in the Solicitor General's argument is the final statement that Asian Indians do not share the "white" man's burden but impose it, severing Asian Indians from the solidarity of common suffering that Kipling's poem suggests and instead framing them as inflicting that suffering. The citation of Kipling also formed part of a broader theme in the Government's brief of citing authorities from British imperialism, including a lengthy quotation from Edmund Burke's address to the House of Lords in the eighteenth-century impeachment trial of Warren Hastings in which Burke claimed that the Indian caste system rendered the inhabitants of India "the most unalliable to any other part of mankind," without the "convivial bond" of society.<sup>6</sup> By citing these authorities, the Solicitor General argued that far from proving that he was "white," Thind's assertion of caste privilege was proof of his inassimilability with Western civilization.

In contrast to Thind's rhetorical strategy of claiming that his high caste status proved beyond any doubt that he was "white," in the third epigraph above, Sakharam Pandit adopts a rhetorical strategy that appears to have been novel among the Asian Indian naturalization cases of the time. Pandit not only severs himself from the negative associations of caste that the Solicitor General highlighted in *Thind*, but even uses those negative associations to his advantage by claiming that he had irreversibly abandoned his high caste status when he became an American citizen and married a "white" American woman and that if his naturalization certificate were canceled he would himself become a victim of the Indian caste system. If he returned to India he would be an outcast in Indian society, one of India's "untouchables," and would be rendered a stateless person, "a man without a country." Pandit also argued that by operation of the Cable Act of 1922, which declared that any American woman who married an alien ineligible to citizenship would automatically lose her citizenship, his American-born wife Lillian Pandit would also be rendered stateless. Avoiding the Solicitor General's argument in *Thind*, Pandit frames himself and his wife as suffering at the hands of Kipling's "sullen peoples," sharing rather than imposing the "white man's burden." This rhetorical strategy also invites the court to unify against a common enemy and with great effect. Judge McCormick accepted Pandit's argument and dismissed the Government's case, speaking eloquently on the problem of statelessness in his announcement of the decision. Significantly, the

unique rhetorical strategy adopted in *Pandit* also reflects a broader shift in the predominant rhetorical strategy of the Indian independents movement at the time, from the radical rhetoric of the Ghadr movement with which Thind was associated to the nonviolent resistance and self-suffering of Gandhi's *satyagraha* movement.

This chapter examines the rhetorical strategies in the racial prerequisite cases involving Asian Indians between 1909 and 1926, particularly those used before the Supreme Court in *Thind* and during the proceedings to cancel Asian Indian naturalization certificates in a series of cases after *Thind*. The chapter begins by reexamining the Supreme Court's opinions in *Ozawa* and *Thind* and the claim many commentators have made that the opinions reflect duplicitous reasoning designed to exclude non-Europeans from citizenship. I argue that prior interpretations of the Court's opinions in these cases are belied by the Court's express approval in *Ozawa* of lower court cases holding that Asian Indians were "white" and therefore eligible for naturalization. I propose that the Court's reversal on the question of whether Asian Indians were racially eligible for naturalization during the three months between *Ozawa* and *Thind* may be explained by Thind's relationship to the Ghadr party and the rhetorical strategy he employed before the Court. I examine Thind's assertion that high caste Hindus held a claim to racial purity that surpassed even that of the Court's justices themselves and how this rhetorical strategy was influenced by the ideology of the

Ghadr party, then compare this rhetorical strategy with those adopted in several lower court cases involving proceedings to cancel the naturalization certificates of Asian Indians after *Thind*. I argue that the rhetorical strategies of the petitioners in the early post-*Thind* cases seeking to cancel the naturalization certificates of Asian Indian immigrants parallel a shift in the broader rhetorical strategies of the Indian independence movement, from the radical rhetoric of the Ghadr party to the nonviolent resistance and self-suffering of Ghandi's *satyagraha* movement, reflecting an inextricably intertwined relationship between the struggle over Indian independence and the rhetoric adopted by the petitioners, the Government, and the courts in the struggle over Asian Indian racial eligibility for naturalization. I conclude by considering the impact that the complex publics of courts have on the rhetoric of participants in judicial cases.

#### **THE SUPREME COURT'S OPINIONS IN *OZAWA* AND *THIND***

The most studied of the racial prerequisite cases are the United States Supreme Court's opinions in *Ozawa v. United States* and *United States v. Thind*, on November 13, 1922 and February 19, 1923, respectively, holding that a Japanese person and a "high caste Hindu of full Indian blood" were racially ineligible for naturalization, the only instances in which the Supreme Court decided the racial eligibility of petitioners for naturalization.<sup>7</sup> Two years later, in *Toyota v. United States*, the Court also decided whether the racial prerequisites in

the naturalization act were superseded by a 1918 act that extended eligibility for naturalization to military veterans in a case involving a Japanese petitioner who had served in the United States Coast Guard during World War I. The 1918 act extended eligibility for naturalization to “any native-born Filipino” or “any alien, or any Porto Rican not a citizen of the United States,” and the Court had to decide if the phrase “any alien” in the act was limited to Puerto Ricans or included all of those otherwise racially ineligible for naturalization. The Court held that the 1918 act was limited to Puerto Ricans and that the Japanese veteran in the case was not eligible for naturalization because he was racially ineligible, but the Court merely cited its earlier opinion in *Ozawa* for purposes of determining the petitioner’s racial eligibility for naturalization.<sup>8</sup>

The Court’s opinions in *Ozawa* and *Thind* were both unanimous opinions of the Court and both authored by Justice George Sutherland.<sup>9</sup> Both cases came to the Court from the United States Court of Appeals for the Ninth Circuit, which certified questions to the Court in *Ozawa* and *Thind* through an infrequently used procedure by which appellate courts can request guidance from the Court on a question of law before deciding a case. In *Ozawa*, the United States District Court for the Territory of Hawaii had denied the Japanese petitioner’s application consistent with the majority of lower courts which had held that the Japanese were not “white” and were therefore racially ineligible for naturalization. In *Thind*, the United States District Court for the District of Oregon had granted the

Asian Indian petitioner's application consistent with the majority of lower courts which had held that Asian Indians were "white" and were therefore racially eligible for naturalization. Thus, the district courts in both cases had followed the vast majority of lower courts in their racial classifications of Japanese and Asian Indian petitioners under the naturalization act.

As noted in Chapter 1, in *Ozawa* the Court rejects the argument that the term "white" in the naturalization act should be interpreted negatively as a catch-all term referring to everyone but those the First Congress commonly considered non-"white," i.e. everyone but Africans and American Indians. The Court bases this interpretation on its conclusion that the affirmative form of the act and the petitioner's burden of proof does not support that definition.<sup>10</sup> The Court then states that the phrase "white persons" in the act reflects a racial rather than an individual test, noting that the test afforded by the skin color of individual petitioners is "impracticable." The Court finds that the lower courts, "in an almost unbroken line," had held that "the words 'white person' were meant to indicate only a person of what is *popularly* known as the Caucasian race," and that this interpretation of the racial prerequisite had "become so well established by judicial and executive concurrence and legislative acquiescence that we should not at this late day feel at liberty to disturb it, in the absence of reasons far more cogent than any that have been suggested."<sup>11</sup> Because a large number of the federal and state courts had decided that the Japanese were not "white" within the

meaning of the act and the Court finds “no reported case definitely to the contrary,” the Court concludes that this line of lower court precedent should be respected, stating that the Court does not deem it necessary to review the numerous scientific authorities on the racial classification of the Japanese.<sup>12</sup>

In *Thind*, the Court merely elaborates on *Ozawa* in response to Thind’s claim, as a “high caste Hindu of full Indian blood,” to share a biological ancestor with Europeans, reiterating its holding in *Ozawa* that the words “white person” in the naturalization act are “synonymous with the word ‘Caucasian’ only as that word is popularly understood” and to be interpreted as “words of common speech and not of scientific origin, . . . written in the common speech, for common understanding, by unscientific men.”<sup>13</sup> The Court emphasizes in *Thind* that the naturalization act uses the phrase “white person” rather than the word “Caucasian,” a word probably unfamiliar to the First Congress in 1790:

When we employ [the word “Caucasian”] we do so as an aid to the ascertainment of the legislative intent and not as an invariable substitute for the statutory words. Indeed, as used in the science of ethnology, the connotation of the word is by no means clear and the use of it in its scientific sense as an equivalent for the words of the statute, other considerations aside, would simply mean the substitution of one perplexity for another. But in this country, during the last half century especially, the word by common usage has acquired a popular meaning, not clearly defined to be sure, but sufficiently so to enable us to say that its popular as distinguished from its scientific application is of appreciably narrower scope. It is in the popular sense of the word, therefore, that we employ it as an aid to the construction of the statute, for it would be obviously illogical to convert words of common speech used in a statute into words of scientific terminology when neither the latter nor the science for whose

purposes they were coined was within the contemplation of the framers of the statute or of the people for whom it was framed.<sup>14</sup>

Thus, in both *Ozawa* and *Thind* the Court specifically rejects the scientific definition of the Caucasian racial classification as an adequate definition of the word “white” except to the extent that they are loosely associated in popular usage.

In reaching this conclusion, the Court simply applied the first and most elementary rule of statutory interpretation, referred to as the “ordinary usage” rule, according to which the words of a statute are to be interpreted according to their ordinary or “popular” meaning unless a technical meaning is clearly indicated.<sup>15</sup> In an unrelated opinion issued shortly before *Ozawa* and *Thind*, for example, the Court writes that “statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them,” and in *Thind* the Court cites *Maillard v. Lawrence* in support of its conclusion that the racial prerequisites in the naturalization act should be interpreted “in accordance with the understanding of the common man.”<sup>16</sup> In *Maillard*, the Court provides the following explanation of the ordinary usage rule:

If language which is familiar to all classes and grades and occupations—language, the meaning of which is impressed upon all by the daily habits and necessities of all, may be wrested from its established and popular import in reference to the common concerns of life, there can be little stability or safety in the regulations of society.<sup>17</sup>

The lower court opinions that the Court cites with approval in *Ozawa* also expressly apply the ordinary usage rule to the racial prerequisite in the naturalization act,<sup>18</sup> which further indicates that the Court consistently applied this rule of statutory interpretation in both *Ozawa* and *Thind*.

A variety of scholarly commentators in fields as diverse as law, history, literary studies, cultural studies, and religious studies have nonetheless interpreted the Court's opinions in *Ozawa* and *Thind* to reflect duplicitous rationales designed to exclude non-Europeans from naturalization. According to this interpretation of the cases, the Court first held that the phrase "white persons" should be interpreted as synonymous with Caucasian in *Ozawa*, then when confronted in *Thind* with an Asian Indian who ethnologists largely held to belong to the Caucasian racial classification the Court changed its position and held that the phrase "white persons" should be interpreted as synonymous with Caucasian only in the "popular" sense of the term, which the Court concluded did not include Asian Indians. According to Milton Konvitz's 1946 formulation of this interpretation, for example, he states: "In the *Ozawa* case the court said the test of membership is the Caucasian race. *Thind* showed he was a Caucasian. But now the court changed its position: the test is whether or not one is a 'white person,' and one may be a Caucasian (like *Thind*) and yet not a 'white person.'"<sup>19</sup> A similar formulation is found in Lon Fuller's classic of legal philosophy *The Morality of Law*, in which Fuller writes that the Supreme Court became

“entangled in its own interpretations” in *Ozawa* and *Thind* by first interpreting the phrase “white person” to mean a person of the Caucasian race “in an attempt to achieve something like scientific exactitude,” then arguing that the term Caucasian was unknown to the First Congress and should only be interpreted according to its popular rather than scientific sense when confronted with convincing proof that Asian Indians were Caucasian.<sup>20</sup> Roger Daniels and Harry Kitano make a similar argument in their book *American Racism*, as does Paul Rundquist in his dissertation on the racial prerequisite cases, arguing that the Supreme Court only decided that the racial prerequisites should be interpreted according to their popular sense in *Thind* after first making a “false start” in *Ozawa*: “The Supreme Court established one standard, and when faced with an opportunity to apply it a short time later, denied that it had ever enacted the standard and abandoned it in favor of still another standard.”<sup>21</sup> Later scholarly commentators also offer this interpretation of the two cases, many of them following the version of this interpretation in Ian Haney López’s *White by Law*.<sup>22</sup>

Many of the recent commentators to offer this interpretation of *Ozawa* and *Thind* apply critical race theory to claim that the petitioners in the racial prerequisite cases were only offered illusory opportunities to be heard by the courts while in fact the outcomes of the cases were predetermined by the racial ideologies of the era. Indeed, it is tempting to view the Court’s opinions in *Ozawa* and *Thind* as the products of the highly racist and xenophobic era of the early 1920s.

Thomas Gossett argues that in the 1920s racist theories achieved “an importance and respectability which they had not had in this country since the Civil War.”<sup>23</sup> In 1896, the Supreme Court’s landmark opinion in *Plessy v. Ferguson*, which upheld the “separate but equal” doctrine of segregation, had claimed that “legislation is powerless to eradicate racial instinct, or to abolish distinctions based upon physical differences.”<sup>24</sup> During the World War I era, this belief in “racial instincts” and a growing fear of immigrants combined to create a highly racist and xenophobic climate, often directed at immigrants. In President Wilson’s State of the Union address on December 7, 1915, for example, he warned that the gravest threats to the nation’s security had been “uttered within our own borders” by citizens “born under other flags but welcomed under our generous naturalization laws.”<sup>25</sup> This climate was further inflamed by the Bolshevik Revolution of 1917 and the Red Scare of the early postwar period.<sup>26</sup> During this period, Americanization efforts reached their height based on a racism that, much like the Court’s reference to “racial instincts” in *Plessy* or its holding that race was a matter of “common knowledge” in *Ozawa* and *Thind*, claimed that racial classifications did not require scientific verification but could be discovered by “intuition.”<sup>27</sup>

While the Court’s opinions in *Ozawa* and *Thind* have come to epitomize the perceived ad hoc nature of the decisions in the racial prerequisite cases, other commentators have noted that the Court faced nearly identical choices between popular and scientific definitions of race in the cases and consistently rejected scientific definitions of race in both. As Mark Weiner writes in *Americans*

*Without Law*, a significant portion of the substantive claims in *Ozawa* “centered on issues addressed by anthropologists and other students of human variation and classification” that the attorneys on both sides attempted to marshal in their favor, but the Court ignored the evidence: “it chose, that is, not to rely on social science or a scientific standard in determining who was and was not a white person.”<sup>28</sup> Like the Asian Indian petitioner in *Thind*, the Japanese petitioner in *Ozawa* presented the Court with scientific evidence that the Japanese had Caucasian origins and were therefore “white” within the meaning of the naturalization act, including an impressive list of citations to several editions of the *Encyclopedia Britannica*, a host of ethnological, linguistic, and travel authorities, archaeological evidence of commonalities between dolmen mounds in Europe and Japan, and evidence that the ancient Japanese mitsudomoe symbol (a sort of three-sided “yin yang” symbol) originated in the Mediterranean where it was also found “on the spindle weights of Troy.”<sup>29</sup> The theory that the Japanese were Caucasian was also far from novel. As early as 1894, prominent legal scholar John Wigmore argued in the *American Law Review* that “in the scientific use of language and in the light of modern anthropology, the term ‘white’ may properly be applied to the ethnical composition of the Japanese.”<sup>30</sup> In 1870, Thomas Huxley had claimed that the darker Mediterranean peoples of Europe had migrated east into central Asia,<sup>31</sup> and H.G. Wells’s bestselling *Outline of History*, published only a few years before the Court published its opinion in *Ozawa*, claimed that the Mediterranean culture

Huxley referred to extended further east across Polynesia and included the Japanese among other people living in the Mediterranean, Indian Ocean, and Pacific Rim.<sup>32</sup> In 1913, William Elliott Griffis even claimed in the *North American Review* that “to class the Japanese as ‘Mongolians’ is absurd.”<sup>33</sup> In both *Ozawa* and *Thind*, Justice Sutherland used the term Caucasian only as it was “popularly known,” and as Mark Weiner notes, by doing so the Court “flatly rejected the significance of the ethnological data in determining the outcome of Ozawa’s dispute, no matter how [the Court] spoke to the question of race and citizenship at hand.”<sup>34</sup> As Dudley McGovern observed shortly after the Court issued the opinions, the only significant difference between them is that in *Thind* “the word *popularly* is italicized.”<sup>35</sup>

But a more specific reversal occurred between *Ozawa* and *Thind* that prior commentators have neglected, one that is even more difficult to explain and further contradicts the claim that the Court changed its position when confronted with evidence that ethnologists included Asian Indians within the Caucasian racial classification. During the three month period between *Ozawa* and *Thind*, the Court reversed itself on the specific question of whether Asian Indians were “white” and were therefore racially eligible for naturalization. A careful reading of *Ozawa* reveals that the Court expressly approves of two lower court cases that had held high caste Hindus to be “white” in the *popular* sense of the term and therefore racially eligible for naturalization before the Court reversed those same

lower court cases a mere three months later in *Thind*. In *Ozawa*, the Court expressly approves of *In re Mozumdar* and *In re Mohan Singh*, two lower court opinions that had held high caste Hindus to be “white” in the popular sense of the term and therefore racially eligible for naturalization.<sup>36</sup> After listing *Mozumdar* and *Singh* among other lower court opinions that had held that the racial prerequisites to naturalization should be interpreted to include “only a person of what is popularly known as the Caucasian race,” the Court in *Ozawa* unambiguously declares its approval of the opinions by stating that “we see no reason to differ” with their conclusions.<sup>37</sup> Three months later in *Thind*, however, the Court writes that “we are unable to agree with the District Court, or with other lower federal courts, in the conclusion that a native Hindu is eligible for naturalization.” The Court neglects to mention that it had itself expressly approved of the decisions in two of those lower federal court cases three months earlier in *Ozawa*.

Despite the fact that later courts and litigants were quick to point out this contradiction, no scholarly commentators have addressed it. In proceedings filed after *Thind* to cancel the naturalization certificates of Akhay Mozumdar and Mohan Singh, for example, both pointed out that the cases originally granting their naturalization certificates had been expressly approved by the Supreme Court in *Ozawa*, and another Asian Indian wrote of *Ozawa*’s express approval of *Mozumdar* and *Singh* after he was the target of proceedings to cancel his

citizenship.<sup>38</sup> In a 1924 naturalization case involving a Palestinian petitioner, the petitioner also noted that *Ozawa* had also expressly approved of *In re Ellis*, a case indistinguishable from his own, but the Government's attorneys argued in response that because in *Thind* the Court "withdrew" its approval of *Mozumdar* the district court should "extend this withdrawal of approval to the *Ellis* case also."<sup>39</sup> The Supreme Court's approval of *Mozumdar* and *Singh* shortly before "withdrawing" that approval in *Thind* cannot be reconciled with a racial ideology that predisposed the Court to view high caste Hindus as non-"white" in the first place.

In addition, the Court's peculiar withdrawal of its approval of lower court cases like *Mozumdar* and *Singh* in *Thind* highlights the fact that in contrast to claims that the Court's opinion in *Thind* reinforced popular beliefs regarding the racial classification of Asian Indians, they were not merely held to be "white" by the scientific community, but by the majority of lower courts and by popular belief at the time *Thind* was decided. When the United States Senate Committee on Immigration held hearings to discuss the proposed reinstatement of naturalization certificates of Asian Indians whose citizenship had been canceled following *Thind*, the Commissioner of Naturalization produced a list of sixty-seven Hindus who had been naturalized by federal and state courts since 1908<sup>40</sup> and there is only one published opinion and little evidence of unpublished opinions that rejected the whiteness of Asian Indian petitioners in racial

prerequisite cases.<sup>41</sup> Moreover, as Ray Chase and Sakharam Pandit note in a 1926 tract published to critique the *Thind* decision, not only did the 1797 *Encyclopedia Britannica* include within the “white” race “those of Asia on this side of the Oby, the Caspian, Mount Imans, and the Ganges”—including the high caste Hindus of northwestern India where Thind was born—but Asian Indians were included within the “white” or Caucasian racial classification in all of the geography textbooks used to teach American schoolchildren during the decades immediately before and after the last enactment of the naturalization act before *Thind*.<sup>42</sup> In other words, outside of the naturalization context the claim that Asian Indians were “white” was neither novel nor limited to the scientific community, but a commonplace. Because at the time of *Ozawa* and *Thind* many Americans believed both the Japanese and Asian Indians belonged to the “white” or Caucasian racial classification, it is simply not true that scientific evidence indicating that the Japanese were not “white” reinforced popular beliefs in *Ozawa* or that scientific evidence indicating that Asian Indians were “white” contradicted popular beliefs in *Thind*.

The question that has yet to be answered by critics of *Ozawa* and *Thind* is not how consistently the Supreme Court defined whiteness and its relationship to the ethnographic category of Caucasian, but why the Court reversed both the majority of lower federal courts and itself on the specific question of whether high caste Hindus were racially eligible for naturalization during the three-month

period between November 13, 1922 and February 19, 1923. How can the Court's reversal on the specific eligibility of high caste Hindus be explained if not by reference to a formalist approach or a racial ideology of the Court that predisposed it to view Asian Indians as non-“white”? One element of the explanation lies in the tensions that arose between race, religion, and nationality as competing forms of identity during the period of rising nationalisms in the early twentieth century and the rhetorical strategies of the participants in the cases. A close examination of the arguments and authorities cited in *Thind* and subsequent racial prerequisite cases involving Asian Indians suggests that the conflict between a rising Indian independence movement and British imperialism exerted a powerful influence on the rhetoric of the cases and shaped both the decisions and the judicial opinions in the cases.

#### **A REVOLUTIONARY FOR THE GHADR PARTY**

The rhetorical strategies of both the Government and Bhagat Singh Thind before the Supreme Court cannot be adequately understood without addressing Thind's role as one of the foundational members of the Ghadr party (meaning “revolution” or “mutiny” in Hindi), an Indian nationalist movement based in San Francisco that advocated a violent revolution against the British government in India modeled on the American Revolution.<sup>43</sup> One writer describes the movement as “an incongruous mixture of Sinn Fein, Marxian socialism, and the romantic

nationalism of the Italian patriot, Mazzini.”<sup>44</sup> Although the primary objective of the Ghadr party was to secure India’s independence from British rule, the party also represented itself as part of a global anti-imperialist struggle among revolutionaries in all of the former British colonies, including the United States. Thus, the Ghadr party united in solidarity with revolutionary groups throughout the world who represented themselves as resisting systems of imperial oppression. The founding leader of the Ghadr party, Har Dayal, who inspired Thind to join the party while they were students together at the University of California at Berkeley, wrote favorably of the Bolshevik Revolution, and United States intelligence documents reveal that federal authorities believed the Ghadr party might eventually join the Bolsheviks.<sup>45</sup>

Thind was a Sikh born in the Amritsar District of Punjab State, which had been part of the Sikh Empire until the British imposed imperial control over the region in the mid-nineteenth century. After graduating from college in India, where he studied American history and literature, Thind traveled to the Philippines and then immigrated to the United States in 1913. He initially worked in the lumber mills of the Pacific Northwest, settling in Astoria, Oregon, but he soon moved to San Francisco where he attended the University of California at Berkeley and became one of the founding members of the Ghadr party. Thind actively supported the party by giving speeches in support of Indian independence throughout the Pacific Northwest, and as a result of his efforts, he was eventually

appointed secretary general of the Ghadr party in Oregon.<sup>46</sup> Although Thind's case before the Supreme Court was argued on the basis of whether or not high caste Hindus were racially eligible for naturalization, the Government's motivation for opposing Thind's racial eligibility for naturalization was his participation in the activities of the Ghadr party in Astoria, Oregon, whose correspondence with other Ghadr members in San Francisco had been intercepted by military intelligence and forwarded to the Department of Justice. The Government informed the district court of these activities and that both the United States and British governments had been interested in the Ghadr party as early as 1917 when numerous Ghadr members were prosecuted in a federal court in San Francisco for conspiracy to violate the neutrality laws of the United States.<sup>47</sup>

In 1917, only five years before Thind's naturalization case, the Ghadr party made national headlines when the party's leadership was credited with efforts to make its dream of revolution a reality by organizing a violent attack on the British government in India with Germany's assistance in what is referred to as the "Ghadr Conspiracy," the "Hindu Conspiracy," or the "Hindu-German Conspiracy."<sup>48</sup> At the insistence of the British government, one day after the United States declared war in World War I, the United States arrested seventeen Ghadr conspirators in San Francisco and numerous Asian Indian and German defendants across the country, eventually resulting in the indictment of 105 defendants by a federal grand jury in San Francisco on charges of violating the

neutrality laws of the United States.<sup>49</sup> During opening statements in the federal criminal trial that followed, the attorney for the Asian Indian defendants used the opportunity to publicly denounce British rule in India, proclaiming that Britain exacted \$300 million a year from India while one-third of India's population starved and that Britain had "suppressed newspapers, imprisoned editors and closed the shores of its self-governing possessions against the Indians, who are also British subjects," charges the prosecutor objected to as "scurrilous, unpatriotic and almost treasonable."<sup>50</sup> The trial lasted more than five months and was a media spectacle, with the Asian Indian defendants frequently disrupting the proceedings, and on the final day of the trial the courtroom erupted with violence when one of the Asian Indian defendants obtained a gun during the lunch recess and shot and killed one of his codefendants in court during the afternoon session before he was himself shot and killed by a federal marshal.<sup>51</sup> The *Washington Post's* headline the next day read, "Hindu Prisoner Shoots Another and Is Slain by Marshal."<sup>52</sup>

Among the early commentators on the racial prerequisite cases involving Asian Indians were Ghadr leader Taraknath Das, whose naturalization had also been opposed based on his political activities as a member of the Ghadr party, and his American-born wife Mary Das. Both claimed that *Thind* was politically motivated.<sup>53</sup> In a 1927 article written from New York for India's *Modern Review*, for example, Mary Das wrote that "it may be safely asserted that in the *Thind*

case, the Supreme Court rendered a '*political decision*' at the request of the Government of the United States and *for other considerations involving foreign governments.*'<sup>54</sup> The phrase "foreign governments" in this passage is a thinly veiled reference to the British government and the efforts of its intelligence service to pressure the United States to oppose the naturalization of Ghadr members. The same year, Taraknath Das wrote an article entitled "What Is at the Back of Anti-Asianism of the Anglo-Saxon World?" in which he answers that British imperialism supports the Asian exclusion policy of American immigration and naturalization. According to Das, the Asian exclusion laws in all of the former British colonies of North America and Australasia were based on the central unifying principle of Anglo-Saxonism and he urges that the issue be taken before the League of Nations.<sup>55</sup> The significance of the Ghadr party to the racial prerequisite cases and the mutual influence of North American and Australasian legal restrictions on Asian immigration have also been the subject of discussion by recent commentators.<sup>56</sup>

The ideology of the Ghadr party was the culmination of a growing political consciousness among Asian Indian immigrants in North America who primarily attributed the racial discrimination they faced by local populations to the fact that India was a colony under British rule rather than a sovereign nation. If they secured independence for India, they believed, they would not face racial discrimination in North America or anywhere else in the world. They often

pointed out that the British government not only failed to assist them in securing equal rights in North America as British subjects, but actively pressured North American authorities to restrict their activities, including pressure to oppose the naturalization of Asian Indian activists. Thus, Asian Indian immigrants became increasingly committed to the cause of Indian independence as they mobilized to defend their civil rights in North America, and as a result they viewed their struggle for naturalization as inseparable from their struggle for Indian independence and equality worldwide.<sup>57</sup> The Ghadr party's ideology is therefore critical to understanding both the Government's rhetorical strategy in *Thind* and Thind's own.

One of the best sources for understanding the Ghadr party's ideology is the Ghadr Press, based in San Francisco, which was the party's central organ for communicating with its worldwide audience. The Ghadr Press primarily published a monthly journal entitled *Ghadr*, which was distributed free and to voluntary subscribers internationally and eventually published in nine languages including English. The Ghadr Press also published a variety of pamphlets, handbills, and articles written for publication in mainstream newspapers as part of its lobbying effort. In 1916, after the British government banned the distribution of *Ghadr* in India and the British colonies, editor Ram Chandra claimed that the journal had roughly a million readers even outside of those areas.<sup>58</sup> The *Ghadr*

journal openly advocated the use of violence to achieve its revolutionary goal, including the following mission statement its inaugural issue:

Today, there begins in foreign lands, but in our country's language, a war against the British *Raj* . . . . What is our name? *Ghadar*. What is our work? *Ghadar*. Where will *Ghadar* break out? In India. The time will soon come when rifles and blood will take the place of pen and ink.<sup>59</sup>

Subsequent issues reflect even more violent language, explicitly inciting its readers to kill all of the “whites,” or Europeans, and to fill the rivers with their corpses:

Let us kill the whites. . . . Kill the wicked and tyrannical European. . . . It is very easy to kill him. Do not leave any trace of him. . . . Extirpate the whole nation . . . kill, all Europeans, men and women, show no mercy . . . Spare neither parents nor offspring . . . . You should flay Europeans alive, so that they remember it for ages to come . . . . Kill the whites and fill the rivers with their corpses. We will go up to England shouting kill, kill.<sup>60</sup>

As reflected in this and other passages, the Asian Indian authors of *Ghadr* often identify Europeans as “whites” in adverse terms, indicating that the authors did not consider Asian Indians to be “white.” *Ghadr* also regularly printed the following advertisement in its wanted column:

Wanted: Enthusiastic and heroic soldiers for organizing Ghadr in Hindustan  
Remuneration: Death  
Reward: Martyrdom  
Pension: Freedom  
Field of work: Hindustan.<sup>61</sup>

As these passages of *Ghadr* reflect, the Ghadr party frequently advocated both violent revolution and the genocidal killing of Europeans as a terroristic tactic in the fight to secure India's independence.

The Ghadr party's open advocacy of violence quickly drew the attention of United States and British intelligence authorities and intelligence documents reveal that both governments closely monitored the activities of the party's leadership, including Thind, who British intelligence identified as "the soul of the revolutionary movement in Astoria," sent to Oregon "to preach sedition."<sup>62</sup> Thind actively supported the *Ghadr* journal by collecting subscriptions and helping to mail copies abroad, and in 1918 he even managed the journal while editor Ram Chandra was in prison for participating in the Hindu-German conspiracy.<sup>63</sup> Among the British government's earliest efforts to suppress the Ghadr party's activities was to try to get leaders of the Ghadr party like Thind extradited from the United States to British jurisdictions where they could be prosecuted, imprisoned, or even executed for sedition. These efforts ultimately resulted in the arrest of Ghadr leader Har Dayal in 1914, and although the case against Dayal appeared weak, the threat of extradition to British custody led him to flee to Switzerland before trial.<sup>64</sup> The British government similarly pressured the United States to deny the naturalization petition of Ghadr leader Taraknath Das, who the British claimed only sought naturalization because he believed it would be to his advantage to claim American citizenship if he were arrested during visits to India

in support of his revolutionary activities.<sup>65</sup> Indian activists frequently sought United States citizenship to preclude their deportation to British jurisdictions and to protect them in the event they were arrested abroad, as well as for the significant advantages that came with citizenship including the right to vote, own land, participate in professional trades, and marry American women. Despite British success in thwarting Das's initial efforts to obtain a naturalization certificate in Oakland, however, which was denied on the ground that he was not "white," Das was granted a naturalization certificate on a subsequent attempt in Seattle and the Government declined to pursue an appeal of the decision.<sup>66</sup>

The Government's concerns regarding the Ghadr party's activities were compounded by a broader concern with rising Asian nationalisms and pan-Asianism at the time. United States opposition to growing Asian immigration during the early twentieth century was powerfully influenced by Japan's victory in the Russo-Japanese War, which was widely perceived to be the "first real challenge to white world supremacy" because it represented the first time in modern history that a non-European power had defeated a major European power in war.<sup>67</sup> The rise of Japanese nationalism following this victory inspired Indian nationalists, who believed Japan's victory signified the capacity of Asians to compete with European powers, and the Indian independence movement looked to Japan's victory in the Russo-Japanese war as a source of inspiration throughout the first half of the century.<sup>68</sup> British intelligence documents reveal that one of

Thind's most common declaration was that Japan became civilized almost immediately after its victory in the Russo-Japanese War and that the same would occur in India once it gained independence from the British government.<sup>69</sup> As Japan tried to mobilize a pan-Asian alliance during this period, tensions arose between the United States and Asia that inspired the United States to initiate more aggressive steps to combat Asian power, and among other things the Chief of the Naturalization Division of the newly inaugurated Bureau of Immigration and Naturalization issued a restrictive interpretation of the racial prerequisite in the naturalization act, claiming that "Turks, peoples of the Barbary states and Egypt, Persians, Syrians, and 'other Asiatics'" were not "white" in statements restrictively interpreting the racial prerequisite to naturalization. Although this interpretation of the act met with prompt objection by the State Department, the Department of Justice, and the federal courts and was almost immediately overruled by the Secretary of Commerce and Labor, it reflects a growing fear of emerging Asian nationalisms during the period that led to a number of test cases involving petitioners from Central and Western Asia whose whiteness had previously gone unchallenged.<sup>70</sup> These cases ultimately led to a strong push for clarification of the racial prerequisite by the Supreme Court and to the certification of questions regarding the racial eligibility of Japanese and Asian Indians for naturalization in *Ozawa* and *Thind*. In light of the growing fear of Asian nationalisms, growing concerns regarding the threat of violence posed by

Asian nationalist groups such as the Ghadr party, and British pressure to assist in controlling the activities of such groups, it is not surprising that the first two test cases to reach the Supreme Court involved petitioners from Japan and India, the two most threatening Asian nationalisms at the time.

### **QUESTIONS ABOUT THIND'S CHARACTER IN THE DISTRICT COURT**

Thind first applied for naturalization in Washington state in the summer of 1918 and was initially granted a naturalization certificate on December 9, 1918, but less than a week later the decision to grant his naturalization certificate was reversed after an Immigration and Naturalization Service examiner disagreed with the court's conclusion that Thind was "white" and therefore racially eligible for naturalization. Thind continued to seek naturalization, however, and on May 6, 1919, he filed a new petition for naturalization in Oregon. The Immigration and Naturalization Service again opposed Thind's petition, in part based on Thind's activities as a leader of the Ghadr party, and after the district court granted Thind's petition for naturalization over the Immigration and Naturalization Service's objection, Government attorneys initiated a proceeding to challenge Thind's naturalization on the basis that he was not "white" and was therefore racially ineligible for naturalization.<sup>71</sup> Importantly, the Government often conflated the racial prerequisites with considerations of individual character, as reflected in the Secretary of Commerce and Labor's concession in November 13,

1919 correspondence addressing his decision to overrule the Bureau of Immigration and Naturalization's restrictive interpretation of the racial prerequisite that, "plainly speaking, we are more concerned with the general character of the immediate applicant than we are with his nativity."<sup>72</sup> Following a trial regarding the Government's petition to cancel Thind's naturalization certificate during which the Government presented evidence of Thind's association with the Ghadr party, Judge Charles Wolverton of the United States District Court for the District of Oregon approved the decision to grant Thind's petition for naturalization based on prior precedent that had held Parsi, Armenian, and Hindu petitioners to be "white" and therefore racially eligible for naturalization. Before explaining his holding regarding Thind's racial eligibility for naturalization, however, Judge Wolverton addresses the Government's evidence of Thind's association with the Ghadr party.<sup>73</sup>

When he heard the *Thind* case, Judge Wolverton had been a judge for more than twenty-five years, having been appointed to the federal bench in 1905 by President Theodore Roosevelt after serving more than a decade on the Oregon Supreme Court. Judge Wolverton had already published another significant opinion interpreting the racial prerequisite to naturalization in the 1910 case of *In re Ellis*, holding that a Syrian petitioner was "white" and was therefore racially eligible for naturalization.<sup>74</sup> In fact, his opinion in *Ellis* was among those lower court opinions expressly approved by the Supreme Court in *Ozawa*. Judge

Wolverton's opinion in *Thind* begins by noting the Government's concerns regarding Thind's character, writing that Thind's deportment had been that of a good citizen,

unless it be that his alleged connection with what is known as the Ghadr Party or Ghadr Press, . . . and the defendants Bhagwan Singh and others, prosecuted in federal court in San Francisco for a conspiracy to violate the neutrality laws of this country, has rendered him an undesirable citizen.

Judge Wolverton's opinion explains in some detail that Thind was on friendly terms with Ghadr leaders such as Ram Chandra and Ram Singh, the Asian Indian defendant who murdered one of his codefendants on the final day of the Hindu-German conspiracy trial, and that Thind had frequently visited Ghadr leader Bhagwan Singh in prison following Bhagwan Singh's conviction for his role in the conspiracy. Judge Wolverton's opinion notes that Thind "stoutly denies . . . that he was in any way connected with the alleged propaganda of the Ghadr Press to violate the neutrality laws of this country, or that he was in sympathy with such a course," but he also notes that although Thind did "not [admit] that he favors an armed revolution," he "frankly admits . . . that he is an advocate of India for the Indians, and would like to see India rid of British rule."<sup>75</sup>

The evidence regarding whether or not Thind advocated violence to rid India of British rule is mixed. Although Thind denied that he "favored" an armed revolution before Judge Wolverton and a biography recently published by Thind's son claims Thind shunned violence as a means of achieving Indian independence,

it is difficult to reconcile Thind's activities as a leader of the Ghadr party, including his management of the *Ghadr* journal, with a philosophy of nonviolence. Moreover, British intelligence documents from years after *Thind* reflect that in speeches he gave in support of Indian independence Thind suggested violence was at least inevitable, speaking favorably of the benefits Japan derived from defeating Russia in the Russo-Japanese War and criticizing Gandhi's philosophy of nonviolent resistance known as *satyagraha*. According to these documents, Thind even stated that if the British continued to suppress the Indians "we will break them to smithereens."<sup>76</sup> Although Judge Wolverton eventually credited evidence that supported Thind's good character and accepted his claim of nonviolence, Judge Wolverton states that Thind's affection for the constitution, laws, customs, and privileges of the United States was a recent development, noting that "obviously, he has modified somewhat his views on the subject."<sup>77</sup>

Judge Wolverton's opinion in *Thind* suggests that he weighed the evidence of Thind's activities as a leader of the Ghadr party against Thind's status as a veteran of the United States military during World War I, which was the primary source of his character evidence. By noting that Thind had "modified his views," however, Judge Wolverton suggests that he does not accept Thind's claim to have never favored violence but only that he had reformed his views, perhaps as a result of his service in the United States military. This conclusion may have

particularly appealed Judge Wolverton's patriotism given the variety of programs the War Department initiated to Americanize foreign-born soldiers who served in the military during World War I.<sup>78</sup>

Although Thind's connection with the Ghadr party was not argued before the Supreme Court or addressed in the Court's opinion in *Thind*, Judge Wolverton's opinion apprised the Court of the Government's concerns regarding Thind's character. Thind's connection to the Ghadr movement is critical to understanding the rhetorical choices made in the Supreme Court briefs of both Thind and the Government, because the Ghadr party's political ideology and the conflict between the Indian independence movement and British imperialism are apparent in both briefs. It is also difficult to imagine that Thind's connection to a violent nationalist movement in the United States would have no effect on the Court's reception of the arguments, particularly in the context of concerns regarding the rise of Asian nationalisms at the time. As a result of the relatively recent headlines surrounding the Ghadr party's activities, including the Hindu-German conspiracy trial, the Ghadr party was perceived to be a terrorist organization when the Court heard *Thind*. The party was opposed to America's closest ally Britain and linked with America's World War I enemy Germany, the Bolshevik Revolution in Russia, and anarchism. The British government had labeled the Ghadrites anarchists, a political faction whose believers had been responsible for the assassination of William McKinley in 1901 and a series of

bombings in 1919 that targets of which included United States Attorney General A. Mitchell Palmer's home.<sup>79</sup> At least as a matter of perception, Thind's association with the Ghadr party can only have cast doubt on his credibility in the minds of the Court's justices and on his desirability as a citizen. Moreover, Thind's arguments appear likely to have compounded these concerns by adopting the position that as a high caste Hindu his racial purity was superior even to that of European Americans such as the Court's justices themselves.

#### **THIND'S CLAIM OF HIGH CASTE PRIVILEGE BEFORE THE SUPREME COURT**

As reflected in his Supreme Court brief in *Thind*, the central premise of Thind's argument that he was "white" and therefore racially eligible for naturalization was that as a "high caste Hindu of full Indian blood" he was a descendent of the European invaders of the Indian subcontinent. As discussed in the introduction to this chapter, when Sir William Jones discovered that Sanskrit and European languages had a common linguistic origin, European scholars of the eighteenth century believed the study of Sanskrit would give rise to an Oriental Renaissance as influential as the study of newly discovered Greek texts during the fifteenth century.<sup>80</sup> Although Edward Said argues in his classic study of Orientalism that European Orientalism created "a relationship of power, of domination, or varying degrees of a complex hegemony,"<sup>81</sup> Thind sought to use this to his advantage by citing the most prominent scholars of the Oriental

Renaissance in support of his argument for the whiteness of high caste Hindus, quoting directly from European scholars such as William Jones, Franz Bopp, and Max Müller, who had concluded that Europeans and Asian Indians descended from a common ancestor.

According to the Indo-Aryan invasion theory of ancient Indian civilization circulating among Asian Indian immigrants at the time, an Aryan-speaking race had invaded the Indian subcontinent prior to India's Vedic era and conquered the dark-skinned Dravidians of the region, who they drove into southern India. The British originally sponsored this historiography to serve the ideological needs of imperial rule by claiming Aryan authorship of the great literary works of classical Indian civilization, but it quickly became an ideological weapon of both imperialists and nationalists in the struggle for Indian independence.<sup>82</sup> According to this theory, the Aryan invaders of the Indian subcontinent originated in Central Asia and migrated south through the Caucasus to Iran and India before migrating west to Europe. Some variations of this theory still have general currency, although recent archaeological evidence suggests that the Indo-Europeans who migrated to the Indian subcontinent may have peacefully migrated there rather than come as invading conquerors of the region<sup>83</sup> and some Dravidian activists claim that it was not Aryans but Dravidians who inhabited the Indus Valley during the height of India's ancient civilization and that the Dravidian language rather than Sanskrit was the original substratum of Vedic Sanskrit.<sup>84</sup>

In Thind's Supreme Court brief, although he concedes that common linguistic descent alone does not conclusively establish his racial ancestry he argues that the caste restrictions on marriage imposed by Hindu religion and law uniquely preserved the racial purity of high caste Hindus. In support of this claim, he cites the Institutes of Manu, one of the oldest and most sacred of the religious texts of ancient India. According to Thind, "the caste system prevails in India to a degree unsurpassed elsewhere" and the fact that it was "reprehensible for one of a higher caste to marry one of a lower caste" proved "a most effective barrier to prevent a mixture of the Aryan with the dark races of India." Accordingly, high caste Hindus maintained an unparalleled racial purity. Furthermore, Thind emphasized the theory that the European ancestors of high caste Hindus came to the Indian subcontinent not peacefully but as conquerors. According to Thind's brief, high caste Hindus could not have learned the Indo-Aryan language from any conquering race because "as far back as history goes the Aryans themselves have been the conquering race," and

there being no evidence whatsoever that the so-called Aryans of India were ever conquered by any other race, then the fact that they speak the Aryan language is very strong evidence that they have sprung from the primordial Aryan race who spoke the primordial Aryan language.<sup>85</sup>

As these passages of his brief reflect, Thind frames his whiteness in a claimed relationship between imperial conquest and caste privilege in India.

Thind also explicitly pressed this claim to its logical conclusion by contrasting the racial purity of high caste Hindus like himself with that of Americans, implicitly questioning the Supreme Court's authority to determine his racial purity. Thind first compares the Indo-Aryan invaders of the Indian subcontinent to the European invaders of North America, arguing that the Aryans who invaded ancient India were like "the Caucasian people of this country who have taken possession and driven out the native red men," and adds that "the high-class Hindu regards the aboriginal Indian Mongoloid in the same manner as the American regards the negro." It is unclear whether in making this argument Thind sought to create an identification with the "white" members of the Court by appealing to a common racial prejudice or, if so, whether such an argument could have been successful, but in almost the same breath Thind also questions the racial purity of European Americans in contrast to high caste Hindus due to the "melting pot" effect. Although "there are a great many more distinct races in India than there are in the United States," Thind contends, there was "no 'melting pot' in India in the sense that we use the term in the United States."<sup>86</sup> This view of the "melting pot" is not only contrary to the positive metaphor it represented to many immigrants at the time, but intimates that Thind's racial purity is superior even to that of the Court's justices themselves.

Thind's argument that Asian Indians possessed a claim to whiteness even superior to that of Europeans was not new, but expressed a common argument

among Asian Indians. As historian Harold Isaacs notes, Hindu nationalists of the early twentieth century internalized the racial supremacy of the Indo-Aryan invasion theory of Indian civilization developed by European scholars and frequently conceived of themselves as “more ‘white’ than the ‘whites,’ indeed, as descendants from the ‘pure Aryan family’ of prehistoric times,” who as a result were endowed with a sort of Mayflower status in relation to whiteness.<sup>87</sup> Because many Indian nationalists believed that their claim to Aryan racial purity was the only way to resist British imperialism, an alliance had formed between the European myth of the Aryan and the Indian one by World War I.<sup>88</sup> A 1916 *Ghadr* pamphlet regarding the Asian exclusion policies of the United States proclaimed the Aryan origins of high caste Hindus in contrast to the Dravidians of southern India,<sup>89</sup> for example, and a 1936 pamphlet entitled *Ethnological Epitome of the Hindustanees of the Pacific Coast*, published to contest the conclusion of *Thind* that high caste Hindus were not “white,” argued that the Sikhs of the Punjab were “the purest high type of Aryan blood without any mixture at all . . . , purer than the mixed white races of America,” and claimed that “no race, no nationality, no group of people, anywhere on the face of the earth, is as pure in its blood as the people of India.”<sup>90</sup> Likewise, the founding leader of the Ghadr party, Har Dayal, reported that he was originally inspired to travel to the United States by a spiritual adviser who persuaded him “to go to America and propagate the ancient culture

of the Aryan race,<sup>91</sup> and one of the earliest political journals of the Asian Indian communities in North America also reflected this purpose in its title, *Aryan*.<sup>92</sup>

The most basic tenets of the Indian independence movement rejected racial hierarchies, however, and the claim that Asian Indians were more “white” than the whites appears to have been a rhetorical strategy that Indian independence activists only advanced as a challenge to the racial hierarchy on which British imperialism was based. The Ghadr party was a secular and egalitarian movement that frequently used the strongest language to reject race and caste distinctions as divisive impediments to securing Indian independence, in part because it was apparent a mass movement would be necessary to achieve independence.<sup>93</sup> Nonetheless, the party’s egalitarianism was not perfectly conceived. Although the party proposed that the overthrow of British rule in India should be followed by a democratic government based on liberty and equality, little thought was given to the system that would replace British rule and the party’s alliances with India’s native princes highlighted contradictions in the party’s commitment to democracy.<sup>94</sup> These contradictions are illustrated in two articles by Ghadr leader Har Dayal that were reprinted together in a pamphlet published by the Ghadr Press. In the first article, Dayal praises the power of the Aryans to conquer the Dravidians of southern India by bending them to their will and argues that Indians should revive this power to defeat the British government. In the second article, however, he claims that race introduced the first inequalities

into Indian society and calls the distinction between the Aryans and aborigines of the Indian subcontinent a “hateful antithesis” that destroyed Asian Indian unity and enslaved the Aryans themselves.<sup>95</sup> As illustrated by Dayal’s contradictory writing on racial hierarchy in these pamphlets, Indian nationalists appear to have appealed to the Aryan origins of high caste Hindus primarily to contest British imperialism while critiquing the divisive effect of race on Indian society.

As Jennifer Snow notes, it is one of the great ironies of ideological history that the concept of an Aryan race, which originally signified the racial kinship and desire for a closer bond between Europeans and Asian Indians, would come to racially divide the people of India as the British Empire grew and metaphors of hierarchy and domination gained more prominence in racial discourse.<sup>96</sup> Thind could have adopted a rhetorical strategy that emphasized European Orientalist scholarship that was directed toward inclusion rather than exclusion, as well as Sikhism’s rejection of race and caste distinctions and the egalitarian ideals of the Indian independence movement, but he elected not to. Thind’s appeal to his high caste status as proof of his superior racial purity not only contradicts the egalitarian basis of the Ghadr movement, but is also surprising because one of the primary tenets of Sikhism is the denial of caste distinctions.<sup>97</sup> The idealist strain of European Orientalist scholarship had also been enthusiastically embraced by American intellectuals such as Ralph Waldo Emerson, Walt Whitman, and Henry David Thoreau, whose interest in Indian philosophy and religion had inspired

Thind as a student in India.<sup>98</sup> Moreover, even within the framework of racial hierarchies, Thind could have emphasized the British racial ideology of “martial races” formed in the wake of the 1857 Indian rebellion against the British government in which the British elevated the Sikhs and Gurkhas who supported the British during the rebellion to the status of “martial races” while representing the high caste Hindus who were primarily responsible for the rebellion as weak and effeminate due to their devotion to caste ritual.<sup>99</sup> Instead, Thind placed his entire claim to whiteness on his high caste status, suggesting that his rhetorical strategy was heavily motivated by the Indian independence movement and primarily directed at resisting the claims of British imperialism, leading him to express his racial identity in a manner that created division rather than identification with Europeans.

Thind’s rhetoric reflects the ideology of the Ghadr party and suggests that his brief may have been addressed to a complex audience concerned not only with the racial eligibility of Asian Indians for naturalization but with a critique of British imperialism as a means of securing Indian independence. Given the connection Asian Indian immigrants perceived between the racial prejudice they faced in North America and the Indian independence movement, the *Thind* case held a wider symbolic significance than the naturalization question alone. It also signified where Indians stood in the struggle for equality on a global scale. In this respect, Thind’s arguments paralleled Takao Ozawa’s arguments in *Ozawa*, which

also expressed a competing nationalism by arguing that long before the Mayflower sailed to Plymouth the Japanese had established colonies in countries even further away, that the Japanese adhered to Western ideals of honor, duty, patriotism, family life, and religion even better than Americans, and that the Japanese in Hawaii had lower crime rates than whites.<sup>100</sup> Rather than reduce the conflicts and tensions between these rival nationalisms and the United States, the rhetorical strategies adopted by Ozawa and Thind highlighted them.

The rhetorical strategy of listing civilizational accomplishments appears to have also been employed in other racial prerequisite discourse and to have consistently failed. Many critics of *Thind* in the Asian Indian community, for example, adopted this rhetorical strategy by listing civilizational accomplishments in an effort to establish their equality with Europeans. In 1923, Sudhindra Bose criticized the Court's opinion in *Thind* for, among other things, failing to consider "higher values—the extraordinary achievements and potentialities of India," and "the cultural contributions of the Hindus to the world." Noting the contributions of India to science, literature, religion, and philosophy, Bose remarked that apparently the Court held the view that "American civilization has no need of spiritual values or that they are the close monopoly of only the Europeans."<sup>101</sup> Similarly, in a series of racial prerequisite cases involving Syrian petitioners in South Carolina federal court shortly before World War I, Syrians adopted this strategy by claiming whiteness through their contributions to Western civilization,

particularly the contributions Syrians had made to Western Christendom, and after suffering a series of refusals to naturalize them based on the conclusion that they were racially ineligible for naturalization they began to frame their whiteness in terms that explicitly racialized blacks and Asians as inferior, non-“white” people. Although the Syrian cases were reversed on appeal, Syrian efforts to establish their whiteness by listing their contributions to Western civilization and disparaging non-“white” groups repeatedly failed in the trial court.<sup>102</sup> Thus, Thind’s assertion of imperial credentials and caste privilege before the Supreme Court was not an isolated strategy but exemplifies a common rhetorical strategy in the racial prerequisite cases that had often failed.

#### **THE SOLICITOR GENERAL’S CITATION OF BRITISH AUTHORITIES ON THE “UNALIABILITY” OF THE INDIAN CASTE SYSTEM**

It is difficult to imagine a clearer validation of Asian Indian immigrants’ belief that barriers to immigration and naturalization that they faced in the United States were tied to their status as imperial subjects than the Solicitor General’s brief for the Government in *Thind*. In the Government’s brief, the Solicitor General appeals to British sources that emphasize the “unaliability” reflected in India’s dependency on the caste system and frames high caste Hindus as alien to the “white” race and a threat to Western civilization. The Government’s brief begins by conceding that the authorities Thind cited in support of his claim to be a

member of “what is commonly recognized as the Aryan family . . . seem to afford little ground for challenge,” and the Government does not directly challenge Thind’s claim that the caste restrictions on marriage had preserved his biological racial purity in the modern era. Rather than challenge Thind’s biological claim to a pure European ancestry, the Government’s brief places its greatest emphasis on the argument that a cultural and political divide separates Indians and Europeans due primarily to India’s the caste system, arguing that “though high caste Hindus may have kept their blood pure for centuries, nevertheless, the centuries have removed them far from political fellowship with the white men of the Western World.”<sup>103</sup>

The claim that India’s caste system was responsible for the fact that Asian Indians were subjects of British rule was a commonplace of British imperialism. While some Europeans admired the caste system as the most enduring characteristic of Indian society, they simultaneously viewed it as the result of racial conflict and blamed it for India’s resistance to Western civilization.<sup>104</sup> Ironically, one of the earliest fears that animated racial discrimination toward Asian Indians in North America was that the erosion of caste divisions would enable them to achieve a higher level of political organization. As Harold Gould writes, many Americans feared that Asian Indians living in open societies like the United States and Canada “were undergoing social and ideological changes which had revolutionary implications for the perpetuation of British rule in India,”

particularly the erosion of caste divisions in favor of a more egalitarian society.<sup>105</sup>

The claim that caste resisted such changes nonetheless served to sever Thind's claim to whiteness from his Indo-European ancestry.

To support the Government's claim that a cultural and political gulf separated Asian Indians from Western civilization, the Solicitor General expressly appealed to the ideology of ruling and subject races that supported British imperialism, arguing that in 1790 and thereafter

British domination in India was really exercised by the British East India Company, [the] people of India were a subject-race, and, while the ideals of liberty, equality and fraternity were being preached in Europe and America, there is no reason to believe that any one seriously extended their applications to the people of India, or believed that those people were of the kind to be assimilated in citizenship in Western civilization.

