"The White Man's Burden":

Rhetorical Constructions of Race and Identity in U.S. Naturalization Cases from India, 1914-1926

by

Douglas Marshall Coulson, J.D., M.L.A., B.A.

Master's Report

Presented to the Faculty of the Graduate School

of the University of Texas at Austin

in Partial Fulfillment

of the Requirements

for the Degree of

Master of Arts in English

The University of Texas at Austin

May 2009

The Report committee for Douglas Marshall Coulson

Certifies that this is the approved version of the following report:

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APPROVED BY

SUPERVISING COMMITTEE:

Supervisor: _____
Patricia Roberts-Miller

_____
Gretchen Murphy

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This report examines the rhetorical strategies employed in several judicial cases during the 1920s in which the U.S. government contested the racial eligibility of Hindus for naturalization under a law providing that only "white persons" were eligible for naturalization. Through a close examination of the arguments and evidence in the cases, the report argues that the decisions in the cases were inextricably linked to the the conflict between the British and a rising Hindu nationalism movement in the struggle for Indian independence during the period surrounding World War I, and thereby highlight the significance of a wide variety of group identities to racial identification as the courts in the cases negotiated the boundaries of America's global identity through the lens of race.

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I. Introduction

Between 1790 and 1870, the U.S. naturalization statute provided that only "white persons" could become U.S. citizens by naturalization, and although the statute was amended in 1870 to also extend eligibility to "aliens of African nativity and persons of African descent," from 1870 to 1940, unless a person was either "white" or "African," they were ineligible for naturalization.[1] Further, although after 1940 eligibility 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," these racial prerequisites all remained in the statute until 1952.[2] During most of this period any court of general jurisdiction could grant a naturalization certificate, and therefore the vast majority of naturalization decisions appear to have been largely uncontested and to have resulted in no written judicial opinions. But in dozens of contested naturalization cases between 1878 and 1954, numerous federal and state courts, and ultimately the Board of Immigration Appeals, struggled to determine the meaning of the statutory phrase "white person."[3] These cases, referred to as the racial prerequisite cases, offered widely conflicting interpretations of what it meant to be a "white person" in cases involving petitioners classified as Chinese, Native American, Hawaiian, Burmese, Japanese, Hindu, Mexican, Parsi, Filipino, Syrian, Korean, Afghan, Iraqi,

Armenian, Turkish, Arabian, Tartar, and Kalmuk,[4] leading one court to label the conflicting opinions in the cases a "Serbonian bog."[5]

Although these cases remained largely unstudied by scholars for years, they have recently generated renewed attention among Critical Race Theory and whiteness scholars, most notably in Ian F. Haney López's *White by Law: The Legal Construction of Race*, which examines judicial frustrations with scientific evidence of race in the cases, in Matthew Frye Jacobson's *Whiteness of a Different Color*, which examines how the cases confirmed the whiteness of southern Europeans in the process of excluding those from central and eastern Asia, and most recently in John Tehranian's *Whitewashed: America's Invisible Middle Eastern Minority*, which examines how the cases constructed a category of Middle Eastern whiteness by requiring an assimilatory "white" performance by petitioners of Middle Eastern descent.[6] Significantly, Critical Race Theory's focus on the social construction of racial identities has also recently attracted a number of rhetoric and composition scholars,[7] and because the racial prerequisite cases are explicitly focused on the criteria by which racial identities are formed they offer a unique opportunity to consider the rhetorical construction not only of race but of group identity generally, particularly those cases that followed a critical turning point when the U.S. Supreme Court finally rejected any role for skin color

or scientific evidence of race in the interpretation of the racial prerequisites in the statute.

Specifically, the Court heard two prerequisite cases in which it issued opinions a mere three months apart, first in *Ozawa v. United States* on November 13, 1922, in which it held that a person of the Japanese race was not a "white person," and second in *United States v. Thind* on February 19, 1923, in which it held that a "high caste Hindu of full Indian blood" was not a "white person." Prior to these two opinions, lower federal and state courts had reached a wide range of conflicting decisions regarding the racial classification issue and had frequently remarked on the need for clarification by a higher authority. In *Ozawa* and *Thind*, however, the Court held only that "white persons" should be interpreted according to "common knowledge" of racial identities, by "the understanding of the common man," rather than by reference to skin color or scientific authorities,[8] which far from clarifying the statute, led later courts into the even deeper abyss of examining the social, political, and cultural histories of petitioners in order to determine if they were "white." By rejecting skin color and scientific evidence of race as determinative of racial identities, however, the prerequisite cases that followed the Court's "common knowledge" test of racial identities also provide unique examples of the ways in which such identities intersect with a vast array of other group identities, not only of class and gender, but of social, political, and

cultural affiliations, as well as the ways in which racial identities are rhetorically constructed in specific acts of discourse.

It is particularly tempting to view the Court's opinions in *Ozawa* and *Thind* and the cases that followed as the predictable products of the highly racist and xenophobic era of the early 1920s. As Thomas Gossett describes, in the 1920s racist theories achieved "an importance and respectability which they had not had in this country since the Civil War."[9] The Court's landmark segregation opinion in *Plessy v. Ferguson*, which upheld the "separate but equal" doctrine behind segregation, had claimed decades before that "legislation is powerless to eradicate racial instinct, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the present situation,"[10] and combined with this belief in "racial instincts," fears of immigrants during the period surrounding World War I led to a peculiarly racist and xenophobic era. In President Woodrow Wilson's State of the Union address on December 7, 1915, Wilson warned that

> the gravest threats against our national peace and safety have been uttered within our own borders. There are citizens of the United States, I blush to admit, born under other flags but welcomed under our generous naturalization laws to the full freedom and opportunity of America, who have poured the poison of disloyalty into the very arteries of our national life . . . .[11]

Further, World War I and the Russian Revolution of 1917 created the Red Scare that led among other things to the passage of the Espionage Act on June 15, 1917,

which made it a crime for anyone to convey information with the intent to interfere with the success of the military, promote the success of America's war enemies, or incite disloyalty among the military, and the Sedition Act on May 7, 1918, which additionally prohibited, among other things, speaking or publishing "any disloyal, profane, scurrilous, or abusive language" about the United States or any language intended to bring the United States into "contempt, scorn, contumely, or disrepute."[12] These acts provided the basis for the Palmer Raids, a series of controversial raids on immigrants suspected of anarchist and other seditious activities between 1919 and 1921,[13] and during this period Americanization reached "its most feverish level."[14]According to Gossett, the xenophobia that characterized the era was widely based in a racism that, much like the Supreme Court's reference to "racial instincts" in *Plessy*, argued that "the truths of race could be learned from 'intuition' and had no need of scientific verification,"[15] closely paralleling the central holding of *Ozawa* and *Thind* that racial identity should be determined by "common knowledge" rather than by scientific evidence.

Thus, it may not be surprising that prior studies of the prerequisite cases have neglected to consider the social, political, and cultural contexts of these cases or the rhetorical contexts created by the evidence and arguments introduced in the cases. In *White by Law*, for example, Ian F. Haney López openly

acknowledges these limitations of his study, noting that "I do not intend to provide an exhaustive historical study of these cases, or to offer a periodization of the cases that can serve other analytical purposes," and concludes that the cases therefore remain "a rich vein of information about how we became who we are as a racialized country, and deserve continued and more ambitious excavation."[16] I will argue that this decontextualized approach to understanding the prerequisite cases has led to a misreading of the relationship between the Court's opinions in *Ozawa* and *Thind*, however, that highlights how the rhetorical construction of race varies in specific acts of discourse even within the most racist and xenophobic of eras and is contingent on a variety of other social, political, and cultural identities.

