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STORIES FROM THE NEGATIVE SPACES: *United States v. Thind* and the Narrative of (Non)Whiteness

Joy Kanwar*

"You must never be limited by external authority, whether it be vested in a church, [person] or book. It is your right to question, challenge, and investigate." - Bhagat Singh Thind

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Thank you to Jordan Stone and the Mercer Law Review for inviting me to be part of *Past is Prologue: Legal Narratives and the Law's Potential for Justice and Injustice*. Shakespeare was right, and I am grateful to be part of the collective storytellers here.

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For years, Bhagat Singh Thind's case has resonated in my mind. I thought of it in the days after September 11, 2001, when a group of attorneys and I scrambled to organize in the South Asian legal community as brown people became targets for hate crimes overnight. I thought of it a few years later when representing Rajinder Singh Bammi, a Sikh livery cab driver who was beaten within an inch of his life by young men of Italian ancestry leaving a Queens restaurant after celebrating a christening. I thought of it every time I saw a documentary about the "Third Reich" and its iconography stolen from Hindu culture, which like many things stolen, undoes the original stories so they are unrecognizable. I thought of it when reading Isabel Wilkerson's work on caste, fully understanding, as Thind did, that "high caste" status can sometimes pave an easier path. I thought of it, too, when I saw Kamala Harris become the first woman, first Black person, and first South Asian person to ever win the office of the Vice President of the United States of America. And now I think of it as incidents of hate spiral out against Asian American Pacific Islander (AAPI) communities again, reminding us that old tropes can make way for newer ones, but the overarching story is the same: you are a perpetual—sometimes sudden but always eventual—outsider.

Thind's case is unknown to many, even among lawyers and legal scholars, but in the South Asian community, it is one of the most important cases in American history. Thind applied for citizenship in America at a time when only "white persons" or "persons of African ancestry" could qualify under the Naturalization Act. The Court ultimately ruled against Thind. At its heart, the opinion shows that the Supreme Court in 1923, in its unanimous decision as penned by Justice Sutherland, chose to recognize a standard of whiteness so subjective that it could only be populated (and defined) by those who already "commonly" understood themselves to be white. The decision, when paired with the Ozawa *decision by Justice Sutherland just three months before, shows that the Court took pains, in inconsistent ways, to define whiteness as the narrowest of targets, one that favored immigration from a particular small number of originating countries (England and northern Europe), one religion (Protestant), and a political orientation that supported these norms. As a result, all South Asians were shut out of the possibility of naturalizing, many lost their status retroactively, and the Court created a new category of person—the non-white Caucasian. Finally, the decision leaves out much of the "back story"—that Thind's support of Indian independence from Britain appears to have cost him dearly. Despite serving the United States in World War I, he was not understood to be worthy of the "club."*

In the year in which United States v. Bhagat Singh Thind *turns one hundred years old, I set out to tell the stories that were left out of the*

Finally, thank you to David and Justin Thind for allowing me to get to know you, and to hear about the influence your father and grandfather had on your lives and his legacy as a spiritual teacher far beyond the Supreme Court case.

This article is dedicated to the three Singhs – Bhagat Singh Thind, Rajinder Singh Bammi, and, my dad, Rajinder Singh Kanwar, who—across decades, oceans and impossible odds—came from Punjab to make their lives in the United States of America.

decision. I write this Article inspired by the form of an ancient Indian storytelling tradition, the Panchatantra ("five treatises"), which tells separate stories interwoven within a larger frame story. One feature of the stories is that a character in the last story (often minor) becomes a featured character in the next. The stories themselves are designed as moral tales, and—at first blush—appear to be children's stories. The original purpose of the tales, however, was to teach strategy in a complicated world. With this technique, and based in Critical Legal and Realist principles that foreground narrative, we unpack the story of Bhagat Singh Thind again from his journey from Punjab to the Supreme Court and beyond. With this re-telling, we can see again the many countervailing forces working with and against immigrants and other communities of color who strove to become part of this nation. The lessons lie in the negative spaces around the Supreme Court's unanimous decision. These stories—like those in the Panchatantra—are far more complex than they first appear.

I. INTRODUCTION

In the years following September 11, 2001, hate crimes and violent incidents against Sikh people in America rose dramatically.[1] Most of these incidents involved individuals who targeted Sikh people—often men—because of their turbans and beards, which the attackers conflated with their own imagined versions of "9/11 terrorists." Although the Sikh faith had no relationship to whom these attackers thought they were assaulting, very often someone they believed to be from the Islamic faith, the "visual" told the story—the victim was an outsider, someone who did not belong here and someone who was dangerous for America.[2]

One particularly poignant moment resonated with me from that time. In 2005, my firm took over the *pro bono* representation of Rajinder Singh Bammi (also known as Khalsa, an honorific for priest), who was beaten within an inch of his life in Queens by several young men of Italian ancestry leaving a christening party.[3] The Queens District Attorney brought a hate crimes case against the men, who were convicted and served either time or community service. Significantly, Mr. Bammi then decided to bring the first case in America in which a Sikh person brought

1. *Justice for Rajinder Singh Khalsa*, THE SIKH COALITION, https://www.sikhcoalition.org/our-work/legal-and-policy/rajinder-singh-khalsa/ (last visited Apr. 8, 2023); *see also* Spectrum News NY1, *Sikh Hate Crime Victim Files Suit Against Attackers*, YOUTUBE (Nov. 15, 2006), https://youtu.be/kfdERA0IquA.

2. For a general discussion about the creation and othering of Muslim communities under the American immigration system, *see* Tina Al-kersab and Azedeh Shahshahani, *From the Chinese Exclusion Act to the Muslim Ban: An Immigration System Built on Systemic Racism*, 17 HARV. L. AND POL'Y REV. 132 (2022).

3. *Sikh Coalition—5 Year Anniversary Video Series*, THE SIKH COALITION (Sept. 28, 2011), https://www.sikhcoalition.org/blog/2011/sikh-coalition-5-year-anniversary-video-series/.

a civil suit against his attackers to pay for his hospital bills and lost wages. In reflecting upon the burden and responsibility of bringing such a case, he asked out loud, "Why are they mixing us up? Why don't they know who we are?" I have thought both of my immediate response to the first question—that no one should be attacked no matter their faith and that we stand with all vulnerable communities—but also of the lingering second question: "Why don't they know who we are?"

In the years since, violent incidents burst forth again in a shooting rampage in the Oak Creek gurdwara,[4] and in shootings and arson in mosques,[5] in synagogues,[6] in churches[7] against other minority communities across the country. Further incidents took place in mundane, everyday locations like FedEx shipping depots in Indianapolis,[8] nail salons and spas in Atlanta,[9] and corner and grocery stores in just about every city in America.[10] What was it that kept certain communities invisible? And more importantly, when the communities were suddenly noticed in incidents such as these, who was creating the narratives around them? I wanted to revisit the story of another case, this one before the Supreme Court of the United States, to see how

4. Steven Yaccino et al., *Gunman Kills 6 at a Sikh Temple Near Milwaukee*, N.Y. TIMES (Aug. 5, 2012), https://www.nytimes.com/2012/08/06/us/shooting-reported-at-temple-in-wisconsin.html.

5. Eric Lichtblau, *Crimes Against Muslim Americans and Mosques Rise Sharply*, N.Y. TIMES (Dec. 17, 2015), https://www.nytimes.com/2015/12/18/us/politics/crimes-against-muslim-americans-and-mosques-rise-sharply.html.

6. *See*, *e.g.*, Neil Vigdor, *College Student Charged in Arson at Texas Synagogue*, N.Y. TIMES (Nov. 15, 2021), https://www.nytimes.com/2021/11/15/us/austin-synagogue-fire-arson.html; Adam Serwer, *White Nationalism's Deep American Roots*, THE ATLANTIC (Apr. 2019) (reporting that Robert Bowers, a gunman who gunned down eleven worshippers at the Tree of Life Synagogue in Pittsburgh on October 27, 2018, wanted "all Jews to die" to protect white Americans from "genocide.").

7. Alan Blinder, *Man Accused of Burning Louisiana Churches is Charged With Hate Crimes*, N.Y. TIMES (Jun. 12, 2019), https://www.nytimes.com/2019/06/12/us/louisiana-church-fires-hate-crimes-charges.html.

8. Andrés R. Martínez et al., *FedEx Gunman Bought 2 Rifles After Police Seized His Shotgun, Chief Says*, N.Y. TIMES (Apr. 19, 2021), https://www.nytimes.com/2021/04/17/us/indianapolis-shooting-victims.html?searchResultPosition=8; *see also FBI Updates Record High Hate Crime Statistics*, THE SIKH COALITION (Oct. 27, 2021), https://www.sikhcoalition.org/blog/2021/fbi-updates-record-high-hate-crime-statistics/.

9. Richard Fausset & Neil Vigdor, *8 People Killed in Atlanta-Area Massage Parlor Shootings*, N.Y. TIMES (Mar. 16, 2021), https://www.nytimes.com/2021/03/16/us/atlanta-shootings-massage-parlor.html.

10. *See*, *e.g.*, Jesse McKinley et al., *Gunman Kills 10 at Buffalo Supermarket in Racist Attack*, N.Y. TIMES (May 17, 2022), https://www.nytimes.com/live/2022/05/14/nyregion/buffalo-shooting.

another Sikh immigrant contested his identity and to see what we can learn from stories left in the negative spaces around the case.

The Supreme Court's decision in *United States v. Bhagat Singh Thind*[11] turned a century old in February 2023. Other than for scholars who have examined its impact on American immigration history, it remains a relatively unknown case to the general public. But its impact is monumental when it comes to the history of Asians—and in particular, South Asians—in America. The case captures its own historical moment and provides lessons for the ways in which we understand race, citizenship, and what it means to be an American today.

Thind's story spans continents, decades, and empires. By taking the lens back to encompass more of the picture—of the various political and historical forces at play and the ways in which actors contemplated, used, and challenged existing and competing norms—we can see more of the story. This Article articulates why—despite presenting a case carefully designed to align with the Court's own prior reasoning—Thind could not have prevailed in his case to retain his American citizenship before the Supreme Court in 1923.

A word on the various uses of language in this paper. Terminology is ever-changing, and historical terminology does not always comport with the words we tend to use today. To the extent possible, I will try to clarify which community I mean and at which time period. I use the term "South Asian" to describe the modern diaspora of persons originally from India, Pakistan, Bangladesh, Sri Lanka, Nepal, Bhutan, Afghanistan, and the Maldives.[12] When I refer to India or the Indian Independence movement, I am referring to the country before Independence in 1947 (which would also encompass modern-day Pakistan and Bangladesh), and in this specific historical context I may use the word "Indian" to refer to persons from that region. Most American historical sources in the nineteenth century referred to people from India as "Hindus or Hindoos" rather than Indians to distinguish these immigrants from people native to the Americas. This term encompassed all people from India, regardless of whether they were religiously Hindu, and included people of the Sikh, Muslim, Buddhist, and other faiths, as well. Although this Article focuses on Thind and his quest for citizenship, many of the prevailing forces were already in place long before Thind set sail for America, and many

11. 261 U.S. 204 (1923).

12. Immigrants from these places traveled all over the world and have created vibrant communities *in situ*. For example, the *desi* community in New York City includes a vibrant Indo-Caribbean diasporic community.

continue to work in the negative spaces to define who gets to become fully part of this country and who does not.

