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## Precarious Citizenship: Asian Immigrant Naturalization 1918 to 1925

Angela M. Banks<sup>†</sup>

### Abstract

During the height of the exclusion era, when Asian immigrants were prohibited from naturalizing and becoming United States citizens, state and federal court judges around the country naturalized at least 500 Asian immigrant servicepersons and veterans. Between 1918 and 1925, Federal Bureau of Naturalization officials and state and federal court judges had to determine whether the military naturalization provisions enacted in 1918 included the same racial restrictions that the general naturalization provisions included. This Article tells the story of how these officials and judges navigated statutory text, congressional intent, and the reality of Asian immigrant membership in the United States Armed Forces to determine the role that race vis-à-vis military service should play in determining citizenship eligibility.

The story of Asian immigrant naturalization between 1918 and 1925 highlights a long-standing question within American citizenship and immigration law: how to measure an applicant's adoption of and commitment to mainstream American values, norms, and practices. Are there accurate and reliable categories that measure cultural assimilation and allow for cost-effective and efficient decision-making? Alternatively, are categories sufficiently inaccurate and unreliable such that individualized assessments of specific cultural criteria offer the only legitimate approach? Based on administrative memos, state and federal court judicial opinions,

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<sup>†</sup> Charles J. Merriam Distinguished Professor of Law, Sandra Day O'Connor College of Law, Arizona State University. This article is part of a larger research project examining the role of culture in citizenship access. For comments, advice, and discussion about this project, I would like to thank the participants in the Texas A&M Faculty Speaker Series, 2015 Global Migration, Structural Inclusion and Citizenship Education Across Nations Conference, 2015 Law & Society Annual Meeting, 2014 Immigration Law Teachers Workshop, 2013 Lutie A. Lytle Writing Workshop, Emerging Immigration Law Scholars and Teachers Workshop, University of Richmond Emroch Faculty Colloquy. I am also thankful for comments and discussion provided by Hank Chambers, Ming Hsu Chen, Kit Johnson, Corinna Lain, David Martin, Isabel Medina, Hiroshi Motomura, Shari Robertson, Carrie Rosenbaum, and Diane Uchimiya. Nadia Abramson, Kelsey Baack, Charles Barriere, Ross Natividad, and Danielle Troumouliaris provided excellent research assistance.

and newspaper articles, this article reveals how state and federal court judges struggled with this general question and how the Supreme Court resolved the split that existed across the country. United States naturalization law continues to require category-based decision-making, and it is important that we similarly interrogate those categories to determine the extent to which they accurately and reliably measure the intended naturalization criteria.

### Introduction

Between 1790 and 1952, federal law prohibited Asian immigrants from naturalizing to become United States citizens.<sup>1</sup> Yet, between 1918 and 1925, at least 500 Asian immigrants became United States citizens.<sup>2</sup> State and federal court judges across the country granted these individuals' naturalization petitions based on their service in the United States Armed Forces.<sup>3</sup> The exclusion of Asian immigrants from naturalization was based on the idea that Asian immigrants were unassimilable—no matter how much time they spent in the United States, they would neither adopt nor commit to mainstream American values, norms, and practices.<sup>4</sup> Yet

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1. See 1790 Naturalization Act ch. 3, § 1, 1 Stat. 103 (1790) (repealed 1795) (“[A]ny alien, being a free white person . . . may be admitted to become a citizen thereof.”); Immigration and Nationality Act of 1952, 66 Stat. 163 (1952) (eliminating race requirements in naturalization laws); see also Yuji Ichioka, *The Early Japanese Immigrant Quest for Citizenship: The Background of the 1922 Ozawa Case*, 4 AMERASIA J. 1, 1 (1977) (“Denied the right of naturalization, Japanese immigrants were so-called ‘aliens ineligible to citizenship’ for decades . . . until the McCarran Act of 1952 altered their legal status and finally admitted them into citizenship.”).

2. See JAPANESE AM. NAT’L MUSEUM, ENCYCLOPEDIA OF JAPANESE AMERICAN HISTORY: AN A TO Z REFERENCE FROM 1868 TO THE PRESENT 46 (Brian Niiya ed., 2001).

3. See *Japanese in Army Entitled to Citizenship*, Star Bulletin, Dec. 4, 1918, in Records of the Immigration and Naturalization Service, file 106799/926, entry 26, National Archives, Washington, D.C. [hereinafter Naturalization Administrative Files] (“Japanese, Chinese and Koreans, serving in the United States army or navy are eligible to become citizens of the United States.”); Memorandum from Deputy Comm’r of Naturalization Raymond F. Crist to Commissioner Richard K. Campbell (Dec. 24, 1918) (on file with Naturalization Administrative Files) (supporting Judge Vaughn’s decisions to confirm citizenship); *In re Saichi Shimodao* at \*8 (D. Terr. Haw.) (Mar. 17, 1919) (on file with Naturalization Administrative Files) (“The petitioner is in the military service of the United States; and the provision of the seventh subdivision of the Act of May 9, 1918 authorize[s] his naturalization though he is of the Japanese race.”).

4. See MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 8 (William Chafe et al. eds., 2004) (“The legal racialization of these ethnic groups’ national origin cast them as permanently foreign and unassimilable to the nation.”); Angela M. Banks, *Respectability & the Quest for*

the enlistment and military service of Asian immigrants contradicted this assumption. Bureau of Naturalization officials and state and federal court judges were faced with this contradiction when hundreds of Asian immigrant servicepersons and veterans sought to naturalize pursuant to the military naturalization provisions in the 1918 Naturalization Act.<sup>5</sup> These provisions appeared to repeal the racial requirements for servicepersons and veterans.<sup>6</sup> Based on original archival research, this Article tells the story of how administrative officials and state and federal court judges navigated statutory text, congressional intent, and the reality of Asian immigrant membership in the United States Armed Forces to determine if Asian immigrants would remain “permanently foreign.”<sup>7</sup>

One of the boundaries that separates citizens and noncitizens is culture—values, norms, and practices. Since America’s founding, naturalization eligibility criteria have sought to evaluate noncitizens’ adherence and commitment to mainstream American culture.<sup>8</sup> Those criteria have included factors such as race, length of residence, knowledge of United States history and civics, and oaths.<sup>9</sup> The story of Asian immigrants’ naturalization between 1918

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*Citizenship*, 83 BROOKLYN L. REV. 1, 39–44 (2017) (“Concerns about social unrest were most often expressed as concerns about the inability of Chinese immigrants to assimilate.”); Lucy E. Salyer, *Baptism by Fire: Race, Military Service, and U.S. Citizenship Policy, 1918–1935*, 91 J. AM. HIST. 847, 848 (Dec. 2004) (“Such determinations often rested on the presumption that Asians would remain always ‘yellow at heart,’ that they would not, and could not, assimilate.”).

5. See Naturalization Act of 1918, ch. 69, § 7, 40 Stat. 542, 542–44 (1918) (expanding the race requirement for naturalization to Filipinos, Puerto Ricans, and potentially “any alien” who served in the armed forces, which would include those who served and were of Asian descent); JAPANESE AM. NAT’L MUSEUM, *supra* note 2, at 46.

6. *E.g.*, *In re Saichi Shimodao* at \*8 (“The petitioner is in the military service of the United States; and the provision of the seventh subdivision of the Act of May 9, 1918 authorize[s] his naturalization though he is of the Japanese race.”); Memorandum from Deputy Comm’r of Naturalization Raymond F. Crist to Secretary of Labor (May 11, 1921) (on file with Naturalization Administrative Files) (advocating for the 1918 Naturalization Act to be read allowing for the naturalization of United States veterans of Asian descent).

7. NGAI, *supra* note 4, at 8.

8. *E.g.*, Deenesh Sohoni & Amin Vafa, *The Fight to Be American: Military Naturalization and Asian Citizenship*, 17 ASIAN AM. L.J. 119, 126 (2010) (citing JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870*, 243 (1978) (“Typically, the naturalization process involved a waiting period of several years, during which aliens served an apprenticeship to allow the individual immigrant to become firmly attached to the well-being of the Republic. This ensured that individuals could demonstrate their loyalty and allegiance, key qualities necessary for constructing and maintaining national unity.”) (internal quotations omitted).

9. See, *e.g.*, 1906 Naturalization Act, Pub. L. No. 59-338, ch. 3592, 34 Stat. 596,

and 1925 highlights a long-standing question within American citizenship and immigration law: how to measure an applicant's adoption of and commitment to mainstream American values, norms, and practices. Are there accurate and reliable categories that measure cultural assimilation and allow for cost-effective and efficient decision making? Alternatively, are categories sufficiently inaccurate and unreliable such that individualized assessments of specific cultural criteria offer the only legitimate approach? Based on administrative memos, state and federal court judicial opinions, and newspaper articles, this article reveals how state and federal court judges struggled with this general question and how the Supreme Court resolved the split that existed across the country.

This Article proceeds in three parts. Part I presents a brief history of the statutory law and case law that made Asian immigrants ineligible for naturalization and thus "permanently foreign."<sup>10</sup> Part II presents the history of military naturalization in the United States and examines the purpose of the provisions. Part III details the analysis that Bureau of Naturalization officials and state and federal court judges used to evaluate the legitimacy of various categorical eligibility requirements. Relying on plain meaning interpretations of the statute and congressional intent, many judges and administrative officials concluded that the statutory language clearly used race as a categorical eligibility requirement and that Asian immigrants were therefore ineligible.<sup>11</sup> The judges that naturalized Asian immigrant servicepersons and veterans relied on the same interpretive tools. However, they concluded that the statutory language was either similarly clear in eliminating the racial requirements or the text was ambiguous and

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596-99 (1906).

10. *NGAI, supra* note 4, at 8.

11. *See, e.g., Toyota v. United States*, 268 U.S. 402, 412 (1925) ("The legislative history of the act indicates that the intention of Congress was not to enlarge § 2169, except in respect of Filipinos qualified by the specified service."); *United States v. Thind*, 261 U.S. 204, 213 (1923) ("The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white."); *Ozawa v. United States*, 260 U.S. 178, 198 (1922) (holding "white person" applied to the Caucasian race and did not encompass the Japanese); *In re Cruz*, 23 F. Supp. 774, 775 (E.D.N.Y. 1938) (holding a man of both Indian and African race did not constitute as a man of "African nativity" or "African descent" under the statute because "African descent must be shown to be at least an affirmative quantity, and not a neutral thing as in the case of the half blood, or a negative one as in the case of the one-quarter blood."); *In re Charr*, 273 F. 207, 213 (W.D. Mo. 1921) (denying Korean veteran of the United States Army citizenship because "the provisions of the draft law clearly did not contemplate the incorporation of those not eligible to citizenship into the land and naval forces of the United States. That such may have been inducted into the service through voluntary enlistment or inadvertence of draft boards cannot affect the purpose of Congress.").

immigrant servicepersons and veterans should get the benefit of the ambiguity in light of their clear demonstration of loyalty and commitment to the United States.<sup>12</sup>

The analysis provided in this Article reveals how citizenship decision makers have navigated the challenges associated with categorical eligibility requirements in the citizenship context. Categories vary in their accuracy and reliability, and the case study of the naturalization of Asian immigrant servicepersons and veterans illustrates that the inaccuracy and unreliability of race was recognized, even if not completely accepted, in the 1920s. United States naturalization law continues to require category-based decision-making. It is important that we similarly interrogate those categories to determine the extent to which they accurately and reliably measure the intended naturalization criteria.<sup>13</sup>

### I. Permanently Foreign

Between 1790 and 1952, Asian immigrants were what historian Mae Ngai has referred to as “permanently foreign.”<sup>14</sup> Immigrants who were able to enter the United States despite the Chinese Exclusion Act or the Asiatic Barred Zone created by the 1924 Immigration Act were not able to naturalize and become citizens.<sup>15</sup> Federal law prohibited the naturalization of Asian immigrants. In 1918, Congress amended the 1906 Naturalization Act to harmonize the provisions regarding the naturalization of immigrants serving in the United States Armed Forces.<sup>16</sup> The language used in the 1918 amendments raised the possibility that

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12. See, e.g., *In re Mohan Singh*, 257 F. 209, 212 (1919) (holding that scientific studies of ethnology determined Hindus were of the Caucasian or Aryan race, and thus without more clarity from Congress, petitioner, a Hindu, would be admitted to citizenship). See *In re Saichi Shimodao* at \*8; Letter from Richard M. Sato to Comm’r of Naturalization Richard K. Campbell, (Feb. 8, 1919) (on file with the Naturalization Administrative Files) (stating that Congress intended the 1918 Naturalization Act to reward aliens for their loyalty and service during World War I, and without further clarity, Judge Sheppard would continue to confirm citizenship to United States veterans of Asian descent).

