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A Heritage of Bias: From Naturalization and Immigration Laws in the Late 19th to Early 20th Centuries to Contemporary Bias Against Muslims and Latines

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Part I describes the links between contemporary bias against Muslims and Latines and its historical roots. The groups whom Americans fear change, but the script is the same. The rationales for limiting who could be naturalized as American citizens and who could immigrate to this country in the late 19th and early 20th centuries are similar to the rationales given for discriminating today against Muslims and Latines. These reasons fall into two broad categories: empirically-identifiable traits which (presumably) made assimilation into American culture difficult if not impossible; and a normative conception of who should be Americans.

The legal embodiment of this heritage of bias can be traced to a 1790 federal statute stating that only free white persons could be naturalized. Initially, whites included the northern and western Europeans who were the bulk of the U.S. population in 1790. But the arrival of new immigrants from Ireland, China, Japan, India, and southern and eastern Europe between the middle of the 19th, and early decades of the 20th century put immense pressure on the legal definition of "white" as well as on the political response to changing immigration patterns.

Part II provides a brief review of the interpretive approaches that courts used to define "white" (textualism vs. intentionalism). Most important is the "functional textualist" approach to defining statutory language, because that allowed the historical text to adapt to new circumstances—in this instance to adapt "white" to include at least some new immigrants who were considered able to assimilate into American culture.

Part III of the Article describes the negative political and legal reactions to the arrival of different groups of immigrants. Those reactions emphasized the difficulty that these immigrants had in assimilating into American culture. Each of these groups endured negative stereotypes, but Asians were treated worse than Europeans. Unlike Europeans, Asians were denied the right to become naturalized American citizens and were prevented from immigrating into the United States because they were not white. By contrast, Europeans were always considered white and were never barred from immigrating, although they were subjected to severe quota restrictions.

Part IV compares the more favorable treatment of southern Italians with the less favorable treatment of Asian Indians, despite southern Italians faring no better and sometimes worse on criteria relevant to assimilation. A contributing factor in making this distinction was the assumption, associated with the eugenics movement, that Asian Indians were a different species who were genetically incapable of assimilating. But there was something else at work that disfavored Asian Indians—a normative judgment that the country should remain a homogenously white nation by favoring Europeans over Asian people of color.

The Article concludes with a reminder that restrictive assumptions about who can assimilate and who deserves to be an American persist. Bias against Muslims and Latines is simply the modern version of bias against Asian people. These patterns of thought are as embedded in the American psyche as the inclusive ideals that we profess. The hope of this Article is that remembering our history will give us a better

chance of attaining those ideals than simply bathing in the warm glow of a past that never was.

I. INTRODUCTION

A. Empirical and Normative Justifications for Bias

The contemporary bias against Muslims and Latines is not an aberration. The immigrant groups that Americans fear have changed, but the script is the same. As the following pages will reveal, the rationales for preventing those who could be naturalized as American citizens or who could immigrate to this country in the late 19th and early 20th centuries are strikingly similar to the reasons given by those who would now prevent immigration by Muslims and Latines.[1] These reasons fall into two broad categories—empirically identifiable traits, which were supposed to make assimilation into American culture difficult if not impossible, and a normative conception of who should be Americans.

Among the *empirical* traits are a propensity for crime, an association with disease, and a likelihood of being poor. First, there is the contemporary fear of criminal behavior by Muslims, stoked by then-presidential candidate Trump's claim that Muslims were dancing in the streets of New Jersey after 9/11.[2] The chosen remedy—a geographically-based exclusion of Muslims—is reminiscent of the 1917 Asiatic Barred Zone Act.[3] Similarly, Trump's campaign promises to prevent Latines immigration to the United States relied in part on their alleged propensity for crime; at Trump's campaign announcement in June 2015, he said that people crossing the Mexican border are "bringing drugs; they're bringing crime . . . ."[4] These fears are an echo of the fear of criminal behavior by different groups of late 19th and early 20th century immigrants.[5]

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1 Robert S. Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183, 1184–91 (2018) (comparing the Muslim ban to excluding Chinese and to Japanese internment); Kevin R. Johnson, *Trump's Latines Repatriation*, 66 UCLA L. REV. 1444, 1467–96 (2019) (comparing Trump's immigration enforcement policies to earlier Latines repatriation campaigns); Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV. 575, 578 & passim (2019) ("[W]hen situated within the history of immigration laws and policies in the United States, the current war against immigration diversity exhibits the Administration's broader goal of returning to pre-1965 immigration policies designed to maintain a "white nation.").

2 Jim Dwyer, *A Definitive Debunking of Donald Trump's 9/11 Claims*, N.Y. TIMES (Nov. 24, 2015), https://www.nytimes.com/2015/11/25/nyregion/a-definitive-debunking-of-donald-trumps-9-11-claims.html; s*ee also* George A. Martínez, *Law, Race, and the Epistemology of Ignorance*, 17 HASTINGS RACE & POVERTY L.J. 507, 530 (2020) (Trump links terrorist attacks and a Muslim ban based on the difficulty Muslims have in assimilating into Western culture).

3 The geographically-based exclusion of Muslims was upheld by the Supreme Court in *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (discussing Executive Orders 13769 and 13780). The Asiatic Barred Zone Act was adopted by the Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874, 875–78 (repealed 1952).

4 Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda* N.Y. TIMES (Dec. 24, 2017), https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html.

5 *See infra* text accompanying notes 143, 195, 270, 288, 296, 313, 328, 355.

Second, fear of disease was advanced as a reason for barring Latines immigration—regarding Haitians, then-candidate Trump is alleged to have said that "[t]hey all have AIDS," and, regarding Mexicans, that they bring "tremendous infectious disease."[6] A concern that immigrants would bring disease was one of the justifications for hostility to various groups of early immigrants.[7] Third, recent rules making it harder for people to immigrate to the United States if there is a risk of their becoming a public charge (not limited to Muslims and Latines) also motivated anti-immigrant provisions in the late 19th and early 20th centuries.[8]

The *normative* reasons for bias against Muslims and Latines are direct descendants of the effort to preserve the homogeneity of a European-based white America, which fueled the late 19th and early 20th-century prohibition of naturalization and immigration by non-Europeans.[9] Today, this manifests itself in the palpable fears by a white majority that non-white immigrants will replace white Americans,[10] and that the country will soon become majority-minority (projected to occur before 2050),[11] fears which feed the bias against Muslims and Latines who might try to become Americans.

B. Naturalization and Immigration Law

United States naturalization legislation began with a 1790 federal statute stating that only free white persons could be naturalized—that is, become U.S.

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6 Shear, *supra* note 4 (discussion regarding Haitians); Rupert Neate, *Donald Trump: Mexican Migrants Bring 'Tremendous Infectious Disease' to US*, GUARDIAN (July 6, 2015), https://www.theguardian.com/us-news/2015/jul/06/donald-trump-mexican-immigrants-tremendous-infectious-disease (discussion regarding Mexicans).

7 *See infra* text accompanying notes 180, 195, 270, 288, 296.

8 Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019); *see infra* text accompanying notes 176, 265, 283, 349.

9 *See infra* notes 298, 391.

10 *See* Engy Abdelkader, *Our Country Is Full*, 45 HUM. RTS. 1, 21–22 (2020) ("According to public opinion polling data . . . 63 percent of Republicans believe that immigrants are invading our country and replacing our cultural and ethnic background. Significantly, such beliefs underpin the white supremacist 'great replacement' or 'white genocide' theory. According to this conspiracy theory, non-white populations are 'replacing' white people vis-à-vis mass immigration."); John Reynolds, *Emergency and Migration, Race and the Nation*, 67 UCLA L. REV. 1768, 1787 (2021) ("Like the great replacement conspiracy, white genocide is a byword among white supremacists for immigration and demographic trends that will lead not just to the loss of white majority status, but to the elimination of the white 'race' as such."); Darin E.W. Johnson, *Homegrown and Global: The Rising Terror Movement*, 58 HOUS. L. REV. 1059, 1071 (2020) ("This theory, also referred to as The Great Replacement, posits that the existential decline of the white race is furthered by rising immigration and declining fertility among white women."); Juan F. Perea, *Immigration Policy as a Defense of White Nationhood*, 12 GEO. J. L. & MOD. CRITICAL RACE PERSP. 1, 2 (2020) ("Immigrants of color on the southern border . . . threaten the prevailing conception of the United States as a country controlled and dominated by whites and their culture.").

11 Ryan W. Miller, *46% of Whites Worry Becoming a Majority-Minority Nation Will 'Weaken American Culture,' Survey Says*, USA TODAY (Mar. 21, 2019, 2:00 PM), https://www.usatoday.com/story/news/nation/2019/03/21/pew-survey-whites-fearful-minority-country-will-weaken-american-culture/3217218002/ ("The U.S. Census Bureau predicts that before 2050, the majority of the USA will be made up of minority populations. According to Pew's research, 46 percent of white people fear that would weaken U.S. culture.").

citizens.[12] After some uncertainty, the courts ended up deciding that Asians did not fit that definition, the most notable examples of which were two Supreme Court cases—one dealing with Japanese in 1922[13] and the other with Asian Indians in 1923.[14] The continuity between historical and contemporary bias is apparent in the judicial emphasis on an inability to assimilate as a way to identify who was not "white" and therefore ineligible for naturalization, a standard that has also been used to justify policies discriminating against Muslim and Latines immigration.

Naturalization was important because some states prohibited a noncitizen from owning land;[15] from obtaining a license to practice certain jobs;[16] from qualifying for most public works projects during the Depression;[17] and from gaining the political clout that came with voting.[18] In addition, a 1922 Act (repealed in 1931) stripped a woman of citizenship if she married an alien ineligible for naturalization.[19] And, for the majority of immigrants who planned to stay in the country, "whiteness" was undoubtedly an important symbolic statement that they belonged.

Eventually, the white requirement on naturalization was selectively deleted for the Chinese in 1943[20] and for Asian Indians in 1946 (hereinafter referred to as "Indians").[21] This selective easing of the white requirement probably occurred to avoid having the United States appear to be similar to Nazi Germany. When the Commissioner of Immigration and Naturalization resigned in 1944, he noted that the only country outside of the United States that discriminated on the basis of race

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12 Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (1790); *see generally* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

13 Ozawa v. United States, 260 U.S. 178, 198 (1922).

14 United States v. Thind, 261 U.S. 204, 215 (1923).

15 *See* MILTON R. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 161 (1946). The California Alien Land Law of 1913 applied to aliens ineligible for citizenship, and the California Attorney General admitted that the law was based on "race undesirability." *Id.* at 159. However, the Court in *Porterfield v. Webb* held that the prohibition of aliens owning land did not violate equal protection. 263 U.S. 225, 232–33 (1923).

16 *See generally* KONVITZ, *supra* note 15, at 190–211 (displaying a list of occupations restricted in each state).

17 *See* Gary R. Hess, *The "Hindu" in America: Immigration and Naturalization Policies and India, 1917-1946*, 38 PAC. HIST. REV. 59, 71 (1969).

18 Beginning with Louisiana in 1812, most newly admitted states barred aliens from voting, and others revoked laws allowing aliens to vote. *See* ARISTIDE R. ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA 110 (2006). In 1996, federal law made it illegal for a non-citizen to vote in federal elections. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 215, 110 Stat. 3009-546, 3009-572 (1996).

19 Cable Act of 1922, Pub. L. No. 67-346, § 3, 42 Stat. 1021, 1022 (1922) (repealed 1931).

20 Magnuson Act (also known as the Chinese Exclusion Repeal Act), Pub. L. No. 78-199, § 3, 57 Stat. 600, 601 (1943). The repeal of the Chinese exclusion laws did not entirely eliminate discrimination against Chinese people. If a Chinese person lived in a country other than China, he or she still came to this country on the Chinese quota of 100 persons, which was not generally true of other groups; the wife of a Chinese man came in on the Chinese quota, which was not true of the wives of other immigrants. *See* KONVITZ, *supra* note 15, at 28.

21 *See* Luce-Celler Act of 1946, Pub. L. No. 79-483, § 303(a)(3), 60 Stat. 416 (1946).

Two other statutes reversed limitations on citizenship imposed by the 1790 law. First, the post-Civil War Naturalization Act of 1870 extended naturalization to aliens of African nativity and descent, *see* Pub. L. No. 41-254, § 7, 16 Stat. 254, 256 (1870). Second, the Indian Citizenship Act of 1924 granted citizenship to American Indians born in the United States. Pub. L. 68-175, ch. 233, 43 Stat. 253 (1924).

in matters of naturalization was Nazi Germany, which he emphasized was not "very desirable company."[22] Finally, in 1952, the McCarran-Walter Act deleted the white requirement for naturalization altogether.[23]

Naturalization law was not the only reason for worrying about the ability of immigrants to assimilate. The influx of Irish, Chinese, Japanese, Indians, and southern and eastern European immigrants in the middle to late 19th and early 20th centuries not only put significant pressure on the meaning of the legal term "white," but also led to laws restricting immigration—prohibiting Asians and imposing severe restrictions on immigration by southern and eastern Europeans. Although these politically motivated immigration rules did not usually turn on a legal definition of who was white, they were influenced by the same assumptions about assimilation that determined who was white. The deep connection between the rules applicable to immigration and naturalization was apparent in the 1924 law forbidding immigration by members of any group who could not be naturalized (for example, Japanese people were among this group, after the 1922 *Ozawa* case interpreted the naturalization law to mean that a Japanese person was not white).[24] This connection was also apparent in the 1923 *Thind* case denying that Indians were white, in part because a 1917 law forbid immigration by Indians.[25] As one federal court noted in a 1944 case, "the naturalization and immigration acts have always been regarded as *in pari materia*."[26]

C. Administrative Framework

The administrative framework for implementing these laws is also part of the story. Throughout much of the 19th century, the administration of immigration and naturalization laws rested with the states. But that began to change when the Supreme Court struck down state regulation of immigration in 1875.[27] By 1891, the federal government had created the Office of the Superintendent of Immigration within the Treasury Department.[28] In 1895, the Superintendent was renamed the

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22 KONVITZ, *supra* note 15, at 81.

23 *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, 239 (1952).

24 *See* Immigration Act of 1924, Pub. L. No. 68-139, § 28(b), 43 Stat. 153, 154 (1924). The exclusion of Japanese people by the 1924 law resulted in resignation of the American Ambassador to Japan, a formal protest by the Japanese government, anti-American protests, and boycotts of American products in Japan, but to no avail. *See* KONVITZ, *supra* note 15, at 24–25; Ozawa v. United States, 260 U.S. 178, 198 (1922).

25 United States v. Thind, 261 U.S. 204, 215 (1923); *see also* Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874 (1917). The 1917 law did not apply to Japanese immigrants because the Japanese government had already limited Japanese immigration to the United States through the Gentlemen's Agreement. *See* discussion *infra* Part III.B.2.a. The 1917 law did not apply to Thind, who had immigrated to the United States in 1913. *See In re* Thind, 268 F. 683, 683 (D. Or. 1920), *rev'd*, United States v. Thind, 261 U.S. 204, 215 (1923).

26 *Ex parte* Mohriez, 54 F. Supp. 941, 942 (D. Mass. 1944).

27 Chy v. Freeman, 92 U.S. 275, 280 (1875) (holding that state regulation of immigration from foreign nations, to prevent arrival of paupers and criminals, was an unconstitutional intrusion on congressional power).

28 Immigration Act of 1891, Pub. L. No. 51-551, §7, 26 Stat. 1084, 1085 (1891).

Commissioner-General and the office was upgraded to the Bureau of Immigration;[29] in 1906, the Commissioner-General became head of a combined Bureau of Immigration and Naturalization;[30] and in 1913, two separate Bureaus were created, with a Commissioner General of Immigration in charge of the Bureau of Immigration, and a Commissioner of Naturalization in charge of the Bureau of Naturalization.[31] These changes established federal control over what had previously been state administration of federal naturalization laws, in part as a response to widespread evidence of fraudulent granting of U.S. citizenship.[32] Congress also became more active, creating a Senate committee to deal with immigration in 1889, and a House committee to deal with both immigration and naturalization in the same year.[33]

D. Outline of Article

Our discussion of how bias influenced the judicial and legislative approaches to naturalization and immigration proceeds in the following way:

Part II explains which of several approaches to statutory interpretation the courts used to define "white." The predominant interpretive approach was functional textualism, which defined "white" as people who could assimilate to American culture, a criterion that also influenced immigration law.

Part III describes the negative public reaction to different groups of immigrants who came to the United States in the middle of the 19th and early 20th centuries—the Irish, Chinese, Japanese, Indians, and southern and eastern Europeans. It explains the resulting legislative, judicial, and administrative responses that distinguished between Europeans and Asians.

I pay special attention to southern Italians because they were viewed as a race with much the same negative characteristics as Asians—for example, as "illiterate and ignorant in the extreme"[34] who "by their votes keep our worst men in power."[35] If this now sounds strange to us, it is because we are far removed from the way race was understood in the early 20th century. The List of Races and Peoples

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29 Act of Mar. 2, 1895, ch. 177, 28 Stat. 764, 780 (1895); IRENE BLOEMRAAD, BECOMING A CITIZEN 289 (2016).

30 Naturalization Act of 1906, Pub. L. No. 59-338, § 1, 34 Stat. 596, 596 (1906).

31 *See* Act of Mar. 4, 1913, ch. 141, Pub. L. No. 62-426, § 3, 38 Stat. 736, 737. Immigration statistics were gathered by the Department of State from 1820–1874, by the Bureau of Statistics from 1867–1895, and by the Commissioner-General of Immigration beginning from 1895 onward. *See* U.S. IMMIGR. COMM'N, ABSTRACTS OF REPORTS OF THE IMMIGRATION COMMISSION, S. Doc. No. 61-747, at 55 (3d Sess. 1910) [hereinafter DILLINGHAM COMMISSION REPORTS VOLUME 1]. Although the dominant pattern in this period was to restrict immigration, a federal statute encouraged immigration in 1869, but it did not last. Opposition to foreign labor took firm root in 1885 with the criminalization by federal law of importing foreign contract workers to perform labor or service of any kind. *See* U.S. IMMIGR. COMM'N, IMMIGRATION LEGISLATION, S. DOC. NO. 61-758, at 34 (3d Sess. 1910) [hereinafter DILLINGHAM COMMISSION REPORTS VOLUME 39].