This Article builds upon the scholarship about the racial prerequisite cases, including the two Supreme Court decisions in *Thind* and *Takao Ozawa v. United States*,[13] which the Supreme Court took up only three months before Thind's case. Scholars such as Ian Haney Lopez,[14] Sherally Munshi,[15] and Doug Coulson[16] have theorized about the legal and rhetorical underpinnings of these cases, including, in Coulson's work, the British imperial influence on Thind's fate. I offer my contribution as in line with Vinay Harpalani's work on DesiCrit,[17] which adds to the rich literature about law and the "creation" of Asian identity and South Asian identity, with John Tehranian's work on the mutability of racial categories,[18] and with the movements of legal storytelling to contextualize the impacts of law on real people.[19] Finally, I am inspired by scholars, including those in my own field of legal writing, who have brought fresh perspectives to the study of historical cases, including by revisiting and rewriting cases as if they were judges of the time,[20] or by

13. 260 U.S. 178 (1922).

14. IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (rev. and updated 10th anniversary ed. 2006).

15. Sherally Munshi, *"You Will See My Family Become So American": Toward a Minor Comparativism*, 63 AM. J. COMP. L. 655 (2015); Sherally Munshi, *Immigration, Imperialism, and the Legacies of Indian Exclusion*, 28 YALE J. L. & HUMAN. 51 (2016).

16. *See, e.g.*, Doug Coulson, *British Imperialism, the Indian Independence Movement, and the Racial Eligibility Provisions of the Naturalization Act:* United States v. Thind *Revisited*, 7 GEO. J.L. & MOD. CRIT. RACE PERSP. 1 (2015); DOUG COULSON, RACE, NATION, AND REFUGE: THE RHETORIC OF RACE IN ASIAN AMERICAN CITIZENSHIP CASES (SUNY PRESS, 1ST ED. 2017).

17. Vinay Harpalani, Desi*Crit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURV. AM. L. 77 (2013).

18. John Tehranian, *Is Kim Kardashian White (And Why Does It Matter Anyway)? Racial Fluidity, Identity Mutability & The Future of Civil Rights Jurisprudence*, 58 HOUS. L. REV. 151 (2020); John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 819 (2000).

19. *See*, *e.g.*, Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L.J. 379 (2017); Aderson Bellegarde François, *A Lost World: Sallie Robinson, the Civil Rights Cases, and the Missing Narratives of Slavery in the Supreme Court's Reconstruction Jurisprudence*, 109 GEO. L.J. 1015 (2021); Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 4 (2006); Cathren Page, "Astonishingly Excellent Storytelling Tips: Overcoming Superhero Fiction Techniques Employed by Fascist Leaders*," Global Legal Skills* (2018).

20. *See, e.g.*, FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi et al. eds., 2016), which inspired several other

foregrounding methodologies that recenter stories about justice from non-Western perspectives.[21]

I recently wrote a dissenting opinion in the *Thind* case for the forthcoming U.S. Feminist Judgments Project: Immigration Law edition.[22] In the dissent, I had an opportunity to delve into what the Court could have considered in its decision based on resources available in 1923, including its reading of the Naturalization statute and use of the existing tests used in the lower federal courts at the time. After writing that piece (with Professor Jaya Ramji-Nogales' truly insightful accompanying commentary tying *Thind* to current tropes in immigration law), I wanted to address the stories that illuminated the decision but could not be part of a formal judicial opinion. In terminology I borrow from artistic composition, these were the stories in the negative spaces,[23] stories which surround the main subject and give it greater definition and context. With this article, I look again at the language in filings, briefs, and decisions, and add back the details of people's lives that are often removed from the stories we tell about the law. Some of these details and documents are little-known, and I thank Bhagat Singh Thind's family members—his son, David, and his grandson, Justin—for allowing me to get a larger sense of the impact of the case on their lives as well.[24]

Like the *Panchatantra* itself, this Article proceeds in five parts. I start with the frame story—the case itself and the language that the Court used to exclude Thind and, thereby, all Indian immigrants from

editions of the series by subject matter; *see also* CRITICAL RACE JUDGMENTS: RE-WRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW (Bennett Capers et al. eds., 2022).

21. *See* Elizabeth Berenguer et al., *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, 23 HARV. LATINX L. REV. 1 (2020); *see also* their forthcoming book, ELIZABETH BERENGUER ET AL., CRITICAL AND COMPARATIVE RHETORIC: UNMASKING PRIVILEGE AND POWER IN LAW AND LEGAL ADVOCACY TO ACHIEVE TRUTH, JUSTICE AND EQUITY (2023).

22. JOY KANWAR, *A New Dissent in United States v. Thind*, in U.S. FEMINIST JUDGMENTS PROJECT: REWRITTEN IMMIGRATION LAW OPINIONS (forthcoming 2023); *see also* JAYA RAMJI-NOGALES, *Commentary on United States v. Thind and Justice Kanwar's Dissen*t, in U.S. FEMINIST JUDGMENTS PROJECT: REWRITTEN IMMIGRATION LAW OPINIONS, (forthcoming 2023).

23. Negative space, in art, is the space around and between the subject(s) of an image. Negative space may be most evident when the space around a subject, not the subject itself, forms an interesting or artistically relevant shape, and such space occasionally is used to artistic effect as the "real" subject of an image. *See Negative Space*, WIKIPEDIA, https://en.wikipedia.org/wiki/Negative_space#:~:text=Negative%20space%20in%20art%2C%20also,on%20what's%20between%20the%20objects.

24. *See, e.g.*, Interview with Justin Thind (Jul. 6, 2022).

naturalization. Then I tell the nesting stories around the case to provide context for why and how race became a moving target for Thind and other immigrants at that time.

II. TELLING THE STORY

The *Panchatantra* is an ancient Indian collection of moral fables, originally written in Sanskrit, and translated into various languages in India and around the world.[25] "Panch" means five, and "tantra" means treatise. The texts are organized into five books, each of which present interrelated stories organized within a larger frame story.[26] The stories are sometimes structurally compared to Russian nesting dolls, in which one story successively leads into the next one,[27] and one character (often minor) becomes a narrator or major character in the next story.

Drawing upon "the expert tradition of political science and literary tradition of folklore and storytelling," the stories metaphorically teach *nītiśāstra,* or "the wise conduct of life" to three unwise princes.[28] The first four books deal primarily with animal stories, in which the animal's names and personalities have recognizable human counterparts (a story about a smiling crocodile in lotus flower-laden pond, for example "is presented to symbolize dangerous hidden intent beneath a welcoming ambiance.")[29] The fifth and final book departs from the others and features primarily human characters faced with challenging moral dilemmas.

As a frame for this article, I begin with a story from the fifth book (Book V, 2) and draw upon one which seems particularly appropriate to a tale about immigrants. In the *Panchatantra* story of the "treasure seekers," four scholars set out from their home to find wealth and knowledge and are sent on a journey by a magician-sage, *Bhairava-ananda* (translated from the Sanskrit as "Terror-Joy") to an unknown land.[30] The sage gives them each a quill[31] and instructs them to keep walking until the quill drops from each one's hand. At that point,

25. *See Panchatantra*, WIKIPEDIA, https://en.wikipedia.org/wiki/Panchatantra#:~:text=The%20Panchatantra%20(IAST%3A%20Pa%C3%B1catantra%2C,are%20likely%20much%20more%20ancient.

26. *See id*.

27. *See id*.

28. *Id*.

29. *Id*.

30. *The Four Treasure-Seekers*, in THE PANCHATANTRA OF VISHNU SHARMA 434–42 (Arthur W. Ryder, trans. 1925).

31. In some versions, this item is translated as a lit oil lamp, known as a *diya*, with a cotton wick, and in others, as a tablet.

the person whose quill has dropped should stop to see what lies at that location and take that treasure back home. Each scholar's quill drops along the journey: the first one finds unlimited amounts of copper, another finds the same in silver, another finds the same but in gold, and the last one, having eschewed all the prior treasures and now traveling alone, finds a stranger standing with a wheel circling around his head. The stranger feels no hunger or thirst but is in agony as the wheel is cutting him, and rivulets of blood are running down his face. Upon being asked by the scholar what is going on, the stranger says he had come to that location ages ago and in the same way, with a quill from *Bhairava-ananda*. Immediately, the Wheel of Destiny moves away from the stranger and alights upon the scholar's head, causing great pain. The stranger takes his leave, and the story ends with this fable folding—in *Panchatantra*-style—into the next one.[32]

Joseph Campbell included this story in his *Masks of God* series[33] and Arthur W. Ryder in his English translation of the *Panchatantra* in 1925.[34] It has been interpreted by Buddhist scholars as an analogy to the journey of the Boddhisatva, as a story not about greed, but rather of the suffering that is part of the journey towards self-realization. This ancient tale of the magician-sage *Bhairava-ananda* has also been noted as an inspiration for the Arthurian tales/tales of Merlin.[35] Campbell wrote about myth-making and "the hero's journey" across traditions, which in turn has been analogized to the real stories of immigrants in all kinds of literature.[36] In this last context, the immigrant's journey is depicted as

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32. *The Four Treasure-Seekers, supra* note 30, at 442.

33. *See* JOSEPH CAMPBELL, *The Crucified, about the Turning Wheel of Terror-Joy,* in THE MASKS OF GOD: CREATIVE MYTHOLOGY 405 (Penguin Compass ed. 1991); *see also* JOSEPH CAMPBELL, THE HERO WITH A THOUSAND FACES (David Kudler, ed., 3d ed. 2008).

34. *The Four Treasure-Seekers*, *supra* note 30, at 434–42. This is Ryder's translation of the 1199 A.D. version, which itself appears to be a retelling of Kashmiri tales dating back to 200 B.C. The author of the *Panchatantra* tales, pandit Vishnu Sharma, may be a pseudonym as well, and many of the stories themselves stretch back almost 2,500 years.

35. *See* JOSEPH CAMPBELL, ROMANCE OF THE GRAIL: THE MAGIC AND MYSTERY OF THE ARTHURIAN LEGEND (David Kudler & Evans Lansing Smith eds., 2020); *see generally* Robbins, *supra* note 19, for the concept that the archetypal hero's story often has a mentor who sends the hero on a quest.

36. *See, e.g.*, SUKETU MEHTA, THIS LAND IS OUR LAND: AN IMMIGRANT'S MANIFESTO (2019); Anupam Chander & Madhavi Sunder, *Fred Korematsu: All American Hero*, UC DAVIS LEGAL STUDIES RESEARCH PAPER SERIES (2011), https://ssrn.com/abstract=2702601. Others have pushed back on stories analogizing immigrants as heroes, citing that "hero" stories place a much higher burden on immigrants to be viewed as unusually "valuable" and extremely educated (like inventors or astronauts) rather than as people in the labor force and certainly not those in the margins of society. *See*, *e.g.,* Hardeep Dhillon, *The Making of Modern U.S. Citizenship and Alienage: The History of Asian Immigration*, *Racial*

often successively more difficult, and rewarding and perilous at once, with no guarantee of a happy ending.

Courts write stories. As scholar Aderson Bellegarde François observed, the particular way in which appellate courts write stories matters, too.[37] The Supreme Court, in particular, "tells stories about who and what we are . . . ."[38]

In the entire history of the Supreme Court, only twice did the Court take up the question of who is white for the purposes of the Naturalization Act[39] in this country.[40] The Court decided these cases, *Ozawa v. United States* and *United States v. Thind*, three months apart, in November 1922 and February 1923, respectively. In both cases, the Court held that the immigrants at issue could not be considered "free white persons," and therefore, could not become citizens.[41] The reasoning in each case, which were both unanimous decisions penned by Justice George Sutherland, showed that the Court was attempting to define a category which was a moving target for immigrants.[42] Most scholars agree that the reasoning and outcome in the two cases appear quite inconsistent. The Court relied heavily on a "scientific" notion of the term "Caucasian" to exclude Takao Ozawa from naturalization.[43] However, when considering Bhagat Singh Thind, who would have been within the western ethnographic classification of Caucasian of the time, barred him as well because he did not meet another test altogether—the "common white man's understanding" of the term.[44] Further, that "common white" test that Justice Sutherland articulated, too, was formulated in two different ways—one that showed who would be considered white in 1790 and the other showed who would be considered white as of 1923, including large swaths of immigrants who would not have been white at the time of the 1790 Act.[45] This Article attempts to trace the larger

Capital, and U.S. Law, LAW. & HIST. REV. 1 (2023) (discussing how well-to-do immigrants used "racial capital" in their quest to retain their citizenship in the aftermath of the *Thind* case).