To explore these issues, I will specifically examine the rhetorical context of the Supreme Court's opinion in *Thind,* particularly the relationship between the rising Hindu nationalism movement in the United States surrounding World War I, petitioner Bhagat Singh Thind's connection to the revolutionary Gadhr conspiracy on the Pacific Coast of the United States to violently overthrow the British Raj during World War I, the highly confrontational rhetoric of Hindu racial supremacy that animated Thind's Supreme Court briefing, and the Government's invocation of racial ideologies of British colonialism. By way of contrast to the failures of Thind's arguments, I will also examine a case filed a mere four months after *Thind* seeking to cancel the naturalization certificate of

Sakharam Ganesh Pandit on the basis that he was Hindu and therefore racially ineligible for citizenship, in which Pandit successfully employed a less confrontational rhetorical strategy to retain his citizenship despite the precedent of *Thind*. I will argue that by claiming that he had lost his high caste status in India as a result of becoming an American citizen and that if his American citizenship was revoked he would become an outcast in India, a "man without a country" welcome only among the "untouchables," Pandit successfully employed the rhetorical strategy Kenneth Burke called identification by antithesis to dissociate himself from the privileges of caste and the Hindu nationalism movement. The contrast between the respective rhetorical strategies of *Thind* and *Pandit* thereby reenacted the conflict between the British and a rising Hindu nationalism movement in the struggle for Indian independence, and highlights the significance of a wide variety of group identities to racial identification in the prerequisite cases, as courts negotiated the boundaries of America's increasingly global identity through the lens of race.

II. The Supreme Court's Reversal in *Ozawa* and *Thind*

The leading interpretation of the Court's opinions in *Ozawa* and *Thind* is that in *Ozawa* the Court held that naturalization petitioners could establish that they were "white persons" within the meaning of the naturalization statute by offering scientific evidence that they were members of the Caucasian race, but a

mere three months later in *Thind*, because a Hindu petitioner offered scientific evidence that high-caste Hindus were Caucasian, the Court suddenly changed its interpretation of the "white persons" prerequisite to one based on "common knowledge" of racial identities in order to exclude Hindus from citizenship. Commentators have generally explained this shift in the Court's interpretation of the statute between *Ozawa* and *Thind* as the result of an *ad hoc* racism that sought to restrict whiteness to western Europeans. In Ian F. Haney López's *White by Law*, for example, he writes that "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 "rejected any role for science in racial assignments" because the Hindu petitioner offered scientific evidence that high-caste Hindus were Caucasian.[17] Numerous commentators have reached similar conclusions, suggesting that the racial ideology of the era made it entirely predictable that the Court would manipulate the definition of "white persons" to find Hindus racially ineligible for citizenship.[18]

The rhetorical context of the Court's opinion in *Ozawa*, however, particularly the scientific evidence petitioner Takao Ozawa offered to prove that the Japanese were Caucasian, significantly contradicts this nearly uniform reading of the reversal between *Ozawa* and *Thind*. In *Ozawa*, Takao Ozawa introduced

evidence from Augustus Keane's *Man, Past and Present*, Francis Hawks' *Narrative of the Expedition of an American Squadron to the China Seas and Japan*, the *Encyclopedia Britannica*, and numerous other scientific and travel authorities to argue that the Japanese had descended from the Ainu and the Yamato islanders of Japan, who were almost uniformly classified as Caucasian, and from the Polynesians, a Caucasian race "springing from the earlier Mediterranean race and allied to the later Baltic peoples of Europe" and speaking the Aryan language. Accordingly, Ozawa argued that "there was probably a paleolithic as well as a megolithic invasion of Polynesia from Japan," which was corroborated by numerous linguistic and cultural affinities between the Japanese and Polynesian culture. Ozawa argued that this supported the conclusion that the Japanese had "Caucasian root stocks."[19] Thus, contrary to prior readings of *Ozawa* and *Thind*, the divergence of scientific evidence and "common knowledge" of racial classifications did not first arise in *Thind* but had already become an issue in *Ozawa*.

Further, previous interpretations of *Ozawa* and *Thind* have failed to recognize that in response to the scientific evidence Ozawa offered to prove that the Japanese and Europeans had common ancestors, the Court did not rely on any of the scientific evidence offered by the parties in *Ozawa* for its conclusion that the Japanese were not Caucasian and therefore not "white," but carefully avoided

deciding between the conflicting evidence in the case by instead relying on a claimed consensus among lower court decisions. In the context of the conflicting scientific evidence introduced in *Ozawa* regarding the proper racial classification of the Japanese, when the Court writes that "the federal and state courts, in an almost unbroken line, have held that the words 'white person' were meant to indicate only a person of what is *popularly* known as the Caucasian race" and that Ozawa was "clearly of a race which is not Caucasian," the Court rejects Ozawa's scientific authorities in favor of a "common knowledge" test of race, but the Court does not rely on scientific evidence of race introduced by the Government in *Ozawa* to do so. Instead, the Court merely approves of a line of lower court precedent that had relied on scientific authorities to hold that the Japanese were not Caucasian, which the Court stated that it did "not deem it necessary to review."[20]

But prior interpretations of *Ozawa* and *Thind* have also overlooked a far more irreconcilable conflict between the two cases, specifically the fact that in *Ozawa* the Court *expressly approved* of two lower-court cases that had held high-caste Hindus were "white persons" and therefore were eligible for citizenship, precisely the holding the Court rejected a mere three months later in *Thind*. This reversal is wholly inconsistent with the conclusion that the exclusion of Hindus in *Thind* was predictable, as it was certainly not predictable to the Court three

months earlier in *Ozawa*. In *Ozawa*, the Court cites *In re Mozumdar* and *In re Mohan Singh*, two federal district court opinions that had held high-caste Hindus were "white persons" within the meaning of the statute, among the "unbroken line" of lower-court cases of which the Court approved, stating that "we see no reason to differ" with the conclusions reached in the cases.[21] The Court also omits *In re Sadar Bhagwab Singh*, the only published opinion at the time to have concluded that high-caste Hindus were *not* racially eligible for naturalization, from its list of approved decisions in *Ozawa*, further suggesting that the Court deliberately approved of Hindu eligibility in *Ozawa*.[22] This reversal simply cannot be explained by reference to a racist ideology that predisposed the Court to exclude Hindus from citizenship in the first place, because both cases were unanimous decisions of the same Justices and written by the same author, Justice George Sutherland. So why did the Court so dramatically reverse its approval of Hindu racial eligibility during the three-month period between November 1922 and February 1923? This question remains unanswered by current scholarship, but a close examination of the rhetorical contexts of these opinions reveals geopolitical pressures surrounding the conflict between the British and a rising Hindu nationalism movement that were inextricably intertwined with the racial issues considered in *Thind* and subsequent Hindu naturalization cases but that

were not before the Court in *Ozawa*, which suggest a better explanation of the Court's reversal in *Thind* than the racial ideologies of the era alone can provide.

