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Mark S. Weiner

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Ian F. Haney López, *White by Law: The Legal Construction of Race.* New York: New York University Press, 1996. Pp. xiv, 296. $24.95 (cloth), $17.95 (paper).

Fourteen years ago, Robert Gordon noted that scholars associated with the Critical Legal Studies movement "pay a lot of attention to history."[1] In fact, wrote Gordon, Critical Legal Studies scholars "have probably devoted more pages to historical description—particularly the intellectual history of legal doctrine—than to anything else."[2] Much the same could be said today of the academic movement known as Critical Race Theory. Although Critical Race theorists are concerned above all with alleviating current racial injustice, they devote a good deal of their intellectual energy to examining the past. In the following Book Note, I consider one of the most recent and celebrated historical contributions to Critical Race Theory, Ian Haney López's *White by Law: The Legal Construction of Race.*[3] Unlike other evaluations of *White by Law*,[4] this Book Note focuses not on Haney López's theoretical objectives, but on one of his central empirical claims. In particular, it examines Haney López's pathbreaking discussion of the role anthropological evidence played in determining the outcome of two Supreme Court decisions of the 1920s: *Ozawa v. United States*[5] and *United States v. Thind.*[6] Both decisions clarified the racial requirements for becoming a naturalized U.S. citizen under federal law.

I have divided this Book Note into three brief sections. First, I describe the subject of *White by Law* and explain why Haney López's

1. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 57 (1984).
2. *Id.*
3. IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).
4. For full-length reviews, see Kevin R. Johnson, *Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 BERKELEY WOMEN'S L.J. 142 (1996); and Frank H. Wu, *From Black to White and Back Again*, 3 ASIAN L.J. 185 (1996).
5. Ozawa v. United States, 260 U.S. 178 (1922).
6. United States v. Thind, 261 U.S. 204 (1923).

analysis of *Ozawa* and *Thind* forms the foundation on which he constructs his more general historical and normative conclusions. Second, by considering the language of *Ozawa* and *Thind* and the jurisprudence of Justice George Sutherland, the author of both decisions, I suggest how that analysis is open to empirical critique. My remarks on Justice Sutherland focus on his consistent wariness toward the use of social science by the Supreme Court, as well as on his drive to consolidate federal authority over international affairs. Finally, I propose an alternative perspective on *Ozawa* and *Thind* that I hope might supplement Haney López's trenchant interpretation.

I

The historical subject of *White by Law* is straightforward. Strictly limiting the empirical bounds of his inquiry, Haney López examines a series of thirty-seven state and federal court decisions handed down between 1878 and 1923, decisions he usefully terms "the racial prerequisite cases."[7] These now-infamous rulings interpreted an ambiguous statutory requirement for becoming a naturalized U.S. citizen enacted by Congress in 1790: that applicants for citizenship be "white persons."[8] Significantly, in the more than 150 years this statutory provision remained in effect, Congress never explicitly identified whom the term "white" was meant to include. Lawmakers seem to have thought the word was clear on its face.[9] While this lack of definition posed little problem throughout most of the nineteenth century, it became the source of legal dispute in the 1870s, when non-European settlement in the United States began to expand. Beginning at that time and continuing until the passage of the McCarran-Walter Act in 1952,[10] members of diverse national groups who had been denied citizenship on the grounds that they were not "white" brought suit claiming that they had been misclassified. In the absence of express definition from Washington, it was left to courts to determine just how the word "white" was to be understood. The resulting decisions, the "prerequisite cases" of Haney López's analysis, among them *Ozawa* and *Thind*, were historically important on several levels. Most immediately, by clarifying the ambiguous term "white," the

7. HANEY LÓPEZ, *supra* note 3, at 3. Although there were a total of 52 prerequisite cases, Haney López examines only those decided prior to *Thind*. For a list of racial prerequisite cases, see *id.* at 203-08.