37. François, *supra* note 19, at 1015.

38. *Id.*

39. Naturalization Act of 1906, 52 Stat. 1247 (1906) (superseded by Immigration and Nationality Act., 66 Stat. 163 (1952)) (current version at 8 U.S.C. § 1101).

40. *See* ARIELLA GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA 211 (2008).

41. *Thind,* 261 U.S. at 214; *Ozawa,* 260 U.S. at 178.

42. *Thind*, 261 U.S. at 208; *Ozawa*, 260 U.S. at 192–93.

43. *Ozawa*, 26o U.S. at 196–97.

44. *Thind*, 261 U.S. at 214–15.

45. *See* KANWAR, *supra* note 22; Naturalization Act of 1790, 1 Stat. 103 (1790).

historical support for the test that was neither of the ones named in the cases, but that I believe undergirds the decisions: an assimilation test. By looking again at Thind's life and the countervailing political and cultural forces at play, the legal decision takes on new—and clearer—meaning.

A. Origin Story: A Brief History of The Naturalization Act: Who is White, Who is of African Ancestry, and Who Gets Left Out?

The Naturalization statute,[46] originally enacted in 1790, limited naturalization to those persons in this country for two years,[47] who could demonstrate that they were "free" and "white." The statute of the time excluded from naturalization all persons who were enslaved, who were from the original native tribes of this country, and who were women.[48] After the Civil War and the enactment of the Fourteenth Amendment,[49] Congress took up the question again of who should be able to naturalize, and ultimately revised the statute to add "aliens of African nativity" and "persons of African descent" in 1870.[50]

The quest for citizenship in this country was long and fraught for many groups, including those whose ancestors were brought here as enslaved persons and those persons born here from native communities.[51] This also included all women, including women who married men naturalized under the law of the time. At the time, a married woman's citizenship was tied to her husband's status, under such doctrines as coverture and acts such as the Expatriation Act of 1907[52] under which Congress mandated that "any American woman who marries a foreigner shall take the nationality of her husband."[53] While the Cable Act[54] changed this reality for many women, the law continued to revoke citizenship from

46. 1 Stat. 103 (1790).

47. Amended in 1795 to "five years." *See* Naturalization Act of 1795, 1 Stat. 414 (1795).

48. 1 Stat. 103 (1790).

49. U.S. CONST. amend. XIV, § 2.

50. Naturalization Act of 1870, 16 Stat. 254 (1870).

51. Native peoples were accorded citizenship by act of Congress in 1924, the year after the *Thind* decision. *See* Immigration Act of 1924, 43 Stat. 153 (1924).

52. 34 Stat. 1228 (1907).

53. *Id.* at § 3.

54. 42 Stat. 1021 (1922).

women who married a specific subset of non-citizens, primarily comprised of Asian men.[55]

Further, as I have noted, "when citizenship came for the Black community in this country, it came piecemeal: only a part at a time and never whole like that accorded to immigrant men who met the definition of free and white, regardless of the latter's wealth or landowning status."[56] Let us regard, for example, the history of our cases from *Dred Scott v. Sandford*,[57] to *Strauder v. West Virginia*, [58] to *Plessy v. Ferguson*.[59]

In *Dred Scott*, Justice Taney articulated for an entire generation of Americans what was meant by white supremacy[60] when writing about Mr. Scott's race:

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that [they] might justly and lawfully be reduced to slavery for his benefit . . . . This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.[61]

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55. *See* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405 (2005).

56. *See* KANWAR, *supra* note 22.

57. 60 U.S. 393 (1857), *overturned* by the Fourteenth Amendment.

58. 100 U.S. 303 (1880).

59. 163 U.S. 537 (1896), *overruled* by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

60. *See White Supremacy*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/421025?redirectedFrom=%E2%80%9CWhite+supremacy%E2%80%9D#eid. The oldest known dictionary definition for the term white supremacy refers to the British colonial relationship to the local Indian community, warning the British not to fall into the reflex of their white supremacy. According to Oxford English Dictionary, H. Bevan wrote in 1839, "[t]he security of our empire in the East would be greatly strengthened if our functionaries would abandon, or at least conceal, those notions of White supremacy, which are frequently absurd, and always offensive." *Id.*

61. *Scott*, 60 U.S. at 407; *see also* United States v. Dow, 25 F. Cas. 901, 903 (C.C.D. Md. 1840) (in which Taney writing then for the Circuit Court of Maryland indicates, when upholding the testimonial exclusion of a person from Malaysia, that "[t]he only nations of the world which were then regarded, or perhaps entitled to be regarded, as civilized, were

Twenty-three years later, in *Strauder*, the Supreme Court grappled with correcting the effects of white supremacy when holding that a West Virginia law barring Black persons from serving on juries violated the Equal Protection Clause of the Fourteenth Amendment.[62] Justice Strong, writing for the majority, observed there:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, *though they are citizens*, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.[63]

When it came to the Black community within our country, many rights were expanding, but others, afforded readily to "free white" men, were yet to be realized.[64] Fifteen years after *Strauder*, Justice Brown, writing for the majority in *Plessy v. Ferguson,* denied Plessy's argument that he should not be relegated to a separate railroad car from white passengers.[65] But what we often remember of this case is not the majority opinion, but the dissent by Justice John Marshall Harlan, who famously said in the case that:

> But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. *There is no caste here.* Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. *The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color* when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has

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the white Christian nations of Europe; and certainly, emigrants were not expected or desired from any other quarter.").

62. *Strauder*, 100 U.S. at 308.

63. *Id.* (emphasis added).

64. *See, e.g.*, Lucy Salyer, *"It Has Not Been My Habit to Yield": Charles Sumner and the Fight for Equal Naturalization Rights*, HISTORY NEWS NETWORK (July 5, 2022), https://historynewsnetwork.org/article/176256. ("Even citizenship did not provide protection from the expanding color line. Lynching of African Americans soared into the thousands as Jim Crow laws divided the country into black and white spaces by the early twentieth century."); *see also* Civil Rights Cases, 109 U.S. 3 (1883); Slaughter-House Cases, 83 U.S. 36 (1873); Plessy v. Ferguson, 163 U.S. 537 (1896).

65. *Plessy*, 163 U.S. at 549.

> reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.[66]

Justice Harlan, known as "the great dissenter" and a hero to generations, could have stopped there. For most people of the time, his exhortation that the Constitution knows no caste or color was the foundation of the dissent. But in the recesses of the opinion, he goes on to elucidate that: *"There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States*. Persons belonging to it are, with few exceptions, absolutely excluded from our country. *I allude to the Chinese race*."[67] And in connection with his observation, Justice Harlan questioned why someone of the Chinese community could be permitted to ride in the rail car designated for white persons when someone like Mr. Plessy could not.[68]

As the country was determining who was to be considered fully American for the purposes of citizenship, immigrant groups also looked to secure rights. This expansion of democratic ideals encompassed groups who were not in this country in measurable numbers in 1790. Under this version of democracy, "active citizenship," and "universal suffrage" opened naturalization to everyone who was adult, male, and "white," regardless of whether that person had a stake in society, such as property ownership, or a steady source of income, as had been the requirement in the eighteenth century.[69] Theoretically, this was meant to encompass every white male settler, but in reality, who was considered white once the waves of immigration began was not clear. Did the concept of white include only Anglo-Saxon Protestants, as had been in the early wave of English immigration? Or did it include Celts? Did it include all Europeans, such as the Germans and Dutch who came mid-century, or the Italians, who are Catholics, and European Jews who came at the end of the century? Did it include all persons called Caucasians? Did it include all persons who spoke Aryan linguistic dialects, from the Nordic Fjords to the Ganges River? Then, what is "white?"[70]

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66. *Id.* at 559 (emphasis added).

67. *Id.* at 561 (emphasis added).

68. *Id.*; *see also* United States v. *Wong Kim Ark*, 169 U.S. 649, 731 (1898) (Fuller, C.J., dissenting) (Justice Harlan joined the dissent authored by Chief Justice Fuller that described Chinese people—even if born on U.S. soil—as wholly unassimilable "strangers in the land" who do not and cannot belong).

69. *See* NELL IRVIN PAINTER, THE HISTORY OF WHITE PEOPLE 106–07, 206 (2010).

70. *Ex parte* Shahid, 205 F. 812 (D.S.C. 1913).

Notably, on two occasions, Congress even considered striking the racial prerequisite language from the Naturalization statute altogether, once in 1870, during the debates that led to the 1870 revisions noted above,[71] and in 1875, when the words "free" and "white" were inadvertently left out of the statute.[72] In both cases, Congress reaffirmed that the statute should mention both "free white" persons and persons of "African descent" in order to exclude communities that could count as neither.[73]

On July 4, 1870, Independence Day, and forty-three years before the day that Mr. Thind immigrated to the United States, Senator Charles Sumner called upon Congress to strike the reference to "white" persons in the Naturalization Act in the debates leading up to the 1870 amendment.[74] Although Sumner indicated that racial categories did not meet the spirit of the Declaration of Independence, opponents argued that leaving out the racial language would allow Chinese immigrants to naturalize.[75] Senator William Stewart spoke on the matter as follows: "European immigrants 'are of our own race . . . and assimilate rapidly,' . . . but 'Chinese civilization is at war with ours.'"[76] The Senate first denied, then approved, and finally rejected Sumner's proposal.[77] A few years later, and in this spirit, Congress closed the door on immigration for people from China to the United States altogether with the passing of the Chinese Exclusion Act.[78] This act would not be repealed until 1943.[79] And this sets the stage for the Asian American quest to naturalize over the next half-century.

B. The Prerequisite Cases

71. *See* CONG. GLOBE, 41st Cong., 2d Sess. 4276, 5151, 5154, 5172 (1870).

72. *See* Ozawa, 260 U.S. at 195.

73. *Id.* at 178; *see also* CONG. GLOBE, 41st Cong. 2d Sess. 4276, 5151, 5154, 5172 (1870).

74. *See* CONG. GLOBE, 41st Cong. 2d Sess. 4276, 5151, 5154, 5172 (1870).

75. Salyer, *supra* note 64.

76. *Id.*

77. *Id.*

78. 22 Stat. 58 (1882); *see also* ERIKA LEE, THE MAKING OF ASIAN AMERICA: A HISTORY (2015); MAE NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004).

79. 57 Stat. 600–01 (1943).

In the years between 1878[80] and 1944,[81] immigrants from Canada, Mexico, and East, West and South Asia tried to naturalize as either the category of "white," or as of "African descent."[82] In that time, and until 1952, when the law changed to remove racial prerequisites,[83] anyone who fell outside these categories was barred from naturalization. Although the prerequisite cases are largely forgotten today, these cases framed "fundamental questions of who could join the citizenry,"[84] and took on a great deal of significance for the Asian historical experience in the United States at that time. As scholar Ian Haney Lopez notes, the prerequisite cases defined who was white "by exclusion, by who was not White, rather than by adducing an independent definition of 'white persons.'"[85] Like the stories in this Article, even the concept of whiteness once relied upon the negative spaces for its meaning.

