

White by Law

The Legal Construction of Race

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In its first words on the subject of citizenship, Congress in 1790 restricted naturalization to “white persons.” Though the requirements for naturalization changed frequently thereafter, this racial prerequisite to citizenship endured for over a century and a half, remaining in force until 1952. From the earliest years of this country until just a generation ago, being a “white person” was a condition for acquiring citizenship.

Whether one was “white” however, was often no easy question. As immigration reached record highs at the turn of this century, countless people found themselves arguing their racial identity in order to naturalize. From 1907, when the federal government began collecting data on naturalization, until 1920, over one million people gained citizenship under the racially restrictive naturalization laws. Many more sought to naturalize and were rejected. Naturalization rarely involved formal court proceedings and therefore usually generated few if any written records beyond the simple decision. However, a number of cases construing the “white person” prerequisite reached the highest state and federal judicial circles, and two were argued before the U.S. Supreme Court in the early 1920s. These cases produced illuminating published decisions that document the efforts of would-be citizens from around the world to establish their Whiteness at law. Applicants from Hawaii, China, Japan, Burma, and the Philippines, as well as all mixed-race applicants, failed in their arguments. Conversely, courts ruled that applicants from Mexico and Armenia were “white,” but vacillated over the Whiteness of petitioners from Syria, India, and Arabia. Seen as a taxonomy of Whiteness, these cases are instructive because they reveal the imprecisions and contradictions inherent in the establishment of racial lines between Whites and non-Whites.

It is on the level of taxonomical *practice*, however, that these cases are most intriguing. The individuals who petitioned for naturalization forced the courts into a case-by-case struggle to define who was a “white person.” More importantly, the courts were required in these prerequisite cases to articulate rationales for the divisions they were creating. Beyond simply issuing declarations in favor of or against a particular applicant, the courts, as exponents of the applicable law, had to explain the basis on which they drew the boundaries of Whiteness. The courts had to establish by law whether, for example, a petitioner’s race was to be measured by skin color, facial features, national origin, language, culture, ancestry, the speculations of scientists, popular opinion, or some combination of these factors. Moreover, the courts also had to decide which of these or other factors would govern in the inevitable cases where the various indices of race contradicted one another. In short, the courts were responsible for deciding not only who was White, but *why* someone was White. Thus, the courts had to wrestle in their decisions with the nature of race in general and of White racial identity in particular. Their categorical practices in deciding who was White by law provide the empirical basis for this book.

How did the courts define who was White? What reasons did they offer, and what do those rationales tell us about the nature of Whiteness? What do the cases reveal about the legal construction of race, about the ways in which the operation of law creates and maintains the social knowledge of racial difference? Do these cases also afford insights into White racial identity as it exists today? What, finally, is White? In this book I examine these and related

questions, offering a general theory of the legal construction of race and exploring contemporary White identity. I conclude that Whiteness exists at the vortex of race in the U.S. law and society, and that Whites should renounce their racial identity as it is currently constituted in the interests of social justice. This chapter introduces the ideas I develop throughout the book.

The Racial Prerequisite Cases

Although now largely forgotten, the prerequisite cases were at the center of racial debates in the United States for the fifty years following the Civil War, when immigration and nativism were both running high. Naturalization laws figured prominently in the furor over the appropriate status of the newcomers and were heatedly discussed not only by the most respected public figures of the day, but also in the swirl of popular politics. Debates about racial prerequisites to citizenship arose at the end of the Civil War when Senator Charles Sumner sought to expunge *Dred Scott*, the Supreme Court decision which had held that Blacks were not citizens, by striking any reference to race from the naturalization statute. His efforts failed because of racial animosity in much of Congress toward Asians and Native Americans. The persistence of anti-Asian agitation through the early 1900s kept the prerequisite laws at the forefront of national and even international attention. Efforts in San Francisco to segregate Japanese schoolchildren, for example, led to a crisis in relations with Japan that prompted President Theodore Roosevelt to propose legislation granting Japanese immigrants the right to naturalize. Controversy over the prerequisite laws also found voice in popular politics. Anti-immigrant groups such as the Asiatic Exclusion League formulated arguments for restrictive interpretations of the “white person” prerequisite, for example claiming in 1910 that Asian Indians were not “white,” but an “effeminate, caste-ridden, and degraded” race who did not deserve citizenship. For their part, immigrants also participated in the debates on naturalization, organizing civic groups around the issue of citizenship, writing in the immigrant press, and lobbying local, state, and federal governments.

