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## MONGOLIAN INVADERS, THE BUREAU OF NATURALIZATION, AND *OZAWA*

Although eligibility for naturalized citizenship was limited to "free white persons" from the time the nation's first naturalization act was passed in 1790, the earliest published judicial opinion to address the racial eligibility provision of the act was issued in *In re Yup* in 1878. In *Yup*, Judge Lorenzo Sawyer of the United States Circuit Court for the District of California decided whether a "native and citizen of the empire of China, of the Mongolian race," was a "free white person" for purposes of naturalization. Sawyer held that the applicant was not "white," writing in his published opinion that 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. 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.

After referring to the leading ethnological authorities of the nineteenth century, Sawyer claimed that

> neither in popular language, in literature, nor in scientific nomenclature, do we ordinarily, if ever, find the words "white person"

> used in a sense so comprehensive as to include an individual of the Mongolian race.[1]

Based on popular perceptions of the Caucasian and Mongolian racial division, which classified the Chinese as Mongolian, Sawyer concluded that it was beyond dispute that because the Chinese were not Caucasian they were not "white."

The certainty with which Judge Sawyer regarded the racial classification of the Chinese was echoed in other cases. In a 1909 case regarding the racial eligibility of Armenians for naturalization, for example, the United States attorney argued that

> without being able to define a white person, the average man in the street understands distinctly what it means, and would find no difficulty in assigning to the yellow race a Turk or Syrian with as much ease as he would bestow that designation on a Chinaman or a Korean.[2]

Despite this argument, there are no reported cases in which the Bureau of Naturalization opposed the racial eligibility for naturalization of a Turk, and there is evidence that the bureau mostly deferred to early judicial precedent holding Syrians to be "free white persons" for purposes of naturalization. In a case involving a Parsi applicant the following year, a federal appeals court similarly wrote that "for practical purposes there is no difficulty in saying that the Chinese, Japanese, and Malays and the American Indians do not belong to the white race."[3] In these and other early cases interpreting the racial eligibility provisions of the naturalization act, the racial classifications made were depicted as so obvious that they required little explanation beyond brief citation of ethnological authorities or previous judicial precedent.

The certainty of such statements is belied by a considerably more fraught history of racial classification in the United States, however, dating from the time of the nation's founding. As Michael Keevak describes, in initial encounters Europeans "almost uniformly" described natives of the Far East as "white" and even described their whiteness in particularly superlative terms, such as "rather white" (*zimblich weiß*), "truly white" (*véritablement blanc*), "completely white" (*fulkomligen hvita*), "white like us" (*bianchi, si come siamo noi*), and "as white as we are" (*aussi blancs que nous*). In correspondence with his former aide Tinch Tilghman, George Washington expressed surprise

that Tilghman had compared the physical appearance of Chinese sailors to American Indians because Washington thought that the Chinese, "tho' droll in shape and appearance, were yet white."[4] In 1860, the United States census included 33,149 male and 1,784 female Asians in the "white" population,[5] and Chinese immigrants arriving in the United States in the nineteenth century were granted naturalization certificates in Eastern states for decades before the Chinese Exclusion Act prohibited Chinese naturalizations. As early as the 1830s, Chinese naturalizations were recorded in New York and North Carolina,[6] and in 1870 a Boston newspaper article recounted the longstanding practice in Massachusetts of naturalizing "Chinese as well as other Asiatics" since at least 1843.[7] The United States Circuit Court for the District of Massachusetts also found as late as the turn of the twentieth century that it had long been its practice to naturalize Asian immigrants.[8] In 1879, a San Francisco newspaper article remarked that although Judge Sawyer had ruled against Chinese naturalizations in California "one Judge Larrimore in New York is making American citizens out of Chinamen as fast as he can."[9]

As late as World War I, the classification of the Japanese as "white" was even explicitly defended by ethnologists and other scholarly commentators. In an 1894 article in the *American Law Review*, legal scholar John Wigmore argued that "in the scientific use of language and in the light of modern anthropology, the term 'white' may properly be applied to the ethnical composition of the Japanese,"[10] and in a 1913 article in the *North American Review* William Griffis wrote that "to class the Japanese as 'Mongolians' is absurd."[11] In 1909, Judge Francis Lowell of the United States District Court for the District of Massachusetts wrote that "at one time Chinese and Japanese were deemed to be white, but are not usually so reckoned today" because "the change of sentiment and usage . . . produced a change in the construction" of the naturalization act, and as a result "its meaning has been narrowed so as to exclude Chinese and Japanese in some instances."[12] Drawing on previous ethnological accounts, H. G. Wells claimed in his 1920 bestseller *Outline of History* that the Japanese and others in the Indian Ocean and Pacific Rim descended from the Mediterranean people of Europe who migrated to Central Asia and the Pacific,[13] and the United States census of 1910 reflected hundreds of Japanese who had been granted naturalizations.[14] Like the Chinese, the racial classification of the Japanese was considerably unstable, and the Chinese were often classified as "white" before the United States Supreme Court held them racially ineligible for naturalization in 1922.[15] Notwithstanding the naive realism

reflected in some early judicial opinions interpreting the racial eligibility provisions of the naturalization act, racial formation is always highly unstable.