32 U.S DEP'T OF LABOR, HISTORICAL SKETCH OF NATURALIZATION IN THE UNITED STATES 8–10 (1926).

33 DILLINGHAM COMMISSION REPORTS VOLUME 39, *supra* note 31, at 38.

34 *See* ZOLBERG, *supra* note 18, at 209.

35 *Id.*

developed by the Bureau of Immigration in 1899 and picked up by the Dillingham Commission in the first decade of the 20th century identified numerous separate European races—for example, describing northern and southern Italians as having very different racial characteristics.[36]

Part IV focuses on the different treatment of southern Italians and Indians, both of whom encountered difficulties in assimilating to American culture. There were two major reasons for this difference. First, as an empirical matter, assimilation was considered harder for Indians because of their genetic makeup, rendering them incapable of adapting to a new culture. Second, as a normative matter, the homogeneity of the white European race in the United States had to be protected from an influx of Asian persons of color who were not welcome as Americans. I raise the distinct possibility that reliance on the assimilation criterion was simply a way to give an empirical/scientific veneer to what was a racially motivated normative preference for Europeans over Asians.

The Article concludes with a reminder that who we were is still a part of who we are. Restrictive assumptions about who can assimilate and who ought to be an American are as embedded in the American psyche as the inclusive ideals that we profess. We have a better chance of attaining those ideals if we do not forget our history.

II. INTERPRETATIVE APPROACHES TO DEFINING "WHITE"

Because the word "white" appears in the 1790 statute identifying who can become a naturalized American citizen, the courts had to adopt a theory of statutory interpretation to apply that term. There are two versions of intentionalism that the courts could have used to define "white," neither of which garnered much support. Courts instead adopted a version of textualism—defining "white" by the function it served in its statutory context (functionalism). As we will see in Part III, the criteria used to answer the statutory interpretation issue—the *legal* meaning of "white"—were also used to make *political* decisions about who could immigrate to the United States.

A. Intentionalism; Exclusion

Everyone agrees that the intent of the 1790 law was to exclude from the definition of "white" the only nonwhites familiar to Americans at that time. An

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[36] *See* U.S. IMMIGR. COMM'N, DICTIONARY OF RACES OR PEOPLES, S. DOC. NO. 61-662, at 82 (3d Sess. 1910) [hereinafter DILLINGHAM COMMISSION REPORTS VOLUME 5]; JOEL PERLMANN, AMERICA CLASSIFIES THE IMMIGRANTS 29–31 (2018). The publication of the Dictionary attracted public notice. *See, e.g., The Races That Go Into the American Melting Pot*, N.Y. TIMES, May 21, 1911, at SM2. The List was a symptom of the late 19th and early 20th century view of racial differences, which posited that group characteristics entered into the "blood" and did not change in response to an individual's surroundings. PERLMANN, *supra* note 36, at 404 (discussing the transmission of human difference through socialization or blood).

exclusionary version of intentionalism would have included all others as "white," but most courts rejected this approach.[37]

B. Intentionalism; Inclusion

Another version of intentionalism would define "white" to include only northern and western Europeans—excluding all others—because they were the dominant groups in the 1790 United States. But that version of intentionalism was rejected by the Supreme Court[38] and was characterized as "absurd" by the Second Circuit Court of Appeals.[39] Instead, courts adopted a textualist approach to defining "white," interpreting the statutory language to mean what its function signifies.

C. Functional Meaning; Inclusion

Textualist judges usually rely not on legislative intent, but on the functional meaning of statutory language in context[40]—how the function of the statute's text would be understood by the relevant author and audience. For example, "pull up a chair" could mean a dining chair, an easy chair, or an antique chair depending on how the word functions in its factual context.[41] A functionalist approach is important because it allows the law to adapt to change occurring after the adoption of a statute without constant legislative amendment. Thus, a "voter" who is eligible to serve on a jury can now include women even though they could not vote when the law on jury membership was adopted;[42] a "mower" can include a more expensive Haybine that does more than mow in a 1935 statute exempting a mower from creditors even though Haybines postdated 1935;[43] and a car can be a "carriage" in a

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37 An occasional court adopted an exclusionary version of the intentionalist approach, relying on the history of both the 1790 law and the 1875 law which reenacted the 1790 white requirement with an intent to exclude the additional category of Chinese. *See* U.S. DEP'T OF COM. AND LAB., ANNUAL REPORT OF THE CHIEF OF THE DIVISION OF NATURALIZATION TO THE COMMISSIONER GENERAL OF IMMIGRATION 14 (1907) (stating that "[s]ome have apparently construed section 2169 of the Revised Statutes [reenacting the 1790 law in 1875] to mean that only Chinese, or 'Mongolians,' are excluded from naturalization, and that all other races are eligible."); U.S. DEP'T OF LAB., ANNUAL REPORT OF THE COMMISSIONER OF NATURALIZATION TO THE SECRETARY OF LABOR 7 (1916) ("practical result has now been reached by the courts that 'white persons' as used in [sec. 2169], means all who are not either black persons or Mongolians.").

38 United States v. Thind, 261 U.S. 204, 213–215 (1923).

39 United States v. Balsara, 180 F. 694, 695 (2d Cir. 1910).

40 *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 26–27 (2001); *see also* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1958 (2011); Tara Leigh Grove, *Which Textualism?,* 134 HARV. L. REV. 265, 267 (2020) (her conception of "flexible textualism" is similar to what I call "functional textualism"). There can, of course, be disagreement about what function is served by the statutory language. *See, e.g.*, Wisconsin Cent. Ltd. v. United States, 138 S. Ct. 2067 (2018) (the issue was whether "money remuneration" included stock options; the majority held that "money" referred only to a "medium of exchange"; the dissent favored a broader "convertible into money" meaning).

41 *See In re* Erickson, 815 F.2d 1090, 1092–93 (7th Cir. 1987).

42 *See* Commonwealth v. Maxwell, 14 A. 825, 829 (Pa. 1921). *But see* People v. Barnett, 150 N.E. 290, 292 (Ill. 1925).

43 *See In re* Erickson, 815 F.2d at 1094.

statute exempting carriages from creditors despite the fact that the statute long predated cars.[44]

This means that "white" need not be limited to those who were considered white in 1790 (northern and western Europeans) but can include those who function in the same way—that is, have similar political, economic, and social characteristics as whites in 1790. Groups, therefore, become "white" by assimilating to those characteristics even though they had not immigrated to the country by the end of the 18th century.[45] The assimilation criterion was applied differently to Asians and Europeans. Asians were considered so unable to assimilate that they were denied the opportunity to become naturalized as white Americans (and were also prohibited from immigrating to the United States). Many Europeans were also thought to have difficulties assimilating, but they were never denied the opportunity to be naturalized and only suffered the imposition of severe immigration quotas, not complete exclusion.

D. Color and Race

An obvious question at this point is why "white" does not refer to the applicant's color. The Court in *Ozawa* explained:

> Manifestly 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, even among Anglo-Saxons, ranging by imperceptible gradations 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. Hence to adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation.[46]

The *Ozawa* Court almost certainly had in mind the swarthy Mediterranean types from southern and eastern Europe whose "whiteness" was nonetheless affirmed in *Thind*.[47]

There were a few cases in which courts paid attention to an individual's color. A 1942 decision suggested that "when one seeking citizenship is in fact clearly not white of skin a strong burden of proof devolves upon him to establish that he is a

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44 Parker v. Sweet, 127 S.W. 881, 881 (Tex. Civ. App. 1910).

45 A 1917 case illustrates the functional approach, affirming the expansion of "white" to include southern and southeastern Europeans (including the "Latin race"), beyond the inhabitants who made up the "more or less homogeneous people" from northern Europe. *See In re* Singh, 246 F. 496, 498–99 (E.D. Pa. 1917). However, the opinion fails to explain what there was about these new immigrants that assimilated them to their European predecessors. *See id.*

46 Ozawa v. United States, 260 U.S. 178, 197 (1922).

47 *See* United States v. Thind, 261 U.S. 204, 213 (1923) ("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.").

white person within the meaning of the act."[48] And, conversely, there were reports of naturalizing "persons of African descent, who are not darker than ordinary white persons,"[49] before the 1870 law explicitly authorized their naturalization.[50] In addition, an unreported case in the 1930s favored naturalization of a Parsi who lifted up his pants leg to show that his skin was white.[51] But, by and large, the courts generalized about whether members of a group belonged to the "white" race without examining their skin color.

The Census Bureau also generalized about whether someone was a member of a racial group without paying attention to skin color. The categories used by the Census Bureau reflected changes in immigration patterns. In 1860, the column designated "color" specified the choices as "White", "Black", and "Mulatto".[52] In 1870 and 1880, the "color" column added 'Chinese" and "American Indian",[53] and, in 1890, added "Japanese",[54] conflating race and color. By 1900, the heading for the relevant column changed from "color" to "color or race," acknowledging what had previously been true–that "color" was a proxy for race. In 1910, the category "Other" was added (used sometimes to refer to a Hindu),[55] and, in 1920, "Filipino", "Hindu", and "Korean" were added.[56]

In the early 1900s, the Census Bureau was confronted with the possibility of adopting a more complex listing of "races," by following the List of Races or Peoples that had been developed by the Bureau of Immigration. The List was not confined to the categories that the Census Bureau used but fine-tuned "race" to include multiple categories of Europeans.[57] The List had begun somewhat innocently as an

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48 *In re* Hassan, 48 F. Supp. 843, 845 (E.D. Mich. 1942).

49 Douglas M. Coulson, *Persecutory Agency in the Racial Prerequisite Cases: Islam, Christianity, and Martyrdom in* United States v. Cartozian, 2 U. MIAMI RACE & SOC. J.L. REV. 117, 123 n.12 (2012).

50 *See* John H. Wigmore, *American Naturalization and the Japanese*, 28 AM. L. REV. 818, 821 (1894) (arguing that "[i]f . . . swarthy or dark-colored [southern] Europeans are to be accepted for citizenship as 'white' merely by contrast with Africans," then both Japanese and "certain pure Hindu stocks of India" would also be "white").

51 *See* Sherally Munshi, *"You Will See My Family Became So American": Toward a Minor Comparativism*, 63 AM. J. COMP. L. 655, 660 (2015); *see also* United States v. Dolla, 177 F. 101, 102 (5th Cir. 1910) (appellate court describes the lower court's conclusion that the applicant was "white," based in part on the fact that the skin on his arm which was protected from the sun was several shades lighter than the skin on his face and hands.). "Parsi" is defined as an individual of Zoroastrian descent, who fled to India in the 7th—8th centuries to avoid Muslim persecution in Persia. *Parsi*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/Parsi (last visited May 29, 2022).

52 *See* U.S. CENSUS BUREAU, 1860 CENSUS SCHEDULE (FREDERICK DOUGLAS) (1860) (column #6).

53 *See* U.S. CENSUS BUREAU, 1870 CENSUS SCHEDULE (EMILY DICKENSON) (1870) (column #6); U.S. CENSUS BUREAU, 1880 CENSUS QUESTIONNAIRE: POPULATION (1880) (column #4).

54 U.S. DEP'T OF THE INTERIOR, CENSUS OFFICE, ELEVENTH CENSUS OF THE UNITED STATES: INSTRUCTIONS TO ENUMERATORS (1890) (instruction #4).

55 U.S. DEP'T OF COM. & LAB.: BUREAU OF THE CENSUS, THIRTEENTH CENSUS OF THE UNITED STATES: INSTRUCTIONS TO ENUMERATORS (1910) (instruction #108).

56 U.S. DEPT' OF COM. & LAB.: BUREAU OF THE CENSUS, FOURTEENTH CENSUS OF THE UNITED STATES: INSTRUCTIONS TO ENUMERATORS (1920) (instruction #120).

57 *See, e.g.*, DILLINGHAM COMMISSION REPORTS VOLUME 5, *supra* note 36, at 13, 25, 50, 54, 68, 79, 81, 92, 111 (list including Albanian at 13, Bulgarian at 25, Dutch at 50, English at 54, Greek at 68, Irish at 79, Italian at 81, Magyar Hungarian at 92, and Russian at 111).

effort to describe how different peoples might fit into the United States labor economy, but it evolved into a catalog of more or less immutable racial traits that were (arguably) hard-wired into the group's gene pool and that would suggest how well each group could assimilate into American culture.[58] The List was then published as Volume 5 of the Report of the Dillingham Commission, which was established pursuant to the Immigration Act of 1907.[59] The Commission repeatedly urged the Census Bureau to use the List of Races and Peoples for census purposes,[60] but the Census Bureau rejected the use of any question that would separately record the European racial subdivisions recognized by the Commission, such as the division between northern and southern Italians.[61] If the census had adopted this racial division, it might have made it easier for the public to perceive a similarity between Indians and southern Italians, which would, in turn, have buttressed the case for Indians being "white."[62]

III. THE IMMIGRANTS: HOW THE PUBLIC AND THE LAW REACTED

Immigration in the mid-19th to early 20th centuries—from Ireland, China, Japan, India, and southern and eastern Europe—was concerning to a nation initially composed mostly of white northern and western Europeans. These concerns manifested themselves both in defining the statutory term "white" and in adopting restrictive immigration legislation.

Concerns about newcomers were not new. Benjamin Franklin feared German immigration in the 18th century because he believed the Germans who came were "the most stupid of their own nation."[63] He was also concerned that immigrants brought poverty and crime.[64] His definition of "white" in a 1751 essay excluded "not only the black and 'tawny'—Africans, Asians, and American Indians—but also Europeans of 'what we call a swarthy complexion'", explicitly referencing Italians, among others.[65] Additionally, Thomas Jefferson was concerned about non-British immigrants coming from countries with absolute monarchies, because he believed they would bring with them an attitude toward government that was opposed to "the freest principles of the English constitution."[66]

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58 *See generally* PERLMANN, *supra* note 36, at 13–40 (explaining the complex and tortuous history of the efforts by immigration officials to compile a list of racial categories).

59 *See* Immigration Act of 1907, Pub. L. No. 59-96, § 39, 34 Stat. 898 (1907). The Commission was established to deflect passage of a literacy test for immigrants which was opposed by Speaker of the House Cannon. *See* PERLMANN, *supra* note 36, at 104.

60 PERLMANN, *supra* note 36, at 133.

61 *Id.* at 133–49.

62 The Census Bureau made one concession. It complied with a legislative mandate to include a question in the 1910 census about mother tongue, which bore some relationship to the races appearing in the List of Races or Peoples because of the association of language with racial categories. *See* DILLINGHAM COMMISSION REPORTS VOLUME 1, *supra* note 31, at 18.

63 MARTHA RAGSDALE, NATIONAL ORIGINS PLAN OF IMMIGRATION RESTRICTION 8 (1928).

64 *See* ZOLBERG, *supra* note 18, at 40–43.

65 *See id.* at 53.

66 *See id.* at 80.

But whatever may have been the concern about European immigration at the time of the Founding, the 1790 law did no more than require an immigrant to be "white."[67] The only additional substantive requirement was that they be of "good character," a standard aimed at keeping out paupers and criminal types.[68] Presumably, large-scale immigration was not seen as a major problem in this pre-steamship age.

In the following century, however, immigration became a politically charged issue as new immigrants arrived from parts of Europe (Ireland and southern and eastern Europe) and Asia (China, Japan, India). This put pressure on the courts to decide the meaning of "white" in the 1790 naturalization law and on Congress to decide who could immigrate to the United States.

A. Irish

There was a large increase in Irish immigration in the middle of the 19th century, primarily because of the Potato Famine in the mid-1840s.[69] Ignatiev fixes the number at 1.8 million from 1845–1855, with many of these immigrants being poorer than their predecessors;[70] while Archdeacon records 1,374,000 Irish immigrants from 1841–1851, with an additional number coming in from Canada.[71] These figures probably explain why the 1850 census was the first to distinguish foreign from native-born.[72]

Antagonism toward the Irish did not begin with the Famine in the mid-1840s. Around the time of the Founding, the Federalists feared Irish immigrants because they tended to vote for their political opponents.[73] Non-English ethnic groups had supported the Democratic-Republicans in 1796, and the Federalists

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67 *See* Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (1790) (repealed 1795). "Whites" also had to be free, thereby ruling out indentured laborers. *Id.*

68 *See* Naturalization Act of 1790, ch. 3, § 1; *see also* Jennifer Chin & Zeenat Hassan, *As Respected as a Citizen of Old Rome: Assessing Good Moral Character in the Age of National Security*, 5 U.C. IRVINE L. REV. 945, 950 n.34 (2015) (noting that some representatives supported the good moral character requirement to prevent the country from being "overrun with the outcasts of Europe"). One author suggested that, for a brief period, naturalization may have been seen as an "instrument" for integrating people into American culture (a kind of baptism), not as a "capstone of a process of integration," as it later became. ZOLBERG, *supra* note 18, at 83.

69 Stephen A. Brighton, *Degrees of Alienation: The Material Evidence of the Irish and Irish American Experience, 1850-1910*. 42 Historical Archaeology 132, 132 (2008) ("As early as the 1820s, individuals were steadily arriving from the west of Ireland, but the watershed for Irish dispersal to the United States was at the time of Ireland's Great Hunger (An Gorta Mhor), beginning in 1845 and popularly known today as the Potato Famine."); SAMUEL P. ORTH, OUR FOREIGNERS: A CHRONICLE OF AMERICANS IN THE MAKING 107 (1921) ("But the most potent cause of the great Irish influx into America was famine in Ireland. . . . When the cold and damp summer of 1845 brought the potato rot, the little, overpopulated island was facing dire want. But when the next two years brought a plant disease that destroyed the entire crop, then famine and fever claimed one quarter of the eight million inhabitants.")

70 NOEL IGNATIEV, HOW THE IRISH BECAME WHITE 39 (1995).

71 THOMAS J. ARCHDEACON, BECOMING AMERICAN 42 (1983).

72 *See* ZOLBERG, *supra* note 18, at 129. Irish immigration may also explain de Tocqueville's warning in 1850 of a "multitude of Europeans whom misfortune and misconduct drive . . . toward the shores of the new world . . . bring[ing] to the United States our greatest vices . . . ." *See id.* at 126.

