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White Lines

In its first words on the subject of citizenship, Congress in 1790 restricted naturalization to "white persons."[1] 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.[2] From the earliest years of this country until just a generation ago, being a "white person" was a condition for acquiring citizenship.

Whether one was "white," however, was often no easy question. 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 one million people gained citizenship under the racially restrictive naturalization laws.[3] Many more sought to naturalize and were rejected. Natu-

ralization rarely involved formal court proceedings and therefore usually generated few if any written records beyond the simple decision.[4] However, a number of cases construing the "white person" prerequisite reached the highest state and federal judicial circles, and two were argued before the U.S. Supreme Court in the early 1920s. These cases produced illuminating published decisions that document the efforts of would-be citizens from around the world to establish their Whiteness at law. Applicants from Hawaii, China, Japan, Burma, and the Philippines, as well as all mixed-race applicants, failed in their arguments. Conversely, courts ruled that applicants from Mexico and Armenia were "white," but vacillated over the Whiteness of petitioners from Syria, India, and Arabia.[5] Seen as a taxonomy of Whiteness, these cases are instructive because they reveal the imprecisions and contradictions inherent in the establishment of racial lines between Whites and non-Whites.

It is on the level of taxonomical *practice,* however, that these cases are most intriguing. The individuals who petitioned 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 creating. Beyond simply issuing declarations in favor of or against a particular applicant, the courts, as exponents of the applicable law, had to explain the basis on which they drew the boundaries of Whiteness. The courts had to establish by law whether, for example, a petitioner's race was to be measured by skin color, facial features, national origin, language, culture, ancestry, the speculations of scientists, popular opinion, or some combination of these factors. Moreover, the courts also had to decide which of these or other factors would govern in the inevitable cases where the various indices of race contradicted one another. In short, the courts were responsible for deciding not only who was White, but *why* someone was White. Thus, the courts had to wrestle in their decisions with the nature of race in general and of White racial identity in particular. Their categorical practices in deciding who was White by law provide the empirical basis for this book.

How did the courts define who was White? What reasons did they offer, and what do those rationales tell us about the nature of Whiteness? What do the cases reveal about the legal construction of race, about the ways in which the operation of law creates and maintains the social knowledge of racial difference? Do these cases also afford insights into White racial identity as it exists today? What, finally, *is* White? In this book I examine these and related questions, offering a general theory of the legal construction of race and exploring contemporary White identity. I conclude that Whiteness exists at the vortex of race in U.S. law and society, and that Whites should renounce their racial identity as it is currently constituted in the interests of social justice. This chapter introduces the ideas I develop throughout the book.

The Racial Prerequisite Cases

Although now largely forgotten, 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 were both running high. Naturalization laws figured prominently in the furor over the appropriate status of the newcomers and were heatedly discussed not only by the most respected public figures of the day, but also in the swirl of popular politics. Debates about racial prerequisites to citizenship arose at the end of the Civil War when Senator Charles Sumner sought to expunge *Dred Scott,* the Supreme Court decision which had held

that Blacks were not citizens, by striking any reference to race from the naturalization statute.[6] His efforts failed because of racial animosity in much of Congress toward Asians and Native Americans.[7] The persistence of anti-Asian agitation through the early 1900s kept the prerequisite laws at the forefront of national and even international attention. Efforts in San Francisco to segregate Japanese schoolchildren, for example, led to a crisis in relations with Japan that prompted President Theodore Roosevelt to propose legislation granting Japanese immigrants the right to naturalize.[8] Controversy over the prerequisite laws also found voice in popular politics. Anti-immigrant groups such as the Asiatic Exclusion League formulated arguments for restrictive interpretations of the "white person" prerequisite, for example claiming in 1910 that Asian Indians were not "white," but an "effeminate, caste-ridden, and degraded" race who did not deserve citizenship.[9] For their part, immigrants also participated in the debates on naturalization, organizing civic groups around the issue of citizenship, writing in the immigrant press, and lobbying local, state, and federal governments.[10]

The principal locus of the debate, however, was in the courts. From the first prerequisite case in 1878 until racial restrictions were removed in 1952, fifty-two racial prerequisite cases were reported, including two heard by the U.S. Supreme Court. Framing fundamental questions about who could join the citizenry in terms of who was 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 famous for his legal treatises, published a law review article in 1894 asserting that Japanese immigrants were eligible for citizenship on the grounds that the Japanese people were anthropologically and culturally White.[11] 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, whom he argued was White.[12] Despite the occasional participation of these accomplished scholars, the courts struggled with the narrow question of whom to naturalize, and 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 appear in the first prerequisite case, *In re Ah Yup*, decided in 1878 by a federal district court in California.[13] "Common knowledge" rationales appealed to popular, widely held conceptions of races and racial divisions. For example, the *Ah Yup* court denied citizenship to a Chinese applicant in part because of 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."[14] Under a common knowledge approach, courts justified the assignment of petitioners to one race or another by reference to common beliefs about race.

The common knowledge rationale contrasts with reasoning based on supposedly objective, technical, and specialized knowledge. Such "scientific evidence" rationales justified racial divisions by reference to the naturalistic studies of humankind. 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 Blumenbach, who makes five. 1. The Caucasian, or white race, to which belong the greater part of European nations and those of West-

ern 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.[15]

These rationales, one appealing to common knowledge and the other to scientific evidence, were the two core approaches used by courts to explain their determinations of whether individuals belonged to the "white" race.

As *Ah Yup* demonstrates, the courts deciding racial prerequisite cases initially relied on both rationales to justify their decisions. However, beginning in 1909 a schism appeared among the courts over whether common knowledge or scientific evidence was the appropriate standard. Thereafter, the lower courts divided almost evenly on the proper test for Whiteness: six courts relied on common knowledge, while seven others based their racial determinations on scientific evidence. No court used both rationales. Over the course of two cases, heard in 1922 and 1923, the Supreme Court broke the impasse in favor of common knowledge. Though the courts did not see their decisions in this light, the early congruence of and subsequent contradiction between common knowledge and scientific evidence set the terms of a debate about whether race is a social construction or a natural occurrence. In these terms, the Supreme Court's elevation of common knowledge as the legal meter of race convincingly demonstrates that racial categorization finds its origins in social practices.

The early prerequisite courts assumed that common knowledge and scientific evidence both measured the same thing, namely, the natural physical differences that divided humankind into disparate races. Courts assumed that typological differences between the two rationales, if any, resulted from differences in how accurately popular opinion and science measured race, rather than from substantive disagreements about the nature of race 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 in anthropological thinking combined to create contradictions between science and common knowledge. These contradictions surfaced most directly in cases concerning immigrants from western and southern Asia, such as Syrians and Asian Indians, dark-skinned peoples who were nevertheless uniformly classified as Caucasians by the leading anthropologists of the times. Science's inability to confirm through empirical evidence the popular racial beliefs that held Syrians and Asian Indians to be non-Whites should have led the courts to question whether race was a natural phenomenon. So deeply held was this belief, however, that instead of re-examining the nature of race, the courts began to disparage science.

Over the course of two decisions, the Supreme Court resolved the conflict between common knowledge and scientific evidence in favor of the former, but not without some initial confusion. In *Ozawa v. United States,* 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").[16] Here, as in the earliest prerequisite cases, 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 earlier linkage of "Caucasian" with "white" to argue for his own naturalization. In *United States v. Thind,* science and common knowledge diverged, complicating a case that should have been easy under *Ozawa*'s straightforward rule of racial specification. Reversing course, the Court repudiated its earlier equation and rejected any role for science in racial assignments.[17] The Court decried the "scientific manipulation" it believed had ignored 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."[18] "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."[19] 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."[20] In the Court's opinion, science had failed as an arbiter of human difference, and common knowledge was made into the touchstone of racial division.

In elevating common knowledge, the Court no doubt remained convinced that racial divisions followed from real, natural, physical differences. The Court upheld common knowledge in the belief that people are accomplished amateur naturalists, capable of accurately discerning differences in the physical world. 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 in the petitioners who came before them. This frustration is understandable, given early anthropology's promise to establish a definitive catalogue of racial differences, and from these differences to give scientific justification to a racial hierarchy that placed Whites at the top. This, however, was a

promise science could not keep. Despite their strained efforts, students of race could not plot 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; it might better have resented that science ever undertook such an enterprise. The early congruence between scientific evidence and common knowledge did not reflect the accuracy of popular understandings of race, but rather the social embeddedness of scientific inquiry. Neither common knowledge nor the science of the day measured human variation. Both merely reported social beliefs about races.