The principal locus of the debate, however, was in the courts. From the first prerequisite case in 1878 until racial restrictions were removed in 1952, fifty-two racial prerequisite cases were reported, including two heard by the U.S. Supreme Court. Framing fundamental questions about who could join the citizenry in terms of who was White, these cases attracted some of the most renowned jurists of the times, such as John Wigmore, as well as some of the greatest experts on race, including Franz Boas. Wigmore, now famous for his legal treatises, published a law review article in 1894 asserting that Japanese immigrants were eligible for citizenship on the grounds that the Japanese people were anthropologically and culturally White. Boas, today commonly regarded as the founder of modern anthropology, participated in at least one of the prerequisite cases as an expert witness on behalf of an Armenian applicant, whom he regarded was White. Despite the occasional participation of these accomplished scholars, the courts struggled with the narrow question of whom to naturalize, and with the categorical question of how to determine racial identity.

Though the courts offered many different rationales to justify the various racial divisions they advanced, two predominated: common knowledge and scientific evidence. Both of these

rationales appear in the first prerequisite case, *In re Ab Yup*, decided in 1878 by a federal district court in California. “Common knowledge” rationales appealed to popular, widely held conceptions of races and racial divisions. For example, the *Ab Yup* court denied citizenship to a Chinese applicant in part because of the popular understanding of the term “white person”: “The words ‘white person’... in this country, at least, have undoubtedly acquired a well settled meaning in common popular speech, and they are constantly used in the sense so acquired in the literature of the country, as well as in common parlance.” Under a common knowledge approach, courts justified the assignment of petitioners to one race or another by reference to common beliefs about race.

The common knowledge rationale contrasts with reasoning based on supposedly objective, technical, and specialized knowledge. Such “scientific evidence” rationales justified racial divisions by reference to the naturalistic studies of humankind. A longer excerpt from *Ab Yup* exemplifies this second sort of rationale:

In speaking of the various classifications of races, Webster in his dictionary says, “The common classification is that of Blumenbach, who makes five. 1. The Caucasian, or white race, to which belong the greater part of European nations and those of Western Asia; 2. The Mongolian, or yellow race, occupying Tartary, China, Japan, etc.; 3. The Ethiopian or Negro (black) race, occupying all of Africa, except the north; 4. The American, or red race, containing the Indians of North and South America; and, 5. The Malay, or Brown race, occupying the islands of the Indian Archipelago,” etc. This division was adopted from Buffon, with some changes in names, and is found on the combined characteristics of complexion, hair and skull.... {N}o one includes the white, or Caucasian, with the Mongolian or yellow race.”

These rationales, one appealing to common knowledge and the other to scientific evidence, were the two core approaches used by courts to explain their determinations of whether individuals belonged to the “white” race.

As *Ab Yup* demonstrates, the courts deciding racial prerequisite cases initially relied on both rationales to justify their decisions. However, beginning in 1909 a schism appeared among the courts over whether common knowledge or scientific evidence was the appropriate standard. Thereafter, the lower courts divided almost evenly on the proper test for Whiteness: six courts relied on common knowledge, while seven others based their racial determinations on scientific evidence. No court used both rationales. Over the course of two cases, heard in 1922 and 1923, the Supreme Court broke the impasse in favor of common knowledge. Though the courts did not see their decisions in this light, the early congruence of and subsequent contradiction between common knowledge and scientific evidence set the terms of a debate about whether race is a social construction or a natural occurrence. In these terms, the Supreme Court’s elevation of common knowledge as the legal meter of race convincingly demonstrates that racial categorization finds its origins in social practices.

The early prerequisite courts assumed that common knowledge and scientific evidence both measured the same thing, namely, the natural physical differences that divided humankind into disparate races. Courts assumed that typological differences between the two rationales, if

any, resulted from differences in how accurately popular opinion and science measured race, rather than from substantive disagreements about the nature of race itself. This position seemed tenable so long as science and popular beliefs jibed in the construction of racial categories. However, by 1909 changes in immigrant demographics and in anthropological thinking combined to create contradictions between science and common knowledge. These contradictions surfaced most directly in cases concerning immigrants from western and southern Asia, such as Syrians and Asian Indians, dark-skinned peoples who were nevertheless uniformly classified as Caucasian by the leading anthropologists of the times. Science's inability to confirm through empirical evidence the popular racial beliefs that held Syrians and Asian Indians to be non-Whites should have led the courts to question whether race was a natural phenomenon. So deeply held was this belief, however, that instead of re-examining the nature of race, the courts began to disparage science.