Beginning with *In re Ah Yup*[86] in 1878, in which a federal district court in the Central District of California denied citizenship to a Chinese applicant because he could not be included in the category of "white person,"[87] courts around the country supported their rulings in the prerequisite cases with various rationales. Courts generally relied upon the following tests to determine who was white: (1) the common understanding; (2) scientific knowledge; (3) congressional intent; (4) legal precedent; and even (5) "ocular inspection" of the skin.[88] As indicated later on in the *Thind* decision when Justice Sutherland wrote about the understanding of the "average well informed white American," the common understanding meant the common understanding of the term "white person" among white people themselves.[89]

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80. LOPEZ, *supra* note 14 (noting that the first prerequisite case was *In re* Ah Yup, 1 F. Cas. 223 (C.C.D. Cal. 1878), followed by fifty-one other prerequisite cases; most naturalization decisions, including rejections, rarely involved formal court proceedings).

81. LOPEZ, *supra* note 14 (noting in Appendix A that the last case is *Ex parte* Mohriez, 54 F. Supp. 941 (D. Mass. 1944) in which an "Arabian" person is deemed white for the purposes of naturalization).

82. LOPEZ, *supra* note 14, at 177 (noting that one petitioner also attempted to categorize as of African descent for the purposes of naturalization. That applicant, like many of those who applied as "white," did not prevail in receiving it).

83. When the law was repealed under the Immigration and Nationality Act, 66 Stat. 163 (1952).

84. LOPEZ, *supra* note 14.

85. *Id.* at 117.

86. 1 F. Cas. 223 (1878).

87. *Id.* at 224.

88. *Ex parte Shahid*, 205 F. at 813.

89. *Thind*, 261 U.S. at 211; *see also* KANWAR, *supra* note 22 (in which I note that the self-defining feature of this concept served to keep others out of the naturalization process);

Notably, in *Ah Yup*, the court relied upon several tests to exclude the applicant from the possibility of naturalization, including by invoking the common "popular" understanding of the term "white person," as well as that era's scientific or ethnographic understanding of the category and congressional intent.[90] Speaking to the first rationale, Judge Sawyer indicated that these words "have undoubtedly acquired a well settled meaning in common popular speech . . . ."[91] Speaking to the second rationale, he relied upon contemporary western scientific authorities of the time, including Blumenbach, Buffon, Cuvier, and Linnaeus[92] and also combined their ethnographic understanding with the common understanding by stating that, "[a]s ordinarily used everywhere in the United States, one would scarcely fail to understand that the party employing the words 'white person' would intend a person of the Caucasian race."[93] Finally, Judge Sawyer addressed the third rationale, congressional intent, by going into detail about the debates surrounding the 1870 revision to the Naturalization Act, in which the word "white" was purposely left in, according to the judge, "for the sole purpose of excluding the Chinese from the right of naturalization."[94]

Lopez indicates that at the time of the early prerequisite cases, like *Ah Yup* above, the common understanding and the scientific understanding worked "hand in hand . . . mutually reinforcing" one another to support the court's resulting ruling.[95] However, after immigration patterns changed and immigration increased from Southern and Eastern Europe and from South and West Asia at the turn of the last century, courts could no longer easily draw the same—or consistent—conclusions using both tests. This inconsistency came to a head in the only two prerequisite cases to reach the Supreme Court.

Not all applicants were able to prove whiteness under the statute, nor were the results—or tests used—consistent even as applied to the same immigrant community.[96] Under the prerequisite cases, all the applicants from China, Burma, Japan, and of mixed ancestry were not considered

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RAMJI-NOGALES, *supra* note 22 (calling Justice Sutherland's move "a logical sleight-of-hand befitting Oz the Great and Terrible").

90. LOPEZ, *supra* note 14 (noting these categories in Appendix A).

91. *In re* Ah Yup, 1 F. Cas. at 223.

92. *Id.* at 223–24; LOPEZ, *supra* note 14.

93. *In re* Ah Yup, 1 F. Cas. at 223.

94. *Id.* at 224; *see also* LOPEZ, *supra* note 14.

95. LOPEZ, *supra* note 14, at 46.

96. *See, e.g.*, *id.* at 163–68 (Appendix A, listing the various tests in use at that time, as well as the result of the petitioners' applications in each case).

"white persons" for the purposes of naturalization.[97] Applicants from Mexico and Armenia were considered white.[98] And applicants from Syria, Arabia, and India presented inconsistent results; they were considered white in many cases, but not uniformly so.[99]

For example, when addressing "Hindu" applicants (who, as previously mentioned, included anyone from pre-1947 India, regardless of religious practice), the courts mostly rested their rationale on the fact that northern India was included in the belt of "Caucasian" people according to western scholars of the time. In both *In re Mozumdar*[100] and *In re Mohan Singh,*[101] district courts in the Eastern District of Washington and the Southern District of California, respectively, held that Hindus were unquestionably white for the purposes of naturalization.[102] Both cases would later become centerpieces in the Supreme Court's reasoning in the *Ozawa* and *Thind* cases.

In contrast, the court in *In re Sadar Bhagwab Singh*,[103] a district court case from the Eastern District of Pennsylvania, denied that a Hindu could be white, punctuating the point with a memorable analogy between a Hindu (here, actually Sikh) applicant and an applicant from Mars.[104] Judge Dickinson, basing his opinion on common knowledge and congressional intent, and eschewing the idea that Caucasian was a good signifier for white, reasoned that "the substitute may lead us away from the right meaning" and "[w]hen the long looked for Martian immigrants reach this part of the earth, and . . . 'a man from Mars' applies to be naturalized, he may be recognized as white within the meaning of the act of Congress, and admitted to citizenship; but he may not be a Caucasian."[105] As noted by scholar Vinay Harpalani: "[T]he lower federal courts used a variety of standards and modes of reasoning—sometimes bordering on the absurd—to resolve the racial ambiguity of South Asian Americans under the law."[106] The Supreme Court cases to follow provided no greater clarity.

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97. *Id.*
98. *Id.* at 164, 167.
99. *Id.*
100. 207 F. 115 (E.D. Wash. 1913).
101. 257 F. 209 (S.D. Cal. 1919).
102. *Id.* at 212; *Mozumdar*, 207 F. at 117.
103. 246 F. 496 (E.D. Pa. 1917).
104. *Id.* at 500.
105. *Id.*
106. Harpalani, *supra* note 17, at 129.

1. *Takao Ozawa v. United States* (1922) and the Exclusion of Non-Caucasians

The first of the only two racial prerequisite cases to get to the Supreme Court of the United States was brought by Takao Ozawa.[107] Ozawa was a person of Japanese origin who immigrated to the United States, lived and worked in the United States continuously for over twenty years, and raised his family in the country.[108] Born in Japan, he lived in Hawaii for much of his life and also lived for some time in Berkeley, California, where he attended Berkeley High School and the University of California.[109]

After being denied his petition for naturalization, Ozawa brought his case before the Supreme Court on October 3, 1922.[110] Relying on a narrow reading of the Naturalization Act, he argued that "free white persons" meant only the exclusion of those individuals who were not considered white at the time that the Act was created in 1790, a time in which persons of Japanese origin were not contemplated.[111] He further argued that in no context – common, popular, ocular, or scientific – does the term "free white persons" mean the exclusion of Japanese persons from naturalization.[112]

The Court ruled Ozawa could not be eligible for naturalization because he was not a "free white person," and specifically, because he was not a "Caucasian" under the scientific understanding of the word.[113] Justice Sutherland, writing for a unanimous court, asserted in *Ozawa* that "appellant, in the case now under consideration . . . is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone [of eligibility] on the negative side."[114]

In an indication of the immediate impact of the case, after the Court issued its opinion in *Ozawa*, it also issued another unanimous decision authored by Justice Sutherland in *Yamashita v. Hinkle*[115] on the same

107. In fact, Ozawa's case was originally supposed to be heard second by the Supreme Court, after Thind's case. What an interesting question that would have been. What would Justice Sutherland have written in each case?

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

109. *Id.*

110. *Ozawa*, 260 U.S. 178.

111. Brief for Petitioner, Ozawa v. United States, 260 U.S. 178 (1922) (No. 1), at *40-52.

112. *Id.* at 52-60.

113. *Id.* at 198.

114. *Id.*

115. 260 U.S. 199 (1922).

day.[116] In that case, the Court determined that because persons of Japanese origin could not naturalize under the new precedent in *Ozaw*a, they would also not be able to hold land in the state of Washington.[117]

2. *United States v. Bhagat Singh Thind* (1923) and the Creation of Non-White Caucasians

After the *Ozawa* decision, the next question became what the courts should do in each "borderline" case of a "free white" person seeking naturalization.[118] Or put another way, did it make sense for courts to police such a line for the purposes of [S]ection 2169 of the Revised Statutes."[119] In light of *Ozawa*, what would happen if someone, like Thind, deemed to be "Caucasian" as an immigrant from North India, brought a naturalization claim to the Court? In Thind's case, the Court was asked to determine whether "a high-caste Hindu[, a native of India,] of full Indian blood, born at Amrit Sar, Punjab, India, [is] a white person within the meaning of section 2169, Revised Statutes[.]"[120] Justice Sutherland, penning the unanimous opinion in *Thind*, just as in *Ozawa*, answered this question as "[n]o."[121] Most notably, rather than relying upon the scientific knowledge notion of "Caucasian" he used in the prior case to exclude Ozawa, he refutes that test and adopts a common understanding approach to exclude Thind.

A second question in *Thind* was whether the "act of February 5, 1917, (39 Stat. L. 875, section 3[122]) [sic] disqualify[ied] from naturalization . . . those Hindus, now barred by that act, who had lawfully entered the United States prior to the passage of said act[,]" thereby asking the Court to clarify whether naturalized citizens can retroactively be denaturalized under such circumstances.[123] The Court declined to entertain this question as "[i]t follows that a negative answer must be given to the first question, which disposes of the case and renders an answer to the second question unnecessary[.]"[124] Here, Justice Sutherland first makes note

116. *Id.*
117. *Id.* at 200–01.
118. *Ozawa*, 260 U.S. at 178.
119. KANWAR, *supra* note 22, at 1.
120. *Thind*, 261 U.S. at 206.
121. *Id.* at 215.
122. 29 Stat. L. 874 (1917).
123. *Thind*, 261 U.S. at 207.
124. *Id.* at 215.

that "it is not likely that Congress would be willing to accept as citizens a class of persons . . . it [now] rejects as immigrants."[125]

To the modern observer who knows what happened after the case, many questions arise. What did the Court expect to happen "if such a decision is applied retroactively to persons who were already naturalized, and who have relied upon such a status to make a life for themselves in this country, including to marry, to raise a family, to buy or rent land, or to start businesses?"[126] I am curious to know whether the Court would have thought about the collateral consequences of that day's decision: the swift and unceremonious denaturalization of Indians who were legally citizens in this country.

Because that is exactly what happened.

C. Ozawa *versus* Thind*: A Question of Consistency*

I have wondered before how Thind must have reacted to the decision, given that he appeared to have all but followed the script from the Court's prior reasoning.[127] One theory is that it was likely to Thind's great surprise that the Supreme Court ruled against his naturalization when the very same Court in *Ozawa* held that Ozawa could not naturalize because he did not meet the scientific notion of Caucasian. In fact, the Court expressly relied upon certain district court cases to deny Ozawa citizenship that would seem to do the opposite in Thind's case. For example, in *In re Mohan Singh*, the court granted citizenship to a high-caste Hindu, finding that:

> [I]n the absence of any more definite expression by Congress, which is the body possessing the power to determine who may lawfully apply for naturalization, any members of the white or Caucasian race, possessing the proper qualifications in every other respect, are entitled to admission under the general wording of the statute respecting "all free white persons."[128]

Similarly, in *Mozumdar*, the court granted citizenship to a native of India on the basis that "it is now settled, by the great weight of authority, at least, that it was the intention of Congress to confer the privilege of naturalization upon members of the Caucasian race only," further noting that "[i]t is likewise true that certain of the natives of India belong to that

125. *Id.*

126. KANWAR, *supra* note 22, at 2.

127. *Id.* at 10.