73 *See* ARCHDEACON, *supra* note 71, at 60.

blamed their near defeat in that year on the Irish.[74] A Federalist member of Congress stated that there was no need to "invite hordes of wild Irishmen, nor the turbulent and disorderly of all parts of the world, to come here with a view to disturb our tranquility . . . ."[75] One legislative response was a 1798 law raising the waiting period for naturalization to 14 years.[76] Ironically, anti-immigrant feelings were a partial cause of large numbers of immigrants to seek naturalization.[77]

But the increase in Irish immigration associated with the Famine led to greater friction than had previously existed. There were anti-Irish riots, one of which occurred in 1844 as a result of Catholic objection to reading the Protestant version of the Bible in school.[78] More significantly, there was organized political opposition. The Native American and Know Nothing parties originated as anti-Catholic and anti-Irish movements.[79] A major (unsuccessful) plank of the Know Nothing Party was to lengthen the time before an immigrant could be naturalized to 21 years.[80] Although these parties had little success at the national level,[81] they thrived in many states.[82] Governors and legislators of at least six states in 1855 were adherents to the Know Nothing Party (New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, and Pennsylvania).[83]

Opposition to the Irish also had racial overtones.[84] The Irish suffered ethnic slurs associated with Black people; and, conversely, Black people were "smoked Irish."[85] The Irish response was to work especially hard to separate themselves from Black people and become "white"—an effort made more pressing because the Irish and Black people lived and worked so close together.[86] One way the Irish established their distance from Black people was to become staunch defenders of slavery.[87] To that end, the Irish threw in their lot with the Democratic Party (the

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74 ZOLBERG, *supra* note 18, at 91–92.

75 IGNATIEV, *supra* note 70, at 65.

76 ARCHDEACON, *supra* note 71, at 60; Naturalization Act of 1798, Pub. L. No. 5-54, § 1, 1 Stat. 566, *repealed by* Naturalization Law, Pub. L. No. 7-28, § 5, 2 Stat. 153 (1802).

77 *See* ZOLBERG, *supra* note 18, at 96.

78 *See* IGNATIEV, *supra* note 70, at 149–52.

79 *See id.* at 157. *See generally* DILLINGHAM COMMISSION REPORTS VOLUME 39, *supra* note 31, at 9–17 (discussing the Native American and Know Nothing movements). Mel Brooks captured this mid-century hostility to the Irish in his movie BLAZING SADDLES (1974) (All right, we'll give some land to the n****** and the ch****, but we DON'T WANT THE IRISH.").

80 ZOLBERG, *supra* note 18, at 151–52.

81 *See* ARCHDEACON, *supra* note 71, at 82.

82 *See* ZOLBERG, *supra* note 18, at 155–56, 165.

83 *See* TYLER ANBINDER, NATIVISM AND SLAVERY: THE NORTHERN KNOW NOTHINGS AND THE POLITICS OF THE 1850S 127 (1992).

84 It is also likely that anti-Irish sentiment relied in part on suspicion that Catholics would be more deferential to the Pope than to the U.S. government; *see* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925 6 (1955).

85 IGNATIEV, *supra* note 70, at 41.

86 *See id.* at 41–42.

87 *See generally id.* at 6–31 (detailing the split between Irish and Irish-Americans over the issue of race).

party of slavery), which had rejected nativist antagonism to Irish immigrants.[88] Ignatiev notes that poorer Irish immigrants were especially likely to be wary of Black people because they feared that free Black people would compete as equals in the Northern job market.[89] Irish opposition to Black people also took a violent form;[90] for example, in 1842 "a largely Irish mob in Philadelphia attacked an Afro-American temperance parade."[91]

In the end, these observations about the Irish have more interest to the sociologist and political scientist than to the lawyer. For census and naturalization purposes, there was never any doubt that the Irish were "white." There were probably several reasons for this. First, there was no significant federal administrative involvement in matters of naturalization until much later in the nineteenth century.[92] Second, there was no basis on which to describe the Irish as belonging to a race other than the white race. The List of Races and Peoples, which divided Europeans into different races, did not exist until around 1900.[93] Third, most of the Irish spoke English.[94] Fourth, Henry Cabot Lodge (in the late 19th century) noted that, unlike the new immigrants from southern and eastern Europe, the Irish were in close geographical proximity to the English, though of different stock.[95]

The way in which the Irish made use of their ability to vote as naturalized citizens might have raised an important question about how to evaluate their ability to assimilate. The Irish used the vote to gain political power in several big cities, by mastering the skills of city machine politics.[96] Opponents of naturalization might have characterized this version of assimilation as a corruption of our political system that would justify not giving the Irish the right to vote. But, conversely, big-city political organizations could have been viewed more favorably because of the help they provided to immigrants and the poor.[97]

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88 *See id.* at 75–77.

89 *See id*. at 97–98.

90 *See id*. at 137 (providing an example of Irish laborers attacking Black workers in Philadelphia in 1842); *see also* ARCHDEACON, *supra* note 71, at 83–84 (detailing attacks on a Black orphanage during a draft riot).

91 IGNATIEV, *supra* note 70, at 23.

92 *See supra* Part I.A.3.

93 *See* PERLMANN, *supra* note 36, at 32.

94 *See id*. at 58. In a similar vein, Archdeacon notes that the Irish at least had the English language. ARCHDEACON, *supra* note 71, at 152. *But see* IGNATIEV, *supra* note 70, at 38–40 (claiming that many Irish spoke only Irish and that it was a myth that their ability to speak English made their plight easier).

95 *See* DILLINGHAM COMMISSION REPORTS VOLUME 5, *supra* note 36, at 79 ("Like the English, the Irish come to the United States speaking our own language and imbued with sympathy for our ideals and our democratic institutions.").

96 *See* ARCHDEACON, *supra* note 71, at 99–100.

97 *See generally* TERRY GOLWAY, MACHINE MADE: TAMMANY HALL AND THE CREATION OF MODERN POLITICS (2014) (dismantling negative stereotypes of city machine politics by detailing its benefits for new immigrants and low-income constituents).

B. Asians

A person was "white," as that term was used in the 1790 naturalization statute, if they could assimilate into American culture. That standard was never invoked to determine whether the Irish were "white," but it played an important role in deciding whether Asians who came to this country beginning in the second half of the nineteenth century (Chinese, Japanese, Indians) could be naturalized. And it also influenced the adoption of legislation preventing Asians from immigrating to the United States.

i. Chinese

Chinese immigration was much less than Irish immigration but excited more extreme opposition. The totals rose after the middle of the 19th century: 1850–1869 (89,961) [98]; 1870–1889 (198,936) [99]; 1890–1909 (35,152) [100]—a total of 324,049. Other data confirm this pattern. One tally fixes the annual average of Chinese immigration through 1868 at 4,567. Chinese immigration then increased dramatically in 1869–1870 to 28,614. After falling to 15,923 in the next two years, it then peaked at 69,090 between 1873–1877.[101] Another tally records an annual average of 4,300 immigrants from 1861–1867, rising to 6,707 in 1868; 12,874 in 1869; 15,740 in 1870; and reaching new highs of 20,292 in 1873 and 22,781 in 1876.[102]

The demand for Chinese labor surged after the formation of the Central Pacific Railroad in California. Despite one of the railroad founder's concerns about the "settlement among us of an inferior race," profit won over prejudice, and the Chinese were hired.[103] But welcoming Chinese laborers did not mean welcoming them as citizens. An 1868 treaty with China stated that its citizens' entry as laborers would not be construed as providing a right to acquire citizenship by naturalization.[104]

The fact that Chinese immigration concentrated in California explains the intense political opposition in that state.[105] After the Revised Statutes of 1873 accidentally omitted the white requirement for naturalization, it was restored in 1875 in response to West Coast concerns about extending citizenship to the "Mongolian" race.[106] California had also rejected the 15th Amendment to the United States Constitution, which prohibited the denial of a citizen's right to vote based on

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98 DALE ANDERSON, CHINESE AMERICANS 14 (2007).

99 *Id.*

100 *Id.*

101 ARCHDEACON, *supra* note 71, at 120.

102 ZOLBERG, *supra* note 18, at 182.

103 *See id.* at 180.

104 *See id.*

105 PERLMANN, *supra* note 36, at 14.

106 *In re* Saito, 62 F. 126, 126–27 (D. Mass. 1894); *see also* 382 Rev. Stat. § 2169 (1875).

race or color, because of fear that it might lead to Chinese citizenship;[107] and the defeat of an 1870 proposal to delete the requirement that only whites could be naturalized was attributable to West Coast objections to Chinese citizenship.[108] Opposition to Chinese citizenship also resulted in limiting the availability of birthright citizenship by making it harder in the 1870s for Chinese women to come to the United States because they might give birth to U.S. citizens.[109]

The restoration of the white requirement for naturalization in 1875 at the behest of the West Coast states was a harbinger of the May 1882 federal statute that banned immigration by Chinese laborers[110] and also explicitly prohibited Chinese from becoming naturalized citizens.[111] There had been some doubt about whether Chinese were "white" before the passage of the 1882 law. One author noted that before the Chinese Exclusion Act expressly prohibited Chinese naturalization, several Chinese persons were naturalized as United States citizens in New York and North Carolina,[112] and "a July 22, 1870 newspaper article recount[ed] Massachusetts' longstanding practice of naturalizing 'Chinese as well as other Asiatics' since at least 1843."[113] But a reported 1878 United States district court case from California held that Chinese persons were not white,[114] and the 1882 legislation settled the matter.

The dominant image of Chinese persons was that they were unwilling or unable to assimilate. This view was based mainly on experience with Chinese "coolies," an Anglicized version of the Chinese word for unskilled laborers.[115] This image of Chinese immigrants worked its way into judicial decisions. In upholding the Chinese exclusion law, the Supreme Court stated:

> [T]hey remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where

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107 NAJIA AARIM-HERIOT, CHINESE IMMIGRANTS, AFRICAN AMERICANS, AND RACIAL ANXIETY IN THE UNITED STATES 156 (2006).

108 ZOLBERG, *supra* note 18, at 182.

109 *Id.*

110 Chinese Exclusion Act of 1882, ch. 126, § 1, 22 Stat. 58. In 1884, the ban was extended to include all Chinese people. *See* Act of July 9, 1884, ch. 220, § 15, 23 Stat. 115. The Chinese Exclusion Act was periodically renewed. *See* Act of May 5, 1892, ch. 60, § 1, 27 Stat. 25 (renewing the Act for ten more years); Act of April 29, 1902, ch. 641 §1, 32 Stat. 176 (extending the Act until otherwise provided by law). Despite this legislation, an estimated 17,300 Chinese immigrants entered illegally through the back doors of Mexico and Canada from 1882 to 1920. *See* Erika Lee, *The "Yellow Peril" and Asian Exclusion in the Americas*, 76 PAC. HIST. REV. 537, 543 (2007).

111 *See* Chinese Exclusion Act of 1882, ch. 126, § 14.

112 *See* JOHN KUO WEI TCHEN, NEW YORK BEFORE CHINATOWN: ORIENTALISM AND THE SHAPING OF AMERICAN CULTURE 1776–1882, 136, 231–32 (2001).

113 Coulson, *supra* note 49, at 123 n.12.

114 *In re* Ah Yup, 1 F. Cas. 223, 224–25 (C.C.D. Cal. 1878) (No. 104).

115 *See* ARCHDEACON, *supra* note 71, at 147.

> population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them, unless prompt action was taken to restrict their immigration.[116]

ii. Japanese

a. The Negative View of Japanese Immigration

Japanese immigration became significant in 1891, when it first exceeded 1,000,[117] well after the influx of Chinese immigration. The number of Japanese immigrants in the continental U.S. (excluding Alaska) quadrupled soon after 1900, from around 25,000 to somewhere between 95,000 to 100,000.[118] During the period from 1900 to 1908, 136,601 Japanese immigrants arrived by sea and others came through Canada and Mexico.[119] One estimate is that upward of 37,000 immigrants came from Hawaii between 1902 and 1908.[120] Other tallies indicate a significant, but not overwhelming, influx of Japanese immigrants: 260,492 between 1899 and 1924, and 118,872 between 1908 and 1925.[121] Japanese immigrants were concentrated on the West Coast, and in 1920, 83% were in California.[122] Although these numbers may have alarmed West Coast residents, Japanese immigration was only 1.6% (148,729) of total U.S. immigration from 1899–1910.[123]

Significant opposition to Japanese immigration came from California, where some segments of the public and members of the California legislature favored extending the Chinese exclusion laws to Japanese immigrants.[124] Congress did not pass a Japanese exclusion law, but President Theodore Roosevelt brokered an agreement that had a similar effect for Japanese workers. The event which precipitated the agreement was the San Francisco school board arranging

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116 Ping v. United States, 130 U.S. 581, 595 (1889). In the same vein is the dissenting opinion of Justice Field in *Chew Heong v. United State*s, 112 U.S. 536, 566–67 (1884). He asserted that "[the Chinese] have remained among us a separate people . . . . Our institutions have made no impression on them during the more than 30 years they have been in the country. . . . They do not and will not assimilate with our people; and their dying wish is that their bodies may be taken to China for burial." *Id.* (Field, J., dissenting)*; see also* People v. Hall, 4 Cal. 399, 404–05 (Cal. 1854) (holding that Chinese people were "Black" and were therefore not allowed to give evidence against a white man. The court stated that the Chinese are "a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point . . . differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference . . . .").

117 ARCHDEACON, *supra* note 71, at 121.

118 U.S. IMMIGR. COMM'N, IMMIGRANTS IN INDUSTRIES, JAPANESE AND OTHER IMMIGRANT RACES IN THE PACIFIC COAST AND ROCKY MOUNTAIN STATES, JAPANESE AND EAST INDIANS, S. DOC. NO. 61-633, 5 (3d Sess. 1910) [hereinafter DILLINGHAM COMMISSION REPORTS VOLUME 23].

119 ARCHDEACON, *supra* note 71, at 121.

120 DILLINGHAM COMMISSION REPORTS VOLUME 23, *supra* note 118, at 6.

121 ARCHDEACON, *supra* note 71, at 118, 121.

122 *Id.* at 141.

123 U.S. IMMIGR. COMM'N, STATISTICAL REVIEW OF IMMIGRATION 1820-1910 AND DISTRIBUTION OF IMMIGRANTS 1850-1900, S. DOC. NO. 61-756, 45 (3d Sess. 1910) [hereinafter DILLINGHAM COMMISSION REPORTS VOLUME 3].

124 *See* DILLINGHAM COMMISSION REPORTS VOLUME 23, *supra* note 118, at 167–68.

in 1906 for Asian children to be placed in a segregated school.[125] This offended Japan, and Roosevelt wanted to preserve good relations as a counter to Russian expansion in the Far East.[126] He therefore persuaded San Francisco, in 1907, to rescind the segregation order in exchange for which Japan entered into what became known as the "Gentlemen's Agreement" with the United States (not a statute or a treaty) and agreed to deny passports to laborers intending to enter the United States.[127] In effect, the result of the Chinese exclusion laws was achieved for Japanese laborers without legislation.[128] The impact of the Gentlemen's Agreement is apparent from the following annual Japanese immigration figures. Beginning in 1893 (before the Gentlemen's Agreement was reached), arrivals of Japanese immigrants were as follows: 1,380 (1893); 12,626 (1900); 4,908 (1901); 5,325 (1902); 6,990 (1903); 7,771 (1904); 4,319 (1905); 5,178 (1906); and 9,949 (1907), but the numbers fell to less than 2,000 from 1909–1910 after the Gentlemen's Agreement was reached.[129]

The United States government's concern with Japanese sensibilities contrasts with the absence of such regard for Chinese sensibilities incident to the passage of the Chinese exclusion laws. This undoubtedly had something to do with Japan having emerged onto the world stage with its defeat of Russia in the Russo-Japanese war of 1904–1905. This was the first victory in modern times of an Asian power over a European power and announced Japan's arrival as a country that could not be trifled with.

California's opposition to Japanese immigration did not abate after the Gentlemen's Agreement.[130] Three state political parties in 1909 adopted exclusion planks. Unable to persuade Congress to prevent Japanese immigration, California adopted the California Alien Land Law in 1913, which removed the rights of aliens to own property not protected by treaty; the idea was that the Japanese would not come to this country if they could not own land.[131]

This dispute about how to react to Japanese immigration persisted in the 1916–1917 debate over legislation creating the Asiatic Barred Zone. This law did not apply to Japan because the Gentlemen's Agreement already barred Japanese

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125 *See* David Brudnoy, *Race and the San Francisco School Board Incident: Contemporary Evaluations*, 50 CAL. HIST. Q. 295, 297 (1971).

126 *See generally* Masuda Hajimu, *Rumors of War: Immigration Disputes and the Social Construction of American-Japanese Relations, 1905–1913*, 33 DIPLOMATIC HIST. 1, 10–16 (2009).

127 Yuji Ichioka, *The Early Japanese Immigrant Quest for Citizenship: The Background of the 1922* Ozawa *Case*, 4 AMERASIA J. 1, 5 (1977).

128 In addition, a 1907 law permitted the President to forbid anyone granted a passport for entry to one country for the purpose of gaining entry to the U.S. from entering into the United States. This provision was aimed at both Japanese and Korean workers. *See* DILLINGHAM COMMISSION REPORTS VOLUME 39, *supra* note 31, at 61.

129 DILLINGHAM COMMISSION REPORTS VOLUME 23, *supra* note 118, at 5.

130 *See id.* at 170, 173.