The Government's brief also quotes at length from Edmund Burke's address to the House of Lords in the eighteenth century trial of Warren Hastings, the former Governor-General of India who was impeached by the House of Commons after Burke charged him with high crimes and misdemeanors for his rule of India. In the passage of Burke's speech quoted in the brief, Burke claims the inhabitants of India are "the most unalliable to any other part of mankind," without the "convivial bond" of society, and specifically identifies caste as a wide gulf that separates the Indian and British people, "that gulf which manners, opinions, and laws have radicated in the very nature of the people." Due to caste restrictions, Burke argues, high caste Hindus cannot come into contact with any other people

and “this circumstance renders it difficult for us to enter with due sympathy into their concerns, or for them to enter into ours, even when we meet on the same ground.” In addition, Burke claims, “none of their high castes, without great danger to his situation, religion, rank, and estimation, can ever pass the sea; and this forbids, forever, all direct communication between that country and this.” The Indian caste system, Burke argues, is the most powerful enclave in the history of the world:

Their blood, their opinions, and the soil of their country make one consistent piece, admitting no mixture, no adulteration, no improvement: accordingly, their religion has made no converts, their dominion has made no conquests; but in proportion as their laws and opinions were concentrated within themselves, and hindered from spreading abroad, they have doubled their force at home. They have existed in spite of Mohammedan and Portuguese bigotry,—in spite of Tartarian and Arabian tyranny,—in spite of all the fury of successive foreign conquest,—in spite of a more formidable foe, the avarice of the English dominion.<sup>106</sup>

The Solicitor General’s quotation of these passages from Burke’s speech serve to establish that a cultural and political gulf separated high caste Hindus from modern Western civilization regardless of whether they shared a common European ancestor,<sup>107</sup> and Thind’s assertion of high caste privilege confirmed rather than refuted this argument. As Jennifer Snow writes, the Government’s brief in *Thind* “made strategic use of the echoes set up by ‘caste’ itself, negative ideas about caste practices that were well established in scholarship alongside the ideal of caste as preserver of racial purity.”<sup>108</sup> These negative echoes were made readily available by the rhetorical strategy of Thind’s brief itself.

Like Thind's brief, the Government's brief also takes this argument to its logical conclusion, drawing on the imperialist ideology of white supremacy contained in Rudyard Kipling's poem "The White Man's Burden," as noted in the introduction to this chapter. The Government's claim that Thind was "an alien to the white race and part of the 'white man's burden,'" who imposed rather than shared that burden,<sup>109</sup> represented Thind as an aggressor rather than a victim in a narrative of empire. In this passage, the Solicitor General also explicitly associates whiteness with American imperialism because Kipling's poem was originally intended for an American audience and included the subtitle "The United States and the Philippine Islands." By appealing to a linguistic notion of an "English-speaking race," the Solicitor General succinctly binds British and American imperialism in common opposition to the "sullen peoples / Half-Devil and Half-child" that form the subject of the poem. The Solicitor General did not appeal to the perceived degradation and effeminacy of the Indian caste system but to its dangerous resistance to empire.

#### **JUSTICE SUTHERLAND'S OPINION IN *THIND***

In light of how central the history of British imperialism in India was to the arguments in *Thind*, it is noteworthy that Justice Sutherland, who authored the Court's opinion holding that high caste Hindus were not "white" and were therefore racially ineligible for naturalization, was himself a naturalized citizen

born in England before immigrating to the United States with his parents as a child.<sup>110</sup> Justice Sutherland's background magnified the significance of the conflict between the British government and Indian nationalists like Thind even further, a conflict which motivated the Government's opposition to Thind's naturalization in the first place and shaped the arguments in both parties' Supreme Court briefs. As discussed earlier in this chapter, the Court's opinion in *Thind* reversed two lower court opinions that had held high caste Hindus to be "white" and therefore racially eligible for naturalization, opinions which the Court had expressly approved of three months earlier in *Ozawa*. Unlike *Ozawa*, in which Justice Sutherland framed his opinion as merely upholding a line of lower court decisions that had racially classified the Japanese as non-"white," in *Thind* the Court reverses a majority of lower court decisions that had concluded that high caste Hindus were "white" and therefore racially eligible for naturalization.<sup>111</sup> Not only is this silent reversal of the lower court opinions the Court had approved in *Ozawa* surprising, but Justice Sutherland's opinion in *Thind* evinces an anxiety regarding Thind's claim of European ancestry which the Government itself largely conceded, suggesting that the claim prompted an emotional response from the Court.

The central question certified to the Court was: "Is a high caste Hindu of full Indian blood, born at Amrit Sar, Punjab, India, a white person within the meaning of section 2169, Revised Statutes?" In his opinion for the court, Justice

Sutherland quickly notes that “no question is made in respect of the individual qualifications of the appellee,” but “the sole question is whether he falls within the class designated by Congress as eligible.” Because even the Solicitor General had largely conceded that Europeans and Asian Indians shared a common biological ancestor and that the caste restrictions on marriage had preserved the racial purity of high caste Hindus, the question regarding India’s relationship to Western civilization formed the central point of dispute between the parties. This left the Court with little opportunity to avoid the historical issues regarding the Indian subcontinent as it had avoided the dispute regarding Japanese history in *Ozawa*. Despite the apparent agreement of the parties regarding the common ancestry of Europeans and Asian Indians, however, Justice Sutherland begins his discussion of the racial classification question by challenging Thind’s claim that caste restrictions had preserved the racial purity of high caste Hindus, a position even the Solicitor General had not particularly denied in the Government’s brief.

Justice Sutherland’s opinion begins by rejecting the Indo-European language theory of race on which European Orientalist scholars based their conclusion that Europeans and Asian Indians had a common biological ancestor, writing that

it would seem reasonably clear that mere resemblance in language, indicating a common linguistic root buried in remotely ancient soil, is altogether inadequate to prove common racial origin. There is, and can be, no assurance that the so-called Aryan language was not spoken by a variety of races living in proximity to one another. Our own history has

witnessed the adoption of the English tongue by millions of Negroes, whose descendants can never be classified racially with the descendants of white persons notwithstanding both may speak a common root language.

Justice Sutherland then challenges Thind's claim that the caste restrictions on marriage had preserved the racial purity of high caste Hindus, concluding that although the original Aryan invaders of India may have been "white," their contemporary descendants were mixed-race people as a result of their intermarriage with the darkskinned Dravidians of the Indian subcontinent:

The type may have been so changed by intermixture of blood as to justify an intermediate classification. Something very like this has actually taken place in India. Thus, in Hindustan and Berar [in northeastern India] there was such an intermixture of the "Aryan" invader with the darkskinned Dravidian.

In the Punjab and Rajputana [in northwestern India where Thind was born], while the invaders seem to have met with more success in the effort to preserve their racial purity, intermarriages did occur producing an intermingling of the two and destroying to a greater or less degree the purity of the "Aryan" blood. The rules of caste, while calculated to prevent this intermixture, seem not to have been entirely successful.<sup>112</sup>

In these passages, Justice Sutherland directly engages the historical debate regarding the history of the Indian subcontinent in a manner the Court had declined to do in *Ozawa* with regard to Japanese history.

Significantly, Justice Sutherland mischaracterizes the 1911 *Encyclopedia Britannica* entry on "Hinduism" which forms the sole authority offered to support his historical claims in *Thind*. Perhaps Justice Sutherland cites the *Encyclopedia Britannica* either due to its accessibility or because it could be viewed as

“common knowledge” of racial classifications, or both, but the entry actually contradicts Justice Sutherland’s conclusion about the Aryan invaders of Thind’s homeland in the Punjab. The *Encyclopedia Britannica* entry on “Hinduism” cited in *Thind* does not suggest that intermarriages with the darkskinned Dravidians of India occurred among the Aryan invaders of the Punjab, but only among the Aryan invaders of northeastern India and indicates that these invaders may have even formed part of a second invasion through the mountainous areas of the upper Indus and northern Kashmir. By contrast, the entry states that the invaders of the Punjab where Thind was born did not merely meet with “more success” in the effort to preserve their racial purity, as Justice Sutherland writes in *Thind*, but that they “seem to have been *signally successful* in their endeavor to preserve their racial purity, probably by being able to clear a sufficiently extensive area of the original occupants for themselves with their wives and their children to settle upon.”<sup>113</sup> Justice Sutherland’s use of the significantly diluted term “more” in contrast to the *Encyclopedia Britannica*’s use of the word “signally”—meaning “in a signal or striking manner; conspicuously, notably, remarkably, pre-eminently”<sup>114</sup>—is surprising given that the rest of Justice Sutherland’s passage is nearly identical to the *Encyclopedia Britannica* and given the importance of the quantification question to the argument at issue. This modification suggests either that Justice Sutherland simply presumed that Asian Indians had intermarried with Dravidians or that he deliberately altered the entry’s meaning to suit his

argumentative purpose. The *Encyclopedia Britannica* entry on “Hinduism” that Justice Sutherland cites also explicitly identifies the Aryan invaders of northern India as part of the “white race” and states that the Aryan invaders of the Indian subcontinent dealt with the Dravidians “the way the white race usually deals with the coloured race—they kept them socially apart,” further contradicting Justice Sutherland’s reliance on the entry for the conclusion that high caste Hindus were not “white.” Despite the fact that this authority does not support Justice Sutherland’s claim, by citing the *Encyclopedia Britannica* the opinion suggests that Justice Sutherland’s conclusion is commonly known and undisputed, serving to establish that the “unalliability” of high caste Hindus had not only a cultural but a biological basis.

Justice Sutherland also uses language in *Thind* that suggests a remarkably high burden of whiteness reminiscent of the “one drop” rule of the nineteenth and early twentieth century that classified individuals as “black” based on even the slightest African ancestry. In his opinion in *Thind*, Justice Sutherland states that high caste Hindus had failed to establish their whiteness merely by virtue of the fact that the rules of caste had not been “entirely” successful and that intermarriage had destroyed the racial purity of high caste Hindus only “to a greater or less degree.” Only after Justice Sutherland severs *Thind*’s claim that Europeans and Asian Indians shared a common biological ancestor by imposing this high burden of proof does he address the Government’s argument that a

cultural divide separated Asian Indians from Western civilization. Justice Sutherland writes that the naturalization act was only intended to include “the type of man whom [the original framers of the law] knew as white,” and because the immigration of 1790 was almost exclusively from the British Isles and Northwestern Europe, from which the drafters of the law and their ancestors had come, these were the people intended by the phrase “white persons” in the act. Justice Sutherland adds an ethno-religious element to this argument in the opinion, however, by adding that “it was these immigrants—bone of their bone and flesh of their flesh—and their kind whom they must have had affirmatively in mind.”<sup>115</sup> The phrase “bone of their bone and flesh of their flesh” is an allusion to the creation story in the biblical book of Genesis in which God takes one of the first man Adam’s ribs and uses the rib to create the first woman, who Adam refers to as “bone of my bone and flesh of my flesh.”<sup>116</sup> This biblical allusion suggests a necessary relationship between whiteness and Judeo-Christianity and an anxiety regarding Thind’s use of the religious restrictions of ancient Hindu religious texts as a basis for his claim to superior racial purity.

Finally, Justice Sutherland cites the “physical group characteristics of the Hindus” and asserts that unlike the children of English, French, German, Italian, Scandinavian, and other European parentage, who “quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin,” the children born in the United States of Hindu parentage “would retain indefinitely

the clear evidence of their ancestry.” Then, in language that bears the imprint of the “separate but equal” doctrine first endorsed in the Supreme Court’s landmark 1896 opinion in *Plessy v. Ferguson*, Justice Sutherland remarks that despite the Court’s conclusion that Hindus were entirely inassimilable with American life,

it is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.<sup>117</sup>

The “separate but equal” doctrine denied that segregation implied any racial hierarchy and claimed, however disingenuously, that separate schools and public accommodations for different races did not constitute unequal treatment. The reference to the “instinctive” recognition of racial difference in Justice Sutherland’s opinion in *Thind* restates the “racial instincts” language of *Plessy*, in which the Court stated that “legislation is powerless to eradicate racial instinct, or to abolish distinctions based upon physical differences.”<sup>118</sup> *Thind*’s claim of racial superiority and disparagement of blacks and American Indians, if it was intended to persuade the Court of *Thind*’s cultural and political affiliation with “white” Western civilization, failed to demonstrate an understanding of the “separate but equal” doctrine that had supported segregation for more than two decades in the United States at the time of *Thind*’s case. Because the Court could not have approved of *Thind*’s appeal to racial supremacy without threatening its commitment to the “separate but equal” doctrine of segregation, *Thind* not only

failed to establish an identification of interests with the Court but failed to identify with the Court's segregation-era rhetoric that had categorically denied that it supported a racial hierarchy. Nothing could more clearly make this point than to contrast *Thind's* assertion of high caste privilege with another passage of the Supreme Court's opinion in *Plessy* that had stated simply: "There is no caste here."<sup>119</sup>

#### **GANDHI'S SATYAGRAHA AND SAKHARAM PANDIT AS "OUTCASTE"**

The Supreme Court's opinion in *Thind* had immediate and far-reaching consequences. Within weeks of the decision, Government attorneys began asking courts to cancel the naturalization certificates obtained by Asian Indians before *Thind*, arguing that they were "illegally procured" within the meaning of the Naturalization Act of 1906. The 1906 act provided that it was the duty of the United States district attorney in each district to institute proceedings to cancel or set aside naturalization certificates "on the ground of fraud or on the ground that such certificate of citizenship was illegally procured."<sup>120</sup> Although this provision was probably intended to combat fraud rather than erroneous naturalization rulings, Government attorneys insisted that the naturalization certificates of immigrants who were racially ineligible for naturalization should be canceled under this provision because their naturalization certificates had been "illegally procured." These cancellation proceedings ultimately resulted in the

naturalization certificates of fifty Asian Indians being canceled between 1923 and 1926, although Department of Labor documents presented to Congress reflect that the Government selectively exempted Asian Indian veterans from such cancellation proceedings.<sup>121</sup> The California Attorney General immediately began instituting proceedings to revoke Asian Indian land purchases under California's alien land law that prohibited land ownership by those "ineligible to citizenship."<sup>122</sup> Approximately a year after the *Thind* decision, Congress also passed the Immigration Act of 1924 which prohibited any alien "ineligible to citizenship" from entering the United States, which as a result of the Court's opinions in *Ozawa* and *Thind* effectively barred all immigration to the United States by those classified as Japanese or Asian Indian.<sup>123</sup>

Asian Indians across the globe first responded to the *Thind* decision with hostility, and the Indian National Congress passed a reciprocal law that limited eligibility for naturalization in India to immigrants from nations that admitted Asian Indians to citizenship. According to British intelligence documents, after receiving the news Thind "endeavored to create an agitation against [the decision] amongst his fellow Indians." With this purpose in mind, he moved to San Francisco where he looked up Bhagwan Singh and other Ghadr leaders who had been convicted in the Hindu-German conspiracy trial and organized a meeting of the Ghadr party two weeks after the *Thind* opinion was issued to discuss a response.<sup>124</sup> Nothing appears to have come of this meeting, however, and rather

than create an agitation, the Indian independence activists in the United States used mainstream political lobbying efforts to have the naturalization act expanded to include eligibility for Asian Indians and for the naturalization certificates that had already been canceled to be restored.<sup>125</sup> These lobbying efforts inaugurated a shift in the rhetorical strategy of the Indian independence movement in the United States, reflecting the transition from the violent revolutionary rhetoric of the Ghadr party to Gandhi's philosophy of nonviolent resistance known as *satyagraha*, which superseded Ghadr radicalism as the predominant mode of expression of political activism for Indian independence during the 1920s.<sup>126</sup> This shift in the rhetorical strategy of the Indian independence movement between the end of World War I and the mid-1920s also coincides with a comparable shift in the rhetorical strategies reflected in Asian Indian naturalization discourse at the time and may explain the new rhetorical strategy of Sakharam Pandit during the post-*Thind* period which ultimately convinced the United States Department of Labor to reverse its position on the cancellation of Asian Indian naturalization certificates.

The rise of Gandhi's philosophy of *satyagraha* as the predominant mode of activism in the Indian independence movement was in part an abandonment of the violent methods of the Ghadr party. In contrast to the methods of the Ghadr party, Gandhi taught that *satyagraha*—literally “insistence on truth,” from the Sanskrit *satya* (“truth”) and *āgraha* (“pertinacity”), translated as “truth-force” or

“soul-force”—was a method of securing rights by “personal suffering” and “the reverse of resistance by arms.”<sup>127</sup> In contrast to the Ghadr party’s persistent critique of the British and promotion of violent resistance, Gandhi proclaimed that Indian independence activists should try to convert, not to coerce, their opponents. Among the rules Gandhi announced for *satyagraha* were admonitions to harbor no anger and refrain from cursing at or insulting an opponent, to suffer an opponent’s anger, to bear an opponent’s assaults without retaliating, and to voluntarily submit to arrest.<sup>128</sup> During the post-World War I period, this more mainstream and pragmatic political philosophy of non-violent resistance began to supersede the radicalism of the Ghadr party and had largely replaced it by the mid-1920s.

It is important for purposes of considering Gandhi’s *satyagraha* in connection with a study of the rhetorical strategy of unifying against a common enemy that although Gandhi carefully distinguished *satyagraha* from “passive resistance” because he did not believe *satyagraha* to be passive, he insisted on the central importance of self-suffering and self-sacrifice as a means of converting opponents.<sup>129</sup> Thus, Gandhi writes that *satyagraha* is “not a movement of brag, bluster or bluff” but refers to the “vindication of truth not by infliction of suffering on the opponent but on one’s self,” and that a *satyagrahi* will “joyfully suffer even unto death” while “he who has not the capacity for suffering cannot non-co-operate.”<sup>130</sup> The rules of *satyagraha* also include admonitions to protect

others during the course of any resistance, perhaps most importantly one's opponents. Thus, Gandhi not only provides that one should not insult or attack one's opponent but that if during a resistance any one insults or attacks an official, a *satyagrahi* must "protect such official or officials from the insult or attack even at the risk of his life," and Gandhi repeatedly emphasizes that it should never be the intention of a *satyagrahi* to embarrass or frighten his opponent.<sup>131</sup> This protection of one's opponents also extended to minimizing their hardships, as in accounts of *satyagrahis* in India who refused to organize resistance activities during the heat of the day because they realized that their European opponents were less accustomed to extreme heat, or postponed resistance activities to allow the British to attend Easter services.<sup>132</sup> As Joan Bondurant writes of Gandhi's philosophy of *satyagraha*, "Gandhi's refusal to take advantage of a misfortune or disability of the opponent was an element essential to *satyagraha*," and "the constructive goodwill attitude so fundamental in the *satyagraha* approach was a novel introduction into political and social tactics, even to those which were characterized as passive resistance."<sup>133</sup>

The self-suffering that was essential to Gandhi's method of *satyagraha* not only created solidarity within the Indian independence movement but between Asian Indians and their British opponents, particularly by insisting that they sympathize with and seek to protect their opponents from harm while prohibiting *satyagrahis* from appealing to their opponents' fears. Gandhi's method had a far-

reaching influence on all aspects of the Indian independence movement both in India and across the globe from the time of its emergence after World War I until India achieved independence in 1946 and permeated all aspects of Asian Indian life during the period, particularly the pursuit of Asian Indian civil rights. As Haridas Muzumdar recounts of Asian Indian efforts to secure legislation extending racial eligibility for naturalization to them during the 1930s and 1940s, when the editor of *The New Republic* encouraged Muzumdar to write a letter to the editor regarding the injustice of the Asian exclusion laws, Muzumdar declined because he believed a crusade in the press was inconsistent with Gandhi's philosophy.<sup>134</sup> Following Gandhi's advice to avoid violence "in any shape or form, whether in thought, speech, or deed," Indian independence activists considered *satyagraha* to be more than a strategic tactic to be used for specific protests, but instead a way of life.<sup>135</sup> The rhetorical strategies adopted by the Asian Indian petitioners in the cancellation proceedings that followed *Thind* appear to reflect this shift to Gandhi's philosophy of nonviolent resistance in the broader struggle for Indian independence, and this shift in rhetorical strategies eventually secured an important victory for Asian Indians in the history of the racial prerequisite cases.

The shift in rhetorical strategies adopted by the participants in racial prerequisite cases involving Asian Indians after *Thind* particularly appears in cancellation proceedings involving the Asian Indian attorney Sakharam Ganesh

Pandit, both in cases he argued as an attorney for other Asian Indian petitioners and when he defended his own naturalization certificate against cancellation. After becoming a naturalized citizen in 1914, Pandit obtained a license to practice law in California and represented other Asian Indian immigrants in naturalization proceedings before defending his own naturalization certificate against the Government's efforts to cancel it in *United States v. Pandit*, filed shortly after the Court issued its opinion in *Thind*. Because the Department of Labor stopped pursuing cancellation proceedings against Asian Indians and restored the naturalization certificates that had already been declared void after the dismissal of the Government's case in *Pandit* was upheld on appeal and the Supreme Court rejected the Government's petition for certiorari,<sup>136</sup> *Pandit* is the most important racial prerequisite case involving Asian Indians after *Thind*.

Before Pandit defended his own naturalization certificate against cancellation, he represented Akhay Mozumdar and Mohan Singh in their cancellation proceedings. In *Mozumdar* and *Singh*, the Government succeeded in cancelling the defendants' naturalization certificates despite the fact that the lower court opinions granting Mozumdar's and Singh's naturalizations had both been expressly approved by the Supreme Court in *Ozawa*. Because Pandit wrote the briefs in both *Mozumdar* and his own case and these the two cases reflect strikingly different rhetorical strategies and results, Pandit's briefing in these cases provides a unique portrait of the shift in rhetorical strategies of the racial

prerequisite cases involving Asian Indians during the post-*Thind* period. These cases reveal that Pandit began his post-*Thind* advocacy by adopting a rhetorical strategy much like Thind's, emphasizing the civilizational accomplishments of high caste Hindus and criticizing the Court's opinion in *Thind*, but after the strategy failed he adopted a unique rhetorical strategy in *Pandit* in which he reversed his relationship to the Indian caste system by framing himself and his American-born wife as potential victims of that system.

In contrast to the rhetorical strategy he would later adopt in *Pandit*, in his early post-*Thind* briefing in *Mozumdar* Pandit adopted an agitational rhetorical strategy, attacking both the Court's opinion in *Thind* and the British imperialism he blamed it on. In fact, Pandit's exchanges with the Government's attorneys in *Mozumdar* became so rancorous that United States District Court Judge William James admonishes Pandit in his published opinion for his criticism of the Supreme Court. In an October 15, 1923 brief Pandit filed in *Mozumdar*, nearly five months before he filed his answer in his own case, he not only repeats Thind's argument that as a result of caste restrictions on marriage high caste Hindus were "the only true and full inheritors of 'the pure Aryan blood undefiled,'" but excoriates the Supreme Court for its opinion in *Thind*. Pandit argues that Asian Indians had been forcibly assimilated to Western ideals by British imperialism for nearly two centuries and that to conclude otherwise was to

be the victim of a “historical strabismus” (i.e., to be historically cross-eyed). As

Pandit explains in his *Mozumdar* brief,

England has established schools and universities (modeled after Eton and Harrow, Oxford and London) where the English language is the medium of instruction, even for the teaching of Sanskrit (the classical language of India), whose chief chair at the Universities is usually filled by an Englishman, she has made English the language of the courts of justice, the lingua franca of the literate people of India; [and] the common law of England is administered by English and Hindu judges in Indian Courts.

This critique of the *Thind* opinion in Pandit’s *Mozumdar* briefing not only repeats all of the failures of Thind’s rhetorical strategy, but Judge James was legally obligated to follow *Thind* whether it was well-reasoned or not. As a result, Pandit’s critique of *Thind* in *Mozumdar* appears to have had no practical goal other than to express Asian Indian dissatisfaction with the Court’s opinion.

In *Mozumdar*, not only does Pandit accuse the Supreme Court of being cross-eyed, but he attacks Rudyard Kipling’s “The White Man’s Burden” despite the absence of any reference to the poem in the Government’s briefing in *Mozumdar*. This may suggest that Pandit’s critique of Kipling’s poem is a belated effort to respond to the Government’s brief in *Thind*, but in the context of *Mozumdar* it has the quality of a rant. In the following passage of his *Mozumdar* briefing, Pandit satirically notes that Asian Indians helped make the white man’s “burden” lucrative for the British and argues that the Supreme Court’s failure to conclude that Asian Indians were assimilated to Western civilization after

centuries of British rule effectively called for the abdication of British rule in

India:

What is more, quite a number of [Hindus] are effectively helping Kipling's "white man" to bear his burden, indeed are making it most lucrative for him to do so, and are at the same time getting themselves assimilated to Kipling's ideal. Is it any wonder, then, that William Ewart Gladstone, Prime Minister of England many years ago, should have said: If you want to hear the most grammatical English spoken, go and hear the graduates of the Bombay University and not those of Oxford or Cambridge, nor expect to hear it in Cockneydom. To say that Hindus are more unassimilable to Western civilization and Western ways than some of the European nations is to brand oneself as untraveled and unenlightened, or to brand the British as the most inept of teachers and to implicitly demand their abdication of the role they have so long pretended to fulfill.<sup>137</sup>

In these passages and elsewhere in his briefing in *Mozumdar*, Pandit attacks British imperialism and promotes the cause of Indian independence, indicating a complex notion of audience much like that of Thind's briefing and highlighting the conflicting goals of Asian Indians and Western civilization.

The Government's attorneys in *Mozumdar* responded to Pandit's criticisms of *Thind* by accusing him of violating the decorum of the court by using "language which is disrespectful, scandalous and impertinent" regarding the Supreme Court, adding that "we feel it is our duty to call this court's attention to this uncalled for attack by defendant's counsel on the learning and intelligence of the Honorable Justices of the United States Supreme Court."<sup>138</sup> In reply to the Government's remarks, rather than attempt to defuse the conflict, Pandit responds

that the statements in his earlier brief had not been directed at the Supreme Court but at the “trashy” writings of Rudyard Kipling:

If the learned counsel were familiar with some of the more trashy writings of one, Rudyard Kipling, he would have realised directly that if any one was particularly in the writer’s mind at all—and counsel for the defendant doubts that there was—then it was Kipling, the originator of these baseless notions that was aimed at by the unconscious or subconscious mind (to borrow a phrase from analytic psychology) of counsel for the defendant.<sup>139</sup>

Pandit’s effort to deny that he had directed his attack at the Supreme Court failed to persuade Judge James. Judge James not only canceled Mozumdar’s citizenship but admonished Pandit in his published opinion, stating that naturalization was not a right. The United States government, Judge James wrote, could exclude whomever it wished from eligibility for naturalization without explanation:

Counsel for the defendant is inclined to be critical of this decision of the Supreme Court, unmindful evidently that an alien, when he lands on the shores of this country, comes with no right at all of any natural kind to have extended to him the privilege of citizenship. That privilege is in the nature of a bounty, which this government may confer or withhold at its option, and without the support of any reason whatsoever.<sup>140</sup>

It is apparent from these passages of the briefing and Judge James’s opinion that Pandit’s rhetorical strategy not only failed to persuade the court that Mozumdar was entitled to retain his naturalization certificate but actually alienated and perhaps angered Judge James.

Several months after Judge James issued his opinion in *Mozumdar*, Pandit filed his answer in his own case, adopting a markedly different rhetorical strategy. As noted in the introduction to this chapter, in his effort to defend his own

naturalization certificate from cancellation Pandit denied that he was a high caste Hindu and claimed to the contrary that after becoming an American citizen he had become an “outcaste” in Indian society and would become a stateless person, “a man without a country,” if his naturalization certificate were to be canceled. In addition, because the Cable Act of 1922 automatically revoked the citizenship of any American woman who married an alien ineligible for citizenship,<sup>141</sup> California law prohibited miscegenation, and Pandit’s law license, notary public appointment, and ability to own land depended on his citizenship status, he argued that if his naturalization certificate were canceled on the basis that he was not “white” and therefore ineligible for citizenship his American-born wife of English and French ancestry, Lillian Bernice Pandit (born Lillian Bernice Stringer), would also be rendered stateless and the legality of their marriage cast in doubt, he would be deprived of his means of earning a living, and both he and his wife would be deprived of their home and property in California pursuant to the alien land law and federal requirements for the purchase of government property. Furthermore, he claimed that in reliance on his citizenship he had renounced his right of inheritance to substantial ancestral property in India, had been disinherited by his family as a result of his decision to become an American citizen, and had lost his degree of Mahamahopadhyaya from the Pathashala, or orthodox Sanskrit University, corresponding to a doctoral degree that entitled him to admission in learned institutions and assemblies of Hindus in India.<sup>142</sup>

These arguments reversed the rhetorical strategy of earlier Asian Indian petitioners like Thind and Mozumdar by framing Pandit and his American-born wife not as actors in the drama advanced in the case but as the victims of the Indian caste system. Pandit's rhetorical strategy rested on the legal defense that the Government was barred from canceling Pandit's citizenship by the doctrine of equitable estoppel, which precludes a party from changing a position taken toward someone who has justifiably relied on the position to such an extent that it would be unfair for it to be changed.<sup>143</sup> According to Pandit, he had relied on the finality of the judgment granting his citizenship and had significantly changed his position in the meantime to such an extent that it would be unfair to allow the Government to revoke his citizenship after nearly a decade.<sup>144</sup> Although traditionally the government could not be estopped by the courts, many exceptions to this prohibition have emerged, including a rule that the government may be estopped when it is the plaintiff seeking the assistance of a court to protect its rights, and Judge Paul McCormick agreed with Pandit that the Government could be estopped under the circumstances of *Pandit*.<sup>145</sup>

Both Pandit and his wife Lillian testified during a December 15, 1925 hearing in the case. Pandit testified that when he became an American citizen he had the status of a Brahman, the highest caste in Indian society, and even among the Brahmans he belonged to the Marata Brahmans, who held the highest status of all of the Brahmans and therefore of all Hindus. But when he renounced his

allegiance to India and changed his nationality to an American citizen, he became an outcast who could no longer associate with any but the untouchables of India, even with the members of his own family. According to Pandit's testimony,

An outcaste has no social standing at all, and the higher one's caste originally, the lower he falls, on the theory that those who are high ought to know better than those who are lower. An outcaste cannot have any social position at all, not only with the caste to which he belongs, but in all castes of Hindu society. All he can do is to associate with the so-called "Hill Tribes," the aboriginal people, a kind of negroid stock, with which the Hindus have no social intercourse whatever.

If my certificate of naturalization should be canceled, and I should return to India, I couldn't associate with my own family now. They would not even eat with me, and, of course, there is no possibility of any other social relation; in fact, even any water touched by me would be considered polluted by my own mother, if she were living, and she would not drink it, no matter how much she loved me, because that is against the rules. And in the matter of social status, that is a matter of birth, and once lost, is lost forever.<sup>146</sup>

In this passage, Pandit reverses the positions of the parties in *Thind*, in which Thind claimed that he was entitled to the privileges of his high caste status while the Government asserted that India's caste system posed a threat to Western civilization that rendered Thind inassimilable with American life. In the passage above and throughout his case, Pandit represented both himself and his American-born wife not as the privileged members of the high caste status into which Pandit was born, but as themselves victims of the Indian caste system who faced discrimination because Pandit had become an American citizen and married an American-born "white" woman.

Judge Benjamin Bledsoe initially presided in *Pandit* before resigning from the bench to run in the Los Angeles mayor's race while *Pandit* was pending. Judge Bledsoe had issued judicial opinions in several racial prerequisite cases that followed World War I. In *In re Singh*, one of the lower court opinions expressly approved by the Supreme Court in *Ozawa*, Judge Bledsoe held that high caste Hindus were "white" and therefore racially eligible for naturalization.<sup>147</sup> Several years later, Bledsoe also published an opinion in the consolidated cases of *In re Song* and *In re Mascarenas*, in which he held that Korean and Filipino veterans of the United States military were both racially ineligible for naturalization and were also ineligible for the exemption of racial eligibility for veterans contained in the Naturalization Act of 1918.<sup>148</sup> Before resigning from the bench, Judge Bledsoe rejected Pandit's motion to dismiss the Government's complaint in *Pandit*, citing Judge James's opinion in *Mozumdar* that had already held naturalization certificates issued to those racially ineligible for naturalization to be "illegally procured" within the meaning of the Naturalization Act of 1906, and Judge Bledsoe struck all of Pandit's defenses except for the equitable estoppel defense on which Pandit ultimately prevailed.

Judge Paul McCormick was assigned to preside in *Pandit* for the remainder of the case and ultimately dismissed the Government's case based on Pandit's equitable estoppel defense. Previously an assistant district attorney in Los Angeles County, a judge on the California Superior Court for Los Angeles

County, and an associate justice of the District Court of Appeals of California, Judge McCormick was appointed to the federal court by President Coolidge in 1924. Judge McCormick would later become Chief Judge of the court and in 1949 decide the landmark *Méndez v. Westminster School District* case, in which he held that the practice of segregating Mexican schoolchildren into separate schools in Orange County, California was an unconstitutional denial of equal protection, a case often cited as an important precursor to the Supreme Court's 1954 opinion in *Brown v. Board of Education*.<sup>149</sup> During the December 15, 1925 hearing in *Pandit*, Judge McCormick emphasized his view that Pandit fell within the group that the Supreme Court held racially ineligible for naturalization in *Thind*, but he claimed that the Court's opinion in *Thind* indicated that a court might refuse to cancel the naturalization certificate of individuals of such groups in special circumstances.

Judge McCormick agreed with all of the arguments Pandit advanced in support of his equitable estoppel defense, later repeating the arguments nearly verbatim in the court's Findings of Fact and Conclusions of Law,<sup>150</sup> but during the hearing in the case Judge McCormick particularly emphasized the effect revoking Pandit's naturalization certificate would have on Pandit's wife Lillian. While announcing the reasons for his decision during the hearing, Judge McCormick explained:

[Pandit] entered into the marriage state with a woman, relying upon the statute that he was authorized by law so to do, not only because of his citizenship, but because of his race. He, together with his wife, in her name—and this, to my mind, is one of the most important features of the legal situation as presented—his wife commenced proceedings with the government looking toward the acquisition of a property right upon the public domain.

Judge McCormick concluded that if anything would estop the government it was the fact that the government had acknowledged that Pandit was lawfully entitled to citizenship by dealing with him and his wife for the sale of public land. “I regard the acquisition of this government’s possessory right as one of the most important features,” Judge McCormick explained, “because there is no doubt at all that whatever rights Mrs. Pandit has gained, will be rendered insecure at least, probably totally defeated, by the revocation of the citizenship of her husband, upon the grounds set out in this petition.”<sup>151</sup> Furthermore, Judge McCormick declared in the court’s Findings of Fact and Conclusions of Law that

if the [Government] is permitted to cancel the naturalization certificate of the defendant and to set aside his naturalization, the defendant’s wife will thereby lose her citizenship in the United States and she will then be said to become an alien, and she will lose her claim to the desert lands aforesaid, to the great pecuniary loss of the defendant and to his said wife.<sup>152</sup>

These passages reflect that Judge McCormick emphasized the importance of protecting Lillian Pandit’s citizenship and property rights, which would be threatened if her husband were held racially ineligible for naturalization.

Judge McCormick also addressed what he called “other matters that appeal to the conscience of the court,” however, which he concluded he could not leave out of consideration despite the fact that “under the application of cold legal principles” they might not be sufficient to justify the court in refusing to cancel Pandit’s certificate. The matters of conscience Judge McCormick referred to were those raised by Pandit’s statelessness argument. Judge McCormick commented that

it is the intent of this country to have all aliens who come here lawfully and conduct themselves properly, become citizens, become members of the American family, to identify themselves with this country in a substantial and patriotic manner, and do so by becoming American citizens. It is much better to have aliens citizens of the United States than it is to have foreigners in the United States.

Judge McCormick explained that a court of equity should interpret the law in such a way as to encourage desirable aliens to become American citizens, “rather than ostracizing them from our political family.” He concluded of Pandit that “this man is now a member of the national family” and that the court was not justified in cancelling his citizenship after years of exemplary conduct.<sup>153</sup>

It is also useful to contrast Judge McCormick’s opinion in *Pandit* with his decision in *United States v. Chand*, another cancellation proceeding that Judge McCormick heard and decided almost simultaneously with *Pandit*. The petitioner in *Chand* also denied that he was a high caste Hindu of full Indian blood, and like Pandit claimed that he had relied on his acquisition of citizenship to such an

extent that to cancel it would be unfair. Chand appealed to his status as a veteran who served in the United States Army during World War I, writing in his answer in the case that “when called by the United States to serve in its army he responded to the call” and “loyally served the United States” in an infantry unit stationed in France during the war before receiving an honorable discharge. Chand claimed that he had sacrificed significant earnings by serving in the military and that he was entitled to benefits under the Veterans’ Farm and Home Purchase Act of 1921, which provided benefits for veterans acquiring farms and homes. If his naturalization certificate were canceled, however, he would be deprived of the ability to own land and therefore to take advantage of his rights as a veteran under the Veterans’ Farm and Home Purchase Act.<sup>154</sup> The rhetorical strategy Chand adopted is remarkably similar in certain respects to that of Pandit insofar as both claimed that they would be inequitably deprived of property rights if their naturalization certificates were cancelled. But Judge McCormick granted the Government’s petition in *Chand* during a January 4, 1926 hearing, less than three weeks after the December 15, 1925 hearing in which he denied the Government’s petition in *Pandit*. Unfortunately, the record of the proceedings in *Chand* is not complete and Judge McCormick’s order in the case does not address Chand’s arguments regarding his military service and right to benefits under the Veterans’ Farm and Home Purchase Act. The record does reflect that Chand was born in India, so his case appears to have posed the prospect of statelessness, but

his answer does not make that argument.<sup>155</sup> It may be important to the decisions in *Pandit* and *Chand*, however, that any threat to the past sacrifices and future expectations of veterans' benefits claimed by Chand was less imminent than the threat the Pandits faced of being denaturalized after a decade of citizenship and rendered stateless.

By framing himself as the object of discrimination by the Indian caste system because he had become an American citizen and married an American-born "white" woman, Pandit framed his argument in a manner that appealed to the shared fear of a common enemy. The threat posed by the Indian caste system was directed at the Pandits because they were Americans rather than for any individual qualities attributed to them, and as such it was a threat Judge McCormick could easily identify with even if he had never been a member of India's caste system. Pandit's argument essentially appealed to the same notion of the "unaliability" of the Indian caste system toward Western civilization that the Solicitor General had appealed to in the Government's brief in *Thind*. Judge McCormick's emphasis on the potential effect of the case on Lillian Pandit when he announced his decision also suggests the possibility that gender perceptions influenced his decision. Although the potential effect of the case on Lillian Pandit also hinged on Pandit's statelessness since a woman's citizenship followed her husband's in such circumstances, the presence of an American-born "white" woman as a victim may have intensified Judge McCormick's identification with the threat that the case

posed to the Pandits. It is not difficult to imagine how Judge McCormick could view his decision as a patriotic act of protecting a couple from persecution directed at them for being Americans. The rhetorical strategy of uniting against a common enemy also appeared in a different form earlier in Pandit's naturalization struggle. According to Pandit's testimony in *Pandit*, when he was coming out of the court clerk's office with his naturalization certificate on May 7, 1914, Bureau of Naturalization Examiner Frederick Jones met him at the entrance of the building and remarked, "Well, Mr. Pandit, now that you are a citizen, you may be required to go on military duty on the Mexican border where men are wanted at the present time."<sup>156</sup>

The success of Pandit's rhetorical strategy further supports the conclusion that the Indian independence movement and the perceived "unalliability" of the Indian caste system exerted a powerful influence on the decisions in *Thind* and *Mozumdar*. Presumably as high caste Hindus who had become American citizens, both Thind and Mozumdar could have emphasized their renunciation of the benefits of caste in India as a result of embracing American citizenship. In contrast to earlier racial prerequisite cases involving Asian Indians, the arguments in *Pandit* not only reflect virtually none of the agitational rhetoric characteristic of the Ghadr movement, but sever Pandit from a close identification with his caste identity. This strategy also severed him from the violent Indian nationalism of the Ghadr movement by emphasizing that he had sacrificed his status as a high caste

Hindu when he became an American citizen and married an American woman. By placing emphasis on their high caste status, the Indian petitioners in *Thind* and *Mozumdar* ironically bound themselves to the negative associations of caste and to a violent Indian nationalism that was threatening to many Americans.<sup>157</sup> The contrast between these cases suggests that the decisions in the cases were influenced by a wide array of concerns regarding America's position in the world and its relation to the ongoing struggle for Indian independence. The success or failure of the rhetorical strategies of the Asian Indian petitioners may have had as much to do with the decisions as either a formalist definition of whiteness or the racial ideology of the time.

Judge McCormick's decision in *Pandit* was upheld by the United States Court of Appeals for the Ninth Circuit, which distinguished its earlier opinion affirming the opposite result in *Mozumdar* by the fact that the same arguments had not been advanced in *Mozumdar*.<sup>158</sup> Thus, the different rhetorical strategies in these two cases determined their outcomes. After the Government's petition for certiorari to the Supreme Court was denied, *Pandit* came to stand for the proposition that the Government's proceedings seeking to cancel the naturalization certificates of Asian Indians after *Thind* on the basis that they were "illegally procured" were suspect if not categorically improper. The Department of Labor stopped instituting cancellation proceedings against Asian Indians and reissued naturalization certificates to Asian Indians whose certificates had been

cancelled before *Pandit*.<sup>159</sup> As the following chapters will demonstrate, the appeal to the prospect of becoming a stateless person also played a prominent role in later racial prerequisite cases, but the argument appears to have first appeared in *Pandit* and played a significant role in the rhetoric of both Pandit and Judge McCormick.

### **THE EPIDEICTIC QUALITIES OF JUDICIAL DISCOURSE**

The Supreme Court's opinion in *Thind* remained binding precedent until the racial prerequisites were removed from the naturalization act in 1952.<sup>160</sup> As discussed in Chapter 1, Thind himself petitioned for naturalization a third time in 1935 after Congress passed a law making World War I veterans eligible for naturalization, and nearly two decades after he first petitioned for naturalization he was finally granted American citizenship without objection by the Government. During a 1933 speech given shortly before he obtained his citizenship, Thind expressed his lingering bitterness toward the United States over the issue, stating that

America, by far the best of all the Christian lands, sided with perfidious Albion to insult India in the matter of citizenship, we being the only Aryans excluded. Our compatriots in California have trouble after trouble with local authorities in the Imperial Valley in connection with their leasing of land. Any Oriental who expects justice from the West, America included, should be examined for his sanity.<sup>161</sup>

It is significant that in this passage Thind refers to Britain by the poetic designation “Albion,” from the Latin *albus*, for “white.” The name is believed to have originally been a reference to the white cliffs of Dover, England, but in Thind’s speech it may also suggest a racial meaning, particularly when used in the phrase “perfidious Albion,” from the French *la perfide Albion*, an expression that associates Britain with treachery toward foreigners.<sup>162</sup> Thind’s attribution of America’s racial discrimination toward Asian Indians to Britain, with which America only “sided” in the matter of citizenship, combined with his continued assertion of his Aryan identity in his 1933 speech, offers a succinct summary of his rhetorical strategy before the Supreme Court.

The racial prerequisite cases discussed in this chapter reveal how the rhetorical strategy of uniting against a common enemy was used to determine the citizenship of Asian Indian immigrants shortly after World War I. The whiteness of high caste Hindus and their racial eligibility for naturalization were in little doubt among lower courts, the scientific community, and many segments of the population at the time the Supreme Court heard the issue in *Thind*. Two lower court opinions holding that high caste Hindus were “white” and therefore racially eligible for naturalization were even expressly approved by the Supreme Court in *Ozawa* before the Court reversed those opinions three months later in *Thind*. The complicated relationship between race, the Indian caste system, and nationality in the conflict between British imperialism and Asian Indians promoted an

agitational rhetoric in *Thind* and *Mozumdar* that highlighted the conflicting goals of Asian Indians and Western civilization rather than reducing or eliminating conflict. The Government's argument in *Thind* that Asian Indians were "alien to the white race" and "unalliable" with Western civilization could almost have cited *Thind's* brief as evidence. By contrast, Pandit reversed this perception that the Indian caste system posed a threat to Western civilization by representing himself and his wife as victims of that threat by highlighting the discrimination he would face in Indian society for having become an American. These cases also represent the opposing rhetorical methods of the Ghadr movement and Gandhi's philosophy of *satyagraha* during a period of transition between them.

To conclude that the agitational rhetoric of the petitioners in *Thind* and *Mozumdar* failed oversimplifies the issue, however, for as Chaïm Perelman and Lucie Olbrechts-Tyteca explain in *The New Rhetoric*, the effectiveness of persuasive speech can be assessed "only in terms of the actual aim the speaker has set himself."<sup>163</sup> In light of the parallels between the agitational rhetoric of the petitioners in *Thind* and *Mozumdar* and the radical rhetoric of the Ghadr party, it cannot be assumed that the petitioners in these cases were motivated solely by the struggle to secure their naturalization certificates. Instead, *Thind* and other Asian Indian immigrants perceived the legal obstacles to immigration and naturalization in the United States as examples of their oppression by British imperialism. There is substantial evidence to suggest that the Asian Indian petitioners in these cases

used the opportunity of a public trial on an equal procedural basis with the United States government to express their critique of the white supremacy that underlied the racial prerequisite in the naturalization act, a racial ideology they primarily attributed to British imperialism. This was how the Ghadr leaders who were prosecuted in the Hindu-German conspiracy trial used their opportunity to speak in federal court in San Francisco and is consistent with the Ghadr party's ideology that offered little more than a critique of British imperialism without a clear idea of what would replace it if India actually achieved independence.<sup>164</sup>

If Thind and Mozumdar viewed their trials primarily as an opportunity to advance the cause of Indian independence, it is possible to view their agitational rhetoric as primarily an effort to advance a nascent nationalism. This goal is also suggested by the fact that the shift in the rhetorical strategy from the agitational rhetoric of the petitioners in *Thind* and *Mozumdar* to the more adaptive rhetoric of *Pandit* parallels the transition within the Indian independence movement from the radical rhetoric of the Ghadr movement to Gandhi's philosophy of *satyagraha* and the post-*Thind* Indian lobby that pursued reform through traditional political methods.

Beginning in Greek antiquity, judicial discourse was categorized as pragmatic speech designed to gain the adherence of an audience sitting in judgment on a specific issue of practical consequence. In this respect, judicial discourse has traditionally been distinguished from epideictic discourse, an

oratorical genre within which the Greeks placed ceremonial and ritual discourse, eulogy, epic and lyric poetry, philosophy, and history. According to Jeffrey Walker, the Greeks distinguished epideictic discourse from the pragmatic functions of judicial and legislative oratory by its nonpragmatic settings and its function of

suasive ‘demonstration,’ display, or showing-forth (*epideixis*) of things, leading its audience of *theôroi* to contemplation (*theôria*) and insight and ultimately to the formation of opinions and desires on matters of philosophical, social, ethical, and cultural concern.

Walker argues that in Hesiod’s world, epideictic discourse “establishes and mnemonically sustains the culturally authoritative codes of value and the paradigms of eloquence” from which pragmatic discourse derives “its ‘precedents,’ its language, and its power.” Thus, epideictic discourse preceded judicial discourse in Greek antiquity and forms the “primary” form of rhetoric from which judicial and other forms of pragmatic discourse derived the material to apply to particular disputes in civic life.<sup>165</sup> Similarly, Kenneth Burke refers to epideictic discourse as “an incipient act,” which seeks “persuasion ‘to attitude,’”<sup>166</sup> and Chaïm Perelman and Lucie Olbrechts-Tyteca argue that epideictic “forms a central part of the art of persuasion, and the lack of understanding shown toward it results from a false conception of the effects of argumentation.” By strengthening “the disposition toward action by increasing adherence to the values it lauds,” Perelman and Olbrechts-Tyteca claim, epideictic

discourse strengthens communal identity around particular values recognized by the audience.<sup>167</sup>

The model of understanding judicial discourse as easily distinguishable from epideictic discourse neglects the many motives participants in judicial settings have to employ more complex forms of rhetoric directed to less pragmatic ends than traditionally assigned to such discourse. Thus, an appraisal of modern legal advocacy reveals a far greater association with epideictic forms of discourse than theories of judicial discourse traditionally acknowledge, particularly since the advent of modern communications technology which amplifies the arguments and results of judicial cases to mass audiences. As J. Justin Gustainis writes of the trial of the Catonsville Nine who were tried for entering a draft board office during the Vietnam War and burning hundreds of draft files:

The trial augmented the act of burning the draft records by providing a forum and a legitimacy that could not be present in the act itself. . . . The legitimacy came from placing the act within an explicitly argumentative process, a process which granted each side (prosecution and defense) equal time. The deviant stance of a handful of radicals thus became proportional to the official position of the state, and the arguments of the protesters were presented within a framework which was self-consciously rational.<sup>168</sup>

The Catsonville Nine defendants used their trial as a forum for protesting the Vietnam war, addressing audiences and issues far beyond those involved in the question of whether they had violated the law by burning draft files. Similarly, Patricia Roberts-Miller writes that John Quincy Adams's argument to the

Supreme Court in the nineteenth century *Amistad* case, which heard various claims to ownership of Africans who were kidnapped from Africa and sold into slavery before seizing the slave ship that carried them, narrowly addressed the rights of the African defendants to freedom without addressing the broader question of slavery as abolitionists had hoped. Thus, Roberts-Miller notes that Adams's *Amistad* speech was passionate but attacked neither slavery nor slave owners, and perhaps as a result "failed to persuade the justices of the inherent injustice of slavery, or the universal rights of humanity, the right of a state to forbid slavery within its borders, or even that descendants of slaves—whether now free or not—have any rights."<sup>169</sup> More recently, after Attorney General Eric Holder announced that Khalid Sheikh Mohammed, the alleged mastermind of the September 11, 2001 terrorist attacks on New York and Washington, D.C., would be transferred from a military tribunal to a civilian court for trial, one of the objections to the transfer was that Mohammed would use the trial as a platform to promote the political propaganda of Al Qaeda.<sup>170</sup>

These concerns regarding speech in judicial settings and its relationship to the complex audiences of public trials highlight the influence such audiences can have on the model of judicial discourse as speech directed solely toward pragmatic ends and to the judiciary's desire to contain discourse that exceeds that purpose. As Jeffrey Walker notes of epideictic and judicial discourse in antiquity, the distinction between these rhetorical genres was not based on subject matter

but on the setting in which speech was received and the nature of the audience.<sup>171</sup>

A judicial setting may have many audiences, however, and through word of mouth as well as print and communications technologies may be received in many settings. Like the Catsonville Nine, the petitioners in *Thind* and *Mozumdar* may have found speaking in a public forum on an equal procedural basis with the United States government to be a unique opportunity to critique British imperialism. In this respect, the agitational rhetoric of the petitioners may be understood to have an epideictic function of shaping attitudes and opinions regarding Indian independence. Both *Thind's* challenge to the racial purity of Americans compared to high caste Hindus and Pandit's critique of the Supreme Court's failure to find high caste Hindus assimilable to Western civilization in his *Mozumdar* briefing may be best understood not by the traditional models of judicial discourse directed solely to pragmatic ends, but as an effort to shape the attitudes of Asian Indians and others regarding the relationship between India's status in the world and their own. The audience to which this discourse was directed was not limited to the Government and the courts but included their fellow Asian Indians and others that they might persuade of the broader injustice of British imperialism.

Although the rhetorical strategies of the petitioners in *Thind* and *Mozumdar* may have been motivated in part by the practical purpose of obtaining citizenship and its attendant rights and by the less immediate but no less concrete goal of securing

India's independence from British rule, the equality of treatment Indians sought was not as simple as eliminating British rule in India but required that Indians establish a relationship with Western civilization. Thus, to the extent the rhetoric of the petitioners in *Thind* and *Mozumdar* was motivated by the Indian independence movement, the effort to secure an equal status for Asian Indians was not a goal for which there could be an end but one that was ongoing. The agitational rhetoric of the Asian Indian petitioners in *Thind* and *Mozumdar* also suggests an ironic critique of the racial hierarchies on which the British historiography of ancient Indian civilization was based, in a sense confronting the West with its own contradictions on race. In this way, the rhetoric of the petitioners in the racial prerequisite cases involving Asian Indians suggests the form of expression Homi Bhabha calls "sly civility," in which the colonized subject resists the mode of address proffered by the imperial ruler.<sup>172</sup> As Harold Gould describes the Ghadr movement's prospects of actually fomenting a mutiny-like uprising in India against the British *Raj*, it was "little more than a touching, quixotic fantasy."<sup>173</sup> The agitational rhetoric of the petitioners in *Thind* and *Mozumdar* shares this quixotic quality, but the rhetorical strategy of *Pandit* does not.

These possibilities for understanding the racial prerequisite cases involving Asian Indians also point to the broader problem of modern legal theory's effort to deny and obscure its rhetorical roots. Despite the intimately intertwined history of law and rhetoric,<sup>174</sup> the modern professionalization of law and legal education has tended to obscure the rhetorical roots of legal practice to

foster a view of legal discourse as complete, autonomous, and hermetic.<sup>175</sup> Thus, while lawyers are, in the words of James Boyd White, “the modern rhetorician in its purest form,” modern legal discourse has adopted the antirhetoric of foundations, logical deductions, unification, objectivity, and closure.<sup>176</sup> Much like modern scientific discourse, this discourse relies on the denial that it is engaged in rhetoric at all.<sup>177</sup> This perspective has even been expressed by legal practitioners such as Francis Wellman, who writes at the turn of the twentieth century that the great orations of trial lawyers have become useless because modern juries are impervious to such rhetoric, “composed of practical business men accustomed to think for themselves, experienced in the ways of life, capable of forming estimates and making nice distinctions, unmoved by the passions and prejudices to which court oratory is nearly always directed.”<sup>178</sup> Perhaps as a result of this view, the study of modern legal advocacy has been largely neglected and legal historian David Cairns recently noted that no history of modern legal advocacy has been written nor has any modern legal advocate or teacher even tried to explain legal advocacy as Aristotle or Quintilian did the forensic rhetoric of the classical era.<sup>179</sup>

Part of the development of modern law has been to diminish the significance of courts as sites for public discourse, but they are still approached that way by the participants and this fact must be taken into account in any understanding of law and its language. While there are few studies of the complex

audiences which judges address in their opinions,<sup>180</sup> there are even fewer of the complex audiences addressed by litigants and virtually none of modern legal advocacy in its full scope and complexity. As Neil MacCormick writes in *Rhetoric and the Rule of Law*, “no less ancient than recognition of the Rule of Law as a political ideal is recognition of law’s domain as a locus of argumentation, a nursery of rhetoric in all its elegant and persuasive but also sometimes dubious arts.”<sup>181</sup> The racial prerequisite cases involving Asian Indians reveal the potentially complex audiences and strategies of this “nursery of rhetoric” and the strategy of uniting against a common enemy in the struggle between British imperialism and the Indian independence movement among Asian Indians in the United States.

## NOTES

<sup>1</sup> Brief for the United States at 19, *United States v. Thind*, No. 202 (U.S. Sup. Ct. Jan. 11, 1923).

<sup>2</sup> Brief of Respondent at 46-48, *United States v. Thind*, No. 202 (U.S. Sup. Ct. Dec. 30, 1921).