In order to provide the historical context needed to understand the racial eligibility cases, this chapter examines the relationship between race and citizenship in the United States from the nineteenth century through the early 1920s when the United States Supreme Court issued its only two opinions interpreting the racial eligibility provisions of the naturalization act in *Ozawa* and *Thind*. I begin by examining the period of territorial expansion during the nineteenth century when countless American Indians, Mexicans, Asians, and Pacific islanders—groups later held to be racially ineligible for naturalization—were collectively naturalized under the provisions of various treaties. Despite these collective naturalizations of Asians and other non-European residents in territorial expansion treaties, as anti-Chinese sentiment developed in the late nineteenth century an Asian exclusion policy emerged in interpretations of the racial eligibility provisions of the naturalization act. I examine the emergence of this policy and the interpretive approach adopted by the United States Bureau of Naturalization after its creation in the early twentieth century, then analyze the rhetorical significance of naturalization applicant Takao Ozawa's expression of Japanese nationalism in *Ozawa*.

## RACIAL INCLUSIVENESS DURING TERRITORIAL EXPANSION

Throughout the nineteenth century, the various treaties and legislative acts that annexed new territories to the United States reflect the contradictions in the nation's policy regarding racial eligibility for citizenship as the nation made citizens of American Indians, Mexicans, Asians, and Pacific islanders by collectively naturalizing the inhabitants of most newly annexed territories without regard to race. The Louisiana Purchase of 1803 granted American citizenship to all inhabitants of the Louisiana territory, including those of French, Spanish, and Mexican descent as well as a substantial number of free blacks and mulattoes.[16] Similarly, the annexations of Florida, Texas, and southern portions of Arizona and New Mexico in 1819, 1845, 1848, and 1853 provided American citizenship to all of the citizens of the annexed territories and in most cases to all of the inhabitants without regard to race.[17] As United States Supreme Court Justice John McLean noted in his dissenting opinion in *Dred Scott*, on the question of citizenship the nation

had "not been very fastidious" because it "made citizens of all grades, combinations, and colors" during its many territorial expansions.[18] The territorial expansions reflect the fact that the need to clearly define the nation's borders transcended any racial difference that may have been perceived.

The collective naturalization provisions of the annexations were occasionally observed to conflict with the racial eligibility provisions of the naturalization act, but the conflicts were mostly ignored. With regard to Mexicans, the judiciary even relied on their collective naturalization in various annexation treaties to hold them racially eligible for naturalization under the naturalization act. In an 1897 opinion in *In re Rodriguez*, Judge Thomas Maxey of the United States District Court for the Western District of Texas justified his decision that a "pure-blooded Mexican" with no Spanish descent was racially eligible for naturalization based largely on the fact that the Adams-Onís Treaty, the Treaty of Guadalupe Hidalgo, and the Gadsden Treaty had collectively naturalized numerous Mexican inhabitants:

> A reference to the constitution of the republic of Texas and the constitution, laws, and treaties of the United States will disclose that both that republic and the United States have freely, during the past 60 years, conferred upon Mexicans the rights and privileges of American citizenship . . . by various collective acts of naturalization.

Because *Rodriguez* was the only published judicial opinion regarding Mexican racial eligibility for naturalization, it mostly settled the question of Mexican racial eligibility for naturalization under the naturalization act by serving as precedent for later cases. Although some have questioned whether Maxey actually found Mexicans to be "free white persons" in *Rodriquez* because the opinion does not explicitly state the finding, in 1944 the Board of Immigration Appeals explicitly found that a native and citizen of Mexico was "a person of the white race" for purposes of their eligibility for citizenship.[19]

After the Civil War, the United States also reaffirmed the English common law rule of birthright citizenship by which a person's citizenship is determined by their place of birth rather than their parents' nationality.[20] In 1868, the Fourteenth Amendment to the United States Constitution granted citizenship to "all persons born or naturalized in the United States, and subject to the jurisdiction thereof."[21] Although the reaffirmation of birthright citizenship

in the Fourteenth Amendment was specifically designed to reverse the United States Supreme Court's decision in *Dred Scott*, which had held that African Americans were constitutionally incapable of becoming citizens, the principle more broadly repudiated racial eligibility criteria for citizenship with regard to anyone born in the United States. In 1884, the United States Supreme Court held that American Indians who maintained their tribal relations could not become citizens by birth under the Fourteenth Amendment because they were not "subject to the jurisdiction" of the United States,[22] but in 1897 the Supreme Court held that a child born in San Francisco of Chinese parents became a United States citizen under the Fourteenth Amendment because "every citizen or subject of another country, while domiciled here, is within the allegiance and protection, and consequently subject to the jurisdiction, of the United States."[23] As in the nation's territorial expansions, one consequence of the Civil War was to reaffirm birthplace citizenship as part of an effort to establish national unity. Although racial discrimination in the form of racial segregation laws, poll taxes, literacy tests, and other measures continued to undermine the full exercise of citizenship rights by racial minorities, the Fourteenth Amendment afforded formal legal protection to every person born in the United States without regard to race.