Over the course of two decisions, the Supreme Court resolved the conflict between common knowledge and scientific evidence in favor of the former, but not without some initial confusion. In *Ozawa v. United States*, the Court relied on both rationales to exclude a Japanese petitioner, holding that he was not of the type "popularly known as the Caucasian race," thereby invoking both common knowledge ("popularly known") and science ("the Caucasian race"). Here, as in the earliest prerequisite cases, science and popular knowledge worked hand in hand to exclude the applicant from citizenship. Within a few months of its decision in *Ozawa*, however, the Court heard a case brought by an Asian Indian, Bhagat Singh Thind, who relied on the Court's earlier linkage of "Caucasian" with "white" to argue for his own naturalization. In *United States v. Thind*, science and common knowledge diverged, complicating a case that should have been easy under *Ozawa*'s straightforward rule of racial specification. Reversing course, the Court repudiated its earlier equation and rejected any role for science in racial assignments. The Court decried the "scientific manipulation" it believed had ignored racial differences by including as Caucasian "far more [people] than the unscientific mind suspects," even some persons the Court described as ranging "in color . . . from brown to black." "We venture to think," the Court said, "that the average well informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogenous elements." The Court held instead that "the words 'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man." In the Court's opinion, science had failed as an arbiter of human difference, and common knowledge was made into the touchstone of racial division.

In elevating common knowledge, the Court no doubt remained convinced that racial divisions followed from real, natural, physical differences. The Court upheld common knowledge in the belief that people are accomplished amateur naturalists, capable of accurately discerning differences in the physical world. This explains the Court's frustration with science, which to the Court's mind was curiously and suspiciously unable to identify and quantify those racial differences so readily apparent in the petitioners who came before them. This frustration is understandable, given early anthropology's promise to establish a definitive catalogue of racial differences, and from these differences to give scientific justification to a racial hierarchy that

placed Whites at the top. This, however, was a promise science could not keep. Despite their strained efforts, students of race could not plot the boundaries of Whiteness because such boundaries are socially fashioned and cannot be measured, or found, in nature. The Court resented the failure of science to fulfill an impossible vow; it might better have resented that science ever undertook such an enterprise. The early congruence between scientific evidence and common knowledge did not reflect the accuracy of popular understandings of race, but rather the social embeddedness of scientific inquiry. Neither common knowledge nor the science of the day measured human variation. Both merely reported social beliefs about races.

The early reliance on scientific evidence to justify racial assignments implied that races exist as physical fact, humanly knowable but not dependent on human knowledge or human relations. The Court's ultimate reliance on common knowledge says otherwise: it demonstrates that racial taxonomies devolve upon social demarcations. That common knowledge emerged as the only workable racial test shows that race is something which must be measured in terms of what people believe, that it is a socially mediated idea. The social construction of the White race is manifest in the Court's repudiation of science and its installation of common knowledge as the appropriate racial meter of Whiteness.

The Legal Construction of Race

The prerequisite cases compellingly demonstrate that races are socially constructed. More importantly, they evidence the centrality of law in that construction. Law is one of the most powerful mechanisms by which any society creates, defines, and regulates itself. Its centrality in the constitution of society is especially pronounced in highly legalized and bureaucratized late-industrial democracies such as the United States. It follows, then, that to say race is socially constructed is to conclude that race is at least partially legally produced. Put most starkly, law constructs race. Of course, it does so within the larger context of society, and so law is only one of many institutions and forces implicated in the formation of races. Moreover, as a complex set of institutions and ideas, "law" intersects and interacts with the social knowledge about race in convoluted, unpredictable, sometimes self-contradictory ways. Nevertheless, the prerequisite cases make clear that law does more than simply codify race in the limited sense of merely giving legal definition to pre-existing social categories. Instead, legislatures and courts have served not only to fix the boundaries of race in the forms we recognize today, but also to define the content of racial identities and to specify their relative privilege or disadvantage in U.S. society. As Cheryl Harris argues specifically with respect to Whites, "[t]he law's construction of whiteness defined and affirmed critical aspects of identity (who is white); of privilege (what benefits accrue to that status); and of property (what *legal* entitlements arise from that status)." The operation of law does far more than merely legalize race; it defines as well the spectrum of domination and subordination that constitutes race relations.