<sup>3</sup> See Defendant’s Answer, *United States v. Pandit*, No. G-111-T (S.D. Cal. March 10, 1924), in Transcript of Record, *United States v. Pandit*, No. 4938 (9th Cir. Aug. 13, 1926), 30, in Records of the U.S. Courts of Appeals, Record Group 276, National Archives and Records Administration Pacific Region, San Bruno, Calif.

<sup>4</sup> See, e.g., John James Clarke, *Oriental Enlightenment: The Encounter Between Asian and Western Thought* (London: Routledge, 1997), 55-59; Wendy Doniger, *The Hindus: An Alternative History* (New York: Penguin, 2009), 85-102; Raymond Shwab, *The Oriental Renaissance: Europe’s Rediscovery of India and the East, 1680-1880*, trans. Gene Patterson-Black and Victor Reinking (New York: Columbia Univ. Press, 1984), 32; Thomas R. Trautmann, *Aryans and British India* (Berkeley: Univ. of California Press, 1997), 11-13, 23-26; Romila Thapar, “Imagined Religious Communities? Ancient History and the Modern Search for a Hindu Identity,” *Modern Asian Studies* 23.2 (1989): 226.

<sup>5</sup> Rudyard Kipling, “The White Man's Burden,” *McClure's Magazine* 12, no. 4 (February 1899): 4.

<sup>6</sup> Brief of Respondent at 11-12, *United States v. Thind*, No. 202 (U.S. Sup. Ct. Dec. 30, 1921).

<sup>7</sup> See *Ozawa v. United States*, 260 U.S. 178 (1922); *United States v. Thind*, 261 U.S. 204 (1923).

<sup>8</sup> *Toyota v. United States*, 268 U.S. 402 (1925). Significantly, many lower courts had disagreed with this conclusion and Chief Justice William Howard Taft dissented from the Court's decision in *Toyota* without issuing an opinion. See generally Lucy E. Salyer, “Baptism by Fire: Race, Military Service, and U.S. Citizenship Policy, 1918-1935,” *Journal of American History* 91 (2004): 847-76.

<sup>9</sup> Although a mere three months separated *Ozawa* and *Thind*, the same justices did not hear both cases. Justice William Day retired on November 12, 1922, the day the *Ozawa* opinion was issued, and Justice Pierce Butler took his judicial oath on January 2, 1923, approximately a week before the Court heard oral arguments in *Thind*.

<sup>10</sup> See *Ozawa*, 260 U.S. at 195-96; cf. *Scott v. Sandford*, 60 U.S. 393 (writing that the racial prerequisite in the naturalization act “would seem to have been used merely because it followed out the line of division which the Constitution has drawn between the citizen race, who formed and held the Government, and the African race, which they held in subjection and slavery, and governed at their own pleasure”).

<sup>11</sup> *Ozawa*, 260 U.S. at 195-96 (emphasis added).

<sup>12</sup> *Ibid.*, 198.

<sup>13</sup> *Ibid.*, 214-15; *Thind*, 261 U.S. at 210.

<sup>14</sup> *Thind*, 261 U.S. at 208-09; see Gustav A. Endlich, *A Commentary on the Interpretation of Statutes: Founded on the Treatise of Sir Peter Benson Maxwell* (Jersey City, N.J.: Frederick D. Linn & Co., 1888), 197.

<sup>15</sup> See generally, e.g., Endlich, *A Commentary*, 4; see also, e.g., *Caminetti v. United States*, 242 U.S. 470, 485-86 (1917) (“Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them.”).

<sup>16</sup> See *Thind*, 261 U.S. at 214.

<sup>17</sup> *Maillard v. Lawrence*, 57 U.S. 251, 261 (1853).

<sup>18</sup> See *Ozawa v. United States*, 260 U.S. 178, 197 (1918). See also *In re Ellis*, 179 F. 1002, 1003 (D. Or. 1910) (applying the ordinary usage rule to the racial prerequisite in the naturalization act); *In re Saito*, 62 F. 126, 127 (C.C.D. Mass. 1894) (same). See generally Endlich, *A Commentary*, 4.

<sup>19</sup> Milton Ridvas Konvitz. *The Alien and the Asiatic in American Law* (Ithaca, N.Y.: Cornell Univ. Press, 1946), 89.

<sup>20</sup> Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale Univ. Press, 1969), 161-62.

<sup>21</sup> Paul Rundquist, "A Uniform Rule: The Congress and the Courts in American Naturalization, 1865-1952" (PhD diss., Univ. of Chicago, 1975), 216-334; see Roger Daniels and Harry H.L. Kitano, *American Racism: Exploration of the Nature of Prejudice* (Englewood Cliffs, N.J.: Prentice-Hall, 1970), 53-54; cf. Stanford Lyman, "The Race Question and Liberalism: Casuistries in American Constitutional Law," *International Journal of Politics, Culture, and Society* 5 (1991): 221.

<sup>22</sup> See Ian F. Haney López, *White by Law: The Legal Construction of Race* (New York: New York Univ. Press, 1996); see also, e.g., Angelo N. Ancheta, *Scientific Evidence and Equal Protection of the Law* (New Brunswick, N.J.: Rutgers Univ. Press, 2006), 34-35; Donald Braman, "Of Race and Immutability," *UCLA Law Review* 46 (1999): 1407 n. 126; Harold A. Gould, *Sikhs, Swamis, Students, and Spies: The India Lobby in the United States, 1900-1946* (Thousand Oaks, Calif.: Sage, 2006), 272; Ariela J. Gross, *What Blood Won't Tell: A History of Race on Trial in America* (Cambridge: Harvard Univ. press, 2008), 240-41; Sarah Gualtieri, "Becoming 'White': Race, Religion and the Foundations of Syrian/Lebanese Ethnicity in the United States," *Journal of American Ethnic History* 20.4 (2001): 29-58, Religion and the Foundations of Syrian/Lebanese Ethnicity in the United States," *Journal of American Ethnic History* 20.4 (2001): 38; Matthew Frye Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (Cambridge, Mass.: Harvard Univ. Press, 1998), 236; Laura Hyun Yi Kang, *Compositional Subjects: Enfiguring Asian/American Women* (Durham, N.C.: Duke Univ. Press, 2002), 135-36; Desmond King, *Making Americans: Immigration, Race, and the Origins of the Diverse Democracy* (Cambridge, Mass.: Harvard Univ. Press, 2000), 45-46; Susan Koshy, "Morphing Race Into Ethnicity: Asian Americans and Critical Transformations of Whiteness," *boundary 2* 28 (2010): 173; Jeff H. Lesser, "Always 'Outsiders': Asians, Naturalization, and the Supreme Court," *Amerasia* 12 (1985-1986): 86-88; Kenneth L. Marcus, *Jewish Ethnicity and Civil Rights in America* (Cambridge: Cambridge Univ. Press, 2010), 110-11; Natalia Molina, "'In a Race All Their Own': The Quest to Make Mexicans Ineligible for U.S. Citizenship," *Pacific Historical Review* 79 (2010): 176-78; Wendy Leo Moore, *Reproducing Racism: White Space, Elite Law Schools, and Racial Inequality* (Lanham, Md.: Rowman and Littlefield, 2007), 71; Sucheta Mazumdar, "Racist Responses to Racism: The Aryan Myth and South Asians in the United States," *South Asia Bulletin* 9 (1989): 50; John S. W. Park, *Elusive Citizenship: Immigration, Asian Americans, and the Paradox of Civil Rights* (New York: New York Univ. Press, 2004), 121-27; Kunal M. Parker, "Citizenship and Immigration Law, 1800-1924," in *The Cambridge History of Law in America*, eds. Michael Grossberg and Christopher Tomlins (Cambridge, U.K.: Cambridge Univ. Press, 2008), 194-95; David R. Roediger, *Working Toward Whiteness: How America's Immigrants Became White: The Strange Journey from Ellis Island to the Suburbs* (New

York: Basic Books, 2005), 59; Jennifer Snow, “The Civilization of White Men: The Race of the Hindu in *United States v. Bhagat Singh Thind*,” in *Race, Nation, and Religion in the Americas*, eds. Henry Goldschmidt and Elizabeth McAlister (New York: Oxford Univ. Press, 2004), 262; Nyan Shah, *Stranger Intimacy: Contesting Race, Sexuality and the Law in the North American West* (Berkeley: Univ. of California Press, 2011), 245-46; Min Song, “Pahkar Singh’s Argument with Asian America: Color and the Structure of Race Formation,” in *A Part, Yet Apart: South Asians in Asian America*, eds. Lavina Dhingra Shankar and Rajini Srikanath (Philadelphia: Temple Univ. Press, 1998), 93-95; Ronald Takaki, *Strangers From a Different Shore: A History of Asian Americans*, rev. ed. (New York: Little, Brown, 1998), 298-99; John Tehranian, *Whitewashed: America’s Middle Eastern Minority* (New York: New York Univ. Press, 2009), 41.

<sup>23</sup> Thomas F. Gossett, *Race: The History of an Idea in America*, New Ed. (New York: Oxford Univ. Press, 1997), 369.

<sup>24</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>25</sup> President Woodrow Wilson delivering his State of the Union Address on Dec. 7, 1915, to a joint session of Congress, 64th Cong, 1st sess., *Congressional Record* 53, pt. 1:99.

<sup>26</sup> See, e.g., Thomas Adam, *Germany and the Americas: Culture, Politics, and History* (Santa Barbara, Calif.: ABC-CLIO, 2005), 319; Philip S. Foner, *History of the Labor Movement in the United States: Postwar Struggles, 1918-1920* (New York: International Publishers, 1987), 25-26; Gossett, *Race*, 371.

<sup>27</sup> See Gossett, *Race*, 353; William Petersen, Michael Novak, and Philip Gleason, *Concepts of Ethnicity* (Cambridge, Mass.: Harvard Univ. Press, 1980), 88.

<sup>28</sup> Mark S. Weiner, *Americans Without Law: The Racial Boundaries of Citizenship* (New York: New York Univ. Press, 2006), 100-02; see also Braman, “Of Race and Immutability,” 1403-04; J. Allen Douglas, “The ‘Priceless Possession’ of Citizenship: Race, Nation and Naturalization in American Law, 1880-1930,” *Duquesne Law Review* 43 (2005): 416-17; Dudley O. McGovney, “Race Discrimination in Naturalization,” *Iowa Law Bulletin* 8 (1923): 152; Dudley O. McGovney, “Naturalization of the Mixed-Blood—A Dictum,” *California Law Review* 22 (1934): 380; cf. Rogers Smith, review of *White by Law: The Legal Construction of Race*, by Ian F. Haney López, *The American Journal of Legal History* 42 (1998): 66 (noting that López “strains to read George Sutherland’s opinions in the two Supreme Court cases of the 1920s, *Ozawa* and *Thind*, as more contrasting than they are”). For a commentary that seeks to bridge these conflicting readings of the cases by arguing that in *Ozawa* the Supreme Court evinces a greater effort to reconcile ordinary usage and scientific definitions of race before entirely abandoning scientific definitions in *Thind*, see Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton: Princeton Univ. Press, 2004), 44-46.

<sup>29</sup> Brief for Petitioner at 62-77, *Ozawa v. United States*, 260 U.S. 178 (1918) (No. 222).

<sup>30</sup> See John H. Wigmore, “American Naturalization and the Japanese,” *American Law Review* 28 (1894): 824-27; cf. Gretchen Murphy, “How the Irish Became Japanese: Winnifred

Eaton's Racial Reconstructions in a Transnational Context," *American Literature* 79 (2007): 33-35.

<sup>31</sup> See Thomas Henry Huxley, "On the Geographical Distribution of the Modifications of Mankind," *Journal of the Ethnological Society of London* 2 (1870): 404-12.

<sup>32</sup> See H.G. Wells, *The Outline of History: Being a Plain History of Life and Mankind* (New York: Macmillan, 1920), 1:147.

<sup>33</sup> William Elliott Griffis, "Are the Japanese Mongolian?," *North American Review* 197 (1913): 721; cf. Raymond Leslie Buell, "Some Legal Aspects of the Japanese Question," *The American Journal of International Law* 17 (1923): 29-49.

<sup>34</sup> Weiner, *Americans Without Law*, 102-104.

<sup>35</sup> McGovney, "Race Discrimination in Naturalization," 152.

<sup>36</sup> *Ozawa*, 260 U.S. 178, 197. The Court cites *In re Mozumdar*, 207 F. 115 (E.D. Wash. 1913) (holding that a "high-caste Hindu of pure blood," from "Upper India, or what is called Hindustan proper," was "white" and was therefore racially eligible for naturalization) and *In re Mohan Singh*, 257 F. 209 (S.D. Cal. 1919) (holding that a "high caste Hindu" was "white" and was therefore racially eligible for naturalization). The Court also omits from its list of approved cases in *Ozawa* the only lower court opinion concluding that high caste Hindus were *not* "white" and therefore racially eligible for naturalization. The omission of the latter opinion suggests that the Court specifically considered prior lower court opinions regarding the racial eligibility of high caste Hindus for naturalization and approved those cases that had concluded that they were. See *In re Singh*, 246 F. 496 (E.D. Penn. 1917) (holding that a Hindu was not "white" and was therefore racially ineligible for naturalization).

<sup>37</sup> *Ozawa*, 260 U.S. 178, 197.

<sup>38</sup> See Defendant's Brief of Points and Authorities in Support of Motion to Dismiss, *United States v. Mozumdar*, No. H-5-J Equity (S.D. Cal. Oct. 15, 1923), 5-6; Taraknath Das, "Stateless Persons in the U.S.A.," *Calcutta Review* 16 (July, 1925): 42. *Mozumdar's* citizenship was canceled notwithstanding the fact that the Supreme Court had expressly approved of the lower court case that had granted it.

<sup>39</sup> Decision, *In re Sallak*, No. 14876 (N.D. Ill, June 27, 1924), 2, in Transcript of Evidence, *United States v. Cartozian*, No. E-8668 (D. Or. June 10, 1925), Civil and Criminal Case Files, District of Oregon (Portland), Records of the District Courts of the United States, Record Group 21, National Archives and Records Administration Pacific Alaska Region, Seattle, Wash.

<sup>40</sup> See Correspondence between Commissioner of Naturalization Raymond F. Christ and the Secretary of Labor, 26 October 1926, in Senate Committee on Immigration, *Ratification and Confirmation of Naturalization of Certain Persons of the Hindu Race on S.J. Res. 128*, 69th Cong., 2nd sess. (Washington, DC: GPO, 1926), 1:5-7. See *In re Singh*, 246 F. 496 (E.D. Penn.

1917) (holding that a Hindu was not “white” and was therefore racially ineligible for naturalization).

<sup>41</sup> See *Singh*, 246 F. 496 (holding that a high caste Hindu was not “white” and was therefore racially ineligible for naturalization).

<sup>42</sup> Ray E. Chase and S.G. Pandit, *An Examination of the Opinion of the Supreme Court of the United States Deciding Against the Eligibility of Hindus for Citizenship* (Los Angeles: S.G. Pandit, 1926), 3, 5, 9.

<sup>43</sup> Amanda de la Garza, *Doctorji: The Life, Teachings, and Legacy of Dr. Bhagat Singh Thind* (Malibu, Calif.: David Singh Thind, 2010), 1-10.

<sup>44</sup> Mark Naidis, “Propaganda of the Ghadar Party,” *The Pacific Historical Review* 20 (1951): 251.

<sup>45</sup> See Harish K. Puri, *Ghadar Movement: Ideology, Organisation & Strategy* (Amritsar, India: Guru Nanak Dev University, 1983), 72; Lothyan, “A Question of Citizenship,” 269.

<sup>46</sup> See Gurdev Singh Deol, *The Role of the Ghadar Party in the National Movement* (Delhi, India: Sterling, 1969), 68, 74-75; De la Garza, *Doctorji*, 12-13; Puri, *Ghadar Movement*, 72.

<sup>47</sup> See, e.g., Lothyan, “A Question of Citizenship,” 269.

<sup>48</sup> See, e.g., Haridas T. Muzumdar, *America’s Contributions to India’s Freedom* (Allahabad, India: Central Book Depot, 1962), 7-9; Ronald Takaki, *Strangers From a Different Shore*, 301; Giles T. Brown, “The Hindu Conspiracy, 1914-1917,” *The Pacific Historical Review* 17 (1948): 299-310; Don K. Dignan, “The Hindu Conspiracy in Anglo-American Relations During World War I,” *The Pacific Historical Review* 40 (1971): 57-76.

<sup>49</sup> See Gould, *Sikhs, Swamis*, 214, 220-21; Puri, *Ghadar Movement*, 100-01; Kushwant Singh and Satindra Singh, *Ghadar 1915: India’s First Armed Revolution* (New Delhi, India: R & K, 1966), 52; Brown, “The Hindu Conspiracy, 1914-1917,” 308-09; Karl Hoover, “The Hindu Conspiracy in California, 1913-1918,” *German Studies Review* 8 (1985): 258-59; Muzumdar, *America’s Contribution*, 9. The federal criminal trial of these defendants in San Francisco lasted 155 days, costing the United States government \$450,000 and the British government \$2.5 million.

<sup>50</sup> “British Rule in India Denounced in Hindu Trial,” *Aberdeen Daily American* (*Aberdeen, S.D.*), March 1, 1918.

<sup>51</sup> Gould, *Sikhs, Swamis*, 214, 220-21; Puri, *Ghadar Movement*, 100-01; Singh and Singh, *Ghadar 1915*, 52; Brown, “The Hindu Conspiracy, 1914-1917,” 308-09; Hoover, “The Hindu Conspiracy,” 258-59; Muzumdar, *America’s Contribution*, 9.

<sup>52</sup> “Two Killed in Court,” *Washington Post*, April 24, 1918.

<sup>53</sup> See, e.g., Mary Das, “True Status of Hindus Regarding American Citizenship,” *Modern Review* 41 (1927): 461-65; Taraknath Das, “India and the League of Nations,” *Modern Review* 35 (1924): 163-67; Taraknath Das, “What Is at the Back of Anti-Asianism of the Anglo-Saxon World?,” *Modern Review* 35 (1924): 262-68; Taraknath Das, “Stateless Persons in the U.S.A.,” *Calcutta Review* 16 (July, 1925): 40-46; Taraknath Das, “American Naturalization Law Is Against the Chinese, Japanese and Hindustanees,” *Modern Review* 39 (1926): 349-50; Taraknath Das, *Foreign Policy in the Far East* (New York: Longmans, Green and Co., 1936), 16-18; Taraknath Das, “People of India and U.S. Citizenship,” *India Today* (August, 1941): 3-4; see also Sudhindra Bose, “Indians Barred from American Citizenship,” *Modern Review* 33 (1923): 691-95.

<sup>54</sup> Das, “True Status of Hindus Regarding American Citizenship,” 462.

<sup>55</sup> See Das, “India and the League of Nations”; Das, “What Is at the Back of Anti-Asianism of the Anglo-Saxon World?”; Das, “American Naturalization Law Is Against the Chinese, Japanese and Hindustanees.”

<sup>56</sup> With regard to the significance of the Ghadr party to the racial prerequisite cases involving Asian Indians, see, e.g., De la Garza, *Doctorji*; Gould, *Sikhs, Swamis*; Hess, “The Forgotten Asian Americans”; Hess, “The ‘Hindu’ in America”; Lothyan, “A Question of Citizenship,” 267-73; Stanford M. Lyman, “The Race Question and Liberalism: Casuistries in American Constitutional Law,” *International Journal of Politics, Culture, and Society* 5 (1991), 209; Nyan Shah, *Stranger Intimacy: Contesting Race, Sexuality and the Law in the North American West* (Berkeley: Univ. of California Press, 2011), 242-45; Jennifer Snow, “The Civilization of White Men: The Race of the Hindu in *United States v. Bhagat Singh Thind*,” in *Race, Nation, and Religion in the Americas*, eds. Henry Goldschmidt and Elizabeth McAlister (New York: Oxford Univ. Press, 2004): 260. With regard to the mutual influence of North American and Australasian legal restrictions on Asian immigration during the nineteenth and twentieth centuries, see generally, e.g., Henry F. Angus, “The Legal Status in British Columbia of Residents of Oriental Race and Their Descendants,” in *The Legal Status of Aliens in Pacific Countries: An International Survey of Law and Practice Concerning Immigration, Naturalization and Deportation of Aliens and Their Legal Rights and Disabilities*, ed. Norman MacKenzie (London: Oxford Univ. Press, 1937); Brawley, *The White Peril*; Tom Clark and Brian Galligan, “‘Aboriginal Native’ and the Institutional Construction of the Australian Citizen 1901-48,” *Australian Historical Studies* 26 (1995): 523-43; David Dutton, *One of Us?: A Century of Australian Citizenship* (Sydney, Austral.: Univ. of New South Wales Press, 2002); Robert A. Huttenback, *Racism and Empire: White Settlers and Colored Immigrants in the British Self-Governing Colonies 1830-1910* (Ithaca, N.Y.: Cornell Univ. Press, 1976); Andrew Markus, *Australian Race Relations 1788-1993* (St. Leonards, Austr.: Allen and Unwin, 1994); Andrew Markus, *Fear and Hatred: Purifying Australia and California 1850-1901* (Sydney, Austral.: Hale and Iremonger, 1979); John McLaren, “The Early British Columbia Judges, the Rule of Law and the ‘Chinese Question’: The California and Oregon Connection,” in *Law for the Beaver: Essays in the Legal History of the North American West*, eds. John McLaren, Hamar Foster, and Chet Orloff (Pasadena, Calif.: Ninth Judicial Circuit Historical Society, 1992); Charles A. Price, *The Great White Walls Are Built: Restrictive Immigration to North America and*

*Australasia 1836-1888* (Canberra: Australian National Univ. Press, 1974); Patricia E. Roy, *A White Man's Province: British Columbia Politicians and Chinese and Japanese Immigrants, 1858-1914* (Vancouver: Univ. of British Columbia Press, 1989); Shah, *Stranger Intimacy*; W. Peter Ward, *White Canada: Popular Attitudes and Public Policy Toward Orientals in British Columbia* (Montreal: McGill-Queen's Univ. Press, 1978); Myra Willard, *History of the White Australia Policy to 1920* (London: Cass, 1967).

<sup>57</sup> See De la Garza, *Doctorji*, 9; Gould, *Sikhs, Swamis*, 106-07; 134, 138, 146; Deol, *The Role of the Ghadar Party*, 44-45; Puri, *Ghadar Movement*, 61, 118; Takaki, *Strangers from a Different Shore*, 301.

<sup>58</sup> See Ram Chandra, *Hindus Hanged: History of Hindustan Ghadar Political Parties in India*, reprinted in *Selected Documents on the Ghadr Party*, ed. T.R. Sareen (Inderpuri, New Delhi: Mouno, 1994), 152; Deol, *The Role of the Ghadar Party*, 71, 74, 183; Naidis, "Propaganda of the Ghadar Party," 251-60; Puri, *Ghadar Movement*, 74; Kushwant Singh and Satindra Singh, *Ghadar 1915: India's First Armed Revolution* (New Delhi, India: R & K, 1966), 20.

<sup>59</sup> Quoted in Singh and Singh, *Ghadar 1915*, 19.

<sup>60</sup> Quoted in Deol, *The Role of the Ghadar Party*, 76. Similarly, another *Ghadar* publication urged readers to "take arms from the troops of native states and, wherever you see the British, kill them." *Ibid.*, 100.

<sup>61</sup> Reprinted in Singh and Singh, *Ghadar 1915*, 20-21. *Ghadar* also frequently printed songs and poetic verse which captured the revolutionary spirit of the movement, including passages like the following explicitly calling for violent revolution:

*Though Hindus, Mussulmans and Sikhs we be,  
Sons of Bharat are we still  
Put aside your arguments for another day  
Call of the hour is to kill.*

*Ibid.*

<sup>62</sup> See Indian Political Intelligence Files, 1912-1950, British Library, London, Oriental and India Office Collections, available via IDC Publishers BV, microfiche, IPI-13 Fiche 382-392 (1-11), Fiche 410 (29), and Fiche 415 (34).

<sup>63</sup> See De la Garza, *Doctorji*, 12-14.

<sup>64</sup> See Gould, *Sikhs, Swamis*, 200.

<sup>65</sup> See Correspondence between Commissioner of Naturalization Raymond F. Christ and the Secretary of Labor, 1:5, 23; Dignan, "The Hindu Conspiracy," 60-61, 76; Gould, *Sikhs, Swamis*, 189-90, 275-76.

<sup>66</sup> See Dignan, "The Hindu Conspiracy," 60-61, 76; Gould, *Sikhs, Swamis*, 274-76; Tapan K. Mikhherjee, *Taraknath Das: Life and Letters of a Revolutionary in Exile* (Calcutta, India: National Council of Education, Bengal, 1997), 10.

<sup>67</sup> Gerald Horne. "Race From Power: U.S. Foreign Policy and the General Crisis of White Supremacy," in *Window on Freedom: Race, Civil Rights, and Foreign Affairs 1945-1988*, ed. Brenda Gayle Plummer (Chapel Hill: Univ. of North Carolina Press, 2003), 50; see also Deol, *The Role of the Ghadar Party*, 25-26.

<sup>68</sup> See, e.g., Ramparkash Dua, *The Impact of the Russo-Japanese (1905) War on Indian Politics* (Delhi, India: S. Chand and Co., 1966); Gould, *Sikhs, Swamis*, 184; James Ramsay MacDonald, *The Awakening of India* (London: Hodder and Stoughton, 1910), 180.

<sup>69</sup> See Indian Political Intelligence Files, 1912-1950, British Library, London, Oriental and India Office Collections, available via IDC Publishers BV, microfiche, IPI-13 Fiche 382-392 (1-11), Fiche 410 (29), and Fiche 415 (34). In his 1917 book *Is Japan a Menace to Asia?*, Ghadr leader Taraknath Das argued that Japan's victory over Russia had given "a new consciousness to the Orient" and that Japan's goal should be to restore equality between the Asian and European races through an Asiatic Monroe Doctrine that granted Asia autonomy in Asian affairs. Taraknath Das, *Is Japan a Menace to Asia?* (Shanghai, China: Taraknath Das, 1917), 77-79, 122, [http://archive.org/details/\\_cu31924023240587](http://archive.org/details/_cu31924023240587) (accessed October 6, 2012).

<sup>70</sup> Correspondence from Charles Nagel to Justin S. Kirreh dated November 13, 1909, in Records of the Immigration and Naturalization Service of the United States, Record Group 85, Box 1573, File 19783/43, National Archives Building, Washington, DC; see also "Aliens Refused Naturalization," *Duluth (Duluth, MN) News Tribune*, September 29, 1909; "Turkey Will Protest," *Washington Post*, November 1, 1909; A. Rustem Bey, "Thinks Law Unfair," *Washington Post*, November 3, 1909; "Race Row Up To Courts," *Washington Post*, November 4, 1909; "Conflicting Views Taken of Asiatic Exclusion," *Dallas Morning News*, November 6, 1909; "Way Paved for Syrians," *Grand Forks (ND) Daily Herald*, December 15, 1909. See generally Craver, "On the Boundary of White," 30-56.

<sup>71</sup> Bill of Complaint in Equity, *In re Thind*, No. E-8547 (D. Or. Jan. 8, 1921), 1-2, in Civil, Criminal and Admiralty Case Files, 1911-1922, Southern District of California, Central Division (Los Angeles), Records of the District Courts of the United States, Record Group 21, National Archives and Records Administration Pacific Alaska Region, Seattle, Wash. (copy on file with author).

<sup>72</sup> Correspondence from Charles Nagel to Justin S. Kirreh dated November 13, 1909, in Records of the Immigration and Naturalization Service of the United States, Record Group 85, Box 1573, File 19783/43, National Archives Building, Washington, DC; see also *Aliens Refused Naturalization*, *supra* note 33; *Turkey Will Protest*, *supra* note 33; A. Rustem Bey, *supra* note 33; *Race Row Up To Courts*, *supra* note 33; *Conflicting Views Taken of Asiatic Exclusion*, *supra* note 33; *Way Paved for Syrians*, *Grand Forks Daily Herald*, Dec. 15, 1909; see generally Craver, "On the Boundary of White," 30-56.

<sup>73</sup> See *In re Thind*, 268 F. 683 (D. Or. 1920).

<sup>74</sup> See *In re Ellis*, 179 F. 1002, 1003 (D. Or. 1910); *Ozawa*, 260 U.S. at 197 (including *In re Ellis* in a list of cases with which “we see no reason to differ”).

<sup>75</sup> *Thind*, 268 F. at 683.

<sup>76</sup> Indian Political Intelligence Files, 1912-1950, British Library, London, Oriental and India Office Collections, available via IDC Publishers BV, microfiche, IPI-13 Fiche 382-392 (1-11), Fiche 410 (29), and Fiche 415 (34).

<sup>77</sup> *Thind*, 268 F. at 683.

<sup>78</sup> See, e.g., Nancy Gentile Ford, *Americans All! Foreign-Born Soldiers in World War I* (College Station: Texas A & M Univ. Press, 2001).

<sup>79</sup> See, e.g., Ram Chandra, “What Young India Has in Mind: Rumbblings of Dissatisfaction the First Warning that the People Have a Vision of a Republican Government,” *New York Times*, July 8, 1916.

<sup>80</sup> Clarke, *Oriental Enlightenment*, 55-59; Doniger, *The Hindus*, 85-102; Shwab, *The Oriental Renaissance*, 32; Trautmann, *Aryans and British India*, 11-13, 23-26; Thapar, “Imagined Religious Communities,” 226.

<sup>81</sup> Edward W. Said, *Orientalism*, 25th Anniversary Ed. (New York: Vintage, 1994), 5.

<sup>82</sup> See, e.g., David Lorenzen, “Imperialism and the Historiography of Ancient India,” in *India: History and Thought, Essays in Honor of A.L. Basham*, ed. S.N. Mukherjee (Calcutta, India: Subarnarekha, 1982), 84-102.

<sup>83</sup> Wendy Doniger, *The Hindus: An Alternative History* (New York: Penguin Press, 2009), 85-102; Vasant Kaiwar, “The Aryan Model of History and the Oriental Renaissance,” in *Antinomies of Modernity: Essays on Race, Orient, Nation*, eds. Vasant Kaiwar and Sucheta Mazumdar (Durham, N.C.: Duke Univ. Press, 2003), 24; Laurie L. Patton, “Cosmic Men and Fluid Exchanges: Myths of *Ārya*, *Varṇa*, and *Jāti* in the Hindu Tradition,” in *Religion and the Creation of Race and Ethnicity: An Introduction*, ed. Craig R. Prentiss (New York: New York Univ. Press, 2003), 185, 194.

<sup>84</sup> See Patton, “Cosmic Men and Fluid Exchanges,” 185.

<sup>85</sup> Brief of Respondent Bhagat Singh Thind at 2, *United States v. Thind*, No. 202, (U.S. Sup. Ct. Dec. 30, 1921).

<sup>86</sup> *Ibid.*, 18-20.

<sup>87</sup> Harold Isaacs, *Images of Asia* (New York: Harper and Row, 1972), 290.

<sup>88</sup> See, e.g., Patton, “Cosmic Men and Fluid Exchanges,” 184-85.

<sup>89</sup> See “Hindu from America Exclusion,” reprinted in Sareen, *Selected Documents on the Ghadr Party*, 161-66.

<sup>90</sup> Singh, *Ethnological Epitome*, 10, 12.

<sup>91</sup> Quoted in Gould, *Sikhs, Swamis*, 164.

<sup>92</sup> See Singh and Singh, *Ghadar 1915*, 15.

<sup>93</sup> See, e.g., Emily C. Brown, *Har Dayal: Indian Revolutionary and Rationalist* (Tucson, Ariz.: Univ. of Arizona Press, 1975), 92, 230-35; Deol, *The Role of the Ghadar Party*, 58; Gould, *Sikhs, Swamis*, 82-83; Puri, *Ghadar Movement*, 122, 125; Singh and Singh, *Ghadar 1915*, 20-21, 57.

<sup>94</sup> See, e.g., Puri, *Ghadar Movement*, 65, 111-12, 125, 179.

<sup>95</sup> See Har Dayal, *Social Conquest of the Hindu Race and Meaning of Equality*, 2, 7, Univ. of California at Berkeley Library, South Asians in North America Collection 347, Box 2, Folder 3.

<sup>96</sup> Snow, “The Civilization of White Men,” 265.

<sup>97</sup> See, e.g., *ibid.*, 267.

<sup>98</sup> Clarke, *Oriental Enlightenment*, 116, 136; De la Garza, *Doctorji*, 5, 21; Shwab, *The Oriental Renaissance*, 200-02; 401-03; Trautmann, *Aryans and British India*, 13.

<sup>99</sup> See, e.g., Gould, *Sikhs, Swamis*, 78; Heather Streets, *Martial Races: The Military, Race and Masculinity in British Imperial Culture, 1857-1914* (Manchester, U.K.: Manchester Univ. Press, 2004), 8, 178-79.

<sup>100</sup> See Brief for Petitioner at 75-78, *Ozawa v. United States*, No. 222, (U.S. Sup. Ct. Dec. 9, 1918).

<sup>101</sup> Sudhindra Bose, “Indians Barred from American Citizenship,” *Modern Review* 33 (1923): 693-94.

<sup>102</sup> See generally Gualtieri, “Becoming ‘White’”: 40-47.

<sup>103</sup> Brief for the United States at 4, 19-20, *United States v. Thind*, No. 202, (U.S. Sup. Ct. Dec. 30, 1921). Throughout the racial prerequisite cases, the Government argued that what constitutes a “white person” cannot be “wholly determined upon either geographical, philological, or ethnological bases,” but “can only be determined in the light of history,” and that the phrase

“white persons” meant “only those peoples of the white race who, at the time of the formation of the government, lived in Europe and were inured to European governmental institutions, or upon the American continent,” who “from tradition, teaching, and environment, would be predisposed toward our form of government, and thus readily assimilate with the people of the United States.” Brief for the United States at 20, *United States v. Thind*, No. 202, (U.S. Sup. Ct. Dec. 30, 1921); cf. *In re Ellis*, 179 F. 1002, 1003 (D. Or. 1910).

<sup>104</sup> See Snow, “The Civilization of White Men,” 266. In one early example of Europeans blaming caste for India’s supposed deficiencies compared to Western civilization, the German philosopher Hegel attributed the absence of history in Indian literature to India’s inordinate dependency on the caste system. See Georg Wilhelm Friedrich Hegel, *Lectures on the Philosophy of History*, trans. J. Sibree (London: G. Bell and Sons, 1914), 64-65.

<sup>105</sup> Gould, *Sikhs, Samis*, 111.

<sup>106</sup> Brief for the United States at 10-14, *United States v. Thind*, No. 202, (U.S. Sup. Ct. Dec. 30, 1921).

<sup>107</sup> Regarding Edmund Burke’s speech during the impeachment trial of Warren Hastings, see generally Sarah Suleri, *The Rhetoric of English India* (Chicago: Univ. of Chicago Press, 1992), 45-46, 65.

<sup>108</sup> Snow, “The Civilization of White Men,” 270.

<sup>109</sup> Brief for the United States at 10-19, *United States v. Thind*, No. 202, (U.S. Sup. Ct. Dec. 30, 1921).

<sup>110</sup> See, e.g., Gould, *Sikhs, Swamis*, 270.

<sup>111</sup> *Thind*, 261 U.S. 204, 213.

<sup>112</sup> *Ibid.*, 212-15.

<sup>113</sup> *Encyclopedia Britannica*, 11th ed., s.v. “Hinduism,” 502 (emphasis added); *Thind*, 261 U.S. at 212-13 and 213 n. 8-9.

<sup>114</sup> *Oxford English Dictionary*, 2nd ed., s.v. “Signally.”

<sup>115</sup> *Thind*, 261 U.S. at 213.

<sup>116</sup> *Genesis* 2:23 (King James).

<sup>117</sup> *Thind*, 261 U.S. at 210-11.

<sup>118</sup> *Plessy*, 163 U.S. 537.

<sup>119</sup> Ibid., 559.

<sup>120</sup> *Naturalization Act of 1906*, 59th Cong., 1st Sess., *U.S. Statutes at Large* 34 (1906): 596.

<sup>121</sup> See U.S. Senate Committee on Immigration, *Hearings on S.J. Res. 128, Providing for the Ratification and Confirmation of Naturalization of Certain Persons of the Hindu Race*, 69th Cong., 2nd sess. (Washington, DC: GPO, 1926), 7 (providing list of “Soldier cases in which cancellation proceedings have not been instituted”).

<sup>122</sup> See, e.g., De la Garza, *Doctorji*, 20; Takaki, *Strangers from a Different Shore*, 300.

<sup>123</sup> *Immigration Act of 1924*. 68th Cong., 1st Sess. *U.S. Statutes at Large* 43 (1924): 153.

<sup>124</sup> Indian Political Intelligence Files, 1912-1950, British Library, London, Oriental and India Office Collections, available via IDC Publishers BV, microfiche, IPI-13 Fiche 382-392 (1-11), Fiche 410 (29), and Fiche 415 (34).

<sup>125</sup> See Gould, *Sikhs, Swamis*, 289.

<sup>126</sup> The Indian lobbying efforts that began to emerge in the post-*Thind* period are the subject of Harold Gould’s book *Sikhs, Swamis, Students, and Spies: The India Lobby in the United States, 1900-1946*. See Gould, *Sikhs, Swamis*, 226, 245, 247-51, 262-63, 278, 288-91, 299. As Gould writes, “the strategies of old-fashioned intrigue, violence and bomb-throwing were being replaced by the more subtle, less violent methods of persuasion.” Ibid., 278.

<sup>127</sup> *Oxford English Dictionary*, 2nd ed., s.v. “Satyagraha”; Mahatma Gandhi, *Non-Violent Resistance (Satyagraha)* (Mineola, N.Y.: Dover, 2001), 10, 17, 54, 78; see also Joan V. Bondurant, *Conquest of Violence: The Gandhian Philosophy of Conflict*, New rev. ed. (Princeton: Princeton Univ. Press, 1988), 8, 16. Speaking elsewhere of *satyagraha*, Gandhi writes that “violence is the negation of this great spiritual force.” Gandhi, *Non-Violent Resistance*, 34; see also Bondurant, *Conquest of Violence*, 15.

<sup>128</sup> See, e.g., Mahatma Gandhi, “Some Rules of Satyagraha” *Young India (Navajivan)*, February 23, 1930, reprinted in Mahatma Gandhi, *Mahatma Gandhi: Selected Political Writings* (Indianapolis: Hackett, 1996), 81-82; Gandhi, *Non-Violent Resistance*, 87.

<sup>129</sup> See, e.g., Bondurant, *Conquest of Violence*, 20, 29-33, 114.

<sup>130</sup> Gandhi, *Non-Violent Resistance*, 6, 17, 59, 67, 78.

<sup>131</sup> Ibid., 79-87.

<sup>132</sup> Bondurant, *Conquest of Violence*, 43, 119-20.

<sup>133</sup> *Ibid.*, 119-120.

<sup>134</sup> Muzumdar, *America's Contributions*, 39.

<sup>135</sup> Gandhi, *Non-Violent Resistance*, 56, 78 (“A civil resister, whilst he will strain every nerve to compass the end of the existing rule, will do no intentional injury in thought, word or deed to the person of a single Englishman.”).

<sup>136</sup> *Ibid.*, 278.

<sup>137</sup> Defendant’s Brief of Points and Authorities in Support of Motion to Dismiss, *United States v. Mozumdar*, No. H-5-J Equity (S.D. Cal. Oct. 15, 1923), 28-29.

<sup>138</sup> Plaintiff’s Brief of Points and Authorities in Opposition to the Motion to Dismiss, *United States v. Mozumdar*, No. H-5-J Equity (Oct. 18, 1923), 13-14.

<sup>139</sup> Defendant’s Reply Brief in Support of His Motion to Dismiss, *United States v. Mozumdar*, No. H-5-J Equity, 26.

<sup>140</sup> *United States v. Mozumdar*, 296 F. 173, 177-78 (S.D. Cal. 1923).

<sup>141</sup> Section 3 of the 1922 Cable Act provided that “any woman who marries an alien ineligible to citizenship shall cease to be a citizen.” *Cable Act, U.S. Statutes at Large* 42 (1922): 1021.

<sup>142</sup> See Defendant’s Answer, *United States v. Pandit*, No. G-111-T (S.D. Cal. March 10, 1924), in Transcript of Record, *United States v. Sakharam Ganesh Pandit*, No. 4938 (9th Cir. Aug. 13, 1926), 21-31 (emphasis added), in Records of the U.S. Courts of Appeals, Record Group 276, National Archives and Records Administration Pacific Region, San Bruno, Calif.

<sup>143</sup> See Bryan A. Garner, *A Dictionary of Modern Legal Usage*, 2nd ed. (Oxford: Oxford Univ. Press, 1995), 321-22.

<sup>144</sup> Defendant’s Answer, *United States v. Pandit*, No. G-111-T (S.D. Cal. March 10, 1924), 5-11.

<sup>145</sup> See David K. Thompson, “Equitable Estoppel of the Government,” *Columbia Law Review* 79 (1979): 551-571; Statement of Testimony Under Equity Rule 75 B, *United States v. Pandit*, No. G-111-T (S.D. Cal. May 11, 1926), in Transcript of Record, *United States v. Sakharam Ganesh Pandit*, No. 4938 (9th Cir. Aug. 13, 1926), 152, in Records of the U.S. Courts of Appeals, Record Group 276, National Archives and Records Administration Pacific Region, San Bruno, Calif.

<sup>146</sup> Statement of Testimony Under Equity Rule 75 B, United States v. Pandit, No. G-111-T (S.D. Cal. May 11, 1926), in Transcript of Record, United States v. Sakharam Ganesh Pandit, No. 4938 (9th Cir. Aug. 13, 1926), 84-85.

<sup>147</sup> See *Singh*, 257 F. 209.

<sup>148</sup> See *In re Song*, 271 F. 23 (S.D. Cal. 1921).

<sup>149</sup> See *Mendez v. Westminster School District*, 64 F.Supp. 544 (C.D. Cal. 1946).

<sup>150</sup> See Findings of Fact and Conclusions of Law, United States v. Pandit, No. G-111-T (S.D. Cal. Jan. 8, 1926), in Transcript of Record, United States v. Sakharam Ganesh Pandit, No. 4938 (9th Cir. Aug. 13, 1926), 33-42.

<sup>151</sup> Statement of Testimony Under Equity Rule 75 B, United States v. Pandit, No. G-111-T (S.D. Cal. May 11, 1926), in Transcript of Record, United States v. Sakharam Ganesh Pandit, No. 4938 (9th Cir. Aug. 13, 1926), 151-52.

<sup>152</sup> Findings of Fact and Conclusions of Law, United States v. Pandit, No. G-111-T (S.D. Cal. Jan. 8, 1926), in Transcript of Record, United States v. Sakharam Ganesh Pandit, No. 4938 (9th Cir. Aug. 13, 1926), 33-42.

<sup>153</sup> Statement of Testimony Under Equity Rule 75 B, United States v. Pandit, No. G-111-T (S.D. Cal. May 11, 1926), in Transcript of Record, United States v. Sakharam Ganesh Pandit, No. 4938 (9th Cir. Aug. 13, 1926), 152-54.

<sup>154</sup> Answer, United States v. Chand, No. G-105 (S.D. Cal. Jan. 19, 1925), 1-4, in Records of the District Courts of the United States, Record Group 21, Folder G105, Box 126, National Archives and Records Administration Pacific Region, Laguna Niguel, Calif.

<sup>155</sup> The extant record in *Chand* consists of only twenty pages of documents. See Records of the District Courts of the United States, Record Group 21, Folder G105, Box 126, National Archives and Records Administration Pacific Region, Laguna Niguel, Calif.

<sup>156</sup> Statement of Testimony Under Equity Rule 75 B, United States v. Pandit, No. G-111-T (S.D. Cal. May 11, 1926), in Transcript of Record, United States v. Sakharam Ganesh Pandit, No. 4938 (9th Cir. Aug. 13, 1926), 75.

<sup>157</sup> See Gould, *Sikhs, Swamis*, 250-51.

<sup>158</sup> See *Mozumdar v. United States*, 299 F. 240 (9th Cir. 1924); *United States v. Pandit*, 15 F.2d 285 (9th Cir. 1926), *cert. denied*, 273 U.S. 759 (1927).

<sup>159</sup> See Transcript of Hearing on Naturalization of Natives of India Now Living in the United States, United States House of Representatives Committee on Immigration and

Naturalization, June 21, 1939, 12, in Records of the Immigration and Naturalization Service of the United States, Record Group 85, Box 1573, File 19783/43, National Archives and Records Administration, Washington, D.C.

<sup>160</sup> See *Immigration and Nationality Act of 1952*. 82nd Cong., 2nd Sess. *U.S. Statutes at Large* 66 (1952): 169.

<sup>161</sup> Quoted in de la Garza, *Doctorji*, 20-21.

<sup>162</sup> *Oxford English Dictionary*, 2nd ed., s.v. "Albion."

<sup>163</sup> See, e.g., Chaim Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, trans. John Wilkinson and Purcell Weaver (Notre Dame: Univ. of Notre Dame Press, 1969), 47.

<sup>164</sup> See, e.g., Naidis, "Propaganda of the *Gadar Party*," 251.

<sup>165</sup> See Jeffrey Walker, *Rhetoric and Poetics in Antiquity* (Oxford: Oxford Univ. Press, 2000), 7-10; Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 47-51; cf. Davida Charney, "Performativity and Persuasion in the Hebrew Book of Psalms: A Rhetorical Analysis of Psalms 22 and 116," *Rhetoric Society Quarterly*, 40.3 (2010) 247-268. Aristotle distinguishes these genres by their temporal referents:

The political orator is concerned with the future: it is about things to be done hereafter that he advises, for or against. The party in a case at law is concerned with the past; one man accuses the other, and the other defends himself, with reference to things already done. The ceremonial orator is, properly speaking, concerned with the present, since all men praise or blame in view of the state of things existing at the time, though they often find it useful also to recall the past and to make guesses at the future.

Aristotle, *Rhetoric*, trans. W. Rhys Roberts, in *The Rhetoric and Poetics of Aristotle* (New York: Modern Library, 1984), 1358<sup>b</sup>.

<sup>166</sup> Kenneth Burke, *A Rhetoric of Motives*, Calif. ed. (Berkeley: Univ. of California Press, 1969), 42, 50.

<sup>167</sup> Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 50-51.

<sup>168</sup> J. Justin Gustainis, "Crime as Rhetoric: The Trial of the Catonsville Nine," in *Popular Trials: Rhetoric, Mass Media, and the Law*, ed. Robert Hariman (Tuscaloosa: Univ. of Alabama Press, 1990), 178.

<sup>169</sup> See Patricia Roberts-Miller, "John Quincy Adams's Amistad Argument: The Problem of Outrage; Or, the Constrains of Decorum," *Rhetoric Society Quarterly* 32.2 (2002): 22-23.

<sup>170</sup> See, e.g., Charles Krauthammer, Editorial, “*Miranda* Rights for Terrorists?,” *Washington Post*, January 29, 2010; Karen Matthews, “Lawyer: 9/11 Defendants Want Platform for Views,” *ABCNews.com*, November 22, 2009, <http://abcnews.go.com/US/wireStory?id=9148851> (accessed August 1, 2010).

<sup>171</sup> Walker, *Rhetoric and Poetics*, 8.

<sup>172</sup> Homi Bhabha, *The Location of Culture* (New York: Routledge, 1994), 132-44.

<sup>173</sup> Gould, *Sikhs, Swamis*, 203.

<sup>174</sup> See, e.g., Malthon Anapol, “Rhetoric and Law: An Overview,” *Today’s Speech* 18.4 (1970): 12-20; Alessandro Giuliani, “The Influence of Rhetoric on the Law of Evidence and Pleading,” *The Juridical Review*, new ser., 7 (1962): 216-51; Hanns Hohmann, “The Dynamics of Stasis: Classical Rhetorical Theory and Modern Legal Argumentation,” *The American Journal of Jurisprudence* 34 (1989): 171-97; Richard J. Schoeck, “Rhetoric and Law in Sixteenth-Century England,” *Studies in Philology* 50 (1953): 110-27; Barbara J. Shapiro, “Classical Rhetoric and the English Law of Evidence,” in *Rhetoric and Law in Early Modern Europe*, eds. Victoria Kahn and Lorna Hutson (New Haven: Yale Univ. Press, 2001). As Thomas Sloane notes, “a legal career is and always has been an end of an education in rhetoric.” Thomas O. Sloane, *On the Contrary: The Protocol of Traditional Rhetoric* (Washington, D.C.: The Catholic Univ. of America Press, 1997), 106. The lawyer is also one of the most frequently cited professional advocates in modern society, often considered, as James Boyd White writes, “the modern rhetorician in its purest form.” James Boyd White, “The Ethics of Argument: Plato’s *Gorgias* and the Modern Lawyer,” *University of Chicago Law Review* 50 (1983): 872.

<sup>175</sup> Peter Brooks, “Narrative Transactions—Does the Law Need a Narratology?,” *Yale Journal of Law and the Humanities* 18 (2006): 20.

<sup>176</sup> Gerald B. Wetlaufer, “Rhetoric and Its Denial in Legal Discourse,” *Virginia Law Review* 76 (1990): 1591.

<sup>177</sup> *Ibid.*, 1554, 1591.

<sup>178</sup> Francis L. Wellman, *The Art of Cross-Examination, With the Cross-Examinations of Important Witnesses in Some Celebrated Cases* (1903, repr. New York: Collier Books: 1962), 21-22.

<sup>179</sup> David A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865* (Oxford, UK: Clarendon Press, 1998), xi.

<sup>180</sup> See, e.g., Sanford Levinson, “The Rhetoric of the Judicial Opinion,” in *Law’s Stories: Narrative and Rhetoric in the Law*, eds. Peter Brooks and Paul Gewirtz (New Haven: Yale Univ. Press, 1996), 199; see Haig Bosmajian, *Metaphor and Reason in Judicial Opinions* (Carbondale: Southern Illinois Univ. Press, 1992), 28-34; Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton: Princeton Univ. Press, 2006).

<sup>181</sup> Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford: Oxford Univ. Press, 2005), 13.

### Chapter 3: Islam, Christianity, and Martyrdom in *United States v. Cartozian*

*Q. Are there not also Armenians who are Mohammedans?*

*A. Not one, only if they have become Mohammedan by force, by persecution.*

\* \* \*

*Q. But people of Armenian origin and race and blood do belong to the Mohammedan faith; have joined that faith? Is that not true?*

*A. By force, perhaps, they have been made, during the massacres, to save their lives.*

Cross-examination of M.B. Parounagian during the 1924 naturalization trial of Tatos Cartozian<sup>1</sup>

*I found that Armenians assimilate with American life more readily than any other race from Southeastern Europe or Asia Minor, for two reasons. One is that the American missionaries who have been working in Armenia and among the Armenians for one hundred years have acquainted the American public about the Armenians. . . . The other reason is that Armenians have been known among the Christian people of Europe and America as the great defenders of the Christian religion, and I believe there is an admiration for the Armenians for the way they have withstood the onslaught of Mohammedanism.*

Direct examination of M. Vartan Malcolm, author of *The Armenians in America*, during the 1924 naturalization trial of Tatos Cartozian<sup>2</sup>

*Q. What was the attitude of the Armenian race in so far as you came in contact with them during the World War?*

*A. It was one of the most inspiring experiences in my life. They were willing to serve, not only as enemies of Turkey, not only to defend their own native country, but they felt a deep loyalty to this country. All of them were willing to enter the army; and I know a great many cases of Armenians who came a great distance, paid their own expenses and entered the United States army and never were sent across to fight the Turks.*

Direct examination of Mrs. Otis Floyd Lamson during the 1924 naturalization trial of Tatos Cartozian<sup>3</sup>

The epigraphs above appear in the transcript of a trial held in the United States District Court for the District of Oregon on May 8-9, 1924 to determine whether Armenian immigrant Tatos Cartozian was racially eligible for naturalization. The United States Bureau of Naturalization opposed Cartozian's naturalization based solely on the assertion that as an Armenian he was not "white" and was therefore racially ineligible for naturalization. The National Archives and Records Administration has preserved a nearly complete record of the

proceedings in the case, including a 167-page transcript of a two-day trial, a 97-page transcript of four expert depositions, a 30-page defense brief, trial exhibits, and other documents. According to one source, the Armenian community raised approximately \$50,000 in donations to defend the case (equivalent to over \$500,000 today) and shortly after the case was filed the lead attorney for the Armenian defense informed the Government's attorney that the Armenians intended to spare no expense to defend the case.<sup>4</sup> The defense hired the prestigious Portland law firm McCamant and Thompson to represent Cartozian and offered the testimony of twenty-three witnesses at trial, including renowned Columbia University anthropologist Franz Boas, Harvard ethnologist Roland Dixon, German geographer and political economist Paul Rohrbach, and James Barton, foreign secretary of the American Board of Commissioners for Foreign Missions who headed the relief expedition in Turkey after World War I. The defense also offered twenty-two exhibits into evidence, including a comparative list of English and Armenian words and a tabulation of 339 answers to a questionnaire sent to Armenian men in the United States regarding their residence, citizenship, occupation, and membership in Christian churches and professional, civic, and fraternal organizations.<sup>5</sup> As a result, the record of the proceedings offers the most complete record available of the arguments and evidence advanced to determine whether an individual petitioner was "white" within the meaning of the racial prerequisites in the naturalization act.

