White by Law

The Legal Construction of Race

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refers to an unstable category which gains its meaning only through social relations and that encompasses a profoundly diverse set of persons.

Notwithstanding this rich diversity, however, it remains the case that in the social elaboration of Whiteness, trends can be discerned and some commonalities persist in recognizable form. In this book I attempt to unearth and elaborate some of the perduring, seemingly fundamental characteristics of Whiteness, particularly as these have been fashioned by law. Nevertheless, I seek to talk about the legal construction of White racial identity in a manner that remains true to the argument that, however powerful and however deeply a part of our society race may be, races are still only human inventions.

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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. Naturalization 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.[4] His efforts failed because of racial animosity in much of Congress toward Asians and Native Americans.[5] 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.[6] 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.[7] 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 Western Asia; 2. The Mongolian, or yellow race, occupying Tartary, China, Japan, etc.; 3. The Ethiopian or Negro (black) race, occupying all of Africa, except the north; 4. The American, or red race, containing the Indians of North and South America; and, 5. The Malay, or Brown race, occupying the islands of the Indian Archipelago," etc. This division was adopted from Buffon, with some changes in names, and is founded on the combined characteristics of complexion, hair and skull. . . . [N]o one includes the white, or Caucasian, with the Mongolian or yellow race.[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 disparate 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, pre-legal 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, rule-makers 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 categories 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."[33] 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

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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 continuing 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 slaveholding 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 implicitly 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).

3 The Prerequisite Cases

The first reported racial prerequisite decision was handed down in 1878.[1] From then until the end of racial restrictions on naturalization in 1952, courts decided fifty-one more prerequisite cases. These decisions were rendered in jurisdictions across the nation, from state courts in California to the U.S. Supreme Court in Washington, D.C., and concerned applicants from a variety of countries, including Canada, Mexico, Japan, the Philippines, India, and Syria. All but one of these cases presented claims of White racial identity.[2]

These bare facts give rise to two initial questions. First, what explains the nearly ninety-year lag between the legislative imposition of the "white person" prerequisite in 1790 and its first legal test in 1878? Second, why did all but one of the applicants petition for citizenship on the basis of a White identity, when, after 1870, naturalization was also available to Blacks? The lag between the enactment of a racial prerequisite for naturalization and its first legal test may partly reflect the relative insignificance of federal as opposed to state citizenship during this country's first century. Prior to the Civil War, state citizenship was more important than federal citizenship for securing basic rights and privileges. National citizenship gained significance only in the wake of the Civil War and the Fourteenth Amendment. After 1870, "[a]ll persons born within the dominion and allegiance of the United States were citizens and constituents of the sovereign community. Their status with respect to the states depended upon this national status and upon their own choice of residence, and it could not be impeached or violated by state action."[3] Thus, the spate of naturalization cases that began in 1878 may reflect the increased importance of national versus state citizenship after the Civil War. In addition, the initial lack of prerequisite litigation may have been a function of the early demographics of migration to this country. Those disembarking on U.S. shores through the first half of the 1800s were for the most part either clearly admissible to or obviously

Appendix A
The Racial Prerequisite Cases

The following tables list the prerequisite cases. The tables are chronologically divided to coincide with the periodization offered in the text, namely, early, late, and post-*United States v. Thind* cases. They include annotations regarding the principle rationales employed by the courts. The annotations are listed in an order that roughly correlates to the apparent degree of reliance on each rationale. Thus, if a court seemed to base its decision primarily on legal precedent but also used congressional intent and, to a lesser extent, common knowledge, the annotations would appear in that order.

TABLE 1
Racial Prerequisite Cases, 1878–1909

Case	Holding	Rationales
In re Ah Yup 1 F. Cas. 223 (C.C.D.Cal. 1878)	Chinese are not White.	Scientific evidence Common knowledge Congressional intent
In re Camille 6 F. 256 (C.C.D.Or. 1880)	Persons half White and half Native American are not White.	Legal precedent
In re Kanaka Nian 6 Utah 259 21 Pac. 993 (1889)	Hawaiians are not White.	Scientific evidence
In re Hong Yen Chang 84 Cal. 163 24 Pac. 156 (1890)	Chinese are not White.	Legal precedent
In re Po 7 Misc. 471 28 N.Y. Supp. 838 (City Ct. 1894)	Burmese are not White.	Common knowledge Legal precedent
In re Saito 62 F. 126 (C.C.D.Mass. 1894)	Japanese are not White.	Congressional intent Common knowledge Scientific evidence Legal precedent

