THE "FREE WHITE PERSON" CLAUSE OF THE NATURALIZATION ACT OF 1790 AS SUPER-STATUTE

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ABSTRACT

A body of legal scholarship persuasively contends that some judicial decisions are so important that they should be considered part of the canon of constitutional law including, unquestionably, Marbury v. Madison *and* Brown v. Board of Education. *Some decisions, while blunders, were nevertheless profoundly influential in undermining justice and the public good. Scholars call cases such as* Dred Scott v. Sandford *and* Plessy v. Ferguson *the anticanon. Recognizing the contemporary centrality of statutes, Professors William Eskridge and John Ferejohn propose that certain federal laws should be recognized as part of legal canon because of their extraordinary influence and duration. These so-called "super-statutes" include the Sherman Antitrust Act of 1890 and the Civil Rights Act of 1964. This Article proposes that the Naturalization Act of 1790 is a super-statute whose impact is not fully appreciated. Responding to George Washington's first Address to Congress and reflecting a complaint leveled against King George III in the Declaration of*

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Independence, in the 1790 Act, the First Congress limited naturalization to "any alien being a free white person." The racial restriction, as modified, would remain in effect until 1952, inducing White immigration and discouraging that of others. Through the mechanism of the "declaration of intent to naturalize," added in a 1795 amendment, Congress made it possible for state and federal law to grant political and economic rights to White immigrants immediately upon arrival while ensuring that non-White immigrants could never enjoy them. The Naturalization Act of 1790 helps explain why, for example, as late as 1960, more than 99 percent of Americans were White or Black. It also resolves the question of the racial attitudes of the Framers—whether or not they supported slavery, a majority of them unambiguously conceived of the United States as a White country.

Notwithstanding its racism, the Naturalization Act of 1790 has earned recognition as among the most effective pieces of legislation ever enacted by Congress. It deserves a place of dishonor alongside segregation laws, the Indian Removal Act, prohibitions on interracial marriage, and other laws establishing White supremacy.

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INTRODUCTION

In recent years, scholars have classified a body of landmark cases as part of the "canon" of American constitutional law.[1] There has also been substantial work on cases that were influential and important in a negative way—*Johnson and Graham's Lessee v. M'Intosh*, asserting that the United States government owns all lands occupied or used by Native Americans, who had no ownership in such land;[2] *Prigg v. Pennsylvania*, denying the need for any judicial hearing or due process rights for people seized as fugitive slaves;[3] *Dred Scott v. Sandford*, denying citizenship to people of African ancestry;[4] and *Plessy v. Ferguson*, upholding racial segregation,[5] are key examples of the anticanon.[6] In recognition of the centrality of statutes in contemporary law, Professors William Eskridge and John Ferejohn proposed that some federal statutes are so significant and influential that they should be understood as super-statutes.

> A super-statute is a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does "stick" in the public culture such that (3) the super-statute and its institutional or normative

1. An early, influential piece is J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998); *see also* Mark Tushnet, *The Canon(s) of Constitutional Law: An Introduction*, 17 CONST. COMMENT. 187 (2000) (identifying current themes in the constitutional law canon); Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425 (2017); Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295 (2000); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 243 (1998).

2. 21 U.S. (7 Wheat.) 543, 586 (1823). We could also include here the other two cases in the Marshall trilogy, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 48-49 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 595-96 (1832).

3. 41 U.S. (16 Pet.) 539, 632 (1842).

4. 60 U.S. (19 How.) 393, 403-05 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

5. 163 U.S. 537, 543 (1896).

6. Notable work in this area includes Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011); Akhil Reed Amar, Plessy v. Ferguson *and the Anti-Canon*, 39 PEPP. L. REV. 75 (2011); and Mark A. Graber, *Hollow Hopes and Exaggerated Fears: The Canon/Anticanon in Context*, 125 HARV. L. REV. F. 33 (2011).

> principles have a broad effect on the law—including an effect beyond the four corners of the statute.[7]

Examples of super-statutes include the Civil Rights Acts of 1866, 1871,[8] and 1964;[9] the Voting Rights Act of 1965;[10] the Sherman Anti-Trust Act of 1890;[11] the National Labor Relations Act (Wagner Act) of 1935;[12] and the Endangered Species Act of 1973.[13] Other acts not mentioned by Eskridge and Ferejohn might include the Social Security Act of 1935;[14] the Social Security Amendments of 1965 (the Medicare and Medicaid Act of 1965);[15] and the Immigration and Nationality Act of 1965.[16]

Just as cases promoting liberty and justice are sometimes matched by decisions doing the opposite, it is also the case that laws that do not promote the common good can rise to the rank of super-statutes. Surely among these would be the Fugitive Slave Laws of 1793[17] and 1850;[18] the Indian Removal Act of 1830;[19] the Chinese Exclusion Act of 1882;[20] and the Immigration Act of 1924;[21] which

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7. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001).

8. *Id.* at 1225; Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27; Civil Rights Act of 1871, Pub. L. No. 42-22, 17 Stat. 13 (codified in part at 42 U.S.C. §§ 1981-83).

9. *Id.* at 1237; Civil Rights Act of 1964, 42 U.S.C. § 1983.

10. Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

11. Eskridge & Ferejohn, *supra* note 7, at 1231; 15 U.S.C. §§ 1-38.

12. *Id.* at 1227; National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169).

13. Eskridge & Ferejohn, *supra* note 7, at 1242; Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended in scattered sections of 16 U.S.C.). Some scholars propose that state enactments can also be super-statutes. *See, e.g.*, Christopher S. Elmendorf & Timothy G. Duncheon, *When Super-Statutes Collide: CEQA, The Housing Accountability Act, and Tectonic Change in Land Use Law*, 49 ECOLOGY L.Q. 655, 661 (2023).

14. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (codified as amended at 42 U.S.C. §§ 301-1305).

15. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended at 42 U.S.C. § 1305).

16. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

17. Fugitive Slave Law of 1793, 1 Stat. 302.

18. Fugitive Slave Law of 1850, 9 Stat. 462.

19. Indian Removal Act of 1830, 4 Stat. 411.

20. Chinese Exclusion Act of 1882, 22 Stat. 58.

21. Immigration Act of 1924, 43 Stat. 153; *see* Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J.

dramatically restricted immigration of "undesirable" White people from southern and eastern Europe and eliminated *all* immigration for most non-White people. In this Article we nominate a clause of the comparatively obscure[22] Naturalization Act of 1790[23] as a super-statute, one that established a fundamental principle of racism in American law, state and federal, by limiting naturalization to "any ... free white person."[24] An early project of the First Congress, the Naturalization Act of 1790 remained in effect with various modifications until it was finally repealed in 1952.[25] The 1790 Act shaped both broad areas of state and federal law and the very composition of the people of the United States.[26]

Immigration and naturalization were central to the revolutionaries and Framers. One count against King George III in the Declaration of Independence charged that, "He has endeavoured to

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1111, 1127-31 (1998) (describing the National Origins Quota System created by the 1924 Act).

22. For example, Professors Eskridge and Ferejohn propose that "[t]he first Congresses adopted few super-statutes" identifying as an exception "the law creating the Bank of the United States." Eskridge & Ferejohn, *supra* note 7, at 1223. This is not to suggest that Professors Eskridge and Ferejohn were unaware of the 1790 Act or its racial nature. *See* William N. Eskridge, Jr., *The Relationship Between Obligations and Rights of Citizens*, 69 FORDHAM L. REV. 1721, 1725 n.22 (2001) (noting racial restriction in the 1790 Act).

23. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (replaced in 1795).

24. *Id.*; *see generally* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (Rev. Ed. 2006). There seems to have been no discussion at the time over why Congress included "free" in this clause since there were no White slaves in the western world at this time and the few indentured servants in the nation were "free" although subject to the contractual obligation of their indentures. There had been White Europeans held as slaves as late as the fourteenth and fifteenth centuries, and perhaps this explains the usage. In addition, at this time White Europeans were held as slaves in North Africa under Muslim law, and this practice would continue into the nineteenth century. *See* Paul Finkelman & Seymour Drescher, *The Eternal Problem of Slavery in International Law: Killing the Vampire of Human Culture*, 2017 MICH. ST. L. REV. 755, 755-803 (2017).

25. *The Nationality Act of 1790*, IMMIGR. HIST., https://immigrationhistory.org/item/1790-nationality-act/ [https://perma.cc/CA6X-MVVY].

26. Because of its longevity—part of American law for more than 160 years—and its dramatic impact on shaping the very nature of American society, the law might plausibly be ranked as a fundamental "organic law" of the nation, along with the Declaration of Independence, Articles of Confederation, Northwest Ordinance, and the Constitution, which have been recognized by a range of authorities as the "four organic laws" of the United States. Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. PA. L. REV. 1631, 1631-32 (2019); John C. Eastman, *Lessons from the Past*, 5 GREEN BAG 2d 207, 213-14 (2002); Juan F. Perea, *Denying the Violence: Missing Constitutional Law of Conquest*, 24 U. PA. J. CONST. L. 1205, 1343 (2022). At a minimum, the implications of the fundamental laws and ideals of the Nation's founders and their posterity can only be understood in light of the policy of the naturalization law.

prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands."[27] Accordingly, the original Constitution gave Congress the power to establish "an uniform Rule of Naturalization."[28] In his first annual address to Congress in January, 1790, President George Washington noted that "[v]arious considerations also render it expedient that the terms on which foreigners may be admitted to the rights of citizens, should be speedily ascertained by a uniform rule of naturalization."[29] The First Congress responded to President Washington with the Naturalization Act of 1790, which made naturalization a relatively simple process. Unlike naturalization in other countries, the Act did not have a religious test and "refrained from subjecting applicants to political vetting" except for "foreign-born persons who had left the United States at the time of the Revolution."[30] The Act was self-consciously intended to encourage immigration of anyone from Europe or of European descent, if the immigrant was "a free white person."[31] The Act was a major step in the creation of "A nation of

27. The Declaration of Independence, 1 Stat. 1, 2 (1776).

28. U.S. CONST. art. I, § 8, cl. 4.

29. President George Washington, Annual Address to Congress (Jan. 8, 1790), *in* 1 AM. ST. PAPERS: FOR. RELS. 11, 12. The term "State of the Union Address" would not be used until 1934 and was not generally part of the American political lexicon until 1947. MARIA KREISER & MICHAEL GREENE, CONG. RSCH. SERV., R44770, HISTORY, EVOLUTION, AND PRACTICES OF THE PRESIDENT'S STATE OF THE UNION ADDRESS: FREQUENTLY ASKED QUESTIONS 4-5 (2023).

30. ARISTIDE R. ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA 86 (2006).

31. Naturalization Act of 1790, ch. 3, 1 Stat. 103, *repealed by* Naturalization Act of 1795, ch. 20, 1 Stat. 414. At no point did Congress provide a definition of a "white person." The common notion in the US, known as the one drop rule, is that any person of any mixed ancestry was not White. But no states adopted the one drop rule until the twentieth century. In 1924, Virginia passed a law defining people as "White" if they had no non-White ancestors. An Act to Preserve Racial Integrity, Act of March 20, 1924, ch. 371, § 5099a, 1924 Va. Acts 534 (repealed 1975). In 1930, the state codified the one drop rule, declaring that people could not be considered "White" if they had any sub-Saharan African ancestry. But the law also allowed people who were otherwise "White," but were one-sixteenth or less Native American to be considered White, which was known as the Pocahontas rule: "Every person in whom there is ascertainable any negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one-fourth or more of American Indian blood shall be deemed an American Indian." An Act to amend and re-enact section 67 of the Code of Virginia defining colored persons and American Indians and tribal Indians, Act of March 4, 1930 Va. Acts 96-97; *see* Kevin N. Maillard, *The Pocahontas Exception: The Exemption of American Indian Ancestry from Racial Purity Law*, 12 MICH. J. RACE & L. 351 (2007).

immigrants ... but not just any immigrants."[32] As Ian Haney López noted in his now-classic study of race and naturalization *White by Law*, "[t]he United States is ideologically a White country not by accident, but by design at least in part affected through naturalization and immigration laws."[33]

One indication of the Act's influence is its longevity; it was, as noted above, in effect as amended from 1790 until 1952.[34] Congress amended the Act several times in the Early National period and considerations of equality were discussed at length. Some elected representatives spoke in favor of naturalizing Jews and Catholics without discrimination (Congress agreed sub silentio),[35] debated

32. ZOLBERG, *supra* note 30, at 1.

33. HANEY LÓPEZ, *supra* note 24, at 82.

34. Technically, the 1795 Act repealed the 1790 Act, and so on. However, many requirements remained the same or were expressed in the same terms. With respect to the "free white person" clause, the Supreme Court described subsequent laws as "reenacting the naturalization test of 1790." United States v. Thind, 261 U.S. 204, 214 (1923); *see also* Ozawa v. United States, 260 U.S. 178, 192 (1922) ("In all of the Naturalization Acts from 1790 to 1906 the privilege of naturalization was confined to white persons."); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 168 (1874) (1790 restrictions have "in substance, been retained in all the naturalization laws adopted since"); Steamship Co. v. Joliffe, 69 U.S. (2 Wall.) 450, 458 (1864) (noting in the context of a different statute that "[t]he new act took effect simultaneously with the repeal of the first act; its provisions may, therefore, more properly be said to be substituted in the place of, and to continue in force with modifications, the provisions of the original act, rather than to have abrogated and annulled them").

35. This was actually a progressive change. At the time, England did not allow Jewish immigrants to naturalize, and various countries discriminated against Jews and some other Christians based on their faith. Paul Finkelman & Lance J. Sussman, *The American Revolution and the Emergence of Jewish Legal and Political Equality in the New Nation*, 75 AM. JEWISH ARCHIVES J. 1 (2023); *see also* NOAH PICKUS, TRUE FAITH AND ALLEGIANCE: IMMIGRATION AND AMERICAN CIVIC NATIONALISM 23-24, 31 (2005). Similarly, the New York Constitution of 1777 appeared to limit the naturalization of Catholics and perhaps Anglicans, since the head of that church was King George III. *See* N.Y. CONST. of 1777, art. XLII. The clause provided:

> And this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare that it shall be in the discretion of the legislature to naturalize all such persons, and in such manner, as they shall think proper: *Provided*, All such of the persons so to be by them naturalized, as being born in parts beyond sea, and out of the United States of America, shall come to settle in and become subjects of this State, shall take an oath of allegiance to this State, and abjure and renounce all allegiance and subjection to all and every foreign king, prince, potentate, and State in all matters, ecclesiastical as well as civil.

Id. The federal law of 1790 superseded this state provision, and thus the United States became the first nation in the Atlantic World that did *not* impose a religious test for naturalization. For discussion of this issue, see Finkelman & Sussman, *supra* note 35. It was

making citizens of European hereditary nobles who found their way here, and considered whether it was consistent with equality to allow naturalized citizens to own enslaved persons. Yet, research has uncovered no opposition to the free White person restriction. This appears to have been a policy so widely shared or so sufficiently settled that discussion was unnecessary.

Racial restrictions on citizenship in federal law provided the foundation for a variety of other discriminatory laws. The states and the federal government offered political and economic benefits to those who had taken the first statutory step toward naturalization, which was filing what was called a "declaration of intention" to naturalize.[36] Only a person eligible to naturalize—which would exclude anyone who was not White—could file such a valid declaration; for example, a White immigrant fresh off the boat could file a declaration of intention to naturalize.[37] The law required a waiting period to become a full U.S. citizen.[38] However, under the laws of some states and territories, a declarant immediately became eligible to vote or, importantly, to own land.[39] Such laws were, to a degree, a progressive change over traditional Anglo-American land law, which usually limited land ownership to citizens.[40] But, of course, while functioning to welcome White immigrants from Europe, these rules also discriminated against non-White immigrants.

Some benefits offered by federal and state law turned not on whether an immigrant had fully naturalized or had started the naturalization process but on whether they were racially eligible to become a citizen.[41] In this way, the laws carried out the intention of the 1790 Act: encouraging desirable White immigration, without offering benefits or removing restrictions with respect to noncitizens of undesirable races.

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obviously not progressive on the basis of race.

36. *See* Gabriel J. Chin, *A Nation of White Immigrants: State and Federal Racial Preferences for White Noncitizens*, 100 B.U. L. REV. 1271, 1271, 1273 (2020).

37. *See id.* at 1274-75.

38. *See id.*

39. It is worth noting that the "fear" of aliens voting that emerged in the twenty-first century would have surprised most political leaders in the eighteenth and nineteenth centuries, when noncitizens voted in many places. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 32-33 (2000).

40. *See id.* at 5-6.

41. *See* Chin, *supra* note 36, at 1273-75.

In the aftermath of the Civil War, some members of Congress openly opposed racial restriction in principle. They were a minority, however. Just as at the time of the framing, Congress repeatedly elected to restrict naturalization by race. In 1870, Congress amended the existing naturalization law to punish fraud, perjury, and other crimes associated with aliens becoming citizens.[42] The law left in place the existing rules on naturalization for any "free white person."[43] However, reflecting the fact that slavery was over and more than 200,000 Black Americans had served in the military to preserve the Union and defeat southern treason, the final section of the Act also provided "[t]hat the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent."[44] But after several opportunities to consider the issue, Congress failed to make the law race neutral in toto.[45] The Republicans who controlled Congress in this period cared deeply about Black civil rights and making formerly enslaved and free Black persons "equal" under the law, but a majority refused to open naturalized American citizenship to any other non-White newcomers.[46]

The term "White" in the naturalization laws was also vital in the courts, not just in direct application,[47] but in influencing other bodies of law. Although it may well be that Congress in 1790 intended to exclude persons of African ancestry and Indians, since there were virtually no other people of color in the nation at the time, the courts in subsequent years readily applied the law to other non-White persons.[48] For example, in *Dred Scott* and other important

42. Naturalization Act of 1870, Pub. L. No. 41-254, §§ 1-3, 16 Stat. 254.

43. *See id.*

44. *Id.* § 7. This law allowed for the naturalization of formerly enslaved persons residing in the United States who had been legally imported before 1808 or illegally smuggled into the country thereafter. *See id.* Since they were not "born" in the United States, they were not considered citizens under the Fourteenth Amendment. This law also allowed for the naturalization of migrants from Haiti, the British Caribbean, and other places in the Western Hemisphere, as well as migrants from Africa. 30 Rev. Stat. § 2169 (1874).

45. *See* Naturalization Act of 1870.

46. *See* Civil Rights Acts of 1866, 1870, 1875; U.S. CONST. amends. XIII-XV.

47. One of the legal contributions of *White By Law* is that it "examines a series of cases from the first part of this [i.e., the twentieth] century in which state and federal courts sought to determine, and thereby partially defined, who was White enough to naturalize as a citizen." HANEY LÓPEZ, *supra* note 24, at xxi.

