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Yellow by Law

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INTRODUCTION

Over the past decade, scholars have paid increasing attention to Japanese American constitutional history.[1] For the most part, this literature focuses on the United States government's decision during World War II to intern people of Japanese ancestry. This body of work is designed to demonstrate the extent to which, and precisely how, the U.S. Supreme Court acquiesced in various aspects of internment—curfew, evacuation, and detention—and to reveal the continuities between that acquiescence and current legal doctrine and social practices.[2]

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1. *See* ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2001); Symposium, *Judgments Judged and Wrongs Remembered: Examining the Japanese Civil Liberties Cases on Their Sixtieth Anniversary*, 68 LAW & CONTEMP. PROBS. 1 (2005); Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 U. HAW. L. REV. 649 (1997).

2. *See* Dean Masaru Hashimoto, *The Legacy of* Korematsu v. United States*: A Dangerous Narrative Retold*, 4 ASIAN PAC. AM. L.J. 72 (1996); Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933 (2004); Eric L. Muller, *The Japanese American Cases—A Bigger Disaster Than We Realized*, 49 How. L.J. 417 (2006).

It makes sense to pay attention to the Japanese American internment, and to the Supreme Court's role in legitimizing what the government euphemistically referred to as "relocation centers."[3] Within the constitutional history of internment are important lessons about the racial work national security arguments can perform and about the role race plays in constituting American national identity.[4] More narrowly, engaging with the Supreme Court's jurisprudence on internment helps to reveal the relationship between the legal construction of race in judicial opinions and the existential realities of race in the social world.[5] Indeed, the experiences of people of Japanese ancestry in what Justice Owen Roberts referred to as "concentration camp[s]"[6] were, at least in part, the juridical effect of the legal construction of Japanese Americans as both foreign (regardless of their citizenship status) and unassimilable (regardless of their cultural practices). Put another way, in the context of Japanese American internment, people of Japanese ancestry became in life what the Supreme Court in effect rendered them in law—irreducibly foreign.

But one has to be careful not to overstate this claim, for the trope of the Japanese Americans as perpetual foreigners predates internment.[7] It has an earlier social, cultural, and doctrinal history. My aim in this Article is to explore another historical moment in which that trope figured in constitutional discourse: 1922. In that year, a Japanese American named Takao Ozawa attempted to persuade the Supreme Court that he was eligible for naturalization, and more particularly, that he was "white."[8]

Ozawa's argument was the direct result of a racialized immigration system. The Naturalization Act of 1790 restricted eligibility for U.S. citizenship to "any alien, being a free white person."[9] In the context of Reconstruction, and in part as a response to the antebellum holding in *Dred Scott v. Sandford* that blacks could not be citizens,[10] this act was amended to render "aliens of African

3. Korematsu v. United States, 323 U.S. 214 (1944).

4. *See* Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-*Hamdi *World*, 54 U. KAN. L. REV. 307 (2006); Jerry Kang, *Watching the Watchers: Enemy Combatants in the Internment's Shadow*, 68 LAW & CONTEMP. PROBS. 255 (2005); Eric L. Muller, *Inference or Impact? Racial Profiling and the Internment's True Legacy*, 1 OHIO ST. J. CRIM. L. 103 (2003); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

5. *See* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002) (exploring this idea with respect to Fourth Amendment law).

6. *Korematsu*, 323 U.S. at 226 (Roberts, J., dissenting).

7. For good histories of Japanese experiences in the United States see EAST ACROSS THE PACIFIC: HISTORICAL & SOCIOLOGICAL STUDIES OF JAPANESE IMMIGRATION AND ASSIMILATION (Hilary Conroy & T. Scott Miyakawa eds., 1972); DAVID J. O'BRIEN & STEPHEN S. FUGITA, THE JAPANESE AMERICAN EXPERIENCE (1991); PAUL R. SPICKARD, JAPANESE AMERICANS: THE FORMATION AND TRANSFORMATIONS OF AN ETHNIC GROUP (1996).

8. Ozawa v. United States, 260 U.S. 178 (1922).

9. Naturalization Act of 1790, ch. 3, 1 Stat. 103.

10. Scott v. Sandford, 60 U.S. 393, 404 (1856) ("We think [African Americans] are not . . .

nativity and . . . persons of African descent" eligible for naturalization.[11] Though there was some concern that this change might facilitate black emigration from the Caribbean to the United States, few people thought the numbers of such immigrants would be substantial.[12] In this respect, the recognition of "aliens of African nativity and persons of African descent" as eligible for citizenship was a symbolic gesture. The racial parameters of the revised Naturalization Act remained in place for more than half a century. It was not until 1952, two years before *Brown v. Board of Education*,[13] that Congress passed the McCarran-Walter Act, which eliminated race as a basis for naturalization.[14]

In the meantime, Ozawa, and other people of Japanese descent living in the United States, had to navigate this racialized legal landscape. Like other Asian litigants seeking to naturalize, Ozawa did not challenge race-based naturalization laws as being per se inconsistent with the United States Constitution. Instead, drawing on biological, social, and performative conceptions of race, Ozawa argued that he was white. Neither the Hawai'i District Court nor the Supreme Court agreed: both insisted that Ozawa was yellow by law. The basis for that conclusion and its implications for law's role in constructing race are key questions that this Article takes up.

More broadly, the Article articulates a civil rights history of *Ozawa v. United States*. Notwithstanding that *Ozawa* is one of a few cases in which the rights of people of Japanese descent were squarely before the Supreme Court, not a single law review article sets forth the case's legal, political, and social context. Consequently, we know very little about how Ozawa got to the United States, how his case reached the Supreme Court, and how he shaped the timing and substance of the litigation. Nor do we know how the lawsuit figured in, helped to constitute, and was itself constituted by the civil rights consciousness of the Japanese American community. Even less appreciated are the geopolitical concerns that shaped how the U.S. and Japanese governments responded to Ozawa's case as it journeyed through the courts and eventually received media attention.

This Article fills these gaps and sheds new light on the district court and Supreme Court opinions. I give a full telling of *Ozawa*'s story to demonstrate how both courts drew on popular and scientific sources of racial knowledge to conclude that people of Japanese descent were neither white nor Caucasian. More importantly, the Article shows that these opinions helped to make Ozawa

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and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.").

11. 8 U.S.C. § 359 (1875), *amended by* 8 U.S.C. § 1422 (1952).
12. SUZANNE MODEL, WEST INDIAN IMMIGRANTS: A BLACK SUCCESS STORY? 22 (2008).
13. 347 U.S. 483 (1954).
14. McCarran-Walter Act, 8 U.S.C. § 1422 (1952).

yellow. The inability of Japanese people to become citizens—their unnaturalizability—was not a *natural* fact but a *legally produced* reality. In other words, Takao Ozawa was not born yellow. He became yellow—at least in part by law.

Part I begins with a brief history of people of Japanese ancestry in the United States from the late nineteenth century to the Supreme Court's decision in *Ozawa v. United States*. As will become clear, that history intersects with and is shaped by Chinese immigration to the United States. Indeed, to a significant extent, anti-Chinese nativism was rearticulated and redeployed against the Japanese. The latter became the new "yellow peril"[15]—a construct that signified both Asian immigrants' supposed unwillingness and their perceived incapacity to assimilate. The fear of the Japanese as foreign and unfit for citizenship prompted exclusionary legislation and media hysteria in California. Presumably, these developments shaped how Ozawa experienced his years in San Francisco and might have pushed him to migrate to Hawai'i in 1906, from where he would litigate his right to naturalize.

Part II then turns to the district court litigation. After Ozawa's petition for naturalization was denied, what motivated him to file suit? By 1916, several district courts had weighed in on the question of whether people of Japanese ancestry were eligible for naturalization, and each answered that question in the negative. Upon what basis did Ozawa conclude that he could contest the dominant racial idea—namely, that people of Japanese ancestry were not white? At least part of the answer can be found in Ozawa's brief, which Ozawa authored himself. Surprisingly, scholars have paid little attention to this document. Yet, it is the clearest expression of Ozawa's voice: of how he conceived of his relationship to America; of how he understood the naturalization statutes; and of how he thought about the relationship between race and Japanese identity, on the one hand, and the racial categories white, black, and yellow, on the other. Despite Ozawa's efforts, though, the district court judge roundly rejected his petition for naturalization.

Ozawa's story could have ended here. After all, the conclusion that Ozawa was not white was unequivocal. Nevertheless, Ozawa determined to push on, appealing his case to the Ninth Circuit Court of Appeals. Part III of the Article looks at how Ozawa's case drew the attention of immigrant leaders who were looking for a test case. As lawyers for the Japanese American community took over Ozawa's representation, the arguments were shaped to build on preexisting civil rights initiatives to secure the right to naturalize.

Part IV then turns directly to the Supreme Court's opinion to explore how it confronted the question of Ozawa's racial identity. Significant here is the fact

15. *See* Erika Lee, *The "Yellow Peril" and Asian Exclusion in the Americas*, 76 PAC. HIST. REV. 537 (2007); Fred H. Matthews, *White Community and the "Yellow Peril"*, 50 MISS. VALLEY. HIST. REV. 612 (1964).

that nineteenth-century biologically-centered notions of race did not exhaust "scientific" thinking about race. In fact, by the early twentieth century, sociology had already emerged (albeit in a nascent form) as a field within which scholars contested the claim that race is biologically determined. W.E.B. Du Bois's now-classic, *The Philadelphia Negro*, helped inaugurate this tradition.[16] An empirically-driven project that explicitly positioned itself over and against "biological" notions of race, *The Philadelphia Negro* conceptualized blackness as part of a system of racial representation and stratification, not as a predetermined biological body. In part, Ozawa drew on this understanding of race to ask the Court to focus on his character, not on his formal racial classification.[17] His request fell on deaf ears. Instead, the Court focused on two key, and seemingly disconnected, sources of guidance in interpreting racial classifications: science and common knowledge. Part V discusses how this approach allowed the court to deem persons of Japanese ancestry ineligible for citizenship.

Part VI then explores the interdependency of common sense and science-based concepts in establishing and enforcing the racial parameters of the naturalization laws. To do so, it discusses not only *Ozawa* but also *United States v. Thind*,[18] which was decided one year after *Ozawa*. Together, these opinions created the doctrinal field out of which subsequent lower court naturalization cases would grow. In *White by Law*, the most significant treatment of the naturalization cases, Ian Haney López suggests that, in adjudicating the question of whiteness, courts moved back and forth between rationales based on common knowledge and rationales based on science, and that in *Thind*, the common-knowledge standard for determining whiteness carried the day.[19] Part VI offers a slightly different reading of the cases. It suggests that science and common knowledge are codependent: common-knowledge understandings of race often have their foundation in science. For example, during much of the Jim Crow era in the South, it was commonly understood—that is, a part of Southern society's common knowledge—that blood quantum determined one's racial identity. The social intelligibility of this idea is directly linked to nineteenth-century scientific notions of race and racial categorization. The one-drop rule is both a scientific idea and a product of common understanding.

Not only does common knowledge rely on science, it also helps to determine what we refer to as science. That is, what any given society comes to accept as science is a product of consensus and shared understanding. Science,

16. *See generally* W.E.B. DU BOIS, THE PHILADELPHIA NEGRO: A SOCIAL STUDY (Lawrence Bobo ed., Oxford University Press 2007) (1899).

17. Takao Ozawa, *Naturalization of a Japanese Subject: A Brief in re Ozawa Case Now Pending the Decision in the Supreme Court of U.S.A.* (brief printed for private circulation October 1922) (on file with author) [hereinafter Ozawa's Brief].

18. 261 U.S. 204 (1923).

19. IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (2006).

in other words, is socially constructed.[20] In this sense, it is a mistake to disaggregate, or delineate an oppositional relationship between, common-knowledge rationales and scientific rationales for whiteness. Science and common knowledge not only feed on each other, they create conditions of possibility for each other. Read together, *Ozawa* and *Thind* demonstrate this point.

Central to Part VI, then, is the idea that *Thind* relies on science even as it purports to repudiate it, and *Ozawa* relies on common knowledge even as it purports to privilege science. To the extent that after *Thind*, there exists a test for naturalization, it is perhaps best captured by this formulation: being Caucasian is a necessary but insufficient condition for whiteness. In other words, one cannot be white unless one falls within the "scientific" classification of Caucasian, but one's classification as a Caucasian does not necessarily render one white.

Part VII concludes by explaining why the *Ozawa* litigation history is important to contemporary discussions of race. The short answer is this: in addition to exposing the rhetorical strategies the Supreme Court employed to constitutionalize the notion of the Japanese as permanently and irreducibly foreign, *Ozawa* reveals the role that law plays in constructing race—its categories, social meanings, and existential realities.

I
PUSHED AND PULLED TO AMERICA?

Ozawa v. United States is a story about immigration that fits into, but also departs from, the larger story of Japanese people being "pushed" and "pulled" to America. A significant "pull" factor for Japanese immigration to the United States in the late 1860s was the labor shortage created by increasing hostility among white Californians toward Chinese immigrants. This hostility culminated in the 1882 Exclusion Act, which prohibited Chinese immigration and naturalization.[21] A significant "push" factor was the economic, political, and legal restructuring of Japan—that is, its emerging "modernization."[22] In the

20. I mean this in a relatively thin sense. In other words, I am not arguing that science is socially constructed all the way down. The argument I make is decidedly more modest—that science does not exist outside of but is itself shaped by broader social processes, the very social processes that produce our "common knowledge."

21. This is somewhat of an oversimplification in the sense that Chinese laborers were still very much present during the first wave of Japanese immigration. Indeed, "[t]he earliest Japanese Labor gangs were in direct competition with the remaining Chinese, and had to resort to wage cutting to get employment." ROGER DANIELS, THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION 8 (2d ed. 1977). The Chinese Exclusion act was renewed for another ten years in 1892 and extended indefinitely in 1904. LABOR IMMIGRATION UNDER CAPITALISM: ASIAN WORKERS IN THE UNITED STATES BEFORE WORLD WAR II 74 (Lucie Cheng & Edna Bonacich eds., 1984).

22. Masao Suzuki, *Selective Immigration and Ethnic Economic Achievement: Japanese Americans before World War II*, 39 EXPLORATIONS IN ECON. HIST. 254 (2002).

1880s, as a part of this restructuring, Japan reversed its non-emigration policy and geopolitical isolationism.[23] Moreover, the Japanese government promulgated laws designed to remove feudal lords from their lands; as a result, a large percentage of Japanese agricultural laborers were forced off plots that they had tended for years.[24]

Displaced Japanese farmers migrated first to the sugar cane plantations of Hawai'i,[25] with some moving to California to work in the citrus groves and vegetable fields.[26] Their numbers were relatively small at first, but by the time Takao Ozawa landed in San Francisco in 1894, several thousand Japanese émigrés were living in the continental United States.[27]

Born in the Kanagawa Prefecture on June 15, 1875, Ozawa was nineteen years old when he arrived in California.[28] What the precise push and pull factors were for him, we do not know. What we do know is that he graduated from Berkeley High School in Berkeley, California, and subsequently attended the University of California at Berkeley for three years before settling in what was then the territory of Hawai'i in 1906.[29]

It is hard to know how much anti-Japanese sentiment Ozawa experienced in San Francisco. After all, booming agribusiness enterprises initially welcomed the Japanese labor force.[30] Moreover, at the turn of the century, the Japanese were perceived to be less culturally and socially threatening than the Chinese. The claim that the Chinese were unassimilable was based in part on the notion that they lived in overcrowded and segregated "Chinatowns" and that the community was largely male. Moreover, the perception on the part of white Americans was that the Chinese conceived of themselves as temporary visitors rather than permanent residents of America.[31]

By and large, Americans did not perceive the first wave of Japanese immigrants in this way. Commenting on the American public's reaction to early Japanese émigrés, Roger Daniels observes that "[a] typical newspaper editorial pointed out that 'the objections raised against the Chinese . . . cannot

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23. *Id.* at 262.

24. Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, 45 (1998).

25. Am. Nat'l Biography Online: Ozawa, Takao, http://www.anb.org/articles/11/11-00960.html (last visited Jan. 1, 2009).

26. BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850-1990, at 27 (1993).

27. YAMATO ICHIHASHI, JAPANESE IN THE UNITED STATES 55 (1969).

28. Am. Nat'l Biography Online: Ozawa, Takao, *supra* note 25.

29. *Id.*

30. Suzuki, *supra* note 22; Aoki, *supra* note 24.

31. *See* Victor Nee & Herbert Y. Wong, *Asian American Socioeconomic Achievement: The Strength of the Family Bond*, 28 SOC. PERSP. 281 (1985); Steven I. Thompson, *Assimilation and Nonassimilation of Asian Americans and Asian Peruvians*, 21 COMP. STUD. SOC'Y & HIST. 572 (1979); *see also* KAZUO ITO, ISSEI: A HISTORY OF JAPANESE IMMIGRANTS IN NORTH AMERICA 908 (Schinichiro Nakamura & Jean S. Garard trans., 1973). *See generally* FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE (2002).

be alleged against the Japanese. . . . They have brought their wives, children and . . . new industries among us.'"[32] Like Ozawa, many in the Issei (first-generation) community evidenced a genuine interest in building a permanent life in America, an interest that manifested itself in a variety of assimilationist practices that Ozawa himself would invoke to describe his relationship to American values, norms, and institutions.[33]

America's acceptance of the Japanese was short-lived. Within the first decade of the twentieth century, people of Japanese descent would replace the Chinese as the new "yellow peril," a construct that "inscribe[d] on Japanese immigrants an image of disloyalty and allegiance to a threatening foreign military power."[34] But, in the meantime, there was no broad-based racialized movement against the early Issei arrivals.