131 KONVITZ, *supra* note 15, at 158–60.

labor and more explicit legislation naming Japan would give offense.[132] But some Senators objected (without success) to delegating power over U.S. immigration to a foreign government—which is how they viewed the Gentlemen's Agreement—and to worrying more about what the Japanese thought than about United States interests.[133]

Although there were hints that opposition to Japanese immigration was based in part on a fear of adverse competition from cheap Japanese labor, the opposition ran deeper.[134] The Asiatic Exclusion League argued that the "Asiatic races are unassimilable,"[135] and admitted that its opposition was "not alone on industrial but on racial and political grounds as well."[136] Some people were more blunt. Congressman Church from California described Japanese people (along with Hindus) as the "greatest plague we have in the West."[137] And another California congressman (Curry) affirmed that the "white" and "yellow" races were unassimilable.[138] The California Attorney General explicitly admitted that the Alien Land Law was based on "race undesirability."[139] Negative attitudes toward "Japanese laborers [persisted] because of race feeling growing out of difference in color, characteristics, and ideals,"[140] as well as "economic conflict."[141] This racial disparity "practically forbids, when not expressed in law, marriage between [Japanese people] and persons of the white races . . . ."[142]

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132 *See* 54 CONG. REC. 154, 155 (1916) (statement of Sen. Smith) (Japan had not violated the Gentlemen's Agreement); 54 CONG. REC. 2618 (1917) (statement of Sen. Reed) ("The Japanese citizen is now excluded by the action of his own Government, which is not offensive to the Japanese Nation, whereas if we pass this law we will then exclude him by our act, which will be offensive.").

133 *See* 54 CONG. REC. 155 (1916) (statement of Sen. Works) ("By this gentlemen's agreement we have absolutely turned over to the Japanese nation the right to say who of their subjects shall enter this country, and we have no control over it."). There was also an objection to worrying so much about offending Japan. *See* 51 CONG. REC. 2785 (1914) (statement of Sen. Nolan) ("It occurs to me, Mr. Chairman, that the national honor of our own people should be our first consideration, and whenever we find a menace to our public institutions, whether it be black, brown, or yellow, we should . . . enact legislation that will protect our people . . . and make us what we ought to be—a homogeneous people.").

134 *See* DILLINGHAM COMMISSION REPORTS VOLUME 23, *supra* note 118, at 168–71.

135 *Id.* at 170. The extreme example of assuming that Japanese people (even citizens) cannot assimilate was their internment during WWII. *See* Korematsu v. United States, 323 U.S. 214 (1944). There is a striking contrast between the concern about the disloyalty of U.S. citizens of Japanese ancestry during WWII and the objection to denying naturalization of citizens of a country with which we are at war, set forth in a 1917 Report of the Commissioner of Naturalization. The Report characterizes as "unreasonable and archaic" the exclusion of every alien from naturalization irrespective of personal merits just because they were born in a country with which the U.S. was at war. U.S. DEP'T OF LABOR, ANNUAL REPORT OF THE COMMISSIONER OF NATURALIZATION TO THE SECRETARY OF LABOR 6 (1917). The more "humane" policy in keeping with the "American principle" would be to judge unworthiness on a case-by-case basis. *See id.*

136 DILLINGHAM COMMISSION REPORTS VOLUME 23*, supra* note 118, at 171.

137 51 CONG. REC. 2690 (1914) (statement of Rep. Church).

138 *See id.* at 2679 (statement of Rep. Curry).

139 *See* KONVITZ, *supra* note 15, at 159.

140 DILLINGHAM COMMISSION REPORTS VOLUME 1, *supra* note 31, at 675.

141 *Id.*

142 *Id.* at 676.

There were other less negative voices. The Japanese committed fewer crimes than the Latin races,[143] were more assimilable than the Chinese,[144] were "anxious to learn western ways,"[145] went to school to learn English (more so than southern and eastern Europeans),[146] their dress conformed to Americans,[147] and a large number of younger Japanese people were Christians.[148] Professor Wigmore wrote a law review article in 1894 claiming that the Japanese were assimilable and were therefore "white," and, thus, eligible to be naturalized.[149] He argued that the Japanese have "to-day [sic] greater affinities with us in culture and progress and facility of social amalgamation than they have with any Asiatic people, isolated as they are to-day [sic] from Asia in tendencies and sympathies and isolated as they have been in racial history . . . ."[150] A similar claim was made in Ozawa's brief in the Supreme Court:

> If . . . the only argument against fitness of the Japanese for naturalization is their non-assimilability, the argument is ended, for it is preposterous to claim that a nation which has shown itself to have the greatest capacity for adaptation, against whom the severest criticism is that they are imitators, is not capable of adapting itself to our civilization.[151]

The more positive image of Japanese assimilation compared to that of Chinese assimilation suggests that there may be a subtle difference in the type of threat Japanese immigrants were perceived to pose to some Americans. The discussion of the Japanese people contains a hint of a different concern—that they could become politically powerful because, as one observer noted, their "partial adoption of American customs . . . makes them the more dangerous as competitors."[152] In the same vein, Archdeacon notes that reaction to the Japanese was a combination of envy and fear,[153] which would undoubtedly have been nurtured by Japan's defeat of Russia in the Russo-Japanese war. This fear recasts concern about the Japanese as an issue of political power, not as a concern about diluting American values because they could not assimilate.

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143 *Id.* at 675.

144 *Id.*

145 *Id.*

146 *See id.*

147 *Id.*

148 *See id.*

149 Wigmore, *supra* note 50, at 827. Wigmore's impression of the Japanese was undoubtedly formed when he was a professor at the Keio University in Tokyo from 1889–92. *See* Kenneth W. Abbott, *Wigmore: The Japanese Connection*, 75 NW. U. L. REV. 10 (1981).

150 Wigmore, *supra* note 50, at 827.

151 Brief for Petitioner at 79, Ozawa v. United States, 260 U.S. 178 (1922).

152 DILLINGHAM COMMISSION REPORTS VOLUME 23, *supra* note 118, at 167.

153 *See* ARCHDEACON, *supra* note 71, at 164.

b. The Ozawa Case

As it turned out, the issue of Japanese assimilation played no role in the 1922 Supreme Court *Ozawa* decision denying that Japanese were "white." In 1914, Ozawa's application for citizenship had been denied by the district court of Hawaii, and the Ninth Circuit Court of Appeals certified the question to the Supreme Court.[154] Ozawa had come to the United States at the age of nineteen. He was not a laborer, which was the kind of work that led to a negative view of many Japanese immigrants. He attended the University of Berkeley for three years and moved to Hawaii in 1906. He ended up working as a salesclerk at one of the big five Hawaiian sugar companies. He was a practicing Christian with no connection to Japanese churches, schools, or organizations. He sent his children to American schools and churches, spoke mostly English at home, educated himself in American schools, and married a woman who was educated in the United States.[155] He was, in sum, a "paragon of an assimilated Japanese immigrant."[156]

But it did not matter. Evidence of Ozawa's assimilation as an American was disregarded in the Court's unanimous decision that Japanese people were not "white." The Court based its conclusion on a "scientific" definition of Caucasian, which excluded Japanese.[157] Relying on "science" enabled the Court to avoid confronting the potential weakness of the argument that the Japanese were unlikely to assimilate. It was left to the *Thind* case, heard by the Supreme Court in the following year, to make explicit that popular common understanding about assimilation was the test for defining "white," without regard to "scientific" racial categories.[158] This two-pronged approach was convenient for those determined to exclude Asians. "Science" prevented Japanese who might be good at assimilating from being "white," and when "science" favored labeling Caucasian Indians as "white," the Court shifted to the "popular understanding" criterion for defining "white," yielding the same "non-white" label for Indians.

One consequence of the *Ozawa* decision was that Japanese immigration was forbidden by a 1924 law that forbid immigration by anyone not eligible to become a citizen.[159] By 1924, therefore, Japanese and Chinese people were treated alike—denied the opportunity both to immigrate and to become naturalized. There were objections by the Japanese government and by Japanese consumers to adverse

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154 *See* Ozawa v. Unites States, 4 D.Haw. 671 (1916); *Ozawa*, 260 U.S. at 189–90.

155 Ichioka, *supra* note 127, at 10–11. Ozawa was born in 1875 and came to the United States in 1894. *Id.* Additional details on Ozawa's life can be found in the Densho Encyclopedia. DENSHO ENCYCLOPEDIA, HTTPS://ENCYCLOPEDIA.DENSHO.ORG/OZAWA_V._UNITED_STATES/ (last updated April 16, 2014): Ozawa was fluent in English; was a practicing Christian; and (he argued) his skin was as white or whiter than the average Caucasian. *See also* Devon W. Carbado, *Yellow by Law*, 97 CALIF. L. REV. 633 644, 645 (2009).

156 *Ichioka, supra* note 127*, at 11.* Not every Japanese immigrant bought into Ozawa's implicit assumption of white superiority, based on his ability to assimilate. An article in the Japanese immigrant press stated that "[s]ince this newspaper did 'not believe whites are the superior race,' it was 'delighted' the high tribunal 'did not find the Japanese to be free white persons.'" LÓPEZ, *supra* note 12, at 85.

157 LÓPEZ, *supra* note 12, at 85.

158 *See infra* text accompanying notes 241–43.

159 *See* Immigration Act of 1924, Pub. L. No. 68-139, § 13(c), 43 Stat. 153 (1924).

treatment by the 1924 law, which were unavailing.[160] The Japanese Ambassador's statement—"I realize, as I believe you do, the grave consequences which the enactment of the measure retaining that particular provision would inevitably bring . . . "[161]—was interpreted as a "veiled threat" to the United States that could not be tolerated.[162] According to the Densho Encyclopedia, a number of people from California were behind the 1924 Act's anti-Japanese provision, including a former publisher of a Sacramento newspaper, a former California senator, and the California Attorney General.[163] Opponents of Japanese immigration characterized the Japanese as unassimilable and as a menace to California's Anglo-Saxon civilization.[164] Others expressed economic concerns that the Japanese "naturally make more dangerous competitors in an economic way."[165] The Japanese were also accused of violating the Gentlemen's Agreement.[166] By 1924, the concern with Japanese sensibilities that had existed in the first two decades of the twentieth century had dissipated in the xenophobia that followed WWI.

iii. Indians

a. The Negative View of Indian Immigration

The number of Indian immigrants was small. From 1899–1910 they numbered 5,786, only .10% of total immigration, compared to 1.6% for Japanese.[167] There were 9 Indian immigrants in 1900; 258 in 1904; 1,710 in 1908; and 1,782 in 1910.[168] But some people thought that the increasing numbers sounded an alarm.[169] The *Dictionary of Races or Peoples*, under the "Hindu" heading, stated that the "immense population of India [is] beginning to arouse some concern."[170] Moreover, opponents of Indian immigration placed a much higher estimate of the numbers of Indians in the country than were officially reported. Congressman Church put the

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160 *See The Senate's Declaration of War*, JAPAN TIMES AND MAIL (Apr. 19, 1924), http://historymatters.gmu.edu/d/5077 (describing the Japanese response to the adverse treatment by the United States as a "humiliating" wound that "will hurt and rankle for generations and generations").

161 65 CONG. REC. 6074 (1924) (letter read aloud from Japanese Embassy written by Masanao Hanihara).

162 *See* MASAYO DUUS, THE JAPANESE CONSPIRACY: THE OAHU SUGAR STRIKE OF 1920 306 (1999) ("[T]he House and the Senate suggested that 'grave consequences' amounted to a veiled threat by the Japanese government, and the furor became front page news in papers around the country.").

163 Shiho Imai, *Immigration Act of 1924*, DENSHO ENCYCLOPEDIA, https://encyclopedia.densho.org/Immigration_Act_of_1924/ (last updated Mar. 19, 2013).

164 *Id.*

165 ROGER DANIELS, THE POLITICS OF PREJUDICE 99 (1999).

166 *Japanese Immigration: Hearing Before the H. Comm. on Immigr. & Naturalization*, 66th Cong., Part 1 at 715 (1920).

167 DILLINGHAM COMMISSION REPORTS VOLUME 3, *supra* note 123, at 45.

168 *Id.* at 348.

169 *See id.* at 325.

170 DILLINGHAM COMMISSION REPORTS VOLUME 5, *supra* note 36, at 75.

number at 30,000,[171] probably adding many illegal entrants. There was obviously enough fear of Indian immigration to lead the Japanese and Korean Exclusion League to change its name to the Asiatic Exclusion League and to spawn anti-Indian riots in two Washington cities.[172] The League warned that Japanese "immigration had mushroomed" from small numbers, implying that there was a similar risk of Indian immigration.[173]

It was not surprising that the concerns came primarily from the West Coast, where Indians, Chinese, and Japanese workers clustered. The *Dillingham Report* contains the following statements: "The East Indians on the Pacific coast are almost universally regarded as the least desirable race of immigrants thus far admitted to the United States. In point of desirability they are placed far below the Japanese, Chinese, and other oriental races found in the Western States";[174] and "the people of the coast States as a whole are opposed to such immigration, and the force and validity of their objections are recognized." [175] As a response to these concerns, the *Dillingham Report* made a proposal, based on the Japanese precedent of the Gentleman's Agreement, that "[a]n understanding should be reached with the British Government whereby East Indian laborers would be effectively prevented from coming to the United States."[176]

The *Dillingham Report* also contained multiple references to specific negative traits that characterized the Indian population, providing a level of detail absent in the case of the Japanese people. Specific negative traits mentioned included the following:

Literacy: There was more illiteracy among Indians than any other immigrant race.[177]

Becoming a public charge: Indians were likely to become public charges.[178]

Immorality: Indian Muslims were polygamists.[179]

Disease: Hindus would bring diseases such as hookworm.[180] Comments about lack of hygiene also suggested a concern about disease. Statements such as the following: they use dirty blankets, do not wash clothes, and have unclean habits.[181]

Living conditions: Their living conditions kept them apart from others. They had no family life because their wives were left at home, and they all slept in the

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171 *See Restriction of Immigration of Hindu Laborers: Hearing Before the H. Comm. on Immigr. & Naturalization*, 63rd Cong. 37–64, Part II at 74 (1914) [hereinafter *1914 Hindu Immigration Hearings].*

172 Hess, *supra* note 17, at 61.

173 *See* Hess, *supra* note 17, at 61–62.

174 DILLINGHAM COMMISSION REPORTS VOLUME 23, *supra* note 118, at 349.

175 DILLINGHAM COMMISSION REPORTS VOLUME 1, *supra* note 31, at 41.

176 *Id.* at 47.

177 *Id.* at 681.

178 DILLINGHAM COMMISSION REPORTS VOLUME 23, *supra* note 118, at 347.

179 Sherally Munshi, *Immigration, Imperialism, and the Legacies of Indian Exclusion*, 28 YALE J.L. & HUMAN. 51, 73 (2016).

180 *Id.*

181 DILLINGHAM COMMISSION REPORTS VOLUME 23, *supra* note 118, at 341–42.

same room.[182] They were "unfit for American citizenship" because they were "single, unskilled male laborers . . . uninterested in assimilation."[183] Their standard of living was lower than others; they lacked furniture, slept on the floor or ground, and ate without plates, knives, or forks.[184]

Appearance: Indians looked different ("strange appearance"), which (presumably) would have made social and economic assimilation difficult.[185] Most of them were Sikhs who wore turbans and had beards.[186]

Concerns about Indian immigrants were expressed not only by the Dillingham Commission but also in the 1914 Hindu Immigration Hearings.[187] The specific subject was a proposed Hindu Exclusion Bill, modeled after the Chinese Exclusion Act.[188] The fact that committee hearings were devoted specifically to Indian immigration indicates a concern that exceeded what the numbers might justify as well as the influence that west coast legislators had in Congress.

There was significant variation in the testimony at the hearings. They began with testimony from a high caste Hindu, Sudhindra Bose,[189] who spoke explicitly about the issue of assimilation, explaining how Hindus fit well into American society. He testified that Indians were educated and bathed religiously, very few became public charges, they were ethnically Aryans and not as clannish as Chinese and Japanese, and English was spoken because it was the common language of Indians from different places in India.[190] He acknowledged that assimilation would take a while, but that such was true of all social adjustments.[191]

Subsequent testimony was far less favorable to Indians. The Commissioner-General of Immigration argued for exclusion, stating that the Pacific Coast Indian workers were not as described by Bose.[192] He acknowledged that the number of Indian immigrants was not at present very high, but he feared a developing emergency.[193] Many Indians were using entry from a foreign country other than their country of origin to obtain entry to the United States.[194]

Extensive negative testimony about Indians was presented by Church, a Congressman from the State of California: disease was a major problem; they were dirty and did not bathe; they were criminals; they were weak in English; they

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182 *See id*. at 339, 341.

183 LON KURASHIGE, TWO FACES OF EXCLUSION: THE UNTOLD HISTORY OF ANTI-ASIAN RACISM IN THE UNITED STATES 106 (2016).

184 DILLINGHAM COMMISSION REPORTS VOLUME 1, *supra* note 31, at 680.

185 *See* DILLINGHAM COMMISSION REPORTS VOLUME 23, *supra* note 118, at 337.

186 *See id.*

187 *See 1914 Hindu Immigration Hearings*, *supra* note 171.

188 *See* Munshi, *supra* note 179, at 56.

189 *See 1914 Hindu Immigration Hearings*, *supra* note 171, Part I at 4.

190 *See id.* at 5–10.

191 *See id*. at 8.

192 *See id*. at 36–37.

193 *See 1914 Hindu Immigration Hearings*, *supra* note 171, Part I at 46.

194 *See id*. at 42–43.

dressed differently; and intermarriage was impossible.[195] As for wage competition, Indians low-bid American workers.[196] More vituperatively, he stated: "You can not [sic] imagine anything more strange as a human being than a Hindu."[197] When a questioner asked whether both a professor and a rural Indian worker could be naturalized, hinting at the distinction between those Indians who could and could not assimilate, Church stated: "They all look alike to me. I can not [sic] see any difference between them in any way."[198] A second Indian witness at the hearings was equally negative although less vicious. He argued that all Indians should be eligible for naturalization because they were Caucasians, but lower caste Hindus could not assimilate and should be excluded from immigrating by requiring a literacy test that they could not pass.[199]

Church further elaborated on his critique of Indians in statements recorded in the 1914 Congressional Record when Congress was considering a literacy requirement for immigrants: "[Hindus] are an odd, inferior people, bound down by strange traditions and religious fanaticisms. They ever present the appearance of slothfulness, stupidity, and pity."[200] And, in the run-up to the Asiatic Barred Zone Act,[201] adopted in 1917, there were further statements by members of Congress explaining why various groups, including Indians, did not belong in this country. As for assimilation by the "brown" races generally:

> It is established that the brown and black races do not amalgamate with the white but remain identically the same as when they are put into this melting pot or smelting pot. They do not amalgamate; they do not "smelt"; and therefore they are undesirable elements in the composition of our population.[202]

As for Indian assimilation in particular:

> The people of India . . . are as unlike us as is the foliage of the tropics unlike that of the Temperate Zone, and their civilization, their habits of thought can no more be transformed into the habits and thoughts of the people of the Occident than the tropic vegetation can be made to grow at the Arctic Circle. . . . [T]he religion which they believe, the castes which they acknowledge, the family life which they employ, all exist in their country because it was the natural flower and fruitage

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195 *See 1914 Hindu Immigration Hearings*, *supra* note 171, Part II at 70–78, 82.