The history of American Indian citizenship during the nineteenth and early twentieth centuries also reflected the contingency of racial eligibility for citizenship on threats to the nation, culminating in the unilateral naturalization of all noncitizen Indians as a reward for their support of the nation during World War I. Although courts found that American Indians were racially ineligible for naturalization under the naturalization act because they were not "free white persons,"[24] all American Indians living in the United States were naturalized by various treaties and statutes long before the racial eligibility provisions of the naturalization act were removed. In a particularly notable example of the contingency of American Indian citizenship on threats to the nation, United States Supreme Court Justice Roger Taney wrote in his majority opinion in *Dred Scott* that American Indians, unlike African Americans, were capable of becoming citizens based in part on his conclusion that while African Americans were prohibited from serving in state militias, American Indians were treated with the respect given to foreign governments and "their alliance sought for in war." In other words, the ability and desirability of American Indians to defend the nation in times of crisis distinguished their eligibility for citizenship from that of African Americans. According to Taney, however, in their "untutored and savage state" no one

would have thought of admitting American Indians to citizenship in a "civilized" community because

> the atrocities they had but recently committed, when they were the allies of Great Britain in the Revolutionary war, were yet fresh in the recollection of the people of the United States, and they were even then guarding themselves against the threatened renewal of Indian hostilities.

As these comments reflect, Taney imagined the history of American Indian citizenship in the United States to be contingent on their potential for military enmities and alliances.

The contingency of citizenship on such threat assessments not only explains broad policy decisions such as those collectively naturalizing all of the inhabitants of new territories without regard to race, but is also reflected in the language of individual arguments and opinions in judicial cases. Justice Taney also wrote in *Dred Scott*, for example, that the First Congress only considered those eligible for naturalization "whose rights and liberties had been outraged by the English government; and who . . . assumed the powers of Government to defend their rights by force of arms."[25] The transitive verb *outrage* indicated an excessive wrong, violation, or assault, and it was specifically associated with literal or metaphorical rape.[26] Similarly, as Sumi Cho and Gil Gott note of United States Supreme Court Justice John Marshall's series of opinions in the early nineteenth century regarding American Indian sovereignty, the Court granted Indians a sort of "quasi-sovereignty" in which they were denied full sovereignty as independent nations but granted a measure of autonomy from the states based on the imaginary of Indian savagery. For Marshall, the "fierce and warlike" character of Indians rendered them racially incommensurable with Europeans. Cho and Gott write that Marshall's analysis of the perceived savagery of Indians "necessitated the degree of sovereignty afforded" by the Court, and the sovereignty granted them was inversely proportionate to the threat they were perceived to pose.[27] The same is true of Justice Taney's remarks regarding the eligibility of Indians for American citizenship in *Dred Scott*.

The eligibility of Indians for citizenship in the United States was contingent on the threat particular Indian tribes were perceived to pose, however, rather than on a general imaginary of Indian savagery. Despite Justice Taney's conclusion that it was unlikely that Indians would be desired

as citizens given the threat they were perceived to pose to the European colonists of North America, hundreds of thousands of Indians were collectively naturalized during the nineteenth and early twentieth centuries through various treaties as individual tribes were incorporated into the nation.[28] In support of Indian removal efforts, between 1817 and 1868 citizenship was formally granted to the Cherokees, the Choctaws, the Brothertown Indians, the Stockbridge Indians, the Wyandotts, the Ottawas, the Kickapoos, the Delawares, the Pottawatomies, various Kansas tribes, and the Sioux.[29] Similarly, the Oklahoma Organic Act of 1890 provided for the naturalization of 101,506 Indians in Indian Territory.[30] Although efforts to naturalize Indian tribes were both fraught with congressional exceptions and resisted by Indians,[31] what is important for purposes of the present study is that the formal incorporation of Indian tribes into the nation often proceeded according to the distinction between civilized and savage much like Marshall's and Taney's analyses of Indian sovereignty and their capacity for citizenship. The Dawes Act of 1887 divided tribal land into allotments for individual Indians and granted citizenship to every Indian born in the United States "who has voluntarily taken up . . . his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life," resulting in the citizenship of 53,168 Indians by 1900.[32] The willingness of Indians to volunteer for military service during World War I was also rewarded with the eligibility for naturalization of roughly ten thousand American Indian veterans in 1919 and with the unilateral naturalization of all remaining noncitizen Indians in 1924.[33] Despite decades of continued opposition to the right of Indians to vote and exercise other rights of citizenship, the formal grant of citizenship to Indians reflected in this series of acts largely prevailed to alter their legal status.[34]