The early reliance on scientific evidence to justify racial assignments implied that races exist as physical fact, humanly knowable but not dependent on human knowledge or human relations. The Court's ultimate reliance on common knowledge says otherwise: it demonstrates that racial taxonomies devolve upon social demarcations. That common knowledge emerged as the only workable racial test shows that race is something which must be measured in terms of what people believe, that it is a socially mediated idea. The social construction of the White race is manifest in the Court's repudiation of science and its installation of common knowledge as the appropriate racial meter of Whiteness.

The Legal Construction of Race

The prerequisite cases compellingly demonstrate that races are socially constructed. More importantly, they evidence the centrality of law in that construction. Law is one of the most powerful mechanisms by which any society creates, defines, and regulates itself. Its centrality in the constitution of society is especially pronounced in highly

legalized and bureaucratized late-industrial democracies such as the United States.[21] It follows, then, that to say race is socially constructed is to conclude that race is at least partially legally produced. Put most starkly, law constructs race. Of course, it does so within the larger context of society, and so law is only one of many institutions and forces implicated in the formation of races. Moreover, as a complex set of institutions and ideas, "law" intersects and interacts with the social knowledge about race in convoluted, unpredictable, sometimes self-contradictory ways. Nevertheless, the prerequisite cases make clear that law does more than simply codify race in the limited sense of merely giving legal definition to pre-existing social categories. Instead, legislatures and courts have served not only to fix the boundaries of race in the forms we recognize today, but also to define the content of racial identities and to specify their relative privilege or disadvantage in U.S. society. As Cheryl Harris argues specifically with respect to Whites, "[t]he law's construction of whiteness defined and affirmed critical aspects of identity (who is white); of privilege (what benefits accrue to that status); and of property (what *legal* entitlements arise from that status)."[22] The operation of law does far more than merely legalize race; it defines as well the spectrum of domination and subordination that constitutes race relations.

Little to date has been written on the legal construction of race. Indeed, the tendency of those writing on race and law has been to assume that races exist wholly independent of and outside law. While the race-and-law literature is too extensive to summarize quickly, two of the best-known works on the subject illustrate this point. Consider A. Leon Higginbotham, Jr.'s classic study, *In the Matter of Color: Race and the American Legal Process: The Colonial Period* (1978) and Derrick Bell's equally classic casebook, *Race, Racism, and American Law* (3rd edition, 1992). Both

works provide exhaustive, meticulously researched, and invaluable studies of the legal burdens imposed on Blacks in North America over the last few centuries. Yet, in both works, "Black" and "White" are treated as natural categories rather than as concepts created through social, and at least partially through legal, interaction between peoples not initially racially defined in those terms. The discussions in both books of the arrival of the first Africans in colonial North America exemplify this tendency. Higginbotham writes: "In 1619, when these first twenty blacks arrived in Jamestown, there was not yet a statutory process to especially fix the legal standing of blacks."[23] For his part, Bell quotes the following passage from the Kerner Commission: "In Colonial America, the first Negroes landed at Jamestown in August, 1619. Within forty years, Negroes had become a group apart, separated from the rest of the population by custom and law. Treated as servants for life, forbidden to intermarry with whites, deprived of their African traditions and dispersed among Southern plantations, American Negroes lost tribal, regional and family ties."[24] These passages are striking because of the manner in which "blacks," "Negroes," and "whites" seem to exist as prelegal givens, groups that interacted socially and legally but that in all significant respects possessed identities not dependent on their social and legal interaction.

In Higginbotham's study, those African men who were forced onto American shores in 1619 disembarked already possessed of a "black" identity. Similarly, in Bell's casebook, the Africans who were brought to Jamestown only a year after the Pilgrims had landed at Plymouth Rock arrived already "Negroes" in a way that attributed to them the same identity as those the passage later terms "American Negroes." Neither work seems to recognize that the very racial categories under examination were largely created by the legal and social relations between the dispa-

rate peoples who found themselves for weal or woe on the northeastern shores of the Americas in the first years of the seventeenth century. This is all the more surprising because the very point of both passages is that the legal liabilities that would significantly define the relative identity of Whites and Blacks in North America were not in place in 1619. These works treat races as natural, prelegal categories on which the law operates, but which the law does not in many ways create. In this assumption, they are joined by almost every other examination of race and law.

Nevertheless, the tendency to treat race as a prelegal phenomenon is coming to an end. Of late, a new strand of legal scholarship dedicated to reconsidering of the role of race in U.S. society has emerged. Writers in this genre, known as critical race theory, have for the most part shown an acute awareness of the socially constructed nature of race.[25] Much critical race theory scholarship recognizes that race is a legal construction. For example, a recent article by Gerald Torres and Kathryn Milun examines the imposition of the legal concept of "tribe" on the Mashpee of Massachusetts.[26] In order to proceed in a suit over alienated lands, the Mashpee were required to prove their existence as a tribe in legal terms that focused on racial purity, hierarchical leadership, and clearly demarcated geographic boundaries. This legal definition of tribal identity ineluctably led to the nonexistence of the Mashpee people, since it "incorporated specific perceptions regarding race, leadership, community, and territory that were entirely alien to Mashpee culture."[27] Because the Mashpee did not conform to the racial and cultural stereotypes that infuse the law, they could not prove their existence in those terms, and hence did not exist as a people capable of suing in federal court. The article documents the manner in which Mashpee legal identity—and more,

their existence—depended upon a particular definition of race and tribe, thus unearthing the manner in which law mediates racial and tribal ontology. This recognition of the role of law in the social dynamics of racial identity arguably lies near the heart of critical race theory. As John Calmore argues, "Critical race theory begins with a recognition that 'race' is not a fixed term. Instead, 'race' is a fluctuating, decentered complex of social meanings that are formed and transformed under the constant pressures of political struggle."[28] Critical race theory increasingly acknowledges the extent to which race is not an independent given on which the law acts, but rather a social construction at least in part fashioned by law.[29]

Despite the spreading recognition that law is a prime suspect in the formation of races, however, to date there has been no attempt to evaluate systematically just how the law creates and maintains races. How does the operation of law contribute to the formation of races? More particularly, by what mechanisms do courts and legislatures elaborate races, and what is the role of legal actors in these processes? Do legal rules construct races through the direct control of human behavior, or do they work more subtly as an ideology shaping our notions of what is and what can be? By the same token, are legal actors aware of their role in the fabrication of races, or are they unwitting participants, passive actors caught in processes beyond their ken and control? These are the questions this book attempts to answer. I suggest that law constructs races in a complex manner through both coercion and ideology, with legal actors as both conscious and unwitting participants. Rather than turning directly to theories of how law creates and maintains racial difference, however, I would like here to explore at greater length what is meant by the basic assertion that law constructs race.

A more precise definition of race will help us explore the

importance of law in its creation. Race can be understood as the historically contingent social systems of meaning that attach to elements of morphology and ancestry.[30] This definition can be pushed on three interrelated levels, the physical, the social, and the material. First, race turns on physical features and lines of descent, not because features or lineage themselves are a function of racial variation, but because society has invested these with racial meanings. Second, because the meanings given to certain features and ancestries denote race, it is the social processes of ascribing racialized meanings to faces and forbearers that lie at the heart of racial fabrication. Third, these meaning-systems, while originally only ideas, gain force as they are reproduced in the material conditions of society. The distribution of wealth and poverty turns in part on the actions of social and legal actors who have accepted ideas of race, with the resulting material conditions becoming part of and reinforcement for the contingent meanings understood as race.

Examining the role of law in the construction of race becomes, then, an examination of the possible ways in which law creates differences in physical appearance, of the extent to which law ascribes racialized meanings to physical features and ancestry, and of the ways in which law translates ideas about race into the material societal conditions that confirm and entrench those ideas.