A second reason to query whether Ozawa experienced significant racial hostility in San Francisco relates to the fact that he was not an agricultural laborer. Farm work became a significant (though certainly not the only) site for white and Japanese racial conflicts. In 1902, Oxnard business owners formed a labor contracting company whose "purpose was to undercut the independent Japanese labor contractors while at the same time lowering labor costs."[35] One year later, 500 Japanese and Mexican laborers organized the Japanese-Mexican Labor Association (JMLA) and led 1,200 workers on strike to demand that independent labor contractors be allowed to negotiate directly with producers.[36] The successful strike was supported by the Los Angeles County Council of Labor, which explicitly called for organization of the entire labor force, including the Japanese.[37]

Organized labor at the national level responded differently to the JMLA, largely because of the presence of Japanese laborers. The Mexican president of JMLA, J.M. Lizarras, petitioned the American Federation of Labor (AFL) to charter his organization, but AFL president Samuel Gompers agreed only on the condition that Japanese (and Chinese) laborers be excluded from membership.[38] Although the Mexican wing of the JMLA stood by Japanese workers, the organization could not survive without the charter.[39] More importantly, though, Gompers and the AFL called for the amendment of the 1882 Chinese Exclusion Act to include Japanese.[40] The AFL's official publication, *American Federationist*, explained the exclusionary policies as

32. DANIELS, *supra* note 21, at 3.
33. *See* Nee & Wong, *supra* note 31; ITO, *supra* note 31.
34. Aoki, *supra* note 24, at 47.
35. RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 198 (1989).
36. *Id.*
37. *Id.* at 199.
38. *Id.*
39. *Id* at 200.
40. *Id.*

follows:

> White workers, including ignorant ones and the newcomers from southern and eastern Europe, possessed qualities enabling them to join and contribute to the labor movement. They could be taught the fundamentals of unionism and would stand shoulder to shoulder with faithful workers . . . . Unable to be "assimilated," the Japanese could not become "union men."[41]

Because Ozawa was not a laborer, he would not have had firsthand experience with these labor battles. To what extent he was otherwise familiar with them is difficult to know. However, it is hard to imagine that when Ozawa departed for Hawai'i in 1906, he was unaware of the extent to which San Francisco had become openly hostile to the Japanese. In 1905, several events crystallized a growing anti-Japanese sentiment. Japan's defeat of Russia created a sense of geopolitical anxiety within the United States, an anxiety that California newspapers reflected by focusing on the still-emerging Japanese community in the state. The *San Francisco Chronicle* carried headlines like: "THE JAPANESE INVASION, THE PROBLEM OF THE HOUR," "JAPANESE A MENACE TO AMERICAN WOMEN," and "BROWN MEN AN EVIL IN THE PUBLIC SCHOOLS."[42] *The Examiner*, William Hearst's rival paper, ran stories framed with similar headlines.[43] In addition, the California state legislature unanimously passed a resolution requesting that the federal government restrict Japanese immigration, a measure heavily covered in the press.[44] The anti-immigrant Union Labor Party was enormously successful in local and county elections. In fact, "labor controlled the entire government of San Francisco, and it was the labor unions who most strongly opposed the influx of Japanese into California."[45] Representatives from different unions formed the Asiatic Exclusion League, which committed itself to anti-Japanese political organizing.[46] By the time Ozawa left California in 1906, people of Japanese descent had become increasingly vulnerable to public assaults at the hands of white San Franciscans.[47] This growing violence captured the attention of President Theodore Roosevelt, who deployed a federal investigator to San Francisco. The investigator found that the assaults were too frequent to be explicable on grounds other than race.[48]

If Ozawa did not notice the "anti-Japanese thunderclouds"[49] forming in

41. *Id.* at 198.
42. BILL HOSOKAWA, NISEI: THE QUIET AMERICANS 82-83 (1969).
43. DANIELS, *supra* note 21, at 25.
44. HOSOKAWA, *supra* note 42, at 83.
45. FRANK F. CHUMAN, THE BAMBOO PEOPLE: THE LAW AND JAPANESE-AMERICANS 26 (1976).
46. DANIELS, *supra* note 21, at 27-28.
47. CHUMAN, *supra* note 45, at 23.
48. DANIELS, *supra* note 21, at 33.
49. CHUMAN, *supra* note 45, at 17.

California, he would have been even more thoroughly unprepared for the impending racial storm: the San Francisco School Board's proposal to segregate the fewer than one hundred Japanese American students it served.[50] The controversy centered on an order issued by the San Francisco School Board on October 11, 1906, directing school principals to send Japanese children to "the Oriental school," a school to which Chinese students already had been assigned.[51] The school board's plan created a national and international crisis and was widely covered in the press. Prior to 1906, the federal government largely ignored political efforts by public figures in California, including Governor Henry Gage, to persuade Congress to pass legislation prohibiting Japanese immigration.[52] In response to the school board's segregation initiative, President Roosevelt dispatched Victor Metcalf, secretary of commerce and labor, to investigate. After failing to persuade the school board to rescind the segregation order, "Metcalf reported to President Roosevelt that it was hopeless to look for modification or repeal of the resolution."[53]

Nor was it clear that the courts would declare the resolution unconstitutional. Arguments that it violated an 1895 "most favored nation" treaty between the United States and Japan were less than compelling. For one thing, "the Treaty of 1895 did not contain a 'most favored nation' clause concerning education."[54] For another, even if such a clause were interpreted to be implicitly a part of the treaty, it did not follow that the school board had acted unconstitutionally. Under *Plessy v. Ferguson*, which endorsed "separate but equal" services and facilities, racial segregation was not inconsistent with the notion of equal rights under the law.[55] In other words, the mere fact that the Japanese American children were being forced to attend an "Oriental" school did not, without more, mean that they were being denied equal protection.

President Roosevelt was experiencing tremendous pressure from the Japanese government, pressure he knew he could not afford to ignore.[56] Nor could he ignore the anti-Japanese pressure from the West Coast. Feeling squeezed from all sides, Roosevelt initially "recommended to Congress that 'an act be passed specifically providing for the naturalization of the Japanese who come here intending to become American citizens.'"[57] Predictably, his

50. Nora M. Walsh, The History of Chinese and Japanese Exclusion 1882-1924, at 31 (Mar. 1947) (unpublished M.A. dissertation, Northwestern University) (on file with author).

51. TAKAKI, *supra* note 35, at 201.

52. *See* DANIELS, *supra* note 21, at 25; Aoki, *supra* note 24, at 46 n.31.

53. CHUMAN, *supra* note 45, at 25.

54. *Id.*

55. 163 U.S. 537 (1896).

56. *See* CHUMAN, *supra* note 45, at 24-28; Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 ASIAN L.J. 181, 206-07 (1998).

57. Jiuji G. Kasai, *The Relations Between Japan and the United States*, 54 ANNALS AM. ACAD. POL. & SOC. SCI. 260, 262 (1914).

recommendation engendered feelings of goodwill in Japan and widespread condemnation on the West Coast—in particular, from those on the San Francisco School Board. The California papers, moreover, "w[ere] almost unanimous in opposing the President's views."[58]

California's swift and overwhelmingly negative response to President Roosevelt's intervention forced him to rethink his approach to racial politics on the West Coast. Specifically, Roosevelt came to realize that California's public officials had to play an active role in managing what had become a national and international crisis.[59] To that end, he invited the Mayor of San Francisco, Eugene Schmitz, and members of the school board to Washington, D.C., to explore a variety of proposals he could present to Japan.[60] The seeds of the "Gentleman's Agreement" were planted in that meeting and grew in a series of subsequent negotiations between the President and Japan.

Under the Agreement, President Roosevelt promised not to support legislation restricting immigration from Japan and the Japanese government in turn agreed to restrict emigration of Japanese citizens to the United States.[61] Roosevelt was, however, authorized to curtail "Secondary Immigration," that is, Japanese immigration to the United States from Canada, Mexico, and Hawai'i.[62] The Japanese government was satisfied with this arrangement, as were the political leaders in California.[63] Indeed, when Congress passed the 1907 immigration bill (which included a provision authorizing the President to forbid secondary immigration to the United States), Mayor Schmitz commented "that the administration now shares, and that it will share, our way of looking at the problem, and that the result we desire—the cessation of the immigration of Japanese laborers, skilled or unskilled, to this country, will be speedily achieved."[64] The school board subsequently rescinded its segregation order.[65] The coda to all of this: on March 14, 1907, President Roosevelt issued an Executive Order specifically prohibiting Japanese immigration from Canada, Hawai'i, and Mexico.[66] Californians could tell themselves that they had effectuated Japanese exclusion. Japan could tell itself that it had prevented both the segregation of Japanese children and the passage of legislation barring immigration into the United States *from Japan*. A national and international crisis had been averted—for the moment.

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58. CHUMAN, *supra* note 45, at 28.
59. DANIELS, *supra* note 21, at 40-41.
60. *Id.*; TAKAKI, *supra* note 35, at 202.
61. DANIELS, *supra* note 21, at 41-44.
62. *Id.* at 41, 43-44.
63. *Id.* at 43-44.
64. TAKAKI, *supra* note 35, at 203.
65. *Id.* The order was rescinded only as to Japanese, not Chinese or Korean, schoolchildren.
66. Exec. Order No. 589 (Mar. 14, 1907), amended by Exec. Order No. 10,009, 13 Fed. Reg. 6,104 (Oct. 18, 1948), 3 C.F.R. 831 (1943-48).

By the time the dust from the San Francisco school board affair had settled, Ozawa was in Honolulu. Whether the foregoing events pushed him there is difficult to say; still, it is hard to imagine that Ozawa was oblivious to the growing anti-Japanese movement in San Francisco. By the end of 1905, the racial campaign against the Japanese had become something more than the "tail to the anti-Chinese kite."[67] White exclusionists had raised the anti-Japanese kite well off the ground, if not fully aloft.

Nor do we know the extent to which Ozawa's experiences as an undergraduate at Berkeley shaped his decision to leave the Bay Area. Ozawa likely was one of a few Japanese students at Berkeley during this time.[68] Interestingly, the Hearst family, whose newspapers were stoking anti-Japanese sentiment in California, was heavily involved in the rapid development of the Berkeley campus.[69] What impact that had on campus culture, we do not know. What we do know is that Ozawa did not graduate from Berkeley; he left after completing only three years.[70] However, this was not entirely unusual, given that graduation rates from the university at the beginning of the early twentieth century were only approximately fifty percent.[71]

Another possibility is that Ozawa was not pushed from San Francisco; rather, he might have been pulled to Hawai'i because he believed it was more racially tolerant than the mainland.[72] This does not mean that the Islands were

67. DANIELS, *supra* note 21, at 21 (commenting that "[i]n 1900 the anti-Japanese campaign . . . was mainly a tail to the anti-Chinese kite").

68. Berkeley did not start systematically collecting racial demographic data pertaining to its student body until the early 1970s. Email from David Radwin, Principal Analyst, Office of Student Research, U.C. Berkeley, to Emily J. Wood, Research Assistant, UCLA School of Law Library (July 20, 2007) (on file with author). There seems to be a similar paucity of information about the racial composition of Berkeley High at the time. An online exhibit in the U.C. Digital History Archive of the Bancroft Library entitled *The University of California at the Turn of the Century 1899–1900* makes no mention of the racial breakdown of the student body or faculty, and provides little insight into what life might have been like for minority students in general and Japanese students in particular. *The University of California at the Turn of the Century 1899-1900*, U.C. History Digital Archive (1999–2005), *available at* http://sunsite.berkeley.edu/uchistory/archives_exhibits/online_exhibits/1899/index.html. The exhibit does feature a number of photographs of students and faculty. The subjects of these photographs all appear to be of European-Caucasian racial derivation. In any case, there is not any discernible person of color depicted in the exhibit.

69. *See The University of California at the Turn of the Century 1899–1900,* University of California History Digital Archives, http://sunsite.berkeley.edu/~ucalhist/archives_exhibits/online_exhibits/1899/introp3.html ("The Phoebe Hearst Architectural Competition brought the name of the University of California before an international audience, and its grand plan guided the physical development of the Berkeley campus for decades."); *id.* at http://sunsite.berkeley.edu/~ucalhist/archives_exhibits/online_exhibits/1899/eventsp8.html ("The Hearst competition brought considerable attention to its new and inspiring vision for Berkeley's campus.").

70. Am. Nat'l Biography Online: Ozawa, Takao, *supra* note 25.

71. U.C. History Digital Archive, *supra* note 68.

72. William C. Smith, *Minority Groups in Hawaii*, 223 ANNALS AM. ACAD. POL. & SOC. SCI. 36, 40 (1942) ("Visitors to Hawaii characteristically comment on the friendly relations existing among the several ethnic groups.").

free of racial prejudice.[73] Instead, the "wholesome influence" of native Hawai'ians positively shaped, at least to some extent, how different racial groups interacted with one another.[74] When the Chinese first arrived in Hawai'i, for example, they were not met with the kind of "treatment experienced by their fellow nationals in California."[75] Furthermore, since modern Hawai'i always had a multiethnic, multiracial population, and interracial marriages were not uncommon in the Islands,[76] individual minority groups were never subjected to the kind of attacks faced by the Chinese, and later the Japanese, in California.[77] Given these conditions, Ozawa could have decided that Hawai'i was a better site than California to pursue his dream of becoming a naturalized citizen.

Whatever Ozawa's reasons for leaving California for Hawai'i, his departure occurred at the very moment when thousands of Japanese had begun to migrate in precisely the opposite direction—from the Islands to the mainland. In 1898, after Hawai'i became an American territory subject to the United States Constitution, Japanese people who labored under an abusive contract system were, at least in a formal sense, liberated.[78] Many chose to pursue job opportunities on the mainland. Employment agents from a number of West Coast industries aggressively sought out these workers.[79] Their recruitment efforts helped to produce a labor shortage on the Islands; the Hawai'ian legislature responded by charging the recruiters an annual fee.[80]

Ozawa's arrival in Hawai'i had no impact on this labor shortage. Ozawa worked as a sales clerk, not an agricultural worker; he was employed by one of the Big Five sugar companies in Honolulu, the Theo H. Davies Company. Ozawa would work there for twenty-three years.[81] It was his first and only job in Hawai'i.[82] Although the majority of Issei were farmers, it is not remarkable that Ozawa would end up with a job in sales. As successive generations of plantation workers acculturated in Hawai'i, the newest arrivals began as

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73. *Id.*

74. *Id.* at 40-41.

75. *Id.* at 41.

76. *Id.* at 42.

77. *Id.*

78. TAKAKI, *supra* note 35, at 149. When it became a United States territory, Hawai'i became subject to the Alien Contract Labor Act of 1885, ch. 164, § 1, 23 Stat. 332, which made it unlawful to "assist or encourage the importation or migration of any . . . foreigner[], into the United States [or] its Territories . . . under contract . . . to perform labor or service of any kind."

79. YUKIKO KIMURA, ISSEI: JAPANESE IMMIGRANTS IN HAWAII 14 (1988).

80. TAKAKI, *supra* note 35, at 140 (noting that even the Japanese Consul General in Hawai'i attempted to forestall the Hawai'i-to-mainland migration).

81. Harry N. Scheiber & Jane L. Scheiber, *Bayonets in Paradise: A Half-Century Retrospect on Martial Law in Hawai'i, 1941-1946*, 19 U. HAW. L. REV. 477, 524-25, 525 n.153, 549, 549 n.245 (1977).

82. Tomi Knaefler, *Battles and Brave Men to Remember Proudly*, HONOLULU STAR-BULL., Sept. 14, 1963 (on file with author).

laborers, but then moved into other sectors of the economy.[83] By the time Ozawa arrived in Hawai'i, the first generation of Issei already was beginning to leave farm work. Presumably, his educational background enabled him to ride this emerging wave of professional opportunities for people of Japanese ancestry.[84] As a result of these changes, by 1920 Japanese people were well-represented in the retail trades[85] as well as in service-oriented industries like auto repair[86] and building and carpentry.[87]

In short, Ozawa's experience in Hawai'i was simultaneously typical and atypical of other Issei in Hawai'i. It was typical in that he went there to work within the sugar industry, but atypical in that he worked in sales and not as a laborer. It was typical in that his story involved living in both Hawai'i and California, but atypical in that he moved from the latter to the former and not the other way around. And, as we will see from the rest of his life story, it was typical in that his children did not receive the benefits of Japanese-American schools, but atypical in that the reason for this was that he never sent them. It was typical in that he was a practicing Christian, but atypical in that his relationship to Christianity resided completely outside of the borders of Japanese norms or cultural practices. In this sense, Ozawa's story intersects with, but does not neatly trace, the histories of others in his demographic.

By the time Ozawa died in 1936, he had made Hawai'i his home. It was in Hawai'i that he met and married his wife, Masako;[88] it was in Hawai'i that he raised his four daughters and only son, who would die while serving in the U.S. military during World War II;[89] and it was in Hawai'i that he began his litigation journey to the Supreme Court, a journey paved in part by a brief Ozawa himself authored.

83. *See generally* KIMURA, *supra* note 79.

84. I am not suggesting that the Japanese who worked in professional or semi-professional settings experienced no discrimination. *See* Smith, *supra* note 72, at 43 (observing that after gaining entry to certain professions, people of Japanese descent "find barriers, some of them very subtle, to be sure, while their Caucasian classmates, protected by vested rights, move unopposed into the preferred positions").

85. TAKAKI, *supra* note 35, at 294.

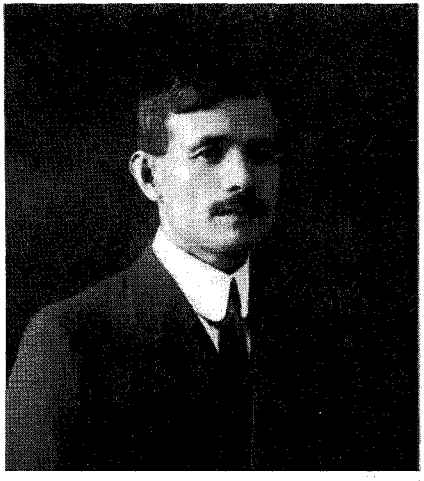
86. *Id.* at 295.

87. *Id.* at 299.