8. Act of March 26, 1790, ch. 3, 1 Stat. 103. This was amended by the Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256 (allowing "aliens of African nativity and . . . persons of African descent" to apply for naturalized citizenship as well).

9. Indeed, the racial restriction generally appears not to have been the subject of debate. For possible reasons, see ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 159-60 (1997).

10. Immigration and Nationality Act of 1952, ch. 2, § 311, 66 Stat. 239.

decisions explicitly drew the boundaries of American national identity according to a vision of racial exclusion; they thus represented an especially powerful manifestation of the stratified conception of citizenship that has haunted the United States since its founding.[11] The cases also sounded in the history of immigration and real property: In 1924, Congress restricted immigration solely to those persons capable of naturalization (that is, to "white persons"), and, at about the same time, western states passed a series of laws similarly limiting title to land.[12]

Haney López brings a variety of theoretical perspectives to bear on his analysis of the prerequisite cases; for the purposes of this Book Note, however, the most significant is Barbara Flagg's recent argument that white racial identity is characterized by "transparency," or what she calls "the transparency phenomenon."[13] According to Flagg, one of the defining characteristics of European Americans as a group is their general failure to acknowledge their own "norms, behavior, experiences, or perspectives" as "white-specific."[14] Whites tend to think of "race" as a quality that inheres exclusively in others, not in themselves. This lack of critical awareness, argues Flagg, perpetuates racial inequality by obscuring the function of racial privilege in social and economic life. Among its many other achievements, *White by Law* expands this thought-provoking analysis by tracing the origin of transparency into the very heart of the legal system. According to Haney López, the law plays an important, if not central, role in forging racial identity. "On multiple levels," he writes, "law is implicated in the construction of the contingent social systems of meaning that attach in our society to morphology and ancestry."[15] Law, that is, literally "constructs race."[16] Haney López uses the prerequisite cases to develop and add historical specificity to Flagg's analytic framework. For if law constructs race, and if white identity is defined largely by transparency, then the prerequisite decisions, which directly address the question of what constitutes a white person and so "exemplify the construction of Whiteness,"[17] should exhibit how

11. On racial hierarchy in the history of American citizenship, see generally SMITH, *supra* note 9.

12. *See* Immigration Act of 1924, ch. 190, § 13(c), 43 Stat. 153, 162. For an early introduction to anti-alien land legislation, see MILTON R. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 148-70 (1946).

13. BARBARA J. FLAGG, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW 1 (1998).

14. Barbara Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993).

15. HANEY LÓPEZ, *supra* note 3, at 19.

16. *Id.*

17. *Id.*

transparency originates at the level of the legal process. Here, Haney López employs a key critical concept from cultural studies: that of "naturalization," the process by which "socially constructed" categories appear to assume objective existence in the material world. For Haney López, the prerequisite cases helped maintain white transparency and social dominance by masking the contingency of racial classifications and so "naturalizing" racial difference itself.

Within the history of the prerequisite cases, *Ozawa* and *Thind* hold an especially important place and consequently play a pivotal role in Haney López's analysis. The judges considering the prerequisite cases faced a difficult semantic dilemma: In the absence of clear language from Congress, how could they decide whether or not a particular applicant for citizenship was "white" under federal law? On what basis were they to make such a decision? There were a variety of rationales available (including an examination of original congressional intent or, when appropriate, the use of judicial precedent), but two became especially prominent. The first was what might be called a "scientific standard." According to this rationale, judges were to determine who was white by employing the racial classification schemes developed within the science of anthropology. This rule typically was based on the assertion that "white" was synonymous with the word "Caucasian," a term derived from Johann Friedrich Blumenbach's classification of races in *The Natural Varieties of Mankind*.[18] The second standard was what might be called the "common knowledge" test. According to this rule, the term "white" was to be understood as the word was used in common speech. The standard enabled judges to resolve the facial ambiguity of the word "white" through reference to popular linguistic usage. These two tests coexisted without difficulty for some time, but over the course of the early twentieth century, they began to yield conflicting and often troubling results. With shifting patterns of global migration, new groups of immigrants settled in the United States. Members of some of these groups, such as Syrians and Asian Indians, were excluded from naturalization based on the "common knowledge" test. They could, however, make persuasive arguments that they were "white" based on anthropological categories, particularly "Caucasian." The "scientific standard" thus threatened to destabilize popular conceptions of national identity.