Despite this substantial record, prior scholars have largely treated *Cartozian* as a footnote to the earlier case of *Halladjian*, in which a federal district court in Massachusetts held that four Armenians were "white" and therefore racially eligible for naturalization,<sup>6</sup> which served as precedent on the question of Armenian eligibility for naturalization before *Cartozian*. Furthermore, those scholars who have discussed *Cartozian* have mostly limited their remarks to the arguments and evidence presented by the defense regarding Armenian assimilability with

“white” Europeans and Americans, including ethnographic and statistical evidence of prior Armenian naturalizations in the United States and Armenian marriages to Europeans and Americans. In *Whitewashed*, for example, John Tehranian argues that *Cartozian* epitomizes performative aspects of whiteness reflected in the racial prerequisite cases and concludes that “performance of whiteness and perceived assimilatory capacity played a critical role in the court’s decision” in the case.<sup>7</sup> Phillip Lothyan focuses exclusively on evidence of census figures regarding the number of Armenian naturalizations in the United States, evidence of affinities between European and Armenian languages, and evidence that Armenians intermarried and assimilated quickly with Europeans and Americans.<sup>8</sup> In Ian Haney López’s *White by Law*, López only mentions *Cartozian* in passing to note that Columbia University anthropologist Franz Boas provided expert testimony in the case,<sup>9</sup> and Matthew Frye Jacobson gives the case a similar treatment in *Whiteness of a Different Color: European Immigrants and the Alchemy of Race*,<sup>10</sup> as does Ariela Gross in *What Blood Won’t Tell: A History of Race on Trial in America*.<sup>11</sup>

The epigraphs above reveal another rhetorical strategy that played a dominant role in the trial and judicial opinion in *Cartozian*, however, the claim that Armenians not only readily assimilated with Europeans and Americans but were inassimilable with their Islamic neighbors in Asia Minor. According to the defense, this inassimilability was evidenced by Armenian support of Europeans during the Crusades and Muslim persecution of the Armenians since the rise of the Ottoman Empire, ultimately culminating in the Armenian genocide of World War I. Even more explicitly than Pandit’s rhetorical strategy of appealing to the threat posed by the Indian caste system, the defense’s rhetorical strategy in *Cartozian* appealed to the process of unifying against a common enemy by framing Armenians as Christian martyrs persecuted by Ottoman Turks, Kurds, and Syrian Muslims for Armenians’ Christian faith and cultural alliance

with Western Europe. In the epigraphs above, M.B. Parounagian testifies that the Armenians were persecuted by Ottoman Turks who forced Armenians to convert to Islam “during the massacres, to save their lives,” a reference to the Turkish massacres of Armenians that escalated during the 1890s through the Armenian genocide of World War I and resulted in many Armenian refugees fleeing to the United States.<sup>12</sup> Similarly, M. Vartan Malcolm testifies that Europeans and Americans admired Armenians as “the great defenders of the Christian religion,” who withstood “the onslaught of Mohammedanism” at the hands of the Turks, and Mrs. Otis Floyd Lamson testifies of how Armenians fought with American troops against a common enemy during World War I. Similar references to the Crusades, the Hamidian massacres of the 1890s, and the Armenian genocide of World War I are found throughout the trial transcript, representing Armenians as Christian martyrs at the hands of “black pagans, Turks, and Saracens”<sup>13</sup> in what Murray Edelman calls a “dramaturgy of enmity.”<sup>14</sup> This narrative echoed American war propaganda during World War I that had thematically invoked the imagery of the Crusades in portrayals of the war as one between “white” Christians and dark barbarian “Huns,” and appealed to significant tensions that lingered between the United States and Turkey during the postwar period as a result of Turkey’s opposition to the establishment of an independent republic of Armenia and its continued massacres of Armenians and American missionaries. Accordingly, the defense’s narrative of persecution by the Ottoman Turks, Kurds, and Syrian Muslims in *Cartozian* appealed both to historical fears of barbarian invaders in medieval Europe called to mind by recent war propaganda and to contemporary fears of Turkish aggression.<sup>15</sup>

These conflicts and tensions are less evident in the published judicial opinion in *Cartozian*.<sup>16</sup> As Robert Ferguson writes, because trial transcripts reflect complete records of court proceedings in which everything that is said is spontaneously recorded, they reveal, “as

nothing else quite can, the real preoccupations in the flow of legal argument,” supplying a better perspective for understanding “the formulation of story that lies at the center of all courtroom proceedings,” and

if transcripts are decidedly more opaque, less accessible, and less dramatic than final opinions, they are richer in the range of commentary that they include, and they tell us much about the choices made in a final opinion. As complete records of court proceedings, transcripts register the conflict in the advocacy system in ways that a judicial decision ignores in the name of judgment.<sup>17</sup>

The transcript in *Cartozian* reveals the conflicts and tensions that faced Armenians during the postwar period and the defense’s rhetorical strategy of creating a powerful sense of social solidarity with Americans by portraying Turkey as a common enemy through a rhetoric of persecution and martyrdom. The transcript also reveals the conflict between this rhetorical strategy and Armenians’ proto-nationalist aspirations as this strategy depended upon a negation of Armenian national identity that at times metaphorically echoed the eliminationist campaign the Armenians had suffered in the war.

To explore these issues, this chapter compares the rhetorical strategies reflected in the trial transcript and judicial opinion in *Cartozian*. I begin by situating the case within its historical context during a time of existential crisis for Armenian refugees as postwar negotiations for an independent republic of Armenia grew increasingly doubtful. I then examine the rhetorical strategy of the Armenian defense reflected in the transcript, particularly the representation of Ottoman Turks, Kurds, and Syrian Muslims as persecutors of Armenians throughout the history of the Ottoman Empire and in the Armenian genocide of World War I. I argue that by portraying Turkey as a common enemy during the postwar period, the defense created a powerful sense of solidarity between Armenians and Americans while negating Armenians’ protonationalist aspirations for an independent republic of Armenia in a way that highlights the effects of the

genocide on Armenian refugees. I then examine Judge Charles Wolverson's judicial opinion in *Cartozian* in light of the arguments advanced during the trial and argue that although his opinion adopts the defense's narrative of Armenian inassimilability with the Ottoman Turks, Kurds, and Syrian Muslims as a central justification for his conclusion that Armenians are "white," he leaves the agency in the historical narrative on which his opinion relies ambiguous and his opinion reflects a broader refusal of narrativity that suggests an uncomfortable relationship with the "historical interpretation" of race. The chapter concludes by reflecting on the rhetoric of martyrdom as a common form of unifying against a common enemy, particularly in the context of nationalism, and the rhetorical significance of martyrdom to the racial prerequisites to naturalization.

#### **THE ARMENIAN GENOCIDE AND REFUGEE CRISIS**

On April 24, 2010, President Barack Obama marked the ninety-fifth anniversary of the Armenian genocide by remarking that "on this solemn day of remembrance, we pause to recall that 95 years ago one of the worst atrocities of the 20th century began," for "in that dark moment of history, 1.5 million Armenians were massacred or marched to their death in the final days of the Ottoman Empire."<sup>18</sup> Between 1894 and 1896, Turkish attacks on the Armenian minority in the Ottoman Empire resulted in the deaths of approximately 100,000-250,000 Armenians in what were referred to as the Hamidian massacres, named after Sultan Abdul Hamid II, also known as the "Red Sultan" or the "Bloody Sultan" for his Armenian massacres. Following the rise of the Young Turks, another 15,000-25,000 Armenians were massacred in Adana, Turkey in the spring of 1909, and experts estimate that between one to one and a half million Armenians were killed in the Ottoman Empire during World War I in what is widely referred to as the Armenian

genocide. As Vahakn Dadrian remarks, although the number of Armenians who died during World War I gives the period a particular gravity, the Armenian genocide was “punctuated by a history of accumulative tensions, animosities, and attendant sanguinary persecutions, . . . anchored on a constantly evolving and critically escalating perpetrator-victim conflict” that extended deep into the history of Anatolia.<sup>19</sup> This perpetrator-victim conflict is crucial to understanding the arguments advanced in support of Armenian racial eligibility for naturalization in *Cartozian*.

Many critics have argued that the treatment of the Armenian Christian minority in the Ottoman Empire was a result of the rising nationalisms of the early twentieth century and the volatile nature of state boundaries in the Balkans, Anatolia, Ukraine, and the Caucasus. According to Cathie Carmichael, for example, many of the previously tolerated subjects of these regions, including Armenians, never made the transition from subject to citizen. As a result, the practice of population elimination in Europe and Western Asia from the nineteenth through the mid-twentieth century occurred because certain groups never received full citizenship rights.<sup>20</sup> Tragically, the idea that conflicts of nationality and citizenship could be resolved by violent population elimination inspired a generation of such eliminationists, as reflected in the question Adolf Hitler is reported to have put to German troops before the invasion of Poland after telling them to kill all men, women, and children they found: “Who, after all, speaks today about the annihilation of the Armenians?”<sup>21</sup> As this question suggests, such eliminationist campaigns have often eliminated not only the physical presence of the populations they targeted but their historical presence as well.<sup>22</sup> Although the international movement for recognition of the Armenian genocide has established it as one of the three canonical genocides alongside the Holocaust and Rwanda, for decades it was so immersed in silence that it was often referred to as

the “forgotten genocide,” the “unremembered genocide,” the “hidden holocaust,” or the “secret genocide,”<sup>23</sup> and it has been the object of genocide denial by its perpetrator, Turkey, from the postwar period to the present.<sup>24</sup>

Although the phrase “crimes against humanity” was originally coined to refer to the Armenian genocide and the first war crimes tribunals in Turkish history were convened to prosecute Ottoman officials for their treatment of Armenians during the war,<sup>25</sup> the war crimes tribunals were soon abandoned under the pressure of Turkish nationalism and the major powers stopped publicly confronting Turkey about the issue.<sup>26</sup> For many in America the genocide had been the worst crime of the war, and an independent republic of Armenia was considered necessary to protect Armenians from further violence. Accordingly, President Wilson awarded territory in Anatolia to the Armenians for an independent republic of Armenia in the Treaty of Sèvres, but the Treaty of Sèvres was annulled after the Turkish War of Independence by the Treaty of Lausanne, which awarded no territory to Armenians. The United States Senate refused to ratify the Treaty of Lausanne over the Armenian question, but after the other major powers ratified it the treaty prevailed as the final statement on Turkey’s postwar borders.<sup>27</sup> Because the Treaty of Lausanne was signed while the *Cartozian* case was pending and was ratified by the other major powers shortly after the trial but before Judge Wolverson issued his opinion in the case, the negotiations for an independent Armenia during the postwar period and their apparent failure at the time of the trial provide a critical context for understanding the significance of the *Cartozian* case for the many Armenian refugees who had fled the Ottoman Empire during the war.

After World War I, Armenian refugees began immigrating to the United States in greater numbers to escape the religious persecution and genocide they suffered in the Ottoman Empire.

Between 1920 and the time of the *Cartozian* trial in 1924 Armenian petitions for naturalization had increased by sixty percent due in part to the genocide and the desire of many Armenians to secure passports to return and help loved ones abroad.<sup>28</sup> The first statutory protection of refugees in the United States was a provision in the Immigration Act of 1917 that exempted immigrants “seeking admission to the United States to avoid religious persecution in the country of their last permanent residence” from act’s the literacy test,<sup>29</sup> an exemption specifically designed to protect Armenians and Russian Jews affected by the war. In a 1924 habeas corpus proceeding regarding Ossana Soghanalian’s request for an exemption to the literacy test under this provision, the record showed that “the Turks killed her father and mother, and killed or deported all the Christians in Hadjin, that she was seized and kept in a harem for 3 1/2 years, until she was saved by the Allied armies,” and that she pleaded that ““if the government of the United States sends me back, I will throw myself overboard, as I have no place to go.””<sup>30</sup>

Surprisingly, in the midst of this refugee crisis and growing doubts regarding the ability of the major powers to secure an independent republic of Armenia to address it, the United States Bureau of Naturalization renewed its challenge to the racial eligibility of Armenians for naturalization in *Cartozian*. Because by the time the case would be decided the Immigration Act of 1924 prohibited any alien “ineligible to citizenship” from entering the United States,<sup>31</sup> the case would also decide Armenian eligibility for immigration to the United States. The Government’s decision to challenge Armenian racial eligibility for naturalization at this particularly vulnerable time for the Armenian community profoundly shocked the Armenian diaspora. The Armenian weekly review *Gotchag* wrote that the case was of great concern to all Armenians, “rich and poor, educated and uneducated, big and small,”<sup>32</sup> and the *Washington Post* noted that it seemed “strange to raise the question of eligibility at this late hour.”<sup>33</sup> The move

threatened many Armenian refugees not only with the diplomatic abandonment in their efforts to secure an independent republic of Armenia but with exclusion by its greatest ally the United States, a set of conditions previously inconceivable. The Government's renewed challenge to Armenian racial eligibility for naturalization in *Cartozian* was apparently motivated by a desire to clarify conflicting rulings among lower courts after Armenian naturalization petitions increased during the postwar period and lower courts began to interpret dicta in the Supreme Court's opinion in *Thind* to indicate that historical residents of Asia such as the Armenians might be racially ineligible for naturalization. The Bureau of Naturalization's official policy before *Cartozian* was filed had been to take no action to question the racial eligibility of Asians other than the Chinese who were expressly denied eligibility for naturalization by the Chinese Exclusion Act and the Japanese who had consistently been held racially ineligible for naturalization by lower courts and by the Supreme Court in *Ozawa*.<sup>34</sup>

Although the defense in *Cartozian* argued that the "color line" had never been drawn against Armenians and that they readily assimilated with Europeans and Americans, historical evidence suggests that Armenian immigrants suffered significant racism and xenophobia in the United States during the early twentieth century. In Fresno, California, for example, where a substantial Armenian immigrant community resided, the social establishment referred to Armenians as "Fresno Niggers," excluded them from churches and social centers, and prohibited them from owning or leasing land through restrictive land covenants.<sup>35</sup> Armenians were also frequently excluded from American labor unions because they were regarded as "foreigners."<sup>36</sup> The discrimination Armenians faced in communities like Fresno probably contributed to the growing questions regarding Armenian whiteness among lower courts. These growing racial tensions generated by increased Armenian immigration were further compounded by the

Supreme Court's opinion in *Thind*, in which the Court commented in dicta that "there is much in the origin and historic development of the [naturalization act] to suggest that no Asiatic whatever was included" within the scope of the racial prerequisites in the act.<sup>37</sup>

The Court's opinion in *Thind* provides the most immediate precedent for *Cartozian*, and because the Court issued its opinions in *Ozawa* and *Thind* less than a year before the Government filed *Cartozian*, *Cartozian* also provides one of the earliest attempts by lower courts to interpret these important opinions of the Court regarding the racial prerequisites in the Naturalization Act. As discussed in Chapter 2, the Court's opinions in *Ozawa* and *Thind* rejected the argument that contemporary descendants of a European ancestor were necessarily "white" within the ordinary usage of the term absent evidence that they remained assimilable with Europeans and Americans. As discussed further below in this chapter, the defense in *Cartozian* responded directly to *Thind* by seeking to establish that unlike high caste Hindus, Armenians not only descended from a European ancestor but remained assimilable with Europeans and Americans despite residing in Asia for centuries. To accomplish this, the defense embraced the "historical interpretation" of race and advanced a narrative of a uniquely rigid racial segregation in Asia Minor evidenced by Armenian persecution by the Ottoman Turks, Kurds, and Syrian Muslims, a narrative that invoked the anti-Islamic sentiment of battles between Christianity and Islam during the Crusades, popular epithets of the Armenians as the "Christian people of ancient Eden," the "first people to embrace Christianity," and "guides to the Crusaders,"<sup>38</sup> and tensions between the United States and Turkey during the postwar period.

## THE *CARTOZIAN* TRIAL: A STORY OF PERSECUTION AND MARTYRDOM

Correspondence between the lead counsel for the Armenian defense and the Department of Labor indicates that the Government reassured Armenians that the case was friendly.<sup>39</sup> Apparently as a result, the Government presented virtually no opposition to Armenian racial eligibility for naturalization during the trial, but rested its case after introducing only a small amount of documentary evidence and brief testimony regarding reports from the Committee on Immigration and Naturalization of the House of Representatives classifying Armenians as originating in “Turkey in Asia.”<sup>40</sup> This stance is consistent with the Department of Labor’s policy of taking no position on the racial eligibility of individual naturalization petitioners, but instead merely informing courts of the petitioner’s race and prior judicial precedent regarding the eligibility of people belonging to that race. The Government otherwise relied on the position that the trial court and any appellate courts reviewing the case could take judicial notice of “historical, geographical and ethnological matters and works and authorities” to determine whether Armenians were “white,” a position with which the defense and Judge Wolverton agreed. Judicial notice allows courts to rely on the existence and truth of facts without the need for formal proof when they are “universally regarded as established by common notoriety, *e.g.*, the laws of the state, international law, historical events, the constitution and course of nature, main geographical features, etc.”<sup>41</sup> Despite decades of confusion regarding the meaning of the racial prerequisites to naturalization, the Government appears to have taken the position that because the Supreme Court had held that the racial prerequisite should be interpreted in accordance with “common knowledge,” racial classification under the act no longer required formal proof.<sup>42</sup> This position would have rendered the *Cartozian* trial unnecessary, and although Judge Wolverton initially agreed that he would probably want to look at materials on racial

classification outside of the trial record, he eventually declined to do so as reflected in a statement toward the end of his judicial opinion that “I have confined my investigation to the testimony in the record, and have made no attempt at independent investigation respecting race, color, assimilation, or amalgamation.”<sup>43</sup> Thus, because the Government presented almost no evidence in the case and Judge Wolverton declined to take judicial notice of facts outside of the trial record, the arguments and evidence presented by the Armenian defense provide the sole record from which the case was decided.

The defense presented a tripartite case for Armenian whiteness within the meaning of the naturalization act: (1) Armenians descended from European ancestors who originated in Europe and migrated to Asia Minor in the seventh century BCE in one of the many Indo-European invasions of Central Asia, (2) unlike descendants of the European invaders of the Indian subcontinent who were rejected as non-“white” in *Thind* because they had intermarried with the darkskinned Dravidians of the subcontinent, Armenians had remained “white” due to a unique geographical, linguistic, and religious isolation in Asia Minor, and (3) Armenians readily assimilated with Europeans and Americans as evidenced by their Christianity, their proximity to the people of the Russian Caucasus region who were the original inspiration for the Caucasian racial classification, and numerous marriages of Armenians to Europeans and Americans. Because Armenians claimed whiteness through one of the many Indo-European invasions of Central Asia like the Asian Indian petitioner had in *Thind*, the greatest challenge for the defense was to distinguish their case from that of high caste Hindus which had been rejected by the Supreme Court in *Thind*. The defense primarily sought to accomplish this by first claiming Armenians had remained isolated in Asia Minor due to their inassimilability with the Ottoman Turks, Kurds, and Syrian Muslims of the region through a historical narrative that represented

these Islamic groups as persecutors of the Armenian Christian minority in the Ottoman Empire and by claiming that in contrast to their inassimilability with these groups, Armenians were completely assimilable with Europeans and Americans.

The argument that Armenians descended from a European ancestor who originated in Europe and migrated to Asia Minor in the seventh century BCE reflected what was known at the time as the “classical hypothesis” of Armenian origins. The defense supported this claim through the expert testimony of Columbia University anthropologist Franz Boas, Harvard ethnologist Roland Dixon, and M. Vartan Malcolm, author of *The Armenians in America*. These experts cited a host of anthropological, archaeological, philological, geographical, historical, and travel authorities, beginning with the fifth century BCE. Greek historian Herodotus’s *Histories* and the first century BCE Greek geographer Strabo’s *Geography*, to support the conclusion that Armenians descended from Phrygian colonists who migrated to Asia Minor from Europe and belonged to the Alpine subdivision of the Caucasian race.<sup>44</sup> Significantly, although this was the prevailing hypothesis of Armenian origins at the time, the defense exaggerated the reliability of the hypothesis, the racial homogeneity that it reflected, and the marginality of competing hypotheses. The history of Armenian origins in Strabo’s *Geography* is laden with mythology and claims that Armenia was founded by the consolidation of a host of heterogeneous people from Central and Western Asia.<sup>45</sup> Moreover, in M. Vartan Malcolm’s book *The Armenians in America*, written less than a decade before the trial, Malcolm acknowledges that some scholars identified the Armenians with the non-Aryan Hittites of the Bible.<sup>46</sup> In a noteworthy example of the latter hypothesis, Mardiros Ananikian argues in the *Mythology of all Races* that the original inhabitants of the Armenian plateau, known as the Uuratrians, belonged to the same non-Aryan and non-Semitic peoples as the Hittites.<sup>47</sup> Nevertheless, the “classical hypothesis” that

Armenians descended from Indo-Europeans who migrated to Asia Minor from Europe was the prevailing theory of Armenian origins, endorsed by numerous authorities.<sup>48</sup>

The defense then claimed that despite residing in Asia Minor for centuries, Armenians had also remained “white” into the modern era due to their religious isolation which had “preserved their individuality, their religion, and their national characteristics, as against the conquering Turks, more than probably any other people.”<sup>49</sup> Harvard ethnologist Roland Dixon testified, for example, that the Armenians had maintained a remarkable homogeneity despite tremendous pressure from the Turks and other conquerors of the region:

The Armenians retained their nationality and national characteristics against the tremendous pressure brought to bear upon them by these conquerors for many centuries. They were practically the first nation to be converted to Christianity, and they have retained their faith in the face of tremendous odds from the early fourth century to the present time.<sup>50</sup>

Similarly, the defense asked Franz Boas to read the following translated excerpt from Felix von Luschan’s work *Die Tachtadschy*, in which von Luschan wrote that the racial homogeneity of Armenians was unparalleled anywhere in the world,

the homogeneity of this people which is not found in equal or similar degree in any other civilized nation, is interesting because it shows that owing to the striking geographical, linguistic and religious isolation of Armenia during its development and florescence, the type has remained pure and has been consolidated to such an extent that even today, many centuries after the fall of the empire, it has remained almost entirely uniform.<sup>51</sup>

Several witnesses denied they knew of even a single instance when an Armenian married a Muslim or converted to Islam other than by forced conversion.<sup>52</sup> When one witness was asked if he had ever known of any marriages between the Armenian race and the Turks or Kurds, he replied, “I have never heard of it,” and when another was pressed on cross-examination regarding whether there were not some Armenian Muslims he replied adamantly, “not one.”<sup>53</sup> In this testimony and elsewhere in the transcript, the defense argues that unlike the Asian Indians of

the Indian subcontinent, Armenians had retained their “white” racial identity through the centuries due to their unique geographical, linguistic, and religious isolation.

The defense claimed that this unparalleled isolation and racial purity was due to the inassimilability of Armenians with their Islamic neighbors, evidenced by a history of religious persecution suffered by the Armenians since their conquest by the Ottoman Turks, ultimately culminating in the Hamidian massacres and the Armenian genocide of World War I. This argument invoked deep historical prejudices between Christianity and Islam which remain evident in the United States since the September 11, 2001 terrorist attacks on New York and Washington, D.C.,<sup>54</sup> but which were also a particularly powerful source of American identification with Armenians during the late nineteenth and early twentieth century. When American missionaries began arriving in the Ottoman Empire and establishing Christian missionaries and schools in the mid-nineteenth century, the Christian communities in the United States developed a powerful identification with Armenians. As Judge Francis Cabot Lowell notes in *Halladjian*, in the European imagination Armenia was “continuously associated with the place and landscape of the Bible,” particularly Armenia’s national symbol, Mount Ararat, the site of God’s covenant with Noah in the biblical book of Genesis, located in Armenia by Renaissance cartographers.<sup>55</sup> Recognizing this mythic power of Armenia in mid-nineteenth century America, Walt Whitman wrote in his poem to the peoples of the world, “*Salut au Monde*,” in *Leaves of Grass*,

*You thoughtful Armenian pondering by some stream of the  
Euphrates! You peering amid the ruins of Nineveh!  
You ascending Mt. Ararat!*<sup>56</sup>

The Hamidian massacres were widely published and had a profound impact on the American public, even prompting debate about military intervention in the region before the turn of the

century.<sup>57</sup> In part as a result of the sympathy generated by these massacres, the early twentieth century became an era of popular epithets about the Armenians, referring to them as the “Christian people of ancient Eden,” the “first people to embrace Christianity,” and “guides to the Crusaders.”<sup>58</sup> The Armenians were also frequently called “the starving Armenians” in recognition of the starvation that flowed from their treatment by the Ottoman Turks, and after a charity drive spread news of the Armenian genocide through this epithet, American children were often told to remember “the starving Armenians” when admonished to clean their plates.<sup>59</sup> As President Herbert Hoover would later comment of the period, “the name Armenia was in the front of the American mind” and “known to the American schoolchild only a little less than England.”<sup>60</sup>

As a result of this powerful identification with Armenians, Americans were particularly shocked by the Armenian genocide of World War I and the politics of genocide denial that followed. In the immediate postwar period, numerous books and films about the genocide proliferated. Most notably, in 1918, Henry Morgenthau’s memoirs of his service as American ambassador to Turkey were published under the title *Ambassador Morgenthau’s Story* to wide critical acclaim,<sup>61</sup> including a lengthy chapter entitled “The Murder of a Nation” that recounts the horrific details of the Armenian genocide which Morgenthau describes as “one of the most hideous chapters of modern history,”<sup>62</sup> lamenting that “the whole history of the human race contains no such horrible episode.”<sup>63</sup> The same year *Ambassador Morgenthau’s Story* was published, the epic drama of Aurora Mardiganian’s struggle to survive her forced march across Anatolia was published as a book and adapted to silent film under the title *Ravished Armenia*, depicting the terror of genocide on the screen for the first time.<sup>64</sup> By these and other cultural

representations of the Armenian genocide that proliferated during the postwar period, the shock and trauma of the events was still fresh in the American mind at the time of the *Cartozian* trial.

Although the events are not specifically referenced in the judicial opinion in *Cartozian*, the transcript reveals that the Hamidian massacres of the 1890s and the more recent Armenian genocide of World War I were frequently discussed during the trial. Two Armenian witnesses testified that they and their parents had escaped from Turkey during the Hamidian massacres to seek refuge in the United States.<sup>65</sup> M. Vartan Malcolm testified that Armenians came to the United States in larger numbers during the 1890s because of the sympathy that the American missionaries showed to them, noting that “from that time on these people have come here because of their religious persecution by the Turks and because they found friends among the American missionaries in Turkey,”<sup>66</sup> and that the reason for the dramatic increase in Armenian applications for naturalization in the United States since 1920 was that Armenians, particularly bachelors “whose parents have been driven out of their home land through the last Turkish massacres and the war, needed a passport and other protections to go back and find their lost loved ones.”<sup>67</sup> James Barton, foreign secretary of the American Board of Commissioners for Foreign Missions who headed the relief expedition in Turkey after World War I, also referenced the Turkish deportations of Armenians during the war.<sup>68</sup> Moreover, at the end of M. Vartan Malcolm’s testimony on the first day of the trial, he explained to Judge Wolverton that although President Wilson had awarded Armenia territory for an independent republic of Armenia it no longer existed and “today the entire Armenian people are scattered all over the Near East, and the possibility of Armenians going back to the old country is absolutely dead.”<sup>69</sup> When Judge Wolverton asked if the Armenians had any governmental organization in Turkey, Malcolm explained, “we have no Armenia, your Honor,” “there is no Armenia now,” adding,

I must state that we lost a million Armenians during the war. There were before the war four million Armenians in all the world. We lost one quarter of the entire population. No other nation has lost so many as the Armenians. And there are now in all the world about two and a half million Armenians, and most of them are in the Caucasus. They took refuge there in order to save themselves.<sup>70</sup>

When asked if Syria was more populated than Armenia, another witness responded “well, certainly, because the Armenians have been decimated in their numbers, and scattered broadcast.”<sup>71</sup> The defense emphasized that as a consequence of these conditions, if their citizenship were denied or revoked the Armenian refugees would be a stateless people, a “people without a country.”<sup>72</sup> In this respect, the defense’s argument was nearly identical to Pandit’s argument that he and his wife would be rendered stateless if his naturalization certificate were canceled in *Pandit*, but in *Cartozian* the defense appealed to the threat of Turkish aggression rather than the Indian caste system.

The defense also specifically represented the Armenians as Christian martyrs who suffered Turkish persecution because they would not recant their Christian faith.<sup>73</sup> The defense frequently reiterated the claim that the Armenians were “the oldest Christian nation” and had remained devout in their Christian faith through the centuries.<sup>74</sup> Numerous witnesses testified to the positions of Armenians in Christian churches in Armenia, Europe, and America, including a number of witnesses who were ministers, pastors, or Sunday school teachers, and the defense’s tabulation of hundreds of responses to a questionnaire distributed to Armenian American men lists detailed Christian affiliations for most of the respondents.<sup>75</sup> Paul Rohrbach testified of how Armenians in Venice and Vienna belonged to the Armenian church, described as “a very old branch of Christendom,” even detailing how the Armenian monasteries in Venice and Vienna had “very large libraries and a very noted printing office” used for “the most difficult printing work in the eastern language of Europe,”<sup>76</sup> and James Barton testified that the Armenians were

“pastors of our churches” and everywhere “recognized as a Christian race.”<sup>77</sup> The defense also emphasized that Armenians retained their Christian faith by withstanding “the onslaught of Mohammedanism,” or as Roland Dixon testified, “against tremendous pressure” and “in the face of tremendous odds” due to their persecution by the Ottoman Turks, Kurds, and Syrian Muslims of Asia Minor.<sup>78</sup>

Finally, in even more explicit terms the defense appealed to anti-Islamic sentiment by explicitly framing Armenian Christianity as superior to the Islamic faith of the Ottoman Turks, Kurds, and Syrian Muslims of Asia Minor. The attorneys for the Armenian defense repeatedly exploited the epithet of Armenians as “guides to the crusaders” by asking witnesses what effect the Crusades had on the Armenians<sup>79</sup> and one witness attributed the downfall of the last kingdom of Armenia to the fact that “Armenians had given all of their men protectors and a great deal of the resources of their country” to the European crusaders.<sup>80</sup> Other witnesses testified that “the social conception of Mohammedans is that a woman is a chattel; the Christian conception of a woman is that she is the equal of the man,” that unlike the monogamy of Armenians “the Mohammedan is permitted to have four wives, legal wives, and as many concubines as his pocketbook will permit,” and that Armenians and Christian civilization were “entirely superior to the Mohammedan faith” and “superior to the Mohammedan ideals.”<sup>81</sup>

The defense’s representation of Islam as an inferior religion and its association of Christianity with whiteness and Islam with “black pagans, Turks, and Saracens”<sup>82</sup> is disturbing on many levels, but particularly when considered in light of the fact that Armenian efforts to achieve a “white” status by representing Ottoman Turks, Kurds, and Syrians as non-“white” for purposes of naturalization was a dubious legal conclusion at the time. Although the Supreme Court’s dicta in *Thind* that “no Asiatic whatever” might be racially eligible for naturalization

provided an opportunity for litigants to advocate that certain groups from the Middle East were racially ineligible for naturalization, most authorities had held that Turks, Syrians, and Arabs were “white” within the meaning of the naturalization act and continued to until the racial prerequisites were repealed in 1952.<sup>83</sup> In 1909, after the Chief of the Naturalization Division of the Bureau of Immigration and Naturalization claimed that “Turks, peoples of the Barbary states and Egypt, Persians, Syrians, and ‘other Asiatics’” were racially ineligible for naturalization in statements restrictively interpreting the racial prerequisite to naturalization, the interpretation was almost immediately withdrawn after it met with vigorous objection not only from the Ottoman Empire but from the State Department and the Department of Justice, and Secretary of Commerce and Labor Charles Nagel later wrote in correspondence that he had taken immediate steps to ensure “a discontinuance of any aggressive measures” by the Government against these groups.<sup>84</sup> Similarly, after a federal district court canceled the naturalization certificate of an Arab petitioner in 1942 based on the conclusion that Arabs were “part of the Mohammedan world and . . . a wide gulf separates their culture from that of the predominately Christian peoples of Europe,” both the Bureau of Naturalization and later courts repudiated the decision, noting that it had long been the administrative policy of the United States not to object to Arab naturalizations.<sup>85</sup> In *Halladjian*, Judge Lowell rejected the Government’s claim that “the Turks have never commingled with Europeans, nor can it be said with any truth that they are descendants of Europeans,” noting instead that “for many centuries the Turks have ruled in Europe and Asia over Christians of many names, and have employed Christians for many purposes,” and that “the Turks, indeed, both socially and sexually, commingled with Europeans to an unusual degree.”<sup>86</sup> Furthermore, President Wilson formally recognized Syrian American citizenship when he signed a presidential proclamation encouraging Americans to make

donations to the American Red Cross to help Armenians and Syrians stricken in World War I, writing in his proclamation that “thousands of citizens of the United States in practically every State of the Union were either born in Syria or are the children of Syrians born in that country.”<sup>87</sup> As these sources reflect, the majority of executive and judicial authorities concluded that Middle Easterners were racially eligible for naturalization, a fact neither the Armenian defense nor the Government addressed during the *Cartozian* trial. Instead, the Armenian defense simply adopted the useful fiction that Turks, Kurds, and Syrian Muslims were not “white” and were therefore racially ineligible for naturalization as a foil against which to establish Armenian whiteness by virtue of the segregation of these groups in Asia Minor.

This fiction raises difficult questions about the defense in *Cartozian*, the effect of the racial prerequisites in the naturalization act, and the Supreme Court’s interpretation of the racial prerequisites in *Ozawa* and *Thind*. If the Armenians were as inassimilable with Ottoman Turks, Kurds, and Syrian Muslims as they claimed, and these groups were also “white” and therefore racially eligible for naturalization, not to mention birthright citizenship under the Fourteenth Amendment, the defense arguably proved that Armenians were inassimilable with many early twentieth century Americans. The defense’s central premise was that Christianity determined not only their assimilability with Europeans but their inassimilability with Asian racial groups through an indissoluble link between whiteness and Christianity, and the defense frequently heralded the claim that Armenia was the first nation to make Christianity a national religion. The First Amendment prohibits the establishment of a national religion in the United States, however, and American religious life was significantly more diverse by the early twentieth century.<sup>88</sup> As mentioned in Chapter 1, numerous courts held that petitioners from Islamic, Zoroastrian, Hindu, Sikh, and Buddhist religious backgrounds were “white” and therefore racially eligible for

naturalized citizenship, not to mention the children born to these and other religious groups who became citizens by birth under the Fourteenth Amendment.

By emphasizing an indissoluble link between whiteness and Christianity in their effort to establish that they were not truly “Asian,” the defense ironically cast doubt on Armenian assimilability with non-Christian whites in the United States. This problem also extends to the defense’s reliance on the prospect of Armenian statelessness to create sympathy for their cause. Could the Allied abandonment of Armenian aspirations for an independent republic of Armenia have signified the conclusion that Armenians did not truly belong to the West? One writer complained that instead of extending protection to Armenia, the Allies abandoned Armenia to her enemies after World War I and that American Christians were washing their hands of Armenian suffering because “they, and the enemies of Armenia, denounce a Union of Church and State.”<sup>89</sup> The defense’s effort to create a religious identification with American Christians in *Cartozian* had already failed during the postwar negotiations for an independent republic of Armenia for reasons that could also have doomed their claim of racial eligibility for naturalization in the United States.

Although the rhetorical strategy of the defense succeeded in securing a favorable ruling in *Cartozian*, it also reflects what Kenneth Burke calls the “paradox of purity” or the “paradox of the absolute,” implicit in “any term for a *collective* motivation, such as a class, nation, the ‘general will,’ and the like,” where the collective motive only becomes “pure” by negating any individual motive.<sup>90</sup> The defense could only prove that Armenians had retained their racial “purity” despite residing in Asia for centuries by establishing that they had remained in a state of proportionately “pure” isolation from the Ottoman Turks, Kurds, and Syrian Muslims through a narrative in which Armenians were represented as the passive victims of religious persecution by

these Islamic neighbors, a narrative that suggests the ritual purification through violence essential to martyrdom.<sup>91</sup> By connecting Armenian racial identity to this persecutor-victim complex Armenian racial “purity” was made proportionate to the negation of Armenian national agency.

The extreme claims of purity that result from this paradox are evident not only in the defense’s claim that Armenians were absolutely inassimilable with the Ottoman Turks, Kurds, and Syrian Muslims in Asia Minor, but in its corresponding claim that Armenians were absolutely assimilable with contemporary Europeans and Americans. In support of the latter claim, the defense offered a wealth of evidence including Armenians’ proximity to the people of the Caucasus region of southwestern Russia who formed the original inspiration for the Caucasian racial classification, Armenian Christianity and support for Europeans during the Crusades, marriages between Armenians and Europeans and Americans, statistical evidence regarding prior Armenian naturalizations in the United States, and evidence of Armenian membership in American churches and professional, civic, and fraternal organizations.<sup>92</sup> Notably, even in conjunction with these direct forms of assimilability evidence the defense often highlighted Armenian support of the American war effort during World War I, frequently citing Armenians who provided service in the United States military, the national guard and state defense corps, and draft and exemption boards, as well as one who was appointed by President Wilson to serve as a Four Minute Man who spoke in support of America’s participation in World War I and one who served as War Work Secretary of the Y.M.C.A.<sup>93</sup> This evidence all appeals to Armenian and American solidarity as brothers in arms against threats to the nation.

In its effort to establish that Armenians assimilated readily with contemporary Europeans and Americans the defense also offered evidence that Armenian immigrant communities in

Europe and America did not form enclaves but readily interspersed with the native populations of Europeans and Americans, and this testimony often took a particularly disturbing turn, at times using metaphors of disappearance, loss, and consumption in support of a claimed assimilation so absolute that it suggested a continuation of the eliminationist campaign the Armenians had recently escaped in the war. When asked about Armenian “colonies” in Europe, for example, M. Vartan Malcolm testified that an Armenian colony in Lemberg, Poland that had once numbered approximately 200,000 Armenians had become assimilated into the Polish population to such an extent that when he visited Lemberg a decade before the trial he found “no trace” of the Armenian colony there with the exception of “the great buildings which these Armenians had built, and the names of the streets in a certain section of the town,” because “the entire colony had disappeared by assimilating with the native population.”<sup>94</sup> Similarly, Malcolm testified that the oldest Armenian colony in Europe, which was in Holland, “has disappeared, and there are no traces of it left,” that an Armenian colony in Marseilles, France, too, “has disappeared,” and that Armenian colonies in Italy and England “have been lost within the native populations.”<sup>95</sup> Franz Boas read from a French writer explaining that the Armenians had probably not “played an important part in [French] national history and demography” because immediately upon their arrival they “submerged themselves in the great French family” and were “devoured” by the French nation.<sup>96</sup> Similarly, one Armenian witness testified that as soon as Armenians learned to speak English, they immediately separated from each other and became “very readily consumed in American life.”<sup>97</sup>

This testimony suggests particularly extreme claims of assimilation, an assimilation as absolute as the eliminationist campaigns such as the Armenian genocide of World War I. The testimony suggests that the assimilability of Armenians was considered proportionate to the

“decay” of Armenian immigrant communities in Europe and the United States,<sup>98</sup> and the metaphors of disappearance, loss, decay, and consumption not only reflect the continued elimination of the Armenian identity elsewhere praised as resilient to eliminationist efforts, but negates Armenian national agency by representing Armenians as passive objects in this process of assimilation much like their agency is negated by their representation as passive victims of Turkish persecution. As Richard Hovannisian remarked to the Permanent Peoples’ Tribunal during its session on the Armenian genocide in 1985, one result of the Allies’ failure to establish an independent republic of Armenia during the post-World War I period was a life of exile and dispersion for Armenians, who were “subjected to inevitable acculturation and assimilation on five continents and facing an indifferent and even hostile world that preferred not to remember.”<sup>99</sup> The defense’s rhetorical strategy in *Cartozian* not only reflects the acceptance of this fate, but by denying Armenians’ frustrated protonationalist aspirations the defense denies the suffering brought by the forced acculturation and assimilation that is often a continuing harm of genocide. As Primo Levi writes of the Holocaust of World War II, “we had not only forgotten our country and our culture, but also our family, our past, the future we had imagined for ourselves, because, like animals, we were confined to the present moment.”<sup>100</sup> The assimilability that the defense sought to establish in *Cartozian* reflects a metaphorical continuation of the eliminationist campaign directed at Armenian history, culture, and identity, and while this conflict was largely avoided during the trial it clearly emerged during the final hours of testimony.

The conflict between Armenian protonationalism and the absolute assimilability of Armenians with Europeans and Americans becomes most apparent during the final hours of the trial when the Government’s attorney cross-examines M. Vartan Malcolm about his 1919 book

*The Armenians in America*, where in stark contrast to Malcolm's unqualified endorsement of Armenian assimilability with Americans during his testimony in *Cartozian* he writes that Armenians are less than entirely assimilable to American life.<sup>101</sup> In one passage of the book, for example, Malcolm states that "an independent Armenia will naturally attract many Armenians who are now in the United States" because Armenians "have no home here" and would long to return to their birthplace in Armenia which they could never forget. In other passages, Malcolm claims that "as a rule Armenians marry within their own race" and warns Armenian men against marrying American women. Elsewhere he cites among the reasons Armenians should return to Armenia the fact that they had been excluded from American trade unions because they were regarded as "foreigners" and that their ignorance of the English language and American customs would lead to nothing but frustration if they remained in America.<sup>102</sup> When the Government's attorney confronts Malcolm with the contradiction between such passages and his assertions that Armenians were entirely assimilable to American life, Malcolm explains frankly that he had written *Armenians in America* in connection with the Paris Peace Conference and the negotiations of the United States and other Allied powers for the independent republic of Armenia that President Wilson had promised. Malcolm explains that all of that changed after the plan for an independent Armenia had failed, and he acknowledges that the purpose of his book was argumentative:

What I say there does not mean that the Armenians are not faithful and good citizens of America, but that the Armenian colony in America would furnish some material which, in some measure, would help to build up an Armenian state, and help to improve conditions in the East and to make a better world and less war.<sup>103</sup>

This exchange highlights the difficult identity issues facing Armenian refugees during the postwar period and the conflict between the Armenian testimony of assimilability offered to satisfy the requirements of the Supreme Court's opinion in *Thind* and the protonationalist

aspirations that had grown doubtful by the time of the *Cartozian* trial. The paradoxical position reflected in the defense's case reveals this tension in a way the judicial opinion ignores and illustrates the problems that evidence of assimilability presented in the racial prerequisite cases.

### **THE HISTORICAL INTERPRETATION OF RACE AND THE ROLE OF NARRATIVE IN THE CARTOZIAN OPINION**

Judge Wolverton did not issue his opinion in *Cartozian* until July 27, 1925, more than a year after the trial. As discussed in Chapter 2, Judge Wolverton had already issued two significant opinions interpreting the racial prerequisite in the naturalization act. It was Judge Wolverton's district court opinion that the Supreme Court had recently reversed in *Thind*,<sup>104</sup> and a decade earlier he published an opinion in *In re Ellis* holding that a Syrian petitioner was "white" and was therefore racially eligible for naturalization.<sup>105</sup> In *Ellis*, Judge Wolverton had relied almost exclusively on the Government's admission that the petitioner was "white," but rejected the Government's argument that the racial prerequisite in the naturalization act included only those whites who at the time the act was passed either lived in Europe or on the American continent and were "inured to European governmental institutions." Judge Wolverton briefly cited Daniel Brinton's *Races and Peoples*, Augustus Keane's *The World's Peoples*, and Joseph Deniker's *The Races of Man*, and noted that from these sources the Government's attorney admitted that the petitioner was "a member of what is known as the white or Caucasian race."<sup>106</sup> In *Thind*, Judge Wolverton relied on previous lower court precedent, citing cases holding that Armenians, Asian Indians, and Parsis were "white" within the meaning of the naturalization act as particularly illustrative.<sup>107</sup> Judge Wolverton offered no other authorities to support his decision in *Thind*.

In *Cartozian*, Judge Wolverton could not adopt the approach he took in either *Ellis* or *Thind*. Instead, he adopted the defense's theory of the case in its entirety, although as will be discussed below, Judge Wolverton's opinion manifests a marked absence of narrativity that raises intriguing questions about his response to the "historical interpretation" of race that had recently emerged in case law interpreting the racial prerequisites in the naturalization act. The defense's tripartite case for Armenian racial eligibility for naturalization provides the basic structure of Judge Wolverton's opinion: (1) Armenians descended from premodern "white" ancestors who originated in Europe and migrated to Asia Minor in the seventh century BCE, (2) Armenians had remained "white" due to their unique geographical, linguistic, and religious isolation in Asia Minor, and (3) Armenians readily assimilated with Europeans and Americans (although with regard to the latter part of this argument Judge Wolverton places greater emphasis on Armenia's proximity to and alliance with the Russian people of the Caucasus region who were the original inspiration for the Caucasian racial classification than on the other assimilability evidence cited in his opinion).

Judge Wolverton begins his defense of Armenian whiteness with the foundational premise that Armenians belonged to the Alpine subdivision of the Caucasian race, beginning this section of his opinion with the simple declaration, "That the Armenians are of Alpine stock can scarcely be doubted." He then lists numerous authorities supplied by the defense to support the classical hypothesis of Armenian descent from Europeans who migrated to Asia Minor in the seventh century BCE, citing Herodotus's *Histories*, Strabo's *Geography*, Daniel Brinton's *Races and Peoples*, William Ripley's *Races of Europe*, Henry Lynch's *Armenia, Travels and Studies*, and Alfred Haddon's *The Races of Man and Their Distribution*, as well as the testimony of Franz Boas and Roland Dixon.<sup>108</sup> Judge Wolverton uses hyperbolic language to defend this hypothesis,

writing that “all the evidence points to” the European origins of Armenians, that the continuity of the Alpine race across Asia Minor “cannot be doubted,” that the authors and writers relied on by Boas and Dixon are “entirely reliable” and their conclusions accepted “without hesitation,” and that the evidence is so overwhelming that “nobody doubts” it.<sup>109</sup> With this language, Judge Wolverton ignores and perhaps even suppresses the alternative hypotheses of more heterogeneous Armenian origins discussed in Judge Lowell’s opinion in *Halladjian* and M. Vartan Malcolm’s book *The Armenians in America*.

After advancing his foundational claim that Armenians had European origins, Judge Wolverton presents a highly condensed version of the historical narrative justifying the conclusion that Armenians had remained “white” despite residing in Asia for centuries. In contrast to the detail given this narrative by the Armenian defense, however, Judge Wolverton reduces the narrative to the following two sentences in the *Cartozian* opinion:

Although the Armenian province is within the confines of the Turkish Empire, being in Asia Minor, the people thereof have always held themselves aloof from the Turks, Kurds, and allied peoples, principally, it might be said, on account of their religion, though color may have had something to do with it. The Armenians, tradition has it, very early, about the fourth century, espoused the Christian religion, and have ever since consistently adhered to their belief, and practiced it.<sup>110</sup>

Unlike Judge Wolverton’s conclusion that the evidence of Armenians’ descent from European ancestors is so overwhelming that “nobody doubts it,” the passage above is fraught with doubt and hesitation and reflects a markedly ambiguous agency.

The most significant language in the passage is the phrase “held themselves aloof,” particularly the single word “aloof.” By condensing the defense’s narrative of Islamic persecution and martyrdom in Asia Minor to the brief statement that the Armenians “held themselves aloof” from the Ottoman Turks, Kurds, and allied peoples of the region, Judge Wolverton introduces an ambiguity regarding the agency in the narrative that suggests an

inability or unwillingness to clarify it. The Armenians are given the active voice in this passage, but are they also given the active agency?<sup>111</sup> Who is doing what to whom in Judge Wolverton's account? Did the Armenians discriminate against the Turks, vice versa, or both, and who was to blame for the rigid segregation between the two groups? This was, after all, at issue in the case. Much of the testimony had addressed whether or not the Armenian communities in Europe and the United States formed enclaves, leading the defense to make such strong claims of Armenian assimilability with Europeans and Americans as that Armenian colonies in Europe and America had left "no trace" of themselves or been "devoured" or "consumed" by the local populations. Moreover, one of the familiar claims of genocide denial is that the perpetrators were the real victims because the killing was committed in self-defense and the perpetrators also suffered casualties. Turkey claimed that Armenians were separatists who provoked the atrocities against them by forming alliances with foreign powers, for example, and that the Armenian genocide was justified by the fact that Armenians joined Russian forces during the war to form a "fifth column" inside the Ottoman Empire.<sup>112</sup> The ambiguity of the word "aloof" in the *Cartozian* opinion suggests a deliberate evasion of this central question of who was responsible for the isolation of Armenians from the Ottoman Turks, Kurds, and allied peoples in Asia Minor.

The word "aloof" originally derives from "a loof," a combination of the preposition "a," referring to motion toward a position of contact, and the noun "loof," referring to the palm of the hand. The combined form "a loof" came to refer to the injunction to a rudder operator of a ship to "keep your loof" in the act of turning the ship toward the wind and clear of the direction where it might otherwise drift. From this arose the sense of "steering clear of," or "giving a wide berth to" anything with which one might otherwise come in contact, as in the exhortation to "keep aloof." The word may also describe a lack of sympathy or community with a person or group, in

the sense of someone who stands “coldly aloof” from others.<sup>113</sup> The latter meaning is more often associated with the verb “hold,” or alternatively “stand” or “keep,” as in the phrases, “stood aloof,” “kept aloof,” “held aloof,” or Judge Wolverton’s phrase “held themselves aloof.” This sense of “aloof” may even refer to a person ignoring pleas of help or appeasement, as in the final act of Shakespeare’s *Hamlet* when Laertes tells Hamlet, “I stand aloof, and will no reconciliation,”<sup>114</sup> or may suggest a resistance offered to temptation, echoing its earlier use as an injunction to turn a ship toward the wind so that it does not drift.

This tension between those who “hold themselves aloof” and the group denied sympathy or community creates a remarkably ambiguous representation of agency. What is the nature of the relationship between the Armenians and their Islamic neighbors in Asia Minor in this narrative? How does it explain centuries of Armenian isolation despite the close proximity to these people? Have the Armenians “held themselves aloof” for fear of being massacred, or of being seduced (either religiously or sexually)? Judge Wolverton adds that the Armenians held themselves aloof based “principally . . . on account of their religion, though color may have had something to do with it,” an explanation that compounds the ambiguity of the passage rather than clarifies it. The unequivocal claim that the Armenians “always” held themselves aloof from these people was necessary to distinguish the case from *Thind*, yet the certainty of the claim is almost immediately contradicted by the hesitation of merely claiming that “it might be said” that this isolation was “principally” due to religion but that color “may” have had “something” to do with it.<sup>115</sup> Moreover, the trial record reflects no discussion of “color” having anything to do with the relationship between the Armenians and the Ottoman Turks, Kurds, and allied peoples of Asia Minor, at least not explicitly. The social stratification of the Ottoman *millet* system was based on religious rather than racial difference.<sup>116</sup> Are the Turks, Kurds, and allied people of Asia Minor

persecutors or victims in this passage? What does the answer reflect about Armenian assimilability in the diverse population of early twentieth century America? The passage leaves these questions unanswerable.

At nearly the same time as the trial in *Cartozian*, the word “aloof” also appeared in the district court proceedings in *Pandit*. When an expert witness testified during an evidentiary hearing in *Pandit* that a high caste Hindu who became an American citizen would lose his high caste status in India, Judge McCormick interrupted the witness to ask if Brahmins in India exercised rights as British subjects, adding, “I mean, do they do it because of necessity or through choice? Does the Brahmin as a caste, the Hindu caste, *hold itself aloof* from the rest of the citizenry and accept the political status simply because they have to accept it?”<sup>117</sup> In this exchange, Judge McCormick uses “aloof” in a phrase nearly identical to Judge Wolverton’s in *Cartozian*, but in the context of asking whether a Brahmin’s exercise of his rights as a British subject was voluntary. Judge McCormick’s use of “aloof” in *Pandit* leaves no ambiguity; for the Brahmin caste to “hold itself aloof” in the context of Judge McCormick’s question is unmistakably an act of choice.

A different use of “aloof” appears in a 1951 opinion of the United States Board of Immigration Appeals holding that the Kalmyk people of southeastern European Russia, while originally “a tribe of Mongolian stock” and Asiatic in origin, were “white” within the meaning of the naturalization act by virtue of their identification with Europeans by several generations of affinity, education, cultural activity, and several decades of Soviet rule in Russia. This case is discussed at greater length in Chapter 4, but to limit the scope of its opinion the Board carefully distinguishes the Kalmyks of southeastern European Russia to whom the opinion refers from the Kalmyks who migrated east to China in 1771, because unlike the former group of Kalmyks the

latter “*stayed aloof* from the neighboring Russian and non-Russian tribes” out of “fear of Russian Tsarist influence and domination.”<sup>118</sup> This use of “aloof” suggests a passive or reactionary agency as the Kalmyks fled the Russian Tsar, perhaps suggesting that they were chased or driven. Like Judge McCormick’s use of “aloof” in *Pandit*, the agency in the Board’s use of “aloof” is relatively clear, although the agency lies as much with the Tsar as with the Kalmyks. By contrast to these examples, however, the agency of Judge Wolverton’s claim that the Armenians “held themselves aloof” from the Ottoman Turks, Kurds, and allied peoples of Asia Minor remains unclear.

Studies of the racial prerequisite cases that focus exclusively on the direct evidence of assimilability discussed in Judge Wolverton’s opinion also neglect the fact that a close reading of the opinion reveals that he only relies on evidence of Armenian marriages to Europeans and Americans, prior Armenian naturalizations and membership in American social clubs, and Armenian use of the English language to corroborate a more figural argument regarding Armenians’ affiliation with the Russian people of the Caucasus region of southwestern Russia. After advancing his extraordinarily condensed version of the defense’s historical narrative, Judge Wolverton argues that Armenians are assimilable with contemporary Europeans and Americans based on the geographical and political proximity of Armenians to the Russian people of the Caucasus region who originally inspired the Caucasian racial classification, an argument he notes is one of analogy:

Whatever analogy there may be or may exist between the Caucasian and the white races that may be of assistance in the present controversy, the alliance of the Armenians with the Caucasians of Russia has ever been very close. Indeed, the Armenians have for many generations, possibly centuries, occupied territory in Caucasian Russia, have intermingled freely and harmoniously with that people, and the races mix and amalgamate readily and spontaneously.<sup>119</sup>

The prominence given this argument in Judge Wolverton’s opinion significantly outweighs the emphasis placed on it by the defense. Although during Franz Boas’s testimony he quoted a passage from Johann Friedrich Blumenbach’s *On the Natural Variety of Mankind* in which Blumenbach explains that he named the Caucasian racial classification after Mount Caucasus because he considered the people of that region “the most beautiful race of men” and “the autochthones of mankind,”<sup>120</sup> the transcript is otherwise entirely silent on the etymology of the Caucasian racial classification. Furthermore, the only testimony regarding the Armenian alliance with the Russian people of the Caucasus region came when M. Vartan Malcolm testified that the Armenians took refuge in the Caucasus to save themselves during World War I.<sup>121</sup> Judge Wolverton’s metonymic claim that Armenians’ proximity to and affiliation with the Russian people of the Caucasus region demonstrated that Armenians were “white” is also curious in light of the Supreme Court’s rejection of the Caucasian racial classification as an index for the meaning of the racial prerequisites in the naturalization act, unless Judge Wolverton believed the metonymic association supplied evidence of the ordinary usage of the term “white.”