III. Bhagat Singh Thind, Hindu Nationalism, and the Indo-Aryan Controversy

On November 12, 1920, Bhagat Singh Thind became a U.S. citizen by naturalization, but shortly after he received his naturalization certificate, U.S. attorneys initiated a proceeding to cancel Thind's naturalization on the basis that he was not a "white person" within the meaning of the naturalization statute and that his naturalization certificate had therefore been "illegally procured" as defined by a provision of the Naturalization Act of 1906 that provided for cancelation of naturalizations certificates to combat fraud in naturalization proceedings.[23] Following a trial regarding Thind's eligibility for citizenship, the district court admitted Thind to citizenship based on prior precedent that had held Parsi, Armenian, and Hindu petitioners to be "white persons" within the meaning of the statute, but the district court's opinion also refers to testimony offered during the trial regarding Thind's connection with what was known as the Gadhr party and the Gadhr Press on the Pacific Coast of the United States.[24]

The Gadhr party was a Hindu nationalist movement opposed to British imperialism and credited with efforts to organize a violent overthrow of the British government in India from the Pacific Coast of the United States between 1914 and 1917, and the Gadhr Press published a weekly journal entitled *Gadhr*

which disseminated the group's revolutionary message.[25] When the British government became aware of the Gadhr party's organizational activities in the United States, one of its first efforts to suppress the party's activities was to pressure the United States deny the naturalization petition of alleged Gadhr conspirator Taraknath Das. Despite the British government's protestations, however, the United States District Court for the Northern District of California granted a naturalization certificate to Das on June 9, 1914, and when U.S. attorneys failed to appeal the decision, the British government complained further.[26] The British did not succeed in persuading the United States to appeal the decision in the Das case, however, which suggests that as of the summer of 1914, U.S. authorities were not aggressively pursuing the cancelation of Hindu naturalization certificates even under British diplomatic pressure claiming a national security threat.

All of that appears to have changed on April 7, 1917, one day after the United States declared war in World War I, when seventeen of the Gadhr conspirators were arrested in San Francisco and numerous other Indian defendants were arrested across the United States, ultimately resulting in the indictment of 105 defendants by a federal grand jury in San Francisco in July 1917 on charges of violating the neutrality laws of the United States. All of the defendants pleaded not guilty, and on November 20, 1917, a federal trial commenced during which

the Indian defendants frequently disrupted the proceedings. This trial lasted until April 23, 1918, when on the final day of the trial, defendant Ram Chandra managed to obtain a gun during a morning recess and when court reconvened shot and killed defendant Ram Singh in open court before Chandra was himself shot and killed by a U.S. marshal amidst fleeing spectators.[27] A *Washington Post* headline the following day read, "Hindu Prisoner Shoots Another and Is Slain by Marshal," and reported that the murder was motivated by a dispute over the diversion of funds earmarked for use in the Hindu nationalist revolution contemplated by the conspirators.[28] Given the spectacle and violence of this federal trial only a few years prior to Thind's case, his connection to the Gadhr conspirators would likely have been given grave consideration by the federal courts.

Thus, Thind's connection with the Gadhr conspirators presented a significant rhetorical problem in his effort to defend his citizenship against cancelation. In the district court's opinion in *Thind*, the district court remarks that Thind's deportment

> has been that of a good citizen . . . , unless it be that his alleged connection with what is known as the Gadhr Party or Gadhr 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 undesireable citizen.

The court explains that Thind "was on friendly terms with Bhagwan Singh, Ram Chandra [the defendant who murdered Ram Singh and was shot and killed by a marshal on the final day of the Gadhr conspiracy trial], and others who had to do with the Gadhr Press," and that Thind had frequently visited defendant Bhagwan Singh in prison following Singh's conviction in the case. Based on the testimony of "disinterested citizens" who upheld Thind's character, the district court ultimately rejected the argument that Thind's connection with the Gadhr party rendered him ineligible for citizenship, but not before noting that Thind "frankly admits . . . that he is an advocate of India for the Indians, and would like to see India rid of British rule," and that Thind's newfound affection for the Constitution, laws, customs, and privileges of the United States reflected that "obviously, he has modified somewhat his views on the subject."[29]

Although Thind's connection with the Gadhr conspirators and Hindu nationalism during World War I is not mentioned in arguments before the Supreme Court or in the Court's opinion in *Thind*, the Court would undoubtedly have been aware of this connection through its review of the district court's opinion. This connection provides a critical rhetorical context for understanding the significance of Thind's briefing before the Court and the Court's judicial opinion, because in this context Thind surprisingly employed a highly confrontational rhetoric of Hindu racial supremacy in his briefing that could only

have exacerbated concerns regarding his revolutionary character and beliefs. The primary emphasis of Thind's argument was that as a "high-caste Hindu of full Indian blood" he was a pure descendent of the primordial Aryan race which, according to one of the many Aryan invasion theories of Indian civilization, had invaded the Indian subcontinent in approximately 2000 B.C.E. and conquered the dark-skinned Dravidians, driving them into southern India where they resided in modern times. Thind cited European scholars of the nineteenth century's Oriental Renaissance such as Sir William Jones, Franz Bopp, and Max Müller, who had argued based on similarities between Sanskrit and European languages that Indians and Europeans descended from a common Indo-Aryan ancestor, and although Thind acknowledged that the linguistic heritage alone did not necessarily establish his racial ancestry, "as far back as history goes the Aryans themselves have been the conquering race," and

> there being no evidence whatsoever that the so-called Aryan 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.[30]

Thus, Thind claimed a lineage to the original conquering tribes who had brought the Aryan language to India.

The Aryan invasion theory of Indian civilization, which has always been highly political and contested, basically claimed that an Indo-European race that originated in central Asia had migrated south to Iran and India then west to

Europe and ultimately to the Americas, and some variations on the theory still have general currency.[31] In 1786, Sir William Jones claimed to have discovered commonalities among Indo-European languages including Sanskrit, Latin, Greek, Gothic, Celtic, and Old Persian, which he concluded all descended from a lost ancestral language spoken by people he referred to as Indian or Hindu. Many of the early European Sanskrit scholars originally believed the study of Sanskrit would give rise to an Oriental Renaissance as influential as the study of Greek texts during the fifteenth century and the European Renaissance, and in connection with these philological investigations, the British also found a history of invasions of India particularly convenient to justify their own military conquest of the Indian subcontinent. Among other things, the Aryan invasion theory also separated north India from south India and its mass of darker-skinned races and cultures because the latter were deemed inferior, and its racial significance was always controversial.[32]

According to the version of the Aryan invasion theory advanced in Thind's briefing, it was settled that "the people residing in many of the states of India, particularly in the north and northwest, including the Punjab, belong to the Aryan race," having come from "some part of Central Asia, probably from Persia, or the headwaters of the Oxus and other rivers in the vicinity" to conquer the "aborigines" of India. According to Thind, both because the Aryans themselves

were the conquering race and "the caste system prevails in India to a degree unsurpassed elsewhere," high caste Hindus had maintained a peculiar racial purity, proving "a most effective barrier to prevent a mixture of the Aryan with the dark races of India." Accordingly, Thind noted, "the high-class Hindu regards the aboriginal Indian Mongoloid in the same manner as the American regards the negro." As though this argument had not sufficiently expressed his meaning, however, Thind took his Hindu racial supremacy argument even further, eventually intimating that he was even racially superior to the members of the Court themselves. Although Thind compared the Aryan invaders who drove out the native inhabitants of India to "the Caucasian people of this country who have taken possession and driven out the native red men," Thind challenged the racial homogeneity of white Americans due to the "melting pot" effect, arguing that although "there are a great many more distinct races in India than there are in the United States," there was "no 'melting pot' in India in the sense that we use the term in the United States."[33]