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18. JOHANN FRIEDRICH BLUMENBACH, *The Natural Varieties of Mankind*, *in* THE ANTHROPOLOGICAL TREATISES OF JOHANN FRIEDRICH BLUMENBACH 65 (Thomas Bendyshe ed. & trans., London, Longman, Green, Roberts, & Green 1865) (1775). On the relation of Blumenbach to 19th-century racial classification, see JOHN S. HALLER, JR., OUTCASTS FROM EVOLUTION: SCIENTIFIC ATTITUDES OF RACIAL INFERIORITY, 1859-1900 (1971).

Ozawa and *Thind* stood at the center of this dilemma, and according to Haney López, they formed a dividing line in the debate between the scientific and common knowledge standards in federal law. *Ozawa* concerned the citizenship application of a resident of Hawaii named Takao Ozawa, a man one scholar characterized as a "paragon of an assimilated Japanese immigrant."[19] *Thind* concerned the application of Bhagat Singh Thind, an Asian Indian described in the record as a "high caste Hindu," though he appears rather to have identified with both the Sikh and Radhasoami traditions.[20] After judgments against Ozawa and in favor of Thind in the federal district courts for Hawaii and Oregon respectively, the two cases reached the Supreme Court. In each case, the ultimate issue was whether the plaintiff could be considered "white." These were the only prerequisite cases ever considered by the Supreme Court, and not surprisingly, they decided more than the specific questions of whether Japanese or Asian Indians were capable of naturalizing (the Court held that neither was). Instead, the cases determined the underlying interpretive standard courts and immigration officials would use when faced with similar cases in the future. It is at this point that Haney López makes a vital empirical claim, one that forms the historical foundation for his book. He asserts that the Court in *Ozawa*, in an opinion written by Justice Sutherland, was "eager to rely on science,"[21] embracing *both* the scientific and common knowledge standards in its reasoning, but that some six months later, the Court in *Thind*, in another opinion by Justice Sutherland, flatly rejected the scientific standard, becoming "furiously apostate" in its position toward anthropological classification.[22] The Court in both cases determined that the litigants in question were not white, but in Haney López's view, it did so for vastly different reasons, explicitly foreclosing in *Thind* the interpretive openness expressed in *Ozawa*. In doing so, the Court decided once and for all that only the common knowledge test would determine what constituted a white person.

Haney López bases his argument that *Thind* overturned *Ozawa* on the Court's differing use of the term "Caucasian," and he draws significant implications from that difference. Specifically, in arguing that the Court in *Ozawa* actively blended both the scientific and common knowledge standards in its decision, Haney López points to the Court's statement that it would read the words "white person" as

19. Yuji Ichioka, *The Early Japanese Immigrant Quest for Citizenship: The Background of the 1922* Ozawa *Case*, *in* JAPANESE IMMIGRANTS AND AMERICAN LAW: THE ALIEN LAND LAWS AND OTHER ISSUES 397, 407 (Charles McClain ed., 1994).