TABLE 1 *Continued*

Case	Holding	Rationales
In re Gee Hop 71 F. 274 (N.D.Cal. 1895)	Chinese are not White.	Legal precedent Congressional intent
In re Rodriguez 81 F. 337 (W.D.Tex. 1897)	Mexicans are White.	Legal precedent[a]
In re Burton 1 Ala. 111 (1900)	Native Americans are not White.	No explanation
In re Yamashita 30 Wash. 234 70 Pac. 482 (1902)	Japanese are not White.	Legal precedent
In re Buntaro Kumagai 163 F. 922 (W.D.Wash. 1908)	Japanese are not White.	Congressional intent Legal precedent
In re Knight 171 F. 299 (E.D.N.Y. 1909)	Persons half White, one-quarter Japanese, and one-quarter Chinese are not White.	Legal precedent

[a] Although the reasoning in this case is characterized as relying on "legal precedent," *Rodriguez* is unique in that the court relied on treaties rather than cases to hold the applicant admissible to naturalization.

TABLE 2
Racial Prerequisite Cases, 1909–1923

Case	Holding	Rationales
In re Balsara 171 F. 294 (C.C.S.D.N.Y. 1909)	Asian Indians are probably not White.[a]	Congressional intent
In re Najour 174 F. 735 (N.D.Ga. 1909)	Syrians are White.	Scientific evidence
In re Halladjian 174 F. 834 (C.C.D.Mass. 1909)	Armenians are White.	Scientific evidence Legal precedent[b]
United States v. Dolla 177 F. 101 (5th Cir. 1910)	Asian Indians are White.	Ocular inspection of skin[c]
In re Mudarri 176 F. 465 (C.C.D.Mass. 1910)	Syrians are White.	Scientific evidence Legal precedent
Bessho v. United States 178 F. 245 (4th Cir. 1910)	Japanese are not White.	Congressional intent

TABLE 2 *Continued*

Case	Holding	Rationales
In re Ellis 179 F. 1002 (D.Or. 1910)	Syrians are White.	Common knowledge Congressional intent
United States v. Balsara 180 F. 694 (2nd Cir. 1910)	Asian Indians are White.	Scientific evidence Congressional intent
In re Alverto 198 F. 688 (E.D.Pa. 1912) White.	Persons three-quarters Filipino and one-quarter White are not White.	Legal precedent Congressional intent
In re Young 195 F. 645 (W.D. Wash. 1912)	Persons half German and half Japanese are not White.	Legal precedent
In re Young 198 F. 715 (W.D.Wash. 1912)	Persons half German and half Japanese are not White.	Common knowledge Legal precedent
Ex parte Shahid 205 F. 812 (E.D.S.C. 1913)	Syrians are not White.[d]	Common knowledge
In re Akhay Kumar Mozumdar 207 F. 115 (E.D.Wash. 1913)	Asian Indians are White.	Legal precedent[e]
Ex parte Dow 211 F. 486 (E.D.S.C. 1914)	Syrians are not White.	Common knowledge
In re Dow 213 F. 355 (E.D.S.C. 1914)	Syrians are not White.[f]	Common knowledge Congressional intent
Dow v. United States 226 F. 145 (4th Cir. 1915)	Syrians are White.	Scientific evidence Congressional intent Legal precedent
In re Lampitoe 232 F. 382 (S.D.N.Y. 1916)	Persons three-quarters Filipino and one-quarter White are not White.	Legal precedent
In re Mallari 239 F. 416 (D.Mass. 1916)	Filipinos are not White.	No explanation
In re Rallos 241 F. 686 (E.D.N.Y. 1917)	Filipinos are not White.	Legal precedent