196 *Id.* at 78.

197 *Id.* at 83.

198 *Id.* at 85.

199 *See 1914 Hindu Immigration Hearings*, *supra* note 171, Part V at 159–60. Accuracy was not this witness's strong suit, mischaracterizing the caste system. For example, he labelled Kshatriyas as merchants; in fact, they were warriors. *See* Jeremy Sarkin & Mark Koenig, *Ending Caste Discrimination in India*, 41 GEO. WASH. INT'L L. REV. 541, 547 (2010). He labelled Sudras as warriors; in fact, they were one rung above untouchables. *See id.* He also got the caste rank order wrong: he ordered castes as Brahmin, Sudra, Kshatriya and Vaishya; but the correct order is Brahmin, Kshatriya, Vaishya, Sudra. *See id.*

200 51 CONG. REC. 2690 (1914) (statement of Rep. Church).

201 *See* Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874, 875–78 (repealed 1952).

202 54 CONG. REC. 270 (1916) (statement of Sen. Phelan).

> of their hearts and souls. . . . They can no more appreciate a government like ours, or a civilization such as ours, than we can appreciate theirs. They can no more transform themselves into creatures of the Occident than we can make ourselves into children of the Orient.[203]

And, finally, there was this comment about the risk of mongrelization by inferior races, including darker races of the Orient, conflating the issues of immigration and naturalization:

> I am most heartily in favor of prohibiting . . . the immigration into this country of any people, any race, the amalgamation of which with the white race will tend to lower the standard of manhood and womanhood. . . . I think . . . that the decadence of the civilizations of the past has been in a large measure due to the amalgamation of superior and inferior races. Nothing could be more undesirable in America than the encouragement of the multiplication of the mongrel in this country. . . . I do not want to vitiate the pure Caucasian blood of America with the blood of the darker races of the Orient . . . . If I had my way about it, I would not permit any but the Caucasian races to enjoy the privileges of citizenship in America.[204]

These negative observations about Asians in general and Indians, in particular, resulted in the adoption of the Asiatic Barred Zone Act in 1917. One Senator said that the statute's use of latitude and longitude to define the Barred Zone was to cover islands near the coast of Asia,[205] but it was clear that barring Indians was the true objective.[206] The wording of the 1917 law avoided explicitly naming Hindus because a geographical test was a more diplomatic way of achieving the same result.[207] Although the Act avoided taking sides on whether Indians were "white," which at the time was legally unclear,[208] the Act provided important political context for the Supreme Court's 1923 judicial decision that Indians were not "white."[209]

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203 *Id.* at 161 (statement of Sen. Reed).

204 *Id.* at 159 (statement of Sen. Vardaman).

205 *See id.* at 154 (statement of Sen. Ellison Smith); *id*. at 157 (statement of Sen. Reed).

206 *See id*. at 154 (statement of Sen. Ellison Smith) (wanted to exclude Hindus); *id.* at 2619 (statement of Sen. Hardwick) (Hindus were not the sort of white people we want); *see also* Munshi, *supra* note 179, at 77 (most people affected by the 1917 law will be Indians). The Act contained exceptions which allowed immigration by, among others, ministers, religious teachers, professionals, artists, merchants, and tourists; Immigration Act of 1917, Pub. L. No. 64-301, ch.29, § 3, 39 Stat. 874, 877 (repealed 1952).

207 *See* 54 CONG. REC. 159 (1916) (statement of Sen. Ellison Smith) (avoid names to be diplomatic; preferable to being candid).

208 *See id.* at 2619 (statement of Sen. Hardwick) (courts have said Hindus were "white").

209 *See* United States v. Thind, 261 U.S. 204, 215 (1923) ("[The 1917 Act] not only constitutes conclusive evidence of the congressional attitude of opposition to Asiatic immigration generally but is persuasive of a similar attitude toward Asiatic naturalization as well, since it is not likely that Congress would be willing to accept as citizens a class of persons whom it rejects as immigrants."). The 1917 law did not apply to Thind, who had immigrated to the United States in 1913. *See In re* Thind, 268 F. 683, 683 (D. Or. 1920).

b. The Administrative and Legal Background of the Thind Case

Notwithstanding the 1917 Act, plaintiff Thind might have had some reason for optimism based on the statement in the 1922 *Ozawa* decision that there would be borderline cases between those who were clearly white or nonwhite,[210] especially when the government's brief conceded that Thind fell in that middle zone.[211] Thind might also have been optimistic that he would be considered "white" because of existing administrative and legal precedent.

First, administrative action was not entirely consistent. Although a casual perusal of census records appears to label most Indians as "Hin"(du), a number of Indians named Singh were labeled "W"—for example: in 1910, Javalla Singh, Lakha Singh, and Sinder Singh; and, in 1920, Manghe Singh. [212]

There was also evidence that the agency making naturalization decisions sometimes favored an Indian applicant. A 1913 comment by the Commissioner of Naturalization stated that a clerk charged with the responsibility to certify an applicant for naturalization would yield to a Hindu applicant who insisted that he was white: "[because the clerk] can not [sic] anticipate the action of the court in such a case, there remains nothing for him to do beyond explaining to the applicant the grounds of his doubt, and accepting the petition if the applicant is insistent."[213]

Second, before the Supreme Court decided the *Thind* case in 1923, there was considerable judicial uncertainty about how to classify someone as "white."[214] The legal divide was between a "scientific" meaning (Caucasian) and popular common understanding**,** based on the functional meaning of the statutory word "white" (ability to assimilate).[215] According to López, in cases involving Indians from 1909 until the 1923 Supreme Court decision in *Thind*,[216] three decided that Indians were "white" because they were Caucasian,[217] one decided that they were "white" based on the weight of precedent,[218] and one relied on common speech to decide that they were not "white."[219] In addition, Hess reports that about seventy Indians were

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210 Ozawa v. United States, 260 U.S. 178, 198 (1922).

211 *See* Brief for the United States at 3, United States v. Thind, 261 U.S. 204 (1923) (No. 202).

212 ANCESTRY LIBR., https://www.ancestrylibrary.com/ (search relevant year, either 1910 or 1920; type first and last name; specify "match all terms exactly"; click "view record") (last visited Mar. 25, 2020).

213 U.S. DEP'T OF LABOR, ANNUAL REPORT OF THE SECRETARY OF LABOR AND REPORTS OF BUREAUS 370 (1913). *See also* Dep't of Just., *The Eligibility of Arabs to Naturaliz*ation, 1 IMMIGR. & NATURALIZATION SERV. MONTHLY REV. 16 (1943) (noting that in 1943 the Board of Immigration Appeals and the Immigration and Naturalization Service both declined to follow the court holdings that Arabians were ineligible for naturalization and instead concluded that Arabians were members of the white race).

214 *See infra* text accompanying notes 216–32.

215 *See supra* text accompanying notes 40–45 (discussing a functional approach).

216 *See* LÓPEZ, *supra* note 12, at 203–07.

217 *See* United States v. Balsara, 180 F. 694, 695 (2d Cir. 1910); *In re* Mozumdar, 207 F. 115, 117 (E.D. Wash. 1913); *In re* Singh, 257 F. 209, 212 (S.D. Cal. 1919).

218 *See In re* Thind, 268, 684 F. 683 (D. Ore. 1920), *rev'd*, United States v. Thind, 261 U.S. 204, 215 (1923).

219 *See In re* Singh, 246 F. 496, 498–500 (E.D. Pa. 1917) (not "white").

naturalized because their Aryan background was the same as Europeans, despite opposition from the federal attorney general.[220]

Indians were not the only group whose racial category was uncertain. There were seven pre-*Thind* decisions that involved Syrians; four held that they were "white", and three ruled that they were not "white".[221]

Turks were also on the brink of "whiteness." A 1909 newspaper report states that a number of Turks employed in Indiana factories had been naturalized.[222] And another newspaper report states that a federal District Court judge in Rhode Island admitted Jacob Thompson, a

> . . . 'subject of the Sultan of Turkey and a native of Armenia,' to citizenship over the government's objection, stating that 'it has been the practice of this court for many years to recognize . . . Turks as coming within the designation of free white persons, and the court will continue so to consider them until a court of higher authority decides otherwise.'[223]

In 1909, after the Chief of the Naturalization Division of the Bureau of Immigration and Naturalization claimed that "Turks, peoples of the Barbary states and Egypt, Persians, Syrians, and 'other Asiatics'" were not "white," that interpretation was almost immediately withdrawn when it met vigorous objection not only from the Ottoman Empire but also from the State Department and the Department of Justice. [224] Secretary of Commerce and Labor, Charles Nagel, wrote that he had taken immediate steps to ensure "a discontinuance of any aggressive measures" by the Government against these groups.[225]

Even Japanese people might be "white." Although four cases after 1909 decided that Japanese people were not white,[226] they did not tell the whole story. A court noted that previously, East Asians were sometimes naturalized as "white" persons by census takers and courts.[227] According to Ichioka, as late as the 1910 census, there were 420 naturalized citizens of Japanese descent.[228] And the

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220 *See* Hess, *supra* note 17, at 65.

221 *See In re* Najour, 174 F. 735, 736 (N.D. Ga. 1909) ("white"); *In re* Mudarri, 176 F. 465, 466 (C.C.D. Mass. 1910) ("white"); *In re* Ellis, 179 F. 1002, 1003–04 (D. Or. 1910) ("white"); Dow v. United States, 226 F. 145, 148 (4th Cir. 1915) ("white"); *Ex parte* Shahid, 205 F. 812, 816 (E.D.S.C. 1913) (dictum that Syrians were not "white"); *Ex parte* Dow, 211 F. 486, 490 (E.D.S.C. 1914) (not "white"), *rev'd* 226 F. 145 (4th Cir. 1915); *In re* Dow 213 F. 355, 366–67 (E.D.S.C. 1914) (not "white"), *rev'd,* 226 F. 145 (4th Cir. 1915).

222 *See* DOUG COULSON, RACE, NATION, AND REFUGE: THE RHETORIC OF RACE IN ASIAN AMERICAN CITIZENSHIP CASES 218 n.40 (2017).

223 *Id.*

224 Coulson, *supra* note 49, at 157–58; *see also* People v. Elyea, 14 Cal. 144, 146 (Cal. 1859) (reasoning that Turks were Caucasian and could therefore serve as a witness in cases involving a white person, an opportunity not afforded to Chinese).

225 Coulson, *supra* note 49, at 158.

226 *See* Bessho v. United States, 178 F. 245, 248 (4th Cir. 1910); *In re* Kumagai, 163 F. 922, 924 (W.D. Wash. 1908); *In re* Yamashita, 70 P. 482, 483 (Wash. 1902); *In re* Saito, 62 F. 126, 126 (C.C.D. Mass. 1894).

227 *See In re* Halladjian, 174 F. 834, 843–44 (C.C.D. Mass. 1909) ("At one time . . . Japanese were deemed to be white, but are not usually so reckoned today.").

228 Ichioka, *supra* note 127, at 2 (citing U.S. Bureau of the Census data).

government's reply brief in *Ozawa* concedes that prior to 1909 "Japanese were naturalized by many courts," even though several court cases were to the contrary.[229]

The pre-*Thind* treatment of Parsis also reflected uncertainty about how to categorize Indians. Parsis came to India after the Muslim conquest of Persia in the seventh century CE.[230] Before *Thind*, a 1909 court decision allowed a Parsi to be naturalized but expected doubts about the relevant criteria to be resolved on appeal; [231] an appellate court then held that a Parsi was white.[232]

c. The Thind Case

Thind must have been encouraged about his chances of being "white" when a lower court granted him citizenship, relying on precedent.[233] Thind might also have hoped that a court would rely on his individual characteristics,[234] which suggested assimilation into American culture, rather than take an all-or-nothing approach to determine whether someone was "white" based on group membership. For example, a court might have considered the following: (1) his very American work and educational background (he had immigrated to the United States in 1913 and began working summers in Oregon lumber mills to pay his way through school at UC Berkeley)[235]; (2) his patriotism (he enlisted in the army in 1917 and was honorably discharged in 1918)[236]; and (3) his status as a high-caste Hindu.[237]

But the Supreme Court unanimously reversed the lower court, and Thind was stripped of his citizenship.[238] The Court disregarded his individual traits, which was consistent with the judicial practice of relying on generalizations about group

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229 Reply Brief for the United States, *supra* note 211, at 4, Ozawa v. United States, 260 U.S. 178 (1922).

230 *See Zoroastrianism*, THE HIST. CHANNEL, https://www.history.com/topics/religion/zoroastrianism (Oct. 8, 2019).

231 *See In re* Balsara, 171 F. 294, 295 (C.C.S.D.N.Y. 1909), *aff'd* 180 F. 694 (2d Cir. 1910).

232 *See* United States v. Balsara, 180 F. 694, 696 (2d Cir. 1910). The post-*Thind* treatment of Parsis was also murky. A 1939 case held that a Parsi was not "white" because he was like the Hindu "in the mind of the common man," following *Thind*. *See* Wadia v. United States, 101 F. 2d 7, 9 (2d Cir. 1939). But an unreported decision after *Thind* favored Dinshah Ghadiali, a Parsi whose revocation of U.S. citizenship was threatened in 1932. *See* Munshi, *supra* note 51, at 656. At trial, he lifted up his pant leg to show white color. *See id.* at 660. Ghadiali won his case but it was never officially reported. *See id.* We know about him only because he wrote about his ordeal in *Dinshah Naturalization Case Clearing Contested Citizenship*. *See id.*

233 *See In re* Thind, 268 F. 683, 684 (D. Ore. 1920), *rev'd*, United States v. Thind, 261 U.S. 204, 215 (1923).

234 There was an occasional suggestion that relying on individual traits was the better way of determining who should be eligible for naturalization. *See* KONVITZ, *supra* note 15, at 32.

235 *Bhaghat Singh Thind*, PBS, https://www.pbs.org/rootsinthesand/i_bhagat1.html.

236 *In re* Bhaghat Singh Thind, 268 F. 683, 683–84 (D. Ore. 1920).

237 *See* United States v. Thind, 261 U.S. 204, 210 (1923) (though he was a Sikh, the Court labelled him a Hindu).

238 Thind was eventually granted citizenship in New York in 1936, *see* Tanveer Kalo, *Dr. Bhagat Singh Thind,* THE U.S. WORLD WAR I CENTENNIAL COMMISSION, https://www.worldwar1centennial.org/index.php/indians-who-served/1940-dr-bhagat-singh-thind.html (last visited Jan. 24, 2020), because of a law allowing citizenship for WWI veterans regardless of race.

characteristics.[239] When courts described an applicant's individual traits, they usually went on to lament having to deny naturalization based on group membership.[240]

In reaching its conclusion, the Supreme Court rejected reliance on Thind being a Caucasian (a "scientific" category) but instead relied on the "popular meaning" of the word "white," as follows:

> In the endeavor to ascertain the meaning of the statute we must not fail to keep in mind that it does not employ the word "Caucasian," but the words "white persons," and these are words of common speech and not of scientific origin . . . [I]n this country, during the last half century especially, the word 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. It is in the popular sense of the word . . . that we [use] as an aid to the construction of the statute, for it would be obviously illogical to convert words of common speech used in a statute into words of scientific terminology when neither the latter nor the science for whose purposes they were coined was within the contemplation of the framers of the statute or of the people for whom it was framed. The words of the statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken.[241]

Once the Court had focused on the popular meaning of the statutory language, it was a short step to the conclusion that the word "white" referred to the public's perception of a group's potential for assimilation. The government's brief had been explicit on this point, to the disadvantage of Indians: "[A]t the time the first naturalization law was passed the Hindus were regarded as a people wholly alien to

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[239] *But see In re* Balsara, 171 F. 294, 295 (C.C.S.D.N.Y. 1909) (admitting a Parsi to citizenship, based on his "high character and exceptional intelligence"), *aff'd*, United States v. Balsara, 180 F. 694, 696 (2d Cir. 1910).

[240] A list of such cases appears in Charles Gordon, *The Racial Barrier to American Citizenship*, 93 U. PA. L. REV. 237, 246 n.47 (1945). Some individual traits were, by law, an independent reason for denying naturalization, even if the applicant was "white." *Id.* The annual reports of the Commissioner of Naturalization include immoral character and ignorance (probably referencing an understanding of our government system) as among those reasons. *See, e.g.*, U.S. DEP'T OF LABOR, ANNUAL REPORT OF THE COMMISSIONER OF NATURALIZATION TO THE SECRETARY OF LABOR 6 tbl. 6 (1921) (showing that in 1921, 719 immigrants were denied naturalization based on immoral character and 1,120 were denied naturalization based on ignorance); *see also* Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214 (barring those likely to become a public charge). Individualized tests may have had a greater negative impact on applicants whose status as "white" was unclear. For example, a 1913 case denied naturalization to a Syrian based on the applicant's character traits. *Ex parte* Shahid, 205 F. 812, 816–17 (E.D.S.C. 1913). The court stressed that the applicant was a polygamist, a disbeliever in organized government, did not speak English, and was "not one the admission of whom to citizenship is likely to be for the benefit of the country." *Id.* at 812–13, 816–17.

[241] *Thind*, 261 U.S. at 208–09.