20. United States v. Thind, 261 U.S. 204, 206 (1923).

21. HANEY LÓPEZ, *supra* note 3, at 92.

22. *Id.* at 95.

indicating "a person of what is popularly known as the Caucasian race."[23] With this formulation, writes Haney López, the Court "ran together the rationales of common knowledge, evident in the reference to what was 'popularly known,' and scientific evidence, exemplified in the Court's reliance on the term 'Caucasian.'"[24] For signs of the doctrinal reversal in *Thind*, Haney López points to the Court's more forceful and limiting assertion that "the words 'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word 'Caucasian' only as that word is popularly understood."[25] With this declaration, writes Haney López, "the use of scientific evidence as an arbiter of race ceased."[26] Haney López argues that the Court made this sudden reversal because its members unconsciously were driven to maintain white supremacy through the naturalization of racial difference.[27] Whereas the weight of anthropological evidence in *Ozawa* supported popular racial beliefs that Japanese should be excluded from citizenship, a somewhat plausible argument was made in *Thind* that Asian Indians were "Caucasian" and thus "white."[28] Rather than "destabilize the notion of a White race" by agreeing that Thind might indeed be entitled to naturalize, the Court obscured the social contingency of racial classification by rejecting the scientific standard and inscribing the prejudice of "common knowledge" permanently into law.[29] "The Supreme Court in *Ozawa* manifested an abiding faith in science," argues Haney López, "but only a few months later, in *Thind*, the same Court, the same [J]ustices, even the same judicial author, became furiously apostate. Underlying both their faith and their apostasy was the deep conviction that race was natural."[30]

II

This is a powerful interpretation, one that enriches our understanding of conceptions of U.S. citizenship. There is, however, an alternative way of reading *Ozawa* and *Thind*. In particular, while Haney López argues that *Thind* explicitly overruled *Ozawa*, one might as plausibly suggest that *Ozawa* and *Thind* were not in opposition at all,

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23. Ozawa v. United States, 260 U.S. 178, 197 (1922).
24. HANEY LÓPEZ, *supra* note 3, at 79.
25. *Id.* at 90 (citing *Thind*, 261 U.S. at 214-15).
26. *Id.* at 90.
27. *See id.* at 93. On the role of unconscious racism in the Court's decisionmaking, see *id.* at 133-46.
28. For the argument that Asian Indians should be considered Caucasian on the basis of anthropological authorities, see *Thind*, 261 U.S. at 205-06.
29. HANEY LÓPEZ, *supra* note 3, at 93.
30. *Id.* at 95.

but in fact advanced the same doctrinal position, with *Thind* merely clarifying the argument against the scientific standard that the Court already had made in its earlier decision. There are two bases for such a reading. The first draws upon the language of the *Ozawa* opinion itself. While the Court in *Ozawa* stated that the word "white" in prerequisite cases should be understood as being synonymous with "Caucasian," dictionaries of the period suggest that by 1922, "Caucasian" did not have an especially scientific meaning, but instead was used widely as an equivalent for European. One contemporary etymological dictionary, for instance, describes the term as "formerly" referring to Blumenbach's classification scheme, and other British and American dictionaries of the period confirm this usage.[31] This reading of the Court's use of "Caucasian" comports with its own reference to the term as it was "popularly known," and implies that an argument that the Court was "eager to rely on science" in *Ozawa* is overstated. Other passages in *Ozawa* suggest a similar interpretation. At one point in its opinion, the Court paused to take judicial notice of the anthropological evidence cited by counsel for both parties. There, the Court appeared to suggest that such evidence could play no role in its judgment, regardless of how skillful or convincing it might be. "We have been furnished with elaborate briefs in which the meaning of the words 'white person' is discussed with ability and at length, both from the standpoint of judicial decision and from that of the science of ethnology," Justice Sutherland wrote. "It does not seem to us necessary, however, to follow counsel in their extensive researches in these fields."[32] Such a reading further accords with at least one contemporary journalistic commentary about *Ozawa*, which praises the Court's reasoning for precisely its nonscientific character.[33]

The second basis supporting an alternative reading of *Ozawa* concerns the man who wrote the opinion of the Court in both cases,

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31. *See, e.g.*, ERNEST WEEKLEY, AN ETYMOLOGICAL DICTIONARY OF MODERN ENGLISH 266 (1921) ("[f]ormerly used (first by Blumenbach, c. 1800) for Indo-European, white races, from supposed place of origin").