Little to date has been written on the legal construction of race. Indeed, the tendency of those writing on race and law has been to assume that races exist wholly independent of and outside law. While the race-and-law literature is too extensive to summarize quickly, two of the best-known works on the subject illustrate this point. Consider A. Leon Higginbotham, Jr.'s

classic study, *In the Matter of Color: Race and the American Legal Process: The Colonial Period* (1978) and Derrick Bell's equally classic casebook, *Race, Racism, and American Law* (3rd edition, 1992). Both works provide exhaustive, meticulously researched, and invaluable studies of the legal burdens imposed on Blacks in North America over the last few centuries. Yet, in both works, "Black" and "White" are treated as natural categories rather than as concepts created through social, and at least partially through legal, interaction between peoples not initially racially defined in those terms. The discussions in both books of the arrival of the first Africans in colonial North America exemplified this tendency. Higginbotham writes: "In 1619, when these first twenty blacks arrived in Jamestown, there was not yet a statutory process to especially fix the legal standing of blacks." For his part, Bell quotes the following passage from the Kerner Commission: "In Colonial America, the first Negroes landed at Jamestown in August, 1619. Within forty years, Negroes had become a group apart, separated from the rest of the population by custom and law. Treated as servants for life, forbidden to intermarry with whites, deprived of their African traditions and dispersed among Southern plantations, American Negroes lost tribal, regional and family ties." These passages are striking because of the manner in which "blacks," "Negroes," and "whites" seem to exist as prelegal givens, groups that interacted socially and legally but that in all significant respects possessed identities not dependent on their social and legal interaction.

In Higginbotham's study, those African men who were forced onto American shores in 1619 disembarked already possessed of a "black" identity. Similarly, in Bell's casebook, the Africans who were brought to Jamestown only a year after the Pilgrims had landed at Plymouth Rock arrived already "Negroes" in a way that attributed to them the same identity as those the passage later terms "American Negroes." Neither work seems to recognize that the very racial categories under examination were largely created by the legal and social relations between the disparate peoples who found themselves for weal or woe on the northeastern shores of the Americas in the first years of the seventeenth century. This is all the more surprising because the very point of both passages is that the legal liabilities that would significantly define the relative identity of Whites and Blacks in North America were not in place in 1619. These works treat races as natural, pre-legal categories on which the law operates, but which the law does not in many ways create. In this assumption, they are joined by almost every other examination of race and law.

Nevertheless, the tendency to treat race as a pre-legal phenomenon is coming to an end. Of late, a new strand of legal scholarship dedicated to reconsidering of the role of race in U.S. society has emerged. Writers in this genre, known as critical race theory, have for the most part shown an acute awareness of the socially constructed nature of race. Much critical race theory scholarship recognizes that race is a legal construction. For example, a recent article by Gerald Torres and Kathryn Milun examines the imposition of the legal concept of "tribe" on the Mashpee of Massachusetts. In order to proceed in a suit over alienated lands, the Mashpee were required to prove their existence as a tribe in legal terms that focused on racial purity, hierarchical leadership, and clearly demarcated geographic boundaries. This legal definition of tribal identity ineluctably led to their nonexistence of the Mashpee people, since it "incorporated specific perceptions regarding race, leadership, community, and territory that were entirely alien to Mashpee culture." Because the Mashpee did not conform to the racial and cultural stereotypes

that infuse the law, they could not prove their existence in those terms, and hence did not exist as a people capable of suing in federal court. The article documents the manner in which Mashpee legal identity---and more, their existence---depended upon a particular definition of race and tribe, thus unearthing the manner in which law mediates racial and tribal ontology. This recognition of the role of law in the social dynamics of racial identity arguably lies near the heart of critical race theory. As John Calmore argues, “Critical race theory begins with a recognition that ‘race’ is not a fixed term. Instead, ‘race’ is a fluctuating, decentered complex of social meanings that are formed and transformed under the constant pressures of political struggle.” Critical race theory increasingly acknowledges the extent to which race is not an independent given on which the law acts, but rather a social construction at least in part fashioned by law.