Although prior studies of *Cartozian* have largely focused on the evidence of Armenian marriages to contemporary Europeans and Americans, prior Armenian naturalizations and membership in American social clubs, and Armenian use of the English language that is all referenced toward the end of the *Cartozian* opinion, it is significant that Judge Wolverton first emphasizes the claim that Armenians are metonymically “white” by virtue of their association with the Russian people of the Caucasus region. Moreover, after making this argument Judge Wolverton pauses to state that “the status of the [Armenian] people thus evolved is *practically conclusive* of their eligibility to citizenship in the United States, seeing that they are of Alpine stock, and so remain to the present time, without appreciable blending with the Mongolian or

other kindred races.”<sup>122</sup> Contrary to the prior scholarly emphasis on assimilability evidence in the latter half of the opinion, Judge Wolverton clearly indicates his satisfaction with the evidence discussed at this earlier point as “practically conclusive” of the question. He only catalogues additional assimilability evidence after remarking, “but to pursue the inquiry further, it may be confidently affirmed that Armenians are white persons, and moreover that they readily amalgamate with the European and white races.”<sup>123</sup> He then catalogues testimony and statistical evidence introduced by James Barton, Franz Boas, Roland Dixon, Mrs. Otis Floyd Lamson, M. Vartan Malcolm, and Paul Rohrbach regarding Armenian assimilability with Europeans and Americans, including statistical evidence introduced by Boas and Malcolm.<sup>124</sup>

When Judge Wolverton’s opinion in *Cartozian* is considered as a whole, it is also apparent that his condensed narrative of Armenian isolation in Asia Minor is not the only passage in which the agency of the events is ambiguous, but instead the opinion generally fails to clarify the agency in the events described and attributes almost no agency to Armenians. Judge Wolverton represents the Armenians as a people whose origins are shrouded in mythology, then migrate from Europe to Asia Minor, “hold themselves aloof” from their Islamic neighbors until they are driven out of the region and consumed by the native populations in Europe and the United States. In Judge Wolverton’s opinion, the Armenians truly are a people without a country because they have no national agency. The absence of a clear agency in the opinion is also reflected in an absence of transitional words and phrases, any clear framework linking the beginning and ending, or a coherent order of meaning in which the relationships between events are ordered into a purposive sequence. While the opinion depends on a particular historical account of Armenian isolation in Asia Minor, Judge Wolverton’s account of this isolation is presented with virtually no narrative development, which is also lacking throughout the opinion.

Instead, the sections before and after the historical account read like a catalogue of evidentiary items with no explanation of the relationship between them or recognition of their contested nature.

The absence of narrativity in Judge Wolverton's opinion is particularly interesting in light of the emergence of the "historical interpretation" of race in judicial interpretations of the racial prerequisites in the naturalization act because the style of the opinion suggests the form of natural history that Hayden White attributes to annals in contrast to fully developed histories. Unlike a fully realized history, White argues, annalists show no concern for any system of human morality or law but present "a world in which things happen to people rather than one in which people do things," a world in which events "appear to belong to the same order of existence as the natural events which bring either 'great' crops or 'deficient' harvests, and are as seemingly incomprehensible."<sup>125</sup> Despite the Supreme Court's rejection of racialist science in *Thind*, the style of Judge Wolverton's opinion in *Cartozian* suggests a world of biological determinism, perhaps reflecting a continued ambivalence about the "historical interpretation" of race despite the fact that the entire opinion hinges on the defense's narrative of Armenian isolation in Asia Minor through the centuries. Throughout the opinion, Judge Wolverton introduces rhetorical appeals to scientific authority and statistical evidence in close proximity to the historical narratives on which the opinion most centrally relies, as though the certainty of science might compensate for the contingency of histories steeped in mythology, tradition, and figurality.

What is perhaps most remarkable about Judge Wolverton's opinion in contrast to the trial transcript in *Cartozian*, however, is the opinion's deafening silence regarding the Armenian genocide and the threat of statelessness Armenians faced were they denied eligibility for

immigration and naturalization in the United States. Even in *Halladjian*, written years before the Armenian genocide of World War I, Judge Lowell wrote that since the Armenians' final conquest by the Turks they had been "oppressed by the Turks, and have looked vainly to Europe for relief."<sup>126</sup> In *Pandit*, Judge McCormick spoke passionately of how the statelessness question appealed to the conscience of the court and could not be left out of consideration.<sup>127</sup> As is apparent from the transcript in *Cartozian*, the persecution of the Armenians by Ottoman Turks, Kurds, and Syrian Muslims was a central theme of the defense's case, offered to explain why Armenians remained "white" despite living in Asia for centuries while Asian Indians had not remained "white" in the Indian subcontinent. Judge Wolverton was clearly presented with an exigency to speak to this issue, but neglects to even allude to it in his opinion. This raises particularly difficult questions given the silences that have attended many genocides and the Armenian genocide in particular, long referred to as the "forgotten genocide," the "unremembered genocide," the "hidden holocaust," or the "secret genocide."<sup>128</sup> Is Judge Wolverton's silence and the absence of a clear narrative in the *Cartozian* opinion a part of this legacy of silences surrounding genocide?

As the first genocide in modern history, the Armenian genocide left spectators as well as survivors with a powerful feeling of speechlessness, the sense that they were confronting an event for which there were not yet words. As one writer attempted to describe it during the postwar period,

Those bodies endured the most frightful physical suffering possible to human flesh and nerves—more than your imagination can conceive after reading all the horrors of Indian torture; of shipwreck and starvation in open boat or on desert island; of famine and pestilence in India or China; of being lost on the trackless desert; of being mangled and burned in a wreck of railroad train or of theater or of home; or of tortures by Inquisition or by Roman Empire. All that you have experienced or witnessed or read or heard of pain and horror pales before the dreadful realities of Armenian famine and massacre.<sup>129</sup>

This author's effort to negatively define the traumatic experiences of the genocide by reference to the horrors that they surpass is a commonplace of genocide discourse, and genocide often poses such unique challenges to speech that silence is considered the only appropriate response to it. In his study of the oral narratives of Holocaust survivors, Lawrence Langer concludes that the frequent refusal of Holocaust survivors to speak of their trauma is motivated in part by an "anxiety of futility," the certainty that those who most need to understand will not understand and may even be alienated by the incomprehensibility of the events. Because such events dispel the idea that choice is "purely an internal matter, immune to circumstance and chance,"<sup>130</sup> they contest the notion of autonomous agency on which law, narrative, and history depend and even the concept of narrativity itself, a view perhaps most famously suggested by Theodor Adorno's statement that to write poetry after Auschwitz would be barbaric.<sup>131</sup> Perhaps Judge Wolverton believed the only appropriate response to the history of violence at the heart of the defense's case was silence or that the history of this violence was so incomprehensible as to defy narrativity. The answer to this question is ultimately unknowable, but the problem of narrativity in the context of genocide offers a possible explanation of the broader narrative refusal reflected in Judge Wolverton's opinion.

## **MARTYRDOM AND TRANSCENDENCE**

The Department of Labor originally intended to appeal Judge Wolverton's decision to the Supreme Court, but after the change of administrations following President Harding's death brought opposition to an appeal, the Department agreed not to appeal the decision.<sup>132</sup> The record of the proceedings in *Cartozian* offers the most complete record available of the rhetorical strategies adopted in a racial prerequisite case and reflects how the Supreme Court's opinions in

*Ozawa* and *Thind* affected subsequent lower court cases involving the racial prerequisites to naturalization. In particular, the transcript reveals that the defense's theory of the case was almost all that Judge Wolverton heard during the trial and that he almost adopted the defense's arguments verbatim. The defense's rhetorical strategy centered on a strategy of unification against a common enemy in the form of the Ottoman Turks, Kurds, and Syrian Muslims of Asia Minor who were responsible for the persecution of Armenians for decades and most recently during the Armenian genocide of World War I, invoking memories of the Crusades and the Mongol invasions of medieval Europe reflected in legends of Attila the Hun, Genghis Khan, and Tamerlane which had been invoked in American war propaganda during World War I,<sup>133</sup> as well as existing tensions between the United States and Turkey. The transcript reveals the significance of this rhetorical strategy to the case in a way that is obscured by the judicial opinion and exposes the difficulties the strategy posed for protonationalist refugees like the Armenians who were forced to remain in the United States and other nations when negotiations for a nation of their own failed.

The transcript specifically reflects the rhetoric of martyrdom as a strategy of uniting a community through persecution by a common enemy. The Armenian defense represented Armenian suffering at the hands of Ottoman Turks, Kurds, and Syrian Muslims as that of Christian martyrs who were persecuted because they resisted conversion to Islam. By constructing Christianity as an essential component of Western civilization and Islam as an essentially foreign and hostile religion, the defense represented Armenian suffering as a direct consequence of their European identity, caused by hateful racism directed at them by their Islamic neighbors because they were "white" and not Asian. The defense's rhetoric of martyrdom also reflected a common historiography regarding Armenian persecution in the

Ottoman Empire at the time, which frequently represented Armenian history in terms of martyrdom. In an article published in *The New Armenia* shortly before *Cartozian*, for example, Herbert Lee wrote that “when . . . we remember that [Armenians] were slain *because* they would not deny Christ, may we not assert that here is the supreme call to every Christian in the world?”<sup>134</sup> Shortly after the trial, Mardiros Ananikian dedicated his essay on Armenian mythology in *The Mythology of all Races* to “the memory of the Armenian hosts which fought in the last war for freedom and of the great army of martyrs who were atrociously tortured to death by the Turks.”<sup>135</sup> By representing martyrs as heroic witnesses to a common cause that unites a community through their suffering, the rhetoric of martyrdom has a powerfully transcendent effect, as suggested by Herbert Lee’s claim that Armenian martyrdom was a “call to every Christian in the world.” In *Cartozian*, the rhetoric of martyrdom represented Armenian persecution as a rallying cry for solidarity of Armenians and Americans, who had formed a powerful identification with Armenians in the nineteenth and early twentieth centuries and whose missionaries continued to suffer Turkish aggression directed at Armenians even during the postwar period.

A number of scholars have noted that the willingness of individuals to sacrifice themselves, often to the point of their lives, coalesces the boundaries of national and group identity.<sup>136</sup> In *Burning Zeal: The Rhetoric of Martyrdom and the Protestant Community in Reformation France, 1520-1570*, Nikki Shepardson examines the rhetorical strategies of martyrologists during the French Reformation and argues that the rhetoric of martyrdom in their texts reflects a significance for martyrdom that extended far beyond the martyr’s individual conscience by serving “to console and unite the faithful, while at the same time defining their world view vis-à-vis persecution.”<sup>137</sup> The creation of Huguenot community and communal

identity during the French Reformation, she claims, was “intrinsically tied to the shared experience of persecution and suffering” through the rhetoric of martyrdom.<sup>138</sup> The purpose of martyrological narratives during this period was “to respond to the needs of a fledgling community struggling for their existence and sense of identity,” and the rhetoric of martyrdom found in such texts bound the Huguenot community together on a psychological level and created a powerful sense of solidarity by defining it as a “community of suffering.” Shepardson also argues that this solidarity provided equality for all of those included in the community regardless of age, class, gender, or nationality, through “the universality of martyrdom—a phenomenon transcendent of the traditional boundaries and hierarchies within a community.”<sup>139</sup> The rhetoric of martyrdom incorporated the individual experiences of the Huguenot community into a “larger, more profound, and meaningful context” by emphasizing “the faithful’s responsibility not only to God, but the individual’s responsibility to the community as well.”<sup>140</sup>

Like the transcendent function that Shepardson claims the rhetoric of martyrdom served in the Huguenot community of the French Reformation, the defense’s rhetorical strategy in *Cartozian* incorporated the suffering of Armenians during the Armenian genocide into a larger, more profound, and meaningful context of a conflict between East and West. The defense’s strategy positioned Armenians on the Western side of this conflict and emphasized the need for solidarity between Armenians and Americans in common defense against Turkish aggression, a need that transcended any other conflicting goals or competition that the Armenian immigrant community might have offered to the local populations in the United States. The absolute terms in which the defense represented Armenian assimilability with Americans and inassimilability with the Ottoman Turks, Kurds, and Syrian Muslims also reveals the central importance of agency to the rhetorical strategy of unifying against a common enemy. The defense attributed the

active agency in their narrative to the persecutors, not to the Armenians, representing Armenians instead as victims with little or no capacity to act. As Sam Keen writes of political propaganda, “he who projects the power and responsibility for doing evil onto the enemy loses the ability to take initiative, to act,”<sup>141</sup> and this negation of agency on the part of the victim of suffering at the hands of an enemy may be viewed as an important aspect of the rhetorical strategy of unifying against a common enemy and even crucial to its effect. Social psychologists have noted the relationship of this phenomenon to the willingness of men to deny their individual interests and sacrifice themselves on behalf of their group. Because the transcendence that is the goal of uniting against a common enemy requires some negation of the groups merging to form a new unity, the relationship between persecutory agency and the paradox of purity may be particularly close.<sup>142</sup>

As discussed in Chapter 2, the Ghadr movement also adopted the rhetoric of martyrdom by, among other things, running an advertisement in its journal *Ghadr* calling for “heroic soldiers” to fight in Hindustan with the reward of “martyrdom,”<sup>143</sup> echoing a long Sikh tradition of martyrdom that celebrated the martial glory and sacrifices of Sikh martyrs.<sup>144</sup> But the source of suffering of these Ghadr martyrs was the British government, an ally of the United States in World War I that Americans were unlikely to identify as a threat. This conflict between the British government and Indian independence activists is also reflected in *Thind*. By contrast, although *Pandit* did not explicitly draw on the rhetoric of martyrdom, the list of sacrifices he made to become an American served a similar rhetorical purpose while reframing the enemy not as the British government but as the Indian caste system itself. As a consequence of his decision to become an American and marry a “white” American woman, Pandit had lost his high caste status in India, been disinherited of a substantial estate, and been stripped of his doctoral degree

in India, and both he and his wife Lillian stood to lose substantial property rights for their decisions. These sacrifices were represented as part of the broader conflict between Asian Indians and the West, but positioned the Pandits on the Western side of the conflict, their sacrifices representative of the “unalliability” of Asian Indians toward Western civilization.

By illustrating how the rhetorical strategy of uniting against a common enemy operates in the racial prerequisite cases that followed *Ozawa* and *Thind*, the *Cartozian* case also reveals the failure of the “historical interpretation” of race. Although the courts that adopted this interpretation often openly recognized, as Ian Haney López notes, that race is not “a biologically defined group, a static taxonomy, a neutral designation of difference, an objective description of immutable traits, a scientifically defensible division of humankind, [nor] an accident of nature unmolded by the hands of people,”<sup>145</sup> but a highly contingent political commodity that is socially, culturally, and historically constructed, they nevertheless continued to apply the racial prerequisites to naturalization through historical narratives that were equally if not more capable of creating racial divisions than biological determinism. Rather than conclude that the instability of racial classifications suggested that the racial prerequisites to naturalization were so ambiguous that they should be disregarded, the courts that adopted the “historical interpretation” of race constructed racial classifications by imagining American identity against perceived threats to the nation, consistent with Robert Ivie’s claim that the possibility of American identity is diminished without the rhetorical construction of a threatening other.<sup>146</sup> The fact that in *Cartozian* the defense constructed Armenian whiteness by representing Ottoman Turks, Kurds, and Syrian Muslims as non-“white” when they and other groups from the Middle East had largely been held to be “white” for purposes of naturalization even suggests that the form of this rhetorical strategy itself may have been particularly important. The rhetorical construction of

Ottoman Turks, Kurds, and Syrian Muslims as non-“white” in *Cartozian* also highlights the divisive nature of this rhetorical strategy, particularly when enmity is translated into racial terms. As Janice Okoomian notes of *Halladjian*, Armenian whiteness “rested on Turkish racial difference,” but that difference was not only debatable on a cultural level but a fiction in the context of the racial prerequisites to naturalization.<sup>147</sup>

Following World War I and the emergence of displaced and stateless persons like the Armenians, the rhetorical strategy of unifying against a common enemy particularly served the plight of such groups as a form of asylum before legal protections for refugees had fully developed. As discussed in Chapter 2, the appeal to statelessness appeared in *Pandit* in the early 1920s, was followed by *Cartozian*, and it appears in the opinions in two cases before the United States Board of Immigration Appeals during the early cold war to be discussed in the next chapter. In the Board of Immigration Appeals cases, the Board determined the racial eligibility for naturalization and admission to the United States of Kalmyk and Tatar refugees from the Soviet Union by highlighting their persecution by the Soviet government. This rhetorical strategy reflects a pattern during World War II and the early cold war of continually shifting the basis of enmity as new threats to the nation emerged. These new threats ultimately resulted in the racial prerequisites to naturalization being removed from the act in 1952,<sup>148</sup> but not before the policy of Asian exclusion was further eroded as eligibility was extended to people in China, India, and the Philippines to bolster their support for the war effort and interpretations of the racial prerequisites to naturalization broadened from similar motives.

## NOTES

<sup>1</sup> Transcript of Evidence, *United States v. Cartozian*, No. E-8668 (D. Or. May 8-9, 1924), at 17-18, in Civil and Criminal Case Files, District of Oregon (Portland), Records of the District Courts of the United States, Record Group 21, National Archives and Records Administration Pacific Alaska Region, Seattle, Wash. (hereinafter “*Cartozian Trial Transcript*”).

<sup>2</sup> Ibid., 126-27.

<sup>3</sup> Ibid., 60-61.

<sup>4</sup> See Earlene Craver, “On the Boundary of White: The *Cartozian* Naturalization Case and the Armenians, 1923-1925,” *Journal of American Ethnic History* 28 (2009): 30; Phillip E. Lothyan, “A Question of Citizenship,” *Prologue: Quarterly of the National Archives* 21 (1989): 272.

<sup>5</sup> See *Cartozian Trial Transcript*, a-d, 104; *United States v. Cartozian*, 6 F.2d 919 (D. Or. 1925). See also Craver, “On the Boundary of White,” 44-51.

<sup>6</sup> See *In re Halladjian*, 174 F. 834 (C.C.D. Mass. 1909).

<sup>7</sup> John Tehranian, *Whitewashed: America’s Middle Eastern Minority* (New York: New York Univ. Press, 2009), 51-54.

<sup>8</sup> See Lothyan, “A Question of Citizenship,” 14. Likewise, in a recent article discussing the archival records in the case, Earlene Craver primarily focuses on direct evidence of assimilability. See Craver, “On the Boundary of White,” 56.

<sup>9</sup> López, *White by Law*, 4-5.

<sup>10</sup> See Matthew Frye Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (Cambridge, Mass.: Harvard Univ. Press, 1998), 240.

<sup>11</sup> See Ariela J. Gross, *What Blood Won’t Tell: A History of Race on Trial in America* (Cambridge: Harvard Univ. press, 2008), 235; see also Janice Okoomian, “Becoming White: Contested History, Armenian American Women, and Racialized Bodies,” *MELUS* 27 (2002): 213-37 (emphasizing direct evidence of assimilability). At least one later court also emphasizes the direct evidence of assimilability in *Cartozian*. In *In re Hassan*, Judge Arthur Tuttle cites *Cartozian* in support of his holding that an “Arab, being a native of Yemen,” was not a “white person” and was therefore racially ineligible for naturalization. See *In re Hassan*, 48 F. Supp. 843 (E.D. Mich. 1942). Judge Tuttle explains his decision in part by stating that

it is recognized that in *United States v. Cartozian* . . . , the District Court held an Armenian from Asia Minor eligible to citizenship as a white person. The court there found, however, that the Armenians are a Christian people living in an area close to the European border, who have intermingled and intermarried with Europeans over a period of centuries. Evidence was also presented in that case of a considerable amount of intermarriage of Armenian immigrants to the United States with other racial strains in our population. These facts serve to distinguish the case of the Armenians from that of the Arabians.

Ibid., 846.

<sup>12</sup> Indeed, most Armenian immigrants who came to the United States during the early twentieth century came as refugees. See, e.g., Leslie A. Davis, *The Slaughterhouse Province: An American Diplomat’s Report on the Armenian Genocide, 1915-1917* (New Rochelle, N.Y.: Aristide D. Caratzas, 1989).

<sup>13</sup> *Richard II*, *The Oxford Shakespeare: The Complete Works*, 2nd ed., ed. John Jowett, William Montgomery, Gary Taylor, and Stanley Wells (Oxford: Clarendon, 2005), 4.1.83-86 (“Many a time hath banish’d Norfolk fought / For Jesus Christ in glorious Christian field / Streaming the ensign of the Christian cross / Against black pagans, Turks, and Saracens”). This passage of *Richard II* is quoted in Judge Lowell’s opinion in *In re Halladjian*, 174 F. 834, 841 (C.C.D. Mass. 1909).

<sup>14</sup> See Murray Edelman, *Constructing the Political Spectacle* (Chicago: Univ. of Chicago Press, 1988), 78, 83. In his discussion of the rhetorical construction of political enemies, Edelman writes that “the highlighting of foreign enemies to weaken domestic dissent or divert attention from domestic problems is a classic political gambit because it is so often an effective one.” *Ibid.*

<sup>15</sup> See, e.g., Brewer, *Why America Fights*, 46-86. The postwar tension between the United States and Turkey related in large part to the many Armenians who were rendered refugees by the Armenian genocide of World War I and to Turkish resistance to efforts to establish an independent republic of Armenia. Although President Wilson initially awarded territory to establish an independent Armenia in the Treaty of Sèvres, after Turkish nationalists gained independence for Turkey they renegotiated the terms of postwar peace in the Treaty of Lausanne which established the current borders of Turkey and awarded no territory to Armenia. The United States Senate refused to ratify the Treaty of Lausanne, but it nonetheless prevailed as the final negotiation of Turkey’s postwar borders after the other major powers ratified it. See generally Stanford J. Shaw and Ezel Kural Shaw, *History of the Ottoman Empire and Modern Turkey*, 2 vols. (New York: Cambridge Univ. Press, 1976-1977). Even before World War I, conflict between the United States and the Ottoman Empire had emerged over the racial prerequisite in the naturalization act. On November 1, 1909, shortly after the Chief of the Naturalization Division of the Bureau of Immigration and Naturalization issued a restrictive interpretation of the racial prerequisite that concluded Turks, Syrians, and other “Asiatics” were non-“white” and therefore racially ineligible for naturalization, the Turkish embassy vigorously protested the Bureau’s position. See generally “Turkey Will Protest,” *Washington Post*, November 1, 1909; “Conflicting Views Taken of Asiatic Exclusion,” *Dallas Morning News*, November 6, 1909; “Aliens Refused Naturalization,” *Duluth (Duluth, MN) News Tribune*, September 29, 1909; “Race Row Up To Courts,” *Washington Post*, November 4, 1909. This protest included an open letter from the Ottoman Charge d’Affairs denouncing the Bureau’s position in the *Washington Post*, calling the Bureau’s interpretation of the act as “pernicious as it is artificial, since it is calculated to hinder the cause of peace, amity, and brotherhood among the natives, that cause so eloquently preached from the American pulpit and tribune.” A. Rustem Bey, “Thinks Law Unfair,” *Washington Post*, November 3, 1909.

<sup>16</sup> Because expert witnesses Paul Rohrbach, Roland Burrage Dixon, James Barton, and Franz Boas testified by deposition in *Cartozian*, textual references to the transcript may alternatively or collectively refer to the transcript of evidence of the two-day bench trial held on May 8-9, 1924 in Portland, Oregon and to the transcript of expert depositions held between April 5-9, 1924. The transcripts of these expert depositions were introduced as evidence during the trial and so also constitute part of the trial record. The notes to this dissertation identify whether one or both transcripts serve as documentation of content referenced in the text.

<sup>17</sup> Robert A. Ferguson, “Becoming American: High Treason and Low Incentive in the Republic of Laws,” in *The Rhetoric of Law*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: Univ. of Michigan Press 1994), 103.

<sup>18</sup> Peter Baker, “Obama Marks Genocide Without Saying the Word,” *New York Times*, April 25, 2010.

<sup>19</sup> Vahakn N. Dadrian, “The Armenian Genocide: An Interpretation,” in *America and the Armenian Genocide of 1915*, ed. Jay Winter (Cambridge: Cambridge Univ. Press, 2003), 52.

<sup>20</sup> See Cathie Carmichael, *Genocide Before the Holocaust* (New Haven: Yale Univ. Press, 2009), 3.

<sup>21</sup> See *ibid.*, 3, 10; see also Adam Jones, *Genocide: A Comprehensive Introduction*, 2nd ed. (New York: Routledge, 2011), 149.

<sup>22</sup> As Lawrence Douglas writes of Israeli Attorney General Gideon Hausner’s approach to the trial of Adolph Eichmann for his part in the Holocaust of World War II, Hausner treated the Nazis’ crime as “both the act of physical annihilation and the more profound attempt to erase memory itself—both of the cultural life of a people and of the crimes of the final solution.” Lawrence Douglas, *The Memory of Judgment: Making Law and Memory in the Trials of the Holocaust* (New Haven: Yale Univ. Press, 2001), 106.

<sup>23</sup> See Peter Balakian, *The Burning Tigris: The Armenian Genocide and America's Response* (New York: HarperCollins, 2003), 149.

<sup>24</sup> See generally Balakian, *The Burning Tigris*, 11; Donald Bloxham and Fatma Müge Göçek, "The Armenian Genocide," in *The Historiography of Genocide*, ed. Dan Stone (New York: Palgrave Macmillan, 2008), 360; Robert Koolakian, *Struggle for Justice: A Story of the American Committee for the Independence of Armenia, 1915-1920* (Dearborn: Armenian Research Center, Univ. of Michigan-Dearborn, 2008), 21-23. For recent news regarding Turkey's aggressive campaign to deny the Armenian genocide, see, e.g., David Rennie, "France to Jail Deniers of Armenian Genocide," *The Daily Telegraph (London)*, October 13, 2006; Sebnem Arsu, "Turks Angry Over House Armenian Genocide Vote," *New York Times*, October 12, 2007.

<sup>25</sup> See Balakian, *The Burning Tigris*, 331-47; Jones, *Genocide*, 149; Significantly, these proceedings resulted in a number of guilty verdicts and executions before they were abandoned. See, e.g., Vahakn N. Dadrian, "The Naim-Andonian Documents on the World War I Destruction of Ottoman Armenians: The Anatomy of a Genocide," *International Journal of Middle East Studies* 18 (1986): 311-60; Vahakn N. Dadrian, "The Turkish Military Tribunal's Prosecution of the Authors of the Armenian Genocide: Four Major Court-Martial Series," *Holocaust and Genocide Studies* 11 (1997): 28-59; see also "The Turkish Military's Prosecution," *Washington Post*, February 13, 1919. The Turkish Attorney General appointed to prosecute the perpetrators of the Armenian genocide in the Turkish war crimes tribunals after the war himself denounced the crimes against the Armenians as "crimes against humanity." See Dadrian, "The Turkish Military Tribunal's Prosecution," 34.

<sup>26</sup> See Balakian, *The Burning Tigris*, 331-47; see also Shaw and Shaw, *History of the Ottoman Empire*; Richard G. Hovannisian, "Confronting the Armenian Genocide," in *Pioneers of Genocide Studies*, eds. Samuel Totten and Steven Leonard Jacobs (New Brunswick, N.J.: Transaction, 2002), 34.

<sup>27</sup> See Balakian, *The Burning Tigris*, 331-47. In 1994, the Soviet Union granted independence to the current Republic of Armenia which consists of portions of eastern Armenia annexed by the Soviet Union after World War I.

<sup>28</sup> See Cartozian Trial Transcript, 138, 141; see also Craver, "On the Boundary of White," 56.

<sup>29</sup> *Immigration Act of 1917*, 64th Cong., 2nd Sess., *U.S. Statutes at Large* 39 (1917): § 3. In a 1924 habeas corpus proceeding regarding Ossana Soghanalian's admission to the United States as an alien fleeing religious persecution and seeking an exemption under this provision, the record showed that "the Turks killed her father and mother, and killed or deported all the Christians in Hadjin, that she was seized and kept in a harem for 3 1/2 years, until she was saved by the Allied armies," and that she pleaded that "if the government of the United States sends me back, I will throw myself overboard, as I have no place to go." *Johnson v. Tertzag*, 2 F.2d 40, 41 (1st Cir. 1924).

<sup>30</sup> *Johnson v. Tertzag*, 2 F.2d 40, 41 (1st Cir. 1924).

<sup>31</sup> See *Immigration Act of 1924*, 68th Cong., 1st Sess., *U.S. Statutes at Large* 43 (1924): §§ 13(c), 28(c).

<sup>32</sup> See Craver, "On the Boundary of White," 56; Lothyan, "A Question of Citizenship," 272.

<sup>33</sup> "The Status of Armenians," *Washington Post*, August 1, 1925.

<sup>34</sup> See, e.g., Correspondence from Commissioner of Naturalization Richard Campbell to the Secretary of Labor dated March 22, 1913, in Records of the Immigration and Naturalization Service of the United States, Record Group 85, Box 1573, File 19783/43, National Archives Building, Washington, DC (confirming the Bureau of Naturalization's policy of not "raising the question in any way as to whether aliens applying for citizenship came within the [racial eligibility] provisions of section 2169" of the naturalization act).

<sup>35</sup> See Michael Bobelian, *Children of Armenia: A Forgotten Genocide and the Century-Long Struggle for Justice* (New York: Simon and Schuster, 2009), 110. Both President Eisenhower and then Vice President Richard Nixon owned property containing such anti-Armenian covenants. See *ibid.*

<sup>36</sup> See M. Vartan Malcolm, *The Armenians in America* (Boston: The Pilgrim Press, 1919), 83-126.

<sup>37</sup> *United States v. Thind*, 261 U.S. 204, 214 (1923).

<sup>38</sup> Koolakian, *Struggle for Justice*, 23.

<sup>39</sup> See, e.g., Correspondence from M. Vartin Malcolm to Commissioner of Naturalization Raymond Crist dated Jan. 8, 1924, in Records of the Immigration and Naturalization Service of the United States, Record Group 85, Box 1573, File 19783/43, National Archives Building, Washington, DC (writing that “we realize that . . . the suit commenced by the Government [in *Cartozian*] is friendly, and on every level I have heard the expression of the hope that we may and will win . . .”).

<sup>40</sup> The Government introduced several reports of the Committee on Immigration and Naturalization of the United States House of Representatives showing that Armenian immigration was categorized as originating from “Turkey in Asia,” George Washington’s statement in his Farewell Address to the American people that “with slight shades of difference, you have the same Religion, Manners, Habits, and political principles,” and a statement from John Quincy Adams’s writings expressing the expansionist doctrine of “manifest destiny,” writing that “the whole continent of North America appears to be destined by Divine Providence to be peopled by one nation, speaking one language, professing one general system of religious and political principles, and accustomed to one general tenor of social usages and customs.” See *Cartozian Trial Transcript*, 4 (referencing George Washington’s “The Farewell Advice of the Father of His Country” and John Quincy Adams’s “One Nation in North America”). The Government’s attorneys did not state what they found significant about these items but they appear to support the Government’s argument that the racial prerequisite to naturalization was only intended to include Western Europeans, who from tradition, teaching, and environment would be predisposed toward the American form of government and readily assimilate with the American people.

<sup>41</sup> *Black’s Law Dictionary*, 6th ed., s.v. “Judicial notice”; see also Bryan A. Garner, *A Dictionary of Modern Legal Usage*, 2nd ed. (Oxford: Oxford Univ. Press, 1995), s.v. “Judicial notice; judicial cognizance”).

<sup>42</sup> See *Cartozian Trial Transcript*, 8.

<sup>43</sup> *United States v. Cartozian*, 6 F.2d 919, 922 (D. Or. 1925). See also *Cartozian Trial Transcript*, 1-5.

<sup>44</sup> The works cited include: Johann Friedrich Blumenbach, “On the Natural Variety of Mankind”; Friedrich Braun, “The Aboriginal Population of Europe and the Origin of the Teutonic People”; Daniel Brinton, *Races and Peoples: Lectures of the Science of Ethnography*; Roland Dixon, *The Racial History of Man*; Wynfrid Duckworth, *Studies from the Anthropological Laboratory*; Louis Figuier, *Les Races Humaines*; Madison Grant, *The Passing of the Great Race*; Alfred Haddon, *The Races of Man and Their Distribution*; Jean Baptiste Julien d’Omalius d’Halloy, *Des Races Humaines ou Eléments d’ Ethnographie*; Johann Heinrich Hübschmann, *Armenische Studien*; Paul Kretschmer, *Der nationale Name der Armenier Haik*; Felix von Luschan, *The Early Inhabitants of Western Asia*; Henry Lynch, *Armenia: Travels and Studies*; Jacques de Morgan, *The History of the Armenian People: From the Remotest Times to Present Day*; William Ripley, *Races of Europe*; Otto Schrader, *Prehistoric Antiquities of the Aryan Peoples: A Manual of Comparative Philology and the Earliest Culture*; and Giuseppe Sergi, *Man, His Origin, Antiquity, Variety and Geographical Distribution*. See *Transcript of the Depositions of Dr. Paul Rohrbach, Roland Burrage Dixon, Dr. James L. Barton, and Dr. Franz Boas, United States v. Cartozian*, No. E-8668 (D. Or. Apr. 5, 8-9, and 11, 1924), 5, in Significant Civil and Criminal Case Files, 1899-1925, District of Oregon (Portland), Records of U.S. Attorneys and Marshals, Record Group 118, National Archives and Records Administration Pacific Alaska Region, Seattle, Wash. [hereinafter *Cartozian Deposition Transcript*]; *Cartozian Trial Transcript*, 101, 128-29.

<sup>45</sup> In the same chapter of *The Geography* that the defense cites, Strabo reports that the Armenians descended from Jason and Medea, a reference to the epic myth by which Jason, who was raised by a centaur, led the Greek Argonauts on a quest for the Golden Fleece which was guarded by a dragon that never slept. See Strabo, *The Geography of Strabo*, trans. H.C. Hamilton and W. Falconer (London: G. Bell, 1903), 269. Strabo also writes that the ancient origin of Armenia derives from Armenus of Armenium, who accompanied Jason in his expedition into Armenia, and that the Jasonia serve as proof of Jason's expedition. See *Ibid.*, 272; cf. *The Reader's Encyclopedia: An Encyclopedia of World Literature and the Arts*, ed. William Rose Benét (New York: T.Y. Crowell, 1948), 45, 555, 707. In addition to these mythic origins of the Armenians, Strabo notes in *The Geography* that Armenia was originally a small country enlarged by the conquest of surrounding areas, consolidating under one language an array of heterogeneous peoples. See Strabo, *The Geography*, 269, 273-74.

<sup>46</sup> See Malcolm, *The Armenians in America*, 49.

<sup>47</sup> See Mardiros H. Ananikian, "Armenian Mythology," in *The Mythology of All Races*, Vol. 7, ed. Canon John Arnott MacCulloch (Boston: Marshall Jones, 1925), 7-8. According to Ananikian, the Armenians conquered the Urartians and reduced many to serfdom, imposing on them the Armenian name, language, religion, and civilization, such that "it is very natural that such a relation should culminate in a certain amount of fusion between the two races." *Ibid.*

<sup>48</sup> In *In re Halladjian*, Judge Lowell probably offers the most accurate conclusion regarding Armenian racial origins, writing that "the present inhabitants of western Asia have their racial descent so mixed that there are many individuals who cannot safely be assigned by descent to any one race, however comprehensive." 174 F. at 837-38. According to Judge Lowell, racial mixing was equally apparent in European history:

Only where a people has remained without considerable emigration or immigration, substantially unmixed, in the same country for a very long time, do racial and geographical boundaries coincide. The inhabitants of no considerable part of Europe belong to a race thus unmixed. In what is called by analogy a "mixed race," the cross must have been ancient, and the hybrid must have persisted without much later crossing. In nearly all Europe the mixture is not only ancient, but has continued to modern times, and even to the present day.

*Ibid.* For an excellent study of how historians rhetorically constructed a homogeneous Anglo-Saxon race out of a heterogeneity of races in Britain, see Cohen, *Hybridity, Identity and Monstrosity*, 25.

<sup>49</sup> See Cartozian Deposition Transcript, 36; Cartozian Trial Transcript, 103.

<sup>50</sup> Cartozian Deposition Transcript, 35.

<sup>51</sup> *Ibid.*, 82; Cartozian Trial Transcript, 103.

<sup>52</sup> Cartozian Trial Transcript, 14-15, 17-18, 51-53, 66.

<sup>53</sup> *Ibid.*, 17, 52. Similarly, Mrs. Floyd Lamson testified that she had never known of an Armenian woman who had married a Muslim. *Ibid.*, 66.

<sup>54</sup> See Tehranian, *Whitewashed*, 51-54; Salah D. Hassan, "Arabs, Race and the Post-September 11 National Security State," *Middle East Report* 224 (2002): 16-21.

<sup>55</sup> *Halladjian*, 174 F. at 841. Renaissance cartographers also located the Garden of Eden and other sacred sites of biblical literature in or near Armenia, see Balakian, *The Burning Tigris*, 29-30, and the Caucasian racial classification had long centered around hypotheses about the location of Mount Ararat and the subsequent spread of Noah's progeny, see Keevak, *Becoming Yellow*, 74, 80.

<sup>56</sup> Walt Whitman, *Leaves of Grass*, eds. Harold W. Blodgett & Sculley Bradley (New York: New York Univ. Press, 1965), 146.

<sup>57</sup> See Balakian, *The Burning Tigris*, xix, 4, 10-11, 66-67, 207, 282-85, 345. On September 10, 1895, for example, decades before the Holocaust of World War II, a *New York Times* headline described a massacre of Armenians in the Ottoman Empire as “Another Armenian Holocaust.” See “Another Armenian Holocaust,” *New York Times*, September 10, 1895.

<sup>58</sup> Koolakian, *Struggle for Justice*, 23.

<sup>59</sup> See Balakian, *The Burning Tigris*, 75, 291.

<sup>60</sup> Herbert Hoover, *The Memoirs of Herbert Hoover: Years of Adventure 1874-1920* (New York: MacMillan, 1951), 385.

<sup>61</sup> See Henry Morgenthau, *Ambassador Morgenthau's Story* (Garden City, N.Y.: Doubleday, 1918), 301-25.

<sup>62</sup> *Ibid.*, 305.

<sup>63</sup> *Ibid.*, 322.

<sup>64</sup> Balakian, *The Burning Tigris*, 314-17.

<sup>65</sup> See Cartozian Trial Transcript, 19, 56-57.

<sup>66</sup> *Ibid.*, 101-04.

<sup>67</sup> *Ibid.*, 138.

<sup>68</sup> See Cartozian Deposition Transcript, 46.

<sup>69</sup> Cartozian Trial Transcript, 153-54.

<sup>70</sup> *Ibid.*, 155.

<sup>71</sup> *Ibid.*, 18. Likewise, after being asked if the Syrians had not suffered similar treatment, M.B. Parounagian testified that only one part of Syria had suffered similar persecution but “only I know about the Armenian race and their persecution, their sufferings.” *Ibid.* As indicated in the epigraph at the beginning of this chapter, Parounagian also testified that Armenians never married Turks unless it was “by force” and Armenians never adopted Islam except “for force, perhaps, they have been made, during the massacres, to save their lives.” *Ibid.*, 17-18.

<sup>72</sup> Because an Armenian who left Turkey forfeited his personal and property rights and the Turkish government would not issue a passport to him, he would be unable to travel without an American passport. See, e.g., Cartozian Trial Transcript, 68, 130-31. As one witness testified, “we are a people with no country, and it is a great privilege for every Armenian to call America as their own country.” *Ibid.*, 72.

<sup>73</sup> This was a familiar narrative regarding Armenian history in the Ottoman Empire. In an article published in *The New Armenia* shortly before *Cartozian*, for example, Herbert Lee wrote that “when . . . we remember that these [Armenians] were slain *because* they would not deny Christ, may we not assert that here is the supreme call to

every Christian in the world?” Herbert Powell Lee, “Armenia as the Measure of Our Civilization,” *The New Armenia* 8 (1921): 67-69.

<sup>74</sup> Cartozian Trial Transcript, 14.

<sup>75</sup> See *ibid.*, 11-12, 20-21, 38-40, 42, 44-46, 56, 62, 81, 84, 89, 98, 114, 117, 166. See also Defendant’s Exhibit listing “names, addresses, occupations, the maiden name of those that are married, citizenship, membership and affiliation with native American fraternal, educational, religious, and social institutions, of 339 persons of Armenian parentage, now residing in all parts of the United States, and who are engaged in business and in some professions,” *United States v. Cartozian*, No. E-8668 (D. Or.), in Significant Civil and Criminal Case Files, 1899-1925, District of Oregon (Portland), Records of U.S. Attorneys and Marshals, Record Group 118, National Archives and Records Administration Pacific Alaska Region, Seattle, Wash. [hereinafter Cartozian Tabulation Exhibit].

<sup>76</sup> Cartozian Deposition Transcript, 12-13.

<sup>77</sup> *Ibid.*, 54-55. The defense’s reliance on Armenian Christianity as evidence of whiteness follows a theme among racial prerequisite cases during the early twentieth century of associating whiteness with Christianity. See, e.g., *United States v. Thind*, 261 U.S. 204, 213 (1923) (using the biblical allusion “bone of their bone and flesh of their flesh” to describe those European immigrants who the First Congress intended by the phrase “white persons”); *In re Halladjian*, 174 F. 834, 841 (C.C.D. Mass. 1909) (noting that “by reason of their Christianity, [Armenians] generally ranged themselves against the Persian fire-worshippers, and against the Mohammedans, both Saracens and Turks,” that when the Armenians were conquered by the Saracens in the seventh century they recovered their independence in the ninth century under princes who they claimed “were of the lineage of David,” and that when the Armenians were finally conquered in Armenia by the Turks, their refugees set up an independent state in Cilicia “streaming the ensign of the Christian cross against black pagans, Turks, and Saracens”); *In re Ellis*, 179 F. 1002, 1003 (D. Or. 1910) (noting that a Syrian petitioner was “reared a Catholic, and is still of that faith”); *In re Dow*, 213 F. 355, 364 (E.D.S.C. 1914), *rev’d*, 226 F. 145 (4th Cir. 1915) (writing that the modern inhabitant of the Lebanon District of Syria in which a Syrian petitioner was born was not the location either of the Old Testament or “the labors of Christ”); *In re Hassan*, 48 F. Supp. 843, 845 (E.D. Mich. 1942) (canceling the naturalization certificate of an Arab petitioner based on the conclusion that Arabs were “part of the Mohammedan world and that a wide gulf separates their culture from that of the predominately Christian peoples of Europe”). Of course, the association of whiteness and Christianity also has a long history in Western imperialism. See, e.g., Jacobson, *Whiteness of a Different Color*, 212; Rubin Francis Weston, *Racism in U.S. Imperialism: The Influence of Racial Assumptions on American Foreign Policy, 1893-1946* (Columbia: Univ. of South Carolina Press, 1972), 39; Robert A. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford Univ. Press, 1990), 14-15, 21, 46-47.

<sup>78</sup> Cartozian Trial Transcript, 126-27; Cartozian Deposition Transcript, 35.

<sup>79</sup> See Cartozian Deposition Transcript, 36, 77, 88.

<sup>80</sup> Cartozian Trial Transcript, 67.

<sup>81</sup> See Malcolm, *The Armenians in America*, 14, 51-52, 137. M. Vartan Malcolm claimed that Syrians did not have the word “home” in their language because a Syrian Muslim’s wife and children did not dwell with him, but were kept apart. *Ibid.*, 137. The Armenian defense also argued in their brief that the Supreme Court’s dicta in *Thind* suggesting that “no Asiatic whatever” may be eligible for naturalization was based in large part on the congressional debates regarding the Naturalization Act in 1870 and 1875 in which congressmen opposed to removing the racial prerequisite from the statute had emphasized their concern that the Chinese, whom they sought to exclude, were a “pagan people.” The Armenian defense argued that the 1870 and 1875 debates, however, suggested “no intention whatever to exclude the Armenians, a Christian people living in Asia Minor.” See Brief for Defendant at 14-20, *United States v. Cartozian*, 6 F. 2d 919 (D. Or. 1925) (No. E-8668), in Civil and Criminal Case

Files, District of Oregon (Portland), Records of the District Courts of the United States, Record Group 21, National Archives and Records Administration Pacific Alaska Region, Seattle, Wash.

<sup>82</sup> See *Richard II; In re Halladjian*, 174 F. 834, 841 (C.C.D. Mass. 1909).

<sup>83</sup> Although John Tehranian argues that in the history of the racial prerequisite cases only “occasionally, and by the slimmest of margins, [were] Middle Easterners . . . considered white,” this conclusion references only the published judicial opinions in the cases and is debatable even with reference to those. See Tehranian, *Whitewashed*, 49. There is ample evidence that Middle Easterners were more frequently considered “white” within the meaning of the naturalization act, and the Bureau of Naturalization had an official policy of not opposing the naturalization of Arabs and other petitioners from the Middle East almost from its formation in the first decade of the twentieth century. See, e.g., “When ‘White’ Is Not White,” *The State (Columbia, SC)*, October 20, 1909 (reporting that a number of Turks employed in Indiana factories had been naturalized); “‘Free Whites’ From Turkey,” *Washington Post*, November 8, 1909 (reporting that Judge Arthur L. Brown of the United States District Court for the District of Rhode Island admitted Jacob Thompson, a “subject of the Sultan of Turkey and a native of Armenia,” to citizenship over the Government’s objection, stating that “it has been the practice of this court for many years to recognize Armenians and Turks as coming within the designation of free white persons, and the court will continue so to consider them until a court of higher authority decides otherwise”); Internal Correspondence from the Acting Secretary of the Department of Commerce and Labor to Messrs. O’Brien, et al. dated Nov. 15, 1909, in Records of the Immigration and Naturalization Service of the United States, Record Group 85, Box 1573, File 19783/43, National Archives Building, Washington, DC (reporting that “the records of the Department show but three cases in which courts have held Syrians are not white persons” and attaching a table of the cases); *In re Najour*, 174 F. 735 (C.C.N.D. Ga. 1909) (holding that a Syrian “from Mt. Lebanon, near Beirut” was a “white person”); Correspondence from Secretary of the Department of Commerce and Labor Charles Nagel to Secretary of State Philander Knox dated Dec. 7, 1909, in Records of the Immigration and Naturalization Service of the United States, Record Group 85, Box 1573, File 19783/43, National Archives Building, Washington, DC (writing that “neither the Department [of Commerce and Labor] nor the Division of Naturalization has requested that appeals be taken in any of the cases” in which Syrian petitioners had been held to be “white” and therefore racially eligible for naturalization); *In re Halladjian*, 174 F. at 845 (noting prior naturalizations of Armenians “as well as Syrians and Turks,” who had all been “freely naturaliz[ed] in this court until now”); *In re Mudarri*, 176 F. 465 (C.D. Mass. 1910) (holding that a Syrian “born in Damascus” was a “white person”); *In re Ellis*, 179 F. 1002 (D. Or. 1910) (holding that a Syrian who was “a native of the province of Palestine” and “a Turkish subject” was a “white person”) (cited with approval in *Ozawa v. United States*, 260 U.S. 178, 197 (1922)); *Dow v. United States*, 226 F. 145 (4th Cir. 1915) (holding that a Syrian was a “white person” and that “a large number of Syrians have been naturalized without question,” and reversing *Ex parte Dow*, 211 F. 486 (E.D.S.C. 1914) and *In re Dow*, 213 F. 355 (E.D.S.C. 1914) (on rehearing)), *In re Sallak*, No. 14876 (N.D. Ill. June 27, 1924), in Significant Civil and Criminal Case Files, 1899-1925, District of Oregon (Portland), Records of U.S. Attorneys and Marshals, Record Group 118, National Archives and Records Administration Pacific Alaska Region (holding that a petitioner “born in Palestine” was a “white person”); *In re S---*, 1 I & N Dec. 174 (B.I.A. 1941) (holding that a native and citizen of Iraq, whose parents were “full-blooded Arabians” and whose ancestors “came from Turkish stock” was a “white person”); U.S. Department of Justice, Immigration and Naturalization Service, “The Eligibility of Arabs to Naturalization,” *Monthly Review* 1 (1943): 12-16 (concluding that persons of “the Arabian race” are “white persons”); ”); U.S. Department of Justice, Immigration and Naturalization Service, “Summaries of Recent Court Decisions,” *Monthly Review* 1 (1944): 12 (reporting a January 13, 1944 ruling of the United States District Court for the Western District of Pennsylvania that “an Arab born in Beit Hanina, Palestine” was a “white person”); *In re Shaikhaly*, Nat. Case No. 119332 (S.D. Cal. Dec. 20, 1944), in Folder 119332, Contested Naturalizations, Southern District of California, Central Division (Los Angeles), National Archives and Records Administration Pacific Region (holding that “a native and citizen of Palestine . . . of the Arabian race,” was a “white person”); *In re K---*, 2 I & N. Dec. 253 (B.I.A. 1945) (holding that a native and citizen of Afghanistan, “of the Afghan race,” was a “white person”).

<sup>84</sup> Correspondence from Charles Nagel to Justin S. Kirreh dated November 13, 1909, in Records of the Immigration and Naturalization Service of the United States, Record Group 85, Box 1573, File 19783/43, National Archives Building, Washington, DC; see *Aliens Refused Naturalization*, *supra* note 33; *Turkey Will Protest*, *supra*

note 33; A. Rustem Bey, *supra* note 33; *Race Row Up To Courts*, *supra* note 33; *Conflicting Views Taken of Asiatic Exclusion*, *supra* note 33; *Way Paved for Syrians*, Grand Forks Daily Herald, Dec. 15, 1909.

<sup>85</sup> *Compare In re Hassan*, 48 F. Supp. 843, 845 (E.D. Mich. 1942), with *In re S---*, 1 I & N Dec. 174 (B.I.A. 1941); U.S. Department of Justice, Immigration and Naturalization Service, “The Eligibility of Arabs to Naturalization,” 16, and *Ex parte Mohriez*, 54 F. Supp. 941, 942 (D. Mass. 1944).

<sup>86</sup> *Halladjian*, 174 F. at 839.

<sup>87</sup> President Woodrow Wilson, Proclamation 1345, “Contribution Days for Aid of Stricken Syrian and Armenian Peoples” (August 31, 1916), reprinted in Koolakian, *Struggle for Justice*, 130-32.

<sup>88</sup> See generally, e.g., Edward L. Queen II, Stephen R. Prothero, and Gardiner H. Shattuck, Jr., *Encyclopedia of American Religious History*, 3rd ed. (New York: Facts on File, 2009): 1:52-53.

<sup>89</sup> Lee, “Armenia as the Measure of Our Civilization,” 69.

<sup>90</sup> See Kenneth Burke, *A Grammar of Motives*, Calif. ed. (Berkeley: Univ. of California Press, 1969), 35-38.

<sup>91</sup> In *The Myth of the State*, Ernst Cassirer describes the deep disillusionment Arthur de Gobineau felt after the initial intoxication of his nineteenth century theories of racial supremacy subsided, a disillusionment that arose as a result of this paradox of purity because the “higher races,” as Gobineau conceived of them, could not fulfill their historical mission of ruling the inferior races without close contact with those races, but “to them contact is a dangerous thing, the permanent and eternal source of infection.” See Ernst Cassirer, *The Myth of the State* (New Haven, Yale Univ. Press, 1946), 245-46.

<sup>92</sup> See, e.g., Cartozian Trial Transcript, 9-15, 19-24, 26-29, 47-50, 56-95, 64-66, 99, 104-27, 136; Cartozian Deposition Transcript, 5-11, 36-37, 52-55, 90-93. In presenting this evidence of assimilability, the defense went to extraordinary lengths to establish that Armenians had been freely admitted to numerous “whites only” fraternal organizations such as the Freemasons, the Benevolent and Protective Order of Elks, the Independent Order of Foresters, the Fraternal Order of Eagles, the Modern Woodmen of America, the Loyal Order of Moose, the Independent Order of Odd Fellows, and the Knights of Pythias. See Cartozian Trial Transcript, a-d, 104; *Cartozian*, 6 F. 2d 919; see also Craver, “On the Boundary of White,” 56. The defense not only offered evidence that Armenians were members of these fraternal organizations, but presented testimony from organizational officers of the Freemasons, the Benevolent and Protective Order of Elks, the Loyal Order of the Moose, the Independent Order of Odd Fellows, and the Knights of Pythias regarding the racial prerequisites for membership in their groups, even introducing the constitution and statutes of the Benevolent and Protective Order of Elks into evidence. See Cartozian Trial Transcript. The Deputy Grand Master of the Independent Order of Odd Fellows, for example, testified that the Odd Fellows admitted Armenians but excluded Chinese, Japanese, and Hindus from membership on racial grounds. *Ibid.*, 36-38. The defense also elicited testimony from the Deputy Grand Master that the racial classification of Syrians for purposes of Odd Fellows membership had been “adjudicated” within the organization and they had been classified as “white.” *Ibid.* The admission of evidence regarding fraternal racial prerequisites and private adjudications of whiteness within these organizations raises particularly interesting questions about the relationship between private dispute resolution and public law in the case.

<sup>93</sup> See Cartozian Tabulation Exhibit. Judge Wolverton appears to have been receptive to these arguments, at times himself expressing interest in the question of Armenian military service. During the testimony of Martin Fereshtian, for example, Judge Wolverton interjected to ask Fereshtian if he had been in the war, and when Fereshtian replied that he was exempt but had asked to serve anyway, Judge Wolverton asked him to confirm that he had not claimed an exemption on account of his nationality. See Cartozian Trial Transcript, 23. The defense also omitted evidence of racial discrimination and xenophobia toward Armenians in the United States. See, e.g.,

Bobelian, *Children of Armenia*, 110. The transcript reflects several references to Fresno, California reflecting the Government's effort to highlight the well-known racial discrimination toward Armenians there, and Judge Wolverton asked one witness what proportion of the Armenians living in Fresno had been admitted to American citizenship. See Cartozian Trial Transcript, 24-25, 72.

<sup>94</sup> Cartozian Trial Transcript, 96.

<sup>95</sup> *Ibid.*, 96-97.

<sup>96</sup> Cartozian Deposition Transcript, 82-83.

<sup>97</sup> Cartozian Trial Transcript, 64, 68.

<sup>98</sup> See Cartozian Deposition Transcript, 93.

<sup>99</sup> See Richard G. Hovannisian, "The Armenian Question, 1878-1923," in *A Crime of Silence: The Armenian Genocide*, ed. Gérard Libaridian (London: Zed, 1985), 28.

<sup>100</sup> Primo Levi, *The Drowned and the Saved*, trans. Raymond Rosenthal (New York: Summit, 1989), 75.

<sup>101</sup> See Cartozian Trial Transcript, 147-55.

<sup>102</sup> See Malcolm, *The Armenians in America*, 83-126.

<sup>103</sup> Cartozian Trial Transcript, 153-55.

<sup>104</sup> See generally *In re Thind*, 268 F. 683 (D. Or. 1920), *rev'd*, 261 U.S. 204 (1923)

<sup>105</sup> See *Ellis*, 179 F. at 1003. In contrast to the Supreme Court's reversal of Judge Wolverton's opinion in *Thind*, his opinion in *Ellis* was included among a list of lower court opinions expressly approved of by the Court in *Ozawa* because Judge Wolverton had written in *Ellis* that the ordinary usage rule of statutory interpretation required that the racial prerequisite in the naturalization act be interpreted according to its "popular sense." See *Ozawa*, 260 U.S. at 197 (including *In re Ellis* among a list of cases with which "we see no reason to differ"). Because in *Thind* the Supreme Court reversed two cases holding that Hindus were "white" after also expressly approving of those cases in *Ozawa*, however, some doubted the status of *Ellis* after *Thind* as well.