Western civilization and utterly incapable of assimilation to Western habits and customs, mode of life, political and social institutions.[242]

And the *Thind* Court followed the lead of the government's brief, rejecting the notion of Indian assimilation (in contrast to the notion of assimilation by Europeans):

> It 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. The children of English, French, German, Italian, Scandinavian, and other European parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry.[243]

One might have thought that Thind's army service would have influenced the Court and especially Justice Sutherland, who wrote the opinion in *Thind*. In 1907, Sutherland had argued that his Mormon colleague should be seated as a Senator from Utah over the objections of those opposed to Utah in general and polygamy in particular.[244] As for potentially offensive habits, he argued that these would be discarded as Mormons embraced progressive modernity; Mormons were capable of change.[245] He reminded his listeners that Christians had done as much when they let go of their concerns about witchcraft.[246] And he explicitly cited Mormon military service as evidence that Mormons sacrificed in common with other Americans.[247] But when it came to Indians in 1923, the possibility that they could change did not arise, and Sutherland did not even mention Thind's military service.[248]

The Court strongly denied a racist foundation for its conclusion, stating: "[i]t is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation."[249] In this respect, the Court echoed the government's brief expressing "full appreciation of the wonderful civilization of the Far East . . . which may possibly be in existence if and when our Western civilization shall wane" and

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242 Brief for the United States, *supra* note 211, at 14.

243 *Thind*, 261 U.S. at 215.

244 Victor Jew, *George Sutherland and American Ethnicity: A Pre-History to* Thind *and* Ozawa, 41 CENTENNIAL REV. 553, 557 (1997).

245 *Id*. at 558–59.

246 *Id.* at 559.

247 *Id*. at 558.

248 But the lower court decision in *Thind*, holding that the applicant was "white," did mention his army service. *In re* Thind, 268 F. 683, 684 (D. Ore. 1920), *rev'd*, United States v. Thind, 261 U.S. 204, 215 (1923).

249 *In re* Thind, 261 U.S. 204, 215 (1923).

which "enjoyed a literature and art which, in some respects, have not yet been surpassed in our somewhat arrogant Western civilization."[250]

This denial of racism was an obvious attempt to unlink the view that the people seeking citizenship were unlikely to assimilate from the view that they were inferior. But it is unconvincing. If the criterion for "whiteness" is "popular meaning," public perception should be what matters, not what the Court thinks about the quality of Indian civilization. And the public perception was that Indians were a decidedly inferior race,[251] at least to those on the West Coast who figured prominently in the 1914 hearings about Hindu immigration and in the committee deliberations leading up to the 1917 Asiatic Barred Zone statute.[252]

There was another way that a court could have decided to grant Thind citizenship, falling between individualized and all-or-nothing approaches. Courts might have defined a subgroup within a racial category as white without allowing or denying everyone in the broader category to qualify. There was a plausible precedent for doing this in the famous *Holy Trinity* case, which dealt with an 1885 statute prohibiting someone from bringing contract labor into the country for "labor or service of any kind."[253] The Court held that this broad category did not include "brain toilers,"[254] thereby dividing "labor or service" into "higher" and "lower" subcategories. Thus, the fact that Thind was a high-caste Hindu might have justified concluding that this subgroup deserved the label "white." Another Indian (Mozumdar) made a similar claim when he described himself as a high-caste Hindu of pure blood (an Aryan), belonging to the warrior caste, kept pure by rigid rules of exclusion regarding marriage. He contrasted himself with those Indians who performed rough manual labor, who were an entirely separate class, having quite a different religion and a different ancestry.[255]

The discussion of Hindus in the *Dictionary of Races or Peoples* also provided some support for the "subgroup" approach when it described some northern Indians

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250 Brief for the United States, *supra* note 211, at 21. There is a strong hint of "Orientalism" in this appreciation of Indian civilization. In the nineteenth century, this took the form of praise for Indian spiritualism (apparent in the writings of Emerson and Thoreau), contrasted with Western materialism. *See* VIJAY PRASHAD, THE KARMA OF BROWN FOLK, 15–20 (2000).

251 The link between a negative view of a racial group and the possibility of citizenship was also clear in the infamous 1857 case, *Dred Scott v. Sandford,* which decided that persons of African descent (whether slave or free) could not be citizens because they were "subordinate and inferior." 60 U.S. 393, 404–05 (1857).

252 A 1942 case suggested that the public perception of Indians might have changed, questioning whether Indians would still be considered nonwhite if the Supreme Court were to revisit the issue. Samras v. United States, 125 F.2d 879, 881–82 (9th Cir. 1942). The petitioner brought a test case for the Supreme Court to reverse *Thind* and decide that Indians were "white." *See id.* The Court of Appeals stated that it could not overrule *Thind*, but "[w]e believe that with the present changed personnel of the United States Supreme Court it is entirely possible that they may reconsider their decision in the *Thind* case and depart therefrom and hold that natives of India (Hindus) are 'white' persons within the spirit and meaning of the statute." *Id.* "Before his appeal could be heard, Samras was drafted into the United States Army, which automatically entitled him to citizenship" under the law at that time. Hess, *supra* note 17, at 72.

253 Holy Trinity v. United States, 143 U.S. 457, 458 (1892) (interpreting Alien Contract Labor Law of 1895. Feb. 26, 1885, ch. 164, *23 Stat. 332*).

254 *Id.* at 463–64.

255 *In re* Mozumdar, 207 F. 115, 116 (E.D. Wash. 1913).

as good merchants and noted that "perhaps [they] identify themselves with western civilization to a greater degree than do the Chinese."[256] The Dictionary went on to distinguish the southern Dravidians, "many of them extremely low in civilization and approaching the Negro in physical characteristics," with the Aryan Hindus of the north, who are "more closely related in language, if not physical appearance, to our northern Europeans".[257] It would not have been too much of a stretch to hold that at least high-caste Hindus were "white," but not Indians belonging to other castes. But those responsible for labeling whites were not inclined to separate members of a group into subgroups. In a different context—the debate over the 1924 Immigration bill—Senator Reed of Pennsylvania was unwilling to divide Italians into subgroups.[258] He stated that "[a]s a matter of common-sense legislation . . . we have to treat the people in what is now known as Italy as one group . . . ."[259] Consequently, Italians were not classified based on their origins in different parts of Italy prior to Italian unification in 1861, missing an opportunity to treat northern and southern Italians differently.[260]

C. Southern and Eastern Europeans

Asian immigration was a drop in the bucket compared to the increase in immigration in the late nineteenth and early twentieth centuries. During the decade before 1880, total immigration peaked at 2,812,191.[261] Thereafter, the totals ballooned: 1881–1890 (5,246,613); 1891–1900 (3,687,564); 1901–1910, (8,795,386); 1911–1920 (5,735,811).[262] The major contributors to this increase were immigrants from southern and eastern Europe, who were referred to as the "new immigra[nts]."[263] In 1907 alone, total immigration was 1,285,349; the number from Europe was 1,207,619, 81% of which came from southern and eastern Europe; twenty-five years earlier, Europe immigration had been 648,186, of which only 13.1% (84,973) came from southern and eastern Europe.[264] The following data show the dramatic shift in the percentage contribution to U.S. immigration from northern and western Europe (NW) to southern and eastern Europe (SE):

DECADE	PERCENTAGE OF IMMIGRATION	
1871–1880:	NW, 73.6%;	SE, 7.2%
1881–1890:	NW, 72%;	SE, 18.3%

256 DILLINGHAM COMMISSION REPORTS VOLUME 5, *supra* note 36, at 53.

257 *Id.* at 75–76.

258 68 CONG. REC. 5462 (statement of Sen. Reed).

259 *Id.*

260 *See* Robert Orsi, *The Religious Boundaries of an Inbetween People: Street Feste and the Problem of the Dark-Skinned Other in Italian Harlem, 1920-1990*, 44 AM. Q. 313, 315 (1992) (pointing out that Italians south of Rome had little identification with the newly formed Italian state).

261 U.S. DEP'T OF JUSTICE, ANNUAL REPORT OF THE IMMIGRATION AND NATURALIZATION SERVICE 56 (1948).

262 *Id.*

263 *See* DILLINGHAM COMMISSION REPORTS VOLUME 1, *supra* note 31, at 13.

264 *Id.*

1891–1900:	NW, 44.6%;	SE, 51.9%
1901–1910:	NW, 21.7%;	SE, 70.8%
1911–1920:	NW, 17.4%;	SE, 59%
1920–1930:	NW, 31.2%;	SE, 29.1%[265]

The *Dillingham Report* states that this shift in the makeup of immigrants was creating "a widespread feeling of apprehension as to its effect on the economic and social welfare of the country," based on the following concerns expressed that were similar to those expressed about Asian immigrants.[266] The old immigrants quickly assimilated; they mingled freely, and their racial identity was entirely lost for their children, but the new immigrants were segregated "apart from Native Americans and older immigrants," slowing their assimilation.[267] They were either single or came without their wives and lived in crowded groups.[268] The old immigrants were essentially permanent settlers, but about 40% of the new immigrants returned to their country of origin, and two-thirds of that 40% stayed there.[269] The *Dillingham Report* asserted that new immigrants were less intelligent than their predecessors; of those over age 14, one-third were illiterate, and they brought disease, crime, and pauperism.[270]

This apprehension led to a renewed embrace of Know-Nothingism. The man who was soon to become the Commissioner-General of Immigration wrote as follows about the new immigrants: "Whatever Know-Nothingism meant in former years, a man who advocates a restriction of immigration today is a patriot . . . . The population that came previous to 1860 was civilized and that which comes today is, in great proportion semi-barbarous."[271] Another symptom of discomfort with new immigrants prior to WWI was the change in the motto of the National Americanization Committee from "Many Peoples, But One Nation" to "America First" and their proposal that all immigrants seek citizenship within three years or face deportation.[272]

The *Dillingham Report* made one admission that rarely surfaced in the discussion of immigrants: "it is difficult to define and still more difficult to correctly measure the tendency of newer immigrant races toward

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265 *Sources of Immigration to the United States, 1820-1944*, 2 IMMIGR. & NATURALIZATION SERV. MONTHLY REV. 77 (1944). The decline in immigration from southern and eastern Europe in 1920–1930 resulted from the severe quotas adopted by the Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153.

266 DILLINGHAM COMMISSION REPORTS VOLUME 1, *supra* note 31, at 24.

267 *Id.* at 13–14.

268 *Id.* at 38.

269 *Id.* at 24.

270 *Id.* at 24, 26–28.

271 PERLMANN, *supra* note 36, at 32.

272 *See* ARCHDEACON, *supra* note 71, at 167. Not everyone was so dismissive of new immigrants. President Cleveland's veto of an anti-immigration bill in 1897 reminded the public that "[t]he time is quite within recent memory when the same [negative things were] said of immigrants who, with their descendants, are now numbered among our best citizens." DILLINGHAM COMMISSION REPORTS VOLUME 39, *supra* note 31, at 48.

Americanization, or assimilation into the body of the American people."[273] But the Report then reverted to pessimism about the assimilation of the new immigrants: "[i]f, however, the tendency to acquire citizenship, to learn the English language, and to abandon native customs and standards of living may be considered as factors, it is found that many of the more recent immigrants are backward in this regard, while some have made excellent progress."[274] Of special note was their living arrangements; because it was common for them to live together in boarding houses and work together, the result (in the view of the *Dillingham Report*) was that they had little incentive to learn English, become acquainted with American institutions, or adopt American standards.[275]

Martha Ragsdale's 1928 book tells the same story. She describes how immigration trends shifted in 1880 toward southern and eastern Europeans, whose "looks, habits, and temperament [differed] from the Nordic stock."[276] "The coming in of people who will not be assimilated creates discord"[277] and tends toward deterioration of political institutions.[278] The 1920 Republican Party platform stated that immigration "should not exceed that which can be assimilated with reasonable rapidity, and . . . favor[ed] immigrants whose standards are similar to ours."[279]

In the eugenics spirit of that era,[280] the negative view of certain Mediterranean types was put in physical terms, describing the "dark Mediterranean subspecies" as having smaller skulls than Nordics, with stunted stature and weak musculature.[281] This led to Madison Grant's conclusion that if the Melting Pot boiled out of control, "the type of native American [sic] . . . will become as extinct as the Athenian of the age of Pericles . . . ."[282]]

The negative characterization of the new immigrants from southern and eastern Europe never reached the point of treating them like Asians. They had so-called "inbetween" status, as evidenced by attitudinal surveys in the 1920s that placed them on a spectrum between the higher ranked northern and western Europeans and the lower-ranked Asians from Japan and China.[283] They were also

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273 DILLINGHAM COMMISSION REPORTS VOLUME 1, *supra* note 31, at 42.

274 *Id.*

275 *See id.*

276 RAGSDALE, *supra* note 63, at 10.

277 *Id.* at 12.

278 *See id.*

279 *Id.* at 13. An article in a Japanese newspaper expressed the same negative view of the new immigrants. It objected to the California law prohibiting land ownership by aliens ineligible for citizenship (obviously aimed at Japanese immigrants) because it treated Japanese immigrants worse than people of "third-rate southern and eastern European nations living in the United States." *See* Ichioka, *supra* note 127, at 5–6.

280 *See* ARCHDEACON, *supra* note 71, at 161 (eugenics was much in vogue in the United States on the eve of World War I).

281 *See* NANCY FONER, FROM ELLIS ISLAND TO JFK: NEW YORK'S TWO GREAT WAVES OF IMMIGRATION 144 (2000).

282 MADISON GRANT, THE PASSING OF THE GREAT RACE 228 (1916).

283 *See* LÓPEZ, *supra* note 12, at 105–06. The use of the term "inbetween" to describe the new immigrants is explained in James R. Barrett & David Roediger, *Inbetween Peoples: Race, Nationality and the "New Immigrant" Working Class*, 16 J. AM. ETHNIC HIST. 3, 3–34 (1997).

"inbetween" Black people and Whites, which meant that discrimination in housing and the workplace was never as severe for the new immigrants as it was for Black people; and while intermarriage between Black people and Whites remained taboo, Italians could marry whomever they chose without similar resistance.[284] Consequently, as recounted below, the new immigrants became targets of a 1917 law imposing literacy requirements on immigrants and a 1924 law imposing harsh quotas, but never experienced the blanket prohibition on immigration that applied to Asian immigrants.

The first major federal legislation to come out of these negative views of southern and eastern Europeans was the adoption in 1917 of a literacy test, which required immigrants to be able to read thirty to eighty words in a language of their choice.[285] Although this requirement applied regardless of where the immigrants came from, it was widely understood as "An Intelligent and Effective Restriction" [286] to prevent immigration by the less desirable new immigrants.[287] An 1896 Senate Report had earlier explained that the use of a literacy test would bar immigration by those "most alien in language and origin to the people who founded the 13 colonies" and "would tell most heavily against those classes of immigrants which now furnish paupers, diseased and criminal . . . ."[288] A literacy test was even described in a 1916 cartoon as establishing an "Amercanese Wall."[289] The illiteracy data among new immigrants explained why a literacy test was useful as an exclusionary tactic. From 1899 to 1909, illiteracy among prospective immigrants ranged from 24.3% (Slovaks) to 46.9% (Italians), but the range for the old immigrants (Irish and German immigrants) was from 2.7% (Irish) to 5.1% (Germans).[290]

The second major immigration legislation in the early 20th century was a 1924 law which adopted harsh immigration quotas. This legislation was aimed primarily at southern and eastern Europeans, and based on the percentage of U.S. population from particular countries in 1890 (a 2% limit).[291] Advocates of these quotas characterized the literacy test as a frail barrier.[292] Chairman Johnson of the House Committee on Immigration had begun to push for quota laws as early as 1914 but was not successful until after WWI when immigration resumed in large numbers in the face of wartime destruction in Europe.[293] Johnson buttressed his

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284 *See* Barrett & Roediger, *supra* note 283, at 4; Orsi, *supra* note 260, at 316–18.

285 *See* Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874, 877 (applicable to an immigrant over sixteen years of age).

286 *See generally* ZOLBERG, *supra* note 18, at 199–242.

287 ZOLBERG, *supra* note 18, at 234.

288 DILLINGHAM COMMISSION REPORTS VOLUME 39, *supra* note 31, at 47.

289 *See* Raymond O. Evans, *The Americanese Wall, as Congressman Burnett Would Build It*, HERB: RESOURCES FOR TEACHERS, https://herb.ashp.cuny.edu/items/show/2301 (last visited Apr. 19, 2020).

290 ARCHDEACON, *supra* note 71, at 152.

291 *See* H.R. REP. NO. 176, at 3 (1924). The 1924 law followed a similar 1921 law, which had a 3% limit based on the 1910 population. *See id.* at 2.

292 *See* U.S. DEP'T LAB., ANN. REP. COMM'R NATURALIZATION TO SEC'Y LAB. 3–4 (1923).

293 *See* PERLMANN, *supra* note 36, at 204.

case for quotas by appointing Dr. Harry Laughlin, a geneticist with the Eugenics Records Office, as the Committee's eugenics expert.[294] His expertise produced an "Analysis of America's Modern Melting Pot" (1920), which purported to show the relationship between biology, immigration, and the risk of social degeneracy. His analysis found that recent immigration trends presented a higher percentage of "inborn socially inadequate qualities than do the older stocks." He reminded the committee that America's commitment to democracy had left out what a scientist familiar with breeding plants and animals knows, that there are "blood or natural inborn hereditary mental and moral differences."[295] His data purported to show that crime and disease were more prevalent among southern and eastern Europeans.[296] The 1924 law was very successful in achieving its aim of drastically reducing the influx of new immigrants. From 1925–1927, the quota for northern/western Europeans was 142,483, for southern/eastern Europeans 18,439.[297]

The dominant theme, expressed in a committee report to the 1924 law, was that an undigested mass of alien thought, alien sympathy, and alien purpose was intolerable; for the country to endure, the nation's homogeneity must be preserved.[298] The report went on to describe the immigrants' lack of government traditions that made assimilation difficult—their familiarity with state control, lack of independent courts, and living under laws not made by the people.[299]

The absence of a total ban on white European immigration contrasted with a provision in the 1924 law that had the effect of banning Japanese immigration. This was achieved by prohibiting anyone from immigrating unless they could be naturalized, which (after *Ozawa*) ruled out Japanese immigrants.

D. Southern Italians

Italians were by far the largest group of new immigrants (3,820,986 from 1899–1924).[300] But it was a subset of this group that caused the most concern. Southern Italian immigration was a significant multiple of northern Italian immigration. For example, from 1899–1910, northern Italian immigration was 372,668 and southern Italian was 1,911,933.[301] Data provided in a Commissioner-

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294 *See id.* at 205–06. For a devastating critique of Laughlin's analysis of data,.