The concepts of civilized and savage as criteria for the eligibility of American Indians for citizenship is also evident in the nation's 1867 treaty with Russia for the purchase of Alaska. In the Alaska treaty, numerous aboriginal and creole residents of Alaska were naturalized depending on whether they were designated as belonging to "civilized" or "uncivilized" tribes. In 1904, a court in Fairbanks, Alaska, published an opinion in *In re Minook* involving an application for naturalization by a man born of a Russian father and an Eskimo mother who believed himself to be a subject of Russia. The applicant John Minook was born at St. Michael in the Russian possessions in North America and his parents resided in Alaska when it was ceded to the United States. Contrary to Minook's belief that he was a subject of Russia

who had to apply for naturalization, it was suggested on his behalf that he was already an American citizen under the naturalization clause of the Alaska treaty. The naturalization clause of the treaty provided that the inhabitants of Alaska could return to Russia within three years or they would automatically become American citizens if they elected to remain in Alaska. An exception to the treaty's grant of naturalized citizenship to the inhabitants was made for "*uncivilized* native tribes," however, who did not become American citizens but became subject to "such laws and regulations as the United States may from time to time adopt in regard to aboriginal tribes of that country."[35]

The court in *Minook* concluded that the Russian Empire recognized a difference between "the settled tribes who lived in permanent villages in fixed habitations, and who were wholly or in greater part, members of the established Russian Church," on the one hand, and "the uncivilized native tribes—the pagan tribes," on the other. As a result, the court concluded that at the time of the treaty Russian law recognized the Russian colonists, their creole children, and "those settled tribes who embraced the Christian faith" as Russian subjects, but not the "uncivilized native tribes," or "those tribes not wholly dependent—the independent tribes of pagan faith who acknowledged no restraint from the Russians, and practised their ancient customs." As a result, the court found that the uncivilized tribes excluded from the benefits of the naturalization clause in the Alaska treaty were "pagan" tribes who "acknowledged no allegiance to Russia, and lived the wild life of their savage ancestors."[36] The court compared the Alaska treaty and its distinction between civilized and uncivilized tribes to the Dawes Act and held that Minook was already an American citizen either as an inhabitant entitled to the automatic grant of naturalization under the Alaska treaty or as a member of an uncivilized native tribe who had voluntarily taken up his residence "separate and apart from any tribe of Indians therein, and . . . adopted the habits of civilized life" under the Dawes Act.[37] Like the Louisiana Purchase, the Treaty of Guadalupe-Hidalgo, the Treaty with Spain, and the Gadsden Treaty, the Alaska treaty collectively naturalized numerous aboriginal people and creole descendants of mixed aboriginal and Russian lineage in order to clearly delineate the nation's borders as it expanded its territory. The naturalization provision of the Alaska treaty, however, conditioned aboriginal eligibility for citizenship on an assessment of whether their social and political history was "civilized" or "uncivilized" with regard to Russians.

In 1898, the annexation of Hawaii also collectively naturalized numerous inhabitants who were found racially ineligible for naturalization under the naturalization act. Although in 1889 the Supreme Court of Utah held that a "native of the Hawaiian islands," appearing "of Malayan or Mongolian complexion, a shade lighter than the average of his race," whose "ancestors were Kanakas," was racially ineligible for naturalization because he was not a "free white person,"[38] the Hawaiian Organic Act of 1900 collectively naturalized all of the inhabitants of the Hawaiian islands who were citizens of the Kingdom of Hawaii, including all of those born or naturalized in Hawaii during the Hawaiian monarchy and later governments. This included many Chinese, Japanese, and native Hawaiian inhabitants.[39] Not only did Hawaii follow the principle of birthright citizenship, but it imposed no racial limits on naturalization. The naturalization records of the Hawaiian Islands from 1844 to 1894 reflect 763 Chinese, 136 Pacific islanders, and 3 Japanese among naturalized citizens, and the Hawaiian census of 1900 included among the inhabitants of Hawaii 61,111 Japanese, 29,799 Hawaiians, 25,767 Chinese, and 8,272 others who were classified as non-Caucasian. Many of these inhabitants would have been naturalized by the Hawaiian Organic Act.[40] Similarly, Congress collectively naturalized all of the inhabitants of Puerto Rico in 1917 and all of the inhabitants of the Virgin Islands in 1927, including many who had been racially classified as non-"white" under the racial eligibility provisions of the naturalization act.[41]

The collective naturalizations of inhabitants of new territories during the nation's territorial expansion illustrate either that no racial differences were perceived between the inhabitants or that the need to clearly delineate the nation's territorial sovereignty transcended any racial differences that were perceived,[42] and the racial eligibility provisions of the naturalization act were similarly contingent on perceived threats to the nation's borders and the enmities and alliances they prompted. Judge Oliver Dickinson of the United States District Court for the Eastern District of Pennsylvania explicitly appealed to this principle in the 1917 case of *In re Singh*, writing in his published opinion in the case that the meaning of the phrase *free white person* in the naturalization act was considerably broadened as an effect of the Revolutionary War. According to Dickinson,

> As the inhabitants of what was then the United States were a more or less homogeneous people who or whose immediate forbears had come from what has been termed "Northern

> Europe," and as the vast territories then known as Florida and as Louisiana formed no part of our national domain, and as our people had been in almost continuous conflict with the French and Spaniards, it is doubtful whether the words "white persons," as used in common speech, originally included any of the so-called Latin races.