128. *Mohan Singh*, 257 F. at 212.

race."[129] In fact, in *Ozawa*, Justice Sutherland complimented the district courts on their well-reasoned opinions on the matter, when he wrote:

> With the conclusion reached in these several decisions we see no reason to differ. Moreover, that conclusion has become so well-established by judicial and executive concurrence and legislative acquiescence that we should not at this late day feel at liberty to disturb it, in the absence of reasons far more cogent than any that have been suggested.[130]

In *Ozawa*, Justice Sutherland indicated that Caucasian is synonymous with white which "simplifies the problem, although it does not entirely dispose of it[,]" and there might arise "border line" cases in which the courts will have to intervene.[131] He also relied on scientific authority when he indicated that federal and state courts have decided cases against applicants: "These decisions are sustained by numerous scientific authorities, which we do not deem it necessary to review. We think these decisions are right and so hold."[132]

In the *Thind* case, neither the petitioner's nor respondent's voluminous briefs ever claimed that Thind is not a Caucasian person.[133] The major difference between the two cases is that while one used the category of "Caucasian" to deny entry to Ozawa, who by all other accounts the Court found to be "well qualified by character and education for citizenship,"[134] because he fell outside of the ethnographic, linguistic, and social scientific understanding of Caucasian at that time, when it came to Thind, who would be understood to be Caucasian by these standards, the Court threw out all of these categories in favor of what a common white person would understand the category to mean.[135]

In the *Thind* decision, Justice Sutherland noted:

> It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today; and it is not impossible, if that

129. *Mozumdar*, 207 F. at 117.

130. *Ozawa*, 260 U.S. at 197.

131. *Id.* at 198.

132. *Id.*

133. Brief for Appellant, United States v. Bhagat Singh Thind, 261 U.S. 204 (1923) (No. 202); Brief for Appellee, United States v. Bhagat Singh Thind, 261 U.S. 204 (1923) (No. 202).

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

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

> common ancestor could be materialized in the flesh, we should discover that he was himself sufficiently differentiated from both of his descendants to preclude his racial classification with either.[136]

Why did the Court choose to distance itself from cases it approved just three months prior? Nothing in the decision indicated that Justice Sutherland was making a consistent ruling, nor one which was easy to apply. Sutherland not only disregarded the very district court cases he used as a sword against Ozawa's naturalization, but the whole category of Caucasian, which he deemed as being relevant to whiteness in the "appreciably narrower scope" of popular application within the white community itself.[137] Further, as I have noted before, there is nothing to say that the common understanding of the term did not—if one asks someone the Justices would agree is "common" and "white"—include persons like Thind within its bounds. Therefore, with this decision, the Court created a new category of legal person—the non-white Caucasian—one who was closed out of the naturalization process in the United States.[138]

Thind may have well been surprised at the result of this case. On the other hand, and as is the work of the rest of this Article, he may not.

III. RE-TELLING THE STORY

In these silences, the silences overflowing with the muted voices of people of color, the violence of assimilation and the pain of survival are ubiquitous and enduring.[139]

A. The Tale of Two Ships

1. Bhagat Singh Thind and the Journey of the *U.S.S. Minnesota*

Bhagat Singh Thind was born on October 3, 1892, in the village of Tara Garh Talawan in the Amritsar district of Punjab, India.[140] The Amritsar district lies in the far northwestern part of India and was part of the Sikh empire from 1748 to 1849 before being taken over by the British Raj along

136. *Id.* at 209.

137. *Id.*

138. KANWAR, *supra* note 22, at 9.

139. TERI MCMURTRY-CHUBB, STRATEGIES AND TECHNIQUES FOR INTEGRATING DIVERSITY, EQUITY, AND INCLUSION INTO THE CORE LAW CURRICULUM: A COMPREHENSIVE GUIDE TO DEI PEDAGOGY, COURSE PLANNING, AND CLASSROOM PRACTICE 46 (2022).

140. AMANDA DE LA GARZA, DOCTORJI: THE LIFE, TEACHINGS, AND LEGACY OF DR. BHAGAT SINGH THIND 3 (2010).

with the rest of India. Thind's father, Sardar Boota Singh Thind, was a retired Subedar Major in the British Indian Army. His mother, Isher Kaur, a powerful influence on his life, passed away suddenly when he was a child, leaving Bhagat and two younger brothers, Jagat Singh Thind and Hira Singh Thind, to be raised by their father. Although the elder Thind served as member of the British Indian military forces, he grew disenchanted with the toll of foreign rule and colonialism, reflecting in a letter to his son[141] that:

> The British were imposing ludicrous and bizarre rules upon the population of the Punjab. For instance, due to the "disrespect" shown to British authority, all people, innocent or guilty, women, children, and the elderly, had to crawl on their knees while traveling on the street in front of the house of the offended British party. Such humiliating practices, needless to add, did not stem the rising tide of freedom. Instead[,] they gave us an impetus to all unite against such . . . foreign rule.[142]

Although U.S. legal documents of the era referred to all people from India as Hindus, Thind was raised in and practiced in the Sikh faith, which was founded in the late fifteenth century. Mr. Thind's contention that he was a "high caste Hindu" makes sense and would be accurate of his heritage before Sikhism was established, and his argument is based in his status for thousands of years. (Sikhism itself does not subscribe to class-based caste hierarchies in the same way as Hinduism). By his family's account, he comes from a long military tradition, and his Kamboj clan dates back centuries and is even mentioned in the *Mahabharata*, the epic poem of the Hindu tradition.[143]

After graduating from high school in 1908, Thind enrolled in Khalsa College in the Sikh holy city of Amritsar.[144] Thind became deeply interested in America after reading Emerson, Whitman, Thoreau, and other Enlightenment scholars. These thinkers relied in part upon Indian philosophical traditions that Thind was studying as well. He graduated with honors from Khalsa College and decided to come to the United States to further his studies, and to eventually become a lawyer. At around the same time, many Punjabi immigrants were coming to the west coast of America to California, Oregon, and Washington, as well as to British Columbia in Canada, to work on the railroads and lumber

141. *Id.* at 4.
142. *Id.*
143. *See id.* at 3.
144. *Id.* at 5.

yards to replace other immigrant groups, such as Chinese laborers, who had been excluded by an act of Congress in 1882, from *both* immigration and naturalization, which were otherwise rarely coordinated before the creation of the Bureau of Immigration and Naturalization in 1906. In fact, laborers from India were actively sought as early as the 1870s, when planters in Hawaii petitioned the Hawaiian Minister of Foreign Affairs to seek labor from India, but that plan was abandoned when Japan permitted emigration to Hawaii at that time.[145]

Immigrants from India came in far smaller numbers than the Chinese and Japanese communities before them and were initially welcomed to the west coast as "full-blooded Aryan" brothers.[146] However, these communities quickly became the new "peril" to local nativist economic interests. In 1908, Agnes Foster Buchanan, writing for the *Overland Monthly*, observed:

> While the Chinese stood knocking at our outer doors, which had been barred and closed by legislation, their neighbors, not waiting for permission, crept stealthily past the suppliants, entered and took possession. When San Francisco awoke from her short sleep, she found herself face to face with the Japanese question, infinitely greater and more insidious in its influence than the Chinese problem had ever threatened to be, for while the yellow men had raised a labor question, their brown brothers have created an industrial one.
> . . . .
> . . . But unlike the other visitors, this last is a brother of our own race—a full-blooded Aryan, men of like progenitors with us.
> . . . .
> The Hindus and the Hindu Invasion is the latest racial problem with which we of the West have to deal.
> . . . .
> It is just this fact that these men [Hindus] *are* subjects of Great Britain which makes their right of way into this country more or less an undisputed one.
> . . . .
> The Hindus make good, steady workmen, though[,] on account of their peculiar diet[,] they lack physical endurance. In appearance[,] they are striking, well-built fellows, many of them with features of Europeans. They are all born soldiers and they look it.
> . . . .

145. RONALD TAKAKI, *The Tide of Turbans*, *in* STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 294 (1998).

146. Agnes Foster Buchanan, *The West and the Hindu Invasion*, OVERLAND MONTHLY, Apr. 1908, at 309 (Original source found at: https://www.saada.org/item/20111101-444).

> The sacred writings of the Vedas say: "I gave the earth to Arya." This is a propitious moment for the State Department to adopt an amendment to the Vedas and to tell our brothers of the East that while the earth is large enough for us all, there is no one part of it that will comfortably accommodate both branches of the Aryan family.[147]

At the age of nineteen, Thind traveled eastward across India to Calcutta, where on March 5, 1912, he boarded a ship headed to Manila, in the Philippines.[148] While in Manila, he worked as an interpreter for Indians in the court system to earn some money for his travels ahead and befriended a United States immigration official, who offered to help him get to the United States. Thind boarded the *U.S.S. Minnesota* and was admitted at the port of Seattle as an immigrant into America on July 4, 1913, where he had come to further his studies at Berkeley college in California. This day—a rebirth—and exactly forty-three years after Charles Sumner attempted to strike the word white from the naturalization statute, becomes significant to Thind and his story. And as he steps off of the boat in Seattle, I somehow imagine the slow refrain of a popular song of the era:

> I'm a Yankee Doodle Dandy,
> A Yankee Doodle, do or die;
> A real live nephew of my Uncle Sam's,
> Born on the Fourth of July.[149]

2. Jagat Singh Thind and the (Ill-Fated) Journey of the *Komagata Maru*

While Bhagat Singh Thind made it to North America upon the *U.S.S. Minnesota*, his younger brother, Jagat Singh Thind, did not fare as well on a parallel journey.[150] Rather than coming to the United States like his brother, the younger Thind traveled on from Hong Kong on April 4, 1914, on the ill-fated *Komagata Maru*, which was bound for the Dominion of Canada with 376 passengers (340 Sikhs, 24 Muslims, and 12 Hindus). The *Komagata Maru*'s voyage is well known for its passengers' attempt to challenge the 1908 Amendment to the Dominion of Canada's Immigration Act,[151] the continuous journey regulation, which provided

147. *Id.* at 309, 312–13.

148. DE LA GARZA, supra note 140, at 6.

149. GEORGE M. COHAN, The Yankee Doodle Boy, from the musical *Little Johnny Jones* (1904).

150. DE LA GARZA, supra note 140, at 6.

151. An Act to Amend the Immigration Act, 1908. Ottawa: SC 7–8 Edward VII, Ch. 33.

Canada the discretion to "prohibit the landing in Canada of any specified class of immigrants or of any immigrants who have come to Canada otherwise than by continuous journey from the country of which they are natives or citizens . . . ."[152] This regulation was specifically created as a barrier for immigrants from India, who were otherwise British subjects, but their main immigration routes included stops.[153]

When the *Komagata Maru* arrived at the Burrard Inlet of Vancouver on May 22, 1914, the Canadian immigration officials were waiting on shore. Except for about twenty people, including a doctor and his family, the officials did not let the passengers disembark, and the crew and passengers were stranded on the ship for two months, during which they endured harrowing living conditions. Indians from Vancouver rallied on the shore and created a "shore committee" to get the passengers food and water, provisions that the local government routinely blocked from getting to the passengers. Despite enormous difficulties in their living conditions, the crew and passengers sought out legal counsel from J. Edward Bird, who had famously challenged the original law in court and prevailed. The test case for passenger Munshi Singh challenged the legality of the detention, and deportation wove its way from the immigration authority called the Board of Inquiry to the lower court to the British Columbia Court of Appeal. And this time, the high appellate court ruled against Bird and his client in a decision on July 6, 1914.[154]

The decision, which was unanimous, but in which all five judges published their own opinions, weaves fascinatingly through the judges' views of plenary power, including the right to exclude British subjects if they were not born in Canada, the meaning and import of Caucasian and Aryan and—thereby, in reverse—the meaning and import of Asian.[155]

Eerily echoing the words to come in another country and by another court in the *United States v. Bhagat Singh Thind*, Judge McPhillips of the British Columbia Court of Appeal came to the conclusion that:

> Better that peoples of non-assimilative, and by nature properly non-assimilative, race should not come to Canada, but rather that they should remain of residence in their country of origin and there do their

152. *Id.*

153. *See generally*, Ray Gardner, *When Vancouver Turned Back the Sikhs*, SIKH NATIONAL ARCHIVES OF CANADA (Nov. 8, 1958), https://www.sikhnationalarchives.com /book/read/macleans-november-8-1958/#page/35/mode/2up.