13. See Banks, *supra* note 4, at 1–2 n.5 (discussing recent Executive Orders prohibiting Iraqi and Syrian refugees and citizens from entering the United States).

14. NGAI, *supra* note 4, at 8.

15. See Chinese Exclusion Act of 1882, ch. 126, § 14, 22 Stat. 58, 61 (repealed by Immigration and Nationality Act of 1952, 66 Stat. 163 (1952)) (“That hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.”); see also Ichioka, *supra* note 1, at 2 (discussing how naturalization statutes barring Asians from citizenship “formed the legal framework of the Ozawa case.”).

16. See Naturalization Act of 1918, ch. 69, § 7, 40 Stat. 542, 542–43 (describing procedures for naturalization of immigrant servicepersons).

the military naturalization provisions did not include racial prerequisites.<sup>17</sup> In the midst of World War I, Asian immigrant servicepersons and veterans seized upon this possibility and applied to become United States citizens.<sup>18</sup> The manner in which officials within the Bureau of Naturalization and state and federal court judges responsible for granting or denying naturalization petitions decided Asian immigrants' eligibility was tied to the historical treatment of Asian immigrants in United States naturalization law.<sup>19</sup> The following sections provide a history of the prominent role race has played in U.S. naturalization law through federal statutes and Supreme Court cases interpreting the racial requirements.

#### A. Naturalization Statutes

Naturalization law in the United States has sought to limit access to citizenship to those noncitizens who are least likely to threaten America's political experiment and who would add "to the wealth and strength" of the country.<sup>20</sup> Since 1790, in order to naturalize, an individual must have resided in the United States for a specified period of time, be a person of good moral character, and support the United States Constitution.<sup>21</sup> Over the past two centuries, additional requirements have existed and some of them

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17. See Memorandum from Deputy Comm'r of Naturalization Raymond F. Crist to Commissioner Richard K. Campbell, *supra* note 3; Letter from Richard M. Sato to Comm'r of Naturalization Richard K. Campbell, *supra* note 12.

18. See JAPANESE AM. NAT'L MUSEUM, *supra* note 2.

19. *Compare Thind*, 261 U.S. at 215 ("This not only constitutes conclusive evidence of the congressional attitude of opposition to Asiatic immigration generally, but is persuasive of a similar attitude toward Asiatic naturalization as well, since it is not likely that Congress would be willing to accept as citizens a class of persons whom it rejects as immigrants."), with *In re Soon Nahm Ahn* (D. Terr. Haw.) (on file with Naturalization Administrative Files) ("If it was not the intention of Congress thereby to provide equal treatment, or at least fair treatment for all aliens in our service, I am unable to perceive what Congress did intend.")

20. See 1 ANNALS OF CONG. 1039–1040, 1111 (1790) (statement of Rep. Madison) (advocating for the naturalization of only economically attractive aliens); KETTNER, *supra* note 8, at 241–42 (quoting 4 ANNALS OF CONG. 1064, 1065 (1795) (statement of Rep. Smith). Kettner contends that in 1795 there was a shared assumption within Congress that a residence longer than two years should be required so that "prejudices which the aliens had imbibed under the Government from whence they came might be effaced, and that they might, by communication and observance of our laws and government, have just ideas of our Constitution and the excellence of its institution before they were admitted to the rights of a citizen." *Id.* at 1065.

21. See, e.g., 1790 Naturalization Act ch. 3, § 1, 1 Stat. 103 (1790) (*repealed* 1795) (creating a two-year residency requirement); 1795 Naturalization Act, ch. 20 § 1, 1 Stat. 414, 414 (1795) (creating a five year residence requirement, a good moral character requirement, and a requirement to be "attached to the principles of the constitution of the United States . . .").

remain today. For example, naturalization law has had an English language requirement since 1906,<sup>22</sup> a knowledge of United States history and government since 1952,<sup>23</sup> and racial restrictions between 1790 and 1952.<sup>24</sup> Naturalization requirements operationalize the state's conception of who should be full members of the polity and evaluate applicants based on their adoption of and commitment to mainstream American values, norms, and practices.<sup>25</sup> The requirements "reflect deep-seated societal views of who belongs."<sup>26</sup>

Legislative debates during the 1790s reveal that members of Congress were concerned that America's democratic experiment could be threatened by foreign residents' values, norms, and practices.<sup>27</sup> Members of Congress wanted to ensure that future citizens were "fit for self-government."<sup>28</sup> The naturalization requirements adopted at that time were viewed as limiting access to citizenship to those noncitizens who were unlikely to threaten America's political experiment.<sup>29</sup> The concern about new citizens threatening the political life of the United States expanded to a concern about American social and economic life as well by 1870.<sup>30</sup> Concerns about future citizens threatening mainstream American political, social, and economic life have been addressed by incorporating cultural assimilation requirements into naturalization law.

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22. 1906 Naturalization Act, Pub. L. No. 59-338, ch. 3592, 34 Stat. 596, 599(1906).

23. See Immigration and Nationality Act of 1952, 66 Stat. 163, 239-40 (1952) (creating a knowledge of history and government requirement).

24. See, e.g., 1 Stat. 103, 103 (instituting a race requirement); 1870 Naturalization Act, ch. 254, § 7, 16 Stat. 254, 256 (1870) (stating that "naturalization laws are hereby extended to aliens of African nativity and to persons of African descent.").

25. See Banks, *supra* note 4, at 14 ("Senators Williams, Corbett, and Stewart believed that Chinese immigrants' values, norms, and practices were incompatible with American democracy and mainstream American culture. They used these perceived differences as justification for denying Chinese immigrants access to U.S. citizenship."); Ichioka, *supra* note 1, at 11 (citing Takao Ozawa, *Naturalization of a Japanese Subject*, undated brief, JARP, JFMAD, reel 39) (explaining a Japanese-American petitioner's commitment to mainstream American values).

26. THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, & MARYELLEN FULLERTON, *IMMIGRATION & CITIZENSHIP: PROCESS & POLICY* 110 (West Publishing Co. eds., 7th ed. 2012).

27. See, e.g., KETTNER, *supra* note 8, at 235 (exploring how "[s]uspicion of the foreign-born and a belief that citizenship conferred political rights combined to shape the development of a federal naturalization policy in the 1790s.").

28. Banks, *supra* note 4, at 25.

29. See KETTNER, *supra* note 8, at 241-42.

30. *Id.* at 235.

United States naturalization law has conditioned citizenship upon evidence of a willingness and ability to adopt mainstream American values, norms, and practices.<sup>31</sup> At times this condition has been explicit and at other times implicit. Naturalization requirements—such as demonstrating the adoption of “the habits of civilized life” or English language skills—are explicit cultural assimilation requirements.<sup>32</sup> Racial requirements for naturalization represent implicit cultural assimilation requirements. These requirements use race as a category for evaluating values, norms, or practices rather than evaluating each individual candidate based on criteria that directly measure the desired values, norms, and practices. Other categories are used to measure cultural assimilation within naturalization law like military service, marriage to a United States citizen, and lawful immigration status.<sup>33</sup> Each of these categories is viewed as an accurate and reliable measure of an individual’s commitment to democracy and the rule of law, belief in individualism, self-sufficiency, Christian beliefs and morals, and English-language skills. These are values, norms, and practices that citizenship decision makers have deemed important for future United States citizens.<sup>34</sup>

Members of Congress were doubtful that “the subjects of all Governments, Despotic, Monarchical, and Aristocratical, are, as soon as they set foot on American ground, qualified to participate in administering the sovereignty of our country.”<sup>35</sup> Congress adopted naturalization requirements that would limit the ability of those without the desired political character to become United States citizens.<sup>36</sup> Congress addressed this concern through two particular categorical requirements: length of residence and race.

Residence requirements were used because there was a sense that time in the United States would allow immigrants to develop the desired political character.<sup>37</sup> These concerns are evident in the

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31. See Immigration and Nationality Act of 1952, 66 Stat. 163, 239–40 (1952).

32. See Banks, *supra* note 4, at 25–26, n.26.

33. See discussion *infra* Part II.

34. See Banks, *supra* note 4, at 25 (“Within the immigration and citizenship context, legal decision makers have emphasized six aspects of American culture as being imperative for future citizens to possess. They are a commitment to democracy, adherence to the rule of law, Christian beliefs and morals, English-language skills, self-sufficiency, and a belief in individualism.”).

35. KETTNER, *supra* note 8, at 240 (quoting Theodore Sedgwick of Massachusetts).

36. See Banks, *supra* note 4, at 11–14 (discussing Congressional fear and bias in relation to the 1870 Naturalization Act).

37. See KETTNER, *supra* note 8, at 218 (describing how residence requirements

1790 naturalization requirements. Only a noncitizen who had resided in the United States for two years was eligible to naturalize.<sup>38</sup>

Members of Congress had less confidence in the power of time to socialize non-White immigrants. Between 1790 and 1870 only noncitizens who were “free white person[s]” were eligible to naturalize.<sup>39</sup> In 1870 this racial requirement was expanded to include noncitizens of “African descent” and “African nativity.”<sup>40</sup> Chinese immigrants became eligible to naturalize in 1942 but all racial requirements were not eliminated.<sup>41</sup> Immigrants of color were viewed as having unchangeable and dangerous values, norms, and practices different from those of mainstream American citizens. No amount of time in the United States was thought to enable these immigrants to develop the desired political character. This led Congress to make these immigrants categorically ineligible for naturalization, and thus “permanently foreign.”<sup>42</sup>

In 1870, the perception that Black immigrants were permanently and dangerously different had dissipated, but it held steady for Asian immigrants. That year, Senator Charles Sumner of Massachusetts moved to amend the naturalization law by removing the “white person” requirement.<sup>43</sup> During the floor debates about this proposed amendment, Black immigrants and Chinese immigrants were discussed in great detail. Congress agreed to make immigrants of African nativity or descent eligible for citizenship but denied that opportunity to Asian immigrants.<sup>44</sup>

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existed when state law governed naturalization and they were based on the assumption that “the exercise of political rights required a clear and conscious attachment to and familiarity with republican principles.”; *see also id.* at 219 (describing how time in the United States was thought to ensure “that those imbued with ‘foreign principles’ had the opportunity to assimilate the habits, values, and modes of thought necessary for responsible participation in a virtuous, self-governing republican community.”); *see also id.* at 237 (quoting Thomas Hartley of Pennsylvania during the congressional debates in 1790 as stating that residency requirements were necessary for immigrants to develop “a firm attachment to government” and noting Michael Stone of Maryland’s argument for a residence term “long enough to guarantee ‘first, that he should have an opportunity of knowing the circumstances of our Government, and in consequence thereof, shall have admitted the truth of the principles we hold. Second, that he shall have acquired a taste for this kind of Government.’”).

38. 1790 Naturalization Act ch. 3, § 1, 1 Stat. 103, 103 (1790) (repealed 1795).

39. *Id.*

40. *See* 1870 Naturalization Act, ch. 254, § 7, 16 Stat. 254, 256 (1870).

41. *See* Immigration and Nationality Act of 1952, 66 Stat. 163 (1952).

42. NGAI, *supra* note 4, at 8.

43. *See* CONG. GLOBE, 41st Cong., 2d Sess. 5121 (1870); *see also* Banks, *supra* note 4, at 11.