48. *See* Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* 3, 19 (U.S. Census Bureau, Working Paper No. 56) (noting that there

cases, the Supreme Court and other courts recognized the 1790 Act as establishing a federal policy of White racial nationalism.[49] In 1922, a unanimous Supreme Court recognized the foundational nature of the 1790 Act, calling the racial restriction "a rule in force from the beginning of the Government, a part of our history as well as our law, welded into the structure of our national polity by a century of legislative and administrative acts and judicial decisions."[50]

The 1790 Act then had an extraordinary career, both in terms of duration and influence. It facilitated and encouraged the immigration of White people by offering full citizenship and status and economic opportunities along the way. Simultaneously, it discouraged the immigration of non-White people from other countries by creating legal barriers to their economic and political participation. The policy of the 1790 Act was carried forward in substantive immigration laws[51] as well as through citizenship law. The 1960 Census reported that 99.1 percent of the U.S. population was either "White" or "Negro"; Indians, Chinese, Japanese, Filipinos, and "All Others" collectively made up less than 1 percent of the nation.[52] This

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was no data for other non-White persons in 1790 census).

49. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 419-20 (1857); Ozawa v. United States, 260 U.S. 178, 194-95.

50. *Ozawa*, 260 U.S. at 194.

51. Paul Finkelman, *Coping with a New "Yellow Peril": Japanese Immigration, The Gentlemen's Agreement, and the Coming of World War II*, 117 W. VA. L. REV. 1409 (2015). In addition to Professor Haney López, Professor Bill Ong Hing has explored how immigration policy has shaped the Asian American community, and the United States as a whole. *See* BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY (2004); BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990 (1993). That immigration law shaped the racial demographics of the country is not controversial; even white supremacists agree. For a modern, full-throated endorsement of this racial policy, see PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER 59 (1995) ("As late as 1950, somewhere up to nine out of ten Americans looked like me. That is, they were of European stock. And in those days, they had another name for this thing dismissed so contemptuously as 'the racial hegemony of white Americans.' They called it 'America.'"); *id.* at 60 (chart showing national origins of immigrants, 1821-1990). Brimelow exaggerates his calculations, since in 1950 non-Whites made up 10.5 percent of the United States population, and this figure did not include Hispanic Americans, who are today categorized as non-Whites, or Hawaii which was about 80 percent non-White and Alaska which was about 50 percent non-White. *See* Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* 3, 19 (U.S. Census Bureau, Working Paper No. 56), Tables A-1, 16, and 26.

52. U.S. CENSUS BUREAU, RACE OF THE POPULATION OF THE UNITED STATES BY STATES:

is more complicated than the raw numbers suggest, because there was no separate racial or ethnic category for Hispanic or Latinx Americans.[53] Nevertheless, the purpose of the First Congress to populate the United States with White citizens must be regarded as one of the most effective laws ever enacted. Congress set a goal and successfully carried it out.

Part I discusses the "free white person" clause of the Naturalization Act of 1790, the creation of the declaration of intention to naturalize in 1795, and the debates that surrounded these early laws. Part II discusses some of the noncitizenship bodies of law which arose to leverage the racial restriction on citizenship created in 1790. Part III discusses the influence of the clause in the Supreme Court, and its survival, in amended form, through the end of slavery and Reconstruction. Part IV describes the end of the policy, coincident with World War II and the Cold War.

I. NATURALIZATION LAW AND THE POLITICAL COMMUNITY

A. The Naturalization Act of 1790

Americans have long debated whether the original Constitution of 1787 protected slavery or merely accommodated it. Perhaps the most famous of the contestants were William Lloyd Garrison, who called the Constitution "a covenant with death" and "an agreement with Hell,"[54] and Frederick Douglass who initially agreed with Garrison, but later argued, probably for strategic political reasons, that the Constitution contained the seeds of reform.[55] Many others

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1960 3, Tbl. 56 (Sept. 7, 1961) (Supp. Rpt. No. PC(S1)-10).

53. *See id.*

54. PAUL FINKELMAN, SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT 11 (2018); *see also* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 3 (3d ed. 2014); WILLIAM M. WIECEK, THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 62-64 (1977); DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION (2009); Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337 (1987); Raymond T. Diamond, *No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 VAND. L. REV. 93 (1989).

55. *See* Paul Finkelman, *Frederick Douglass's Constitution: From Garrisonian Abolitionist to Lincoln Republican*, 81 MO. L. REV. 1, 6 (2016). Ruth Colker wrote:

> By the late 1830s, William Lloyd Garrison had taken the position that the Constitution was so profoundly pro-slavery that the only solution was for the

have taken a position on the issue.[56] The debate continues with full force today, exemplified in rulings by the Florida Board of Education to effectively prohibit the teaching of African American history in the state's public schools and controversial attacks on the College

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> free states to secede from the Union. While Frederick Douglass initially agreed with Garrison that the Constitution was inextricably pro-slavery, Douglass eventually abandoned that position and argued that the Constitution could be used as a vehicle for reform. We are in a moment where the Garrison/Douglass debate should be rekindled. Despite the ratification of the Thirteenth, Fourteenth, and Fifteenth amendments, is the Constitution still a profoundly pro-slavery document? Or can it be used as an abolitionist tool?

Ruth Colker, *The White Supremacist Constitution*, 2022 UTAH L. REV. 651, 656 (2022) (citations omitted).

56. Sarah Cleveland argues the Constitution reflected the mixed attitudes toward slavery that prevailed during the Founding era. Sarah H. Cleveland, *Foreign Authority, American Exceptionalism, and the* Dred Scott *Case*, 82 CHI.-KENT L. REV. 393, 425 (2007). Thus, she quotes John McLean's dissent in *Dred Scott* that he would

> prefer the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution in all its bearings [on slavery] rather than to look behind that period, into a traffic which is now declared to be piracy, and punished with death by Christian nations. I do not like to draw the sources of our domestic relations from so dark a ground.

Id.; *see also* Phyllis Goldfarb, *Equality Writ Large*, 17 NEV. L.J. 565, 572 (2017) ("Despite the fact that slavery is not prohibited by the text of the original Constitution—because the political realities of forming a union of free and slave states in 1787 could not accommodate such a prohibition—some abolitionists argued that the Declaration's equality principles imbued the spirit of the Constitution. It could not be otherwise, their argument ran, because our two national blueprints could not be inconsistent.") (citations omitted); Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1125 (2012) ("*Federalist No. 54* shows that part of Madison's public defense of the Constitution included the defense of some of its proslavery provisions. Madison and his reading public were well aware that aspects of the Constitution protected slavery."); Paul Finkelman & Gabriel Jack Chin, *How We Know the U.S. Constitution Was Proslavery*, 9 CONST. STUD. 1 (2024).

Former law professor, now Princeton University President, Christopher L.M. Eisgruber, took seriously the anti-slavery claim of Justice Joseph Story, who participated in many decisions upholding slave ownership:

> [A]ccording to Story, the Constitution aimed to create not merely a free North, or a collection of states partly free and partly slave, but rather a free Union. In order to effectuate this purpose, the Constitution had to accommodate and include both the recognition that slavery was immoral and also the means sufficient to keep the Union together until the federal government could eliminate slavery.

Christopher L.M. Eisgruber, Note, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273, 296 (1988). For a critical analysis of Story's claim, pointing out that the evidence for Story's quotation is highly questionable, see Paul Finkelman, *Story Telling on the Supreme Court:* Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247, 282-92 (1994).

Board's preliminary proposed curriculum for AP African American Studies.[57] A central objection was that conservative contemporary scholars insisted that "America was not conceived in racism"[58] in response to historical views they deem too critical of the Founders of the United States.[59] Presidential Executive Orders and anti-

57. *See Revised AP African American Studies Class Drops Controversial Topics After Criticism*, NPR (Feb. 1, 2023, 2:43 PM), https://www.npr.org/2023/02/01/1153364556/ap-african-american-studies-black-history-florida-desantis [https://perma.cc/3XQ8-YHM9]; Ana Ceballos & Alyssa Johnson, *Florida Reviewers of AP African American Studies Sought 'Opposing Viewpoints' of Slavery*, MIA. HERALD (Aug. 31, 2023, 10:02 AM), https://www.miamiherald.com/news/local/education/article278582149.html [https://perma.cc/FP4T-4MNX].

58. *See, e.g.*, Ryan P. Williams, *America Was Not Conceived in Racism*, NEWSWEEK (July 15, 2020, 3:08 PM), https://www.newsweek.com/america-was-not-conceived-racism-opinion-1518091 [https://perma.cc/SLJ3-CGA6] (op-ed by the president of Claremont Institute and editor of *Claremont Review of Books*); Thomas D. Klingenstein & Ryan P. Williams, *America Is Not Racist*, AM. MIND (June 3, 2020), https://americanmind.org/salvo/america-is-not-racist/ [https://perma.cc/7N78-P2AQ]; Arthur Milikh, *1776, Not 1619*, CITY J. (Oct. 29, 2019), https://www.city-journal.org/new-york-times-1619-project [https://perma.cc/FVK3-Z9QS] (denying that "any statements exist from the Founders elaborating a defense of human inequality or arguing that natural rights are based on race"); Timothy Sandefur, *The Founders Were Flawed. The Nation Is Imperfect. The Constitution Is Still a 'Glorious Liberty Document.'*, REASON (Aug. 21, 2019, 11:00 AM), https://reason.com/2019/08/21/the-founders-were-flawed-the-nation-is-imperfect-the-constitution-is-still-a-glorious-liberty-document/ [https://perma.cc/7X6H-Q2Y5] (asserting that idea that the Founders were racist arise from people who "disregarded the facts of history to portray the founders as white supremacists"); *see also* Goldberg v. Kelly, 397 U.S. 254, 264-65 (1970) ("From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders."); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."). For discussion criticizing an earlier effort to deny that the U.S. was racist, see Paul Finkelman, *The Rise of the New Racism*, 15 YALE L. & POL'Y REV. 245 (1996) (reviewing DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY (1995)). Criticism of the 1619 Project, written by a journalist, has also come from well-known scholars who are not "conservative," but find the scholarship in the project deeply flawed. See, for example, an essay written by a leading African American historian at Northwestern. Leslie M. Harris, *I Helped Fact-Check the 1619 Project. The Times Ignored Me.*, POLITICO (Mar. 6, 2020, 5:10 AM), https://www.politico.com/news/magazine/2020/03/06/1619-project-new-york-times-mistake-122248 [https://perma.cc/48GS-AGAS].

59. *See, e.g.*, Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 984 (1987) (noting the "founding principles of equality and liberty"); PRESIDENT'S ADVISORY 1776 COMM'N, THE 1776 REPORT (Jan. 2021) ("The principles of the American founding can be learned by studying the abundant documents contained in the record. Read fully and carefully, they show how the American people have ever pursued freedom and justice, which are the political conditions for living well."); Wilfred Reilly, *The Moral Case for American Goodness Endures*, REALCLEARPOLITICS, https://www.realclearpolitics.com/disputed_questions/is-america-good.html [https://perma.cc/8VNQ-BZX4] ("Was the U.S. 'founded' on white supremacy? It is worth noting that, as both Abraham Lincoln and Frederick Douglass pointed out, the word 'slavery'

Critical Race Theory laws also warn against accusing the founders of racism.[60]

Whatever the intention of the various Framers with respect to slavery or the Constitution, there can be no question that the First Congress conceived of the United States as a White nation. This decision is reflected in the Naturalization Act of 1790, signed into law by George Washington on March 26, 1790.[61] It provided: "That

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is never mentioned in the Constitution. The critical topics discussed in the Bill of Rights include free speech, religious liberty, the right of peaceable assembly, the right to bear arms, and freedom from state quartering of soldiers. The importance of white supremacy, or how to maintain its existence going forward, is never discussed in the Bill of Rights or in the Constitution's earlier articles. There is a critical difference between saying that the Founding Fathers were personally racist to one extent or another—by today's standards, most of them were, as were virtually all human beings at the time—and saying that racism was an ideological or moral pillar of the nation they established.").

60. A Trump Executive Order claims that one of the "fundamental premises underpinning our Republic [was that] all individuals are created equal and should be allowed an equal opportunity under the law to pursue happiness and prosper based on individual merit." Exec. Order No. 13950, 3 C.F.R. 433, 435 (2021); *see also* Hannah Daigle, *Critical Race Theory Through the Lens of* Garcetti v. Ceballos, 20 FIRST AMEND. L. REV. 230, 245 (2022) ("[I]n Michigan, if schools teach students that the Declaration of Independence or the United States Constitution are 'fundamentally racist[,]' up to 5% of their funding will be withheld."); Dylan Salzman, Comment, *The Constitutionality of Orthodoxy: First Amendment Implications of Laws Restricting Critical Race Theory in Public Schools*, 89 U. CHI. L. REV. 1069, 1071-72 (2022) (noting that Texas law prohibits teaching that "with respect to their relationship to American values, slavery and racism are anything other than deviations from ... the authentic founding principles of the United States"); Paul Finkelman, *The Racist Roots of Ron DeSantis's "Don't Say Gay" Law*, WASH. MONTHLY (June 8, 2022), https://washingtonmonthly.com/2022/06/08/the-racist-roots-of-ron-desantis-dont-say-gay-law/ [https://perma.cc/S9PG-CETU].

61. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795). The racial implications of the 1790 Act are widely recognized by scholars. *See, e.g.*, DAVID SCOTT FITZGERALD & DAVID COOK-MARTIN, CULLING THE MASSES: THE DEMOCRATIC ORIGINS OF RACIST IMMIGRATION POLICY IN THE AMERICAS 82 (2014) ("The United States was ... the first independent country in the Americas to introduce racial selection in policies of naturalization (1790) and immigration (1803) and late to end racial discrimination in policies of naturalization (1952) and immigration (1965)."); KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 50-51 (2007) ("For much of U.S. history, race has been expressly incorporated into the immigration laws and their enforcement. Laws like the Chinese exclusion laws, the national-origins quota system, which preferred immigrants from northern Europe, and the requirement that an immigrant be 'white' to naturalize, which was the law of the land from 1790 to 1952, exemplify this express racial bias."); KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 153-54 (2004) ("Before 1952, the law prohibited most non-White immigrants from naturalizing, thereby forever relegating noncitizens of color to 'alien' status and effectively defining them as permanent outsiders to the national community."); DESMOND KING, MAKING

any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof."[62] The vision and goals of Congress are supported by a series of other laws of the period,[63] including those creating a national militia composed of "every free able-bodied white male citizen,"[64] the first Fugitive Slave Act,[65] and a law limiting carriage of the mail—one of the most important federal functions of the era—to "free white person[s]."[66] Congress refused to even consider a bill to protect free Black people from being kidnapped and taken across state lines to be sold as slaves,[67] and established slavery in the new national capital.[68] The Naturalization Act of 1790 and laws enacted by the founding generation are, for some reason, generally omitted from arguments that the Framers were not racist.

AMERICANS: IMMIGRATION, RACE, AND THE ORIGINS OF THE DIVERSE DEMOCRACY 24 (2000) (noting that the Naturalization Act of 1790 "excluded nonwhites" which "sealed the fate not only of Asians resident in the United States but also of black immigrants"); DAVID M. REIMERS, UNWELCOME STRANGERS: AMERICAN IDENTITY AND THE TURN AGAINST IMMIGRATION 9 (1998) (noting that "[t]he federal naturalization statute of 1790 permitted white immigrants to become citizens after two years residence in the United States"); Angela M. Banks, *Precarious Citizenship: Asian Immigrant Naturalization 1918 to 1925*, 37 L. & INEQ. 149, 150 n.1 (2019); Devon W. Carbado, *Yellow by Law*, 97 CAL. L. REV. 633, 634 (2009); Robert S. Chang, *The 14th Amendment and Me: How I Learned Not to Give Up on the 14th Amendment*, 64 HOW. L.J. 53, 57 (2020); Neil Gotanda, *The "Common Sense" of Race*, 83 S. CAL. L. REV. 441, 446 (2010); Ediberto Román, *Who Exactly Is Living* La Vida Loca*?: The Legal and Political Consequences of Latino-Latina Ethnic and Racial Stereotypes in Film and Other Media*, 4 J. GENDER RACE & JUST. 37, 59 (2000); SpearIt, *Why Obama Is Black: Language, Law and Structures of Power*, 1 COLUM. J. RACE & L. 468, 473 (2012); Enid Trucios-Haynes, *The Legacy of Racially Restrictive Immigration Laws and Policies and the Construction of the American National Identity*, 76 OR. L. REV. 369, 400 (1997); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 840-41 (1997).

62. Naturalization Act ch. 3, § 1, 1 Stat. 103. *See generally* David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 822-23 (1994) (discussing the debate over the Act).

63. *See* Paul Finkelman, *Race, Slavery, and Federal Law, 1789-1804: The Creation of Proslavery Constitutional Law Before* Marbury, 14 U. ST. THOMAS L.J. 1, 12-14 (2018).

64. Militia Act of 1792, ch. 33, 1 Stat. 271.

65. Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (repealed 1864).

66. Act of May 3, 1802, ch. 48, 2 Stat. 189, *amended by* Act of Apr. 30, 1810, ch. 37, 2 Stat. 592.

67. Finkelman, *supra* note 58, at 272-75.

68. *Id.* at 270.

The major exception to consignment of the 1790 Act to the memory hole among scholars denying the racism of the Founders is Thomas G. West, who admits that "[t]oday this history of exclusion by race ... is considered an embarrassment and an injustice" but argues that those who passed the 1790 law were not "mindless bigots," but simply reflecting "that in those days white was practically equivalent to European,"[69] and thus excluding non-White people from naturalization was not discriminatory. He goes on to "vindicate" the Founders by contending that "Europe was the realm of what we now call Western civilization ... Europeans as a group shared with Americans a heritage that made them, in the Founders' view, the most likely candidates for successful assimilation into democratic citizenship."[70] Citing Benjamin Franklin, he also argued that the Framers viewed "this kind of preference for one's own" as "a permissible and understandable, although not a particularly noble, basis for immigration and citizenship policy."[71]

One problem with this account is that West, like Chief Justice Taney before him, ignores the fact that about a fifth of the U.S. population at this time was of African ancestry, and that many Black people had served honorably and sometimes with great heroism in the Revolution.[72] He also fails to note that free Black persons voted in a majority of the states ratifying the Constitution and in two of the three states admitted to the Union in 1790s. Free Black persons voted on the same basis as White persons in this period in Massachusetts, New Hampshire, Connecticut, New York, New Jersey, Pennsylvania, North Carolina, and at least some voted in Maryland, as well as Vermont (the fourteenth state) and Tennessee (the sixteenth state).[73] In this era, free Black men held

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69. THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA 168, 169 (1997).

70. *Id.* at 169; *see also id.* at 168 ("They resorted to these crude categories because characteristics shared by *many* (not all) of a given group in the past were judged likely to affect their future capacity, *as a group*, for assimilation and for developing, at least in some measure, the republican qualities of self-control and self-assertion.").

71. *Id.* at 170.

72. *Black Soldiers in the U.S. Military During the Civil War*, NAT'L ARCHIVES (Oct. 4, 2023), https://www.archives.gov/education/lessons/blacks-civil-war [https://perma.cc/J2W3-WFNC]. *See generally* DUDLEY TAYLOR CORNISH, THE SABLE ARM: BLACK TROOPS IN THE UNION ARMY, 1861-1865 (rev. ed. 1987).