Despite the spreading recognition that law is a prime suspect in the formation of races, however, to date there has been no attempt to evaluate systematically just how the law creates and maintains races. How does the operation of law contribute to the formation of races? More particularly, by what mechanisms do courts and legislatures elaborate races, and what is the role of legal actors in these processes? Do legal rules construct races through the direct control of human behavior, or do they work more subtly as an ideology shaping our notions of what is and what can be? By the same token, are legal actors aware of their role in the fabrication of races, or are they unwitting participants, passive actors caught in processes beyond their ken and control? These are the questions this book attempts to answer. I suggest that law constructs races in a complex manner through both coercion and ideology, with legal actors as both conscious and unwitting participants. Rather than turning directly to theories of how law creates and maintains racial difference, however, I would like here to explore at greater length what is meant by the basic assertion that law constructs race.

A more precise definition of race will help us explore the importance of law in its creation. Race can be understood as the historically contingent social systems of meaning that attach to elements of morphology and ancestry. This definition can be pushed on three interrelated levels, the physical, the social, and the material. First, race turns on physical features and lines of descent, not because features or lineage themselves are a function of racial variation, but because society has invested these with racial meanings. Second, because the meanings given to certain features and ancestries denote race, it is the social processes of ascribing racialized meanings to faces and forbearers that lie at the heart of racial fabrication. Third, these meaning-systems, while originally only ideas, gain force as they are reproduced in the material conditions of society. The distribution of wealth and poverty turns in part on the actions of social and legal actors who have accepted ideas of race, with the resulting material conditions becoming part of and reinforcement for the contingent meanings understood as race.

Examining the role of law in the construction of race becomes, then, an examination of the possible ways in which law creates differences in physical appearance, of the extent to which law ascribes racialized meanings to physical features and ancestry, and of the ways in which law translate ideas about race into the material societal conditions that confirm and entrench those ideas.

Initially, it may be difficult to see how laws could possibly create differences in physical appearance. Biology, it seems, must be the sole provenance of morphology, while laws would appear to have no ability to regulate what people look like. However, laws have shaped the

physical features evident in our society. While admittedly laws cannot alter the biology governing human morphology, rule-makers can and have altered the human behavior that produces variations in physical appearance. In other words, laws have directly shaped reproductive choices. The prerequisite laws evidence this on two levels. First, these laws constrained reproductive choices by excluding people with certain features from this country. From 1924 until the end of racial prerequisites to naturalization in 1952, persons ineligible for citizenship could not enter the United States. The prerequisite laws determined the type of faces and features present in the United States, and thus, who could marry and bear children here. Second, the prerequisite laws had a more direct regulatory reproductive effect through the legal consequences imposed on women who married noncitizen men. Until 1931, a woman could not naturalize if she was married to a foreigner racially ineligible for citizenship, even if she otherwise qualified to naturalize in every respect. Furthermore, women who were U.S. citizens were automatically stripped of their citizenship upon marriage to such a person. These legal penalties for marriage to racially barred aliens made such unions far less likely, and thus skewed the procreative choices that determined the appearance of the U.S. population. The prerequisite laws have directly shaped the physical appearance of people in the United States by limiting entrance to certain physical types and by altering the range of marital choices available to people here. What we look like, the literal and “racial” features we in this county exhibit, is to a large extent the product of legal rules and decisions.

Race is not, however, simply a matter of physical appearance and ancestry. Instead, it is primarily a function of the meanings given to these. On this level, too, law creates races. The statutes and cases that make up the laws of this country have directly contributed to defining the range of meanings without which notions of race could not exist. Recall the exclusion from citizenship of *Ozawa* and *Thind*. These cases established the significance of physical features on two levels. On the most obvious one, they established in stark terms the denotation and connotation of being non-White versus that of being White. To be the former meant one was unfit for naturalization, while to be the latter defined one as suited for citizenship. This stark division necessarily also carried important connotations regarding, for example, agency, will, moral authority, intelligence, and belonging. To be unfit for naturalization—that is, to be non-White—implied a certain degeneracy of intellect, morals, self-restraint, and political values; to be suited for citizenship—to be White—suggested moral maturity, self-assurance, personal independence, and political sophistication. These cases thus aided in the construction of the positive and negative meanings associated with racial difference, at least by giving such meanings legitimacy, and at most by actually fabricating them. The normative meanings that attach to racial difference—the contingent evaluations of worth, temperament, intellect, culture, and so on, which are at the core of racial beliefs—are partially the product of law.