<sup>106</sup> Judge Wolverton also noted that the petitioner was "reared a Catholic, and is still of that faith." *Ellis*, 179 F. at 1002-03.

<sup>107</sup> See *Thind*, 268 F. at 684.

<sup>108</sup> *Cartozian*, 6 F.2d at 920.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> As *The Oxford Companion to the English Language* explains, "in English, the semantic role of the subject in active constructions is typically agentive, but not exclusively so: *books* in *These books sell well* is not the

agent but the affected.” *The Oxford Companion to the English Language*, ed. Tom McArthur (Oxford: Oxford Univ. Press, 1992): s.v. “agent.”

<sup>112</sup> See generally, Jones, *Genocide*, 168-72; Dadrian, “The Turkish Military Tribunal’s Prosecution,” 34. The Turkish Attorney General who prosecuted the perpetrators of the Armenian genocide in the war crimes trials held in the Ottoman Empire after World War I even partially blamed the victims for provoking the atrocities during his opening remarks, a claim that elicited protest from the Armenian lawyers who strongly disputed the accuracy and propriety of the Attorney General’s remarks and left the proceedings in protest after failing to have him disqualified. The Ottoman officials on trial asserted that their acts were required by Armenian threats to state security, but these assertions were contradicted by documentary evidence introduced during the proceedings. Dadrian, “The Turkish Military Tribunal’s Prosecution,” 34-36, 38-39.

<sup>113</sup> See *Oxford English Dictionary*, 2nd ed., sv. “aloof.”

<sup>114</sup> See *Hamlet, The Oxford Shakespeare: The Complete Works*, 2nd ed., eds. John Jowett, William Montgomery, Gary Taylor, and Stanley Wells (Oxford: Clarendon Press, 2005): 5.2.193.

<sup>115</sup> The second sentence of the quoted passage from the *Cartozian* opinion reflects a similar juxtaposition of certainty and hesitation, claiming “tradition has it” that in “about” the fourth century Armenians adopted Christianity but have “ever since consistently adhered” to their belief and practiced it. *Cartozian*, 6 F.2d at 920.

<sup>116</sup> See, e.g., Sarah Gualtieri, “Becoming ‘White’: Race, Religion and the Foundations of Syrian/Lebanese Ethnicity in the United States,” *Journal of American Ethnic History* 20.4 (2001): 41 (discussing the Ottoman *millet* system in the context of the racial prerequisite cases involving Syrian petitioners).

<sup>117</sup> Transcript of Record, *United States v. Sakharam Ganesh Pandit*, No. 4938 (9th Cir. Aug. 13, 1926), 121-22 (emphasis added), in Records of the U.S. Courts of Appeals, Record Group 276, National Archives and Records Administration Pacific Region, San Bruno, Calif.

<sup>118</sup> *In re R---*, 4 I & N. Dec. 275, 280 (B.I.A. 1951) (emphasis added).

<sup>119</sup> *Cartozian*, 6 F.2d at 920. Judge Wolverton’s use of the word “spontaneously” in this passage appeals to the notion of “racial instincts,” once again responding to *Thind* in which the Supreme Court concluded that the racial difference of high caste Hindus was “of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.” *Thind*, 261 U.S. at 210-11. In 1896, the Supreme Court’s opinion in *Plessy v. Ferguson* had similarly claimed that “legislation is powerless to eradicate racial instinct, or to abolish distinctions based upon physical differences.” *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896). During the era surrounding World War I, this belief in racial instincts developed into the argument that the truths of race did not need scientific verification but could be learned from “intuition.” See, e.g., Thomas F. Gossett, *Race: The History of an Idea in America*, New ed. (Oxford: Oxford Univ. Press, 1997), 353; William Petersen, Michael Novak, and Philip Gleason, *Concepts of Ethnicity* (Cambridge: Harvard Univ. Press, 1980), 88. Although a theory of racial instincts also appears to be the basis for the defense’s theory of the case in *Cartozian*, Judge Wolverton’s claim that Armenians “spontaneously” intermingled with other “whites” is the most explicit statement of this theory in the record.

<sup>120</sup> See *Cartozian* Deposition Transcript, 66.

<sup>121</sup> *Cartozian* Trial Transcript, 155.

<sup>122</sup> *Cartozian*, 6 F.2d at 920 (emphasis added).

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*, 921.

<sup>125</sup> Hayden White, *The Content of the Form: Narrative Discourse and Historical Representation* (Baltimore: The Johns Hopkins Univ. Press, 1990), 10, 14.

<sup>126</sup> *Halladjian*, 174 F. at 841.

<sup>127</sup> Statement of Testimony Under Equity Rule 75 B, *United States v. Pandit*, No. G-111-T (S.D. Cal. May 11, 1926), in Transcript of Record, *United States v. Sakharam Ganesh Pandit*, No. 4938 (9th Cir. Aug. 13, 1926), 152-54.

<sup>128</sup> See Balakian, *The Burning Tigris*, xii.; Jones, *Genocide*, 149.

<sup>129</sup> Lee, "Armenia as the Measure of Our Civilization," 67.

<sup>130</sup> Cf. Lawrence Langer, *Holocaust Testimonies: The Ruins of Memory* (New Haven: Yale Univ. Press, 1991), xii.

<sup>131</sup> See, e.g., Liliane Weissberg, "In Plain Sight," in *Visual Culture and the Holocaust*, ed. Barbie Zelizer (New Brunswick, N.J.: Rutgers Univ. Press, 2001), 14.

<sup>132</sup> See Craver, "On the Boundary of White," 56.

<sup>133</sup> See Keevak, *Becoming Yellow*, 4, 75-76; see also Keen, *Faces of the Enemy*, 26. ("The old image of Genghis Khan and the Mongol hordes still haunts us and is retooled and pressed into service when needed."). Michael Keevak argues that it was only at the end of the nineteenth century that "the idea of a yellow East Asia would fully take hold in the Western imagination, crystallizing in the phrase 'the yellow peril' to characterize the perceived threat that the people of the Far East were now said to embody" and that the association of yellow skin with Asian races during the nineteenth century firmly brought together what had been closely allied for centuries, "yellow skin, numerous 'Mongolian' invasions, and the specter of large numbers of people from the region migrating to the West." Keevak, *Becoming Yellow*, 124-25.

<sup>134</sup> Lee, "Armenia as the Measure," 67-69.

<sup>135</sup> Ananikian, "Armenian Mythology," 3.

<sup>136</sup> See, e.g., Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev. ed. (New York: Verso, 2006), 4; Jean Bethke Elshtain, "Sovereignty, Identity, Sacrifice," in *Reimagining the Nation*, eds. Marjorie Ringrose and Adam J. Lerner (Buckingham, U.K.: Open Univ. Press, 1993), 159-75; Rebecca Herzig, "In the Name of Science: Suffering, Sacrifice, and the Formation of American Roentgenology," *American Quarterly* 53.4 (2001): 563-89; Adam J. Lerner, "The Nineteenth-Century Monument and the Embodiment of National Time," in *Reimagining the Nation*, eds. Marjorie Ringrose and Adam J. Lerner (Buckingham, U.K.: Open Univ. Press, 1993), 176-96; Michael Rowlands, "Memory, Sacrifice and the Nation," *New Formations* 30.4 (1996): 8-17.

<sup>137</sup> Nikki Shepardson, *Burning Zeal: The Rhetoric of Martyrdom and the Protestant Community in Reformation France, 1520-1570* (Bethlehem, Pa.: Lehigh Univ. Press, 2007), 23, 118; see also Donald W. Riddle, *The Martyrs: A Study in Social Control* (Chicago: Univ. of Chicago Press, 1931).

<sup>138</sup> *Ibid.*, 112.

<sup>139</sup> Ibid., 118-19.

<sup>140</sup> Ibid., 149.

<sup>141</sup> Keen, *Faces of the Enemy*, 23.

<sup>142</sup> See James Jasinski, *Sourcebook on Rhetoric: Key Concepts in Contemporary Rhetorical Studies* (Thousand Oaks, Calif.: Sage, 2001): s.v. "Transcendence"; Vugt, De Cremer, and Janssen, "Gender Differences in Cooperation and Competition," 22.

<sup>143</sup> Reprinted in Singh and Singh, *Ghadar 1915*, 20-21.

<sup>144</sup> See, e.g., Louis E. Fenech, "Martyrdom and the Sikh Tradition," *Journal of the American Oriental Society* 117.4 (1997): 623-42.

<sup>145</sup> López, *White by Law*, 107.

<sup>146</sup> See Robert L. Ivie, *Democracy and America's War on Terror* (Tuscaloosa: Univ. of Alabama Press, 2005), 6, 10-11.

<sup>147</sup> Okoomian, "Becoming White," 219-20.

<sup>148</sup> See *Immigration and Nationality Act of 1952*, 82nd Cong., 2nd Sess., *U.S. Statutes at Large* 66 (1952): 169 (providing that the "right of a person to become a naturalized citizen . . . shall not be denied . . . because of race").

## Chapter 4: Pearl Harbor, the Red Scare, and the End of the Racial Prerequisites to Naturalization

*Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals. . . . Nothing is written more firmly into our law than the compact of the Plymouth voyagers to have just and equal laws. To say that any group cannot be assimilated is to admit that the great American experiment has failed, that our way of life has failed . . . . Today is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry.*

United States Supreme Court Justice Frank Murphy, concurring in the opinion of the Court in *Hirabayashi v. United States*, 320 U.S. 81 (1943)<sup>1</sup>

*We and our allies will aim our forces at the heart of Japan in ever-increasing strength until the common enemy is driven from China's soil. But China's resistance does not depend alone on guns and planes . . . . By the repeal of the Chinese exclusion laws, we can correct a historic mistake and silence the distorted Japanese propaganda.*

President Franklin D. Roosevelt to the United States Congress, October 11, 1943<sup>2</sup>

*If we expect to protect ourselves against what is freely referred to as the Communist ideology in the world; if we expect not only to safeguard ourselves but to translate democratic ideals in other corners of the earth, how can you best do it than to build upon a foundation of good will? So, in proportion as we do this, we shall gain a respectful hearing among those people, and instead of becoming willing converts to some ideology with which we do not agree, there will be an opportunity for us to have the language and also the message of America find a place in those far-off corners.*

New York congressman Samuel Dickstein during an October 10, 1945 debate in the U.S. House of Representatives regarding a proposal to extend racial eligibility for naturalization to Asian Indians<sup>3</sup>

During the two decades after the Supreme Court declined to review the dismissal of the Government's case in *Pandit*, only six judicial opinions were published in racial prerequisite cases and the evidence suggests there were few unpublished opinions compared to the two decades preceding *Pandit*, when thirty-eight published opinions and many unpublished opinions were issued. This decline in racial prerequisite cases after *Pandit* appears to be the result of the fact that by this time the eligibility of the three largest racial classifications in Asia—Chinese,

Japanese, and Asian Indian—had been settled by the Chinese Exclusion Act and by the Supreme Court’s opinions in *Ozawa* and *Thind*. In addition, because the Immigration Act of 1917 created an “Asiatic Barred Zone” that expressly prohibited immigration from most of the continent of Asia and the Middle East, including Indonesia and the Arabian Peninsula, fewer Asians were immigrating to the United States to request naturalization.<sup>4</sup> After the Immigration Act of 1924 also prohibited the admission to the United States of all aliens “ineligible to citizenship,” most remaining eligibility questions under the naturalization act were shifted to immigration authorities and special immigration courts.<sup>5</sup> In addition, of the six published judicial opinions in racial prerequisite cases between *Pandit* and World War II, three involved procedural questions similar to those raised in *Pandit* regarding the cancellation of naturalization certificates issued to Asian Indian immigrants and to a Filipino immigrant who had not served in the United States military,<sup>6</sup> two were “mixed-blood” cases involving questions relating to persons of mixed Chinese and Asian Indian descent,<sup>7</sup> and one involved the whiteness of an Afghan immigrant who the court held racially ineligible for naturalization based on the conclusion that he “approximates to Hindus.”<sup>8</sup> Thus, the few judicial opinions issued between *Pandit* and World War II raised no novel issues but instead largely relied on prior precedent.

Perhaps as a result, the racial prerequisite cases issued during this period have received little scholarly attention. Until the racial prerequisites to naturalization were repealed, however, the “historical interpretation” of race continued to govern their interpretation and the racial prerequisite discourse during World War II and the early cold war not only continued to reflect the rhetorical strategy of uniting against common enemies but manifested a marked shift in the enmities relied on. In place of the fears of Chinese, Indian, and Turkish nationalisms in the earlier cases, fears of the Axis powers, particularly Japan, and later of Soviet communism,

supplied the enemy against which American racial identities were constructed during World War II and the early cold war. As the epigraphs above reflect, the events of the war, particularly America's entry into the War in the Pacific after the Japanese attacked Pearl Harbor and the fear of Soviet communism that followed during the early cold war, occasioned a dramatic revision of American rhetoric regarding race relations and national identity with resulting changes to the racial prerequisites to naturalization.

In Justice Murphy's concurring opinion in *Hirabayashi v. United States*, in which the Supreme Court upheld the constitutionality of curfews imposed as part of the internment of Japanese Americans after Pearl Harbor, Justice Murphy praises the history of equality in America since the time of the Plymouth colonists and repudiates the sort of inassimilability attributed to Asian immigrants in Justice Sutherland's opinions in *Ozawa* and *Thind*. Justice Murphy also writes that the decision in *Hirabayashi* is the first time to his knowledge that the Court had sustained a substantial restriction on the personal liberty of United States citizens based on "the accident of race or ancestry." Not only does Justice Murphy neglect the significance of the Court's holdings limiting those who could become citizens in the first place based on the "accident of race or ancestry"—including the Court's holding in *Dred Scott* that African Americans were constitutionally incapable of becoming United States citizens and its more recent holdings in *Ozawa*, *Thind*, and *Toyota* that Japanese, Hindu, and Filipino immigrants were racially ineligible for naturalization—but he neglects the restrictions imposed by segregation laws such as those upheld in *Plessy v. Ferguson*. Perhaps Justice Murphy did not consider segregation laws a "substantial" restriction on personal liberty when compared to the forced relocation and detention of Japanese Americans in internment camps, but his claim is surprising given the growing questions regarding the constitutionality of segregation during the

following decade, ultimately resulting in the Court's landmark opinion in *Brown v. Board of Education*.<sup>9</sup>

Justice Murphy's account of American history in *Hirabayashi* expresses a growing idealism during World War II and the early cold war regarding the relationship between the principle of racial equality and what became represented as a global fight for democracy led by the United States, first against the Axis powers during World War II and then against Soviet communism in the postwar period. This idealism promoted an image of the United States as the model of a fully realized democracy, including at times through idealized histories such as Justice Murphy's claims that distinctions based on color and ancestry were utterly inconsistent with American traditions and ideals and that the Court had never sustained a substantial restriction on personal liberty of United States citizens based on race. This image of America as the model of democracy served as an important source of moral authority for the nation during World War II and the cold war in response to intensifying anti-American propaganda that highlighted the discrepancy between America's history of racial discrimination and its claim to lead the global fight for democracy.

Other examples of this idealism abound during the World War II and early cold war period. In 1939, during congressional hearings on the naturalization of Asian Indians living in the United States, Ramlal Bajpal argued that "America has been the heaven of free institutions and asylum for the disowned and oppressed of the human race" and that "since arbitrary discriminations are becoming the rule of our times, it is utterly unworthy of American tradition and professions of melting pot democracy to give them sanction here."<sup>10</sup> This statement suggests both that racial discrimination was only recently becoming the rule while historically the United States had been an exception to this rule. Similarly, during congressional debates regarding the

Chinese Exclusion Repeal Act of 1943, congressmen claimed that the Chinese Exclusion Act was “not born of ill will toward the Chinese people” but directed at Americans who were exploiting cheap Chinese labor and designed only to protect the country against the exploitation of imported contract laborers rather than originating in the violent racial discrimination that had developed toward Chinese immigrants on the West Coast.<sup>11</sup> During the same debates, Pennsylvania congressman James Wright asked, “do you think America, with the traditional respect it has for human rights—America, the traditional champion of liberty—should imitate the Germans and Japs—should put herself in the position of saying to a proud civilized people, the Chinese, ‘You are not fit to come here and live?’”<sup>12</sup> Perhaps summing up this perspective, Tennessee congressman John Jennings claimed that the United States had “always been friendly to the people of China.”<sup>13</sup> Likewise, in correspondence recommending that Congress extend racial eligibility for naturalization to Asian Indians at the end of the war, President Roosevelt wrote that “the present statutory provisions that discriminate against persons of East Indian descent . . . are incongruous and inconsistent with the dignity of both of our peoples,” a statement that suggests the racial prerequisites to naturalization were an anomaly rather than a true reflection of American culture.<sup>14</sup>

Despite the remarkable absence of appeals to abstract principles of equality in racial prerequisite discourse before World War II, the relationship between race, democracy, and internationalism in American historical narratives suddenly permeated legislative, judicial, and administrative debates regarding the racial prerequisite during World War II and the early cold war. Although Senator Charles Sumner had advanced the principle of equality reflected in the Declaration of Independence’s proclamation that “all men are created equal” during debates regarding his proposal to remove the racial prerequisite from the naturalization act in 1870 and a

few scholarly commentators referenced the principle during the period, references to the principle of racial equality and the Declaration of Independence as a symbol of that principle nearly vanished in debates regarding the racial prerequisite from the time Sumner's proposal was defeated until the World War II era. When Takuji Yamashita appealed to the principle of equality at the turn of the century in support of his application for a license to practice law in the state of Washington—an application that depended on his racial eligibility for United States citizenship—the Washington Attorney General's brief mocked Yamashita for relying on “the worn out star spangled banner orations, based upon the Declaration of Independence that all men are created equal,”<sup>15</sup> and similar appeals are not even evident in most of the racial prerequisite cases. Similarly, it was not until 1942 that the first legal complaint arose claiming that the racial prerequisites to naturalization violated the due process and equal protection provisions of the United States Constitution.<sup>16</sup> References to the principle of racial equality and the Declaration of Independence's claim that “all men are created equal” resurfaced during World War II and the early cold war, however, and became a commonplace in in debates regarding the racial prerequisites to naturalization.

In *Cold War Civil Rights: Race and the Image of American Democracy*, Mary Dudziak documents the negative impact that America's race relations had on its image abroad during the cold war era of the 1950s and early 1960s and the influence this image had on the civil rights movement in the United States. According to Dudziak, as civil rights crises became foreign affairs crises, the relationship between civil rights and cold war propaganda became in part “the story of a struggle over the narrative of race and democracy.”<sup>17</sup> Dudziak primarily focuses on the relationship between the United States and the newly independent African nations during the 1950s and early 1960s, restricting her analysis almost exclusively to the treatment of African

Americans. The War in the Pacific and the treatment of Asian Americans had at least as great of an impact on the narrative of race and democracy during the period, however, and these conflicts were intimately linked to the growing tensions between the United States, Japan, and Asia over racial restrictions on immigration and naturalization that disproportionately targeted immigrants from Asia and the Pacific Rim since the latter half of the nineteenth century, as reflected in part by the racial prerequisites in the naturalization act and their function in the Immigration Act of 1924 which banned all aliens “ineligible to citizenship” from admission to the United States.<sup>18</sup>

The War in the Pacific brought about its own revolution in racial ideology separate and apart from the impact of the news of Nazi death camps which were not publicly revealed until the year after Pearl Harbor. The Pan-Asian ideology that had emerged in the wake of Japan’s victory in the Russo-Japanese War persisted during the first half of the twentieth century and became a major centerpoint of Japanese propaganda in Asia during World War II, leading to significant racial tensions in the Pacific that were further inflamed by the Japanese attack on Pearl Harbor. As Minnesota congressman Walter Judd recounted during congressional debates regarding the Chinese Exclusion Repeal Act, the Japanese ambassador to the United States had warned that the ban on Japanese immigration through the combined effect of *Ozawa* and the prohibition of immigration by aliens “ineligible to citizenship” in the Immigration Act of 1924 would have “grave consequences.” Judd noted that “the Americans at Bataan and Iwo Jima would admit there have been rather ‘grave consequences,’” and he claimed to have stated many times that “war between Japan and ourselves was inevitable from that day on.”<sup>19</sup> During the year following Pearl Harbor, Asian leaders and others presented the war in terms of a race war between the Orient and Occident, and historian John Dower argues that Japan’s framing of the War in the Pacific as a race war gave rise to an obsession with extermination on both sides of the

Pacific, a “war without mercy,” that was far more savage than anything in the European theater of the war.<sup>20</sup> In part as a result of the fact that Japan represented the war in these terms, and because Asians, particularly Chinese and Asian Indians, decried the humiliation of being allies with a country that declared them racially ineligible for citizenship, the exclusion of Asians from immigration and naturalization also became crucial political issues in the United States and Asia during the war.<sup>21</sup>

The Japanese, feeling humiliated by the Court’s ruling in *Ozawa* that they were racially ineligible for naturalization and their exclusion from immigration to the United States by operation of the Immigration Act of 1924, persistently targeted this issue during the interwar period and in propaganda before and during World War II throughout Asia. In 1942, Pearl Buck reported that Japan was telling Asians in the Philippines, China, India, Malaya, and Russia that “there is no basis for hope that colored people can expect any justice” from the United States and that “every lynching, every race riot gives joy to Japan” because they gave credence to Japan’s message that “white” America was false to its claim that it fought on the side of democracy.<sup>22</sup>

According to a typical Tokyo broadcast during the war:

The few Chinese who are temporarily permitted to enter the United States, such as international merchants, professional men, and tourists, are forced to undergo the most humiliating and discourteous treatment and detention at the various immigration stations. They are practically treated like a class apart from the rest of humanity. . . . The Chungking authorities must also know that the Chinese are rigidly excluded from attaining American citizenship by naturalization, a right which is accorded to the lowliest immigrant from Europe.<sup>23</sup>

The United States government knew it had to combat this claim, and the proposed repeal of the Chinese Exclusion Act was promoted as a simple act of military expediency. One legislator repeated claims by a United States Navy commander that the Chinese Exclusion Act, including its declaration that the Chinese were racially ineligible for naturalization, was “worth 20

divisions to the Japanese army.” Another noted that its repeal was “a military action just as surely as is winning a battle in Italy, occupying Bougainville, or bombing a German munitions center.”<sup>24</sup> In the second epigraph at the beginning of this chapter, President Roosevelt, in the face of such Japanese propaganda, acknowledged that America’s racial exclusion laws were a “historic mistake,” as did the majority of the United States House of Representatives who praised the heroism of the Chinese during debates regarding the Chinese Exclusion Repeal Act. This sudden unity with the Chinese in the face of adversity also inspired Missouri congressman William Elmer, however, to remark that were it not for Pearl Harbor the people once regarded as “Chinese devils” would not suddenly have become “Chinese saints.”<sup>25</sup>

This chapter will examine the shifting interpretations of American race relations during World War II and the early cold war and the impact this rhetoric had on the racial prerequisites to naturalization from World War II until they were repealed in 1952. The shifting narrative regarding American race relations during this period not only led authorities to reconsider whether specific races should be excluded from eligibility for naturalization, eventually leading to the repeal of racial restrictions on naturalization for the Chinese, Asian Indians, and Filipinos, but altered the meaning of whiteness and other racial prerequisites in the act. The racial prerequisite discourse during this period relies on a rhetorical strategy of uniting against common enemies in which persecution by the Japanese and Soviet governments plays a pivotal role in the “historical interpretation” of race and the construction of a new national identity. I first examine Japan’s response to racial exclusion during the interwar period, a response that remarkably parallels Takao Ozawa’s rhetorical strategy before the Supreme Court in *Ozawa* and eventually led to Japan’s decision to declare war on the United States in the attack on Pearl Harbor. Next, I examine how legislators responded to the threat Japan posed in the Pacific by passing the

Chinese Exclusion Repeal Act the year after Pearl Harbor to strengthen its alliance with China and how legislators similarly responded to the threat of Soviet communism after the war by extending racial eligibility to Asian Indians and Filipinos to strengthen its alliances against Soviet communism. I then examine two opinions of the United States Board of Immigration Appeals during the early cold war which consider the whiteness of Tatar and Kalmyk refugees from the Soviet Union, groups the Board found to be “white” despite their Mongolian ancestors and Asian origins based in part on their persecution by the Soviet Union, a “historical interpretation” of race that I argue reflects a new cold war enemy that significantly influenced the racial classifications of the petitioners in these cases as the final chapter in the legacy of the racial prerequisite cases. I conclude by reflecting on how the racial prerequisite discourse from this period participated in the construction of a new national identity that arose out of the war and how frequent recitations of the Declaration of Independence’s proclamation that “all men are created equal” during the period appealed to people to unify against Axis and Soviet threats in the global fight for democracy.

### **THE JAPANESE ATTACK ON PEARL HARBOR, CHINESE HEROISM IN THE PACIFIC, AND THE CHINESE EXCLUSION REPEAL ACT**

As discussed in Chapter 2, Japan’s victory in the Russo-Japanese War inspired an aggressive Japanese nationalism which was viewed by many as “the first real challenge to white world supremacy.”<sup>26</sup> Japan’s effort to mobilize a pan-Asian alliance also created tension between the United States and Asia that inspired the Taft Administration to initiate steps to combat such an alliance, and it was in this context that the Chief of the Naturalization Division of the Bureau of Immigration and Naturalization issued a restrictive interpretation of the racial prerequisites to naturalization that led to numerous test cases including *Ozawa* and *Thind*.<sup>27</sup> The tension between

the United States and Japan particularly coalesced around the racial exclusion issue, and the failure to resolve this dispute was one of the most important factors in the failure of interwar peace in the Pacific. As early as the Paris Peace Conference in 1919, Japan aggressively advocated racial equality in international relations, and Japan's agitation surrounding the issue even prompted the Solicitor General to request a delay of the decision in *Ozawa* while the case was pending before the Supreme Court.<sup>28</sup> During the earliest postwar negotiations, Japan maintained that the removal of racial discrimination was the single most important factor in securing world peace and that without it the League of Nations would be a "miserable contradiction." Accordingly, Japan submitted the following draft proposal to the League of Nations, insisting that it be included in the preamble to the League Covenant:

The equality of nations being a basic principle of the League of Nations, the High Contracting Parties agree to accord as soon as possible to all alien nationals of states who are members of the League, equal and just treatment in every respect, making no discrimination in law or in fact on account of their race or nationality.<sup>29</sup>

A member of the Japanese Imperial Diet also warned the American and British delegations that there could be no League of Nations until racial discrimination was eliminated.<sup>30</sup>

Japan's stance on racial equality created significant anxiety among the British and their former colonies in Australia, New Zealand, Canada, and the United States, all of which had raised racial restrictions to immigration and naturalization aimed at Asian immigrants.<sup>31</sup> One American delegate to the Paris Peace Conference wrote in his diary of his concern that the proposal would "allow Asiatics to repeal the Asiatic Exclusion Law of the United States," and Australians feared the same fate for their exclusionary administrative practices known as the White Australia Policy.<sup>32</sup> American delegates even tried to soften the language of the Japanese proposal so that it would recognize equality without granting it any specific legal effect, but the Japanese insisted that any proposal have binding effect.<sup>33</sup> During the negotiations, Japan

repeatedly referenced the Declaration of Independence's proclamation that "all men are created equal," making it difficult for Americans to reject the spirit of equality in the proposal, although British diplomats encouraged the Americans to reject the notion that this equality extended beyond a particular nation.<sup>34</sup>

Although a majority of the delegates of the League of Nations Commission voted in favor of Japan's racial equality proposal and none voted against it, President Woodrow Wilson as the chair of the Commission took the unprecedented step of declaring that a unanimous vote was required because the British delegation had lodged strong opposition to it in support of Australia's complaint that the proposal threatened its White Australia Policy.<sup>35</sup> The defeat of the Japanese proposal was received with significant hostility in Japan, where the Osaka *Mainichi* warned of Wilson's "dangerous justice,"<sup>36</sup> and the incident intensified Japanese antagonism toward the United States during the interwar period.<sup>37</sup> The opposition that Japan's racial equality proposal inspired in the United States had already grown to such proportions that it cast doubt on support for the League of Nations generally, raising doubts in many circles about the viability of internationalism. Furthermore, after a domestic jurisdiction clause introduced into the League's Covenant empowered the League Council to determine what matters were within the League's jurisdiction, the fear that the Council might declare immigration to not be solely a matter of domestic jurisdiction but one on which the League could rule was a critical factor in the decision of the United States to decline to join the League.<sup>38</sup> The decision of the United States not to join the League based on its concerns regarding the League's potential threat to Asian exclusion was among the most crucial failures of interwar diplomacy, ultimately undermining interwar peace and leading, some say inevitably, to World War II.<sup>39</sup>

Japanese hostility grew as the defeat of its racial equality proposal was soon followed by the United States Supreme Court's decision in *Ozawa* and the ban on admission of aliens "ineligible to citizenship" to the United States by the Immigration Act of 1924, which combined to ban not only Japanese eligibility for naturalization but Japanese immigration to the United States as well. The 1924 act's restriction on Japanese immigration abrogated a bilateral Gentlemen's Agreement between the United States and Japan made in 1907, an informal agreement in which the United States agreed not to brand the Japanese as inferior by imposing restrictions on Japanese immigration and Japan agreed to voluntarily restrict its emigration to the United States.<sup>40</sup> As mentioned above, when the details of the Immigration Act of 1924 were negotiated in Congress, the Japanese ambassador to the United States warned of "grave consequences" if any exclusionary measures should target Japan. Many congressional leaders considered this warning a veiled threat of war, and as a result it galvanized congressional resolve to restrict Japanese immigration.<sup>41</sup> The State Department recognized the threat that such a racial restriction posed to peace between the United States and Japan and warned President Coolidge of the danger. President Coolidge accepted the act, however, only noting that he regretted the impossibility of severing the restriction on Japanese immigration and claiming that the restriction did not change the admiration and cordial friendship felt by the United States toward Japan.<sup>42</sup>

The decision to bar Japanese immigration intensified Japan's hostility toward both the United States and the British dominions who showed public support for the restriction, and as early as the fall of 1924, Rumanian writer and educator Savel Zimand wrote in *The New York Times* that "never before has the East resented so much the assumed superiority of the white races" and that the issue had assumed such grave importance that "it is apt to become in the near future a menace to world peace."<sup>43</sup> Ten years later, Raymond Buell, then President of the non-

profit Foreign Policy Association, wrote that “the Japanese people are even more indignant over the treatment accorded Orientals by the United States than are the American people over Japanese imperialism.”<sup>44</sup> After the Japanese declared war on the United States in the attack on Pearl Harbor less than a decade later, Minnesota congressman Walter Judd claimed he had long felt that the racial exclusion of the Japanese created by *Ozawa* and the 1924 act made war with Japan inevitable.<sup>45</sup> Recounting Churchill’s remarks shortly after Pearl Harbor in which Churchill asked, “What kind of people do the Japanese think we Anglo-Saxons are? Do they imagine that we are the sort of men which this treacherous attack will cause to fold up?” Judd lamented that he could not help asking a parallel question:

I could not help thinking of some Japanese who were saying, “What kind of people did you think we are? Did you think you could write into your statute books a law permanently branding us and stigmatizing us as inferior human beings because of the color of our skin, without having us hate you and grit our teeth and strive until we could become strong enough to stick a knife between your ribs and twist it as we did at Pearl Harbor?”<sup>46</sup>

Judd was not alone in these sentiments, but the growing conflict between Japan and the United States was a frequent topic of discussion during the interwar period and prominently focused on the racial exclusion issue.

Japan also cited America’s racial exclusion laws in support of a political campaign to solidify a pan-Asian alliance across Asia and the Pacific Rim. Particularly as Japan expanded into Asia during the early years of World War II, Japan broadcast propaganda telling Asians that the United States was motivated by racism and imperialistic designs as reflected by the fact that the United States had not come to the assistance of its Chinese and Filipino allies in the Pacific as quickly as it did to its European allies because Chinese and Filipinos were not “white” and that the Western powers had not offered military assistance in the Pacific until Japan began encroaching on the “white man’s empires” in Indochina.<sup>47</sup> The racial prerequisites to

naturalization figured prominently in such propaganda. The Japanese emphasized to the Chinese, for example, that although they were allies they could not become American citizens: “Americans say they love and admire the Chinese. But can you go to America? Can you become citizens? No, Americans don’t want you. They just want you to do their fighting.”<sup>48</sup>

This Japanese propaganda was successful in creating solidarity against the United States and its Western allies in many parts of Asia and the Pacific Rim. As Chinese, Indian, and Burmese nationalists formed independent armies in collaboration with the Japanese, officials in the United States began to fear that Japan might succeed in creating a pan-Asian alliance that would threaten the West with a race war in which the “white” races would be outnumbered.<sup>49</sup> Thus, almost immediately after the Japanese declared war on the United States in the attack on Pearl Harbor, popular and diplomatic pressure arose to repeal the Chinese Exclusion Act and extend racial eligibility for naturalization to the Chinese to solidify China’s alliance in the Pacific and silence Japan’s propaganda regarding America’s Asian exclusion policy. At the same time, a popular glorification of the “heroic Chinese people” in their war with Japan arose across the United States,<sup>50</sup> and congressional debates regarding the Chinese Exclusion Repeal Act reflect this collective encomium of Chinese heroism and sacrifice in the Pacific theater of the war. In contrast to the negative stereotypes of the Chinese prevalent in American discourse for nearly a century, the Chinese were suddenly portrayed as a brave and gallant people who were readily distinguishable from the Japanese, fighting side by side with American soldiers in heroic resistance to Japan in the global fight for democracy. This moment in which differences of race, religion, and nationality were transcended by the mutual fear of a common enemy fundamentally altered American attitudes toward Asian exclusion with the result that the United States

immediately extended racial eligibility for naturalization to the Chinese and completely eliminated the racial prerequisites to naturalization shortly after the war.<sup>51</sup>

The heroism of the Chinese in their war against Japan was a theme throughout the congressional debates regarding the Chinese Exclusion Repeal Act. A letter from the director of the National Conference of Christians and Jews that was read during the debates, for example, praised the “heroic resistance” the Chinese had offered to Japan,<sup>52</sup> as did New York congressman Hamilton Fish, III, who proclaimed China “a very gallant and heroic nation,”<sup>53</sup> and numerous other legislators explicitly praised Chinese “heroism” and “bravery” in the Pacific.<sup>54</sup> Washington congressman Warren Magnuson referred to the Chinese as “brothers in arms,” arguing that the Chinese Exclusion Repeal Act was undoubtedly supported by “our soldiers and sailors and marines returning from the Pacific war front, fighting side by side, maybe literally side by side, with Chinese as brothers in arms,” and that these American soldiers would find Congress derelict in its duties if it did not put “our brothers in arms on an equal basis with all the other allies.”<sup>55</sup> In addition to such general praise of Chinese heroism, Minnesota congressman Walter Judd invoked the principle of equality set forth in the Declaration of Independence and analogized America’s alliance with the Chinese in the Pacific to the American Revolution, stating that “we who are the descendants of 1776 ought to know of people who fought in the snow with bare, bleeding feet for such things as equality.”<sup>56</sup> This rhetoric of Chinese persecution and heroism was also depicted in American war films such as the 1943 film *Mission to Moscow*, in which a Chinese official and Russian doctor remark during United States Ambassador Joseph Davies’s tour of a Moscow hospital treating “destitute, homeless, and starving” Chinese civilians that “if our three countries would be united, we could stop all this” and “the three of us must face this common enemy together.”<sup>57</sup> Similarly, in the 1944 film *The Purple Heart*, a young Chinese man

heroically kills his father in a Japanese courtroom after his father gives false testimony against American pilots tried for taking part in the Doolittle Raid.<sup>58</sup>

The persecutory agency in such rhetoric is emphasized during these debates, in which legislators frequently depicted the sacrifice of the Chinese for the greater cause of democracy in the world. “Peaceful China” was depicted as suffering at the hands of the “conceited, treacherous Japanese,” and their “atrocities and dastardly machinations.”<sup>59</sup> New York congressman Hamilton Fish, III remarked that China was a “very gallant and heroic nation that has been fighting for the last 6 years, almost without arms, against one of the strongest and mightiest armies in the world,”<sup>60</sup> Minnesota congressman Walter Judd remarked that “the Chinese have endured over 6 years of bombings and invasion, famine, disease, dislocation of all normal life, uncontrolled inflation, enforced migration of over 50,000,000 people, and a year and a half of almost complete blockade,”<sup>61</sup> and Nebraska congressman Carl Curtis remarked that the Chinese “have withstood bombings, executions, hunger, disease, and all the terrible ravages of war,” being “attacked by a savage enemy, who possesses the mechanized monsters of war.”<sup>62</sup> Reminiscent of the Armenian defense’s rhetoric of persecution in *Cartozian* discussed in Chapter 3, President Roosevelt’s letter recommending that Congress pass the Chinese Exclusion Repeal Act also notes that China has stood firm against overwhelming odds, standing “alone in the fight against aggression” and continuing her struggle “against very great odds.”<sup>63</sup> New York congressman Samuel Dickstein recounted the testimony of Americans detained in Hong Kong as prisoners of the Japanese and that “it was the poor Chinese people who, risking their own lives, smuggled food into that concentration camp to feed the Americans,” demonstrating that the Chinese “did not hesitate to endanger their own safety when this became necessary to come to the aid of their

American ally,”<sup>64</sup> Massachusetts congressman John McCormack summed up the sentiment of the debates when he noted:

For 6 years, China has courageously fought off the savagery of our enemy, Japan. China is tired, China is hungry, and there are those of her children who know starvation. China knows sickness and the death that follows disease—China knows what inflation is. China is a nation, made up of human beings with souls just as yours and mine: Human beings, brave but tired, hungry, and without money, and must be affected, and seriously so, by the propaganda, Axis-inspired, continually droned in her ears. . . . How long can tired minds withstand such propaganda—when hearts are heavy and stomachs empty?<sup>65</sup>

Throughout the congressional debates regarding the Chinese Exclusion Repeal Act, the Chinese were represented as a heroic people bravely defending themselves against relentless assaults by the Japanese. Like the rhetoric of martyrdom discussed in Chapter 3, these encomiums of Chinese heroism attributed Chinese sacrifices in their war with Japan to the common cause of a global fight for democracy.

Congress passed the Chinese Exclusion Repeal Act, expressly extending racial eligibility for naturalization to “Chinese persons or persons of Chinese descent,” although as noted during the debates a quota on Chinese immigration continued a policy of virtual Chinese exclusion for decades.<sup>66</sup> The rhetoric of Chinese heroism that followed the attack on Pearl Harbor and the need to negate Japanese propaganda regarding America’s Asian exclusion laws combined to finally end the legacy of Chinese exclusion that had been the sole reason Senator Charles Sumner’s proposed amendment to remove the racial prerequisites from the act failed 73 years earlier in debates that represented the Chinese not as heroic but as a “tide of ignorance and pollution” seeking to spread “paganism and despotism” to the United States.<sup>67</sup> In both the 1870 and 1943 debates, the recognition that “all men are created equal” in the preamble of the Declaration of Independence was invoked in support of racial eligibility for naturalization, failing in the first

debate but succeeding in the second, with almost no mention of the principle during the intervening decades.

Given the original significance of Chinese immigration to the broader “Asiatic question” that formed the sole reason for the continuation of the racial prerequisites to naturalization after the Civil War, the Chinese Exclusion Repeal Act was also perceived to be a statement of congressional intent regarding the racial prerequisites in the act more generally and to foreshadow their elimination. In a racial prerequisite case decided the year after Congress passed the Chinese Exclusion Repeal Act, for example, a federal district judge deciding the racial eligibility for naturalization of a “native and citizen of Palestine . . . of the Arabian race” questioned the continuing authority of *Thind* given the new legislative changes:

To interpret the words “white persons” as found in the existing statute applicable to this petition in the manner stated by the Supreme Court in the *Thind* decision would, in my opinion, render ineffectual provisions now present in the law relating to certain Asiatics and to descendants of races indigenous to the Western Hemisphere, and would also tend to introduce confusing and contradictory interpretations of the statute under construction. Such results should be avoided if possible.

We think that the amendments to applicable law subsequent to the *Thind* decision evince a Congressional intent to depart from the meaning attributed to the term “white persons” by the framers of the original statute in 1790.<sup>68</sup>

Thus, courts deciding racial prerequisite cases after Congress extended racial eligibility for naturalization to the Chinese questioned what implication this change might have for the meaning of the remaining racial prerequisites as well.

The same month that the congressional debates regarding the Chinese Exclusion Repeal Act were held, the Immigration and Naturalization Service denounced a decision by the United States District Court for the Eastern District of Michigan that denied the racial eligibility of an Arab for naturalization based on the conclusion that Arabs were “part of the Mohammedan world and . . . a wide gulf separates their culture from that of the predominately Christian peoples of

Europe”<sup>69</sup> In its October 1943 *Monthly Review*, the same month as the House debates regarding the Chinese Exclusion Repeal Act, the Immigration and Naturalization Service devoted an entire article to “The Eligibility of Arabs to Naturalization” in which the Service challenged the Michigan court’s recent decision, surveyed numerous contrary judicial decisions holding Arabs to be “white,” noted that it had long been the administrative policy of the United States not to object to Arab naturalizations on racial grounds, and concluded by warning that the Michigan court’s decision was also deplored “because it comes at a time when the evil results of race discrimination are so disastrously apparent.”<sup>70</sup> As discussed in Chapter 1, scholarly commentators like Charles Gordon also wrote of this sentiment as a widespread response to the war, which had created “increasing public sentiment” that challenged the validity of the racial prerequisites to naturalization.<sup>71</sup>

Similarly, in his April 1944 judicial opinion in *Ex Parte Mohriez*, Judge Charles Wyzanski of the United States District Court for the District of Massachusetts relies in part on the Service’s October 1943 *Monthly Report* to support the conclusion that an Arab petitioner was “white” and therefore racially eligible for naturalization, commenting that “both the learned and the unlearned would compare the Arabs with the Jews towards whose naturalization every American Congress since the first has been avowedly sympathetic” and reciting the significant contributions of Arabs to European history and culture including their contributions to the Greek foundations of Western thought.<sup>72</sup> In the final paragraph of his opinion, Judge Wyzanski also notes that the changing geopolitical situation of World War II and the Chinese Exclusion Repeal Act suggest that the racial prerequisites to naturalization should be broadly rather than narrowly interpreted:

It may not be out of place to say that, as is shown by our recent changes in the laws respecting persons of Chinese nationality and of the yellow race, we as a country have

learned that policies of rigid exclusion are not only false to our professions of democratic liberalism but repugnant to our vital interests as a world power. In so far as the Nationality Act of 1940 is still open to interpretation, it is highly desirable that it should be interpreted so as to promote friendlier relations between the United States and other nations and so as to fulfill the promise that we shall treat all men as created equal.<sup>73</sup>

Judge Wyzanski's citation of the Declaration of Independence's proclamation that "all men are created equal" follows the theme of the congressional debates regarding the Chinese Exclusion Repeal Act and of the war generally, suggesting a new interpretive approach to the racial prerequisites to naturalization designed to reduce racial tensions and promote alliances important to the nation's security.

Despite the view that congressional intent regarding the meaning of the racial prerequisites to naturalization had changed, however, they were not entirely negated by the Chinese Exclusion Repeal Act. The Japanese were still considered racially ineligible for naturalization until the racial prerequisites to naturalization were completely eliminated in 1952. The United States Court of Appeals for the Ninth Circuit upheld a ruling by the Board of Immigration Appeals shortly after the war, for example, that a woman of "one-half white and one-half Japanese blood" was not entitled to admission to the United States because the woman was racially ineligible for naturalization despite her marriage to an American serviceman during the American occupation of Japan after World War II.<sup>74</sup> Similarly, Vietnamese and Samoans were also held to be racially ineligible for naturalization.<sup>75</sup> The significance of nationality to racial classifications under the naturalization act during this period was also more explicitly discussed by authorities. In a closer case, the Board of Immigration Appeals narrowly interpreted the phrase "Chinese persons or persons of Chinese descent" to hold that a person born in Germany of a German mother and of a father who was a native of Siam but "predominantly Chinese in blood" was neither "white" nor a "person of Chinese descent," based in part on the

Board's consideration of the congressional debates regarding the Chinese Exclusion Repeal Act which the Board interpreted to evince only an intention to extend racial eligibility for citizenship to Chinese nationals who were America's ally during the war in the Pacific and their progeny.<sup>76</sup> The repeal of Chinese exclusion had not yet negated the racial prerequisites to naturalization in their entirety, but the role of nationality in racial classifications under the act was becoming more evident.

### **THE RED SCARE AND THE FILIPINO AND INDIAN NATURALIZATION ACT**

The year after Congress extended racial eligibility for naturalization to "Chinese persons and persons of Chinese descent" in the Chinese Exclusion Repeal Act, debates regarding the extension of racial eligibility for naturalization to "persons of races indigenous to India" also reflected appeals to unite against a common enemy. In contrast to the Chinese Exclusion Repeal Act which was supported by the need to unite against the Axis threat alone, two alternative enmities were used to end Asian Indian exclusion: the Axis threat while the war continued and the Soviet communist threat once the war was over. The first wartime legislation proposing to extend racial eligibility for naturalization to Asian Indians was introduced in March 1944, and hearings were held on the measure by the Committee on Immigration and Naturalization before the war ended, but the Senate did not debate the measure until October 10, 1945, after Germany, Italy, and Japan had surrendered. Because the consideration of the bill spanned both the war and postwar periods, the debates regarding it mark one of the clearest shifts in the rhetorical appeals to geopolitical enmities in the discourse regarding the racial prerequisite to naturalization, reflecting a shift from fear of the Axis threat during the war to the fear of the Soviet threat when the elimination of wartime fears threatened to defeat the legislation.

Although the bill was initially motivated by the same concerns that had motivated the Chinese Exclusion Repeal Act—to shore up Asian alliances and “dull the edge of Jap propaganda” to win the war<sup>77</sup>—once Japan had surrendered some legislators objected that the measure was no longer necessary. Congress nonetheless passed the bill following debates in which legislators appealed to the need to strengthen India’s alliance with the United States against its new cold war adversary the Soviet Union, often identified through its persona in “Joe Stalin.” Thus, the debates regarding the bill to extend racial eligibility for naturalization to Asian Indians reflect a sudden shift to a new cold war enemy against which to unify. The rhetorical strategy of unifying against Soviet communism is also reflected in two opinions issued by the United States Board of Immigration Appeals in racial prerequisite cases involving Kalmyk and Tatar refugees from the Soviet Union in the early 1950s which are discussed below in this chapter.

The legislation extending racial eligibility for naturalization to Asian Indians was in part the culmination of decades of Asian Indian lobbying that began after the Supreme Court’s opinion in *Thind*. As discussed in Chapter 2, the manner in which Asian Indians chose to combat the consequences of the *Thind* decision paralleled what Harold Gould describes as “an important transition from the rather crude and somewhat quixotic revolutionism that characterized Ghadr” to Gandhi’s nonviolent philosophy of *satyagraha*. During this period, “the strategies of old-fashioned intrigue, violence and bomb-throwing were being replaced by more subtle, less violent means of persuasion” as Asian Indian activists abandoned their violent revolutionary rhetoric and sought allies in the United States government to lobby for change through traditional political methods.<sup>78</sup> By 1926, former Ghadr leader Taraknath Das had secured a favorable letter of recommendation to Congress from Supreme Court Chief Justice William Howard Taft who had

presided in *Thind*, and Das secured a sponsor for a resolution introduced in Congress to ratify and confirm the naturalizations of those Asian Indians whose naturalizations certificates had been canceled after *Thind*. The first of many bills proposing to make Asian Indians racially eligible for naturalization was introduced in conjunction with this resolution.<sup>79</sup> In addition, Department of Labor files reflect a persistent lobbying effort by individual Asian Indians and organizations such as the India Welfare League during the interwar period, including numerous trips to Washington, D.C. by lobbyists petitioning for Asian Indian naturalization rights, eventually resulting in a June 1939 hearing before the House of Representatives Committee on Immigration and Naturalization regarding “Petitions by Natives of India for Legislation to Include Natives of India Now Residing in the United States as Eligible for Naturalization.”<sup>80</sup>

Throughout these efforts, the Asian Indian lobby appears to have appealed primarily to direct forms of identification and abstract principles of equality to secure Asian Indian eligibility for naturalization, continuing to insist that Asian Indians were of “white blood ethnologically,” emphasizing that thousands had lawfully resided in the United States for years and had demonstrated that they were assimilable with Americans, and appealed to America’s tradition of free institutions and “melting pot” democracy to argue against the arbitrary discriminations of race. Although at times Asian Indians claimed during these efforts that they were stateless people, references to their inability to return to India due to their support of Indian independence were rare and did not indicate that this inability was due to any discrimination they would face as a result of the Indian caste system, but instead represented the British government as the threat. As a result, the only threat to Asian Indians appealed to during these efforts was that posed by an ally of the United States rather than a common enemy.

As reflected in a “Petition for Indian Citizenship Rights” presented to Congress, Asian Indian lobbying efforts also began to frame racial eligibility for naturalization in the United States as a matter of right. In a 1937 letter sent to President Roosevelt, Brooklyn resident Ali Kadir Box stated that “we are created by our Creator to be endowed in the pursuit of Life, Liberty and Happiness,” an allusion to the preamble of the Declaration of Independence, and asked,

would not Liberty rock itself to know the hands that once bade welcome to our shores awakens to realization and say - I AM LIBERTY - but, AMERICA, where are you? Where does FREEDOM enter not enabling India to have her chance of equal rights here in America?<sup>81</sup>

Although the Asian Indian lobby abandoned the violent revolutionary rhetoric of Ghadr for the kinder, gentler approach of building coalitions and consensus as promoted by Gandhi’s *satyagraha* movement during this period, the Asian Indian lobby failed to appeal to a shared fear of a common enemy but instead only reflected a gentler form of self-assertive rhetoric and occasionally highlighted their persecution by the British government.

After the United States entered World War II in the Pacific, however, India’s alliance was seen as a strategic asset against the Japanese, and suddenly Asian Indian efforts to secure racial eligibility for naturalization succeeded. In March 5, 1945 correspondence to the House Committee on Immigration and Naturalization, President Roosevelt stated that he considered the legislation extending racial eligibility for naturalization to Asian Indians, like the Chinese Exclusion Repeal Act, to be an important enactment that “will help us to win the war and to establish a secure peace,” and he offered laudatory praise of the Indian army during the war:

I am sure that your committee is aware of the great services that India has rendered to the United Nations in their war against the Axis. The Indian army, raised entirely by voluntary enlistment, has fought with great skill and courage in Europe, Africa, and Asia.<sup>82</sup>

By a separate letter of May 18, 1945, President Truman endorsed President Roosevelt's letter, and Attorney General Francis Biddle wrote that the legislation was particularly desirable "in view of the important contributions both of men and material that India has made in the present war."<sup>83</sup>

Because the legislation was based on this desire to help win the war, however, when the war ended many questioned whether the legislation remained necessary.<sup>84</sup> Ohio congressman Edward McCowen argued, for example, that while the extension of eligibility for naturalization to the Chinese was to keep China in the war, "Indians are not now fighting Japan,"<sup>85</sup> and Connecticut congresswoman Clare Luce acknowledged that although at the time of the hearings on the legislation the United States was at war with Japan and much was made of the strategic importance of India in winning the war, "that reason of military expediency was disposed of by VJ-day."<sup>86</sup> In place of this initial motive for the legislation, legislators substituted the strategic importance of an alliance with India against the Soviet Union. Congresswoman Luce argued that the fact that official Soviet ideology "seems to make room for men of all colors, is a most potent political fact in the world," perhaps "the most potent one of all." She noted that Soviet communism "has a great appeal for some few American Negroes, who otherwise would despise it," because communism "seems to promise a quick end to the spiritual humiliations and economic handicaps they must suffer simply because they were born, with a black skin," and similarly, "the colored peoples of Asia, those who are still under white masters, will be inclined, all other forces being equal, to do their ideological shopping in Moscow."<sup>87</sup> Illinois congressman Noah Mason also remarked on the "tug of war between Uncle Sam and Joe Stalin" in Asia:

We all know the effort Stalin is making today, through his Communist agents all over the world, to undermine MacArthur and to weaken Uncle Sam's position in Asia. The work of his agents in both China and India is witness to this fact. We must do what we can to offset his efforts in these two countries, each of which has some 400,000,000 people.<sup>88</sup>

These passages reflect the call to secure India's alliance against the rise of Soviet communism in Asia and the concern that racial exclusion would threaten this alliance, even expressing the concern that Soviet efforts to transcend racial differences in the region might succeed if the United States delayed.

In a statement reminiscent of Justice Murphy's comment in *Hirabayashi* that Japanese internment was the first time to his knowledge that the Supreme Court had sustained a substantial restriction on the personal liberty of United States citizens based on "the accident of race or ancestry," congresswoman Luce also offered a lengthy jeremiad of America's loss of moral leadership to Russia on racial justice:

In India and in the colonial world America, once the hope of all enslaved peoples of every color, race, and creed, is slowly coming to be viewed, at worst, as a nation of dollar imperialists, of hypocritical coexploiters with other imperialistic nations, of the black, brown, and yellow man. . . . Yes, more and more today, colonial peoples are looking for inspiration and economic salvation toward Russia rather than toward us, as did all the world, including Russia, from 1776 until the time of Versailles. The loss of moral leadership implied by such a reorientation of the colonial peoples of Europe and Asia, and, yes, Africa, too, toward Soviet ideals can be, I repeat, a very great tragedy for our Nation and for the cause of our democracy and our freedom everywhere in the world.<sup>89</sup>

Here Luce, like Justice Murphy in *Hirabayashi*, presents a remarkably idealistic view of America's history of race relations, one that in Luce's case explicitly alludes to the American Revolution and the principle of equality set forth in the Declaration of Independence. Like Justice Murphy, congresswoman Luce advances a remarkably myopic view of United States immigration and naturalization history, stating that "as I understand it, the original principle behind our immigration laws was the principle that any man . . . was eligible for entry and citizenship, regardless of race, color, or creed," based on the principle that "all men, regardless of color, race, or creed, are judged alike, not only in the eyes of God, but in the eyes of Uncle Sam," a principle which she argues was abandoned by the Asian exclusion acts which put "the Hitlerian

principle” of racial discrimination in its place.<sup>90</sup> Luce’s language of “all men, regardless of color, race, or creed,” being “judged alike” reflects a modified form of the proclamation in the preamble of the Declaration of Independence that “all men are created equal,” expressly infusing racial and religious equality into this principle. This abstract principle again reflected both an enthusiasm for racial equality and internationalism and a revision of America’s history of racial discrimination against blacks, American Indians, and numerous immigrants from Asia and the Pacific Rim.