It is also important to recognize that Thind's argument for the superior whiteness of high caste Hindus was not a novel one, but expressed a common refrain among Hindu nationalists of the era, who as Harold Isaacs points out, having internalized the racial supremacy of the Aryan invasion theory developed by European scholars, frequently conceived of themselves as "more 'white' than

the 'whites,' indeed, as descendants from the 'pure Aryan family' of prehistoric times," endowing them with "a sort of Mayflower status" in relation to whiteness.[34] In fact, according to one variant of the Aryan origin theory, rather than an Indo-Aryan invasion from the north, the Indo-Europeans originated in India and invaded to the north, making India the cradle of world civilization by spreading civilization from India outward rather than the reverse.[35] Further, the Aryan origin theory embraced by such Hindu nationalists not only fostered the belief that they were racially superior to Europeans, but to Muslims on the Indian subcontinent and in surrounding regions as well.[36]

Significantly, however, Thind relied on a far narrower, more restrictive version of the Indo-Aryan theory rather than the more inclusive idealism of the Oriental Renaissance that viewed the theory as a basis for a filial union between the British and Indian people. Rather than emphasizing the more supremacist elements of the theory, Thind could have capitalized more on this idealist strain of Orientalist scholarship that was aimed toward inclusion rather than exclusion and which had been espoused by respected American public figures such as Ralph Waldo Emerson, Josiah Royce, and William James.[37] In addition, because Thind acknowledged in his briefing that he was a Sikh despite his formal claim to be a high caste Hindu, he could have capitalized on the British racial ideologies of "martial races" formed in the wake of the 1857 Indian rebellion against the British

Raj, in which the Sikhs and Gurkhas who had supported the British in the rebellion were elevated to the status of "martial races," while the high-caste Hindus who were held primarily responsible for the rebellion were framed as weak and effeminate due to their devotion to caste ritual.[38] Thind may not have adopted these positions because they conflicted with his cultural identity as a Hindu nationalist, but the rhetorical consequence of his highly confrontational strategy was one that in retrospect seems to have been doomed to fail.

The Government responded to Thind's arguments with rhetoric as racially supremacist as Thind's own, relying heavily on sources connected with British colonial rule of India. The Government argued that what constituted a "white person" could not be "wholly determined upon either geographical, philological, or ethnological bases," but "can only be determined in the light of history." The Government focused its argument less on contesting Thind's claim to Aryan purity, however, than on the lack of cultural affinity between India and western Europe, arguing that "though they 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."[39] During the previous decade, a similar Aryan invasion theory had been advanced by the Asian Exclusion League, which wrote that

> we, the people of the United States, are cousins, far removed, of the Hindus of the northwest provinces, but our forefathers pressed to the west,

> in the everlasting march of conquest, progress and civilization. The forefathers of the Hindus went east and became enslaved, effeminate, caste-ridden and degraded, until to-day we have a spectacle of the Western Aryan, the "Lords of Creation," if we may use the simile, while on the other hand the Eastern Aryans have become the "Slaves of Creation" to carry the comparison to its logical conclusion.[40]

Thus, the Government invoked familiar images of Indian cultural inferiority and the necessity of British rule in India rather than contesting Thind's claim of pure Aryan ancestry.

To support its argument, the Government drew explicitly on the ideology of ruling and subject races that characterized much of Britain's colonial rule of India, 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.

As already noted, the absolutism of this argument could have been readily refuted by reference to the more idealist strain of Western Orientalist scholarship which viewed high caste Hindus as members of the European family, had Thind not appealed solely to Hindu supremacy rather than to commonality between the British and Indians. The Government also quoted at length from Edmund Burke's address to the House of Lords in the trial of Warren Hastings, the former Governor-General of India in the late eighteenth century who was impeached

after Burke charged him with high crimes and misdemeanors for his rule of India. In the passage of Burke's speech quoted by the Government in *Thind*, Burke claimed the inhabitants of the Indian subcontinent were "the most unalliable to any other part of mankind," without the "convivial bond" of society, and that a wide gulf separated the Indian and British people, "that gulf which manners, opinions, and laws have radicated in the very nature of the people." Finally, in perhaps its most extraordinary rhetorical move, the Government explicitly drew upon the colonial ideology of Rudyard Kipling's poem "The White Man's Burden," arguing that, in "popular conception,"

> [Thind] is an 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.

Not only does the Government's reference to the "English-speaking" race peculiarly privilege the whiteness of Anglo-Saxons over other western Europeans, but the Government's reference to Kipling's poem further invokes the colonial ideology of ruling and subject races. The Government continues, "whatever may be the white man's burden, the Hindu does not share it, rather he imposes it."[41]

Given the centrality of these issues in the parties' briefing, the Court was confronted with a significant historiographical question regarding India's racial and cultural identity in relation to the West. In response to the arguments presented by Thind and the Government, the Court adopted neither Thind's

arguments of Hindu racial purity nor the Government's arguments of mere cultural inferiority, but instead rejected Thind's claim that his Aryan ancestry and the rules of caste rendered him the purest of Aryans. The Court began by rejecting the sufficiency of common origins to establish racial identity:

> the term "race" is one which, for the practical purposes of the statute, must be applied to a group of living persons now possessing in common the requisite characteristics, not to groups of persons who are supposed to be or really are descended from some remote, common ancestor, but who, whether they both resemble him to a greater or less extent, have, at any rate, ceased altogether to resemble one another.

The Court then rejected the Aryan theory of racial classification as "discredited by most, if not all, modern writers on the subject of ethnology," noting that

> The term "Aryan" has to do with linguistic and not at all with physical characteristics, and 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.[42]

Apparently unsatisfied with its rejection of the language theory of race, however, and perhaps betraying a certain anxiety regarding Thind's claim to possess a purer form of whiteness than the members of the Court themselves, the Court's opinion goes further to accept the Aryan invasion theory advanced by Thind but find that the racial purity of the Aryan invaders of India had degenerated by intermarriage with the dark-skinned Dravidians.

To accomplish this, the Court openly acknowledges the mutability of race and the practical impossibility of establishing "sharply bounded" racial divisions, but in a manner that ironically excludes the possibility of Thind's claim to a "white" racial identity:

> It may be, therefore, that a given group cannot be properly assigned to any of the enumerated grand racial divisions. 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 there was such an intermixture of the "Aryan" invader with the darkskinned Dravidian.
>
> In the Punjab and Rajputana, 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.[43]

Several things are particularly significant about this passage of the opinion. First, although the Court rejects the Aryan theory of racial classification because it is founded in language use, the Court appears to accept the racial homogeneity of the Dravidians, a racial classification also based on similarities of languages spoken in southern India and surrounding areas.[44] Second, the Court recognizes the mutability of race in this passage, but conceives of the possibility of change only in degenerative terms, because shortly after the passage quoted above, the Court finds that unlike the children of western Europeans, 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 evidence of their ancestry."[45]