In other words, the conflict between the British colonies in North America and the French and Spanish during the French and Indian Wars initially rendered it unlikely to Dickinson that the French and Spanish would be encompassed by the phrase *free white persons,* but

> the events of the Revolution . . . and the gratitude which our people felt toward France, and more especially the large number of French Huguenots who had come to make their homes here, caused instant recognition of the French as having a common heritage with us, and the phrase automatically expanded to include them. The desire to be consistent forced us to include the Spaniards and Portuguese, and later the Italian peoples, and broadly the Latin race.[43]

In this and other instances of racial eligibility discourse, national enmities and alliances assumed a more prominent position in explanations of racial classifications than biological descent.

The relationship of territorial expansion to the racial eligibility provisions of the naturalization act has been largely ignored in previous studies of the racial eligibility cases. In one noteworthy exception, however, Matthew Frye Jacobson argues that the racial eligibility cases played a crucial role in confirming the whiteness of Southern and Eastern Europeans whose whiteness Anglo-Saxons deemed inferior as expansion into the Pacific and the depiction of Pacific natives as dangerous "savages" dissolved the boundary between "superior" and "inferior" whites from Europe.[44] Jacobson claims that the efforts of a variety of Asian applicants to secure naturalization "were part of what kept the probationary white races of Europe white" because

> like the nation's frontier warfare and its perpetual narrations, . . . these legal skirmishes along the borders of naturalized citizenship staked out a brand of monolithic whiteness which corroborated

> the reasoning of 1790 precisely in a period when that reasoning was undergoing massive revision.[45]

Jacobson writes that the phrase *free white person* in the naturalization act signified "a powerful crucible whose exclusions based upon distinctions of color blurred other potentially divisive physical distinctions," forming a true "melting pot" in which the whiteness of Southern and Eastern Europeans was confirmed.[46] The "crucible of empire" that Jacobson describes, however, neglects the more pervasive role that enmities and alliances played in a wider variety of cases and periods in racial eligibility discourse. While the image of the crucible aptly captures the powerful transcendent effect of shared external threats on perceived racial difference, persuasive appeals to such threats were not limited to the whiteness of Southern and Eastern Europeans or to Pacific expansion alone but appear throughout the discourse surrounding the racial eligibility provisions of the naturalization act.

## FEARS OF MONGOLIAN INVASION

The relationship between racial formation and the desire to control and manage the nation's borders is also evident in the fact that the objection to the racial eligibility of Asians for naturalization was often premised on the Mongolian racial classification. The controversy regarding Asian racial eligibility for naturalization first appears in a heated debate in the United States Senate on July 4, 1870, regarding an amendment to remove the racial eligibility provision from the naturalization act as part of Civil War Reconstruction. During the 1870 debates, West Coast senators objected that removing the racial eligibility provision would permit the Chinese to become American citizens. This conclusion was premised on the claim that the Chinese were not "free white persons," and as evidence for this claim many of those who objected to Chinese eligibility for naturalization asserted that the Chinese belonged to the Mongolian race. Oregon Senator George Williams remarked, for example, that "Mongolians, no matter how long they may stay in the United States, will never lose their identity as a peculiar and separate people."[47] As noted above, Judge Sawyer also referred to the classification of the Chinese as Mongolian in *Yup*,[48] and the Mongolian racial classification is found throughout the history of racial eligibility discourse as presumptive evidence of a non-"white" status. In 1908, one United States

attorney even claimed that Finnish immigrants were not racially eligible for naturalization because they were believed to have Mongolian ancestry.[49]

In Michael Keevak's study of Western racial depictions of Asians, he writes that although the Mongolian racial classification initially arose when Johann Friedrich Blumenbach created his five-part division of humanity into the Caucasian, Mongolian, Malayan, Ethiopian, and American races at the end of the eighteenth century, it was mostly the creation of mid-nineteenth-century racialist science. The word *Mongol* had appeared before, but the people of northeastern Asia had most often been racially classified as "Tartars" from the time of the travel narratives of Marco Polo, John of Plano Carpini, and William of Rubrick. The Tartar racial classification included the Mongols, Manchus, Kalmyks, Buryats, and Tibetans, among others, and China was simply called Tartary or Tartaria. The Tartar racial classification was rejected, however, when Catherine the Great sought to define and control the eastern borders of the Russian Empire in the late eighteenth century. In connection with the effort to define and control Russia's border with Asia, scholars in cooperation with the Imperial Academy of Sciences in St. Petersburg rejected the Tartar racial classification and introduced new classifications that included the Mongolian. Under the Mongolian racial classification produced from this effort, the Tartar racial classification was broadened to include both the Chinese and Japanese along with all other natives of the Far East.[50]