73. *See* Paul Finkelman, *The First Civil Rights Movement: Black Rights in the Age of the Revolution and Chief Taney's Originalism in* Dred Scott, 24 U. PA. J. CONST. L. 676, 684 n.33

office in New Hampshire and Vermont.[74] He similarly ignores that some Indians lived within White society, where they could own property, vote, and hold office in some states.[75] Moreover, West ignores that the statute would have barred naturalization for immigrants of mixed-race heritage from Europe, Canada, the Caribbean, and Latin America, including the significant populations of free people of color in Haiti, Jamaica, Barbados, Brazil, and other European colonies in the Americas. A fair-minded observer could hardly look at these experiences and deny the possibility of a successful, multi-racial republic; that the Framers failed to do so is, obviously, a tragic missed opportunity.

Professor West should be credited for confronting head-on the "free white person" limitation, even if his claim that the Founders were not racist is unpersuasive. Many other commentators and scholarly advocates of his position simply ignore this inconvenient statute. Ultimately, however, his argument seems to be a non-denial denial. The argument rationalizes the Founders' explicit racial discrimination on the ground that it was not racist to prefer members of one's own race, that it was not racist for the Founders to consider only Europe to be civilized, and that it was not racist to only allow naturalization of White persons, because purported negative racial characteristics of non-White persons were so likely to be shared by any given non-White person that individual examination was pointless.[76] Professor West asserts that the Founders honestly thought that it was appropriate to draw lines on the basis of race. He is correct here. However, just because they honestly believed this does not mean their beliefs and actions were not fundamentally racist. Indeed, such beliefs are the essence of racism.

West's analysis dovetails with the attitudes of some modern political leaders, who still support the long history of discriminating in

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(2022).

74. *Id.*

75. A number of state constitutions, including Massachusetts and North Carolina enfranchised all free adult men. MASS. CONST. of 1780 ch. I, § 2, art. 2; N.C. CONST. of 1776 art. VII. New Jersey enfranchised all free adults, which included women. N.J. CONST. of 1776 art. IV. Native Americans living in states with such clauses who were not living in "Indian country," could and did vote in such states.

76. See WEST, *supra* note 69, at 147-73.

favor of White citizenship. In *White by Law*, Ian Haney López quotes Patrick Buchanan, a 1992 candidate for the Republican presidential nomination, that he would prefer Englishmen as immigrants over "Zulus" because they would "be easier to assimilate and would cause less problems" because "we are a European country."[77]

Americans were concerned with naturalization from the beginning of the Revolution. As noted, the Declaration of Independence objected to British obstruction of naturalization.[78] In the aftermath of the Revolution and under the Articles of Confederation, naturalization was a state matter.[79] Some state constitutions set out rules for naturalization that did not have any racial limitation, while other new constitutions specifically granted their legislatures the right to pass laws for naturalizing immigrants[80] while others were

77. HANEY LÓPEZ, *supra* note 24, at 13 (citing Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 863-64 (1993)).

78. *See* The Declaration of Independence, 1 Stat. 1, 2 (1776).

79. *See* Finkelman, *supra* note 63, at 10. In 1776, a few months after the signing of the Declaration of Independence, Virginia considered a naturalization act which allowed "all Foreign Protestants" to become citizens of the newly independent state. Thomas Jefferson, who was now serving in the Virginia legislature, crossed out the word "Protestants" on his copy of the bill, and wrote in the margins that "Jews" are "advantageous." *Bill for the Naturalization of Foreigners*, [14 October 1776] *in* THE PAPERS OF THOMAS JEFFERSON 558, 558-59 (ed. Julian Boyd, 1950). The Bill did not pass at that session of the legislature, but three years later Virginia allowed "all white persons" born in the state or living there for two years to claim citizenship. "An act declaring who shall be deemed citizens of this commonwealth," Act of May 1779, Ch. LVI, *in* 10 STATUTES AT LARGE BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 129 (ed. William Waller Hening, 1821).

80. *See* N.Y. CONST. § XLII (1777) ("[I]t shall be in the discretion of the legislature to naturalize all such persons, and in such manner, as they shall think proper: *Provided*, all such of the persons so to be by them naturalized, as, being born in parts beyond sea, and out of the United States of America, shall come to settle in, and become subjects of, this state, shall take an oath of allegiance to this state, and abjure and renounce all allegiance and subjection to all and every foreign king, prince, potentate, and state, in all matters, ecclesiastical as well as civil."); N.C. CONST. § XL (1776) ("That every foreigner who comes to settle in this state, having first taken an oath of allegiance to the same, may purchase, or by other just means acquire, hold, and transfer land or other real estate; and after one year's residence, shall be deemed a free citizen."); PA. CONST. § 42 (1776) ("Every foreigner of good character who comes to settle in this state, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means acquire, hold, and transfer land or other real estate; and after one year's residence, shall be deemed a free denizen thereof, and entitled to all the rights of a natural born subject of this state, except that he shall not be capable of being elected a representative until after two years residence."); VT. CONST. § XXXVIII (1776) ("Every foreigner of good character, who comes to settle in this State, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means acquire, hold, and

silent. At the Constitutional Convention, the need for a "uniform Rule of Naturalization" was clear.[81] While delegates such as Edmund Randolph of Virginia and William Paterson of New Jersey held opposing views on the scope and power of the central government, they agreed that the variety of different approaches in the states was problematic[82] and therefore that "the rule for naturalization ought to be the same in every State."[83] When the Committee of Detail presented the first important draft of the Constitution, one of the least controversial provisions was "[t]o regulate naturalization."[84]

Delegates favoring immigration successfully opposed a durational residency requirement. Oliver Ellsworth of Connecticut, a future Chief Justice, argued that such a rule would "discourag[e] meritorious aliens from emigrating to this Country."[85] James Madison feared such a restriction "[would] discourage the most desirable class of people from emigrating to the U.S."[86] He thought that under the new Constitution, "great numbers of respectable Europeans; men who love liberty and wish to partake its blessings, [would] be ready to transfer their fortunes hither."[87] But, Madison warned, a long period of waiting before new citizens could fully participate in the government would make these prospective new citizens "feel the mortification of being marked with suspicious incapacitations though they s[houl]d not covet the public honors."[88]

The bottom line is that the Framers agreed that under the evolving Constitution there should be a "uniform" rule for

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transfer, land or other real estate; and after one years residence, shall be deemed a free denizen thereof, and intitled to all the rights of a natural born subject of this State; except that he shall not be capable of being elected a representative, until after two years residence."). None of these clauses had a racial limitation on naturalization. Significantly, in all four states, free Black persons could vote on the same basis as White persons under their Revolutionary-era constitutions.

81. Finkelman, *supra* note 63, at 10 (quoting U.S. CONST. art. I, § 8, cl. 4).

82. *See* 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 25 (rev. ed., 1966) (Debate of May 29, 1787).

83. *Id.* at 245 (Debate of June 15, 1787) (Patterson); *id.* at 256 (Debate of June 16, 1787) (Randolph).

84. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 144 (rev. ed., 1966).

85. *Id.* at 235.

86. *Id.* at 236.

87. *Id.*

88. *Id.* at 235-36 (Debate of Aug. 9, 1787).

naturalization.[89] Given the adamant support for slavery by at least six states, and the general hostility to free Black people in those states, everyone at the Convention would have understood that a "uniform Rule of Naturalization" would be tied to race.[90] The six slave states, from Delaware to Georgia, would tolerate nothing else. Illustrative of this is the Virginia Citizenship Act of 1779.[91] At the same time, it was clear that the delegates supported rules that would encourage immigration from Europe. As Madison noted, the goal was to encourage "respectable Europeans; men who love liberty" to come to the new nation.[92] Those men (and their families) would be White.

Accordingly, the First Congress passed a federal naturalization law on March 26, 1790, the 28th law passed by Congress after ratification of the Constitution.[93] The records of Congress in this period are not completely satisfactory; the *Annals of Congress* did not report debates verbatim in the House of Representatives, instead describing the gist of the discussions from the perspective of a narrator.[94] No Senate debates were officially reported from this period.[95]

In the House, those who weighed in on the bill were trying to achieve several things. Different rules in the states created confusion at the national level.[96] Congressional action was also shaped by Article I, Section 9 of the Constitution, which denied Congress the power to prohibit either the African slave trade or international

89. Finkelman, *supra* note 63, at 10 (quoting U.S. CONST. art. I, § 8, cl. 4).

90. 2 FARRAND, *supra* note 82, at 236.

91. An Act Declaring Who Shall Be Deemed Citizens of This Commonwealth, Act of May 1779, Ch. LVI, *in* 10 STATUTES AT LARGE BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 129 (ed. William Waller Hening, 1821).

92. *Id.*

93. *See* Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795). By contrast, the same clause that gave Congress the power to pass a naturalization act also empowered Congress to pass "uniform Law on the subject of Bankruptcies." U.S. CONST. art. 1, § 8, cl. 4. But Congress did not pass a comprehensive bankruptcy act for decades. Act of Aug. 19, 1841, 5 Stat. 440 (repealed 1843).

94. *See* 1 ANNALS OF CONG. 15-16 (1789) (Joseph Gales ed., 1834).

95. *See id.*

96. The Senate met in secret in its first few sessions. *See* CHRISTOPHER M. DAVIS, SECRET SESSIONS OF THE HOUSE AND SENATE: AUTHORITY, CONFIDENTIALITY, AND FREQUENCY, CONGR. RSCH. SERV., R42106, 3 (2014); DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, March 4, 1789-March 3, 1791 (Linda Grant De Pauw et al. eds., 1972).

migration before 1808.[97] By 1790, Massachusetts and New Hampshire had ended slavery outright; Connecticut, Pennsylvania, and Rhode Island were gradually ending it.[98] New Jersey and New York were slowly moving in this direction.[99] Free Black people voted in all these states except Rhode Island; none of these states' naturalization statutes had a racial restriction.[100] Thus, the northern states could accept Black immigrants and make them citizens. The Constitution also obligated the states to grant "[p]rivileges and [i]mmunities" to citizens of other states.[101] A naturalization law which prohibited granting citizenship to non-White immigrants would reduce problems for the South caused by northern Black citizens who had federally protected rights. These concerns help explain why the First Congress passed the 1790 Act, which only allowed for the naturalization of "white" people.

The debate over naturalization focused primarily on the value of immigration to the new nation, and the effect that naturalization restrictions would have on encouraging or discouraging immigration.[102] This mirrored, to some extent, the debate in the Constitutional Convention over limiting when new citizens could hold public office.[103] The members of Congress widely and clearly understood that a citizenship law was in part an immigration law.[104]

The version of the bill presented to the House for debate required one year's residence in the U.S. before naturalization.[105]

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97. U.S. CONST. art. I, § 9.

98. Finkelman, *supra* note 73, at 707.

99. *See id.* at 702-03.

100. *See id.* at 678.

101. U.S. CONST. art. IV, § 2, cl. 1.

102. *See* 1 ANNALS OF CONG. 1101, 1124 (1789) (Joseph Gales ed., 1834).

103. *See supra* notes 86-92 and accompanying text.

104. Professors Pfander and Wardon made this point. James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 365 (2010); *see also id.* at 367 ("We can see the connection between property ownership, naturalization policy, and immigration in a variety of sources, including the population grievance in the Declaration of Independence."); *id.* at 398 (writing of the 1790 Naturalization Act that "members of the House agreed that whatever rule of naturalization they adopted would operate in effect as a rule of immigration").

105. 1 ANNALS OF CONG. 1109 (1789) (Joseph Gales ed., 1834) ("The first clause enacted that all free white persons, who have, or who shall migrate into the United States, and shall give satisfactory proof, before a magistrate, by oath, that they intend to reside therein, and shall take an oath of allegiance, *and shall have resided in the United States for one whole year*,

Rep. Thomas Tudor Tucker of South Carolina moved to eliminate the temporal residence requirement entirely "to enable foreigners to hold lands, in their own right, in less than one year ... the object of his motion was, to let aliens come in, take the oath, and hold lands without any residence at all."[106] This position may have reflected his personal history, since he was himself an immigrant from Bermuda, who had moved to South Carolina in 1771, where he faced no limitations on citizenship since he was moving from one part of the British Empire to another.[107] Rep. John Laurence of New York agreed:

> The reason of admitting foreigners to the rights of citizenship among us is the encouragement of emigration, as we have a large tract of country to people. Now, he submitted to the sense of the committee, whether a term, so long as that prescribed in the bill, would not tend to restrain rather than encourage emigration [*sic*]?[108]

Others wanted some period of residence before granting citizenship. For example, James Madison agreed that immigration was desirable but was concerned about fraud:

> When we are considering the advantages that may result from an easy mode of naturalization, we ought also to consider the cautions necessary to guard against abuses. It is no doubt very desirable that we should hold out as many inducements as possible for the worthy part of mankind to come and settle amongst us, and throw their fortunes into a common lot with ours. But why is this desirable? Not merely to swell the catalogue of people. No, sir, it is to increase the wealth and strength

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shall be entitled to all the rights of citizenship, except being capable of holding an office under the State or General Government, which capacity they are to acquire after a residence of two years more.").

106. *Id.*

107. Diana Dru Dowdy, "*A School for Stoicism": Thomas Tudor Tucker and the Republican Age*, 96 S.C. HIST. MAG. 102, 102, 104 (1995). His younger brother, St. George Tucker, would become a law professor at the College of William and Mary, a federal judge in Virginia, and the author of the first American edition of *Blackstone's Commentaries*. Davison M. Douglas, *St. George Tucker (1752-1827)*, ENCYCLOPEDIA VA. (Dec. 7, 2020), https://encyclopediavirginia.org/entries/tucker-st-george-1752-1827/ [https://perma.cc/DD9Q-F5UV]; Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111 (2006).

108. 1 ANNALS OF CONG. 1111 (1789) (Joseph Gales ed., 1834).

> of the community; and those who acquire the rights of citizenship, without adding to the strength or wealth of the community, are not the people we are in want of. And what is proposed by the amendment is, that they shall take nothing more than an oath of fidelity, and declare their intention to reside in the United States. Under such terms, it was well observed by my colleague, aliens might acquire the right of citizenship, and return to the country from which they came, and evade the laws intended to encourage the commerce and industry of the real citizens and inhabitants of America, enjoying at the same time all the advantages of citizens and aliens.[109]

Similarly, Rep. Richard Bland Lee of Virginia favored "as short a term as would be consistent, because he apprehended it would tend considerably to encourage emigration."[110] Only Rep. James Jackson of Georgia was hostile to immigration and easy naturalization. "I am clearly of opinion, that rather than have the common class of vagrants, paupers, and other outcasts of Europe, that we had better be as we are, and trust to the natural increase of our population for inhabitants."[111] But there is no record that he made a motion against the bill.[112]

Not surprisingly, there was vigorous discussion of equality in connection with immigration policy. Rep. Thomas Hartley of Pennsylvania noted that Europe drew a sharp line between citizens and noncitizens, and therefore opposed the Tucker motion: "he had no doubt of the policy of admitting aliens to the rights of citizenship; but he thought some security for their fidelity and allegiance was requisite besides the bare oath; that is, he thought an actual residence" for some period should be required.[113] In responding to Rep. Hartley, Virginia's John Page made a speech which contained expressions of the principles of equality that seem remarkably similar to ideas of our own time. Page argued:

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109. *Id.* U.S.-flag vessels have long-enjoyed certain privileges; in 1789, Congress restricted their ownership to citizens. Gabriel J. Chin & Sam Chew Chin, *The War Against Asian Sailors and Fishers*, 69 UCLA L. REV. 572, 575-76 (2022).

110. 1 ANNALS OF CONG. 1121 (1789) (Joseph Gales ed., 1834).

111. *Id.* at 1114.

112. *See id.*

113. *Id.* at 1109.

> that the policy of European nations and States respecting naturalization, did not apply to the situation of the United States. Bigotry and superstition, or a deep-rooted prejudice against the Government, laws, religion, or manners of neighboring nations had a weight in that policy, which cannot exist here, where a more liberal system ought to prevail. I think, said he, we shall be inconsistent with ourselves, if, after boasting of having opened an asylum for the oppressed of all nations, and established a Government which is the admiration of the world, we make the terms of admission to the full enjoyment of that asylum so hard as is now proposed. It is nothing to us, whether Jews or Roman Catholics settle amongst us; whether subjects of Kings, or citizens of free States wish to reside in the United States, they will find it their interest to be good citizens, and neither their religious nor political opinions can injure us, if we have good laws, well executed.[114]

Page's speech offers important insight into the progressive thinking of many Founders. A fascinating figure, Page was a poet and later married a poet.[115] He commanded a militia regiment in the Revolutionary War, and in addition to four terms in Congress, he served in the Virginia House of Delegates, had been Virginia's Lieutenant Governor during the Revolution, and was a future Governor of that state.[116] That Page was an enslaver[117] puts his egalitarian words in context.

Page was open to the immigration of European Jews or Roman Catholics, since they were White.[118] This was actually a progressive move for him, since he opposed the Virginia Statute for Religious Freedom in the state and favored a non-denominational Protestant

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114. *Id.* at 1110.

115. AMERICAN POETRY: THE SEVENTEENTH AND EIGHTEENTH CENTURIES 865 (David S. Shields ed., 2007).

116. *John Page*, WM. & MARY SPECIAL COLLECTIONS RSCH. CTR., https://scrc-kb.libraries.wm.edu/john-page [https://perma.cc/YDR3-QYZ8].

117. *Rosewell's Plantation Life & Slavery*, ROSEWELL FOUND., http://www.rosewell.org/plantation-life---slavery.html [https://perma.cc/P5JF-Z2L6].

118. Page assumed that such migrants would be White, although some may very well have been of mixed ancestry. *See* LAURA ARNOLD LEIBMAN, ONCE WE WERE SLAVES: THE EXTRAORDINARY JOURNEY OF A MULTI-RACIAL JEWISH FAMILY (2021) (documenting some Jews of mixed ancestry from the Caribbean (and one who had also lived in England) who moved to the United States as "White" people).

establishment.[119] His tolerance for non-Protestant immigrants reflects the emergence of race as the essential fault line in the Nation. Furthermore, at this time only two states, New York and Virginia, allowed Jews to hold public office, and some also prohibited Catholics from holding office.[120] New York allowed both to hold office, but did not allow Catholics to naturalize unless they renounced allegiance to the Pope.[121] Thus, Page was remarkably open-minded in supporting citizenship for Catholics and Jews,[122] but this did not extend to non-White people. He was concerned that too-strict rules would "discourage many of the present inhabitants of Europe from becoming inhabitants of the United States."[123] This made sense for Virginia politicians. In 1790, Virginia was 43.4 percent Black, and at least since the 1770s, many leaders had feared that there might soon be a Black majority.[124] South Carolinians, whose state had a slightly larger percentage of Black residents, also wanted to encourage European immigration.[125] Every member of the House who alluded to geography seemed to assume that immigrants would come from Europe.[126]

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119. *See 82. A Bill for Establishing Religious Freedom, 18 June 1779*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082 [https://perma.cc/3Z8T-545H].