Initially, it may be difficult to see how laws could possibly create differences in physical appearance. Biology, it seems, must be the sole provenance of morphology, while laws would appear to have no ability to regulate what people look like. However, laws have shaped the physical features evident in our society. While admittedly laws cannot alter the biology governing human morphology, rulemakers can and have altered the human behavior that produces variations in physical appearance. In other words,

laws have directly shaped reproductive choices. The prerequisite laws evidence this on two levels. First, these laws constrained reproductive choices by excluding people with certain features from this country. From 1924 until the end of racial prerequisites to naturalization in 1952, persons ineligible for citizenship could not enter the United States.[31] The prerequisite laws determined the types of faces and features present in the United States, and thus, who could marry and bear children here. Second, the prerequisite laws had a more direct regulatory reproductive effect through the legal consequences imposed on women who married noncitizen men. Until 1931, a woman could not naturalize if she was married to a foreigner racially ineligible for citizenship, even if she otherwise qualified to naturalize in every respect. Furthermore, women who were U.S. citizens were automatically stripped of their citizenship upon marriage to such a person.[32] These legal penalties for marriage to racially barred aliens made such unions far less likely, and thus skewed the procreative choices that determined the appearance of the U.S. population. The prerequisite laws have directly shaped the physical appearance of people in the United States by limiting entrance to certain physical types and by altering the range of marital choices available to people here. What we look like, the literal and "racial" features we in this country exhibit, is to a large extent the product of legal rules and decisions.

Race is not, however, simply a matter of physical appearance and ancestry. Instead, it is primarily a function of the meanings given to these. On this level, too, law creates races. The statutes and cases that make up the laws of this country have directly contributed to defining the range of meanings without which notions of race could not exist. Recall the exclusion from citizenship of Ozawa and Thind. These cases established the significance of

physical features on two levels. On the most obvious one, they established in stark terms the denotation and connotation of being non-White versus that of being White. To be the former meant one was unfit for naturalization, while to be the latter defined one as suited for citizenship. This stark division necessarily also carried important connotations regarding, for example, agency, will, moral authority, intelligence, and belonging. To be unfit for naturalization—that is, to be non-White—implied a certain degeneracy of intellect, morals, self-restraint, and political values; to be suited for citizenship—to be White—suggested moral maturity, self-assurance, personal independence, and political sophistication. These cases thus aided in the construction of the positive and negative meanings associated with racial difference, at least by giving such meanings legitimacy, and at most by actually fabricating them. The normative meanings that attach to racial difference—the contingent evaluations of worth, temperament, intellect, culture, and so on, which are at the core of racial beliefs—are partially the product of law.

Rather than simply shaping the social content of racial identity, however, the operation of law also creates the racial meanings that attach to features in a much more subtle and fundamental way: laws and legal decisions define which physical and ancestral traits code as Black or White, and so on. Appearances and origins are not White or non-White in any natural or presocial way. Rather, White is a figure of speech, a social convention read from looks. As Henry Louis Gates, Jr., writes, "Who has seen a black or red person, a white, yellow, or brown? These terms are arbitrary constructs, not reports of reality."[33] The construction of race thus occurs in part by the definition of certain features as White, other features as Black, some as Yellow, and so on. On this level, the prerequisite cases demonstrate that law can construct races by setting

the standard by which features and ancestry should be read as denoting a White or a non-White person. When the Supreme Court rested its decision regarding Thind's petition for naturalization on common knowledge, it participated in the creation of that knowledge, saying this person and persons like him do not "look" White. The prerequisite cases did more than decide who qualified as a "white person." They defined the racial semiotics of morphology and ancestry. It is upon this seed of racial physicality that the courts imposed the flesh of normative racial meanings, establishing the social significance of the very racial categories they were themselves constructing. Only after constructing the underlying racial categories could the courts infuse them with legal meaning. The legal system constructs race by elaborating on multiple levels and in various contexts and forms the meaning systems that constitute race.

Finally, racial meaning systems are complex, containing both ideological and material components. That is, the common knowledge of race is grounded not only in the world of ideas, but in the material geography of social life. Here, too, law constructs race. U.S. social geography has in part been constructed by the legal system. Racial categories are in one sense a series of abstractions, but their constant legal usage makes these abstractions concrete and material. Indeed, the very purpose of some laws was to create and maintain material differences between races, to structure racial dominance and subordination into the socioeconomic relations of this society. It is here that the operation of law effects the greatest, most injurious, and least visible influence in entrenching racial categories. As laws and legal decision-makers transform racial ideas into a lived reality of material inequality, the ensuing reality becomes a further justification for the ideas of race.

In terms of the prerequisite cases, for example, the cate-

gories of White and non-White became tangible when certain persons were granted citizenship and others excluded. A "white" citizenry took on physical form, in part because of the demographics of migration, but also because of the laws and cases proscribing non-White naturalization and immigration. The idea of a White country, given ideological and *physical* effect by law, has provided the basis for contemporary claims regarding the European nature of the United States, where "European" serves as a not-so-subtle synonym for White. In turn, the notion of a White nation is used to justify arguments for restrictive immigration laws designed to preserve this supposed national identity. Consider here Patrick Buchanan's views on immigration, offered during his 1992 bid for the Republican presidential nomination: "I think God made all people good, but if we had to take a million immigrants in, say, Zulus, next year, or Englishmen and put them in Virginia, what group would be easier to assimilate and would cause less problems for the people of Virginia? There is nothing wrong with sitting down and arguing that issue, that we are a European country."[34] Buchanan argues as a matter of fact that the United States is a European country, refusing to recognize that this "fact" is a contingent one, a product in large part of identifiable immigration and naturalization laws. Buchanan and others easily confirm their notions regarding the racial nature of the United States, as well as the naturalness of a White citizenry, by looking around and noting the predominance of White people. The physical reality evident in the features of the U.S. citizenry supports the ideological supposition that Whites exist as a race and that this is a White country. Hidden from view, indeed difficult to discern except through extended study, is that Whites do not exist as a natural group, but only as a social and legal creation. What we see in the prerequisite cases is "not the defence of the white state but the creation of the

state through whiteness."[35] The legal reification of racial categories has made race an inescapable material reality in our society, one which at every turn seems to reinvigorate race with the appearance of reality.

On multiple levels, law is implicated in the construction of the contingent social systems of meaning that attach in our society to morphology and ancestry, the meaning systems we commonly refer to as race. The legal system influences what we look like, the meanings ascribed to our looks, and the material reality that confirms the meanings of our appearances. Law constructs race.

White Race-Consciousness

The racial prerequisite cases demonstrate that race is legally constructed. More than that, though, they exemplify the construction of Whiteness. They thus serve as a convenient point of departure for a discussion of White identity as it exists today, particularly regarding both the way in which those constructed as White conceptualize their racial identity, and in terms of the content of that identity. In this way, the prerequisite cases also afford a basis for formulating arguments concerning the way Whites ought to think about Whiteness. In short, the prerequisite cases offer a useful vehicle for exploring the forms White race-consciousness does and should take.

Race-consciousness, the explicit recognition of racial differences, has recently emerged as a trend in legal scholarship. The vast bulk of race-conscious scholarship is by minority scholars, particularly those writing in the genre of critical race theory.[36] This trend toward race-consciousness takes two forms. First, some scholars have explicitly recognized, and encouraged the recognition of, races and racial difference. This has often come in response to arguments that the legal system should be "color-blind," that

is, that law ought not to notice races.[37] Second, scholars are also increasingly race-conscious in the sense of acknowledging the importance of race to personal identity and world view. Scholars now frequently discuss the epistemological influence of race in general, or an author's race in particular, positing the existence of subjective, racially mediated points of view as a rebuttal to the notion of an objective, "race-less" perspective.[38]

For the most part, White scholars have been reluctant either to produce or to engage intellectually this emergent race-based scholarship. Several potential reasons for the silence of White legal scholars suggest themselves. Some minority scholars have asserted a special expertise in the area of race, perhaps suggesting to Whites that they are not welcome to join the critical discourse on race and law.[39] This silence may also result from institutional pressures, where White scholars are directed away from, and minority academics are channeled toward, the relatively marginal discussion of race and law.[40] Or the lack of response may be engendered by racism on the part of some Whites—of a subtle sort that relegates the concerns of minorities to the margins of relevance, or of a more pernicious type that, by disregarding minority voices, seeks to control all discourse about race.[41] Whatever its origins, this White silence has resulted in the accumulation of a body of race-conscious scholarship that focuses almost exclusively on people of color and on the epistemological importance of being a minority. Until recently, this scholarship rarely concerned Whites or addressed the intellectual influence of White identity.