44. *See* Banks, *supra* note 4, at 11–16 (discussing the proffered and actual

The legislative history for the 1870 Naturalization Act reveals significant misgivings within Congress about Chinese immigrants' values, norms, and practices, and their ability to adapt to mainstream America.<sup>45</sup> Concerns about an inability to assimilate led Congress to revise the naturalization law in a way that reinforced the permanent foreignness of Asian immigrants through the Chinese Exclusion Act.<sup>46</sup> This act is generally known for prohibiting Chinese laborers from entering the United States. The Act also stated: "hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed."<sup>47</sup> Despite the federal naturalization law limiting naturalization to noncitizens who were "free white person[s]" and those of "African nativity and African descent," Congress doubled down on the permanent foreignness of Asian immigrants.<sup>48</sup>

### B. Naturalization Case Law

The 1790 Naturalization Act, the 1870 Naturalization Act, and the Chinese Exclusion Act of 1882 each utilized categorical eligibility criteria—specifically race.<sup>49</sup> Asian immigrants were ineligible because they were not White. Yet it took a series of court cases to confirm that Chinese, Japanese, and Indian immigrants were not White and to explain why. As documented in Ian F. Haney López' 1996 classic, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE*, courts adopted two main strategies for determining whether

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reasons for denying Asian immigrants citizenship in the 1870 Naturalization Act); 1870 Naturalization Act, ch. 254, § 7, 16 Stat. 254, 256 (1870) ("And it be further enacted, That the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent.").

45. See Immigration and Nationality Act of 1952, 66 Stat. 163, 239–240; NGAI, *supra* note 4, at 8.

46. See NGAI, *supra* note 4, at 8; see also Chinese Exclusion Act of 1882, ch. 126, § 14, 22 Stat. 58, 61 (repealed by Immigration and Nationality Act of 1952, 66 Stat. 163 (1952)); see also Sohoni & Vafa, *supra* note 8, at 124–25 (discussing how the Chinese Exclusion Act of 1882 and other naturalization laws "reinforced the notion of Asians as intrinsically foreign.").

47. Chinese Exclusion Act §14, 22 Stat. 58, 61.

48. See Banks, *supra* note 4, at 11–14 (describing how many senators did not believe that Chinese immigrants could assimilate while "there was overwhelming support for black immigrants to have access to naturalization.").

49. See 1790 Naturalization Act ch. 3, § 1, 1 Stat. 103, 103 (1790) (repealed 1795) ("Be it enacted . . . That any alien, being a free white person . . . may be admitted to become a citizen thereof."); 1870 Naturalization Act, ch. 254, § 7, 16 Stat. 254, 256 (1870) ("And be it further enacted, That the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent."); §14, 22 Stat. 58, 61 ("That hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.").

an individual was a “white person” as the phrase was used in the naturalization statutes.<sup>50</sup> In the first approach, courts relied on scientific conceptions of racial classifications and concluded that those deemed Caucasian were “white persons.”<sup>51</sup> The second approach relied on popular conceptions of Whiteness rather than the scientific classifications of Caucasian or Mongolian.<sup>52</sup>

In 1878 the Circuit Court for the District of California was the first court to hold that Chinese immigrants were not White and were thus ineligible to naturalize.<sup>53</sup> The court described petitioner Ah Yup as “a native and citizen of the empire of China, of the Mongolian race” and stated that the issue before the court was “whether the statute authorizes the naturalization of a native of China of the Mongolian race.”<sup>54</sup> The court held that it did not and initially justified its decision based on popular conceptions of Whiteness. The court explained that:

[T]hese words in this country, at least, have undoubtedly acquired a well settled meaning in common popular speech, and they are constantly used in the sense so acquired in the literature of the country, as well as in common parlance. As ordinarily used everywhere in the United States, one would scarcely fail to understand that the party employing the words ‘white person’ would intend a person of the Caucasian race.<sup>55</sup>

The court’s analysis then used the scientific approach to confirm the idea that an Asian individual could not be White. The court referred to racial classifications as defined in Webster’s dictionary, which referenced Blumenbach’s race-based

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50. The case law focuses on defining Whiteness because only one of the 52 racial prerequisite cases litigated between 1878 and 1952 raised a claim that an individual was eligible based on being of “African nativity or African descent.” See, e.g. *In re Cruz*, 23 F. Supp. 774, 775 (E.D.N.Y. 1938) (holding that Benedito Cruz could not be naturalized even though his “mother is half African and half Indian and [his] father is a full blooded Indian” because if Cruz were “of one-quarter white blood and three-quarters Indian, he could not be admitted to citizenship as a white person . . . . It would therefore seem entirely incongruous to reason that the words ‘African descent’ should be construed to be less exacting in denoting eligibility for naturalization, than the term ‘white persons.’”).

51. IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (Richard Delgado & Jean Stefancic eds., 1996).

52. See *Thind*, 261 U.S. at 208–09 (“It is in the popular sense of the word, therefore, that we employ it as an aid to the construction of the statute, for it would be obviously illogical to convert words of common speech used in a statute into words of scientific terminology when neither the latter nor the science for whose purposes they were coined was within the contemplation of the framers of the statute or of the people for whom it was framed.”).

53. *In re Ah Yup*, 1 F. Cas. 223, 224–25 (C.C.D. Cal. 1878).

54. *Id.* at 223.

55. *Id.*

classification system, and noted that “no one includes the white, or Caucasian, with the Mongolian or yellow race.”<sup>56</sup>

Congress reinforced the court’s decision with the Chinese Exclusion Act in 1882.<sup>57</sup> Yet the status of Japanese immigrants and Indian immigrants was still an open question. The Supreme Court held that neither group of immigrants were eligible for naturalization in 1923 and 1924 respectively. Through *Ozawa v. United States* and *United States v. Bhagat Singh Thind*, the United States Supreme Court solidified the permanent foreignness of Asian immigrants by holding that neither science nor common sense allowed Asian immigrants to be White.<sup>58</sup> Whiteness within United States naturalization law was used as a proxy for identifying immigrants who had the capacity to adopt mainstream American values, norms, and practices.<sup>59</sup> Consequently, the holdings in *Ozawa* and *Thind* reaffirmed that Asian immigrants would be permanently foreign because they would remain ineligible for citizenship despite their individual characteristics.

i. *Ozawa*

In *Ozawa v. United States*, the Supreme Court was faced with deciding whether Japanese immigrants were eligible to naturalize based on being White.<sup>60</sup> The Court focused on a scientific approach to Whiteness and rejected the idea that individual evidence of assimilation could be sufficient.<sup>61</sup> This approach to viewing race as a fixed category rather than as a proxy for values, norms, and practices was reinforced in *Thind* and *Toyota v. United States*.

Takao Ozawa came to the United States in 1894 as a child and resided in California.<sup>62</sup> He was educated at the University of

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56. *Id.* at 224. Johann Friedrich Blumenbach was a German social scientist who introduced a race-based classification system for humans. Raj Bhopal et al., *The Beautiful Skull and Blumenbach’s Errors: the Birth of the Scientific Concept of Race*, 335 B.M.J. 1308 (2007).

57. Chinese Exclusion Act of 1882, ch. 126, § 14, 22 Stat. 58, 61 (repealed by Immigration and Nationality Act of 1952, 66 Stat. 163 (1952)).

58. *See Ozawa*, 260 U.S. at 198 (“the appellant . . . is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side. A large number of the federal and state courts have so decided and we find no reported case definitely to the contrary. These decisions are sustained by numerous scientific authorities, which we do not deem it necessary to review.”); *see also Thind*, 261 U.S. at 208–09.

59. *See Banks*, *supra* note 4, at 81 (discussing how “culture is used to evaluate immigrant groups.”).

60. *Ozawa*, 260 U.S. at 189–190.

61. *Id.* at 198.

62. *Id.* at 189.

California, Berkeley and settled in Hawaii in 1914.<sup>63</sup> On October 16, 1914, Ozawa submitted an application for naturalization to the United States District Court for the Territory of Hawaii.<sup>64</sup> The United States District Attorney for the District of Hawaii opposed Ozawa's petition because Ozawa was not a "white person," but appears to have conceded that Ozawa "was well qualified by character and education for citizenship."<sup>65</sup>

There could be no doubt that Ozawa had adopted and was committed to mainstream American values, norms, and practices. In his brief before the district court, Ozawa explained, "In name, General Benedict Arnold was an American, but at heart he was a traitor. In name, I am not an American, but at heart I am a true American."<sup>66</sup> He then went on to detail evidence of his assimilation:

(1) I did not report my name, my marriage, or the names of my children to the Japanese Consulate in Honolulu; notwithstanding all Japanese subjects are requested to do so. These matters were reported to the American government. (2) I do not have any connection with any Japanese churches or schools, or any Japanese organizations here or elsewhere. (3) I am sending my children to an American church and American school in place of a Japanese one. (4) Most of the time I use the American (English) language at home, so that my children cannot speak the Japanese language. (5) I educated myself in American schools for nearly eleven years by supporting myself. (6) I have lived continuously within the United States for over twenty-eight years. (7) I chose as my wife one educated in American schools . . . instead of one educated in Japan. (8) I have steadily prepared to return the kindness which our Uncle Sam has extended me . . . so it is my honest hope to do something good to the United States before I bid a farewell to this world.<sup>67</sup>

The Supreme Court did not doubt any of this but noted that it was required to give effect to Congress' intent.<sup>68</sup> Congress intended that only "white persons" and individuals of "African nativity and descent" were eligible to naturalize.<sup>69</sup> The Court focused its analysis on determining how to define Whiteness.

63. LÓPEZ, *supra* note 51, at 56.

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

65. *Id.*

66. LÓPEZ, *supra* note 51, at 80 (citing Ichioka, *supra* note 1, at 11).

67. *Id.* at 80 (citing Ichioka, *supra* note 1, at 11).

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

69. *See Amendments to the Naturalization Laws: Hearing on H.R. 10694 Before the H. Comm. On Immigration & Naturalization*, 65th Cong. 9–10 (1918) (statement of Raymond Crist, Deputy Commissioner, Bureau of Naturalization). *But see* Salyer, *supra* note 4, at 859–861 (discussing how Crist intentionally minimized the bill's scope in his representations to Congress, and in fact remained an ardent advocate

The Court stated that the language creating the racial requirements in the naturalization law “import a racial and not an individual test.”<sup>70</sup> The Court rejected using color as a basis for ascertaining Whiteness because it would be impracticable, “as that differs greatly among persons of the same race, even among Anglo-Saxons.”<sup>71</sup> Consequently, “to adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation.”<sup>72</sup> The Court similarly concluded that information about Ozawa’s actual assimilation was irrelevant. The opinion noted that “[t]he briefs filed on behalf of appellant refer in complimentary terms to the culture and enlightenment of the Japanese people, and with this estimate we have no reason to disagree; but these are matters which cannot enter into our consideration of the questions here at issue.”<sup>73</sup> The only matter for the Court to decide is “the will of Congress.”<sup>74</sup> There is no implication in the naturalization law or the Court’s opinion of “any suggestion of individual unworthiness or racial inferiority. These considerations are in no manner involved.”<sup>75</sup> Rather the Court is simply attempting to ascertain what Congress meant when it used the term “white persons,” and decided it meant Caucasian.<sup>76</sup>

The Court acknowledged that the category Caucasian did not create “a sharp line of demarcation between those who are entitled and those who are not entitled to naturalization, but rather a zone of more or less debatable ground outside of which, upon the one hand, are those clearly eligible, and outside of which, upon the other hand, are those clearly ineligible for citizenship.”<sup>77</sup> While the Court concluded that Ozawa was clearly not Caucasian, the Court would later struggle with what to do when scientific authorities and common understandings of Whiteness contradict each other.

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for the naturalization of Asian veterans).

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

71. *Id.* (explaining that there were “imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races.”).

72. *Id.*

73. *Id.* at 198.

74. *Id.*

75. *Id.*

76. *Id.* at 197.