This new classification associated all natives of Asia with, in Keevak's words, "the idea of barbaric hordes and merciless slaughter, centering on Attila the Hun, Genghis Khan, and Tamerlane, that familiar triad who were now regularly called 'Mongols.'"[51] The introduction of the Mongolian racial classification became the basis of a revision of European history as well as new fears of Mongolian invasions. In S. Wells Williams's mid-nineteenth-century study of China, he described "vast swarms" of Mongol tribes who had "overrun, in different ages, the plains of India, China, Syria, Egypt, and Eastern Europe," exterminating rather than subjugating those they conquered,[52] and in the early twentieth century Lothrop Stoddard described the Mongols as part of "a millennium of Asiatic aggression" against Europe that began with "the Huns in the last days of Rome."[53] The Mongolian racial classification reflected a renewed fear of Asian aggression, as Keevak explains:

> the Mongolian was . . . considered a wandering and dangerous human type that perhaps threatened to overrun the world once

> again, a fear of the populous East that would be invoked by such thinkers as [Thomas] Malthus, whose contemporaneous theory of overpopulation and limited food supply ignited the specter of a new "Northern Immigration," reminiscent of the invasions of Attila and Genghis Khan.

According to Keevak, it was only at the end of the nineteenth century that "the idea of a yellow East Asia would fully take hold in the Western imagination, crystallizing in the phrase 'the yellow peril' to characterize the perceived threat that the people of the Far East were now said to embody." The association of yellow skin with Asian races during the nineteenth century brought together what had been closely allied for centuries, "yellow skin, numerous 'Mongolian' invasions, and the specter of large numbers of people from the region migrating to the West."[54]

The image of dangerous Mongolian invaders appeared frequently in American public discourse in the late nineteenth and early twentieth centuries. In 1854, the California Supreme Court held that a law prohibiting any "Black, or Mulatto person, or Indian" from testifying for or against a "white" person also prohibited the testimony of Chinese witnesses based on the conclusion that the word *Indian* referred not only to American Indians but to "the whole of the Mongolian race,"[55] and in 1863 the California legislature amended the law to explicitly exclude the testimony of "Mongolian" witnesses.[56] By 1880, the California legislature had prohibited the admission of "Mongolian" children to public schools[57] and the marriage of a "Mongolian" to any "white" person.[58] During an 1882 town hall in San Francisco demanding a federal ban on Chinese immigration, one speaker warned of an impending "Mongolian flood" that would be "more fatal to the life of this public than was the invasion of the Goths, Vandals and Huns to the Roman Empire,"[59] and in 1886 former United States senator William Steward published a pamphlet opposing Chinese immigration in which he cited "the great Mongolian invasions of Western Asia and Eastern Europe, and the supplanting of the native populations by the invaders."[60] The threat Mongolians were imagined to pose was eventually simply expressed by the transitive verb *Mongolianize*. In 1884, for example, Edward Gilliam wrote in the *North American Review* that Asian immigrants "threaten . . . to Mongolianize the Pacific slope,"[61] and in 1910 the Asiatic Exclusion League warned that California agricultural labor was being "Mongolianized."[62]

The Mongolian racial classification also figures prominently in Chinese invasion fiction that proliferated in the late nineteenth and early twentieth centuries, beginning with Abwell Whitney's *Almond-Eyed*, Pierton Dooner's *Last Days of the Republic*, and Robert Woltor's *A Short and Truthful History of the Taking of Oregon and California in the Year A.D. 1899*, all published between 1878 and 1882.[63] In Dooner's *Last Days of the Republic*, the Chinese Empire conquers the United States following a "Mongolian invasion" facilitated by the country's generous immigration and naturalization laws. The novel includes a fictional federal court case that holds the racial eligibility provisions of the naturalization act to be unconstitutional because they "discriminated against the Mongolian," and once this barrier is removed "the great empire of the East was now in position to turn loose, without the shadow of reserve, the flood-gates of her pent-up human torrent." By the end of the story, "Mongolian Governors" in numerous states have declared martial law and branded "white" militias unlawful and riotous assemblies.[64] Similarly, in "The Battle of Wabash," an epistolary story published under the pseudonym Lorelle in the October 1880 issue of the *Californian*, a future author describes how a "Mongolian" army spread "a reign of horror, unknown even under the rage of the Huns, Vandals, and Goths . . . all over the land" until the American army was ultimately "exterminated."[65] In Woltor's *A Short and Truthful History*, the fictional "survivor" of an invasion by Chinese military and an uprising of a fifth column of Chinese immigrants compares the fate awaiting "the Caucasian race in America at the hands of the alien Mongolian, now irremediably engrafted on her shore," to the removal and genocide of American Indians by Europeans.[66] These fictional fantasies continued well into the twentieth century, as reflected in Philip Nowlan's *Armageddon 2419 A.D.* (1928) and *The Airlords of Han* (1929), in which Buck Rogers wakes up in the twenty-fifth century to discover that the Mongolian Han, a race originating "somewhere in the dark fastnesses of interior Asia," has "spread itself like an inhuman yellow blight over the face of the globe."[67]