Rather than simply shaping the social content of racial identity, however, the operation of law also creates the racial meanings that attach to features in a much more subtle and fundamental way: laws and legal decisions define which physical and ancestral traits code as Black or White, and so on. Appearances and origins are not White or non-White in any natural or presocial way. Rather, White is a figure of speech, a social convention read from looks. As Henry Louis Gates, Jr., writes, “Who has seen a black or red person, a white, yellow or brown? These terms are arbitrary constructs, not reports of reality.” The construction of race thus occurs

in part by the definition of certain features as White, other features as Black, some as Yellow, and so on. On this level, the prerequisite cases demonstrate that law can construct races by setting the standard by which features and ancestry should be read as denoting a White or a non-White person. When the Supreme Court rested its decision regarding Thind's petition for naturalization on common knowledge, it participated in the creation of that knowledge, saying this person and persons like him do not "look" White. The prerequisite cases did more than decide who qualified as a "white person." They defined the racial semiotics of morphology and ancestry. It is upon this seed of racial physicality that the courts imposed the flesh of normative racial meanings, establishing the social significance of the very racial categories they were themselves constructing. Only after constructing the underlying racial categories could the courts infuse them with legal meaning. The legal system constructs race by elaborating on multiple levels and in various contexts and forms the meaning systems that constitute race.

Finally, racial meaning systems are complex, containing both ideological and material components. That is, the common knowledge of race is grounded not only in the world of ideas, but in the material geography of social life. Here, too, law constructs race. U.S. social geography has in part been constructed by the legal system. Racial categories are in one sense a series of abstractions, but their constant legal usage makes these abstractions concrete and material. Indeed, the very purpose of some laws was to create and maintain material differences between races, to structure racial dominance and subordination into the socioeconomic relations of this society. It is here that the operation of law effects the greatest, most injurious, and least visible influence in entrenching racial categories. As laws and legal decision-makers transform racial ideas into a lived reality of material inequality, the ensuing reality becomes a further justification for the ideas of race.

In terms of the prerequisite cases, for example, the categories of White and non-White became tangible when certain persons were granted citizenship and other excluded. A "white" citizenry took on physical form, in part because of the demographics of migration, but also because of the laws and cases proscribing non-White naturalization and immigration. The idea of a White country, given ideological and *physical* effect by law, has provided the basis for contemporary claims regarding the European nature of the United States, where "European" serves as a not-so-subtle synonym for White. In turn, the notion of a White nation is used to justify arguments for restrictive immigration laws designed to preserve this supposed national identity. Consider here Patrick Buchanan's views on immigration, offered during his 1992 bid for the Republican presidential nomination: "I think God made all people good, but if we had to take a million immigrants in, say, Zulus, next year, or Englishmen and put them in Virginia, what group would be easier to assimilate and would cause less problems for the people of Virginia? There is nothing wrong with sitting down and arguing that issue, that we are a European country." Buchanan argues as a matter of fact that the United States is a European country, refusing to recognize that this "fact" is a contingent one, a product in large part of identifiable immigration and naturalization laws. Buchanan and others easily confirm their notions regarding the racial nature of the United States, as well as the naturalness of a White citizenry, by looking around and noting the predominance of White people. The physical reality evident in the features of the U.S. citizenry supports the ideological supposition that Whites exist as a race and that this is a White country. Hidden from view, indeed difficult to discern except

through extended study, is that Whites do not exist as a natural group, but only as a social and legal creation. What we see in the prerequisite cases is “not the defence of the white state but the creation of the state through whiteness.” The legal reification of racial categories has made race an inescapable material reality in our society, one which at every turn seems to reinvigorate race with the appearance of reality.

On multiple levels, law is implicated in the construction of the contingent social systems of meaning that attach in our society to morphology and ancestry, the meaning systems we commonly refer to as race. The legal system influences what we look like, the meanings ascribed to our looks, and the material reality that confirms the meanings of our appearances. Law constructs race.

White Race-Consciousness

The racial prerequisite cases demonstrate that race is legally constructed. More than that, though, they exemplify the construction of Whiteness. They thus serve as a convenient point of departure for a discussion of White identity as it exists today, particularly regarding both the way in which those constructed as White conceptualize their racial identity, and in terms of the content of that identity. In this way, the prerequisite cases also afford a basis for formulating arguments concerning the way Whites ought to think about Whiteness. In short, the prerequisite cases offer a useful vehicle for exploring the forms of White race-consciousness does and should take.