120. Finkelman & Sussman, *supra* note 35, at 2.

121. *See id.* at 33; JASON K. DUNCAN, CITIZENS OR PAPISTS?: THE POLITICS OF ANTI-CATHOLICISM IN NEW YORK, 1685-1891 54-80 (2005).

122. This understanding seems to have been carried out. There appear to be no reported cases denying or even questioning the right of White European Jewish or Catholic migrants to naturalize.

123. 1 ANNALS OF CONG. 1115 (1789) (Joseph Gales ed., 1834).

124. *See* Gibson & Jung, *supra* note 48, Table 61.

125. *See id.*, Table 55; David T. Gleeson, *Immigration*, S.C. ENCYCLOPEDIA (June 8, 2016), https://www.scencyclopedia.org/sce/entries/immigration/ [https://perma.cc/57DP-9FMK].

126. *See* 1 ANNALS OF CONG. 1114 (1789) (Joseph Gales ed., 1834) (remarks of Rep. Jackson) ("I am clearly of opinion, that rather than have the common class of vagrants paupers, and other outcasts of Europe, that we had better be as we are, and trust to the natural increase of our population for inhabitants."); *id.* at 1117 ("Mr. SEDGWICK was against the indiscriminate admission of foreigners to the highest rights of human nature, upon terms so incompetent to secure the society from being overrun with the outcasts of Europe ... [t]he citizens of America preferred this country because it is to be preferred; the like principle he wished might be held by every man who came from Europe to reside here; but there was at least some grounds to fear the contrary; their sensations, impregnated with prejudices of education, acquired under monarchical and aristocratical Governments, may deprive them of that zest for pure republicanism, which is necessary in order to taste its beneficence with that gratitude which we feel on the occasion."); *id.* (remarks of Rep. Aedanus Burke of S.C.) ("Mr. BURKE thought it of importance to fill the country with useful men, such

There is no record of anyone opposing or even commenting on the "free white person" clause.[127] As one of the earliest acts of the First Congress, the law's vision of the American population is important.[128] It is also the first federal law to recognize and codify race, and as such was a harbinger of other acts in the first decade and a half under the Constitution.[129] Congress revisited the naturalization law repeatedly in the next fifteen years, and addressed related issues.[130] But the "free white person" clause was untouched.[131] The intent of the law was clearly to discourage non-White immigration, insuring that the United States would remain a "white man's country."

B. The Naturalization Act of 1795

The Naturalization Act of 1795 introduced the concept of a declaration of intention to become a citizen to federal law, a court filing required some years before full naturalization.[132] By creating

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as farmers, mechanics, and manufacturers, and, therefore, would hold out every encouragement to them to emigrate to America. This class he would receive on liberal terms; and he was satisfied there would be room enough for them, and for their posterity, for five hundred years to come. There was another class of men, whom he did not think useful, and he did not care what impediments were thrown in their way; such as your European merchants, and factors of merchants, who come with a view of remaining so long as will enable them to acquire a fortune, and then they will leave the country, and carry off all their property with them.... There is another class also that I would interdict, that is, the convicts and criminals which they pour out of British jails.").

127. ZOLBERG, *supra* note 30, at 86 ("[T]he requirement of whiteness ... evoked no debate whatsoever.").

128. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010) (noting that a decision by the First Congress "provides contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument") (quoting Bowsher v. Synar, 478 U.S. 714, 723-724 (1986)) (internal quotation marks omitted); Michael Bhargava, *The First Congress Canon and the Supreme Court's Use of History*, 94 CAL. L. REV. 1745, 1746-47 (2006).

129. *See supra* notes 57-63 and accompanying text.

130. Eilleen Bolger, *Naturalization Process in U.S.: Early History*, V.C.U. LIBRS. SOC. WELFARE HIST. PROJECT, https://socialwelfare.library.vcu.edu/federal/naturalization-pro cess-in-u-s-early-history/ [https://perma.cc/N2CB-H5W8].

131. *See id.*

132. Naturalization Act of 1795, Pub. L. No. 3-20, 1 Stat. 414 (repealed 1802) ("First. He shall have declared on oath or affirmation, before the supreme, superior, district or circuit court of some one of the states, or of the territories northwest or south of the river Ohio, or a circuit or district court of the United States, three years, at least, before his admission, that it was bona fide, his intention to become a citizen of the United States, and to renounce

a formal preliminary step toward citizenship, Congress resolved the problem recognized by some in the debate over the 1790 Act: immigrants should have the right to own land upon arrival, but not necessarily receive indefeasible citizenship or full rights of political participation without a probationary period. Once again, it was assumed that immigrants would be European. For example, Rep. Jonathan Dayton of New Jersey (like Madison, a signer of the Constitution) opposed inquiry into immigrants' political beliefs, given the variety of possible understandings of citizens of "many Governments in Europe," or residents of "Poland" or "Venetian or Genoese" migrants.[133]

As in 1790, there was extensive and revealing discussion of equality for White immigrants. By far the most vigorously debated issue was a motion by Rep. William B. Giles of Virginia, a future U.S. Senator and Governor, to provide for "the exclusion of any foreign emigrant from citizenship who had borne a title of nobility in Europe till he had formally renounced it."[134] Rep. Samuel Dexter of Massachusetts, a future Senator, Secretary of War, and Secretary of the Treasury, asked why it did not apply to Catholics who were loyal to the pope. It is not clear if his comment was sarcastic or truly aimed at Catholics. That he opposed the motion suggests that his comment might have been sarcastic.[135] However, James Madison, a stalwart supporter of religious liberty, defended Catholics at length,[136] as he supported Giles's motion: "As to hereditary

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forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly, by name, the prince, potentate, state or sovereignty whereof such alien may, at the time, be a citizen or subject."). Authorization for a declaration of intention, while no longer required for naturalization, remains as part of the current law. 8 U.S.C. § 1445(f).

133. 4 ANNALS OF CONG. 1021-22 (1795). Significantly, the examples he gave here were most likely Catholics.

134. *Id.* at 1033.

135. *Id.* at 1034-35.

136. *Id.* at 1035 ("He did not approve the ridicule attempted to be thrown out on the Roman Catholics. In their religion there was nothing inconsistent with the purest Republicanism. In Switzerland about one-half of the Cantons were of the Roman Catholic persuasion. Some of the most Democratical Cantons were so; Cantons where every man gave his vote for a Representative. Americans had no right to ridicule Catholics. They had, many of them, proved good citizens during the Revolution.").

titles, they were proscribed by the Constitution. He would not wish to have a citizen who refused such an oath."[137]

> No man can say how far the Republican revolution that is now proceeding in Europe will go. If a revolution was to take place in Britain, which for his part he expected and believed would be the case, the peerage of that country would be thronging to the United States. He should be ready to receive them with all that hospitality, tenderness, and respect, to which misfortune is entitled. He should sympathize with them, and be as ready to afford them whatever friendly offices lay in his power, as any man. But this was entirely distinct from admitting them as citizens of America before they were Constitutionally qualified to become so.[138]

As he had in 1790, Rep. Page argued energetically in favor of equality, insisting that titles were inconsistent with the philosophy of the United States.[139] "Titles only give a particular class of men a right to be insolent, and another class a pretence to be mean and cringing."[140] This was, potentially, a serious problem:

> Equality is the basis of good order and society, whereas titles turn everything wrong. Mr. P. said that a scavenger was as necessary to the health of a city as any one of its magistrates.... He did not want to see a Duke come here, and contest an election for Congress with a citizen.[141]

Again, as the owner of enslaved persons, it is clear that the equality Page envisioned was only among White people.

Rep. Lee of Virginia opposed the motion as unnecessary and pointless.[142] "We are secure from the danger, because every citizen here is equal. No privileged orders exist amongst us, nor can exist, unless the people shall choose to change their present Constitution

137. *Id.*
138. *Id.* at 1049-50.
139. *Id.* at 1035.
140. *Id.*
141. *Id.*
142. *Id.* at 1038.

and Laws."[143] Lee then used the example of slavery to buttress his point.[144]

Lee's argument seemed to be that a foreigner who once lorded over serfs, or a Virginian who was master to enslaved persons, revealed nothing about the relationship between free and equal U.S. citizens. Lee explained that the

> strongest reason [why] a foreign nobleman could not become a good citizen, was the education he had received; the superiority which he had been accustomed to exercise over his fellow men, and the servile court he had been accustomed to receive from them. It was, then, the corrupting relation of lord and vassal, which rendered him an unfit member of an equal Republican Government.[145]

This proposition, Lee contended, was a serious mistake. The logical fallacy of the claim was that it might suggest that

> the existing relation of master and slave in the Southern country, (rather a more degrading one than even that of lord and vassal) would go to prove that the people of that country were not qualified to be members of our free Republican Government. But he knew that this was not the case. Though in that House the members from the State of Virginia held persons in bondage, he was sure that their hearts glowed with a zeal as warm for the equal rights and happiness of men, as gentlemen from other parts of the Union where such degrading distinctions did not exist. He rejoiced, that, notwithstanding the unfavorable circumstances of his country in this respect, the virtue of his fellow-citizens shone forth equal to that of any other part of the nation.[146]

Some members of the House were skeptical that European nobles could be just as dedicated to "the equal rights and happiness of

143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* Lee's speech is an example of the argument that slavery actually strengthened the Republican values of White southerners. *See* EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 369-87 (1975).

men."[147] Rep. Dexter from Massachusetts—where slavery had been abolished—immediately moved that part of the naturalization process should be the renunciation of slave ownership:

> Mr. DEXTER would vote for the resolution, if the gentleman would agree to an amendment; which was, that he renounced all possession of slaves.
>
> Mr. [George] THATCHER [from Massachusetts] moved as a second amendment, "and that he never will possess them."
>
> The words of Mr. DEXTER'S amendment were nearly these: "And also, in case any such alien shall hold any person in slavery, he shall renounce it, and declare that he holds all men free and equal."[148]

Several members replied that stripping titles of nobility from new citizens was unrelated to denying their right to engage in legitimate commerce, such as owning slaves.[149] Rep. Joseph McDowell of North Carolina argued that "the amendment of Mr. DEXTER partook more of monarchical or despotic principles than any thing which he had seen for some time. What right had the House to say to a particular class of people, you shall not have that kind of property which other people have?"[150] Alluding to the Haitian Revolution, McDowell considered it particularly inadvisable "at this time, when

147. 4 ANNALS OF CONG. 1038 (1795).

148. *Id.* at 1039.

149. Rep. Giles stated:

> As to slavery, he lamented and detested it; but, from the existing state of the country, it was impossible at present to help it. He himself owned slaves. He regretted that he did so, and if any member could point out a way in which he could be properly freed from that situation, he should rejoice in it.

Id. Rep. John Nicholas of Virginia noted "that Mr. DEXTER had more than on one occasion hinted his opinion that possessors of slaves were unfit to hold any Legislative trust in a Republican Government." *Id.* at 1040. Rep. John Heath of Virginia

> thought this introduction of slavery as at best highly improper. He read a clause of the Constitution prohibitory of proposing an abolition for many years to come. He then asked how gentlemen, in the [face] of an express article of the Constitution could propose an amendment like that of Mr. DEXTER.

Id. Rep. Theodore Sedgwick, of Massachusetts opined: "To propose an abolition of slavery in this country would be the height of madness. Here the slaves are, and here they must remain." *Id.*

150. *Id.* at 1042-43.

the West Indies are transformed into an immense scene of slaughter."[151] He asked: "When thousands of people had been massacred, and thousands had fled for refuge to this country, when the proprietors of slaves in this country could only keep them in peace with the utmost difficulty, was this a time for such inflammatory motions?"[152]

On a roll call vote, the motion to require renunciation of slave-owning failed 28-63, and the motion to require renunciation of titles of nobility passed 59-32.[153] The duty to renounce hereditary titles upon naturalization remains part of the U.S. Code.[154] This provision seems consistent with the Constitution, which prohibits both the federal government and the states from "grant[ing] any Title of Nobility."[155]

Again, clearly these representatives took equality seriously, given the amount of time they spent debating it. But the dog that did not bark is important. Rep. Dexter's motion about slavery was symbolic and seemed to have no chance of passing. Indeed, given the politics of the age, it is surprising that nearly a third of the House supported it. Yet, even in the context of making a rhetorical point, the "free white person" clause was unmentioned.[156] Significantly, while using this debate to take some rhetorical shots at slavery, no

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151. *Id.* at 1043.

152. *Id.*

153. *Id.* at 1057.

154. 8 U.S.C. § 1448(b) provides:

> In case the person applying for naturalization has borne any hereditary title, or has been of any of the orders of nobility in any foreign state, the applicant shall in addition to complying with the requirements of subsection (a) of this section, make under oath in the same public ceremony in which the oath of allegiance is administered, an express renunciation of such title or order of nobility, and such renunciation shall be recorded as a part of such proceedings.

8 U.S.C. § 1448(b).

155. U.S. CONST. art. I, § 10, cl. 1 (limiting states); U.S. CONST. art. I, § 9, cl. 8 (limiting the federal government). Significantly, neither clause limits private U.S. citizens from receiving titles of nobility. These clauses are limited to secular titles from governments and not ecclesiastical titles, like Bishop or Cardinal. *See id.* This contrasts with the naturalization provision in the New York Constitution of 1777, which required naturalizing immigrants to "take an oath of allegiance to this State, and abjure and renounce all allegiance and subjection to all and every foreign [k]ing, [p]rince, [p]otentate, and State in all matters ecclesiastical as well as civil." N.Y. CONST. OF 1777, art. XLII.

156. *See supra* notes 134-53 and accompanying text.

one challenged the existing law that only White people could be naturalized.[157]

C. Exclusion of People of Color

Another early statute addressed the situation in the West Indies that Rep. McDowell discussed, and it was consistent with the policy of the 1790 Act.[158] In 1803, while slave holders fleeing Haiti or elsewhere continued to be welcome,[159] in order to exclude formerly enslaved refugees, Congress prohibited the entry of some people of color by ship into states which banned the migration or immigration of people of color under their own laws.[160] While the law exempted certain people associated with the United States, and certain sailors, other people of color were excluded.[161] The statute punished importing

> any negro, mulatto, or other person of colour, not being a native, a citizen, or registered seaman of the United States, or seamen natives of countries beyond the Cape of Good Hope, into any port or place of the United States, which port or place shall be situated in any state which by law has prohibited or shall prohibit the admission or importation of such negro, mulatto, or other person of colour.[162]

The law also provided

> [t]hat it shall be the duty of the collectors and other officers of the customs, and all other officers of the revenue of the United States.... [to] vigilantly carry into effect the said laws of said states, conformably to the provisions of this act; any law of the United States to the contrary notwithstanding.[163]

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157. *See supra* notes 134-53 and accompanying text.

158. *See* Act of Feb. 28, 1803, ch. 10, 2 Stat. 205.

159. *See In re* Kaine, 55 U.S. (14 How.) 103, 114 (1852) ("This country is open to all men who wish to come to it. No question, or demand of a passport meets them at the border.").

160. Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215, 2231 (2021).

161. *Id.* at 2227-28.

162. Act of Feb. 28, 1803, ch. 10, 2 Stat. 205. This is the first permanent federal regulation of immigration. *See* Chin & Finkelman, *supra* note 160, at 2232.

163. Act of Feb. 28, 1803, ch. 10, 2 Stat. 206.

The law was not limited to enslaved persons, or Haitians.[164]

II. LEVERAGING THE "FREE WHITE PERSON" CLAUSE: DECLARANTS AND ELIGIBLES

The Naturalization Acts created classifications of noncitizens, which were used by states and the federal government to impose burdens and benefits apart from naturalization itself.[165] The 1790 Act granted White people the right to naturalize and denied that right to members of other races, thereby creating classes of "aliens eligible for citizenship" and "aliens ineligible for citizenship."[166] Although the classification rested on race, the Supreme Court held that it was a reasonable one, explaining, in 1923:

> Eligible aliens are free white persons and persons of African nativity or descent. Congress is not trammeled, and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit. But it is not to be supposed that its acts defining eligibility are arbitrary or unsupported by reasonable considerations of public policy. The State properly may assume that the considerations upon which Congress made such classification are substantial and reasonable. Generally speaking, the natives of European countries are eligible. Japanese, Chinese and Malays are not.[167]

Another racial classification was even more influential. The innovation in the 1795 Act—establishing the concept of the declaration of intention to naturalize—created another classification because some noncitizens had declared their intention to naturalize,

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164. *See id.* at 205-06.

165. Chin, *supra* note 36, 1271.

166. *See id.* at 1275.

167. Terrace v. Thompson, 263 U.S. 197, 220 (1923); *see also* Porterfield v. Webb, 263 U.S. 225, 233 (1923) ("In the case now before us the prohibited class includes ineligible aliens only. In the matter of classification, the States have wide discretion. Each has its own problems, depending on circumstances existing there. It is not always practical or desirable that legislation shall be the same in different States. We cannot say that the failure of the California Legislature to extend the prohibited class[,] so as to include eligible aliens who have failed to declare their intention to become citizens of the United States, was arbitrary or unreasonable.").

others had not, and others could not legally do so.[168] Declarants were known as "intending citizens" or those who had filed "first papers," and many state legislatures awarded them substantial benefits.[169] The declaration of intention has not been a required part of the naturalization process since 1952, so it has largely faded from legal memory.[170] Yet, at one time, it was recognized as highly significant. In 1950, the Court explained the rights of noncitizens as follows:

> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.[171]

A key consequence of having filed a declaration of intent, or being an "alien eligible for citizenship," was, in many states, the right to own land, resolving the problem Congress contemplated in 1790 and 1795; namely, that land ownership could be and was often restricted by state law.[172] The United States government was relatively lenient to immigrants, giving "declarants" the right to own land, but also extending that right to "bona fide resident[s]" who had not declared an intention to naturalize.[173] State practice varied widely. In the

168. *See* Act of Jan. 29, 1795, ch. 20, 1 Stat. 414.

169. Chin, *supra* note 36, at 1273-74.

170. *See id.* at 1273.

171. Johnson v. Eisentrager, 339 U.S. 763, 770 (1950).

172. Historical U.S. laws with respect to noncitizen land ownership are discussed in Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. LEGAL HIST. 152, 152 (1999). Contemporary property ownership laws are analyzed in Allison Brownell Tirres, *Property Outliers: Non-Citizens, Property Rights and State Power*, 27 GEO. IMMIGR. L.J. 77, 77 (2012).