But perhaps most significantly, the Court mischaracterizes the *Encyclopedia Britannica* entry that it relies on as authority for the conclusion that caste had not preserved the racial purity of the Aryan invaders of India. Specifically, the entry cited by the Court does not support the conclusion that while "in the Punjab and Rajputana, 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' race."[46] The entry instead states that these invaders "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." The entry only questions the racial purity of the invaders of the adjoining valley of the Jumna and Ganges rivers in the northeastern areas of Hindustan and Behar known as "the sacred *Madhyadesa* or Middle-land of classical India," perhaps even as the result of a second Aryan invasion through the mountainous areas of the upper Indus and northern Kashmir. It was only the Aryan invaders of these areas of northeastern India who according to the entry cited in *Thind* "were not allowed to establish themselves without undergoing a considerable mixture of foreign

blood," not those of Punjab and Rajputana in northwestern India where Thind was born.[47] Although European scholars had begun to qualify the Aryan invasion theory by claiming that the original purity of the Aryans had been corrupted after, or perhaps even before, they arrived in India, the entry cited by the Court in *Thind* is limited to suggesting racial mixing in middle and south India only, a considerably more cautious retreat from the Aryan invasion theory than that asserted by the Court. The Court's mischaracterization of this source reflects just how heterogenous the populations of the Indian subcontinent were that the Court sought to homogenize under the reductive category of Hindu, unsatisfied even with the binary of Aryan and Dravidian, and how complex the historiographical debates regarding Indian history were and even remain today.

The Court concluded by holding that Thind was not a "white person" and was therefore ineligible for American citizenship, without any reference to the fact that it had expressly approved of cases finding Hindus eligible for citizenship three months earlier in *Ozawa*. In the conclusion of its opinion, with echo of the "separate but equal" doctrine upheld in *Plessy* is unmistakeable:

> 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.[48]

This reference to the "instinctive" recognition of racial difference in contrast to inferiority clearly restates the "racial instincts" language of *Plessy*, in which the

Court wrote that "legislation is powerless to eradicate racial instinct, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the present situation,"[49] and the appearance of this language in *Thind* further highlights how unlikely Thind's appeal to Hindu racial supremacy was to succeed, because it fundamentally failed to recognize the "separate but equal" doctrine that had prevailed in American law for over two decades. This doctrine had denied any intimation of racial superiority or inferiority in segregation, and would have rejected Thind's racial supremacy arguments as a threat to the public order segregation was believed to create.

IV. Sakharam Ganesh Pandit's Loss of Caste and Appeal to Equity

A mere four months after the Court issued its opinion in *Thind* holding that Hindus were not "white" and therefore were racially ineligible for citizenship, the Government filed a petition in the United States District Court for the Southern District of California to cancel the naturalization certificate of another Hindu, Sakharam Ganesh Pandit, who had been admitted to American citizenship by a California federal court nearly a decade before *Thind* and at nearly the same time as Gadhr conspirator Taraknath Das was admitted to citizenship over British diplomatic objection. Despite the clear precedent of *Thind*, however, Pandit employed a significantly different rhetorical approach to successfully oppose the Government's effort to cancel his citizenship. When Pandit was originally granted

his citizenship on May 14, 1914, the Government had also opposed his naturalization on the basis that he was not "white" and was therefore racially ineligible for naturalization, but had lost following a trial in which the court had concluded that he was "white" and granted him a naturalization certificate. As in the Taraknath Das case, the Government did not appeal the decision to admit Pandit to citizenship in 1914, but with the new authority of the *Thind* opinion the Government renewed its opposition in 1923.[50]

Although Pandit offered proof that he was "white" within the meaning of the naturalization law, including expert testimony that "the Brahmans of India are probably purer Caucasians than any group of people in Europe or America or elsewhere," he minimized the racial issue and instead appealed primarily to principles of equity.[51] As early as the Roman common law, or *ius commune*, as well as in the English common law tradition, "equity" has referred to principles of fairness, justice, and natural right which arose alongside the general rules of the common law to correct or supplement the harsh application of law in particular cases and thereby make the administration of justice more complete.[52] Specifically, Pandit asserted the defense of equitable estoppel, a legal doctrine according to which a party may be precluded from changing its position toward another who has "justifiably relied" on that position to such an extent that principles of fairness should not allow the position to later be modified. Pandit

argued that he had relied on the finality of the judgment granting his citizenship and on the Government's "acquiescence" in that judgment by failing to appeal or otherwise contest the judgment at the time, and that he had significantly changed his position in the meantime to such an extent that it would be fundamentally unjust to allow the Government to cancel his citizenship after nearly a decade.[53]

To support this argument, Pandit introduced evidence that because he had become a U.S. citizen and married a "white" American woman, he had lost his "high social station in India, and if he should return to his native land he would be an outcast," and "a man without a country," that he had renounced his right as eldest son to his ancestral property in India, that his deceased sister had disinherited him, and that he had lost his doctoral degree from the Sanskrit university Pathashala, a very high honor in India.[54] According to testimony introduced by Pandit, because he had belonged to the Brahman caste in India and had violated the rules of caste by becoming a U.S. citizen and marrying a "white" American woman, not only was he an outcast among those of the Brahman caste, but "he could not associate with the next lower caste, or any caste, he would lose all his social status, and the only place for him is with the outcasts, or with the 'Hill Tribes,'" known as the "untouchables."[55] Further, because Pandit had studied law in California and was admitted to the California and federal bar, had been appointed a notary public, had purchased a home in California, and his wife

had also purchased land in California, he argued that if his naturalization certificate were canceled he would lose his right to practice law in the United States, his wife would be deprived of her citizenship under a recent law that operated to revoke the citizenship of any woman who married an alien ineligible for citizenship, and both he and his wife would be rendered incapable of owning their California property under California's alien land law.[56]

Thus, Pandit argued that he had lost his identity as a high caste Hindu in the very act of becoming an American citizen and thereby violating the rules of caste, confirmed by his high professional status and marriage to a "white" American woman whose status had become inextricably linked with Pandit's own. Significantly, the emphasis on loss of caste and high social status in India also suggests a renunciation of the sort of Hindu nationalism espoused by Thind. Further, Pandit did not immediately arrive at this approach, but only asserted it after he himself had also failed with a more confrontational approach embracing Hindu nationalism as the attorney of record for Akhay Kumar Mozumdar in a case also filed immediately following *Thind* to cancel Mozumdar's citizenship. In a brief Pandit filed on behalf of Mozumdar on October 15, 1923, before Pandit filed his answer in his own case, he harshly criticized the Court's conclusion in *Thind* that Hindus were not assimilable to Western ideals:

> To say that Hindus are not assimilable to western civilization because of lack of acquaintance and of contact with the uplifting, enlightening and

> ennobling forces of western life is to be the victim of a historical strabismus; it is to overlook the fact that Great Britain, the fountain-head of Anglo-Saxon civilization—the western civilization par excellence, according to even some Americans—has for nearly two hundred years accepted the burden of ruling India and flooding the minds of India's people with the light from the West.