In the last few years, however, this pattern has been broken. Writing in top law reviews across the country, several White law professors have helped place race-consciousness at the forefront of legal academic discourse.[42] These efforts seem to be part of a larger current in which

White scholars are increasingly willing to grapple with critical race theory, and they constitute an important contribution to the exploration of the relationship between race and law.[43] Nevertheless, these writings invite critical response. Some of this scholarship maintains Whiteness as the unexamined norm by equating race-consciousness with the conscious recognition of Blackness. Other writings uncritically advocate race-consciousness as a step toward the elaboration of a positive White racial identity, and thus disregard the extent to which a positive White identity already exists, and further, the extent to which such a positive identity may require inferior minority identities as tropes of hierarchical difference.

An article by Alexander Aleinikoff entitled simply *A Case for Race-Consciousness* exemplifies the first error.[44] Responding to arguments in favor of color-blindness, Aleinikoff asserts that law, or more particularly the Supreme Court, should acknowledge the paramount importance of racial differences in our society. Yet, the racial differences Aleinikoff argues the law should recognize are those distinctions that mark Blacks, not Whites. For example, he writes: "Race matters. . . . To be born black is to know an unchangeable fact about oneself that matters every day";[45] and, "race has deep social significance that continues to disadvantage blacks and other Americans of color";[46] and, "at the base of racial injustice is a set of assumptions—a way of understanding the world—that so characterizes blacks as to make persistent inequality seem largely untroubling."[47] It is difficult to take issue with what Aleinikoff writes; indeed, his assertions are insightful and entirely accurate. His error lies in what he omits. Aleinikoff does not explore the implications of consciously recognizing Whites, and thus misses important insights about Whiteness. He does not write, as he might have with powerful effect, that "to be born White is to know an unchange-

able fact about oneself that matters every day"; or that "race has deep social significance that continues to advantage Whites"; or that "at the base of racial injustice is a set of assumptions—a way of understanding the world—that so characterizes Whites as to make persistent inequality seem largely untroubling." Instead, and unfortunately, he limits himself to discussing Blacks. For Aleinikoff, as well as for others, race-consciousness seems to mean the conscious recognition of Black difference.[48]

Not all White scholars suffer from the same myopia regarding Whiteness. Indeed, Barbara Flagg introduces her article on White race-consciousness, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminating Intent,* by criticizing other White authors for their singular focus on Blacks.[49] Importantly, Flagg suggests that the exclusive focus on Blacks is more than an innocent mistake. She argues that it is a contingent, particularly revealing error, a function of the nature of White race-consciousness rather than a fortuitous slip. Flagg fits this myopia into her theory of White race-consciousness by suggesting that there exists a tendency among Whites not to see themselves in racial terms. She identifies this tendency as one of the defining characteristics of being White, and labels this the "transparency phenomenon." "The most striking characteristic of whites' consciousness of whiteness is that most of the time we don't have any. I call this the *transparency* phenomenon: the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific."[50] Flagg argues that as an antidote to transparency, Whites must develop "a carefully conceived race consciousness, one that begins with whites' consciousness of whiteness."[51] In this critique and in her prescription for change, Flagg is almost certainly correct. Her article advances the thinking on race-consciousness by placing Whites securely within the parameters of discussion and by identifying transparency as a central hurdle that must be surmounted in the development of White racial self-awareness.

If transparency is a common phenomenon among Whites today, it seems also to have afflicted judges deciding prerequisite cases. Despite the apparent simplicity of the issue before them, the courts hearing prerequisite cases experienced great difficulty defining who was White, often turning for succor to such disparate materials as amici briefs, encyclopedias, and anthropological texts. Even with the assistance of these materials, however, the courts hearing prerequisite cases were slow to develop a defensible definition of Whiteness, instead frequently reaching contradictory results. Though themselves White, judges hearing prerequisite cases could not easily say what distinguished a "white person." More than a few judges expressed considerable consternation over the indeterminacy of the prerequisite language in its reference to "whites." Thus, in a 1913 case, *Ex parte Shahid,* a federal court in South Carolina protested that "[t]he statute as it stands is most uncertain, ambiguous, and difficult both of construction and application."[52] *Shahid* posed in frustration the beguilingly simple question that introduces this book: "Then, what is white?"[53]

The inability of the judges to articulate who was White is a product of the transparency phenomenon. Within the logic of transparency, the race of non-Whites is readily apparent and regularly noted, while the race of Whites is consistently overlooked and scarcely ever mentioned. The first case in North America to turn on race exhibits this tendency. The full report of *Re Davis,* a Virginia case decided in 1630, reads as follows: "Hugh Davis to be soundly whipt before an assembly of negroes & others for abusing himself to the dishonor of God and shame of Christianity

by defiling his body in lying with a negro which fault he is to act Next sabbath day."[54] As Leon Higginbotham notes, "Although the full picture can never be reconstructed, some of its elements can reasonably be assumed. . . . [B]ecause Davis's mate was described as a 'negro,' but no corresponding racial identification was made of Davis, it can be inferred that Davis was white."[55] Transparency is a legal tradition of long standing, not something new to the law today or to the prerequisite cases. As a threshold matter, then, defining "whites" taxed the prerequisite courts' abilities not because the question was inherently abstruse, but because through the operation of transparency the judges had never really thought about it.

But why, after they had thought about it, were the judges still unable to define Whiteness? Exploring the origins and maintaining technologies of transparency is useful here. For her part, Flagg ascribes transparency to White privilege. "There is a profound cognitive dimension to the material and social privilege that attaches to whiteness in this society," she writes, "in that the white person has an everyday option not to think of herself in racial terms at all."[56] Yet, the prerequisite cases hint that transparency is not simply a matter of privilege. Privilege explains transparency by positing that those who are constructed as the norm experience difficulty in accurately perceiving their relational position in society exactly because they constitute the norm.[57] But privilege does not seem to fully explain why, when finally jarred into the task of examining White racial identity, the judges in the prerequisite cases could not readily identify the normative boundaries by which they defined themselves—even as late as *Shahid* in 1913, with thirty-five years of precedent to assist them. On this score, the transparency of White identity seems inextricably tied to the naturalization of Whiteness.

The prerequisite cases are literally about the legal naturalization of Whites; they are also figuratively about naturalizing White identity. First, these cases naturalize Whites by treating this grouping as a purely physical phenomenon, an unchanging division of humankind that occurs in nature. Thus, the court in *Shahid,* while frustrated by the ambiguity of the term "white," nevertheless asserted that the phrase "would mean such persons as in 1790 were known as white Europeans, with their descendants, including as their descendants their descendants in other countries to which they have emigrated."[58] The emphasis on descent, repeated three times in a single sentence, transforms Whiteness into a zoetic grouping, a matter of innate, inherited, physical, essential, and, finally, natural being. When Virginia Dominguez observes that "legal disputes over race are nearly always *naturalized,*" she does so in this sense of the term. As Dominguez writes, "[T]here is a willingness to recognize nature as the architect of racial distinctions, and man simply as the foreman who interprets nature's design."[59] This conceptualization of race as a natural phenomenon facilitates transparency by obscuring the contingency of racial demarcation in the language of physicality. By framing race as a physical phenomenon, the courts obviated the need for, and made more difficult, a careful examination of racial typologies. The insistence that "white persons" constitute a natural grouping prohibits at the level of basic assumptions any exploration of the social origins and functions of Whiteness, rendering its socially mediated parameters invisible and impossible to discern correctly.