88. Knaefler, *supra* note 82.

89. *Id.*

II
THE DISTRICT COURT LITIGATION



A. White Like Me: Ozawa's Brief[90]

Surprisingly, scholars have paid very little attention to Ozawa's brief.[91] Most have focused almost entirely on a single paragraph of the thirty-page document. As best I can tell, no one has fully explicated, interrogated, or theoretically situated Ozawa's arguments. Perhaps this is because Ozawa's brief was filed at the district court level and was not, therefore, a part of the Supreme Court litigation. Perhaps the explanation is that, in terms of organization, the brief is a mess. The argument headings Ozawa employs do very little to discipline the claims sandwiched between them. Perhaps scholars have ignored the brief for a substantive reason, particularly the extent to which Ozawa's arguments are sometimes contradictory and other times little more than rhetorical gestures. Perhaps it is the simple fact that Ozawa authored the brief himself that accounts for its marginalization. Because Ozawa was not a lawyer, scholars, and especially legal scholars, have been disinclined to take his legal analysis too seriously.

Yet there is much to mine in Ozawa's brief. Notwithstanding its problems of organization and argumentation, the brief has a logic and thematic coherence to some of his analysis. As I will demonstrate, a careful reading of Ozawa's brief reveals two sets of interrelated claims. The first set focuses on the extent to which Ozawa had successfully assimilated into mainstream American society. The second addresses the role of race in determining who can be, or become, an American.

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90. Picture of Takao Ozawa. The Japanese American National Museum supplied and authorized the use of the image.

91. Ozawa's Brief, *supra* note 17.

1. "A True American"

According to Ozawa, "In name, I am not an American, but at heart I am a true American."[92] His narrative strategy described cultural and associational practices that delineated his attachment to America and his detachment from Japan. This part of his story is decidedly not about Japanese people as a racial group. It is about Ozawa and his relationship to American culture, values, and institutions. One might query, then, whether Ozawa's self-representation reflects his attempt to distinguish himself from the general assumption that people of Japanese ancestry are unassimilable. However, elsewhere in his brief, Ozawa expressly contested the idea that Japanese people lacked the willingness and the capacity to assimilate. Thus, it is more accurate to say that, in describing his social and familial life, Ozawa wanted to highlight his American credentials to shore up his *particular* claim to American citizenship, not to differentiate himself from or disidentify with other Japanese.

Ozawa begins his American story by proclaiming his loyalty and commitment to the United States. Unlike "General Benedict Arnold [who] was an American but at heart . . . a Traitor," Ozawa conceived of himself as a patriot, a "true American."[93] This dichotomy between "the traitor" and "the true American" would become particularly salient in the context of political and juridical discourses legitimizing the federal government's World War II internment of people of Japanese descent. But by the end of the first decade of the twentieth century, the dichotomy already had meaningful social traction, marking the Japanese as suspect in terms of American patriotism. Ozawa's invocation of Benedict Arnold challenged this suspect identity. His aim was not only to advance a claim that he had been and would continue to be loyal and patriotic to America, but also to make explicit that he considered it a part of his civic duty to give back to America, "to do something good to the United States before I bid farewell to this world."[94]

For Ozawa, the proof of his "true American" identity was in the pudding of his assimilation and, correlatively, his dissociation from Japanese institutions and cultural practices. Ozawa made much of his proficiency in English. Indeed, one of his arguments demonstrating his qualifications to be an American citizen was based on his fluency in English. Ozawa reasoned that:

> Section 8 [of the naturalization law] declares that no aliens shall hereafter be naturalized or admitted as a citizen of the United States who can not speak the English language; provided that the requirement of this section shall not apply to any alien who had, prior to the passage of this act, declared his intentions to become a citizen of the United States.[95]

92. *Id.* at 4.
93. *Id.*
94. *Id.*
95. *Id.* at 3.

Because Ozawa had declared such an intention, the English-language competency test for naturalization did not apply to him. Thus, he perceived himself to have far exceeded this threshold—to be "more qualified [to be a citizen] than required by law."[96]

In addition to his language skills, Ozawa stressed that he had educated himself in "American schools for nearly eleven years . . . [and resided] continuously within the United States for over twenty-eight . . . years."[97] During all of this time, he did not attend "any Japanese churches or schools."[98] Nor did Ozawa affiliate with any official Japanese institution. In fact, while the Japanese Consulate required all Japanese subjects to register with its office, Ozawa refused to do so. "I did not report my name, my marriage, or the names of my children to the Japanese Consulate in Honolulu."[99] However, "[t]hese matters were reported to the American government,"[100] which, to Ozawa, was an important signifier of his broader efforts to integrate himself formally into American society.

Moreover, Ozawa's family life was structured around American cultural practices and social norms. To begin with, "I chose as my wife, one educated in American schools . . . instead of one educated in Japan."[101] This is particularly significant because between the years 1907 and 1923, 14,276 picture brides came to Hawai'i from Japan.[102] In this sense, Ozawa's invocation of his wife's American education was evidence not only of *her* American socialization, but also of *his* choice not to participate in a cultural practice that was common among the Japanese in Hawai'i, picture-bride weddings.

Ozawa also stressed that, for the most part, he and his wife both "us[ed] the American [English] language at home."[103] As a result, Ozawa's children could not "speak the Japanese language."[104] And they did not, as Ozawa's daughter Edith Takeya explains, "have any Oriental friends. My neighbors were all Caucasian."[105] Ozawa's children were thus thoroughly disconnected not only from the Japanese language but from Japanese cultural institutions and peers.

This was not the way many Issei socialized their second-generation Nisei children. Consider, for example, Japanese-language schools. By World War I, Japanese-language schools were so prevalent in Hawai'i that anti-Japanese

96. *Id.*
97. *Id.*
98. *Id.* at 4.
99. *Id.*
100. *Id.*
101. *Id.*
102. KIMURA, *supra* note 79, at 142-43.
103. Ozawa's Brief, *supra* note 17, at 4.
104. *Id.*
105. DVD: Race: The Power of an Illusion, Episode Three: The House We Live In (California Newsreel 2003) (an online transcript is available at http://www.newsreel.org/transcripts/race3.htm) [hereinafter DVD: Race].

agitators invoked them as evidence that the Japanese were both unassimilable and disloyal.[106] As it turns out, "the language schools were generally unsuccessful in making their Nisei students fluent in Japanese."[107] Disinterested in the subject matter because of their cultural separation from Japan, "Nisei were more interested in English school than language school, and attended the latter only because their parents wanted them to."[108] Ozawa harbored no such desires for his children; he raised them in an English-only environment.

And he raised them as Christians, sending them "to an American Church and American School in place of a Japanese one."[109] His religious choices reflected broader trends in the Japanese community. Most Issei were Buddhists.[110] In fact, many of the early Japanese-language schools in Hawai'i were Buddhist institutions.[111] However, attendance at Buddhist religious services was sparse.[112] One religious leader of the era suggested that this was

> not [because of a] lack of believers of Hongwanji Sect . . . . It was due to self-humiliation because the immigrants were sensitive to the fact that they came to a Christian country. And earlier even Consul General [Taro] Andō and his consulate staff became Christian. Christians seemed to enjoy priority in everything. It appeared that only stupid people came to Hongwanji.[113]

Although subsequent efforts by Buddhist religious leaders inspired renewed interest in the overt and active practice of Buddhism, this move away from Buddhism mirrored the era's larger trend of Americanization in Hawai'i to replace old cultural values with new ones.

Notwithstanding Ozawa's deep interest in assimilation, his complete disassociation from Japanese institutions is somewhat curious. At least some Japanese organizations were explicitly committed to westernization. Consider, for example, the Japanese Association of America (JAA).[114] Formed in 1908,

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106. KIMURA, *supra* note 79, at 186-87.

107. *Id.* at 46.

108. *Id.* at 47.

109. Ozawa's Brief, *supra* note 17, at 4.

110. KIMURA, *supra* note 79, at 153.

111. Doremus Scudder, *Hawaii's Experience with the Japanese*, 93 ANNALS AM. ACAD. POL. & SOC. SCI. 110, 113 (1921).

112. *See* KIMURA, *supra* note 79, at 153-54.

113. *Id.* at 154 (quoting Honolulu Bishop Imamura).

114. Leaders in the Japanese community founded the Japanese Deliberative Council of America in San Francisco in 1900. Its official purpose was to "'expand the rights of Imperial subjects in America and to maintain the Japanese national image.'" Yuji Ichioka, *Japanese Associations and the Japanese Government: A Special Relationship, 1909-1926*, 46 PAC. HIST. REV. 409, 413 (1977). In an effort to expand its coverage of Japanese communities, in 1905 the Council held meetings with various representatives of Japanese communities across the United States. The result was the United Japanese Deliberative Council of America, formed in 1906, which again had San Francisco as its headquarters. The organization was soon, however, plagued by financial problems and internal strife; this led the Japanese Consul General, Chozo Koike, to urge community leaders to form the Japanese Association of America in 1908. *Id.*

the JAA was a bureaucratic agency that helped to ensure that Japanese immigration to the United States met the requirements of the "Gentlemen's Agreement." As a major voice in the Japanese community, the organization sought to mold the ideal immigrant through a moral improvement campaign for the Issei. This campaign was very much a westernization project, with its aim the abandonment of "traditional" culture for a more modern aesthetic.[115] This included the JAA's recommendation that Japanese women in America wear Western female clothing as opposed to *kimono* and *obi*.[116] In addition, the JAA sponsored the creation of a textbook which outlined the "gendered expectations" of Issei women and was distributed to picture brides in Tokyo before they came to the United States.[117]

The JAA also embarked upon an anti-gambling campaign in 1912.[118] The ostensible aim of the campaign was to curb the financial dispossession as well as the general moral degeneration of those Japanese who participated in the kind of gambling offered by the Chinese.[119] The deeper reason for the campaign can be found in the urge to decrease the numbers of Japanese falling into the "trap of Sinification" — the process by which a person could become yellow by association with the Chinese.[120] The basis for moral reform and modernization was rooted in the Japanese government's desire to prove to the West that the Japanese nation had the will and the capacity to modernize.[121]

Ozawa's investment in assimilation is not surprising, given that the Japanese government itself advocated assimilation with the help of Christian and Buddhist leaders alike.[122] Both communities invoked "historic allusions" to justify this Americanization project: Japanese citizens should engage in culturally assimilatory American practices as a function of their loyalty to Japan.[123] The agenda was to be carried out by Japanese subjects, who would be made to bear the burden of proving their modernity.[124] It is unclear whether Ozawa would have experienced the JAA's goal of "proving modernity" as a burden. Ozawa conceived of himself as a picture of modernity—and he willingly placed himself in that frame in the hope that others would see him that way as well. Yet, Ozawa likely would not have considered it *his duty as a Japanese subject* to present himself as modern. Acknowledging that sense of duty, after all, would have been tantamount to acquiescing to a nation-building

115. EIICHIRU AZUMA, BETWEEN TWO EMPIRES: RACE, HISTORY AND TRANSNATIONALISM IN JAPANESE AMERICA 50-51 (2005).
116. *Id.* at 50.
117. *Id.* at 53.
118. *Id.* at 48-50.
119. *Id.* at 47-48.
120. *Id.* at 48.
121. *Id.* at 47, 50-51.
122. *Id.* at 111-12.
123. *Id.* at 50-52.
124. *Id.*

project for, as opposed to dissociating from, Japan.

In hypothesizing Ozawa's relationship to modernity, I do not mean to suggest that modernization and assimilation are equivalent. They are not. However, with respect to people of Japanese descent, historically both modernity and assimilation have been part of the same discursive field, or what Edward Said refers to as Orientalism—a set of discourses that position the West and the East as oppositional dualities.[125] More particularly, Orientalism represents the West as modern, enlightened, and democratic and the East as archaic, primitive, and despotic.[126] The notion that the Japanese were unassimilable explicitly traded on this East/West polarity: only the subjects of modernity (that is to say, Western subjects) could assimilate; and Western subjects were, by definition, not Oriental. With this understanding of the East/West polarity, we can say that both Ozawa and the JAA were contesting Orientalism, albeit in their own different ways. The JAA's contestation sounded in arguments about modernity; Ozawa's sounded in the language of assimilation.

In fact, as the late Yuji Ichioka observed, "Ozawa was a paragon of an assimilated Japanese immigrant."[127] Seemingly, he had a sincere investment in and commitment to American socialization. It is hard to read the account Ozawa provides and not conclude that, in terms of his everyday life, he was already an American—a modern Western subject. Certainly, Ozawa thought that he had been "living like an American."[128] His deep hope was that the law would finally catch up with and formally legitimize that reality.

Ozawa framed his argument as just that—a hope, not a demand. The language of civil rights was nowhere to be found in his brief. His arguments were a gentle request made of the United States; he was "humbly asking for admission and recognition as a citizen,"[129] and nothing more. He employed the assimilationist facts of his own life, which he maintained were "absolutely true,"[130] in order to do so.

2. Race: Character, Contrast, and Color

In addition to contending that he had a "strong attachment to the United States,"[131] Ozawa presented arguments that more directly engaged race. Read together, the argument headings in his brief advanced the following three claims: (1) the Naturalization Act of 1790 was not a racial classification but

125. EDWARD W. SAID, ORIENTALISM (1978).

126. *Id.*; *see also* Volpp, *supra* note 4, at 1575 (drawing on Said to explain the treatment of "persons who appear 'Middle Eastern, Arab or Muslim'" in the aftermath of 9/11).

127. Yuji Ichioka, *The Early Japanese Immigrant Quest for Citizenship: The Background of the 1922* Ozawa *Case*, 4 AMERASIA J. 1, 11 (1977).

128. Ozawa's Brief, *supra* note 17, at 23.

129. *Id.* at 5.

130. *Id.* at 4.

131. *Id.*

rather a screening device for character; (2) the Japanese were white because they were neither black nor Chinese; and (3) while race and racial categories did not really exist, the Japanese were white based on the color of their skin. I discuss each argument in turn.

a. White on the Inside: Race as Character

Ozawa argued that the 1790 naturalization statute did not rely on a racial classification scheme. The term "free white person" was "used simply to distinguish black people from others."[132] For Ozawa, slavery was a normative racial baseline; the naturalization statute did no more than reflect this baseline and did not establish new racial classifications.

According to Ozawa, the existence of slavery did not call into question the racial bona fides of our Founding Fathers. However, a racial reading of the naturalization statute would do so by attributing racism to them. Ozawa specifically sought to avoid that attribution, which he believed would impose a dignitary harm not only on "the great founders of this great Union,"[133] but on the United States itself. He argued that, in offering a race-neutral interpretation of the naturalization statute, he was "[f]rom the bottom of [his] heart . . . defend[ing] the honor of this great Republic."[134]

That defense required Ozawa to engage another founding father of sorts, Johann Friedrich Blumenbach, who played an enormously important role in establishing the field of physical anthropology. In his third edition of *On the Natural Variety of Mankind*, Blumenbach set forth five categories of mankind: Mongolian, American, Malayan, African, and Caucasian.[135] Of these groups, the Caucasian, "[i]n general," Blumenbach declared to be the "most handsome and becoming."[136] Prior to Blumenbach's work, neither the word "race" nor the term "Caucasian" circulated in popular venues; by the mid-nineteenth century, both would be thoroughly normalized.

Under Blumenbach's classification system, the Japanese were Mongolian, not white. Ozawa understood this. He knew as well that, by the time he filed suit, the conceptualization of the Japanese as Mongolian had been instantiated in several lower court opinions.[137] He could not, therefore, proceed with an argument for Japanese naturalization without directly challenging Blumenbach.

His challenge to Blumenbach was threefold. First, Ozawa argued that

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132. *Id.* at 14 (emphasis omitted).

133. *Id.* at 18.

134. *Id.* (emphasis omitted).

135. JOHANN FRIEDRICH BLUMENBACH, ON THE NATURAL VARIETY OF MANKIND (3d. ed. 1795), *reprinted in* THE ANTHROPOLOGICAL TREATISES OF JOHANN FRIEDRICH BLUMENBACH 145 (Thomas Bendyshe ed. & trans., 1865).

136. *Id.* at 265.

137. *See In re* Young, 198 F. 715, 716-17 (W.D. Wash. 1912); *In re* Saito, 62 F. 126, 126 (D. Mass. 1894); and United States v. Louie Lee, 184 F. 651, 655 (W.D. Tenn. 1911).

Blumenbach's approach was an "abandoned scientific theory."[138] Second, according to Ozawa, Blumenbach's theory of racial "classification was . . . not generally known or current in the United States in 1790."[139] Thus, there was little reason to believe that the Congress relied upon Blumenbach's race-classification regime in passing the naturalization law. Third, Ozawa maintained that Blumenbach, along with other physical anthropologists, "without going out from Europe tried to classify the people living in different climates."[140] Blumenbach's work was therefore substantively and methodologically flawed and should have currency in neither law nor social policy. From Ozawa's perspective, then, it would be a mistake to invoke Blumenbach to support the claim that the term "free white person" in the naturalization statute was intended to operate as a racial classification.[141]

Ozawa's analysis did not end there. To further support the idea that the term "free white person" was non-racial, Ozawa compared that term to another: "any white person." He explicated the difference between these two terms by invoking, of all things, white eggs:

> Whenever we speak of white eggs, we mean the eggs having white shells. Hence the term "white" does not indicate any quality of eggs. It only designates the color of eggs. On the other hand, when we speak of "fresh white eggs" we mean newly laid eggs. A white eggs [sic] may or may not be fresh. But a fresh white egg must always be fresh, that is, of good quality. . . . Similarly, in the expression, "White Persons," the word "white" designates the color of the person, but not quality.[142]

The gist of Ozawa's argument was that the "true intent" of Congress in employing the term "free white person" was to make the content of a person's character—one's worthiness, not one's race—relevant for the purposes of naturalization. He argued that the term "free white person" was not synonymous with the racial category "Caucasian." Quoting Madison, Ozawa maintained that the fundamental criterion for naturalization was whether a person was "'worthy of mankind.'"[143] According to Ozawa, the claim that only people of European descent are "worthy of mankind" was both under- and over-inclusive:

> General Benedict Arnold was of European descent of a good family, but he became a traitor. Hence he was a person not wanted. On the other hand, Booker Washington was a poor black slave and was of African descent; but he had done a great deal of good to the United States, by uplifting the standard of his race . . . . Hence he was the

138. Ozawa's Brief, *supra* note 17, at 19.
139. *Id.*
140. *Id.*
141. *See* Blumenbach, *supra* note 135.
142. Ozawa's Brief, *supra* note 17, at 6-7.
143. *Id.* at 20.

person wanted by our founders . . . .[144]

What distinguished these two cases, Ozawa reasoned, was not race but character.

