60 White by Law

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Then, what is white?[1]

IN ITS first words on the subject of citizenship, Congress in 1790 limited naturalization to "white persons."[2] Though the requirements for naturalization changed frequently thereafter, this racial prerequisite to citizenship endured for over a century-and-a-half, remaining in force until 1952.[3] From the earliest years of this country until just a short time ago, being a "white person" was a condition for acquiring citizenship.

Whether one was "white," however, was often no easy question. Thus, as immigration reached record highs at the turn of this century, countless people found themselves arguing their racial identity in order to naturalize. From 1907, when the federal government began collecting data on naturalization, until 1920, over a million people gained citizenship under the racially restrictive naturalization laws.[4] Many more sought to naturalize and were denied. Records regarding more than the simple decision in most of these cases do not exist, as naturalization often took place with a minimum of formal court proceedings, and so produced few if any written decisions. However, a number of cases construing the "white person" prerequisite reached the highest state and federal judicial circles, including in the early 1920s two cases argued before the United States Supreme Court, and these cases resulted in illuminating published decisions. These cases document the efforts of would-be citizens from around the world to establish that as a legal matter they were "white." Applicants from Hawaii, China, Japan, Burma, and the Philippines, as well as all mixed-race applicants, failed in their arguments. On the other hand, courts ruled that the applicants from Mexico and Armenia were "white," and on alternate occasions deemed petitioners from Syria, India, and Arabia to be either "white" or not "white." As a taxonomy of Whiteness, these cases are instructive because of the imprecision and contradiction they reveal in the establishment of racial divisions between Whites and non-Whites.

It is on the level of taxonomical *practice*, however, that they are most intriguing. The petitioners for naturalization forced the courts into a case-by-case

struggle to define who was a "white person." More importantly, the courts were required in these prerequisite cases to articulate rationales for the divisions they were promulgating. It was not enough simply to declare in favor of or against a particular applicant; the courts, as exponents of the applicable law, faced the necessity of explaining the basis on which they drew the boundaries of Whiteness. They had to establish in 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 the above, and which of these or other factors would govern in those inevitable cases where the various indices of race contradicted each other. In short, the courts were responsible not only for deciding who was White, but *why* someone was White. Thus, the courts had to wrestle in their written decisions with the nature of race in general, and of White racial identity in particular. Their categorical practices provide the empirical basis for this chapter.

How did the courts define who was White? What reasons did they offer, and what do those rationalizations tell us about the nature of Whiteness? Do these cases also afford insights into White race-consciousness as it exists today? What, finally, *is* White? This chapter examines these and related questions, offering an exploration of contemporary White identity. It arrives at the conclusion that Whiteness exists at the vortex of race in U.S. law and society, and that Whiteness as it is currently constituted should be dismantled.

The Racial Prerequisite Cases

Although not widely remembered, the prerequisite cases were at the center of racial debates in the United States for the fifty years following the Civil War, when immigration and nativism ran at record highs. Figuring prominently in the furor on the appropriate status of the newcomers, naturalization laws were heatedly discussed by the most respected public figures of the day, as well as in the swirl of popular politics. Debates about racial prerequisites to citizenship arose at the end of the Civil War as part of the effort to expunge *Dred Scott*, the Supreme Court decision that had held that Blacks were not citizens. Because of racial animosity in Congress towards Asians and Native Americans, the racial bar on citizenship was maintained, though in 1870 the right to naturalize was extended to African Americans. Continuing into the early 1900s, anti-Asian agitation kept the prerequisite laws at the forefront of national and even international attention. Anti-immigrant groups such as the Asiatic Exclusion League formulated arguments to address the "white person" prerequisite, arguing in 1910 that Asian Indians were not "white" but were rather an "effeminate, caste-ridden, and degraded" race who did not qualify for citizenship.[5] For their part, immigrants also mobilized to participate as individuals and through civic groups in the debates on naturalization, writing for popular periodicals and lobbying government.[6]