Although this argument is framed in confrontational terms and came too late, following as it did the clear authority of the Court's opinion in *Thind*, it highlights yet another available rhetorical strategy neglected by Thind, that British rule in India had itself assimilated Hindus to Western ideals. Pandit extended his critique to an explicit embrace of Hindu nationalism, however, in an attack on Rudyard Kipling's poem "The White Man's Burden":

> And what is more, quite a number of them 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. . . . To say that Hindus are more unassimilable to Western civilization and Western ways than some of the European nations is to brand oneself as untravelled 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.[57]

The Government responded to Pandit's remarks by accusing him of violating rules of proper decorum, referring to the remarks as a "disrespectful, scandalous and impertinent" attack on the "learning and intelligence of the Honorable Justices of the United States Supreme Court."[58] Although Pandit subsequently claimed that his criticism was directed at the "baseless notions" of "some of the more trashy writings of one, Rudyard Kipling," rather than the

Court, the district court nonetheless admonished Pandit in its published opinion in *Mozumdar*:

> 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.[59]

It was only several months after the court issued its opinion in *Mozumdar* that Pandit filed his answer in his own case and for the first time appealed to his changed status as an American citizen and loss of caste in India as a basis for equitable estoppel.

The district court in *Pandit* concluded that although Pandit was racially ineligible for citizenship according to the holding of *Thind*, the "special defense of equitable estoppel" applied to bar the Government from prosecuting its action to cancel Pandit's naturalization certificate because it had not appealed from or otherwise contested the original judgment granting his citizenship.[60] Although the finality of the original judgment granting Pandit's citizenship distinguishes his case from Thind's, Pandit's rhetorical approach to his Hindu and American identities further suggests the significance of caste and Hindu nationalism to the Court's reversal in *Thind* and the district court's decision in *Mozumdar*. In contrast to Thind's appeal to Hindu racial supremacy, claiming that he was a pure member of the "conquering race" more entitled to the privileges of whiteness than

the Court itself, Pandit framed his identity in terms of his loss of caste and his status as an outcast from Indian society, coupled with his status as a successful professional and his marriage to a "white" American woman. Despite the differences between *Thind* and *Pandit*, presumably as a "high-caste Hindu of full Indian blood" who had become an American citizen, Thind too could have emphasized his own renunciation of the benefits of caste and status in India as a result of embracing American citizenship rather than emphasizing Hindu racial supremacy. The failures of Thind and Mozumdar, contrasted with Pandit's success, suggest that these cases were influenced not by formal rules of law or even by the narrow question of whether or not the petitioners were "white," but by a far wider array of geopolitical concerns regarding America's position in the world and its relation to the ongoing struggle for Indian independence.

V. Conclusion

The Court's opinion in *Thind* remained precedential until the statute was repealed in 1952, although in 1944 a federal district court questioned the continuing authority of *Thind* in light of statutory amendments providing for the naturalization of Chinese and Native Americans who had been excluded at the time of *Thind*.[61] By holding that "white persons" should be interpreted according to "common knowledge," through the lens of history rather than by skin color or scientific evidence of race, the Supreme Court provided little guidance to later

prerequisite courts and even added to the confusion by stating in a nonbinding aside in *Thind* that "there is much in the origin and historic development of the statute to suggest that no Asiatic whatever was included" in the classification of "white persons." Following the Court's opinions in *Thind*, lower federal courts and the Board of Immigration appeals later went to extraordinary lengths to examine the history of various naturalization petitioners from central Asia whose racial eligibility was contested by the Government, at times literally surveying ancient origins, migrations, and social histories of racial groups through millennia of history in an attempt to determine whether or not they were "white."

The *Thind*, *Mozumdar*, and *Pandit* cases reflect how highly contingent and rhetorically constructed race can be even in a peculiarly racist and xenophobic era like the 1920s, and demonstrate how racial identities intersect with a variety of social, political, and cultural identities that contribute to how racial identities are constructed. These cases reenacted the conflict between the British and the Hindu nationalism movement that was rising in strength in the World War I era. Thind's highly confrontational rhetoric of Hindu racial supremacy was precisely the wrong approach to adopting his new American identity under these circumstances, and the Government's emphasis on the racial ideologies of British colonialism effectively highlighted Thind's association with the Gadhr conspirators and a violent Hindu nationalism. Moreover, this effect was

compounded by Thind's neglect of numerous alternatives for framing his identity in more inclusive terms, by invoking the idealism of the Oriental Renaissance that held the British and Indian people to descend from a common ancestral and linguistic heritage, by invoking his identity as a Sikh who had helped the British suppress the Hindu rebellion in India in 1857, by claiming that British rule of India had acculturated him to Western ideals, or by emphasizing other cultural affinities between India and the West. In a later case, individuals racially classified as Kalmuks, a Tibetan buddhist people residing in southeastern Russia, were held to be "white persons" eligible for naturalization based significantly on their identification with "European people by several generations of affinity, education, cultural activity, and 33 years of Soviet rule in Russia," and Thind had similar opportunities for framing an inclusive social, political, and cultural identity with the West but neglected them in favor of emphasizing Hindu racial supremacy.[62]

The conclusion that the Hindu nationalism and racial supremacy asserted by Thind and Mozumdar influenced the negative outcomes in this cases is further confirmed by Pandit's success in retaining his citizenship through what Kenneth Burke referred to as identification by antithesis, or identification formed when "allies who would otherwise dispute among themselves join forces against a common enemy."[63] By establishing that he had lost his high caste status and

become an outcast in India as the result of becoming an American citizen and marrying a "white" American woman, Pandit effectively dissociated himself from his Hindu identity and, by implication, from the cause of Hindu nationalism. The significance of this broader geopolitical conflict regarding Indian independence, along with Thind's connection to the Gadhr conspirators and the cause of Hindu nationalism, also provides a better explanation of the Court's reversal in *Thind* than the racist ideologies of the era alone and highlights the difficulties of reading judicial opinions in isolation from the rhetorical context created by the evidence and argument introduced in the cases. The racial identities in these cases were not prefigured, but were positioned according to specific rhetorical strategies, much as positioning theorists have proposed that local moral orders are "ever-shifting patterns of mutual and contestable rights and obligations of speaking and acting."[64] These cases demonstrate that rhetoric can provide a means of explaining the outcomes in judicial cases where a general consideration of historical ideologies alone fails, and although Critical Race Theory has only recently begun to study the ways in which legal and compositional subjects intersect and its reception among rhetoric scholars is even more recent, such studies warrant considerably more attention for what they may offer in terms of understanding the rhetoric through which our identities are constructed and what motivates this rhetoric.

[1] *Naturalization Act of 1790*, *Stats at Large of USA* 1 (1790): 103; *Naturalization Act of 1795*, *Stats at Large of USA* 1 (1795): 414; *Naturalization Act of 1802*, *Stats at Large of USA* 2 (1802): 153; *Naturalization Act of 1804*, *Stats at Large of USA* 2 (1804): 292; *Naturalization Act of 1824*, *Stats at Large of USA* 4 (1824): 69; *Naturalization Act of 1870*, *Stats at Large of USA* 16 (1870): 254 (extending eligibility to "aliens of African nativity and persons of African descent"); *Revised Statutes of the United States* 1 (1st ed. 1873): §§ 2165-74; Act of February 18, 1875, *Stats at Large of USA* 18 (1875): 316; *Revised Statutes of the United States* 1 (2d ed.1875): §§ 2165-74; see generally Darrell Hevenor Smith, *The Bureau of Naturalization: Its History, Activities and Organizations* (Baltimore, Md.: The Johns Hopkins Univ. Press, 1926), app. 4(A), "Index to Laws."