154. *In re* the Immigration Act and Munshi Singh, 1914 Carswell BC 255 (Can.) (WL).

155. *Id.*

> share as they have in the past in the preservation and development of the Empire.[156]

Having failed to convince the court of its position, the *Maru* finally turned back to India on July 23, 1914, and eventually docked in the bay of Budge Budge (transliterated in Indian languages as "Buj Buj") outside of Calcutta, West Bengal, on September 27, 1914. However, upon arrival, it was stopped by a British gunboat, and when Gurdit Singh, the leader of the *Maru* passengers, resisted arrest, a riot broke out during which at least nineteen passengers were shot dead by British colonial forces. Jagat survived and eventually returned to his village of Tara Garh. A letter sent from Oregon, dated December 21, 1914, shows Bhagat Singh Thind's concern for his brother's safety. Thind wrote to his father, "[p]lease let me know whether brother, Jagat Singh, has returned home or not . . . . I am much worried about brother, Jagat Singh. Please reply soon."[157] In another letter from Thind to his father, Thind reacts to the news that his friend, Sardar Khushal Singh, had been killed while traveling upon the *Maru*. Thind wrote, "I am very sorry to hear of the death of Sardar Khushal Singh. I am very sad."[158]

The *Maru* incident has inspired scholarship,[159] films and plays,[160] and novels and poetry.[161] It inspired a memorial at Budge Budge and an archive in Vancouver. And, notably, it inspired apologies from the Canadian government.[162] In 2016, Prime Minister Justin Trudeau issued

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156. *Id.*

157. Letter from Bhagat Singh Thind to His Father (Dec. 21, 1914).

158. Letter from Bhagat Singh Thind to His Father (Jan. 21, 1915). Historical records show that the letter indicated a date of Jan. 21, 1914, but that year seems to have been written in error since the ship sailed in May 1914.

159. *See, e.g.,* UNMOORING THE KOMAGATA MARU: CHARTING COLONIAL TRAJECTORIES (Dhamoon et al., eds. 2019); RENISA MAWANI, ACROSS OCEANS OF LAW: THE *KOMAGATA MARU* AND JURISDICTION IN THE TIME OF EMPIRE (2018); Sherally Munshi, *Immigration, Imperialism, and the Legacies of Indian Exclusion*, 28 YALE J.L. & HUMAN 51 (2017), https://digitalcommons.law.yale.edu/yjlh/vol28/iss1/2; MAIA RAMNATH, HAJ TO UTOPIA: HOW THE GHADAR MOVEMENT CHARTED GLOBAL RADICALISM AND ATTEMPTED TO OVERTHROW THE BRITISH EMPIRE (2011).

160. Anu Kumar, *Films about Komagata Maru's Indian passengers remind us of struggles of refugees around the world*, SCROLL (Sept. 27, 2019), https://scroll.in/reel/938657/films-about-komagata-maru-remind-us-of-the-brave-and-risky-journeys-of-refugees-the-world-over (referring to films such as the *Continuous Journey*, *Jeevan Sangram,* and several other films and plays in production).

161. TARIQ MALIK, CHANTING DENIED SHORES (2010).

162. The government of British Columbia issued an apology in 2008. *B.C. Apologizes for Komagata Maru Incident*, CBC NEWS (May 23, 2008), https://www.cbc.ca/news/canada/british-columbia/b-c-apologizes-for-komagata-maru-incident-1.747490.

a formal apology in the House of Commons[163] to the passengers aboard the Komagata Maru and their descendants.[164] In it, he stated:

> No words can fully erase the pain and suffering they experienced. Regrettably, the passage of time means that none are alive to hear our apology today. Still, we offer it, fully and sincerely. For our indifference to your plight. For our failure to recognize all that you had to offer. For the laws that discriminated against you, so senselessly. And for not formally apologizing sooner.[165]

Speaking for many, scholar and filmmaker Ali Kazimi reflected that "[t]he real value in the apology lies in a re-examination," and "that Canada for the first 100 years of its existence had what was effectively a 'White Canada' policy."[166] Further, poet Tariq Malik captured the moment at the century mark in this way:

> Fate of All Tides
>
> Now
> Here we all are
> Sprawled across the buckled rusting decks
> Our bloodlines stretching a century back
> To this day
> Anxiously peering over shoulders
> At what might have been
>
> The waiting
> The shouting

163. Watching the video of the speech, I was struck by how long all assembled stayed on their feet after Mr. Trudeau stated, "Today, I rise in this House to offer an apology on behalf of the government of Canada." Justin Trudeau—Prime Minister, *Prime Minister Trudeau Offers a Formal Apology for the Komagata Maru Incident*, YOUTUBE (May 18, 2016), https://youtu.be/0Wx1KLtRgQY; for more on apologies, *see* Heidi R. Gilchrist, *Released, But Not Free: The Unexonerated,* 14 NORTHEASTERN U. L. REV. 113 (2022).

164. *Prime Minister Delivers Formal Komagata Maru Apology in the House of Commons*, PRIME MINISTER OF CANADA (May 18, 2016), https://pm.gc.ca/en/news/news-releases/2016/05/18/prime-minister-delivers-formal-komagata-maru-apology-house-commons; for the full text of the speech, *see Komagata Maru Apology in the House of Commons*, PRIME MINISTER OF CANADA (May 18, 2016), https://pm.gc.ca/en/news/speeches/2016/05/18/komagata-maru-apology-house-commons.

165. *Komagata Maru Apology in the House of Commons*, supra note 164.

166. Ishaan Tharoor, *Canada's Trudeau Makes Formal Apology for Racist Komagata Maru Incident*, WASHINGTON POST (May 18, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/05/18/the-tragic-story-behind-justin-trudeaus-apology-in-canadas-parliament/.

The wringing of hands
Has finally been silenced

Mercifully
Hidden behind the western horizon
Is what awaits us at Buj Buj
The first deafening volley has already been fired
In the first imperial war
Our silences can no longer echo here

Yet
Twice daily the tides continue
Ebbing and cresting in exhalation
The crescent waxing
Waning into the night
The fate of all tides is to return

Will not this rising tide
Lift my boat as well as yours?[167]

Most notably, the *Komagata Maru* and its story inspired something else: the people on the shore and in the Indian communities in Canada and the Pacific coast in the United States rallied to the *Ghadr*[168] cause, a nascent West Coast and Indian diasporic movement that called for an India free of British rule. And—as told by his family—Bhagat Singh Thind acquired this fire as well; the incident "perhaps planted the seeds of determination for what would become an epic struggle for Bhagat's own citizenship."[169]

B. Bhagat Singh Thind and the Journey Forward

Bhagat Singh Thind put himself through school while working at an Oregon lumber mill, like many Punjabis before him. Like his father and many in his community, Thind also earnestly believed that India should be free of British rule, a cause championed by the *Ghadr* Press, [170] a

167. TARIQ MALIK, *Fate of All Tides*, from *Still Chanting Denied Shores*, UNMOORING THE KOMAGATA MARU: CHARTING COLONIAL TRAJECTORIES 290 (Dhamoon et al., eds., 2019).

168. *Ghadr* is the Hindi and Punjabi word for *revolution* or *revolt*. The word can also be transliterated as *Ghadar* or *Gadar*.

169. DE LA GARZA, *supra* note 140, at 7.

170. *Ghadr* Press was based in San Francisco, California, and many of its volunteers were Berkeley College students.

newspaper out of San Francisco.[171] The *Ghadr* cause, started by Ram Chandra, Har Dayal, Taraknath Das, and other academics in 1913, attracted the attention of both the British and American governments, and many of these early leaders (as well as Thind himself) were tracked for their entire lives.[172]

As for Thind, he followed the *Ghadr* cause while at Berkeley, but, as noted later in the district court opinion in his naturalization case, he was never known to associate with any violent activities towards that end.[173] After the party split into two factions, Thind distanced himself from its internal politics but continued to lecture on Indian independence through 1917.[174] The MI5 surveillance files recovered on Thind since that time noted that "Thind worked hard to promote the revolutionary movement."[175] Despite these challenges, Thind made several close friends in Berkeley, including with lawyer Sakharam Ganesh Pandit, who would one day represent Thind before the Supreme Court, and shop owner Vaishno Das Bagai, who brought his wife Kala and his two young children from India to seek a new life in America free of colonial interference.

During World War I, Thind voluntarily enlisted in the United States Army as a member of the Second Company, First Development Battalion, 166th Depot Brigade at Camp Lewis, Washington, and was honorably discharged at the end of the war in 1918.[176] There he may have been the first person of the Sikh faith to wear his turban while enlisted, and he achieved the rank of sergeant.[177]

Thind wanted to ultimately become a lawyer, an endeavor that required citizenship. In July 1918, in the state of Washington, Thind applied for naturalization while wearing his Army uniform and was granted his citizenship certificate on December 9, 1918. A United States

171. Brief for Respondent at 5, United States v. Bhagat Singh Thind, 261 U.S. 204 (1923) (No. 202).

172. For a thorough examination of the *Ghadr* cause and its history, *see* SEEMA SOHI, ECHOES OF MUTINY: RACE, SURVEILLANCE, AND INDIAN ANTICOLONIALISM IN NORTH AMERICA (2014); COULSON, *supra* note 16.

173. Brief for Respondent at 4–5, United States v. Bhagat Singh Thind, 261 U.S. 204 (1923) (No. 202) (*quoting* J. Wolverton's original opinion, *In re* Thind, 268 F. 683 (D. Or. 1920)).

174. DE LA GARZA, *supra* note 140, at 13.

175. *Id.* (citing to *Naturalization Saga: British Intelligence Files*, DR. BHAGAT SINGH THIND, https://bhagatsinghthind.com/about/british-intelligence-files/ (last visited Apr. 10, 2023).

176. Brief for Respondent at 4, 34, United States v. Thind, 261 U.S. 204 (1923) (No. 202).

177. *Id.* at 4.

Bureau of Naturalization official, Vernor Tomlinson, opposed his certificate on the basis that Thind was not a "free white person" under § 2169, Revised Statutes. Thind's naturalization was revoked four days later. In 1919, he petitioned again for citizenship, this time in Oregon, and the same Bureau official opposed his application. On November 18, 1920, District Judge Charles Wolverton ruled for Thind over the objection of the United States.[178] The United States filed a bill in equity to cancel Thind's citizenship, which the district court dismissed, stating that Thind, having lawfully entered the country, was entitled to citizenship.[179] The United States then appealed the decision to the Ninth Circuit Court of Appeals, which certified two questions of law to the Supreme Court on October 28, 1921.[180]

In his decision, District Judge Wolverton took the following position on Mr. Thind:

> The applicant is a high-caste Hindu, born in Amritsar, Punjab, in the northwestern part of India. He is 28 years of age, and was admitted into this country on July 4, 1913, at Seattle, Wash. He entered the army, and served therein for six months at Comp [sic] Lewis, and was accorded an honorable discharge; his character being designated by the officer granting the discharge as "excellent." He was acting sergeant at the time of his discharge. The testimony in the case tends to show that, since his entry into this country, the applicant's deportment has been that of a good citizen attached to the Constitution of the United States, unless it be that his alleged connection with what is known as the *Ghadr* party or *Ghadr* Press, a publication put out in San Francisco, and the defendant Bhagwan Singh and others, prosecuted in the federal court in San Francisco for a conspiracy to violate the neutrality laws of this country, has rendered him an undesirable citizen.
>
> . . . .
>
> . . . He frankly admits, nevertheless, that he is an advocate of the principle of India for the Indians, and would like to see India rid of British rule, but not that he favors an armed revolution for the accomplishment of this purpose. Obviously, he has modified somewhat his views on the subject, and now professes a genuine affection for the Constitution, laws, customs, and privileges of this country."[181]

178. Brief for the United States at 2, United States v. Thind, 261 U.S. 204 (1923) (No. 202).

179. *Id.*

180. *Id.* at 1.