The principal locus of the debate, however, was in the courts. Beginning with the first prerequisite case in 1878, until racial restrictions were removed in 1952,

forty-four racial prerequisite cases were reported, including two heard by the United States Supreme Court. Raising fundamental questions about who could join the polity as a citizen in terms of who was and who was not White, these cases attracted some of the most renowned jurists of the times, such as John Wigmore, as well as some of the greatest experts on race, including Franz Boas. Wigmore, now more famous for his legal-treatise writing, published a law review article in 1894 advocating the admission of Japanese immigrants to citizenship on the grounds that the Japanese people were anthropologically and culturally White.[7] Boas, today commonly regarded as the founder of modern anthropology, participated in at least one of the prerequisite cases as an expert witness on behalf of an Armenian applicant, arguing he was White.[8] Despite these accomplished participants, however, the courts themselves struggled not only with the narrow question of whom to naturalize but more fundamentally with the categorical question of how to determine racial identity.

Though the courts offered many different rationales to justify the various racial divisions they advanced, two predominated: common knowledge and scientific evidence. Both of these rationales are apparent in the first prerequisite case, *In re Ah Yup*.[9] "Common knowledge" refers to those rationales that appealed to popular, widely held conceptions of races and racial divisions. For example, the *Ah Yup* court based its negative decision regarding a Chinese applicant in part on the popular understanding of the term "white person": "The words 'white person' . . . in this country, at least, have undoubtedly acquired a well settled meaning in common popular speech, and they are constantly used in the sense so acquired in the literature of the country, as well as in common parlance."[10] Under a common knowledge approach, courts justified the assignment of petitioners to one race or another by reference to what was commonly believed about race. This type of rationale is distinct from reasoning that relied on knowledge of a reputedly objective, technical, and specialized sort. Such rationales, which justified racial divisions by reference to the naturalistic studies of humankind, can be labeled appeals to scientific evidence. A longer excerpt from *Ah Yup* exemplifies this second sort of rationale:

> In speaking of the various classifications of races, Webster in his dictionary says, "The common classification is that of Blumbach, who makes five. 1. The Caucasian, or white race, to which belong the greater part of European nations and those of Western Asia; 2. The Mongolian, or yellow race, occupying Tartary, China, Japan, etc.; 3. The Ethiopian or Negro (black) race, occupying all of Africa, except the north; 4. The American, or red race, containing the Indians of North and South America; and, 5. The Malay, or Brown race, occupying the islands of the Indian Archipelago," etc. This division was adopted from Buffon, with some changes in names, and is founded on the combined characteristics of complexion, hair and skull. . . . [N]o one includes the white, or Caucasian, with the Mongolian or yellow race. . . .[11]

These rationales, one appealing to common knowledge and the other to scientific evidence, were the two core approaches used by courts to explain the assignment of an individual to one race or another.

As *Ah Yup* illustrates, at least initially the courts deciding racial prerequisite cases relied simultaneously on both rationales to justify their decisions. However, after 1909, a schism appeared among the courts over whether common knowledge or scientific evidence was the appropriate standard. After that year, the lower courts divided almost evenly on the proper test for Whiteness: Five courts relied exclusively on common knowledge, while six decisions turned only on scientific evidence. No court drew on both rationales. In 1922 and 1923, the Supreme Court intervened in the prerequisite cases to resolve this impasse between science and popular knowledge, securing common sense as the appropriate legal meter of race. Though the courts did not see their decisions in this light, the early congruence and subsequent contradiction of common knowledge and scientific evidence set the terms of a debate about whether race is social or natural. In these terms, the Supreme Court's elevation of common knowledge as the legal meter of race convincingly illustrates the social basis for racial categorization.