77. *Ozawa*, 260 U.S. at 198.

ii. *Thind*

On July 4, 1913, Bhagat Singh Thind arrived in the United States as a twenty-one year old graduate of Punjab University.<sup>78</sup> After his arrival in the United States, he served in the United States Army for six months at Camp Lewis.<sup>79</sup> He obtained the rank of acting sergeant and was granted an honorable discharge.<sup>80</sup> Seven years later, Thind became a United States citizen when Judge Wolverton, of the District Court of the United States for the District of Oregon granted him a certificate of naturalization.<sup>81</sup> Thind had argued that he was eligible to naturalize because Indians from India were Caucasian and therefore, he was a White person eligible to naturalize.<sup>82</sup> Judge Wolverton was not alone in concluding that individuals from India were Caucasian and therefore White.<sup>83</sup> In fact, his decision was based on precedent. He cited three cases with similar conclusions and explained that he “was content to rest [his] decision . . . upon a line of cases which . . . are illustrative.”<sup>84</sup> He noted that there were contrary decisions, but he explained that he was “impressed that they [were] not in line with the greater weight of authority.”<sup>85</sup>

The United States moved to cancel Thind’s certificate of naturalization, claiming that he was not a White person and therefore was not “lawfully entitled to naturalization.”<sup>86</sup> The government lost at the district court and the appellate court certified the question of eligibility to the United States Supreme Court.<sup>87</sup> The Supreme Court agreed with the government and held that a “high caste Hindu of full Indian blood, born at Amrit Sar, Punjab, India” is not a White person, and is therefore not eligible to naturalize.<sup>88</sup>

In *Thind*, Justice Sutherland (who had also written *Ozawa*) rejected equating Caucasian and White. Justice Sutherland explained that, “‘Caucasian’ is a conventional word of much

78. LÓPEZ, *supra* note 51, at 61.

79. *In re Bhagat Singh Thind*, 268 F. 683, 684 (D. Or. 1920).

80. *Id.* at 684.

81. *See id.* at 686.

82. LÓPEZ, *supra* note 51, at 61.

83. *See Singh*, 257 Fed. at 209; *see also* *United States v. Balsara*, 180 Fed. 694 (2d Cir. 1910); *see also In re Halladjian*, 174 Fed. 834 (D. Mass. 1909).

84. *Thind*, 268 F. at 684 (citing *Singh*, 257 Fed. at 209; *see also Balsara*, 180 Fed. at 694; *Halladjian*, 174 Fed. at 834).

85. *Thind*, 268 F. at 684.

86. *Thind*, 261 U.S. at 207.

87. *Id.* at 206.

88. *Id.* at 206, 215.

flexibility, as a study of the literature dealing with racial questions will disclose, and while it and the words ‘white persons’ are treated as synonymous for the purposes of that case, they are not of identical meaning—*idem per idem*.<sup>89</sup> The Court applied a “common man” understanding to the phrase “white persons.”<sup>90</sup> Based on a common understanding of Whiteness, the Court concluded that “[i]t is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as White.”<sup>91</sup> Consequently, individuals from India were not White persons and were thus not eligible to naturalize.<sup>92</sup>

As in *Ozawa*, the *Thind* Court rejected an individualized approach to measuring Whiteness. The *Thind* Court suggested that the white person requirement is a proxy for assimilation. Justice Sutherland explained that:

[t]he children of English, French, German, Italian, Scandinavian, and other European parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry.<sup>93</sup>

The Court went on to explain that this was not “to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it was of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.”<sup>94</sup> Despite the Court’s concession that there was no question regarding *Thind*’s “individual

89. *Id.* at 208 (“In the endeavor to ascertain the meaning of the statute we must not fail to keep in mind that it does not employ the word ‘Caucasian,’ but the words ‘white persons,’ and these are words of common speech and not of scientific origin. The word ‘Caucasian,’ not only was employed in the law, but was probably wholly unfamiliar to the original framers of the statute in 1790.”).

90. *Thind*, 261 U.S. at 214 (“What we now hold is that the words ‘free white persons’ are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word ‘Caucasian’ only as that word is popularly understood.”). Compare *id.* at 208 (“we held that the words imported a racial and not an individual test and were meant to indicate only persons of what is popularly known as the Caucasian race.”) (emphasis in original), with *Ozawa*, 260 U.S. at 198 (describing that Caucasian was not “a sharp line of demarcation between those who are entitled and those who are not entitled to naturalization, but rather a zone of more or less debatable ground.”).

91. *Thind*, 261 U.S. at 215.

92. *Id.*

93. *Id.*

94. *Id.*

qualifications,” there was no escaping that he belonged to a group that Congress had deemed unassimilable.<sup>95</sup>

The Court’s opinions in *Ozawa* and *Thind* clarified that, based on scientific classifications and common knowledge, Asian immigrants were not White and were thus ineligible to naturalize. These decisions suggested that the individual characteristics of Asian immigrants were irrelevant for eligibility. Congress dictated that only White persons and persons of African nativity and descent were eligible to naturalize.<sup>96</sup> Consequently, the Court’s role was limited to interpreting the term “white person.”

By 1923, it was clear that United States naturalization decisions would not be made based on individualized assessments of loyalty and language skills.<sup>97</sup> Such an assessment would only be available to individuals who fell within certain racial categories.<sup>98</sup> Congress and the courts concluded that being within the category of Asian provided sufficiently accurate and reliable information about an individual’s values, norms, and practices to make an individualized assessment unnecessary.

## II. Military Naturalization

Another category that Congress viewed as useful for naturalization purposes was membership in the United States Armed Forces.<sup>99</sup> While such membership did not provide automatic access to naturalization, certain assumptions about the time necessary to develop loyalty and adopt key mainstream American values, norms, and practices were relaxed.

### A. *Fast-Track Naturalization for Servicepersons & Veterans*

Military service has not only been viewed as a “duty and right of citizenship,” but also as a way for noncitizens to prove “their worth for citizenship.”<sup>100</sup> Congress first provided a naturalization

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95. *Id.* at 207.

96. *Ozawa*, 260 U.S. at 190 (quoting Section 2169).

97. *Thind*, 261 U.S. at 207 (“The children of English, French, German, Italian, Scandinavian, and other European parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin.”); *Ozawa*, 260 U.S. at 190 (describing Asian individuals as “having manners, customs and language which seemed strange, and unwilling to mingle with western people”).

98. *Cf. Ozawa*, 260 U.S. at 192 (holding only those who are deemed to be “free white persons” are eligible for naturalization).

99. *See* Milita Act of 1862, 12 Stat. 594, 597 (1862) (eliminating certain time and residency requirements for applicants who serve in the United States Armed Forces).

100. Sohoni & Vafa, *supra* note 8, at 125.

“fast track” for servicepersons in 1862.<sup>101</sup> That year Congress enacted legislation stating that:

any alien, of the age of twenty-one years and upwards, who has enlisted or shall enlist in the armies of the United States . . . and has been or shall be hereafter honorably discharged, may be admitted to become a citizen of the United States . . . and that he shall not be required to prove more than one year’s residence within the United States previous to his application to become such citizen.<sup>102</sup>

Since 1862, Congress has continuously provided a fast track to naturalization for servicepersons.<sup>103</sup> Congress has viewed noncitizens willing to serve voluntarily in the United States Armed Forces as individuals who have “demonstrated the necessary qualities for national membership.”<sup>104</sup> Military naturalization is also viewed as a reward to noncitizens who have been willing to sacrifice their lives for the United States. The court in *In re Charr* explained that the purpose of military naturalization provisions is:

to reward those aliens who had entered the military or naval service of the United States, as therein described, by admitting them to citizenship without many of the slow processes, formalities, and strictness of proofs which were rigidly provided and enforced under the law affecting naturalization as it existed then, and as it exists now.<sup>105</sup>

Military naturalization provisions eliminate or alter some of the substantive and procedural naturalization requirements. For example, the Militia Act of July 17, 1862 and the Act of June 30, 1914 allowed servicepersons to naturalize without a declaration of intention.<sup>106</sup> Pursuant to then-existing law, individuals could not naturalize unless they had filed a declaration of intention to become a citizen three years prior to seeking naturalization.<sup>107</sup> The military naturalization provisions eliminating the need for a declaration of intention allowed individuals to avoid the three-year wait before becoming citizens.<sup>108</sup> Those provisions also occasionally shortened

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101. *Id.* at 120.

102. The Militia Act of 1862, 12 Stat. 594, 597 (1862). The standard residence requirement was five years. Naturalization Law of 1802, 2 Stat. 153, § 1 (1802).

103. *Cf.* Sohoni & Vafa, *supra* note 8 (tracking the history of military naturalization for non-citizen Asian veterans).

104. *Id.* at 126.

105. *In re Charr*, 273 F. at 210–11.

106. 63 Cong. Ch. 130, June 30, 1914, 38 Stat. 392, 395; Militia Act, 12 Stat. 594, § 21.

107. 1906 Naturalization Act, Pub. L. No. 59-338, ch. 3592, 34 Stat. 596, 596–99 (1906); Naturalization Law of 1802, 2 Stat. 153, § 1 (1802).

108. *Cf.* 38 Stat. 392, 395 (allowing applicants to forego “proof of residence on shore.”); 12 Stat. 594, § 21 (“[H]e shall not be required to prove more than one year’s residence within the United States previous to his application to become such

the length of time that one had to reside in the United States. For example, the Act of July 17, 1862 only required one year of residence and the Act of July 19, 1919 did not have a residency requirement.<sup>109</sup> At the time that both of these provisions were enacted, the general naturalization laws required five years of residency.<sup>110</sup> Citizenship scholars and historians have noted that residence periods have been a feature of United States naturalization law as an “apprenticeship’ to allow the individual immigrant to become firmly attached to the well-being of the Republic.”<sup>111</sup> Sufficient residence was viewed as ensuring that future citizens were loyal, which was a key quality to “community security.”<sup>112</sup> Shorter residence periods were justified for servicepersons and veterans because “[m]ilitary service was seen as more than adequately demonstrating these normative qualities.”<sup>113</sup>

Hundreds of Asian immigrant servicepersons and veterans voluntarily served in the United States Armed Forces during World War I.<sup>114</sup> They served out of a sense of duty to the country they viewed as their own, and many hoped that the presumptions about military service and cultural assimilation would extend to them.

#### *B. Asian Immigrant Military Service*

In need of “quickly raising and training a modern national army with the capability of fighting abroad,” the United States government has frequently targeted immigrants for military recruitment.<sup>115</sup> Asian immigrants responded to these recruitment efforts during World War I and approximately one thousand Asian immigrants volunteered for military service.<sup>116</sup> Due to the prohibition on Asian immigrant naturalization, judges and administrative officials were faced with determining whether the general prohibition against non-White and non-Black immigrant naturalization applied to the military naturalization provisions.

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citizen.”).

109. Act of July 19, 1919, ch. 24, 41 Stat 222; Militia Act, 12 Stat. 594, § 21.

110. 1906 Naturalization Act, 34 Stat. 596, 596–98; Naturalization Law of 1802, 2 Stat. 153, § 1.

111. KETTNER, *supra* note 8, at 243.

112. *Id.* at 10.

113. Sohoni & Vafa, *supra* note 8, at 126.

114. See Salyer, *supra* note 4, at 854 (detailing how many Asian immigrants were eligible for the draft in 1917).

115. *Id.* at 851.

116. *Id.*; Harry Maxwell Naka, *The Naturalization of Japanese War Veterans of the World War Forces 40* (1939) (unpublished M.A. thesis, University of California).

Most judges concluded that the statutory language was clear—it either prohibited Asian immigrant naturalization or it had no racial requirements.<sup>117</sup> The congressional intent analysis that judges and administrative officials conducted reflected strong disagreement about how Congress viewed military service and other naturalization criteria vis-à-vis race as a tool for measuring citizenship eligibility.<sup>118</sup> The judges that naturalized at least 500 Asian immigrant servicepersons and veterans between 1918 and 1925 concluded that Congress viewed the specific practice of military service as a better measure of assimilation than race.<sup>119</sup> Yet the Supreme Court's decision in *Toyota v. United States* reinforced the idea that Congress concluded that race was a better indication of cultural compatibility despite specific evidence of mainstream American cultural practices.<sup>120</sup>

### III. Measuring American Values, Norms, & Practices

With the enactment of the 1918 Naturalization Act, immigrant members of the United States Armed Forces and veterans had a clear and uniform fast track to citizenship. As noted in Part II, this fast track was partially based on the idea that military service was an excellent proxy for loyalty and the other characteristics deemed desirable for United States citizenship. Asian immigrant servicepersons and veterans sought to take advantage of these new naturalization provisions because they appeared to eliminate the racial requirements.<sup>121</sup> This Part analyzes the various strategies that Bureau of Naturalization officials and state and federal judges used to interpret the 1918 Naturalization Act. All officials and judges began by attempting to determine the plain meaning of the statutory text, but some found the text ambiguous.<sup>122</sup> Approaches to determining congressional intent varied. Some decision makers focused on the history of congressional action in the area of naturalization while others attempted to ascertain the normative

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117. *Compare In re Charr*, 273 F. at 214 (“The words ‘any person of foreign birth’ occurring in the Act of July 19, supra, do not enlarge the word ‘alien’ as contemplated by these acts.”) *with Thind*, 268 F. at 685 (“I see no analogy in this act to the Chinese Exclusion Act.”).