181. *Thind*, 268 F. at 683–84.

Judge Wolverton emphasized that Thind's "excellent" references convinced him that Thind was a natural fit for citizenship (he gave the evidence a "careful survey[,]" though he did not "analyze the testimony critically" because of its length),[182] that he had served the United States honorably, and that, in the Great War, he showed his commitment to the country. With that as background, what went wrong for Thind in the Supreme Court case to come?

C. The Final Quill Drops: The Creation and Implication of (Non) Whiteness

In the ideological showdown between the United States and Bhagat Singh Thind on the highest stage in the land, much of what would occur happened off of the pages, in the negative spaces. Associate Supreme Court Justice George Sutherland, himself a naturalized citizen who had come to the United States from England as a young child, offered in his short opinion at least four disparate reasons that the words of the naturalization statute could not apply to Bhagat Singh Thind.[183]

At the time that the Court considered the case, the word "white" as used in the statute created a moving target for applicants and courts alike. As Congress did not define the term, the Bureau of Immigration and Naturalization in 1906 asked that federal courts provide clarity on it. As the courts below and the Supreme Court would show in both the *Ozawa* and *Thind* cases, the word cannot be defined in a way that it is both fixed and makes sense. The district courts struggled mightily to find a standard, employing the common person's understanding, scientific standard, legislative history, precedent, and even "ocular inspection." Further, the Supreme Court could not clearly articulate the role of ethnographic science as opposed to common understanding as to Caucasian between the *Ozawa* and *Thind* cases. More importantly, even the standard that Justice Sutherland settled upon for a "common white person's understanding" of white speaks of *two* formulations—those who the "fathers" (interestingly rather than framers, at first) understood as white in 1790, and, separately, those who would be included over time. These are not necessarily harmonious standards.

Bhagat Singh Thind makes this point in his respondent's brief:

> Words in a statute, other than technical terms, should be taken in their ordinary sense. The words, "white person," . . . taken in a strictly

182. *Id.* at 684.

183. *Thind*, 261 U.S. 204.

> literal sense, *constitute a very indefinite description of a class of persons* where none can be said to be literally white, and those called white may be found of every shade from the lightest blonde to the most swarthy brunette. But these words in this country, at least, have undoubtedly acquired a well-settled meaning in common popular speech, and they are constantly used in the sense so acquired in the literature of the country, as well as in common parlance. As ordinarily used everywhere in the United States, one would scarcely fail to understand that the party employing the words "white person" would intend a person of the Caucasian race.[184]

Further, the unanimous Court in *Ozawa*, with Justice Sutherland penning the decision, agreed at least with this initial part that "none can be said to be literally white"[185] and that a color test would be impracticable for the purposes of this matter:

> 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.[186]

In the *Thind* decision, the Court attempted to find that "practical line of separation."[187] Justice Sutherland reminds us from *Ozawa* that "[t]he intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified."[188] But even founding father Benjamin Franklin did not seem to welcome all persons that Justice Sutherland would unquestionably include as white under § 2169 of the Revised Statute,[189] when he said: "Why should *Pennsylvania*, founded by the *English,* become a Colony of *Aliens*, who will shortly be so numerous as to Germanize us instead of our Anglifying them, and will never adopt our

184. Brief for Respondent at 38–39, United States v. Thind, 261 U.S. 204 (1923) (No. 202) (emphasis added).

185. *Id.* at 38.

186. *Ozawa*, 260 U.S. at 197.

187. *Thind*, 261 U.S. at 207 (citing *Ozawa*, 260 U.S. at 197).

188. *Id.* (citing *Ozawa*, 260 U.S. at 195).

189. KANWAR, *supra* note 22.

Language or Customs, any more than they can acquire our Complexion."[190]

Sutherland, in *Thind*, attributed to the framers a broader understanding of which immigrants to include over the ensuing century, although one still limited to Europeans:

> The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white. The immigration of that day was almost exclusively from the British Isles and Northwestern Europe, whence they and their forebears had come. When they extended the privilege of American citizenship to "any alien, being a free white person," it was these immigrants—bone of their bone and flesh of their flesh—and their kind whom they must have had affirmatively in mind. *The succeeding years brought immigrants from Eastern, Southern and Middle Europe, among them the Slavs and the dark-eyed, swarthy people of Alpine and Mediterranean stock, and these were received as unquestionably akin to those already here and readily amalgamated with them*. It was the descendants of these, and other immigrants of like origin, who constituted the white population of the country when § 2169, re-enacting the naturalization test of 1790, was adopted; and there is no reason to doubt, with like intent and meaning.[191]

As I have argued before, those the Court considered to be "unquestionably akin" were not already present in the country in any measurable numbers in 1790, and often not welcomed in practice once they actually arrived here.[192] Active "homegrown" political movements to counter immigrant labor and political participation (a practice replicated when immigrants from Asia came to the country, and whose lobbying led to the Chinese Exclusion Act of 1882[193] and California's Alien Land Law of 1913[194]) organized to keep new immigrants—even those who "looked white" from naturalizing.[195] Whether the term was white, Aryan, or Caucasian, the line would move as to meaning to keep the line away from Thind and all Indian immigrants who had naturalized as of that time.

D. Racial Science as Magician (or The Return of "Terror-Joy"): A

190. *Id.* (quoting BENJAMIN FRANKLIN, OBSERVATIONS CONCERNING THE INCREASE OF MANKIND, PEOPLING OF COUNTRIES, ETC. 10 (1751)).

191. *Thind*, 261 U.S. at 213–14 (emphasis added).

192. KANWAR, supra note 22, at 7.

193. Ch. 126, 22 Stat. 58.

194. 1913 Cal Stats. 113 § 1 at 206.

195. KANWAR, supra note 22, at 7.

Tale of Two American "Sciences"

The next layer of the story involves America's obsession with racial "science" and categorization at the time of Thind's case. A growing American eugenics movement, headed by Madison Grant and his contemporaries, further fueled the fire of division between existing and new immigrant communities. Grant's book, *The Passing of the Great Race*, which had as its aim to purify the white race, referred to "southern Italians, Mediterraneans and Jews" as unassimilable people who could destroy the "Aryan race."[196] Grant's "scientific racism" theory is that race is based in characteristics and abilities that are fixed and immutable, and that the "Nordic" white person is at the top of this pyramid with "inferior" Europeans and members of other races in rank order below.[197] There is no question that Grant's work aimed both at immigration and at miscegenation. As the only nation with a racial prerequisite requirement for naturalization, Grant's ideas influenced thinkers and common persons of this era.[198] As Robert Wald Sussman writes, "When one reads Grant's assessment of eugenics, it is no wonder that Hitler saw *Passing of the Great Race* as his bible[.]"[199]

At the same time, Franz Boas and the emerging field of cultural anthropology severely criticized the eugenics movement and began turning the conversation away from eugenics and its "scientific racism" towards the idea that race and identity are culturally determined rather than biologically ordained.[200] This meant that differences in persons of different races are based in social learning and meaning and not because of immutable biological characteristics.[201] Further, a nascent movement was also forming to challenge Grant and his theory of scientific racism

196. MADISON GRANT, THE PASSING OF THE GREAT RACE (4th rev. ed. 1923).

197. *Id.* at para. 20–21.

198. *See generally* EDWIN BLACK, WAR AGAINST THE WEAK EUGENICS AND AMERICA'S CAMPAIGN TO CREATE A MASTER RACE 259, 273, 274–275, 296 (2003).

199. ROBERT WALD SUSSMAN, THE MYTH OF RACE 90 (2014); *see also* Serwer, *supra* note 6 (quoting Adolph Hitler from 1932, just one year before his elevation as Chancellor, as follows: "It was America that taught us that a nation should not open its doors equally to all nations.").

200. Serwer, *supra* note 6. (Boas posited that differences in human behavior are not primarily determined by innate biological dispositions but are largely the result of cultural differences acquired through social learning.); *see generally* PAINTER, *supra* note 69.

201. Serwer, *supra* note 6; *see generally* CHARLES TAYLOR, RACE: A PHILOSOPHICAL INTRODUCTION (2nd ed., 2013).

from within the field, with former members leaving the fold and rebuking his ideas.[202]

By World War II, Grant's ideas would lose their potency in the American imagination.[203] At the time of Thind's case, however, they held sway over such key figures as members of Congress, including Senators Albert Johnson from Washington and David Reed from Pennsylvania, both authors of the Johnson-Reed Act of 1924, which would close the United States to immigration for all Asians and severely limit immigration for Eastern and Southern Europeans.[204] And eugenics found its way into speeches by Presidents,[205] and into decisions by the U.S. Supreme Court. The same Court that decided *Thind* also decided *Buck v. Bell* in 1927,[206] a case that was considered a major victory for the American eugenics movement.

In the *Thind* decision, Justice Sutherland, writing for the Court, drew a line as well. In contrast to his pronouncement on the European members of the "great family," when discussing Thind and people from India, he says:

> What we now hold is that the words "free white persons" are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word "Caucasian" only as that word is popularly understood. As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs. It is a matter of familiar observation and knowledge that the

202. *See* NELL IRVIN PAINTER, *Refuting Racial Science*, *in* THE HISTORY OF WHITE PEOPLE 327 (2010) ("The reassessment [of racial science] had begun quietly as early as the First World War, when a cadre of Columbia University geneticists resigned from the prime eugenics organization, still called the American Breeders' Association. In 1921, Franz Boas had published an article in the *Yale Review* questioning the racial interpretation of Army IQ tests, and in 1922 Walter Lippmann in the New Republic had denounced mental testers' claim to measure permanent, intrinsic intelligence.").

203. Serwer, *supra* note 6. (quoting Jonathan Peter Spiro, author of *Defending the Master Race: Conservation, Eugenics, and the Legacy of Madison Grant* (2009), as describing the backlash this way: "Even though the German had been directly influenced by Madison Grant and the American eugenics movement, when we fought Germany, because Germany was racist, racism became unacceptable in America. Our enemy was racist; therefore we adopted antiracism as our creed.")

204. Serwer, *supra* note 6.

205. Serwer, *supra* note 6 (quoting Calvin Coolidge who stated in a 1921 article in *Good Housekeeping* magazine that: "[t]here are racial considerations too grave to be brushed aside for any sentimental reasons. Biological laws tell us that certain divergent people will not mix or blend.").

206. 274 U.S. 200 (1927).

> 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 Europe 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. It 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.*[207]

In language and intent that sounds very similar to Judge McPhillips's earlier opinion in British Columbia's *Komagata Maru* case, Justice Sutherland again turns to a familiar concept: assimilability.