The definition of Whiteness offered in *Shahid* also indicates a second way in which Whiteness has been naturalized, one which may in fact have a far greater impact in preserving transparency among Whites. *Shahid* used not only the language of descent, but also that of common knowledge, defining Whites in terms of those "known as

white."[60] In this way, *Shahid* anticipated the ruling in *Thind* that a "white person" was a person "the average well informed white American" knew to be White.[61] To grasp how this common knowledge of Whiteness naturalizes Whites, consider an alternate formulation used by the court in *Shahid* to express its holding: "the meaning of free white persons is to be such as would *naturally* have been given to it."[62] This allusion to natural meaning illustrates the manner in which common knowledge is widely seen as entailing an unmediated (and therefore true) understanding of the world. Locating race in common knowledge suggests that race is part of the external world, and that our perception of race is a matter of its objective existence rather than of its subjective creation. Consequently, races as well as the belief in races are seen as "natural." In the face of this type of naturalization, any effort to interrogate Whiteness becomes a doomed battle against received knowledge. The common-knowledge naturalization of Whites deflects and defeats any inquisition of Whiteness by positing that this grouping is an easily identified, commonly recognized truth. Transparency is established and maintained first in the assertion that Whites are a physical grouping and second in the assertion that everyone knows what White is. More than simply a function of privilege, transparency is also the result of the physical and common-knowledge naturalization of Whiteness.

The prerequisite cases reveal the various levels on which Whiteness has been naturalized. In turn, understanding the physical and common-knowledge naturalization of Whiteness helps explain the persistence of both transparency and the belief in the naturalness of racial differences. Yet, these are not the most important lessons regarding Whiteness to be taken from the prerequisite cases. More important is the light these cases shed on

how the construction of Whiteness has given content to White identity.

As a category, "white" was constructed by the prerequisite courts in a two-step process that ultimately defined not just the boundaries of the group, but its identity as well. First, 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 not do so by referring to a freestanding notion of Whiteness. No court offered a complete typology listing the characteristics of Whiteness against which to compare the petitioner. Instead, the courts defined "white" through a process of negation, systematically identifying who was non-White. Thus, from *Ah Yup* to *Thind,* the courts established not so much the parameters of Whiteness 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 defined entities, but only as amalgamations of people standing in complex relationships with other such groups. In this relational system, the prerequisite cases show that Whites are those not constructed as non-White. This is the significance of the "one drop of blood" rule of racial descent in the United States.[63] Under this rule, historically given legal form in numerous state statutes, any known African ancestry renders one Black. As Neil Gotanda writes, "The metaphor is one of purity and contamination: White is unblemished and pure, so one drop of ancestral Black blood renders one Black. Black is a contaminant that overwhelms white ancestry."[64] Stated differently, Whites are those with no known African or other non-White ancestry. In this respect, recall that no mixed-race applicant was naturalized as "white." 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 contributes more directly to the content of the White character. After defining Whiteness by declaring certain peoples non-White, the prerequisite courts denigrated those so described. For example, the Supreme Court in *Thind* wrote not only that common knowledge held South Asians to be non-White, but also that the racial difference marking South Asians "is of such character and extent that the great body of our people recognize and reject it."[65] 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 Whiteness exists not only as the opposite of non-Whiteness, but as the *superior* opposite. Witness the close connection between the negative characteristics imputed to Blacks and the reverse, positive traits attributed to Whites. Blacks have been constructed as lazy, ignorant, lascivious, and criminal; Whites as industrious, knowledgeable, virtuous, and law-abiding.[66] For each negative characteristic ascribed to people of color, an equal but opposite and positive characteristic is attributed to Whites. To this list, the prerequisite cases add Whites as citizens and others as aliens.[67] The prerequisite 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 observation has been made in different contexts and with different language. For example, Richard Ford advances a "psycho-spatial" version of this point:

> [I]n order for the concept of a white race to exist, there must be a Black race which is everything the white race is not (read of course: does not want to be associated with). Thus, the most debased stereotypical attributes of the 'Black savage' are none other than the guilty projections of white society. This white self-regard is at the root of race bigotry in all its forms: it is not a fear of the other, but a fear and loathing of the self; it is not so much the construction of Blackness which matters, it is the construction of whiteness as the absence of those demons the white subject must project onto the other.[68]

By way of comparison, Toni Morrison describes the same oppositional constructivism in the literary fabrication of Whiteness through the depiction of Black ("Africanist") subjects.

> Africanism is the vehicle by which the American self knows itself as not enslaved, but free; not repulsive, but desirable; not helpless, but licensed and powerful; not history-less but historical; not damned but innocent; not a blind accident of evolution, but a progressive fulfillment of destiny.[69]

Whatever the language used, it is clear that White identity is tied inextricably to non-White identity as its positive mirror, its superior opposite.

In this relational system, where White identity is the positive mirror of non-White identity, the question of White race-consciousness is a difficult one. Clearly, some form of racial self-awareness exists among Whites, though this consciousness remains superficially buried by the transparency and naturalization of Whiteness. Whites need to elaborate a more critical racial self-consciousness, if only to overcome the tendency not to see themselves in racial terms. Beyond this, however, in what direction should a White race-consciousness move? Other than bringing White identity into focus, what should be the purpose behind White race-consciousness? One suggestion, offered by Barbara Flagg, is that Whites should develop a new race-consciousness tied to the elaboration of a "positive"

self-image. Flagg introduces her article by writing: "Reconceptualizing white race consciousness means doing the hard work of developing a positive white racial identity."[70] She returns to this theme in her conclusion, reiterating the importance of developing "a positive white racial identity, one that comprehends whiteness . . . as just one racial identity among many."[71] But in what sense should White race-consciousness be "positive"? Certainly, Flagg repudiates the idea that White identity should rest on superiority to Blacks, or should otherwise advantage Whites.[72] However, she says little more about her vision of a positive White racial identity.

In a setting in which White identity exists as the superior opposite to the identity of non-Whites, elaborating a positive White racial identity seems at best redundant, and at worst dangerous. Whiteness is already defined almost exclusively in terms of positive attributes. Whites already exist as innocent, industrious, temperate, judicious, and so on, in a series of racial accolades that hardly need burnishing through a program of positive reinforcement. Further, advocating the development of a positive White racial identity disregards the extent to which White attributes rest on the negative traits that supposedly define minorities. All racial characteristics are relational descriptors: innocence can only be established by comparison with guilt, industriousness by reference to indolence, temperance in contradistinction to indulgence. Because identities are relational, inferiority is a predicate for superiority, and vice versa. This implies that there can be no positive White identity without commensurately negative minority identities. Elaborating a positive White racial identity thus runs the high risk of concomitantly fostering deleterious images of non-Whites.

The diacritical relationship between White and minority identities condemns the idea of a positive White race-consciousness and it suggests instead that a deconstructive one is necessary. Because White identity is a hierarchical fantasy that requires inferior minority identities, Whiteness as it currently exists should be dismantled. The systems of meaning that define races revolve primarily around Whites, not non-Whites. The vast, intricate, pervasive belief structures about racial identity, the backdrop against which Whites so easily see non-Whites but not themselves, are predicated on, and indeed are a requirement for, the existence of Whites. The existence of Whites depends on the identification of cultures and societies, particular human traits, groups, and individuals as non-White. Whites thus stand at the powerful vortex of race in the United States; Whiteness is the source and maintaining force of the systems of meaning that position some as superior and others as subordinate. In this violent context, Whites should renounce their privileged racial status. They should do so, however, not simply out of guilt or any sense of self-deprecation, but because the edifice of Whiteness stands at the heart of racial inequality in America. Whiteness in its current incarnation necessitates and perpetuates patterns of superiority and inferiority. To move from society's present injustices to any future of racial equality will require the disassembly of Whiteness. Whites must overcome transparency in order fully to appreciate the salience of race to their identity. They should do so, however, with the intention of consciously repudiating Whiteness as it is currently constituted in the systems of meaning known as races, in the interest of social justice.