118. Sohoni & Vafa, *supra* note 8, at 142–44 (tracking the history of judicial interpretation of Congressional intent).

119. JAPANESE AM. NAT'L MUSEUM, *supra* note 2, at 46.

120. Salyer, *supra* note 4, at 865.

121. Memorandum from Deputy Comm'r Raymond F. Crist to Comm'n Richard K. Campbell 1 (Jan. 22, 1919) (on file with the Naturalization Administrative Files); *Japanese in Army Entitled to Citizenship*, *supra* note 3. This textual reading is addressed further in Section III.A.ii.a.

122. *See, e.g., In re Charr*, 273 F. at 210–12 (discussing the ambiguity of the Act)

goals of the military naturalization provisions and extrapolate from there. In *Toyota v. United States*, the Court used the former approach to conclude that Congress intended for the racial requirements to apply to the military naturalization provisions.<sup>123</sup> The Court's holding reinforced the use of race as a categorical eligibility requirement, which foreclosed the possibility that Asian immigrants would have the opportunity to demonstrate their individual worthiness of United States citizenship.

#### A. 1918 Naturalization Act

In 1918, Congress revised the 1906 Naturalization Act to harmonize the naturalization rules for immigrants serving in different branches of the United States Armed Forces.<sup>124</sup> To facilitate this goal, the seventh subdivision was proposed as an addition to the 1906 Naturalization Act. The seventh subdivision provided a legal basis for the naturalization of noncitizens who had served in the various branches of the United States Armed Forces.<sup>125</sup> Noncitizens who served in one of the specified capacities were not required to file a declaration of intention to become a citizen or to prove five years of residence within the United States.<sup>126</sup>

The seventh subdivision did not include any racial requirements.<sup>127</sup> Rather, the 1918 Naturalization Act included the

123. See *Toyota*, 268 U.S. at 412 (holding the Congressional intent “was not to enlarge § 2169”).

124. *Immigrants to the Naturalization Laws: Hearing on H.R. 10694 Before the H. Comm. on Immigration & Naturalization*, 65th Cong. 3-4 (1918) (explaining the purpose of the revisions was to provide “for the uniform naturalization of nearly all of the men in the United States service, including those in the service of our Army and Navy.”); *id.* at 4 (explaining Deputy Commissioner of Naturalization Raymond F. Crist’s view that the substantive revisions to the seventh subdivision would “unify the exemptions that are extended to various classes, such as aliens who have served in the Army and have been honorably discharged, in the Navy, in the Marine Corps, in the merchant marine, and in the Revenue-Cutter Service.”); *id.* (detailing how Mr. Crist’s view that without the revisions there was no legal provision that allowed the Government to “avail itself of the military experience of men who have served in the National Guard, who served in the Coast Guard, and who have served on board the vessels of the United States Government, such as the Army transports.”).

125. Naturalization Act of 1918, Ch. 69, § 7, 40 Stat. 542, 542 (The statute applied to noncitizens who had served in “the armies of the United States, either the Regular or the Volunteer Forces, or the National Army, the National Guard or Naval Militia of any State, Territory, or the District of Columbia, or the State militia in Federal service, or in the United States Navy or Marine Corps, or in the United States Coast Guard, or who has served for three years on board of any vessel of the United States Government, or for three years on board of merchant or fishing vessels of the United States of more than twenty tons burden . . .”).

126. *Id.*

127. See *id.* at 542 (opening military naturalization to “any alien”).

following language: “nothing in this Act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this Act and under the limitation therein defined.”<sup>128</sup> This was often referred to as a limited repeal of section 2169,<sup>129</sup> which had limited the naturalization provisions to “aliens being free white persons, and to aliens of African nativity and to persons of African descent.”<sup>130</sup>

When courts and the Bureau of Naturalization were faced with naturalization applications from Asian immigrant servicepersons and veterans, they were confronted with a challenging statutory interpretation question. The seventh subdivision not only used the term “any alien,” it also specifically provided for the naturalization of “[a]ny native-born Filipino” and “any Porto Rican not a citizen of the United States.”<sup>131</sup> Bureau of Naturalization Commissioner Richard K. Campbell and a number of judges interpreted the repeal of section 2169 as only applying to Filipino and Puerto Rican noncitizens.<sup>132</sup> They did not interpret the section 2169 limited repeal as applying to the language “any alien” within the seventh subdivision.<sup>133</sup> The seventh subdivision in relevant part stated:

*Any native-born Filipino* of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in [specified military service] . . . ; *or any alien, or any Porto Rican* not a citizen of the United States, of the age of twenty-one years and upward who has enlisted or may hereafter enlist in or enter [specified military service] . . . may, on presentation of the required declaration of intention petition for naturalization without proof of the required five years’ residence within the United States if upon examination by the representative of the Bureau of Naturalization, in accordance with the requirements of this subdivision it is shown that such residence can not be established; any alien serving in the military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without proof of the required five years’ residence within the United States . . . .<sup>134</sup>

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128. *Id.* at 547

129. *Id.*

130. *In re Knight*, 171 F. 299, 300 (E.D.N.Y. 1909) (quoting Act of Feb. 18, 1875, ch. 80, 18 Stat. 318).

131. Naturalization Act of 1918, ch. 69, § 7, 40 Stat. 542, 542.

132. Memorandum from Comm’r Richard K. Campbell 3 (Apr. 2, 1919) (on file in Naturalization Administrative Files) (citing legal opinions in his decision restricting the seventh subdivisions impact).

133. *Id.* at 3.

134. 40 Stat. 542, 542 (emphasis added).

Other naturalization decision makers like Judge Horace W. Vaughan of the United States District Court for Hawaii and Bureau of Naturalization Deputy Commissioner Raymond Crist concluded that the limited repeal of section 2169 applied to the term “any alien” as it appeared within the seventh subdivision.<sup>135</sup> Their conclusions often turned on how they believed Congress viewed Asian immigrants.<sup>136</sup>

Judges and administrative officials can only naturalize individuals who satisfy the criteria established by Congress. Was the military service provided by these immigrants sufficient evidence of their commitment to and adoption of mainstream American values, norms, and practices? Or did their race and ethnicity create a presumption of unassimilability that could not be overcome? If Congress answered yes to the first question, then the limited repeal of section 2169 should be read as applying to the term “any alien” appearing in the seventh subdivision. However, if Congress answered yes to the second question, then the repeal of section 2169 would be limited to Filipino and Puerto Rican servicepersons and veterans.

Administrative officials and judges analyzed the relevant precedent, statutory text, and congressional intent to interpret the meaning of the seventh subdivision. While this section examines each of these bases for decision as separate and distinct, judges and administrative officials rarely treated them as independent silos. Text was often interpreted in light of congressional intention and precedent was viewed as valuable based on its congruence with congressional intent.<sup>137</sup> Yet independently analyzing the text, precedent, and congressional intent clarifies the framework for deciding whether Asian immigrant servicepersons and veterans were eligible to naturalize.

After approximately eight years of judges and administrative officials debating this issue, the Bureau of Naturalization and the Department of Justice filed a test case to get a definitive answer.<sup>138</sup>

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135. See Memorandum from Deputy Comm'r of Naturalization Raymond F. Crist to Comm'r Richard K. Campbell, *supra* note 3; see also *Japanese in Army Entitled to Citizenship*, *supra* note 3.

136. See *Japanese in Army Entitled to Citizenship*, *supra* note 3 (“It is evident from the seventh subdivision that Congress did not intend to exclude any race from naturalization when it passed the law.”).

137. See, e.g., *Toyota*, 268 U.S. at 412. (“The legislative history of the act indicates that the *intention* of Congress was not to enlarge § 2169, except in respect of Filipinos qualified by the specified service.”) (emphasis added).

138. Memorandum from Sec'y of Labor Wilson to Comm'r of Naturalization 3 (Feb. 7, 1921) (on file with the Naturalization Administrative Files).

On May 25, 1925, the Supreme Court decided *Toyota v. United States* and held that Asian immigrant servicepersons and veterans were not eligible to naturalize pursuant to the 1918 Naturalization Act.<sup>139</sup> The Court concluded that the limited repeal of section 2169 only applied to Filipinos.<sup>140</sup> This holding was based in large part on the Court's conclusion that "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."<sup>141</sup>

i. Precedent

Between 1918 and 1925, courts and administrative officials did not have the benefit of a Supreme Court decision interpreting the 1918 Naturalization Act. Yet relevant precedent existed due to Asian immigrant servicepersons and veterans seeking to naturalize pursuant to prior military naturalization fast track statutes.<sup>142</sup> At the time each of the five fast-track statutes was enacted, section 2169 was a part of the naturalization law.<sup>143</sup> It limited the naturalization provisions to "aliens being free white persons, and to aliens of African nativity and to persons of African descent."<sup>144</sup> The military naturalization provisions made no mention of race, and Asian immigrant servicepersons and veterans sought to naturalize pursuant to these provisions.<sup>145</sup> Between 1862 and 1918, there were four published cases in which Asian immigrant servicepersons and veterans sought to naturalize pursuant to the military naturalization fast track.<sup>146</sup> In each of these cases, the petitioners had the required military service, but the court was faced with determining whether or not section 2169 applied to the military naturalization provisions.<sup>147</sup> In each of these cases, the courts held that section 2169 applied to the military naturalization provisions

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139. See *Toyota*, 268 U.S. 402.

140. *Id.* at 412.

141. *Id.*

142. *In re Alverto*, 198 F. 688 (E.D. Pa. 1912); *Bessho v. United States*, 178 F. 245 (4th Cir. 1910); *In re Knight*, 171 F. 299 (E.D.N.Y. 1909); *In re Buntaro Kumagai*, 163 F. 922 (W.D. Wash. 1908).

143. See, e.g., Act of Feb. 18, 1875, ch. 80, 18 Stat. 316, 318 (amending Section 2169 to include the words "being free white persons").

144. *In re Knight*, 171 F. 299, 300.

145. Act of May 9, 1918, 40 Stat. 542, 542 (opening military naturalization to "any alien").

146. *In re Alverto*, 198 F. 688; *Bessho*, 178 F. 245; *In re Knight*, 171 F. at 299; *In re Buntaro Kumagai*, 163 F. at 922.

147. One case was brought pursuant to the Act of July 17, 1862 and the other three cases were based on the Act of July 26, 1894.

and thus the Asian immigrant servicepersons and veterans were ineligible to naturalize.<sup>148</sup>

ii. Textual Analysis

Administrative officials and judges read the text of the 1918 Naturalization Act to reach one of three conclusions. Either (1) the text made Asian immigrant servicepersons and veterans eligible to naturalize, (2) Filipinos and Puerto Ricans were the only non-White and non-Black immigrant servicepersons eligible to naturalize, or (3) the text was ambiguous and did not clearly answer the question of eligibility.<sup>149</sup> Much of the information available about judicial decision making on this question is administrative memoranda in which naturalization officials report on the decisions of judges around the country. The most detailed textual analyses came from Commissioner Campbell and Deputy Commissioner Crist. In internal memoranda these two administrative officials present detailed arguments for their respective positions based on the text of the statute.<sup>150</sup> Such analysis from judges is rare because there are so few written opinions available, though Judge Vaughan of Hawaii did perform a detailed textual analysis.<sup>151</sup>

a. *Asian Immigrant Servicepersons & Veterans Eligible*

Deputy Commissioner Raymond F. Crist read the 1918 Naturalization Act as making Asian immigrant servicepersons and veterans eligible to naturalize. When the debate initially arose he stated, “[t]he language seems to me to be perfectly clear.”<sup>152</sup> He argued that the limited repeal of section 2169 was to be construed as applying to the phrase “any alien” appearing in the seventh subdivision.<sup>153</sup> In a memo to Commissioner Campbell, he explained that:

[the] question presented is whether the words “any alien serving in the military or naval service of the United States during the time this country is engaged in the present war,” when read in conjunction with the language of section 2 of the

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148. *In re Alverto*, 198 F. at 691; *Bessho*, 178 F. at 245, 248; *In re Knight*, 171 F. at 301; *Kumagai*, 163 F. at 924.