173. One section of federal law governing the territories restricts land ownership to citizens and declarants. *See* 48 U.S.C. § 1501 (2018) ("No alien or person who is not a citizen of the United States, or who has not declared his intention to become a citizen of the United States ... shall acquire title to or own any land in any of the Territories of the United States."). However, the next section extended the right to bona fide residents as well. *See id.* § 1502 ("This chapter shall not apply to ... any alien who shall become a bona fide resident of the United States, and any alien who shall become a bona fide resident of the United States, or

twentieth century, fifteen states prohibited aliens from owning land if they were racially ineligible for naturalization:[174] Arizona,[175] Arkansas,[176] California,[177] Delaware,[178] Florida,[179] Idaho,[180] Kansas,[181] Louisiana,[182] Montana,[183] New Mexico,[184] Oregon,[185] Texas,[186] Utah,[187] Washington,[188] and Wyoming.[189] Another group of states, including Kentucky, Missouri, and Washington, granted land rights to declarants.[190] Texas relaxed its laws for various noncitizens, including declarants who were eligible for citizenship.[191] But most other states did not have such restrictions.[192]

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shall have declared his intention to become a citizen of the United States.").

174. Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CAL. L. REV. 7, 7-8 (1947); Comment, *The Alien Land Laws: A Reappraisal*, 56 YALE L.J. 1017, 1019-20 (1947); Comment, *Anti-Alien Land Legislation*, 31 YALE L.J. 299, 299 (1922).

175. 1917 Ariz. Sess. Laws 56-57 (repealed 1978).

176. *See* Applegate v. Luke, 291 S.W. 978, 979 (Ark. 1927) (invalidating "ineligible alien" land law under state constitutional provision allowing all noncitizens to own land).

177. 1913 Cal. Stat. 206; 1923 Cal. Stat. 1020, *invalidated by* Fujii v. State, 242 P.2d 617, 630 (Cal. 1952) (en banc).

178. 32 Del. Laws 616 (1921) (repealed 1933).

179. FLA. CONST. art. I, § 2 (amended 2018).

180. 1923 Idaho Sess. Laws 160.

181. 1925 Kan. Sess. Laws 277.

182. LA. CONST. of 1921, art. XIX, § 21.

183. 1923 Mont. Laws 123.

184. *See* Jamie Bronstein, *Sowing Discontent: The 1921 Alien Land Act in New Mexico*, 82 PAC. HIST. REV. 362, 363 (2013).

185. 1923 Or. Laws 145.

186. 1921 Tex. Gen. Laws 261 (exempting "[a]liens eligible to citizenship in the United States who shall become bona fide inhabitants of this State, and who shall, in conformity with the naturalization laws of the United States, have declared their intention to become citizens of the United States").

187. 1943 Utah Laws 127.

188. In 1886, the Washington Territory legislature prohibited ineligible aliens from owning land. 1886 Wash. Sess. Laws 102 (repealed 1927). In its 1889 constitution, the state of Washington restricted land ownership to declarant aliens. WASH. CONST. art. II, § 33, *repealed by* WASH. CONST. amend. 42. The constitutional provision was enforced by a 1921 statute which the Supreme Court upheld in 1923. Terrace v. Thompson, 263 U.S. 197, 211, 224 (1923); *see also The Alien Land Laws*, *supra* note 174, at 1022 n.42, 1036 ("The Washington land law is framed to prohibit only those who have not in good faith declared their intention of becoming a citizen. Since alien Japanese, ineligible to become citizens, may not file declarations of intention, the law has the same ultimate effect.").

189. 1943 Wyo. Sess. Laws 33 (repealed 2001).

190. *See* Justin Miller, *Alien Land Laws*, 8 GEO. WASH. L. REV. 1, 14 (1939).

191. 1921 Tex. Gen. Laws 261.

192. For a discussion of the contemporary rights of noncitizens to own land, see Tirres, *supra* note 172, at 97.

Another important benefit was suffrage. Many states enfranchised White male inhabitants irrespective of citizenship status.[193] A larger group granted the right to vote to declarants.[194] Thus, for example, the Oregon Constitution of 1857 granted suffrage, subject to age and residency requirements, to "every white male citizen" and "every white male of foreign birth ... [who] shall have declared his intention to become a citizen of the United States."[195] It also provided that "[n]o negro, Chinaman, or mulatto shall have the right of suffrage."[196] The distinction of White declarants from noncitizens of undesirable races shows the relationship between the categories. These racial restrictions could not be applied to birthright citizens after enactment of the Fifteenth Amendment.[197] However, because the Fifteenth Amendment prohibited racial discrimination only against citizens of the United States, such provisions could be applied to noncitizens.[198]

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193. *See* Dorsey v. Brigham, 52 N.E. 303, 305 (Ill. 1898) ("The constitution of 1848 vested every white male citizen above the age of twenty-one years who had resided in the state one year, and every white male inhabitant of the age aforesaid who was a resident of the state at the time of the adoption of the constitution, with the right of suffrage."); Thacker v. Hawk, 11 Ohio 376, 379 (1842) (Read, J., dissenting) ("The words of the constitution are [a]rt. 4, sec. 1,: 'In all elections, all *white* male inhabitants-above the age of twenty-one years shall enjoy the right of an elector.'"); People v. Dean, 14 Mich. 406, 414 (1866) ("The constitution now in force gives the right of voting (under certain restrictions) to '*white male*' citizens or inhabitants, and certain civilized male inhabitants of *Indian descent*.").

194. *See* Gerald L. Neuman, *"We Are the People": Alien Suffrage in German and American Perspective*, 13 MICH. J. INT'L L. 259, 295-97 (1992); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1395 (1993); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1098-99, 1117 (1977).

195. OR. CONST. art. II, § 2 (amended 1914).

196. *Id.* § 6 (repealed 1927).

197. For example, the Oregon Attorney General issued an opinion in 1928 that a person of Japanese ancestry born in the United States was entitled to vote. Or. Att'y Gen. Op. 479 (1928).

198. In the civil rights era, the Supreme Court concluded that the Equal Protection Clause of the Fourteenth Amendment prohibited, among other things, discriminatory voting restrictions. Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 666 (1966) ("Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate."). Presumably, then, in the modern era there would be a compelling argument that allowing immigrants of one race to vote but not others would violate the Equal Protection Clause. There appear to be no cases making this argument during the era of noncitizen voting; most of the suffrage cases in that period relied on the Fifteenth Amendment. The second Justice Harlan concluded that the Fourteenth Amendment was categorically inapplicable to voting, never wavering from the view that "the Fifteenth Amendment's *existence* 'alone is evidence that [Congress] did not

Professor Gerald Neuman identified the following jurisdictions as having declarant noncitizen suffrage at one time or another: Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Washington, Wisconsin, and Wyoming.[199] Congress also authorized declarant voting in the territories of Alaska,[200] Montana,[201] and Wyoming.[202] Some jurisdictions offered declarants other political rights, such as the ability to sit as jurors[203] and to hold office.[204] Colorado continues to permit declarants to vote in some irrigation district elections.[205]

Congress incentivized immigration with access to naturalization, in substantial part to allow migrants to own land. It also gave them land directly. In the nineteenth and twentieth centuries, Congress gave away or sold at submarket prices tens of millions of acres of federal land under a variety of programs.[206] Beginning with the Preemption Act of 1841, all federal programs imposed racial restrictions on beneficiaries.[207] By allowing declarants to participate,

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understand the Fourteenth Amendment to have' 'extend[ed] the suffrage.'" Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1551 (2020) (quoting Oregon v. Mitchell, 400 U.S. 112, 166 (1970) (Harlan, J., concurring in part and dissenting in part)).

199. Neuman, *supra* note 194, at 297-99, 304-07. Women's suffrage as an inducement to immigration is part of this story. In 1869, the Wyoming Territory enfranchised women. And Utah did so as a territory in 1870. As Professor Kerry Abrams noted, "[b]y 1914, the only state west of the Rockies that did not have woman suffrage was New Mexico; the only state east of the Rockies that *did* was Kansas." Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1407-08 (2009).

200. Act of June 6, 1900, ch. 786, § 199, 31 Stat. 321, 520.

201. Act of May 26, 1864, ch. 95, § 5, 13 Stat. 85, 87-88.

202. Act of July 25, 1868, ch. 235, § 5, 15 Stat. 178, 179-80.

203. *See* Territory v. Harding, 12 P. 750, 751 (Mont. 1887) ("[O]ur statute provides that any male person of lawful age, who is a citizen of the United States, or who has declared his intention to become such, who is a tax-payer, and a *bona fide* resident of the county, shall be competent to serve as a grand or trial juror.") (citing REV. STAT. MONT. § 780), *habeas corpus denied sub nom. Ex parte* Harding, 120 U.S. 782, 783 (1887).

204. *See Recent Cases, Public Officer—Election of an Alien—Naturalization After Election*, 7 HARV. L. REV. 119, 123 (1893) (discussing an Iowa case in which a noncitizen was elected sheriff). *Compare* State *ex rel.* Taylor v. Sullivan, 47 N.W. 802, 802 (Minn. 1891) (holding that non-declarant's election was void), *with* State v. Trumpff, 5 N.W. 876, 878 (Wis. 1880) ("[I]f an alien who is not an elector receives a plurality of votes for an office, he may lawfully hold and exercise the same, if, by naturalization or declaration, his disability is removed before the commencement of the term of office to which he has been elected.").

205. *See* COLO. REV. STAT. § 37-26-103 (2023); COLO. REV. STAT. § 37-41-104(2) (2023).

206. *See generally* PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 464 (1968).

207. Preemption Act of 1841, ch. 16, 5 Stat. 453.

they ensured that White immigrants could obtain land as soon as they arrived, even though American-born non-White persons, like non-White migrants, might be precluded from such land purchases.

The Donation Land Act of 1850 contained an express racial limitation, offering free land "to every white settler or occupant of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law, of his intention to become a citizen."[208] The Act applied to the Oregon Territory, which included what are now the states of Idaho, Oregon, and Washington, and parts of western Montana and Wyoming.[209] The statute was extended to the territories of New Mexico (covering what are now the states of New Mexico and Arizona and parts of Colorado and Nevada)[210] and the Washington Territory after Oregon statehood in 1859.[211] The landmark Homestead Act of 1862 restricted its benefits to citizens and declarants.[212] These laws obviously initially denied access to federal land to African Americans,[213] Black immigrants from the Caribbean, Africa, Europe, or the Americas,[214] Indigenous Americans, Chinese immigrants who could not be naturalized, and the handful of other immigrants from the Pacific Islands and some parts of Asia other than China.[215]

208. Donation Land Act of 1850, ch. 76, § 4, 9 Stat. 497.

209. *Id.* §§ 1-2.

210. Act of July 22, 1854, ch. 103, 10 Stat. 308.

211. Act of Mar. 2, 1853, ch. 90, 10 Stat. 172-73 (making laws applicable to Oregon Territory also applicable to Washington Territory).

212. Homestead Act of 1862, ch. 75, 12 Stat. 392 (repealed 1976).

213. All Black people born in the United States and living there in 1866 became citizens under the Civil Rights Act of 1866, which was constitutionalized by the Fourteenth Amendment. Civil Rights Act of 1866, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-82 (1970)).

214. The Naturalization Act of 1870 opened federal lands for people from Africa or of African ancestry. Naturalization Act of 1870, Pub. L. No. 41-254, 16 Stat. 254, 256.

215. "The steady trickle of emigration from Ottoman lands, especially from Syria to the Americas, started in the 1860s." Kemal H. Karpat, *The Ottoman Emigration to America, 1860-1914*, 17 INT'L J. MIDDLE E. STUD. 175, 180 (1985). While some were initially denied naturalization, ultimately Arabs and Muslims were deemed White. Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U. ANN. SURV. AM. L. 29, 73 (2013).

III. EXPANSION AND PERSISTENCE OF THE CLAUSE IN THE COURTS

A. Application to Non-White People

The "free white person" clause was primarily related to slavery and free Black people in the minds of judges and legislators, because most discussions of race and citizenship until the 1850s related to African Americans, and, to a lesser extent, Indigenous persons. Noah Pickus, for example, posits that the "free white person" clause was based on the idea, held by many elected officials in the founding era, that Black people could not be incorporated into the nation.[216] "At America's founding, and in the nation's early years, almost all of the leading political figures believed that civic freedom depended on a shared sense of belonging."[217] While "they disagreed over its meaning,"[218] there was, among proponents and opponents of slavery alike, a "shared concern to establish a nationalist foundation for citizenship [which] made it easier for all to agree on excluding blacks from citizenship."[219] But, as we have noted above, Pickus ignored the fact that Black people voted on the same basis as White people in a majority of the states from 1787, when the Constitution was being written and first debated, until the early nineteenth century when new states, starting with Ohio in 1803, did not enfranchise Black people. Furthermore, a few Black people held public office in various states from the early national period to the Civil War. These facts undermine Pickus's assertion of "the Founders' disbelief in the possibility of a multiracial nation."[220]

Certainly, most southern Founders accepted these views, articulated most forcefully by Thomas Jefferson in his *Notes on the State of Virginia*.[221] However, Pickus, like Professor West, fails to note the political participation of Black people on the same basis as White people in a majority of the states at the Founding.

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216. *See* PICKUS, *supra* note 35, at 15.
217. *Id.*
218. *Id.*
219. *Id.* at 53.
220. *Id.* at 56.
221. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, 84-85 (William Peden, ed., 1783).

In the twentieth century, the Supreme Court had no difficulty in construing the "free white person" clause to include only those who were White, rather than seeing it as an eighteenth-century exclusion of the only two groups of non-White people in the country in the 1790s, Indians and Black people.[222] By the time the Court ruled on this, Black people, who had originally been targeted, had been granted the privilege of naturalization in 1870.[223] A Japanese immigrant making an originalist argument to the Court in 1922 contended that the Justices "should give to this phrase the meaning which it had in the minds of its original framers in 1790 and that it was employed by them for the sole purpose of excluding the black or African race and the Indians."[224] But the Court was unimpressed:

> to say that they were the only ones within the intent of the statute would be to ignore the affirmative form of the legislation. The provision is not that Negroes and Indians shall be *excluded*, but it is, in effect, that only free white persons shall be *included*. The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified.[225]

The limited early nineteenth century materials support the *Ozawa* Court's reasoning. For example, in 1831, an anonymous commentator noted that the law excluded all of "the colored races of men."[226] The commentator objected to the limitation:

> Corrupt and ignorant foreigners of any color are not desirable citizens. But we are unable to perceive why a Chinese, an African, a Malay, or an American Indian, if he has the intellectual

222. *See* Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795).

223. *See* Naturalization Act of 1870, Pub. L. No. 41-254, § 7, 16 Stat. 256.

224. Ozawa v. United States, 260 U.S. 178, 195 (1922).

225. *Id.* at 195. The Court found it irrelevant that Congress might not have had the Japanese in mind, specifically:

> It is not important in construing their words to consider the extent of their ethnological knowledge or whether they thought that under the statute the only persons who would be denied naturalization would be Negroes and Indians. It is sufficient to ascertain whom they intended to include and having ascertained that it follows, as a necessary corollary, that all others are to be excluded.

Id. at 196. It is of course obvious that in reenacting the "white person" rule in 1870 and later, Congress had people from Asia, among other places, in mind.

226. *The Naturalization Laws*, 6 AM. JURIST L. MAG. July & Oct. 1831, at 55, 61.

> and moral qualities which are requisite in a citizen, ought not to be entitled to the same privileges as an Englishman, an Irishman, a German, or a Spaniard?[227]

This sentiment seems not to have been widespread; the very year that this argument was anonymously made, the Supreme Court undermined the right of Native Americans to defend their rights in federal courts.[228]

The most famous antebellum invocation of the meaning of the 1790 Act came in Chief Justice Roger B. Taney's opinion in *Dred Scott*, which he used to contend that African Americans were not part of the political community.[229] He discussed a number of laws discriminating in favor of White people.

> The first of these acts is the naturalization law, which was passed at the second session of the first Congress, March 26, 1790, and confines the right of becoming citizens "*to aliens being free white persons* [sic]."
>
> Now, the Constitution does not limit the power of Congress in this respect to white persons. And they may, if they think proper, authorize the naturalization of any one, of any color, who was born under allegiance to another Government. But the language of the law above quoted, shows that citizenship at that time was perfectly understood to be confined to the white race; and that they alone constituted the sovereignty in the Government.[230]

Thus, the racial scope of the Naturalization Act was used to define the political community. The point was not that some races were excluded, but that only the White race—"they alone"—were included.[231]

Taney, a slaveowner from Maryland, discussed the racial basis of the political community in another case, involving a different race, some seventeen years before *Dred Scott*. *United States v. Dow* arose

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227. *Id.*

228. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet. 1), 20 (1831) (holding that an Indian tribe was not a foreign state under the Constitution, and thus lacked standing to sue).

229. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 406 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend XIV.

230. *Id.* at 419-20.

231. *Id.* at 420.

when Taney presided over trials in the District of Maryland as Circuit Justice.[232] The question presented was whether Dow, a "Malay" sailor from the Philippines, would be tried for an alleged murder under the procedural rules applicable to White Christians, or, instead, those applicable to people of color.[233] This was a critical issue, because the only witnesses against Dow were Black people, and if Dow was White, they could not testify against him.[234]

Taney wrote that "[t]he only question is, whether he is to be regarded as a Christian white person?"[235] For several reasons, he concluded, "[w]e think he is not."[236] First, "the Malays have never been ranked by any writer among the white races."[237] The second reason drew on matters of political self-definition:

> The colonists were all of the white race, and all professed the Christian religion; from the situation of the world at that time, no persons but white men professing the Christian religion could be expected to emigrate to Maryland; and if any person of a different color, or professing a different religion, had come into the colony, he would not, at that time, have been recognized as an equal by the colonists, or deemed worthy of participating with them in the privileges of this community. The only nations of the world which were then regarded, or perhaps entitled to be regarded, as civilized, were the white Christian nations of Europe; and certainly emigrants were not expected or desired from any other quarter.[238]

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232. *See* United States v. Dow, 25 F. Cas. 901, 901 (C.C.D. Md. 1840) (No. 14, 990). *Dow* is discussed in detail in Gabriel J. Chin, Dred Scott *and Asian Americans*, 24 U. PA. J. CONST. L. 633 (2022).

233. *Dow*, 25 F. Cas. at 901-03.

234. *Id.* at 902-03.

235. *Id.* at 903.

236. *Id.*

237. *Id.* Taney did not say who the "writers" were; later cases go into more detail about the pseudo-scientific racial anthropology of the time. *See In re* Ah Yup, 1 F. Cas. 223, 223-24 (C.C.D. Cal. 1878) (No. 104); *In re* Kanaka Nian, 21 P. 993, 993 (Utah 1889); United States v. Thind, 261 U.S. 204 (1923).

238. *Dow*, 25 F. Cas. at 903. It is important to note that Taney's aggressive racism led him to make assertions about religion that were not only untrue but that he must have known were untrue. Taney would certainly have known that in 1801, Thomas Jefferson appointed Soloman Etting, a leader of Baltimore's Jewish community, to be the U.S. Marshal for Maryland, and that other Jews had held political positions under Washington, Adams, Jefferson, and Madison. He might have known that there were Jewish officers in Washington's army and he certainly should have known that there were a number of Jewish

Taney, of course, is notorious for the vicious racism expressed in *Dred Scott* and other opinions.[239] Yet, he was not alone in arguing for the importance of the naturalization statute and of the exclusively White nature of the political community. In 1822, Kentucky's highest court opined: "as the laws of the United States do not now authorise any but a white person to become a citizen, it marks the national sentiment upon the subject."[240] The Connecticut Supreme Court wrote in 1837 that because under its constitution "all coloured persons are excluded from the privileges of electors, it would seem as if all such persons were considered as excluded from the social compact."[241] Many other antebellum decisions conceptualize the political community as being made up exclusively of White people.[242]

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officers in the Maryland militia that helped defend his home state in the War of 1812. Thus, his emphasis on Christians illustrates his intellectual dishonesty, and perhaps that his bigotry went beyond Black people, to Jewish people and other minorities.