During the 1870 legislative debates regarding the proposed amendment to remove the racial eligibility provision of the naturalization act, West Coast senators not only drew explicitly on the Mongolian racial classification to argue that Asians were not "free white persons" but also used the language of "hordes" and "barbarism" that emerged with the Mongolian racial classification in the mid-nineteenth century. During the debates, senators described Asian immigrants as a "countless horde of aliens," an

"influx of paganism and despotism," "hostile to free institutions," inhabiting a civilization "at war with ours."[68] As a compromise to defeat the proposed amendment to remove the word *white* from the act so that the argument that Asians were racially excluded from naturalization could be maintained, senators succeeded in substituting an amendment that did not remove the racial eligibility provision from the act but instead simply extended eligibility for naturalization to both "free white persons" and "aliens of African nativity and persons of African descent."[69] Recognizing the power of national crisis in racial eligibility discourse, a New York state court judge would later describe the extension of racial eligibility for naturalization to Africans as occurring "under the stress of the feeling generated by the late war."[70] The 1870 debates profoundly influenced later interpretations of the racial eligibility provisions of the naturalization act, often cited as evidence of a congressional intent that the Chinese and other natives of Asia were racially ineligible for naturalization because they were neither "white" nor "African."[71] As a result of this congressional history, many immigrants from Asia sought to establish their racial eligibility for naturalization by claiming that they were "free white persons" under the act.

The imaginary of dangerous Mongolian invaders also appeared in the United States Supreme Court's 1889 opinion in *Chae Chan Ping v. United States*, in which the Court held that the government had the absolute and unlimited power to unilaterally revoke certificates that had previously granted Chinese persons who had left the United States permission to return. Writing for the Court, Justice Stephen Field wrote that whatever license such certificates provided was revocable by the government "at its pleasure" because the power to exclude foreigners is an "incident of sovereignty." Field described the "great danger" that the West Coast perceived in the prospect that it would be "overrun" by "crowded millions of China" in "an Oriental invasion," and he defended the nation's duty to "preserve its independence, and give security against foreign aggression and encroachment," including that from "hordes of its people crowding in upon us," who, unwilling to assimilate, were "dangerous to its peace and security."[72] In many respects, *Chae Chan Ping* created the concept of plenary power, in this context Congress's full and complete authority to regulate the nation's borders without judicial review, which, as Sumi Cho and Gil Gott note, "embeds a racialized history in which race and law were mutually constituted."[73] The word *horde* in the 1870 debates and in *Chae Chan Ping* particularly invokes the image of dangerous Mongolian invaders

and threats to the territorial integrity of the nation, from which national sovereignty and related concepts were constructed.[74]

Although the 1870 debates regarding the racial eligibility provision of the naturalization act were often cited as congressional intent to exclude Asians from naturalization, because many courts continued to find that Chinese immigrants were "free white persons" and racially eligible for naturalization under the naturalization act, Congress also expressly provided in the Chinese Exclusion Act of 1882 that "no State court or court of the United States shall admit Chinese to citizenship."[75] This provision further complicated interpretations of the racial eligibility provisions of the naturalization act, as courts questioned why the express prohibition was necessary if, as one court put it, it was "simply declaratory of the existing conditions, unless it was feared that some one might figure out that the Chinese were free white persons or of African nativity or descent."[76] In *Rodriguez*, Judge Maxey wrote that Judge Sawyer's opinion in *Yup* appeared to indicate that the 1870 amendment of the naturalization act was intended "solely as a prohibition against the naturalization of members of the Mongolian race," leading Maxey to ask why Congress would expressly prohibit Chinese naturalizations in the Chinese Exclusion Act if they were not previously eligible.[77] Despite this apparent contradiction, however, many interpreted the congressional actions regarding racial eligibility for naturalization in the nineteenth century to reflect a policy of Asian exclusion. This interpretation of congressional intent exerted a powerful influence on later interpretations of the racial eligibility provisions of the naturalization act.

## The Bureau of Naturalization's Historical Interpretation of Race

Because the vast majority of the published judicial opinions in racial eligibility cases occurred after the United States Bureau of Naturalization was formed in 1906, the bureau's role in racial eligibility cases is crucial for understanding racial eligibility discourse. From 1790 to 1906, the naturalization act provided that any common law court of record in a state in which an applicant resided could grant a naturalization certificate.[78] This empowered many small municipal courts and justices of the peace to grant naturalizations, a practice that eventually led to inconsistent naturalization decisions and fraud as immigration increased in the late nineteenth

century. In response to these problems, President Theodore Roosevelt commissioned a study of the naturalization laws by the State Department, the Department of Justice, and the Department of Commerce and Labor, to be accompanied by a proposed draft of a new naturalization act.[79] Based on the recommendations of Roosevelt's commission, the Naturalization Act of 1906 limited jurisdiction over naturalizations to federal courts and state courts of record having a seal and a clerk with no monetary limit on their jurisdiction. These changes effectively removed jurisdiction over naturalizations from many smaller courts.