TABLE 2 *Continued*

Case	Holding	Rationales
In re Sadar Bhagwab Singh 246 F. 496 (E.D.Pa. 1917)	Asian Indians are not White.	Common knowledge Congressional intent
In re Mohan Singh 257 F. 209 (S.D.Cal. 1919)	Asian Indians are White.	Scientific evidence Legal precedent
In re Thind 268 F. 683 (D.Or. 1920)	Asian Indians are White.	Legal precedent
Petition of Easurk Emsen Charr 273 F. 207 (W.D.Mo. 1921)	Koreans are not White.	Common knowledge Legal precedent
Ozawa v. United States 260 U.S. 178 (1922)	Japanese are not White.	Legal precedent Congressional intent Common knowledge Scientific evidence
United States v. Thind 261 U.S. 204 (1923)	Asian Indians are not White.	Common knowledge Congressional intent

[a] Despite concluding that Asian Indians probably were not White, the court noted the need for an authoritative pronouncement on this issue, as well as the government's willingness to appeal. For these reasons, the court ruled that Balsara could naturalize.

[b] Here, "legal precedent" refers not to case law but to prior government usage.

[c] *Dolla* is unique in two respects. First, at the appellate level, the Fifth Circuit refused to hear the government's objection to the naturalization of Dolla on the ground that naturalization proceedings do not constitute a "case" such that an appeal could be taken. Second, at least as the underlying case is summarized in the appellate decision, the district court did not rely on any of the four prevalent rationales, but instead inspected Dolla's skin minutely, going so far as to ask him to roll up his sleeve, in order to determine whether Dolla was White.

[d] This holding is dictum, as the court rested denial of the petition for citizenship on "personal disqualifications." 205 F. at 817.

[e] The court relied on legal precedent for the proposition that the terms "white person" and "caucasian" were synonymous. For the secondary postulate that a Hindu is a Caucasian, however, the court relied on the testimony of the petitioner himself, who claimed to be "a high-caste Hindu of pure blood, belonging to what is known as the warrior caste, or ruling caste." 207 F. at 116.

[f] The court limited its holding to the conclusion that Syrians are not White within the meaning of the prerequisite statute. The court specifically refused to answer the more general question of whether Syrians "belong to the 'white race.' " 213 F. at 356, 366–67.

TABLE 3
Racial Prerequisite Cases, 1923–1944

Case	Holding	Rationales
Sato v. Hall 191 Cal. 510 217 Pac. 520 (1923)	Japanese are not White.	Legal precedent

TABLE 3 *Continued*

Case	Holding	Rationales
United States v. Akhay Kumar Mozumdar 296 F. 173 (S.D.Cal. 1923)	Asian Indians are not White.	Legal precedent
United States v. Cartozian 6 F.2d 919 (D.Or. 1925)	Armenians are White.	Scientific evidence Common knowledge Legal precedent
United States v. Ali 7 F.2d 728 (E.D.Mich. 1925)	Punjabis (whether Hindu or Arabian) are not White.	Common knowledge
In re Fisher 21 F.2d 1007 (N.D.Cal. 1927)	Persons three-quarters Chinese and one-quarter White are not White.	Legal precedent
United States v. Javier 22 F.2d 879 (D.C. Cir. 1927)	Filipinos are not White.	Legal precedent
In re Feroz Din 27 F.2d 568 (N.D.Cal. 1928)	Afghanis are not White.	Common knowledge
United States v. Gokhale 26 F.2d 360 (2nd Cir. 1928)	Asian Indians are not White.	Legal precedent
De La Ysla v. United States 77 F.2d 988 (9th Cir. 1935)	Filipinos are not White.	Legal precedent
In re Cruz 23 F.Supp. 774 (E.D.N.Y. 1938)	Persons three-quarters Native American and one-quarter African are not African.	Legal precedent
Wadia v. United States 101 F.2d 7 (2nd Cir. 1939)	Asian Indians are not White.	Common knowledge
De Cano v. State 110 P.2d 627 (Wash. 1941)	Filipinos are not White.	Legal precedent
Kharaiti Ram Samras v. United States 125 F.2d 879 (9th Cir. 1942)	Asian Indians are not White.	Legal precedent
In re Ahmed Hassan 48 F.Supp. 843 (E.D.Mich. 1942)	Arabians are not White.	Common knowledge Legal precedent
Ex parte Mohriez 54 F.Supp. 941 (D.Mass. 1944)	Arabians are White.	Common knowledge Legal precedent