149. See *In re Charr*, 273 F. at 210–11; *In re Alverto*, 198 F. at 690; *Japanese in Army Entitled to Citizenship*, *supra* note 3.

150. Memorandum from Comm’r Richard K. Campbell 3, *supra* note 132 (Apr. 2, 1919); Memorandum from Deputy Comm’r of Naturalization Raymond F. Crist to Comm’r Richard K. Campbell, *supra* note 3.

151. *Japanese in Army Entitled to Citizenship*, *supra* note 3.

152. Memorandum from Deputy Comm’r of Naturalization Raymond F. Crist to Comm’r Richard K. Campbell, *supra* note 3.

153. *Id.*

same act constitute an exception from the general provisions of section 2169, which admits of the naturalization of aliens, during military or naval service of the United States during the present war, who are not white persons or aliens of African nativity or persons of African descent.<sup>154</sup>

Deputy Commissioner Crist explained that the text “clearly showed that [Congress] intention was to remove section 2169 of the Revised Statutes from consideration in the naturalization of any alien embraced within subdivision 7th.”<sup>155</sup> He went on to note that “[t]his subdivision is an exempting subdivision. It is the subdivision where all of the differing exemptions have been brought together and there unified.”<sup>156</sup> He emphasized the relationship between the use of the phrase “any alien” and the limited repeal of section 2169, and concluded the seventh subdivision made all immigrant servicepersons and veterans eligible for naturalization by using the language “any alien.” While section 2169 generally modified that terminology throughout the naturalization statutory provisions, Deputy Commissioner Crist argued that it did not in this case. The 1918 Naturalization Act specifically stated that it did not repeal or enlarge any part of 2169, except as specified in the seventh subdivision.<sup>157</sup>

Judge Vaughan read the text similarly. Before he began hearing naturalization petitions from Asian immigrant servicepersons and veterans, Honolulu’s *Star Bulletin* newspaper reported that he believed “this act of May 9, 1918, is an amendment to naturalization laws and repeals section 2169.”<sup>158</sup> He is reported to have explained that “[i]t is evident from the seventh subdivision that Congress did not intend to exclude any race from naturalization when it passed the law, otherwise, . . . a clause would have been inserted dealing separately with those that exclusion was intended for.”<sup>159</sup> The *Star Bulletin* concluded, “the words ‘any alien’ are taken literally by the judge.”<sup>160</sup> Judge Vaughan followed this interpretation in the case *In re Leon Feronda*.<sup>161</sup> He explained:

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154. *Id.* at 1–2.

155. *Id.* at 4.

156. *Id.*

157. Naturalization Act of 1918, ch. 69, § 7, 40 Stat. 542, 547 (stating that “nothing in this Act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this Act and under the limitation therein defined.”).

158. *Japanese in Army Entitled to Citizenship*, *supra* note 3.

159. *Id.*

160. *Id.*

161. *In re Leon Feronda* 5 (D. Haw. Jan. 24, 1919) (on file with Naturalization

The seventh subdivision does not mention section 2169, but it does authorize the doing of some things that are inconsistent with said section. Considering this fact and the peculiar language of this repealing clause, *it appears to me that Congress intended to make section 2169 inapplicable to cases coming within the specification of the seventh subdivision*. If this is not what the language means I am unable to see what it does mean.<sup>162</sup>

Three months later, he offered additional analysis regarding the relationship between the limited repeal of section 2169 and the seventh subdivision.<sup>163</sup> Judge Vaughan explained that Congress had passed various statutes providing for the naturalization of servicepersons and veterans.<sup>164</sup> He noted that “in every instance in which the question has been before the courts, it has been held that section 2169 limited every provision of every such act.”<sup>165</sup>

Based on the text, Judge Vaughan concluded section 2169 was “repealed or enlarged as specified in the seventh subdivision,” and that meant that “the provisions of the seventh subdivision [were taken] out of the operation of section 2169.”<sup>166</sup> Judge Vaughan single handedly naturalized a large portion of the Asian immigrant servicepersons and veterans who became United States citizens between 1918 and 1925. It is estimated that he naturalized 398 Japanese immigrant servicepersons, 99 Korean immigrant servicepersons, and four Chinese immigrant servicepersons.<sup>167</sup>

A number of judges shared this textual reading, including Judge Trippet of the United States Federal Court for the District of Los Angeles, Judge Hollenbeck, state court judge in Colorado, and Judge John B. Zabriskie, state court judge in New Jersey. Each of these judges concluded that the text of the 1918 Naturalization Act permitted the naturalization of Asian immigrant servicepersons and veterans. For example, the Naturalization Examiner for Los Angeles reported to the Chief Examiner in San Francisco that Judge Trippet “went carefully over the provisions of the law and of Section 2169. He finally gave his opinion that these petitioners were eligible under the provisions of the Act, and granted them citizenship.”<sup>168</sup> Judge Hollenbeck was reported as “[taking] the view

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Administrative Files (emphasis added).

162. *Id.*

163. See *In re Saichi Shimodao* (D. Haw. Mar. 17, 1919) (on file with the Naturalization Administrative Files).

164. *Id.* at 3–4.

165. *Id.* at 4.

166. *Id.* at 4–5.

167. JAPANESE AM. NAT'L MUSEUM, *supra* note 2, at 46; Naka, *supra* note 116.

168. Memorandum from Office of Naturalization, L.A. to Chief Examiner, S.F.

that the that the seventh subdivision of Section 4 of the Act of May 9, 1918 superseded all prior enactments on the subject, especially in view of the general repeal embodied in Section 26 of said Act.”<sup>169</sup> Judge Zabriskie “construe[d the] naturalization law of May ninth nineteen eighteen to permit the naturalization of Chinese and Japanese in military service.”<sup>170</sup>

*b. Only Filipinos and Puerto Ricans Eligible*

Commissioner Campbell and a number of judges disagreed with this reading of the 1918 Naturalization Act. They viewed the limited repeal of section 2169 as a necessary provision to effectuate the explicit grant of eligibility to Filipino and Puerto Rican servicepersons and veterans. Judge Bledsoe of the United States District Court for the Southern District of California was one of these judges.<sup>171</sup> Judge Bledsoe had an interesting history with interpreting the eligibility provisions. In an October 31, 1919 letter to Senator Phelan, Judge Bledsoe explained:

Upon first reading of the statute, I considered that it entitled Japanese to admission and so ruled with respect to the individual Japanese then applying. Thereafter, however, upon a more careful reading of the statute, rather complex in its phraseology, I came to the conclusion that it did not in any way affect the right of naturalization as provided for in the general law theretofore in force and therefore it did not permit the naturalization of Japanese.<sup>172</sup>

In 1921, Judge Bledsoe had the opportunity to apply his new interpretation of the statute and denied the naturalization applications of En Sk Song and Simeon Ogbac Mascarenas.<sup>173</sup> Judge Bledsoe concluded, “[i]f Congress, in the enactment of subdivision 7, had intended to make it possible for aliens of every race to become

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(Apr. 7, 1919) (on file with the Naturalization Administrative Files).

169. Memorandum from Richard Wright, Naturalization Examiner, Denver, CO. to Chief Examiner, Denver, CO. (Aug. 6, 1919) (on file with the Naturalization Administrative Files). Judge Hollenbeck, like other judges, also expressed his opinion that “if any man was willing to fight for the country, he was entitled to be a citizen.” *Id.*

170. Letter from Assistant Attorney Gen. William C. Fitts to Sec’y of Labor (July 6, 1918) (on file with the Naturalization Administrative Files) (advising secretary of a wire the Department of Justice received from Judge Zabriskie).

171. *In re Song*, 271 F. 23, 26 (S.D. Cal. Feb. 24, 1921) (holding that racial categories could still bar naturalization except for “native-born Filipinos” who had served because without “the presence of the exception created by subdivision 7 of the act of May 9, 1918, they would have been denied citizenship.”).

172. Letter from Judge Bledsoe to Senator Phelan (Oct. 31, 1919) (on file with the Naturalization Administrative Files).

173. *In re Song*, 271 F. at 26–27. Song was a Korean native who was a subject of Japan, and Mascarenas was a native-born Filipino. *Id.* at 23.

citizens, merely through participation in the war in our Army or Navy, it would have been very easy for it to have said so.”<sup>174</sup>

Commissioner Campbell had made a similar argument two years earlier. He stated:

If the act had said ‘any alien, including Japanese, etc.,’ then there would have been a specific exception and Japanese would have been removed from the excluding terms of section 2169 . . . . There is no such exception and therefore in lieu of it there is pointed out the comprehensive language ‘any alien’ as constituting the exception.<sup>175</sup>

Yet for Commissioner Campbell, the term “any alien” was “general language” that could not create a “specific exception” to section 2169 because to do so would make the limited repeal of section 2169 “entirely nugatory.”<sup>176</sup>

I cannot reconcile it with any authority of which I am aware that a legal construction which expunges a specific provision from a law and deprives it of all meaning is a correct construction, and if the term “any alien” is to be construed in its broad literal sense then the Court has denied all significance to the language “but nothing in this act shall repeal or in any way enlarge section 2169 of the Revised Statutes \* \* \* \*” This is an express provision of the law that is unconditioned and independent and must, therefore, be held to be effective. The remaining portion of the sentence “\* \* \* \* except as specified in the seventh subdivision of this act and under the limitation therein defined \* \* \* \*,” is apparently descriptive of a supposed specific exception which a perusal of that part of the section in which it apparently should occur fails to disclose.<sup>177</sup>

That specific exception was native-born Filipinos. The grant of eligibility to native-born Filipinos in the opening sentences of the seventh subdivision was:

an enlargement of section 2169, since a Filipino is an Asiatic and of the yellow race, and plainly the language reserving with an exception section 2169 R.S. was incorporated for the purpose of showing that Congress did not intend any further enlargement of its terms to include others than Filipinos and even in such case only those Filipinos specified and under the limitations as to them which are therein defined.<sup>178</sup>

For Commissioner Campbell the issue was “whether ‘any alien’ [was] to be broadly interpreted in its literal sense and without restriction.”<sup>179</sup> He concluded that it was not. For him, the

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174. *Id.*

175. Memorandum from Comm’r Richard K. Campbell 3, *supra* note 132, at 1.

176. *Id.* at 1.

177. *Id.*

178. *Id.* at 3.

179. *Id.* at 1.

“inevitable conclusion” was that the 1918 Naturalization Act did “not in any ways enlarge nor d[id] it repeal section 2169 R.S., except as to native born Filipinos of the designated age and under the circumstances defined in the first portion of the seventh subdivision.”<sup>180</sup>

Judge Kerrigan of the Supreme Court of California agreed:

[A]fter having said that section 2169 was not to be repealed, it was necessary for Congress to add, ‘except,’ etc., because as a matter of fact there were two classes mentioned in subdivision 7, namely Filipinos and Porto Ricans, who were neither free white persons nor of African descent or nativity.<sup>181</sup>

Judge Van Valkenburg of the United States District Court for the Western District of Missouri similarly concluded “[t]he exceptions referred to must have been the races especially mentioned in the seventh subdivision, and the limitation was the military or naval service performed. In other words, under the general law, neither a Filipino nor a Porto Rican could necessarily have been admitted to citizenship.”<sup>182</sup> Judge Wolverton of the United States District Court for the Western District of Washington also concluded that the only exception to section 2169 within the seventh subdivision was “relat[ed] to native-born Filipinos and to Porto Ricans.”<sup>183</sup>

Deputy Commissioner Crist rejected this interpretation. In a 1921 memo to the Secretary of Labor, Crist stated:

Section 2169 refers only to “aliens.” It does not have any reference whatsoever to “persons owing permanent allegiance,” although it has been urged that the reference in this subdivision to the Filipino makes the only exception to 2169. The Filipino is not an “alien” but a “person owing permanent allegiance to the United States.” The provision regarding the Filipino specifically excepts him from the general provisions of the naturalization law upon service in the navy after the declaration of intention, and not from section 2169.<sup>184</sup>

Judge Vaughan shared this perspective. In his opinion in *In re Soon Nahm Ahn*, he explained “the provision relating to ‘any native Filipino’ is not in conflict with section 2169; the native born Filipino is not an alien, and section 2169 has no application to laws specifically providing for the naturalization of those who are not

180. *Id.* at 3.