[2] *Naturalization Act of 1940*, *U.S. Statutes at Large* 54 (1940): 1140 (extending eligibility to "descendants of races indigenous to the Western Hemisphere"); Naturalization Act of 1943, *U.S. Statutes at Large* 57 (1943): 600 (extending eligibility to "Chinese persons or persons of Chinese descent"); Naturalization Act of 1946, *U.S. Statutes at Large* 60 (1946) 416 (extending eligibility to "persons of races indigenous to India," and amending "descendants of races indigenous to the Western Hemisphere" to "descendants of races indigenous to the continents of North or South America or adjacent islands and Filipino persons or persons of Filipino descent").

[3] Regarding the authority of courts to issue naturalization certificates, see generally Smith, *The Bureau of Naturalization*, 2-5. Only one of the prerequisite cases 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 for citizenship under the statute).

[4] For a list of the racial prerequisite cases, see Appendix A to 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 Board of Immigration Appeals issued a series of 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," which § 28(c) defined by reference to the

racial eligibility provisions of the naturalization act. *Stats at Large of USA* 43 (1924): 153, §§ 13(c), 28(c); see, e.g., *In re S—*, 1 I & N Dec. 174 (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 (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 (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 not a "white person"); *In re S—*, 4 I & N. Dec. 104 (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 (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 (1954) (holding that a native of the Philippines, but "racially Chinese (full blood)" was not a "white person").

[5] *In re Dow*, 213 F. 355 (E.D.S.C. 1914).

[6] Matthew Frye Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (Cambridge, Mass.: Harvard Univ. Press, 1998); López, *White by Law*; John Tehranian, *Whitewashed: America's Middle Eastern Minority* (New York: New York Univ. Press, 2009); see also Earlene Craver, "On the Boundary of White: The *Cartozian* Naturalization Case and the Armenians, 1923-1925," *Journal of American Ethnic History* 28 (2009): 30-56.

[7] See generally, e.g., Adam J. Banks, *Race, Rhetoric, and Technology: Searching for Higher Ground* (Mahwah, N.J. Lawrence Erlbaum Associates, 2006); Keith Gilyard, ed., *Race, Rhetoric, and Composition* (Portsmouth, N.H.: Boynton/Cook, 1999); Carl Gutiérrez-Jones, *Critical Race Narratives: A Study of Race, Rhetoric, and Injury* (New York: New York Univ. Press, 2001); Gary A. Olson and Lynn Worsham, eds., *Race, Rhetoric, and the Postcolonial* (New York: State Univ. of NewYork Press, 1999); Catherine Predergast, "Race: The Absent Presence in Composition Studies," *College Composition and Communication* 50.1 (1998): 36-53; Krista Ratcliffe, *Rhetorial Listening: Identification, Gender, Whiteness* (Carbondale, Ill.: Southern Illinois Univ. Press, 2005).

[8] *Ozawa v. United States*, 260 U.S. 178, 197 (1922); *United States v. Thind*, 261 U.S. 204, 214 (1923) ("[T]he words 'free white persons' are words of common speech, to be interpreted in accordance with, synonymous with the word 'Caucasian' only as that word is popularly understood.").

[9] Thomas F. Gossett, *Race: The History of an Idea in America*, New Ed. (New York: Oxford Univ. Press, 1997), 369.

[10] *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[11] 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.

[12] *Espionage Act*, *U.S. Statutes at Large* 40 (1917): 217; *Sedition Act*, *U.S. Statutes at Large* 40 (1918): 553; see also Thomas Adam, *Germany and the Americas: Culture, Politics, and History* (Santa Barbara, Calif.: ABC-CLIO, 2005), 319; Gossett, *Race*, 371.

[13] Philip S. Foner, *History of the Labor Movement in the United States: Postwar Struggles, 1918-1920* (New York: International Publishers, 1987), 25-26.

[14] William Petersen, Michael Novak, and Philip Gleason, *Concepts of Ethnicity* (Cambridge, Mass.: Harvard Univ. Press, 1980), 88.

[15] Gossett, *Race*, 353.

[16] López, *White by Law*, 34.

[17] Ibid., 7-8, 86-87, 89, 92-95.

[18] See, 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; Sarah Gualtieri, "Becoming 'White': Race, Religion and the Foundations of Syrian/Lebanese Ethnicity in the United States," *Journal of American Ethnic History* 20 (2001): 38; Jacobson, *Whiteness of a Different Color*, 235-36; Laura Hyun Yi Kang, *Compositional Subjects: Enfiguring Asian/American Women* (Durham, N.C.: Duke Univ. Press, 2002), 135; Desmond King, *Making Americans: Immigration, Race, and the Origins of the Diverse Democracy* (Cambridge, Mass.: Harvard Univ. Press, 2000), 45-46; Milton Ridvas Konvitz, *The Alien and the Asiatic in American Law* (Ithaca, N.Y.: Cornell Univ. Press, 1946), 89; 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; Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, N.J.: Princeton Univ. Press, 2004), 45-46; 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; Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven, Conn.: Yale Univ. Press, 1997), 447-48; 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; 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), 94-95; Ronald Takaki, *Strangers From a Different Shore: A History of Asian Americans*, rev. ed. (1989; rpt., New York: Little, Brown and Co., 1998), 298-99; Tehranian, *Whitewashed*, 41.

[19] Brief for Petitioner Takao Ozawa at 62-65, 67-74, Takao Ozawa v. United States, No. 222, (U.S. Sup. Ct. Dec. 9, 1918). The Government directly responded to these arguments with scientific evidence classifying the Japanese as Mongolian and dismissed Ozawa's argument regarding the Caucasian ancestry of the Japanese as mere conjecture. Brief for the United States at 33-37, Takao Ozawa v. United States, No. 1, (U.S. Sup. Ct. Sept. 19, 1922).

[20] *Ozawa*, 260 U.S. 178, 197-98 (emphasis added).

[21] Ibid., 197 (citing *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 a white person eligible for naturalization); *In re Mohan Singh*, 257 F. 209 (S.D. Cal. 1919) (holding that a "high caste Hindu" was a white person eligible for naturalization)). When the Government later petitioned the United States District Court for the Southern District of California to cancel the naturalization certificate of Akhay Kumar Mozumdar on the authority of the *Thind* opinion, Mozumdar pointed out that *Ozawa* "explicitly recognizes the *reasonableness* of the decision" that granted Mozumdar's naturalization in 1913, but the court canceled Mozumdar's naturalization anyway. 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, in Folder H5, Equity

Case Files, 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 Region, Laguna Niguel, Cal. (hereinafter "NA Pacific Region").

[22] See *In re Sadar Bhagwab Singh*, 246 F. 496 (E.D. Penn. 1917) (holding that a Hindu was not a white person and therefore was ineligible for naturalization).

[23] Bill of Complaint in Equity, *United States v. 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. Section 15 of the Naturalization Act of 1906 provided that it was the "duty" of the U.S. 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." *Naturalization Act of 1906*, *U.S. Statutes at Large* 34 (1906): 596. This provision was likely intended to combat fraud in naturalization proceedings rather than erroneous naturalization rulings, but the U.S. attorneys aggressively asserted that the naturalization certificates of non-"white" citizens should be canceled under the 1906 statute because they were not racially eligible for citizenship and therefore their naturalization certificates had been "illegally procured."

[24]*See In re Thind*, 268 F. 683 (D. Or. 1920).

[25] See, e.g., Giles T. Brown, "The Hundu 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.

[26] Dignan, "The Hindu Conspiracy in Anglo-American Relations," 60-61, 76.