The early prerequisite courts assumed that common knowledge and scientific evidence both measured the same thing, the natural physical differences that marked humankind into disparate races. Any difference between the two would be found in levels of exactitude, in terms of how accurately these existing differences were measured, and not in substantive disagreements about the nature of racial difference itself. This position seemed tenable so long as science and popular beliefs jibed in the construction of racial categories. However, by 1909, changes in immigrant demographics and evolution in anthropological thinking combined to create contradictions between science and common knowledge. These contradictions surfaced most acutely in cases concerning immigrants from western and southern Asia, notably Syrians and Asian Indians, arrivals from countries inhabited by dark-skinned peoples nevertheless uniformly classified as Caucasians by the leading anthropologists of the times. The inability of science to confirm through empirical evidence the popular racial beliefs that held Syrians and Asian Indians to be non-Whites should have drawn into question for the courts the notion that race was a natural phenomenon. So deeply held was this belief, however, that instead the courts disparaged science.

Over the course of two decisions, the Supreme Court resolved the conflict between common knowledge and scientific evidence in favor of the former, although not without some initial confusion. In *United States v. Ozawa*, the Court relied on both rationales to exclude a Japanese petitioner, holding that he was not of the type "*popularly* known as the Caucasian race," thereby invoking both common knowledge ("popularly known") and science ("the Caucasian race").[12] Here, as in the early prerequisite cases, both science and popular knowledge worked hand in hand to exclude the applicant from citizenship. Within a few months of its decision in *Ozawa*, however, the Court heard a case brought by an Asian Indian, Bhagat Singh Thind, who relied on the Court's recent equation of "Caucasian" and "white" to argue for his own naturalization. In Thind's case, science

and common knowledge diverged. In a stunning reversal of its holding in *Ozawa*, the Court in *United States v. Thind* repudiated its earlier equation, rejecting any role for science in racial assignments.[13] The Court decried the "scientific manipulation" it believed had eroded racial differences by including as Caucasian "far more [people] than the unscientific mind suspects," even some persons the Court described as ranging "in color . . . from brown to black."[14] "We venture to think," the Court said, "that the average well informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogenous elements."[15] The Court held instead that "the words 'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man."[16] In the Court's opinion, science had failed as an arbiter of human difference; common knowledge succeeded it as the touchstone of racial division.

In elevating common knowledge, the Court no doubt remained convinced that racial divisions followed real, natural, physical differences. This explains the Court's frustration with science, which to the Court's mind was curiously and suspiciously unable to identify and quantify those racial differences so readily apparent to it. This frustration is understandable, given the promise of early anthropology to definitively establish racial differences, and more, a racial hierarchy that placed Whites at the top. Yet, this was a promise science could not keep. Despite their strained efforts, students of race could not measure the boundaries of Whiteness because such boundaries are socially fashioned and cannot be measured, or found, in nature. The Court resented the failure of science to fulfil an impossible vow; we might better resent that science ever undertook such a promise. The early congruence between scientific evidence and common knowledge reflected, not the accuracy of popular understandings of race, but the embeddedness of scientific inquiry. Neither common knowledge nor science measured human variation. Both only reported social beliefs about races.

The reliance on scientific evidence to justify racial assignments implied that races exist on a physical plane, that they reflect biological fact that is humanly knowable but not dependent on human knowledge or human relations. The Court's ultimate reliance on common knowledge says otherwise. The use of common knowledge to justify racial assignments demonstrates that racial taxonomies dissolve upon inspection into mere social demarcations. Common knowledge as a racial test shows that race is something that must be measured in terms of what people believe, that it is a socially mediated idea. The social construction of Whiteness (and race generally) is manifest in the Court's repudiation of science and its installation of popular knowledge as the appropriate racial meter.