The new act also expanded the Bureau of Immigration into a new Bureau of Immigration and Naturalization and moved it from the Treasury Department to the Department of Commerce and Labor.[80] In addition to imposing an open hearing and recordkeeping requirement and criminal penalties for issuing false and counterfeit naturalization certificates, the 1906 act provided the federal government with the right to intervene in any naturalization proceeding, cross-examine the applicant and any witnesses, produce evidence, and oppose the application.[81] The act also separately charged United States district attorneys with the duty of instituting proceedings

> in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured.[82]

These provisions essentially empowered the government to intervene in naturalization proceedings at its discretion and specifically enjoined United States district attorneys to institute proceedings to cancel naturalization certificates found to have been fraudulently or illegally procured.

The relationship between the government's right to intervene in original naturalization proceedings and its duty to institute cancellation proceedings led some lower courts to disagree regarding the scope of jurisdiction in cancellation proceedings, particularly where the government sought to cancel naturalization certificates as "illegally procured" based solely on its disagreement with a court's interpretation of the law. Some courts held that an appeal from a judgment granting a naturalization certificate was the only recourse for such errors of law, while other courts found that a naturalization

certificate could be canceled at any time regardless of whether the action was based on factual or legal error as long as the applicant had been ineligible for naturalization when the certificate was granted.[83] Although the United States Supreme Court never considered whether a naturalization certificate based on an erroneous racial classification was "illegally procured" under the act, after the Court held that high caste Hindus were racially ineligible for naturalization in 1923 some federal courts granted government requests to cancel naturalization certificates that had been previously granted to applicants from the Indian subcontinent.[84] These cancellation proceedings are discussed in chapter 2.

As a result of the rights and duties given to the new Bureau of Naturalization, the bureau and its lawyers in the Department of Justice assumed a leading role in interpreting the racial eligibility provisions of the naturalization act. In fact, the government's role became so important after the Bureau of Naturalization was created that if the government did not oppose a naturalization on racial grounds its silence became a basis for holding that the applicant was racially eligible for naturalization by default. In a 1910 judicial opinion, for example, Judge Francis Lowell of the United States District Court for the District of Massachusetts wrote that the court routinely granted applications that were not opposed by the government:

> Where the attorney attends at the hearing, and in behalf of the United States examines the petitioner and his witnesses with the freedom permitted in cross-examination; where the right to offer additional evidence is fully recognized, being often exercised in like case—the court is ordinarily justified in restricting its function to a decision as between litigants . . . After a hearing conducted as above described, the court will ordinarily admit [the applicant] to citizenship in the absence of declared opposition by the United States.[85]

As Lowell's comment reflects, the bureau's role fundamentally changed the institutional practices of the courts surrounding the racial eligibility provisions of the naturalization act.

The bureau's influence on the interpretation of the racial eligibility provisions of the naturalization act was consistent with the political branch of government to which it belonged. Soon after the bureau was formed, Chief of Naturalization Richard Campbell became the target of criticism from

the secretary of commerce and labor, other government agencies within the political branch, and the public when he questioned whether "Turks, peoples of the Barbary states and Egypt, Persians, Syrians, and 'other Asiatics'" were racially eligible for naturalization. His comments regarding Turks, Syrians, and other groups within the Ottoman Empire raised particular concerns. Almost immediately, the Ottoman chargé d'affaires published an open letter in the *Washington Post* objecting to Campbell's interpretation,[86] the State Department objected to the interpretation,[87] and the Department of Justice instructed its attorneys to "take no further proceedings with respect to naturalization until the department has had an opportunity to give the subject proper study."[88] The State Department's influence on racial eligibility discourse can be seen in other instances as well. During legislative debates regarding the Asiatic Barred Zone restriction in the Immigration Act of 1917, for example, United States Senator Henry Cabot Lodge noted in reference to the racial eligibility provisions of the naturalization act that the State Department had asked, "in the interest of foreign relations," that Congress avoid naming specific racial groups for exclusion.[89]

When Secretary of Commerce and Labor Charles Nagel learned of Campbell's statement, he immediately admonished Campbell for misstating the bureau's position. In a November 11, 1909, letter, Nagel reminded Campbell of the bureau's policy of leaving the interpretation of the racial eligibility provisions of the naturalization act to the courts and that the bureau "may be considered to have complied with its duty when it has placed the court in possession of facts."[90] This policy was later confirmed in a memorandum from Campbell to the naturalization examiners throughout the country in which he advised them with regard to "the doubt heretofore expressed by this office in regard to whether Asiatics, so-called, may be naturalized," that they should limit themselves to seeing that

> the race or nationality of the petitioner is made known to the court, either on the record or at the hearing, and to advise the court of the existence of any prior judicial decisions in the premises. The proper interpretation of the statute . . . is a matter which rests with the courts, and it is no part of the business of this Department to endeavor to secure any particular interpretation. It is desired, therefore, that, having apprised the court of the facts in any particular case, you should refrain from urging the adoption of one construction or the other.[91]