295 Regarding mental differences, the biological determinism embraced by the eugenics movement was supported by a reliance on IQ tests that had been administered to army men during WWI and which were thought to provide objective data about inherited intelligence. Congressional debates in 1924 relied on the minimal scores of southern and eastern Europeans on these tests to restrict their immigration. *See* STEVEN JAY GOULD, THE MISMEASURE OF MAN 20, 157, 196, 224–32 (1981).

296 *See* PERLMANN, *supra* note 36, at 206.

297 *Who Was Shut Out?: Immigration Quotas, 1925-1927*, HISTORY MATTERS: THE U.S. SURVEY COURSE ON THE WEB, http://historymatters.gmu.edu/d/5078 (last visited Jan. 29, 2020); *see also* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 100 (1929); PERLMANN, *supra* note 36, at 227–28 (the Italian quota in 1925 was 6,203, compared to 283,738 in 1914).

298 *See* H.R. REP. NO. 176, at 3, 17 (1924).

299 *See id.* at 18.

300 ARCHDEACON, *supra* note 71, at 118, 121.

301 DILLINGHAM COMMISSION REPORTS VOLUME 1, *supra* note 31, at 97.

General of Immigration report gives the following breakdown of northern and southern Italian immigration—northern, 44,802, southern, 251,612 (1913–14); northern 27,459, southern, 195,037 (1920–21); northern, 9,054, southern, 39,226 (1922–23).[302] In 1907 there were 240,000 southern Italian immigrants, but northern Italians were one-fifth of that number.[303]

Southern Italians did not easily fit into American culture, frequently treated as almost Black. They were characterized as "not-yet-white" and were labeled "'black dagoes' as neither Black nor white."[304] They were described in the press as "swarthy, kinky-haired" and were contrasted with northern Italians who were "Teutonic" Italians.[305] They were even made to sit in the back row of churches with Black people.[306] Several commentators struck a similar theme. A *New York Times* article, entitled "How Italians Became 'White,'" noted that darker-skinned southern Italians suffered the stigma of Blackness on both sides of the Atlantic.[307] The article explained that northern Italians considered the southern Italians, especially Sicilians, as inferior; southerners were guineas (a slur usually applied to Blacks) and dagoes; "they were sometimes shut out of schools, movie houses, and labor unions"; they accepted Black jobs and lived in Black neighborhoods.[308] Northern Italians denigrated their southern neighbors as Turks, deriding them as "Africans" and of African ancestry.[309] One observer noted that northern and southern Italians were viewed as biologically different, almost a different species.[310] Another commentator noted the negative view that northern Italians held of southern Italians, describing them as "culturally and/or innately inferior. . . disposed to crime and violence."[311]

Thomas Guglielmo painted a derogatory image of southern Italians in Chicago: they were "excitable, impulsive . . . impracticable,"[312] "criminally inclined mongrels", and "worshippers of power [like the] Chinese."[313] He believed that, unlike the northern Italians, they were not fit for citizenship.[314] They were thought

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302 U.S. DEP'T OF LABOR, ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION TO THE SECRETARY OF LABOR 10 (1923).

303 DILLINGHAM COMMISSION REPORTS VOLUME 5, *supra* note 36, at 84.

304 DAVID ROEDIGER, TOWARDS THE ABOLITION OF WHITENESS 186 (1994).

305 Orsi, *supra* note 260, at 313, 315.

306 *Id.* at 316. Even today the similarity of Black people to some Italians was worthy of comment. On the February 4, 2020, edition of the *Daily Show* on the Comedy Channel, Roy Wood Jr. delivered the following introduction: "Good evening Black people, African Americans, people of color, and really tan Italian people." *The Daily Show: 2020 State of the Union Special* (Comedy Central television broadcast Feb. 5, 2020).

307 *See* Brent Staples, *How Italians Became 'White'*, N.Y. TIMES (Oct. 12, 2019), https://www.nytimes.com/interactive/2019/10/12/opinion/columbus-day-italian-american-racism.html.

308 *Id.*

309 Orsi, *supra* note 260, at 315.

310 *Id.* at 324 n.7.

311 RICHARD GAMBINO, BLOOD OF MY BLOOD: THE DILEMMA OF THE ITALIAN-AMERICANS 105 (1974).

312 THOMAS A. GUGLIELMO, WHITE ON ARRIVAL: ITALIANS, RACE, COLOR, AND POWER IN CHICAGO, 1890-1945, at 23 (2004).

313 *Id.* at 24.

314 *Id.* at 23.

to have Negroid ancestry.[315] The House Committee on Immigration and Naturalization even debated about whether a southern Italian was a full-blooded Caucasian.[316] A spokesperson for the Chicago Italian Chamber of Commerce told an interviewer that northern and southern Italians were different races, speaking different languages.[317]

Guglielmo gave further evidence that southern Italians were viewed as inferior. A Mississippi town attempted to bar them from schools; some state legislators tried to disenfranchise them along with Black people; and a Louisiana sugar cane boss referred to them as n******.[318] One observer said that southern Italians were as different from northern Italians as an alligator pear is different from an alligator.[319] Another distinguished northern from southern Italians because the latter had a "horrifying 'propensity for personal violence', 'ineptness' for teamwork, a strong dose of African blood, and a 'lack of mental ability.'"[320] A magazine urged Congress in 1914 to exclude southern Italians, just like "Asiatics," because they were not fit to take part in our government.[321]

There was even the kind of violence against southern Italians that we usually associate as having been perpetrated against African Americans. In 1891, eleven Sicilians were lynched in New Orleans for their alleged role in killing the police chief.[322] This led Italy to break off diplomatic relations and resulted in the Harrison administration paying indemnity.[323] President Harrison even declared a one-time national celebration of Columbus Day in 1892 as a sign of goodwill.[324]

Most significantly, the alleged differences between southern and northern Italians was clearly demarcated in the List of Races or Peoples.[325] It described southerners as "excitable, impulsive, highly imaginative, impracticable; as an individualist having little adaptability to highly organized society."[326] By contrast, northern Italians were described as "cool, deliberate, patient, practical, and capable of great progress in the political and social organization of modern civilization."[327] According to the *Dillingham Report*, the criminal element was far greater among the southern Italians, from which the mafia originated, stating: "Italian statistics [show] that all crimes, and especially violent crimes, are several times more numerous among the South than the North Italians"[328] Southern Italians were also

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315 *Id.* at 24.

316 *Id.* at 27.

317 *Id.* at 32.

318 *Id.* at 27.

319 *Id.* at 65.

320 *Id.* at 23.

321 *Id.* at 23–24.

322 Staples, *supra* note 307.

323 *Id.*

324 *See id.*

325 *See* PERLMANN, *supra* note 36, at 29–31.

326 DILLINGHAM COMMISSION REPORTS VOLUME 5, *supra* note 36, at 82.

327 *Id.*

328 *Id.* at 83.

more likely to be illiterate; in 1901, 48.5% of all Italians were illiterate, but the illiteracy rate for the Calabria region in southern Italy was 78.7%.[329] The distinction between southern and northern Italians also found its way into the U.S. government's annual reports of immigration data, both as to the numbers of immigrants and the cross-tabulation of various characteristics.[330]

Still, despite concerns about the ability of southern Italians to assimilate and despite their purported similarity to Black people, they were never barred from immigrating or from becoming naturalized "white" citizens, which was the fate suffered by Asian immigrants. But why this discrepancy? The remainder of this Article answers this question by focusing on a comparison of southern Italians with Indians. Rather than ask why southern Italians escaped "nonwhite" status, we ask why Indians did not achieve the same "white" status as southern Italians.[331]

IV. WHY SOUTHERN ITALIANS, BUT NOT INDIANS?

There are four possible explanations for treating southern Italians and Indians differently for naturalization and immigration purposes—census practice, a disparity in political power, different perceptions of the ability to assimilate, and disparate treatment of Europeans and Asians.

A. Census

The government officials who recorded census data always defined southern and eastern Europeans as "white" by placing a "W" in the "color" or "color or race" column.[332] Guglielmo gives this census practice as one explanation for why southern Italians were considered "white," because the census undoubtedly influenced public perceptions and, by inference, the decisions made by those responsible for naturalization.[333] This meant that all southern and eastern Europeans could claim

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[329] *Id.*

[330] *See, e.g.*, U.S. DEP'T OF LABOR, ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION TO THE SECRETARY OF LABOR 32, 35 (1922) (showing the number admitted and departed and their sex, age, and length of residence).

[331] The possibility that Indians were at least as worthy as "white" southern Italians occurred to one observer who noted that "Indians are . . . far more hygienic in their methods of living than . . . some of the southern Europeans." *1914 Hindu Immigration Hearings*, *supra* note 171, Part V, at 155. Moreover, Guglielmo's arguments for why southern Italians were always considered "white" also applied to Indians. First, Guglielmo notes that scientific taxonomies placed Italians in the white category; this was the older traditional taxonomy of white, black, red, brown, and yellow, not the more recent taxonomy advanced by the Bureau of Immigration and taken up by the Dillingham Commission, which divided white Europeans by race. *See* GUGLIELMO, *supra* note 312, at 29. But Indians could also rely on scientific taxonomy, which some courts invoked to label Indians as Caucasian. *See* GUGLIELMO, *supra* note 312. Second, as a counter to their alleged African/Negroid admixture, southern Italians claimed a link to the ancient Greek and Etruscan civilizations, in contrast to the backward wild men of northern Europe who went about in "the skins of wild beasts." *Id.* at 30. But Indians could also claim a link to an ancient, advanced civilization, as the government's brief in the *Thind* case conceded. *See* Brief for the United States, *supra* note 211, at 21.

[332] *See supra* text accompanying notes 52–56 (discussing the history of the use of the "color" and "color or race" categories).

[333] GUGLIELMO, *supra* note 312, at 30–31.

to be members of the superior white "*color* division of mankind," even if they were members of an inferior race; they were just not that inferior.[334]

If it were true that the census always recorded Indians as other than "white"—either "Hindu" or "Other" depending on the available categories—then census practice would help to explain why Indian immigrants could not be naturalized under prevailing law. But census practice was not uniform. As noted earlier, census records sometimes referred to Indians as "white,"[335] presumably reflecting the uncertainty that existed prior to the *Thind* decision. The census records do not, therefore, explain why southern Italians were "white" and Indians were not. Moreover, judicial decisions and administrative practice did not always follow the categorization of Indian immigrants as other than "white" in the census records.[336]

B. Political Power

Earlier discussions of Irish and Japanese immigrants called attention to the possibility that their voting power would be used to achieve significant political power—an actuality in the case of the urban Irish immigrants and a remote fear in the case of the Japanese immigrants. Similarly, the voting power of southern and eastern European immigrants might have dampened any inclination to label any subset of Italian immigrants as "nonwhite." If the government had denied southern Italian immigrants citizenship in the early 1900s, there might have been a political backlash from members of this group who already had the vote,[337] as well as from descendants of those without the vote who had acquired birthright citizenship.

Although it is impossible to be sure how Italian voters would have reacted to denying their compatriots the opportunity to be naturalized, one commentator notes that "[m]any politicians of the Progressive Era tailored their thinking about the racial desirability of the new European immigrants to appeal to the 'foreign' vote."[338] She gives the example of Woodrow Wilson's 1912 campaign for the presidency, in which he "repudiated the contemptuous phrases" he had used to describe southern and eastern Europeans in a history text he had written ten years earlier.[339] And, in 1916, when the question arose why Africa was not included in the areas from which immigration was forbidden, one senator suggested that it was because Black individuals voted.[340] Perlmann also suggests that Henry Cabot

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334 *Id.* at 63.

335 *See supra* text accompanying note 212.

336 *See supra* text accompanying notes 214–20.

337 These southern and eastern European voters would have included previously naturalized citizens as well as noncitizens in those few states that did not require voters to be citizens, at least if they had declared their intention to gain citizenship. *See* ZOLBERG, *supra* note 18, at 110. It was not until 1996 that Congress made citizenship a requirement for voting in *federal* elections. *See* Illegal Immigration Reform and Immigrant Responsibility Act, 18 U.S.C. § 611.

338 FONER, *supra* note 281, at 146.

339 *Id.*

340 *See* 54 CONG. REC. 156–57 (1916) (statement of Sen. Reed).

Lodge's defense of Irish immigrants had something to do with Irish-American voters in Massachusetts and that some senators' opposition to the complete exclusion of certain groups of immigrants was their sensitivity to "foreign-born voters."[341] And Zolberg notes that one of the advantages of using a literacy test to limit immigration was that party managers would have opposed an exclusion based explicitly on racial categories because of the foreign vote.[342]

To the extent that political power was at all relevant to determining who could be naturalized, Indian immigrants were at a disadvantage compared to Italians. There were simply too few Indian immigrants to constitute a political threat. Archdeacon notes that Italian immigration from 1899–1924 equaled 3,820,986 but Indian immigration equaled 8,234.[343] After the *Thind* decision, there were some protests from educated Indians, Protestant missionaries in India, American liberal journals, and some nationalist groups in India, but nothing of real significance and certainly nothing organized or vocal from lower-caste Indians.[344] Moreover, political power worked to Indian immigrants' disadvantage. Opposition to Indians came from California, which was a swing state whose political power in national elections was of concern to national parties.[345]

Another way in which political power might have worked against Indian immigrants was the absence of a credible threat from the Indian government. We earlier encountered effective complaints by the Italian, Turkish, and Japanese governments about the U.S. treatment of immigrants from these countries. Italy protested the lynching of Italians in New Orleans,[346] Turkey objected to the denial of naturalization on the ground that Turks were not "white,"[347] and Japan objected to discrimination in San Francisco schools.[348] But the Indian government could not be expected to support Indian immigrants in the United States. India was still a British colony, and the British government supported the exclusionists.[349] Moreover, Britain was unlikely to come to the defense of Indian immigrants in the United States after about 100 Indians had used the United States as a base to

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341 *See* PERLMANN, *supra* note 36, at 58, 205.

342 *See* ZOLBERG, *supra* note 18, at 211.

343 ARCHDEACON, *supra* note 71, at 118–19.

344 *See* Hess, *supra* note 17, at 66. Beginning in the 1930s, a pro-Indian political movement eventually led to allowing Indians to be naturalized. *See id.* at 71–79. When Indians were allowed to be naturalized in 1946, the law gave them the same "inbetween" status that had been accorded new immigrants in 1924: naturalization but with a low quota (100 annually). *Id.* at 78–79.

345 California's political clout had been apparent in anti-Chinese legislation. *See* KONVITZ, *supra* note 15, at 11 (California was a swing state in national elections; seven of eight anti-Chinese laws were passed on the eve of a national election); *see also* accompanying text *supra* notes 195–200 (stating that opposition to Indians was expressed by Representative Church of California). *Cf.* ZOLBERG, *supra* note 18, at 188 (the fact that Chinese could not vote to counteract the anti-Chinese bias in western states was one factor in the passage of Chinese exclusion laws); KONVITZ, *supra* note 15, at 11 (China was not a great power able to exert pressure against Chinese exclusion laws).

346 *See supra* text accompanying notes 322–24.

347 *See supra* text accompanying notes 222–25.

348 *See supra* text accompanying notes 125–27.

349 *See* Munshi, *supra* note 179, at 76.

develop a plan to gain independence from Britain with the furtive support of Germany.[350]

Absence of political power is not, however, a justification for how Indian immigrants were treated. It is only an explanation. The next section considers an important contemporary justification for concluding that Indians were not "white" as well as for barring them from immigrating to the United States—the difficulty of assimilation.

C. Ability to Assimilate—The Empirical Standard

As noted earlier, the *Thind* Court dismissed the possibility of Indian assimilation.[351] At the same time, however, the Court wrote affirmatively of the ability of southern and eastern Europeans to assimilate. The opinion argued that, although Congress's affirmative intent in 1790 was to limit naturalization to people coming from the British Isles and Northwestern Europe, "[t]he 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."[352]

The facts, however, call into question any unfavorable comparison of Indians to southern Italians. On several assimilationist criteria, Indians seemed to fare better. As for *literacy*, the *Dillingham Report* noted a low literacy level for Indians, but southern Italians were worse. From 1899–1910, the percentage of persons aged fourteen or over who could neither read nor write was: southern Italians, 53.9%; northern Italians, 11.5%; Indians, 47.2%; and Japanese, 24.6%.[353] As for the risk of becoming a *public charge*, data also indicated that Indians were better than southern Italians. Although there was no requirement that immigrants have any particular amount of money when they arrived, they were required to say whether they had more than $30 (later raised to $50), and the answer was recorded in the ship manifest. This information provides some evidence of whether an immigrant would become a public charge, even though the accuracy of these amounts might be questioned because the records depended on the amount shown to inspectors. From 1899–1903, 74.6% of the Indian immigrants had $30, or more; and from 1904–1910, 27.9% had $50 or more. For southern Italian immigrants, the percentages were 6.9% and 5.4%, respectively.[354] As for the risk of *criminality*, southern Italians were

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350 *See* Hess, *supra* note 17, at 65; *see also* COULSON, *supra* note 222, at 47 (suggesting that Thind's involvement with efforts to overthrow British rule in India played an unspoken role in the Court's decision that Thind was not "white").

351 *See supra* text accompanying note 241.

352 United States v. Thind, 261 U.S. 204, 213–14 (1923).

353 DILLINGHAM COMMISSION REPORTS VOLUME 1, *supra* note 31, at 99.

354 *See id.* at 102–03. The Commissioner-General of Immigration also compiled statistics for 1904 and 1908 about the number of aliens debarred from entry or deported as paupers or likely to become paupers. *See* U.S. IMMIGR. COMM'N, IMMIGRANTS AS CHARITY SEEKERS, S. DOC. NO. 61-665, at 320 tbl.44 (3d Sess. 1910). No data were compiled for Indians, but the data indicated a much greater propensity for pauperism among southern Italians (SO) compared to northern (NO) Italians. For 1904—debarred: SO (1396), NO (141);

often identified as having criminal tendencies, including a mafia connection;[355] Indians were not usually viewed in that light.[356]

It is true that Italian immigrants could make a strong factual case that they were trying to assimilate based on their leading the list of participants in various Americanization programs,[357] which were established to teach citizenship in the schools.[358] Twenty states created such programs between 1919 and 1921,[359] probably in response to the Commissioner of Naturalization's observation that there had been a "childish confidence" that a certificate of naturalization alone could secure Americanization and a growing recognition by the courts that they had to be "more painstaking . . . to insure admittance" of only those "genuinely attached to the principles of the American form of government."[360]

Italian immigrants were also the specific targets of government efforts to advance their assimilation.[361] The Italian Minister of Foreign Affairs persuaded the U.S. government to set up a bureau of information and protection, staffed by Italians nominated by the Italian ambassador.[362] This bureau was expected to provide information about potential jobs in different states, including central and western states where farm or mining work was available, thereby reducing immigrant crowding in New York City[363] and finding work that did not displace U.S. workers.