It is worthwhile here to return to the question that opened this chapter, a question originally posed by a district court deciding a prerequisite case. The court asked: "Then, what is white?"[17] The above discussion suggests some answers to this question. Whiteness is a social construct, a legal artifact, a function

of what people believe, a mutable category tied to particular historical moments. Other answers are also possible. "White" is: an idea; an evolving social group; an unstable identity subject to expansion and contraction; a trope for welcome immigrant groups; a mechanism for excluding those of unfamiliar origin; an artifice of social prejudice. Indeed, Whiteness can be one, all, or any combination of these, depending on the local setting in which it is used. On the other hand, in light of the prerequisite cases, some answers are no longer acceptable. "White" 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; an accident of nature unmolded by the hands of people. No, it is none of these. In the end, the prerequisite cases leave us with this: "White" is common knowledge.

White Race-Consciousness

The racial prerequisite cases demonstrate that Whiteness is socially constructed. They thus serve as a convenient point of departure for a discussion of White identity as it exists today, particularly regarding the content of Whiteness.

As a category, "white" was constructed by the prerequisite courts in a two-step process that ultimately defined not just the boundaries of that group but its identity as well. First, note that the courts constructed the bounds of Whiteness by deciding on a case by case basis who was *not* White. Though the prerequisite courts were charged with defining the term "white person," they did so not through an appeal to a freestanding notion of Whiteness, but instead negatively, by identifying who was non-White. Thus, from *Ah Yup* to *Thind*, the courts did not establish the parameters of Whiteness so much as the non-Whiteness of Chinese, South Asians, and so on. This comports with an understanding of races, not as absolute categories, but as comparative taxonomies of relative difference. Races do not exist as abstract categories, but only as amalgamations of people standing in complex relationships with each other. In this relational system, the prerequisite cases show that Whites are those not constructed as non-White. That is, Whites exist as a category of people subject to a double negative: They are those who are not non-White.

The second step in the construction of Whiteness more directly contributes to the content of the White character. In the second step, the prerequisite courts distinguished Whites not only by declaring certain peoples non-White but also by denigrating those so described. For example, the Court in *Thind* wrote not only that common knowledge held South Asians to be non-White but that in addition the racial identity of South Asians "is of such character and extent that the great body of our people recognize and reject it."[18] The prerequisite courts in effect labeled those who were excluded from citizenship (those who were non-White) as inferior; by implication, those who were admitted (White persons) were superior. In this way, the prerequisite cases show that Whites exist not just as the antonym

of non-Whites but as the *superior* antonym. This point is confirmed by the close connection between the negative characteristics of Blacks and the opposite, positive attributes of Whites. Blacks have been constructed as lazy, ignorant, lascivious, and criminal, Whites as industrious, knowledgeable, virtuous, and law abiding.[19] For each negative characteristic ascribed to people of color, an equal but opposite and positive characteristic is imputed to Whites. To this list, the prerequisite cases add Whites as citizens and others as aliens.[20] These cases show that Whites fashion an identity for themselves that is the positive mirror image of the negative identity imposed on people of color.

This relational construction of the content of White identity points towards a programmatic practice of dismantling Whiteness as it is currently constituted. Certainly, in a setting in which White identity exists as the superior antonym to the identity of non-Whites, elaborating a positive White racial identity is a dangerous proposition. It ignores the reality that Whiteness is already defined almost exclusively in terms of positive attributes. Further, it disregards the extent to which positive White attributes seem to require the negative traits that supposedly define minorities. Recognizing that White identity is a self-fashioned, hierarchical fantasy, Whites should attempt to dismantle Whiteness as it currently exists. Whites should renounce their privileged racial character, though not simply out of guilt or any sense of self-deprecation. Rather, they should dismantle the edifice of Whiteness because this mythological construct stands at the vortex of racial inequality in America. The persistence of Whiteness in its current incarnation perpetuates and necessitates patterns of superiority and inferiority. In both structure and content, Whiteness stands squarely between this society's present injustices and any future of racial equality. Whites must consciously repudiate Whiteness as it is currently constituted in the systems of meaning which are races.