Race-consciousness, the explicit recognition of racial differences, has recently emerged as a trend in legal scholarship. The vast bulk of race-conscious scholarship is by minority scholars, particularly those writing in the genre of critical race theory. This trend toward race-consciousness takes two forms. First, some scholars have explicitly recognized, and encouraged the recognition of, races and racial difference. This has often come in response to arguments that the legal system should be “colorblind,” that is, that law ought not to notice races. Second, scholars are also increasingly race-conscious in the sense of acknowledging the importance of race to personal identity and world view. Scholars now frequently discuss the epistemological influence of race in general, or an author’s race in particular, positing the existence of subjective, racially mediated points of view as a rebuttal to the notion of an objective, “race-less” perspective.

For the most part, White scholars have been reluctant either to produce or to engage intellectually this emergent race-based scholarship. Several potential reasons for the silence of White legal scholars suggest themselves. Some minority scholars have asserted a special expertise in the area of race, perhaps suggesting to Whites that they are not welcome to join the critical discourse on race and law. This silence may also result from institutional pressures, where White scholars are directed away from, and minority academics are channeled toward, the relatively marginal discussion of race and law. Or the lack of response may be engendered by racism on the part of some Whites—of a subtle sort that relegates the concerns of minorities to the margins of relevance, or of a more pernicious type that, by disregarding minority voices,

seeks to control all discourse about race. Whatever its origins, this White silence has resulted in the accumulation of a body of race-conscious scholarship that focuses almost exclusively on people of color and on the epistemological importance of being a minority. Until recently, this scholarship rarely concerned Whites or addressed the intellectual influence of White identity.

In the last few years, however, this pattern has been broken. Writing in top law reviews across the country, several White law professors have helped place race-consciousness at the forefront of legal academic discourse. These efforts seem to be part of a larger current in which White scholars are increasingly willing to grapple with critical race theory, and they constitute an important contribution to the exploration of the relationship between race and law.

Prof. Barbara Flagg suggests that the exclusive focus on Blacks is more than an innocent mistake. She argues that it is a contingent, particularly revealing error, a function of the nature of White race-consciousness rather than a fortuitous slip. Flagg fits this myopia into her theory of White-consciousness by suggesting that there exists a tendency among Whites not to see themselves in racial terms. Prof. Flagg identifies this tendency as one of the defining characteristics of being White, and labels this the “transparency phenomenon.” “The most striking characteristic of Whites’ consciousness of whiteness is that most of the time we don’t have any. I call this the *transparency* phenomenon: the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific. Flagg argues that as an antidote to transparency, Whites must develop “a carefully conceived race consciousness, one that begins with whites’ consciousness of whiteness. In this critique and in her prescription for change, Flagg is almost certainly correct. Her article advances the thinking on race-consciousness by placing Whites securely within the parameters of discussion and by identifying transparency as a central hurdle that must be surmounted in the development of White racial self-awareness.

If transparency is a common phenomenon among Whites today, it seems also to have afflicted judges deciding prerequisite cases. Despite the apparent simplicity of the issue before them, the courts hearing prerequisite cases experienced great difficulty defining who was White, often turning for succor to such disparate materials as amici briefs, encyclopedias, and anthropological texts. Even with the assistance of these materials, however, the courts hearing prerequisite cases were slow to develop a defensible definition of Whiteness, instead frequently reaching contradictory results. Though themselves White, judges hearing prerequisite cases could not easily say what distinguished a “white person.” More than a few judges expressed considerable consternation over the indeterminacy of the prerequisite language in its reference to “whites.” Thus, in a 1913 case, *Ex parte Shabid*, a federal court in South Carolina protested that “[t]he statute as it stands is most uncertain, ambiguous, and difficult both of construction and application.” Shabid posed in frustration the beguiling simple question that introduces this book: “Then, what is white?”