Here now comes the crux of the matter, and the test that truly held the moment: who was *assimilable* in our society, and who was not? This seems to be the real test, which the Court created by placing Thind on the other side of the border in a "border line" case. If those from European countries, particularly, at that moment, those newer immigrants from Southern and Eastern Europe, who were often Catholic or Jewish, were still testing their ability to be part of the "white" (Anglo-Saxon and Protestant) society, did such a line make sense? Did the courts need to continue to police a line that is indefinite in the first place? And did that leave no room for immigrants who had, but for race, met every standard for being an American, as Ozawa had done in the prior case?

E. Confronting the Stranger on the Path: Bhagat Singh Thind and The Effects of Empire

1. Caste as a Battleground

As to Bhagat Singh Thind's case, two specific factors arise as to why he may not have been considered assimilable. He argued that he was a Caucasian person by the ethnographic science of the day but *also* by the common understanding of that term.[208] The Court does not take up his arguments as to the latter in its decision, but rather focuses on the former. Part of his argument, and that which made his case different from *Ozawa,* is that he had a claim to the Aryan heritage that counts not

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207. *Thind*, 261 U.S. at 214–15 (emphasis added).

208. Brief for Respondent at 8, United States v. Bhagat Singh Thind, 261 U.S. 204 (1923) (No. 202).

only Europeans as its descendants, but also that portion of the community that migrated south to India and formed that country's upper caste. Therefore, he raised the "high caste" argument to show that, as practiced in India, the caste system has for generations preserved itself and its assigned statuses in society by preventing marriage and social mobility between the groups.[209]

First, I suspect that his argument about caste played a negative role in Thind being able to naturalize in the majority decision. While the idea that he relies upon in the argument may seem problematic today, it cannot escape my notice that his argument came from a place in which Thind (or his lawyer) recognized something quite analogous about American society—that it, too, has a caste system. In fact, the famous author, Oliver Wendell Holmes, Sr., the father of one of the members of the Supreme Court in *Thind*, Oliver Wendell Holmes, Jr., coined the well-known phrase "Boston Brahmin"[210] to describe the high caste of American society, and named that caste directly after its Hindu counterpart. Despite the fact that Justice Harlan, dissenting in *Plessy v. Ferguson*, exhorted that "there is no caste here"[211] in reference to American society, many immigrants from the outside and others from the inside of American society knew that a hierarchy of class and race existed in this society as well.

Whether or not the Court could see the analogy, such an argument may have had the effect of pushing the line away from Thind. In its brief, despite acknowledging that Thind is Caucasian as the word is currently understood, the United States argued that the caste system made the people of Indian *unassimilable*.[212] After a lengthy discussion on the caste system in India, it states, "[These words] show that at the time the first naturalization law was passed the Hindus were regarded as a people wholly alien to Western civilization and utterly incapable of assimilation to Western habits and customs, mode of life, political and social institutions."[213] Further, the new idea of the democratic and active citizenship available to persons considered "free white" men since the last century—however uncertain that may have been in actuality—may have clashed with the idea of caste as well. The Court may not have even

209. *Id.* at 20.

210. Oliver Wendell Holmes, *The Professor's Story: Chapter I: The Brahmin Caste of New England*. THE ATLANTIC MONTHLY. Vol. V. 93 (1860). This was part of a series of articles that eventually became his novel *Elsie Venner* in 1861.

211. 163 U.S. 537, 559.

212. Brief for the United States at 14, United States v. Bhagat Singh Thind, 261 U.S. 204 (1923) (No. 202).

213. *Id.*

recognized any implied analogy to the caste system, which stratified society into classes, since over time whiteness became more important in this country than holding "a stake in society."[214]

2. The Role of British Surveillance and Interference in Thind's Naturalization Proceedings

Finally, I believe that one more factor played a role in the decision: the role of Thind's relationship with the United States as a subject of the British Empire. Judge Wolverton of the District Court of Oregon emphasized Thind's ability to "westernize" himself and assimilate into American society, commenting that his "character [has been] designated as . . 'excellent'" by his commanding officer in the United States Army and that he "professes a genuine affection for the Constitution, laws, customs, and privileges of this country."[215] Like Ozawa before him, he also possessed a high degree of education and knowledge of American culture. Although this information did not appear to impact Judge Wolverton's decision, it is likely relevant to the question that the Bureau official informed the district court of Thind's political activities and of United States and British intelligence interest in the *Ghadr* party. British intelligence officers identified Thind as someone who should not be granted naturalization because of his professed belief in an India free of British rule.[216]

British imperialism is also referenced in the brief for the United States against Thind's naturalization:

> The people of India were a subject-race, and, while the ideals of liberty, equality and fraternity were being preached in Europe and America, there is no reason to believe that any one seriously extended their applications to the people of India, or believed that those people were of the kind to be assimilated in citizenship in Western civilization.[217]

Here, too, we see an argument as to the whole category of people as unassimilable, but this time for the reason that they are colonial subjects. The United States itself was formerly comprised of colonies. It is notable, then, that proponents of the free India movement in the United States linked their fate in this country to whether they continued to be a "subject-race" of Britain – they believed unless they were free from

214. PAINTER, *supra* note 69, at 106.

215. *In re* Bhagat Singh Thind, 268 F. at 684.

216. Coulson, *supra* note 16, at 4.

217. Brief for the United States at 10, United States v. Thind, 261 U.S. 204 (1923) (No. 202).

British imperial rule, they would not be considered serious candidates for naturalization anywhere else.[218]

IV. RETURN TO THE FRAME: THE WHEEL OF DESTINY AND AN ALTERNATE ENDING

Like the *Panchatantra* story of the "treasure seekers," we have reached the final stage of the story. The Wheel of Destiny is whirring and the impact on the sojourner (and those who follow) is yet unknown.

After *Thind* came a question of the highest order—one which impacted the life and liberty of those who had already been naturalized at the time of the decision. Simply put, what happened if this decision was applied retroactively? Justice Sutherland declined to take up that question in *United States v. Bhagat Singh Thind*, stating that the answer to the first question "disposes of the case and renders an answer to the second question unnecessary[,]"[219] but it is a question still.

We know the answer. The impact was devastating to those naturalized persons who owned property, who were now subject to the Alien Land Laws. Greater still was the impact on those, like Thind, who were subjects of the British crown but had already been naturalized as Americans. If they were stripped of their citizenship, and had already renounced their British citizenship, they were left "stateless," between two worlds, yet protected by none. This was also true of women who married naturalized citizens, only to find that those persons were no longer American citizens. Those who fall in the former category of having married a British subject, as are all persons from India, would likewise be rendered among the stateless.[220]

And this was not conjecture. This is what actually happened to over fifty Indian persons[221] and, famously, to Mary Das, a white woman who was married to Taraknath Das, a leader in the *Ghadr* party's free India movement.[222] She wrote to *The Nation* to complain that she had been rendered "stateless."[223] She noted that her husband had enquired of three

218. Coulson, *supra* note 16, at 29.

219. 261 U.S. at 215.

220. *Asiatic Marriage Leaves This Woman Without a Country*, NEWSPAPERS.COM (Oct. 11, 1926), https://www.newspapers.com/clip/2123690/reprint-of-mary-k-das-article-in-the/.

221. Coulson, *supra* note 16, at 76-82, noting that even Thind's own lawyer, Sakharam Ganesh Pandit, was targeted for denaturalization. However, Pandit successfully argued before the Ninth Circuit that revoking his citizenship would do him and his wife unfair harm under the equitable estoppel doctrine.

222. *Id.*

223. *Id.*

lawyers as to the "chance of losing my citizenship in marrying him," stating that "these legal experts, one a former adviser to the State Department, told him that this could never happen, because the United Sates [sic] could not and would *never* apply a Supreme Court decision retroactively."[224]

Ironically, it is very possible that Justice Sutherland himself would have been troubled by Mary's plight, as he was, for his time, a "feminist" and involved heavily in the women's suffrage movement, noting in 1915, before his time on the bench that:

> To deprive . . . [women] of the right to participate in government is to make an arbitrary division of the citizenship of the country upon the sole ground that one class is made up of men, and should therefore rule, and the other class is made up of women, who should therefore be ruled.[225]

And if arbitrary divisions lead to tragic consequences, then no one knew this better than Bhagat Singh Thind's friend, Vaishno Das Bagai.[226] After having come to America with his family, assimilating to the culture as much as possible, and buying a store in San Francisco that he was proud of, his denaturalization proved too much. In May 1928, Vaishno Das Bagai committed suicide with poison gas, leaving behind a note for his family that read:

> I came to America thinking, dreaming and hoping to make this land my home. Sold my properties and brought more than twenty-five thousand dollars (gold) to this country, established myself and tried to give my children the best American education . . . . But now they come to me and say, I am no longer an American citizen. They will not permit me to buy my home and, lo, they even shall not issue me a passport to go back to India. Now what am I? What have I made of myself and my children? We cannot exercise our rights. Humility and insults, who is responsible for all this? Myself and the American government. I do not choose to live the life of an interned person: yes, I am in a free country and can move about where and when I wish

224. *Id.* (emphasis added).

225. David E. Bernstein, *The Feminist Horseman*, 10 GREEN BAG 2d. 379, 381, 389 (2007) (*quoting* in full George Sutherland, Speech at Women's Suffrage Meeting, Belasco Theatre 3–4 (Dec. 12, 1915) (Wash., D.C.) (transcript available in the Sutherland Papers at the Library of Congress)).

226. Erika Lee, United States of America v. Vaishno Das Bagai*: The Afterlives of the Thind Decision*, SAADA (Feb. 19, 2023), https://www.saada.org/tides/article/united-states-of-america-vs-vaishno-das-bagai.

> inside the country. Is life worth living in a gilded cage? Obstacles this way, blockades that way, and the bridges burnt behind.[227]

But what if we could write an alternate ending? What if we could stop the wheel of destiny and reset it? And rather than dropping the quill along the journey, what if we could pick it up and write with it instead? What would we say?

V. CONCLUSION

I asked before whether Bhagat Singh Thind must have been surprised by the decision in his naturalization case. When asked about the decision, he is understood to have said, "America, by far the best of all the Christian lands, sided with perfidious Albion[228] to insult India in the matter of citizenship."[229] And he was not alone in his assessment that Britain and its treatment of Indians as subjects played a role in their denaturalization in America. The Indian press of the time came to the same conclusion.

Thind, by then, Dr. Thind, a world-famous spiritual teacher who was known to his students as "Doctorji," and a friend of luminaries such as Swami Yogananda, applied again for citizenship in New York in 1935. He applied on the basis that he served the United States in World War I. On March 2, 1936, on the third try, Dr. Bhagat Singh Thind became a citizen of the United States of America. Years later, in 1946, when the Luce-Celler Act removed racial restrictions, Indians were able to naturalize in this country. The next year, India gained independence from Britain, and the nations of India and Pakistan were born.

When I asked him about the case, Dr. Thind's son, David, graciously obliged and answered my questions. But he primarily knew his father as someone who traveled across the country giving spiritual lectures, who was joyous and full of life, and who had endless patience for his students and family. He told me that his father never talked about it, but that he had learned so much about the case in the years since his death. Finally, I asked David's son, Justin, whose mother is white, and grandmother, Vivian Thind, was white, what he considers himself, and he said, "Oh, I consider myself South Asian."[230]

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227. Kritika Agarwal, *Living in a Gilded Cage: Vaishno Das Bagai's Disillusionment with America*, SAADA (Aug. 6, 2014), https://www.saada.org/TIDES/AUTHOR/KRITIKA-AGARWAL.

228. An ancient name for England.

229. DE LA GARZA, *supra* note 140, at 20.

230. Interview with Justin Thind (Jul. 6, 2022).

One hundred years ago, Bhagat Singh Thind challenged his denaturalization in the Supreme Court of this land. And if "past is prologue,"[231] then we should know his story.

231. WILLIAM SHAKESPEARE, THE TEMPEST act II, sc. 1.