It should not be surprising that Ozawa turned to Booker T. Washington to make an argument about character. One can only speculate about the degree to which Ozawa was familiar with Washington's political life and social philosophy. However, given Ozawa's self-presentation as industrious, hard working, and committed to American values, it made perfect sense for him to invoke Booker T. Washington to make an argument about race and character. On several occasions, Washington publicly spoke out against the mistreatment of Japanese people. For example, in his address to the Fourth American Peace Conference, he expressed puzzlement at Americans' willingness to "humiliate" and "degrade" people of Japanese descent for practicing "our methods of industry and civilization."[145] The mistreatment of the Japanese, Washington argued, was "unworthy of our civilization."[146] In other contexts, Washington praised the Japanese and suggested that blacks could learn from the way in which these newcomers had made the most of opportunities in America. "The Japanese race," Washington noted, "is a convincing example of the respect which the world gives to a race that can put brains and commercial activity into the development of the resources of a country."[147]

Washington's respect for the Japanese is somewhat surprising. There was a real concern within the black community that Japanese workers would replace black labor; for some blacks, this generated feelings of "scorn" toward the Japanese.[148] But for Washington, the threat of black labor being supplanted by immigrant labor, both white and non-white, recommitted him to the idea of racial uplift: "hard work, acquisition of manual skills, establishment of small businesses and farms, and frugality; in short by pulling oneself up by the bootstrap."[149] For Washington, the success of immigrants in the face of economic hardship portended the success of African Americans. In an address

144. *Id.* at 20-21.

145. Booker T. Washington, Address at the Fourth American Peace Conference (May 1, 1913), *in* 12 THE BOOKER T. WASHINGTON PAPERS 173, 176 (Louis R. Harlan & Raymond W. Smock eds., 1982).

146. *Id.*

147. BOOKER T. WASHINGTON, PUTTING THE MOST INTO LIFE 33 (1906).

148. ARNOLD SHANKMAN, AMBIVALENT FRIENDS: AFRO-AMERICANS VIEW THE IMMIGRANT 38 (1982). This is not to say that blacks as a whole were against Japanese immigration. It might be fairer to say that they were somewhat ambivalent. Blacks were concerned about black economic opportunities (which engendered a certain level of resentment about Japanese immigration) and about the racialization of immigration policy to delimit Chinese and Japanese immigration (which engendered a certain level of sympathy). *See generally* David J. Hellwig, *Afro-American Reactions to the Japanese and the Anti-Japanese Movement, 1906-1924*, 38 PHYLON 93 (1977).

149. David J. Hellwig, *Building a Black Nation: The Role of Immigrants in the Thought and Rhetoric of Booker T. Washington*, 31 MISS. Q. 529, 548 (1978) (characterizing Washington's racial ideology).

to the Negro Business League in Chicago in 1912, Washington observed that "[i]f the Italians and Greeks can come into this country strangers to our language and civilization and within a few years gain wealth and independence by trading in fruits, the Negro could do the same."[150]

Significantly, Ozawa's discussion of Washington was not the only way in which blackness figured into his argument that the fundamental test for naturalization was character, not race. Blackness was also a part of a more specific claim about statutory interpretation. At the center of this claim was a question about the word "free": why did "free" remain a part of the term "free white person" when the naturalization statute was amended after the Civil War to make people of African descent eligible for naturalization?[151] If "free" was intended to function solely as a racial restraint on naturalization, there was no point in reproducing the term in the post-slavery amendment. For Ozawa, the explanation was obvious: The fact that "Congress did not strike out the term 'Free' from the law . . . prove[s] that it was not used to exclude only *slave black or white*,"[152] but rather, the term "free" was used to exclude people with bad character.

Ozawa advanced a similar argument with respect to the Chinese. According to Ozawa, Congress did not intend to prevent Chinese naturalization under the 1790 naturalization statute. Instead, almost a hundred years later, Congress had to pass the Exclusion Act, a "*special law prohibiting particular nationalities from naturalization.*"[153] This Act would not have been necessary if the 1790 law already foreclosed the Chinese from becoming citizens. The passage of the Chinese Exclusion Act, like the use of the term "free" in the amended naturalization statute, suggested to Ozawa that the chief purpose of the naturalization regime was not to draw racial lines, but to screen out undesirables.

Needless to say, Ozawa did not conceive of himself as an undesirable. On the contrary, he maintained that he was precisely the kind of person that America should desire: "I neither drink liquor of any kind, nor smoke, nor play cards, nor gamble nor associate with any improper persons. My honesty and industriousness are well known among my Japanese and American acquaintances and friends . . . ."[154] From Ozawa's perspective, his "good character" and respectable mode of living rendered him a "free white" person within the meaning of the naturalization statute.

Ozawa's analysis extended to all people of Japanese descent. In his estimation, they were free white people as well.[155] Indeed, according to Ozawa,

150. *Id.* at 540.
151. *See* Naturalization Act of Mar. 26, 1790, 1 Stat. 103, 104.
152. Ozawa's Brief, *supra* note 17, at 7.
153. *Id.*
154. *Id.* at 4.
155. *Id.* at 15.

"the only argument against the fitness of the Japanese for naturalization is their non-assimilability," an argument Ozawa considered "preposterous."[156] After all, the Japanese "have the greatest capacity for adaptation," so much so in fact that "[i]n art and literature, the criticism of the Japanese today is of abandonment of their ideas, and too easy adaptation of western methods."[157] Americans could not have it both ways, Ozawa implicitly suggested. That is, they could not, on the one hand, assert that the Japanese were "imitators" of culture, and, on the other, claim that they were "not capable of adapting . . . to our civilization."[158]

Ozawa drew on empirical evidence to demonstrate the extent of Japanese assimilation. He argued that Japanese people had a low crime rate (their "convictions are chiefly, like the Chinese, for gambling"[159]), they ran productive and successful businesses,[160] and they did not degrade labor by working for lower wages than whites.[161] Moreover, Japanese people "have high ideals of honor, of duty, of patriotism, of family life."[162] For Ozawa, these facts were irrefutable evidence that the Japanese were indeed assimilable.

Still, Ozawa was careful not to argue that the Japanese had fully assimilated into American society. Not only would such an argument have been difficult to sustain as a factual matter, but from Ozawa's perspective, there were at least two good reasons why one should not expect complete assimilation. The first reason related to racism, as illustrated by state antimiscegenation laws directed at the Japanese. Some people had argued that the extent of same-race marriages within the Japanese community was evidence that Japanese people had no interest in assimilating. According to one commentator:

> There can be no effective assimilation of Japanese without intermarriage . . . . The laws of some states forbid such marriages, but even where such marriages are permitted and encouraged, the Japanese themselves will not take advantage thereof. That is best demonstrated in Hawaii, where there is a great commingling of races; but the Japanese, comprising nearly half of the entire population of the Territory, and steadily increasing in number, maintain in wonderful degree their racial purity.[163]

Ozawa was aware of the currency of these claims and responded by invoking discrimination. His basic contention was that racial discrimination caused a

156. *Id.* at 27.
157. *Id.*
158. *Id.*
159. *Id.* at 28.
160. *Id.*
161. *Id.* at 27-28.
162. *Id.* at 27.
163. V. S. McClatchy, *Japanese in the Melting-Pot: Can They Assimilate and Make Good Citizens?*, 93 ANNALS AM. ACAD. POL. & SOC. SCI. 29, 29-30 (1921).

certain degree of racial insularity.

The relationship between discrimination and insularity could cut two ways. Ozawa saw racism as mitigating the significance of Japanese insularity. Twenty years later, however, the Supreme Court justified procedures for internment during World War II by citing racial isolation. Even if this isolation was in part due to discrimination, the Court saw it as a factor that the government could legitimately invoke to raise concerns about loyalty: to the extent that the Japanese had been mistreated in law and society, it would be rational for them to be disloyal.[164] Perhaps Ozawa anticipated this line of argument. For while he employed racism to explain the extent of intraracial marriages within the Japanese community, he also argued that, notwithstanding racism, Japanese people "do intermarry with whites, and the almost uniform testimony is that they have happy families and vigorous progeny, *preeminently American*."[165] Still, his broader point was that the existence of racial discrimination made some degree of non-assimilation inevitable.

Ozawa offered a second reason why the Japanese might not assimilate completely, namely, the fact that at least some cultural practices, "particularly . . . [with respect to] the women, are superior to our own."[166] Ozawa was not convinced that America's interests were served by requiring Japanese people to give up these "superior" cultural attributes. Importantly, in employing the language of superiority, Ozawa was not suggesting that the Japanese were infallible: "Of course, they have race prejudice."[167] But so does America: "How about our treatment of the black man in the south, or the Oriental in the west?"[168] Moreover, Ozawa argued, the Jews were prejudiced to a greater extent than the Japanese. Japanese racial prejudices are "nothing compared with that of the Jew," Ozawa insisted, and "we gladly welcome and protect [the Jews] even in foreign lands."[169] Furthermore, Jews "sit[] in the halls of Congress, in our highest courts, amongst our executives, in the marts of trade."[170] To Ozawa, it was illogical to use prejudice within the Japanese community as a basis for denying naturalization to people of Japanese descent. One's eligibility for naturalization should not turn simply on "[r]ace prejudice [which] will always exist,"[171] but on one's overall character and worthiness.

164. *See* Hirabayashi v. United States, 320 U.S. 81, 96-97 (1943).

165. Ozawa's Brief, *supra* note 17, at 27 (emphasis added).

166. *Id.* Ozawa did not provide a specific indication of how the cultural practices of Japanese women were superior to those of American women.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 28.

b. White by Contrast: The Japanese Are White Because They Are Neither Black Nor Chinese

Ozawa understood that in order to persuade a court that the Japanese were eligible for naturalization, he had to articulate a theory of whiteness. Assuming that "free" in the expression "free white person" spoke to character, a fundamental question remained: What was the signification of the word "white"? At first blush, Ozawa's answer appeared simple: the term "white" referred to people who were not black. Because the Japanese were not black, they necessarily were white. Ozawa supported this argument by referring to various state constitutions containing language which defined whiteness as the absence of a certain quantum of "African blood." Those provisions "sufficiently prove that the term 'White person' were [sic] used to include all persons other than black people."[172]

However, Ozawa understood that the rules of racial categorization were more complicated than that. Consider, for example, the Chinese. Were they black? If the answer was no, did their non-black identity, like the non-black identity of the Japanese, render them white? This would have been a difficult argument for Ozawa to make, not only because of the passage of the 1882 Chinese Exclusion Act,[173] but also because of a California case with which Ozawa was presumably familiar and which the Supreme Court would subsequently cite in adjudicating Ozawa's case: *People v. Hall*.[174] In that case, George W. Hall, a white man, was accused of murdering Ling Sing, a Chinese man. After a four-day trial, the jury found Hall guilty of murder and sentenced him to be hanged. Hall appealed his conviction, arguing that the trial court committed error when it permitted a Chinese witness to testify against him. A state law provided, in relevant part, that "No Black, or Mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man."[175] The government argued that, because the Chinese were not explicitly mentioned in the statute and because the Chinese were neither black nor mulatto nor Indian, the trial court properly admitted the testimony of the Chinese witness.

Writing for the California Supreme Court, Justice Hugh Murray disagreed. He found that, at least for the purposes of "our Constitution and laws," the Chinese were black because they were not white.[176] Underwriting Justice Murray's approach was the idea that the term "black" is both a specific identity (referring to the "American Negro") and a generic identity (referring to people who are not white). "The word 'Black' may include all Negroes, but the

172. *Id.* at 15.

173. Chinese Exclusion Act of May 6, 1882, ch. 126, 22 Stat. 58, repealed by Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.

174. 4 Cal. 399 (1854).

175. *See id.* at 399.

176. *Id.* at 404.

term 'Negro' does not include all Black persons."[177] More generally, "we understand [the term 'Black'] to mean the opposite of 'White,' and that it should be taken as contradistinguished from all White persons."[178] Under this analysis, the Chinese were black.

Importantly, this argument about Chinese blackness was different from claims about the "negroization of the Chinese"—that is, arguments that, in terms of moral worthiness, intellectual capacity, and social behavior, people of Chinese descent were like people of African descent.[179] While images of the "Negroid Chinese" circulated in California newspapers in the mid- to late nineteenth century, the California Supreme Court did not explicitly invoke such images in its reasoning. Its argument that the Chinese are black was not based on a comparative racial analysis, but on a generic understanding of blackness.

The court's generic approach to racial categorization did not stop at the borders of blackness; it also extended to the category "Indian," which was "to be regarded as [a] generic term[]."[180] In this respect, the Chinese were not only black, they were also Indian. The court reasoned that its "generic" approach to racial categorization was necessary to avoid "the most anomalous consequences . . . . The European white man who comes here would not be shielded from the testimony of the degraded and demoralized caste, while the Negro, fresh from the Coast of Africa, or the Indian of Patagonia, the Kanaka, South Sea Islander, or New Hollander, would be admitted, upon their arrival, to testify against white citizens in our courts of law."[181] For the California Supreme Court, there was "no doubt" that the Chinese were not white.[182]

Nor was the non-white racial identity of the Chinese in doubt to the Congress that passed the Chinese Exclusion Act. Ozawa understood this. Thus,

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177. *Id.* at 403.

178. *Id.*

179. Dan Caldwell, *The Negroization of the Chinese Stereotype in California*, 53 S. CAL. Q. 123 (1971).

180. *Hall*, 4 Cal. at 402. The court advanced two additional arguments that the Chinese were Indian. According to the court, when "[Christopher] Columbus first landed upon the shores of this continent, in his attempt to discover a western passage to the Indies, he imagined that he had accomplished the object of his expedition, and that the Island of San Salvador was one of those Islands of the Chinese Sea, lying near the extremity of India. . . . Acting upon this hypothesis, and also perhaps from the similarity of features and physical conformation, he gave to the Islanders the name of Indians, which appellation was universally adopted, and extended to the aboriginals of the New World, as well as of Asia." *Id.* at 400. "From that time, down to a very recent period, the American Indians and the Mongolian, or Asiatic, were regarded as the same type of the human species." *Id.* According to Justice Murray, the Chinese were Indian for another reason—both the Chinese and Native Americans were Mongolians. He based this claim both on the "similarity of the skull and pelvis" and on the overall physical appearance "of the two races." *Id.* at 401.

181. *Id.* at 402.

182. "There can be no doubt as to the intention of the Legislature, and that if it had ever been anticipated that this class of people were not embraced in the prohibition, then such specific words would have been employed as would have put the matter beyond any possible controversy." *Id.* at 405.

he knew that he could not sustain a claim that the Chinese were white because they were not black. He had to modify his theory of whiteness accordingly. And so he did. His argument that people who are not black are white contained an important proviso: the Chinese, by dint of the California Supreme Court and Congress having deemed them to be non-white, could not claim whiteness. This proviso was rooted in a more general principle: to the extent that the government expressly indicated in case law or a statute that a particular non-black identity was not white, members of that group lacked the racial standing to claim white identity. Ozawa explained that this principle described the racial bind of the Chinese: "[I]n 1882, Congress made a *special* law against the Chinese."[183] Ozawa referred to the Chinese Exclusion Act as a "special law" in part because he perceived it as a departure from the general rule that people who are not black are white.[184] But for the passage of this "special law," the Chinese could credibly claim whiteness. In fact, drawing on a 1911 edition of Century Dictionary, Ozawa noted that the Chinese were within one of the four categories of the white race—"Chinese—Yellowish White."[185] (The other categories were "Armenian—Pale White," "German—Florid or Rose," and "Italian—Brownish White."[186]) However, the passage of the Exclusion Act superseded this categorization.

The Japanese were differently situated. Unlike the Chinese, there was "not a law against any Japanese [barring them] from naturalization."[187] Ozawa explicitly argued that "until any special law be made against Japanese as it was made against the Chinese, all good Japanese who are faithful to the United States ought to be admitted under the existing law."[188] At the core of this analysis was the notion that to be black or Chinese was to be non-white. Accordingly, the Japanese were white not only because they were not black; they were also white (and hence eligible for citizenship) because they were not Chinese.

c. White on the Outside: "Yellowish White" and the "Transparent Pink Tint" (But There Are No Real White Persons as Such)

Ozawa expressly argued that, in terms of color, the Japanese are at least as white as the Chinese—"Yellowish White"—which, as mentioned above, was one of the recognized categories of whiteness.[189] But many Japanese were whiter than the "Yellowish White" baseline. For example, "[t]hose who live in central and northern part of Japan are much whiter than some of so-called white

183. Ozawa's Brief, *supra* note 17, at 7 (emphasis added).

184. Ozawa also focused on the Chinese Exclusion Act to argue that the term "Free White Person" in the naturalization statute was not intended to exclude any race from naturalization. *Id.*

185. *Id.* at 15.

186. *Id.*

187. *Id.* (emphasis omitted).

188. *Id.* at 15-16.

189. *Id.* at 15.

person [sic] in Hawaii."[190] Ozawa enlisted these descriptions of the Japanese phenotype to suggest that the category "white" could not and should not be limited to people of European descent.

At the same time, Ozawa argued that "there is not an absolutely white person existing on this earth."[191] This argument was both a descriptive and a theoretical claim. The descriptive claim was that, in a literal sense, there were no white (or yellow) people. Indeed, Ozawa suggested that because no one "existing on this earth" is literally white, "all so-called white persons must be, in fact, . . . more or less colored persons."[192]

Ozawa went on to point out that a person's skin color was a function of geography. Ozawa first considered people in Hawai'i, his new home. They "are becoming either darker or more brown than they were when they came here."[193] He then turned to the Jews. According to Ozawa, their phenotype was also determined by geography. "[T]he bulk of the Jews who have lived for centuries in Asia present predominently [sic] an Asian physical type. And European Jews are mostly of the anthropological type met with among European race."[194] For Ozawa, this proved not only that the Jews were not a race, but also that neither white people nor yellow people existed as such.[195]

At this point, Ozawa already had moved from a descriptive to a theoretical argument—that racial categories "are not stable." Drawing on the work of an unnamed academic, he argued that "[r]ace in the present state of thing [sic] is an abstract conception, a notion of continuity in discontinuity, of unity in diversity. It is the rehabitation of a real but directly inattainable thing."[196] For Ozawa, the fact that race was both unattainable and indeterminate rendered it an impractical basis for naturalization. The Japanese, he argued, "are composed of many races. . . . Among Japanese we will find many Europeans naturalized or born."[197] Race-based naturalization laws could not manage these and other complexities of identity.