The argument for a self-deconstructive White race-consciousness evolves from examination of the prerequisite cases as a study in the elaboration of Whiteness. This examination also suggests, however, a facet of Whiteness that will certainly forestall its easy disassembly, namely, its value to Whites. The racial prerequisite cases are, in

one possible reading, an extended essay on the real value of being White. They are also, by another reading, about the willingness of Whites to protect that value, even at the cost of basic justice. Seeking citizenship, petitioners from around the world challenged the courts to define the phrase "white person" in a consistent, rational manner. The courts could not meet this challenge and resorted instead to the common knowledge of those already considered White. Despite this manifest failure, only one court acknowledged the falsity of race, the rest preferring instead to formulate fictions.[73] Admittedly the courts were caught within the contemporary understandings of race, making unlikely a complete break with the prevalent ideology of racial difference. However, 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 colored their opinions when proclaiming that certain applicants were not White. These disturbing facets of judicial inquietude, clearly evident in *Ozawa* and *Thind,* belie mere uncertainty in judicial interpretation. Rather, the judges' words reveal the extent to which the terms they examined held deep personal significance for them. In a very real sense, they were setting the terms of their own existence. Wedded to their own sense of self, the judges proved to be loyal defenders of Whiteness, defining this identity in ways that preserved its contours even at the cost of arbitrarily excluding fully qualified persons from citizenship. Confronted by powerful challenges to the meaning of Whiteness, judges—particularly the justices of the Supreme Court—embraced this identity in full disregard of the costs of their actions to people across the country. This, perhaps, is the most important lesson to be taken from the prerequisite cases, and it is where this book concludes. When confronted with the falsity of White identity, Whites tend not to abandon

Whiteness, but to embrace and protect it. The value of Whiteness to Whites almost certainly ensures the continuation of a White self-regard predicated on racial superiority.

Qualifications

My ambitions in this book include setting out a general theory of the legal construction of race and elaborating through an assessment of the content of Whiteness the argument that Whites should consciously work against their racial identity. Both of these projects arise out of but are not circumscribed by the study of the typological practices of the prerequisite cases. On the other hand, there are a number of ambitions I do not pursue here. Indeed, with respect to many important facets of the prerequisite cases, and regarding Whiteness more generally, this work is quite focused. It may therefore be worthwhile to lay out what I will not attempt in this book.

The analysis I offer here with respect to the prerequisite cases is relatively limited, focusing on the processes of racial differentiation in these cases. Consequently, of the fifty-two reported decisions, I discuss only the first thirty-seven, stopping at the Supreme Court's decision in *Thind,* since subsequent lower court decisions adduce little new in terms of racial rationales. The written decisions themselves are the center of attention because they evidence the typological practices of interest. Other sources of information about the naturalization laws, such as the records of magistrates or the statistics gathered in census counts, are considered only in passing. More generally, examining the processes of racial categorization requires historicizing the cases within a particular epoch of American history, as well as periodizing them into early and late cases. These practices are aimed only at highlighting the contra-

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Racial Restrictions in the Law of Citizenship

The racial composition of the U.S. citizenry reflects in part the accident of world migration patterns. More than this, however, it reflects the conscious design of U.S. immigration and naturalization laws.

Federal law restricted immigration to this country on the basis of race for nearly one hundred years, roughly from the Chinese exclusion laws of the 1880s until the end of the national origin quotas in 1965.[1] The history of this discrimination can briefly be traced. Nativist sentiment against Irish and German Catholics on the East Coast and against Chinese and Mexicans on the West Coast, which had been doused by the Civil War, reignited during the economic slump of the 1870s. Though most of the nativist efforts failed to gain congressional sanction, Congress in 1882 passed the Chinese Exclusion Act, which suspended the immigration of Chinese laborers for ten years.[2] The

Act was expanded to exclude all Chinese in 1884, and was eventually implemented indefinitely.[3] In 1917, Congress created "an Asiatic barred zone," excluding all persons from Asia.[4] During this same period, the Senate passed a bill to exclude "all members of the African or black race." This effort was defeated in the House only after intensive lobbying by the NAACP.[5] Efforts to exclude the supposedly racially undesirable southern and eastern Europeans were more successful. In 1921, Congress established a temporary quota system designed "to confine immigration as much as possible to western and northern European stock," making this bar permanent three years later in the National Origin Act of 1924.[6] With the onset of the Depression, attention shifted to Mexican immigrants. Although no law explicitly targeted this group, federal immigration officials began a series of round-ups and mass deportations of people of Mexican descent under the general rubric of a "repatriation campaign." Approximately 500,000 people were forcibly returned to Mexico during the Depression, more than half of them U.S. citizens.[7] This pattern was repeated in the 1950s, when Attorney General Herbert Brownwell launched a program to expel Mexicans. This effort, dubbed "Operation Wetback," indiscriminately deported more than one million citizens and noncitizens in 1954 alone.[8]

Racial restrictions on immigration were not significantly dismantled until 1965, when Congress in a major overhaul of immigration law abolished both the national origin system and the Asiatic Barred Zone.[9] Even so, purposeful racial discrimination in immigration law by Congress remains constitutionally permissible, since the case that upheld the Chinese Exclusion Act to this day remains good law.[10] Moreover, arguably racial discrimination in immigration law continues. For example, Congress has enacted special provisions to encourage Irish immigration, while

refusing to ameliorate the backlog of would-be immigrants from the Philippines, India, South Korea, China, and Hong Kong, backlogs created in part through a century of racial exclusion.[11] The history of racial discrimination in U.S. immigration law is a long and contuing one.

As discriminatory as the laws of immigration have been, the laws of citizenship betray an even more dismal record of racial exclusion. From this country's inception, the laws regulating who was or could become a citizen were tainted by racial prejudice. Birthright citizenship, the automatic acquisition of citizenship by virtue of birth, was tied to race until 1940. Naturalized citizenship, the acquisition of citizenship by any means other than through birth, was conditioned on race until 1952. Like immigration laws, the laws of birthright citizenship and naturalization shaped the racial character of the United States.

Birthright Citizenship

Most persons acquire citizenship by birth rather than through naturalization. During the 1990s, for example, naturalization will account for only 7.5 percent of the increase in the U.S. citizen population.[12] At the time of the prerequisite cases, the proportion of persons gaining citizenship through naturalization was probably somewhat higher, given the higher ratio of immigrants to total population, but still far smaller than the number of people gaining citizenship by birth. In order to situate the prerequisite laws, therefore, it is useful first to review the history of racial discrimination in the laws of birthright citizenship.

The U.S. Constitution as ratified did not define the citizenry, probably because it was assumed that the English common law rule of *jus soli* would continue.[13] Under *jus soli,* citizenship accrues to "all" born within a nation's jurisdiction. Despite the seeming breadth of this doctrine,

the word "all" is qualified because for the first one hundred years and more of this country's history it did not fully encompass racial minorities. This is the import of the *Dred Scott* decision.[14] Scott, an enslaved man, sought to use the federal courts to sue for his freedom. However, access to the courts was predicated on citizenship. Dismissing his claim, the United States Supreme Court in the person of Chief Justice Roger Taney declared in 1857 that Scott and all other Blacks, free and enslaved, were not and could never be citizens because they were "a subordinate and inferior class of beings." The decision protected the slave-holding South and infuriated much of the North, further dividing a country already fractured around the issues of slavery and the power of the national government. *Dred Scott* was invalidated after the Civil War by the Civil Rights Act of 1866, which declared that "All persons born . . . in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States."[15] *Jus soli* subsequently became part of the organic law of the land in the form of the Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."[16]

Despite the broad language of the Fourteenth Amendment—though in keeping with the words of the 1866 act—some racial minorities remained outside the bounds of *jus soli* even after its constitutional enactment. In particular, questions persisted about the citizenship status of children born in the United States to noncitizen parents, and about the status of Native Americans. The Supreme Court did not decide the status of the former until 1898, when it ruled in *U.S. v. Wong Kim Ark* that native-born children of aliens, even those permanently barred by race from acquiring citizenship, were birthright citizens of the United States.[17] On the citizenship of the latter, the Supreme Court answered negatively in 1884, holding in *Elk v. Wilkins* that Native Americans owed allegiance to their tribe and so did not acquire citizenship upon birth.[18] Congress responded by granting Native Americans citizenship in piecemeal fashion, often tribe by tribe. Not until 1924 did Congress pass an act conferring citizenship on all Native Americans in the United States.[19] Even then, however, questions arose regarding the citizenship of those born in the United States after the effective date of the 1924 act. These questions were finally resolved, and *jus soli* fully applied, under the Nationality Act of 1940, which specifically bestowed citizenship on all those born in the United States "to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe."[20] Thus, the basic law of citizenship, that a person born here is a citizen here, did not include all racial minorities until 1940.