[27] Brown, "The Hindu Conspiracy, 1914-1917," 308-09.

[28] *Washington Post*, "Two Killed in Court," Apr. 24, 1918.

[29] *In re Thind*, 268 F. 683, 683.

[30] Brief of Respondent Bhagat Singh Thind at 2, United States v. Bhagat Singh Thind, No. 202, (U.S. Sup. Ct. Dec. 30, 1921).

[31] Wendy Doniger, *The Hindus: An Alternative History* (New York: Penguin Press, 2009), 85-102; Kaiwar, "The Aryan Model of History," 24.

[32] John James Clarke, *Oriental Enlightenment: The Encounter Between Asian and Western Thought* (London: Routledge, 1997), 55-59; Doniger, *The Hindus*, 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. In particular, the hypothesis of an Aryan invasion of northwestern India has been largely discredited. As Romila Thapar concludes, most archaeological sites "register a gradual change of archaeological cultures," and accordingly "there is virtually no evidence of the invasion and conquest of northwestern India by a dominant culture coming from across the border." Romila Thapar, "Imagined Religious Communities? Ancient History and the Modern Search for a Hindu Identity," *Modern Asian Studies* 23.2 (1989): 226.

[33] Brief of Respondent Bhagat Singh Thind at 18-20, United States v. Bhagat Singh Thind, No. 202, (U.S. Sup. Ct. Dec. 30, 1921).

[34] Harold Isaacs, *Images of Asia* (New York: Harper and Row, 1972), 290.

[35] Doniger, *The Hindus*, 93.

[36] Vasant Kaiwar, "The Aryan Model of History and the Oriental Renaissance: The Politics of Identity in an Age of Revolutions, Colonialism, and Nationalism," in Kaiwar and Mazumdar, *Antinomies of Modernity*; Mazumdar, "The Politics of Religion and National Origin: Rediscovering Hindu National Identity in the United States,"in Vasant Kaiwar and Sucheta Mazumdar, eds., *Antinomies of Modernity: Essays on Race, Orient, Nation* (Durham, N.C.: Duke Univ. Press, 2003), 229-30; Thapar, "Imagined Religious Communities?," 209-31.

[37] Clarke, *Oriental Enlightenment*, 116, 136; Shwab, *The Oriental Renaissance*, 200-02; 401-03; Trautmann, *Aryans and British India*, 13.

[38] 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.

[39] Brief for the United States at 19-20, United States v. Bhagat Singh Thind, No. 202, (U.S. Sup. Ct. Dec. 30, 1921). The Government persistently argued that "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." *In re Ellis*, 179 F. 1002, 1003 (D. Or. 1910).

[40] Asiatic Exclusion League, *Proceedings of the Asiatic Exclusion League* (San Francisco, April 1910), 8, reprinted in Asiatic Exclusion League, *Proceedings of the Asiatic Exclusion League 1907-1913* (New York: Arno Press, 1977).

[41] Brief for the United States at 10-19, United States v. Bhagat Singh Thind, No. 202, (U.S. Sup. Ct. Dec. 30, 1921).

[42] *Thind*, 261 U.S. 204, 209-11.

[43] Ibid., 212-15.

[44] Doniger, *The Hindus*, 88, 106-07.

[45] *Thind*, 261 U.S. 204, 212-15.

[46] Ibid., 212-13 and 213 n. 8-9.

[47] *Encyclopedia Britannica*, 11th ed., s.v. "Hinduism," 502 (emphasis added).

[48] *Thind*, 261 U.S. 204, 210-11.

[49] *Plessy*, 163 U.S. 537.

[50] Defendant's Answer, *United States v. Pandit*, No. G-111-T (S.D. Cal. March 10, 1924), 1-3, Defendant's Offer of Proof, 3, and Index, in Folder G111,

Equity Case Files, Southern District of California, Central Division (Los Angeles), NA Pacific Region. Ibid.

[51] Ibid., Defendant's Offer of Proof Regarding Testimony of Professor William C. Smith, 3; Defendant's Answer.

[52] Bryan A. Garner, *A Dictionary of Modern Legal Usage*, 2nd ed. (Oxford, U.K.: Oxford Univ. Press, 1995), 321-22.

[53] Defendant's Answer, *United States v. Pandit*, 5-11.

[54] Ibid., 9-10.

[55] Ibid., Statement of Testimony Under Equity Rule 75 B (Feb 8, 1924), 12.

[56] Ibid., Defendant's Answer, 6-9. Pandit's wife was not a party to the case, but 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.

[57] 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, in Folder H5, Equity Case Files, Southern District of California, Central Division (Los Angeles), NA Pacific Region.

[58] Ibid., Plaintiff's Brief of Points and Authorities in Opposition to the Motion to Dismiss (Oct. 18, 1923), 13-14.

[59] *United States v. Mozumdar*, 296 F. 173, 177-78 (S.D. Cal. 1923).

[60] Court's Memorandum Opinion, *United States v.Pandit* (S.D. Cal. Jan. 9, 1925), 1, and Court's Findings of Fact and Conclusions of Law, *United States v.Pandit* (S.D. Cal. Jan. 8, 1926), 9.

[61] 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), NA Pacific Region. The court's opinion in *Shaikhaly* states that "undoubtedly there are *dicta* in *United States v. Thind*, 261

U.S. 204, (1923), which would operate to exclude petitioner," "a native and citizen of Palestine . . . of the Arabian race," from citizenship if the statutory requirements in effect at the time of *Thind* remained in effect. Ibid., 1. The court in *Shaikhaly* notes, however, that the December 17, 1943 repeal of the Chinese Exclusion Act and the statutory amendment that provided for naturalization of "descendants of races indigenous to the Western hemisphere" removed *Thind* as a decisive authority because the subsequent statutory amendments evinced a change of Congressional intent. Ibid., 1-2.

[62] *In re R—*, 4 I & N. Dec. 275, 276 (1951).

[63] Kenneth Burke, *Dramatism and Development* (Barre, Mass.: Clark Univ. Press, 1972), 28.

[64] Rom Harré and Luk van Langenhove, "The Dynamics of Social Episodes," in *Positioning Theory: Moral Contexts of Intentional Action*, eds. Rom Harré and Luk van Langenhove (Oxford: Blackwell Publishers, 1999), 1.

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VITA

Douglas Marshall Coulson was born in Oklahoma City, Oklahoma on July 18, 1969, the son of Richard Earl Coulson and Marilyn Deal Coulson. After completing his work at Edmond Memorial High School in Edmond, Oklahoma, in 1988, he entered Oklahoma City University in Oklahoma City, Oklahoma, where he earned a Bachelor of Arts degree in English and Philosophy in 1994 and a Master of Liberal Arts degree in Philosophy in 1996. Between 1995 and 1996, he was also a fellow in the Philosophy Department of Texas A&M University in College Station, Texas. From 1996 through 1999, he attended Tulane Law School in New Orleans, Louisiana, where he earned his Juris Doctor degree in 1999, and he worked as a business and commercial litigation attorney from 2000 through 2007 with the law firms of Glidden Partners, LLP, McFall, Sherwood & Breitbeil, PC, and most recently Kasowitz, Benson, Torres and Friedman LLP. In August 2007, he entered the Graduate School at the University of Texas at Austin.

Permanent Address: 3401 W. Parmer Ln., Unit 2021
Austin, Texas 78727

This report was typed by the author.