239. PAUL FINKELMAN, *DRED SCOTT V. SANDFORD*: A BRIEF HISTORY WITH DOCUMENTS 29-30, 34-36 (2d ed. 2019); FINKELMAN, SUPREME INJUSTICE, *supra* note 54, at 182-83.

240. Amy v. Smith, 1 Litt. 326, 334 (1822).

241. Jackson v. Bullock, 12 Conn. 38, 42 (1837). While Connecticut enfranchised Black people at the Founding, this right disappeared with the adoption of the Connecticut Constitution of 1818, which granted the privilege only to "white male citizen[s]." CONN. CONST. art. VI, § 2 (1818) (alteration in original).

242. *See, e.g.*, Douglass v. Stephens, 2 Del. Cas. 489, 496 (1819) ("The word 'citizen' imports the same as the word 'freeman' in our old Acts of Assembly; and means every white man, who, by birth or naturalization, is or may be qualified to exercise and enjoy, under like circumstances, all the rights which any native born, white inhabitant of the State does or can enjoy."); Bryan v. Walton, 14 Ga. 185, 202 (1853) ("Our ancestors settled this State when a province, as a community of white men, professing the christian religion, and possessing an equality of rights and privileges."); Thomasson v. State, 15 Ind. 449, 450 (1860) ("Now who are citizens within the meaning of this provision? Evidently none but those who participated in the formation of the government, or have a right to participate in its administration. These are, *white male citizens* of the United States, of the age of twenty-one years, and *white males* of foreign birth, of the like age, who have declared their intentions, under the act of Congress, to become *citizens* of the United States, and have resided in this State six months."); Ely v. Thompson, 10 Ky. (3 A.K. Marsh.) 70, 75 (1820) ("Although free persons of color are not parties to our social compact, yet they have many privileges secured thereby, and have a right to its protection."); *Ex parte* Thompson, 10 N.C. (3 Hawks) 355, 361 (1824) ("With this single exception, all persons (I mean to speak only of free white persons) residing here are either citizens or aliens; the former, whether native or naturalized, being entitled to equal rights, with the exception of eligibility to the office of president, which is confined to those who were citizens at the adoption of the Constitution of the United States."); United States v. Tom, 1 Or. 26, 27 (1853) (In interpreting statute applying Indian Country law to the Oregon territory "so far as its provisions may be applicable," Chief Justice Williams noted that "[a]ll which tends to prevent immigration, the free occupation and use of the country by whites, must be considered as repealed. Whatever militates against the true interests of a white population is inapplicable."); Foremans v. Tamm, 1 Grant 23, 23 (Pa. 1853) ("Whenever the white

Certainly, this viewpoint was not unanimous in U.S. law, and was not consistent with the history of the Founding that was fully available to judges at this time.[243] This view of the Founding was, however, strong and successful.

The racial restriction on naturalization also helped facilitate the incarceration of Japanese Americans during World War II. The Court noted that Japanese immigrants were not allowed to naturalize and therefore might be seen as threats in the war against their home country.[244] A remarkable passage from *Hirabayashi v. United States*, upholding a suspicionless curfew imposed on Japanese Americans during World War II, explains:

> There is support for the view that social, economic and political conditions which have prevailed since the close of the

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population, who settled this Commonwealth, under a charter and laws derived from a government established by a similar caste of men ... think proper to admit into political partnership either the black population of Africa or the red aborigines of America, they have a right to do so. Until this be done, the negro and the Indian must be content with the privileges extended to them, without aspiring to the exercise of the elective franchise, or to the right to become our legislators, judges and governors."); White v. Tax Collector of Kershaw Dist., 37 S.C.L. (3 Rich.) 136, 139 (1846) ("Habit and education have so strongly associated with the European race the enjoyment of all the rights and immunities of freedom, that color alone is felt and recognized as a claim."); State v. Claiborne, 19 Tenn. (10 Meigs) 331, 339 (1839) ("Free negroes have always been a degraded race in the United States, having the right, it is true, of controlling their own actions and enjoying the fruit of their own labor, but deprived of almost every other privilege of the free citizen, and constituting an inferior caste in society, with whom public opinion has never permitted the white population to associate on terms of equality, and in relation to whom the laws have never allowed the enjoyment of equal rights, or the immunities of the free white citizen.").

243. Opinion of Judge Davis, 44 Me. 576, 587 (1857) ("But if the matter were pertinent, I affirm, as a historical fact, that at the time when our independence was established, the white population of this country did recognize the citizenship of colored persons of African descent, and did intend to secure to them the rights of citizens. That they at that time possessed the privileges and immunities of citizens in the states, and in nearly all of them enjoyed the right of suffrage as a constitutional right, is beyond all question. The members of the congresses, both before and during the confederation, were chosen, in part, by such persons. They were bound to represent these persons as a part of their constituents; and no evidence exists that they were not true to their trust. On the contrary, the evidence is indubitable that, during the whole period of our struggles, from the commencement of the agitation which resulted in the declaration of our independence, to the adoption of the federal constitution in 1789, the freedom and elevation of the African race was a prominent and cherished purpose with the leading statesmen of the country, both north and south.").

244. Hirabayashi v. United States, 320 U.S. 81, 96-98 (1943). Of course, in taking this position, the Court ignored the more plausible argument that Japanese *emigrants* who moved to the United States were effectively rejecting the country of their birth.

> last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population.[245]

A footnote details the mechanism of this failure to assimilate:

> Federal legislation has denied to the Japanese citizenship by naturalization, and the Immigration Act of 1924 excluded them from admission into the United States. State legislation has denied to alien Japanese the privilege of owning land. It has also sought to prohibit intermarriage of persons of Japanese race with Caucasians. Persons of Japanese descent have often been unable to secure professional or skilled employment except in association with others of that descent, and sufficient employment opportunities of this character have not been available.[246]

The Court did not regard the history of anti-Asian racial discrimination, much of which the Court upheld or applied, as a reason to be suspicious of the racial discrimination at issue in curfew and internment cases. Instead, the Court reasoned that systematic political, economic, and social discrimination against Japanese Americans, including denying them the right to naturalize, justified additional forms of discrimination against them during wartime.[247] The Court also explicitly deemed "the white population," not, say, the American population, to be the appropriate group against which to measure Japanese Americans.[248] The reasoning is reminiscent of slave law, where the resentment against White people generated by enslavement justified the deprivation of other privileges for free Black people, such as the ability to testify.[249]

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245. *Id.* at 96.

246. *Id.* at 96-97, n.4 (citations omitted).

247. *Id.* at 96-98.

248. *Id.* at 96-97.

249. Thus, Chief Justice Taney explained why Indians and persons of African ancestry were not permitted to testify against whites:

> These three races existing in the same territory, one possessing all the power, and holding the other two in a state of subjection and degredation, it was natural, that feelings should be created by such a state of things, that would make it dangerous for the white population to receive as witnesses against themselves the members of the two races which it had thus degraded;

Dow, 25 F. Cas. at 903; *see also, e.g.*, Collins v. Hall, 1 Del. Cas. 652, 655 (1793) (holding

B. Immigration of White People—The Passenger Cases

The idea of the United States as a White nation contained in the 1790 Act also played out in cases involving White immigration. The *Passenger Cases* was a consolidation of two cases involving state laws imposing a tax or landing fee on ships bringing immigrants—White European immigrants—into the United States.[250] In *Smith v. Turner*, the master of the British ship *Henry Bliss*, carrying 295 steerage passengers, challenged the power of New York to charge a landing fee of $1.50 for cabin passengers and $1.00 for steerage passengers.[251] In *Norris v. City of Boston*, the captain of the *Union Jack* out of New Brunswick, carrying nineteen noncitizens, challenged a Massachusetts law assessing a $2.00 landing fee for all passengers and also requiring a bond of $1,000 for passengers who might not be able to support themselves.[252] By a vote of 5-4, the Court held both laws invalid.[253]

There was no "Opinion of the Court" in this case. Each of the five Justices in the majority issued a separate seriatim opinion.[254] Each of the four dissenting Justices also wrote an opinion.[255] For the first time in Supreme Court history, there were nine opinions.[256] Illustrating the importance of race to the Court, the next such case was *Dred Scott v. Sandford*.

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persons of African ancestry could not testify; accepting argument of counsel that "[t]hey cannot love those who depress and enslave them, and who enjoy rights, privileges and advantages in the community of which they find themselves deprived.").

250. On the history of this case, see Tony A. Freyer & Daniel Thomas, *The* Passenger Cases *Reconsidered in Transatlantic Commerce Clause History*, 36 J. SUP. CT. HIST. 216, 217-18 (2011) and TONY ALLEN FREYER, THE PASSENGER CASES AND THE COMMERCE CLAUSE: IMMIGRANTS, BLACKS, AND STATES' RIGHTS IN ANTEBELLUM AMERICA 1-3 (2014).

251. 48 U.S. (7 How.) 283, 284 (1849).

252. *Id.* at 285-86.

253. *Id.* at 572-73.

254. *See id.* at 392-573.

255. *See id.*

256. Some sources assert there were only eight opinions in the case. *See* Freyer & Thomas, *supra* note 250, at 216. In fact, each of the nine Justices wrote something in a seriatim style. The opinions ranged in length from Justice Woodbury's 55 page dissent to Justice Nelson's one paragraph dissent. *See Passenger Cases*, 48 U.S. (7 How.) at 392-518 (The majority opinions written by Justices McLean, Wayne, Catron, McKinley, and Grier begin on pages 392, 410, 437, 452, and 455 respectively, and the dissenting opinions written by Justices Taney, Daniel, Nelson, and Woodbury begin on pages 464, 494, 518, and 518 respectively).

All five Justices in the majority agreed that either under the Commerce Clause or the Migration and Importation Clause,[257] Congress had the exclusive power to regulate immigration, and the states therefore could not tax immigrants or in any other way interfere with immigration.[258] The case is generally seen as an early application of the dormant Commerce Clause to state laws that might interfere with Congress' commerce power.[259] While a case about "commerce," the case had implications for both immigration and race.

David B. Ogden, one of the most important Supreme Court advocates of the age, made the salience of race clear on behalf of George Smith, who challenged the New York law.[260] Ogden argued that under the Constitution "no impost can be laid upon white men," and asked, "by what authority does the State of New York impose such a duty upon every passenger, white or black, bond or free?"[261] On the other side, Willis Hall, a former New York attorney general, argued that under the Constitution, Congress could not tax White immigrants because immigration was *not* commerce, and thus he asserted that the state could regulate and tax immigrants as part of its local police powers.[262] Similarly, John Van Buren, another former New York attorney general and the son of a former U.S. President, argued that the states could regulate immigration in order to enforce their "slave laws."[263] An attorney for the city of Boston, John Davis, argued that the immigration of free Europeans was not "commerce" because "Men ... are not imports, or articles of trade or traffic."[264] Thus, these taxes were not on imports, but

257. *See Passenger Cases*, 48 U.S. (7 How.) at 453, 455 (1849). Justice McKinley, a states' rights slaveholding Democrat from Alabama, *see* James L. Noles, Jr., *Alabama's Forgotten Justices: John McKinley and John A. Campbell*, 63 ALA. LAW. 236, 236-37 (2002), was probably sympathetic to the dissenters, but believed the Migration and Importation Clause gave Congress plenary power to regulate immigration. *See Passenger Cases*, 48 U.S. (7 How.) at 452-55.

258. *See Passenger Cases*, 48 U.S. (7 How.) at 452-55.

259. *See id.*

260. *See id.*

261. *Id.* at 307.

262. *Id.* at 350-51; *Willis Hall*, HIST. SOC. N.Y. CTS., https://history.nycourts.gov/figure/willis-hall/ [https://perma.cc/4DDR-8DUB].

263. *Passenger Cases*, 48 U.S. (7 How.) at 373; *John Van Buren*, HIST. SOC. N.Y. CTS., https://history.nycourts.gov/figure/ john-van-buren/ [https://perma.cc/W9QT-YDUW].

264. *Passenger Cases*, 48 U.S. (7 How.) at 288, 328-29.

merely taxes on individuals, which states were always allowed to levy.[265] He argued that the states were free to limit the migration or immigration of free Black persons—as all the slave states did—as well as the introduction of slaves as merchandise, as some slave states and all free states did.[266] Similarly, he asserted that the states had to have the right to regulate the arrival of "the insane, the imbecile, the infirm, and such as are incapable of providing for themselves."[267] He saw no reason not to admit "those sent from the poor-houses of Europe" to America, but the states had to be able to have some sort of guarantee that these White immigrants would not become a burden on the places where they landed.[268]

The Court agreed with counsel about the importance of race and immigration. The majority, led by Justice John McLean of Ohio, favored immigration and focused on the federal government's interest in encouraging White immigration and its power to do so under the Commerce Clause.[269] The four dissenters, led by Chief Justice Roger B. Taney, were more respectful of the states' power to exclude undesirable migrants, such as enslaved persons, and free Black people.[270] Neither the dissenters nor the lawyers for New York and Boston argued that the states could prohibit White European immigrants, but only asserted that the states had to be able to protect against impoverished immigrants through fees and bonds assessed on ships.[271]

As the senior Justice in the majority,[272] Justice McLean's seriatim opinion appears first.[273] It was endorsed by Justice McKinley,[274] and barely touched on race, reflecting Justice McLean's strong personal

265. *Id.* at 330-31.
266. *Id.* at 331.
267. *Id.*
268. *Id.*
269. *See id.* at 406, 408-09.
270. *See id.* at 483.
271. *See id.* at 316, 318, 381, 490, 526.
272. Paul Finkelman, *John McLean: Moderate Abolitionist and Supreme Court Politician*, 62 VAND. L. REV. 519, 536 (2009).
273. *See Passenger Cases*, 48 U.S. (7 How.) at 392.
274. *Id.* at 452 (McKinley, J.) ("I have examined the opinions of Mr. Justice McLean and Mr. Justice Catron, and concur in the whole reasoning upon the main question."); *see supra* note 257 and accompanying text.

opposition to slavery.[275] In an apparent reference to the 1790 Act, Justice McLean wrote:

> To encourage foreign emigration was a cherished policy of this country at the time the Constitution was adopted. As a branch of commerce the transportation of passengers has always given a profitable employment to our ships, and within a few years past has required an amount of tonnage nearly equal to that of imported merchandise.[276]

A tax could amount to a prohibition: "The tax on each passenger, in the discretion of the legislature, might have been five or ten dollars, or any other sum, amounting even to a prohibition of the transportation of passengers."[277] The opinion anticipated Chief Justice Taney's dissent, which argued that if regulation of immigration were commerce, Congress could resume the slave trade, and force states to accept imported captives.[278] Justice McLean disagreed: "It is suggested that, under this view of the commercial power, slaves may be introduced into the Free States. Does any one suppose that Congress can ever revive the slave trade? And if this were possible, slaves thus introduced would be free."[279]

Justice Catron's opinion may be regarded as the plurality opinion, as Justice Grier of Pennsylvania joined it,[280] and Justices Wayne and McKinley endorsed it even though they also wrote separately.[281]

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275. Finkelman, *supra* note 272, at 540. Notably, Justice McLean would dissent a few years later in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 529 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend XIV.

276. *Passenger Cases*, 48 U.S. (7 How.) at 401.

277. *Id.* at 404.

278. *Id.* at 477 (Taney, C.J., dissenting) ("It would require very plain and unambiguous words to convince me that the States had consented thus to place themselves at the feet of the general government; and if this power is granted in regard to voluntary immigrants, it is equally granted in the case of slaves ... every State may be compelled to receive a cargo of slaves from Africa, whatever danger it may bring upon the State, and however earnestly it may desire to prevent it.").

279. *Id.* at 406 (McLean, J.).

280. *Id.* at 452 (Grier, J.).

281. *See id.* at 411 (Wayne, J.) ("For the acts of Massachusetts and New York imposing taxes upon passengers, and for the pleadings upon which these cases have been brought to this court, I refer to the opinion of Mr. Justice Catron. They are fully and accurately stated. I take pleasure in saying that I concur with him in all the points made in his opinion, and in his reasoning in support of them."); *id.* at 452 (McKinley, J.) ("I have examined the opinions of Mr. Justice McLean and Mr. Justice Catron, and concur in the whole reasoning upon the

In his opinion voting to overturn the state laws, Justice Catron, a slave owner from Tennessee,[282] quoted the 1790 Naturalization Act to support the point that it was unconstitutional for the states to tax free White immigrants.[283]

> We have invited to come to our country from other lands all free white persons, of every grade and of every religious belief, and when here to enjoy our protection, and at the end of five years to enjoy all our rights, except that of becoming President of the United States.[284]

> Keeping in view the spirit of the Declaration of Independence with respect to the importance of augmenting the population of the United States, and the early laws of naturalization, Congress, at divers[e] subsequent periods, passed laws to facilitate and encourage more and more the immigration of Europeans into the United States for the purpose of settlement and residence.[285]

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main question.").

282. *Great American Biography: John Catron*, CONST. L. REP., https://constitutionallawreporter.com/great-american-biographies/john-catron [https://perma.cc/ADR6-MXKG].

283. *See Passenger Cases*, 48 U.S. (7 How.) at 442.

284. *Id.* at 440 (Catron, J., joined by Grier, J.). In an opinion joined by Justice Catron, Justice Grier wrote that "[i]t is the cherished policy of the general government to encourage and invite Christian foreigners of our own race to seek an asylum within our borders, and to convert these waste lands into productive farms, and thus add to the wealth, population, and power of the nation." *Id.* at 461 (Grier, J., joined by Catron, J.).

285. *Id.* at 440 (Catron, J., joined by Grier, J.). Justice Catron noted that immigration had been a boon for the United States:

> Every department of science, of labor, occupation, and pursuit, is filled up, more or less, by naturalized citizens and their numerous offspring. From the first day of our separate existence to this time has the policy of drawing hither aliens, to the end of becoming citizens, been a favorite policy of the United States, it has been cherished by Congress with rare steadiness and vigor. By this policy our extensive and fertile country has been, to a considerable extent, filled up by a respectable population, both physically and mentally, one that is easily governed and usually of approved patriotism.

Id. The states could not be allowed to interfere with this:

> We cannot take into consideration what may or may not be the policy adopted or cherished by particular [s]tates; some [s]tates may be more desirous than others that immigrants from Europe should come and settle themselves within their limits, and in this respect no one [s]tate can rightfully claim the power of thwarting by its own authority the established policy of all the [s]tates united.