But why didn't Indian immigrants appear to have the same potential for assimilation? As Perlmann suggests, the critical question was whether "the assimilative process of the republic transform[s] the descendants enough to make them unrecognizable, mentally and spiritually, from their immigrant forbearers."[364] The *Dillingham Report* made a similar point:

> The most potent influence in promoting the assimilation of the family is the children, who, through contact with American life in the schools, almost invariably act as the unconscious agents in the uplift of their parents. Moreover, as the children grow older and become wage earners, they usually enter some higher

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deported after three years: SO (72), NO (4); deported after one year; SO (57), NO (1). For 1908—debarred: SO (481), NO (80); deported after three years: SO (133), NO (19); deported after one year: SO (34), NO (2). *Id.*

355 *See* ARCHDEACON, *supra* note 71, at 158.

356 *See supra* text accompanying note 190. *But see supra* text accompanying note 200 (comments by Congressman Church).

357 *See, e.g.*, U.S. DEP'T LAB., ANN. REP. COMM'R NATURALIZATION TO SEC'Y LAB. 74–75 (1919); U.S. DEP'T LAB. ANN. REP. COMM'R NATURALIZATION TO SEC'Y LAB. 15, 17 (1921).

358 *See* DARRELL HEVENOR SMITH, THE BUREAU OF NATURALIZATION 11–12, 19 (1926).

359 U.S. IMMIGRATION AND NATURALIZATION LAWS AND ISSUES, at xxxiv (Michael LeMay & Elliot Robert Barkan eds., 1999).

360 U.S. DEP'T LAB. ANN. REP. COMM'R NATURALIZATION TO SEC'Y LAB. 3–4 (1917).

361 *See* Luigi Bodio, *The Protection of Italian Emigrants in America*, 23 CHAUTAUQUAN 42, 44–45 (1896).

362 See *id.*

363 *See id.* at 45.

364 PERLMANN, *supra* note 36, at 2.

> occupation than that of their fathers, and in such cases the Americanizing influence upon their parents continues until frequently the whole family is gradually led away from the old surroundings and old standards into those more nearly American.[365]

The disadvantage Indian immigrants faced was that neither they nor their children had been here for sufficient time in sufficient numbers to demonstrate their ability to assimilate. And, as one person noted, waiting for grandchildren to assimilate was too long.[366]

So the question becomes: Why wasn't there a willingness to wait and see whether assimilation was realistic for recent Indian immigrants and their children?[367] The answer lies in the difference between two views of the potential for assimilation. One view assumes that individual traits are socially constructed and capable of being modified over time by the environment;[368] the other view assumes that racial characteristics are genetically hardwired into the blood of an individual who belongs to a particular group so that inborn character traits would persist despite changes in an individual's environment.[369]

In keeping with the eugenics spirit of the times,[370] southern Italians and Indians were viewed as separate species with "bad" genes,[371] but Indians were viewed to have been at a special genetic disadvantage. Although there was tolerance of "mixing genes"[372] with new immigrants (including southern Italians) through intermarriage,[373] there was visceral opposition to the gene-mixing that would occur if Indians and Whites married.[374] Opposition amounting to revulsion against intermarriage with Indians was apparent in comments made in the 1914 hearings dealing with Hindu immigration. Congressman Raker of California wanted to make sure that intermarriage remained a remote possibility, stating: "I

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365 DILLINGHAM COMMISSION REPORTS VOLUME 1, *supra* note 31, at 42. There was even evidence from a study by Columbia Professor Boas of children in New York and its immediate vicinity that the physical characteristics of children of European immigrants showed positive differences from their immigrant foreign-born parents! *See id.* at 44.

366 *See* ZOLBERG, *supra* note 18, at 211.

367 A wait-and-see attitude influenced at least one observer in 1894 to alter his restrictionist view of immigration and come around to the view that placed the second generation in the "assimilator" category, having "been subjected to the influence of American life." *Id.* at 215.

368 For example, IQ test scores rose as years of residence in the United States increased. *See* GOULD, *supra* note 295, at 220–21.

369 ZOLBERG, *supra* note 18, at 207–08..

370 *See* ARCHDEACON, *supra* note 71, at 161.

371 Orsi, *supra* note 260, at 342 n.7 (northern and southern Italians are so different that they are "almost a different species").

372 The racist and pseudoscientific idea of "gene mixing" was an outgrowth of the eugenics movement.

373 *See* PERLMANN, *supra* note 36, at 62.

374 As an example of the vociferous opposition, Madison Grant stated in his book, *The Passing of the Great Race*, that "Whether we like to admit of or not, the result of the mixture of two races, in the long run, gives us a race reverting to the more ancient, generalized and lower type. The cross between a white man and an Indian is an Indian . . . ." GRANT, *supra* note 282, at 18 (1916).

understand from what you said that you would not claim that there should be any intermarriage between those in America of the Caucasian race and the Hindus. . . ."[375] He later repeated this objection to intermarriage: "As a matter of fact, you would deplore, would you not, a mixture of races between the Caucasian race now in America and the Hindus, as a general principle,"[376] and he urged exclusion of Indians so as "not to put them in a position to [intermarry]."[377] A later colloquy between congressmen Raker and Church repeated this theme: Raker stated, "[f]rom your observation as to assimilation, from the marriage standpoint, it is unthinkable,"[378] and Church replied, "[i]ndeed, it is."[379]

In sum, Indian immigrants and their children were thought to lack the potential for assimilation because they were considered a separate species with a gene pool that made assimilation almost impossible. Consequently, they were denied both citizenship and the opportunity to immigrate. By contrast, southern Italians (along with other new immigrants) were viewed to have had "bad" genes, but not so bad that it made assimilation impossible. They were, therefore, more amenable to being influenced by their new environment and were only subject to harsh immigration quotas and could become naturalized citizens.

D. Europeans vs. Asians – The Normative Standard

There is something a bit forced in trying to distinguish the ability of southern Italian immigrants and Indian immigrants to assimilate based on their genes. This suggests that there is another more disturbing way to understand why Indian immigrants (and other Asians) were treated differently from southern Italian immigrants. The distinction between Indians and southern Italians was a proxy for a broader distinction—between Asians and Europeans.

This distinction did not rest on a judgment about the ability to assimilate to the American way of life, which is an *empirical* question, but instead implemented a *normative* choice of whom we wanted to be Americans. The United States immigration and naturalization laws implemented this choice by distinguishing people geographically; undesirable Asians (people of color) were denied opportunities available to desirable Europeans (whites).[380] White Europeans,

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375 *1914 Hindu Immigration Hearings*, *supra* note 171, Part I, at 15.

376 *Id.* at 30.

377 *Id.*

378 *1914 Hindu Immigration Hearings*, *supra* note 171, Part II, at 85.

379 *Id.* No mention was made of Punjabi-Indian intermarriage with Mexicans, presumably because that mixture of species was not threatening to whites. *See* PRASHAD, *supra* note 250, at 128; *see also In Search of Bengali Harlem*, PBS, http://bengaliharlem.com/thedocumentary/ (last visited Jan. 20, 2022) (discussing a PBS documentary which recounts the history of "illegal" South Asian Muslim men who married African-American and Puerto Rican women between WWI and the 1940s and merged into communities of color in Harlem and the Lower East Side).

380 The white/nonwhite distinction is identified geographically in THE NEW OXFORD AMERICAN DICTIONARY, 2001 edition, which draws a divide between Asia and Europe in its definition of a "person of color" as "a person who is not white or of European parentage." A similar distinction is made in THE AMERICAN HERITAGE, THE AMERICAN HERITAGE GUIDE TO CONTEMPORARY USAGE AND STYLE 356 (Houghton Mifflin

though subject to restrictive quotas, could still immigrate to the United States and could be naturalized under prevailing immigration law, but non-white Asian immigrants could not. This suggests that the recurrent theme of assimilation, recounted in prior pages, was a way to disguise normative racist policies as empirical science, in much the same way that "scientific" eugenics was racist at its core.[381]

Once you begin to look for references to an Asian/European divide in the political debates and judicial decisions about immigration and naturalization, they pop up frequently. Perlmann notes that the differences *among* European races and *between* Europeans and Asians were viewed as raising discrete issues in political debates. For example, in the 1924 debates about excluding immigrants, members of Congress spoke about racial differences among Europeans and racial differences between whites and nonwhites as separate subjects, never comparing the two kinds of differences: "In the debates over desired and undesired White races, there was usually no mention of non-white immigration. In the debates over the Japanese clauses, there was almost never a mention of the continuum of white race desirability."[382] Despite the distinction between different European races, European differences appeared to be minor when compared to the differences between white (European) and non-white (Asian) races.[383]

Legal discussion also highlighted the Asian/European divide. The government's brief in *Thind* contrasted the ability of Europeans and Indians to assimilate, illustrated by the following quotes from Edmund Burke's 1788 speech to Parliament during the impeachment trial of Governor Warren Hastings. Burke characterized the Indian people as "unalliable to any other part of mankind," [384] and explained that "the Hindues [sic] were regarded as a people wholly alien to Western habits and customs, mode of life, political and social institutions." [385] But the brief then goes on to draw a seemingly unbridgeable gap between Europe and Asia, explaining that the label white is "inclusive only of such men . . . as belonged to a civilization known as the white civilization. Such was the civilization of Europe. . . . Thus, the term 'white men' had come to represent men of the white civilization, as distinguished from the Eastern or Oriental civilization."[386]

The European/Asian distinction also came up in a number of cases where the applicant for naturalization was on the Europe/Asia border. In a 1925 decision, right after *Thind*, the court held that an Armenian from Asia Minor could be

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Company 2005), which states that "person of color . . . [is] used inclusively of all non-European peoples." Thus, "white" is European; nonwhite is non-European.

381 Nothing more clearly establishes the racism underlying eugenics than Hitler's referring to Grant's book as his "bible". STEFAN KÜHL, NAZI CONNECTION: EUGENICS, AMERICAN RACISM, AND GERMAN NATIONAL SOCIALISM 85 (2002)

382 *See* PERLMANN, *supra* note 36, at 402.

383 *See id.* at 239.

384 Brief for the United States, *supra* note 211, at 11.

385 *Id.* at 14.

386 *Id.* at 16. *Cf. id.* at 20–21 (the conclusion that the Semitic races were "assimilable" rested on the fact that they had "roots [that] became blended into the European civilization of Rome").

naturalized as a white person.[387] The court noted that Armenians are a Christian people living in an area close to the European border, who have intermingled and intermarried with Europeans over a period of centuries.[388] Also, in *Halladjian*, the court asked whether Armenians may "become westernized and readily adaptable to European standards" and stated they could because "[t]hey have dealt in business with Greeks, Slavs, and Hebrews, as well as with Turks, . . . and they have pursued by immigration the civilization of Great Britain and of the United States."[389] Much later, in 1944, a decision holding that Arabs were "white" also stressed their European link.[390]

It is possible to argue that the European/Asian divide was a blunt, overgeneralized way of answering the empirical question—who can and cannot assimilate? But there are strong indications that this geographical division is better understood as a way to implement a normative definition of who should be an American. As one member of Congress expressed it, "we wanted to preserve the homogeneity of the White race."[391] Once you set racial homogeneity as the goal, it does not matter how good outsiders might be at assimilating. The presence of Indians and other Asians would undermine a vision of a homogenous white society.[392] In the end, the United States' attitude toward Indians may not have been all that different from the view advanced by the Royal Commissioner of Canada, who stated "that Canada should remain a white man's country."[393] The United States of the early twentieth century was no less committed than Canada to remaining a homogeneously European/white nation.[394]

The United States tried to construct a homogeneous white nation piecemeal, as best it could, through the adoption of laws that excluded Asian immigration and naturalization. An 1882 statute prevented Chinese from immigrating and denied

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387 United States v. Cartozian, 6 F.2d 919, 922 (D. Or. 1925).

388 *See id.* at 920.

389 *In re* Halladjian, 174 F. 834, 841 (D. Mass. 1909).

390 *Ex parte* Mohriez, 54 F. Supp. 941, 942 (D. Mass. 1944) ("As every schoolboy knows, the Arabs have at various times inhabited parts of Europe, lived along the Mediterranean, been contiguous to European nations and been assimilated culturally and otherwise, by them. . . . Indeed, to earlier centuries as to the twentieth century, the Arab people stand as one of the chief channels by which the traditions of white Europe, especially the ancient Greek traditions, have been carried into the present. . . . It follows that even by the narrow criteria which were adopted in the opinions of Mr. Justice Sutherland the Arab passes muster as a white person."). *See also In re* Charr, 273 F. 207, 209 (W.D. Mo. 1921) (the statutory language limiting naturalization to "white persons" should "be construed . . . as a geographical term, referring to the peoples who were commonly known in the United States as those inhabiting Europe . . . .").

391 *See* 54 CONG. REC. 159 (1916) (statement of Sen. Vardaman); *see also* 51 CONG. REC. 2785 (1914) (statement in the 1914 Congressional Record expressing opposition to Japanese immigration because it threatened American homogeneity); *supra* note 298 and accompanying text (explaining that the 1924 law imposing immigration quotas helped to preserve homogeneity).

392 That might explain why we prevented Indian immigrants from becoming naturalized citizens, despite the affirmative view of Indians in the government's brief in *Thind*, expressing a "full appreciation of the wonderful civilization of the Far East." Brief for the United States, *supra* note 211, at 21.

393 DILLINGHAM COMMISSION REPORTS VOLUME 23, *supra* note 118, at 329.

394 *See* ZOLBERG, *supra* note 18, at 248.

them the opportunity to become naturalized citizens;[395] a 1917 statute prevented Indians from immigrating;[396] a 1923 Supreme Court decision denied Indians the right to be naturalized;[397] a 1922 Supreme Court case prevented Japanese naturalization;[398] and a 1924 statute prevented Japanese people from immigrating (because immigration was denied to those who could not be naturalized).[399] The result was that nonwhite Asians would not be added to the existing stock of Americans. Instead of worrying about whether Asian immigrants could in fact assimilate, the United States did its best to prevent nonwhite Asians from assimilating in the first place by denying them the opportunity to become citizens and by keeping them out of the country.

CONCLUSION

"The past is never dead, it's not even past."[400]

In the late nineteenth and early twentieth centuries, the judiciary and Congress sublimated their fear that immigrants would bring crime, disease, and poverty into an inference that newcomers could not become assimilated Americans. In a more virulent form, these fears morphed into the racist goal of preserving a white homogeneous America. The result was restrictive naturalization and immigration policies. Today similar fears have resulted in restricting Muslim and Latines immigration to the United States,[401] stoked by the racist ideology known as "replacement theory," which posits that nonwhite immigrants threaten to replace the existing stock of white Americans.[402]

The historical and contemporary parallels are clearly apparent in the following statement to an NPR interviewer by John Kelly, the White House chief of staff, in 2018. Kelly insisted that undocumented immigrants are "not people that would easily *assimilate* into the United States into our modern society."[403] Why? Because, Kelly believes, "[t]hey're overwhelmingly rural people in the countries they come from—fourth, fifth, sixth-grade educations are kind of the norm. They don't speak English . . . . They don't integrate well, they don't have skills."[404]

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395 *See* Chinese Exclusion Act of 1882, 126 Stat. 58–59.

396 *See* Immigration Act of 1917, Pub. L. No. 301, 39 Stat. 874.

397 *See* United States v. Thind, 201 U.S. 204 (1923).

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

399 *See* Immigration Act of 1924, Pub. L. No. 68-139, 190 Stat. 153.

400 WILLIAM FAULKNER, REQUIEM FOR A NUN, Act I, § 3 (1951).

401 *See supra* text accompanying notes 1–8.

402 *See* Reynolds, *supra* note 10, at 1786–87.

403 *Transcript: White House Chief of Staff John Kelly's Interview with NPR*, NPR (May 11, 2018, 11:36 AM), https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr.

404 *Id.*

Equally true to history was Kelly's amnesia. In 1897, when new immigrants were viewed with suspicion, President Cleveland's veto message accompanying an anti-immigration bill reminded the public that "[t]he time is quite within recent memory when the same [negative things were] said of immigrants who, with their descendants, are now numbered among our best citizens."[405] But Cleveland spoke to an audience that had lost its memory of how immigrants had become good Americans. Kelly seemed to have suffered a similar amnesia, forgetting that his negative view of immigrants had been attributed to several of his ancestors—four from Italy (two possibly from southern Italy) and three from Ireland.[406] The surnames and geographic origins (to the extent known) of Kelly's four Italian ancestors were: Joseph Pedalino (Avellino in southern Italy); Rosa Paterno (a southern Italian name; married to Pedalino); John DeMarco (a name found in both northern and southern Italy); Crescenza Bardo (a northern Italian name; married to DeMarco).[407] As for assimilation, DeMarco did not speak English after more than a decade in the United States; Bardo did not learn English after more than 30 years in this country.[408]

The unrelenting lesson from this history is that bias against the "other" is deeply embedded in the American psyche. Restrictive assumptions about who can assimilate and who we want to be Americans are as much a part of "who we are" as the inclusive ideals that we profess. The hope that motivates this Article is this: we have a better chance of fulfilling the ideal of inclusiveness by not forgetting this history than we do by simply bathing in the warm glow of a past that never was.

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405 DILLINGHAM COMMISSION REPORTS VOLUME 39, *supra* note 31, at 48.

406 *See* Phillip Bump, *How John Kelly's Family History Compares with the Immigrants He Wants to Keep From Entering*, WASH. POST (May 11, 2018, 5:18 PM), https://www.washingtonpost.com/news/politics/wp/2018/05/11/how-john-kellys-family-history-compares-to-the-immigrants-he-wants-to-keep-from-entering/.

407 *Id.*

408 *Id.*