Unfortunately, the impulse to restrict birthright citizenship by race is far from dead in this country. Apparently, California Governor Pete Wilson and many others seek a return to the times when citizenship depended on racial proxies such as immigrant status. Wilson has called for a federal constitutional amendment that would prevent the American-born children of undocumented persons from receiving birthright citizenship.[21] His call has not been ignored: thirteen members of Congress recently sponsored a constitutional amendment that would repeal the existing Citizenship Clause of the Fourteenth Amendment and replace it with a provision that "All persons born in the United States . . . of mothers who are citizens or legal residents of the United States . . . are citizens of the United States."[22] Apparently, such a change is supported by 49 percent of Americans.[23] In addition to explicitly discriminating against fathers by eliminating their right to confer citizenship through parentage, this proposal implic-

itly discriminates along racial lines. The effort to deny citizenship to children born here to undocumented immigrants seems to be motivated not by an abstract concern over the political status of the parents, but by racial animosity against Asians and Latinos, those commonly seen as comprising the vast bulk of undocumented migrants. Bill Ong Hing writes, "The discussion of who is and who is not American, who can and cannot become American, goes beyond the technicalities of citizenship and residency requirements; it strikes at the very heart of our nation's long and troubled legacy of race relations."[24] As this troubled legacy reveals, the triumph over racial discrimination in the laws of citizenship and alienage came slowly and only recently. In the campaign for the "control of our borders," we are once again debating the citizenship of the native-born and the merits of *Dred Scott*.[25]

Naturalization

Although the Constitution did not originally define the citizenry, it explicitly gave Congress the authority to establish the criteria for granting citizenship after birth. Article I grants Congress the power "To establish a uniform Rule of Naturalization."[26] From the start, Congress exercised this power in a manner that burdened naturalization laws with racial restrictions that tracked those in the law of birthright citizenship. In 1790, only a few months after ratification of the Constitution, Congress limited naturalization to "any alien, being a free white person who shall have resided within the limits and under the jurisdiction of the United States for a term of two years."[27] This clause mirrored not only the de facto laws of birthright citizenship, but also the racially restrictive naturalization laws of several states. At least three states had previously limited

citizenship to "white persons": Virginia in 1779, South Carolina in 1784, and Georgia in 1785.[28] Though there would be many subsequent changes in the requirements for federal naturalization, racial identity endured as a bedrock requirement for the next 162 years. In every naturalization act from 1790 until 1952, Congress included the "white person" prerequisite.[29]

The history of racial prerequisites to naturalization can be divided into two periods of approximately eighty years each. The first period extended from 1790 to 1870, when only Whites were able to naturalize. In the wake of the Civil War, the "white person" restriction on naturalization came under serious attack as part of the effort to expunge *Dred Scott*. Some congressmen, Charles Sumner chief among them, argued that racial barriers to naturalization should be struck altogether. However, racial prejudice against Native Americans and Asians forestalled the complete elimination of the racial prerequisites. During congressional debates, one senator argued against conferring "the rank, privileges, and immunities of citizenship upon the cruel savages who destroyed [Minnesota's] peaceful settlements and massacred the people with circumstances of atrocity too horrible to relate."[30] Another senator wondered "whether this door [of citizenship] shall now be thrown open to the Asiatic population," warning that to do so would spell for the Pacific coast "an end to republican government there, because it is very well ascertained that those people have no appreciation of that form of government; it seems to be obnoxious to their very nature; they seem to be incapable either of understanding or carrying it out."[31] Sentiments such as these ensured that even after the Civil War, bars against Native American and Asian naturalization would continue.[32] Congress opted to maintain the "white person" prerequisite, but to extend the

right to naturalize to "persons of African nativity, or African descent."[33] After 1870, Blacks as well as Whites could naturalize, but not others.

During the second period, from 1870 until the last of the prerequisite laws were abolished in 1952, the White-Black dichotomy in American race relations dominated naturalization law. During this period, Whites and Blacks were eligible for citizenship, but others, particularly those from Asia, were not. Indeed, increasing antipathy toward Asians on the West Coast resulted in an explicit disqualification of Chinese persons from naturalization in 1882.[34] The prohibition of Chinese naturalization, the only U.S. law ever to exclude by name a particular nationality from citizenship, was coupled with the ban on Chinese immigration discussed previously. The Supreme Court readily upheld the bar, writing that "Chinese persons not born in this country have never been recognized as citizens of the United States, nor authorized to become such under the naturalization laws."[35] While Blacks were permitted to naturalize beginning in 1870, the Chinese and most "other non-Whites" would have to wait until the 1940s for the right to naturalize.[36]

World War II forced a domestic reconsideration of the racism integral to U.S. naturalization law. In 1935, Hitler's Germany limited citizenship to members of the Aryan race, making Germany the only country other than the United States with a racial restriction on naturalization.[37] The fact of this bad company was not lost on those administering our naturalization laws. "When Earl G. Harrison in 1944 resigned as United States Commissioner of Immigration and Naturalization, he said that the only country in the world, outside the United States, that observes racial discrimination in matters relating to naturalization was Nazi Germany, 'and we all agree that this is not very desirable company.' "[38] Furthermore, the United States was

open to charges of hypocrisy for banning from naturalization the nationals of many of its Asian allies. During the war, the United States seemed through some of its laws and social practices to embrace the same racism it was fighting. Both fronts of the war exposed profound inconsistencies between U.S. naturalization law and broader social ideals. These considerations, among others, led Congress to begin a process of piecemeal reform in the laws governing citizenship.

In 1940, Congress opened naturalization to "descendants of races indigenous to the Western Hemisphere."[39] Apparently, this "additional limitation was designed 'to more fully cement' the ties of Pan-Americanism" at a time of impending crisis.[40] In 1943, Congress replaced the prohibition on the naturalization of Chinese persons with a provision explicitly granting them this boon.[41] In 1946, it opened up naturalization to persons from the Philippines and India as well.[42] Thus, at the end of the war, our naturalization law looked like this:

> The right to become a naturalized citizen under the provisions of this Act shall extend only to—
>
> (1) white persons, persons of African nativity or descent, and persons of races indigenous to the continents of North or South America or adjacent islands and Filipino persons or persons of Filipino descent;
>
> (2) persons who possess, either singly or in combination, a preponderance of blood of one or more of the classes specified in clause (1);
>
> (3) Chinese persons or persons of Chinese descent; and persons of races indigenous to India; and
>
> (4) persons who possess, either singly or in combination, a preponderance of blood of one or more of the classes specified in clause (3) or, either singly or in combination, as much as one-half blood of those classes and some additional blood of one of the classes specified in clause (1).[43]

This incremental retreat from a "Whites only" conception of citizenship made the arbitrariness of U.S. naturalization law increasingly obvious. For example, under the above statute, the right to acquire citizenship depended for some on blood-quantum distinctions based on descent from peoples indigenous to islands adjacent to the Americas. In 1952, Congress moved towards wholesale reform, overhauling the naturalization statute to read simply that "[t]he right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married."[44] Thus, in 1952, racial bars on naturalization came to an official end.[45]

Notice the mention of gender in the statutory language ending racial restrictions in naturalization. The issue of women and citizenship can only be touched on here, but deserves significant study in its own right.[46] As the language of the 1952 Act implies, eligibility for naturalization once depended on a woman's marital status. Congress in 1855 declared that a foreign woman automatically acquired citizenship upon marriage to a U.S. citizen, or upon the naturalization of her alien husband.[47] This provision built upon the supposition that a woman's social and political status flowed from her husband. As an 1895 treatise on naturalization put it, "A woman partakes of her husband's nationality; her nationality is merged in that of her husband; her political status follows that of her husband."[48] A wife's acquisition of citizenship, however, remained subject to her individual qualification for naturalization—that is, on whether she was a "white person."[49] Thus, the Supreme Court held in 1868 that only "white women" could gain citizenship by marrying a citizen.[50] Racial restrictions further complicated matters for noncitizen women in that naturalization was denied to those married to a man racially ineligible for citizenship, irrespective of the

woman's own qualifications, racial or otherwise.[51] The automatic naturalization of a woman upon her marriage to a citizen or upon the naturalization of her husband ended in 1922.[52]

The citizenship of American-born women was also affected by the interplay of gender and racial restrictions. Even though under English common law a woman's nationality was unaffected by marriage, many courts in this country stripped women who married noncitizens of their U.S. citizenship.[53] Congress recognized and mandated this practice in 1907, legislating that an American woman's marriage to an alien terminated her citizenship.[54] Under considerable pressure, Congress partially repealed this act in 1922.[55] However, the 1922 act continued to require the expatriation of any woman who married a foreigner racially barred from citizenship, flatly declaring that "any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen."[56] Until Congress repealed this provision in 1931,[57] marriage to a non-White alien by an American woman was akin to treason against this country: either of these acts justified the stripping of citizenship from someone American by birth. Indeed, a woman's marriage to a non-White foreigner was perhaps a worse crime, for while a traitor lost his citizenship only after trial, the woman lost hers automatically.[58] The laws governing the racial composition of this country's citizenry came inseverably bound up with and exacerbated by sexism. It is in this context of combined racial and gender prejudice that we should understand the absence of any women among the petitioners named in the prerequisite cases: it is not that women were unaffected by the racial bars, but that they were doubly bound by them, restricted both as individuals, and as less than individuals (that is, as wives).