One cannot help but wonder whether Ozawa had read Dean John

190. *Id.* at 17. (emphasis omitted). Ozawa's argument that the Japanese were phenotypically white occupied even more rhetorical space in the brief that Ozawa's attorney filed on his behalf to the Supreme Court. There, the attorney observed that "[i]n general, the Japanese are of lighter color than other Eastern Asiatics, not rarely showing the transparent pink tint which whites assume as their own privilege." Brief for Petitioner, Ozawa v. United States, 260 U.S. 178 (1922), *reprinted in* CONSULATE-GEN. OF JAPAN, DOCUMENTAL HISTORY OF LAW CASES AFFECTING JAPANESE IN THE UNITED STATES, 1916-1924, at 43 (1978 prtg., 1925). Furthermore, "[l]adies of distinction, who seldom go out into the open air without being covered are perfectly white." *Id.*

191. Ozawa's Brief, *supra* note 17, at 15.

192. *Id.*

193. *Id.* at 16.

194. *Id.*

195. *Id.*

196. *Id.* at 15.

197. *Id.* at 17.

Wigmore's 1894 *American Law Review* article on "American Naturalization and the Japanese."[198] Wigmore's point of departure was an argument that, for the most part, Americans were not resistant to Japanese naturalization:

> We may assume that no American is disposed to refuse to admit members of the Japanese nation to citizenship with us. That we should deliberately propose to rank as inferior to ourselves and unworthy of incorporation in our political society the members of a people to whom we and the whole civilized world have in the past quarter of a century become indebted for so much, implies an attitude of inflated conceit and ignorant prejudice of which there are no indications.[199]

While Ozawa did not expressly advance this particular claim, his arguments about the Chinese, about whiteness as a non-black identity, about the role of color in racial determinations, about the unmanageability of the category "white," and about the cultural contributions of the Japanese track several arguments that Wigmore advanced in his article. This is not to say that Ozawa's brief merely reproduced Wigmore's article. It assuredly did not. In fact, Ozawa's analysis departed from Wigmore's in two significant respects. First, Ozawa did not explicitly racially differentiate the Chinese from the Japanese. Wigmore spent considerable time doing exactly that. Indeed, one of his central claims was that "the Japanese nation has racially nothing to do with the Chinese."[200] Second, whereas Wigmore drew on modern anthropology to argue that "the term 'white' may properly be applied to the ethnical composition of the Japanese race,"[201] Ozawa's brief was suspicious if not critical of (even though to some extent it relies upon) racial designations based on science.

Of course, we cannot know for sure whether Ozawa in fact read Wigmore's article. Yet it would be surprising if he did not encounter this work in the many hours he spent in the Supreme Court Library in the Judiciary Building researching American naturalization laws.[202] At any rate, whatever the sources of Ozawa's arguments, they faced an uncertain reception in the federal courts. Ozawa's first hurdle was District Court Judge Charles Clemons.

B. Judge Clemons's Naturalization Quiz: Who Cannot Be Naturalized?

Although we know very little about Judge Clemons, what we do know is that he was no stranger to the issue of naturalization. Indeed, the very year he issued his opinion, he published *What An Applicant For Naturalization Should Know About Our Government: A Quiz on the Constitution of the United States, with a Few Questions on American History* in a pamphlet circulated by the

198. John H. Wigmore, *American Naturalization and the Japanese*, 28 AM. L. REV. 818 (1894).

199. *Id.* at 818.

200. *Id.* at 824 (emphasis omitted).

201. *Id.* at 827.

202. KIMURA, *supra* note 79, at 18.

Citizenship Education Committee of the Young Men's Christian Association of Honolulu.[203] Clemons's quiz contained questions that bore specifically on the naturalization process. The most relevant for our purposes was one that asked: "Who cannot be naturalized?" Among eight subparts, the answer included:

> (5) The Chinese.
>
> (6) Those not included within the following classes: (a) "white persons", (b) "aliens of African nativity and persons of African descent", or (c) persons not citizens who owe permanent allegiance to the United States and (are) residents of any State or organized territory of the United States." The class (c) has been held to include Filipinos and Porto [sic] Ricans and people of our other insular possessions.[204]

What did these answers portend for the Japanese generally and Ozawa specifically? Neither subpart 5 nor subpart 6 specifically mentioned the Japanese. Would Judge Clemons rule that, with respect to naturalization, the Japanese and the Chinese had the same racial standing because they were members of the same racial group? Alternatively, would he conclude that the Japanese were white? Or would Judge Clemons simply focus on the particularities of Ozawa's case—the extent to which Ozawa had internalized and practiced American cultural values and social norms—to grant Ozawa's petition for naturalization, without reaching the larger question of the appropriate categorization of the Japanese? The answer lies within his district court opinion.

C. The District Court Opinion: Yellow Is Yellow

After briefly reciting the facts of the case and particularly highlighting the extent and nature of Ozawa's assimilation, Judge Clemons framed the central question as whether the term "free white person" in the naturalization statute extended to people of Japanese descent. Relying on precedent and a number of racial treatises, Judge Clemons concluded that the Japanese were yellow, not white. Importantly, while Clemons spent little time on the questions of character that dominated Ozawa's brief, he made clear that his interpretation of the term "white" did not carry with it notions of superiority or inferiority. "Intelligent men, of course, agree with Dr. [William Elliott Griffis, a social scientist who had studied the Japanese] that the words 'Mongolian' and 'Oriental,' as mere epithets, can bear no sense of unworthiness or inferiority in

203. CHARLES F. CLEMONS, WHAT AN APPLICANT FOR NATURALIZATION SHOULD KNOW ABOUT OUR GOVERNMENT: A QUIZ ON THE CONSTITUTION OF THE UNITED STATES, WITH A FEW QUESTIONS ON AMERICAN HISTORY (1916). The pamphlet set forth questions on and answers to both American history and basic features of America's constitutional democracy: "Who discovered America, and when?" "What is the birthday of the American nation?" "How is the right to vote protected?" "How is freedom secured from class distinctions such as prevail in Europe, for instance?" "In what ways may a bill become a law?" "What is the Supreme Law of the Land?" *Id.* at 3-5, 7, 9.

204. *Id.* at 12.

the case of the Japanese people."[205] Furthermore, Clemons reasoned, worthiness as such was not the test for naturalization, as Ozawa had argued at length,[206] because Congress always understood "free" to be "the opposite of 'slave,'" not an expression of character.[207] For Clemons, both "free" and "white" were racialized terms. This was the way courts had construed them, and Congress had at least implicitly "acquiesced in and adopted the interpretation that the courts had put upon its own work."[208]

Judge Clemons's conclusion that race, not character, was the test for naturalization did not determine whether Ozawa was naturalizable. Was Ozawa of the right—which is to say, white—race? To answer this question, Clemons had to engage Ozawa's claim that he was white because he was not Chinese and because no federal statute had formally racially classified the Japanese as non-white.

Judge Clemons rejected this claim for two reasons. First, he argued that "yellow" or "Oriental" was a broad category to which both the Chinese and the Japanese belonged. In other words, yellow transcended the boundaries of Chinese identity. Second, Judge Clemons repudiated the reasoning of *In re Halladjian*.[209] In that case, Judge [Francis Cabot] Lowell had to decide whether Armenians were white. Lowell answered the question in the affirmative, arguing that the statutory meaning of the term "white" was broad, referring not exclusively to the "European" or "white" race, but covering as well "substantially all the people of Asia."[210] He reached this conclusion in part by reasoning that "the word 'white' ha[d] been used in colonial practice, in the federal statutes, and in the publications of the government to designate persons not otherwise classified."[211] Because Armenians were not otherwise classified, they were, under Lowell's formulation, white.

Lowell's analysis, which seemed to affirm Ozawa's argument that the Japanese were white, did not persuade Judge Clemons. He found that Judge Lowell placed too much reliance on the use of the words "white" and "black" in early census materials, when those classes were virtually the only ones present in the colonies (with the exception of indigenous peoples).[212] Judge Clemons then noted that even Judge Lowell admitted that "when the Oriental population, as represented first by the Chinese, came to be appreciable" in the late 1800s, "the word 'white' ceased to be used as a catchall to designate those

205. *In re* Ozawa, (D. Haw. 1916) (No. 274) *reprinted in* Appendix to Brief for the United States at 53, Ozawa v. United States, 260 U.S. 178 (1922) [hereinafter *District Court Opinion*].

206. *Id.* at 40.

207. *Id.* at 55.

208. *Id.*

209. 174 F. 834 (D. Mass. 1909).

210. *Id.* at 845.

211. *Id.* at 843. Recall that Ozawa made precisely the same claim. *See* Ozawa's Brief, *supra* note 17, at 7.

212. *District Court Opinion*, *supra* note 205, at 41.

people."[213]

According to Judge Clemons, other cases supported the finding that the statutory meaning of white was more limited than Ozawa maintained. Consider, for example, the Supreme Court's 1884 decision, *Elk v. Wilkins*.[214] There, the Court held that Indians were ineligible to naturalize because they were not white.[215] Judge Clemons further noted that in *Dred Scott*, Justice Roger Taney suggested that "'Congress might . . . have authorized the naturalization of Indians, because they were aliens and foreigners.'"[216] Rhetorically, Judge Clemons asked: "If Indians were excepted [from naturalization], then why not also races of the Orient, who though since found to be more adaptable to our manners and customs, were in earlier days regarded as strange peoples, of manners and customs incompatible with ours."[217]

Clemons then proceeded through a number of precedents and legal treatises that narrowly construed the statutory meaning of "white." First, Clemons cited Chancellor Kent's Commentaries:

> "The act of Congress confines the description of aliens capable of naturalization to 'free white persons.' . . . Perhaps there might be difficulties . . . as to the [classification of] . . . the yellow or tawny races of the Asiatics, and it may well be doubted whether any of them are 'white persons' within the purview of the law."[218]

Next, Clemons turned to a dictum from *People v. Hall*: "'the word "white" has a distinct signification, which *ex vi termini* excludes black, yellow, and all other colors.'"[219] Under the racial logic of *Hall*, the Japanese were yellow and, therefore, could not be white.

Clemons got the most mileage out of a long citation from the very first naturalization case, *In re Ah Yup*, where Circuit Judge Lorenzo Sawyer relied on a number of racial treatises to support the proposition that, notwithstanding the literal vagueness of the term "white person," "those words . . . have undoubtedly acquired a well-settled meaning in common popular speech, and . . . are constantly used in the sense so acquired in the literature of the country, as well as in common parlance . . . [to mean] a person of the Caucasian race."[220] Judge Sawyer's *Ah Yup* opinion concluded that Congress evidently did not intend to include in the term "white person" anyone other than individuals

213. *Id.*

214. 112 U.S. 94 (1884).

215. *Id.* at 104 ("Since the ratification of the Fourteenth Amendment, Congress has passed several acts for naturalizing Indians of certain tribes, which would have been superfluous if they were, or might become, without any action of the government, citizens of the United States.").

216. *District Court Opinion*, *supra* note 205, at 42 (quoting Scott v. Sandford, 60 U.S. (19 How.) 393, 420 (1856)).

217. *Id.*

218. *Id.* at 43-44.

219. *Id.* at 44 (quoting People v. Hall, 4 Cal. 399, 403, 404 (1854)).

220. *Id.* (quoting *In re* Ah Yup, 1 F. Cas. 223 (D. Cal. 1878)).

of the Caucasian race; moreover, Sawyer found "much in the proceedings of Congress to show that it was universally understood in that body . . . that [white] excluded Mongolians."[221] To substantiate the claim that the category "white" did not include people of Japanese descent, Sawyer relied on various racial taxonomies of the period.[222] In no ethnological division, Sawyer argued, was the "Mongolian" included in the term "white."[223] Judge Sawyer's analysis persuaded Judge Clemons that the Japanese, like the Chinese, were ineligible for naturalization.

Still, Judge Clemons understood that he had to respond directly to Ozawa's claim concerning the significance of the Chinese Exclusion Act. Recall that Ozawa maintained that the Act's passage argued in favor of—not against—granting naturalization to the Japanese. Ozawa's thinking was twofold: (1) that had Congress intended to prohibit Japanese naturalization, it would have done so expressly and (2) that Congress passed the Exclusion Act precisely because the Naturalization Act itself did not prevent Chinese naturalization.

Judge Clemons disagreed with both arguments. First, Clemons emphasized that *Ah Yup*, a case in which the court clearly stated that people of Chinese descent were ineligible for naturalization, was decided several years *before* the passage of the Exclusion Act.[224] Thus, even without the Exclusion Act, the judiciary already had indicated that the Chinese were not free white persons. Second, according to Judge Clemons, the promulgation of racial classifications (such as the Exclusion Act) that specifically identified the Chinese was due to their population growth and not to the fact that, prior to those classifications, Chinese people were considered white.[225] The implication of this reasoning for the Japanese was clear: the absence of legislation that explicitly mentioned people of Japanese descent did not mean that the Japanese were white, but rather that they were not yet sufficiently numerous to justify separate racialized attention.

Judge Clemons further supported his narrow interpretation of "white" by turning to a number of cases that specifically focused on the Japanese. In *In re Saito*, for example, Circuit Judge LeBaron Colt ruled expressly on the eligibility of the Japanese for citizenship.[226] According to Colt, the legislative history of the naturalization statute showed that "[C]ongress refused to eliminate 'white' from the statute for the reason that it would extend the privilege of naturalization to the Mongolian race, and that when, through

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

222. *Id.* at 223-24.

223. *Id.* at 224.

224. *District Court Opinion*, *supra* note 205, at 44. The Chinese Exclusion Act was passed in 1882, while *In re Ah Yup* was decided in 1878.

225. *Id.*

226. 62 F. 126 (D. Mass. 1894).

inadvertence, this word was left out of the statute, it was again restored for the very purpose of such exclusion."[227] At least three other cases were in accord.[228] Against this legal backdrop, Judge Clemons argued that "no reported case is known in which a person of the Japanese race has been naturalized, in which the court has rendered a written opinion to justify its ruling."[229] For Judge Clemons, the fact that about fifty people had previously "been naturalized by State and Federal Courts" was insufficient to overcome these precedents.[230]

Clemons could have stopped there. He went on, however, to reject Ozawa's claim that phenotypically speaking, the Japanese were as white as some European groups, making the legal concept of whiteness ambiguous and unreliable. The district court distinguished cases in which courts reasoned that the naturalization statute should be construed in light of recent developments rather than solely from the perspective of the framers' original intent.[231] As Clemons explained, "the decisions just referred to were dealing with borderline cases of races closely related to what may be loosely called the 'Europeans.'"[232] He reasoned that none of those cases involved people of Japanese descent because the ethnological divisions classifying the Japanese as "Mongolian or yellow race" guided both the 1875 legislature, which adopted the revised statutes, and the courts that interpreted it.

Clemons then discussed a number of other ethnological and anthropological authorities to support his racial theory. His analysis began with Blumenbach's work and, more particularly, with Ozawa's challenge to Blumenbach's racial taxonomy: "Even if, as the petitioner contends, Blumenbach's classification is unscientific . . . nevertheless, it has not yet been superseded so far as to assimilate the Japanese with what for many years . . . and especially before 1875, has been generally regarded as the 'white' race."[233] Next, Clemons looked to Tylor's *Anthropology* (1881) and the *Encyclopedia Brittanica* (11th ed. 1910) for the classification of the Japanese as Mongolian.[234] To make clear that the Japanese need not be "pure" Mongolian in order to still be non-white, Clemons cited Captain Frank Brinkley's *A*

227. *Id.* at 127.

228. Bessho v. United States, 178 F. 245 (4th Cir. 1910) (expressly holding that the Japanese are ineligible for citizenship); *In re* Knight, 171 F. 299 (D.N.Y. 1909) (denying naturalization to a person of both Japanese and Chinese ancestry based on the argument that neither Japanese nor Chinese were eligible for naturalization); *In re* Kumagai, 163 F. 922, 924 (W.D. Wash. 1908) (reserving the privilege of naturalization for "those of that race which is predominant in this country").

229. *District Court Opinion*, *supra* note 205, at 48.

230. *Id.* at 43.

231. *See, e.g.*, Dow v. United States, 226 F. 145 (4th Cir. 1915); *In re* Mudarri, 176 F. 465 (D. Mass. 1910); and *In re* Sakharan Ganesh Pandit (cited in *District Court Opinion*, *supra* note 205, at 48).

232. *District Court Opinion*, *supra* note 205, at 48-49.

233. *Id.* at 49.