The Filipino and Indian Naturalization Act became effective on July 2, 1946, only a year before India achieved independence on August 14, 1947. Although the two events did not coincide exactly, by the time Asian Indians achieved eligibility for naturalization India’s independence seemed almost inevitable. The belief long held by Asian Indian immigrants that the racial discrimination they faced in North America was inextricably intertwined with their struggle for independence was confirmed in the end.<sup>91</sup> The debates regarding the extension of racial eligibility for naturalization to Asian Indians reflects the shift from the Axis to the Soviet communist threat that occurred after the war and the impact the fear of Soviet communism had on the racial prerequisites to naturalization. Importantly, although the legislation extending racial eligibility for naturalization to Asian Indians did not necessarily reflect a new understanding of whiteness but only of the relationship between race and citizenship, some legislators repeated the claim that races indigenous to India were “Caucasians” during the debates, indicating that for some the legislation recognized that Asian Indians were “white.”<sup>92</sup> In two opinions issued by the Board of Immigration Appeals, the cold war anxieties reflected in the debates regarding the extension of racial eligibility for naturalization to Asian Indians are also evident in cases deciding that Tatar and Kalmyk refugees from the Soviet Union were “white” within the

meaning of the naturalization act, suggesting that the wartime and cold war enmities altered not only the racial eligibility of certain groups for naturalization, but the meaning of whiteness in the act as well.

### **THE RACIAL PREREQUISITES TO NATURALIZATION AND THE ADMISSION OF SOVIET REFUGEES IN THE EARLY 1950S**

From the earliest legislative and judicial discussions of the racial prerequisites to naturalization after the Civil War, the distinction between “white” and Asian racial classifications was associated with the nineteenth century division between the Caucasian and Mongolian racial classifications. During the 1870 debates regarding Senator Charles Sumner’s proposed amendment to remove the racial prerequisites from the naturalization act, Oregon Senator George Williams, referring to the Chinese immigrants to whom he opposed extending naturalization, remarked that “Mongolians, no matter how long they may stay in the United States, will never lose their identity as a peculiar and separate people.”<sup>93</sup> In the first published judicial opinion in a racial prerequisite case, Judge Lorenzo Sawyer wrote that “neither in popular language, in literature, nor in scientific nomenclature, do we ordinarily, if ever, find the words ‘white person’ used in a sense so comprehensive as to include an individual of the Mongolian race.”<sup>94</sup> Similarly, the Supreme Court’s opinion in *Thind* refers to the Caucasian and Mongolian division,<sup>95</sup> and although the Court does not explicitly find that the Japanese are Mongolian in *Ozawa*—perhaps because Takao Ozawa disputed the classification<sup>96</sup>—it expressly approves of a line of lower court opinions that had concluded the Japanese were Mongolian. The Mongolian racial classification is also frequently referred to throughout the racial prerequisite cases, several times including the aside that Finns and Magyars, although perhaps “white” in the ordinary usage of the term, were known to be Mongolian. In 1908, a United States attorney even

opposed the naturalization of Finnish immigrants based on the claim that they were “Mongolians” and therefore racially ineligible for naturalization.<sup>97</sup>

In *Becoming Yellow*, Michael Keevak writes that the Mongolian racial classification first arose when Friedrich Blumenbach created his five-part racial hierarchy at the end of the eighteenth century and that the classification was largely the creation of nineteenth century racialist science. Previously, though the term “Mongol” was not unknown, the people of northeastern Asia had most often been grouped together under the racial classification of “Tartar,” dating back to the travel narratives of Marco Polo, John of Plano Carpini, and William of Rubrick. Groups classified as Tartar included the Mongols, Manchus, Kalmyks, Buryats, Tibetans, and many others, and China itself was often simply called Tartary or Tartaria. According to Keevak, however, coinciding with Catherine the Great’s effort to bring the eastern borders of the Russian empire under control in the late eighteenth century, numerous scholars in cooperation with the Imperial Academy of Sciences in St. Petersburg criticized the accuracy of the Tartar racial classification and introduced new classifications for the region, including that of Mongolian. Significantly, Tatars themselves were classified as Caucasian rather than Mongolian under this new classification, and the Chinese and Japanese were both classified as Mongolian along with all of the other people of eastern Asia, including the Kalmyks. In fact, Kalmyks were viewed as the epitome of the Mongolian type, known for being “dark and ugly.” In 1676, Jean-Baptiste Tavernier wrote in a popular travel narrative that the Kalmyks were “the ugliest and most deformed people under the sun” and “the most hideous and brutal,” and Petrus Camper identified the Kalmyk skull to epitomize Asian man.<sup>98</sup>

Indeed, Keevak argues that once this new Mongolian racial classification was created, the entire region was imagined as Mongolian, particularly associated with “the idea of barbaric

hordes and merciless slaughter, centering on Attila the Hun, Genghis Khan, and Tamerlane, that familiar triad who were now regularly called ‘Mongols’ as well.” Furthermore, once this change in the European imagination took place,

the Mongolian was also considered a wandering and dangerous human type that perhaps threatened to overrun the world once again, a fear of the populous East that would be invoked by such thinkers as T.R. Malthus, whose contemporaneous theory of overpopulation and limited food supply ignited the specter of a new “Northern Immigration,” reminiscent of the invasions of Attila and Ghengis Khan.<sup>99</sup>

The fact that the Mongolian racial classification originated in the effort to define and secure Russia’s border against raiding Mongol hordes is of particular significance to understanding racial prerequisite discourse because it reveals that the Mongolian classification itself resulted from the unification of Russia against a common enemy. It also illuminates the rhetoric of two racial prerequisite cases that held displaced Tatar and Kalmyk refugees from the Soviet Union to be “white” during the early cold war period.

After 1924, the Board of Immigration Appeals issued a series of opinions interpreting the racial prerequisite in the naturalization act in cases arising from orders of immigration officers to exclude certain people from admission to the United States based on the conclusion that they were not “white.” Section 13(c) of the Immigration Act of 1924 prohibited the admission of aliens “ineligible for citizenship,” requiring immigration officers to apply the racial prerequisites to naturalization in their decisions regarding whether to allow individual immigrants to enter the country. Thus, in a number of cases between 1944 and 1947, the Board issued unexplained findings that certain immigrants were persons of “the white race” as part of opinions regarding other immigration issues. These cases include findings that natives and citizens of Canada, Mexico, Hungary, Italy, and Portugal belonged to the “white race” without discussion of the racial findings.<sup>100</sup> (As discussed above, however, it was frequently remarked that Magyars, or

Hungarians, although perhaps “white,” were Mongolian.) Other Board opinions turned entirely on the racial classification of the immigrant and required the Board to justify its interpretation of the racial prerequisite in the naturalization act in the same manner as the courts by reference to precedents such as *Ozawa* and *Thind*. Among these opinions are two from the early cold war era considering the whiteness of Tatar and Kalmyk refugees fleeing the Soviet Union. These two opinions are remarkable not only because they are two of the latest racial prerequisite cases, serving as a final chapter in the racial prerequisite saga, but because they reflect a continuation of the cold war anxieties that served a crucial function in extending racial eligibility for naturalization to Asian Indians shortly after the war.

The first of these opinions was issued on July 12, 1950, finding that a “native and citizen of Russia of the Tartar race, born in Ufa, Russia,” and “a Mohammedan by religion,” is “white” within the meaning of the naturalization act. The English word “Tartar,” used by the Board in *In re S---*, is a corruption of the Arabic and Persian designation “Tatar.” This corruption originated in a pun on “Tatary” and “Tartarus,” the ancient Greek word for the underworld, because the region of Tartary was considered “the place of damned souls, and Hell it self, in resemblance.”<sup>101</sup> I preserve the Board’s use of “Tartar” in quotations from the Board’s opinion, but otherwise use the original designation “Tatar.” In *In re S---*, the Board writes that the appellant in the case, “a soldier in the Russian army from 1941 to January 1945, when he was captured by the German Army,” was sent to a camp in Austria where “he stated that he was born in Istanbul, Turkey, to avoid repatriation to Russia,” and since that time had been housed in a displaced persons camp in Germany.<sup>102</sup> The appeal came to the Board after the appellant’s eligibility for the visa issued to him by a consular officer under the Displaced Persons Act of 1948 was disputed by a Board of Special Inquiry and by the Acting Assistant Commissioner of

Immigration, who concluded that because Tatars were “members of the Mongolian race originating in Turkestan, a region of central Asia,” they were not “white” and were racially ineligible for naturalization and therefore for admission to the United States under the 1924 Immigration Act.

The Displaced Persons Act of 1948 specifically provided assistance to victims of Nazi persecution and displaced persons in Germany, Austria, and Italy who were fleeing persecution, as well as natives of Czechoslovakia fleeing communist persecution after the Soviet-sponsored communist coup of 1948.<sup>103</sup> In a special message from President Truman to Congress regarding aid for refugees and displaced persons in 1952, he wrote of the success of the Displaced Persons Act and recommended passage of similar measures to continue its purpose when it expired, remarking that “the flight and expulsion of people from the oppressed countries of Eastern Europe” affected “the peace and security of the free world” and was of great concern to the United States “because of our long-established humanitarian traditions.” President Truman referred to those affected as “victims of oppression who are escaping from communist tyranny behind the Iron Curtain,” “fugitives from Soviet terror,” “fugitives from communism,” and “friends of freedom,” and insisted that “our common defense requires that we make the best possible use not only of the material resources of the free world but of our human resources as well.” President Truman also proposed that “as under the Displaced Persons Act, there should be no religious, racial or other discrimination in the selection of immigrants.”<sup>104</sup> S--- and other immigration cases reflect that President Truman’s conclusion that the Displaced Persons Act did not select immigrants based on race was not entirely accurate, however, because even after World War II made “the evil results of race discrimination . . . so disastrously apparent,”<sup>105</sup> and the Displaced Persons Act was passed to protect those displaced by the war, some American

immigration officials continued to exclude people from admission to the United States based on the assertion that they were not “white.”

In *S---*, the Board rejects the Immigration Service’s claim that Tatars are not “white,” however, arguing instead that Tatars had become “more or less Europeanized” by association and intermarriage with the people of eastern European Russia for centuries and by life under oppressive Soviet rule since the Bolshevik Revolution:

Although the Tartars were originally considered Asiatic barbarians of the Mongolian variety, the majority of Tartars have for several centuries lived in eastern Russia, have become civilized and partially absorbed or assimilated by association and intermarriage. In language and religion, they may be designated as near Eastern or closely related to that portion of western Asia bordering on southwestern Russia. The Tartar strain, from which the appellant springs, has become well integrated with other peoples inhabiting the eastern European section of Russia which lies between the Volga River and the Ural Mountains. There has been considerable admixture of Tartars and Ruthenians. The Tartar group have become absorbed into the mass of Eastern Russian peoples and more or less Europeanized in blood and custom, even though the racial traces are still discernible. The Soviet rule during the past 33 years has probably hastened the process of integration, since the Soviet Government requires all communities to speak Russian, in addition to their own traditional language.

As a footnote to this central passage of the opinion, the Board also notes that the people of Ufa, the appellant’s birthplace, “are reportedly being systematically displaced or exterminated and replaced by a special military class of so-called Russianized Cossacks or trusted members of the Red Army’s communist youth organization.”<sup>106</sup> After narrating these historical accounts, the Board cites prior judicial precedent finding that racial groups in nearby Asia Minor such as Arabs, Armenians, Syrians, and Afghans had been held to be “white” in cases such as *Halladjian*, *Ellis*, *Cartozian*, and *Mohriez*, and cites a 1945 Board of Immigration Appeals case finding that an Afghan was “white” despite the fact that “some Afghans have some Mongoloid and Indian strains.”<sup>107</sup>

The Board's opinion in *S---* is also accompanied by an appendix outlining the racial origins and historical background of the Tatars, classifying them within the Mongolian racial division related to the Turks and Huns and tracing the history of the Ufa region from the eighth century through the time of Genghis Khan, Tamerlane, Ivan the Terrible, Peter the Great, and Catherine the Great:

In the latter part of the ninth century, the Magyars, who were originally classed as Mongols, began to make inroads into Europe, eventually settling in Hungary. In the days of the "Great Khanate" of Jenghis Khan, during the late twelfth and early thirteenth centuries, the inhabitants of the area north of the Caspian Sea were called The Golden Horde; during the succeeding era of Kublai Khan, the area was ruled by Kublai's brothers with little interference from the Asiatic side.

The adherence of the present inhabitants of the Idel-Ural sector to the Moslem faith appears to date back to 1395, when they were conquered by Timus of Tamerlane and Samarkand, an ardent Mohammedan zealot. Upon Tamerlane's death in 1405, the empire vanished and reverted to minor tribal chiefs; the process of stabilization and assimilation then began, progressing very slowly from the advent of rising Russian power under Ivan the Terrible in the sixteenth century through the twentieth century of the Romanov and Soviet regimes. The process of Europeanizing Russia began about 1700 by command of Tsar Peter I, "The Great," and was continued by Catherine the Great, who made Russia a great world power for the first time.<sup>108</sup>

The appendix also makes special note of the fact that since the establishment of the Soviet Union, "that government has permitted very few visitors in the eastern and southeastern portions of European Russia," and as a result "statistics cannot readily be verified and represent a reliable estimate."<sup>109</sup>

The long association of Tatars with Mongolians of Asian origin whose racial traces the Board acknowledged were "still discernible" makes it difficult to imagine them being classified as "white" before the Chinese Exclusion Repeal Act and other developments of World War II and the early cold war. As noted in Chapters 1 and 3, cultural memories of Mongol invasions of Europe were invoked during the latter half of the nineteenth century in spreading fear of a flood of Asian immigrants, or "yellow peril," to former British colonies, and this fear played a critical

role in the failure of Senator Charles Sumner's effort to have the racial prerequisite removed from the naturalization act during Reconstruction. From the time of Reconstruction until Pearl Harbor, Mongolians were repeatedly vilified as the primary threat to be excluded from American citizenship in racial prerequisite discourse, and as noted in Chapter 3, the United States Committee on Public Information even represented the Germans, who were thought to reflect barbarism, autocracy, and militarism, as shadowy barbarian Huns during World War I on propaganda posters bearing the slogan "Hun or Home," invoking memories of the Mongol slaughter of Europeans by invaders such as Attila the Hun.<sup>110</sup> During the nineteenth and early twentieth centuries, this image of threatening Mongol invaders held a strong archetypal power in the Western mind and descent from Mongolian ancestors had almost always meant exclusion from immigration and naturalization.

Moreover, racial discrimination against Tatars had deep roots in European history, persisted in the Soviet Union during World War II, and even persists to a limited extent in areas of Russia and the former Soviet republics to this day. Tatars of the Golden Horde were notorious enemies of European Russians until Ivan the Terrible conquered the Volga Tatar of Kazan and Astrakhan in the sixteenth century to form the Russian Empire.<sup>111</sup> In seventeenth century England, the Tatars were frequently equated with the ancient Scythians, known for barbarism and savagery, and Tatars were characterized as an extraordinarily barbarous, vile, and savage people, accused of rapaciousness and iniquity on an unparalleled scale, as reflected in Giles Fletcher the Elder's statement that they were "the most vile and barbarous Nation of all the World." Fletcher argued that the Russian Tatars were the lost ten tribes of Israel, who God had "cast . . . down from the highest Heaven, to the lowest Center of dishonour, even ad Tartaros" because of their idolatry in the ancient kingdom of Israel.<sup>112</sup> Moreover, although the Volga

Tatars undoubtedly shared a close relationship with Russians as its largest ethnic and religious minority through the early twentieth century, the Russian Orthodox Church and many Russian and Soviet elites viewed the Tatars with suspicion and closely monitored pro-nationalist, pan-Islamic, and pan-Turkic elements among the Tatar minority both before and following the Bolshevik Revolution, eventually leading to the execution or exile of Tatar leaders after Tatars formed their own nation following the Bolshevik revolution in 1917.<sup>113</sup> The narrator of Arthur Koestler's 1940 novel *Darkness at Noon*, set during the Moscow Show Trials of the late 1930s and early 1940s, twice refers to a character with "slit Tartar eyes" and "slanting Tartar eyes,"<sup>114</sup> and the Stalinist purges of Tatars described in *S---* were the result of alleged Tatar collaboration with the Nazis during World War II. The Stalinist deportations of Tatars fragmented and had a lasting impact on their culture, contributing to the discrimination that continues to confront repatriated Crimean Tatars in Ukraine today.<sup>115</sup> This history of discrimination against Tatars in Russian and Soviet society illustrates the selective quality of the Board's narrative of Tatar assimilation in *S---*, as the Board could have represented Tatars as non-"white" and dangerous others.

The shift that made it possible to racially classify Tatars as "white" appears to have been caused by the Chinese Exclusion Repeal Act and the broader enthusiasm for internationalism that accompanied the global fight for democracy in response to the fear of Soviet communism during the early cold war, which led President Truman to argue that "our common defense requires that "we make the best possible use not only of the material resources of the free world but of our human resources" with no room for "religious, racial or other discrimination."<sup>116</sup> This unification against Soviet communism meant that narratives of Tatar assimilation into Russian life and culture served two conflicting purposes, both of which are evident in *S---*. On the one

hand, because Tatars were recognized as a Mongolian people of Asian origin, their assimilation into Russian life and culture was essential to finding that they had become part of Western civilization despite their Asian origins, but on the other hand it was necessary to establish that they were not communists. Thus, although the Board notes that the Tatars were “more or less Europeanized in blood and custom, even though the racial traces are still discernible,” and “Soviet rule during the past 33 years has probably hastened the process of integration,” the Board also writes that the appellant lied about his birthplace to avoid repatriation to the Soviet Union and that the Tatars residing in the appellant’s birthplace were suffering persecution by the Soviet government to the point of being “systematically displaced or exterminated.”<sup>117</sup>

A comparison of *S---* and *Cartozian* highlights the extent to which the effort to sever the association of Soviet immigrants from communism was a wartime development in racial prerequisite discourse, however, because as noted in Chapter 3 both the Armenian defense and Judge Wolverton argued in *Cartozian* that Armenians’ alliance with the Russian people of the Caucasus region served as proof of Armenian whiteness and Judge Wolverton writes favorably of “an Armenian who became a count in Russia, marrying a Russian countess or baroness” in his *Cartozian* opinion.<sup>118</sup> By contrast, in *S---* and a case involving Kalmyk refugees from the Soviet Union discussed below, the Board seeks to establish that although life in Russia had assimilated them to Western civilization, they were fleeing Russia because they faced persecution by the Soviet government for offering political resistance to communism. It is also noteworthy that in *S---* the Board does not frame the conquest of Tatars by the Russian Tsar in terms of persecution, but only the more recent assimilation efforts of the Soviet government. In the racial prerequisite cases, when assimilation was represented as involuntary it generally meant that assimilation had failed and vice versa. In *Cartozian*, for example, the defense successfully argued that the only

Armenians to convert to Islam did so involuntarily as the result of forced conversions during the massacres perpetrated by Ottoman Turks, Kurds, and Syrian Muslims.<sup>119</sup> In Pandit's briefing in *Mozumdar*, however, he failed to persuade Judge James that despite Asian Indian resistance to British imperialism, centuries of British rule in India had successfully assimilated Asian Indians to Western civilization.<sup>120</sup> Similarly, during hearings before the House Committee on Immigration and Naturalization regarding a proposal to extend racial eligibility for naturalization to Asian Indians, one congressman remarked in response to claims that Christian missionaries had successfully converted many Chinese to Christianity that the Chinese who had become Christians were "contemptuously called 'rice Christians,' which means that they are Christians because they get some free rice."<sup>121</sup> As Chaïm Perelman and Lucie Olbrechts-Tyteca write regarding which acts of an individual or group are interpreted as essential and which are dismissed as accidents, "it is often held that essence is determined by the element that was intentional, while the remainder, that which contravenes what was intended, is regarded as abuse or accident."<sup>122</sup> In racial prerequisite discourse, when the assimilation of a group was represented as involuntary, or its sincerity questioned, it was generally in support of a conclusion that the assimilation had failed.

The cold war anxieties reflected in the Board's opinion in *S---* are duplicated in an opinion issued the following year holding that two Kalmyk immigrants from the Soviet Union were "white" and therefore racially eligible for naturalization and admission to the United States. In *In re R---*, a Kalmyk husband and wife, natives of Russia, applied for immigration under the Displaced Persons Act of 1948 and, like the Tatar immigrant in *S---*, were granted a visa by a consular officer but excluded by a Board of Special Inquiry and by the Assistant Commissioner of Immigration based on the conclusion that Kalmyks were racially ineligible for naturalization

because they were not “members of the white race.” According to the Board’s opinion in *R---*, the couple was married in Bulgaria “according to the Buddhist rite, which is their religion,” and both were stateless persons, having “fled from Russia about 1920, after resisting the communist revolutionary forces.” The opinion indicates that the man had served in the cavalry of the Russian Tsar, but his first wife and two children “died of starvation in Russia in 1922,” while the woman’s first husband was “shot by the revolutionaries in 1918.”<sup>123</sup> Counsel for the couple argued before the Board that even if the couple did have a predominance of Kalmyk blood, which was disputed in the case, the Kalmyk ethnic group “has been identified with European people by several generations of affinity, education, cultural activity, and 33 years of Soviet rule in Russia and is, therefore, a member of the white race.”<sup>124</sup>

The Board agreed with the couple’s counsel, holding that despite the fact that the Kalmyks of southeastern European Russia were “admittedly of Mongolian” and “Asiatic” origin, they were “white” within the meaning of the naturalization act. The Board begins its explanation of this conclusion with the following historical narrative of the settlement of Kalmyks in southeastern European Russia and their role as protectors of the Russian border against invaders:

During the opening years of the 17th century, a small group of Kalmuks migrated from their original habitat in central Asia to southeastern European Russia. They ultimately settled in that portion of Russia which lies between the mouth of the Don River and the mouth of the Volga River. About the middle of the 17th century, this group of Kalmuks took an oath of allegiance to the Tsar, submitted to Russian rule, and thereafter served as the official protectors of the southeastern borders of European Russia from infringement by warring tribes. Although the Kalmuks were considered to be seminomadic in their habits prior to the 1917 revolution, they have settled on land and carried on their occupation of herding on collective farms under Soviet rule. They have also been taught how to read the Russian language.

The Board indicates that because the Kalmyk couple had been landowners before the Bolshevik revolution and spoke primarily Russian, knowing very little of the Kalmyk language, “it would seem that the Kalmuks, after residing in European Russia for 300 years, have become partially

integrated with the other ethnic groups of Russia.”<sup>125</sup> As in *S---*, the Board then cites prior judicial precedent holding that Arabs, Armenians, Syrians, and Afghans were “white” as well as its opinion in *S---* holding that Tatars were “white,” and concludes that the Kalmyks of southeastern European Russia are “members of the so-called European race, in spite of their Asiatic origin.”<sup>126</sup>

As in *S---*, the Board’s opinion is also followed by an appendix outlining the racial origins and historical background of the Kalmyks, classifying them within the Mongolian racial division that includes the Turks and Huns, and outlining the recent deportation of the Kalmyks of southeastern European Russia by the Soviet government:

The Kalmuks of southeastern European Russia were a tribe of Mongolian stock, originally nomadic in character, tormented by perpetual poverty and numbering less than an estimated 135,000 people in 1939. After the Bolshevik Revolution of 1917, the Soviet Government sought the support and loyalty of the downtrodden Kalmuks by decreeing that the area of the Kalmuk steppes and the adjoining territory should be the property of the Kalmuk people in perpetuum and also granting the Kalmuks a measure of administrative autonomy within the Soviet framework, first as an autonomous oblast (province) and later as an autonomous republic.

However, on February 11, 1943, the Soviet Politbureau and the State Committee of Defense, in joint conference, determined that the Kalmuks should be displaced and deported, because they opposed the oppressive Soviet regime and, hence, were considered wanting in loyalty, dangerous to the State. This order was actually executed on February 22, 1944 (Red Army Day), when without warning and at gun-point, the Kalmuk population was herded into unheated railroad cars. Since they were sent on their journey in locked cars, without benefit of food or water, many died en route, while the rest were scattered in various spots of the Soviet Union. This action, by which the helpless Kalmuk minority group was forced to migrate east, was ratified, or legalized in retrospect, by Soviet government decree in 1946.

The length of this passage and detail provided plainly evince the Board’s identification with the plight of the Kalmyk minority described, repeatedly referring to them as “tormented,” “downtrodden,” and “helpless,” whose only crime was that they opposed the “oppressive Soviet regime.”

The Board also explains that its opinion is limited to those Kalmyks of southeastern European Russia who lived on the west bank of the Volga River and did not take part in the Kalmyk exodus from Russia in 1771:

The Kalmuk tribe involved in that ill-fated trek eastward toward China lived on the east bank of the Volga River in Asiatic Russia. This group is distinct from the Kalmuks of southeastern European Russia, for they stayed aloof from the neighboring Russian and non-Russian tribes. Their flight was motivated by fear of Russian Tsarist influence and domination.<sup>127</sup>

As discussed in Chapter 3, the phrase “stayed aloof” in this passage emphasizes the pursuing agency of the Russian Tsarist forces referred to in the final sentence, suggesting that the Kalmyks of southeastern European Russia did not fear Russian Tsarist influence and domination and chose not to flee. This conclusion is not supported by historical sources, however, and appears designed to establish that the assimilation of these remaining Kalmyks in the Russian Empire was voluntary rather than acknowledge their shared desire to flee.

In the early seventeenth century, a large number of Kalmyks migrated west across Kazakhstan from the far northwestern province of Xinjiang, China to the lower Volga River region of Russia near the Caspian Sea. As the Board’s opinion in *R---* describes, by the middle of the seventeenth century this group of Kalmyks “took an oath of allegiance to the Tsar, submitted to Russian rule, and thereafter served as the official protectors of the southeastern borders of European Russia from infringement by warring tribes,” becoming a border power allied with the Tsarist government against Muslim powers to the south such as the Turks of the Ottoman Empire.<sup>128</sup> Although at first the Kalmyks enjoyed relative autonomy, the Tsar increasingly encroached on this autonomy as the relationship progressed, eventually imposing a council on the Kalmyk Khan. As a result of these encroachments, the Kalmyk Khan, in consultation with the Dalai Lama, decided to revolt from the authority of the Tsar and return the Kalmyks to their

ancient homeland in China during the winter of 1771,<sup>129</sup> but on the date set for their departure the Kalmyks living on the west side of the Volga were prevented from following the eastern Kalmyks either because the ice on the Volga was not strong enough to sustain them or because Russian troops interfered.<sup>130</sup> Whatever the reason for the division of the Kalmyks during this exodus, it appears undisputed that the western Kalmyks who remained did not do so willingly but through some accident of history, and Catherine the Great subsequently abolished the autonomy of the Kalmyks who remained and forcibly integrated them into the Russian empire.<sup>131</sup> Accordingly, the Board's suggestion in *R---* that the Kalmyks who remained in Russia did not fear Tsarist influence and domination as much as the eastern Kalmyks is misleading. Furthermore, the Kalmyks living east of the Volga were ruthlessly pursued and massacred by Russian forces during their flight across the desert to the Great Wall of China, hundreds of thousands of them never reaching China, and Thomas DeQuincey portrays them sympathetically in *Revolt of the Tartars*, describing the flight as a "national Exodus" through "the afflictions of the Desert" analogous to literary and historical epics such as the exodus of the Israelites from Egypt.<sup>132</sup>

Unlike in *S---*, the Board's initial opinion in *R---* was contested by the Immigration Service's Central Office, which returned the case to the Board for reconsideration with an opinion arguing that "the Kalmuks have only been settled in European Russia for a little over 300 years, a comparatively short time in the history of western civilization," and noting that in light of the 1911 *Dictionary of Races and Peoples*'s description of the Kalmyks as "more Asiatic than the Tartars" in appearance and culture, "while it is true that 33 years of Soviet rule may have hastened the process of integration, it does not follow that the characteristics of this group, as set forth in a compilation made in 1911, have been materially altered in such short space of

time.” The Central Office distinguished S--- by arguing that there was a substantial difference between the Tatars and Kalmyks insofar as “the Tartars are of the Tartaric group whereas the Kalmuks are of the Mongolian group” and more closely related to “the Mongols of northern China,” and moved that the Board reconsider and withdraw its order and requested representation for the Immigration Service before the Board.<sup>133</sup>

On reconsideration, the Board disagrees with the Central Office and insists that the Kalmyks of southeastern European Russia are “white” and therefore racially eligible for naturalization and admission to the United States. In response to the Central Office’s request that the Board reconsider its opinion, the Board particularly challenges the Central Office’s reliance on the assertion that Kalmyks were Mongolian as a basis on which to conclude that they were not “white,” writing that the term “Mongol” could be applied to numerous European people:

The use of “Mongol” is a loose application of the word for the Magyars of Hungary, the Huns of the Balkans and the Italian peninsula, the Finns, the Tartars, and the Mordvinians of east-central Russia are all members of the Mongol racial family.

The Kalmuks of southeastern European Russia are admittedly of Mongolian origin, as are the Tartars of the same general area but these parallel racial groups have both become fused with the rest of the racial minorities of southeastern European Russia by a gradual process of association and intermarriage. Thus, both the Kalmuks and Tartars have become “more or less Europeanized in blood and custom, even though the racial traces are still discernible.”<sup>134</sup>

The Board also emphasizes that the Kalmyks resided within the geographical boundaries of Europe, arguing that because the Kalmyk tribe in question “inhabits a part of Europe,” members of the tribe were “in a better position to contend that they are ‘white persons’ than the Afghans, Armenians, Syrians, and non-European Arabs, who have been held eligible to naturalization,” and that the phrase “white person” as commonly understood includes “all races living in Europe, even though some of the southern and eastern European races included are technically classified as Mongolian or Tartaric in origin.”<sup>135</sup> An “editor’s note” to the Board’s opinion also notes that

after the Central Office's opinion, the Board issued an opinion in an unreported case holding that "a person of stock (Tadjik or Tadshik) originating in the Turan area, east coast of the Caspian Sea, of a group of families settled in the Ukraine in 1931 by the Soviet Government," was "white" and therefore racially eligible for naturalization and admission to the United States.<sup>136</sup> The Board also questions the Central Office's reliance on the 1911 *Dictionary of Races and Peoples*, remarking that "it is felt that more recent sources should not be ignored in arriving at a valid conclusion, since these contemporary studies of races ought to be more reliable," citing State Department documents entitled *Fate of Minorities Under Soviet Rule* and *Voluntary and Involuntary Soviet Migrations*, a text entitled *The Moscow Conspiracy ("Murder of a Nation")* by Col. G.A. Tokaev, and two CIA map studies of ethnic groups in the Soviet Union.<sup>137</sup> The latter documents, like the rest of the Board's opinion in *R---* and its opinion in *S---*, emphasize Soviet persecution of the Kalmyk minority.

Unlike the judicial opinion writing in the racial prerequisite cases of the late nineteenth and early twentieth century, the opinion writing in *S---* and *R---* suggests that the need to unify against America's cold war enemy the Soviet Union transcended the distinction between "white" and Asian racial classifications. In contrast to the opinions in earlier racial prerequisite cases involving Europe's border with the Middle East and the Indian subcontinent, in these early cold war cases the Board of Immigration Appeals was faced with defining Europe's border with China and the Mongol hordes of Atilla the Hun, Genghis Khan, and Tamerlane that dominated Central Asia in the Middle Ages and early modern era. As one court noted, the Chinese Exclusion Repeal Act may have suggested to courts of the era a congressional intent to depart from the meaning attributed to the term "white" by the framers of the original statute in 1790,<sup>138</sup> or, as Judge Wyzanski proposes in *Mohriez*, perhaps courts of the period were motivated to resist

the racial prerequisites to naturalization for the same reasons as Congress and concluded that whiteness “should be interpreted so as to promote friendlier relations between the United States and other nations and so as to fulfill the promise that we shall treat all men as created equal.”<sup>139</sup> As discussed above, however, after the Chinese Exclusion Repeal Act certain groups were excluded from admission to the United States based on the conclusion that they were not “white,” including Vietnamese and Samoan petitioners and petitioners who were half “white” and half Japanese or half mixed Chinese and Thai parentage.

The language in which whiteness is defined in the Board’s opinions in *S---* and *R---* also admits of greater contingency in racial classifications than earlier precedent, suggesting that the Board did not consider whiteness to have a fixed meaning. The Board writes in both cases that the Tatar and Kalmyk immigrants were “*more or less* Europeanized in blood and custom, even though the racial traces are still discernible.”<sup>140</sup> This presents a stark contrast to Justice Sutherland’s conclusion a basis for holding that high caste Hindus were not “white” in *Thind* that “it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry.”<sup>141</sup> The Board’s language suggests it almost entirely dismissed discernible physical differences in the cases. The Central Office’s conclusion in *R---* that 300 years was “a comparatively short time in the history of western civilization”<sup>142</sup> is also a reasonable interpretation of the Supreme Court’s holding in *Thind*, which as Pandit pointed out in *Mozumdar* necessarily implied that centuries of British rule in India had not succeeded in assimilating Asian Indians to Western civilization.<sup>143</sup>

Relying as the Board does in *S---* and *R---* on a persecutory rhetoric similar to that used in *Cartozian* by emphasizing the Soviet deportation and genocide of Tatar and Kalmyk minorities in their Russian homelands, their effort to escape the Soviet communist government, and

government documents such as *Fate of Minorities Under Soviet Rule* and *Voluntary and Involuntary Soviet Migrations* as well as a text subtitled “*Murder of a Nation*”—a title made famous by Henry Morgenthau’s chapter on the Armenian genocide in *Ambassador Morgenthau’s Story*<sup>144</sup>—the Board’s opinions in these cases appear to reflect both the conclusion of President Truman that the flight of “victims of oppression who are escaping from communist tyranny behind the Iron Curtain” affected “the peace and security of the free world”<sup>145</sup> and the idealism of Justice Murphy in *Hirabayashi* that the assimilability of Asian and other immigrants was a vital part of American culture.<sup>146</sup> In light of the association of Tatars and Kalmyks with the Mongolian racial classification and residence in Asia, it is unlikely that these minority groups would have been classified as “white” absent the fact that they had been victims of Soviet persecution during the early cold war. In these final examples of racial prerequisite cases reflecting the “historical interpretation” of race, the Board of Immigration Appeals finds Tatar and Kalmyk refugees from the Soviet Union “white” and therefore racially eligible for naturalization and admission to the United States by appealing to the need to unify against the threat of Soviet communism.

#### **“ALL MEN ARE CREATED EQUAL”**

During World War II and the early cold war, the legislative, executive, and judicial discourse regarding the racial prerequisites in the naturalization act reflects solidarity in the face of the threats posed by the Axis powers during the war, particularly the threat posed by Japan in the Pacific, and by Soviet communism after the war ended. The rhetoric of solidarity against these threats expanded both the groups considered racially eligible for naturalization and the interpretation of whiteness within the meaning of the naturalization act. Wartime rhetoric that

seeks to unify groups against a common enemy is of course not surprising, as this is a common rhetorical form in the face of danger. More recently, the French newspaper *Le Monde* proclaimed “We are all Americans” in a front-page headline after the September 11, 2001 terrorist attacks on New York and Washington, D.C. In a front-page editorial, *Le Monde* wrote that “in this tragic time, when words to express the shock we feel appear meaningless, the first thing that comes to mind is this: We are all Americans,” adding, “we are all New Yorkers, as surely as John Kennedy in 1963 declared in Berlin that he was a Berliner.”<sup>147</sup> Similar sentiments were expressed across the globe after 9/11, even by some of the most open adversaries of the United States such as Iran, the Palestinian Authority, and Cuba. Expressions of unity with the victims of violent attacks are a commonplace, particularly evident in times of national crisis such as Pearl Harbor and 9/11. As noted earlier in this chapter, Winston Churchill represented the Japanese attack on Pearl Harbor during World War II not as an attack on the United States but on the entire Anglo-Saxon race, asking, “What kind of people do the Japanese think we Anglo-Saxons are? Do they imagine that we are the sort of men which this treacherous attack will cause to fold up?”<sup>148</sup>

The racial prerequisite cases demonstrate, however, that considerable confusion exists regarding the agency at work in this strategy. In numerous examples of racial prerequisite discourse, when the racial eligibility for naturalization or the category of whiteness itself is expanded, a passive or persecutory agency is used to represent the immigrants found racially eligible for naturalization, as exemplified by the persecutory narratives in the legislative debates regarding the extension of racial eligibility for naturalization to Chinese and Asian Indians during World War II and the early cold war and in the arguments and opinions in *Pandit*, *Cartozian*, *S---*, and *R---*. By contrast, when petitioners sought to establish their racial eligibility

for naturalization through rhetoric in which they played an active role, recounting their history of conquest, civilizational accomplishments, and discriminatory segregation of non-“white” groups such as blacks, American Indians, and Dravidians, as reflected in the arguments of the Syrian, Japanese, and Asian Indian petitioners in *Dow*, *Ozawa*, *Thind*, and *Mozumdar*, they were held to be racially ineligible for naturalization. Moreover, as described in Chapter 1, numerous wars and military expediencies expanded the racial demographics of American citizenship through the naturalization provisions of the Treaty of Guadalupe-Hidalgo, the Treaty with Spain, the Gadsden Treaty, and the Treaty with Russia, along with the opinion in *Rodriguez*, in which Judge Maxey relied on such treaties for holding that Mexicans were racially eligible for citizenship.<sup>149</sup> Throughout the racial prerequisite discourse, appeals to unify against common enemies frequently accompanied findings of eligibility for naturalization and extensions of racial eligibility for naturalization to new groups, and such appeals also received an emphasis that suggests they were viewed as particularly persuasive of eligibility.

While Jeremy Engels at times describes “enemyship” as an animosity toward a shared enemy, describing the solidarity created by this rhetoric as “a bond of mutual antagonism for an enemy, . . . a community of spite, . . . and a brotherhood of hatred,”<sup>150</sup> and Sam Keen claims that “striking at strangers” brings our tribe or nation together, the racial prerequisite cases examined in this dissertation suggest that a rhetoric of aggression toward an enemy does not create this bond, at least not as powerfully as a passive agency. Instead, the racial prerequisite cases suggest that that the maxim “the enemy of my enemy is my friend,” commonly used to refer to the strategy of unifying against a common enemy, might more aptly be formulated as “the victim of my enemy is my friend.” The close bond felt by fellow soldiers in war is, as Chris Hedges writes, created by “the wolf of death banging at the door,” and “without the threat of violence and death

it cannot be sustained.”<sup>151</sup> During World War II, the United States Office of War Information issued propaganda guidance warning against treating the Japanese as “funny little men” rather than “tough fighting men, ruthless and fanatical in their military aspirations,”<sup>152</sup> a strategy of intensifying fear of the enemy rather than their degradation. The unifying power of violent attacks such as Pearl Harbor and 9/11, as well as the many minor examples of threatening forces in human society, is in the first instance an effect not of aggression but of fear, and is intensified only when the enemy is represented as the aggressor. It is Armenians maintaining their Christianity in Asia Minor by withstanding “the onslaught of Mohammedanism” perpetrated by Ottoman Turks, Kurds, and Syrian Muslims massacring the helpless Armenian minority in the Ottoman Empire, standing firm “in the face of tremendous odds,”<sup>153</sup> or the Chinese, “attacked by a savage enemy, who possesses the mechanized monsters of war,” standing firm “against very great odds,”<sup>154</sup> or the “helpless Kalmuk minority,” who “without warning and at gun-point,” were “herded into unheated railroad cars,” “without benefit of food or water, many [dying] en route, while the rest were scattered in various spots of the Soviet Union.”<sup>155</sup> As in these examples, the powerful force to unify against a common enemy is not created by banging at the door of the wolf of death, but by the wolf of death banging at the door.

The rhetoric of solidarity in the face of the threats faced during World War II and the early cold war is also powerfully expressed by the many recitations of and allusions to the Declaration of Independence during the period, particularly the proclamation that “all men are created equal.” The Declaration of Independence provides an eloquent expression of unification against a common enemy, itself arising out of the Revolutionary War and reflecting the unification of the American colonies to form a nation in common defense against the British monarchy. In the first book-length study of the Declaration, Carl Becker notes how the form of

the Declaration itself invokes a powerful persecutory agency in the first two paragraphs which outline the colonists' charges against King George III:

Whereas the king is represented as exclusively aggressive, the colonists are represented as essentially submissive. In this drama the king alone acts—he conspires, incites, plunders; the colonists have the passive part, never lifting a hand to burn stamps or destroy tea; they suffer while evils are sufferable. It is a high literary merit of the Declaration that by subtle contrasts Jefferson contrives to conjure up for us a vision of the virtuous and long-suffering colonists standing like martyrs to receive on their defenseless heads the ceaseless blows of the tyrant's hand.<sup>156</sup>

As Becker aptly notes, Jefferson creates this effect by beginning each charge with the phrase “he has,” giving King George the active agency in the events:

‘he has refused to assent’; ‘he has forbidden his governors’; ‘he has refused to pass laws’; ‘he has called together legislative bodies’; ‘he has refused for a long time.’ As if fearing that the reader might not after all notice this oft-repeated ‘he has,’ Jefferson made it still more conspicuous by beginning a new paragraph with each ‘he has.’ To perform thus is not to be ‘literary’ in a genteel sense; but for the particular purpose of drawing an indictment against the king it served very well indeed. Nothing could be more effective than these brief, crisp sentences, each one the bare affirmation of a malevolent act. Keep your mind on the king, Jefferson seems to say; he is the man: *‘he has refused’*; *‘he has forbidden’*; *‘he has combined’*; *‘he has incited’*; *‘he has plundered’*; *‘he has abdicated.’*<sup>157</sup>

Both the rhetoric of martyrdom in Becker's description of the Declaration's charges against the king and the principle of equality set forth in the proclamation that “all men are created equal” parallel Nikki Shepardson's argument, discussed in Chapter 3, that the rhetoric of martyrdom promises a claim of universality for those within the martyr's community, “a phenomenon transcendent of the traditional boundaries and hierarchies within a community.”<sup>158</sup> When expressed during times of crisis, the proclamation that “all men are created equal” is a powerful call to unify and makes the Declaration's preamble particularly suited for recitation at such times.<sup>159</sup>

As realistic group conflict theory suggests, however, the principle of equality reflected in the proclamation that “all men are created equal” depends on a threatening other, for without the

motive condition of a superordinate goal that requires groups in competition or conflict to cooperate, exhortations to treat every person as equal prove futile.<sup>160</sup> This may explain the absence and ineffectiveness of recitations of the proclamation during interwar periods and its sudden power during World War II. Recently, the proclamation has been recited during 9/11 memorials. One World Trade Center, known as Freedom Tower, which serves as the center of the World Trade Center currently under construction to replace the complex destroyed on 9/11, is even designed to stand 1776 feet tall in symbolic tribute to the date on which the Declaration of Independence was signed.<sup>161</sup> At the beginning of Frank Capra's 1942 film *Prelude to War*, the first of seven films Capra produced during World War II in cooperation with the Office of War Information in a series entitled "Why We Fight," the narrator explains that the free world for which Americans were fighting had become free "only through a long and unceasing struggle inspired by men of vision," including Moses, Mohammed, Confucius, and Christ, who "all believed that in the sight of God all men were created equal, and from that there developed this spirit among men and nations which is best expressed in our own declaration of freedoms: 'We hold these truths to be self-evident, that all men are created equal,'" a declaration which the film describes as "the cornerstone upon which our nation was built and the ideal of all the great liberators."<sup>162</sup> During World War II, the declaration that "all men are created equal" was aligned with the great scriptural traditions of the world and often claimed to define the character and ideals of the nation more than any other piece of literature.

Many historians have claimed that the rapid globalization of the early twentieth century caused a crisis in American exceptionalism seen in the protracted and uneven American historiography of the period in which historical writing wavered between recognizing America's transnational relationships and ignoring them.<sup>163</sup> During this period, historical writing responded

to an exigency of national identity that called for public memories to be renegotiated to address newly arising threats to the nation. The racial prerequisite discourse of the early twentieth century reflects this purpose, seeking through renegotiations of world historical narratives to not only racially classify individual naturalization petitioners as “white” or non-“white” in a narrow act of statutory interpretation but to also define American identity as the United States forged new relationships in response to rapidly shifting geopolitical alliances and enmities.<sup>164</sup> The racial prerequisite discourse of the early twentieth century must be understood as a highly symbolic rhetoric addressed to a much broader audience than that traditionally ascribed to judicial discourse, as reflected in the racial prerequisite discourse of World War II and the early cold war. The racial prerequisite discourse of this period reflects the understanding that Asian exclusion had greater ramifications for the global struggle for democracy in the world,<sup>165</sup> and the claim that “all men are created equal” celebrated the shared suffering of that struggle.

## NOTES

<sup>1</sup> *Hirabayashi v. United States*, 320 U.S. 81, 110-11 (1943) (Murphy, concurring).

<sup>2</sup> President Franklin D. Roosevelt to the United States Congress, October 11, 1943.

<sup>3</sup> *Filipino and Indian Naturalization Act of 1946*, HR 3517, 79th Cong., 2nd Sess., *Cong. Rec.* 91 (October 10, 1945), 9523.

<sup>4</sup> See *Immigration Act of 1917*, 64th Cong, 2nd Sess., *U.S. Statutes at Large* 39 (1917): 874.

<sup>5</sup> See *Immigration Act of 1924*, 68th Cong., 1st Sess., *U.S. Statutes at Large* 43 (1924): 153.

<sup>6</sup> See *United States v. Ali*, 20 F.2d 998 (E.D. Mich. 1927); *United States v. Javier*, 22 F.2d 879 (D.C. Cir. 1927); *United States v. Gokhale*, 26 F.2d 360 (2d Cir. 1928).

<sup>7</sup> See *In re Fisher*, 21 F.2d 1007 (N.D. Calif. 1927) and *In re Cruz*, 23 F.Supp. 774 (E.D.N.Y. 1938).

<sup>8</sup> See *In re Din*, 27 F.2d 568 (N.D. Calif. 1928).

<sup>9</sup> See *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>10</sup> Transcript of Hearing on Naturalization of Natives of India Now Living in the United States, United States House of Representatives Committee on Immigration and Naturalization, June 21, 1939, 1-2, in Records of

the Immigration and Naturalization Service of the United States, Record Group 85, Box 1573, File 19783/43, National Archives and Records Administration, Washington, D.C. This historical narrative offers a stark contrast to Bhagat Singh Thind's assertion in *Thind* that America's melting pot suggested a racial degeneracy that high caste Hindus had avoided by their strict observance of caste restrictions on marriage and reflects the profoundly different rhetorical approach of Indian nationalists who succeeded the Ghadr movement. Others highlighted the hypocrisy of the United States framing itself as a leader in the global fight for democracy, as reflected in the comments of former Ghadr leader Taraknath Das made during congressional hearings several years later regarding the Chinese Exclusion Repeal Act:

If this war is for world unity and world freedom, then the United States cannot practice double standards of international morality—one for the whites and the other for the Asiatics. . . . If this war is being fought for world freedom, and in this fight the peoples of the orient are used as allies, then they should be given equality.

Quoted in Paul Rundquist, "A Uniform Rule: The Congress and the Courts in American Naturalization, 1865-1952" (PhD diss., Univ. of Chicago, 1975), 327.

<sup>11</sup> See, e.g., *Chinese Exclusion Repeal Act of 1943*, HR 314, 78th Cong., 1st Sess., *Cong. Rec.* 89 (November 26, 1943): 9990. Tennessee congressman John Jennings, for example, remarked that "we have always been friendly to the people of China." *Ibid.*, 8602.

<sup>12</sup> *Chinese Exclusion Repeal Act of 1943*, HR 314, 78th Cong., 1st Sess., *Cong. Rec.* 89 (October 20, 1943): 8596.

<sup>13</sup> *Ibid.*, 8602.

<sup>14</sup> Correspondence from President Franklin Roosevelt to Samuel Dickstein dated March 5, 1945, *Filipino and Indian Naturalization Act of 1946*, HR 3517, 79th Cong., 2nd Sess., *Cong. Rec.* 91 (October 10, 1945), 9523.

<sup>15</sup> Brief of Attorney General at 48, *In re Yamashita*, No. 202 (Wash. Sup. Ct. 1902).

<sup>16</sup> See Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof, *Samras v. United States*, No. 130, June 8, 1942, 21 (arguing in part that the racial prerequisite in the naturalization act "was and is unconstitutional because it is so manifestly and grossly irrational, illogical, arbitrary and capricious upon its face because of its discriminatory classification solely because of race or color as to constitute a violation of the due process of law clause of the Fifth Amendment to the Constitution of the United States" and noting that no constitutional objection to the racial prerequisite had been urged in "any . . . case thus far"). Samras filed his petition for certiorari in the United States Supreme Court one day late and his petition was dismissed for being untimely.

<sup>17</sup> Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy*, 250.

<sup>18</sup> See *Immigration Act of 1924*, 68th Cong., 1st Sess., *U.S. Statutes at Large* 43 (1924): 153.

<sup>19</sup> *Filipino and Indian Naturalization Act of 1946*, HR 3517, 79th Cong., 2nd Sess., *Cong. Rec.* 91 (October 10, 1945), 9541.

<sup>20</sup> John W. Dower, *War Without Mercy: Race and Power in the Pacific War* (New York: Pantheon, 1986), 4-11; see also Susan A. Brewer, *Why America Fights: Patriotism and War Propaganda from the Philippines to Iraq* (New York: Oxford Univ. Press, 2009), 124 ("In the Pacific theater, especially, Americans and Japanese adopted a ferocious kill or be killed attitude."); Pearl S. Buck, "The Race Barrier 'That Must Be Destroyed,'" *New York Times*, May 31, 1942 ("Although we may not be willing to know it, it is possible that we are already embarked upon the

bitterest and the longest of human wars, the war between the East and the West, and this means the war between the white man and his world and the colored man and his world.”).

<sup>21</sup> Dower, *War Without Mercy*, 5.

<sup>22</sup> Pearl S. Buck, *American Unity and Asia* (New York: John Day, 1942), 29.

<sup>23</sup> Quoted in Department of Justice, Immigration and Naturalization Service, “Proposed Repeal of the Chinese Exclusion Acts,” *Monthly Review* 1 (1943): 14.

<sup>24</sup> *Chinese Exclusion Repeal Act of 1943*, HR 314, 78th Cong., 1st Sess., *Cong. Rec.* 89 (October 20, 1943), 8579, *Cong. Rec.* 89 (November 26, 1943), 9995.

<sup>25</sup> *Ibid.*, 8594.

<sup>26</sup> Gerald Horne, “Race From Power: U.S. Foreign Policy and the General Crisis of White Supremacy,” in *Window on Freedom: Race, Civil Rights, and Foreign Affairs 1945-1988* (Chapel Hill: Univ. of North Carolina Press, 2003), 50; see also Gurdev Singh Deol, *The Role of the Ghadar Party in the National Movement* (New Delhi, India: Sterling, 1969), 25-26.

<sup>27</sup> See generally Craver, “On the Boundary of White,” 30-56.

<sup>28</sup> See, e.g., “Defers Again Japanese Case: U.S. Solicitor General Asks to Postpone Argument in Citizenship Rights,” *Washington Post*, Sep. 30, 1920.

<sup>29</sup> Brawley, *The White Peril*, 13; see generally Edwin L. James, “Europeans Incline to Side With Japan: Old World Diplomats Take Issue With American Exclusion Law,” *New York Times*, June 5, 1924; Savel Zimand, “Color Issue Breeds Unrest in the East,” *New York Times*, Oct. 26, 1924.

<sup>30</sup> Brawley, *The White Peril*, 14.

<sup>31</sup> *Ibid.*, 15-17.

<sup>32</sup> *Ibid.*, 16-17.

<sup>33</sup> *Ibid.*, 17-18.

<sup>34</sup> *Ibid.*, 19.

<sup>35</sup> *Ibid.*, 26.

<sup>36</sup> Quoted in Brawley, *White Peril*, 28.

<sup>37</sup> See Margaret MacMillan, *Paris 1919: Six Months That Changed the World* (New York: Random House, 2002), 321.

<sup>38</sup> Brawley, *White Peril*, 18, 36-44.

<sup>39</sup> See, e.g., *Ibid.*, 43.

<sup>40</sup> See, e.g., *Ibid.*, 84-89.

<sup>41</sup> *Ibid.*, 85-86. Massachusetts Senator Henry Cabot Lodge claimed that he had been inclined to support an amendment granting the Japanese a quota under the act, but that the Japanese ambassador's letter had changed his mind. See *ibid.*, 86.

<sup>42</sup> See *ibid.*, 87.

<sup>43</sup> Zimand, "Color Issue." The following month a special edition of the *Japan Times and Mail* was devoted to the immigration question with cover art that depicts Uncle Sam carrying buildings under one arm labeled "gifts" while the other arm is outstretched to bar the path of a Japanese and labeled "exclusion." See "Japan Still Stirred by Our Exclusion Act: Symposium Conducted by Tokio Newspaper Indicates That Japanese People Resent Our Exclusion Act," *New York Times*, November 30, 1924.

<sup>44</sup> Raymond Leslie Buell, "America's Course Toward Japan: A Momentous Decision," *New York Times*, December 23, 1934.

<sup>45</sup> *Filipino and Indian Naturalization Act of 1946*, HR 3517, 79th Cong., 2nd Sess., *Cong. Rec.* 91 (October 10, 1945), 9541.

<sup>46</sup> *Ibid.*

<sup>47</sup> See, e.g., *Chinese Exclusion Repeal Act of 1943*, HR 314, 78th Cong., 1st Sess., *Cong. Rec.* 89 (October 20, 1943): 8573, 8580-81, 8591-92, 8595-97. As one American congressman put it, Japan could "loot, murder, burn, slaughter, and destroy at will in China, but [the United States] began to take real steps against her only when she started interfering with the white man's colonial system." *Ibid.*, 8591.

<sup>48</sup> Quoted in Brawley, *White Peril*, 184. Whether this was truly propaganda is debatable. As Texas congressman Ed Gossett stated during congressional debates regarding the Chinese Exclusion Repeal Act, "there is no propaganda quite so effective as true propaganda." *Chinese Exclusion Repeal Act of 1943*, HR 314, 78th Cong., 1st Sess., *Cong. Rec.* 89 (October 20, 1943): 8581. Several speakers at the congressional hearings regarding the repeal of the Chinese Exclusion Act also stressed that "our treatment of and attitude toward the black, yellow, and brown races do not square with our wholehearted condemnation of the Hitlerian super-race theory" and that unless the United States abandoned its discriminatory policy toward the Chinese, "we may cause the Chinese and other Asiatics to join Japan in her 'Asia for Asiatics' campaign and eventually help precipitate a third world war, this time a race war." Department of Justice, Immigration and Naturalization Service, "Proposed Repeal of the Chinese Exclusion Acts," *Monthly Review* 1 (August 1943): 14.

<sup>49</sup> Dower, *War Without Mercy*, 6-7.