Id. at 442-43.

Under the circumstances, such migrants were "exempt from the State taxing power."[286]

Justice Wayne, a slaveowner from Georgia,[287] found that state taxation of arriving migrants

> is inconsistent with the naturalization clause in the Constitution, and the laws of Congress regulating it. If a State can, by taxation or otherwise, direct upon what terms foreigners may come into it, it may defeat the whole and long-cherished policy of this country and of the Constitution in respect to immigrants coming to the United States.[288]

But Justice Wayne recognized an existing power of self-defense against undesirable noncitizens: "the States have the right to turn off paupers, vagabonds, and fugitives from justice, and the States where slaves are have a constitutional right to exclude all such as are, from a common ancestry and country, of the same class of men."[289]

The dissenters agreed with the majority (other than Justice McLean) about the demographics of desirable immigrants; they also supported White immigration.[290] But they believed that regulation of immigration was a state rather than federal responsibility. Chief Justice Taney's dissent concluded that

> it must ... rest with the State to determine whether any particular class or description of persons are likely to produce discontents or insurrection in its territory, or to taint the morals of its citizens, or to bring among them contagious diseases, or the evils and burdens of a numerous pauper population.[291]

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286. *Id.* at 452.

287. *See* George Gordon Battle, *James Moore Wayne—Southern Unionist*, 13 FORDHAM L. REV. 42, 42, 58 (1944); *see also* ALEXANDER A. LAWRENCE, JAMES MOORE WAYNE, SOUTHERN UNIONIST (1943); JOEL MCMAHON, OUR GOOD AND FAITHFUL SERVANT: JAMES MOORE WAYNE AND GEORGIA UNIONISM (2017).

288. *Passenger Cases*, 48 U.S. (7 How.) at 426 (Wayne, J.).

289. *Id.*

290. *See, e.g.*, *id.* at 525 (Woodbury, J., dissenting).

291. *Id.* at 467 (Taney, C.J., dissenting). Justice Nelson joined Taney's opinion. *Id.* at 518; *see also id.* at 514 (Daniel, J., dissenting) ("This authority over alien friends belongs not, then, to the general government, by any express delegation of power, nor by necessary or proper implication from express grants.").

Chief Justice Taney argued that the Constitution, specifically the Migration Clause,[292] was never meant to give the federal government the power "to prevent voluntary and beneficial migration from Europe, which all the States desired to encourage."[293]

Justice Woodbury, a pro-slavery Democrat from New Hampshire, agreed in his dissent that immigration was desirable.

> Whatever may be their religion, whether Catholic or Protestant, or their occupation, whether laborers, mechanics, or farmers, the majority of them are believed to be useful additions to the population of the New World, and since, as well as before our Revolution, have deserved encouragement in their immigration by easy terms of naturalization, of voting, of holding office, and all the political and civil privileges which their industry and patriotism have in so many instances shown to be usefully bestowed. (See Declaration of Independence; Naturalization Law; 1 Lloyd's Debates, Gales and Seaton's ed., p. 1147; Taylor v. Carpenter, 2 Woodbury & Minot.).[294]

Nevertheless, the states had the power to exclude undesirable migrants, prominently including certain people of color.[295] Referring to

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292. U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress proper to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each person.").

293. *Passenger Cases*, 48 U.S. (7 How.) at 475 (Taney, C.J., dissenting).

294. *Id.* at 521 (Woodbury, J., dissenting). In *Taylor v. Carpenter*, Justice Woodbury upheld the right of a noncitizen to sue in a U.S. court on the same basis as a citizen. 23 F. Cas. 744, 748-50 (C.C.D. Mass. 1846) (No. 13,785). He explained that the noncitizen "is not now regarded as 'the outside barbarian,' he is considered in China." *Id.* at 749.

295. *Passenger Cases*, 48 U.S. (7 How.) at 525 (Woodbury, J., dissenting) ("Those coming may be voluntary emigrants from other nations, or travelling absentees, or refugees in revolutions, party exiles, compulsory victims of power, or they may consist of cargoes of shackled slaves, or large bands of convicts, or brigands, or persons with incendiary purposes, or imbecile paupers, or those suffering from infectious diseases, or fanatics with principles and designs more dangerous than either, or under circumstances of great ignorance, as liberated serfs, likely at once, or soon, to make them a serious burden in their support as paupers, and a contamination of public morals. There can be no doubt, on principles of national law, of the right to prevent the entry of these, either absolutely or on such conditions as the State may deem it prudent to impose."); *id.* at 569 ("And who ever thought that these treaties were meant to empower, or could in any moral or political view empower, Great Britain to ship her paupers to Massachusetts, or send her free blacks from the West Indies into the Southern States or into Ohio, in contravention of their local laws, or force on the States, so as to enjoy their protection and privileges, any persons from abroad deemed

the Act of 1803, Justice Woodbury noted "[t]he only act of Congress on this subject before 1808 expressly recognized the power of the State alone then to prohibit the introduction or importation 'of any negro, mulatto, or other person of color,' and punished it only where the States had."[296] Justice Woodbury also rejected Justice Wayne's promise that under the majority's ruling, states would still have the power to exclude enslaved persons and free Black people.[297]

Finally, Justice Woodbury hinted that the states had alternatives to carry out exclusionary policies such as taxation. After landing

> they could all be taxed, though with less ease; and they could all, if the State felt so disposed to abuse the power, be taxed out of their limits as quickly and effectually as have been the Jews in former times in several of the most enlightened nations of modern Europe.[298]

The logic of Justice Wayne's opinion, and Justice Catron's, left open state exclusion of those whom Congress had not invited through the naturalization law. It is not clear whether Justices Catron, Grier, and McKinley would have limited federal preemption to the free White persons invited by the naturalization laws, or whether they would have concluded that anyone not prohibited by federal law was ipso facto invited. Nevertheless, there seemed to be no question in any of the opinions that the policy of Congress was to encourage White immigration.[299] At least five Justices—Wayne and the dissenters—would have held that states had the power to exclude free Black people and others who were not free and White.[300]

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dangerous, such as her felon convicts and the refuse of her jails?").

296. *Id.* at 527 (citation omitted).

297. *Id.* at 550 ("It is a mistaken view to say, that the power of a State to exclude slaves, or free blacks, or convicts, or paupers, or to make pecuniary terms for their admission, may be one not conflicting with commerce, while the same power, if applied to alien passengers coming in vessels, does conflict. Slaves now excepted, though once not entirely, they are all equally and frequently passengers, and all oftener come in by water in the business and channels of ocean commerce than by land.").

298. *Id.* at 531-32.

299. *Id.* at 440, 452, 461.

300. *Id.* at 410, 426. Under modern jurisprudence, perhaps this would be deemed a holding. Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976)

C. The Civil War and Reconstruction

The Civil War permanently changed the American law of race. The service of more than 200,000 Black soldiers, sailors, guides, and civilians working for the army in the war helped lead to a massive rethinking of the role of race in federal law.[301] During and after the war, various federal laws protected Black people, allowed them to serve in the army, and ended slavery.[302] These changes were permanently protected through the Thirteenth, Fourteenth, and Fifteenth Amendments. Reconstruction's legal reforms are justly celebrated. However, the fate of the naturalization restriction is more complicated.

The Court has said that "the promise of the Reconstruction Amendments [is] that our Nation is to be free of state-sponsored discrimination;"[303] that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."[304] In *Loving v. Virginia*, the Court wrote that "the clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."[305] More recently, Justice Thomas has written that "[t]he Fourteenth Amendment views racial bigotry as an evil to be stamped out, not as an excuse for perpetual racial tinkering by the State."[306] While some members of the Reconstruction Congresses

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(opinion of Stewart, Powell, and Stevens, JJ.)").

301. *See Black Soldiers in the U.S. Military During the Civil War*, *supra* note 72.

302. Paul Finkelman, *Lincoln v. The Proslavery Constitution: How a Railroad Lawyer's Constitutional Theory Made Him the Great Emancipator*, 47 ST. MARY'S L.J. 63, 66-67 (2015); Paul Finkelman, *The Summer of '62: Congress, Slavery, and a Revolution in Federal Law*, *in* CONGRESS AND THE PEOPLE'S CONTEST: THE CONDUCT OF THE CIVIL WAR, 81, 86 (Paul Finkelman & Donald R. Kennon eds., 2018). *See generally* KATE MASUR, AN EXAMPLE FOR ALL THE LAND: EMANCIPATION AND THE STRUGGLE OVER EQUALITY IN WASHINGTON, D.C. (2010); KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION (2021).

303. Bush v. Vera, 517 U.S. 952, 968 (1996).

304. Palmore v. Sidoti, 466 U.S. 429, 432 (1984). However, this analysis, like the Fourteenth Amendment itself, applies only to the states, and was not to the national government. Thus, in 1870, just two years after the ratification of the Fourteenth Amendment, Congress reenacted the "free white person" rule in nationalization and reaffirmed this in the 1875 Correction Act, changing the language from "free white person" to "free white persons, and to aliens." Act of Feb. 18, 1875, ch. 80, 18 Stat. 316.

305. 388 U.S. 1, 10 (1967); *see also* McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

306. Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 325 (2013) (Thomas, J., concurring)

wanted to eliminate all racial discrimination, the treatment of naturalization and related policies belies the aspirations of this minority.

In fact, Congress elected to maintain many forms of state and federal racial discrimination and limited the application of "equal protection of the laws" in the Fourteenth Amendment, allowing the national government to use race and other categories to help *or harm* certain groups.[307] On the fundamental question of race and citizenship, the Naturalization Act of 1870 was consciously structured to permit racial discrimination. In the House, the bill as proposed, which addressed mainly technical and procedural aspects of naturalization, did not include the racial requirement.[308] After debate and recommitment, a new draft left the "free white person" clause in place.[309] In the Senate, Charles Sumner of Massachusetts, a lifelong opponent of slavery and race discrimination, moved to amend the law "by striking out the word 'white' wherever it occurs, so that in naturalization, there shall be no distinction of race or color."[310] The Senate voted the motion down, 22-23,[311] and rejected a reconsideration, 14-30.[312] The Senate immediately voted 21-20 to extend naturalization "to aliens of African nativity and to persons of African descent."[313] Lest there be any doubt, Congress had the

(citing DeFunis v. Odegaard, 416 U.S. 312, 342 (1974) (Douglas, J., dissenting)). Justice Thomas made this argument in opposition to affirmative action.

307. Earl M. Maltz, *The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment*, 17 HARV. J.L. & PUB. POL'Y 223, 250-51 (1994). *See generally* EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869 (1990). Indeed, during the Reconstruction era, some members of Congress began openly discussing exclusion of Asians. Lea VanderVelde & Gabriel J. Chin, *Sowing the Seeds of Chinese Exclusion as the Reconstruction Congress Debates Civil Rights Inclusion*, 25 UCLA ASIAN PAC. AM. L.J. 29, 29 (2021). Some members of Congress wanted to deny birthright citizenship to the children of Chinese immigrants, but they were defeated by the more egalitarian Republican majority. Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 CHI.-KENT L. REV. 1019, 1024 (2014).

308. CONG. GLOBE, 41st Cong., 2d Sess. 4267 (1870) (remarks of Rep. Noah Davis, a New York Republican).

309. *See id.* at 4366-68.

310. *Id.* at 5121.

311. *Id.* at 5123.

312. *Id.* at 5176.

313. *Id.* While nominally favored in this way, U.S. immigration law has consistently discriminated against persons of African ancestry. *See generally* Bill Ong Hing, *African Migration to the United States: Assigned to the Back of the Bus*, *in* THE IMMIGRATION AND NATIONALITY ACT OF 1965 60 (Gabriel J. Chin & Rose Cuison Villazor eds., 2015). Judge

opportunity to revisit the question during the drafting of the Revised Statutes of 1874, the first codification of federal laws. The first printing of the new Revised Statutes inadvertently dropped the word "white" as a prerequisite for naturalization.[314] Thus, a person of any race could naturalize. In 1875 Congress added back the word "white" as part of a long list of technical corrections to the Revised Statutes.[315] Thus, while Reconstruction was unquestionably an era of dramatic racial change, the durability of the policy of the Naturalization Act of 1790 shows that during Reconstruction, Congress did not fully accept race-neutral, non-discriminatory legal equality in principle. On four separate occasions, Congress elected to maintain a racial restriction on naturalization.[316] Thus, while Africans and people of African ancestry were accommodated, Congress did not embrace a strong theory or principle of universal racial equality or nondiscrimination.

Congress also decided to allow racial discrimination in land ownership. The original version of what became the Civil Rights Act

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Matthew Paul Deady of Oregon offered this explanation for the "seeming inconsistency" of allowing persons of African ancestry to naturalize but not other non-White people:

> [T]he negroes of Africa were not likely to emigrate to this country, and therefore the provision concerning them was merely a harmless piece of legislative buncombe, while the Indian and Chinaman were in our midst, and at our doors and only too willing to assume the mantle of American sovereignty, which we ostentatiously offered to the African, but denied to them.

In re Camille, 6 F. 256, 258 (C.C.D. Or. 1880) (rejecting naturalization petition concluding that a person with one White and one Indian parent was not White).

314. REV. STAT. § 2169 (1874). The revisers were very conservative politicians. The most important one, Caleb Cushing, was a proslavery northern Democrat before the Civil War and had little interest in racial equality. *Caleb Cushing*, LIBR. OF CONG., https://www.loc.gov/item/2021670873/ [https://perma.cc/KJU6-X2EV]. The other two, Charles Pinckney James and William Johnston, were equally conservative and had no record of supporting racial equality. Indeed, they were appointed to this position by President Andrew Johnson who firmly opposed rights for any minorities. Elizabeth R. Varon, *Andrew Johnson: Life in Brief*, UVA MILLER CTR., https://millercenter.org/president/johnson/life-in-brief [https://perma.cc/HXB4-EA9Q]. Thus, leaving out the racial restriction on naturalization must surely have been an oversight, rather than an intentional change of the law in favor of equality.

315. An Act to correct and to supply omissions in the Revised Statutes of the United States, Act of Feb. 18, 1875, 18 Stat. 316, 318 [hereinafter 1875 Correction Act]. The language was this: "Section two thousand one hundred and sixty-nine is amended by inserting, in the first line, after the word 'aliens,' the words 'being free white persons, and to aliens." This is the first time Congress used the plural term "free white persons" in the Naturalization Act.

316. *See generally* Naturalization Act of 1790, ch. 3, 1 Stat. 103; Naturalization Act of 1795, ch. 20, 1 Stat. 414; Naturalization Act of 1870, Pub. L. No. 41-254, 7 Stat. 254; Act of Feb. 18, 1875, ch. 80, 18 Stat. 316.

of 1866,[317] as introduced by Senator Lyman Trumbull of Illinois, protected the "inhabitants of every race and color" in their rights, including "to inherit, purchase, lease, sell, hold, and convey real and personal property."[318] If "inhabitants" could own land in the states, including noncitizens, regardless of whether they had filed a declaration of intent, then one of the key barriers to non-White migrants created by the 1790 Act would vanish.[319] However, in the House, the scope of protection was changed to cover only discrimination against "citizens."[320] This view prevailed and remains the law. Accordingly, for example, although ruling in their favor on other grounds, the U.S. District Court for the Southern District of Texas held that Vietnamese fishers could not sue the Ku Klux Klan under 42 U.S.C. § 1982 for trying to drive them off their property, because the fishers were not citizens.[321]

The Enforcement Act of 1870, also known as the First Ku Klux Klan Act, extended many of the provisions of the Civil Rights Act of 1866 to "all persons."[322] This legislation was in part aimed at protecting Chinese immigrants, who were promised federal protection by treaty.[323] However, it deliberately excluded the right to own land.[324] As Earl Maltz explains:

> [U]nlike the Civil Rights Act of 1866, the 1870 enactment omitted all reference to equality in property rights. This difference was not accidental; the right to obtain and hold real estate was associated with citizenship in Nineteenth-Century legal thought, and Senator [William Morris] Stewart [of Nevada] made a conscious decision to omit it from his proposal.[325]

The Fifteenth Amendment followed the same pattern. Senator Charles Sumner proposed a prohibition against racial

317. Act of Apr. 9, 1866, 14 Stat. 27, 27 (codified at 42 U.S.C. §§ 1981(a), 1982 (2018)).

318. CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866).

319. *See* Naturalization Act of 1790, ch. 3, 1 Stat. 103.

320. CONG. GLOBE, 39th Cong., 1st Sess. 1115 (1866).

321. Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993, 1012 (S.D. Tex. 1981); *see also* Mwangi v. Braegelmann, 507 F. App'x 637, 640 (8th Cir. 2013).

322. An Act to enforce the Right of Citizens of the United States to vote in the several States of the Union, and for other Purposes, Act of May 31, 1870, ch. 114, 16 Stat. 140.

323. Maltz, *supra* note 307, at 235.

324. *See* 16 Stat. at 140.

325. Maltz, *supra* note 307, at 235-36.

discrimination in voting,[326] which would have created a problem for states that wanted to enfranchise White immigrants and Black persons but not others. His proposal was not popular, and he withdrew it.[327] However, in the end the Fifteenth Amendment prohibited the federal government and the states from denying the right to vote "on account of race, color, or previous conditions of servitude," and this language applied to all non-White citizens.[328]

The maintenance of racial discrimination in these and other contexts refutes the idea that the Reconstruction Congresses were systematically opposed to racial discrimination in all ways. The changes in this period were sometimes contradictory. As Mark Graber has recently argued, the major goal of the Fourteenth Amendment was to protect the rights of former slaves and the Black Civil War veterans and their families, while at the same time ensuring that former Confederates did not take over the South.[329] The 1866 Civil Rights Act applied to all people in the United States, and Congress flatly rejected attempts by representatives from California, Oregon, and a few other places to water down birthright citizenship to exclude the American-born children of Chinese parents.[330] At the same time, while allowing for Black naturalization, Congress maintained the prohibition on the naturalization of other non-White people, mostly because of anti-Chinese sentiment. Similarly, the Fifteenth Amendment did not directly enfranchise Black people or Chinese Americans.[331] After Reconstruction, the Supreme Court narrowly interpreted the new Amendments and

326. CONG. GLOBE, 40th Cong., 3d Sess. 1033 (1869) ("The right to vote and hold office shall not be denied or abridged by the United States nor by any State on account of race, color, or previous condition of servitude.").

327. *See id.* at 1035 (statement of Senator Charles Sumner) ("As I have read the Declaration of Independence, it says 'all men are created equal.' It does not say, 'all white men.' Senators about me say it does not say 'Chinamen' or except 'Chinamen.' There is nothing on the subject of Chinamen. But now since my friend from Oregon has found in the suggestion that I made on this amendment the empire of China and all her millions of population, I certainly shall not press it any further. I conceived that in making the suggestion I did I was adding something to the improvement of the pending proposition. I find I have opened an immense debate, and therefore I ask leave to withdraw the amendment.").