The inability of the judges to articulate who was White is a product of the transparency phenomenon. Within the logic of transparency, the race of non-Whites is readily apparent and

regularly noted, while the race of Whites is consistently overlooked and scarcely even mentioned. The first case in North America to turn on race exhibits this tendency. The full report of *Re Davis*, a Virginia case decided in 1630, reads as follows. “Hugh Davis to be soundly whipt before an assembly of negroes & others for abusing himself to the dishonor of God and shame of Christianity by defiling his body in lying with a negro which fault he is to act Next Sabbath day.”” As Leon Higginbotham notes, “Although the full picture can never be reconstructed, some of its elements can reasonably be assumed.... [B]ecause Davis’s mate was described as a ‘negro,’ but no corresponding racial identification was made of Davis, it can be inferred that Davis was white.”” Transparency is a legal tradition of long standing, not something new to the law today or to the prerequisite cases. As a threshold matter, then, defining “whites” taxed the prerequisite courts’ abilities not because the question was inherently abstruse, but because through the operation of transparency the judges had never really thought about it.

But why, after they had thought about it, were the judges still unable to define “Whiteness? Exploring the origins and maintaining technologies of transparency is useful here. For her part, Flagg ascribes transparency to White privilege. “There is a profound cognitive dimension to the material and social privilege that attaches to whiteness in this society,” she writes, “in that the white person has an everyday option not to think of herself in racial terms at all.” Yet, the prerequisite cases hint that transparency is not simply a matter of privilege. Privilege explains transparency by positing that those who are constructed as the norm experience difficulty in accurately perceiving their relational position in society exactly because they constitute the norm. But privilege does not seem to fully explain why, when finally jarred into the task of examining White racial identify, the judges in the prerequisite cases could not readily identify the normative boundaries by which they defined themselves---even as late as *Shabid* in 1913, with thirty-five years of precedent to assist them.

As a category, “white” was constructed by the prerequisite courts in a two-step process that ultimately defined not just the boundaries of the group, but its identity as well. First, the courts constructed the bounds of Whiteness by deciding on a case-by-case basis who was *not* White. Though the prerequisite courts were charged with defining the term “white person,” they did not do so by referring to a freestanding notion of Whiteness. No court offered a complete typology listing the characteristics of Whiteness against which to compare the petitioner. Instead, the courts defined “white” through a process of negotiation, systematically identifying who was non-White. Thus, from *Ab Yup* to *Thind*, the courts established not so much the parameters of Whiteness as the non Whiteness of Chinese, South Asians, and so on. This comports with an understanding of races not as absolute categories, but as comparative taxonomies of relative difference. Races do not exist as defined entities, but only as amalgamations of people standing in complex relationships with other such groups. In this relational system, the prerequisite cases show that Whites are those not constructed as non-Whites. This is the significance of the “one drop of blood” rule of racial descent in the United States. Under this rule, historically given legal form in numerous state statutes, any known

African ancestry renders one Black. As Neil Gotanda writes, “The metaphor is one of purity and contamination: White is unblemished and pure, so one drop of ancestral Black blood renders one Black. Black is a contaminant that overwhelms white ancestry.” Stated differently, Whites are those with no known African or other non-White ancestry. In this respect, recall that no mixed-race applicant was naturalized as “white.” Whites exist as a category of people subject to a double negative: they are those who are non-White.

The second step in the construction of Whiteness contributes more directly to the content of the White character. After defining Whiteness by declaring certain peoples non-White, the prerequisite courts denigrated those so described. For example, the Supreme Court in *Thind* wrote not only that common knowledge held South Asians to be non-White, but also that the racial difference marking South Asians “is of such character and extent that the great body of our people recognize and reject it.” The prerequisite courts in effect labeled those who were excluded from citizenship (those who were non-White) as inferior; by implication, those who were admitted (White persons) were superior. In this way, the prerequisite cases show that Whiteness exists not only as the opposite of non-Whiteness, but as the *superior* opposite. Witness the close connection between the negative characteristics imputed to Blacks and the reverse, positive traits attributed to Whites, Blacks have been constructed as lazy, ignorant, lascivious, and criminal; Whites as industrious, knowledgeable, virtuous, and law-abiding. For each negative characteristic ascribed to people of color, an equal but opposite and positive characteristic is attributed to Whites. To this list, the prerequisite cases add Whites as citizens and others as aliens. The prerequisite cases show that Whites fashion an identity for themselves that is the positive mirror image of the negative identity imposed on people of color.

Notes and Questions – White by Law

1. *What facially neutral rationales did the court use in its construction of racial demarcations (and the subsequent allocation of privilege)?*
2. *Is law ever truly neutral in its application, even if it is in intent? Should law always be neutral?*
3. *Haney López talks about the courts' quest to determine the parameters of who qualified as 'white.' Do you think this quest is over, or has it just changed in how it happens? Why?*