234. *Id.*

History of the Japanese People, in which Brinkley noted that while there was "an element of white, Caucasian or Iranian, blood" in the Japanese, the Japanese were "essentially of the same race" as the Chinese and the Koreans.[235]

Presumably to bolster his argument that the Japanese were not white, Judge Clemons invoked the work of a "Japanese educator," Okabura Yoshisaburo, who published "The Life and Thought of Japan" in 1913.[236] Importantly, as cited by Clemons, Yoshisaburo's work itself reflected a nationalist, racist ideology of Japanese superiority by describing the early Chinese and Korean immigrants to Japan as "swarms" that "lost their own identity" in assimilating into a presumptively superior Japanese culture and people.[237] Although Yoshisaburo described "two distinct racial face types among the present Japanese," he cautioned readers to "remember[]. . . that both types are Mongol."[238] According to Judge Clemons, "[w]hether these [Yoshisaburo's] views just quoted are wholly accurate or not, I do not undertake to say. They are at all events in line with the statements of scientific works . . . ."[239]

Finally, Clemons turned to Dr. William Eliot Griffis's *The Japanese Nation in Evolution*. Clemons began by observing the length to which Griffis went "to demonstrate . . . that 'the Japanese people are not Mongolian.'"[240] However, Clemons concluded that despite Griffis's belief that the "basic stock of the Japanese people is Aino" ("a white race"), his findings ultimately supported the proposition that the Japanese are not "white."[241] According to Clemons, Griffis had acknowledged the presence of "the Mongolian element" in people of Japanese descent. Further, Griffis described the Aino people (and thus presumably the "presence" of Aino "blood" in the "Japanese stock") as having been "crowded out."[242]

At this point, Judge Clemons was one analytical move away from delivering his holding. But, before doing so, he distinguished "the Magyars of Hungary and . . . the very dark Portuguese, who are both freely admitted to citizenship, in spite of the fact that the former are Mongolic in origin and that the latter are in a strict sense of the word not 'white.'"[243] In the course of this discussion, Clemons cited *In re Mudarri*,[244] another opinion by Judge Lowell whose *Halladjian* decision the district court had roundly criticized. For Judge

235. *Id.* at 50 (quoting F. BRINKLEY, A HISTORY OF THE JAPANESE PEOPLE FROM THE EARLIEST TIMES TO THE END OF THE MEIJI ERA (1915)).

236. *Id.*

237. *Id.* (quoting OKABURA YOSHISABURO, THE LIFE AND THOUGHT OF JAPAN (1913)).

238. *Id.* at 51 (quoting YOSHISABURO, *supra* note 237).

239. *Id.*

240. *Id.* (quoting WILLIAM ELLIOT GRIFFIS, THE JAPANESE NATION IN EVOLUTION: STEPS IN THE PROGRESS OF GREAT PEOPLE 400 (1907)).

241. *Id.* at 52.

242. *Id.*

243. *Id.* at 53.

244. 176 F. 465 (D. Mass. 1910).

Lowell as for Ozawa, the entire system of racial classification came close to foundering on an absurdity: "Hardly anyone classifies any human race as white . . . classification by ethnological race is almost or quite impossible."[245]

Judge Clemons, however, viewed Lowell's *Mudarri* opinion skeptically. Relying again on the *Encyclopedia Britannica* and *Webster's Dictionary*, Clemons argued: "Centuries before our first legislation on naturalization, the Magyars had 'become physically assimilated to the western peoples.'"[246] Then somewhat summarily, Judge Clemons found that the Magyars "have long been 'one of the dominant people of Hungary' . . . and they, with the Portuguese . . . are within the meaning of 'white,' as commonly understood."[247] And that was that. Notwithstanding some non-white pedigree, the Magyars were white because they had "physically assimilated to the western peoples."[248] The Japanese had not performed that "physical assimilation," which, presumably, was to be distinguished from the cultural assimilation Ozawa described in his brief. In a seemingly conciliatory gesture, Judge Clemons was willing to concede that there might be some uncertainty as to the meaning of the word "white." But the remedy for that "lies, of course, with the legislative body."[249]

Judge Clemons was now ready to conclude. He ended, rather abruptly, this way:

> [T]he court finds that the petitioner is not qualified under Revised Statutes, section 2169, and must therefore deny his petition; and it is so ordered, in spite of the finding hereby made that he has fully established the allegations of his petition, and, except as to the requirements of section 2169, is in every way eminently qualified under the statutes to become an American citizen.[250]

Conspicuously absent from this conclusion were the terms "white" and "yellow." It was, however, precisely because Ozawa was the latter and not the former that he was outside of the racial borders of American citizenship.

D. Postscript: Judge Clemons's Final Words

Judge Clemons's opinion was not his last word on the matter. Subsequent to deciding the case, he wrote to the United States attorney of Hawai'i indicating that "[i]n my opinion in the Ozawa case, I might have added to the citation of Kent's Commentaries for the meaning of the word 'white', as understood early in the last century, the following from Francis Lieber's 'Legal and Political hermeneutics.'"[251] According to Lieber, "everyone knows [white]

245. *Id.* at 467.
246. *District Court Opinion*, *supra* note 205, at 54.
247. *Id.*
248. *Id.*
249. *Id.* at 55.
250. *Id.* at 55-56.
251. Letter from Charles F. Clemons, United States District Court Judge, to S.C. Hunber,

is used to indicate the decendants [sic] of the Caucasian race, whose blood has remained unmixed with that of Negroes, Indians or that of any other colored race. The provision cannot be invalidated by the objection that no really white people exist."[252] In Judge Clemons's view, "Doctor Lieber's international eminence as a jurist gives great weight to this as an authority in support of my decision."[253]

None of this is to say that Judge Clemons was unsympathetic to Ozawa's case. "It is indeed a pity," Clemons was reported to have said, "that a man so eminently qualified, morally and intellectually, may not become one of us. I cannot speak too highly of the briefs he has prepared. They evidence more originality, more thought, more thoroughness than many of the briefs of members of our bar."[254] There is reason to believe that Clemons was not being disingenuous. In an op-ed "inspired by the Ozawa case" entitled *Race Lines and Color Lines*, Clemons argued that "it is absurd . . . that a man must be either 'white' or 'of African nativity' . . . in order to become a naturalized citizen. And it is absurd, because there is really no such thing as a 'white' person."[255]

For Clemons, the legal predicament Ozawa found himself in was at least in part a function of the fact that the Japanese were misunderstood by the American public. In this sense,

> [i]t is a good thing for this Territory to have one of her own native people, or at least one of largely Hawaiian blood, as delegate to Congress, in order to educate the people of the mainland States to the fact that the native Hawaiians are not like the aborigines of Africa or the wild men of some of the Pacific isles.[256]

In Clemons's view, there was a relationship between how "mainland" Americans perceived native Hawai'ians, on the one hand, and people of Japanese descent, on the other.

Quite apart from this misunderstanding was the unmanageability of the naturalization regime. According to Clemons, because America was "so mixed racially . . . the statutory rule of eligibility to citizenship by naturalization [was] unworkable."[257] This was not a problem that the judiciary could fix, however: "The remedy for this anomaly lies with Congress."[258] And there was no good reason why Congress should "delay[] the radical cure of this international ill. How hypocritical so much prating about the 'international mind,' while

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United States Attorney for Hawai'i (Aug. 31, 1917) (on file with author).

252. *Id.*

253. *Id.*

254. Knaefler, *supra* note 82.

255. Charles Clemons, Editorial, *Race Lines and Color Lines: An Editorial Inspired by the Ozawa Case*, HONOLULU STAR-BULL., (date unknown) (copy on file with author).

256. *Id.*

257. *Id.*

258. *Id.*

retaining so much prejudice against mere radical 'color' as such!"[259]

III
FROM INDIVIDUAL STRUGGLE TO GROUP RIGHTS

Judge Clemons's adverse ruling did not end Ozawa's quest to become a naturalized citizen. He was determined to push on. What Ozawa could not have known was that his efforts would intersect with a broader political struggle within the Japanese American community to advance its members' civil rights. Arguments against Japanese naturalization figured into anti-Japanese agitation as early as the 1900s, but the issue did not come to a head until the San Francisco School Board affair. The resulting controversy prompted President Roosevelt to urge Congress to pass legislation granting naturalization rights to the Japanese.[260] Whether this proposal was an empty diplomatic gesture or an authentic demand for change, Roosevelt's "Gentleman's Agreement" with Japan ultimately settled the problem with the school board but left the question of naturalization unresolved. Efforts on the part of immigrant newspapers such as the *Nichibei Shimbun* and the *Shin Sekai* to keep the issue alive were largely unsuccessful.[261] Even the Japanese Association of America failed to prioritize Japanese naturalization. While the JAA explicitly made the right to naturalization a part of its organizational mission, ultimately the matter was "referred . . . to a study committee where it languished from want of action."[262]

It was not until 1913—after California passed the Alien Land Law of 1913,[263] which, among other things, prevented Japanese people from purchasing agricultural land—that Japanese naturalization became a significant political issue for leaders within the Japanese community.[264] Although the law contained a number of loopholes,[265] it remained an assault on the civil rights and dignity of the Japanese community. Because the prohibition applied to

259. *Id.*

260. TAKAKI, *supra* note 35, at 202.

261. *Id.* at 207.

262. Ichioka, *supra* note 127, at 5.

263. Act of May 19, 1913 (California Alien Land Law), ch. 113, §§ 1-8, 1913 Cal. Stat. 206-208 (1913).

264. The California legislature first debated laws aimed at limiting or denying land ownership by Japanese immigrants in 1907. TAKAKI, *supra* note 35, at 203. The bill introduced during this session was reintroduced over a period of several years and was finally adopted in 1913 by an overwhelming majority. While the law was facially neutral with respect to the Japanese, supporters of the legislation openly acknowledged its intended object. Under its terms, real property acquired by "aliens ineligible to citizenship" would escheat to the State following a successful escheat action brought by the state Attorney General. The law also limited leasehold arrangements to periods of not more than three years. *Id.* Similar laws were enacted in many western states as well as states reaching as far east and north as Louisiana and Minnesota, respectively. *Id.* at 206-07.

265. These loopholes allowed "aliens ineligible to citizenship" to place lands in trust for their American-born children; form corporations holding land; hold property in the names of American-born relatives; and renew leases after the maximum three-year period ended. *Id.* at 205.

"aliens ineligible for citizenship," the right to naturalize was the solution. On this point, there was consensus among Japanese newspapers, community leaders, and organizations.[266] The difficult question was how to push for naturalization rights. At least three options were available: (1) wait for Japanese diplomats to take the initiative on behalf of their nationals in the United States; (2) "lobby for Congressional legislation" allowing them to be naturalized; or (3) secure the right to naturalize through litigation in the Supreme Court in order to "get a final judicial ruling regarding their eligibility under existing statutes."[267] The last option seemed the most likely to get a favorable result because "[i]t did not hinge directly on either the initiative of Japanese diplomats or the state of American public opinion."[268]

The founding of the Pacific Coast Japanese Association's Deliberative Council in July 1914 played an important role in advancing the Japanese American community's interest in naturalization. The organization functioned as the "higher coordinating organ" of the central bodies of all other Japanese associations.[269] It "embrac[ed] at least all immigrants on the Pacific Coast and in the western states," plus Canada.[270] The Deliberative Council made clear in its very first meeting that its fundamental aim was to solve the naturalization problem, resolving that: "Whereas, recognizing the present urgency of solving the naturalization question, be it hereby resolved that a test case be instituted at an appropriate time in pursuit of the just legal goal of acquiring the right of naturalization for the Japanese."[271]

Politically and legally, Ozawa's case presented a real opportunity for the Japanese American community to pursue the issue. From a political standpoint, Ozawa was fully assimilated and his "character was beyond reproach."[272] In short, he was as racially palatable as a person of Japanese descent could hope to be in the eyes of the American public. His high degree of cultural assimilation meant that anti-Japanese agitators would be hard-pressed to attribute the trope of the perpetual foreigner to him. From a legal standpoint, "Ozawa fulfilled all the nonracial requirements for naturalization set by the Act of 1906."[273] In particular, an immigrant who wanted to naturalize had to file a petition of intent at least two years before filing a formal application—and Ozawa had filed his petition of intent twelve years prior.[274] Additionally, he met the requirements of five years of continuous residency, moral fitness, and knowledge of the English

266. *Id.* at 207.
267. Ichioka, *supra* note 127, at 7-8.
268. *Id.*
269. *Id.* at 9.
270. *Id.*
271. *Id.* at 10.
272. *Id.* at 11.
273. *Id.* at 11.
274. *Id.* at 11; Naturalization Act of 1906, ch. 3592, 34 Stat. 596 (naturalization of aliens) (repealed 1940).

language.[275]

At the district court level, Ozawa had represented himself without any backing from Japanese organizations or civic leaders. His quest for naturalization was a personal one, an individual struggle to become in law what he maintained he was in life—an American. But things were about to change. When Ozawa decided to appeal his case to the Ninth Circuit Court of Appeals, he hired David L. Withington as his counsel.[276] The appeal received a fair amount of attention in the press—at the precise moment that the Deliberative Council determined to look for a test case.[277] So extensive was the press coverage that Ozawa's daughter recalls wondering: "Ooh. What did he do? . . . I was kind of ashamed [of all the media attention]."[278] Part of this media frenzy included immigrant newspapers urging the Deliberative Council to support the case, arguing that the civil rights of the entire Japanese community were at stake.[279]

The Council discussed Ozawa's appeal in August 1916 but chose not to pursue it.[280] Then, on May 31, 1917, the Ninth Circuit referred the case to the Supreme Court.[281] Two months later, the Deliberative Council voted unanimously to assist Ozawa and appointed a four-man naturalization committee to plan a strategy.[282] The committee kept Ozawa's attorney but made clear that it was important to retain as principal counsel "a man familiar with the procedure of the Supreme Court and one who is recognized as a leader in his profession."[283] George W. Wickersham fit the bill. As the former U.S. attorney general, Wickersham had meaningful Supreme Court litigation experience.[284] Moreover, as a past president of the Japan Society and Chairman of the National Committee on American-Japanese Relations, he had relationships with several leaders within the Japanese community.[285] After the naturalization committee agreed to Wickersham's $1,000 retainer, Wickersham joined Ozawa's litigation team.[286]

Significantly, the naturalization committee decided to pursue Ozawa's litigation despite the fact that "Japanese diplomats were opposed unalterably to

275. Naturalization Act of 1906, ch. 3592, 34 Stat. 596 (naturalization of aliens) (repealed 1940).

276. Ozawa v. United States, 260 U.S. 178, 185 (1922).

277. Ichioka, *supra* note 127, at 13.

278. DVD: Race, *supra* note 105.

279. Ichioka, *supra* note 127, at 13.

280. *Id.* at 12-13.

281. *Id.* at 13.

282. *Id.*

283. Letter from K. Kanzaki to David L.Withington, Attorney for Takao Ozawa (Aug. 7, 1917) (on file with author).

284. *See* Letter from K. Kanzaki to George W. Wickersham, Attorney for Takao Ozawa (July 22, 1918) (on file with author).

285. *Id.*

286. *Id.*

the Ozawa case," which meant that the Council could not depend on the Japanese government for help.[287] From the Japanese government's perspective, the timing was simply not right; America was not ready to grant Japanese the right to naturalize.[288] Rather than pursue the matter in courts, the Japanese government thought it best to engage in an aggressive public relations campaign, one that would make Americans better understand Japan as a nation and the Japanese immigrants residing in the States as a community.[289]

At the same time, for political and diplomatic reasons, the U.S. federal government did not want the Supreme Court to issue an opinion. Indeed, Secretary of State Robert Lansing urged Solicitor General John W. Davis to delay the case until the end of the First World War. "Japan and the United States are co-belligerents in the present war, in which, as you know, Japan has given and is giving consistent and essential assistance to the common cause," wrote Lansing in a letter dated June 3, 1918.[290] When Solicitor General Alex King took over the case, he wrote to the secretary of state on February 3, 1919, to confirm the government's interest in delaying the litigation:

> From correspondence in the files I understand that last summer it was not the desire of the State Department nor the Japanese Embassy to have the case argued at the then approaching term of the Supreme Court; also that the Embassy had endeavored to bring some pressure upon the applicant to delay or abandon the case but that this had been unsuccessful.
>
> The Supreme Court will be in recess from today, February 3, until March 3, and this case will probably be reached within a week after the court reconvenes. I would be glad to be advised whether the State Department still thinks the argument of this in the Supreme Court and a decision from that tribunal undesirable under existing conditions.
>
> I do not know that a postponement can be obtained, but it will be my desire to endeavor to carry out the wishes of your Department in this matter as far as I properly can.[291]

Although the end of the war resolved one set of diplomatic concerns, it introduced another: America's interest in managing Japan's growing military power, especially Japan's increasing influence in the Far East. The worry was that a definitive answer from the Supreme Court on the question of Japanese

287. Ichioka, *supra* note 127, at 13-14.

288. *Id.* at 13.

289. *Id.*

290. Letter from Robert Lansing, U.S. Sec'y of State, to John W. Davis, U.S. Solicitor Gen. (June 3, 1918) (on file with author). "Moreover," Lansing continued, "the Japanese land question in California, which aroused considerable feeling in Japan, has not been definitely settled, and would, I fear, be opened, or at least a public discussion of it renewed if the Takao Ozawa case were argued in the Supreme Court." *Id.*

291. Letter from Alex C. King, U.S. Solicitor Gen., to Robert Lansing, U.S. Sec'y of State (Feb 3, 1919) (on file with author).

naturalization would complicate arms-control negotiations that were scheduled to take place between the U.S. and Japan in November 1921.[292]

While Ozawa's litigation team may not have been surprised by the American and Japanese governments' interest in delaying (if not derailing) the litigation, they may have been surprised by the opposition from a former ally—the *Nichibei Shimbun* newspaper, which lodged a legal objection based on a Supreme Court decision handed down after the Council decided to take over the case.[293] In *United States v. Morena*,[294] the Court upheld the constitutionality of a procedural provision of the 1906 Act that required that the petition of intent to naturalize be filed no less than two years, but no more than seven years, prior to the official petition to naturalize. Because Ozawa had waited twelve years, the Act presented a potential procedural obstacle to his case and the *Nichibei Shimbun* was reluctant to support a test case with such uncertain chances of success. Ozawa, however, was willing to assume that risk and refused to withdraw his petition.

But withdrawal and postponement were not the same thing. Wickersham thought it best to take the procedural issue seriously. He advised the committee to defer the case temporarily out of a concern that the Court would declare Ozawa's case moot (that is, not a live case or controversy) because it failed to meet the procedural requirement set forth in *Morena*.[295] Following Wickersham's advice, Ototaka Yamaoka, the head of the committee, looked for a second test case and found Takuji Yamashita and Hyosaburo Kono, two Japanese men who had been naturalized in 1902 in Washington. When they filed articles of incorporation to form a real estate company in 1921, the Secretary of State refused to accept their filing "on the grounds that the two men had not been naturalized legally and were unable consequently to form such a company under the laws of the state."[296] The Washington Supreme Court declined to issue a writ of mandate to compel the acceptance of the articles of incorporation, so Yamashita and Kono appealed to the U.S. Supreme Court.[297]

The case was brought as a companion case to *Ozawa* to expedite review; the moment Ozawa had been waiting for was now a little more than a year away. In November 1922, Ozawa would have his answer from the Supreme Court—and so would the rest of America: people of Japanese descent were not "free white persons" and therefore were ineligible for naturalization.