181. *Sato v. Hall*, 217 P. 520, 524 (Cal. July 26, 1923).

182. *In re Charr*, 273 F. at 212.

183. *In re Sato*, No. 3604-P-5214, slip op. at 1 (W.D. Wash. Apr. 12, 1919) (on file with the Naturalization Administrative Files).

184. Memorandum from Deputy Comm’r of Naturalization Raymond F. Crist to Secretary of Labor, *supra* note 6.

aliens.”<sup>185</sup> This perspective was ultimately rejected by the Supreme Court in *Toyota v. United States*. There, the Court held that the limited repeal of section 2169 only applied to Filipinos.<sup>186</sup>

*c. Ambiguous Text*

The administrative archival records include three cases in which judges concluded that the text of the 1918 Naturalization Act was ambiguous before the Court’s decision in *Toyota*. In two of these cases the judges decided that the ambiguity should be read in favor of the Asian servicepersons and veterans seeking naturalization. In the remaining case, the judge concluded that ambiguity required an examination of Congressional intent, which he decided did not support the Asian immigrant servicepersons’ and veterans’ eligibility.

Judge Dooling of the United States District Court for the Northern District of California concluded that the text of the 1918 Naturalization Act was “broad enough to cover” the case of an Asian immigrant service member.<sup>187</sup> He decided that “any doubt as to the meaning of the law should be resolved in favor of those whom the Government thought fit to take into active military or naval service during the late war.”<sup>188</sup> This conclusion was supported by his opinion that the court could do this much for “those who were willing to fight for this Country, during the late war.”<sup>189</sup> Judge P.C. Evans, a state court judge in Utah, agreed with Judge Dooling’s sentiments. The Acting Chief Naturalization Examiner reported that Judge Evans stated “the law should be interpreted to permit [Asian immigrant servicepersons’ and veterans’] naturalization if such interpretation was at all permissible.”<sup>190</sup> It appears he did find this interpretation permissible because he granted the naturalization petition of Hideo Kazuta.<sup>191</sup> Kazuta was a Japanese native and honorably discharged soldier.<sup>192</sup> Judge Evan’s reading of the 1918 Naturalization Act was shaped by his belief that “a

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185. *In re Soon Nahm Ahn* (D. Haw.) (on file with the Naturalization Administrative Files).

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

187. *In re Mon Foo Yan*, No. 3747 (N.D. Cal. Sep. 19, 1919) (on file with the Naturalization Administrative Files).

188. *Id.*

189. *Id.*

190. Memorandum from Acting Chief Naturalization Exam’r Frederick Emmerich to Comm’r of Naturalization (May 25, 1920) (on file with the Naturalization Administrative Files).

191. *Id.*

192. *Id.*

Japanese who had voluntarily entered our military forces and served honorably during the late war was entitled to the benefits of citizenship.”<sup>193</sup> It does not appear that either judge was willing to ignore the statutory text to reach this outcome, but rather that both were persuaded that the text did not clearly answer the question. In light of such ambiguity, it was possible for Asian immigrant servicepersons and veterans to get the benefit of the doubt.<sup>194</sup>

Judge Kerrigan of the Supreme Court of California similarly read the statute as ambiguous, but in the face of ambiguity he turned to congressional intent.<sup>195</sup> Based on an analysis of legislative history Judge Kerrigan concluded Asian immigrant servicepersons and veterans were not eligible to naturalize.<sup>196</sup> Judge Kerrigan specifically pointed to the fact that “the committee which reported the bill to Congress, in response to questions from the floor, repeatedly said that the act would not apply to those not capable of citizenship.”<sup>197</sup>

### iii. Congressional Intent

Administrative officials and judges gave considerable weight to their understanding of whether Congress intended to make Asian immigrant servicepersons and veterans eligible for naturalization through the 1918 Naturalization Act. Opinions on this issue were split at the highest levels within the Bureau of Naturalization.<sup>198</sup> Commissioner Richard K. Campbell concluded that section 2169 prohibited Asian immigrant servicepersons’ and veterans’ naturalization, while Deputy Commissioner Crist believed that such naturalization was permitted. Both gentlemen had been actively involved in the enactment of U.S. naturalization law. Commissioner Campbell was one of three members of the Presidential Commission on Naturalization in 1905. This commission drafted legislation that became the 1906 Act. The main purpose of the 1906 Act was to centralize naturalization procedures, but both of the proposed bills submitted by the Commission recommended limiting naturalization to “persons of the Caucasian

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193. *Id.*

194. *See In re Mon Foo Yan*, No. 3747. (“the meaning of the amendment is not very clear . . . but I believe the law should be resolved [in favor of the serviceperson].”).

195. *Sato*, 217 P. at 524.

196. *Id.*

197. *Id.* at 525.

198. *See, e.g.*, Memorandum from Deputy Comm’r of Naturalization Raymond F. Crist to Comm’r Richard K. Campbell, *supra* note 130, at 3; Memorandum from Comm’r Richard K. Campbell, *supra* note 141 (on file with the Naturalization Administrative Files).

race and to aliens of African nativity or descent.”<sup>199</sup> Commissioner Campbell’s commitment to racial requirements for naturalization in 1905, which excluded Asian immigrants, may have influenced his interpretation of the 1918 Naturalization Act that amended the 1906 Naturalization Act. Commissioner Campbell noted that a committee hearing before the passage of the 1918 Naturalization Act “bears out” the idea that the section 2169 repeal was limited to Filipinos.<sup>200</sup> He thought it was obvious that “Congress believed that there was some respect in which section 2169 of the Revised Statutes would be operative in regard to the new matter adopted on behalf of aliens who had been engaged in the present military service of the United States, otherwise the reservation would have been futile.”<sup>201</sup>

Deputy Commissioner Crist was involved in the drafting of the 1918 amendments and testified before Congress about them.<sup>202</sup> Based on his involvement, he concluded “[t]he intention of Congress was to make eligible for citizenship any alien who could be prevailed upon during its greatest historical crisis to enter the military or naval service of the United States.”<sup>203</sup> Further, that “there were others than white or black aliens [in the Army] was generally understood. It was known that there were Chinese, Japanese, Hindus, Filipinos, American Indians, and others ineligible ordinarily to naturalize under the naturalization laws of this country.”<sup>204</sup> Section 2169 was “freely discussed on the floor of the House,” and Deputy Commissioner Crist argued that Congress’ “intention was to remove section 2169 of the Revised Statutes from consideration in the naturalization of any alien embraced within subdivision 7.”<sup>205</sup>

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199. H.R. DOC. NO. 59-46, at 97 (1905) (Purdy & Campbell proposed legislation); *Id.* at 108 (Hunt proposed legislation requiring court to be satisfied that the applicant “is of the Caucasian race, or of African nativity or descent.”).

200. Letter to Chief Naturalization Exam’r William M. Ragsdale (Jan. 9, 1919) (on file with the Naturalization Administrative Files).

201. Memorandum from Comm’r Richard K. Campbell 3, *supra* note 132.

202. *See, e.g., Amendments to the Naturalization Laws: Hearing on H.R. 10694 Before the H. Comm. on Immigration & Naturalization*, 65th Cong. 4 (1918) (statement of Mr. Sabbath) (“I think Mr. Crist could explain the bill more thoroughly and more intelligently, as well as in a shorter space of time, than I could. We worked together on it, but he did most of the work . . .”); *Naturalization of Residents of the United States: Hearing on H.R. 3132 Before the S. Comm. on Immigration*, 65th Cong. 3-27 (1918).

203. Memorandum from Comm’r Richard K. Campbell 3, *supra* note 132.

204. *Id.* at 4.

205. *Id.*

Commissioner Campbell and Deputy Commissioner Crist both had supporters within the judiciary. For example, Judge Bledsoe and Judge Van Valkenburg agreed with Commissioner Campbell. Judge Bledsoe concluded:

The purpose of Congress . . . was not to provide for admission of aliens generally, who had served with us in the World War, but merely to provide that those of them who were otherwise eligible to admission might be admitted without being required to execute the usual preliminary declaration, and without completing the usual period of residence within the confines of the United States.<sup>206</sup>

Judge Van Valkenburg similarly concluded that “[t]he history of legislation upon this subject convincingly demonstrates the purpose of Congress to limit applicants for naturalization to free white persons and those of African nativity and descent.”<sup>207</sup>

Judge Vaughan offered the most detailed discussion of congressional intent, which corresponded with Deputy Commissioner Crist’s conclusions. Judge Vaughan explained:

We had drafted them into our service and they had thought enough of us to serve, to risk their lives for us. Was Congress unwilling to grant citizenship to those among them found to possess the qualifications required of others? I do not think so. In my opinion, Congress by repealing the clause quoted above lifted section 2169 so as to admit them to citizenship.<sup>208</sup>

He concluded that Congress intended to treat all alien servicepersons and veterans equally, stating “[i]f it was not the intention of Congress thereby to provide equal treatment, or at least fair treatment for all aliens in our service, I am unable to perceive what Congress did inten[d].”<sup>209</sup> In a subsequent case he reiterated this conclusion stating, “[e]vidently Congress intended to provide for extending the protection of citizenship to them without regard to race or color.”<sup>210</sup>

A detailed review of the legislative history for the 1918 Naturalization Act reveals that members of Congress expressed grave concern that the military naturalization provisions would enable Asian immigrant servicepersons and veterans to naturalize. When members of Congress expressed such concerns, they were constantly reassured that no such outcome was possible. For

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206. *In re Song*, 271 F. 23, 26 (S.D. Cal. Feb. 24, 1921).

207. *In re Charr*, 273 F. 207, 212 (W.D. Mo. 1921).

208. *In re Saichi Shimodao* at \*4-5 (D.C. Haw. Mar. 17, 1919) (on file with the Naturalization Administrative Files).

209. *In re Soon Nahm Ahn*, 2 (D. Haw.) (on file with the Naturalization Administrative Files).

210. *In re Shimodao*, at \*5.

example, Representative Moore of Pennsylvania asked how the military naturalization provisions would “apply in the case of a Chinaman or a Japanese. The term ‘any alien’ there is pretty broad. It applies to a Filipino in the service. Is it possible it would apply also to a Chinaman or a Jap?”<sup>211</sup> Representative John L. Burnett of Alabama assured Representative Moore that the military fast track did not “repeal the existing law which excludes Chinese and Japanese from citizenship.”<sup>212</sup> Still not entirely convinced, Representative Moore wondered whether it would be possible for an Asian immigrant “to obtain a foothold in the Army and make that the medium of becoming a citizen under this section.”<sup>213</sup> Representative Hayes replied, “the purpose of this, of course, is to admit Porto Ricans and Filipinos who are in the Army to apply for commissions in order to have an official position in the various Filipino and Porto Rican contingents of the Army. That is the primary purpose of it.”<sup>214</sup> Representative Burnett added, “[i]t would not apply to those who are not capable of acquiring citizenship.”<sup>215</sup> During House hearings on an earlier bill that had language similar to that of the 1918 Naturalization Act, Representative Burnett, Chairman of the House Committee on Immigration and Naturalization, asked, “[a]re there any Asiatics that are not eligible for citizenship who are serving in any capacity on ships, and if so, would this bill in its broad terms allow them to come in?”<sup>216</sup> Deputy Commissioner Crist replied, “I understand the Navy Department allows no one in the Navy who is not a citizen of the United States, with the exception of the Filipino and Porto Rican.”<sup>217</sup> After Chairman Burnett sought greater clarification, Representative Sabath explained, “[i]t was not intended that we naturalize Japanese or Chinese, but it is intended that we should naturalize as many of the seaman as we can.”<sup>218</sup> Deputy Commissioner Crist finally stated, “[t]he Chinese could not be naturalized, because by a specific act of Congress they are excluded.”<sup>219</sup> He then proceeded to quote section three of the bill, which stated, “[t]hat all acts of parts of acts inconsistent with or repugnant to the provisions of this act

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211. 56 CONG. REC. 6000 (May 3, 1918).