32. Ozawa v. United States, 260 U.S. 178, 196-97 (1922).

33. *See Law and Common Sense* (collection of Library of Congress, George Sutherland Papers, General Miscellany-Newspaper Clippings, 1906-1938, Box 7) (n.d.). The article read:

> The decision by the United States Supreme Court that Japanese cannot become citizens of the United States because they are not white is likely to amaze the average casual reader of newspapers, not because of the quality of the decision but because a question so obviously simple should never have gotten as far as the Supreme Court of the United States. Every schoolboy knows that the Japanese is not Caucasian and he also knows that the laws of his country restrict naturalization to "free white persons" . . . . This decision . . . may be considered a happy augury of the quality of the service [Justice Sutherland] will perform. Those familiar with his career long have understood his belief that common sense and law are neither irreconcilable nor incompatible . . . .

Id.

Justice George Sutherland.[34] While Justice Sutherland frequently is the subject of derision among scholars today,[35] most agree that he was a man of unwavering principle—and two of his most central beliefs suggest that it would have been out of character for him to be "eager" to rely on anthropology in his decisionmaking. First, more than any other member of the Court in 1922, Justice Sutherland advanced the mantle of the "liberty of contract" jurisprudence associated with Justice Stephen Field. Underlying Justice Sutherland's adherence to this intellectual tradition was his absolute commitment to natural law, which, for him, demanded great skepticism toward the use of social science to resolve judicial questions.[36] Justice Sutherland believed that the function of the judiciary was to scrutinize legislation according to the substantive due process limits imposed by the Fifth and Fourteenth Amendments. In this interpretive universe, anthropology had little relevance. Natural law limits were timeless, universal, and ideal in character, unaffected by changing bodies of knowledge created by professional thinkers. Justice Sutherland's work in this respect reveals a consistent opposition to the use of scientific evidence in appellate adjudication, and his views on this and other matters can be understood as the precise opposite of those held by Justice Louis Brandeis. Indeed, within a year of *Ozawa* (Justice Sutherland's first opinion on the bench), he argued against the use of the scientific evidence presented to the Court by Brandeis protégé Felix Frankfurter in *Adkins v. Children's Hospital*.[37] There, Justice Sutherland suggested that such evidence could not bind the judiciary. Rather than characterizing Justice Sutherland's opinions in *Ozawa* and *Thind* as indicating a shift from the use of an anthropological taxonomy to the deployment of a common knowledge standard in naturalization cases, then, it is possible to read both opinions as revealing their author's continuing wariness regarding the use of social science by the Court.

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34. While Haney López acknowledges that both opinions were written by Justice Sutherland, he chooses not to explore this biographical aspect of the cases, remarking simply that the great doctrinal differences between *Ozawa* and *Thind* are "all the more remarkable" for the fact of their having been written by the same author. HANEY LÓPEZ, *supra* note 3, at 92. On Justice Sutherland, see HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS (1994); and JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE (1951).

35. *See, e.g., Justice George Sutherland and the Status Quo: A Biographical and Review Essay*, 1995 J. SUP. CT. HIST. 137; Gary C. Leedes, *An Unsuccessful Attempt to Restore Justice George Sutherland's Tarnished Reputation: A Review Essay*, 30 U. RICH. L. REV. 815 (1996).

36. *See* ARKES, *supra* note 34, at 51-82; PASCHAL, *supra* note 34, at 121-24.

37. *See* Adkins v. Children's Hospital, 261 U.S. 525, 559-60 (1923) ("A mass of reports, opinions of special observers and students of the subject, and the like, has been brought before us in support of [the minimum wage law at issue]. These are all proper enough for the consideration of the lawmaking bodies . . . but they reflect no legitimate light upon the question of [the legislation's] validity.").