Careful examination of the prerequisite cases as a study in the construction of Whiteness leads to the argument for a self-deconstructive White race-consciousness. This examination suggests as well, however, a facet of Whiteness that will certainly forestall its easy disassembly: the value of White identity to Whites. The racial prerequisite cases are, in one possible reading, an extended essay on the great value Whites place on their racial identity, and on their willingness to protect that value, even at the cost of basic justice. In their applications for citizenship, petitioners from around the world challenged the courts to define the phrase "white person" in a consistent, rational manner, a challenge that the courts could not meet except through resort to the common knowledge of those already considered White. Even though incapable of meeting this challenge, virtually no court owned up to the falsity of race, each court preferring instead to formulate fictions. To be sure, the courts were caught within the contemporary understandings of race, rendering a complete break with the prevalent ideology of racial difference unlikely, though not out of the question. Nevertheless, this does not fully explain the extraordinary lengths to which the courts went, the absurd and self-contradictory positions they assumed, or the seeming anger that col-

ored the courts' opinions in proclaiming that certain applicants were not White. These disturbing facets of judicial inquietude, clearly evident in *Ozawa* and *Thind*, arguably belie not simple uncertainty in judicial interpretation but the deep personal significance to the judges of what they had been called upon to interpret, the terms of their own existence. Wedded to their own sense of self, they demonstrated themselves to be loyal defenders of Whiteness, even to the extent of defining this identity in manners that arbitrarily excluded fully qualified persons from citizenship. Confronted by powerful challenges to the meaning of Whiteness, judges, in particular those on the Supreme Court, fully embraced this identity, in utter disregard of the costs of their actions to immigrants across the country. This perhaps is the most important lesson to be taken from the prerequisite cases. When confronted by the falsity of White identity, Whites tend not to abandon Whiteness, but to embrace and protect it. The value of Whiteness to Whites probably insures the continuation of a White self-regard predicated on racial superiority.

NOTES

1. *Ex parte* Shahid, 205 F. 812, 813 (E.D. S.C. 1913).

2. Act of March 26, 1790, Ch. 3, 1 Stat. 103. Naturalization involves the conferring of the nationality of a state upon a person after birth, by whatever means. *See* Immigration and Nationality Act § 101(a)(23), 8 U.S.C. § 1101(a)(23) (1952).

3. Immigration and Nationality Act § 311, 8 U.S.C. § 1422 (1952).

4. Louis DeSipio & Harry Pachon, *Making Americans: Administrative Discretion and Americanization*, 12 CHICANO-LATINO L. REV. 52, 54 (1992) (giving the figure as 1,240,700 persons).

5. *Proceedings of the Asiatic Exclusion League* 8 (1910), quoted in RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 298 (1989).

6. YUJI ICHIOKA, THE ISSEI: THE WORLD OF THE FIRST-GENERATION JAPANESE IMMIGRANTS, 1885–1924, at 176–226 (1988).

7. John Wigmore, *American Naturalization and the Japanese*, 28 AMER. L. REV. 818 (1894).

8. United States v. Cartozian, 6. F.2d 919 (D. Ore. 1925). The contribution of Boas to anthropology is discussed in AUDREY SMEDLEY, RACE IN NORTH AMERICA: ORIGIN AND EVOLUTION OF A WORLDVIEW 274–82 (1993).

9. *In re* Ah Yup, 1 F. 223, 224 (D. Cal. 1878).

10. *Id.* at 223.

11. *Id.* at 223–24.

12. 260 U.S. 178, 198 (1922). [Emphasis in original.]

13. 261 U.S. 204, 211 (1923).

14. *Id.*

15. *Id.*

16. *Id.* at 214–15.

17. *Ex parte* Shahid, 205 Fed. 812, 813 (E.D. S.C. 1913).

18. *United States v. Thind*, 261 U.S. 204, 215 (1922).

19. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1373 (1988).

20. Drawing on a wider range of cases, Neil Gotanda also notes the close linkage of non-Black minorities with foreignness. Neil Gotanda, *"Other Non-Whites" in American Legal History: A Review* of Justice at War, 85 COLUM. L. REV. 1186, 1190–92 (1985).