328. U.S. CONST. amend. XV.

329. *See generally* MARK GRABER, PUNISH TREASON, REWARD LOYALTY: THE FORGOTTEN GOALS OF THE CONSTITUTIONAL REFORM AFTER THE CIVIL WAR (2023).

330. *See* Act of Apr. 9, 1866, ch. 31, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. §§ 1981(a), 1982 (2018)).

331. *See* U.S. CONST. amend. XV.

legislation, limiting the power of the national government to protect Black people, even as the Court suggested the purpose of the Amendments was to end slavery and protect former slaves. The Court rejected the idea that the Amendments had created a race-neutral society.[332]

While Congress did not expand racial eligibility to naturalization between 1870 and 1940, it did borrow racial limitations in an important way. In 1917 Congress passed, over President Woodrow Wilson's veto, a new immigration act.[333] The law tightened rules for entrance into the country, including a requirement that adult male immigrants be literate[334] while excluding people with various health issues, anarchists, and polygamists.[335] Most importantly, the law applied the racial restriction on naturalization to immigrants, while not explicitly declaring it was doing so. The law defined a geographic region that included much of Asia, including most of southern India, Indochina, Thailand, Burma, Malaysia, and Indonesia.[336] While the law did not exclude many people living in Muslim areas of Asia, the law prohibited anyone from entering the country who supported polygamy or believed in it.[337] The goal was to prevent new immigrants from south Asia East Asia, without excluding all people who might be ineligible for naturalization. Recent scholarship argues that one of the goals of the law was to prevent the immigration

332. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873) ("[N]o one can fail to be impressed with the one pervading purpose found in [all the Reconstruction amendments] ... we mean the freedom of the slave race."); Strauder v. West Virginia, 100 U.S. 303, 306 (1880) ("[The Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated ... all the civil rights that the superior race enjoy."); The Civil Rights Cases, 109 U.S. 3, 26 (1883) (rejecting the 1875 Civil Rights Act in the face of growing segregation, legalizing racism, and violence against Black people in the South (and Chinese immigrants and their children in the West)). The Court initially focused on former slaves, but then abandoned them: "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected." *Id.* at 25. Illustrative of this complexity is that two years after the Court upheld racial segregation in *Plessy v. Ferguson*, the same Court upheld birthright citizenship for Chinese Americans in *United States v. Wong Kim Ark*. *See* 169 U.S. 649 (1898).

333. Immigration Act of 1917, ch. 29, 39 Stat. 877.

334. Immigration Act of 1917 § 3.

335. *Id.* at 876-77.

336. *Id.*

337. *Id.* at 875.

of people from India who opposed British colonialism.[338] This law was a prelude to the temporary immigration act of 1921[339] and then the more important and longer lasting 1924 immigration act.[340] Taken together, these three laws "sent the unequivocal message that the United States welcomed only immigrants with desirable political beliefs, socioeconomic backgrounds, cultures, sexual orientations, and nationalities. For many Americans, the most desirable immigrants hailed from northern and western Europe."[341]

In 1924, Congress tied eligibility to immigrate to eligibility to naturalize, by providing that "alien[s] ineligible to citizenship" could not be admitted as immigrants.[342] The problem of non-White immigrants with lesser status in the United States was solved by not allowing them to be here in the first instance.

Decisions of the Supreme Court in this period are consistent with the conception of the United States as a White nation.[343] In 1923, the Court construed the original "free white person" clause as Chief Justice Taney had in *Dred Scott*:

> The immigration of that day was almost exclusively from the British Isles and Northwestern Europe, whence they and their forbears had come. When they extended the privilege of American citizenship to "any alien; being a free white person" it was these immigrants—bone of their bone and flesh of their

338. Seema Sohi, *Barred Zones, Rising Tides, and Radical Struggles: The Antiradical and Anti-Asian Dimensions of the 1917 Immigration Act*, 109 J. AMER. HIST. 298 (2002).

339. Emergency Quota Act of 1921, 42 Stat. 5.

340. Immigration Act of 1924, 43 Stat. 153.

341. Maddalena Marinari, *The 1921 and 1924 Immigration Acts a Century Later: Roots and Long Shadows*, 109 J. AM. HIST. 271, 273 (2002). The laws also allowed exclusion for sexual orientation and favored scientists, lawyers, physicians, engineers, teachers, merchants, artists and others who were considered valuable new immigrants. 39 Stat. 876.

342. Immigration Act of 1924, ch. 190, § 13(c), 43 Stat. 153, 162. *See generally* A. Warner Parker, *The Ineligible to Citizenship Provisions of the Immigration Act of 1924*, 19 AM. J. INT'L L. 23 (1925) (explaining the restrictions on immigration under the Immigration Act of 1924).

343. *See, e.g.*, Wong Wing v. United States, 163 U.S. 228, 237 (1896) ("No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein."); *Ex parte* Mayfield, 141 U.S. 107, 115-16 (1891) ("The policy of Congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization.").

> flesh—and their kind whom they must have had affirmatively in mind. The succeeding years brought immigrants from Eastern, Southern and Middle Europe, among them the Slavs and the dark-eyed, swarthy people of Alpine and Mediterranean stock, and these were received as unquestionably akin to those already here and readily amalgamated with them. It was the descendants of these, and other immigrants of like origin, who constituted the white population of the country when § 2169, reenacting the naturalization test of 1790, was adopted; and there is no reason to doubt, with like intent and meaning.[344]

The monumental legal changes wrought by Reconstruction were, in this context, irrelevant to the question of the treatment of non-Black noncitizens. Accordingly, the Court refused the naturalization of non-White, non-Black people even in the face of powerful textual and policy arguments that could have led to a different result. In seeking naturalization, a Japanese immigrant pointed out that the U.S. Code was divided into titles, and the general immigration requirements were in one title, and the racial restriction in another.[345] The restriction, by its text, applied only to "this Title."[346] While the argument was plausible on a plain language interpretation, it was hopeless in light of the centrality of racial policy. The Court concluded, unanimously:

> It is inconceivable that a rule in force from the beginning of the Government, a part of our history as well as our law, welded into the structure of our national polity by a century of legislative and administrative acts and judicial decisions, would have been deprived of its force in such dubious and casual fashion.[347]

The Court clearly saw the 1790 Act as a super-statute, even though that term had not yet been invented.

In 1925, Hidemitsu Toyota, a U.S. Coast Guard veteran of ten years who had served in World War I, appealed a judgment cancelling his naturalization on the ground that he was entitled to

344. United States v. Thind, 261 U.S. 204, 213-14 (1923).
345. Ozawa v. United States, 260 U.S. 178, 190-92 (1922).
346. *Id.* at 192.
347. *Id.* at 194.

the special naturalization provisions available to veterans.[348] The Court rejected his claim; as a Japanese person he was ineligible.[349]

> [A]s it has long been the national policy to maintain the distinction of color and race, radical change is not lightly to be deemed to have been intended.... And in view of the policy of Congress to limit the naturalization of aliens to white persons and to those of African nativity or descent the implied enlargement of § 2169 should be taken at the minimum.[350]

The Court's decision here defies the logic of other decisions, like *Ozawa*, since Congress passed the law giving citizenship to all veterans of World War I well after reenacting the White rule for normal naturalization.[351] A far more logical interpretation would have been that in creating a "special" category for naturalization—for those who honorably served in World War I—Congress had clearly made naturalization available for all veterans, without regard to race. This interpretation would have also been consistent with legislation changing naturalization and other laws after the Civil War to recognize that by the end of the War, at least 10 percent of the United States armed forces was made up of Black soldiers and sailors, which led to their enfranchisement and their citizenship.[352] Had Congress wanted to deny naturalization of non-White people, the law could easily have included the language of "whites and people from Africa." Congress chose not to do this. Chief Justice Taft dissented without opinion.[353] Perhaps sensitized by his former service as Secretary of War, and as President and Commander-in-Chief of the Army and Navy, only he thought it reasonable to conclude that Congress deemed military service to be important enough to overcome the racial bar.[354]

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348. Toyota v. United States, 268 U.S. 402, 406-07 (1925).

349. *Id.* at 411-12.

350. *Id.* at 412.

351. *See* Alien Naturalization Act of 1918, ch. 69, 40 Stat. 542.

352. *Black Soldiers in the U.S. Military During the Civil War*, *supra* note 72.

353. *Toyota*, 268 U.S. at 412.

354. *William Howard Taft*, WHITE HOUSE HIST. ASS'N (Nov. 1, 2023), https://www.whitehouse.gov/about-the-white-house/presidents/william-howard-taft/ [https://perma.cc/K7DY-5LX2].

IV. THE END OF THE FREE WHITE PERSONS CLAUSE[355]

Between 1870 and the eve of American entrance into World War II, the general naturalization law remained unchanged. From 1940 to 1952, a series of laws reformed the rules. The Nationality Act of 1940 reiterated the old rules allowing for the naturalization of "white persons, persons of African nativity or descent," but allowed naturalization for "descendants of races indigenous to the Western Hemisphere" and "native-born Filipinos having the honorable service in the United States Army, Navy, Marine Corps, or Coast Guard."[356] During World War II, with China as an important ally in the war against Japan, Congress allowed for the naturalization of Chinese immigrants and repealed the Chinese Exclusion laws.[357] In the wake of World War II, the United States extended naturalization to people from India and the Philippines.[358]

Finally, in 1952, in part as a response to the Cold War and the integration of post-war Japan into the emerging western alliance, the United States eliminated all racial restrictions on naturalization, while at the same time continuing ethnic and racial restrictions on immigration through national origins quotas that had been in place since 1921.[359] The law simply declared: "The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married."[360]

It is clear that these changes reflected geopolitical concerns. Just as with African Americans in 1870, it was not irrelevant to Congress that these acts allowed naturalization for members of certain races who had fought and died as members of the U.S. armed forces or as allies.[361] China was our ally in World War II, Filipinos fought

355. Starting in 1875 the federal law used the plural term "free white persons," and so here we do as well.

356. Nationality Act of 1940, ch. 876, 54 Stat. 1137, 1140, § 303.

357. Act of Dec. 17, 1943, ch. 344, 57 Stat. 600, 600-01.

358. Act of July 2, 1946, ch. 534, 60 Stat. 416, 416-17.

359. Emergency Quota Act of 1921, ch. 8, 42 stat 5, *revised by* The Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153.

360. Immigration and Nationality Act of 1952, Pub. L. No. 414, § 311, 66 Stat. 163, 239 (codified as amended in scattered sections of 8 U.S.C.).

361. Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look*

alongside the United States during the War against Japan, and 2.5 million Indians volunteered during the war, fighting in North Africa, Italy, and throughout the Pacific theater.[362]

The Supreme Court and the Truman Administration also acted in anti-racist ways in response to international concerns. As Mary Dudziak has written, "the effect of U.S. race discrimination on international relations during the postwar years was a critical motivating factor in the development of federal government policy."[363] This played out in several important cases implicating citizenship.

As noted above, California's Alien Land Law prohibited aliens ineligible to citizenship from owning land in the state.[364] In 1948, in *Oyama v. California*, the Court invalidated a presumption of fraud under California law when an ineligible alien paid for land and title was taken by a citizen.[365] California applied that law to a Japanese father's purchase of land for his American-born son who was a birthright U.S. citizen, and attempted to escheat it.[366] Chief Justice Vinson's majority opinion found that this resulted in discrimination against U.S. citizen children "on the basis of their racial descent."[367] Four Justices who concurred in the six-Justice majority opinion added concerns about international relations.[368] Justice

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at the Immigration and Nationality Act of 1965, 75 N.C. L. REV. 273, 288 (1996).

362. Adam Volle, *Allied Powers*, ENCYC. BRITANNICA (Sept. 27, 2023), https://www.britannica.com/topic/Allied-powers-World-War-II [https://perma.cc/WE8K-HHGN]; Cecilia I. Gaerlan, *Liberation of the Philippines in 1945*, NAT'L WWII MUSEUM (Sept. 1, 2020), https://www.nationalww2museum.org/war/articles/liberation-of-philippines-cecilia-gaerlan) [https://perma.cc/K567-WWJW]; Maria Abi-Habib, *The Forgotten Colonial Forces of World War II*, N.Y. TIMES MAG. (Sept. 1, 2020), https://www.nytimes.com/2020/09/01/magazine/the-forgotten-colonial-forces-of-world-war-ii.html [https://perma.cc/5MQA-7UXH].

363. Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 66 (1988); *see also* MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2011).

364. *See supra* note 177 and accompanying text.

365. 332 U.S. 633, 647 (1948). The case is trenchantly discussed in Rose Cuison Villazor, *Rediscovering* Oyama v. California*: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979 (2010).

366. *Oyama*, 332 U.S. at 635.

367. *Id.* at 646.

368. *See* Robert J. Delahunty & Antonio F. Perez, *Moral Communities or a Market State: The Supreme Court's Vision of the Police Power in the Age of Globalization*, 42 HOUS. L. REV. 637, 671 (2005).

Black, joined by Justice Douglas, contended that the Alien Land Law

> stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to cooperate with the United Nations to "promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?[369]

Justice Murphy, joined by Justice Rutledge, noted that

> the Alien Land Law from its inception has proved an embarrassment to the United States Government. This statute has been more than a local regulation of internal affairs. It has overflowed into the realm of foreign policy; it has had direct and unfortunate consequences on this country's relations with Japan.[370]

Justice Murphy agreed with Justice Black that the "Alien Land Law stands as a barrier to the fulfillment of that national pledge" to support the U.N. Charter.[371]

Although a verbatim record of the oral argument of *Oyama* did not survive, it may not be surprising that the Court's attention was drawn to international agreements. One of the counsel arguing for the Oyamas was Dean Acheson, who was in private practice for eighteen months after serving as Truman's Undersecretary of State and before becoming Secretary of State in 1949.[372] In office, he

369. *Oyama*, 332 U.S. at 649-50 (Black, J., concurring) (footnote omitted).

370. *Id.* at 672-73 (Murphy, J., concurring).

371. *Id.* at 673.

372. While Acheson participated in much litigation in his long career, his name appears in the Westlaw database as counsel (as opposed to as a defendant in his official capacity) in only three cases between 1941, when he joined the Roosevelt Administration as Assistant Secretary of State, and 1953, when he left office as Secretary of State. U.S. DEP'T OF STATE, Biographies of the Secretaries of State: Dean Gooderham Acheson (1893-1971), https://history.state.gov/departmenthistory/people/acheson-dean-gooderham [https://perma.cc/5PRZ-RMAJ]. The three cases were the two discussed here and a civil case, also in 1948, in which he represented the American Sugar Refining Company. Cent. Roig Refin. Co. v. Sec'y of Agric., 171 F.2d 1016, 1017 (D.C. Cir. 1948), *rev'd*, 338 U.S. 604 (1950). His selective practice may

"played an important role in State Department efforts to advance domestic civil rights,"[373] and wrote a memo that was quoted in the U.S. Amicus Brief in *Shelley v. Kraemer*.[374] He is not a named author of the brief for the Oyamas, but the brief cites the U.N. Charter.[375]

Acheson was also counsel for a Japanese American litigant in a decision later in 1948, *Takahashi v. Fish and Game Commission*.[376] There, the Supreme Court reversed another California Supreme Court decision, invalidating a statute denying fishing licenses to aliens ineligible to citizenship.[377] California seemed to be relying on settled constitutional law; twenty-six years earlier, in upholding alien land laws, the Court held that "[t]he State properly may assume that the considerations upon which Congress made such classification are substantial and reasonable."[378] But the Court no longer regarded it as reasonable for states to rely on the "free white person" clause of the 1790 Naturalization Act:

> It does not follow, as California seems to argue, that because the United States regulates immigration and naturalization in part on the basis of race and color classifications, a state can adopt one or more of the same classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living.[379]

Notably, the United States, so recently the villain of other cases involving Japanese Americans, such as *Toyota v. United States*,[380] *Hirabayashi v. United States*,[381] and *Korematsu v. United States*,[382]

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suggest the importance of the cases or at least his interest in them. One assumes that the Oyama and Takahashi families did not pay the Covington & Burling hourly rate, and this representation was either important pro bono work, or perhaps even quasi-official. *See* U.S. DEP'T OF STATE, *supra* note 372.

373. Dudziak, *supra* note 363, at 101.

374. *Id.*

375. Brief for Petitioners at 52-53, Oyama v. California, 332 U.S. 633 (1948) (No. 1947-44).

376. 334 U.S. 410, 411 (1948).

377. *Id.* at 413, 422.

378. Terrace v. Thompson, 263 U.S. 197, 220 (1923).

379. *Takahashi*, 334 U.S. at 418-19.

380. 268 U.S. 402 (1925).

381. 320 U.S. 81 (1943).

382. 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

filed an amicus brief supporting Mr. Takahashi.[383] This time, Acheson participated in the written brief, and one section reflected his area of expertise, identifying the U.N. Charter and several other existing or contemplated international agreements disfavoring discrimination.[384] The brief concluded:

> [I]t will be seen that the Federal Government has legislated domestically, and, in the international field, has twice agreed with other nations to eliminate within its borders the very discrimination on account of race which the amendment of 1945 to the California Fish and Game Code, if valid, would perpetuate. This amendment must, therefore, fall in the face of this national action.[385]

In the Immigration and Nationality Act of 1952, Congress made naturalization race-neutral.[386] 1952 was, of course, a war year, and the legislative history shows that here too, Congress was concerned about foreign policy.[387]

CONCLUSION

The free white persons clause was a considered, fundamental, and consequential decision of the First Congress which remained in place for over 160 years.[388] It is entitled to recognition as revealing the views of the members of Congress in the 1790s, of the Reconstruction Congresses, and other federal officials and leaders who chose to leave it in place, reinforce it, and maintain it until the middle of the twentieth century. The existence and influence of the free white persons clause also undermines the notion, supported by

383. Brief for the United States as Amicus Curiae Supporting Petitioner, Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (No. 1947-533).

384. Brief for Petitioner at 10, 38, Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (No. 1947-533).

385. *Id.* at 37-38.

386. 8 U.S.C. § 1422 ("The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married.").

387. Chin, *supra* note 361, at 287.

388. *See* Immigration and Nationality Act, Pub. L. No. 414, § 311, 66 Stat. 163, 239 (1952) (prohibiting denial of naturalization "because of race or sex or because a person is married" 160 years after Naturalization Act of 1790 was passed).

Justice Scalia and others that "racial discrimination against any group finds a more ready expression at the state and local than at the federal level."[389] The federal government was a leader in this and other methods of discriminating based on race. Some states then applied this discrimination to their own laws and regulations. To reiterate the words of the Supreme Court, the Naturalization Act of 1790 created "a rule in force from the beginning of the Government, a part of our history as well as our law, welded into the structure of our national polity by a century of legislative and administrative acts and judicial decisions."[390] A statute of this impact is entitled to rank with laws mandating school segregation, segregation in public accommodations, segregation in the armed forces and other employment, prohibition on interracial marriage, and in housing segregation as part of an anticanon of statutes establishing and maintaining White supremacy.

389. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 523 (1989) (Scalia, J., concurring).
390. Ozawa v. United States, 260 U.S. 178, 194 (1922).