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292. *Id.*

293. Ichioka, *supra* note 127, at 14.

294. 245 U.S. 392 (1918).

295. Letter from George W. Wickersham, Attorney for Takao Ozawa, to K. Kanzaki (Oct. 31, 1918) (on file with author). Wickersham believed that the Supreme Court would "hold the [legal] questions . . . moot." *Id.*

296. Ichioka, *supra* note 127, at 16.

297. Yamashita v. Hinkle, 260 U.S. 199 (1922).

IV
THE SUPREME COURT LITIGATION

A. The Taft Court

At the time that Ozawa's case was heard, William Howard Taft was the Chief Justice of the United States Supreme Court. In this sense, *Ozawa* is part of the Taft Court's legacy, and any "discussion of . . . [this] legacy must begin with . . . Taft [himself]."[298] Because "[o]n the great constitutional questions of his day, . . . Taft displayed a generally consistent conservatism,"[299] his appointment as Chief Justice and the subsequent appointments of Justices Pierce Butler, Edward T. Sanford, and George Sutherland, who would write the *Ozawa* opinion, created within the Court an "insurmountable conservative majority" at a time when "conservative Republicans were safely in control of the executive and legislative branches of the federal government."[300] A strong believer in the Court's exercise of political discretion,[301] Taft's influence over the Court's jurisprudence during his tenure as Chief Justice was undeniable.

The Taft Court was comfortable engaging in judicial activism, particularly with respect to reviewing legislative enactments.[302] According to Alpheus Mason, "Taft considered the shaping of law to meet new situations the Court's 'highest and most useful function.'"[303] The Taft Court therefore has been characterized as a "Super-legislature."[304] One need only look at the number of federal laws and state statutes invalidated by the Court (12 and 131, respectively) to see this judicial philosophy at work.[305] At the same time, Taft also was suspicious of challenges to precedents. Mason notes that he harbored and "adhered to his conviction that sanctity of the judicial process is best

298. PETER G. RENSTROM, THE TAFT COURT: JUSTICES, RULINGS, AND LEGACY 183 (2003). According to Renstrom, Taft "dominated his Court for most of the decade," and "wrote almost 20% of his Court's opinions." *Id.* at 184, 186. Other scholars have noted, however, that "[p]itifully few of Taft's more than 250 opinions have survived as living presences in the law." Robert Post, *William Howard Taft*, *in* THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 457, 460 (Melvin I. Urofsky ed., 1994). However, because of his active role in buttressing the nominations of politically like-minded, conservative candidates after his appointment to the Court, Taft had an enormous influence on the composition of the Court itself. RENSTROM, *supra*, at 187.

299. SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 277 (Timothy L. Hall ed., 2001). This is not to say that this conservatism brought anything new to the table: Renstrom characterizes the Court prior to Taft's arrival as "already a conservative tribunal." RENSTROM, *supra* note 298, at 183. Taft's appointment, he posits, "reinforced this conservatism." *Id.*

300. RENSTROM, *supra* note 298, at 183. The author also notes that this "had the effect of marginalizing Holmes and Brandeis in cases in which the court was not unanimous." *Id.*

301. *Id.* at 185.

302. *Id.* at 187.

303. ALPHEUS THOMAS MASON, THE SUPREME COURT FROM TAFT TO BURGER 48 (3d ed. 1979).

304. *Id.* at 40-73 (using a term employed by Brandeis in Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 534 (1924)).

305. RENSTROM, *supra* note 298, at 187.

preserved by maintenance of a line of judicial precedents against challenge by both court and legislature."[306] While sometimes deferential to the "right of Congress to define the scope of its own power and to choose the means of carrying out its express powers into execution,"[307] his belief in the limits of national power was deeply rooted.[308]

"Taft's absorbing ambition was . . . to 'mass' the Court."[309] He brought a degree of collegiality to the Court, and "pressed hard for unanimity."[310] In this respect, perhaps it is not surprising that there were no dissents in *Ozawa*. Among others, Justices Louis Brandeis and Oliver Wendell Holmes joined the unanimous opinion of the newly appointed Justice Sutherland.

Sutherland was himself an immigrant to this country. Born in England, he arrived in Springville, Utah at the age of one after his father and perhaps mother had converted to Mormonism.[311] Like Ozawa, Sutherland's life was marked by hard work and accomplishment. Having left school at the age of twelve to earn a living, Sutherland entered Brigham Young Academy in 1879 "entirely as a result of his own industry and frugality."[312]

Prior to his appointment to the bench, Sutherland's career was largely in politics. This career provided some clues to the decision he would ultimately reach in *Ozawa*. In 1900, Sutherland won Utah's single congressional seat.[313] Before leaving for the capital, Sutherland gave an interview in which he discussed his likely stance on issues of interest to his constituency. Notably, Sutherland was committed to the extension of the Chinese Exclusion Act and to nativist economic protections:

> "The Chinese laborers, who would naturally come to this country[,] would be brought into unhealthy competition with our own laborers. We already have one race problem in the South with the negroes, and to open our doors to the unrestricted immigration of Mongolians would be to invite another and more serious race problem into the West."[314]

Despite the comments in this interview, Sutherland mostly focused on laissez-faire policies while in Congress. By the time he reached the Supreme Court, his conservative philosophy of government was well-entrenched, and ultimately earned him his appointment and record-speed confirmation to the

306. MASON, *supra* note 303, at 53.

307. *Id.* at 58-59.

308. *See* Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (invalidating a burdensome tax on the employment of children imposed to end child labor as an impermissible exercise of legislative power under the Tenth Amendment).

309. MASON, *supra* note 303, at 60.

310. *Id.* at 61.

311. *Id.* at 3.

312. JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 5 (1951).

313. *Id.* at 41.

314. *Id.*

Court.[315] After losing his Senate seat in 1916, Sutherland maintained his ties with Republican party officials.[316] He served as a confidential advisor to Warren Harding during his presidential campaign in 1920.[317] Although one scholar refers to Harding as "the man who has been universally regarded as [the presidency's] crassest failure,"[318] Sutherland's close relationship with Harding was fortuitous. On September 5, 1922, one day after Justice John Clarke withdrew from the bench, Harding nominated his friend to the Court; that same day, Sutherland was affirmed by the Senate.[319]

During his sixteen years on the bench, Sutherland drew on his earlier commitment to laissez-faire policies to become the intellectual leader of a group of conservative justices who consistently overturned social-welfare legislation.[320] *Ozawa*, however, was one of Sutherland's first opinions. After having been put on hold for several years, arguments in the case were finally held on October 3 and 4, 1922, less than two weeks after Sutherland arrived at the Court.[321] Though his conservative politics up to this point were clearly developed, there was little on record to indicate the nature of his jurisprudence. In particular, prior to *Ozawa*, there was almost nothing to suggest his likely take on the issues of race and naturalization.[322]

B. Sutherland's Opinion for the Supreme Court: White Skin Is Not White

Justice Sutherland began his opinion by sketching a brief biography of Ozawa, whom he described as "a person of the Japanese race born in Japan."[323] He then moved on to engage the central question the case presented: Whether Ozawa was a "free white person" within the meaning of the naturalization statute. Answering the question in the negative, Sutherland concluded that Ozawa was ineligible for naturalization.[324]

Like Judge Clemons, Sutherland rejected the claim that the 1790 naturalization statute was "employed . . . for the *sole* purpose of excluding the black or African race and the Indians then inhabiting th[e] country."[325] For

315. *Id. at* 87-100.

316. *Id.* at 98.

317. *Id.* at 105.

318. HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 185 (3d ed. 1992).

319. PASCHAL, *supra* note 315, at 111.

320. ABRAHAM, *supra* note 318, at 189.

321. *See* Ozawa v. United States, 260 U.S. 178 (1922).

322. Sutherland's later opinions were decidedly unfriendly to immigrants. Although people of Asian ancestry were most frequently the victims of Sutherland's brand of strict statutory interpretation, they were not alone. *See, e.g.*, United States v. Macintosh, 283 U.S. 605 (1931) (Canadian émigré). That said, Asians were most frequently the subject of Sutherland's alien and naturalization opinions. *See, e.g.*, Chung Fook v. White. 264 U.S. 443 (1924) (denying eligibility for citizenship to wife of native-born Chinese).

323. *Ozawa*, 260 U.S. at 189.

324. *Id.* at 198.

325. *Id.* at 195 (emphasis added).

Sutherland, the key issue was not one of exclusion but one of inclusion:

> The provision is not that Negroes and Indians shall be excluded, but it is, in effect, that only free white persons shall be included. The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified.[326]

Sutherland's claim that being white was the test for naturalization still triggered a crucial question: What were the criteria for determining who is white? According to Sutherland, "[m]anifestly the test afforded by the mere color of the skin of each individual is impracticable, as that differs greatly among persons of the same race."[327] This was true, Sutherland reasoned, even of the "Anglo-Saxon," whose skin color ranges "from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races."[328] In this sense, one could be dark in color and white in terms of race—and white in color and dark in terms of race. A test based on skin color therefore would produce "a confused overlapping of races."[329]

But if skin color was an unreliable guide to whiteness, did a workable standard exist? A careful reading of Justice Sutherland's opinion reveals three interrelated formulations:

> Formulation 1: "[t]he words 'white person' were meant to indicate only a person of what is popularly known as the Caucasian race."[330]

Here, Sutherland is relying both on science (by employing the term "Caucasian") and common knowledge (by employing the expression "popularly known as").

> Formulation 2: "The determination that the words 'white person' are synonymous with the words 'a person of the Caucasian race' simplifies the problem, although it does not entirely dispose of it."[331]

Here, Sutherland seems to be suggesting that there are potential pitfalls that will arise from equating the terms "Caucasian" and "white."

> Formulation 3: "The effect of the conclusion that the words 'white person' means a Caucasian is not to establish a sharp line of demarcation between those who are entitled and those who are not entitled to naturalization, but rather a zone of more or less debatable ground outside of which, upon the one hand, are those clearly eligible, and outside of which, upon the other hand, are those clearly ineligible for citizenship. Individual cases falling within this zone must be

326. *Id.*
327. *Id.* at 197.
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.* at 198.

> determined as they arise from time to time by what this court has called, in another connection, 'the gradual process of judicial inclusion and exclusion.'"[332]

Here, Sutherland makes clear that equating "white" with "Caucasian" does not create a definitive line for ascertaining who is and is not eligible for naturalization; instead, it creates "a zone of more or less debatable ground."[333] According to Sutherland, some cases are clear, though he does not explain why. Ozawa's is one of these: he "is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side."[334]

There is some slippage from the first formulation to the third. As I will show, paying attention to this slippage is crucial to understanding the relationship among race, science, and common knowledge not only in *Ozawa*, but in the only other naturalization case to reach the Supreme Court, *United States v. Thind*.[335] Decided in 1923, a few months after Ozawa, *Thind* is an important part of *Ozawa's* aftermath—as is *Webb v. O'Brien*, an Alien Land law case litigated that very year.[336]

V

OZAWA'S AFTERMATH: INELIGIBLE FOR CITIZENSHIP AND PROPERTY

Ironically, the *Ozawa* case not only cemented the racialized identity of the Japanese Americans but also subjected them to exclusionary treatment under purportedly race-neutral provisions. California's Alien Land Laws offer a particularly instructive example of the decision's pernicious effects. Recall that as early as 1907, the California legislature discussed the propriety and feasibility of passing legislation restricting the rights of people of Japanese ancestry to own land; six years later the legislature passed such a bill, prohibiting "aliens ineligible for citizenship" from owning real property in California.[337]

In two ways, these laws are an important part of *Ozawa's* constitutional history. First, but for the existence of a race-based naturalization regime, the regulatory effect of the Alien Land Laws on people of Japanese ancestry would have been minimal. Had the Supreme Court rendered people of Japanese ancestry "aliens *eligible* for citizenship," they would have been beyond the reach of these purportedly race-neutral restrictions. Second, one year after deciding *Ozawa*, the Supreme Court in *Webb v. O'Brien* upheld the Alien Land

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332. *Id.* (citing Davidson v. New Orleans, 90 U.S. 97, 104 (1877)) (citation omitted).
333. *Id.*
334. *Id.*
335. 261 U.S. 204 (1923).
336. 263 U.S. 313 (1923).
337. Act of May 19, 1913 (California Alien Land Law), ch. 113, §§ 1-8, 1913 Cal. Stat. 206-208 (1913). This act was intended both as a punitive measure and a limitation on the extent to which the Japanese could farm their own land.

Laws.[338] Together, these rulings locked people of Japanese descent out of an aspect of formal citizenship (naturalization) and one of citizenship's crucial social markers (property). In the absence of these exclusions, the project of Japanese American internment—which came more than twenty years later and which might itself be understood as a dispossession of both citizenship and property—would have been more difficult to sustain ideologically, politically, and jurisprudentially.

The *Ozawa* decision also laid the foundation for a narrow definition of whiteness. During the same year that the Court upheld the Alien Land Laws, it decided the case of *United States v. Thind*.[339] Dr. Bhagat Singh Thind was born in the Punjab region of India on October 3, 1892, into a Sikh community.[340] In August 1912, shortly before his twentieth birthday, Thind left India for the United States, where he hoped to become a spiritual teacher.[341] Like Ozawa, he attended the University of California at Berkeley, working during the summers to pay for his education.[342] When World War I started, Thind joined the United States Army and fought honorably until his discharge in 1918.[343] He applied for U.S. citizenship in 1920 in Oregon, and the district court granted his petition.[344] The Bureau of Naturalization appealed to the Ninth Circuit Court of Appeals.[345] As with Ozawa's case, the Ninth Circuit sent the case to the Supreme Court with the following question: "Is a high-caste Hindu, of full Indian blood, born at Amritsar, Punjab, India, a white person?"[346] This "question presented" could not have been more racially loaded.

Thind's oral argument was scheduled to take place on January 11, 1923, roughly two months after the Supreme Court decided Ozawa's case. According to Haney López:

> It must have seemed to Thind that he could not lose, for the Supreme Court itself had made Caucasian status the test for whether one was White, and every major anthropological study classified Asian Indians as Caucasians. In addition to the *apparent precedential value* of Ozawa, four lower courts had specifically ruled that Asian Indians were White, while only one had held to the contrary. Moreover, Thind was a veteran of the U.S. Army, and though he had served only six months, he perhaps thought that his service to the country, as well as

338. 263 U.S. 313.

339. 261 U.S. 204.

340. *Id.* at 210.

341. Doctor Bhagat Singh Thind, About Dr. Thind, http://www.bhagatsinghthind.com/index01.html (follow "skip intro"; then follow "Enter WebSite"; then follow "About Dr. Thind") (last visited Jan. 3, 2009).

342. *Id.*

343. *Id.*

344. *Id.*

345. Public Broadcasting System, Bhagat Singh Thind, http://www.pbs.org/rootsinthesand/i_bhagat1.html (last visited Jan. 3, 2009).

346. *Thind*, 261 U.S. at 206.

> the congressional decision to make citizenship available to those who had served in the military for three years, might favorably affect his case.[347]

While the preceding factors did indeed militate against finding that Thind was not white, the "apparent precedential value" of Ozawa was far from decisive in granting Thind's petition. True, Sutherland equated "Caucasian" with "white," but he made clear that, in terms of eligibility for naturalization, there was a "zone of debatable ground," not a sharp line of demarcation.[348]

Nothing in *Ozawa* suggested that Asian Indians were "clearly eligible" for naturalization. Indeed, one could reach just the opposite conclusion if by "white" Sutherland meant "what is *popularly known* as Caucasian," and by "popularly known" he meant common knowledge or broad public consciousness. Thind, of course, saw things differently. From Thind's perspective, *Ozawa* had opened the door to Asian Indian whiteness through Ozawa's heavy reliance on "scientific" racial classification schemes that had excluded the Japanese from the racial class of "Caucasian," but had included Asian Indians in that category. Thind believed that the Court would treat these scientific racial taxonomies as binding in defining whiteness; from his perspective, that was precisely what the Court had done in *Ozawa*.[349]

Sutherland, however, was not persuaded. He made clear that *Ozawa* had not treated "Caucasian" and "white" as synonymous terms: "[A]s . . . pointed out [in *Ozawa*], the conclusion that the phrase 'white persons' and the word 'Caucasian' are synonymous does not end the matter. It enabled us to dispose of the problem as it was there presented, since the applicant for citizenship clearly fell outside the zone of debatable ground on the negative side; but the decision still left the question to be dealt with, in doubtful and different cases, by the 'process of judicial inclusion and exclusion.'"[350] For Sutherland, Thind's application was one of those "doubtful and different cases."

Significantly, Thind presented a "doubtful and different case" not only in terms of the bottom-line question of whether Thind was eligible for naturalization, but also in terms of whether he was Caucasian in the strict scientific classificatory sense. According to Sutherland:

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

347. HANEY LÓPEZ, *supra* note 19, at 88 (emphasis added).

348. *Thind*, 261 U.S. at 208.

349. *See* Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633 (2005) (discussing Giorgio Agamben's notion of "bare life" and how it relates to "inclusive exclusions").

350. *Thind*, 261 U.S. at 208.