This argument is reinforced by yet another facet of Justice Sutherland's jurisprudential life: his drive to consolidate federal authority over international matters. This drive would have militated against yielding congressional control over lawmaking to anthropologists. Sutherland firmly believed in the inviolable integrity of the Union, and he sought to further national coherence by granting the federal government extensive power over international matters. The Justice saw himself as a forward-thinking person in this respect, and he fervently hoped to develop a body of constitutional law that would allow the government to respond to contemporary needs (the United States, he insisted, "is a progressive nation in a progressive world").[38] So firmly did Sutherland believe in the importance of expanding federal authority over international affairs that he argued that the federal government had been granted a vast foreign policy command merely as an incident of national sovereignty. He advanced this position not only theoretically, in his early writings, but also practically, in his opinion in *United States v. Curtiss-Wright Export Corp.*[39] Given his intense, overarching interest in strengthening federal authority over international matters, one can well imagine that Sutherland would have felt his general aversion to using social science with particular force in the prerequisite cases. Although popularly understood as a domestic concern, naturalization law bears directly on the United States's relations with other powers. Considering Sutherland's views on federal authority and world affairs, it would have been the height of folly, in his eyes, to suggest that legal language concerning naturalization crafted by the U.S. Congress might be limited by anthropologists. This would have implied that the scope of U.S. international policy could be restricted by the writings of a few isolated scholars. For a "progressive nation in a progressive world," such a restrictive conclusion would have been untenable.

III

The possibility that *Ozawa* and *Thind* are not in doctrinal opposition, but instead are of a piece, is significant not simply as a factual matter, but also as a theoretical issue of broader importance. In particular, viewing the Court as having rejected a scientific standard in both cases suggests the complex way in which the history of American citizenship has been guided by social and political forces other than simple racism, even of the unconscious variety Haney López describes. If Justice Sutherland in fact rejected a scientific

38. GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 48 (1919).
39. United States v. Curtiss-Wright Export Corp., 209 U.S. 304 (1936).

standard in *Ozawa*, he seems to have been driven not so much by an interest in maintaining white supremacy as by judicial principles arising from his belief in natural law and his desire to safeguard the foreign affairs capacity of the federal government. He seems to have been guided, that is, by largely nonracial motives. Indeed, Justice Sutherland explicitly denied in *Ozawa* that the Court was guided by racism,[40] and as a matter of historical method, it is worthwhile to consider such denials as being not wholly disingenuous. To the extent such denials are sincere, they suggest that racially restrictive judicial decisions are inextricable from legal ideas having no immediately apparent connection to racial issues. Conversely, seemingly nonracial legal ideas are deeply implicated in matters of race. Being attentive to this dialogical relation suggests the need to supplement the normative lesson Haney López draws from the prerequisite cases: that whites should develop a "self-deconstructive White race-consciousness"[41] to "dismantle the meaning systems surrounding Whiteness"[42] and so "relinquish the privileges" of white identity.[43] Such self-reflexive knowledge may destroy Flagg's "transparency phenomenon" by undercutting the naturalization of racial difference. But when the differences between *Ozawa* and *Thind* are collapsed, and the Court's motivations are shown to rest on nonracial as much as racial grounds, legal and cultural interventions at the level of race alone seem an inadequate way of combating racial exclusion. A reinterpretation of the prerequisite cases may bring into greater relief the intractability of the racism that Haney López explores in his fascinating and important book.

—*Mark S. Weiner*

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40. He wrote:

> The briefs filed on behalf of appellant refer in complimentary terms to the culture and enlightenment of the Japanese people, and with this estimate we have no reason to disagree; but these are matters which cannot enter into our consideration of the questions here at issue. . . . Of course there is not implied—either in the legislation or in our interpretation of it—any suggestion of unworthiness or racial inferiority. These considerations are in no manner involved.

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

41. HANEY LÓPEZ, *supra* note 3, at 31.

42. *Id.* at 183.

43. *Id.* at 202.