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Amendments to the Naturalization Laws: Hearing on H.R. 10694 Before the H. Comm. on Immigration & Naturalization, 65th Cong. 8 (1918).*

218. *Id.* at 9.

219. *Id.*

are hereby repealed; but nothing in this act shall repeal or in any way enlarge section 2169 of the Revised Statutes.”<sup>220</sup> Chairman Burnett replied, “That probably guards it” to which Deputy Commissioner Crist stated, “That guards it.”<sup>221</sup> Finally, a Senate report on the bill that was enacted explained:

[The bill] also declares that nothing in the act shall enlarge or repeal in any way section 2169 of the Revised Statutes except as specified in the seventh subdivision and under the limitation therein defined. This means that Filipinos may be naturalized who are enlisted in the Army or Navy of the United States and are honorably discharged therefrom.<sup>222</sup>

The repeated reassurance that the seventh subdivision only expanded naturalization eligibility to Filipinos and Puerto Ricans was due to the text of the bill. The bill stated “[t]hat all Acts or parts of Acts inconsistent with or repugnant to the provisions of this Act are hereby repealed; but nothing in this Act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes.”<sup>223</sup> Yet the text ultimately adopted was different, and it included the limited repeal language. In both forums, the same concerns were raised and the same reassurances were given, despite different texts being considered.

In *Toyota*, the Supreme Court examined congressional intent and concluded that “[t]he legislative history of the act indicates that the intention of Congress was not to enlarge section 2169, except in respect of Filipinos qualified by the specified service.”<sup>224</sup> The Court concluded that Congress did not extend to Asian immigrant servicepersons and veterans the same presumptions about cultural assimilation that it extended to non-Asian immigrant servicepersons and veterans.<sup>225</sup> Their military service could not overcome a presumption of unassimilability.<sup>226</sup>

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220. *Id.* The language of H.R. 10694 that was discussed differed from the text adopted in the 1918 Act. The 1918 Act language regarding section 2169 stated, “nothing in this Act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this Act and under the limitation therein defined.” Naturalization Act of 1918, ch. 69, § 7, 40 Stat. 542, 547 (1918).

221. *Amendments to the Naturalization Laws: Hearing on H.R. 10694 Before the H. Comm. on Immigration & Naturalization*, 65th Cong. 9 (1918).

222. S. COMM. ON IMMIGRATION, AMENDING THE NATURALIZATION LAW, S. REP. NO. 65-388, at 8–9 (Apr. 12, 1918) (“[t]o accompany H.R. 3132”).

223. H.R. 10694, 65th Cong. (Mar. 13, 1918).

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

225. *Id.*

226. *Id.*

Before *Toyota* was decided, lower federal and state court judges had different opinions about Congress' intent.<sup>227</sup> While there is no record of judges or administrative officials demeaning the military service of Asian immigrants, some decision makers exalted this service and viewed it as evidence of the characteristics desired for future citizens.<sup>228</sup> For these decision makers, there was likely no legitimate basis for distinguishing between Asian immigrant servicepersons and veterans and non-Asian immigrant servicepersons and veterans. Consequently, they concluded that Congress could not have meant to make such a distinction. For example, Deputy Commissioner Crist noted:

To construe this statute adversely to the soldier because of his nationality, race or creed is to repudiate those upon whom the Nation has leaned and depended to sustain the fundamentals upon which its national life exists. A policy of repudiation of the soldier of the country must bring about just rebuke.<sup>229</sup>

Yet other decision makers concluded that Congress intended to maintain the racial distinctions that existed before the 1918 Naturalization Act.<sup>230</sup> These decision makers thought Congress viewed Asian immigrants as having different and incompatible values, norms, and practices—thus making them unassimilable.

In *Toyota*, however, the Supreme Court examined congressional intent and concluded that “[t]he legislative history of the act indicates that the intention of Congress was not to enlarge section 2169, except in respect of Filipinos qualified by the specified service.”<sup>231</sup> The Court concluded that Congress did not extend to Asian immigrant servicepersons and veterans the same presumptions about cultural assimilation that it extended to non-

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227. *Id.*

228. *Id.*

229. Memorandum from Deputy Comm'r Raymond F. Crist to Comm'n Richard K. Campbell 1, *supra* note 130, at 5.

230. These discussions do not detail why Asian immigrants were excluded from naturalization eligibility. However, the legislative history of the 1870 Naturalization Act and subsequent legislation barring Asian migration and prohibiting access to naturalization provide thorough explanations for their exclusion. Asian immigrants were barred from citizenship “on the grounds that American politics and culture would remain perennially foreign to them; indeed, Asians had become, in American rhetoric, anti-citizens, embodying values and characteristics antithetical to those of the ideal American citizen.” Salyer, *supra* note 4, at 856. More specifically, Asian immigrants were viewed as disloyal pagan imperialists who lowered wages and threatened the livelihood of hardworking Americans. See NGAI, *supra* note 4, at 47–48.

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

Asian immigrant servicepersons and veterans.<sup>232</sup> Their military service could not overcome the presumption of unassimilability.<sup>233</sup>

### Conclusion

Many Asian immigrants believed that military service would enable them to demonstrate their loyalty and adoption of mainstream American values, norms, and practices.<sup>234</sup> The special provisions within the naturalization laws for immigrant servicepersons and veterans supported their belief. Like many immigrants, Asian immigrants viewed military service as “some indication of the feeling of loyalty expressed . . . towards the country of their adoption.”<sup>235</sup> Further, “most Asian men apparently joined the armed forces in the same rush of enthusiasm stirring other Americans and alien residents and with the added hope that demonstrations of loyal wartime service would be a path to social acceptance and incorporation.”<sup>236</sup> For example, Kiichi Kanzaki, the general secretary of the Japanese Association of America, saw the war as an opportunity for Asian immigrants to demonstrate their assimilation, to “dislodge the theory that the Japanese are so unshakably devoted and faithful to their country that they will never become loyal American citizens.”<sup>237</sup>

Kanzaki’s desire to prove Japanese immigrants’ cultural assimilation was not simply intended to change the hearts and minds of the American public. Rather, it was to demonstrate a legal requirement for citizenship. The racial requirements embedded in naturalization laws were an example of categorical decision making rather than individualized assessments.

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232. *Id.*

233. *Id.*

234. Even though Asian immigrants were exempt from the draft, over one thousand Asian immigrants volunteered for military service. Naka, *supra* note 116, at 40–41. The majority of Japanese World War I veterans “were volunteers, prompted by the feeling of loyalty and devotion to their adopted country. Such an expression of loyalty [was] surprising and a revelation to many who had believed the Japanese immigrants unassimilable and unpatriotic to the cause of their adopted country.” *Id.*

235. *Id.* at 43.

236. See Salyer, *supra* note 4, at 854; see also Letter from Richard M. Sato to Richard K. Campbell, (Feb. 8, 1919) (on file with the Naturalization Administrative Files) (stating how Sato had been educated in the United States and that he was familiar with U.S. law and the duties of a citizen).

237. Salyer, *supra* note 4, at 854 (citing Kiichi Kanzaki, *American-Born Japanese Loyal to United States*, S.F. CHRON., at 19 (Jan. 16, 1918) (describing how the Japanese Association of America was an important political organization for first-generation Japanese immigrants)).

The categorical approach creates a serious risk that individuals who have internalized American culture will be denied the opportunity to naturalize. This risk is particularly pronounced when the categories do not provide accurate and reliable information. As long as assimilation is evaluated via categorical criteria rather than individualized assessments, it is a problematic citizenship requirement.<sup>238</sup> It is critically important that applicants have the opportunity for individualized review of their specific life story to determine whether they have internalized American culture.

United States citizenship requirements are no longer defined by race or demonstrated “habits of civilized life.” But concerns about cultural assimilation continue to shape public and political discourse about who should be eligible to naturalize.<sup>239</sup> As a category, unauthorized migrants are unable to become citizens because they lack lawful permanent residence status.<sup>240</sup> Proposals for a pathway to citizenship are rooted in the idea that these individuals “are Americans in their heart, in their minds, in every single way but one: on paper.”<sup>241</sup> Advocates for a pathway to

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238. The use of assimilation proxies to categorically grant citizenship eligibility raises similar questions about accuracy and reliability. An example of this would be the naturalization fast track for servicepersons and veterans. Military service can be a proxy for the internalization of American culture, but people also enlist for a variety of instrumental reasons that have little to nothing to do with mainstream American values, norms, and practices. Yet the use of proxies to categorically grant access to citizenship is less problematic than the use of proxies to categorically deny access to citizenship from an individual rights perspective. Granting a right that may not be deserved does not deprive an individual of important rights and opportunities the way that denying a right that is deserved does.

239. See Hailey Branson-Potts, *Trump Wants Immigrants to “Share Our Values.” They Say Assimilation Is Much More Complex*, L.A. TIMES (Apr. 11, 2017), <http://www.latimes.com/local/lanow/la-me-ln-immigrant-assimilation-2017-story.html> (“‘Not everyone in our country will be able to successfully assimilate,’ President Trump said in a campaign-trail speech in which he called for new immigrants to pass an ‘ideological certification to make sure that those we are admitting to our country share our values and love our people.’”).

240. See *Estimates of the Unauthorized Immigrant Population Residing in the United States*, DEPT OF HOMELAND SECURITY, <https://www.dhs.gov/immigration-statistics/population-estimates/unauthorized-resident> (“Unauthorized immigrants applying for adjustment to LPR status under the Immigration and Nationality Act (INA) are unauthorized until they have been granted lawful permanent residence, even though they may have been authorized to work.”).

241. President Barack Obama, Remarks by the President on Immigration (June 15, 2012) (transcript available at <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration>). In 2012, Time Magazine had a cover that featured a picture of Jose Antonio Vargas, a Pulitzer Prize winning journalist and unauthorized migrant who outed himself as undocumented in a New York Times article, and other unauthorized migrants. Jose Antonio Vargas, *We Are Americans\* \*Just Not Legally*, N.Y. TIMES (June 25, 2012), <http://content.time.com>

citizenship argue for individualized assessments to demonstrate that unauthorized migrants deserve access to United States citizenship because of their values, norms, and practices.<sup>242</sup> Opponents argue that these individuals' failure to abide by U.S. immigration law demonstrates that they have not internalized American culture.<sup>243</sup> As long as culture remains an implicit citizenship requirement, decision makers will struggle with whether or not category-based criteria or individual assessments provide the right balance between accurate and reliable decision making and cost-effective and efficient decision making.

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/time/covers/0,16641,20120625,00.html.

242. Melissa Block, *Army Tightens Rules for Immigrants Joining as a Path to Citizenship*, NPR (Oct. 22, 2017), <https://www.npr.org/2017/10/22/559336282/army-tightens-rules-for-immigrants-joining-as-a-path-to-citizenship> (quoting Margaret Stock, arguing in favor of a path to citizenship for service people: "But what you don't do is label an entire group of people as security threats just because they were born in a foreign country.").

243. Conor Friedersdorf, *It's Silly to Oppose a 'Path to Citizenship' Because It's 'Unfair'*, THE ATLANTIC (Jan. 29, 2013), <https://www.theatlantic.com/politics/archive/2013/01/its-silly-to-oppose-a-path-to-citizenship-because-its-unfair/272618/> (quoting Senator Ted Cruz's remarks regarding a path to citizenship: "To allow those who came here illegally to be placed on such a path is both inconsistent with the rule of law and profoundly unfair to the millions of legal immigrants who waited years, if not decades, to come to America legally.").