<sup>50</sup> Fred Riggs, *Pressures on Congress: A Study of the Repeal of Chinese Exclusion* (New York: King's Crown, 1950), 35.

<sup>51</sup> As one young Chinese American remarked, "World War II was the most important historic event of our times," because "for the first time we could make it in American society," and as another recalled, "all of a sudden, we became part of an American dream" and "we had heroes with Chiang Kai-shek and Madame Chiang Kai-shek and so on." Quoted in Takaki, *Strangers from a Different Shore*, 373.

<sup>52</sup> *Chinese Exclusion Repeal Act of 1943*, HR 314, 78th Cong., 1st Sess., *Cong. Rec.* 89 (October 20, 1943): 8573.

<sup>53</sup> Ibid., 8574.

<sup>54</sup> Ibid., 8573-98.

<sup>55</sup> Ibid., 8586.

<sup>56</sup> Ibid., 8589.

<sup>57</sup> *Mission to Moscow*, DVD, directed by Michael Curtiz (1943; Burbank, Calif.: Warner Home Video, 2009). When Davies asks the Chinese ambassador why the Chinese people were brought to a Russian hospital, the Chinese ambassador replies, "Because Russia is our friend." Ibid.

<sup>58</sup> *The Purple Heart*, DVD, directed by Lewis Milestone (1944; Beverly Hills: Twentieth Century Fox Home Entertainment, 2007). Other epics of embattled heroism also circulated during the war, including *They Died With Their Boots On*, in which Errol Flynn stars as General Custer dying in the Battle of Little Bighorn. *They Died With Their Boots On*, DVD, directed by Frank Capra (1942; Burbank, Calif.: Warner Home Video, 2005).

<sup>59</sup> *Chinese Exclusion Repeal Act of 1943*, HR 314, 78th Cong., 1st Sess., *Cong. Rec.* 89 (October 20, 1943): 8573.

<sup>60</sup> Ibid., 8574.

<sup>61</sup> Ibid., 8591.

<sup>62</sup> Ibid., 8597.

<sup>63</sup> Ibid., 8576.

<sup>64</sup> Ibid., 8602-03. Minnesota congressman Walter Judd even attributed the Chinese struggle against the Japanese to superior insight, arguing that Congress should not stigmatize as congenitally inferior "the Chinese people who recognized the nature of this world struggle and held the line single-handed for 4 ½ years before we woke up" and who "proved their friendship with their lives." Ibid., 8588.

<sup>65</sup> Ibid., 8580.

<sup>66</sup> *Chinese Exclusion Repeal Act of 1943*, 78th Cong., 1st Sess., *U.S. Statutes at Large* 57 (1943): 601.

<sup>67</sup> *Congressional Globe*, 41st Cong., 2d Sess. 42 (July 4, 1870), pt. 6:5151, 5157.

<sup>68</sup> Conclusions of the Court and Order Granting Petition for Naturalization, *In re Shaikhaly*, Nat. Case No. 119332 (S.D. Cal. Dec. 20, 1944), in Folder 119332, Contested Naturalizations, Southern District of California, Central Division (Los Angeles), National Archives and Records Administration, Pacific Region.

<sup>69</sup> *In re Hassan*, 48 F. Supp. 843, 845 (E.D. Mich. 1942).

<sup>70</sup> U.S. Department of Justice, Immigration and Naturalization Service, "The Eligibility of Arabs to Naturalization," *Monthly Review* 1 (1943): 16; cf. *In re S---*, 1 I & N Dec. 174 (1941) (holding that a native and citizen of Iraq whose parents were "full-blooded Arabians," whose ancestors "came from Turkish Stock," and who stated that he was "of Arabian blood" was a "white person" within the meaning of the Nationality Act of 1940, in part because "the connection of the Arabians and the other Semitic races with the beginning of our civilization has

always been well-known to the historian, to the student of the Bible, and to the common man insofar as he had such learning”).

<sup>71</sup> Charles Gordon, “The Racial Barrier to American Citizenship,” *University of Pennsylvania Law Review* 93 (1945): 246.

<sup>72</sup> *Ex parte Mohriez*, 54 F. Supp. 941, 942 (D. Mass. 1944). Judge Wyzanski writes:

The names of Avicenna and Averroes, the sciences of algebra and medicine, the population and the architecture of Spain and of Sicily, the very words of the English language, remind us as they would have reminded the Founding Fathers of the action and interaction of Arabic and non-Arabic elements of our culture. Indeed, to earlier centuries as to the twentieth century, the Arab people stand as one of the chief channels by which the traditions of white Europe, especially the ancient Greek traditions, have been carried into the present.

Ibid. (citations omitted).

<sup>73</sup> Ibid.

<sup>74</sup> *Bonham v. Bouiss*, 161 F.2d 678, 678 (9th Cir. 1947) (also noting that the couple “cohabited and although appellee’s moral character is not in issue the record shows that in Japan she also openly engaged in immoral practices with various other men”).

<sup>75</sup> See *In re B---*, 3 I. & N. Dec. 729 (1949); *In re N---*, A-7483378 (56247/95) C.O. May 16, 1950 (cited in *In re S---*, 4 I. & N. Dec. 104, 106 (1950)).

<sup>76</sup> *In re B---*, 3 I. & N. Dec. 304, 306 (1948) (“The House report makes it clear that the bill was concerned with the people of China, and that the House intended to limit the benefits of the measure to them, and did not intend that the benefits cover any other Asiatic peoples.”).

<sup>77</sup> New York Congressman Emmanuel Celler speaking about wartime legislation to extend eligibility for citizenship to Asian Indians, quoted in Takaki, *Strangers from a Different Shore*, 368.

<sup>78</sup> Harold A. Gould, *Sikhs, Swamis, Students, and Spies: The India Lobby in the United States, 1900-1946* (Thousand Oaks, Calif.: Sage, 2006), 278. During this period, traditional Hindu nationalist radicalism moved “beyond mere agitational politics” and began to acknowledge and yield to the kinder, gentler approach of building coalitions and consensus as advocated by Lajpat Rai, the Indian National Congress, and Ghandi’s *satyagraha* movement. This transition even resulted in the “mellowing” of former Ghadr leaders such as Taraknath Das. See *ibid.*, 244-51, 261-323.

<sup>79</sup> See U.S. Senate Committee on Immigration, *Hearings on S.J. Res. 128, Providing for the Ratification and Confirmation of Naturalization of Certain Persons of the Hindu Race*, 69th Cong., 2nd sess. (Washington, DC: GPO, 1926).

<sup>80</sup> See Transcript of Hearing on Naturalization of Natives of India Now Living in the United States, United States House of Representatives Committee on Immigration and Naturalization, June 21, 1939, and various correspondence in Records of the Immigration and Naturalization Service of the United States, Record Group 85, Box 1573, File 19783/43, National Archives and Records Administration, Washington, D.C. During the June 1939 hearings, the chairman of the House Committee on Immigration and Naturalization remarked that “this group of Indians has . . . been here quite a number of times, and I thought the Chair would give them an opportunity under their petition . . . to come in and have a hearing.” *Ibid.*, 3.

<sup>81</sup> See Correspondence from Ali Kadir Box to President Franklin Delano Roosevelt dated September 10, 1937, in Records of the Immigration and Naturalization Service of the United States, Record Group 85, Box 1573, File 19783/43, National Archives and Records Administration, Washington, D.C.

<sup>82</sup> Quoted by New York congressman Samuel Dickstein, *Filipino and Indian Naturalization Act of 1946*, HR 3517, 79th Cong., 2nd Sess., *Cong. Rec.* 91 (October 10, 1945), 9523.

<sup>83</sup> Quoted by New York congressman Samuel Dickstein, *Filipino and Indian Naturalization Act of 1946*, HR 3517, 79th Cong., 2nd Sess., *Cong. Rec.* 91 (October 10, 1945), 9524.

<sup>84</sup> See, e.g., *Filipino and Indian Naturalization Act of 1946*, HR 3517, 79th Cong., 2nd Sess., *Cong. Rec.* 91 (October 10, 1945), 9524-27.

<sup>85</sup> Quoted by Ohio congressman Edward McCowen, *Filipino and Indian Naturalization Act of 1946*, HR 3517, 79th Cong., 2nd Sess., *Cong. Rec.* 91 (October 10, 1945), 9524.

<sup>86</sup> *Ibid.*, 9527.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Filipino and Indian Naturalization Act of 1946*, HR 3517, 79th Cong., 2nd Sess., *Cong. Rec.* 91 (October 10, 1945), 9521. Congressman Mason also noted, “That is one reason why we want to establish this good will in India, because Communist influence is beginning to permeate India.” *Ibid.*, 9521. Similarly, Illinois congressman Everett Dirksen argued that the legislation should be passed so that the United States could protect itself against “what is freely referred to as the Communist ideology in the world,” not only to safeguard itself “but to translate democratic ideals in other corners of the earth.” Dirksen also noted, much like the narratives of Chinese heroism during the debates regarding the repeal of the Chinese Exclusion Act, that Asian Indians “fought shoulder to shoulder with the American doughboy and the British Tommy against the common enemy,” and “died in the elephant grass of Burma along with other soldiers in the interest of victory.” *Ibid.*, 9523, 9542.

<sup>89</sup> *Ibid.*, 9528.

<sup>90</sup> *Ibid.*

<sup>91</sup> This belief was confirmed by the Government’s brief in *Thind*, which relied heavily on the subjection of Asian Indians by the British. In response to the question of why the exclusion of Asian Indians should not also be repealed during the 1943 congressional debates regarding the Chinese Exclusion Repeal Act, one congressman also replied that India was not an independent nation and “we must deal with other nations as sovereign nations.” *Chinese Exclusion Repeal Act of 1943*, HR 314, 78th Cong., 1st Sess., *Cong. Rec.* 89 (October 20, 1943): 8579.

<sup>92</sup> See, e.g., *Filipino and Indian Naturalization Act of 1946*, HR 3517, 79th Cong., 2nd Sess., *Cong. Rec.* 91 (October 10, 1945), 9542.

<sup>93</sup> *Congressional Globe*, 41st Cong., 2d Sess. 42 (July 4, 1870), pt. 6:5156.

<sup>94</sup> *In re Yup*, 1 F. Ca. 223, 224 (C.C.D. Cal. 1878).

<sup>95</sup> *United States v. Thind*, 261 U.S. 204, 211 n.3 (1923) (noting that although Augustus Keane included some Polynesians, including the Maori, Tahitians, Samoans, and Hawaiians, within the Caucasian racial classification, the United States Bureau of Immigration “classifies all Pacific Islanders as belonging to the ‘Mongolic grand division’”).

<sup>96</sup> As discussed in Chapter 2, not only did Ozawa dispute this classification in his Supreme Court brief, but the conclusion that the Japanese were Mongolian was disputed by prominent Americans at the time. In 1913, for example, William Elliott Griffis wrote in the *North American Review* that “to class the Japanese as ‘Mongolians’ is absurd.” William Elliott Griffis, “Are the Japanese Mongolian?” *North American Review* 197 (1913): 721.

<sup>97</sup> See, e.g., *In re Halladjian*, 174 F.834, 841 (C.C.D. Mass. 1909); *Ex parte Shahid*, 205 F. 812, 814 (E.D.S.C. 1913) (“Nor would ‘free white persons’ mean an ‘Aryan’ race, a word of much later coinage, and practically unknown to common usage in 1790, and one still more indefinite than Caucasian, and which would exclude all Semitics, viz., Jews and Arabians, and also all Europeans, such as Magyars, Finns, and Basques, not included in the Aryan family.”); *Ex parte Dow*, 211 F. 486, 488 (E.D.S.C. 1914) (“If racial determination or definition is to be given to the expression as limiting it to the Caucasian races, and the Caucasian race is to be determined philologically by the tongue spoken as Indo-European, then there are a number of European peoples who would be excluded, such as the Magyars, the Finns, the Turks, the Basques, and the Lapps.”); *In re Dow*, 213 F. 355, 359 (E.D.S.C. 1914) (“This philological development led to the coining of the word ‘Aryan,’ taken from the Vedic or old Sanscrit and Zend, . . . and excluded from the ‘Aryan brotherhood’ of whites the Magyars, the Finns, and the Turks because they spoke tongues of the Ugric or Turanian group.”); Arthur William Hoggland, *Finnish Immigrants in America 1880-1920* (Madison: Univ. of Wisconsin Press, 1960), 114. As late as the June 1939 hearings before the House Committee on Immigration and Naturalization regarding Petitions by Natives of India for Legislation to Include Natives of India Now Residing in the United States as Eligible to Naturalization, one congressman asked a witness regarding Asian Indian marriages, “Do any of them marry Mongolians, or any of the yellow race?” Transcript of Hearing on Naturalization of Natives of India Now Living in the United States, United States House of Representatives Committee on Immigration and Naturalization, June 21, 1939, 12, in Records of the Immigration and Naturalization Service of the United States, Record Group 85, Box 1573, File 19783/43, National Archives and Records Administration, Washington, D.C.

<sup>98</sup> Michael Keevak, *Becoming Yellow: A Short History of Racial Thinking* (Princeton: Princeton Univ. Press, 2011), 70-76.

<sup>99</sup> *Ibid.*

<sup>100</sup> See *In re I---*, 1 I. & N. Dec. 627 (B.I.A. 1943) (finding without discussion that a native and citizen of Canada is “a person of the white race”); *In re P---*, 2 I. & N. Dec. 84 (B.I.A. 1944) (same); *In re M---*, 2 I. & N. Dec. 196 (B.I.A. 1944) (finding without discussion that a native and citizen of Mexico is “a person of the white race”); *In re C---*, 2 I. & N. Dec. 220 (B.I.A. 1944) (same); *In re K---*, 2 I. & N. Dec. 411 (B.I.A. 1945) (finding without discussion that a native and citizen of Hungary is “a person of the white race”); *In re T---*, 2 I. & N. Dec. 614 (B.I.A. 1946) (finding without discussion that a native and citizen of Italy is “a person of the white race”); *In re B---*, 2 I. & N. Dec. 492 (B.I.A. 1947) (finding without discussion that a native and citizen of Portugal is “a person of the white race”).

<sup>101</sup> See Richard W. Cogley, “The Most Vile and Barbarous Nation of all the World”: Giles Fletcher the Elder’s *The Tartars Or, Ten Tribes* (ca. 1610),” *Renaissance Quarterly* 58 (2005): 796-99.

<sup>102</sup> *S---*, 4 I & N. Dec. at 104. The identities of immigrants in Board opinions are not revealed but are instead identified using only the first letter of their names.

<sup>103</sup> Displaced Persons Act, 62 Stat. 109 (1948).

<sup>104</sup> President Harry S. Truman, “Special Message to the Congress on Aid for Refugees and Displaced Persons,” March 24, 1952, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/index.php?pid=14435&st=displaced+persons+act&st1#axzz1jTaZnYId> (accessed Jan. 14, 2012).

<sup>105</sup> U.S. Department of Justice, Immigration and Naturalization Service, “The Eligibility of Arabs to

Naturalization,” *Monthly Review* 1 (1943): 12-16.

<sup>106</sup> S----, 4 I. & N. Dec. at 105 and 105 n. 2 (citing the “Treatise of Ayaz Ishaki-Idelli, found in the record.”).

<sup>107</sup> Ibid., 106 n. 3.

<sup>108</sup> Ibid., 107.

<sup>109</sup> Ibid.

<sup>110</sup> Brewer, *Why America Fights*, 47, 61, 85. During world War II, Frank Capra’s propaganda film for the United States government *The Nazis Strike* compares Adolf Hitler to the “barbarian hordes” led by Ghengis Khan that arose “out of the wilds of Mongolia” to conquer most of the world in the thirteenth century. According to the film, Hitler viewed the area of eastern Europe and Russia that coincided with the old empire of Ghengis Khan as central to his plan of world conquest. *The Nazis Strike*, DVD, directed by Frank Capra (New York: GoodTimes Home Video, 2000).

<sup>111</sup> The turrets of Moscow’s St. Basil’s Cathedral, built in the sixteenth century by Ivan the Terrible to commemorate the capture of Tatar-controlled Kazan and Astrakhan, are even rumored to have been modeled after the severed turbaned heads of Tatar chieftans.

<sup>112</sup> See Cogley, “The Most Vile and Barbarous Nation,” 783-84, 796-99, 807.

<sup>113</sup> See Galina M. Yemelianova, “Volga Tatars, Russians and the Russian State at the Turn of the Nineteenth Century: Relationships and Perceptions,” *The Slavonic and East European Review* 77 (1999): 449-53, 458-61, 471-77. Galina Yemelianova writes that Russian and Tatar peasants held “rigid stereotypes of each other, most of which were negative and mutually insulting” during the early twentieth century, accumulated in popular collective memory and perpetuated through national folklore, legends and proverbs, and traditional songs. Ibid., 453.

<sup>114</sup> Arthur Koestler, *Darkness at Noon*, trans. Daphne Hardy (New York: Scribner, 1941), 59, 61.

<sup>115</sup> See, e.g., Volodymyr Prytula, “Ukraine: A Bittersweet Homecoming for Crimea’s Tatars,” *Radio Free Europe/Radio Liberty*, Jan. 20, 2012, <http://www.rferl.org/content/article/1078529.html> (accessed Jan. 20, 2012).

<sup>116</sup> President Harry S. Truman, “Special Message to the Congress on Aid for Refugees and Displaced Persons,” March 24, 1952, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/index.php?pid=14435&st=displaced+persons+act&st1#axzz1jTaZnYId> (accessed Jan. 14, 2012). Similarly, Mary Dudziak outlines the subsequent effect of these cold war fears on American civil rights discourse. See generally Dudziak, *Cold War Civil Rights*.

<sup>117</sup> S----, 4 I & N. Dec. at 104-05 and 105 n. 2.

<sup>118</sup> *Cartozian*, 6 F.2d 919.

<sup>119</sup> See, e.g., *Cartozian Trial Transcript*, 17-18.

<sup>120</sup> See Defendant’s Brief of Points and Authorities in Support of Motion to Dismiss, *United States v. Mozumdar*, No. H-5-J Equity (S.D. Cal. Oct. 15, 1923).

<sup>121</sup> Transcript of Hearing on Naturalization of Natives of India Now Living in the United States, United

States House of Representatives Committee on Immigration and Naturalization, June 21, 1939, 12, in Records of the Immigration and Naturalization Service of the United States, Record Group 85, Box 1573, File 19783/43, National Archives and Records Administration, Washington, D.C.

<sup>122</sup> Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 328.

<sup>123</sup> *In re R---*, 4 I & N. Dec. 275, 275-76 (B.I.A. 1951).

<sup>124</sup> *Ibid.*, 276.

<sup>125</sup> The Board lists among these other ethnic groups of Russia “Great Russians, Belorussians (White Russians), Ukrainians, Tartars, Ossetians, Nogaystys, Armenians, Georgians, Bashkirs, Kirgiz—Kazkas, and Dagestans, to mention a few.” *Ibid.*, 278 n. 9.

<sup>126</sup> *Ibid.*, 276.

<sup>127</sup> *Ibid.*, 280.

<sup>128</sup> De Quincey, *Flight of a Tarter Tribe*, 15-16.

<sup>129</sup> *Ibid.*, 10-11. At the time designed for the revolt, the Kalmyk leaders gathered their people together and announced a declaration of independence from the Russian Tsar with a list of allegations portraying the threats posed by continued residence under Russian rule:

They were told of the oppressions of Russia; of her pride and haughty disdain, evidenced toward them by a thousand acts; of her contempt for their religion; of her determination to reduce them to absolute slavery; of the preliminary measures she had already taken by erecting forts upon many of the great rivers of their neighborhood; of the ulterior intentions she thus announced to circumscribe their pastoral lands, until they would all be obliged to renounce their flocks, and to collect in towns like Sarepta, there to pursue mechanical and servile trades of shoemaker, tailor, and weaver, such as the free-born Tartar had always disdained. “Then again,” said the subtle prince, “she increases her military levies upon our population every year. We pour out our blood as young men in her defence, or, more often, in support of her insolent aggressions; and, as old men, we reap nothing from our sufferings nor benefit by our survivorship where so many are sacrificed.” At this point of his harangue Zebek produced several papers (forged, as it is generally believed, by himself and the Lama), containing projects of the Russian Court for a general transfer of the eldest sons, taken en masse from the greatest Kalmuck families, to the Imperial Court. “Now, let this be once accomplished,” he argued, “and there is an end of all useful resistance from that day forwards. Petitions we might make, or even remonstrances; as men of words, we might play a bold part; but for deeds; for that sort of language by which our ancestors were used to speak—holding us by such a chain, Russia would make a jest of our wishes, knowing full well that we should not dare to make any effectual movement.”

*Ibid.*, 22-23.

<sup>130</sup> De Quincey, 14, 21-22, 29-30.

<sup>131</sup> As De Quincey describes it,

little did the Western Kalmucks guess what reasons they also had for gratitude on account of an interposition so unexpected, and which at the moment they so generally deplored. Could they but have witnessed the thousandth part of the sufferings which overtook their Eastern brethren in the first month of

their sad flight, they would have blessed Heaven for their own narrow escape; and yet these sufferings of the first month were but a prelude or foretaste comparatively slight of those which afterward succeeded.

Ibid., 30-31.

<sup>132</sup> Specifically, DeQuincey compares the Kalmyk migration to Thomas Otway's *Venice Preserved* and Friedrich Schiller's *Fiesco*, as well as to "the Egyptian expedition of Cambyses—the anabasis of the younger Cyrus, and the subsequent retreat of the ten thousand, the Parthian expeditions of the Romans, especially those of Crassus and Julian—or (as more disastrous than any of them, and, in point of space, as well as in amount of forces, more extensive) the Russian anabasis and katabasis of Napoleon," and to a religious exodus "resembling the great Scriptural Exodus of the Israelites, under Moses and Joshua, as well as in the very peculiar distinction of carrying along with them their entire families, women, children, slaves, their herd of cattle and of sheep, their horses and their camels." DeQuincey also frequently alludes to literary epics such as John Milton's *Paradise Lost*:

Then, again, in the gloomy vengeance of Russia and her vast artillery, which hung upon the rear and the skirts of the fugitive vassals, we are reminded of Miltonic images—such, for instance, as that of the solitary hand pursuing through desert spaces and through ancient chaos a rebellious host, and overtaking with volleying thunders those who believed themselves already within the security of darkness and of distance.

Thomas De Quincey, *Revolt of the Tartars* (1837; Boston: D.C. Heath, 1900), 1-3. Cf. John Milton, *Paradise Lost*, David Scott Kastan, ed. (Indianapolis: Hackett, 2005), ("Fool, not to think how vain / Against the omnipotent to rise in arms, / Who out of smallest things could without end / Have raised incessant armies to defeat / Thy folly, or, with solitary hand / Reaching beyond all limit, at one blow / Unaided could have finished thee and whelmed / Thy legions under darkness.").

<sup>133</sup> R---, 4 I. & N. Dec. at 282.

<sup>134</sup> Ibid., 284-85 (citing the *Dictionary of Races and Peoples*, *Encyclopedia Americana*, *Encyclopedia Britannica*, *New International Encyclopedia*, John Hammerton and Harry Barnes's *Illustrated World History*, Carlton Hays and Parker Moon's *Ancient and Medieval History*, Jacob Schapiro's *Modern and Contemporary European History*, and Louis Segal's *Concise History of Russia*).

<sup>135</sup> R----, 4 I & N. Dec. at 283.

<sup>136</sup> Ibid., 286.

<sup>137</sup> Ibid., 284.

<sup>138</sup> Conclusions of the Court and Order Granting Petition for Naturalization, *In re Shaikhaly*, Nat. Case No. 119332 (S.D. Cal. Dec. 20, 1944), in Folder 119332, Contested Naturalizations, Southern District of California, Central Division (Los Angeles), National Archives and Records Administration Pacific Region.

<sup>139</sup> 54 F. Supp. 941, 942.

<sup>140</sup> S----, 4 I. & N. Dec. at 105 and R----, 4 I & N. Dec. at 284-85 (emphasis added in both). The Board similarly expresses skepticism about the "white" racial classification when it writes that the Kalmyks of southeastern European Russia are "members of the *so-called* European race, in spite of their Asiatic origin." 4 I & N. Dec. 275, 280 (emphasis added).

<sup>141</sup> *Thind*, 261 U.S. 204, 215.

<sup>142</sup> R----, 4 I. & N. Dec. at 282

<sup>143</sup> Defendant's Brief of Points and Authorities in Support of Motion to Dismiss, *United States v. Mozumdar*, No. H-5-J Equity (S.D. Cal. Oct. 15, 1923).

<sup>144</sup> R---, 4 I. & N. Dec. at 284.

<sup>145</sup> President Harry S. Truman, "Special Message to the Congress on Aid for Refugees and Displaced Persons," March 24, 1952, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/index.php?pid=14435&st=displaced+persons+act&st1#axzz1jTaZnYId> (accessed Jan. 14, 2012).

<sup>146</sup> *Hirabayashi*, 320 U.S. 81, 110-11 (Murphy, concurring).

<sup>147</sup> "'We are all Americans,' proclaims France's *Le Monde*," *Agence France Presse*, September 12, 2001 ("How can we not show—like in the darkest moments of our history—solidarity with this population, with the United States, with whom we are very close and to whom we owe our freedom and thus our solidarity."). As *Le Monde* noted in its editorial, another example of this sort of expression of solidarity is President Kennedy's famous statement during his June 26, 1963 speech in West Germany after the Soviet-sponsored East Germany built the Berlin Wall, "Ich bin ein Berliner," a phrase he explicitly connected to citizenship: "Two thousand years ago the proudest boast was *civis Romanus sum*. Today, in the world of freedom, the proudest boast is 'Ich bin ein Berliner!' . . . All free men, wherever they may live, are citizens of Berlin, and, therefore, as a free man, I take pride in the words 'Ich bin ein Berliner!'"

<sup>148</sup> Quoted by Minnesota congressman Walter Judd speaking to the U.S. House of Representatives, *Filipino and Indian Naturalization Act of 1946*, HR 3517, 79th Cong., 2nd Sess., *Cong. Rec.* 91 (October 10, 1945), 9541.

<sup>149</sup> *In re Rodriguez*, 81 F. 337, 349 (W.D. Tex. 1897).

<sup>150</sup> Jeremy Engels, *Enemyship: Democracy and Counter-Revolution in the Early Republic* (East Lansing: Michigan State Univ. Press, 2010), 13.

<sup>151</sup> Hedges, *War Is a Force*, 115-16.

<sup>152</sup> Brewer, *Why America Fights*, 107.

<sup>153</sup> Cartozian Trial Transcript, 126-27; Cartozian Deposition Transcript, 35.

<sup>154</sup> *Chinese Exclusion Repeal Act of 1943*, HR 314, 78th Cong., 1st Sess., *Cong. Rec.* 89 (October 20, 1943): 8576, 8597.

<sup>155</sup> R---, 4 I & N. Dec. at 280.

<sup>156</sup> Carl Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (New York: Vintage, 1922), 207.

<sup>157</sup> *Ibid.*, 205-06 (emphasis in original).

<sup>158</sup> Nikki Shepardson, *Burning Zeal: The Rhetoric of Martyrdom and the Protestant Community in Reformation France, 1520-1570* (Bethlehem, Pa.: Lehigh Univ. Press, 2007), 118-19.

<sup>159</sup> Cf. William Raymond Smith, "The Rhetoric of the Declaration of Independence," *College English* 26 (1965): 309 ("Confronted with a crisis, it is the commonplace by which men act. . . . Our problem has been to understand this commonplace as an argument to meet a crisis.").

<sup>160</sup> See, e.g., Muzafer Sherif and Carolyn Sherif, "Research on Intergroup Relations," in *The Social Psychology of Intergroup Relations*, eds. William G. Austin and Stephen Worchel (Monterey, Calif.: Brooks/Cole, 1979), 259.

<sup>161</sup> 1 World Trade Center / Freedom Tower, NYC.com, [http://www.nyc.com/arts\\_attractions/1\\_world\\_trade\\_center\\_freedom\\_tower.998440/editorial\\_review.aspx](http://www.nyc.com/arts_attractions/1_world_trade_center_freedom_tower.998440/editorial_review.aspx) (accessed Jan. 25, 2012).

<sup>162</sup> *Prelude to War*, DVD, directed by Frank Capra (1942; New York: GoodTimes Home Video, 2000). Similarly, another film in the series, *War Comes to America*, cites the proclamation in the Declaration of Independence that "all men are created equal" as a guiding ideal of the war. *War Comes to America*, DVD, directed by Frank Capra (New York: GoodTimes Home Video, 2000) (emphasis in voice-over narration).

<sup>163</sup> See Ian Tyrrell, "Making Nations/Making States: American Historians in the Context of Empire," *Journal of American History* 86 (1999): 1017.

<sup>164</sup> Cf. Stephen H. Browne, "Reading Public Memory in Daniel Webster's *Plymouth Rock Oration*," *Western Journal of Communication* 57 (1993): 464-66; Celeste Michelle Condit, "The Functions of Epideictic: The Boston Massacre Orations as Exemplar," *Communication Quarterly* 33 (1985): 290-91.

<sup>165</sup> Cf. Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale Univ. Press, 2001), 2-3 (concluding that in Holocaust cases the criminal trial has been used as "a tool of collective pedagogy" staged as "exercises in didactic legality").

## Chapter 5: Shrinking Distances

The bond of unity against a common enemy is, as Kenneth Burke notes of martyrdom in the epigraph to this dissertation, “essentially rhetorical.”<sup>1</sup> It can be exploited for either positive or negative purposes depending on the situation in which it occurs. It has been used by both Gandhi and Hitler,<sup>2</sup> and it never occurs without conflict, without division, and without, of course, an enemy. The divisions reflected in the use of this rhetorical strategy in the racial prerequisite discourse discussed in this dissertation are often disturbing, only transcending one division by creating or at least highlighting another. At the same time, the human propensity to unify in the face of adversity is often promoted as the surest promise of peace, a means of broadening human interdependence until human conflict is eliminated. Perhaps more importantly but neglected in discussions of the bond of unity against a common enemy, the strategy necessarily implies a negative view of aggression. As Elias Canetti writes, “it is impossible to overrate the part played by the first dead man in the kindling of wars.”<sup>3</sup> The strategy necessarily relies on dissociating those who seek to transcend their existing divisions through a bond of shared fear or suffering from any acts of aggression. It is suffering aggression rather than committing it that creates the bond.

In the racial prerequisite cases between World War I and the early cold war era discussed in this dissertation, petitioners were represented as political or religious refugees suffering persecution at the hands of the nation’s enemies and at risk of becoming stateless if they were denied eligibility for naturalization. The rhetorical strategies in these cases appealed to the call to unite against common enemies as a means of navigating the often tense relationship between race and citizenship during the rise of nationalisms in the early twentieth century. A close consideration of the rhetorical strategies adopted by the participants in individual cases as

reflected in the briefs, evidence, and trial testimony reveals a judicial rhetoric regarding the racial prerequisites to naturalization that is consistent with the executive and legislative discourse regarding the racial prerequisites, particularly an emphasis on ideals of martial citizenship and unification against common enemies which is neglected or obscured by the less rhetorical approaches of formalism and critical theory.

In his case before the Supreme Court in *Thind*, Bhagat Singh Thind failed to secure eligibility for naturalization using a rhetorical strategy that claimed whiteness through the assertion of a high caste privilege, a strategy that emphasized the capacity of Asian Indians to pose a competitive threat to European Americans and perhaps even a violent one by its affinities with the rhetoric of the Ghadr party. By contrast, Sakharam Pandit severed himself from the negative associations of the Indian caste system which the United States Solicitor General had highlighted in *Thind* and Pandit used those negative associations to his advantage through a rhetorical strategy that appealed to the bond of unity against a common enemy, claiming that because he had abandoned his high caste status when he became an American citizen and married a “white” American woman he would be rendered an outcast in Indian society and “a man without a country” if his naturalization certificate were canceled.<sup>4</sup> Thus, as demonstrated in Chapter 2, the complicated relationship between race, the Indian caste system, and nationality in the conflict between British imperialism and Asian Indians promoted an agitational rhetoric in *Thind* and *Mozumdar* that highlighted the conflicting goals of Asian Indians and Western civilization rather than reducing or eliminating them, while Pandit used that conflict to position himself and his wife, in Judge McCormick’s words, as “members of the American family” in solidarity against a hostile and unalliable Indian caste system in *Pandit*.<sup>5</sup> The racial prerequisite cases involving Asian Indians examined in Chapter 2 also reflect powerful affinities with the

agitational rhetoric of the Ghadr party, on the one hand, and with Gandhi's philosophy of *satyagraha* which was opposed to the "brag, bluster or bluff" of movements such as Ghadr on the other,<sup>6</sup> further highlighting the importance of the complex relationship between British imperialism and Asian Indians to the rhetorical strategies in the cases.

In *Cartozian*, the Armenian defense centered its case on appealing to the bond of unity against a common enemy in the form of the Ottoman Turks, Kurds, and Syrian Muslims of Asia Minor who the defense claimed were responsible for centuries of persecution of Armenians, a claim that invoked memories of the Crusades and the Mongol invasions of medieval Europe as well as the more recent Armenian genocide of World War I and lingering tensions between the United States and Turkey in the postwar period. As in *Pandit*, the defense claimed that Armenians would be rendered stateless by Turkish persecution if they were denied naturalization. The defense also adopted a rhetoric of martyrdom to express its appeal to the bond of unity against a common enemy, representing Armenian suffering as that of Christian martyrs who were persecuted because they resisted conversion to Islam. By representing Armenians as Christian martyrs in a common cause with Western civilization, the defense incorporated Armenian suffering into a larger, more profound, and meaningful context of a conflict between East and West in solidarity with the many Christians in the United States who had formed a powerful identification with Armenians during the nineteenth and early twentieth centuries. The *Cartozian* case illustrates the persecutory agency at work in the rhetorical strategy of unifying against a common enemy and how a rhetoric of martyrdom may be used to exemplify this strategy.

During World War II and the early cold war, the racial prerequisite discourse reflects a shift to new solidarities against the threats posed by the Axis powers during the war, particularly

the threat posed by Japan in the Pacific, and by Soviet communism after the war. The rhetorical strategy of uniting against common enemies is evident during this period in legislative and executive discourse regarding extensions of racial eligibility for naturalization to the Chinese, Asian Indians, and Filipinos to solidify wartime alliances in the Pacific and in two opinions of the United States Board of Immigration Appeals during the early cold war which consider the whiteness of Tatar and Kalmyk refugees from the Soviet Union whose visas under the Displaced Persons Act of 1948 were challenged based on the conclusion that they were racially ineligible for naturalization and therefore for entry to the United States. Because these cases arose under the Displaced Persons Act and involved immigrants displaced by the events of World War II, both cases reflect a threat of statelessness to the petitioners similar to the threat of statelessness claimed in *Pandit* and *Cartozian*, and the Board of Immigration appeals relied on the fact that the Tatars and Kalmyks were persecuted by the Soviet Union and subjected to violent extermination programs as support for the Board's conclusion that the groups were "white" despite their Mongolian ancestors and Asian origins. Through this appeal to unify against the threat of Soviet communism, the racial prerequisite discourse of this period participated in the construction of a new national identity that arose out of anxieties regarding global influence during the early cold war.

In contrast to previous commentaries on the racial prerequisite cases that have focused on efforts to imitatively perform whiteness in the cases, I argue that arguments framed in competitive, nationalistic terms in racial prerequisite cases such as *Ozawa*, *Thind*, *Mozumdar*, and *Dow* were particularly ineffective compared to those in which the petitioners were framed as victims of a common enemy in cases such as *Pandit*, *Cartozian*, *S---*, and *R---*, because the former arguments exacerbated the racial conflicts that gave rise to the cases in the first place. By

comparing and contrasting the rhetorical strategies in racial prerequisite discourse across a variety of circumstances rather than in isolation, this dissertation reveals a relationship between these rhetorical strategies and a corresponding expansion or contraction of racial eligibility for naturalization as racial prerequisite discourse adapted to shifts in the nation's geopolitical interests. The self-assertive rhetoric of petitioners that cited the civilizational accomplishments of their races, often including an attempt to position themselves at the top of a racial hierarchy by denigrating "lower" races, appears to have frequently been less persuasive than the inverse approach which framed petitioners as sharing in the suffering inflicted by the nation's adversaries. The frequency and emphasis given the appeal to the bond of unity against a common enemy as a means of subordinating perceived racial divisions to national interests in the racial prerequisites to naturalization suggests that this strategy reflects a particularly persuasive means of constructing national belonging.

Thus, in contrast to Matthew Frye Jacobson's claim that the racial prerequisite cases played a crucial role in what he refers to as the "crucible of empire," by which the whiteness of the probationary "white" races of Europe was confirmed when American expansion into the Pacific and the representation of Pacific natives as dangerous "savages" dissolved the boundary between "superior" and "inferior" whites from Europe,<sup>7</sup> unification against common enemies may be seen in many circumstances of racial prerequisite discourse. In other words, the racial prerequisite cases reflect not only a "crucible of empire" but many crucibles. Although the cases may have confirmed the whiteness of the probationary "white" races of Europe, Jacobson neglects the much more pervasive presence of this rhetorical strategy in racial prerequisite discourse and its impact on a wide variety of groups and across a wider period than the rise of American imperialism in the Pacific. This form of discourse instead appears to be a more

commonly occurring rhetorical strategy, or to use Mark Weiner's phrase a "rhetorical amalgam,"<sup>8</sup> used to construct group identity in many settings.

As a result, this study of the racial prerequisite cases leads to several important conclusions about group identity, particularly the rhetorical construction of enemies and the role of rhetoric in resolving intergroup conflict. As reflected in the racial prerequisite cases, the rhetorical strategy of unifying against a common enemy is most effective when the enemy is framed as an aggressor, persecutor, or tyrant threatening imminent harm rather than through representations of shared aggression toward an enemy. While previous scholarship on the rhetorical construction of enemies often blurs the distinction between shared animosity toward an enemy and shared fear of an enemy when describing the bond of unity created by a common enemy, the racial prerequisite cases suggest that this bond is a defensive alliance which is motivated by fear rather than aggression. This often means that the enemy will be given an active grammatical agency and that those uniting in a defensive alliance to defeat the aggressor will be given a passive agency, although the agency need not be framed in such simple grammatical categories as long as the groups who transcend their differences to unite against a common enemy are discursively framed in a defensive posture. The difference between an offensive and defensive posture appears to be the crucial element.

The importance of offensive and defensive postures to the bond of unity against a common enemy may be explained by considering a threatening enemy as a particularly compelling superordinate goal that requires that groups unite to defend themselves. According to realistic group conflict theory, increasing contact between hostile groups, even in favorable circumstances, is as likely to exacerbate conflict as it is to reduce it absent a common goal to unite the groups. To reduce or resolve intergroup conflict, a series of superordinate goals,

defined as “goals which are compelling for members of two or more groups and cannot be ignored, but which cannot be achieved by the efforts and resources of one group alone,” must be introduced.<sup>9</sup> Superordinate goals are the motive condition necessary to induce members of the in-group to reformulate their views of the out-group so that “information about the out-group—ignored, rejected, or distorted before—will be viewed in a new, more positive light.”<sup>10</sup> Applying this theory to the bond of unity against a common enemy suggests that the motive condition for this bond to have a transcendent effect is a threat sufficiently compelling and imminent to require the groups to unite to survive.

Accordingly, in circumstances of perceived intergroup competition a self-assertive agency may be inherently dangerous and likely to inhibit the resolution of conflict if not escalate the conflict. The rhetorical strategy of unifying against a common enemy may be understood as a basic principle of conflict resolution that avoids this problem by deflecting attention away from the source of perceived conflict to a superordinate goal that groups share in common. This conception of the bond of unity against a common enemy as a routine function of threat assessment and positioning erodes the distinction between enemy and adversary. This approach differs from that of scholars such as Murray Edelman, Robert Ivie, and Jeremy Engels who focus on the exaggerated demonization of enemies or the use of stable, long-established enmities as a “technique of governing” that provides a means of controlling and containing the will of the governed<sup>11</sup> rather than on the identification of threats that require groups to join forces to defend themselves. For the bond of unity against a common enemy to have effect, essentializing an enemy’s hostile intentions may be less powerful for creating a sense of imminent threat than concrete statements of the actions taken by an enemy, just as denigrating an enemy may signify a weak or ineffective enemy and therefore reduce the need for groups to unite to defend

themselves. This suggests that the most effective discourse for effecting the bond of unity against a common enemy may be more specific and falsifiable than previous scholarship indicates, and that the effect created may be fleeting. Once the threat is gone the bond is dissolved, as reflected in the hesitation to pass the Filipino and Indian Naturalization Act after World War II because the legislation had initially been based on the desire to help win the war but “that reason of military expediency was disposed of by VJ-day.”<sup>12</sup>

Despite the negative implications of this rhetorical strategy in the fact that it only transcends one division to create a greater one, the racial prerequisite cases studied in this dissertation also suggest that the rhetorical strategies adopted by the participants helped to undermine a legally codified racism. Although the geopolitics of the early twentieth century provided the material with which the participants in the cases could rhetorically construct national identities, the participants did not all approach the topic with equal rhetorical efficacy. The rhetorical situations of individual cases must be closely examined, particularly the arguments and evidence advanced by the participants and the identity issues implicated by the historical contexts, to understand the effect of persuasion in the cases. The geopolitical context provided opportunities for advocacy that were developed successfully by some litigants and neglected by others, which confirms the possibility that rhetoric can be successfully used to challenge legally codified discrimination in other areas.

In addition to the implications for research on group identity, by demonstrating how legal concepts emerge from the rhetorical strategies adopted by participants in individual cases this dissertation builds on work by scholars in rhetorical and legal studies who have traced a variety of legal concepts, particularly rules of evidence and procedure, to the rhetorical tradition.<sup>13</sup> Following World War I and the emergence of displaced and stateless people like the Armenians,

the Tatars, and the Kalmyks, the rhetorical strategy of unifying against a common enemy particularly served the plight of such groups as a form of asylum protection before legal protections for refugees had fully developed. The first statutory protection of refugees in the United States was a provision in the Immigration Act of 1917 that exempted immigrants seeking admission to the United States “to avoid religious persecution” from act’s the literacy test,<sup>14</sup> but it was only after World War II that formal legal protection for refugees was adopted in the United Nations Convention Relating to the Status of Refugees in 1951 and the United Nations Protocol Relating to the Status of Refugees in 1967 which defined a refugee as a person who was stateless due to a “well-founded fear of being persecuted.” Although the United States operated under the protocol for years, the Immigration and Nationality Act was only amended to incorporate the protocol’s “well-founded fear” of persecution language in 1980.<sup>15</sup> The circumstances of displaced and stateless people arising out of the world wars of the early twentieth century created the felt sense of sense of justice that ultimately led to the “well-founded fear” of persecution standard, and the rhetorical strategy of unifying against a common enemy in the racial prerequisite cases involving displaced and stateless refugees anticipated this standard. Thus, the racial prerequisite cases demonstrate the power of rhetoric to both undermine and shape legal doctrine.

Finally, the observation that the rhetorical strategy of unifying against a common enemy prominently appeared in many instances of racial prerequisite discourse contributes to a growing body of scholarship on race, nationality, and civil rights during the cold war by illustrating the rhetorical dimensions of Derrick Bell’s “interest convergence” thesis, in which Bell posits that “the interest of blacks in achieving racial equality will be accommodated only when it converges with the interest of whites.” Bell writes that in cases involving race, constitutional protection

may not be determined by “the character of harm suffered by blacks or the quantum of liability proved against whites” but instead may reflect “the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites.” According to Bell, the claim that segregated schools were inferior finally succeeded in the Supreme Court’s 1954 decision in *Brown v. Board of Education* in part because the decision “helped to provide immediate credibility to America’s struggle with Communist countries to win the hearts and minds of emerging third world peoples” and “offered much needed assurance to American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home.”<sup>16</sup> Since Bell’s proposal of the interest convergence thesis in 1980, others have significantly expanded on the thesis in studies of how civil rights reforms were influenced by cold war foreign policy considerations.<sup>17</sup>

The conclusion that the participants in racial prerequisite discourse rhetorically constructed a convergence of interests with the nation through a strategy of unifying against common enemies gives Bell’s thesis a rhetorical dimension that has been neglected in this growing body of scholarship. Through challenges to the nation’s Asian exclusion policy, the racial prerequisite discourse of the early twentieth century reflects a slow erosion of segregationist logic well before *Brown v. Board of Education*, as legal actors advocated for equality in naturalized citizenship. This demonstrates how critical legal studies and its related legal reform movements such as critical race theory can be “informed by and addressed to the rhetorical dimensions of legal governance.”<sup>18</sup> While critical theory can enrich our understanding of rhetorical situations, without a rhetorical dimension critical theory’s focus on ideology can lead to misinterpretations of legal phenomena such as the assumption that the outcomes in

*Ozawa* and *Thind* were predetermined by the racial ideologies of the period or the conclusion that the cold war only created pressure on the United States to improve its “international impression management”<sup>19</sup> rather than actually resolve its internal competitive divisions in unity against the threat of Soviet expansion. By considering the socially constructed quality of racial and legal categories, however, critical race theory offers a wealth of resources for rhetorical studies and the two fields can benefit from one another.

The World War II and early cold war period gave voice to particularly powerful expressions of the desire to transcend human conflict, one of these expressions found in Simone Weil’s essay “The *Iliad*, or the Poem of Force,” written in late 1940 after the fall of France and first published in the December 1940 and January 1941 issues of the Marseilles literary monthly *Cahiers du Sud*. Weil begins her essay with the simple statement that “the true hero, the true subject, the center of the *Iliad* is force.” In the *Iliad*, according to Weil, “at all times, the human spirit is shown as modified by its relations with force, as swept away, blinded by the very force it imagined it could handle, as deformed by the weight of the force it submits to.”<sup>20</sup> Force is not a condition of the Greeks or the Trojans alone in the *Iliad*, Weil writes, but a “condition common to all men,” which results in “the friendship between comrades-at-arms, . . . the final theme of The Epic,” expanding to encompass “the friendship that floods the hearts of mortal enemies” and before which “the distance between benefactor and suppliant, between victor and vanquished, shrinks to nothing.”

Weil represents humanity’s agency in the *Iliad* as passive, persecuted by the presence of force itself, and she claims that the poem’s continual theme of “incurable bitterness” in response to the widespread violence that the poem represents proceeds from a “tenderness that spreads over the whole human race.” The *Iliad* views both victor and vanquished as counterparts of the

poet, who the reader can barely distinguish as a Greek or a Trojan. It is the common suffering of those on both sides of the battle that Weil argues makes the *Iliad* surpass other Western literature. The *Iliad*, in other words, promotes shared suffering as a precondition of love and justice:

He who does not realize to what extent shifting fortune and necessity hold in subjection every human spirit, cannot regard as fellow-creatures nor love as he loves himself those whom chance separated from him by an abyss. The variety of constraints pressing upon man give rise to the illusion of several distinct species that cannot communicate. Only he who has measured the dominion of force, and who knows not to respect it, is capable of love and justice.<sup>21</sup>

Weil recognizes the powerful bond that shared suffering creates. She reads in the *Iliad* the expression of the shared suffering of all humanity at the hands of force itself, shifting the enmity between races or nations into a common struggle of humanity against violence. In certain respects, Weil's essay also expresses a common realization during World War II, reflected in the rise of human rights discourse and international organizations such as the United Nations after the war, that the rivalries of nations could destroy humanity itself. As President Barack Obama recently stated in a speech before the United Nations, "this institution was established from the rubble of conflict."<sup>22</sup>

The realization that violence could destroy humanity also manifests itself in the final chapter of the racial prerequisite saga, as American authorities increasingly eliminated the restrictions on racial eligibility for naturalization both by legislatively extending eligibility to Chinese, Filipinos, and Asian Indians and by expansively interpreting the category of whiteness in judicial interpretations of the naturalization act. As the Secretary of Commerce and Labor stated regarding the racial prerequisites to naturalization well before World War I, "we are more concerned with the general character of the immediate applicant than we are with his nativity."<sup>23</sup>

The character he referred to was not demonstrated by imitatively performing whiteness but by sharing in the suffering and sacrifices of the nation.

## NOTES

<sup>1</sup> Kenneth Burke, *A Rhetoric of Motives*, Calif. ed. (Berkeley: Univ. of California Press, 1969), 222.

<sup>2</sup> Cf., e.g., Kenneth Burke, "The Rhetoric of Hitler's 'Battle,'" in *The Philosophy of Literary Form: Studies in Symbolic Action*, 3rd ed. (Berkeley: Univ. of California Press, 1973), 191-220.

<sup>3</sup> Elias Canetti, *Crowds and Power* (New York: Viking 1962), 138.

<sup>4</sup> See Defendant's Answer, *United States v. Pandit*, No. G-111-T (S.D. Cal. March 10, 1924), in Transcript of Record, *United States v. Pandit*, No. 4938 (9th Cir. Aug. 13, 1926), 30, in Records of the U.S. Courts of Appeals, Record Group 276, National Archives and Records Administration Pacific Region, San Bruno, Calif.

<sup>5</sup> Statement of Testimony Under Equity Rule 75 B, *United States v. Pandit*, No. G-111-T (S.D. Cal. May 11, 1926), in Transcript of Record, *United States v. Sakharam Ganesh Pandit*, No. 4938 (9th Cir. Aug. 13, 1926), 152-54.

<sup>6</sup> Mahatma Gandhi, *Non-Violent Resistance (Satyagraha)* (Mineola, N.Y.: Dover, 2001), 6, 17, 59, 67, 78.

<sup>7</sup> Matthew Frye Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (Cambridge: Harvard Univ. Press, 1998), 203-222.

<sup>8</sup> Mark S. Weiner, *Americans Without Law: The Racial Boundaries of Citizenship* (New York: New York Univ. Press, 2006), 1.

<sup>9</sup> Muzafer Sherif and Carolyn W. Sherif, "Research on Intergroup Relations," in *The Social Psychology of Intergroup Relations*, eds. William G. Austin and Stephen Worchel (Monterey, Calif.: Brooks/Cole, 1979), 11.

<sup>10</sup> Jay W. Jackson, "Realistic Group Conflict Theory: A Review and Evaluation of the Theoretical and Empirical Literature," *Psychological Record* 43 (1993): 398, 405.

<sup>11</sup> Jeremy Engels, *Enemyship: Democracy and Counter-Revolution in the Early Republic* (East Lansing: Michigan State Univ. Press, 2010), 20.

<sup>12</sup> *Filipino and Indian Naturalization Act of 1946*, HR 3517, 79th Cong., 2nd Sess., *Cong. Rec.* 91 (October 10, 1945), 9527.

<sup>13</sup> See, e.g., Malthon Anapol, "Rhetoric and Law: An Overview," *Today's Speech* 18.4 (1970): 12-20; Alessandro Giuliani, "The Influence of Rhetoric on the Law of Evidence and Pleading," *The Juridical Review*, new ser., 7 (1962): 216-51; Hanns Hohmann, "The Dynamics of Stasis: Classical Rhetorical Theory and Modern Legal Argumentation," *The American Journal of Jurisprudence* 34 (1989): 171-97; Richard J. Schoeck, "Rhetoric and Law in Sixteenth-Century England," *Studies in Philology* 50 (1953): 110-27; Barbara J. Shapiro, "Classical Rhetoric and the English Law of Evidence," in *Rhetoric and Law in Early Modern Europe*, eds. Victoria Kahn and Lorna Hutson (New Haven: Yale Univ. Press, 2001).

<sup>14</sup> *Immigration Act of 1917*, 64th Cong, 2nd Sess., *U.S. Statutes at Large* 39 (1917): § 3.

<sup>15</sup> See Christopher J. Einolf, *The Mercy Factory: Refugees and the American Asylum System* (Chicago: Ivan R. Dee, 2001), 3-10.

<sup>16</sup> Derrick A. Bell, Jr., “*Brown v. Board of Education* and the Interest-Convergence Dilemma,” *Harvard Law Review* 93 (1980): 523-24.

<sup>17</sup> See, e.g., Carol Anderson, *Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights, 1944-1955* (Cambridge: Cambridge Univ. Press, 2003); Thomas Borstelmann, *The Cold War and the Color Line: American Race Relations in the Global Arena* (Cambridge: Harvard Univ. Press, 2003); Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton: Princeton Univ. Press, 2000); Calvin B. Holder, “Racism Toward Black African Diplomats During the Kennedy Administration,” *Journal of Black Studies* 14.1 (1983): 31-48; Gerald Horne, *Black and Red: W.E.B. DuBois and the African American Response to the Cold War* (Albany: State Univ. of New York Press, 1986); Brenda Gayle Plummer, *Rising Wind: Black Americans and U.S. Foreign Affairs, 1935-1960* (Chapel Hill: Univ. of North Carolina Press, 1996); Jonathan Rosenberg, *How Far the Promised Land? World Affairs and the American Civil Rights Movement from the First World War to Vietnam* (Princeton: Princeton Univ. Press, 2006)

<sup>18</sup> *Encyclopedia of Rhetoric*, Thomas Sloane, ed. (New York: Oxford Univ. Press, 2001), s.v. “Law”; see also Marouf Hasian, Jr. *Legal Memories and Amnesias in America’s Rhetorical Culture* (Boulder, Colo.: Westview, 2000), 9 (noting that critical legal studies appears to take “the notion of rhetoric and the role of the public in the formation of judicial principles” seriously); Francis J. Mootz III, *Rhetorical Knowledge in Legal Practice and Critical Legal Theory* (Tuscaloosa: Univ. of Alabama Press, 2006), xvii (“My central themes are that rhetorical knowledge . . . is a feature of social life; that rhetorical knowledge plays an important role in legal practice; and that legal critique is appropriately grounded by the normative injunction to maximize the generation of and reliance on rhetorical knowledge in the administration of justice by legal actors.”); William E. Wiethoff, “Critical Perspectives on Perelman’s Philosophy of Legal Argument,” *Journal of the American Forensic Association* 22 (1985): 8 (noting that Chaïm Perelman’s new rhetoric and critical legal studies both see “a salutary role for rhetorical method in jurisprudence”).

<sup>19</sup> Stanford M. Lyman, “The Race Question and Liberalism: Casuistries in American Constitutional Law,” *International Journal of Politics, Culture, and Society* 5 (1991): 233-34.

<sup>20</sup> Simone Weil, “The *Iliad*, or the Poem of Force,” *Chicago Review* 18 (1965): 6.

<sup>21</sup> *Ibid.*, 23-28.

<sup>22</sup> “President Obama’s speech to the UN general assembly,” *The Guardian*, September 25, 2012, <http://www.guardian.co.uk/world/2012/sep/25/obama-un-general-assembly-transcript> (accessed October 15, 2012).

<sup>23</sup> Correspondence from Charles Nagel to Justin S. Kirreh dated November 13, 1909, in Records of the Immigration and Naturalization Service of the United States, Record Group 85, Box 1573, File 19783/43, National Archives Building, Washington, DC.

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