7

The Value to Whites of Whiteness

The prerequisite cases provide an invaluable study in the construction of the White race and offer important insights into the structuring and content of Whiteness as a legal and social idea. These insights have prompted the argument that in the interest of racial justice Whites must adopt a race-consciousness that renounces the privileged construction of Whiteness. However, the prerequisite cases afford a variety of different readings. One interpretation in particular draws into question the likelihood of a self-deconstructive White race-consciousness. The cases can be read as an extended discourse on the tremendous value of Whiteness to Whites, suggesting that Whites are much more likely to embrace than dismantle their identity.

The prerequisite cases demonstrate that when confronted with the falsity of racial lines, many Whites—even those in the highest positions of public trust and under

the greatest charge to do justice—will choose to entrench White identity and privilege rather than allow its destabilization. *Ozawa* and *Thind* confronted the Supreme Court with compelling evidence that the racial boundaries that defined Whites lacked objective meaning. In these cases the Court had the opportunity to call into question the very notion of a White race upon which the racial prerequisite to naturalization depended. Second-guessing historical actors, always fraught with danger, remains a scholarly necessity.[1] While it would be an obvious error to criticize the Court for failing to live by ideas and ideals unknown at the time, there is no such risk in suggesting that the Court could have followed the weight of precedent and refused to overturn Bhagat Singh Thind's naturalization. By so doing, the Court would have broadened and softened the parameters of Whiteness, rather than narrowing and rigidifying Whiteness as it did. But the Court preferred instead to shore up the fractured definition of Whiteness by embracing popular prejudice. While the Court's decision is intelligible on a number of levels, it is perhaps best understood as an expression of the value of Whiteness to Whites. White identity provides material and spiritual assurances of superiority in a crowded society. We should thus not be too surprised that the prerequisite courts clung to the notion of a fixed White race, even when confronted by its falsity.

Contemporary evidence suggests that among Whites, White identity continues to be highly valued. Despite its superficial transparency, Whites widely continue to recognize the value of their own Whiteness. In *Two Nations: Black and White, Separate, Hostile, Unequal,* Andrew Hacker recounts the following: When White college students were asked what sort of compensation they would expect should they have to endure the remainder of their lives as someone suddenly made physically "Black" but not otherwise changed, the majority "seemed to feel that it

would not be out of place to ask for $50 million, $1 million for each coming black year."[2] Although this figure seems more metaphorical than accurate in its roundness, it is a metaphor that testifies to the immense value Whites attach to White identity. But perhaps these students were far more accurate than they could imagine in estimating the value of White identity. After all, what would one pay to be accorded the differing treatment meted to Whites as opposed to Blacks?

Adrian Piper has known both sides as a light-skinned Black woman. She remarks of the difference looking White makes in the way one is treated:

> A benefit and disadvantage of looking white is that most people treat you as though you were white. And so, because of how you've been treated, you come to expect this kind of treatment, not, perhaps, realizing that you are being treated this way because people think you are white, but rather falsely supposing that you're being treated this way because people think you are a valuable person. So, for example, you come to expect a certain level of respect, a certain degree of attention to your voice and opinions, certain liberties of action and self-expression to which you falsely suppose yourself to be entitled because your voice, your opinion, and your conduct are valuable in themselves.[3]

Presumptions of worth accompany Whiteness. In her position between Black and White, Piper is conscious of these presumptions in a way that few Whites are. Having been both granted and stripped of personal worth through changing evaluations of her race, Piper now perceives their operation clearly. In contrast, never experiencing their loss, most Whites continue to falsely suppose presumptions of worth are accorded them because they are valuable in themselves, rather than because they are White.

There is at least one young White college student, however, who knows intimately the worth of Whiteness. Joshua Solomon, a student at the University of Maryland,

recently took a semester off to relive the experiences of John Griffin, the White journalist who in 1959 darkened his skin and subsequently wrote *Black Like Me*.[4] Solomon too used drugs to change his skin pigmentation; then, when he thought himself suitably dark, he set off from Baltimore for Forsyth County, Georgia. His racial odyssey was short-lived. By the time he checked into a hotel in Gainesville, just short of Forsyth County and only two days after starting his trip, Solomon had given up his plan.

> When I got to the room, it hit me. I was sick of being black. I couldn't take it anymore. I wanted to throw up. . . . Now people acted like they hated me. Nothing had changed but the color of my skin. I went to the closet, pulled out my suitcase. After all of two days, the experiment was over. Maybe I was weak, maybe I couldn't hack it. I didn't care. The anger was making me sick and the only antidote I knew was a dose of white skin.[5]

Perhaps Solomon's experiences, like Piper's, are unique. But if they are exceptional, they are so only in the sense that few people come to know first-hand both the benefits of being White and the burdens of being Black.[6] What makes their experiences extraordinary is not that they have lived through the presumptions of worth and worthlessness that attach to racial identity per se, but that they have experienced both sets of presumptions.

Much later in his book, Hacker acknowledges the implausibility of the hypothetical posed to the White college students, a question impossible to answer since few Whites can truly imagine themselves Black. Even this implausibility, however, confirms the importance of Whiteness to Whites.

> No matter how degraded their lives, white people are still allowed to believe that they possess the blood, the genes, the patrimony of superiority. No matter what happens, they can never become "black." White Americans of all classes have found it comforting to preserve blacks as a subordinate caste: a presence, which despite all its pain and problems, still provides whites with some solace in a stressful world.[7]

Others echo this sense that Whiteness possesses a fundamental, inestimable value for Whites. In *Faces at the Bottom of the Well*, Derrick Bell writes:

> Black people are the magical faces at the bottom of society's well. Even the poorest whites, those who must live their lives only a few levels above, gain their self-esteem by gazing down on us. Surely, they must know that their deliverance depends on letting down the ropes. Only by working together is escape possible. Over time, many reach out, but most simply watch, mesmerized into maintaining their unspoken commitment to keeping us where we are, at whatever cost to them or to us.[8]

Francis Lee Ansley similarly observes:

> White supremacy is concretely in the interests of all white people. It assures them greater resources, a wider range of personal choice, more power, and more self-esteem than they would have if they were (1) forced to share the above with people of color, and (2) deprived of the subjective sensation of superiority they enjoy as a result of the societal presence of subordinate nonwhite others.[9]

These excerpted assertions of the value of Whiteness to Whites are to some extent oversimplified. They elide such important questions as how racial ideology both benefits and disadvantages Whites, about how and why race is experienced differently among Whites, and about how and why some Whites actively oppose racial privilege.[10] Nevertheless, it seems incontestable that, on the whole, Whites greatly value their racially superior identity.

The racial prerequisite cases make clear that Whiteness is a social artifact by highlighting both the failure of science to find any physical basis for racial differentiation and also the ultimate importance of common prejudice in

the creation and maintenance of racial lines. The central role law plays as both a coercive and ideological force in the construction of race is also evident. The cases demonstrate as well that races are relational constructions, and that Whites have fashioned themselves as the superior opposite to those denigrated others designated non-Whites. They suggest too that Whites cannot know themselves, and that society cannot overcome racism, until Whiteness is dismantled. But perhaps most sadly of all, these cases may tell us that the tremendous value of Whiteness to Whites, a value still evident today, makes those constructed as White unwilling to relinquish the privileges of Whiteness.