> may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them to-day; and it is not impossible, if that common ancestor could be materialized in the flesh, we should discover that he was himself sufficiently differentiated from both of his descendants to preclude his racial classification with either.[351]

Although Ozawa had contended in his brief that racial taxonomies were unreliable, Sutherland did not credit this point until formal science appeared to be at loggerheads with the racial conclusion he sought to reach: that Asian Indians were not white. As he wrote, "The various [scientific] authorities are in irreconcilable disagreement as to what constitutes a proper racial division."[352] He then added:

> It may be, therefore, that a given group cannot be properly assigned to any of the enumerated grand racial divisions. The type may have been so changed by intermixture of blood as to justify an intermediate classification. Something very like this has actually taken place in India. Thus, in Hindustan and Berar there was such an intermixture of the 'Aryan' invader with the darkskinned Dravidian.
>
> In the Punjab and Rajputana, while the invaders seem to have met with more success in the effort to preserve their racial purity, intermarriages did occur producing an intermingling of the two and destroying to a greater or less degree the purity of the 'Aryan' blood. The rules of caste, while calculated to prevent this intermixture, seem not to have been entirely successful.
>
> It does not seem necessary to pursue the matter of scientific classification further.[353]

Here, Sutherland was not simply rejecting science; he was suggesting as well that science is a contested field in which, by some accounts, the "supposed" or "real" Caucasian roots of Asian Indians no longer grew. To put the point slightly differently, Asian Indians had intermixed their way out of their Caucasian ancestral ground. Consequently, they would be unrecognized by and unrecognizable to their "common [Caucasian] ancestor."

The broader point here is that Sutherland both repudiated scientific knowledge, on the one hand, and appropriated it, on the other. This is reflected in the very way in which Sutherland articulates his holding: "What we now hold is that the words 'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word 'Caucasian' only as that word is popularly

351. *Id.* at 209.
352. *Id.* at 212.
353. *Id.* at 212 (citations omitted).

understood."[354] In effect, this holding is a re-articulation of one of the ways in which he formulates whiteness in *Ozawa*: "[T]he words 'white person' were meant to indicate only a person of what is popularly known as the Caucasian race."[355] Both formulations include the term "Caucasian" and in both formulations that term is modified by a common knowledge signifier: "popularly."

Still, Sutherland understood that his holding in *Thind* begged a significant question: What precisely is "Caucasian . . . popularly understood"? He concluded that common knowledge dictated that Thind was not white because "[i]t is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white."[356] As a result, "the great body of our people instinctively recognize [Thind's racial difference] and reject the thought of assimilation."[357]

Sutherland then linked his reliance on common knowledge to the conditions surrounding immigration to the United States at the time Congress passed the naturalization statute:

> The immigration of that day [1790] was almost exclusively from the British Isles and Northwestern Europe, whence they and their forebears had come. When they extended the privilege of American citizenship to 'any alien being a free white person' it was these immigrants—bone of their bone and flesh of their flesh—and their kind whom they must have had affirmatively in mind. The succeeding years brought immigrants from Eastern, Southern and Middle Europe, among them the Slavs and the dark-eyed, swarthy people of Alpine and Mediterranean stock, and these were received as unquestionably akin to those already here and readily amalgamated with them. It was the descendants of these, and other immigrants of like origin, who constituted the white population of the country when section 2169, re-enacting the naturalization test of 1790, was adopted, and, there is no reason to doubt, with like intent and meaning.[358]

Because Thind was not among the Europeans who populated the country in 1790, he, like Ozawa, was ineligible for citizenship.

In the aftermath of the *Thind* decision, the government targeted Asian Indians for denaturalization. So aggressive was this campaign that, by 1924, at least sixty Asian Indians lost their citizenship.[359] Like the Japanese and the Chinese, they became aliens ineligible for citizenship—perpetual foreigners as a matter of law.

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354. *Id.* at 214-15.
355. Ozawa v. United States, 260 U.S. 178, 197 (1922).
356. *Thind*, 261 U.S. at 215.
357. *Id.*
358. *Id.* at 213-14.
359. HANEY LÓPEZ, *supra* note 19, at 91.

VI
THE RACIAL SCIENCE OF COMMON SENSE AND VICE VERSA: CRITICAL PERSPECTIVES ON *OZAWA* AND *THIND*

The existing literature on *Ozawa* and *Thind* often portrays the cases as adopting inconsistent approaches to racial classification. Haney López, a leading scholar on race and naturalization, contends that the Court in *Ozawa* "ran together the rationales of common knowledge, evident in the reference to what was 'popularly known' and scientific evidence, exemplified in the Court's reliance on the term 'Caucasian.'"[360] Because the Japanese were not scientifically classified as Caucasian, they could not be white under the naturalization law. He then suggests that Sutherland's conclusion that Asian Indians were not white is an about face, a "reversal"[361] because "[t]he Court in *Thind* repudiated its earlier equation in *Ozawa* of Caucasian with White."[362]

Haney López's account puts the point too strongly. His interpretation treats Sutherland's language in *Thind* as a concession—"albeit tangentially and without grace"—"that, as an Asian Indian, [Thind] was a 'Caucasian.'"[363] Although this is a perfectly plausible reading, the case also can be understood as evidence of Sutherland's difficulty in grappling with the question of whether Thind was Caucasian. In *Thind*, Sutherland struggled to reconcile, on the one hand, the indeterminacy and unmanageability of science ("[t]he various authorities are in irreconcilable disagreement as to what constitutes a proper racial division"),[364] and on the other, the ostensible determinacy and manageability of common knowledge (the "racial difference" of Asian Indians "is of such character and extent that the great body of our people instinctively recognize it").[365] To resolve this conflict, Sutherland distinguished between scientific views, which can be manipulated and distorted, and common knowledge, which offered clarity and certainty in interpreting the naturalization statute.

Read this way, *Ozawa* and *Thind* do not present us with two Justice Sutherlands—one (in *Ozawa*) who engages racial science and another (in *Thind*) who is indifferent to or unengaged by it. Rather, in both opinions, Sutherland puts racial science to work. In *Ozawa*, Sutherland employs science to reproduce and instantiate extant racial categories; in *Thind*, he draws on debates within science both to challenge the validity of racial taxonomies and to question whether, according to these taxonomies, Thind was undeniably Caucasian.

Sutherland's interest in science should not surprise us. After all, the

360. *Id.* at 79.
361. *Id.* at 92.
362. *Id.* at 89.
363. *Id.* at 88-89.
364. 261 U.S. 204, 212 (1923).
365. *Id.* at 215.

problem of racial classification is essentially epistemological: How do we come to know what is white and what is yellow, for example, and who gets to define what these words mean? The insistence on the "popular" formulation of the "common man" and the "ordinary" sense of the word "white" assumes that the meaning of these terms are self-evident and readily available to the members of Congress who enacted the naturalization law. Moreover, the emphasis on popular understanding already assumes its incompatibility with scientific formulations, which presumably are less commonly known, more varied in their tests and measurement of races, and less widely agreed upon.

This dichotomy between science and common knowledge is problematic. More specifically, it is ahistorical, arbitrary, and deceptive. It is ahistorical because it ignores the sociohistorical and sociolinguistic context within which "white" and "Caucasian," as European descriptors, emerged. It was not the idea of the common man, but the ideas of Blumenbach and his successors, the nineteenth-century physical anthropologists, that established once and for all different categories of people who exhibited ostensibly similar characteristics. At the same time, this emerging field of physical anthropology did not exist in a social, political, or historical vacuum. Instead, the "laws, hypotheses and theories of [racial] science 'necessarily reflect[ed] in large part the general non-scientific intellectual atmosphere of the time."[366] Some history of science scholars would go even further, describing science as an ideology.[367] In this view, "scientists go into their laboratories to meet the needs of society."[368] If we understand this to be so, the deployment of racial science was, at least in part, an effort to make sense of—and even legitimize—the physical anthropologists' own social world, a world within which differences had already been hierarchically marked.[369]

Of course, difference and hierarchy do not inevitably go together, notwithstanding that, historically, they have comfortably coexisted. Thus, the fact that—even before Blumenbach—the common white man could recognize differences in appearance between himself and an African does not dictate that any strictly "racial" identification would follow, or that this identification would take a hierarchical form. Both consequences are socially contingent, shaped by science, common knowledge, and the interaction between the two.

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366. D. Raghunandan, *Walking on Three Legs: Science, Common Sense, and Ideology*, SOC. SCIENTIST, Mar. 1989, at 92, 96 (quoting J. D. BERNAL, SCIENCE IN HISTORY 51-52 (1969)).

367. *See Id.* According to Raghunandan, science is an ideology in the sense that "the system of ideas in a society is to be understood as arising from, and acting upon, the social structure and as expressing the effort by society to understand, explain the relationship with nature and between people so as to at least sustain society as it is known." *Id.* at 96.

368. L. Guy Brown, *Social Nature of Science*, 55 SCI. MONTHLY 361, 365 (1942).

369. Because science emerged in the context of a culture where "war was already a cultural pattern; political and religious conflicts were well established; the idea of exploitation was not new [and] there were already ancient prejudices, hatreds and many misconceptions about life," these phenomena formed part of the "social life that was ready to be expressed through science." *Id.*

Understood in this way, the line between common knowledge and racial science is very much blurred because of the popularization of scientific terms and because of the role of nonscientific discourses and political projects in shaping race-based scientific inquiries.[370]

The dichotomy between science and common knowledge is arbitrary and deceptive because it obscures the fact that the project of racial classification—both inside and outside of the Supreme Court—is ultimately a normative one. Recall the popular definition of "white person" from *In re Young*, invoked in Clemons's District Court opinion:

> As commonly understood, the expression includes all European races and those *Caucasians* belonging to the races around the Mediterranean sea, whether they are considered as "*fair whites*" or "*dark whites*," as classified by Huxley, and notwithstanding that certain of the southern and eastern European races are *technically* classified as of Mongolian or Tartar origin.[371]

Clemons's very invocation of formal taxonomies to elucidate a common-sense interpretation of race belies any clear divide between scientific and popular spheres of knowledge. It is doubtful that people commonly made technical scientific distinctions between "fair" and "dark" whites, or that they drew precise geographical and ethnological parameters to define the white race—save, of course, that they were educated upon these matters by technicians like Huxley. In short, the commitment to common knowledge notwithstanding, the district court's estimation is far from being purely a product of widespread popular understandings.

Moreover, the focus in Clemons's opinion in *Ozawa* and later Sutherland's opinion in *Thind* on a pan-European conception of whiteness obfuscated the extent to which Southern and Eastern Europeans were not easily folded into white identity. The same can be said of Jews—even across lines of national origin. Americans had not by default perceived Europeans to be an undifferentiated mass of whiteness; on the contrary, the "common" American man made intra-European distinctions along a white/non-white axis, perceiving many European groups to be non-white. At different historical moments, though, these European groups became white by law. Indeed, their transition from exclusion to eventual assimilation has prompted numerous historical accounts of "How the Irish Became White" and "How Jews Became White."[372]

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370. *See* Michael Mulkay, *Knowledge and Utility: Implications for the Sociology of Knowledge*, 9 SOC. STUD. SCI. 63, 64-68 (1979).

371. *In re* Young, 198 F. 715 (W.D. Wash 1912) (emphasis added) (quoted in Brief for the United States at 26, Ozawa v. United States, 260 U.S. 178 (1922)).

372. *See, e.g.*, KAREN BRODKIN, HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA (1998); NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995). In this respect, John Tehranian is right to challenge the manageability of the common knowledge test. *See* John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817 (2000). His sense that Sutherland's account of

In short, contrary to the simplified accounts in *Ozawa* and *Thind*, not all Europeans were always white.

In fact, then, the common knowledge test was never an empirical investigation into what the "common man" (or the Congress that promulgated the naturalization statute) thought. Nor was this test unmediated by science. Despite the formal judicial wavering between *vox populi* and the voice of science in *Ozawa* and *Thind*, the epistemic foundation of these two discourses remained co-constitutive. That is, the validation and application of racial terms required the input—collaboration—of both the scientific community and laypersons.[373] Science was one of several "social habits" through which human nature and social organization (in this case, through racial classification), "in their interactive relationship, could become functional."[374] In truth, then, the Supreme Court's express repudiation of racial science could never be complete.

Nor could the Court's repudiation of the term "Caucasian" ever be complete. Consider, again, *Thind*, which, according to Haney López, marked the "end[] [of] the reign of the term 'Caucasian,'"[375] so that "[w]ith this decision, the use of scientific evidence as an arbiter of race ceased in the racial prerequisite cases."[376] I would say, rather, that *Thind* invited us to read the term "Caucasian" in two ways—in a formal scientific classificatory way (which I have suggested is mediated by common knowledge) and in a popularly understood way (which I have suggested is mediated by science). *Ozawa* relied on science that was confirmed by popular understanding; because Ozawa was not "Caucasian," Sutherland easily concluded that he was not white. *Thind* invoked common knowledge that was informed by but not subservient to science. This case was more difficult, however. Because Asian Indians were formally categorized as Caucasian, Sutherland had to ascertain whether that categorization comported with the popular understanding of "Caucasian," an inquiry that could never be cleanly disentangled from racial science.

Sutherland's reliance on "familiar" racial-classificatory regimes demonstrated that the law's racial epistemology was created by a combination of scientific and common knowledge: non-scientific people (including judges) engaged in the process of observation and knowledge production, but depended on physical group characteristics that were largely over-determined by scientific categories, theories, and terminology. Indeed, observing the body by

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immigration integration into whiteness is "revisionist" is persuasive. *Id.* at 826. Less persuasive is his claim that an accurate common knowledge test would utilize color, and that because *Ozawa* and *Thind* rejected a color test, "the common knowledge test never really triumphed." *Id.* at 827. Tehranian's reasoning here elides the extent to which anxieties about various groups (and particularly blacks) passing for white led the "common man" not to over-rely on physicality as a basis for racial categorization.

373. Brown, *supra* note 368, at 362.

374. *Id.*

375. HANEY LÓPEZ, *supra* note 19, at 90.

376. *Id.*

dividing it into physical characteristics—such as hair, facial features, and skin color—was a social practice derived at least in part from science, even if not recognized as such by Sutherland.

And we can see the influence of common knowledge on scientific knowledge as well. Sutherland made clear in *Thind* that "Caucasian" was not just a scientific term; it was "a conventional term,"[377] that "in this country, . . . by common usage has acquired a popular meaning, not clearly defined to be sure, but sufficiently so to enable us to say that its popular as distinguished from its scientific application is of appreciably narrower scope."[378] These two understandings of "Caucasian" allow for a more coherent doctrinal connection between *Ozawa* and *Thind*. Read together, these cases set forth a test for naturalization that might be articulated this way: Being Caucasian in a formal scientific sense is a necessary but insufficient condition for naturalization. While Ozawa lacked this necessary condition, for Thind it was insufficient. In no post-*Thind* naturalization case did a court grant naturalization to a person whose origins placed him outside the scientific borders of the term "Caucasian."[379]

This is not to say that *Thind* and *Ozawa* are thoroughly consistent with each other. They are not. Unlike *Ozawa*, *Thind*, as Haney López suggests, spent some time discrediting racial science.[380] Sutherland's discussion of the Aryan theory of race, for example, was scathing.[381] Moreover, whereas in *Ozawa* Sutherland rejected the idea of a color (and implicitly a physical difference) test for race, in *Thind* the notion of bodily difference performed significant racial work. For example, Sutherland found the Aryan theory of race problematic in part because

> [t]he term 'Aryan' has to do with linguistic, and not at all with *physical, characteristics*. . . . Our own history has witnessed the adoption of the English tongue by [millions] of negroes, whose descendants can never be classified racially with the descendants of white persons, notwithstanding both may speak a common root language.[382]

It was precisely this idea, that physical difference (specifically skin color) was a manageable basis upon which to make racial determinations, that Sutherland had rejected in *Ozawa*. In *Thind*, these phenotypical distinctions become dispositive and could not be overridden by assimilation, for instance, through acquisition of a common language. The contradictions and tensions between the *Ozawa* and *Thind* decisions should not blind us to their normative

377. 261 U.S. 204, 211 (1923).
378. *Id.* at 209.
379. HANEY LÓPEZ, *supra* note 19, at 90.
380. *Id.* at 94.
381. *Thind*, 261 U.S at 210-13.
382. *Id.* at 210-11 (emphasis added).

and doctrinal continuity, a continuity facilitated by the fact that both relied on common knowledge *and* racial science, even when they expressly disavowed one or the other. Both cases evidenced a negotiation, not a hard polarization, of popular and scientific categories of racial difference.[383]

CONCLUSION: THE LEGAL CONSTRUCTION OF RACE

The significance of *Ozawa v. United States* is not just that it evidences a judicial moment in which the Supreme Court employed both scientific and common knowledge to pave a racialized path to American citizenship, though scholars are right to note the importance of this dynamic. Nor does the case's significance lie solely in its role in creating a broader social web of racially-based exclusion within which people of Japanese descent were caught. Another significant reason for paying attention to *Ozawa* is that it helps, particularly when discussed alongside *Thind*, to make concrete an argument critical race theorists have advanced for more than two decades—namely, that race is a social construction and that the law plays a key role in that process.

In neither *Ozawa* nor *Thind* was the Court merely reflecting on and applying a set of preexisting criteria for racial classifications. Rather, in both cases, Justice Sutherland instantiated whiteness as a racial boundary and articulated a set of rules—about phenotype, about science, about common knowledge—that was to govern the policing of this border. These rules were not in the "nature" of things. They were socially contingent and, more particularly, the product of judicial agency. Understood in this way, Ozawa was not "naturally" non-white. His non-white identity was the effect of, and was endogenous to, a set of juridical moves. The same, of course, is true of Bhagat Thind and his racial identity. These moves were never just about science, nor were they just about common sense. The construction of whiteness in *Ozawa* and *Thind* was about both.

Ozawa remains an enormously productive resource for critical race theorists. The case and its progeny are a clear window on the American legal construction of race. This legal construction is not just discursive—it is also material and ontological. In setting forth a test for whiteness, the *Ozawa* Court helped to create both a racial category and a racial people—or, in other words, both a racial classification and a racial experience. By the end of Justice Sutherland's opinion, Ozawa was not only non-white, he was also a non-

383. The debate over the respective roles of common knowledge and science in defining race does not exhaust the critical perspectives on *Ozawa* and *Thind*. For example, John Tehranian has argued that there is a performative element to whiteness in these cases. Tehranian, *supra* note 372, at 820. Although I agree that this is a significant dynamic in the naturalization cases, I also believe that no amount of "dramaturgy of whiteness" would have satisfied Justice Sutherland that either Ozawa or Thind was white. In fact, after *Thind*, it seems that the performance of whiteness mattered most in evaluating the claims of individuals with some credible claim to Caucasian identity.

citizen—irreducibly foreign. This race-making function of *Ozawa* is a critical part of its legacy.